Vanderbilt Journal of Transnational Law

Volume 35
Issue 4 *October 2002*

Article 5

2002

The Prosecution of Rape Under International Law: Justice That Is Long Overdue

James R. McHenry, III

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ABSTRACT

This Note argues that despite theoretical criticisms, the prosecution of rape and sexual enslavement as crimes against humanity by the International Criminal Tribunal for the former Yugoslavia (ICTY) fits within a larger, emerging picture of international legal jurisprudence. First, the ICTY built upon both its own prior decisions and the decisions of the International Criminal Tribunal for Rwanda (ICTR), especially Prosecutor v. Akayesu, *in order to close gaps in the international legal conceptualizations of rape and enslavement, torture, war crimes, genocide and crimes against humanity. Second, building upon the example set by the ICTR, the ICTY broadened international protections of civilians of either gender, especially civilians of different ethnicities, from even unsystematic acts of depravity. Third, it fully codified women as legally equal to men in the human community, but it did not unfairly single women out as a weaker gender in need of special protections, nor did it establish a victimology for women in rape cases. In other words, it brought women within the purview of humanity for purposes of prosecuting crimes against humanity. Finally, it established an historic foundation for the prosecution of crimes against humanity by other courts and in other locations, but did not infringe upon the sovereignty of either a state or an individual.*

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According to a 1996 indictment by prosecutors at the International Criminal Tribunal for the former Yugoslavia (ICTY), eight Bosnian Serb police and military officers raped and sexually assaulted fourteen Bosnian Muslim women in the town of Foca, a

bucolic village in southeastern Bosnia-Herzegovina.[1] The eight officers, all men, detained and enslaved the women in houses and apartments that they maintained as brothels for paramilitary troops.[2] All of the women, including some girls as young as twelve years old, were subjected to "almost constant rape, sexual assault, and torture."[3] The impact of these attacks was both psychologically and physically devastating:

> The physical and psychological health of many female detainees seriously deteriorated as a result of these sexual assaults. Some of the women endured complete exhaustion [and serious gynecological harm]. . . . Some of the sexually abused women became suicidal. Others became indifferent as to what would happen to them and suffered from depression. . . . All the women who were sexually assaulted suffered psychological and emotional harm; some remain traumatized.[4]

The attacks on the Muslin women of Foca were part of a broader campaign of ethnic cleansing by Bosnian Serbs to reduce the non-Serb population in Serbian-claimed regions of Bosnia-Herzegovina.[5] To effectuate this policy, the Bosnian Serb leaders in charge of Foca murdered most of the non-Serb men in the town and sent the survivors to concentration camps.[6] The women, however, were not killed immediately; rather, they were sent to rape camps like the one described in the ICTY's indictment where they were forced to perform sexual services for the Bosnian Serb soldiers.[7] Many of the women were gang-raped and forced to live in a condition of sexual slavery.[8] Two women were even sold as chattel for DM 500 each.[9] Put simply, these actions were "calculated, cynical, and subhuman," yet they were also grimly effective.[10] Before 1992, Foca's population of approximately forty thousand was almost evenly divided between Muslim and Serb ethnic groups.[11] As of 2002, however, Foca's

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1. Kate Nahapetian, Note, *Selective Justice: Prosecuting Rape in the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 14 BERKELEY WOMEN'S L.J. 126, 130 (1999).
2. *Id.*
3. *Id.*
4. *Id.* at 131.
5. HUMAN RIGHTS WATCH, A CLOSED DARK PLACE: PAST AND PRESENT HUMAN RIGHTS ABUSES IN FOCA (July 1998), http://www.hrw.org/reports98/foca/.
6. *Id.*
7. *Id.*
8. *Id.*
9. Human Rights Watch, *Bosnia: Landmark Verdicts for Rape, Torture, and Sexual Enslavement* (Feb. 22, 2001), *at* http://www.hrw.org/press/2001/02/serbia0222.htm.
10. J. F. BROWN, HOPES AND SHADOWS: EASTERN EUROPE AFTER COMMUNISM 249 (1994).
11. A CLOSED DARK PLACE: PAST AND PRESENT HUMAN RIGHTS ABUSES IN FOCA, *supra* note 5.

population is approximately twenty-four thousand, and fewer than one hundred non-Serbs live within its borders.[12]

What happened in Foca is almost unthinkable, yet a similar series of events occurred in Rwanda two years later.[13] Jean-Paul Akayesu, an ethnic Hutu and the mayor of Taba, a small Rwandan village, knowingly allowed the mass rape of hundreds of Tutsi women in 1994, even though as mayor he controlled the police and could have prevented the attacks.[14] Indeed, when Tutsi women sought refuge at the village's communal center,

> [they] were regularly taken by armed local militia and/or communal police and subjected to sexual violence, and/or beaten on or near the bureau communal premises. . . . Many women were forced to endure multiple acts of sexual violence which were at times committed by more than one assailant. These acts of sexual violence were generally accompanied by explicit threats of death or bodily harm.[15]

In 1998, the Trial Chamber of the International Criminal Tribunal for Rwanda (ICTR) convicted Akayesu of genocide and crimes against humanity for his encouragement of the rape of Tutsi women in Rwanda, and the Appeals Chamber upheld that conviction in 2001.[16] Akayesu's conviction was historic because it was the first time in history that a defendant was tried and convicted by an international tribunal for genocide.[17] Moreover, Akayesu's conviction paved the way for later prosecutions of sexual crimes by international tribunals, including the recent trial of some of the perpetrators of the events in Foca.[18] Indeed, as Prosecutor Louise Arbour noted,

> [t]he judgment [in *Akayesu*] is truly remarkable in its breadth and vision, as well as in the detailed legal analysis on many issues that will be critical to the future of both ICTR and ICTY, in particular with respect to the law of sexual violence. The Court showed great sensitivity to the difficulties of bringing forward the victims who are required to reveal, often in public, the shocking indignities to which they were subjected.[19]

Although *Akayesu* generally was hailed as an historic judgment, it was also criticized for being "abundant in facts but short on law and

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12. *Id.*

13. *See generally* Sherrie L. Russell-Brown, *Rape as an Act of Genocide,* 21 BERKELEY J. INT'L L. (forthcoming 2003) (copy on file with author) (discussing the Rwandan situation, the *Akayesu* decision, and the implications of considering rape as an act of genocide).

14. Kelly D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status,* 93 AM. J. INT'L L. 97, 106 (1999).

15. *Id.*

16. FOUNDATION HIRONDELLE, ICTR, APPEALS COURT CONFIRMS JUDGMENT ON FORMER MAYOR (June 1, 2001), *at* http://www.hirondelle.org.

17. Askin, *supra* note 14, at 105.

18. *Id.* at 110.

19. Press Release, ICTY Office of the Prosecutor, Statement by Justice Louise Arbour, ICTY Doc. CC/PIU/342-E (Sept. 4, 1998).

reasoning to support its determinations."[20] Consequently, its conclusions about rape in international law were only tentative. However, the *Akayesu* case represented an important first step in the consideration of crimes involving rape under international law, and it laid a foundation upon which subsequent decisions by the ICTY, including the prosecution of the atrocities in Foca, were built.

The events in Foca marked the second attempt at ethnic cleansing in Europe within the past fifty years and the first of two significant worldwide attempts in the 1990s.[21] Although murder and genocide were significant elements of the ethnic cleansing campaign in the former Yugoslavia, just as they were in Rwanda, the actions in Foca also involved a targeted campaign of gruesome dehumanization—actualized as the rape and sexual enslavement of approximately twenty thousand women—on a scale of inhumanity that is unique in modern times.[22]

On February 22, 2001, nine years after the Bosnian Serb soldiers came to Foca, Trial Chamber II of the ICTY found three Bosnian Serb soldiers—Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic—guilty of committing crimes against humanity including torture and rape.[23] Human rights organizations worldwide immediately hailed the verdict in *Prosecutor v. Kunarac* because wartime rape campaigns were unequivocally defined as both a crime against humanity and a war crime.[24] Furthermore, it expanded the definition of slavery as a crime against humanity to include sexual slavery; previously, forced labor was the only type of slavery to be viewed as a crime against humanity.[25]

The full impact of this decision, like its legal cousin *Prosecutor v. Akayesu,* may not be felt for many years as other warring groups must bear it in mind when contemplating committing similar acts;

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20. Askin, *supra* note 14, at 110 n.63.

21. *See, e.g.*, THE HOLOCAUST ENCYCLOPEDIA (Walter Laquer & Judith Tydor Baumel eds., Yale Univ. Press 2001).

22. William Drozdiak, *Serbs Forces Raped 20,000, EC Team Says*, WASH. POST, Jan. 9, 1993, at A12.

23. The case was appealed, and on June 12, 2002 the Appeals Chamber upheld the convictions and sentences of all three defendants. *See generally* Prosecutor v. Kunarac, Judgment, Nos. IT-96-23-T & IT-96-23/1-T (Int'l Trib. for the Prosecution of Pers. Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 [hereinafter ICTY], Feb. 22, 2001), *available at* http://www.un.org/icty/ind-e.htm.

24. *See, e.g., Bosnia: Landmark Verdict for Rape, Torture, and Sexual Enslavement, supra* note 9; *see also* Amnesty International, *Bosnia-Herzegovina: Foca verdict—Rape and Sexual Enslavement are Crimes Against Humanity*, Feb. 22, 2001, *at* http://www.web.amnesty.org/ai.nsf/print/EUR630042001?OpenDocument; Human Rights Watch, *Bosnia and Herzegovina, in* WORLD REPORT 2002, at http://www.hrw.org/wr2k2/europe5.html#developments.

25. *Q & A: The Impact of the Ruling*, CNN, Feb. 22, 2001, *at* http://www.cnn.com/2001/WORLD/europe/02/22/hague.trial.armanpour/index.html.

indeed, *Kunarac* and *Akayesu* may signal the eventual end of campaigns of sexual ethnic cleansing by warring parties.[26] Despite their potential to reshape international law and norms of international warfare, the *Kunarac* and *Akayesu* decisions are not uncontroversial. Both cases raise troubling issues about the international community's judgment of state and individual sovereignty as well as the questionableness of criminalizing behavior after it has occurred.[27] Moreover, the decisions also raise a question about the community's underlying views of women as rape victims – views that some may argue inappropriately portray women simply as weak and defenseless individuals.[28] In fact, just as the promulgation of the battered women's syndrome defense sparked controversy in U.S. legal circles over its possible underlying views of women, so too may these decisions raise questions in international legal circles regarding whether women should have a unique identity or a role as victims in crimes against humanity.[29]

Despite these criticisms, this Note argues that the expansion of the definition of crimes against humanity in *Kunarac* and the application of war crimes' standards to acts of rape and sexual enslavement were warranted for several reasons. First, by building upon the *Akayesu* decision, the expansion closed holes in the international legal conceptualizations of rape and enslavement, torture, war crimes, genocide, and crimes against humanity, and it brought prosecution of sexual crimes against women to the forefront of international law.[30] Second, it broadened the enforcement of international protections of civilians, especially those of different ethnicities, from even unsystematic acts of depravity during an armed conflict.[31] Third, it explicitly recognized women as equal to men in the human community, but did not identify women as a

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26. *Id.*

27. *See, e.g.*, GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS (2000).

28. *See* Nadine Taub & Elizabeth M. Schneider, *Perspectives on Women's Subordination and the Role of Law, in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 328, 347-50 (David Kairys ed., 3d ed. 1998) (criticizing gender-based rape laws).

29. *See, e.g.*, Pamela Posch, *The Negative Effects of Expert Testimony on the Battered Women's Syndrome*, 6 AM. U. J. GENDER SOC. POL'Y & L. 485 (1998); A. Renee Callahan, *Will the "Real" Battered Woman Please Stand Up? In Search of a Realistic Legal Definition of Battered Woman Syndrome*, 3 AM. U. J. GENDER & L. 117 (1994); Kristian Miccio, *In the Name of Mothers and Children: Deconstructing the Myth of the Passive Battered Mother and the "Protected Child" in Child Neglect Proceedings*, 58 ALB. L. REV. 1087 (1995).

30. Prosecutor v. Kunarac, Judgment, No. IT-96-23, § IV (ICTY, Feb. 22, 2001), *available at* http://www.un.org/icty/ind-e.htm; *see also infra* Part V.A.1. (discussing the legal foundations of *Kunarac*).

31. *See Kunarac*, Judgment, Nos. IT-96-23-T & IT-96-23/1-T; *see also infra* Part III.B.2. (discussing the significance of *Kunarac* for Article 3 of the Geneva Conventions relative to the Protection of Civilian Persons in Time of War).

weaker gender in need of protection.[32] Fourth, it established an historic foundation for the prosecution of sexually-related crimes by other international courts and, in doing so, did not violate the sovereignty of either the state or the individuals who were culpable for these crimes.[33]

Because the ICTR and the *Akayesu* decision have been analyzed in some detail already, this Note will focus primarily on the implications of the *Kunarac* decision. However, the *Akayesu* decision should be kept in mind as the legal and intellectual progenitor of *Kunarac*, and the ICTR case is important to understand the underlying jurisprudence in *Kunarac*. Part I of this Note examines international law regarding crimes against humanity in the twentieth century. Part II then discusses the specific milieu of the acts committed by Kunarac and others, namely the conflict among the former Yugoslavian republics. Part III breaks down the *Kunarac* decision in detail, including discussions of the cases by both the ICTY and the ICTR upon which the *Kunarac* decision was founded. Part IV looks at criticisms of the jurisprudential behavior at issue in international legal cases involving rape. Part V analyzes the implications of the rape cases decided by the ICTR and the ICTY for the future of international law, and reasserts the legality, morality, and humanity of those cases by locating them within appropriate spaces of international law, conventional morality, and human decency. To be sure, in the words of U.N. Coordinator of Operations Jacques Klein, *Kunarac* itself may have been "a judgment that is long overdue."[34] Now that it has finally arrived, however, its impact may be momentous.

I. INTERNATIONAL LAW REGARDING CRIMES AGAINST HUMANITY PRIOR TO *AKAYESU* AND *KUNARAC*[35]

Legally, the notion of a crime against humanity had little resonance until the twentieth century. Few states saw an international community capable of being harmed, and even fewer

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32. *See Kunarac*, Judgment, Nos. IT-96-23-T & IT-96-23/1-T; *see also infra* Part IV.D. (discussing *Kunarac*'s assessment of women).

33. *See Kunarac*, Judgment, Nos. IT-96-23-T & IT-96-23/1-T; *see also infra* Parts IV.A.-B., V.B.1. (discussing the sovereignty implications of *Kunarac* and its possible use in future cases).

34. *Bosnian Serbs Convicted of Rape*, BBC NEWS, Feb. 22, 2001, *at* http://news.bbc.co.uk/2/hi/world/europe/1184313.stm.

35. *See, e.g.*, BASS, *supra* note 27; *see also Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, at 10-11, UN Doc. S/25704 (1993), reprinted in 32 ILM 1159 [hereinafter Secretary-General's Report] (quoting the U.N. Secretary General's connections between the 1907 Hague Conventions, the Nuremberg judgments, the 1949 Geneva Conventions, and the ICTY).

felt that they could be held responsible for their conduct.[36] Nonetheless, as the twentieth century dawned, some states began to recognize a need for new norms that respected law and humanity.[37]

A. *Before Nuremberg and Tokyo*

The Hague Conventions of 1899 and 1907 first contemplated establishing normative principles based on the laws of humanity.[38] The Hague Conventions' attempts at creating such principles focused primarily on efforts to limit warfare and arms buildup and to establish an international court of justice, but the issue of sexual attacks upon civilians did not arise during the meetings.[39] The Conventions were ultimately unsuccessful in limiting warfare or what would later be called "crimes against humanity," but they did establish a foundation for the prosecution of later violations of the laws of humanity in the twentieth century.[40]

Following the conclusion of World War I, the concept of individual criminal liability for what would later be deemed human rights violations began to acquire more meaning.[41] For example, Article 23 of the Covenant of the League of Nations contained an express provision regulating the treatment of individuals in member states, though the League's relative weakness made the enforcement of such a provision difficult.[42] Moreover, the Allies did attempt to try

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36. *See, e.g.*, Timothy L. H. McCormack, *Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law*, 60 ALB. L. REV. 681, 684-98 (1997).

37. *See generally* GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE (1999) (tracing the history and development of the idea of crimes against humanity).

38. *See* Hague Convention Respecting the Laws and Customs of War, July 29, 1899, pmbl., para. 9, 1 Bevans 247, 32 Stat. 1803, *reprinted in* 1 AM. J. INT'L LAW 129 (1907). Paragraph 9 reads in part: "Populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience." 32 Stat at 1805. *See also* Hague Convention (II) With Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803 (addressing international principles governing war on land); Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 (updating the 1899 treaty).

39. William J. Aceves, *Critical Jurisprudence and International Legal Scholarship: A Study of Equitable Distribution*, 39 COLUM. J. TRANSNAT'L L. 299, 327-32 (2001).

40. McCormack, *supra* note 36, at 697.

41. *See generally*, JAMES F. WILLIS, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR (1982); *see also*, Karina Michael Waller, *Intrastate Ethnic Conflicts and International Law: How the Rise of Intrastate Ethnic Conflicts Has Rendered International Human Rights Laws Ineffective, Especially Regarding Sex-Based Crimes*, 9 AM. U. J. GENDER SOC. POL'Y & L. 621 (2001).

42. LEAGUE OF NATIONS COVENANT art. 23.

German leaders, including the Kaiser, for war crimes.[43] Additionally, they also sought to try Turkish officials for their part in a genocidal campaign against Armenians in 1915-1916.[44] Neither of these efforts came to fruition as political infighting among the Allies and realpolitik decision-making in the postwar environment ultimately scuttled the attempts at trial; nonetheless, the seed of an idea for the postwar adjudication of inhumane crimes during wartime was planted, and this seed would grow to maturity twenty-five years later at Nuremberg and Tokyo.[45]

B. *The Post-World War II Trials*

The phrase "crimes against humanity" was first used publicly by Allied prosecutors in the Nuremberg Trials.[46] It was given its meaning by the charter which established the International Military Tribunal to try Nazi officials following the conclusion of World War II though, contrary to some assertions, the charter contained no specific reference to rape as a crime against humanity:

> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
>
> (a) Crimes against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing:
>
> (b) War Crimes: namely, violations of the laws or customs of war. Such violations include, but not be limited to, murder, ill-treatment or deportation to slave labor 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:
>
> (c) Crimes against Humanity: namely, 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. . . .[47]

The trials at Nuremberg, and also the similar postwar trials of former Japanese military officials in Tokyo, resulted in not only the

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43. WILLIS, *supra* note 41; *see also* McCormack, *supra* note 36, at 705-08.

44. WILLIS, *supra* note 41; *see also* McCormack, *supra* note 36, at 699-701.

45. McCormack, *supra* note 36, at 698-708.

46. Leo Gross, *The Punishment of War Criminals: The Nuremberg Trial*, 2 NETH. INT'L L. REV. 356, 358 (1955). *See also*, M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL LAW (1992).

47. Charter of the International Military Tribunal (IMT), *in* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), Aug. 8, 1945, 58 Stat. 1544, 82 U.N.T.S. 280.

convictions of several perpetrators of the Holocaust, but they also established a clear foundation for the future prosecution of war crimes and crimes against humanity.[48]

C. *The Geneva Convention Relative to the Protection of Civilian Persons in Time of War*

The Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention) was concluded in 1949 and entered into force on October 21, 1950.[49] As its title implies, the convention governs the treatment of civilians during times of war.[50] In relevant part, it asserts that "[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."[51] Thus, for the first time in international law rape was considered to be a crime, though its parameters at this time were ill-defined.[52] As the ICTY later noted, the force of the Geneva Conventions within international law is well-established, and Article 2 of the ICTY enabling statute explicitly considers violations of the Geneva Conventions to be offenses for which prosecution may be brought within its forum.[53] Consequently, the ICTY's reliance on the Geneva Conventions as a source for establishing rape as a crime against humanity rests on a solid foundation of international law.

D. *The ICTR and the ICTY*

Pursuant to U.N. Security Council Resolution 955, the International Criminal Tribunal for Rwanda (ICTR) was established in 1994.[54] A year earlier, the Security Council passed a resolution establishing the International Criminal Tribunal for the former Yugoslavia (ICTY) for the prosecution of crimes committed during the fighting among the states that emerged from the breakup of the

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48. BASS, *supra* note 27; *see also* Kevin R. Chaney, *Pitfalls and Imperatives: Applying the Lessons of Nuremberg to the Yugoslav War Crimes Trials*, 14 DICK. J. INT'L L. 57 (1995) (tracing the influence of the Nuremberg trials on the ICTY).

49. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art 3, 75 U.N.T.S 287-88, 6 U.S.T. 3516 [hereinafter Geneva Convention].

50. *Id.*

51. *Id.* art. 27.

52. *Id.*

53. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Art. 2, U.N. Doc. S/25704, annex (1993), *reprinted in* 32 I.L.M. 1192 (amended 2002) [hereinafter ICTY Statute].

54. *See generally* THE INTERNATIONAL TRIBUNAL FOR RWANDA: FACTS, CASES, DOCUMENTS 240 (C. Schletana & W. Van Der Wolf, eds. 1999).

former communist state of Yugoslavia.[55] As it later did for the ICTR, the Security Council gave the ICTY binding authority to prosecute those individuals accused of committing grave breaches of the Geneva Conventions of 1949 and violations of the laws or customs or war, genocide, and crimes against humanity, and also authorized that the act of rape could fall under the aegis of any of these violations and crimes.[56] Former Court of Appeals for the District of Columbia Circuit and ICTY Judge Patricia M. Wald summarized the scope of the ICTY's powers and responsibilities:

> The ICTY was created by United Nations Security Council Resolution in 1993 to prosecute and adjudicate war crimes, crimes against humanity, and genocide committed in the territory of the former Yugoslavia on or after January, 1991. That includes all aspects of the Bosnian conflict as well as the more recent Kosovo war. The Tribunal exercises personal jurisdiction over persons indicted for the categories of war crimes set out in the ICTY Statute, wherever apprehended; no extradition proceedings are necessary. It can impose sentences up to life imprisonment, but not death. The Tribunal is a temporary court in the sense that its mission is geographically and temporally limited. It is not expected to finish its work for at least another decade.[57]

Furthermore, Judge Wald noted that the ICTY faces challenges that go beyond its forerunners, such as the trials at Nuremberg and Tokyo following World War II:

> The ICTY is a bold experiment. It tracks to some degree the earlier Nuremberg and Tokyo World War II war crime trials but it goes far beyond those precedents in important ways. It is performing three functions: adjudicating international crimes, developing international humanitarian law, and memorializing important, albeit horrible, events of modern history. Except for Nuremberg and Tokyo and subsequent isolated war crimes prosecutions in national courts of figures such as Adolph Eichmann and Klaus Barbie, the Tribunal has very little caselaw to rely upon. Its procedures are a hybrid of common law and continental practice and its judges speak a dozen native languages more fluently than the official French and English of the Tribunal.[58]

In Judge Wald's opinion, the most difficult aspect of the ICTY's work was dealing with "the darkest and most brutal tales . . . of man's inhumanity to man and woman, including genocide and crimes against humanity involving thousands of victims, systematic rapes of women and girls, prolonged detention under the most barbaric of conditions, merciless beatings, and callous destruction of homes and

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55. *See generally*, ICTY Statute, *supra* note 53; *see also* U.N. SCOR, 48th Sess., 3217th mtg. at 1, U.N. Doc. S/Res 827 (1993); U.N. Doc. S/RES/808(1993); U.N. SCOR, 48th Sess., 3175th mtg. at 1, U.N. Doc. S/RES/827 (1993).

56. ICTY Statute, *supra* note 53.

57. Patricia M. Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court*, 5 WASH. U. J.L. & POL'Y 87, 87 (2001).

58. *Id.* at 89.

villages."[59] In addition, the ICTY has faced challenges to its jurisdiction[60] and charges that it is biased against Serbs, yet both the ICTY and the ICTR continue to function in their missions to bring a sense of justice to victims of atrocities in the former Yugoslavia and Rwanda.[61] Indeed, since the trial of Slobodan Miloševic—the former leader of Serbia and the man many argue is most responsible for the atrocities committed on the territory of the former Yugoslavia—began in February 2002,[62] the ICTY has established itself as a significant international judicial body capable of "perform[ing] important adjudication and accountability functions that national courts in the thrall of leaders who are themselves alleged war criminals cannot."[63]

II. THE CONFLICT IN YUGOSLAVIA AND THE CREATION OF THE ICTY

The roots of the conflict at issue in *Kunarac* go back at least to the creation of a sovereign state of Yugoslavia following World War I, and may even stretch earlier to the relations among ethnic groups, first within the larger Ottoman Empire and then later as a mix of sovereign states, such as Serbia and Montenegro, and territories of the Austro-Hungarian Empire, such as Croatia, Slovenia, and Bosnia-Herzegovina.[64] Following World War I, the victorious Allies established the precursor to the modern Yugoslavian state, which was officially named to reflect the diverse groups within its borders: the Kingdom of the Serbs, Croats, and Slovenes.[65] Joseph Rothschild, a noted historian of this region, concluded that this type of state-creation meant that the new multiethnic state was almost preordained to face internal conflict:

> Populated as it was by sundry antagonistic communities of widely divergent cultures, who worshipped in several different religions, had inherited eight legal systems from their former sovereignties, and wrote the basic Serbocroatian language in two orthonographies (not to mention their several other Slavic and non-Slavic languages),

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59. *Id.* at 88.

60. Prosecutor v. Tadic, Decision on the Defence Motion on Jurisdiction (Rule 73), No. IT-94-1, T.Ch. II (ICTY, Aug. 10, 1995), *available at* http://www.un.org/icty/ind-e.htm.

61. *See, e.g.*, Katarina Kratovac, *Fair Milosevic Trial Doubted*, ASSOCIATED PRESS, Feb. 18, 2002. *But see* SEVENTH ANNUAL REPORT OF THE INT'L TRIB. FOR THE PROSECUTION OF PERS. RESPONSIBLE FOR SERIOUS VIOLATIONS OF INT'L HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF THE FORMER YUGOSLAVIA SINCE 1991, Aug. 7, 2000, *available at* http://www.un.org/icty/rappannu-e/2000/index.htm.

62. Keith B. Richburg, *Trial of Milosevic Begins*, WASH. POST, Feb. 13, 2002, at A1.

63. Wald, *supra* note 57, at 117-18.

64. *See, e.g.*, Yugoslavia, *available at* http://www.encyclopedia.com/html/section/yugoslav_history.asp.

65. *Id.*

> Yugoslavia was bound to be subjected to profound centrifugal pressures which were to overwhelm her elite. Furthermore, areas of mixed populations, such as the Vojvodina, Bosnia, or Macedonia, functioned less as bridges than as barriers, aggravating rather than easing these centrifugal pressures.[66]

Indeed, this new state, whose name was changed to Yugoslavia in 1929, faced intense nationalist strife among its various ethnic groups in the 1920s and 1930s.[67] The Nazi invasion in 1941 led to the creation of puppet states in Croatia and Serbia.[68] Following this invasion, several resistance groups of various nationalities emerged including one led by Tito, a communist who would become the postwar leader of Yugoslavia.[69] Partisan forces drove the Germans from Yugoslavia in 1944, and Soviet troops installed Tito as the new leader of the country.[70] Under Tito, the new state consisted of six primary republics and two autonomous regions.[71]

Domestically, Tito was very successful at mediating the ethnic tension within Yugoslavia by playing the various ethnic groups off against one another.[72] Even when ethnic issues did arise, Tito, through the force of his cult of personality and his adept management skills, successfully sidestepped major conflicts.[73] Tito's successors after his death in 1980, however, were not as adept as Tito had been at managing the peculiar ethnic arrangements within Yugoslavia, and the collapse of communism across Eastern Europe in 1989 hastened the eruption of simmering ethnic hostilities.[74]

Slobodan Miloševic was elected leader of the Serbian Communist Party in 1987, and in 1989 he became President of Serbia.[75] Following attempts by Miloševic and his Serb supporters to impose greater Serb authority on the entire Yugoslavian state, the republics of Slovenia, Croatia, Macedonia, and Bosnia-Herzegovina each declared its independence from the central Yugoslavian state in 1991.[76] In response, Serbia used federal troops, composed primarily of ethnic Serbs, to attack the seceding states in an effort to maintain the territorial integrity of the Yugoslavian state and to unite all

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66. JOSEPH ROTHSCHILD, EAST CENTRAL EUROPE BETWEEN THE WARS 202 (1974).
67. Yugoslavia, *supra* note 64.
68. *Id.*
69. *Id.*
70. *Id.*
71. The six republics were Croatia, Slovenia, Bosnia-Herzegovina, Serbia, Macedonia, and Montenegro, and the two autonomous regions were Vojvodina and Kosovo. *Id.*
72. Yugoslavia, *supra* note 64.
73. *Id.*; *see also* ROBERT KAPLAN, BALKAN GHOSTS: A JOURNEY THROUGH HISTORY (1994).
74. Yugoslavia, *supra* note 64.
75. *Id.*
76. *Id.*

Serbian peoples under one flag.[77] An initial campaign against Slovenia failed, but Serbia was more successful in its attacks on Croatia and Bosnia-Herzegovina.[78] The latter, in particular, was a prime target for Serbia because thirty percent of its population was Serbian.[79] In addition to Serbia, Croatia also attacked Bosnia-Herzegovina because it claimed the Bosnian lands occupied by the twenty percent of the Bosnian population that was ethnically Croatian.[80] Thus, by 1992 Bosnia-Herzegovina was largely occupied by two outside military forces, both of whom sought the elimination of the local Bosnian Muslim population and committed terrible acts, similar to the acts committed in Foca, in order to achieve their objectives.[81] To be sure, no side in the conflict was blameless, but although Croatia also committed some wartime atrocities, it was the Serbian crimes that attracted more international attention because they were more widespread and involved larger numbers of people.[82]

Despite almost universal international condemnation, fighting continued among Serbia, Croatia and Bosnia-Herzegovina for another three years before a peace accord was reached in Dayton, Ohio in 1995.[83] The breakup and subsequent fighting raised several important issues within international law, including the question of how to treat those responsible for some of the terrible acts perpetrated during the conflict.[84] Following the conclusion of the fighting, the United Nations established an International Tribunal of the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, known as the International Criminal Tribunal for Yugoslavia, or ICTY.[85] As of November 7, 2001, the ICTY held forty-six accused war criminals in custody, and had issued arrest warrants for thirty-one others not in custody. Additionally, the ICTY had adjudicated the cases of sixty-one accused war criminals in proceedings before the Tribunal, including the *Kunarac* case that was decided on February 22, 2001 and appealed on March 6, 2001.[86]

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77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. BROWN, *supra* note 10, at 265-70.
83. Yugoslavia, *supra* note 64.
84. *See generally* PETER RADAN, THE BREAK-UP OF YUGOSLAVIA AND INTERNATIONAL LAW (2002).
85. *See generally* ICTY, *at* http://www.un.org/icty [hereinafter ICTY Web site].
86. *Id.* at http://www.un.org/icty/glance/index.htm.

III. THE ICTY'S DECISION[87]

The ICTY named Kunarac, Kovac and Vukovic, in addition to several co-defendants, in an indictment in 1996.[88] Separate indictments were issued for these three men specifically in 1999, and they were tried before the ICTY in 2000.[89] Each man was accused of crimes against humanity and of violations of the laws and customs of war stemming from incidents and actions that occurred in Foca in 1992.[90] Specifically, Kunarac was charged with rape, enslavement, torture and the commitment of outrages upon personal dignity; Kovac was charged with rape, enslavement and the commitment of outrages upon personal dignity; and Vukovic was charged with torture and rape.[91]

A. *Allegations*

According to the factual allegations contained in the indictment, Kunarac, Kovac and Vukovic were part of the Bosnian Serb forces that took over Foca in April 1992.[92] Following the takeover, most of the Croats and Muslims were arrested, the men and women were separated, and all were kept in various detention facilities.[93] Indeed, "[d]uring the arrests many civilians were killed, beaten or subjected to sexual assault."[94] Moreover, "[m]any of the detained women were subjected to humiliating and degrading conditions of life, to brutal beatings and to sexual assaults, including rapes and gang rapes."[95] At a detention center within a school building, women and girls as young as twelve years old were subjected to rape and sexual assaults.[96]

The indictment singled out each of the three defendants for specific acts of brutality and barbarism.[97] As the commander of a special reconnaissance unit of the Bosnian Serb Army, Kunarac was

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87. *See generally* Prosecutor v. Kunarac, Judgment, Nos. IT-96-23-T & IT-96-23/1-T (ICTY, Feb. 22, 2001), *available at* http://www.un.org/icty/foca/trialc2/judgement/index.htm.

88. Case Information Sheet: *Kunavac, Kovac* and *Vukovic* Case, *available at* http://www.un.org/icty/glance/kunarac.htm [hereinafter *Kunarac* Web Site]. *See also* Nahapetian, *supra* note 1, at 130.

89. *Kunarac* Web Site, *supra* note 88.

90. *Id.*

91. *Id.*

92. *Id. See also* Nahapetian, *supra* note 1, at 130.

93. *Kunarac* Web Site, *supra* note 88.

94. *Id.*

95. *Id.*

96, *Id.*; *see also Bosnian Serbs Jailed for War Sex Crimes*, CNN, Feb. 22, 2001, *at* http://www.cnn.com/2001/WORLD/europe/02/22/hague.trial.02/index.html (noting the youthful ages of many of the victims).

97. *Kunarac* Web site, *supra* note 88.

alleged to have been responsible for the acts of the soldiers subordinate to him and to have known or had reason to know that those subordinates were engaged in the sexual assaults of detained Muslim women; in other words, Kunarac, like Akayesu in Rwanda, was charged with violating his command responsibility by allowing and encouraging the rapes and sexual assaults to go on.[98] Additionally, Kunarac was alleged to have personally committed acts of sexual assault and rape upon several Muslim women.[99] Kovac was a sub-commander of the military police as well as a paramilitary leader in Foca, and he was alleged to have been involved with the rapes and sexual assaults of several detained Muslim women.[100] Finally, Vukovic, who was also a sub-commander of the military police and paramilitary leader in Foca, was alleged to have been personally involved in the gang-rape of women and girls detained at a local school.[101] Moreover, he was also alleged to have sexually abused other women detained at a sports hall, including a fifteen-year-old and a sixteen-year-old, and he was alleged to have arranged the removal of women from detention centers to private homes and apartments in order to be further sexually abused.[102]

B. *The Decision*

On February 22, 2001, the ICTY's Trial Chamber announced its decision convicting Kunarac, Kovac, and Vukovic of both war crimes and crimes against humanity.[103] Presiding Judge Florence Mumba labeled the actions of the three men a "nightmarish scheme of sexual exploitation" that was "especially repugnant."[104] Furthermore, she noted that the defendants "thrived in the dark atmosphere of the dehumanisation of those believed to be enemies."[105] In short, the ICTY left little doubt about its feelings regarding both the guilt of Kunarac and the others, and the utter depravity of their actions; moreover, in contrast to the ICTR's *Akayesu* decision, the ICTY in *Kunarac* explicitly spelled out its legal reasoning in finding rape to be both a war crime and a crime against humanity.[106]

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98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Convictions Highlight Tragic Victims*, CNN, Feb. 22, 2001, *at* http://www.cnn.com/2001/WORLD/europe/02/22/hague.rape.
104. *Id.*
105. *Id.*
106. *See* Prosecutor v. Kunarac, Judgment, Nos. IT-96-23-T & IT-96-23/1-T (ICTY, Feb. 22, 2001), *available at* http://www.un.org.icty.foca.trialc2/judgement/index.htm.

Among the crimes for which the three defendants were convicted, enslavement had already been labeled as a crime against humanity by the Nuremberg Trials; thus, the ICTY's decision to consider a specific type of enslavement (i.e., sexual enslavement) as a crime against humanity did not require a great extension of previous international legal principles.[107] The Trial Chamber's decision to also delineate rape as a crime against humanity, however, did require more unpacking from previous international legal jurisprudence on rape.[108] The ICTY found the defendants guilty of war crimes and crimes against humanity under Articles 3 and 5 of the ICTY's enabling statute and under Article 3 of the Geneva Convention.[109] Furthermore, the ICTY explicitly ruled that the rapes in Foca constituted a war crime in violation of both international humanitarian law and the ICTY's enabling statute.[110] Most importantly, the Chamber also ruled that rapes in Foca constituted an outrage upon personal dignity under Article 3(c) of the Geneva Conventions.[111] Therefore, although the definition of rape, and of measures to prevent its occurrence, had not been written into the Geneva Conventions explicitly, the act was still of such a terrible nature that it could constitute a war crime as contemplated by the Geneva Conventions' drafters.[112]

1. Rape as a Crime Against Humanity

The Trial Chamber found that all three defendants committed crimes against humanity in violation of Article 5 of the ICTY's enabling statute.[113] Article 5 specifically lists the offenses that constitute crimes against humanity if they are committed in an armed conflict and are considered to be directed against a civilian population.[114] Article 5 states:

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107. Charter of the International Military Tribunal (IMT), *supra* note 47. *See also* HUMAN RIGHTS INTERNET, THE INDIVIDUAL AND INTERNATIONAL CRIMINAL RESPONSIBILITY, *available at* http://www.hri.ca/doccentre/docs/hrd/handbook97/criminal.shtml#humanity (noting the categories of crimes against humanity used in the Nuremberg Trials).

108. *See infra* Part III.B.1.

109. Press Release, Judgement of Trial Chamber II in the *Kunarac, Kovac & Vukovic* Case (Feb. 22, 2001), *at* http://www.un.org/icty/pressreal/p566-e.htm (last visited Sept. 27, 2002).

110. Prosecutor v. Kunarac, Judgment, No. IT-96-23, § IV, para. 408 (Applicable Law) (ICTY, Feb. 22, 2001), *at* http://www.un.org/icty/foca/trialc2/judgement/index.htm (last visited Sept. 17, 2002).

111 *Id.*

112. THE INDIVIDUAL AND INTERNATIONAL CRIMINAL RESPONSIBILITY, *supra* note 107.

113. *Kunarac*, Judgment, No. IT-96-23, at § V.

114. *Id.* § IV, para. 410.

> The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
>
> (a) murder;
>
> (b) extermination;
>
> (c) enslavement;
>
> (d) deportation;
>
> (e) imprisonment;
>
> (f) torture;
>
> (g) rape;
>
> (h) persecutions on political, racial and religious grounds;
>
> (i) other inhumane acts.[115]

Thus, Article 5(g) of the enabling statute specifically contemplates that rape may be prosecuted as a crime.

Before the ICTY can actually try crimes against humanity, it must establish jurisdiction over the offenses alleged to constitute such crimes, and its jurisdiction under Article 5 is to try atrocities committed by the participants of the Balkan conflict; therefore, as an initial, threshold matter, the Trial Chamber must first determine that the alleged offenses were indeed committed during an armed conflict, for this prerequisite "goes beyond the stipulations of customary international law."[116] An armed conflict is defined as an occurrence "whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state."[117]

To fulfill this initial requirement, an armed conflict must exist at the relevant time and place, namely the time and location of the acts alleged in the indictment.[118] A relational nexus between the acts of the accused and the armed conflict, however, is not required.[119] In this context, therefore, the acts by the defendants must have been carried out during the course of the conflict in the Balkans, especially in the context of the fighting in Bosnia-Herzegovina. The rapes in Foca were conducted amid that fighting in 1992, and it is well-

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115. ICTY Statute, *supra* note 53.

116. *Kunarac*, Judgment, No. IT-96-23, at § IV, para. 413.

117. *Id.* § IV, para. 412 (citing Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, No. IT-94-1-A, para. 70 (ICTY, Oct. 2, 1995), *available at* http://www.un.org/icty/ind-e.htm).

118. *Id.* § IV, para. 413 (citing Prosecutor v. Tadic, Judgment, No. IT-94-1-A, paras. 249, 251 (ICTY, July 15, 1999), *available at* http://www.un.org/icty/ind-e.htm).

119. *Id.* (citing *Tadic*, Judgment, No. IT-94-1-A, § III, paras. 249, 272; *see also* Prosecutor v. Blaskic, Judgment, No. IT-95-14-T, § II, para. 71 (ICTY, Mar. 3, 2000), *available at* http://www.un.org/icty/ind-e.htm).

established that the war in Bosnia-Herzegovina was ongoing at that time. Consequently, the first prerequisite for ICTY jurisdiction was clearly met.

For jurisdiction to attach, after the ICTY determines that the alleged offenses were indeed committed during an armed conflict, it must then also conclude that there was an attack directed against a civilian population.[120] The five elements of an "attack directed against any civilian population" are:

(1) There must be an attack.
(2) The acts of the perpetrator must be part of the attack.
(3) The attack must be "directed against any civilian population."
(4) The attack must be "widespread or systematic."
(5) The perpetrator must know of the wider context in which his acts occur and know that his acts are part of the attack.[121]

According to the ICTY, an attack may be defined as "a course of conduct involving the commission of acts of violence," and the ICTY relied on a previous case, *Prosecutor v. Tadic*, to assert that an attack will normally be a pattern of conduct and not one particular act.[122] Furthermore, the term "attack" carries with it a different meaning in regard to crimes against humanity than it does in regard to war crimes, for in the context of a crime against humanity, an attack is not limited to the conduct of hostilities; in fact, it may also apply to the treatment of those not actively involved in the fighting, such as the mistreatment of prisoners in detention.[123] Additionally, a nexus must exist between the acts of the accused and the attack:

> (1) the commission of an act which, by its nature or consequences, is objectively part of the attack; coupled with
>
> (2) knowledge on the part of the accused that there is an attack on the civilian population and that his act is part of the attack.[124]

The Commentary to the Two Additional Protocols of 1977 to the Geneva Conventions of 1949 suggests that the term "civilian population" applies only to a narrowly-defined range of people, and not to those who may constitute members of the armed forces or to other active participants in the conflict composed primarily of

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120. *Kunarac*, Judgment, No. IT-96-23, § IV, para. 410.
121. *Id.*
122. *Id.* § IV, para. 415.
123. *Id.* § IV, para. 416.
124. *Id.* (citing *Tadic*, Judgment, No. IT-94-1-A, § III, paras. 248, 251, 271); Prosecutor v. Tadic, Opinion and Judgment, No. IT-94-1-T, para. 659 (ICTY, May 7, 1997), *available at* http://www.un.org/icty/ind-e.htm; Prosecutor v. Mrksic, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, No. IT-95-13-R61, para. 30 (ICTY, Apr. 3, 1996); Prosecutor v. Kunarac, Decision on Prosecution's Motion for Exclusion of Evidence and Limitation of Testimony, Nos. IT-96-23 & IT-96-23/1, para. 6(b) (ICTY, July 3, 2000), *available at* http://www.un.org/ icty/ind-e.htm).

members from the civilian population; consequently, although the Geneva Conventions view an attack as simply an act of violence against an adversary, the character of that adversary must be purely military, for a "civilian population cannot be a legitimate target."[125]

The attack on the civilian population must also be "widespread or systematic" to fall under the language of Article 5, which thereby excludes isolated or random acts of violence.[126] Only the attack itself, however, must be widespread or systematic to attach jurisdiction, so the individual acts of the accused do not necessarily have to be widespread or systematic.[127] In fact, in the *Tadic* case, the ICTY held that "[t]he very nature of the criminal acts in respect of which competence is conferred upon the International Tribunal by Article 5, that they be directed against any civilian population, ensures that what is to be alleged will not be one particular act but, instead, a course of conduct."[128] The underlying offense also does not need to constitute an attack in itself; rather, it must only form a part of the overall attack, or it must "comprise part of a pattern of widespread and systematic crimes directed against a civilian population."[129]

In a previous crimes-against-humanity case, *Prosecutor v. Mrksic*, the ICTY clarified the relationship between the nature of an attack and its ability to constitute a crime against humanity:

> Crimes against humanity . . . must be widespread or demonstrate a systematic character. However, as long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. As such, an individual committing a crime against a single victim or a limited number of victims might be recognized as guilty of a crime against humanity if his acts were part of the specific context [of an attack against a civilian population].[130]

As an example of how an individual act could be regarded as a crime against humanity in the proper context, the Trial Chamber discussed the act of denouncing Jewish neighbors to Nazi authorities:

> For example, the act of denouncing a Jewish neighbour to the Nazi authorities—if committed against a background of widespread

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125. *Kunarac*, Judgment, No. IT-96-23, at § IV, para. 426 (citing COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 611, 1451-52 (1987)).

126. *Id.* § IV, para. 427 (citing *Tadic*, Opinion and Judgment, No. IT-94-1-T, para. 648).

127. *Id.* § IV, para. 431.

128. *Id.* § IV, para. 422 (citing Prosecutor v. Tadic, Decision on the Form of the Indictment, No. IT-94-1-A, para. 11 (ICTY, Nov. 14, 1995), *available at* http://www.un.org/icty/ind-e.htm).

129. *Id.* § IV, para. 417; see also *Tadic*, Judgment, No. IT-94-1-A, § III, paras. 248, 255.

130. *Id.* § IV, para. 417 (quoting Prosecutor v. Mrksic, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, No. IT-95-13-R61, para. 30 (ICTY, Apr. 3, 1996), *available at* http://www.un.org/icty/ind-e.htm).

> persecution—has been regarded as amounting to a crime against humanity. An *isolated act*, however,—i. e. an atrocity which did not occur within such a context—cannot.[131]

The mental element required for a violation of Article 5 is that in addition to the intent to commit the underlying offense, the accused must simply know that his actions occurred within the context of a broader attack on the civilian population; however, the accused does need to have detailed knowledge of the attack.[132] In *Tadic*, the Appeals Chamber of the ICTY concluded that the motives of a defendant in taking part in an attack are irrelevant and that a defendant may commit a crime against humanity for purely personal reasons.[133] Additionally, the defendant must have reason to believe that the victim of the attack was a civilian, but prosecutors do not need to prove that the victims were chosen because of their civilian status.[134] Finally, the Trial Chamber stressed that in cases of doubt, the ICTY will assume that the victim was a civilian.[135]

It is sufficient for the prosecution to demonstrate that the act of an accused person at issue occurred amid an accumulation of acts of violence, even though the individual acts within that set may vary greatly in nature and gravity.[136] Even though the attack must be part of the overall armed conflict, it may also outlast the hostilities, and such attacks may be prosecuted even if they occurred after hostilities concluded.[137]

In *Kunarac*, the ICTY held that the actions of the defendants constituted a widespread and systematic attack upon the civilian population during the conflict in the Balkans.[138] In other words, the ICTY concluded that the rapes of Bosnian Muslim women in Foca were well-orchestrated and that Kunarac and the others possessed the requisite mens rea regarding their intent in committing an attack upon civilians.[139] As part of the larger armed conflict that engulfed much of the former Yugoslavia in 1992, the women of Foca were rounded up, placed under armed guard, and then intentionally raped,

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131. *Id.* § IV, para. 431 (emphasis in original).

132. *Id.* § IV, para. 434 (citing *Tadic*, Judgment, No. IT-94-1-A, § III, para. 248; Prosecutor v. Tadic, Opinion and Judgment, No. IT-94-1-T, para. 659 (ICTY, May 7, 1997); Prosecutor v. Kupreskic, Judgment, No. IT-95-16-T, § V, para. 556 (ICTY, Jan. 14, 2000), *available at* http://www.un.org/icty/ind-e.htm).

133. *Id.* § IV, para. 433 (citing *Tadic*, Judgment, No. IT-94-1-A, § III, para. 248).

134. *Id.* § IV, para. 435.

135. *Id.*

136. *Id.* § IV, para. 419.

137. *Id.* § IV, para. 420; *see also Tadic*, Judgment, No. IT-94-1-A, at § III, para. 251; *Kupreskic*, Judgment, No. IT-95-16-T, at § V, para. 546; Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, No. IT-94-1-A, para. 69 (ICTY, Oct. 2, 1995), *available at* http://www.un.org/icty/ind-e.htm).

138. *See* Prosecutor v. Kunarac, Judgment, Nos. IT-96-23-T & IT-96-23/1-T (ICTY, Feb. 22, 2001), *available at* http://www.un.org/icty/ind-e.htm.

139. *Id.*

abused, and used as sex slaves.[140] Therefore, the actions of Kunarac and the others, particularly their acts of rape, clearly constituted crimes against humanity in violation of Article 5 of the ICTY Statute.[141]

2. Rape as a War Crime

Additionally, the ICTY Trial Chamber found that Kunarac, Kovac, and Vukovic committed war crimes, namely the crimes of rape and torture in violation of both Article 3 of the ICTY's enabling statute and, under customary international law, Article 3 of the Geneva Convention.[142] Article 3 of the ICTY enabling statute, titled Violations of the Laws or Customs of War and incorporates the 1907 Hague Convention and the Regulations annexed to it, states:

> The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:
>
> (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
>
> (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
>
> (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
>
> (d) seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
>
> (e) plunder of public or private property.[143]

In *Tadic*, the Appeals Chamber of the ICTY interpreted Article 3 to encompass other violations of international humanitarian law beyond those of the Hague Conventions:

> It can be held that Article 3 is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5 [of the Statute of the Tribunal], more specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as grave breaches by those Conventions; (iii) violations of common Article 3 [of the Geneva Conventions] and other customary rules on internal conflicts; (iv) violations of agreements binding upon the parties to the conflict,

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140. *Id; see also* A CLOSED DARK PLACE: PAST AND PRESENT HUMAN RIGHTS ABUSES IN FOCA, *supra* note 5 (detailing the specific treatment of the women of Foca).

141. *See Kunarac*, Judgment, Nos. IT-96-23-T & IT-96-23/1-T.

142. *See* Press Release, *supra* note 109.

143. *See* ICTY Statute, *supra* note 53, art. 3.

> considering qua treaty law, i.e., agreements which have not turned into customary international law . . . .[144]

Consequently, in the view of the ICTY, Article 3 functions as a "residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal."[145] Two preliminary requirements must be met in order for Article 3 to apply: (1) an armed conflict, defined as "a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State,"[146] must be present, and (2) a close nexus must exist between the alleged crime and the armed conflict.[147] The second relationship requirement is satisfied whenever the alleged crime is "closely related to the hostilities."[148] In *Tadic*, the Appeals Chamber identified four additional requirements specific to the application of Article 3:

> (1) the violation must constitute an infringement of a rule of international humanitarian law;
>
> (2) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met . . .;
>
> (3) the violation must be "serious," that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim . . .;

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144. Prosecutor v. Kunarac, Judgment, No. IT-96-23, § IV, para. 401 (ICTY, Feb. 22, 2001), *available at* http://www.un.org/icty/ind-e.htm (citing Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, No. IT-94-1-AR72, para. 89 (ICTY, Oct. 2, 1995), confirmed in Prosecutor v. Delalic, Judgment, No. IT-96-21-A, § I, paras. 125, 136 (ICTY, Feb. 20, 2001), *available at* http://www.un.org/icty/ind-e.htm).

145. *Id.* (quoting *Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, No. IT-94-1-AR72, at para. 91).

146. *Id.* § IV, para. 402 (citing *Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, No. IT-94-1-AR72, at para. 70).

147. *Id.* (citing *Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, No. IT-94-1-AR72, para. 70; Prosecutor's Pre-Trial Brief I, para. 98-101; Prosecutor's Final Trial Brief, para. 690-96); *see also* Prosecutor v. Delalic, Judgment, No. IT-96-21-T, § III, para. 193 (ICTY, Nov. 16, 1998), *available at* http://www.un.org/icty/ind-e.htm; Prosecutor v. Blaskic, Judgment, No. IT-95-14-T, § II, paras. 65, 69 (ICTY, Mar. 3, 2000), *available at* http://www.un.org/icty/ind-e.htm).

148. *Id.* (citing *Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, No. IT-94-1-AR72, at para. 70). In *Delalic*, the ICTY required "an obvious link" or a "clear nexus" between the alleged crimes and the armed conflict. *Delalic*, Judgment, No. IT-96-21-T, § III, paras. 193, 197. In *Blaskic*, the Trial Chamber referred to this requirement as finding an "evident nexus between the alleged crimes and the armed conflict as a whole." *Blaskic*, Judgment, No. IT-95-14-T, § II, para. 69.

> (4) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[149]

Based upon these four elements, the ICTY concluded that the general requirements for the application of Article 3 differ "depending on the specific basis of the relevant charges brought under Article 3."[150] For example, if a charge is brought based on a treaty violation, then two additional requirements must be met: (1) the treaty must be binding upon the parties at the time the violation occurred, and (2) the treaty must be congruent with the norms of customary international law.[151]

Additionally, the ICTY held that the rapes perpetrated by Kunarac and the others constituted a violation of Article 3 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.[152] Article 3 states:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> 1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) Taking of hostages;
>
> (c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

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149. *Id.* § IV, para. 403 (citing *Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, No. IT-94-1-AR72, at para. 94). The Appeals Chamber in *Prosecutor v. Aleksovski* endorsed these requirements. Prosecutor v. Aleksovski, Judgment, No. IT-95-14/1-A, § 1, para. 20 (ICTY, Mar. 24, 2000), *available at* http://www.un.org/icty/ind-e.htm.

150. *Id.* § IV, para. 404.

151. *Id.* (citing *Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, No. IT-94-1-AR72, para. 143).

152. *Id.* § IV, paras. 400, 405.

> 2. The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
>
> The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
>
> The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.[153]

The ICTY stated that "it is well established in the jurisprudence of the Tribunal that common Article 3, as set out in the Geneva Conventions, has acquired the status of customary international law."[154] Consequently, the ICTY Trial Chamber declined to review any existing treaties, for it determined that the application of common Article 3 would be the same under treaty law or under customary international law; in other words, because common Article 3 of the Geneva Conventions acquired status as customary international law, it was a sufficient basis for prosecution and conviction by itself.[155] The Trial Chamber delineated six requirements that must be met in order for Article 3 of the Geneva Conventions to apply:

> (1) The violation must constitute an infringement of a rule of international humanitarian law.
>
> (2) The rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met.
>
> (3) The violation must be "serious," that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim.
>
> (4) The violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.
>
> (5) There must be a close nexus between the violations and the armed conflict.
>
> (6) The violations must be committed against persons taking no active part in the hostilities.[156]

Additionally, the Trial Chamber in *Kunarac* noted that common Article 3 of the Geneva Conventions may require a relationship

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153. *Id.* § IV, para. 405; *see also* Geneva Convention, *supra* note 49.

154. Prosecutor v. Kunarac, Judgment, No. IT-96-23, § IV, para. 406 (ICTY, Feb. 22, 2001), *available at* http://www.un.org/icty/ind-e.htm (citing *Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, No. IT-94-1-AR72, at paras. 98, 134; Prosecutor v. Delalic, Judgment, No. IT-96-21-A, § I, para. 143 (ICTY, Feb. 20, 2001), *available at* http://www.un.org/icty/ind-e.htm).

155. *Id.* § IV, para. 406.

156. *Id.* § IV, para. 407 (citing *Delalic*, Judgment, No. IT-96-21-A, § V, para. 420).

between the accused and a party to the conflict.[157] In the instant case, however, the Trial Chamber saw no need to determine whether such a relationship was actually required, for the three defendants all fought "on behalf of one of the parties to the conflict [the Bosnian Serb paramilitary force]."[158]

The ICTY was satisfied that the actions of Kunarac and the two other defendants met all of the four general requirements set out in Article 3 of the ICTY Statute:

> Not only were the many underlying crimes made possible by the armed conflict, but they were very much a part of it. Muslim civilians were killed, raped or otherwise abused as a direct result of the armed conflict and because the armed conflict apparently offered blanket impunity to the perpetrators. It is irrelevant that the actual fighting had shifted from Foca town once it was safely in Serb hands to the surrounding areas by the time the events charged occurred, because the criterion of a nexus with the armed conflict under Article 3 of the Statute does not require that the offences be directly committed whilst fighting is actually taking place, or at the scene of combat. Humanitarian law continues to apply in the whole of the territory under the control of one of the parties, whether or not actual combat continues at the place where the events in question took place. It is therefore sufficient that the crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict. The requirement that the act be closely related to the armed conflict is satisfied if, as in the present case, the crimes are committed in the aftermath of the fighting, and until the cessation of combat activities in a certain region, and are committed in furtherance or take advantage of the situation created by the fighting.[159]

In short, the Trial Chamber concluded that the rapes in Foca constituted an infringement of international humanitarian law because they violated common Article 3 of the Geneva Conventions.[160] Moreover, the ICTY specifically reiterated the idea that that common Article 3 of the Geneva Conventions has attained the status of customary international law.[161] To be sure, the Trial Chamber did raise the question of whether all breaches of common Article 3 would constitute serious violations of international humanitarian law; however, it declined to address that question in more detail because it concluded that rape is a serious offense which

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157. *Id.*
158. *Id.*
159 *Id.* § V, para. 568.
160. *Id.* § IV, para. 408.
161. *Id.* (citing Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, No. IT-94-1-AR72, para. 98 (ICTY, Oct. 2, 1995), *available at* http://www.un.org/icty/ind-e.htm). This was affirmed in *Delalic*, Judgment, No. IT-96-21-A, § II, paras. 143, 150; *see also* Prosecutor v. Blaskic, Judgment, No. IT-95-14-T, § II, para. 166 (ICTY, Mar. 3, 2000), *available at* http://www.un.org/icty/ind-e.htm; Secretary-General's Report, *supra* note 35, para. 35.

unquestionably satisfies the requirements of common Article 3.[162] Finally, relying on its *Tadic* holding that customary international law imposes criminal liability for serious violations of common Article 3, the Trial Chamber consequently held that a violation of common Article 3 of the Geneva Conventions could be used to satisfy the fourth general requirement for a violation of Article 3 of the ICTY enabling statute.[163] Thus, the defendants were criminally liable for the rapes under Article 3 of the ICTY enabling statute and under common Article 3 of the Geneva Conventions.[164]

The Trial Chamber found all three defendants guilty of war crimes and crimes against humanity for their various offenses: Kunarac was found guilty of rape, torture and enslavement; Kovac was found guilty of enslavement, rape, and outrages upon personal dignity; and Vukovic was found guilty of torture and rape.[165] All three were sentenced to prison: Kunarac for twenty-eight years, Kovac for twenty years, and Vukovic for twelve years.[166] On June 12, 2002, the Appeals Chamber of the ICTY upheld the convictions and sentences of all three perpetrators.[167] The ICTR *Akayesu* decision, that considered rape to be an act of genocide, laid the foundation for *Kunarac*; however, the ICTY in *Kunarac* went beyond *Akayesu* in clearly detailing the legal rationale for its holdings as it unequivocally established rape and sexual enslavement as crimes against humanity.[168] Furthermore, the ICTY reiterated the conclusion that rape and sexual enslavement could also be considered war crimes.[169] Although the decisions in *Akayesu* and *Kunarac* may not necessarily prevent campaigns of mass rape against civilians in future wars, they nonetheless establish clear boundaries for intolerable behavior; indeed, after *Akayesu* and *Kunarac*, any rape during war may become tantamount to a crime against humanity, a

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162. *Id.* (citing *Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, No. IT-94-1-AR72, para. 134 (emphasis added)); *Blaskic*, Judgment, No. IT-95-14-T, § II, para. 134.

163. *Id.* (citing *Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, No. IT-94-1-AR72, para. 134; *confirmed in Delalic*, Judgment, No. IT-96-21-A, § II, para. 174; *see also Blaskic*, Judgment, No. IT-95-14-T, § II, para. 134).

164. *See id.* § V, para. 568.

165. *Id.* § VI, paras. 883-90.

166. *Id.* § VI, paras. 885, 887, 890.

167. Prosecutor v. Kunarac, Judgment, Nos. IT-96-23-T & IT-96-23/1, § I, para. 32 (Appeals Chamber of the ICTY, June 12, 2002) *available at* http://www.un.org/icty/ind-e.htm.

168. *Landmark ruling*, AMNESTY MAG., Mar.-Apr. 2001, *available at* http://www.amnesty.org.uk/news/mag/mar01/news.shtml. *See also Kunarac*, Judgment, No. IT-96-23, § VI, paras. 883-90; ICTY Web Site, *supra* note 85.

169. *See, e.g.*, Christopher Scott Maravella, *Rape As A War Crime: The Implications of the International Criminal Tribunal For the Former Yugoslavia's Decision in Prosecutor v. Kunarac, Kovac, & Vukovic on International Humanitarian Law*, 13 FLA. J. INT'L L. 321 (2001).

war crime, or an act of genocide. In other words, such behavior may not necessarily be prevented in the future, but these decisions strongly suggest that such behavior is less likely to be tolerated or ignored by the international legal community.

IV. JURISPRUDENTIAL CRITICISMS OF FINDING RAPE AS A CRIME AGAINST HUMANITY

Like previous international law decisions that affected the scope of the nature of crimes against humanity, recent decisions by the ICTY and the ICTR, such as *Kunarac* and *Akayesu,* are not without criticism.[170] Indeed, these decisions represent a trade off between domestic state autonomy and the desire of the international community to effectuate justice following the commission of particularly inhumane crimes.[171] Like its predecessor *Akayesu*, *Kunarac* clearly focuses more on the justice side of the balance sheet, but its reach for justice may go too far such that it inappropriately violates the sovereignty of either Serbia or Kunarac and the other defendants.[172] Moreover, these decisions may contain underlying by-products, such as the violation of conventional due process and the reification of gender stereotypes about women, that undercut the overall attempts by the ICTR and the ICTY to secure justice.[173] Ultimately, this Note argues that the *Kunarac* decision and its predecessor *Akayesu* were justified, and indeed, both cases were upheld on appeal; however, the criticisms that emerged in the wake of *Kunarac* are nonetheless worth exploring because of what they reveal about the nature of international human rights justice and because of how they may be addressed in future human rights' cases.

A. *Prosecuting Crimes Against Humanity Violates Established Principles of State and Personal Sovereignty*

Under the Charter of the United Nations, one state cannot interfere with the domestic affairs of another state.[174] Furthermore, the idea of state sovereignty embodied in the U.N. Charter is a bedrock principle of international law, and the prosecution of state officials acting under government orders may be viewed as a violation

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170. *See, e.g.,* George Will, *Lawless Redress*, WASH. POST, Aug. 9, 2001, at A19 (raising "serious questions about ad hoc uses of judicial forums created in response to particular events, forums such as the court for the former Yugoslavia and the tribunal concerning genocide in Rwanda").

171. McCormack, *supra* note 36, at 730-32.

172. *See infra* Parts IV.A., IV. B.

173. *See infra* Parts IV.C., IV. D.

174. U.N. CHARTER art. 2, para. 7.

of that state sovereignty.[175] Indeed, Serbian officials raised such an argument in their defense, claiming that their actions were domestic affairs within Yugoslavia; thus, they argued, their actions were not subject to outside interference or prosecution.[176]

This criticism is unpersuasive, however, for several reasons. First, the rapes in Foca were not purely domestic affairs of the Serbian government, for Foca is located in a state, Bosnia-Herzegovina, that achieved the criteria of statehood and was recognized as such in 1992.[177] Thus, one cannot argue that the mass rape of Bosnian women by Serbian paramilitary fighters was inherently a domestic Serbian incident.[178] Second, no modern state asserts the right not to be bound by *jus cogens* norms or norms of customary international law that prohibit the commission of genocide or crimes against humanity.[179] In other words, even though similar violations of international law, including mass rape, had not been prosecuted in the past, Serbia cannot now claim that its actions are not subject to prosecution by an international tribunal precisely because it undertook policies that violated international law.

Third, and perhaps most consequentially, previous judgments by international tribunals regarding war crimes and crimes against humanity, including the ICTR's judgment against *Akayesu*, suggest that this argument is invalid.[180] Although precedent is not determinative in international law as it is generally in a common law legal system like in the United States, the decisions of previous international tribunals are not without some type of precedential value.[181] In fact, Nazi officials offered similar arguments about state sovereignty during the Nuremberg Trials, and those arguments were roundly rejected.[182] Put more simply, a state does not have the

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175. *See generally* Anne Bodley, *Weakening the Principle of Sovereignty in International Law: The International Criminal Tribunal for the Former Yugoslavia*, 31 N.Y.U. J. INT'L L. & POL. 417 (1999). *See also* Guy Roberts, *Assault on Sovereignty: The Clear and Present Danger of the New International Criminal Court*, 17 AM. U. INT'L L. REV. 35 (2001).

176. *See* International Action Center, *Milosevic Puts "Tribunal" on Trial*, *available at* http://www.iacenter.org/sm_tohague.htm.

177. U.S. Central Intelligence Agency, *Bosnia and Herzegovina*, *in* WORLD FACTBOOK 2001, *available at* http://www.odci.gov/cia/publications/factbook/index.html.

178. Human Rights Watch, *The Milosevic Case: Questions and Answers, Human Rights News*, *available at* http://www.hrw.org/press/2001/08/milo-q&a-0829.htm.

179. Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 783-84 (2001). *But see* Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT'L L. 413, 427, 438 (1983) (asserting that *jus cogens* norms should not be viewed as customary international law because they do not require consent).

180. Christin B. Coan, *Rethinking the Spoils of War: Prosecuting Rape as a War Crime in the International Criminal Tribunal for the Former Yugoslavia*, 26 N.C. J. INT'L L. & COM. REG. 183, 203 (2000).

181. Roberts, *supra* note 179, at 774-75.

182. Coan, *supra* note 180, at 203.

sovereignty to massacre its people under any kind of international legal standard.

Arguably, the prosecutions of Kunarac in the former Yugoslavia, Akayesu in Rwanda, and all other defendants from both locations were interferences with personal, individual sovereignty.[183] In each case, defendants were taken from their home states, detained in another state, and prosecuted by a politically-charged tribunal whom the defendants asserted was biased; moreover, in the case of defendants before the ICTY, their detentions occurred in a state on the other side of the continent, and their trials took place amid a highly charged political backdrop of the worst human rights abuses in Europe since World War II.[184] Consequently, the defendants felt that they could not receive a fair hearing in an international forum and thus, they should have been tried domestically, if at all.[185] Moreover, the defendants felt that they should not even be tried as individuals before an international tribunal.[186] Indeed, if any entity should have been prosecuted, it should have been the state because the defendants were merely following orders from the state.[187]

Although the concept of individual sovereignty is not recognized uniformly within international law, these arguments fail even upon their own merits. First, international public policy outweighs any interference with personal sovereignty because of the likelihood that most defendants before the tribunals would never be tried in domestic courts.[188] As Judge Wald observed regarding the ICTY, an international tribunal can perform important "accountability functions that national courts in the thrall of leaders who are themselves alleged war criminals cannot."[189] Second, Article 7 of the

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183. *See* Alexander Orakhelashvili, *The Position of the Individual in International Law*, 31 CAL. W. INT'L L.J. 241 (2001); see also Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT'L L. 302, 309 (1999) (noting that "[c]rimes against humanity constitute a more difficult case as regards individual responsibility").

184. *See generally* Human Rights Watch, *Bosnia and Hercegovina*, *in* WORLD REPORT 2001, War Criminals, *at* http://www.hrw.org/wr2k1/europe/bosnia.html.

185. Letter from the Charge D'Affaires A.I. of the Permanent Mission of Yugoslavia (Serbia and Montenegro) to the United Nations Addressed to the Secretary-General, U.N. Doc. A/48/170-S/25801 (1993); *see also* Simma & Paulus, *supra* note 186, at 314 (noting that "[s]tates remain . . . reluctant . . . to bring their own leaders to justice").

186. *Milosevic Puts "Tribunal" on Trial*, *supra* note 176.

187. This idea was wholly rejected by the ICTY. *See Convictions Highlight Tragic Victims*, *supra* note 103 (quoting Judge Florence Mumba's admonition that "[l]awless opportunists should expect no mercy, no matter how low their position in the chain of command may be").

188. Wald, *supra* note 57, at 117-18; *see also* Simma & Paulus, *supra* note 183, at 314 (arguing that failing to prosecute heads-of-state domestically "runs counter to the stated purpose of international humanitarian law, i.e., to exclude certain criminal acts from the legitimate exercise of state functions").

189. Wald, *supra* note 57, at 117-18.

ICTY enabling statute and Article 6 of the ICTR enabling statute explicitly consider individual criminal responsibility for acts committed in relation to the conflicts in Yugoslavia and Rwanda respectively; therefore, the ICTY and the ICTR have personal jurisdiction to prosecute anyone who may be criminally liable for violations of international law in these settings.[190] Furthermore, Article 7(4) of the ICTY enabling statute and Article 6(4) of the ICTR enabling statute expressly prohibit a "just following orders" defense, although they do allow such a claim as a mitigating factor.[191] Moreover, the ability of the ICTY and the ICTR to prosecute individuals reflects a growing trend in international law to expand the legal personalty of individuals.[192] Finally, the defense of "just following orders," even if not prohibited by the enabling statutes of the ICTY and the ICTR, has been soundly rejected by international law since the Nuremberg Trials.[193]

Upon first glance, both of the sovereignty criticisms are intuitively appealing, yet neither have been recognized as a defense to the prosecution of suspected war criminals or defendants charged with crimes against humanity.[194] Indeed, the failure of these arguments suggests that the international community believes in a hierarchy of values under which state and personal sovereignty may be trumped in extreme circumstances, such as crimes against humanity.[195] In other words, the *Kunarac* and *Akayesu* prosecutions and decisions do constitute violations of state and individual sovereignty, but they do so in pursuit of a higher goal: justice.

B. *The International Prosecution of Rape Represents Ex Post Facto, Retroactive Adjudication*

The conviction of Kunarac and his co-defendants by the ICTY, as well as the conviction of Akayesu by the ICTR, may be criticized on the grounds that the convictions were based on ex post facto crimes; thus, the tribunals violated norms of due process and fairness.[196] Prior to *Akayesu* and *Kunarac*, rape was a reprehensible, vicious and inhumane action; however, it was not explicitly recognized within international law as a crime against humanity.[197] Indeed, contrary to

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190. ICTY Statute, *supra* note 53, art. 7.

191. *Id.* art. 7(4).

192. *See, e.g.*, P.K. Menon, *The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine*, 1 J. TRANSNAT'L L. & POL'Y 151, 182 (1992).

193. Coan, *supra* note 180, at 203.

194. *See infra* text accompanying notes 174-93.

195. *Id.*

196. *See* McCormack, *supra* note 36, at 731.

197. *See* Prosecutor v. Kunarac, Judgment, Nos. IT-96-23-T & IT-96-23/1-T (ICTY, Feb. 22, 2001), *available at* http://www.un.org/icty/ind-e.htm.

what some have later asserted, the Charter authorizing the Nuremberg Trials, for example, did not explicitly list rape as a criminal offense.[198] To be sure, rape was clearly a violation of the Geneva Conventions, and it was also generally recognized as a war crime under international law; however, rape "overwhelmingly has been viewed by the international community as an inevitable product of war, and as such, has seldom been prosecuted."[199] Furthermore, even though it was conceptually illegal as a war crime or as a violation of the Geneva Conventions, rape had not been defined under international law, leaving the ICTY in the paradoxical position of trying "sexual assault cases under a statute that offers groundbreaking international recognition of the crime of rape [even though] the ICTY's mandate explicitly prohibits it from applying anything other than accepted definitions of international humanitarian law."[200] Thus, the ICTY's assessment "of the legal gray area occupied by rape under international humanitarian law cannot help but position it in what some would call a legislative role."[201] Consequently, the ICTY, despite its Article 5(g) statutory charge, had no clear legal justification for trying rape as a crime against humanity because it had no clear definition of the crime that it was adjudicating.

Therefore, because rape was not defined expressly as a crime against humanity at the time that the events in Foca transpired and because the crime of rape was not clearly defined within international law in general, the standard by which Kunarac and the other defendants were prosecuted was necessarily ex post facto. This criticism of international prosecutions was raised by Akayesu before the ICTR, but was most famously asserted by Senator Robert Taft during the Nuremberg Trials because such ad hoc international tribunals like the International Military Tribunal at Nuremberg seemed to run against the traditional U.S. notion of justice that prohibits someone from being retroactively convicted of a crime.[202] Indeed, a prohibition on ex post facto crimes is even enshrined in the U.S. Constitution, raising the troubling question of why Kunarac and the other criminal defendants should be held to a standard beyond that of the U.S. Constitution.[203]

Again, this criticism has some initial appeal, but two counterarguments strongly question its validity. First, previous conventions and norms of international law explicitly prohibited

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198. *See* Charter of the International Military Tribunal, Annexed to the London Agreement, August 8, 1945, 59 Stat. 1546, 1547, 82 U.N.T.S. 279, 288.

199. Coan, *supra* note 180, at 184.

200. *Id.* at 195.

201. *Id.*

202. *See* JOHN F. KENNEDY, PROFILES IN COURAGE 211-24 (1956).

203. U.S. CONST., art. I, § 9, cl. 3.

torture and enslavement, and both categories may include the crime of rape, especially as it was perpetrated in Foca and the surrounding areas.[204] Consequently, rape may have implicitly been a crime against humanity under these other categories even if it was not recognized as a specific crime of its own; therefore, the defendants before the ICTY and the ICTR did commit acts recognized as criminal at the time they were committed, even though rape itself was not clearly a crime against humanity. Furthermore, the Geneva Conventions explicitly recognized rape as crime, even though there was no clear definition of rape within international law and even though rape was rarely prosecuted as a war crime.[205] Therefore, the acts of Kunarac and the others, as well as those of Akayesu in Rwanda, clearly constituted an international crime even if that crime was not well-defined at the time it occurred.

Second, one may plausibly argue that any standard permitting rape during war had already been abandoned by the same conventional reasoning that also prohibited torture and enslavement.[206] From this perspective, such an argument is similar to that offered recently by the U.S. Supreme Court in *Rogers v. Tennessee*, where the Court upheld the conviction of a man for murder even though his actions did not constitute that crime under the law at the time when they occurred.[207] In the words of Justice O'Connor, the Court merely brought "the law into conformity with reason and common sense."[208] A similar logic can be applied to the situations faced by both the ICTR and the ICTY, for both brought international law regarding war crimes and crimes against humanity into conformity with reason and common sense, especially in light of other similar crimes already prohibited.

C. *International Criminal Prosecution of Rape Reifies Women as a Weaker Sex in Need of Special Protections*

Arguably, the *Akayesu* and *Kunarac* decisions reify hoary stereotypes of women as a weaker sex in need of special protection under international law. Indeed, the Geneva Conventions, on which the ICTY relied for part of its decision, mentions women only in connection with rape, a convention that probably reflected traditional thinking at the time that the Geneva Conventions were drafted.[209]

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204. *See, e.g.*, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *entered into force* June 26, 1987, 1465 U.N.T.S. 85, 23 I.L.M. 1027 (1984), *as modified*, 24 ILM 535 (1985).

205. Geneva Convention, *supra* note 49.

206. *See infra* text accompanying notes 204-05.

207. *See* Rogers v. Tennessee, 532 U.S. 451 (2001).

208. *Id.*

209. Geneva Convention , *supra* note 49.

Furthermore, the ICTY's "case law stipulates that witnesses who have suffered traumatic experiences are not necessarily considered unreliable, and its statute requires no corroboration of testimony from rape victims."[210] Consequently, it reinforces the stereotypical view of women as helpless victims whose accusations are taken unquestionably without corroboration in order to afford them more protection as victims.[211]

This argument fails to consider the essence of the decisions in *Akayesu* and *Kunarac* in two crucial respects. First, decisions by the ICTY and the ICTR apply equally to men and women; thus, both genders are afforded the protections under international law determined by the tribunals.[212] Second, men were already accorded protections during time of war as both soldiers and civilians.[213] Put more forcefully, the "exclusion of the corroboration requirement 'confirms the formal international standards of equality between the sexes.'"[214] In other words, the decisions by the ICTR and the ICTY simply bring women into an equal position as men under international law, vis-à-vis their status as innocent civilians.[215] In short, rather than reinforcing tired stereotypes about women and their weakness and vulnerability during war, the decisions by the tribunals, especially the *Kunarac* decision by the ICTY, actually make women more fully members of the international community and subject to the same protections as men.[216]

V. JUSTIFICATIONS OF *KUNARAC* AND *AKAYESU* AND THE SIGNIFICANCE OF THESE DECISIONS FOR INTERNATIONAL LAW

The criticisms discussed above suggest that the recent ICTY and ICTR decisions regarding rape under international law have moral

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210. *Rape Now a War Crime*, CBS News, Feb. 22, 2001, *at* http://www.cbsnews.com/stories/2001/02/22/world/main273808.shtml.

211. So far, however, no conviction has occurred without corroborating evidence. *See Rule 96 of the Rules of Procedure and Evidence*, U.N. SCOR, 23d Plenary Sess. of the Int'l Crim. Trib. for Yugoslavia, U.N. Doc. IT/32/REV:18 (1994), *available at* http://www.un.org/icty/basic/rpe/IT32_rev18con.htm.

212. *See* Prosecutor v. Kunarac, Judgment, Nos. IT-96-23-T & IT-96-23/1-T (ICTY, Feb. 22, 2001), *available at* http://www.un.org/icty/ind-e.htm.

213. *Id.*; *see also* Sanja Kutnjak Ivkovic, *Justice by the International Criminal Tribunal for the Former Yugoslavia*, 37 STAN. J. INT'L L. 255, 288 (2001) (noting how the ICTY has addressed perceived international legal gender disparities).

214. Ivkovic, *supra* note 213, at 288 (quoting Fionnuala Ni Aolain, *Radical Rules: The Effects of Evidential and Procedural Rules on the Regulation of Sexual Violence in War*, 60 ALB. L. REV. 883, 901 (1997)).

215. *Kunarac*, Judgment, Nos. IT-96-23-T & IT-96-23/1-T.

216. *See* Waller, *supra* note 41, for an opposing view.

and political implications in addition to legal importance.[217] Indeed, the arguments used to refute the criticisms of *Kunarac* and *Akayesu* also may be used to provide a strong justification both for the decisions and also for the jurisprudential methods by which they were obtained. *Kunarac*, in particular, is justified legally as an extension of prior international law, including the *Akayesu* case, regarding war crimes and crimes against humanity. Additionally, just as *Akayesu* rested upon strong moral grounds, *Kunarac* is also justified morally because of its condemnation and international criminalization of a thoroughly repugnant and immoral act. Finally, *Kunarac* is justified from a humanistic perspective, for it further establishes standards of human behavior that should govern even when there is disagreement and fighting among members of the human community. Indeed, at their hearts, the *Kunarac* and *Akayesu* decisions are about protecting humanity from further atrocities, and therein may lie their true importance over time.

A. *Justifications*

Like *Akayesu*, the justifications for *Kunarac* rest on three principal foundations: international law, conventional morality, and global respect for humanity. To be sure, all three of these elements are connected, yet each identifies an element of the tribunals' decision-making that is necessary to understand the full rationale of their decisions, including *Kunarac*.

1. International Law

Prior to the recent decisions by the ICTR and the ICTY, acts of torture, enslavement and genocide—all of which may encompass rape—were already considered both war crimes and crimes against humanity; indeed, prohibitions on these acts had arguably acquired the status of *jus cogens* norms from which no derogation by a state would be permitted.[218] In contrast, the fact that "rape often functions in ways similar to other human rights abuses makes all the more striking the fact that, until recently, it has not been condemned like any other abuse."[219] Though it was rarely prosecuted in the past, rape was considered a criminal act under international law, and the *Akayesu* decision reinforced this conclusion by making rape legally

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217. *See infra* Parts V.A.2.-3. *See also Kunarac*, Judgment, No. IT-96-23, § IV, paras. 883-90.

218. Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 568-71 (1995).

219. HUMAN RIGHTS WATCH, GLOBAL REPORT ON WOMEN'S HUMAN RIGHTS, § 1, *at* http://www.hrw.org/about/projects/womrep/General-24.htm.

tantamount to genocide.[220] Additionally, the prosecution of rape as both a war crime and as a crime against humanity was expressly contemplated by the enabling statutes of both the ICTR and the ICTY.[221] Thus, the decision in *Kunarac* represents the culmination of a series of international legal trends – dating back to at least the Geneva Conventions and following closely the logic and jurisprudence of the ICTR in the *Akayesu* decision – pointing toward the conclusion that official, systematic rape during an armed conflict is unequivocally a war crime and a crime against humanity.[222] Indeed, some scholars and many humanitarian organizations such as Human Rights Watch had already asserted, even before *Akayesu* and *Kunarac*, that "[r]ape is explicitly prohibited under international humanitarian law governing both international and internal conflicts."[223] Therefore, after *Kunarac*, there can be no more confusion or uncertainty regarding whether rape is to be tolerated or ignored as an act of war. Although *Akayesu* was, arguably, murky in its legal analysis of rape as genocide and a crime against humanity, the decision in *Kunarac* to make rape a war crime and crime against humanity is clear and compelling, and its legal justification is without doubt.

2. Morality

No society condones the physical, nonconsensual sexual violation of another human being, though sadly, many societies do not prosecute or punish such violations as vigorously as they should.[224] Unlike other crimes that may acquire moral defenses to their commission (e.g., murder in self-defense; murder as euthanasia; theft of truly necessary goods), rape is never justifiable because it can never be a defensive act.[225] Thus, specifically criminalizing rape and sexual enslavement in the international community recognizes this fact, and by criminalizing such wholly indefensible behavior, international legal tribunals raise the moral dignity of all members of

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220. *See, e.g.*, Patricia Viseur Sellers & Kaoru Okuizumi, *Intentional Prosecution of Sexual Assaults*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 45, 46-47 (1997); Theodor Meron, *Rape as a Crime under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 425 (1993) (noting that individual soldiers have also been convicted in domestic courts for rape).

221. ICTY Statute, *supra* note 53.

222. McCormack, *supra* note 36 *passim*.

223. GLOBAL REPORT ON WOMEN'S HUMAN RIGHTS, *supra* note 219, § 1, International Protections.

224. *See* Meron, *supra* note 220, at 568.

225. *See* Survive, *Some Misconceptions and Facts about Rape*, *at* http://survive.org.uk/index1.html#miscon.

that community.[226] Moreover, the decisions in *Akayesu* and *Kunarac* acknowledge that "[r]ape is a moral issue between men and women, not just between one 'moral monster' and his victim."[227] As *Akayesu* and *Kunarac* profess, "[r]ape cannot be properly understood in moral terms without seeing it as a matter of collective responsibility, not just an issue of personal responsibility."[228] Therefore, international legal decisions that criminalize rape, such as *Akayesu* and *Kunarac*, do not neglect a moral dimension to international law, for the foundation of those legal decisions was laid in part by legal principles that embodied moral concerns (i.e., the Geneva Conventions).[229]

3. Respect for Humanity

The recent decisions by the ICTY and the ICTR also provide guidance for establishing respectful standards for living as humans in an increasingly diverse world.[230] Both *Akayesu* and *Kunarac* reinforce prohibitions on physical violation, racism or ethnic hatred, and sexism – all of which affect interpersonal interaction within the larger community of humans, especially in the developing world.[231] Moreover, *Akayesu* acknowledges both human obligations to tolerate those who are different and the need to recognize similarity as part of the human community, and the *Kunarac* decision amplified this sense of obligation.[232] Acknowledging this sense of humanity, as the ICTY and ICTR have done, is the first step toward effectuating a change in international behavior that may one day culminate in the abolition of diseased acts like the ones that occurred in Rwanda and in Bosnia-Herzegovina.[233] Indeed, once the human community has attained this acknowledgement, "[o]nly then can we begin to see a change in the way the international community, comprised of states themselves, responds to acts of aggression that violate not only human rights laws, but our own sense of morality and decency."[234]

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226. *See generally* Meron, *supra* note 220 (noting the "great humanitarian importance" of criminalizing rape).

227. Larry May, Editorial, *Rape and Collective Responsibility*, WASH. U. EDITORIAL SERVICES., Aug. 1997, *at* http://news-info.wustl.edu/opeds/opeds97/MayAug97.html.

228. *Id.*

229. *See, e.g.*, Jane Lampman, *Morality and War*, CHRISTIAN SCI. MONITOR, Oct. 11, 2001, *available at* http://www.csmonitor.com/2001/1011/p14s1-lire.html.

230. *See* Prosecutor v. Kunarac, Judgment, Nos. IT-96-23-T & IT-96-23/1-T, (ICTY, Feb. 22, 2001), *available at* http://www.un.org/icty/ind-e.htm.

231. *See, e.g.*, Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000).

232. *Id.*

233. Siegfried Wiessner and Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, 93 AM. J. INT'L L. 316 (1999).

234. Waller, *supra* note 41, at 658.

B. *Significance*

Much was written about the ICTR and the *Akayesu* case after it was decided, and much has been written about the trajectory of the ICTY leading up to the *Kunarac* decision; [235] however, the academic community has been much quieter than the popular press since the *Kunarac* decision was issued in February 2001, and so far, the academic analysis of *Kunarac* has been much less than that of *Akayesu*.[236] Part of this academic reticence may stem from the belief that *Kunarac* really says nothing new, or from analytic caution in order to avoid prematurely trying to assert *Kunarac*'s significance—especially before the Appeals Chamber released its decision in June 2002 regarding the defendants' appeal of their convictions and sentences. Indeed, the true significance of *Kunarac* may not be known for many years, even though the media has already hailed it as a landmark decision.[237] With more than a year passed for perspective, however, the impact of *Kunarac* seems most likely to be strongest across four separate areas that touch international law.

1. Value for Use by Other Tribunals

Just as *Kunarac* relied upon ideas developed earlier in *Akayesu*, the most immediate impact of *Kunarac* may be its reference by other international tribunals faced with adjudicating claims of rape as either a war crime or a crime against humanity.[238] The enabling statutes of the ICTR and the ICTY, as well as the Treaty of Rome creating the International Criminal Court, explicitly consider the international criminal prosecution of rape;[239] however, the *Kunarac*

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235. *See, e.g.*, Darren Anne Nebesar, *Gender-Based Violence as a Weapon of War*, 4 U.C. DAVIS J. INT'L L. & POL'Y 147 (1998); Amy E. Ray, *The Shame of It: Gender-Based Terrorism in the Former Yugoslavia and the Failure of International Human Rights Law to Comprehend the Injuries*, 46 AM. U. L. REV. 793 (1997); Sharon A. Healey, *Prosecuting Rape Under the Statute of the War Crimes Tribunal for the Former Yugoslavia*, 21 BROOK. J. INT'L L. 327, 350 (1995); Catharine A. MacKinnon, *Crimes of War, Crimes of Peace*, 4 UCLA WOMEN'S L.J. 59 (1993).

236. As of March 2002, only one major piece on *Kunarac* had been published, and it focused primarily on *Kunarac*'s implications for war crimes jurisprudence. *See generally* Maravella, *supra* note 169 (discussing the impact of *Kunarac* on the prosecution of war crimes under international law).

237. *See, e.g.*, Barnaby Mason, *Rape: A Crime Against Humanity*, BBC NEWS, Feb. 22, 2001, *at* http://news.bbc.co.uk/2/hi/world/europe/1184763.stm (hailing the decision as a "crucial precedent").

238. *See infra* text accompanying notes 18-20.

239. Kristen Boon, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy and Consent*, 32 COLUM. HUM. RTS. L. REV. 625 (2001). *But see* Jelena Pejic, *The Tribunal and the ICC: Do Precedents Matter?*, 60 ALB. L. REV. 841 (1997) (arguing that the ICTY provides little, if any, precedential value for the ICC). Unfortunately, the failure of the United States to join the ICC may overshadow any other issue that comes before it, including the prosecution of sexual crimes against

decision provides the most extensive interpretation of those provisions by presenting a definition of rape for use in international law.[240] Indeed, rape—and ethnic cleansing in general—has tragically become a widespread policy for warfare in much of the developing world, including Peru, Haiti, Myanmar and Somalia, in addition to the more well-known examples in Rwanda and Bosnia-Herzegovina.[241] Consequently, any future prosecutions of mass rapes in these areas will likely rely on the standard first contemplated in *Akayesu* but firmly established in *Kunarac*.

Admittedly, neither *Akayesu*, *Kunarac*, nor any other case addresses a persistent problem in international law: enforcement.[242] Indeed, one reason why international tribunal judgments regarding rape were so long in coming was not only that rape during war was rarely prosecuted, but also that judgments could not be enforced.[243] Moreover, the historically inadequate prosecution of rape stands in stark contrast to the prosecution of other similarly heinous crimes.[244] Indeed, this "differential treatment of rape makes clear that the problem—for the most part—lies not in the absence of adequate legal prohibitions, but in the international community's willingness to tolerate sexual abuse against women."[245] Therefore, even though *Kunarac* may provide a standard for other prosecutions of rape, there is no guarantee that decisions like *Akayesu* and *Kunarac* will necessarily act as a forceful deterrent to future mass rapes. Nonetheless, their significance for providing useful international legal standards regarding an indefensibly heinous crime cannot be overstated.

2. The Establishment of a Definition of Rape Under International Law

The ICTY Trial Chamber in *Kunarac* also adopted a definition of rape—first discussed in a previous ICTY case, *Prosecutor v. Furundzija*, and also explored in the ICTR's *Akayesu* decision—into

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humanity. *See, e.g.*, Glen Kessler, *Concerns Over War Crimes Court Not New*, WASH. POST, July 2, 2002, at A9.

240. *See generally* Prosecutor v. Kunarac, Judgment, Nos. IT-96-23-T & IT-96-23/1-T, § IV, paras. 439-40 (ICTY, Feb. 22, 2001), *available at* http://www.un.org/icty/ind-e.htm.

241. *See, e.g.*, Julius Strauss, *Sierra Leone's Rebels Use Rape As a Revenge Weapon*, DAILY TELEGRAPH, June 2, 2000, LEXIS, News Library, Daitel File.

242. Lucas W. Andrews, Comment, *Sailing Around the Flat Earth: The International Tribunal for the Former Yugoslavia as a Failure of Jurisprudential Theory*, 11 EMORY INT'L L. REV. 471, 510-13 (1997).

243. GLOBAL REPORT ON WOMEN'S HUMAN RIGHTS, *supra* note 219, § 1, International Protections.

244. *Id.*

245. *Id.*

customary international law.[246] This definition of the specific crime of rape was based upon definitions found in the common law of some of the world's major legal systems including Sweden, Canada, Germany, and the United Kingdom.[247] To be sure, even after *Akayesu* and *Kunarac*, rape is only an international crime if it occurs in the context of war or a systematic military campaign; however, after *Kunarac*, this crime has a definition, and its future application may expand beyond that of a situation of armed conflict.[248] In its *Kunarac* judgment, the ICTY presented its definition of rape:

> The Chamber must define rape, as there is no commonly accepted definition of this term in international law. While rape has been defined in certain national jurisdictions as non-consensual intercourse, variations on the act of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual. The Chamber considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. . . . The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances, which are coercive. Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.[249]

This definition emphasizes a context of aggression and coercion, and it allows for the "reformation of the standards of rape prosecution [which] may also 'assist in the creation of generally accepted international standards on the adjudication of sexual offenses.'"[250]

3. Increased Equalization of the Two Genders Before International Law

As suggested previously, both the *Akayesu* and *Kunarac* decisions go a long way toward equalizing the status of men and women under international law.[251] These decisions afford women almost identical civilian protections as men, and they take almost all violations of the individual to be unacceptable in times of war. Furthermore, both decisions apply equally to men and women;

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246. *See* American Society of International Law, *ICTY: Prosecutor v. Furundzija, IT-95-17/1-T (Dec. 10, 1998), in* INTERNATIONAL LAW IN BRIEF (Dec. 21-25, 1998), *available at* http://www.asil.org/ilib/ilibarch.htm; *see* Prosecutor v. Akayesu, Judgment, No. ICTR-96-4-T (Int'l Criminal Trib. for Rwanda, Sept. 2, 1998), *available at* http://www.ictr.org/wwwroot/ENGLISH/cases/Akayesu/judgement/akay001.htm.

247. *See generally* Prosecutor v. Kunarac, Judgment, Nos. IT-96-23-T & IT-96-23/1-T, § IV, para. 439 (ICTY, Feb. 22, 2001), *available at* http://www.un.org/icty/ind-e.htm.

248. *See Kunarac*, Judgment, Nos. IT-96-23-T & IT-96-23/1-T.

249. *See generally id.* § V, paras. 596-98.

250. Ivkovic, *supra* note 213, at 287.

251. *See infra* Part IV.D.

indeed, some men were also sexually assaulted during the armed conflict in the former Yugoslavia.[252] Moreover, they condemn in very strong language any official policy of a government or military apparatus that condones, encourages, or supports a campaign of mass sexual violation, including rape or sexual enslavement; indeed, both Akayesu and Kunarac were government agents who had the power to protect people from these acts, and the ICTR and the ICTY made clear that their failure to exercise this power was a gross violation of their duties as government agents. These decisions, however, do not single out women as a weaker class of victims in need of special protection; rather, they bring women more fully into the larger class of human beings who are afforded all legal, moral and humanistic protections.[253]

4. The Establishment of an Inviolable *Jus Cogens* Principle Against Rape

Jus cogens norms in international law are notoriously difficult to identify, and because of their absolute, nonderogative character, there is no general consensus that norms or principles should be labeled as *jus cogens*.[254] Prohibitions against piracy, slavery, and genocide are among principles most commonly asserted as *jus cogens* norms, and over time a prohibition on rape may also be included. Indeed, one may argue that rape is already included under *jus cogens* prohibitions against genocide and slavery. To be sure, the *Akayesu* and *Kunarac* decisions do not explicitly place rape into this category, but they present an extremely strong argument regarding why a prohibition on rape should be such a norm. Indeed, the reasoning in *Akayesu* and *Kunarac* leaves little room for the argument that prohibiting rape should not be treated as a *jus cogens* principle. Moreover, because rape is inherently an indefensible act, these decisions would force one to make an inhumane, almost barbaric argument regarding why rape should not be expressly prohibited in all situations.

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252. Men were also victimized by sexual violence, including sexual mutilation and forced rape, during the Yugoslavian conflict; therefore, these decisions protect them just as much as they protect women. *See* Askin, *supra* note 14, at 102 (detailing the incidents of sexual violence directed against men).

253. *See, e.g.*, Askin, *supra* note 14, at 97; Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT'L L. 379 (1999). *But see* Waller, *supra* note 41 (arguing that the ICTY's current limited role in stopping gender-based human rights violations makes it an inadequate tool for such goals).

254. *See* Princz v. Federal Republic of Germany, 26 F.3d 1166, 1173 (D.D.C. 1994) (defining a *jus cogens* norm as "a principle of international law that is 'accepted by the international community of States as a whole as a norm from which no derogation is permitted'") (quoting Committee of U.S. Citizens in Nicaragua v. Reagan, 859 F.2d 929, 940 (D.D.C. 1988)).

VI. CONCLUSION

Kunarac's expansion of the definition of a crime against humanity is logical, moral, and humane, and follows closely from the example set by the ICTR in *Akayesu* in which rape is condemned as genocidal. It goes beyond *Akayesu*, however, in its establishment of a useful international legal definition of rape, its clear condemnation of rape as both a war crime and a crime against humanity, and its detailed analysis of the law underlying its holdings. Contrary to the arguments of some, classifying rape or enslavement as a crime against humanity does not violate international laws and norms of sovereignty, nor does it reinforce old stereotypes of women as a weaker sex in need of rescue. Rather, it leads to an opposite conclusion, namely that women now possess truly equal legal standing with men in the human community as both men and women are shielded from personal sexual violations like those that occurred in Rwanda and Bosnia-Herzegovina. Moreover, the *Kunarac* and *Akayesu* decisions closed outdated gaps in existing international law, established useful foundations for future prosecutions of crimes against humanity, and created important legal bulwarks for civilians against ethnic, gender and other difference-motivated crimes committed by a state or a state-sponsored group. In fact, these decisions may even change how war is conducted in the future, for they will almost certainly impact the newly-established International Criminal Court's view of crimes against humanity.[255]

To be sure, rape will most likely still be used by military combatants, especially as an instrument to effectuate goals of ethnic cleansing within a desired territory. Rape has been a common policy in warfare throughout history, particularly in armed conflicts within developing countries, and its use as a tool of war shows little sign of receding even in light of cases such as *Kunarac* and *Akayesu*.[256] Indeed, rape has played a large role in recent military conflicts in Peru, Myanmar, Haiti, Kashmir, and Somalia, in addition to the aforementioned examples in Bosnia-Herzegovina and Rwanda, and its frequency is almost as disturbing as its apparent acceptance as a method for achieving military and political power. Its corrosive power, however, cannot be overstated, and as Catharine MacKinnon has noted in her discussion of genocidal rape, the use of rape in a military conflict is particularly insidious:

> [The use of rape in the conflict in Yugoslavia] is ethnic rape as an official policy of war in a genocidal campaign for political control. That means not only a policy of the pleasure of male power unleashed, which

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255. *See, e.g.*, ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, UN Doc. A/CONF.183/9 (1998), *reprinted in* 37 I.L.M. 999 (1998), *entered into force* July 1, 2002, *available at* http://www.un.org/law/icc/.

256. *See, e.g.*, Coan, *supra* note 180, at 183-85.

> happens all the time in so-called peace; not only a policy to defile, torture, humiliate, degrade, and demoralize the other side, which happens all the time in war; and not only a policy of men posturing to gain advantage and ground over other men. It is specifically rape under orders. This is not rape out of control. It is rape under control. It is also rape unto death, rape as massacre, rape to kill and to make the victims wish they were dead. It is rape as an instrument of forced exile, rape to make you leave your home and never want to go back. It is rape to be seen and heard and watched and told to others: rape as spectacle. It is rape to drive a wedge through a community, to shatter a society, to destroy a people.[257]

The decisions in *Akayesu* and *Kunarac* cannot prevent such acts in and of themselves, but they are important first steps toward the prevention of such acts in the future.

James R. McHenry III[*]

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257. Catharine A. MacKinnon, *Rape, Genocide, and Women's Human Rights*, 17 HARV. WOMEN'S L.J. 5, 11-12 (1994).

* J.D./Ph.D. Candidate 2003, Vanderbilt University; BSFS 1997, Georgetown University. I wish to thank Brooke Ackerly and W. James Booth for their thoughts on issues addressed in this note. I also wish to thank Olga McHenry, Morgan and Edith McHenry, Prateek Goorha, Jennifer Hoef, Wolfgang Moehler, Karen Petersen, and Carol Swain for their support while I wrote this note. This note is dedicated to the efforts to bring justice to people everywhere who have been victimized by crimes against humanity. *Salus populi suprema lex* (The welfare of the people is the highest law.).

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