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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

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Maravilla: Rape as a War Crime: The Implications of the International Crimin
**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**

*Christopher Scott Maravilla**

“To recognize sexual violence as a war crime, to develop a new discourse that allows these women to articulate their experience publically in a way that preserves their dignity — these are prerequisites for bringing rape in war and rape as a military strategy to the center of the historical and political discourse, so that these crimes can be addressed and ultimately prevented and the perpetrators punished”

Amnesty International, RAPE AND SEXUAL ABUSE: TORTURE AND ILL-TREATMENT OF WOMEN IN DETENTION 510 (1991).

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I. INTRODUCTION

Rape as an organized strategy of armed conflict has been employed by armies throughout history. In Greek mythology there is the example of the abduction of Helen of Troy, and, in Roman folklore, the rape of the Sabine women at the founding of Rome. It has been well documented as having

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occurred even in the Twentieth century. Rapes of civilian women were carried out in World War I, World War II, and Vietnam among others. Yet, these incidents, with a few exceptions, have been mostly overlooked in historical accounts. Until recently, this oversight was reflected in International Conventions and customary international law. Even the Fourth Geneva Convention on the protection of civilians during armed conflict which emphasizes the importance of protecting women does not explicitly prohibit rape. The previous state of the law reflects the gender biases of the predominantly male diplomats who crafted the modern rules of warfare.

The movement toward designating rape as a war crime has been percolating over the past decade. It was included in the jurisdiction of both the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in their enabling Statutes. The ICTY was established pursuant to United Nations Resolution 808 in 1993 to try the alleged perpetrators of war time atrocities committed during the course of the war in the Balkans in the 1990s. The Statute, adopted May 25, 1993, states the mission and jurisdiction of the Tribunal:

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, 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 (hereinafter referred to as "the International Tribunal") shall function in accordance with the provisions of the present Statute.¹

The decision by the Trial Chamber in *Prosecutor v. Kunarac, Kovac, & Vukovic* marks the first occasion that an international tribunal has explicitly ruled that the systematic rape of women during an armed conflict constitutes a war crime. A three judge panel convicted Dragoljub Kunarac, Radomir Kovac, and Zoran Vukovic, all of whom are Bosnian Serbs, of war crimes for their participation in the organized raping of Bosnian Muslim women in the city and surrounding area of Foca, Bosnia-Herzegovina after its conquest and occupation in 1992.² It is estimated that more than 20,000 women have been raped during the Balkans

1. Statute of the International Tribunal, May 25, 1993, (amended May 13, 1998), at http://www.un.org/icty/basic/statut/statute_con.htm (last visited May 1, 2001).

2. *Prosecutor v. Kunarac, Kovac, & Vukovic*, Case IT-96-23 and IT-96-23/1, Sentencing, Feb. 22, 2001, <http://www.un.org/icty/foca/trial2/judgement/kun-tj010222e-6.htm> (last visited Apr. 25, 2001).

conflict.³ These were not the errant actions of a few single soldiers, but a systematic policy encouraged, and often actively participated in, by commanders of both the regular army and the paramilitary units.⁴ The ruling on its face goes a long way toward insuring that all of the perpetrators of rape are punished for their crimes and justice is brought to the people of the Balkans. This decision also has further implications in international law because the definition adopted by the Chamber in terms of customary international law is not gender specific. Moreover, it solidifies the place in customary international law that the raping of civilians during an armed conflict will not be tolerated.

This Recent Developments piece sets out to: (1) document the atrocities committed against the Bosnian Muslim women in Foca by the Bosnian Serbs, (2) lay out the decision of the Trial Chamber in *Prosecutor v. Kunarac, Kovac, & Vukovic*, (3) discuss the evolution of rape as a war crime in light of the Trial Chamber's ruling, and (4) discuss its implications in international law.

A. *The Events in Foca, Bosnia-Herzegovina*

The Prosecution for the International Criminal Tribunal for the Former Yugoslavia indicted Dragan Gagovic, Gojko Jankovic Janko Janjic, Radomir Kovac, Zoran Vukovic, Dragan Zelenovic, Dragoljub Kunarac, and Radovan Stankovic for crimes against humanity, breaches of the Geneva Conventions, and violations of the customary international law of war.⁵ The ICTY Trial Chamber convicted Kunarac, Kovac, and Vukovic while the remaining defendants' cases are still pending. The systematic rape of Bosnian Muslim women occurred in the city and municipality of Foca located south-east of Sarajevo in Bosnia-Herzegovina.⁶ The 1991 census figures showed the population of Foca to be 40,513 with 51.6% Muslim, 45.3% Serbian, and the remaining 3.1% composed of several different ethnic groups.⁷ The purpose of the attack on Foca by the Bosnian Serbs was to "cleanse" the area of its Muslim inhabitants.⁸ Unfortunately,

3. Kevin Cullen, *Bosnian Sex-slave Verdict Declares Rape a War Crime*, AUSTIN-AMERICAN STATESMAN, Feb. 23, 2001, at http://www.austin360.com/statesman/editions/today/news_5.html (last visited Feb. 23, 2001).

4. *Id.*

5. *Prosecutor v. Kunarac, Kovac & Vukovic*, Case IT-96-23, Indictment, <http://www.un.org/icty/indictment/english/foc-ii960626e.htm> (last visited May 1, 2001) [hereinafter Indictment].

6. *Id.* para. 1.1.

7. *Id.*

8. 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 May 2, 2001).

this objective was accomplished. Today, there are almost no Muslims present in the area, and Foca has been renamed Srbinje.⁹

The conquest of Foca and the surrounding area began on April 7, 1992 and was consummated on April 17th.¹⁰ After the town had been taken over, the Foca police worked closely with Bosnian Serb forces, both regular army and paramilitary, to round up the Muslim residents.¹¹ Men and women were separated with most being sent to detention centers, and others effectively placed under house arrest.¹² The Foca Kazneno-popravni Dom prison facility was the primary detention center for men.¹³ Muslim women were sent to Buk Bijela, Foca High School, Partizan Sports Hall, and various apartments and motels in the area where they were raped and beaten.¹⁴

Buk Bijela, one of the women's detention centers, is a settlement on the rive Drina that lies between Brod and Miljevina.¹⁵ It became a military headquarters for Bosnian Serb forces complete with barracks and an adjoining motel in which Muslim women were kept for use as sex slaves.¹⁶ At the motel, women were separated from their children, and acts of violence were threatened upon them and their children if they did not cooperate with authorities.¹⁷ Defendants Janko Janjic, Dragan Zelenovi, and soldiers under the control of Gojko Jankovic gang-raped women after first interrogating them.¹⁸ One witness, FWS-75, was interrogated by Gojko Jankovic and Dragan Zelenovic, and, afterwards, raped in an adjoining room by ten soldiers.¹⁹ She was subject to vaginal penetration and oral sex prior to losing consciousness.²⁰ The ordeal lasted for almost two hours.²¹ Another witness, FWS-87, a 15-year old girl was interrogated by Zelenovic and three others, and then forced to remove her clothes where each in turn raped her by vaginal penetration.²² After the rape, she experienced severe vaginal bleeding.²³ FWS-74 gave an account of the

9. *Id.*

10. Indictment, *supra* note 5, at para. 1.1.

11. *Id.* para. 1.2.

12. *Id.* para. 1.3.

13. *Id.* para. 1.4.

14. *Id.*

15. *Id.* para. 5.1.

16. *Id.* para. 5.3.

17. *Id.*

18. *Id.*

19. *Id.* para. 5.4.

20. *Id.*

21. *Id.*

22. *Id.* para. 5.5.

23. *Id.*

motel where she was raped for twenty minutes by a soldier under the auspices of defendant Janko Janjic.²⁴

The situation at Foca High School was no different. Foca High School, in the Aladza area, served as a barracks for soldiers and a detention center for Muslim women.²⁵ Every evening, Serb soldiers would arrive at the facility and sexually assault and gang-rape the young women and girls in classrooms.²⁶ If the women resisted they were severely beaten and threatened with death.²⁷ Four of the defendants, Gojko Jankovic, Dragan Zelenovic, Janko Janjic, and Zoran Vukovic, were among these soldiers.²⁸

The Partizan Sports Hall, located in the center of Foca near the police station and run by defendant Dragan Gagovic, the chief of police, was noted for its inhumane living conditions in addition to the torture and rape of its female occupants.²⁹ Soldiers would arrive in small groups, and remove the women they wanted for their own sexual pleasure.³⁰ The rapes that occurred there were very similar to the ones performed at Foca High School. Two other places, where the Serbs systematically raped Muslim women who were under their control, were Karamans House and the Brena Apartment. At Karamans House, elite Vukovar soldiers used the women as their exclusive sex slaves where they raped girls as young as 12.³¹ At the Brena Apartment, the women did household chores during the day, and were subject to rape and sexual assaults at night.³²

The situation in Foca, for which the defendants Kunarac, Kovac, and Vukovic were convicted of crimes against humanity, constituted a systematic and well-organized policy of raping of Muslim women as a method of "ethnic cleansing." While soldiers used these women for sexual gratification, their actions also constituted direct attacks against the civilian population. The rapes were intended to drive civilians from their homes while weakening the bonds of family and community in order to humiliate and degrade the Bosnian Muslims. Rape, in this case, represented an extreme act of violence aimed at an ethnic group despised by another.

24. *Id.* para. 5.7.

25. *Id.* para. 6.1.

26. *Id.* para. 6.4.

27. *Id.*

28. *Id.*

29. *Id.* para. 7.1.

30. *Id.* para. 7.5.

31. *Id.* para. 10.1.

32. *Id.* para. 12.1.

B. *The Decision of the Trial Chamber*

The Trial Chamber convicted the defendants for the crimes of rape under Article 3 and 5 of the ICTY's enabling statute and under Article 3 of the Geneva Conventions. The Trial Chamber also adopted a definition of rape, first contemplated in *Prosecutor v. Furundzija* before the ICTY Trial Chamber and *Prosecutor v. Akayesu* before the International Criminal Tribunal for Rwanda, into customary international law.³³ This usage of the term 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.³⁴ The Chamber explicitly ruled that the rapes that occurred in Foca constituted a war crime in violation of both international humanitarian law and the Tribunal's Statute.³⁵ Most significant, the Chamber also ruled that rape constitutes an outrage upon personal dignity under Article 3(c) of the Geneva Conventions.³⁶ Thus, although the prevention of the rape of women was not explicitly written into the Conventions, it is still of the nature of actions that constitute war crimes as contemplated by the drafters.

II. THE APPLICATION OF ARTICLE 3 OF THE STATUTE OF THE TRIBUNAL AND ARTICLE 3 OF THE GENEVA CONVENTIONS

The defendants were found by the Trial Chamber to have committed the crimes of rape and torture in violation of Article 3 of the Tribunal's statute, titled outrages upon personal dignity, rape, and torture, and under customary international law including Article 3 of the Geneva Convention.³⁷ Article 3 of the ICTY Statute, Violations of the Laws or Customs of War, 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;

33. *Prosecutor v. Kunarac, Kovac, & Vukovic*, IT-96-23, Applicable Law, Feb. 22, 2001, para. 437, at <http://www.un.org/icty/foca/trialc2/judgement/kun-tj010222e-4.htm> (last visited May 2, 2001) [hereinafter Applicable Law].

34. *Id.* para. 439.

35. *Id.* para. 408.

36. *Id.*

37. See Press release, *supra* note 8.

- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or wilful 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.³⁸

Article 3 incorporates the 1907 Hague Convention and the Regulations annexed to it.³⁹ The Appeals Chamber gave the following interpretation to Article 3 in the *Tadic* case:

[I]t 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, considering *qua* treaty law, *i.e.*, agreements which have not turned into customary international law⁴⁰

Article 3, therefore, serves 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.”⁴¹ It applies to both domestic civil wars and inter-State conflicts.⁴² There are two threshold requirements that must be met in order for Article 3 to apply to a given

38. See Statute of the International Tribunal, *supra* note 1.

39. Applicable Law, *supra* note 33, para. 401 (citing The 1907 Hague Convention IV Respecting the Laws and Customs of War on Land and Annexed Regulations Respecting the Laws and Customs of War on Land).

40. *Id.* (citing Prosecutor v. Tadic, Case IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Oct. 2, 1995, para. 89 (“Jurisdiction Decision”), *confirmed in* Prosecutor v. Delalic & Others, Case IT-96-21-A, Judgement, Feb. 20, 2001, para. 125 & 136).

41. *Id.* (quoting Prosecutor v. Tadic, Case IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Oct. 2, 1995, para. 91).

42. *Id.* at para. 402 (citing Prosecutor v. Tadic, Case IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Oct. 2, 1995, para. 137, *confirmed in* Prosecutor v. Delalic & Others, Case IT-96-21-A, Judgement, 20 Feb. 2001, para. 140 & 150; *see also* Prosecutor v. Delalic & Others, Case IT-96-21-T, Judgement, Nov. 16, 1998, para. 184; Prosecutor v. Furundzija, Case IT-95-17/1-T, Judgement, Dec. 10, 1998, para. 132; Prosecutor v. Blaskic, Case IT-95-14-T, Judgement, Mar. 3, 2000, para. 161).

situation: (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,”⁴³ must be present, and (2) there must exist a nexus between the crime alleged to have been committed and the armed conflict.⁴⁴ The latter requirement is satisfied whenever the alleged offenses arise from the armed conflict in question.⁴⁵ After these threshold requirements are met, there are four general requirements for 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 . . . ;
- (4) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.⁴⁶

Based upon these four elements laid out by the Appeals Chamber, the Trial Chamber concluded that the general requirements for the application of Article 3 differ dependant upon whether the charges are brought under a treaty or customary international law.⁴⁷ If a charge is brought based on a treaty violation then two additional requirements must be met before it

43. *Id.* (citing Prosecutor v. Tadic, Case IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Oct. 2, 1995, para. 70).

44. *Id.* (citing Prosecutor v. Tadic, Case IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Oct. 2, 1995, para. 70; Prosecutor’s Pre-Trial Brief I, para. 98-101; Prosecutor’s Final Trial Brief, para. 690-696; *see also* Prosecutor v. Delalic & Others, Case IT-96-21-T, Judgement, Nov. 16, 1998, para. 193; Prosecutor v. Blaskic, Case IT-95-14-T, Judgement, Mar. 3, 2000, para. 65 & 69).

45. *Id.* The court cited *Prosecutor v. Tadic*, Case IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Oct 2, 1995, para. 70. The Trial Chamber in the Delalic case, required “an obvious link” or a “clear nexus” between the alleged crimes and the armed conflict. *Prosecutor v. Delalic & Others*, Case IT-96-21-T, Judgement, Nov. 16 1998, para. 193 & 197. The Trial Chamber in the *Blaskic* case, referred to this requirement as finding an “evident nexus between the alleged crimes and the armed conflict as a whole.” *Prosecutor v. Blaskic*, Case IT-95-14-T, Judgement, Mar. 3, 2000, para. 69.

46. Applicable Law, *supra* note 33, at para. 403 (citing Prosecutor v. Tadic, Case IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Oct 2, 1995, para. 94. The Appeals Chamber in *Prosecutor v. Aleksovski*, Case IT-95-14/1-A, Judgement, Mar. 24, 2000, para. 20.).

47. *Id.* para. 404.

may apply to the defendants.⁴⁸ The two requirements are: (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.⁴⁹ In situations where the latter requirement is not met, the implication made by the Trial Chamber in its judgment is that the charges may still be brought, but must be solely based on customary international law.⁵⁰

The rapes found to have been committed by the defendants also constituted a violation of Article 3 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War.⁵¹ Article 3 of the Geneva Convention 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.

48. *Id.*

49. *Id.* (citing Prosecutor v. Tadic, Case IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, para. 143).

50. *Id.*

51. *Id.* para. 408.

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.⁵²

The Trial Chamber noted that “[i]t 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.”⁵³ The Trial Chambers did not review any existing treaties because it found Article 3 of the Geneva Conventions, as customary international law, a sufficient basis for conviction.⁵⁴ There are six requirements that must be met in order for Article 3 of the Geneva Conventions to apply. The requirements are:

- (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.⁵⁵

52. *Id.* para. 405; Geneva Convention relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 3, 75 U.N.T.S. 287, available at <http://www1.umn.edu/humanrts/instreet/y4gcpcp.htm>.

53. Applicable Law, *supra* note 33, at para. 406 (citing Prosecutor v. Tadic, Case IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Oct. 2, 1995, para. 98 & 134; Prosecutor v. Delalic & Others, Case IT-96-21-A, Judgement, Feb. 20, 2001, para. 143).

54. *Id.*

55. *Id.* para. 407 (citing Prosecutor v. Delalic & Others, Case IT-96-21-A, Judgement, Feb. 20, 2001, para. 420).

The Trial Chamber noted that Article 3 of the Geneva Conventions may require a nexus between the accused and a party to the conflict.⁵⁶ In the instant action, the three defendants were members of the Bosnian Serb paramilitary forces. Therefore, the Chamber declined to further address this question.⁵⁷

The Trial Chamber was satisfied that the actions of the three defendants met all of the four general requirements set out in Article 3 of the ICTY Statute. Moreover, the application of common Article 3 of the Geneva Conventions satisfies the fourth element of ICTY Statute Article 3. First, the violations, i.e. the rapes, constituted an infringement of a rule of international humanitarian law by being carried out contrary to the prohibitions set out in Article 3.⁵⁸ Regarding the second general requirement, the Appeals Chamber of the ICTY has explicitly held that Article 3 has attained the status of customary international law.⁵⁹ As to the third general requirement, the Trial Chamber noted that whether all breaches of Article 3 constitute "serious" violations of international humanitarian law, in such a way that they involve strong negative consequences for the victims, is an open question.⁶⁰ However, the Trial Chamber did conclude that rape is a serious offense, and, thereby, satisfies the third general requirement of Article 3 regardless.⁶¹ Finally, the Fourth general requirement is satisfied because the Appeals Chamber held in *Prosecutor v. Tadic* that customary international law imposes criminal liability for serious violations of common Article 3.⁶² Thus, the defendants

56. *Id.*

57. *Id.*

58. *Id.* para. 408.

59. *Id.* The court cites *Prosecutor v. Tadic*, Case IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Oct. 2, 1995, para. 98. This was affirmed in *Prosecutor v. Delalic & Others*, Case IT-96-21-A, Judgement, Feb. 20, 2001, para. 143 & 150; see also *Prosecutor v. Blaskic*, Case IT-95-14-T, Judgement, Mar. 3, 2000, para. 166. *The Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), May 3, 1993, U.N. Doc. S/25704, para. 35. Yugoslavia ratified both the Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts and Geneva Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts on June 11, 1979 and Bosnia and Herzegovina succeeded to both Additional Protocols on December 31, 1992. Yugoslavia ratified the four Geneva Conventions (including Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 1949 of August 12, 1949, which is most relevant to the present case) on April 21, 1950 and Bosnia and Herzegovina succeeded to the Geneva Conventions on December 31, 1992.

60. Applicable Law, *supra* note 33, para. 408 (citing *Prosecutor v. Tadic*, Case IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct 1995, para. 134 (emphasis added); *Prosecutor v. Blaskic*, Case IT-95-14-T, Judgement, Mar. 3, 2000, para. 134).

61. *Id.*

62. *Id.* (citing *Prosecutor v. Tadic*, Case IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Oct. 2, 1995, para. 134; confirmed in *Prosecutor v. Delalic* Published by UF Law Scholarship Repository, 2001

were criminally liable for the rapes under Article 3 of the ICTY Statute and common Article 3 of the Geneva Conventions.

III. THE APPLICATION OF ARTICLE 5 OF THE STATUTE OF THE TRIBUNAL

The defendants also were found to have committed crimes against humanity in violation of Article 5 of the ICTY's Statute. Article 5 of the Tribunal's Statute lays out offenses that, if committed in the context of an armed conflict, and, are considered an "attack" on a civilian population, will constitute a crime against humanity.⁶³ Article 5 states:

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.⁶⁴

Because the ICTY's jurisdiction under Article 5 is to try war time atrocities carried out by the participants of the conflict in the Balkans, it must first be established as a threshold matter that the alleged offences were, in fact, committed during an armed conflict.⁶⁵ This general prerequisite for jurisdiction by the Tribunal is unique to its Statute.⁶⁶ An armed conflict is 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."⁶⁷ The law

& Others, Case IT-96-21-A, Judgement, Feb. 20, 2001, para. 174; *see also* Prosecutor v. Blaskic, Case IT-95-14-T, Judgement, Mar 3, 2000, para. 134).

63. *Id.* para. 410.

64. Statute of the International Tribunal, *supra*, note 1.

65. Applicable law, *supra* note 33, para. 413.

66. *Id.*

67. *Id.* para. 412 (citing Prosecutor v. Tadic, Case IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Oct. 2, 1995, para. 70).

of crimes against humanity continues to apply to the actors beyond formal cessation of all hostilities.⁶⁸

An armed conflict must exist at the time and place pertaining to the indictment.⁶⁹ However, a nexus between the acts of the defendant and the conflict is not required.⁷⁰ The requirement is met when there is one present at the appropriate time and place.⁷¹ Therefore, the acts by the accused must have been carried out during the course of the war in the Balkans. In this instance, the rapes were conducted during the armed conflict in the Balkans in 1992. It is well established that the war in Bosnia-Herzegovina was ongoing at this time. Therefore, the first threshold requirement for jurisdiction was met by the defendants in the instant case.

After it is substantiated that the offences were committed during an armed conflict then the Trial Chamber must conclude that there was also an "attack" against the civilian population carried out by the accused.⁷² 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.⁷³

An "attack" is defined as "a course of conduct involving the commission of acts of violence."⁷⁴ The term "attack" is not only applicable to those actively engaged in the armed conflict such as soldiers, but also applies to the mistreatment of those taking no active part in the conflict like prisoners.⁷⁵ A nexus must exist between the acts of the defendant and the attack itself.⁷⁶ This is determined by a two part test:

68. *Id.* para. 414 (citing Prosecutor v. Tadic, Case IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Oct. 2, 1995, para. 70).

69. *Id.* para. 413 (citing Prosecutor v. Tadic, Case IT-94-1-A, Judgement, July 15, 1999, para. 249 & 251).

70. *Id.* (citing Prosecutor v. Tadic, Case IT-94-1-A, Judgement, July 15, 1999, para. 249 & 272; see also Prosecutor v. Blaskic, Case IT-95-14-T, Judgement, Mar. 3, 2000, para. 71).

71. *Id.* (citing Prosecutor v. Tadic, Case IT-94-1-A, Judgement, 15 July 1999, para. 249 & 251).

72. *Id.* para. 410.

73. *Id.*

74. *Id.* para. 415.

75. *Id.* para. 416.

76. *Id.* para. 418.

- (1) the commission of an act which, by its nature or consequences, is objectively part of the attack; couple 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.⁷⁷

The Commentary to the Two Additional Protocols of 1977 to the Geneva Conventions of 1949 intimates that the term "civilian population" applies only to civilians as opposed to those who may constitute members of the armed forces or other active participants in the conflict whose composition is derived primarily from the civilian population.⁷⁸ However, merely because active partisans may be present among the civilian population, this by itself will not alter the nature of the population under this definition.⁷⁹

The attack on the civilian population must also be "widespread or systematic" to come under the auspices of Article 5.⁸⁰ This excludes random acts of isolated violence. Only the attack itself need be widespread or systematic not the actions of the perpetrators.⁸¹ A single isolated attack on an individual or individuals in and of itself generally cannot constitute a violation of Article 5.⁸² The Trial Chamber in *Prosecutor v. Tadic* further stated: "The 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."⁸³ A single act may constitute a widespread or systematic attack if it is executed within the context of a greater assault on the civilian population.⁸⁴ The underlying offense also does not need to constitute an attack in itself, but only must form a part of an overall course of conduct.⁸⁵

77. *Id.* (citing *Prosecutor v. Tadic*, Case IT-94-1-A, Judgement, July 15, 1999, para. 248, 251 & 271; *Prosecutor v. Tadic*, Case IT-94-1-T, Opinion and Judgement, May 7, 1997, para. 659; *Prosecutor v. Mrksic & Others*, Case IT-95-13-R61, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Apr. 3, 1996, para. 30; *Prosecutor v. Kunarac & Others*, Case IT-96-23 and IT-96-23/1, Decision on Prosecution's Motion for Exclusion of Evidence and Limitation of Testimony, July 3, 2000, para. 6(b)).

78. *Id.* para. 426 (citing COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 611 & 1451-1452 (1987)).

79. *Id.* para. 425 (citing *Prosecutor v. Kupreskic and Others*, Case IT-95-16-T, Judgement, Jan. 14, 2000, para. 549).

80. *Id.* para. 427 (citing *Prosecutor v. Tadic*, Case IT-94-1-T, Opinion and Judgement, May 7, 1997, para. 648).

81. *Id.* para. 431.

82. *Id.* para. 422.

83. *Id.* (citing *Prosecutor v. Tadic*, Case IT-94-1-A, Decision on the Form of the Indictment, Nov. 14, 1995, para. 11).

84. *Id.*

85. *Id.* para. 417; see also *Prosecutor v. Tadic*, Case IT-94-1-A, Judgement, July 15, 1999, paras. 248 & 255.

In *Prosecutor v. Mrksic*, the Appeals Chamber stated:

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].⁸⁶

The example given by the court was the turning in of Jews to Nazi authorities during World War II.⁸⁷ The act by an individual may not itself be enough to constitute an attack, but with the systematic persecution of Jews by the Nazis the act by its nature would become part of a systematic and widespread attack upon the civilian population.⁸⁸

The mental element required for a violation of Article 5 is that the accused must merely know that his or her actions occurred within the context of a broader assault on the civilian population.⁸⁹ In *Prosecutor v. Tadic*, the Appeals Chamber concluded that the motives of a defendant in conducting an attack on a civilian population are irrelevant to a finding of *mens rea*.⁹⁰ The perpetrator must merely possess the intent to commit the offence combined with the knowledge that his or her actions comprise a part of an overall attack on the civilian population.⁹¹ He or she must at least have reason to believe that the victim of his or her attack was a civilian.⁹² In cases of doubt, the Tribunal will assume that the victim was a civilian.⁹³

86. Applicable Law, *supra* note 33, para. 417 (quoting *Prosecutor v. Mrksic & Others*, Case IT-95-13-R61, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Apr. 3, 1996, para. 30).

87. *Id.*

88. *Id.*

89. *Id.* para. 434 (citing *Prosecutor v. Tadic*, Case IT-94-1-A, Judgement, July 15, 1999, para. 248; *Prosecutor v. Tadic*, Case IT-94-1-T, Opinion and Judgement, May 7, 1997, para. 659; *Prosecutor v. Kupreskic & Others*, Case IT-95-16-T, Judgement, Jan. 14, 2000, para. 556).

90. *Id.* para. 433 (citing *Prosecutor v. Tadic*, Case IT-94-1-A, Judgement, July 15, 1999, para. 248).

91. *Id.* para. 434 (citing *Prosecutor v. Tadic*, Case IT-94-1-A, Judgement, July 15, 1999, para. 248; *Prosecutor v. Tadic*, Case IT-94-1-T, Opinion and Judgement, May 7, 1997, para. 659; *Prosecutor v. Kupreskic & Others*, Case IT-95-16-T, Judgement, Jan. 14, 2000, para. 556).

92. *Id.* para. 435.

93. *Id.*

It is sufficient for the Prosecution to demonstrate that the actions of the defendants occurred in the context of an accumulation of acts of violence which in and of themselves may vary in gravity.⁹⁴ Although the attack must be part of the overall conflict, it may also outlast the hostilities.⁹⁵ It must be primarily directed toward the civilian population in order to constitute a crime against humanity.⁹⁶ The scope of Article 5 includes intra-State atrocities as well as those committed against the populations of another party to the conflict.⁹⁷

In this case, the Trial Chamber concluded that the actions of the defendants constituted a widespread and systematic attack upon the civilian population during the armed conflict in the Balkans. There was no doubt that the rapes of Bosnian Muslim women were well orchestrated, and that the defendants possessed the requisite intent of committing an attack against civilians. The women were rounded up and placed under armed guard in locations where they were intentionally used as sex slaves. Therefore, the actions of the defendants constituted crimes against humanity in violation of Article 5 of the ICTY Statute.

A. Rape as a War Crime

The sanctioned rape of civilians by military invaders has gone unpunished and unrecognized as a war crime for most of history. During World War II, Japanese soldiers abducted over 100,000 Korean women for use as sexual slaves.⁹⁸ The Japanese Army also raped Chinese women in Nanking in the course of the war.⁹⁹ The Nazis in *Kristallnacht*, the organized attack against the Jewish ghettos that formally commenced the Holocaust, gang raped Jewish women as part of their efforts to mollify resistance.¹⁰⁰ The Russian Army committed many acts of rape against German women upon their entry into Berlin at the conclusion of World

94. *Id.* para. 419.

95. *Id.* para. 420; *see also* Prosecutor v. Tadic, Case IT-94-1-A, Judgement, July 15, 1999, para. 251; Prosecutor v. Kupreskic & Others, Case IT-95-16-T, Judgement, Jan. 14, 2000, para. 546; Prosecutor v. Tadic, Case IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Oct. 2, 1995, para. 69.

96. *Id.* para. 421.

97. *Id.* para. 423 (citing Prosecutor v. Tadic, Case IT-94-1-T, Opinion and Judgement, May 7, 1997, para. 635); *see also* HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION 193 (1948).

98. Shana Swiss & Joan E. Giller, *Rape as a War Crime: A Medical Perspective*, J. AMER. MED. ASSOC., Aug. 4, 1993, at 612, available at http://www.phrusa.org/research/health_effects/humrape.html.

99. Maria B. Olujic, *Women, Rape, and War: The Continued Trauma of Refugees and Displaced Persons in Croatia*, 13 ANTHROPOLOGY OF EAST EUROPE REV. 1 (Spring 1995), at http://www.depaul.edu/~rrotenbe/aecer/aecer13_1/olujic.html (last visited May 4, 2001).

100. *Id.*

War II.¹⁰¹ More recently, the Pakistani Army raped women in Bangladesh during the latter's war for independence in 1971.¹⁰²

The recognition of rape as a war crime has been pushed since the end of World War II, and comes under strong consideration during the International Criminal Tribunals for both the Former Yugoslavia and Rwanda this past decade. Rape was first introduced as a war crime in the Nuremberg War Crimes Trials at the conclusion of World War II, but it was not included among the final judgments handed down.¹⁰³ In contrast, in the Tokyo War Crimes Trials, also held at the conclusion of World War II, Japanese commanders were convicted of command responsibility for the rapes committed by their soldiers.¹⁰⁴ The War Crimes Tribunals have handed down convictions for rape in other contexts before the ICTY's ruling that rape constitutes a war crime in itself during the Kunarac, Kovac, and Vukovic case. The ICTY in the Celebici case, characterized the systematic rape of Bosnian Serb women at the Celebici detention camp as acts of torture.¹⁰⁵ Hazim Delic, the Bosnian Muslim deputy commander of the camp was convicted of breaching the Geneva Conventions and committing war crimes as acts of torture for his part in the raping of the Bosnian Serb women at the Celebici camp.¹⁰⁶ The camp commander, Zdravko Mucic, was convicted of command responsibility for the rapes and sexual assaults that took place under his watch.¹⁰⁷ Neither was convicted specifically of rape, only torture and command responsibility. In *Prosecutor v. Akayesu*, the International War Crimes Tribunal for Rwanda found Jen-Paul Akayesu, a communal leader, guilty of genocide for encouraging the raping of Tutsi women.¹⁰⁸ Akayesu was also charged specifically with rape, but was acquitted because the prosecution failed to establish that he was a member of the armed forces.¹⁰⁹ In *Prosecutor v. Tadic*, the ICTY convicted Tadic, a Bosnian Serb police officer, of beating Bosnian women at the Omarska and Trnopolje detention camps.¹¹⁰ The Trial Chamber heard evidence of rapes and sexual assaults conducted at

101. *Id.*

102. *Id.*

103. Swiss, *supra* note 98.

104. 1 TOKYO WAR CRIMES TRIAL 784-85, 791-92, 815-16, 820-21 (R. John Pritchard & Sonia Magbanua Zaid., eds., 1981).

105. *Prosecutor v. Delalic & Delic*, Judgement, IT-96-21, Feb. 16, 1998, at <http://www.un.org/icty/celebici/trialc2/judgment/cel-tj981116e-1.htm> (last visited May 1, 2001).

106. *Id.* para. 644.

107. *Id.* para. 775.

108. *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4, Sep. 2, 1998, Judgement, para. 195, at <http://www.icty.org/ENGLISH/cases/Akayesu/judgment/akay001.htm> (last visited May 1, 2000).

109. *Id.*

110. See *Prosecutor v. Tadic*, IT-94-1-T, Sentencing Judgement, Nov. 11, 1999, para. 1, at <http://www.un.org/icty/tadic/trialc2/judgment/tad-ts991111e.htm> (last visited May 1, 2001).

the camps, but the charges for rape against Tadic himself were later withdrawn.¹¹¹ However, the rulings in these cases by both the Trial and Appeals Chambers for the ICTY and ICTR formed the legal foundation for the ICTY Trial Chambers' ruling in *Prosecutor v. Kunarac, Kovac, & Vukovic* that rape is a war crime.

Rape is explicitly listed as a crime against humanity under the jurisdiction of the Tribunal in Article 5, section (g). In ruling that rape is a war crime and that the defendants by committing such acts violated Articles 3 and 5 of the ICTY Statute and Article 3 of the Geneva Conventions, the Trial Chamber still needed to define what constitutes a rape under international law. The elements of rape are nowhere to be found in the Statute of the Tribunal, any existing Treaties, or customary international law.¹¹² The Trial Chamber culled the elements of the crime of rape from the common law of major legal systems of several nations including Germany, Sweden, and the United Kingdom.¹¹³ The *actus reus* of the crime of rape in international law is: the sexual penetration, even slightly: "(a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim."¹¹⁴ Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances.¹¹⁵ The *mens rea* is the intent by the accused to knowingly penetrate the victim without consent.¹¹⁶

The rapes committed in Bosnia-Herzegovina were intended to humiliate the men as well as attack the women. In the Balkans, chastity of women is a sign of family and community honor.¹¹⁷ Rape was used as an instrument of war, used to undermine community ties, and threaten the civilian population into fleeing. In this case, the rapes committed by the Bosnian Serbs also were a manifestation of extreme nationalism. The Bosnian Serbs violated the women of their hated nemesis in order to undermine their manhood by not being able to protect their wives and daughters. It was a process of dehumanizing the enemy to the point where the women and children could be treated like cattle only to serve the appetites of the conquering Bosnian Serb forces. Thus, it is in this context that the Trial Chambers ruled rape to constitute a war crime. A precedent that will no doubt be followed by both Tribunals and future courts.

111. *Id.* para. 30.

112. Applicable Law, *supra* note 33, para. 437.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* para. 438.

117. Olujic, *supra* note 99.

B. *The Implications of the Decision in International Law*

The decision by the Trial Chambers possesses far reaching implications for the further development of international humanitarian law. First, the Chamber adopted the principle that rape constitutes a war crime into customary international law. Prior to this decision, there were no precedents under customary international law to conclude that rape is a crime against humanity. The issue of whether the organized and systematic rape of women by military forces constitutes a war crime and breach of the Geneva Conventions had been an open question. As discussed earlier, the Nuremberg judgments did not include the rapes committed by German soldiers, and the Tokyo judgments only convicted Japanese officers of command responsibility for the rapes committed by their troops not for the rapes themselves. The Geneva Conventions on the protection of civilians in war time do not explicitly mention rape, although the Fourth Geneva Convention emphasizes the protection of women. The ruling also included rapes committed independently by errant soldiers to be a war crime so long as they were committed in the course of a general attack on the civilian population. An "attack" was liberally defined, and, thus, all rapes committed during an armed conflict and after can be characterized as war crimes. There is little room for an individual to avoid conviction. Therefore, the ruling explicitly makes rape for the first time a war crime in regards to customary international law.

The Trial Chamber interpreted the provisions of Article 3 of the Geneva Conventions to include rape. Thus, the principles enunciated in Article 3 now explicitly prohibit the raping of civilians during war. This reading of Article 3 further implies that other international accords and treaties that provide for the protection of civilians and prisoners of war also include a prohibition against rape whether one is explicitly stated or not. Therefore, in all future deliberations of the nature involving the War Crimes Tribunals will read, in light of *Prosecutor v. Kunarac, Kovac, & Vukovic*, that rape constitutes a crime against humanity. It is understood to be encompassed in any language that provides for the protection of personal dignity or any other phraseology along those lines.

Finally, the definition of rape under customary international law that was adopted by the ICTY is gender neutral. One of the problems with International Conventions and Treaties thus far with regards to rape has been the gender bias of the male diplomats charged with the drafting. For example, the Fourth Geneva Convention asserts the protection of women as one of its guiding principles. Thereby implicating that rape, now included in the Geneva Conventions, may only constitute a war crime when inflicted upon women. Convention (IV) relative to the Protection of

Civilian Persons in Time of War, adopted in Geneva on August 12, 1949, states:

Part III. Status and Treatment of Protected Persons

Section I. Provisions common to the territories of the parties to the conflict and to occupied territories Art. 27. Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault.

Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.¹¹⁸

The same gender bias that originally did not include rape as a war crime could lend itself to the erroneous conclusion that only women can be raped. This reflects the societal stigma upon men who are subjected to rape. The raping of women in war has long been an atrocity whose time has been overdue for recognition as such, and for punishment to be rendered upon its perpetrators. The definition adopted by the ICTY in *Prosecutor v. Kunarac, Kovac, & Vukovic* ensures that rape is a crime against humanity regardless upon whom it is perpetrated upon. Thereby, the ruling aids in the protection of women and men.

118. Geneva Convention relative to the Protection of Civilian Persons, *supra* note 52, art. 27. (Emphasis added).

IV. CONCLUSION

Rape has been perpetrated as a military strategy throughout history. Until recently, it has been overlooked in international law. The ruling by the International War Crimes Tribunal for the Former Yugoslavia in *Prosecutor v. Kunarac, Kovac, Vukovic* marks the first time that rape has been explicitly held to be a war crime.

