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**A CARROT OR A STICK?  
STRENGTHENING THE RULE OF LAW WITH A STICK:  
FAILURE TO ENFORCE SEXUAL ASSAULT LAWS AS A  
CRIME AGAINST HUMANITY**

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## 1. INTRODUCTION

It may not matter how educated or healthy a young child is if she is daily subjected to physical and sexual violence without protection, kidnapped without rescue, or murdered without justice. The rule of law problem is so pervasive in some developing countries that all the good NGOs do by providing food, education and health care is overshadowed by the violence that the most vulnerable populations face on a daily basis. Focus and funds should be shifted away from simply providing material aid (an incentive, or a “carrot”), and instead more attention should be given to establishing the rule of law by punishing (a “stick”) those who fail to uphold it.

The media has been saturated with stories of violence against children and women in developing countries and the lack of meaningful action by government officials. In a recent report, courts in Malaysia have required girls as young as twelve-years to marry their rapists as a way for the perpetrators to avoid rape prosecutions.<sup>1</sup> A few years ago, hundreds of girls in Nigeria were kidnapped from a boarding school and Nigerians have criticized government officials for failure to sufficiently act.<sup>2</sup> Around the same time, in India, two girls were raped and hung from a mango tree while the police stood by.<sup>3</sup> And, in Pakistan, a pregnant woman, who was literally standing on the courthouse steps of a high court, was stoned to death by relatives while law officials watched, even though such “honor killings” are illegal.<sup>4</sup> In all these tragic stories, the issue is not whether

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<sup>1</sup> Heather Barr, *Marrying Your Rapist in Malaysia*, HUM. RTS. WATCH: DISPATCHES (Jan. 26, 2017), <https://www.hrw.org/news/2017/01/26/marrying-your-rapist-malaysia> [<https://perma.cc/Q829-3J9T>].

<sup>2</sup> See, e.g., Adam Taylor, *Boko Haram was supposed to be releasing the Nigerian girls, but instead may have kidnapped more*, THE WASH. POST (Oct. 24, 2014), <http://www.washingtonpost.com/blogs/worldviews/wp/2014/10/24/boko-haram-was-supposed-to-be-releasing-the-nigerian-girls-but-instead-may-have-kidnapped-more/> [<https://perma.cc/7CB3-KBL4>] (reporting on the skepticism that the Nigerian government had entered into cease-fire negotiations with Boko Haram after the latter failed to free hundreds of kidnapped girls).

<sup>3</sup> Harmeet Shah Singh & Jethro Mullen, *Three arrested after girls are gang-raped and left hanging from tree in India*, CNN (May 30, 2014), <http://www.cnn.com/2014/05/30/world/asia/india-gang-rape/> [<https://perma.cc/D929-2P8G>].

<sup>4</sup> Anup Kaphle, *Pakistani woman stoned to death because she married the man she loved*, THE WASH. POST (May 27, 2014), <https://www.washingtonpost.com/news/worldviews/wp/2014/05/27/photo-pakistani-woman-stoned-to-death-because-she-married-the-man-she-loved/> [<https://perma.cc/UXC4-C5ZH>].

laws are being violated (indeed they are), but whether government officials are enforcing those laws.

Surprisingly, though many developing countries have enacted well-written laws dealing with issues of violence against women and children, bonded labor, and the general administration of justice, a wide swath of the most vulnerable part of the population (the poorest, the women, and the children) fail to receive the protection of those laws. Rule of law issues are complex. Developing countries may not have the funds to enforce their own laws.<sup>5</sup> Citizens of developing countries are often unaware of their rights and protection under the law.<sup>6</sup> Law enforcement officials can be poorly paid, under-staffed and not properly trained.<sup>7</sup> Corruption is a problem throughout law enforcement agencies and the justice system, from the police to the prosecutors and the judges.<sup>8</sup> The purpose of this article is to focus on the last of these issues – the interplay of corruption among government officials and the rule of law.

This article sets forth a novel idea: it argues that failure by government officials to enforce their countries' criminal laws could establish a *prima facie* case for a crime against humanity under international criminal law as codified in the Rome Statute.<sup>9</sup> This article first looks at certain countries' laws, specifically sexual assault and rape laws, and the lack of enforcement of those laws. In the second section, this article gives a historical and legal background to the development of the underlying principles of the crime against humanity. The third section sets forth the principal argument by analyzing whether the failure to enforce domestic criminal laws establishes the *prima facie* elements of a crime against humanity. Even if a crime

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<sup>5</sup> See, e.g., Brian Z. Tamanaha, *The Primacy of Society and the Failures of Law and Development*, 44 CORNELL INT'L L.J. 209, 217 (2011) (explaining that rule of law issues "ha[ve] involved an untold number of projects around the world, focusing on enhancing legal education; implementing judicial reform; constitution or code drafting; transplanting laws and institutions; law enforcement training; combating corruption; educating lay people about the law . . . and supplying material assistance for legal institution building").

<sup>6</sup> See *id.*

<sup>7</sup> See *id.*

<sup>8</sup> See generally GARY A. HAUGEN & VICTOR BOUTROS, *THE LOCUST EFFECT: WHY THE END OF POVERTY REQUIRES THE END OF VIOLENCE* (2014) (arguing that corruption and the lack of access to justice are the paramount problems facing the poor).

<sup>9</sup> The Rome Statute is an international treaty which governs crimes that the International Criminal Court can charge. Rome Statute of the International Criminal Court, Jul. 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

against humanity can be established, so what? Who has the jurisdiction to oversee the prosecutions of the defendants and what happens if they are found guilty? The last section of this article focuses on the impact international pressure might have on helping to enforce the rule of law.

## 2. SEXUAL VIOLENCE AND THE RULE OF LAW PROBLEM

Generally, most articles dealing with rule of law issues propose solutions based on development assistance, such as providing training, economic support, or actual governance.<sup>10</sup> This article is unique in that it looks to international criminal accountability of law enforcement officials as a path to advance the rule of law in developing countries. Generally, international law attorneys label conduct as a crime against humanity when the action involves murder, torture, rape or other overt actions, which often occur during a conflict.<sup>11</sup> This article is again unique because it argues that crimes against humanity should extend to omissions (not just overt acts) when those omissions are based on a government official's failure to enforce the rule of law. These two lines of argument – using international criminal accountability to bolster the rule of law, and analyzing a crime of omission as a crime against humanity – can work together to create a legal framework which addresses rule of law problems.

Before delving into this legal framework, this section briefly provides evidence of the failure of the rule of law. A number of different areas of law could be illustrative. For example, many countries

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<sup>10</sup> See, e.g., Cynthia Alkon, *The Flawed U.S. Approach to the Rule of Law Development*, 117 PENN. ST. L. REV. 797, 801 (2013) (explaining that before giving aid for rule of law development, it should be determined that the country is able to receive it); Tamanaha, *supra* note 5, at 244 (explaining “the failures of law and development efforts”); Amichai Magen, *The Rule of Law and Its Promotion Abroad: Three Problems of Scope*, 45 STAN. J. INT’L L. 51, 54 (2009) (setting forth an interdisciplinary agenda on how to move forward with rule of law issues); Randall Peerenboom, *Human Rights and Rule of Law: What’s the Relationship?*, 36 GEO. J. INT’L L. 809, 944 (2005) (discussing the failures of rule of law initiatives).

<sup>11</sup> See, e.g., *Legal Memorandum: War Crimes and Crimes against Humanity in Eastern Myanmar*, INT’L HUMAN RIGHTS CLINIC AT HARVARD LAW SCH. 42–57 (Nov. 2014), <http://hrp.law.harvard.edu/wp-content/uploads/2014/11/2014.11.05-IHRC-Legal-Memorandum.pdf> [<https://perma.cc/6AX6-VBZS>].

(applying the elements of a crime against humanity to conduct by military and government officials in Myanmar) [hereinafter *Harvard Report*].

have laws against human trafficking, but, nevertheless, have rampant human trafficking within their borders.<sup>12</sup> Many countries have laws against “property grabbing” (where widows and their children are forcefully driven out of their homes by neighbors and relatives), but, despite the laws, property grabbing occurs unchecked.<sup>13</sup> And, many countries have outlawed honor killings, and yet these unlawful killings still occur without punishment of the perpetrators.<sup>14</sup> While the legal framework set forth in this article could be applied to any of these rule of law problems, the principal focus of this article will be on rape laws since sexual violence is arguably one of the most prevalent challenges to the lives of women and children in developing countries.<sup>15</sup> Indeed, rape is now becoming recognized as a form of torture.<sup>16</sup>

While this article primarily focuses on developing countries where the rule of law challenges are most acute, the United States certainly has its own problems. Scholars have shown that law enforcement officials in the U.S. fail to enforce the rule of law in sexual assault cases and in numerous other areas.<sup>17</sup> However, as discussed later in this article,<sup>18</sup> crimes against humanity only arise when the action (or inaction) is so extensive that it “deeply shock[s] the

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<sup>12</sup> See, e.g., ALISON SISKIN & LIANA SUN WYLER, CONG. RESEARCH SERV., RL34317, TRAFFICKING IN PERSONS: U.S. POLICY AND ISSUES FOR CONGRESS 10–15 (2010), <https://fas.org/sgp/crs/misc/RL34317.pdf> [<https://perma.cc/MA5Z-Z7R4>] (discussing the problems of human trafficking in various countries).

<sup>13</sup> See, e.g., Katherine Hughes & Elisabeth Wickeri, *A Home in the City: Women's Struggle to Secure Adequate Housing in Urban Tanzania*, 34 FORDHAM INT'L L.J. 788, 794–95 (2011) (discussing property grabbing problems in urban Tanzania).

<sup>14</sup> See, e.g., Bethany A. Corbin, *Between Saviors and Savages: The Effect of Turkey's Revised Penal Code on the Transformation of Honor Killings into Honor Suicides and Why Community Discourse Is Necessary for Honor Crime Eradication*, 29 EMORY INT'L L. REV. 277, 323 (2014) (“In the context of Turkish honor killings, the collision between cultural norms and textual law appears like clashing waves in the sea.”).

<sup>15</sup> See HAUGEN, *supra* note 8.

<sup>16</sup> Felice D. Gaer, *Rape as a Form of Torture: The Experience of the Committee Against Torture*, 15 CUNY L. REV. 293, 293 (2012) (explaining “the recognition of rape as a form of torture by several international human rights mechanisms and . . . in particular how the Committee Against Torture has continued to address the issue since . . . November 2007”).

<sup>17</sup> See, e.g., Corey Rayburn Yung, *How to Lie with Rape Statistics: America's Hidden Rape Crisis*, 99 IOWA L. REV. 1197, 1198–204 (2014) (arguing that “America is in the midst of a hidden rape crisis” due to U.S. police departments deliberately underreporting rape statistics and “aggressively interrogat[ing] and harass[ing] rape victims—pressing them to recant their allegations”).

<sup>18</sup> See *infra* Section 3 of this Article (discussing the *prima facie* elements of a crime against humanity).

conscience of humanity.”<sup>19</sup> Thus, while this section focuses on rule of law problems in developing countries where the statistics are most shocking, there is nothing that limits the analysis to only these countries.

The first part of this section juxtaposes rape laws with statistics such as those that relate to rates of rape prosecution. The worse the statistics, the stronger an inference can be made that the laws are not being enforced. The second part of this section discusses specific incidents where laws were not enforced. While these stories are primarily anecdotal in nature, they are important because they illustrate how rule of law problems have grave impacts on individual lives.

### 2.1. Example Statistics and the Law

*India:* India has enacted clear laws denoting rape as a crime.<sup>20</sup> In 2013, parts of the law were amended to make the elements more straightforward and the penalties stronger.<sup>21</sup> Yet, as set forth below, the number of reported rapes,<sup>22</sup> prosecuted rapes, and rape convictions are unreasonably disproportionate to India’s population of over 1.3 billion people (the second largest population in the world).<sup>23</sup>

<sup>19</sup> See Rome Statute, *supra* note 9, at Preamble.

<sup>20</sup> Indian Penal Code, No. 45 of 1860, §§ 375–376, PEN. CODE (1860), [http://mha.nic.in/sites/upload\\_files/mha/files/pdf/IPC1860.pdf](http://mha.nic.in/sites/upload_files/mha/files/pdf/IPC1860.pdf) [<https://perma.cc/LLL3-MRDB>].

<sup>21</sup> Criminal Law (Amendment) Bill, No. 63-C of 2013, § 9, PEN. CODE (2013) (amending portions of the Indian Penal Code §§ 375–76), <http://www.prsindia.org/uploads/media/Criminal%20Law,%202013/Criminal%20Law%20Amendment%20Bill%20as%20passed%20by%20LS.pdf> [<https://perma.cc/T2TM-W5L7>]. See also Wendy Zeldin, *India: Criminal Law Amendment Bill on Rape Adopted*, LAW LIBRARY OF CONGRESS: GLOBAL LEGAL MONITOR (Apr. 9, 2013), <http://www.loc.gov/law/foreign-news/article/india-criminal-law-amendment-bill-on-rape-adopted/> [<https://perma.cc/UY6C-FL5U>].

<sup>22</sup> Importantly these numbers only reflect reported rapes, not actual rapes. There is widespread consensus that the rate of actual rapes is much higher worldwide because numerous victims do not report sexual assault incidents for a number of different reasons. See generally, THE BUREAU OF JUSTICE STATISTICS, ESTIMATING THE INCIDENCE OF RAPE AND SEXUAL ASSAULT (Candace Kruttschnitt et al. eds., 2014) [hereinafter *INCIDENCE OF RAPE*] (explaining that while the survey measures the rates of rape and sexual assault, there is a concern that they are underreported).

<sup>23</sup> CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK (2013), <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2119rank.html#in> [<https://perma.cc/6JH6-4R82>] [hereinafter *THE WORLD FACTBOOK*].

In 2013, for example, 33,707 rapes were reported.<sup>24</sup> As a point of comparison, in 2013, the United States, with a much smaller population of 320 million people,<sup>25</sup> had 79,770 reported cases;<sup>26</sup> that is more than double the number of reported cases than in India. The conviction rate for rape in India is even more shockingly dismal. For example, in 2011, of the 635 rapes reported to Delhi police, there was only *one* conviction.<sup>27</sup> That means only one perpetrator went to jail for rape, despite the fact that Delhi has a population of 25 million.<sup>28</sup>

In India, child rape is atrociously high despite laws criminalizing such behavior.<sup>29</sup> Based on one government study, 53.22% of over 12,400 children surveyed reported that they faced sexual abuse.<sup>30</sup> "Imagine 48,838 children raped in just 10 years and you have a small measure of how deep the inhuman phenomenon of child rapes runs in India."<sup>31</sup>

*Belize:* Like India, Belize's rape laws, revised in 2000, are

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Federal Bureau of Investigation, *Crime Statistics for 2013 Released*, F.B.I.: NEWS, (Nov. 10, 2014), <https://www.fbi.gov/news/stories/crime-statistics-for-2013-released> [<https://perma.cc/54BV-PRE2>].

<sup>27</sup> Sara Gates, *Of 706 Rape Cases Reported in Delhi in 2012, Only 1 Resulted in Conviction*, HUFFINGTON POST: THE WORLD POST (Dec. 10, 2013), [http://www.huffingtonpost.com/2013/12/10/delhi-rape-one-conviction-706-cases-2012\\_n\\_4419374.html](http://www.huffingtonpost.com/2013/12/10/delhi-rape-one-conviction-706-cases-2012_n_4419374.html) [<https://perma.cc/99TL-FJJR>] (explaining that, like in 2012, there was only one conviction in 2011). The one conviction in 2012 was the highly discussed gang rape that took place on a bus, which is discussed in the last section of this article. See *infra* Section 4.2 of this Article.

<sup>28</sup> Gaurav Vivek Bhatnagar, *Delhi is now world's second most populous city*, THE HINDU (July 19, 2016), <http://www.thehindu.com/news/cities/Delhi/delhi-is-now-worlds-second-most-populous-city/article6203066.ece> [<https://perma.cc/82D5-5VHW>].

<sup>29</sup> Indian Penal Code, *supra* note 20, at §§ 375–76.

<sup>30</sup> MINISTRY OF WOMEN AND CHILD DEVELOPMENT, GOV'T OF INDIA, STUDY ON CHILD ABUSE: INDIA 2007, § 6.2 at 74 (2007), <http://www.child-lineindia.org.in/pdf/MWCD-Child-Abuse-Report.pdf> [<https://perma.cc/ZCX2-KSRG>].

<sup>31</sup> Ludovica Iaccino, *Child Sexual Abuse: Top 5 Countries with the Highest Rates*, INT'L BUS. TIMES (Feb. 12, 2014), <http://www.ibtimes.co.uk/child-sexual-abuse-top-5-countries-highest-rates-1436162> [<https://perma.cc/6GC8-DVJH>].



straightforward with clear language.<sup>32</sup> Perpetrators can be imprisoned from eight years to life.<sup>33</sup> Yet, in 2013, only twenty-six rapes were reported<sup>34</sup> out of a population of 350,000.<sup>35</sup> A few years before, it was even worse – only twelve cases of rape were reported.<sup>36</sup>

*South Africa:* Again, despite clear rape laws,<sup>37</sup> convictions for rape in South Africa are low. The U.S. State Department reported that many rape cases are never referred for prosecution in South Africa<sup>38</sup> and concluded that the conviction rate is only around four percent.<sup>39</sup> One news article reported that there were more than 67,000 cases of sexual assault against children in just one year, but far fewer perpetrators were tried or convicted.<sup>40</sup>

Alarming statistics like these, of course, do not alone prove that failure to enforce rape law directly causes rape to be underreported or perpetrators to go free.<sup>41</sup> However, a correlation can be observed:

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<sup>32</sup> BELIZE CRIMINAL CODE, ch. 101 § 46 (2000), [http://www.oas.org/juridico/MLA/en/blz/en\\_blz-int-text-cc.pdf](http://www.oas.org/juridico/MLA/en/blz/en_blz-int-text-cc.pdf) [<https://perma.cc/3BRA-68YV>] (“Every person who commits rape or marital rape shall on conviction on indictment be imprisoned for a term which shall not be less than eight years but which may extend to imprisonment for life.”)

<sup>33</sup> *Id.*

<sup>34</sup> *Crime and Violence Statistics Released by Police for 2013*, CTV3 BELIZE NEWS (Jan. 29, 2014), [http://www.ctv3belizenews.com/index.php?option=com\\_content&view=article&id=4110:crime-and-violence-statistics-released-by-police-for-2013&catid=44:education&Itemid=112](http://www.ctv3belizenews.com/index.php?option=com_content&view=article&id=4110:crime-and-violence-statistics-released-by-police-for-2013&catid=44:education&Itemid=112) [<https://perma.cc/G73V-W86B>].

<sup>35</sup> THE WORLD FACTBOOK, *supra* note 23.

<sup>36</sup> U.S. DEP’T OF STATE, 2008 COUNTRY REPORT ON HUMAN RIGHTS PRACTICES: BELIZE (2009), <http://www.state.gov/j/drl/rls/hrrpt/2008/wha/119148.htm> [<https://perma.cc/J3XN-ZXKT>].

<sup>37</sup> See Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (S. Afr.), [http://www.gov.za/sites/www.gov.za/files/a32-07\\_0.pdf](http://www.gov.za/sites/www.gov.za/files/a32-07_0.pdf) [<https://perma.cc/9JSU-N4RX>] (amending laws pertaining to sexual crimes in an effort to consolidate any laws into one statute); Criminal Law (Sexual Offences and Related Matters) Amendment Act 6 of 2012, [http://www.gov.za/sites/www.gov.za/files/a6\\_2012\\_0.pdf](http://www.gov.za/sites/www.gov.za/files/a6_2012_0.pdf) [<https://perma.cc/BV7R-HFHD>].

<sup>38</sup> U.S. DEP’T OF STATE, 2013 COUNTRY REPORT ON HUMAN RIGHTS PRACTICES: SOUTH AFRICA 26 (2013), <http://www.state.gov/documents/organization/220371.pdf> [<https://perma.cc/Y2RV-4XCQ>] [hereinafter SOUTH AFRICA COUNTRY REPORT].

<sup>39</sup> “According to the 2012–13 NPA annual report, the conviction rate for sexual offense crimes was 65.8 percent, although watchdog groups claimed the rate was lower because it did not include the many credible cases that never made it to trial. Many cases were never referred for prosecution, and many watchdog groups estimated that the real conviction rate in rape cases was 4.1 percent.” SOUTH AFRICA COUNTRY REPORT, *supra* note 38.

<sup>40</sup> Iaccino, *supra* note 31.

<sup>41</sup> See INCIDENCE OF RAPE, *supra* note 22 (discussing the many reasons why rape

in some developing countries, there are clear rape laws, but despite those laws, there is a shockingly low rate of prosecutions and convictions.<sup>42</sup> This correlation, particularly in light of some of the incidents discussed in the next section, illustrate that there is a rule of law problem when it comes to enforcing sexual assault laws.

## 2.2. Example Reported Incidents

As mentioned in the Introduction section of this article, a recent report concluded that rapists in Malaysia are avoiding prosecution through forced child marriage.<sup>43</sup> Although under Malaysian law, non-consensual sex with a child under sixteen years old is considered statutory rape,<sup>44</sup> rape within marriage is not illegal.<sup>45</sup> With permission of Malaysia's Sharia court, children can be married.<sup>46</sup> In one particular case, a forty-year-old rapist was given permission to marry a twelve-year-old girl whom he had raped.<sup>47</sup> Due to the work of activists, this particular rapist was prosecuted, but a chair of one nongovernmental organization concluded that men marrying the girls they rape as a way to get out of prosecution is "not a rare occurrence . . . It's happening often."<sup>48</sup>

In addition to those reports mentioned in the Introduction section, there are numerous incidents where international organizations and scholars have determined that government officials are failing to uphold the rule of law. For example, in 2013, the United

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might be underreported).

<sup>42</sup> U.S. DEP'T OF STATE, 2013 COUNTRY REPORT ON HUMAN RIGHTS PRACTICES: BELIZE 14 (2013), <http://www.state.gov/documents/organization/220631.pdf> [<https://perma.cc/54KW-2ESS>] (observing that such poor statistics of rape prosecutions and convictions in countries like Belize may be, in part, because of "inefficiencies in the police and judicial systems").

<sup>43</sup> Barr, *supra* note 1.

<sup>44</sup> MALAYSIAN PENAL CODE, § 376(2) (2015), <http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Penal%20Code%20%5BAct%20574%5D2.pdf> [<https://perma.cc/ECM5-WVTK>].

<sup>45</sup> Liz Gooch, *Malaysia's child brides*, AL JAZEERA (Aug. 12, 2016), <http://www.aljazeera.com/indepth/features/2016/08/malaysia-child-brides-160810123204474.html> [<https://perma.cc/7HJL-5QVE>] (explaining how "[m]en accused of rape are marrying their alleged victims in order to avoid prosecution").

<sup>46</sup> Barr, *supra* note 1.

<sup>47</sup> Gooch, *supra* note 45.

<sup>48</sup> Barr, *supra* note 1.

Nations conducted a survey of 10,000 men across Asia and the Pacific and found that almost half admitted to sexual violence and a quarter admitted to actual rape, yet “the vast majority . . . did not experience any legal consequences, confirming that impunity remains a serious issue in the region.”<sup>49</sup>

More specifically, an Indian scholar, who witnessed rape trials in India first-hand, reported on the investigation and trial of a ten-year old rape victim. When the rape was initially brought to the attention of the police, and when they were shown the victim’s bloody clothes, the police told the victim’s father, “you must not talk about all this,” leading the father to feel that the police protected the perpetrator “as if he was their relative.”<sup>50</sup> Three years later the case was brought to trial, but the multiple delays and the cost to the family to travel and miss work caused the father to say, “Many a times I felt that I should with my family commit suicide . . . I have to endure a great deal to come here [to court].”<sup>51</sup> After the judgment was delayed indefinitely, the father concluded that he “knocked on the doors of the court” but the “result was zero.”<sup>52</sup> This story is important because it illustrates how continuous violations of the rule of law wore down the victim and her family to the point where they had an utter lack of faith that sexual assault laws in India would be enforced. Based on studying cases like this, the scholar concluded that there is a “widespread tolerance of the intolerable harm of sexual violence” in police investigations and trials in India.<sup>53</sup>

In another case involving killings and other violent abuses over land disputes in Honduras, the Human Rights Watch concluded that rule of law was a primary problem. The Human Rights Watch

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<sup>49</sup> U.N. survey of 10,000 men in Asia and the Pacific reveals why some men use violence against women and girls, U.N. WOMEN (Sept. 10, 2013), <http://asiapacific.unwomen.org/en/news-and-events/stories/2013/9/un-survey-of-10000-men-in-asia-and-the-pacific> [<https://perma.cc/T638-J6LZ>]. See also Elli Nur Hayati et al., *Men Experiences of Violence Against Women in Indonesia and How We Can Begin to Prevent It* 13–15 (May 2015), [https://www.researchgate.net/publication/311440787\\_Men's\\_Experiences\\_of\\_Violence\\_against\\_Women\\_in\\_Indonesia\\_and\\_How\\_We\\_Can\\_Begin\\_to\\_Prevent\\_It](https://www.researchgate.net/publication/311440787_Men's_Experiences_of_Violence_against_Women_in_Indonesia_and_How_We_Can_Begin_to_Prevent_It) [<https://perma.cc/NVF4-3FGT>] (putting forth results from a 2013 United Nations multi-country study on men and violence in Asia and the Pacific).

<sup>50</sup> PRATIKSHA BAXI, PUBLIC SECRETS OF LAW: RAPE TRIALS IN INDIA 322 (2014).

<sup>51</sup> *Id.* at 329.

<sup>52</sup> *Id.* at 330. Eventually the perpetrator was found guilty of sexual assault, but he appealed and he was sentenced to just a few months in prison which was time already served. *Id.* at 331.

<sup>53</sup> *Id.* at 340.

explained that “officials’ failures to make even minimal efforts to investigate crimes . . . was striking” and that the “[d]istrust [was] particularly acute among peasant organizations . . . whose members routinely expressed . . . the belief that government officials were at best incompetent, and at worst directly collaborating with private landholding firms.”<sup>54</sup>

A head of a NGO reported that when he visited Huánuco, Peru (an Andes village with a population of about 200,000), doctors at one medical clinic recorded that within five days they examined fifty girls between the ages of ten and thirteen who had been raped. Despite these fifty reports made in a mere five days, none of the medical staff at the clinic “could remember anyone being sent to prison” for these sexual assaults.<sup>55</sup> The same NGO leader reported of another of incident in Bangalore, India, where the police gave several unlawful reasons why they secretly filed a report to dismiss numerous victims’ claims of rape and bonded labor without any investigation whatsoever.<sup>56</sup> Encounters like these led the NGO leader to conclude: “But just like the sexual assault in Peru, these offenses are not, in fact, as a *practical matter* prohibited by law when committed against very poor people – because the laws are not enforced by the justice system.”<sup>57</sup> Simply put, there is a rule of law problem.

In sum, the alarming statistics and tragic stories referenced in this section set the stage for the rest of this article. To the extent that there is evidence that a government official’s failure to enforce the rule of law allows perpetrators of crimes to go unchecked on a wide-scale level, action must be taken. What can the international community do? The remainder of this article presents a legal framework in which there might be grounds for a punitive international response by charging those government officials who fail to enforce the law with a crime against humanity.<sup>58</sup>

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<sup>54</sup> “There are No Investigations Here”: *Impunity for Killings and Other Abuses in Bajo Aguán, Honduras*, HUMAN RIGHTS WATCH (Feb. 12, 2014), <https://www.hrw.org/report/2014/02/12/there-are-no-investigations-here/impunity-killings-and-other-abuses-bajo-aguan> [<https://perma.cc/E98W-UTVR>].

<sup>55</sup> HAUGEN, *supra* note 8, at 2.

<sup>56</sup> *Id.* at 25.

<sup>57</sup> *Id.* at 24 (emphasis in original).

<sup>58</sup> This article provides a legal framework in which, theoretically, a government official who fails to enforce the rule of law could be charged with a crime against humanity. It is beyond the scope of this article to analyze the actions, or inactions, of one specific government official.

### 3. THE DEVELOPMENT OF THE CRIME AGAINST HUMANITY

International law is generally consensual in nature in that it derives from generally accepted norms among nations (customary law) and from treaties.<sup>59</sup> Criminal law is generally a matter of domestic law, not international law. World War II, however, created a sea of change because it brought about the first prosecution based on violations of international *criminal* law. This section of the article will first go through the development of this relatively new area of law. Next, this section will explore the elements of crimes against humanity under the most recent codification of the crime in the Rome Statute, an international treaty derived from a United Nations General Assembly conference in Rome in 1998.<sup>60</sup>

#### 3.1. *World War II and the Foundational Principles of Crimes Against Humanity*

The Nuremberg Tribunal, which tried individuals for the atrocities committed by Hitler's Nazi Germany before and during World War II, marked the first instance of successful prosecutions of crimes against humanity. The acts by the Nazis were unique because war crimes generally involved attacks on foreigners; the Nazis, however, committed atrocities on their *own* citizens.<sup>61</sup> The Nuremberg Char-

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<sup>59</sup> See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102(1) (AM. LAW INST. 1986) [hereinafter RESTATEMENT OF FOREIGN RELATIONS] (providing that “[a] rule of international law is one that has been accepted as such by the international community of states (a) in the form of customary law; (b) by international agreement; or (c) by derivation from general principles common to the major legal systems of the world”). Section 102(2) of the Restatement goes on to define customary international law as a “general and consistent practice of states followed by them from a sense of legal obligation.” *Id.* § 102(2).

<sup>60</sup> Rome Statute, *supra* note 9.

<sup>61</sup> The inadequacy of modern law to address a state's attacks on its own citizens perhaps first surfaced when Turkey attacked its own citizens of Armenian descent during and after World War I. See, e.g., Vahakn N. Dadrian, *The Historical and Legal Interconnections Between the Armenian Genocide and the Jewish Holocaust: From Impunity to Retributive Justice*, 23 YALE J. INT'L L. 503, 504 (1998) (explaining that “the concept of ‘crimes against humanity’ in international law was first introduced publicly, explicitly, and formally by the World War I Allies . . . [because of] the Ottoman-Turkish authorities’ World War I genocide against Turkey’s Armenian population”).

ter was the first written instrument to codify crimes against humanity, and U.S. Supreme Court Justice Robert H. Jackson became the first chief prosecutor to try the crime.<sup>62</sup> Article 6(c) of the Nuremberg Charter defined crimes against humanity to include “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war.”<sup>63</sup> As enumerated in the Nuremberg Charter, crimes against humanity historically required that the criminal acts took place in relation to a war.

Beyond the first codification of crimes against humanity, three additional principles important to the understanding of international criminal law arose from the Nuremberg trials. First was the idea that an *individual*, not a state or even only state actors, should be punished for international crimes. Indeed, the Nuremberg Tribunal oversaw prosecutions of individual government and military officials, as well as individual private actors. As the Tribunal explained, “[c]rimes 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.”<sup>64</sup>

Second, the Nuremberg Charter provided that international criminal law would trump domestic law that legalized the conduct of the Nazis. Specifically, the Charter provided that crimes against humanity were crimes “whether or not in violation of the domestic law of the country where perpetrated.”<sup>65</sup> The concepts of individual criminal liability for atrocious crimes, regardless of domestic law, are foundational principles of modern day international criminal

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<sup>62</sup> Roger S. Clark, *History of Efforts to Codify Crimes Against Humanity*, in FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 8, 8–14 (Leila Nadya Sadat ed., 2011).

<sup>63</sup> Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, art. 6.c, Aug. 8, 1945, 82 U.N.T.S. 279, [http://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.2\\_Charter%20of%20IMT%201945.pdf](http://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.2_Charter%20of%20IMT%201945.pdf) [<https://perma.cc/6F8U-4T5H>] [hereinafter IMT Charter]. See also Charter of the International Military Tribunal of the Far East, § 2, art. 5.c, Jan. 19, 1946, T.I.A.S. No. 1589, [http://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.3\\_1946%20Tokyo%20Charter.pdf](http://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.3_1946%20Tokyo%20Charter.pdf) [<https://perma.cc/PX8L-33VX>] (adopting a similar definition of crimes against humanity for the military court proceedings post-World War II that took place in Tokyo, Japan).

<sup>64</sup> *Judicial Decisions Involving Questions of International Law – International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT’L L. 172, 221 (1947) [hereinafter IMT Decision] (providing the full IMT judgment).

<sup>65</sup> IMT Charter, *supra* note 63, at art. 6.c.

law.

The final principle that arose from the Nuremberg Trials which is important to this discussion involves the rejection of certain criminal defenses. The defendants in the Nuremberg Trials argued that under the principle of *nullum crimen sine lege* an individual could not be prosecuted for conduct that was not illegal when the individual acted. The Tribunal rejected this argument since the conduct at issue so obviously violated fundamental human values.<sup>66</sup> The Tribunal also rejected head of state and sovereign immunity to protect high-ranking government officials from criminal prosecution by explaining that “the very essence of the [Nuremberg] Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State.”<sup>67</sup>

After the Nuremberg Trials, in 1949, the Geneva Conventions were promulgated. These Conventions codified, among other things, the war crimes tried in Nuremberg as “grave breaches.”<sup>68</sup> Importantly, however, the Geneva Conventions apply to crimes associated with wartime. As discussed below, more modern understandings of crimes against humanity eliminate the war requirement.<sup>69</sup> Due in part to the stalemate era of the Cold War, there were no other international criminal law prosecutions until the 1990s.<sup>70</sup>

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<sup>66</sup> THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 438–40 (Antonio Cassese et al. eds., 2009).

<sup>67</sup> IMT Decision, *supra* note 64, at 221.

<sup>68</sup> See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. The Geneva Conventions and subsequent Protocols are available at <https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions> [https://perma.cc/HTQ6-4MR8] (establishing protocols for protecting civilians who are not actively fighting, but are in conflict areas).

<sup>69</sup> See generally FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY, *supra* note 62; Leila Sadat, *Crimes Against Humanity in the Modern Age*, 107 AM. J. INT’L L. 334 (2013); David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT’L L. 85 (2004) (all discussing the development of the modern codification of crimes against humanity).

<sup>70</sup> During this time period there were efforts to strengthen international human rights on numerous fronts. For example, on December 10, 1948, the Universal Declaration of Human Rights was adopted by the United Nations General Assembly, available at <http://www.un.org/en/universal-declaration-human-rights/> [https://perma.cc/8RLP-JQTQ]. The day before, on December 9, 1948, the Convention on the Prevention and Punishment of the Crime of Genocide was promulgated. Almost two decades later, on December 16, 1966, both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights were promulgated. These groundbreaking international documents laid the groundwork for modern day international criminal law and the

### 3.2. *Two Ad Hoc Tribunals Oversee the Prosecutions of Crimes Against Humanity*

In the 1990s, the United Nations Security Council voted to establish two *ad hoc* tribunals to oversee the prosecution of international crimes, including crimes against humanity. These tribunals were considered *ad hoc* because their jurisdiction was limited to crimes that came out of specific conflicts during a specific timeframe.

First, in 1993, due to reports of widespread uses of concentration camps and mass killings of civilians during the conflict in former Yugoslavia, the United Nations Security Council unanimously voted to establish the International Criminal Tribunal for Yugoslavia (ICTY).<sup>71</sup> The jurisdiction of the ICTY was limited to four crimes which took place during the conflict, one of which was crimes against humanity. Specifically, Article 5 of the ICTY Statute allowed the Tribunal to “have the power to prosecute persons responsible for . . . [specific enumerated] crimes when committed in an armed conflict, whether international or internal in character, and directed against any civil population.”<sup>72</sup> The enumerated acts included such crimes as murder, torture, rape and “other inhumane acts.”<sup>73</sup> As discussed more fully in the next section, the crimes against humanity elements laid out in the ICTY Statute are similar to the most modern codification in the Rome Statute, with the important exception that under the Rome Statute there is no required link to an armed conflict.<sup>74</sup>

The next year, starting in April 1994, it is estimated that almost one million Rwandans were killed in matter of only about one hundred days based on whether they were Hutu or Tutsi.<sup>75</sup> In November of the same year, the United Nations Security Council adopted

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International Criminal Courts. See Clark, *supra* note 62, at 15–18.

<sup>71</sup> S.C. Res. 808, ¶ 1 (Feb. 22, 1993). See also THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE, *supra* note 66, at 357–59.

<sup>72</sup> Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, May 25, 1993, art. 5, [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf) [<https://perma.cc/5MYJ-6XJY>] [hereinafter ICTY Statute].

<sup>73</sup> *Id.* at art. 5(a), (f), (g), (i).

<sup>74</sup> See *infra* Section 2 of this Article.

<sup>75</sup> See, e.g., Rebecca Faulkner, Comment, *Taking Judicial Notice of the Genocide in Rwanda: The Right Choice*, 27 PENN ST. INT’L L. REV. 895, 898 (2009) (explaining that



Resolution 955 which established the International Criminal Tribunal for Rwanda (“ICTR”).<sup>76</sup> Under Article 3 of the ICTR Statute, the elements for crimes against humanity were identical to those of the ICTY,<sup>77</sup> except instead of requiring the crime to be linked to an armed conflict, it had to be linked to violations “[c]ommitted in the Territory of Rwanda.”<sup>78</sup> It also required that the attack be “widespread or systematic” and based “on national, political, ethnic, racial or religious grounds.”<sup>79</sup>

Up to this point, under all previous international prosecutions of crimes against humanity, the conduct had to be tied to a specific war (Nuremberg, ICTY) or based on national or ethnic-like grounds within a specific territory (ICTR). As discussed in the next section, such requirements were changed under the Rome Statute. This change is particularly important for the thesis of this article—that government officials who fail to uphold domestic rape laws could be charged with crimes against humanity, regardless of whether there is a war or a conflict, and regardless of whether the motivation is based on discriminatory intent.

### 3.3. *The First Permanent International Criminal Court*

At the same time the ICTY and ICTR were being established, the United Nations General Assembly was contemplating a permanent international criminal court. This effort was initially led by Latin American states seeking help to combat the transnational illicit drug trade.<sup>80</sup> The need for the creation of the ICTY and ICTR provided further inspiration for a permanent court. In 1998, comprehensive

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“from early April to mid July, the atrocities committed by the Hutu government led to the slaughter of approximately one million Tutsis and moderate Hutus”). See also S.C. Res. 955, ¶ 1 (Nov. 8, 1994) (establishing the ICTR).

<sup>76</sup> Statute of the International Tribunal for Rwanda, adopted by S.C. Res. 955, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatuteInternationalCriminalTribunalForRwanda.aspx> [<https://perma.cc/UMR4-NX9T>] [hereinafter ICTR Statute].

<sup>77</sup> *Id.* at art. 3.

<sup>78</sup> *Id.* at Preamble.

<sup>79</sup> *Id.* at art. 3.

<sup>80</sup> See, e.g., Leila Sadat Wexler, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 CORNELL INT’L L.J. 665, 683 & n. 112 (1996) (explaining the U.N. initiatives leading up to the Rome Statute).

negotiations took place in Rome to establish a permanent court that would have jurisdiction over international crimes. These negotiations led to the most modern codification of international crimes as set forth in the Rome Statute, a treaty that was finalized in July of 1998 and came into force on July 1, 2002, after the ratification of sixty states.<sup>81</sup>

The Rome Statute created the International Criminal Court (ICC), the first *permanent* international criminal court. Currently, there are 124 state parties to the treaty.<sup>82</sup> Although the United States initially helped negotiate sections of the Rome Treaty and signed it, the U.S. has not ratified the treaty and was even openly hostile to the creation of the ICC under the Bush administration.<sup>83</sup> Nevertheless, the U.S. has expressed some confidence in the ICC, because, as a voting member on the United Nations Security Council, the U.S. has voted to refer matters involving Sudan (Darfur) and Libya to the ICC.<sup>84</sup> As discussed in the next section, because the Rome Statute codifies the most recent understanding of crimes against humanity, it will be the primary source on which my legal argument will be made.

In sum, beginning with the Nuremberg Tribunal and through a growing network of human rights and international criminal law treaties, the international community has worked to criminalize the most atrocious kinds of violent conduct—genocide, war crimes, and crimes against humanity—and to establish international courts to prosecute and hold individuals accountable for their acts. The most recent codification of the elements that establish the crimes against humanity is embodied in the Rome Statute.<sup>85</sup> This codification reflects the work of several different groups including delegations

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<sup>81</sup> Rome Statute, *supra* note 9.

<sup>82</sup> *The States Parties to the Rome Statute*, INT'L CRIMINAL COURTS, [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) [https://perma.cc/6Z5U-HZBQ] (last visited Oct. 23, 2017).

<sup>83</sup> See Jean Galbraith, *The Bush Administration's Response to the International Criminal Court*, 21 BERKELEY J. INT'L L. 683, 689 (2003) (discussing the hostility of the Bush administration towards the ICC).

<sup>84</sup> Tiina Intelmann, *The International Criminal Court and the United Nations Security Council: Perceptions and Politics*, THE WORLD POST, (July 28, 2013), [http://www.huffingtonpost.com/tiina-intelmann/icc-un-security-council\\_b\\_3334006.html](http://www.huffingtonpost.com/tiina-intelmann/icc-un-security-council_b_3334006.html) [https://perma.cc/24L2-ZBKM] (explaining situations in which non-ratifying parties of the U.N. Security Council like the United States have voted to refer matters to the ICC).

<sup>85</sup> Clark, *supra* note 62, at 22 (“[T]he customary law definition of crimes against

from over 120 states and numerous intergovernmental and nongovernmental organizations.<sup>86</sup> Thus, as discussed in the next section, this article will analyze the law as it has been codified in the Rome Statute.

#### 4. MODERN CODIFICATION OF CRIMES AGAINST HUMANITY IN THE ROME STATUTE: AN ANALYSIS OF THE ELEMENTS

The Preamble to the Rome Statute explains the purpose of its creation: party members are “[m]indful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.”<sup>87</sup> The Preamble then recognizes the need for an “independent, permanent International Criminal Court” (ICC) to have jurisdiction over “the most serious crimes of concern to the international community as a whole” in order “to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.”<sup>88</sup> Hence, the ICC was born.<sup>89</sup>

Since the Rome Statute is relatively new, case law interpreting the ICC Statute is limited. There are helpful decisions from the ICTY and ICTR. Thus, in developing the legal framework here, the statutory language will be from the Rome Statute and the case law will primarily be from other tribunals who interpreted the same language in the ICTY and ICTR Statutes.

##### 4.1. *The Elements*

As defined in Article 7(1) of the Rome Statute, the elements of a

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humanity was crystallized with the adoption of the Rome Statute.”).

<sup>86</sup> See Brian J. Newquist, *The International Criminal Court*, 34 INT’L LAW. 691, 691–692 n.10 (2000) (explaining the efforts of numerous government and non-governmental organizations in formulating the rules of procedure and elements of crimes for the International Criminal Court).

<sup>87</sup> Rome Statute, *supra* note 9, at Preamble.

<sup>88</sup> *Id.*

<sup>89</sup> In the opening paragraph, the Preamble of the Rome Statute eloquently sets the stage for the reason why the ICC is needed, explaining that the Parties are “[c]onscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time.” *Id.*

crime against humanity are: (1) a commission of one or more enumerated prohibited “acts,” (2) “committed as part of a widespread or systematic attack,” which is (3) “directed against any civilian population,” and (4) the perpetrator must know that his or her acts constitute part of the attack.<sup>90</sup> As for element two, Article 7(2)(a) defines an “attack” as “a course of conduct involving the multiple commission of [prohibited] acts” identified in element one “against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”<sup>91</sup>

The drafters of the Rome Statute took into consideration prior definitions of crimes against humanity under customary international law, those used in the Nuremberg Charter, and those in the ICTY and ICTR Statutes, but made at least two material changes—a deletion and an addition.<sup>92</sup> First, the deletion—as noted in the previous section, during the Nuremberg Trials<sup>93</sup> and under the ICTY Statute,<sup>94</sup> the existence of an armed conflict was a required condition for crimes against humanity. The Rome Statute does not have this requirement. The deletion of this requirement is important here because it means that crimes against humanity can be established by conduct that takes place in areas like rural India where rape laws are not being enforced, despite there being no warlike activity there.

Second, the addition—the Rome Statute’s requirement of a

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<sup>90</sup> *Id.* at art. 7.

<sup>91</sup> *Id.* at art. 7(2)(a).

<sup>92</sup> See Clark, *supra* note 62, at 13–25.

<sup>93</sup> See *infra* Section 2.1 of this Article. See also Clark, *supra* note 62, at 11–12. The justification behind the armed conflict requirement was couched in an attempt to support this relatively new crime by connecting it with the established prohibition against war crimes. As crimes against humanity became a more established concept, this nexus to an armed conflict requirement began to erode until it was completely removed in the Rome Statute.

<sup>94</sup> ICTY Statute, *supra* note 72, at art. 5 (“The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population . . .”). Even though ICTY statute contained a condition of armed conflict for crimes against humanity, in *Prosecutor v. Tadić*, the ICTY Appeals Chamber held that “[a] nexus between the accused’s acts and the armed conflict is *not* required.” The ICTY court explained that the element was satisfied as long as there was an armed conflict, thus deviating from the Nuremberg approach. *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, ¶ 251 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999), <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf> [<https://perma.cc/BT62-4UM8>].

“widespread or systematic attack” linked to a “furtherance of a State or organizational policy,” as set forth in element two, creates additional obligations. Except for the ICTY Statute, no other previous charter or statute requires a widespread or systematic attack, and none require that it be done in furtherance of a State or organizational policy.<sup>95</sup> Moreover, customary international law does not have these requirements.<sup>96</sup> However, to give “context in which the conduct takes place,”<sup>97</sup> this addition, a nexus to a policy, replaces the deletion of the nexus to an armed conflict.<sup>98</sup> Even with this additional requirement, a legal argument can be made that the failure to uphold the rule of law could establish a crime against humanity. This leads to the analysis of a legal framework.

#### 4.2. Examining the Elements

A cursory review of the four elements as laid out in the Rome Statute shows that charging an individual who has failed to uphold the rule of law with a crime against humanity creates some issues. Most problematic are element one’s requirement of an “act” and element two’s requirement of an “attack” because failure to enforce the rule of law is neither an overt “act,” nor an “attack,” but is rather an omission. This section of the article will analyze each element of

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<sup>95</sup> See, e.g., Jordan J. Paust, *The International Criminal Court Does Not Have Complete Jurisdiction over Customary Crimes Against Humanity and War Crimes*, 43 J. MARSHALL L. REV. 681, 692 (2010) (explaining that the furtherance of policy is not part of customary law or the ICTY or ICTR Statutes).

<sup>96</sup> See, e.g., Jordan J. Paust, *The Need for New U.S. Legislation for Prosecution of Genocide and Other Crimes Against Humanity*, 33 VT. L. REV. 717, 727 (2009) (“[L]imiting words such as ‘widespread’ or ‘systematic’ . . . are not currently among the limitations under customary international law”).

<sup>97</sup> The Int’l Criminal Court, *Elements of Crimes*, art. 7, intro. ¶ 2, (Sept. 9, 2002), <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf> [https://perma.cc/2ERH-NRVE] [hereinafter ICC Elements]. As Article 9(1) of the Rome Statute explains, the purpose of the Elements are to assist the ICC “in the interpretation and application” of definition of the international crimes in the Rome Statute.

<sup>98</sup> See Stuart Ford, *Crimes Against Humanity at the Extraordinary Chambers in the Courts of Cambodia: Is a Connection with Armed Conflict Required?*, 24 PAC. BASIN L.J. 125 (2007) (stating that it would be possible to prosecute the members of Cambodian Communist party years after the atrocities because the nexus requirement had already disappeared from definitions of crimes against humanity, or it was foreseeable that the requirement would be eliminated).

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the crime as it could apply to a government official who fails to uphold the rule of law, particularly one who fails to uphold domestic sexual assault laws.

For an actual charge to be brought there would have to be specific factual research linking specific behavior to a specific individual.<sup>99</sup> After the evidence is collected, then the facts would have to be evaluated on a case-by-case basis.<sup>100</sup> Doing so here is beyond the scope of this article. Thus, while certain events are discussed below, nothing should be interpreted as concluding that an actual crime against humanity has occurred because there would have to be more extensive factual research for actions of a specific individual, like a specific judge or police chief. The purpose of this article is to set up the legal framework by using reported incidences and hypotheticals to show how a *prima facie* case might be made when government officials are not enforcing the rule of law.

#### 4.2.1. A Commission of a Prohibited Act

As for element one, the list of enumerated prohibited acts that constitute crimes against humanity is long. There are eleven prohibited acts and include such acts as murder, extermination, enslavement, imprisonment, torture, rape and any other form of sexual violence of comparable gravity.<sup>101</sup> Nine of the eleven prohibited acts

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<sup>99</sup> As discussed in section 2.1 of this Article, one principle that emerged from the Nuremberg Trials is that international criminal law holds individuals (as opposed to states) criminally liable. The Rome Statute codified this principle in Article 25. Rome Statute, *supra* note 9, at art. 25.

<sup>100</sup> A good example of how specific individuals' actions establish crimes against humanity can be found in the *Legal Memorandum: War Crimes and Crimes Against Humanity in Eastern Myanmar* prepared by the International Human Rights Clinic at Harvard Law School, *supra* note 11. This Harvard Report focuses on overt acts, such as murder and persecution, which took place during the military offensive from 2005–2008.

<sup>101</sup> Rome Statute, *supra* note 9, at art. 7(1)(a)–(k). The list of prohibited acts includes murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution; enforced disappearance of persons; apartheid; and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

can also be found in the ICTY and ICTR Statutes.<sup>102</sup> The Rome Statute added three more prohibited acts: sexual slavery, disappearances and apartheid.<sup>103</sup> These types of prohibited acts cannot reasonably be applied to the failure to uphold the rule of law because they constitute overt acts, not acts of omission.

There is a residual, however. Article 7(1)(k) prohibits “[o]ther inhumane acts of similar character.” In interpreting similar language in the ICTY Statute, the ICTY recognized certain acts that fell into the category, including beatings, mutilation, degrading treatment, and forced prostitution.<sup>104</sup> While these are overt acts as well, as discussed below, there are two reasons why “acts” under Article 7(1)(k) could apply to the failure to uphold domestic rape laws (*i.e.*, the failure to act or an omission). One reason is based on statutory interpretation provided by case law; the other stems from the criminal theory that a breach of a legal duty to act can give rise to criminal liability.

#### 4.2.1.1. Case Law

Case law from international courts suggests that inhumane acts could be interpreted to include “omissions” or lack of an overt action.<sup>105</sup> As the ICTY explained, “other inhumane acts” is intended to encompass other “intentional acts or omissions which infringe on fundamental human rights causing serious mental or physical suffering or injury of a gravity comparable to that of other crimes [enumerated in the ICTY Statute].”<sup>106</sup> In one case, the ICTY found the

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<sup>102</sup> ICTY Statute, *supra* note 72, at art. 5; ICTR Statute, *supra* note 76, at art. 3.

<sup>103</sup> Rome Statute, *supra* note 9, at art. 7(g), (i)–(j).

<sup>104</sup> Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Judgment, ¶ 208 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001), <http://www.icty.org/x/cases/kvocka/tjug/en/kvo-tj011002e.pdf> [<https://perma.cc/CF7R-ZERH>].

<sup>105</sup> See Stuart Ford, *Is the Failure to Respond Appropriately to a Natural Disaster a Crime Against Humanity? The Responsibility to Protect and Individual Criminal Responsibility in the Aftermath of Cyclone Nargis*, 38 DENV. J. INT’L L. & POL’Y 227, 242 (2010) (“The jurisprudence of the international courts demonstrates that crimes against humanity can be caused either by acts of the accused or by omissions, if those omissions are accompanied by the requisite intent.”).

<sup>106</sup> Prosecutor v. Kupreškić et al., Case No. IT-95-16-T, Judgment, ¶ 817–18 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000), <http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf> [<https://perma.cc/T7VE-8BPJ>] (emphasis added).

accused guilty of murder as a crime against humanity even though the accused did not do the killing. The ICTY held that “[t]he accused, even though he may not have killed [the victim], *by his active presence in the group . . . has fulfilled the actus reus of murder as a co-perpetrator.*”<sup>107</sup> In another case, the ICTY explained: “In the jurisprudence of both the Tribunal and the ICTR, murder has consistently been defined as the death of the victim which results from an act or *omission* by the accused, committed with the intent either to kill or to cause serious bodily harm with the reasonable knowledge that it would likely lead to death.”<sup>108</sup>

Similarly, in another case, the ICTY held the accused criminally liable for violations of international criminal law by aiding and abetting in torture as perpetrated, in part, through the rape committed by his accomplices.<sup>109</sup> Thus, as one scholar has concluded: “The jurisprudence of the international criminal courts demonstrates that crimes against humanity can be caused either by acts of the accused or *by omissions*, if those omissions are accompanied by the requisite criminal intent.”<sup>110</sup>

Thus, in a case where police officers stand by while a rape is occurring against established law, and their intent is to allow the rape to occur despite the law, then their “presence in the group” and their failure to act establishes an “inhumane act.” This argument is harder if the individual was not physically present when the conduct occurred. Arguably, however, if judges, prosecutors or police are aware that an allegation of rape has been made, but intend to block the investigation or the victim’s access to justice in violation of domestic law, then they too have committed the requisite act.<sup>111</sup>

<sup>107</sup> *Id.* (emphasis added).

<sup>108</sup> Prosecutor v. Blagojević & Jokić, Case No. IT-02-60-T, Judgment, ¶ 556 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005), [http://www.icty.org/x/cases/blagojevic\\_jokic/tjug/en/bla-050117e.pdf](http://www.icty.org/x/cases/blagojevic_jokic/tjug/en/bla-050117e.pdf) [<https://perma.cc/2VN5-6QY9>].

<sup>109</sup> Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶¶ 273–74 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf> [<https://perma.cc/9J5M-LGH8>].

<sup>110</sup> Ford, *supra* note 105, at 242 (emphasis added). “Killing by omission, so long as it is accompanied by the requisite criminal intent, is just as much a crime against humanity as killing by commission.” *Id.* at 243.

<sup>111</sup> Scholars have concluded that a “rape culture” in certain justice systems prevents women and children from access to justice. See generally BAXI, *supra* note 50, at 340–51 (concluding that in India there is a rape culture that sets forth insurmountable hurdles to justice); Ronald J. Allen et al., *Reforming the Law of Evidence of Tanzania (Part One): The Social and Legal Challenges*, 31 B.U. INT’L L. J. 217, 240–41



These arguments become even stronger when we take into consideration that the actor here would be a government official (like a police officer, prosecutor, or judge) who has a duty to enforce the law but breaches that duty. This leads to the next sub-section.

#### 4.2.1.2. Breach of a Legal Duty to Act

Generally, under criminal law theory, an omission will constitute a criminal *actus reus* only when the law imposes a legal duty to act and the defendant breaches that duty.<sup>112</sup> Thus, the question becomes whether, under international criminal law, government officials have a duty to enforce laws that protect a large portion of the population (*i.e.*, women and children) from rape or “other inhumane acts.” There are three principles of law which suggest that there is such a duty: human rights law; domestic criminal law; and the international call for states to protect their civilians from atrocious crimes, such as crimes against humanity. Each principle will be taken in turn.

##### 4.2.1.2.1. Human Rights Law:

As one international court explained, “[t]he State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction.”<sup>113</sup> The court went on to clarify that a state has a “*duty to prevent*” human rights violations and when a violation occurs, it should “lead to the punishment of those responsible.”<sup>114</sup> By extension, state actors who work in legal enforcement also have a duty to prevent such violations.

Most international human rights treaties create a duty for state

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(2013) (discussing how the application of the evidence law in Tanzania impedes women’s access to the courts).

<sup>112</sup> WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW VOL. 1* § 6.2, § 6.2(a) (2d ed. 2016).

<sup>113</sup> See, e.g., *Velasquez Rodriguez Case, Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988), *reprinted in* 9 HUMAN RIGHTS L.J. 212, 241 (1988), *and in* 28 I.L.M. 291, ¶ 174 (1989).

<sup>114</sup> *Id.* at ¶ 175 (emphasis added).

parties to enact and enforce domestic laws consistent with the requirements of the treaty. For example, The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, a treaty ratified by the majority of nations, requires states to create domestic laws that would prevent torture within their borders.<sup>115</sup> Indeed, the preamble to the Rome Statute affirms “that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by *taking measures at the national level* and by enhancing international cooperation.”<sup>116</sup> Thus, arguably, law enforcement officials in party-member states to these treaties have a *duty to enact and enforce* certain domestic laws. As discussed in Section I of this Article, many developing countries have complied with enactment, but have failed in enforcement, which, in some cases, has led to rampant sexual violence with impunity.<sup>117</sup>

#### 4.2.1.2.2. Domestic Law:

While domestic U.S. law generally does not impose a duty to act on law enforcement, European law does.<sup>118</sup> Many European codes

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<sup>115</sup> *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* art. 2, opened for signature Dec. 10, 1984, 1465 U.N.T.S. 112, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx> [<https://perma.cc/7XTM-XFA5>].

<sup>116</sup> Rome Statute, *supra* note 9, at Preamble (emphasis added).

<sup>117</sup> See, e.g., BAXI, *supra* note 50, at 340–51 (concluding the lack of access to justice for rape victims in India has led to a rape culture).

<sup>118</sup> See, e.g., Edward A. Tomlinson, *The French Experience with Duty to Rescue: A Dubious Case for Criminal Enforcement*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 451, 452 (2000) (“Most civil law countries . . . recognize a general duty to rescue in their criminal codes.”); Graham Hughes, *Criminal Omissions*, 67 YALE L.J. 590, 632–34 (1958) (describing various laws in Europe (including in France, Italy, and Germany) that require those able to prevent a serious crime or offense or help someone facing danger to do so); Peter M. Agulnick & Heidi V. Rivkin, Comment, *Criminal Liability for Failure to Rescue: A Brief Survey of French and American Law*, 8 TOURO INT'L L. REV. 93, 93 n.2 (1998) (comparing the “Good Samaritan Law” in the United States with the “Good Samaritan Law” in France). The proposition that government officials do not have a special duty to protect a specific individual, but only the public at large, is adopted by a majority of state jurisdictions under U.S. tort law in civil actions. See John H. Derrick, Annotation, *Modern Status of Rule Excusing Governmental Unit from Tort Liability on Theory that Only General, Not Particular, Duty Was Owed Under Circumstances*, 38 A.L.R. 4th 1194, § 3 (1985). Even under this narrower definition, law enforcement would still have the duty to protect civilians. Specifically, if the nature of the conduct establishes a crime against humanity, then the conduct had

impose “a duty to rescue on *anyone* who could do so without danger to himself.”<sup>119</sup> If these domestic laws impose a duty on “anyone,” then it certainly applies to law enforcement whose job is to protect civilians. Therefore, in addition to human rights law, there is support from domestic law that the government officials have a duty to act, and the failure to do so could lead to criminal liability.

#### 4.2.1.2.3. Responsibility to Protect:

There is a third source of law that establishes this duty to act. Arguably, a duty to protect is required by customary international law. “Responsibility to protect” means that on the national and international level, states have an affirmative duty to protect populations from “atrocities” crimes, such as crimes against humanity.<sup>120</sup> The term was first coined in 2001 in a report by an international commission tasked with gathering a consensus on how the international community should respond to crimes against humanity and other large-scale loss of life.<sup>121</sup> Since then, the principle has gone through numerous analyses, leading to the most current report by the Secretary-General wherein he calls for the international community to take affirmative actions to implement the responsibility to protect.<sup>122</sup>

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to be part of a widespread or systematic attack against a civilian population. See *infra* Section 3.2.2 of this Article. “Against a civilian population” means against the public, or at least against more than just one individual. Thus, even under the narrower U.S. definition, in context here, law enforcement would have an affirmative duty to protect.

<sup>119</sup> LaFave, *supra* note 112, at § 6.2, § 6.2(f) (emphasis added).

<sup>120</sup> A *Vital and Enduring Commitment: Implementing the Responsibility to Protect* § I, INT’L COALITION ON THE RESPONSIBILITY TO PROTECT (Aug. 11, 2015), [http://responsibilitytoprotect.org/FINAL%20ICRtoP%20report%20summary\(2\).pdf](http://responsibilitytoprotect.org/FINAL%20ICRtoP%20report%20summary(2).pdf) [<https://perma.cc/CBE2-8B2X>] [hereinafter ICRtoP Summary Report]. See also Halil Rahman Basaran, *Responsibility to Protect: An Explanation*, 36 HOUS. J. INT’L L. 581, 583 (2014) (arguing that the development of the responsibility to protect has elevated human rights issues from national to international matters).

<sup>121</sup> See ICRtoP Summary Report, *supra* note 120, at § I.

<sup>122</sup> See U.N. Secretary-General, *Mobilizing Collective Action: The Next Decade of the Responsibility to Protect: Rep. of the Secretary-General*, ¶ 48, U.N. Doc. A/70/999-S/2016/620 (July 22, 2016), <http://www.responsibilitytoprotect.org/SG%20Report%202016-%20Mobilizing%20collective%20action-%20the%20next%20decade%20of%20the%20responsibility%20to%20protect.pdf> [<https://perma.cc/7BV9-N9U4>] (“[T]he international community must act early and decisively.”)

Most importantly, in October 2014, the Office on Genocide Prevention and the Responsibility to Protect created a “Framework of Analysis for Atrocity Crimes” (the “Framework”).<sup>123</sup> This document clearly concludes that there is an affirmative duty to protect. Specifically, the Framework cites to international human rights and humanitarian law and treaties, customary international law, and decisions from international courts to conclude that there are “well-established legal obligations” to prevent atrocity crimes.<sup>124</sup> The Framework concludes that there is “an obligation not only to punish atrocity crimes but also to prevent them.”<sup>125</sup> Specifically, states have a responsibility to prevent the commission of genocide, war crimes, ethnic cleansing, and crimes against humanity.<sup>126</sup> This responsibility falls on both the national and international communities.<sup>127</sup> Even prior to this 2014 report, scholars have used the breach of a duty to protect (or omission) as a way to establish the first element of the crimes against humanity.<sup>128</sup> Thus, for example, subjecting a person

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<sup>123</sup> United Nations Office on Genocide Prevention and the Responsibility to Protect, *Framework of Analysis for Atrocity Crimes: A Tool for Prevention* (2014), [http://www.un.org/en/preventgenocide/adviser/pdf/framework%20of%20analysis%20for%20atrocity%20crimes\\_en.pdf](http://www.un.org/en/preventgenocide/adviser/pdf/framework%20of%20analysis%20for%20atrocity%20crimes_en.pdf) [<https://perma.cc/9EFQ-HEKU>] [hereinafter *Framework*].

<sup>124</sup> *Id.* at 2–3.

<sup>125</sup> *Id.* at 3.

<sup>126</sup> *Id.* at 1.

<sup>127</sup> *Id.* at 3.

<sup>128</sup> See, e.g., Ford, *supra* note 105, at 235–36 (arguing that an inadequate governmental response to a natural disaster constitutes a crime against humanity and therefore triggers the responsibility to protect); Hilmi M. Zawati, *The Challenge of Prosecuting Conflict-Related Gender-Based Crimes Under Libyan Transitional Justice*, 10 J. INT'L L. & INT'L REL. 44, 60 (2014) (arguing that Libya is obligated to prosecute international gender-based crimes under domestic and international law); Paul R. Williams, J. Trevor Ulbrick & Jonathan Worboys, *Preventing Mass Atrocity Crimes: The Responsibility to Protect and the Syria Crisis*, 45 CASE W. RES. J. INT'L L. 473, 488–89 (2012) (arguing that “[i]n the face of Security Council inaction, a regional organization or coalition of the willing should be able to authorize and undertake the limited use of force to protect populations from mass atrocity crimes.”); Casinova O. Henderson, *Hurricane Katrina Victims: A Claim in the International Courts?*, 5 FLA. A & M U. L. REV. 155, 177 (2010) (arguing that the response to Hurricane Katrina constituted an inhumane act because the government had advance notice of the storm, and could have warned the citizens of the gulf coast and distributed aid more quickly, but failed to do so, resulting in the humiliation and degradation of many citizens); Tyra Ruth Saechao, Note, *Natural Disasters and the Responsibility to Protect: From Chaos to Clarity*, 32 BROOK. J. INT'L L. 663, 667 (2007) (arguing that the responsibility to protect should include not only situations of gross human rights violations but, under the doctrine of humanitarian intervention, extend to countries facing natural disasters).

to rape with impunity in violation of domestic law can be considered a breach of the duty to protect.<sup>129</sup>

In sum, based on numerous different sources of law including human rights treaties,<sup>130</sup> domestic law, and customary law, there is ample support to conclude that States, and by extension individual government officials, have an affirmative duty to protect civilians. Certainly that means that government officials should enforce domestic laws, especially rape laws, which are linked to horrific human rights violations.<sup>131</sup> The failure to do so could establish a criminal omission, which, in turn, would establish the first element of a crime against humanity under the residual “other inhumane act” of the Rome Statute.

#### 4.2.1.3. *The Breach of a Legal Duty to Act (to Uphold the Rule of Law) as an “Inhumane Act”*

In applying these legal principles, evidence could be gathered to prove that intentional failure to enforce domestic rape laws (an omission) constitutes an “inhumane act.” For instance, if a young girl is raped in violation of domestic law, but has no recourse to seek justice, or even worse, is considered a criminal herself for having sex outside of marriage,<sup>132</sup> then the level of mental suffering is comparable to that of the mental suffering caused by the actual rape.<sup>133</sup>

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<sup>129</sup> Rome Statute, *supra* note 9, at art. 7(1)(g) (identifying rape and “any other form of sexual violence of comparable gravity” as an act that satisfies the first element of a crime against humanity).

<sup>130</sup> See, e.g., Prosecutor v. Kupreškić et al., Case No. IT-95-16-T, Judgment, ¶ 566 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000), <http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf> [<https://perma.cc/3DSD-MCV8>] (explaining that “international standards on human rights” should be used to define the “parameters” of “other inhumane acts”).

<sup>131</sup> See Gaer, *supra* note 16, at 293 (explaining rape is understood to be an act of torture).

<sup>132</sup> Annie Gowen, *An Indian teen was raped by her father. Village elders had her whipped*, THE WASH. POST (May 9, 2016), [https://www.washingtonpost.com/world/asia\\_pacific/an-indian-teenager-was-raped-by-her-father-village-elders-had-her-whipped/2016/05/09/f6d6c840-c531-11e5-8965-0607e0e265ce\\_story.html](https://www.washingtonpost.com/world/asia_pacific/an-indian-teenager-was-raped-by-her-father-village-elders-had-her-whipped/2016/05/09/f6d6c840-c531-11e5-8965-0607e0e265ce_story.html) [<https://perma.cc/MQ86-LVRL>].

<sup>133</sup> See, e.g., Brian Murphy, *Dubai pardons woman at center of rape dispute*, ASSOCIATED PRESS (July 22, 2013), <https://www.yahoo.com/news/dubai-pardons-woman-center-rape-dispute-093407907.html> [<https://perma.cc/E5QH-X5JM>] (explaining that in the United Arab Emirates, “allegations of rape can boomerang into illegal sex charges for the accuser,” and reporting on such instances).

By way of example, in 2014, it was reported that a young woman was gang-raped by twelve men at the direction of a village council,<sup>134</sup> a “male-dominated,” “unelected clan council” that metes out punishment based on “social mores.”<sup>135</sup> Apparently, as punishment for having relations with a man from another community, the leader of the village council said: “Have fun. Do whatever you want to do with her.”<sup>136</sup> This type of village justice “undermine[s] India’s established law.”<sup>137</sup> This reported rape took place over three years after the Supreme Court of India ruled that such punishments by village councils were “wholly illegal.”<sup>138</sup> The Supreme Court ordered that notice of its decision be given to “[a]ll administrative and police officers” who would be “accountable . . . if, despite having knowledge of any such practice in the area under their jurisdiction, they do not launch criminal proceedings against the culprits.”<sup>139</sup>

Although arrests were made in this 2014 case, reports show that “unelected clan councils continue to operate with impunity throughout rural India.”<sup>140</sup> In a case like this, the young girl suffered from a rape that perhaps would have never had occurred if local officials had enforced the law given by the Supreme Court years earlier and clamped down on illegal local village councils. Cases like this show that victims suffer “inhumane acts”<sup>141</sup> when government officials fail to act and uphold domestic laws (an omission). Thus, there is reason to believe that a government official’s failure to enforce the rule of law constitutes the crime of inhumane acts.

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<sup>134</sup> Julie McCarthy, *Alleged Gang Rape in India Draws Spotlight on Village Justice*, NPR (Jan. 27, 2014), <http://www.npr.org/2014/01/27/267203616/alleged-gang-rape-in-india-draws-spotlight-on-village-justice> [https://perma.cc/RG6H-X7MM].

<sup>135</sup> Gowen, *supra* note 132.

<sup>136</sup> McCarthy, *supra* note 134.

<sup>137</sup> *Id.*

<sup>138</sup> J. Venkatesan, *Stamp out khap panchayats: court*, THE HINDU (Apr. 20, 2011), <http://www.thehindu.com/news/national/Stamp-out-khap-panchayats-court/article14689356.ece> [https://perma.cc/L8GT-47VJ].

<sup>139</sup> *Id.*

<sup>140</sup> Gowen, *supra* note 132.

<sup>141</sup> Rome Statute, *supra* note 9, at art. 7(1)(k).

#### 4.2.2. Widespread or Systematic Attack

The second element of crimes against humanity is that there must be a widespread or systematic attack.<sup>142</sup> According to Article 7(2)(a) of the Rome Statute, the term “attack” necessitates “multiple” prohibited acts committed “in furtherance of a State or organizational policy to commit such attack.”<sup>143</sup> These requirements raise three issues: the meanings of the terms “attack,” “widespread or systematic,” and “in furtherance of” a policy. Each will be taken in turn.

##### 4.2.2.1. Attack

First, while the word “attack” connotes an overt violent action, it neither has to be violent nor an overt act. Case law explains that an “attack” does not have to be violent so long as the conduct can be categorized into one of the prohibited acts enumerated in paragraph 1 of Article 7 of the Rome Statute.<sup>144</sup> As discussed in the previous section, failure to enforce the rule of law can be categorized as an inhumane act.<sup>145</sup> Thus, as a matter of statutory interpretation, this “act” (or omission) also qualifies as an “attack” since it falls into an

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<sup>142</sup> *Id.* at art. 7(1).

<sup>143</sup> *Id.* at art. 7(2)(a). *See also* Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment, ¶ 203 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000), <http://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf> [<https://perma.cc/KF76-Y2Q4>] (enunciating the four elements that comprise an attack, which include “the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community; the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhuman acts linked to one another; the perpetration and use of significant public and private resources, whether military or other; the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan”).

<sup>144</sup> *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 581 (Sept. 2, 1998), <http://www.un.org/en/preventgenocide/rwanda/pdf/AKAYESU%20-%20JUDGEMENT.pdf> [<https://perma.cc/78ZZ-N6M5>] (“An attack may also be non violent in nature, like imposing a system of apartheid, which is declared a crime against humanity, . . . or exerting pressure on the population to act in a particular manner, may come under the purview of an attack, if orchestrated on a massive scale or in systematic manner.”).

<sup>145</sup> *See supra* Section 3.2.1 of this Article (arguing that a failure to enforce the rule of law—an omission—establishes the crime of inhumane acts).

enumerated prohibited act.<sup>146</sup>

#### 4.2.2.2. Widespread or Systematic

Second, a single act will generally not constitute a crime against humanity, unless it is shown that the act itself is a widespread or systematic attack.<sup>147</sup> In *Prosecutor v. Mrkšić*, the ICTY describes “widespread” as the “large scale nature of the attack and the number of victims,” and describes “systematic” as the “organised nature of the acts” and “the improbability of their random occurrence.”<sup>148</sup> The purpose of these requirements is to prevent a single act from being categorized as an international crime against humanity, instead of simply a crime under domestic law.<sup>149</sup> Evidence of a widespread or systematic attack “is sufficient to exclude isolated or random acts.”<sup>150</sup>

For example, if a police officer fails to enforce domestic rape law in one sexual assault case, this, by itself, does not rise to the crime of inhumane acts. However, if this one failure to enforce the law is part of many other instances where other law enforcement failed to enforce the same law, then that would constitute “multiple” acts as required under Article 7(2)(a).<sup>151</sup>

One way to prove that an attack is widespread (beyond just the actions of one individual) would be to have evidence that a number

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<sup>146</sup> See, e.g., Akayesu, *supra* note 144, at ¶ 581 (explaining that an “attack” is an “unlawful act of the kind enumerated . . . like murder, extermination, enslavement etc.”).

<sup>147</sup> See, e.g., *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, Judgment, ¶ 438 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 27, 2007), <http://www.icty.org/x/cases/mrksic/tjug/en/070927.pdf> [<https://perma.cc/VV7Z-47KW>] (noting that “[o]nly the attack, not the accused’s individual acts, must be widespread or systematic” but requiring that a nexus be shown between the accused’s acts and the attack).

<sup>148</sup> *Id.* at ¶ 437.

<sup>149</sup> See, e.g., *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Judgment, ¶ 194 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005), <http://www.icty.org/x/cases/limaj/tjug/en/lim-tj051130-e.pdf> [<https://perma.cc/DV9U-K7HB>] (explaining that the “contextual element . . . serves to exclude single, random or limited acts from the domain of crimes against humanity”).

<sup>150</sup> *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-T, Judgment, ¶ 215 (Jun. 20, 2007), <http://www.rscsl.org/Documents/Decisions/AFRC/613/SCSL-04-16-T-613s.pdf> [<https://perma.cc/R8UM-HP4F>].

<sup>151</sup> Rome Statute, *supra* note 9, at art. 7(2)(a).



of victims did not report a rape, or were denied access to justice after reporting a rape, because of fears that the law would not be enforced. It may be difficult to gather direct evidence that the attack is widespread because the exact number of victims who fail to report sexual assault is unknown. The number can be estimated by statistics, but statistics alone do not explain if victims failed to report a rape primarily because of rule of law problems or for other reasons.<sup>152</sup>

Notably, the Rome Statute uses the conjunctive “or;” thus, the attack can be either widespread “or” systematic, but does not have to be both.<sup>153</sup> It may be easier to collect evidence to show a systematic attack. For instance, circumstantially it could be argued that alarmingly low reports and prosecutions of rape<sup>154</sup> show a systematic failure on the part of a legal system to enforce rape laws. Another way to show a systematic attack would be to rely on work by scholars like Pratiksha Baxi who wrote a detailed account of her first-hand experiences studying specific rape trials in India’s trial courts. In her book, she concluded that there was a “rape culture that inhabits the courtrooms” where “the disqualification of children’s voices in courts of law remains routine”<sup>155</sup> and where there is a “widespread tolerance of the intolerable harm of sexual violence.”<sup>156</sup>

#### 4.2.2.3. *In Furtherance of a Policy*

If such a systematic attack can be established, then it would follow that there is a state or organizational policy. Although this may result in an extra level of inquiry not required by the ICTR or ICTY,<sup>157</sup> evidence of a policy or plan is, perhaps, sufficiently clear when an attack is systematic. Moreover, this additional requirement

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<sup>152</sup> See INCIDENCE OF RAPE, *supra* note 22, and accompanying text.

<sup>153</sup> Rome Statute, *supra* note 9, at art. 7(1).

<sup>154</sup> See *supra* Section 2 of this Article discussing rule of law problems and related statistics.

<sup>155</sup> BAXI, *supra* note 50, at xlvii.

<sup>156</sup> *Id.* at 340.

<sup>157</sup> See Prosecutor v. Kunarac et al., Case No. IT-96-23 & IT-96-23/1-A, Judgment, ¶ 98 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002), <http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf> [<https://perma.cc/W7NV-CAY6>] (holding that a policy or plan is not a requirement of the offense under the ICTY Statute).

may be met where there is a *deliberate failure* to take action motivated by an intent to further the attack.<sup>158</sup> Thus, if there is a systematic “rape culture” which denies victims access to justice for sexual assault, despite laws protecting them, then an individual government official’s deliberate failure to enforce rape laws would be done to further that state policy.<sup>159</sup>

#### 4.2.3. *Against Any Civilian Population*

The third element of crimes against humanity requires that the attack be made on “any civilian population.”<sup>160</sup> One question that arises when contemplating the civilian population requirement is whether a population containing civilians and combatants will meet the standard. The ICTY has explained that the “term ‘civilian’ refers to persons not taking part in hostilities, including members of armed forces who have laid down their arms.”<sup>161</sup> The ICTY has further stated that the requirement would be met so long as the population was predominately civilian.<sup>162</sup>

In the issue at hand, because the failure to enforce the rule of law would not necessarily be linked to an armed conflict, this analysis is straightforward. If evidence shows that a government official was

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<sup>158</sup> However, the ICC Elements state: “Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred *solely* from the absence of governmental or organizational action.” ICC Elements, *supra* note 97, at 5 n.6 (emphasis added). Thus, here for example, so long as evidence shows that a systematic “rape culture” was consciously aimed at not enforcing rape laws, then this element should be met. *See supra* Section 2 of this article where there is a discussion of how government officials have consciously chosen not to enforce laws.

<sup>159</sup> *See, e.g.*, BAXI, *supra* note 50, at xxiii. The author quotes an interview from a woman clerk who works for an Indian court: “Women should not do work like this. It is only when you have misconceived ideas of bringing change that you do work like this . . . It is partly the women’s fault that they are raped . . . Women are helpless.”) *Id.*

<sup>160</sup> Rome Statute, *supra* note 9, at art. 7.

<sup>161</sup> Prosecutor v. Blagojevic et al., Case No. IT-02-60-T, Judgment, ¶ 544 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005), [http://www.icty.org/x/cases/blagojevic\\_jokic/tjug/en/bla-050117e.pdf](http://www.icty.org/x/cases/blagojevic_jokic/tjug/en/bla-050117e.pdf) [<https://perma.cc/SS84-5XBP>].

<sup>162</sup> Prosecutor v. Kordic et al., Case No. IT-95-14/2-T, Judgment, ¶ 180 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001), [http://www.icty.org/x/cases/kordic\\_cerkez/tjug/en/kor-tj010226e.pdf](http://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf) [<https://perma.cc/RA2G-3KSV>].

not enforcing the law for victims of rape, and the victims are civilians, then this element is met.

#### 4.2.4. *With Knowledge*

As for *mens rea*, the approach taken by the International Criminal Court (ICC) was modeled on the approach taken by the ICTR and ICTY tribunals. This approach implements a two-tier inquiry into *mens rea* in evaluating allegations of crimes against humanity. First, the *chapeau* elements proscribe an overarching *mens rea*: the perpetrator must have had knowledge of the attack, but he does not have to share in the purpose or the goals of the larger attack,<sup>163</sup> nor does he have to possess “knowledge of all characteristics of the attack or the precise details of the plan or policy.”<sup>164</sup> Moreover, knowledge of the attack can be either actual or constructive.<sup>165</sup>

The second requirement, separate from the *chapeau mens rea*, is the *mens rea* required for the specific offense committed.<sup>166</sup> The perpetrator does have to have the specific *mens rea* to commit the prohibited act identified in element one. This second tier inquiry will differ depending on which prohibited act the perpetrator committed. For example, if the alleged wrong is murder as a crime against humanity, the prosecutor must show that the defendant knew his act was part of a widespread or systematic attack (*chapeau mens rea*),

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<sup>163</sup> ICC Elements, *supra* note 97, at art. 7. See also Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgment, ¶ 134 (May 21, 1999) <http://unictr.unmict.org/sites/unictr.org/files/case-documents/ict-95-1/trial-judgments/en/990521.pdf> [<https://perma.cc/8NTV-WK49>]. In this sense, the *mens rea* element for crimes against humanity is not as strict as the specific intent requirement for genocide, which requires showing specific intent to “destroy” a group because its members share, for example, a common racial or religious identity. See Rome Statute, *supra* note 9, at art. 6.

<sup>164</sup> ICC Elements, *supra* note 97, at art. 7 intro. ¶ 2. See also Prosecutor v. Kunarac et al., IT-96-23 & IT-96-23/1-A, Judgment, ¶ 103 (Int’l Crim. Trib. for the Former Yugoslavia June 12, 2002), <http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf> [<https://perma.cc/W7NV-CAY6>].

<sup>165</sup> See ICC Elements, *supra* note 97, at art. 7 intro. ¶ 2 (“[T]he last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy . . . . [T]he intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.”)

<sup>166</sup> See, e.g., ALEXANDER ZAHAR, *Chapeau Elements*, in THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE, *supra* note 66, at 260, 260 (defining “chapeau elements” of the international crime as distinct from the underlying crime).

and also that he possessed the intent to kill, the specific *mens rea* required to prove murder, the prohibited enumerated act.

Applying these principles here, to meet the *chapeau mens rea*, evidence would have to be collected to show that a perpetrator knew rape laws were not being enforced. It seems likely that if, for example, a government official in India was not enforcing rape laws, that he was doing so as part of the India "rape culture."<sup>167</sup> Evidence would also have to show that this government knew the law, but decided not to enforce it in breach of his duty to act, which would meet the specific *mens rea* requirement to prove inhumane acts.

#### 4.2.5. Summary

The preceding sections have set forth a detailed framework of how the failure to enforce the rule of law by a government official can establish a *prima facie* case for a crime against humanity. By failing to enforce the law, government officials breach their duty to act which can be categorized as an inhumane act. In a situation, for example, where there is a rape culture, meaning it is commonplace for rape victims to be denied access to justice in violation of domestic laws, there is likely evidence that the perpetrator knew that his act was part of a widespread or systematic attack on a civil population.<sup>168</sup>

It is important to note the individual government official who might be charged with this international crime could be the "superior" who "as a result of his or her failure to exercise control properly" over "subordinates" could be criminally responsible for the subordinates' crimes.<sup>169</sup> In other words, even if there is not specific evidence that a Chief-of-Police failed to enforce the rule of law,

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<sup>167</sup> BAXI, *supra* note 50, at xlvii.

<sup>168</sup> This argument is novel. Thus, to the extent that failure to uphold the rule of law establishes a *prima facie* case for a crime against humanity, a perpetrator might be tempted to claim the defense of *nullum crimen sine lege*, namely that he was unaware his conduct was criminal. That defense will not work. As a legacy of the Nuremberg Trials where such a defense was not allowed, the same is true under the Rome Statute. See Rome Statute, *supra* note 9, at art. 22. If a crime is so egregious as to rise to the level of a crime against humanity, then the perpetrator should have known that his actions were criminal. See *supra* Section 2.1 of this Article (discussing the Nuremberg Trials).

<sup>169</sup> See Rome Statute, *supra* note 9, at art. 28 (setting forth the grounds for commander responsibility).

if there is evidence that police officers under his leadership failed to do so, then the Chief could be responsible under the principle of command responsibility.

#### 4.3. *Legal Theory Supports the Outcome*

As a matter of theory, interpreting the failure of government officials to enforce rape laws as a crime against humanity is consistent with the underlying theory of the crime. Professor David Luban, a leading professor of law and philosophy, has explained that “crimes against humanity assault one particular aspect of human being, namely our character as political animals.”<sup>170</sup> Professor Luban goes on to argue that humans live socially because of the constructs of “political organization”, despite the fact that they “inevitably pose[] threats to our well-being,” and that “[c]rimes against humanity represent the worst of those threats; they are the limiting case of politics gone cancerous.”<sup>171</sup> Professor Luban explains: “Precisely because we cannot live without politics, we exist under the permanent threat that politics will turn cancerous and the indispensable institutions of organized political life will destroy us.”<sup>172</sup> Rape victims who are unable to seek justice through the written laws of their country because government officials fail to uphold those laws experience exactly this – organized political life that destroys, instead of protects.

### 5. PRACTICAL PROBLEMS

So what? Even if an act of omission rises to the level of an international crime, would anyone really be charged with crimes against humanity or face any real punishment? There are two practical issues that need to be addressed: jurisdictional issues related to which court would oversee the litigation of the case, and pragmatic issues

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<sup>170</sup> David Luban, *A Theory of Crimes Against Humanity*, 29 *YALE J. INT’L L.* 85, 90 (2004).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 90–91. According to Professor Luban, the underlying theoretical propositions to crimes against humanity are: “(i) that ‘humanity’ in the label ‘crimes against humanity’ refers to our nature as political animals, and (ii) that these crimes pose a universal threat that all humankind shares an interest in repressing.” *Id.* at 91.

related to enforcement.

### 5.1. Jurisdictional Matters

The ICC may exercise jurisdiction over an individual who has committed a crime against humanity if that individual's country is a party-member to the Rome Statute<sup>173</sup> and so long as the individual is not being prosecuted domestically for the conduct.<sup>174</sup> Thus, in places like Belize or Cambodia, where rape often goes unchecked despite national laws to the contrary,<sup>175</sup> the ICC has jurisdiction to oversee the case since both countries are party-members to the Rome Statute.<sup>176</sup>

Many developing nations (including India and South Africa) who struggle with rape rule of law issues<sup>177</sup> are not party-members to the Rome Statute, meaning they are not bound by the treaty or subject to prosecution in the ICC.<sup>178</sup> In such cases, there is another possible way to bring a matter before the ICC. Under the Rome Statute, the U.N. Security Council can refer non-party members to the ICC to be charged.<sup>179</sup> Indeed, the U.N. Security Council has done so in the case of Sudan and Libya. In the Sudan matter, the ICC issued an arrest warrant for Omar al-Bashir, Sudan's president, for matters in Darfur under the Rome Statute even though Sudan is not a party member.<sup>180</sup> Al-Bashir, however, is still at-large with what appears

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<sup>173</sup> Rome Statute, *supra* note 9, at art. 13.

<sup>174</sup> *Id.* at art. 17(1)(a) (providing that the ICC does not have jurisdiction over a case that is "being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution"). This jurisdictional principle is known as complementarity. See Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT'L L. 869, 870 (2002) (explaining the complementarity principle under the Rome Statute).

<sup>175</sup> See *supra* Section 1 of this Article.

<sup>176</sup> *The States Parties to the Rome Statute*, *supra* note 82.

<sup>177</sup> See *supra* Section 1 of this Article.

<sup>178</sup> *The States Parties to the Rome Statute*, *supra* note 82.

<sup>179</sup> See Rome Statute, *supra* note 9, at art. 13 (providing that the UN Security Council may refer a situation to the ICC).

<sup>180</sup> See Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Request to the Republic of the Sudan for the Arrest and Surrender of Omar Al Bashir, at 4 (Mar. 5, 2009), [https://www.icc-cpi.int/CourtRecords/CR2009\\_01572.PDF](https://www.icc-cpi.int/CourtRecords/CR2009_01572.PDF) [<https://perma.cc/7MQK-PTHW>] (requesting that Sudan surrender al-Bashir pursuant to UN Security Council Resolution 1593).

to be the approval of other African states, despite the fact that they are party members to the Rome Statute.<sup>181</sup> Thus, it is possible—though probably very unlikely given the recent criticism and weakening of the ICC<sup>182</sup> and the political nature of the U.N. Security Council—that a case for failure to enforce the rule of law would actually be referred to the ICC.

There are two jurisdictional principles under international law that would allow domestic courts to oversee the prosecution of such cases—those that have occurred outside of their national borders. First, universal jurisdiction “provides [domestic courts] jurisdiction over extraterritorial acts . . . for crimes so heinous as to be universally condemned.”<sup>183</sup> Crimes against humanity are one of those universally condemned heinous crimes. As such, domestic courts, particularly in European countries, have exercised universal

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<sup>181</sup> Recently, in October 2016, South Africa announced it would withdraw as a party-member from the Rome Statute. Kevin Sieff & Krista Mahr, *South Africa Says It Will Quit the International Criminal Court*, THE WASH. POST (Oct. 21, 2016), [https://www.washingtonpost.com/world/africa/south-africa-says-it-will-quit-the-international-criminal-court/2016/10/21/0eb8aa66-978f-11e6-9cae-2a3574e296a6\\_story.html](https://www.washingtonpost.com/world/africa/south-africa-says-it-will-quit-the-international-criminal-court/2016/10/21/0eb8aa66-978f-11e6-9cae-2a3574e296a6_story.html) [http://web.archive.org/web/20171103135706/https://www.washingtonpost.com/world/africa/south-africa-says-it-will-quit-the-international-criminal-court/2016/10/21/0eb8aa66-978f-11e6-9cae-2a3574e296a6\_story.html]. The year before, even though it was still a party-member, South Africa allowed al-Bashir to freely enter and leave its borders despite its obligation to turn him over to the ICC due to the outstanding arrest warrant. See Kate Cronin-Furman & Stephanie Schwartz, *Is this the End of the International Criminal Court?*, THE WASH. POST (Oct. 21, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/10/21/is-this-the-end-of-the-international-criminal-court/> [http://web.archive.org/web/20171103135934/https://www.washingtonpost.com/news/monkey-cage/wp/2016/10/21/is-this-the-end-of-the-international-criminal-court/].

<sup>182</sup> See Mark Kersten, *Sudan, South Africa and the Future of the International Criminal Court in Africa*, THE WASH. POST (Oct. 13, 2015), <https://www.washingtonpost.com/news/monkey-cage/wp/2015/10/13/sudan-south-africa-and-the-future-of-the-international-criminal-court-in-africa/> [http://web.archive.org/web/20171110000437/https://www.washingtonpost.com/news/monkey-cage/wp/2015/10/13/sudan-south-africa-and-the-future-of-the-international-criminal-court-in-africa/].

<sup>183</sup> *United States v. Yousef*, 327 F.3d 56, 91 n.24 (2d Cir. 2003). Universal jurisdiction is one of five principles first articulated in a study by Harvard Research in International Law, *Jurisdiction with Respect to Crime: Introductory Comment*, 29 AM. J. INT’L L. 435, 445 (Supp. 1935). The universal principle is controversial. See *id.* (explaining the universal principle is “widely though by no means universally accepted”); see also Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 HARV. INT’L L.J. 183, 184 (2004) (“Universal jurisdiction can have dangerous consequences.”).

jurisdiction to try crimes against humanity committed in Rwanda, the Former Yugoslavia, Latin America,<sup>184</sup> and, most recently, may attempt to exercise universal jurisdiction over a potential case against Syria's president, Bashar al-Assad.<sup>185</sup>

Second, domestic courts may also have jurisdiction if the alleged victims live within the country based on the passive personality principle.<sup>186</sup> For example, in January 2017, it was reported that alleged victims filed a case in a Belgium court against the former Minister of Foreign Affairs of Israel asserting crimes against humanity that purportedly took place in the Gaza Strip.<sup>187</sup>

Thus, even if prosecution in the ICC might pose difficulties, under the universal and passive personality jurisdictional principles, it is possible for domestic courts to have jurisdiction over the prosecution of another country's government official for his failure to uphold the rule of law as a crime against humanity.

## 5.2. Enforcement and International Pressure

Even if a government official is charged with a crime against humanity in a court with proper jurisdiction, pragmatically, would there really be any consequence? Some scholars have concluded that international law is problematic because it lacks enforcement mechanisms.<sup>188</sup> Others have responded that international law does, indeed, have teeth via "outcasting" which involves denying the disobedient "the benefits of social cooperation and membership."<sup>189</sup>

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<sup>184</sup> ELLEN S. PODGOR & ROGER S. CLARK, UNDERSTANDING INTERNATIONAL CRIMINAL LAW 24 (2nd ed. 2008).

<sup>185</sup> *German lawyers seek criminal case against Syria's Assad*, AL JAZEERA (Nov. 28, 2016) <http://www.aljazeera.com/news/2016/11/german-lawyers-seek-criminal-case-syria-assad-161128141943783.html> [https://perma.cc/45WD-J8YD] (explaining that Germany may use the universal jurisdiction principle to pursue Assad for crimes committed abroad).

<sup>186</sup> See RESTATEMENT OF FOREIGN RELATIONS, *supra* note 59, at § 402.

<sup>187</sup> Ruben Sindahl, *Belgium court orders arrest of former Israel top official for war crimes*, JURIST: PAPER CHASE (Jan. 22, 2017), <http://www.jurist.org/paper-chase/2017/01/belgium-court-orders-arrest-of-former-israel-top-official-for-war-crimes.php> [https://perma.cc/N389-AKJ5].

<sup>188</sup> See, e.g., Anthony D'Amato, *Is International Law Really "Law"?*, 79 NW. U. L. REV. 1293, 1293 (1985) (explaining that some question whether international law can be "true law").

<sup>189</sup> Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252, 259 (2011).



While this debate is beyond the scope of this article, it is the “out-casting” principle that is most relevant to our discussion here. It boils down to international attention and public pressure that results in a type of outcasting. If there is public outcry against the actions of an individual government official, then that individual might feel pressured to change. There have been a few recent examples of how international pressure has brought about some changes to rule of law issues.

For example, the perpetrators who raped and killed a young woman on a bus in India a few years ago were swiftly tried and sentenced, quicker than any other documented rape in India.<sup>190</sup> Indeed, the enormous amount of international pressure caused by this gang rape brought about amendments to India’s rape laws.<sup>191</sup> The international pressure led to the only 2012 rape conviction in Delhi, despite the fact that 706 rapes were reported that year.<sup>192</sup> The international pressure likely caused an increase of reported rapes which has nearly doubled in Delhi since 2012.<sup>193</sup> Thus, in India, international pressure brought about a positive change in the law, a positive change in enforcement, and a positive change in civilians’ perception of the rule law.

There are other recent examples of how pressure has brought about prosecutions. In a case in Sudan, international pressure saved the life of a pregnant woman who was imprisoned for her religion despite the fact that her imprisonment violated domestic laws.<sup>194</sup> In Malaysia, the forty-year old rapist who tried to evade prosecution by marrying the twelve year old girl he raped was eventually tried,<sup>195</sup> but a NGO worker explained: “The only reasons this guy is being recharged is that there was an outcry . . . How many other

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<sup>190</sup> See, e.g., Sumnima Udas, *Covering the rape case that changed India*, CNN (Dec. 15, 2013), <http://www.cnn.com/2013/12/04/world/asia/india-rape-problem-udas/> [<https://perma.cc/S6HE-V7Z9>].

<sup>191</sup> See *India: Rape Victim’s Death Demands Action*, HUMAN RIGHTS WATCH (Dec. 29, 2012), <https://www.hrw.org/news/2012/12/29/india-rape-victims-death-demands-action> [<https://perma.cc/JMH9-A9QE>].

<sup>192</sup> Gates, *supra* note 27.

<sup>193</sup> *Id.*

<sup>194</sup> In 2014, a young Sudanese mother who was sentenced to death, contrary to domestic laws, was set free after enormous international pressure. See Steve Almasy, *Sudanese Christian woman who once faced death penalty arrives in U.S.*, CNN (Aug. 1, 2014), <http://www.cnn.com/2014/07/31/us/new-hampshire-sudanese-woman/> [<https://perma.cc/F8XA-CGEA>].

<sup>195</sup> See Barr, *supra* note 1; Gooch, *supra* note 45 and accompanying text.

cases are happening?"<sup>196</sup> From a pragmatic point-of-view, a public "outcry" might bring about more practical changes than an actual international criminal trial.

Perhaps if a government official thinks that a failure to enforce the rule of law will lead to an investigation for a crime against humanity, the fear of the unwanted international attention and pressure that would come with that investigation will make him think twice.<sup>197</sup> It certainly sends a message that the international community believes in and cares about the rule of law. As one scholar put it, "[T]he most effective form of law-enforcement is not the imposition of external sanction, but the inculcation of internal obedience."<sup>198</sup>

## 6. CONCLUSION

This article has provided a legal framework in which individual government officials can be held criminally and internationally accountable for failing to uphold the rule of law. Although such a failure is an omission (instead of an overt act), it still establishes a *prima facie* case of a crime against humanity. For example, if a judge fails to enforce domestic rape laws as part of a cultural custom, then that official has breached his duty and has allowed inhumane acts to systematically impact women and children, a large part of the civilian population—the very population he knew the laws were there to protect. The threat of being labeled as an individual under investigation for a crime against humanity may pressure government officials to give more than mere lip service to their countries' own laws.

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<sup>196</sup> Gooch, *supra* note 45.

<sup>197</sup> Although these stories suggest that public pressure can bring about change, it is unclear if public pressure, or, generally speaking, shaming as a penalty, is an actual deterrent. See, e.g., Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 638 (1996) (explaining that "we don't know" if shaming is a deterrent because of lack of empirical evaluation, but that it "should work"); Note, *Shame, Stigma, and Crime: Evaluating the Efficacy of Shaming Sanctions in Criminal Law*, 116 HARV. L. REV. 2186, 2202 (2003) (concluding that shaming sanctions have a "potentially powerful deterrent force").

<sup>198</sup> Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1401 (1999). In discussing the enforcement of international human rights law, the author explains: "Notice that as we move down this scale from coincidence to conformity to compliance to obedience, we see an increase of what I will call 'norm-internalization.'" *Id.* at 1400.

To the extent a state has enacted a law, there should be more pressure for individual state officials to enforce it, or consequently to suffer potential criminal liability (*e.g.*, they should face a stick, not just be given a carrot).