

RAPE OF MUSLIM WOMEN IN WARTIME BOSNIA

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Sofija, a thirty-year-old Muslim woman, was raped some 900 times by Serbian soldiers during the six months she was detained in a prison camp. After her release, Sofija was hiding from her family in humiliation while expecting an unwanted Serbian baby.¹

I. INTRODUCTION

For almost four years, former Yugoslavia was ravaged by a war in which acts of incomprehensible and shocking cruelty were carried out on an enormous magnitude. Among the atrocities were the rapes of an estimated 30,000 to 50,000 Bosnian women by the Serbian military.²

After World War II, several international documents were created to prevent the recurrence of such cruelty and bloodshed.³ These treaties address rape specifically but do not provide sufficient enforceable remedies for their violations.⁴ The atrocities committed in former Yugoslavia, however, have prompted the United Nations Security Council to institute an International War Crimes Tribunal (Tribunal) to prosecute the responsible individuals for the horrors committed in former Yugoslavia since 1991.⁵

This article discusses the key international documents currently in place which could be used to prosecute Serbs for the mass rapes and focuses on the prosecution of rape in the Tribunal. Although the Tribunal has demonstrated its willingness to prosecute rape as a war crime, it remains to be seen whether the Tribunal and the international community will bring the suspects to justice.

1. Tom Post et al., *A Pattern of Rape*, NEWSWEEK, Jan. 4, 1993, at 32. Under Muslim culture, a baby takes its father's ethnicity. See *infra* note 23.

2. Post et al., *supra* note 1. See also AMNESTY INTERNATIONAL, BOSNIA-HERZEGOVINA: RAPE AND SEXUAL ABUSE BY ARMED FORCES 3-5 (1993) (stating that all sides to the conflict have committed rape, and Serbs also used rape as an instrument of war).

3. John Darnton, *Does the World Still Recognize a Holocaust?*, N.Y. TIMES, Apr. 25, 1993, § 4, at 1.

4. Compliance with international law is usually only ensured by the state's desire to maintain good world relations which may lead it to recognize international jurisdiction. See generally Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, FOREIGN AFF., Summer 1993, at 122.

5. The Tribunal was established under Chapter VII of the United Nations Charter which requires that before a tribunal can be created, the situation must constitute a threat to international peace. UNITED NATIONS, SECURITY COUNCIL, REPORT OF THE SECRETARY-GENERAL PURSUANT TO PARAGRAPH 2 OF SECURITY COUNCIL RESOLUTION 808, U.N. S/25704 (1993) [hereinafter Secretary-General's Report].

II. BOSNIAN SERB *ETHNIC CLEANSING* STRATEGY

The historical ethnic division and animosity between Serbs and Muslims dates back over 600 years.⁶ At that time, the Ottoman Turks dominated the region comprised of southern Slavic minorities: Serbs, Croats, and Muslims.⁷ Strong Serbian nationalistic feelings surfaced during the Turkish dominion,⁸ and their intensity grew over the years.⁹

In 1991, the former Yugoslavia¹⁰ started to disintegrate.¹¹ After Bosnia declared its independence from the former Yugoslavia in 1992,¹² the Serbs who lived in Bosnia feared they would be persecuted by the Muslim majority.¹³ Supported by the government of neighboring Serbia, Bosnian Serbs began a strategy of expelling Muslims from Bosnia.¹⁴ Serb leaders use the term *ethnic cleansing*¹⁵ as a cynical euphemism to characterize their vicious campaign to create a homogeneous Serbia.¹⁶

Mass rape was an instrument of the Bosnian Serbs' ethnic cleansing campaign.¹⁷ The Serbian strategy was to eliminate the Muslim

6. Water Russel Mead, *West Can't Quell Balkan Hatreds, Resentment in Region Is Centuries Old*, ATLANTA J. & CONST., Aug. 16, 1992, at D2.

7. *Id.*

8. *Id.*

9. See generally VLADIMIR DEDIJER ET AL., HISTORY OF YUGOSLAVIA (1974) (discussing the history of the internal conflicts during Ottoman and Hapsburg Empires). For additional analysis of civil conflicts during the 20th century, see Mead, *supra* note 6.

10. Prior to recent dissolution, the Federal People's Republic of Yugoslavia consisted of six republics: Bosnia, Croatia, Macedonia, Montenegro, Serbia, and Slovenia. *EC Ministers to Discuss Bosnian Conflict and Aid to CIS*, INTER PRESS SERVICE PORT., Apr. 30, 1992, available in LEXIS, News Library, ARCNEWS File.

11. For a discussion of history of the ethnic conflicts in Yugoslavia, see ALEX N. DRAGNICH, SERBS AND CROATS: THE STRUGGLE IN YUGOSLAVIA (1992). See also *infra* note 12.

12. *U.S. Seeks Support for Action in Bosnia; Christopher Sent to Talk to European Allies*, ORLANDO SENTINEL TRIB., May 2, 1993, at A1, available in LEXIS News Library, ARCNEWS File [hereinafter *U.S. Seeks Support*].

13. Before the present war, Muslims made up 44% of Bosnia's population while the Serbs, who are Eastern Orthodox Christian, accounted for 33% and Croats, who are Roman Catholic, constituted 17% of the population, *U.S. Seeks Support, supra* note 12.

14. David M. Kresock, "Ethnic Cleansing" in the Balkans: *The Legal Foundations of Foreign Intervention*, 27 CORNELL INT'L L.J. 203, 221 (1994).

15. The term is deceiving because Bosnian Muslims, Serbs, and Croats, all have a Slavic ethnicity and are split more by their religious identity. For a historical background of ethnic cleansing generally, see Andrew Bell-Fialkoff, *A Brief History of Ethnic Cleansing*, FOREIGN AFF., Summer 1993, at 110.

16. Kresock, *supra* note 14.

17. *Report on the Situation of Human Rights in the Territory of the Former Yugoslavia Submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights*,

population of Bosnia through an attack on Muslim women.¹⁸ Subsequently, the body of a woman was "used to send a message to the woman and her community that she and it are conquered,"¹⁹ since rape wounds not only the individual woman but also the *morale and identity* of her society.²⁰

III. THE RAPE OF MUSLIM WOMEN IN WARTIME BOSNIA

A. Reports of Mass Rape in Bosnia

To accomplish their mission, Serbian soldiers raped Muslim women in a typical pattern.²¹ Serbs transformed villages into rape camps for the convenience of their soldiers and for easy access to women.²² The rapes were committed particularly to impregnate Muslim women and to keep them captive past the period for obtaining a safe abortion so that they would "give birth to unwanted Serbian babies."²³

Shocking reports reveal information of gang rapes during which victims died — systematic rapes of girls as young as six years old, some performed in front of their fathers, mothers, and siblings and as many as two hundred witnesses.²⁴ In one instance, a twenty-eight-year-old woman

U.N. SCOR, 48th Sess., Annex, Item 115(c), at 57, 74, U.N. Doc. A/48/92, S/25341 (1993) [hereinafter *Report of the Special Rapporteur on Human Rights*].

18. *Rape Was Weapon of Serbs, U.N. Says*, N.Y. TIMES, Oct. 20, 1993, at A1. Although the reported rape cases involve female victims, ranging from children to elderly women, there is evidence that Bosnian men have also been subjected to rape. See Louise Branson, *Sexual Abuse of POWs Widespread in Yugoslav War*, STRAITS TIMES, Aug. 2, 1993, at 13.

19. Laurel Fletcher et al., *Human Rights Violations Against Women*, 15 WHITTIER L. REV. 319, 321 (1994) (discussing that the lower social status of women makes them targets for rape, and that such an injury to a woman is a reflection on the community in which women are passive and protected by men).

20. Lance Morrow, *Unspeakable: Is Rape an Inevitable and Marginal Part of War?*, TIME, Feb. 22, 1993, at 48.

21. Sharon A. Healey, *Prosecuting Rape Under the Statute of the War Crimes Tribunal for the Former Yugoslavia*, 21 BROOK. J. INT'L L. 327, 339 (1995).

22. Roy Gutman, *Ethnic Cleansing, 'Rape' Camps: Bosnian War Is Savage as Ever*, ST. LOUIS POST DISPATCH, Sept. 30, 1993, at A4. Once a village is taken over, the male population is sent to prison camps while women are taken to facilities where they are repeatedly raped in front of numerous witnesses. See Fletcher et al., *supra* note 19, at 320.

23. Post et al., *supra* note 1. Muslims will consider the babies Serbs because under Muslim culture and Islamic law, a child assumes its father's ethnicity. Rebecca O. Bresnick, *Reproductive Ability as a Sixth Ground of Persecution Under the Domestic and International Definitions of Refugee*, 21 SYRACUSE J. INT'L L. & COM. 121, 127 (1995) (citing Mary Elizabeth Mayer, *Law and Religion in the Muslim Middle East*, 35 AM. J. COMP. L. 127 (1987)).

24. Post et al., *supra* note 1.

was raped by twenty-eight soldiers before she lost consciousness.²⁵ Countless women have experienced a fate similar to one nineteen-year-old woman who was detained four-and-one-half months in a Serb facility where she was raped five or six times daily.²⁶

B. Consequences of Rape

Forcible rapes produce numerous harmful consequences, such as impregnation, ostracism of rape victims by their families, and psychological harm. Many rape victims who become pregnant choose abortion if possible.²⁷ However, many of the women in Bosnia could not have a safe abortion and were therefore forced to bear the Serbian offspring toward whom they felt disgust and repugnance.²⁸ Conceived during savage Serbian rapes, the children born of these rapes are the youngest victims of the war. Numerous children all have been abandoned by their mothers and are left to live in woeful conditions in hospitals and orphanages.²⁹

Rape victims are often ostracized by their husbands, families, and communities if they reveal that they have been raped³⁰ because the Muslim culture, "views rape victims as particularly shameful."³¹ Women face family rejection if they speak publicly about their rapes³² because if "they have been defiled, their family has been defiled, and by extension their community has been defiled."³³

Rape is a humiliating experience which creates enduring social trauma. When a woman is raped, not only does she suffer physically, she

25. Terry Atlas, *U.N. Will Pursue War Crimes Trials for Bosnia Rapes*, CHI. TRIB., Jan. 30, 1994, at C1.

26. Fletcher et al., *supra* note 19, at 368.

27. Women in Bosnia can obtain legal abortions within the first six months of pregnancy. Fletcher et al., *supra* note 19, at 377-78 (discussing the legal requirements for obtaining abortion: after the 10th week of pregnancy, women must obtain a certificate from an ethics committee in order to legally abort). See also Post et al., *supra* note 1.

28. Fletcher et al., *supra* note 19.

29. *Id.* at 378; see Louise Branson, *Balkan "Rape Babies" Face Dark Future*, STRAITS TIMES, July 5, 1993, at 12.

30. Fletcher et al., *supra* note 19, at 321.

31. Bresnick, *supra* note 23, at 126. For a detailed analysis of women's chastity in Muslim cultures, where virginity is considered the greatest gift a woman can give to her husband, see generally NAWAL EL SAADAWI, *THE HIDDEN FACE OF EVE: WOMEN IN THE ARAB WORLD* (Sherif Hetata trans., 1980).

32. The family shame brought on by rape was so great that rape victims were killed by their own relatives. See Associated Press, *Shamed Muslims Killing Rape Victims*, CHI. TRIB., Feb. 10, 1993, at 5N.

33. Fletcher et al., *supra* note 19, at 321.

also experiences profound shame and internalizes a sense of guilt.³⁴ Rape victims may also suffer serious psychological disorders, such as depression, phobia, suicidal impulses, or severe psychosis.³⁵ A part of the healing process for some victims would be for the international community to recognize what has happened to them by punishing their tormentors.³⁶

IV. TREATMENT OF WARTIME RAPE BY THE INTERNATIONAL COMMUNITY

A. Rape Historically Unenforced

Rape has been prohibited by international law, but historically, the rape of women in wartime has been deemed not as serious as other abuses and has often been forgotten.³⁷ For example, mass rapes by the Russians, Germans, and Japanese during World War II received limited attention.³⁸ Similarly, the rapes by soldiers during the Vietnam war,³⁹ and by the Pakistanis against Bangladeshi women in 1971 were also ignored.⁴⁰

The Nuremberg war crimes trials after World War II,⁴¹ which set an example for future tribunals, did not indict any suspects for rape.⁴² The only reference to rape after World War II was in the Tokyo Tribunal; however, these rapes were given only an ephemeral attention.⁴³

34. *Id.* at 367.

35. *Id.* at 378. Many victims are left gynecologically scarred. Clare Dyer, *Law: Bringing Barbarians to the Bar; Bosnian Rapists are in Danger of Getting Off Scot-free*, *GUARDIAN*, Sept. 24, 1996, at 17.

36. Robert Marquand, *A Dogged UN Hudge Propels "the Real Trial of the Century,"* *CHRISTIAN SCI. MONITOR*, Oct. 23, 1995, at 7.

37. Dianna Marder, *Once Again, Rape Becomes a Weapon of War*, *ATLANTA CONST.*, Feb. 17, 1993, at A11.

38. SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* 53-62 (1975). See also LEON FRIEDMAN, *THE LAW OF WAR: A DOCUMENTARY HISTORY 1060-64* (1972).

39. BROWNMILLER, *supra* note 38, at 87-118.

40. *Id.* at 78-87.

41. The International Military Tribunal at Nuremberg was empowered to punish individuals who committed war crimes, crimes against humanity, and crimes against peace. Rape was not explicitly listed in any of these crime categories, but was probably encompassed within the definitions in the Nuremberg Charter. See Nuremberg Charter, annexed to the London Agreement on War Criminals, Aug. 8, 1945, art. 6, 82 U.N.T.S. 279.

42. Atlas, *supra* note 25.

43. *Id.*

Historically, women have been considered a prize of the war, seized by the conquerors as their well deserved reward.⁴⁴

B. *International Documents Addressing Rape*

In the aftermath of World War II, several international documents were created to prevent the recurrence of similar tragedies. Serbians could be prosecuted for the mass rapes they committed under the following treaties.

1. Genocide Convention

One of the most significant documents which emerged after World War II was the Genocide Convention designed to recognize genocide as a crime under international law.⁴⁵ The Genocide Convention defines the crime of genocide⁴⁶ and makes any party liable, regardless of the defense of respondent superior.⁴⁷

The mass rapes of Muslim women in Bosnia fit the definition of genocide under the Genocide Convention because they were committed as part of the Serbs' campaign to exterminate a national, religious, or ethnic group.⁴⁸ This determination has been recognized by the International Court of Justice which issued a provisional ruling prohibiting various Serbian acts in Bosnia.⁴⁹ The ruling declared that Bosnian Serbs were committing acts in

44. Susan Brownmiller, *Making Female Bodies the Battlefield*, NEWSWEEK, Jan. 4, 1993, at 37.

45. Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277. [hereinafter Genocide Convention].

46. The crime of genocide is defined as follows:

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

- a. Killing members of the group;
- b. Causing serious bodily or mental harm to members of the group;
- c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d. Imposing measures intended to prevent births within the group;
- e. Forcibly transferring children of the group to another group.

Id. at art. 2.

47. Article 4 of the Genocide Convention states: "Persons committing genocide or any other acts enumerated in article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." Genocide Convention, *supra* note 45.

48. See Fletcher et al., *supra* note 19, at 355-56.

49. *Id.*

violation of the Genocide Convention by virtue of their *ethnic cleansing* in Bosnia.⁵⁰

2. Geneva Conventions and Protocols

The Geneva Convention Relative to the Protection of Civilian Persons in Time of War⁵¹ (Civilian Convention) is highly applicable to the treatment of Muslim women in Bosnia. Rape is explicitly prohibited under article 27 of the Civilian Convention: "Women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault."⁵² Although rape is not listed as a grave breach of the Civilian Convention, the International Committee of the Red Cross (ICRC) interpreted rape as a grave breach under article 147 of the Civilian Convention.⁵³ Thus, the Civilian Convention is another potential medium for prosecuting rapes of Bosnian women.⁵⁴ However, whether rape can be prosecuted as a grave breach and as such be subject to universal jurisdiction also depends on whether the conflict in Bosnia is considered international or civil because the grave breaches provision of the Civilian Convention applies only to international conflicts.⁵⁵

50. *Id.* (citing the International Court of Justice:

[T]he Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should . . . ensure that any military, paramilitary or irregular armed units . . . do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnic, racial or religious group . . .).

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. (Serbia and Montenegro)), 1993 I.C.J. 3, at para. 52.A(2) (Provisional Measures, Order of Apr. 8).

51. The Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Civilian Convention]. The Civilian Convention is one of the four 1949 Geneva Conventions drafted after World War II.

52. Civilian Convention, *supra* note 51, at art. 27.

53. *Id.* at art. 147; See Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 426 (1993) (stating that the ICRC recognized rape as grave breach because it is torture or inhumane treatment "willfully causing great suffering or serious injury to body or health").

54. Meron, *supra* note 53, at 427.

55. Healey, *supra* note 21, at 341. The division of former Yugoslavia into independent republics has complicated the analysis, because the status of the conflict is not clearly defined. On one side, Bosnia's declaration of independence suggests that the rapes by Bosnian Serbs constitute part of a civil conflict. On the other side, Bosnia's independence may imply that the conflict is international, especially due to the Serbia's intervention on behalf of the Bosnian Serbs in Bosnia. *Id.* at 343. Most countries recognized Bosnia as an independent state. Also, a number of United Nations Security Council resolutions have apparently assumed that the conflict is to be governed by the standard of international armed conflict. See, e.g., S.C. Res. 771, U.N.

Similarly, Protocol I to the Geneva Conventions, developed to clarify those Conventions, does not list rape as a crime constituting grave breach.⁵⁶ However, article 76(1) of Protocol I explicitly provides that women “shall be protected in particular against rape.”⁵⁷ In addition, Article 4(2)(e) of Protocol II⁵⁸ to the Geneva Conventions expressly prohibits rape. While Protocol I applies to international armed conflicts, Protocol II pertains to non-international armed conflicts. Both Protocols specifically refer to rape as a crime under international law regardless of whether the conflict in Bosnia is ultimately considered international or civil.

3. The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR)⁵⁹ prescribes to states a duty to guard civil and political rights of the its citizens. Article 17 applies to women specifically as a prohibition against unlawful attacks on honor.⁶⁰ Article 7 prohibits “torture and other cruel, inhuman or degrading treatment.”⁶¹ Since rape can be considered such a treatment⁶² under both the ICCPR and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention),⁶³ these provisions are violated by the Serbian rapes.

There is some question, however, whether these treaties are binding on the states of the former Yugoslavia. Because the former Yugoslavia was a party to both the ICCPR and the Torture Convention, the succession to this obligation by Bosnia is arguable.⁶⁴ Moreover, even if

SCOR, 3106th mtg., U.N. Doc. S/RES/771 (1992); S.C. Res. 780, U.N. SCOR, 3119th mtg., U.N. Doc. S/RES/780 (1992); S.C. Res. 808, U.N. SCOR, 3175th mtg., U.N. Doc. S/RES/808 (1993); Fletcher et al., *supra* note 19, at 355.

56. Protocol I Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3, art. 76(1), [hereinafter Protocol I].

57. *Id.*

58. Protocol II Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609, art. 4(2)(e), [hereinafter Protocol II].

59. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1996, 999 U.N.T.S. 171 [hereinafter ICCPR], *reprinted in* UNIFO, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS OF THE UNITED NATIONS 1948-1982, 91-99 (1983).

60. *Id.* at art 17.

61. *Id.* at art. 7.

62. *See supra* note 53.

63. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. GAOR, 39th Sess., at 197, U.N. Doc. A/39/46 (1984) [hereinafter Torture Convention].

64. Fletcher et al., *supra* note 19, at 356.

not bound by these treaties *per se*, wartime rape can be also regarded as a violation of customary international law since "the major conventional humanitarian law has become part of customary international law."⁶⁵

C. No Enforceable Remedy Against Non-Complying States

The international treaties discussed above are applicable to the prosecution of the mass rapes in Bosnia. However, despite the fact that these treaties contain prohibitions against the rape of women, the question remains whether these documents have any concrete effect on the protection of women during wartime.

United Nations authorities have considered these treaties applicable to the present situation in Bosnia,⁶⁶ and the Serbs' actions have generally been punished through diplomatic and economic channels.⁶⁷ Yet, this did not stop the rapes.

The stimulus behind creating these treaties was condemnation of the atrocities of World War II to prevent them from recurring. But, not even fifty years later, they occurred again and the world appeared to fight the brutality with a noble principle alone.⁶⁸ One must conclude that while the international community is efficient in constructing documents of condemnation, it has no ability to implement its aspirations and to protect women's human rights during armed conflict.⁶⁹ The newly founded War Crime Tribunal may be viewed as partial protection of women's rights.

V. CURRENT PROGRESS TO HALT THE MASS RAPES IN BOSNIA

A. Creation of War Crimes Tribunal

In May 1993, the United Nations Security Council established a war crimes tribunal⁷⁰ and adopted a statute proposed by the United Nations

65. *Secretary-General Report*, *supra* note 5, at Annex, art. 1; *see also* Healey, *supra* note 21, at 331-32 (stating that violations of customary international law provide a basis for prosecuting rape in the Tribunal).

66. *See Report of the Special Rapporteur on Human Rights*, *supra* note 17.

67. Alan Riding, *Europeans Impose a Partial Embargo on Belgrade Trade*, N.Y. TIMES, May 28, 1992, at A1; RES. 757, U.N. SCOR, 3082nd mtg., U.N. Doc. S/RES/757 (1992). However, it is unclear whether rapes played much part in the imposition of the sanctions.

68. *See* Elaine Sciolino, *U.S. Names Figures It Wants Charged With War Crimes*, N.Y. TIMES, Dec. 17, 1992, at A1.

69. *See* Jean-Michel Stoullig, *Rights Panel Probes Rape as Wartime Weapon*, AGENCE FR. PRESSE, Aug. 7, 1996, available in LEXIS, News Library, Int'l News File.

70. S.C. Res. 827, U.N. SCOR, 3217th mtg., U.N. Doc. S/RES/827 (1993) (reaffirming its resolution 713 of Sept. 25, 1991). There is a dual view on the Tribunal's creation. Some legal scholars say that the Tribunal will verify whether the nations that signed the Geneva

Secretary-General which gave the Tribunal universal jurisdiction over "persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."⁷¹ The statute grants the Tribunal subject matter jurisdiction over the following crimes: grave breaches of the 1949 Geneva Conventions,⁷² violations of the laws or customs of war,⁷³ genocide,⁷⁴ and crimes against humanity.⁷⁵ These categories of crimes constitute "beyond doubt . . . part of international customary law . . . applicable in armed conflict."⁷⁶

B. Prosecuting Rape Under the Tribunal's Statute

The rape of women in Bosnia could be prosecuted under the statute of the Tribunal as a grave breach of the Geneva Conventions and as genocide under the Genocide Convention.⁷⁷ In addition, rape constitutes a crime against humanity.⁷⁸ Since the Tribunal's statute explicitly recognizes rape as crime against humanity,⁷⁹ it can be prosecuted in the Tribunal as such.

Moreover, the rape of Bosnian women can be prosecuted in the Tribunal as a violation of the laws or customs of war.⁸⁰ Article 3 of the statute is based on⁸¹ the Charter of the Nuremberg Tribunal⁸² and the 1907

Conventions will ever implement the legal norms of the treaties. Robert Marquand, *A Dogged UN Judge Propels 'The Real Trial of the Century,'* CHRISTIAN SCI. MONITOR, Oct. 23, 1995, at 7. Others claim that the Tribunal's creation is a reflection of the international community's inability to solve conflicts such as the one in Bosnia. Healey, *supra* note 21, at 377.

71. SECRETARY-GENERAL'S REPORT, *supra* note 5, at Annex, art. 1. The international humanitarian law exists in two forms: conventional law and customary law. Although some of the customary international law is not listed in the conventions, "the major conventional . . . law has become part of customary international law." *Id.* at § 33.

72. *Id.* at Annex, art. 2.

73. *Id.* at art. 3.

74. *Id.* at art. 4.

75. *Id.* at art. 5.

76. *Id.* at art 1, § 35. See also Meron, *supra* note 53, at 425.

77. See *supra* prior analysis in Parts IV.B.1-2.

78. "Crimes against humanity" as defined in Nuremberg Charter consisted of brutal, inhumane acts on the same level of severity as murder and torture, committed on a massive scale. See Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2588 (1991).

79. SECRETARY-GENERAL'S REPORT, *supra* note 5, art. 5(g), at 13. Crimes against humanity are more difficult to prove than grave breaches. See Oren Gross, *The Grave Breaches System and the Armed Conflict in the Former Yugoslavia*, 16 MICH. J. INT'L L. 783, 823 (1995) (contending that if the Tribunal decides to label rape as grave breach, that will put a seal on the historical intolerance on violence against women).

80. Healey, *supra* note 21, at 350.

81. SECRETARY-GENERAL'S REPORT, *supra* note 5, § 34, at 9.

Convention Respecting the Laws and Customs of War on Land.⁸³ Rape may be covered in article 46 of the Hague Regulations⁸⁴ which states that “[f]amily honor . . . must be respected.”⁸⁵ This indicates that the mass rapes committed in front of many witnesses, deliberately dehumanizing not only the victim but also her family,⁸⁶ could be included as attacks on family honor and as such be prosecuted under the statute of the Tribunal as violations of customs of war.

Finally, as the first body in history, the Tribunal recognized rape as a war crime when it indicted eight Bosnian Serbs on charges of rapes of Muslim women in Bosnia.⁸⁷ Thus, the Tribunal has sufficient legal basis for the prosecution of the mass rapes.

C. *Collecting Evidence for Prosecution*

How the prosecution in the Tribunal will proceed depends on the quality of collected evidence.⁸⁸ However, since vital documentation is in the hands of the persons responsible for the violations, and many victims and witnesses of the atrocities have widely scattered,⁸⁹ the collection of evidence is problematic.

In addition, the Tribunal cannot try suspects in absentia;⁹⁰ thus, unless the suspected war criminals are arrested by their government, consent to trial, are captured outside their own country⁹¹ or are arrested by NATO forces, it is doubtful that justice will be served.⁹²

82. Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 284.

83. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Regulations].

84. *Id.* at art. 46.

85. Healey, *supra* note 21, at 350.

86. See discussion *supra* Part II.B., stating that the Muslim culture views rape victims especially shameful and that when the rape victim is defiled, her family is defiled as well.

87. Marlise Simons, *U.N. Court, for First Time, Defines Rape as War Crime*, N.Y. TIMES, June 28, 1996, at A1. However, the suspects are at large. *Id.*

88. The British Broadcasting Corporation, *War Crimes Commission Has Evidence on 17,000 Criminals*, BBC SUMMARY OF WORLD BROADCASTS, Nov. 7, 1994, available in LEXIS, Nexis Library, News File.

89. Fletcher et al., *supra* note 19, at 360.

90. SECRETARY-GENERAL'S REPORT, *supra* note 5, at art. 1. A trial in absentia would conflict with article 14 of ICCPR. See ICCPR, *supra* note 59.

91. Article 29 of the Tribunal's statute pronounces that states shall assist the Tribunal in the "investigation and prosecution of persons accused of committing serious violations of international humanitarian law," and lists the instances in which states shall provide assistance to the Tribunal, such as identification of persons, service of documents, or arrest. SECRETARY-GENERAL'S REPORT, *supra* note 5, art. 29, at 47.

One of the major obstacles in collecting evidence for rape prosecution is that the women are ashamed to come forward and testify publicly about the torture they endured. As a result, the acts of rape are under-reported.⁹³ Despite the estimated 30,000 to 50,000 rapes in Bosnia, the United Nations Commission has examined about 3,000 accounts of rape⁹⁴ and has named about 800 victims.⁹⁵ An important role in identification of evidence rests with non-governmental organizations and special commissions.⁹⁶

Another reason why rape victims are disinclined to testify is that "they fear retaliation either from their families or from their perpetrators."⁹⁷ However, this barrier could be viewed as partially resolved by the statute's provision for in camera proceedings to protect the victim's identity.⁹⁸

As Mrs. Albright, United States Ambassador to United Nations, states, once the indictments are issued, the suspects become "international pariahs." *Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting*, U.N. SCOR, 3217th mtg. at 13, U.N. Doc. S/PV.3217 (1993).

92. The Dayton peace agreement directs the former parties to the conflict and the NATO forces to apprehend the suspects indicted by the Tribunal. *8 Serbs Are Indicted in Mass Rapes*, NEWSDAY, June 28, 1996, at A17, available in LEXIS, Nexis Library, News File. However, NATO troops will arrest the suspects "only if they are noticed by their soldiers in the course of their normal duties and if the soldiers feel that circumstances permit." Stacy Sullivan, *Bosnia's Most Wanted Mostly Accessible; War Crimes Suspects Maintain High profile in Croat-Run Town, But Police Pay No Mind*, WASH. POST, Nov. 27, 1996, at A21. See also *Yugoslavia War Crimes Court to Begin Trials in April*, REUTERS, Nov. 27, 1993, available in LEXIS, Nexis Library, News File.

93. DIANA E. H. RUSSELL, *THE POLITICS OF RAPE: THE VICTIM'S PERSPECTIVE* 62 (1975); see also Brownmiller, *supra* note 44. Due to the victims' fragile emotional state, interviews should be conducted only by women and only those victims who wish to speak should be questioned since silence is a part of their ability to cope with the recent trauma. See Fletcher et al., *supra* note 19, at 360-62.

94. The reports were compiled by the International Human Rights Law Institute of DePaul University in Chicago based on the information received from several nongovernmental organizations. See *Rape Was Weapon of Serbs*, *supra* note 18.

95. *Id.*

96. So far 17,000 war criminals are incriminated by the evidence collected in Bosnia by the Bosnian State Commission for Gathering Evidence on War Crimes in Bosnia-Herzegovina. The British Broadcasting Corporation, *supra* note 88. The Commission has prepared about 7,100 cases supported with documents and eyewitnesses. The criminals are responsible for 50 mass graves, 352 concentration camps, 450 villages burnt to the ground, and about 25,000 rape cases. *Id.*

97. Fletcher et al., *supra* note 19, at 361.

98. SECRETARY-GENERAL'S REPORT, *supra* note 5, Annex, at art. 22.

D. Current Progress in the Prosecution of Rapes

1. First Trials in the Tribunal

So far, the Tribunal has issued warrants for the arrest of seventy-four suspected war criminals, including the Bosnian Serb leader, Radovan Karadzic, and Bosnian Serb military commander, Ratko Mladic; however, only seven are in custody in the Hague.⁹⁹ The first international war crimes trial since Nuremberg in 1945 was the prosecution of Dusan Tadic accused of murder and torture.¹⁰⁰ The verdict against Tadic is anticipated in the spring.¹⁰¹ Recently, the Tribunal handed down its first decision, sentencing a Croat soldier to ten years in prison for killing about seventy Bosnian Muslims.¹⁰² In January 1997, the Tribunal prosecuted four suspects charged with rape, murder, and torture.¹⁰³

Some indicted suspects live quite freely and work daily, even though they could be arrested by the 50,000-strong NATO forces in Bosnia.¹⁰⁴ Moreover, until now the international community has failed to arrest the two most wanted suspects, the orchestrators of the mindless sea of destruction, Karadzic and Mladic.

2. Recognition of Rape in National Courts of Former Yugoslavia

A court in Sarajevo convicted two Serbian soldiers for committing several rapes and murders of Bosnian Muslims and sentenced the soldiers to death.¹⁰⁵ But, the United Nations military chief, Phillippe Morillon, criticized the trial and claimed that Bosnian's should have turned those two Serbs over to the Tribunal.¹⁰⁶

99. *One Killer Down, 73 to Go*, USA TODAY, Dec. 2, 1996, at A13. See Julian Rake, *First Yugoslav War Crimes Trial Postponed to 1996*, REUTERS WORLD SERV., Oct. 24, 1995, available in LEXIS, Nexis Library, News File.

100. Ed Vulliamy, *Sketch: Bosnian 'Butcher' Faces Accusers*, GUARDIAN, Oct. 25, 1995, at 2. Tadic was accused of rape as well; however, the rape charges were dropped after the alleged victim refused to testify. Clare Dyer, *Law: Bringing Barbarians to the Bar; Bosnian Rapists Are in Danger of Getting Off Scot-free*, GUARDIAN, Sept. 24 1996, at 17.

101. *UN Tribunal Sets January Date for War Crimes Trial*, ANP ENG. NEWS BULL., Dec. 19, 1996, available in LEXIS, Nexis Library, News File.

102. *One Killer Down, 73 to Go*, *supra* note 99. The soldier argued that he committed the crimes only because he was threatened with being a victim himself. *Id.*

103. *Muslims Go On Trial Over War Crimes*, TIMES (London), Mar. 11, 1977, available in LEXIS, Nexis Library, News File.

104. Sullivan, *supra* note 92. *One Killer Down, 73 to Go*, *supra* note 99.

105. One defendant, Borislav Herak, confessed to killing 35 people and raping 16 women, 12 of whom he subsequently murdered. See John F. Burns, *2 Serbs to Be Shot for Killings and Rapes*, N.Y. TIMES, Mar. 31, 1993, at A6.

106. Healey, *supra* note 21, at 378.

3. Civil Lawsuits Filed in the United States

In the United States, two lawsuits have been filed on behalf of Bosnian rape survivors under the Alien Tort Act,¹⁰⁷ a federal statute which provides jurisdiction when an alien sues for *torts* committed in violation of the law of nations.¹⁰⁸ The plaintiffs allege that Radovan Karadzic is responsible for the rapes of Muslim women in Bosnia and seek damages and an injunction which would order Karadzic to stop the rapes.¹⁰⁹ A lower court refused to confer subject matter jurisdiction,¹¹⁰ but the United States Court of Appeals for the Second Circuit¹¹¹ unanimously ruled that victims can sue Karadzic in the United States "for genocide, war crimes, and crimes against humanity."¹¹² However, the court cannot compel Karadzic to come to the United States and collecting damages will be quite difficult.¹¹³

VI. CONCLUSION

It has been fifty years since the end of World War II, and barbarian war crimes have emerged again. All the international documents have proven to be of no worth in this situation. Although the Tribunal took the opportunity to recognize rape for the first time as a war crime, the Tribunal and the international community have an obligation to arrest and convict the criminals guilty of rape and other sexual abuses.

107. See Michele Brandt, *Redressing Non-State Acts of Gender-Specific Abuse Under the Alien Tort Statute*, 79 MINN. L. REV. 1414-15 (1995).

108. 28 U.S.C. § 1350 (1988).

109. Matthew Goldstein, *Bosnian Suit Uses 200-Year Old Law*, N.Y. L.J., Sept. 28, 1993, at 1.

110. 28 U.S.C. § 1435 (1988).

111. This court has decided that under the Alien Tort Act, a relative of a Paraguayan citizen could sue the torturer for money damages in a United States court. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

112. Thomas Scheffey, *No Place to Hide*, CONN. L. TRIB., Nov. 6, 1995, at 1.

113. Alex Michelini, *War Crimes Suits OK'd Here, Victims vs. Karadzic*, DAILY NEWS (N.Y.), Oct. 14, 1995, at 37.