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Many Roads to Justice for Women: A Foreword to the Symposium Issue of the Berkeley Journal of International Law

Carolyn Patty Blum

Many Roads to Justice for Women: A Foreword to the Symposium Issue of the *Berkeley Journal of International Law*

By
Carolyn Patty Blum*

In 1979, at the age of twenty, Neris Gonzalez was captured by the Salvadoran National Guard. She was eight months pregnant at the time. She was a catechist with the Catholic Church, at that time under the leadership of Archbishop Oscar Romero, an advocate of the church working closely with the most disenfranchised. One of Neris' projects was to teach *campesinos, (peasants)* how to count. Learning to count was an important way to empower farm workers, as they would be able to calculate how much money they were owed by the landowners who often exploited them.

During over two weeks of detention, Neris was tortured constantly, in ways that defy human imagination. She was raped repeatedly and subject to other forms of sexual violence. When her broken body was dumped at the side of a road, she was near death. Her baby was born prematurely and died two months later. She was nursed back to health by a compassionate woman, and later she came to the United States in search of true sanctuary. But how was Neris to find justice in all of this? Although the authorities may have broken Neris' body, they were unable to affect her courageous and passionate spirit, and she decided to fight back.

The Alien Tort Claims Act of 1789 allows victims of torts "in violation of the law of nations" to seek civil damages against the perpetrators or their commanders for gross human rights abuses.[1] In the summer of 2002, two Boalt Hall law students, Mary Beth Kaufman and Daniela Yanai, and I worked on behalf of Neris and two other Salvadoran refugees against that country's Minister of Defense and Director of the National Guard, who were now living in Florida.[2] Ultimately, a jury awarded the plaintiffs over $54 million. The verdict was not only a milestone in ending the impunity of commanders for the actions of their subordinates, but established a public space where the three plaintiffs became

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1. Judiciary Act, 28 U.S.C. § 1350 (1789).

2. *Romagoza Gonzalez and Mauricio v. Garcia and Vides-Casanova, No. 77 Civ. 99-8364 (District. Date).*

the voices of not only themselves, but also of the 83,000 murdered or disappeared civilians in El Salvador.

I heard Neris' voice as I read the set of articles for this special issue of the *Berkeley Journal of International Law*. And it became clear to me that this symposium, like Neris' court action, is not about abstract concepts in law. What resounded throughout this issue of the *Journal* were the voices of the lived realities of women and the pain caused by the purveyors of war, the architects of the destruction of the minds, bodies, and spirits of women. This symposium is about real lives, real experiences, real witnessing, real testimony, real risk-taking, and real courage. The bravery of the "comfort women," of the Bosnian and Rwandan women survivors who sit in courtrooms facing their persecutors, of the mothers who are forced to leave children and husbands because of war, cruelty and famine, all of this resounds throughout this issue.

This issue of the *Journal* not only testifies to the experiences of specific women, but also pushes out the frontiers where women and their advocates struggle for justice. Just as Neris' fundamental human rights were advanced by tort law, this symposium links women's rights to other types of law—international criminal law, humanitarian law, immigration law, and family law. The intersection of these branches of law with the concerns of international human rights marks a crucial synergy. And the *Journal* has done a "mitzvah"[3] in devoting, for the first time, an issue to women. This focus, on the convergence of human rights and other types of law, could not be more timely. The work of international bodies, like the international tribunals and UN sub-agencies, regional organizations and international women's human rights organizations have put these issues front and center on the international stage. International law has been transformed forever.

Boalt Hall was honored to have The Honourable Madam Justice Louise Arbour address the symposium. Justice Arbour's leadership at the Prosecutor's Office of the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTFY/ICTR) greatly advanced the thinking about criminal prosecution of sexual violence. In her talk, Justice Arbour connected her own experiences investigating allegations of brutality in a Canadian women's prison with her work with the two tribunals. For her, one of the most crucial aspects of this work was bringing to light the dark terrors that women historically have had to endure in silence. She credits domestic movements against violence on women with assisting in that transformation. Now, the gauntlet has been picked up on the international level as well. Justice Arbour interestingly raised the debate within the prosecutor's office about setting priorities for prosecutions. She noted that her office selected prosecutions that could advance a determination of high command culpability. But she queries whether this strategy is appropriate for sexual violence since there might be benefit in prosecuting actual perpetrators, "the Mr. Nobodies that are actually out there committing the crimes."[4] She

3. A "mitzvah" is a good deed in the Jewish tradition.

4. Justice Louise Arbour, *Stefan A. Riesenfeld Award Lecture—Crimes against Women under International Law*, 21 BERKELEY J. INT'L L. 196, 203 (2003).

displayed enormous sensitivity to the Bosnian and Rwandan victims of sexual violence by noting how difficult it is for them to testify, especially given the lack of reliable supportive infrastructures in their own countries. In closing, Justice Arbour emphasized that the work of the Tribunals was built on the foundation of the advocacy work for protection of women from sexual violence. Reciprocally, recent work to expand universal jurisdiction and to create the International Criminal Court has been built on the foundational work of the Tribunals. Justice Arbour, in no small measure, contributed to that reality.

Kelly Askin's article, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles,* provides a comprehensive review of the changes in international law regarding sexual violence against women.[5] Askin provides an overview of the relevant customary and treaty law norms, particularly within humanitarian law, relevant to her analysis. Focusing on the experiences of women and girls during armed conflict, Askin highlights the ways in which war increasingly is waged against the civilian population; in particular, she emphasizes the systematic and strategic use of sexual violence as "weapons of warfare" and "a core part of the war machine."[6] While Askin recognizes that rape and other gender violence were prohibited, as a matter of law, through the post WWII Tribunals at Nuremberg and Tokyo and the 1949 Geneva Conventions, the International Criminal Tribunals for the Former Yugoslavia and Rwanda have produced the most important jurisprudence on sexual violence. Askin's close reading of the five crucial decisions of the ICTY/ICTR presents a rich and nuanced understanding of the doctrinal evolution.

Askin examines the following concepts: the definition of rape; sexual violence (including non-physical violence) as fulfilling the elements of the definition of torture; rape as a crime against humanity and a war crime; rape as a crime of genocide; the criminal responsibility of superior commanders for war crimes and genocide; sexual violence against men; sexual violence as a grave breach of the Geneva Conventions, "willfully causing great suffering or serious injury to body or health;"[7] sexual slavery as a crime against humanity; sexual violence as "outrages upon personal dignity,"[8] constituting war crimes; and sexual violence, including forced nudity, as prosecutable. Throughout, Askin names what happened to the victims as a way of reinforcing that a victim of sexual violence should not have the shame and stigma imputed to them as a result of the crime committed against them.[9]

Sherrie Russell-Brown further illuminates this subject in her article, *Rape as an Act of Genocide.*[10] Russell-Brown particularly analyzes the *Akayesu*

5. *See* Kelly Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT'L L. 288 (2003).
6. *Id.* at 297-98.
7. *Id.* at 324 (citing *Celibici* Trial Chamber Judgement, para. 511).
8. *Id.* at 337 (citing *Kunarac* Trial Chamber Judgement, paras. 773-74).
9. *Id.* at 347.
10. Sherrie L. Russell-Brown, *Rape as an Act of Genocide*, BERKELEY J. INT'L L. 350 (2003).

Judgment of the ICTR as seminal in the doctrinal development of defining rape as an act of genocide. By so doing, the Tribunal navigates through a recurring debate among legal commentators about the intersection of ethnicity and gender in the analysis of rape as an act of genocide. Russell-Brown emphasizes that the acts of rape against individual Tutsi women advanced the genocidal project of Rwanda's *genocidaires*. She further reviews the doctrine on rape as a crime under the Geneva Conventions and Protocols, as violations of the laws of war, as crimes against humanity, and as genocidal acts under the Genocide Convention. Throughout, Russell-Brown exposes the acts of sexual violence as intentional—to make individual Tutsi women suffer and, thereby, to destroy the Tutsis, as a group.

Carmen Argibay reaches back in history to examine the sexual slavery of the "comfort women" of World War II.[11] She first outlines the historical origins of the system of "comfort stations" for Japanese soldiers as a response to the worldwide outrage over the Japanese Army's invasion and destruction of the city of Nanking. During the course of those actions, Japanese forces systematically raped thousands of young women and girls. This incident became known as the "Rape of Nanking." As Argibay rightly emphasizes, the Japanese Army was concerned primarily with protecting its "honor" and thus, created a system of sexual enslavement of women to limit the public humiliation of Japan. Argibay documents the patterns of recruitment, forcible abduction, deception, and coercion utilized to force women into the "comfort stations." She then turns to an analysis of whether this system constituted sexual slavery. Argibay's analysis focuses on the definitions of slavery extant at the time of the Japanese actions and makes reference both to concepts of chattel slavery and of compulsory labor. Argibay concludes that the situation of the former "comfort" women is most accurately described as "sexual slavery". Argibay acknowledges the important work of The Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery in advancing this understanding.

Sonja Starr and Lea Brilmayer excavate related but uncharted terrain in their article, *Family Separation as a Violation of International Law*.[12] Their article is a thorough treatment of a subject too often unexplored in international law—the involuntary separation of families. Starr and Brilmayer do not shy away from the contentious issues at the core of the consideration of this question—the definition of a family, methods of accounting for rights-holders' interests, the role of the state in the protection of families or children, and the underlying cultural assumptions in the concept of family. Starr and Brilmayer review the trajectory of the development of international norms, both customary and treaty-based, related to the protection of children and families, the right to privacy and family integrity, the "best interests of the child" standard, the rights of parents to care for their own children, and the right to marry. Uniquely, they

11. Carmen M. Argibay, *Sexual Slavery and the "Comfort Women" of World War II*, BERKELEY J. INT'L L. 375 (2003).

12. Sonja Starr & Lea Brilmayer, *Family Separation as a Volation of International* Law, BERKELEY J. INT'L L. 213 (2003).

root their inquiry in the real stories of implementation of policies which lead to family separation. They chose disparate subjects—the Australian government's forcible separation of Aboriginal children from their parents, the French policy of forcibly separating polygamous immigrant families, U.S. immigration policies that lead to the splitting of families, U.S. welfare policies that remove children from homes where they may be abused or neglected, and family separation as a product of other forms of human rights abuse. Their choice of a range of case studies reveals a willingness to struggle through the treacherous waters of this kind of analysis. Their conclusion, a set of general guiding principles, is extrapolated from their legal and case analysis.

This symposium issue is a gift to the world of legal scholarship as a recognition of both the reality of women's experiences and the legal doctrine that has evolved and will continue to evolve from it. Its timeliness and its cutting edge analysis dovetail with the continuing discourse, occurring at the international, regional and local level, about the centrality of women's unique concerns within the broader agenda of expansion and enforcement of human rights protections.

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Stefan A. Riesenfeld Award Lecture - Crimes against Women under International Law

Louise Arbour

STEFAN A. RIESENFELD SYMPOSIUM 2002 FEBRUARY 28, 2002, BERKELEY, CALIFORNIA

Stefan A. Riesenfeld Award Lecture—Crimes against Women under International Law[1]

By
The Honourable Madam Justice Louise Arbour,
Supreme Court of Canada

Professor Guzman's Introduction:

Thank you, Dean Dwyer. Let me add a welcome, on behalf of the International Legal Studies Program, to all of you, and especially to our guest speaker. It is great to see so many people here, especially in light of the significance of the topic that will be discussed. I also want to add my congratulations to the Berkeley Journal of International Law for yet again carrying off an event seemingly without a flaw.

My role here is to introduce our speaker, which is an honor and a pleasure. There are really two ways in which it can be difficult to introduce someone. One is if their accomplishments are so few in number and so small in magnitude that it is difficult to know really what to say. The other one is if their accomplishments are so large in number and so impressive in magnitude that, without occupying the entire time left to the speech, you have to decide what you are going to say. I face the second of these problems. I am going to just do my best to deal with it, recognizing that I'm omitting a whole bunch of important information, and hoping that Justice Arbour will not take offense.

She is referred to as Justice Arbour because she is a member of the Canadian Supreme Court, and has been since 1999. Before that, she was a judge on the Court of Appeals for Ontario and, before that, was on the Supreme Court of Ontario. I do not need to tell anybody here that having Supreme Court Justice on your resume is a pretty good thing, and not a bad justification for us to have

1. This piece was transcribed from the 2002 Stefan A. Riesenfeld Award Lecture.

someone come to speak. In fact, we would be honored and thrilled to have her speak in her capacity as a Supreme Court Justice. But that is not why she is here.

Before becoming a judge and a justice, Justice Arbour was a professor at the Osgood Hall School of Law in Toronto, one of Canada's premier law schools. As such, she wrote on criminal law, human rights, constitutional law, and more. We would again be lucky to have her here, speaking as an authority on any of those subjects in her capacity as an academic, but again, that is not why she is here.

In 1995, Justice Arbour took on a task to investigate the alleged abuses of inmates at the Republic Prison for Women in Hasting, Ontario. This was at the request of the Canadian government, and she reported to the Solicitor General of Canada. You and I can only imagine what that task involved—a whole range of delicate issues on the table—inmates' rights, women's rights, a broader set of human rights, as well as notions of law and order and corrective justice. With that experience behind her, again, it would be helpful and informative for us to have Justice Arbour speak on just that one project, trying to deal with problems at a penitentiary for women, but again, that is not why she is here.

Why she is here is that, from 1996 until her appointment to the Canadian Supreme Court in 1999, Justice Arbour was the chief prosecutor for the International Criminal Tribunals for the former Yugoslavia and Rwanda. There, she worked as a tireless advocate on behalf of the victims of violence as well as an unrelenting prosecutor of criminals who perpetrated staggering acts of violence, cruelty and genocide. I cannot even begin to list the accomplishments of Justice Arbour as chief prosecutor, but let me cite just one. As chief prosecutor, she issued the first ever international warrant for the arrest of a sitting head of state, Slobodan Milosevic. Facing political pressure from many sides, and skepticism from a lot of places, Justice Arbour predicted that this was merely the first step toward the trial of Mr. Milosevic.

There is no longer much skepticism about whether that is true, since, today, Mr. Milosevic sits in the Hague in the midst of a trial for his acts. So, here, and in all of her other work on the criminal tribunal, Justice Arbour has distinguished herself, and that is what has brought her here to speak for us today. With that introduction, I want to introduce our speaker, who will talk about crimes against women under international law. I turn it over to Justice Louise Arbour.

Justice Louise Arbour:

Thank you very much to the Dean and to Professor Guzman, for that kind introduction.

I am absolutely delighted to be here. I feel, however, that I am here under absolutely false representation. If you knew how little I know about international law, you would find it scary. I am a criminal lawyer, a criminal law academic. I'm a judge. I'm a generalist. I do everything except international law. When I was working on the international scene, I was so busy getting it

done, that I was just hoping that the law would fall into place. So, I have to start with this enormous disclaimer before I embark on talking to you about international criminal prosecutions, and in particular about prosecutions on the international scene related to violence against women.

The other disclaimer that I should make at the beginning is that I was a law teacher for many years, and every time we brought in a non-academic, a practitioner, a judge—they're all the same—we, the academics, would roll our eyes, sitting in the back of the room, waiting for the war stories, expecting no intellectual content whatsoever, just a string of anecdotes. As a matter of fact, I have war stories, and they're real war stories. I find them, not only irresistible, but extremely good at explaining in very concrete terms the actual content of legal issues. While these stories may not have the appearance of intellectual rigor that a more theoretical presentation would have, now that I'm on the other side of the fence, I realize that they serve a purpose.

To introduce my talk, I'll take you back, which will show again that I'm not an international lawyer, to the work I did that Professor Guzman referred to: the work in corrections, in a criminal correctional environment. In the late fall of 1995, I received a phone call from the then-secretary general of the United Nations. Not being an international lawyer, I found it quite impressive when someone called and asked if I would take a call from Mr. Boutros Boutros-Ghali. I could not for the life of me imagine why he would be calling me. When he called, and when I took his call, I was actually in the basement of a building that belonged to the correctional service of Canada. This building is across the street from the only federal penitentiary for women in Canada, which houses the total number of women in the whole country who serve a sentence of more than two years, which is about 300 women. I was conducting an inquiry into an event that had taken place at the prison for women.

Now, if you bear with me, there will be a point. I was in the basement of that correctional building, conducting an inquiry, in the spring of 1994 because there had been a spree of very violent incidents in the prison for women. Six inmates had assaulted correctional officers while they were waiting to get their medication. It was quite a violent event, which allegedly involved the use of a syringe and an alleged stabbing. It was not too clear exactly what had happened, but it was very traumatic for the correctional staff.

The six inmates who had been involved were put in segregation units with two other women who were already in isolation cells. During the next four days, intense unrest took place in that little segregation unit—fires were set, urine was thrown at correctional officers who walked by, and there was an enormous amount of verbal abuse. There was a general feeling that things were very much out of hand.

On the fourth day, the correctional staff held a protest outside the prison and a demonstration calling for an end to this destruction in the segregation unit. That night, the warden of the prison for women called in what's called an IERT, an institutional emergency response team. The IERT did not exist in the women's correctional service. When you only have 200 prisoners from the whole

country to manage, you don't have all the refined programs or services that are necessary. So, this IERT had to be called in from a neighboring male institution. The IERT is a team that is composed of correctional officers and volunteers. They work anonymously. They are extremely well-trained. Their main task is to do cell extractions and strip searches of men. In this instance, they opened these eight cells, removed each of the women, stripped the cell, leaving nothing inside, then stripped the women, and returned them inside this bare cell, wearing only a paper gown. This procedure was felt necessary to ensure that there were no weapons left inside, and to put an end to what had taken place in the segregation unit.

The IERT uses the technique of intimidation in order to ensure compliance. The team is composed of eight men who are in full combat gear. They wear black uniforms, shin pads, eye visors, helmets and gas masks. They carry mace, batons and shields, and they never speak. They do not answer questions, and they do not communicate verbally at all. They communicate with each other by using hand signals. All of this creates an atmosphere of terror. There's no other way to describe it. It's extremely scary. And, as I said, it's done this way to ensure the least amount of resistance.

This was the first time that this institutional emergency response team from the male penitentiary had been requested not just to intervene in the prison for women—they had done that before—but to actually conduct cell extractions and strip searches. One of the features of their procedures is that all of their cell extraction procedures are videotaped. One of the members of the team carries the video equipment. This is done for self-critiques of their performance. The IERT marches into the cell block, making a huge amount of noise. They bang their shields against the bars of the cell, and they give an order to the inmate to comply. They enter the cell whether there is resistance or not. Essentially, they wrestle the inmate to the floor, apply leg-irons, handcuffs, and body restraints, and they cut off the inmate's clothing. All of this, including the videotaping, was done at the prison for women.

The procedure took virtually all night. It began at midnight and lasted until four or five o'clock in the morning. Six of the eight women were kept in segregation from April until December of that year. A claim for *habeas corpus* was made. At the court proceedings, the inmates claimed that there had been a videotape of the event that they complained of. Eight months later, that videotape made its way into the hands of the Canadian Broadcasting Corporation, and segments of it were aired on national television. That led to the government calling the commission of this inquiry over which I presided.

You're probably wondering if I'll ever get to the international scene, but I will get there. What is very important for me to convey to you is what I learned in investigating this particular incident. The procedure that I described to you was recorded on videotape, and the public saw segments of it, including this IERT coming in, opening the cell, and performing a cell extraction. They actually saw the women's clothing being cut, and even saw the women being marched out of their cells naked, dressed only in their paper gowns. The reac-

tion of the Canadian public was one of shock, disbelief and horror. Viewers all took what they saw on the videotape quite literally: "This is what happened."

The contents of the videotape were extremely disconcerting because of the enormous display of force, coercion and intimidation. There was also a very disconcerting response from the inmates. There was a lot of swearing and cursing. There was also a lot of laughing, and extremely crude comments, which led the members of the IERT who testified before me to say that in their opinion, the inmates were not intimidated by their intervention. They testified that the inmates were joking and laughing, making rude comments, and that in at least one instance, one of them was openly flirting with them. If you view the videotapes, there is some corroboration for that kind of clinical description of what happened. However, of the inmates who testified, several expressed emotions that I accepted as very real and genuine. They spoke of their fear, humiliation and, in some cases, of the painful reliving of early memories of abuse.

The only sense I eventually was able to make of that event, to try to capture what had really happened, I found in the testimony of the prison doctor for the women, Dr. Pierson, who was present that night. It was in her evidence that I found a coherent explanation for what otherwise felt like a surreal quality in that videotape. I accepted her interpretation of the events that were depicted on that videotape. I'll just read a little bit from the report that I wrote: "In her opinion, the numerous requests which were shouted by the inmates for medications, for Tampax, which seemed so inappropriate in the circumstances, were in fact a desperate cry for help and comfort. As for the incidents that the team members had perceived as an attempt at flirting by one of the inmates, Dr. Pierson, who has known this woman for some time, testified that, in her view, the inmate was in fact in a disassociative state, speaking in a girlish voice, possibly re-living a childhood episode of sexual abuse. Dr. Pierson said that this very emotionally fragile inmate was exhibiting signs of having lost contact with reality." This explanation, as I said in my report, was very plausible to me. "The bravado that the words displayed betrayed the humiliation, the defeat, and the terror that these women were experiencing when confronted and subjected to this unimaginable display of force in the middle of the night, behind prison bars. The many references to their menstrual periods, Tampax, and rape is consistent with the fact that they were experiencing the event as having a significant sexual aspect."

You may wonder what this has to do with the prosecution of sexual violence internationally. When I wrote my report on the incident in the prison for women, I had already accepted the post as chief prosecutor for the Hague. I wrote in the first line of the preface of the report as follows: "The incidents that gave rise to this inquiry could have gone largely unnoticed. Until the public viewing of the videotape which shed light on parts of these events, and until the release of the report by the congressional investigator, the correctional service of Canada had essentially closed the book on these events." Then I packed my bags and I went to the Hague.

Two years later, in the Hague, in September of 1998, Jean-Paul Akayesu, the *quarter-meister* of the Taba community of Rwanda was convicted of several

counts of genocide and crimes against humanity, and violations of common Article 3 to the Geneva Convention, and Article 4 to the Condition of Protocol 2, amongst other things, for crimes that are called outrages upon personal dignity, including rape, degrading and humiliating treatment and indecent assault.

In December of 1998, Anto Furundzija was convicted of torture, inhuman treatment, and rape. His conviction has subsequently been upheld on appeal. And then, in December of 2001, three men from Foca, in an indictment that is usually referred to as the Foca indictment—Foca is a town in Bosnia and Herzegovina—were convicted of rape and torture as crimes against humanity, and as violations of the laws and customs of war. They were also convicted, again, in relation to the sexual exploitation of girls and women, and of enslavement as a crime against humanity. There are many, many similar charges pending before the International Tribunal.

If I were ever to write a book about all of this, I would start my preface as follows: "The incidents that gave rise to these convictions could have gone largely unnoticed. Without the creation of the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, the world would have long ago closed the book on these events." It is clear that, in my opinion, neither Akayesu, nor Furundzija, nor Kunarac nor Kovac and the third man from Foca would have ever, ever been brought to account in their own national jurisdictions for what they had done. Yet, I am not sure that when the Security Council created these two ad-hoc international criminal tribunals, the Tribunal for the former Yugoslavia in 1993, and Rwanda in 1994, that the Security Council ever contemplated that there would be investigations, prosecutions and convictions reflecting the level of sexual violence that had been associated with these conflicts.

I'm not persuaded that members of the Security Council thought very seriously that there would ever be a trial and convictions for anyone who would fall in the jurisdiction of the tribunals. Even on the assumption that they thought there would be some accounting, I can't imagine that there was much of a sense in that institution that launching these tribunals under Chapter 7 of the U.N. Charter as a tool to restore international peace and security, would mean that sexual violence had to be denounced and prosecuted. Basically, there are three broad issues that I would like to discuss with you: How did we get there? What have we learned? And where do we go from here?

First, how did we get there? I'm not sure to what extent you know the history of the creation of these tribunals. I won't spend much time on that because much of that information is readily available in the literature that has been produced since the tribunals were created. I think history will show that these tribunals had, in a sense, an accidental birth—completely unexpected. After the Nuremberg and Tokyo trials, the general consensus was that if there was to be that kind of personal criminal liability or enforcement of international humanitarian law, and if that was to take place before an international institution, it would have to be done by a consensus in the international community.

The Security Council Chapter 7 powers are very broad. They are the most coercive forms of power that can be exercised on the international scene. When the Security Council imposes duties, they bind all states. It is sometimes in the form of sanctions—economic sanctions, political denunciation, any ultimately military intervention—but the creation of the criminal judicial organ, a subsidiary organ emanating from the Security Council, had never really been contemplated. I think that it had been born, it's fair to say, out of the utter despair of the international community as to how to manage these unmanageable conflicts in the Balkans. Hundreds of Security Council resolutions have been issued in the conflict in the Balkans, and the creation of the tribunal was one of them.

Second, how did we get there, and what are these resolutions? When I was involved with these two tribunals, I spent a lot of time defending against the accusation that, like Nuremberg and Tokyo, these tribunals were just another form of victor's justice. I claimed that, technically, this was not the case. The tribunals at Nuremberg and Tokyo were not simply international, they were multi-national; they were created by the victorious Allies, essentially to try their defeated enemies. I would make the argument that these two ad-hoc tribunals were created by the United Nations, by the Security Council, whose budget is governed by the General Assembly. But, in a sense, I've withdrawn from this technical defense of these institutions after reading a wonderful book by Gary Bass, called *Seta and the Vengeance: The Politics of War Crimes Tribunals*, which was published at the end of the year 2000. Gary Bass says if in fact these tribunals are victor's justice, they can't be otherwise. It makes a difference who the victors are. They can't be otherwise, because only advanced liberal democracies could have created these kinds of institutions. So, in a sense, they are a product of the developed, advanced democracies that are fully engaged in a culture of rights, and the impetus for creating this kind of institution could have only come from there.

Let me come back to the prosecution of sexual violence, and I'll say three things. The first relates to what happened at the prison for women before I went to the Hague. I believe that the prosecution of sexual violence on the international scene could not have happened without the immense progress that had been made throughout the Western World. Certainly in North America and in Europe, in the preceding twenty or thirty years, we have enhanced our understanding of sexual violence. In developing and modernizing our rules of substantive law and evidence, we have developed a new method for denouncing sexual violence, prosecuting it and punishing it appropriately. I don't think that it's a coincidence that sexual violence was not prosecuted at Nuremberg, but is now at the forefront of the international prosecutorial agenda. It reflects very much what is happening throughout the liberal democracies that have been the champions of the protection of rights in the court system.

The second point is that, because of the progress that had been made domestically in countries that were attentive to what was happening internationally, it would have been unthinkable for the international tribunal, in particular the international prosecutor, not to be fully engaged in the prosecution and de-

nunciation of sexual violence. It could not have happened without the work that happened domestically, and, because of that, it could not have happened internationally.

My third point is that now, both in courts with international jurisdiction and in our domestic courts, we are developing and understanding what was intended in the prosecution of offenses on which we had long ago closed the book, and that, for a long time conveniently went unnoticed. So, we are fully engaged in what I have called an "era of enforcement."

What have we learned? I don't know where to begin. I'll try to touch on the broad issues, and when there is time for questions at the end, you can take me back to the areas that interest you most. In the prosecution of sexual offenses before these international tribunals, the very first thing you have to do is look at the broad policy choices. One of the debates that we had constantly in the office of the prosecutor was: should we "normalize" the prosecution of sexual violence, or should we keep nurturing it as a separate issue? The debate was whether we should just announce that a sexual offence was like any other offence that all investigators must be attentive to and must prosecute as part of any investigation.

When you investigate crimes against humanity or crimes of genocide, violations of human rights, murder or extermination, you look for torture and rape. The question is how sexual offenses should be investigated. Should we investigate them as we would any other crime, or, alternatively, because of the difficulty of investigating sexual offenses, should we continue to use a team that is particularly trained and sensitive to the special needs of this kind of an investigation, one that will ensure that these investigations are not neglected? We have these policy debates all the time.

Another debate that was a constant source of tension in the office of the prosecutor was the exercise of prosecutorial discretion. The offenses in the former Yugoslavia and Rwanda that fell within our jurisdiction were so numerous and deserving of prosecution that we had to be very strict about how we prioritized cases. In general terms, we determined that we had to concentrate on the most serious offenses that could bring us to the highest possible echelons of command. Accordingly, we would select for prosecution events like Srebrenica, where there was massive loss of human life, and the promise of climbing up the chain of command to visit the responsibility of the highest echelons was greatest.

Part of the debate concerned whether prosecuting the direct perpetrators of sexual offenses was an equally appropriate prosecutorial strategy. We discussed whether there was more to be gained by prosecuting actual perpetrators, the Mr. Nobodies who actually committed the crimes, rather than deciding that the goal of prosecution was to move up the chain of command. Punishment would, in the case of sexual violence, be particularly difficult to visit on the commanders under the doctrine of command responsibility. It would require proving that the commanders either participated in the offenses, or knew that the offenses were being committed but failed to punish those responsible.

The use of the doctrine of command responsibility in sexual violence was also a source of constant debate: should we create a special team for these kinds of offenses and actually focus on the actual perpetrators? If so, would we be trivializing these crimes by not normalizing them and putting them in the fold of our general prosecution? We had enormous operational difficulties. Our contacts were obviously extremely traumatized witnesses and victims. In addition, all of our conversations took place through interpreters. It was very difficult work for the interpreters, who got the first shock wave of stories they were being told. All of the difficulties of investigation in a domestic setting were amplified.

We also had tremendous difficulties with respect to protecting victims. This is endemic in the work of these international institutions, and is particularly keen in sexual violence cases. In that field more than any other, it was obvious how difficult it was to offer a criminal justice system without the rest of the infrastructure that we take for granted in our own national systems. There was no Children's Aid Society, no social services and no health care of any sort to work in partnership with criminal law enforcement. This was particularly acute in Rwanda, where we had a lot of interaction particularly with local NGOs, who worked with women in the country. This interaction, which was certainly helpful to us in performing our work, was also creating completely unrealistic expectations as to what this international institution could deliver.

By the time we went to trial, the difficulties were even more enormous. There may be some of you here who have looked at these issues. The cases can be found on the website of the tribunals. Real progress has been made in the development of, for instance, providing a definition of rape in an international environment. It's amazing that, in so little time, writing of such quality was produced. The judgments were not without controversy, however, and there are parts of them that I found rather timid in their approach. But the judgments made progress. If you look at the definitions of sexual offenses that were provided in the *Akayesu*, *Kovac*, *Furundzija* and *Foca* cases, you can see that they were forming a definition of *actus reus* and *mens rea*, bringing the international forum to the cutting edge of what is being done in most domestic departments.

Lawyers also bring cutting-edge issues and litigation techniques to these international tribunals. Any lawyer in good standing from any jurisdiction can appear before these international institutions. This country, this state, produces very good lawyers. Some of them appear in the defense of accused war criminals before international institutions. These lawyers bring with them the latest issues in the litigation of sexual violence from their own country to an environment where it is just beginning.

I'll give you one example, which is documented in one of the cases. In *Furundzija*, after the case was closed for both parties I received a phone call at my office. The phone message was the following: a trial opinion in another case had come to the disturbing discovery that we had not disclosed to the defense the records of therapy of the main complainant. This woman had received psychotherapy after extremely brutal sexual violence which she'd been subjected to at the hands of, not the accused personally, but his associate. There were

records of therapy in existence and we had, of course, a disclosure obligation that would be familiar to those of you taking criminal law and criminal procedure: the prosecution must turn over to the defense essentially its case, and any exculpatory evidence that may be relevant to the presentation of the defense. The issue of the disclosure of therapy records of the plaintiffs was an issue that in Canada we had just finished struggling with. The Supreme Court of Canada had pronounced on the relevance of, and the level of access that a defendant in criminal proceedings should be afforded to therapy materials, a matter that goes to the very heart of the right to privacy of the complainant.

In my view, we had to disclose the records. We had to disclose them and then argue vigorously that they were weak, irrelevant and not admissible, but we could not undertake the responsibility to make that decision without telling the court and the defense. Eventually, we did disclose the records and took a huge penalty for having disclosed late. The only reason that I bring this point to your attention is that, in domestic jurisdictions, it took us 100 years to get to that level of sophistication with respect to the relevance of certain materials in the prosecution and the defense of sexual violence. And, yet, in these international institutions where we were only starting, where the environment was so challenging and the witnesses were so vulnerable, defendants were presenting aggressive, modern defenses. And that is probably how it should have been. In the end, it's probably a good thing that these international institutions are catching on to the cutting-edge litigation that is taking place in our own systems.

Where do we go from here? I'll have to preface my next remark by saying, in Canada, there is a great feeling of optimism towards the future of these international criminal tribunals. You may know that, in the summer of 1998 in Rome, 120 countries signed the Rome Treaty creating the International Criminal Court. The expectations were that it would take years to collect the sixty ratifications necessary to bring the court into existence. We speculated that it would take about six, eight or even ten years. But now, there are fifty-two ratifications at last count. Conventional wisdom is that there will be sixty by the summer for sure. It is happening. It's an amazing development. It's a development that holds promise. It's also an environment in which there will be enormous difficulties. I won't spend a lot of time discussing it, but I'll just put forth, for the true international lawyers among you, a few questions that really trouble me.

With the advent of the ICC we have also seen, in a parallel movement, the growth of universal jurisdiction in domestic states. The two are sort of competing for prominence. Again, I'll use the example of Canada. In the statute that Canada enacted in order to ratify the International Criminal Court, Canada, by the same act, broadened its universal jurisdiction, giving itself jurisdiction over genocide, crimes against humanity, and war crimes. The act did not limit jurisdiction to crimes committed in Canada.

Other countries went even further. Belgium, for instance, equipped itself with a form of universal jurisdiction that created a severe headache for its government when a magistrate interpreted that jurisdiction literally, and with a vengeance. Belgium gave itself jurisdiction over crimes committed against

humanity, regardless of whether committed by or against a Belgian national. Essentially, it declared jurisdiction over all crimes against humanity committed anywhere by anyone. That decision led, as you may know, to a recent decision of the International Court of Justice which ratified an arrest warrant against a foreign minister of the Democratic Republic of the Congo, which had been issued by a Belgian magistrate.

With respect to the International Criminal Court, the one question that is on everybody's mind is whether we can do this without the United States. The answer seems to be, "We have no choice but to do so." It will happen. And it will, unfortunately, with or without the United States. Speaking for myself, it seems that, in view of this growth of universal jurisdiction, the ICC, the International Criminal Court, is bound to become the least unattractive alternative for the United States. I cannot imagine a nation facing potential exposure to prosecution in a multiplicity of national forums without mastering exactly how they will operate. It seems to me that, if that growth continues, this is the one forum where you can be a player, where you can have your own people influencing the thinking of the court and staffing the office of the prosecutor, as unattractive as that might be. It might just become considerably more attractive than what the world is going to look like with this checkered view of universal jurisdiction.

So one big question is, "Can this be done without the United States?" The next big question is, "The court will be operational imminently, certainly before the end of the year. Where will the work come from? Is it likely to come from the Security Council?" Again, it will depend on what position the United States takes. If, in its opposition to the court, it is so hostile that it will not do anything to recognize it, then it probably will not permit certain cases to be heard in the court—those cases that the Security Council would like to see in the International Tribunal. Will the work come from the prosecutor on his or her own motion? I think most probably the exercise of that discretion is going to be extremely challenging. This is too complicated to get into, but on the question of primacy, complementarity of primacy could just jam the international court for years in jurisdictional conflict with states who will want to assert their jurisdiction every time the court launches an investigation.

The question that I ask myself on all of these issues is, "What is it that we are afraid of; is it people or is it institutions?" Someone said, and I very much regret that I cannot attribute that quote to anybody, but it stayed with me when I heard it said by somebody else: "Nothing happens without people, but nothing lasts without institutions." I think that the prosecution of sexual violence could not have happened without the impetus that was generated in many national jurisdictions by people, very many in the legal profession, who made it a lifetime project to tackle this issue. From there, it could not have happened on the international scene without institutions like the International Tribunal. I think people deserve immense credit in the years to come, not only for the prosecution of genocide, crimes against humanity and war crimes generally, but, more particularly, for having been at the forefront of the policy and the prosecution of sexual violence. Thank you very much.

I'm very happy to answer your questions.

Question: Given the political opposition of the U.S., and that the U.S. has said that it doesn't want its soldiers prosecuted abroad—and maybe even some higher officials, though there hasn't been mention of that—how much reach could this ever have over the U.S.? That is, could the U.S. just completely block any prosecution of its nationals if it wanted?

Answer: Actually, interestingly enough, if the United States ratifies the Rome Treaty, it could, to use your term, "block" the prosecution of a U.S. national anytime. All they'd have to do is do it themselves. The international court is secondary to national jurisdiction. The national courts of countries that ratify the Rome Treaty have primacy over the ICC. So, if an international prosecutor decides to launch an investigation and eventually prosecute person X for alleged commission of offenses, any country possessing jurisdiction under its national law—either because the crime was committed on its territory, its nationals were the victims, or the accused or the target of the prosecution is one of its nationals—could assert jurisdiction and essentially trump the prosecutor. And the only way the prosecutor could bypass this primacy of national court is by showing that the national court in question is not genuinely ready, willing and able to do it.

That is not likely to be the case if, for instance, there is an international investigation involving a U.S. official. The United States (all fifty states) could assert jurisdiction and prosecute. What do you think are the chances of an international prosecutor persuading a panel of judges, and I'll get to the credibility and legitimacy of judges in a minute, that the United States is neither genuinely able nor willing to conduct a criminal investigation? That would be the end of the question, right there. That is immense protection for a country that is paralyzed by fear of an unfair prosecutor.

If the United States does not ratify, it's still in the same position, I suppose, that any nation would be. If a U.S. citizen goes to Canada and commits a crime, for example, he or she is subject to Canadian law and may be prosecuted in Canada. Frankly, in terms of exposure, I'm not sure there's a big difference whether you ratify it or you don't ratify it.

Question: You mentioned that the United States may not only stay outside of the convention, but may also be hostile to the convention, thereby pressuring others to be hostile as well. I wanted to get your views on an alternative that's emerging, namely, special tribunals such as in Sierra Leone, East Timor and Cambodia, which in some ways are supported by the United States.

Answer: The United States' support for the Cambodia commission, which used to be very strong and ongoing, seems to have totally collapsed. The issue is the utility of these ad-hoc initiatives in an era where so many countries—in fact, most of the countries of the European Union, as well as Canada—have now embraced a more universal and readily-available alternative.

These ad-hoc tribunals also tend to be backward-looking. The fact that they are surgical interventions after the fact deprives them, as far as criminal law enforcement is concerned, of some of the attributes of criminal law, such as

deterrence and the ability to act rapidly. Certainly, that was the case with the former Yugoslavia. There, the tribunal had jurisdiction from 1991 onward. Its jurisdiction included the entire territory of the former Yugoslavia, that is, the six republics. When Srebrenica occurred in 1995, the tribunal was just barely operational. When Kosovo happened, on the other hand, we were a real-time law enforcement operation. We had staff, we had vehicles, we had equipment, we had money and, sure enough, in three months, we had Milosevic for what happened in Kosovo.

That's what an international criminal court can do—it can anticipate. It's not hard, at the moment, for the international prosecutors to anticipate work stemming from international crises. Human Rights Watch can feed information about where a conflict is likely to erupt. There's a lot of information from multiple sources that we can start collecting. These on-again, off-again ad-hoc initiatives look to the past, instead of the future and, therefore, have less utility today. They were important in the past, but, with the ICC in place, I think ad-hoc tribunals have become of less interest to those who are embracing the ICC.

Question: [Can you speculate how the International Criminal Court will affect the persons the United States captured in Afghanistan and currently detained in Cuba?][2]

Answer: First of all, the question would assume that the international criminal court is already in existence. Assuming it comes into effect in July, its jurisdiction will only be prospective. If and when it comes into effect there's nothing it will be able to do after the fact. The second thing is, as I indicated before, it does not have primacy over national courts. So, if national courts assert their jurisdiction, the most the prosecutors can do is challenge that.

Question: [How does the ICC determine whether it has jurisdiction over a criminal defendant?]

Answer: First of all, it would depend on what crimes it is alleged these people committed. The ICC only has jurisdiction over war crimes and crimes against humanity, genocide, and the breaching of the Geneva Convention. You first have to determine what it is that these people are to be charged with, whether it falls under the jurisdiction of the ICC, and whether there is a competent national jurisdiction that is asserting its primacy. And, if so, that's the end of the case.

Question: I wanted you to articulate a little further why you think the ICC [will be a better alternative even for nations, like the United States, that oppose it].

Answer: I think I was trying to develop an argument that, from the point of view of those who are reluctant to embrace the idea of an ICC, they don't have much choice with respect to universal jurisdiction. Given that lack of choice, I believe the ICC would be a better forum. Why? Because it's an international

2. Portions of some questions from the question-and-answer period were unintelligible and could not be transcribed verbatim. These questions have been paraphrased. The paraphrased portions appear in brackets.

institution, and, if the United States were to become a signatory, it could play, it could have judges, it could have prosecutors.

You know, when you work within an institution, you give it a culture. The International Criminal Tribunal for the former Yugoslavia was originally staffed by twenty-five U.S. attorneys who donated their time for a couple of years. Many European countries were outraged by the large number of Americans and felt that the United States had basically hijacked the institution culturally . And it had, to a large extent. It was a common-law jurisdiction, and the way of doing business was very North American because the Americans were there from day one. It's easier to fight something from within, if you're not comfortable with it, than it is to fight this growth of universal jurisdiction. I can't imagine that the universal jurisdiction of the laws of Belgium did not create a problem for the United States.

Question: Just for the purposes of the enforcement of human rights, what are the advantages of the ICC?

Answer: From the human rights or the humanitarian law enforcement perspective, I think, the more the merrier. You want broad-based universal jurisdiction and a strong ICC. And you want the ICC to be essentially the default jurisdiction. Now, the problem in the long run is that the ICC will then become the default jurisdiction for the developing world. Let me give you an example from the former Yugoslavia and Rwanda. I'll talk more specifically about Croatia, the most European of the Yugoslavian republics.

We had cases involving Croatian nationals, Blaskic and Kordic. If this had been under an ICC regime, I would still be in court today fighting Croatia. They would have asserted their jurisdiction—these were their generals who had fought in their war on their side, and I was trying to prosecute them. Given the choice, they would have asserted their primacy, and I would still be there, trying to prove that Croatia was not genuinely winning the war. But I could never attempt to show that they weren't able, with courts, buildings, judges, lawyers and money, to have all the trappings of a functioning criminal justice system. How do you prove that judges are not truly independent? How do you prove that the prosecutor will be manipulated by political interests?

In the case of Rwanda, 100 days after the onslaught of the genocide, with 800,000 people dead, when the FPR came into power, there was not a single lawyer or judge standing in the country. The international jurisdiction could have taken over immediately and said to Rwanda, "You are not able to do it! You don't have the resources." I think the danger for the ICC is that it will become subject to default jurisdiction for countries that are either not physically able to prosecute, or whose human rights—I mean rights of the defendant—just do not meet the expectations of fairness.

Question: If we consider briefly the record of allegedly Western enlightened democracies, the U.S. has No Ben Ri in Korea; Japan has the Rape of Nanking, for which they have not apologized and which is not discussed in Japanese history books; France has Algeria, where someone who actually acknowledged the events is in trouble with French law right now; and the U.K.

[has similar events in its history, as well]. If these nations are not willing to apologize and prosecute those responsible for such acts, how likely is it that renegade countries would?

Answer: I think the gamble we have to take is that we could actually invest a huge amount of effort into redressing history. In some cases, it's important because there are issues that were such an affront to all of mankind that we can never turn our backs and say, "It's too late. It's too far in the past." There are very few of those.

You have to be sort of forward-looking and say, "It starts now." From now on, there will be accountability, there will be a forum. Maybe you can do both. And maybe the impetus to go forward will also revive an interest in revisiting some events of the past. The range of remedies then becomes very difficult. There is no longer anyone to apply criminal sanctions to, but you can use various forms of compensation, and expose the truth. But I would like to think that for the most part the gamble is in making a better future. If there's only so much energy going to be applied, it should be applied to the future.

Question: [Do you see any problems with the fact that, unlike the American judicial system, for example, the ICC does not have the equivalent of a legislative or executive branch providing a check on its power?]

Answer: That goes to the root of the problem that the ICC will have, which is to establish its legitimacy—to establish its credentials completely when it doesn't have the partners that you normally have in a democratic setting. If you look at the tribunals, God knows that a lot of mistakes were made. They were far from perfect. I was the first one to complain. For instance, in a typical judicial system, the judges cannot both enact the rules and then interpret them. Only the legislature can enact the rules. In the tribunal, the substantive role was enacted by the Security Council through a resolution, but all the laws of evidence and procedures were delegated to the judges for enactment. It sounds like a small point, but it's an illustration.

In the ICC, there will be an Assembly of State Parties. It's going to start looking a little more, it seems to me, like a body that will be able to exercise some kind of political oversight over the prosecutor. For example, it can fire the prosecutor. Theoretically, the Security Council could have done that to me as well. I could have said to its ambassadors, "Listen, you've appointed me. I've been doing exactly what I've been mandated to do. If you're not happy with my work, just pass a resolution to have me removed." I think the chances of getting a veto over removal were good enough.

You cannot duplicate all of these national institutions internationally, but if you have a strong Assembly of State Parties, and if you have this theoretical role of a prosecutor out of touch with reality, it's pretty clear that there would be political consequences. The Assembly of State Parties would reign in that prosecutor. In that sense, you have a semblance of a legislative and executive type of system. But, you need a lot of imagination to duplicate all of this infrastructure that you're used to. That's the real challenge. It's hard to create an institution. I've argued to my American friends many times that you cannot create an

institution on the assumption that it will be run by incompetent, corrupt, idiotic people. You have to make sure it doesn't happen and, if it does, then you must have a mechanism to fix it. You have to have your own checks and balances built in. That's why I ask, "What is it we're afraid of? Are we afraid of people or are we afraid of institutions?"

Question: Just to shift away from the ICC a bit, I'm really interested in the victims in all this, and I'm wondering if you had time to get a sense of how an institutional litigation solution to these atrocities felt for the victim. There's a debate about whether truth commissions are better; should we prosecute these people; and how does that work for them? Did you get any sense of the women involved, how they felt?

Answer: Frankly, I can't speak for all of them. At times, you despair because, now, for instance, you hear from the press in the Balkans that people see Milosevic on trial and say, "Well, I don't care about him, he's not the one who killed my brother or burned my house." And that's so true. The same thing is true in Rwanda: there are 130,000 people in jail inside Rwanda awaiting trial on genocide-related charges. For a lot of the victims, they're the ones who could identify who had done it. But that's not the mandate that was given to this kind of partnership. So there are times that we feel very disconnected from the people who were actually victimized by the conflict.

This is going to be my final war story. At the height of the NATO air strikes in Kosovo—in February or March of 1999—there was an exodus of people leaving Kosovo, and there were camps set up in Albania and Macedonia. A journalist came to the Hague to interview me. He had just come back from the camp of Kukes in Albania, which was full of Kosovar Albanian refugees, and he said to me, "I'll tell you a story. I'd like to have your reaction." He said that he met a woman in this camp. She had just crossed the border. She had just arrived in total despair, extremely traumatized by the conflict. I've forgotten all of the details—her son was missing, her husband had been killed, her entire village burned, and she was there, completely desperate. At this point, there was zero hope. Her papers had been seized and burned at the border, and this journalist told me he asked her, "If you can ever go back to Kosovo, what are your hopes, what do you want to do?" And she said, "When I go back, if I can, I will kill all the Serbs, but if I can't do that, I want to talk to that woman judge."

He said, "What do you think about that? I said, "If we had not been there, I know what she would have said. She would have said, when I go back to Kosovo, I will kill all the Serbs, and if I cannot do that I will tell my friends to kill all the Serbs, and I will tell all of my children and grandchildren to kill all the Serbs and I will work on that program until it's accomplished. There is no other alternative." What she articulated for the first time, however, was the rule of law as an alternative. Now, let's be very clear which alternative she preferred. But I felt very strongly that it was up to us to give her that choice. We have introduced the alternative, the rule of law alternative. The big step is to promote it as the better alternative, and that is a long road ahead of us.

Professor Guzman's Closing Remarks:

Thank you, Justice Arbour, for that terribly stimulating talk. I would be shocked if any of the pointy-headed academics in the room such as myself were rolling their eyes while you were speaking. I do have one point of disagreement, which is that for someone who claims to know nothing about international law, you seem to have an awfully subtle understanding of some of the more complex and treacherous areas in that field. I'm thinking that maybe you might want to strike that disclaimer from the beginning of the talk.

Before proceeding with the actual presentation of the Riesenfeld Award, I wanted to give my thanks to Phyllis Riesenfeld, whose support has made this possible. She's been generous to the International Law Program here in a lot of ways, this being one of them. And let me say just a couple of things about the award, and about Stefan Riesenfeld himself, in whose honor the award is being presented. Professor Riesenfeld was, without any doubt, one of the real giants of international law in the twentieth century, and a professor of this institution for a number of years. He came to the United States escaping another horrible incident in international law, which was Nazi Germany. He landed in Michigan, worked as a researcher there, and in very short order managed to get himself a law degree from Boalt Hall and a JSD from Harvard. Along the way, he found time to learn English as he was doing this. He then started teaching at the University of Minnesota, along the way serving in the U.S. Navy during the Second World War. And in 1952, Boalt Hall had the good sense to appoint him to the faculty here, and he remained on this faculty until his death in 1999.

I would like to list for you just the areas in which Professor Riesenfeld worked, but I would never be able to enumerate them and we don't have time in any event, so let me mention just a few: maritime law, trade law, development of treaty law, commercial law, and labor law, is a tiny sampling of areas, and in each of these areas he wrote authoritatively and influentially. This award, then, stands in tribute to him and his enormous effect on international law that we continue to feel both in the debates over international law and the practice of international law in the world. Now, let me turn to awarding the actual Award to Justice Arbour. I really want to say only this, which is that an award named after someone as inspiring as Professor Riesenfeld, and someone as influential as Professor Riesenfeld deserves to be given to another human being who is as inspiring and influential on the international law scene. I'm thrilled to be able to present this Award to Justice Arbour.

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Family Separation as a Violation of International Law

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Family Separation as a Violation of International Law*

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Devastating to the individuals involved and frequently destructive in its long-term impact on cultural groups and entire societies, the involuntary separation of families is a widespread problem that deserves increased attention as an issue of international human rights. Today, the international legal system is beginning to address the concerns of the family and the need for justice within the family, and to develop norms that in many circumstances treat involuntary family separation as a violation of international law. Its approach, however, has been fragmentary and inconsistent, viewing family separation through particular lenses, such as children's rights or privacy, without establishing a coherent framework that brings these various perspectives together. In this article, we identify and compare the emerging principles of international law that relate to the issue of family separation and elaborate on them in a way that, we hope, will help to build such a framework.

Our analysis focuses on several case studies, including Australia's long history of removing Aboriginal children from their parents, recent anti-polygamy policies in France, current immigration and child welfare laws in the United States, and mass family separation in crisis situations worldwide. Each of these varied cases reflects one or more of the many facets of the problem of family separation, including the cultural significance of the family, the difficulty of defining "family," the balancing of interests and rights among different members of the family, and the balancing of these individuals' rights against the broader social, political, or economic interests of society or the state. In addition, each case tests the boundaries of possible international norms addressing this problem.

Issues involving the integrity of families are difficult for international law to resolve because they involve a variety of competing values, values that are often both passionately held and deeply contested among and within cultures. These include the rights and interests of individual family members, including the special rights of children as well as the rights of adults to form relationships,

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marry, and raise children. In this article, we address only involuntary family separation—that is, separation implemented against the expressed will of all the family members concerned. We do not address, except tangentially, separations that stem from the active, expressed choice of one or more persons—most notably from divorce—even though some of the legal principles we discuss may have implications for, or have been developed largely in the context of, such situations. Thus, by definition, all the cases of family separation we discuss interfere with individuals' autonomy, and the question is whether this interference is justified. In some cases, the "autonomy" underlying these decisions may be less than genuine; for example, women who "choose" to enter structurally oppressive family arrangements may sometimes be so constrained by cultural pressures or socioeconomic necessity as to lack a meaningful choice.[1]

Individual interests often weigh strongly in the direction of keeping families together, and they form a central motivation for norms, international or otherwise, in favor of family integrity.[2] In some cases, however, individuals' interests conflict, or a single individual may have multiple competing interests. In child welfare cases, for example, the interest of a child in being raised by her parents, and of that her parents in raising her, must be balanced against her strong interest in protection from abuse and neglect. Moreover, in addition to various competing individual interests, involuntary family separation implicates broader concerns, including core aspects of social structure, culture, and national identity. As many treaties recognize, the family is a core social institution in almost all societies, although the nature of families and their social role varies tremendously. Family separation may therefore threaten the cultural integrity of peoples. On the other hand, a nation's ability to define what constitutes a family is often a critical aspect of its collective identity, and may require the separation of some self-defined families.

Another set of values at stake, particularly important from a feminist perspective, are those involving structural equality and justice in the relations among groups within a society, including but not limited to gender equality. This perspective places emphasis on the need for justice within the family itself, which may weigh against protecting certain types of family structure and in favor of protecting others, and on solutions to the disproportionate impact of family separation policies on women and ethnic or racial minorities.

Finally, the state also has significant interests in matters involving families. As a general matter, international regulation of state behavior always implicates state sovereignty. In addition, other specific state interests, such as the regulation of immigration and the protection of children, are at stake in particular categories of family separation cases.

It should come as no surprise that international law today fails to provide any comprehensive or consistent framework for ordering and weighing these values; indeed, the total lack of consensus on many of these issues may make

1. These issues will be further discussed below, particularly in Section II.B.

2. We use "family integrity" to mean "family unity," and use the two phrases interchangeably.

such a framework impossible to achieve. Yet this difficulty should not paralyze us. International law involves, inevitably, choices and compromises that take place against a background of cultural difference. Using today's piecemeal international regulation of family matters as a starting point, we can begin to identify principles to help guide these choices in the future. This article examines the conflicts among these diverse values and interests as they play out in a number of different case studies, from which we draw some guidance for the development of international norms against involuntary family separation. Our primary focus is on the content of these norms. We leave for another day important questions regarding the best procedures and institutional arrangements for their implementation, including whether and when the use of the emerging international criminal justice system might be appropriate.

In Section I, we begin with a brief review of the current state of international law on this subject, which consists of a patchwork of treaty provisions and the glimmerings of a developing customary norm against the involuntary separation of families. The case studies in Section II illustrate the complexity of the problem and help us to flesh out the parameters of the international norms we would like to see emerge. In Section II.A, we look at the tragic history of the Stolen Generations in Australia (and analogous policies in North America)—the systematic forced removal of tens of thousands of Aboriginal children from their parents. In Section II.B, we consider the situation of polygamous immigrant families in France, a longstanding and difficult problem that has recently been turned on its head by the adoption of rigorous new anti-polygamy laws. Sections II.C and II.D, which primarily focus on very recent legal changes and court decisions in the United States, address concerns that are nonetheless significant every year in countries around the world: family separation issues in immigration policy and the protective removal of children by social service agencies. Section II.E considers mass family separation as an aspect of crisis situations, and particularly examines the obligation of states and international institutions responding to crises to work toward the reunification of families. We conclude by assessing the need for new international norms to deal with the growing problem of involuntary family separation in our fast-changing and conflict-prone contemporary world.

I.
Family Values: Conflict and Compromise in Today's International Law

This Section provides an overview of the past, existing, and newly emerging international legal norms implicating the problem of involuntary family separation and analyzes these norms in light of the value conflicts discussed in the Introduction. In Section A, we briefly review the historical evolution of these norms, addressing the question of how the family became a subject of international lawmaking in the first place. In Section B, we review existing treaty provisions that relate to family separation as well as decisions by the relevant international bodies interpreting them. In Section C, we consider what potential

general principles or customary norms we can draw from these treaty provisions and assess whether strengthening legal protections of the family is justifiable from a feminist perspective.

A. *History*

The emergence of principles of international law regarding the family is a relatively new phenomenon. In the nineteenth and early twentieth centuries, international law addressed families and family law only insofar as it established choice-of-law principles for cases in national courts involving immigrant families or families of mixed nationality.[3] The dominant principle was the notion, associated with the theorist Pasquale Mancini, that legal disputes relating to an individual's "personal status"—a concept encompassing marriage and other family relationships—should be governed by the law of that individual's domicile.[4] A number of European and Latin American multilateral conventions codified this principle and attempted to provide consistent principles for the determination of domicile; the United States and the United Kingdom did not join these conventions.[5] The possibility of reaching an international consensus on substantive provisions regarding a subject as contentious as the treatment of the family seemed remote, as even most of the choice-of-law conventions did not achieve widespread support.[6]

The middle of the twentieth century saw the development of the first treaties that set forth substantive principles regarding the state's treatment of families and, particularly, its protection of children.[7] The first treaties regarding child protection dealt with the prohibition of child labor pursuant to the creation of the International Labor Organization.[8] In 1924, the League of Nations passed a Declaration on the Rights of the Child; this was followed by a similar United Nations Declaration in 1959.[9] These were soft law instruments, not binding on states. The most significant binding international treaty to emerge from this era was the 1961 Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants.[10] The Convention still dealt largely with choice-of-law issues in guardianship cases; it was notable because it provided an exception to the prevailing domicile rule when necessary to protect children. For the first time, a treaty adopted as a central principle the protection

3. *See* Adair Dyer, *The Internationalization of Family Law*, 30 U.C. DAVIS L. REV. 625, 625-29 (1997).

4. *Id.* at 626.

5. *Id.* at 627-28. The U.S. declined to participate in part on the grounds that under its federal system choice-of-law rules for family law were left up to individual states. *Id.* at 628. The United Kingdom also refused participation because it rejected Mancini's domicile-based principle. *Id.*

6. Linda Silberman, *The Hague Child Conventions: The Internationalization of Child Law*, *in* CROSS CURRENTS: FAMILY LAW AND POLICY IN THE UNITED STATES AND ENGLAND 589, 589 (Katz et al. eds., 2000).

7. Dyer, *supra* note 3, at 629-30.

8. *Id.*

9. *Id.* at 630, 633.

10. Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants, Oct. 5, 1961, 658 U.N.T.S. 143.

of the "interests of the child," a shift away from earlier conflicts rules that had been premised solely on the competing rights of parents.[11] This shift was a precursor to the 1989 Convention on the Rights of the Child, which addressed children's rights far more comprehensively but still in a manner guided by the "best interests of the child" standard.[12] It was also followed by more recent Hague Conventions setting forth standards for international cooperation on issues such as child abduction and adoption.[13]

The increasing internationalization of law affecting the family represents the confluence of two significant trends over the past century. First, the traditional view of the family as belonging to a private sphere insulated from public scrutiny and regulation, or at least as being a "local" rather than national (much less international) issue, has become increasingly untenable, if still highly influential. Feminist scholars have long critiqued this notion, both as a cultural phenomenon[14] and as a legal one.[15] For example, the placement of family issues on the "local" side of the national/local divide has long been treated by courts as a central feature of federalism in the United States. Yet Professor Judith Resnik has shown that this categorization, in addition to perpetuating inequality, has always been and is increasingly belied by many federal laws that directly or indirectly affect family affairs.[16] Feminist critiques of the public/private dichotomy, and their implications for international legal protections of the family, will be discussed later in this Section. On an international level, the dichotomy is increasingly breaking down, as "international law is gradually and reluctantly moving into unfamiliar areas" such as the regulation of family life to prevent domestic abuse.[17]

Second, the focus of international law has shifted from relations among nation-states toward the protection of individual rights.[18] The mid- to late twentieth century saw the development of a number of other major human rights treaties, both global and regional. The Universal Declaration of Human Rights

11. Dyer, *supra* note 3, at 633. The effect of this treaty was limited, however, by the fact that only eleven states (all civil law countries) ratified it. *See* Karin Wolfe, Note, *A Tale of Two States: Successes and Failures of the 1980 Hague Convention on the Civil Aspects of International Child Abductions in the United States and Germany*, 33 N.Y.U. J. INT'L L. & POL. 285, 293 & n.24 (2000). The treaty has now been superceded by a subsequent Hague Convention passed in 1996. *See* Adair Dyer, *Keynote Address: To Celebrate a Score of Years*, 33 N.Y.U. J. INT'L. L. & POL. 1, 4 n. 13 (2000); *see also infra* note 13 and accompanying text.

12. Convention on the Rights of the Child, G.A. Res. 44/25, annex, U.N. GAOR, 44th Sess., Supp. No. 49 at 167, U.N. Doc. A/44/49 (1989) [hereinafter CRC]; *see, e.g., id.* art. 3 (setting forth the "best interests of the child" standard).

13. *See* Silberman, *supra* note 6, at 589 (discussing these conventions).

14. *See, e.g.*, SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 110-133 (1989).

15. *See, e.g.*, Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2001) (critiquing American law's traditional characterization of family matters as "local," and of gender violence as belonging to the category of family matters).

16. *Id.*

17. GERALDINE VAN BUEREN, THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD 72 (1995).

18. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS, Part II (Introductory Note) (1987); Bartram S. Brown, *International Law: The Protection of Human Rights in Disintegrating States: A New Challenge*, 68 CHI.-KENT L. REV. 203, 214 (1992) (describing a "fundamental shift away from the old state-centric international law").

set the stage for the postwar expansion of human rights law.[19] The Universal Declaration is not a treaty; it was originally intended to be a hortatory set of standards, not binding law. However, many of its provisions are now accepted as customary international law.[20] Probably the most significant human rights treaty today, in terms of its scope and number of signatories, is the 1966 International Covenant on Civil and Political Rights (ICCPR), which entered into force in 1976.[21] In addition to the wide-ranging protections of the Universal Declaration and ICCPR, a number of treaties specifically address particular categories of human rights abuses—for example, sex discrimination,[22] race discrimination,[23] and genocide.[24] Finally, three regional human rights conventions for Europe, the Americas, and Africa entered into force in 1953, 1978, and 1986, respectively.[25] Each of these treaties contains specific provisions affecting families and has implications for the development of an international norm against involuntary family separation. These will be discussed further in the next Section.

B. Family Separation Under Current International Law: Treaty Provisions

In this Section, we review a variety of different treaty provisions suggesting that current international law contains norms against involuntary family separation. We divide these provisions loosely into five categories. The first four consist of protections of individual rights: the individual right to familial privacy, children's rights, parental rights, and the right to marry. The final category consists of provisions that protect the family as an institution. This protection may be framed as a right of the family or as an obligation of the state. Note that the individual rights provisions do not encompass the full range of individual family relationships one might imagine; no international treaty specifically protects the rights of siblings to stay together, for example, nor grandparents' rights. International law protects such rights to some extent through

19. Universal Declaration of Human Rights, G.A. Res. 217(A)(III), U.N. Doc. A/810 at 71 (1948) [hereinafter Universal Declaration].

20. *See* W. Michael Reisman, *Comment: Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 867 (1990).

21. International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

22. Convention on the Elimination of All Forms of Discrimination Against Women, 1249 U.N.T.S. 20378 (1981) [hereinafter CEDAW].

23. International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter CERD].

24. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 1021 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].

25. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov 4, 1950, 213 U.N.T.S. 222 (entered into force 3 Dec. 1953) [hereinafter European Convention]; American Convention on Human Rights, Nov. 22, 1969 1144 U.N.T.S. 123 (entered into force Jul. 18, 1978) [hereinafter American Convention]; African (Banjul) Charter on Human and Peoples' Rights, Jun. 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986) [hereinafter African Charter].

general provisions protecting privacy and family life; some court decisions on this point are discussed below.[26]

This section is not a comprehensive review of existing treaty provisions that have implications for the legality of particular instances of family separation. A number of additional provisions affect the application of this norm to specific circumstances—for example, where family separation is used as a tool of genocide, it may violate the Genocide Convention, while policies that restrict family members' rights to travel in order to visit one another may violate provisions protecting the freedom of movement. The African Commission on Human and Peoples' Rights has held that family separation under certain circumstances violates provisions against inhuman and degrading treatment.[27] A range of specific provisions will be discussed in Section II in the context of particular case studies. Also, in addition to international provisions *against* family separation, some treaty provisions may weigh in *favor* of family separation in particular circumstances. For example, provisions obligating the state to act to prevent child abuse, which are discussed to a limited extent in Subsection 2 below, sometimes necessitate a child's removal from her parents, while provisions in favor of gender equality may arguably weigh in favor of the anti-polygamy policies discussed in Section II.B. Both of these other categories of treaty provisions will be considered in the context of the case studies in Section II. This Section, however, simply reviews the possible treaty-based arguments in favor of a norm against involuntary family separation, considering them against the background of the value conflicts discussed in the Introduction and using them to provide a broader context for the subsequent discussion of the case studies.

1. The Right to Privacy and Family Life

The right to family integrity is an aspect of the right to privacy, which is protected by a number of international conventions. Article 12 of the Universal Declaration of Human Rights states: "No one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence, nor to attacks upon his honour or reputation. Everyone has the right to the protection of the law against such interference or attacks."[28] Very similar language is found in Article 17 of the ICCPR,[29] Article 11 of the American Convention,[30] Article 16

26. *See also* VAN BUEREN, *supra* note 17, at 83 (discussing siblings' rights). Note that Article 5 of the CRC imposes a general obligation on sates to respect, "where applicable," the rights of the extended family. *See infra* note 48.

27. Modise v. Botswana, African Comm'n Hum. & Peoples' Rights, Comm. No. 97/93 (1997).

28. Universal Declaration, *supra* note 19, art. 12.

29. ICCPR, *supra* note 21, art. 17.

30. American Convention, *supra* note 25, art. 11. The American Convention's structure is somewhat different. Headed "Right to Privacy," Article 11 reads: "1. Everyone has the right to have his honor respected and his dignity recognized. 2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation. 3. Everyone has the right to the protection of the law against such interference or attacks." *Id.*

of the Convention on the Rights of the Child,[31] and Article 10 of the African Charter on the Rights and Welfare of the Child.[32] In each of these treaties, arbitrariness is the touchstone for what counts as unlawful interference with the family. Article 8 of the European Convention provides similar protection, although, instead of using the term "arbitrary," it spells out the conditions under which the state may interfere with family life:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[33]

Among the various international human rights institutions, the European system has produced the most developed family privacy doctrine; we will take a closer look at it here. Notwithstanding the potentially broad scope of the exceptions in section 2, the European Court of Human Rights (ECHR) has interpreted Article 8 to provide fairly robust privacy protection generally, and specifically to protect family integrity against state interference. The right to cohabitate with one's family has been held to be a central aspect of "family life" under Article 8 (as well as a core element of the Article 12 right to "found a family").[34] The Court has held that Article 8 places restrictions and obligations on states in areas including child custody decisions,[35] protective removal of children,[36] immigration policy,[37] and illegitimacy laws.[38] Many of these decisions will be discussed in subsequent sections of this article; we set forth some of the basic principles here.

In *Marckx v. Belgium*, which held that Article 8 forbids states from legally discriminating against illegitimate children, the ECHR set forth the principle that Article 8 does not simply impose negative restrictions on the state's authority to interfere with family life. Rather, "there may be positive obligations inherent in an effective 'respect' for family life. . . . [The State] must act in a manner calculated to allow those concerned to lead a normal family life."[39] This obligation encompasses the creation of domestic "legal safeguards that

31. CRC, *supra* note 12, art. 16 (granting these privacy rights specifically to children).

32. African Charter on the Rights and Welfare of the Child, July, 1990 OAU Doc. CAB/LEG/24.9/49 (1990) (entered into force Nov. 29, 1999) [hereinafter African Children's Charter] (protecting the privacy of the child). Note that the African Charter on Human and Peoples' Rights, in contrast, does not contain privacy protections. *See* African Charter, *supra* note 25.

33. European Convention, *supra* note 25, art. 8.

34. Abdulaziz v. United Kingdom, App. Nos. 9214/80, 9473/81, 9474/81, 7 H.R. Rep. 471, ¶ 62 (1985).

35. *E.g.*, Hoffman v. Austria, App. No. 12875/87, 17 Eur. H.R. Rep. 293 (1993); Salgueiro da Silva Mouta v. Portugal, App. No. 33290/96, 31 Eur. H.R. Rep. 1055 (1999).

36. *E.g.*, Olsson v. Sweden, App. No. 10465/83, 11 Eur. H.R. Rep. 259 (1987); *see also* notes 369-380 and accompanying text.

37. *E.g.*, *Abdulaziz*, 7 Eur. H.R. Rep. 471; Ciliz v. Netherlands, 2000-VIII Eur. Ct. H.R. 267.

38. *E.g.*, Marckx v. Belgium, App. No. 6833/74, 2 Eur. H.R. Rep. 330 (1979); Johnston v. Ireland, App. No. 9697/82, 9 Eur. H.R. Rep. 203, ¶¶ 70-75 (1986).

39. *Marckx*, 2 Eur. H.R. Rep. 330 ¶ 31.

render possible, as from the moment of birth, the child's integration in his family."[40] The principle that the state may be required to affirmatively promote family life is repeated, if not extensively developed, in a number of other cases.[41] However, the Court has held that these positive obligations are particularly culturally contingent and that states are entitled to considerable discretion in carrying them out.[42]

The ECHR has often added strength to Article 8's protections by reading them in conjunction with the Article 14 prohibition on discrimination. For example, in *Mouta v. Portugal*, the Court read Articles 8 together with 14 to prevent states from discriminating in child custody decisions against homosexual parents.[43] In *Abdulaziz v. United Kingdom*, it found that an immigration policy that allowed admission to the spouses of male but not female legal residents discriminated on the basis of sex, violating Article 14 in conjunction with Article 8.[44] Similarly, in *Markcx* the Court cited the non-discrimination imperative embodied by Article 14 when it held that "Article 8 makes no distinction between the 'legitimate' and the 'illegitimate' family."[45] In this regard, it also noted that Council of Europe resolutions had established that families headed by single mothers are entitled to be treated as no less of a "family" than traditional two-parent families.[46] In rejecting the Belgian government's defense that its illegitimacy policy was necessary to protect "morals and public order," the Court agreed that "support and encouragement of the traditional family is in itself legitimate or even praiseworthy," but held that measures toward this end must not prejudice the rights of other families.[47] The Court also held that Article 8 protects not only the rights of immediate family members, but also those of grandparents and other extended family members.[48]

Yet the ECHR's cases also reflect ambivalence about the power of international law to restrict states' ability to control the legal and practical definition of a family. For example, in *Rees v. United Kingdom*, the Court held that the Article 8 privacy right did not encompass a right of a post-operative transsexual to have his new sex identity legally recognized so that he could marry a woman. It reasoned that "the notion of 'respect' is not clear-cut. . . . [H]aving regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to

40. *Id.*

41. *E.g.*, *Abdulaziz*, 7 Eur. H.R. Rep. 471 ¶ 67; *Ciliz*, 2000-VIII Eur. Ct. H.R. 267 ¶¶ 61-62.

42. *See* Rees v. United Kingdom, 9 Eur. H.R. Rep. 56 ¶¶ 35-37 (1986) (noting that the scope of the positive obligations entailed by Article 8 is indeterminate, will vary from state to state based on cultural practices, and will depend on a "fair balance" between community and individual interests).

43. 31 Eur. H.R. Rep. 1055 ¶ 36.

44. 7 Eur. H.R. Rep. 471 ¶ 83.

45. 2 Eur. H.R. Rep. 330 ¶ 31.

46. *Id.*

47. *Id.* ¶ 40.

48. *Id.* ¶ 45. Note that the extended family is also protected under the Convention on the Rights of the Child, the drafting history of which reflects particular concern for the accommodation of cultural difference. *See* SHARON DETRICK, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 335 (1999); *see also supra* note 26.

case."[49] Thus, although acknowledging that a number of European states did afford transsexuals the legal right at issue, the Court refused to require the U.K. to follow this example, instead allowing it to resolve such critical issues of identity on its own.[50] The Court has also emphasized the evolution of social and cultural norms, as reflected by state practice across Europe; sometimes, as in the illegitimacy cases, this has served to justify the recognition of a new Article 8 right.[51] In other cases, like *Rees*, the Court has left open the possibility of further evolution that might change the law in the future, but has found that thus far the necessary state practice element for the establishment of a particular norm is lacking.[52]

2. *The Rights of the Child and the "Best Interests" Test*

The second category of relevant treaty provisions are those that protect the rights of children to remain with their families. As described above, a series of international treaties and declarations, culminating in the 1989 Convention on the Rights of the Child, has established the "best interests of the child" as the general standard states must employ to shape their policies and practices affecting children.[53] A number of specific provisions of the Convention reflect a presumption that family unity will best serve these interests. First, the Preamble to the Convention describes the family as the "natural environment for the growth and well-being of all its members and particularly children," and further states that "the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding."[54] More specifically, Article 7(1) of the Convention grants each child "as far as possible, the right to know and be cared for by his or her parents,"[55] while Article 8(1) grants the "right of the child to preserve his or her identity, including . . . family relations . . . without unlawful interference."[56] Article 9(1) specifically bans the separation of children from their parents except under specific circumstances:

> State Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.[57]

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49. *Rees*, 9 Eur. H.R. Rep. 56 ¶ 37.

50. *Id.* ¶¶ 37, 42.

51. *See Marckx*, 2 Eur. H.R. Rep. 330 ¶ 41.

52. *Rees*, 9 Eur. H.R. Rep. 56 ¶¶ 37, 47.

53. This standard, and particularly its application to the protective removal of children by social welfare services, will be discussed extensively in Section II.D below.

54. CRC, *supra* note 12, Preamble ¶ 6.

55. *Id.* art. 7(1).

56. *Id.* art. 8(1).

57. *Id.* art. 9(1).

Note that while Article 9(1) allows states to remove children from their families in order to protect them from abuse or neglect, it imposes a procedural requirement of judicial review—a protection lacking in many states, as discussed below in Section II.D. Although the Convention does not make clear whether this judicial review must take place *before* the child is removed, Article 9(1) is commonly interpreted as imposing such a requirement.[58] Article 9(2) further specifies that "all interested parties" shall have a right to participate in proceedings pursuant to Article 9(1). This procedural right "has been compared with Article 14(1) of the ICCPR," a provision generally outlining due process protections for any individual whose legally protected rights are at stake.[59]

Article 24(1) of the ICCPR grants children the right to special protection by the state. The U.N. Human Rights Committee has held that this right affirmatively obligates the state to intervene in situations where a child faces abuse or neglect.[60] A similar requirement of special protection for children is provided by Article 16 of the Additional Protocol to the American Convention on Economic, Social, and Cultural Rights.[61]

The Convention on the Rights of the Child also imposes obligations on states in situations where families have already been separated. First, where children are separated from one or both parents (for example, due to child custody decisions as described in Article 9(1)), the state must respect a child's right to "maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."[62] Furthermore, if parents are separated from their children due to "any action initiated by a State Party, such as . . . detention, imprisonment, exile, deportation, or death," the state must furnish the parents or children with any available information regarding their family members' whereabouts.[63] Finally, where national borders separate children from their parents, states must allow sufficient freedom of movement to enable the families to see one another regularly.[64] They also must handle applications by children or parents "to enter or leave a State Party for the purpose of family reunification" in a "positive, humane, and expeditious manner."[65] One scholar has noted that this constitutes an "innovative obligation"

58. States that allow only ex post facto review by their courts have submitted reservations to this portion of the Convention. *See* DETRICK, *supra* note 48, at 171-72.

59. *Id.* at 174.

60. *Id.* at 173 (citing the Committee's General Comments).

61. *Id.*

62. CRC, *supra* note 12, art. 9(4).

63. *Id.* art. 9(3).

64. *Id.* art. 10(2).

65. *Id.* art. 10(1). Article 10 stops short of requiring that states permit immigration for the purpose of family reunification, however. Furthermore, it may not even require that states admit alien parents or children for visits. Although Article 10(2) grants children whose parents reside in different countries the right to maintain "personal relations and direct contacts with both parents," it goes on to state: "Towards that end . . . States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country." This last clause does not give children or parents the right to enter any foreign country—which raises the question of how a parent and child of different nationalities could visit one another if neither of the states in question was willing to admit the one who was an alien.

under international law, arguably giving rise to a right to enter a foreign country (subject to exclusion based on certain specific justifications), a right that other international conventions have not afforded.[66] Ordinarily, states have not had to justify the exclusion of aliens under international law. Subject to certain limitations such as non-discrimination, control of immigration has always been viewed as a sovereign right. This principle and its limits are discussed further in Sections II.B and C.

Another treaty that extensively details the human rights of children is the 1990 African Charter on the Rights and Welfare of the Child, which entered into force in 1999.[67] Like the Convention on the Rights of the Child, this Charter employs the "best interests of the child" standard.[68] Subject only to this standard, it prohibits the separation of children from their parents. Article 19 states:

> 1. Every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents. No child shall be separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law, that such separation is in the best interest of the child.
>
> 2. Every child who is separated from one or both parents shall have the right to maintain personal relations and direct contact with both parents on a regular basis. . . .

Furthermore, the Charter requires that states share information and otherwise facilitate reunification where families have been separated.[69] It also imposes detailed requirements for care of children and family reunification efforts in the event of armed conflict and refugee situations, and limits the conditions under which mothers (but not fathers) may be separated from their children due to imprisonment.[70] These reunification provisions, which have precursors in the Geneva Conventions,[71] demonstrate how the specific rights of the child protected by these treaties build on other, more generally applicable human rights. For example, one scholar has noted that the "right of the child to reunification

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In fact, Article 10(2) may not provide any significant protection beyond that already provided by other principles of international law. The rights to leave any country and to enter one's own are basic human rights that are not contingent on the need for family unification. *See, e.g.*, Universal Declaration, *supra* note 19, art. 13(2). But the protections of freedom of movement were controversial at the time of drafting, however elementary they seem now, because the Convention was drafted during the Cold War, when many Soviet bloc countries did not permit their citizens to leave freely. *See* DETRICK, *supra* note 48, at 185-86. In addition, it is possible that the general "right" set forth in the first sentence of CRC Article 10(2) reaches beyond the specific obligations imposed by the remaining sentences, which may not alone be enough to realize that right.

66. DETRICK, *supra* note 48, at 189. *But see id.* at 190 (noting that the *travaux preparatoires* of the CRC stated that Article 10 did not interfere with "the general right of States to establish and regulate their respective immigration laws in accordance with their international obligations," although these international obligations might, in a circular fashion, include the specific requirements of Article 10 itself).

67. African Children's Charter, *supra* note 32.

68. *Id.* art. 4(1).

69. *Id.* art. 19(3).

70. *Id.* arts. 22, 23, 30.

71. *See* DETRICK, *supra* note 48, at 179.

with his or her family has developed from two fundamental rights: the right to respect for family life and the right to freedom of movement."[72]

The principle of the "best interests of the child," which originally derived from U.S. family law, is today a ubiquitous feature of international treaties and the reasoning of international institutions. In addition to its prominence in the specific treaties addressing the rights of children, the "best interests" principle has been the basis for decisions and comments of the U.N. Human Rights Committee interpreting provisions of the ICCPR and its optional protocols,[73] as well as for decisions by the ECHR.[74] Yet despite the consensus this standard enjoys, its meaning is highly contested, and it has been criticized for vagueness. "Best interests" may be given "very diverse interpretations" depending on the cultural context.[75] The evolution and application of the best interests of the child standard will be discussed further in the case studies, particularly Section II.D, which focuses on the protective removal of children from their parents.

3. Parental Rights

In addition to protecting the rights of children to be with their parents, international law also protects the rights of parents to be with and care for their children. Parental rights are, in fact, extensively recognized by the Convention on the Rights of the Child, and may modify the "best interests" standard. Article 3 states:

> 1. In all actions concerning children . . . the best interests of the child shall be a primary consideration.
> 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents. . . .[76]

The wording of Article 3 suggests that protection of parental rights may permit some departures from the strict application of the best interests standard. The best interests of the child are only required to be *a* primary consideration, not necessarily the dispositive consideration, and Article 3(2) seems to suggest that parental rights need to be balanced against any contrary interests of the child. Indeed, the drafting history of the Convention shows that the choice of language was quite deliberate; an earlier proposal to define the child's best interests as

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72. VAN BUEREN, *supra* note 17, at 105; *cf. supra* note 65.

73. *See* General Comment No. 17(35), *Report of the Human Rights Committee*, U.N. GAOR, 44th Sess., Supp. No. 40, Annex VI, ¶ 6, U.N. Doc. A/44/40 (1989); General Comment No. 19(39), *Report of the Human Rights Committee*, U.N. GAOR, 45th Sess., Supp. No. 40, at 175 U.N. Doc. A/CONF. 157/24 (Part I) (1993); Hendriks v. Netherlands, App. No. 8427/78, 5 Eur. Comm'n H.R. Dec. & Recs. (1982); Philip Alston, *The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights*, 8 INT'L J.L. & FAM. 1, 4 (1994) (collecting these cases).

74. *See infra* notes 369-380 and accompanying text.

75. Alston, *supra* note 73, at 4-5; *see also id.* at 10-11 (criticizing the drafters for giving too little attention to the meaning of "best interests"); *id.* at 18 (noting that "best interests" is a particularly indeterminate standard even when compared to other international human rights norms); *cf.* Abdullah An-Na'im, *Cultural Transformation and Normative Consensus on the Best Interest of the Child*, 8 INT'L J.L. & FAM. 62, 63 (1994) (noting that the CRC in general may represent "much apparent consensus on very little substance").

76. CRC, *supra* note 12, art. 3.

"the paramount consideration" was rejected.[77] This suggests that international law recognizes a strong parental right to family unity that must be considered, even where a child's interests lean toward removal from his or her parents.

In Article 18, which obligates the state to provide parents with appropriate assistance in child care, the Convention states, "Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern."[78] This provision not only recognizes parental rights to care for children, but also sets forth the presumption that the exercise of those rights will be in the best interests of children. Furthermore, the Convention recognizes specific rights of parents in a number of other provisions: the right to guide children in the exercise of their own rights, the right to state-provided information and reunification efforts in the event of separation, and the right to travel across national borders to visit children.

Several other treaties recognize the right of parents to care for their children. The Universal Declaration, the ICCPR, and the European and American Conventions all recognize the right of all persons to "found" or "raise a family."[79] The African Charter on the Rights and Welfare of the Child both recognizes parents' "primary responsibility . . . [for] the upbringing and development [of] the child" and imposes upon them individual duties regarding the exercise of that responsibility.[80] In addition, carving out an exception to children's privacy rights, it states that "parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children."[81] The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) mandates that states accord parental rights equally to men and women, although not necessarily mandating that such rights exist in the first place.[82] In addition, the ICCPR recognizes parents' right to control their children's religious and moral education—a right that could not be exercised in the event of family separation.[83]

4. The Right to Marry

The fourth type of international law provision affecting family unity is the protection of the right to marry. This right was set forth in Article 16(1) of the Universal Declaration, which states: "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage

77. *See* Alston, *supra* note 73, at 10, 12. In many domestic legal systems, the best interest of the child is treated as paramount, in contrast to the international standard. *See* Stephen Parker, *The Best Interests of the Child: Principles and Problems*, 8 INT'L J.L. & FAM. 26, 27 (1994).

78. CRC, *supra* note 12, art. 18(1).

79. Universal Declaration, *supra* note 19, art. 16(1); ICCPR, *supra* note 21, art. 23(2); European Convention, *supra* note 25, art. 12; American Convention, *supra* note 25, art. 17(2).

80. African Children's Charter, *supra* note 32, art. 20.

81. *Id.* art. 10.

82. CEDAW, *supra* note 22, art. 16.1(d).

83. ICCPR, *supra* note 21, art. 18(4).

and at its dissolution." The ICCPR and the American and European Conventions all protect the "right of men and women of marriageable age to marry."[84] Like the Universal Declaration, the American Convention also specifies that states may not limit the right to marry on discriminatory grounds.[85] CEDAW requires that marriage rights (including the rights to freely consent to and to terminate marriages) be available equally to men and to women.[86]

The ECHR has adopted a fairly narrow interpretation of the right to marry in the European Convention. For example, the Court has held that Article 12 does not provide a right to same-sex marriage, an issue discussed further in Section II.B.[87] Subsequently, although the Court held that three-year restrictions on remarriage violate Article 12, it suggested unwillingness to judge domestic marriage law by international standards. The Court stated that the fact that "a country finds itself in an isolated position as regards one aspect of its legislation does not necessarily imply that that aspect offends the Convention, particularly in a field—matrimony—which is so closely bound up with the cultural and historical traditions of each society and its deep-rooted ideas about the family unit."[88] Thus, even strong evidence of predominant state practice supporting the existence of an international norm will not, in the realm of marriage, necessarily provide a basis for rejecting the particular policy choices of states.

The Court has also held that Article 12 only protects the initial act of marriage, but does not implicate individuals' rights thereafter.[89] Thus, the Convention does not protect the right to divorce,[90] although it may protect the right to physical separation and does protect the right of persons to remarry once they are legally divorced.[91] Similarly, one might infer from this narrow construction that Article 12 does not prevent states from forcing already-married couples to separate, and that such a restriction, if found in the Convention at all, must be grounded in Article 8's protection of family life or some other provision.

Interestingly, the ECHR has specifically distinguished Article 12 in this regard from Article 16 of the Universal Declaration, on which it was based; the drafters of the European Convention dropped the Declaration's language extending equal rights to men and women "during marriage and at its dissolution."[92] Although the Declaration's language may appear only to ban sex discrimination in marriage rights, the ECHR's citation to it in a case unrelated to sex discrimination suggests that the Court may have read the Declaration to provide all people with a right to maintain or dissolve a marriage. Thus, to the

84. *Id.* art. 23(2); *see also* European Convention, *supra* note 25, art. 12 (using similar but not identical language); American Convention, *supra* note 25, art. 17(2).

85. American Convention, *supra* note 25, art. 17(2) (stating that states may impose conditions on marriages "insofar as such conditions do not affect the principle of nondiscrimination established in this convention").

86. CEDAW, *supra* note 22, art. 16(1).

87. *See Rees*, 9 Eur. H.R. Rep. 56 ¶ 50.

88. F. v. Switzerland, App. No. 11329/85, 10 Eur. H.R. Rep. 411 ¶ 33 (1987).

89. *E.g.*, Johnston v. Ireland, 9 Eur. H.R. Rep. 203 ¶ 52 (1986).

90. *Id.* ¶ 54.

91. *F. v. Switzerland*, 10 Eur. H.R. Rep. 411.

92. *Johnston*, 9 Eur. H.R. Rep. 203 ¶ 52.

extent that the Declaration is binding as customary international law, it may offer protection beyond that provided by the European Convention.

The Human Rights Committee has held that the right to "marry and found a family," which is protected by Article 23(2) of the ICCPR, encompasses the right to procreate and to live together with one's family.[93] This holding implies that the right to marry and found a family under the ICCPR extends beyond the initial act of marriage and procreation—the state cannot force already-married couples to separate from one another or from their children. Furthermore, the right to marry may impose affirmative obligations on the state to take necessary measures to ensure family reunification when, for whatever reason, families are separated between or within states.[94]

5. *The "Fundamental Group Unit": The Rights of the Family*

The final category of relevant treaty provisions consists of those that seek to protect the family unit, as opposed to the rights of individuals to remain with their families. These provisions focus on the family as an institution and its relationship to society as a whole. The prototype is Article 16(3) of the Universal Declaration, which states: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."[95] Article 23(1) of the ICCPR and Article 17(1) of the American Convention contain the same language, and the Preamble to the Convention on the Rights of the Child similarly describes the family as the "fundamental group of society."[96] Article 18 of the African Charter goes into further detail regarding the family's cultural role and the state's obligations:

> 1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and morals.
> 2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.[97]

The Charter, which is the only major human rights treaty to assign individuals a set of duties toward society, goes on to require individuals to respect their parents, "preserve the harmonious development of the family," and work for its "cohesion and respect."[98] In addition, a number of treaty provisions and soft law instruments require the state to provide affirmative protection to the family.[99] As international family law scholar Geraldine Van Bueren has noted, fi-

93. *See* DETRICK, *supra* note 48, at 187.

94. Human Rights Committee, General Comment 19, 39th Sess. at 29, U.N. Doc. HRI/GEN/1, (1990).

95. Universal Declaration, *supra* note 19, art. 16(3).

96. ICCPR, *supra* note 21, art 23(1); American Convention, *supra* note 25, art. 17(1); CRC, *supra* note 12, preamble.

97. African Charter, *supra* note 25, art. 18(1)(2).

98. *Id.* art. 29. *See also* African Children's Charter, *supra* note 32, art. 18 (stating that the family, as the "natural unit and basis of society . . . shall enjoy the protection and support of the State).

99. *See* VAN BUEREN, *supra* note 17, at 77 (citing provisions of the CRC, the International Covenant on Economic, Social, and Cultural Rights, and the Declaration on Social Progress and Development, as well as statements of the Committee of Independent Experts, which was established pursuant to the European Social Charter).

nancial or other assistance from the state may be "the most effective measure to ensure the unity of the family as the basic unit in society."[100]

Provisions such as these point to an "essential dichotomy surrounding the family," which international law constructs both as a collection of individuals with competing interests and as a group that is protected as such.[101] The language in many of these treaty provisions emphasizing the family's place in society suggests that the provisions protect the family not as a holder of a group right but rather as a cultural institution. Such a reading is also supported by the fact that no procedural mechanisms exist to enforce protection of the "rights" of the family unit under the European and American conventions, nor under the ICCPR.[102] In practice, then, these provisions protect broader societal interests rather than the interests of the family per se; they are a means of cultural preservation. Not surprisingly, then, interpretations of these provisions have afforded a wide degree of cultural latitude. The Human Rights Committee has interpreted Article 17 of the ICCPR to mean that a society's obligation to protect the family "may vary from country to country and depend on different social, economic, political or cultural conditions and traditions."[103] Indeed, the Committee has also held that the very definition of the family may vary considerably from society to society.[104] As a general rule, "both international and regional human rights law are slowly coming to terms with the different cultural approaches to the concept of family."[105]

C. *Customary Norms Against Family Separation*

All of these categories of provisions, and their application by the relevant treaty bodies, demonstrate that international law now recognizes a number of principles that, at least under certain circumstances, protect the integrity of families. We argue that the various conventions may also be giving rise to a nascent broader norm of customary international law. Customary international law, which binds all states,[106] derives from two elements: state practice and *opinio juris*. The former refers to what states do and the latter to why they do it, that is, to a prevailing belief that certain behavior is either required or prohibited by international law.[107] Professor Anthea Roberts has described a recent shift in the weight of these elements in the process of forming customary law. Traditionally, the state practice element was paramount, while the *opinio juris* element posed the subsidiary question of why certain state practices existed. The

100. *Id.*
101. *Id.* at 68.
102. *Id.* at 78 (noting that the "entitlement of the family to protection by society and the state is formulated as a group right, but the basic procedural hurdles only allow for individual claims").
103. *See id.* (quoting the HRC's decision in *Cziffra and Nineteen Mauritius Women*).
104. *See id.* (noting that the HRC "accepts that there is not a singly universally binding definition of family" and interprets Article 17 to encompass all those groups that would comprise the family "in the society of the State Party concerned").
105. *Id.* at 71.
106. *See* Alston, *supra* note 73, at 17.
107. *See* Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 757-58 (2001).

"modern" view, however, has placed primary weight on the *opinio juris* element, which may be inferred from court decisions, declarations of international forums, and the content of treaties that have been ratified by a large number of states.[108] The modern approach allows norms to evolve more quickly, because international legal opinion changes more easily than does state practice.[109] Without taking up the question of the comparative legitimacy of these approaches, we will by necessity analyze the existence of customary norms largely from the modern perspective; we simply lack sufficiently comprehensive information as to the practice of large numbers of states. In any case, our main objective is to explore the directions in which we think customary and treaty-based international law *ought* to evolve, rather than simply describing its current content.

It is probably too early to argue that a general norm against family separation has achieved the status of customary international law—at least, to the extent that that norm would extend beyond the specific aspects and circumstances discussed here. Given the widespread occurrence of family separation, the state practice element is probably lacking. Furthermore, few sources of international opinion have addressed this problem in any kind of comprehensive manner. We believe, however, that such a norm is beginning to evolve in fragmentary ways. Sufficient consensus exists against particular types of family separation, or in favor of some of the specific principles discussed above that weigh against family separation, to constitute customary international law.[110] Moreover, we believe that customary norms will continue to evolve as international and domestic institutions apply the relevant treaty provisions and engage in dialogue regarding their meanings and implications.[111] The piecemeal treaty provisions discussed in this Section may increasingly come to be seen to embody an underlying general norm. For example, as Professor Sharon Detrick has stated, Articles 9(1) and 10(1) of the Convention on the Rights of the Child "embody the principle of family unity, as they share the aim of protecting children against separation from their parents."[112] More to the point, these norms *should* continue to evolve. The case studies discussed in this article give just a few examples of the magnitude of the problem of family separation and the variety of its forms, which suggest that the issue cannot be addressed adequately by narrowly tailored treaty provi-

108. *Id.* at 758-59. Professor Roberts also describes a sharp schism among international legal scholars regarding the acceptability of these two approaches and provides a theory that aims to reconcile the two.

109. *Id.*

110. *See, e.g.*, April Adell, Note, *Fear of Persecution for Opposition to Violations of the International Human Right to Found a Family as a Legal Entitlement to Asylum for Chinese Refugees*, 24 HOFSTRA L. REV. 789, 795-96 (1996) (arguing that the right to found a family has achieved the status of customary international law).

111. *See, e.g.*, An-Na'im, *supra* note 75, at 64 (noting that continued international dialogue will produce increasing consensus on the "meaning and implications" of the best interests principle). The best interests principle itself probably enjoys the status of customary international law already. *See* discussion, *infra* notes 311-320 and accompanying text, of the *Beharry v. Reno* case in the United States, which held the provisions of the CRC binding on the non-signatory United States as customary international law.

112. DETRICK, *supra* note 48, at 191.

sions. The remainder of this article is devoted to the exploration of the possible contours of new international norms against involuntary family separation.

First, however, we anticipate one significant objection, grounded in feminist theory and experience, to the recognition of international norms against family separation. Many critics have argued that notions such as family rights and family privacy simply insulate from scrutiny, and thereby ensure the continuation of, violence and oppression within families. Professor Fernando Teson provides one version of this argument:

> [I now turn to] one of modern feminism's most persuasive points: the modern state affords excessive protection to the family. Family "autonomy," as the legal basis of the private social domain, has legitimized the domination of women and children by men. . . . The law should punish the victimization of women, and culprits should not be allowed to hide behind the "family unit," a politically defined space where men may unjustly dominate and sometimes even victimize women and children. . . . [G]roup autonomy (state sovereignty, family autonomy) is an illiberal notion. Kantian liberalism insists that our moral principles derive from individual dignity and autonomy. Every person holds individual rights which are not forfeited by membership in the group. . . . Just as the principle of state sovereignty must be set aside to protect citizens whose rights are violated by their government, so the principle of family autonomy must be set aside to protect the rights of members of the family.[113]

Professor Teson's argument is a liberal version of the critique, extensively developed by feminist scholars over several decades, of the relegation of women to the private sphere. Some feminists go further, arguing that the public/private dichotomy itself institutionalizes oppression and violence.[114] Many contemporary international legal scholars argue that international law should increasingly focus on affairs of the family—not in order to increase the legal protection offered to the family as a unit, but rather in order to protect the individual rights of family members and/or to break down social structures of subordination.[115] As it stands now, international law places excessive weight on state sovereignty and imposes insufficient duties on states to protect human rights within the family. The result, in Professor Teson's words, is that "there are two layers of legal immunity enjoyed by men who oppress women: domestic law, which treats the family as the man's castle, and international law, which likewise leaves the state (with its many men's castles) largely shielded from external scrutiny."[116]

Those obligations that international law does place on states with respect to their treatment of families may simply perpetuate oppression. As feminist scholars Hilary Charlesworth, Christine Chinkin, and Shelley Wright have argued, treaty provisions protecting the "natural and fundamental group unit of society . . . ignore that to many women, the family is a unit for abuse and

113. Fernando R. Teson, *Feminism and International Law: A Reply*, 33 VA. J. INT'L L. 647, 657-58 (1993).

114. *E.g.*, Hilary Charlesworth, Christine Chinkin, & Shelley Wright, *Feminist Approaches to International Law*, 85 A.J.I.L. 613, 636-37 (1991).

115. *See, e.g.*, Teson, *supra* note 113 (making the individual rights-based argument); *see generally* Charlesworth et al., *supra* note 114 (critiquing both the traditional model of international law and the rights-based alternative of liberal feminism for perpetuating structures of oppression).

116. Teson, *supra* note 113, at 658.

violence; hence, protection of the family also preserves the power structure within the family, which can lead to subjugation and dominance by men over women and children."[117] Furthermore, some contend that treaty provisions that link privacy rights to the protection of the family (such as Article 8 of the European Convention) reinforce the role of the public/private dichotomy in international law.[118]

We do not know what any of these scholars would have to say specifically about international norms dealing with involuntary family separation. However, we imagine that some might argue that *any* legal norm, international or otherwise, that seeks to protect the family *qua* family risks strengthening the public/private divide and setting up further barriers to legal remedies for intra-family oppression. This is especially true when such norms depend on the right to privacy or the value of the "family unit," whether conceived as a matter of "group autonomy" or as a social institution.

We are sympathetic to these criticisms, and we wish at this point to make clear what we are *not* arguing when we argue for international norms against family separation. First, we are only addressing involuntary family separation—that is, separation enforced against the expressed wishes of all family members. We do not argue in favor of an international norm that would prevent individuals from leaving oppressive family structures voluntarily; indeed, we believe international law should protect their right to do so.[119] Second, we are not by any means arguing that family unity is a value that should trump all others, or that it should in general take precedence over individual rights or social equality concerns. Indeed, a central aspect of our argument is that family separation issues involve deep and difficult conflicts between competing values and interests, including the strong interests of individual family members. Depending on the situation, the balance of these values will sometimes weigh in favor of family separation, and sometimes against. As noted previously, we think that international law does to some extent, and should to a greater extent, place emphasis on issues of justice within the family.

Third, we would like to examine more closely what we mean, and what international law means, by the value of the family as an entity. The various competing interests of individuals, as reflected in the first five categories of treaty provisions discussed above, are relatively easy to understand and compare. Though the content and weight given to individual rights may be contested, it is at least possible to talk meaningfully about their universal

117. Charlesworth et al., *supra* note 114, at 636; *see also* VAN BUEREN, *supra* note 17, at 67 (noting that the "potential of international law" to protect children effectively has been limited by its embrace of the traditional public/private dichotomy).

118. VAN BUEREN, *supra* note 17, at 72.

119. As noted in the Introduction, we understand that a focus on family members' expressed wishes is not sufficient in all cases to protect against oppression within the family; victims of abuse or women facing strong cultural pressures may fear expressing a wish to leave their families, while younger abused children may be literally unable to express themselves.

application.[120] The provisions that protect the family unit are more difficult to conceptualize. In what sense does the family as a unit or an institution have value beyond the interests of its members? Treaty language describing the family as a "natural" and "fundamental" unit brings to mind long-entrenched notions that the traditional form of the family, with a man at its head, is fixed by human biology and central to human society. But the case studies we discuss in the next Section will demonstrate that far from being universal, what counts as a "family" is radically culturally contingent, as is the social role that the institution of family plays. When we discuss the value of family unity as something separate from the interests of the individual members of families, we are not employing some abstract notion of "group autonomy," nor relying on the suspect notion that human society has a "natural" unit or a "natural" order. Neither do we give any weight to tradition- or natural law-based notions that family affairs are in some way inherently private. Rather, we understand the value of the family unit to be a social construction that can only be meaningfully understood when set in a particular cultural context. Furthermore, we understand cultures themselves to be fluid, not static—both evolving over time and subject to conflict within.[121]

Notwithstanding these disclaimers, it would be overly simplistic to conclude that, because legal protections of the family have frequently perpetuated oppression, international (or domestic) law should not seek to protect the family at all. That the family's role as an institution is socially constructed does not strip it of its significance; people live their lives in cultural context, not in abstract universals. The family does unarguably play an important role in preserving cultures, and even though some cultural norms (for example, patriarchy) are unjust and require transformation, we think cultural integrity is a valid concern for international law. Indeed, we doubt many would disagree on this point; even in the West, most feminists today at least temper the more rigorous universalist principles advanced in decades past with respect for cultural difference. Furthermore, as many of the treaty provisions above suggest, and as the case studies below will demonstrate, the individual interests of women and children, as well as a systemic concern with the eradication of gender-based and other forms of inequality, often weigh strongly in *favor* of a norm against family separation. As international law on this issue evolves, our challenge will be to identify the circumstances in which, on balance, the competing values at stake compel the application of such a norm. We attempt, with the following case studies, to shed some light on that challenge.

120. This is not to say that concepts such as "rights" or even "interests" are inherently universal or given, rather than constructed and contingent. *See, e.g.*, Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 303 (1988) (noting that the "best interests of the child is a highly contingent social construction" that depends as much on "political and social judgments about what kind of society we prefer" as on "neutral or scientific data about what is 'best' for children"). Bartlett's point is clearly supported by the example of the "child welfare" policies of the Australian government discussed in Section II.A, as well as by the difficulties in applying the best interests test discussed in Section II.D.

121. *See* An-Na'im, *supra* note 75, at 67 (criticizing the search for single "authentic" representations of cultures).

II.
CASE STUDIES

If international law does, in fact, contain a norm against the involuntary separation of families, what is the scope and content of that norm? In this Section, we use a number of case studies to flesh out the nature of and exceptions to international protections of family integrity, and to consider how recognition of those protections would influence several areas of national law and policy. In Section A, we examine how states use family separation to attack the cultural integrity of minority groups, focusing particularly on the history of Australia's removal of Aboriginal children from their parents. In Section B, we analyze France's recently implemented policy of forcibly separating polygamous immigrant families, and evaluate the need to balance the integrity of families with the goal of gender equality. In Section C, we assess states' responsibilities to accommodate family unification in their immigration policies, specifically focusing on the removal policies of the United States. In Section D, we consider international law's implications for domestic family law, in particular for the protective removal of children by child welfare services in the United States. Finally, in Section E, we consider instances of mass family separation as a corollary of crisis situations.

A. Stolen Generations: Family Separation as Cultural Genocide

The forced separation of families is always painful to the individuals it directly affects, but it is especially dangerous when targeted at discrete racial, ethnic, or cultural minorities. In such situations, family separation may, by design or effect, attack the cultural integrity and possibly the survival of the entire group, either by directly interfering with reproductive autonomy or by preventing younger members from learning the group's traditions and history. The sad story of Australia's Stolen Generations,[122] along with similar policies of removal of indigenous children in other countries, is a notable example. During the twentieth century, the Australian government systematically and forcibly removed tens of thousands of Aboriginal children from their parents and gave them to white adoptive parents.[123] In addition to these forced adoptions, the government also removed many children from their families at a slightly older age and forced them to attend white-run boarding schools. Although the removals ended in the 1960s, their effects on Aboriginal life in Australia are still plain today. Many, perhaps most, of these now-grown children still have no idea who their birth parents or siblings were. Moreover, they have been completely dis-

122. This term was coined by Peter Read in 1982 and is now in common parlance. Jennifer Clarke, Cubillo v. Commonwealth, 25 MELB. U. L. REV. 218, 219 n.1 (2001) (citing PETER READ, THE STOLEN GENERATIONS: THE REMOVAL OF ABORIGINAL CHILDREN IN NEW SOUTH WALES 1883 TO 1969 (1982)). According to Prof. Robert Van Krieken, the term is "meant to refer to something broader" than the physical removal of children; it "aims to capture the 'theft' of part-Aboriginal children from their culture, their history, and their community." Robert Van Krieken, *Is Assimilation Justiciable?* Lorna Cubillo & Peter Gunner v. Commonwealth, 23 SYDNEY L. REV. 239, 240 (2001).

123. *See, e.g.*, READ, *supra* note 122.

connected from the communities in which they were born, undermining their sense of cultural identity.[124] As this discussion will show, these policies violate a number of international and Australian legal principles—yet none of these principles has been enforced successfully either in Australian courts or by any international institution that has considered the Stolen Generations travesty. The development of a new international norm against involuntary family separation might thus provide a viable remedy in a situation where other approaches have failed.

1. History of the Stolen Generations

The removal policy in Australia had its roots in practices of the British colonial era,[125] but removals began on a large scale around 1910 and accelerated with the passage of the Aboriginals Ordinance of 1918 in the Northern Territory (where most Aboriginal Australians live). The Ordinance gave "exceptionally wide powers"[126] to the Director of Native Welfare, who was authorized "at any time to undertake the care, custody, or control of any aboriginal or half-caste, if, in his opinion it [was] necessary or desirable in the interests of the aboriginal or half-caste for him to do so."[127] Furthermore, he was authorized to order Aboriginals or so-called "half-castes" to be removed for any reason or to be detained in any "reserve or aboriginal institution," the latter a term that could apply to schools, homes, missions, orphanages, or reformatories.[128] In 1947, the ordinance was amended to make the Director the "legal guardian of every aboriginal and every half-caste child, notwithstanding that the child has a parent or other relative living."[129] The fact that the legal authorization for the removal policy was ostensibly the "interests" of the children demonstrates the malleability of "interests" language, especially when applied to children who are too young to express their interests themselves.

Australia's child removal policy affected virtually all Aboriginal families. A recent investigation by the Australian Human Rights and Equal Opportunity Commission found that nationally,

> between one in three and one in ten Indigenous children were forcibly removed from their families and communities in the period from approximately 1910 until 1970 . . . In that time not one Indigenous family has escaped the effects of forcible removal . . . Most families have been affected, in one or more generations, by the forcible removal of one or more children.[130]

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124. Philip Lynch, *Keeping them Home: The Best Interests of Indigenous Children and Communities in Canada and Australia*, 23 SYDNEY L. REV. 501, 511-12 (2001).

125. *See generally* READ, *supra* note 122.

126. Cubillo v. Commonwealth, 174 A.L.R. 97, 154 (Austl. F.C. 2000).

127. Aboriginals Ordinance, 1918 (Aust.); *see* Clarke, *supra* note 122, at 234. The position of the Director of Native Welfare was originally referred to as Chief Protector of Aboriginals. *Id.* at 231. "Half-caste" referred to a multiracial person with any amount of Aboriginal ancestry. *Id.* at 232. In 1953, the Ordinance was amended to remove most "half-castes" from its scope. *Id.* at 237.

128. Clarke, *supra* note 122, at 234-35.

129. *Id.* at 232 (quoting the amendment).

130. Human Rights and Equal Opportunity Commission, Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their

Notwithstanding these terrible statistics, the Australian case, while particularly egregious, is not unique in kind. As one Australian commentator noted, "First Nations and Aboriginal communities in North America and Australia have been deprived of their children from the time of the European invasion."[131] Both the United States and Canada implemented policies that forcibly placed indigenous children in boarding schools as a means of cultural assimilation. In Canada, this policy remained in effect until the 1970s, and even more recently, some First Nations children have been removed and given to white adoptive families.[132] In 1998, the Canadian government established a CAD$350 million fund to award reparations to children who were sent to the boarding schools.[133] Even today, child welfare services in Canada, the United States, and Australia remove indigenous children from their parents and place them in state or foster care at dramatically higher rates than the rates at which non-indigenous children are removed.[134]

The negative effects of these removal policies on indigenous children's development and psychological well-being are well documented and continue into adulthood.[135] But the damage extends far beyond the individual children:

> The removal of First Nations and Aboriginal children from their homes has a devastating impact upon those who remain. The family unit, so often the primary vehicle for the transmission of identity, meaning, love, and ultimately, meaningful life, is destroyed. . . . With children gone, the shared goal of raising children disintegrates. Parents give up: "If you lose your children you are dead." As the family disintegrates, so too the community. . . . The net effect, felt both by those who are removed and those who remain, is a sense of instability, loss, confusion, and abandonment. "Because the family is the most fundamental economic, education, health-care unit in society and the centre of an individual's emotional life, assaults on Indian families help cause the conditions that characterise those cultures of poverty where large numbers of people feel hopeless, powerless, and unworthy."[136]

The history of the Stolen Generations thus demonstrates how involuntary family separation can operate as an assault on the individual, the family, and the community as a whole.[137]

Families (1997) [hereinafter Commission Report], *cited in* George Williams, *Race and the Australian Constitution: From Federation to Reconciliation*, 28 OSGOODE HALL L.J. 643, 660 (2000).

131. Lynch, *supra* note 124, at 501-02 (citing a Canadian report documenting 200 years of efforts by missionaries, teachers, and governments to assimilate indigenous children into white society).

132. *Id.* at 502 (citing 1983 report by Manitoba County Services).

133. Ben Saul, *The International Crime of Genocide in Australian Law*, 22 SYDNEY L. REV. 527, 574 (2000).

134. Lynch, *supra* note 124, at 503-04 (citing factors of ten or more in removal rate differences).

135. *See id.* at 504 (citing evidence that Stolen Generation children were, as adults, twice as likely to be arrested or do drugs than were Aboriginal children who were not removed); *id.* at 511-12 (citing severe psychological and emotional damage); *cf. id.* at 511 (quoting a native Canadian activist saying the culture in boarding schools ingrained in Indians "a legacy of violence").

136. *Id.* at 518-19 (quoting comments of Russell Barsh and W. Byler on the destruction of American Indian families).

137. *See* discussion *infra* note 170 and accompanying text.

2. Applicability of the International Prohibition of Genocide

The Australian child removal policy has often been described as cultural genocide.[138] Indeed, the Human Rights and Equal Opportunity Commission report stated unambiguously, without the "cultural" modifier: "[The removals] were an act of genocide, aimed at wiping out Indigenous families, communities and cultures, vital to the precious and inalienable heritage of Australia."[139] The removal policy clearly demonstrates certain core elements of the crime of genocide. The Genocide Convention defines genocide 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*:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.[140]

Australia's child removal policy evidently fits into category (e); the question, however, is whether it meets the requirements of the intent element emphasized above. The policy was expressly intended to bring about the total assimilation of Aboriginal children into white society. Although never officially admitted by the Australian government, which has described the removals as a child welfare policy, the end goal may well have been to eliminate Aboriginal society as a distinct cultural group—at least "in part," which is all the Convention requires.[141] The fact that not every Aboriginal child was removed does not disprove the intent element, as the strategy may have been to erode Aboriginal culture gradually over the course of generations.

Yet despite arguably possessing the characteristics of the crime of genocide, the history of the Stolen Generations and its treatment by Australian courts demonstrate the inadequacy of the international prohibition of genocide as a mechanism for addressing family separation, even when it is targeted at distinct minorities. Although Australia has ratified the Genocide Convention, it has never passed implementing legislation. Courts have held that the crime of genocide is not incorporated into Australia's common law,[142] and they have rejected the argument that the Stolen Generations policy was a violation of an implicit

138. *See, e.g.*, Lynch, *supra* note 124, at 520.

139. Commission Report, *supra* note 130.

140. Genocide Convention, *supra* note 24, art. 2 (emphasis added). Note that while clause (e) is relevant in the Australian case, clause (d) of this definition may also be applicable to some forms of family separation. The systematic separation of men from women, which necessarily separates families, may be a measure intended to interfere with the group's ability to reproduce.

141. As one member of the National Commission established to investigate the removal practice stated, "'the attempt to "solve the Aboriginal problem" by the taking away of children and merging them into white society fell within [the modern definition of genocide].'" Timothy L.H. McCormack, *Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law*, 60 ALB. L. REV. 681, 725 n. 230 (1997) (quoting statement by J.H. Wootten).

142. *See* Saul, *supra* note 133, at 533 (describing the holding in *Nulyarimma v. Thompson*, 165 A.L.R. 621 (1999)).

constitutional right to freedom from genocide.[143] Some commentators have argued that Australia's failure to enforce its international law obligations stems from its refusal to admit that "genocide," a term very much associated with Nazi Germany, could ever take place in a "civilized" country like Australia.[144] Indeed, Australian officials proudly tout the country's human rights record.[145]

Critics have argued that the refusal to expressly criminalize genocide reflects an unwillingness to confront the implications of the child removal policy—demonstrating an unspoken recognition that the policy at least raises the issue of genocide. Australian officials claim that existing laws, such as those against murder, proscribe sufficiently the underlying acts that constitute genocide.[146] Yet no official has ever been convicted of a crime for implementing the child removal policy.[147] Moreover, Aboriginal plaintiffs challenging the policy through civil claims have thus far been unsuccessful, although few cases have yet been heard and thousands more are pending.[148] Taken together, this case law demonstrates the inadequacy of reliance on either existing domestic laws or the international prohibition on genocide.

In the future, Australian courts may recognize a crime of genocide pursuant to recent legislation passed to implement Australia's obligations under the Rome Statute of the International Criminal Court.[149] The Rome Statute lacks retroactive effect, however. Moreover, precedent shows that Australian courts would not consider the child removal policy to amount to genocide even if a legal prohibition existed. The first case brought to Australian courts by members of the Stolen Generations was *Kruger v. Commonwealth* in 1997. In a declaratory judgment action, plaintiffs alleged that the removal policy exceeded the government's constitutional powers, violated the freedom of religion, and breached implied constitutional provisions protecting equality and freedom of movement and preventing genocide.[150] In *Kruger,* the Australian High Court reserved consideration of the question (later resolved in the negative by the Full Federal Court) of whether the crime of genocide was prohibited by Australian law.[151] Instead, the Court held that the child removal policy did not amount to genocide. In the Court's view, the necessary element of intent to harm or destroy the Ab-

143. Kruger v. Commonwealth, 190 C.L.R. 1 (1997).

144. *See* Saul, *supra* note 133, at 540-41 (citing statements by Australian politicians); *see also* McCormack, *supra* note 141, at 725 (noting that "[i]n Australia, the prevailing view is that, as the [child removal policy] did not involve extermination camps and gas-ovens, [it] could not have constituted genocide").

145. Williams, *supra* note 130, at 644-45 (citing, inter alia, statement of Prime Minister John Howard).

146. Saul, *supra* note 133, at 541 (citing Australian submissions to U.N. Human Rights Committee).

147. *See generally id.* Forcible transfer of children is not a crime under the Australian Criminal Code. *Id.* at 543.

148. *Id.* at 570-71; *see Cubillo,* 174 A.L.R. at 97.

149. Saul, *supra* note 133, at 541.

150. Clarke, *supra* note 122, at 219 n.3.

151. 190 C.L.R. 1 (1997); *see* Saul, *supra* note 133, at 533-34.

original population was absent; rather, the policy's intent was to promote child welfare.[152]

In *Cubillo v. Commonwealth*, the first civil damages suit concerning the Stolen Generations, an Australian federal court similarly referred to the removals as an Aboriginal "protection" and "welfare" policy that, though "badly misguided," was "well-meaning."[153] *Cubillo*, which was later affirmed on appeal,[154] was a tort suit for wrongful imprisonment, negligence, and breach of statutory and fiduciary duty. Without foreclosing the possibility that these legal theories might succeed in future challenges to the child removals, the *Cubillo* court held that the evidentiary record in this case lacked sufficient information about whether the plaintiff was in the care of a parent before she was taken. The court also held that it was inappropriate to rule on the overall validity of the child removal policy in a tort suit by an individual plaintiff, and accordingly excluded parliamentary apologies and other evidence of the policy's wrongfulness.[155] This analysis demonstrates the weakness of domestic litigation by individuals (at least pursuant to ordinary domestic law) as a strategy for addressing policies of widespread and systematic family separation. In contrast to this piecemeal domestic law approach, an international law approach would allow judgment on the lawfulness of a state policy taken as a whole.

But the Stolen Generations case likewise demonstrates the pitfalls of reliance on the international prohibition against genocide as a strategy against family separation policies that target particular ethnic groups. Part of the problem lies in the language of the Genocide Convention itself. When the Convention was drafted, it included an express prohibition on cultural genocide.[156] However, this language was removed from the final version.[157] Many delegates felt that the equation of destruction of cultures with the actual mass murder of peoples would trivialize the crime and inhibit the effective formation of international norms against atrocities like those in Nazi Germany.[158] Furthermore, at that time a number of countries, including the United States, had explicit policies of assimilating immigrant and indigenous groups, and thus opposed using the Convention to protect cultural difference.[159] Despite this resistance, the Convention goes beyond mass murder by reaching removals of children and policies designed to interfere with reproduction.[160] Scholars have suggested

152. *See* Saul, *supra* note 133, at 533-34.

153. *Cubillo*, 174 A.L.R. 97 (2000); *see* Clarke, *supra* note 122, at 222; Van Krieken, *supra* note 122, at 258-59. Similarly, Canadian courts have relied on the principle of the "best interests" of the child to support Canada's child removal policies. *See* Alston, *supra* note 73, at 20-21.

154. Cubillo v. Commonwealth, 183 A.L.R. 249 (2001).

155. Clarke, *supra* note 122, at 250.

156. Saul, *supra* note 133, at 555.

157. *Id.*

158. *See* Matthew Lippman, *Art and Ideology in the Third Reich: The Protection of Cultural Property and the Humanitarian Law of War*, 17 DICK. J. INT'L L. 1, 62 (1998).

159. Saul, *supra* note 133, at 555.

160. Genocide Convention, *supra* note 24, art. 2(c)-(e).

that the inclusion of these provisions enabled the Convention to reach certain forms of cultural genocide without expressly using that phrase.[161]

Yet the Convention's intent requirement may frustrate this indirect approach to cultural genocide. For a policy to constitute genocide, it must be intended to destroy a group, in whole or in part—language that arguably may not encompass the simple destruction of the group's cultural integrity. Moreover, the intent requirement has proven to be a significant obstacle to indigenous groups in pursuing claims of genocide in general.[162] The requirement of "special intent" is more stringent than the intent elements of ordinary crimes, requiring evidence of a clear purpose on the part of the perpetrator, rather than mere knowledge of the likely consequences.[163]

Furthermore, as a practical matter, although the Convention has been important in solidifying an international consensus against genocide, it has virtually never been enforced on an international level. In fact, although it entered into force in 1951, and although there have been several widely recognized cases of genocide since then,[164] the world's first conviction for the international crime of genocide did not take place until 1999, in a decision by the International Criminal Tribunal for Rwanda.[165]

3. Other Applicable Provisions of International Law

In addition to the international prohibition of genocide, Australia's child removal policy contravened a number of other principles of international law, some long since established and some emerging today. For example, when targeted against indigenous or other racial or ethnic groups, family separation policies violate international customary and conventional law against race discrimination.[166] But absent some particular elaboration of why and under what circumstances family separation policies violate them, general provisions of international law against racism, like the prohibition of genocide, may not set a clear enough norm to deter countries from adopting policies like Australia's.

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161. *See* Rhona K. M. Smith, *The International Impact of Creative Problem-Solving: Resolving the Plight of Indigenous Peoples*, 34 CAL. W. L. REV. 411, 414 (1998).

162. McCormack, *supra* note 141, at 723; Saul, *supra* note 133, at 566.

163. Saul, *supra* note 133, at 566.

164. The post-World War II atrocities most broadly agreed to constitute genocide are those in Cambodia and Rwanda. *See, e.g.*, Ivan Eland, *Middle East: What Should the United States Do About Saddam Hussein?*, 50 EMORY L.J. 833, 836 (2001). Events in Bosnia are also often referred to as genocide. *See, e.g.*, Kofi Annan, *Opening Remarks: Advocating for an International Criminal Court*, 21 FORDHAM INT'L L.J. 363, 364-65 (1997); Ronald C. Slye, *International Law, Human Rights Beneficiaries, and South Africa: Some Thoughts on the Utility of International Human Rights Law*, 2 CHI. J. INT'L L. 59, 59 (2001). Some commentators have used the term "genocide" to describe events in Biafra, Bangladesh, Somalia, and East Timor as well. *See, e.g.*, Evo Popoff, Note, *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. INT'L L. REV. 363, 368 (2001); Mary Margaret Penrose, *Impunity—Inertia, Inaction, and Invalidity: A Literature Review*, 17 B.U. INT'L L. J. 269, 282 (1999).

165. Saul, *supra* note 133, at 527.

166. *See, e.g.*, ICCPR, *supra* note 21, art. 2(1); CERD, *supra* note 22, art. 2.

Australia has never admitted that its child removal policy was racist; it characterizes the policy as a well-intentioned mistake.

Were it enacted today, Australia's policy would violate the requirements of Article 20(3) of the Convention on the Rights of the Child, which requires that when the state separates a child from its parents, even in the child's best interests, it be sensitive to the cultural heritage of the child in selecting alternative care arrangements.[167] Furthermore, policies such as Australia's are inconsistent with the principles embodied in certain international declarations promoting protection of the specific rights of indigenous peoples. For example, the U.N. Draft Declaration on the Rights of Indigenous Peoples explicitly addresses the issue in Article 6, which states in relevant part:

> Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and to full guarantees against genocide or any other act of violence, including the removal of indigenous children from their families and communities under any pretext.[168]

In addition, other provisions of the Draft Declaration are certainly implicated by Australia's policy, including Article 7, which prevents cultural genocide, including population transfer or forced assimilation, and Article 15, protecting the right of indigenous children to "education in their own culture and language." But although the language of the Draft Declaration is encouragingly strong, it is not a treaty and does not bind any country. In general, international protection of indigenous rights is inchoate. Other than the African Charter, which alone among the major human rights conventions protects the rights of peoples, no treaty currently in force in any significant number of nations expressly protects these rights.[169] Thus, an approach to the child removal issue premised on international legal protections of indigenous peoples would currently be ineffective.

167. *See generally* VAN BUEREN, *supra* note 17, at 102 (discussing this requirement).

168. Res. 1994/45, Subcommission on Prevention of Discrimination and Protection of Minorities, 46th Sess. U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994). *See also* Vienna Declaration and Programme of Action, World Conf. on Human Rights, art. 20, U.N. Doc. A/CONF.157/23 (1993) (providing vague protection for the "human rights and fundamental freedoms of indigenous people," as well as their "distinct identities, culture, and social organization"); Proposed American Declaration on the Rights of Indigenous Peoples, Inter-American Commission on Human Rights, 1333rd Sess., 95th Reg. Sess., art. 5 (1997) (prohibiting "enforced assimilation" and the "destruction of a culture," and protecting the right to develop a cultural identity), *available at* http://www.cidh.oas.org/indigenous.htm (last visited Oct. 20, 2002); *id.* art. 7 (protecting the right to cultural integrity); *id.* art. 11 (protecting indigenous families and requiring that courts separating families consider "the views of the peoples, including individual, family, and community views"). Like the UN Draft Declaration, neither the Vienna Declaration nor the Proposed American Declaration are binding treaties.

169. *See, e.g.*, Carlos M. Ayala Corao, *Situation of the Human Rights of Indigenous Persons and Peoples in the Americas*, OAS Doc. OEA/Ser.L/V/II.108 Doc. 62 (2000) (critiquing inadequacy of current treaty law), *available at* http://www.cidh.oas.org/indigenas/intro.htm (last visited Oct. 20, 2002).

4. *Implications of the Australian Child Removal Policy for International Norms Against Family Separation*

Therefore, despite the apparent inconsistency of Australia's child removal policy with international norms against race discrimination, discrimination against indigenous persons, and possibly genocide, no effective international or domestic law remedy has been provided to the victims thus far. The main problem lies in convincing people generally, and courts specifically, that the policy was motivated by malice or animus against the group. The history of the Stolen Generations thus provides a case study supporting the necessity of international legal norms specifically prohibiting involuntary separation of families, without a requirement of group-based animus. Of course, where courts consider the validity of specific removals of children—for example, those intended to protect the welfare of victims of abuse or neglect—they should take into account the existence of group-based animus or stereotypes. Reviewing courts should vigilantly guard against child removals that are premised on discriminatory assumptions about different groups' caretaking abilities. We will discuss these issues further in Section II.D.

There are several different ways to classify the wrong inherent in the Australian child removal policy: as a crime against the individual child, as a crime against the family, or as a crime against a cultural and racial group. These interpretations are not mutually exclusive; we believe that all are accurate. An international norm against family separation would primarily address the first two categories of harm, protecting the rights of individuals to remain with their families as well as the rights of families themselves. Certainly, in the case of the Stolen Generations, conceiving of the harm done in these ways alone would miss an important facet of the story; a crucial part of the tragedy and the evil of the child removals was its lasting impact on Aboriginal communities and culture.[170] Yet the private suffering experienced by the children and the families they left behind should not be downplayed. A norm against involuntary family separation might help to prevent or remedy such harms without the necessity of proving discriminatory intent. Furthermore, a robust, fully developed norm against family separation ought to take broader group injuries into account. Accordingly, family separation policies that target discrete minorities should be understood as a particularly egregious violation of international law, perhaps rising to the level of a crime against humanity. The inclusion of a prohibition on child transferal in the Genocide Convention demonstrates that the international community has already come to understand some discriminatory family separation policies as falling within the ambit of international criminal law.

In terms of identifying the exact contours of an international legal norm against family separation, the Stolen Generations example is perhaps not very useful, precisely because the violation of international law is so clear. A number

170. *Cf.* Lynch, *supra* note 124, at 520-21 (critiquing family courts' overly individualistic focus on the best interests of indigenous children, arguing that for indigenous persons, individual, family, and community needs cannot meaningfully be separated).

of different and important values recognized by international law are at play: the integrity of families, the elimination of racial discrimination, the protection of indigenous cultures, and the welfare of children. What makes this case easy is that all of those values point in the same direction: toward the illegality of Australia's conduct. Although Australia ostensibly justified the removals based on child welfare, the actual harms suffered by the children it affected are well documented.[171] Furthermore, to the extent that child welfare concerns were premised on the idea that Aboriginals were unfit or otherwise inferior parents—or that children were inherently better off if raised in white Australian culture—they reflect racial stereotypes that cannot count as legitimate interests for the purposes of international law.[172] In short, there is no compelling justification for the involuntary separation of Aboriginal families, and a number of strong international law arguments against it. Thus, Australia's child removal policy is a core example of state behavior prohibited by the international legal norm against family separation.

B. What Constitutes a Family? The Case of Polygamous Immigrants in France

If international law recognizes, or should recognize, norms against family separation, how do we define the "family" that these norms protect? Understandings of what groups of people constitute legitimate families vary tremendously cross-culturally and are often highly contested within cultures. The institution of polygamous marriage represents one particularly deep intercultural divide. In this section, we consider the case of polygamous immigrant families in France, who have recently been subjected to a sudden change in legal regime that has forced many of them to choose between permanently separating and being deported. We argue that the draconian retroactive aspects of France's policy should be understood to violate international law; however, we believe that some anti-polygamy measures are not only allowed but encouraged or even required by international law. The separation of polygamous families poses a difficult case for international law because it requires the balancing of strong, conflicting internationally recognized values and interests—in particular, weighing families' rights not to be forcibly separated against women's rights to gender equality and freedom from coercive family environments.

171. *See supra* notes 135-136 and accompanying text.

172. *See* Robert Manne, *The Child's Interests Must Come First*, SYDNEY MORNING HERALD, Aug. 14, 2000, at 14 (arguing that the *Cubillo* decision was "blind to the racist assumptions that conditioned what, for 40 years, the administrators regarded as being, self-evidently, in the best interests of the child"); *cf.* Lynch, *supra* note 124, at 520-24 (critiquing "best interests of the child" standard as employed by contemporary family courts in Australia and Canada for being insensitive to cultural difference). *But see* Van Krieken, *supra* note 122, at 258 (criticizing Manne's argument and arguing that the *Cubillo* court recognized the prejudices of administrators, but could not deem their actions unauthorized by law because the prejudices were in fact embodied in the law of the time).

1. The Status of Polygamy in the Contemporary World

Polygamy, the marriage of one man to more than one woman,[173] has for centuries been nearly unknown in the West.[174] It is forbidden by mainstream Christian and Jewish religious doctrine,[175] and no Western country today legally sanctions the performance of polygamous marriages.[176] When practiced by particular groups within Western countries—most notably by the Mormons in the United States during the nineteenth century, and to a much smaller extent today—mainstream society has condemned polygamy as immoral, sexist, and destructive to children, and has pressured these groups to change their practices.[177] In most Western countries, to the extent that polygamy survives today, it is seen at best as a distasteful oddity.[178]

Yet in much of the world, polygamy is very much alive. Islamic law authorizes each man to have as many as four wives, and the law in many Muslim countries incorporates this rule.[179] Polygamy is also a long-standing tradition in many African cultures and remains prevalent today, especially in West Africa.[180] A 1998 study found that over fifty percent of women in Senegal, Burkina Faso, Togo, and Benin were in polygamous marriages, with just slightly smaller percentages in a number of other countries.[181] Polygamy is legal in a significant majority of non-industrialized countries.[182] Even nations that have constitutional provisions against sex discrimination often specifically exempt marriage laws.[183]

However, polygamy is culturally contested even within societies where it is legal and common. Over the past two decades, women's rights advocates within many Third World countries have begun to scrutinize polygamy's effect on gender hierarchy, within the family and in society at large. Today, many African women's groups and activists are working actively to end this tradition.[184] Nat-

173. Polyandry, the marriage of one woman to more than one man, is extremely rare almost everywhere. *See* Reuel S. Amdur, *Here Come the Brides*, OTTAWA CITIZEN, Jul. 20, 2002, at B7.

174. David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53, 61 (1997).

175. *See* WIKIPEDIA, *available at* http://www.wikipedia.org/wiki/polygamy (last visited Oct. 22, 2002).

176. *See* Lydia Esteve Gonzalez & Richard Mac Bride, *Fortress Europe: Fear of Immigration? Present and Future of Immigration Law and Policy in Spain*, 6 U.C. DAVIS J. INT'L L. & POL'Y 153, 178 (2000) (stating that polygamy is banned in every European Union country).

177. *See* Chambers, *supra* note 174, at 63-67; *see also* Reynolds v. United States, 98 U.S. 145, 164 (1878) (affirming conviction of a Mormon for bigamy and noting that polygamy "has always been odious among the northern and western nations of Europe").

178. *See* Chambers, *supra* note 174, at 73.

179. Adrien Katherine Wing, *Polygamy from Southern Africa to Black Britannia to Black America: Global Critical Race Feminism as Legal Reform for the Twenty-first Century*, 11 J. CONTEMP. LEGAL ISSUES 811, 812 (2001).

180. Benedicte Manier, *Polygamy in Africa resisting pressure of change: Report*, AGENCE FRANCE PRESSE, Apr. 16, 1998, *available at* 1998 WL 2262382.

181. *Id.*

182. Chambers, *supra* note 174, at 61.

183. Wing, *supra* note 179, at 844.

184. Lara Santoro, *First Wives Club Unites in Africa*, CHRISTIAN SCI. MONITOR, Jan. 23, 1998, at 1; Howard W. French, *For Women in Ivory Coast, New Fight for Equality*, N.Y. TIMES, Apr. 6, 1996, at A41.

urally, polygamy is not the only feature of life in many of these societies that relegates women to a position of inferiority; where women are culturally devalued, monogamous marriage can also be a subordinating institution.[185]

2. *Polygamy Among Immigrant Families in France*

The situation of polygamous families living in France highlights both inter- and intra-cultural conflicts over what forms of "family" society and the law should recognize. While France, Europe's most multiethnic society, is home to millions of recently arrived immigrants from former French colonies in Africa, it is also a particularly jealous guardian of its own traditional culture, to which immigrants have faced increasing pressure to assimilate.[186] The arrival of polygamous immigrant families has thus created a serious cultural clash. Polygamous marriages may not lawfully be performed in France, but for several decades, driven by its postwar need for immigrant labor,[187] France legally recognized foreign polygamous marriages so long as they were valid in the country in which they were performed. This policy enabled male immigrants to bring multiple wives into the country on long-term spousal visas.[188] A substantial number of immigrants, mostly from West Africa, took advantage of this policy. As a result, France had 200,000 people living in polygamous families by the 1990s.[189] These families were primarily concentrated in enclaves in the poorer Paris suburbs, where today they make up the majority of some communities.[190]

In the 1980s and early 1990s, African women's advocacy groups in France began to criticize the living situations of the wives of polygamous men. The issues paralleled those raised by some women living in Africa:[191] many first

185. *Cf.* Chambers, *supra* note 174, at 65-66 (noting that late nineteenth-century American women were not, on average, more liberated than women in polygamous Mormon families).

186. *See* Jeremy Jennings, *Citizenship, Republicanism and Multiculturalism in Contemporary France*, 30 BRIT. J. POLIT. SCI. 575, 575 (2000) (stating that "despite an astonishing level of cultural and ethnic diversity, France has seen itself as and has sought to become a monocultural society"); *id.* at 576-79 (arguing that "French universalism" is inconsistent with particularistic claims for minority rights). *See also* Bertrand Bissuel, *Divorcer ou Vivre Sans Papiers: Le Dilemme des Femmes de Polygames*, LE MONDE, Feb. 10, 2002, *available at* http://www.lemonde.fr/article/0,5987,3226--262133-,00.html (noting that the desire to force immigrants to assimilate to mainstream culture was a major factor behind the adoption of anti-polygamy laws).

187. Jon Henley, *"I Can't Say to a Wife of 20 Years She Has to Go": Polygamy Used to Be Tolerated in France—But Not Any More*, GUARDIAN, May 9, 2001, at 16 (also citing a 1980 government directive stating that polygamy among immigrants was not "contrary to the public order").

188. *See* Adrian Pennink, *Thousands of Families in Despair as France Enforces Ban on Polygamy*, INDEPENDENT, Apr. 1, 2001, at 22.

189. Marlise Simons, *African Women in France Battling Polygamy*, N.Y. TIMES, Jan. 26, 1996, at A1 (200,000 people in the Paris area alone); Wilma Randle, *So Far From Home*, ESSENCE, Sept. 1998, at 76 (200,000 in France); *see also* Pennink, *supra* note 188 (140,000 in France, as of 2001). It is unclear whether Pennink's lower estimate reflects the effects of the anti-polygamy policy or is simply based on different data; in any event, accurate estimates of numbers are impossible "because foreign wives are often in the country clandestinely and immigrants keep other wives back in Africa." Simons, *supra*; *see also* Judy Scales-Trent, *African Women in France: Immigration, Family, and Work*, 24 BROOKLYN J. INT'L L. 705, 720 (1999).

190. Simons, *supra* note 189.

191. *See id.* (citing Madine Diallo's statement that "it is a myth that African women like polygamy," whether in Africa or in France).

wives were shocked and hurt by their husbands' decisions to take additional spouses,[192] rivalry among the women was common,[193] and some women were coerced into marriage at a young age by their families. In addition, living in France brought new challenges for these families. In Africa, each wife generally had her own house or hut for herself and her children; not so in France, where housing was very expensive.[194] As a result, large families, sometimes over twenty people, were crammed into tiny apartments where privacy was nonexistent.[195] Tensions often grew among the spouses and children, sometimes to the point of violence,[196] and some wives wanted out of their marriages or even attempted suicide.[197] In addition, mainstream French society's repugnance for polygamy made newly arrived women and their children feel unwelcome in their new communities. Children often feared mockery by their classmates, and delinquency rates were high.[198] Second and third wives with proper residence and working papers sometimes had trouble accessing the government's health care and social security benefits.[199] As a result of these pressures, some African women's groups began to lobby the government to discourage polygamy through changes in its immigration policies.[200]

Concurrent with these developments was a rise in French anti-immigrant sentiment. Statements and policies of mainstream political leaders reflected this trend. Jacques Chirac, now the French president, gave a speech while mayor of Paris in which, talking about African immigrants, he declared: "If you add the noise they make and the smell, well, the French worker goes mad. And if it were you, you would go mad too."[201] In this political context, polygamy was a lightning rod for anti-immigrant attitudes. Politicians characterized polygamous families as burdens on the welfare state: Chirac derided families "with a father, three or four wives, twenty kids, who receive 50,000 francs in welfare payments, without working, naturally."[202] Furthermore, polygamy was seen as an obstacle to immigrants' assimilation into mainstream French culture, and anti-immigrant groups thus portrayed it as a threat to the stability of French society itself.[203]

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192. Randle, *supra* note 189.

193. Simons, *supra* note 189.

194. Henley, *supra* note 187; Randle, *supra* note 189.

195. Ruth Nabakwe, *African Polygamous Life in a Western Context*, AFRICA NEWS, Dec. 4, 2000, *available at* LEXIS, News Library, Africa News File.

196. Simons, *supra* note 189.

197. Bissuel, *supra* note 186 (citing Isabelle Gillette-Faye of the Group for the Abolition of Sexual Mutilation, who also stated that physical violence between co-wives caused some women severe physical injury).

198. Nabakwe, *supra* note 195.

199. Angeline Oyog, *France: African Women Seek to Break Out of Chains of Polygamy*, INTER PRESS SERVICE, Mar. 4, 1992, *available at* LEXIS, News Library, Inter Press Service File.

200. *Id.*; Bissuel, *supra* note 186.

201. Pennink, *supra* note 188.

202. Bissuel, *supra* note 186 (translated from French).

203. Henley, *supra* note 187 (noting that polygamy was perceived as "one of many foreign customs that were a threat to French society"); Emmanuelle Andrez & Alexis Spire, *Droits des étrangers et statut personnel*, PLEIN DROIT No. 51, Nov. 2001 (stating that in the early 1990s, polygamy was stigmatized as a sign of failed integration, and experts were solicited to support the view that eradicating it was essential to the goal of assimilation), *available at* http://www.gisti. org/doc/

3. *The Loi Pasqua*

In 1993, the government responded to these various pressures by passing new immigration legislation known as *le loi Pasqua*, after then-Interior Minister Charles Pasqua. Among other changes, the new law substantially changed French policy regarding polygamy. First, it changed the immigration policy so that only one spouse of each new French immigrant would be issued a spousal visa and working papers and be eligible for the *allocation familiale* (the family allowance, a welfare benefit); the other spouses and their children were excluded.[204] Second, these changes were applied retroactively to families that had already immigrated.[205] Under the new policy, polygamous men and all their wives would lose their working and residence papers and *allocation familiale*, and be subject to deportation, unless they legally divorced and physically separated the household so that each wife was living separately. This policy was mitigated somewhat by a longstanding law that immigrants whose children are French citizens cannot be deported, but even these parents could lose their working papers and welfare eligibility.[206] In addition, a circular issued in 2000 formalized the practice of not applying the retroactive provisions of the laws to the first wife of a polygamous husband, but only to his subsequent wives.[207]

For the first five or six years after the law's passage, it was not enforced against families already in France.[208] In the past several years, however, enforcement has begun in earnest, and the effects of the new policy are now becoming evident.[209] For a few women, the policy has provided the excuse they needed to leave their living arrangements;[210] for most, it appears to be a disaster. Facing harsh penalties, these families face several unattractive options: ac-

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plein-droit/51/statut.html (last visited Oct. 22, 2002); *see also* Jennings, *supra* note 186, at 589 (citing Christian Jelen's polemic against multiculturalism, which associated polygamy with practices such as cannibalism and cutting off the hands of thieves).

204. The *loi Pasqua* was passed as an amendment to the immigration ordinance of November 2, 1945. Article 30 reads: "Lorsqu'un étranger polygame réside sur le territoire français avec un premier conjoint, le bénéfice du regroupement familial ne peut être accordé à un autre conjoint. Sauf si cet autre conjoint est décédé ou déchu de ses droits parentaux, ses enfants ne bénéficient pas non plus du regroupement familial." *See Étapes d'une répression*, PLEIN DROIT, No. 51, Nov. 2001, *available at* http://www.gisti.org/doc/plein-droit/51/etapes.html (last visited Oct. 22, 2002).

205. Article 15bis states, "La carte de résident ne peut être délivrée à un ressortissant étranger qui vit en état de polygamie ni aux conjoints d'un tel ressortissant. Une carte de résident délivrée en méconnaissance de ces dispositions doit être retirée." *Id.*

206. *See Polygamie: mieux vaut tard . . .*, PLEIN DROIT No. 46, Sept. 2000 (quoting *Polygamie: ne pas se tromper de combat!*, PLEIN DROIT No. 36, Dec. 1997) (arguing that French children are not spared from the policy's effects when their parents are prevented from working and cut off from welfare benefits) *available at* http://www.gisti.org/doc/plein-droit/46/polygamie.html (last visited Oct. 22, 2002); *see also* Bissuel, *supra* note 186; Jean-Pierre Alaux, *À la rue sous prétexte de polygamie*, PLEIN DROIT No. 51, Nov. 2001, *available at* http://www.gisti.org/doc/plein-droit/51/polygamie.html (last visited Oct. 22, 2002).

207. *Étapes d'une répression, supra* note 204. Occasionally first wives have had their papers revoked anyway. *See* Charlotte Rotman, *Un An Pour Paraître Monogame*, LIBÉRATION, July 7, 2000.

208. Henley, *supra* note 187.

209. *Id.*

210. *See also* Nabakwe, *supra* note 195 (stating that some members of polygamous families, including men, have supported the policy).

cept deportation, try to live in France as *sans-papiers* (illegal immigrants or those lacking work permits), or divorce and split up the family.[211] The last option is obviously unappealing for those who are satisfied with their existing living situations, but even for those who are not, divorce poses major problems. Many women are opposed to divorce on principle,[212] and furthermore, relocation can cause major upheaval in the lives of the women and their children. Beyond that, relocation is often a practical impossibility, as families simply cannot afford to pay for multiple homes.[213] In cases where the husband elects to divorce all but his first wife to maintain his own immigration status, the other wives (and frequently their children) often find themselves thrown out on the street with nowhere to go.[214] Today, many such women are living as squatters in abandoned buildings around Paris.[215] Others have been sent back to Africa.[216] According to Jean-Pierre Alaux of the immigrants' rights group GISTI, "eight years after the institutionalization of [anti-polygamy laws] . . . it is women who are paying the price."[217]

Furthermore, the French authorities have often been quite strict in their application of the law. A physical separation of households is required, not just legal divorce. Immigration authorities have refused to certify families as complying with the new conditions when they have simply rented additional apartments in the same building.[218] Enforcement is often carried out by the police, who have reportedly harassed and interrogated immigrant women about their private lives, demanding evidence that they have completed their "decohabitation."[219]

Today, some of the same African women's advocates who pushed for a crackdown on polygamy decry the *loi Pasqua* as being unduly draconian and as inflicting serious harm on the very group of people it was intended to help. Some commentators have noted that the law, though ostensibly designed as a response to feminist concerns, was in fact meant to appeal to French xenophobia and the backlash against the welfare state.[220] In other words, conservative politicians co-opted the gender equality issue and twisted it to serve their own agenda. According to activist Lydie Dooh Bunya, "[t]he French authorities have

211. Bissuel, *supra* note 186.

212. *African Women Caught Between Difficult Choices in France*, PANAFRICAN NEWS AGENCY DAILY NEWSWIRE, Feb. 13, 2002, available at LEXIS, News Library, PANA File.

213. Rotman, *supra* note 207.

214. Alaux, *supra* note 206.

215. Bissuel, *supra* note 186. Housing discrimination may make relocation even more difficult. *See* Pennink, *supra* note 188 (describing the plight of one woman who, with her eight children, was forced to squat after being "turned back from dozens of better apartments because the residents just do not want her to live there").

216. Rotman, *supra* note 207.

217. Alaux, *supra* note 206 (translated from French). GISTI stands for *Groupe d'information et de soutien des immigrés* [Group for the Information and Support of Immigrants].

218. *See* Pennink, *supra* note 201.

219. Bissuel, *supra* note 186.

220. *Id.*

just found a pretext to render life much more difficult for all Africans in France and to force us to leave."[221]

Under pressure from immigrants' rights groups, the government has recently passed several measures intended to soften the blow of the *loi Pasqua*. However, these measures will not eliminate the damage. For example, in 1998 the government re-enacted the basic provisions of the *loi Pasqua* in the *loi Chevènement*, but created exceptions under which certain limited categories of people could receive one-year visas.[222] In April 2000, the Ministry of the Interior issued a circular allowing these temporary visas to be issued more broadly to polygamous spouses,[223] but these measures were only intended to buy time for the families to make new housing arrangements. The circular made visa renewal dependant on ending cohabitation.[224] Furthermore, the government delayed circulation of the order to local officials, a delay that immigrants' rights advocate Claudette Bodin alleges was due to election-year anti-immigrant politics.[225] In 2000, a government circular authorized the re-issuance of work permits for non-deportable parents of French children.[226] Following the lead of non-governmental organizations, the government issued another circular in 2001 ordering local officials to help displaced wives gain access to emergency shelter.[227] Advocates have criticized this policy as a grossly inadequate solution to a problem of the government's own making.[228]

Prior to the passage of the *loi Pasqua*, the French courts had traditionally recognized the right of polygamous immigrant families to enter France and reside together.[229] However, in 1997, the Conseil d'État upheld the authority of the administration to refuse to renew resident visas on the basis of the new laws.[230] In addition, the Ministry of the Interior's April 2000 circular supporting the enforcement of the laws cited the "consistent" holdings of the Conseil d'État that polygamous families were not covered by Article 8 of the European

221. Angeline Oyog, *France: Clamping Down on Polygamy to Chase Out Foreigners*, INTER PRESS SERVICE, Jun. 17, 1993, *available at* 1993 WL 2540140. Dooh Bunya also explained that the French did not take the problem of polygamy seriously until they came to see it as a burden on the welfare system. *Id.*

222. *See Étapes d'une Répression*, *supra* note 204.

223. Ministère de l'Interieur, Circulaire du 25 avril 2000, *available at* http://www.gisti.org/doc/textes/2000/circulaire-polygames.html (last visited Oct. 22, 2002); *see also* Bissuel, *supra* note 186.

224. Ministère de l'Intérieur, *supra* note 223; *see also* Bissuel, *supra* note 186; Alaux, *supra* 206.

225. Henley, *supra* note 187. The circular was eventually made public in June 2000. Rotman, *supra* note 207.

226. *See Polygamie: mieux vaut tard . . .* ,PLEIN DROIT No. 46, Sept. 2000 (discussing both policy changes) *available at* http://www.gisti.org/doc/plein-droit/46/polygamie.html (last visited Oct. 22, 2002).

227. Meanwhile, non-governmental organizations have also started to make efforts to help displaced wives of polygamists find housing; however, such initiatives are too few and far-between to make a substantial dent in the problem. *See* Bissuel, *supra* note 186.

228. *See* Alaux, *supra* note 206.

229. *See* Andrez & Spire, *supra* note 203 (citing the *Montcho* decision of the Conseil d'État in 1980).

230. *See Étapes d'une répression*, *supra* note 204 (discussing this decision).

Convention on Human Rights, which protects the privacy of family life.[231] The circular also cited a 1993 advisory opinion of the Conseil Constitutionnel, which had confirmed that the law only protected "the conditions of a normal family life," with "normal" conditions defined as those that are dominant in France—that is, not polygamy.[232] The Ministry circular concluded: "In fact, the prohibition of polygamy is founded on a necessary respect for republican values, for women's rights, and for the integration of children [into French society]."[233]

4. *Value Conflicts and Balancing of Interests in the Regulation of Polygamy*

As these decisions suggest, the legal status of polygamy and the immigration of polygamous families both pose difficult problems for the articulation of international legal norms against involuntary family separation. As a general rule, polygamy is a serious obstacle to gender equality, both in the societies that practice it traditionally and when transplanted into new contexts through immigration.[234] There may be an emerging international legal norm against polygamy, with roots that extend back several decades. Early articulations of the international right to religious freedom made clear that this right did not encompass polygamy; that is, that there was no affirmative right *to* polygamy.[235] Polygamy was identified as a threat to women's internationally-protected legal rights in a seminal 1976 article on sex discrimination by Professor Myres McDougal.[236] In the United States, an organized movement of Mormon women has emerged opposing the continued practice of polygamy in some enclaves, despite its ban by the Utah state constitution and the laws of all fifty states.[237] Where states allow polygamy but not polyandry (as per Islamic law), they violate the basic principle against sex discrimination contained in Article 16(1) of CEDAW.[238] That Article further declares that there must be equality in the marital relationship.[239] In addition, polygamy may be harmful to children, especially when, as in France, it results in extremely crowded living conditions, potentially violating the "best interests" standards of the Convention on the Rights

231. Ministère de l'Intérieur, *supra* note 223 (citing specifically the decision in *Préfet du Calvados*, Oct. 2, 1996).

232. *Id.* (citing Conseil Constitutionnel Decision No. 93-325 DC, Aug. 13, 1993) (translated from French).

233. *Id.*

234. *But see* Elizabeth Joseph, *My Husband's Nine Wives*, N.Y. TIMES, May 23, 1991, at A31 (arguing, based on her own experience in a polygamous household in Utah, that polygamy is good for women, helping them to balance a career with family).

235. *See* Carol Weisbrod, *Universals and Particulars: A Comment on Women's Human Rights and Religious Marriage Contracts*, 9 S. CAL. REV. L. & WOMEN'S STUD. 77, 80 (1999).

236. Myres McDougal et al., *Human Rights for Women and World Public Order: The Outlawing of Sex-Based Discrimination*, 69 AM. J. INT'L L. 497, 506 (1975); *see also* Weisbrod, *supra* note 235, at 80-81.

237. *See generally* http://www.polygamy.org (last visited May 2, 2003); http://www.polygamyinfo.com/frontdoor.htm (last visited Oct. 22, 2002).

238. *See* Urfan Khaliq, *Beyond the Veil?: An Analysis of the Provisions of the Women's Convention in the Law as Stipulated in Shari'ah*, 2 BUFF. J. INT'L L. 1, 30 (1995).

239. *See also* Khaliq, *supra* note 238, at 31.

of the Child. Finally, even if none of these harms are inherent in the concept of polygamy, the practice in much of the world has been compared to slavery.[240] Women and quite young girls are often forced into polygamous marriages, sometimes after having been sold at auctions.[241]

Thus, there are strong interests, cognizable at international law, that weigh against a norm in favor of keeping polygamous families intact. Yet these factors must be balanced against the human right to family integrity. As those immigrants whose homes the *loi Pasqua* broke apart can attest, the forcible separation of families is usually emotionally traumatizing for all members and frequently brings harsh economic and social consequences. This is especially true when such separation results in deportation.

International law recognizes a right against arbitrary deportation. The deportation of women as a response to their husbands' practice of polygamy may well be considered arbitrary, particularly given the law's retroactive application. As French jurist Emmanuelle Andrez and sociologist Alexis Spire have stated, "[I]t is indisputable that polygamy must be combated as a practice that is hostile to the dignity of women and contrary to the equality of the sexes. But instead of protecting women in polygamous situations, the legislature chose to penalize them."[242]

A more general concern underlies the debate about polygamy: what limits, if any, does international law place on the state's ability to define what constitutes a legitimate family? This concern has applications far beyond the sphere of immigration. A government's legal recognition of a marriage or other family relationship generally brings a range of legal and practical advantages, often including taxation, welfare, private and public benefits eligibility, child custody, inheritance, and many others. To what extent may a state determine what relationships may be granted these advantages, thus discriminating against family arrangements that diverge from the societal norm? An obvious contemporary example of such a dilemma is the debate over same-sex marriage. Should states be required to authorize such marriages domestically or at least to recognize the validity of those that have been legally performed abroad? Most advocates of same-sex marriage do not endorse polygamy, just as most polygamists do not support same-sex marriage.[243] But is there a principled way to distinguish between the two for the purpose of developing international legal norms?[244] We return to this issue below.[245]

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240. Weisbrod, *supra* note 235, at 95.

241. Simons, *supra* note 189.

242. Andrez & Spire, *supra* note 203 (translated from French).

243. Chambers, *supra* note 174, at 74, 79-80 (noting that Mormon doctrine views homosexuality as sinful, while most advocates of same-sex marriage have taken pains to distinguish it from polygamy).

244. *See generally* Jorge Martin, *English Polygamy Law and the Danish Registered Partnership Act: A Case for the Consistent Treatment of Foreign Polygamous Marriages and Danish Same-Sex Marriages in England*, 27 CORNELL INT'L L.J. 419 (1994) (arguing that because England recognizes polygamous marriages of immigrants legally married abroad, it should apply same standard to foreign same-sex partnerships).

245. *See infra* notes 254-256 and accompanying text.

In the immigration context, concerns for sovereignty and international comity complicate the issue. International law recognizes that states have the sovereign right to exclude aliens, although this right is subject to a number of limitations such as certain non-discrimination principles, due process rights, and perhaps a concern for familial integrity.[246] This right arguably provides states with the authority to require immigrants, as a condition of entry or of residence, to comply with policies that reflect national cultural norms. On the other hand, international comity principles generally encourage states to give effect to marriages and other legal acts performed in other countries. From this perspective, France's lack of recognition of a Senegalese polygamous marriage is an affront not just to the family concerned but to Senegal itself. French choice-of-law rules generally *do* measure the validity of marriages (and other legal acts related to families) performed abroad according to the laws of an immigrant's country of nationality.[247] This principle (known as *statut personnel*) is grounded partly in comity concerns and partly in deference to the individual in matters of his or her private life.[248] Against the background of this legal rule, the anti-polygamy law is an anomaly.

Finally, the situation of polygamous immigrants is complicated by concerns for the accommodation of cultural difference. African women in France face a number of different but interlocking forms of oppression: racial, cultural, gender-based, and socioeconomic. Western feminism has frequently and notoriously failed to approach gender issues with an adequate understanding of the problems and perspectives of Third World women (as well as Western women of color).[249] The need to account for different forms of oppression is not merely a matter for feminist theorizing; it is of tremendous practical importance. In the French polygamy example, legitimate concerns about gender inequality gave rise to an immigration policy that ultimately facilitated the further subordination of a racial and cultural minority group, in many cases literally throwing women and children out on the streets.

At the same time, however, an appreciation of cultural difference should not blind us to the forms of subjugation that take place within cultures.[250] In France, it was African women who first brought attention to the problems women and children face in polygamous families. Aided by these advocates, many other African women in France who may previously have been afraid to raise their voices now have shared stories of the indignities they have suffered in polygamous households.[251] A truly intersectional analysis of discriminatory so-

246. These limitations are explored in Section II.C.

247. Andrez & Spire, *supra* note 203; Bissuel, *supra* note 186.

248. *See* Andrez & Spire, *supra* note 203.

249. *See, e.g.*, Elizabeth M. Iglesias, *LatCrit Theory: Some Preliminary Notes Towards a Transatlantic Dialogue*, 9 U. MIAMI INT'L & COMP. L. REV. 1, 23-25 (2001).

250. *See* Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57 (1994) (critiquing the relativistic application of the "cultural defense" to excuse violence against women, and arguing instead for an intersectional analysis that accounts for cultural difference as well as subordination within cultures and the existence of multiple interpretations of what norms a given "culture" embraces).

251. *See* Simons, *supra* note 189.

cial structures must give heavy weight to these concerns.[252] The question, then, is how to address them without making things worse.

5. *Equality and Family Formation: Legitimacy of Restrictions on Polygamous Marriage*

We believe France's enforcement of the *loi Pasqua* should be considered a violation of international legal norms against family separation, primarily because the law's retroactive application fails to respect family members' autonomy interests in maintaining their existing family relationships. But this claim should not be understood to mean that French law may not make any distinctions between polygamous and monogamous marriages, nor that France must authorize the performance of polygamous marriages. There is a meaningful distinction between laws limiting the *formation* of families and those that require the separation of families that are already formed. For the most part, we believe international law does and should give states considerable leeway in determining what constitutes a legally cognizable family. Because conceptions of the family vary so much among and within cultures, it is necessary to allow each nation to develop its own evolving consensus regarding what types of relationships should be granted the legal advantages that attach to marriage or other familial ties. It is unreasonable to expect states to grant these advantages to all groups of people who self-identify as families, no matter how loose their connections to one another.[253]

We do think, however, that international law places limits on the latitude of states in this regard.[254] For example, international law clearly forbids states to ban interracial marriages.[255] We would like to see the evolution of an international legal prohibition on discrimination on the basis of sexual orientation, including discrimination against same-sex marriages or partnerships; we recognize, however, that today such a norm is a long way off. On the other hand, we believe that international law properly does *not* require states to recognize polygamous marriages, and, in fact, there may be an evolving international norm *against* polygamy.

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252. *See, e.g.*, Volpp, *supra* note 250.

253. For example, in one Australian Aboriginal society, "a Manitjamaat woman with a Wardangmaat mother and a Manitjamaat father would accept all Wardangmaat women as 'mother' and all Manitjamaat men as 'father.'" Lynch, *supra* note 131, at 522 (critiquing the "dominant conception of 'parent'"). While this is a perfectly legitimate cultural practice, it would probably be unworkable for another country to use such broad and culturally contingent definitions of family relationships for the purposes of immigration policy. *But cf.* James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115, 174 (1997) (arguing that government policies for the reunification of refugee families frequently inappropriately exclude extended families, and that they should use a "functional" criterion for what constitutes a family rather than relying on arbitrary categories such as "spouses" and "children").

254. In the *Cziffra* case, the Human Rights Committee held that a state's definition of a family, although it could be culturally specific, must be "without discrimination." *See* VAN BUEREN, *supra* note 17, at 69.

255. *See* CERD, *supra* note 23, art. 5 (prohibiting race, ethnicity, and national origin discrimination in "the right to marry and the choice of spouse").

The distinction is grounded in equality considerations. Although polygamy and same-sex marriage are similar in the sense that they are both deviations from "normal" Western family structure, in other senses they are quite different. Polygamy tends to support women's subordination within the family and in society at large. Same-sex marriage, on the other hand, is a partial *solution* to the subordination of gays and lesbians; it tends to promote equality rather than to undermine it. Neither domestic nor international law can or should be value-neutral with respect to family formation, and we believe that the promotion of equality norms should be one central guiding value. Such an approach would be consistent with the widespread adoption of international legal norms against discrimination, which have sometimes been interpreted to encompass discrimination on the basis of sexual orientation in areas other than marriage.[256]

France, therefore, has the right under international law not to recognize polygamous marriages performed within its borders. The question regarding its treatment of polygamous immigrants, however, hinges on France's obligation (or lack thereof) to recognize these marriages when they are validly performed abroad. This question, which cuts to the central problem with the *loi Pasqua*, is the focus of the remainder of this Section.

6. *Separation of Polygamous Families as a Violation of International Law*

When immigrants are already married before their arrival in France, an immigration policy that disrupts these marriages involuntarily separates existing families rather than simply restricting family formation. The legitimacy of this involuntary family separation can in turn be separated into three distinct questions regarding France's specific international obligations. First, may France, consistently with international law, refuse to allow polygamous families to immigrate in the first place; more specifically, may it refuse to issue spousal visas and benefits to more than one wife of each male immigrant? Second, if it may do this, is it nonetheless precluded from revoking the visas and benefits (and otherwise forcing the separation) of polygamous families that were already admitted to France before the anti-polygamy policy was adopted? Third, if it is so precluded, must it also continue to allow entry to the additional wives and children of polygamous men who immigrated before the policy was adopted?

As to the first question, it should be noted that France's new policy of excluding polygamous families (or, more precisely, refusing to consider them to be families for immigration purposes) is not at all unusual. Many Western countries, including the United States, refuse to recognize polygamous marriages

256. *See Mouta*, 31 Eur. H.R. Rep. 1055 (holding that sexual orientation discrimination in child custody decisions violates Articles 8 and 14 of the European Convention, taken together); Toonen v. Australia, U.N. Human Rights Comm., 50th Sess., Communcation No. 488/1992, U.N. Doc. U.N. Doc CCPR/C/50/D/488/1992 (1994) (holding that sexual orientation discrimination violates the prohibition of sex discrimination under Article 26 of the ICCPR); Sutherland v. United Kingdom, App. No. 25186/94, 24 Eur. H.R. Rep C.D. 22 (1997) (Commission report) (holding that differences in age of consent for homosexual and heterosexual sex violate Articles 8 and 14 taken together).

even when they are validly performed abroad.[257] We believe that these policies are, and should be, permissible under international law.[258] The right to set conditions for immigration is a sovereign state right, subject only to the limits found in particular international legal prohibitions; these conditions are presumptively legitimate.[259] While international law prohibits certain forms of discrimination in immigration policy (racial discrimination, most clearly), no such norm exists proscribing discrimination against polygamous families. If anything, as discussed above, international law may encourage this form of discrimination.

Immigration policy ought to be subject to an international norm against involuntary family separation, as we argue further in Section II.C. But this norm ought not to be interpreted so rigidly as to prohibit any policy that places burdens on families that wish to stay together. In this case, would-be immigrants who are told that France will not recognize their marriages and will therefore not allow more than one spouse to immigrate have an obvious option that will allow their families to stay intact: they can stay in their home country. This option is obviously not ideal; however, international law does not afford any person a right to live in the country of his or her choice.[260] Unless we are ready to demand that all nations open their borders to unrestricted immigration, countries will continue to turn away millions of would-be immigrants each year based on any number of reasons. The strong equality concerns underlying opposition to polygamy constitute valid reasons for exclusion.

The second and third questions posed above, however, bring us to the central problem with the anti-polygamy provisions of the *loi Pasqua*: their retroactivity. Once immigrants are admitted to a country, they acquire rights that they did not have before they came, and they may not be deported arbitrarily or without due process of law.[261] Once immigrants have arrived in France, they are entitled to respect for the basic integrity of their families. It is in this respect that French law violates international norms against family separation. Even though France retains the right to control the legal creation of marriages (and other non-biological family relationships), its obligations under international law, including Article 8 of the European Convention and other existing provisions discussed in Section I, should be interpreted to obligate it to accommodate situations where people's practical reality does not match the legal fictions surrounding the definition of "family."

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257. Simons, *supra* note 189; *see also, e.g.*, Jean Pineau, *L'ordre public dans les relations de famille*, 40 C. de D. 323, 332 (1999) (Canada); Gonzalez & Mac Bride, *supra* note 176, at 179 (Spain); *id.* at n.106 (Germany). However, Britain recognizes the validity of polygamous marriages performed overseas. Martin, *supra* note 244, at 420, 424.

258. French opponents of the *loi Pasqua* generally recognize the legitimacy of its *prospective* application. *See, e.g.*, Alaux, *supra* note 206.

259. *See, e.g.*, Abdulaziz v. United Kingdom, App. Nos. 9214/80, 9473/81, 9474/81, 7 Eur. H.R. Rep. 471 ¶ 67 (1985) (holding that State's right to "control the entry of non-nationals" is a matter of "well-established international law and subject to its treaty obligations").

260. *See id.* ¶¶ 61, 68 (holding that Article 8's protections of family life "cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence").

261. *See, e.g.*, ICCPR, *supra* note 21, art. 13.

The need for a flexible, substantive approach to defining "family life" under Article 8—one that focuses on the real strength of the ties between people—has already been endorsed by the European Commission on Human Rights in *Khan v. United Kingdom*, a decision involving the protection of polygamous families.[262] Polygamous families are, in short, families. They are made up of mothers and fathers—and children, who have a strong and internationally recognized interest in growing up with both of their parents. Although France may legitimately attempt to prevent people from forming such families, or from bringing them to the country, once they have already done so with the full understanding that France would respect their right to stay together, France may not force them apart.

For this reason, we believe that the *loi Pasqua* violates international law when applied to polygamous families already present in France before its passage. Specifically, it violates the right to respect for family life protected by the European Convention on Human Rights and other international conventions; it also may violate the right to marry, though not under the ECHR's restrictive interpretations, as well as the individual rights of parents and children reflected in various treaties.[263]

In addition, the *loi Pasqua*'s prospective application to families is problematic when the husband, but not one or more of the wives, immigrated prior to the law's passage. In France, it has traditionally been very common for a man to immigrate first, then bring his family once he has found work and housing and acquired visas for them. None of the measures France has passed to soften the law's blow do anything to help such families. These situations impose perhaps somewhat less of a hardship on families than does the entirely retroactive application discussed above, because they do not require families to uproot themselves but simply to stay separated as they already were. In another sense, however, the burden is much more severe, because it requires families to be separated entirely by national borders (usually on different continents) rather than simply maintaining two separate households in the same city. Moreover, polygamous men who arrived in France prior to 1993 had the legitimate expectation that they would be able to take advantage of the laws enabling familial immigration.

Therefore, we believe that, in situations where the marriages in question as well as the husband's immigration preceded the passage of the *loi Pasqua*, its enforcement violates the international norm against family separation. Where the marriage occurred subsequent to the law's passage, however (even when the husband immigrated first), no similar legitimate expectation of the right to family integrity would exist, and the situation should be treated similarly to that of whole families who have not yet immigrated. Enforcing the law against such

262. *See* VAN BUEREN, *supra* note 17, at 70 (discussing this case); Khan v. United Kingdom, App. Nos. 2991/66, 2292/66, 10 Y.B. Eur. Conv. on H.R. 478 (1967) (Euro. Comm'n on H.R).

263. *See supra* Part I; *see also* Oyog, *supra* note 199 (citing argument of the immigrants' rights group GISTI that the *loi Pasqua* violates two aspects of this protection: "the right to live with one's spouse and the right to protect the family from breaking apart").

marriages would have the benefit of discouraging the rightly decried practice of men returning to Africa and acquiring additional wives without the permission or knowledge of their first wives living in France.[264]

The ultimate difference between the retroactive and prospective applications of the anti-polygamy policy is grounded in their different implications for the subjective autonomy interests of the family members' concerns. When men and women today choose to immigrate to France despite their knowledge of its anti-polygamy policy, they make a conscious decision to accept that limitation on their family lives as a condition of immigration, or to stay in their countries of origin in order to pursue the family arrangements of their choice. In contrast, when they have immigrated on the understanding that their family relationships will be allowed to remain intact, a sudden change in this policy that forces them to abruptly change their situation or be deported does not adequately respect the autonomy of any of the family members.

Clearly, in instances where women or girls have been forced into polygamous marriages or otherwise wish to escape them, this notion of autonomy may be illusory. France should make every effort to identify such cases and to give the women involved a chance to make a meaningful choice; such possibilities will be discussed further at the end of this section. But it is too simplistic, and too disrespectful of the actual choices some women make, to assume that all choices to enter polygamous marriages are inherently coerced. Cultural conditioning in favor of certain marriage arrangements is not the same as forcible marriage from a legal or moral perspective. Women's freely expressed choices should not be disregarded simply because they occur against a background of cultural norms that are inconsistent with principles of equality. Women's lives (like men's) are made up not just of principles, but of people and relationships, and to sacrifice these on the altar of abstract principle after women have chosen and structured their lives around them is no vision of true autonomy.

In addition to its retroactivity, certain features of the French anti-polygamy policy are particularly harsh and uncompassionate, to such an extent that they may raise concerns under international law.[265] First, the policy requires physical separation of families, not simply legal divorce or annulment of marriages. As a matter of simple freedom of association, this seems problematic. Consenting adults in France are generally permitted to live with whomever they like, and today many families consist of unmarried parents and/or half-siblings from different marriages or relationships. A policy that restricts this freedom should

264. *See* Simons, *supra* note 189 (describing the practice of men going home "to buy new, young brides, often still teen-agers."); Richard Grenier, *Polygamy and Multiculturalism the French Way*, WASHINGTON TIMES, Dec. 1, 1993, at A17 (criticizing African practice of marketing wives to be sent to France, where they will be accorded "a pitiable social standing barely distinguishable from slavery"). Grenier accuses African men in France of buying wives as an investment in future welfare benefits; we believe that this characterization is largely unfair, and echoes the stereotypes being propagated by the xenophobic French right wing in the early 1990s. *See supra* notes 201-203 and accompanying text. Still, to the extent that his description of wives being sold at auction is accurate, *see* Simons, *supra* note 189, the practice it describes should be eradicated.

265. *See Polygamie: mieux vaut tard . . . , supra* note 226 (describing the enforcement method of the *loi Pasqua* as 'blind" and "without nuance," and the measures themselves as "demagogic").

raise concerns, particularly when applied disproportionately against certain immigrant groups. If France does not prohibit unmarried people from living together generally, it should not prohibit African immigrants from doing so on the mere basis that they had been married in a different country. Although France need not grant legal advantages to those foreign marriages, it should not impose disadvantages on them that would not apply if the couple had never married at all.

Second, the enforcement mechanisms of the *loi Pasqua* are arbitrary and irrational, since they harm the very people the law was ostensibly designed to help.[266] Deportation is a terribly severe punishment that wreaks havoc on people's lives. After families acquire jobs and housing, enroll their children in school, and otherwise build ties to their new communities, deportation forces them to leave all that behind and return to a country to which they may have cut all ties. The trauma of deportation—perhaps most of all for children—is even graver when it results in the separation of families.[267] Deportation should not be used as a threat to coerce families living in a country to separate from one another—nor, for that matter, should the revocation of work permits and the termination of welfare benefits. Parents should not be forced to choose between abandoning their families and throwing them into economic ruin.

Finally, notwithstanding the problems with the current policy, France can and should undertake other, non-punitive measures to alleviate the harms suffered by women and children in polygamous households. Some African women's groups are already making such efforts—for example, providing counseling for women and helping them to find jobs and housing if they choose to leave their marriages voluntarily.[268] No reasonable principle of international law would forbid *voluntary* family separation. Women (and men) who want to leave bad marriages, whether polygamous or otherwise, should have the right to do so. France may need to alter its policy to make this easier. For example, many African women's groups in France are working to eliminate the system of derivative rights, under which married women's residency and work permits and social benefits are actually issued to their husbands.[269] Some groups have requested the European Parliament to mandate that states issue permits directly to women, "which would make them much less vulnerable in cases of divorce or spousal abuse."[270] In the special case of polygamous immigrants, where the women often face both misery in their marriages and significant cultural and economic obstacles to divorce, governments should make a special effort to enable those who want to escape polygamy to do so.

266. Alaux, *supra* note 206 (stating, in French, that "the struggle against polygamy, in its current form, hurts almost exclusively the victims of polygamy").

267. We will explore this issue further in our discussion of U.S. immigration law in the next Section.

268. *See* Henley, *supra* note 187 (citing work of Afrique Partenaire Service); Simons, *supra* note 189 (describing support group meetings).

269. Scales-Trent, *supra* note 189, at 734.

270. *Id.* at 735.

The problem of anti-polygamy laws in France provides a useful example for the development of international legal norms against involuntary family separation. Unlike the Australian child removal policy discussed in Section A, the polygamy situation presents a "hard case" for international law because the various legally cognizable and important values and interests at stake tug in opposite directions. Women's interests in structural gender equality and in being protected individually from oppressive or coerced polygamous marriages weigh in favor of France's policy, while the values of family integrity, economic and social stability for immigrants, respect for cultural difference, and respect for the (arguably) autonomous choices of family members weigh against it. None of these concerns can be disregarded, but balances must be struck and hard choices must be made. We believe that these choices should be guided by an understanding of the intersectional nature both of the cultural life of the immigrant women whose protection is, at least ostensibly, the goal of these policies, and of the various forms of oppression they face.

Ultimately, when a policy is supposed to protect women, it is essential to analyze its likely and actual outcomes realistically. A policy that results in immigrant women being thrown out on the streets ought not to be praised by feminists. Whatever abstract principles are at play in the shaping of international legal norms, they need to be adapted to this reality. A stronger recognition of international norms against family separation, and an understanding of how those norms can actually *help* women, might prevent states from jumping into major policy changes like France's without fully considering their ramifications for the individuals and the families they affect.

C. Family Interests and Exceptional Hardship in United States Immigration Law

Beyond the particular circumstances of polygamous immigrants, international legal protection of family integrity has broad implications for immigration law. This Section analyzes the ways that United States immigration law does and does not accommodate the rights and interests of families. In particular, we argue that provisions of two 1996 laws restricting the consideration of family hardship in deportation proceedings, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Antiterrorism and Effective Death Penalty Act (AEDPA), violate the United States' international obligations to protect families.[271] United States courts have traditionally been notoriously reluctant to incorporate international norms into their interpretation of domestic laws.[272] However, two recent federal district court decisions by Judge Jack Weinstein, enjoining deportations on international law grounds, break this mold, and in fact contain quite detailed assessments of the United States' obligations to

271. Pub. L. 104-208, Div.C., 110 Stat. 3009-546 (1996); Pub. L. 104-32, 110 Stat. 1214 (1996).

272. *See, e.g.*, Martha F. Davis, *International Human Rights and United States Law: Predictions of a Courtwatcher*, 64 ALB. L. REV. 417, 417-20 (2000) (suggesting that a change in U.S. courts' insularity may be approaching).

protect families and children.[273] We draw heavily on this analysis and argue that other courts should similarly integrate these international law requirements into their review of immigration and removal decisions. In addition, we compare these decisions to those of the European Court of Human Rights, which has developed a relatively robust jurisprudence regarding the limitations international law places on immigration decisions that separate families.

1. U.S. Immigration Law's Treatment of the Family

U.S. immigration law has traditionally required that exclusion and removal decisions take family integrity into account, yet even before the 1996 reforms, concerns for the family were frequently subordinated to other concerns.[274] In most circumstances, U.S. immigration law favors spouses of U.S. citizens, who are entitled to visas and eventually permanent resident status provided that they do not fall into certain categories of inadmissible aliens. The Immigration and Nationality Act (INA) of 1952 set forth both bases for inadmissibility—including, for example, some criminal convictions—as well as criteria for waivers of inadmissibility decisions.[275] A typical example of these waiver provisions was Section 212(c), which, before its repeal in 1996 as part of the IIRIRA, provided for discretionary waivers of inadmissibility decisions for lawful permanent residents who, after traveling abroad, were denied the right to return to the United States. In deciding whether to grant these waivers, immigration judges were required to "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether the granting of section 212(c) relief appears in the best interests of this country."[276] Family ties in the United States, as well as hardship to the family that would result if the alien was deported, were among the relevant "social and humane considerations" to be evaluated.[277]

However, even a simple reading of the text of section 212(c) demonstrates that it never provided a very robust protection of family integrity. The alien bore the burden of proving he or she met the criteria for the waiver; the default presumption was in favor of family separation, not against it. In addition, the harm of family separation was measured only in terms of its effect on "the best interest of this country," not on that of the alien. The distinction is important because international human rights limitations on immigration proceedings are primarily oriented toward the protection of the individual immigrant. The INA

273. *See* Maria v. McElroy, 68 F. Supp. 2d 206 (E.D.N.Y. 1999); Beharry v. Reno, 183 F. Supp. 2d 584 (E.D.N.Y. 2002).

274. *See, e.g.*, Enid Trucios-Haynes, *"Family Values" 1990's Style: U.S. Immigration Reform Proposals and the Abandonment of the Family*, 36 BRANDEIS J. FAM. L. 241, 241 (1998) (citing the "longstanding family unity goals reflected in immigration law").

275. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 212, 66 Stat. 163, 182-89 (codified as amended at 8 U.S.C. § 1182); *see* Matter of Marin, 16 I. & N. Dec. 581, 582 (Bd. of Immigration Appeals 1978).

276. *Marin*, 16 I. & N. Dec. at 584.

277. *Id.* at 584-85.

waiver provisions, even pre-1996, took into account family ties not as an individual right, but as simply one measure of U.S. interests.[278]

Pursuant to INA Section 240A, the cancellation of removal provision, Section 212(c) waiver proceedings were also available to most aliens facing deportation proceedings.[279] This provision allowed the Attorney General (in practice, the Board of Immigration Appeals (BIA)) to stop any deportation so long as the alien met certain "residency and character requirements" and could show that the deportation would cause "extreme hardship" to himself or to U.S. citizen or legal permanent resident family members.[280] BIA decisions are subject to review by federal appellate courts, which at first tended frequently to overturn denials of the waiver on the basis that the BIA had interpreted the "extreme hardship" requirement too stringently.[281] Specifically, some courts placed emphasis on family unity, holding that family separation alone may constitute extreme hardship and that family ties are the single most important factor in a hardship determination.[282] In *INS v. Wang*, however, the Supreme Court reversed an appellate decision that had overturned a BIA waiver decision.[283] The Court held that the INA granted broad discretion to the BIA in making waiver decisions, and that the courts must therefore defer to administrative interpretations of "extreme hardship," which are reviewable only on the basis of abuse of discretion.[284] Even with this limited review authority, some court decisions in the wake of *Wang* nonetheless ordered the BIA to increase the weight given to the harms of family separation in its balancing of interests.[285]

As limited as it has always been, the availability of hardship waivers for immigrants facing deportation orders has decreased in the wake of IIRIRA and AEDPA. First, both bills greatly increase the range of criminal offenses defined as "aggravated felonies," for which immigrants, even lawful permanent re-

278. Similar waiver provisions existed throughout the INA, and still exist, though many have been modified by the 1996 reforms. For example, Section 212(e) of the INA, 8 U.S.C. § 1182, provides for discretionary waivers of rules prohibiting foreign students in certain exchange programs from applying for permanent resident status after completion of the program until after they have returned to their host countries for two years. *See* Inna V. Tachkalova, Comment, *The Hardship Waiver of the Two-Year Foreign Residency Requirement Under Section 212(e) of the INA: The Need for a Change*, 49 AM. U. L. REV. 549, 558-65 (1999) (describing and critiquing U.S. courts' narrow interpretation of section 212(e), which like section 212(c) is focused on U.S. interests, taking into account the interests of American family members but not those of the alien herself). Courts interpreting this section have imposed a limiting interpretation of "exceptional hardship," holding that "separation of families by itself never will qualify as exceptional hardship because temporary separation from a spouse is a problem that many families face." *Id.* at 563.

279. Act of Oct. 24, 1962, Pub. L. No. 87-885, § 4, 76 Stat. 1247, 1248 (codified at 8 U.S.C. § 1229b (2003)).

280. Susan L. Kamlet, Comment, *Judicial Review of "Extreme Hardship" in Suspension of Deportation Cases*, 34 AM. U. L. REV. 175, 175 (1984).

281. *Id.* at 176.

282. Mejia-Carillo v. INS, 656 F.2d 520, 522 (9th Cir. 1981); Villena v. INS, 622 F.2d 1352, 1357 (9th Cir. 1980).

283. 450 U.S. 139 (1981) (per curiam).

284. *Id.*

285. *E.g.*, Antoine-Dorcelli v. INS, 703 F.2d 19, 20 (1st Cir. 1983); Contreras-Buenfil v. INS, 712 F.2d 401, 403-04 (9th Cir. 1983); *see* Kamlet, *supra* note 280, at 199-200.

sidents, are automatically subject to deportation.[286] AEDPA also excludes all aggravated felons from consideration for any sort of hardship waiver, and immunizes their deportation orders from judicial review.[287]

Other provisions of the IIRIRA also threaten family integrity. For example, Section 212(a)(9) bars persons who have been present illegally in the United States for one year or more from applying for permanent resident status at any time in the next ten years.[288] Because many undocumented immigrants have legal resident family members—for example, their children born on American soil are U.S. citizens—these policies pose a major danger of family separation.[289] Undocumented immigrants must continue to hide from authorities in order to avoid this risk. There is no exception for immigrants who marry U.S. citizens, a major change from long-standing policy; indeed, there are no waivers at all.[290] Similarly, Section 245(i) repealed a provision that enabled undocumented immigrants to acquire visas without first returning to their home countries; essentially, this provision prevents these immigrants from legalizing their status even temporarily.[291]

2. *Consistency of U.S. Immigration Policy with International Law Relating to Family Separation: Recent Court Decisions*

Various aspects of U.S. immigration law, especially post-1996, may be inconsistent with international legal norms against family separation. International law has traditionally recognized a sovereign right to exclude and deport aliens.[292] This right, however, is limited by countervailing provisions of international law.[293] For example, a number of human rights conventions require that deportees be provided with various procedural protections.[294] Some require that proceedings be individualized, specifically banning mass expulsion.[295] Exile of citizens, or restrictions on their right of return, is banned.[296] Immigration policy may not discriminate on the basis of illicit factors such as race.[297] No specific human rights treaty provision bans separation of families through deportation. However, the general treaty provisions protecting family integrity, those protecting child welfare, and the customary international norms that they represent all implicate the legality of immigration policies that separate families.

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286. *See* Maria v. McElroy, 68 F. Supp. 2d. 206, 209-10 (1999).
287. *Id.* at 212.
288. Immigration and Nationality Act § 212(a)(9), 8 U.S.C. § 1182 (2000).
289. *See* Emma O. Guzman, Comment, *The Dynamics of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996: The Splitting-Up of American Families*, 2 SCHOLAR 95, 121-23 (2000).
290. 8 U.S.C. § 1182.
291. *See* Guzman, *supra* note 289, at 123-25.
292. *See, e.g.*, Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892); Dalia v. France, 1998-I Eur. Ct. H.R. 76, ¶ 52.
293. *See Dalia*, 1998-I Eur. Ct. H.R. 76 ¶ 52.
294. *E.g.*, ICCPR, *supra* note 21, art. 13; American Convention, *supra* note 25, art. 22.
295. American Convention, *supra* note 25, art. 22(9); African Charter, *supra* note 25, art. 12.
296. *E.g.*, American Convention, *supra* note 25, art. 22(5); African Charter, *supra* note 25, art. 12.
297. CERD, *supra* note 22, art. 5(d)(i)-(ii).

For example, the U.N. Human Rights Committee has recognized that deportation can interfere with family life in violation of Article 17 of the ICCPR.[298] Accordingly, Congress and administrators should take care that they comply with these international norms when designing and implementing immigration policies, as should the courts in interpreting and reviewing them.

In a groundbreaking decision in 1999, the Eastern District of New York did just that, overturning a BIA deportation order on international law grounds. *Maria v. McElroy* dealt with a challenge to a BIA decision that the petitioner, Eddy Maria, was deportable pursuant to the IIRIRA's provisions regarding aggravated felons.[299] Maria, a 24-year-old citizen of the Dominican Republic, had lived in the U.S. continuously since the age of ten and was a lawful permanent resident. His parents were U.S. citizens, as were some of his siblings.[300] In 1996, Maria was convicted of attempted unarmed robbery in the second degree, an offense that the AEDPA redefined as an "aggravated felony" when it was passed later that year. The INS began deportation proceedings against him and held a hearing in 1997. After serving his two-year sentence, Maria was immediately taken into INS custody.[301] The BIA approved the INS decision on the basis that Maria "had been convicted of an 'aggravated felony' and was thus both deportable and ineligible for any form of relief from deportation."[302] Although the AEDPA barred direct judicial review, Maria filed a petition for habeas corpus in district court.[303]

Although denying Maria's request to be declared non-deportable, the court held that he was entitled to a humanitarian hearing allowing consideration of his claim to a hardship waiver. Specifically, the court held that to deport Maria without a hardship hearing would violate a number of principles of international law preventing interference with family life.[304] The court gave a particularly detailed analysis of the provisions of the ICCPR, including Article 23(1)'s statement that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State" and Article 17's establishment of an individual right against arbitrary or unlawful interference with the family.[305] Citing decisions by the Human Rights Committee, the court held that deportation proceedings that do not take family separation into account violate these principles, and also may constitute "cruel, inhuman, and degrading treatment" in violation of Article 7.[306]

298. Aumeeruddy-Cziffra v. Mauritius, U.N. GAOR, Hum Rts. Comm., 36th Sess., Supp. No. 40, Annex 13, at 134, U.N. Doc. A/36/40 (1981). In addition, Article 19(6) of the Convention on Economic, Social, and Cultural Rights requires states to "facilitate as far as possible the reunion of the family of a foreign worker" who has legally migrated, while the 1977 European Convention on the Legal Status of Migrant Workers provides similar protections for migrant workers' families. DETRICK, *supra* note 48, at 186-87.

299. 68 F. Supp. 2d 206, 219-20 (1999).

300. *Id.* at 213.

301. *Id.* at 215.

302. *Id.*

303. *Id.*

304. 68 F. Supp. 2d at 231-34.

305. *Id.* at 231.

306. *Id.* at 231-32.

In addition, the court held that customary international law prohibited arbitrary expulsion and arbitrary interference with family life.[307] Judge Weinstein cited a range of international treaties, including the Universal Declaration of Human Rights and the three regional human rights conventions, as well as U.S. Supreme Court decisions recognizing a domestic constitutional right to family integrity.[308] He held that the denial of a humanitarian hearing to establish hardship—at which the impact of family separation could be raised and considered—made the expulsion and interference with family life "arbitrary" within the meaning of international law.[309] Therefore, the court vacated the deportation decision and ordered that Maria be granted such a hearing.

The court in *Maria* stopped short of declaring that the AEDPA aggravatedfelony provisions violated international law. Rather, it followed the principle of avoidance of conflict with international law by construing the statute narrowly so as not to apply to Maria's particular case.[310] Specifically, the statute was ambiguous as to whether the redefinition of aggravated felonies applied retroactively to crimes committed before its passage. To avoid reaching the international law issue, the court held that the statute was not retroactive, thus exempting Maria from its provisions and entitling him to the hardship waiver to which he would have been entitled prior to 1996.

In his more recent decision in *Beharry v. Reno*, Judge Weinstein again narrowly construed the AEDPA aggravated felony provisions, this time in a case where the conviction had occurred after AEDPA and IIRIRA were passed, but the crime had been committed earlier.[311] The petitioner, Don Beharry, was a lawful permanent resident who had moved to the United States from Trinidad at the age of seven; his six-year-old daughter and his sister were U.S. citizens.[312] Beharry was convicted of second-degree robbery for helping a friend to steal $714 from the cash register of the coffee shop where he worked.[313] While he was in prison, the INS initiated deportation proceedings, and the BIA held that he was ineligible for hardship waivers.[314] In overturning this decision, Judge Weinstein relied on many of the same principles of customary and conventional international law that formed the basis for the *Maria* holding. In addition, however, because Beharry had a U.S. citizen daughter, the court found that several provisions of the Convention on the Rights of the Child applied. These included the Preamble's general requirement for the "protection and assistance" of the family, the Article 3 protection of the best interests of the child, and the Article 7 protection of the child's "right to know and be cared for by his or her parents."[315] Although the United States has not ratified the Convention, the court

307. *Id.* at 232-33.
308. *Id.*
309. 68 F. Supp. 2d at 234.
310. *Id.* at 231.
311. 183 F. Supp. 2d 584 (E.D.N.Y. 2002).
312. *Id.* at 586.
313. *Id.*
314. *Id.* at 587.
315. *Id.* at 595.

reasoned that its ratification by every other organized government in the world demonstrated clearly that its prohibitions constitute customary international law.[316]

The difficulty in *Beharry* was that under United States domestic law, all provisions of international law may be statutorily overruled by Congress; where domestic and international law unavoidably conflict, the last-in-time rule normally applies.[317] But the court held that taken together, two competing principles—that Congress may override international law, but courts must construe statutes to avoid conflicts—"create a principle of clear statement."[318] Thus, "in order to overrule customary international law, Congress must enact domestic legislation which both postdates the development of a customary international legal norm and which clearly has the intent of repealing that norm."[319] This principle best ensures that court decisions will promote the compliance of the United States with its international obligations. Because Congress, in passing the immigration bills, did not unequivocally state its intention to override international law, Judge Weinstein construed the legislation to be in conformance with it—that is, to allow hardship hearings in cases where family separation may occur and where the underlying crime was committed prior to the statutory change that defined it as an "aggravated felony." The court described this non-retroactive construction as the "most narrowly targeted way to bring the INA into compliance with international law."[320] It remains to be seen whether the rationale of *Maria* and *Beharry* will be applied to cases where application of the AEDPA would be entirely non-retroactive. Given the international principles discussed in the two cases, there is no apparent reason, other than a desire to craft a narrow holding in these particular cases, that the hearing requirement ought to hinge on retroactivity.

3. Approach of the European Court of Human Rights

The case law of the European Court of Human Rights regarding family separation in immigration proceedings provides an interesting comparison to these American cases. Like Judge Weinstein, the ECHR has emphasized the procedural protections available to persons being excluded or deported. In *Ciliz v. Netherlands*, the Court held that a father's rights to a family life under Article 8 of the European Convention were violated by his immigration-related exclusion from the country during proceedings concerning custody of his son and visitation rights.[321] Pursuant to Dutch policy, Ciliz had lost his right to stay in the country as soon as he got divorced because his visa had been contingent on his marriage to a Dutch resident. The European Commission on Human Rights, in an opinion approved by the Court's decision, acknowledged the state's eco-

316. *Id.* at 600.
317. *See* 183 F. Supp. 2d at 599 (citing The Paquete Habana, 175 U.S. 677, 694 (1900) and RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115(1)(a) (1987)).
318. *Id.* at 598-99.
319. *Id.*
320. *Id.* at 604.
321. Ciliz v. Netherlands, 2000-VII Eur. Ct. H.R. 267.

nomic interests in controlling immigration. It concluded, however, that because Ciliz was excluded from critical proceedings concerning access to his son, "the respondent State had failed to strike a fair balance between the interest of the applicant and his son in continued contact and the general interest of the economic well-being of the country."[322] Therefore, the Court found a violation of Article 8 and ordered the government to pay damages.

However, the European Court noted in *Ciliz*, that "the applicant was not convicted of any criminal offences warranting his removal from the Netherlands."[323] This distinction, though seemingly just an aside in *Ciliz*, is apparently significant. In *Dalia v. France*, the Court approved the removal and permanent exclusion of a woman who had been convicted of heroin trafficking, which it described as a "scourge" with "devastating effects . . . on people's lives."[324] The Court held that this removal did not violate Article 8 notwithstanding the fact that it separated Dalia permanently from her mother, seven siblings, and French citizen son, as well as the country where she had lived for nineteen years. The Court acknowledged that the woman's "family ties" were "essentially in France," yet premised its decision on the extremely dubious ground that Dalia still maintained "certain family relations" and social ties in Algeria, and therefore the removal did not effect a "drastic" interference with her family life.[325] The Court also noted that Dalia had given birth to her child while illegally in France after the initial removal order, which, in the Court's view, estopped her from relying on this relationship in subsequent immigration proceedings.

The core of the Court's rationale, however, appears to have been the basic proposition that

> It is for the Contracting States to maintain public order, in particular by exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens. To that end they have the power to deport aliens convicted of criminal offences. However, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued. . . . The Court's task accordingly consists in ascertaining whether the refusal to lift the order in issue struck a fair balance between the relevant interests, namely the applicant's right to respect for her private and family life, on the one hand, and the prevention of disorder or crime, on the other.[326]

This type of balancing test has in other contexts led the Court to broad interpretations of the Article 8 right to family life.[327] But in the immigration context, any realistic assessment of the magnitude of the interference approved in *Dalia* suggests that from the ECHR's perspective, *any* interference with family life is justified when a cause the Court considers important, like the "scourge" of

322. *Id.* ¶ 55; *see id.* ¶ 71 (agreeing with the Commission's reasoning).
323. *Id.* ¶ 69.
324. *Dalia*, 1998-I Eur. Ct. H.R. 76 ¶ 54 (1998).
325. *Id.* ¶ 53.
326. *Id.* ¶ 52.
327. *See, e.g.*, *infra* notes 369-380 and accompanying text (discussing ECHR review of child welfare decisions).

drugs, is involved. The fact that the Court downplayed the significance of the interference, while not engaging in any analysis of whether this particular woman's exclusion was truly "necessary" to the successful prosecution of France's war on drugs, suggests the malleability of balancing tests; the Court did not really engage in much balancing at all.[328]

4. Conclusions

The district court decisions in *Maria* and *Beharry* provide a paradigmatic example of the effective incorporation of international legal norms against family separation into U.S. immigration decisions. These norms may extend farther than Judge Weinstein took them—that is, beyond the non-retroactive interpretation of immigration statutes and beyond the requirement of a humanitarian hearing to a substantive command against family separation under at least some circumstances. Some nations, such as France, as a general rule bar the deportation of aliens with citizen children;[329] international law could reasonably be interpreted to require such a rule. Stopping short of an absolute bar, international law could specify that the state needs to meet a certain standard of justification, such as a compelling state interest, for deporting aliens and thereby separating them from their families. In any event, however, *Maria* and *Beharry* go much further in the direction of implementing international protections of the family than had any previous decision. Moreover, the hearing requirement seems to strike a reasonable balance between the state's interests in deportations and the alien's interests in family integrity—at least to the extent that the hearings actually give meaningful consideration to the alien's interests. All in all, it is too early to tell whether Judge Weinstein's rationale will ever be followed by other United States courts; at least one has already rejected it based on a belief that Congress overrode international law when it passed the immigration statutes.[330] Still, the decisions are an encouraging sign.

328. The ECHR's protections, if not totally effective, exceed those given to deportees by the Human Rights Committee in its interpretation of the ICCPR. *See* Stewart v. Canada, U.N. Human Rights Comm., 58th Sess., Communcation No. 538/1993, U.N. Doc. CCPR/C/58/D/538/1993 (1996) (upholding deportation of a person who had been convicted of a range of petty offenses even though it meant separation from his whole family); *see also* Geraldine Van Bueren, *Annual Review of Family Law*, *in* THE INTERNATIONAL SURVEY OF FAMILY LAW 1997 8 (Andrew Bainham ed. 1999) (discussing *Stewart* and comparing it to ECHR precedent).

329. As the case of the petitioner in *Dalia* indicates, this rule is apparently not applicable to removals on the basis of criminal convictions. *See supra* notes 324-328 and accompanying text.

330. Taveras-Lopez v. Reno, 127 F. Supp. 2d 598, 607-08 (M.D. Pa. 2000). This decision predated *Beharry*, and thus did not specifically address the clear statement rule argument. Instead, it assumed that Congress had abrogated international law, and held that this abrogation was not barred by *jus cogens* principles. *Id.* at 608; *see also* Gonzales-Polanco v. INS, 2002 U.S. Dist. LEXIS 14303 at *1 (refusing to extend *Beharry* to a case where a non-lawful resident was convicted of a drug crime).

D. *Family Integrity vs. Child Welfare: Protective Removal under International Law*

International norms against family separation have, naturally, significant implications for family law and particularly for the involuntary removal of children from their parents.[331] The protection of children from abuse and neglect is a legitimate and strong state interest that international law recognizes.[332] This interest sometimes requires the separation of families. However, international law places some limits even on protective family separation. These limits are grounded both in the rights of parents and in those of children, whose interests may be ill served by some forms of supposedly protective removals. In this section, we analyze these limits with respect to child welfare law in the United States. We focus on a recent U.S. case that applies international law as a limit on child welfare agencies' removal authority, and compare it with analogous cases in the European Court of Human Rights. We believe this case study is crucial, because the ultimate test of the viability of an international norm against family separation is its ability to adapt to the situations where there is a good argument that the family *should* be separated. Protective removal of children is perhaps the core example of such a situation. Moreover, given that probably the strongest and most specific international norms implicating family matters are those that protect the rights and interests of the child, it will be essential for any norm in favor of family unity to accommodate the strong, treaty-based prerogative afforded to child protection.

1. Evolution of the "Best Interests of the Child" Standard

The prevailing legal standard for protective removal of children from their parents in the United States is the "best interests of the child."[333] This model, which replaced an earlier parental rights focus, has evolved considerably over the years. The "best interests" standard has been applied by courts in a wide variety of contexts; its origins in child custody cases date back to the late nineteenth century.[334] In the child welfare context, "best interests" analysis has long drawn on the pioneering work during the 1960s by child psychologists Joseph Goldstein, Anna Freud, and Albert Solnit.[335] As they conceived it, the model placed heavy emphasis on the maintenance of a stable family environment. Goldstein et al. argued that continuity in a child's surroundings and care was

331. *See generally* Dyer, *supra* note 3.

332. *See supra* Section I.B.2 (discussing the "best interests of the child" principle in international law).

333. *See, e.g.*, LeAnn Larson LaFave, *Origins and Evolution of the "Best Interests of the Child" Standard*, 34 S.D. L. REV. 459 (1989).

334. *See id.* at 467-68 (tracing origins of the standard); *see also* Chapsky v. Wood, 26 Kan. 650 (1881) (awarding custody over a child to the foster parent who raised her at her parents' request, rather than to her biological father, on the basis of the child's interests); Finlay v. Finlay, 240 N.Y. 429 (1925) (holding that the state must act paternalistically to protect the child in child custody disputes, rather than simply adjudicating the competing interests of the parents).

335. *See generally* JOSEPH GOLDSTEIN, ALBERT J. SOLNIT, SONJA GOLDSTEIN, & ANNA FREUD, THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE (1996) (a compilation of J. Goldstein, Solnit, and Freud's earlier writings on the subject).

crucial to his or her psychological and emotional development.[336] Furthermore, they found that healthy parent-child relationships are more likely to develop when parents have considerable autonomy in their caretaking.[337] The implication for governmental regulation of child welfare was a strong presumption against intervention and removal, with removal justified only on the basis of imminent risk of severe harm.[338] Furthermore,

> [t]he degree of intrusion on family integrity at each stage of decision [invocation of state intervention, adjudication, and disposition] should be no greater than that which is necessary to fulfill the function of the decision. . . . [N]o state intrusion ought to be authorized unless probable and sufficient cause has been established with limits prospectively and carefully defined by the legislature.[339]

Over the past several decades, the prominence of the "best interests" standard in child welfare law has varied, as has the prevailing approach to defining those interests. In the 1970s, placement of children in foster care for long periods of time became common as authorities cracked down on abuse and neglect.[340] This system produced the increasingly criticized problem of "foster care drift," as children often spent years in the foster care system without any continuity in care.[341] Congress responded to this problem in 1980 with the passage of the Child Welfare Act, the goal of which was to reduce the time children spent in foster care.[342] The Act emphasized family reunification, imposing for the first time the requirement that social workers make "reasonable efforts" toward reunification of separated families, as well as measures designed to prevent removals initially.[343] Another law passed in 1993, the Family Preservation and Family Support Act, further emphasized the goal of reunification.[344] However, as family preservation policies, both of these laws were fairly unsuccessful.[345] Children continued to languish in foster care,[346] and at the same time, there were a number of highly publicized tragedies in which children were returned to

336. JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 31-34 (2d ed. 1979).

337. JOSEPH GOLDSTEIN ET AL., BEFORE THE BEST INTERESTS OF THE CHILD 9 (1979).

338. *Id.* at 194-95.

339. GOLDSTEIN ET AL., *supra* note 336, at 97.

340. Madelyn Freundlich, *Expediting Termination of Parental Rights: Solving a Problem or Sowing the Seeds of a New Predicament?*, 28 CAP. U. L. REV. 97, 97 (1999).

341. *Id.* at 97-98.

342. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No 96-272 (1980); *see* Freundlich, *supra* note 340, at 98 (describing reasons for passage of the Act); Libby S. Adler, *The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 38 HARV. J. ON LEGIS. 1, 2-3 (2001).

343. *See* Jim Moye & Roberta Rinker, *It's a Hard Knock Life: Does the Adoption and Safe Families Act of 1997 Adequately Address Problems in the Child Welfare System?*, 39 HARV. J. ON LEGIS. 375, 379 (2002); Adler, *supra* note 342, at 5.

344. Family Preservation and Family Support Act, Pub. L. No. 103-66, 107 Stat. 312; *see* Freundlich, *supra* note 340, at 98.

345. *See* Freundlich, *supra* note 340, at 98-99 (stating that foster care populations "increased significantly" during this period); Dorothy E. Roberts, *Poverty, Race, and New Directions in Child Welfare Policy*, 1 WASH. U. J. L. & POL'Y 63, 65 (1999).

346. Stephanie Jill Gendell, *In Search of Permanency: A Reflection on the First 3 Years of the Adoption and Safe Families Act Implementation*, 39 FAM. CT. REV. 25, 25 (2001).

violent homes pursuant to reunification policies and then killed.[347] The outcry surrounding these cases was a major impetus[348] for Congress's passage in 1997 of the Adoption and Safe Families Act (ASFA),[349] which remains the main governing federal child welfare statute.

Often described as a "sea change" in child welfare law,[350] ASFA "shifted the priority of the child welfare system from family reunification to child protection."[351] ASFA's main purpose was to facilitate adoption, which was viewed as a better permanent solution for many children than family reunification.[352] ASFA's centerpiece was a mandate that state authorities accelerate the timetable for the involuntary termination of parental rights, a legal process that permanently severs the parent-child relationship and clears the way for adoption.[353] The provision requires states to initiate involuntary termination proceedings in any case in which a child has been in foster care for fifteen out of the previous twenty-two months.

Although hailed by some as a potential safe solution to foster care drift,[354] ASFA has also been criticized as unduly draconian. Critics have argued that this hasty movement toward permanent separation of families risks emotional damage to children, who may move to more stable adoptive families but lose the lifelong loving relationships they have had with their biological parents.[355] Moreover, the policy has a disparate impact on poor and minority families, an effect exacerbated by the juxtaposition of ASFA with contemporaneous welfare policy reforms that may force poor single mothers to place children in foster care so that they can meet work requirements,[356] as well as with harsh penalties for drug and other crimes that make it impossible for imprisoned single parents to keep their children out of foster care for the requisite number of months.[357] Thus, a mother sentenced to fifteen months or more in prison for drug possession risks losing her child forever, without any showing of her unfitness as a parent.[358] Finally, critics of ASFA argue that past family reunification approaches failed not because of any basic flaw with reunification as a goal, but

347. Roberts, *supra* note 345, at 66.

348. *Id.*

349. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) [hereinafter ASFA]; *see* Rachel Venier, *Parental Rights and the Best Interests of the Child: Implications of the Adoption and Safe Families Act of 1997 on Domestic Violence Victims' Rights*, 8 AM. U. J. GENDER SOC. POL'Y & L. 517, 517-18 (2000) (outlining the Act's provisions).

350. Freundlich, *supra* note 340, at 97.

351. Alison B. Vreeland, Note, *The Criminalization of Child Welfare in New York City: Sparing the Child or Spoiling the Family?*, 27 FORDHAM URB. L.J. 1053, 1069 (2000); *see also* Moye & Rinker, *supra* note 343, at 379-80.

352. *See* Adler, *supra* note 342, at 9 (noting that the CWA and ASFA shared the goal of permanence but employed radically different strategies toward that goal).

353. 42 U.S.C. § 675(5).

354. *E.g.*, Gendell, *supra* note 346.

355. Roberts, *supra* note 345, at 70-71.

356. Gwendolyn Mink, *Violating Women: Rights Abuses in the Welfare Police State*, 577 ANNALS 79, 87 (2001); Moye & Rinker, *supra* note 343, at 387.

357. Mariely Downey, *Losing More than Time: Incarcerated Mothers and the Adoption and Safe Families Act of 1997*, 9 BUFF. WOMEN'S L.J. 41 (2001).

358. *See id.* at 47.

because they were never given the resources they needed to succeed, such that insufficient assistance was given to struggling families while some truly dangerous situations were allowed to slip through the cracks.[359]

Rapid movement toward permanent termination of parental rights poses a particular threat to the principle of family integrity because of the frequently weak grounds on which initial removal decisions are often made. Child removals are often preventive in nature; that is, they are justified on the basis of merely potential harm to the child without any showing of pre-existing abuse or neglect. For example, in many jurisdictions, evidence of past or present parental drug use has justified removal of children independent of any evidence that it has in any way affected the child's wellbeing. In the late 1990s, for instance, the California Child Protective Services agency in Sacramento adopted a "zero tolerance" policy, removing children automatically from any home in which there was any evidence of drug use, whether past or present.[360] Over the course of 18 months, approximately seven thousand children were removed from their families and placed in "protective custody holds." About half of these children were never returned to their parents.[361] No showing of actual abuse or neglect of children was required, and in the vast majority of cases, there was no evidence whatsoever that any abuse or neglect had occurred. Participation in drug treatment did not exempt parents from the removals. Many newborn babies were removed from their mothers at birth.[362] Critics of the policy have argued that the separations not only devastated parents, but also caused major and traumatic disruption to the children's lives and development.[363]

We believe, therefore, that policies such as these pervert the notion of "best interests of the child." Moreover, these policies also give little or no weight to parental rights, and may therefore be inconsistent with Supreme Court rulings establishing a fundamental constitutional right to raise one's children. For example, in *Moore v. City of East Cleveland*, the Supreme Court held the substantive due process protection of the "right to live together as a family" to extend to grandparents, citing a long line of cases demonstrating that the "constitutional right of parents to assume a primary role in decisions concerning the raising of their children" is an "enduring American tradition" that is "basic to the structure of our society."[364] In *Lyng v. Castillo*, the Court clarified the standard for finding a violation of this fundamental right: strict scrutiny would apply to policies that "directly and substantially interfere with family living arrangements."[365]

359. Roberts, *supra* note 345, at 67-68.

360. John McCarthy, *The CPS Drug Use Dilemma*, SACRAMENTO MED., Nov. 1998, at 11, *available at* http://www.lindesmith.org/library/mccarthy2.cfm (last visited Oct. 22, 2002).

361. *Id.*

362. *Id.*

363. *Id.*

364. 431 U.S. 494, 500, 503 n.12 (1977) (plurality opinion).

365. 477 U.S. 635, 638 (1986).

2. Balancing Parents' and Children's Interests

The characterization of the right to live with family members as a fundamental right aptly captures the tremendous significance of family ties in peoples' lives. Child removals are frequently traumatic for all concerned. Even when judicial or administrative application of the best interests test results in the eventual return of children to their parents, temporary removal in the interim may cause lasting harm to the children and to the stability of the family relationship, especially if frequent visitation is not allowed during the removal period. As the European Court of Human Rights has noted in a child removal case, the "ties between members of a family and the prospects of their successful reunification will perforce be weakened if impediments are placed in the way of their having easy and regular access to each other."[366] The problem, then, is not the state's right to remove children per se but the too-hasty resort to removal any time a child's well-being is at all in doubt—a practice that, indeed, is the official policy of many child protective services agencies.

The obvious difficulty is that protective services must retain some flexibility in their decisions to remove children or they will lose their ability to intervene in truly dangerous situations. The challenge, then, is to strike a balance between the state's (and children's) interest in prevention of abuse and neglect and the interests of parents and children in staying together. International law, which recognizes each of these interests, may provide guidance or, indeed, impose obligations regarding the proper balance.

The international obligation of states to refrain from arbitrary or unjustified interference with the unity and privacy of families does not, of course, prohibit states from *ever* separating families. Rather, it simply demands an internationally cognizable justification that overrides the interests supporting family unity. International law not only recognizes the protection of children's welfare as a legitimate state interest; it affirmatively obligates states to protect children. Indeed, the protection of children's best interests is the primary stated objective of the Convention on the Rights of the Child.[367] The use of "best interests" language in treaties, however, does not by any means imply that the requirements of international law are exactly coextensive with the best interests standard as currently interpreted and applied in the United States. The terminology is fairly open-ended, as demonstrated by the variation in interpretation of the test in the past several decades in the United States. Indeed, as discussed in Section I, the best interests standard has been widely criticized internationally for being too open-ended. Similar criticisms have been voiced in the United States by those

366. Olsson v. Sweden, App. No. 10465/83, 11 Eur. H.R. Rep. 259, ¶ 81 (1987). In another case, the ECHR found that "there is a significant danger that a prolonged interruption of contact between parent and child or too great a gap between visits will undermine any real possibility of their being helped to surmount the difficulties that have arisen within the family and of the members of the family being united." Scozzari v. Italy, App. No. 39221/98, 35 Eur. H.R. Rep. 243, ¶ 177 (2002).

367. *See* discussion *supra* Part I.

who consider the ill-defined standard to be a poor guide to policy and, worse, subject to manipulation.[368]

Moreover, the combination of different international law principles discussed here suggest that parental and other interests in family integrity deserve at least some weight in the balance alongside children's interests. Experiences with application of the best interests test internationally—notably in the Aboriginal child removal policies discussed in Section II.A—demonstrate the dangers of officials exercising unfettered discretion to act on their ideas of the child's best interests. The test is simply too subjective. Rather, international law should require that the test be applied against a background presumption against family separation that may only be overcome by evidence of danger to the child's welfare.

3. *European Court of Human Rights Decisions*

International courts have been reluctant to interfere with the decisions of states with respect to protective removal of children. Nonetheless, some limits have been imposed. The jurisprudence of the European Court of Human Rights provides some interesting contrasts. In *Olsson v. Sweden*, for example, the ECHR held that despite the legitimacy of the goals of Sweden's child welfare policy,

> it is an interference of a very serious order to split up a family. Such a step must be supported by sufficiently sound and weighty considerations in the interests of the child; as the [European] Commission rightly observed, it is not enough that the child would be better off if placed in care.[369]

The balancing test suggested by the Court in this passage was grounded in the requirement of Article 8 of the European Convention that all interferences with family life be "necessary in a democratic society" to fulfill one of a list of enumerated objectives.[370] The Court explained that the concept of "necessity" required both that there be a "pressing social need" and that the solution chosen be "proportionate to the legitimate aim pursued."[371] In *Olsson,* the Court held that the protective removal of three children from parents who were believed to be neglecting them was not in and of itself a violation of Article 8. It held that protective removals might be appropriate and necessary even in some cases where no harm had yet been documented, noting that discretion had to be given to authorities since "it would scarcely be possible to formulate a law to cover every eventuality."[372] The Court also placed emphasis on the procedural protections available to the parents, noting that judicial review safeguards against the "arbitrary" use of the power of preventive removal.[373]

368. *See, e.g.*, LaFave, *supra* note 334, at 486, 497 (describing the best interests test as "value-laden," "poorly defined," and a "vague platitude"); Bartlett, *supra* note 120, at 303.

369. *Olsson,* 11 Eur. H.R. Rep. 259 ¶ 72.

370. European Convention, *supra* note 25, art. 8.

371. *Olsson,* 11 Eur. H.R. Rep. 259 ¶ 67.

372. *Id.* ¶ 62.

373. *Id. See also* W. v. United Kingdom, App. No. 9749/82, 10 Eur. H. R. Rep. 29, ¶ 64 (1988) (holding that Article 8's procedural requirements included the involvement of parents in the deci-

However, the ECHR in *Olsson* held that the state's actions *subsequent* to the removal violated Article 8—placing the three children in separate foster homes at considerable distance from one another and their parents, allowing extremely limited visitation, and failing to return the children to their parents within a reasonable length of time. The Court held that Article 8 required removal to be treated "as a temporary measure, to be discontinued as soon as circumstances permitted, and any measures of implementation should have been consistent with the ultimate aim of reuniting the Olsson family."[374] Moreover, ease of administration simply could not justify keeping families separate longer or more completely than is necessary; "in so fundamental an area as respect for family life, such considerations cannot be allowed to play more than a secondary role."[375]

Other ECHR cases have reached similar results. For example, in at least three fairly recent cases, the Court has again shown deference to a state's decision to remove children from their families, but still found violations of Article 8 due to lack of visitation opportunities and an inadequate commitment to eventual family reunification.[376] In *Johansen v. Norway*, the Court reaffirmed the principle that reunification must be the ultimate goal of removal policies;[377] in *Scozzari and Giunta v. Italy*, it held that "a measure as radical as the total severance of contact can be justified only in exceptional circumstances."[378] Although acknowledging the importance of the "best interests of the child," the Court in both cases made it clear that parents' rights count too; the child's interests may outweigh the parents' "depending on their nature and seriousness," and in particular when the child's "health and development" is at serious risk of harm.[379] Moreover, in *Johansen* the Court explained the reasoning behind the different degrees of deference given to state authorities in initial removal decisions, on the one hand, and in their subsequent conduct as well as procedural protections, on the other. It found that

> perceptions as to the appropriateness of intervention by public authorities in the care of children vary from one Contracting State to another, depending on such factors as traditions relating to the role of the family and to State intervention in family affairs and the availability of resources for public measures . . . . [Also,] national authorities have the benefit of direct contact with all the persons concerned. . . . It follows from these considerations that the Court's task is not to substitute itself for the domestic authorities . . . but rather to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation.

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sion-making process "to a degree sufficient to provide them with the requisite protection of their interests").

374. *Olsson*, 11 Eur. H.R. Rep. ¶ 81.

375. *Id.* ¶ 82.

376. Johansen v. Norway, App. No. 17383/90, 23 Eur. H.R. Rep. 33 (1996); Scozzari v. Italy, App. No. 39221/98, 35 Eur. H.R. Rep. 243, ¶ 177 (2002); E.P. v. Italy, App. No. 31127/96, 31 Eur. H.R. Rep. 463 (1999).

377. *Johansen*, 23 Eur. H.R. Rep. 33 ¶ 78.

378. *Scozzari*, 35 Eur. H.R. Rep. 243 ¶ 170.

379. *Id.* ¶ 169 (citing *Johansen*, 23 Eur. H.R. Rep. 33 ¶ 78).

The margin of appreciation so to be accorded to the competent national authorities will vary in the light of the nature of the issues and the seriousness of the interests at stake. . . . Thus, the Court recognizes that the authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into care. However, a stricter scrutiny is called for both of any further limitations, such as restrictions placed by those authorities on parental rights and access, and of any legal safeguards. . . . Such further limitations entail the danger that the family relations between the parents and a young child are effectively curtailed.[380]

Thus, the differing standards applied by the ECHR are intended to strike a balance between, on the one hand, deference to states' discretion in areas involving sensitive cultural issues and to their ability to tailor decisions to a particular situation, and, on the other, the strong rights of parents and children in eventual successful reunification as protected by Article 8. The balancing tests in these cases are probably not ideal; the American child removal situations discussed above and below demonstrate that significant abuses can happen at the initial removal stage as well. But there is something important to be said for deference to state authorities when it comes to decisions that, for children, may sometimes make a life-or-death difference. One possibility to keep in mind is that international courts, given their temporal, physical, and cultural distance from the actual situations, may be well advised to be more deferential in these situations than would be national courts reviewing similar decisions. Yet national courts can, and should, take into account their international obligations as well, and should do so with heightened vigilance.

4. *Incorporating International Law into U.S. Child Welfare Decisions:* Nicholson v. Williams

In the United States, when an international law obligation conflicts with domestic federal law, United States judges are required to interpret the domestic law in a way that avoids the conflict if possible; if not, the two have equal status and the last-in-time rule applies.[381] State and local law, however—which comprises the great majority of American family law—is trumped by international law, whether treaty-based or customary.[382] Following this rule, judges must interpret state and local child welfare laws in a way that conforms to the international legal norms set forth above, and if they conflict unavoidably, the domestic laws cannot be applied. This clear constitutional principle (grounded in the Supremacy Clause) notwithstanding, federal and state judges rarely cite interna-

380. *Johansen,* 23 Eur. H.R. Rep. 33 ¶ 64.

381. *See supra* note 317.

382. *See* Erik G. Luna & Douglas J. Sylvester, *Beyond Breard,* 17 BERKELEY J. INT'L L. 147, 153 (1999) (stating that treaty provisions trump state law); Leslie Wells, *A Wolf in Sheep's Clothing: Why Unocal Should Be Liable Under U.S. Law for Human Rights Abuses in Burma,* 32 COLUM. J.L. & SOC. PROBS. 35, 57 (1998) (stating that customary international law trumps state law).

tional law at all in family law cases.[383] A recent decision of the Eastern District of New York, again by Judge Weinstein,[384] provides a notable exception. *Nicholson v. Williams* was a class action lawsuit by a group of mothers against the New York City Administration for Child Services (ACS).[385] The lawsuit challenged ACS's policy of automatically removing children from homes where domestic violence had occurred even if it meant removing them from the *victims* rather than the perpetrators of that violence. Pursuant to this policy, an incident of domestic violence (that is, committed by a man against a mother, not against her child) would result in ACS citing both parties for "engaging in domestic violence," with no distinction between abuser and victim.[386] Sometimes, in fact, ACS would cite only the victim and not list the abuser at all.[387] Then the child would be preemptively taken away from the mother and placed in foster care. All this would occur absent any showing that either parent, much less the mother, had committed abuse or neglect of the child. However extraordinary this policy may sound, New York was not alone in adopting it; indeed, the widespread problem of termination of domestic violence victims' parental rights has been "well-documented."[388]

The children of the named plaintiffs in *Nicholson* were kept in foster care for several weeks. The court cited the emotional and developmental damage done to the children, the destruction of their family relationships, and the disruption to their schoolwork and daily lives inflicted even by these relatively short-term placements in foster care. The *Nicholson* court held that the ACS policy resulted in "the forcible and unjustified separation of abused mothers and their children."[389] Specifically, the court relied on both constitutional and international protections of the right to family integrity, with respect to both parents' and children's rights. The court cited specific international provisions including the Universal Declaration of Human Rights, the ICCPR, and the Convention on the Rights of the Child.[390] As to the last, the court, citing *Beharry v. Reno*, stated that its protections had the force of customary international law. The court thus held that the ACS policy violated the basic human rights of family integrity and freedom from arbitrary interference with family life, as well as the specific right of a child to be cared for by her parents. Unlike in the immigration cases discussed in the previous Section, however, in *Nicholson* the court did not rely heavily on international law arguments, which were not really used as independent grounds for the decision. Rather, the court's citations to interna-

383. *Cf.* Peter J. Spiro, *The States and International Human Rights*, 66 FORDHAM L. REV. 567, 568 (1997) (noting that "the federal government has refused to press the states into conforming" with international norms in traditionally state-dominated areas including family law).

384. *See supra* notes 298-319 and accompanying text (discussing Judge Weinstein's decisions in recent immigration cases).

385. 203 F. Supp. 2d 153 (E.D.N.Y. 2002).

386. *Id.* at 192-93.

387. This, amazingly, occurred in 46.2 percent of cases where ACS cited parents for engaging in domestic violence. *See id.* at 209.

388. Venier, *supra* note 349, at 528.

389. *Nicholson*, 203 F. Supp. 2d. at 168.

390. *Id.* at 234.

tional law provided support for the claim that family integrity and privacy are fundamental rights, interference with which merits heightened scrutiny under the Constitution.

5. *Application of International Norms Governing Family Separation to the Protective Removal of Children*

Protective removal of children provides a difficult case for the formation and application of international norms governing family separation. Unlike the Aboriginal child removal policy discussed in Section II.A, the various international obligations at stake in this context compete with one another; they pull the state in opposite directions. Balancing the interests of parents and children in family integrity against the state's strong interest in protecting children from abuse can often be difficult, whether one employs principles of international or domestic law or both. But there are cases in which child protection agencies have clearly crossed the line, wherever the line may be drawn. The New York policy at issue in *Nicholson*, and the Sacramento policy discussed above, are two such cases. Not only do these policies conflict with United States constitutional protections of family integrity; they also violate U.S. obligations at international law.[391] The *Nicholson* case shows that one effective enforcement mechanism for those obligations is to incorporate them in the rulings of courts reviewing decisions to remove children.

But how, then, to strike the balance in more marginal cases? This is an area in which we hope international norms will evolve to incorporate the shared wisdom of a variety of national experiences. For now, we suggest a few basic principles. First, there should be a presumption against child removal that can be overcome only by a showing of parental wrongdoing or some other actual danger to the child's safety. That is, the state should not remove children simply because it believes that to do so would be marginally better for the child. Not only are such judgment calls unreliable predictors of the child's actual best interests, but they also give too little weight to the fundamental human right of parents to raise their children. Instead, children should generally not be removed absent a showing of actual (not merely potential) abuse or neglect. As a corollary, children should only be removed for purely preventive purposes (that is, absent a showing of past harm) if there is a strong reason to believe they are in imminent and serious danger, and then there should be a hearing as soon as possible to determine whether this belief is supported. In general, all removal decisions should be subject to very prompt administrative and judicial review. Finally, child welfare agencies should never rely on facile assumptions that certain groups of people are inadequate parents, absent actual showings of harm to children in specific cases. Blanket policies like those that remove children automatically from domestic violence victims, former drug users, and so forth violate the family's right to individualized decision-making, and set the stage for

391. The actions of state and local governments are imputed to the United States under international law. *See* Marian Nash Leich, *U.S. Practice*, 77 AM. J. INT'L. L. 135, 135 (1983).

"indiscriminate intervention on the basis of current moral panics."[392] The stakes for families are too high to let stereotypes take the place of reasoned judgments.

E. Mass Family Separation in Crisis Situations

In each of the case studies discussed above, family separation was implemented pursuant to specific state policies adopted through a legislative or legal process. But state-enforced separation of families frequently occurs without such processes and without an official state policy. Families are often forcibly separated en masse as a result of wars or refugee crises. In this Section, we analyze the implications of international law for mass family separation in crises, both when it results from a deliberate state policy that itself constitutes a major human rights violation (as in mass expulsion campaigns) and when it is an inadvertent consequence of other types of disaster situations. We argue that international law places both negative and positive obligations on states in crises: they must refrain from forcibly separating families and work toward the reunification of those that have been separated.

Unlike each of the case studies discussed above, family separation is not necessarily the central element of the wrong that occurs in crisis situations.[393] In cases such as mass expulsions or unjust warfare, for example, recognition of a norm against involuntary family separation is not *necessary* in order to condemn the abuses or find a violation of international law. However, analysis of family separation in many such situations may be useful for at least three reasons. First, although it may seem "secondary" in terms of international law, family separation is a central element of the harm many victims of major human rights abuses experience. People simply care a great deal about their families, and often suffer more from losing them than they do even from serious individual harms they suffer personally. Recognition of the impact of family separation can thus help us to come to a fuller understanding of victims' experience. Second, recognition that family separation constitutes an important element of a particular human rights abuse may affect the choice of remedy for that abuse at international law. That is, family reunification should be a central element of any remedy ordered by a court or other international body, or of international humanitarian relief efforts. Current requirements for, and efforts toward, family reunification will be discussed further below. Third, family separation deserves attention because it can increase the likelihood of other human rights abuses

392. VAN BUEREN, *supra* note 17, at 87 (arguing that such indiscriminate interventions violate the principles of the CRC).

393. In the Stolen Generations, polygamy, and child welfare examples, the direct, immediate intent of the contested policy was to separate families. The motives or ultimate goals of the policies, of course, differed, ranging from benevolent (child welfare) to malign (cultural destruction); but in each of the three cases, the state deliberately employed a policy of family separation as a strategy to accomplish those goals. In the American immigration law case, although family separation was only a side effect of the state's deportation policy, it was nonetheless the central violation of international law; the unjustified or arbitrary separation of families made illegal deportations that ordinarily would have been permitted by international law.

occurring and compounding the initial crisis situation. This is particularly so in the case of children being separated from their parents, as the discussion of unaccompanied refugee children below will reveal.[394]

1. Mass Expulsion

One major cause of widespread separation of families is mass expulsion. Mass expulsion is widely recognized as a major violation of human rights, contravening numerous prohibitions of international law. For example, provisions in the American Convention on Human Rights and in the African Charter ban mass expulsion specifically.[395] As the African Commission on Human and Peoples' Rights has noted, "the drafters of the Charter believed that mass expulsion presented a special threat to human rights."[396] In addition to these specific prohibitions, mass expulsion violates treaty provisions that provide for procedural protections for deportees.[397] The International Law Association adopted a Declaration of Principle of International Law on Mass Expulsion in 1986, which suggested that mass expulsion of nationals might be considered an international crime and certainly a violation of international law.[398] The International Criminal Tribunal for the Former Yugoslavia has issued a number of indictments charging leaders for their roles in the expulsion of thousands of Kosovo Albanians and similar expulsions in Croatia and Bosnia and Herzegovina between 1991 and 1995.[399] The Rome Statute of the International Criminal Court includes "deportation or forcible transfer of population" as a crime against humanity.[400] Despite this international recognition, expulsions remain a serious problem. For example, shortly after the outbreak of hostilities between Ethiopia and Eritrea in 1998, Ethiopia began a campaign to deport persons of Eritrean national origin, many of them Ethiopian citizens. Over the next two to three years, tens of thousands of people were expelled.[401] Deportations occurred

394. *See* VAN BUEREN, *supra* note 17, at 80 (noting that, "when the family is unable to exercise its primary role in bringing up children, children become more vulnerable to violations of other fundamental rights").

395. American Convention, *supra* note 25, art. 22(9); African Charter, *supra* note 25, art. 12.

396. *See Rencontre Africaine pour la Defense des Droits de l'Homme v. Zambia*, African Comm. Hum. & Peoples' Rights, 20th Sess., Comm. No. 71/92, ¶ 40 (1997) (condemning the expulsion of 517 West Africans from Zambia); *see also Union Inter Africaine v. Angola,* African Comm. Hum. & Peoples' Rights (ACHPR), 22nd Sess., Comm. No. 159/96, ¶ 15 (1997).

397. *E.g.*, ICCPR, *supra* note 21, art. 13; American Convention, *supra* note 25, art. 22; African Charter, *supra* note 25, art. 12.

398. JEAN-MARIE HENCKAERTS, MASS EXPULSION IN MODERN INTERNATIONAL LAW AND PRACTICE 81 (1995).

399. *See, e.g.,* Prosecutor of the Tribunal v. Slobodan Milosevic, Indictment, Case IT-99-37, (May 24, 1999) ¶ 35, *available at* http://www.un.org/icty/indictment/english/mil-ii990524e.htm (last visited Oct. 22, 2002).

400. Rome Statute of the International Criminal Court, U.N. Doc. A/Conf. 183/9 (1998) art. 7 §1(d).

401. *See* Human Rights Watch World Report 2001: Ethiopia, *available at* http://www.hrw.org/wr2k1/africa/ethiopia.html (last visited Nov. 6, 2002) (stating that Ethiopia had expelled 70,000 people by early 2000). The authors have been, and Prof. Brilmayer remains, actively involved in advocacy on behalf of deportees from Ethiopia, including preparing claims against Ethiopia for an international war crimes compensation commission.

without judicial hearings; frequently people were rounded up at their homes at gunpoint during the night, thrown in jails or detention camps, and then herded onto buses for the border.[402]

Family separation is an inevitable consequence of mass expulsion campaigns. For example, in *Union Inter Africaine v. Angola,* the African Commission found that Angola had violated Article 18 of the African Charter by separating families during a mass expulsion.[403] In Ethiopia, separation of families was ubiquitous and well documented,[404] sometimes because families were of mixed national origin and those deemed "Ethiopian" were not permitted to join their deported family members.[405] Additionally, more than one thousand people were detained for months or years at detention camps and thus separated from their families.[406] Beyond the physical, financial, and emotional consequences of forced expulsion, the separation of families caused heightened trauma for the deportees and those left behind.[407] Today, although the war is over, the border remains closed and ordinary lines of communications cut off; there is no foreseeable prospect of deportees being allowed to return. Thus, although some families have been reunited in Eritrea due to succeeding waves of deportations, for some the separation has been total and is potentially permanent.

2. *Internal Displacement*

Internal displacement of populations, particularly in combination with restrictions on freedom of movement within a country, may also violate international norms against family separation. For example, the European Court of Human Rights found that Turkey violated Article 8's protections of family life, and many other provisions of the European Convention, by enacting a systemic policy designed to displace Greek Cypriots from northern Cyprus.[408] This policy included a number of restrictions on freedom of movement between north and south that "resulted in the enforced separation of families and the denial to the Greek Cypriot population in the north of the possibility of leading a normal family life."[409] The Court also cited the cutoff of normal lines of communication as well as surveillance members that made contacts between family members, when they did occur, restricted by a surrounding "hostile environment."[410]

402. *See* Ethiopia Country Report on Human Rights Practices for 1998, DEP'T ST,. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR Feb. 26, 1999, *available at* http://www.state.gov/ www/global/human_rights/1998_hrp_report/ethiopia.html (last visited Oct. 22, 2002).

403. *See Union Inter Africaine,* ACHPR, Comm. No. 159/96, ¶ 15.

404. *See* United Nations Consolidated Inter-Agency Flash Appeal for Humanitarian Assistance to Eritrea 46, Sept. 1998.

405. *See* AMNESTY INTERNATIONAL, ETHIOPIA AND ERITREA: HUMAN RIGHTS ISSUES IN A YEAR OF ARMED CONFLICT, AFR 04/03/99, 27, (1999).

406. *Id.* at 22, 28.

407. *Id.*

408. Cyprus v. Turkey, App. No. 25781/94, 35 Eur. H.R. Rep. 731 (2001).

409. *Id.* ¶ 293.

410. *Id.* ¶¶ 296, 300.

The situation of the Greek Cypriots parallels that of families separated by many instances of internal displacement worldwide. As UNHCR has explained,

> During the past decade, there has been a dramatic increase in the number of people who are internally displaced or directly affected by warfare but who do not cross international borders and do not benefit from the provisions of refugee law. Many of these people are children who have become separated from their families or whose parents lost their lives in the conflict.[411]

As this passage points out, an additional problem for the victims of such separations is that internally displaced persons may have fewer rights under current international law than do refugees. The development of a cohesive international norm against involuntary family separation—one that governs states' conduct generally, not just in situations to which refugee law applies—might thus offer internally displaced persons a measure of protection that they are currently denied.

3. Warfare

Family separation is also a frequent consequence of warfare, whether it results from family members being killed or from internal displacements or refugee migrations. Following wars, families may have a right, protected by the Geneva Conventions, to information about the fate of missing family members and, if possible, to reunification.[412] Refugee crises in general almost invariably separate families, and pose a particular threat to children, who are frequently left entirely alone.[413] Minors compose just over half of the refugee population receiving assistance from the United Nations High Commissioner for Refugees (UNHCR).[414] In 1999, Human Rights Watch documented the situation of many thousands of Sierra Leonean children living in refugee camps in Guinea.[415] Being left alone subjects refugee children to serious danger, including starvation, physical and sexual abuse, and labor exploitation.[416] A UNHCR report details some of these risks:

> Boys and girls on their own are easy targets for recruitment into armed groups, as combatants, porters, spies or servants, and they are at high risk of exploitation and physical or sexual abuse, and even death. Involuntary separation thus increases the risks faced by the displaced, refugee, and other war-affected children; it can be more traumatic than the displacement itself.[417]

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411. *Report of the United Nations High Comm'r for Refugees: Assistance to unaccompanied refugee minors*, U.N. GAOR, 53rd Sess. Agenda Item 108, ¶ 5, U.N. Doc. A/53/325 (1998), *available at* http://www.un.org/documents/ga/docs/53/plenary/a53-325.htm (last visited Oct. 22, 2002) [hereinafter UNHCR Report].

412. *See* Vaughn A. Ary, *Concluding Hostilities: Humanitarian Provisions in Cease-Fire Agreements*, 148 MIL. L. REV. 186, 207-10 (1995).

413. *See* Megan E. Kures, Note, *The Effect of Armed Conflict on Children: The Plight of Unaccompanied Refugee Minors*, 25 SUFFOLK TRANSNAT'L L. REV. 141, 141-44 (2001).

414. *Id.* at 144.

415. *See* HUMAN RIGHTS WATCH, FORGOTTEN CHILDREN OF WAR: SIERRA LEONEAN REFUGEE CHILDREN IN GUINEA (1999), *available at* http://www.hrw.org/reports/1999/guinea /guine997.htm (last visited Oct. 22, 2002).

416. *Id.; see also* Kures, *supra* note 413, at 145 (describing "extreme violence" including "mass rape," as well as other dangers to children's survival and wellbeing).

417. UNHCR Report, *supra* note 411, at ¶ 6.

Indeed, family separation is emotionally traumatic for refugees of all ages. According to Professors Hathaway and Neve, "[o]ne of the strongest emotional needs of refugees is to be reunited with close family members."[418]

4. *International Legal Obligations in Crisis Situations: Reunification and Prevention of Separation of Families*

Not all forms of warfare, and not all causes of refugee crises, constitute violations of international law in and of themselves. But all may raise an international obligation for states to attempt to minimize family separation, and to reunify families who have unavoidably been separated. One problem for the enforcement of existing international norms against family separation during times of international or internal crisis is that the relevant international provisions have generally been considered derogable in emergency situations.[419] However, at least where no derogation has taken place, countries may already have an affirmative obligation under international law to prevent and redress the separation of families in crisis circumstances, particularly when such separations affect children.

For example, as discussed in Section I, both the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child set forth detailed provisions regarding reunification measures that must be taken in refugee or conflict situations.[420] In addition, a number of U.N. soft law instruments specifically address the plight of refugee minors. For example, the Special Representative of the Secretary General on internally displaced persons has set forth a list of principles that "reaffirm the right of families to remain together and to be speedily reunited if separated."[421] The UNHCR Guidelines contain a number of directives mandating efforts to preserve and restore family unity during refugee crises.[422] Moreover, the Geneva Convention on the Protection of Civilian Persons in Time of War mandates that in any war, "the parties to the conflict shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources."[423] Although not prohibiting family separation per se, this provision obligates states to address the consequences of it. In addition, the Convention on the Rights of the Child specifically mandates that all member states cooperate in U.N. efforts to reunify families by tracing the family

418. James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115, 163 (1997); *id.* at 173 (stating that family separation causes "extreme anxiety and fear," and "often interferes with efforts to become self-sufficient in the asylum country").

419. *See* VAN BUEREN, *supra* note 17, at 86 (arguing that this allowance of derogation weakens the "protection of the rights of the child at the time when they are most needed").

420. *See supra* notes 63-72 and accompanying text.

421. *See* UNHCR Report, *supra* note 411, at ¶ 11.

422. *See Evaluation of UNHCR's Efforts on Behalf of Children and Adolescents*, U. N. High Comm'r for Refugees, U.N. Doc. EVAL/06/97 (1997).

423. Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 24, 6 U.S.T. 3516, 213 U.N.T.S. 379.

members of child refugees.[424] To date, the U.N. reunification program has been greatly underutilized.[425] Yet reunification efforts can be successful when sufficient resources are devoted to them; for example, in 1997 and 1998, UNHCR, UNICEF, the Red Cross and other agencies reunited three-quarters of unaccompanied Rwandan refugee children in the Congo with their families.[426]

This case study thus suggests the need for greater international attention to the impact of wars and major human rights crises on family unity. In terms of their illegality under international law, and in terms of the resolution of competing values and interests, at least most of the cases discussed in this section are the paradigmatic "easy cases," much like the Stolen Generations case. That is, there are a number of strong internationally recognized values at stake, all of them pulling in the same direction: toward condemnation of these situations as major violations of international law. Yet when the ramifications for families are taken into account, it becomes evident, if it was not already, that condemnations are not enough; shattered families and children alone in refugee camps will not be significantly mollified by pronouncements that their treatment was, indeed, illegal. Rather, the international community needs to look for solutions. A paramount concern in responses to crises like these should be the reunification of families. International law already contains provisions imposing affirmative obligations on states in this regard; more efforts and resources should be put to making sure these on-paper commitments are fulfilled in reality.

III.
CONCLUSIONS

The diversity and complexity of the various issues discussed in Section II suggest that the problem of involuntary family separation does not admit of easy generalization. To an international lawyer, this may be a discouraging conclusion, for the successful functioning of international law depends on the ability to generalize—that is, to fashion general rules and principles that can work when applied to specific situations and cultural contexts. Conflicts of values and interests are inevitable in any area of law; without conflicts, one might say, law would not be necessary. But conflicts involving the family are especially difficult to resolve. Passions on the issues run deep, both because of people's strong feelings for their own families and because many people place great weight on the cultural values bound up in this central social institution. Moreover, there is a remarkably low degree of consensus, both between and within cultures, on basic assumptions such as what constitutes a "family." It is tempting, perhaps, to conclude that an area this sensitive and contested does not belong in the domain of international law at all.

This, of course, is not our conclusion. International law, especially international human rights law, often deals with complicated, difficult-to-resolve is-

424. CRC, *supra* note 12, art.22.
425. Kures, *supra* note 413, at 158.
426. UNHCR Report, *supra* note 411, at ¶ 15.

sues, and by its nature must accommodate cultural conflict. Perhaps one of the reasons the idea of "international family law" seems so problematic is that at least in the West, attitudes are only beginning to change as to whether and to what extent family relations are a proper object of *national* law, or even of law at all. The wall surrounding the proverbial man's castle is only beginning to crumble, and its doctrinal foundations are still for the most part in place. But these doctrines, no less than the meaning of "family," are cultural artifacts that are subject to transformation. Today, international law increasingly regulates matters involving the family, as reflected in a wide range of treaty provisions; there is no turning back. With respect to family separation, the task ahead is to make sense of and improve upon current international law requirements. We must construct from today's piecemeal approach a coherent set of substantive principles and effective procedures that can help to balance the various competing values and find solutions to the serious human rights concerns confronting us. We hope the near future will bring a concerted international effort in that direction. For now, we offer some tentative conclusions drawn from our case studies:

1. Involuntary family separation is a widespread and serious human rights concern.

We hope that if nothing else, this article will help to bring into focus a major problem that affects, we suspect, every country in the world. The forced separation of families occurs in a variety of contexts—from wars and refugee crises to immigration and family courts—but in every case, very serious interests are at stake. The breakup of families is typically devastating to the people involved and, as the Stolen Generations case makes clear, can have serious ramifications for societies and cultural groups. Although we know the number is large, we have no idea how many families are involuntarily broken up worldwide every year, and this is part of the problem; the international community is not paying enough attention. Family separation deserves to be treated as a major human rights issue. It should, accordingly, be incorporated into United Nations human rights reporting requirements for member states and into the U.N.'s own fact-finding assessments and those of non-governmental organizations assessing the human rights situations in particular countries. Protection against involuntary family separation should be part of the agenda of international and national bodies dealing with refugee crises, conflicts, immigration, child protection, gender, racial, and cultural discrimination, and other major human rights concerns.

2. Many instances of family separation occurring today violate already-existing international legal requirements and prohibitions.

Although we have described the current state of international law on the subject of family separation as fragmentary, we do not mean to suggest that it is insignificant. Rather, we simply mean that there is no cohesive and internally consistent set of principles addressing the subject of family separation per se. Instead, a variety of international provisions implicate different aspects of the

problem, while some aspects are not covered at all. Nevertheless, these existing provisions do impose substantial limits on state behavior, as well as some affirmative state obligations. Furthermore, some of these requirements may enjoy a sufficient level of consensus that they rise to the level of customary international law.

In some of the cases we have discussed, we think there is little serious controversy regarding the existence of international law violations—the Australian child removal policy, for example, or the crisis situations discussed in Section II.E. In other cases, we have deliberately selected situations that fall rather close to the line in terms of what international law permits, although we think that each involves some state behavior that crosses that line (or at least the one that we would draw). We have noted that the "hard cases" are characterized by conflicts between values and interests that international law properly recognizes—for example, between the rights of parents and the safety of children, or between the family relationships and economic security of immigrant women and the right to gender equality for those same women. However, we think existing international law can help to resolve the conflicts even in these cases. For example, the recent decisions on family and immigration law by U.S. District Judge Weinstein demonstrate an admirable effort to bring existing international legal principles to bear on a domestic legal system that is ordinarily quite resistant to international influences.

3. *International and domestic courts, and other institutions and individuals who help to shape and apply international law, should recognize an international norm against the involuntary separation of families, and should develop specific sets of rules dealing with family separation in particular contexts.*

The significance of this human rights concern is such that today's piecemeal approach, however helpful, is not enough. We believe that from these beginnings we can see the outlines of a customary international norm against family separation taking shape, and we hope that international and domestic courts and other international law institutions will recognize such a norm in the future. In addition, we think new treaties, protocols, and soft law instruments should address family separation in particular contexts in more specific ways—for example, delineating the procedural and/or substantive rights of immigrants whose families are divided by national borders. Ultimately, we think it is important that involuntary family separation be recognized as a violation of international law in and of itself, not merely a corollary of other human rights concerns such as privacy or protection of children.

4. *This norm should not, however, be considered an absolute rule, but should be subject to limitations grounded in the need to protect other internationally recognized human rights.*

As we have said repeatedly, the individual, cultural, and social interests underlying the value of family unity conflict in many circumstances with other

values and interests that are properly cognizable at international law. Although experience teaches that balancing tests are often so malleable that they can support any desired result, the fact is that when legitimate and important interests conflict there is no alternative but balancing, whether a concretized "test" is employed or not. At a minimum, we think there should be a clear presumption that involuntary family separation violates international law. To put this another way, the existence of involuntary family separation should be considered sufficient to overcome the ordinary baseline presumption of international law—that the actions of sovereign states are presumptively legitimate. Thus, states should have to justify separating families.

The adequacy of a state's justification will, of course, depend on the specific situation. But as a general rule, we think the interests of individuals in staying together with their families are strong enough that, to borrow language (if not doctrinal baggage) from United States constitutional law, the competing interest should be compelling. Sometimes, too, other factors beyond individual interests—such as the cultural integrity of minority groups—may weigh in favor of family unity and thus demand an even stronger justification for separation. Factors that may be considered sufficiently compelling include the safety and well-being of children and the prevention of gender-based and other forms of oppression and violence. But mere citation to these interests should not be sufficient; serious scrutiny as to whether family separation is necessary to accomplish these ends is required. The history of the application of the "best interests of the child" standard, as well as the specter of African immigrant women squatting in abandoned Paris apartments, demonstrate that too often, deference to state authorities' facile determinations regarding what actions are necessary to serve particular interests ends up hurting the very people the policies were designed to help.

5. *This balancing of interests should be conducted in forums that provide for the meaningful participation of all affected family members, including all necessary procedural protections.*

Judge Weinstein's recent immigration decisions have emphasized the importance of affording a fair hearing where potential deportees can argue for consideration of the impact of family separation, and where immigration authorities will genuinely weigh this impact against the state interests supporting deportation. We think that procedural protections such as these are a minimum requirement for the acceptability of any state-enforced family separation, not just in the immigration context but in *any* context. Due process should be afforded when fundamental rights are at stake; this is such a core principle of United States law that it is surprising how routinely it is ignored, as the child welfare case study shows. International law should and does also recognize this right, and the existing international customary and conventional due process protections should be applied consistently in cases of family separation.

6. *Justice within the family is an important objective of international law; to that end, international norms against family separation should not be understood to insulate the family from external scrutiny.*

As discussed in Section I, we think it is overly simplistic to jump to the conclusion that, because violence and injustice often occur within families, the family is necessarily an institution of violence and injustice and deserves no legal protection. But we do recognize the serious need for attention, in both international and domestic law, to issues of human rights within the family, including domestic violence and gender inequality. This is one of feminism's great insights, and today it holds an important place in international law, as the widespread ratification of CEDAW demonstrates. We think that norms of international law protecting families from forcible breakup by the state are fully compatible with a commitment to the individual and structural equality rights of women and children. In any balancing of interests, this latter commitment should weigh heavily. But as the polygamy case study demonstrates, sometimes what seems to be a simple issue of gender inequality does not admit of easy solutions, and policies that disregard concerns for family integrity can often have bad results for women. The polygamy case also shows that it is important to guard against well-intentioned concerns for equality being co-opted, in this case by xenophobic political forces, to serve anti-equality ends.

* * *

We have in this article explored in some depth only a few cases of involuntary separation of families, a widespread problem that has vastly more incarnations and complexities than even this fairly varied sample illustrates. Similarly, we have drawn from these cases only a few general principles and propositions regarding the content and application of a legal norm that can only be developed effectively through international effort informed by international experience. We hope that more international attention will be paid to this problem in the future, because the problem of family separation is not going to go away. Some of the most frequent, yet most difficult to resolve, instances of family separation occur in the context of immigration and anti-immigration policies. Others result from wars and refugee crises, or from intra-cultural conflicts, including changing conceptions of what constitutes a family. We believe that the forces of globalization, combined with social movements worldwide pushing for and against rapid cultural transformation, are likely to bring these pressures and tensions into sharper and sharper focus in coming years. If so, the development of international norms governing family separation will probably become a yet more complicated task—but one that will be ever more important. The problem is vast and daunting taken as a whole, and on an individual level makes for many sad and painful stories. Yet the foundations for a serious international response to it are in place; we hope the international community rises to the challenge.

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Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles

Kelly D. Askin

Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*

By
Kelly D. Askin**

The last decade witnessed explosive developments in efforts to impose criminal responsibility on leaders and others responsible for the most serious international crimes committed during periods of armed conflict or mass violence. One of the most revolutionary advances in these efforts has been in redressing crimes committed disproportionately against women and girls, particularly rape and sexual slavery. Laws prohibiting wartime sexual violence languished ignored for centuries, so the recent progress in prosecuting various forms of gender-related crimes is unparalleled in history and has established critical precedential authority for redressing these crimes in other fora and conflicts.

While the post-World War II trials held in Nuremberg and Tokyo largely neglected sexual violence, the Yugoslav and Rwanda Tribunals have successfully prosecuted various forms of sexual violence as instruments of genocide, crimes against humanity, means of torture, forms of persecution and enslavement, and crimes of war. The Tribunal Judgements have compellingly verified that warring parties use sexual violence as a mighty instrument of war and an illicit weapon that causes extensive terror and devastation throughout the enemy group. Not only are rape crimes increasingly committed systematically, but they also continue to be routinely committed opportunistically, essentially because the atmosphere of war and the violence it engenders creates the opportunity. Whether organized or random, orchestrated or opportunistic, sexual violence generates mass terror, panic, and destruction.

This article first reviews the historical development of international laws most relevant to women during periods of war or mass violence, particularly interna-

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tional humanitarian law, emphasizing that for centuries, treaties and customary practices overwhelmingly failed to take women and girls, and crimes committed against them, into account. It then examines the treatment of gender-related crimes in the post-World War II trials held in Nuremberg and Tokyo. Finally, this article reviews the most salient gender jurisprudence developed in the Yugoslav and Rwanda Tribunals and by the Statute of the International Criminal Court (ICC).

I.
INTERNATIONAL LAW AND GENDER CRIMES: CONFLUENCE AT A SNAIL'S PACE

International humanitarian law, commonly referred to as the law of war, is the body of law that attempts to lessen the horrors of armed conflict on both combatants and noncombatants. It does so through establishing mandatory rules that include setting limits on the means and methods in which war can be waged, regulating the conduct of hostilities on the ground, by air, and at sea, standardizing the treatment of combatants rendered *hors de combat* (out of battle), such as the wounded and prisoners of war, and requiring that a distinction be made between combatants and noncombatants.[1] A fundamental principle of humanitarian law is that warring parties may never target civilians for attack and must make continuous efforts to spare them from harm to the maximum extent possible.[2] Another fundamental principle is that of humane treatment, yet the proscriptions intended to minimize wartime suffering are frequently disregarded in the atmosphere of violence, hatred, revenge, and fear that is endemic to war. Consequently, armed conflicts are rife with breaches of the laws and customs of war.

Serious violations of humanitarian law impose individual or superior criminal responsibility on the perpetrator or others responsible for their commission or omission (usually military, civil, or political leaders who fail to take appropriate measures to prevent the crimes, to stop the crimes once commenced, or to punish the crimes afterwards),[3] even when applicable treaties do not overtly

1. *See, e.g.*, LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT (2d ed. 2000); INGRID DETTER, THE LAW OF WAR (2d ed. 2000).

2. Articles 48-58 of Additional Protocol I stipulate requirements for protecting civilians from the effects of hostilities. Essentially, attacks may only be directed against military objectives and precautions must be taken to the maximum extent possible under the circumstances and in correlation to the military advantage anticipated, to prevent incidental death to civilians and harm to civilian objects. Thus, death of civilians does not necessarily imply criminal sanction, as the law recognizes that civilian casualties are inevitable during war; the law does however impose duties upon combatants and their superiors to minimize harm to civilians and civilians may never under any circumstances be intentionally targeted for attack. *See* 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, 1125 U.N.T.S. 3, 16 I.L.M. 1331 (entered into force Dec. 7, 1978) [hereinafter Additional Protocol I].

3. *See, e.g.*, ILIAS BANTEKAS, PRINCIPLES OF DIRECT AND SUPERIOR RESPONSIBILITY IN INTERNATIONAL HUMANITARIAN LAW (2002). In the context of international humanitarian law, a "serious" violation has been held to be a violation that breaches a rule protecting important values and which

impose criminal sanctions. Many international crimes carry individual criminal responsibility, regardless of whether a state or non-state actor is involved.[4]

The principal international humanitarian law treaties that regulate contemporary armed conflicts are the 1907 Hague Conventions and Regulations,[5] the four 1949 Geneva Conventions along with annexes to these conventions,[6] and the two 1977 Additional Protocols to the Geneva Conventions.[7] All or parts of these instruments are now recognized as comprising customary international law.[8] International humanitarian law governs international, and increasingly non-international, armed conflicts.[9] The characterization of a conflict as international, internal, or mixed often poses crucial legal questions, in part because the body of law pertaining to international conflicts is far more developed and codified than laws governing internal conflicts.[10] Nevertheless, there is a palpable trend in humanitarian law to reduce the disparity between the two because "the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned."[11] Indeed, the Yugoslav Tribunal in particular has

involves grave consequences for the victim. Prosecutor v. Delalić, Judgement, IT-96-21-T, 16 Nov. 1998, at para. 394 [hereinafter *Čelebići* Trial Chamber Judgement.]

4. *See, e.g.*, Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2552 (1991); M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW (2d ed. 1999).

5. *See* Convention Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 3 Martens Nouveau Recueil (ser. 3) 461 [hereinafter Hague Convention IV]. Essentially, Hague law governs the conduct of hostilities and duties of combatants. Article 19 of the 1954 Hague Cultural Property Convention provides for the application of certain parts of the Convention to non-international conflicts. *See also* DOCUMENTS ON THE LAWS OF WAR 380 (Adam Roberts & Richard Guelff eds., 3d ed. 2000). The 1907 Hague Conventions supercede the 1899 Hague Conventions. *See* Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 26 Martens Nouveau Recueil (ser. 2) 949.

6. The Conventions signed at Geneva on August 12, 1949, consist of the following: Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention (III) Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]. The 1949 Geneva Conventions supersede the 1864, 1906, and 1929 Geneva Conventions.

7. *See* Additional Protocol I, *supra* note 2; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, S. TREATY DOC. NO. 100-2, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978) [hereinafter Additional Protocol II].

8. *See, e.g.*, Prosecutor v. Tadić, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, IT-94-1-AR72, at paras. 96-137, *reprinted in* 35 I.L.M. 32 (1996) [hereinafter *Tadic* Appeals Chamber Decision on Jurisdiction].

9. The extension of international humanitarian law to internal armed conflicts has been greatly assisted by the jurisprudence of the ICTY. *See, e.g.*, Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554 (1995).

10. *See, e.g.*, Richard A. Falk, *Janus Tormented: The International Law of Internal War, in* INTERNATIONAL ASPECTS OF CIVIL STRIFE 185, 185-248 (James N. Rosenau ed., 1964); Rosalyn Higgins, *International Law and Civil Conflict, in* THE INTERNATIONAL REGULATION OF CIVIL WARS 169, 169-86 (Evan Luard ed., 1972); Howard J. Taubenfeld, *The Applicability of the Laws of War in Civil War, in* LAW AND CIVIL WAR IN THE MODERN WORLD 499, 499-517 (John Norton Moore ed., 1974).

11. *Tadić* Appeals Chamber Decision on Jurisdiction, *supra* note 8, at para. 97.

made unprecedented inroads in bridging these gaps in redressing crimes committed in international, internal, and mixed armed conflicts.[12]

There are substantial similarities and important distinctions between international humanitarian law, international criminal law, and international human rights law, although each body of law provides certain protections during armed conflict and there is significant overlap in their protections of individuals, including women and girls.[13] International humanitarian law is only invoked once an armed conflict exists,[14] whereas crimes against humanity and genocide do not need a connection to war in order to be prosecuted (unless the enabling legislation imposes the connection as a jurisdictional requirement). International human rights and international humanitarian law prohibit torture and slavery, yet redress efforts depend upon which body of law is applied. For example, international human rights law requires state action or acquiescence, whereas international humanitarian law requires a connection to an armed conflict.[15] Slavery and torture also form part of international criminal law, and indeed, there is growing recognition that the most serious human rights or humanitarian law violations may constitute international crimes.[16] Moreover, certain treaties, such as the Genocide Convention, explicitly impose criminal sanction for violation.[17]

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12. *See, e.g., Tadić* Appeals Chamber Decision on Jurisdiction, *supra* note 8; Prosecutor v. Aleksovski, Judgement, IT-95-14/1-T, 25 June 1999; *Čelebići* Trial Chamber Judgement, *supra* note 3; *see also* JOHN R.W.D. JONES, THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA (2d ed. 2000); Kelly Dawn Askin, *The ICTY: An Introduction to its Origins, Rules and Jurisprudence, in* ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK MCDONALD 19, 19-23 (Richard May et al. eds., 2001).

13. For a discussion of overlaps and distinctions between international humanitarian law, international criminal law, international human rights law, and to some extent refugee law, see Juan E. Mendez, *International Human Rights Law, International Humanitarian Law, and International Criminal Law and Procedure: New Relationships, in* INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT 65, 67-71 (Dinah Shelton ed., 2000).

14. An armed conflict has been defined as "exist[ing] whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State." *Tadić* Appeals Chamber Decision on Jurisdiction, *supra* note 8, at para. 70. The Appeals Chamber further clarified that

> [i]nternational humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.

Id.

15. *See, e.g.,* Prosecutor v. Kunarac, Judgement, IT-96-23-T & IT-96-23/1-T, 22 Feb. 2001, at paras. 467-97 (stating that "The Trial Chamber concludes that the definition of torture under international humanitarian law does not comprise the same elements as the definition of torture generally applied under human rights law") [hereinafter *Kunarac* Trial Chamber Judgement] *Id.* at para. 496.

16. *See, e.g.*, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION (Princeton Project on Universal Jurisdiction ed., 2001).

17. For example, Article I of the Genocide Convention requires states parties to "prevent and punish" genocide, "a crime under international law." Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 3, 1948, S. EXEC. DOC. 0, 81-1, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951). For more information, see generally M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW (1999). Despite a legal obligation to act in the face of genocide, that obligation is all too often ignored. See the chilling descriptions of failures in SAMANTHA POWER, A PROBLEM FROM

Even within the context of war, international human rights law can still provide protections. The Universal Declaration of Human Rights (UDHR)[18] and the International Covenant on Civil and Political Rights (ICCPR) denounce all forms of slavery, torture, and inhuman or degrading treatment and the right to be free of these abuses is explicitly nonderogable.[19] The Convention on the Rights of the Child obliges states to protect children from sexual assault and torture and to respect rules of humanitarian law.[20] The Convention Against Torture prohibits torture at all times, stipulating that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."[21]

Even in human rights instruments that focus specifically on women, most provisions continue to be applicable during wartime. The Convention on the Elimination of All Forms of Discrimination against Women (Women's Convention)[22] prohibits discrimination and disparaging treatment on the basis of "sex." This prohibition extends to violence against women, as interpreted by the Committee on the Elimination of Discrimination Against Women (CEDAW).[23] The Declaration on Elimination of Violence Against Women[24] and the Inter-American Convention on Violence[25] also provide protection against all forms of violence against women, including sexual violence, whether committed in so-called "peacetime" or in wartime, in the public sphere or in the private sphere. The Optional Protocol to the Women's Convention provides enforcement measures to monitor and ensure compliance with the Women's Convention.[26]

HELL: AMERICA AND THE AGE OF GENOCIDE (2002) and MICHAEL BARNETT, EYEWITNESS TO A GENOCIDE: THE UNITED NATIONS AND RWANDA (2002).

18. Universal Declaration of Human Rights, U.N. GAOR, 3d Sess. Part I, at arts. 1, 2, 3, 4, 5, 7, 12, U.N. Doc. A/810, 171, (1948).

19. International Covenant on Civil and Political Rights, Dec. 16 1966, arts. 4.2, 6-8, 999 U.N.T.S. 171, 174-5, 6 I.L.M. 368, 370-71 (1967) (entered into force on Mar. 23, 1976).

20. Convention on the Rights of the Child, Nov. 20 1989, arts. 34, 37, 38, 28 I.L.M. 1448, 1469-70 (entered into force on Sept. 2 1990).

21. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 2(2), S. TREATY DOC. No. 100-20, 1465 U.N.T.S. 85, 114 (entered into force June 26, 1987) [hereinafter Convention Against Torture].

22. Convention on the Elimination of all Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (entered into force Sept. 3, 1981).

23. Committee on the Elimination of Discrimination of Violence Against Women, General Recommendation No. 19, U.N. GAOR, 49th Sess., Supp. No. 38, at 1, U.N. Doc A/47/38 (1993) (adopted on Jan. 29, 1992).

24. Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. GAOR, 48th Sess., Supp. No. 49, vol. 1, at 217, U.N. Doc. A/48/49 (1993).

25. Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June 9, 1994, 33 I.L.M. 1534, General Assembly of the O.A.S., Doc. OEA/Ser.P AG/ doc.3115/94 rev.2 (commonly referred to either as the Convention of Belém do Pará or the Inter-American Convention Against Violence).

26. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, GA Res. A/54/4, 54th Sess., Supp. No. 4, U.N. Doc. A(01)/R3 (Oct. 6, 1999) (entered into force Dec. 22, 2000). The Optional Protocol has a communications procedure that allows women to submit claims for violation of the Women's Convention; it also has an inquiry procedure which enables the CEDAW Committee to initiate inquiries for gross violations when the state is a party to the Women's Convention and the Optional Protocol.

The principle of nondiscrimination, including "sex" discrimination, is enshrined throughout all human rights instruments and recognized as the most fundamental principle of human rights law.[27] Therefore, these instruments may not be interpreted or applied in a manner discriminatory to women. While international humanitarian laws apply only in the context of an armed conflict, human rights laws, especially nonderogable rights, apply regardless of the presence of an armed conflict or public emergency. Common Article 2 to the 1949 Geneva Conventions stipulates that the articles of these conventions apply *"[i]n addition to* the provisions which shall be implemented in peacetime."[28] The Martens Clause of the Hague Conventions provides additional support for the principle that fundamental human rights norms do not cease to be applicable during armed conflict.[29] International human rights law thus supplements, reinforces, and complements international humanitarian law. As the Yugoslav Tribunal Appeals Chamber notes, "[b]oth human rights and humanitarian law focus on respect for human values and the dignity of the human person. Both bodies of law take as their starting point the concern for human dignity, which forms the basis of a list of fundamental minimum standards of humanity."[30]

Additionally, several crimes, including genocide, war crimes, torture, slavery, and crimes against humanity, have achieved *jus cogens* status, making the crimes prohibited at all times, in all places.[31] These peremptory norms supersede any treaty or custom to the contrary. *Jus cogens* norms constitute principles of international public policy, and serve as rules "so fundamental to the international community of states as a whole that the rule constitutes a basis for the community's legal system. . . . [I]t is a sort of international law that, once ensconced, cannot be displaced by states, either in their treaties or in their practice."[32] In other words, these crimes (except for war crimes) do not need a nexus to a war and do not require ratification of a treaty; they are crimes that can be prosecuted by any state on the basis of universal jurisdiction. *Jus cogens* crimes subject to universal jurisdiction are justiciable by any state, even if such acts do not violate municipal law in the state in which they were committed, and even when the prosecuting state lacks a traditional nexus with the crime, of-

27. *See* Thomas Buergenthal, *The Normative and Institutional Evolution of International Human Rights*, 19 HUM. RTS. Q. 703 (1997) ("The only unambiguous provision . . . is the prohibition of discrimination").

28. First, Second, Third and Fourth Geneva Conventions, *supra* note 6, at art. 2 (emphasis added).

29. The famous Martens Clause, contained in the preamble of the 1899 and 1907 Hague Convention IV, *supra* note 5, and reproduced almost verbatim in art. 1(2) of Additional Protocol I, *supra* note 2, states: "Until a more complete code of the laws of war has been issued . . . 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."

30. Prosecutor v. Delalic, Judgement, IT-96-21-A, 20 Feb. 2001, at para. 149 [hereinafter *Celebici* Appeals Chamber Judgement].

31. *See, e.g.*, Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 541 (1993); JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW 12 (1996); Lauri Hannikainen, *Implementation of International Humnanitarian Law in Finnish Law*, *in* IMPEMENTING HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICT 118 (Lauri Hannikainen et al. eds., 1992).

32. MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 64 (2d ed. 1993).

fender, or victim.[33] As discussed *infra*, there is increasing evidence that sexual violence has now reached the level of a *jus cogens* norm.

Customary international law also regulates armed conflict, mass violence, and situations of occupation or transition. Customary international law is based on state practice and grounded in the notion of implied agreement, derived from acceptance of or acquiescence to a legal obligation. Whereas customary international law is derived from state practice based on *opinio juris* (a sense of legal obligation), *jus cogens* norms have their foundation in upholding an international *ordre public.* In the *Siderman* case, a civil suit brought in the U.S. against Argentina for torture and other abuses inflicted by the military, Judge Fletcher noted that while "customary international law derives solely from the consent of states, the fundamental and universal norms constituting *jus cogens* transcend such consent."[34] That crimes such as torture, genocide, slavery, crimes against humanity, and war crimes have attained *jus cogens* status reflects state condemnation of these crimes and the international community's desire to prevent and punish them.

There is thus a rich body of international law that protects individuals during periods of armed conflict, occupation, mass violence, or transition. The law's treatment of women and the crimes committed against them is not so rich however. Even on the rare occasion when the law explicitly prohibits rape crimes, enforcement of the law has been minimal or non-existent.

A. Disparate Reference to Women in International Humanitarian Law Documents

International humanitarian law instruments provide both general and extremely detailed guidelines on the treatment of protected persons during periods of armed conflict; however, protections for women are minimal and weak. Laws of war regulate everything from the minimum number of cards or letters a prisoner of war can receive each month, to provisions requiring opportunities for internees to participate in outdoor sports, to the maximum number of warships a belligerent may have at any one time in the port of a neutral power.[35] Yet despite the fact that many regulations protecting either combatants or civilians are often described in minute and exhaustive detail, very little mention is made of female combatants or civilians. The same is true for collections documenting war crimes trials. For example:

33. *See* Kenneth C. Randall, *Universal Jurisdiction Under International Law,* 66 TEX. L. REV. 785, 788 (1988).

34. Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 715 (9th Cir. 1992).

35. Article 71 of the Third Geneva Convention, *supra* note 6, stipulates that "[p]risoners of war shall be allowed to send and receive letters and cards . . . [of which] the said number shall not be less than two letters and four cards monthly"; Article 95 of the Fourth Geneva Convention, *supra* note 6, requires that internees be given opportunities to participate in sports and outside games in "sufficient open spaces"; Article 15 of Hague Convention IV, *supra* note 5, Convention Concerning the Rights and Duties of Neutral Powers in Naval War, provides that "the maximum number of warships belonging to a belligerent which may be in one of the ports or roadsteads of that [Neutral] Power simultaneously shall be three."

—In the entirety of the Hague Conventions and Regulations, one single article (IV, art. 46) vaguely and indirectly prohibits sexual violence as a violation of "family honour."

—The forty-two-volume set of transcripts of the Nuremberg Trial contains a 732-page index. Neither "rape" nor "women" is included in any heading or subheading in this index, despite the fact that crimes of sexual violence committed against women were extensively documented in the transcripts.[36]

—In the five supplementary indexes to the twenty-two-volume set documenting the Tokyo Trial, "rape" is only included under the subheading "atrocities." Even then, a mere four references are cited, representing but a minuscule portion of the number of times rape and other forms of sexual violence were included within the International Military Tribunal for the Far East (IMTFE) transcripts.[37]

—The four 1949 Geneva Conventions came after the Second World War and the Nuremberg and Tokyo war crimes trials. Within the 429 articles that comprise the four 1949 Geneva Conventions, only one sentence of one article (IV, art. 27) explicitly protects women against "rape" and "enforced prostitution," and only a few other provisions can be interpreted as prohibiting sexual violence.

—The 1974 Declaration on the Protection of Women and Children in Emergency and Armed Conflict omits any reference to sexual violence.[38]

—In the two 1977 Additional Protocols to the Geneva Conventions, only one sentence in each explicitly prohibits sexual violence (Protocol I, art. 76; Protocol II, art. 4).

Women and girls have habitually been sexually violated during wartime, yet even in the twenty-first century, the documents regulating armed conflict either minimally incorporate, inappropriately characterize, or wholly fail to mention these crimes. Until the 1990s, men did the drafting and enforcing of humanitarian law provisions; thus, it was primarily men who neglected to enumerate, condemn, and prosecute these crimes.[39] While males remain the principal actors in international (and domestic) fora, in recent years, women have

36. The official documents of the Nuremberg Trial are contained in TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NOV. 14, 1945 TO OCT. 1, 1946 (1947) [hereinafter IMT Docs]. For some examples of documentation of sexual violence by the tribunal, see, e.g., vol. 2, transcript at 139; vol. 6, transcript at 211-14, 404-07; vol. 7, transcript at 449-67; vol. 10, transcript at 381.

37. Documents of the Tokyo Trial are reproduced in THE TOKYO WAR CRIMES TRIAL: THE COMPLETE TRANSCRIPTS OF THE PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (R. Pritchard & S. Zaide eds., 1981) [hereinafter IMTFE Docs]. For some examples of documentation of sexual violence by the tribunal, see, e.g., IMTFE Docs, vol. 2, transcript at 2568-73, 2584, 2593-95, 3904-44, 4463-79, 4496-98, 4501-36, 4544, 4559, 4572-73, 4594, 4602, 4615, 4638, 4642, 4647; vol. 6, transcript at 12521-48, 12995, 13117, 13189, 13641-42, 13652.

38. Declaration on the Protection of Women and Children in Emergency and Armed Conflict, G.A. Res. 3318, U.N. GAOR, 29th Sess., Supp. No. 31, at 146, U.N. Doc. A/9631 (1974). An obvious place for the inclusion of explicit prohibitions of sexual violence would have been para. 5, which states: "All forms of repression and cruel and inhuman treatment of women and children, including imprisonment, torture, shooting, mass arrests, collective punishment, destruction of dwellings and forcible eviction, committed by belligerents in the course of military operations or in occupied territories shall be considered criminal."

39. *See* Christine M. Chinkin, *Peace and Force in International Law, in* Reconceiving Reality: Women and International Law 212 (Dorinda G. Dallmeyer ed., 1993) ("Despite the far-reaching consequences of conflict upon women, their voices are silenced in all levels of decision-making about war. . . . The whole area of the use of force is the one from which women's exclusion is most absolute.") For a review of women in high level positions of power in international law, see Kelly D. Askin, *Introduction, in* 1 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW xxv-xxix (Kelly Askin & Dorean Koenig eds., 1999).

broken through the glass ceiling and are changing the traditional landscape by securing high-level positions in international legal institutions and on international adjudicative bodies.[40] It is impossible to overemphasize how crucial it is to women's issues, gender crimes, and the law in general to have women in decision-making positions in international fora, particularly within the United Nations structure, and as judges, prosecutors, and peacemakers.

B. Treatment of Women and Girls During Armed Conflict or Mass Violence

The progress made globally in recognizing, prohibiting, and finally enforcing gender-related crimes has been painstakingly slow. Historically, women were considered "property," owned or controlled by men (typically fathers, then husbands). The rape of a woman was not considered a crime against her, but instead a crime against the man's property.[41] During war, women were considered legitimate spoils of war, along with livestock and other chattel. By the Middle Ages, the rape and slavery of women were inducements to war, such that anticipation of unrestricted sexual access to vanquished women was used as an incentive to capture a town. When customary law began prohibiting rape crimes, as discussed below, sexual violence did not tend to be officially encouraged, but the crimes were largely ignored or tolerated by commanders, many of whom believed sexual violence before a battle increased the soldiers' aggression or power cravings and that rape after a battle was a well-deserved reward, a chance to release tensions and relax. As rape became explicitly prohibited, the crimes were still deemed mere inevitable consequences or side effects of armed conflict and were rarely punished. Efforts to enforce the prohibitions against rape generated little interest, as most considered sexual vio-

40. For example, two of the three Chief Prosecutors of the ICTY/R Tribunals have been women (Louise Arbour from Canada and Carla del Ponte from Switzerland), one of the three Registrars of the ICTY has been a woman (Dorothy De Sampayo from the Netherlands), and both the ICTY and ICTR have had a woman as President of the Tribunal (Gabrielle Kirk McDonald from the U.S. (ICTY) and Navanethem Pillay from South Africa (ICTR)), and several other women have been permanent judges (Elizabeth Odio-Benito from Costa Rica, Florence Mumba from Zambia, and Patricia Wald from the U.S. to the ICTY and Arlette Ramaroson from Madagascar and Andrésia Vaz from Senegal to the ICTR) as well as ad litem judges (Sharon Williams from Canada, Carmen Argibay from Argentina, Maureen Harding Clark from Ireland, Ivana Janu from Czech Republic, Chikako Taya from Japan, and Fatoumata Diarra from Mali.) The ICTY Prosecutor's Office also created the vital position of gender issues legal advisor, held by Patricia Viseur Sellers from the U.S. In 2001, for the first time in over fifty years, the UN's influential International Law Commission elected women (Paula Escarameia from Portugal and Xue Hanqin from China), and the International Court of Justice elected a female judge in 1995 (Rosalyn Higgins from the UK.) These are modest advances but revolutionary nonetheless when considering that for decades, no women held high (or typically even mid- or low-level) positions of power in international law bodies or courts. *See also* statistical delineations in Jan Linehan, *Women in Public Litigation*, P.I.C.T. (July 13, 2001), *available at* http://www.pict-pcti.org/publications; Thordis Ingadottir, *The International Criminal Court, The Nomination and Election of Judges*, P.I.C.T. (June 2002), *available at* http://www.pict-pcti.org/publications.

41. There are many publications devoted to this issue. *See, e.g.*, Alexandra Wald, *What's Rightfully Ours: Toward a Property Theory of Rape*, 30 COLUM. J. L. & SOC. PROBS. 459 (1997).

lence incidental byproducts of the conflict.[42] By the twentieth century, men and boys still principally waged the wars, but combatants increasingly targeted the most vulnerable for attack: women, children, the ill, and the elderly.

In modern wars, the greatest casualties of the conflict are civilians.[43] During these attacks, female civilians are subjected to the same violence to which male civilians are subjected. Both are murdered, tortured, displaced, imprisoned, starved, and subjected to slave labor. Yet in addition to these crimes, women and girls are also singled out for additional violence—gendered violence—that is commonly manifested in the form of sexual violence. Outside a domestic prison context, targets of sex crimes are overwhelmingly female. Certain crimes, such as forced impregnation and forced abortion, are exclusive to women and girls.

History is replete with reports of women being raped, sexually enslaved, impregnated, sexually mutilated, and subjected to myriad other forms of sexual violence during periods of armed conflict, mass violence, occupation, resistance, and transition.[44] For thousands of years, in conflicts in every region of the world, women have been subject to both androgynous crimes and crimes of a sexual nature.[45] Despite increased codified protections afforded to civilians in wartime and purported advances in creating more civilized societies, the situation did not improve during the twentieth century, which was the bloodiest in history.[46] Indeed, despite the creation of the United Nations and the proliferation of a broad range of humanitarian law and human rights instruments after World War II, it appears that women's situations during armed conflict actually worsened in the twentieth century.

Evidence indicates that rape crimes are increasingly committed systematically and strategically, such that sexual violence forms a central and fundamental part of the attack against an opposing group. Indisputably, rape and other forms of sexual violence are used as weapons of war. In some cases, such as the sexual slavery of some 200,000 of the so-called "comfort women" during World

42. For a more detailed analysis of the development of gender crimes in customary law, see KELLY DAWN ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS 1-48 (1997).

43. THE NEW HUMANITARIAN LAW OF ARMED CONFLICT 478 (Antonio Cassese ed., 1979); THE AMERICAN NATIONAL RED CROSS, HUMANITY IN THE MIDST OF WAR 1-7 (1993).

44. *See generally* THEODOR MERON, HENRY'S WARS AND SHAKESPEARE'S LAW, PERSPECTIVES ON THE LAW OF WAR IN THE LATER MIDDLE AGES (1993); SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE (1975); PETER KARSTEN, LAW, SOLDIERS AND COMBAT (1978); M.H. KEEN, THE LAWS OF WAR IN THE LATE MIDDLE AGES (1965).

45. *See, e.g.*, GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY, THE STRUGGLE FOR GLOBAL JUSTICE 95, 306-07 (1999); JULIE A. MERTUS, WAR'S OFFENSIVE ON WOMEN (2000); Madeline Morris, *By Force of Arms: Rape, War, and Military Culture*, 45 DUKE L.J. 651, 654 (1996); MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA (Alexandra Stiglmayer ed., 1994); Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, 5 HASTINGS WOMEN'S L.J. 243 (1994); Christine Chinkin, *Rape and Sexual Abuse of Women in International Law*, 5 EUR. J. INT'L L. 326 (1994); ASKIN, WAR CRIMES AGAINST WOMEN, *supra* note 42, at 18-33.

46. *See, e.g.*, JONATHAN GLOVER, HUMANITY: A MORAL HISTORY OF THE 20TH CENTURY (1999); ROBERT CONQUEST, REFLECTIONS ON A RAVAGED CENTURY (2000).

War II by the Japanese military,[47] sexual violence forms a core part of the war machinery, such that military personnel target women and girls to conveniently and efficiently service the male soldiers and to improve their morale.[48] Thus, instead of being a weapon used to attack the opposing side, sexual violence is used as part of the military machinery to fuel the fighting soldiers.

Rape is a potent weapon for a number of reasons. The destructive stereotypes and harmful cultural and religious attitudes associated with female chastity or notions of so-called "purity" make sex crimes useful tools for destroying lives. Prevailing attitudes and beliefs often create an erroneous impression that a woman is "spoiled goods" if she has sex, whether voluntarily or involuntarily, outside a marital context, a stereotype rarely imposed upon victims of non-sexual crimes. Rape crime survivors (and those who do not survive) are not the only victims of sexual violence. The impact and the harms often extend to families, local communities, and society at large.

Furthermore, evidence suggests that women are also commonly killed in a gender-related manner:

> [T]he murder of the women did not tend to occur in an androgynous way—the means and method of death was often sexualized, such as by having a sexual organ or body part mutilated or exploded, by having a fetus ripped from the womb, or by being raped with broken glass or crude weapons. So even their deaths frequently had a gendered, particularly a reproductive, component.[49]

It is only recently that the international community is beginning to grasp the moral, social, economic, and legal importance of taking adequate measures to prevent and punish gender crimes. The international community has been even slower in providing other forms of accountability to victims of sex crimes.[50]

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47. *See* Prosecutors v. Hirohito Emperor Showa, The Women's International War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery Judgement [hereinafter Women's International War Crimes Tribunal], Dec. 4, 2001, PT-2000-1-T (*corr.* Jan. 31, 2002); YOSHIMI YOSHIAKI, THE COMFORT WOMEN SEXUAL SLAVERY IN THE JAPANESE MILITARY DURING WORLD WAR II (Suzanne O'Brien trans., 2000); GEORGE HICKS, THE COMFORT WOMEN: JAPAN'S BRUTAL REGIME OF ENFORCED PROSTITUTION IN THE SECOND WORLD WAR (1995).

48. *See* Christine Chinkin, *Women's International Tribunal on Japanese Military Sexual Slavery*, 95 AM. J. INT'L L. 335, 340 (2001) ("[R]ape as practiced in the comfort stations was not an inevitable consequence or war, nor even an instrument of war but was part of the very engine of war where the sexual enslavement of women was considered necessary to the pursuit of military objectives"); Kelly D. Askin, *Comfort Women – Shifting Shame and Stigma from Victims to Victimizers*, 1 INT'L CRIM. L. REV. 5, 29 (2001) ("The Japanese did not establish the 'comfort' houses as a strategic weapon of war *per se*. Indeed, the Japanese tried to keep the 'comfort facilities' secret and even murdered countless victims in an attempt to protect their secret. Thus, the facilities were not used, for example, as a weapon of terror and humiliation against the enemy group to cause them to flee the area, or in an attempt to destroy a group mentally, physically or reproductively, or to impregnate women. They were established primarily for expediency of the military: it was considered essential to the military image to not have their soldiers randomly raping local women, and it was important to the military structure to have women readily accessible for 'safe' sex for the weary soldier.")

49. Askin, *Comfort Women, supra* note 48, at 21.

50. For example, most Truth and Reconciliation Commission reports have completely ignored or given short shrift to crimes committed against women. *See, e.g.*, Kelly Askin & Christine Strumpen-Darrie: *Truth Commission Reports: Reporting Only Half the Truth?: Listening for the Voices of Women, in* WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW (Kelly Askin, Martina Vandenberg, & Deena Hurwitz eds., vol. IV, forthcoming 2003). Essentially, the Guatemala, Haiti, and

C. Development of Gender Crimes Under International Law

Prior to the mid-1800s, the laws of war existed primarily in custom, domestic military codes, and religious instruction.[51] Long before international humanitarian law was codified, the customs of war prohibited rape crimes. For example, in the 1300s, Italian lawyer Lucas de Penna urged that wartime rape be punished as severely as peacetime rape;[52] in the 1474 trial of Sir Peter Hagenbach, an international military court sentenced Hagenbach to death for war crimes, including rape, committed by his troops.[53] In the 1500s, eminent jurist Alberico Gentili surveyed the literature on wartime rape and contended that it was unlawful to rape women in wartime, even if the women were combatants;[54] in the 1600s international law pioneer Hugo Grotius concluded that sexual violence committed in wartime and peacetime alike must be punished.[55]

In 1863, the United States codified international customary laws of war into the U.S. Army regulations on the laws of land warfare. These regulations, known as the Lieber Code,[56] were the cornerstone for many subsequent war codes.[57] The Lieber Code listed rape by a belligerent as one of the most serious war crimes. Article 44 of the Code declared that "all rape . . . is prohibited under the penalty of death," and Article 47 dictated that "[c]rimes punishable by all penal codes, such as . . . rape . . . are not only punishable as at home, but in all cases in which death is not inflicted, the severer punishment shall be preferred." Wartime rape was thus considered so serious that it warranted the death penalty.

Customary international law dates back thousands of years and codified international humanitarian law has been in place for well over a century. When World War I began in 1914, the 1907 Hague Conventions governed the means

South Africa commissions were the only ones, as of 2001, that even attempted to cover gender crimes or address women's issues.

51. Adam Roberts, *Land Warfare: From Hague to Nuremberg, in* THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD 116, 119 (Michael Howard et al. eds., 1994).

52. *See* RICHARD SHELLY HARTIGAN, THE FORGOTTEN VICTIM: A HISTORY OF THE CIVILIAN 50 (1982).

53. William Parks, *Command Responsibility for War Crimes,* 62 MIL. L. REV. 1 (1973); M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW, A DRAFT INTERNATIONAL CRIMINAL CODE 8 (1980); TELFORD TAYLOR, NUREMBERG AND VIETNAM, AN AMERICAN TRAGEDY 81-82 (1970); LYAL S. SUNGA, INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS 18-19 (1992); Theodor Meron, *Shakespeare's Henry the Fifth and the Law of War,* 86 AM. J. INT'L L. 1 (1992); M. CHERIF BASSIOUNI & PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 576-79 (1996).

54. *See* ABERICO GENTILI, DE JURE BELLI LIBRI TRES 258-59 (John C. Rolfe trans., 1995) (1612).

55. *See* HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 656-57 (Francis W. Kelsey trans., 1995) (1646).

56. Instructions for the Government of the United States in the Field by Order of the Secretary of War, Washington, D.C. (Apr. 24, 1863); Rules of Land Warfare, War Dept. Doc. No. 467, Office of the Chief of Staff (G.P.O. 1917) (approved Apr. 25, 1914) [hereinafter Lieber Code]. The Lieber Code is also known as General Orders No. 100.

57. *See* Telford Taylor, *Foreword, in* THE LAW OF WAR, A DOCUMENTARY HISTORY xv (Leon Friedman ed., 1972).

and method of warfare.[58] The original Geneva Conventions were also in force, but they did not provide protections to civilians.[59] The 1907 Hague Conventions and Regulations contain a provision that implicitly prohibits sexual violence by mandating that "[f]amily honour and rights . . . must be respected."[60] At the turn of the twentieth century, a violation of family "honor" was commonly understood as encompassing sexual assault.[61] Thus, both customary and Hague law prohibited wartime rape.

As a result of the ruthless atrocities committed during World War I, the major Allied powers established the 1919 War Crimes Commission to investigate crimes and make recommendations concerning methods of punishing suspected Axis war criminals. In its report, the War Crimes Commission listed thirty-two non-exhaustive violations of the laws and customs of war that had been committed by the Axis powers. "Rape" and "abduction of girls and women for the purpose of forced prostitution" were two of the enumerated offenses that were deemed punishable offenses, yet again reinforcing their status as war crimes in the early twentieth century.[62] However, the attention to sex crimes in enforcement endeavors was minimal at best.

D. International Military Tribunals at Nuremberg and Tokyo in the Wake of World War II

The intentional extermination of millions of innocent civilians during World War II stunned the world community and shattered illusions of state security and protection. Men, women, and children alike were slaughtered, tortured, starved, and forced into slave labor. In addition to these crimes, countless women and girls were also singled out for rape, sexual slavery, and other forms of sexual violence and persecution.[63] When the war ended after years of catastrophic devastation, the Allies held trials for individuals considered most culpable for the atrocities. In establishing the International Military Tribunals in Nuremberg (IMT) and Tokyo (IMTFE) to prosecute leaders for crimes against

58. *See* Convention Concerning the Laws and Customs of War on Land (Hague IV), Oct. 18, 1907, 36 Stat. 2277, 3 Martens Nouveau Recueil (ser. 3) 461 (entered into force Jan. 26, 1910).

59. *See* Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 22 Stat. 940, 1 Bevans 7. The 1864 Geneva Convention was revised and expanded in 1906 and 1929. The four 1949 Geneva Conventions, including the Fourth Geneva Convention applicable to civilians, replace the earlier conventions.

60. *See* Hague Convention IV, *supra* note 5, at art. XLVI. The 1899 Hague Convention held a similar provision.

61. For instance, when Professor J.H. Morgan reported the rape of Belgian women during the First World War, the terminology he used was the "[o]utrages upon the honour of women by German soldiers have been frequent." *See* BROWNMILLER, *supra* note 44, at 42.

62. U.N. WAR CRIMES COMMISSION, 13 LAW REPORTS OF TRIALS OF WAR CRIMINALS 122, 124 (1949); HISTORY OF THE U.N. WAR CRIMES COMMISSION 34 (1948); Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, *Report presented to the Preliminary Peace Conference, March 29, 1919*, 14 AM. J. INT'L L. 95, 114 (1920).

63. *See* ASKIN, WAR CRIMES AGAINST WOMEN, *supra* note 42, at 49-95. Some offenses, such as sexual mutilation, (en)forced sterilization, sexual humiliation, and forced nudity are also commonly committed against men, although women do tend to be subjected to these abuses more frequently and often for different reasons.

peace, war crimes, and crimes against humanity,[64] both trials focused principally on what was considered the "supreme" crime: crimes against peace.[65] In part because of the trial's focus on those responsible for waging aggressive war, sexual violence was largely ignored.

In the post-war proceedings held in Nuremberg, Germany against twenty-two Nazi leaders, the IMT Charter failed to include any form of sexual violence, and the tribunal did not expressly prosecute such crimes, even though they were extensively documented throughout the war and occupation.[66] Nonetheless, the trial records contain extensive evidence of sexual violence. While not explicit, gender-related crimes were included as evidence of the atrocities prosecuted during the trial and can be considered subsumed within the IMT Judgement.[67] For example, the Nuremberg Tribunal implicitly recognized sexual violence as torture:

> Many women and girls in their teens were separated from the rest of the internees . . . and locked in separate cells, where the unfortunate creatures were subjected to particularly outrageous forms of torture. They were raped, their breasts cut off . . . .[68]
>
> [W]omen were subjected to the same treatment as men. To the physical pain, the sadism of the torturers added the moral anguish, especially mortifying for a woman or a young girl, of being stripped nude by her torturers. Pregnancy did not save them from lashes. When brutality brought about a miscarriage, they were left without any care, exposed to all the hazards and complications of these criminal abortions.[69]

The Nuremberg Trial thus did implicitly prosecute sexual atrocities as part of the Nazi atrocities committed during the war.

Similarly, in the subsequent Nuremberg trials held by the Allied forces under the auspices of Control Council Law No. 10 (CCL10),[70] which did explic-

64. Charter of the International Military Tribunal, Annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), Aug. 8, 1945, 82 U.N.T.S. 59; 279 Stat. 1544 [hereinafter IMT Charter]; Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevans 20. The Annex to the Special Proclamation contains the Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, 4 Bevans 21, *as amended* Apr. 26, 1946, 4 Bevans 27 [hereinafter IMFTE Charter].

65. *See, e.g.*, John Murphy, *Crimes Against Peace at the Nuremberg Trial, in* THE NUREMBERG TRIAL AND INTERNATIONAL LAW 141 (George Ginsburg & V.N. Kudriavtsev eds., 1990).

66. For arguments on how sex crimes could have been prosecuted in the Nuremberg Trial if there had been the political will to do so, see ASKIN, WAR CRIMES AGAINST WOMEN, *supra* note 42, at 129-63. Professor Robertson states that the Allies declined to indict Nazi war criminals for sexual violence because they themselves committed the worst abuses: "[T]he worst example of tolerated and systematic rape was during the Russian army advance on Germany through eastern Europe, during which an estimated two million women were sexually abused with Stalin's blessing that 'the boys are entitled to their fun'." GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY, THE STRUGGLE FOR GLOBAL JUSTICE 306 (1999).

67. *See, e.g.*, IMT DOCS, *supra* note 36, at vol. 2, transcript at 139; vol. 6, transcript at 211-14, 404-07; vol. 7, transcript at 449-67; vol. 10, transcript at 381.

68. IMT DOCS, *supra* note 36, vol. 7, transcript at 494.

69. IMT DOCS, vol. 6, transcript at 170.

70. *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and against Humanity*, Allied Control Council Law No. 10, Dec. 20, 1945, OFFICIAL GAZETTE OF THE CONTROL COUNCIL FOR GERMANY, No. 3, (Jan. 31, 1946) [hereinafter CCL10].

itly list rape as a crime against humanity,[71] gender crimes were given only cursory treatment. In the trials of some of the so-called "lesser" war criminals, such as medical doctors performing unethical experiments and concentration camp guards facilitating the commission of grave crimes within the camps, forced sterilization, forced abortion, and sexual mutilation were mentioned.[72]

In the post-World War II trials held in Tokyo, Japan, rape crimes were expressly prosecuted, albeit to a limited extent and in conjunction with other crimes. The Tokyo Tribunal charged twenty-eight Japanese Axis defendants with various war-related crimes.[73] Like the Nuremberg Charter, the Tokyo Charter did not specifically enumerate any sex crime. Unlike the Nuremberg Indictment however, the Tokyo Indictment did include allegations of gender-related crimes: it characterized the rape of civilian women and medical personnel as "inhumane treatment," "mistreatment," "ill-treatment," and a "failure to respect family honour and rights," and prosecuted these crimes under the 'Conventional War Crimes' provision in the Charter.[74] A substantial number of gender-related crimes were cited as evidence of atrocities committed in Asia during the war.[75] As a result of these charges, the IMTFE held General Iwane Matsui, Commander Shunroku Hata, and Foreign Minister Hirota criminally responsible for a series of crimes, including rape crimes, committed by persons under their authority.[76] It should also be noted that in war crimes trials held in Batavia (Jakarta) after the war, some Japanese defendants were convicted of "enforced prostitution" for forcing Dutch women into sexual servitude to the Japanese military.[77]

In another war crimes trial held in Asia by the U.S. military commission, General Tomoyuki Yamashita,[78] commander of the 14th Area Army of Japan, was charged with failing to exercise adequate control over his troops, who had committed widespread rape, murder, and pillage in Manila (known as the "Rape

71. *Id.* at art. II(1)(c).

72. *See, e.g.*, U.S. v. Brandt, *in* 2 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNAL UNDER CONTROL COUNCIL LAW NO. 10 (1946) (forced sterilization and castration); U.S. v. Pohl, *in* 5 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNAL UNDER CONTROL COUNCIL LAW NO. 10 (1947) (evidence of forced abortion and concentration camp "brothels"); U.S. v. Greifelt, *in* 4-5 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNAL UNDER CONTROL COUNCIL LAW NO. 10 (1947) (forced abortion, gender/ethnic persecutions, genocide, and reproductive crimes).

73. IMTFE DOCS, *supra* note 37, at vol 1.

74. *See* IMTFE DOCS, *supra* note 37, at 31, and *id.* at 111-17.

75. Sexual violence was documented in the IMTFE transcripts, *supra* note 37 at vol. 2, transcript at 2568-73, 2584, 2593-95, 3904-44, 4463-79, 4496-98, 4501-36, 4544, 4559, 4572-73, 4594, 4602, 4615, 4638, 4642, 4647, 4660; *see also* IMTFE DOCS, vol. 6, transcript at 12521-48, 12995, 13117, 13189, 13641-42, 13652.

76. THE TOKYO JUDGEMENT: THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 446-54 (B.V.A. Roling & C.F. Ruter eds., 1977).

77. *See, e.g.*, *Trial of Washio Awochi*, 13 LAW REPORTS OF TRIALS OF WAR CRIMINALS 122-25 (1949) (a Japanese hotel/club/restaurant manager was found guilty of the war crime of enforced prostitution for forcing Dutch women into sexual servitude in his club from 1943-1945).

78. Because Yamashita was not charged with "crimes against peace," he was not tried by the IMTFE. *See generally* RICHARD L. LAEL, THE YAMASHITA PRECEDENT, WAR CRIMES AND COMMAND RESPONSIBILITY (1982).

of Manila") during the war.[79] Yamashita insisted that he knew nothing of the atrocities because of a complete breakdown of communications; he also alleged that his troops were disorganized and out of control, and thus, inferentially, he could not have prevented the crimes even if he had known of them. He further protested that because he was actively fighting a war and planning military strategies, he could not be held responsible for failing to control all persons under his authority. The Commission concluded, however, that because the crimes were committed over a large area during an extended period of time, Yamashita either did know of the crimes, or he could have and should have known of them unless he intentionally remained willfully blind to them, and intentional ignorance would provide no excuse for being derelict in his duties. Thus, the crimes did not need to be ordered and it was not necessary to prove that the commander had actual knowledge of the crimes being committed by persons under his authority; indeed, the widespread commission of crimes over an extended period of time was enough to impute knowledge to Yamashita, the commander. The Tribunal found Yamashita guilty of failing his command responsibility, and sentenced him to death.[80] Thus, under the rubric of command responsibility or superior authority, leaders who have a duty to prevent, halt, or punish crimes committed by their subordinates may be held criminally responsible for abrogating this duty.

E. The 1949 Fourth Geneva Convention

In response to the systematic slaughter and persecution of millions of civilians during World War II, the original Geneva Conventions[81] were deemed inadequate. The Geneva Conventions were thus amended in 1949, resulting in four conventions, the fourth of which is devoted to protecting civilians during wartime. The four Conventions, including the interdicts against sexual violence, are not only part of conventional international law, they are also part of customary international law and are binding universally, regardless of whether states are parties to the treaties.[82]

The four 1949 Geneva Conventions govern the treatment of certain belligerents (the sick, wounded, and shipwrecked), civilians, and prisoners of war during periods of armed conflict.[83] In 1977, these conventions were supple-

79. *See In re Yamashita,* 327 U.S. 1 (1946). Although appealed to General Douglas MacArthur and the U.S. Supreme Court, the decision stood and Yamashita was executed. *See* William H. Parks, *Command Responsibility for War Crimes,* 62 MIL. L. REV. 1, 69-73 (1973); Gordon Ireland, *Uncommon Law in Martial Courts,* 4 WORLD AFF. Y.B (1950).

80. *In re Yamashita, id.*

81. *See supra* note 59, referring to the 1864, 1906, and 1929 Geneva Conventions. These conventions are no longer in force, as the 1949 Conventions supercede the earlier documents.

82. *Tadić* Appeals Chamber Decision on Jurisdiction, *supra* note 8, at para. 97.

83. First Geneva Convention, *supra* note 6, protects wounded and sick armed forces on land; Second Geneva Convention, *supra* note 6, protects wounded and sick armed forces at sea; Third Geneva Convention, *supra* note 6, protects prisoners of war; and Fourth Geneva Convention, supra note 6, protects civilians. For more information on the First, Second and Third Geneva Conventions' protections of women, see Karen Parker, *Human Rights of Women During Armed Conflict,* in 3 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 283 (Kelly Askin & Dorean Koenig eds., 2001).

mented by two Additional Protocols to the 1949 Geneva Conventions, one devoted to international and the other to non-international armed conflicts.[84] As previously noted, a single article in the Fourth Geneva Convention and in each of the two Additional Protocols explicitly prohibits rape and (en)forced prostitution.[85] More specifically, Article 27 of the Fourth Geneva Convention, which provides protection to the civilian population in times of war, mandates the following:

> Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.
>
> Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.[86]

Similarly, Article 76(1) of Protocol I states: "Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault."[87] Article 4(2)(e) of Protocol II prohibits "[o]utrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault." Thus, the Conventions expressly include rape and forced prostitution, although they erroneously link rape with crimes of honor or dignity instead of with crimes of violence. Such a demarcation grossly mischaracterizes the offense, perpetuates detrimental stereotypes, and conceals the sexual and violent nature of the crime.[88]

There is now broad consensus that serious violations of the Geneva Conventions can carry criminal liability and be punished as crimes of war. It was recognized at the Nuremberg trials that it "is not essential that a crime be specifically defined and charged in accordance with a particular ordinance, statute, or treaty if it is made a crime by international convention, recognized customs and usages of war, or the general principles of criminal justice common to civilized nations generally."[89] Grave breaches of the Geneva Conventions and violations of Common Article 3 of the Geneva Conventions, discussed *infra*, can also be used to punish torture or inhuman or cruel treatment, including rape.

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84. Additional Protocol I, *supra* note 2, regulates international armed conflicts; Additional Protocol II, *supra* note 7, regulates non-international armed conflict.

85. *See* Fourth Geneva Convention, *supra* note 6; Additional Protocol II, *supra* note 7; Additional Protocol I, *supra* note 2.

86. Fourth Geneva Convention, *supra* note 6, at art. 27.

87. Notice that the language in Protocol I is "forced" prostitution instead of the "enforced" prostitution used in Article 27 of the Fourth Geneva Convention and in Protocol II. *See* Additional Protocol I, *supra* note 2, at art. 76(1); Fourth Geneva Convention, *supra* note 6, at art. 27.

88. *See, e.g.*, Dorean M. Koenig & Kelly D. Askin, *International Criminal Law and the International Criminal Court Statute: Crimes Against Women*, *in* 2 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 3, 11-16 (Kelly D. Askin & Dorean M. Koenig eds., 2000).

89. U.S. v. List, II TRIALS OF WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945-1 OCTOBER 1946, 1239 (commonly known as the Hostage Case).

In conclusion, the laws of warfare have both implicitly and explicitly prohibited the rape of combatants and noncombatants for centuries. Increasingly, this prohibition extends to other forms of sexual violence, including sexual slavery, forced impregnation, forced maternity, forced abortion, forced sterilization, forced marriage, forced nudity, sexual molestation, sexual mutilation, sexual humiliation, and sex trafficking.[90]

II.
RECENT EFFORTS TO ENFORCE GENDER-RELATED CRIMES IN INTERNATIONAL CRIMINAL TRIBUNALS

In the early 1990s, the United Nations Security Council established a Commission of Experts to investigate the allegations of gross violations of humanitarian law committed during the conflict raging on the territory of the former Yugoslavia.[91] Based on documented reports and preliminary findings, including evidence of widespread or systematic rape to further the policies of "ethnic cleansing," the United Nations Security Council, acting under Chapter VII of the U.N. Charter, called for the establishment of an *ad hoc* international war crimes tribunal.[92] Consequently, the International Criminal Tribunal for the former Yugoslavia (ICTY) was established to prosecute "Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991."[93]

The following year, as a result of mass slaughter and other crimes committed during the ensuing genocide in Rwanda, the United Nations appointed a Special Rapporteur for Rwanda in mid-1994.[94] Shortly thereafter, the U.N. Security Council established a Commission of Experts to investigate reports and allegations of serious crimes committed during the armed conflict in Rwanda.[95] Compelled by evidence that over 600,000 people had been slaughtered during a nearly 100-day period in Rwanda, the Security Council, again acting under Chapter VII of the U.N. Charter, established the International Criminal Tribunal

90. Rome Statute of the International Criminal Court, 1998 Sess. at arts. 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi) U.N. Doc. A/CONF.183/9 (1998) (entered into force July 1, 2002) [hereinafter ICC Statute]; Prosecutor v. Kvočka, Judgement, IT-98-30-T, 2 Nov. 2001, at para. 180 & n.343 [hereinafter *Kvočka* Trial Chamber Judgement]. *See also* ASKIN, WAR CRIMES AGAINST WOMEN, *supra* note 42; Jennifer Green, Rhonda Copelon, Patrick Cotter, Beth Stephens & Kathleen Pratt, *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, 185 (1994).

91. S.C. Res. 780, U.N. SCOR, 47th Sess., 3119th mtg. at 36-37, U.N. Doc. S/780/1992 (1992).

92. S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg. at 28, U.N. Doc. S/808/1993 (1993). S.C. Res. 808 endorsed the principle of establishing a tribunal.

93. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 29, U.N. Doc. S/827/1993 (1993). The Statute is contained in U.N. Doc. S/25704, Annex (1993) which is attached to the "Report on the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808." [hereinafter ICTY Statute or Yugoslav Statute].

94. Hum. Rts. Comm. Res. S-3/1.L, 3d.sp. Sess., U.N. Doc. E/CN.4/S-3/1.L (1994).

95. S.C. Res. 935, U.N. SCOR, 49th Sess., 3400th mtg. at 11-12, U.N. Doc. S/935/1994 (1994).

for Rwanda (ICTR) for the "Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other violations committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994."[96] The Final Report of the Commission of Experts for Rwanda,[97] while recording few substantive crimes in depth, nevertheless noted that "[d]isturbing reports have been filed with the Commission of Experts that document the abduction and rape of women and girls in Rwanda." The U.N. Special Rapporteur on Rwanda concluded that "rape was the rule and its absence the exception,"[98] adding that many of these rapes resulted in pregnancy.[99]

A. The Yugoslav and Rwanda Tribunals

The Statutes of the Yugoslav and Rwanda Tribunals authorize the *ad hoc* Tribunals to prosecute war crimes, crimes against humanity, and genocide. Whereas genocide is defined identically in the two Statutes, and mirrors the definition contained in the Genocide Convention, the war crime and crime against humanity provisions differ. The differences largely reflect the different nature of the armed conflict in the two territories, the principal crimes committed, and the interests of the U.N. Security Council in establishing the two Tribunals. For example, Articles 2 and 3 of the ICTY Statute contain the war crime provisions, and grant the Yugoslav Tribunal jurisdiction over grave breaches of the 1949 Geneva Conventions and serious violations of the laws or customs of war.[100] Article 4 of the ICTR Statute contains the war crime provisions and

96. S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 15, U.N. Doc. S/INF/50 Annex (1994) [hereinafter ICTR Statute or Rwanda Statute].

97. *Final Report of the Commission of Experts on Rwanda*, Annex, U.N. Doc. S/1994/1405 (1994).

98. *See Report on the Situation of Human Rights in Rwanda by Reneé Degni-Segui, Special Rapporteur of the Commission on Human Rights*, at para. 16, U.N. Docs. E/CN.4/1996/68 (1996) & E/CN.4/1995/7 (1995).

99. *Id.* at para. 16.

100. The ICTY Statute grants subject matter jurisdiction over:

Article 2

Grave breaches of the Geneva Conventions of 1949

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(a) wilful killing;
(b) torture or inhuman treatment, including biological experiments;
(c) wilfully causing great suffering or serious injury to body or health;
(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
(g) unlawful deportation or transfer or unlawful confinement of a civilian;
(h) taking civilians as hostages.

grants the Rwanda Tribunal jurisdiction over serious violations of 1977 Additional Protocol II and Common Article 3 of the 1949 Geneva Conventions.[101]

Article 3
Violations of the laws or customs of war
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, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
(e) plunder of public or private property.

Article 4
Genocide
1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.
2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
(a) killing members of the group;
(b) causing serious bodily or mental harm to members of the group;
(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) imposing measures intended to prevent births within the group;
(e) forcibly transferring children of the group to another group.
3. The following acts shall be punishable:
(a) genocide;
(b) conspiracy to commit genocide;
(c) direct and public incitement to commit genocide;
(d) attempt to commit genocide;
(e) complicity in genocide.

Article 5
Crimes against humanity
The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:
(a) murder;
(b) extermination;
(c) enslavement;
(d) deportation;
(e) imprisonment;
(f) torture;
(g) rape;
(h) persecutions on political, racial and religious grounds;
(i) other inhumane acts.

101. The ICTR Statute grants subject matter jurisdiction over:
Article 2: Genocide
1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article
2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
a) Killing members of the group;
b) Causing serious bodily or mental harm to members of the group;

The core of the provisions encompassing gender or sex crimes is discussed below. The Statutes provide for individual responsibility for one who participated by planning, instigating, ordering, committing, or otherwise aiding or abetting any of the aforementioned crimes; they provide superior responsibility for one who was in a position of authority and knew or had reason to know "that a subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measure to prevent such acts or to punish the perpetrators thereof."[102]

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c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
d) Imposing measures intended to prevent births within the group;
e) Forcibly transferring children of the group to another group.

3. The following acts shall be punishable:
a) Genocide;
b) Conspiracy to commit genocide;
c) Direct and public incitement to commit genocide;
d) Attempt to commit genocide;
e) Complicity in genocide.

Article 3: Crimes against Humanity

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:
a) Murder;
b) Extermination;
c) Enslavement;
d) Deportation;
e) Imprisonment;
f) Torture;
g) Rape;
h) Persecutions on political, racial and religious grounds;
i) Other inhumane acts.

Article 4: Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:
a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
b) Collective punishments;
c) Taking of hostages;
d) Acts of terrorism;
e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
f) Pillage;
g) The passing of sentences and the carrying out of executions without previous Judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples;
h) Threats to commit any of the foregoing acts.

102. ICTY Statute, *supra* note 93, at art. 7(1)&(3); ICTR Statute, *supra* note 96, at art. 6(1)&(3).

B. War Crimes: Grave Breaches and Other Serious Violations of the Laws or Customs of War

Although the offenses included in Article 3 of the ICTY Statute derive primarily from Hague law, there is broad consensus that "laws or customs of war" also encompass the Geneva Conventions, Additional Protocols, and customary international law.[103] War crimes include grave breaches of the Geneva Conventions and serious violations of other laws (including Hague and Geneva Conventions and Additional Protocols) and customs of war.

1. Grave Breaches (ICTY, Art. 2)

Each of the 1949 Geneva Conventions provide a list of acts considered "grave breaches" and violation of these provisions is considered among the most egregious violations of international humanitarian law. The Geneva Conventions expressly confer criminal liability for violations of the articles of the Convention enumerating the grave breaches. The language ascribing criminal liability to the grave breaches is contained in the article immediately preceding the enumeration of grave breaches. Article 146 of the Fourth Geneva Convention provides:

> The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering, to be committed, any of the grave breaches. . . .
> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.

Article 147 of the Fourth Geneva Convention, which protects the civilian population, enumerates the grave breaches as: "willful killing, torture or inhumane treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or unlawful confinement of a protected person."[104] The caveat in each Convention is that the grave breach must be committed against "persons or property protected by" the particular Convention. Article 50 of the First Geneva Convention, Article 51 of the Second Geneva Convention, and Article 130 of the Third Geneva Convention list identical grave breaches to those included in Article 147 of the Fourth Geneva Convention. Protocol II does not mention grave breaches, although Additional Protocol I in Article 11(4) and in Article 85 includes and expands upon them.

There are differing views as to whether criminality for grave breach provisions extends to non-international conflicts.[105] As Professor Meron observes:

103. *See, e.g., Tadić* Appeals Chamber Decision on Jurisdiction, *supra* note 8, at para. 87.

104. Fourth Geneva Convention, *supra* note 6, at art. 147.

105. *See Tadić* Appeals Chamber Decision on Jurisdiction, *supra* note 8, at paras. 84-89 indicating that in the early 1990s, the law was not yet developed enough to apply grave breaches to internal armed conflicts. For alternative views, *see, e.g.,* Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law,* 90 AM. J. INT'L L. 238, 243 (1996) (grave breach provisions may have an "independent existence as a customary norm" and are applica-

"There is no moral justification, and no truly persuasive legal reason, for treating perpetrators of atrocities in internal conflicts more leniently than those engaged in international wars."[106] States have the right to punish grave breaches on the basis of universal jurisdiction.[107] Moreover, although there was disagreement prior to the establishment of the Yugoslav and Rwanda Tribunals as to whether violations of the Geneva Conventions outside the grave breach provisions carry criminal sanctions, the Tribunals have successfully disabused assertions that criminal liability for violations rests exclusively with grave breaches.[108]

The Geneva Conventions do not specifically list any form of sexual violence as a grave breach, although case law confirms that sex crimes are covered by the grave breaches provisions, particularly the prohibitions of "torture," "inhuman treatment," "willfully causing great suffering," and "serious injury to body or health."[109] The grave breach language is intentionally expansive to provide as much protection as possible to persons protected by the Conventions, and there is general consensus that the provisions should be interpreted liberally.

As noted above, in order to prosecute a grave breach of the Geneva Conventions, the prosecution must establish that the grave breaches were committed against persons or property protected by the relevant Convention. The "protected persons" under the Fourth Geneva Convention are "those in the hands of a Party to the conflict or Occupying Power of which they are not nationals."[110] The ICTY Trial and Appeals Chambers have interpreted this provision generously in order to afford "protected person" status to as many persons as possible, including victims who could be considered as being of the same nationality as their victimizers (for example, Bosnian Muslims victimized by Bosnian Serbs.)[111]

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ble to Common Article 3, and thus apply also in internal armed conflicts); Jordan Paust, *Applicability of International Criminal Laws to Events in the Former Yugoslavia,* 9 AM. U. J. INT'L L. & POL'Y 499 (1994) (interpreting the grave breaches to apply only to "protected persons" is too restrictive); LAURI HANNIKAINEN, PEREMPTORY NORMS IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS 685 (1988) (grave breaches comprise *jus cogens* and apply to internal or international conflicts); Christopher C. Joyner, *Strengthening Enforcement of Humanitarian Law: Reflections on the International Criminal Tribunal for the Former Yugoslavia,* 6 DUKE J. COMP. & INT'L L. 79, 83 (1995) (change of "protected persons" to "civilians" in Article 3 of the ICTY Statute extends grave breach provisions to internal conflicts).

106. Meron, *International Criminalization of Internal Atrocities, supra* note 9, at 561.

107. *See, e.g., Čelebići* Trial Chamber Judgement, *supra* note 3.

108. *See, e.g., Tadić* Appeals Chamber Decision on Jurisdiction, *supra* note 8, at para. 94.

109. *See, e.g., Čelebići* Trial Chamber Judgement, *supra* note 3.

110. Fourth Geneva Convention, *supra* note 6, at art 4(1).

111. *See, e.g., Prosecutor v. Tadić,* Judgement, 1T-94-1-A, 15 July 1999 [hereinafter *Tadić* Appeals Chamber Judgement] at paras. 164-68; *Aleksovski* Appeals Chamber Judgement, *supra* note 12, at paras. 151-52; *Čelebići* Appeals Chamber Judgement, *supra* note 3, at paras. 73-84. The Chambers essentially determined that ethnicity may be taken into account in determining nationality because, during conflict situations, factors such as religion or ethnicity may be more determinative of where an individual's alliance lies than formal nationality. According to *Čelebići*: "The nationality of the victims for the purpose of the application of Geneva Convention IV should not be determined on the basis of formal national characterizations, but rather upon an analysis of the substantial relations, taking into consideration the different ethnicity of the victims and the perpetrators, and their bonds with the foreign intervening State." *Čelebići* Appeals Chamber Judgement, *id.* at para. 84.

In practice, the ICTY has limited its Article 2 "grave breach" charges in indictments. Instead, it has simply brought most war crimes charges under Article 3 of its Statute, which means that the prosecution does not have to prove that the conflict was international in nature at the time and place charged in the indictment, as such proof may entail a lengthy and arduous evidentiary process. Prerequisites for Article 3 crimes merely require proof that the crime was committed in either an international or internal armed conflict and was "closely related" to the armed conflict.[112] Grave breaches are not included within the terms of the ICTR Statute because the conflict in Rwanda in 1994 is generally regarded as non-international in character.

2. Violations of the Laws or Customs of War (ICTY, Art. 3)

Serious violations of the laws and the customs of war may be prosecuted as war crimes. Article 3 of the ICTY Statute has been interpreted as having a "catch-all" residual function.[113] Originally, there was some discussion as to whether serious violations of the Geneva Conventions outside the grave breach provisions carry criminal penalties. Article 146 of the Fourth Geneva Convention requires each state to "take measures necessary for the suppression of all acts contrary to the provisions of the . . . [c]onvention other than the grave breaches." Indeed, Meron accurately insists that "[j]ust because the Geneva Conventions created the obligation of *aut dedere aut judicare* only with regard to grave breaches does not mean that other breaches of the Geneva Conventions may not be punished by any state party to the Conventions."[114] Thus, simply because the grave breaches are specifically attributed "war crime" status does not mean that criminal responsibility cannot attach to other provisions. The ICTY Appeals Chamber has articulated the requirements for when an act constitutes a serious violation of the laws or customs of war:

> (i) the violation must constitute an infringement of a rule of international humanitarian law;
> (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met . . .;
> (iii) the violation must be 'serious', that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. . .;
> (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[115]

It is now beyond dispute that serious violations of Hague and Geneva law, the Additional Protocols, and customary international law, impose criminal re-

112. *See, e.g., Tadić* Appeals Chamber Decision on Jurisdiction, *supra* note 8, at para. 70.

113. *Id.* at para. 91.

114. Meron, *International Criminalization of Internal Atrocities, supra* note 9, at 569. Support is also provided by the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, *supra* note 38, at art. 5 ("[C]ruel and inhuman treatment of women and children. . . shall be considered criminal"). *Aut dedere aut judicare* is essentially the duty to extradite or adjudicate persons accused of international crimes, on the basis of universal jurisdiction or treaty obligation. *See, e.g.*, M. CHERIF BASSIOUNI & EDWARD M. WISE, AUT DEDERE AUT JUDICARE: THE DUTY TO PROSECUTE OR EXTRADITE IN INTERNATIONAL LAW (1995).

115. *Tadić* Appeals Chamber Decision on Jurisdiction, *supra* note 8, at para 94.

sponsibility upon the individuals and superiors responsible for the violations. The ICTY has expressly noted that violations of the provisions of the Fourth Geneva Convention and Additional Protocols expressly prohibiting rape, enforced prostitution, and any other form of indecent assault, may be prosecuted.[116] In practice, however, most gender or sex crimes have been prosecuted under Article 3 of the ICTY Statute and Article 4 of the ICTR Statute, through the Common Article 3 provisions.

3. Common Article 3 to the Geneva Conventions (ICTR, Art. 4)

The term "Common Article 3" refers to the identical language found in Article 3 of each of the four 1949 Geneva Conventions. Common Article 3 is regarded as a "mini convention" within the Geneva Conventions, as it was originally intended to be the article in the Conventions dedicated to dictating the treatment of persons in internal conflicts. However, Common Article 3 is now recognized as part of customary international law, applicable to both internal and international armed conflicts alike.[117] Additional Protocol II, which governs internal conflicts, and which is also included within the jurisdiction of the Rwanda Tribunal, uses similar language.[118] Common Article 3 requires that humane treatment be afforded to "[p]ersons 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." It explicitly prohibits the following acts: "(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; . . . (c) Outrages upon personal dignity, in particular humiliating and degrading treatment."[119]

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116. *Kvočka* Trial Chamber Judgement, *supra* note 90, at 63-64 & n.409 ("The Trial Chamber notes that, under Article 3 of the Statute, violations of the laws or customs of war, rape is a crime also explicitly protected against by Article 27 of the Fourth Geneva Convention, Article 76(1) of Additional Protocol I, and Article 4(2)(3) of Additional Protocol II. Rape is a war crime under these provisions as well, and not solely under Common Article 3 of the Conventions.")

117. *Tadić* Appeals Chamber Decision on Jurisdiction, *supra* note 8, at paras. 98-127. *See also* THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 35 (1991); Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27); Prosecutor v. Tadić, Decision on the Defence Motion on Jurisdiction, IT-94-1, 10 Aug. 1995, at paras. 65-74, *revised and affirmed in part* by the Appeals Chamber (2 Oct. 1995).

118. *See* Additional Protocol II, *supra* note 7, at art. 4(2).

119. Common Article 3 to the 1949 Geneva Conventions, *supra* note 6. The language used in Article 4 of the ICTR Statute is nearly identical to that used in Additional Protocol II and is strikingly similar to Common Article 3. Article 4 of the ICTR Statute confers jurisdiction over, in pertinent part: "(a) Violence to life, health and physical or mental well being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; . . . (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault." *See also* ICTR Statute, *supra* note 96, at art. 4, Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. While most of the language in the ICTR Statute is identical to the language in Protocol II, Article 4(2), there are two significant differences: Subarticles (a)-(e) and (h) are exactly the same in both, and "pillage" is included in both (under differing subarticle letters), but the ICTR Statute adds: "The passing of sentences and the carrying out of executions without previous Judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples" (at art. 4(g)), and deletes: "Slavery and the slave trade in all their forms"

Although it is not explicitly listed in the ICTY Statute (whereas it is formally included in the ICTR Statute), the ICTY Appeals Chamber has consistently affirmed that Common Article 3 is implicitly subsumed within the "laws or customs of war" language of the ICTY Statute.[120] The jurisprudence of the Tribunals, as discussed *infra*, confirms that Common Article 3 encompasses various forms of sexual violence.[121]

The ICTR has contributed little to developing the law relating to serious violations of Common Article 3 and Additional Protocol II. To date, not a single person has been convicted of a war crime by the ICTR, largely because the ICTR has erroneously articulated, interpreted, and applied the war crimes prescriptions. However, in 2001, the ICTR Appeals Chamber rejected the Trial Chambers' formulation and interpretation of the war crime provisions under its Statute, allowing subsequent Appeals Chamber decisions to reverse applicable war crimes acquittals or Trial Chambers to provide for convictions at first instance.[122] Thus, there will presumably be at least marginal development of the war crime provisions regarding internal armed conflict in future ICTR decisions. This development will be especially useful because most contemporary armed conflicts are internal rather than international in character.

4. Crimes Against Humanity (ICTY, Art. 5; ICTR, Art. 3)

The term "crimes against humanity" first appeared in an international instrument in the Nuremberg Charter, when it was included as a means of prosecuting the German Nazi leaders for the gross atrocities committed against certain members of the civilian population, including German citizens, during the Second World War. Although the IMT, IMTFE, CCL10, ICTY, ICTR, and ICC Statutes or Charters have defined the scope of the crime differently, in essence, a crime against humanity consists of an inhumane act (typically a series of inhumane acts such as murder, rape, and torture) committed as part of a widespread or systematic attack that is directed against a civilian population.[123] It

from Protocol II (at art. 4(2)(f)). It is unclear why slavery was dropped from the language of the ICTR Statute.

120. *See, e.g., Tadić* Appeals Chamber Decision on Jurisdiction, at paras. 87-98.

121. *See, e.g., Čelebići* Trial Chamber Judgement, *supra* note 3; *Furundžija* Trial Chamber Judgement, *infra* note 200; *Kunarac* Trial Chamber Judgement, *supra* note 15. See also some of the original ICTY Indictments charging various forms of sexual violence under the Common Article 3 protections: Karadžić & Mladić, IT-95-5, 25 July 1995, at Count 4 (outrages upon personal dignity); Sikirica, IT-95-8, "Keraterm" of 21 July 1995, at Count 19 (cruel treatment); Miljković, IT-95-9, "Bosanski Samac" of 21 July 1995, at Counts 37, 52 (humiliating and degrading treatment); Jelisić & Češić, IT-95-10, "Brcko" of 21 July 1995, at Count 51 (humiliating and degrading treatment); Delalić, IT-96-21, "Čelebići" of 21 March 1996, at Counts 19, 22 (torture) or alternatively Counts 20, 23 (cruel treatment); Gagovic, IT-96-23, "Foža" of 26 June 1996, at Counts 112 (torture), Counts 13-28 (torture), Count 31 (outrages upon personal dignity), Counts 32-35 (torture), Counts 36-55 (torture), Count 59 (outrages upon personal dignity).

122. Prosecutor v. Akayesu, Judgement, ICTR-96-4-A, 1 June 2001, at paras. 442-45 [hereinafter *Akayesu* Appeals Chamber Judgement].

123. *See, e.g.,* LEILA SADAT, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM (2001); Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 427 (1993); Matthew Lippman, *The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five*

can consist of crimes committed by a state against its own citizens and often has a discriminatory purpose. In practice, persecution and extermination appear to be the most common manifestations of crimes against humanity, and this coupling often results in genocide charges as well. Rape may be a crime against humanity when committed as part of a widespread or systematic attack; sexual violence also regularly forms part of the inhumane acts committed against an enemy group. Rape crimes may also be prosecuted as a crime against humanity under the persecution, torture, enslavement, or inhumane acts provisions.[124]

Although the ICTY Statute requires a nexus to an armed conflict, the Statute simply imposes that element as a jurisdictional requirement, thus proof of an armed conflict is not a constituent element of the crime in other courts.[125] And although the ICTR Statute stipulates that the attack be committed on national, political, ethnic, racial, or religious grounds, the common Appeals Chamber has interpreted this requirement as being necessary to prove only for the persecution charge.[126] Moreover, the ICC Statute appropriately recognizes "gender" as one of the discriminatory grounds for the crime of persecution.[127]

The case law has confirmed that the particular act alleged (for example, rape) does not need to be committed in a widespread or systematic manner—the act need simply form part of a widespread or systematic attack. Thus, it is the attack that must be widespread or systematic, not each persecuting or criminal act forming part of the attack.[128]

The ICTY Appeals Chamber has confirmed that under customary international law, and as applied by the Tribunal, the general (*chapeau*) requirements for crimes against humanity are: "(i) there must be an attack; (ii) the acts of the perpetrator must be part of the attack; (iii) the attack must be directed against any civilian population; (iv) the attack must be widespread or systematic; and (v) the perpetrator must know that his acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population and know that his acts fit into such a pattern."[129]

Years Later, 8 TEMP. INT'L & COMP. L.J. 1, 9 (1994). A more lengthy examination of the differing crime against humanity provisions in international documents can be found in ASKIN, WAR CRIMES AGAINST WOMEN, *supra* note 42, at 344-48.

124. *See, e.g., Kvočka* Trial Chamber Judgement, *supra* note 90, and discussed *infra* in regards to rape, torture, enslavement and persecution as a crime against humanity for sexual violence; *See also* Prosecutor v. Akayesu, Judgement, ICTR-96-4-T, 2 Sept. 1998 [hereinafter *Akayesu* Trial Chamber Judgement] (recognizing forced nudity as inhumane acts constituting a crime against humanity).

125. The ICTY and ICTR have articulated the prerequisite elements for crime against humanity charges under their respective Statutes and the jurisprudence has also interpreted these provisions and applied them to the charges in each case. *See, e.g.*, summary of the ICTY elements in Prosecutor v. Kunarac, Judgement, IT-96-23 & IT-96-23/1, 12 June 2002, at para. 127 [hereinafter *Kunarac* Appeals Chamber Judgement].

126. *Akayesu* Appeals Chamber Judgement, *supra* note 121, at paras. 464-67.

127. ICC Statute, *supra* note 90, at art. 7(h).

128. *See, e.g., Kunarac* Trial Chamber Judgement, *supra* note 15, at para. 419 ("It is sufficient to show that the act took place in the context of an accumulation of acts of violence which, individually, may vary greatly in nature and gravity.")

129. *Kunarac* Appeals Chamber Judgement, *supra* note 124, at paras. 85, 105.

The Tribunals have interpreted the core legal requirements of crimes against humanity and applied them to the facts of each case, copiously developing the jurisprudence of this crime. Perhaps the most contentious issue was whether "systematic" required the existence of a plan or policy. The ICTY Appeals Chamber has recently answered in the negative, stating that a plan or policy may be indicative of the systematic nature of the crime and thus be "evidentially relevant", but it is not a legal element of the crime.[130]

5. Genocide (ICTY, Art. 4; ICTR, Art. 2)

The ICTY, ICTR, and ICC Statutes have all reproduced the definition of genocide contained in the Genocide Convention.[131] Article II of the Genocide Convention defines genocide as:

> [A]ny one of the following acts, when committed with an intent to destroy, in whole or in part, a national, ethnical, racial or religious group: (a) killing, members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group.[132]

Genocide is an international crime imposing individual criminal responsibility upon those committing or facilitating the commission of the crime.[133] It is predominately defined by intent. This intent must be to destroy, wholly or partially, a national, ethnic, racial, or religious group, as such, by any act that fits into the aforementioned list.[134] Although genocide is also considered a crime against humanity,[135] the trend has been to separate the crimes.

The process of destruction of an intended target group is not limited to physical extermination.[136] An intent to destroy—wholly or partially, physically or mentally—any protected group can be evidence of genocide. The possible

130. *Id.* at para. 98. Because the five members of the ICTY and ICTR Appeals Chambers share the same pool of seven ICTY/R Appeals Chamber Judges, it is likely that, except for peculiarities in the respective Statutes, the ICTR Appeals Chamber will reach similar conclusions as to the elements of crimes against humanity under the ICTR Statute. Indeed, the *Akayesu* Appeals Chamber Judgement appears to adopt the ICTY Appeal Chamber's formulations of the crime. *Akayesu* Appeals Chamber Judgement, *supra* note 122, at paras. 460-69.

131. In the ICC negotiations in particular, there was fear that if delegates started tinkering with the definition, some delegates might want it more expansive while others would want to make it more restrictive.

132. Convention on the Prevention and Punishment of the Crimes of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

133. *Id.* at art. 1. Genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide are all punishable.

134. *Id.* at art. 11. For a superb analysis of the *dolus specialis* of genocide, see WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 217-28 (2000).

135. *See, e.g.,* Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, Nov. 26, 1968, art. 1(b), 754 U.N.T.S. 73; M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL LAW (1999).

136. For discussion of this, see Daphna Shraga & Ralph Zacklin, *The International Tribunal for the Former Yugoslavia,* 5 EUR. J. INT'L L. 360, 368 (1994); M. .Cherif Bassiouni, *Genocide and Racial Discrimination, in* 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW 530 (M. Cherif Bassiouni & Ved Nanda eds., 1973).

sub-elements of the crime of genocide are not mutually exclusive, and more than one sub-element committed during the process of destruction can and usually does apply. Sexual violence can fall under each of the sub-elements,[137] although the most common means of using sex crimes as instruments of genocide are: (b), causing serious bodily or mental harm to the group (such as by raping or otherwise violating women);[138] (c), inflicting conditions of life on members of the group to bring about a slow death (such as having HIV/AIDS-infected persons repeatedly rape the victims); and (d) imposing measures intended to prevent births within the group (such as forced abortion or miscarriage, forced impregnation, sexual mutilation, or rape by a different ethnic group when custom dictates that the father determines the ethnicity of the child).[139]

Various forms of sexual violence may meet the elements of genocide, even when only a single member of the protected group is harmed.[140] If the intent is to seriously harm (that is, destroy, in whole or in part) a member of the protected group by any of the aforementioned methods, targeted as such because of their membership in the group, that should constitute genocide. Often the destructive act will be one of many linked to a broader pattern of both systematic and intentionally random destruction.[141]

The ICTR has most extensively developed the law on genocide. Each Indictment in the Rwanda Tribunal has charged genocide and prosecution has been largely successful. In contrast, only a small percentage of ICTY cases allege genocide, and thus far, there has been only one successful genocide conviction in the Yugoslav Tribunal. By and large, the ICTR *Akayesu* case and the

137. *See, e.g.*, Martina Vandenberg & Kelly Askin, *The Use of Gender Violence as Instruments of Genocidal Destruction, in* WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW (Kelly Askin, Martina Vandenberg, & Deena Hurwitz eds., vol. IV, forthcoming 2003); Kelly D. Askin, *Women and International Humanitarian Law, in* 1 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 41, 71-76 (Kelly D. Askin & Dorean M. Koenig eds., 1999).

138. *See, e.g.*, KATHRYN QUINA & NANCY L. CARLSON, RAPE, INCEST, & SEXUAL HARASSMENT—A GUIDE FOR HELPING SURVIVORS 86, 143 (1989); P.A. Resick, *The Psychological Impact of Rape,* 8 J. INTERPERSONAL VIOLENCE 223, 223-55 (1993); I. L. Schwartz, *Sexual Violence Against Women: Prevalence, Consequences, Societal Factors, and Preventions,* 7 AM J. PREV. MED. 363-73 (1991) and references cited therein. *See also* Vera Folnegovi-Smalc, *Psychiatric Aspects of the Rapes in the War Against the Republics of Croatia and in Bosnia-Herzegovina, in* MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA 174 (Alexandra Stiglmayer ed., 1994).

139. Christine Chinkin, *Rape and Sexual Abuse of Women in International War,* 5 EUR. J. INT'L L. 326, 333 (1994); Catharine A. MacKinnon, *Crimes of War, Crimes of Peace, in* ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 89-90 (Stephen Shute & Susan Hurley eds., 1993); Catharine MacKinnon, *Rape, Genocide and Women's Human Rights,* 17 HARV. WOMEN'S L.J. 5 (1994); ASKIN, WAR CRIMES AGAINST WOMEN, *supra* note 42, at 338-39; ANNE TIERNEY GOLDSTEIN, RECOGNIZING FORCED IMPREGNATION AS A WAR CRIME UNDER INTERNATIONAL LAW 24 (The Center for Reproductive Law and Policy, 1993).

140. HILARE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW: THE REGULATION OF ARMED CONFLICT 140 (1990); M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL TRIBUNAL 73 (1987); H.H. Jescheck, *International Criminal Law: Its Object and Recent Developments, in* A TREATISE ON INTERNATIONAL CRIMINAL LAW 73 (M. Cherif Bassiouni & Ved Nanda eds., 1973).

141. *See* Prosecutor v. Krstić, Judgement, IT-98-33-T, 2 Aug. 2001 [hereinafter *Krstić* Trial Chamber Judgement].

ICTY *Krstić* case contribute a majority of the Tribunal's jurisprudence on the elements and scope of genocide.[142]

The next section reviews the cases of the ICTY and ICTR that have developed the most significant jurisprudence in relation to gender and sex crimes.

III.
PROSECUTING GENDER-RELATED CRIMES IN THE ICTY AND ICTR

Crimes committed exclusively or disproportionately against women and girls have secured reluctant but nonetheless groundbreaking redress in the Yugoslav and Rwanda Tribunals. This section will review the jurisprudence of the five cases in the Tribunals that have most extensively developed the law on gender-related crimes, namely the *Akayesu, Èelebiœi, Furundžija, Kunarac*, and *Kvoèka* Judgements. Other cases, most notably *Tadić, Musema, Karadžić & Mladić, Milošević, Krajišnik & Plavšić, Nikolić, Cyangugu,* and *Butare*, also include evidence of gender-related crimes and are at varying stages in the judicial proceedings.[143] The prosecution of gender crimes in the Tribunals is typically fraught with inherent difficulties and gratuitous obstacles, and the crimes are usually investigated and indicted only after concerted pressure by women's rights organizations and feminist scholars to prosecute the crimes. Nonetheless the progress made is nothing short of revolutionary.

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142. *See Akayesu* Trial Chamber Judgement, *supra* note 124; *Krstić* Trial Chamber Judgement, *supra* note 141.

143. *See* ICTY/R websites at http://www.un.org/icty and http://www.ictr.org to review these cases. Of particular note, the Karadžić & Mladić Rule 61 Decision mentioned "forced impregnation", the *Tadić* Trial Chamber Judgement discussed instances of rape and male sexual mutilation, and the *Plavšić* and *Butare* cases (ICTY and ICTR respectively) bring charges against female leaders accused of responsibility for crimes against humanity and genocide for various crimes, including sexual violence. Prosecutor v. Karadžić & Mladić, Review of the Indictment Pursuant to Rule 61, IT-95-5-R61 & IT-95-18-R61, 11 July 1996, at para. 64; Prosecutor v. Tadić, Opinion & Judgement, IT-94-1-T, 7 May 1997, at paras. 154, 206, 470, 726-30; Prosecutor v. Krajišnik & Plavšić, Consolidated Amended Indictment, IT-00-39 & 40-PT, 7 Mar. 2002, at paras. 17(b)(c),19(c)(g); Prosecutor v. Nyiramasuhuko & Ntahobali, Amended Indictment, ICTR-97-21-I, 1 Mar. 2001, at paras. 5,18, 6.37, 6.53, 6.56. See discussion of these cases in: Betty Murungi, *Prosecuting Gender Crimes at the International Criminal Tribunal for Rwanda*, AFLA Q. 5 (Apr.-Jun. 2001); Gabrielle Kirk McDonald, *Crimes of Sexual Violence: The Experience of the International Criminal Tribunal,* 39 COLUMBIA J. TRANSNAT'L L. 1 (2000); Patricia Viseur Sellers, *Rape and Sexual Assault as Violations of International Humanitarian Law, in* 1 SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000); Martina Vandenberg, *Kosovo: Rape as a Weapon of "Ethnic Cleansing"*, 12(3) HUMAN RIGHTS WATCH (2000); Magdalini Karagiannakis, *The Definition of Rape and Its Characterization as an Act of Genocide—A Review of the Jurisprudence of the International Criminal Tribunals for Rwanda and the Former Yugoslavia*, 12 LEIDEN J. INT'L L. 1 (1999); Kelly D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 AM. J. INT'L L. 97-123 (1999); Patricia Viseur Sellers, *Emerging Jurisprudence on Crimes of Sexual Violence*, 13(6) AM. U. INT'L L. REV. 1523 (1998); Patricia Viseur Sellers & Kaoru Okuizumi, *International Prosecution of Sexual Assaults,* 7 TRANSNAT'L L. & CONTEMP. PROBS. (1997); Kelly Dawn Askin, *The International Criminal Tribunal for Rwanda and Its Treatment of Crimes Against Women, in* 2 INTERNATIONAL HUMANITARIAN LAW: ORIGINS, CHALLENGES AND PROSPECTS (John Carey et al. eds., forthcoming 2003).

A. *The* Akayesu *Judgement: Characterizing Rape as an Instrument of Genocide*

The landmark *Akayesu* Trial Chamber Judgement was handed down by the Rwanda Tribunal on September 2, 1998.[144] The Judgement carries monumental legal significance: It concluded that rape and other forms of sexual violence were used as instruments of genocide, and also the crimes formed part of a widespread and systematic attack directed against civilians, constituting crimes against humanity. This was the first ever conviction of either genocide or crimes against humanity for sexual violence. The Trial Chamber also articulated the seminal definitions of rape and sexual violence under international law, and recognized forced nudity as a form of sexual violence constituting inhumane acts as crimes against humanity.

In this case, Jean-Paul Akayesu, *bourgmestre* (akin to mayor) of Taba commune in Rwanda, was charged in the original Indictment with twelve counts of genocide, crimes against humanity, and war crimes for the murder, extermination, torture, and cruel treatment committed throughout Taba. There were no charges for gender-related crimes, despite the fact that women's and human rights organizations had documented extensive evidence of rape and other forms of sexual violence throughout Rwanda, including Taba.[145]

During the trial, a witness on the stand spontaneously testified about the gang rape of her six-year-old daughter by three Interahamwe soldiers. This was followed by the testimony of another witness, who said that she was a victim of and witness to other rapes in Taba committed by members of the Hutu militia. As a direct result of this evidence, as well as international exhortations to include sexual violence in the charges against Akayesu,[146] the trial was convened so that the Office of the Prosecutor (OTP) could investigate charges of sexual violence and consider amending the indictment to include appropriate charges if evidence of the crimes were found in Taba and individual or superior responsibility for the crimes could be attributed to Akayesu.[147] Also crucial to its inclusion was the presence of Judge Navanethem Pillay of South Africa on the bench, a judge with extensive expertise in international human rights law and gender-related crimes.

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144. *See Akayesu* Trial Chamber Judgement, *supra* note 124.

145. *See, e.g.*, BINAIFER NOWROJEE, SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH (Human Rights Watch & Fédération Internationale, 1996); *Report of the Mission to Rwanda on the Issue of Violence Against Women in Situations of Armed Conflict, by Radhika Coomaraswamy, U.N. Special Rapporteur on Violence Against Women, U.N.* Doc. E/CN.4/1998/54/Add.1 (1998).

146. Dozens of women's rights activists, human rights organizations, academics, and international lawyers faxed letters to the Tribunal urging it not to exclude the gender-related crimes. The NGO Coalition for Women's Human Rights in Conflict Situations also filed an *amicus* in the case on the issue of sexual violence. *See* Prosecutor v. Akayesu, Amicus Brief Respecting the Amendment of the Indictment and Supplementation of the Evidence to Ensure the Prosecution of Rape and Sexual Violence Within the Competence of the ICTR, May 1997 (prepared by Joanna Birenbaum, Lisa Wyndel, Rhonda Copelon & Jennifer Green).

147. *See Akayesu* Trial Chamber Judgement, *supra* note 124, at para. 416.

After an investigation revealed vast evidence of sexual violence committed in Taba by Hutu men against Tutsi women, the prosecution amended the indictment to charge Akayesu with rape and "other inhumane acts" as crimes against humanity and war crimes in Counts 13-15 of the Amended Indictment. The genocide counts also referenced the paragraphs alleging the rape crimes, thus allowing a finding of rape as an instrument of genocide if the evidence led to that conclusion.

The *Akayesu* Trial Chamber defined rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."[148] Sexual violence, which is broader than rape, is defined as "any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact."[149] In the Judgement, forced nudity was cited as an example of sexual violence not involving touching. Further, the Trial Chamber emphasized that the amount of coercion required does not need to amount to physical force, as "[t]hreats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion." Notably, the Chamber stressed that coercion may be inherent in armed conflict situations or when military personnel, such as militia, are present.[150]

The Trial Chamber noted that while national jurisdictions have historically defined rape as "non-consensual sexual intercourse," a broader definition was warranted to include "acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual." Providing an example from the testimony before the Court, the Chamber stipulated that the act of "thrusting a piece of wood into the sexual organs of a woman as she lay dying—constitutes rape in the Tribunal's view."[151]

The Trial Chamber additionally noted that sexual violence fell within the scope of "other inhumane acts" as crimes against humanity, "outrages upon personal dignity" of the war crime provisions of the Statute, and "serious bodily or mental harm" of the genocide prescriptions.[152] Although the rape crimes were not charged as torture in the Amended Indictment, the Trial Chamber analogized aspects of the crimes of rape and torture, noting that rape "is a form of aggression" and the elements of the crime "cannot be captured in a mechanical description of objects and body parts."[153] The Chamber noted that "[l]ike torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture,

148. *Id.* at para. 688.

149. *Id.*

150. *Id.* The *Akayesu* definition of rape was adopted by the ICTY in the *Čelebići* Trial Chamber Judgement, *supra* note 3, at para. 479.

151. *Akayesu* Trial Chamber Judgement, *supra* note 124, at para. 686.

152. *Id.* at para. 688.

153. *Id.* at para. 687.

rape is a violation of personal dignity, and rape in fact constitutes torture" when all of the elements of torture are satisfied.[154]

The Judgement unambiguously recognized that sexual violence causes extensive harm, and it is intentionally used during periods of mass violence to subjugate and devastate a collective enemy group—in this case members of the Tutsi group and their sympathizers. The decision forcefully recognized that, in the genocidal regime carried out by Hutus, rape crimes were perpetrated as "an integral part of the process of destruction."[155] It explained that "[s]exual violence was a step in the process of destruction of the Tutsi group—destruction of the spirit, of the will to live, and of life itself."[156] Thus, the Court emphasized that the injury and suffering inflicted by sexual violence extends beyond the individual to the collective targeted group, in this case, the Tutsis.

There were no allegations that Akayesu himself physically perpetrated rape crimes. The Trial Chamber held that he could be held accountable for the sexual violence because of his role in ordering, instigating, or aiding and abetting the rapes, forced public nudity, and sexual mutilation, thereby facilitating the commission of the crimes.[157] He did this by his presence, omissions, or words of encouragement during or before many of the instances of sexual violence. Ultimately, the Tribunal found that Akayesu incurred criminal responsibility for several crimes, including various forms of sexual violence, committed by Hutu men against Tutsi women and girls in and around the Taba commune. The Trial Chamber determined that "by virtue of his authority," Akayesu's presence and words of encouragement "sent a clear signal of official tolerance" for the acts of sexual violence.[158] As a result, the Tribunal convicted Akayesu of individual responsibility for the sex crimes.

In finding Akayesu guilty of rape as a crime against humanity, the Chamber found that: "a widespread and systematic attack against the civilian ethnic population of Tutsis took place in Taba, and more generally in Rwanda, between April 7 and the end of June, 1994. The Tribunal finds that the rape and other inhumane acts which took place on or near the bureau communal premises of Taba were committed as part of this attack."[159]

As noted above, the Trial Chamber also held that Akayesu was responsible for rape crimes committed within the context of the genocide. Finding that rape crimes "constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particu-

154. *Id.* Note that the last requirement, that state action be involved when applying international humanitarian law or international criminal law, as opposed to human rights law, has been rejected by the ICTY in the *Kunarac* case, discussed *infra*.

155. *Id.* at para. 731.

156. *Id.* at para. 732. The Chamber further explained that the "acts of rape and sexual violence, as other acts of serious bodily and mental harm committed against the Tutsi, reflected the determination to make Tutsi women suffer and to mutilate them even before killing them, the intent being to destroy the Tutsi group while inflicting acute suffering on its members in the process." *Id.* at para. 733.

157. *Id.* at paras. 692-94.

158. *Id.* at para. 693.

159. *Id.* at para. 695.

lar group, targeted as such,"[160] the Chamber concluded that rape was used as an instrument of the genocide in Taba, and that Akayesu's acts and omissions rendered him individually responsible for these crimes. The Trial Chamber reported:

> Numerous Tutsi women were forced to endure acts of sexual violence, mutilations and rape, often repeatedly, often publicly and often by more than one assailant. Tutsi women were systematically raped, as one female victim testified to by saying that "each time that you met assailants, they raped you." Numerous incidents of such rape and sexual violence against Tutsi women occurred inside or near the Bureau communal. It has been proven that some communal policemen armed with guns and the accused himself were present while some of these rapes and sexual violence were being committed.[161]

The Judgement recognized that rape was frequently a prelude to death, but at times, the women were left alive because rape was considered worse than death.

In total, the Trial Chamber convicted Akayesu of nine of the fifteen counts charged against him in the Amended Indictment. He was found guilty of genocide and the crimes against humanity of extermination, murder, torture, rape, and other inhumane acts. For these crimes, the Trial Chamber sentenced him to life imprisonment.[162] The ICTR Appeals Chamber Judgement rendered on June 1, 2001 upheld the Trial Chamber Judgement.[163]

B. The Čelebići *Judgement: Recognizing Sexual Violence as Torture*

Trial Chamber II *quater* of the Yugoslav Tribunal rendered the *Čelebići* Trial Chamber Judgement on November 16, 1998.[164] The most notable gender-related aspects of this case are its implications regarding superior responsibility, its treatment of various forms of sexual violence committed against male detainees, and its development of the law of torture when victims are tortured by means of rape.

In *Čelebići*, the four accused on trial were charged with various war crimes (as grave breaches of the 1949 Geneva Conventions under Article 2 of the ICTY Statute; or as violations of the laws or customs of war for violations of Common Article 3 of the Geneva Conventions under Article 3 of the ICTY Statute). The prosecution indicted the accused for the war crimes of unlawful confinement of civilians, willfully causing great suffering, cruel treatment, willful killing, murder, torture, inhuman treatment, and plunder. These crimes were alleged to have occurred when Bosnian Muslims and Bosnian Croats attacked the Konjic municipality in central Bosnia and Herzegovina in May 1992, expelling the Bosnian Serb residents from their homes and confining most of them in Čelebići prison

160. *Id.* at 731.

161. *Id.* at paras. 706-07.

162. Prosecutor v. Akayesu, Sentence, ICTR-96-4-T, 2 October 1998. For an examination of a broader scope of the crimes, *see, e.g.*, ALISON DES FORGES, LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA 271-82 (Human Rights Watch & International Federation of Human Rights, 1999).

163. *See Akayesu* Appeals Chamber Judgement, *supra* note 122.

164. *See Čelebići* Trial Chamber Judgement, *supra* note 3.

camp. The Indictment alleged that detainees in the camp were "killed, tortured, sexually assaulted, beaten, and otherwise subjected to cruel and inhuman treatment."[165]

The accused included Zejnil Delalić, a person with alleged authority over Čelebići camp; Zdravko Muciæ, *de facto* commander of the camp; Hazim Delić, a person who worked in the camp; and Esad Landzo, a guard at the camp. Delalić, Mucić, and Delić were charged not only with individual responsibility, but also with superior or command responsibility for failing to prevent, halt, or punish crimes committed by subordinates purportedly under their authority. Mucić and Delić were also charged with individual responsibility for physically committing certain crimes, including sexual violence. Holding no position of authority, the prosecution charged Landzo solely with individual responsibility for the crimes alleged against him.

Although the sexual nature of certain crimes is not immediately obvious in the charges due to the language used in the indictment, the charges did include various forms of sexual violence brought against three of the accused. More explicitly, the prosecution charged Delić with torture under Article 2 of the Statute as a grave breach of the 1949 Geneva Conventions, and under Article 3 of the Statute as a violation of the laws or customs of war, for the *actus reus* of forcible sexual penetration.[166] He was also charged in the alternative with cruel treatment. According to the allegations, Delić personally raped two victims, including survivor-witness Ms. Ćećez, who "was raped by three different persons [including Delić] in one night and on another occasion she was raped in front of other persons." Another survivor, Witness A, "was subjected to repeated incidents of forcible anal and vaginal intercourse. . . . Hazim Delić raped Witness A during her first interrogation and continued to rape her every few days over a six-week period thereafter."[167] The prosecution charged Delić with individual responsibility for these crimes.

Delalić, Mucić and Delić were charged with superior responsibility for "willfully causing great suffering or serious injury to body or health" as a grave breach and with cruel treatment as a violation of the laws or customs of war, for acts committed by their subordinates, which included subjecting two male detainees to abusive treatment by having a burning fuse cord placed around their genitals.[168] These three accused were also charged with superior responsibility for the grave breach of inhuman treatment and for cruel treatment as a violation of the laws or customs of war when subordinates forced two male detainees to perform fellatio on each other.[169]

In considering the torture charges for the sexual violence, the Trial Chamber emphasized that "in order for rape to be included within the offence of tor-

165. Prosecutor v. Delalić, Indictment, IT-96-21-I, 19 March 1996, para. 2 [hereinafter *Čelebići* Indictment].

166. *Id.* at paras. 18, 19.

167. *Čelebići* Trial Chamber Judgement, *supra* note 3, at para. 14 (paraphrasing the Indictment.)

168. *Id.* at para. 24 (paraphrasing the Indictment.)

169. *Id.* at para. 26 (paraphrasing the Indictment.)

ture it must meet each of the elements of this offence."[170] The elements of torture for purposes of the war crimes provisions of the ICTY Statute were held by the Trial Chamber to be:

> (i) There must be an act or omission that causes severe pain or suffering, whether physical or mental,
> (ii) which is inflicted intentionally,
> (iii) and for such purposes as obtaining information or a confession from the victim, or a third person, punishing the victim for an act he or she or a third person has committed or is suspected of having committed, intimidating or coercing the victim or a third person, or for any reason based on discrimination of any kind,
> (iv) and such act or omission being committed by, or at the instigation of, or with the consent or acquiescence of, an official or other person acting in an official capacity.[171]

The Trial Chamber thus adopted the elements of torture contained in the Convention Against Torture,[172] and stipulated that when any form of sexual violence satisfies these elements, it may constitute torture.[173] Interpreting the elements of torture vis-à-vis the rapes, the Chamber stressed:

> The Trial Chamber considers the rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity. The condemnation and punishment of rape becomes all the more urgent where it is committed by, or at the instigation of, a public official, or with the consent or acquiescence of such an official. Rape causes severe pain and suffering, both physical and psychological. The psychological suffering of persons upon whom rape is inflicted may be exacerbated by the social and cultural conditions and can be particularly acute and long lasting. Furthermore, it is difficult to envisage circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation. In the view of this Trial Chamber this is inherent in situations of armed conflict.[174]

According to the evidence established at trial, when Ms. Ćećez arrived in the camp, Delić interrogated her. During the course of the interrogation, Delić repeatedly raped Ms. Ćećez as he questioned her as to the whereabouts of her husband. Three days later, Delić subjected her to multiple rapes when she was transferred between buildings in the camp, and he again raped her in the camp two months later.[175] The Trial Chamber held that "the acts of vaginal penetration by the penis under circumstances that were coercive, quite clearly constitute rape."[176] The Chamber found that the rapes committed by Delić caused severe pain and suffering[177] and they were committed against Ms. Ćećez for the purpose of obtaining information as to the whereabouts of her husband, to punish

170. *Id.* at para. 480.
171. *Id.* at para. 494.
172. Convention Against Torture, *supra* note 21, at art 1.
173. *Čelebići* Trial Chamber Judgement, *supra* note 3, at para. 496.
174. *Id.* at para. 495.
175. *Id.* at paras. 937-38.
176. *Id.* at para. 940.
177. *Id.* at para. 942.

her for not providing the information, to punish her for the acts of her husband, and to coerce and intimidate her into cooperating.[178]

In addition, the Trial Chamber found that she was raped for discriminatory purposes, concluding that discrimination on the basis of sex was another purpose behind the torture: "the violence suffered by Ms. Ćećez in the form of rape, was inflicted upon her by Delić because she is a woman . . . [and] this represents a form of discrimination which constitutes a prohibited purpose for the offence of torture."[179] This acknowledges that females are often tortured in ways different than males, and singled out for discriminatory treatment because of their sex or gender. Here, the accused tortured the victim by means of rape because she was a female of an opposing group; this constitutes discriminatory treatment under the Torture Convention.

The Trial Chamber also emphasized that Delić used sexual violence as an instrument of terror and subordination, since he committed the rapes with an aim of "intimidat[ing] not only the victim but also other inmates, by creating an atmosphere of fear and powerlessness."[180] Hence, the Trial Chamber held that Delić had repeatedly raped Witness A for the purpose of intimidating, coercing, and punishing her, and that these rapes caused severe mental and physical pain and suffering. The Chamber found Delić guilty of torture for the *actus reus* of forcible sexual penetration.[181]

The Trial Chamber considered the offense of "wilfully causing great suffering or serious injury to body or health," a grave breach of the Geneva Conventions, and stated that the crime constitutes an act or omission that is intentional, being an act which, judged objectively, is "deliberate and not accidental, which causes serious mental or physical suffering or injury. It covers those acts that do not meet the purposive requirements for the offence of torture, although clearly all acts constituting torture could also fall within the ambit of this offence."[182]

In the Judgement, the Tribunal found Mucić guilty of the grave breach of "wilfully causing great suffering" when subordinates under his authority tied a burning fuse cord around the genitals of a victim.[183]

When considering the crime of inhuman treatment, which is a grave breach of the Geneva Conventions, the Trial Chamber surveyed the term's usage in the Commentary to the Geneva Conventions, human rights instruments, and jurisprudence of human rights bodies. It defined inhuman treatment as "an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity."[184] It postulated that this intentional mistreatment is inconsistent with the fundamental principle of humanity,

178. *Id.* at para. 941.
179. *Id.*
180. *Id.*
181. *Id.* at paras. 475-96, 965-65.
182. *Id.* at para. 511. The purposive requirements of torture are discussed *infra.*
183. *Id.* at paras. 1038-40.
184. *Id.* at para. 543.

and inhuman treatment "forms the umbrella" covering all other 'grave breaches' listed in the Geneva Conventions.[185]

The Trial Chamber also considered the crime of cruel treatment as a violation of Common Article 3 to the Geneva Conventions, and concluded that it shared an identical definition with inhuman treatment. As such, it carried the "equivalent meaning and therefore the same residual function for the purposes of common article 3 . . . as inhuman treatment does in relation to grave breaches."[186]

The Tribunal also convicted Mucić of inhuman treatment and cruel treatment for failing his command responsibility when subordinates under his authority forced two brothers to publicly perform fellatio on each other. Significantly, the Trial Chamber noted that the forced fellatio "could constitute rape for which liability could have been found if pleaded in the appropriate manner."[187] Thus, if the forced fellatio had been pleaded as rape, the Trial Chamber would have convicted of rape instead of the more obscure crimes of inhuman and cruel treatment.

The Trial Chamber examined the scope of criminal responsibility for military commanders or other persons having superior authority and explained that holding a superior criminally responsible for unlawful conduct of subordinates was a "well-established norm" of international customary and conventional law.[188] It identified the essential elements of command or superior responsibility, which involves the failure to act when there is a legal duty to do so, as follows:

(i) the existence of a superior-subordinate relationship;
(ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and
(iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.[189]

The Trial Chamber concluded that persons in positions of authority, whether civilian or within military structures, may incur criminal liability under the doctrine of superior responsibility on the basis of "their *de facto* as well as *de jure* positions as superiors. The mere absence of formal legal authority to control the actions of subordinates should therefore not be understood to preclude the imposition of such responsibility."[190] To be held criminally accountable, the superior, whether civilian or military, must have "effective control" over subordinates committing the crime, "in the sense of having the material ability to prevent and punish the commission" of the crimes.[191]

185. *Id.* at para. 543. Inhuman treatment would cover all offences found to constitute torture or willfully causing great suffering. *Id.* at para. 544.
186. *Id.* at para. 552. Thus torture under Common Article 3 is included within the concept of cruel treatment and acts not satisfying the purposive requirements of torture would constitute cruel treatment. *Id.*
187. *Id.* at para. 1066.
188. *Id.* at para. 333.
189. *Id.* at para. 346.
190. *Id.* at para. 354.
191. *Id.* at para. 378.

The Chamber may not presume knowledge, but it can and often does infer knowledge. Hence, without direct evidence (a paper trail, a tacit admission, or eyewitness testimony, for example) that superiors knew of crimes committed by subordinates, the prosecution will typically attempt to establish knowledge through circumstantial evidence.[192] Knowledge can be inferred in a number of ways, including by considering the number, type, or scope of illegal acts; the length of time; the logistics, number, type, or rank of troops or officers involved; the geographical location or widespread occurrence of the illegal acts; the location of the commander; the "tactical tempo of operations"; and the *modus operandi* of similar acts.[193]

The Trial Chamber considered that inquiry notice was the appropriate standard in determining whether a superior had "reason to know" of crimes committed by subordinates, such that information must have been available which would put a superior on notice about possible criminal activity by subordinates. It clarified that the "information need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes."[194] Indeed, inquiry notice is satisfied if the information "indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed" by subordinates.[195]

The Trial Chamber was careful to stress that "law cannot oblige a superior to perform the impossible. Hence, a superior may only be held criminally responsible for failing to take such measures that are within his powers." This means that the measures required but not forthcoming had to have been "within his material possibility."[196] Moreover, lack of formal legal power authorizing the measures to prevent or repress the crimes does not automatically preclude holding a superior criminally responsible for crimes committed by subordinates.[197]

Superior responsibility for crimes committed by subordinates—crimes which the superior had a duty to prevent, halt, or punish, but failed to take necessary and reasonable steps to do so—is not limited to war crimes and can be incurred for other crimes, including crimes against humanity and genocide. Superior responsibility may be used to hold military and civilian leaders accountable for crimes of sexual violence committed by subordinates that the superior negligently failed to prevent or punish. The ICTY Appeals Chamber Judgement rendered on February 20, 2001,[198] upheld the findings of the 452-page *Ćelebići* Trial Chamber Judgement.

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192. *Id.* at para. 386.
193. *Id.*
194. *Id.* at para. 393.
195. *Id.* The *Čelebići* Appeals Chamber expounded upon this standard, giving an example of inquiry notice, stating that a superior who "has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having the required knowledge." Prosecutor v. Delalić, Judgement, IT-96-21-A, 20 Feb. 2001, at para. 238 [hereinafter *Čelebići* Appeals Chamber Judgement].
196. *Čelebići* Trial Chamber Judgement, *supra* note 3, at para. 395.
197. *Id.*
198. *Čelebići* Appeals Chamber Judgement, *supra* note 195.

The precedent from this case can be used, *inter alia*, to hold superiors criminally liable for failing to adequately train, monitor, supervise, control, and punish subordinates who commit rape crimes.[199] There can be no illusions that women and girls are not at high risk of sexual violence during war, mass violence, and occupation. The danger of sexual violence increases when women and girls are separated from their families and held in detention facilities guarded by armed men of an opposing side, a situation that renders them exceptionally vulnerable to exploitation and abuse.

C. *The* Furundžija *Judgement: The Rape of a Single Victim is a Serious Violation of International Humanitarian Law*

The Yugoslav Tribunal rendered the *Furundžija* Trial Chamber Judgement on December 10, 1998.[200] The most significant gender aspects of this case are developments in the law of torture by means of sexual violence and the Tribunal's rejection of the notion that female Judges with gender advocacy backgrounds are inherently biased against men accused of rape crimes.

During the armed conflict in central Bosnia-Herzegovina, a civilian woman of Bosnian Muslim origin (Witness A) was arrested and taken to the headquarters of the Jokers, a special military police unit of the Croatian Defense Council (HVO) whose members had "a 'terrifying' reputation."[201] At the headquarters, Furundžija (the only accused on trial because he was the only indictee within the custody of the Tribunal) verbally interrogated Witness A while another, Accused B, physically assaulted her. Furundžija and Accused B were both subcommanders of the Jokers.

Her interrogators forced Witness A to stand nude before them and a group of laughing soldiers. During the initial phase of the interrogation, Accused B repeatedly ran a knife up the victim-witness's inner thigh and threatened to stick it inside her and cut her sexual organs if she failed to cooperate.[202] Over the course of the day, Accused B proceeded to rape Witness A several times and in multiple ways (orally, vaginally, and anally), often in the presence of Furundžija and others. The prosecution charged Furundžija in the Indictment with two counts of violations of the laws or customs of war: torture and "outrages upon personal dignity, including rape."[203] The accused also interrogated and beat Witness D, a Bosnian Croat male member of the HVO who was suspected of assisting Witness A and her sons, in the same room where Witness A was being

199. This is especially so when combined with the jurisprudence of the *Kvočka* Trial Chamber Judgement, *supra* note 90.

200. Prosecutor v. Furundžija, Judgement, IT-95-17/1-T, 10 Dec. 1998 [hereinafter *Furundžija* Trial Chamber Judgement].

201. *Id.* at para. 72.

202. *Id.* at para. 82.

203. *See* Prosecutor v. Furundžija, Indictment, Amended-Redacted, IT-95-17/1-PT, 2 June 1998, in which Counts 1-11 and 15-25 against additional accused are redacted. Furundžija was charged under Article 3 of the ICTY Statute with Count 13, Violation of the Laws or Customs of War (torture), and Count 14, Violation of the Laws or Customs of War (outrages upon personal dignity). Count 12 was withdrawn. Torture and outrages upon personal dignity are prohibited by Common Article 3 to the 1949 Geneva Conventions, and thus fall under Article 3 of the Statute.

raped and otherwise abused.[204] Furundžija was present during part of the sexual violence, and his role in verbally interrogating the witness during the infliction of the violence, as well as his words, acts, and omissions, encouraged and facilitated the crimes.

After surveying trends in national laws and other jurisprudence, the *Furundžija* Trial Chamber held that the "objective elements" of rape in international law consist of the following:

(i) the sexual penetration, however slight:
  (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
  (b) of the mouth of the victim by the penis of the perpetrator;
(ii) by coercion or force or threat of force against the victim or a third person.[205]

The Chamber found that the elements of rape in this case were met "when Accused B penetrated Witness A's mouth, vagina and anus with his penis;" the rape was attributable to the accused because the Trial Chamber had also found that these crimes were committed as part of the interrogation process in which Furundžija participated.[206] Although consent was not raised in this case, the Trial Chamber stressed that "any form of captivity vitiates consent."[207]

The Trial Chamber noted increased efforts by international bodies to redress "the use of rape in the course of detention and interrogation as a means of torture and, therefore, as a violation of international law."[208] It further noted that when the requisite elements are met, rape might also constitute a crime against humanity, a grave breach of the Geneva Conventions, a violation of the laws or customs of war, and an act of genocide.[209]

In determining the appropriate definition of torture to utilize in the case, the Trial Chamber adopted the definition of torture found in the Torture Convention, which imposes a "state actor" requirement. Noting that a large number of persons are typically involved in the torture process, the Chamber stressed that many people take part in torture by performing different functions and it emphasized that each of these roles, even the relatively minor ones, renders one liable for torture.[210] More precisely, the Trial Chamber stated that the tendency in torture is to divide the process and distribute the tasks among many in order to:

> "compartmentalize" and "dilute" the moral and psychological burden of perpetrating torture by assigning to different individuals a partial (and sometimes relatively minor) role in the torture process. Thus, one person orders that torture be carried out, another organises the whole process at the administrative level, another asks questions while the detainee is being tortured, a fourth one provides or prepares the tools for executing torture, another physically inflicts torture or causes mental suffering, another furnishes medical assistance so as to prevent the detainee from dying as a consequence of torture or from subsequently showing physical traces of the sufferings he has undergone, another processes the results of interrogation

204. *Furundžija* Trial Chamber Judgement, *supra* note 200, at paras. 124-30.
205. *Id.* at para. 185.
206. *Id.* at para. 270.
207. *Id.* at para. 271.
208. *Id.* at para. 163.
209. *Id.* at para. 172.
210. *Id.* at para. 254.

known to be obtained under torture, and another procures the information gained as a result of the torture in exchange for granting the torturer immunity from prosecution.[211]

Indeed, the Chamber noted that international law "renders all the aforementioned persons equally accountable," and different levels and forms of participation should simply be reflected in sentencing.[212] The Trial Chamber emphasized that the different roles played by Furundžija and Accused B complemented the torture process:

Witness A was interrogated by the accused. She was forced by Accused B to undress and remain naked before a substantial number of soldiers. . . .The interrogation by the accused and the abuse by Accused B were parallel to each other. . . . There is no doubt that the accused and Accused B, as commanders, divided the process of interrogation by performing different functions. The role of the accused was to question, while Accused B's role was to assault and threaten in order to elicit the required information from Witness A and Witness D.[213]

The Trial Chamber expanded the list of prohibited purposes behind the Torture Convention's definition of torture to include humiliation, stating that "among the possible purposes of torture one must also include that of humiliating the victim. This proposition is warranted by the general spirit of international humanitarian law: the primary purpose of this body of law is to safeguard human dignity."[214] Here, the Trial Chamber found that Witness A was raped during the course of her interrogation in an effort to "degrade and humiliate her."[215] The Chamber concluded that the verbal interrogation by Furundžija, which was "an integral part of the torture,"[216] as well as the physical perpetration by Accused B, "became one process," and these acts caused severe physical and mental suffering to the victim.[217] For these crimes, the Chamber found Furundžija guilty of individual responsibility for the sexual violence as a co-perpetrator of torture and as an aider and abettor of outrages upon personal dignity including rape.[218]

To be a perpetrator or co-perpetrator of torture, an accused must "participate in an integral part of the torture and partake of the purpose behind the torture." To be an aider or abettor of torture, there must be some assistance "which has a substantial effect on the perpetration of the crime and with knowledge that torture is taking place."[219]

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211. *Id.* at para. 253.

212. *Id.* at paras. 254, 257.

213. *Id.* at paras. 124, 130.

214. *Id.* at para. 162.

215. *Id.* at para. 124, 130.

216. *Id.* at para. 267(i).

217. *Id.* at para. 264.

218. *Id.* at paras. 269, 275. In distinguishing a co-perpetrator from an aider or abettor, the Trial Chamber concluded that one who participates in torture and "partakes of the purpose behind torture" is a perpetrator, whereas one who does not share the intent but "gives some sort of assistance and support with the knowledge" that torture is being inflicted is an aider or abettor. *Id.* at para. 252. *See also id.* at paras. 243, 245, 249, 257. The assistance must not only be knowing, it must also "have a substantial effect on the commission of the crime." *Id.* at paras. 234-35.

219. *Id.* at para. 257.

Significantly, the Trial Chamber also found that being forced to witness rape formed part of the torture of Witness D, who was interrogated and beaten while Witness A was being raped in his presence: "The physical attacks on Witness D, as well as the fact that he was forced to watch sexual attacks on a woman, in particular, a woman whom he knew as a friend, caused him severe physical and mental suffering."[220] It could have also found that having her rape witnessed by either the soldiers or Witness D was an aggravating factor to the torture to which Witness A was intentionally subjected.[221]

The Trial Chamber analyzed the "outrages upon personal dignity including rape" charge and considered that Witness A "suffered severe physical and mental pain, along with public humiliation, at the hands of Accused B in what amounted to outrages upon her personal dignity and sexual integrity." Although Furundžija did not physically perpetrate the violence inflicted upon Witness A, nonetheless "his presence and continued interrogation of Witness A encouraged Accused B and substantially contributed to the criminal acts committed by him."[222] For these crimes, the Chamber sentenced Furundžija to ten years of imprisonment for the torture conviction and eight years imprisonment for the outrages upon personal dignity conviction, which were to run concurrently instead of consecutively.[223]

During the trial, which lasted a total of eleven trial days extended over a period of five months, several troubling issues arose. A primary concern centered on the disclosure of statements made to a rape counseling center and the weight given to a victim's testimony vis-à-vis her credibility when suffering from post traumatic stress disorder (PTSD) or rape trauma syndrome (RTS).[224]

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220. *Id.* at para. 267(ii). Regretably, the Trial Chamber did not explain or provide support for its apparent conclusion that the accused committed a war crime against Witness D, who was a member of the same side as the perpetrators.

221. See *Kvočka* Trial Chamber Judgement, *supra* note 90, at para. 149: "The presence of onlookers, particularly family members, also inflicts severe mental harm amounting to torture on the person being raped."

222. *Furundžija* Trial Chamber Judgement, *supra* note 198, at para. 273.

223. In imposing concurrent sentencing, the Trial Chamber reasoned:

> Witness A was tortured by means of serious sexual assault and beatings, and the Trial Chamber has considered this to be a particularly vicious form of torture for the purpose of aggravating the sentence imposed under Count 13 [torture]. On the other hand, in assessing the sentence imposed under Count 14 [outrages upon personal dignity including rape], the Trial Chamber has [already] considered the fact that the sexual assault and rape amounted to a very serious offence. Therefore, the sentence imposed for outrages upon personal dignity including rape shall be served concurrently with the sentence imposed for torture.

Furundžija Trial Chamber Judgement, *supra* note 200, at para. 295.

224. Most of the concerns were raised in two *amicus* briefs submitted to the ICTY by Notre Dame Law School and a group of international human rights lawyers. *See* Prosecutor v. Furundžija, Amicus Curiae Brief on Protective Measures for Victims or Witnesses of Sexual Violence and Other Traumatic Events, Submitted on behalf of the Center for Civil and Human Rights, Notre Dame Law School, Nov. 6, 1998 (prepared by Kelly Askin, Sharelle Aitchison, and Teresa Phelps); Amicus Curiae Brief Respecting the Decision and Order of the Tribunal of July 16, 1998 Requesting that the Tribunal Reconsider Its Decision Having Regard for the Rights of Witness "A" to Equality, Privacy and Security of the Person, and to Representation by Counsel, Nov. 4, 1998 (prepared by Working Group on Engendering the Rwandan Criminal Tribunal, International Women's Human Rights Law Clinic, & the Center for Constitutional Rights.).

Ultimately, the Trial Chamber emphasized that no evidence suggests that witnesses suffering extreme trauma cannot give accurate information or provide wholly reliable testimony.[225] It did not address whether a patient-client privilege exists in international law, which would make medical or psychological records or statements given during a counseling session outside the scope of compellable evidence.

The Trial Chamber decision was upheld by the ICTY Appeals Chamber Judgement rendered on July 21, 2000.[226] On appeal, however, a key dispute arose from an allegation by the Defence that the presiding Judge in the case, Florence Mumba, should be disqualified for giving at least the appearance of bias.[227] Essentially, the allegations stemmed from the fact that, prior to her election as a Judge at the ICTY, Mumba had served as a representative of Zambia on the United Nations Commission on the Status of Women (CSW), during which the Commission rigorously condemned wartime rape and urged its prosecution and punishment. The Defence further implied that that the feminist views held by Judge Mumba made her predisposed to promote a common feminist agenda.

The Appeals Chamber noted that Rule 15(A) of the Rules of Procedure and Evidence of the Tribunal addresses the issue of impartiality and provides:

> A Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality. The Judge shall in any such circumstance withdraw, and the President shall assign another Judge to the case.[228]

The Appeals Chamber reviewed domestic case law regarding the appropriate standard in determining judicial bias, and concluded that a general rule exists requiring Judges to be free not only from bias, but also from the appearance of bias.[229] Consequently, the Appeals Chamber adopted the following principles to direct it in interpreting and applying ICTY Rule 15(A):

(A) A Judge is not impartial if it is shown that actual bias exists.
(B) There is an unacceptable appearance of bias if:
  (i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or
  (ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[230]

225. *Furundžija* Trial Chamber Judgement, *supra* note 200, at para. 109.

226. Prosecutor v. Furundžija, Judgement, IT-95-17/1-A, 21 Jul. 2000 [hereinafter *Furundžija* Appeals Chamber Judgement].

227. *Id.* at para. 164 (fourth ground of appeal).

228. *Id.* at para. 191 (quoting ICTY R.P. & EVID. 15(A)).

229. *Id.* at para. 189.

230. *Id.* As to b(ii), the Appeals Chamber adopted the language of the 1997 Canadian Supreme Court in RDS v. The Queen, which states that "'the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold.'" *Id.* at para. 190.

The Appeals Chamber ultimately determined that there was "no basis" to sustain the allegations that Judge Mumba's position and role as a member of the CSW created even the appearance of bias.[231] Indeed, the Appeals Chamber concluded that, even if Judge Mumba shared the goals and objectives of the CSW to promote and protect the human rights of women, "she could still sit on a case and impartially decide upon issues affecting women."[232] Hence, to support and share the view that rape is a horrible crime, and those responsible for it should be prosecuted, is a just position and cannot inherently constitute grounds for disqualification.[233]

The Appeals Chamber also noted that Article 13(1) of the ICTY Statute requires that "due account" be taken of the human rights, international law, and criminal law experience of the Judges in composing the Chambers of the Tribunal. It considered that Judge Mumba's experience in international human rights and gender issues that she gained as a member of the CSW was relevant in her election to the Tribunal, and it reasoned that a Judge should not be disqualified "because of qualifications he or she possesses which, by their very nature, play an integral role in satisfying the eligibility requirements. . . . It would be an odd result if the operation of an eligibility requirement were to lead to an inference of bias."[234] The Appeals Chamber determined that, unless there is evidence to the contrary, Judges should be entitled to a presumption of impartiality.[235]

Another challenge to the Trial Chamber Judgement on appeal was that the evidence of sexual assault adduced at trial was of conduct that was insufficient to rise to the level of torture. In robustly affirming that torture had been committed, however, the Appeals Chamber found it "inconceivable" that an argument could be made that sexual violence was not serious enough to amount to torture.[236]

Essentially, this case involved multiple rapes committed against one woman during the conflict. Prosecuting this case set an important precedent in confirming that sexual violence committed against a single victim is a serious violation of international law deserving of prosecution in an international criminal tribunal.[237]

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231. *Id.* at para. 199.

232. *Id.* at para. 200.

233. *Id.* at para. 202.

234. *Id.* at paras. 204-05.

235. *Id.* at paras. 196-97. This challenge was raised only after the Trial Chamber had rendered a guilty verdict against the accused. Because Judge Mumba's qualifications, including her prior membership on the CSW, were public and easily accessible, the Trial Chamber found that it could conclude that the Defense had waived its right to complain and thus dismiss this ground of appeal on that basis. Nevertheless it decided to consider the merits of the case "given its general importance." *Id.* at paras. 173-74.

236. *Id.* at paras. 113-14.

237. Because of the historical neglect of rape crimes, this prosecution set an important precedent in prosecuting rape against a single woman and not solely in conjunction with other crimes. For a more detailed discussion on the significance of this case, as well as the treatment by the Trial Chamber of the credibility of the testimony of a witness alleged to be suffering from post traumatic stress disorder or rape trauma syndrome, see Kelly D. Askin, *The International War Crimes Trial of*

D. *The* Kunarac et al. *Judgement: Developing the Law on Sexual Slavery*

Trial Chamber II of the Yugoslav Tribunal rendered the historic *Kunarac* Judgement on February 22, 2001.[238] In a groundbreaking case, the Tribunal convicted an accused of rape and enslavement as crimes against humanity for conduct constituting sexual slavery, when victims were held in facilities and repeatedly raped over a period of days, weeks, or months. This Judgement renders the first rape as a crime against humanity conviction in the Yugoslav Tribunal and the first ever conviction for enslavement in conjunction with rape. It made extensive holdings regarding indicia of enslavement, and it further clarified the elements of rape and torture under international law.[239]

Each accused was charged with and convicted of various forms of gender-related crimes, including rape, torture, enslavement, and outrages upon personal dignity. The original indictment itself was groundbreaking, in that it centered on eight accused who were each charged with various forms of sexual violence and the allegations focused exclusively on sex crimes committed in Foča municipality.[240] The trial was held against three of the accused who were in the custody of the Tribunal, namely Dragoljub Kunarac, Radomir Kovać, and Zoran Vuković. During the period covered in the Amended Indictment, Kunarac was the leader of a special reconnaissance unit of the Bosnian Serb Army and Kovać and Vuković were members of a Bosnian Serb military unit in Foča.[241]

According to the Amended Indictment, Serb military forces took over the municipality of Foča in the spring of 1992, whereupon the military gathered the people of the town together and then separated the Muslim and Croatian men from the women and children, with the two groups taken to separate detention facilities. The military forces held the women and children collectively in gymnasiums and schools. In these facilities, the forces systematically raped, gang raped, and publicly raped many of the women and young girls; others were routinely taken out of the facilities to be raped and then returned; and yet others were permanently removed from the facilities to be held elsewhere for sexual access whenever their captors demanded it.[242]

Anto Furundžija: Major Progress Toward Ending the Cycle of Impunity for Rape Crimes, 12 LEIDEN J. INT'L L. (1999).

238. *Kunarac* Trial Chamber Judgement, *supra* note 15.

239. *See, e.g.*, Christopher Scott Maravilla, *Rape as a War Crime: The Implications of the International Criminal Tribunal for the former Yugoslavia's Decision in Prosecutor v. Kunarac, Kovac, & Vukovic on International Humanitarian Law*, 13 FLA. J. INT'L L. 321 (2001); Kelly D. Askin, *The* Kunarac *Case of Sexual Slavery: Rape and Enslavement as Crimes Against Humanity, in* 5 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS (André Klip & Göran Sluiter eds., forthcoming 2003).

240. Prosecutor v. Gagovic, Indictment, IT-96-23, 26 June 1996.

241. *Kunarac* Trial Chamber Judgement, *supra* note 15, at paras. 49, 51, 52.

242. Prosecutor v. Kunarac, Amended Indictment, IT-96-23-T, 1 Dec. 1999 & IT-96-23/1-T, 3 Mar. 2000. Note that the terms of the ICTY Statute, *supra* note 93, do not explicitly list sexual slavery as a specific crime. Article 5 of the Statute, covering crimes against humanity, lists rape and enslavement as two of the acts justiciable as crimes against humanity in the Tribunal. Consequently, the crime of holding women and girls for sexual servitude was charged and prosecuted under the provisions of the ICTY Statute granting the tribunal jurisdiction over rape and enslavement as crimes against humanity.

The Trial Chamber elaborated upon the appropriate elements of rape under international law. While stating that it agreed that the elements of rape articulated in *Furundžija* constitute the *actus reus* of the crime of rape under international law,[243] it found that paragraph (ii) of the *Furundžija* classification of the elements was more narrow than required by international law, and should be interpreted to include consent: "In stating that the relevant act of sexual penetration will constitute rape only if accompanied by coercion or force or threat of force against the victim or a third person, the *Furundžija* definition does not refer to other factors which would render an act of sexual penetration *non-consensual or non-voluntary* on the part of the victim."[244] The Trial Chamber emphasized that while force, threat of force or coercion are relevant, these factors are not exhaustive and the emphasis must be placed on violations of sexual autonomy because "the true common denominator which unifies the various systems may be a wider or more basic principle of penalising violations of sexual *autonomy*."[245]

The Chamber held that sexual autonomy is violated "wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant."[246] Factors such as force, threat, or taking advantage of a vulnerable person provide evidence as to whether consent is voluntary.[247] Noting that common law systems typically define rape by the absence of the victim's free will or genuine consent,[248] the Trial Chamber identified three broad categories of factors to determine when sexual activity should be classified as rape:

(i) the sexual activity is accompanied by force or threat of force to the victim or a third party;
(ii) the sexual activity is accompanied by force *or* a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal; or
(iii) the sexual activity occurs without the consent of the victim.[249]

The Trial Chamber stressed that it is important to recognize a victim's vulnerability or deception when he or she is unable to refuse sex due to such things as "an incapacity of an enduring or qualitative nature (e.g., mental or physical illness, or the age of minority) or of a temporary or circumstantial nature (e.g., being subjected to psychological pressure or otherwise in a state of inability to resist)".[250] Furthermore, the key effect of factors such as surprise, fraud or mis-

243. Again, the objective elements of rape were articulated in *Furundžija* as consisting of:
(i) the sexual penetration, however slight:
(a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
(b) of the mouth of the victim by the penis of the perpetrator;
(ii) by coercion or force or threat of force against the victim or a third person.
Furundžija Trial Chamber Judgement, *supra* note 200, at para. 185 (emphasis added).
244. *Id.* at para. 438 (emphasis in original).
245. *Id.* at para. 440 (emphasis in original).
246. *Id.* at para. 457.
247. *Id.* at para. 458.
248. *Id.* at para. 453.
249. *Id.* at para. 442 (emphasis in original).
250. *Id.* at para. 452.

representation is that the victim is unable to offer an "informed or reasoned refusal. In all of these different circumstances, the victim's will was overcome, or her ability to freely refuse the sexual acts was temporarily or more permanently negated."[251] These factors focus on violations of sexual autonomy, which should be the standard for determining when sexual activity constitutes rape.

Rendering its findings as to the elements of rape under international law, the Trial Chamber held that the *actus reus* of the crime is "constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim."[252] In this context, consent must be given voluntarily "as a result of the victim's free will, assessed in the context of the surrounding circumstances."[253] The *mens rea* is satisfied by demonstrating an intent to effectuate the sexual penetration and the knowledge that it occurs without the consent of the victim.[254]

The Trial Chamber also interpreted the effect of Rule 96 of the Rules of Procedure and Evidence of the Tribunal, governing evidence in cases of sexual assault. Rule 96 provides:

> In cases of sexual assault:
> (i) no corroboration of the victim's testimony shall be required;
> (ii) consent shall not be allowed as a defence if the victim
> (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or
> (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;
> (iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber *in camera* that the evidence is relevant and credible;
> (iv) prior sexual conduct of the victim shall not be admitted in evidence.[255]

Interpreting sub-element (ii) of Rule 96 in a manner consistent with the element of rape promulgated above, the Trial Chamber stated that it:

> understands the reference to consent as a "defence" in Rule 96 as an indication of the understanding of the judges who adopted the rule of those matters which would be considered to *negate* any apparent consent. It is consistent with the jurisprudence considered above and with a common sense understanding of the meaning of genuine consent that where the victim is "subjected to or threatened with or has reason to fear violence, duress, detention or psychological oppression" or "reasonably believed that if [he or she] did not submit, another might be so subjected, threatened or put in fear", any apparent consent which might be expressed by the victim is not freely given and the second limb of the Trial Chamber's definition would be satisfied. The factors referred to in Rule 96 are also obviously not the only factors which may negate consent. However, the reference

251. *Id.*
252. *Id.* at para. 460.
253. *Id.*
254. *Id.*
255. *See, e.g.*, Rule 96 of the Rules of Procedure and Evidence of the ICTY, Evidence in Cases of Sexual Assault, IT32/Rev. 21, 12 July 2001.

> to them in the Rule serves to reinforce the requirement that consent will be considered to be absent in those circumstances unless freely given.[256]

Although all of the victims in this case were in captivity when the crimes were committed against them, the Tribunal nonetheless considered consent in one instance, with the accused Kunarac effectively circumventing Rule 96 by asserting mistake of fact—he said he thought she consented. The evidence discloses that one witness took an active part in initiating sexual activity with Kunarac after being threatened that if she did not seduce and sexually please him, she would suffer severe consequences. Kunarac claimed that because of her actions in initiating the sex, he thought the act was consensual. The Trial Chamber rejected the notion that she consented to sex or that he could have reasonably believed she consented, stating unequivocally:

> The Trial Chamber is satisfied that it has been proven beyond reasonable doubt that D.B. subsequently also had sexual intercourse with Dragoljub Kunarac in which she took an active part by taking of[f] the trousers of the accused and kissing him all over the body before having vaginal intercourse with him. . . . The Trial Chamber, however, accepts the testimony of D.B. who testified that, prior to the intercourse, she had been threatened by "Gaga" that he would kill her if she did not satisfy the desires of his commander, the accused Dragoljub Kunarac. The Trial Chamber accepts D.B.'s evidence that she only initiated sexual intercourse with Kunarac because she was afraid of being killed by "Gaga" if she did not do so.[257]

The Trial Chamber rejected Kunarac's claim that he did not know that D.B. only initiated sex with him because she feared for her life, finding it wholly unrealistic that Kunarac could have been confused by D.B.'s actions, particularly in light of the ongoing war and her detention by hostile forces.[258]

Kunarac was also found to have raped and tortured several other women and girls, selecting them for abuse because they were Muslim. The Trial Chamber stated: "The treatment reserved by Dragoljub Kunarac for his victims was motivated by their being Muslims, as is evidenced by the occasions when the accused told women, that they would give birth to Serb babies, or that they should 'enjoy being fucked by a Serb.'"[259] It stipulated that discrimination need not be the sole purpose the crime is committed.[260] Thus, the Trial Chamber concluded that discriminating against the women and girls was part of the reason they were singled out for the rape but it need not be the exclusive reason. Pronouncing upon the grave impact of the crime, the Trial Chamber stressed that "[r]ape is one of the worst sufferings a human being can inflict upon another."[261] Kunarac was held to be individually responsible for the crimes as a result of his participation as a perpetrator, instigator, and as an aider or abettor of the sexual violence.[262]

256. *Kunarac* Trial Chamber Judgement, *supra* note 15, at para. 464 (emphasis in original).
257. *Id.* at paras. 644-45.
258. *Id.* at para. 646.
259. *Id. at* para. 654.
260. *Id.*
261. *Id.* at para. 655.
262. *Id.* at para. 656 (stating, "By raping D.B. himself and bringing her and FWS-75 to Ulica Osmana Đikića no 16, the latter at least twice, to be raped by other men, the accused Dragoljub

The prosecution also charged Vuković with rape and torture for certain instances of sexual violence committed against women and girls in Foča. In contesting allegations of sexual torture, Vuković argued that even if it were proved that he had committed rape, he "would have done so out of a sexual urge, not out of hatred" and thus claimed that he did not commit the rape for a prohibited purpose necessary for establishing torture.[263] However, the Trial Chamber explained that "all that matters in this context is his awareness of an attack against the Muslim civilian population of which his victim was a member and, for the purpose of torture, that he intended to discriminate between the group of which he is a member and the group of his victim."[264] The Trial Chamber stressed that torture can be committed for any number of reasons, and one of the prohibited purposes need merely be part of the motivation behind the act, not necessarily even the principal motivation: "There is no requirement under international customary law that the conduct must be *solely* perpetrated for one of the prohibited purposes of torture, such as discrimination. The prohibited purpose need only be part of the motivation behind the conduct and need not be the predominant or sole purpose."[265] The Tribunal subsequently found Vuković guilty of torture as a war crime and a crime against humanity for the sexual torture he inflicted upon his victims.

The prosecution charged the accused Kovać with "outrages upon personal dignity" for sexual violence committed against women and girls he held in enslavement conditions. An outrage upon personal dignity is an act that is "animated by contempt for the human dignity of another person. The corollary is that the act must cause serious humiliation or degradation to the victim."[266] The *Kunarac* Trial Chamber emphasized that the suffering need not be long lasting:

> So long as the humiliation or degradation is real and serious, the Trial Chamber can see no reason why it would also have to be "lasting." In the view of the Trial Chamber, it is not open to regard the fact that a victim has recovered or is overcoming the effects of such an offence as indicating of itself that the relevant acts did not constitute an outrage upon personal dignity."[267]

In convicting Kovać of outrages upon personal dignity for instances in which women and girls were made to dance nude on a table, together or individually, while Kovać and occasionally others watched them for entertainment, the Trial Chamber stated:

> [Kovać] certainly knew that, having to stand naked on a table, while the accused watched them, was a painful and humiliating experience for the three women

Kunarac thus committed the crimes of torture and rape as a principal perpetrator, and he aided and abetted the other soldiers in their role as principal perpetrators by bringing the two women to Ulica Osmana Đikića no 16.")

263. *Id.* at para. 816.

264. *Id.*

265. *Id.* (emphasis in original).

266. Prosecutor v. Aleksovski, Judgement, IT-95-14/1-T, 25 June 1999, at para. 56 [hereinafter *Aleksovski* Trial Chamber Judgement]. The *Aleksovski* Trial Chamber made extensive findings with regard to this offense. *See, e.g., id.* at paras. 54-57.

267. *Kunarac* Trial Chamber Judgement, *supra* note 15, at para. 501.

> involved, even more so because of their young age. The Trial Chamber is satisfied that Kovać must have been aware of that fact, but he nevertheless ordered them to gratify him by dancing naked for him. The Statute does not require that the perpetrator must intend to humiliate his victim, that is that he perpetrated the act for that very reason. It is sufficient that he knew that his act or omission could have that effect.[268]

Thus, whether the accused forced these young girls to dance nude for his own gratification or for their sexual degradation, the Tribunal can hold an accused responsible for the war crime of outrages upon personal dignity if the effect was serious humiliation. Notably, the Chamber recognized that serious humiliation is a clearly foreseeable consequence of the forced nudity. As demonstrated in the *Akayesu* Judgement, forced nudity is not limited to "outrages upon personal dignity" or even war crime charges.

As mentioned above, one of the groundbreaking aspects of the *Kunarac* Judgement is in its elaboration on the crime of enslavement, particularly in conjunction with gender-related crimes. The Trial Chamber made extensive findings related to enslavement, articulated indicia of enslavement present in the case, and found two of the accused guilty of rape and enslavement as crimes against humanity for acts essentially amounting to sexual slavery. Noting that international law, including the Slavery Convention, has consistently defined slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised," the Trial Chamber held that the *actus reus* of the crime of enslavement is "the exercise of any or all of the powers attaching to the right of ownership over a person." The *mens rea* is the intentional exercise of such powers.[269]

The Tribunal found that indicia of enslavement can include sub-elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; the accruing of some gain to the perpetrator; absence of consent or free will; exploitation; "the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship"; sex, prostitution, trafficking in persons, assertion of exclusivity, subjection to cruel treatment and abuse, and control of sexuality.[270] The Tribunal may also consider duration as a factor when ascertaining whether someone has been enslaved. Further, while acquisition or disposal of a person for monetary or other gain is not a requirement for enslavement, such acts are "prime example[s]" of exercising the right of ownership over a person.[271]

Most of the victims in this case were enslaved for weeks or months, during which time the accused or others systematically and repeatedly raped them during all or part of the time they were held in captivity. In some instances, the accused gave the victims keys to the house where they were held; at other times those enslaved occasionally found the door to the apartment where they were

268. *Id.* at paras. 773-74.
269. *Id.* at para. 540.
270. *Id.* at para. 542.
271. *Id.* at paras. 542-43.

kept left open. The Trial Chamber deemed the absence of physical barriers irrelevant in light of the psychological or logistical barriers present. The Judgement stated, as to the accused Kunarac's culpability for enslavement:

> [T]he witnesses were not free to go where they wanted to, even if, as FWS-191 admitted, they were given the keys to the house at some point. Referring to the factual findings with regard to the general background, the Trial Chamber accepts that the girls, as described by FWS-191, had nowhere to go, and had no place to hide from Dragoljub Kunarac and DP 6, even if they had attempted to leave the house.[272]

In fact, giving the captives keys to lock the door to keep out other potential rapists demonstrated ownership rights over the women, with the perpetrators holding the women and girls for their exclusive use and abuse.

The Trial Chamber reached a similar conclusion as to the enslavement status of the women and girls held in Kovać's apartment:

> [T]he girls could not and did not leave the apartment without one of the men accompanying them. When the men were away, they would be locked inside the apartment with no way to get out. Only when the men were there would the door of the apartment be left open. Notwithstanding the fact that the door may have been open while the men were there, the Trial Chamber is satisfied that the girls were also psychologically unable to leave, as they would have had nowhere to go had they attempted to flee. They were also aware of the risks involved if they were re-captured.[273]

The Judgement forcefully concluded that neither physical restraint nor detention is a required element of enslavement. The Judgement implicitly accepted fear of retribution if they escaped and were recaptured as a reason that the women were psychologically prevented from escaping from the facilities. Further, they were unable to leave while the conflict was still raging and hostile military forces were present in the area.

In convicting Kunarac of both rape and enslavement as crimes against humanity, the Trial Chamber held that he had held women and girls against their will, treated them as his personal property, and forced them to provide sexual and domestic services at any time:

> FWS-191 was raped by Dragoljub Kunarac and [ ] FWS-186 was raped by DP 6, continuously and constantly whilst they were kept in the house in Trnovače. Kunarac in fact asserted his exclusivity over FWS-191 by forbidding any other soldier to rape her. The Trial Chamber is satisfied that Kunarac was aware of the fact that DP 6 constantly and continuously raped FWS-186 during this period, as he himself did to FWS-191. . . .

The Trial Chamber is satisfied that FWS-191 and FWS-186 were denied any control over their lives by Dragoljub Kunarac and DP 6 during their stay there. They had to obey all orders, they had to do household chores and they had no realistic option whatsoever to flee the house in Trnovaèe or to escape their assailants. They were subjected to other mistreatments, such as Kunarac inviting a soldier into the house so that he could rape FWS-191 for 100 Deutschmark if he so wished. On another occasion, Kunarac tried to rape FWS-191 while in his

272. *Id.* at para. 740.
273. *Id.* at para. 750.

hospital bed, in front of other soldiers. The two women were treated as the personal property of Kunarac and DP 6. The Trial Chamber is satisfied that Kunarac established these living conditions for the victims in concert with DP 6. Both men personally committed the act of enslavement. By assisting in setting up the conditions at the house, Kunarac also aided and abetted DP 6 with respect to his enslavement of FWS-186.[274]

The accused Kovać eventually sold at least two of the girls, and one of these, a young girl of 12 at the time she was enslaved and repeatedly raped, has never been seen or heard from since she was sold to a passing soldier for a box of cleaning powder. One of the girls was sexually enslaved for approximately seven days, while another was held for several months. Some of the more traditional forms of slavery were also discernible in this case:

> Radomir Kovać detained FWS-75 and A.B. for about a week, and FWS-87 and A.S. for about four months in his apartment, by locking them up and by psychologically imprisoning them, and thereby depriving them of their freedom of movement. During that time, he had complete control over their movements, privacy and labour. He made them cook for him, serve him and do the household chores for him. He subjected them to degrading treatments, including beatings and other humiliating treatments.
>
> The Trial Chamber finds that Radomir Kovać's conduct towards the two women was wanton in abusing and humiliating the four women and in exercising his *de facto* power of ownership as it pleased him. Kovać disposed of them in the same manner. For all practical purposes, he possessed them, owned them and had complete control over their fate, and he treated them as his property.[275]

The Trial Chamber found that free will or consent is impossible or irrelevant when certain conditions are present, such as "the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions."[276]

The Judgement took care to emphasize that control over a person's sexual autonomy, or obliging a person to provide sexual services, may be indicia of enslavement, but such indicia are not elements of the crime. The facts of the case demonstrate that the enslavement and rape were inseparably linked, and the accused enslaved the women and girls as a means to effectuate continuous rape. Since a primary, but not necessarily exclusive, motivation behind the enslavement was to hold the women and girls for sexual access at will and with ease, the crime would most appropriately be characterized as sexual slavery.[277] Regrettably, the term "sexual slavery" was never used in the Judgement.

The Appeals Chamber Judgement of June 12, 2002 upheld and reinforced the Trial Chamber Judgement's holdings concerning rape, torture, and enslave-

274. *Id.* at paras. 741-42.

275. *Id.* at paras. 780-81.

276. *Id.* at para. 542. This finding was made in regards to enslavement, although it is widely considered that one can never consent to crimes such as slavery and torture.

277. For a recent explanation of why sexual slavery is the appropriate legal characterization for this activity, and in particular is preferred over "enforced prostitution", *see generally* Women's International War Crimes Tribunal, *supra* note 47, at paras. 147-52.

ment.[278] Indeed, the Appeals Chamber rejected the assertion that resistance, force, or threat of force are elements of rape, as such factors are simply evidence of non-consent[279] and it found that not only may rape constitute torture, but also that rape is an act that "establish[es] *per se* the suffering of those upon whom they were inflicted."[280]

E. The Kvoèka *Judgement: Rape as Persecution in the Context of a Joint Criminal Enterprise*

Trial Chamber I of the Yugoslav Tribunal rendered the *Kvoèka* Judgement on November 2, 2001.[281] The prosecution charged only one of the five accused in the case, Radić, with physically committing sex crimes. However, rape crimes were charged against all accused because sexual violence was one of a number of acts that formed the persecution charge. The Trial Chamber made significant findings concerning individual responsibility for rape as part of persecution and rendered important holdings with regard to torture for threats of sexual violence. It also articulated standards of liability for any foreseeable, consequential, or incidental rape crimes when committed during the course of a joint criminal enterprise.

The *Kvoèka* case concerned five accused who worked in or regularly visited Omarska prison camp. Bosnian Serbs in Prijedor established Omarska camp in May 1992, purportedly in order to suppress an uprising of Bosnian Muslims and Bosnian Croats in the region. Over three thousand men and approximately 36 women were detained in Omarska camp during its some three months of operation. Mistreatment and inhumane conditions pervaded the camp, where crimes such as murder, torture, rape, and persecution were rampant. In Counts 1-3 of the Amended Indictment, the prosecution jointly charged all five accused with persecution and inhumane acts as crimes against humanity and with outrages upon personal dignity as a war crime. The persecution count alleged that the accused persecuted non-Serbs detained in Omarska camp through several means, namely: murder, torture and beating, sexual assault and rape, harassment, humiliation and psychological abuse, and confinement in inhumane conditions.[282] In addition, Counts 14-17 charged one of the accused, Mlađjo Radič, a guard shift leader in the camp, with rape, torture, and outrages upon personal dignity for the sexual violence he allegedly committed personally against women detained in Omarska prison camp.[283]

278. *Kunarac* Appeals Chamber Judgement, *supra* note 125.

279. *Id.* at paras. 128-29.

280. *Id.* at para. 150.

281. *Kvočka* Trial Chamber Judgement, *supra* note 90.

282. Prosecutor v. Kvočka, Amended Indictment, IT-98-30/1-I, 21 August 2000, at para. 25 [hereinafter *Kvočka* Indictment].

283. *Id.* at para. 42. The charges were: Count 14, torture as a crime against humanity; Count 15, rape as a crime against humanity; Count 16, torture as a violation of the laws or customs of war; and Count 17, outrages upon personal dignity as a violation of the laws or customs of war. *Id.*

The Trial Chamber found that "female detainees were subjected to various forms of sexual violence" in the camp.[284] The Chamber pointed out that sexual violence covers a broad range of acts and includes such crimes as rape, molestation, sexual slavery, sexual mutilation, forced marriage, forced abortion, enforced prostitution, forced pregnancy, and forced sterilization.[285]

Building upon the development of the common purpose doctrine/joint criminal enterprise theory contained in the *Tadić* Appeals Chamber Judgement, and its holding that such a theory of responsibility is implicitly included within Article 7(1) (individual responsibility) of the Statute of the Tribunal,[286] the *Kvočka* Trial Chamber specified that a joint criminal enterprise may exist

> whenever two or more people participate in a common criminal endeavor. This criminal endeavor can range anywhere along a continuum from two persons conspiring to rob a bank to the systematic slaughter of millions during a vast criminal regime comprising thousands of participants. Within a joint criminal enterprise there may be other subsidiary criminal enterprises. . . . Within some subsidiaries of the larger criminal enterprise, the criminal purpose may be more particularized: one subset may be established for purposes of forced labor, another for purposes of systematic rape for forced impregnation, another for purposes of extermination, etc.[287]

Recounting sordid atrocities that were pervasive throughout the camp, the Trial Chamber ultimately concluded that Omarska camp operated as a joint criminal enterprise established to persecute non-Serbs contained therein.[288] The Tribunal did not convict three of the accused for physically perpetrating crimes, mistreating detainees, or having any role in the establishment of the camp or significant influence over abusive policies in the camp. However, they indisputably knew that assorted horrific crimes were everyday occurrences and that the camp was used to gather, persecute, and eliminate non-Serbs.[289] Therefore, when the accused continued to show up for work everyday in Omarska camp

284. *Kvočka* Trial Chamber Judgement, *supra* note 90, at para. 108.

285. *Id.* at para. 180 & n.343.

286. *Tadić* Appeals Chamber Judgement, *supra* note 111, at paras. 185-229. The *Krstić* Trial Chamber further held that this theory of responsibility need not necessarily be explicitly pled in the indictment. *Krstić* Trial Chamber Judgement, *supra* note 141, at para. 602.

287. *Kvočka* Trial Chamber Judgement, *supra* note 90, at para. 307.

288. *Id.* at para. 319 (finding that it had "an enormous amount of evidence on which to conclude beyond a reasonable doubt that Omarska camp functioned as a joint criminal enterprise. The crimes committed in Omarska were not atrocities committed in the heat of battle; they consisted of a broad mixture of serious crimes committed intentionally, maliciously, selectively, and in some instances sadistically against the non-Serbs detained in the camp.").

289. The Trial Chamber found that in addition to other indicia of the joint criminal enterprise,

> [k]nowledge of the abuses could also be gained through ordinary senses. Even if the accused were not eye-witnesses to crimes committed in Omarska camp, evidence of abuses could be *seen* by observing the bloodied, bruised, and injured bodies of detainees, by observing heaps of dead bodies lying in piles around the camp, and noticing the emaciated and poor condition of detainees, as well as by observing the cramped facilities or the bloodstained walls. Evidence of abuses could be *heard* from the screams of pain and cries of suffering, from the sounds of the detainees begging for food and water and beseeching their tormentors not to beat or kill them, and from the gunshots heard everywhere in the camp. Evidence of the abusive conditions in the camp could also be *smelled* as a result of the deteriorating corpses, the urine and feces soiling the detainees clothes, the broken and overflowing toilets, the dysentery af-

despite being aware of the criminal activities committed in the camp, and their efforts contributed significantly to the continued and effective functioning of the camp, which facilitated the commission of the crimes and allowed them to continue with ease, they incurred criminal responsibility for participating in the criminal enterprise.[290]

Additionally, there was no evidence admitted at trial that indicated most of the accused knew about the rapes or other forms of sexual violence committed in Omarska camp. However, the Trial Chamber found that by knowingly working in the camp where criminal activity was rampant, the participants assumed the risk of incurring criminal responsibility for all foreseeable crimes, including rape crimes, committed therein: "[A]ny crimes that were natural or foreseeable consequences of the joint criminal enterprise . . . can be attributable to participants in the criminal enterprise if committed during the time he participated in the enterprise."[291] Holding that sexual violence in the camp was patently foreseeable and virtually inevitable under the circumstances, the Trial Chamber reasoned:

> In Omarska camp, approximately 36 women were held in detention, guarded by men with weapons who were often drunk, violent, and physically and mentally abusive and who were allowed to act with virtual impunity. Indeed, it would be unrealistic and contrary to all rational logic to expect that none of the women held in Omarska, placed in circumstances rendering them especially vulnerable, would be subjected to rape or other forms of sexual violence. This is particularly true in light of the clear intent of the criminal enterprise to subject the targeted group to persecution through such means as violence and humiliation.[292]

Participants in a joint criminal enterprise, whether aiders and abettors or coperpetrators, may thus be held liable for any natural or foreseeable crimes committed while they participate in the criminal enterprise.[293]

Implicit in the Judgement is that such detention, whether in a large facility where many women are formally detained or in a house where a small group or

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flicting the detainees, and the inability of detainees to wash or bathe for weeks or months.

Id., at para. 324.

290. *Id.* at paras. 408, 464, 500, 566. Their individual degree of participation was reflected in sentencing. Although all were convicted of persecution as a crime against humanity, the three men who worked in the camp for a relatively short period of time or on occasion tried to assist certain detainees were given five- to seven-year prison sentences; the two men who physically participated in and sometimes instigated atrocities were given twenty- to twenty-five-year sentences.

291. *Id.* at para. 327.

292. *Id.*

293. *Id.* at para. 327. A similar holding was rendered in the *Krstić* case. Although the Trial Chamber was not convinced that many crimes, including rape, committed against refugees at Potoèari were "an agreed upon objective among the members of the joint criminal enterprise," nonetheless, the crimes were "natural and foreseeable consequences of the ethnic cleansing campaign." *Krstić* Trial Chamber Judgement, *supra* note 141, at para. 616. Indeed, not only were the crimes of murder, rape, beatings, and abuses foreseeable, the circumstances essentially made the crimes virtually "inevitable" due to the "lack of shelter, the density of the crowds, the vulnerable condition of the refugees, the presence of many regular and irregular military and paramilitary units in the area and the sheer lack of sufficient numbers of U.N. soldiers to provide protection." *Id.* Thus, the accused was held responsible for the "incidental" rapes committed during the persecution of non-Serbs at Potočari.

even one woman is unlawfully kept, may constitute a criminal enterprise if individuals knowingly participate with others in criminal activity.[294] Indeed, the *Kvočka* Trial Chamber specified that extra measures may be needed to protect women from rape crimes in such situations: "[I]f a superior has prior knowledge that women detained by male guards in detention facilities are likely to be subjected to sexual violence, that would put him on sufficient notice that extra measures are demanded in order to prevent such crimes."[295] By now, with extensive evidence of wartime rape broadcast through various media and reported in daily news, virtually everyone has notice that women held by male guards are in grave danger of being subjected to sexual violence, and this is particularly true during periods of hostility or mass violence. This holding has important implications for prosecuting crimes committed against women and girls held in detention camps or other facilities. The decision can be interpreted as imposing a burden on those detaining females to ensure that adequate protections are devised to prevent sexual abuse, and to monitor the facilities to guarantee compliance with the preventative measures.

The Trial Chamber also recognized that persecution takes many forms and is not limited to physical violence: "Just as rape and forced nudity are recognized as crimes against humanity or genocide if they form part of an attack directed against a civilian population or if used as an instrument of the genocide, humiliating treatment that forms part of a discriminatory attack against a civilian population may, in combination with other crimes or, in extreme cases alone, similarly constitute persecution."[296]

The Trial Chamber then ruled on the rape and torture charges alleged against Radić. Allegations for sexual violence committed by Radić ranged from groping or blatant threats and attempts, to outright rape. In concluding that he committed sexual violence against some of the women in the camp, the Chamber recalled the definition of sexual violence promulgated in *Akayesu* as "any act of a sexual nature, which is committed on a person under circumstances which are coercive,"[297] and found that "the sexual intimidations, harassment, and assaults committed by Radić . . . clearly fall within this definition, and thus finds that Radić committed sexual violence against these survivors."[298] The Chamber also found that Radić physically perpetrated rape against women detained in the camp.[299] One alleged rape victim, however, was not listed in either the Indictment or the attached Schedules that listed alleged victims. The Trial Chamber

294. *Kvočka* Trial Chamber Judgement, *supra* note 90, at paras. 266, 306.

295. *Id.* at para. 318.

296. *Id.* at para. 190.

297. *Id.* at para. 559 (quoting the definition put forth in the *Akayesu* Trial Chamber Judgement, *supra* note 124, at para. 688).

298. *Id.* at para. 559.

299. *Id.* at para. 559. The credibility of Witness K, who was found to have been raped by Radić, was challenged by the Defence, primarily because when she was interviewed by a journalist shortly after the crimes were committed, she did not mention the rape crimes. However, the Trial Chamber stated that "the fact that Witness K did not mention this rape incident in 1993 to a journalist is irrelevant, particularly in light of the sexual and intensely personal nature of the crime." *Id.* at para. 552.

held that in fairness to the accused, "new charges cannot be brought against the accused in mid-trial without adequate notice."[300] Thus, the testimony of this particular witness formed part of the court record, but was not considered in determinations of Radić's guilt. Significantly, however, the Chamber noted that the testimony, which was found credible, could be used to "assist in establishing a consistent pattern of conduct."[301]

Determining that the rape and other forms of sexual violence constituted torture, the Trial Chamber stated that "the rape and other forms of sexual violence were committed only against the non-Serb detainees in the camp, and that they were committed solely against women, making the crimes discriminatory on multiple levels."[302] It also stressed that Radić intentionally raped and attempted to rape, and that these acts in and of themselves "manifest his intent to inflict severe pain and suffering," amounting to torture.[303] In finding that the accused intentionally inflicted severe pain and suffering on these women by subjecting them to groping, harassment, and threats of rape, the Trial Chamber concluded that these acts too satisfied the requirements of torture:

> [T]he Trial Chamber takes into consideration the extraordinary vulnerability of the victims and the fact that they were held imprisoned in a facility in which violence against detainees was the rule, not the exception. The detainees knew that Radić held a position of authority in the camp, that he could roam the camp at will, and order their presence before him at any time. The women also knew or suspected that other women were being raped or otherwise subjected to sexual violence in the camp. The fear was pervasive and the threat was always real that they could be subjected to sexual violence at the whim of Radić. Under these circumstances, the Trial Chamber finds that the threat of rape or other forms of sexual violence undoubtedly caused severe pain and suffering . . . and thus, the elements of torture are also satisfied in relation to these survivors.[304]

Ultimately, however, although the Trial Chamber concluded that Radić committed rape and torture as a crime against humanity, the Chamber held that "due to lack of clarity on this issue," the persecution conviction already "cover[s] the rape crimes for which Radić is separately charged." This was because the Amended Indictment did not specifically identify these crimes as differing from the rape crimes alleged in the persecution charges (which alleged persecution for physical, mental, and sexual violence and mistreatment).[305] Consequently, the rape and torture as crimes against humanity counts were "dismissed" as being subsumed within the persecution as a crime against humanity conviction.[306] Clearly, the dismissal is not an acquittal of the crimes. The Tribunal thus convicted Radić of sexual violence under the persecution charge, and held that the persecution conviction subsumed the separate rape charges because

300. *Id.* at para. 556.

301. *Id.* Rule 93 of the ICTY Rules of Procedure and Evidence allows the Tribunal to consider evidence of "a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute [which] may be admissible in the interests of justice."

302. *Id.* at para. 560.

303. *Id.*

304. *Id.* at para. 561.

305. *Kvočka* Indictment, *supra* note 282, at para. 25.

306. *Kvočka* Trial Chamber Judgement, *supra* note 90, at para. 573.

the prosecution did not identify the rapes separately indicted as being different crimes from those charged in the persecution count. The torture charges for sexual violence brought as war crimes were not subsumed within the persecution as a crime against humanity convictions, and thus Radić was convicted for rape crimes for the war crime of torture.

The *Kvočka* case has considerable implications for securing criminal responsibility for sex and gender crimes committed either during a joint criminal enterprise or as part of a persecution scheme. This is especially important given the indictment trend in ICTY cases to indict leaders and other accused under the joint criminal enterprise theory, and to use persecution as a catch-all category that covers a broad range of the crimes allegedly committed (murder, torture, rape, deportation, and destruction of homes or religious facilities), without indicting each crime separately.[307]

In each of the above cases, a female judge was a member of the Trial Chamber hearing the case,[308] and occasionally it was her skillful intervention, expertise in women's issues, or judicial competence that facilitated the judicial redress process and impacted the development of gender crimes. There is also some indication that survivor-witnesses of sex crimes are less reluctant to give testimony to the Court when female jurists are present. There is little doubt that the presence of qualified female judges, prosecutors, investigators, translators, defense attorneys, and facilitators (for example., in the Victim and Witnesses Unit) has improved the record in affording redress for gender-related crimes.

IV.
CONCLUSION—SEXUAL VIOLENCE AS A *JUS COGENS* NORM

Ten years ago, because there had been so little attention to wartime rape, there was debate as to whether rape was even a war crime. Since that time, the Tribunals have developed immensely the jurisprudence of war crimes, crimes against humanity, and genocide.[309] The extraordinary progress made in the Tribunals on redressing gender-related crimes is largely the result of extremely hard work by scholars, activists, and practitioners inside and outside the Tribunals who have fought long, difficult battles to ensure that gender and sex crimes are properly investigated, indicted, and prosecuted. Sex crimes are undoubtedly some of the most difficult to investigate and prosecute. Because there is reluctance from all sides, the tendency is to ignore gender and sex based crimes. The crimes are intensely personal, the injuries often less visible, and the details provoke discomfort and aversion. But the alternative is silence, impunity, and grave injustice.

307. *See, e.g.*, Prosecutor v. Milošević, Second Amended Indictment "Kosovo" IT-02-54, 29 Oct. 2001; Krajisnic & Plavšić, Consolidated Amended Indictment, IT-00-39 & 40, 7 Mar. 2002.

308. See *supra* note 40 for a discussion of women participating in decision-making positions in the ICTY/R and in other international law or justice initiatives.

309. *See, e.g.*, David Tolbert, *The International Criminal Tribunal for the former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings*, 26 FLETCHER F. OF WORLD AFF. 7 (Fall 2002).

We must confront sex crimes and find ways to understand and prevent them. We must also emphasize deconstructing the harmful stereotypes and practices that have resulted in the endemic marginalization of women and a systemic indifference to the crimes committed against them. Only when we accept that victims of sexual violence should not bear the shame and stigma that society traditionally imposes on them, and when we acknowledge that rape is a crime of serious sexual, mental, and physical violence that deserves redress will we truly be able to tackle the underlying causes of sex crimes. For when we reverse the stigmas and the stereotypes associated with sex crimes, we take away much of the power held by the perpetrators of these crimes. When we place the shame on the perpetrators of sex crimes instead of on the victims, recognize perpetrators as weak and cowardly, typically men with weapons preying on civilians in far more vulnerable positions, and formulate rape as a despicable crime that brings dishonor to all men, then we can also take away at least some of its potency and thus its use as a weapon.[310]

The gender jurisprudence of the ICTY and ICTR will help in the struggle to ensure that gender crimes in other places, such as Afghanistan, Burma, Bangladesh, Guatemala, Congo, Chechnya, and Cambodia, are prosecuted and punished.[311] The Serious Crimes Unit in East Timor, the Special Court in Sierra Leone, and the International Criminal Court join other international, regional, mixed, and local accountability initiatives to resoundingly demonstrate that justice has turned a corner and impunity is no longer the norm.[312] It was evidence of gender-related crimes before the ICTY and ICTR, indefatigable efforts by individuals and organizations working alongside or under the auspices of the Women's Caucus for Gender Justice in the ICC, and the participation of gender-sensitive delegates that secured the inclusion of rape, enforced prostitution, sexual slavery, forced pregnancy, enforced sterilization, sex trafficking, and other crimes of sexual violence within the war crimes and crimes against humanity provisions of the ICC Statute. The unequivocal inclusion of a broad range of

310. *See generally* Askin, *Comfort Women: Shifting Shame and Silence from Victim to Victimizer, supra* note 48.

311. *See, e.g.*, JOANNE CSETE & JULIANE KIPPENBERG, THE WAR WITHIN THE WAR: SEXUAL VIOLENCE AGAINST WOMEN AND GIRLS IN EASTERN CONGO (Human Rights Watch, 2002); CHEN REIS ET AL., WAR-RELATED SEXUAL VIOLENCE IN SIERRA LEONE (Physicians for Human Rights, 2002); Martina Vandenberg & Kelly Askin, *Chechnya: Another Battleground for the Perpetration of Gender Based Crimes*, 2(3) HUM. RTS. REV. 140 (2001); Jan Perlin, *The Guatemala Historical Clarification Commission Finds Genocide*, 6(2) I.L.S.A. J. INT'L & COMP. L 389-413 (2000); Kevin Sullivan, *Kabul's Lost Women: Many Abducted by Taliban Still Missing*, WASH. POST, Dec. 19, 2001, at A1; Sultana Kamal, *The 1971 Genocide in Bangladesh and Crimes Committed Against Women, in* COMMON GROUNDS: VIOLENCE AGAINST WOMEN IN WAR AND ARMED CONFLICT SITUATIONS 268 (Indai Lourdes Sajor ed., 1998); *License to Rape: The Burmese Military Regime's Ongoing War in Shan State* (Shan Human Rights Foundation & Shan Women's Action Network, 2002), *available at* http://www.earthrights.org/news/shanrape.html.

312. ICC Statute, *supra* note 90, at arts. 7, 8; Statute of the Special Court for Sierra Leone, *pursuant to* S.C. Res. 1315 (2000) of 14 August 2000, at arts. 2, 3, &5, *available at* http://www.sc-sl.org/; On the Establishment of Panels with Exclusive Jurisdiction Over Serious Criminal Offences, UNTAET/Reg/2000/15, of 6 June 2000, Sec. 1.3, 5, 6, & 9, available at www.un.org/peace/etimor/UNTAETN.htm. *See also* Kadić v. Karadzić, 70 F.3d 232 (2d Cir. 1995), *reprinted in* 34 I.L.M. 1592 (1995) for an example of redress for gender crimes in domestic courts.

sex crimes within the jurisdiction of the ICC, which have largely been reproduced in the statutes for the Sierra Leone and East Timor courts, indicates a new global awareness of the dangers of continuing impunity for gender and sex crimes.[313]

The explosive development of gender-related crimes in international law within the last ten years reflects the international community's denouncement of the crimes and the commitment to redress them. The inclusion and enumeration of several forms of sexual violence in the ICC Statute acknowledges that these are crimes of the gravest concern to the international community as a whole, and their inclusion in the ICTY/R Statutes situates them amongst the crimes regarded as constituting a threat to international peace and security. Further, the large and ever increasing number of human rights treaties, declarations or reports, conference or committee documents, U.N. resolutions and decisions by human rights bodies promulgated since the 1990s that condemn, protect against, prohibit, or outright criminalize gender-related violence reflects the commitment of the international community to afford accountability for these crimes, irrespective of the presence of an armed conflict.[314]

313. *See generally*, Eve La Haye, *Article 8(2)(b)(xxii), in* THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 814 (Roy S. Lee ed., 2001); Donald Piragoff, *Evidence in Cases of Sexual Violence, in* THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE, *id.*, at 369; William R. Pace & Jennifer Schense, *Coalition for the International Criminal Court at the Preparatory Commission, in* THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES RULES OF PROCEDURE AND EVIDENCE, *ibid.* at 705; Monika Satya Kalra, *Forced Marriage: Rwanda's Secret Revealed*, 7 UC DAVIS J. INT'L L & POL'Y 197 (2001); HILARY CHARLESWORTH & CHRISTINE CHINKIN: THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS (2000); Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women Into International Criminal Law*, 46 MCGILL L. J. 217 (2000); Dorean Koenig & Kelly Askin, *International Criminal Law and the International Criminal Court Statute: Crimes Against Women, in* 2 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 3-29 (Kelly D. Askin & Dorean M. Koenig eds., 2000); Kelly Dawn Askin, *Women's Issues in International Criminal Law: Recent Developments and the Potential Contribution of the ICC, in* INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT 47-63 (Dinah Shelton ed., 2000); Barbara Bedont & Katherine Hall Martinez, *Ending Impunity for Gender Crimes Under the International Criminal Court*, 6 BROWN J. WORLD AFFAIRS 65-85 (1999); Cate Steins, *Gender Issues, in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 357 (Roy S. Lee ed., 1999); Kelly Askin, *Crimes Within the Jurisdiction of the International Criminal Court*, 10 CRIM. L. FORUM 33-59 (1999). For more information on the Women's Caucus for Gender Justice, see http://www.icc women.org.

314. *See, e.g.*, Inter-American Convention for the Prevention, Punishment and Eradication of Violence Against Women, *supra* note 25; *Contemporary Forms of Slavery*, Prevention of Discrimination and Protection of Minorities Sub-Comm. Res. 1992/3, U.N. Doc. E/CN.4/Sub.2/1992/L.11 (1992); *Declaration on the Elimination of Violence Against Women*, G.A. Res. 104, U.N. GAOR, 48th Sess. 85th plen. mtg., U.N. Doc. A/ RES/48/104 (1994); *Vienna Declaration and Programme of Action, adopted* by the World Conference on Human Rights in.Vienna, U.N. Doc. A/CONF.157/ 23 (1993); *Beijing Declaration and Platform for Action, Fourth World Conference on Women*, U.N. Doc. A/CONF.177/20 & A/CONF.177/20/Add.1 (1995); Committee on Elimination of Discrimination against Women, Gen. Recommendation 19, Sess. 11, U.N. Doc. A/47/38 (1992); S.C. Res. 798, U.N. SCOR, 47th Sess., 3150th mtg. At 32, U.N. Doc. S/798/1992 (1992) (strongly condemning reports of massive, organized and systematic detention and rape" in Yugoslav conflict); S.C. Res. 820, U.N. SCOR 48th Sess., 3200th mtg. At 7-10, U.N. Doc. S/820/1993 (1993) (condemning detention and rape of women and affirming individual responsibility for those responsible for committing or ordering such acts); G.A. Res. 49/205, U.N. GAOR, Sess. 49, U.N. Doc. A/RES/49/205 (23 Dec. 1994) ("Appalled at the continuing and substantiated reports of widespread rape and abuse of wo-

As noted above, genocide, slavery, torture, war crimes, and crimes against humanity are violations of *jus cogens,* subject to universal jurisdiction.[315] Many forms of sexual violence constitute forms or instruments of genocide, slavery, torture, war crimes, and crimes against humanity, making them subject to universal jurisdiction when they meet the constituent elements of these crimes.[316] However, there is now a strong indication that rape crimes may be subject to universal jurisdiction in its own right. The landmark jurisprudence of the Yugoslav and Rwanda Tribunals recognizing sexual violence as war crimes, crimes against humanity, and instruments of genocide, the inclusion of various forms of sexual violence in the ICC Statute (including crimes that had never before been formally articulated in an international instrument), the increasing attention given to gender violence in international treaties, U.N. documents, and statements by the Secretary-General, the new efforts to redress sexual violence in internationalized/hybrid courts and by truth and reconciliation commissions, the recent recognition of gender crimes by regional human rights bodies, and the increasingly successful claims brought in domestic court to adjudicate gender crimes all provide compelling evidence that crimes of sexual violence are now considered amongst the most serious international crimes. This in turn supports an assertion that sexual violence, at the very least rape and sexual slavery, has risen to the level of a *jus cogens* norm. Such an attribution provides increased means of protecting women and girls, bolsters efforts in enforcing violations of the laws, and challenges traditional stereotypes of gender crimes being less grave or important. It has taken over twenty-one centuries to acknowledge sex crimes as one of the most serious types of crimes committable, but it appears that this recognition has finally dawned.

men and children in the areas of armed conflict in the former Yugoslavia"); G.A. Res. 48/143, U.N. GAOR, 48th Sess., U.N. Doc. A/RES/48/143 (20 Dec. 1993) (discussing rape and abuse of women in the Yugoslav conflict); *Rape and Abuse of Women in the Territory of the Former Yugoslavia,* Hum. Rts. Comm. Res. 1993/L.3, U.N. Doc. E/CN.4/1993/L.3 (1993) (condemning sexual violence of women during Yugoslav conflict).

315. *See* Hilary Charlesworth & Christine Chinkin, *The Gender of* Jus Cogens, 15 HUM. RTS. Q. 63 (1993); Jonathan I. Charney, *Universal International Law,* 87 AM. J. INT'L L. 529, 541 (1993); Lauri Hannikainen, *Implementation of International Humanitarian Law in Finnish Law, supra* note 31; JALIL KASTO, *Jus Cogens* And Humanitarian Law (1994).

316. ASKIN, WAR CRIMES AGAINST WOMEN, *supra* note 42, at 241-42.

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Rape as an Act of Genocide

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Rape as an Act of Genocide

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Like all rape, genocidal rape is particular as well as part of the generic, and its particularity matters. This is ethnic rape as an official policy of war in a genocidal campaign for political control. That means not only a policy of the pleasure of male power unleashed, which happens all the time in so-called peace; not only a policy to defile, torture, humiliate, degrade, and demoralize the other side, which happens all the time in war; and not only a policy of men posturing to gain advantage and ground over other men. 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. It is rape as genocide.[1]

I.
INTRODUCTION

Rape has occurred within internal and international armed conflicts, throughout history.[2] Unfortunately, for much of history, rape has been looked

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1. Catharine A. MacKinnon, *Rape, Genocide, and Women's Human Rights,* 17 HARV. WOMEN'S L. J. 5, 11-12 (1994).

2. Human Rights Watch summarizes the history as follows:

> During the Second World War, some 200,000 Korean women were forcibly held in sexual slavery to the Japanese army. During the armed conflict in Bangladesh in 1971, it is estimated that 200,000 civilian women and girls were victims of rape committed by Pakistani soldiers. Mass rape of women has been used since the beginning of the conflict in the Former Yugoslavia. Throughout the Somali conflict beginning in 1991, rival ethnic factions have used rape against rival ethnic factions. During 1992 alone, 882 women were reportedly gang-raped by Indian security forces in Jammu and Kashmir. In Peru in 1982, rape of women by security forces was a common practice in the ongoing armed conflict between the Communist Party of Peru, the Shining Path, and government counterinsurgency forces. In Myanmar, in 1992, government troops raped women in a Rohingya Muslim village after the men had been inducted into forced labor. Under the former Haitian military regime of Lt. Gen. Raoul Cedras, rape was used as a tool of political repression against female activists or female relatives of opposition members.

upon as an unavoidable aspect of conflict.[3] However, with the horrific reports of mass rapes and rape/death camps in Bosnia, the crime of rape both gained media attention and evoked public outrage.

In the wake of the attention given to the mass rapes committed in Bosnia, one legal scholar, Rhonda Copelon, expressed concern about this "overemphasis" and "focus" on *genocidal* rape. Her concerns were: 1) that an overemphasis on "genocidal rape" could result in the elision of rape and genocide; 2) that the gendered nature of the crime of rape—a violent crime committed against women *qua* women—could become obscured; 3) that rape victims could lose their subjectivity and become objectified because the crime of genocidal rape would be viewed primarily as a crime perpetrated against a group and not against the individual woman; and, lastly, 4) that rape committed in an armed conflict *outside* of the context of a genocide could become invisible. In response to these concerns, Copelon proposed "surfacing" gender in the midst of genocide, that is, acknowledging the relevancy of gender in genocidal rape.[4]

On the other side of the debate, there are legal scholars who contend that, notwithstanding the *gendered* nature of the crime of rape, it is important to acknowledge the intersectionality of genocidal rape. It is important to acknowledge that genocidal rape is in fact a crime that implicates both gender and ethnicity and to understand that *certain* women are being raped by *certain* men for *particular* reasons.[5] In September 1998, the Rwandan Tribunal rendered an historic judgment in *Prosecutor v. Jean-Paul Akayesu,*[6] becoming the first international criminal tribunal to define rape as an act of genocide and to find an individual guilty of genocide on the basis, *inter alia*, of acts of rape and sexual violence. The Rwandan Tribunal in its *Akayesu Judgment* addresses and clarifies many, if not all, of the concerns raised in the debate about genocidal rape.

First, the Rwandan Tribunal recognized the intersectionality of the crime of genocidal rape. The Tribunal recognized that "genocidal rape" during the Rwandan genocide happened to certain women because of their ethnicity—specifically to Tutsi women or Hutu women married to Tutsi men. The Tribunal

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BINAIFER NOWROJEE, HUMAN RIGHTS WATCH/AFRICA, SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH n.39 (Dorothy Q. Thomas & Janet Fleishman eds., 1996) [hereinafter SHATTERED LIVES].

3. At least one commentator has posited that rape has not received significant attention, either legally or socially, because: 1) rape has been viewed as "an inevitable but subsidiary component of warfare; a 'natural' sideshow in the theatre of war," 2) "rape has been treated as a legitimate tactic in the arsenal of weapons used to fight the enemy nation by way of anti-morale campaigns, and in this sense is not an act against the individual woman, but is an attack on the whole community," and, finally, 3) "rape can also been seen to have developed into a sophisticated form of political torture, albeit one informed by sexual impulses, used to punish suspected 'enemies' and to terrorize the population into submission." Jasminka Kalajdzic, *Rape, Representation, and Rights: Permeating International Law with the Voices of Women,* 21 QUEENS L.J.457, 463 (1996).

4. Rhonda Copelon, *Gendered War Crimes: Reconceptualizing Rape in Time of War, in* WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 197, 199 (Julie Peters & Andrea Wolper, eds., 1995).

5. Catharine A. MacKinnon, *Crimes of War, Crimes of Peace*, 4 UCLA WOMEN'S L. J. 59, 64-65 (1993).

6. Prosecutor v Akayesu, Case No. ICTR-96-4-T (Judgment, September 2, 1998) ch. 6.3.1, ¶ 496, *available at* ICTR website, http://www.ictr.org.

also recognized that these women were targeted both because of their ethnicity and because of the beliefs and opinions held by Hutus about Tutsi women *as* women.

Second, the Rwandan Tribunal managed to "surface gender in the midst of genocide" by recognizing the subjectivity of victims of the crime of genocidal rape. The Tribunal recognized that although the intent of the act of genocidal rape is to destroy a particular group, the effect of the act is the infliction of serious injury and harm. The Rwandan Tribunal acknowledged genocidal rape as possibly the most effective and serious way of inflicting injury and harm on individual Tutsi women, thus advancing the destruction of the entire Tutsi group.

Lastly, through its definition of rape and the finding in its *Akayesu Judgment* that rape can be an *actus reus* of genocide, the Rwandan Tribunal acknowledged that it viewed rape not as sexual in nature but as a tool of war, as a violent act perpetrated against a member of a group with the intent of destroying that group. As Professor Katharine Franke argues, the Rwandan Tribunal in its *Akayesu Judgment* recognized how "sex worked" to destroy a people.[7] This Article analyzes how the *Akayesu Judgment* advances not only the discussion of rape in armed conflict but also of rape as an act of genocide. However, the *Akayesu Judgment* is not the only case through which the Rwandan Tribunal has managed to advance the discussion of rape in armed conflict and genocidal rape. There is another historic case before the Rwandan Tribunal that further cements the advances made in the *Akayesu Judgment*.

On May 26, 1997, the prosecutor of the Rwandan Tribunal filed an indictment accusing Pauline Nyiramasuhuko of genocide, crimes against humanity and serious violations of Article 3 common to the Geneva Conventions, all of which were committed during the 1994 genocide in Rwanda. Nyiramasuhuko was the former Minister of Family and Women's Development in both the government of Rwandan President Juvénal Habyarimana that collapsed after Habyarimana's death on April 6, 1994 and the interim government that succeeded it.[8] On August 10, 1999, the Tribunal granted the prosecution leave to amend the indictment to include charges of conspiracy to commit genocide, complicity in genocide and direct, and public incitement to commit genocide. The amended indictment was filed on March 1, 2001.[9] Additional crimes against humanity included rape.[10] Nyiramasuhuko is the first woman to be indicted by an international criminal tribunal, the first woman to be charged with rape as a war crime and a crime against humanity, and the first woman to be indicted before an

7. Katherine M. Franke, *Putting Sex to Work*, 75 DENV. U. L. REV. 1139 (1998).

8. Prosecutor v. Pauline Nyiramasuhuko & Arsénes Ntahobali, Case No. ICTR-97-21-I (case summary), *available at* http://www.ictr.org/wwwroot/default.htm

9. *See* Fondation Hirondell, ICTR—Pauline Nyiramasuhuko, Former Minister, *at* http://www.hirondelle.org/hirondelle.nsf/caefd9edd48f5826c12564cf004f793d/9bd9560889 73079cc1256721007da2a3?OpenDocument; *see also* Prosecutor v. Pauline Nyiramasuhuko, ICTR-97-21-I (Amended Indictment for March 1, 2001) [hereinafter Amended Indictment], *available at* http://www.ictr.org.

10. *Id.*

international tribunal for genocide.[11] Allegations of rape, sexual assault and other crimes of a sexual nature are part of the factual bases of the charge against Nyiramasuhuko for genocide.[12]

According to the accounts of Nyiramasuhuko's participation in acts of rape as part of the Rwandan genocide, one male *genocidaire* said that Nyiramasuhuko commanded, "Before you kill the women, you need to rape them."[13] According to another male *genocidaire*, Nyiramasuhuko ordered him and others to burn the women and then said, "Why don't you rape them before you kill them?"[14] The man explained that he and the other men had been killing all day and were tired.[15] Therefore, they put the gasoline in bottles, scattered it among the women and then started burning.[16] According to a young Tutsi woman survivor of the genocide, even though the "overarching objective was to kill, the men seemed particularly obsessed by what they did to women's bodies."[17] She saw men rape two girls with spears then burn their pubic hair.[18] She was also taken to another spot where a woman was giving birth.[19] The baby was halfway out and the men speared it.[20] All the while, the young woman said, she heard the soldiers say that they were doing what Pauline Nyiramasuhuko ordered.[21]

In general, the rapes that were committed as part of the Rwandan genocide were committed "by many men in succession, were frequently accompanied by other forms of physical torture and often staged as public performances to multiply the terror and degradation."[22] For example, one case included a 45-year old Rwandan woman who was raped by her 12-year-old son–with a hatchet held to his throat–in front of her husband while their five other young children were forced to hold open her thighs.[23] So many women feared the rapes that they begged to be killed instead.[24] Often the rapes were a prelude to murder.[25] However, sometimes, the women were not killed but instead were repeatedly raped and then left alive so that the humiliation would affect not only the survivor but also those closest to her.[26] Other times, women were used as a different

11. *See generally* HR-NET Hellenic Resources Network, United Nations Daily Highlight, 99-08-12, *at* http://www.hri.org/news/world/undh/1999/99-08-12.undh.html (last visited May 7, 2003).
12. *See* Amended Indictment, *supra* note 9, count 2.
13. Peter Landesman, *A Woman's Work*, THE N.Y. TIMES, Sept. 15, 2002, (Magazine) at 82-84.
14. *Id.* at 84.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 89.
23. *Id.* at 116.
24. *Id.* at 89.
25. *Id.*
26. *Id.*

kind of tool: half dead, or even already a corpse, a woman would be publicly raped as a way for the killing mobs to bond together.[27]

But the destruction did not stop with the acts of rape. Indeed, according to recent reports, AIDS contracted through rape was deliberately used as a way to murder Tutsi's and particularly Tutsi women, slowly and more agonizingly.[28] According to one estimate, seventy percent of women raped during the Rwandan genocide have H.I.V. and most will eventually die from it.[29] Rwanda's President said that the former Hutu government released AIDS patients out of the hospitals specifically to form battalions of rapists.[30] Professor Charles B. Strozier, psychoanalyst and Professor of History at John Jay College of Criminal Justice in New York, has stated that "[b]y using a disease, a plague, as an apocalyptic terror, as biological warfare, you're annihilating the procreators, perpetuating the death unto the generations . . . [t]he killing continues and endures."[31] The Rwandan Tribunal's acting chief of prosecutions, Silvana Arbia, stated that "H.I.V. infection is murder . . . [s]exual aggression is as much an act of genocide as murder is."[32] According to one reporter, it is the use of AIDS as a tool of warfare against Tutsi women that helped the prosecutors of the Rwandan Tribunal focus on rape as a driving force of the genocide.[33]

The case against Pauline Nyiramasuhuko and these recent reports of the intentional transmission of AIDS through rape as part of the 1994 Rwandan genocidal campaign, further concretize the precedent established in the *Akayesu Judgment*. First, a good example of the intersectionality of "genocidal rape" and of how rape can be understood as something other than an attack on honor or a "reward" for soldiers or something that soldiers "do" during war, is to charge a woman with rape as a means through which she committed genocide. It is difficult to argue that "genocidal rape" should be viewed solely as a crime about gender, something that male soldiers commit generally against women during armed conflict, when a Hutu *woman* (who quite tellingly might actually have been a Tutsi who re-categorized herself as a Hutu in order to maintain her political power and prestige[34]) can commit "genocidal rape" against a Tutsi *woman* precisely because of that woman's gender but also because of her ethnic identity. Second, the same can be said about the recent news that transmitting AIDS through rape was part of the Rwandan genocidal campaign. It is yet another example of rape being used as a method of destruction, albeit slow and painful, of not only the individual Tutsi women who were raped but also the Tutsi group in general.

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27. *Id.*

28. *Id.* at 89, 116; *see also* Nicole Itano, *How Rwanda's Genocide Lingers on for Women*, THE CHRISTIAN SCI. MONITOR, Nov. 27, 2002, *available at* http://www.csmonitor.com/2002 /1127/ p08s01-woaf.html.

29. Landesman, *supra* note 13, at 89, 116.

30. *Id.* at 116.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 130, 132.

As explained above, after the reports of mass rapes and rape camps in Bosnia in 1991 and 1992, a debate developed among legal scholars about rape as an act of genocide. One side essentially argued that rapes committed during genocide are no different from rapes that have occurred throughout history during armed conflict and, therefore, should not receive special attention or characterization. This side of the debate was concerned with the gendered nature of the crime of rape disappearing because of the focus on the group rather than the individual in genocide. The other side of the debate contended that, as murder is different in genocide than in other contexts, including non-genocidal armed conflict, rape as a form of genocide is also different. Not different in a normative sense, but yet still different from rape that occurs in non-genocidal armed conflict. This side of the debate emphasized focusing on the intersectionality (that it is about both gender and group identity) of genocidal rape.

The Rwandan genocide and the accounts of women being raped as part of that genocide were known at the time that some of the scholarship about rape as an act of genocide was being written. However, for reasons unknown to the author, the debate about rape as genocide centered around the sexual violence that occurred in Bosnia and did not seem to include in its discussion the acts of rape and sexual violence that had occurred in the 1994 African genocide. The Rwandan Tribunal in its *Akayesu Judgment* addresses and clarifies many of the concerns raised in the debate about genocidal rape, most likely in part because the nature of what occurred in Bosnia was different from what happened in Rwanda.

The "genocidal rapes" committed in Bosnia, were designed in large part to have the effect of impregnating the victim so that she would have a child that would be identified as being a member of the rapist's/enemy's ethnicity.[35] Another intended consequence of the "genocidal rapes" in Bosnia was that the raped woman would be ostracized and alienated from her ethnic community and would therefore be removed as a possible procreator for her own ethnic group.[36] Thus, rape as an act of genocide as "practiced" in Bosnia resulted, *inter alia*, in the prevention of births within the particular ethnic group of the victim, because the victim would either bear a child that would be recognized as having the ethnic identity of the rapist and/or as a result of the birth or the rape, the victim would no longer be a desirable candidate for having children of her own ethnicity.[37] Therefore, the women were, in a sense, vessels through which the dilution, disappearance, and destruction of their own ethnic group occurred.[38] This Bosnian "paradigm" of genocidal rape would give support to an argument that a focus on genocidal rape could result in the elision of rape in genocide—that women would merely be viewed as the object through which and by which, the destruction of the group occurred.

35. *See* Copelon, *supra* note 4, at 205-206.
36. *Id.*
37. *Id.*
38. *Id.*

In contrast, the aim of "genocidal rape" in Rwanda was to kill Tutsi women whether it be through the transmission of AIDS, penetration with sharp objects, or as a result of the sheer number of times a woman was raped. Rape was used as a method, weapon, or tool through which Tutsi women were destroyed. Tutsi men were often macheted and could pay to die a quicker death through being shot.[39] Tutsi women were targeted for rape as a method of their destruction (which would lead, in turn, to the destruction of the Tutsis, in general) and did not have the privilege of paying for a quicker death.[40]

There is some validity, therefore, to one side of the debate about genocidal rape if the lens, albeit a Eurocentric lens, is on what happened in Bosnia as the paradigm. Had what happened to African women during the Rwandan genocide been included in the analysis of the debate about genocidal rape (and to be fair, the Rwandan genocide had occurred only by the time that the *responding* legal scholar had written much of her scholarship on the topic), I suspect that there would not have been a debate or perhaps the debate would have been more inclusive and comprehensive. What I hope this Article will do is to not only give voice to what happened to Rwandan women (many scholars have written many pages on what happened to the women in Bosnia) but also explain how the Rwandan Tribunal's jurisprudence has advanced the discussion of rape in armed conflict as well as rape as an act of genocide.

Before I do so, however, by way of background, I summarize the historical status of rape as a war crime other than the crime of genocide in Part II of this Article. In Part III, I discuss the definition of genocide under the Genocide Convention and explain how, although not enumerated in the Genocide Convention, rape and other acts of sexual violence can be genocidal acts. In Part IV, I familiarize the reader with the debate about genocidal rape in legal scholarship. Part V, contains a brief history of the 1994 genocidal campaign in Rwanda, background on the Rwandan Tribunal and its *Akayesu Judgment*. Finally, in Part VI, I explain how the Rwandan Tribunal's decision in the *Akayesu* case goes far towards answering and clarifying some of the concerns raised in the debate about "genocidal rape." I conclude that the *Akayesu Judgment* demonstrates the complexity of the issue and illustrates that it need not be an either/or proposition but can be both.

II.
THE STATUS OF RAPE AS A CRIME UNDER INTERNATIONAL HUMANITARIAN LAW[41]

In this section, I explain the status of rape under international humanitarian law. Specifically, I address rape as a "grave breach," rape as a violation of the laws and customs of war, and rape as a crime against humanity. As discussed

39. Landesman, *supra* note 13, at 125.

40. *Id.*

41. There are numerous good articles on the status of rape as a war crime. *See, e.g.*, Theodor Meron, *Rape as a Crime under International Humanitarian Law*, 87 AM. J. INT'L L. 424 (1993). An exhaustive analysis of the topic is beyond the scope of this piece.

below in further detail, rape is prohibited by the law of armed conflict but is not specifically enumerated as a "grave breach" nor as a violation of the laws and customs of war. Rape has recently been defined as a crime against humanity in the statutes of the International Criminal Court as well as the International Criminal Tribunals for Rwanda and Yugoslavia.

A. Grave Breaches, the Geneva Conventions and its Protocols

The four Geneva Conventions[42] form the core of humanitarian law or, as it is sometimes called, the law of armed conflict.[43] While rape has been interpreted as a war crime, it is not specifically enumerated as such in the Geneva Conventions and the subsequent Protocols. The Geneva Conventions regulate the conduct of war from the humanitarian perspective by protecting certain categories of persons, namely, wounded and sick members of armed forces in the field; wounded, sick and shipwrecked members of armed forces at sea; prisoners of war, and civilians in time of war. Each Convention lists the particularly serious violations that qualify as "grave breaches" or war crimes.[44] The grave breaches or war crimes enumerated in the Geneva Conventions are subject to universal jurisdiction and persons committing, or ordering to be committed, any of the grave breaches of the Conventions shall be subject to penal sanctions.[45]

According to the Geneva Conventions, grave breaches involve any of the following acts if committed against persons or property protected by the Conventions: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly, compelling a prisoner of war or a civilian to serve in the forces of a hostile power, willfully depriving a prisoner of war or a civilian of the rights of fair and regular trial, unlawful deportation or

42. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.T.S. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

43. *Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808*, U.N. SCOR, 48th Sess., at 37, U.N. Doc. S/25704 (1993) [hereinafter *Secretary-General's Report*].

44. First Geneva Convention, *supra* note 42, art. 50, 6 U.S.T. at 3146, 75 U.N.T.S. at 62; Second Geneva Convention, *supra* note 42, art. 51, 6 U.S.T. at 3250, 75 U.N.T.S. at 174; Third Geneva Convention, *supra* note 42, art. 130, 6 U.S.T. at 3420, 75 U.N.T.S. at 238; Fourth Geneva Convention, *supra* note 42, art. 147, 6 U.S.T. at 3618, 75 U.N.T.S. at 388.

45. First Geneva Convention, *supra* note 42, art. 49, 6 U.S.T. at 3146, 75 U.N.T.S. at 62; Second Geneva Convention, *supra* note 42, Article 50, 6 U.S.T. at 3250, 75 U.N.T.S. at 174; Third Geneva Convention, *supra* note 42, art. 129, 6 U.S.T. at 3418, 75 U.N.T.S. at 236; Fourth Geneva Convention, *supra* note 42, Article 146, 6 U.S.T. at 3616, 75 U.N.T.S. at 386.

transfer or unlawful confinement of a protected person, and taking civilian hostages.[46]

Rape is explicitly prohibited by Article 27 of the Fourth Geneva Convention, which provides, in pertinent part, 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."[47] However, as stated above, rape is *not* listed as a "grave breach" or war crime in any of the four Geneva Conventions. As a consequence, rape is not listed as a grave breach in Article 2 of the Statute of the International Criminal Tribunal for the Former Yugoslavia which simply mirrors the Geneva Conventions.[48]

Nonetheless, the International Committee of the Red Cross (ICRC), which played an influential role in drafting the Conventions, has interpreted the grave breach of "willfully causing great suffering or serious injury to body or health" to encompass rape.[49] Likewise, the United States Department of State has declared that it considers rape a war crime or a grave breach under customary international law and the Geneva Conventions and that it can be prosecuted as such.[50]

Following the drafting of the Geneva Conventions, the ICRC widened the application of international humanitarian law to broaden the scope of protected persons.[51] The 1977 Protocols I and II Additional to the Geneva Conventions of 1949, which pertain to the protection of victims of international and internal war crimes, respectively, were drafted as a result.[52]

In Protocol I, rape is *not* listed as a crime constituting a grave breach.[53] Rape is, however, specifically prohibited by Article 76(1) of Protocol I, which states that "women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault."[54]

Article 4(2)(e) of Protocol II prohibits "[o]utrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and

46. *See* First Geneva Convention, *supra* note 42, art. 50, 6 U.S.T. at 3146, 75 U.N.T.S. at 62; Second Geneva Convention, *supra* note 42, art. 51, 6 U.S.T. at 3250, 75 U.N.T.S. at 174; Third Geneva Convention, *supra* note 42, art. 130, 6 U.S.T. at 3420, 75 U.N.T.S. at 238; Fourth Geneva Convention, *supra* note 42, art. 147, 6 U.S.T. at 3618, 75 U.N.T.S. at 388

47. The Fourth Geneva Convention, *supra* note 42, art. 27, 6 U.S.T. at 3536, 75 U.N.T.S. at 306.

48. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827.

49. Meron, *supra* note 41, at 426-427; Sharon A. Healey, *Prosecuting Rape Under the Statute of the War Crimes Tribunal for the Former Yugoslavia,* 21 BROOK. J. INT'L L. 327, 336-337 (1995).

50. Meron, *supra* note 41, at 427.

51. Healey, *supra* note 49, at 345.

52. Protocol Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims of Non-International Conflicts, 1125 U.N.T.S. 609 [hereinafter, Protocol II].

53. Protocol I, *supra* note 52, art. 85, 1125 U.N.T.S. at 41 - 42.

54. *Id.* at art. 76(1), 1125 U.N.T.S at 38.

any form of indecent assault."[55] In sum, although rape has been interpreted as a war crime or "grave breach," the treaties forming the foundation of the law of armed conflict, namely the Geneva Conventions along with its two Protocols, do not specifically list rape as such. Likewise, as discussed in the next section, although not explicitly enumerated as a violation of the laws and customs of war, rape can be so interpreted and one of the World War II war crimes tribunals explicitly listed rape as a violation of the recognized customs and conventions of war.

B. Violations of the Laws and Customs of War

The 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land[56] and the Regulations annexed thereto comprise a second important area of conventional humanitarian international law which has become part of the body of international customary law.[57] The Nuremberg Tribunal recognized that many of the provisions contained in the Hague Regulations, although innovative at the time of their adoption, were by 1939, recognized by all civilized nations and were regarded as being declaratory of the laws of customs of war.[58] The Nuremberg Tribunal also recognized that war crimes defined in Article 6(b) of the Nuremberg Charter were already recognized as war crimes under international law, and covered in the Hague Regulations, for which guilty individuals were punishable.[59]

Rape is not explicitly enumerated as a violation of the laws and customs of war in the 1907 Convention. Under a broad interpretation of Article 46 of the Hague Regulations, which provides that, "[f]amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected," rape could be construed as a crime against "family honour and rights."[60] However, in practice it has seldom been so interpreted.[61]

The Nuremberg Charter[62] lists the crimes that came within the jurisdiction of the Nuremberg Tribunal for which there was individual responsibility: 1) Crimes Against Peace, 2) War Crimes, and 3) Crimes against Humanity. Rape is not mentioned as a war crime or as a crime against humanity and none of the Nuremberg defendants were charged with rape as a war crime under customary international law.[63] In contrast, in the Tokyo Charter,[64] although rape similarly

55. Protocol II, *supra* note 52, at art. 4(2)(e), 1125 U.N.T.S. at 612.

56. Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. IV, 36 Stat. 2277, T.S. No. 539 (entered into force 26 Jan. 1910) [hereinafter 1907 Convention].

57. *Secretary-General's Report*, *supra* note 43, at 41.

58. *Id.* at 42.

59. *Id.*

60. Meron, *supra* note 41, at 425.

61. *Id.*

62. Charter of the International Military Tribunal in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, art. 6.

63. Nicole Eva Erb, *Gender-Based Crimes Under the Draft Statute for the Permanent International Criminal Court*, 29 COLUM. HUM. RTS. L. REV. 401, 409 (1998); Meron, *supra* note 41, at 425-26.

was not listed as a crime against humanity, it *was* listed as a violation of recognized customs and conventions of war and some Japanese military and civilian officers were found guilty of rape.[65] Although rape was not explicitly listed as a violation of the laws and customs of war (with the exception of the Toyko Charter), nor was listed as a crime against humanity in the Charters of Nuremberg and Tokyo, more current definitions of crimes against humanity include rape.

C. *Crimes Against Humanity*

Crimes against humanity were first recognized in the Tokyo and Nuremberg Charters as well as in Law Number 10 of the Control Council for Germany.[66] As stated above, rape was not mentioned as a crime against humanity in either the Nuremberg or Tokyo Charters. Although rape was not prosecuted at any of the domestic German trials, Control Council Law Number 10, a charter adopted by the four occupying powers in Germany for war crimes trials by their own courts in Germany, included rape in its list of crimes against humanity.[67] Control Council Law Number 10 provides: "*Crimes against Humanity*. Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated."[68] Following this precedent, the Statutes of the ICTY, the International Criminal Tribunal for Rwanda (ICTR), and the Rome Statute of the International Criminal Court, list rape as a crime against humanity.[69]

Thus, as this Part has described, with respect to the status of rape as a war crime, rape is included in the recent definitions of crimes against humanity. Rape is not explicitly enumerated as a "grave breach" or a violation of the laws and customs of war. However, rape has been interpreted as such. In addition, rape can be an act of genocide.

64. Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, amended Apr. 26, 1946, T.I.A.S. No. 1589.

65. Erb, *supra* note 63, at 410; Meron, *supra* note 41, at 426.

66. *Secretary-General's Report*, *supra* note 43, at 47.

67. Erb, *supra* note 64, at 409; Meron, *supra* note 41, at 426.

68. Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, 3 OFFICIAL GAZETTE CONTROL COUNCIL FOR GERMANY 50-55 (1946), art. II(1)(c).

69. *See generally* Statute of the International Criminal Tribunal for Yugoslavia, *supra* note 48; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute]; Rome Statute of the International Criminal Court, July 17, 1998, art. 7(1)(g), U.N. Doc. A/CONF.183/9th, (entered into force July 1, 2002), *available at* http://www.un.org/law/icc/statute/ romefra.htm.

III.
THE GENOCIDE CONVENTION AND RAPE AS A GENOCIDAL ACT

A. The Genocide Convention

Genocide and the acts through which genocide is committed are defined in the Convention on the Prevention and Punishment of the Crime of Genocide,[70] the first major human rights instrument adopted by the United Nations.[71] The Genocide Convention was drafted in response to World War II and the atrocities committed by the Nazis.[72] A Polish attorney, Raphael Lemkin, coined the term "genocide" to describe the destruction of a nation or of an ethnic group.[73] Lemkin "defined genocide as both the 'mass killings of all members of a nation,' and the 'coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the group themselves.'"[74]

According to Article I of the Genocide Convention, genocide is a crime under international law whether or not it occurs during war or peacetime.[75] Thus, genocide is a war crime when committed during war but it could also be described as an aggravated crime against humanity.[76] It differs, however, from the other crimes against humanity such as mass murder or racial and religious persecution, in that it requires a specific intent, *dolus specialis*, to exterminate a group.[77]

Since crimes against humanity are punishable under customary international law and are, therefore, binding on all members of the international community, the prohibition on genocide, as a crime against humanity, is applicable to states which have not yet ratified the Genocide Convention.[78]

The crime of genocide is defined in Article II of the Genocide Convention.[79] There must be an intention to destroy, in whole or in part, a national ethnic, racial or religious group through the commission of the following enumerated acts: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; and forcibly transferring children of the group to another group.[80] Rape is not explicitly enumerated as an act of genocide. However, as was seen in Rwanda, rape and other acts of sexual violence can be genocidal acts.

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70. Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951,, 78 U.N.T.S. 277. [hereinafter Genocide Convention].
71. Healey, *supra* note 49, at 364.
72. *Id.*
73. *Id.*
74. *Id.*
75. Genocide Convention, *supra* note 70, art. I, 78 U.N.T.S. at 280.
76. Healey, *supra* note 49, at 365.
77. *Id.*
78. *Id.* at 366.
79. 78 U.N.T.S. at 280.
80. *Id.*

B. *Rape as a Genocidal Act*

Rwanda acceded by legislative decree to the Genocide Convention on April 16, 1975.[81] Thus, the crime of genocide existed in Rwanda in 1994 when the genocide against the Tutsis occurred.[82] Although rape is not enumerated in the Genocide Convention, rape and other acts of sexual violence can be genocidal acts.[83] However, as stated above, establishing genocide requires the *dolus specialis* to destroy a national, ethnic, racial or religious group.[84] Acts such as rape and sexual violence do not constitute "genocidal acts" simply because they occur at the same time as or in the context of a genocide.[85] The requisite intent must be proven.[86] As a report by Human Rights Watch states,

> In individual cases documented by Human Rights Watch/FIDH, survivors testified that their attackers enunciated their intent to destroy them and their people and characterized sexual violence as a means to achieve that destruction. One rape survivor told Human Rights Watch, "While they were raping me, they were saying that they wanted to kill all Tutsi so that in the future all that would be left would be drawings to show that there were once a people called the Tutsi." Others recounted how their attackers said that rather than kill the women on the spot, they would leave them to die from their grief.[87]

Therefore, the rapes that were committed in Rwanda were "genocidal rapes" not because they occurred during the Rwandan genocide but because, as the testimony of the survivors demonstrates, there were expressions of a specific intent to destroy the Tutsis by and through raping Tutsi women before, during and after the commission of the rapes.

The question that arose about genocidal rapes among legal scholars, was why the rapes that occured in Bosnia received so much attention while rape and other acts of sexual violence that commonly occur in both internal and international armed conflicts received less attention. The fear expressed by one scholar is that what has now been termed "genocidal rape" will occlude rape that occurs regularly in situations outside of genocide and will occlude the gender aspect of rape.

IV.
THE DEBATE ABOUT GENOCIDAL RAPE

The two quotes juxtaposed below are from the writings of two scholars on opposite sides of the debate about genocidal rape.

> What we sought to argue and insert into this debate is that you cannot treat genocidal rape as special. In terms of its impact on the women affected, there is no difference between genocidal rape and the most common form of rape in war, which is rape as booty, exemplified by the Japanese comfort women. These wo-

81. *See* Genocide Convention, Status of Ratifications, Reservations and Declarations, *available at* http://www.unhchr.ch/html/menu3/b/treaty1gen.htm.
82. *Id.*
83. *See* SHATTERED LIVES, *supra* note 2, at 34.
84. Genocide Convention, *supra* note 70, 28 U.N.T.S. at 280.
85. *See* SHATTERED LIVES, *supra* note 2.
86. *Id.*
87. *Id.*

> men were not kidnapped and hauled into sexual slavery in order to diminish or destroy their ethnicity; they were hauled off to be the prostitutes for the troops. The Japanese industrialized that practice in the Second World War, kidnapping thousands of Korean, Chinese, Philippino, and Dutch women to serve the sexual needs of their soldiers. Women were used as a way of keeping soldiers going, as a reward to them. Why is that not a crime against humanity based upon gender?[88]

The result is that these rapes are grasped in either their ethnic or religious particularity, as attacks on a culture, meaning men, or in their sex specificity, meaning as attacks on women. But not as both at once. Attacks on women, it seems, cannot define attacks on a people. If they are gendered attacks, they are not ethnic; if they are ethnic attacks, they are not gendered. One cancels the other. But when rape is a genocidal act, as it is here, it is an act to destroy a people. What is done to women defines that destruction. Also, aren't women a people?[89]

In short, one side of the debate is concerned with gender disappearing from "genocidal rape" while the other recognizes and deems important its intersectionality. The issue surrounding genocidal rape is whether an overemphasis on "genocidal rape" will result in the "elision of rape and genocide." That the recognition of rape as a violent crime perpetrated against women *qua* women will be occluded with this focus on "genocidal rape." The fear is that the focus on "genocidal rape" could result in the effacement of gender in the crime of genocidal rape—the effacement of rape as a crime of violence perpetrated against women *because* they are women.

Therefore, the concern with respect to the mass rapes that occurred in Bosnia, is that those rapes received so much attention as opposed to rapes that occurred in earlier armed conflicts, because of their association with ethnic cleansing. Because the *effect* of these rapes was that people fled their homes, women were forcibly impregnated, and the Croat and Muslim men were "humiliated" as part of the intent of the rapist to "assault the community as a matter of military strategy."[90] The problem with this, according to one legal scholar, is that the gendered nature of the crime of rape—that it is a crime perpetrated against women because they are women and not solely because they belong to a particular group—is obscured. In addition, there is also a fear that this focus on "genocidal rape" will result in the female victim of the rape becoming the object of the crime or that her subjectivity will be denied, for example, that the female victim will be viewed as the object of a crime that is ultimately or fundamentally perceived as a crime against a particular group, rather than against that individual woman.

For example, Copelon writes:

> The elision of genocide and rape in the focus on "genocidal rape" as a means of emphasizing the heinousness of the rape of Muslim women in Bosnia is dangerous. Rape and genocide are each atrocities. Genocide is an effort to debilitate or

88. Rhonda Copelon, *Women and War Crimes,* 69 ST. JOHN'S L. REV. 61, 67 (1995).
89. MacKinnon, *supra* note 1, at 10.
90. Kalajdzic, *supra* note 3, at 479.

> destroy a people based on its identity as a people, while rape seeks to degrade and destroy a woman based on her identity as a woman. Both are grounded in total contempt for and dehumanization of the victim, and both give rise to unspeakable brutalities. Their intersection in the Serbian (and, to a lesser extent, the Croatian) aggressions in Bosnia creates an ineffable living hell for women there. From the standpoint of these women, they are inseparable.
>
> But to emphasize as unparalleled the horror of genocidal rape is factually dubious and risks rendering rape invisible once again. When the ethnic war ceases or is forced back into the bottle, will the crimes against women matter? Will their suffering and struggles to survive be vindicated? Or will condemnation be limited to this seemingly exceptional case? Will the women who are brutally raped for purposes of domination, terror, booty, or revenge in Bosnia and elsewhere be heard?[91]

What Copelon suggests is to "surface" gender in the midst of genocide.[92] Copelon feared that the focus of genocidal rape would be on its effect on a group rather than on the women who were targeted because they are female, and who also happen to be members of a targeted group. Professor Copelon is concerned that an emphasis on genocidal rape would mean that rapes that occur outside of genocide would not get appropriate attention. Only when rape and other acts of sexual violence have a genocidal effect on an ethnic group, would these acts get attention.

On the other side of the debate, there are those, including Catharine MacKinnon and Jasminka Kalajdzic, who contend that it is important to recognize the particular *as well as* the generic in the crime of genocidal rape. MacKinnon understands that women are targeted for rape generally because they are women and that rape is violence against women. But she also understands that particular women from a specific group who are targeted for genocide are also targeted for genocidal rape. Thus, for both Kalajdzic and MacKinnon, it is important not to lose sight of the intersectionality between ethnicity and gender in genocidal rape. MacKinnon writes:

> One result of this equalization of aggressor with aggressed-against is that these rapes are not grasped either as a strategy in genocide or as a practice of misogyny, far less as both at once, continuous at once with this ethnic war of aggression and with the gendered war of aggression of everyday life. This war is to everyday rape what the Holocaust was to everyday anti-Semitism. Muslim and Croatian women and girls are raped, then murdered, by Serbian military men, regulars and irregulars, in their homes, in rape/death camps, on hillsides, everywhere. Their corpses are raped as well. When this is noticed, it is either as genocide or as rape, or as femicide but not genocide, but not as rape as a form of genocide directed specifically at women. It is seen either as part of a campaign of Serbia against non-Serbia or an onslaught by combatants against civilians, but not an attack by men against women. Or, in the feminist whitewash, it becomes just another instance of aggression by all men against all women all the time, rather than what it is, which is rape by some men against certain women. The point seems to be to obscure, by any means available, exactly who is doing what to whom and why.[93]

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91. *See generally* Copelon, *supra* note 4, at 199 (emphasis added). For a discussion of these issues, see generally *id.* at 197-214.

92. *Id.* at 199.

93. MacKinnon, *supra* note 5, at 64-65.

Again, MacKinnon understands the intersectionality of "genocidal rape" and that it differs from acts of rape and sexual violence that occur outside of genocide. MacKinnon understands that it is important to recognize that genocidal rape is not just about a woman's identity as a woman but is also about a woman's identity in a particular group and that both are equally important and distinguishing. Kalajdzic also recognizes this point when she writes:

> An overemphasis on gender to the exclusion of all other possible motivating factors 'can obscure other characteristics of a woman's identity that determine *which* women are raped.' . . . Sexism and racism, therefore, operate in conjunction to determine which women are raped. Indeed, rape survivors are women *and* members of a given national, political, or religious group. Their identities as women cannot be separated from their membership in a particular race or religion. According to this school of thought, therefore, rape cannot be defined by gender alone, and some reliance on the community aspects of the crime must continue.[94]

In sum, one side of the debate is concerned with gender disappearing from "genocidal rape" while the other recognizes and deems important its intersectionality. With the debate about genocidal rape in context, I will analyze it in light of the genocide in Rwanda, the establishment of the International Tribunal for Rwanda and the historic *Akayesu Judgment*.

V.
THE 1994 GENOCIDAL CAMPAIGN IN RWANDA,[95] THE INTERNATIONAL TRIBUNAL FOR RWANDA AND ITS HISTORIC *AKAYESU JUDGMENT*

A. The 1994 Rwandan Genocide

The killing of Tutsis started in 1990 after an attack was launched from Uganda by the Rwandan Patriotic Front (RPF), a group formed in 1979 by Tutsi exiles based in Uganda.[96] The killings started as an attempt by the then President of Rwanda, Habyarimana, to stop the efforts of the RPF to take over his government.[97] What touched off the genocidal campaign of 1994 against the Tutsis (and those considered to be sympathetic to them) was that President Habyarimana's plane was shot down on April 6, 1994 on his way back from a peace conference that he had attended in Tanzania.[98] President Habyarimana was a Hutu and those close to him blamed the RPF for his death.[99] Actually, Habyarimana's death was most likely a pretext for the genocide of both Tutsis and moderate Hutus who were in opposition to President Habyarimana, which had been planned for months.[100] The 1994 Rwandan genocide started before

94. Kalajdzic, *supra* note 3, at 477-78.

95. The facts herein are based upon facts found in SHATTERED LIVES, *supra* note 2, and the factual findings of ICTR in the *Akayesu Judgment*, *supra* note 6, at ch. 6.3.1, ¶ 496.

96. SHATTERED LIVES, *supra* note 2, at 12; *Akayesu Judgment*, *supra* note 6, at ch. 2, ¶ 93.

97. *Id.*

98. SHATTERED LIVES, *supra* note 2, at 13; *Akayesu Judgment*, *supra* note 6, at ch. 2, ¶ 106.

99. SHATTERED LIVES, *supra* note 2, at 13.

100. *Id.*

dawn on April 7, 1994 and continued up until July 18, 1994.[101] The estimated total number of victims varies from 500,000 to 1,000,000 or more.[102]

B. *The International Tribunal for Rwanda*

As a result of the events which took place in Rwanda during the spring of 1994, the Security Council of the United Nations established the International Tribunal for Rwanda in its Resolution 955 of November 8, 1994.[103] The Government of Rwanda requested the creation of the Tribunal because of its desire to avoid "the risk of being accused of administering an 'expeditious victor's justice;' its belief that genocide [is] a 'crime against humanity calling for collective efforts to prevent, stop and punish it;' and its hope that a 'free and fair international tribunal would contribute to ally the fear of retribution . . . would facilitate much needed national reconciliation . . . and [is] indispensable in building a legal system based on the rule of law.'"[104]

The International Tribunal for Rwanda consists of three Trial Chambers and an Appeals Chamber.[105] There are fourteen independent judges, no two of whom may be nationals of the same State.[106] Three judges each sit on the Trial Chambers and five in the Appeals Chambers.[107] The judges are elected by the United Nations General Assembly and represent, in accordance with Article 12(3)(c) of the Statute, the principal legal systems of the world.[108] The Statute stipulates that the members of the Appeals Chamber of the International Tribunal for Yugoslavia shall also serve as members of the Appeals Chamber of the International Tribunal for Rwanda.[109]

Under the Statute, the International Tribunal for Rwanda has the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring States, between January 1 and December 31, 1994.[110] According to Articles 2 through 4 of the Statute relating to its subject matter jurisdiction, the International Tribunal for Rwanda has the power to prosecute persons who committed genocide as defined in Article 2 of the Statute, persons responsible for crimes against humanity as defined in Article 3 of the Statute and persons responsible for serious violations of Article 3 common to the Geneva Conventions of August 12, 1949 for the protection of victims of war, and of Additional Protocol II, a crime defined in Article 4 of the Statute.[111] Article 8 of the Statute provides

101. *Akayesu Judgment*, *supra* note 6, at *ch.* 2, ¶¶ 107, 111.
102. *Id.* at ¶ 111.
103. ICTR Statute, *supra* note 69.
104. *See* Rupa Bhattacharyya, *Establishing A Rule-Of-Law International Criminal Justice System*, 31 TEX. INT'L J. 57, 61-62, n.23 (1996).
105. ICTR statute, *supra* note 69, at art. 10.
106. *Id.* at art. 11.
107. *Id.*
108. *Id.* at art. 12(3)(c).
109. *Id.* at art. 12(2).
110. *Id.* at pmbl.
111. *Id.* at arts. 2, 3,4.

that the International Tribunal for Rwanda has concurrent jurisdiction with national courts, over which it has primacy.[112] One of the most important cases coming out of the Tribunal involved Jean-Paul Akayesu, a powerful figure who used his position to both advocate and ignore countless acts of genocidal rape. The *Akayesu Judgment* was the first case to come out of an international criminal tribunal which recognized rape as an act of genocide.

C. *The Akayesu Judgment*

Akayesu was indicted variously for genocide, crimes against humanity, incitement to commit genocide, war crimes and "grave breaches." The indictment against Akayesu was submitted by the then Prosecutor for the Rwandan and Yugoslav Tribunals, Louise Arbour, on February 13, 1996 and was confirmed on February 16, 1996.[113] The Prosecutor amended the Akayesu Indictment during the trial, in June 1997, to add three counts (13-15, Crimes Against Humanity based on the allegations of rape and sexual violence) and three paragraphs (10A, 12A and 12B) which are the paragraphs that include the allegations of rape and sexual violence.[114]

Rwanda is divided into eleven prefectures, each one of which is governed by a prefect.[115] The prefectures are divided into communes, which are placed under the authority of bourgmestres.[116] The bourgmestre is appointed by the President of the Republic, upon the recommendation of the Minister of the Interior.[117] The bourgmestre is the most powerful figure in the commune.[118]

Akayesu was the bourgmestre of the Taba commune, prefecture of Gitarama, from April 1993 until June 1994.[119] Prior to being Taba's bourgmestre, Akayesu was a teacher and a school inspector for Taba.[120] As bourgmestre, Akayesu was charged with the performance of executive functions and the maintenance of public order within his commune, subject to the authority of the prefect.[121] Akayesu had exclusive control over the communal police, as well as any police put at the disposition of the commune.[122] He was responsible for the execution of laws and regulations and the administration of justice, also subject to the prefect's authority.[123]

Between April 7 and the end of June 1994, hundreds of civilians took refuge at the bureau communal of Taba.[124] The majority of the civilians who

112. *Id.* at art. 8.
113. *Akayesu Judgment*, *supra* note 6, at ch. 1.2(6).
114. *Id.*
115. *Id.* at ¶ 2.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at ch. 1.2, ¶ 3.
120. *Id.*
121. *Id.* at ¶ 4.
122. *Id.*
123. *Id.*
124. *Id.* at ch. 5.5.

sought shelter were Tutsi.[125] Tutsi women were regularly subjected to rape and other forms of sexual violence on or near the bureau communal and the civilian population was frequently murdered and/or beaten on or near the bureau communal premises.[126]

There were fifteen counts in the Indictment against Akayesu.[127] Akayesu was charged with genocide, crimes against humanity (extermination, murder, torture, rape, other inhumane acts), incitement to commit genocide, violations of Common Article 3 to the Geneva Conventions and of Article 4(2)(e) of Additional Protocol II (murder, cruel treatment, outrages upon personal dignity, in particular rape, degrading and humiliating treatment and indecent assault).[128] On the basis of the allegations of rape and sexual violence, described in paragraphs 12A and 12B of the Indictment, Akayesu was charged with Genocide, Complicity to Commit Genocide, Crimes Against Humanity (extermination, rape and other inhumane acts) and Violations of Article 3 common to the Geneva Conventions and of Article 4(2)(e) of the Additional Protocol II (outrages upon personal dignity, in particular rape, degrading and humiliating treatment and indecent assault).[129]

The Indictment charged that, with respect to the killings, as the bourgmestre, Akayesu was responsible for maintaining law and public order in his commune. That responsibility notwithstanding, at least 2,000 Tutsis were killed in Taba between April 7 and the end of June 1994 while Akayesu was still in power.[130] According to the Indictment, the killings in Taba were openly committed and so widespread that Akayesu must have known about them.[131] Although he had the authority and responsibility to do so, the Indictment alleged, Akayesu never attempted to prevent the killings of Tutsis in the commune in any way and never called for assistance from regional or national authorities to quell the violence.[132] With respect to the acts of rape and sexual violence, the Indictment charged that Akayesu knew that acts of sexual violence, beatings, and murders were being committed and was at times present during their commission.[133] The Indictment further charged that Akayesu facilitated the commission of the sexual violence, beatings, and murders by allowing the sexual violence, beatings and murders to occur on or near the bureau communal premises.[134] The Indictment charged that, by virtue of his presence during the commission of the sexual violence, beatings, and murders and his failure to prevent these acts, Akayesu had encouraged these activities.[135]

125. *Id.*
126. *Id.*
127. *Id.* at ch. 1.2.
128. *Id.*
129. *Id.*
130. *Id.* at ch. 1.2, ¶ 12.
131. *Id.*
132. *Id.*
133. *Id.* at ¶ 12(B).
134. *Id.*
135. *Id.*

Akayesu's defense with respect to the killings was that he did not commit, order or participate in any of the killings, beatings or acts of sexual violence alleged in the Indictment.[136] Akayesu conceded that genocide occurred in Rwanda and that massacres of Tutsis took place in the Taba Commune but he claimed that he was helpless, being outnumbered and overpowered, to stop them.[137] Akayesu claimed that he should not have had to have been a hero or to have laid down his life in a futile attempt to prevent killings and beatings.[138] Furthermore, he alleged that no acts of sexual violence took place at the Bureau Communal.[139] Akayesu pleaded not guilty to all the counts of the Indictment including the new counts, which were added when the Indictment was amended June 17, 1997.[140]

Interestingly, before deciding whether or not Akayesu had committed genocide, the Rwandan Tribunal had to decide whether the Tutsis constituted a group protected against genocide, that is, a national, ethnic, racial or religious group.[141] The Tutsis and the Hutus shared the same nationality, race and religion. The Tribunal defined an ethnic group as a group who shared a "common language or culture."[142] The Trial Chamber noted that the Tutsi population does not have its own language or a distinct culture from the rest of the Rwandan population.[143] The Tribunal, therefore found it necessary to search the *travaux preparatoires* of the Genocide Convention to discern the intent of the drafters.[144] In the opinion of the Tribunal, the intent of the drafters was to protect any stable and permanent group determined by birth, in a continuous and often irremediable manner.[145] According to the Tribunal, the Tutsis constituted such a "stable and permanent" group.[146]

The Tribunal noted that the distinctions—Hutu, Tutsi and Twa—had been imposed on the Rwandan population by the Belgian authorities in the early 1930's.[147] It then became mandatory for every Rwandan to carry an identity card mentioning his or her ethnicity.[148] This remained the case until after the events in Spring 1994.[149] Those identity cards referred to "ubwoko" in Kinyarwanda or "*ethnie*" (ethnic group) in French, which referred to the designation of Hutu or Tutsi or Twa.[150] The Trial Chamber also noted that all of the Rwandan witnesses who appeared before it answered spontaneously and without hesita-

136. *Id.* at ch. 1.4.2, ¶ 30.
137. *Id.*
138. *Id.* at ¶ 31.
139. *Id.* at ¶ 32.
140. *See id.* at ¶ 29.
141. *Id.* at ch. 6.3.1, ¶ 499.
142. *Id.* at ¶ 513.
143. *See id.* at ch. 5.1, ¶ 170.
144. *Id.* at ch. 6.3.1, ¶ 511.
145. *See id.* at ¶¶ 511, 516.
146. *Id.* at ch. 7.8, ¶ 702.
147. *Id.* at ch. 2, ¶ 83.
148. *Id.*
149. *Id.*
150. *Id.* at ch. 5.1, ¶ 170, ch. 7.8, ¶ 702.

tion to questions put by the Prosecutor regarding their ethnic identity.[151] Furthermore, the Rwandan Constitution and laws in place during 1994 referred to Rwandans by their ethnic group.[152] Moreover, customary rules existed in Rwanda which, followed patrilineal lines of heredity in determining membership in an ethnic group.[153] Lastly, the Tutsis were perceived to be a distinct, separate, stable, and permanent group and were targeted for killing on that basis.[154] Therefore, the Rwandan Tribunal found that the categorization of Hutu, Tutsi and Twa, albeit imposed on the Rwandan people, was embedded in Rwandan culture by the time of the events of Spring 1994. So although the Tutsi and Hutu ethnicities were to some extent a product of choice and perception rather than immutable features, either individually as a group or imposed by an outsider, the Tribunal found that the Tutsis constituted a group that was intended to be protected against genocide.[155]

Akayesu's trial on the merits began on January 9, 1997 and was adjourned on March 26, 1998 for deliberation on the judgment by the Chamber.[156] There was a total of sixty days of hearings.[157] The judgment in the Akayesu case was rendered September 2, 1998. The Trial Chamber found Akayesu guilty of genocide, crimes against humanity (extermination, murder, torture, rape, and other inhumane acts), and direct and public incitement to commit genocide.[158]

With respect to the allegations of rape and sexual violence, Akayesu was found guilty of genocide and crimes against humanity (rape and other inhumane acts).[159] The Trial Chamber found Akayesu guilty of genocide under Articles 2(2)(a) and (b), killing and inflicting serious bodily and mental harm on members of said group.[160] As a result, the *Akayesu Judgment* is an extremely important decision in the international law on rape and acts of sexual violence in armed conflict as well as in recognizing rape as an act of genocide. The

151. *Id.*

152. *Id.* at ch. 5.1, ¶ 170.

153. *Id.* at ¶ 171.

154. *Id.*

155. *See* Lori Fisler Damrosch, *Genocide and Ethnic Conflict, in* INTERNATIONAL LAW AND ETHNIC CONFLICT 256, 261 (David Wippman, ed., 1998), wherein Professor Damrosch discusses this idea of what constitutes a national, ethnical, racial or religious group, as such, and explains, using the Kurdish situation in Iraq as illustration, that

> [n]onetheless, it would be misleading to view the Genocide Convention as addressed solely to violence against groups defined exclusively on the basis of immutable characteristics such as the color of one's skin. Admittedly, an undertone of this philosophy runs through certain aspects of the *travaux preparatoires* . . . But the protections of the Genocide Convention are not restricted only to groups that are determined by some objective condition or accident of birth. Indeed, the convention protects ethnical groups even though (and perhaps because) ethnicity is to some extent a matter of choices and perceptions rather than immutable features. These choices and perceptions can emanate from individuals and groups, or they can be imposed on individuals and groups by outsiders such as the state."

156. *Akayesu Judgment, supra* note 6, at ¶¶ 17, 28.

157. *Id.* at ¶ 28.

158. *Id.* at ch.8.

159. *Id.* at ch. 7.8, ¶¶ 696, 697, 707, 734.

160. *Id.* at ¶ 734.

Akayesu Judgment also substantially contributed to the clarification of the debate about genocidal rape.

VI.

How the International Tribunal for Rwanda, in its *Akayesu Judgment* Addresses and Clarifies Some, If Not All, of the Concerns Raised in the Debate about Genocidal Rape

The *Akayesu Judgment* is the first time that a tribunal has defined rape as a genocidal act. The *Akayesu Judgment* is encouraging because it clarifies the debate about the "overemphasis" on genocidal rape. The International Tribunal for Rwanda recognized: 1) How sex worked to destroy a people; 2) The intersectionality of the "ethnicized" rape and the gendered nature of the crime of genocidal rape; and 3) The subjectivity of the rape victim in the crime of genocidal rape.

First, the Tribunal acknowledged in its *Akayesu Judgment,* through its definition of rape and through its finding that rape can be an *actus reus* of genocide, that it viewed rape, not as simply or purely sexual in nature, but as a tool of war, as a violent act perpetrated against a member of a group with the intent of destroying that group.

Professor Katharine Franke argues in her article, *Putting Sex to Work,*[161] that overemphasizing the sexual, (understood as erotic) in certain behavior may result in the occlusion of the way in which sex mediates other social relations of power.[162] Particularly with respect to sex crimes such as rape, Franke regards the treatment of sex-based violence by the Prosecutor of the Yugoslav international criminal tribunal (who is also the Prosecutor of the Rwandan tribunal) as a good example.[163] According to Franke,

> What the . . . Prosecutor has devised, in effect, is a strategy to evaluate on a case-by-case basis what role sex-related violence plays in the context of violations of international humanitarian law, in so far as it "shock[s] the conscience of humankind to such a degree [that it has] an international effect." Rather than rely upon special laws that isolate rape and/or sexual assault as a privileged kind of injury, the Tribunal's Prosecutor and judges have chosen to tailor the construction of these crimes to the way in which sex-related violence figures in the physical or mental destruction of a people or person.[164]

The International Tribunal for Rwanda in its *Akayesu Judgment* recognized how "sex worked" to destroy a people. By interpreting the enumerated acts of genocide in the Genocide Convention to include acts of rape, the Tribunal acknowledged that "sex" can cause "serious bodily or mental harm" to an individual and that "sex" can kill and be used to destroy a people.

Contrary to the historical definition or characterization of rape—as a wrong against men, against the woman's husband, father, brother, community, and nation, or even more recently in the Fourth Geneva Convention as an attack on a

161. *Supra* note 7.
162. *Id.* at 1141.
163. *Id.* at 1163-64.
164. *Id.* at 1177.

woman's honor and modesty—the International Tribunal for Rwanda in *Akayesu* "properly" defined rape.[165] It defined rape as a form of aggression.[166] It likened rape to torture and it characterized rape as a violation of personal dignity.[167] It also defined rape as a physical invasion of a sexual nature.[168]

In keeping with this definition of rape, the Tribunal first recognized the violent and destructive nature of acts of rape and sexual violence perpetrated against women *qua* women, and found that rape and sexual violence,

> constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm . . . These rapes resulted in the physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.[169]

Accordingly, the International Tribunal for Rwanda demonstrated that it understood how sex, during the 1994 genocidal campaign in Rwanda, worked to destroy a people.

Second, the Tribunal both recognized the intersectionality of the crime of genocidal rape and managed to "surface gender in the midst of genocide." It recognized that Tutsi women were targeted both because they were Tutsi (and that Hutu women were targeted because they were married to Tutsi men) and because of the beliefs and opinions held by Hutus about Tutsi women *as* women. The Tribunal understood that Tutsi *women* were raped because the Hutu believed them to have been dangled before the Hutus as seductress-spies, enemies of the state—unattainable, inaccessible and sexually intriguing *women* who thought themselves better than Hutu women and who believed themselves to be too good to marry Hutu men. And for that they were targeted on the basis of *both* their ethnicity *and* their gender.[170]

Thus, the Tribunal stated:

> The rape of Tutsi women was systematic and was perpetrated against all Tutsi women and solely against them. A Tutsi woman, married to a Hutu, testified before the Chamber that she was not raped because her ethnic background was unknown. As part of the propaganda campaign geared to mobilizing the Hutu against the Tutsi, the Tutsi women were presented as sexual objects. Indeed, the Chamber was told, for example, that before being raped and killed, Alexia, who was the wife of the Professor, Ntereye, and her two nieces, were forced by the Interahamwe to undress and ordered to run and do exercises "in order to display the thighs of Tutsi women." The Interahamwe who raped Alexia said, as he threw

165. Kalajdzic, *supra* note 3, at 465 (stating that rape is "properly" defined as a "sexual *invasion* of the body by *force*, an incursion into the private, personal inner space without consent—in short, an internal *assault* . . . and a *hostile*, degrading act of violence.").

166. *Akayesu Judgment*, *supra* note 6, at ch. 7.7 ¶ 687.

167. *Id.*

168. *Id.* at ¶ 688.

169. *Id.* at ch. 7.8, ¶ 731.

170. SHATTERED LIVES, *supra* note 2, at 2, 16-19.

> her on the ground and got on top of her, "let us now see what the vagina of a Tutsi woman takes [sic] like". As stated above, Akayesu himself, speaking to the Interahamwe who were committing the rapes, said to them: "don't ever ask against [sic] what a Tutsi woman tastes like". This sexualized representation of ethnic identity graphically illustrates that Tutsi women were subjected to sexual violence because they were Tutsi. Sexual violence was a step in the process of destruction of the tutsi group—destruction of the spirit, the will to live, and of life itself.[171]

Lastly, the International Tribunal for Rwanda recognized the subjectivity of the victims of the crime of genocidal rape. It recognized that although the intent of the act of genocidal rape is to destroy a particular group, the effect of the act is the infliction of serious injury and harm, what the Tribunal recognized as possibly one of the worst ways of inflicting harm upon individual Tutsi women, thus advancing the destruction of the entire group.[172]

VII.
CONCLUSION

Rape, although committed in internal and international armed conflicts throughout history, is not explicitly enumerated as a "grave breach" or a war crime in the conventional law of armed conflict. Recently, however, rape has been defined as a crime against humanity. The Genocide Convention does not include rape as one of the listed acts of genocide. However, as evidenced by the events in Bosnia and Rwanda, rape and other acts of sexual violence can be used to commit genocide.

A debate arose around "genocidal rape" in which scholars took opposing positions. One side argued in effect that rape as an act of genocide should not receive special treatment and that it should not be specially denominated. The other side contended that genocidal rape is different from rape that occurs outside of a genocide and that the international community should acknowledge a woman's gender identity along with her identity as a member of a particular national, ethnic, racial or religious group. Although the Rwandan genocide had occurred at the time that most of the legal scholarship about the debate on genocidal rape had been written, it was not until the *Akayesu Judgment* that there was analysis and discussion of how the mass rapes committed in Rwanda constituted acts of genocide or genocidal rapes. By so analyzing and discussing genocidal rape in the *Akayesu Judgment*, the International Tribunal for Rwanda provides some clarity to the debate about genocidal rape. For example, in finding and defining genocidal rape, the Tribunal recognized how rape and sexual violence worked to destroy the Tutsis. Second, it recognized the intersectionality of genocidal rape. And, lastly, the International Tribunal for Rwanda acknowl-

171. *Akayesu Judgment, supra* note 6, at ch. 7.8, ¶ 732.

172. *Id.* at ¶ 733. The tribunal stated the following:

> [I]n this respect, it appears clearly to the Chamber that the acts of rape and sexual violence, as other acts of serious bodily and mental harm committed against the Tutsi, reflected the determination to make Tutsi women suffer and to mutilate them even before killing them, the intent being to destroy the Tutsi group while inflicting acute suffering on its individual members in the process.

Id.

edged that, although the group is a focal concern of the crime of genocide, genocidal rape is one of the worst ways of inflicting harm and injury on an individual member of that group, here, Tutsi women.

In this respect, the *Akayesu Judgment* (as well as the Nyiramasuhuko case, which hopefully will build upon the *Akayesu* Judgment) is an important addition to the debate about genocidal rape. Hopefully, the *Akayesu Judgment* along with the Nyiramasuhuko case will be instrumental to future cases because they demonstrate the complexity of the issue since oversimplification itself is an assault. Therefore, MacKinnon, who has been viewed at times as a radical voice, had her description of genocidal rape affirmed by the *Akayesu Judgment*.

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Sexual Slavery and the Comfort Women of World War II

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Sexual Slavery and the "Comfort Women" of World War II*

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I.
INTRODUCTION

International law prohibited slavery well before the Japanese army created "comfort stations" during World War II. Slavery, correctly defined, is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.[1] Slavery is often equated with forced labor or deprivation of liberty; however, sexual autonomy is a power attaching to the right of ownership of a person, and controlling another person's sexuality is, therefore, a form of slavery. The Japanese "comfort system" combined these forms of control. In addition to restricting its victims' freedom of movement, it forced them to perform sexual labor. Thus, it constituted a system of slavery that violated international law.

The treaties and customary law that provide the basis for criminalizing slavery have used different language in their attempts to define the crime. As both the Special Rapporteur to the UN Commission on Human Rights and the ITCY have recognized, however, the language of the 1926 Slavery Convention, by focusing on the exercise of the rights of ownership, provides the best definition of slavery and one that encompasses sexual slavery. The recent Rome Statute of the International Criminal Court (ICC),[2] on the other hand, adopts a definition of sexual slavery that emphasizes commercial trafficking and deprivation of liberty, rather than control over sexuality. Although the Rome Statute

* I must start by thanking all the people who contributed to the Women's War Crimes International Tribunal (Tokyo Tribunal 2000) and who invited me to participate as a Judge. I am honored that the organizers of the Tokyo Tribunal 2000 felt that I was qualified to participate in this important event. I give my heartfelt thanks to Judges Gabrielle Kirk McDonald (USA), Christine Chinkin (UK) and Willy Mutunga (Kenya); legal advisers Rhonda Copelon and her students at CUNY (USA), Kelly Dawn Askin (USA), Barbara Bedont (Canada) and Betty Murungui (Kenya); and the International Organizing Committee (IOC) members Indai Sajor (Philippines), Yun Chung Ok (South Korea) and Yayori Matsui (Japan). I also would like to thank the courageous survivors for whom I have the deepest admiration.

** International Criminal Tribunal for the former Yugoslavia (ICTY) *ad litem* Judge.

1. *See, e.g.*, Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 60 U.N.T.S. 253 [hereinafter 1926 Slavery Convention].

2. The Rome Statute of the International Criminal Court, U.N. Doc. A/ CONF.183/9 (1998) *available at* http://www.un.org/law/icc/ (last visited Dec. 17, 2002) [hereinafter Rome Statute].

reiterates the ban on sexual slavery, its overly narrow definition represents a step backward from the 1926 Slavery Convention.

II.
Historical Background

In 1895, the island of Taiwan became a colony of Japan. In 1905, Japan forced Korea to become a Japanese protectorate; in 1910, Korea became a colony of Japan. Japan controlled Taiwan and Korea up to and through the start of World War II. From Korea, Japan began a war of aggression against China, aiming to form an Asia-Pacific Empire under its domination. It also established in the north of China a "puppet" state named "Manchuguo." Japanese military forces fully controlled Manchuguo and deployed from there to the south with the intent of conquering all of China. Japanese history books dismissively refer to this as the "Manchurian Incident" (Manshuu Jihen).

As the Japanese military moved across mainland Asia, its soldiers and officers committed widespread atrocities. In 1937, for example, the Japanese military invaded and destroyed the city of Nanking, an incident which became known as "The Rape of Nanking." The atrocities that the Japanese forces committed there—especially the large scale rape of young women and girls, and the barbaric treatment of the general population—created an outcry in the international press.

The press reports of the Rape of Nanking reached Emperor Hirohito, who was appalled by the negative image of the Imperial Army that the incident had created. According to Japanese historians, the Emperor asked his Ministers, Counselors and Military Chiefs to devise ways to restore the "honor of Japan" and stop the condemnation by the international press. The Emperor's aides proposed two ideas. The first was a reform of the Military Code, a task in which the Emperor as well as his Army and Navy Commanders, and his Ministers were involved. The second was the creation and systematic extension of what the Japanese military euphemistically called "comfort stations."

Comfort stations had existed since 1932. The Japanese military created the first such stations near some barracks in continental China. Japanese soldiers referred to them as whore houses or brothels. As licensed prostitution existed at that time in Japan, it is possible that those first comfort stations employed licensed prostitutes. After the Rape of Nanking, however, military regulation of comfort stations changed them into facilities for sexual slavery.

III.
Japanese Goals

Japan had four reasons for establishing comfort stations. As stated previously, one of the main reasons was the desire to restore the image of the Imperial Army. By confining rape and sexual abuse to military-controlled facilities, the Japanese government hoped to prevent atrocities like the Rape of Nanking or, if such atrocities did occur, to conceal them from the international press.

A second reason for establishing comfort stations was to prevent anti-Japanese sentiment from fomenting among local residents in the occupied territories. Rape increased anti-Japanese sentiment and stimulated resistance in the occupied countries, which in turn complicated military actions for the Japanese army during World War II.

Third, Japan hoped to keep its military personnel healthier and reduce medical expenses. Because Japanese soldiers were committing rape indiscriminately and on a large scale, they often contracted venereal diseases and other illnesses. These diseases caused loss of strength and required expensive medical treatment before soldiers and officers could resume their war duties. Military oversight of the comfort stations, even where the facilities were run by private operators, included medical examination of the women by Japanese military doctors to assert their virginity and health, thus reducing the incidence of venereal disease and the attendant loss of manpower and expense of treatment.

There was a fourth reason for establishing comfort stations. The women kept there for the pleasure of Japanese military personnel were isolated. Many of them had been trafficked from distant countries, did not know the local language, could not leave the facilities and were abused if they did not comply with their captors' orders. Therefore, they could not communicate any military secrets confided to them. This isolation provided a distinct advantage over local brothels which, the Japanese believed, could hide dangerous spies.

IV.
THE "RECRUITMENT"

At the end of World War II, the Japanese military destroyed or withheld many documents on the comfort stations system. Nevertheless, some important documents survived, such as the one uncovered in 1992 by Professor Yoshiaki Yoshimi, the author of a book entitled *Comfort Women*.[3] This memorandum, entitled "Matters Concerning the Recruitment of Women to Work in Military Comfort Stations" ("Recruitment Memo"),[4] was sent on March 4, 1938, by an adjutant in the Japanese War Ministry to the Chiefs of Staff of the North China Area Army and the Central China Expeditionary Force.

This document addresses so-called social problems caused by unsupervised recruiters. It states: "You are hereby notified of the order [of the Minister of War] to carry out this task with the utmost regard for preserving the honor of the army and for avoiding social problems." The document does not mention the need to ensure that the women consent to their recruitment into the comfort station system or to avoid recruiting minors. As usual, the most important issue to the Japanese was "the honor of the army."

The Japanese used several means to recruit women for the comfort stations. One such means was deception. The colonies—Taiwan and Korea—and the

3. Yoshiaki Yoshimi, COMFORT WOMEN: SEXUAL SLAVERY IN THE JAPANESE MILITARY DURING WORLD WAR II (Suzanne O'Brien trans., 2000).

4. *Id.* at 59.

occupied territories were very poor because Japan had taken for the war effort any available means of production of food and clothing. Many young women and girls were living in poverty and had been working from a very early age to support their families. Recruiters promised these women better jobs as nurses, waitresses, maids, or typists, along with a salary that could help their families. Even when recruiters did mention the comfort stations, they misrepresented the nature of "comfort service." The U.S. Office of War Interrogation Report No. 49 ("OWI Report")[5] indicates that, initially, Korean women assumed that comfort service consisted of visiting wounded soldiers and generally making the soldiers happy, and that many Korean women enlisted on the basis of these misrepresentations.

In another means of recruitment, girls or young women were purchased from their economically destitute families, or became debt bonded, that is, indentured servants. The Southeast Asia Translation and Interrogation Center (SEATIC) Psychological Warfare Interrogation Bulletin No. 2[6] states that the Japanese manager of a comfort station in Burma, who operated under military authority, purchased the Korean women from their families for 300 to 1000 yen each "depending on the girls' characters, appearance, and ages," and that once bought the women became his sole property. The OWI Report on debt bondage states that the term of the servitude contracts varied from "six months to a year depending on the size of the family debt advanced." The OWI Report also indicates that the women could not leave the comfort stations even after they had fulfilled the terms of their contracts.

The Japanese army also forcibly abducted women and girls both in the colonies and the occupied territories. Survivors who gave testimony before The Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery stated that they were enslaved through abduction in the Philippines, Malaysia, East Timor, Korea, China, Taiwan and Indonesia. In most of these cases, the women witnessed the Japanese army or its recruiters murder family members who tried to defend the women from being taken.

Sometimes the Japanese military told the heads of small villages to round up girls of a certain age—usually between 15 and 22—and deliver them to the Japanese forces for "work." If the women refused, the Japanese threatened to destroy the village, kill the elders and children and commit other violent measures. That was a means of coercion to induce villagers to sacrifice their daughters. One survivor said that her mother was convinced to sign "some papers" sending her to the Japanese military as contribution to the war effort because she had no sons to give to the army.

In Java, the Japanese army used civilian internment camps as the source of young women and girls for the comfort stations. Jan Ruff O'Herne, from the Netherlands, told the Tokyo Tribunal 2000 that she was in one of those camps with her mother and sisters when a group of Japanese soldiers, including a high

5. *Id.* at 105-106.
6. *Id.* at 105-108.

ranking officer, arrived and ordered women between 17 and 28 years old to be inspected. They selected several girls and women and took them away despite their protests and those of their mothers. The Japanese army placed these women in a comfort station against their will and despite their resistance.[7]

In other places, the Japanese military took women into the facilities for sexual slavery because they suspected them of having a relationship with members of the resistance or participating themselves as such. Police forces also contributed by arresting women and girls in the street and forcing them into comfort stations. The Japanese military employed any form of force or violence to obtain the increasing number of women needed to "comfort" soldiers.

Even in the few cases where the Japanese military brought licensed prostitutes to work at comfort stations, the living conditions in the facilities—the harsh control over movement, the medical examinations, the mistreatment, and the deprivation of control over their sexuality—dehumanized and objectified the women to the extent that they, too, became sexual slaves.

V.
SLAVERY

Several treaties in effect at the start of World War II establish that slavery was an international crime, and that forced sex was a form of slavery. As the various treaties make clear, the comfort stations were a system of sexual slavery that violated international law. Although the recent Rome Statute continues the international prohibition of sexual slavery, it defines the crime too narrowly.

A. Freedom

Freedom is the "birthright of every human being."[8] It is both central to, and interdependent on, other human rights. Freedom is the source of many other rights, including the right to protect, control, and determine the disposition of one's body and self in relation, for example, to work, sexuality, and reproduction; to practice one's religion or spirituality; to express opinions; to form relationships of one's choice and to decide whether to have a family; to vote, join trade unions, and participate in political, economic, social and cultural community life. Freedom means dignity and the full and free development of personal potential. Slavery is the antithesis of freedom. As a basic principle of the rule of law, freedom cannot be relinquished. It is not an exercise of paternalism to say that no one can consent to enslavement; it is fundamental to the nature of freedom itself. Freedom and equality under international law are based on a concept of the human being as free and able to fulfill his or her capabilities. Freedom requires protection of individual autonomy, respect for every person's potential and development, and the presence of enabling economic social and cultural conditions.

7. YUKI TANAKA, HIDDEN HORRORS: JAPANESE WAR CRIMES IN WORLD WAR II 93-94 (1996).

8. 1926 Slavery Convention, *supra* note 1.

Consent, to be valid, must be based on knowledge and sustained by reason and the ability to make free and informed choices. Consent is not valid when it is not knowingly and freely given; when there is deceptive or distorted information, or no information at all; when there is coercion, violence, or the threat thereof; when the victim is subject to inhumane and debilitating conditions, kept isolated from social support or denied the means of survival and without access to means of communication, assistance, or redress; or when there is exploitation of the victim's vulnerability. Consent is not free when the victim fears retaliation in the form of physical or mental abuse.

B. The International Prohibition of Slavery before World War II

Slavery, as one of the most profound violations of a human being's inherent freedom and dignity, was one of the first crimes to be proscribed under international law. A 1944 survey of a representative group of states demonstrates that virtually all had prohibited slavery as a matter of national law. International law also banned slavery before World War II. In fact, the existence of an international prohibition of slavery prior to the development of the comfort system draws support from at least five sources.

First, the 1926 Slavery Convention provides that every person has a right to be free from slavery. The 1926 Convention defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."[9] The 1926 Convention was the culmination of a century-long development of the norms against slavery, the slave trade and forced labor. Even before the Convention came into effect on March, 9, 1927, however, multilateral declarations and treaties prohibited slavery and the slave trade, and increasingly strengthened the criminal nature and universal obligation to prosecute slavery. As an example, Argentina (then under the name of United Provinces of the Rio de la Plata) prohibited and criminalized slavery in 1813.

Although Japan was not a signatory to the 1926 Slavery Convention and its criminal code did not specifically address slavery before 1944, in a 1972 case in which Peruvian slave-traders were convicted, Japan appears to have declared that it had always prohibited the slave trade.[10] By the time of the Rape of Nanking in 1937, the 1926 Slavery Convention was clearly understood as declaratory of customary international law[11] and, therefore, binding upon Japan regardless of whether it had ratified the 1926 Convention.

The second source of recognition for the crime of sexual slavery during the Second World War is the 1907 Hague Convention IV and annexed Regula-

9. 1926 Slavery Convention, *supra* note 1, at art. 1.

10. *See* U. N. Commission on Human Rights: Final Report on Contemporary Forms of Slavery; Systematic Rape, Sexual Slavery, and Slavery-Like Practices During Armed Conflict: Report of the Special Rapporteur, Gay J. McDougall, U.N. ESCOR, 50th Sess., Prov. Agenda Item 6 app. at para. 13, U.N. Doc. E/CN.4/Sub.2/1998/13 (1998) [hereinafter McDougall Report].

11. *Id.* at para. 14.

tions,[12] to which Japan was a signatory. The 1907 Convention codified the customary law prohibition on making slaves of prisoners of war or occupied civilian populations. Although the 1907 Convention stipulates an exception for "the needs of the army of occupation,"[13] this exception can never include sexual slavery because sex is not a military necessity. Furthermore, the 1907 Convention prohibits rape and emphasizes the prohibition in article 46, which requires respect for "family honor."[14] When read together, these provisions prohibit, among other things, what is now understood as the crime of sexual slavery.

The 1929 Geneva Convention Relative to the Treatment of Prisoners of War reinforced and broadened this protection.[15] Article 29 provides: "No prisoner of war may be employed at labors for which he is physically unfit"; and article 32 states: "It is forbidden to use prisoners of war at unhealthful or dangerous work."[16] Sexual slavery is obviously dangerous and unhealthy and falls within the purview of these protections.

Third, in 1996,[17] the International Labour Organization (ILO) Committee of Experts ruled that Japan's system of military sexual slavery violated the 1930 Convention Concerning Forced Labour. The Committee stated that article 2(a), which permits compulsory military service, does not apply to the "comfort women" system because that exception applies only to "work of a purely military character."[18] Further, it found no justification for applying article 2(d),[19] which permits compulsory labor in the event of war or other calamities which threaten the safety or well-being of the population. The Committee found that this exception is strictly limited to genuine public emergencies requiring immediate action and that the scope and purpose of the involuntary labor must be restricted to those meeting the exigencies of the situation. Women's sexual integrity and sexual autonomy may never be sacrificed in the name of emergency.

Sexual servitude can never be a permissible form of compulsory labor. There is no "necessity" argument that can justify subjecting a person to sexual violence. Nor can rape, sexual bondage, or other forms of sexual violence ever be rendered acceptable by payment, by providing amenities such as health care, or by limiting the days of service. In this sense, forced sexual labor is different from other forms of forced labor, which may be permissible under narrowly

12. Law and Customs of War on Land (Hague, IV), Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, reprinted in 1 C. BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949 247, 631 (1968) [hereinafter BEVANS].

13. *Id.* at art. 52.

14. *Id.* at art. 46.

15. The 1929 Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 2 BEVANS 932.

16. *Id.* at art. 29, 32.

17. Report of the Committee of Experts on the Application of Conventions and Recommendations, Int'l Lab. Conf., 83rd Session, Report III (Part 4A), Convention 29 on Japan, Int'l Lab. Org. (1996). *See also* Report of the Committee of Experts on the Application of Conventions and Recommendations, Int'l Lab. Conf., 85th Session, Report III (Part 1A), Convention 29 on Japan, Int'l Lab. Org. (1997) (reaffirming the 1996 Report).

18. *Id.*

19. *Id.*

defined circumstances, because forced sex constitutes an exercise of ownership over a person.

Fourth, the Trafficking Conventions of 1904,[20] 1910[21] and 1933[22] provide further evidence that the international community considered sexual slavery a criminal offense before and during World War II. The 1910 Convention provides, in article II, that parties must punish those who have "by fraud or by the use of violence, threats, abuse of authority, or any other means of constraint, hired, abducted or enticed" a girl or woman for "immoral purposes," which was a reference to prostitution.[23] To traffic a woman or girl against her will or by deception was an aggravating circumstances requiring greater punishment than trafficking with her consent.

The 1921 International Convention for the Suppression of the Traffic in Women and Children is particularly relevant.[24] Under articles 2 and 3, states parties had to take all steps necessary to discover and prosecute persons engaged in the traffic of women and children.[25] All the conventions are cumulative in the sense that the later conventions reaffirmed the earlier ones. Moreover, the General Assembly of the League of Nations considered the prohibition on trafficking in women and girls to have become part of customary international law before World War II.[26] Thus, both conventional and customary law provide forceful evidence that sexual slavery was a crime well before Japan instituted the system of militarily-controlled sexual slavery.

The fifth and final source of the prohibition on sexual slavery at the time of the World War II was the customary humanitarian law prohibition on forced prostitution. The 1919 War Commission Report of World War I listed "abduction of girls and women for the purpose of enforced prostitution" as a war crime.[27]

C. Developments in International Slavery Law after World War II

With the exception of the post-war Allied military proceedings, the prosecution of war crimes was largely a domestic matter. After World War II, the Dutch Military Tribunal at Batavia (now Jakarta) prosecuted and convicted Japanese defendants on charges of "enforced prostitution" as a violation of the

20. International Agreement for the Suppression of the White Slave Traffic, Mar. 18, 1904, 11 L.N.T.S. 83 [hereinafter 1904 Agreement].

21. Convention for the Suppression of the White Slave Traffic, May 4, 1910, 211 Consol. T.S. 45 [hereinafter 1910 Convention].

22. International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 53 U.N.T.S. 49 [hereinafter 1933 Convention].

23. 1910 Convention, *supra* note 21, at art. II.

24. International Convention for the Suppression of the Traffic in Women and Children, Sept. 30, 1921, arts. 2, 5, 53 U.N.T.S. 39, 42 [hereinafter 1921 Convention].

25. *Id.* at art. 2.

26. Yoshimi, *supra* note 3 at 161.

27. *See* Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, Mar. 29, 1919, reprinted in 14 AM. J. INT'L L. 95, 115 (1920).

Dutch war crimes statutes, for crimes related to Japan's system of military sexual slavery committed against Dutch women.[28]

The charters and jurisprudence of the post-war Tribunals confirm the status of enslavement and forced labor as international crimes and outline conditions for these crimes in the context of non-sexual forced labor. These conditions were also prevalent in the military comfort women system and demonstrate that the comfort stations violated international law.

Both post-war military tribunals, the International Military Tribunal at Nuremburg (IMT) and the International Military Tribunal for the Far East (IMTFE), found that both the German and Japanese slave labor systems were governmentally organized. With limited exception, the post-war proceedings did not define slavery or enslavement; nor did they attempt to define or draw clear distinctions between slavery, forced labor, and the slave trade. At times, they made statements that have become important to developing concepts on slavery. For instance, *In re Pohl and Others*[29] defines slavery as "involuntary servitude." *Pohl* also states: "Involuntary servitude, even if tempered by humane treatment, is still slavery."[30] The detailed treatment and prosecution of both the Japanese and German slave labor system stands in sharp contrast to the absence of consideration of its gender analogue, the comfort women system. Nonetheless, the judgments of the post-war tribunals make clear that the comfort women system was in fact a slavery system, and should have been prosecuted as such. Largely at the insistence of the comfort women survivors, the term "sexual slavery" has been widely recognized today, most significantly in the Rome Statute,[31] which more than 120 countries have signed.

D. Determining When Slavery Occurs

Considering the various international sources of law from 1937 to 1945, it is clear that enslavement is built upon two interrelated forms of subordination: chattel slavery and forced labor. Sexual slavery combines both concepts of slavery.

1. Chattel Slavery

Chattel slavery occurs when a person is treated as an object or as property subject to use or disposal by another person. Such use may be for economic, recreational, domestic or other purposes. A person is treated as a chattel if he or she is regarded as merely an item of property or economic value, while the person's humanity is disregarded. Where a person's body is placed at the dispo-

28. *See* USTINIA DOLGOPOL & SNEHAL PARANJAPE, COMFORT WOMEN, AN UNFINISHED ORDEAL: REPORT OF A MISSION, INTERNATIONAL COMMISSION OF JURISTS 135-37 (1994).

29. *In re Pohl and Others* (WVHA Judgment), 14 I.L.R. 290 (case summary), V Nuremberg Trials, 958, 1020 (U.S. Milit. Trib. 1947)

30. TELFORD TAYLOR, NUREMBERG TRIALS: WAR CRIMES AND INTERNATIONAL LAW, IN INTERNATIONAL CONCILIATION 241, 295 (Carnegie Endowment for Int'l Peace No. 450, 1949) (quoting transcript of *Pohl*).

31. Rome Statute, *supra* note 2.

sal of another to use sexually without his or her valid or genuine—that is, knowing and voluntary—consent, that is a form of chattel slavery. Sexual slavery is particularly heinous because using a person as, or reducing a person to, sexual property violates the physical and mental integrity of the victim on the most profoundly personal level. The victim is deprived of control over not only his or her body, but also sexual activity and autonomy, which denies some of the most fundamental components of human dignity. Moreover, because of the sexual nature of this form of enslavement, the victim often suffers either in silence or from socially-induced rejection and marginalization.

2. Forced Labor

Forced labor exists when a person is made to perform labor against his or her will. Forced labor involves fundamental disregard for a person's right of self-determination; physical, mental and spiritual integrity; right to livelihood; and human dignity. Depriving a person of control over sexuality and denying his or her sexual integrity in order to satisfy the demands of another is a particularly atrocious form of forced labor, using and abusing the victim's body and spirit. It is axiomatic that rape and other forms of sexual violence or abuse can never be legitimate forms of labor. Neither remuneration nor the satisfaction of one's survival needs mitigates the conditions involving servitude.

3. The 1926 Slavery Convention

The 1926 Slavery Convention, which defined slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised," provides the overarching and enduring definition of slavery. This definition incorporates both the chattel and forced labor concepts and applies with full force to sexual slavery. Using the 1926 Convention, it is easy to recognize that the acts involved in acquiring persons for enslavement are an integral part of the enslavement process.

The *actus reus* of the crime of sexual slavery is the exercise of any or all of the powers attaching to the right of ownership over a person by exercising sexual control over a person or depriving a person of sexual autonomy. Control over a person's sexuality or sexual autonomy may in and of itself constitute a power attaching to the right of ownership. The *mens rea* is the intentional exercise of such powers.

4. Kunarac

Recent jurisprudence and the writing of jurists support this approach to the elements of the crime of sexual slavery. However, this approach differs from the elements of sexual slavery adopted in the non-binding Elements Annex to the Rome Statute of the International Criminal Court. In *Prosecutor v. Kunarac*,[32] the Trial Chamber of the ICTY reached a similar conclusion and laid a sound foundation for the subsequent prosecution of the crime of sexual slav-

32. Prosecutor v. Kunarac, Nos. IT-96-23-T & IT-96-23/1- T, Judgment (Feb. 22, 2001).

ery. Because the ICTY Statute[33] does not distinguish sexual slavery as a separate crime, two of the accused in *Kunarac* were instead charged with both "rape" and "enslavement" as crimes against humanity. The indictment charged that these defendants enslaved women and young girls and subjected them to repeated rape and other forms of sexual violence, including forced nudity and sexual entertainment, over a period of weeks or months. In addition to the sexual servitude, the victims were also required to perform domestic labor.

Kunarac adopted the 1926 Slavery Convention's definition of enslavement, and went on to illustrate in broad terms what is meant by "the powers attaching to the right of ownership." It said:

> Indications of enslavement include elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking. With respect to forced or compulsory labour or service, not all labour or service by civilians in armed conflicts, is prohibited—strict conditions are, however, set for such labour or service. The "acquisition" or "disposal" of someone for monetary or other compensation, is not a requirement for enslavement. Doing so, however, is a prime example of the exercise of the right of ownership over someone. The duration of the suspected exercise of powers attaching to the right of ownership is another factor whose importance will depend on the existence of other indications of slavery. [The basic factors include] the control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labor.[34]

These are all factors "to be taken into account in determining whether enslavement was committed." Significantly, *Kunarac* does not place greater weight on any one factor and treats "control of sexuality" as an exercise of a power of ownership every bit as much as more traditional factors such as control of movement or forced labor.

Control of sexuality is itself an indicium of the general crime of enslavement. This is true regardless of whether the enslavement encompasses the use of a person as sexual property or for forced sexual labor. Otherwise, the definition of enslavement would erroneously exclude one of the most common forms of servitude imposed upon women, sexual servitude.

While exercising control over sexuality may be an essential factor in a case of enslavement, it need not be the dominant factor. Such exercise of sexual

33. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Art. 2, U.N. Doc. S/25704, annex (1993), reprinted in 32 I.L.M. 1192 (amended 2002) [hereinafter ICTY Statute].

34. *Kunarac*, *supra* note 32.

control will usually entail some other indicia of enslavement, such as control over movement, coercion, repetition, or duration. Where control of sexuality is a factor in enslavement, the crime of sexual slavery can also be charged separately. Both sexual slavery and enslavement should be charging options because both crimes may be applicable as their elements and the interests they protect are distinct. Sexual slavery recognizes the specific nature of the form of enslavement and ensures that it will be given the distinct attention it deserves. Moreover, victims of the crime of sexual slavery may need somewhat different forms of protective measures or redress than victims of other forms of slavery.

5. *The Special Rapporteur to the UN Commission on Human Rights*

This approach to the essential elements of sexual slavery finds support in the Special Rapporteur's Final Report on Contemporary Forms of Slavery; Systematic Rape, Sexual Slavery, and Slavery-Like Practices During Armed Conflict, by Gay McDougall,[35] a leading expert in international law. In her Final Report to the UN Commission on Human Rights, McDougall defines "sexual slavery" as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including sexual access through rape or other forms of sexual violence. Slavery, when combined with sexual violence, constitutes sexual slavery."[36]

Like *Kunarac*, the strength of the Special Rapporteur's approach is to recognize that the violation of sexual autonomy through rape or other forms of sexual violence is a power attaching to the right of ownership of a person. Further, the McDougall Report explained:

> The Special Rapporteur understands that based on customary law interpretations of the crime of slavery, and thus sexual slavery, there are no requirements of any payment or exchange; of any physical restraint, detention or confinement for any set or particular length of time; nor is there a requirement of legal disenfranchisement. Nonetheless, these and other factors may be taken into account in determining whether a "status or condition" of slavery exists. While the most commonly recognized form of slavery involves the coerced performance of physical labour or service of some kind, again, this is merely a factor to be considered in determining whether a "status or condition" exists, which transforms an act, such as rape, into sexual slavery. It is the status or condition of being enslaved which differentiates sexual slavery from other crimes of sexual violence, such as rape.[37]

E. Sexual Slavery

Because the terms "prostitute" and "prostitution" reflect profoundly discriminatory attitudes toward women, the situation of the former comfort women and girls is more accurately termed "sexual slavery" rather than "forced prostitution."

35. McDougall Report, *supra* note 10.
36. *Id.*
37. *Id.*

Identifying sexual slavery as a crime under international law today results in a long overdue renaming of the crime of forced prostitution. As such, it responds to a very important concern expressed by the survivors of the comfort system, which is that the term "forced prostitution" obscures the terrible gravity of the crime, suggests a level of voluntarism, and stigmatizes its victims as immoral or "used goods." Thus, the crime historically denominated as "forced prostitution" is more appropriately named "sexual slavery."

Obscuring the offense of sexual slavery by calling it prostitution did not end with the close of the war. Japan's sympathizers who deny its responsibility for the systematic atrocities committed against comfort women and girls continue to characterize them as "prostitutes" and "camp followers" to assert both the voluntarism and immorality of the comfort women, and thus Japan's own innocence.

The 1933 Trafficking Convention's use of the term "immoral purposes" to refer to both voluntary and coerced prostitution illustrates the problematic character of the term "forced prostitution." The definition of the word "prostitute," a term historically associated primarily with women, is often referred to in terms such as "base behavior," "promiscuous lewdness," and "purposeful evil." In many countries, prostitution—the exchange of sex for money or other value—is a crime. Moreover, "prostitute" refers both to those who sell sex and to women who violate social rules against sex outside of marriage or who otherwise break the rules of "proper" female sexual conduct.

The term "forced prostitution" describes essentially the same conduct as "sexual slavery," but it does not communicate the same level of egregiousness. "Forced prostitution" tends to reflect the male view: that of the organizers, procurers, and those who take advantage of the system by raping the women. The term "sexual slavery" reflects the victims' view. It focuses on the enslavement and the rape, and captures more accurately the enormity of subordination and suffering.

Many survivors of the comfort system testified before the Tokyo 2000 Tribunal. They said that, even after the ordeal they had survived, being stigmatized as prostitutes cruelly exacerbated their suffering. Instead of being welcomed back to their communities as victims of a terrible wrong, they experienced indescribable shame and isolation. Naming the crime "sexual slavery" is intended to lessen the misplaced stigma for these survivors as well as for future victims of such crimes.

VI.
INDICIA OF SEXUAL SLAVERY IN THE "COMFORT SYSTEM"

The instances of slavery discussed in the IMT and IMTFE cases demonstrate some common characteristics of slavery. *Kunarac* also contains a useful summary of many of the various characteristics or indicia of enslavement and sexual slavery. The indicia are not elements that must exist in all cases, but rather a guide to determining when the status or condition of being enslaved

exists. The presence or absence of any one indicium is not conclusive evidence of whether a person has been enslaved. In discussing the pertinent indicia of sexual slavery, the Tokyo 2000 Tribunal also addressed the significance of either their presence or absence in the comfort system. The most common indicia are listed as: 1) involuntary procurement, 2) treatment as disposable property, 3) restriction of fundamental rights and basic liberties, 4) absence of consent or of conditions under which consent is possible, 5) forced labor, and 6) discriminatory treatment. As stated previously, these are not requirements of the crime of slavery. One or more of these indicia can be missing in a particular case, but nevertheless the other remaining indicia may suffice to create the status or condition of slavery or sexual slavery.

The Tokyo 2000 Tribunal found all of these indicia in the comfort system. It stated that the Japanese military and government officials and their agents committed the crimes of rape and sexual slavery against women and girls as a part of, and in the course of, their war of aggression in the Asia-Pacific. These crimes were widespread—occurring on a vast scale and over a huge geographic area—and systematic—being highly organized, heavily regulated, and sharing common characteristics. They were crimes against humanity committed against tens of thousands of civilian women and girls who were forced into sexual servitude to the Japanese military as part of the comfort system during World War II.

VII.
CONCLUSION

The Rome Statute criminalizes sexual slavery but contains no definition of the crime. The statute defines enslavement, as does the 1926 Slavery Convention, as "the exercise of any or all of the powers attaching to the right of ownership over a person," and provides, significantly, that enslavement "includes the exercise of such power in the course of trafficking in persons, in particular women and children." Unlike the 1926 Convention, however, the Rome Statute later specifically addressed the crime of sexual slavery.

Subsequent to the adoption of the Statute, the Preparatory Commission negotiated an Elements Annex to guide the ICC in interpreting the crimes within its jurisdiction. The Elements Annex adopts an unreasonably narrow definition of enslavement which it then extends to sexual slavery. Hence the elements adopted do not adequately reflect the crime under international law. It defines the *actus reus* of sexual slavery thus: "1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons or by imposing on them a similar deprivation of liberty. 2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature."[38] While this definition contains potential flexibility in the phrase "such as," it puts the emphasis on commercial exchange or similar deprivation of liberty, which is not

38. Report of the Preparatory Commission for the International Criminal Court, Addendum Part II: Finalized draft text of the Elements of Crimes, PCNICC/2000/Add.2, July 6, 2000.

only antiquated but also contrary to the lived experience of women and men coerced or deceived into enslavement situations and sexual slavery. It is important to note the absence of relevant and non-commercial means of enslavement such as "using" another person as one's property.

Since at least 1907, the international community has recognized the crime of sexual slavery. As the comfort system of World War II made clear, sexual slavery involves both chattel slavery and forced labor. The 1926 Slavery Convention's definition encompasses both kinds of slavery, and thus provides the seminal definition of the crime. The ICC and the Preparatory Commission should adopt that definition instead of using an unnecessarily narrow definition.

The International Community must be aware of this crime and the scope of sexual slavery around the world—whatever guise it may take—and should make all possible effort to eliminate it as well as discrimination, which is the basis of slavery. Only then can humanity hope for a better century.

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Feminists in International Human Rights: The Changer and the Changed

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Feminists in International Human Rights: The Changer and the Changed*

By
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In composing an Afterword for this symposium, I have often had the feeling expressed by Justice Arbour: that I am here under false pretenses.[1] As a feminist theorist whose focus is largely domestic, I am more like a student of the riveting international developments described here than an informed commentator on them. In my comments, however, I will try to use this domestic perspective as a lens through which to assess the emergence of international human-rights norms that address crimes against women. These norms can be understood, in part, as the product of domestic feminist efforts to expose the prevalence and significance of gender-based violence. But, while this development is cause for satisfaction, feminists must recognize that we need to learn from, as well as contribute to, the domain of international human rights.

It is heartening, from a feminist perspective, to see many of the norms for which feminist advocates have struggled in a range of domestic contexts emerging as constitutive norms of international human rights. The notion, so thoughtfully explored by Kelly Askin[2] and Sherrie Russell-Brown,[3] that international tribunals should understand rape as an instrumentality of genocide is one powerful example. Askin and Russell-Brown suggest that we should view rape not simply as a "spoil of war"—that is, as a lamentable product of male exigencies—but also as a violation of the integrity of the victim and as a means to the destruction of the community through the debasement of the individual. This approach builds on the insights developed in feminist struggles with intranational systems of criminal justice.[4] Similarly, the idea that the plight of the

* The title evokes the album by Cris Williamson, an icon of late second-wave feminism, whose deployment in the context of discussing new iterations of hard-won feminist insights seems appropriate. *See* CRIS WILLIAMSON, THE CHANGER AND THE CHANGED (Olivia Records 1975).

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1. Justice Louise Arbour, Stefan A. Riesenfeld Award Lecture, 21 BERKELEY J. INT'L L. 196 (this issue).

2. Kelly Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT'L L. 288 (2003).

3. Sherrie Russell-Brown, *Rape As an Act of Genocide*, 21 BERKELEY J. INT'L L. 350 (2003).

4. *See, e.g.*, SUSAN ESTRICH, REAL RAPE (1987); CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989); THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF

Korean "comfort women," which Carmen Argibay so aptly describes,[5] can be recharacterized, not as an expedient to foster Japanese military efficacy, but as a deeply troubling episode involving deception and coercion applied against young Korean women and their families, owes a great deal to feminist efforts in a range of domestic contexts.[6] Even the emerging international valuation of the integrity of the family, vividly explored by Sonja Starr and Lea Brilmayer,[7] reflects one longtime focus of feminist analysis and inquiry, though its protection may also come into conflict with other feminist norms.[8]

It is also gratifying to see that, in bringing their analyses to the realm of international human rights, feminists have avoided some of the conceptual and procedural errors that marred their earlier approach to similar problems. Russell-Brown notes, for example, that Catharine MacKinnon has highlighted the intersectional character of the genocidal rape of Muslim women in the former Yugoslavia: this rape is both ethnically based and a form of genocide directed specifically at women.[9] This characterization reflects movement from the earlier positions of MacKinnon and other feminists, whose analysis suggested that one could disentangle gender from (and privilege it over) factors such as race and ethnicity.[10] A similar point can be made about the procedural and administrative features of these human-rights prosecutions. Justice Arbour notes that a point of ongoing contention among her colleagues at the International Criminal Tribunals was whether the prosecution of sexual violence should be undertaken by a separate unit or "normalized" among other prosecutions of human-rights violations.[11] The value—and cost—of distinct, separately trained sexual violence units are questions to which feminist scholars and advocates have become attuned only gradually, over many years of domestic violence and rape prosecu-

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DOMESTIC ABUSE (Martha A. Fineman & Roxanne Mykitiuk eds., 1994); ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING (2000).

5. Carmen Argibay, *Sexual Slavery and the "Comfort Women" of World War II*, 21 BERKELEY J. INT'L L. 375 (2003).

6. *See, e.g.*, Beverly Balos & Mary Louise Fellows, *A Matter of Prostitution: Becoming Respectable*, 74 N.Y.U. L. REV. 1220 (1999).

7. Sonja Starr & Lea Brilmayer, *Family Separation As a Violation of International Law*, 21 BERKELEY J. INT'L L. 213 (2003).

8. *Compare* MARTHA FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995) (describing reconceptualization of the family around the "caregiving dyad" as a crucial feminist innovation central in achieving women's equality), *with* Katherine Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001) (criticizing feminist legal theorists for a focus on reproductive sexuality or sexual danger, to the exclusion of any systematic exploration of sexual pleasure).

9. Russell-Brown, *Rape As an Act of Genocide*, *supra* note 3, at 365.

10. For an example of this privileging, see, e.g., Catharine MacKinnon, *Whose Culture? A Case Note on Martinez v. Santa Clara Pueblo*, *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 63, 68 (1987) ("the aspiration of women to be no less than men . . . is an aspiration indigenous to women across place and across time. . . ."). For critiques of MacKinnon's failure to come to terms with the interpenetrating, mutually constructive character of race and gender, see Martha Mahoney, *Women and Whiteness in Theory and Practice: A Reply to Catharine MacKinnon*, 5 YALE J. OF L. & FEMINISM 217 (1993); Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

11. Arbour, Stefan A. Riesenfeld Award Lecture, *supra* note 1, at 203.

tions.[12] There is a learning curve here, and feminist advocates are working our way up it; this permits us to commence later efforts with greater sophistication and expertise.

Yet while the human-rights victories documented here may yield a sense of satisfaction, they also offer grounds for caution. Human rights violations such as "rape as genocide" or the coercive conscription of the "comfort women" may be easier cases in which to frame a feminist response because they are normatively unambiguous. One can argue, as Justice Arbour suggests, about who should be held liable for particular atrocities, or about what states should be accountable in what fora,[13] but there is little that can be said to contest the culpability of the acts, and certainly little that resonates with feminist understandings. Far more difficult, in this sense, are the cases explored by Starr and Brilmayer, in which feminist norms—and often feminists—come into conflict. The issue of family separation speaks to feminists more ambivalently: Women are deeply invested in and powerfully constructed through their familial roles, yet the norms on behalf of which separation is often undertaken—ranging from gender equality in the case of polygamous marriages to physical security in the case of intimate violence—also make strong claims on feminists' normative sensibilities. Such issues require difficult line-drawing—such as whether countries should exclude polygamous families prior their immigration but not afterward, for example[14]—and solutions that have the contingency and irresolution of necessary compromises. They may also require of feminist advocates more careful observation and more unsparing self-scrutiny than some have been able to muster in the past.

In these more difficult contexts, which also include female genital surgeries and the kinds of "cultural" defenses critiqued by Professor Susan Okin,[15] the path of feminist intervention has not always run smooth. Western feminists have sometimes assumed a position of leadership, when what was needed was collaboration or dialogue; we have sometimes been too quick to assume the singularity or stasis of those cultures we have sought to critique; and we have often been reluctant to place in question their own understandings of feminism or of the women it seeks to represent.[16] The vehicles for remediation this symposium explores—international bodies and international law—may mitigate these problems to some degree by requiring collaborative, often institutionalized processes of formulation and enforcement. But particularly feminists who seek

12. *See, e.g.*, CASSIA SPOHN & JULIE HONEY, RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT (1992) (addressing the organization of separate sexual violence units as one factor bearing on the efficacy of rape law reform from a social science perspective).

13. Arbour, Stefan A. Riesenfeld Award Lecture, *supra* note 1, at 203.

14. *See* Starr & Brilmayer, *Family Separation As a Violation of International Law*, supra note 7, at 254.

15. Susan Moller Okin, *Is Multiculturalism Bad for Women? in* IS MULTICULTURALISM BAD FOR WOMEN? 9-24 (Joshua Cohen, Matthew Howard & Martha Nussbaum eds., 1999).

16. *See, e.g.*, IS MULTICULTURALISM BAD FOR WOMEN?, *supra* note 15; Colloquium, *Bridging Society, Culture and Law: The Issue of Female Circumcision*, 47 CASE W. RES. L. REV. 263 (1997), especially Leslye A. Obidora, *Bridges and Barricades: Rethinking Polemics and Intransigence in the Campaign Against Female Circumcision*, 47 CASE W. RES. L. REV. 275 (1997).

to apply our insights in new contexts must learn to be more careful observers of unfamiliar cultures; as scholars such as Homi Bhabha[17] and Leti Volpp[18] have reminded us, we must be as attentive to "internal differences" and as astute in observing the "less formalized institutions and spheres of social life"[19] in distinct cultures as we are within our own. Feminists must also be more consistently willing to call our own cultural assumptions and histories into question. The hesitation, by some feminists, to place our own self-understandings under scrutiny, to ask what might be learned from our encounter with new and unfamiliar contexts, is referenced, at least obliquely, in the work of Starr and Brilmayer. They observe that contested episodes of family separation to which human-rights norms might be applied have occurred not only in Australia's encounter with aboriginal peoples and France's with polygamy, but in the United States' approaches to the children of Indian tribes and to poor families of color.[20] Starr and Brilmayer's article challenges us to think of our own culture and polity not only as the source of corrective insight but as the site of potential human-rights violations.

The starker contexts of rape as genocide and sexual slavery might offer similar lessons for American feminists. As I was preparing this Afterword, I had the opportunity to attend a lecture by Professor Adrienne Davis, a legal scholar whose work has focused on the gendered dimensions of U.S. slavery.[21] One of Davis' central arguments is that slavery entailed a "sexual economy": the same legal and cultural regime that constructed human beings as property also purposefully authorized the white slaveholding men's unencumbered reproductive and sexual access to enslaved African American women.[22] This sexual abuse was directed not only "against enslaved women as individuals, but as a weapon of racial terror. Sexual authority over enslaved women was intimately bound with racial, economic, and political authority over all black workers."[23] Moreover, it was a form of abuse into which white men routinely drew their wives, who vented their pain and humiliation on the enslaved women, often through the separation and sale of enslaved families. I was struck forcefully by the fact that this single practice, deeply enmeshed in our own history and culture, implicated all the wrongs addressed (in culturally distant contexts) by the articles in this symposium: sexual slavery, rape with a genocidal impetus, and the forced separation of families. Has the feminist-inspired naming of these

17. Homi K. Bhabha, *Liberalism's Sacred Cow*, in IS MULTICULTURALISM BAD FOR WOMEN?, *supra* note 15, at 79-84.

18. Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181 (2001).

19. Bhabha, *Liberalism's Sacred Cow*, *supra* note 17, at 81.

20. *See* Starr & Brilmayer, *Family Separation As a Violation of International Law*, *supra* note 7.

21. Adrienne D. Davis, talk based on *Slavery As Sexual Harassment* (Oct. 17, 2002), *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 8 (Catharine MacKinnon & Reva Siegel eds., forthcoming 2002) (manuscript available at http://www.law.berkeley.edu/faculty/abramsk/288.5_page.html).

22. Davis observes that white men regularly raped enslaved women, "because of entitlement, to achieve sexual dominance, for personal pleasure, and to discipline women as workers and as women." *Id.* (manuscript at 8).

23. *Id.* (manuscript at 10).

abuses as human-rights violations incited us—as American feminists or Americans more broadly—to reconsider our own context of a longstanding sexualized chattel slavery with continuing legacies for Americans of all sexes and races? Has it affected our own domestic dialogues about questions such as reparations or race-conscious remedies? It is not clear from the articles presented whether this reconsideration has begun in earnest. But it is only when feminist activists begin to see what can be learned from, as well as taught in, the domains of international human rights, when we come to see ourselves not only as the changer but the changed, that we will have reaped the fruit of this new effort.