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Journal

UCLA Women's Law Journal, 4(2)

Author

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Publication Date

1994

DOI

10.5070/L342017597

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INTERNATIONAL PROSECUTION OF RAPE IN WARFARE: NONDISCRIMINATORY RECOGNITION AND ENFORCEMENT

Arden B. Levy*

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INTRODUCTION

The twentieth century has manifested substantial progress in recognizing crimes against humanity committed during warfare. Customary international law,¹ the general practice of states which is accepted and observed as law, has increasingly acknowledged humanitarian norms.² The Restatement (Third) of the Foreign Relations Law of the United States states that customary law "results from a general and consistent practice of states which is followed by them from a sense of legal obligation."³ Numerous conventions have either codified customary law or established new humanitarian norms.⁴ Both of these sources largely ignore the issue of rape committed during warfare. Custom is viewed as law which is "explained" by jurists and commentators.⁵ The absence of discussion about rape translates into an issue having little significance within the international legal system. Rape has been viewed as a subsidiary, if not inconsequential, human rights abuse during war.⁶ Such human rights treaties as Geneva

1. THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 3 (1989) [hereinafter MERON, CUSTOMARY LAW] (stating that Article 38(1)(b) of the Statute of the International Court of Justice (ICJ) defines international customs as evidence of a general practice accepted as law).

2. DAVID FORSYTHE, THE INTERNATIONALIZATION OF HUMAN RIGHTS 14-20 (1991); see HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD 6-7 (Thomas Buergenthal ed., 2d ed. 1979). The drafting and signing of such instruments as the Helsinki Accord in 1975, the International Covenant on Civil and Political Rights in 1966, as well as the Universal Declaration of Human Rights in 1948, provide evidence of increasing acceptance of human rights as a matter of law.

3. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1987). For a thorough discussion of international custom, see MERON, CUSTOMARY LAW, *supra* note 1, at 3-10.

4. Conventional law is one of four sources of international law, along with international custom, general principles of law recognized by civilized nations, and judicial decisions. Article 38(1)(a) of the Statute of the ICJ defines conventional law as "rules expressly recognized by the contesting, or participating, states." One key difference between conventional law that codifies custom and conventional law that establishes norms is that states can never avoid custom, whereas states can reserve the right to abstain from certain treaty provisions where they represent "new" law. MERON, CUSTOMARY LAW, *supra* note 1, at 3-10.

5. See *The Paquete Habana*, 175 U.S. 677 (1900). This is a seminal case in establishing when states are bound by international custom.

6. *War Crimes and the Humanitarian Crisis in the Former Yugoslavia Before the Commission on Security and Cooperation in Europe*, 103d Cong., 1st Sess. 10, at 5

Convention IV⁷ and Protocol I to the Geneva Conventions⁸ and the Genocide Convention⁹ have been either too vague or inadequate in addressing the prevention and punishment of rape.

Rape has functioned as a method of control over women's bodies from time immemorial.¹⁰ More specifically, rape has been an integral and accepted military tactic throughout the centuries¹¹ and has evolved as a method for terrorizing and demoralizing populations during warfare.¹² Women have been relatively powerless to condemn the crime of rape due to their long-standing second-class status.¹³ Since most societies and most cultures impose a norm of male control over females,¹⁴ the act of rape has evolved as the ultimate symbol of victory, representing control over an adversary's women.¹⁵

(Jan. 25, 1993) [hereinafter *Hearings*] (testimony of Catherine O'Neill, Chairwoman, Women's Commission for Refugee Women and Children discussing the need to address global violence against women in the international forum (draft, Jan. 25, 1993)).

7. Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]. This Article focuses on Geneva Convention IV because it deals with the treatment of civilians during war. However, the drafters acknowledged certain general principles applicable to the other three Geneva Conventions, which address combatants.

8. 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Dec. 12, 1977, art. 75(2)(b), U.N. Jurid. Y.B. 95, 16 I.L.M. 11391 [hereinafter Protocol I].

9. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, U.N. GAOR Res. 2670, 78 U.N.T.S. 277 (entered into force, January 12, 1951) [hereinafter Genocide Convention].

10. SUSAN ESTRICH, *REAL RAPE* 5-7 (1987). Estrich discusses not only the traditional reluctance towards punishing rapists, but also the view that rape is generally good for women, and part of women's "rape fantasies." *Id.*

11. SUSAN BROWNMILLER, *AGAINST OUR WILL* 31 (1975).

12. *Id.* at 31-113 (discussing a traditional acceptance of rape as a "heroic" practice of war, and war as an opportunity to rape women).

13. The absence of discussion on rape, both in the history of warfare and in conventional legal documents addressing war crimes, is indicative of its near acceptance by male dominated societies. Jessica Neuwirth, *Towards a Gender-Based Approach to Human Rights Violations*, 9 WHITTIER L. REV. 399, 399 (1987) (explaining how little discussion has taken place on human rights violations as they relate particularly to women).

14. See DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* 230-56 (1989); see also ESTRICH, *supra* note 10, at 8, 16-18. For example, the common law definition of rape excluded husbands from the possibility of legal culpability, and even now prosecutors tend to avoid pursuing rape cases where the victim knows the defendant. RHODE, *supra* at 230-56.

15. Laura Pitter & Alexandra Stigmayer, *Will the World Remember? Can the World Forget?*, Ms., Mar.-Apr. 1993, at 19, 20.

The mass rape occurring in the former Yugoslavia, primarily committed by Serbian soldiers against Bosnian and Croatian Muslim women, brought the issue of rape as a violent crime to the level of global attention.¹⁶ Initial press reports forced nations to hear about and recognize the heinous nature of crimes specifically directed at women.¹⁷ For the first time, circumstances have forced the international community to confront the fact that rape, and its consequences of pregnancy and psychological destruction, is used as part of a military strategy to terrorize and abuse civilians during war.¹⁸ The outrageous nature of the rapes has pressured the international community to address rape as a crime of international proportion, requiring an extreme international remedy.¹⁹ In an unprecedented step, the United Nations Security Council established an international tribunal to prosecute individuals for violating humanitarian norms.²⁰ The publicity surrounding the atrocities has allowed for this strong, international response.²¹ The Serbian military has carried out an

16. The Balkan War, also known as the Bosnian or Yugoslavian War, is an ethnic conflict primarily occurring between Bosnian Muslims and Serbian Christians, although there are other minorities such as the Croats who are entangled in the struggle. The international perspective is that the Serbs are the aggressors, and are committing acts of genocide against the Bosnians. See, e.g., Paul Lewis, *Rape Was Weapon of Serbs*, U.N. Says, N.Y. TIMES, Oct. 20, 1993, at A1, A6 (reporting on the mass rape of Bosnian Muslim women by Serbs).

17. ABC News Nightline: *Rape as a Weapon of War Against Bosnian Muslims* (ABC television broadcast, Jan. 14, 1993).

18. *Weekend Edition: Mass Rape of Women in Bosnian War Horrifying* (National Public Radio broadcast, Mar. 13, 1993) [hereinafter *Weekend Edition*]. The notoriety of the mass rape in the former Yugoslavia shows a marked difference from previous incidences of rape, viewed as a part of genocidal acts, rather than as the genocidal acts themselves. Nonrecognition is the usual standard and was most notable in the Nuremberg trials, where sexual abuse against women was subordinated to other abuses, rather than highlighted as an example of human rights abuses. See Rachel Pine, *Pregnancy as Evidence of a Crime*, NAT'L L.J., Jan. 24, 1994, at 16 (discussing how rape was prosecuted, but never formally charged). Similarly, human rights abuses in Latin America have been brought to the attention of the international community in the recent past. Although one of many human rights abuses, rape of women has not been as highly publicized as other acts. See James Brooke, *Rapists in Uniform: Peru Looks the Other Way*, N.Y. TIMES, Apr. 29, 1993, at A4, for a clear and recent example of the sudden international attention devoted to the issue of rape as a human rights abuse.

19. *Sixth Report on War Crimes In the Former Yugoslavia*, Supplemental United States Submission of Information to the United Nations Security Council in Accordance with Resolution 771 ¶ 5 (1992) and Resolution 780 ¶ 1 (1992), Mar. 1, 1993, 4 DEP'T STATE DISPATCH, Apr. 12, 1993.

20. S.C. Res. 827, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/827 (1993).

21. James C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT'L L. 639, 639 n.1 (1993)

intentional program to eliminate the Muslim population by raping women and impregnating them. This strategy has been implemented such that the children born will not be of pure Muslim descent, thus transforming mass rape into an issue of genocide.²²

I will argue that in order for an international tribunal to recognize the crime of rape it must overcome the inherent gender bias in conventional and customary international law. In the first section I will explain how customary international law, through the gender bias in traditional interpretation, has inadequately addressed and discriminated against women. Second, I will demonstrate that because conventional international law is often a codification of customary law, it merely reflects, and does not transcend this gender bias. In the third section, I will propose that a viable and nondiscriminatory method of enforcement is both feasible and crucial for developing and solidifying human rights norms applicable to women as rape victims in warfare. Under progressive interpretation and procedure, rape constitutes a war crime, an act of genocide, and a human rights violation. States have the opportunity to prosecute violators. More importantly, states can apply effective and nondiscriminatory enforcement mechanisms which recognize that such abuses require international attention and support. Prosecution will not occur without acknowledgement and recognition of the crime.

I. THE INHERENT GENDER BIAS IN CUSTOMARY LAW EXAMINED WITHIN THE CONTEXT OF BOSNIA

Throughout the twentieth century, major world powers have altered many underlying assumptions of warfare. Most notably, international organizations have recognized norms respecting human rights and condemning military acts affecting non-combatants.²³ However, despite the increased emphasis on protect-

(discussing that "[t]here is considerable information available on violations of international humanitarian law in the former Yugoslavia," creating a sense of public outrage).

22. See United States Mission to the United Nations, Press Release: Statement by Ambassador Madeleine K. Albright, United States Permanent Representative to the United Nations, in the Security Council, in Explanation of Vote, on the Adoption of the Security Council Resolution to Establish an International Tribunal, May 25, 1993. As defined in the Genocide Convention, *supra* note 9, art. 2, genocide is any act committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group.

23. See JAMES BOND, *THE RULES OF RIOT: INTERNAL CONFLICT AND THE LAW OF WAR* 3-28, 148 (1974); FORSYTHE, *supra* note 2, at 1-26 (discussing in general the evolution of moral standards condemning human rights abuses during wartime).

ing civilian human rights, states have largely ignored women's particular vulnerability to sexual abuse. Wartime rape has existed since time immemorial as a message from "man to man, [and from] warrior to warrior."²⁴ Historically, rape has been accepted and encouraged as a strategy of war and as part of the division of spoils won in battle.²⁵ Regardless of the unique damage, both physical and psychological, that wartime rape inflicts upon women, international organizations and tribunals have never before focused specifically on wartime rape as a crime worth prosecuting.²⁶

States have recognized many violations of human rights as breaches of customary international norms.²⁷ Under the principle of *jus cogens*, certain rights are classified as peremptory norms. States may not contract away these norms that represent overriding principles of customary international law.²⁸ These in-

International law represents ambiguous standards and tenuous enforcement systems. "The tension between military necessity and restraint on the conduct of belligerents is the hallmark of humanitarian law." THEODOR MERON, *HUMAN RIGHTS IN INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION* 11 (1987) [hereinafter MERON, *INTERNAL STRIFE*]. Thus, fundamental principles, and the recognition thereof, represent the cornerstone of human rights in international law. See *Military and Paramilitary Activities (Nicar. v. U. S.)*, 1986 I.C.J. 4 (June 27), for a discussion of humanitarian principles.

24. Dianne Marder, *Once Again, Rape Becomes a Weapon of War*, ATLANTA J. & CONST., Feb. 17, 1993, at A11; see *It Took the World Too Long to Acknowledge that Rape Has Become a Serbian Military Tactic in Bosnia-Herzegovina: Croatian Women Survivors*, Business Wire, Mar. 9, 1993, available in LEXIS, News Library, Curnws File [hereinafter *Croatian Women Survivors*].

25. See Estelle F. Strizhak & Catherine Harries, *Sex, Lies and International Law* (1993) (unpublished manuscript, on file with the *UCLA Women's Law Journal*) (discussing traditional treatment of women during war and the accepted practice of raping women from the enemy's national or ethnic group). Historically, warfare established a set of rules which apportioned spoils among the victors, and created guidelines for permissible brutality. See BOND, *supra* note 23, at 7-15 (discussing the evolution of war from a method of punishment to a means of enforcing laws).

26. IV COMMENTARY GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 205 (Jean S. Pictet ed., 1958) [hereinafter COMMENTARY]. Most notably, the Nuremberg trials neither formally charged nor prosecuted for rape. Instead, rape fell under a general category of human rights abuses. See Pine, *supra* note 18, at 16.

27. Payam Akhavan, *Punishing War Crimes in the Former Yugoslavia: A Critical Juncture for the New World Order*, 15 HUM. RTS. Q. 262, 274 (1993).

28. This is defined in Article 53 of the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, *opened for signature* Mar. 20, 1986, 25 I.L.M. 543. For a general discussion, see MARK JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 53-54 (1988).

clude protections from "slavery and racial discrimination."²⁹ However, these protections are subjective. Their overriding characteristics exist only so far as they are recognized to be peremptory. That recognition has manifested an inherent gender bias.

Legal rights and wrongs are based on political, cultural, and ethnic norms. These norms represent a belief by states that certain practices are rendered obligatory by particular rules of law,³⁰ thus establishing certain rights. These rights are defined by those who acknowledge them, the language used, and the processes by which they are defined.³¹ Men have traditionally maintained political and psychological control over most world cultures³² and over international politics. International legal bodies, most notably the United Nations, mirror this patriarchal control.³³ Given that such international legal bodies define legal standards, norms and rights also reflect an inherent gender bias.

Hilary Charlesworth, a noted feminist scholar in international law, argues that these underlying discriminatory and patriarchal assumptions have developed out of the nature of prohibited conduct, which relies on a distinction between the public and private realms.³⁴ Within this framework, "the public

29. Akhavan, *supra* note 27, at 274 (citing Barcelona Traction, Light and Power Co. (Second Phase) (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5)).

30. MERON, CUSTOMARY LAW, *supra* note 1, at 4 (quoting North Sea Continental Shelf, 1969 I.C.J. 3, 44 (Feb 20)). This precedent-setting case discussed the subjective foundation of customary law. A state's belief, and not necessarily a world view, is implicit in defining *opinio juris*. *Id.*

31. Rebecca J. Cook, *Women's International Human Rights Law: The Way Forward*, 15 HUM. RTS. Q. 230, 232 (1993) (citing Celina Romany, from the City University of New York Law School, at the Women's Conference at the University of Toronto Faculty of Law in August, 1992).

32. Hilary Charlesworth, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 621-23 (1991); see CAROL SMART, FEMINISM AND THE POWER OF LAW 138-46 (1989); see also ESTRICH, *supra* note 10, at 102 (explaining how men established female chastity as an obligatory virtue, thus discouraging women from reporting rape). Even when women do become politically active in the international arena, they are often subject to adverse reactions from within their own countries for departing from their traditional, passive role. Neuwirth, *supra* note 13, at 402-03.

33. See J. Ann Tickner, *Hans Morgenthau's Principles of Political Realism: A Feminist Reformulation*, 17 MILLENIUM 429 (1988) (critiquing a traditional perspective of international relations that does not encompass feminist concerns).

34. Charlesworth, *supra* note 32, at 628-29; see Cook, *supra* note 31, at 234. See also Neuwirth, *supra* note 13, at 400, explaining that even in the traditional paradigm of the "family as a victim of human rights violations," the wife would take care of the children while her husband was imprisoned. Mass rape of women, however, destroys this paradigm of protected women.

realm of the workplace, law, economics [and] politics" is viewed as the domain of men.³⁵ The public sphere is seen as the "province of international law."³⁶ In stark contrast, the private realm of home, family, and women is viewed as the domain of women. "[G]reater significance is attached to the public, male world than to the private, female one."³⁷ Rape traditionally fell within the context of a private, and not public, matter.³⁸ International law has traditionally ignored or undermined the private sphere, and thus issues of concern to women.

Charlesworth explains that "[a] crucial aspect of torture and cruel, inhuman or degrading conduct . . . is that [these acts must] take place in the public realm: a public official . . . must be implicated in the pain and suffering."³⁹ The rationale for this stipulation is rooted in the notion of state sovereignty. Charlesworth cites an Amnesty International report that "private acts (of brutality) would usually be ordinary criminal offenses which national law enforcement is expected to repress."⁴⁰ International attention focuses on the action only when the state completely abandons its role. However, where women suffer human rights abuses it is often seen as falling within the private realm. Thus, when an individual soldier rapes a woman, the act is seen to fall within the private realm. The act falls outside of the state's, and thus the international community's, purview. This normative perspective has allowed international organizations to take a minor or even nonexistent enforcement role.

Throughout the nineteenth and twentieth centuries, preventing war and its resulting human rights abuses was clearly the motivating factor for developing an international order consisting of such international legal bodies as the United Nations.⁴¹ "At the theoretical level, traditional concepts of fundamental and univer-

35. Charlesworth, *supra* note 32, at 626.

36. *Id.* at 625.

37. *Id.* at 626.

38. See ESTRICH, *supra* note 10, at 10-15. The underreporting of rape is largely due to victim humiliation and shame at coming forward with such a "private" problem. *Id.*

39. Charlesworth, *supra* note 32, at 628.

40. *Id.* (citing Nigel S. Rodley, *The Evolution of the International Prohibition of Torture*, in AMNESTY INTERNATIONAL, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 1948-1988: HUMAN RIGHTS, THE UNITED NATIONS AND AMNESTY INTERNATIONAL* 55, 63 (1988)).

41. IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 51 (1963). See generally *id.* for a description of the development of war from a means of settling disputes to a means of last resort.

sal human rights presuppose equality and gender neutrality."⁴² However, male political leaders created an international body of law out of their own cultural frame of reference and discourse.⁴³ This frame of reference is silent on issues concerning discrimination and violence against women. Merely by ignoring women, societies reflect intense gender bias.

International organs repeat the cultural biases that occur on a state level.⁴⁴ As a result, sexual violence against women has not been apportioned the same significance as human rights abuses against men.⁴⁵ The oppression of women has not been regarded as a violation of human rights, but rather as a norm of existence, in that the topic has received little international attention.⁴⁶ Because *jus cogens* reflects national standards and norms, customary international law displays a discriminatory approach in protecting men's and not women's rights. The United Nations perpetuates this gender bias by ignoring women, and abuses particular to women.⁴⁷

The extent and scale of rapes committed during the civil strife within the former Yugoslavia has brought the issue of wartime rape to the forefront of world news for the first time.⁴⁸ Only since late 1992 has the international community turned its attention to rape during wartime, and the potentially destructive effect it may have on a civilian population.⁴⁹ Extensive human

42. Neuwirth, *supra* note 13, at 406.

43. Cook, *supra* note 31, at 237-41.

44. Charlesworth, *supra* note 32, at 629; see BROWNMILLER, *supra* note 11, at 114 (discussing how rape against women occurs at all levels of warfare, from uprisings to war).

45. Neuwirth, *supra* note 13, at 406.

46. See CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 237-49 (1989).

47. Charlesworth, *supra* note 32, at 620-25. Charlesworth discusses the lack of input women have in the United Nations at all levels, particularly their difficulty in obtaining positions of leadership where real and effective change could be implemented. This virtual absence of women has a direct impact on the U.N.'s inability to recognize issues affecting women as equal in importance to those affecting men. *Id.*

48. Marder, *supra* note 24, at A11; see, e.g., Slavenka Drakulic, *Rape After Rape After Rape*, N.Y. TIMES, Dec. 13, 1992, § 4, at 17; see *Croatian Women Survivors*, *supra* note 24; Somini Sengupta, *Marchers Call for Prosecuting Bosnia Rapes as War Crimes*, L.A. TIMES, Mar. 9, 1993, at 4B; see also Geraldine A. Ferraro, *Condemn Rape as an Act of War*, STAR TRIB., Mar. 10, 1993, at A15 (discussing the consensus by the Human Rights Commission of the United Nations that rape should be defined as a war crime).

49. O'Brien, *supra* note 21, at 645 n.28. It is interesting to note the recent discussion of rape as a war crime. No sources until the past year discussed rape as a crime under humanitarian law. This raises the question of whether or not the silence

rights abuses, motivated by ethnic discrimination, are taking place in the former Yugoslavia. These violations are being carried on in large part by the Serbs against Bosnian and Croatian Muslim women. Even these events show how the customary norm of gender inequality enables the political community to ignore, and thus encourage, massive abuses against women. After significant delays, and only as a result of political pressure, the European Community conducted initial investigations and hearings on the nature of rape committed in the Balkans and its impact on the Muslim women victims.⁵⁰ Segments of the international community have urged international organs, most notably the United Nations, to classify rape as a war crime, and thus as a crime against humanity.⁵¹

According to international reports, Serbian forces have incorporated rape as a method of warfare in two ways. First, soldiers are utilizing rape on a massive scale as an actual military tool.⁵² By raping large numbers of women and girls, the Serbs are attempting to demoralize Muslim communities psychologically, thus diminishing effective Muslim opposition.⁵³ The Serbian troops have forced both their soldiers and ethnic Serbian civilians, upon the threat of death, to rape neighbors and friends.⁵⁴

has represented acquiescence in rape as a war crime, and why scholars have suddenly decided rape should be a war crime.

50. Helsinki Commission, *EC Investigative Mission into the Treatment of Muslim Women in the Former Yugoslavia*, Mar. 2, 1993, at 3 (Report to EC Foreign Ministers) [hereinafter *EC Report*] (on file with the *UCLA Women's Law Journal*).

51. Julia Preston, *U.N. Security Council Establishes Yugoslav War Crimes Tribunal*, WASH. POST, Feb. 23, 1993, at A1; see, e.g., *Hearings*, *supra* note 6; O'Brien, *supra* note 21, at 640-41; see *Rape is Crime Against Humanity — Council of Europe*, REUTER LIB. REP., Feb. 18, 1993 (discussing the statement by the Council of Europe condemning the mass rape), available in LEXIS, News Library, Curnws File. The United Nations has responded by recognizing rape as a "weapon of terror," and by establishing a commission to gather evidence of war crimes, with rape included in that category. Lewis, *supra* note 16, at A1, A6.

52. Roy Gutman, *Serbs' Rape of Muslim Women in Bosnia Seen as Tactic of War*, HOUSTON CHRON., Aug. 23, 1992, at A1; see Yolanda S. Wu, *Genocidal Rape in Bosnia: Redress in United States Courts Under the Alien Tort Claims Act*, 4 UCLA WOMEN'S L.J. 101, 101-11 (1994) (discussing the Bosnian situation and domestic legal remedies).

53. Michael Getler, *In Europe, a New Savage Age*, WASH. POST, Dec. 21, 1992, at A14.

54. *ABC News Nightline*, *supra* note 17. Interviews with Bosnian women about being gang-raped, and information from international human rights workers who have spoken with hundreds of Bosnian women, show a brutal pattern of abuse by the Serbian militia. *Id.*

International reports have described the Serbian tactics as a military tool designed to undermine the Muslim community's national and cultural identity.⁵⁵ The military has focused on demoralizing Muslim forces through the constant threat of deporting women to rape camps.⁵⁶ The Serbs have allegedly set up special camps in hotels specifically for the purpose of raping women.⁵⁷ In these hotels soldiers repeatedly rape women, killing many of them in the process.⁵⁸ Estimates of the number of women raped fall between 20,000 and 50,000.⁵⁹ Moreover, many of the rapes are being committed against children from the age of nine or ten, attracting even greater outrage from the international community.⁶⁰

The second purpose of widespread rape, and the one drawing the most international attention, is to effectuate genocide of Bosnian and Croatian Muslims.⁶¹ Genocide is defined as acts committed with the specific intent to "destroy whole or in part," a national, ethnic, racial, or religious group.⁶² This has been effective both directly and indirectly. The intended focus of these Serbian military and anti-Islamic tactics has been ethnic-cleansing by impregnating women so that their children will not be of "pure" ethnic descent from Bosnian or Croatian Muslims.⁶³ Due to traditional patrilineal and cultural biases, children conceived through rape by Serbs will be Serbian, and not Muslim, thus in-

55. *Weekend Edition*, *supra* note 18. The international press initiated widespread attention on the Balkans by focusing on the egregious and innumerable acts of rape.

56. Pitter & Stigmayer, *supra* note 15, at 22.

57. Roy Gutman, *U.N. Troops Reportedly Visit Brothel*, PHILA. INQUIRER, Nov. 1, 1993, at A2; see Stuart Vincent, *For Muslims, a Time to Reflect*, NEWSDAY, Feb. 22, 1993, at 17.

58. Anna Quindlen, *Is Rape of Bosnians a Sophisticated Form of Genocide?*, DALLAS MORN. NEWS, Mar. 17, 1993, at A27. International investigators have reported Serb commanders describing the hotels as "'good for raising the fighter's morale.'" *Id.*

59. *Hearings*, *supra* note 6; see *EC Report*, *supra* note 50, at 5 (the *EC Report* has been the principal source for the West learning about atrocities committed by Serbian soldiers).

60. See *EC Report*, *supra* note 50, at 4 (discussing the need to prevent such atrocities).

61. See Michael Scammell, *Old Hatreds Die Hard*, WASH. POST, Apr. 25., 1993, at X6.

62. INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY 165 (Richard B. Lillich & Frank C. Newman eds., 1979).

63. See *Weekend Edition*, *supra* note 18 (describing the tribalistic methods of the Serbs).

creasing the Serb population while destroying the "pure" Muslim populations.⁶⁴ Thus, the direct effect is ethnic genocide.

The indirect effect of the rapes committed for purposes of "accomplishing" genocide is to have the women themselves, through their guilt and silence, enforce and perpetuate the genocide. Bosnian and Croatian Muslim women who have been raped are reluctant to seek help because of the resulting stigmatization that they would face in their communities.⁶⁵ Even in western society, women are reluctant to seek prosecution of a rapist due to the shame and stigma attached to what society often regards as a voluntary sexual encounter.⁶⁶ However, because Islamic culture esteems virginity so highly, there is an additional stigma attached to violated Muslim women. Women who have been brave enough to report these incidents to international and medical sources have experienced a backlash of social isolation.⁶⁷ Some international investigators have found that husbands no longer want to touch their violated wives, families reject daughters who have been victimized, and women themselves, horribly traumatized, recoil from sexual conduct.⁶⁸ Women have largely failed to report these crimes to doctors and are often unable to discuss the crimes even when receiving psychiatric help.⁶⁹ When these women have sought help, they have frequently been ostrac-

64. Kim S. Hirsh & Abbie Jones, *Bosnian Tragedy: Groups Mobilizing to Aid Rape Victims*, CHI. TRIB, Feb. 21, 1993, at N1.

65. Pitter & Stiglmeier, *supra* note 15, at 21-22. One Islamic authority in Croatia and Slovenia recognizes the need to change traditional attitudes, stating: "Our women and girls . . . have experienced violence, and our community has to accept them as if nothing happened." *Id.* at 22.

66. See ESTRICH, *supra* note 10, at 10-15 (discussing that the number of rapes that take place exceed the number of rapes that are reported); LINDA FAIRSTEIN, *SEXUAL VIOLENCE: OUR WAR AGAINST RAPE* 13, 270 (1993).

67. Neuwirth, *supra* note 13, at 405.

68. See William Drozdiak, *Serbs Raped 20,000, EC Team Says Assault in Bosnia Part of 'Cleansing'*, WASH. POST, Jan. 9, 1993, at A12; Jasmina Kuzmanovic, *Bosnian Woman's Wounds: Rape and a Child Fathered by Hate*, BOSTON GLOBE, Jan. 8, 1993, at 2; Judy Mann, *Report From the Front*, WASH. POST, Jan. 15, 1990, at E3; *Rape as 'Ethnic Cleansing' Serbian Forces Use Torture, Terror*, BOSTON GLOBE, Jan. 10, 1993, at 74. However, extensive interviews by investigators for Professor Catharine MacKinnon have found that this may not be accurate. They have discovered strong solidarity in the entire Muslim community, and support for these women, rather than ostracism. Nevertheless, such traumatic events can be presumed to have a dramatic cultural impact on the entire community. Telephone Interview with Natalia Nenadic, Bosnian Women's Rape Crisis Project (Dec. 1993).

69. *Weekend Edition*, *supra* note 18.

cized by their families, refused treatment for venereal diseases, refused counseling, or even denied abortions.⁷⁰

The dual expectations placed on men and women concerning chastity have burdened these women who already suffer from "psychosexual destruction."⁷¹ The lack of institutional recourse for these women compounds the psychological trauma.⁷² Women have silenced themselves to avoid blame and embarrassment. Their self-imposed silence contributes to the Serbs' program of genocide upon the Muslim ethnic population.

Prior to the current situation, members of the international community, including the drafters of such human rights conventions as the Geneva Conventions,⁷³ the Genocide Convention,⁷⁴ and the Convention against Torture,⁷⁵ did not consider rape a "weapon."⁷⁶ As in customary international law, states had not viewed sexual violence against women as a priority in the international order.⁷⁷ However, the Serbs' state-directed military campaign, focused as it is on eliminating an entire ethnic population, is all too reminiscent of Nazi Germany's Final Solution to eliminate the Jewish population.⁷⁸ The Serbs' actions have placed the international community on notice by going beyond "accepted" practices of warfare. The international community is most horrified that the Bosnian rapes are calculated, state-directed tactics developed specifically to destroy an ethnic population.⁷⁹ The resulting outcry has pushed international leaders and human rights activists to focus on the possibility that rape, when

70. Quindlen, *supra* note 58, at A27.

71. *Id.*; see Frances Olsen, *The Sex of Law*, in *THE POLITICS OF LAW* 453 (David Kairys ed., 1990) (concerning the dual expectations that law places upon men and women); Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law*, in *THE POLITICS OF LAW*, *supra*, at 151.

72. Neuwirth, *supra* note 13, at 405.

73. Geneva Convention IV, *supra* note 7.

74. Genocide Convention, *supra* note 9.

75. Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 39/46, *reprinted in* 23 I.L.M. 1027 (1984).

76. Charlesworth, *supra* note 32, at 628-29.

77. Theodore Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L., 424, 425-26 (1993) [hereinafter Meron, *Rape as a Crime*] (discussing the sudden interest and need to recognize rape as a war crime and condemn the act as a violation of humanitarian norms).

78. John Goshko, *U.S. Human Rights Report Charges Serb Drive "Borders on Genocide"*, WASH. POST, Jan. 20, 1993, at A4.

79. See O'Brien, *supra* note 21, at 639-42.

used as a military strategy for purposes of achieving genocide, constitutes a crime against humanity.⁸⁰

Rape, when viewed as isolated acts committed by individuals, has been regularly overlooked as a negligible problem during warfare.⁸¹ In this "normal" context, it has become an "accepted" practice. The Serbian military program, however, has brought the atrocities of wartime rape into the international spotlight.⁸²

Customary international law is an insufficient legal source for prosecuting rapists. Therefore, an international tribunal must look to conventional legal sources.

II. CONVENTIONAL LAW IS INADEQUATE TO PROSECUTE RAPE AS INTERPRETED THROUGH CUSTOMARY LAW

In order to recognize rape as a human rights crime, international bodies must focus on the effective prosecution of perpetrators. Two factors comprise an "international crime:" (1) the definition of the crime; and (2) the ability of either a state or the international community to punish or prosecute the crime.⁸³ In defining whether or not an act is an international crime, it must constitute a crime under either conventional or customary law.⁸⁴ In prosecuting human rights violations, it is necessary to define what crime is punishable and who can be punished. International legal scholar Diane F. Orentlicher defines "international crimes" as "offenses which conventional or customary law either authorizes or requires states to criminalize, prosecute, and/or punish. Although international law generally establishes rights and duties between and among states, international criminal law

80. *U.N. Representative Discusses Serbian Atrocities* (CNN television broadcast, Mar. 12, 1993).

81. As an "overlooked" issue in human rights law, the absence of discussion on rape is notable. See HERSCH LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* (1968); HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES (Theodor Meron ed., 1984). Lauterpacht and Meron, known as experts in the human rights field, both fail to mention rape in these works.

82. The lag time between international recognition of the Balkan conflict, and international recognition of the mass rapes, was almost a year. See *More Balkan Blood and Bones*, CLEVELAND PLAIN DEALER, Aug. 6, 1991, at 46, for one of the first reports on the Balkan conflict. It is devoid of discussion on the mass rapes. See also Drakulic, *supra* note 48, at 17.

83. See LEO KUPER, *THE PREVENTION OF GENOCIDE* 17-20 (1985) (discussing the inadequacies in both the definition of genocide and the Genocide Convention's enforcement mechanisms).

84. See I.C.J. CHARTER art. 38.

imposes obligations on individuals, making them liable to criminal punishment."⁸⁵

Orentlicher compares various scholars' methods of defining punishable crimes. For example, Quincy Wright, in discussing the criminal tribunals at Nuremberg, defines an international crime as "an act committed with intent to violate a fundamental interest protected by international law or with knowledge that the act will probably violate such an interest, and which may not be adequately punished by the exercise of the normal criminal jurisdiction of any state."⁸⁶ In contrast, international scholar Yoram Dinstein states that "while international crimes typically are grave offenses that 'harm fundamental interests of the whole international community,' an offense becomes an international crime only when defined as such by positive international law."⁸⁷ All scholars focus on recognition as the defining factor, whether it be of a violated right or prohibited act.

Ian Brownlie notes the distinction between breaches of international law, such as violations of the laws of war, that can only be punished by the international community at large, and other offenses established by municipal law which international law authorizes any state to punish.⁸⁸ Similarly, "the term international criminal law is sometimes used to . . . refer to law pursuant to which 'individuals are personally held to account for violations of the international order.'"⁸⁹ In contrast, "[t]he International Law Commission's draft articles on state responsibility use the term 'international crimes' to refer to crimes of a state."⁹⁰

Under all of these interpretations, whether addressing individual or state responsibility, scholars refer to conventional law as incorporating traditional customary law. However, customary

85. Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 *YALE L. J.* 2537, 2552 (1991) (footnotes omitted).

86. *Id.* at 2552 n.57 (citing Quincy Wright, *The Law of the Nuremberg Trial*, 41 *AM. J. INT'L L.* 38, 56 (1947)).

87. *Id.* (citing Yoram Dinstein, *International Criminal Law*, 20 *ISR. L. REV.* 206, 221 (1985)).

88. *Id.* (citing IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 305 (4th ed. 1990)).

89. *Id.* (citing Paul K. Ryu & Helen Silving, *International Criminal Law — A Search for Meaning*, in *INTERNATIONAL CRIMINAL LAW* 25 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973)).

90. *Id.* (citing *Draft Articles on State Responsibility*, [1976] 2 *Y.B. INT'L L. COMM'N* (pt. 2) at 119, U.N. Doc. A/CN.4/SER.A/1976/Add.1; THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* 210 (1989)).

law reflects a gender bias, which ultimately provides an inadequate basis upon which to prosecute the crime of rape under standard methods of interpretation. Historical context and legal codification of recognized norms do not adequately establish wartime rape as a crime against humanity.

Several legal texts do, however, provide a potential legal basis, apart from customary law, for the prosecution of rape as a war crime. Two of the texts were used in prior criminal trials for prosecuting different war crimes and crimes against humanity. The sources most likely to be relevant are the U.N. Charter, Geneva Convention IV and its Protocols,⁹¹ the Genocide Convention,⁹² the Convention on the Elimination of All Forms of Discrimination against Women,⁹³ and the Convention on the Rights of the Child.⁹⁴ These sources create a positive law foundation for prosecuting rape as a war crime. Nevertheless, they fail to address or define rape as a crime in and of itself. Until the present, this absence was almost tantamount to a sanction of rape in that conventions incorporate discriminatory customary law.⁹⁵

A. *The United Nations Charter*⁹⁶

The United Nations Charter sets the legal foundation for the function and purpose of the United Nations.⁹⁷ Although there is no specific provision guaranteeing the right to life, the opening chapter discusses the promotion of human rights and fundamental freedoms.⁹⁸ Article 2(4) forbids Member States "to use, or threaten [to use,] force against any State except under the auspices of the U.N. or in self-defense."⁹⁹ More specifically, Article 55(c) states that the Charter was created "[w]ith a view" to pro-

91. Geneva Convention IV, *supra* note 7; Protocol I, *supra* note 8.

92. Genocide Convention, *supra* note 9.

93. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, G.A. Res. 280, *reprinted in* 19 I.L.M. 33 (1980) [hereinafter *Women's Convention*].

94. Convention on the Rights of the Child, Nov. 20, 1989, G.A. Res. 44/25, *reprinted in* 28 I.L.M. 1448 (1989) [hereinafter *Child Convention*].

95. See Charlesworth, *supra* note 32, at 629.

96. Legal authority for applying the Charter is found in Article 2(4) of the Charter which condemns the use of force by any member. Article 35 allows any member to bring a dispute to the attention of the Security Council or General Assembly, and Article 42 provides for the conclusion of disputes between members. For purposes of this Article, I will not address the issue of an ethnic group as a state.

97. JANIS, *supra* note 28, at 13.

98. KUPER, *supra* note 83, at 3 (discussing U.N. CHARTER arts. 1, 2).

99. G.I.A.D. Draper, *Wars of National Liberation and War Criminality*, in *RESTRAINTS ON WAR* 135, 138 (Michael Howard ed., 1979).

moting "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."¹⁰⁰

However, the drafters of the U.N. Charter did not establish a proactive legal basis for recognizing rape as a war crime. Until recent resolutions by the U.N. addressing the mass rape in Bosnia, the topic had not received any attention.¹⁰¹ Two factors have prevented the use of the Charter as a means to recognize rape in warfare. First, although rape could be punished under the broad language of the Charter, those who enforced its provisions did not address the rape of women and the resulting pregnancies in the same light as other human rights violations.¹⁰² The Charter's provisions are meant to be general in nature, reflecting customary international law.¹⁰³ The application of the Charter has thus reflected the overall discriminatory structure of the international legal order.¹⁰⁴ The absence of women in significant positions of power¹⁰⁵ within international organizations functioning as extensions of states reflects a bias of nonrecognition.¹⁰⁶ "[W]omen's concerns" have been "relegated to a special, limited category" within the United Nations and are generally overlooked.¹⁰⁷

The second factor preventing use of the Charter is that it is intended to serve merely as a guideline document, and does not transgress state sovereignty for purposes of recognizing specific norms.¹⁰⁸ Unlike treaties, which tend to be more specific in nature, the Charter is general, and does not bind states to concrete terms. The United Nations is based on the concept of "non-in-

100. U.N. CHARTER art. 55(c); see THE INTERNATIONAL LEGAL SYSTEM 573-76 (Joseph M. Sweeney et al. eds., 1988).

101. See Statement by Madeline K. Albright, *supra* note 22. Again, this is evidenced by the absence of any acknowledgement prior to the Balkan conflict.

102. See Meron, *Rape as a Crime*, *supra* note 77, at 424, 427; cf. Pine, *supra* note 18, at 15-16.

103. "[A]ll members pledge themselves to take joint and separate action in cooperation with the organization for the achievement of the purposes set forth in Article 55." U.N. CHARTER art. 56. However, the Charter does not provide for specific machinery to secure the observance of human rights.

104. See Fred Halliday, *Hidden from International Relations: Women and the International Arena*, 17 MILLENIUM 419 (1988).

105. See Charlesworth, *supra* note 32, at 621. Charlesworth discusses the disproportionate number of men in powerful positions at the U.N., where in almost every committee men constitute the overwhelming majority. *Id.*

106. *Id.* at 622.

107. *Id.* at 625.

108. See FOREST GRIEVES, SUPRANATIONALISM AND INTERNATIONAL ADJUDICATION 45 (1969).

tervention" in the internal affairs of its member states. States have not recognized the Charter as enabling the United Nations to bypass customary law and to recognize certain crimes proactively.¹⁰⁹ Therefore, the instrument alone, without the actions of its members, does not establish rape as a crime against humanity.¹¹⁰

B. *Geneva Convention IV of 1949 and Protocol of 1977*¹¹¹

Geneva Convention IV and Protocol I are the main sources of textual law for human rights violations during wartime.¹¹² The precedent for their utility is found in the Nuremberg War Crimes Tribunal.¹¹³ As this has been the only significant war crimes tribunal, Geneva Convention IV is likely to be employed in any future trials.¹¹⁴ The main objective of the four Conventions in 1949 was protection of "strictly defined categor[ies] of civilians from arbitrary action [by] the enemy, and not from the dangers due to the military operators themselves."¹¹⁵ The provisions focus not on the purposes of acts, but rather on the acts themselves, and the manner in which they violate certain international norms. Geneva Convention IV offers a substantive legal basis for prosecuting rape where an individual soldier commits rape against a member of a civilian population. This source lies in the requirement of full responsibility for failure to protect civilians. Article 29 discusses this responsibility to "protected persons."

109. *Id.* at 18 (discussing international bodies' observance of social custom); see KUPER, *supra* note 83, at 126-27 (discussing the insufficient perimeters of the Genocide Convention).

110. Jack Greenberg, *Race, Sex and Religious Discrimination in International Law*, in HUMAN RIGHTS IN INTERNATIONAL LAW 308 (Theodor Meron ed., 1984).

111. Geneva Convention IV, *supra* note 7; Protocol I, *supra* note 8. These instruments provide that states shall suffer penal sanctions for breaches and grave breaches of the conventions. They require states to enact legislation providing effective penal sanctions, something which many states have not done. However, it is significant that they impose on the contracting parties an "active duty . . . to ensure that the person concerned is arrested and prosecuted with all dispatch." Most importantly, the U.N. War Crimes Commission for Nuremberg utilized the study done by the drafters of the Geneva Conventions. Yves Sandoz, *Penal Aspects of International Humanitarian Law*, in 1 INTERNATIONAL CRIMINAL LAW: CRIMES 221-22, 209-32 (M. Cherif Bassiouni ed., 1986) [hereinafter CRIMES].

112. Geneva Convention IV, *supra* note 7. See BROWNLIE, *supra* note 41, for a general discussion on the Convention's applicability to war crimes.

113. Sandoz, *supra* note 111, at 225.

114. See, e.g., O'Brien, *supra* note 21, at 643-50.

115. COMMENTARY, *supra* note 26, at 10.

The intention of the Convention is to protect individuals, not groups of people that might constitute a state-like entity.¹¹⁶

If a tribunal were to apply only the principles of the Geneva Convention, it would examine only the *acts* committed by individuals. The Convention would not require the tribunal to make a finding of an overarching military strategy to rape women. The tribunal could not then try military and political leaders who encouraged soldiers to rape women, but did not commit the acts themselves.¹¹⁷ Therefore, the Convention would be ineffective for prosecuting crimes of genocide like those in Bosnia, which were perpetrated as part of a military tactic. In addition, neither the Convention nor its Protocol have been interpreted to recognize rape, and its ensuing consequences of impregnating women, positively as war crimes, even where employed as weapons of war.¹¹⁸

Discriminatory interpretations are evident in all of the relevant provisions of Geneva Convention IV and Protocol I. The first evidence of gender bias arises in Article 2 of the Preamble, concerning the application of the Conventions. The drafters intended that contracting states apply the four Conventions as the "codification of rules which are generally recognized."¹¹⁹ Therefore, Geneva Convention IV was intended to merely codify existing customary law on warfare. This interpretation of conventional law through customary international law by scholars¹²⁰ and diplomats suggests that Geneva Convention IV is not intended to address crimes perpetrated against women during wartime. The absence of condemnation of rape against women under customary international law may define the Convention as an inadequate legal method for prosecuting those who commit rape during warfare.

116. See BROWNLIE, *supra* note 41, at 561–63 (discussing individual responsibility for war crimes).

117. See TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 165–207 (1992). This strict application of Geneva Convention IV contrasts with the Nuremberg trials, which focused on a theory of conspiracy by the Nazi party. The opening statements by the prosecution in the Nuremberg trials charged defendants with creating aggressive war, a charge that goes beyond mere war crimes, and denotes war crimes committed with a purpose. *Id.*

118. See Strizhak & Harries, *supra* note 25, at 1.

119. COMMENTARY, *supra* note 26, at 20 (citing II-B *Final Record of the Diplomatic Conference of Geneva of 1949*, at 108 (First Report drawn up by the Special Committee of the Joint Committee)).

120. See *id.*

Part II of Geneva Convention IV established general guidelines for the protection of civilians during times of conflict.¹²¹ Article 13 was intended "to provide the civilian population with general protection against certain consequences of war."¹²² In this provision, the Convention specifically did not prohibit distinctions in treatment based on a person's gender. "[It] expressly stipulate[d] that women are to be treated with all the respect due to their sex."¹²³

Interpreters have diminished the effectiveness of Article 3 as a textual provision upon which to base prosecution for a war crime by invoking the more specific definition in Part III of Geneva Convention IV. This specific provision and the main body of the Convention are "intended to provide civilians with certain safeguards against arbitrary action on the part of an enemy Power in whose hands they are."¹²⁴ Article 27, Paragraph 1, is to be "understood in [the] widest sense . . . [covering] all the rights of [an] individual . . ."¹²⁵ Article 27 does state that "[w]omen shall be especially protected against any attack on their honour, in particular against rape[.]"¹²⁶ However, this broad statement is countered by discriminatory interpretive provisions, as well as by its actual implementation. "Respect for the person," within Article 27, means respect for those values which form part of "man's heritage."¹²⁷ Because what constitutes "man's heritage" is ambiguous, scholars have again found it to denote those values espoused under customary international law¹²⁸ — those that do not recognize rape as a war crime.

Moreover, Article 27, Paragraph 2, describes rape as an attack against the "honour" of women.¹²⁹ The drafters originally intended to prevent a repetition of World War II, where rape was committed in occupied territories and women were made to

121. Geneva Convention IV, *supra* note 7, art. 13; see Strizhak & Harries, *supra* note 25, at 1.

122. COMMENTARY, *supra* note 26, at 118.

123. *Id.* at 119.

124. *Id.* at 118.

125. *Id.* at 201. See U.S. DEP'T OF ARMY, THE LAW OF LAND WARFARE 98-99 (1956), for general provisions applicable to civilians.

126. Geneva Convention IV, *supra* note 7, art. 27.

127. COMMENTARY, *supra* note 26, at 201.

128. See Howard S. Levie, *Criminality in the Law of War*, in CRIMES, *supra* note 111, at 233-42 (discussing the application of customary international law by the Versailles Peace Conference).

129. Geneva Convention IV, *supra* note 7, art. 27; see Strizhak & Harries, *supra* note 25, at 2.

enter brothels or were infected with venereal diseases.¹³⁰ The drafting conference thus listed certain acts constituting “an attack on women’s honour, . . . [including] rape, enforced prostitution . . . and any form of indecent assault.”¹³¹ The intent was to apply Article 27 to rape.¹³²

Yet in Article 147, the final draft did not list rape among the “grave breaches” defined as “war crimes,” such as “wilful killing, torture or inhuman treatment . . . causing great suffering or serious injury to body or health . . . not justified by military necessity.”¹³³ Although the mass rapes in Bosnia seem to fall within this category, under traditional interpretations the absence of rape from the list denotes its intentional exclusion.

Paragraph 2 also emphasizes “respect for family rights” in tandem with other articles of the Convention.¹³⁴ This principle is primarily expressed in Article 46 of the Hague Regulations, and is intended to safeguard the institution of marriage, family, and community ties from arbitrary interference.¹³⁵ Additionally, the obligation “to treat humanely” in Geneva Convention IV, Article 27, is taken from the Hague Regulations and from the two 1929 Geneva Conventions.¹³⁶ As before, the vague and undefined nature of these terms has rendered them useless in practice to create a specific prohibition against rape as a war crime.

Protocol I to the Geneva Conventions essentially reiterates the above provisions relating to women and their treatment as civilians during wartime.¹³⁷ Despite two amended articles in the

130. COMMENTARY, *supra* note 26, at 205 (citing 3 *Commission of Government Experts for the Study of the Convention for the Protection of War Victims* 47 (Geneva, Apr. 14–26, 1947) (Preliminary Documents)).

131. *Id.* at 206.

132. See O’Brien, *supra* note 21, at 645 n.28 (discussing the incorporation by reference of Article 27 into the grave breach provisions).

133. Geneva Convention IV, *supra* note 7, art. 147; see Meron, *Rape as a Crime*, *supra* note 77, at 426. In discussing the absence of rape among the grave breaches, Meron insists that it is time to change traditional interpretations and to interpret rape as a war crime. See also Strizhak & Harris, *supra* note 25, at 2.

134. COMMENTARY, *supra* note 26, at 202–03. For example, Article 82 provides that families should not be separated and should be lodged together. *Id.*

135. *Id.* at 202 (discussing *Universal Declaration of Human Rights*, G.A. Res. 217 (III), 3d Sess., pt. 1, 183d plen. mtg. at art. 16, para. 3, U.N. Doc. A/811 (1984)); see Meron, *Rape as a Crime*, *supra* note 77, at 425 (discussing that although in practice rape is a crime, it has not been interpreted as such) (citing Convention Respecting the Laws and Customs of War on Land Annex of Regulations, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague Convention No. IV]).

136. COMMENTARY, *supra* note 26, at 204.

137. See DOCUMENTS ON THE LAWS OF WAR 387–88 (Adam Roberts & Richard Guelff eds., 1989).

1977 Geneva Protocol, the provisions are unsuccessful in strengthening the language regarding rape.¹³⁸ Although Article 75 refers to rape as an "indecent assault,"¹³⁹ discriminatory interpretations have established that the Protocol:

distinguishes between "indecent assaults" (and by implication rape) and the list which provides the basic elements of "war crimes" and includes "violence to the life, health, or physical or mental well-being of the person[.]" such as murder, torture, corporal punishment and mutilation. This is the list of perpetrations . . . which may be called "war crimes" when the level of "grave breach" is reached.¹⁴⁰

Rape is thus still distinguished from other war crimes.

Similarly, Article 85 of Protocol I creates an additional list of "grave" offenses.¹⁴¹ This list includes "making the civilian population or individual civilians the object of attack."¹⁴² This list maintains the potential to address genocidal tactics used by a military group. Nevertheless, scholars have determined that neither rape nor inhumane practices based on gender were specifically added to this list of "war crimes."¹⁴³

Neither Geneva Convention IV nor Protocol I address situations involving military strategy, but rather they address non-military, purely civilian contexts. They are of questionable value in ethnic conflicts where war is waged against and among civilian populations and not between clearly defined military troops.¹⁴⁴ That rape is used as a strategy of war¹⁴⁵ indicates its potential as a psychological military tactic. Because the provisions do not address crimes committed as part of military strategy, they are probably not the best means of recognizing and prosecuting crimes of rape. Prosecution seems permissible only where rape is

138. Strizhak & Harries, *supra* note 25, at 2.

139. Protocol I, *supra* note 8.

140. Strizhak & Harries, *supra* note 25, at 2 (discussing Protocol I, *supra* note 8, art. 75(2)(a)).

141. Protocol I, *supra* note 8, art. 85(1).

142. *Id.* art. 85(3)(a).

143. See Strizhak & Harries, *supra* note 25, at 2.

144. See Andrew Bell-Fialkoff, *A Brief History of Ethnic Cleansing*, FOREIGN AFF., Summer 1993, at 110, 116-20 (discussing the deep-seated hatred between Muslims and Serbs).

145. A strategy of war is essentially a tactic that states use during conflict. States have agreed that some strategies are illegal, both through treaties and through acceptance of the notion that certain practices violate international norms. That rape has occurred so consistently seems to indicate that its prohibition is not yet part of state practice. See BOND, *supra* note 23, at 61-65, for a discussion on the purposes and effect of law of war prohibitions.

committed in tandem with some other crime. Rape, in and of itself, seems to be viewed merely as an attack on women, and thus not worthy of "additional protections,"¹⁴⁶ such as trial by an international tribunal.

C. *The Convention on the Prevention and Punishment of the Crime of Genocide*¹⁴⁷

The Genocide Convention, in contrast, recognizes military strategy as integral to the crime itself. For this reason, it is probably the most viable legal basis for a tribunal to prosecute and punish those who commit rape during warfare. The Genocide Convention has become the most important human rights instrument in the period following World War II due to the increase in conflicts between ethnic groups, as opposed to traditional warfare between different nationalities.¹⁴⁸

The situation in the former Yugoslavia is exemplary of modern civil strife between ethnic, racial, or religious groups. Although this situation provides an extreme prototype, all such clashes are likely to manifest some psychological destruction and demoralization as integral to the conflict.¹⁴⁹ Destructive tactics violating basic humanitarian concepts and norms are common within this type of framework.¹⁵⁰ The very nature of ethnic warfare produces a profound level of animosity between groups of people closely related through cultural and geographic proximity.¹⁵¹ In these circumstances then, the international community

146. *Id.* at 5. Bond discusses whether or not "additional protections," different from any provided by the Geneva Conventions, should be granted in particular situations. *Id.*

147. Genocide Convention, *supra* note 9. The Convention was created with an international penal tribunal in mind. It grew out of a necessity by the Nuremberg tribunal to distinguish between the murder of anti-Nazi Germans and German Jews, and anti-Nazi non-Germans and non-German Jews. Most significantly, it is not limited to crimes committed during war. M. Cherif Bassiouni, *Introduction to the Genocide Convention*, in *CRIMES*, *supra* note 111, at 113, 281, 281-82.

148. Michael Howard, *Temperamenta Belli: Can War be Controlled?*, in *RESTRAINTS ON WAR: STUDIES IN THE LIMITATION OF ARMED CONFLICT* 1, 7-13 (Michael Howard ed., 1979); see *U.N. Court Hears Charges of Serb Genocide*, *NEWSDAY*, Apr. 2, 1993, at 15 (discussing that this is the first time the U.N. has condemned a group for violating the Genocide Convention). The very definition of ethnic conflicts seems to indicate firmly established "hatred," rather than mere national conflicts.

149. See *EC Report*, *supra* note 50, at 6-7; *ABC News Nightline*, *supra* note 17 (discussing how the humiliation and ostracization that rape produces act to perpetrate genocide); see also Charlesworth, *supra* note 32, at 628.

150. See MERON, *INTERNAL STRIFE*, *supra* note 23, at 71-86.

151. RICHARD A. FALK, *THE INTERNATIONAL LAW OF CIVIL WAR* 1-18 (1971).

may anticipate the possibility of rape as a military tactic employed in future ethnic clashes. The Geneva Conventions and its Protocols have therefore become less important in preventing human rights abuses. Where military tactics constitute a predetermined strategy that affects large numbers of people, international prosecutors should evaluate them within the category of genocide.

Article I states that all genocidal acts are punishable under international legal standards:

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.¹⁵²

Article II defines genocide in broad terms:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, such as:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.¹⁵³

The drafter of the word "genocide," Raphael Lemkin, specifically adopted "genocide," and not "ethnocide," to indicate that he "conceived of genocide in broader terms than simply killing members of groups; rather, he thought of it as the destruction of groups which could be brought about by a variety of means including, but not limited to, outright killing of their members."¹⁵⁴ There is evidence in his writings that when he created the definition he "had in mind groups other than national groups as possible victims of genocide."¹⁵⁵

Lemkin's definition indicates that mass rape falls within the scope of the Convention. "Commentators have suggested that

152. Genocide Convention, *supra* note 9, art. 1.

153. *Id.* art. 2.

154. LAWRENCE J. LEBLANC, *THE UNITED STATES AND THE GENOCIDE CONVENTION* 17-18 (1991).

155. *Id.* at 18. See generally NEHEMIA ROBINSON, *THE GENOCIDE CONVENTION* (1960).

imposing measures intended to prevent births within a group could be thought of as 'biological' genocide."¹⁵⁶ Preventing births of children entirely of Muslim descent arguably falls into that category. Serbian forces, as well as other forces acting similarly, could be construed as "deliberately inflicting" conditions calculated to bring about the physical destruction, in whole or in part, of the ethnic and religious group of Bosnian and Croatian Muslims. Article III of the Genocide Convention then provides that acts defined in Article II are punishable if committed in the course of the following:¹⁵⁷ genocide; conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; and complicity in genocide.¹⁵⁸

Nevertheless, there are four primary reasons why these provisions may be inadequate for prosecuting rape committed individually or for military purposes. First, there is an overarching conceptual problem in defining genocide. Perpetrators of genocide are usually compared to those from the Holocaust. The Holocaust has left such an indelible impression upon the twentieth century that the international community has rarely recognized less dramatic instances of slaughter as constituting genocide.¹⁵⁹ States have thus been reluctant to prosecute due to a lack of realistic standards apart from those developed during the Holocaust.¹⁶⁰ In the situation of the former Yugoslavia the United Nations has been slow to recognize genocide of Bosnians, particularly the impact of genocide on Bosnian women.¹⁶¹

Second, state sovereignty impedes the application of the Convention. Genocide is one of the "best defined and least adhered to lexicon[s]" in modern times.¹⁶² Governments have opposed the Convention because of their desire to "dispose of political opposition without interference from the outside

156. LEBLANC, *supra* note 154, at 91.

157. *Id.* at 90-91.

158. Genocide Convention, *supra* note 9, art. 3.

159. BARBARA HARFF, GENOCIDE AND HUMAN RIGHTS: INTERNATIONAL LEGAL AND POLITICAL ISSUES 9-11 (1984). There are many examples during the twentieth century of genocidal practices that fall below the "Holocaust" standard, including the Armenians, Idi Amin in Uganda, Pol Pot in Kampuchea, and My Lai. *Id.*

160. See, e.g., KUPER, *supra* note 83, at 16-17, 193.

161. See *Hearings*, *supra* note 6, at 2-3. Note that the *EC Report*, *supra* note 50, is dated March 2, 1993, almost one year after the Balkan conflict began.

162. IRVING L. HOROWITZ, GENOCIDE: STATE POWER AND MASS MURDER 17 (1976).

world.”¹⁶³ Parties to the Convention have diminished its impact by accepting neither universal jurisdiction nor the establishment of an international penal court.¹⁶⁴ States maintain the ability to judge human rights norms according to internal policies by emphasizing the “territoriality principle,” or the right to adjudicate crimes falling within national, and not international, interests.¹⁶⁵ Although the Convention purports to supersede national sovereignty where acts of genocide occur, there is no real enforcement power where the member states do not recognize the jurisdiction of the Convention.

National jurisdiction is problematic because “most acts of genocide are committed by or with the complicity of governments.”¹⁶⁶ Therefore, in the case of “domestic genocides, . . . the perpetrators are not likely to be . . . deterred by threat of punishment.”¹⁶⁷ Political mass murder is generally “characterized by [patterns of] past violent conflicts” left untried and unadjudicated by the international community.¹⁶⁸ Although a tribunal need not show evidence of a war to make a finding of genocide,¹⁶⁹ the primary difficulty lies in the ability actually to try defendants in an international tribunal under the Genocide Convention.

Third, the Genocide Convention is only effective for prosecuting those guilty of designing or ordering genocidal military strategies, and not for prosecuting individual soldiers who commit crimes of war. This requires a significant amount of evidence to prove genocidal tactics.¹⁷⁰ The essential element in making a finding of genocide is an intent to destroy an entire group.¹⁷¹ Yet, because women tend to be viewed as a subgroup of their “communities, castes, or ethnic groups,”¹⁷² violence against women may not always be regarded as affecting an entire group. Thus, while mass rape may be *evidence* of the crime of genocide,

163. KUPER, *supra* note 83, at 16.

164. *Id.* at 15.

165. See Akhavan, *supra* note 27, at 275 (discussing the pivotal case of *The Steamship Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (Ser. A) No. 10 (Sept. 7)).

166. KUPER, *supra* note 83, at 173.

167. *Id.* at 102.

168. *Id.* at 126–27.

169. Akhavan, *supra* note 27, at 277.

170. See O'Brien, *supra* note 21, at 651–54.

171. KUPER, *supra* note 83, at 9–10.

172. See Cook, *supra* note 31, at 232 (quoting Rhadika Coomaraswamy, from the International Centre for Ethnic Studies in Colombo, Sri Lanka).

an international tribunal may not determine that rape, in and of itself, constitutes the international crime of genocide.¹⁷³

Fourth, like other human rights documents, the Convention merely codifies customary law, and does not create new standards for international law. The International Court of Justice, in an advisory opinion, held that the Convention merely affirms genocide as "a crime under international law," and is not innovative in any sense.¹⁷⁴ Because of gender bias, interpreters have not viewed women as a discrete "group" under customary international law, and have excluded women from coverage under the Convention.¹⁷⁵ Offenses against women thus become secondary to offenses against their ethnic group.

D. *The United Nations Convention on the Elimination of All Forms of Discrimination Against Women*¹⁷⁶

The Convention on the Elimination of All Forms of Discrimination Against Women, at face value, represents an effective tool in recognizing and prosecuting crimes of rape and violence against women.¹⁷⁷ Article I broadly describes discrimination as:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, . . . on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.¹⁷⁸

Among the far-reaching measures contained in the Convention, Part I includes states' obligations to take measures to eliminate prejudice and practices based on ideas of gender superiority or

173. Strizhak & Harries, *supra* note 25, at 3.

174. Reservations to the Genocide Convention, 1951 I.C.J. 15, 23 (May 28); see KUPER, *supra* note 83, at 18; see also LEBLANC, *supra* note 154, at 214-17 (discussing that although the ICJ upheld customary law, it did emphasize the flexibility of state sovereignty in applying the Convention).

175. See Charlesworth, *supra* note 32, at 627; Neuwirth, *supra* note 13, at 405.

176. Women's Convention, *supra* note 93. This recently drafted legal instrument was viewed initially as a success for the advancement of women's rights in the international arena. However, many nations accepted it only with caveats that ultimately negated the Convention's radical characteristics. Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L L. 643, 643 (1990).

177. Cf. Charlesworth, *supra* note 32, at 631 (explaining that despite the prominence of the Women's Convention, its effectiveness remains questionable).

178. Women's Convention, *supra* note 93.

inferiority.¹⁷⁹ Unlike other legal instruments, this Convention specifically recognizes women's rights and crimes against women.

Nevertheless, there are two problems that render the Convention nearly ineffective. First, the Convention's procedural guarantees are the weakest of any United Nations Convention regarding human rights.¹⁸⁰ The enforcement mechanism, the Committee on the Elimination of Discrimination Against Women (CEDAW Committee), is consistently given low priority on the human rights agenda.¹⁸¹ In fact, the United Nations itself has been noted for its inadequate hiring or promoting of women, as well as for ignoring complaints of sexual harassment in the workplace.¹⁸² Moreover, the reservations accompanying ratification of the Convention are substantial enough to call the object and purpose of the treaty into question.¹⁸³

Second, the norms incorporated into the Convention, while establishing state obligations, do not create international crimes.¹⁸⁴ The provisions alone do not establish positive law enforceable by international tribunals. They merely codify existing norms under international law.¹⁸⁵ Like customary law, the underlying presumption of the Convention's definition of discrimination represents that women and men are the same.¹⁸⁶

However, the very nature of sexual violence against women is specific to their sex.¹⁸⁷ Equal application of human rights documents overlooks the underlying and inherent distinction between the two sexes. Gender neutrality of legal terms can thus represent a discriminatory approach to recognizing international crimes.¹⁸⁸ The fact that sexual violence against women has been ignored throughout history provides evidence of unequal application of international norms to women and men. Thus an effec-

179. Dinah Sheldon, *Improving the Status of Women Through International Law*, 9 WHITTIER L. REV. 413, 415 (1987).

180. *Id.*

181. See Charlesworth, *supra* note 32, at 624; Sheldon, *supra* note 179, at 417.

182. Sheldon, *supra* note 179, at 417.

183. *Id.*; see Cook, *supra* note 31, at 643-44.

184. Strizhak & Harries, *supra* note 25, at 4.

185. Women's Convention, *supra* note 93 (affirming *existing* principles of "the inadmissibility of discrimination").

186. Charlesworth, *supra* note 32, at 631.

187. MacKinnon, *supra* note 46, at 190. MacKinnon states that "[i]nequality because of sex defines and situates women as women. If the sexes were equal, women would not be sexually subjected." *Id.*

188. See CATHARINE A. MacKINNON, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32-38 (1987).

tive instrument must acknowledge and deal with these differences. The Convention does not create a new definition for discrimination based upon inherent biological and sociological differences between men and women.¹⁸⁹ This inadequacy, combined with a lack of support by the international community, renders the Convention less than effective as a means to condemn and to prosecute wartime rape.

E. *The Convention on the Rights of the Child*¹⁹⁰

The Convention on the Rights of the Child might provide a means to prosecute crimes for the thousands of children raped in the former Yugoslavia. Again, traditional interpretations render the Convention ineffective. Article 6(2) states that "States Parties shall ensure to the maximum extent possible the survival and development of the child."¹⁹¹ The Convention thus places the burden of enforcement upon states, whose representatives are often the perpetrators themselves.¹⁹² Most importantly, the Child Convention never invokes or discusses a valid means of enforcement.¹⁹³ As a result, a convening authority would not utilize its provisions.

F. *Creating a New Textual Basis for Prosecution*

On a theoretical level the international community could overcome the deficiencies found in existing law for prosecuting rape during wartime by promulgating a separate and effective textual basis. Such a document might establish violence against women as mandating protective and punitive measures equal to other forms of violence.¹⁹⁴ These provisions would be invaluable

189. See MACKINNON, *supra* note 46, at 75, 218–19 (arguing that an evaluation of gender as a "matter of sameness and difference covers up the reality of gender as a system of social hierarchy, as an inequality."). This issue constitutes the main debate within current feminist legal discourse — whether women would profit more from systems which treat them differently from men or from systems which maintain a presumption of equality. See also CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* 5–23, 128–50 (1982) (discussing women's developmental differences with men, and how the feminist movement's push for equal rights has not taken these differences into consideration).

190. Child Convention, *supra* note 94.

191. *Id.*

192. Charlesworth, *supra* note 32, at 630, 633.

193. The Child Convention's virtual absence from publications and discussions on human rights is evidence that it would not be a viable legal source for a tribunal to consider.

194. Charlesworth, *supra* note 32, at 629.

in that they might alter the underlying gender discrimination through effective recognition, and thus prosecution procedures.

On a practical level, such a convention would ultimately face the same barriers to overcoming gender bias and functioning as an effective prosecutorial tool as did the Women's Convention. By creating a text addressing only women's concerns, it would receive second-class treatment. The primary effect would be merely that of disseminating a message of intolerance towards sexual abuse of women during times of war, just as the Women's Convention purports to send a message.

However, the result would be just that, a message. Like the Women's Convention, it will not lead to actual changes in global attitudes regarding sexual violence against women. Rather, international organs must take a proactive approach to recognizing, investigating, and prosecuting sexual violence against women. Creating pragmatic solutions requires an active prosecutorial tribunal that implements international law in a manner which adequately protects women and punishes those who commit the crime of rape.¹⁹⁵

III. NONDISCRIMINATORY ENFORCEMENT MECHANISMS FOR PROSECUTING WARTIME RAPE

A crime exists only so long as there is an explicit sanction attached to the act.¹⁹⁶ Under traditional interpretive schemes, wartime rape does not fall squarely into the category of either a crime against humanity under the Genocide Convention or a violation of treatment of civilians during war under Geneva Convention IV and Protocol I.¹⁹⁷ Rape is a unique crime in terms of the elevated level of individual responsibility and the corresponding evidentiary problems with proving that individual responsibility. The nature of individual participation in committing the crime of rape is inherently greater than in many other human rights crimes.

195. As will be discussed in the following section, such actions go beyond continued recognition of these crimes. However, as with all human rights abuses, it is important to note the inherent difficulties in prosecuting human rights abuses through the protective shield of state sovereignty.

196. HARFF, *supra* note 159, at 10, 30.

197. See Theodor Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 AM. J. INT'L L. 589, 589-02 (1983) [hereinafter Meron, *Inadequate Reach*] (discussing what is covered by existing human rights instruments); Meron, *Rape as a Crime*, *supra* note 77, at 428.

Frits Kalshoven, the current chairperson of the United Nations Commission on War Crimes and a noted scholar on war crimes, was recently quoted as saying that "without any doubt rape is a war crime under existing international law."¹⁹⁸ However, he also explained that, in prosecuting an accused, it will be very difficult to prove that "his superiors ordered him to rape."¹⁹⁹

The United Nations has created an ad hoc criminal tribunal to prosecute Serbs accused of massive violations during warfare.²⁰⁰ The Bosnians have held their own trial of several captured Serbian soldiers. Some scholars argue for the establishment of a permanent international tribunal.²⁰¹ Each would be effective in its own way. Most importantly, international, and not domestic, jurisdiction is essential to fair and effective prosecution of wartime rape.²⁰²

An international war crimes tribunal will soon address the mass rape of women in the former Yugoslavia.²⁰³ Revising interpretive methods and establishing effective prosecutorial procedures represents a more pragmatic approach than creating new legal texts. Additionally, amending current international instruments or creating an entirely new one would represent retroactive application if used to convict Bosnian war criminals during a war crimes tribunal. Prosecution of current offenders under law applied retroactively is prohibited by Article 15 of the Covenant on Civil and Political Rights, which establishes defendant rights in international criminal law.²⁰⁴ Instead, the more immediate focus should be placed on establishing an international tribunal

198. *Bosnia: Doubts Cast Over Feasibility of War Crimes Tribunal*, INTER PRESS SERV., Feb. 18, 1993, available in LEXIS, News Library, Curnws File.

199. *Id.*

200. S.C. Res. 827, *supra* note 20.

201. M. Cherif Bassiouni has established this as a constant theme in his writings. See, e.g., M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL (1987).

202. Prosecuting the victors, as opposed to the vanquished, will present a formidable problem for the tribunal to resolve. Whether or not the United Nations can actually retain the political muscle to bring the Serbs to trial is still unclear. See *infra* notes 224-66 and accompanying text for a discussion of some of the legal problems facing the tribunal.

203. See O'Brien, *supra* note 21, at 639-41 (discussing the Bosnia War Crimes Tribunal); see also Statement by Madeleine Albright, *supra* note 22.

204. MARC J. BOSSUYT, GUIDE TO THE "TRAVAUX PREPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS xv-vi (1987) (prefacing an examination of the Covenant by describing it as a cornerstone of individual rights in international law); see Strizhak & Harries, *supra* note 25, at 5-6.

and creating effective prosecution mechanisms that reinterpret conventional international law with proactive standards.

A. *The Importance of Establishing an International Tribunal*

1. Inadequate Justice Under Domestic Enforcement

"In general, international law recognizes a state's right to exercise criminal jurisdiction in situations where it has a significant relationship to the case."²⁰⁵ Theoretically, this enables a state to prosecute its own individuals for violations of international crimes.²⁰⁶ "[I]nternational law, rather than prohibiting exercise of jurisdiction when the territorial principle does not apply, permits exercise of jurisdiction except when specifically prohibited."²⁰⁷

Effective means to punish human rights violations, however, involve the need to supersede state sovereignty. The inherent problem in safeguarding human rights of a persecuted group is that "protection of human rights is viewed as essentially a function of the state."²⁰⁸ The United Nations recognizes the relationship between the state and the individual by regarding the state as the source of human rights.²⁰⁹ Therefore, the individual may receive no entitlement independent of the state. States, and not individuals, are subjects of international law.²¹⁰

205. Orentlicher, *supra* note 85, at 2552 n.58 (citing IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 300-05 (4th ed. 1990); Harvard Research in Int'l Law, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435 (Supp. 1935)). These authors discuss the recognized principles of jurisdiction: the "territorial" principle, when the crime occurred in the territory of the prosecuting state; the "passive personality" principle, when the victim is a national of the prosecuting state; the "nationality" principle, when the offender is a national of the prosecuting state; and the "protective" jurisdiction principle, when states have the right to prosecute crimes that threaten the national security or fundamental governmental functions, regardless of where the crimes were committed. *Id.*

206. "[I]nternational law imposes duties and liabilities upon individuals as well as upon States . . . [I]ndividuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." *Id.* at 2553 n.60 (citing International Military Tribunal, *Judgment*, reprinted in 41 AM. J. INT'L L. 172, 220-21 (1947)).

207. *Id.* at 2552 n.58 (citing S.S. Lotus Case (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7)).

208. KUPER, *supra* note 83, at 92.

209. *Id.*

210. *Id.* This viewpoint was strongly influenced by Eastern European socialist states. *Id.*

The major problem in enforcing international human rights conventions and preventing violations lies in the fact that states are the major violators.²¹¹ Civil warfare, which frequently manifests itself in the form of ethnic struggles for power within one larger state, obfuscates the clear lines delineated by rules of jurisdiction.²¹² It has frequently been the state itself which commits crimes against humanity, and therefore neutrality on a domestic level is essentially impossible.²¹³

Where a state retains jurisdiction over crimes of rape, particularly where the crimes are ongoing, the nature of the proceedings is likely to resemble a political event rather than a judicial proceeding. The situation in the former Yugoslavia presents just such an example. In March of 1993, the Bosnian government prosecuted two Serbian soldiers who had been apprehended in November 1992.²¹⁴ Both defendants were charged with genocide, rape, murder, and looting, and faced a firing squad if convicted.²¹⁵ One defendant confessed to having committed the crimes and acting under Serbia's state-defined genocide policy.²¹⁶ His co-defendant, however, stated that he was beaten into signing a confession.²¹⁷ The trial received international notoriety, with interest generated by a genuine desire to bring criminals to justice.²¹⁸ Not surprisingly, both defendants were found guilty.²¹⁹

Since the end of World War II, the international community has supported domestic prosecution in pursuit of reducing international tensions.²²⁰ However, the Bosnian trial highlights the inadequacies of such a policy where publicity decreases impartiality and effective justice.²²¹ That both defendants happened to

211. *Id.* at 94.

212. FALK, *supra* note 151, at 26.

213. HEATHER A. WILSON, *INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS* 37, 48-52 (1988).

214. Peter Maass, *War Crimes Case Opens*, WASH. POST, Mar. 13, 1993, at A14.

215. Peter Maass, *Two Serbs Face Murder, Rape Charges in Bosnia's First War Crimes Tribunal*, WASH. POST, Mar. 12, 1993, at A17.

216. *Serbian Soldier Seeks Death Sentence*, WASH. TIMES, Mar. 18, 1993, at A2.

217. *Id.*

218. David Ohaway, *Bosnia Convicts 2 Serbs in War Crimes Trial*, WASH. POST, Mar. 31, 1993, at A21.

219. The details and outcome of both convictions did not generate similar interest as did the trials themselves, perhaps due to an international sense of futility.

220. Orentlicher, *supra* note 85, at 2558.

221. See KUPER, *supra* note 83, at 16-17. Kuper illustrates this problem with the fact that there have been only two trials by a relatively competent tribunal of the state in the territory in which the crime was committed, and both were in the fall of 1979. First, in Equatorial Guinea the leader, Macias, was overthrown and found

be the only soldiers caught by Bosnian Muslims manifests the problematic nature of domestic prosecution.

States maintain a responsibility to comply with international laws and customs in preventing genocide and crimes against humanity.²²² In these circumstances, there is a need for the international community to undertake prosecution by maintaining jurisdiction over both the victim(s) and defendant(s). Part I, Article 8, of Geneva Convention IV states that where there is no neutral state then, "as a last resource, the Convention calls upon a humanitarian organization" to try alleged violators.²²³

2. An International Tribunal

In order to carry out effective and impartial prosecution, a tribunal should be external and international in nature.²²⁴ Although a permanent international court of criminal law would be an ideal tool for eliminating bias, there is little chance of its development in the near future.²²⁵ The United Nations Commission on War Crimes has established an ad hoc criminal tribunal for prosecuting human rights crimes committed during the Yugoslavian War.²²⁶ The principle of universality emerging out of the

guilty of crimes including genocide, and then executed. However, a legal officer of the International Commission of Jurists concluded that he was wrongly convicted. Second, in Kampuchea the leader of the Khmer Rouge was found guilty of genocide by a revolutionary tribunal after being overthrown by the Vietnamese invasion. However, he was protected by his army following the conviction and was still recognized as the accredited national representative by the U.N. *Id.*

222. See RICHARD A. FALK, *A STUDY OF FUTURE WORLDS* 23 (1975); see also HARFF, *supra* note 159, at 8-9.

223. COMMENTARY, *supra* note 26, at 109 (discussing Geneva Convention IV, *supra* note 7, art. 11, para. 3).

224. See Theo van Boven, *The Role of Non-Governmental Organizations in International Human Rights Standard-Setting: A Prerequisite of Democracy*, 20 CAL. W. INT'L L.J. 207, 207-25 (1990) (discussing the importance of international human rights organizations to publicizing abuses and "exercising public pressure" on governments). See also LEBLANC, *supra* note 154, at 151-64, for a discussion of the issues involved with establishing an international criminal court.

225. LEBLANC, *supra* note 154, at 47.

226. S.C. Res. 827, *supra* note 20. This Bosnian War Crimes Tribunal has an international panel of judges, as well as designated prosecutors. In pursuit of its goal to prosecute and punish those who committed war crimes, the United Nations General Assembly elected judges for the tribunal in September, 1993. *Election of Judges of the International Tribunal for Violations of Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT'L L. 668 (1993). The tribunal is currently developing applicable procedures and determining applicable law based on its convening charter of authority. See O'Brien, *supra* note 21, at 639-44 (discussing many of the issues which will be ruled upon by the panel of judges).

Nuremberg criminal tribunals²²⁷ has enabled an ad hoc international tribunal to maintain jurisdiction over war criminals for crimes against humanity.²²⁸

The crucial focus of the tribunal must be on applying fair and effective justice. First, a tribunal must carefully and impartially select defendants. In the Nuremberg trials the tribunal focused on a few important political figures or leaders, rather than the majority of those who actually committed crimes.²²⁹ Because of political ramifications resulting from the choice of defendants,²³⁰ the message disseminated by prosecuting a few key actors will often make a greater impact on the international community than conducting lengthy trials of numerous soldiers and violators. Second, a tribunal must both apply laws to different defendants in an unbiased fashion, as well as appear unbiased.²³¹

Third, the crime of rape should be prosecuted only where the situation involves members of one ethnic, racial, or religious group raping another. It is true that in the post-World War II era nationality is no longer considered the per se measure differentiating one group of peoples from another.²³² However, for purposes of clarity and fairness, international law distinguishes

227. Orentlicher, *supra* note 85, at 2553 n.60 (citing Georg Schwarzenberger, *The Problem of an International Criminal Law*, in INTERNATIONAL CRIMINAL LAW 3, 10, 16 (Gerhard O.W. Mueller & Edward M. Wise eds., 1965)).

228. See *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986). Grounds for establishing such a tribunal were asserted through two justifications by the Allied Powers following World War II. Orentlicher, *supra* note 85, at 2555-58. "First, [it was determined that] crimes against humanity could be punished by an international court because the conduct, by its nature, offended humanity." *Id.* at 2556 (discussing *United States v. Ohlendorf* (Case No. 9), IV TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, at 46-47 (1950)). The legal status and consequences of the crime transcended the province of municipal law. Second, the tribunals could judge "matters traditionally subject to the exclusive sovereign power of states by linking crimes against humanity to conduct that had unambiguous international ramifications," that of international war. *Id.* at 2558.

229. ROBERT WOETZEL, *THE NUREMBERG TRIALS IN INTERNATIONAL LAW* 156 (1962).

230. FRANK BUSCHER, *THE U.S. WAR CRIMES TRIAL PROGRAM IN GERMANY, 1946-1955*, at 2 (1989).

231. For example, many Muslims worldwide believe that international officials and organizations have delayed establishing a criminal tribunal pertaining to the Persian Gulf War because many of the victims do not adhere to the Judeo-Christian tradition. Such beliefs have incited anti-Western sentiment and disdain for maintaining the international legal order.

232. WILSON, *supra* note 213, at 48-52 (discussing the developing controversy of how to define "belligerents," or "armies," under the Geneva Conventions).

between violations of one group against another group and violations within one group of people.²³³ A clear line must be drawn to achieve effective prosecution.

B. Creating an Effective Prosecutorial Tribunal Under Modern Legal Standards

The primary purposes of prosecution are to "uphold the rule of law and to redress grievances."²³⁴ Any prosecutorial tribunal must apply the relevant conventional legal source in order to try defendants and punish those convicted. Procedure will link principles of law with crimes of defendants. Extensive criminal procedures were developed during the Nuremberg trials in World War II. The Bosnian War Crimes Tribunal will probably rely on a set of procedural rules based upon those used in Nuremberg, the Draft Articles for the Permanent Criminal Court, as well as other international prosecutorial bodies.²³⁵

Like the Bosnian tribunal, the Nuremberg trials consisted of an ad hoc international military court.²³⁶ Because the series of trials were initiated prior to passage of the Genocide Convention, the Nuremberg Charter "generally linked the crimes against humanity to aggressive war or conventional war crimes."²³⁷ Although the procedure did not use the term "genocide" or refer to the concept, the tribunal did deal in substance with the crime of genocide.²³⁸ The precedent established that future tribunals

233. Orentlicher, *supra* note 85, at 2552 n.58. The Nuremberg trial prosecuted crimes which were perpetrated by the nationals of one country against the nationals of another country, whether civilian or military. WOETZEL, *supra* note 229, at 177.

234. Akhavan, *supra* note 27, at 281.

235. See KUPER, *supra* note 83, at 175-76. The problem in finding historical precedent is that groundbreaking work on international penal tribunals has been achieved mostly in the area of apartheid, and only as a result of great international pressure. Therefore, the primary examples of trying war crimes are those tribunals established following World War II, including those in Tokyo. *Id.* at 175-76. See also BUSCHER, *supra* note 230, for a general discussion on the development of the Nuremberg trials, and the American government's attempt to balance punitive measures with its own global interests. The key difference between the Bosnian tribunal and all prior situations is that this tribunal will attempt to try the victors, rather than the vanquished. On the issue of prosecuting rape and sexual violence against women, there is no true precedent. However, if the tribunal acknowledges that rape is a war crime and women constitute a separate group against whom crimes can be committed, it can refer to earlier tribunals as precedent for prosecuting war crimes and crimes against humanity.

236. See WOETZEL, *supra* note 229, at 40.

237. KUPER, *supra* note 83, at 9; see TAYLOR, *supra* note 117, at 5-20.

238. KUPER, *supra* note 83, at 9, 175.

could prosecute violators either for committing war crimes or for perpetrating acts of genocide.²³⁹

Similarly, the Bosnian War Crimes Tribunal can invoke effective principles of law not previously established. By applying nondiscriminatory versions of the Conventions, the tribunal will actually abide by accepted norms of international law. The purpose of international criminal law is to utilize fair procedures that will contrast with state conflicts and cultural biases.²⁴⁰ Thus the tribunal would not be deviating from the rule of legal conventions, but rather applying them in an adequate and accurate manner.

The stated purpose of Nuremberg was to depart from historical traditions of biased trials held by victor over vanquished. The prosecution focused on the existence of a general "common plan or conspiracy" to violate the rules and customs of war.²⁴¹ Commission of crimes against peace and humanity constituted sufficient evidence for purposes of trying individuals.²⁴² The primary effect of the Nuremberg trials, and ideally of the Bosnian trial, is to provide international bodies with an obligation to prohibit and to try wartime conduct adequately under international law. Like the creation and completion of the Nuremberg trials, international legal precedent should be established in the Bosnian trial to recognize, and correct, the underlying bias of customary law.

Tribunal procedure can accomplish this in two ways. First, the judges should recognize that conventional law is gender biased. There are two aspects to nondiscriminatory recognition, theoretical and pragmatic. On a theoretical and intellectual level, the tribunal must accept rape as a war crime, applying Geneva Convention IV and Protocol I such that rape, in and of itself, constitutes a war crime. Article 147 of the Geneva Convention can be interpreted to include rape as "wilful killing, torture or inhuman treatment . . . causing great suffering or seri-

239. ANN TUSA & JOHN TUSA, *THE NUREMBERG TRIAL* 16-17 (1983).

240. See FALK, *supra* note 151, at 11-29.

241. AIREY NEAVE, *ON TRIAL AT NUREMBERG* 244-45 (1978).

242. WOETZEL, *supra* note 229, at 228-29; cf. Julie Mertus, *Evidence Must Be Gathered Now to Prosecute Balkan War Crimes*, PHILA. INQUIRER, Sept. 2, 1993, at A23 (discussing how the Balkan War Crimes Tribunal will differ from prior tribunals in that the U.N. must convince Serbian forces to stand trial when the Serbs are the victors).

ous injury to body or health."²⁴³ It is essential that rape fall squarely into the category of a war crime in order to undergo adequate prosecution. One American prosecutor defines rape as:

[An] assault in which men, who could use any [other] weapons to cause injury, choose instead to use as the weapon a penis — and with it to violate the most private and personal part of a woman's body. That is a crime of sexual violence, which is what sets it apart from every other kind of criminality.²⁴⁴

Under this proposed interpretation of Geneva Convention IV and Protocol I, rape is clearly a war crime. In this context, rape is a violation of an international humanitarian norm, and not an act encouraged by commanders for congratulating their soldiers.²⁴⁵

More importantly, the tribunal judges must recognize that rape is a crime against humanity, constituting genocide. The tribunal *must* find sufficient evidence that individuals acted within the rubric of state policy. Nevertheless, if each rape is not viewed as incidental, but rather as a war crime, then multiple war crimes will form a basis for proving military strategy. The tribunal must then find the underlying theoretical element to prove that rape can be integrated into military tactics pursuant to a state program of genocide and terror.

Second, procedure should directly reflect the unique and special difficulties involved with rape cases in view of both victim testimony and defendant rights. Legal scholars have noted that few international programs include crime prevention or criminal justice components.²⁴⁶ This absence of procedure makes it feasible for a tribunal essentially to create effective procedural mechanisms. Rape, unlike other war crimes, intimates direct physical involvement with the victim. In this way, it is a more "personal" war crime.²⁴⁷ It is obviously impossible to prosecute all men re-

243. Geneva Convention IV, *supra* note 7, art. 147; see Strizhak & Harries, *supra* note 25, at 2 (concerning discriminatory interpretations of this key provision).

244. FAIRSTEIN, *supra* note 66, at 14. As a New York City prosecutor who heads the Sex Crimes Unit, Fairstein provides a good summary of the key issues facing prosecutors in cases involving sexual violence.

245. See Meron, *Rape as a Crime*, *supra* note 77, at 425.

246. See M. Cherif Bassiouni, Book Review, 81 AM. J. INT'L L. 511 (1987) (reviewing MANUEL LÓPEZ-REY, A GUIDE TO UNITED NATIONS CRIMINAL POLICY (1985)).

247. Unlike rape on a domestic or national level, rape as a war crime does not usually involve rape by someone the victim knows. See ESTRICH, *supra* note 10, at 8. However, this does not necessarily alleviate the trauma of being violated in the most personal way. Victims will still have to confront the aggressors who engaged in forced sexual intercourse with them.

sponsible for mass rape and to prove that each one was acting in the course of his military orders.²⁴⁸ Moreover, evidence will be particularly difficult to obtain for purposes of linking the accused to individual victims. This problem is exacerbated since many women hesitate to speak out and participate in a criminal tribunal.²⁴⁹

The tribunal requires prosecutorial mechanisms that both respect and protect the defendants' rights while simultaneously correcting gender bias. The International Covenant on Civil and Political Rights and the Optional Protocol thereto define standards for criminal procedure requiring procedural due process.²⁵⁰ Due process represents those procedures that conform with international human rights norms.²⁵¹

Helsinki Watch, a division of the Human Rights Watch organization, has stated that "full due process is important in and of itself, as an essential component to reestablishing the rule of law."²⁵² Similarly, the European Commission on Human Rights has emphasized that certain criminal procedures affording due process are necessary to the stability of a tribunal and the validity of its holding.²⁵³ As in other areas, these international norms contain an underlying gender bias. Where necessary, the court should apply special procedural rules for rape defendants and victims in order to counter inherent discrimination and protect the victims' privacy and dignity.²⁵⁴ Special evidentiary procedures should be included among the factors the court should consider in trying war crimes of rape and rape as a means of genocide for the first time.

248. *Bosnia: Doubts Cast Over Feasibility of War Crimes Tribunal*, *supra* note 198.

249. See Terry Atlas, *UN Will Pursue War Crimes Trials for Bosnia Rapes War Crimes*, CHI. TRIB., Jan. 30, 1994, at 1.

250. See HURST HANNUM, *MATERIALS ON INTERNATIONAL HUMAN RIGHTS AND U.S. CRIMINAL LAW AND PROCEDURE* 13, 144-45 (1989) (citing the International Covenant on Civil and Political Rights and the Optional Protocol Thereto, 999 U.N.T.S. 671 (1966) (entered into force Mar. 23, 1976) [hereinafter *The Covenant*]). The Covenant discusses such norms as impartial juries, the presumption of innocence until proven guilty, and the right to adequate time for preparation. *Id.*

251. *Id.* at 18.

252. *Procedural and Evidentiary Issues for the Yugoslav War Crimes Tribunal*, 5 HELSINKI WATCH, Aug. 1993, at 2 [hereinafter HELSINKI WATCH].

253. For example, judges should remain impartial and not be subject to influence in deciding cases. See HANNUM, *supra* note 250, at 85-86 (citing *Sutter v. Switzerland*, Ap. No. 8209/78, 16 Eur. Comm. H.R. Dec. & Rep. 166, 173-74 (1979)).

254. See FAIRSTEIN, *supra* note 66, at 81.

The criminal tribunal would benefit from using an existing set of procedural rules that deals specifically with the issue of rape and its unique circumstances.²⁵⁵ Criminal procedure in the United States for prosecution of rape acknowledges victim sensitivity while continuing to safeguard defendant due process rights. Several novel features offer a model for international prosecution of rape as a war crime. Aside from victim protection for both physical safety and mental security, two key areas of procedure have been altered in the American system, and should likewise be considered in an international tribunal: (1) eliminating the need for corroboration of victim testimony;²⁵⁶ and (2) not requiring a showing of victim resistance for a finding of rape.²⁵⁷

In United States courts, corroboration of the victim's testimony is required in all criminal trials except in cases of rape.²⁵⁸ Eliminating the need for corroboration would allow for a more objective tribunal. Rape is a "private" crime of the victim even during wartime, and very frequently there will be no one to corroborate the victim's testimony. A corroboration requirement would thus diminish the testimony's impact. Moreover, in a situation such as Bosnia where rape was committed on a massive scale, the only people who may be able to corroborate the victim's testimony are other Serbian soldiers. Where witnesses are hostile to the prosecution, particularly if they may receive international criminal punishment if found guilty, corroboration decreases the likelihood of their being "objective witnesses."²⁵⁹

Secondly, a key procedural focus should be on the defendant's behavior rather than on the victim's resistance. A defendant should be presumed innocent, and the burden of proof should rest on the prosecution.²⁶⁰ However, the tribunal should

255. See Charlesworth, *supra* note 32, at 614 (suggesting that successful prevention will occur by application of a new and different way of solving problems that eliminates patriarchal biases).

256. See FAIRSTEIN, *supra* note 66, at 122-26.

257. See ESTRICH, *supra* note 10, at 30-32 (showing how examining the victim's resistance is both unfair to the victim, and ignores the defendant's own culpability).

258. FAIRSTEIN, *supra* note 66, at 122-26. These are known as the "rape-shield" laws, essentially "shielding" the rape victim's personal life from the jury. *Id.*

259. Lucinda Finley, *Breaking Women's Silences in Law: What Language Can We Use? The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 886-906 (1989).

260. See HANNUM, *supra* note 250, at 89, discussing the European Human Rights Committee and its interpretation of the Covenant on Civil and Political Rights, General Comment 13(2) (article 14), REPORT OF THE HUMAN RIGHTS COMMITTEE 143-44.

not focus on the victim's level of resistance. A victim may unwillingly submit to rape for the purpose of preserving her life.²⁶¹ Where the court is trying military personnel for committing or ordering the rape, resistance can be presumed for women who are "nationals" of the "opposition," due to an inherent fear of the enemy during wartime. Where women were taken in large numbers to hotels used specifically for the purpose of being raped, the court can similarly assume a lack of consent.

Helsinki Watch advocates against "'special' safeguards for rape victims," and instead supports an approach that does not grant rape victims 'extra protections.'"²⁶² This view does not account for discrimination that occurs against women at all levels of the crime, from the act, to gathering evidence, to the decision of whether or not to prosecute prior to a final determination.²⁶³ Their argument presumes fair treatment without recognition of rape victims' unique situation as witnesses to their own case.

The standard of proof employed by the tribunal constitutes an additional issue. In other international human rights tribunals the standard of proof has varied from "convincing" evidence²⁶⁴ to "beyond a reasonable doubt."²⁶⁵ For example, in Nuremberg, the standard for the burden of proof was "convincing evidence," requiring mere involvement with the Nazi "conspiracy."²⁶⁶ Because of the difficulty involved with proving every single rape, I propose that "convincing evidence" is an appropriate standard here. If the prosecution cannot show that every woman was raped, they should still meet the burden of proof by proving the existence of "rape camps." However, whether or not the tribunal adopts this procedure it will probably be integrated into its acceptance or non-acceptance of rape as a war crime and means of

261. See FAIRSTEIN, *supra* note 66, at 128.

262. HELSINKI WATCH, *supra* note 252, at 10.

263. See MACKINNON, *supra* note 188, at 34-36.

264. Thomas Buergenthal, *Judicial Fact-Finding: Inter-American Human Rights Court*, in *FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS* 261, 269-72 (Richard Lillich ed., 1992). The standards of proof have often varied because many of these cases deal with disappearances, and so the Court will take into account the "special seriousness" of a situation in formulating a standard. *Id.*

265. Jochen A. Frowein, *Fact-Finding by the European Commission of Human Rights*, in HANNUM, *supra* note 250, at 237, 246. This standard was confirmed in the case of *Ireland v. United Kingdom of Great Britain and Northern Ireland*, 1976 Y.B. Eur. Conv. on H.R. 512, 796 (Eur. Comm'n on H.R.), where the court held that "such proof may follow from the coexistence of sufficiently strong, clear and concordant influences or of similar un rebutted presumptions of fact."

266. TAYLOR, *supra* note 117, at 165-69 (discussing the "conspiracy" charge).

genocide. The methodology of interpretation by judges will constitute the true determinative factor. Where judges recognize the special circumstances affecting rape victims and the manner in which elements of conventional law have been interpreted in the past, any relevant standard should accomplish justice.

CONCLUSION

The allegations of mass rapes committed in the former Yugoslavia have caught the world's attention. This publicity has pushed the international community to address the issue of violence against women, which has been an unrecognized human rights abuse in both customary and conventional international law. The context in which these crimes are being committed, for purposes of "ethnic cleansing," has amplified the interest of international groups in bringing the perpetrators to justice. By crossing some indefinite line of conduct during war, the Serbs have awakened an international conscience.²⁶⁷ Ideally, the international community would address rape against women in all circumstances as a crime against humanity, not merely where the population is simultaneously subjected to genocide. However, now that the issue of wartime rape has surfaced, there is an opportunity to affect change in international legal norms and procedures.

Because conventional law is currently interpreted through the inherent gender bias of customary law, it is of questionable value in the situation of the former Yugoslavia. The ambiguity conventional law reflects towards prevention of rape is evidenced by its virtual silence on the matter. Rape is not defined as a war crime, and does not fall squarely into the definitions of genocide or torture. Unlike victims of many other human rights crimes, rape victims do not always die. So long as legal scholars and military forces alike view rape as sexual conduct of soldiers, rather than purely violent conduct, a prosecuting tribunal will rest on a shaky foundation. Specific mechanisms must be developed that recognize rape as a crime against humanity and as a means of committing genocide.

Any proposed international criminal tribunal will have to deal with issues of state sovereignty. Nations are generally reluctant to cede the sovereignty necessary to operate a permanent

267. See KUPER, *supra* note 83, at 193-94 (discussing how publicizing egregious conduct increases international revulsion for the acts).

penal court in any human rights situation. Once states surrender their sovereignty over war criminals to an international war crimes tribunal, it will be crucial that the tribunal employ effective procedural standards. Such standards are necessary to recognize and correct prior bias against both the value of prosecuting the crimes of rape and the treatment of rape victims.

During the Bosnian War Crimes Tribunal it is critical that the prosecution not become entangled in the issue of ethnic cleansing such that it ignores the crime of rape. Rape has previously been considered a mere side effect of war, and it will be an enormous hurdle for this tribunal to treat rape as an independent crime and to prosecute it as such successfully. Merely recognizing rape as a grave breach and crime against humanity will in and of itself represent a nondiscriminatory legal precedent. It is important that rape not remain a subsidiary issue. There may be future incidents where mass genocide is not the situation in which rape is committed; therefore, the tribunal must establish precedent which acknowledges rape as a war crime, of equal significance as other humanitarian abuses and finally worthy of international attention.

