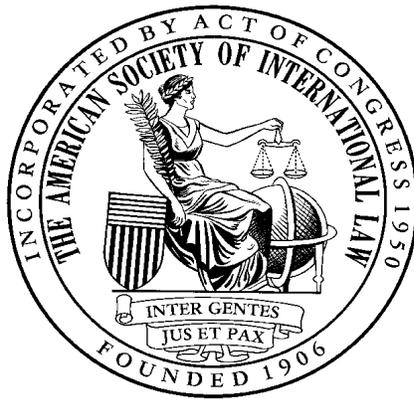


# INTERNATIONAL LEGAL THEORY



## International Criminal Law

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Publication of the American Society of International Law  
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# INTERNATIONAL LEGAL THEORY

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# How is Humanity Harmed by Genocide?

*Larry May*  
*Washington University*

Genocide is the worst of the crimes with which a person can be charged in international criminal law.<sup>1</sup> It was defined in the Genocide Convention as: “any of the following acts committed with intent to destroy (in whole or in part) a national, ethnical, racial, or religious group as such.”<sup>2</sup> Genocide, originally listed under the category of crimes against humanity, was the most serious category of international crime during the Nuremberg trials.<sup>3</sup> The Rome Charter of the International Criminal Court has elevated genocide into its own separate and most serious category.<sup>4</sup> Yet, scant attention is paid to the precise harm of genocide. This article intends to partially fill this

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<sup>1</sup> For more on the crime of genocide see chapter 9 of my book, *Crimes against Humanity: A Normative Account*, NY: Cambridge University Press, 2005. I am grateful to James Bohman whose work in this topic inspired me to take another look at the idea of a “right to have rights.”

<sup>2</sup> Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (1948), Art. II.

<sup>3</sup> Charter of the International Military Tribunal at Nuremberg, Annex to the London Agreement (8 Aug. 1945), 82 U.N.T.S. 279, Art. 6 – the term “genocide” is not here used.

<sup>4</sup> Rome Statute of the International Criminal Court, Adopted by the U.N. Diplomatic Conference (17 July 1998), Art. 5 and Art. 6.

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gap by arguing that the harm of genocide is not based on the damage to the groups in question, but on the damage to humanity when individuals lose their group-affiliations.

Inspiration in this effort generates from the work of Hannah Arendt, especially her *Origins of Totalitarianism*,<sup>5</sup> which also attempts coming to terms with the worst of crimes committed by the Nazi regime. *Origins of Totalitarianism* is in many ways a difficult book. While Arendt's ideas are often brilliant, she is not always interested in careful analysis. She provides a key to unlocking the puzzle of the harm of genocide by viewing it as a crime against the status of humanity, but what she says about this is admittedly very brief. This article attempts to work out a more detailed view, keeping with Arendt's original insights into the harms of genocide.

### I. THE RIGHT TO LIFE OF GROUPS

William Schabas, the preeminent scholar of genocide in international law, begins his major book on genocide by pointing out that:

The General Assembly Resolution 96  
(I), adopted in December 1946, de-

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<sup>5</sup> Hannah Arendt, *Origins of Totalitarianism*, NY: Harcourt, Brace and World, 1951, second edition 1966.

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clares that “[g]enocide is a denial of the right of existence of entire human groups[,] as homicide is the denial of the right to live of individual human beings.”<sup>6</sup>

Schabas then points out that this analysis is too simple since genocide, unlike the crime of murder, is “directed against the entire international community rather than the individual.”<sup>7</sup> Of course, what Schabas does not note is that the crime of murder is also seen as primarily a crime against the domestic community, not primarily a crime against an individual. This is the main difference between the tort of wrongful death (which is fully about what happens to an individual person) and the crime of murder (which is prosecuted by the public organ of the State standing in for the harmed community).

Historically, the crime of genocide is linked with that of “denationalization.”<sup>8</sup> This link points to an obvious fact: a group can be destroyed without killing any of its members. One can destroy a group by disconnecting members of the group from the group; for instance, by forbidding them to speak their native language or by dispersing them to destroy any group coherence. Once ac-

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<sup>6</sup> William A. Schabas, *Genocide in International Law*, Cambridge: Cambridge University Press (2000), p. 6.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*, p. 28.

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completed, the members are often forcibly reincorporated into another nation, as Lemkin pointed out.<sup>9</sup> It is also possible to leave these “denationalized” people alone, as so-called “stateless people,” like the Jews in many parts of the world who have lost any sense of having rights. Indeed, one harm of genocide is to disconnect a people from its natural protective structure, so that the members are left to fend for themselves as individuals without recognized rights, perhaps even without recognized membership in humanity.

In international law, the concept of ‘group’ plays a prominent role—although largely unexamined and undefined. The Universal Declaration of Human Rights says that education “shall promote understanding, tolerance, and friendship among all nations, racial or religious groups.”<sup>10</sup> Discussed earlier, the Genocide Convention of 1948 speaks of “national, racial, ethnical, or religious groups” as entities that, when assaulted, could be the subject of genocide. But why are these social groups the subject of international law’s chief prohibition? Are groups merely orderings of individual persons? What makes some ordering of individuals more deserving of protection than other order-

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<sup>9</sup> Raphael Lemkin, *Axis Rule in Occupied Europe, Laws of Occupation, Analysis of Government, Proposals for Redress*, Washington: Carnegie Endowment for World Peace, 1944, pp. xi-xii.

<sup>10</sup> Universal Declaration of Human Rights, U.N. G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810, at 71 (1948), Art. 26.

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ings of individuals? This article provides the beginning of an answer to these questions.

It may be that certain groups have significance because their memberships are based on immutable characteristics of which no individual should be discriminated against. Perhaps certain groups have significance because they permanently remain in a minority status in a given society, a basis on which should not allow the state to exercise its tyrannical majoritarian rule. The *Akayesu* decision of the *ad hoc* International Criminal Tribunal for Rwanda argues that “stable and permanent groups” are protected by the Genocide Convention, relying on both of the above factors of significance. The court says that “a common criterion in the four types of group protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically by birth, in a continuous and irremediable manner.”<sup>11</sup>

Yet, as William Schabas sagely notes: “On closer scrutiny, three of the four categories in the Convention enumeration: national groups, ethnic groups, and religious groups, seem neither stable nor permanent. Only racial groups, when they are defined genetically, can lay claim to some pro-

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<sup>11</sup> Prosecutor v. Akayesu, Trial Chamber Judgment of the International Criminal Tribunal for Rwanda, Case No. ICTR-96-4-T, para. 652.

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longed stability and permanence.”<sup>12</sup> In addition, birth does not seem to be a clearly relevant factor, since one can undo any of the group memberships that one is born into, with the possible exception of race. Perhaps there is a *prima facie* claim that one can make, not to be discriminated against on the basis of the group that one did not initially join, but was thrust into at birth. Lockeians will quickly point out that most people have “exit options,” and it is the failure to exercise these options that constitutes a kind of tacit consent to remain a member. Once one chooses not to exit a social group, this undermines the claim that henceforth group membership should be an illegitimate basis for discriminatory treatment.

The idea that the harm of genocide is the destruction of a group “as such” is the most difficult idea for the Genocide Convention to understand. The words “as such” remove the individual from the group; it is the destruction of the group, not the destruction of the individual members, which is important. It seems that it is not the loss of rights of these individuals, but the loss of the group itself, that is characteristic of the crime of genocide. Yet, it is very unclear what the precise harm is when a group is lost, especially when it happens that the members of the group are assimilated into another group, or reformed into a new group with a different identity. The loss of

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<sup>12</sup> Schabas, pp. 132-133.

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one group does not indicate one less group in the world; hence, it is difficult to understand why that loss is the crime of crimes.

Some groups, racial or ethnic, cannot be destroyed without destroying the individual members, indeed, all of the individual members. Schabas points out in the debates at the Genocide Convention: “Iran saw a distinction between groups whose membership was inevitable ... and those of which membership was voluntary. [I]t must be admitted that destruction of the first type appeared more heinous in light of the conscience of humanity, since it was directed against human beings whom chance alone had grouped together.”<sup>13</sup> For racial groups, genocide is truly terrible since destroying the group—even in part—means killing lots of individual persons. Yet, this is only one of the four types of groups that the Genocide Treaty focuses on.

There are also groups based on religion or nationality which can be changed, although in many societies these changes are rare. To destroy these groups is not as much of an outrage as it is to destroy a group of which the members cannot voluntarily leave. As Brazil’s representative to the Genocide Convention points out, even forced assimilation is not necessarily a wrong since it can be part of “perfectly normal assimilation in new

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<sup>13</sup> Schabas, p. 137, quoting UN Doc. A/C.6/SR.74 (Abdoh, Iran).

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countries.”<sup>14</sup> The following will focus on voluntary groups, religious groups, ethnic groups, and national groups, where genocide is not the result of killing or torture. What is the harm when these groups are destroyed?

II. ARENDT ON THE RIGHT TO HAVE RIGHTS

In *Origins*, Arendt worries that genocide campaigns that create concentration camps of mass killings result in not only the “manufacture of corpses,” but also the manufacture of “living corpses.” “A period of political disintegration suddenly and unexpectedly made hundreds of thousands of human beings homeless, stateless, outlawed and unwanted....” This creation of “living corpses” occurred, Arendt argued, because the “[r]ights of Man, which had never been philosophically established but only formulated; which had never been politically secured, but merely proclaimed, lost all validity.”<sup>15</sup> The loss of validity of the Rights of Man came as a result of the failure of States to secure such rights through their own laws, and as a result of the failure of the international community to demand that each person have his or her human rights secured by being granted civil rights in a particular State. Arendt focuses on political disintegration: literally the

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<sup>14</sup> UN Doc. A/C.6/SR.133 (Amado, Brazil).

<sup>15</sup> Arendt, *Origins*, p. 447.

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pulling apart of States, where certain minority groups were expelled from the domain of full civil rights protection and left “Stateless” in the sense that no other State came forward to protect their human rights, by granting them domestic civil rights.

Arendt argues that in the nineteenth Century it was recognized that the “Rights of Man, supposedly inalienable, proved to be unenforceable (even in countries whose constitutions were based on them) whenever people appeared who were no longer citizens of any sovereign State.”<sup>16</sup> In the 19<sup>th</sup> Century, theorists realized what seemed “obvious: civil rights—that is the varying rights of citizens in different countries—were supposed to embody and spell out in the form of tangible laws the eternal Rights of Man, which by themselves were supposed to be independent of citizenship and nationality.”<sup>17</sup> When people were forced to be refugees, they clearly saw that having inalienable human rights did not afford much protection. “The stateless people were as convinced as the minorities that the loss of national rights was identical with the loss of human rights.”<sup>18</sup>

As Peg Birmingham has argued, “the right to have rights” is the key political and moral concept

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<sup>16</sup> *Ibid.*, p. 293.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*, p. 292.

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for Arendt.<sup>19</sup> Arendt equates the “right to have rights” with “the right of every individual to belong to humanity.”<sup>20</sup> States can strip a person, or group of persons, of the status of humanity by denying them civil rights and, hence, failing to protect the human rights of that individual or group of individuals. States can deny the humanity of whole sub-groups (minority groups) within their borders by depriving these groups of their full civil rights and, thus, undermining the major protection of their human rights. It is for this reason, Arendt says, that “it is by no means certain whether” the protection of human rights by *international* means “is possible.”<sup>21</sup> Indeed, “the abstract nakedness of being nothing but human was their greatest danger.”<sup>22</sup> As a last attempt to secure their rights, minority group members insisted “on their nationality, the last sign of their former citizenship, as their only remaining and recognized tie with humanity.”<sup>23</sup>

If an individual has lost “his place in a community... and the legal personality which makes his actions and part of his destiny a consistent whole, he is left with these qualities which usually can become articulate only in the sphere of private

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<sup>19</sup> Peg Birmingham, *The Predicament of Common Responsibility: Hannah Arendt and the 'Right to Have Rights,'* unpublished book manuscript.

<sup>20</sup> Arendt, *Origins*, p. 298.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*, p. 300.

<sup>23</sup> *Ibid.*

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life....”<sup>24</sup> In such a position, one’s status as a rights-bearer can be secured “only by the unpredictable hazards of friendship and sympathy, or by the great incalculable grace of love....”<sup>25</sup> But this becomes (at least in law) largely unprotected, as one does not have a claim to make if one is treated badly. Legal personality is what best secures these rights; without legal personality, one lacks even the “right to have rights.” Racism denies that a sub-group in a State merits legal personality and racism, thus, denies the common humanity of all humans. When racism is made a policy of the State, then the State denies “in principle... the idea of humanity which constitutes the sole regulating idea of international law.”<sup>26</sup>

Arendt gives a very good demonstration for figuring out what is wrong with genocide, and why the wrongness of genocide affects humanity in a way that international law should be concerned with. Genocide often forces a people to become refugees, an outlawed people who have lost their rights because they have been expelled from a sovereign State and have not yet been accepted into another sovereign State. Refugees are members of a group that has been excluded from the benefits of the State and lacks the protection of civil rights, the mainstay of human rights. Arendt focuses on the European Jews in the 1940s that

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<sup>24</sup> *Ibid.*, p. 301.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*, p. 157.

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went from State to State without a home and, hence, were effectively rendered non-human. Another example is a group that has been forcibly evicted from one State, and exists in a refugee camp across the border in another State. In turn, the other State does not accept the refugees and, instead, tries to push them back across the border from which they came. It is not sufficient to grant Stateless people abstract human rights. What they need is to be accepted into another State with civil rights protections.

International law could play a rather large role in preventing States from creating Stateless people of their disfavored minority groups. International law, in Arendt's view, is not likely able to protect the rights of refugees on its own. The League of Nations, which sees itself as primary defender of the displaced minority groups in Europe, failed to protect minority group rights. Arendt thinks that similar actions by international organizations are also likely to fail. An international organization may be able to prevent, however, the creation of Stateless people by preventing horrible crimes, such as genocides that destroy groups or force individuals from the groups that provide protection against the withdrawal of rights by a State.

When a people are excluded from a State, an attempt to harm the people by forcing them to be assimilated into many other States is made, thus destroying the character of the group. It is not ini-

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tially clear why the international community should be concerned when there exists one less people or social group. The most obvious problem occurs when members of the group are forced to wander the face of the earth as refugees; hence, as people who do not have civil rights protection, resulting in the lack of human rights. But what about the situation where refugees are accepted as members of another State? Why should it matter that these individuals are not formally accepted as members of a group, but only as individuals who are pressured to assimilate into another State? How does their forced exodus from a social group (ultimately aimed at the destruction of the group as such) add to the expulsion that renders it such a significant harm, even when the individuals have been assimilated into another State?

Arendt does not provide an answer to how harm occurs when groups are destroyed. She does, however, show the way by talking about the important connection between being a member of a State and having human rights protections. Most importantly, she demonstrates that being a member of a social group is also a way to be protected, or at least a way for individuals to put up a last effort against becoming Stateless and rightless. So, when a person is forcibly removed from a group, this often may destroy the last opportunity for the individual to have the right to have rights. If assimilated into another State, especially where no guaranteed equal status with born citizens is offered, the harm still exists. The harm is that hav-

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ing rights is not a matter of right, but of charity. Rights are awarded as a free gift, not as one's due, and can be easily withdrawn.

### III. RIGHTS IN GROUPS AND RIGHTS OF GROUPS

Members of minority groups within a State have rights in two senses: as members of the State they have civil rights; and as members of the group they have group-based rights, that is, rights by virtue of their membership in a group. Arendt focuses on the former, but not the latter, and so she was not able to give a full account of the wrong of genocide. She did, however, give significant hints by talking about the importance of political friendship. A State can give an individual a sense of being formally protected by bestowing civil rights protections on him or her, but the State cannot give an individual a sense of belonging and purpose that is often achieved through social group membership. Social groups can give to their members this sense of belonging and, therefore, overcome what Arendt describes at the end of *Origins of Totalitarianism* as the loss involved in loneliness. Indeed, in what seems an aside, Arendt coins the phrase "organized loneliness" and calls it generally "more dangerous" than tyrannical rule.<sup>27</sup> Genocide seems especially harmful in

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<sup>27</sup> Arendt, *Origins*, p. 478.

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creating large numbers of lonely individuals, who have lost their rights and even their sense of self.<sup>28</sup>

Voluntary and involuntary social groups perform two important tasks. First, social groups act as a last refuge for a minimal protection of human rights. Unlike States, social groups are able to act as a bulwark against rights infringement by appeal to a sovereign authority. But insofar as social groups cohere, they have some power that can be exerted against States on behalf of their members. Second, social groups provide an important ingredient in an individual's sense of self. When a person is stripped of group membership, he or she is at a loss, lonely even when clearly not fully alone. In an important sense, the groupless individual does not know who he or she is and, in that sense, has lost him or her self.

Genocide is a catastrophic assault on the person, which destroys the last bulwark protecting the rights of the individual, and ultimately destroys the self. Genocide leaves the individual group member without resources to claim his or her rights as a human and without resources even to understand who he or she is. Genocide is a form of organized loneliness, or the organized creation of loneliness. Understood in this way, genocide is not primarily harmful to the group,

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<sup>28</sup> For more on the sense of self see my book, *The Socially Responsive Self*, Chicago: University of Chicago Press, 1996.

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but also to the individual person. It still remains unclear, though, why the international community should be so concerned and punish above all other acts, the crime of genocide. Since genocide is a violation of the rights of individuals in groups, and not a violation of the rights of groups, then understanding genocide as harmful against humanity is still not proven. Also, the Genocide Convention and the recent Rome Statute of the International Criminal Court talks of the destruction of a group “as such” as the key to understanding the horror of genocide. This term must still be explained.

To understand how humanity is harmed by the organized loneliness of genocide, we need to first understand what or who humanity is. In one sense, humanity is a status conferred on all humans. In this light, all humans are equal in their humanity. It is on this basis that the doctrine of human rights is grounded, where each human has certain inalienable rights merely by virtue of being human, or having the status of being a member of humanity. But the equality of humans, or the status of humanity, is not truly a birthright. Arendt says: “We are not born equal; we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights. Our political life rests on the assumption that we can produce equality through

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organization....”<sup>29</sup> Social groups are necessary to bridge the gap between the promise of equality for all humans and the actuality of diversity. Humans in their diversity must overcome the animosity that diversity inspires in order to attain the promised equality.

Humanity and, hence, the international community, has an interest in the perpetuation of social groups since, despite appearances, social groups are centers for the attainment of equality. In a provocative comment, Arendt says: “It seems that a man who is nothing but a man has lost the very qualities which make it possible for other people to treat him as a fellow-man.”<sup>30</sup> One of the main things that membership in a social group does is to provide the member with common responsibilities. Stripped of moral responsibilities, according to Arendt, humans are seen as no more than savages, not individuals to be respected. It appears that this is the condition that genocide seeks to perpetuate: namely, to reduce humans with dignity to humans as mere savages, as those who are not worthy of respect let alone of rights. For Arendt, people worthy of equal respect are those that are recognized as having common responsibilities based on having taken joint action in the world.<sup>31</sup>

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<sup>29</sup> *Ibid.*, p. 301.

<sup>30</sup> *Ibid.*, p. 300.

<sup>31</sup> On this point see my book, *Sharing Responsibility*, Chicago: University of Chicago Press, 1992.

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Genocide devalues individuals by depriving them of membership in social groups in such a way that it renders impossible the promise of equality to all humans. With this loss of equality, the seeds are sown for the destruction of the rule of law that had replaced “the old laws and orders of the feudal society.”<sup>32</sup> Naked individuals stripped of group affiliation, long ago stripped of Feudal class status, are unprotected and subject to arbitrary rule. Arbitrary rule, especially of the totalitarian kind, so obliterates even the hope of equality that it ultimately harms humanity itself. There is truth to the claim that concentration camps are as much an affront to Jews or gypsies as to humanity as a whole.

Humanity is harmed by genocide in that individuals, previously protected as members of humanity, are now transformed into naked individuals or killed for something that they did not do and could not easily change. In this sense, genocide incidentally harms groups, but its primary harm is to individuals and to humanity. This explains the harm of genocide in cases where no group is literally destroyed, or where there is no net loss of groups in the world. Important is that individuals are forcibly removed from the group, either by killing or other means. It does not matter whether the group is actually destroyed or not.

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<sup>32</sup> *Ibid.*, p. 290.

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What if the individuals who have been forcibly evicted from a social group are assimilated into another social group? Has humanity been harmed in such an instance, as well?

Assimilation, especially forced assimilation, still undermines an individual's sense of self as a consequence. Unless the assimilation happens at a very young age and the assimilating group accepts the new member, bestowing friendship-like sentiments upon him or her, the individual will still feel "loneliness." The individual stands to the new group as an outsider, and also feels that a significant part of him or her self has been forcibly removed from the group that this individual grows up within. In any event, there is only a small likelihood that the group that one has been forced to join, after being removed from a group one was born into, will provide support.

So, if the key to understanding the harm of genocide is not the destruction of the group "as such," then why does the Genocide Convention present this as the main definition of genocide? On this account, the group's existence is tied to the "right" to have rights: that is, to the individual group member's ability to claim as a matter of rights, not a matter of charity, that he or she should have rights. To have the right to make claims, one must have a certain status. Arendt shows that it isn't sufficient merely to have the status of human (for this directs no one to do anything). More importantly, no one is responsible

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when rights were not protected and, hence, there is no place to turn to make one's rights claims. Groups are important for providing a basis of identity and protection. The intention to destroy a group significantly harms individuals in a way that harms humanity.

IV. THE CLAIM TO HAVE RIGHTS

In the extensive literature on rights, one dominant view sees rights as claims to specific goods. Arendt's view that respect for humanity requires the recognition of the right to have rights could be understood to mean that individuals retain a status to claim various goods. What precisely is gained by iterating claims in such a way? Some, like Joel Feinberg,<sup>33</sup> argue that once one has a right, one necessarily has some one or some entity to which one can address a claim. That person would also have a mechanism to provide sanctions against those who deprive one of the goods one claims. Perhaps Arendt uses the phrase "the right to have rights" to make a similar point, namely that it is not enough to have rights in the abstract; those rights must result in claims against someone if they are to be meaningful. The iteration in the "right to have rights" surely does have this meaning for Arendt, but there might be more

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<sup>33</sup> Joel Feinberg, *Rights, Justice, and the Bounds of Liberty*, Princeton: Princeton University Press, 1980.

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to it as indicated earlier, following a suggestion from Peg Birmingham.

It might also be that the “right to have rights” adds an important dimension to the normal way one thinks about rights. It is not enough that one can make claims for various things or that some moral sanctioning power can be appealed when those claims go unanswered. In addition, the rights-claimant must have a certain legal status within a particular political society. On this construal, to have “the right to have rights” one must be an equal, at least before the law, to everyone else in the society. If one is not in the majority of society, then one must have some clear status as a minority member that entitles one to make claims against the majority or the State. In this context, being a member of a recognized and respected minority group will provide a foot-in-the-door to having equality before the law, even if one is a member of a minute minority.

As an example, think of Blacks in the United States South, before the Civil War. They had certain limited rights, effective only when their owners were willing to grant them as a matter of charity, or perhaps even pity. After the Civil War, and especially after the passage of the 14<sup>th</sup> Amendment to the United States Constitution, Blacks in the United States had rights as a matter of equal legal right. One might think that since the “right to have rights” seems to be a function of equality of rights, it is unclear what role social groups play

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in the guarantee of rights. The response is, as indicated above, that being a member of a social group provides one with an entity that will aid in pressing one's rights as a bulwark against the denial of the equal protection of laws.

It is now clear why genocide might be one of the most important crimes in international criminal law. Genocide is wrong because it is the denial of one chief protection for the "right to have rights." This explanation of the wrong of genocide will not satisfy. Indeed, it should not. In addition, an explanation of how humanity is affected when individuals are deprived of the "right to have rights" is needed. For this, Arendt's own account of the "right to have rights" is used. Her claim is that people do not really have human rights and, hence, are not fully members of humanity unless they have civil rights, and that these civil rights protections are significantly undercut when people are not able to be members of social groups. Indeed, humanity is harmed in that some of its members are denied their status as humans. More is stated about this point to clarify why genocide is the crime most deserving of prosecution and severe punishment.

Arendt, once again, provides the key of consideration. The so-called "rights of man" do not secure human rights since, in the abstract; they offer few, if any, protections. While genocide violates the "rights of man," not much (in Arendt's view) follows from that. There need to be institu-

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tions that will provide remedies when rights are violated. For Arendt, international institutions are not able to do much and have not done much, historically. This is why she links civil rights with human rights. When a whole group of people is deprived of their civil rights, as occurs most dramatically in genocidal campaigns, the human rights of those people is also harmed; humanity is harmed.

One might wonder what Arendt would say today about the new set of international institutions and their remedies that arose to deal with human rights complaints. The regional human rights commissions, such as the European Commission on Human Rights, and the *ad hoc*, and permanent international criminal courts are some such institutions. Perhaps these commissions and tribunals will be seen as the new last bulwark for the protection of human rights. In addition, one might wonder whether the role of social groups will be diminished in protecting human rights and whether the attempt to destroy a social group will remain the greatest of crimes in international law. Genocide will still be an important—although not the worst—crime in the constellation of international crimes, as it deprives people of something significant in their identities.

Only some of the harm, not the overriding harm of genocide, is treating genocide as a crime that harms primarily individuals and humanity, not the specific groups that are targeted. To continue

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defending genocide as the worst of all international crimes, after the rise of new effective international institutions for redressing human rights violations, one might look to some other theory of the harm of genocide. In doing so, one must pay heed to Arendt's arguments, and those of many who represented States at the 1948 Genocide Convention. Groups do not have value in themselves; the value of groups is in terms of how they affect individuals.<sup>34</sup>

The destruction of a group where most of the members are also killed is a truly terrible crime, primarily because of the widespread killing of individuals involved. The destruction of a group, in which individuals are not killed, is more difficult to see as a great crime. To make sense of the harm of genocide largely in Arendtian terms is to successfully show how the destruction of social groups harms humanity. These arguments may be undercut by the rise of effective international institutions that take the place of social groups in providing a last bulwark against human rights abuse. If nothing else, the rise of these institutions paradoxically makes it complicated to see the harm of genocide. One may wonder if Arendt would come to the same, perhaps counter-

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<sup>34</sup> See my book *The Morality of Groups*, Notre Dame, IN: University of Notre Dame Press, 1987.

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intuitive, conclusion. In so many other matters, Hannah Arendt has pointed scholars in the right direction, but leaves the task of finding one's own way in solving such complex problems in political philosophy.



# The Case for Prosecuting Iraqi Nationals in the International Criminal Court

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Most legal systems gain legitimacy and maintain public order by protecting law-abiding citizens from harm through the criminal prosecution and eventual punishment of those who violate the law. International criminal law is no different in that weak enforcement undermines the system as a whole. Indeed, the serious nature of all international crimes makes effective enforcement more important than would ordinary violations of national criminal codes.

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To make the enforcement of international criminal law more certain and more fair, the international legal community has contemplated the creation of a permanent international criminal court for more than seven decades.<sup>1</sup> That goal was finally realized with the formation of the International Criminal Court (ICC). Established in July 2002, the ICC investigates and prosecutes the most egregious violations of international criminal law: the crime of genocide, crimes against humanity, war crimes, and (in the future, perhaps) the crime of aggression.<sup>2</sup> These four categories of offenses are eligible for prosecution before the ICC because they violate fundamental humanitarian principles and constitute the most serious crimes of concern to the international community as a whole.

Since its inception, however, the Court's jurisdictional power has been a matter of considerable controversy, particularly with regard to the extent to which nationals of non-signatory States may be eligible for prosecution. This raises fundamental issues of justice because those States

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<sup>1</sup> See e.g. M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 Harv. Hum. Rights J. 11 (1997); Georg Schwarzenberger, *The Problem of an International Criminal Law*, 3 Current Problems 263 (1950); Vespasian Pella, *Towards an International Criminal Court*, 44 Am. J. Intl. L. 37 (1950).

<sup>2</sup> United Nations, [www.un.org/law/icc/index.html](http://www.un.org/law/icc/index.html) (accessed 5 Nov. 2003).

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that have committed, or are most likely to commit, international crimes have very little incentive to cooperate in the enforcement of international criminal law.

The situation in Iraq exemplifies this problem. While Iraq is not party to the Rome Statute of the ICC,<sup>3</sup> there is strong evidence to suggest that Iraqi nationals may have committed the crime of genocide. This essay will argue: first, that Iraqi nationals should be prosecuted for the crime of genocide; and second, that these trials should take place before the ICC. Part I briefly reviews the crime of genocide and the use of *ad hoc* tribunals for prosecuting genocidal offenses. Part II describes the development of the ICC and discusses its prosecutorial alternatives. Part III describes genocidal events in Iraq and discusses whether Iraqi nationals are eligible for prosecution for the crime of genocide before the ICC. Part IV offers insight to the future of the ICC.

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<sup>3</sup> Rome Statute of the International Criminal Court, [www.un.org/law/icc/statute/romefra.htm](http://www.un.org/law/icc/statute/romefra.htm) (accessed 5 Nov. 2003) [hereinafter Rome Statute].

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I. GENOCIDE

The Armenian Massacres of 1915 are often cited as the first genocide of the 20<sup>th</sup> century.<sup>4</sup> During the large-scale deportation of Armenians from the eastern portions of the new Turkish republic, more than 1.5 million men, women, and children lost their lives.<sup>5</sup>

More than two decades later, Nazi Germany determined to eliminate the Jewish population of Europe.<sup>6</sup> In 1933, the Jewish population of Europe was approximately 9.5 million.<sup>7</sup> This number represented more than 60 percent of the world's Jewish population at that time.<sup>8</sup> By 1945, the Nazis had conquered most of Europe and the majority of European Jews (two out of every three) were dead.

At the time of the Armenian Massacres and the Jewish Holocaust, neither the crime nor the definition of genocide had been developed. There were rules of war that protected civilian populations, but these regulations did not cover a gov-

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<sup>4</sup> Vahakn N. Dadrian, *The History of the Armenian Genocide* (Berghahn Books 1995).

<sup>5</sup> *Id.*

<sup>6</sup> Helen Fein, *Accounting for Genocide* (U. Chi. Press 1979).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

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ernment's persecution of its own people.<sup>9</sup> The term "genocide" was coined by Raphael Lemkin, a Polish jurist, to signify "a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves."<sup>10</sup> Lemkin's efforts, which culminated in the Convention on the Prevention and Punishment of the Crime of Genocide,<sup>11</sup> came into effect on 12 January 1951. Article II of the Genocide Convention defines genocide as:

The commitment of any of the following acts with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:

1. Killing members of the group
2. Causing serious bodily or mental harm to members of the group
3. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

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<sup>9</sup> George S. Yacoubian, Jr., *Underestimating the Magnitude of International Crime: Implications of Genocidal Behavior for the Discipline of Criminology*, 14 *World Bulletin* 23, 30 (1998).

<sup>10</sup> Raphael Lemkin, *Axis Rule in Occupied Europe*, at 79 (Carnegie Endowment Intl. Peace 1944).

<sup>11</sup> *Convention on the Prevention and Punishment of the Crime of Genocide* (9 Dec. 1948), 78 U.N.T.S. 277 [hereinafter Genocide Convention].

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4. Imposing measures intended to prevent births within the group
5. Forcibly transferring children of the group to another group<sup>12</sup>

No state has ever asserted that genocide is not a crime, and the definition contained in Article II is considered to be binding international law. Today, there are 132 States signatory to the Genocide Convention.<sup>13</sup>

Despite the ratification of the Genocide Convention, the phenomenon has occurred repeatedly during the last four decades. Victimized groups include more than 1 million Bengali in 1971;<sup>14</sup> 150 thousand Hutu in Burundi in 1972;<sup>15</sup> 1.5 million Cambodians between 1975 and 1979;<sup>16</sup> 200 thousand Bosnian Muslims and Croats in the Former Yugoslavia in 1992;<sup>17</sup> and 800 thousand Tutsi in

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<sup>12</sup> *Id.*

<sup>13</sup> United Nations, *United Nations Treaty Collection*, [www.unhchr.ch/html/menu3/b/treaty1gen.htm](http://www.unhchr.ch/html/menu3/b/treaty1gen.htm) (accessed 5 Nov. 2003).

<sup>14</sup> Frank Chalk & Kurt Jonassohn, *The History and Sociology of Genocide* (Yale U. Press 1990); Leo Kuper, *Genocide: Its Political Use in the Twentieth Century* (Yale U. Press 1981).

<sup>15</sup> Leo Kuper, *The Pity of It All: Polarisation of Racial and Ethnic Relations* (U. Minn. Press 1977).

<sup>16</sup> Ben Kiernan, *The Cambodian Genocide: Issues and Responses*, in *Genocide: Conceptual and Historical Dimensions* (George J. Andreopoulos ed., 1994).

<sup>17</sup> M. Cherif Bassiouni, *The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia*, in *The Prosecution of International Crimes* (Roger S. Clark & Madeleine Sann eds., 1996).

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Rwanda in 1994.<sup>18</sup> The genocidal casualties during the twentieth century are astounding. It has been estimated that approximately 170 million lives were lost to acts of genocide and mass murder between 1900 and 1987.<sup>19</sup>

Article VI of the Genocide Convention states that persons charged with genocide, “. . . shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”<sup>20</sup> To date, four *ad hoc* international tribunals have been convened to prosecute accused genocidal perpetrators: the International Military Tribunal (IMT) in 1945;<sup>21</sup> the International Military Tribunal for the Far East (IMTFE) in 1946;<sup>22</sup> the International Criminal Tribunal for the Former Yugo-

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<sup>18</sup> Alain Destexhe, *Rwanda and Genocide in the Twentieth Century* (N.Y. U. Press 1995); George Prunier, *The Rwanda Crisis: History of Genocide* (Colum. U. Press 1995).

<sup>19</sup> Rudolph J. Rummel, *Power, Genocide, and Mass Murder*, 1 J. Peace. Research 1 (1994).

<sup>20</sup> Genocide Convention, *supra* note 12.

<sup>21</sup> *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis* (8 Aug. 1945), 82 U.N.T.S. 279.

<sup>22</sup> *International Military Tribunals for the Far East Special Proclamation: Establishment of an International Military Tribunal for the Far East* (19 Jan. 1946), T.I.A.S. No. 1589.

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slavia (ICTY) in 1992,<sup>23</sup> and the International Criminal Tribunal for Rwanda (ICTR) in 1994.<sup>24</sup>

Criticisms of these Tribunals, particularly the more recent ICTY and ICTR, have revealed several serious weaknesses in their structures and procedures.<sup>25</sup> There are four major problems with the ICTY. First, because the prosecutors and

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<sup>23</sup> International Criminal Tribunal for Yugoslavia, S.C. Res. 808, U.N. SCOR, 48<sup>th</sup> Session, 3217<sup>th</sup> mtg., U.N. Doc. S/RES/808 (1993).

<sup>24</sup> International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49<sup>th</sup> Session, 3453<sup>rd</sup> mtg., U.N. Doc. S/RES/955 (1994).

<sup>25</sup> See e.g. Antonio Cassese, *International Criminal Justice: Is It Needed in the Present World Community?* in State, Sovereignty, and International Governance (Gerard Kreijen ed., 2002); George S. Yacoubian, Jr., *A Cost/Benefit Analysis of the International Criminal Tribunals for Rwanda and the Former Yugoslavia: Implications for Criminology and International Criminal Law*, 1 Intl. J. Comp. Criminology 132 (2002); Evo Popoff, *Inconsistency and Impunity in International Human Rights Law: Can the International Criminal Court Solve the Problems Raised by the Rwanda and Augusto Pinochet Cases?* 33 Geo. Wash. Intl. L. Rev. 363 (2001); Daryl L. Mundis, *Improving the Operation and Functioning of the International Criminal Tribunals*, 94 Am. J. Intl. L. 759 (2000); 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. Intl. L. & Com. Reg. 551 (2000); Christina M. Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994*, 18 B.U. Intl. L.J. 163 (2000); Henry T. King & Theodore C. Theofractus, *From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy*, 31 Case W. Res. J. Intl. L. 47 (1999); Michael P. Scharf, *Responding to Rwanda: Accountability Mechanisms in the Aftermath of Genocide*, 52 J. Intl. Affairs 621 (1999); Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 Am. J. Intl. L. 501 (1996); Peter Burns, *An International Criminal Tribunal: The Difficult Union of Principles and Politics*, in *The Prosecution of International Crimes* (Roger S. Clark & Madeleine Sann eds., 1996).

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judges at the ICTY work in the same location and are serviced by the same administrative unit, it has been argued that there is no separation of prosecutorial and judicial functions.<sup>26</sup> Second, criticism is that the ICTY has failed to prosecute NATO military personnel for the 1999 attacks in Kosovo.<sup>27</sup> Third, unlike Nuremberg, the ICTY cannot hold trials *in absentia*.<sup>28</sup> Fourth, unlike the IMT, the ICTY has no written documentation of genocidal acts left by the Serbs.<sup>29</sup> Thus, the prosecutors must rely on the testimony of witnesses, which has contributed to the protracted process.

There are two main criticisms of the ICTR: the time frame and the staffing. Because the ICTR could only prosecute crimes committed between 1 January and 31 December 1994, (thus excluding genocidal acts by the Hutu before and after this window) the Rwandan delegation argued that the Tribunal would not create a climate conducive to national reconciliation.<sup>30</sup> In regard to the objection of poor staffing,<sup>31</sup> critics argue that the ICTR is too small and inadequate to fulfill its monumental task. More than 80 thousand persons await

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<sup>26</sup> Cassese, at 253.

<sup>27</sup> *Id.*

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

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

<sup>30</sup> Popoff, *supra* note 28.

<sup>31</sup> *Id.*

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trial, there are only six justices, and an appellate court shares with the ICTY.<sup>32</sup>

Though the commission of genocide has been more prevalent than the frequency with which these Tribunals have been convened, they do demonstrate a commitment to international criminal law enforcement. Moreover, (logistical and pecuniary drawbacks aside) the Tribunals have provided significantly more than superficial justice. Eleven Nazis were sentenced to death and seven incarcerated, as a result of the IMT.<sup>33</sup> In Tokyo, two premiers and five generals were put to death.<sup>34</sup> With the ICTR, 66 persons have been arrested. Of these, 30 are awaiting trial, 20 are on trial, and six have been convicted.<sup>35</sup> Of the 92 detainees at the ICTY, 42 have been convicted, while 36 are either currently on trial or awaiting trial.<sup>36</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> Telford Taylor, *The Anatomy of the Nuremberg Trials* (Aspen Publishers 1992).

<sup>34</sup> Arnold C. Brackman, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials* (Morrow, William & Co. 1987).

<sup>35</sup> United Nations, *ICTR Detainees – Status on 1 September 2003*, <http://www.icty.org/ENGLISH/factsheets/detainee.htm> (accessed 5 Nov. 2003).

<sup>36</sup> United Nations, *Detainees and Former Detainees*, <http://www.un.org/icty/glance/index.htm> (accessed 5 Nov. 2003).

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### II. INTERNATIONAL CRIMINAL COURT

The 20<sup>th</sup> century demonstrates the harsh reality that the global community failed to create a mechanism to enforce international humanitarian law. Most violations of the established norms of international behavior such as genocide, war crimes, and crimes against humanity, are committed with the complicity of the State and its leadership.<sup>37</sup> The chance of deterring such criminal acts diminishes considerably if individuals commit them with impunity.<sup>38</sup>

The Hague Conventions of 1899 and 1907 were the first significant codifications of the laws of war in an international treaty. The Conventions, however, failed to create a permanent international criminal court with jurisdiction that would transcend national boundaries, primarily because sovereign nations were unwilling to be bound by the judgments of an international judicial authority. The United States (US), for example, persistently claimed that it “reserved the right to resolve any purely American issue.”<sup>39</sup>

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<sup>37</sup> Benjamin B. Ferencz, *New Legal Foundations for Global Survival: Security Through the Security Council*, at 67 (Oceana Publications 1994).

<sup>38</sup> *Id.*

<sup>39</sup> Howard Ball, *Prosecuting War Crimes and Genocide: The Twentieth Century Experience*, at 14 (U. Press Kan. 1999).

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Between 1946 and 1996, the United Nations (UN) led the efforts to codify certain international crimes.<sup>40</sup> Immediately after World War II, the US sponsored Resolution 95(I), which recognized the principles of international law contained in the Nuremberg Charter.<sup>41</sup> In 1948, the General Assembly directed the International Law Commission (ILC) to formulate the principles of international law in a draft code of offenses, while a special rapporteur was assigned to formulate a Draft Statute for the Establishment of the International Criminal Court.<sup>42</sup> While many nations supported the establishment of a permanent international criminal court, its creation was unattainable without the consensus of the world's superpowers.

Various draft reports were produced between the 1950s and 1980s, but it was not until 1989 that the General Assembly was faced again with the question of an international criminal court when Trinidad and Tobago proposed to address international drug trafficking. The ILC persevered in developing the limited 1989 mandate related to illicit drug trafficking, which eventually evolved into the Draft Statute for an International Criminal Court.<sup>43</sup> It was this draft that served as the basis for the General Assembly's decision to estab-

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<sup>40</sup> Bassiouni, *supra* note 2.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

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lish the *Ad Hoc* Committee on the Establishment of an International Criminal Court, and then the Preparatory Committee for the Establishment of an International Criminal Court.<sup>44</sup>

On 17 July 1998, the Rome Statute was adopted at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.<sup>45</sup> Of the 148 nations in attendance, 120 voted in favor of the Court, and seven against, with 21 abstentions.<sup>46</sup> Ratification obligates a State to cooperate with the Court and to accept the Court's complementary jurisdiction over crimes committed in its territory. As of 27 February 2004, 97 nations ratified the treaty.<sup>47</sup>

There are four significant jurisdictional components to the Rome Statute. First, the Rome Statute entered into force on 1 July 2002.<sup>48</sup> This means that if Iraqi nationals were to be prosecuted for genocide, it would have to be for acts perpetrated after 1 July 2002. Second, all nations party to the Rome Statute must accept its jurisdiction.<sup>49</sup> This is the cornerstone of a cooperative,

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<sup>44</sup> *Id.*

<sup>45</sup> Dadrian, *supra* note 4.

<sup>46</sup> United Nations Documents, [www.un.org/icc/index.htm](http://www.un.org/icc/index.htm) (accessed 5 Nov. 2003).

<sup>47</sup> The International Criminal Court,

<http://www.icc-cpi.int/asp/statesparties.html> (accessed 10 Feb. 2005).

<sup>48</sup> Dadrian, *supra* note 4, Art. 11, para. 1.

<sup>49</sup> *Id.*, Art. 12, para. 1.

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international legal community. Third, non-signatory States may, by special declaration, accept the temporary jurisdiction of the ICC.<sup>50</sup> A new Iraqi government, for example, could temporarily accept the Court's jurisdiction to prosecute its nationals for genocide. Fourth, the Court can exercise jurisdiction of a referral made by the United Nations Security Council to the prosecutor.<sup>51</sup> Because Iraq is currently party to the Rome Statute, there are two prosecutorial alternatives available via the ICC: one, Iraq's temporary acceptance of the Court's jurisdiction; or two, Security Council referral.

The ICC reflects the practical experiences of the ICTY and ICTR. It operates not only on the basis of primary jurisdiction, but also is subject to the principle of complementarity.<sup>52</sup> Thus, the ICC is a subsidiary mechanism to handle the prosecution of international crimes. Some States supporting the creation of the ICC were reluctant to create an institution that could potentially impinge on their national sovereignty.<sup>53</sup> The principle of complementarity, thus, provides that the Court will

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<sup>50</sup> *Id.*, Art. 12, para. 3.

<sup>51</sup> *Id.*, Art. 13(b).

<sup>52</sup> *Id.*, Arts. 17 & 18.

<sup>53</sup> John T. Holmes, *The Principle of Complementarity*, in *The International Criminal Court, The Making of the Rome Statute: Issues, Negotiations, Results* (Roy S. Lee ed., 1999).

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exercise jurisdiction only when a State is unable or unwilling to handle the case.

### III. GENOCIDE IN IRAQ

There has been significant controversy surrounding the presumed inadequacy of the definition of genocide contained in Article II of the Genocide Convention.<sup>54</sup> For the purposes of current analysis, these debates are inconsequential. There is only one legally recognized definition for genocide. Any scientific inquiry into genocidal behavior, therefore, must be measured against the definition provided by the Genocide Convention.<sup>55</sup> That definition is used in this analysis of the Iraqi question.

While the concept of genocide evokes an image of the complete or attempted eradication of an entire race, the burden in proving that the accused intended to destroy a large number of the identified group by systematic means may be dif-

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<sup>54</sup> Frank Chalk, *Redefining Genocide*, in Genocide: Conceptual and Historical Dimensions (George J. Andreopoulos ed., 1994); Israel Charny, *Toward a Generic Definition of Genocide*, in Genocide: Conceptual and Historical Dimensions (George J. Andreopoulos ed., 1994); Helen Fein, *Genocide, Terror, Life Integrity, and War Crimes: The Case for Discrimination*, in Genocide: Conceptual and Historical Dimensions (George J. Andreopoulos ed., 1994).

<sup>55</sup> George S. Yacoubian, Jr., *The (In)significance of Genocidal Behavior to the Discipline of Criminology*, 34 Crime, L. & Soc. Change 7 (2000).

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ficult. If specific Iraqi leaders are to be charged with genocide under the terms of the Genocide Convention, it must be shown that the killings occurred with the intent to commit genocide. Intent, however, is difficult to prove. Barring an overt oral or written proclamation, intent can only be proven through an objective examination of the atrocities themselves.<sup>56</sup>

Intermittent ethnic violence has been perpetrated against Kurdish populations since the 1930s.<sup>57</sup> In February 1988, however, the Iraqi government (led by Saddam Hussein) launched the systematic *al-Anfal* campaign against Kurds in northern Iraq.<sup>58</sup> As part of this campaign, Hussein ordered the dropping of chemical weapons (mustard gas, cyanide, and nerve agents) on the Kurdish town of Halabja.<sup>59</sup> The campaign, which continued for more than seven months, resulted in approximately 100 thousand deaths or forced disappearances of civilians and non-combatants, and

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<sup>56</sup> Jean-Paul Sartre, *On Genocide* (Beacon Press 1968).

<sup>57</sup> Martin van Bruinessen, *Genocide in Kurdistan?: The Suppression of the Dersim Rebellion in Turkey (1937-38) and the Chemical War Against the Iraqi Kurds (1988)*, in *Genocide: Conceptual and Historical Dimensions* (George J. Andreopoulos ed., 1994).

<sup>58</sup> See e.g. Yash Ghai, Mark Lattimer, and Yahia Said, *Building Democracy in Iraq* (Minority Rights Group International 2003); Human Rights Watch, *Iraq's Crime of Genocide: The Anfal Campaign Against the Kurds* (Yale U. Press 1995); Robert Olson, *The Kurdish Question in the Aftermath of the Gulf War: Geopolitical and Geostrategic Changes in the Middle East*, 13 *Third World Q.* 475 (1992).

<sup>59</sup> *Id.*

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the destruction of more than 75 percent of the Kurdish villages. Over the next decade, human rights violations continued on a significant scale.<sup>60</sup> Supporting the attempts to change the demography of Kurdish areas, an ethnic cleansing campaign was implemented to make “corrections of nationality” and to eliminate culturally defining activities. Based on research conducted in the summer of 2002, the torturing and killing of ethnic and religious groups has led to thousands more deaths.<sup>61</sup>

Evidence exists of continued genocide by Iraqi nationals through the end of Saddam Hussein’s regime. A report by Amnesty International, addressing human rights conditions in Iraq, indicated that families were being deported to strategic locations to further the goals of ethnic cleansing between July and December 2002.<sup>62</sup> In addition, Human Rights Watch indicated that “the Iraq government’s systematic and continuing forced transfer since 1991 of an estimated 120 thousand Kurds, Turkomans, and Assyrians on the basis of their ethnic identity... involved the

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<sup>60</sup> See e.g. Fédération Internationale des Ligues de Droits de l’Homme, *Irak: Épuration Ethnique Continue et Silencieuse* (Paris 2002); Foreign & Commonwealth Office, *Saddam Hussein: Crimes and Human Rights Abuses* (London 2002).

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

<sup>62</sup> Amnesty International, *Annual Report 2003* (2003) available at [www.amnestyusa.org](http://www.amnestyusa.org).

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multiple commission of repressive acts in furtherance of state policy.”<sup>63</sup> These attacks against ethnic minorities suggest a calculated extension of the genocidal *al-Anfal* campaign through and after July 2002. Although the gravity of the offenses diminished over time, the intent and calculated objective remained the same: the destruction of non-Arab citizens. It is, thus, believed that the atrocities in Iraq after July 2002 rise to the level of genocide, as defined by the Genocide Convention, making Iraqi government officials eligible for prosecution before the ICC.

IV. PROSECUTING IRAQI GENOCIDE

Convening an *ad hoc* tribunal, similar to the ICTY or ICTR, is another option for the prosecution of Iraqi nationals for the crime of genocide. Such a tribunal would be problematic, however, for two reasons. First, the creation of a temporary court would represent legal regression, now that there is an established and permanent International Criminal Court.<sup>64</sup> The ICTY and ICTR were intended, in part, to provide the legal and logisti-

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<sup>63</sup> Human Rights Watch, *Iraq: Forcible Expulsion of Ethnic Minorities* (March 2003).

<sup>64</sup> George S. Yacoubian, Jr., *Toward the Prosecution of Terrorists Before the International Criminal Court: Resisting the Slippery Slope of Jurisdictional Cacophony*, 12 *Critical Criminologist* 12 (2003).

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cal framework for an eventual permanent court.<sup>65</sup> Second, convening an *ad hoc* tribunal would send the wrong message to ICC opponents that the Court can be circumvented by the use of temporary replacements.<sup>66</sup> There can be no commitment to the ICC, or the establishment of international criminal justice, if States have unfettered discretion to create temporary tribunals. Therefore, if Iraqi nationals are to be prosecuted for the crime of genocide, these trials belong before the ICC.

As noted previously, the ICC provides two options for prosecuting Iraqi nationals for the crime of genocide. First, Article 12, section 3 of the ICC Statute allows non-signatory States such as Iraq to accept, by special declaration, the temporary jurisdiction of the ICC. This is a reasonable alternative in theory, as it would demonstrate to the international community that the new Iraqi government is committed to a legal and humanitarian renaissance. Practically, however, this alternative may be problematic because establishing a new Iraqi government with the legitimacy to make such a commitment may take many years. Nor are the ICC and its jurisdiction likely to be the first

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<sup>65</sup> See e.g. Michele Caianiello & Giulio Illuminati, *From the International Criminal Tribunal for the Former Yugoslavia to the International Criminal Court*, 26 N.C. J. Intl. Law & Com. Reg. 407 (2001); Jonathan I. Charney, *Progress in International Law*, 93 Am. J. Intl. L. 452 (1999).

<sup>66</sup> *Id.*

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priority to be considered, even when a new government does come to power. Moreover, the influence currently wielded by the United States in the redevelopment of Iraq would likely undermine the legitimacy of any Iraqi court, with detrimental consequences for the development of the international criminal law.

Second, the ICC may exercise jurisdiction if “a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the United Nations Security Council acting under Chapter VII of the Charter of the UN.”<sup>67</sup> The Security Council is permitted to “determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations . . . to maintain or restore international peace and security.”<sup>68</sup> The Security Council is comprised of five permanent members (China, France, the Russian Federation, the United Kingdom, and the United States) and ten temporary members.<sup>69</sup> Under the Charter, all members of the United Nations agree to accept the decisions of the Security Council.<sup>70</sup> Nine votes from the Security Council are required for all pro-

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<sup>67</sup> Cianiello & Illuminati, *supra* note 65.

<sup>68</sup> Charter of the United Nations, Chap. VII, Art. 39 *available at* <http://www.un.org/aboutun/charter/>.

<sup>69</sup> United Nations Security Council Members, [http://www.un.org/Docs/sc/unsc\\_members.html](http://www.un.org/Docs/sc/unsc_members.html).

<sup>70</sup> *Id.*, Chap. V, Art. 25.

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cedural<sup>71</sup> and substantive<sup>72</sup> matters. Thus, if nine members of the Security Council agree to refer the Iraqi question to the ICC, the requirements of Article 13b is fulfilled. Given the current composition of the Security Council, however, securing nine votes may be difficult. Of the 15 current members, only six (Bulgaria, France, Germany, Guinea, Spain, and the United Kingdom) have ratified the Rome Statute.<sup>73</sup>

There are two major limitations to the contention that Iraqi nationals may be eligible for prosecution for genocide before the ICC. First, the quality of the genocidal evidence is questionable. No scholarly sources have detailed the genocidal campaign in Iraq in as much detail as was collected in documenting the more recent atrocities in Rwanda and the Former Yugoslavia. Arguably, however, a lack of scholarly sources to evidence genocide in Iraq (while potentially limiting) does not preclude prosecution. Non-scholarly sources such as newspaper articles and human rights reports, when taken collectively, may ultimately provide the most convincing evidence of genocidal behavior because of their breadth and macabre detail. Second, the jurisdictional window is narrow. Because the ICC has jurisdiction only for

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<sup>71</sup> *Id.*, Chap. V, Art. 27, para. 2.

<sup>72</sup> *Id.*, Chap. V, Art. 27, para. 3.

<sup>73</sup> Dadrian, *supra* note 50.

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crimes committed after July 2002, there must be evidence of genocide committed between July 2002 and April 2003, the point at which US military occupied Iraq. A narrow time frame, however, does not preclude the commission of genocide, but rather suggests that any investigative work undertaken by the ICC specifically (or the world community generally) must be more focused.

These two limitations in no way preclude the prosecution of Iraqi nationals for the crime of genocide before the ICC. The more serious barrier to prosecution is likely to be United States' hostility to the International Criminal Court, as currently constituted, because of its independence from Security Council oversight. When the Rome Statute was drafted, the United States (under President Clinton) had advocated a court in which all referrals for jurisdiction would originate in the Security Council. The best argument for avoiding a United States veto in the Iraqi case is that by proceeding through the Security Council, jurisdiction would follow the formula first proposed by the United States itself in Rome.

V. DISCUSSION

Certain crimes are such serious and fundamental affronts to justice that they violate not only domestic statutory law, but also laws that govern

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the international community as a whole. The ability to identify, prosecute, and punish such crimes is a fundamental test of international law. Prosecution requires not only international collaboration in identifying prohibited criminal behavior, but also in prosecuting all offenders to the fullest extent permitted by the international legal order. Anything less than comprehensive criminal law enforcement diminishes the legitimacy of the international system as a whole.

International criminal law should consistently reflect the shifting interests of global political, social, economic, and military reality. Therefore, its development must evolve with the cooperation and contribution of the entire global community. The development of an international criminal law requires that individuals and nations of diverse cultures, ideologies, and experiences agree on the norms and principles that will limit and monitor behaviors. Unfortunately, however, there has been, and will likely always be, reluctance by certain nations to relinquish power and sovereignty to an outside legal institution.

There are two primary reasons why States have elected not to ratify the Rome Statute. First, governments that do not value democracy and human rights (such as Saddam's Iraq, China, Libya, and Sudan) have little or no incentive to cede

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criminal jurisdiction to an international entity.<sup>74</sup> By relinquishing jurisdiction to the ICC, they would essentially be turning themselves over for prosecution before the international community. Some other States (such as the United States), which endorse human rights, feel that their nationals' rights would be better protected by attacking or ignoring the Court than by joining it.<sup>75</sup> This is a clear paradox, for those States that purport to value human rights have the greatest incentive to promote an institution dedicated to the realization of international justice.

Given recent military activities, the United States currently has a clear stake in establishing a legitimate, democratic regime in Iraq. Strong evidence suggests that acts of genocide were committed in Iraq after July 2002, making the perpetrators eligible for prosecution before the ICC. If democracy and human rights were indeed valued by those with control of the government of Iraq, the most appropriate demonstration of these ideals would be the prosecution of former Iraqi leaders for the crime of genocide.

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<sup>74</sup> Cianiello & Illuminati, *supra* note 65.

<sup>75</sup> See e.g. Diane M. Amann and Mortimer N.S. Sellers, *The United States of America and the International Criminal Court*, 50 Am. J. Comp. L. 381 (2002); David J. Scheffer, *Developments in International Criminal Law: The United States and the International Criminal Court*, 93 Am. J. Intl. L. 12 (1999).

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If Iraqi nationals are to be prosecuted for the crime of genocide, these trials should take place before the ICC. The ICC is in its infancy. The United States can either participate in its development or hinder the enforcement of international justice. Strenuous argument is made for the former, as any reluctance or refusal by the US to participate in ICC proceedings will give aid and comfort to the violators of international law. As a member of the Security Council, the United States could advance its own interests—and those of the international community as a whole—by encouraging a Chapter VII referral of the genocide crimes in Iraq to the International Criminal Court.



# *Aut Dedere Aut Judicare* and the Death Penalty Extradition Prohibition

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## I. THE PROBLEM: POTENTIAL FOR DOCTRINAL COLLISION

During the past two decades, most European and some American states have parted company with the United States (US) government's viewpoint on the issue of capital punishment.<sup>1</sup> Although 13 states within the US prohibit this form of criminal punishment, and an additional five have not executed anyone since 1976, the rest still allow it. Some, such as Texas, use this form of punishment regularly. The federal government and military employ capital punishment, as well.<sup>2</sup>

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<sup>1</sup> This essay is a deeper theoretical construct derived from an earlier article by the author, *Cheating Justice by Cheating Death: The Doctrinal Collision for Prosecuting Foreign Terrorists – Passage of Aut Dedere Aut Judicare into Customary Law & Refusal to Extradite Based on the Death Penalty*, 20 ARIZ. J. INT'L & COMP. L. 491 (2003). For a more extensive discussion of cases, treaties and fact patterns referenced in this essay please see the Arizona article.

<sup>2</sup> Bureau of Justice Statistics, U.S. Department of Justice, *Capital Punishment Statistics 2002-2003: Summary Findings available at*

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Conversely, the majority of countries in the world (118) has abolished use of the death penalty in law or practice (including Canada and the EU), while 78 has retained it.<sup>3</sup>

For those countries that have forsworn capital punishment, abolition is often accompanied by prohibition on extradition of criminal suspects to requesting countries that retain the death penalty as a sentencing option. Such a prohibition runs contrary to an emerging norm of customary international law, known as *aut dedere aut judicare*, requiring States in which suspects reside, who have committed particularly heinous crimes, to be either prosecuted or extradited by the custodial State.

However, prohibition on the use of the death penalty (and the accompanying extraditory prohibition) can also be characterized as an emerging norm of at least regional (if not universal) cus-

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<http://www.ojp.usdoj.gov/bjs/cp.htm>: "In 2002, 71 persons in 13 States were executed—33 in Texas; 7 in Oklahoma, 6 in Missouri; 4 each in Georgia and Virginia, 3 each in Florida, South Carolina, and Ohio; 2 each in Alabama, Mississippi, and North Carolina; and 1 each in Louisiana and California." See also, Cornell University School of Law Death Penalty Project *available at* <http://www.lawschool.cornell.edu/lawlibrary/death/>; and the Death Penalty Information Center *available at*

<http://www.deathpenaltyinfo.org/article.php?did=121&scid=11>.

<sup>3</sup> Amnesty International, The Death Penalty Abolitionist & Retention's Countries, *available at*

<http://www.deathpenaltyinfo.org/article.php?did=121&scid=11>.

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tomary international law. So the question then becomes: when two customary law doctrines collide, what happens? Is it a wash: do they cancel each other out and preserve the *status quo ante*? Does the universal norm defeat the regional norm (requiring a comparative quantification of the duration and practice elements)? Do international legal obligations defeat conflicting domestic ones? What if the conflicting domestic legal obligations are of a constitutional, rather than a statutory, judicial or policy character?

The crux of where the issues collide is centered on terrorism. The regional prohibition on extradition to death penalty States would not apply to conduct that violates *jus cogens*, as customary treaty and statutory law would fail against *jus cogens* requirements. “Terrorism” has not been viewed holistically as a crime in international law for the reasons discussed below. Instead, the constituent crimes have been regarded individually and outlawed selectively (kidnapping, murder, etc.). To the extent those acts are characterized as mundane crimes, they remain amenable to the regional prohibition on extradition to death penalty states.

A requested State that does not elect to prosecute is faced with conflicting extradition obligations (one to extradite, and the other to refuse). Such a State has four choices, none of which are completely satisfactory: one, to comply with a sin-

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gle obligation—do nothing; two, to extradite; three, to transfer to a third State or international tribunal (get rid of the problem); or four, to utilize the paradigm of accommodation whereby a promise not to seek the death penalty is extracted from the requesting state.

The first two choices keep the State in breach of at least one obligation. The third choice avoids the problem; the fourth choice does not work well with regard to terrorists, due to political reasons. The first choice was elected by Italy in the case of Abdullah Ocalan, the Kurdish terrorist fugitive from Turkey, who later evaded capture for some time. The third choice was elected by Libya after turning its agents, implicated in the Pan Am 108 bombing, over to a third country.<sup>4</sup>

The conflict does not exist on all levels—mainly with respect to terrorism, since some terrorist acts can be regarded as *jus cogens* violations or are covered by treaty prohibitions containing *aut dedere aut judicare* provisions (torture, hijacking, etc.), while others are not. It is the area of overlap and conflict that is the issue.

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<sup>4</sup> Kelly, *supra* note 1, for more discussion on these cases.

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### II. *AUT DEDERE AUT JUDICARE*: A CUSTOMARY NORM

*Aut dedere aut judicare* provisions exist in over 70 treaties; however, on the surface, only States party to such treaties are bound by their provisions. *Aut dedere aut judicare* is also widely regarded as a general principle of International Law; however, courts and tribunals have been loathe to make determinations (such as granting extradition) based solely on such general principles, preferring instead to utilize them in conjunction with a holding based on treaty or custom. Thus, to become binding on non-party States, the principle has to have made the jump into customary law. Some believe this is happening now. In a recent book on the principle, Professor Bassiouni of DePaul and Professor Wise of Wayne State, explore this possibility with regard to both the narrow and broad view of such a passage.

The narrow view holds that the duty to extradite or prosecute can become customary law with respect to one offense defined in one treaty. Thus, the principle evolves to bind States not party to the treaty on a highly individualized, crime-by-crime basis through a process of accretion, depending upon State practice regarding that crime and the accompanying *opinio juris*. This is the most theoretically conservative approach.

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The broad view, on the other hand, holds that the duty to extradite or prosecute can become customary law with respect to an entire class of international offenses.<sup>5</sup> There appears to be agreement that *jus cogens* violations give rise to permissive assertions of universal jurisdiction. There is also support for the proposition that *aut dedere aut judicare* obligations attach to States where perpetrators of *jus cogens* violations are found (effectively thrusting universal jurisdiction upon that State and requiring it to either prosecute the individual or extradite him elsewhere).

While State practice demonstrates a growing acceptance of *aut dedere aut judicare* as a customary norm (and necessary vehicle for the successful assertion of universal jurisdiction), some believe that *opinio juris* is still lacking, thereby denying the duty customary law status. Other legal scholars have found the duty to make the jump

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<sup>5</sup> This broad view can be further subdivided into three aspects – each with correlating levels of acceptance. The broadest aspect, and the least accepted, holds that *aut dedere aut judicare* applies to all international offenses. The middle aspect extends the duty to *jus cogens* crimes and terrorism. And the third aspect only extends the duty to crimes against humanity and war crimes. The middle and third aspects of the broad view garner wider acceptance and can be viewed together in the sense that both are theoretically linked. War crimes and crimes against humanity are both now regarded as *jus cogens* conduct. Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law Extraordinary Advances, Enduring Obstacles*, 21 Berkley J. Int'l L. 288, 294 (2003).

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into customary law.<sup>6</sup> The US State Department has utilized the doctrine to pressure countries into extraditing terrorists since the 1990s. As the former coordinator for counterterrorism, Philip C. Wilcox, Jr., noted in 1996: “The policy is that no nation should offer itself as a refuge or safe haven for terrorists. They have an obligation to extradite or prosecute them, and more countries have accepted that.”<sup>7</sup>

### III. REFUSAL OF EXTRADITION TO DEATH PENALTY STATES: A CUSTOMARY NORM

Part and parcel of the death penalty’s steady erosion as a modern sentencing option is the prohibition on the extradition of criminals who would face capital punishment in the requesting State for their crimes.

For several decades, the European Union countries have refused to extradite criminal defendants to stand trial here [in the US]—even suspected terrorists—without commitments by state

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<sup>6</sup> J. Wouters & F. Naert, *Shockwaves through International Law after 11 September: Finding the Right Responses to the Challenges of International Terrorism*, in LEGAL INSTRUMENTS IN THE FIGHT AGAINST INTERNATIONAL TERRORISM: A TRANSATLANTIC DIALOGUE 532-533 (C. Fijnaut, J. Wouters & F. Naert eds. 2004).

<sup>7</sup> Christopher S. Wren, *Long Arm of U.S. Law Gets Longer*, N.Y. TIMES (7 July 1996), at D4.

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prosecutors to forego the death penalty.<sup>8</sup>

Legal grounds, sought to justify this policy choice and rationalize it into existing jurisprudence, finds that the “cruel and unusual” punishment inflicted by way of a death sentence is tantamount to torture—a violation of basic human rights.<sup>9</sup> The thrust of the argument is not targeted at the resulting death so much as the “death row phenomenon” that is a precursor to the execution of the sentence. As Professors Dugard and Van Den Wyngaert observe:

It is difficult to argue that customary international law contains a rule prohibiting the death penalty. No human rights convention outlaws the death penalty, although protocols to the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights do so. All Western European states have abolished this penalty *de facto* or *de jure*, but it is still a lawful penalty in many states. Neither *usus* nor *opinio*

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<sup>8</sup> Harold Hongju Koh & Thomas R. Pickering, *American Diplomacy & the Death Penalty*, FOREIGN SERVICE JOURNAL, (Oct. 2003), at 19, 21.

<sup>9</sup> John Dugard & Christine Van Den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AM. J. INT’L L. 187, 196-98 (1998).

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*juris* therefore supports such a prohibition under international law. In *Soering* the European Court of Human Rights was obliged to base its finding on the death row phenomenon rather than on the death penalty itself because the latter is not outlawed by either the European Convention or customary law, while the former as a form of inhuman and degrading treatment is so prohibited. However, in *Kindler v. Canada* the UN Human Rights Committee held that, ‘while States Parties are not obliged to abolish the death penalty totally, they are obliged to limit its use.’<sup>10</sup>

The “death row phenomenon” was defined by the European Court of Human Rights as an amalgam of several factors facing the defendant, were he extradited to the United States for murder: the extensive time period an inmate waits on death row, the harsh conditions attending that wait, and the mounting anguish of awaiting execution.<sup>11</sup> Domestic political pressure, case law, statutory law, or constitutions that incorporate this repugnance to the death sentence may be significant

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<sup>10</sup> *Id.* at 196 (citations omitted).

<sup>11</sup> *Id.* at 198 (citing *Soering v. United Kingdom*, App. No. 14038/88, 11 Eur. H.R. Rep. 439, 489 para. 111 (1989) (Eur. Ct. H.R.)).

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obstacles to extradition and, thereby, put the requested State in breach of its international legal obligation (if *aut dedere aut judicare* is deemed to have passed into customary law). Moreover, the customary law principle that States may not use internal political or legal constraints as an excuse to avoid meeting their international legal obligations, reflected in the Vienna Convention, is also violated. However, such refusal derives from its own custom, and then the impasse on the international level ensues.

It is evident that this practice has ripened into custom. National courts offer some examples. Case law prohibiting extradition of prisoners to requesting States that maintain the death sentence has restricted the ability of governments as diverse as those in India, Zimbabwe, and the United Kingdom from going forward with extradition requests.<sup>12</sup> France, Germany, and Spain recently and routinely denied extradition requests of terrorist suspects to the United States, unless a promise is extracted from the Justice Department not to seek the death penalty, a particularly steep

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<sup>12</sup> Dugard & Van Den Wyngaert, *supra* note 12, at 198 (citing India: *Triveniben v. State of Gujarat*, [1989] 1 S.C.J. 383; *Madhu Mehtu v. Union of India*, [1989] 3 S.C.R. 775; *Vatheeswaran v. State of Tamil Nadu*, [1983] 2 S.C.R. 348; *Sher Singh v. State of Punjab*, [1983] 2 S.C.R. 582, 593; Zimbabwe: Catholic Commission for Justice & Peace, *Zimbabwe v. Attorney-General Zimbabwe*, [1993] (4) SALR 239 (Sup. Ct.); Britain: *Pratt v. Attorney-General for Jamaica*, [1993] 3 W.L.R. 995 (P.C.), 98 ILR 335).

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political price to extract given domestic American sentiment toward terrorists.<sup>13</sup>

International courts have followed suit. In *Soering*, the European Court of Human Rights held that—given the age and mental state of the defendant—extradition from the UK to Virginia for trial, and a resulting sentence that put him on death row, would constitute inhuman and degrading punishment prohibited by the European Convention on Human Rights.<sup>14</sup> The United Nations Human Rights Committee used an alternate basis for denying extradition to a death penalty requesting State. Instead of accepting the *Soering* rationale of the death row phenomenon in the case of *Ng v. Canada*,<sup>15</sup> the Committee focused on execution methods (discovering that the execution by gas asphyxiation sentence in California could take up to ten minutes to cause death), which is a form of “prolonged suffering” tantamount to “cruel and inhuman treatment” within the meaning of the International Covenant on Civil and Political

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<sup>13</sup> Peter Finn, *Germany Balks at Helping U.S. in Moussaoui Trial*, CHI. TRIB. (11 June 2002), at A3; T.R. Reid, *Europeans Reluctant to Send Terror Suspects to U.S.; Allies Oppose Death Penalty and Bush's Plan for Secret Military Tribunals*, WASH. POST, (29 Nov. 2001), at A23.

<sup>14</sup> *Soering v. United Kingdom*, App. No. 14038/88, 11 Eur. H.R. Rep. 439, 478 (1989) (Eur. Ct. H.R.).

<sup>15</sup> *Chitat Ng v. Canada*, U.N. Human Rights Committee., 49th Sess., Comm. No. 469/1991, paras. 16.3-4, U.N. Doc. CCPR/C/49/D/469/1991 (1994).

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Rights.<sup>16</sup> Therefore, Canada failed to comply with its obligations under the Covenant to extradite him to the United States.<sup>17</sup>

The UN General Assembly's 1990 Model Treaty on Extradition contains a similar prohibition in Article 4, Optional Grounds for Refusal. It states:

Extradition may be refused in any of the following circumstances:... If the offence for which extradition is requested carries the death penalty under the law of the requesting State, unless that State gives such assurance as the requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out.<sup>18</sup>

General Assembly resolutions are reflective of world opinion because a majority of the world's countries necessarily vote to adopt them.<sup>19</sup> How-

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<sup>16</sup> Dugard & Van Den Wyngaert, *supra* note 12, at 199 (citing 98 I.L.R. 479); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), *entered into force* (23 March 1976).

<sup>17</sup> Dugard & Van Den Wyngaert, *supra* note 12, at 199.

<sup>18</sup> Model Treaty on Extradition, art. 4(d), G.A. Res. 45/116, 45th Sess., 68th plen. mtg. (1990), *available at* <http://www.un.org/documents/ga/res/45/a45r116.htm>.

<sup>19</sup> See LORI FISLER DAMROSCH ET AL., INTERNATIONAL LAW 145-46 (4th ed. 2001).

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ever, for customary law purposes, they are also considered reflective of developing *opinio juris*.<sup>20</sup> Thus, *opinio juris* may coalesce around the refusal of extradition based on the death penalty. However, because a majority of nations continue to allow the death penalty as a domestic punishment option,<sup>21</sup> the national practice element necessary for such a rule to form in customary law is still not sufficient for it to be universally applicable.

This does not prevent it from moving into regional custom, as certainly seems to be the case with Europe. Former US Assistant Secretaries of State, Koh and Pickering, note: “European regional organizations have made abolition of the death penalty a prerequisite to joining the ‘new Europe,’ and a cornerstone of European human rights policy.”<sup>22</sup>

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<sup>20</sup> See BARRY E. CARTER & PHILIP R. TRIMBLE, INTERNATIONAL LAW 139-42 (3d ed. 1999) (citing Schachter, *International Law in Theory and Practice*, 178 Rec. des Cours 111-21 (1982-V)).

<sup>21</sup> Thomas Rose, *A Delicate Balance: Extradition, Sovereignty, and Individual Rights in the United States and Canada*, 27 YALE J. INT'L L. 193, 215 n.95 (2002); Alex G. Peterson, *Order Out of Chaos: Domestic Enforcement of the Law of Internal Armed Conflict*, 171 MIL. L. REV. 1, 90 n.429 (2002). In March 2002 Amnesty International reported that eighty-five countries continue to allow the death penalty, seventy-six countries have abolished the death penalty, twenty countries retain the death penalty but have not used it in ten years, and fourteen countries retain the death penalty only for exceptional crimes. Amnesty International, *Facts and Figures on the Death Penalty* (2002), at [http://www.amnestyusa.org/abolish/facts\\_figures032002.pdf](http://www.amnestyusa.org/abolish/facts_figures032002.pdf).

<sup>22</sup> Koh & Pickering, *supra* note 11, at 20.

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#### IV. THE EITHER/OR SCENARIO: PROBLEMS WITH TERRORISM

America's post-9/11 war on terrorism has generated many detainees at home and abroad. Some are being prosecuted, while others await charges and are interrogated for intelligence value. Suspects with links to al Qaeda, who have been arrested in European countries and whose extradition has been requested by the US, put those custodial countries in the position of having to comply with either their international legal obligation to extradite the individual if he is not prosecuted, or with their international/domestic obligation to deny extradition to a death penalty state. They cannot do both.

There are fundamental conflicts of value that make it very difficult to decide whether the death penalty should be waived or allowed. Assuming that the successful prosecution of the war on terror is agreed in all western societies to be the policy imperative of uppermost importance (a major assumption in some cases), then the US has much more flexibility in deciding to waive the imposition of the death penalty at the federal level than the EU or Canada does in deciding to allow the reverse (imposition of the death penalty).

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On the American side of the equation, that policy decision is a political one (subjective) in nature. The availability of the death penalty as a sentencing option is one that exists within the realm of prosecutorial discretion, which can be plea-bargained away without significant judicial or legislative review. On the European and Canadian side of the equation, the decision would be a legal one (objective) in nature. The prohibitions against the death penalty as a sentencing option for Europe and Canada exist within domestic as well as regional international case law and statutory/treaty law in addition to the emerging regional customary law. Thus, policymakers on the European/Canadian side of the death penalty divide are more constrained in their capacity to bargain away the prohibition on a death penalty sentencing option and, in many instances, prohibited from doing so.

This one-sided flexibility leads to a paradigm of accommodation in non-terrorism cases, whereby extraditions from non-death penalty allies to the US takes place only if an assurance is made that the American prosecutor will not seek a capital sentence against the suspect/extraditee. In many cases, such assurances have been forthcoming, especially at the federal level.

At the state level, it is a bit more difficult, as politics are involved more directly. Many District Attorneys are elected to office, often under a ban-

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ner of being tough on crime. Bargaining away the death penalty option, especially in states where it is carried out regularly, could be characterized by political opponents as a sign of weakness, particularly in high-profile murder cases.

As appointed officials, US Attorneys are somewhat immunized from local death penalty politics. Consequently, they may be more amenable to entering such political accommodations with requested States, despite the gravity of the crime (as with the anti-abortion murderer of Dr. Bernard Slepian). Even so, they remain vulnerable to top-down political pressure with regard to terrorism cases, especially since the Justice Department articulates the prosecution of terrorists as its top goal. The nation has been put on a war footing, and the Attorney General strenuously and repeatedly endorses use of the death penalty for terrorism cases.

Consequently, assuming that the war on terror continues into the foreseeable future and that American prosecution of terrorists continues to be fraught with political pressure to request capital punishment, the paradigm of accommodation that has grown to alleviate the colliding responsibilities becomes unworkable.

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### V. THE PRINCETON AND CAIRO-ARUSHA PRINCIPLES

In January 2001, a group of eminent international law scholars and former government officials met at the Wilson School in Princeton and undertook outlining the basic principles whereby universal jurisdiction should be exercised by States over perpetrators of crimes, traditionally accepted as belonging to the *jus cogens* canon (piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide, and torture). Some conferees advocated including terrorism on the *jus cogens* list, but in the pre-9/11 world, this was not agreed.<sup>23</sup>

That summer, they produced the “Princeton Principles on Universal Jurisdiction.” Principle 10 attempts to remedy the inconsistency emerging between death penalty extradition refusals and requirements to extradite by stating:

1. A state or its judicial organs shall refuse to entertain a request for extradition based on universal jurisdiction if the person sought is likely to face a

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<sup>23</sup> Princeton Principles on Universal Jurisdiction, Commentary at 48 (July 2001) available at [http://www.law.uc.edu/morgan/newsdir/unive\\_jur.pdf](http://www.law.uc.edu/morgan/newsdir/unive_jur.pdf). Principle 2(1) leaves open the possibility of other crimes being included in the future.

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death penalty sentence or to be subjected to torture or any other cruel, degrading, or inhuman punishment or treatment, or if it is likely that the person sought will be subjected to sham proceedings in which international due process norms will be violated and no satisfactory assurances to the contrary are provided.

2. A State which refuses to extradite on the basis of this Principle shall, when permitted by international law, prosecute the individual accused of a serious crime under international law as specified in Principle 2(1) or extradite such person to another state where this can be done without exposing him or her to the risks referred to in paragraph 1.<sup>24</sup>

Part one of Principle 10 recognizes the duty to refuse extradition when the requesting state maintains death penalty as a sentencing option, while part two purports to enshrine the *aut dedere aut judicare* duty. The authors engineered part one as mandatory and part two as permissive, thereby

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<sup>24</sup> Princeton Principles on Universal Jurisdiction, Principle 10 (July 2001), available at [http://www.law.uc.edu/morgan/newsdir/unive\\_jur.pdf](http://www.law.uc.edu/morgan/newsdir/unive_jur.pdf). (emphasis added).

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seeking to resolve the inherent impasse. However, part two is not a restatement of the *aut dedere aut judicare* duty in its pure form. It is, rather, a restatement of the *aut dedere aut judicare aut transferre* principle that emerged from the *Lockerbie* terrorist bombing trial.

In the *Lockerbie* case, two Libyan agents accused of killing hundreds of American and British citizens in the 1988 bombing of Pan Am flight 108 over Lockerbie, Scotland returned to Libya. Libya refused strenuous extradition requests from the United States and Britain. Instead, it initiated its own sham trial. This trial failed to satisfy the requesting States and the world community, which placed severe economic sanctions on Libya through the United Nations Security Council.<sup>25</sup>

Those sanctions remained in place until Libya agreed to a deal, negotiated by Secretary-General Annan, to transfer the two suspects to a third country (the Netherlands) where they would be tried by Scottish judges applying Scottish law. Thus, the third alternative *transferre* altered the traditional either/or choice offered by *aut dedere aut judicare*. Article 10, part two of the Princeton Principles, appears to adopt this version if the requesting State happens to employ the death pen-

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<sup>25</sup> Wouters & Naert, *supra* note 9, at 420-422.

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alty.<sup>26</sup> Applied to the “US as requesting State in the war on terrorism” scenario that underlies this paper, the Princeton Principles are not particularly helpful: the US would not want to abandon the death penalty for al Qaeda operatives, nor turn them over to third countries or international tribunals for prosecution.

African legal experts, who gathered in Egypt during the summer of 2001 to adopt similar universal jurisdiction principles, were much more sanguine with regard to the death penalty issue. The Cairo-Arusha Principles on Universal Jurisdiction did not list the international crimes amenable to universal prosecution, but terrorism was not explicitly excluded either. Indeed, Principles 5, 9, and 19 enshrine the *aut dedere aut judicare* duty without any death penalty exception mentioned:

5. The absence of specifically enabling domestic legislation does not relieve any State of its international legal obligation to prosecute suspects under the principle of universal jurisdiction, or to extradite, surrender or transfer to any State willing and able to prosecute such suspects.

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<sup>26</sup> Kelly, *supra* note 1, at 505-506.

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9. Financial and other constraints do not relieve States of their duty to carry out investigations or to prosecute, extradite or transfer for trial persons suspected or accused of gross human rights offences under international law. However, the international community should assist developing countries in the latter's [sic] efforts in prosecuting such offences.
  
19. A State in whose territory a gross human rights violation suspect is found shall prosecute him or her in good faith or extradite or surrender him or her to any other State or international tribunal willing and able to prosecute such suspect. The absence of an extradition treaty shall not bar the extradition, surrender or transfer of such a suspect to any State willing and able to prosecute the suspect.<sup>27</sup>

The Cairo-Arusha Principles differ from the Princeton Principles in several respects (mostly

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<sup>27</sup> African Legal Aid, *Preliminary Draft Of The Cairo Guiding Principles On Universal Jurisdiction In Respect Of Gross Human Rights Offenses: An African Perspective*, Principles 2 and 14 (July 31, 2001), available at <http://www.afla.unimaas.nl/en/act/univjurisd/symposium/Cairo-Arusha%20Principles%20+%20List%20of%20Participants.doc>. (emphasis added).

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having to do with Africa's regional and economic situation), but they appear to go down the same road of adding the *transfere* option. The "other constraints" language in Principle 9, however, could interpreted as sweeping aside the death penalty impediment to extradition, especially since capital punishment is still available in most of Africa.<sup>28</sup>

Terrorism was not necessarily thought of as regulated by *jus cogens* prior to 9/11, and was not listed in either the Princeton or Cairo-Arusha Principles. Yet sufficient flexibility, inherent in both definitions, allows for its inclusion. Principle 2 in Princeton, and in the accompanying commentary, characterizes the listed crimes as illustrative rather than exhaustive and foresees the inclusion of other heinous acts in the future. Principle 1 in Cairo-Arusha incorporates by reference "gross human rights violations," and Principle 4 incorporates references to crimes currently recognized by international law as amenable to universal jurisdiction.

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<sup>28</sup> According to Amnesty International, only 20 of the 54 countries in Africa have abolished the death penalty *de jure* or *de facto*. See Africa: Moving Towards Abolition of the Death Penalty (10 May 2004), available at <http://web.amnesty.org/library/Index/ENGAFR010102004?open&of=ENG-2AF>.

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### VI. A SOLUTION: CHARACTERIZE TERRORISM AS *JUS COGENS*

Bringing terrorism into the *jus cogens* canon solves the problem of potential doctrinal collision. Acceptance of the *aut dedere aut judicare* duty with regard to *jus cogens* conduct is growing, solidifying its emergence as a customary norm. *Jus cogens* crimes are amenable to universal jurisdiction exercised pursuant to *aut dedere aut judicare*. Treaties and customs that conflict with *jus cogens* prohibitions fail, and domestic impediments to the fulfillment of international legal obligations must yield.<sup>29</sup>

Thus, the emerging regional European custom of refusing to extradite criminals to requesting death penalty States is defeated in cases of terrorism (as with other *jus cogens* conduct), but still remains applicable in other criminal matters, preserving the utility of the accommodation paradigm calling for death penalty waiver prior to extradition.

Prior to 9/11, the main disagreement keeping terrorism from entering *jus cogens* status concerned its definition: one country's terrorist is another's "freedom fighter." Thus, individual terrorist acts were outlawed by individual multilateral

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<sup>29</sup> Kelly, *supra* note 1, at 508.

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treaties. Many of those conventions contained *aut dedere aut judicare* and universal jurisdiction provisions.<sup>30</sup> One could also rummage through much older treaties in an attempt to effectuate this mechanism. For instance, identifying a criminal act listed as a grave breach in the Geneva Conventions, and utilizing the *aut dedere aut judicare* provisions in Article 146 of the Fourth Geneva Convention relative to the Protection of Civilians in Time of War.

Alternatively, the possibility also existed to attach these requirements to an individual terrorist act, if that act amounted to a crime against humanity or a war crime, (since it would be lifted into *jus cogens* via also being a crime against humanity or war crime).<sup>31</sup> As Columbia's Professor Henkin notes: "It is increasingly accepted that at least certain acts of terrorism are subject to uni-

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<sup>30</sup> *Id.* at 505; Wouters & Naert, *supra* note 9, at 413:

Criminalising [sic] certain terrorist offences, in particular those specified in treaties, became the dominant approach of national and international lawmakers to international terrorism. It led to an elaborate body of criminal law, both international and – since, lacking an international criminal tribunal with jurisdiction for terrorist offences, enforcement and implementation was needed on that level – domestic. However, when terrorism was taken up in the UN General Assembly (UNGA), it quickly became clear that no consensus on a general definition was possible. The delimitation between terrorists and freedom fighters pursuing self-determination proved especially insurmountable. This led the UN to adopt a piecemeal approach criminalizing [sic] specific terrorist acts irrespective of the motive but focusing on the techniques or instruments used or targets selected. Thus, each time new forms of terrorism emerged, a new treaty was adopted at UN level, outlawing it.

<sup>31</sup> Wouters & Naert, *supra* note 9, at 534.

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versal jurisdiction.”<sup>32</sup> Henkin’s view was adopted in the Restatement Third of Foreign Relations, paragraph 404.

So terrorism in its aggregate form was not considered as having been folded into the relatively small canon of *jus cogens* heinous crimes, although individual terrorist acts (such as torture) were included<sup>33</sup>. But Lord Millet’s observation in the Pinochet extradition decision would prevent, if widely accepted, those individual terrorist acts from garnering *jus cogens* status where, if taken in aggregate form (i.e., terrorism), the judge’s second criteria would be met:

[C]rimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied. First, they must be contrary to a peremptory norm of international law so as to infringe *jus cogens*. Secondly, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order.<sup>34</sup>

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<sup>32</sup> Wren, *supra* note 10.

<sup>33</sup> A few writers did characterize terrorism as *jus cogens* conduct prior to 9/11: Viktor Mayer-Sch nberger & Teree E. Foster, *More Speech, Less Noise: Amplifying Content-Based Speech Regulations Through Binding International Law*, 18 B.C. INT’L & COMP. L. REV. 59, 100-01 (1995); Maria Ermolaeva, *Crimes Without Punishment*, 23 S. ILL. U. L.J. 755, 777 (1999).

<sup>34</sup> *Ex Parte Pinochet Ugarte*, No. 3, (2002) 1 A.C. at 275.

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Despite the confusion and conflicting interpretations, there is some post-9/11 movement toward incorporating terrorism into the *jus cogens* canon, thereby rendering its perpetrators amenable to universal jurisdiction through *aut dedere aut judicare* obligations on the States where those perpetrators are located.<sup>35</sup> One week after the 9/11 terrorist attacks on the US, Datuk Dr. Cyrus Das, president of the 53 nation Commonwealth Lawyers Association, called for terrorism against civilians to be tried on the basis of universal jurisdiction and pressed the UN and world community to create a legal mechanism to do so.<sup>36</sup>

Professor Bassiouni describes the process whereby criminal acts can join the *jus cogens* canon:

Three... considerations must be taken into account in determining whether a given international crime has reached the status of *jus cogens*. The first has

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<sup>35</sup> Sarah E. Smith, *International Law: Blaming Big Brother: Holding States Accountable for the Devastation of Terrorism*, 56 Okla. L. Rev. 735, 763 (Fall 2003):

[A]s terrorism gains attention in the international community as a threat to peace and a "shock [to] the conscience of humanity," it will likely gain the designation of a peremptory norm. Indeed, many scholars now recognize that terrorism has evolved to occupy its own position as a *jus cogens* principle of international law.

<sup>36</sup> *Proposal on Trial for Terrorists*, NEW STRAITS TIMES (19 Sept. 2001), at 2.

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to do with the historical legal evolution of the crime. Clearly, the more legal instruments that exist to evidence the condemnation and prohibition of a particular crime, the better founded the proposition that the crime has risen to the level of *jus cogens*. The second consideration is the number of states that have incorporated the given proscription in their national laws. The third consideration is the number of international and national prosecutions for the given crime and how they have been characterized. Additional supporting sources that can be relied upon in determining whether a particular crime is a part of *jus cogens* is other evidence of general principles of law and the writings of the most distinguished publicists.<sup>37</sup>

The reporter for the Restatement Third of Foreign Relations essentially tracks this approach in determining that the crime of Apartheid has entered the *jus cogens* canon.<sup>38</sup>

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<sup>37</sup> M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 70-71 (Autumn 1996).

<sup>38</sup> RESTATEMENT (THIRD) FOREIGN RELATIONS §702 rep.'s note 7 (1987).

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According to Bassiouni's criteria, terrorism should be ready to enter the *jus cogens* canon and a functional definition should emerge drawn from the individual elements that have already been criminalized in a dozen multilateral treaties. As Professor Grant of Glasgow University noted in a post-9/11 speech at Lewis & Clark College of Law:

We can no longer tolerate the excuse that there is no universally acceptable definition of terrorism. We do not need a definition of terrorism. We need an enumeration of the terrorist acts that we wish to proscribe. We already have a list, albeit probably a partial list, in the existing piecemeal conventions. The concept of crimes against humanity was not known until 1945, was used at Nuremberg and became part of the language of international law and relations long before it was defined. And we now have, if not a definition, then at least an enumeration of the acts which are to be regarded as crimes against humanity.<sup>39</sup>

From a policy perspective, incorporating terrorism into *jus cogens* would render the patchwork

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<sup>39</sup> John Grant, *International Law*, available at <http://www.lclark.edu/dept/colcomm/grant.html>.

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approach (crime by crime), created to protect political sensibilities, unnecessary. Professor Grant goes further by specifically emphasizing the importance of the *aut dedere aut judicare* mechanism and recommending that non-surrendering States be regarded as harboring terrorists.<sup>40</sup> Some agree that this is the likely outcome if the impasse cannot be alleviated, as *Times* columnist Camilla Cavendish writes regarding the treaty basis for British courts' inability to extradite terrorists:

Article 3 of the European Convention on Human Rights [is] the catch-22 of our age. We cannot send a foreigner home, however heinous his crime, if he might face persecution, torture or the death penalty... and so we are stuck with terrorists and extremists. It is hard to see how Britain can call so primly for other countries to take action in the War on Terror when we so flagrantly harbour terrorists ourselves.<sup>41</sup>

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<sup>40</sup> *Id.* "The duty to prosecute or extradite, so central to the existing regime and so easily evaded, must be made mandatory. The state that does not prosecute or extradite should be regarded as equivalent to a harboring state and subject to sanctions through the Security Council."

<sup>41</sup> Camilla Cavendish, *Britain: A Legal Paradise for the World's Men of Terror*, *TIMES* (LONDON), (27 Mar. 2004), at 30.



# Prosecuting Sexual Violence Crimes During War and Conflict: New Possibilities for Progress

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Women have endured sexual violence crimes during wars and conflict for as long as records exist. Until recently these crimes have not been considered or prosecuted as war crimes, crimes against humanity, or genocide. Recently, however, the International Criminal Tribunal for the Former Yugoslavia (ICTY)<sup>1</sup> has begun to strengthen and more clearly delineate the legal definition of sexual violence crimes as they fit into the framework of war crimes, crimes against humanity, genocide, and grave breaches of international law.

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<sup>1</sup> U.N. Doc. S/25704 (3 May 1993) The International Criminal Tribunal for the former Yugoslavia (ICTY) was established pursuant to SC Res. 827 (25 May 1993) to prosecute "Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991." The Statute of the ICTY is attached to the Secretary General's report in U.N. Doc. S/25704, Annex (1993) [hereinafter the Yugoslav Tribunal Statute].

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The Rome Statute<sup>2</sup> has redefined gender-violence crimes and their prosecution for a new International Criminal Court. This brings the principle of prosecution for sexual crimes to the edge of a new era, as the International Criminal Court (using definitions created by the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda) begins to investigate sexual violence crimes, such as those that have occurred in the Congo or during the conflict in Darfur, Sudan. New legal concepts within the Rome Statute regarding sexual violence will broaden national criminal codes and inaugurate a new way of thinking about crimes of sexual violence.

I. INTRODUCTION: SEXUAL VIOLENCE IN ARMED CONFLICT

During war, men are killed and women are often raped, beaten and raped, or raped and killed.<sup>3</sup> Sexual violence against women during war has been reported for as long as records exist, beginning with the rape of the Sabine women in Rome.

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<sup>2</sup> Rome Statute of the International Criminal Court, UN Doc. No. A/CONF. 183/9 (17 July 1998), 37 ILM. 999 [hereinafter Rome Statute].

<sup>3</sup>See generally, SUSAN BROWNMILLER, *AGAINST OUR WILL, MEN, WOMEN AND RAPE* (1975). This book chronicles wartime rape including the First and Second World Wars, mass rape of Bengali women by Pakistani soldiers and rape during the Vietnam War. [hereinafter BROWNMILLER]

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Military commanders often believed that rape “after a battle [is] a well-deserved reward, a chance to release tensions and relax.”<sup>4</sup>

During World War II, Japanese troops enslaved approximately 200 thousand Korean and Taiwanese “comfort women” for use by Japanese troops to boost morale.<sup>5</sup> The Japanese military abducted women for the purpose of sexual slavery and for the entertainment of soldiers.<sup>6</sup> In Bangladesh, the number of women raped in 1971 during the country’s war for independence was estimated from 250 thousand to 400 thousand. These rapes led to an estimated 25 thousand pregnancies.<sup>7</sup> The United Nations High Commissioner for Refugees reported that 39 percent of Vietnamese boat women between the ages of 11 and 40 were abducted and raped at sea in 1985.<sup>8</sup> In Uganda, during the early 1980s, health care workers reported that soldiers had raped approximately 80 percent of the women in the community of Luwero trian-

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<sup>4</sup> Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT’L LAW 298 (2003) [hereinafter *Prosecuting Wartime Rape*].

<sup>5</sup> *Id.*, at 132.

<sup>6</sup> United Nations Secretary-General Hearing (25 Feb. 1992) (testimony of Hyo-chai Lee, MA, Soon-Kim Park, and Chung-Ok Yun, MFA, Korean Council for the Women Drafted for Military Sexual Service by Japan.)

<sup>7</sup> BROWNMILLER, *supra* 3.

<sup>8</sup> See generally, United Nations High Commissioner for Refugees, *Services for Vietnamese Refugees Who Have Suffered from Violence at Sea: An Evaluation of the Project in Thailand and Malaysia*, (8 Feb. 1986).

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gle. Many of the survivors were assaulted by as many as 10 soldiers in a single episode of gang rape.<sup>9</sup> Estimates of the rapes in Rwanda ranged from 15 thousand to 500 thousand, which were committed in less than 10 days.<sup>10</sup> It is estimated that Iraqi forces raped at least 5 thousand Kuwaiti women during the 1990 invasion of Kuwait.<sup>11</sup> Throughout the civil war and ethnic violence in Liberia, women have been repeatedly raped. A World Health Organization study found that 35 percent of women reported rapes in which typically more than one attacker was present, and that weapons were used in over 90 percent of the attacks.<sup>12</sup> In Bosnia, specific figures remain in dispute, but it is estimated that between 20 thousand and 50 thousand women were raped, mostly by

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<sup>9</sup> Joan Giller et al., *Uganda: War, Women and Rape*, 337 LANCET, 604 (1991); Shana Swiss and Joan E. Giller, *Rape as a Crime of War: A Medical Perspective*, 270 J. AM. MED. ASSOC. 613 (4 Aug. 1993).

<sup>10</sup> Sasha Chriss, *Understanding and Responding to War-Related Sexual Violence: Application of the Human Security Framework Towards the Development of Psychological Interventions in War-Affected Communities* (2004) (master's thesis, Harvard School of Public Health) reprinted in Tara Gingerich and Jennifer Leaning, *The Use of Rape As A Weapon of War in the Conflict in Darfur, Sudan* (Oct. 2004) (prepared for the U.S. Agency for International Development/OTI) (on file with the Program on Humanitarian Crisis, Harvard School of Public Health and Physicians for Human Rights) [hereinafter *Rape As a Weapon of War*].

<sup>11</sup> Middle East Watch, *A Victory Turned Sour, Human Rights in Kuwait since Liberation* (Sept. 1991).

<sup>12</sup> See generally, Kenneth L. Cain, *The Rape of Dinah: Human Rights, Civil War in Liberia, and Evil Triumphant*, 21 HUM. RTS. Q. Q. 265 (May 1999); UNAIDS, AIDS Epidemic Update (Geneva: UNAIDS and WHO, 1998); *Rape As a Weapon of War*, supra note 10 at 7 (n. 18).

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the Serbian forces.<sup>13</sup> The war in Kosovo resulted in reports that between 30 to 50 percent of women had been raped by the Serbian military.<sup>14</sup> Most recently, Human Rights Watch has estimated that one-third of women in the Congo have been raped. In some communities, the rate may be as high as 80 percent.<sup>15</sup>

Sexual violence during war is about power and control. Radhika Coomaraswamy has identified numerous reasons for sexual violence against women during armed conflict. Violence against women may be directed toward a particular social group of which she is a member because “to rape a woman is to humiliate her community.”<sup>16</sup> For men of a particular social group, rape defines the totality of defeat; they could not protect the women of their community.

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<sup>13</sup> See generally, Marlise Simons, *Landmark Bosnia Rape Trial: A Legal Morass*, N.Y. TIMES (29 July 1998) at A3; Jeanne Ward, *If Not Now, When? Addressing Gender-Based Violence in Refugee, Internally Displaced, and Post Conflict Settings: A Global Overview* (produced by The Reproductive Health for Refugees Consortium, April 2002 at 81); *Rape As a Weapon of War*, *supra* note 10, at 7 (nn. 25-26).

<sup>14</sup> See generally, News Release, Amnesty International, *Kosovo: Incidents of Multiple Rape* (27 May 1999); Martina Vandenberg, *Kosovo: Rape as a Weapon of “Ethnic Cleansing”* (Human Rights Watch) 2000, at 9; *supra* note 10, at 7 (n. 28).

<sup>15</sup> CONGO: A CONTINUING HUMAN RIGHTS DISASTER (Human Rights Watch), 2003.

<sup>16</sup> Coomaraswamy, *Of Kali Born: Violence and the Law in Sri Lanka*, in *FREEDOM FROM VIOLENCE: WOMEN’S STRATEGIES FROM AROUND THE WORLD* 49 (M. Schuler, ed., 1992).

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Sexual violence has been used as a military policy and as a nationalistic policy. Rape against “one side” by another combines emotions of hatred, superiority, vengeance for past wrongs, and national pride.<sup>17</sup> In the former Yugoslavia, rape was massive, organized, and systematic. The Special Rapporteur, appointed by the United Nations Commission on Human Rights, noted that rape as an instrument of war was a method of ethnic cleansing “intended to humiliate, shame, degrade and terrify the entire ethnic group.”<sup>18</sup> The rape of women and girls in front of family members was frequently reported.<sup>19</sup>

Rape during war can create “fear, shame and demoralization. Communities threatened by mass rape in war may... be more likely to choose flight in advance of the enemy.”<sup>20</sup> In Bosnia, mass rape was used as a means of ethnic destruction. Muslim women were abducted, gang raped, and repeatedly raped until impregnated and then held so that

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<sup>17</sup> Christine Chinkin, *Rape and Sexual Abuse of Women in International Law*, 5 EUR. J. INT'L. L. 3 (1994). [hereinafter Chinkin].

<sup>18</sup> *Id.*, at 4 (note 21 and accompanying text) (Tadeusz Mazowiecki was the Special Rapporteur of the Commission on Human Rights, Report Pursuant to Commission Resolution 1992/2-1/1 of 14 of August 1992, E/CN.4/1993/50 (10 Feb. 1993).

<sup>19</sup> A. Goldfield, et al., *The Physical and Psychological Sequelae of Torture*, 259 J. AM. MED. ASSOC. 2725-29 (13 May 1988).

<sup>20</sup> *Rape As a Weapon of War*, *supra* note 10, at 8.

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they could not abort the child. These acts diluted the Muslim community.<sup>21</sup>

### A. Prosecution of Sexual Violence Crimes in International Tribunals and Courts

The Lieber Code of 1863<sup>22</sup> promulgated rules of engagement for United States soldiers during the Civil War. It prohibited rape or other abuse of women under penalty of death. Rape is also prohibited in the laws of war in the modern Codes of Military Conduct.<sup>23</sup> Prosecution of sexual-violence crimes against women did not occur within the Military Tribunals of Nuremburg or in Tokyo.<sup>24</sup> Law Number 10<sup>25</sup> of the Local Council, regulating the trials of low-level Nazis, recognizes rape as a crime against humanity,<sup>26</sup> but no individual was

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<sup>21</sup> See generally, WAR CRIMES IN BOSNIA-HERZEGOVINA (Human Rights Watch), April 1993.

<sup>22</sup> *Instructions for the Government of the United States in the Field by Order of the Secretary of War*, (24 April 1863) (also known as General Orders No. 100 and drafted by Francis Lieber).

<sup>23</sup> Chinkin, *supra* note 8, at 6, n. 31 (discussing Meron, *Rape As a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424 (1993)).

<sup>24</sup> DAWN ASKIN, WAR CRIMES AGAINST WOMEN, 6 n.12 (1997) (discussing generally Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo (19 Jan. 1946) TIAS No. 1589, 4 Bevans 20) [hereinafter WAR CRIMES AGAINST WOMEN].

<sup>25</sup> *Id.*, at 6, n. 13 (discussing generally the two sets of trials: the trial of the major war criminals and the lesser war criminals, Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Humanity," (20 Dec. 1945), in OFFICIAL GAZETTE OF THE CONTROL COUNCIL FOR GERMANY, No. 3 (31 Jan. 1946).

<sup>26</sup> *Id.*

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ever prosecuted under the law for sexual violence crimes. Rape is not listed as a war crime in Article 6 of the Nuremberg Charter. Article 6 includes “murder, ill-treatment or deportation to slave labor..., killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.”<sup>27</sup> The Tokyo Tribunal uses evidence of rape to support other charges of war crimes and crimes against humanity. Commanders are held responsible for the rapes committed by soldiers under their command.<sup>28</sup> Rape is recognized as a violation of the laws and customs of international armed conflicts.

### B. Emergence of a New Definition for Sexual Violence within International Law

Prosecutors in the Nuremberg Trials first used the legal concept “crimes against humanity.”<sup>29</sup> Its legal meaning was established in the Charter that created the International Military Tribunal to try Nazi officials, but it contains no specific reference

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<sup>27</sup> *Id.*, at n. 6 (citing Charter Annexed to the Agreement for the Establishment of an International Military Tribunal, 5 U.N.T.S. 251).

<sup>28</sup> *See generally*, TOKYO WAR CRIMES TRIAL (R. Pritchard, et al., (eds.).

<sup>29</sup> Leo Gross, *The Punishment of War Criminals: The Nuremberg Trial*, 2 NETH. INT’L L. REV. 356, 358 (1955).

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to rape as a crime against humanity.<sup>30</sup> The Nuremberg Charter defines several international crimes:

1. War crimes: namely, violations of the laws or customs of war. Such violations shall include, but are not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war... or devastation not justified by military necessity.
2. Crimes against humanity: namely murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime.<sup>31</sup>

The prohibition of rape during conflict can be found in the Geneva Conventions, specifically the Fourth Geneva Convention (which provides for

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<sup>30</sup> James R. McHenry, *The Prosecution of Rape Under International Law*, 35 VAND. J. TRANSNAT'L L. 1277 (2002). [hereinafter McHenry].

<sup>31</sup> Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal (8 Aug. 1945), 58 Stat. 1544, 82 U.N.T.S. 280 (London Agreement).

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the protection of civilians in time of war)<sup>32</sup> and Protocols I and II.<sup>33</sup> These generally state that women shall be especially protected against any attack on their honour; in particular, against rape, enforced prostitution, or any form of indecent assault.<sup>34</sup> Protocol I<sup>35</sup> requires that “[w]omen shall be the object of special respect and shall be protected against rape, forced prostitution, and any other form of indecent assault.”<sup>36</sup>

The 1993 World Conference on Human Rights in Vienna affirmed prior case law, expanding the legal definition of rape in international law. The Declaration and Program of Action states that violations, including systematic rape and sexual slavery, require a particularly effective response.<sup>37</sup> At that time in history, no effective legal response

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<sup>32</sup> Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (12 Aug. 1949), 75 U.N.T.S. 287, 6 U.S.T. 3516; TIAS No. 3365 [hereinafter Fourth Geneva Convention].

<sup>33</sup> Protocol Additional (II) to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (8 June 1977), 1125 U.N.T.S. 609; 12 Dec. 1977, U.N. Doc. A/32/144 Annex II. [hereinafter Protocol II].

<sup>34</sup> *Id.*, at Pt. III, Sect. I, Art. 27 (“Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.”).

<sup>35</sup> Protocol (I) Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims in International Armed Conflicts (8 June 1977), 1125 U.N.T.S. 3; 12 Dec. 1977, U.N. Doc. A/32/144 Annex I. specifically Protocol I, Chapt. II, Art. 76 (“Women shall be the object of special respect and shall be protected against rape, forced prostitution and any other form of indecent assault.”) [hereinafter Protocol I].

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

<sup>37</sup> Chinkin *supra* note 8, at 7.

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had been constructed, and no prosecution of rape as a war crime or crime against humanity had occurred.

Gender crimes against women within the Convention on the Elimination of Violence Against Women is defined as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”<sup>38</sup> The ICTR and ICTY would soon broaden this definition within international law and specifically prosecute crimes of sexual violence. They further refine the legal definitions of rape as a war crime, using the language of the Geneva Convention. They consider violations of the human rights of women in situations of armed conflict to be violations of the humanitarian principles of international human rights and humanitarian law.

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<sup>38</sup> Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, 1249 U.N.T.S. 13, 19 I.L.M. 33 (18 Dec. 1979); Annex to G.A. Res. 34/180, U.N. Doc. A/RES/34/180.

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C. The ICTR and ICTY: New Legal Concepts for Sexual Violence Crimes

The rapes that occurred in Rwanda and the former Yugoslavia became the basis for recognizing a new concept of genocide through sexual violence:

[The use of] ethnic rape as an official policy of war in a genocidal campaign for political control... [is] not only a policy to defile, torture, humiliate, degrade and demoralize the other side, which happens all the time in war. It is specifically rape under orders. This is not rape out of control. It is rape under control. It is also rape unto death, rape as massacre, rape to kill and to make the victims wish they were dead. It is rape as an instrument of forced exile, rape to make you leave your home and never want to go back. It is rape to be seen and heard and watched and told to others: rape as spectacle. It is rape to drive a wedge through a community, to shatter a society, to destroy a people.<sup>39</sup>

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<sup>39</sup> Catherine McKinnon, *Rape, Genocide, and Women's Rights*, 17 HARV. WOMEN'S L.J. 5, 11-12 (1994).

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In the past, sexual violence crimes against women were recognized as “genocidal practices.” The Trial Chamber of the International Criminal Tribunal for Rwanda (ICTR) in the *Akayesu*<sup>40</sup> case determined that rape was used as a method to destroy or cause physical and mental damage to a group or members of a group, thus constituting genocide.<sup>41</sup> The rape and sexual mutilation of Tutsi women constituted a form of genocide. Jean-Paul Akayesu, an ethnic Hutu and mayor of Taba, allowed the mass rape of hundreds of Tutsi women even though he controlled the police and could have prevented the attacks. The Court determined that when rape is used as a method to destroy or cause physical and mental damage to a group or members of a group, it constitutes genocide. Akayesu’s conviction for genocide influenced the later prosecution of sexual crimes in international tribunals.<sup>42</sup> The *Akeyesu* case also determined that rape had been used as ethnic birth prevention, which is a form of genocide in a culture where the father determines ethnicity. Raping women with the intention to impregnate them prevents them from having a child that shares their ethnicity and, therefore, destroys the race.<sup>43</sup>

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<sup>40</sup> See Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (2 Sept. 1998).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

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The ICTR began to developed precedents that the ICTY would later use to consider rape within a larger context of international law for the definition of a war crime, crime against humanity, enslavement, or genocide. The *Kunarac* case developed the definition of rape as a war crime and a crime against humanity.<sup>44</sup> The International Criminal Tribunal for Rwanda in the *Akayesu* decision set the foundation for *Kunarac* to consider rape as a form of genocide. The *Kunarac* decision went further than *Akayesu* had, and also considered rape and sexual enslavement to be war crimes. Before the *Akayesu* and *Kunarac* decisions, rape was not specifically recognized as a crime against humanity within international law. It was seen as an inevitable part of war and, therefore, not prosecuted in the past. The *Akayesu* decision clarified that rape could be equivalent to genocide.<sup>45</sup>

The ICTY recognizes the rape of women and forced pregnancy as a weapon of war and, under Article 3 of the Geneva Convention, as genocide and a crime against humanity.<sup>46</sup> The ICTY consid-

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<sup>44</sup> See generally Prosecutor v. Dragoljub Kunarac, Case Nos. IT-96-23-T & IT 96-23/1-T, Judgment (22 Feb. 2001), available at <http://www.un.org/icty/foca/trialc2/judgement/index.htm>.

<sup>45</sup> Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 425 (1993).

<sup>46</sup> Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Allegations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Art. 2, U.N. Doc. S/25704,

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ers the legal definitions alluding to rape within the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, which provided that “women [must] be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.”<sup>47</sup> The ICTY helped to develop clearer definitions of sexual violence crimes and a more certain path toward a violator’s prosecution.

The United Nations Security Council created the ICTY in 1993 to prosecute war crimes, crimes against humanity, and genocide committed in the former Yugoslavia on or after January 1991. The Tribunal could impose life sentences, but not death.<sup>48</sup> Judge Patricia Wald of the ICTY stated that the ICTY had to cope with “man’s inhumanity to man and woman, including genocide and crimes against humanity..., systematic rapes of women and girls...,”<sup>49</sup> and countless such acts committed in the former Yugoslavia.

In the *Kunarac* case in the ICTY, eight Bosnian Serb police and military officers were accused of

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annex (1993), reprinted in 32 I.L.M. 1192 (amended in 2002) [hereinafter ICTY Statute].

<sup>47</sup> Fourth Geneva Convention, *supra* note 33.

<sup>48</sup> ICTY Statute, *supra* note 47.

<sup>49</sup> Patricia Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court*, 5 WASH. U. J. L. & POL’Y 87 (2001).

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having raped and sexually assaulted 14 Bosnian women in Foca, a city close to Gorazde that was declared one of the “safe zones” in southeastern Bosnia. Bosnian Serb forces overtook Foca in April 1992. The majority of Foca were Muslim at that time. Muslims and Croats were arrested and the men and women separated. Many civilians were killed, beaten, or subjected to sexual assault.<sup>50</sup> “Detained women were subjected... to brutal beatings and to sexual assaults, including rapes and gang rapes.”<sup>51</sup> At the high school, “women and girls as young as 12 years old were subjected to rape and sexual assaults.”<sup>52</sup>

Kunarac was the commander of a special reconnaissance unit of the Bosnian Serb Army. He knew, or had reason to know, that his subordinates were engaged in sexual assaults upon detained Muslim women. Kunarac also personally committed acts of sexual assault and rape upon Muslim women.<sup>53</sup> Kovac, another defendant, was a sub-commander of the military police and a paramilitary leader in Foca. He was alleged to have been personally involved with rapes and sexual assaults of detained Muslim women.<sup>54</sup> Vukovic,

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<sup>50</sup> *Dragoljub Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T; Case Information Sheet: *Kunarac, Kovac and Vukovic* Case, available at <http://www.un.org/icty/glance/kunarac.htm>.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

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

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also a defendant, was a sub-commander of the military police and paramilitary leader in Foca, and alleged to have been personally involved in the gang rape of women and girls detained within the school. He was alleged to have had sexually abused women detained at a sports hall, and arranged to have the removal of women from detention centers to private homes and apartments to be sexually abused in the future.<sup>55</sup>

The ICTY, in the *Kunarac* decision, explicitly explained its legal reasoning that rape could be viewed as a war crime and a crime against humanity. The Tribunal concluded that the rapes in Foca were well organized and that the perpetrators possessed the *mens rea* intent to commit the attacks.<sup>56</sup> The crimes in Foca against Bosnian-Muslim women constituted “crimes against humanity” as part of a larger conflict in the Balkans, directed at a specific group. The ICTY found the defendants guilty of war crimes and crimes against humanity under Articles 3 and 5 of the ICTY’s enabling Statute, as well as Article 3 of the Fourth Geneva Convention.<sup>57</sup> Article 5 of the Statute lists the offenses that constitute crimes against human-

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> ICTY Statute, *supra* note 47; Fourth Geneva Convention, *supra* note 34, Art. 3: “...(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages (c) outrages upon personal dignity, in particular, humiliating and degrading treatment.”

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ity if they are committed in armed conflict and directed against a civilian population. It states:

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

1. murder
2. extermination
3. enslavement
4. deportation
5. imprisonment
6. torture
7. rape
8. persecutions on political, racial and religious grounds
9. other inhumane acts<sup>58</sup>

The Tribunal also ruled that the Foca rapes constituted a war crime under humanitarian law and the ICTY's enabling statute. The Tribunal ruled that the rapes were an outrage upon personal dignity within Article 3c of the Geneva Conven-

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<sup>58</sup> ICTY Statute, *supra* note 47.

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tions.<sup>59</sup> The ICTY held that the defendant's actions represented a systematic and widespread attack upon the civilian population in the Balkan conflict.<sup>60</sup> The three defendants were also convicted of enslavement.<sup>61</sup> The Nuremberg Trials had defined enslavement as a crime against humanity.<sup>62</sup> The Tribunal ruled that this particular enslavement (sexual enslavement) could fit into established international legal principles.<sup>63</sup> Enslavement is further defined in the Rome Statute.

The ICTY found all three defendants guilty of war crimes, specifically rape and torture, under Article 3 of the ICTY's enabling statute and under customary international law, specifically Article 3 of the Fourth Geneva Convention. The ICTY ruled that rape is a serious offense that satisfies the requirements of Article 3. Article 3 of the Geneva Convention Relative to the Protection of Civilian Person in Time of War applicable to these issues states that:

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<sup>59</sup> Fourth Geneva Convention, *supra* note 34, Art. 3(c) ("outrages upon personal dignity, in particular, humiliating and degrading treatment").

<sup>60</sup> *Dragoljub Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T.

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

<sup>62</sup> Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, London (8 Aug. 1945), 8 U.N.T.S. 279; 59 Stat. 1544, 8 A.S. No. 472., reprinted in 39 AM. J. INT'L L. 257 (1945) (Supp); 1 Ferencz 454; I Friedman 863, Charter of the International Military Tribunal (8 Aug. 1945) Annex (IMT Charter).

<sup>63</sup> *Dragoljub Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T.

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In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

Persons taking no active part in the hostilities, including members of armed forces who had laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause shall, in all circumstances, be treated humanely, without any adverse distinction founded on race, color, religion, or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

1. violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture
2. taking of hostages
3. outrages upon personal dignity, in particular humiliating and degrading treatment

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The eventual prosecution of rape was considered in the ICTY and ICTR statutes. The ICTY formulates new definitions of rape, stating:

The Chamber must define rape... in international law. The Chamber considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances, which are coercive.<sup>64</sup>

The Rome Statute, establishing the International Criminal Court, took these legal developments into consideration for its new definitions of sexual violence. Most importantly, it considered rape during war as a crime against humanity, a war crime, or an act of genocide.

Rape as torture also attained a more definite status under international law. The Chamber of the ICTR in the *Akayesu* decision defines rape as a physical invasion of a sexual nature, committed on a person under circumstances, which are coercive.<sup>65</sup> The Court stated that “like torture, rape is

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<sup>64</sup> *Dragoljub Kunarac*, Case Nos. IT-96-23-T & IT-96-23/1-T.

<sup>65</sup> *Akayesu*, Case No. ICTR-96-4-T, para. 597.

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used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity.” The Tribunal considered sexual violence, including rape, to be any act of a sexual nature that is committed on a person under circumstances, which are coercive.<sup>66</sup> The Tribunal found that sexual violence was not limited to physical invasion of the human body. Sexual violence could include acts that do not involve penetration or even physical contact, such as publicly making a woman undress and forcing her to do gymnastics naked in a courtyard in front of a crowd.<sup>67</sup>

The United Nations Special Rapporteur on Torture recognizes that rape can constitute torture. “[R]ape is a traumatic form of torture for the victim.”<sup>68</sup> Judges in the *Furundzija* case wrote that “[i]n certain circumstances... rape can amount to torture and has been found by international judicial bodies to constitute a violation of the norm prohibiting torture.”<sup>69</sup> Here, the accused had interrogated a Bosnian Muslim woman while an-

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<sup>66</sup> *Id.*

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

<sup>68</sup> U. N. Commission on Human Rights, Report of the U.N. Special Rapporteur on Torture (Mr. Nigel Rodley, Special Rapporteur) submitted pursuant to the Commission on Human Rights Resolution 1992/32, E/CN.4/1995/34, para. 19 (12 Jan. 1995).

<sup>69</sup> Prosecutor v. Furundzija, Case No. IT-95-17/I-T, Judgment, para. 171 (10 Dec. 1998).

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other accused had raped and threatened her with sexual mutilation. The Court found that the intent to humiliate is one of the purposes of torture and found him guilty as a co-perpetrator of torture.<sup>70</sup> In the *Celebici* concentration camp, the judges stated that “sexual violence strikes at the very core of human dignity and physical integrity.”<sup>71</sup>

## II. DEVELOPMENT OF THE ICC

On 17 July 1998, 120 States voted to adopt the Rome Statute of the International Criminal Court.<sup>72</sup> The International Criminal Court (ICC) hears cases of grave crimes including genocide, war crimes, and crimes against humanity. It provides redress to victims and survivors of crimes. The Court is prospective and can only prosecute crimes committed after the Rome Statute, entered into force 1 July 2002.<sup>73</sup>

Referral of cases to the ICC can be made by a State party to the ICC, through referral by the United Nations Security Council in accordance with authority under Chapter VII (which comprises Articles 39-51 of the United Nations Char-

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<sup>70</sup> *Id.*, para. 185.

<sup>71</sup> *See generally*, Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment (16 Nov. 1999).

<sup>72</sup> Rome Statute, *supra* note 2.

<sup>73</sup> *Id.*, Art. 11.

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ter related to actions the Security Council must take to maintain or restore international peace and security) or by the Prosecutor, who can initiate an investigation based on information regarding crimes within the Court's jurisdiction.<sup>74</sup>

The ICC has jurisdiction over crimes if there is an appropriate territorial connection with a State party or with a non-State party that accepts the jurisdiction of the ICC, or if the person charged is a national of such States.<sup>75</sup> The ICC is complementary to national courts.<sup>76</sup> Thus, it cannot exercise its jurisdiction if the State that has jurisdiction has investigated or prosecuted the action, is investigating or prosecuting, or has investigated and decided not to prosecute.<sup>77</sup>

Nation States are obligated to prosecute international crimes such as genocide, war crimes, and crimes against humanity. Unfortunately, there have been and continue to be States that do not prosecute these crimes. The Rome Statute gives the ICC jurisdiction over these crimes if States fail to act. The ICC can exercise its jurisdiction only after it has established that no State is able or

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<sup>74</sup> *Id.*, Arts. 12-15.

<sup>75</sup> *Id.*, Art. 12(2)(b).

<sup>76</sup> *Id.*, at Preamble: "Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions."

<sup>77</sup> *Id.*, Art. 17(1)(a)(b).

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willing to investigate or prosecute. The complementarity principle preserves that national criminal jurisdictions primarily try cases involving justice, but allows the ICC to intervene when States fail to act to prevent those who have committed genocide, war crimes, or crimes against humanity.

Under Article 17, the Court shall determine that a case is inadmissible where:

1. The case is being investigated or prosecuted by a State which has jurisdiction over it, unless that State is unwilling or unable genuinely to carry out the investigation or prosecution;
2. The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
3. The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted (Article 20, paragraph 3);

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4. The case is not of sufficient gravity to justify further action by the Court.<sup>78</sup>

Determination of “unwillingness” is articulated in Article 17(2), having regard to the principles of due process recognized by international law, when one or more of the following exist, as applicable:

1. The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court, referred to in Article 5;
2. There has been an unjustified delay in the proceedings which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice;
3. The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner that, in the circumstances, is inconsistent with intent to bring the person concerned to justice.<sup>79</sup>

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<sup>78</sup> *Id.*, Art. 17(1).

<sup>79</sup> *Id.*, Art. 17(2).

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States now have an obligation under conventional or customary international law to prosecute certain crimes of international concern.

The Rome Statute also gives the ICC jurisdiction over military commanders and civilians in positions of superiority.<sup>80</sup> Under certain circumstances, they may be held individually liable for the crimes committed by their subordinates.<sup>81</sup> This is consistent with customary law. Military commanders will be criminally responsible even if they were not aware of the commission of crimes, but should have been.<sup>82</sup> The Rome Statute states:

1. A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
  - a) That military commander or person either knew or, owing to the circumstances at the time, should have

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<sup>80</sup> *Id.*, Art. 27-28.

<sup>81</sup> *Id.*, Art. 28.

<sup>82</sup> *Id.*

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known that the forces were committing or about to commit such crimes;

- b) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
2. With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court... as a result of his or her failure to exercise control properly over such subordinates.

The ICC has three divisions: Pre-Trial, Trial, and Appeals Chambers.<sup>83</sup> There are 18 judges who serve 9-year terms that are not renewable.<sup>84</sup> The Rome Statute requires that, in the selection of these judges, State parties assure a fair representation of female and male judges.<sup>85</sup> State parties are required to identify and nominate suitable women as candidates in order to meet this re-

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<sup>83</sup> *Id.*, Art. 34.

<sup>84</sup> *Id.*, Art. 35-36.

<sup>85</sup> *Id.*, Art. 36(8)(iii).

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quirement. The ICC can sentence imprisonment (including life sentences) for grave crimes as well as fines if conviction occurs. The death penalty is prohibited.<sup>86</sup> The Rome Statute has provided for the establishment of a Victims and Witness Unit within the Registry.<sup>87</sup> It requires the Prosecutor, Pre-Trial Chamber, and the Trial Chamber to protect victims and witnesses throughout the investigation and prosecution process. Reparations can be made to victims. The Rome Statute establishes a Trust Fund for this purpose into which money and properties are collected through fines, assets forfeiture, and the seizure of the proceeds of crimes.<sup>88</sup>

### III. PROSECUTION OF SEXUAL VIOLENCE CRIMES

Prosecution of sexual violence crimes within the ICC is a tremendous step forward for international law and the development of international customary law. The prosecution of rape and sexual violence as a separate and unique crime within the definition of a war crime, crime against humanity, and genocide can be considered a very significant step forward. Sexual violence crimes were not enumerated as grave breaches under the 1949

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<sup>86</sup> *Id.*, Art. 77.

<sup>87</sup> *Id.*, Art. 43(6).

<sup>88</sup> *Id.*, Art. 79.

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Geneva Conventions. The Geneva Conventions and the 1977 Additional Protocols to the Geneva Conventions cited only the harm to a woman's honor,<sup>89</sup> overlooking the real impact that sexual violence has on the physical and psychological state of its victims. This also contributes to the shame of the victim, and to the crime of the perpetrator. Because of these historical trends, under-investigation and under-prosecution of sexual crimes continued until very recently.

The statutes of the Tribunals for the Former Yugoslavia and Rwanda included rape as a crime against humanity but not, initially, as other categories of crime. The historical lack of enumeration of sexual violence crimes as separate prosecutable claims could be considered discriminatory because it treats the violence of these crimes with less seriousness than crimes that do not occur predominately against women. The ICTR did not include any charges of rape in its initial indictments. In 1977, Judge Navi Pillay was instrumental in questioning witnesses in the *Akayesu* case and evoking testimony of sexual violence that resulted in additional charges for the indictment of sexual violence and genocide. The sexual violence in the amended indictment led to the defendant's conviction for genocide for those acts. This was the first time that an international tribunal ruled

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<sup>89</sup> Fourth Geneva Convention, *supra* note 33; Protocol I, *supra* note 36.

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that rape and sexual violence constitutes genocide.<sup>90</sup> Because of the work of the ICTR and ICTY, the Rome Statute recognizes other forms of sexual violence in addition to rape, such as forced pregnancy and sexual slavery. The Rome Statute includes a new definition of enslavement, including the trafficking of prostitutes.<sup>91</sup>

The Rome Statute has codified rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and any other form of sexual violence as grave breaches of the Geneva Conventions, and as war crimes and crimes against humanity. Article 7 of the Rome Statute defines crimes against humanity as a “pervasive or systematic attack against any civilian population, requiring the perpetrator to have knowledge that such conduct was part of a widespread or systematic attack.”<sup>92</sup> If murder, extermination, enslavement, deportation, forcible transfer of the population, imprisonment, torture, or rape is committed as part of systematic or widespread attack against any civilian population with knowledge of the attack, it is now recognized as a crime against humanity under Article 7 of the Rome Statute. The Rome Statute of the ICC specifies “rape, sexual

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<sup>90</sup> Kelly Askin, *Legal Precedents in Rwanda Court*, CRIMES OF WAR MAGAZINE: The Tribunals (May 2001), at [http://www.crimesofwar.org/tribunals/Rwanda\\_print.html](http://www.crimesofwar.org/tribunals/Rwanda_print.html).

<sup>91</sup> Rome Statute, *supra* note 2, Art. 7(2)(c).

<sup>92</sup> *Id.*, Art. 7(1).

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slavery, enforced prostitution, forced pregnancy, enforced sterilization,” or any other form of sexual violence of comparable gravity as war crimes and crimes against humanity.

The Rome Statute has adopted specific investigative, procedural, and evidentiary rules to assist in establishing gender justice. Some of these changes were created through the work of the ICTY by the judges that adopted particular rules of procedure and evidence to protect against sexual violence crimes. Rule 96 provides that no corroboration of the victim’s testimony was required. Consent is not allowed as a defense except in limited circumstances, and no prior sexual conduct of the victim is introduced at trial.<sup>93</sup>

Article 68(1) requires the ICC to “take appropriate measures to protect the safety, physical and psychological well being, dignity, and privacy of victims and witnesses. The Court shall have regard to all relevant factors including age, gender, health, the nature of the crime, and particularly whether the crime involves sexual or gender violence or violence against children.”<sup>94</sup> Article 68(5) requires information to be withheld where the disclosure of evidence or information could lead to grave endangerment of the security of a witness

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<sup>93</sup> ICTY Rule 96.

<sup>94</sup> Rome Statute, *supra* note 2, Art. 68(1).

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or the witness's family and, instead, submit a summary of the information.<sup>95</sup> Article 75 allows the Court to award reparations to, or in respect of, victims. These reparations may include restitution, compensation, and/or rehabilitation upon request or by motion.<sup>96</sup> Article 69 allows the Court to include in-camera proceedings or the presentation of evidence by electronic means.<sup>97</sup>

### IV. THE ICC AND PROSECUTION OF SEXUAL VIOLENCE CRIMES: TWO EXAMPLES

#### A. Congo

During the five years of conflict in the Democratic Republic of Congo, tens of thousands of incidents of sexual violence have occurred. Soldiers and rebels have used sexual violence to scare the civilian population into submission, provide gratification for fighters, and punish civilians for supporting enemy forces and target persons of ethnic groups seen as the enemy.<sup>98</sup> In October 2004, humanitarian agencies estimated that eight to ten

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<sup>95</sup> Id., Art. 68(5).

<sup>96</sup> Id., Art. 75.

<sup>97</sup> Id., Art. 69(2).

<sup>98</sup> SEEKING JUSTICE: THE PROSECUTION OF SEXUAL VIOLENCE IN THE CONGO WAR, Vol. 17, No.1(A) (Human Rights Watch), March 2005 [hereinafter Congo].

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persons were being raped in the town of Bunia each day.<sup>99</sup> Women and girls stopped going to the fields to work due to the extent of rape. Rebels living in the forest abducted women and girls and kept them for months at a time to provide sexual services and “women’s work.”<sup>100</sup> In September 2004, a Catholic women’s center, Centre Olame, received over 200 new cases of sexual violence each month from parts of South Kivu.<sup>101</sup> Between August 2003 and January 2004, more than 550 rape victims were treated in Baraka.<sup>102</sup> Children as young as three years old had been raped.<sup>103</sup> Gang rape was frequently reported. Severe beatings, murder, and death after rape by gangs occurred.<sup>104</sup>

Congo ratified the Rome Statute in April 2002. In June 2004, the Office of the Prosecutor announced a formal investigation by the ICC into the situation in the Democratic Republic of Congo. The jurisdiction of the investigation of the ICC extends to crimes committed in the Congo since 1 July 2002. The reports brought to the Court focus on the rape, torture, forced displacement, and recruitment of child soldiers.

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<sup>99</sup> *Id.*, at 9.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*, at 24.

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The Congolese government, as a party to the 1949 Geneva Conventions and the Rome Statute of the ICC, is obligated to ensure that its criminal codes prosecute war crimes and crimes against humanity, including rape and sexual violence in accordance with Treaty provisions. The 1972 Military Justice Code of Congo does not have a specific provision on sexual violence.<sup>105</sup> The national government had used this Code to define and punish sexual violence crimes. The Congolese Criminal Code is valid for the armed forces. The Military Penal Code of 2002 does not have a basic provision on sexual violence, but such crimes may be punished under the Criminal Code.<sup>106</sup> The Military Penal Code includes sexual violence in its provision on crimes against humanity.

The 2002 Military Code remains incompatible with the Rome Statute and the Geneva Conventions because it fails to fully incorporate criminal provisions into Congolese law. A proposed draft law implementing the statute of the ICC would bring Congolese law into conformity with these

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<sup>105</sup> *Id.*, at 26.

<sup>106</sup> The Congolese Criminal Code, applies in both civilian and military courts, prohibits rape and indecent assault. Rape is defined as forcible sexual penetration of a female, and is punishable by a prison sentence of five to twenty years. Indecent assault is defined as sexual assault without penetration, and is punishable by a prison sentence of six months to twenty years. The length of punishment depends on the age of the victim and whether violence, ruse, or threats were used in committing the crime. Any sexual relations with a girl under the age of fourteen are statutory rape.

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international instruments. Despite the investigations and abilities of the ICC to prosecute, this would be a first and needed step in the Congolese judiciary in prosecuting sexual violence crimes within their own country. On 9 September 2005, the Council of Administrators adopted a draft ICC implementation bill.<sup>107</sup> The new legislation expands the jurisdiction of civilian tribunals to members of the armed forces accused of crimes against humanity or war crimes.

B. Darfur, Sudan

In March 2004, The United Nations Humanitarian Coordinator described Darfur in western Sudan as “the world’s greatest humanitarian crisis.”<sup>108</sup> Amnesty International reports that the attacks on civilians led to the displacement of at least 1.2 million persons.<sup>109</sup>

The United States Department of State found that more than 405 villages were completely destroyed, and 123 additional villages were substan-

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<sup>107</sup> Coalition for the International Criminal Court, Country Information: Democratic Republic of Congo, <http://www.iccnw.org/countryinfo/africa/congodemrep.html> (last updated 9 Sept. 2005). The bill now awaits adoption by the National Parliament. *Id.*

<sup>108</sup> *See generally, Darfur: Rape as a Weapon of War: Sexual Violence and Its Consequences* (Amnesty International), 19 July 2004.

<sup>109</sup> *Id.*

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tially damaged.<sup>110</sup> The UN High Commissioner for Refugees stated that approximately 200 thousand individuals fled to eastern Chad.<sup>111</sup>

Men typically escape villages when the Sudanese *Janjaweed* militia approaches because they will be killed if found. This leaves the women and children to fend for themselves. Women and children are raped, despite seeking the safety of refugee camps. Shortages of food, water, and firewood in these camps force young girls and women into the surrounding countryside where they are often raped by *Janjaweed* forces, security forces, and even those supposedly protecting refugee camps in Chad.<sup>112</sup> Not surprisingly, after the Government of Sudan increased the police forces in North Darfur to protect individuals against the *Janjaweed*, the incidents of sexual violence against women perpetrated by the police and army rose.<sup>113</sup>

During the Darfur attacks, as in Bosnia, rapes were often committed in front of others. This in-

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<sup>110</sup> U. S. DEPARTMENT OF STATE, DOCUMENTING ATROCITIES IN DARFUR, State Publication 11182, at 3 (Sept. 2004), [hereinafter Documenting Atrocities in Darfur]. One woman told the team that members of the Sudanese military and Janjaweed had raped her repeatedly in front of her father. *Id.* Her father was then dismembered in front of her. *Id.*

<sup>111</sup> *Id.*, at 3.

<sup>112</sup> Press release, United Nations, U.N. RIGHTS OFFICIALS TELL SECURITY COUNCIL INTERNATIONAL POLICE ARE REQUIRED IN SUDAN (30 Sept. 2004).

<sup>113</sup> SUDAN: SECURITY FORCES ATTACKING WOMEN SEEKING FIREWOOD (Refugees International), 13 Oct. 2004.

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cludes husbands, fathers, mothers, and children of the victims. The rapes included girls as young as 10 and women 70 years and older. Pregnant women were raped. The majority of victims were raped by multiple men.<sup>114</sup> Rapes by the *Janjaweed* included vaginal and anal penetration, and penetration with objects.<sup>115</sup> Assaults included beatings, cutting of the legs with knives, and sexual mutilation.<sup>116</sup> Women were killed after being raped, in some instances. As in the former Yugoslavia and Rwanda, the use of ethnic cleansing through forced pregnancy appeared. The *Janjaweed* berated women, telling them they were producing a “free” child and wiping out non-Arabs.<sup>117</sup> The *Janjaweed* abducted women and girls for use as sex slaves, where they were gang raped by multiple men or many times by the same man.<sup>118</sup> Women were held for a number of days and then released, typically naked. Reports arose of women and girls having been abducted for months, then forced to marry.<sup>119</sup>

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<sup>114</sup> Int’l Comm’n of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004*, (25 Jan. 2005) [hereinafter Commission of Inquiry on Darfur].

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

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The use of rape in Darfur is similar to what was done in Bosnia. Mass rapes create fear and restrict movement. Fear prevents individuals from going outside of their villages unless absolutely necessary. Trade and economic activity slows to a stop. The *Janjaweed* encircle a village, kill the men and boys, and rape the women and girls. This type of warfare also allows for easier attainment of military objectives, requiring fewer munitions. Property and livestock can be accumulated. Individuals running to escape are more easily killed and raped, and fewer military casualties occur. In addition, mass rape destroys community and family ties. As a result, virginity and chastity are highly valuable in Darfur.

The Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General found that widespread rape was committed against girls in all three States of Darfur.<sup>120</sup> These included rapes, gang rapes, abductions and confinement for several days with repeated rape occurrences, and other types of sexual violence. Some women and girls became pregnant during these attacks. In some instances, torture was used to prevent women from escaping.<sup>121</sup>

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

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International human rights law and international humanitarian law apply to the Darfur conflict. International human rights law applies and ought to protect individuals at all times. International humanitarian law applies only in situations of armed conflict. Sudan is bound by a number of international treaties, many of which specifically prohibit torture, rape, killing, and gross human rights violations.<sup>122</sup> Sudan is a signatory of the Rome Statute for the International Criminal Court, but has not yet ratified the Statute. As a signatory, Sudan must refrain from “acts, which would defeat the object and purpose of the Statute.”<sup>123</sup> Sudan is bound, under international humanitarian law, by the Geneva Conventions of 1949. Sudan is also bound by customary rules of international humanitarian law, clarified by the precedent set in 1995 by the ICTY Appeals Chamber in *Prosecutor v. Tadic*. The *Tadic* case held that the main body of international humanitarian law applies to internal conflicts as a matter

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<sup>122</sup> The International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Elimination of All Forms of Racial Discrimination (ICERD); and the Convention on the Rights of the Child (CRC). Sudan has signed but not ratified the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. Sudan has not ratified the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, or the Convention on the Elimination of Discrimination Against Women.

<sup>123</sup> Vienna Convention on the Law of Treaties, Art. 18, (22 May 1969), U.N.T.S. 331 (ratified by Sudan on 18 April 1990).

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of customary law, and that serious violations of such rules constitute war crimes.<sup>124</sup>

On 31 March 2005, the United Nations Security Council, under Chapter VII of the Charter of the United Nations, and in accordance with Resolution 1593, decided to refer the situation in Darfur to the Prosecutor of the ICC.<sup>125</sup> The vote was 11 in favor, with four abstentions by Algeria (which opposed any international trials), Brazil (a supporter of the ICC that objected to US exemptions for US citizens), China, and the United States.<sup>126</sup> Khartoum objected to this Resolution, calling it “unfair.”<sup>127</sup> The Sudanese embassy criticized the decision by the UN, and ignored the African Union initiative for the prosecution of war criminals to be tried in Khartoum.<sup>128</sup> The UN Resolution referred 51 war crime suspects to the ICC.

The Rome Statute gives the ICC jurisdiction when States fail to act. The ICC may exercise its jurisdiction only after it has established that the State in question is not able or willing to investigate or prosecute international crimes. Such is the

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<sup>124</sup> Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defense Motions for Interlocutory Appeal on Jurisdiction, paras. 96-127, 128-137 (2 Oct. 1995).

<sup>125</sup> U.N. SCOR, 5158th mtg., U.N. Doc. S/RES/1593 (31 Mar. 2005).

<sup>126</sup> Evelyn Leopold, *UN Sends Darfur Suspects to Hague Court for Trial*, REUTERS NEWS SERVICE, (1 Apr. 2005).

<sup>127</sup> Stephen Mbogo, *Sudan, African States Oppose International Trial for Darfur Suspects*, CNS NEWS (8 Apr. 2005).

<sup>128</sup> *Id.*

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case in Sudan. The Sudanese government failed to act in prosecuting sexual violence crimes and to bring perpetrators before the Courts for prosecution. In November 2004, outside the Abu Shouk camp, two girls (ages 12 and 14) were raped and beaten. The two girls went to the police to make an official complaint. Initially, the response of the local authorities was inadequate until the Commission insisted upon action.<sup>129</sup> The Commission found other incidents of inaction by local authorities in the vicinity of Kabkabiya, North Darfur. Women and girls were raped at gunpoint and left naked on the road.<sup>130</sup>

The Sudanese government established “rape committees” to investigate allegations of rape. The committees were formed on 8 August 2004 and began work 13 August 2004.<sup>131</sup> Representatives of the Attorney General and police also stated they

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<sup>129</sup> Commission of Inquiry on Darfur, *supra* note 115, para. 348.

<sup>130</sup> *Id.*

<sup>131</sup> See generally, IF WE RETURN, WE WILL BE KILLED: CONSOLIDATION OF ETHNIC CLEANSING IN DARFUR, SUDAN (Human Rights Watch), Nov. 2004. Human Rights Watch interviewed several members of these committees in Oct. 2004 in Khartoum, and one in Fashir. The three committees were all female and consisted of judges, police officers, attorneys, and other women in the criminal justice system. They stated that they had three weeks to prepare a report for the U.N. A U.N. representative witnessed an interview by one of the committees conducted in plain view of spectators and children in a displaced persons camp. The committees had no budget, no offices, no further tasks or meetings, or follow-up schedule. The committees concluded that Darfur had the same low rate of rape as before the conflict. No reports have ever been made public.

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were ready to receive rape complaints. The Attorney General's office in Fashir, North Darfur, went to the internally displaced camp of Zam Zam where rapes had been reported to international agencies.<sup>132</sup> It is doubtful that the government is committed to prosecution of rapes. The Attorney General's office, according to an NGO, displayed a hostile attitude to the allegations of rape in Zam Zam. They neither investigated the cases, nor believed that they occurred.<sup>133</sup> The government also refused to prosecute *Janjaweed* leaders.<sup>134</sup>

### C. Prosecuting Sexual Violence Crimes in Darfur under the Rome Statute

Sexual violence that occurred in Darfur fits many of the criteria for war crimes, crimes against humanity, enslavement, and genocide. The International Commission of Inquiry on Darfur found that 21 women were abducted during a joint attack by government forces and *Janjaweed* on Kanjew, West Darfur, in January 2004. The women were held for three months, and some became pregnant as a result of their confinement.<sup>135</sup> The actions of the *Janjaweed* and government forces, under the Rome Statute, constitute crimes against humanity, war crimes, grave breaches,

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*, at 24.

<sup>134</sup> *Id.*

<sup>135</sup> Commission of Inquiry on Darfur, *supra* note 115, para. 342.

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and genocide. Under Article 7(1)(g) “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity” is a “crime against humanity” when committed as part of a widespread attack directed against any civilian population.”<sup>136</sup> Under Article 7(2)(f), forced pregnancy is defined as the “unlawful confinement of a woman forcibly made pregnant with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.”

The ICTY Trial Chamber held in *Kordić and Cerkez* that a crime may be considered as “widespread” or committed on a large scale because of the “cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.”<sup>137</sup> This may depend on the number of victims.<sup>138</sup> In order for rapes to be systematic, the criminal acts must have an “organized nature” and there must be an “improbability of their random occurrence.”<sup>139</sup> Additionally, the “number of victims, the nature of the

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<sup>136</sup> Rome Statute, *supra* note 2, Art. 7.

<sup>137</sup> See Prosecutor v. Kordić & Cerkez, Case No. IT-95-14/2, Judgement, 179 (26 Feb. 2001).

<sup>138</sup> See, e.g., Prosecutor v. Blaskić, Case No. IT-95-14, Judgement, para. 206 (3 Mar. 2000); Prosecutor v. Naletilić & Martinović, Case No. IT-38-94-T, Judgement, para 236 (31 Mar. 2003); Prosecutor v. Kayishema & Ruzindana, Case No. ICTR 95-1-T, Judgement, para. 123 (21 May 1999).

<sup>139</sup> *Naletilić*, Case No. IT-38-94-T, para. 236.

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acts, and the possible participation of officials or authorities or any identifiable patterns of crimes, could be taken into account to determine whether the attack satisfies either or both requirements of a ‘widespread’ or ‘systematic’ attack.”<sup>140</sup> Kofi Annan stated to the United Nation’s General Assembly: “In Darfur, we see whole populations displaced, and their homes destroyed, while rape is used as a deliberate strategy.”<sup>141</sup> One apparent motive of the *Janjaweed* is to use rape to destroy the non-Arab society.

The Commission found that a sufficient number of rapes had been committed, and “that these attacks created fear among women and girls which has forced them to stay in or return to their villages of origin and led to displacement.” The Commission also found sufficient evidence that rape and sexual violence continued to be systematically perpetrated against women during their displacement, and that these patterns of rape and sexual violence were used by the *Janjaweed* and government soldiers as a “deliberate strategy... to achieve certain objectives, including terrorizing the population, ensuring control over the movement of the IDP population, and perpetuating its displacement. Rape [was] used as a means to de-

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<sup>140</sup> Prosecutor v. Kunarac, Kovac, & Vokovic, Case No. IT-96-23&23/1, Judgement, para. 95 (12 June 2002).

<sup>141</sup> The Secretary-General, *Secretary-General’s Address to the General Assembly* (21 Sept. 2004).

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moralize and humiliate the population.”<sup>142</sup> The use of rape fits the definition of a “widespread and systematic” crime, set by *Kordic* and *Cerkez* and is, thus, a crime against humanity.

Under Article 8(2)(a) and 8(b)(xxii), war crimes are defined as “grave breaches of the Geneva Convention,” including “committing rape, sexual slavery, enforced prostitution, forced pregnancy..., enforced sterilization, or any other form of sexual violence.”<sup>143</sup> The Commission found that in Kailek, South Darfur region, up to 30 thousand people were confined for about 50 days. Women and children were separated from the men, confined to an area around a mosque, and taken away by their captors to be raped. They were subjected to gang rapes that lasted for protracted periods of time. Many were left naked.<sup>144</sup>

In Wadi Tina, North Darfur, a victim who had been raped 14 times over a one week period, described her abduction. She was taken to Wadi Tina where she “saw at least 95 women... [and] all the women were naked. Soon after arrival we were forced at gunpoint to take off our clothing. A very large group of *Janjaweed* arrived at the Wadi. They selected a woman each and raped

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<sup>142</sup> *Id.*, para. 353.

<sup>143</sup> Rome Statute, *supra* note 2, Art. 8.

<sup>144</sup> Commission of Inquiry on Darfur, *supra* note 115, para. 343.

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them. Over a period of a week, I was raped 14 times by different *Janjaweed*. I told them to stop. They said ‘you are women of Tora Bora and we will not stop this.’ We were called ‘slaves’ frequently and beaten with leather straps, punched, and slapped. We were humiliated in front of other women and were forced to have sex in front of them.”<sup>145</sup>

These incidents should be considered war crimes, as defined in the Rome Statute, because they constitute “torture or inhuman treatment,”<sup>146</sup> “willfully causing great suffering, or serious injury to body or health,”<sup>147</sup> and “unlawful deportation or transfer or unlawful confinement.”<sup>148</sup> The women were confined without the ability to escape for long periods of time and used as sexual slaves. Enslavement, as defined by the Statute, is “the exercise of any or all of the powers attaching to the ownership over a person.”<sup>149</sup> These incidents fall under the definitions of “deportation or forcible transfer of population.”<sup>150</sup> The *Janjaweed* committed acts of sexual slavery. In March 2004, 150 soldiers abducted and raped 16 young girls from Kutum, North Darfur. Similar reports exist of mass

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<sup>145</sup> *Id.*, para. 345.

<sup>146</sup> Rome Statute, *supra* note 2, Art. 7(ii).

<sup>147</sup> *Id.*, Art. 7(iii).

<sup>148</sup> *Id.*, Art. 7(vii).

<sup>149</sup> *Id.*, Art. 7(2)(c).

<sup>150</sup> *Id.*, Art. 7(2)(d).

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rape and sexual violence against women and girls confined in Mukjar, West Darfur and Kailek, South Darfur. Thirty five female students were abducted and raped near Tawila in February 2004.<sup>151</sup>

The use of rape as a weapon to displace civilians falls under the definitions of crimes against humanity and war crimes. Article 7(1)(d) includes “deportation or forcible transfer of population,” and defines forced displacement as the “expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law”<sup>152</sup> and (Article 8 (War Crimes) (2)(a)(vii)), the “unlawful deportation or transfer or unlawful confinement.”<sup>153</sup> The Commission found sufficient evidence that rape and sexual violence continued to be “systematically perpetrated against women during their displacement, so as to perpetuate the feeling of insecurity among them and fear of leaving internally displaced persons sites.”<sup>154</sup> The Commission cites an incident that occurred outside the Krinding IDP camp, West Darfur, in September 2004. A group of women were cutting firewood in Giri where they had been living for 10 months. Four men approached and raped them, including girls as young

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<sup>151</sup> Commission of Inquiry on Darfur, *supra* note 115, para. 341.

<sup>152</sup> Rome Statute, *supra* note 2, Art. 7(2)(d).

<sup>153</sup> *Id.*, Art. 8(2)(a)(vii).

<sup>154</sup> Commission of Inquiry on Darfur, *supra* note 115, para. 352.

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as eight years old.<sup>155</sup> The Commission states that incidents such as these are used by the *Janjaweed* and government soldiers as a “deliberate strategy with a view to achieve certain objectives including terrorizing the population, ensuring control over the movement of the IDP population and perpetuating its displacement.”<sup>156</sup> Rape was used to demoralize and humiliate the population. In an attack on Kalokitting, South Darfur, women were raped while fleeing the village; some of them were gang raped and killed.<sup>157</sup> Outside the Zam Zam IDP camp, North Darfur, two groups of women were raped when they went to sell firewood in the market in El Fashir in October 2004.<sup>158</sup>

### V. CONCLUSION

The definition and prosecution of sexual violence crimes has progressed. The ICTY determined that the Foca rapes constitute a war crime under humanitarian law. Rape is now considered torture. The ICTR Court drew the link between rape and torture: “like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or

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<sup>155</sup> *Id.*, para. 351.

<sup>156</sup> *Id.*, para. 353.

<sup>157</sup> *Id.*, para. 347.

<sup>158</sup> *Id.*, para. 350.

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destruction of a person. Like torture, rape is a violation of personal dignity.” Torture is a crime against humanity within the Rome Statute. The International Criminal Tribunal for Rwanda in the *Akayesu* decision set the foundation for *Kunarac* to consider rape as genocide. The *Kunarac* decision considers rape and sexual enslavement as a war crime. The Rome Statute makes it more likely that rape and sexual violence crimes committed during war and conflict will no longer be invisible, un-prosecuted, and ignored.

The sexual violence crimes that occurred in Rwanda and the former Yugoslavia were horrific. Prior to the Tribunals for Rwanda and the former Yugoslavia, sexual violence acts were not always considered capable of constituting torture, enslavement, war crimes, crimes against humanity, or genocide. Rape and sexual violence crimes were not prosecuted as separate criminal acts under international law.

The ICTR and the ICTY grappled with these crimes and formulated new concepts. The *Akayesu* decision began the progress of recognizing rape as a form of genocide. The enabling statutes of the ICTR and ICTY had the foresight to prosecute rape as a separate war crime and crime against humanity. The *Kunarac* court held that systematic rape during armed conflict is both a war crime and a crime against humanity, and punishable as such. The *Kunarac* decision elimi-

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nates any misleading ideas that rape during conflict is tolerated or overlooked as a crime within international law. The ICTY Trial Chamber created and adopted a definition of rape into customary international law as “a form of aggression” whose central elements “cannot be captured in a mechanical description of objects and body parts.”<sup>159</sup>

A new legal concept for sexual violence crimes during war and conflict is solidified through the Rome Statute. It raises the once seemingly invisible and inevitable crimes of rape and sexual violence during conflict into recognizable and prosecutable offenses of customary international law as war crimes, crimes against humanity, or genocide. The pressure to incorporate these new concepts into signatories’ national laws forces nations to consider the significance of these crimes and their victims, including women and their families.

Bringing perpetrators of sexual violence before the International Criminal Court (whether the crimes took place in the Congo, Sudan, or wherever the next such conflict arises) gives these age-old crimes new visibility, recognition, and perhaps assists in their prevention. The special requirement of gender sensitivity in the selection of judges in the International Criminal Court may

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<sup>159</sup> Dragoljub Kunarac, Case Nos. IT-96-23-T & IT-96-23/1-T, paras. 596-98.

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better affect the interpretation of law and the development of legal standards that protects women against sexual violence. The requirement that experts in gender violence crimes advise the Courts can only add to the better understanding of these crimes and how to make their victims feel whole again. The provision that sexual violence victims are to receive reparations may not heal the physical and psychological damage inflicted by what they endured, but it reiterates that these crimes will not be tolerated by the international community or allowed to occur with impunity, as they have in the past.

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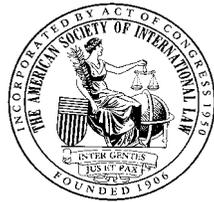
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