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## The Complicity and Limits of International Law in Armed Conflict Rape

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# THE COMPLICITY AND LIMITS OF INTERNATIONAL LAW IN ARMED CONFLICT RAPE

JOHN D. HASKELL\*

**Abstract:** The inauguration of the International Criminal Court and the proliferation of criminal tribunals over the last twenty years are often presented as historic and progressive moments in the trajectory of international law's response to victims of rape in armed conflicts. However, these moments may signal not only inclusion, but also repression. They signal not just progress, but also a renewed rhetorical and institutional legitimization of colonialism. Historicizing the advent of the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the Former Yugoslavia, and the International Criminal Court, this Article examines some ways that international law obfuscates its complicity in armed conflict rape, looking particularly at calls within the profession for greater efficiency, nation-state security, and reparations for victims. In doing so, this Article grapples with questions concerning the limits and alternatives to our current legal imagination towards rape in armed conflict.

*"We think that justice is very important, but at the moment, it is meaningless."*

—M.K., Rwandan rape survivor<sup>1</sup>

## INTRODUCTION: PROGRESS OR PATERNALISM?

The standard account of the history of international law in the context of widespread rape in armed conflicts envisions that international law operates as a flexible process to: 1) restore peace and secu-

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<sup>1</sup> HUMAN RIGHTS WATCH, STRUGGLING TO SURVIVE: BARRIERS TO JUSTICE FOR RAPE VICTIMS IN RWANDA 36 (2004) [hereinafter HUM. RTS. WATCH, STRUGGLING TO SURVIVE], available at <http://www.hrw.org/en/reports/2004/09/29/struggling-survive>.

ity to armed conflict situations;<sup>2</sup> and 2) define the terms and methods by which women may be integrated into the international legal framework. In other words, modern international law is characterized principally in its struggle, or project, to bring order to chaos and inclusion to those on the peripheries.

This Article posits that each legal restructuring to bring order and inclusion is accompanied by a simultaneous act that instills new imbalances and forms of exclusion.<sup>3</sup> The standard approach denies these excluded experiences or “realities” (what Nathaniel Berman characterizes as “a series of catastrophes and mutations”) to maintain that international law is somehow linked to civilization, to freedom and democracy, and to modernity.<sup>4</sup> Against civilization, barbarianism—the wars of succession in the former Yugoslavia, the 100-day “genocide” in Rwanda,<sup>5</sup> the ongoing armed conflicts and butchery in

<sup>2</sup> See S.C. Res. 1503, U.N. Doc. S/RES/1503 (Aug. 28, 2003). The Resolution reads in part: “[c]ommending the important work of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in contributing to lasting peace and security in the former Yugoslavia and Rwanda and the progress made since their inception . . . .” *Id.* It continues to discuss recent changes to be implemented in trying the accused; however, there is no language attempting to define the ultimate objective, or “important work” of the international tribunals aside from “contributing to lasting peace and security in the former Yugoslavia and Rwanda.” *See id.* Here, it may be relevant in the overall scheme of the analysis to pause for a moment and consider the implications of this choice in words. In short, the structure and language of Resolution 1503 boldly suggests that mass rape in armed conflicts is prosecuted not in the interests of justice for the victims so much as it is in the interests of ensuring the stability and welfare of the mentioned states (“lasting peace and security”). *See id.* This will be discussed more in Part II.

<sup>3</sup> For a thorough treatment of this idea in other contexts see Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT’L L.J. 1, 7, 21 (1999) (stating, for example, that “positivists were engaged in an ongoing struggle to define, subordinate, and exclude the uncivilized native” while asserting itself as a set of techniques, or “doctrines that could coherently account for native personality”; and also, that “[l]egal science in the latter half of the nineteenth century was conceived of . . . as a struggle against chaos”); *see also* Nathaniel Berman, In the Wake of Empire, Presentation at the American Society of International Law’s 93rd Annual Meeting (March 1999), in 14 AM. U. INT’L L. REV. 1515, 1521, 1523, 1531, 1553 (1999) (analogizing Caribbean history to international legal history in order to characterize the history of international law as “phase[s] of repression,” observing that “decolonization was only the end of a specific form of imperial domination, one that only took definitive shape in the late 19th century,” and stating that “each gesture of greater inclusion in the ‘international legal community’ has been accompanied by a gesture of exclusion”).

<sup>4</sup> *See* Berman, *supra* note 3, at 1523.

<sup>5</sup> *See* Robert Murtfeld, Lemkin’s Genocide, Presentation at the International Law Association (British Branch) Spring Conference, “Tower of Babel—International Law in the 21st Century: Coherent or Compartmentalised?” (Mar. 3, 2006) (on file with author)

the Sudan. Against freedom and democracy, empire—often projected onto the former Soviet Union or the western international order before de-colonization. Against modernity, the past—a term of dark ambivalence and vague foreboding, the signaling of a return to nature, to the primitive, to empire—in short, to a time when the world was ruled and defined by strength not morals, by the sword rather than the pen, by fear instead of enlightenment. International law constantly speaks in the language of the past and the future; the way forward is always to elevate international law above politics and local ambitions. International law is, in essence, presented as a dynamic emancipation project whereby international law has been reborn and the role of law, and implicitly western civilization, redeemed from the horrors of its past.

Yet there is also anxiousness, or ambivalence, within the discipline and the international community at large as to international law's purpose and practicality.<sup>6</sup> The proclamation that the International Criminal Court (ICC) symbolizes a “historical development” rings shrill, perhaps too insistent on its place and character, especially when only a handful of cases have been successfully prosecuted by either the International Criminal Tribunal for the Former Yugoslavia (ICTY) or the International Criminal Tribunal for Rwanda (ICTR).<sup>7</sup>

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(challenging the concept of “genocide” as it functions on a moral and pragmatic level within the international human rights scheme and with international lawyers).

<sup>6</sup> See *id.* (describing calls for “coherency” and “compartmentalization” of international law as “anxious”). In fact, the tendencies are not so much alternatives, but moments in a process whereby international lawyers rationalize the horrors of their discipline with their own sense of right and wrong, and of purpose. Specifically, international lawyers compartmentalize, or distance, the horrors from their profession to present international law with a coherent history and purpose—that being, a story of the few bringing order and civilization to the many. To some extent, the narrative carries with it a missionary zeal, a duty to bring light to darkness, to right the wrong. Indeed, the current mindset of international legal enthusiasts and skeptics is still conditioned by the Old Testament and Judeo-Christian doctrinal traditions. See John Haskell, *From the Sacred to the Secular . . . And Back Again?: The Dynamic of Self-Determination from Genesis to Modern International Law*, Presentation at the International Law Association (British Branch) Spring Conference, “The Tower of Babel—International Law in the 21st Century—Coherent or Compartmentalised?” (Mar. 3, 2006) (on file with author) (tracing how the notion of difference developed in the creation account of Genesis and throughout the Old Testament (a “doctrine of difference”)—from light and darkness to the lineage of Adam and Satan to Israel and enemy nations to Gentiles becoming spiritual Israel and non-Christians—affects how we currently understand genocide, civilization, and the way forward).

<sup>7</sup> See Ivan Simonovic, *The Role of the ICTY in the Development of International Criminal Adjudication*, 23 *FORDHAM INT'L L.J.* 440, 447–48 (quoting former ICTY Prosecutor Justice Louise Arbour's explanation that the ICC courts are forced to be selective in their prosecutions because of limited resources); Press Release, Women's Caucus for Gender Justice,

Ultimately, the ICC looks as if it will operate as a more symbolic, rather than practical, institutional functionary. These voices loudly clamor that they represent something new, or are at least at odds with the past, when at the same moment the structural continuity in power and rhetoric today is strikingly reminiscent of the past.

For example, jurists in the nineteenth century were preoccupied with the problem of how to justify colonial expansion. The answer came in what Antony Anghie calls “the dynamic of difference,” whereby jurists, “using the conceptual tools of positivism, postulated a gap, understood principally in terms of cultural differences, between the civilized European and uncivilized non-European world.”<sup>8</sup> Once this gap was established, international law “proceeded to devise a series of techniques for bridging this gap—of civilizing the uncivilized.”<sup>9</sup> Implicit in this arrangement was the notion that civilization was a known commodity, a set of pre-determined and neutral characteristics that international jurists could use to gauge and determine other communities’ and peoples’ levels of and capacity for civilization, and hence the degree to which such groups might partake in the benefits, protections, and obligations afforded through formally recognized legal identity within the emerging global western order. Through “powerful evocations of the backward and barbaric,” international law was able to confirm “the incongruity of any correspondence between Europe and these societies,” thereby justifying the continued exclusion of non-European peoples from international law.<sup>10</sup> In other words, international law became the process by which uncivilized, non-European peoples were re-imagined, assimilated, and commonly subordinated into a Eurocentric web of ambiguous power relations among European states and other colonial territories.<sup>11</sup>

In the same way, the modern international law project concerning rape in armed conflict also establishes a similar tension between the

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International Criminal Court is Here! Rome Statute Enters into Force (July 1, 2002), *available at* <http://www.iccwomen.org/wigjdraft1/Archives/oldWCGJ/news/prjuly1.htm> (expressing excitement over the “historic” nature of the development of the ICC courts).

<sup>8</sup> Anghie, *supra* note 3, at 5.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 29.

<sup>11</sup> *Id.* at 25, 29 (noting how positivists saw law both as “the creation of unique, civilized, and social institutions” and the means by which states “could be[come] members of ‘international society’”); *see also* David Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 17 QUINNIPIAC L. REV. 99, 119 (1997) (observing that “international lawyers” in the nineteenth century “would increasingly think of a single, universal, international legal fabric ordering relations among civilized and uncivilized states”).

civilized and the uncivilized, albeit in slightly modified language. Pursuant to the rights that are guaranteed to women in international human rights instruments, the rape victim (the “uncivilized,” or other) is given a legal identity invoking all the duties and protections of the international legal framework (the “civilized”). Thus, international law is presented as the means by which women acquire their identity—as new members within civilization, and hence entitled to human dignity, self-determination, and justice. In this sense, the current conception of international law is rooted in, or at least mimics, a past where international law explicitly served the colonial ambitions of European nation-states. And, just as colonized peoples often found themselves no better off after their encounters with nineteenth century colonial powers, the needs and restitution of raped women in armed conflicts have not been a reality despite the attention of international law.

In this Article, I look at how the conceptual identities and practical realities of raped women are subordinated, and sometimes excluded completely, in the common dialogue among international scholars concerning rape in armed conflict and the modern reform framework implemented by the ICTY, ICTR, and ICC. I argue that these moments of exclusion call into question the very legitimacy and standard depiction of international legal history evolving through struggle and recollection from a patriarchal, colonial past to a more pluralistic, humanitarian liberal-modernist regime.<sup>12</sup>

This Article also addresses the periodic permutations of the legal order, but not as developments or setbacks that may be measured and plotted in some grand, comprehensive timeline. Instead, these changes should be understood as incoherent responses by the post-World War II legal order to the widespread rape of women in armed conflicts that has occurred and continues to occur with frequency and severity. International law’s efforts to provide a structure to dispense justice and restitution for raped women in armed conflicts are recognized to generate simultaneously new forms of “alienation and subordination” that

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<sup>12</sup> In critiquing the way the standard account approaches the history of international law in regards to rape in armed conflict, however, I do not want merely to establish another narrative to counter the dominant approach. To do so would only adopt the same myth, or idea, that the “shapeless mass of undigested and sometimes inconsistent rules” within international law can be sculpted into some coherent and chronological narrative of inclusion and progress. See Anghie, *supra* note 3, at 19 (quoting THOMAS LAWRENCE, *THE PRINCIPLES OF INTERNATIONAL LAW* 94 (1895)). Also, it would ignore that inherent in any attempt to produce a narrative, the actual stories and experiences of the survivors and their families in these situations are subordinated to the purposes and structural needs of the narrative structure.

deny any sense of “empowerment” to either the rape victims, or women in general.<sup>13</sup> In other words, rather than being acts augmenting the inclusion and representation of rape victims (and, as often asserted, all women) within the “contemporary vocabulary of human rights, governance, and economic liberation,” international law commonly and tragically operates to efface the identities, histories, and claims of rape victims.<sup>14</sup>

## I. DEFINING RAPE IN ARMED CONFLICTS

### A. *The Concept of the “Unprecedented”*

The efforts to define rape in the Rome Statute<sup>15</sup> and the case history within the International Criminal Tribunals in the Former Yugoslavia (ICTY) and Rwanda (ICTR) are often asserted as proof that women are finding unprecedented inclusion into the international legal order. According to the standard narrative, this period of “unprecedented” inclusion was inaugurated with the international community’s shock over the severe and distinct character of the mass rapes that occurred in the wars of succession in Yugoslavia (1992–94) and the 100-day genocide in Rwanda (1994).<sup>16</sup>

Just as nineteenth century jurists employed a “series of [legal] techniques” to the “postulation of a gap” between civilized (European) countries and uncivilized (non-European) countries, modern legal practitioners and scholars present the armed conflicts in Yugoslavia and Rwanda as “unprecedented” to postulate a gap between armed conflict situations and international law before and after the early 1990s and to juxtapose the rights of raped women in armed con-

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<sup>13</sup> See *id.* at 70.

<sup>14</sup> See *id.* at 80; Berman, *supra* note 3, at 1547 (describing this as a process whereby inclusion means “internalization, displacement, and transformation” for subjects on the peripheries of the international community).

<sup>15</sup> See Rome Statute of the International Criminal Court, art. 5, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (giving the ICC jurisdiction over the crime of genocide, crimes against humanity, war crimes, and the crime of aggression); Frances Pilch, *The Crime of Rape in International Humanitarian Law*, 9 USAFA J. LEGAL STUD. 99, 109–11 (1999). The statute includes as crimes against humanity: “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence.” Rome Statute, *supra*, art. 7(1)(g).

<sup>16</sup> Pilch, *supra* note 15, at 106–07 (noting that the mass rape in Yugoslavia and the genocide in Rwanda facilitated the establishment of tribunals to try rape crimes).

flicts situations before the “intervention” of international law with the rights of raped women under the international legal order.<sup>17</sup>

Presenting the early 1990s as “unprecedented,” jurists establish the notion that international legal history may be divided into two periods: the first period rooted in patriarchal sentiments and extending to the last decade of the twentieth century; the second period, a modern and increasingly pluralistic, gender-sensitive institution. For example:

The [United Nations Secretary General] Kofi Annan asserted at the close of the Rome Conference that only a few years ago nobody would have thought the Rome outcome possible. It is only now, at the turn of the millennium, and after numerous large scale atrocities, that the momentum has swung forcefully behind the need to reign in impunity for gross atrocity and for the international community to take seriously the need for structures to enforce the law all too often violated.<sup>18</sup>

This historical approach is echoed throughout legal scholarship in strikingly uniform language. Again, in line with the standard narrative, another writer states:

Undoubtedly, the single greatest impetus in the development of international humanitarian law concerning rape and sexual violence came as a result of the events in the former Yugoslavia and the formation and record of the ICTY. *These events marked a turning point in the international understanding of rape in armed conflict and a quantum leap in the criminalization of rape and sexual violence.*<sup>19</sup>

Pursuant to the dominant narrative, the unique, or unprecedented, nature of the wars in the former Yugoslavia and the genocide in Rwanda are made the catalyst by which international law and “womankind” become more attuned to one another. In doing so, an explicit gap is established between international law before and after the early 1990s, whereby: 1) the past is largely irrelevant (except as a means of charting international legal history as a story of growing inclusion and sensitivity to women by the international community); and 2) any current defects are not due to any fundamental attribute of international

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<sup>17</sup> See Anghie, *supra* note 3, at 5, 25, 29.

<sup>18</sup> Timothy L. H. McCormack & Sue Robertson, *Jurisdictional Aspects of the Rome Statute for the New International Criminal Court*, 23 MELB. U. L. REV. 635, 638–39 (1999).

<sup>19</sup> Pilch, *supra* note 15, at 101–02 (emphasis added).



law, but only the lingering shadows of a receding patriarchal, imperialist past. In short, by labeling these two events “unprecedented,” international law provided itself with a story, characters, and an alibi: the story is about international law as a universalist, humanitarian enterprise; the characters are women in general and pluralists pitted against international law’s patriarchal past, the interests of nation-states in preserving the full benefits of their sovereignty, and “uncivilized” moments, such as armed conflicts; and the alibi is that international legal history, as a “drama of social evolution,” is not a perfect science, but rather a struggle towards greater rights and sensitivities, wherein its failures are necessarily learning moments for not only international law, but also the entire international community (representative of humanity).<sup>20</sup>

To support the notion that the conflicts in the former Yugoslavia and Rwanda are “unprecedented,” or at least exceptional, as far as armed conflicts go, international legal commentators generally rely on the brutality and multiplicity of rapes that have occurred in both regions. These rapes are claimed to be especially egregious since they were not only attacks against women, but also used “as an instrument of . . . ‘ethnic cleansing’” and as a method of “torture, reward and a boost to soldiers’ morale . . . ‘to ensure that the victims and their families would never want to return to [the] area.’”<sup>21</sup> In other words, as Todd Salzman explains, “the Bosnian conflict brought the practice of rape

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<sup>20</sup> See Kennedy, *supra* note 11, at 101 (explaining that mainstream international lawyers view their progress as slow and gradual, but “part of a drama of social evolution”).

<sup>21</sup> Pilch, *supra* note 15, at 102 (quoting Catherine N. Niarchos, *Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia*, 17 HUM. RTS. Q. 649, 658 & n.54 (1995)). What is particularly interesting about this statement is the idea that these rapes are elevated to a “new level.” See Todd A. Salzman, *Rape Camps as a Means of Ethnic Cleansing: Religious, Cultural, and Ethical Responses to Rape Victims in the Former Yugoslavia*, 20 HUM. RTS. Q. 348, 349 (1998). Hence, it is “exceptional,” or “unprecedented,” because they “involve a public component” and represent “deliberate attacks on specific populations” in that they “bring shame upon the nation, the people, or the family.” See Kristen Boon, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and Consent*, 32 COLUM. HUM. RTS. L. REV. 625, 631–32 (2001). This idea is repeated in other works as well. See, e.g., Pilch, *supra* note 15, at 102–03 (“[W]hat is happening here is first a genocide, in which ethnicity is a tool for political hegemony: the war is an instrument of the genocide; the rapes are an instrument of the war.” (quoting Catharine MacKinnon, *Rape, Genocide, and Women’s Human Rights*, in MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA 187 (Alexandra Stiglmeier ed., 1994))). Pursuant to this approach, it is not the act of rape itself, but its threat to the “nation” and “people” that entitles heightened awareness by the international community. In practical and theoretical terms, this attitude subordinates the hardships and suffering of rape victims and their right to peace and justice by requiring an additional level of intent to qualify for the full benefits of inclusion in the international legal order.

with genocidal intent to a new level,” which he notes “[c]aused an outcry among the international community . . . [because] these violations were not random acts . . . [but] an assault against the female gender, violating her body and its reproductive capabilities as a ‘weapon of war.’”<sup>22</sup>

Some writers have gone further and drawn a connection between German and Japanese atrocities in World War II and the atrocities of Serbian forces in the Yugoslavian wars and Hutu militias in Rwanda. For example, speaking of the conflicts in Bosnia and Rwanda, Kelly Askin states that “a number of reports . . . exposed a calculated system of . . . rape . . . and other atrocities unseen in Europe since the Nazi holocaust of World War II.”<sup>23</sup> Likewise, Catharine MacKinnon describes the armed conflict in the former Yugoslavia, stating that “[t]his war is to everyday rape what the Holocaust was to everyday anti-Semitism.”<sup>24</sup>

These attempts to link the Holocaust with the events in Yugoslavia and Rwanda are problematic on two counts. First, the project of equating these events seems prone to inaccuracy and generalization. Can we really reduce the complexity and diversity of victims’ experiences in World War II with the equally diverse and complex experiences of women in Yugoslavia and Rwanda? Why would we want to make this analogy anyway? What purpose does it serve? Is there truly a universally shared experience? And if there is not, then upon what basis can we justify humanitarian intervention and the promotion of liberal international legal norms? Second, we may ask how the genocidal events in Yugoslavia and Rwanda can be “historic” and “unprecedented” moments, yet also find their identity rooted, to some degree, in the Nazi program in World War II. In other words, how can these events be both “unprecedented” and “analogous”?

This persistence in analogizing the atrocities in World War II with the armed conflicts in Yugoslavia and Rwanda is predicated on the needs of the standard international legal narrative. The end of World War II is often associated with the birth of the U.N. and the phenomena of individual human rights and the augmentation of international

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<sup>22</sup> Salzman, *supra* note 21, at 349. Again, his choice to characterize rape as “an assault against the female gender” offers an interesting glimpse at how the activity by the international legal order in relation to women raped in the crisis in Yugoslavia is projected, or universalized, into a grander story of all womankind making strides forward. *See id.*

<sup>23</sup> Kelly D. Askin, *A Decade in Human Rights Law: A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003*, 11 HUM. RTS. BRIEF 16, 16 (2004).

<sup>24</sup> Catharine A. MacKinnon, *Crimes of War, Crimes of Peace*, 4 UCLA WOMEN’S L.J. 59, 65 (1993).

actors and institutions. By attaching Yugoslavia and Rwanda to the events in World War II, the standard account suggests that these recent armed conflicts are also a monumental break from the past. It endorses international legal history as “memorabilia” of moments that intimates a larger story of how international law brings the benefits of civilization (expressed in terms such as human rights, self-determination, and modernization) to groups and individuals held out as previously beyond the peripheries of the international community.<sup>25</sup> In other words, the analogy allows international law to see itself as undergoing a process of “renewal,” whereby it is able to shed its past—excusing its wrongs by addressing each instance only in what may be learned and how it can be remedied.

By breaking from the past, the story shifts from inspecting how the international community and its normative valuations may have contributed to these various moments of crisis to focusing on how international law can formulate a solution. Consequently, here, we see another “gap” is being created in the way the narrative link between World War II and the armed conflicts in Yugoslavia and Rwanda distances the international community from being implicated in these situations and preserves the characterization of international law as a pluralistic, humanitarian project. In silencing the past, the international order washed its hands of any guilt.

## B. *The International Community’s Complicity in the Former Yugoslavia and Rwanda: A Brief History*

### 1. The Former Yugoslavia

The armed conflicts in Yugoslavia and Rwanda and the responses by the international legal order in the 1990s, however, were both shaped, in part, by their entanglements much earlier in the twentieth century. In Yugoslavia, for example, the roots of the conflict extended back at least to the Allied power’s creation of the Kingdom of the Serbs,

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<sup>25</sup> This notion of “memorabilia” comes from a lecture by Professor Catriona Drew in the course, Colonialism, Empire and International Law, at the School of Oriental and African Studies, University of London. What we observe is that this conception of international law as an evolving process or standardization of liberal humanitarian values and principles of legal (and, theoretically political) egalitarianism is dependent on international jurists being able to chart a progressive, linear journey by international lawyers and western powers. This historical map-making dominates the psychology of international legal scholarship concerning rape in armed conflicts.

Croats, and Slovenes as a sovereign state in the wake of World War I.<sup>26</sup> The territory was prone to internal ethnic conflict, “[p]opulated 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 orthographies.”<sup>27</sup> In 1929, the state’s name was changed to Yugoslavia.<sup>28</sup> The new state experienced “intense nationalist strife among its various ethnic groups in the 1920s and 1930s.”<sup>29</sup> Then, in 1941, the Nazis invaded, which in turn led to the creation of Croatia and Serbia, which served largely as puppet states.<sup>30</sup> Later, that same decade, the Germans were expelled and Soviet troops installed Josip Broz Tito as the new leader of the country, which consisted of six primary republics and two autonomous regions.<sup>31</sup>

During Tito’s regime, ethnic tensions were largely mediated; however, the breakdown of the former Soviet Union sparked ethno-nationalistic fervor in the republics of Slovenia, Croatia, Macedonia, and Bosnia-Herzegovina, as well as among ethnic Serbs (under the leadership of Slobodan Milosevic) who were encouraged and financed by the state of Serbia to fight against the other republics for a united Yugoslavia under the Serbian flag.<sup>32</sup> The ethnic turmoil was further exacerbated by the fact that the 1992 Arbitration Committee, in its opinions in the Conference on Yugoslavia, relied heavily on defining the states along Soviet-sponsored territorial borders and referred problems of ethnic conflict to the prescription of minority rights protection, reminiscent of the interwar regime under the League of Nations.<sup>33</sup>

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<sup>26</sup> See James R. McHenry III, Note, *The Prosecution of Rape Under International Law: Justice That Is Long Overdue*, 35 VAND. J. TRANSNAT’L L. 1269, 1280 (2002) (arguing that the conflict might even be traced back further to “relations among ethnic groups, first within the larger Ottoman Empire and then later as a mix of sovereign states, such as Serbia and Montenegro”).

<sup>27</sup> *Id.* at 1280–81 (quoting JOSEPH ROTHSCHILD, *EAST CENTRAL EUROPE BETWEEN THE TWO WORLD WARS* 202 (1974)).

<sup>28</sup> *Id.* at 1281.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> McHenry, *supra* note 26, at 1281.

<sup>32</sup> *Id.* at 1281–82.

<sup>33</sup> See generally Arbitration Committee of the Conference on Yugoslavia (Badinter Arbitration Committee) Opinion Nos. 2–3, reprinted in Alain Pellet, *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples*, 3 EUR. J. INT’L L. 178, 183–85 (1992) (concluding that “the Serbian population in Bosnia-Herzegovina and Croatia is entitled to all the rights concerned to minorities and ethnic groups” and that the boundaries between Croatia and Serbia “may not be altered except by agreement freely arrived at”).

Moreover, in spite of brewing ethnic hostilities, the European community initiated measures to attempt and preserve a “united” Yugoslavia. In 1991, the European Union Council of Ministers set up a conference explicitly with the aim of keeping Yugoslavia united.<sup>34</sup> The conference was followed shortly afterwards by “economic deterrence in the concurrent aims of keeping the republics from claiming independence and preventing the Serbian government from using military force to enforce unity,” as well as periodic threats from the European Community that it would deny EC membership to any newly declared independent states emerging from the Yugoslavian conflict.<sup>35</sup> Despite these measures and threats, Bosnia-Herzegovina, Croatia, and Slovenia achieved recognition as independent republics in 1992.<sup>36</sup>

In response to the political recognition of these republics by the international community, the Serbian and Croatian governments incurred intense assaults within Bosnia-Herzegovina, framing their invasions as “an attempt to protect [their] minority populations in the various republics and to retain [their] hold over portions of the land.”<sup>37</sup> The invasion carried out by the Serbian forces was particularly brutal and severe. Hence, while Croatian and Serbian soldiers attacked the local Bosnian Muslim population, it is generally accepted among the international legal order that the Serbian crimes were “more widespread and involved larger numbers of people.”<sup>38</sup>

In the name of “ethnic homogeneity,” according to the U.N. Special Rapporteur on Human Rights, between 1992 and 1994, as many as 20,000 women were raped in the ensuing conflict.<sup>39</sup> Many of these

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<sup>34</sup> 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, 637 (2001).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 637–38; see also McHenry, *supra* note 26, at 1282 (reporting that Croatia invaded Bosnia-Herzegovina on the grounds that twenty percent of the Bosnian population was ethnically Croatian).

<sup>38</sup> See McHenry, *supra* note 26, at 1282. Thus, when the international community stepped in, it primarily focused its resources on women raped by Serbian forces—the experiences of women raped by Croatian forces, to some degree, received a subordinate status compared to the other victims. See *id.*

<sup>39</sup> See Jocelyn Campanaro, Note, *Women, War, and International Law: The Historical Treatment of Gender-Based War Crimes*, 89 GEO. L.J. 2557, 2570 (2001) (citing *Preliminary Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery, and Slavery-Like Practices During Periods of Armed Conflict*, U.N. ESCOR, Hum. Rts. Comm., 48th Sess., Provisional Agenda Item 15, U.N. Doc. E/CN.4/Sub.2/1996/26 (1996)). Other statistics have placed the number of women raped at approximately 50,000. See Shana Swiss & Joan E. Giller, *Rape as a Crime of War—A Medical Perspective*, 270 JAMA 612, 613 (1993), available at

women were subjected to “gang rapes, multiple rapes, vaginal and anal rapes, fellatio and public rapes,”<sup>40</sup> often “as part of a deliberate system of ethnic cleansing [of Bosnian Muslims]” in which women became the principal “vehicles utilized to humiliate, subordinate, or emotionally destroy entire communities; to cause chaos and terror; to make people flee; and to ensure the destruction or removal of an unwanted group by forcible impregnation by a member of a different ethnic group [primarily Serbian].”<sup>41</sup>

Government officials (“from police officers to high ranking officials”)<sup>42</sup> and, in some cases, U.N. peacekeepers were reported to have participated in the rapes.<sup>43</sup> “Rape camps” were established to cater to the soldier populations.<sup>44</sup> According to one correspondent within the conflict, there were “reports of UN troops participating in raping Mus-

[www.womens-rights.org/publications/jama93.html](http://www.womens-rights.org/publications/jama93.html) (noting that estimates of women raped in Bosnia “fluctuated widely from 10,000 to 60,000”); Marius van Niekerk, Report to the World Veterans Federation’s Committee on African Affairs, *Breaking the Silence—Why Do Soldiers Rape in War?* (1999), <http://www.saveterans.org.za/breakingthesilence.htm> (stating that the armed crisis in Yugoslavia resulted in 50,000 victims who were raped in front of their family members).

<sup>40</sup> Kelly D. Askin, *Developments in International Criminal Law: Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 AM. J. INT’L L. 97, 119 (1999) (discussing specifically certain crimes charged in the *Foca* case, but also asserted more generally).

<sup>41</sup> Campanaro, *supra* note 39, at 2569–70; *see, e.g.*, MacKinnon, *supra* note 24, at 67. MacKinnon notes that the Serbian soldiers impregnate the Bosnian women on the belief: 1) that the rape will shame the women and child as “dirty and contaminated” by their families and culture; and 2) that it will cause the children born from Bosnian women to “rise up and join their fathers” because the “sperm carries all the genetic material [from the Serbian father].” *See* MacKinnon, *supra* note 24, at 67. MacKinnon holds this second notion as the “ultimate racialization of culture, the (one hopes) final conclusion to Nazism: now culture is genetic.” *Id.* Here, again, we see the narrative connection being drawn between the World War II era and the armed crisis in the former Yugoslavia (and, as this Article posits, the standard approach’s set-up for representing international law as part of a universal project). *See id.*

<sup>42</sup> *E.g.*, Dean Adams, Comment, *The Prohibition of Widespread Rape as a Jus Cogens*, 6 SAN DIEGO INT’L L.J. 357, 382 (2005).

<sup>43</sup> *E.g.*, MacKinnon, *supra* note 24, at 67. Sometimes the women know their assailants. *See, e.g.*, 2 HELSINKI WATCH, WAR CRIMES IN BOSNIA-HERCEGOVINA 21, 182 (1993) (quoting one woman who testified that “she recognized two of the soldiers who came into the room . . . looking for women . . . [and] testified that the two men had been her highschool [sic] teachers”).

<sup>44</sup> Maria B. Olujic, *Women, Rape, and War: The Continued Trauma of Refugees and Displaced Persons in Croatia*, 13 ANTHROPOLOGY E. EUR. REV. 40, 40 (1995), available at [http://condor.depaul.edu/~rrotenbe/acer/acer13\\_1/Olujic.html](http://condor.depaul.edu/~rrotenbe/acer/acer13_1/Olujic.html) (noting that these makeshift brothels were generally given names that either signified the establishment as a place for “weary travelers in the Balkans” (such as “Vilina Vlas,” meaning “Nymph’s Hairdressers,” and “Kafana Sonja,” meaning “Coffeehouse Sonja”) or “suggest[ed] the modern, Western lifestyle” (such as “Laser” and “Fast Food Restaurant”).

lim and Croatian women from the Serb rape/death camps. Their presence has apparently increased trafficking in women and girls through the opening of brothels, brothel-massage parlors, peep-shows, and the local production of pornographic films.<sup>45</sup> There was also “[a] former United Nations Protection Force (UNPROFOR) commander reportedly accept[ing] offers from Serbian commanders to bring him Muslim girls from the camps for orgies.”<sup>46</sup> In many of these camps, the “majority of female victims have died, either from gunshots, bleeding as a consequence of gang rape, or by suicide motivated by shame.”<sup>47</sup>

These atrocities finally prompted the U.N. to act in 1992 through a series of Security Council Resolutions condemning the armed conflict.<sup>48</sup> In October 1992, Resolution 780 expressed the international community’s “grave alarm at continuing reports of widespread violations of international humanitarian law . . . reports of mass killings and the continuance of the practice of ‘ethnic cleansing.’”<sup>49</sup> Resolution 780 also authorized a Commission of Experts to investigate and submit reports on the alleged human rights violations.<sup>50</sup> The outcome of these reports led the Security Council to conclude that the Serbian forces practiced a policy of ethnic cleansing; furthermore, rape and sexual assaults were included as part of this policy’s implementation.<sup>51</sup> Resolution 770 allowed governments to take “all measures necessary” to bring an end to the human rights abuses.<sup>52</sup>

The Security Council Resolutions, however, were not meaningfully enforced, and consequently were “seemingly inconsequential to the warring parties” and “[i]n some instances, the Resolutions only

<sup>45</sup> MacKinnon, *supra* note 24, at 67 (citing Letter from [name withheld] to Author (Oct. 13, 1992)).

<sup>46</sup> *Id.* MacKinnon also briefly mentions an interview with Ragib Hadzic, head of the Center for Research on Genocide and War Crimes, to state that “General MacKenzie visited the ‘Sonje’ restaurant in Dobrinia, which was a brothel and had become a wartime rape/death camp. He reportedly loaded four Muslim women in his UNPROFOR truck, and drove away. The women have never been seen again.” *Id.* at 67–68 n.24.

<sup>47</sup> Olujić, *supra* note 44, at 40.

<sup>48</sup> Waller, *supra* note 34, at 647.

<sup>49</sup> S.C. Res. 780, U.N. Doc. S/RES/780 (Oct. 6, 1992) (requesting the “Secretary-General to establish . . . an impartial Commission of Experts to examine and analyse . . . its conclusions on the evidence of grave breaches of the Geneva Convention”).

<sup>50</sup> *Id.*; see Waller, *supra* note 34, at 647–48.

<sup>51</sup> Waller, *supra* note 34, at 648.

<sup>52</sup> S.C. Res. 770, U.N. Doc. S/RES/770 (Aug. 13, 1992) (calling “States to take . . . all measures necessary to facilitate . . . the delivery . . . of humanitarian assistance to Sarajevo and wherever needed in other parts of Bosnia and Herzegovina”); see also Waller, *supra* note 34, at 649–50 (noting that Resolution 770 does not reach the level of authorizing states to use force to dispel human rights abuses).

served to increase the hostilities that caused the massacre of thousands of Bosnian Muslims.”<sup>53</sup> In Security Council meetings, China and Russia proved reluctant to endorse any military force against the Serbs “for fear that such action would create a dangerous precedent for them.”<sup>54</sup> The United States was also opposed to intruding into the Yugoslavian armed conflict. One clear reason for this hesitation in responding to the atrocities in the former Yugoslavia is that the United States has always been remiss to ratify any international human rights instruments for fear it might “jeopardize” its sovereignty and Constitution.<sup>55</sup> Another possible reason may be that the turmoil surrounding the breakup of the former Soviet Union and the conflict in Somalia had put a damper on the United States’s desire to involve itself in any precarious military operation.<sup>56</sup> Expressing the United States’s seeming exhaustion abroad, President William J. Clinton told the U.N. in his 1999 address, that “some are troubled that the United States and others cannot respond to every humanitarian catastrophe in the world. We cannot do everything, everywhere.”<sup>57</sup> Thus, in 1993, pursuant to Resolution 827, the Security Council decided against military intervention and in favor of establishing the ICTY.<sup>58</sup>

## 2. Rwanda

The notion that the establishment of the ICTY was a step forward in ensuring humanitarian protection for all women was challenged within a year of its inception; in 1994, Rwanda broke out in civil war. In a period of approximately one hundred days, Hutu forces wiped out somewhere between 600,000 and 800,000 Tutsi in a full scale extermination campaign.<sup>59</sup>

While the genocidal campaign officially began when Rwandan President Habyarimana’s airplane was shot down on April 6, 1994 and extremist Hutu claimed that Tutsi were responsible, the origins of the

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<sup>53</sup> See Waller, *supra* note 34, at 650.

<sup>54</sup> *Id.* at 652.

<sup>55</sup> See *id.* at 656–57.

<sup>56</sup> See *id.* at 656.

<sup>57</sup> See *id.*

<sup>58</sup> See S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) (declaring the establishment of an “international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law in the territory of the former Yugoslavia”).

<sup>59</sup> Askin, *supra* note 23, at 16 (stating that “between April 7th and mid-July 1994, some 700,000 men, women, and children were systematically slaughtered”); see also HUM. RTS. WATCH, STRUGGLING TO SURVIVE, *supra* note 1, at 7 (estimating that at least 500,000 died).



conflict stretch much further back.<sup>60</sup> Hutu and Tutsi are the two principal ethnic groups in Rwanda.<sup>61</sup> Prior to the late nineteenth century, the Tutsi exercised minority rule over the Hutu population through a caste system.<sup>62</sup> The distinctions between the two groups, however, were not rigid or categorically ethnic—wealthy Hutu could undergo a ceremony to become Tutsi.<sup>63</sup> Similarly, Tutsi could become Hutu if they fell into poverty.<sup>64</sup> Thus, to some extent, the classifications were chiefly related to wealth and status, not ethnicity; moreover, ethnic divisions were blurred by the fact that both groups spoke the same language and practiced the same religion.<sup>65</sup>

In the early years of the twentieth century, Belgium colonizers encouraged “a historical myth of differences between Hutu and Tutsi in order to control the majority Hutu and institutionalize minority rule.”<sup>66</sup> This myth proposed that “Tutsi were a Nilo-Hamitic race from Egypt and Ethiopia who naturally ruled over the Bantu Hutu.”<sup>67</sup> The notion of racial difference was also promoted through the colonial practice of measuring each person’s nose to determine their group identity.<sup>68</sup> Furthermore, the Belgium colonizers issued identity cards that marked the local population as Hutu or Tutsi—Tutsis enjoying privileges generally denied to Hutu peoples, such as the right to go to school or enter the civil service.<sup>69</sup>

Minority rule, however, is difficult to maintain. In 1959, Hutu discontent escalated into open revolt against the Tutsi aristocracy.<sup>70</sup> The establishment of a Hutu-led government in 1961 did little to lessen

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<sup>60</sup> Alexandra A. Miller, Comment, *From the International Criminal Tribunal for Rwanda to the International Criminal Court: Expanding the Definition of Genocide to Include Rape*, 108 PENN ST. L. REV. 349, 350 (2004). Even though no one claimed responsibility and there was no convincing proof of guilt, the Rwandan radio blamed the Rwandan Patriotic Front, primarily consisting of Tutsi refugees, for the shooting. See *id.* at 350 n.3. Other allegations have also been made that members of Habyarimana’s Presidential Guard shot down the airplane. *Id.*

<sup>61</sup> *Id.* at 351.

<sup>62</sup> *Id.* at 352.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Miller, *supra* note 60, at 351–52.

<sup>66</sup> *Id.* at 352. This may be inaccurate, to some degree, as to whether Belgian colonizers really “institutionalized” these differences, or if they were already firmly in place, albeit lacking any violent element (that is, the fact that there was an official ceremony by which Hutu could become Tutsi may be seen as an “institutionalized” difference). See *id.*

<sup>67</sup> *Id.* at 352.

<sup>68</sup> *Id.* at 352 n.24.

<sup>69</sup> *Id.*

<sup>70</sup> Miller, *supra* note 60, at 352.

pressure on the Tutsi population.<sup>71</sup> By 1964, approximately 10,000 Tutsi had been killed, while hundreds of thousands more were forced to flee the country.<sup>72</sup> Things worsened in the 1970s when Major General Habyarimana, a Hutu senior army commander, led a successful coup against the government: the Mouvement Revolutionnaire National pour le Developpement (MRND).<sup>73</sup> The new government, led by President Habyarimana and a small inner circle, the Akazu, initiated a policy of “Hutu Power,” which essentially stood for “the Hutu need to rid Rwanda of Tutsi entirely.”<sup>74</sup> By late 1990, the MRND had reduced the Tutsi population in Rwanda to nine percent.<sup>75</sup>

In 1991, due to increasing international and political pressure, as well as the invasion of the Rwandan Patriotic Front (a group of Tutsi refugees demanding repatriation) in Northern Rwanda, the MRND was reduced to a minority party and a new, less militant Hutu government was established.<sup>76</sup> Habyarimana and his followers, however, secretly organized a plan to retake control, primarily premised once again on the concept of “cleansing” of Tutsi from Rwanda to mobilize support.<sup>77</sup>

The international community was aware of Habyarimana’s plans. Indeed, there was ample evidence of an imminent genocide. For example, between October 1990 and February 1994, “Hutu Power” loyalists massacred thousands of Tutsi.<sup>78</sup> Also, in 1990, *Kangura* (Wake Up!), a newspaper sympathetic with Habyarimana, published the “Hutu Ten Commandments,” which became “the Hutu manifesto” with calls to “stop having mercy on the Tutsi.”<sup>79</sup> In response to the escalating anti-Tutsi sentiment, however, the international community was largely silent.

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 352–53.

<sup>74</sup> *Id.* at 353 & n.31.

<sup>75</sup> Miller, *supra* note 60, at 353.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 353–54.

<sup>78</sup> *See id.* at 353 n.31. Even as a new government came into power, the MRND did not stop its “Hutu power” mission. Indeed, Habyarimana and his forces began to focus even more intently on carrying out a program of genocide against the Tutsi, possibly believing it was their best opportunity to regain power. *Id.* at 353–54. Thus, in the early 1990s, “Hutu power” loyalists established a youth militia, the Interahamwe, to “facilitate the cleansing of Tutsi from Rwanda,” distributed weapons to Hutu civilians, supported the preparation of extermination lists, and assassinated certain political figures. *Id.* at 354 (citing Prosecutor v. Nyiramasuhuko & Ntahobali, Case No. ICTR 97-21-I, Indictment (Jan. 3, 2001)).

<sup>79</sup> *Id.* at 353 n.34.

When Habyarimana's airplane was shot down on April 6, 1994, Hutu leaders incited the militia and public to "hunt down and quash" the Tutsi.<sup>80</sup> The international community again did not intervene. Instead, the U.N. ignored the pleading of UNAMIR commander, General Romeo Dallaire, to supply more forces and actually reduced its presence in Rwanda from 2500 to 270 peacekeepers during the first three weeks of the genocide.<sup>81</sup> Pursuant to U.N. orders, these troops abandoned outposts, which had been protecting fleeing Tutsi. In one case, "almost one hundred Belgian peacekeepers abandoned approximately two thousand unarmed Rwandan citizens in one of these outposts. As the soldiers left through one gate, the killers entered through another. More than one thousand unarmed civilians died in that slaughter."<sup>82</sup> Over the next one hundred days, according to an estimate by the U.N. Special Rapporteur on Rwanda, "at least 250,000 women were raped."<sup>83</sup> These women were subjected to "individual rape; gang-rape; rape with sticks, guns, or other objects," often by "relatives, neighbors, teachers, employers, domestic servants, police, and soldiers in the Rwandan Defense Forces."<sup>84</sup> Rwandan officials "sanctioned and encouraged this violence," even dispensing propaganda, often in the form of pornography, which presented Tutsi women as "sexual temptresses."<sup>85</sup>

The severity of the rapes "wrought devastating medical and psycho-social consequences on Rwandan women."<sup>86</sup> For example, Human Rights Watch reports that:

women and girls contracted sexually transmitted diseases, including HIV/AIDS; faced unwanted pregnancies and health complications resulting from botched abortions; and suffered sexual mutilation and other injuries, such as fistulas, uterine problems, vaginal lesions, and scarring. Ten years

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<sup>80</sup> See, e.g., Askin, *supra* note 23, at 16.

<sup>81</sup> Miller, *supra* note 60, at 351.

<sup>82</sup> See *id.* at 351 n.12.

<sup>83</sup> HUM. RTS. WATCH, STRUGGLING TO SURVIVE, *supra* note 1, at 7. Other reports put the number of women raped as high as 500,000. See Stephanie Wood, *A Woman Scorned for the "Least Condemned" War Crime: Precedent and Problems with Prosecuting Rape as a Serious War Crime in the International Criminal Tribunal for Rwanda*, 13 COLUM. J. GENDER & L. 274, 285 (2004).

<sup>84</sup> HUM. RTS. WATCH, STRUGGLING TO SURVIVE, *supra* note 1, at 7, 12.

<sup>85</sup> See Wood, *supra* note 83, at 284–85. Tutsi women were also portrayed as spies who would "dominate and undermine Hutu men." *Id.* at 284–85 n.55.

<sup>86</sup> HUM. RTS. WATCH, STRUGGLING TO SURVIVE, *supra* note 1, at 8 (noting that these rapes were carried out "on the basis of . . . [the women's] ethnicity . . . as an effective method to shame and conquer the Tutsi population").

after the events, victims of sexual violence [in Rwanda] . . . are still haunted by the abuse and remain traumatized, stigmatized, and isolated.<sup>87</sup>

According to one source, seventy percent of these rape survivors are HIV positive,<sup>88</sup> which may under-represent the number of victims due to the social stigma attached to women who have been raped.<sup>89</sup> One widowed woman, a rape survivor in Rwanda, explains that “[o]ur past is so sad. We are not understood by society . . . We become crazy. We aggravate people with our problems. We are the living dead.”<sup>90</sup> Another woman, also a woman raped and widowed during the genocide, accounts that “[w]hen they kill your husband and children and then leave you, it is like killing you. They left us to die slowly. I wish every day that I was dead.”<sup>91</sup>

The international order, however, remained reluctant to characterize these rapes, as well as other atrocities, in such a way to warrant intervention even though “all understood the gravity of the crisis within the first twenty-four hours.”<sup>92</sup> More than two weeks after the beginning of the genocide, the Secretary General of the U.N. acknowledged the conflict, but “portrayed the attackers as independent actors rather than a group following a government-directed program.”<sup>93</sup> Likewise, a day before the Secretary General’s remarks, the U.S. Ambassador to Rwanda, David Rawson, “characterized the slaughter as tribal killings

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<sup>87</sup> *Id.* The report also notes that Rwanda’s National Population Office estimated that 2000 to 5000 children were born out of rapes during the armed conflict. *Id.*

<sup>88</sup> See Wood, *supra* note 83, at 286.

<sup>89</sup> See BINAIFER NOWROJEE, HUMAN RIGHTS WATCH, SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH 1, 72–75 (1996); Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 66–69 (2002) (discussing how women with sexual histories, including rape victims, are perceived as unchaste and without legal redress for sexual assault).

<sup>90</sup> NOWROJEE, *supra* note 89, at 73.

<sup>91</sup> *Id.* at 74–75; see Adams, *supra* note 42, at 381 (observing that “[t]hose not murdered immediately following the heinous acts were permitted to live so they would ‘die from sadness’”).

<sup>92</sup> Miller, *supra* note 60, at 362 (quoting ALISON DES FORGES, LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA 595). Miller also points out that during the first few weeks of April 1994, a number of international organizations understood the gravity of the situation. *Id.* Thus, for example, Oxfam called the atrocities, “genocidal slaughter”; the International Committee of the Red Cross declared it “had rarely seen a human tragedy on the scale of the massacres.” *Id.*

<sup>93</sup> *Id.* at 362–63.

rather than genocide.”<sup>94</sup> Finally, on November 8, 1994, the U.N. acted; pursuant to Resolution 955, the Security Council created the ICTR.<sup>95</sup>

### C. *The Rome Statute: A Step Forward?*

Rape continues with impunity in armed conflicts around the world, as well as within the former Yugoslavia and the countries surrounding Rwanda. In Kosovo, for example, reports estimate that between 750 to 1000 women continue to be trapped in brothels.<sup>96</sup> Likewise, in 2000, the Council of Europe adopted Resolution 1212, which suggests that rape is still used in Kosovo as a “systematic war crime” and constitutes a crime against humanity.<sup>97</sup> These allegations are even more disturbing in light of reports by female trafficking victims that they were sometimes forced to provide free sexual services for local police officers, members of the North Atlantic Treaty Organization (NATO), and officials from the International Police Task Force (IPTF).<sup>98</sup>

Widespread rape is also present in armed conflicts in Sierra Leone, Sri Lanka, Iraq, Sudan, and the Democratic Republic of Congo (DRC), all countries that have recognized a number of human rights instruments and conventions.<sup>99</sup> Rebel fighters in Sierra Leone, for example, have been reported to brand women, making it difficult for their victims to be accepted back into the community.<sup>100</sup> In the DRC, Amnesty International reports that since 2002, approximately forty rapes occur every day in the Uvira area.<sup>101</sup> Hundreds of allegations have also surfaced since 2001 alleging widespread rape in Sri Lanka by offi-

<sup>94</sup> *Id.* at 363.

<sup>95</sup> See S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) (declaring the establishment of an “international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda”).

<sup>96</sup> Tina R. Karkera, Comment, *The International Criminal Court’s Protection of Women: The Hands of Justice at Work*, 12 AM. U.J. GENDER SOC. POL’Y & L. 197, 218–19 (2003).

<sup>97</sup> See EUR. PARL. ASS., 2000 Sess., Res. No. 1212 (April 3, 2000) (calling on member states to ratify the Treaty on the Statute of the International Criminal Court).

<sup>98</sup> See HUMAN RIGHTS WATCH, WORLD REPORT 2002: FEDERAL REPUBLIC OF YUGOSLAVIA 385 (2002) [hereinafter HUM. RTS. WATCH, FEDERAL REPUBLIC OF YUGOSLAVIA] (noting that trafficking continued to “surge into 2001”); HUMAN RIGHTS WATCH, WORLD REPORT 2002: WOMEN’S HUMAN RIGHTS 541–43 (2002) [hereinafter HUM. RTS. WATCH, WOMEN’S HUMAN RIGHTS]; Karkera, *supra* note 96, at 219.

<sup>99</sup> See, e.g., Adams, *supra* note 42, at 374–80.

<sup>100</sup> Jennifer Friedlin, *Experts Make Treatment of Wartime Rape a Priority*, WOMEN’S E NEWS, Jan. 16, 2005, <http://www.womensenews.org/article.cfm/dyn/aid/2146/context/cover>.

<sup>101</sup> Media Briefing, Amnesty International, Making Violence Against Women Count: Facts and Figures—A Summary (Mar. 5, 2004), available at <http://www.amnesty.org/en/library/asset/AC777/034/2004/en/dom-ACT770342004en.pdf>.

cers within the Sri Lankan Army, Navy, and police force.<sup>102</sup> Rape is also used as a “widespread and sometimes systematic . . . weapon of war” in Sudan.<sup>103</sup> Likewise, the U.S. Department of States reports that in Iraq:

The Iraqi Government uses rape and sexual assault of women to achieve the following goals: to extract information and forced confessions from detained family members; to intimidate Iraqi oppositionists by sending videotapes showing the rape of female family members; and to blackmail Iraqi men into future cooperation with the regime. Some Iraqi authorities even carry personnel cards identifying their official “activity” as the “violation of women’s honor.”<sup>104</sup>

Indeed, the ICC was established in large part as a response to the failures of the ICTY and ICTR. Like the ICTY and ICTR, the ICC and its founding document, the Rome Statute, are generally heralded as a “historic development” and a “coming of age . . . [bringing] a fundamental change for women.”<sup>105</sup> The Rome Statute, like the ICTR and ICTY Statutes, does not specifically define rape; however, the elements of rape are included in the Elements of Crimes, which acts as an interpretive guide for ICC judges.<sup>106</sup> The two basic elements are:

1) The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body; [and]

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<sup>102</sup> Adams, *supra* note 42, at 376.

<sup>103</sup> See Alexis Masciarelli & Iona Eveleens, *Sudanese Tell of Mass Rape*, BBC NEWS, June 10, 2004, available at <http://news.bbc.co.uk/2/hi/africa/3791713.stm>.

<sup>104</sup> Fact Sheet, U.S. Dep’t of State Office of Int’l Women’s Issues, *Iraqi Women Under Saddam’s Regime: A Population Silenced* (Mar. 20, 2003), available at <http://www.state.gov/g/wi/fls/18877.htm>; see also Valerie Oosterveld, *When Women Are the Spoils of War*, UNESCO COURIER, available at [http://www.unesco.org/courier/1998\\_08/uk/ethique/txt1.htm](http://www.unesco.org/courier/1998_08/uk/ethique/txt1.htm) (last visited Nov. 21, 2008) (estimating that Iraqi soldiers raped at least 5000 Kuwaiti women during the Iraqi invasion of Kuwait). All of these countries, however, have adopted a number of international human rights instruments that prohibit rape. See Adams, *supra* note 42, at 374–80. That widespread rape continues in these regions with impunity may call into question the legitimacy of the current formalistic fetish with legal language and provisions rather than addressing political and social realities.

<sup>105</sup> See, e.g., Press Release, Women’s Caucus for Gender Justice, *supra* note 7.

<sup>106</sup> See Rome Statute, *supra* note 15, arts. 7(1)(g), 9(1) (declaring that the Elements of Crimes “assist[s] the Court in the interpretation and application of articles 6, 7, 8,” which includes the interpretation of “rape” in article 7(1)(g)); see also Boon, *supra* note 21, at 644.

2) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such persons or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.<sup>107</sup>

This definition, like the recent ICTY decision in *Prosecutor v. Furundzija*, recognizes consent as an affirmative defense rather than an element of rape.<sup>108</sup> According to Rule 70 of the ICC's Rules of Procedure and Evidence: "[c]onsent cannot be inferred by reason of any words or conduct of a victim . . . or taking advantage of a coercive environment undermin[ing] the victim's ability to give voluntary and genuine consent."<sup>109</sup> The language is also significantly gender-neutral, as evidenced in the Elements of Crimes that "the concept of 'invasion' is intended to be broad enough to be gender-neutral."<sup>110</sup> At the same moment, however, rape is still understood to require "penetration."<sup>111</sup>

Article 7(g) of the Rome Statute specifically enumerates rape as a crime against humanity and article 8(b)(xxii) deems it a violation of the laws and customs of war.<sup>112</sup> Furthermore, the Statute notes that rape in armed conflict is also a grave breach and violation of article 3 common to the four Geneva Conventions.<sup>113</sup> The language of the Statute also implies that rape will be considered a crime against humanity and a war crime whether the armed conflict is "international" or "internal."<sup>114</sup>

<sup>107</sup> See International Criminal Court, Elements of Crimes, art. 7(1)(g)-1, Sept. 10, 2002, ICC-ASP/1/3 (Part II-B).

<sup>108</sup> See *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Trial Chamber Judgment, ¶ 271 (Dec. 10, 1998) (stating that the defense of consent was not raised to counter the elements of rape).

<sup>109</sup> See International Criminal Court, Rules of Procedure and Evidence, R. 70, Sept. 10, 2002, ICC-ASP/1/3 (Part II-A).

<sup>110</sup> See International Criminal Court, Elements of Crimes, *supra* note 107, art. 7(1)(g)-1 n.15.

<sup>111</sup> See *id.* art. 7(1)(g)-1 (defining rape as when the "perpetrator invaded the body of a person by conduct resulting in penetration").

<sup>112</sup> See Rome Statute, *supra* note 15, arts. 7(g), 8(b)(xxii) (listing rape as a "crime against humanity" and a "war crime").

<sup>113</sup> See *id.* arts. 8(2)(b)(xxii), 8(2)(c)(vi). In light of case judgments in the ICTY and ICTR, rape most likely will also be inferred in the Statute's prohibitions against genocide in article 6. See *id.* art. 6(b).

<sup>114</sup> See *id.* arts. 7(2)(a), 8(2)(b), 8(2)(c). Judge McDonald, President of the ICTY, also has argued that "the dichotomy that characterizes international humanitarian law—whether the conflict is international or internal—is untenable at the end of the twentieth century." See Gabrielle K. McDonald, *The Eleventh Annual Waldemar A. Solf Lecture: The Changing Nature of the Law of War*, 156 MIL. L. REV. 30, 34–35 (1998).

Thus, pursuant to the Rome Statute, rape may be a crime against humanity when it forms “part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”<sup>115</sup> Whereas “widespread” relates to the scale of the attack, requiring a large scale action against multiple victims, “systematic” implies premeditation by an organized group, enforcing a common policy.<sup>116</sup> By allowing the attack to be “widespread” or “systematic,” rather than requiring both conditions, the Rome Statute is broadening international law’s perception of rape.

The Rome Statute’s language, however, is deceptively broad. In particular, article 7(2)(a) clarifies “attack directed against any civilian population” to mean “a course of conduct involving the multiple commission of acts . . . pursuant to or in furtherance of a State or organizational policy to commit such attack.”<sup>117</sup> By equating “attack” with “a State or organizational policy,” the Statute renders the choice between “widespread” and “systematic” meaningless, ensuring that a crime against humanity will actually require that rape is not only widespread during an armed conflict, but also that it be “systematic”—that is, a State or group policy.<sup>118</sup>

These “gaps” in the international community’s perception of the nature and gravity of rape, as well as the almost complete lack of enforcement that will be shown in Part II, call into question the general acclaim that they represent, in any real sense, a break from the past. Indeed, while rape was not given an explicit definition long before the late 1990s, communities (both national and international) have been aware of occurrences of rape in armed conflicts, adopted a number of laws condemning it as illegal, and, in some instances, even prosecuted individuals on charges of rape during wartime.<sup>119</sup>

Thus, for example, Homer’s *Iliad*, Poussin’s 1637 masterpiece, *Rape of the Sabine Women*, and various passages from the Old Testament all provide “testaments to the tragedy of rape in historical and cultural

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<sup>115</sup> See Rome Statute, *supra* note 15, art. 7(1).

<sup>116</sup> See McCormack & Robertson, *supra* note 18, at 654.

<sup>117</sup> See Rome Statute, *supra* note 15, art. 7(2)(a).

<sup>118</sup> See McCormack & Robertson, *supra* note 18, at 654 (observing that the Rome Statute actually “raises the threshold requirements” for rape to constitute a crime against humanity).

<sup>119</sup> See Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT’L L. 288, 299 (2003) (noting that rape has been acknowledged for centuries and was prohibited in war by custom before it was ever codified).



memory.”<sup>120</sup> Also, in the 1300s, Italian jurist, Lucas de Penna, “urged that wartime rape be punished as severely as peacetime rape.”<sup>121</sup> Similarly, the sixteenth century jurist, Alberico Gentili, upon analyzing the literature of wartime rape, concluded that “it was unlawful to rape women in wartime, even if the women were combatants.”<sup>122</sup> Here, Gentili’s position that even women who are combatants should be contemplated under provisions acknowledging and punishing rape represents a broader vision of international protection than currently provided for in international law concerning rape in armed conflicts.

The first documented account of an individual being charged for rape in wartime occurred in 1474 when Peter van Hagenbach, a knight and military officer, was charged with rape and sentenced to death by an international military court consisting of twenty-seven judges.<sup>123</sup> In 1863, instructions signed by President Abraham Lincoln to Union forces in the Civil War, commonly referred to as the Lieber Code, contained two provisions concerning rape in armed conflict: Article 44 declared that “all rape . . . [is] prohibited under the penalty of death,”<sup>124</sup> and Article 47 asserted that rape is “not only punishable as at home, but in all cases in which death is not inflicted, the severer punishment shall be preferred.”<sup>125</sup> Only eleven years later, in 1874, suggestions began to surface calling for an international criminal tribunal, primarily from the non-government community.<sup>126</sup> By the First International Peace Conference in the Hague in 1899, governments had begun discussing this idea,<sup>127</sup> culminating in the declaration by the 1907 Hague Conventions and Regulations that sexual violence was

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<sup>120</sup> See, e.g., Pilch, *supra* note 15, at 100; see also Joshua H. Joseph, *Rethinking Yamashita: Holding Military Leaders Accountable for Wartime Rape*, 28 WOMEN’S RTS. L. REP. 107, 108–09 (2007) (quoting passage from *Zechariah* 14:2 (King James) as an example of rape in the Old Testament).

<sup>121</sup> Askin, *supra* note 119, at 299.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> See FRANCIS LIEBER, THE LIEBER CODE OF 1863: INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD, GENERAL ORDER NO. 100, art. 44 (Apr. 24, 1863), available at [http://avalon.law.yale.edu/19th\\_century/lieber.asp#sec1](http://avalon.law.yale.edu/19th_century/lieber.asp#sec1) (recommending that rape be punished by death “or such other severe punishment as may seem adequate for the gravity of the offense”).

<sup>125</sup> *Id.* at art. 47 (saying that rape “committed by an American soldier in a hostile country . . . are not only punishable as at home, but in all cases in which death is not inflicted the severer punishment shall be preferred”).

<sup>126</sup> McCormack & Robertson, *supra* note 18, at 637.

<sup>127</sup> See *id.*

prohibited under the principle that “family honour and rights . . . must be respected.”<sup>128</sup>

While only minimally enforced, the War Crimes Commission, established by the major allied powers after World War I, also produced a list of thirty-two non-exhaustive violations, including “rape” and “abduction of girls and women for the purpose of forced prostitution.”<sup>129</sup> In contrast, neither the Charter for the International Military Tribunal at Nuremberg (IMT) nor the Charter for the International Military Tribunal for the Far East (IMTFE) specifically mentioned “rape” or “sexual assault.”<sup>130</sup> The IMTFE, however, did include rape within the crimes charged in the indictments.<sup>131</sup> Similarly, the Nuremberg Tribunal contemplated rape as a form of torture stating that “[m]any women and girls in their teens were separated from the rest of the internees . . . and locked in separate cells, where the unfortunate creatures were subjected to particularly outrageous forms of torture. They were raped, their breasts cut off . . .”<sup>132</sup> Another transcript of the Nuremberg Tribunal reported that “women were subjected to the same treatment as men. To the physical pain, the sadism of the torturers added the moral anguish, especially mortifying for a woman, or a young girl, of being stripped nude by her torturers. Pregnancy did not save them from lashes.”<sup>133</sup>

Furthermore, the Allied Powers also erected a second series of military trials at the conclusion of the Nuremberg and Tokyo trials, conducted under the authority of Control Council Law No. 10 (CCL10).<sup>134</sup>

<sup>128</sup> See Askin, *supra* note 119, at 300 (quoting Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 3 Martens Nouveau Recueil (ser. 3) 461, art. XLVI).

<sup>129</sup> *Id.* (citing U.N. WAR CRIMES COMMISSION, 13 LAW REPORTS OF TRIALS OF WAR CRIMINALS 122, 124 (1949); HISTORY OF THE U.N. WAR CRIMES COMMISSION 34 (United Nations War Crimes Commission, ed. 1948); Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference (Mar. 29, 1919), *reprinted in* 14 AM J. INT’L L. 95, 114 (1920)).

<sup>130</sup> Askin, *supra* note 119, at 301.

<sup>131</sup> See Campanaro, *supra* note 39, at 2563.

<sup>132</sup> See 7 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 494 (1947) [hereinafter NUREMBERG TRIALS]; Campanaro, *supra* note 39, at 2560.

<sup>133</sup> 6 NUREMBERG TRIALS, *supra* note 132, at 170. However, the recognition that rape may constitute torture is compromised in the Nuremberg Tribunal’s depiction of rape victims as “unfortunate creatures.” See 7 NUREMBERG TRIALS, *supra* note 132, at 494.

<sup>134</sup> See Campanaro, *supra* note 39, at 2565 (citing Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945 [hereinafter CCL10], *in* 3 OFFICIAL GAZETTE OF THE CONTROL COUNCIL FOR GERMANY 49 (1946)).

Under CCL10, rape was explicitly listed as a crime against humanity.<sup>135</sup> CCL10 also expanded the reach of these courts to prosecute any person who committed a crime—not just those in authority.<sup>136</sup> The courts, however, never included rape within any indictment issued.<sup>137</sup>

These documents—the Charters for the IMT and IMTFE, as well as CCL10—question not only the generally accepted notion that the ICTY, ICTR and ICC represent any real “historic” break from the past, but also question the claim that international law may be seen as an enterprise, a project comprised of various stages, and marked by dates or events that chart international law’s development, or learning. More specifically, we might pose the question: do international human rights laws concerning rape in armed conflict have any significant merit or value? Can these definitions and new methods of criminalizing rape be recognized as having substance if they are not enforced in any meaningful way? In short, movement may not necessarily equal progress.

## II. IS INTERNATIONAL LAW PART OF THE PROBLEM? THREE CHALLENGES TO LIBERAL HUMANITARIANISM IN PRACTICE

The ICTY and ICTR have not successfully prosecuted many cases on charges of rape.<sup>138</sup> As of 2008, out of eighty-six total cases that have crossed before the ICTY, only seventeen alleged any form of sexual assault.<sup>139</sup> Furthermore, in the handful of cases which have received judgments, the guilty are often selected to serve their terms concurrently and enjoy the possibility of an early release two-thirds of the way through their sentence.<sup>140</sup> Thus, for example, in *Furundzija*, even though the court found the accused guilty of rape and torture, it opted

<sup>135</sup> See CCL10, *supra* note 134, art. II (defining “Crimes against Humanity”).

<sup>136</sup> See *id.*

<sup>137</sup> See Patricia Viseur Sellers, *Rape Under International Law, in WAR CRIMES: THE LEGACY OF NUREMBERG* 159, 162 (Belinda Cooper ed., 1999).

<sup>138</sup> See ICTY Cases and Judgments, <http://www.un.org/icty/cases-e/index-e.htm> (last visited Nov. 18, 2008).

<sup>139</sup> See *id.* The number charges of rapes is based on the number of instances where rape appears as a “Count” in these indictments. Evidence of rape in the fact findings was not considered a formal allegation of rape. See *id.*

<sup>140</sup> See, e.g., *Furundzija*, Case No. IT-95-17/1-T, ¶¶ 292–296 (holding that the sentence for rape should be “serve[d] concurrently with the sentence imposed for torture”); CASE INFORMATION SHEET: “LASVA VALLEY” (IT-95-17/1) ANTO FURUNDZIJA, *available at* <http://www.un.org/icty/cases-e/cis/furundzija/cis-furundzija.pdf> (mentioning Furundzija was released after serving a little over six years of a ten year sentence).

to allow him to serve both convictions at the same time.<sup>141</sup> The President of the ICTY granted him early release in August 2004.<sup>142</sup>

In comparison, of seventy-four indictments issued by the ICTR, only twenty-eight involved any charge of rape or sexual violence.<sup>143</sup> Indeed, in the much heralded *Akayesu* case, despite documentation from human rights and women's organizations of "extensive evidence of rape and other forms of sexual violence throughout Rwanda," the ICTR only amended the indictment to include allegations of rape when a witness testified on the stand concerning her rape experiences.<sup>144</sup> In response, Judge Navanethem Pillay encouraged the court to convene the trial until the Office of the Prosecutor could "investigate the sexual violence charges and consider amending the indictment."<sup>145</sup> The *Akayesu* judgment was the only successful guilty verdict for rape charges or sexual violence between 1998 and 2002.<sup>146</sup> Three years later, only two other cases resulted in a guilty verdict concerning rape.<sup>147</sup>

<sup>141</sup> See *Furundzija*, Case No. IT-95-17/1-T, ¶¶ 292–296.

<sup>142</sup> CASE INFORMATION SHEET: "LASVA VALLEY," *supra* note 140.

<sup>143</sup> See ICTR, Status of Cases, <http://69.94.11.53/ENGLISH/cases/status.htm> (last visited Nov. 6, 2008). The number of charges of rapes is based on the number of instances where rape appears as a "Count" in these indictments. Evidence of rape in the fact findings was not considered a formal allegation of rape. See *id.*

<sup>144</sup> See Askin, *supra* note 119, at 318–19 & n.146 (noting that "[d]ozens of women's rights activists, human rights organizations, academics, and international lawyers faxed letters to the Tribunal urging it not to exclude the gender-related crimes"); see also Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgement, ¶¶ 416–417 (Sept. 2, 1998) (mentioning that the indictment changed once witness came forward with evidence describing rape).

<sup>145</sup> Askin, *supra* note 119, at 318–19; see *Akayesu*, Case No. ICTR 96-4-T, ¶ 417 (finding that it is in the interest of justice for there to be an investigation upon presentation of evidence of sexual violence). It is perhaps also not coincidence that Pillay was the only woman on the bench in the *Akayesu* case. See Askin, *supra* note 119, at 318. In fact, a woman sat on the bench in the majority of allegations and convictions of rape in the tribunals. See *id.* at 296 (noting that the increased presence of women in "decision-making positions" has been crucial in the development in the recognition of gender crimes").

<sup>146</sup> Gaëlle Breton-Le Goff, Coalition for Women's Human Rights in Conflict Situations, *Analysis of Trends in Sexual Violence Prosecutions in Indictments by the International Criminal Tribunal for Rwanda (ICTR) from November 1995 to November 2002* (2002), [http://www.coalitiondroitsdesfemmes.org/site/advocacyDossiers/rwanda/rapeVictimsDeniedJustice/analysisoftrends\\_en.php](http://www.coalitiondroitsdesfemmes.org/site/advocacyDossiers/rwanda/rapeVictimsDeniedJustice/analysisoftrends_en.php) (noting only four indictments included sexual violence charges between 1998 and 2002).

<sup>147</sup> See BINAIFER NOWROJEE, UNITED NATIONS RESEARCH INSTITUTE FOR SOCIAL DEVELOPMENT, "YOUR JUSTICE IS TOO SLOW": WILL THE ICTR FAIL RWANDA'S RAPE VICTIMS? 3 (2005) (noting that other than *Akayesu*, a rape conviction was only upheld for Laurent Semanza as of April 2004); Rebecca L. Haffajee, Comment, *Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory*, 29 HARV. J.L. & GENDER 201, 210–12 (explaining that the definition of rape was re-expanding in leading to a rape conviction in *Prosecutor v. Muhimana*).

The ICC also appears to be reluctant to bring charges of rape and sexual violence. Since its birth in 2002, the ICC only opened investigations in four areas: in the Democratic Republic of Congo, the Republic of Uganda, Darfur, and the Central African Republic.<sup>148</sup> Yet there have been many armed conflicts since the mid-1990s, and in a number of these conflicts, women were raped, often in large numbers.<sup>149</sup> The ICC's reach into only four situations suggests that widespread rapes occurring in other armed conflicts are somehow less important, at least on a pragmatic level. The ICC's limited scope is also evidenced by the fact that the Commission only named fifty-one individuals as suspects of grave international crimes in Darfur, though reports suggests that many times that number were sexually assaulted and raped.<sup>150</sup>

This Part examines some of the possible reasons why the ICC, the ICTY, and the ICTR have failed to effectively prosecute rape allegations or ameliorate the conditions for women in armed conflict situations. This Article contends that these events, these failures in vision and practice, call in to question the general exuberance of the legal community to represent the ICC, ICTY, and ICTR as somehow a "historic," or "unprecedented," break from the past. This Article bridges this distance, or "gap," established by the standard account in the focus on the before and after of the early 1990s. In doing so, this Article will untangle the rape experiences and events occurring in the former Yugoslavia and Rwanda from the oppressive mantle of the general insistence that international legal history tells the story of international law as a pluralistic, humanitarian project.<sup>151</sup>

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<sup>148</sup> International Criminal Court, Situations and Cases, <http://www.icc-cpi.int/cases.html> (last visited on Nov. 6, 2008).

<sup>149</sup> van Niekerk, *supra* note 39.

<sup>150</sup> See Press Release, International Criminal Court, List of Names of Suspects in Darfur Opened by the ICC OTP (Apr. 11, 2005), <http://www.icc-cpi.int/press/pressreleases/101.html>; see also, e.g., HUMAN RIGHTS WATCH, FIVE YEARS ON: NO JUSTICE FOR SEXUAL VIOLENCE IN DARFUR 10–11 (2008), available at <http://www.hrw.org/reports/2008/04/06/five-years> (reporting that just between October 2004 and February 2005, the humanitarian organization Médecins sans Frontières treated almost 500 women as rape victims, which is likely a fraction of the actual number because rape is underreported).

<sup>151</sup> See, e.g., Susan W. Tiefenbrun, *The Paradox of International Adjudication: Developments in the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the World Court, and the International Criminal Court*, 25 N.C. J. INT'L L. & COM. REG. 551, 561 (2000) (stating that the "dazzling array of newly-created and reformed international tribunals in the twentieth century is testament to the unprecedented expansion of the international judiciary and the development of serious interest in the commitment to the protection of human rights").

### A. Colonialism and the State

One of the principal obstacles facing the effective enforcement of international human rights laws concerning rape in armed conflict is the legal profession's continued adherence to the notion that state sovereignty (the preservation of states' territorial and administrative identity) is the guiding principle of international law. This deference of human rights atrocities to national interests and independence is rooted in, or at least mimics, nineteenth century jurists' conception of international law. In the nineteenth century, the full rights of nation-states, expressed in the term "sovereignty," was crystallized as a doctrine, in large part, to facilitate colonial ambitions among the Western-European nation-states.<sup>152</sup> The colonial project required that international law generate a "continuous construction of difference" in an "endless task of [Western European institutions and values] becoming universal."<sup>153</sup> In short, the late nineteenth century was a period of imperialism, and it was within this soil that the Western nation-state came to full fruition, juxtaposed against its non-European counterparts, as the central tenet of international law.

The Mandate System under the League of Nations did not fundamentally challenge the notion of "state sovereignty" or the underlying gap created by nineteenth century jurists between the "civilized" and "uncivilized" countries. Recognizing that "the well-being and development of such peoples form a sacred trust of civilization," the Mandate Article provided for a three-tiered system of state administration.<sup>154</sup> The mandate territories were "classified according to their degree of advancement."<sup>155</sup> The victorious Western European countries were designated as mandatory powers, enjoying "broad powers" in the mandate territories.<sup>156</sup> In no small part, the power relationships and assignment of peoplehood, identity and progress under the colonial framework had survived, continuing to reinforce disparities of power between European and non-European states in the name of

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<sup>152</sup> See Antony Anghie, *Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations*, 34 N.Y.U. J. INT'L L. & POL. 513, 514 (2002) (stating that "[u]p to the beginning of the twentieth century, sovereign states were the only actors recognized by international law").

<sup>153</sup> *Id.* at 519.

<sup>154</sup> *Id.* at 524–25.

<sup>155</sup> *Id.* at 525.

<sup>156</sup> See *id.* at 526–27 (referring to Article 23 of the League of Nations Covenant, which explained that the "broad powers" of the mandatory countries "dealt with issues ranging from labor standards and traffic in women and children to trade in arms and ammunition").

extending benevolent protection and guidance to less stable territories.

State sovereignty was given priority under the U.N. Charter again on the postulation of a gap. This gap was not between “civilized” versus “uncivilized,” or “mandatory powers” versus “mandate territories,” but instead centered on the “images of the relationship between war and peace . . . associated with an image of the [international] institution as the opposite of the social breakdown of war.”<sup>157</sup> The emphasis on law as the method of providing order to “social breakdown” is expressed in the general assumption that the ICTY, ICTR, and ICC are bulwarks against the atrocities of wars that occur outside the core nation-states of the international order. In essence, the current approach continues the hierarchal sets of relationships between America and Western European states and the rest of the world, and continues its support for the status quo, for a return to order, to “normality”—in short, to securing and maintaining relationships rooted in a colonial past.

Thus, under the current international legal order, the U.N. Security Council has been afforded a wide range of powers to “determine and respond to threats to international peace.”<sup>158</sup> Article 29 of the U.N. Charter, for example, authorizes the Security Council to initiate “such subsidiary organs as it deems necessary for the performance of its functions.”<sup>159</sup> Furthermore, article 24(1) provides:

In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.<sup>160</sup>

These provisions effectively allow the five nation-state members of the Security Council significant input regarding international law’s conception of what constitutes a legitimate threat to international peace and security, which territories are included within the international order, and how disturbances should be addressed. Furthermore, article 42 of the U.N. Charter authorizes the Security Council to “impose its decisions through the use of force where necessary to

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<sup>157</sup> See David Kennedy, *The Move to Institutions*, 8 CARDOZO L. REV. 841, 846 (1987).

<sup>158</sup> See McCormack & Robertson, *supra* note 18, at 640.

<sup>159</sup> See U.N. Charter art. 29.

<sup>160</sup> *Id.* art. 24, ¶ 1.

restore international stability.”<sup>161</sup> In this framework, the focus on rape victims in armed conflict is displaced by the needs of securing the nation-state framework, and more specifically, the hierarchal structure of these nations within the international community. America and Western European countries continue to define the contours of not only international law, but also what constitutes civilization.

Thus, for example, Security Council Resolution 808 recognizes that the ICTY is legally founded pursuant to Chapter VII of the Charter of the U.N., which allows the Security Council to take forceful measures to “maintain or restore international peace and security.”<sup>162</sup> In other words, the ICTY is constitutionally-attuned to human rights interests, such as rapes in armed conflict, only to the degree they correspond with the ICTY’s principal mission to instill peace and the conditions of civilization.<sup>163</sup>

The ICC is also tethered to the authority of the Security Council and its constituents. Under article 13 of the Rome Statute, the ICC may only exercise jurisdiction over situations that are referred to the Office of the Prosecutor by: 1) a State-party to the statute; 2) the U.N. Security Council acting under Chapter VII of the Charter to the U.N.; or 3) the Prosecutor acting *proprio motu*—on their own initiative.<sup>164</sup> The discretion of the State-parties and the Prosecutor, however, is only permitted if the territory in which the crime occurred or in which the perpetrator is a national has consented to the jurisdiction of the Court.<sup>165</sup> The jurisdictional reach of the states or Prosecutor, therefore, does not cover situations where atrocities are being committed in a non-consenting

<sup>161</sup> McCormack & Robertson, *supra* note 18, at 640; U.N. Charter art. 42 (declaring that when measures in article 41, such as “complete or partial interruption of economic relations,” are ineffective, the actions that are available to the Security Council expand to include “demonstrations, blockade, and other operations by air, sea, or land”).

<sup>162</sup> See U.N. Charter art. 39 (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security”); S.C. Res. 808, U.N. Doc. S/RES/808 (Feb. 22, 1993) (deciding that an “international tribunal shall be established for the prosecutions of persons responsible for serious violations of international humanitarian law committed in the territory of former Yugoslavia”).

<sup>163</sup> Likewise, Security Council Resolution 1503 applauds the ICTR and ICTY not for their prosecution of human rights abuses or ensuring justice, but “in contributing to the lasting peace and security in the former Yugoslavia and Rwanda and the progress made since their inception.” See S.C. Res. 1503, *supra* note 2.

<sup>164</sup> See Rome Statute, *supra* note 15, art. 13 (providing the jurisdictional limits of the Rome Statute).

<sup>165</sup> See *id.* art. 12 (stating that only countries who “become a Party to this Statute” are subject to the Court’s jurisdiction).



state by that state's actors, which may often be the case. The Security Council, however, according to article 12(2) of the Rome Statute, is not subject to these restrictions so long as the members on the Security Council are exercising their discretionary powers in the interests of the "maintenance of international peace and security."<sup>166</sup> In aspiring to "peace" and "security," the Rome Statute also gives the Security Council the right to halt any ICC investigation or proceeding for a period of one year.<sup>167</sup> Pursuant to article 16, the Security Council can renew its veto powers at the end of each year period indefinitely, or alternatively, reinstate an investigation that it has put on hold.<sup>168</sup> In effect, the Rome Statute constitutionalizes the preeminence of the Security Council, and implicitly, the authority of its constituent nation-states and their interests.

Indeed, the United States has openly challenged the notion of the Court's role extending beyond the consent of either the Security Council or the consent of the involved states. During the negotiations over the Rome Statute, for example, the head of the U.S. delegation stated:

It is simply and logically untenable to expose the largest deployed military force in the world, stationed across the globe to help maintain international peace and security and to defend U.S. allies and friends, to the jurisdiction of a criminal court the U.S. Government has not yet joined and whose authority over U.S. citizens the United States does not yet recognize. . . . The theory that an individual U.S. soldier acting on foreign territory should be exposed to ICC jurisdiction if his alleged crime occurs on that territory . . . [is] nonsensical.<sup>169</sup>

Even more blatantly, in 2003, the U.S. representative to the Security Council pronounced that the "ICC is not the law" since the "fundamental principle of international law [is] the need for a State to

<sup>166</sup> See U.N. Charter, art. 24, para. 1; Rome Statute, *supra* note 15, art. 12(2). *But see* McCormack & Robertson, *supra* note 18, at 640–42 (arguing that the requirement of a resolution to veto an investigation or proceeding reduces the power of individual nation states).

<sup>167</sup> See Rome Statute, *supra* note 15, art. 16 (stating "[n]o investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months . . . in a resolution . . . [that] has requested the Court to that effect").

<sup>168</sup> See *id.*

<sup>169</sup> McCormack & Robertson, *supra* note 18, at 644 (quoting David Scheffer, *Developments in International Criminal Law: The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 18 (1999)).

consent if it is to be bound.”<sup>170</sup> In explaining the role of the ICC in relation to the mission of the U.N. Security Council, the representative continued:

We all know that United Nations operations are important if the Council is to discharge its primary responsibility for maintaining or restoring international peace and security. We also all know that it is not always easy to recruit contributors, and that it often takes courage on the part of political leaders to join military operations established or authorized by the Council. It is important that Member States not add concern about ICC jurisdiction to the difficulty of participating.<sup>171</sup>

In other words, the political needs of the Security Council in “maintaining or restoring international peace and security” trump any concerns over human rights abuses. Indeed, the statement implicitly acknowledges that these atrocities will occur in these “military operations”—why else would the ICC add “concern” and “difficulty” to political leaders joining? In this context, provisions concerning rape in armed conflict, as well as human rights in general, are made instruments to the political aims and efforts of the Security Council. In short, rape may continue, in large part, with impunity.

To achieve its aims, the United States has taken a number of measures. In 2002, it passed the American Servicemembers’ Protection Act (ASPA), barring U.S. participation in U.N. peacekeeping operations unless the president can “certify to Congress that U.S. service members are protected” from ICC jurisdiction.<sup>172</sup> In addition, the United States actively negotiates bilateral agreements with ICC parties pursuant to which they agree not to surrender U.S. nationals to the ICC without U.S. consent.<sup>173</sup> By June 2003, thirty-eight states had “publicly announced the signing of such agreements with the United States,” while a

<sup>170</sup> U.N. S.C., 58th Sess., 4772 mtg. at 23, U.N. Doc. S/PV.4772 (June 12, 2003).

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

<sup>172</sup> *Contemporary Practice of the United States Relating to International Law: U.S. Bilateral Agreements Relating to ICC*, 97 AM. J. INT’L L. 200, 201 (Sean D. Murphy ed., 2003) [hereinafter *U.S. Bilateral Agreements Relating to ICC*]; see American Servicemembers Protection Act of 2002 (ASPA), 22 U.S.C. § 7424 (Supp. V 2005) (restricting U.S. peacekeeping operations in a country subject to the Rome Statute unless the President receives Congressional permission).

<sup>173</sup> *U.S. Bilateral Agreements Relating to ICC*, *supra* note 172, at 202. These bi-lateral agreements are expressly allowed under article 98(2) of the Rome Statute. See Rome Statute, *supra* note 15, at art. 98(2) (declaring that a “Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements”).

number of other states signed such agreements confidentially.<sup>174</sup> In July 2003, the United States suspended all military assistance to thirty-five states that refused to enter into similar agreements.<sup>175</sup> Moreover, the ASPA originally prohibited any military assistance to the majority of states that have ratified the ICC treaty, although this was repealed in 2008.<sup>176</sup> Finally, in 2002 and 2003, the United States also prompted the other governments on the Security Council to invoke article 16 and request the ICC delay investigations and proceedings for the year.<sup>177</sup>

The presence of armed conflicts and documentation of widespread rape in a number of these countries that have agreed not to turn U.S. soldiers over to the ICC questions whether international human rights are actually “universal” in the sense that they apply to all nations, and not just those countries which remain outside the core fraternity of nation-states or are unwilling to follow their directives.<sup>178</sup> Just as the notion of civilization and development legitimized colonial ambitions in the nineteenth century and the interwar period, the duty to bring peace and order to armed conflicts that threaten the

<sup>174</sup> *U.S. Bilateral Agreements Relating to ICC*, *supra* note 172, at 201. Among the “publicly announced” countries are: Afghanistan, Albania, Azerbaijan, Bahrain, Bolivia, Bhutan, Bosnia and Herzegovina, Democratic Republic of the Congo (DRC), Djibouti, Dominican Republic, East Timor, El Salvador, Gabon, Gambia, Georgia, Ghana, Honduras, India, Israel, Madagascar, Maldives, Marshall Islands, Mauritania, Micronesia, Nauru, Nepal, Palau, Philippines, Romania, Rwanda, Sierra Leone, Sri Lanka, Tajikistan, Thailand, Tonga, Tuvalu, Uganda, and Uzbekistan. *Id.* at 711 n.14–15 (citing Press Release, U.S. Dep’t of State, State Department Lists Countries Who Have Signed Article 98 Agreements (June 12, 2003), *available at* <http://www.state.gov/r/pa/prs/ps/2003/21539.htm>).

<sup>175</sup> *Id.*; Presidential Determination No. 2003–27 (July 1, 2003), *available at* <http://www.whitehouse.gov/news/releases/2003/07/print/20030701.html>). The author lists three countries the U.S. has suspended all military assistance to for not signing these bilateral agreements: Colombia, Croatia, and Ecuador. *Id.*

<sup>176</sup> See ASPA § 7426 (repealed 2008) (establishing that “no United States military assistance may be provided to the government of a country that is a party to the International Criminal Court”).

<sup>177</sup> S.C. Res. 1487, U.N. Doc. S/RES/1487 (June 12, 2003) (declaring that the ICC “shall . . . not commence or proceed with investigation or prosecution of any such case” for a 12 month period). The proposal resulted in a 12–0 verdict in favor of the Security Council adopting a resolution to delay ICC investigations and proceedings for a second year in a row (France, Germany, and Syria abstaining).

<sup>178</sup> Another obstacle facing U.S. and U.N. military forces being prosecuted for rape charges is that the “culprits are [the] international peace-keeping officers” so that there is “often . . . no official record of their involvement.” Karkera, *supra* note 96, at 224. If involvement is discovered, the officer is repatriated for administrative action. *Id.* There is rarely, however, official proof of an officer’s role; in essence, the current policy “leaves the international officers free from prosecution.” See *id.* at 224–25 (discussing the context of trafficking in Kosovo).

international order justifies soldiers and other personnel endorsed by the Security Council to act with a great deal of immunity.

As international legal purveyors and practitioners, we might ask ourselves how deep this critique runs. In other words, is international law's problem one of principally outside political interests or is the problem more fundamental to the discipline? Could it be that the very concepts we so often hold up to battle "injustice" are actually part of a continuing model of colonial domination and empire building?

This questioning may also apply to us on a more personal level. Have we really become more enlightened in both our perception and intervention into the peripheries of our world? After all, did not international lawyers in the late nineteenth century feel civilized and morally correct? Did not the Berlin Conference look to the well-being and material benefit of the "African" peoples? And again, did not international lawyers in the interwar period under the Mandate System celebrate their invention of ethnic minority rights? And what do we imagine international lawyers felt about themselves and the discipline after the defeat of Hitler and the establishment of the U.N. and the foundational tenet of self-determination? Did these lawyers also place the massacre of the Algerian people by French military with the independence of France in the same evaluation of history and their discipline? Did the decolonization process illuminate the danger when international lawyers turn uncritical to the enlightened morality and truth of their calling or merely that international law is a story of progress? And if decolonization was a story of progress, what about the fact that many of those very same decolonized countries now suffer from deep internal and external strife and siege, continuing to operate largely as a market for cheap labor and natural resources for Western interests? In what ways might our very conceptions of human rights, self-determination, sovereignty, or even the nation-state model be a continuation of empire, and ourselves, in our thinking and actions, as colonialists?

### B. *Western Efficiency*

A number of policies in the late 1990s that aimed to make the tribunals more "efficient" and "professional" have undermined the credibility of the court and its effectiveness in redressing rape victims.<sup>179</sup> The majority of these policies were implemented shortly after the replace-

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<sup>179</sup> See Breton-Le Goff, *supra* note 146.

ment of Chief Prosecutor Louise Arbour in 1999 with Swiss prosecutor Carla Del Ponte. Under the post-1999 regime, the ICTR's Office of the Prosecutor underwent a "restructuring plan,"<sup>180</sup> in which the Investigations Division was "totally reorganized" to "streamline" the Tribunal from existence by 2010.<sup>181</sup>

Thus, in 2001, one of the principal investigation teams assigned to sexual violence was dismantled.<sup>182</sup> Without field workers and investigators readily available for rape victims and aware of their needs, the ICTR was unable to encourage rape victims to step forward as witnesses.<sup>183</sup> As a result, since 2001, the ICTR has experienced a sharp decrease in incriminations for sexual violence in its initial indictments.<sup>184</sup> In addition, sexual violence and rape indictments were purposely left out of a number of indictments on the grounds that they would expend too much of the tribunal's resources and time and they are often tainted by less than "fully substantiated" evidence.<sup>185</sup> Yet, this tendency to produce less than "fully substantiated" evidence was itself the product of those very policies meant to "streamline" the prosecution process in the name of "efficiency."

To ensure "professionalism" and guarantee that the ICTR was able to wrap up its activities by 2010, the Tribunal focused on finding ways to "avoid the additional delays caused by preparing the cases, amending the indictments, and the swarm of procedural motions and interlocutory appeals that such an intervention generates."<sup>186</sup> Rape cases, however, were notoriously difficult to prove due to the fact that the events had occurred years beforehand.<sup>187</sup> Likewise, limiting the ability of prosecutors to amend their indictments (such as in lieu of witness testimony) ignored the fact that amending indictments had proven an essential tool of the tribunal in bringing attention to rape crimes. Charges of rape, for example, had to be amended into the original indictments in a number of ICTR cases, including *Bagilishema* (1995), *Akayesu* (1996), *Bagosora* (1996), *Nsengiyumva* (1996), and *Musema* (1996).<sup>188</sup> In

<sup>180</sup> *Id.* (noting that this policy was in line with Resolution 1503's Completion Strategies adopted by the Security Council in 2003); *see also* S.C. Res. 1503, *supra* note 2.

<sup>181</sup> *See* S.C. Res. 1503, *supra* note 2.

<sup>182</sup> *See* Breton-Le Goff, *supra* note 146.

<sup>183</sup> *See id.*

<sup>184</sup> *See id.* (arguing that this decline "attest[ed] to a declining interest in this issue").

<sup>185</sup> *See id.* (noting that the Rules of Procedure and Evidence were amended to this effect in July 2002).

<sup>186</sup> *See id.*

<sup>187</sup> *See* Breton-Le Goff, *supra* note 146.

<sup>188</sup> *See id.*

at least one case, the judges did not initiate an investigation into allegations of rape even though witnesses testified to sexual violence.<sup>189</sup> In another case, the accused were not indicted for acts of sexual violence despite documentation by women's non-governmental organizations in Rwanda that they had occurred.<sup>190</sup> By discouraging the "preparing" of cases and "amending" indictments, these new policies implicitly operated to exclude rape victims from the Tribunal's proceedings.

In an effort to "streamline" prosecutions, the ICTR and ICTY have also adopted other administrative strategies. For instance, in response to criticism that the tribunals moved too slowly, at the end of the twentieth century, the Offices of the Prosecutors began attempting to merge cases and try the accused as a group.<sup>191</sup> By grouping the cases, however, rape and sexual violence indictments dropped.<sup>192</sup> In fact, rape indictments have occasionally been used as bargaining chips whereby the accused agrees to a guilty plea concerning certain charges, on the condition that the sexual violence or rape charges are dismissed.<sup>193</sup> For example, in the *Serushago* case, the ICTR withdrew its rape count in exchange for the accused admitting guilt on a number of other non-related charges.<sup>194</sup> In this context, victims become expendable and "deliberately sacrificed on the altar of judicial expediency."<sup>195</sup> This was explicitly admitted by the current Registrar of the ICTY, Hans Holthuis, as he stated during his address to the Hague:

The aim of joining these cases is to substantially reduce the length of proceedings by *inter alia* reducing the length of the prosecution case, reducing the number of witnesses, avoiding the repetition of evidence, avoiding the overlap of wit-

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<sup>189</sup> See *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR 95-1-A, Judgment, ¶¶ 299, 547 (June 1, 2001) (finding evidence of rape in the witness testimony, but rape was never charged or found).

<sup>190</sup> See Breton-Le Goff, *supra* note 146 (stating that accused Joseph Kanyabashi and Elie Ndayambaje were documented to have planned acts of sexual violence, but they were not charged with such in their final indictment).

<sup>191</sup> *Id.*

<sup>192</sup> See *id.* (concluding that the policy of grouping cases in the *Media* and *Cyangugu* cases led to indictments without the mentioning of sexual violence despite witnesses testifying that it occurred).

<sup>193</sup> See *id.* (construing that rape indictments get thrown out for the purposes of "judicial expediency").

<sup>194</sup> See *Prosecutor v. Serushago*, Case No. ICTR 98-39-S, Sentence, ¶ 4 (Feb. 5, 1999) (stating that the Prosecutor was authorized to withdraw the rape count in exchange for a guilty plea).

<sup>195</sup> See Breton-Le Goff, *supra* note 146.

ness testimony, and reducing the expense of witnesses traveling repeatedly to The Hague for testimony.<sup>196</sup>

Furthermore, both tribunals have made clear that their prosecutors will only indict high level offenders, which also hinders the successful prosecution of armed conflict rape. In 1998, for instance, the Chief Prosecutor of the ICTY stated her strategy was centered on “maintaining an investigative focus on persons holding higher levels of responsibility, or on those who have been personally responsible for the exceptionally brutal or otherwise extremely serious offences.”<sup>197</sup> Under this approach, however, prosecutors in the ICTY are forced to draw lines between “exceptionally brutal” crimes and “lesser” crimes, lines which may not actually exist, legal fictions to once again “postulate a gap”—here, between those crimes that deserve to be addressed by the international community and other crimes that are somehow less demanding on the international conscience, and hence, relegated to the domestic courts.<sup>198</sup>

The decision to relinquish cases to the domestic courts has been widely supported throughout the international community and especially by women’s non-governmental organizations in Rwanda and the Security Council.<sup>199</sup> Pursuant to Resolution 1503, the ICTR and ICTY are to conclude trials of first instance by the end of 2008, and conclude any appeals by the end of 2010 (this directive is commonly referred to as the “Completion Strategies”).<sup>200</sup> Thus, in June 2005, the Chief Prosecutor for the ICTR, Justice Hassan B. Jallow, stated that he was “pleased to report progress . . . [in the] strategy of referral of cases to national jurisdiction [as] endorsed by the Security Coun-

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<sup>196</sup> Hans Holthuis, Registrar, International Criminal Tribunal for the former Yugoslavia, Address by the Registrar, Hans Holthuis (June 23, 2005), available at <http://www.http://www.un.org/icty/pressreal/2005/speech-HH-e.htm>. In similar fashion, the ICTR asserted, in its Sixth Annual report, that “[s]ome trials are finalized within a few months, where, for instance, the defence is willing to make admissions to narrow the disputed issues.” See The Secretary-General, *Sixth Annual Report of the International Criminal Tribunal for Rwanda*, ¶ 41, delivered to the Security Council and the General Assembly, U.N. Doc. A/56/351, S/2001/863 (Sept. 14, 2001).

<sup>197</sup> See Sean D. Murphy, *Developments in International Criminal Law: Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. INT’L L. 57, 59 n.4 (1999) (quoting Press Release, Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, Statement by the Prosecutor Following the Withdrawal of the Charges Against 14 Accused, ICTY Doc. CC/PIU/314-E (May 8, 1998), available at <http://www.un.org/icty/pressreal/p314-e.htm>).

<sup>198</sup> See *id.*

<sup>199</sup> See Breton-Le Goff, *supra* note 146.

<sup>200</sup> See S.C. Res. 1503, *supra* note 2.

cil.”<sup>201</sup> By May 2005, the ICTR handed over approximately forty-five cases, most of which were still in only the investigation stage, to the national Rwandan courts.<sup>202</sup> Non-governmental organizations advocating on behalf of women’s rights in Rwanda applauded this shift, not in the name of “streamlining” the cases (though they did criticize the slow pace of the Tribunal’s proceedings), but in hope that the local courts may more adequately address the specific needs and protection of the raped women in their population.<sup>203</sup>

Unfortunately, the ICTR was discredited by the fact that at least forty-one defense investigators working for the Tribunal were wanted or under investigation by the Government of Rwanda and various women’s rights organizations for crimes related to the 1994 genocide.<sup>204</sup> Furthermore, the ability of these investigators to gain access to rape victims in private settings not only questioned the “possibility of rendering an impartial and truthful justice,” but perhaps more importantly, the ICTR’s guarantee to protect rape victims and witnesses.<sup>205</sup> For example, shortly after giving testimony in the *Akayesu* and *Ruta-*

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<sup>201</sup> Justice Hassan B. Jallow, Prosecutor, Int’l Crim. Trib.1 for Rwanda, Statement by Justice Hassan B. Jallow, Address to the U.N. Security Council (June 13, 2005), available at <http://69.94.11.53/ENGLISH/speeches/jallow130605.htm>.

<sup>202</sup> *Id.*

<sup>203</sup> See Breton-Le Goff, *supra* note 146.

<sup>204</sup> See Sheenah Kaliisa, *Genocide Survivors’ Association Reaffirms Its Suspension of Cooperation with the ICTR*, INTERNEWS, Feb. 28, 2002, available at <http://listserv.acsu.buffalo.edu> (follow Public List Archives hyperlink, then follow JUSTWATCH-L hyperlink, then follow Search Archives hyperlink, then search Subject Contains “Genocide Survivors’”) (mentioning the example of Simeon Nshamihigo, an ICTR investigator, who was wanted by the Government of Rwanda since 1996, but was only suspended from work and put on trial in 2001). The author also notes the pernicious irony of such a situation: contributions from the international community to the ICTR for the purpose of investigating and prosecuting actors in the 1994 genocide are, in fact, being paid out to the very individuals the ICTR is supposed to be investigating. *Id.*

<sup>205</sup> Statistics concerning investigators in the field are revealing. In 1996, for example, Human Rights Watch reports that only four out of thirty ICTR investigators were female. NOWROJEE, *supra* note 89, at 95. Similarly, despite the U.N. goal of equal representation in professional and higher level posts, as of 2004, only one of fifteen ICJ judges was female, only three of sixteen ICTR judges were female, and only one female judge resided on the ICTY. Wood, *supra* note 83, at 305 n.195 (citing Angela E.V. King, Opening Remarks, Fair Representation: The ICC Elections and Women (January 29, 2003), available at <http://www.un.org/womenwatch/osagi/statements/Panel-ICC.html>). But see Press Release, International Criminal Court, State Parties to International Criminal Court Elect Final Four Judges; In Total, 18 Selected, Requiring 33 Ballots Over Four Days (Feb. 7, 2003), available at <http://www.un.org/News/Press/docs/2003/L3026.doc.htm> (announcing that ten of eighteen of the judges selected for the ICC are women).



*ganda* judgments, two female witnesses were assassinated.<sup>206</sup> Also, in 1997, a *Washington Post* editorial reported that “Hutu extremists murdered a witness, her husband and seven children after she appeared before the U.N. trials and was promised protection.”<sup>207</sup>

Despite the fact that these threats to witnesses were a “reoccurring problem,” in 2000 the ICTR dismantled many functions of its Support Programme for Witnesses and Potential Witnesses, including the complete abandonment of “rehousing [projects], development assistance and reconciliation.”<sup>208</sup> Ironically, the very policies meant to facilitate more successful prosecution of rape crimes ended up discouraging the victims to come forward. In effect, rape victims in Rwanda were silenced.

In early 2002, the associations for genocide widows (AVEGA) and genocide survivors (IBUKA) suspended cooperation with the ICTR, and issued a statement that they were “disillusioned with [its] functioning.”<sup>209</sup> Shortly afterwards, the Rwandan government joined the boycott.<sup>210</sup> Rape victims and witnesses were encouraged to find legal recourse through the national courts.<sup>211</sup> However, the problem with this change was that the “already feeble national justice system” had been decimated by the genocide in 1994.<sup>212</sup> It was not ready to handle the more than 120,000 persons in custody on charges related to the genocide. By the end of the genocide, Rwanda “counted only twenty judicial personnel responsible for criminal investigations and only nineteen lawyers”;<sup>213</sup> by the end of 1997 that number had only risen to a total of

<sup>206</sup> Breton-Le Goff, *supra* note 146. According to a report issued by IBUKA in 2002, this appears to be a “reoccurring problem,” as such threats were also reported by IBUKA in 2002. *Id.*

<sup>207</sup> See Nasser Ega-Musa, Op-Ed., *Another Failure of Justice in Africa*, WASH. POST, Mar. 6, 1997, at A21 (noting that “[a]nother tribunal witness was killed with his family . . . last December”).

<sup>208</sup> See Breton-Le Goff, *supra* note 146; *Women’s Human Rights, in* HUMAN RIGHTS WATCH, WORLD REPORT 2000, at 450 (2002). For instance, protection of female witnesses often ceases at the Rwandan border. See INTERNATIONAL FEDERATION FOR HUMAN RIGHTS (IFHR), VICTIMS IN THE BALANCE: CHALLENGES AHEAD FOR THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 10 (2002), available at <http://www.iccnw.org/documents/FIDHrwVictimsBalanceNov2003.pdf>.

<sup>209</sup> Kaliisa, *supra* note 204 (paraphrasing statement made by Rwandan women’s rights groups, IBUKA and AVEGA, on Jan. 24, 2002 and Feb. 27, 2002).

<sup>210</sup> Breton-Le Goff, *supra* note 146.

<sup>211</sup> See *id.* (suggesting that Rwandan women are encouraged to seek justice at *gacaca* trials rather than through the ICC).

<sup>212</sup> See HUM. RTS. WATCH, STRUGGLING TO SURVIVE, *supra* note 1, at 13.

<sup>213</sup> See *id.*

448 judges serving in national courts.<sup>214</sup> To respond to this backlog of cases, the Rwandan government adapted a “community conflict resolution mechanism, known as gacaca, to the pursuit of genocide prosecutions.”<sup>215</sup> In 2001, the Organic Laws of January 26, 2001 Setting Up “Gacaca Jurisdiction” and Organizing Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed between October 1, 1990 and December 21, 1994 (2001 Gacaca Laws) established approximately 11,000 gacaca courts.<sup>216</sup>

The gacaca and Rwandan national courts (also known as classical courts), however, in their pursuit to bring justice to rape victims may actually be excluding them from the judicial process. In fact, the traditional gacaca court system—on which the modern gacaca system is based—was essentially a “more informal dispute resolution mechanism.”<sup>217</sup> The current system, which departs from the traditional gacaca system with more comprehensive procedural powers to prosecute, and punish genocide crimes, still is aimed to “enlist active popular participation in public hearings as a means to facilitate truth-telling, accountability, and national reconciliation.”<sup>218</sup> To this end, until 2004 legislative reforms, rape survivors were required under the gacaca system to testify either publicly or by a written statement before an assembly of a minimum of one hundred community members.<sup>219</sup> This public component may very well discourage female victims from stepping forward to testify due to the social stigma and personal nature attached to rape.<sup>220</sup>

The gacaca system also presents significant procedural obstacles to women coming forward to testify. There are seven pretrial phases undertaken by the gacaca courts.<sup>221</sup> During the sixth stage, pursuant to the 2001 Gacaca Laws, rape witnesses must either testify in front of the general commission or by camera before the accused and a panel of

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<sup>214</sup> *See id.*

<sup>215</sup> *Id.* at 15.

<sup>216</sup> *Id.* (citing Organic Law No. 40/2000 of Jan. 26, 2001 Setting Up “Gacaca Jurisdictions” and Organizing Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Between Oct. 1, 1990 and Dec. 31, 1994, *available at* <http://www.inkiko-gacaca.gov.rw/pdf/lawmodified.pdf>).

<sup>217</sup> HUM. RTS. WATCH, STRUGGLING TO SURVIVE, *supra* note 1, at 15.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 21.

<sup>220</sup> *Id.* at 25 (quoting a number of women discussing their experiences in front of the tribunal). One rape victim testified that “[s]ome people in the crowd were whispering that the women were lying.” *Id.* Another woman notes, “after I spoke in front of the assembly, [community members] snickered and whispered.” *Id.*

<sup>221</sup> *Id.* at 15.

nineteen judges.<sup>222</sup> Once the rape survivors have undergone the seven stages, they are then sent to the national courts, the Tribunals of First Instance, where they must again participate in retrying the accused.<sup>223</sup> Furthermore, while the current 2004 Gacaca Laws prohibit individuals accused of rape to be eligible for a provincial release, the law does not prohibit such individuals from being released if “they were never formally accused” or “did not subsequently confess to rape.”<sup>224</sup> In a number of situations, accused persons have also been freed because “authorities did not register the rape charges” even though the sexual violence survivors had told the police of the crime.<sup>225</sup> Moreover, the gacaca laws require that any rape case that had not already proceeded to the Tribunals of First Instance had to be readmitted to the gacaca system by the rape survivor, who is then obligated to revisit all seven pretrial stages.<sup>226</sup>

These changes have produced few rape indictments or judgments.<sup>227</sup> According to a survey by Human Rights Watch of one thousand cases, “only thirty-two [cases] included charges of rape or sexual torture.”<sup>228</sup> In another survey, Lawyers Without Borders reported that of “1051 persons tried on charges of genocide or related crimes in 1999,” only “forty-nine persons were prosecuted for rape or sexual torture, nine of whom were convicted of some form of sexual violence.”<sup>229</sup> Likewise, between its inception in June 2002 and September 2004, the gacaca courts only registered approximately 134 cases including rape or sexual torture indictments out of more than 3000 non-sexual violence crimes.<sup>230</sup> Moreover, a number of rape witnesses have reported being threatened, and sometimes attacked after testifying in the gacaca proceedings.<sup>231</sup>

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<sup>222</sup> HUM. RTS. WATCH, STRUGGLING TO SURVIVE, *supra* note 1, at 15. However, under the 2004 Gacaca Laws, a woman may testify on camera and the tape is then “secretly” transferred to the prosecutor’s office. *Id.* at 28. The problem here is that it may be too little too late. These reforms come ten years after the rapes have occurred. Many of the victims and rapists are now dead or undetectable.

<sup>223</sup> *Id.* at 16.

<sup>224</sup> *Id.* at 17 n.56.

<sup>225</sup> *Id.*

<sup>226</sup> *See id.* at 15.

<sup>227</sup> HUM. RTS. WATCH, STRUGGLING TO SURVIVE, *supra* note 1, at 18.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 19 n.65.

<sup>230</sup> *Id.* at 22. The report notes that these statistics are incomplete because two provinces did not report their case summaries. *Id.* at 22 n.77.

<sup>231</sup> *Id.* at 28.

### C. Reparations

The need for reparations in countries that have been ravaged by armed conflict rape is great. In the late 1990s the U.N. Development Program reported that “women’s work burden was 113 percent that of men” in the 130 least-developed countries.<sup>232</sup> In Rwanda, approximately sixty percent of the country is below the national poverty line, wherein women are at a particular disadvantage.<sup>233</sup> A 2001 survey conducted the Rwandan Ministry of Health and the National Population Office found that approximately thirty-six percent of Rwandan families are headed by a woman.<sup>234</sup> Ninety-seven percent of Rwandan women “provide for themselves and their families through subsistence agriculture.”<sup>235</sup> Despite recent property law reform, women are “denied equal rights to land,” and are often forced into prostitution to support themselves.<sup>236</sup>

Rwanda also continues to lack adequate health care services. The Rwandan government estimates there are only 300 doctors in the country.<sup>237</sup> The United Nations Children’s Fund (UNICEF) reports that eighty-eight percent of women must walk more than one hour to reach the nearest health center.<sup>238</sup> Many of these women, however, are either too sick to make the journey or cannot afford to sacrifice time from subsistence farming and child care. Furthermore, under the current regime, women are required to pay for public transportation to the health center, and unless they qualify for assistance, women must also pay for any necessary services and medication.<sup>239</sup> Thus, for example, the Rwandan government estimated in 2004 that, while approximately 75,000 Rwandans are in need of antiretroviral (ARV) therapy (many of them rape survivors), only 3524 Rwandans are actually being treated with the necessary medications.<sup>240</sup>

However, these desperate economic and health conditions have been largely ignored by the Tribunals or the ICC. The Statutes of the ICTR and ICJ clearly deny victims any right to reparations. The ICTY

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<sup>232</sup> *Women’s Human Rights*, *supra* note 208, at 447.

<sup>233</sup> HUM. RTS. WATCH, *STRUGGLING TO SURVIVE*, *supra* note 1, at 10 n.15.

<sup>234</sup> *Id.* at 10–11.

<sup>235</sup> *Id.* at 11.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 38–39.

<sup>238</sup> HUM. RTS. WATCH, *STRUGGLING TO SURVIVE*, *supra* note 1, at 38.

<sup>239</sup> *Id.* at 40.

<sup>240</sup> *Id.* at 42 n.166. ARV is the classification of drugs generally used to treat HIV. *Id.* at 37.

Statute, for example, states that “[t]he penalty imposed by the Trial Chamber shall be limited to imprisonment . . . [i]n addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired during criminal conduct, including by means of duress, to their rightful owners.”<sup>241</sup>

In 2000, ICTY and ICTR judges issued an official announcement to explain the reason the Tribunals do not offer women reparation, stating that “[t]he judges agree with the principle of compensation for victims but believe that the responsibility for processing and assessing claims for compensation should not lie with the Tribunal but other agencies within the United Nations systems.”<sup>242</sup> In other words, the economic chaos that rape victims often experience is essentially political, not legal, and hence outside the realm of international law. The judges had postulated a difference or gap: the desperate economic and health conditions of rape survivors should be contemplated separately from the legal redress issue. This approach has also been adopted at the national levels. In Rwanda, for example, the national courts have been remiss to execute any judgment including damages for the victims.<sup>243</sup>

On the other hand, the Rome Statute of the ICC explicitly allows for civil damages to be awarded in international criminal cases, as article 75 states:

The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims.<sup>244</sup>

While this represents the first time the international community has officially recognized the legal right of rape victims to seek reparations, when the perpetrator is unable to satisfy the declared damages, the victim’s only recourse is to apply for reparations through a Trust

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<sup>241</sup> See Statute of the International Tribunal for the Former Yugoslavia, 32 I.L.M. 1192, adopted by S.C. Res 827, U.N. SCOR, 48th Sess., 3217th mtg., art. 24, U.N. Doc. S/RES 827 (May 25, 1993) (establishing penalties and factors the Trial Chamber may use in setting penalties for ICTY convictions).

<sup>242</sup> Breton-Le Goff, *supra* note 146, n.92.

<sup>243</sup> *Id.* n.90.

<sup>244</sup> See Rome Statute, *supra* note 15, art. 75 (permitting reparations to be granted in international criminal cases).

Fund.<sup>245</sup> For these women, their day in court becomes their “justice,” in essence, a legal fiction offered as compensation for their experiences. Moreover, the Rome Statute’s language restricting the Court to contemplating civil damages only “upon request” or “in exceptional circumstances,” suggests that somehow reparations are still secondary to judicial proclamations of innocence or guilt.<sup>246</sup>

In addition to being disadvantaged by the limited availability of reparations, rape victims are required to overcome a series of procedural obstacles to “request” reparations. First, rape victims must “send a written application to the Court Registrar and more precisely to the Victims’ Participation and Reparation Section [VPRS].”<sup>247</sup> In turn, the VPRS must then “submit the application to the competent Chamber which decides on the arrangements for the victims’ participation in the proceedings.”<sup>248</sup> At this point, the Chamber will decide on the merit of victims’ claims based on the amount of evidence the women provide to prove “they are victims of crimes which come under the competence of the Court in the proceedings commenced before it.”<sup>249</sup>

These procedural and evidentiary requirements will undoubtedly bar many women from the legal process, especially rape victims. Few women will be able to offer physical proof of rape or present witnesses due to the fact that many of these witnesses are either dead or unwilling to come forward. More importantly, these requirements suggest that the economic and health conditions of Rwandan and Bosnian women are not a legal concern, but still political. Constraining the scope of reparations to a relative minority of women from these countries suggests that the economic and health conditions of the majority of these women is outside the aims or ambitions of law. Those women who do not meet the conditions of the ICC are essentially considered not to be victims—at least not in a legal sense. The provisions for reparations within the Rome Statute end up excluding, in ideological and practical terms, the survivors for which these provisions are supposed to be structured.

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<sup>245</sup> See *id.* (allowing the court to “make an order directly against a convicted person specifying appropriate reparations” while also allowing the court to order the award of reparations through the Trust Fund “where appropriate”).

<sup>246</sup> See *id.*

<sup>247</sup> International Criminal Court, Participation of Victims in Proceedings, <http://www.icc-cpi.int/victimissues/victimsparticipation.html> (last visited Nov. 2, 2008).

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

Furthermore, the administrative powers allotted to the ICC in dispersing any contributions or awards for victims may be detrimental to the well-being of rape victims in armed conflicts. To administer reparation awards and contributions, article 79 of the Rome Statute establishes a "Trust Fund . . . for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims."<sup>250</sup> The Trust Fund is administered by the Registry.<sup>251</sup> The Fund is also supervised by an independent Board of Directors.<sup>252</sup> Among its powers, the Board has discretion over whether or not the Victim's Trust Fund will accept various voluntary monetary contributions.<sup>253</sup>

The Court has the option of granting individual or collective reparations.<sup>254</sup> In practice, the ICC has indicated that it will most likely favor group trials, once again in the name of "efficiency," as it has declared that "[i]n order to ensure the efficiency of proceedings, particularly in cases where there are a large number of victims, the competent Chamber may ask victims to choose a shared legal representative."<sup>255</sup> This is significant because in cases where "collective reparations" are in order, the Victim's Trust Fund may order that reparations be paid not to the actual survivors, but instead to "an inter-governmental, international, or national organization."<sup>256</sup>

The characterization of the administrative organ overseeing reparations as a "Trust Fund" reinforces the notion of women as "wards" under the protection of the Board of Directors and the ICC Registry. The message is that women are essentially unsuitable to be entrusted with the money themselves even though the funds were the direct product of these women's testimony and structured upon the intent of dispersing these funds to the victims. The current policy alienates in its very attempt to assist. Moreover, the ICC policy reproduces colonial relationships through the very acts that are supposed to be signaling the inclusion of women more fully into the international order and a

<sup>250</sup> See Rome Statute, *supra* note 15, art. 79.

<sup>251</sup> International Criminal Court, Trust Fund for Victims, <http://www.icc-cpi.int/vtf.html> (last visited Nov. 2, 2008).

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> International Criminal Court, Rules of Procedure and Evidence, *supra* note 109, R. 98(3) (permitting a court to grant collective reparations when appropriate).

<sup>255</sup> International Criminal Court, Participation of Victims in Proceedings, *supra* note 247.

<sup>256</sup> International Criminal Court, Rules of Evidence and Procedure, *supra* note 109, R. 98(4) ("[F]ollowing consultation with interested States and the Trust Fund, the Court may order that an award for reparations be made through the Trust Fund to an intergovernmental, international, or national organization approved by the Trust Fund.").

more responsible version of state sovereignty (that is, pluralistic, non-imperialistic international legal order). Women are once again subordinated to the needs of the dominant international legal narrative.

#### CONCLUSION: WE, THE VICTORS . . .

The standard approach views the U.N. regime established in the wake of World War II and de-colonization as monumental moments in the history of international law wherein international law shrugged off the lingering colonialist ambitions of nation states and absolute sovereignty in favor of a pluralistic, liberal, humanitarian character. As Antony Anghie explains:

This development in turn is the basis of the claim—fundamentally important to the contemporary discipline of international law and its legitimacy—that international law is truly universal, open, and cosmopolitan because it extends sovereignty to all states without making the invidious cultural distinctions between the civilized European and the uncivilized non-European that had served in the nineteenth century to exclude non-Europeans from the realm of sovereignty while subjecting them to colonialism.<sup>257</sup>

The common reliance on treating the armed conflicts in Yugoslavia and Rwanda as moments which are distinct and “unprecedented” serves to justify the authority of international law in remedying the problem—international law is given a new subject to carry out its project to universalize international legal structures and their normative rules and techniques. In turn, this demands novel legal techniques and institutions (the ICC, ICTY and ICTR) to deal with this unprecedented, aberrational moment.

This Article challenges this notion of the “unprecedented” to question the legitimacy of the dominant vision of international law as pluralistic and humanitarian. In both theoretical and practical terms, women continue to be excluded from the protection and guarantees of the international legal community. On the one hand, notions of community and the individual are displaced by the principle of the impregnability of state sovereignty and the interests of the pre-eminent nations in maintaining “peace and security” in the international order. On the other hand, women are subordinated to the necessities of the

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<sup>257</sup> Anghie, *supra* note 152, at 514.



international legal narrative and its underlying assumption that international law is a project of inclusion (universalization) and modernization (order, and implicitly, civilization).

However, the reality is that women cannot be lumped together in a homogenous “womanhood” anymore than the various occurrences whereby international law has been forced to reorganize itself due to unstable power relations can be drawn together in a clearly defined linear evolution. I have argued in this Article that each attunement, or act of inclusion, on the part of international law to women in raped conflicts (and projected to all women) corresponds with a simultaneous act of exclusion, which merely reemphasizes uneven relationships which are rooted in a patriarchal, colonial past.<sup>258</sup> Specifically, in this Article, the inability of rape victims in armed conflicts to achieve virtually any real address by the international community is seen as a challenge to the legitimacy of international law and its grand narrative, or project.

Dislocating raped women in armed conflicts from the structure of the standard international legal history does not end the problem with international law, but only raises new questions. How, for instance, can we “bring these perspectives together in a way that would not create a new grand narrative that would simply be the mirror image of the canonical story?”<sup>259</sup> In other words, can we discuss these occurrences in such a way that actually allows them an autonomous voice and at the same time resist the temptation to transform these “obliquely related” events into justifications of international law merely re-organized with a “new” purpose, or project?<sup>260</sup> In short, how do we extricate our “knowledge” from the confines of legal analysis and revision? And, perhaps more importantly, is it enough for “history’s victors [to] muster the courage to look frankly, painfully, at the horrors of its own past?”<sup>261</sup> Where does such recognition leave us? After all, what does it mean to be heard?

The current moment is plagued by this tension between the humanist and the realist within each of us: on the one hand, the desire to do something, on the other hand, the uncomfortable suspicion that benevolence is merely refurbished colonialism. My suspicion is

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<sup>258</sup> See Berman, *supra* note 3, at 1523 (explaining that every attempt to bring others into the international community can be construed as a patriarchal attempt to exclude these same individuals or groups).

<sup>259</sup> *Id.* at 1552.

<sup>260</sup> See *id.*

<sup>261</sup> *Id.* at 1554.

that often we tend to isolate these traits as two distinct personalities, and then pick allegiances. Or, as in Nathaniel Berman's opinion, we assume the "critical" talk of the morning, but after lunch is out of the way, the humanitarian emerges because it is time to be practical and get something done. The challenge to legitimacy seems unable not to pose its own counter-project of legitimacy—the realist becomes the dreamer, the "critical genealogist" changes into the "institutional functionalist." There is no escape from the shadows of colonialism. Reform—no matter how progressive or attuned to the peripheries—remains a postscript to colonialism, tainted with its imagination, and harnessed by its imperialist relationships of power. At the end of the day, we are where we started: left to choose between a gullible picture of international law marching forward, or being left out of the actual application of power, relegated to the remote theoretical outposts of international law (and principally, academia).

In this conception of competing personalities, we cannot escape the traditions of empire. But why must the "humanist" be gullible? Why must the "humanist" forever be like Coleridge's ancient mariner doomed to spend eternity repeating his story of woe as repentance for his pride? Likewise, why must the "realist" critique remain at the peripheries of reform? It may be that the tension between the humanist and the realist is essentially not a problem of reform and the stigma of colonialism, but instead the inability of our imagination. Just as we must dissolve the barriers between the stories of Western inclusion and non-Western exclusion, we must also reconcile the "humanist" and the "realist," not as two competing or contradicting personalities, but as complimentary aspects of the reformer's psychology: our "humanist" attributes sparking our desire for action, our "realist," or "genealogist" attributes informing our method of understanding and change.

By blurring the lines, the realist is no longer banished to theory; the humanist is no longer constrained by the auspices of colonialism. There is no longer a realist or a humanist, but only a critical humanist: the realist and the humanist working together to re-imagine how we understand not only the world at large, but the world at home. The critical humanist employs "humanist" tendencies to engage in the struggles of humanity while invoking the critic, or "realist," to constantly challenge his or her assumptions and move from the general and abstract to the specific, actual workings of power.

In centering law in the actual workings of power, law merges openly with the political and social spheres. Focused on the ground level, on the realities of specific communities and peoples, legal knowledge and techniques may be freed from the high walls of the legal pro-

fession. Legal knowledge becomes social knowledge. It is concerned with specific, local, immediate issues of specific, local peoples—health care, education, welfare—without seeking to attach any grand story or ultimate vision of the future. It allows knowledge and reform to move outside of law and enjoy a free and open range of discourse and possibility.

What I propose is that the realist no longer falls back into the obscurity and moral solitude of legal theory and pessimism—essentially, abstraction and inaction—but instead, embraces what is at the root of the humanitarian impulse: to take responsibility for our beliefs, to test our convictions against the costs we are willing to assume ourselves. It is one thing to face up to the colonialism of the past; it is another thing to place oneself in the driver's seat. The history of the tribunals and criminal courts are not only a lesson in the limits of our ability to reach out; rather, the chief obstacle we face may be that age-old fear of difference, the first and last defense to any self-critique, to any challenge of our own identities, our own reality and sense of right and wrong. For Berman, the realist can only function in the morning before the pens come out because the realization of the realist's challenge—that the current individual human rights regime is perhaps irreconcilably mired in racist and colonial mentality—deals a potentially critical blow to the moorings of the international legal order and dislodges it upon the open seas towards Africa, Asia, and South America.<sup>262</sup> It is not the fear of the "other," but what the "other" might show us about ourselves and our most cherished ideas, that prompts our insecurity about the way forward. It exposes that we may rely on pre-written scripts, that the words we speak and feelings we share are not our own, but rise out of the tribal mysticism and patriarchal irrationality of our past. In Rilke's poem, the *Archaic Torso of Apollo*, one who views the chiseled torso of the deity is transfixed by its message—you must change your life.<sup>263</sup> Quite simply, our refusal may be that it would disrupt the convenience of our daily routines.

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<sup>262</sup> See *id.* at 1552.

<sup>263</sup> See RAINER MARIA RILKE, *Archaic Torso of Apollo*, in *THE ESSENTIAL RILKE* 33 (Galway Kinnell & Hannah Lieberman eds. & trans., 1999).