Making Rapists Pay: Lessons from the Bosnian Civil War

William M. Walker
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I. INTRODUCTION

Wartime rape has long been prohibited by international law.1 Wartime rapists,2 however, have all too often been able to avoid prosecution for their crimes.3 Human rights monitors even today identify a disturbing "history of impunity" with respect to wartime rape.4

Sadly, the record from the Bosnian Civil war has mirrored this pattern5 despite the establishment of the International Tribunal

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2 See generally Madeline Morris, By Force of Arms: Rape, War and Military Culture, 45 Duke L.J. 651, 692-98 (1996) (hypothesizing that wartime rape results, in part, from view that military personnel are banded group with distinct cultural factors, which intensify in combat situations).


5 See Kohn, supra note 4, at 199 (estimating Serbian forces having raped between 20,000 and 50,000 Bosnian Muslim women).
for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 ["Tribunal"]. The Tribunal's establishment in 1993 offered hope that rapists from that war, and those with command responsibility who encouraged them, would be brought to justice. This time things promised to be different.

The Tribunal, however, has been unable to deliver on that promise. It is not that international law does not prohibit wartime rape; it clearly does. It is not that the Tribunal's mandate to prosecute rapists is too limited; it is not. Rather, as the Tribunal's first trial has recently shown, rapists can avoid punishment by intimidating witnesses and victims. The ability of rapists to avoid prosecution is also inextricably linked to the failure to indict more suspects and make more arrests, particularly of prominent indictees such as former Bosnian Serb president Radovan

6 See id. at 201 (discussing international community's failure to alleviate problem); see also Bruce Fein, A Sorry Surrogate for Bayonets; Indicting Bosnian Serbs for War Crimes in a U.N. Tribunal, LEGAL TIMES, Aug. 7, 1995, at 22 (calling international criminal tribunal for former Yugoslavia "surrogate for bayonets" issuing idle indictments and only one arrest).

7 See Sharon A. Healey, Prosecuting Rape Under the Statute of the War Crimes Tribunal for the Former Yugoslavia, 21 BROOK. J. INT'L L. 327, 328 (1995) (noting Tribunal's recognition and prosecution of rape as war crime as both violation of Geneva Conventions and crime against humanity); see also Michael A. Riccardi, U.S. Style Justice Tested in Bosnia War Crimes Trial, Robreno System and Accused Both Face Judgment at the Hague, THE LEGAL INTELLIGENCER, May 13, 1996, at 3 (examining tribunal and trial of Bosnian Serb prison camp guard); Wirpsa, supra note 3, at 15 (reporting that abuses against women have traditionally been excused or ignored).

8 See Kathleen M. Pratt & Laurel E. Fletcher, Time for Justice: The Case for International Prosecutions of Rape and Gender-Based Violence in the Former Yugoslavia, 9 BERKELEY WOMEN'S L.J. 77, 79 (1994) (noting problems arise because rape is not deemed "crime against humanity," is difficult to investigate, and is not prosecutable unless "mass and systematic"); see also Mark Rice-Oxley, Tribunal Depends on the Kindness of Foes, NAT'L L.J., June 3, 1996, at A10 (noting tribunal's failure to obtain physical custody of suspected criminals before trial); Hartley Shawcross, Order NATO to Round Up Suspects Indicted for War Crimes, INT'R. HERALD TRIB., May 23, 1996, at 8 (predicting tribunal will fail unless it can arrest and prosecute those indicted for serious war crimes in former Yugoslavia).

9 See Pratt & Fletcher, supra note 8, at 100 (noting reluctance on part of survivors of rape to discuss it due to fear of retaliation and stigma associated with rape in Bosnian, Croatian, and Serbian communities); see also Terry Atlas, U.N. Will Pursue War Crimes Trials for Bosnia Rapes War Crimes, CHI. TRIB., Jan. 30, 1994, at 1 (attributing rape survivor's reluctance to talk to fear, stigmatization, and well-being of family members remaining in Bosnia).

10 See Fein, supra note 6, at 22 (advocating use of force as most effective way to obtain custody over indicted suspects); Rice-Oxley, supra note 8, at A10 (detailing Bosnian Serbs' refusal to cooperate with tribunal along with U.N. Security Council's failure to invoke its power).
Karadzic\textsuperscript{11} and former Bosnian Serb army commander Ratko Mlatic.\textsuperscript{12} As long as such individuals remain at large in Bosnia,\textsuperscript{13} they symbolize that there is no justice and that victims of war crimes remain in danger.

The solutions for this dilemma are both simple and difficult and apply not only to rape prosecutions, but to the prosecution of other war crimes as well. All depend on the will of the international community for their effective implementation.

Several things can be done. One is to arrest indicted rapists, particularly high profile suspects. Not only will that hinder the suspects' ability to intimidate or arrange for the intimidation of victims and witnesses, it will increase the confidence of the victims and witnesses in the Tribunal. The Tribunal should also have the authority to prosecute people who intimidate victims and witnesses. Without such measures, the only way to insulate victims and witnesses from their tormentors is through relocation and grants of asylum. The importance of ending the history of impunity for wartime rapists, and the magnitude of the crimes committed in Bosnia, demand decisive action.

II. THE PROBLEM

A. Rape as a Weapon in the Bosnian Civil War

Widespread, systematic rape calculated to attain strategic military objectives characterized the conflict in Bosnia-Hercegovina. From its outset, the war was waged:

[ Against civilians who have been subjected to violent and abusive practices on the basis of nationality. Crimes have been committed by all sides, but the chief offenders have been Serbian military and paramilitary forces. The aim of their vicious policy of "ethnic cleansing" has been to rid an area of an "enemy ethnic group" through murder, forced displacement,

\textsuperscript{11} See Philip Smucker, Support for Karadzic, NEWSDAY, July 14, 1997, at A5 (noting Karadzic still remains at large and is popular with Bosnian Serbs). \textit{See generally} Grace Halsell, Human Rights Suit Came as Surprise to Bosnian Serb Leader, DALLAS MORNING NEWS, Feb. 24, 1993, at A14 (writing of lawsuit filed in federal court in New York prepared by three U.S. human rights groups on behalf of two Muslim teenagers alleging they were raped by Serb militias controlled by Radovan Karadzic).

\textsuperscript{12} See Kohn, supra note 4, at 214 (noting prosecution of high level leaders may be compromised if peace treaty is worked out).

\textsuperscript{13} \textit{See, e.g.}, Richard Dicker, World Needs an International Criminal Court, NAT'L L.J., May 6, 1996, at A17 (contending that delays, inefficiency, and selectivity inherent in ad hoc tribunals allow criminals to escape justice).
deportation, detention or confinement to ghetto areas, destruction of villages and cultural and religious objects of the "enemy" ethnic group. Mass rape of women has also been used as a tool of "ethnic cleansing," meant to terrorize, torture and demean women and their families and compel them to flee the area.14

"By attacking and terrorizing individual women, Serb soldiers and paramilitary forces sent the message to the entire community that no one is or will be safe from violence. As a result, entire families and villages have fled."15 Descriptions of the rapes make grim reading. According to human rights monitors:

... [c]ombatants for each of the parties to the conflict in Bosnia-Hercegovina have raped women and girls in their homes, in front of family members and in the village square. Women have been arrested and raped during interrogation. In some villages and towns, women and girls have been gathered together and taken to holding centers — often schools or community sports halls — where they are raped, gang-raped and abused repeatedly, sometimes for days or even weeks at a time. Other women have been taken seemingly at random from their communities or out of a group of refugees with whom they are traveling and raped by soldiers. Whether a woman is raped by soldiers in her home or is held in a house with other women and raped over and over again, she is raped with a political purpose — to intimidate, humiliate and degrade her and others affected by her suffering. The effect of rape is often to ensure that women and their families will flee and never return. Rape by Bosnian Serb soldiers has been particularly systematic and widespread.16

Such abuses occurred with the apparent knowledge and approval of people with command responsibility. Bosnian Serb commanders, for example, allegedly claimed that the rape of Muslim women was "good for raising the fighters’ morale."17 Some such

14 See Woman's Human Rights, supra note 4, at 8-25 (asserting that mass rape is tool of ethnic cleansing); see also Pratt & Fletcher, supra note 8, at 85-86 (detailing gender specific atrocities committed by Bosnian Serbs).
15 Woman's Human Rights, supra note 4, at 25 (reporting that fear of future violence has spread through families and villages after women were raped); see also Pratt & Fletcher, supra note 8, at 86 (noting rape created climate of fear in many villages).
16 Woman's Human Rights, supra note 4, at 10.
17 See M.A. Stapleton, Panel Urges War-Crimes Prosecution in Rapes, Chi. Daily L. Bull., Apr. 5, 1996, at 3 (noting goal of bordello camps was not to punish women, but to provide sex for men).
individuals have denied the reports of mass rapes.\textsuperscript{18} For example, "Radovan Karadzic, leader of the Bosnian Serbs, denied reports of widespread rape by his troops, admitting only that 'psychopaths' were responsible for less than twenty rapes."\textsuperscript{19} Such statements do not withstand scrutiny:

The rape of women in an organized fashion — whether in buildings where they are kept for the purpose of being raped or in camps where they are detained with family members — establishes that local commanders must know that their soldiers are raping women and do nothing to stop these abuses.\textsuperscript{20}

Indeed, "[t]he public nature of the abuses and the frequency with which they [took] place indicate[d] that individual soldiers and military units [did] not anticipate disciplinary action by their superiors."\textsuperscript{21} As of August 1995, "Human Rights Watch [was] not aware of any case in which Bosnian Serb forces guilty of abuses have been punished by their superiors for their crimes."\textsuperscript{22} Even Serbs from Serbia were reported to have crossed the Bosnian border and "were responsible for looting, raping, beating and otherwise terrorizing non-Serbs" in Bosnia.\textsuperscript{23}

\section*{B. The United Nations Act}

Reports of the systematic and widespread use of these and other crimes in Bosnia led to an international consensus on the need to prosecute the perpetrators.\textsuperscript{24} Beginning in 1992, a string of

\textsuperscript{18} See Stephen Schwartz, Rape as a Weapon of War in the Former Yugoslavia, 5 Hastings Women's L.J. 69, 70 (1994) (stating that Serbian leaders denied that rapes happened).

\textsuperscript{19} See Women's Human Rights, supra note 4, at 4 (citing Roy Gutman, Rape Camps: Evidence in Bosnia Mass Attacks Points to Karadzic's Pale, Newday, Apr. 19, 1993, at 7, 31). But see Martin Flumenbaum & Brad S. Karp, War Crimes Jurisdiction, N.Y.L.J., Oct. 25, 1995, at 3 (citing Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1996)) (reporting on allegations that Karadzic "personally planned and ordered a campaign of murder, rape, forced impregnation, and other forms of torture designed to destroy the religious and ethnic groups of Bosnian Muslims and Bosnian Croats...').

\textsuperscript{20} Women's Human Rights, supra note 4, at 10.

\textsuperscript{21} Id. at 9.

\textsuperscript{22} Id.


\textsuperscript{24} See Jennifer Green et al., Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique, 5 Hastings Women's L.J. 171, 175 (1994) (noting pronounced international outcry for action to punish human rights violators in former Yugoslavia to put pressure on U.N. to establish international tribunal).
United Nations Security Council resolutions condemned in increasingly strong language the brutality of the Bosnian war, particularly the practice of ethnic cleansing and its inherent abuse of civilians. A report from the Commission of Experts established by the U.N. Secretary-General pursuant to Security Council Resolution 780 confirmed the widespread use of rape as part of the phenomenon of "ethnic cleansing."26

Finally, in 1993, the United Nations Security Council decided "that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."27 Again, after strongly condemning ethnic cleansing and the "massive, organized and systematic detention and rape of women,"28 the Security Council, on May 25, 1993, formally endorsed the recommendations of the Secretary-General on the structure, jurisdiction and competence of the Tribunal.29 The first international court for the prosecution of war crimes since the World War II Nuremberg and Tokyo tribunals was born and the stage was set for it to begin the prosecution of, among other things, rape as a war crime.30

C. The Tribunal Acts

After a series of delays caused by the selection of judges, the drafting of rules of procedure and evidence, and a first prosecutor

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who critics claimed did “nothing”,\(^\text{31}\) the Tribunal’s energetic second chief prosecutor, Richard Goldstone, finally began to indict suspects, including for rape.\(^\text{32}\) Human rights monitors applauded ["t]he stated commitment of the judges and chief prosecutor for the war crimes tribunal ... to prosecuting rape as a war crime," a commitment that marked “a critical turn away from accepting rape in war."\(^\text{33}\)

Early indictments charged that in May 1992, Muslim residents were forced to flee their homes when Bosnian Serb forces began intensive shelling of Muslim areas in the Opstina Prijedor in Bosnia-Hercegovina. Many Muslims surrendered or were captured by Serb forces. The Serbs then led the Muslims and any Croats they could locate to nearby Serb prison camps. En route, many Muslims and Croats were allegedly pulled from the marching columns, beaten and shot on the spot.\(^\text{34}\)

From approximately May until August of 1992, Serb forces confined more than 3,000 of these Muslims and Croats in a camp situated in a former mining complex at Omarska near the town of Prijedor.\(^\text{35}\) Approximately forty women were detained at Omarska; the remaining prisoners were men.\(^\text{36}\) There, the Serb forces allegedly “killed, raped, sexually assaulted, beat and otherwise mistreated the prisoners.”\(^\text{37}\) Rapes were purportedly committed “regularly and openly” at the Omarska camp.\(^\text{38}\) Both male and fe-


\(^\text{32}\) See Indictment of Nikolic, reprinted in 34 I.L.M. 996, 996-1010 (1995). Dragan Nikolic was charged with grave breaches of the Fourth Geneva Convention, violations of laws or customs of war, and crimes against humanity against the civilian population. Id. The first indictment did not issue until November 7, 1994. Id.

\(^\text{33}\) Women’s Human Rights, supra note 4, at 4. But see Kohn, supra note 4, at 202 (reporting that Bosnian Serb leader, Radovan Karadzic has vowed that Serb-controlled territory in Bosnia will not cooperate in extradition of suspects).

\(^\text{34}\) See International Criminal Tribunal for the Former Yugoslavia: Indictments Against Meakic & Others & Tadic & Others, reprinted in 34 I.L.M. 1011, 1014, par. 2.1; 1028, par. 2.1 (1995) [hereinafter Meakic Indictment & Tadic Indictment] (recounting events of May 1992).

\(^\text{35}\) See id. at 34 I.L.M. at 1034, par. 1, 1028, par. 1 (detailing events of May 25, 1992).

\(^\text{36}\) See id. at 1014, par. 2.3, 1029, par. 2.3 (asserting that Serb forces rounded up Muslims and Croats and sent them to camps).

\(^\text{37}\) See id. at 1014, par. 1, 1029, par. 2.6 (detailing assaults that were committed in Omarska “camp”).

\(^\text{38}\) See Meakic Indictment, supra note 34, at 1017, par. 19.2 (charging Meakic’s subordinates with war crimes).
male prisoners were victims.\textsuperscript{39} According to his indictment, Mladen Radic, a commander who supervised one of the three shifts of guards at the Omarska camp,\textsuperscript{40} was one of the alleged perpetrators:

During June and July, 1992, Mladen Radic repeatedly subjected "A" to forcible sexual intercourse. The first occasion was on or about the night of 25 June 1992. Mladen Radic took "A" to a room downstairs in the administration building, forced her on a table and subjected her to forcible sexual intercourse. Two or three nights later, Radic again called "A" out of the room where she slept and again subjected her to forcible sexual intercourse. On at least three more occasions during June and July 1992, Mladen Radic called "A" out of the room in the administration building where she slept and subjected her to forcible sexual intercourse.\textsuperscript{41}

The indictment further alleged that between early June and August 3, 1992, a guard named Gruban on Radic's shift "repeatedly forced 'F' from the room where she was sleeping, took her to another room on the first floor of the administration building in the Omarska camp and subjected her to forcible sexual intercourse."\textsuperscript{42} The indictment alleged that the ordeal of the woman known as "F" continued at the hands of other Serbs at the Omarska camp:

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- Between early June and 3 August 1992, Predrag Kostic, a guard at the Omarska camp, forced 'F' from the room where she was sleeping, took her to another room on the first floor of the administration building in the Omarska camp and subjected her to forcible sexual intercourse;\textsuperscript{43}

- Sometime between early June and 3 August 1992, "F" was taken to the Separacija building at the entrance to the

\textsuperscript{39} See id. at 1014, par. 2.6, 1029, par. 2.6 (alleging assaults against both men and women); see also Laurel Fletcher et al., No Justice, No Peace: Accountability for Rape and Gender-Based Violence in the Former Yugoslavia, 5 HASTINGS WOMEN's L.J. 89, 95 (1994) [hereinafter No Justice, No Peace] (asserting there is evidence that Muslim men were also subjected to various forms of sexual assault); Schwartz, supra note 18, at 70. (claiming women, girls, children, and men have all been victims of sexual terror).

\textsuperscript{40} See Meakic Indictment & Tadic Indictment, supra note 34, at 1015, par. 6 (noting Meakic's position as shift commander gave him great authority).

\textsuperscript{41} Id. at 1019, par. 22.1 (relating charges brought against Mladen Radic).

\textsuperscript{42} Id. at 1023, par. 25.1 (recounting Gruban's repeated rape of "F" between early June and August 3, 1992).

\textsuperscript{43} Id. at 1024, par. 26.1 (recounting abuse of "F" by Kostic, another guard).
Omarska camp and placed in a room where Mirko Babic subjected “F” to forcible sexual intercourse.\textsuperscript{44}

—Sometime between early June and 3 August 1992, “F” was taken to the Separacija building at the entrance to the Omarska camp and placed in a room where Dusan Tadic subjected “F” to forcible sexual intercourse.\textsuperscript{45}

The camp commanders, deputies, guard shift commanders, their subordinates and others were also indicted because of their alleged roles as “part of a widespread or large-scale or systematic attack directed against a civilian population, specifically the Muslim and Croat population of the Prijedor district.”\textsuperscript{46}

\textbf{D. Setbacks to Prosecution}

In May 1996, the Tribunal began its first trial, that of Dusan Tadic.\textsuperscript{47} Tadic, among other things, was a guard at the Omarska camp who was indicted for his alleged commission of the rape of the woman known as “F”.\textsuperscript{48} The Tadic trial was to have been the first in which rape was prosecuted as a war crime by an international tribunal in Europe. Unfortunately, the prosecution was forced to drop the rape charge because the victim refused to testify, claiming that threats had been made against her and her family.\textsuperscript{49}

That failure was a serious setback for the Tribunal, which by the end of 1996, had indicted 74 suspects but had been able to

\textsuperscript{44} Id. at 1026, par. 30.1. (noting charge against Babic, who was not guard at camp, but was one of group of other Serbs who allegedly, with permission of camp commanders, entered camp “where they beat or otherwise physically abused prisoners”); id. at 1015, par. 8 (noting accused who entered camp and abused prisoners).

\textsuperscript{45} Tadic Indictment, supra note 34, at 1013, par. 4.1 (recounting purported Tadic abuse of “F”).

\textsuperscript{46} Meakic Indictment, supra note 34, at 1016, par. 15 (noting alleged crimes against humanity were part of systematic attack against civilians).

\textsuperscript{47} See War Crimes and Punishment, supra note 30, at 30; see also Riccardi, supra note 7, at 3 (noting trial against Dusan Tadic, accused of murder, sexual assault and crimes against humanity).

\textsuperscript{48} Tadic Indictment, supra note 34, at 1030, pars. 4.1-4.2.

\textsuperscript{49} See Tyler Marshall, International Court Opens Bosnia War Crimes Trial, L.A. TIMES, May 8, 1996, at A7. “The fact that witnesses have said they wouldn’t testify because of fears for their family is an indicator that the presence of senior officials still at large not only undercuts human rights in the former Yugoslavia but also hampers the work of the tribunal.” Id. (citing Richard Dicker, an associate counsel at Human Rights Watch in New York).
prosecute only two and had only seven in custody. It was an even more serious setback for the prosecution of rape in Bosnia. That was not the only problem with the prosecution of Tadic. One of the prosecution's star witnesses recanted his testimony against Tadic, maintaining that he had been forced to lie by the Bosnian Muslim police.

III. The Law

A. Modern International Legal Standards Clearly Prohibit Wartime Rape

Modern humanitarian law leaves little doubt that wartime rape is illegal.

Rape in internal armed conflicts such as the Bosnian civil war is prohibited by Article 3 common to all four of the 1949 Geneva Conventions. Common Article 3 by its terms applies to "armed conflict not of an international character." Although rape is not

50 See Tracy Wilkinson, Bosnia Croat Sentenced in Massacre War Crimes: Ex-soldier Gets Ten Years in Killings of Muslims at Srebrenica, L.A. TIMES, Nov. 30, 1996, at A13. The other prosecution involved Drazen Erdermovic, a Bosnian Croat in the Bosnian Serb armed forces involved in the massacre of Bosnian Muslims after the Bosnian Serbs captured the United Nations "safe haven" of Srebrenica in Eastern Bosnia in 1995. Id. Erdermovic cooperated with prosecutors and pled guilty to the indictment against him. Id. On November 29, 1996 he was sentenced to ten years in prison. Id. Erdermovic's case marked the first international sentencing for war crimes since the end of World War II. Id.

51 See DIE ZEIT, Nov. 8, 1996, at 1. As of November, 1996, 74 purported war criminals had been indicted but only seven were in custody. Id.; Bosnian Croats Surrender to U.N. War Crimes Tribunal, BALT. SUN, Oct. 7, 1997, at A9. This number has slightly improved; today, of 77 indicted suspects, 20 are in custody. Id.; see also James Podgers, The World Cries for Justice, 82 APR-A.B.A. J. 52, 53 (1996). Tadic later became the first person convicted of war crimes by the international tribunal. Id.; Lauren Comiteau & Gilliam Sharpe, Serb Gets 20 Years for War Crimes, NEWSDAY, July 15, 1997, at A7. He was sentenced to 20 years in prison. Id.

52 DIE ZEIT, Nov. 8, 1996, at 1 (one of prosecution's chief witnesses recanted his testimony, maintaining that Bosnian Muslim police had forced him to lie).

53 See Rape as a War Crime, supra note 1, at 425. "Rape by soldiers has of course been prohibited by the law of war for centuries, and violators have been subjected to capital punishment under national military codes, such as those of Richard II (1385) and Henry V (1419)." Id.; see also THEODOR MERON, HENRY'S WARS AND SHAKESPEARE'S LAWS: PERSPECTIVES ON THE LAW OF WAR IN THE LATE MIDDLE AGES 143-144 (1993) [hereinafter HENRY'S WARS AND SHAKESPEARE'S LAWS]; Francis Lieber, Instructions for the Government of Armies of the United States in the Field, art. 44, reprinted in THE LAWS OF ARMED CONFLICTS 3 (Detrich Schindler & Jiri Toman eds., 1988). The Lieber Instructions, written to govern the conduct of the U.S. armed forces in the U.S. Civil War, also explicitly prohibited rape. Id.

prohibited by name in Common Article 3, that article prohibits "violence to life and person" and "outrages upon personal dignity, in particular humiliating and degrading treatment" against "[p]ersons taking no active part in the hostilities." The basic, minimum rights guaranteed by Common Article 3 have achieved such universal and unquestioned recognition that Common Article 3 has been found by the International Court of Justice to be customary international law. The language of Common Article 3 unambiguously covers rape, which by its nature is an extremely violent crime and is arguably the worst "outrage upon personal dignity" imaginable.

Other international humanitarian law specifically prohibits rape in internal armed conflicts. For example, the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Con-


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:

(I) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, 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:

(a) violence to life and persons, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for...

Id.

55 See Geneva Convention IV, supra note 54 (delineating provisions that bind each party in conflict); see also The Prosecution of International Crimes 283 (Roger S. Clark & Madeline Sann eds., 1992) (referring to ruling from International Court of Justice in Nicaragua v. U.S. that Common Article 3 principles constitute "elementary consideration of humanity" that should not be breached in armed conflict regardless of its national or international character).

states in article 4 (2) that “the following acts . . . are and shall remain prohibited at any time and in any place whatsoever:

. . . (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault . . . .” Protocol II specifically mentioned rape because it was deemed necessary to “reaffirm [ ] and supplement[ ] Common Article 3 . . . [because] it became clear that it was necessary to strengthen . . . the protection of women . . . who may also be the victims of rape.”

In addition, Article 27 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 specifically states that “[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.”

Furthermore, Article 146 of Geneva Convention IV requires parties to the Convention “to enact any legislation necessary to provide effective penal sanctions” for persons committing “grave breaches” of the Convention as defined in Article 147. Although Article 147 does not specifically list rape as a grave breach, it does

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58 ICRC COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 1375 (Y. Sandoz et al. eds., 1987). It is regrettable, however, that the only place where rape is specifically prohibited in Protocol II is in the article concerning outrages on personal dignity. Id. Rape is not merely an outrage on personal dignity; it is an extremely violent act that very often causes serious physical, not to mention mental, harm to the victim. Id. As such, it should also have been specifically included in article 4(2)(a) of Protocol II, which prohibits “violence to the life, health and physical or mental well-being of persons. . . .” Id.; C.P.M. Cleiren and M.E.M. Tijssen, Rape and Other Forms of Sexual Assault in the Armed Conflict in the Former Yugoslavia: Legal, Procedural, and Evidentiary Issue, 5 CRiM. L.F. 471, 491 (1994). In any event, the more general language of article 4(2)(a) is certainly broad enough to cover rape. Id.

59 Geneva Convention IV, supra note 54, at 306, art. 27, 3536. Other international humanitarian instruments also specifically prohibit rape. See, e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, reprinted in 16 I.L.M. 1391, 1395. It is stated that “[w]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.” Id.; Healey, supra note 7, at 348. The former Yugoslavia ratified the four Geneva Conventions of 12 August 1949 in 1950 and Protocol I in 1978. Id. Bosnia-Hercegovina ratified them in 1992. Id. at 349.

60 See Geneva Convention IV, supra note 54, art. 146. Article 146 contains provisions which require that parties enact legislation to sanction offenders of the convention. Id.; see also Healy, supra note 7, at 341. Among other things, universal jurisdiction exists for the trial of individuals who commit grave breaches because of the particularly serious nature of those war crimes. Id. Parties to the Geneva Conventions must search for and either try
list "torture or inhuman treatment" as well as "wilfully causing great suffering or serious injury to body or health." There can be little doubt that rape is inhuman and causes great suffering or serious injury to body or health. "Indeed, under the weight of the events in the former Yugoslavia, the hesitation to recognize that rape can be a . . . grave breach has already begun to dissipate."

The International Committee of the Red Cross (ICRC), the United Nations Special Rapporteur on Human Rights in the former Yugoslavia, and various states aided this development by adopting an appropriately broad construction of existing law. "The ICRC declared that the grave breach of 'wilfully causing great suffering or serious injury to body or health' . . . covers rape."

Article 2 of Geneva Convention IV states that articles 27 and 147 apply by their terms "to all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties" to the Convention. This means that, according to the Convention's text, those articles apply only to international, and not internal, armed conflicts. Despite the language of article 2, however, United Nations Security Council resolutions have repeatedly stated that the grave breach provisions also apply to criminals themselves or turn the criminals over to a party or international tribunal that will. Id.

61 Geneva Convention IV, supra note 54, art. 147.
62 See Rape as a War Crime, supra note 1, at 426 (citing ICRC, Aide-Memoire (Dec. 3, 1992)) (noting that ICRC adopted broad construction of existing law); see also Cleiren & Tijssen, supra note 58, at 491-92 (supporting characterization of sexual assault as "a grave breach" under Article 2).
64 The United States State Department also considers rape to be a grave breach of Geneva Convention IV. See Letter from A. Bradtke, Acting Assistant Secretary for Legislative Affairs, to Senator Arlen Specter (Jan. 27, 1993), reprinted in Rape as a War Crime, supra note 1, at 427 n.22. With respect to the Bosnian war in particular, the State Department has declared that "[i]n our reports to the United Nations on human rights violations in the former Yugoslavia, we have reported sexual assaults as grave breaches. We will continue to do so and will continue to press the international community to respond to the terrible sexual atrocities in the former Yugoslavia." Id.; see also Case for Trials, supra note 56, at 131.

65 Rape as a War Crime, supra note 1, at 426 (citing ICRC, Aide-Memoire (Dec. 3, 1992)). The ICRC declared that "willfully causing great suffering or serious injury to body or health" constitutes rape. Id.
66 Geneva Convention IV, supra note 54, at 3518. Article 2 of the statute gives the Tribunal "the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949." Id. See Cleiren & Tijssen, supra note 58, at 491. The author discusses the Tribunal's power to prosecute violations of law or customs of war. Id.
to the Bosnian Civil war, thus providing a solid basis for applying them to that conflict.

Not only does rape constitute a war crime under, and grave breach of, Geneva Convention IV and its 1977 Protocols, "the massive and systematic practice of rape and its use as a 'national' instrument of 'ethnic cleansing' qualify it to be defined and prosecuted as a crime against humanity."67 Crimes against humanity were first spelled out by the Charter of the International Military Tribunal at Nuremberg.68 Building on language in the preamble of, for example, the 1907 Hague Convention (No. IV) Respecting the Laws and Customs of War on Land,69 the identification of crimes against humanity by the Nuremberg Charter provided for, among other things, criminal penalties against individuals for the abuse of a state's own citizens.70

That, however, entails a tougher burden of proof than other war crimes,71 requiring that:

1. The specific crimes are committed as a part of "state action or policy;" 2. The action or policy is based on discrimination-persecution against an identifiable group of persons; 3. The acts committed are otherwise crimes in the national criminal laws of that state; [and] 4. They are committed by the state

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67 Rape as a War Crime, supra note 1, at 426-27 (pointing out that hesitation recognizing rape as war crime or grave breach has begun to dissipate in Yugoslavia).
68 See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, Charter of the International Military Tribunal, 59 Stat. 1544, 1546, 82 U.N.T.S. 279, 284 (1946). The Nuremberg Charter did not specifically list rape as a crime against humanity. Id. However, Control Council Law No. 10, which was adopted by the Allied occupying powers in Germany to regulate war crimes trials in their own courts, did specifically list rape as a crime against humanity. Control Council for Germany, OFFICIAL GAZETTE, Jan. 31, 1946, at 50.
In cases not included in the Regulations . . . the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

Id.
70 See Healy, supra note 7, at 352. The Allied Powers justified this view of international law by claiming these crimes could be punished by international courts because the conduct, by its nature, offended humanity. Id. The prohibition of crimes against humanity is now part of customary international law. Id.
71 See Rape as a War Crime, supra note 1, at 428 (noting that crimes against humanity are more difficult to establish due to burden of proving systematic government planning, which is not necessary element of war crimes).
MAKING RAPISTS PAY

officials or their agents in furtherance of state action or policy. . . . 72

Clearly, the above descriptions of rape committed as part of ethnic cleansing, which has been "particularly systematic and widespread," 73 qualifies as a crime against humanity. 74

Other humanitarian law applicable to international armed conflicts also prohibits rape. The 1907 Hague Regulations annexed to Convention (No. IV) Respecting the Laws and Customs of War on Land provide in article 46 that "[f]amily honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected." 75 Broadly construed, this article prohibits rape, "but in practice it has seldom been so interpreted." 76 Despite its vague language, Article 46 should be so interpreted, particularly in light of other provisions of the Hague Regulations. 77 For example, the preamble of the Hague Convention (No. IV) contains the so-called "Martens Clause," which reads:

. . . in cases not included in the Regulations . . . the inhabitants and the belligerents remain under the protection and the rule of the principles of the laws of nations, as they result

72 See Healey, supra note 7, at 352 (listing legal elements needed to charge crimes against humanity); see also M. Cherif Bassiouini, Crimes Against Humanity in International Criminal Law 248 (1992).

73 Women's Human Rights, supra note 4, at 10.

74 See Case for Trials, supra note 56, at 132 (asserting that there is no reason why rape should not be seen as torture or inhumane treatment).

75 Oct. 18, 1907, 36(2) Stat. 2277, T.S. No. 539, 1 Bevans 631 [hereinafter Hague Regulations].

76 See Rape as a War Crime, supra note 1, at 425 (noting that rape was neither mentioned in Nuremberg Charter nor prosecuted at Nuremberg trials).

77 See Healy, supra note 7, at 351-52. At least one scholar asserts that it is "unwise to bend the meaning of article 46 to encompass rape as a violation of family honor in contradiction of the laws and customs of war" based on the logic that such an interpretation would perpetuate the erroneous view that rape is a crime only against family honor and not against the woman herself. Id. It is absolutely correct that rape should under no circumstances be mischaracterized simply as a crime against family honor, and that attitudes should be adjusted to focus attention on rape as a crime against the victim who, after all, is the one who has been raped. Id. It is likewise correct, however, that rape is unique in its ability to harm the victim both physically, mentally and in terms of personal dignity and family honor. Id. at 350. As a result, it is appropriate for international law to recognize and condemn each way in which the crime can harm an individual. Id.; Hague Convention, supra note 69, 36 Stat. at 2280. In any event, as shown elsewhere herein, the 1907 Hague Convention, through the Martens Clause, also contains a provision, albeit vague, that can be used to condemn rape as contrary to "the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience." Id. Because such sources also condemn rape as a violent crime, the Hague Regulations, through the Martens clause, can also be read to condemn that aspect of rape. Id.; see, e.g., infra notes 79 to 81 and accompanying text.
from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.\textsuperscript{78}

Although commentators have cast doubt on the legally binding character of this provision due to its inclusion in the Convention's preamble as opposed to its text,\textsuperscript{79} the Nuremberg Tribunal used the Martens Clause as the basis for applying customary law, the laws of humanity, and the dictates of the public conscience to an actual case not covered by other conventional obligations.\textsuperscript{80} As discussed previously with respect to Common Article 3 of the 1949 Geneva Conventions, the prohibition of rape during wartime is customary international law. Thus, under the Martens Clause, the commission of rape during wartime also violated the Hague Regulations.\textsuperscript{81}

Therefore, the laws of war clearly prohibit rape in general and in internal armed conflict such as the Bosnian civil war in particular. The successful prosecution of rapists from the Bosnian Civil war before the tribunal would further cement that conclusion.

B. The Tribunal is Equipped to Prosecute Violations of the Law

The Tribunal has the potential to conduct such successful prosecutions.

\textsuperscript{78} Hague Convention, supra note 69, 36 Stat. at 2280 (providing that unforeseen cases should not be left to arbitrary judgment of military commanders).

\textsuperscript{79} Shigeki Miyazaki, The Martens Clause and International Humanitarian Law, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOR OF JEAN PICTET 433, 436 (Christopher Swinarski ed., 1984) (asserting that preamble clause merely shows standard by which to interpret main text of treaty).

\textsuperscript{80} See 9 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 1341 (1950). In United States v. Krupp, the Nuremberg Tribunal stated that the Martens clause: 

\ldots is much more than a pious declaration. It is a general clause, making the usages established among civilized nations, the laws of humanity, and the dictates of public conscience into the legal yardstick to be applied if and when the specific provisions of the [Hague] Convention and Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare.

Id. “The Martens clause is therefore a serious legal obligation.” Id.; see also William M. Walker, The International Law Applicable to Guerrilla Movements in Internal Armed Conflicts: A Case Study of Contra Attacks on Nicaraguan Farming Cooperatives, 21 N.Y.U. J. INT'L L. & Pol. 147, 154-55 nn.45-46 (1988). As shown elsewhere herein, the Martens clause also applies to internal armed conflicts. Id.

\textsuperscript{81} Indeed, any other interpretation of the Hague Regulations is simply not credible. It cannot be argued, for example, that a group of soldiers that break into a woman's home and then gang rapes her has not violated the Hague Regulations, but that they have violated the Regulations if they then steal her videocassette recorder. Hague Regulations, supra note 75, art. 46, 36 Stat. at 2306-07 (stating “private property cannot be confiscated”); Id. at art. 47, 36 Stat. at 2307 (declaring “[p]lillage is formally forbidden”).
1. The Tribunal's Statute

The Statute of the Tribunal contains all of the tools necessary to indict rapists on a number of different legal theories. The Secretary-General, finding that Geneva Convention No. IV, the Hague Regulations and the Nuremberg charter constitute customary international law, utilized these documents in formulating the Statute that defines the crimes that the Tribunal will prosecute.\(^{82}\)

Article 2 of the Statute, which gives the Tribunal the authority to prosecute grave breaches of the 1949 Geneva Conventions, provides for the prosecution of persons "committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely . . . (c) wilfully causing great suffering or serious injury to body or health . . ."\(^{83}\) For example, Dusan Tadic, for his alleged rape of "F", was indicted for "wilfully causing great suffering to 'F' by subjecting her to forcible sexual intercourse, a GRAVE BREACH recognised by Article 29c) of the statute of the Tribunal."\(^{84}\)

Article 3 of the Statute, which provides for the prosecution of violations of the laws and customs of war as set forth in the 1907 Hague Regulation,\(^{85}\) has also been used by the tribunal to indict rapists and so, at last, interprets the Hague Regulations as prohibiting wartime rape. Accordingly, Dusan Tadic's indictment alleged that he "subjected 'F' to cruel treatment by forcible sexual intercourse, a VIOLATION OF THE LAWS OR CUSTOMS OF WAR recognized by article 3 of the Statute of the Tribunal and article 3(1)(a) of the Geneva Conventions of 1949."\(^{86}\)


\(^{83}\) See id. at 37-40 (granting International Tribunal power to prosecute for grave breaches, as listed under 1949 Geneva Convention).

\(^{84}\) See Tadic Indictment, supra note 34, at 1030, par. 4.2 (listing charges against Dusan Tadic).

\(^{85}\) See Secretary-General's Report, supra note 82, at 41-44 (setting forth violation of laws or customs of war as adopted under 1907 Hague Convention (IV)).

\(^{86}\) Tadic Indictment, supra note 34, at 1030, par. 4.3. See Secretary General's Report, supra note 82, at 44. Regrettably, Article 3 does not specifically mention that it covers rape: The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) attack, bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
Article 5 provides yet another basis upon which to indict rape: as a crime against humanity. In his report transmitting the Tribunal’s draft statute to the Security Council, the Secretary-General found that “[i]n the conflict in the territory of the former Yugoslavia, such inhumane acts have taken the form of so-called ‘ethnic cleansing’ and widespread and systematic rape and other forms of sexual assault, including enforced prostitution.” Article 5 thus provides that “[t]he International tribunal shall have the power to prosecute persons responsible for . . . (g) rape.”

Mr. Tadic was, accordingly, also indicted because he allegedly “raped ‘F’, a CRIME AGAINST HUMANITY recognised by Article 5 (g) of the Statute of the Tribunal.”

2. The Tribunal’s Rules of Procedure and Evidence

In his Report to the Security Council, the Secretary-General aptly noted that “[i]n the light of the particular nature of the crimes committed in the former Yugoslavia, it will be necessary for the International Tribunal to ensure the protection of victims and witnesses . . . especially in cases of rape or sexual assault.” Accordingly, article 22 of the Tribunal’s Statute provided that “[t]he International tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim’s identity.” In fulfilling this portion of its mandate, the tribunal

(d) seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(e) plunder of public or private property.

Id. In leaving rape out of Article 3, the Secretary-General missed a good opportunity to make a strong explicit statement that the Hague Regulations prohibit wartime rape. However, the prosecutor’s use of the first sentence of Article 3 of the statute to cover rape in indicting rape suspects is justified by the Hague Regulations, whether throughout Article 46 or through the Martens clause combined with the customary law prohibition against “violence to life and person.” Id.; Hague Regulations, supra note 75, 36 Stat. at 2306-07.

87 See Secretary-General’s Report, supra note 82, at 48 (describing actions constituting crimes against humanity).

88 Id. at 49 (setting forth International Tribunal’s power to prosecute persons for crimes against humanity).

89 Tadic Indictment, supra note 34, at 1030, par. 4.4.

90 See Secretary-General’s Report, supra note 82, at 108 (noting need to protect witnesses and victims when trying criminals for crimes committed in former Yugoslavia).

91 See id. par. 109 (proscribing rules for protection of victims and witnesses by allowing in camera proceedings and anonymous testimony).
adopted several significant procedural and evidentiary protections for victims and witnesses.

For example, Rule 69, entitled “Protection of Victims and Witnesses,” provides that:

(A) In exceptional circumstances, the Prosecutor may apply to a Trial chamber to order non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal.

(C) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defense.92

Rule 75, also entitled “Protection of Victims and Witnesses,” provides that the Tribunal can enter appropriate orders to protect victims and witnesses so long as they are “consistent with the rights of the accused.”93 Rule 75(B) expands on that provision by providing for hearings on whether it is necessary to prevent the disclosure to the public or media of a witness’ or victim’s identity or location or the identity or location of “persons related to or associated with” the victim or witness.94 Names could be expunged from the tribunal’s public records,95 testimony could be given using image or voice-altering devices,96 or pseudonyms could be assigned.97

Controls also exist on the type of evidence that can be presented in rape cases. Rule 96, entitled “Evidence in Cases of Sexual Assault,” provides: “In cases of sexual assault: (i) no corroboration of the victim’s testimony shall be required; (ii) consent shall not be all owed as a defence; (iii) prior sexual conduct of the victim shall not be admitted in evidence.”98 This provision in particular is a

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93 Id. Rule 75(A), 33 I.L.M. at 527 (noting judge may enter these orders at request of either party).
94 Id. Rule 75(B)(i), 33 I.L.M. at 527 (discussing use of ex parte hearings to determine what information to withhold from public).
95 Id. Rule 75(B)(i)(a), 33 I.L.M. at 527 (proscribing that witness names can be withheld from public records).
96 Id. Rule 75(B)(i)(c), 33 I.L.M. at 527.
97 Id. Rule 75(B)(i)(d), 33 I.L.M. at 527.
98 Id. Rule 96, 33 I.L.M. at 535-36.
welcome innovation and removes many obstacles that can deter rape victims from testifying.

Other provisions of the tribunal's rules of procedure and evidence also protect rape victims and witnesses. For example, release of a suspect by the tribunal pending trial may be ordered "only in exceptional circumstances, and only if it is satisfied that the accused . . . will not pose a danger to any victim, witness or other person."\textsuperscript{99} The Tribunal has even established a Victims and Witnesses Unit that recommends protective measures for victims and witnesses and provides "counseling and support for them, especially in cases of rape and sexual assault."\textsuperscript{100} Such a unit greatly helps rape victims cope with both the stigma that unjustly, but often, attaches to them, and with the understandable trauma they suffer in living with their ordeal.

All of these provisions are obviously worthwhile. Are they enough to ensure the successful prosecution of rape as a war crime? The answer is no.

C. "Enforcement": A History of Tolerance

The history with respect to enforcing the prohibition of wartime rape has been one of tolerance. The Tribunal so far has been unable to do much to change that.

Despite the centuries-old prohibition of rape during wartime, "until recently, it has not been condemned like any other abuse. The differential treatment of rape makes clear that the problem — for the most part — lies not in the absence of adequate legal prohibitions but in the international community's willingness to tolerate sexual abuse against women."\textsuperscript{101}

\textsuperscript{99} Id. Rule 65(B), 33 I.L.M. at 521. Again, these are greater protections than exist in the United States. See, e.g., 18 U.S.C. § 3142(b) (1997) (proscribing U.S. rule for release or detention of defendant pending trial, which is dependent upon whether defendant might endanger safety of any other person).

\textsuperscript{100} Rules of Procedure and Evidence, supra note 92, at Rule 34.

(A) There shall be set up under the authority of the Register a Victims and Witnesses Unit consisting of qualified staff to:

(i) recommend protective measures for victims and witnesses in accordance with article 22 of the Statute; and

(ii) provide counseling and support for them, in particular in cases of rape and sexual assault.

(B) Due consideration shall be given, in the appointment of staff, to the employment of qualified women.

\textsuperscript{101} WOMEN'S HUMAN RIGHTS, supra note 4, at 7 (contending that international prohibition of rape during war was not condemned or enforced as vigorously as other crimes).
An examination of the history of wartime rape supports this assertion. For example, notwithstanding Henry V's "severe prohibition of rape," that law and others like it were "not effectively enforced throughout most of the Hundred Years War." Indeed, "the license to rape was considered a major incentive for the soldier involved in siege warfare," the lawfulness of sacking a city was recognized "if 'the necessities of war' required it, 'or as a spur to the courage of the troops', even when rape would result." Rape has also been tolerated and even encouraged during modern warfare. For example, "[during the Second World War, rape was tolerated and, horrifyingly, was even utilized in some instances as an instrument of policy.... Moroccan mercenary troops fought with Free French forces in Italy in 1943 on 'terms [which] included [as a spur to masculine courage] license to rape.'"

In occupied Europe, thousands of women were subjected to rape and thousands more were forced to enter brothels for Nazi troops. Additionally, the Japanese army forced thousands of Korean women to work as "comfort girls" in Japanese army brothels. Yet even after the large-scale rapes committed during World War II, the Allies failed to prosecute anyone for rape at Nuremberg, although the International Military Tribunal for the Far East did bring some rape prosecutions.

Small wonder, then, that this attitude persisted in the Bosnian civil war, with the warring parties doing virtually nothing to stop rape or to prosecute the perpetrators. The Tribunal to date has

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102 HENRY'S WARS AND SHAKESPEARE'S LAWS, supra note 53, at 111 (citation omitted) (discussing rape laws during King Henry's reign, which also were not enforced).
103 Id. at 112 (quoting F. DE VITORIA, DE INDIS ET DE IURE BELLII REJECTIONES) (John Pawley Bate trans. & Ernest Nys ed., 1917).
104 HENRY'S WARS AND SHAKESPEARE'S LAWS, supra note 53, at 110-115.
105 Id. at 113 (discussing lack of punishment given to perpetrators of rape, despite its long time prohibition).
106 See, e.g., id. at 113 n.185 (noting instances of wartime rape occurring in Japan, Italy and Germany).
107 See Rape as a War Crime, supra note 1, at 425-26 (discussing history of rape as war crime and noting parallels and inaction in former Yugoslavia); see also Healy, supra note 7, at 330 (reviewing historical inconsistent attempts to prosecute rape as war crime).
108 See WOMEN'S HUMAN RIGHTS, supra note 4, at 10-11. Others also have reported that accountability through national courts in the former Yugoslavia has not worked. Id.; see, e.g., No Justice, No Peace, supra note 39, at 98.

... following trials that have been criticized for their lack of procedural fairness, a court in Sarajevo (in 1994) convicted two Serb soldiers, who had confessed to committing several rapes and murders of Bosnian Muslims, and sentenced the two to death. Such trials may be rare, however, and in any event would take place under conditions in which the independence of the trial court may be in doubt.

Id.
been unable to alter this history. As discussed above, despite the indictment of 77 suspects, many of whom have been accused of rape, only twenty individuals are in custody and only three trials have actually taken place.\(^{109}\) As noted above, in the only trial completed by the Tribunal so far, that of Dusan Tadic, the rape charges were dropped because of threats to the victim's family.\(^{110}\)

### IV. Possible Solutions

Despite the unencouraging start to rape prosecutions represented by the *Tadic* case, other suspects are in custody who have been accused of rape.\(^{111}\) In March 1997, an additional trial involving rape charges began, this time against Bosnian Muslims and a Bosnian Croat arising out of crimes that they allegedly committed at camps run by the Bosnian government.\(^{112}\) Swift steps should be taken to prevent the intimidation of rape victims and witnesses in future cases before the Tribunal. Eliminating these problems can obviously facilitate the successful prosecution of other war crimes by the Tribunal. As discussed above, the procedural protections provided by the Tribunal's rules of procedure and evidence provide about as much protection as such rules could possibly provide. Accordingly, efforts must be focused elsewhere. The solutions are basic and well-known to every criminal justice system.

First the international community should continue to do what it has only recently started: Arrest the suspects that are currently at large, by force if necessary. The North Atlantic Treaty Organization forces currently enforcing peace in Bosnia already have the mandate to arrest war crimes suspects and have conducted some raids, netting several suspects and killing another who fired on


\(^{110}\) See Marshall, *supra* note 49, at 1 (stating that rape charges against Dusan Tadic were dropped when victim decided not to testify); *see also Comiteau & Sharpe, supra* note 51, at A7 (reporting on tribunal's conviction of Dusan Tadic for his crimes against humanity and his role in ethnic persecution of Muslims).

\(^{111}\) *See Two Indicted on War Crimes Extradited to the Hague*, L.A. TIMES, June 14, 1996, at A4 (noting Bosnian government extradited two Muslim prison camp officials accused of murdering and raping Bosnian Serb inmates for trial before Tribunal).

British soldiers. They have also been ordered to arrest Ratko Mlatic, "but have avoided every opportunity to do so" for a variety of reasons, including, in 1996, to avoid any incidents before the Bosnian and U.S. elections. U.S. troops recently made their first Bosnian war crimes arrest, of Goram Jelisic, a former Bosnian Serb prison camp commander accused of genocide, who called himself the "Serb Adolf." More, however, must be done. Accused war criminals are still left free to roam about Bosnia almost at will; only the Bosnian government has cooperated fully and completely with the Tribunal in trying to make arrests. According to Louis Arbour, the Tribunal's Chief Prosecutor since October 1996, "[t]he kind of impunity that the indictees presently enjoy has always been used as a justification for revenge and, if allowed to remain unchallenged, it will perpetuate the vicious cycles of war." It is not surprising that victims and witnesses are afraid to speak up with so many dangerous people at large.

Instead of arrests, NATO's ministers initially adopted a series of half measures in the forlorn and naive hope that the parties to

113 Die Zeit, Aug. 30, 1996, at 4 (author's translation). Failure of NATO to arrest Mlatic despite the mandate to arrest suspected war criminals was, in part, due to a desire to avoid incidents before the United States and Bosnian elections. Id. In 1996, the efforts of the NATO troops to avoid Mlatic reached a comical extreme when they refused to conduct an inspection of Bosnian Serb headquarters precisely because Mlatic offered to give them a tour of the facility. Id. As former Chief Prosecutor Goldstone noted shortly before the expiration of his term, the troops "simply did not want to run into Mladić." Id. at 4; Die Zeit, Sept. 20, 1996, at 3. In addition, during the Bosnian elections in September 1996, Radovan Karadzic was "omnipresent," with posters of him hanging everywhere. The chair of Karadzic's political party disingenuously said the presence of the posters was the result of a "private initiative." Id.


115 See Die Zeit, Aug. 30, 1996, at 4. Only the Bosnian government has cooperated with the Tribunal; the other parties to the conflict have been conspicuously absent in cooperating. Id. According to former Chief Prosecutor Goldstone, the Croatian government waited three years to finally pass the laws necessary to ensure cooperation with the Tribunal, which Mr. Goldstone noted was simply "too late." Id. Further, "indicted suspects move about freely in Croatia without being arrested." Id. Cooperation from the Federal Republic of Yugoslavia has been "minimal," with the Tribunal's Belgrade representative only being allowed to interview witnesses in the presence of a Serbian judge. Id. "Moreover, the Serbs are not ready to extradite indictees." Id. Instead of cooperating with the Tribunal, the Bosnian Serbs pepper it with demands to indict the leaders of Croatia and Bosnia. Id.; see also Philip Smucker, Suspect War Criminals Chill Tourism Prospects/Serbs Hope to Thaw Economic Deep Freeze, Houston Chron., Dec. 15, 1996, at 30. The author discusses the lack of cooperation with the Tribunal due to the Serb Republic signing the Dayton Accord and Karadzic remaining in power. Id.

116 See William D. Montalbano, Aid to Bosnia Conditional, Nations Note Meeting: International Community Ties Assistance to Balkan Countries Commitment to Peace Pact, L.A. Times, Dec. 6, 1996, at A16 (reporting that agreement stipulated that Western countries would provide aid to Bosnia only if adverse parties sincerely worked toward peace).
the conflict in Bosnia would make arrests themselves. In late 1996, for example, Western countries meeting in London made $1.8 billion in relief funds that they pledged to help rebuild Bosnia conditional on stricter adherence by the former warring parties to the terms of the Dayton Peace Accords that brought an end to the war, including the arrest of indicted war crimes suspects still at large. Notwithstanding that condition, "there were doubts at the conference that there would be increased efforts to arrest suspects." 

Also at the conference, Carl Bildt, a Swedish diplomat serving as the civilian administrator of the Dayton Peace Agreement, made a vague warning that "'further measures' would be considered if suspected criminals were not suspended or apprehended." What further measures? "The conference shied away from a Canadian proposal that would have involved using peacekeeping troops led by the North Atlantic Treaty Organization to pursue suspects." Instead, the conference decided to create a "special police intelligence unit that will seek to pinpoint the accused criminals and facilitate their capture — though not undertaking the capture itself. That is to be left to the authorities in Bosnia." Does anyone doubt that half-measures will not lead to more arrests? Instead of arresting suspects, the international community responded with ineffective window-dressing designed to create the illusion of decisive action. The recent arrests given the continuing lack of cooperation with the Tribunal disclosed above, are a welcome change and, are the only way to bring many of the suspects into custody.

The ability to prosecute other such individuals who intimidate victims and witnesses, would also be welcome. Statutes authoriz-

117 See Women's Human Rights, supra note 4, at 9. Human rights monitors have observed that they are unaware "of any case in which Bosnian Serb forces guilty of abuses have been punished by their superiors for crimes." Id.; Michael Dobbs, Despite Obstacles U.S. Wants Bosnia Vote on Time; Failure to Remove Indicted Serb Leaders Should Not Change Schedule, Officials Say, Wash. Post, May 25, 1996, at A20. The United States has tried to use political pressure to get the Bosnian Serbs to cooperate. Id.

118 See Montalbano, supra note 116, at A16 (reporting on London Peace Implementation Conference).

119 Id. (stating Western countries have donated 1.8 billion dollars to help rebuild Bosnia, provided that parties comply with Dayton peace agreement).

120 Id.

121 Id.

122 Id. See War Crimes and Punishment, supra note 30, at 52. The conference also approved more police resources for the Tribunal, which were long overdue and were badly needed. Id.
ing the prosecution of those responsible for obstructing justice are natural, and necessary, corollaries to any effective criminal justice system. For example, the United States has statutes criminalizing such conduct as tampering with a witness, victim or informant\textsuperscript{123} and retaliation against a witness, victim or informant.\textsuperscript{124} So far, however, the Tribunal has no mandate to conduct such prosecutions and there does not appear to be any likelihood of it obtaining such powers any time soon.

Failing enough arrests and a crackdown on intimidators, the only way to make victims and witnesses feel absolutely secure is to insulate them as completely as possible from those who wish to harm them. It is unlikely that this can be done in the still-chaotic Bosnia-Hercegovina. Accordingly, grants of asylum to victims and witnesses and their families could be made available, with the asylum program being publicized so that the victims and witnesses will learn of it and take advantage of it.\textsuperscript{125}

There are weaknesses in such a proposal, however, that make it an inadequate solution on its own.

Some victims, witnesses or their family members may not wish to leave their homes in Bosnia for uncertain futures in foreign countries. Asylum programs could also encourage false claims of rape by individuals who wish to leave Bosnia for better lives elsewhere, thereby undermining the credibility of legitimate victims. Finally, the enormous amount of rapes committed in Bosnia, which may run in the tens of thousands,\textsuperscript{126} may make a broad asylum program impossible because of the vast pool of eligible individuals.

A limited asylum program would, however, be a very useful tool for encouraging victims and witnesses to come forward in at least (i) the few cases indicted so far in order to at a minimum begin


\textsuperscript{125} See \textit{War Crimes and Punishment}, supra note 30, at 52; \textit{see also} Fletcher, supra note 39, at 105 (asserting that "measures to provide protection of witnesses, including assurances of relocation, are critical"). \textit{Id.} at 127-28 (further suggesting that United States provide increased refugee allocations pursuant to 1980 Refugee Act and temporary protected status for rape victims pursuant to Immigration Act of 1990).

\textsuperscript{126} For a collection of results from various surveys estimating the number of rapes in Bosnia, see Healy, \textit{supra} note 7, at 361-62.
getting some convictions for rape; and, (ii) cases involving the prosecution of prominent suspects, whose convictions would have the greatest impact.

Care should also be taken in the repatriation of refugees from other countries in order to ensure that victims and witnesses will not be placed in danger. For example, at the end of 1996, more than 300,000 Bosnian refugees were in Germany; the pre-war homes for two-thirds of them were in territory occupied by the Bosnian Serbs.\textsuperscript{127} Germany was scheduled to return those individuals by April 1997 and was prepared, if necessary, to force their return to Bosnia through the use of immigration proceedings and in some cases did so.\textsuperscript{128} The safety of victims and witnesses demands strict attention.

**Conclusion**

At the end of his term as Chief Prosecutor, Richard Goldstone remarked that the Tribunal has had an educational effect at the international level, with the result that “newspapers in many countries, particularly in Europe and North America, write almost daily about war crimes in a way that was unthinkable several years ago. I believe that has had a deterring effect on certain political military leaders.”\textsuperscript{129} The Tribunal has indeed come a long way from where it was in May 1994, “when hardly anyone took the Yugoslavian Tribunal seriously. Today it grabs headlines, pressures politicians, and stirs up the public.”\textsuperscript{130} But that is not enough.

Simply put, without enforcement there is no law. The Tribunal, which has so much potential to strike a telling blow against the centuries-old toleration of the war crime of rape, is once again at another one of its critical crossroads. If the Tribunal is unable to

\textsuperscript{127} See **DIE ZEIT**, Sept. 20, 1996, at 1 (describing number of Bosnian refugees in Germany and difficulties repatriating them); see also Ulrik Davy, **Refugees From Bosnia and Herzegovina: Are They Genuine?**, 18 **SUFFOLK TRANSNAT'L L. REV.** 53, 129-30 n.245 (1995) (discussing Germany’s asylum program which led to influx of Bosnian refugees).

\textsuperscript{128} See **DIE ZEIT**, Sept. 20, 1996, at 1 (listing measures needed for repatriation of Bosnian refugees); see also Bavaria Expels Bosnia Refugees, **SAN DIEGO UNION-TRIB.**, Oct. 10, 1996, at A18 (noting Bavaria was first of German states to expel Bosnian war refugees); Ray Moselet, Savaged Bosnia Refugees Afraid To Go Home Germany Plans To Eject Thousands; U.N. Protests, **CHI. TRIB.**, Oct. 20, 1996, at 1 (discussing Germany’s plan to return problematic refugees to Bosnia).

\textsuperscript{129} See **DIE ZEIT**, Aug. 30 1996, at 4, col. 1 (describing impact and importance of Tribunal and difficulties it has faced).

\textsuperscript{130} Id.
successfully prosecute criminals and protect their victims, it will lose all credibility and demonstrate that humanitarian law should mean noting to those inclined to violate it.

Now that the Tribunal is trying some cases, it is time for the vacillating international community to step up to the plate and make the Tribunal work. For centuries the world has witnessed the devastating effect of rape as a weapon of war. It is critical, and long overdue, for the world to see that the Tribunal is an even more effective weapon in the arsenals of peace and justice.