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JUSTICE FOR FOCA: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA'S PROSECUTION OF RAPE AND ENSLAVEMENT AS CRIMES AGAINST HUMANITY

James McHenry[†]

Before 1992 Foca was a small, bucolic town in southeastern Bosnia-Herzegovina whose population of approximately 40,000 was almost evenly divided between Muslim and Serb ethnic groups.¹ Today, however, Foca's population is approximately 24,000, and fewer than 100 non-Serbs live within its borders.² Moreover, the stunning demographic changes only tell part of the story. After Foca was overrun by Bosnian Serb forces in 1992, the conquerors instituted drastic measures to reduce the non-Serb population as part of a broader campaign of ethnic cleansing in regions of Bosnia-Herzegovina claimed by Serbia.³ To effectuate this policy, the Bosnian Serb leaders in charge of Foca murdered most of the non-Serb men in the town and sent the survivors to concentration camps.⁴ Many of the women, however, were not immediately killed.⁵ Instead, they, including some as young as twelve, were sent to "rape camps" where they were forced to perform sexual services for the Bosnian Serb soldiers.⁶ Many of the women were gang-raped and forced to live in a condition of sexual slavery;⁷ indeed, two were even sold as chattel for 500 DM

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1. "A Closed Dark Place:" *Past and Present Human Rights Abuses in Foca*, 10 HUMAN RIGHTS WATCH REPORT 6(D) (July 1998), at <http://www.hrw.org/reports98/foca/> [hereinafter *A Closed Dark Place*].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *A Closed Dark Place*, *supra* note 1.

(Deutschmark) each.⁸ Put simply, these actions were “calculated, cynical, and subhuman.”⁹

The atrocities committed upon the men and women of Foca are almost unthinkable, yet they tragically symbolize the second attempt in fifty years of one European ethnic group trying to completely eradicate another European ethnic group.¹⁰ Moreover, although murder and genocide were significant elements of this ethnic cleansing campaign, the Bosnian Serb actions also involved a targeted campaign of gruesome dehumanization, actualized as the rape and sexual enslavement of approximately 20,000 women, whose scale of inhumanity is unique in modern times.¹¹

On February 22, 2001, nine years after the Bosnian Serb soldiers came to Foca, Trial Chamber II of the International Criminal Tribunal for Yugoslavia (ICTY) found three Bosnian Serb soldiers (Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic) guilty of committing crimes against humanity including torture, rape, and enslavement.¹² The ICTY's verdict in *Prosecutor v. Kunarac* was immediately hailed by human rights organizations worldwide because, for the first time, it established rape as both a crime against humanity and a war crime.¹³ Furthermore, it expanded the definition of slavery as a crime against humanity to include sex slavery, for previously slavery as a crime against humanity only encompassed forced labor.¹⁴

Although the initial reception to the verdict was overwhelmingly positive, its full impact may not be felt for many years as other warring groups, both now and in the future, must bear it in mind when

8. *Bosnia: Landmark Verdicts for Rape, Torture, and Sexual Enslavement* (Feb. 22, 2001), at <http://www.hrw.org/press/2001/02/serbia0222.htm>.

9. J. F. BROWN, *HOPES AND SHADOWS: EASTERN EUROPE AFTER COMMUNISM* 249 (1994).

10. See, e.g., WALTER LAQUER & JUDITH TYDOR BAUMEL, *THE HOLOCAUST ENCYCLOPEDIA* (2001).

11. William Drozdiak, *Serb Forces Rape 20,000 in Bosnia, EC Team Finds*, WASH. POST, Jan. 9, 1993, at A12.

12. See generally *Prosecutor v. Kunarac*, No. IT-96-23-T & IT-96-23/1-T (Int'l Crim. Trib. for the Former Yugoslavia 2001), at <http://www.un.org/icty/foca/trialc2/judgement/kuntj010222e.pdf>.

13. See, e.g., *Bosnia: Landmark Verdict for Rape, Torture and Sexual Enslavement*, supra note 8; Amnesty International, *Bosnia-Herzegovina: Foca Verdict - Rape and Sexual Enslavement are Crimes Against Humanity* (February 22, 2001), available at <http://www.web.amnesty.org/ai.nsf/Index/EUR630042001?OpenDocument&of=COUNTRIES/BOSNI A-HERZEGOVINA>.

14. CNN, *Q & A: The Impact of the Ruling* (Feb. 22, 2001), available at <http://www.cnn.com/2001/WORLD/europe/02/22/hague.trial.armanpour/index.html>.

contemplating committing similar acts.¹⁵ Despite its potential to fundamentally reshape international law and norms of international warfare, the *Kunarac* decision is not uncontroversial. Like almost every crimes against humanity trial before it, *Kunarac* raises troubling issues about the international community's judgment of state and individual sovereignty as well as the possible creation of *ex post facto* crimes.¹⁶ Moreover, the *Kunarac* decision also raises a potential question about its, arguably, underlying view of women as weak and defenseless individuals.¹⁷ Just as the promulgation of the Battered Women's Syndrome defense sparked controversy in American legal circles over its possible underlying stereotyping of women, so too may *Kunarac* raise questions in international legal circles regarding whether women should have a unique space as victims in crimes against humanity.¹⁸

This note argues that despite these potential criticisms, the (belated) expansion of the definition of "crimes against humanity" in *Kunarac* was warranted for several reasons. First, it closed illogical gaps in the international legal conceptualizations of "rape/enslavement," "torture," "war crimes," and "crimes against humanity."¹⁹ Second, it broadened international protections of civilians, especially those of different ethnicities, from even unsystematic acts of depravity.²⁰ Third, it fully codified women as equal to men in the human community but did not unfairly single women out as a weaker gender in need of protection.²¹

15. *Id.*

16. See, e.g., GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* (2000).

17. See Nadine Taub & Elizabeth M. Schneider, *Perspectives on Women's Subordination and the Role of Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 151 (David Kairys, ed., 1982) (criticizing gender-based rape laws).

18. See, e.g., Pamela Posch, *The Negative Effects of Expert Testimony on the Battered Women's Syndrome*, 6 AM. U. J. GENDER SOC. POL'Y & L. 485 (1998); A. Renee Callahan, *Will the "Real" Battered Woman Please Stand Up? In Search of a Realistic Legal Definition of Battered Woman Syndrome*, 3 AM. U. J. GENDER & L. 117 (1994); Kristian Miccio, *In the Name of Mothers and Children: Deconstructing the Myth of the Passive Battered Mother and the "Protected Child" in Child Neglect Proceedings*, 58 ALB. L. REV. 1087 (1995).

19. See *Prosecutor v. Kunarac*, No. IT-96-23-T & IT-96-23/1-T (Int'l Crim. Trib. for the Former Yugoslavia 2001), at <http://www.un.org/icty/foca/trialc2/judgement/kuntj010222e.pdf>; see also *infra* Part V.A.1. (discussing the legal foundations of *Kunarac*).

20. See *Prosecutor v. Kunarac*, No. IT-96-23-T & IT-96-23/1-T (Int'l Crim. Trib. for the Former Yugoslavia 2001), at <http://www.un.org/icty/foca/trialc2/judgement/kuntj010222e.pdf>; see also *infra* Part III.B.2. (discussing the significance of *Kunarac* for Article 3 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War).

21. See *Prosecutor v. Kunarac*, No. IT-96-23-T & IT-96-23/1-T (Int'l Crim. Trib. for the Former Yugoslavia 2001), at <http://www.un.org/icty/foca/trialc2/judgement/kuntj010222e.pdf>; see also *infra* Part IV.D. (discussing *Kunarac*'s assessment of women).

Fourth, it established an historic foundation for the prosecution of war crimes by other courts and in other locations but did not infringe upon the sovereignty of either a state or an individual.²²

Part I of this note traces the development of international law regarding crimes against humanity from its first codification at the Nuremberg Trials following World War II to its status in the 1990's before the *Kunarac* decision. Part II then discusses the specific context in which the atrocities took place, namely the conflict among the newly independent states which were republics in the former Yugoslavia. Part III analyzes the *Kunarac* decision specifically showing how the previous canon of crimes against humanity jurisprudence in international law was extended theoretically to cover the heinous events that took place in Foca. Part IV assesses and ultimately refutes the potential criticisms of *Kunarac* including its perceived attacks of state and individual sovereignty and its underlying view of women. Part V analyzes the implications of *Kunarac* for the future of international law and reasserts the overall legality, morality, and humanity of the *Kunarac* decision by locating it within the larger space of international law, conventional morality, and human decency. *Kunarac* may have been, in the words of U.N. Coordinator of Operations, Jacques Klein, "a judgment that is long overdue,"²³ but now that it has finally arrived, its impact promises to be historic.

I. THE DEVELOPMENT OF INTERNATIONAL LAW REGARDING CRIMES AGAINST HUMANITY²⁴

The idea of a crime against humanity, or against an entire international community, had little resonance until the twentieth century. Few states thought of their actions as being of such a nature to deleteriously affect the entire international community, and even fewer felt that they could be held to some standard even as the losing power following a war.²⁵ Nonetheless, by the end of the nineteenth century, some

22. See *Prosecutor v. Kunarac*, No. IT-96-23-T & IT-96-23/1-T (Int'l Crim. Trib. for the Former Yugoslavia 2001), at <http://www.un.org/icty/foca/trialc2/judgement/kuntj010222e.pdf>; see also *infra* Parts IV.A.-B., V.B.1. (discussing the sovereignty implications of *Kunarac* and its possible use in future cases).

23. *Bosnian Serbs Convicted of Rape* (Feb. 22, 2001), available at <http://news.bbc.co.uk/hi/world/europe/1184313.stm>.

24. See, e.g., BASS, *supra* note 16; see also Report by the Secretary-General 10-11, U.N. Doc. S/25704 (1993), reprinted in 32 I.L.M. 1159 (quoting the U.N. Secretary General's connections between the 1907 Hague Conventions, the Nuremberg judgments, the 1949 Geneva Conventions, and the ICTY).

25. See, e.g., Timothy L. H. McCormack, *Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law*, 60 ALB. L. REV. 681, 684-98 (1997).

states recognized a need to establish guides for international conduct that respected laws and norms of humanity.²⁶

A. International Law Regarding Humanity Prior to Nuremberg

The Hague Conventions of 1899 and 1907 first contemplated basing normative principles on the “laws of humanity,” a concept that could logically lead to prosecutions based on crimes in violation of such laws.²⁷ First called by Russia in 1899, the Conventions attempted to limit warfare and an arms buildup and to establish an international court of justice.²⁸ Although these Conventions were ultimately unsuccessful in limiting warfare and what would later be deemed “crimes against humanity,” they did establish a foundation for prosecuting later violations of laws of humanity in the twentieth century.²⁹

The concept of individual criminal liability for human rights’ violations began to acquire more impact following World War I.³⁰ Article 23 of the Covenant of the League of Nations contained an express provision regulating the treatment of individuals in member states.³¹ Moreover, the postwar Allies attempted to try German leaders, including the Kaiser, for war crimes.³² Additionally, the Allies sought to try Turkish officials for their part in a campaign of genocide against Armenians in 1915-16.³³ Political infighting among the Allies and *realpolitik* decision-

26. See generally GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* (1999) (tracing the history and development of the idea of crimes against humanity).

27. See Hague Convention Respecting the Laws and Customs of War, pmbl., para. 9, 32 Stat. 1803, T.S. No. 403, *reprinted in* 1 AM. J. INT’L L. 129 (1907). Paragraph 9 reads in part: “Populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established among civilized peoples, from the laws of humanity, and the requirements of the public conscience.” *Id.* See also Hague Convention (II) With Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803 (addressing international principles governing war on land); Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 (updating the 1899 treaty).

28. William J. Aceves, *Critical Jurisprudence and International Legal Scholarship: A Study of Equitable Distribution*, 39 COLUM. J. TRANSNAT’L L. 299, 327-32 (2001).

29. McCormack, *supra* note 25, at 697.

30. See generally JAMES F. WILLIS, *PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR* (1982); see also Karina Michael Waller, *Intrastate Ethnic Conflicts and International Law: How the Rise of Intrastate Ethnic Conflicts has Rendered International Human Rights Laws Ineffective, Especially Regarding Sex-Based Crimes*, 9 AM. U.J. GENDER SOC. POL’Y & L. 621 (2001).

31. LEAGUE OF NATIONS COVENANT art. 23(a).

32. WILLIS, *supra* note 30; see also McCormack, *supra* note 25, at 705-08.

33. WILLIS, *supra* note 30; see also McCormack, *supra* note 25, at 699-701.

making in the postwar environment ultimately scuttled those plans, but an idea for the postwar adjudication of particularly inhumane crimes during wartime was planted, and this idea would come to fruition twenty-five years later at Nuremberg.³⁴

B. *The Nuremberg Trials*

Allied prosecutors in the Nuremberg Trials first used the phrase "crimes against humanity."³⁵ It was given meaning by the charter, which established an International Military Tribunal to try Nazi officials following the conclusion of World War II:

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

(a)*Crimes against Peace*: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b)*War Crimes*: namely, violations of the laws or customs of war. Such violations include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c)*Crimes against Humanity*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated . . .³⁶

The trials at Nuremberg resulted in not only the convictions of several German perpetrators of the Holocaust, but it also established a clear

34. McCormack, *supra* note 25, at 698-708.

35. Leo Gross, *The Punishment of War Criminals: The Nuremberg Trial*, 2 NETH. INT'L L. REV. 356, 358 (1955). See also M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* (1992).

36. Charter of the International Military Tribunal, *in* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), Aug. 8, 1945, 58 Stat. 1544, 82 U.N.T.S. 280, 288.

foundation for the future prosecution of war crimes and crimes against humanity.³⁷

C. *The Geneva Convention Relative to the Protection of Civilian Persons in Time of War*

The Geneva Convention Relative to the Protection of Civilian Persons in Time of War was concluded in 1949 and entered into force on October 21, 1950.³⁸ As its title implies, the Convention governs the treatment of civilians during times of war.³⁹ In particular, it asserts 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.*”⁴⁰ The force within international law of the Geneva Conventions is well established, and Article 2 of the ICTY enabling statute explicitly considers violations of the Geneva Conventions as offenses for which prosecution may be brought within its forum.⁴¹ Consequently, the ICTY’s reliance on the Conventions as a source for establishing rape as a crime against humanity rests on a solid foundation of established international law.

D. *The ICTY*

Pursuant to United Nations Security Council Resolution, the International Criminal Tribunal for Yugoslavia was established in 1993 for the prosecution of crimes committed during the fighting among the states that emerged from the breakup of Yugoslavia.⁴² The statute provided for a binding authority on the part of the ICTY to prosecute those individuals accused of committing grave breaches of the Geneva Conventions of 1949, genocide, crimes against humanity, and violations of the laws or customs of

37. BASS, *supra* note 16; see also Kevin R. Chaney, *Pitfalls and Imperatives: Applying the Lessons of Nuremberg to the Yugoslav War Crimes Trials*, 14 DICK. J. INT’L L. 57 (1995) (tracing the influence of the Nuremberg trials on the ICTY).

38. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Oct. 21, 1950, art. 3, 75 U.N.T.S 287, available at <http://www1.umn.edu/humanrts/instreet/y4gcpcp.htm>.

39. *Id.*

40. *Id.* art. 27 (emphasis added).

41. Statute of the International Tribunal, art. 2, May 25, 1993 (amended Nov. 30, 2000), at <http://www.un.org/icty/legaldoc/index.htm>.

42. See generally Statute of the International Tribunal, *supra* note 41; see also U.N. SCOR 48th Sess., 3217th mtg. at 1-2, U.N. Doc. S/Res 827 (1993) & U.N. Doc. S/RES/808 (1993); ICTY Statute of the International Tribunal, art. 1, available at <http://www.un.org/icty/basic/statut/statute.htm> (last visited October 10, 2001).

war.⁴³ Patricia M. Wald, a Judge on the ICTY and a former D.C. Circuit Judge, offered the following assessment of the ICTY's scope:

The ICTY was created by United Nations Security Council Resolution in 1993 to prosecute and adjudicate war crimes, crimes against humanity, and genocide committed in the territory of the former Yugoslavia on or after January 1991. That includes all aspects of the Bosnian conflict as well as the more recent Kosovo war. The Tribunal exercises personal jurisdiction over persons indicted for the categories of war crimes set out in the ICTY Statute, wherever apprehended; no extradition proceedings are necessary. It can impose sentences up to life imprisonment, but not death. The Tribunal is a temporary court in the sense that its mission is geographically and temporally limited. It is not expected to finish its work for at least another decade.⁴⁴

Furthermore, Judge Wald has noted that although the ICTY follows earlier war crimes tribunals in many important ways, it nonetheless faces challenges that go beyond those of its predecessors:

The ICTY is a bold experiment. It tracks to some degree the earlier Nuremberg and Tokyo World War II war crime trials but it goes far beyond those precedents in important ways. It is performing three functions: adjudicating international crimes, developing international humanitarian law, and memorializing important, albeit horrible, events of modern history. Except for Nuremberg and Tokyo and subsequent isolated war crimes prosecutions in national courts of figures such as Adolph Eichmann and Klaus Barbie, the Tribunal has very little caselaw to rely upon. Its procedures are a hybrid of common law and continental practice and its judges speak a dozen native languages more fluently than the official French and English of the Tribunal.⁴⁵

The most difficult aspect of the ICTY's work has been dealing with "the darkest and most brutal tales . . . of man's inhumanity to man and woman, including genocide and crimes against humanity involving thousands of victims, systematic rapes of women and girls, prolonged detention under the most barbaric of conditions, merciless beatings, and callous destruction of homes and villages."⁴⁶ Moreover, the ICTY has

43. Statute of the International Tribunal, *supra* note 41.

44. Patricia M. Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court*, 5 WASH. U. J.L. & POL'Y 87 (2001).

45. *Id.* at 89.

46. *Id.* at 88.

contended with challenges to its jurisdiction⁴⁷ and with charges that it is biased against Serbs.⁴⁸ Nonetheless, as of February 2002 — when the trial began of Slobodan Milošević, the former Serbian leader and the man many argue is most responsible for the atrocities committed on the territory of the former Yugoslavia⁴⁹ — the ICTY has established itself as a significant international judicial body capable of “perform[ing] important adjudication and accountability functions that national courts in the thrall of leaders who are themselves alleged war criminals cannot.”⁵⁰

II. THE FACTUAL BACKDROP TO *KUNARAC*

The roots of the 1990’s conflict among the former republics of Yugoslavia date back at least to their initial placement within a single sovereign state following World War I, if not even earlier to their relations among each other, first as territories within the larger Ottoman Empire and then later as a mix of sovereign states (Serbia, Montenegro) and possessions of the Austro-Hungarian Empire (Croatia, Slovenia, Bosnia-Herzegovina).⁵¹ Following the war, which had begun as the result of an assassination of the heir to the Austro-Hungarian imperial throne by a Serb nationalist, the victorious Allies established the precursor to the modern Yugoslavian state (aptly named to reflect the diverse groups within its borders): the Kingdom of the Serbs, Croats, and Slovenes.⁵² As historian Joseph Rothschild has noted, this new state was almost predestined to have problems:

Populated as it was by sundry antagonistic communities of widely divergent cultures, who worshipped in several different religions, had inherited eight legal systems from their former sovereignties, and wrote the basic Serbocroatian language in two orthonographies (not to

47. Prosecutor v. Tadic, Case No. IT-94-1 (Int’l Crim. Trib. for the Former Yugoslavia 1995) (Decision on the Defence Motion on Jurisdiction).

48. See, e.g., Justin Brown, *Facing Up to Atrocities?*, THE CHRISTIAN SCIENCE MONITOR, Feb. 16, 1999, at 6. But see *Seventh Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, U.N. General Assembly Security Council, 55th Sess., Agenda Item 52, U.N. Doc. A/55/150 (2000), available at <http://www.un.org/icty/rappannu-e/2000/index.htm> (last visited Sept. 27, 2000).

49. Keith B. Richburg, *Trial of Milosevic Begins; Yugoslav Ex-Leader Guided Atrocities*, U.N. Prosecutors Say, WASH. POST., Feb. 13, 2002, at A1.

50. Wald, *supra* note 44, at 117-18.

51. See, e.g., *Yugoslavia*, at http://www.encyclopedia.com/html/section/yugoslav_history.asp (last visited Sept. 22, 2002) [hereinafter *Yugoslavia*].

52. *Id.*

mention their several other Slavic and non-Slavic languages), Yugoslavia was bound to be subjected to profound centrifugal pressures which were to overwhelm her elite. Furthermore, areas of mixed population, such as the Vojvodina, Bosnia, or Macedonia, functioned less as bridges than as barriers, aggravating rather than easing these centrifugal pressures.⁵³

United under a monarchy, this new state, whose name was changed to Yugoslavia in 1929, was beset by internal nationalist strife among its various ethnic groups in the 1920's and 1930's.⁵⁴ Nazi Germany attacked in 1941 and established puppet states in Croatia and Serbia.⁵⁵ Several resistance groups of various nationalities emerged including one led by a communist named Tito.⁵⁶ The Germans were driven from Belgrade in 1944, and Soviet troops established Tito as the new leader of Yugoslavia.⁵⁷ Under Tito, the new State consisted of six primary republics (Croatia, Slovenia, Bosnia-Herzegovina, Serbia, Macedonia, and Montenegro) and two autonomous regions (Vojvodina and Kosovo).⁵⁸ Tito embarked upon a vigorous campaign of communizing life in Yugoslavia, although he formally split with Stalin and the Soviet Union in 1948.⁵⁹ For the rest of his life, Tito guided Yugoslavia on a path unique among communist states by courting favor with both the West and the Eastern Bloc.⁶⁰ Moreover, Tito joined with several Third World countries in 1961 to form a nonaligned movement that sought to successfully maintain relations with both the United States bloc and that of the Soviet Union during the Cold War.⁶¹

Domestically, Tito was quite successful at playing sides off against one another, only within his country, this involved the various ethnic groups residing in Yugoslavia.⁶² To be sure, various ethnic issues cropped up sporadically, but Tito, through the force of his "cult of personality" and his adept management skills, successfully managed to sidestep major conflicts from underlying ethnic tensions regarding power distribution and

53. JOSEPH ROTHSCHILD, *EAST CENTRAL EUROPE BETWEEN THE WARS* 202 (1974).

54. *Yugoslavia*, *supra* note 51.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Yugoslavia*, *supra* note 51.

61. *Nonaligned Movement*, at <http://www.encyclopedia.com/html/n/nonalign.asp> (last visited Sept. 22, 2002).

62. *Yugoslavia*, *supra* note 51.

territorial control.⁶³ Tito's successors after his death in 1980, however, were not so skilled at playing one ethnic group against another, and following the collapse of communism across Eastern Europe in 1989, the end was also near for the state of Yugoslavia.⁶⁴

In 1987, Slobodan Milošević was elected leader of the Serbian Communist Party, and in 1989, he became President of Serbia.⁶⁵ Following attempts by Milošević and his Serb backers to impose greater Serb authority on the entire state, Slovenia, Croatia, Macedonia and Bosnia-Herzegovina each declared its independence from Yugoslavia in 1991.⁶⁶ In response, Serbia used (primarily Serbian) federal troops to attack the seceding states in an effort to unite all Serbian peoples under one flag.⁶⁷ A campaign against Slovenia failed, but Serbia was more successful attacking Croatia and Bosnia-Herzegovina.⁶⁸ The latter, in particular, was a prime target for Serbia because 30% of its population was Serbian.⁶⁹ Additionally, Croatia also attacked Bosnia-Herzegovina to claim the lands occupied by the 20% of the population that was Croatian.⁷⁰ Therefore, by 1992, Bosnia-Herzegovina was largely occupied by two outside forces, both of whom were seeking the elimination of the local Bosnian Muslim population and both of whom committed horrific acts, like the ones in Foca, in order to achieve their objectives.⁷¹ Although Croatia also committed wartime atrocities, the Serbian crimes attracted more attention because they were more widespread and involved larger numbers of people.⁷²

Despite international condemnation, fighting continued among Serbia, Croatia and Bosnia-Herzegovina for another three years before a peace accord was reached in Dayton, Ohio, in 1995.⁷³ The breakup and subsequent fighting raised several important issues for international law, including the question of how to treat those responsible for some of the

63. *Id.*; see also ROBERT KAPLAN, *BALKAN GHOSTS: A JOURNEY THROUGH HISTORY* (1994).

64. *Yugoslavia, supra* note 51.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Yugoslavia, supra* note 51.

71. *Id.*

72. BROWN, *supra* note 9, at 265-70.

73. *Yugoslavia, supra* note 51.

horrific acts perpetrated on the territories of the former Yugoslavia.⁷⁴ Following the conclusion of the fighting, the United Nations established an International Tribunal of the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, known as the International Criminal Tribunal for the Former Yugoslavia, or ICTY.⁷⁵ As of November 7, 2001, the ICTY had 46 accused war criminals in custody, issued arrest warrants for 31 others not in custody, and adjudicated the cases of 61 accused war criminals in proceedings before the Tribunal, including the *Kunarac* case which was decided on February 22, 2001, and then appealed on March 6, 2001.⁷⁶

III. THE *KUNARAC* DECISION⁷⁷

All three defendants (*Kunarac*, *Kovac*, and *Vukovic*), along with several co-defendants, were named in an indictment in 1996.⁷⁸ Separate indictments were issued for these three men in 1999, and they were tried before the tribunal in 2000.⁷⁹ All three, who were originally born in Foca, were accused of crimes against humanity (i.e. torture, rape, enslavement) and violations of the laws and customs of war (i.e. torture, rape, outrages upon personal dignity).⁸⁰ *Kunarac* was charged with all crimes; *Kovac* was charged with rape, enslavement and outrages upon personal dignity; *Vukovic* was charged with torture and rape.⁸¹

A. *Allegations*

According to the factual allegations contained in the indictment, the three men were part of the Bosnian Serb forces that took over Foca in

74. See generally PETER RADAN, *THE BREAK-UP OF YUGOSLAVIA AND INTERNATIONAL LAW* (2002).

75. See generally United Nations, *International Criminal Tribunal for the Former Yugoslavia*, at <http://www.un.org/icty> (last visited Sept. 22, 2002) [hereinafter *ICTY*].

76. United Nations, *Fact Sheet on ICTY Proceedings*, at <http://www.un.org/icty/g glance/procfact-e.htm> (last visited Sept. 22, 2002).

77. See generally *Prosecutor v. Kunarac*, No. IT-96-23-T & IT-96-23/1-T (Int'l Crim. Trib. for the Former Yugoslavia 2001), at <http://www.un.org/icty/foca/trialc2/judgement/kuntj010222e.pdf>.

78. United Nations, *Case Information Sheet: KUNARAC, KOVAC and VUKOVIC Case (IT-96-23-PT) (IT-96-23/I-PT)* (March 21, 2002), at <http://www.un.org/icty/g glance/kunarac.htm> [hereinafter *KUNARAC*].

79. *Id.*

80. *Id.*

81. *Id.*

April 1992.⁸² Following the takeover, most of the Croats and Muslims were arrested, the men and women were separated, and all were kept in various detention facilities.⁸³ Indeed, “[d]uring the arrests many civilians were killed, beaten or subjected to sexual assault.”⁸⁴ Moreover, “[m]any of the detained women were subjected to humiliating and degrading conditions of life, to brutal beatings and to sexual assaults, including rapes and gang rapes.”⁸⁵ Women and girls as young as twelve were subjected to rape and sexual assaults at a detention center within a school building.⁸⁶

Each of the three defendants was singled out for specific instances of brutality.⁸⁷ Kunarac, the commander of a special reconnaissance unit of the Bosnian Serb Army, was alleged, in his capacity as commander, to have been responsible for the acts of the soldiers subordinate to him and to have known or had reason to know that those subordinates were engaged in the sexual assault of detained Muslim women.⁸⁸ Moreover, Kunarac was alleged to have personally been involved with the sexual assaults and rapes of Muslim women.⁸⁹ Kovac, a sub-commander of the military police and a paramilitary leader in Foca, was alleged to have been involved with the rapes and sexual assaults of detained Muslim women.⁹⁰ Finally, Vukovic, also a sub-commander of the military police and paramilitary leader in Foca, was alleged to have been personally involved in the gang-rape of women and girls detained at a local school.⁹¹ Moreover, he was alleged to have sexually abused women, including a 15-year-old and a 16-year-old detained at a sports hall, and to have arranged the removal of women from detention centers to private homes and apartments in order to be further sexually abused.⁹²

82. *Id.*

83. *Id.*

84. *KUNARAC*, *supra* note 78.

85. *Id.*

86. *Id.*; see also CNN, *Bosnian Serbs Jailed for War Sex Crimes*, at <http://www.cnn.com/2001/WORLD/europe/02/22/hague.trial.02/index.html> (last visited Sept. 22, 2002) (noting the youthful ages of many of the victims).

87. *KUNARAC*, *supra* note 78.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

B. *The Decision*

On February 22, 2001, the ICTY handed down its decision convicting the three defendants of war crimes and crimes against humanity.⁹³ Presiding Judge Florence Mumba labeled the actions of Kunarac and the others a “nightmarish scheme of sexual exploitation” that was “especially repugnant.”⁹⁴ Furthermore, she noted that the defendants “thrived in the dark atmosphere of the dehumanisation of those believed to be enemies.”⁹⁵ In short, the ICTY left little doubt about its feelings regarding both the guilt of Kunarac and the others and the utter depravity of their actions.⁹⁶

Among the crimes for which the three defendants were convicted, enslavement was already labeled as a crime against humanity by the Nuremberg Trials; therefore, the Trial Chamber’s decision to specifically consider sexual enslavement as a crime against humanity did not require a strong leap of thought in international law.⁹⁷ What did require more analysis, however, was the Trial Chamber’s decision to also delineate rape as a crime against humanity.⁹⁸ The ICTY convicted the defendants for the crimes of rape under Articles 3 and 5 of the ICTY’s enabling statute and under Article 3 of the Geneva Convention.⁹⁹ The Chamber explicitly ruled that the rapes that occurred in Foca constituted a war crime in violation of both international humanitarian law and the Tribunal’s Statute.¹⁰⁰ Most significant, the Chamber also ruled that rape constitutes an outrage upon personal dignity under Article 3(c) of the Geneva Conventions.¹⁰¹ Thus, although the prevention of the rape of women was not explicitly written

93. CNN, *Convictions Highlight Tragic Victims*, at <http://www.cnn.com/2001/WORLD/europe/02/22/hague.rape> (last visited Sept. 22, 2002).

94. *Id.*

95. *Id.*

96. See Prosecutor v. Kunarac, No. IT-96-23-T & IT-96-23/1-T (Int’l Crim. Trib. for the Former Yugoslavia 2001), at <http://www.un.org/icty/foca/trialc2/judgement/kuntj01022e.pdf>.

97. Charter of the International Military Tribunal, *supra* note 36; see also Human Rights Internet, *The Individual and International Criminal Responsibility*, at <http://www.hri.ca/doccentre/docs/hrd/handbook97/criminal.shtml#humanity> (last visited Sept. 22, 2002) (noting the categories of “crimes against humanity” used in the Nuremberg Trials).

98. See *infra* Part III.B.1.

99. Press Release, Judgement of Trial Chamber II in the Kunarac, Kovac & Vukovic Case (Feb. 22, 2001), at <http://www.un.org/icty/pressreal/p566-e.htm> [hereinafter Press Release].

100. Prosecutor v. Kunarac, No. IT-96-23-T & IT-96-23/1-T, para. 408 (Int’l Crim. Trib. for the Former Yugoslavia 2001), at <http://www.un.org/icty/foca/trialc2/judgement/kuntj01022e.pdf>.

101. *Id.*

into the Conventions, it is still of the nature of actions that constitute war crimes as contemplated by the drafters.¹⁰²

1. Conviction Under Article 5 of the Statute of the Tribunal

The Trial Chamber found that all three defendants committed crimes against humanity in violation of Article 5 of the ICTY's Statute.¹⁰³ Article 5 of the Tribunal's Statute lays out offenses which constitute crimes against humanity if they are committed during an armed conflict and are considered to be directed against a civilian population.¹⁰⁴ Specifically, Article 5 states:

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

- (a)murder;
- (b)extermination;
- (c)enslavement;
- (d)deportation;
- (e)imprisonment;
- (f)torture;
- (g)rape;
- (h)persecutions on political, racial and religious grounds;
- (i) other inhumane acts.¹⁰⁵

The ICTY's jurisdiction under Article 5 is to try atrocities committed by the participants of the Balkan conflict, and in order to try these crimes, an initial threshold must be met, namely that it must be established that the alleged offenses were actually committed during an armed conflict.¹⁰⁶ This general prerequisite for jurisdiction by the Tribunal is contained solely within its Statute.¹⁰⁷ An armed conflict is defined as "a resort to armed force between states or protracted armed violence between

102. Human Rights Internet, *supra* note 97.

103. Prosecutor v. Kunarac, No. IT-96-23-T & IT-96-23/1-T, para. 437 (Int'l Crim. Trib. for the Former Yugoslavia 2001), at <http://www.un.org/icty/foca/trialc2/judgement/kuntj010222e.pdf>.

104. *Id.* para. 410.

105. Statute of the International Tribunal, *supra* note 41, art. 5.

106. Prosecutor v. Kunarac, No. IT-96-23-T & IT-96-23/1-T, para. 413 (Int'l Crim. Trib. for the Former Yugoslavia 2001), at <http://www.un.org/icty/foca/trialc2/judgement/kuntj010222e.pdf>.

107. *Id.*

governmental authorities and organized armed groups or between such groups within a state.”¹⁰⁸

To fulfill this threshold requirement, an armed conflict must exist at the time and place specified within the indictment.¹⁰⁹ A relational “nexus” between the defendant’s acts and the conflict, however, is not required.¹¹⁰ Rather, the requirement is met when a conflict is present at the designated time and place.¹¹¹ In this context, therefore, the acts by the defendants must have occurred during the Balkan conflict. The rapes in Foca occurred during the Balkan conflict in 1992, and the war there was clearly ongoing at the time. Consequently, the first threshold requirement for jurisdiction by the ICTY was met.

After it determines that the offenses were committed during an armed conflict, the ICTY then must conclude that the defendants carried out an “attack” against the civilian population.¹¹² The five elements of an “attack directed against any civilian population” are:

- (1) There must be an attack.
- (2) The acts of the perpetrator must be part of the attack.
- (3) The attack must be “directed against any civilian population.”
- (4) The attack must be “widespread or systematic.”
- (5) The perpetrator must know of the wider context in which his acts occur and know that his acts are part of the attack.¹¹³

An “attack” is defined as “a course of conduct involving the commission of acts of violence.”¹¹⁴ The term “attack” applies to both persons engaged in armed conflict and also to the mistreatment of those not taking part in the conflict, such as prisoners.¹¹⁵ Additionally, a

108. *Id.* para. 412 (citing Prosecutor v. Tadic, No. IT-94-1-A, para. 70 (Int’l Crim. Trib. for the Former Yugoslavia 1995)).

109. *Id.* para. 413 (citing Prosecutor v. Tadic, No. IT-94-1-A, paras. 249, 251 (Int’l Crim. Trib. for the Former Yugoslavia 1999)).

110. *Id.* (citing Prosecutor v. Tadic, No. IT-94-1-A, paras. 249, 272 (Int’l Crim. Trib. for the Former Yugoslavia 1999); Prosecutor v. Blaskic, No. IT-95-14-T, para. 71, (Int’l Crim. Trib. for the Former Yugoslavia 2000)).

111. *Id.* (citing Prosecutor v. Tadic, No. IT-94-1-A, paras. 249, 251 (Int’l Crim. Trib. for the Former Yugoslavia 1999)).

112. Prosecutor v. Kunarac, No. IT-96-23-T & IT-96-23/1-T, para. 410 (Int’l Crim. Trib. for the Former Yugoslavia 2001), at <http://www.un.org/icty/foca/trialc2/judgement/kuntj010222e.pdf>.

113. *Id.*

114. *Id.* para. 415.

115. *Id.* para. 416.

relational nexus must exist between the acts of the defendant and the attack itself, which is determined by a two part test:

- (1) the commission of an act which, by its nature or consequences, is objectively part of the attack; coupled with
- (2) knowledge on the part of the accused that there is an attack on the civilian population and that his act is part of the attack.¹¹⁶

The Commentary to the Two Additional Protocols of 1977 to the Geneva Conventions of 1949 suggests that the term “civilian population” applies only to a narrowly defined range of people, and not to those who may constitute members of the armed forces or to other active participants in the conflict composed primarily of members from the civilian population.¹¹⁷

The attack on the civilian population must also be “widespread or systematic” to fall under the rubric of Article 5, which excludes random acts of isolated violence.¹¹⁸ To come under Article 5, however, only the attack itself must be “widespread or systematic,” and not necessarily the actions of the perpetrators.¹¹⁹ Indeed, the ICTY in *Prosecutor v. Tadic* stated: “The very nature of the criminal acts in respect of which competence is conferred upon the International Tribunal by Article 5, that

116. *Id.* para. 418 (citing *Prosecutor v. Tadic*, No. IT-94-1-A, paras. 248, 251, 271 (Int’l Crim. Trib. for the Former Yugoslavia 1999); *Prosecutor v. Tadic*, No. IT-94-1-T, para. 659 (Int’l Crim. Trib. for the Former Yugoslavia 1997); *Prosecutor v. Mrksic*, No. IT-95-13-R61, para. 30 (Int’l Crim. Trib. for the Former Yugoslavia 1996) (Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence); *Prosecutor v. Kunarac*, No. IT-96-23 & IT-96-23/1, para. 6(b) (Int’l Crim. Trib. for the Former Yugoslavia 2000) (Decision on Prosecution’s Motion for Exclusion of Evidence and Limitation of Testimony)).

117. *Id.* para. 426 (citing COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 611, 1451-52 (Sandoz et al. eds., 1987)). The fact that active partisans may be present among civilians, however, does not alter the nature of the population under this definition. *Id.* para. 425 (citing *Prosecutor v. Kupreskic*, No. IT-95-16-T, para. 549 (Int’l Crim. Trib. for the Former Yugoslavia 2000)).

118. *Prosecutor v. Kunarac*, No. IT-96-23-T & IT-96-23/1-T, para. 427 (Int’l Crim. Trib. for the Former Yugoslavia 2001) (citing *Prosecutor v. Tadic*, No. IT-94-1-T, para. 648 (Int’l Crim. Trib. for the Former Yugoslavia 1997)), at <http://www.un.org/icty/foca/trialc2/judgement/kuntj010222e.pdf>.

119. *Id.* para. 431. In other words, a single isolated attack on an individual or individuals generally cannot constitute a violation of Article 5. *Id.* para. 422; see also James C. O’Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT’L L. 639, 648 (1993) (noting that attacks cannot be “simply episodic and/or scattered attacks on individuals.”).

they be 'directed against any civilian population,' ensures that what is to be alleged will not be one particular act but, instead, a course of conduct."¹²⁰

In *Prosecutor v. Mrksic*, the ICTY stated:

Crimes against humanity . . . must be widespread or demonstrate a systematic character. However, as long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. As such, an individual committing a crime against a single victim or a limited number of victims might be recognized as guilty of a crime against humanity if his acts were part of the specific context [of an attack against a civilian population].¹²¹

As an example, the court noted the turning in of Jews to Nazi authorities during World War II: by itself, the act of an individual was not enough to constitute an attack, but because of the systematic persecution of Jews by the Nazis, the act became part of a "widespread and systematic" attack upon the civilian population.¹²²

The mental element required for a violation of Article 5 is that the accused must simply know that his actions occurred within the context of a broader "attack" on the civilian population.¹²³ In *Prosecutor v. Tadic*, the Appeals Chamber of the ICTY concluded that the motives of a defendant in the attack are irrelevant to a finding of *mens rea*.¹²⁴ Rather, the perpetrator must merely possess the intent to commit the offense in

120. *Prosecutor v. Kunarac*, No. IT-96-23-T & IT-96-23/1-T, para. 422 (Int'l Crim. Trib. for the Former Yugoslavia 2001) (citing *Prosecutor v. Tadic*, No. IT-94-1-A, para. 11 (Int'l Crim. Trib. for the Former Yugoslavia 1995) (Decision on the Form of the Indictment)), at <http://www.un.org/icty/foca/trialc2/judgement/kuntj010222e.pdf>. In contrast, a single act may constitute a "widespread or systematic" attack if it is executed within the context of a larger assault on the civilian population. *Id.* The underlying offense also does not need to constitute an attack in itself, but only must form a part of an overall course of conduct. *Id.* para. 417. See also *Prosecutor v. Tadic*, No. IT-94-1-A, paras. 248, 255 (Int'l Crim. Trib. for the Former Yugoslavia 1999).

121. *Prosecutor v. Kunarac*, No. IT-96-23-T & IT-96-23/1-T, para. 417 (Int'l Crim. Trib. for the Former Yugoslavia 2001) (quoting *Prosecutor v. Mrksic*, No. IT-95-13-R61, para. 30 (Int'l Crim. Trib. for the Former Yugoslavia 1996) (Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence)), at <http://www.un.org/icty/foca/trialc2/judgement/kuntj010222e.pdf>.

122. *Id.*

123. *Id.* para. 434 (citing *Prosecutor v. Tadic*, No. IT-94-1-A, para. 248 (Int'l Crim. Trib. for the Former Yugoslavia 1999); *Prosecutor v. Tadic*, No. IT-94-1-T, para. 659 (Int'l Crim. Trib. for the Former Yugoslavia 1997); *Prosecutor v. Kupreskic*, No. IT-95-16-T, para. 556 (Int'l Crim. Trib. for the Former Yugoslavia 2000)).

124. *Id.* para. 433 (citing *Prosecutor v. Tadic*, No. IT-94-1-A, para. 248 (Int'l Crim. Trib. for the Former Yugoslavia 1999)).

addition to the knowledge that his action is part of an overall attack on the civilian population.¹²⁵ Furthermore, he must have reason to believe that the victim of the attack was a civilian.¹²⁶ It is sufficient for the prosecution to demonstrate that the actions of the accused took place amid a set of accumulated acts of violence, even though individual acts within that set may vary in their nature and gravity.¹²⁷ Although the attack must be part of the overall armed conflict, it may outlast the hostilities.¹²⁸ Nonetheless, the civilian population must still be the primary object of attack in order to constitute a crime against humanity.¹²⁹ Furthermore, the scope of Article 5 contemplates both intrastate crimes as well as atrocities committed against the populations of other parties to the conflict; in other words, the victims do not need to be linked to any particular side in the conflict.¹³⁰ In *Kunarac*, the ICTY concluded that the actions of the defendants constituted a “widespread and systematic” attack upon the civilian population during the conflict in the Balkans.¹³¹ In short, the ICTY concluded that the rapes of Bosnian Muslim women were widespread and systematic and that Kunarac and the others possessed the requisite intent for attacking civilians.¹³² The women of Foca were rounded up at gunpoint and then used as sex slaves.¹³³ Therefore, the actions of the defendants

125. *Id.* para. 434 (citing *Prosecutor v. Tadic*, No. IT-94-1-A, para. 248 (Int'l Crim. Trib. for the Former Yugoslavia 1999); *Prosecutor v. Tadic*, No. IT-94-1-T, para. 659 (Int'l Crim. Trib. for the Former Yugoslavia 1997); *Prosecutor v. Kupreskic*, No. IT-95-16-T, para. 556 (Int'l Crim. Trib. for the Former Yugoslavia 2000)).

126. *Id.* para. 435. In cases of doubt, the Tribunal assumes that the victim was a civilian. *Id.*

127. *Prosecutor v. Kunarac*, No. IT-96-23-T & IT-96-23/1-T, para. 419 (Int'l Crim. Trib. for the Former Yugoslavia 2001), at <http://www.un.org/icty/foca/trialc2/judgement/kuntj010222e.pdf>.

128. *Id.* para. 420; *see also* *Prosecutor v. Tadic*, No. IT-94-1-A, para. 251 (Int'l Crim. Trib. for the Former Yugoslavia 1999); *Prosecutor v. Kupreskic*, No. IT-95-16-T, para. 546 (Int'l Crim. Trib. for the Former Yugoslavia 2000); *Prosecutor v. Tadic*, No. IT-94-1-A, para. 69 (Int'l Crim. Trib. for the Former Yugoslavia 1995) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction).

129. *Prosecutor v. Kunarac*, No. IT-96-23-T & IT-96-23/1-T, para. 421 (Int'l Crim. Trib. for the Former Yugoslavia 2001), at <http://www.un.org/icty/foca/trialc2/judgement/kuntj010222e.pdf>.

130. *Id.* para. 423 (citing *Prosecutor v. Tadic*, No. IT-94-1-T, para. 635 (Int'l Crim. Trib. for the Former Yugoslavia 1997)).

131. *See id.*

132. *Id.*

133. *Id.*; *see also* *A Closed Dark Place*, *supra* note 1 (detailing the specific treatment of the women of Foca).

clearly constituted crimes against humanity in violation of Article 5 of the ICTY Statute.¹³⁴

2. Conviction Under Article 3 of the Statute of the Tribunal and Under Article 3 of the Geneva Convention

Additionally, the defendants were found by the ICTY to have committed war crimes, namely the crimes of rape and torture in violation of both Article 3 of the Tribunal's statute and, under customary international law, Article 3 of the Geneva Convention.¹³⁵ Article 3 of the ICTY Statute, which is titled Violations of the Laws or Customs of War and incorporates the 1907 Hague Convention and the Regulations annexed to it, states:

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
- (e) plunder of public or private property.¹³⁶

The Appeals Chamber of the ICTY interpreted the scope of Article 3 in *Prosecutor v. Tadic*:

It can be held that Article 3 is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5 [of the Statute of the Tribunal], more specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as grave breaches

134. See *Prosecutor v. Kunarac*, No. IT-96-23-T & IT-96-23/1-T (Int'l Crim. Trib. for the Former Yugoslavia 2001), at <http://www.un.org/icty/foca/trialc2/judgement/kuntj010222c.pdf>.

135. See Press Release, *supra* note 99.

136. See Statute of the International Tribunal, *supra* note 41, art. 3.

by those Conventions; (iii) violations of common Article 3 [of the Geneva Conventions] and other customary rules on internal conflicts; (iv) violations of agreements binding upon the parties to the conflict, considering *qua* treaty law, *i.e.*, agreements which have not turned into customary international law¹³⁷

Consequently, Article 3 is a “residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal.”¹³⁸ Article 3 also applies to both internal and international armed conflicts.¹³⁹ Two preliminary requirements must be met in order for Article 3 to apply: (1) an armed conflict, defined as “a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State,”¹⁴⁰ must be present and (2) a “close nexus” must exist between the alleged crime and the armed conflict.¹⁴¹ The second requirement is satisfied when “the alleged crimes

137. Prosecutor v. Kunarac, No. IT-96-23-T & IT-96-23/1-T, para. 401 (Int'l Crim. Trib. for the Former Yugoslavia 2001) (citing Prosecutor v. Tadic, No. IT-94-1-AR72, para. 89 (Int'l Crim. Trib. for the Former Yugoslavia 1995) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), *confirmed in*, Prosecutor v. Delalic, No. IT-96-21-A, paras. 125, 136 (Int'l Crim. Trib. for the Former Yugoslavia 2001)), at <http://www.un.org/icty/foca/trialc2/judgement/kuntj010222e.pdf>.

138. *Id.* (quoting Prosecutor v. Tadic, No. IT-94-1-AR72, para. 91 (Int'l Crim. Trib. for the Former Yugoslavia 1995) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)).

139. *Id.* para. 402 (citing Prosecutor v. Tadic, No. IT-94-1-AR72, para. 137 (Int'l Crim. Trib. for the Former Yugoslavia 1995) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), *confirmed in*, Prosecutor v. Delalic, No. IT-96-21-A, paras. 140, 150 (Int'l Crim. Trib. for the Former Yugoslavia 2001)); *see also* Prosecutor v. Delalic, No. IT-96-21-T, para. 184 (Int'l Crim. Trib. for the Former Yugoslavia 1998); Prosecutor v. Furundzija, No. IT-95-17/1-T, para. 132 (Int'l Crim. Trib. for the Former Yugoslavia 1998); Prosecutor v. Blaskic, No. IT-95-14-T, para. 161 (Int'l Crim. Trib. for the Former Yugoslavia 2000).

140. Prosecutor v. Kunarac, No. IT-96-23-T & IT-96-23/1-T, para. 402 (Int'l Crim. Trib. for the Former Yugoslavia 2001) (citing Prosecutor v. Tadic, No. IT-94-1-AR72, para. 70 (Int'l Crim. Trib. for the Former Yugoslavia 1995) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)), at <http://www.un.org/icty/foca/trialc2/judgement/kuntj010222e.pdf>.

141. *Id.* (citing Prosecutor v. Tadic, No. IT-94-1-AR72, para. 70 (Int'l Crim. Trib. for the Former Yugoslavia 1995) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction); Prosecutor's Pre-Trial Brief I paras. 98-101, Prosecutor v. Tadic, No. IT-94-1-AR72 (Int'l Crim. Trib. for the Former Yugoslavia 1995); Prosecutor's Final Trial Brief paras. 690-696, Prosecutor v. Tadic, No. IT-94-1-AR72 (Int'l Crim. Trib. for the Former Yugoslavia 1995)); *see also* Prosecutor v. Delalic, No. IT-96-21-T, para. 193 (Int'l Crim. Trib. for the Former Yugoslavia 1998); Prosecutor v. Blaskic, No. IT-95-14-T, paras. 65, 69 (Int'l Crim. Trib. for the Former Yugoslavia 2000).

were 'closely related to the hostilities.'"¹⁴² After these threshold requirements are met, four general requirements are necessary for the application of Article 3:

- (i) the violation must constitute an infringement of a rule of international humanitarian law;
- (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met . . .
- (iii) the violation must be "serious," that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim . . .
- (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.¹⁴³

Based upon these four elements, the ICTY concluded that the general requirements for the application of Article 3 differ depending upon the specific basis of the charges, namely whether the charges are brought under a treaty or customary international law.¹⁴⁴ If a charge is brought based on a treaty violation, then two additional requirements must be met.¹⁴⁵ These two requirements are: (1) the treaty must be "unquestionably" binding upon the parties at the time the violation occurred and (2) the treaty must not be in conflict with peremptory norms

142. Prosecutor v. Kunarac, No. IT-96-23-T & IT-96-23/1-T, para. 402 (Int'l Crim. Trib. for the Former Yugoslavia 2001) (quoting Prosecutor v. Tadic, No. IT-94-1-AR72, para. 70 (Int'l Crim. Trib. for the Former Yugoslavia 1995) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)), at <http://www.un.org/icty/foca/trialc2/judgement/kuntj010222e.pdf>. The Trial Chamber in the *Delalic* case required "an obvious link" or a "clear nexus" between the alleged crimes and the armed conflict. Prosecutor v. Delalic, No. IT-96-21-T, para. 193, 197 (Int'l Crim. Trib. for the Former Yugoslavia 1998). The Trial Chamber in the *Blaskic* case referred to this requirement as finding an "evident nexus between the alleged crimes and the armed conflict as a whole." Prosecutor v. Blaskic, No. IT-95-14-T, para. 69 (Int'l Crim. Trib. for the Former Yugoslavia 2000).

143. Prosecutor v. Kunarac, No. IT-96-23-T & IT-96-23/1-T, para. 403 (Int'l Crim. Trib. for the Former Yugoslavia 2001) (quoting Prosecutor v. Tadic, No. IT-94-1-AR72, para. 94 (Int'l Crim. Trib. for the Former Yugoslavia 1995) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), endorsed in Prosecutor v. Aleksovski, No. IT-95-14/1-A, para. 20 (Int'l Crim. Trib. for the Former Yugoslavia 2000)), at <http://www.un.org/icty/foca/trialc2/judgement/kuntj010222e.pdf>.

144. *Id.* para. 404.

145. *Id.*

of international law.¹⁴⁶ In situations where the second requirement is not met, the Trial Chamber of the ICTY has suggested that charges may still be brought, but based solely on customary international law.¹⁴⁷

Additionally, the rapes perpetrated by Kunarac and the others constituted a violation of Common Article 3 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.¹⁴⁸ Article 3 states:

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

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

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

2. The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present

146. *Id.* (citing Prosecutor v. Tadic, No. IT-94-1-AR72, para. 143 (Int'l Crim. Trib. for the Former Yugoslavia 1995) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)).

147. *Id.*

148. *Id.* para. 408.

Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.¹⁴⁹

The ICTY noted that “it is well established in the jurisprudence of the Tribunal that common Article 3, as set out in the Geneva Conventions, has acquired the status of customary international law.”¹⁵⁰ Therefore, the ICTY did not review any existing treaties because it found Article 3 of the Geneva Conventions, as customary international law, to be a sufficient basis alone for conviction.¹⁵¹ Six requirements must be met in order for Article 3 of the Geneva Conventions to apply.¹⁵² These requirements are:

- (i) The violation must constitute an infringement of a rule of international humanitarian law.
- (ii) The rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met.
- (iii) The violation must be “serious,” that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim.
- (iv) The violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.
- (v) There must be a close nexus between the violations and the armed conflict.
- (vi) The violations must be committed against persons taking no active part in the hostilities.¹⁵³

149. *Prosecutor v. Kunarac*, No. IT-96-23-T & IT-96-23/1-T, para. 405 (Int'l Crim. Trib. for the Former Yugoslavia 2001), at <http://www.un.org/icty/foca/trialc2/judgement/kuntj010222e.pdf>; see also Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3516, 75 U.N.T.S. 287, available at <http://www1.umn.edu/humanrts/instr/y4gpcp.htm> (last visited Mar. 5, 2002) [hereinafter Convention on Protection of Civilians].

150. *Prosecutor v. Kunarac*, No. IT-96-23-T & IT-96-23/1-T, para. 406 (Int'l Crim. Trib. for the Former Yugoslavia 2001) (citing *Prosecutor v. Tadic*, No. IT-94-1-AR72, paras. 98, 134 (Int'l Crim. Trib. for the Former Yugoslavia 1995) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction); *Prosecutor v. Delalic*, No. IT-96-21-A, para. 143 (Int'l Crim. Trib. for the Former Yugoslavia 2001)), at <http://www.un.org/icty/foca/trialc2/judgement/kuntj010222e.pdf>.

151. *Id.*

152. *Id.* para. 407 (citing *Prosecutor v. Delalic*, No. IT-96-21-A, para. 420 (Int'l Crim. Trib. for the Former Yugoslavia 2001)).

153. *Id.*

Additionally, the ICTY noted that Article 3 of the Geneva Conventions may require a relationship between the perpetrator and a party to the conflict.¹⁵⁴ In the instant case, however, the three defendants were members of Bosnian Serb paramilitary forces; consequently, the ICTY declined to determine whether a relationship was necessary.¹⁵⁵ The ICTY concluded that the actions of Kunarac and the two other defendants met all of the four general requirements set out in Article 3 of the ICTY Statute.¹⁵⁶ First, the rapes constituted a violation of international law by being carried out contrary to the prohibitions set forth in Article 3, and thus entail criminal responsibility on the part of the defendants.¹⁵⁷ Second, the Appeals Chamber of the ICTY explicitly held that Article 3 of the Geneva Conventions is part of customary international law.¹⁵⁸ Third, the Trial Chamber of the ICTY noted that, in light of the Appeals Chamber's Jurisdiction Decision in the *Tadic* case, it is still an open question whether all breaches of Article 3 constitute "serious" violations of customary international law.¹⁵⁹ The Trial Chamber concluded, however, that rape is a

154. *Id.*

155. *Id.*

156. Prosecutor v. Kunarac, No. IT-96-23-T & IT-96-23/1-T, para. 407 (Int'l Crim. Trib. for the Former Yugoslavia 2001), at <http://www.un.org/icty/foca/trialc2/judgement/kuntj010222e.pdf>.

157. *Id.* para. 408.

158. *Id.* (citing Prosecutor v. Tadic, No. IT-94-1-AR72, para. 98 (Int'l Crim. Trib. for the Former Yugoslavia 1995) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), *confirmed in* Prosecutor v. Delalic, No. IT-96-21-A, paras. 143, 150 (Int'l Crim. Trib. for the Former Yugoslavia 2001)); *see also* Prosecutor v. Blaskic, No. IT-95-14-T, para. 166 (Int'l Crim. Trib. for the Former Yugoslavia 2000); *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, para. 35, U.N. Doc. S/25704 (1993). "Yugoslavia ratified both Geneva Protocols (Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts . . . and Geneva Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts . . . on 11 June 1979) and Bosnia and Herzegovina succeeded to both Additional Protocols on 31 December 1992. Yugoslavia ratified the four Geneva Conventions (including Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 1949 of 12 Aug 1949, which is most relevant to the present case) on 21 April 1950 and Bosnia and Herzegovina succeeded to the Geneva Conventions on 31 December 1992." Prosecutor v. Kunarac, No. IT-96-23-T & IT-96-23/1-T, n.1073 (Int'l Crim. Trib. for the Former Yugoslavia 2001), at <http://www.un.org/icty/foca/trialc2/judgement/kuntj010222e.pdf>.

159. Prosecutor v. Kunarac, No. IT-96-23-T & IT-96-23/1-T, para. 408 (Int'l Crim. Trib. for the Former Yugoslavia 2001) (citing Prosecutor v. Tadic, No. IT-94-1-AR72, para. 134 (Int'l Crim. Trib. for the Former Yugoslavia 1995) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction); Prosecutor v. Blaskic, No. IT-95-14-T, para. 134

serious offense; therefore, it unquestionably satisfies the third general requirement of Article 3.¹⁶⁰ Finally, the fourth general requirement was satisfied because the Appeals Chamber of the ICTY held in *Prosecutor v. Tadic* that "customary international law imposes criminal liability for serious violations of Article 3."¹⁶¹ Therefore, the application of the aforementioned Article 3 of the Geneva Conventions satisfies the fourth element of ICTY Statute Article 3.¹⁶² Consequently, the defendants were criminally liable for the rapes under Article 3 of the ICTY Statute and Article 3 of the Geneva Conventions.¹⁶³

In short, the *Kunarac* decision unequivocally establishes rape and sexual enslavement as crimes against humanity, and it leaves no doubt that "rape, torture, and outrages upon personal dignity . . . entail criminal responsibility under customary international law."¹⁶⁴ Furthermore, it reiterated the conclusion that rape and sexual enslavement could also be considered war crimes.¹⁶⁵ Although this decision may not necessarily prevent a policy of mass rape against civilians in future wars, it nonetheless establishes a clear boundary for intolerable behavior. In other words, simply because this behavior may not be prevented does not also mean that it will go unpunished.

IV. CRITICISMS OF *KUNARAC*

Like previous international law decisions that affected the scope of the nature of crimes against humanity, many recent decisions of the ICTY,

(Int'l Crim. Trib. for the Former Yugoslavia)), at <http://www.un.org/icty/foca/trialc2/judgement/kuntj010222e.pdf>.

160. *Id.*

161. *Id.* (citing *Prosecutor v. Tadic*, No. IT-94-1-AR72, para. 134 (Int'l Crim. Trib. for the Former Yugoslavia 1995) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), *confirmed in* *Prosecutor v. Delalic*, No. IT-96-21-A, para. 174 (Int'l Crim. Trib. for the Former Yugoslavia 2001)); *see also* *Prosecutor v. Blaskic*, No. IT-95-14-T, para. 134 (Int'l Crim. Trib. for the Former Yugoslavia 2000).

162. *Prosecutor v. Kunarac*, No. IT-96-23-T & IT-96-23/1-T, para. 408 (Int'l Crim. Trib. for the Former Yugoslavia 2001), at <http://www.un.org/icty/foca/trialc2/judgement/kuntj010222e.pdf>.

163. *See id.*

164. *Id.*; *see also* *Landmark Ruling*, AMNESTY MAG., Mar./Apr. 2001, available at <http://www.amnesty.org.uk/news/mag/mar01/news.shtml>.

165. *See, e.g.*, Christopher Scott Maravilla, *Rape As A War Crime: The Implications of the International Criminal Tribunal For the Former Yugoslavia's Decision in Prosecutor v. Kunarac, Kovac, & Vukovic on International Humanitarian Law*, 13 FLA. J. INT'L L. 321 (2001).

such as *Kunarac*, are not without criticism.¹⁶⁶ All such decisions represent a trade-off between domestic state autonomy and the desire of the international community to pursue justice following the commission of particularly inhumane crimes.¹⁶⁷ *Kunarac* clearly focuses more on the justice side of the trade-off, but it may go too far in violating the sovereignty of either the states or the individuals who were prosecuted.¹⁶⁸ Moreover, it may produce by-products, such as the violation of due process and the reinforcement of gender stereotypes that undercut its overall attempt to do justice.¹⁶⁹ Ultimately, this article argues that the *Kunarac* decision is legally, morally and humanely justified, but the criticisms of *Kunarac* are nonetheless worth exploring, particularly for what they reveal about the nature of international human rights justice and how they may be answered in future human rights' cases.

A. *Kunarac Violates the State Sovereignty of Serbia*

Under the Charter of the United Nations, one state cannot interfere with the domestic affairs of another state.¹⁷⁰ The idea of state sovereignty is a bedrock principle in international law, and prosecuting state officials acting under government orders may be seen as a violation of that state sovereignty.¹⁷¹ To that end, Serbian officials argued that their actions were domestic affairs within Yugoslavia, and thus are not subject to outside interference, especially from a court considered by them to possess an anti-Serb bias.¹⁷²

This criticism fails to be persuasive for three reasons. First, Foca is located in a state, Bosnia-Herzegovina, which achieved the criteria of

166. See, e.g., George Will, *Lawless Redress*, WASH. POST, Aug. 9, 2001, available at <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A51412-2001Aug8> (raising "serious questions about ad hoc uses of judicial forums created in response to particular events, forms such as the court for the former Yugoslavia and the tribunal concerning genocide in Rwanda.").

167. McCormack, *supra* note 25, at 730-32.

168. See *infra* Parts IV.A.-B.

169. See *infra* Parts IV.C.-D.

170. U.N. CHARTER, art. 2, para. 7.

171. See generally Anne Bodley, *Weakening the Principle of Sovereignty in International Law: The International Criminal Tribunal for the Former Yugoslavia*, 31 N.Y.U. J. INT'L L. & POL. 417 (1999). See also Guy Roberts, *Assault on Sovereignty: The Clear and Present Danger of the New International Criminal Court*, 17 AM. U. INT'L L. REV. 35 (2001).

172. See International Action Center, *Milosevic Puts "Tribunal" on Trial*, at http://www.iacenter.org/sm_tohague.htm (last visited Mar. 12, 2002) [hereinafter *Milosevic Puts "Tribunal" on Trial*].

statehood and was recognized as such in 1992.¹⁷³ Therefore, it is difficult to argue that the mass rape of Bosnian women by Serbian military officials was inherently a domestic Serbian incident.¹⁷⁴ Second, states generally can only be held to the standards to which they consent to be bound; however, no modern state asserts the rights not to be bound by *jus cogens* norms or customary international law that prohibits the commission of genocide or crimes against humanity.¹⁷⁵ In other words, Serbia cannot claim that its actions are not subject to prosecution by an international tribunal because it undertook policies that violated international law, even if similar violations in the past had not been prosecuted.

Third, and perhaps more consequentially, previous judgments by international tribunals regarding war crimes and crimes against humanity suggest that this argument is invalid.¹⁷⁶ Although international law does not recognize precedent as determinative to the same degree that the US legal system does, the decisions of previous international tribunals are not without some type of precedential value.¹⁷⁷ Indeed, Nazi officials offered similar argument during the Nuremberg Trials, and they were roundly rejected.¹⁷⁸ In other words, a state does not have the sovereignty to massacre its people under any kind of international standard.

B. The Decision Violates the Personal and Individual Sovereignty of Kunarac, Kovac and Vukovic

Arguably, the prosecution of Kunarac — and all other persons from the former Yugoslavia as well — is an interference with personal, individual sovereignty.¹⁷⁹ These individuals were taken from their home

173. CENTRAL INTELLIGENCE AGENCY, CIA WORLD FACTBOOK 2001, at <http://www.odci.gov/cia/publications/factbook/index.html> (last visited Sept. 8, 2002).

174. Human Rights Watch, *The Milosevic Case: Questions and Answers*, available at <http://www.hrw.org/press/2001/08/milo-q&a-0829.htm> (last visited Feb. 20, 2002).

175. Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 783-84 (2001). *But see* Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT'L L. 413, 427 (1983) (asserting that *jus cogens* norms should not be viewed as customary international law because they do not require consent).

176. *See* Christin B. Coan, *Rethinking the Spoils of War: Prosecuting Rape as a War Crime in the International Criminal Tribunal for the Former Yugoslavia*, 26 N.C. J. INT'L L. & COM. REG. 183, 203 (2000).

177. Roberts, *supra* note 175, at 775.

178. Coan, *supra* note 176, at 203.

179. Alexander Orakhelashvili, *The Position of the Individual in International Law*, 31 CAL. W. INT'L L.J. 241 (2001); *see also* Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist*

state, detained in a state on the other side of the continent and placed before an international tribunal whom they regard as biased amid a highly charged political backdrop of the worst human rights' abuses in Europe since World War II.¹⁸⁰ Consequently, they feel that as individuals they cannot get a fair hearing in an international forum and should perhaps be tried domestically, if they are to be tried at all.¹⁸¹ Moreover, they feel that they should not even be tried as individuals before an international tribunal.¹⁸² Indeed, if any entity should be tried, it is the state because these individuals were simply following orders from the state.¹⁸³

These arguments also fail upon closer inspection. First, international public policy outweighs any interference with personal sovereignty because of the likelihood that these individuals would never be tried in Serbia.¹⁸⁴ As Judge Wald observed, the ICTY can perform important "accountability functions that national courts in the thrall of leaders who are themselves alleged war criminals cannot."¹⁸⁵ Second, Article 7 of the ICTY statute explicitly considers individual criminal responsibility for acts committed in relation to the conflict in Yugoslavia; therefore, the ICTY itself has personal jurisdiction to prosecute anyone who may be criminally liable for violations of international law in this setting.¹⁸⁶ Furthermore, Article 7(4) expressly prohibits a "just following orders" defense, although it does allow such a claim as a mitigating factor.¹⁸⁷ Moreover, the ICTY's ability to prosecute individuals reflects a growing trend in international law

View, 93 AM. J. INT'L L. 302, 309 (1999) (noting that "[c]rimes against humanity constitute a more difficult case as regards individual responsibility").

180. See Human Rights Watch, *Bosnia and Hercegovina*, available at <http://www.hrw.org/wr2k1/europe/bosnia.html> (last visited Mar. 12, 2002).

181. Letter from the Charge D'Affaires A.I. of the Permanent Mission of Yugoslavia (Serbia and Montenegro) to the United Nations Addressed to the Secretary-General, U.N. Doc. A/48/170-S/25801 (1993); see also Simma & Paulus, *supra* note 179, at 314 (noting that "[s]tates remain . . . reluctant . . . to bring their own leaders to justice.").

182. *Milosevic Puts "Tribunal" on Trial*, *supra* note 172.

183. *But see* CNN, *supra* note 93 (quoting Judge Mumba's admonition that "[l]awless opportunists should expect no mercy, no matter how low their position in the chain of command may be.").

184. Wald, *supra* note 44, at 117-118; see also Simma & Paulus, *supra* note 181, at 314 (arguing that failing to prosecute domestically heads of state "runs counter to the stated purpose of international humanitarian law, i.e., to exclude certain criminal acts from the legitimate exercise of state functions.").

185. *Id.*

186. Statute of the International Tribunal, *supra* note 41, art. 7.

187. *Id.* art. 7(4).

to expand the legal personality of individuals.¹⁸⁸ Finally, the defense of "just following orders," even if not prohibited by Article 7(4) of the ICTY enabling statute, has been rejected soundly by international law since Nuremberg.¹⁸⁹

The two sovereignty criticisms have a good deal of intuitive appeal upon first glance, yet neither has been recognized as persuasive for purposes of preventing the trial of suspected war criminals.¹⁹⁰ Indeed, the failure of these arguments suggests that the international community believes in a hierarchy of values and state and personal sovereignty may be trumped in extreme circumstances.¹⁹¹ In other words, the *Kunarac* prosecutions and decision do constitute violations of state and individual sovereignty, but they do so in the name of a higher ideal: justice.

C. *Kunarac* Represents *Ex Post Facto*, *Retroactive Adjudication*

Third, *Kunarac* may be criticized on the grounds that it convicted the three defendants of an *ex post facto* crime which thereby violated a sense of due process and fairness.¹⁹² Prior to *Kunarac*, rape was a reprehensible, vicious and inhumane action. However, it was also not explicitly recognized within international law as a crime against humanity.¹⁹³ The Charter authorizing the Nuremberg trials, for example, did not explicitly list rape as a criminal offense.¹⁹⁴ Rape was a violation of the Geneva Conventions and was generally recognized as a crime under international law. However, rape "overwhelmingly has been viewed by the international community as an inevitable product of war, and as such, has seldom been prosecuted."¹⁹⁵ Indeed, as Human Rights Watch has noted:

188. See, e.g., P.K. Menon, *The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine*, 1 J. TRANSNAT'L L. & POL'Y 151, 182 (1992).

189. Coan, *supra* note 178, at 203.

190. See *supra* notes 171-189 and accompanying text.

191. *Id.*

192. See McCormack, *supra* note 25, at 731.

193. See *Prosecutor v. Kunarac*, No. IT-96-23-T & IT-96-23/1-T (Int'l Crim. Trib. for the Former Yugoslavia 2001), at <http://www.un.org/icty/foca/trialc2/judgement/kuntj010222e.pdf>.

194. See Charter of the International Military Tribunal, Annexed to the London Agreement, Aug. 8, 1945, 59 Stat. 1546, 1547, 8 U.N.T.S. 284, 288. Rape was not specifically criminalized under Article 6 of the Nuremberg Charter, nor were torture or imprisonment, when committed against any civilian population. See United Nations, *ICTY Bulletin: History from Nuremberg to the Hague*, at <http://www.un.org/icty/BL/05art5e.htm> (last visited Sept. 26, 2002).

195. Coan, *supra* note 178, at 184.

Despite [some] legal precedents, rape has long been mischaracterized and dismissed by military and political leaders as a private crime, the ignoble act of the occasional soldier. Worse still, it has been accepted precisely because it is so commonplace. Longstanding discriminatory attitudes have viewed crimes against women as incidental or less serious violations.¹⁹⁶

Furthermore, rape had not been defined under international law, leaving the ICTY to try “sexual assault cases under a statute that offers groundbreaking international recognition of the crime of rape [even though] the ICTY’s mandate explicitly prohibits it from applying anything other than accepted definitions of international humanitarian law.”¹⁹⁷ Therefore, the ICTY’s assessment “of the legal gray area occupied by rape under international humanitarian law cannot help but position it in what some would call a legislative role.”¹⁹⁸ Therefore, the ICTY, despite its Article 5(g) statutory charge, had no clear legal justification for trying rape as a crime against humanity.

Consequently, because rape was not defined expressly as a crime against humanity at the time that the events in Foca transpired, then the standard by which Kunarac and the other defendants were prosecuted was necessarily an *ex post facto* one. This criticism was one also raised by Senator Robert Taft during the Nuremberg trials because such *ad hoc* international tribunals like the IMT at Nuremberg seemed to run against the traditional American notion of justice which prohibits someone from being retroactively convicted of a crime.¹⁹⁹ Indeed, this idea is even enshrined in the United States Constitution, which raises the obvious question of why Kunarac and the other criminal defendants should be held to a standard beyond that of the United States Constitution.²⁰⁰

Although this criticism may have some initial appeal, two counter-arguments suggest that it is not as valid as it may first appear. First, previous conventions and customs of international law explicitly prohibited torture and enslavement, both of which may cover the crime of rape, especially as it was perpetrated in Foca and the surrounding areas.²⁰¹

196. Human Rights Watch, *Human Rights Watch Applauds Rwanda Rape Verdict*, at <http://www.hrw.org/press98/sept/rrape902.htm> (last visited Sept. 26, 2002).

197. *Id.*

198. *Id.*

199. See JOHN F. KENNEDY, *PROFILES IN COURAGE* 211-24 (1956).

200. U.S. CONST., art. I, § 9, cl. 3.

201. See, e.g., *Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment*, Dec. 10, 1984, 1465 U.N.T.S. 85, available at http://www.unhchr.ch/html/menu3/b/h_cat39.htm (last visited Feb. 20, 2002).

Consequently, rape may have been implicitly a war crime/crime against humanity under these definitions, and therefore, the defendants in *Kunarac* were committing a crime recognized as such at the time. Furthermore, even though there was no explicit definition of rape within international law and even though rape was rarely prosecuted as a war crime, it was nonetheless recognized as a crime under the Geneva Conventions.²⁰² Therefore, the acts of Kunarac and the others clearly constituted a crime even if that crime was not well defined at the time it occurred.

Second, it may be argued that any standard permitting rape during war had already been abandoned by the same reasoning that also prohibited torture and enslavement.²⁰³ From this perspective, such an argument is not dissimilar from that offered by the United States Supreme Court in *Rogers v. Tennessee*,²⁰⁴ in which the Court upheld the conviction of a man for murder even though his actions did not constitute that crime under the law at the time when they occurred. In the words of Justice O'Connor, the Court was merely bringing "the law into conformity with reason and common sense."²⁰⁵ A similar logic could be applied to the situation surrounding *Kunarac* where the ICTY brought international law regarding war crimes and crimes against humanity into conformity with reason and common sense, especially in light of other similar crimes already prohibited.

D. Kunarac Reifies Women as a Weaker Sex in Need of Special Protections

Finally, this decision may reify old stereotypes of women as a weaker sex in need of special protection under international law. Indeed, the Geneva Conventions on which the ICTY relied for part of its decision only mentions women in connection with rape.²⁰⁶ Moreover, the ICTY's "case law stipulates that witnesses who have suffered traumatic experiences are not necessarily considered unreliable, and its statute requires no corroboration of testimony from rape victims."²⁰⁷ Consequently, it reiterates women's role as a helpless victim by implicitly taking her word

202. Convention on Protection of Civilians, *supra* note 149, art. 3, 6 U.S.T. 3516, 75 U.N.T.S. 287.

203. *See infra* notes 199-200 and accompanying text.

204. 532 U.S. 451 (2001).

205. *Id.*

206. Convention on Protection of Civilians, *supra* note 149.

207. CBS News, *Rape Now a War Crime*, available at <http://www.cbsnews.com/stories/2001/02/22/world/main273808.shtml> (last visited Sept. 26, 2002).

without corroboration,²⁰⁸ although so far no conviction has occurred without corroborating evidence.

This argument fails to consider the true nature of the *Kunarac* decision in two respects. First, this decision applies equally to men and women meaning that both genders may require its protections.²⁰⁹ Second, men are already accorded protections during time of war, both as soldiers and civilians.²¹⁰ Indeed, the “exclusion of the corroboration requirement ‘confirms the formal international standards of equality between the sexes.’”²¹¹ This decision simply brings women into an equal position as men, vis-à-vis their status as innocent civilians.²¹² In short, far from reinforcing old stereotypes about women and their weakness and vulnerability during war, this decision actually makes them more fully members of the international community and subject to the same protections as men.²¹³

V. JUSTIFICATIONS OF *KUNARAC* AND ITS SIGNIFICANCE FOR INTERNATIONAL LAW

The criticisms cited above suggest that the *Kunarac* decision has both moral and political implications in addition to its legal importance.²¹⁴ Indeed, the arguments used to refute the criticism of *Kunarac* may be flipped to provide a strong justification both for the decision itself and also for the jurisprudential method by which it was obtained. *Kunarac* is justified legally, as a logical extension of international law regarding war crimes and crimes against humanity. It is justified morally because it explicitly criminalizes a thoroughly immoral act. It is also justified from a

208. See Rule 96 of the Rules of Procedure and Evidence, U.N. SCOR, 23d Plenary Sess. of the International Criminal Tribunal for Yugoslavia, U.N. Doc. IT/32/REV:18 (1994), available at http://www.un.org/icty/basic/rpe/IT32_rev18con.htm (last visited Feb. 19, 2002).

209. Prosecutor v. Kunarac, No. IT-96-23-T & IT-96-23/1-T (Int'l Crim. Trib. for the Former Yugoslavia 2001), at <http://www.un.org/icty/foca/trialc2/judgement/kuntj010222e.pdf>.

210. *Id.*; see also Sanja Kutnjak Ivkovic, *Justice by the International Criminal Tribunal for the Former Yugoslavia*, 37 STAN. J. INT'L L. 255, 288 (2001) (noting how the ICTY has addressed perceived international legal gender disparities).

211. Ivkovic, *supra* note 210, at 287 (quoting Fionnuala Ni Aolain, *Radical Rules: The Effects of Evidential and Procedural Rules on the Regulation of Sexual Violence in War*, 60 ALB. L. REV. 883, 901 (1997)).

212. Prosecutor v. Kunarac, No. IT-96-23-T & IT-96-23/1-T (Int'l Crim. Trib. for the Former Yugoslavia 2001), at <http://www.un.org/icty/foca/trialc2/judgement/kuntj010222e.pdf>.

213. *But see* Waller, *supra* note 30.

214. *See infra* Parts V.A.2.-3.

humanistic perspective because it further establishes standards of human behavior that should govern even when there is disagreement within the larger international community. Indeed, at its core, the *Kunarac* decision is about protecting humanity from further atrocities, and therein may lay its true importance over time.

A. *Justifications*

The justification for *Kunarac* rests on three principal foundations: law, morality, and respect for humanity. All three of these principals are interrelated, yet they each identify an element of the decision that is necessary to understand its full force.

1. Legal

Prior to *Kunarac*, torture and enslavement — both of which may encompass rape — were already considered both war crimes and crimes against humanity; indeed, prohibitions on these acts had generally acquired the status of *jus cogens* norms.²¹⁵ Thus, the fact that “rape often functions in ways similar to other human rights abuses makes all the more striking the fact that, until recently, it has not been condemned like any other abuse.”²¹⁶ Moreover, rape was considered a criminal act under international law even if it was rarely prosecuted.²¹⁷ Additionally, the prosecution of rape as both a war crime and as a crime against humanity was expressly contemplated by the ICTY’s enabling statute.²¹⁸ Consequently, the decision in *Kunarac* represents the culmination of a series of legal trends — dating back to at least the Geneva Convention Relative to the Protection of Civilian Persons in Time of War — all pointing toward the conclusion that official, systematic rape during war is unequivocally a war crime and a crime against humanity.²¹⁹ Indeed, Human Rights Watch had already asserted even before *Kunarac* that “[r]ape is explicitly prohibited under international humanitarian law governing both

215. Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT’L L. 554, 568-71 (1995).

216. Human Rights Watch, *International Protections*, available at <http://www.hrw.org/about/projects/womrep/General-24.htm> (last visited Sept. 5, 2002).

217. See, e.g., Patricia Viseur Sellers & Kaoru Okuizumi, *Intentional Prosecution of Sexual Assaults*, 7 TRANSNAT’L L. & CONTEMP. PROBS. 45, 46-47 (1997); see also Theodor Meron, *Rape as a Crime under International Humanitarian Law*, 87 AM. J. INT’L L. 424, 425 (1993) (noting that individual soldiers have also been convicted in domestic courts for rape).

218. Statute of the International Tribunal, *supra* note 41.

219. McCormack, *supra* note 25, *passim*.

international and internal conflicts.”²²⁰ Thus, after *Kunarac*, there can be no more confusion or uncertainty regarding whether rape is to be tolerated as an act of war. The decision is clear and compelling, and its legal justification is without doubt.

2. Moral

No society anywhere condones the physical, nonconsensual sexual violation of another human being.²²¹ Unlike other crimes which may be morally defensible (e.g. murder in self-defense; murder as euthanasia; theft of truly necessary goods), rape is never justifiable.²²² Criminalizing rape in the international community recognizes this point and seeks to raise the moral dignity of all members of that community.²²³ Moreover, it acknowledges that “[r]ape is a moral issue between men and women, not just between one ‘moral monster’ and his victim.”²²⁴ Furthermore, *Kunarac* reminds us that “[r]ape cannot be properly understood in moral terms without seeing it as a matter of collective responsibility, not just an issue of personal responsibility.”²²⁵ Thus, *Kunarac* does not neglect a moral dimension to its legal considerations, in part because its legal foundation (i.e. the Geneva Conventions) was itself partially based on moral concerns.²²⁶

3. Humane

The decision provides guidance for standards for living as humans in an increasingly diverse world.²²⁷ It reinforces prohibitions on physical violation, racism/ethnic hatred, and sexism, all of which guide interpersonal interaction within the larger community of humans.²²⁸ Moreover, *Kunarac* reminds us of the human obligations of tolerance of

220. Human Rights Watch, *supra* note 216.

221. See Meron, *supra* note 215, at 568.

222. See *Rape: It's Not Your Fault, Some Misconceptions and Facts About Rape*, SURVIVE REPORT, available at <http://survive.org.uk/index1.html#miscon> (last visited Sept. 05, 2002).

223. See generally Meron, *supra* note 215 (noting the “great humanitarian importance” of criminalizing such behavior).

224. Larry May, *Rape and Collective Responsibility* (Aug. 1997), available at <http://news-info.wustl.edu/opeds/opeds97/MayAug97.html>.

225. *Id.*

226. See, e.g., Jane Lampman, *Morality and War*, CHRISTIAN SCIENCE MONITOR, Oct. 11, 2001, available at <http://www.csmonitor.com/2001/1011/p14s1-lire.html>.

227. Prosecutor v. Kunarac, No. IT-96-23-T & IT-96-23/1-T (Int'l Crim. Trib. for the Former Yugoslavia 2001), at <http://www.un.org/icty/foca/trialc2/judgement/kuntj010222e.pdf>.

228. See, e.g., Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000).

those that are different and of the need to recognize similarity as part of the human community.²²⁹ Acknowledging this sense of humanity is the first step toward effectuating a change in international behavior that may one day culminate in the practical abolition of diseased acts like the ones which occurred at Foca.²³⁰ Indeed, it is “[o]nly then can we begin to see a change in the way the international community, comprised of states themselves, responds to acts of aggression that violate not only human rights laws, but our own sense of morality and decency.”²³¹

B. Significance

Much was written about the trajectory of the ICTY leading up to the *Kunarac* decision.²³² However, the academic community has been much quieter than the popular press since the decision was issued in February 2001.²³³ Part of this academic reticence may stem from caution in order to avoid prematurely trying to assert *Kunarac*'s significance. Indeed, its true significance may not be known for many years, even though the media has already hailed it as a landmark decision.²³⁴ With more than a year passed for perspective, the influence of *Kunarac* seems most likely to be strongest across four separate areas that touch international law.

1. Use by Other Tribunals

The most immediate impact of *Kunarac* may be its reference by other international tribunals faced with adjudicating claims of rape as either a war crime or a crime against humanity.²³⁵ The enabling statute of the

229. *Id.*

230. Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, 93 AM. J. INT'L L. 316 (1999).

231. Waller, *supra* note 30, at 658.

232. *See, e.g.*, Darren Anne Nebesar, *Gender-Based Violence as a Weapon of War*, 4 U.C. DAVIS J. INT'L L. & POL'Y 147 (1998); Amy E. Ray, *The Shame of It: Gender-Based Terrorism in the Former Yugoslavia and the Failure of International Human Rights Law to Comprehend the Injuries*, 46 AM. U. L. REV. 793 (1997); Sharon A. Healey, *Prosecuting Rape Under the Statute of the War Crimes Tribunal for the Former Yugoslavia*, 21 BROOK. J. INT'L L. 327, 350 (1995); Catharine A. MacKinnon, *Crimes of War, Crimes of Peace*, 4 UCLA WOMEN'S L.J. 59 (1993).

233. As of March 2002, only one major piece has been published, focusing primarily on *Kunarac* and its treatment of war crimes. *See generally* Maravilla, *supra* note 165 (discussing the implications of *Kunarac* for war crimes jurisprudence).

234. *See, e.g.*, Barnaby Mason, *Rape: A Crime Against Humanity*, BBC NEWS, Feb. 22, 2001, available at http://news.bbc.co.uk/1/hi/english/world/europe/newsid_1184000/1184763.stm (hauling the decision as a “crucial precedent”).

235. *See supra* notes 231-233 and accompanying text.

ICTY, and the Treaty of Rome creating the International Criminal Court, both explicitly consider the international criminal prosecution of rape.²³⁶ However, *Kunarac* provides some additional, possible interpretations of those provisions by providing a definition of rape for use in international law.²³⁷ Moreover rape — and ethnic cleansing in general — has tragically become a widespread policy for warfare in much of the developing world.²³⁸ Consequently, future prosecutions of mass rapes in these areas will rely on the standard established in *Kunarac*.

Admittedly, *Kunarac* does little about a persistent problem in international law: enforcement.²³⁹ Indeed, perhaps one reason why *Kunarac* was so long in coming was that rape during war was rarely prosecuted and judgments could not be enforced.²⁴⁰ This experience stands in stark contrast to the prosecution of other similarly heinous crimes.²⁴¹ Indeed, this “differential treatment of rape makes clear that the problem—for the most part—lies not in the absence of adequate legal prohibitions but in the international community’s willingness to tolerate sexual abuse against women.”²⁴² Therefore, although *Kunarac* may provide a standard for other prosecutions, it may not necessarily act as a forceful deterrent to future mass rapes; nonetheless, its significance for providing a useful international legal standard regarding a heinous crime cannot be overstated.

236. Kristen Boon, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy and Consent*, 32 COLUM. HUM. RTS. L. REV. 625 (2001). *But see* Jelena Pejic, *Panel II: Adjudicating Violence: Problems Confronting International Law and Policy on War Crimes and Crimes Against Humanity: The Tribunal and the ICC: Do Precedents Matter?* 60 ALB. L. REV. 841 (1997) (arguing that the ICTY provides little if any precedential value for the ICC).

237. *See generally* Prosecutor v. Kunarac, No. IT-96-23-T & IT-96-23/1-T, paras. 596-598 (Int’l Crim. Trib. for the Former Yugoslavia 2001), at <http://www.un.org/icty/foca/trialc2/judgement/kuntj010222c.pdf>.

238. *See, e.g., Sierra Leone: Getting Away with Murder, Mutilation, Rape*, 11 HUM. RTS. WATCH REP., 3(A) (1999), available at http://www.hrw.org/reports/1999/sierra/SIERLE99-03.htm#P787_134882.

239. *See* Lucas W. Andrews, Comment, *Sailing Around the Flat Earth: The International Tribunal for the Former Yugoslavia as a Failure of Jurisprudential Theory*, 11 EMORY INT’L L. REV. 471, 510-13 (1997).

240. Human Rights Watch, *supra* note 216.

241. *Id.*

242. *Id.*

2. Definition of Rape Under International Law

The Trial Chamber also adopted a definition of rape, first contemplated in *Prosecutor v. Furundzija* before the ICTY and in *Prosecutor v. Akayesu* before the International Criminal Tribunal for Rwanda (ICTR), into customary international law.²⁴³ This usage of the term was based upon definitions found in the common law of some of the world's major legal systems including Sweden, Canada, Germany, and the United Kingdom.²⁴⁴ Rape is not an international crime *per se*, only if it occurs in the context of war or a systematic campaign.²⁴⁵ Consequently, there is no established international definition, but the ICTY provided one which may now be used in all subsequent cases. In its judgment, the ICTY presented its definition of rape which emphasized a context of aggression and coercion:

The Chamber must define rape, as there is no commonly accepted definition of this term in international law. While rape has been defined in certain national jurisdictions as non-consensual intercourse, variations on the act of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual. The Chamber considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. . . . The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances, which are coercive. Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.²⁴⁶

This definition allows for the "reformation of the standards of rape prosecution [which] may also 'assist in the creation of generally accepted international standards on the adjudication of sexual offenses.'"²⁴⁷

243. See *Prosecutor v. Furundzija*, No. IT-95-17/1-T (Int'l Crim. Trib. for the Former Yugoslavia 1998); The American Society of International Law, *International Law in Brief*, available at <http://www.asil.org/ilib/ilib0115.htm#01> (Dec. 21-25, 1998); *Prosecutor v. Akayesu*, No. N ICTR-96-4-T (Int'l Crim. Trib. for the Former Yugoslavia 1998), available at <http://www.ictr.org> (last visited Sept. 27, 2002).

244. *Prosecutor v. Kunarac*, No. IT-96-23-T & IT-96-23/1-T, para. 439 (Int'l Crim. Trib. for the Former Yugoslavia 2001), at <http://www.un.org/icty/foca/trialc2/judgement/kuntj010222e.pdf>.

245. See *id.*

246. See generally *id.* paras. 596-98.

247. Ivkovic, *supra* note 210, at 287.

3. Further Equalizes the Two Genders Before International Law

As suggested previously, the *Kunarac* decision goes a long way toward equalizing the status of men and women under individual law.²⁴⁸ It affords women almost identical protections as men and takes almost all violations of the individual to be unacceptable in times of war. It does not single out women as a weaker class of victims in need of special protection, but rather it brings women more fully into the larger class of human beings who all require protection.²⁴⁹

4. Perhaps Establishes an Inviolable *Jus Cogens* Principle Against Rape

Jus cogens norms in international law are difficult to identify, and because of their absolute, “strict liability” character, there is no general consensus on which norms should qualify.²⁵⁰ Prohibitions against piracy, slavery, and genocide are among the ones most commonly asserted as *jus cogens* norms, and over time a prohibition on rape may also be included. To be sure, the *Kunarac* decision does not explicitly place rape into this category, but it presents an extremely strong argument regarding why a prohibition on rape should be such a norm. Indeed, it leaves little room for the argument why prohibiting rape should not be treated as a *jus cogens* principle, and it forces one to make an inhumane, almost barbaric argument regarding why rape should not be expressly prohibited in all situations.

VI. CONCLUSION

The results of this note’s analyses show that the expansion in *Kunarac* of the definition of a “crime against humanity” is logical, moral, and humane. Contrary to the arguments of some, classifying rape/enslavement as a crime against humanity does not violate international laws/norms of sovereignty, nor does it reinforce archaic stereotypes of women as a weaker sex in need of rescue. Rather, it leads to an opposite conclusion,

248. See *supra* Part IV.D.

249. See, e.g., Kelly D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 AM. J. INT’L L. 97 (1999); Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT’L L. 379 (1999). But see Waller, *supra* note 30.

250. See *Prinz v. Federal Republic of Germany*, 26 F.3d 1166, 1173 (D.C. Cir. 1994) (defining a *jus cogens* norm as “a principle of international law that is ‘accepted by the international community of States as a whole as a norm from which no derogation is permitted’” (quoting *Comm. of U.S. Citizens in Nicar. v. Reagan*, 859 F.2d 929, 940 (D.D.C. 1988))).

namely that women now possess truly equal standing with men in the human community in terms of legal protections from personal violation. Moreover, the *Kunarac* decision closes gaps in existing international law, establishes a useful foundation for future prosecutions of crimes against humanity, and creates an important bulwark for civilians against ethnic, gender and other “difference-motivated” crimes committed by a state or a state-sponsored group. In fact, this decision may even change how war is conducted in the future, and it will almost certainly impact the International Criminal Court’s view of crimes against humanity once that body formally comes into being.²⁵¹ Therefore, the *Kunarac* decision is warranted legally (because it bridges gaps in existing law), morally (because it explicitly criminalizes the most immoral physical violation imaginable), and humanely (because it establishes standards for the entire human community by which to judge and prosecute crimes against the community regardless of where they transpire).

251. See, e.g., Rome Statute of the International Criminal Court, July 1, 2002, at <http://www.un.org/law/icc/>.