Denver Journal of International Law & Policy

Volume 22
Number 2 *Spring*

Article 5

January 1994

Bringing the Perpetrators of Rape in Balkans to Justice: Time for an International Criminal Court

Caroline D. Krass

Bringing the Perpetrators of Rape in Balkans to Justice: Time for an International Criminal Court

Keywords

International Criminal Court, Rape, Women, Feminism, War Crimes

Bringing the Perpetrators of Rape in the Balkans to Justice: Time for an International Criminal Court

CAROLINE D. KRASS*

> The Security Council . . . appalled by reports of massive, organized and systematic detention and rape of women, in particular Muslim women, in Bosnia and Herzegovina . . . strongly condemns these acts of unspeakable brutality.[1]

On December 18, 1992, the Security Council of the United Nations expressed the abhorrence of the world community regarding the ongoing rape of women and girls in the Republic of Bosnia and Herzegovina.[2] According to a report by a team of experts from the United Nations Commission on Human Rights, the rape of women and minors in Bosnia and Herzegovina has occurred on a large scale, and evidence indicates that women and girls have been detained for extended periods of time and raped repeatedly.[3] In a ten day visit to Bosnia and Herzegovina, the U.N. experts identified 119 pregnancies resulting from rape[4] and determined that the abortion rate at a clinic in Sarajevo between September and November 1992 had reached four times its pre-war level.[5] The experts found no sign of any attempt by

---

* Law Clerk to the Honorable Patricia M. Wald, United States Court of Appeals for the District of Columbia Circuit 1993-1994. B.A. Stanford University 1989; J.D. Yale Law School 1993. The author would like to thank Professor Harold H. Koh for his invaluable assistance.

1. Sec. C. Res. 798, U.N. Doc. S/RES/798 (1992).

2. Although rape has occurred throughout the territory of the former Yugoslavia and has been perpetrated on all sides of the conflict, this article focuses on the rape of Muslim women in Bosnia and Herzegovina because it is part of the systematic policy of "ethnic cleansing."

3. *Situation of Human Rights in the Territory of the Former Yugoslavia*, U.N. ESCOR, 49th Sess., Agenda item 27, at 19, U.N. Doc. E/CN.4/50 (1993) [hereinafter *U.N. Human Rights Report*]. The team of four medical and psychiatric experts visited Bosnia and Herzegovina between January 12 and 23, 1993. *Id.* at 4. *See also* Elaine Sciolino, *U.S. Names Figures it Wants Charged with War Crimes*, N.Y. TIMES, Dec. 17, 1992, at A1 (government and human rights organizations have documented gang rape, the incarceration of women and girls impregnated by rape, the forcing of women into brothels, and murder of rape victims).

4. The U.N. Human Rights Report noted that this number should be seen as a minimum because pregnancies resulting from rape are under-reported due to the emotional pain and stigma associated with rape. *U.N. Human Rights Report*, *supra* note 3, at 67.

5. *Id.*

those in power to stop the sexual violence.[6]

A more recent statement by the U.N. War Crimes Commission indicates that the International Human Rights Law Institute at DePaul University has collected evidence of approximately 3,000 rapes and has identified approximately 800 victims by name.[7] Although the reports of mass rape would suffice to shock the world's conscience, its incidence in the current conflict has taken on a new twist: rape as a tool of genocide.[8]

While nothing will erase the physical and mental scars inflicted on the victims of rape, they could take legal action against the perpetrators of the atrocities in Bosnia and Herzegovina. However, although several fora exist to bring the perpetrators of rape to justice, all are ineffective. To provide relief effectively, a forum must be able to provide the following protections: (1) allow individual access to the prosecution; (2) be impartial; (3) make decisions based on law; (4) avoid politicization; (5) issue judgments with precedential value; (6) resolve cases on the merits; (7) have an enforcement mechanism; (8) reach decisions in a timely manner; and (9) have flexible procedures.

This article argues that due to the defects of the fora currently available to the victims of rape, the world community should create an international adjudicatory body with jurisdiction over certain international crimes. The adjudicatory body could take the form of an ad hoc tribunal for war crimes committed in the former Yugoslavia. Or, preferably, it could become a permanent international criminal court. Section I of this article briefly describes the current juridical situation in Bosnia and Herzegovina. Section II outlines the various fora currently available to arraign the perpetrators of rape and identifies the problems with these fora. Section III describes the mechanics of the proposed war crimes tribunal with jurisdiction over crimes committed in the former Yugoslavia and then evaluates the tribunal. Finally, Section IV surveys the debate over the creation of a permanent international criminal court, analyzes the proposals for such a forum, and concludes by calling for its establishment. Because the peculiar and unique legal status of the conflict in Bosnia has placed many traditional legal doctrines in limbo, it is useful to begin by briefly describing the current juridical situation in Bosnia and Herzegovina.

---

6. *Id.* at 72.

7. *Rape was Weapon of Serbs, U.N. Says*, N.Y. TIMES, Oct. 20, 1993, at A1.

8. Although the current conflict represents the first time rape has been used with a genocidal objective, this is not the first time rape has been used as a weapon of war. Throughout the ages, armed forces have relied on rape as a tactic to demoralize, intimidate, and retaliate against the enemy. *See generally* SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 31-133 (1975).

I. THE SITUATION IN BOSNIA: JURIDICAL STATUS

The Nuremberg and Tokyo trials provide the sole examples of criminal prosecutions of individuals before an international war crimes tribunal. Under the Nuremberg paradigm, an ad hoc tribunal entertains prosecutions for genocide committed in the course of an international armed conflict between recognized states.[9] The mass rape of women and children in Bosnia, however, deviates from this paradigm: the international community does not recognize the Federal Republic of Yugoslavia as a state; no court has classified rape as genocide; and the Bosnian conflict can be characterized as either civil or international. Therefore, the Bosnian situation presents several new and difficult legal issues.

The international community recognized the independence of the Republic of Bosnia and Herzegovina from the Socialist Federal Republic of Yugoslavia ("former Yugoslavia") in early April 1992.[10] On April 27, 1992, the Republics of Serbia and Montenegro formed a new Yugoslav state, the Federal Republic of Yugoslavia ("Federal Republic"), which holds a yet uncertain international status. In September 1992, the General Assembly decided that the Federal Republic could not automatically succeed to the seat of former Yugoslavia in the United Nations[11] — it would have to reapply for membership under Article 4 of the U.N. Charter. The UN has not yet granted it membership.[12] However, the UN has permitted the Federal Republic to maintain a mission at the United Nations and to participate in the work of some non-Assembly bodies.[13]

The international community has not yet addressed whether the rape of women and children in Bosnia and Herzegovina qualifies as genocide. The Republic of Bosnia and Herzegovina has been a party to the Convention on the Prevention and Punishment of Genocide ("Genocide Convention") since March 6, 1992, the date it seceded from the former Yugoslavia.[14] The Federal Republic is also a party to the Genocide Convention, because on April 27, 1992 it formally declared that it would "strictly abide by all the commitments that the Socialist Federal

---

9. *See generally* ROBERT K. WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW (1962).

10. HELSINKI WATCH, WAR CRIMES IN BOSNIA-HERCEGOVINA [sic] 30 (1992).

11. John M. Gosho, *U.N. Declares Yugoslav Seat to be Vacant*, WASH. POST, Sept. 23, 1992, at A27.

12. Order in Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugo. (Serbia and Montenegro)), 1993 I.C.J. 13 [hereinafter *I.C.J. Order*].

13. *Id.*

14. *See* Application Instituting Proceedings Submitted by the Republic of Bosnia and Herzegovina, (Bosnia and Herzegovina v. Yugo. (Serbia and Montenegro)), ___ I.C.J. Pleadings 32 (Mar. 20, 1993) (on file with author) [hereinafter *Bosnian I.C.J. Application*].

Republic of Yugoslavia assumed internationally."[15] The Socialist Federal Republic of Yugoslavia ratified the Genocide Convention without reservation on August 29, 1950.[16]

According to Article II of the Genocide Convention:

> genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such: . . . 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; [or] imposing measures intended to prevent births within the group.[17]

The systematic rape and forced pregnancy of Muslim women and girls qualifies as genocide under all parts of this definition. The Bosnian Serb soldiers employ rape as an instrument of "ethnic cleansing," the euphemism used to describe the Serbian policy of forcing non-Serbs out of certain regions of the former Yugoslavia.[18] According to the Bosnian government, "mass rapes are being used to intentionally destroy the national, religious, and cultural identity of the Muslim people in Bosnia."[19] A European Community investigative mission into the treatment of women in the former Yugoslavia found that the Serbs commit rape with the "conscious intention of demoralizing and terrorizing communities, driving them from their home regions, and demonstrating the power of the armed forces."[20]

To inflict the maximum amount of humiliation on the victims, their families, and the community, the Bosnian-Serbs commit some of the rapes in particularly sadistic ways.[21] Rape victims have reported that their assailants shouted "you will have a Serbian child."[22] Some were also told that if they became pregnant they would be forcibly detained to prevent termination of the pregnancy.[23] Even when repeated

---

15. *I.C.J. Order*, *supra* note 12, at 14.

16. *Id.*

17. Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, G.A. Res. 260(A) (III), 78 U.N.T.S. 278, 280 (entered into force Jan. 12, 1951) [hereinafter *Genocide Convention*].

18. *See, e.g., Situation of Human Rights in the Former Yugoslavia: the Rape and Abuse of Women*, U.N. Doc. E/CN.4/L.21 (1993) (expressing outrage of United Nations Commission on Human Rights that the systematic practice of rape is being used as a weapon of war against Muslim women and children and as an instrument of the policy of ethnic cleansing).

19. *Bosnian I.C.J. Application*, *supra* note 14 at 17.

20. *European Community Investigative Mission Into the Treatment of Muslim Women in the Former Yugoslavia*, U.N. SCOR at 6, U.N. Doc. S/25240 (1993) [hereinafter *European Investigative Report*].

21. *Id.* at 5.

22. *U.N. Human Rights Report*, *supra* note 3, at 69; *see also European Investigative Report*, *supra* note 20, at 5.

23. *Id.*

rape fails to produce "Serbian" babies, it still furthers the policy of "ethnic cleansing" by eliminating the child-bearing capacity of the Muslim victims directly, through physical abuse, or indirectly, by virtue of the societal stigma attached to victims of rape. This stigma proves especially severe in Muslim communities, where the religion emphasizes virginity and chastity before marriage.[24] Because the perpetrators intend the elimination of the child-bearing capability of Muslim women and girls as a consequence of rape, "ethnic cleansing" actually qualifies as genocide.

Whether the ongoing war in Bosnia and Herzegovina qualifies as an international, rather than an internal, armed conflict poses another important juridical question. Although at first most of the fighting in Bosnia occurred between Muslims and Bosnian Serbs, Croatian forces have joined the melee. Paramilitary groups from the Federal Republic and reserve forces of the Yugoslav People's Army have aided the Bosnian Serbs by participating in the conflict,[25] and Croatia has troops fighting on behalf of the Bosnian Croats.[26] As both the Republic of Bosnia and Herzegovina and the Federal Republic have declared their independence from the former Yugoslavia, those two states appear to be engaged in an international conflict.[27] According to the United Nations Commission of Experts,

> the character and complexity of the armed conflicts concerned, combined with the web of agreements on humanitarian issues the parties have concluded among themselves, justify an approach whereby it applies the law applicable in international armed conflicts to the entirety of the armed conflicts in the territory of the former Yugoslavia.[28]

In sum, the conflict in Bosnia and Herzegovina amounts to an international armed conflict involving the genocidal use of rape. Though not an internationally recognized state, the terms of the Genocide Convention bind the Federal Republic. Characterizing both the

---

24. Feryal Gharahi, *Equality Now,* Address at Smith College (Apr. 15, 1993).

25. HELSINKI WATCH, *supra* note 10, at 35.

26. *15 Killed in a Barrage of Shelling Across Sarajevo*, N.Y. TIMES, Jan. 4, 1994, at A4.

27. HELSINKI WATCH. *supra* note 10, at 199-200.

28. *Letter Dated 9 February 1993 From the Secretary-General Addressed to the President of the Security Council*, U.N. SCOR at 14, U.N. Doc. S/25274 (1993) [hereinafter *U.N. Experts Report*]; *see also* Letter from Madeleine K. Albright, Representative of the United States of America to the United Nations, to Boutros Boutros-Ghali, Secretary-General of the United Nations 6 (Apr. 5, 1993) (on file with author) (for jurisdictional purposes, the conflict shall be deemed to be of an international character). *But see Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, U.N. Doc. S/25704, at 16 (1993) [hereinafter *S.G. Report*] (the selection of January 1, 1993 as the starting date for temporal jurisdiction of war crimes tribunal is not intended to convey any judgment as to the international or internal character of the conflict).

war in Bosnia and Herzegovina as an international armed conflict and the mass rape of Muslim women and children as genocide has important legal ramifications.

II. INHERENT DEFECTS IN FORA AVAILABLE TO BRING PERPETRATORS OF RAPE TO JUSTICE

Two types of fora may have jurisdiction over perpetrators of rape in Bosnia and Herzegovina: national courts, including Bosnian and United States courts, and international tribunals.[29] However, the available tribunals have inherent defects that diminish their power to compensate victims and deter perpetrators. While domestic initiations of criminal prosecutions and domestic court adjudications of civil claims will elicit charges of nationalistic prejudice or political influence, the only available international forum — the International Court of Justice — cannot prosecute individual perpetrators. As a result, many obstacles prevent the victims of rape from obtaining relief in the currently available fora.

A. *Bosnian Courts*

At first glance, the Bosnian court system provides the most obvious forum for the victims of rape in Bosnia and Herzegovina. Under the territoriality[30] and passive personality[31] principles of international jurisdiction, a state has jurisdiction to define and punish crimes committed on its territory or against its nationals. In fact, according to Article VI of the Genocide Convention, Bosnia and Herzegovina is the *only* state *required* to try those who have perpetrated genocide within its territory.[32] Similarly, Article 5(1) of the U.N. Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Pun-

---

29. Another potential forum would be a regional tribunal, but the former Yugoslavia was not a party to any of the regional tribunals. If Bosnia and Herzegovina were to become a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms, *adopted* Nov. 4, 1959, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953), Article 25(1) provides that the European Human Rights Commission "may receive petitions . . . from any person . . . or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention" as long as the allegedly offending Party recognizes the competence of the European Human Rights Commission to receive such petitions. *Id.* at 236-237. Thus, through this mechanism, the Bosnian victims of rape could bring a claim only against the Federal Republic rather than against individual perpetrators. Moreover, their claims would only be entertained if the Federal Republic of Yugoslavia had accepted the jurisdiction of the European Human Rights Commission.

30. 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS §402 (1)(a)-(b) (1987).

31. *Id.* § 402 cmt. g.

32. *See Genocide Convention*, *supra* note 17, at 280-82 (persons charged with genocide shall be tried by a competent tribunal of the state in the territory of which the act was committed or by such international penal tribunal as shall have jurisdiction).

ishment ("Convention Against Torture") obligates a state party to take the necessary measures to establish jurisdiction over an offense committed in any territory subject to that state party's jurisdiction.[33]

As a party to the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War ("Fourth Geneva Convention"),[34] the Republic of Bosnia and Herzegovina has an obligation to prosecute any offense that qualifies as a grave breach of that Convention.[35] Article 146 of the Fourth Geneva Convention requires each High Contracting Party "to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and [to] bring such persons, regardless of their nationality, before its own courts."[36] Bosnia and Herzegovina can thus prosecute grave offenses committed by Serbian forces, for as a High Contracting Party, the provisions of the Fourth Geneva Convention bind the Federal Republic.[37]

Attempts to use the Bosnian court system to prosecute the perpetrators of rape in Bosnia and Herzegovina would encounter many practical problems, however. In the occupied regions, legal institutions generally do not function, and "the situation of all-out or avowed war prevailing in the . . . territories [of the former Yugoslavia] rules out any possibility of effective prosecution."[38] Even if the Bosnian legal system operated effectively, the international community would doubt the legitimacy of Bosnian trials of Serbian prisoners.[39] As with the trial of Adolf Eichmann, despite the horrific nature of the allegations

---

33. J. HERMAN BURGERS & HANS DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 177, 178 (1988). Article 14 goes even further, requiring that each state party ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation. *Id.* at 181. Although the Socialist Federal Republic was a party to the Torture Convention, it is not clear that Bosnia and Herzegovina has succeeded to its obligations.

34. Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter *Fourth Geneva Convention*]. Bosnia and Herzegovina declared its succession to the Four Geneva Conventions of 1949 and the two Protocols of 1977 on December 12, 1992. *See European Investigative Report*, *supra* note 20, at 17.

35. For an explanation of why rape qualifies as a grave breach of the Fourth Geneva Convention, see *infra* notes 168-70 and accompanying text.

36. *Fourth Geneva Convention*, *supra* note 34, at 386.

37. *See* HELSINKI WATCH, *supra* note 10, at 201 (The desire of the Federal Republic to be recognized as a successor state to the former Yugoslavia and thus retain membership in international organizations implies a willingness to succeed to the international agreements to which former Yugoslavia was a party. The former Yugoslavia ratified the Fourth Geneva Convention in 1950.).

38. *Letter Dated 10 February 1993 From the Permanent Representative of France to the United Nations Addressed to the Secretary-General*, U.N. SCOR, at 12, U.N. Doc. S/25266 (1993) [hereinafter *French Proposal*].

39. Interview with Mijan Damaska, Ford Foundation Professor of Law, Yale University, New Haven, May 4, 1993 [hereinafter *Damaska Interview*].

and the desire to believe the accused guilty, suspicion would remain as to the impartiality of the proceedings.[40]

For example, some have already raised questions about the fairness of the much-publicized trial of two Serbian soldiers in Bosnia and Herzegovina.[41] Bosnian army forces arrested the two soldiers in Sarajevo in November 1991, and one of the soldiers, Borislav Herak, confessed immediately.[42] However, other than Herak's detailed confession, it remains unclear why the Bosnians singled these two soldiers out from the vast pool of potential defendants.[43] At trial, the defense claimed inducement of the soldiers' confessions by beatings and pointed to the lack of independent verification for most of the crimes.[44] After a twelve-day trial on charges of murder, rape, and genocide, the soldiers were found guilty and sentenced to death by firing squad.[45]

B. *United States Courts*

Victims of rape in Bosnia and Herzegovina can pursue civil remedies in the courts of the United States under two statutes.[46] The Torture Victim Protection Act of 1991 provides victims of torture or extrajudicial killing with a private cause of action for damages.[47] Victims of any nationality have standing if the alleged offender acted under "actual or apparent authority, or color of law, of any foreign nation."[48] Moreover, the statute's definition of torture, which includes "any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering, whether physical or mental, is intentionally inflicted on that individual for such purpose as . . . in-

40. For a discussion of the criticisms of the Eichmann trial, see *infra* text accompanying notes 244-48.

41. *See* John F. Burns, *2 Serbs to Be Shot for Killings and Rapes*, N.Y. TIMES, Mar. 31, 1993, at A6.

42. *Bosnia War Crimes* (COURT TV television broadcast, May 5, 1993)(Video-tape on file with author).

43. *Id.*

44. *Id.*

45. Burns, *supra* note 41.

46. At least two suits against Radovan Karadzic, President of the internationally unrecognized Serbian Republic of Bosnia-Herzegovina, are currently pending in the United States District Court for the Southern District of New York. *See, e.g.*, Kadic v. Karadzic, No. 93-1163 (S.D.N.Y. filed March 2, 1993); Doe v. Karadzic, No. 93-0878 (S.D.N.Y. filed Feb. 11, 1993). In response to each complaint, the defendant filed a Motion to Dismiss and a Memorandum in Support of a Motion to Dismiss on May 10, 1993.

47. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992). The Act defines "extrajudicial killing" as "a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id.* § 3(a).

48. *Id.* § 2(a).

timidating or coercing that individual,"[49] would include rape.

The Alien Tort Statute grants United States district courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[50] As the Ninth Circuit succinctly explained in *Trajano v. Marcos*, the Alien Tort Statute "requires a claim by an alien, a tort, and a violation of international law."[51] In *Trajano*, for example, the court found that the Alien Tort Statute provided the district court with subject matter jurisdiction over a claim by a Philippine national that her son had been tortured to death in the Philippines by military intelligence personnel acting under the authority of then-president Ferdinand Marcos, the defendant. Since both official torture and genocide violate international law,[52] the Alien Tort Statute would allow the victims of rape in Bosnia and Herzegovina to bring a civil action in the district courts of the United States.

United States courts have awarded damages under the Alien Tort Statute to foreign plaintiffs,[53] but many hurdles impede the path to relief. The obstacles to obtaining a favorable judgment fall into the following ten doctrinal categories: (1) personal and subject matter jurisdiction; (2) service of process; (3) *forum non conveniens*, (4) failure to state a claim; (5) standing; (6) diplomatic or foreign sovereign immu-

---

49. *Id.* § 3(b)(1).

50. 28 U.S.C. § 1350 (1988).

51. 978 F.2d 493, 499 (9th Cir. 1992).

52. The circuits are in agreement that official torture is a violation of international law. *See* Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 717 (9th Cir. 1992) ("it would be unthinkable to conclude other than that acts of official torture violate customary international law"); Committee of United States Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 941-42 (D.C. Cir. 1988) (torture constitutes violation of *jus cogens*); Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) ("for purposes of civil liability, the torturer has become — like the pirate and slave trader before him — *hostis humani generis*, an enemy of all mankind"); *see also* 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 702(d) (state violates international law if as a matter of state policy, it practices, encourages, or condones torture or other cruel, inhuman, or degrading treatment).

Genocide is also a violation of customary international law. *See id.* § 702(a) (state violates international law if as a matter of state policy, it practices, encourages, or condones genocide). In addition, since 1987, the United States has been a party to the Genocide Convention. Article I of the Convention states that "The Contracting Parties confirm that genocide . . . is a crime under international law which they undertake to prevent and punish." *See Genocide Convention*, *supra* note 17, at 280.

53. Filartiga v. Pena-Irala, 577 F. Supp. 860 (E.D.N.Y. 1984) (awarding plaintiffs $10,364,000 in damages); *Trajano*, 978 F.2d at 496 (upholding award to plaintiffs of $4.16 million in damages); Forti v. Suarez-Mason, 672 F. Supp 1531 (N.D. Cal. 1987) (awarding $8 million in damages); Siderman de Blake v. Republic of Argentina, No. CV 82-1772 (C.D. Cal. Sept. 28, 1984) (awarding $2.7 million in damages), *rev'd and remanded* Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992) (Argentina may have implicitly waived immunity), *cert. denied*, Republic of Argentina v. Siderman de Blake, 113 S. Ct. 1812 (1993).

nity; (7) nonjusticiability under the Act of State or the political question doctrines; (8) discovery; (9) attachment of assets; and (10) enforcement of judgments.[54] The Torture Victim Protection Act removes only one of these hurdles, subject matter jurisdiction,[55] while adding two more, exhaustion of remedies and a ten-year statute of limitations.[56] Moreover, the Torture Victim Protection Act has yet to be tested in U.S. courts.[57]

Several Bosnian victims of rape have brought suits in federal district court against the leader of the Bosnian Serbs, Radovan Karadzic. These suits raise numerous questions regarding the availability of U.S. courts to Bosnian victims: Do U.S. courts have personal jurisdiction over someone who comes to the United States only for short periods of time to negotiate a peace settlement?[58] As an invitee of the United Nations for peace negotiations,[59] can Karadzic be served with process?[60] Is service on his bodyguards sufficient?[61] Is there an

---

54. *See generally* Harold H. Koh, *Civil Remedies for Uncivil Wrongs: Combatting Terrorism Through Transnational Public Law Litigation*, 22 TEX. INT'L L.J. 169, 181-83 (1987).

55. An individual who subjects an individual to torture or extrajudicial killing "shall, in a civil action, be liable for damages." Pub. L. No. 102-256, 106 Stat. 73, § 2(a) (2) (1992).

56. *Id.* § 2(b) & (c).

57. Although no one has litigated the Torture Victim Protection Act, it has been briefed. However, the arguments primarily revolve around questions of retroactivity and the availability of punitive damages. *See* Supplemental Memorandum of Points and Authorities in Support of Plaintiffs' Motions for Default Judgment at 16-30, Xuncax v. Gramajo, ___ F. Supp. ___ (Mass. 1994) (No. 91-11564 WD).

58. The due process clause prohibits the exercise of personal jurisdiction unless a defendant has minimum contacts with the forum. *See* Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408 (1984) (no personal jurisdiction where defendant lacked continuous and systematic contacts with forum and contacts were unrelated to cause of action). Even if minimum contacts are present, the court will not "unreasonably" exercise jurisdiction. *See* Asahi Metal Indus. Co. v. Superior Ct., 480 U.S. 102, 144 (1987) ("The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.").

59. *See* Letter from Robert A. Bradtke, Acting Assistant Secretary of Legislative Affairs, Dep't of State, to Senator Dole, Mar. 1993 (on file with author) [hereinafter *Bradtke Letter*] (Karadzic in U.S. solely as an invitee of U.N.).

60. Within the U.N. headquarters district, Karadzic can only be served "with the consent of and under conditions approved by the Secretary-General." United Nations Headquarters Agreement, 22 U.S.C. § 287, art. III, § 9 (1988). Such consent has not been given for service of process on Karadzic. In addition, Karadzic might be able to argue that his presence in New York is similar to that of a witnesses entering a state from another jurisdiction to testify at a trial. Under such circumstances, witnesses are immune from service of process. 4 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1076 (1987); *see also* Stewart v. Ramsay, 242 U.S. 128, 129 (1916) (suitors and witnesses coming from another state or jurisdiction cannot be served with civil process while in court and "during a reasonable time coming and going").

61. Reportedly, Karadzic's bodyguards have prevented direct service of process in

adequate alternative forum?[62] Have the plaintiffs exhausted their available, alternative remedies?[63] Can the suit be dismissed under Federal Rule of Civil Procedure 12(b)(6) for lack of a cause of action?[64] Will Karadzic be immune under a theory of official immunity?[65] Un-

---

Kadic v. Karadzic, No. 93-1163 (S.D.N.Y. filed March 2, 1993). *Damaska Interview*, *supra* note 39.

62. In determining whether to dismiss a suit on the basis of *forum non conveniens*, the district court enjoys a high level of discretion in considering whether an alternative forum exists; whether the plaintiff's choice of forum deserves deference; and the private and public interests involved. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255-61 (1982); *see also* In re Union Carbide Gas Plant Disaster at Bhopal, 809 F.2d 195 (2d Cir. 1987). There is no presumption in favor of the choice of forum of an alien plaintiff. Piper Aircraft Co., 454 U.S. at 256. However, "if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all . . . the district court *may* conclude that dismissal would not be in the interests of justice." *Id.* at 254 (emphasis added); *see also* Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 HARV. INT'L L.J. 53, 104 (1981) (issue of *forum non conveniens* will consistently arise in § 1350 cases due to expense of obtaining witnesses and evidence, unavailability of compulsory process, and involvement of law of foreign state).

63. The Torture Victim Protection Act of 1991 requires the claimant to exhaust his or her "adequate and available" remedies in the place where the alleged acts occurred. Pub. L. No. 102-256, 106 Stat. 73, § 2(b) (1992). The court may be persuaded that no adequate remedies are available to victims of rape in Bosnia and Herzegovina because their country is currently engaged in war.

64. In Trajano v. Marcos, the Ninth Circuit affirmed the district court's decision that the Alien Tort Statute confers jurisdiction but provides no cause of action. 978 F.2d 493, 503 n.22 (9th Cir. 1992); *see also* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 799 (D.C. Cir. 1984) (Bork, J., concurring) (§ 1350 does not supply a cause of action). Although the Trajano court also confirmed the theory that a private right of action cannot be implied from a non-self-executing treaty, it found a cause of action under municipal tort law for torture. Trajano v. Marcos, 978 F.2d at 503; *see also* Tel-Oren, 726 F.2d at 808 (Bork, J., concurring) (non-self-executing treaties do not create privately enforceable rights). *But see* Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988) (distinction between non-self-executing and self-executing treaties patently inconsistent with express language of Constitution).

To sustain a claim for torture, plaintiffs must show that Karadzic acted under official authority or under color of such authority. *See* Tel-Oren, 726 F.2d at 791-95 (Edwards, J., concurring). Paradoxically, if Karadzic can demonstrate that he was acting in his official capacity as an agent or instrumentality of a foreign state, he may be immune under the Foreign Sovereign Immunities Act. *See* Chuidian v. Philippine National Bank, 912 F.2d 1095 (9th Cir. 1991); *infra* notes 65 and 69.

65. Although the executive branch has stated that it will not accord Karadzic immunity on a discretionary basis, it has not ruled out the possibility that either a treaty or customary international law will confer immunity on Karadzic. *Bradtke Letter*, *supra* note 59; *cf.* Lafontante v. Aristide, Civ. No. 93-4268 (S.D.N.Y. 1994) (defendant absolutely immune from personal jurisdiction in U.S. courts because U.S. government recognizes him as official head-of-state of Haiti and immunity has not been waived by statute or by Haiti). In Chuidian v. Phillipine National Bank, the government expressed the view that an individual acting in his official capacity as an employee of a foreign sovereign would be entitled to immunity under general principles of sovereign immunity. 912 F.2d 1095, 1099 (9th Cir. 1990).

According to the U.N. Headquarters Agreement, privileges and immunities

der the Foreign Sovereign Immunities Act[66] ("FSIA"), do the Federal Republic and Serbian Bosnia constitute foreign states?[67] Can Karadzic claim that the Alien Tort Statute does not apply to Serbian Bosnia?[68] Can Karadzic claim to be an "agent or instrumentality" of the Federal Republic?[69] Can a waiver of immunity for Karadzic be implied if the Federal Republic is silent?[70] Under the Act of State Doc-

---

must be extended to representatives of U.N. members not recognized by the U.S. if they are within the headquarters district or in transit between the district and their residences or offices. 22 U.S.C. § 287, art. V, § 15(4) (1992). The question is whether Karadzic qualifies as a representative of a U.N. member.

66. 28 U.S.C. §§ 1330, 1602-1611 (1988). The FSIA provides foreign states with blanket immunity subject to specified exceptions. *Id.* § 1604. The FSIA is the sole basis for obtaining jurisdiction over a foreign state in U.S. courts. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989).

67. Under international law, qualification as a nation-state requires a people, a definite territorial unit, a government, and the capacity to enter into relations with other states. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 791 n.21 (D.C. Cir. 1984) (Edwards, J., concurring). Karadzic is currently negotiating in the United Nations as the representative of the Bosnian Serbs. The Bosnian Serbs have an 82-member parliament composed of "ardent nationalists, militia leaders and local political bosses." Stephen Kinzer, *Bosnia's Serbs Weigh a Familiar Choice,* N.Y TIMES, May 5, 1993, at A17.

68. As the leader of the Bosnian Serbs, Karadzic may be able to claim that he is implementing the policies of a non-state organization and thus does not fall within the jurisdiction of 28 U.S.C. § 1350. *See* Tel-Oren, 726 F.2d at 795 (Edwards, J., concurring) (alien tort statute does not cover torture by non-state actors such as the PLO); *see generally* Kenneth C. Randall, *Further Inquiries into the Alien Tort Statute and a Recommendation*, N.Y.U.J. INT'L L. & POL. 473, 503-507 (1986) (analyzing PLO's legal personality).

69. Agents or instrumentalities of foreign states are immune under the FSIA. 28 U.S.C. § 1603(a) (1993). The Ninth Circuit has held that individuals acting in their official capacity may qualify as "agents or instrumentalities." *See* Chuidian v. Philippine National Bank, 912 F.2d 1095 (9th Cir. 1990); *see also* First National Citibank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 629 (1983) (presumption that foreign sovereign is distinct from its instrumentalities may be overcome either by principal/agent relationship or if allowing distinction would work fraud or injustice).

70. If a foreign state has explicitly or implicitly waived its immunity, the FSIA does not bar prosecution. 28 U.S.C. § 1605(1) (1993). In cases involving a crime like systematic rape, when states have an interest in denying that an actor was acting as an agent of their government, an explicit waiver is less likely. *See* Blum & Steinhardt, *supra* note 62, at 106. The Federal Republic has publicly attempted to distance itself from the conflict in Bosnia. *See* Stephen Kinzer, *Belgrade Denounces Sanctions; Calls for Meeting*, N.Y. TIMES, Apr. 29, 1993, at A7 (statement by Yugoslavia's deputy U.N. representative that "Yugoslavia is not a party to the conflict in Bosnia-Herzegovina"). However, unless the Federal Republic explicitly waives immunity, it may be difficult for the court to find an implied waiver. Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 722 (9th Cir. 1992) (direct connection between sovereign's activities in U.S. courts and plaintiffs' claims for relief necessary to support finding of implied waiver), *cert. denied*, 61 U.S.L.W. 3682 (1993). *But see* Adam C. Belsky et al., Comment, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Norms of International Law*, 77 CAL. L. REV. 365 (1989) (violation of international law by foreign state should be viewed as implied waiver).

trine, should the Federal Republic and Serbian Bosnia be considered as recognized foreign sovereigns?[71] Will the Federal Republic claim immunity for Karadzic on the basis of the Act of State Doctrine?[72] Does Karadzic have any assets in the United States? Can the court attach the assets of the Federal Republic?[73] And finally, if judgment were entered against Karadzic, would it be enforceable?[74]

Even if the victims of rape successfully clear all these hurdles — a remote prospect, at best — they would still be unlikely to actually receive monetary compensation. Few defendants have substantial monetary assets in the United States, and even fewer would come to the United States and deposit funds in American banks knowing the attachment power of a court order. Thus, the victims are unlikely to receive restitution.[75]

A monetary judgment entered against the perpetrators of rape would have the positive effects of affirmatively enunciating a legal norm and would dramatically restrict the ability of the defendants to

---

71. The Act of State Doctrine allows courts to declare a case nonjusticiable if it involves an examination of the validity of an action taken by a foreign sovereign, recognized by the United States, in the absence of a treaty or other controlling legal principle. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964); *see also* W.S. Kirkpatrick v. Environmental Tectonics Corp., 493 U.S. 400, 409 (1990) ("Act of State Doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns within their own jurisdictions shall be deemed valid."). The intricacies surrounding the question whether the Federal Republic is a recognized foreign sovereign are reflected in its current United Nations status. *See* Section I, *supra*.

72. Karadzic may be able to rely on the Act of State Doctrine by claiming that the rapes that occurred under his orders were part of the Serbian policy of "ethnic cleansing." *See* Saudi Arabia v. Nelson, 113 S. Ct. 1471 (1993) (unlawful detention and torture by Saudi government are sovereign activities and thus immune from jurisdiction); Andrew M. Scoble, Comment, *Enforcing the Customary International Law of Human Rights in Federal Court*, 74 CAL. L. REV. 127, 174 (1986) (police chief who follows express governmental policy of torturing prisoners may be able to plead Act of State defense if his nation is willing to claim it for him); *see also* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 492 (1989) (Act of State Doctrine applies if defendant official can establish direct chain of command authorizing his acts).

73. *See* 28 U.S.C. §§ 1609-1611 (1988) (property of foreign state in United States immune from attachment in aid of execution, or from execution, unless state has waived immunity from attachment or certain commercial exceptions to immunity apply).

74. In order to enforce a judgment, a separate proceeding must be brought to obtain a writ of execution. Fed. R. Civ. P. 69(a). Such a proceeding would give the court an opportunity to grant Karadzic relief from judgment under Federal Rule of Civil Procedure 60(b)(4) for lack of subject matter jurisdiction.

75. *But see* Harold H. Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2368 (1991) (many plaintiffs have expressed satisfaction simply to have won default judgments announcing that defendant transgressed universally recognized norms of international law).

visit the United States.[76] However, the attenuated possibility of such a judgment, even with its accompanying restrictions on residence in the United States, would not provide a sufficient deterrent to potential perpetrators of rape in Bosnia and Herzegovina. Moreover, perpetrators of genocidal rape in Bosnia and Herzegovina cannot face criminal prosecution in the United States.[77] Finally, even if the U.S. courts created a legal norm qualifying rape as genocide, legal fora in other nations would not necessarily follow the U.S. precedent.

C. *The Courts of Other States*

According to the principle of universal jurisdiction, a state may assert jurisdiction over a person within the state's territorial jurisdiction if he is accused of certain violations of the law of nations.[78] These violations include genocide and war crimes.[79] Furthermore, the Convention Against Torture requires any state party to either extradite such alleged offenders to a state party that has jurisdiction under the territoriality, nationality, or passive personality principles, or to itself

---

76. *See* ROBERT F. DRINAN, CRY OF THE OPPRESSED: THE HISTORY AND HOPE OF THE HUMAN RIGHTS REVOLUTION 56 (1987) (those charged as torturers or their accomplices would be reluctant to travel or acquire personal assets because of damages assessed against them).

77. To implement the Genocide Convention, the U.S. enacted 18 U.S.C. § 1091, which makes genocide criminal when committed within the United States or by a United States national. 18 U.S.C. § 1091(d) (1988). As a result, the statute would not reach aliens accused of committing genocide outside the United States.

78. *See* Bernhard Graefarth, *Universal Criminal Jurisdiction and an International Criminal Court*, 1 EUR. J. INT'L L. 67, 72 (1990) (noting increased international recognition that offenses against peace and security of mankind are punishable even when not treated as crimes under national law).

79. 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 404 (1987). Even if the state is not a party to the Genocide Convention, the International Court of Justice has declared in an advisory opinion that "the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation." Advisory Opinion, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 23 (May 28). *But see* WOETZEL, *supra* note 9, at 264 (little basis in customary international law for extension of universal principle to crimes of genocide).

Any party to the Fourth Geneva Convention has an obligation to prosecute any offense that qualifies as a grave breach of that Convention. *See supra* text accompanying notes 34-36; *see also* WOETZEL, *supra* note 9, at 262 (Geneva Convention of 1949 established universal principle of jurisdiction for ordinary war crimes); Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 817 (1988). The 1977 Protocol to the Geneva Conventions of 1949 states that grave breaches shall be regarded as war crimes. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 85(5), *reprinted in* 72 AM. J. INT'L L. 457, 496 (1978).

For a discussion of why rape in Bosnia and Herzegovina constitutes a grave breach of the Fourth Geneva Convention and thus a war crime, see *infra* notes 168-70 and accompanying text.

take jurisdiction over the alleged offender.[80] The Convention Against Torture, which would cover many of the rapes in Bosnia and Herzegovina, defines torture as

> [a]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . intimidating or coercing him or a third person . . . inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[81]

Therefore, any state may prosecute perpetrators of rape who venture within its borders when the rape qualifies as either genocide, a war crime, or official torture. Indeed, if the rape constitutes official torture, the state *must* either extradite or prosecute the alleged perpetrator.

The general unwillingness to exercise universal jurisdiction remains the primary problem with relying on other states to prosecute the perpetrators of rape in Bosnia and Herzegovina.[82] States rarely intercede on behalf of individuals absent a link such as nationality.[83] Furthermore, a judgment reached under the principle of universal jurisdiction elicits two criticisms: (1) national bias and (2) imposition of a different degree of punishment than another state might have administered.[84] For example, whereas an individual convicted by a United States jury of rape resulting in murder might receive a sentence of death by lethal injection, many countries have refused to institute the death penalty in similar situations.

D. *International Court of Justice*

Currently, the International Court of Justice ("I.C.J." or "World Court") provides the only international tribunal open to the victims of rape in Bosnia and Herzegovina.[85] According to Article 36 of the I.C.J. Statute, the Court's jurisdiction extends to all cases the parties refer to it and to "all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force."[86] The I.C.J., how-

---

80. *Convention Against Torture*, *supra* note 33, at art. 5(1) & art. 8.

81. *Id.* art. 2.

82. *See* 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 404 reporter's note 1 (1987) (genocide and war crimes are subject to universal jurisdiction, but apparently no state has ever exercised such jurisdiction); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2560 (1991) (The willingness of states to prosecute human rights violations committed outside their territory has dissipated.).

83. 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 703(a) reporters' note 4 (1987).

84. Graefarth, *supra* note 78, at 85.

85. Although the Security Council has passed a resolution mandating the creation of an international war crimes tribunal, and has approved its statute, the establishment of such a tribunal is in the germinative stage. *See infra* text accompanying notes 104-107.

86. Statute of the International Court of Justice, art. 36(1) *reprinted in* 39 AM.

ever, "has failed to provide a meaningful forum . . . for enunciating international human rights norms or curbing national misconduct."[87] For the victims of rape in Bosnia and Herzegovina, the I.C.J.'s primary defects stem from its jurisdictional limitations. Because only states may bring claims before the I.C.J.,[88] rape victims must persuade Bosnia and Herzegovina to espouse their claims as an essential prerequisite to the Court's exercise of jurisdiction. Even more important, the I.C.J. can only hold states, and not individual defendants, accountable for crimes within its jurisdiction.

On March 20, 1993, the Republic of Bosnia and Herzegovina filed an application with the World Court instituting proceedings against the Federal Republic. The application alleged violations of the Genocide Convention and specifically refered to rape as "part of a calculated plan of destruction of the Muslim people in Bosnia."[89] The I.C.J. responded on April 8, 1993 with provisional measures ordering the Federal Republic to "immediately . . . take all measures within its power to prevent commission of the crime of genocide."[90] The Court based its *prima facie* jurisdiction on Article IX of the Genocide Convention[91] and will render a judgment on the merits after the parties fully brief and argue the case.

The victims of rape overcame the first obstacle to relief in the World Court when Bosnia and Herzegovina espoused their claims.[92] However, Bosnia based its application to the I.C.J. solely on the Genocide Convention. Thus, if the rapes constitute war crimes, but not genocide, the victims will not receive compensation.[93] In any event, the Court may dismiss the case for lack of standing. Two key uncertainties plague the legal position of the Republic of Bosnia and

---

J. INT'L L. 215, 222 (1945 Supp.) [hereinafter *I.C.J. Statute*]. In addition, any nation that has accepted the jurisdiction of the I.C.J. can make a claim for a violation of customary international law provided that the opposing party has also submitted to the jurisdiction of the I.C.J. with respect to that conduct. *Id.* art. 36(2), at 222-23.

87. Koh, *supra* note 75, at 2360; *see generally* Stephen M. Schwebel, *Human Rights in the World Court*, 24 VAND. J. TRANSNAT'L L. 945 (1991) (discussing cases in which I.C.J. has treated human rights questions).

88. *I.C.J. Statute*, *supra* note 86, at 222.

89. *Bosnian I.C.J. Application*, *supra* note 14, at 14.

90. *I.C.J. Order*, *supra* note 12, at 24.

91. *Id.* at 13. Article IX provides that "[d]isputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide . . . shall be submitted to the International Court of Justice at the request of any of the state parties to the dispute." *Genocide Convention*, *supra* note 17, at 282.

92. *See Bosnian I.C.J. Application*, *supra* note 14.

93. Telephone Interview with Keith Hyatt, Attorney, May 6, 1993 (noting terrible problems associated with proving a policy of genocide); *see generally* Herst Hannum, *International Law and Cambodian Genocide: the Sound of Silence*, 11 HUM. RTS. Q. 82, 94-112 (1989) (explaining why deliberate killings and destruction by Khmer Rouge constitute genocide within meaning of Genocide Convention).

Herzegovina and the Federal Republic as successor states to the former Yugoslavia. First, have the republics succeeded to the obligations of the Genocide Convention?[94] Second, do both republics qualify as states?

Only states can stand as parties to cases before the I.C.J.[95] In addition, states that are not parties to the Statute usually may not avail upon the Court.[96] Even if the case goes to the merits, however, the I.C.J. tends to deliver its judgments very slowly. All briefs are read aloud, word-for-word, in the different languages of the parties. Then, the judges take an extremely long time to write their opinions. Further, the World Court does not rely on precedent, so it must approach each case completely afresh. Finally, even if the Court enters a judgment, it will not target the particular perpetrators of rape but will instead sanction the Federal Republic as a whole. Any compensation will, at least initially, go to the national coffers of Bosnia and Herzegovina, rather than to the individual victims.

The negligible effect of the I.C.J.'s provisional measures in the Bosnia case demonstrates another problem with the I.C.J.: noncompliance.[97] If a state objects to the World Court's exercise of jurisdiction, it will usually refuse to appear or to comply with the judgment rendered,[98] and though the U.N. Charter authorizes the Security Council to enforce I.C.J. judgments, the Council has never done so.[99] Security Council action is especially unlikely with respect to proceedings arising out of the conflict in Bosnia due to Russia's ties to the Federal Republic.[100] Given these impediments to enforcement, Bosnia and Herzegovina will likely never obtain monetary reparations from the Federal Republic, and the victims may never receive restitution.

---

94. For an explanation of why this question should be answered in the affirmative, see Section I, *supra*.

95. *I.C.J. Statute*, *supra* note 86, at 222.

96. *But see id.* at 223 (noting the conditions under which states that are not parties may access the I.C.J.).

97. No change in the policy of "ethnic cleansing" has been reported since the I.C.J. ordered the Federal Republic to take all necessary measures to prevent genocide. Similarly, Iran ignored the I.C.J.'s order to release immediately the American hostages held in Tehran. United States Diplomatic and Consular Staff in Tehran (U.S. v. Tehran), 1980 I.C.J. 3 (May 24).

98. Richard B. Bilder, *Lecture: The United States and the World Court in the Post-"Cold War" Era*, 40 CATH. U. L. REV. 251, 258 (1991).

99. *Charter of the United Nations*, *adopted* June 26, 1945, art. 94(2), *reprinted in* 39 AM. J. INT'L L. 190, 210 (Supp. 1945) [hereinafter *U.N. Charter*] (if a party to a case fails to perform obligations required by a judgment rendered by the I.C.J., the other party may have recourse to Security Council). The United States vetoed a Security Council resolution calling it to comply with the judgment in the Nicaragua case. Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27). *See* Bilder, *supra* note 98, at 255.

100. *I.C.J. Order*, *supra* note 12, at 26-27.

In sum, the domestic fora currently available to victims of rape in Bosnia and Herzegovina suffer from either nationalistic prejudice or various procedural obstacles making judgment on the merits unlikely. Of the nine characteristics necessary for an effective forum,[101] Bosnian courts suffer especially in terms of partiality. While more impartial, U.S. courts are unlikely to reach judgment on the merits, and their judgments are not enforceable. Monetary judgments may restrict perpetrators' opportunities to live in the United States but will not restrain the personal liberty of the perpetrators. Moreover, norms issued by domestic fora do not bind other countries; a decision issued by a U.S. court, for example, has no precedential value in Bosnia.

The inadequacies of the domestic fora leave the victims of rape in Bosnia and Herzegovina with an international tribunal, the I.C.J. However, the I.C.J. does not allow individual access to prosecution, and its judgments are not timely or enforceable. Therefore, the time has come for a new international tribunal, which can better fulfill the nine criteria for an effective forum. The only remaining question is whether the new forum should take the form of an *ad hoc* or a permanent international court. Section III discusses the merits of an *ad hoc* war crimes tribunal, and Section IV evaluates the proposals for a permanent international criminal court.

III. ESTABLISHING AN AD HOC WAR CRIMES TRIBUNAL

A war crimes tribunal with jurisdiction over crimes committed in the former Yugoslavia has many advantages over the fora currently available to the victims of rape in Bosnia and Herzegovina. Prosecuting the perpetrators of rape in an international arena increases the likelihood of impartial trials and potentially provides the victims with a forum able to respond to their claims. Establishment of a war crimes tribunal must occur as soon as possible. If a tribunal quickly prosecutes those responsible, it may deter future atrocities.[102] In addition, it will reassure victims that the international community will hear them and not forget them.[103]

Progress toward the establishment of a war crimes tribunal has already begun. On February 22, 1993, the Security Council unanimously adopted Resolution 808, stating "that an international tribunal *shall* be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the ter-

---

101. The following nine criteria were enumerated at the beginning of this article: (1) individual access to prosecution; (2) impartiality; (3) decisions based on law; (4) depoliticization; (5) precedential value of judgments; (6) likelihood of resolution on the merits; (7) enforceability of judgments; (8) timeliness; and (9) flexibility of procedures.

102. *See French Proposal*, *supra* note 38, at 5.

103. *Id.*

ritory of the former Yugoslavia since 1991."[104] In accordance with Resolution 808, the Secretary-General submitted a report on the mechanics and implementation of such a tribunal to the Security Council ("S.G.'s Report").[105] On May 25, 1993, the Security Council unanimously voted in favor of Resolution 827, which approves the S.G.'s Report and adopts its annex, the "Statute of the International Tribunal."[106] Although the vote was unanimous, several members of the Security Council expressed "understandings" of specific articles of the Statute.[107] These understandings affect any interpretation of the Statute.

The S.G.'s Report concludes that, because of time pressure, the Security Council and not an international treaty should establish the war crimes tribunal.[108] In accordance with the Secretary-General's recommendations, Resolution 827 acts under Chapter VII of the Charter of the United Nations ("U.N. Charter")[109] to formally create the tribunal. By establishing the tribunal under Chapter VII, the Security Council can take enforcement measures against member states that hinder the tribunal's work.

Previous resolutions adopted by the Security Council will facilitate the investigative work of the war crimes tribunal. In August 1992, Resolution 771 called for an end to the breaches of international humanitarian law in the former Yugoslavia and requested states, international humanitarian organizations, and the Secretary-General to collate substantiated information on such violations.[110] Two months later, the Security Council requested the Secretary-General to establish an impartial Commission of Experts to examine and analyze the information gathered.[111] Based on the first interim report of the Commission of Experts, Secretary-General Boutros-Ghali concluded that "grave breaches and other violations of international humanitarian law have been committed, including . . . rape."[112] The Secretary-General's explicit reference to rape as a grave breach provides hope of prosecution of the perpetrators of rape in Bosnia and Herzegovina before the

---

104. S.C. Res. 808, U.N. SCOR, U.N. Doc. S/RES/808 (1993) (emphasis added).

105. *See S.G. Report*, *supra* note 28.

106. S.C. Res. 827, U.N. SCOR, U.N. Doc. S/Res/827 (1993) [hereinafter *S.C. Res. 827*].

107. *See generally Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting*, U.N. SCOR S/PV.3217, at 16-17 (May 25, 1933) [hereinafter *Meeting 3217*].

108. *S.G. Report*, *supra* note 28, at 7-8.

109. *U.N. Charter*, *supra* note 99, at 199-202. Chapter VII gives the Security Council the power to take measures to maintain or restore international peace and security once it has determined the existence of any threat of the peace, breach of the peace, or act of aggression.

110. S.C. Res. 771, U.N. SCOR at 2, U.N. Doc. S/RES/771 (1992).

111. S.C. Res. 789, U.N. SCOR, U.N. Doc. S/RES/789 (1992).

112. *S.G. Report*, *supra* note 28, at 1.

war crimes tribunal.[113]

This section begins with a discussion of the Report of the Secretary-General, which covers three principal topics: (1) the mechanics of the tribunal, including procedural protections for defendants; (2) the theory of individual liability for defendants brought before the tribunal; and (3) the scope of the tribunal's jurisdiction. The manner in which the S.G.'s Report addresses these three topics has important ramifications on the effectiveness of the tribunal with regard to the victims of rape in Bosnia and Herzegovina. In addition, lessons lie in the only precedents for an international war crimes tribunal, the Nuremberg and Tokyo trials. This section concludes, however, that while the war crimes tribunal takes a step in the right direction, as an ad hoc body it possesses inherent defects that a permanent international criminal court would ameliorate.

A. *The Mechanics of the War Crimes Tribunal*

According to the Statute of the International Tribunal (the "Statute"), the war crimes tribunal will sit at the Hague[114] and will consist of eleven independent judges, six of whom will sit in two Trial Chambers with three members each, and five of whom will serve in the Appeals Chamber.[115] In September, 1993, the General Assembly selected the eleven judges from a list prepared by the Security Council.[116] No two of the judges may be nationals of the same state,[117] and the list must take account of the adequate representation of the major legal systems of the world.[118] The Secretary-General invited both U.N. member states and non-member states maintaining permanent observer missions at U.N. headquarters[119] to nominate two candidates, but the nominees could not be of the same nationality.[120] The judges will serve renewable four-year terms[121] and will elect a President, who will be a member of the Appeals Chamber.[122] The eleven judges began drafting the tribunal's rules of procedure and evidence in November 1993.[123]

---

113. *See infra* notes 168-70 and accompanying text.

114. *S.G. Report*, *supra* note 28, Annex, art. 31, at 47; *cf. S.C. Res. 827*, *supra* note 106, at 2 (determination of seat of war crimes tribunal subject to conclusion of appropriate arrangements between the United Nations and the Netherlands).

115. *See id.*, *supra* note 28, Annex, art. 12, at 40.

116. *Id.* art. 13(2)(d), at 41. The judges are nationals of Costa Rica, Canada, Italy, Egypt, China, France, Malaysia, Pakistan, Australia, Nigeria, and the United States. *See* Julia Preston, *U.N. Elects 11 Judges for War Crimes Court*, WASH. POST, Sept. 18, 1993, at A15.

117. *S.G. Report*, *supra* note 28, Annex, art. 12, at 40.

118. *Id.* Annex, art. 13(2)(c), at 41.

119. *Id.* Annex, art. 13(2)(a), at 41.

120. *Id.* Annex, art. 13(2)(b), at 41.

121. *Id.* Annex, art. 13(4), at 41.

122. *Id.* Annex, art. 14(1) & (2), at 41.

123. Paul Lewis, *Somalia and Bosnia; Justice U.N.-Style Moves Onward, Half-*

The Security Council will appoint an independent Prosecutor to perform the investigatory and prosecutorial tasks of the tribunal.[124] The Prosecutor can recommend necessary subordinates for appointment by the Secretary-General.[125] Victims of rape may bring their claims to the attention of the Prosecutor, whose powers include investigating allegations, questioning suspects and victims, examining witnesses, requesting arrest warrants, issuing indictments, and prosecuting individuals.[126]

According to the Statute, the Prosecutor may issue an indictment once he or she determines that a prima facie case exists.[127] One of the judges of the Trial Chamber reviews and confirms the indictment before the Trial Chamber can issue orders for the arrest, detention, surrender, or transfer of the accused.[128] The Statute obligates states to attempt to arrest, detain, and transfer the accused to the custody of the tribunal.[129] Because orders for the surrender or transfer of an accused are "considered to be the application of enforcement measures under Chapter VII of the Charter of the United Nations,"[130] the Security Council may take appropriate action, whether in the form of provisional measures, economic sanctions, or armed force, to ensure cooperation in the extradition of suspects to the tribunal. States must also provide assistance to the Prosecutor and Trial Chamber with respect to, inter alia, the identification and location of persons, the production of evidence, and service of court documents.[131]

Once arrested and taken into custody, the accused has the right to immediate information, in a language he understands, of the nature and cause of the charge against him.[132] As soon as the accused is before the Trial Chamber,[133] the Trial Chamber must read the indictment, satisfy itself that the rights of the accused are being respected, confirm that the accused understands the indictment, and instruct the

---

Heartedly, N.Y. TIMES, Nov. 21, 1993, § 4, at 2.

124. The Security Council unanimously appointed Venezuela's Attorney General, Ramon Escovar-Salom, to be the Chief Prosecutor on October 21, 1993, but he resigned in early February 1994, to take a post as minister of justice in his own country. *Chief Prosecutor for War-Crimes Tribunal Abandons His Post*, THE GAZETTE (MONTREAL), Feb. 4, 1994, at A7. A new Chief Prosecutor has yet to be appointed.

125. *S.G. Report*, *supra* note 28, Annex, art. 16(4) & 16(5), at 42.

126. *Id.* Annex, art. 16(1), at 42; Annex, art. 18(2), at 43.

127. *Id.* Annex, art. 18(4), at 43. According to the U.S. Representative to the U.N., the existence of a *prima facie* case means a "reasonable basis to believe" that a crime within the jurisdiction of the tribunal has been committed by the person named in the indictment. *See Meeting 3217*, *supra* note 107, at 16-17.

128. *S.G. Report*, *supra* note 28, Annex, art. 19, at 43.

129. *Id.* Annex, art. 29, at 47.

130. *Id.* Annex, art. 28, at 31.

131. *Id.* Annex, art. 18(2), at 43; Annex, art. 29, at 47.

132. *Id.* Annex, art. 20(2), at 44.

133. Trials in absentia are prohibited. *Id.* Annex, art. 21(4)(d), at 44.

accused to enter a plea.[134] Although the Statute presumes the accused innocent until proven guilty and may not compel him to testify against himself or to confess,[135] it does not provide any standard of proof at trial. The accused has a right to the services of an interpreter, to have enough time to prepare a defense, to examine the witnesses against him, and to subpoena witnesses on his own behalf.[136] An indigent defendant must be provided with legal assistance.[137] When a national court has already tried an individual, the Trial Chamber can exercise jurisdiction provided that either the national court characterized the act as an ordinary crime, or the crime was not diligently prosecuted before an impartial tribunal.[138]

Judgment of the accused requires a majority vote of the Trial Chamber,[139] and opinions must be in writing.[140] If the Trial Chamber convicts the accused and orders incarceration, it chooses the place of imprisonment from a list of states that have volunteered to imprison those convicted.[141] In determining the length of imprisonment, the Trial Chamber must consider the general practice regarding prison sentences in the courts of the former Yugoslavia.[142] The Trial Chamber must also take into account the extent to which any penalty imposed on the convicted individual by a national court for the same act has already been served.[143] The Statute opposes the use of the death penalty.[144]

Once convicted, an individual can appeal on the following grounds: "(a) an error on a question of law invalidating the decision; or (b) an error of fact which has occasioned a miscarriage of justice."[145] In addition, if a new fact comes to light that would have been a decisive factor in reaching the judgment, but was not discovered at the time of the proceedings before either the Trial or Appeals Chamber, the convicted person may submit an application for review of the judgment to the tribunal.[146] If, pursuant to the law of the state of incarceration of the convicted person, he is eligible for pardon or commutation of sentence, the state concerned shall notify the tribunal, and the President of the tribunal will "decide the matter on the basis of the

134. *Id.* Annex, art. 20(3), at 44.
135. *Id.* Annex, art. 21, at 44.
136. *Id.*
137. *Id.*
138. *Id.* Annex, art. 10(2), at 40.
139. *Id.* Annex, art. 23(2), at 45.
140. *Id.*
141. *Id.* Annex, art. 27, at 46.
142. *Id.* Annex, art. 24(1), at 45.
143. *Id.* Annex, art. 10(3), at 40.
144. *Id.* Annex, art. 24(1), at 45.
145. *Id.* Annex, art. 25(1), at 46.
146. *Id.* Annex, art. 26, at 46.

interests of justice and the general principles of law."[147]

B. *Theories of Individual Liability*

Mirroring the charter that established the Nuremberg Tribunal (the "Nuremberg Charter"), the Statute of the International Tribunal states that an individual acting under orders from his superiors is not thereby free of responsibility for a crime; rather, acting under orders can be a mitigating factor in sentencing.[148] However, the U.S. understanding of the Statute provides an additional defense to prosecution, allowing the offender to claim that "he or she did not know the orders were unlawful and a person of ordinary sense and understanding would not have known the orders to be unlawful."[149] The Statute subjects a military or political superior to individual liability if the illegal acts were committed pursuant to his plan, instigation, or order.[150] The superior also faces individual liability if he knew or should have known of the violations and did not take necessary and reasonable steps to prevent them or to punish the offenders.[151] Individual liability for superiors extends up to and includes heads of state.[152] Finally, those who aided and abetted in the planning, preparation, or execution of any crime within the jurisdiction of the tribunal are individually responsible for such crimes.[153]

Thus, if Karadzic issues a policy of systematic rape of Muslim women and girls, the actual rapist, the commanders discharging the order, and Karadzic himself are all subject to prosecution before the war crimes tribunal. The Nuremberg Tribunal tried the Nazi defendents on a similar basis. Although none of the eighteen convicted at Nuremberg of war crimes and/or crimes against humanity personally committed any crimes against individuals, the Nuremberg Tribunal determined them guilty either of ordering the crimes or of being aware of their commission and doing nothing to stop the offenders.[154] Several defendants asserted a superior orders defense, but the Nuremberg Tribunal generally did not consider the superior orders defense a mitigating factor.[155]

---

147. *See id.* Annex, art. 28, at 46.

148. *Compare* 82 U.N.T.S. 284, art. 8, at 288 [hereinafter *Nuremberg Charter*] *with S.G. Report*, *supra* note 28, Annex, art. 7(4), at 39.

149. *Meeting 3217*, *supra* note 107, at 16.

150. *S.G. Report*, *supra* note 28, Annex, art. 7(1) at 38.

151. *Id.* Annex, art. 7(3), at 39.

152. *Id.* Annex, art. 7(2), at 39.

153. *Id.* Annex, art. 7(1), at 38.

154. *See generally The Nuremberg Trial: 1946*, 6 F.R.D. 69, 147-187 (1947) (describing charges and verdicts against Nuremberg defendants).

155. *Id.*

C. *Subject Matter Jurisdiction of the War Crimes Tribunal*

The threshold issue for the victims of rape in Bosnia and Herzegovina is whether rape qualifies as a crime within the tribunal's jurisdiction. The Statute of the International Tribunal provides the tribunal with jurisdiction over individuals accused of the following crimes: (1) crimes against humanity (defined as acts of murder, extermination, enslavement, deportation, imprisonment, torture, *rape*, persecutions on political, racial, and religious grounds, and other inhumane acts directed against any civilian population during an armed conflict, whether international or internal in character); (2) genocide; (3) violations of the laws and customs of war; and (4) grave breaches of the Geneva Conventions of 1949.[156] The Statute limits jurisdiction to crimes committed in the territory of the former Yugoslavia since 1991.[157]

Therefore, the Statute explicitly states that when directed against any civilian population during an armed conflict, rape qualifies as a crime against humanity falling within the tribunal's jurisdiction. France, the United States, and Russia expressed the understanding that to constitute crimes against humanity, acts must be committed within the context of a widespread or systematic attack against a civilian population for national, political, ethnic, racial, or religious reasons.[158] Most of the rapes committed in Bosnia and Herzegovina meet these conditions. The women and girls held in "rape camps" or detained until they could no longer have abortions also have claims of enslavement and imprisonment. In addition, any of the rapes committed against Bosnian Muslims that were part of a systematic ethnic or religious attack qualify as genocide.[159]

Furthermore, rape is a violation of the laws and customs of war. In modern times, the prohibition of rape in connection with war stems from the "Instructions for the Government of Armies of the United States in the Field" ("Lieber's Code"), promulgated in 1863.[160] The 1899 Hague Convention on the Laws and Customs of War and the 1907 Hague Regulations, while not specifically mentioning women, require that "family honour and rights . . . must be protected."[161]

---

156. *S.G. Report*, *supra* note 28, Annex, arts. 2-5, at 36-38 (emphasis added).

157. *Id.* Annex, art. 1, at 36.

158. *See Meeting 3217*, *supra* note 107, at 11, 16, 45.

159. *See* Section I, *supra*.

160. *See* Theodore Meron, *Shakespeare's Henry the Fifth and the Law of War*, 86 AM. J. INT'L L. 1, 30 (1992); *see also* YOUGINDRA KHUSHALANI, DIGNITY AND HONOUR OF WOMEN AS BASIC AND FUNDAMENTAL HUMAN RIGHTS 6 (1982) (Lieber's Code declared all rape by American soldiers to be prohibited under penalty of death or other severe punishment).

161. Law and Customs of War on Land (Hague II), July 29, 1899, art. 46, *reprinted in* 1 CHARLES I. BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949, at 247, 260 (1968); 1907 Regulations

Surely rape qualifies as a violation of "family honour."[162] After World War I, the commission created by the Paris Peace Conference to report on breaches of the laws and customs of war prepared a list of war crimes that included both rape and the "abduction of girls and women for the purpose of enforced prostitution."[163] At Nuremberg, although rape was not specifically charged in the indictment of the major war criminals,[164] the prosecutors used captured German documents evidencing the routine use of rape as part of the case against some defendants.[165] By the end of World War II, rape was already established as a violation of the laws and customs of war.

In the aftermath of World War II, the Fourth Geneva Convention codified the law on the treatment of civilians in war, including women. Instead of confining itself to a declaration of customary international law, it "laid down new principles which [we]re to become part of that law."[166] The provisions of the Fourth Geneva Convention apply to any international armed conflict,[167] and the jurisdiction of the war crimes tribunal extends specifically to "grave breaches" of the Fourth Geneva Convention. The offenses that qualify as grave breaches include: "wilful killing, torture or inhuman treatment . . . wilfully causing great suffering or serious injury to body or health . . . [or] unlawful confinement."[168] In the official commentary on the Fourth Geneva Conven-

---

Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 46, *reprinted in* BEVANS, *supra* at 651.

162. *See* KHUSHALANI, *supra* note 160, at 10 (Article 46 of Hague Regulations is a mandatory provision guaranteeing women protection against rape).

163. *Id.* at 12; *see also* Remigiusz Beirzenek, *War Crimes: History and Definition*, *in* 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW 563 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973) (rape is number five on commission's list of thirty-two offenses).

164. *See* N.F. Chistiakov, *The Question of War Crimes at the Nuremberg Tribunal*, *in* THE NUREMBERG TRIAL AND INTERNATIONAL LAW 155 (George Ginsburgs & V.N. Kudriavtsev eds., 1990) (count one of indictment included "killing and cruel treatment of the civilian population on occupied territory").

165. *See* BROWNMILLER, *supra* note 8, at 53; *see also id.* at 58-61 (General Iwane Matsui was sentenced to death by the International Military Tribunal for the Far East for ordering the 1937 Rape of Nanking, during which approximately 20,000 cases of rape occurred in first month of occupation); In re Yamashita, 327 U.S. 1, 24 (1946) (upholding decision by an American Military Court in Manilla to detain a Japanese World War II military commander upon finding him responsible for widespread acts of rape and other war crimes by his troops).

166. Joyce A. C. Gutteridge, *The Geneva Conventions of 1949*, 27 BRIT. Y.B. INT'L L. 294, 318-19 (1949).

167. Although Article 2 of the Fourth Geneva Convention states that its provisions apply to war between two or more of the *contracting parties*, the Convention is considered to be declaratory of customary international law and thus binding on all states, regardless of whether they are parties to it. *See* KHUSHALANI, *supra* note 160, at 45, 60; *see also supra* notes 34-36 and accompanying text.

168. *Fourth Geneva Convention*, *supra* note 34, art. 147, at 388. Presumably, those who claim that rape is not a grave breach would base their argument on the absence of any explicit reference to rape in Article 147.

tion, the International Committee of the Red Cross elaborated on the meaning of the phrase "inhuman treatment," stating that the "sort of treatment covered by [Article 27] would be one which ceased to be humane."[169] Article 27 declares 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."[170] Therefore, any rape that takes place in an international armed conflict is a "grave breach" of the Geneva Convention.

Although this article argues that the war in the former Yugoslavia qualifies as an international armed conflict,[171] even if the war in the former Yugoslavia is characterized as an internal conflict, Article 3 of the Fourth Geneva Convention prescribes a baseline code of conduct. Article 3 requires that, even during internal armed conflicts, civilians must be treated humanely and prohibits "cruel treatment and torture" and "outrages upon personal dignity, in particular humiliating and degrading treatment."[172] Thus, because Article 3 of the Fourth Geneva Convention, which qualifies as one of the international instruments setting forth the "law of war,"[173] prohibits rape by soldiers in time of an internal conflict, rape falls within the subject matter jurisdiction of the war crimes tribunal.

D. *Protecting the Victims of Rape: An Evaluation of the Statute*

An evaluation of the Statute for the International Tribunal from the perspective of the victims of rape in Bosnia and Herzegovina must

---

169. INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY: IV GENEVA CONVENTION 598 (Jean S. Pictet ed., 1958). The I.C.R.C. Commentary also explains that "wilfully causing great suffering" can legitimately include moral suffering, and that "unlawful confinement" is internment that is not absolutely necessary for the belligerent's security. *Id.* at 599. Therefore, rapes of women and girls in Bosnia and Herzegovina qualify as several different grave breaches.

170. *Fourth Geneva Convention*, *supra* note 34, art. 27, at 306; *see also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, art. 76, *reprinted in* 72 AM. J. INT'L L. 457, 492 (1978).

171. *See* Section I, *supra*.

172. *Fourth Geneva Convention*, *supra* note 34, art. 3, at 288-89; *see also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *opened for signature* Dec. 12, 1977, art. 4(e), *reprinted in* 72 Am. J. Int'l L. 457, 503-04 ("outrages on personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault" are prohibited at any time and in any place whatsoever).

173. KHUSHALANI, *supra* note 160, at 40 *citing* J. PICTET, 3 COMMENTARY, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 37 (1960) (Article 3 binds insurgent forces not even in existence at time of signing by the contracting parties). *But see* Raymond T. Yingling & Robert W. Ginnane, *The Geneva Conventions of 1949*, 46 AM. J. INT'L L. 393, 396 (1952) (doubting legal efficacy of Article 3).

examine the Statute's effectiveness at monetarily compensating the victims and in punishing, and thus deterring, the perpetrators of rape. As Catherine MacKinnon pointed out at the March 1993 Vancouver Conference on the establishment of a war crimes tribunal, "the goal of the tribunal is individual justice and holding perpetrators responsible, and not the ends of states as such or of any state."[174] The tribunal is likely to be effective only if it is accessible to individual victims, if charges can be brought against the actual rapists as well as those who ordered the rapes, and if there are adequate procedural protections available to ameliorate the effects of resurrecting the victims' emotional trauma.

For victims of rape in Bosnia and Herzegovina, one of the most important features of a war crimes tribunal is accessibility. To receive compensation, victims must have access to the tribunal, which must be equipped to calculate and distribute economic restitution. By requiring the Prosecutor to initiate investigations on the "basis of information obtained from *any* source,"[175] the Statute appears to allow individuals to bring their claims to the tribunal. However, although the Statute specifically refers to governments, U.N. organs, and intergovernmental and non-governmental organizations, it does not explicitly mention individual rape victims, or their representatives, as a potential source of information. Indeed, Resolution 827 specifies that the work of the war crimes tribunal shall be "carried out without prejudice to the right of victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law,"[176] thus implying an intent to exclude civil suits from the jurisdiction of the tribunal. For example, the Statute limits the penalties available to the tribunal to imprisonment or to requiring the return of "any property and proceeds acquired by criminal conduct."[177]

Due to its apparent preclusion of individual civil claims, the Statute should be amended to provide for victim compensation. Resolution 827 allows victims to seek compensation "through appropriate means."[178] However, no fora are available to adequately compensate victims. To conserve judicial resources, the Trial Chamber should adjudicate the appropriate level of compensation as well as guilt and in-

174. Catherine A. MacKinnon, Rapporteur, Notes on Session on Victims, Expert's Meeting, International Centre for Criminal Law Reform and Criminal Justice Policy, Mar. 23, 1993, at 1.

175. *S.G. Report*, *supra* note 28, Annex, art. 18(1), at 43 (emphasis added).

176. *S.C. Res. 827*, *supra* note 106, at 2.

177. *S.G. Report*, *supra* note 28, Annex, art. 24, at 45. *But see Meeting 3217*, *supra* note 107, at 17 (expressing view of U.S. "that compensation to victims by a convicted person may be an appropriate part of decisions on sentencing, reduction of sentences, parole or commutation"); *id.* at 28 (expressing view of Morocco that tribunal "should not ignore appropriate compensation for victims and their families").

178. *S.C. Res. 827*, *supra* note 106, at 2.

nocence. To enforce monetary judgments, the tribunal should call on all participating states to assist in measures such as the attachment and seizure of assets belonging to the defendant. If a state successfully seizes assets in satisfaction of the judgment, the tribunal should facilitate the transfer and distribution of the money to the victims. Alternatively, the United Nations could set up a compensation commission similar to the one established for claims arising out of the Iraqi conflict.[179]

Moreover, the tribunal's rules of procedure and evidence need to guarantee the victims access to the tribunal.[180] The rules of procedure should specifically state that the Prosecutor shall investigate claims brought by individual victims where the crimes charged are within the tribunal's jurisdiction. If the Prosecutor and the Trial Chamber judge reviewing the indictment determine that the claims have enough merit to warrant a trial, the victims and their legal counsel should be permitted to assist in the prosecution and to suggest witnesses of their own.

The theory of individual liability adopted by the war crimes tribunal is crucial to the tribunal's deterrent effect. The Statute furnishes the victims of rape with an arsenal adequate to bring charges against individual offenders, the rapists' co-conspirators and superiors, and through the chain of command to the person acting as head of state. Because rape is illegal in the domestic laws of civilized nations, defendants cannot rely on any exception for those who could not have reasonably been expected to know that their act was unlawful. Holding individuals criminally liable for their acts will help to deter potential perpetrators at every level in the chain of command.

Finally, the victims of rape need special procedural protections.[181] The Statute requires that the tribunal provide for the protection of victims and witnesses in its rules of procedure and evidence[182] and specifies that the protections should include *in camera* proceedings and the protection of the victim's identity.[183] In addition, the Trial Chamber must ensure that trial proceedings are conducted with an eye toward protecting victims and witnesses.[184] The S.G.'s

---

179. For a discussion of the Iraqi claims mechanism, *see infra* note 359.

180. The Statute provides that the judges will adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials, and appeals. *See S.G. Report*, *supra* note 28, Annex, art. 15, at 42.

181. The Vancouver Session on Victims suggested the following: protecting the identities of the victims in the press; the option of *in camera* testimony; anonymous witness testimony; victim impact statements taking into account at sentencing; and allowing the victims to have their own lawyers participate in the proceedings. MacKinnon, *supra* note 174, at 2-3.

182. *S.G. Report*, *supra* note 28, Annex, art. 15, at 42.

183. *Id.* Annex, art. 22, at 45.

184. *Id.* Annex, art. 20(1), at 44.

Report emphasizes that "[g]iven the nature of the crimes committed and the sensitivities of the victims of rape and sexual assault, due consideration should be given in the appointment of [prosecutorial] staff to the employment of qualified women."[185] The statement of the U.S. Representative regarding Resolution 827 goes even further, recommending that "women jurists sit on the Tribunal and that women prosecutors bring war criminals to justice."[186]

E. *Lessons from Nuremberg and Tokyo*

As the only operational international war crimes tribunals in history, the Nuremberg and Tokyo tribunals provide valuable lessons for the proposed war crimes tribunal. The Nuremberg Charter overcame the disparities between the Continental and Anglo-American systems of criminal procedure, demonstrating that technical problems are not insurmountable.[187] Although they are not without their critics, the Nuremberg and Tokyo tribunals are generally regarded as a positive step forward in the enforcement of human rights.[188] Nevertheless, the main criticisms of Nuremberg must be addressed.[189] Critics of the Nuremberg trials label them as an egregious case of the victors trying the vanquished in violation of the maxim *nulla poena sine lege, nullum crimen sine lege*.[190] Critics also attack the Nuremberg trials for holding individuals criminally liable and failing to adequately protect defendants' rights. The first criticism does not apply to the proposed war crimes tribunal in the former Yugoslavia, and, as proposed, the war crimes tribunal would avoid the second and third criticisms.

The four "victorious powers" of World War II[191] established the Nuremberg tribunal by a treaty with jurisdiction over individuals from

---

185. *Id.* at 22.

186. *Meeting 3217*, *supra* note 107, at 14. Two of the eleven judges, those representing Costa Rica and the United States, are women.

187. *See* TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR 63-64 (1992) (outlining compromises reached in the Nuremberg Charter); AMERICAN BAR ASSOCIATION, TASK FORCE ON AN INTERNATIONAL CRIMINAL COURT 19-20 (Summer 1992) [hereinafter *A.B.A. Report*].

188. In addition to granting the Nuremberg Tribunal jurisdiction over the human rights violations embodied in "war crimes" and "crimes against humanity," the Nuremberg Charter allowed the prosecutors to charge the defendants with "crimes against the peace," which were defined as instigating a war of aggression. *Nuremberg Charter*, *supra* note 148, art. 6, at 288. Because this article is concerned with protecting the human rights of Bosnian women and girls, the questions surrounding "crimes against the peace" are not analyzed here.

189. *See generally* WOETZEL, *supra* note 9, at 40-121; RICHARD H. MINEAR, VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL (1971); THE NUREMBERG TRIAL AND INTERNATIONAL LAW (George Ginsburgs & V.N. Kudriavtsev eds., 1990).

190. This Latin phrase stands for the principle that neither punishments nor laws should be applied retroactively; individuals should not be penalized for actions not criminal at the time they were committed.

191. The United States, The Soviet Union, France, and the United Kingdom.

the European Axis countries. Critics contend that the tribunal erred by imposing judgments on individuals whose state, Germany, was not a party to the treaty. Even Justice Jackson, the Chief American Prosecutor, admitted in his opening statement before the Nuremberg tribunal that "[u]nfortunately, the nature of the crimes is such that both prosecution and judgment must be by victor nations over vanquished foes."[192] The process was particularly unfair because some Allied nationals, who were equally guilty of war crimes, were never prosecuted.[193]

The proposed war crimes tribunal for the former Yugoslavia can be distinguished from the Nuremberg tribunal in two important ways. First, it has the prior endorsement of the international community.[194] Second, the tribunal is an impartial body seeking to impose justice on the victors as well as the vanquished. Serbian rapists of Muslim women and girls and Muslim rapists of Serbian women and girls would be equally liable for their crimes, though it would be more difficult to convict Muslim rapists of genocide than their Serbian counterparts.[195]

Selection of the defendents was one of the first tasks of the Nuremberg and Tokyo tribunals.[196] An adamant critic of the Tokyo trials argues that, for political reasons, the prosecutors conspicuously omitted Emperor Hirohito, who was Japan's *de jure* sovereign and an active decision-maker during the war.[197] In addition, Telford Taylor admits that the selection of defendants at Nuremberg was "hastily and negligently discharged."[198] Others claim that the procedural protections outlined in the Nuremberg Charter were willfully violated and that procedural irregularities were particularly egregious due to the unavailability of appeal.[199]

Because choosing defendants will be a problem faced by the proposed war crimes tribunal, the Prosecutor should decide the criteria for

---

192. TAYLOR, *supra* note 187, at 168.

193. *See* WOETZEL, *supra* note 9, at 46.

194. Although nineteen members of the United Nations adhered to the Nuremberg Charter, it was not until after the judgments were handed down that the international community affirmed the principles of international law contained in the Charter. *See Affirmation of the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal*, G.A. Res. 95(I), U.N. GAOR, 1st Sess., at 188, U.N. Doc. A/236 (1947) [hereinafter *Affirmation of Nuremberg Principles*]; TAYLOR, *supra* note 187, at 628.

195. *See* Section I, *supra*.

196. For example, approximately 250 high Japanese officials were in custody before the Tokyo trial began, and the prosecution chose twenty-six. *See* MINEAR, *supra* note 189, at 102.

197. *Id.* at 110-13.

198. TAYLOR, *supra* note 187, at 90.

199. *See* Michael P. Scharf, *The Jury is Still Out on the Need for an International Criminal Court*, 135 DUKE J. INT'L & COMP. L. 135, 138 & n.22 (1991).

their selection in advance. Allowing the Prosecutor to formulate guidelines regarding who will be prosecuted will guard against the risk that potential defendants might be granted amnesty as part of a peace settlement. Political factors should not interfere with the impartial administration of justice. However, the war crimes tribunal faces an even greater problem: unlike the scenario after World War II, none of the potential defendants is in custody. The potential difficulties involved in obtaining custody of defendants creates a serious risk of violating the rights of the defendants — namely, by physical abduction. The infamous kidnappings of Adolf Eichmann and Humberto Alvarez-Machain[200] by Israel and the United States, respectively, demonstrate the potential for abuse. To prevent such abductions, the rules of procedure adopted by the judges of the war crimes tribunal should specify that jurisdiction extends only to individuals voluntarily transferred to the tribunal by the state in which they were located.

Once defendants are brought before the tribunal, the Prosecutor and judges must ensure adherence to the procedural guarantees specified in the Statute. The Statute diligently safeguards the procedural rights of defendants, guaranteeing counsel, an interpreter, a speedy trial, enough time to prepare a defense, protection against self-incrimination, and a presumption of innocence. According to the Statute, an individual cannot be arrested unless there is a *prima facie* basis to believe that he committed a crime within the jurisdiction of the tribunal. Thus, the Statute seeks to protect defendants against the reputational effect of being tried erroneously. In addition, unlike the Nuremberg Charter, the Statute of the tribunal provides an appeal mechanism before judges uninvolved in the original trial.

One possible criticism of the Statute, however, is that it allows for double jeopardy; the tribunal has jurisdiction over a defendant for serious violations of international humanitarian law, such as war crimes or genocide, even if he has already been tried by a national court for an "ordinary" crime, such as rape, premised on the same facts.[201] Nevertheless, the tribunal can only try a defendant for the same crime if the national trial was not diligently prosecuted before an impartial tribunal. Moreover, even in the United States, where there is a constitutional prohibition against double jeopardy,[202] a defendant can be prosecuted by two different sovereigns if the laws of each sovereign allegedly have been broken.[203] Systematic rape during armed

---

200. *See infra* notes 244-47 and accompanying text; *see also infra* notes 251-52 and accompanying text.

201. *S.G. Report*, *supra* note 28, Annex, art. (10)(2)(a), at 40 (person tried by national court for acts constituting serious violations of international humanitarian law may be tried by international tribunal only if act for which he was tried was characterized as an ordinary crime).

202. U.S. CONST. amend. V ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb.").

203. For example, the four Los Angeles police officers accused in the beating of

conflict violates both national and international law.

Another criticism of the Nuremberg tribunal is that only states bear responsibility under international law, and thus *individual* defendants should never have been tried.[204] However, as eloquently expressed by Justice Jackson, "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[205] Furthermore, since the principle of individual liability is now well established in international law,[206] the proposed war crimes tribunal is free to try individual perpetrators of rape.

The Nuremberg Charter has been appropriately criticized for failing to exempt an individual from liability if he followed orders and did not know and had no basis for knowing that the act ordered was unlawful.[207] This problem will be avoided if the tribunal adheres to the U.S. understanding of the Statute allowing the defense of ignorance of unlawfulness. In any event, it will be more difficult to establish a chain of command for the perpetrators of rape in Bosnia and Herzegovina than it was for the Nazis.[208]

Finally, critics of the Nuremberg tribunal charge that it violated the principle of *nulla poena sine lege, nullum crimen sine lege* by charging the defendants with crimes that were not clearly established and therefore lacked precise definitions and penalties.[209] In allowing

---

Rodney King, an African-American motorist, were brought to trial twice: once in Los Angeles Superior Court on charges of assault, *see* Powell v. Superior Court of L.A. County, 283 Cal. Rptr. 777, 779 (Cal. 1991), and once in federal district court on charges of deprivation of rights on the basis of race under color of law. *See* United States v. Koon, 833 F. Supp. 769, 774 (C.D. Cal. 1993).

204. WOETZEL, *supra* note 9, at 100.

205. Judgment of the Nuremberg Tribunal, *quoted in* D.H.N. Johnson, *The Draft Code of Offenses Against the Peace and Security of Mankind*, 4 INT'L & COMP. L.Q. 445, 460-61 (1955).

206. *See* Elizabeth Zoller, *Grounds for Responsibility in* THE NUREMBERG TRIAL AND INTERNATIONAL LAW 102, 106 (George Ginsburgs & V.N. Kudriavtsev eds., 1990) ("Whether as a customary rule or as a general principle of law, the norm on individual criminal responsibility for international crimes is now unquestionably part of substantive international law.").

207. TAYLOR, *supra* note 187, at 630.

208. *See* Jeri Laber, Executive Director, Helsinki Watch, Address Before the New York Bar Association (Apr. 7, 1993) (no hard evidence that order to rape comes from above but clear that commanders do not discourage it); *see also* John F. Burns, *Balkan War Trial in Serious Doubt*, N.Y. TIMES, Apr. 26, 1993, at A9 (unlikely that investigators will find paper trail linking leaders to actions taken by local commanders).

209. *See* M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL 3 (1987). *But see* WOETZEL, *supra* note 9, at 115 (*nulla poena* principle intended to protect against abuse of justice through retroactive law but without injustice there is no violation of the principle).

the prosecution of crimes against humanity, which included Nazi offenses against German nationals, the Nuremberg trials "represented a radical innovation in international law."[210] Previously, international law had not imposed criminal penalties on a state's treatment of its own citizens.[211] Nevertheless, the magnitude of the acts alleged put the defendants on notice that they violated "principles common to the major legal systems of the world."[212] In any case, it is now indisputable that crimes against humanity violate international law.

The primary source for the definition of crimes against humanity is the Nuremberg Charter.[213] The expansive definition in Article 6(c) includes

> murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[214]

On December 11, 1946, the General Assembly fortified the definition by unanimously approving Resolution 95(I), which affirmed "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal."[215] Resolution 95(I) requested the International Law Commission to formulate these principles, and the resulting "Nuremberg Principles" declared that crimes against humanity are punishable as crimes under international law, regardless of whether committed "before or during the war."[216] According to Telford Taylor, one of the United States prosecutors at the Nuremberg war crimes trials, "as a moral and legal statement, clothed with judicial precedent and United Nations recognition, the Nuremberg principles are an international legal force to be reckoned with."[217] Since crimes against humanity are now part of the general principles of international law recognized by civilized nations,[218] the

---

210. Orentlicher, *supra* note 82, at 2555.

211. *Id.*

212. Report to the President from Robert H. Jackson, Chief Counsel for the United States in the Prosecution of Axis War Criminals, *reprinted in* 39 AM. J. INT'L L. 178, 186 (Supp. 1945).

213. 82 U.N.T.S. 284.

214. *Id.* at 288.

215. *Affirmation of Nuremberg Principles*, *supra* note 194.

216. *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, 5 U.N. GAOR Supp. (No. 12), at 11, U.N. Doc A/1316 (1950) [hereinafter *Nuremberg Principles*], *reprinted in* WOETZEL, *supra* note 9, at 233-34.

217. TAYLOR, *supra* note 187, at 4; *see also* WOETZEL, *supra* note 9, at 54-55 (U.N. endorsement of Nuremberg Principles constitutes tangible evidence that majority of nations at that time regarded them as valid principles of international law).

218. BASSIOUNI, *supra* note 209, at 27; *see also* Quincy Wright, *Proposal for an*

proposed war crimes tribunal does not run the risk of applying *ex post facto* law.

F. *The War Crimes Tribunal: A Step in the Right Direction*

The proposed war crimes tribunal represents a positive step toward bringing the perpetrators of rape in Bosnia and Herzegovina to justice, and it is not susceptible to the criticisms of Nuremberg and Tokyo. Although skeptics focus on the difficulties in reaching a consensus on the mechanical details of the tribunal, the problems with obtaining custody of the defendants, the difficulties with establishing a chain of command, and the tribunal's potential interference with the peace process, they underestimate the genuine intellectual and political progress already made toward the tribunal. Moreover, because the Statute requires states to arrest, detain, and transfer the accused to the custody of the tribunal, those offenders who are indicted but not transferred to the tribunal would be virtual prisoners within the few states refusing to extradite them. Furthermore, the Security Council may take enforcement actions under Chapter VII of the U.N. Charter against those states refusing to relinquish custody over the accused. Even in the worst-case scenario, assuming that the links in the chain of command are too tenuous to support the prosecution of powerful officials, the actual rapists would still be brought to justice.

With respect to the nine characteristics essential for an effective forum,[219] the war crimes tribunal represents a substantial improvement over domestic fora. The tribunal will not be open to charges of nationalistic prejudice, and it will provide a sense of regularity that will help with the enunciation of legal norms. Provided that the tribunal relies on its early judgments for precedential value, there is no reason to assume it will suffer from the time delays associated with the International Court of Justice. Because the tribunal's subject matter jurisdiction is clearly delineated, its determinations of guilt or innocence will be guided by the existing international laws, such as the Fourth Geneva Convention and the Genocide Convention.[220] Although judicial opinions interpreting these laws are scarce at best, the tribunal's opinions will develop such precedent. Once a defendant is in custody, criminal judgments are more easily enforceable by any state that has agreed to perform this task. Through the Security Council,

---

International Criminal Court, 46 AM. J. INT'L L. 60, 71 (1952) (crimes against humanity are subject to universal jurisdiction); 1 BENJAMIN FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE 77 (1980) (subsequent war crimes trials reconfirmed that massive abuse by a state of its own citizens is a matter of legitimate legal concern to all mankind).

219. *See supra* note 101.

220. *See S.G. Report*, *supra* note 28, at 8 (The Security Council will not legislate international humanitarian law; the tribunal will apply existing international humanitarian law).

the international community could pressure states into assisting in the collection of monetary judgments by seizing assets within a particular state's jurisdiction. If properly amended, the Statute for the war crimes tribunal would allow individual access to prosecution and would have flexible procedures to allow victims of rape to testify or be deposed anonymously in an intimate setting, rather than in public proceedings.

Nevertheless, the war crimes tribunal is susceptible to criticism for being politicized and dominated by states whose nationals are not subject to the tribunal's jurisdiction — none of the judges are from either the Federal Republic or Bosnia and Herzegovina, and the tribunal's jurisdiction is limited to crimes committed in the former Yugoslavia since 1991.[221] A truly impartial court requires permanence and prior establishment.[222] According to John Bridge,

> [h]owever impartial and incorruptible members of an ad hoc tribunal might in fact be, the mere fact that the tribunal had been set up expressly to try crimes arising out of particular circumstances would suggest, however unjustly, that the tribunal is not impartial, that the matters to be tried have been prejudged and that the tribunal has been set up to give a false impression that justice is being done.[223]

As an ad hoc body, the war crimes tribunal could be accused of partiality because it would dispense case-specific justice — ad hoc tribunals are always vulnerable to the question "why now?" It is estimated that between two and four hundred thousand women were raped in Bangladesh in 1971,[224] yet no tribunal was established to try the Pakistani soldiers who committed the rapes. Recently, it has been reported that Peruvian soldiers routinely rape women and girls in the course of their struggle with the Shining Path guerrillas, yet the war crimes tribunal would not hear the claims of these victims.[225]

Finally, due to the combination of the inherent difficulties in obtaining custody over the defendants and the Statute's prohibition of trials in absentia, the war crimes tribunal will suffer from one of the defects of U.S. courts — it will not be likely to resolve cases on the merits.[226] However, the war crimes tribunal is more likely to reach

---

221. Alfred P. Rubin, *Nothing's Less Simple than a War Crimes Court*, N.Y. TIMES, Oct. 23, 1992, at A32.

222. *See* Vespasian V. Pella, *Towards an International Criminal Court*, 44 AM. J. INT'L L. 37, 58 (1950).

223. John W. Bridge, *The Case for an International Court of Criminal Justice and the Formulation of International Criminal Law*, 13 INT'L & COMP. L.Q. 1255, 1271 (1964).

224. *See* BROWNMILLER, *supra* note 8, at 78; 2 BENJAMIN FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE 65-66 (1980).

225. James Brooke, *Rapists in Uniform: Peru Looks the Other Way*, N.Y. TIMES, Apr. 29, 1993, at A4.

226. Karadzic has already declared that the Bosnian Serbs will not cooperate with

the merits of a case than a U.S. court for two reasons. First, prosecution before the tribunal would not face the procedural obstacles blocking the path of plaintiffs in the United States. Second, there is a higher chance that defendants will eventually surrender to the jurisdiction of the war crimes tribunal because they would be imprisoned in those few states refusing to extradite them.

In sum, as an *ad hoc* body, the war crimes tribunal meets six of the nine criteria for an effective forum: (1) individual access to prosecution; (2) decisions based on law; (3) norm enunciation; (4) enforcement; (5) timeliness; and (6) flexible procedures. Therefore, an *ad hoc* war crimes tribunal is better than none at all. However, it is not the optimum. A permanent international criminal court would possess all of the positive features of a war crimes tribunal, and it would also be free of partiality and politicization and would be more likely to resolve cases on the merits.

IV. THE TIME HAS COME FOR A PERMANENT INTERNATIONAL CRIMINAL COURT

The international community should take advantage of the momentum generated by the proposed war crimes tribunal and seriously consider creating a permanent international criminal court. The consensus on the need to prosecute those responsible for the atrocities in the former Yugoslavia presents a unique opportunity for progress. Although proposals for an international criminal court have languished for years due to a lack of political will, support for the war crimes tribunal in the former Yugoslavia should function as the catalyst for an expanded mandate, and the tribunal should be structured in a way that maximizes its translatable generic qualities so as to lay the foundation for a more permanent body.

As a permanent body, the international court would be truly impartial.[227] In addition, its establishment would relieve the world community of criticism for selective adjudication. Moreover, an international criminal court is less open to reproach for politicization because its statute would only allow states that have submitted to its jurisdiction to appoint judges and prosecutors. Finally, a permanent international court would be more likely to reach the merits of a particular case because states should be more willing to extradite individuals to an impartial permanent body than to a politicized *ad hoc* tribunal. Whereas the war crimes tribunal meets six of the criteria for an effective forum, an international criminal court would fulfill all nine.

---

the war crimes tribunal. *See MacNeil/Lehrer Newshour* (PBS television broadcast, May 26, 1993).

227. *See* Quincy Wright, *The Scope of an International Criminal Law: A Conceptual Framework*, 15 VA. J. INT'L L. 561, 574 (1975).

A. *Evaluating the Merits of an International Criminal Court*

Recent support for a war crimes tribunal with jurisdiction over crimes committed in the former Yugoslavia breathes new life into the fifty year-old debate over the merits of an international criminal court. Historically, the political climate was the most receptive to the idea of an international criminal court in the first few years following the Nuremberg trials, during which the international community affirmed that an international tribunal could try individual state officials for violations of the human rights of their own subjects.[228] In the decades since Nuremberg, however, states have generally refrained from pressing human rights concerns with other nations for fear of jeopardizing international relations.[229] Nevertheless, even before the atrocities in the former Yugoslavia, the problems of increasing worldwide terrorist and drug-trafficking activity had rekindled interest in an international criminal court.[230]

1. Arguments in favor of an international criminal court

An international criminal court could consistently and uniformly interpret and apply international criminal law,[231] thus avoiding the uncertainty of the present system. Currently, each state is obligated to incorporate international criminal law norms into its domestic law. The result has been "different normative proscriptions whose applications in the various legal systems are not always harmonious, let alone identical."[232] Furthermore, many state parties to international conventions have not yet incorporated their international obligations into domestic law.[233] By providing a centralized forum, the international court could develop a body of precedent in international criminal law. Primarily, however, an international court will "assure the punishment of individuals for acts which world opinion regard[s] as peculiarly destructive of international peace and order, peculiarly shocking to the conscience of mankind, and peculiarly likely to escape punishment by national authority."[234]

---

228. *See generally Nuremberg Principles*, *supra* note 216.

229. *See* Orentlicher, *supra* note 82, at 2558-59.

230. *See* H. Con. Res. 66, 101st Cong., 1st Sess. (1989) (calling for creation of an international criminal court with jurisdiction over terrorism, illicit international narcotics trafficking, genocide, and torture); *American Bar Association Section of International Law and Practice Report to the House of Delegates*, August 3, 1990, *reprinted in* 6 INT'L ENFORCEMENT L. REP. 284 (August 1990) (adopting resolution supporting establishment of international criminal court with jurisdiction limited to violations of U.N. Narcotics Convention); *see also* Scharf, *supra* note 199, at 140-44 (describing events leading to growing sense of optimism about creation of international criminal court).

231. Bridge, *supra* note 223, at 1264.

232. BASSIOUNI, *supra* note 209, at 70.

233. *Id.*

234. Wright, *supra* note 218, at 63; *see also* Pella, *supra* note 222, at 44 (Without

An international criminal court is especially necessary when (1) government officials allegedly violate the human rights of their own subjects; (2) a state with custody of a suspect accused of an international crime is either unable or unwilling to prosecute the suspect domestically or to extradite the individual to another state with jurisdiction; or (3) national courts cannot effectively deal with the international crime charged. The systematic rape of women and girls by Bosnian Serbs falls into all three of these categories.

The need for an international court to prosecute international crimes committed by members of the government of a state against its own citizens is demonstrated by the fact that, despite notorious cases of genocide in the past fifty years, none has ever been prosecuted under the Genocide Convention.[235] In effect, the Genocide Convention is itself responsible for the dearth of adjudication because it leaves primary enforcement to municipal courts.[236] Such a solution is illusory; states are either unwilling to indict their own leaders for carrying out state policy[237] or unable to prosecute them impartially.[238] Even when the government accused of the crimes is no longer in power, the successor government may either be unwilling to try former officials or may need the legitimacy of an international trial.[239] Since the current system of combatting genocide fails to deter state officials from committing acts of genocide against their own citizens, the threat of prosecution by an international court is necessary.

There are many circumstances in which a state with custody of a suspect is unable or unwilling to prosecute or extradite the individual but might be willing to cede jurisdiction to an international criminal court.[240] For example, the criminal justice system of a small state might be overwhelmed by the magnitude of a particular offense, in

---

an international criminal court, the Nuremberg Principles "would be perverted for purposes of disguising the mien of vengeance as the mask of justice").

235. *Report of the Working Group on the Question of an International Criminal Jurisdiction*, U.N. Doc. No. A/CN.4/L.471 at 11 (1992) [hereinafter *1992 Working Group Report*]; *see also* Robert-Louis Perret, *Doctrinal Basis for International Penal Jurisdiction*, *in* TOWARDS A FEASIBLE INTERNATIONAL COURT 142, 143 (Julius Stone & Robert K. Woetzel eds. 1970) [hereinafter TOWARDS A FEASIBLE INTERNATIONAL COURT] (citing acts of genocide committed after adoption of Genocide Convention).

236. *Genocide Convention*, *supra* note 17, art. VI, at 280-81.

237. *See* Julius Stone, *Range of Crimes for a Feasible International Jurisdiction*, *in* TOWARDS A FEASIBLE INTERNATIONAL COURT, *supra* note 235, at 315, 335.

238. *See* ANTOINE SOTTILE, THE PROBLEM OF THE CREATION OF A PERMANENT INTERNATIONAL COURT 60 (1951) (National courts cannot be independent and impartial when judging a head of state.).

239. *1992 Working Group Report*, *supra* note 235, at 11.

240. *See State Department Programs and Policies: Hearings Before the Foreign Operations Subcomm. of the Senate Appropriations Comm.*, 103d Cong., 1st Sess. (1993) (testimony of Secretary of State Warren Christopher) (international criminal court attractive in situations where no country has authority or determination to go ahead with prosecution).

terms of the number of crimes committed.[241] States with custody of a national of another state are often reluctant to prosecute domestically because of the potential diplomatic repercussions and the risk of allegations of an unfair trial.[242] The state with custody hampers prosecution when it does not have enough of an interest in the alleged crime to try the offender and lacks an extradition treaty with a state that does have enough interest to pursue a vigorous prosecution.[243] Currently, if a state fails to prosecute an alleged international criminal either who lives within its boundaries or who is one of its nationals, another state with an interest in the case may resort to self-help to obtain jurisdiction over the alleged offender. The classic case of self-help is Israel's 1960 abduction of Adolf Eichmann from Argentine territory for trial before the Israeli Supreme Court. The Security Council condemned the abduction as potentially endangering international peace and security,[244] and critics have labelled the trial an act of vengeance.[245] Eichmann was tried by a court of a country that did not even exist at the time the alleged acts were committed, outside the territory where they took place, and was sentenced to death according to the application of retroactive law.[246] Even though the judges may have performed their duties conscientiously, Eichmann's death may have been a foregone conclusion without a fair trial.[247] An international criminal court as an alternative forum might have prevented the abduction and would have "provided a setting free from taint and prejudice."[248]

The international criminal court provides a more impartial alternative for those states hesitating to extradite a suspect because of a judicial bias in the courts of the requesting state.[249] For instance, an international criminal court is sorely needed for the trial of the two Libyan intelligence agents accused of bombing Pan Am flight 103 and a French airliner.[250] Also, in light of the United States abductions of

---

241. *1992 Working Group Report*, *supra* note 235, at 11.

242. *See* John J. Parker, *An International Criminal Court: the Case for its Adoption*, 38 A.B.A. J. 642 (1952).

243. *See A.B.A. Report*, *supra* note 187, at 8.

244. Resolution Adopted by the Security Council at its 868th Meeting on June 23, 1960, U.N. SCOR, 868 mtg., U.N. Doc. S/4349.

245. *See* WOETZEL, *supra* note 9, at 256.

246. *Id.* at 258.

247. Bridge, *supra* note 223, at 1270.

248. WOETZEL, *supra* note 9, at 256.

249. Michael J. Glennon, *Agora: International Kidnapping: State-Sponsored Abduction: A Comment on United States v. Alvarez-Machain*, 86 AM. J. INT'L L. 746, 755 (1992); *see also A.B.A. Report*, *supra* note 187, at 6 (noting argument that an international criminal court would facilitate prosecution of criminals in accordance with fundamental principles of human rights).

250. A U.S. grand jury has indicted the two suspects, but Libya refuses to extradite them to either the United States, Britain, or France. In April 1992, the International Court of Justice refused Libya's request to enjoin the United States and

General Manuel Noriega and Humberto Alvarez-Machain,[251] some Caribbean and Latin American countries fear that if they refuse to extradite alleged drug traffickers, the United States will engage in military operations or abductions to obtain custody.[252] Surrendering the alleged drug traffickers to an international criminal court would help to dissuade the United States from future international kidnapping activities.

In some cases, a fear of terrorist reprisals discourages a requesting state from extraditing fugitives.[253] Generally, the option of transferring the accused to an international criminal court would be more palatable to the threatening state than subjecting their national to the judicial system of an antagonistic state. Fortunately, this may make terrorist retaliation less likely. Agreeing to transfer the suspect to an international criminal court would mitigate the strain on the relations between the state with custody, the suspect's home state, and the state requesting extradition.[254] By providing an additional alternative forum, an international criminal court would show potential perpetrators of international crimes that their actions will be punished.

For some crimes, like those charged at Nuremberg, an international criminal court is the only competent adjudicatory organ available. Although the Fourth Geneva Convention mandates prosecution or extradition of those who have committed "grave breaches of international law,"[255] the Convention suffers from "the fundamental defect of

---

Britain from taking action to compel it to surrender the accused. *See* Allan Gerson, *Compensate Libya's Victims*, N.Y. TIMES, July 1, 1992, at A23; Paul Lewis, *Sanctions on Libya Begin to Take Hold as Deadline Passes*, N.Y. TIMES, April 15, 1992, at A1.

251. On December 20, 1989, the United States invaded Panama and captured General Manuel Noriega, who was sentenced by a federal district court to a forty year prison term for drug-trafficking charges. Larry Rohter, *Noriega Sentenced to 40 Years in Jail on Drug Charges*, N.Y. TIMES, July 11, 1992, §1 at 1. On April 2, 1990, Drug Enforcement Agency officials kidnapped Humberto Alvarez-Machain from Mexico so that he could stand trial in U.S. court. The Supreme Court ruled that although the abduction may have been contrary to international law, it did not divest the district court of jurisdiction. United States v. Humberto Alvarez-Machain, 112 S. Ct. 2188 (1992).

252. *A.B.A. Report*, *supra* note 187, at 7-8.

253. For example, in two recent cases, countries have bowed to pressure and refused to extradite terrorists to the United States for prosecution. In the first case, the former West Germany refused to extradite the Palestinian terrorists who allegedly hijacked Transworld Airlines Flight 847 in 1985 because members of a Palestinian terrorist organization took two West German businessmen hostage in Beirut. The second case involved a refusal by Greece to extradite a Palestinian terrorist accused of planting a bomb on a Pan American airliner in 1982; the Palestine Liberation Organization had warned the Greek government that extradition would harm their relations. *See generally* Scharf, *supra* note 199, at 150-51.

254. *See id.* at 152-53 (noting that although support for extradition of Columbian drug smuggling suspects is waning, Columbian President Trujillo has publicly endorsed the creation of an international court to fight narco-trafficking).

255. *See supra* notes 34-37 and accompanying text.

not being enforceable by an independent power superior to the states which have adopted [it]."[256] Also, for crimes against humanity, an international court would serve the important function of forcing states to publicly accept responsibility for their actions: "For adequate retribution and deterrence, the guilty should be prosecuted before all mankind."[257] A state refusing to transfer its nationals to the international court would have to assume moral and political responsibility for their actions in front of the entire international community.[258] As a result, the establishment of the court would help to deter war crimes and crimes against humanity.

2. Arguments against an international criminal court

Concerns about sovereignty lie at the heart of most objections to the establishment of an international criminal court. Skeptics of the court argue that states will not be willing to extradite their nationals to the international court for crimes committed within the state's own territory,[259] especially if the actions are not crimes under national law.[260] The reluctance to surrender individuals for prosecution by an international body derives from the Act of State Doctrine, which precludes one state from reviewing the acts of another state.[261] It is important to note, however, that the Act of State Doctrine has never been a fully accepted rule of international law.[262] Customary international law does permit an intrusion on state sovereignty for the prosecution of certain crimes under the principle of universal jurisdiction.[263] Some proponents of an international criminal court argue that a state best proves its sovereignty by voluntarily limiting it and accepting the jurisdiction of an international criminal court.[264]

States are also concerned that both the court and its prosecutorial arm could be politicized bodies exploited by hostile states.[265] The United States is concerned that the court will develop an unacceptable interpretation of crimes and that risk of double jeopardy problems will preclude national courts from prosecuting individuals acquitted by a

256. Perret, *supra* note 235, at 154.

257. Stone, *supra* note 237, at 335.

258. *Id.* at 336.

259. *See* Graefarth, *supra* note 78, at 75 (under present international conditions, most states are neither ready to abandon criminal jurisdiction on important questions nor to take on general extradition obligations); Albert Gastmann, *The Act of State Doctrine in* TOWARDS A FEASIBLE INTERNATIONAL COURT, *supra* note 235, at 242, 256.

260. George A. Finch, *An International Court: the Case Against Its Adoption*, 38 A.B.A. J. 644, 646 (1952).

261. Gastmann, *supra* note 259, at 242.

262. *Id.* at 249 (pirates can be tried by any nation holding them in custody).

263. *See supra* text accompanying notes 46-48.

264. *See* SOTTILE, *supra* note 238, at 58; Bridge, *supra* note 223, at 1273.

265. Stone, *supra* note 237, at 325.

politicized international court.[266] Regardless of these uncertainties, an international criminal court must be given a chance. There is no reason to assume that the court will be susceptible to political influences if the judges and prosecutorial staff of the court are chosen carefully and the court's finances are drawn from a fixed fund. As for potential double jeopardy problems, very few of the individuals likely to be tried by the international criminal court would have been prosecuted at all in its absence, due to the general reluctance of states to prosecute or extradite certain nationals.

In some cases involving the prosecution of high level officials or even heads of state, prosecution by an international court might exacerbate international tensions and interfere with diplomatic processes of conciliation.[267] Nevertheless, if the court is a truly independent and impartial body, its adjudication of codified crimes is less likely to be portrayed as a political act. Furthermore, cooperation in diplomatic negotiations should not be rewarded with amnesty from prosecution for war crimes and crimes against humanity, lest the deterrent value of international criminal law not be felt by those in powerful negotiating positions.

Opponents of an international criminal court contend that its creation is not feasible because of technical difficulties.[268] States either will initially decline to become party to the court,[269] or, having consented to jurisdiction, will refuse to respond to specific requests for extradition and assistance in the collection of evidence. However, the difficulties in setting up an international court are no greater than those attendant to the current attempt to implement a uniform international criminal law in more than 175 distinct states.[270] In addition, the international community is not powerless to respond to a state's noncompliance with the court's jurisdiction, as demonstrated by the U.N. sanctions against Libya for its refusal to extradite alleged terrorists. Additionally, the U.N. can impose trade and economic sanctions, limit the travel of the state's officials and citizens, and even go so far as to deprive the state of its U.N. privileges.[271]

American critics of establishing an international criminal court

---

266. *See* Letter from Janet G. Mullins, Assistant Secretary, Legislative Affairs, Department of State, to The Honorable Dan Quayle, President of the Senate 1 (Oct. 2, 1991) (on file with author) [hereinafter *Mullins Letter*].

267. *See* Wright, *supra* note 218, at 64.

268. *1992 Working Group Report*, *supra* note 235, at 13.

269. *See* Scharf, *supra* note 199, at 138 (The Nuremberg and Tokyo Trials were unique because they were created by a small circle of nations able to exercise sovereignty in defeated countries.).

270. *Report of the International Law Commission on the Work of its Forty-fourth Session*, 47 U.N. GAOR, 47th Sess., Supp. No. 10,at 15, U.N. Doc. A/47/10 (1992) [hereinafter *1992 ILC Report*].

271. *See* Lewis, *supra* note 250.

argue that it would violate the U.S. Constitution because it would not guarantee the "trial of all crimes . . . by jury . . . in the state where the said crimes shall have been committed."[272] In a report to the Senate, the Judicial Conference of the United States questioned whether Congress can constitutionally authorize U.S. participation in a non-Article III court under its powers in Article I, section 8.[273] However, according to Louis Henkin, a noted international law expert, there is no constitutional bar to the establishment of a court:

> If an international court sat outside the United States and imposed punishment outside the United States, it would not be exercising judicial power or other governmental authority of the United States. The United States could adhere to such tribunals, agree that American nationals might be tried by them, and even extradite persons for such trials.[274]

The American Bar Association is concerned that if a request by the United States for the extradition of an American national was met with the suggestion of extradition to an international criminal court instead, it might be unconstitutional for the United States to relinquish jurisdiction.[275] However, it might be within the president's foreign affairs power to choose prosecution by an international court rather than no prosecution at all.[276] Nor would there be grounds for constitutional objection if the United States agreed to prosecution before an international criminal court of an American national who is in another state's custody and accused of committing a crime abroad.[277]

On balance, the advantages of an international criminal court significantly outweigh any negative consequences. Its existence would facilitate the unbiased trial of individuals accused of violations of international criminal law who otherwise would not be brought to justice or who would be adversely affected by national prejudices. The primary objection to the court is that states may not agree to its establishment or abide by its terms. A decision on the court's feasibility, however, cannot be reached without first evaluating the existing proposals for an international criminal court.

---

272. U.S. CONST. art. III, § 6. *See* Finch, *supra* note 260, at 646-47.

273. *Compare* U.S. CONST. art. I, § 8, cl. 10 (stating that Congress shall have power to define and punish offenses against the law of nations) *with* U.S. CONST. art. III, § 2 (stating that judicial power shall extend to all cases arising under treaties of the United States). *See Report of the Judicial Conference of the United States on the Feasibility of and the Relationship to the Federal Judiciary of an International Criminal Court* 12 (1991) (on file with author) [hereinafter *Judicial Report*].

274. LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 198-99 (1972).

275. *See A.B.A. Report*, *supra* note 187, at 13.

276. *See id.*

277. *Id.*

B. *History of Proposals for an International Criminal Court*

The United Nations first expressed its interest in the idea of an international criminal court in 1948, when the General Assembly asked the International Law Commission ("I.L.C.") "to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions."[278] In 1950, the I.L.C. responded that it thought the establishment of such an organ would be both possible and desirable, but it would not recommend that the court be in the form of a criminal chamber of the International Court of Justice.[279] The General Assembly then established a committee composed of representatives from seventeen states. This committee completed a draft statute for an international criminal court ("Draft Statute") in August 1951.[280] A second committee was convened in 1952, and by August 1953 it had prepared two alternative Draft Statutes, one for a court closely linked to the U.N. and the other for a court operating independently.[281]

Meanwhile, the I.L.C. was hard at work drafting a Code of Offenses Against the Peace and Security of Mankind ("Draft Code") pursuant to General Assembly Resolution 95(I).[282] It prepared two drafts, one in 1951 and one in 1954, both stumbling over the definition of aggression. Since the Draft Code and Draft Statute were closely linked, in 1954 and again in 1957, the General Assembly voted to postpone consideration of the Draft Statute until the parties agreed upon a definition of aggression. Such an agreement was not reached until 1974. In 1978, the General Assembly asked the I.L.C. to proceed with the formulation of the Draft Code, but no mention was made of the 1953 Draft Statute. It was not until 1988 that, when the I.L.C. envisioned the use of the principle of universal jurisdiction to enforce the Draft Code, the General Assembly encouraged the I.L.C. to explore all alternatives to that approach.[283]

---

278. *See Report of the International Law Commission on the Work of its forty-second Session*, 45 U.N. GAOR, 45th Sess., Supp. No. 10, U.N. Doc. A/45/10 at 40 (1990) [hereinafter *1990 ILC Report*].

279. *Id.* at 40. In order to establish a criminal chamber of the I.C.J., its statute would have to be amended because, according to Article 34, only states can be parties in cases before the court. To amend the I.C.J. Statute, the United Nations must follow the same procedure as is necessary to amend the U.N. Charter. *See infra* note 346. Therefore, the I.L.C. was concerned that one of the members of the Security Council would veto the amendment, and the international court would never be established. *Report of the International Law Commission Covering its Second Session*, 5th Sess., Supp. No. 12, U.N. Doc. A/1316 (1950), *reprinted in* 2 FERENCZ, *supra* note 224 at 267.

280. 2 FERENCZ, *supra* note 224, at 34-35.

281. *1990 ILC Report*, *supra* note 278, at 41.

282. *See Affirmation of Nuremberg Principles*, *supra* note 194.

283. *1990 ILC Report*, *supra* note 278, at 38 (the General Assembly repeated this

On December 4, 1989, the General Assembly specifically asked the I.L.C. to "address the question of establishing an international criminal court . . . with jurisdiction over persons alleged to have committed crimes which may be covered under the [Draft Code]."[284] In 1990, the I.L.C. responded with a report discussing the general issues involved in establishing an international criminal court and examining the alternatives. The 1990 report concluded that the principle of an international criminal court was desirable.[285] For the next two years, the General Assembly invited the I.L.C. to continue its work.[286] Finally, on November 25, 1992, in response to the I.L.C.'s 1992 detailed report on the establishment of an international criminal court, the General Assembly requested it to undertake a "project for the elaboration of a draft statute for an international criminal court as a matter of priority . . . ."[287] At its forty-fifth session in early summer 1993, the I.L.C. working group on an international criminal court reported a first draft statute to the General Assembly for comment.[288] It has taken over four decades to come full circle.

C. *Academic Proposals for an International Criminal Court*

In addition to the work of the I.L.C., several legal scholars have devised their own proposals for an international criminal court. As with the proposed war crimes tribunal, there is general agreement on the basic structure and operation of the court. For example, state parties would nominate judges who represent the principal types of legal systems in the world and are qualified in criminal law and international law.[289] An independent prosecutor's department would conduct the tasks of investigation and prosecution after an initial screening procedure had eliminated cases outside of the jurisdiction of the court.[290] The statute of the court would outline the procedural guar-

---

request in 1989); *see also* Graefarth, *supra* note 78, at 72.

284. Steven C. McCaffrey, *Current Developments: The Forty-Second Session of the International Law Commission*, 84 AM. J. INT'L L. 930 (1990).

285. *1990 ILC Report*, *supra* note 278, at 52. The report has been criticized for its minimal substantive discussion of any of the issues. *See* Scharf, *supra* note 199, at 144-46.

286. *See 1992 ILC Report*, *supra* note 270, at 11.

287. G.A. Res. 47/33, 44th Sess., 73d mtg. (1992) (on file with author).

288. *See* Report of the International Law Commission on the work of its forty-fifth session, U.N. GAOR, 48th Sess. Supp. No. 10, at 255, U.N. Doc. A/48/10 (1993); James Crawford, *The ILC's Draft Statute for an International Criminal Tribunal*, 88 AM. J. INT'L L. 140 (1994).

289. *See French Proposal*, *supra* note 38, at 43; SOTTILE, *supra* note 238, at 84.

290. Bridge suggests that the preliminary screening should be undertaken by judges of the international criminal court chosen periodically for that purpose. For prosecution to proceed, the allegations must be substantiated by a *prima facie* case. Bridge, *supra* note 223, at 1275; *see also Revised Draft Statute for an International Criminal Court*, U.N. GAOR, 9th Sess. Supp. No. 12, Annex, art. 33, U.N. Doc. A/2645 (1954), *reprinted in* 2 FERENCZ, *supra* note 224, at 454-456 [hereinafter *1953*

antees necessary to protect the rights of the accused,[291] and there would be provisions for appeals of convictions.[292] Penalties would be prescribed in advance or in conjunction with national codes.[293] Finally, sentences would be executed under international supervision by states willing to do so.[294]

As might be expected, however, agreement is limited. The central dilemma in establishing an international criminal court is formulating a court with meaningful powers and jurisdiction acceptable to states jealous of their national sovereignty. This is a delicate balancing act. The three areas causing the greatest divergence of ideas are the jurisdiction of the court, the initiation of suits, and the best method for implementing the proposals for an international criminal court.

1. Jurisdiction

Various jurisdictional issues surround the creation of a permanent international criminal court. Debate centers around the following questions: When could the court exercise jurisdiction? Which crimes would fall within the court's competence? What should be the nature of the court's jurisdiction?

a. Prerequisites to exercising jurisdiction

The first question is the scope of the personal jurisdiction of the international criminal court. The most expansive view utilizes the principle of universal jurisdiction, which would allow all states to exercise criminal jurisdiction over individuals within their custody who are charged with offenses against the law of nations. This principle would assure that an international criminal court would be able to assert jurisdiction over such individuals without obtaining consent from any state.[295] All states would be obligated to assist the court by extraditing persons indicted for offenses against the law of nations and by

---

Draft Statute] (provides for Committing Chamber composed of five judges appointed annually to examine whether evidence is sufficient to support the complaint).

291. *See* Harlington Wood, *International Criminal Procedure in* TOWARDS A FEASIBLE INTERNATIONAL COURT, *supra* note 235, at 223, 269 (append document to draft statute with basic principles of procedure and rules of evidence).

292. *See 1992 ILC Report*, *supra* note 270, at 30; BASSIOUNI, *supra* note 209, at 234.

293. *See* Pella, *supra* note 222, at 49-50; BASSIOUNI, *supra* note 209, at 225.

294. *See* Bridge, *supra* note 223, at 1270 (But neither the state initiating prosecution nor the state of which the criminal is a national should execute the sentence.); *see also* SOTTILE, *supra* note 238, at 89.

295. Wright, *supra* note 227, at 565; *see also* William B. Simons, *The Jurisdictional Bases of the International Military Tribunal at Nuremberg in* THE NUREMBERG TRIAL AND INTERNATIONAL LAW 39, 45 (George Ginsburgs & V.N. Kudriavtsev eds., 1990) (A group of states can exercise jurisdiction whenever the states could do so individually.).

assisting with the location of witnesses.[296] If a state refuses to extradite an individual, a trial in absentia might be required.[297]

Although the simplicity of this approach is attractive, few states would endorse the establishment of an international court with such expansive jurisdiction, and it is difficult to see how the system would work in practice. Trials in absentia would be required every time a state with custody of an alleged offender refused to transfer the accused to the jurisdiction of the court. States not party to the statute of the court could not be forced against their will to transfer indicted individuals to the court for prosecution.[298]

At the opposite end of the spectrum, the 1953 Draft Statute allows the court to exercise its jurisdiction over an individual only when both the state of which he is a national and the state where the crime was allegedly committed have conferred jurisdiction on the court.[299] In addition, the state of which the alleged offender is a national must have consented, in an agreement *separate* from that creating the court, to grant the court jurisdiction over the specific offense charged.[300] The I.L.C.'s 1992 report discusses one danger of such an approach: requiring the consent of the state on whose territory the crimes were committed may allow the government to exempt from punishment officials or other individuals who were responsible for atrocities in their own country.[301] It also contravenes the Nuremberg principles by holding national law above international criminal law.[302] In addition, although pragmatists might argue that states would be unwilling to give an international court jurisdiction to try their nationals without prior consent,[303] demanding such consent as a prerequisite to the exercise of jurisdiction conflicts with the principle of universal jurisdiction.

Others have offered various intermediate approaches. For example, the state with custody over the alleged offender could be given the option of unilaterally conferring jurisdiction on the international criminal court. This process would be fair because all states would be able to deliver one another's nationals to the court.[304] Or, there could be

296. Wright, *supra* note 227, at 567-568.

297. *Id.* at 575.

298. The Allies were able to establish the Nuremberg tribunal without Germany's consent because as victors they had sovereignty over Germany. *See* Quincy Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT'L L. 38, 50-51 (1947).

299. *1953 Draft Statute*, *supra* note 290, art. 27, at 456; *see also A.B.A. Report*, *supra* note 187, at 12 (Most states would still demand the consent of both the state where the crime was committed and the state of nationality of accused.).

300. *See* Parker, *supra* note 242, at 641.

301. *1992 ILC Report*, *supra* note 270, at 23.

302. *See Affirmation of Nuremberg Principles*, *supra* note 194, at 233 ("fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law").

303. *A.B.A. Report*, *supra* note 187, at 12.

304. Robert K. Woetzel, *Correspondence: Professor John F. Murphy's Letter on*

compulsory jurisdiction if the state on whose territory the crime was allegedly committed had accepted the international court's jurisdiction.[305] A third alternative would have jurisdiction depend only on whether the accused is a national of a state recognizing the competence of the international criminal court.[306] A fourth proposal would give the court jurisdiction over nationals of a state that had not conferred jurisdiction on the court as long as the state made no written objection to the particular exercise of jurisdiction.[307] In practice, the key player, for purposes of exercising jurisdiction, would be the state with custody of the accused. Consequently, its consent to the international court's jurisdiction would be the most critical.

Most proponents of an international criminal court would initially limit its jurisdiction to individuals, as opposed to states.[308] Some would confine jurisdiction to individuals acting on behalf of states, claiming it an irregular exercise of state sovereignty.[309] However, for purposes of punishment, the distinction between state-sponsored and non-state-sponsored international crimes is not relevant because, "ultimately, only individuals can be punished and thus deterred."[310]

b. Crimes within the court's competence

The broadest definition of crimes against international law includes all acts that "violate a fundamental interest protected by international law committed with conscious or presumptive knowledge that such act or omission is criminal."[311] Such a definition encompasses the three crimes within the jurisdiction of the Nuremberg tribunal — crimes against the peace, crimes against the laws and customs of war, and crimes against humanity — as well as any other crimes subject to universal jurisdiction.[312] Some believe that for the international criminal court to operate effectively, these crimes must be codified in a single international convention.[313] For an international crim-

---

Professor Gross's Comments on International Terrorism and International Criminal Jurisdiction, 68 AM. J. INT'L L. 717 (1974).

305. *1992 Working Group Report*, *supra* note 235, at 20.

306. Graefarth, *supra* note 78, at 84.

307. Stone, *supra* note 237, at 339.

308. *1992 Working Group Report*, *supra* note 235, at 2; *see also 1953 Draft Statute*, *supra* note 290, at 456; Wright, *supra* note 218, at 67. *But see* BASSIOUNI, *supra* note 209, at 224 (international court should exercise jurisdiction over natural persons, organizations, and states).

309. Pella, *supra* note 222, at 55-56. An individual is a state actor when acting with the "abetment" of a state. *Id.* at 56. A non-state actor, therefore, would be an individual acting independently of state law or state support.

310. BASSIOUNI, *supra* note 209, at 52.

311. Wright, *supra* note 227, at 567.

312. *Id.* at 567-69.

313. Wright, *supra* note 218, at 71; *cf.* BASSIOUNI, *supra* note 209, at 73, 92 (imperative to codify all international crimes into a single international criminal code,

inal code to have any meaning, it must be universally accepted that "[a] piecemeal acceptance of such a code subject to a variety of reservations would damn it before it became operative."[314] Nevertheless, linking the establishment of an international criminal court to the international acceptance of a convention, such as the Draft Code, risks dooming the creation of the court.

A more narrow view of the crimes within the court's jurisdiction would limit jurisdiction to those crimes that prejudice international relations by disrupting peace or perpetuating a national policy repugnant to the international community.[315] To avoid overburdening the court, crimes of a generally international character that do not infringe upon international relations should be prosecuted nationally under the principle of universal jurisdiction.[316] The main problem with this approach is determing which crimes encroach upon the peace and security of the world community and fall within the court's jurisdiction.

One way to delineate the international crimes punishable by the international criminal court is to draw up international conventions on particular crimes and require the signatories of the conventions to submit to the exclusive jurisdiction of the international criminal court over these crimes.[317] Eventually, the series of conventions could be regarded as an international criminal code.[318] Alternatively, the statute setting up the criminal court could limit its jurisdiction to specified international conventions already in force that define crimes of an international character.[319] According to one of the strongest advocates of an international criminal court,

> [r]eliance on conventional international law as the primary source of international criminal law is . . . justifiable for the following reasons: (1) conventions are a source of binding legal obligations *qua* with respect to their state-parties; (2) they frequently embody

---

but international crimes should also include all crimes outlawed by future multilateral conventions).

314. Bridge, *supra* note 223, at 1264.

315. Pella, *supra* note 222, at 54 (such crimes include crimes within jurisdiction of Nuremberg tribunal); *see also* Stone, *supra* note 237, at 336 (choose offenses that stir deep universal concern and condemnation but that do not usually involve states' military, political, or economic self-preservation).

316. Pella, *supra* note 222, at 54.

317. Bridge, *supra* note 223, at 1265.

318. *Id.*

319. *See 1992 Working Group Report*, *supra* note 235, at 2; Scharf, *supra* note 199, at 158 (rely on offenses already outlawed by international conventions and extend court's jurisdiction to cover additional offenses in Draft Code if it is ever completed); *see also* Roger S. Clark, *Codification of the Principles of the Nuremberg Trial and the Subsequent Development of International Law*, *in* THE NUREMBERG TRIAL AND INTERNATIONAL LAW 249, 253-54 (George Ginsburgs & V.N. Kudriavtsev eds., 1990) (listing treaties generally agreed upon as examples of international criminal law).

> or reflect customary rules and general principles of international law; (3) conventional obligations frequently ripen into customary rules; (4) conventions frequently codify *jus cogens* rules.[320]

A more restrictive approach would allow states to make declarations limiting the court's competence to particular conventions or to specific offenses defined within a convention.[321] However, while such an option would increase the number of states willing to set up an international criminal court, "it would from the outset limit its central function and effectiveness in such a way that would largely condemn it to insignificance."[322]

Conferring jurisdiction on the international criminal court on a treaty-by-treaty basis would generate the least resistance. By ratifying the convention establishing the court, states would not be relinquishing any jurisdiction. Relying on conventions already in force to delineate the court's jurisdiction, however, might be quicker because the only hurdle would be setting up the court. The most efficient approach would be to create an international court that would obtain jurisdiction on a treaty-by-treaty basis and then to amend existing conventions defining international crimes to confer concurrent jurisdiction on the court. The signatories to such conventions have already completed the time-consuming process of reaching an agreement on the substantive provisions. Regardless of which crimes were determined to be within the court's jurisdiction, statute of limitations questions and retroactivity issues would have to be addressed up front.

c. Nature of the court's jurisdiction

The 1990 I.L.C. Report outlines the three options regarding the nature of the court's jurisdiction: exclusive jurisdiction over crimes falling within the court's competence; concurrent jurisdiction between the court and national courts; and restricting the court to only reviewing competence.[323]

Those who argue in favor of exclusive jurisdiction for the international criminal court state that it should have sole jurisdiction over certain international crimes.[324] Exclusive jurisdiction would lead to the development of a coherent and consistent body of law with regard to the crimes within the court's jurisdiction. It would also circumvent conflicts of jurisdiction between different states with an interest in the case.[325] However, completely relinquishing jurisdiction over certain

---

320. BASSIOUNI, *supra* note 209, at 24.

321. *See* Graefarth, *supra* note 78, at 84 (discussing 1984 International Law Association proposal).

322. *Id.*

323. *1990 ILC Report*, *supra* note 278, at 48.

324. Bridge, *supra* note 223, at 1265.

325. Scharf, *supra* note 199, at 160.

crimes would constitute a significant infringement on state sovereignty.[326] According to Bernhard Graefarth, "the notion that states would be prepared to delegate their sovereignty over crimes committed on their territory, against them, or by their citizens to an international criminal court is so far from reality that it has hardly been seriously defended."[327]

Most advocates of an international criminal court agree that it should have concurrent jurisdiction with national courts. However, while no national court could try an individual for an offense already adjudicated by the international criminal court,[328] adjudication by a national court would not preclude the international criminal court from exercising jurisdiction.[329] Some scholars suggest that an indictment by the international criminal court would terminate any local proceeding,[330] but others recommend that a request for extradition to the international court be refused if a national court had initiated prosecution.[331]

Some support exists for the use of the international criminal court as a supplemental review body. According to this proposal, at the request of a state involved in a case, the court would review a national court's decision of an offense contained in the Draft Code.[332] To capitalize on the work already completed by the national court, the international court would adopt a "clearly erroneous" standard with respect to the review of facts, an "abuse of discretion" standard for issues involving discretionary balancing, and a *de novo* standard for questions of international criminal law. The court would also be able to issue advisory opinions in cases involving the application of the Draft Code.[333] This system is attractive because it could encourage national courts to adjudicate more conscientiously.[334]

Establishing a court with only review competence, however, fails to solve many of the problems that call for the creation of an international court. For example, a state would not have the option of an

---

326. *Id.*

327. Graefarth, *supra* note 78, at 81. When granting its advice and consent to the Genocide Convention, the U.S. attached an understanding construing Article VI, which allows for trial before an international penal tribunal if one is established, to mean that "nothing . . . shall affect the right of any state to bring to trial before its own tribunals any of its nationals for acts committed outside the state." International Convention on the Prevention and Punishment of the Crime of Genocide, S. Rep. No. 94-23, 94th Cong., 2d Sess. at 10 (1976).

328. *1953 Draft Statute*, *supra* note 290, art. 50, at 457.

329. Wright, *supra* note 218, at 69. *But see* BASSIOUNI, *supra* note 209, at 193-95 (prosecution by an international court can be barred by double jeopardy).

330. Wright, *supra* note 218, at 70.

331. BASSIOUNI, *supra* note 209, at 193-95.

332. Graefarth, *supra* note 78, at 86.

333. *Id.*

334. *Id.* at 87.

international prosecution in a case where domestic prosecution is not politically viable. It might also be difficult for an "involved state" to contest a national judgment because of the potential political repercussions. Furthermore, granting an international court final review competence over national courts' decisions represents a greater relinquishment of sovereignty than agreeing to concurrent jurisdiction.[335]

2. Initiation of suits

In its 1990 report, the I.L.C. considered six possible initiators of suits: (1) all states; (2) states party to the court's statute; (3) any state with an interest in the case; (4) intergovernmental organizations of universal or regional character; (5) nongovernmental organizations; and (6) individuals.[336] Although most proponents of an international criminal court would allow only states or organs of the United Nations to initiate suits,[337] it is crucial that individuals and nongovernmental organizations be allowed to bring claims to the attention of the prosecuting body.[338] One of the most important purposes of an international criminal court is to provide a forum for adjudicating crimes that disrupt international peace and security when no state possesses the political will to bring the perpetrators of such offenses to justice. However, to limit frivolous claims, "adequate and available" domestic remedies should be exhausted before an individual can bring a claim before the court.

3. Method of implementation

There are four possible ways to establish an international criminal court: (1) create the court as an additional organ of the United Nations; (2) set it up by General Assembly resolution; (3) encourage states to sign an international convention establishing the court; or (4) focus on the creation of a committing chamber that would issue public indictments after formal proceedings. Interestingly, there is almost universal agreement that the best course of action is to initially take a minimalist approach, so as to reduce resistance, and then to later

---

335. *See 1992 ILC Report*, *supra* note 270, at 18.

336. *1990 ILC Report*, *supra* note 273, at 49.

337. *See* Pella, *supra* note 222, at 62-63 (suits could be brought by states or an organ of the U.N. upon referral by states); Graefarth, *supra* note 78, at 88 (states would bring suits before court sitting as reviewing body); *A.B.A. Report*, *supra* note 187, at 18 (only states should have the right to institute proceedings); *1990 ILC Report*, *supra* note 278, at 49 (considering option of requiring authorization by either General Assembly or Security Council before case could be submitted); *1953 Draft Statute*, *supra* note 290, art. 29, at 456 (only state parties can initiate prosecutions); Wright, *supra* note 218, at 68 (only allow General Assembly to bring claims).

338. *See* BASSIOUNI, *supra* note 209, at 226-27 (allowing state-parties, organs of the U.N., intergovernmental and nongovernmental organizations, and individuals to file complaints with Procuracy).

expand the court's jurisdiction and membership.[339] Extensive proposals should wait until a flexible body has been set up and engendered confidence.[340] Some argue that the court should be an available judicial forum that only meets when needed.[341]

An international criminal court could be established by amending Article 7 of the United Nations Charter.[342] Although some argue that amendment of the Charter is unnecessary because Article 7(2) already allows for the establishment of subsidiary organs,[343] others contend that there is no support in the present United Nations Charter for the establishment of an international criminal court.[344] One advantage of establishing the court as an organ of the United Nations would be the Security Council's ability to take necessary measures to ensure the assistance of states and to effectuate the court's judgments.[345] However, given the difficulty of amending the Charter, this option may not be practical.[346] Also, involvement with the U.N. may increase allegations of politicization.

It has been argued that the international criminal court could be set up pursuant to a General Assembly resolution under Article 22 of the U.N. Charter.[347] Article 22 allows the General Assembly to establish subsidiary organs necessary for the performance of its functions.[348] Since the functions of the General Assembly include maintaining international peace and security and developing international law, the court would qualify as a necessary subsidiary organ.[349] The problem with this approach would be that the court might lose its independence if its finances are debated annually in the General As-

---

339. *See* Julius Stone, *Introduction*, *in* TOWARDS A FEASIBLE INTERNATIONAL CRIMINAL COURT xii; Parker, *supra* note 242, at 642.

340. *1992 Working Group Report*, *supra* note 235, at 15.

341. *See 1953 Draft Statute*, *supra* note 290, at 43; *1992 Working Group Report*, *supra* note 235, at 2; *A.B.A. Report*, *supra* note 187, at 17.

342. *U.N. Charter*, *supra* note 99, at 192 (Article 7 names the six principle organs of the U.N.).

343. SOTTILE, *supra* note 238, at 83.

344. *French Proposal*, *supra* note 38, at 11; *see also* WOETZEL, *supra* note 9, at 51-52 (Specific consent of states would be required before the U.N. could establish an international court and would probably require an amendment of the U.N. Charter.).

345. Provided that one purpose of the court is the maintenance of international peace and security, the Security Council may use any means necessary to facilitate its effective operation. *See U.N Charter*, *supra* note 99, arts. 39-42, at 199-200.

346. *See* Bridge, *supra* note 223, at 1277-78. Amendments to the U.N. Charter come into force when adopted by two-thirds of the members of the General Assembly and ratified by two-thirds of the members of the U.N., including all the permanent members of the Security Council. *U.N. Charter*, *supra* note 99, art. 108, at 214.

347. Bridge, *supra* note 223, at 1278.

348. *U.N. Charter*, *supra* note 99, art. 22, at 195.

349. Bridge, *supra* note 223, at 1278.

sembly.[350] This need not happen, however, since precedent exists for legislative bodies to establish judicial organs and later refrain from interfering in their activities.[351] To avoid influence by the General Assembly, a fixed fund for the court could be established.

The third alternative — creating a permanent international court by means of an international convention — would be advantageous because it would only include states that favor the creation of an international criminal court.[352] Genuine progress at the negotiating table might outweigh the time delay caused by the domestic ratification procedures of the state parties. The main problem with this approach would be a lack of the prestige typically associated with a United Nations organ.[353]

Gerhard Mueller proposes a fourth alternative: establishing a committing chamber as an independent institution apart from the international criminal court.[354] The committing chamber would have *ex parte* jurisdiction and would receive facts regarding international crimes. It would hold an inquiry and make a public accusation if necessary after formal proceedings. Although the committing chamber could not compel the presence of an individual if the state with custody refused to surrender him, it could thrust the uncooperative state into the spotlight of world opinion.[355] Moreover, the committing chamber could indict the head of the uncooperative state and issue an arrest warrant to be executed by any signatory nation.[356]

The idea of using world public opinion to shame a state into accepting jurisdiction of the international court is appealing and has few legal disadvantages. However, unless the head of a recalcitrant state himself is accused of a crime falling under universal jurisdiction, it would be contrary to international law for another state to arrest and transfer him to the international court.

D. *The Time is Ripe: Using the Prosecution of Rape in the Balkans as a Test Case for the International Criminal Court*

The international community must pursue two goals in tandem: the establishment of a war crimes tribunal for the former Yugoslavia, and the creation of a permanent international criminal court. Lack of

---

350. *See id.* at 1279.

351. Wright, *supra* note 218, at 66 (citing example of United States Congress, which established and maintains federal judicial system, with exception of Supreme Court, but is constitutionally prohibited from exercising judicial power).

352. *See* Perret, *supra* note 235, at 155.

353. Bridge, *supra* note 223, at 1279; Wright, *supra* note 218, at 67.

354. Gerhard O. W. Mueller, *Two Enforcement Models for International Criminal Justice in* ETUDES EN L'HONNEUR DE JEAN GRAVEN 107 (1969).

355. *Id.* at 113-14.

356. *Id.* at 115.

progress in one area should not be allowed to stymie the other. If a war crimes tribunal becomes operational, the world community should build upon its success and establish a permanent international court ready to cope with future instances of crimes against international law. On the other hand, if progress on the war crimes tribunal stagnates, the prosecution of the perpetrators of rape in the Balkans would be a good test case for an international criminal court. Few states would disfavor prosecution of the atrocities committed in the former Yugoslavia in front of an international criminal court.

To capitalize on current United Nations support for bringing war criminals to justice,[357] the United States should initiate efforts to amend Article 7 to include an international criminal court as an organ of the United Nations. To improve chances for U.N. ratification of the amendment, states should confer jurisdiction on the court on a treaty-by-treaty basis. Even if setting up the international criminal court as an organ of the United Nations is not viable, the court could be established by means of an international treaty. Although several powerful states might resist, the court must start somewhere to demonstrate credibility.[358] The statute of the international court could draw on the Statute for the war crimes tribunal and provide for a Mueller-style committing chamber. Other than a domestic exhaustion requirement, no limits should be placed on the initiation of proceedings; any risk of frivolous claims would be circumvented by the screening procedure of the prosecuting body. It would also be important to create a mechanism for compensating the victims of international crimes.[359]

---

357. Support is not confined to the Security Council. *See* Madeleine K. Albright, United States Permanent Representative to the United Nations, Statement to the Security Council 1 (Feb. 22, 1993) (on file with author) (noting that General Assembly has urged creation of war crimes tribunal).

358. The United States would face domestic pressure to be party to a convention establishing a permanent international criminal court. A joint resolution introduced on January 28, 1993 expresses the intent of Congress that the U.S. should make every effort to advance proposals for the establishment of an international criminal court with jurisdiction over crimes of an international character. S.J. Res. 32, 103d Cong., 1st Sess. (1993) (resolution favorably reported by Senate Foreign Relations Committee on May 20, 1993); *see also* Foreign Operations Appropriation Act of 1991, Pub. L. No. 101-513, 104 Stat. 2066-67, §599E (1990) (U.S. should explore need for establishment of an International Criminal Court to assist international community in dealing more effectively with criminal acts defined in international conventions); *A.B.A. Report*, *supra* note 187, at 1 (resolved that U.S. Government should have view toward establishment of an international criminal court). Although the executive branch is skeptical about the possibility of reaching a consensus on the issues surrounding the establishment of an international court, it has also stated that it would be "willing to consider the establishment of an international tribunal in the event that high ranking Iraqi officials fall into the custody of the United States." *Mullins Letter*, *supra* note 266, at 5. In 1991, the judicial branch concluded that more work needs to be done before it can be said whether an international criminal court would be feasible and whether United States participation would be desirable. *Judicial Report*, *supra* note 273, at 16.

359. Such a mechanism could follow the model of the United Nations Compensa-

The next step in the establishment of a permanent court would be to amend the Genocide and the Fourth Geneva Conventions to explicitly confer concurrent jurisdiction on the international criminal court.[360] Since these two conventions outlaw particularly heinous crimes, opposition to the amendment process is likely to be limited. Any state party to the amended conventions and the statute of the international court would be obligated to transfer alleged offenders within their custody to the international criminal court. No additional consent would be required. Once the Mueller-style committing chamber indicted an individual, the spotlight of world opinion would focus on those states refusing to transfer him to the international court. Although there are no guarantees, there is reason to hope that the pressure of world opinion would result in alleged offenders being surrendered for trial.

To gain legitimacy, the international criminal court might begin its life by considering the following four cases. The prosecutor's department could first investigate allegations against Indonesian authorities for the treatment of Roman Catholic Timorese in East Timor. Human rights groups charge that between one and two hundred thousand Roman Catholic Timorese have died of starvation, disease, or execution since Indonesia annexed the area.[361] Second, the prosecutor might respond to the right-wing and neo-Nazi attacks on asylum-seekers in Germany. According to German authorities, more than two thousand attacks were carried out last year, resulting in seventeen deaths and almost six hundred injuries.[362] Third, recent claims that Peruvian soldiers routinely rape women and girls in the course of their struggle against the Shining Path guerrillas could be investigated and soldiers

---

tion Commission, which was established by Security Council Resolution 687. The U.N. Compensation Commission was set up to provide compensation for claims against Iraq stemming from the invasion and occupation of Kuwait. Funding for the claims is to be gleaned from Iraq's next oil sale. The Security Council has allowed Iraq to sell $1.6 billion worth of oil, with thirty percent of the proceeds to go to the compensation fund. John R. Crook, *Current Development: the United Nations Compensation Commission — A New Structure to Enforce State Responsibility*, 87 AM. J. INT'L L. 144 (1993). Individuals submit claims that require minimal documentation to the state in which they reside, and the state then files consolidated claims. *Id.* at 149, 152. If an individual is stateless, the Commission can empower "an appropriate person, authority or body" to submit claims on their behalf. *Id.* at 150 (quoting United Compensation Commission, *Guidelines Relating to Paragraph 19 of the Criteria for Expedited Processing of Urgent Claims*, U.N. Doc. S/AC.26/1991/5, *reprinted in* 31 I.L.M. 1031).

360. Although Article VI of the Genocide Convention already provides for trial by an international penal tribunal, it specifies that the Contracting Parties to the Genocide Convention must also have accepted the jurisdiction of the international tribunal. *Genocide Convention*, *supra* note 17, art. VI, at 280-82.

361. David Binder & Barbara Crossette, *As Ethnic Wars Multiply, U.S. Strives for a Policy*, N.Y. TIMES, Feb. 7, 1993, § 1, at 1.

362. *Id.*

could be tried.[363] Fourth, the international criminal court could examine the "campaign of terror" which has been waged against the Kurds in Northern Iraq, capitalizing on the hundreds of Iraqi files, captured by Kurdish rebels immediately following the Persian Gulf war, which document many officially-sponsored atrocities.[364] Finally, an investigation into the current slaughter taking place in Rwanda may be warranted.

This short list of cases represents international crimes committed in both the industrialized and developing world and includes crimes committed with and without government approval. Even if the permanent international criminal court decided that it did not have jurisdiction over some of these crimes, such a determination would serve the purpose of demonstrating its ability to make reasoned judgments.

V. CONCLUSION

The defects of the fora currently available to the victims of rape in Bosnia and Herzegovina signal the pressing need for an international criminal adjudicatory body. At the moment, victims have little hope of actually recovering monetary relief. In addition, perpetrators of rape will not be deterred by the remote possibility of either an adverse judgment for civil damages or criminal prosecution.

The proposed war crimes tribunal is a step in the right direction. It will have jurisdiction over the systematic rapes committed in Bosnia and Herzegovina, and its theory of individual liability will allow all levels in the chain of command to be prosecuted if evidentiary barriers can be overcome. Although it may be difficult to bring the accused before the tribunal, their freedom of movement will be severely constricted. The Security Council will be able to sanction any states harboring the alleged perpetrators of rape. However, the Statute of the war crimes tribunal and the tribunal's rules of procedure need to be fine-tuned to provide clear access to individual claimants and mechanisms for victim compensation.

The time has come, however, for the international community to go one step further. The uncertainty surrounding the establishment of the war crimes tribunal diminishes its deterrent effect. A permanent international criminal court would provide an impartial forum less likely to be influenced by political considerations. The rules of procedure could be designed to allow for individual access to the prosecution and victim protection. The court could prosecute international crimes committed within national boundaries, and its decisions would have precedential value for purposes of norm enunciation. The use of prece-

363. *See* Brooke, *supra* note 225.

364. Judith Miller, *Iraq Accused: A Case of Genocide*, N.Y. TIMES, Jan. 3, 1993, § 6 at 12.

dent would also facilitate the rendering of judgments without undue delay. Because both the assets and the persons of international offenders would be subject to seizure in all states adhering to the court's jurisdiction, offenders would be more likely to appear before the court, thus increasing the number of cases heard on the merits. The court's judgments would also become easier to enforce as more states join the international court.

An international criminal court is especially important now due to the increased likelihood of ethnic conflicts in the post-Cold War era. For deterrence purposes, perpetrators of international crimes must understand that they will be held personally liable. Although the path to the creation of a permanent international court will be arduous, "has not experience taught us that the utopias of today are the realities of tomorrow?"[365]

365. SOTTILE, *supra* note 238, at 93.