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# International Criminal Court's Protection of Women: The Hands of Justice at Work

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# THE INTERNATIONAL CRIMINAL COURT'S PROTECTION OF WOMEN: THE HANDS OF JUSTICE AT WORK

TINA R. KARKERA\*

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## INTRODUCTION

Sexual violence against women during conflict and war has always had a place in history.<sup>1</sup> However, protection against such gender-based violence found a place in international criminal statutes only after World War II.<sup>2</sup> The Nuremberg Charter of the International Military Tribunal at Nuremberg (“IMT”)<sup>3</sup> did not criminalize rape but created the category of crimes against humanity, which today encompasses gender-based crimes such as rape.<sup>4</sup> Nearly a year later, the International Military Tribunal for the Far East at Tokyo (“IMTFE”)<sup>5</sup> included rape as a violation of war in the Tokyo Charter.<sup>6</sup>

1. See SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 33 (1975) (stating that the ancient Greeks viewed rape as socially acceptable behavior well within the rules of warfare); DONALD WELLS, *WAR CRIMES AND LAWS OF WAR* 91 (2d ed. 1991) (noting that during the Middle Ages in Europe, if a city refused to surrender upon the victors’ demand for surrender, the rules of combat allowed soldiers to rape women occupants); SHARON FREDERICK AND THE AWARE COMMITTEE ON RAPE, *RAPE: WEAPON OF TERROR* 5 (2001) (stating that in World War II, invading armies used rape to subjugate the will of civilian populations); see also KELLY DAWN ASKIN, *WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS* 27 (1997) (asserting that “through[ou]t the ages, triumph over women by rape became a way to measure victory, part of a soldier’s proof of masculinity and success, a tangible reward for services rendered . . . [and] an actual reward of war”) (quoting BROWNMILLER, *supra* note 1, at 35).

2. See Nicole Eva Erb, Article, *Gender-Based Crimes Under the Draft Statute for the Permanent International Criminal Court*, 29 COLUM. HUM. RTS. L. REV. 401, 407-11 (1998) (explaining that prior to World War II, international legal instruments did not explicitly address rape or other gender-based crimes in armed conflicts). However, after World War II, several bodies of law that govern wartime conduct emerged. *Id.* Some of these bodies, such as the Nuremberg Charter and the Geneva Conventions of 1949, directly address gender-based violence during armed conflicts, and others do so indirectly. *Id.*

3. CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter NUREMBERG TRIBUNAL] (establishing the seat of the IMT at Nuremberg, Germany). The governments of the United States, France, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics (U.S.S.R.) jointly decided to create the IMT for the purpose of punishing the major war criminals of the European Axis. *Id.* at art. 1.

4. See *id.* at art. 6(c) (defining crimes against humanity).

[N]amely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

*Id.*

5. Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, *amended* Apr. 26, 1946, T.I.A.S. No. 1589; see also JEANIE M. WELCH, *THE TOKYO TRIAL: A BIBLIOGRAPHIC GUIDE TO ENGLISH-LANGUAGE SOURCES* 1 (2002) (noting that the IMTFE was composed of a tribunal of judges from the Allied nations). The trials in Tokyo occurred at the same time as their more famous counterparts, the Nuremberg trials. *Id.*

6. See Erb, *supra* note 2, at 410 (stating that although the Tokyo Charter included rape along with mass murder and torture as violations of recognized war

While the significance of such prosecutable crimes in the Nuremberg and Tokyo Charters is arguable,<sup>7</sup> the inclusion of rape as a war crime served as the foundation for the wide acknowledgment of gender-based crimes and crimes specifically targeting women.<sup>8</sup> Consequently, an increased awareness of gender-based crimes is evident in the Rome Statute of the International Criminal Court.<sup>9</sup>

This Comment analyzes the Rome Statute and the degree to which the International Criminal Court ("ICC") protects women from

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customs and conventions, it failed to include rape as a crime against humanity). The failure to include rape as a crime against humanity meant that the IMTFE would only be able to prosecute perpetrators who committed rape during an armed conflict as opposed to a systematic assault on civilians during "peace time." *Id.* See *infra* note 43 and accompanying text for a discussion on how the Rome Statute changed this by including gender-based crimes as crimes against humanity as well as war crimes.

7. See Jocelyn Campanaro, Comment, *Women, War, and International Law: The Historical Treatment of Gender-Based War Crimes*, 89 GEO. L.J. 2557, 2560, 2564 (2001) (arguing that while the two charters granted flexibility to prosecute for rape, their failure to appropriately prosecute sexual crimes continued to minimize the harms suffered by women during the war). However, the inclusion of rape in the Tokyo indictments resulted in the first prosecution of sexual violence resulting from World War II. *Id.* See generally LAWRENCE TAYLOR, *A TRIAL OF GENERALS: HOMMA, YAMASHITA, MACARTHUR* 112-133 (1981) (discussing General Yamashita's trial). This prosecution, in particular, was of the high-ranking Imperial Japanese Army General, General Yamashita, for war crimes, including the rape and murder of a large number of people in the Philippines in the early 1940s. *Id.*

8. See *General Recommendation 19: Violence Against Women*, U.N. GAOR, Comm. on the Elimination of Discrimination Against Women, 11th Sess., ¶ 6, U.N. Doc. A/47/38 (1992) (defining gender-based violence), available at <http://www.un.org/womenwatch/daw/cedaw/recomm.htm>.

[V]iolence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.

*Id.* For examples of increased awareness of gender-based crimes, see generally *Violence Against Women Migrant Workers*, U.N. GAOR, 56th Sess., Agenda Item 112, U.N. Doc. A/RES/56/131 (2002). See ECON. AND SOC. COMM'N FOR ASIA AND THE PAC., *Violence Against Women in South Asia*, U.N. Doc. ST/ESCAP/2099, U.N. Sales No. E.01.II.F.13 (2002); *Declaration on the Elimination of Violence Against Women*, U.N. GAOR, 48th Sess., 85th plen. mtg., U.N. Doc A/RES/48/104 (1993); *Convention on the Elimination of All Forms of Discrimination Against Women*, 1249 U.N.T.S. 13 (1981).

9. See *Rome Statute of the International Criminal Court*, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an Int'l Criminal Court, U.N. Doc. A/CONF.183/9\* (July 17, 1998) [hereinafter *Rome Statute*] (establishing the International Criminal Court as a permanent institution that will "exercise its jurisdiction . . . for the most serious crimes of international concern"), available at <http://www.un.org/law/icc/statute/rome.htm>; see also Erb, *supra* note 2, at 432 (noting that prior to the drafting of the ICC Statute, the international community had never before codified crimes against humanity; therefore, a proper definition of gender-based crimes and their inclusion within the ICC's crimes against humanity provision were imperative to the international community's formal recognition of such crimes).

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gender-based violence.<sup>10</sup> Part I discusses the history of international criminal courts and the path leading up to the need for the ICC.<sup>11</sup> It also explores discussions at the Rome Diplomatic Conference<sup>12</sup> that placed gender-based crimes under the ICC's jurisdiction.<sup>13</sup> Part II addresses the protection that women receive under the ICC as regulated by the Rome Statute, specifically Articles 7 and 8 ("the Articles"), which lend greatest protection to women.<sup>14</sup> Part III applies the Rome Statute's Articles 7 and 8 to two regions: the Democratic Republic of Congo ("DRC") and Kosovo. In examining the Articles' protection of women, this Comment pays special attention to the application of the Rome Statute with regard to sexual-violence, including rape,<sup>15</sup> in the DRC<sup>16</sup> and the trafficking of women<sup>17</sup> by international peace-keeping forces in Kosovo.<sup>18</sup> This Comment evaluates the courts of the DRC and Kosovo to see if those courts would be able to exercise their jurisdiction over the crimes.<sup>19</sup> Additionally, this Comment discusses whether nations would be

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10. See LORI F. DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 1071 (4th ed. 2001) (stating that "[t]he 1998 Rome Statute of the International Criminal Court is the most detailed codification to date of sexual and gender-based atrocities").

11. See discussion *infra* Part I.A.

12. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, 15 June-17 July 1998, A/CONF.183/1-12 and A/CONF.183/INF/1-11 [hereinafter *Rome Conference*]; see also THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 27 (Roy S. Lee ed., 1999) [hereinafter MAKING OF THE ROME STATUTE] (claiming that the Rome Statute, resulting from the Rome Conference, achieved the goal of creating an international institution to prosecute and punish the violence of international criminal law "by providing a permanent international criminal court to enforce the law").

13. See discussion *infra* Part I.B.

14. See discussion *infra* Parts II.A, II.B.

15. *Rome Statute*, *supra* note 9, at art. 7, para. 1(g); *id.* at art. 8, para. 2(b)(xxii), para. 2(e)(vi).

16. See *generally* discussion *infra* Part III.A (demonstrating that the DRC is suffering an international armed conflict in which the many sides of the conflict are all engaging in gender-based crimes). The issue with regard to the DRC is whether the ICC would have jurisdiction over the gender-based crimes in the region. *Id.*

17. See *Rome Statute*, *supra* note 9, at art. 7, para. 1(b); see also para. 2(c) (defining enslavement as inclusive of trafficking in persons).

18. See *generally* discussion *infra* Part III.B (demonstrating that Kosovo is administered by the United Nations and is experiencing a great deal of trafficking). Many of the traffickers are international forces who are supposed to be helping the peace efforts in the region. *Id.* Additionally, these international forces are mostly nationals of many of the European countries that wanted an international criminal court. *Id.* The question is whether the ICC would have jurisdiction over the crimes committed by the international forces. *Id.*

19. See *generally Rome Statute*, *supra* note 9, at art. 12 (mandating that national courts must have a chance to exercise their jurisdiction over crimes listed in the Rome Statute before the ICC can exercise its jurisdiction over the crimes).

willing to give up their legal sovereignty in order for the ICC to prosecute international forces. This Comment then applies the Articles to the facts of these specific regions to see if the ICC would have jurisdiction over the crimes and to predict the outcome of those cases if jurisdiction even exists at all.<sup>20</sup>

This Comment concludes that the ICC has accomplished a great deal with regard to protecting women from gender-based crimes in comparison to other international courts and *ad hoc* tribunals. Additionally, upon examination of the facts and circumstances of the Democratic Republic of Congo and Kosovo, this Comment concludes that the specificity with which the Rome Statute was written awards the ICC jurisdiction over the gender-based crimes occurring in those regions. Therefore, this Comment recommends that the ICC prosecute and demand immediate indictments of perpetrators in DRC and Kosovo.

## I. BACKGROUND

### A. *The Need for an International Court: the Rome Conference*

In response to the atrocities committed in Yugoslavia<sup>21</sup> and Rwanda,<sup>22</sup> the United Nations Security Council created an *ad hoc*

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20. The purpose of this Comment is not to establish liability for people in the Democratic Republic of Congo or Kosovo, but rather to see if and how the ICC would work with conflicts such as the ones occurring in those regions.

21. See *Letter Dated 9 February 1993 from the Secretary-General Addressed to the President of the Security Council*, U.N. SCOR, 48th Sess., Annex 1, at 16, ¶ 56, U.N. Doc. S/25274 (1993) (documenting the grave breaches and violations committed in the former Yugoslavia according to the Commission of Experts established by United Nations Secretary-General). The Commission's first letter concluded that

ethnic cleansing had been carried out . . . by means of murder, torture, arbitrary arrest and detention, extra-judicial executions, rape and sexual assault, confinement of civilian population in ghetto areas, forcible removal, displacement and deportation of civilian population, deliberate military attacks or threats of attacks on civilians and civilian areas, and wanton destruction of property.

*Id.*

22. See DAMROSCH ET AL., *supra* note 10, at 1352 (explaining that "Hutu extremist troops, militia and mobs launched a genocidal wave of murder and rape against the Tutsi minority and Hutu moderates," killing between half a million and 800,000 between April and July 1994). See generally *International Criminal Tribunal for Rwanda, about the Tribunal, Fact Sheets, the Tribunal at a Glance*, United Nations (stating that the United Nations established the International Criminal Tribunal for Rwanda "for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between 1 January 1994 and 31 December 1994."), at <http://www.ictt.org> (last visited Oct. 14, 2003). The Tribunal may also deal with the prosecution of Rwandan citizens responsible for similar crimes committed in the territory of neighboring States during the same period. *Id.*

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tribunal<sup>23</sup> for the crimes committed in each territory.<sup>24</sup> The jurisdictions of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”) are limited to adjudicating crimes committed in those territories, respectively.<sup>25</sup> Because the tribunals’ jurisdictions are limited, the world needs an international criminal court to address future issues and violations occurring worldwide, instead of creating *ad hoc* tribunals that can only address crimes occurring in one particular region or territory.<sup>26</sup>

The United Nations General Assembly<sup>27</sup> first assigned the project of creating an international criminal court to the International Law Commission (“ILC”) in 1948.<sup>28</sup> However, it was not until 1990 that

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23. BLACK’S LAW DICTIONARY 41 (7th ed. 1999) (defining “*ad hoc*” as “[f]ormed for a particular purpose”); see *id.* at 1512 (defining “tribunal” as “a court or other adjudicatory body”). Therefore, an “*ad hoc* tribunal” is a court that serves a particular purpose or, in the cases of the ICTY and ICTR, serves a particular region. *Id.*

24. See S.C. Res. 827, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/827 (1993) [hereinafter *Yugoslavia Resolution*] (establishing an international tribunal for the former Yugoslavia “for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia . . .”), available at <http://www.un.org/icty/legaldoc/index.htm>; see also S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994) [hereinafter *Rwanda Resolution*] (establishing an international tribunal for the prosecution of individuals responsible for genocide and other violations of humanitarian law committed in the territory of Rwanda).

25. See *Yugoslavia Resolution*, *supra* note 24 (stating that the jurisdiction of the ICTY falls upon four crimes: grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war, crimes against humanity, and genocide and complicity in genocide); see also *Rwanda Resolution*, *supra* note 24, at Annex (stating that the ICTR will have jurisdiction over genocide, crimes against humanity, and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II).

26. See MAKING OF THE ROME STATUTE, *supra* note 12, at 6 (noting that the jurisdictions of the ICTY and the ICTR are limited to Yugoslavia and Rwanda, respectively, and the tribunals therefore have no competence to address violations committed elsewhere). The Rome Statute relieves the United Nations Security Council of the need to establish *ad hoc* tribunals. *Id.* at 35.

27. U.N. CHARTER art. 9, para. 1 (establishing the United Nations General Assembly and stating that all United Nations member states are represented), available at <http://www.un.org/aboutun/charter/index.html> (last visited Oct. 14, 2003).

28. See MAKING OF THE ROME STATUTE, *supra* note 12, at 2 (stating that the United Nations General Assembly simultaneously addressed the creation of the international criminal court, the Universal Declaration of Human Rights, and the Genocide Convention, but only adopted the latter two in 1948). The same year, the United Nations General Assembly postponed consideration of the drafted statute for the international criminal court pending the definition of aggression. *Id.* The 1974 United Nations Security Council Resolution 3314 provided a definition for aggression, which consisted of a general definition in addition to a list of acts that might or should be considered as acts of aggression. *Id.* at 82. However, due to continuing differences between States regarding the definition of aggression, wanting either to make the definition more general or to have no definition at all, the

the United Nations General Assembly asked the ILC to examine the matter again.<sup>29</sup> In 1995, the United Nations General Assembly created an *ad hoc* committee to review any issues arising from the ILC's draft statute.<sup>30</sup> At the end of the same year, the United Nations General Assembly created a Preparatory Committee to continue the ILC's work and to prepare a widely-acceptable, consolidated text.<sup>31</sup>

By the time of the Rome Conference, the Preparatory Committee had adopted the text of a draft on the establishment of an international criminal court.<sup>32</sup> Governments and organizations from around the world convened in Rome, Italy at the July 1998 conference to finalize and adopt a convention;<sup>33</sup> some organizations were present specifically to ensure that the ICC would protect women.<sup>34</sup> Two years later, the Preparatory Committee adopted the Elements of Crimes

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Assembly postponed consideration of the court again. *Id.* at 83.

29. *See id.* at 2 (re-examining the idea of an international court response to the 1989 initiative of Trinidad and Tobago to find effective ways of fighting transnational criminal activities, such as illegal drug trafficking across national frontiers). In 1993, the United Nations General Assembly finally decided to give priority to the preparation of the draft statute for a criminal court. *Id.* at 6 n.12. The ILC completed and presented the Draft Statute to the Assembly in 1994. *Id.*

30. *See id.* at 3 (stating that various United Nations member states wanted an opportunity to examine the draft after they received it). Therefore, the United Nations General Assembly created an *ad hoc* committee to review the ILC's work on draft statute. *Id.*

31. *See id.* at 3-4 (stating that in preparing the consolidated text, the Preparatory Committee took into account roughly 500 additional proposals and amendments submitted by United Nations member states). The States' suggestions were mostly related to the definition of crimes and criminal law principles and procedures because the States did not want the court or the judges to make such decisions. *See id.*

32. *See Erb, supra* note 2, at 405-6 (noting that the Preparatory Commission adopted the text after drafting it for more than two years). However, the draft still reflected many unresolved issues over which Rome Conference participants would have to deliberate before finalizing and adopting the text. *Id.* at 406.

33. *See generally* Rome Conference, *supra* note 12 (resulting in the establishment of the ICC).

34. *See* CATE STEAINS, *Gender Issues, in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 361 (Roy S. Lee ed., 1999) (mentioning that the Non-Governmental Organization Coalition for an International Criminal Court "worked hard to expose delegations to the serious gaps in the ILC Draft Statute with regard to gender issues, to provide papers containing authoritative bases for their arguments, and to develop specific proposals aimed at remedying these problems.").



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(“the Elements”)<sup>35</sup> and the Rules of Procedure and Evidence<sup>36</sup> to help guide the ICC.<sup>37</sup>

### B. Gender Issues at the Rome Conference

Where other international courts have failed with regard to gender-based crimes, the ICC is expected to succeed.<sup>38</sup> The Rome Statute grants the ICC jurisdiction over four major areas of crimes: genocide, war crimes, crimes against humanity, and aggression.<sup>39</sup> The ICC Prosecutor<sup>40</sup> can choose to prosecute gender-based crimes under either crimes against humanity or war crimes.<sup>41</sup>

35. See *Finalized Draft Text Of the Elements Of Crimes*, Preparatory Commission for the International Criminal Court, U.N. Doc. PCNICC/2000/1/Add.2 (July 2000) [hereinafter *Elements of Crimes*] (providing definitions and clarifications for key terms and phrases included in the Rome Statute’s articles addressing genocide, crimes against humanity, and war crimes), available at [http://ods-dds-ny.un.org/doc/UNDOC/GEN/NOO/724/27/PDF/NOO72427.pdf?openelement; see also Rome Statute, supra note 9, at art. 9](http://ods-dds-ny.un.org/doc/UNDOC/GEN/NOO/724/27/PDF/NOO72427.pdf?openelement;see%20also%20Rome%20Statute,%20supra%20note%209,%20at%20art.%209%20(stating%20that%20the%20%E2%80%9CElements%20of%20Crimes%20shall%20assist%20[the%20ICC]%20in%20the%20interpretation%20and%20application%20of%20articles%206,%207,%20and%208%E2%80%9D.) (stating that the “Elements of Crimes shall assist [the ICC] in the interpretation and application of articles 6, 7, and 8”).

36. *Finalized Draft Text of the Rules of Procedure and Evidence*, Preparatory Commission for the International Criminal Court, U.N. Doc. PCNICC/2000/1/Add.1 (July 2000) [hereinafter *Rules of Procedure and Evidence*].

37. See ROYS LEE, THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE, at iv (2001) (noting the importance of the Elements of Crimes and the Rules of Procedure and Evidence because they pertain to the functioning and operation of the ICC).

38. See Erb, *supra* note 2, at 434 (concluding that the “creation of the ICC provides the international community with an unprecedented opportunity to set new international legal standards for the protection of gender-based individual rights.”). The delegates need to incorporate recent changes in international and humanitarian law into the ICC statute so that victims of gender-based crimes or sexual violence have the opportunity to present their cases against the accused in a court of law. *Id.*

39. See *Rome Statute, supra* note 9, at art. 5 (stating that the ICC’s jurisdiction shall be limited to the most serious crimes of concern to the international community); see, e.g., *id.* at art. 6 for the definition of genocide:

- (a) killing members of a group, (b) causing serious bodily or mental harm to members of a group, (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, (d) imposing measures intended to prevent births within the group, and/or (e) the forcible transferring of children of the group to another group.

*Id.* The perpetrator must commit the acts “with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.” *Id.* The ICC will exercise jurisdiction over the crime of aggression once a provision is adopted defining the crime and setting the conditions under which the ICC can have jurisdiction with respect to the crime. *Id.* at art. 5, para. 2.

40. See *generally id.* at art. 15 (establishing the duties of the ICC Prosecutor). These duties include the initiation of investigations “on the basis of information on crimes within the jurisdiction of the [ICC].” See *id.* at art. 15, para. 1.

41. See *id.* at art. 7 (allowing for prosecution of “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity” if it is committed as part of a widespread or systematic attack against a civilian population). Article 7 specifically addresses “crimes against humanity.” *Id.* War crimes committed in international or non-international armed conflicts are classified under Article 8, which specifically addresses “war crimes,”

The Rome Statute's inclusion of gender provisions did not occur independent of precedent or history.<sup>42</sup> Cases prosecuted in the ICTY, as well as later on in the ICTR, played a crucial role in the inclusion of such provisions in the Rome Statute.<sup>43</sup> Equally influential as the ICTY and ICTR statutes and case law were advances on gender violence issues made within the United Nations.<sup>44</sup>

## II. PROTECTING WOMEN: ARTICLES 7 AND 8

The Rome Statute broadened the ICC's jurisdiction and made gender-based crimes an international concern.<sup>45</sup> Article 7 of the Rome Statute addresses crimes against humanity;<sup>46</sup> Article 8 addresses

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including "rape, sexual slavery, enforced prostitution, forced pregnancy, (as defined in Article 7, paragraph 2 (f)), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions." *Id.* at art. 8.

42. See STEAINS, *supra* note 34, at 358 (noting that the inclusion of gender provisions in the Rome Statute took place "in the wake of a number of important developments in the field of international humanitarian law and advances in the international community's response to violence against women and women's human rights").

43. See *id.* at 359 (explaining that drafters of the Rome Statute might not have had a large number of precedents to follow while drafting the gender provisions but they did have "the benefit of drawing not only on jurisprudence of direct relevance to the negotiations that was being developed by the [ICTY and the ICTR], but also on the experience of the Tribunals in the actual investigation and prosecution of crimes of sexual and gender violence").

44. See *id.* at 360 (stating that, through its work on gender-violence issues, the United Nations provided "the necessary political impetus for the integration of a gender perspective throughout the ICC statute"). For example, at the 1993 World Conference on Human Rights in Vienna, governments from nations around the world denounced gender-based violence and violence against women in war situations and asked for women's rights to be integrated into the mainstream of the U.N. system. *Id.* At the Fourth World Conference on Women in Beijing in 1995, the governments "undertook to integrate a gender perspective in the resolution of armed or other conflicts and foreign occupation." *Id.* Additionally, the 1997 and 1998 United Nations Commission on Human Rights "made specific references to the need to integrate a gender perspective into the Rome Statute." *Id.*

45. See *Rome Statute*, *supra* note 9, at art. 1 (establishing the ICC's ability to exercise its jurisdiction over individuals); *id.* at art. 11 (stating that the ICC does not have jurisdiction over crimes committed prior to its establishment); see also WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 21 (2001) (noting that the crimes over which the ICC has jurisdiction are of international concern because international cooperation is needed for their repression and because these crimes victimize humanity as a whole); see also DARRYL ROBINSON, *The Elements of Crimes Against Humanity*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 57 (Roy S. Lee ed., 2001) ("Universal jurisdiction, and even international prosecution if necessary, is justified by the scale and gravity of these atrocities and the involvement of a [s]tate or organization.").

46. See *Rome Statute*, *supra* note 9, at art. 7, para. 1.

For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: . . .

(a) Murder;

war crimes,<sup>47</sup> and both these articles include gender-based crimes as prosecutable crimes.<sup>48</sup> Furthermore, the ICC has jurisdiction over individuals, not states, engaged in crimes.<sup>49</sup>

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(b) 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 against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . . , or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crimes within the jurisdiction of this Court;  
 Enforced disappearance of persons;  
 The crime of apartheid;  
 Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health;

*Id.* See *id.* at art. 7, para. 2-3 (providing definitions and explanations for terms used in paragraph 1).

47. See *id.* at art. 8, para. 1 (noting that the Court shall have jurisdiction over war crimes, particularly when those crimes were committed as part of a plan or policy or as part of a large-scale commission of such crimes"); *id.* at art. 8, para. 2 (detailing the various types of war crimes addressed by the Rome Statute).

48. See Rana Lehr-Lehnardt, *One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court*, 16 *BYU J. PUB. L.* 317, 341 (2002) (crediting the Rome Statute with improving the possibility of convicting a perpetrator for rape by listing rape as both a crime against humanity and as a war crime). By including rape under both Articles, the Rome Statute surpassed the limits set by the ICTY and ICTR Statutes, which only included rape as a crime against humanity, not as a war crime. *Id.* See also HERMAN VON GABEL & DARRYL ROBINSON, *Crimes Within the Jurisdiction of the Court*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 100 (Roy S. Lee ed., 1999) (explaining that the inclusion of crimes other than rape served as an acknowledgement by the international community that "these acts, which have persisted in history . . . are inhumane acts falling within the definition of crimes against humanity").

49. *Rome Statute*, supra note 9, at art. 1 (claiming jurisdiction over "persons"); see Patricia H. Davis, *The Politics of Prosecuting Rape as a War Crime*, 34 *INT'L LAW.* 1223, 1230 (2000) (quoting Jose E. Alvarez, *Rush to Closure: Lessons of the Tadic Judgment*, 96 *MICH. L. REV.* 2031, 2031 (1998)) (stating that for centuries, international law did not criminalize acts by individuals, with the notable exception of piracy). However, even if a nation condones, encourages, or supports the criminal conduct of an individual, the ICC can still bring that individual to justice. *Id.*

### A. Crimes Against Humanity – Article 7 of the Rome Statute

Article 7 defines a crime against humanity as a particular act “committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack.”<sup>50</sup> Paragraph 1 of the Article lists eleven acts as crimes against humanity.<sup>51</sup> Article 7’s inclusion of a substantial list of gender crimes under Paragraph 1, section (g) extends the scope of the crime from the time of Nuremberg.<sup>52</sup>

“Gender crimes” within Article 7 refers to “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or another form of sexual violence of comparable gravity.”<sup>53</sup> Article 7 also lends attention to enslavement, another crime to which women often fall victim.<sup>54</sup> Additionally, Article 7 includes gender-based persecution as a crime against humanity, an overdue recognition that people are often targeted and persecuted because of their gender.<sup>55</sup>

### B. War Crimes – Article 8 of the Rome Statute

The category of war crimes is the oldest of the four categories of crimes under the jurisdiction of the ICC.<sup>56</sup> While war crimes were historically recognized as international crimes, they were subsequently codified in the Nuremberg Charter and codified a second time in the

50. *Rome Statute*, *supra* note 9, at art. 7, para. 1; *see also* SCHABAS, *supra* note 45, at 36 (distinguishing a crime against humanity from a war crime because the former can only be targeted at civilians while the latter can be targeted at civilians as well as at combatants).

51. *Rome Statute*, *supra* note 9, at art. 7, para. 1; *see also supra* note 46 (listing all eleven crimes).

52. *See* SCHABAS, *supra* note 45, at 38 (noting that the Nuremberg Charter did not explicitly recognize rape as a form of crime against humanity). The extension of crimes against humanity may be due to developments in international human rights law. *Id.* at 37.

53. *Rome Statute*, *supra* note 9, at art. 7, para. 1(g).

54. *Id.* at art. 7, para. 2(c) (defining “enslavement” as the exercise of ownership powers over a person in the course of trafficking in persons, “particular[ly] women and children.”).

55. *See id.* para. 1(h) (adding persecution against any group based on “political, racial, national, ethnic, cultural, religious . . . , or any other grounds that are universally recognized as impermissible under international law” as a crime against humanity); *see also* DINAH SHELTON, INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS 60 n.47 (2000) (arguing that recognition of gender-based persecution as crimes against humanity was overdue because “persons are regularly persecuted either exclusively because of their gender, because gender (or sex) is one of a number of isolated factors, or because gender is intersected or intertwined with another factor.”).

56. *See* SCHABAS, *supra* note 45, at 40 (stating that war crimes have probably been punished as domestic offenses since the beginning of criminal law and were also the first crimes to be prosecuted in international law).

provisions of the four Geneva Conventions of 1949.<sup>57</sup> As opposed to articles that address war crimes in past statutes and charters,<sup>58</sup> the Rome Statute's Article 8 is one of the statute's longest and most comprehensive provisions, addressing more war crimes under more situations.<sup>59</sup> Article 8 contains four categories of war crimes: grave breaches of the Geneva Conventions; serious violations of laws and customs applicable in international armed conflict; serious violations of Article 3 common to the Geneva Conventions of 1949 committed during a non-international armed conflict "against persons taking no active part in the hostilities;" and other serious violations in non-international armed conflicts.<sup>60</sup>

In order for a crime to qualify as a war crime, the crime must occur within an armed conflict.<sup>61</sup> The "laws and customs" provision dealing specifically with international armed conflicts develops the area of sexual offenses, prohibiting "rape, sexual slavery, enforced prostitution, forced pregnancy . . . enforced sterilization or any other

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57. See NUREMBERG TRIBUNAL, *supra* note 3, at art. 6(b). The Tribunal defines war crimes as

[n]amely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

*Id.* See also SCHABAS, *supra* note 45, at 40-41. Following codification in the Nuremberg Charter, the "grave breaches" provisions of the four Geneva Conventions of 1949 advanced a second codification:

Wilful [sic] killing, torture or inhuman treatment, including biological experiments, wilfully [sic] causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile [p]ower, or wilfully [sic] depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

*Id.*

58. See *id.* at 42 (explaining that the Nuremberg Charter and the Geneva Conventions provided very brief provisions concerning war crimes).

59. See *id.* (suggesting that the long length of the war crimes article in the Rome Statute, relative to the short length of similar statutes in previous charters, may indicate progressive development). For example, during an update of the 1949 Geneva Conventions, drafters explicitly excluded any suggestion that a war crime could be committed during a non-international armed conflict. *Id.* at 41. However, Article 8 of the Rome Statute expressly covers non-international armed conflicts. *Id.*

60. *Rome Statute*, *supra* note 9, at art. 8, para. 2(a)-(c), (e).

61. *Id.* at art. 8 2(d) (contrasting "armed conflicts" with "internal disturbances, such as riots"); see also Lehr-Lehnardt, *supra* note 48, at 340 (noting that the primary difference between a war crime and a crime against humanity is that "[a] war crime can only be prosecuted if committed during a war, whereas a crime against humanity can be prosecuted during times of war or peace").

form of sexual violence also constituting a grave breach of the Geneva Conventions.”<sup>62</sup> The same sexual offenses are also included in the war crimes section of non-international armed conflicts.<sup>63</sup>

### III. APPLICATION OF THE ROME STATUTE TO THE DEMOCRATIC REPUBLIC OF CONGO AND KOSOVO

#### A. *The Democratic Republic of Congo*

##### 1. *Gender-Based Crimes*

“War continues to rage in eastern Congo. Within that larger war, combatants carry out another war—sexual violence against women and girls.”<sup>64</sup> A 2002 Human Rights Watch report claimed that all sides of the Democratic Republic of Congo conflict<sup>65</sup> are committing war crimes against women and girls.<sup>66</sup> In 2003, the ICC’s Office of the Prosecutor selected the Ituri District of northeastern Congo as the area under the ICC’s jurisdiction that required the court’s immediate attention.<sup>67</sup> In analyzing the ICC’s protection of women, the DRC

62. *Rome Statute*, *supra* note 9, at art. 8, para. 2(b)(xxii); *see also* KELLY DAWN ASKIN, *Women’s Issues in International Law*, in INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS 62 (Dinah Shelton ed., 2000) (noting the significance of the provision because its wording indicates that each of the mentioned crimes constitutes a “grave breach”).

63. *See Rome Statute*, *supra* note 9, at art. 8, para. 2(e)(vi).

64. *See* Human Rights Watch Report, *Sexual Violence Rampant, Unpunished in DR Congo War* (quoting a statement by Alison Des Forges, senior advisor on the Great Lakes in the Africa division of Human Rights Watch), at <http://www.hrw.org/press/2002/06/congo0620.htm> (last visited Oct. 21, 2003).

65. *See* Amnesty International, *Annual Rep. 2002: Democratic Republic of Congo* [hereinafter *Amnesty DRC Report*] (describing the DRC as a central African nation that has been suffering political turmoil and war for the last few years), at <http://web.amnesty.org/web/ar2002.nsf/afr/democratic+republic+of+congo!Open> (last visited Oct. 20, 2003). The war in the eastern part of the country has many participants, including the Congolese Rally for Democracy, forces of the governments of Burundi, Rwanda and Uganda, the armed groups opposed to the three governments, and Burundian and Rwandan armed political groups generally thought to be supported by the DRC government. *Id.* *See generally* HUMAN RIGHTS WATCH, *THE WAR WITHIN THE WAR: SEXUAL VIOLENCE AGAINST WOMEN AND GIRLS IN EASTERN CONGO* (2000) [hereinafter *THE WAR WITHIN THE WAR*] (providing information on the origins of the DRC conflict), available at <http://www.hrw.org/reports/2002/drc>.

66. *See generally* *THE WAR WITHIN THE WAR*, *supra* note 65, at 23-63 (detailing sexually-violent crimes committed by the Rwandan army, its Congolese ally – the *Rassemblement Congolais pour la Democratie* (RCD), as well as armed groups opposed to them, such as the Congolese Mai Mai rebels and Burundian and Rwandan armed groups).

67. *See* DRC: INTERNATIONAL CRIMINAL COURT TARGETS ITURI, July 17, 2003 (stating that the prosecutor views Ituri as the “most urgent situation” under the court’s jurisdiction), at <http://www.irinnews.org/report.asp?ReportID=35464>. The Office of the Prosecutor “[q]uoted detailed evidence in its possession, which indicated that 5000 civilians had been killed in Ituri between July 2002 and early

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represents an ideal (or suitable) region to examine because of the many females who are victims of sexual assault, rape, torture, and murder committed during the conflict.<sup>68</sup>

## 2. Issue of Complementarity

Before the ICC Prosecutor can take legal action in a case, the Prosecutor must first evaluate whether the ICC has jurisdiction. The ICC has jurisdiction only over crimes occurring within states that have signed and ratified or acceded to the Rome Statute.<sup>69</sup> Prior to the ICC's claiming jurisdiction over a crime, it must first look to the region's national courts.<sup>70</sup> This is the principle of complementarity.<sup>71</sup>

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2003, the court said such crimes 'could constitute genocide, crimes against humanity or war crimes, and could thus fall within the jurisdiction of the ICC.'" *Id.* See PROSECUTOR SELECTS CONGO AS MOST URGENT CASE TO FOLLOW, July 16, 2003 ("The Prosecutor and his staff are currently analyzing credible reports they have received regarding the Congo and crimes such as murder, mass rape, the use of child soldiers, and large-scale displacement of civilians."), at <http://www.endgenocide.org/ceg-icc>.

68. See Amnesty International, *Democratic Republic of Congo: Massive Violations Kill Human Decency* (noting the prevalence of rape committed by the various armed forces in the region), at <http://web.amnesty.org/library/index> (last visited Oct. 20, 2003). Generally, victims refrain from filing official reports due to fear of social scorn and isolation or marital discord. *Id.* See also United States Fund for UNICEF, UNICEF Ambassador Jessica Lange Shocked and Deeply Moved by Systematic rape of Women and Children in Eastern DRC (observing that many rape victims contract HIV as a result of their sexual assaults because soldiers boast high rates of HIV), at <http://www.unicefusa.org/emergencies/drc/releases/081103.html> (last visited Oct. 20, 2003).

69. See *Rome Statute*, *supra* note 9, at art. 12, para. 1 (stating that by becoming a party to the Rome Statute, a state accepts the jurisdiction of the ICC with respect to genocide, crimes against humanity, war crimes, and the crime of aggression); see also *Ratification Status of the Rome Treaty*, Rome Statute of the International Criminal Court [hereinafter *Ratification Status*] (providing a list of states that have signed the Rome Statute and the states that have ratified or acceded to the Statute), at <http://www.un.org/law/icc/index.html> (last visited Oct. 24, 2003). The website provides a list of more than one-hundred twenty countries that have signed the Rome Statute. *Id.* Of the countries that have signed the Rome Statute, the website specifies which states have ratified the Rome Statute, thereby becoming party to the statute. *Id.* Some of the more than eighty states that are party to the statute include Australia, Argentina, Canada, France, Jordan, Italy, and the United Kingdom. *Id.* Nations that have signed but not yet ratified the statute include Chile, the Czech Republic, Haiti, Kuwait, Mexico, the Philippines, and the United Arab Emirates. *Id.* The website also lists the very few states, such as Dominica, that have acceded to the Rome Statute, thereby ratifying the statute without a prior signature. *Id.* The website additionally lists states that have signed the statute but have no present intentions of ratifying it. *Id.* For example, Israel signed the statute at the end of 2000. *Id.* However, on August 28, 2002, Israel declared that it did not intend to become a party to the Statute. *Id.* Therefore, "Israel has no legal obligations arising from its signature on 31 December 2000. Israel requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this [statute]." *Id.* The United States, which signed the statute on the same day as Israel did, also asserted that it had no intentions to be bound by the statute. *Id.* The website does not list states that have not yet signed the statute, such as India and Saudi Arabia. *Id.*

70. See JOHN T. HOLMES, *The Principle of Complementarity*, in THE

According to this principle, national courts have original jurisdiction over crimes occurring within their country's borders, and the ICC assumes jurisdiction only when the national judicial system fails to investigate or prosecute transgressors.<sup>72</sup>

### 3. DRC National Law and Protection

Although the DRC government's poor human rights record improved slightly during 2001, violence against women saw no such improvements.<sup>73</sup> The current status of women under DRC law is that of second-class citizens,<sup>74</sup> and thus, often times the national law is in direct violation of international women's rights.<sup>75</sup>

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INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 41 (1999) (stating that, although most states supported the establishment of an international criminal court, some states "were reluctant to create a body that could impinge on national sovereignty."); see also MAKING OF THE ROME STATUTE, *supra* note 12, at 6 ("[T]he existence of an international criminal court will also encourage [s]tates and national courts to exercise their jurisdiction over crimes committed in their territories or by their nationals; for, failing this, the international criminal court will be there to investigate and prosecute.").

71. *Rome Statute*, *supra* note 9, at art. 17, para. 1.

[T]he Court shall determine that a case is inadmissible where:

The case is being investigated or prosecuted by a [s]tate which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

The case has been investigated by a State which has jurisdiction over it and the [s]tate has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.

*Id.*

72. See HOLMES, *supra* note 70, at 42 (noting that some states did not want the international criminal court to serve as an international court of appeal, pre-empting or challenging the decisions of national courts).

73. See U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2001: CONGO: DEMOCRATIC REPUBLIC OF THE 145 (Apr. 2002) [hereinafter DEPT. OF STATE COUNTRY REPORT] (stating that there were fewer reports of general abuses by the government such as extrajudicial killings, disappearances, and torture). However, violence against women was rarely punished and rape continued as a widespread act of war. *Id.* at 146.

74. See THE WAR WITHIN THE WAR, *supra* note 65, at 84 (referring to Article 444 of the Congolese Family Code, which states that "[t]he husband is the head of the household. His duty is the protection of his wife; the wife owes her obedience to her husband."). Article 454 states that "the wife has to live with her husband and follow him anywhere he chooses to reside; the husband has to allow her to live with him." *Id.* at 84-85 n.234.

75. See *id.* at 84 (referring to the Convention on the Elimination of All Forms of Discrimination Against Women and the International Covenant on Civil and Political Rights, both of which have been ratified by the Congolese government and require the equality of men and women before the law). Therefore, the legal relegation of women to second-class citizens is in violation of the Convention and the International Covenant. *Id.*



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Although the Congolese Penal Code prohibits rape and indecent assault,<sup>76</sup> *de facto* authorities in the eastern part of the country have taken few steps to protect women and girls against rape by either side's soldiers.<sup>77</sup> Additionally, as a result of bribery and corruption within the judicial system, national courts have failed to protect the victims of sexual violence.<sup>78</sup> Because of such corruption, victims need greater protection<sup>79</sup> and seem to have nowhere to turn for help except to the international community.

#### 4. Turning to the ICC for Protection

The DRC signed the Rome Statute in September 2000 and ratified the Statute in April 2002, thereby coming under the ICC's jurisdiction.<sup>80</sup> Once the ICC Prosecutor establishes that the DRC's national courts are not competent enough to try the region's cases, the ICC can then have jurisdiction over the region.<sup>81</sup> The Prosecutor must then determine the Article under which to prosecute individuals for the region's gender-based crimes.<sup>82</sup>

76. See *id.* at 84 n.230 (differentiating between the two crimes as defined by articles 167, 168, 170, and 171 of the Congolese Penal Code). Rape is defined as forcible sexual penetration; indecent assault is a sexual assault without penetration. *Id.*

77. See *id.* at 84 (discussing the application of different laws in the DRC).

The RCD [also known as the Congolese Rally for Democracy and backed by the Rwandan army] has publicly claimed that it is applying Congolese law. According to international humanitarian law, Congolese laws continue to apply in areas of Congo which are not under the control of the government. National legislation continues in force in an occupied territory and *de facto* authorities are responsible for maintaining public order and ensuring that courts continue to function for all crimes covered by this legislation.

*Id.* However, witnesses have reported that the "RCD soldiers and Rwandan government backers rarely intervene when civilians are attacked, even in the immediate vicinity of their military posts." *Id.* at 79.

78. See *id.* at 79 (stating that although the RCD retained much of the pre-war personnel of the judicial system, most of the prosecutorial and judicial personnel are either unpaid or not paid regularly). As a result of the population's deteriorating socio-economic structure, judicial personnel increasingly rely on bribery and corruption, making many people lose faith in the system. See *id.*

79. See *id.* (describing an incident where a girl was raped along with her younger twin sisters and two friends).

Maybe they need send better soldiers to the neighborhoods. We need a better governor and a better government [than the RCD]. With this government, no one has the least pity for anyone. They kill people just like that. We really need peace. You can accept being poor if you can have some peace in your home and in the country. Instead we are attacked.

*Id.*

80. See *Ratification Status*, *supra* note 69.

81. See *Rome Statute*, *supra* note 9, at art. 17, para. 1 (giving the ICC jurisdiction over a crime if a national court is unable to exercise its jurisdiction).

82. See *supra* note 47 and accompanying text regarding the inclusion of gender-

The ICC may prosecute crimes under Article 7 regardless of whether they occurred during an armed conflict;<sup>83</sup> however, the ICC may prosecute crimes under Article 8 only if the crimes occurred during an armed conflict.<sup>84</sup> Although the Elements of Crimes<sup>85</sup> does not define armed conflict,<sup>86</sup> the crimes in the DRC would come under the Elements of Crimes's definition of an international armed conflict because of the role and occupation of the Rwandan and Ugandan armies in the region.<sup>87</sup> According to the Elements of Crimes, the DRC conflict is a type of armed conflict; yet, the ICC Prosecutor may choose to prove that the conflict is an armed conflict even according to ICTY<sup>88</sup> and ICTR<sup>89</sup> precedent.<sup>90</sup> Thus, the conflict

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based crimes under Articles 7 and 8.

83. See VON GABEL AND ROBINSON, *supra* note 48, at 92 (stating that the most important issue in the debate was whether the crimes required a nexus to armed conflict or whether they were applicable even in the absence of armed conflict). Some participants "even went so far as to require a nexus to international armed conflict" because it was required in the Nuremberg and Tokyo Chapters as well as in the ICTY Statute. *Id.* However, it was later argued that this inclusion in prior Chapters and Statutes served as a limitation on the jurisdiction of those Tribunals rather than as an element to the crimes. *Id.* See ROBINSON, *supra* note 45, at 58 (stating that some States wanted Article 7 to be applied only during times of armed conflicts). But because this was not the majority view, the states eventually agreed to "reject any provision restricting crimes against humanity to situations of armed conflict." *Id.*

84. See *id.* at 114 (stating that the concept of grave breaches in art. 8, para. 2(a) applies only to international armed conflicts). Furthermore, art. 8, para. 2(b) deals with the non-international armed conflicts. *Id.*

85. See *supra* note 35 (defining the Elements of Crimes as a guiding interpretative source for the Rome Statute).

86. See HERMAN VON GABEL, *The Elements of War Crimes, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE* 115 (Roy S. Lee ed., 2001) (stating that the drafters of the Rome Statute recognized the traditional difference in norms applicable to international and non-international armed conflicts). Thus, the drafters addressed international and non-international armed conflicts, as opposed to providing a definition or clarification for the meaning of armed conflict itself. *Id.*

87. See generally *Elements of Crimes*, *supra* note 35, at art. 8(2)(a)(i) n.34 (noting that an international armed conflict, although not clearly defined, is inclusive of military occupation).

88. See Prosecutor v. Tadic, Case No. IT-94-I-A, Judgment, ¶ 70 (Oct. 2, 1995) (defining armed conflict as "protracted armed violence between governmental authorities and [an] organized armed group."); see also Guénaél Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 HARV. INT'L L. J. 237, 309 n.285 (2000) (referring to the Tadic Appeal Chamber's definition of armed conflict and stating that the requirement of armed conflict can be satisfied even where there is no state participation).

89. See Alex Obote Odora, *Prosecution of War Crimes by the International Criminal Tribunal for Rwanda*, 10 U. MIAMI INT'L & COMP. L. REV. 43, 51 n.21-22 (2002) (citing to Prosecutor v. Alfred Musema, Case No. ICTR-96-13-T (Jan. 27, 2000) (providing a two-pronged definition for armed conflict: (1) the existence of open hostilities between armed forces, and (2) the existence of situations in which hostilities break out between armed forces or organized armed groups within the

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in the DRC would qualify as an armed conflict under the definitions of either the Elements of Crimes or the definitions that international law precedent provides.<sup>91</sup>

Because gender-based crimes are listed as crimes against humanity as well as war crimes, the ICC Prosecutor may choose to prosecute the acts as war crimes.<sup>92</sup> Under Article 8, the ICC Prosecutor would prosecute gender-based crimes committed in the DRC as war crimes dealing specifically with serious violations of the laws and conflicts applicable in international armed conflict.<sup>93</sup> Within the Rome Statute, a war crime must be “committed as part of a plan or policy or as part of a large-scale commission of such crimes.”<sup>94</sup> The Elements of Crimes for war crimes provides elaboration in the form of two main criteria: (1) the crime must have taken place in the context of and must have been associated with an international armed conflict, and (2) the perpetrator must have been aware of factual circumstances that established the existence of an armed conflict.<sup>95</sup>

Gender-based crimes occurring within the DRC partially meet the first requirement that the crime must have taken place in the context of an international armed conflict.<sup>96</sup> The crimes in the DRC have

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territory of a single state).

90. See HERMAN VON GABEL, *The Making of the Elements of Crimes, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE* 7-8 (Roy S. Lee ed., 2001) (noting that the Elements of Crimes is not binding on the ICC, but will have persuasive force). Because the Elements of Crimes is not binding upon ICC judges, the ICC Prosecutor may benefit by proving that the conflict in the DRC is an armed conflict according to the Elements of Crimes as well as according to international precedent. *Id.*

91. See generally *Amnesty DRC Report*, *supra* note 65 (discussing the hostility in the DRC). The conflict’s main players are the forces of the governments of Burundi, Rwanda and Uganda, who are governmental authorities, as well as the opposing armed groups such as the Congolese *mayi-mayi*, and Burundian and Rwandese armed political groups. *Id.* Open hostilities exist between these two armed sides and there have been situations in which hostilities have occurred within the DRC. *Id.* Thus, the DRC satisfies the definition of armed conflict according to the ICTY as well as the ICTR. *Id.*

92. See Lehr-Lehnardt, *supra* note 48, at 341 (noting that it is usually harder to prove rape as a crime against humanity because the ICC Prosecutor would have to primarily prove that the act was part of a widespread or systematic attack against a civilian population). However, to prosecute the rape as a war crime, the ICC Prosecutor must only prove that the individual rape was part of a plan or policy. *Id.*

93. *Rome Statute*, *supra* note 9, at art. 8, para. 2(a), (b) (dealing with international armed conflicts); see also *id.* at art. 8, para. 2(c), (e) (dealing with internal armed conflicts).

94. *Id.* at art. 8, para. 1.

95. See *Elements of Crimes*, *supra* note 35, at art. 8.

96. See KNUT DORMANN ET AL., *The Elements of War Crimes: The Context of War Crimes, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE* 120 (Roy S. Lee ed., 2001) (referring to the *Tadic* judgment and stating that the phrase “in the context of” should be interpreted in very

occurred and continue to occur within the general geographic and temporal vicinity of the armed conflict itself.<sup>97</sup> The second-half of the first criterion requires that there be some nexus between the individual crime and the on-going armed conflict.<sup>98</sup> Because the Elements of Crimes does not provide any guidance as to how the ICC Prosecutor should establish this nexus, the ICC may turn to the ICTY for guidance.<sup>99</sup> In the DRC, forces from both sides of the conflict are committing the majority of the gender-based crimes,<sup>100</sup> tying the crimes to the conflict.<sup>101</sup> Furthermore, the crimes occur throughout the eastern part of the DRC,<sup>102</sup> a region under control of the RCD and Rwandan army and where the armed conflict is on-going.<sup>103</sup> These facts may be sufficient to prove the nexus between the gender-based crimes and the conflict in the DRC.<sup>104</sup>

The second criterion evaluates the mental element of the crime and is arguably the more important of the two criteria.<sup>105</sup> The

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general geographic and temporal terms).

97. See HUMAN RIGHTS WATCH, WORLD REPORT 2002: DEMOCRATIC REPUBLIC OF CONGO (2002) (stating that the DRC government controls the western half of Congo while rebel movements backed by Rwanda and Uganda control the eastern half). See generally THE WAR WITHIN THE WAR, *supra* note 65 for gender-based crimes occurring in various parts of eastern Congo.

98. See DORMANN, *supra* note 96, at 128 (explaining that the reason for requiring the nexus is so that a violation committed by one civilian against another civilian over a personal conflict does not result in a finding of it being a war crime). Requiring the nexus guarantees that because the individual crime was linked to the conflict, the crime was more than a personal conflict, that it was a war crime. *Id.*

99. See *Tadic*, at ¶ 573 (requiring “an obvious link between the criminal act and the armed conflict . . . it is sufficient that the alleged crimes were closely related to the hostilities occurring in the other parts of the territories controlled by the parties to the conflict”).

100. See THE WAR WITHIN THE WAR, *supra* note 65, at 23 (stating that most of the forces engaged in the conflict have used sexual violence as a weapon of war).

101. See *id.* at 46 (noting that in eastern Congo, the number of rapes increased with the surge in military activity). “Soldiers and combatants raped and otherwise abused women and girls as part of their effort to win and maintain control over civilians and the territory they inhabited.” *Id.* at 23.

102. See *supra* note 97 (providing a source that specifies that much of the violence in the DRC occurs in the eastern part of the country).

103. See *id.* (explaining the geographical division of power in the DRC).

104. See *supra* note 99 (noting the requirement for a close relation between the crimes and the on-going hostilities). Because crimes only need to be closely related to the hostilities, the ICC Prosecutor may find the gender-based crimes and conflict to be closely enough related so as to satisfy the requirement of the nexus. *Id.*

105. See DORMANN, *supra* note 96, at 121 (stating that some States argued that the mental element was necessary to distinguish a war crime from an ordinary crime under national law).

These delegations felt that it would be unfair to brand a person as a ‘war criminal’ . . . if the person did not at least have some awareness of the armed conflict . . . and it would be unfair to convict a person [of a war crime] who was not aware of the armed conflict.

perpetrator must know of factual circumstances that establish the existence of an armed conflict.<sup>106</sup> However, the perpetrator has to know only enough facts so that he is aware of some sort of armed conflict.<sup>107</sup> With regard to gender-based crimes in the DRC, this *mens rea* requirement may not be hard to prove because, again, many of the perpetrators are members of the forces engaged in the conflict.<sup>108</sup>

The Elements of Crimes provides further guidance for gender-based crimes. According to it, a rape requires that the perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.<sup>109</sup>

The Elements of Crimes definition of rape is important within the DRC for a few reasons. The first is that the definition includes the rape of males by males, as opposed to including just female victims.<sup>110</sup>

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*Id.* However, the requirement of proving *mens rea* adds to the burden the ICC Prosecutor already has. *Id.* “[T]he Prosecutor would already be required to prove beyond reasonable doubt that the conduct took place ‘in the context of and was associated with’ an armed conflict.” *Id.* (emphasis added).

106. See *Elements of Crimes*, *supra* note 35, at art. 8 (establishing how the prosecutor may prosecute crimes committed during an international armed conflict); see also DORMANN, *supra* note 96, at 123 (noting that the element required is to be “aware of factual circumstances” as opposed to being “aware of the factual circumstances”) (emphasis added).

The omission of the word “the” underlined that such awareness would not have to relate to the whole complexity of facts determining the existence of an armed conflict, but rather that only some facts should be known by the perpetrator, sufficient for him or her to be aware of the existence of some sort of armed conflict.

*Id.*

107. See DORMANN, *supra* note 96, at 122 (stating that the perpetrator does not have to be aware of whether the conflict is of an international or internal nature as long as he is aware of the conflict). “Requiring a perpetrator to know about the character of a certain conflict and requiring the Prosecutor to prove such knowledge would have been too high a threshold, not required by existing law.” *Id.*

108. See THE WAR WITHIN THE WAR, *supra* note 65, at 25 (“In a significant number of cases women and girls who had been attacked recognized the difficulty of giving a positive identification and said only that their assailants were ‘armed men in uniform’ or, simply ‘men in uniform.’”); see *id.* at 22 (discussing the sexual harassment and rapes women suffer while living in RCD military camps); see also DORMANN, *supra* note 96, at 123 (stating that the mental element may be satisfied with proof of the nexus between the crime in question and armed conflict itself).

109. *Elements of Crimes*, *supra* note 35, at art. 7, para. 1(g)-1.

110. See *id.* at art. 8(2)(b)(xxii)-1 n.50 (“The concept of ‘invasion’ is intended to be broad enough to be gender-neutral.”); THE WAR WITHIN THE WAR, *supra* note 65, at 58 (discussing an incident when combatants rape a thirteen-year old girl and her sixteen-year old brother). *But see* Mettraux, *supra* note 88, at 316 n.285 for a discussion on how the ICTY’s definition of rape, which is very similar to the Rome Statute’s definition, may not cover all the situations where a rape conviction would be appropriate.

Secondly, the Elements of Crimes definition allows for rape to be penetration by body organs as well as by objects, similar to the ICTY and the ICTR.<sup>111</sup> This is important because there have been reports within the DRC of perpetrators inserting objects inside their victims.<sup>112</sup> Therefore, the occurrences of gender-based crimes in the DRC satisfy the war crimes requirements of the Rome Statute.

The judicial system in the DRC is failing to protect the large number of female victims who are suffering not only from the armed conflict but from additional gender-based crimes. These gender-based crimes satisfy the war crimes' requirements of the Rome Statute and the Elements of the Crimes, and thus, the ICC Prosecutor should thoroughly investigate the incidents in DRC and seek convictions.

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[I]f two men were forced to have sexual intercourse with each other (a common occurrence during the Bosnian conflict), one of the victims would not, pursuant to the definition given above, in the absence of penetration of his body, be regarded as having been raped. This illogical discrepancy may call for a reassessment of the definition given by ICTY which would allow this incident to be regarded as rape with respect to the two victims.

*Id.* Because the Rome Statute's definition of rape is very similar to that of the ICTY Statute's definition, the Rome Statute may also not cover forced rape between two men. *Id.*

111. See Prosecutor v. Furundzija, Trial Chamber of the ICTY, IT-95-17/1-T, Judgment, ¶ 185 (Dec. 10, 1998) (giving the ICTY's definition of rape as follows: "(i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator"); see also Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 598 (Sept. 2, 1998) (giving the ICTR's definition of rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive"), available at <http://www.ictcr.org>.

112. See THE WAR WITHIN THE WAR, *supra* note 65, at 39 (stating that sometimes women and girls were raped with objects such as sticks of wood and hot peppers).

*B. Kosovo**1. Trafficking*

Trafficking<sup>113</sup> flourishes throughout the world, aided by corruption, participation, and neglect by States.<sup>114</sup> Victims of this crime migrate in search of better lives and opportunities, only to be trapped in debt bondage, forced labor, and slavery-like conditions.<sup>115</sup> Women are most often the victims of trafficking,<sup>116</sup> and estimates

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113. See *Elements of Crimes*, *supra* note 35, at art. 7, para. 1(c) (defining trafficking as when “[t]he perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty”); see THE PRESIDENT’S INTERAGENCY COUNCIL ON WOMEN, TRAFFICKING IN WOMEN AND GIRLS, available at <http://secretary.state.gov/www/picw/trafficking/def.htm> (last visited Oct. 23, 2003). The Department of State defines trafficking as inclusive of

recruitment, abduction, transport, harboring, transfer, sale or receipt of persons through various types of coercion, force, fraud or deception for the purpose of placing persons in situations of slavery or slavery-like conditions, servitude, forced labor or services. Examples include, but are not limited to, sexual servitude, coerced prostitution, domestic servitude, bonded sweatshop labor or other debt bondage.

*Id.*

114. See generally HOUSE COMMITTEE ON INTERNATIONAL RELATIONS, 107TH CONG., TESTIMONY ON TRAFFICKING OF WOMEN AND GIRLS TO BOSNIA AND HERZEGOVINA FOR FORCED PROSTITUTION (2002) [hereinafter TESTIMONY ON TRAFFICKING] (providing the testimony of Martina E. Vandenberg, the European Researcher for the Women’s Rights Division of Human Rights Watch), available at <http://hrw.org/backgrounder/wrd/trafficking-testim-april.pdf> (last visited on Oct. 23, 2003). The testimony included general information and statistics on trafficking and summarized findings of Human Rights Watch in Bosnia and Herzegovina. *Id.*

115. See *EU Clampdown on Human Trafficking*, CNN, Sept. 28, 2001 [hereinafter *EU Clampdown*] (stating that female trafficking victims are often forced into prostitution or sweatshop industries, often being sold multiple times), at <http://www.cnn.com/2001/WORLD/europe/09/28/eu.trafficking/index.html>.

116. See Francis T. Miko, *Trafficking in Women and Children: The U.S. and International Response*, Congressional Research Service Report for Congress, Rep. 98-649 C, at 1 (2000) (estimating that one to two million people are trafficked annually, of which the overwhelming majority are women and children); Melanie Orhant, *Trafficking in Persons: Myths, Methods and Human Rights* (Dec. 2001) (stating that, “according to a 2000 report by the European Union’s Justice and Home Affairs Commission, women and girls are particularly vulnerable to trafficking because of the low status of women, poverty, and lack of educational and professional opportunities”), at <http://www.prb.org> (last visited Oct. 23, 2003); see also Susan W. Tiefenbrun, *Sex Sells But Drugs Don’t Talk: Trafficking of Women Sex Workers and an Economic Solution*, 24 T. JEFFERSON L. REV. 161, 170 (2002) (stating that traffickers are often successful in luring women because “these women are victims of poverty, of the social practice of marginalizing women, of the failure of some cultures and societies to place a value on traditional women’s work, and of the lack of education and employment opportunities for women in developing and transition countries”).

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show that between 750 to 1000 women and girls are trapped in brothels in the Balkans.<sup>117</sup>

Although Yugoslavia took an important step toward the war against trafficking in 2001 by signing the "Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime,"<sup>118</sup> little actual improvement has taken place within the region with regard to trafficking.<sup>119</sup> Female victims of trafficking told the United Nations that their employers sometimes forced them to provide free sexual services to local police officers;<sup>120</sup> other times, and even more shockingly, officers of the North Atlantic Treaty Organization ("NATO")<sup>121</sup> and International Police Task Force ("IPTF")<sup>122</sup> officers ("international officers") victimized the women.<sup>123</sup>

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117. See Miko, *supra* note 116, at 6 (noting that refugee women fleeing the conflicts in Bosnia and Kosovo are common victims for traffickers in the former Yugoslavia and the Balkans).

118. S.C. Res. 55/25, U.N. SCOR, 55th Sess., U.N. Doc. A/RES/55/25 (2001) (adopting the "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime"); see also Signatories to the UN Convention Against Transnational Crimes and its Protocols (providing a list of signatories to the Protocol), at [http://www.undcp.org/odccp/crime\\_cicp\\_signatures.html](http://www.undcp.org/odccp/crime_cicp_signatures.html) (last visited on Oct. 26, 2002). Yugoslavia signed the Protocol in December 2000 and ratified it in September 2001. *Id.*

119. See Human Rights Watch, *World Report 2002: Federal Republic of Yugoslavia (2002)* (noting that trafficking of women into Kosovo "continued to surge into 2001"), at <http://www.hrw.org/wr2k2/europe23.html>.

120. See Human Rights Watch, *World Report 2002: Women's Human Rights – Trafficking* (2002) [hereinafter *HRW Trafficking*] (describing how Bosnian police sometimes actively participated in trafficking women, for example by procuring false documents for traffickers), at <http://www.hrw.org/wr2k2/women.html#trafficking>; see also IHF-HR: "A Form of Slavery: Trafficking in Women in OSCE Member States" *Country Reports – Kosovo*, The Balkan Human Rights Web Pages (July 2000) (giving an off-the-record comment by the International Organisation for Migration director for Kosovo, stating that Serbian police were helping traffickers), at <http://www.greekhelsinki.gr/English/reports/ihf-wit-july-2000-kosovo.html>.

121. See generally North Atlantic Treaty Organization (providing list of member countries), at <http://www.nato.int/structur/countries.htm> (last visited Oct. 15, 2002).

122. See generally *International Police Task Force*, United Nations Mission in Bosnia & Herzegovina (providing a nationality-based composition of the forces), at <http://www.unmibh.org/unmibh/iptf/index.asp> (last modified Oct. 10, 2002). The task force monitors and advises the local police in order to change "the primary focus of the police from the security of the state to that of the individual." *Id.*

123. See HRW TRAFFICKING, *supra* note 120 (relating how IPTF officers, the United Nations police responsible for supervising local police, visited brothels as clients and even bought women for their own use). For example, in December 2000, the United Nations repatriated an American IPTF officer after discovering he had bought women from a Sarajevo brothel for less than \$2800. *Id.* See also Julie Hyland, *Explosive Growth Internationally in Trafficking of Women and Children for Sex Trade*, World Socialist Web Site (June 8, 2000) (noting the International Organization for



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## 2. Presence of the United Nations in Kosovo

As a result of the United Nations Security Council's adoption of Resolution 1244, the United Nations continues to administer Kosovo.<sup>124</sup> The Resolution also created the Kosovo Force (K-FOR), an international force composed of NATO troops to ensure public safety and peace.<sup>125</sup> While few sources on trafficking by international forces in Kosovo exist, traffickers include some members of the international force empowered with ensuring safety and peace in surrounding areas.<sup>126</sup>

The women, lured by false promises of work and victimized by many, cannot rely on the people or the laws that should protect them;<sup>127</sup> they have no where to turn. The issue is whether they can turn to the ICC for refuge and recourse.

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Migration's complaint that United Nations and international aid agency staff were among frequent visitors to the brothels), at <http://www.wsws.org/articles/2000/jun2000/traf-j08.shtml>; Andrew Locke, *Multimedia: Sex Slaves in Europe*, MSNBC (giving the account of one trafficking victim who said her clients often included NATO soldiers from Germany, France, Britain, and the United States stationed in Macedonia for peacekeeping duties), at <http://www.msnbc.com/news/725802.asp?pne=msn&cp1=1#BODY> (last visited Oct. 15, 2002).

124. See S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg., U.N. Doc. S/RES/1244 (1999) (authorizing the establishment of the United Nations Interim Administration in Kosovo, abbreviated as UNMIK). The Resolution empowered the United Nations to exercise all legislative and executive authority and essentially re-create Kosovo's judiciary system. *Id.*

125. See *id.* at para. 9(d) (stating that K-FOR's responsibilities include ensuring "public safety and order until the international civil presence can . . . take responsibility for this task"). *But see* Paul Anderson, *Serbian Police Swoop on Vice Bars*, BBC, Jan. 25, 2002 (explaining that "[t]he presence of more than 50,000 international peacekeepers in Kosovo and Bosnia has boosted demand for the services of prostitutes"), at <http://news.bbc.co.uk/2/hi/world/europe/1781324.stm>; see also Nicholas Wood, *Kosovo Sex Slave Trade Warning*, BBC, May 24, 2000 (reporting that "UN and aid agencies' staff in Kosovo have been accused of fueling a trade in forced prostitution"), at <http://news.bbc.co.uk/2/hi/world/europe/761183.stm>.

126. TESTIMONY ON TRAFFICKING, *supra* note 114, at 5 (referring to an incident in Bosnia-Herzegovina where Human Rights Watch found reports of misconduct by international forces). "In November 2000, International Police Task Force monitors conducted raids of three nightclubs . . . the raids . . . resulted in the expatriation of six IPTF officers." *Id.*

127. See *EU Clampdown*, *supra* note 115 (stating that trafficking victims have been disadvantaged from prosecuting their culprits because the victims are treated as illegal immigrants and deported); see also HRW *Trafficking*, *supra* note 120 (noting that often trafficking victims are subjected to prosecution, detention, and fines for administrative violations arising from their status as trafficking victims). Some of the violations include "illegal entry into the state, document fraud, and failure to procure a work permit." *Id.*

### 3. *The Judicial System in Kosovo and its Jurisdiction over the International Forces*

The United Nations is establishing the legal-framework in Kosovo.<sup>128</sup> In doing so, the United Nations' responsibilities include the appointment of judges and prosecutors within that legal-framework.<sup>129</sup> In a situation where the United Nations appoints the judicial players, prosecutions for trafficking usually focuses on locals, not on members of the international forces.<sup>130</sup> The international forces involved in trafficking are often officially disciplined for administrative reasons rather than for trafficking.<sup>131</sup>

As stated earlier, the ICC can only gain jurisdiction over a crime if the national courts of the State where the crimes occurred are unable or unwilling to investigate or prosecute the criminals.<sup>132</sup> While the

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128. See Hansjorg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 AM. J. INT'L L. 46, 49 (2002) (stating that in re-creating the judicial system in Kosovo, the United Nations used the Federal Republic of Yugoslavia's criminal code as its basis). The United Nations applied the code "within the framework of recognized international human rights standards." *Id.*

129. See *id.* at 51-55 (explaining the procedure of appointments within the judicial system in Kosovo). The UNMIK established an independent judicial commission, a diverse group of lawyers who accepted applications for the open positions. *Id.* at 52. The commission then selected candidates and made recommendations to the head of the UNMIK. *Id.* By June 30, 1999, the UNMIK appointed nine judges and prosecutors based on the recommendations of the commission. *Id.* at 53. By July 24, 1999, the UNMIK appointed twenty-eight judges and prosecutors. *Id.*

130. See *U.N. Mission in Kosovo on First Trafficking Conviction*, U.S. Dept. of State (Feb. 7, 2001) (providing information on the conviction and sentencing of a Kosovo Albanian man on charges of trafficking in women), at <http://usinfo.state.gov/topical/global/traffic/01020701.htm>; see also Beth Potter, *Illegal Traffic: U.N. Regulation Prompts Prosecution of Human Traffickers in Kosovo*, IN THE NEWS (July 12, 2002) (crediting a 2001 United Nations regulation that made human trafficking illegal in Kosovo). "The regulation allows police to confiscate property of suspected traffickers," who may receive two to twenty years in prison for trafficking. *Id.* After the United Nations passed the regulation, arrests and prosecution of traffickers increased. *Id.* This included arrests at a well-known bar in Pristina that was "rumored to be a hangout of international workers, including off-duty police and soldiers." *Id.*

131. See TESTIMONY ON TRAFFICKING, *supra* note 114, at 5 (noting that in one incident where IPTF members were found among traffickers, the official reason for their repatriation was that the officers conducted the raids themselves instead of supervising the actions of the local police officers). However, a United Nations official informed Human Rights Watch that one of the girls released from the raid told him that the IPTF monitors had actually been among her clients. *Id.*

132. See HOLMES, *supra* note 70, at 49 (defining a court's inability to prosecute a criminal as the State's inability "to obtain an accused or key evidence and testimony, and its inability to do so must relate to the partial or total collapse of its judicial system . . . 'or [the state must be] otherwise unable to carry out its proceedings'"). If the ICC claims jurisdiction over a crime based on the domestic court's unwillingness, the ICC must prove one of two things: either that the purpose of the domestic court's proceedings was to shield the perpetrator or that the domestic legal system's investigation or proceedings caused an undue delay "inconsistent with an intent to

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courts in Kosovo may be able to prosecute the international officers for trafficking,<sup>133</sup> the question about the courts' willingness remains,<sup>134</sup> based primarily on the issue of the court's independence and impartiality.<sup>135</sup> The ICC can intervene in proceedings when the domestic court may not be able to guarantee impartial proceedings.<sup>136</sup> Arguably, courts established by the United Nations in Kosovo will not be able to guarantee fair and impartial proceedings of United Nations officers because the United Nations appointed the judges and prosecutors.<sup>137</sup>

Because the trafficking occurs in Kosovo and the domestic courts may be unable to prosecute impartially the international forces responsible for their role in the trafficking, the ICC may be able to gain jurisdiction over the officers.<sup>138</sup>

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bring the perpetrator concerned to justice." *Id.* at 50.

133. See UK Home Office, Immigration and Nationality Directorate, *Asylum in the UK: Human Rights Issues* (explaining that "[t]rafficking is specifically prohibited by an UNMIK regulation, with a penalty of 2-20 years imprisonment . . . [a] special unit of UNMIK police, Trafficking and Prostitution Investigations Unit, has been set up to deal with the issue [of trafficking]."), at <http://www.ind.homeoffice.gov.uk/default.asp?PageId=2882> (last viewed Oct. 12, 2002).

134. See HOLMES, *supra* note 70, at 50 (stating that the main reason for including a provision on unwillingness was "to preclude the possibility of sham trials aimed at shielding the perpetrator").

135. See *id.* (explaining that in determining the criteria for "unwillingness", the final criterion was whether the national court could be independent and impartial with regard to the proceedings). States present at the conference considered impartiality because they acknowledged the possibility that a state could have procedural problems, which could be inconsistent with the intent to bring an accused to justice, although the state may not actually be shielding the perpetrators. *Id.*

136. See *id.* at 50-51 (giving an example of when a domestic court may not be able to guarantee impartiality). "While the State may genuinely be endeavoring to prosecute someone . . . , there may be individuals who manipulate the conduct of the proceedings to ensure that the accused are not found guilty (for example, engineering a mistrial or deliberately violating a defendant's rights to taint evidence or testimony)." *Id.*

137. See Peter W. Murphy, *Judging War Criminals*, 35 TEX. INT'L L.J. 325, 327 (2000) (arguing that "the enforcement of the law depends on certain political realities"). Sometimes the feasibility of international intervention in cases of conflict depends on the "political interests of the likely enforcers." *Id.* at 327-28. Thus, in Kosovo, the political interests of the judges and prosecutors may prevent impartial legal proceedings of international officers. *Cf. id.* at 329 (discussing the political tension that may arise when the UN, through the ITCY, addresses NATO actions in Serbia, because of the similar members and interests in NATO and the security counsel). *But see generally* Press Statement, UNMIK Spokesman Simon Haselock, UNMIK Press Office Press Briefing (Feb. 7, 2002) (stating that "[t]he judicial process [in Kosovo] is independent of the political one. UNMIK has stood firm against all who have tried to subvert the independence of the judicial system. This independence is a fundamental principle of a civil society."), available at <http://www.unmikonline.org/press/2002/trans/tr070202.htm>.

138. See *Rome Statute*, *supra* note 9, at art. 12, para. 2(a) (stating that the ICC can exercise jurisdiction if the state where the alleged crime occurred is a party to the Rome Statute).

#### 4. *National Courts of the Accused International Officers*

Nations considering becoming a Party to the Rome Statute often must also consider the issue of national sovereignty.<sup>139</sup> The ICC may exercise its jurisdiction only under the circumstances given in Article 12, paragraphs 2-3 of the Rome Statute.<sup>140</sup> Although the ICC may have jurisdiction over the case of an international officer accused of trafficking in Kosovo because of the lack of impartiality of the national courts in Kosovo, the ICC may still lack jurisdiction if a suspected international officer's national courts enforce jurisdiction.<sup>141</sup>

While members of the United Nations did not unanimously favor the establishment of the ICC,<sup>142</sup> many members of the United Nations did favor the establishment of an international court.<sup>143</sup> Specifically, the European Union ("EU" or "Union")<sup>144</sup> has long supported the world's need for an international criminal court.<sup>145</sup> At the Rome Conference, the EU made a statement claiming its

139. See *supra* notes 70-72 and accompanying text (discussing the Rome Statute's careful consideration of complementarity).

140. See *Rome Statute*, *supra* note 9, at art. 12 (requiring that the perpetrator's State of nationality or the territorial State where the crime occurred be a Party to the Rome Statute).

141. See *id.* at art. 17, para. 1 (a)-(c) (stating that the ICC cannot have jurisdiction over an individual if the individual's national courts, which exercise primary jurisdiction, are investigating or prosecuting the case).

142. See, e.g., American Service-Members' Protection Act, H.R. 4775, 107th Cong. §§ 2001-15 (2002) (stating Congress' opposition to the establishment of the ICC). The main argument for American opposition is that the ICC could prosecute United States armed forces operating overseas even if the United States is not a party to the Rome Statute. *Id.* The American Service-Members' Protection Act claims that the United States government has an obligation to protect its armed forces, whom the ICC may seek to prosecute, especially forces stationed overseas to protect the United States' national interests. *Id.* Although President Clinton signed the Rome Statute, he stated that he would not submit the Rome Statute to the Senate for advice and consent, nor would he advise his successor to do so. *Id.* In addition to the United States, China and Israel also voted against the Statute. See *Rome Statute of the International Criminal Court: Some Questions and Answers* (Oct. 1998) (providing answers to general questions about the Rome Statute and the ICC), at <http://www.un.org/law/icc/statute/iccq&a.htm>.

143. See Sean D. Murphy, *U.S. Notification of Intent Not to Become a Party to the Rome Statute*, 96 AM. J. INT'L L. 724, 724 (2002) (noting that 120 of the 160 states in attendance at the Rome Conference voted in favor of the ICC, while seven states voted against it and twenty-one states abstained).

144. See generally *The European Union at a Glance*, Europa: The European Union On-Line (discussing the creation and history of the European Union), at [http://www.europa.eu.int/abc/index\\_en.html](http://www.europa.eu.int/abc/index_en.html) (last viewed Oct. 15, 2002). The EU has fifteen member states and is preparing for the accession of thirteen additional states within the next few years. *Id.* The current member states of the EU are Austria, Belgium, Denmark, Germany, Greece, Finland, France, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom. *Id.*

145. See *infra* notes 145-48 and accompanying text (discussing the European Union's consistent support of the ICC through the Rome Conference and thereafter).

commitment to and support of the ICC.<sup>146</sup> The EU's continuous support for the ICC was prominent before the adoption of the Rome Statute<sup>147</sup> and after the establishment of the ICC.<sup>148</sup> The Union has even made attempts to convince the United States to change its stand and to ratify the Statute, but to no avail to present day.<sup>149</sup>

The main problem with regard to trafficking, especially in Kosovo, is that because the culprits are international peace-keeping officers, often there is no official record of their involvement in trafficking.<sup>150</sup> When their involvement is discovered, as stated above, officers are repatriated for administrative actions.<sup>151</sup> Without official proof of an officer's role in trafficking, national courts would not have any basis

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146. See Statement at the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court ¶ 4 (July 17, 1998) (claiming that “[f]rom the very outset, the EU has committed itself to the creation of this permanent judicial institution which would make the world a more just, safer and more peaceful place”), available at <http://ue.eu.int/pesc/icc/pdf/eu/ICC3EN.pdf>.

147. See Council Common Position of 11 June 2001 on the International Criminal Court (stating that the purpose of the Common Position “is to pursue and support an early entry into force of the Rome Statute,” and therefore early establishment of the ICC), available at <http://ue.eu.int/pesc/icc/pdf/eu/ICC0EN.pdf> (last viewed Nov. 8, 2002). Article 2 of the Common Position states that the EU “and its [m]ember [s]tates shall make every effort to further [the ratification of the Rome Statute] by raising the issue of the widest possible ratification, acceptance, approval or accession to the Rome Statute . . . in negotiations or political dialogues” with other states. *Id.*

148. See EU Presidency Statement on the ICC (Sept. 9, 2002) (stating that “[t]he countries of Central and Eastern Europe associated with the European Union: Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia, and the associated countries Cyprus and Malta . . . align themselves with this statement . . . The EU will do its utmost to ensure that the threshold of 100 States Parties [for ratification] be crossed before the 1st of April 2003”), at <http://europa-eu-un.org/article.asp?id=1588>; see also Commissioner Patten's Statement on the ICC at the EP (Sept. 25, 2002) (asserting that “[t]he European Union fully supports the ICC” and that the principles of the Rome Statute “are fully in line with the principles and objectives of the Union”), available at <http://europa-eu-un.org/article.asp?id=1640>.

149. See EU Presidency Declaration on US Position of the ICC (May 13, 2002) (“The European Union is disappointed that the United States has felt obliged to act as it has without the benefit of actual experience of the Court's activities.”), at <http://europa-eu-un.org/article.asp?id=1372>; see also European Parliament Resolution on the Draft Servicemembers' Protection Act 2002 O.J. (386) (reminding the United States that by “taking national judicial action itself, the US can prevent its citizens from being brought before the International Criminal Court”), available at <http://www.globalpolicy.org/intljustice/icc/crisis/0704res.htm> (last visited Oct. 16, 2002).

150. See Tiefenbrun, *supra* note 116, at 170 (noting that statistics regarding trafficking are often unreliable “because of the clandestine nature of the crime and the social stigma attached to sex worker activity.”); see 4 Encyclopedia of Pub. Int'l Law *Traffic in Persons* 895 (2000) (stating that “trafficking is underreported, statistical information is inaccurate and fragmentary and the true extent of the problem remains unknown”).

151. See *supra* note 131 (discussing a situation when administrative reasons were given for the repatriation of IPTF officers involved in trafficking).

for prosecuting the officer for trafficking.<sup>152</sup> This leaves the international officers free from prosecution by the courts in Kosovo as well as their own country's courts.<sup>153</sup>

##### 5. *Trafficking in Kosovo as a Crime Against Humanity*

Yugoslavia signed the Rome Statute in December 2000 and ratified it in September 2001,<sup>154</sup> thus coming under the ICC's jurisdiction. The Rome Statute's definition of enslavement as a crime under humanity includes trafficking.<sup>155</sup> The Elements of Crimes requires two primary elements for crimes against humanity: (1) "[t]he conduct must be part of a widespread or systematic attack directed at a civilian population," and (2) "the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against the civilian population."<sup>156</sup> Furthermore, the Rome Statute also defines an attack directed at a civilian population as "a course of conduct involving the multiple commission of acts . . . against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."<sup>157</sup>

The Rome Statute has lowered the threshold by applying the disjunctive test of widespread<sup>158</sup> or systematic,<sup>159</sup> as opposed to widespread and systematic.<sup>160</sup> Although the Rome Statute and the

152. See *supra* notes 150-51 and accompanying text (noting the difficulty in finding statistical or oral proof of trafficking).

153. See *supra* notes 134-39, 149-51 and accompanying text (explaining why the Kosovo courts and the courts of the international officers' nations may not exercise their jurisdiction).

154. See *Ratification Status*, *supra* note 69.

155. See *Rome Statute*, *supra* note 9, at art. 7, para. 1(c) (including enslavement as a crime against humanity); see *id.* at art. 7, para. 2(c) (defining enslavement as "the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children").

156. See *Elements of Crimes*, *supra* note 35, at art. 7.

157. *Rome Statute*, *supra* note 9, at art. 7, para. 2(a).

158. See ROBINSON, *supra* note 45, at 63 (defining widespread as "requiring large-scale activity involving a great number of victims.").

159. See *id.* (defining systematic as "requiring methodical organization or orchestration.").

160. See *id.* (discussing generally the debate between States that opposed the disjunctive test and those that favored it). Many Arab and Asian States argued that the disjunctive test had a low threshold and therefore may have unintended consequences. *Id.* These States said, for example, that a common crime wave may satisfy the widespread requirement, although it may not satisfy a requirement of widespread *and* systematic. *Id.* In response to this argument, the Rome Statute included a definition of attack that raised the threshold. *Id.* "The result is a high-threshold but disjunctive test (widespread or systematic) coupled with a low-threshold but conjunctive test (multiple and policy)." *Id.*

Elements of Crimes do not provide a precise definition of either widespread or systematic, the ICC Prosecutor could again turn to other international tribunals for further guidance.<sup>161</sup>

The ICC Prosecutor may be able to prove that trafficking in Kosovo is both widespread and systematic.<sup>162</sup> The number of trafficking victims may help the ICC Prosecutor prove the widespread criteria of the crime against humanity.<sup>163</sup> Trafficking of women in Kosovo victimizes thousands of girls and women<sup>164</sup> and furthers trafficking and prostitution rings and criminal cartels throughout Europe,<sup>165</sup> thereby satisfying the criterion of a widespread crime. Additionally, evidence of wide-scale participation throughout Europe, which promotes trafficking and benefits other criminal networks, proves the systematic aspect of the crime.<sup>166</sup> The organization of trafficking is

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161. See, e.g., *Akayesu*, *supra* note 111, at ¶ 580 (using the ILC's definition of widespread as used in the 1996 Draft Code of Crimes: "massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims"). The ICTR defined "systematic" as "thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources." *Id.* In *Prosecutor v. Clement Kayishema & Obed Ruzindana*, the ICTR defined "widespread" as "directed against a multiplicity of victims." ICTR-95-1-T, Judgment, ¶ 123 (May 21, 1999), available at <http://www.ictr.org>. The same case defined "systematic" as "carried out pursuant to a preconceived policy or plan." *Id.*

162. *But see* Andrew Hayes, *Prostitution in the European Union: Eastern Europe and Human Trafficking*, at [http://www.ex.ac.uk/politics/pol\\_data/undergrad/Hayes/page4.html](http://www.ex.ac.uk/politics/pol_data/undergrad/Hayes/page4.html) (last viewed Oct. 15, 2002).

Due to the understandable unwillingness of women working in the sex industry to speak to the police, coupled with poor data collection procedures on the part of the police; information regarding the extent of human trafficking from Eastern Europe is hard to find. Trafficking in women, remains a largely hidden problem.

*Id.*

163. See Miko, *supra* note 116, at 1 (asserting that victims of trafficking average one to two million per year).

164. See *id.* (claiming roughly 75,000 victims trafficked from Eastern Europe).

165. See *Eighty Held in Sex-Trafficking Sweep*, BBC, Oct. 2, 2002 [hereinafter *Sex-Trafficking Sweep*] (sharing how "Italian authorities believe Russian and Italian crime syndicates worked together to bring in the migrants, before exploiting them as prostitutes or slave labourers."), at <http://news.bbc.co.uk/2/hi/world/europe/2293947.stm>; see also *Human Trafficking Ring Smashed*, BBC, Oct. 1, 2002 (claiming that, according to the Detective of the United Kingdom's National Crime Squad's Immigration Crime Team, "human trafficking generates millions of pounds for the organised crime groups involved in the same way other groups traffic drugs"), at [http://news.bbc.co.uk/2/hi/uk\\_news/england/2289755.stm](http://news.bbc.co.uk/2/hi/uk_news/england/2289755.stm); see also Alexandra Poolos, Radio Free Europe/Radio Free Liberty, *East: Trafficking of Women on Rise in Eastern Europe* (Part I) (asserting that "the Balkans have become a prime destination for crime rings trafficking in women from neighboring Central and Eastern European countries"), at <http://www.rferl.org/nca/features/2001/05/23052001114902.asp> (last visited Oct. 14, 2002).

166. See Tiefenbrun, *supra* note 116, at 172 (listing Thailand, Mexico, Russia, and China, among others as common trafficking sources countries and naming the United States, Japan, Israel, Germany, and Holland, among others, as common

evident in the various ways that traffickers lure their victims.<sup>167</sup> As both widespread and systematic, the trafficking of women in Kosovo also satisfies the definition of attack provided within Article 7.<sup>168</sup>

The *mens rea* requirement of Article 7 is equally significant in the analysis of crimes against humanity.<sup>169</sup> The perpetrators, in this case the international officers, do not need to have knowledge of the widespread or systematic nature of the attack.<sup>170</sup> The perpetrators also do not need to be aware of the underlying policy.<sup>171</sup> Therefore, the ICC could find the international officers guilty of trafficking even though the officers may not know how many victims the trafficking produced or the extent of the methodical orchestrations behind the trafficking rings.<sup>172</sup>

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destination countries for trafficking victims); *see also id.* at 173 (stating that “there is a direct link between sex trafficking and drugs”). “The trafficking industry is also closely intertwined with other related criminal activities, such as extortion, racketeering, money laundering, bribery of public officials, drug use, gambling, smuggling, loan sharking, conspiracy, document forgery, visa, mail, and wire fraud.” *Id.* *See* Orhant, *supra* note 116 (discussing the role of trafficking within the context of organized crimes).

Trafficking has turned into a big business; according to the [Congressional Research Service], trafficking in people represents the third largest source of profits for organized crime after drugs and guns, generating billions of dollars each year. Organized crime groups operating within and across borders often run trafficking networks. These networks are structured, organized, well-funded, and operated beyond the reach of law enforcement. Some traffickers are individuals or small groups that traffic people for specific purposes.

*Id.*

167. *See Sex-Trafficking Sweep, supra* note 165 (explaining that “a network of travel agents, coach companies and hotel owners have been lured [sic] women from Eastern Europe to the West”).

168. *See* ROBINSON, *supra* note 45, at 63 (stating that while a crime against humanity does not have to be widespread, the crime must affect multiple victims). Therefore, when a crime satisfies the widespread criterion, the multiple victims criterion is simultaneously achieved. *Id.* Furthermore, although the crime does not have to be systematic, it must “at least be pursuant to or in furtherance of some sort of plan or policy of a State [or] organization.” *Id.* Accordingly, where the systematic criterion is met, the criterion of furthering a State or organization’s policy is also arguably satisfied. *Id.*

169. *See id.* at 64 (asserting that the perpetrator must be aware of the attack for purposes of Article 7).

170. *See id.* at 72 (discussing generally the debate between States about the extent of knowledge the perpetrator should have about the attack).

171. *See id.* at 73 (“In general, the existence of a policy would be inferred by the [ICC] from the relevant facts and circumstances.”).

172. *See* Sebastian Junger, *Slaves of the Brothel*, VANITY FAIR, July 2002, at 162-63 (providing one example of a raid of a club by U.N. police officers to rescue trafficking victims); *see also* Press Statement, OSCE Spokesperson Sven Lindholm, UNMIK Press Office Press Briefing (Feb. 7, 2002) [hereinafter Press Statement by OSCE Spokesperson] (discussing a program set up to combat trafficking and support victims in Kosovo that includes the UNMIK Police Trafficking and Prostitution Investigation Unit), at <http://www.unmikonline.org/press/2002/trans/tr070202>.



### 6. Likelihood of the ICC Prosecuting the International Officers

If the Kosovo courts are unwilling to prosecute the officers due to the courts' partiality and the courts within the officers' countries are equally unwilling to prosecute due to a lack of official evidence,<sup>173</sup> perhaps the ICC can prosecute the case.<sup>174</sup> However, while trafficking in Kosovo may meet all the requirements of a crime against humanity as set out in the Rome Statute, the issue remains whether nations will give up their sovereignty.<sup>175</sup> While the United States has been, and continues to be, reluctant to ratify the Rome Statute because it is unwilling to give up any national sovereignty,<sup>176</sup> other nations, including member states of the European Union, have agreed to give up at least some of their national sovereignty.<sup>177</sup> However, as supportive as the EU has been to the formation and establishment of the ICC,<sup>178</sup> some uncertainty remains as to whether the EU member states would really give up their sovereignty in order

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htm. The UNMIK set up this unit "specifically to provide a coordinated law enforcement response in the context of action against trafficking." *Id.* The UNMIK's involvement in fighting trafficking and the UNMIK raids of establishments where trafficking victims often work demonstrates awareness by the international forces present in Kosovo of trafficking in the region. See Press Release, Public Information Officer Barry Fletcher, UNMIK Police Press Office, Formation of UNMIK Anti-Prostitution Unit (Oct. 29, 2000) (discussing the reasons for the unit's creation), at <http://unmikonline.org/civpol/archive/pr251002.htm>. Therefore, although it is not necessary for the perpetrators of trafficking to know about the widespread or systematic nature of the crime or any underlying policy, international officers in Kosovo are most likely aware of the trafficking problem in the region.

173. See *supra* notes 150-53 and accompanying text (discussing how nations may be reluctant to give up their sovereignty in dealing with their officers involved in trafficking).

174. See *Rome Statute*, *supra* note 9, at art. 12 (explaining that the ICC can exercise jurisdiction over a crime if either the State where the crime occurred or the criminal's State of nationality are parties to the ICC or accept its jurisdiction).

175. See *generally Ratification Status*, *supra* note 69 (expressing concerns voiced by nations such as the United States and Israel); see also MAKING OF THE ROME STATUTE, *supra* note 12, at 601-02, 632-35 (providing the comments and views of the Israeli and U.S. governments regarding the loss of their national sovereignty if they become party to the Rome Statute).

176. See Wes Vernon, *Globalists Glum as Lawmakers Reject International Criminal Court* (July 19, 2002) (referring to the Rome Statute's mandate that once a country ratifies the Statute, the country should modify its constitution and laws to ensure compatibility with the Statute), at <http://www.newsmax.com/archives/articles/2002/7/18/193941.shtml>. Some Americans view this to mean that the United States would have to give up its sovereignty just "so the globalists can have their international star chamber." *Id.*

177. See, e.g., Crimes Against Humanity and War Crimes Act, R.S.C., ch. 24 (2000) (Can.) (implementing Canada's obligations under the Rome Statute to ensure its ability to cooperate with the ICC's investigations and prosecutions), available at <http://laws.justice.gc.ca/en/c-45.9/39995.html>.

178. See *supra* notes 146-48 and accompanying text (demonstrating the European Union's support of the ICC).

for the ICC to prosecute their officers.<sup>179</sup> Therefore, whether the ICC could actually prosecute international peace-keepers for their role in trafficking also remains unanswered.

If the ICC chooses to prosecute the officers for trafficking, the issue then comes down to evidence. The Rome Statute adopted rules of evidence regarding consent and prior sexual conduct in sexual violence cases but did not do so for trafficking cases.<sup>180</sup> Even though the definition of trafficking may not include sexual violence, in reality, trafficking of women often includes some type of sexual violence.<sup>181</sup> Because the Elements of Crimes is persuasive and not

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179. See Bertus Hendriks, *European Commission: Down and Out in Brussels*, RADIO NETHERLANDS (March 16, 1999) (discussing the struggle between the European States and the European Parliament, which is the EU's Assembly established in Brussels, Belgium), at <http://www.rnw.nl/hotspots/archive/eur/html/europe160399.html>. The European Parliament was not performing its role as watchdog. *Id.* However, although the European States wanted to form the European Union, "the founding members of the European Union were, and still are, very reluctant to give up national sovereignty, vested in their own national parliaments, to a kind of supranational government in Brussels." *Id.* Thus, although these States supported the establishment of the ICC, they may be hesitant to give up their national sovereignty to the International Criminal Court. *Id.* Therefore, at least with regard to trafficking of women in Kosovo by EU's international officers, whether States that have sworn allegiance to the ICC will actually allow their armed forces to be prosecuted within the ICC remains to be seen. *Id.*

180. See *Rules of Procedure and Evidence*, *supra* note 36, at Rule 70 (stating the rule regarding evidence for sexual violence cases).

In the case of sexual violence, the [ICC] shall be guided by and, where appropriate, apply the following principles:

- (a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;
- (b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
- (c) Consent cannot be inferred by reason of the silence, or lack of resistance by, a victim to the alleged sexual violence;
- (d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.

*Id.*

181. See *supra* note 113 (providing definitions of trafficking); see also Orhant, *supra* note 116 (explaining that trafficking victims often suffer many physical and psychological health problems as a result of sexual violence).

Women are specifically vulnerable to reproductive and other gender-specific health problems in trafficking situations as they have little or no access to reproductive health care. These problems include lack of access to birth control, constant rapes, forced abortions and contraceptive use, lack of regular mammograms and Pap smears, and other health issues. Women in domestic servitude are subject to rape and other physical abuse, while women in forced prostitution suffer increased risk of sexually transmitted infections, including HIV/AIDS, repetitive stress injuries, and back problems.

*Id.*

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binding upon the ICC, the ICC Prosecutor may choose to apply the rules of evidence created for sexual violence to trafficking victims as well.<sup>182</sup> In doing so, victims trafficked by international peace officers could testify against the officers regarding the victims' lack of consent and the sexual violence they endured.<sup>183</sup> Additionally, the testimony of victims and witnesses in sexual violence cases would not require corroboration.<sup>184</sup> If the ICC Prosecutor chooses to employ rules regarding sexual violence to trafficking in Kosovo, the ICC could successfully prosecute international officers for trafficking.

#### CONCLUSIONS AND RECOMMENDATIONS

Much of the world saw the establishment of the International Criminal Court as an answer to the prayer for international justice.<sup>185</sup> As a result of the concise writing of the drafters of the Rome Statute and the Elements of Crimes, the ICC can arguably exercise jurisdiction over many different types of crimes in varying circumstances.<sup>186</sup>

The ICC Assembly of States<sup>187</sup> should consider creating rules of evidence for trafficking similar to the rules for sexually violent cases because trafficking victims are often victims of sexual violence as well. This would help with the prosecution and possible conviction of international officers for trafficking when there may be questionable evidence supporting both sides of the argument.

The ICC Prosecutor should immediately prosecute gender-based crimes occurring in Democratic Republic of Congo. A recently issued

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182. See VON HEBEL, *supra* note 90, at 7-8 (noting that the ICC Prosecutor has some discretion with the application of the Elements of Crimes because it is not binding upon the ICC).

183. See *Rules of Procedure and Evidence*, *supra* note 36, at Rule 70 (a)-(c) (providing rules regarding consent and the disclosure of evidence in cases of sexual violence).

184. See *id.* at Rule 63, para. 4 ("Without prejudice to article 66, paragraph 3, a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence.").

185. See Human Rights Watch, *Questions and Answers about the ICC and the United States* (explaining that the ICC's creation followed a century of atrocities and the subsequent need for accountability), at [www.hrw.org/campaigns/icc/qna.htm](http://www.hrw.org/campaigns/icc/qna.htm) (last visited Oct. 14, 2003); see also *supra* notes 26, 28-29, 34, 38 and accompanying text (detailing the reasons for the creation, stagnation, and subsequent revival of the drafting and revising processes).

186. See *supra* notes 32-50 and accompanying text (discussing how the text of the statute was drafted and revised to succeed in areas previously missed).

187. See generally THE MAKING OF THE ROME STATUTE, *supra* note 12 (discussing the duties of the Assembly of the States). The Assembly of the States is the governing body of the ICC made up of States that are party to the Rome Statute. *Id.*

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press statement by the United Nations portrays the immediate need for international focus in that region.<sup>188</sup> Trafficking in Kosovo is a concern for States as well as organizations around the world;<sup>189</sup> unfortunately, when the perpetrators are those in whom we place our faith to carry out justice,<sup>190</sup> those peace-keepers may not be brought to justice for their actions.<sup>191</sup> With the visibility of the crimes against humanity and war crimes occurring in both the Democratic Republic of Congo and Kosovo, the ICC Prosecutor's attention should first focus on these two regions.

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188. See *supra* note 68 and accompanying text (presenting the text of the press statement).

189. See Press Statement by OSCE Spokesperson, *supra* note 172 (stating that the UNMIK Police Trafficking and Prostitution Investigation Unit, many parts of the OSCE, the International Organization for Migration, and numerous local partners are working together to combat trafficking in Kosovo), available at <http://www.unmikonline.org/press/2002/trans/tr070202.htm>.

190. See *supra* pp. 56-58 (discussing the presence of UN officers in Kosovo).

191. See *supra* pp. 61-63 (describing the potential conflict between the UN established courts' partiality in trying its own officers); see also *supra* pp. 60-70 (explaining that administrative rather than criminal action may be the UN remedy for its officers).