

Memorandum for the Deputy Prosecutor of the International  
Criminal Tribunal for Rwanda

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**ISSUE # 4**

**THE EMERGENCE OF GENDER AND RAPE AS  
ELEMENTS OF WAR CRIMES.**

This memo will analyze sexual crimes in armed conflict situations and outline the development of the international community's awareness of gender-based war crimes, using a historical perspective. This will be accomplished by reviewing ad hoc tribunals and statutes established by the United Nations Security Council, and introducing the establishment of a permanent International Criminal Court.

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Elements of War Crimes**

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## I. Introduction and Summary of Conclusions

Violence is a concept that many consider an unfortunate, yet essential aspect of human nature. In times of war, violence is principal and in times of peace, the threatening loom of violence still exists. War crimes are a result of uncontrolled violence and the chaos of societal disorder. They are defined as crimes against the customary or conventional law of war, committed by persons belonging to one party of the conflict against persons of the opposing party<sup>1</sup>. During armed conflict situations, gender-based violence is often used as a military tactic to weaken and intimidate the opposition. More specifically, among gender-based violence, rape is a reoccurring phenomenon that has plagued societies during armed conflict throughout history. This memo will analyze the emergence of gender and rape as distinct elements of war crimes using a historical perspective. The growing concern of rape under international humanitarian law will be discussed through the definition of sexual crimes and an examination of international tribunals and statutes.

## II. Factual Background

Rape in conflict has been a “hidden element of strife,” largely because of its gender-specific character which “depoliticizes” sexual abuse in conflict and thus, rape has historically been ignored as a crime.<sup>2</sup> Warring parties utilize gender-based violence as military strategy to achieve military or political objectives. Until recently, gender-based war crimes have been overlooked by the international community. The Nuremberg trials of 1945 largely overlooked the concept of rape. The Tokyo trials did indirectly recognize rape as a crime of war, but that

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<sup>1</sup> Theodor Meron, Comment, *Rape as a Crime Under International Humanitarian Law*, 87 A.J.I.L. 424, 427 (1993). (see App. 4)

was not the focus of the Far East Tribunal.<sup>3</sup> Because of the nature of the atrocities committed in the former Yugoslavia and more recently, Rwanda, the international community has made significant steps to recognize sexual violence and rape as war crimes. Currently, the community is attempting to establish a permanent International Criminal Court (ICC) to prosecute war criminals. This would avoid the creation of ad hoc tribunals and hence, produce more effective convictions of war criminals. Sexual violence has been seriously considered in the drafting of the statute of the permanent ICC.<sup>4</sup> The significant growth in the recognition of sexual crimes and rape during armed conflict is a positive step towards reducing sexual violence against women.

### III. Legal Discussion

#### A. Definitions and Explanations of Sexual Crimes

While rape is the primary focus of this memo, there are other sexual crimes that must be considered as war crimes, such as sexual torture and forced pregnancy. During times of war, males of the community are expected to battle, while women and children become vulnerable victims of aggression from the opposition. While it is clear that men are also victims of rape, sexual violence has generally been targeted at women and girls, thus the focus will remain on female sexual assault.

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<sup>2</sup> THE HUMAN RIGHTS WATCH GLOBAL REPORT ON WOMEN'S HUMAN RIGHTS 2 (Human Rights Watch Women's Rights Project ed., 1995). (see App. 5)

<sup>3</sup> Kelly Dawn Askin, *WAR CRIMES AGAINST WOMEN*, 164-203 (Kluwer Law International 1997). The "supreme crime" at Tokyo was planning and waging an aggressive war, or crimes against peace and conventional war crimes did not play a major role, as they did at Nuremberg. (see App. 9)

<sup>4</sup> Nicole Eva Erb, *Gender-based Crimes Under the Draft Statute for the Permanent International Criminal Court*, 29 Colum. Human Rights L. Rev. 401, 402 (1998). The statute lists sex crimes under crimes against humanity including: rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity. (see App. 3)

## 1) Rape

Rape is generally defined by American criminal law as the unlawful act of forceful sexual intercourse. While other countries define it as a crime against a woman's honor or a family's honor,<sup>5</sup> it remains a violent and dehumanizing act. The perpetrator uses power and strength to violate a woman in a personal and degrading way, often resulting in shame. In the former Yugoslavia, mass rape was used as a tool for "ethnic cleansing" to terrorize an ethnic group into fleeing the area.<sup>6</sup> In times of armed conflict, sexual violence usually has no limits. During the Serbian-Croatian conflict, women were raped in their homes,<sup>7</sup> on the street, in makeshift prisons, in schools,<sup>8</sup> and countless other locales. Rapists did not discriminate according to age, since grandmothers and young girls alike fell victim to severe sexual assaults. Adding to the mental anguish of rape and the "transportation of the intimate into violence" was the fact that rapists were often colleagues, neighbors or even friends of victims.<sup>9</sup> Wartime rapes are often committed in the presence of husbands, fathers, and children to add to the aspect of humiliation.

In times of conflict, as stated previously, militaries use rape to instill fear and terror in opposing parties. Stories of systematic mass rape in Nanking, during World War II, coined the

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<sup>5</sup> In particular, Islamic nations of Africa and the Middle East, consider rape as a crime against honor due to patriarchal society and the submissive role of females in the community.

<sup>6</sup> THE HUMAN RIGHTS WATCH GLOBAL REPORT ON WOMEN'S HUMAN RIGHTS 1 (Human Rights Watch Women's Rights Project ed., 1995). (see App. 5)

<sup>7</sup> THE HUMAN RIGHTS WATCH GLOBAL REPORT ON WOMEN'S HUMAN RIGHTS 15 (Human Rights Watch Women's Rights Project ed., 1995). As told by a Croatian victim of rape in an interview by the Human Rights Watch, a group of Serbs came to her home wearing ski masks, though she recognized one of them from the neighborhood. Four men proceeded to rape her, including the acquaintance she recognized, while her husband and children were held in the adjoining room. The crime was reported to the authorities, but nothing was ever done about the incident. (see App. 5)

<sup>8</sup> *Id.* at 17. The local high school in a small village became a holding place for women, who were routinely beaten and raped. According to another interview of a Croatian victim, the Serbian soldiers liked to punish women. They often asked women about male relatives in the city. One particular woman mentioned her fourteen-year old son, and they brought him to the school one day and forced him to rape his own mother. (see App. 5)

<sup>9</sup> Susan Brownmiller, *AGAINST OUR WILL, MEN, WOMEN, AND RAPE* 202 (Simon & Schuster 1975). (see App. 6)

phrase, “Rape of Nanking” to describe the invasion of the city.<sup>10</sup> Nanking was a city filled with missionaries that were defenseless against aggressive Japanese soldiers.<sup>11</sup> Missionaries attempted to report daily atrocities to local authorities with an average of ten gang rapes a day.<sup>12</sup> In fact approximately 20,000 cases of rape occurred during the first month of the occupation of Nanking.<sup>13</sup> During the liberation war in Bangladesh, rape was used by the Pakistani army to terrorize and instill fear of Pakistani power.<sup>14</sup> Eighty percent of Bengali women were Muslim, although Hindus and Christians were not exempt from sexual violence.<sup>15</sup> Pakistani soldiers organized mass rape camps and it is estimated that all together, approximately 200,000 girls and women were raped during the 1971 Bangladesh genocide.<sup>16</sup> In recent years, several books and articles have been published to educate the public of the suffering that women of war torn countries have endured, even in today’s modern age.

## 2. Sexual Torture

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<sup>10</sup> *Id.* at 57. (see App. 6)

<sup>11</sup> *Id.* at 60. (see App. 6).

<sup>12</sup> *Id.* Although somewhat helpful at the trials, the reports were pathetic in its sense of outrage, seriousness and significance. For example, a report filed on December 16, 1937 was as follows:

“12. At 10 P.M., on the night of December 14, 1937, a Chinese home on Chien Ying Hsiang was entered by 11 Japanese soldiers who raped four Chinese women.

13. On December 14, Japanese soldiers entered the home of Miss Grace Bauer, an American missionary, and took a pair of fur-lined gloves, drank up all the milk on the table, and scooped up sugar with their hands.” (see App. 6)

<sup>13</sup> *Id.* at 61. (see App. 6)

<sup>14</sup> Rounaq Jahan, *Genocide in Bangladesh*, in CENTURY OF GENOCIDE: EYEWITNESS ACCOUNTS AND CRITICAL VIEWS 291, 298 (Samuel Totten, William S. Parsons & Israel W. Charney eds., 1997). (see App. 8)

<sup>15</sup> Susan Brownmiller, *AGAINST OUR WILL, MEN, WOMEN, AND RAPE* 80 (Simon & Schuster 1975). Under Islamic tradition, Muslim men would not accept their wives if they had been touched by another man. It was irrelevant if they were assaulted by force. Thus, several victims of rape were rejected by their families and husbands. (see App. 6)

<sup>16</sup> Rounaq Jahan, *Genocide in Bangladesh*, in CENTURY OF GENOCIDE: EYEWITNESS ACCOUNTS AND CRITICAL VIEWS 291, 298 (Samuel Totten, William S. Parsons & Israel W. Charney eds., 1997). (see App. 8)

While rape may be categorized as a method of sexual torture, there is a recognizable distinction, in that torture involves a higher severity of physical abuse. In sexual torture, inanimate objects were used to rape, such as broken bottles and guns, resulting in severe bleeding and injury of sexual organs.<sup>17</sup> Gang-rapes are a form of sexual torture, both mentally and physically. In Rwanda, besides physical torture and random death by machete, gang-rapes were yet another form of dehumanization.<sup>18</sup> The rape/death camps of the former Yugoslavia, where women lived in unspeakable conditions and were repeatedly raped by soldiers also fall under the category of sexual torture. In the former Yugoslavia, women were forced to swallow men's urine, sliced with knives, burned by cigarettes, disfigured with hot tar, and forced to endure countless other sexual abuses.<sup>19</sup> Witnesses at the Tokyo trials told stories of sexual torture with similar endings, in that when the rape of a captured woman was completed, soldiers pushed a stick into her vagina, and in some cases, severed her head.<sup>20</sup> Sexual torture often resulted in death, as with the women of Japanese "comfort stations," who were moved from battlefield to battlefield to reward soldiers.<sup>21</sup> In Bangladesh, a thirteen year old victim reported that she was kidnapped by a gang of Pakistani soldiers on her way to school, and held captive in

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<sup>17</sup> Kelly Dawn Askin, *WAR CRIMES AGAINST WOMEN* 208 (Kluwer Law International 1997). (see App. 9)

<sup>18</sup> Rene Lemarchand, *The Rwanda Genocide*, in *CENTURY OF GENOCIDE: EYEWITNESS ACCOUNTS AND CRITICAL VIEWS* 408, 422 (Samuel Totten, William S. Parsons & Israel W. Charney eds., 1997). The eyewitness account described the ordeal of a seventeen-year old survivor of gang-rape who was brutally beaten and left for dead. (see App. 7).

<sup>19</sup> Kelly Dawn Askin, *WAR CRIMES AGAINST WOMEN* 208 (Kluwer Law International 1997). (see App. 9)

<sup>20</sup> Susan Brownmiller, *AGAINST OUR WILL, MEN, WOMEN, AND RAPE* 59 (Simon & Schuster 1975). (see App; 6)

<sup>21</sup> Rhonda Copelon, *Gendered War Crimes: Reconceptualizing Rape in Time of War*, in *WOMEN'S RIGHTS, HUMAN RIGHTS* 197, 204 (Julie Peters & Andrea Wolper, eds., 1995). It is estimated that ninety percent of these "comfort women" died in captivity. (see App. 1)

a military brothel for six months, while being raped daily by soldiers.<sup>22</sup> According to her, the soldiers began limiting the daily ration of food until the girls would submit to the demanded quotas of the soldiers.<sup>23</sup> During the Vietnam War, the US Military raped Vietnamese women and frequented brothels filled with displaced and poverty-struck women, who chose to “work” in that capacity out of desperation, not necessarily choice.<sup>24</sup>

### 3. Forced Pregnancy

Forced pregnancy and motherhood is likely one of the most troublesome of all sexual crimes. The Women’s Law Caucus for Gender Justice in the International Criminal Court reported that a victim of forced pregnancy suffers additional sexual violence, in that she must be reminded of the initial rape for nine months.<sup>25</sup> The psychological torment of choices regarding the pregnancy and how to raise the child is overwhelming.<sup>26</sup> Women will feel hostility towards the child, and thus reject a relationship with him/her because the child is a product of sexual violence.<sup>27</sup> During the Yugoslavia conflict, women were detained in schools and raped repeatedly in the classrooms, for the purpose of getting impregnated.<sup>28</sup> Guards brought gynecologists to perform exams on young women, who were told that pregnant girls were treated

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<sup>22</sup> Susan Brownmiller, *AGAINST OUR WILL, MEN, WOMEN, AND RAPE* 82-83 (Simon & Schuster 1975). (see App. 6)

<sup>23</sup> *Id.* (see App. 6)

<sup>24</sup> Susan Brownmiller, *AGAINST OUR WILL, MEN, WOMEN, AND RAPE* 86-100 (Simon & Schuster 1975). (see App. 6)

<sup>25</sup> Brook Sari Moshan, *Comment: Women, War, and Words: The Gender Component in the Permanent International Criminal Court’s Definition of Crimes Against Humanity*, 22 *Fordham Int’l L.J.* 154, (citing Women’s Caucus for Gender Justice in the International Criminal Court 24 (1997)). (see App. 2)

<sup>26</sup> Amy E. Ray, *The Shame of it: Gender-based Terrorism in the Former Yugoslavia and the Failure of International Human Rights Law to Comprehend the Injuries*, 46 *Am. U. L. Rev.* 793, 809 (1997)). (see App. 16)

<sup>27</sup> *Id.* (see App. 16).

<sup>28</sup> THE HUMAN RIGHTS WATCH GLOBAL REPORT ON WOMEN’S HUMAN RIGHTS 19 (Human Rights Watch Women’s Rights Project ed., 1995). (see App. 5)

better and given special treatment, such as baths and nice clean clothes.<sup>29</sup> Moreover, to add to the frustration of forced pregnancy, pregnant victims were held by their rapists until the option of abortion was no longer available.<sup>30</sup> During the war in Bangladesh, thousands of Bengali women had become pregnant and were rejected by their spouses.<sup>31</sup> Because the children of these Bengali women would share the Punjabi features of rapists, they were rejected by Bengali society.<sup>32</sup> In fact, countless incidents of suicide, infanticide, and self-inflicted abortions were reported throughout Bangladesh after the war.<sup>33</sup> Although forced pregnancy is the most conspicuous form of genocidal rape, in that the sexual assault was intended to destroy a community both physically and mentally, it should extend to all forms of sexual assault in war situations.

Sexual crimes such as rape, sexual torture, and forced pregnancy leave lasting scars on victims that last a lifetime. Even after the war in Bangladesh was over, rape victims were faced with a second round of humiliation.<sup>34</sup> In a country where chastity is cherished, it was difficult for victims to be accepted back into Bengali society.<sup>35</sup> To add further to humiliation, International Planned Parenthood discovered that nearly every rape victim had a venereal

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<sup>29</sup> *Id.* (see App. 5)

<sup>30</sup> Amy E. Ray, *The Shame of it: Gender-based Terrorism in the Former Yugoslavia and the Failure of International Human Rights Law to Comprehend the Injuries*, 46 Am. U. L. Rev. 793, 809-810 (1997). (see App. 16)

<sup>31</sup> Susan Brownmiller, *AGAINST OUR WILL, MEN, WOMEN, AND RAPE* 79 (Simon & Schuster 1975). (see App. 6)

<sup>32</sup> *Id.* at 80, 84. Generally speaking, Punjabi people are taller and light-skinned, compared to Bengali people who are small boned and dark-skinned. Children of rape could apparently be distinguished because of such mixed features. (see App. 6)

<sup>33</sup> *Id.* at 84. (see App. 6).

<sup>34</sup> *Id.* at 83-84. (see App. 6)

<sup>35</sup> *Id.* (see App. 6)

disease.<sup>36</sup> In essence, the effects of sexual crimes during war are endless in pain and suffering, both psychologically and physically.

B. The Historic Recognition of Sexual Violence as a War Crime

1) The Fourth Geneva Convention of 1949

One of the most significant events in humanitarian law concerning violence against women during armed conflict was the adoption of the Fourth Geneva Convention of 1949.

Article 27 of the Fourth Geneva Convention provides as follows:

**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.**<sup>37</sup>

Sexual assault, under the Geneva Convention formulation, is characterized as a crime against honor and dignity, not as a crime of violence.<sup>38</sup> This formulation has been criticized because it reduces the significance of the crime, such as physical violence against a woman's body, not to mention violence against her autonomy and selfhood.<sup>39</sup> The traditional ideal, that rape is essentially a crime against a man, in his failure to protect his woman, is prevalent in recognizing

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<sup>36</sup> *Id.* (see App. 6)

<sup>37</sup> Kelly Dawn Askin, *WAR CRIMES AGAINST WOMEN* 326 (Kluwer Law International 1997) (citing Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [Fourth Geneva Convention], Article 27). (see App. 9)

<sup>38</sup> Rhonda Copelon, *Gendered War Crimes: Reconceptualizing Rape in Time of War*, in *WOMEN'S RIGHTS, HUMAN RIGHTS* 197, 200 (Julie Peters & Andrea Wolper, eds., 1995). (see App. 1)

<sup>39</sup> *Id.* at 201. (see App. 1)

rape as a crime against honor. However, it is critical to recognize rape as violent, to improve the status and importance of rape under international humanitarian law.

Although Article 27 of the Fourth Geneva Convention “protects” attacks on a woman’s “honour” during war, some scholars suggest that it merely “protects against,” rather than “prohibits” rape.<sup>40</sup> Perhaps this is because of the failure to connect rape to violence. In addition, the International Committee of the Red Cross (ICRC) declared that “willfully causing great suffering or serious injury to body or health” constitutes a grave breach of the Geneva Convention and this covers rape.<sup>41</sup> While the language of the Convention does not specifically state rape and sexual assault as grave breaches, a broad interpretation of it may include the act of rape under torture and injury to body or health. The purpose of the Fourth Geneva Convention was to protect civilians in times of war<sup>42</sup>, and the majority of civilians are women and children. Clearly, the protection of women and children from sexual assault would logically be an emphasis.<sup>43</sup>

Moreover, although rape was taken into consideration as a violation of international humanitarian law, and hence a war crime, it has been considered that the “differential treatment of rape makes clear that the problem-for the most part-lies not in the absence of adequate legal prohibitions, but in the international community’s willingness to tolerate sexual abuse in women.”<sup>44</sup> However, there is a recognizable change in the international community’s perception

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<sup>40</sup> Kelly Dawn Askin, *WAR CRIMES AGAINST WOMEN* 326, n. 1017 (Kluwer Law International 1997). (see App. 9)

<sup>41</sup> Theodor Meron, Comment, *Rape as a Crime Under International Humanitarian Law*, 87 A.J.I.L. 424, 427 (1993), (citing ICRC, Aide-Memoire (Dec.3, 1992)). (see App. 4)

<sup>42</sup> Kelly Dawn Askin, *WAR CRIMES AGAINST WOMEN* 311-312, n.984 (Kluwer Law International 1997). (see App. 9)

<sup>43</sup> *Id.* (see App. 9)

<sup>44</sup> THE HUMAN RIGHTS WATCH GLOBAL REPORT ON WOMEN’S HUMAN RIGHTS 4 (Human Rights Watch Women’s Rights Project ed., 1995). (see App. 5)

of sexual violence in war. Regardless of the basis of the problem of overlooking rape in conflict, the trend towards recognizing the intensity of gender-based war crimes and establishing ways to deter rape in conflict is significant.

## 2. International Military Tribunal at Nuremberg

The Nuremberg Tribunal (IMT), established in 1945 to prosecute criminals of World War II, did not specifically enumerate rape as a war crime, or as a crime against humanity.<sup>45</sup> The Nuremberg Tribunal focused on traditional war crimes and underemphasized crimes against humanity.<sup>46</sup> Chapter II, Article 6(c) of the Nuremberg International Military Tribunal Charter states:

**[The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interest of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.**

**The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility.]**

**(c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during war, or persecutions on political, racial or religious grounds in execution of or in connection with any crimes within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.**<sup>47</sup>

While sexual assault was not enumerated in Article 6(c), the significance of gender-based crime was introduced through the concept of crimes against humanity using “other

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<sup>45</sup> Nicole Eva Erb, *Gender-based Crimes Under the Draft Statute for the Permanent International Criminal Court*, 29 Colum. Human Rights L. Rev. 401, 409 (1998). (see App. 3)

<sup>46</sup> Kelly Dawn Askin, *WAR CRIMES AGAINST WOMEN* 140 (Kluwer Law International 1997). (see App. 9)

<sup>47</sup> *Id.* (quoting Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279). (see App. 9)

inhumane acts,” a category that would generally include rape.<sup>48</sup> The IMT could have prosecuted rape under Article 6, but did not. The major focus of the Nuremberg trials remained on atrocities committed on ethnic or religious grounds, rather than based on gender grounds.<sup>49</sup>

### 3. Control Council Law No. 10

In 1945, the Allied Powers adopted Control Council Law No.10 (CCLNo.10), which expanded the Nuremberg Charter to specifically enumerate rape as a crime.<sup>50</sup> While CCLNo.10 is largely similar to the Statute of the Nuremberg International Military Tribunal (IMT), two primary differences are evident. First, the IMT did not specifically list rape as a crime, where as CCLNo.10 enumerated rape under crimes against humanity.<sup>51</sup> Second, the terms “before or during war” are not included in CCLNo.10, thus removing the war connection that is included in the IMT statute.<sup>52</sup> The terms “before war” would implicate a time of peace in a nation, thus allowing a defendant to be charged with crime against humanity during a time of peace, and removing the war connection. Article II, section (c) of Control Council Law No.10 states the following acts are recognized as a crime:

**(c) Crimes against Humanity. Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or**

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<sup>48</sup> Nicole Eva Erb, *Gender-based Crimes Under the Draft Statute for the Permanent International Criminal Court*, 29 Colum. Human Rights L. Rev. 401, 409 (1998). (see App. 3)

<sup>49</sup> Kelly Dawn Askin, *WAR CRIMES AGAINST WOMEN* 142, n.492 (Kluwer Law International 1997). (see App. 9)

<sup>50</sup> Nicole Eva Erb, *Gender-based Crimes Under the Draft Statute for the Permanent International Criminal Court*, 29 Colum. Human Rights L. Rev. 401, 409 (1998). (citing Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Dec. 20, 1945, reprinted in 1 *The Law of War: A Documentary History* 908 (Leon Friedman ed., 1972)). (see App. 3)

<sup>51</sup> Kelly Dawn Askin, *WAR CRIMES AGAINST WOMEN* 125 (Kluwer Law International 1997). (see App. 9)

<sup>52</sup> *Id.* (see App. 9)

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

The preamble to Control Council Law No.10 explains that the purpose of its enactment was to prosecute war criminals, other than those dealt with by the International Military Tribunal at Nuremberg.<sup>54</sup> The United States, France, United Kingdom, and the USSR held subsequent trials to prosecute other war criminals using Control Council Law No.10.<sup>55</sup> These defendants were generally lower level officials and those who performed atrocities, while Nuremberg focused primarily on defendants that instigated and promulgated the war.<sup>56</sup>

#### 4. International Military Tribunal for the Far East

The Tokyo Charter was established in 1946 to prosecute Japanese military and political leaders for war crimes committed during World War II. The Tokyo trials did not differ significantly from Nuremberg. Similar to Nuremberg, rape was not enumerated as a war crime in the Tribunal's Charter, however, it was deemed to be included under "subjecting civilians to indignities."<sup>57</sup> Unlike Nuremberg, rape was prosecuted as a war crime in the Tokyo Tribunal.<sup>58</sup>

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<sup>53</sup> Kelly Dawn Askin, *WAR CRIMES AGAINST WOMEN* 121, n.424 (Kluwer Law International 1997). (citing "Allied Control Council Law No.10 Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Humanity," 20 December 1945, Official Gazette of the Control Council for Germany, No.3, Berlin, 31 January 1946.) (see App. 9)

<sup>54</sup> Kelly Dawn Askin, *WAR CRIMES AGAINST WOMEN* 123 (Kluwer Law International 1997). (see App. 9)

<sup>55</sup> *Id.* at 125 (see App. 9)

<sup>56</sup> *Id.* at 122. Among the 185 defendants tried in the second series of trials, physicians were convicted along with camp administrators, judges, and generals who invaded the Soviet Union. (see App. 9)

<sup>57</sup> Kelly Dawn Askin, *WAR CRIMES AGAINST WOMEN* 175 (Kluwer Law International 1997) (citing "The International Military Tribunal for the Far East," Proclaimed at Tokyo, 19 January 1946 and amended 26 April 1946, T.I.A.S. No. 1589). (see App. 9)

<sup>58</sup> Theodor Meron, Comment, *Rape as a Crime Under International Humanitarian Law*, 87 A.J.I.L. 424, 427 (1993). (see App. 4)

It is interesting to note that three women served as assistant prosecution counsel at Tokyo, although it is not certain whether this fact made a difference in the successful inclusion of the charge of rape as a war crime.<sup>59</sup> Perhaps the presence of the female counsel brought subtle or subconscious attention to sexual crimes. Section II, Article 5 of the Tokyo Charter, shows clear similarities to the Nuremberg Charter.<sup>60</sup>

The Tokyo trials found that acts of sexual violence violated “recognized customs and conventions of war” including “mass murder, rape...and other barbaric cruelties.”<sup>61</sup> The prosecution of rape was successful under “inhumane treatment”, “ill-treatment”, and “failure to

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<sup>59</sup> Kelly Dawn Askin, *WAR CRIMES AGAINST WOMEN* 166-177 (Kluwer Law International 1997). (see App. 9)

<sup>60</sup> Kelly Dawn Askin, *WAR CRIMES AGAINST WOMEN* 175 (Kluwer Law International 1997) (citing “The International Military Tribunal for the Far East,” Proclaimed at Tokyo, 19 January 1946 and amended 26 April 1946, T.I.A.S. No. 1589). (see App. 9)

**The Tribunal shall have the power to try and punish Far Eastern war criminals that as individuals or as members of organizations are charged with offenses, which include Crimes against Peace. The following acts or any of them are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:**

- a) Crimes against Peace: Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;**
- b) Conventional War Crimes: Namely, violations of the laws or customs of war;**
- c) Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such a plan.**

<sup>61</sup> *Id.* at 180, n.598. (see App. 9)

respect family honour and rights.”<sup>62</sup> While no raped women were called to testify at the Tokyo trials, several witnesses gave accounts of horrific stories of rape and sexual violence.<sup>63</sup> Some of the stories were hard to fathom, particularly the descriptions involving the “Rape of Nanking.” It is interesting to note that although it would appear that witness testimony should clearly inform the judges of the severity of sexual assaults that occurred during the war, the Tokyo verdict on counts involving sexual violence was not unanimous.<sup>64</sup> One particular dissenting judge from India, Justice Pal, held some rather disturbing views on rape, and fortunately, as a dissenter, his views were not shared by the majority of judges who clearly found sexual assault in violation of international law.<sup>65</sup>

## 5. International Tribunal for the Former Yugoslavia

The atrocities committed during the wars of the former Yugoslavia gained enough media attention to peak the interest of humanitarians all over the world. While gender-based violence has been an element of war for centuries, the trend to focus specifically on such violence against women only began recently. The Yugoslavia Tribunal was created in 1993 for the sole purpose of prosecuting war criminals that participated in the heinous, inhumane war crimes committed in the Balkan conflict. The statute provisions created for the International Criminal Tribunal for the

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<sup>62</sup> *Id.* at 180. (see App. 9)

<sup>63</sup> Susan Brownmiller, *AGAINST OUR WILL, MEN, WOMEN, AND RAPE* 58 (Simon & Schuster 1975). An American missionary reported in his diary: “Never have I heard or read of such brutality! Rape! Rape! Rape! We estimate at least 1000 cases a night and many by day. In case of resistance...there is a bayonet stab or a bullet. We could write up a hundred cases a day.” (see App. 6)

<sup>64</sup> Kelly Dawn Askin, *WAR CRIMES AGAINST WOMEN* 181 (Kluwer Law International 1997). (see App. 9)

<sup>65</sup> *Id.* at 181-185. (citing International Military Tribunal of the Far East, Dissident Judgment of Justice Pal 624 (1953)). Justice Pal of India had difficulty believing witness accounts of rape and sexual assault. In fact, he used the term, “misbehavior”, instead of rape or sexual assault. He stated in his dissent, “I might mention...that even the published accounts of Nanking rape could not be accepted by the world without some suspicion of exaggeration...” Justice Pal had difficulty believing stories of rape, particularly one about a man who jumped in a river and drowned instead of being forced to rape his own daughter. (see App. 9)

Former Yugoslavia (ICTY) include several areas, under which gender-specific crimes may be prosecuted. Because of the significant influence of the ICTY on international humanitarian law, much emphasis will be placed on the provisions of the statute rules promulgated by this Tribunal and the decisions it renders. Article 5 of the Yugoslav Statute specifically lists rape as a crime against humanity:

**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.”<sup>66</sup>**

Because of the various forms of sexual crimes committed during the Yugoslavia conflict, rape was prosecuted under different criteria of the ICTY Statute. Article 2 of the Yugoslav Statute entitled, “Gender Abuses as Grave Breaches of the Geneva Conventions Under the ICTY Statute” includes a few acts in particular that violated provisions of the 1949 Convention: “torture or inhumane treatment, including biological experiments” and “willfully causing great suffering or serious injury to body or health.”<sup>67</sup> This implies a broad interpretation that includes

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<sup>66</sup> Kelly Dawn Askin, WAR CRIMES AGAINST WOMEN 300 (Kluwer Law International 1997) (citing The Statute for the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 808, .N. SCOR, 48<sup>th</sup> Sess., 3175<sup>th</sup> mtg., U.N. Doc. S/RES/827 (1993)). (see App. 9)

<sup>67</sup> *Id.* at 308. (see App. 9)

rape under such categories. Thus rape can be punished as a grave breach without having to fall into the category of crimes against humanity.<sup>68</sup>

While only two of the eleven judges of the ICTY were women, several women assisted in the prosecution of sexual offenses as researchers, investigators, legal advisors, and prosecutors.<sup>69</sup> The inclusion of female judges also assisted in incorporating the concept of gender into rules of procedure and evidence for the Tribunal.<sup>70</sup> In particular, Rule 96 of the Rules of Procedure and Evidence for the ICTY states:

**In cases of sexual assault:**

- (i) no corroboration of the victim's testimony shall be required;**
- (ii) consent shall not be allowed as a defense 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 that the evidence is relevant and credible;**
- (iv) prior sexual conduct of the victim shall not be admitted into evidence.<sup>71</sup>**

The inclusion of Rule 96, reduces pressure on the victims of sexual assault who were involved in the prosecution of war criminals. It also prevents defense attorneys from embarrassing or harassing victims during trial. Moreover, the rule encourages victims to come forward and report sexual assaults to authorities without fear of ridicule or shame.

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<sup>68</sup> *Id.* at 313. (see App. 9)

<sup>69</sup> *Id.* at 303. (see App. 9)

<sup>70</sup> *Id.* (see App. 9)

<sup>71</sup> *Id.* at 303 (citing "Rules of Procedure and Evidence", 5<sup>th</sup> Sess., UN Doc. IT/32 Rev.3/Corr.1 (6 Feb. 1995)). This statute has been amended and revised several times since 1994. The main topic of dispute is the right of the defendant to face his accuser and whether the victim's right to privacy outweighs the defendant's rights to a fair trial. (see App. 9)

As of October 1998, the Yugoslav Tribunal had nineteen public indictments pending against fifty-six suspects, and about half of these indictments involve some form of gender-based violence.<sup>72</sup> Dusko Tadic was the first defendant convicted of sex crimes in the ICTY trials, in particular, sexual assault.<sup>73</sup> In the *Tadic* decision, the trial chamber reported on sexual violence and rapes in Omarska camp, which housed the largest number of women and girls.<sup>74</sup> *Tadic* also included testimony of sexual violence against men, including sexual mutilation and forcing one man to rape another man.<sup>75</sup> It is interesting to note that the Yugoslav Tribunal recognized sexual crimes against men, as well as women in the prosecution of war criminals.

#### 6. International Criminal Tribunal for Rwanda

The Rwanda Tribunal was established by the United Nations Security Council to prosecute war criminals in violation of international humanitarian laws in Rwanda and neighboring states from January 1, 1994 to December 31, 1994. The statute of the Tribunal was similar to the International Criminal Tribunal for the Former Yugoslavia. Article 2 of the statute focused on genocide as, “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 as a whole or in part; etc...”<sup>76</sup>. This article is significant since it

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<sup>72</sup> Kelly D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 A.J.I.L. 97, 99 (1999). (see App. 10)

<sup>73</sup> *Id.* (citing Prosecutor v. Tadic, Opinion and Judgement, No. IT-95-17/1-T (Dec. 10, 1998)). (see App. 10)

<sup>74</sup> *Id.* at 102. (see App. 10)

<sup>75</sup> *Id.* Male witnesses testified that they were ordered to suck another man’s penis and bite his testicles, so they would be bitten off. (see App. 10)

<sup>76</sup> The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in of Rwanda, S.C. Res. 955, U.N. SCOR, 49<sup>th</sup> Sess., 3453rd mtg., U.N.Doc. S/RES/955 (1994) at Art.2. (see App. 14)

allows bodily and mental injury, as well as killing, under the definition of genocide. Article 3 of the Rwanda Statute involves crimes against humanity:

**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.<sup>77</sup>**

Rape is specifically enumerated as a crime against humanity, similar to the ICTY statute.

Moreover, rape is also listed in Article 4 of the Rwanda Statute which lists violations of the Geneva Conventions and of Additional Protocol II, as “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.”<sup>78</sup>

The Rwandan Tribunal made history with the *Akayesu* case, as the first international war crimes trial to convict a defendant for the crime of genocide.<sup>79</sup> Besides this, the *Akayesu* judgement is significant in prosecuting sexual crimes in international criminal law: “1) the trial chamber recognized sexual violence as an integral part of the genocide in Rwanda and found the accused guilty of genocide for crimes that included sexual violence; 2) the chamber recognized

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<sup>77</sup> *Id.* at Art. 3. (see App. 14)

<sup>78</sup> *Id.* at Art. 4. (see App. 14)

<sup>79</sup> Kelly D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 A.J.I.L. 97, 105 (1999). (see App. 10)

rape and other forms of sexual violence as independent crimes constituting crimes against humanity; and 3) the chamber enunciated a broad, progressive international definition of both rape and sexual violence.”<sup>80</sup> At trial, seven witnesses testified as survivors or witnesses of rape and sexual violence.<sup>81</sup> While the defendant was not accused of personally participating in rapes, the chamber found overwhelming evidences that he “ordered, instigated, and otherwise aided and abetted sexual violence.”<sup>82</sup> The trial chamber stressed that crimes of sexual violence were in fact an “integral part of the process of destruction”<sup>83</sup>, thus an element of genocide.

### C. The Effects of a Permanent International Criminal Court on Sexual Crime

In the summer of 1998, delegates from all over the world met in Rome to discuss the establishment of a permanent International Criminal Court (ICC).<sup>84</sup> For two years, a special Preparatory Committee (PrepCom) worked on the provisions of a draft statute to establish a permanent ICC.<sup>85</sup> The draft statute prepared by the PrepCom included the international criminalization of rape and gender-specific crimes.<sup>86</sup> The statute was adopted in Rome on July 18, 1998 by a vote of 120-70.<sup>87</sup> UN Secretary General Kofi Annan hailed the adoption of the

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<sup>80</sup> *Id.* at 107. (see App. 10)

<sup>81</sup> Kelly D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 A.J.I.L. 97, 107 (1999) (citing *Prosecutor v. Akayesu*, Judgement, No. ICTR-96-4T (Sept.2, 1998), available at ICTR Web site). (see App. 10)

<sup>82</sup> *Id.* (citing para. 452 of *Prosecutor v. Akayesu* ). (see App. 10)

<sup>83</sup> *Id.* (citing paras. 733-34 of *Prosecutor v. Akayesu* ). (see App. 10)

<sup>84</sup> Nicole Eva Erb, *Gender-based Crimes Under the Draft Statute for the Permanent International Criminal Court*, 29 Colum. Human Rights L. Rev. 401, 402 (1998). (see App. 3)

<sup>85</sup> *Id.* (see App. 3)

<sup>86</sup> *Id.* at 403. (see App. 3)

<sup>87</sup> *Establishing International Criminal Court Will Be Fitting Way to Inaugurate New Millenium*, M2 PRESSWIRE, 17 February 1999, available in LEXIS, News Library, Cumws File. (see App. 11)

statute as “a giant step forward in the march towards universal human rights and the rule of law.”<sup>88</sup> With the establishment of a permanent ICC, victims of war crimes, particularly victims of rape, will be able to seek justice against their perpetrators and the generals who allowed the abuse. While international tribunals have been established to try and convict war criminals, a permanent ICC will allow prosecutors to gain convictions more effectively.

The statute of the permanent ICC includes “any other forms of sexual violence” as grave breaches of the Geneva Conventions.<sup>89</sup> The statute also lists several crimes against humanity, particularly Article 7(g) which states:

**(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;**<sup>90</sup>

The enumeration of rape and other sex crimes will assist prosecutors, in that they will not have to satisfy the offense of rape as a grave breach of the Conventions, since it is a crime of sexual violence.<sup>91</sup> Prior to this addition to the statute, the prosecutor would have to refer to grave breaches of the Geneva Convention which lists “willfully causing great suffering or serious injury to body or health” before prosecuting the actual crime of rape.<sup>92</sup> This is a significant step towards more effective prosecutions.

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<sup>88</sup> *Senegal First State to Ratify Statute of Criminal Court*, AFRICA NEWS 4 February 1999, available in LEXIS, News Library Curmws File. (see App. 12)

<sup>89</sup> Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, U.N. Doc. A/CONF. 183/2/Add. 1 (1998). (see App. 13)

<sup>90</sup> *Id.* (see App. 13)

<sup>91</sup> Nicole Eva Erb, *Gender-based Crimes Under the Draft Statute for the Permanent International Criminal Court*, 29 Colum. Human Rights L. Rev. 401, 430 (1998). (see App. 3)

<sup>92</sup> Kelly Dawn Askin, WAR CRIMES AGAINST WOMEN 326 (Kluwer Law International 1997) (citing Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (1949)). See also, Nicole Eva Erb, *Gender-based Crimes Under the Draft Statute for the Permanent International Criminal Court*, 29 Colum. Human Rights L. Rev. 401, 430 (1998). (see Apps. 9 & 3)

On March 8 1999, International Women's Day, UN officials declared "zero tolerance" against those who encourage violence against women.<sup>93</sup> United Nations Secretary-General, Kofi Annan said that the permanent International Criminal Court will "put the world on notice that crimes against humanity, which have disfigured and disgraced this century will not go unpunished in the next."<sup>94</sup> Sixty states are required to ratify the Statute before it can come into force, and Senegal, the first State to ratify<sup>95</sup>, has begun a hopeful trend.

A permanent ICC will allow one entity to constantly monitor and interpret international law clearly and effectively. By having a forum for criminal accountability, nations suffering the trauma of armed conflict will have an outlet for justice, thus breaking down the barrier to national reconciliation.<sup>96</sup> Perhaps the establishment of a permanent International Criminal Court will deter<sup>97</sup> war torn countries from committing such horrendous atrocities, as depicted in the Nuremberg, Tokyo, Yugoslavia, and Rwanda tribunals. Generally speaking, a permanent ICC will reduce the likelihood of international war crimes going unpunished.

#### IV. Conclusion

The international community has made giant leaps in this century regarding humanitarian law. It is unfortunate that catastrophes such as WWII, the Yugoslavian Conflict, the Rwandan conflict, and several others, were required to alarm the world of severe injustices. At

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<sup>93</sup> *Human Rights-U.N.: Annan Denounces Violence Against Women* INTER PRESS SERVICE, 8 March 1999, available in LEXIS, News Library, Curnws File. (see App. 15)

<sup>94</sup> *Establishing International Criminal Court Will Be Fitting Way to Inaugurate New Millenium*, M2 PRESSWIRE, 17 February 1999, available in LEXIS, News Library, Nurnws File. (see App. 11)

<sup>95</sup> *Senegal First State to Ratify Statute of Criminal Court*, AFRICA NEWS 4 February 1999, available in LEXIS, News Library Curnws File. (see App. 12)

<sup>96</sup> David Stoelting, *Status Report on the International Criminal Court*, 3 Hofstra L. & Pol'y Symp. 233 (1999). (see App. 17).

Nuremberg, sexual assault was not enumerated, nor recognized as a crime of war. However, in the recent Rwanda Tribunal, rape is being successfully prosecuted as a war crime. Most importantly, the victims of sexual assault are finally achieving justice against their predators. War criminals that raped, sexually tortured, and forcefully impregnated are being punished.

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<sup>97</sup> *Id.* (see App. 17)