

## PROSECUTING PEACEKEEPERS IN THE ICC FOR HUMAN TRAFFICKING

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### *I. Introduction*

The 1990s saw a dramatic increase in the number of peacekeeping operations throughout the world. Unfortunately, there has also been a corresponding increase in the number of crimes committed by peacekeeping personnel. For the most part, these crimes have been kept quiet, however, in recent years they have become more public. In particular, the prevalence of crimes against women, such as trafficking, forced prostitution, rape, and sexual slavery, have become known.

Traditionally, women are a particularly vulnerable group in situations such as armed conflict and the breakdown of societal structures. The crimes listed above target women specifically because of their gender. Such gender-specific crimes are not normally committed against men; the lack of recognition of their severity and regularity is a direct reflection of the inequitable position of women throughout history.<sup>1</sup>

Gender-specific crimes do not necessarily have to contain a sexual element, but the violence specifically targeted towards women is often of a sexual nature. This type of violence includes rape, forced pregnancy, forced sterilization, sexual slavery, and general

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<sup>1</sup> Women's Initiatives for Gender Justice Operating in the Hague, <http://www.ytech.nl/iccwomen/wigjdraft1/Archives/oldWCGJ/resources/gender.htm> (last visited Mar. 25, 2006). This website defines the term "gender," and addresses gender-related issues. It is hosted by a global women's initiative group that works to ensure justice for women and an independent and effective International Criminal Court.

sexual violence, which is an invasion of fundamental intimacies, both physical and psychological.<sup>2</sup> In other words, such acts are not only physically harmful, but mentally and emotionally degrading. Other crimes, such as trafficking, are not, by definition, crimes of sexual violence; however, the majority of women who are trafficked are forced into sexual slavery or prostitution.

The commission of these types of crimes by peacekeepers is shameful, and this is exacerbated by the fact that peacekeepers are expected to protect civilians, particularly those most vulnerable. The role of peacekeepers is “to help implement comprehensive peace agreements between protagonists in intra-State conflicts.”<sup>3</sup> Peacekeeping missions now run both prior and subsequent to cease-fire agreements, and have taken on a much greater role in reconstructing war-torn societies. “Each peacekeeping operation has a specific set of mandated tasks, but all share certain common aims - to alleviate human suffering, and create conditions and build institutions for self-sustaining peace.”<sup>4</sup> The U.N. has stated that

peacekeeping is a way to help countries torn by conflict create conditions for sustainable peace. UN peacekeepers—soldiers and military officers, civilian police officers and civilian personnel from many countries—monitor and observe peace processes that emerge in post-conflict situations and assist ex-combatants to implement the peace agreements they have signed. Such assistance comes in many forms, including confidence-building measures, power-sharing arrangements, electoral support, strengthening

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<sup>2</sup> Rome Statute of the International Criminal Court, art. 7(1)(g), July 17, 1998, U.N. Doc. A/CONF.183/9, 37 I.L.M. 999 (2002) [hereinafter Rome Statute].

<sup>3</sup> U.N. Department of Peacekeeping Frequently Asked Questions, <http://www.un.org/Depts/dpko/dpko/faq/q2.htm> (last visited Mar. 20, 2006) [hereinafter U.N. Peacekeeping].

<sup>4</sup> U.N. Department of Peacekeeping Operations Mission Statement, <http://www.un.org/Depts/dpko/dpko/info/page3.htm> (last visited Mar. 20, 2006).

the rule of law, and economic and social development.<sup>5</sup>

When peacekeepers take advantage of the women they are charged with supporting and protecting, they violate every common aim they are supposed to stand for. Unfortunately, the peacekeepers who commit these crimes have escaped with impunity, returning to their home countries unpunished. This is a result of the failure of domestic legal systems to prosecute, in the country where the crime occurred as well as in their home country. This lack of accountability in the domestic arena has led to suggestions that peacekeepers be prosecuted for these crimes in the International Criminal Court ("ICC"), as the crimes enumerated in the Rome Statute that governs the ICC represent a breakthrough in the codification of crimes against humanity, war crimes, and genocide – despite the problem that immunities that may attach to peacekeepers from non-member states of the Rome Statute may stand in the way of jurisdiction over these peacekeepers.<sup>6</sup> In any event, the concept of the ICC itself is also a breakthrough. The idea of an international court existing for the purpose of catching criminals that fall through the cracks of national jurisdictions is an exciting concept.<sup>7</sup> Unfortunately, while the

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<sup>5</sup> U.N. Peacekeeping, *supra* note 3, <http://www.un.org/Depts/dpko/dpko/faq/q1.htm> (last visited Mar. 20, 2006).

<sup>6</sup> *See, e.g.*, Limiting the Jurisdiction of the International Criminal Court, S.C. Res. 1422, ¶¶ 1-2, U.N. SCOR, 4572d mtg., U.N. Doc. S/RES/1422 (July 12, 2002). It states in relevant part:

- 1) [I]f a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise;
- 2) [The Security Council] [e]xpresses the intention to renew the request in paragraph 1 under the same conditions each 1 July for further 12-month periods for as long as may be necessary.

*Id.*

<sup>7</sup> The International Criminal Court is the first permanently established treaty-based criminal court. It is governed by the provisions of the Rome Statute. For

suggestion of prosecuting peacekeepers appears relatively simple, the situation is not as straightforward as it seems. The issues relating to immunities and jurisdiction remain unresolved. In fact, it has not yet been considered whether crimes committed by peacekeepers would actually fall within the legal definitions of the crimes enumerated in the Rome Statute.<sup>8</sup>

This article hopes to examine the issue of whether a crime committed by a peacekeeper satisfies the elements required under Article 5 of the Rome Statute for valid subject-matter jurisdiction, which would lead to the possibility of prosecuting peacekeepers in the ICC,<sup>9</sup> pending satisfaction of the requirements of Article 12 of the Rome Statute.<sup>10</sup> Would the crimes of trafficking, enforced prostitution, sexual slavery, or rape fall within the definitions of crimes against humanity or war crimes? To determine these issues, the elements of the individual crimes enumerated in the Rome Statute must first be analyzed.

## *II. Crimes against Humanity*

Crimes against humanity are listed in Article 7 of the Rome Statute. Article 7(1)(c) prohibits enslavement and Article 7(1)(d) prohibits deportation of populations or the forcible transfer of populations. Article 7(1)(g) expressly defines the crimes of rape, sexual slavery, enforced prostitution, and includes a catch-all phrase of any other form of sexual brutality of similar magnitude. Article 7(1)(k) offers a broader prohibition that includes any other types of inhumane acts of a similar quality that intentionally causes immense suf-

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more information, please visit <http://www.icc-cpi.int/about.html> (last visited Mar. 20, 2006).

<sup>8</sup> See generally, Rome Statute, *supra* note .

<sup>9</sup> See *id.* art. 5(1). The subject-matter jurisdiction of the ICC is limited to “the most serious crimes of concern to the international community . . .” *Id.* This includes genocide, crimes against humanity, war crimes, and the crime of aggression.

<sup>10</sup> *Id.* art. 12. This article states in relevant part: “[a] State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.” *Id.* art. 12(1). The ICC can exercise its jurisdiction if the crime was committed on the territory of one of the States Parties or if the person accused of the crime is a national of a State Party. *Id.* art. 12(2).

fering, or severe bodily injury, as well as injury to mental or physical health.

If a crime committed by a peacekeeper is determined to fall within the jurisdiction of the ICC as a crime against humanity, it is not necessary to take into account which local laws or immunities are applicable to the peacekeeper. If the offender falls within the jurisdiction of the ICC, under Article 12, the applicability of humanitarian law is irrelevant, as crimes against humanity under the ICC has no necessary nexus with armed conflict. One must look to see if the act satisfies the individual definition of the crime itself, and if it may be considered a crime against humanity under Article 7.

#### *A. Trafficking as a Form of Enslavement*

The first prosecutorial option for trafficking in persons is Article 7(1)(c) of the Rome Statute, which specifically recognizes the crime of enslavement. Its definition under Article 7(2)(c) of the Rome Statute states that “enslavement means [exercising the power of] ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women . . . .”<sup>11</sup> The Nuremberg Charter, the Tokyo Charter and the Statutes of the ad hoc Tribunal designated enslavement as a crime against humanity without defining the term.<sup>12</sup> In regards to slavery, the definition in the Rome Statute reflects language from the 1926 Slavery Convention but in terms of trafficking reflects the one time that the International Criminal Tribunal for the former Yugoslavia (“ICTY”) dealt with charges of enslavement as a crime against humanity, which were solely related to the poor treatment and forced labour of women and children.<sup>13</sup> The ICTY Trial Chamber looked at many sources to determine the definition of enslavement and found, as the language appears identically in the Rome Statute, that enslavement was a crime in customary international law and consisted of the exercise of

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<sup>11</sup> Rome Statute, *supra* note 2, art. 7(1)(c) & (2)(c). Trafficking in persons is included in the definition of the crime of enslavement.

<sup>12</sup> MACHTELD BOOT, GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES 500 (School of Human Rights Research Series, Vol. 12, 2002).

<sup>13</sup> *Id.* at 501.

any or all of the powers attaching to the right of ownership over a person.<sup>14</sup>

Exercising any or all of the powers attaching to the right of ownership over a person includes the exercise of such power in the course of trafficking in persons, particularly in women and children.<sup>15</sup> However, the language to protect against trafficking of women and children is largely independent of the movement to abolish slavery but reflects the numerous conventions that address trafficking in persons.<sup>16</sup> The elements of the crime of enslavement contain several examples that equate with trafficking, such as purchasing, selling, lending, and bartering a person or persons or imposing on them a similar deprivation of liberty.<sup>17</sup> Additionally, trafficking is mentioned in the footnote to the first element of the crime of sexual slavery.<sup>18</sup> Aside from coming under enslavement, trafficking could possibly be prosecuted as coming under the applicable headings of “forcible transfer of population,” “sexual slavery,” or “inhumane acts . . . intentionally causing great suffering.”<sup>19</sup>

Trafficking is recognized as an international crime under several international treaties, including the 1922 International Convention for the Suppression of the Traffic in Women and Children,<sup>20</sup> the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others;<sup>21</sup> and the Protocol to

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 502.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 503.

<sup>18</sup> International Criminal Court, Elements of Crimes, U.N. Doc. PCNICC/1999/L.5/Rev.1/Add.2, (Nov. 2, 1999) [hereinafter Elements of Crimes]. Article 7(1)(g)-2 n.18. The elements of the crime against humanity of sexual slavery states: “[i]t is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.” *Id.*

<sup>19</sup> Rome Statute, *supra* note 2, arts. 7 (1)(d), 7(1)(g), 7(1)(k).

<sup>20</sup> *See generally* International Convention for the Suppression of the Traffic in Women and Children, Sept. 30, 1921, 9 L.N.T.S. 415 (*entered into force* June 15, 1922).

<sup>21</sup> *See generally* Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, art. 1, Dec. 2, 1949, 96 U.N.T.S. 271 (*entered into force* July 25, 1951) [hereinafter Exploitation of Prostitution Conven-

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Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, (also known as the Palermo Protocol).<sup>22</sup> Trafficking in persons is defined in Article 3(a) of the Palermo Protocol as:

The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purposes of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. . . .<sup>23</sup>

As the criminal elements of trafficking are inherently linked to slavery, charges involving slavery are an obvious choice during the prosecution of traffickers under the Rome Statute. Unfortunately, taking this stance detracts from the severity of the crime of trafficking itself. However, a viable option could also be the enslavement provision in Article 7(2)(c) of the Rome Statute, whereby prosecutors could charge the offenders with trafficking.

Quite a number of the peacekeepers mentioned in this article have engaged in trafficking, as defined in the Palermo Protocol. In 2003, a Russian KFOR contingent was found to have been involved in the trafficking of women from Moldova and Ukraine into Kosovo. They disguised the women for the purposes of transporting them into

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tion]. This only prohibits prostitution and pimping/brothel running, but does not prohibit being a client. This Convention only has 74 States Parties.

<sup>22</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, G.A. Res. 55/25, at 60, U.N. GAOR, 55th Sess., Supp. No. 49, Annex II, U.N. Doc. A/RES/55/383 (*entered into force* Dec. 25, 2003) [hereinafter Palermo Protocol].

<sup>23</sup> *Id.* art. 3(a).

Kosovo for the deliberate provision of sexual services.<sup>24</sup> It can also be argued, that the peacekeepers who purchased women during the commission of the offences, of rape, sexual slavery, and enforced prostitution, also engaged in trafficking.

The applicable provision regarding these individuals would involve the “harbouring or receipt of persons by means of . . . the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purposes of exploitation.” In these cases, the “exploitation” would be the sexual slavery. This rationale is based upon the fact that the victims are purchasable as sexual slaves because they have been illegally trafficked. Therefore, the link to sexual slavery is self-evident, showing trafficking as an inherent element of sexual slavery, which would invoke Article 7(1)(g) of the Rome Statute as a means for prosecuting such trafficking in the ICC.<sup>25</sup>

Admittedly, it is difficult to envisage how the Court could justify applying the crime of sexual slavery to traffickers who play a more intermediate role in the overall process. It is not necessarily certain, for example, that the first person to transport a trafficking victim can be said to cause that person to engage in one or more acts of a sexual nature. The mere act of transportation may not satisfy this element, depending on how well the chain of causation is demonstrated. Nor may the element of ownership be necessarily demonstrated. In fact, some girls go willingly with the initial transporter(s), because they are promised jobs in more affluent countries. This is an attractive proposition that many victims are willing to accept. Therefore, the initial contact and/or transporter(s) are engaging in trafficking, but not necessarily sexual slavery, because the element of ownership is not yet satisfied.

Another prosecutorial option involves charges of deportation or forcible transfer of population(s). The elements of Article 7(1)(d), pertaining to crimes against humanity consisting of deportation or forcible transfer are as follows:

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<sup>24</sup> For details, see *Protecting the Rights of Women*, *infra* note 29.

<sup>25</sup> Rome Statute, *supra* note 2, art. 7(1)(g).

1. The perpetrator deported or forcibly transferred,<sup>26</sup> without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.
2. Such person or persons were lawfully present in the area from which they were so deported or transferred.
3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.<sup>27</sup>

The activities of the Russian KFOR soldiers would certainly fit under this definition. In that case, the women were brought into Kosovo from Moldova and Ukraine, where they were previously lawfully present. It could certainly not be argued that the soldiers were unaware of the lawfulness of the women's presence in Moldova and Ukraine.

Situations involving peacekeepers purchasing women from brothels are not as clearly defined. The presence of the women in the brothels is inherently unlawful, and therefore, the second element of Article 7(1)(d) involving lawful presence, is not satisfied. The second and third elements of the crime of forcible transfer of population appear to limit the Article's application with regard to the crime of trafficking. Often women are bought and sold at many different points on their journey to their final destination. This would mean only the act of taking women from their home territory would necessarily fall within the prohibited activities of Article 7(1)(d). On each subsequent leg of the journey, the women are no longer lawfully present in the area, and thus the second element of Article 7(1)(d) is not satisfied and is inapplicable.

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<sup>26</sup> Prosecutor v Krstic, Case No. IT-98-33-T, Judgment, ¶ 521 (Aug. 2, 2001), <http://www.un.org/icty/cases-e/index-e.htm> (last visited Feb. 28, 2006). "Deported or forcibly transferred" is interchangeable with "forcibly displaced." The ICTY stated that "both deportation and forcible transfer relate to involuntary and unlawful evacuation of individuals from the territory in which they reside. Yet, the two are not synonymous in customary international law. Deportation presumes transfer beyond State border, whereas forcible transfer relates to displacement within a State." *Id.* ¶ 521.

<sup>27</sup> Elements of Crimes, *supra* note 18, art. 7(1)(d).

The final prosecutorial option for charging trafficking as a crime against humanity is Article 7(1)(k), involving crimes against humanity of other inhumane acts. The elements of this provision are as follows:

1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute.
3. The perpetrator was aware of the factual circumstances that established the character of the act.<sup>28</sup>

Trafficking undoubtedly inflicts great suffering upon its victims, as well as serious injury to physical and mental health. The victims, through acts of violence or the threat of violence, are taken away from their families and kept in unhealthy conditions.<sup>29</sup> They are forced to provide sexual services without their consent, an act which is humiliating, harmful, and often life-threatening.<sup>30</sup> Even without taking the criminal affects of sexual slavery and enforced prostitution into account, the actual trafficking experience inflicts severe suffering and injury, as victims are often raped during the journey.

Trafficking victims are bought and sold many times over, kept in unsuitable conditions, subject to invasive inspections by potential buyers, and frequently beaten and abused. In addition, the mere concept of trafficking is *per se* inhumane. In most cases, these trafficking rings consist of sophisticated networks run by organized

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<sup>28</sup> *Id.* art. 7(1)(k)(1)-(3).

<sup>29</sup> Amnesty Int'l, *Kosovo (Serbia & Montenegro): 'So Does It Mean We Have The Rights?' Protecting The Rights of Women and Girls Trafficked for Forced Prostitution in Kosovo*, AI Index: EUR 70/010/2004, May 6, 2004 [hereinafter *Protecting the Rights of Women*]. Often the women are only provided with flimsy dresses, even in freezing conditions. They may only get 4-5 hours sleep before they are forced to clean the brothels and then begin work again. Often the food supplied to the women is insufficient to provide adequate nourishment. These are the facts and reality of enforced prostitution and sexual slavery of women that occurs in every territory.

<sup>30</sup> *Id.* Many of these women are forced to have sex without condoms as the brothel owners get paid more for it.

crime groups.<sup>31</sup> It is highly unlikely that anyone involved in such operations is unaware of the factual circumstances establishing the criminal character of these activities, as each accomplice profits from the sale or transfer of these women. Therefore, all the elements for Article 7(1)(k) are satisfied, and such acts of trafficking may be prosecuted in the ICC under the auspices of this statutory provision.

### *B. Enforced Prostitution*

The crimes of enforced prostitution, sexual slavery, and rape are expressly prohibited under Article 7 of the Rome Statute, and their definitions can be found in the paper titled *Elements of Crimes*, prepared by the Preparatory Commission (“Prep Com”).<sup>32</sup> The elements of Article 7 (1)(g)-3, crimes against humanity consisting of enforced prostitution, are as follows:

1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent.
2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.<sup>33</sup>

An example that would fall directly under the definition of enforced prostitution, is difficult to find. However, in one case, a Russian KFOR contingent was found to have involvement in both the actual trafficking of and the use of women, for sexual purposes.<sup>34</sup> In 2003,

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<sup>31</sup> See, e.g., UNICEF, *Trafficking in Human Beings in South-Eastern Europe* (prepared by Jane Gronow), available at [http://www.unicef.org/evaldatabase/CEE\\_CIS\\_2000\\_Trafficking.pdf](http://www.unicef.org/evaldatabase/CEE_CIS_2000_Trafficking.pdf) (Aug. 15, 2000) [hereinafter *Trafficking in South-Eastern Europe*].

<sup>32</sup> See *Elements of Crimes*, *supra* note 18.

<sup>33</sup> *Elements of Crimes*, *supra* note 18, art. 7(1)(g)-3(1)-(2).

<sup>34</sup> See *Protecting the Rights of Women*, *supra* note 29.

there were allegations of Russian soldiers trafficking women for sex work, with links to a Russian base in Kosovo Polje.<sup>35</sup> Furthermore, it was found that the Russian troops were using trafficked women for their own sexual purposes, as well as providing these women for sex with other officers.<sup>36</sup> The Russian troops returned home in 2003, and there is no evidence that any disciplinary action was taken against them in relation to the trafficking.<sup>37</sup> Under applicable law, there is a possibility the activities of the Russian KFOR soldiers may qualify as enforced prostitution, but evidence would be required to show the offenders obtained pecuniary or other advantages from other soldiers that used the women for sexual services.<sup>38</sup>

It may be possible to find peacekeeping personnel guilty of enforced prostitution through indirect channels. Instead of stopping the prostitution as part of their duties, the peacekeepers are, in fact, encouraging it through their roles as clients. This possibility would only be applicable in limited circumstances, as the act of being a client does not fall within the definition of prohibited activities. According to the statutory definition, prohibitive acts would occur only if the peacekeepers obtained or expected to obtain pecuniary or other advantages from the operations.<sup>39</sup> While using the services of a prostitute violates U.N. regulations, it is not illegal under international law or under the majority of domestic legal systems.<sup>40</sup>

### *C. Rape*

The definition of rape, as determined by the Prep Com, was drawn from many sources, including human rights treaties, and reports of special rapporteurs. In addition, the Prep Com was heavily influenced by the statutes and jurisprudence of the two *ad hoc* War Tribunals: the International Criminal Tribunal for Rwanda (“ICTR”) and the ICTY. The Trial and Appeal Chambers of the Tribunals have comprehensively formulated an expansive international defini-

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

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

<sup>38</sup> Elements of Crimes, *supra* note 18, art. 7(1)(g)-3.

<sup>39</sup> *Id.*

<sup>40</sup> See Exploitation of Prostitution Convention, *supra* note 21.

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tion of rape that did not previously exist. Cases such as *Akayesu*<sup>41</sup>, *Celebici*<sup>42</sup>, *Furundzija*<sup>43</sup>, *Kvočka*<sup>44</sup> and *Foca*<sup>45</sup> all dealt with sexual offenses.

The *Akayesu* decision was the first to develop the definition of rape. This was necessary as there was no standard definition that existed in international law.<sup>46</sup> The Chamber in that case discussed rape as a crime against humanity.<sup>47</sup> The Chamber decided to expand the definition of rape, from that of a traditional domestic jurisdiction definition of non-consensual intercourse, making it more extensive. This developed from the acceptance that rape might include “acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual.”<sup>48</sup>

The Tribunal used the Chamber’s definition of rape, expanding it ever so slightly. The Tribunal agreed with the Chamber that rape is a form of aggression, but stated that rape cannot be described in a “mechanical description of objects and body parts.”<sup>49</sup> The Tribunal also found that “sexual violence, which includes rape, [to be] any act of a sexual nature which is committed on a person under circumstances which are coercive.”<sup>50</sup> The Tribunal defined coercion as “[t]hreats, intimidation, extortion, and other forms of duress which prey on fear or desperation may constitute coercion . . . .”<sup>51</sup> The

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<sup>41</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-1, Judgment (Sept. 2, 1998) [hereinafter *Akayesu*].

<sup>42</sup> Prosecutor v. Delalic, Zdravko, & Mucic, Case No. IT-96-21-T, Judgment (Nov. 16, 1998) [hereinafter *Celebici*].

<sup>43</sup> Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment (Dec. 10, 1998) [hereinafter *Furundzija*].

<sup>44</sup> Prosecutor v. Kvočka et al., Case No. IT-98-30/1-T, Judgment (Nov. 2, 2001) [hereinafter *Kvočka*].

<sup>45</sup> Prosecutor v. Kunarac, Kovac, & Vukovic, Case Nos. IT-96-23 & IT-96-23/1-A, Judgment (June 12, 2002) [hereinafter *Foca*].

<sup>46</sup> See *Akayesu*, Case No. ICTR-96-4-1, ¶¶ 596, 686.

<sup>47</sup> *Id.* ¶ 596. The Chamber referred “to the extent to which rape constitute crimes against humanity, pursuant to Article 3(g) of the [International Criminal Tribunal of Rwanda (ICTR)] Statute. . . .”

<sup>48</sup> *Id.* ¶ 686.

<sup>49</sup> *Id.* ¶¶ 597, 687.

<sup>50</sup> *Id.* ¶ 688.

<sup>51</sup> *Id.*

*Akayesu* case held that coercion is inherent in situations of armed conflict, especially in situations where the military “Interahamwe” were constantly present among the “Tutsi” women in the bureau communal.<sup>52</sup>

In the ICTY, the *Furundzija* Trial Chamber began its discussion of rape and sexual assault under international law by referencing the standards of existing international humanitarian law.<sup>53</sup> This analysis included Article 27 of the Fourth Geneva Convention, and of the two Additional Protocols of 1977.<sup>54</sup> The Chamber also noted the prohibition of rape and inhumane treatment were defined as war crimes under the Criminal Code of the Socialist Federal Republic of Yugoslavia, and that “as a former Republic of that federal State, [Bosnia and Herzegovina should] continue[] to apply an analogous

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<sup>52</sup> *Id.*

<sup>53</sup> See *Furundzija*, Case No. IT-95-17/1-T, ¶¶ 165-71.

<sup>54</sup> *Id.* ¶ 165; see Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 27, (Geneva IV), Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (*entered into force* Oct. 21, 1950) [hereinafter Geneva IV]. It provides that :

[p]rotected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity. Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.

*Id.*; see also Protocol I Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 76, June 8, 1977, U.N. Doc. A/32/144, 1125 U.N.T.S. No. 17 (*entered into force* Dec. 7, 1978). Article 76 of Protocol I states: “Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.” *Id.* See also Protocol II Additional to the Geneva Convention of 12 Aug. 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 4, *adopted* June 8, 1977, U.N. Doc. A/32/144, 1125 U.N.T.S. No. 17513 (*entered into force* Dec. 7, 1978). Article 4 of Protocol II states: “[t]he following acts . . . are and shall remain prohibited at any time and in any place whatsoever . . . (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution, and any form or indecent assault; (f) slavery and the slave trade in all their forms . . .” *Id.*

provision.”<sup>55</sup> The Chamber addressed customary international law, including Article 44 of the Lieber Code prohibiting “wanton violence committed against persons in the invaded country,” including rape.<sup>56</sup> Further mention was made of Control Council Law No. 10, the Tokyo Tribunal convictions,<sup>57</sup> and the United States case of *Yamashita*.<sup>58</sup> Taking into account each source of law, the Chamber determined that the prohibition of rape and sexual assault had become a “universally accepted norm[] of international law . . . .”<sup>59</sup>

However, as the Chamber pointed out in *Furundzija*, there were no human rights instruments that expressly prohibit rape or sexual assault.<sup>60</sup> The International Covenant on Civil and Political Rights contains merely implicit prohibitions under the provisions dealing with the protection physical integrity.<sup>61</sup> In an explanatory footnote, the Chamber cited the European Court of Human Rights

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<sup>55</sup> *Furundzija*, Case No. IT-95-17/1-T, ¶ 167. The Criminal Code of the SFRY at Article 142 states “[w]hoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders that civilian population be subject to . . . forcible prostitution or rape . . . shall be punished by imprisonment for not less than five years or by the death penalty.” *Id.*

<sup>56</sup> Instructions for the Government of Armies of the United States in the Field, promulgated as General Orders No. 100 by President Lincoln, Apr. 24, 1863, art. 44. Article 44 states:

All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense.

*Id.*

<sup>57</sup> See *Furundzija*, Case No. IT-95-17/1-T, ¶ 168. Rape is a crime against humanity “whether or not in violation of the domestic laws of the country where perpetrated . . . .” Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, art. II(1)(c), Dec. 20, 1945, 3 Official Gazette Control Council for Germany 50-55 (1946).

<sup>58</sup> See *Furundzija*, Case No. IT-95-17/1-T, ¶ 168 (citing *In re Yamashita*, 327 U.S. 1 (1946)).

<sup>59</sup> *Furundzija*, Case No. IT-95-17/1-T, ¶ 168.

<sup>60</sup> *Id.* ¶ 170.

<sup>61</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976) [hereinafter ICCPR]. Article 7 prohibits cruel, inhuman or degrading treatment.

cases of *Cyprus v Turkey* and *Aydin v Turkey* as an example of rape being a violation of human rights.<sup>62</sup>

In defining rape, the Trial Chamber in *Furundzija* utilized the unchallenged definition presented by the Prosecution, while recognizing no definition exists in international law. The Prosecution's pre-trial brief presented rape as a forcible act., whereby rape is "accomplished by force or threats of force against the victim or a third person, such threats being express or implied," and the threats or forces "must place the victim in reasonable fear that he, she or a third person will be subjected to violence, detention, duress or psychological oppression."<sup>63</sup> The act of rape itself "includes penetration, however slight, of the vulva, anus or oral cavity, by the penis and sexual penetration of the vulva or anus is not limited to the penis."<sup>64</sup> This is a very limited definition considering the reference to the element of force. This issue was later addressed by the ICTY in the *Foca* case, where the Tribunal found force is not an element *per se* of rape.<sup>65</sup>

The Chamber in *Furundzija*, however, sought to expand upon the Prosecution's definition of rape by using the interpretation provided by the ICTR in *Akayesu*, which presented rape as a coercive crime that cannot be described in mechanical terminology.<sup>66</sup> This interpretation was also upheld by the ICTY in *Celebici*.<sup>67</sup> Nevertheless, the Chamber still sought to define rape under "the criminal law principle of specificity . . . the maxim of '*nullum crimen sine lege*'

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<sup>62</sup> *Furundzija*, Case No. IT-95-17/1-T, ¶ 170 n.196.; see generally *Cyprus v. Turkey*, 23 Eur. Ct. H.R. 244 (1997). The European Court of Human Rights found that Turkey had violated its obligation to prevent and punish inhuman or degrading treatment under Article 3 as a result of the rapes committed by Turkish troops against Cypriot women. See also *Aydin v. Turkey*, 25 Eur. Ct. H.R. 251 (1997). In this case, the European Court found that rape of a detainee by an official of the State must be considered to be an especially serious and offensive form of ill-treatment. This is because the offender can easily exploit the vulnerability and weakened state of the victim.

<sup>63</sup> *Furundzija*, Case No. IT-95-17/1-T, ¶ 174.

<sup>64</sup> *Id.*

<sup>65</sup> See *Foca*, Case Nos. IT-96-23 & IT-96-23/1-A, ¶¶ 437-60.

<sup>66</sup> See *Furundzija*, Case No. IT-95-17/1-T, ¶¶ 176-77; see also *Akayesu*, Case No. ICTR-96-4-1, ¶ 597.

<sup>67</sup> See *Celebici*, Case No. IT-96-21-T, ¶ 479; see also *Furundzija*, Case No. IT-95-17/1-T, ¶ 176.

*stricta.*”<sup>68</sup> The fact that domestic jurisdictions take a strict stance against rape and sexual assault was important in recognizing the universal prohibition of the crimes, yet given the variety of domestic definitions, the Chamber did not have a simple answer for the definition of rape. Some jurisdictions have a very broad construction of the *actus reus* of rape.<sup>69</sup> Yet all jurisdictions specify force, coercion, threat, or acting without the consent of the victim, as essential elements of rape.<sup>70</sup>

The Chamber also noted that there were differing degrees of criminalization for forced oral penetration which was considered to be rape in some domestic jurisdictions, and as sexual assault in others. The Chamber found, however, that “such an extremely serious

<sup>68</sup> *Furundzija*, Case No. IT-95-17/1-T, ¶ 177.

<sup>69</sup> The Australian Crimes Act defines “sexual intercourse” as:

(1) For the purposes of this Division, “sexual intercourse” means: (a) sexual connection occasioned by the penetration to any extent of the genitalia (including a surgically constructed vagina) of a female person or the anus of any person by: (i) any part of the body of another person, or (ii) any object manipulated by another person, except where the penetration is carried out for proper medical purposes, or (b) sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another person, or (c) cunnilingus, or (d) the continuation of sexual intercourse as defined in paragraph (a), (b) or (c).

The Crimes Act, 1900, section 61H(1) (Austl.).

<sup>70</sup> *See, e. g.*, Wetboek van Strafrecht (Criminal Code) [SR] 1886, Tweede Boek, tit. XIV, art. 242 (Neth.), available at <http://wetten.overheid.nl/> (last visited Apr. 18, 2006). This article states that: “[a] person who by an act of violence or another act or by threat of violence or threat of another act compels a person to submit to acts comprising or including sexual penetration of the body is guilty of rape . . . .” *Id.* *See also* Code Pénal [C. PÉN] [Penal Code] Act no. 1998-468 of June 17, 1998, JO., June 18, 1998, tit. II, ch. I, sec. 3, art. 222-23 (Fr.), available at [http://www.legifrance.gouv.fr/html/codes\\_traduits/code\\_penal\\_textan.htm](http://www.legifrance.gouv.fr/html/codes_traduits/code_penal_textan.htm) (last visited Apr. 18, 2006). These articles state that: “[a]ny act of sexual penetration, whatever its nature, committed against another person by violence, constraint, threat or surprise, is rape.” *Id.* *See also* Strafgesetzbuch [StGB] [Penal Code] BGBl. 1974/60, [Neugefasst durch BGBl. I 2004/15], § 201(1) (Austria), available at [http://www.sbg.ac.at/ssk/docs/stgb/stgb201\\_221.htm#201](http://www.sbg.ac.at/ssk/docs/stgb/stgb201_221.htm#201) (last visited Apr. 18, 2006). This article states that: “[w]hoever coerces a person by serious force directed against this person or by the threat of immediate danger for life and limb to perform or to endure sexual intercourse or a sexual act equated to sexual intercourse shall be punished by imprisonment from one to ten years.” *Id.*

sexual outrage as forced oral penetration should be classified as rape.”<sup>71</sup> Under the Tribunal’s jurisdiction, forced oral sex was considered sexual assault and defined as a war crime or crime against humanity.<sup>72</sup> The Tribunal held that “forced oral sex can be just as humiliating and traumatic for a victim as vaginal or anal penetration.”<sup>73</sup> In classifying forced oral penetration as rape, the Chamber, in *Furundzija*, was intending to broaden the definition of rape as part of the fundamental principal of the protection of dignity.<sup>74</sup>

As defined by the Chamber in *Furundzija*, all acts of rape and sexual assault are an abuse on “the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim’s dignity.”<sup>75</sup> Therefore, the Chamber saw the distinction between rape and sexual assault as a relevant issue primarily for the purposes of sentencing.<sup>76</sup>

Finally, the Chamber found that the commission, planning, ordering, instigating, or aiding and abetting of rape and sexual assault are prohibited by Article 7(1) of the Statute of the International Tribunal.<sup>77</sup> According to the Chamber, the objective elements of rape were stated as:

- (i) the sexual penetration, however slight:
  - (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
  - (b) of the mouth of the victim by the penis of the perpetrator;
- (ii) by coercion or force or threat of force against the victim or a third person.<sup>78</sup>

In *Kvočka*, the Chamber discussed the definition of rape, as provided in *Akayesu*, *Furundzija*, *Celebici*, and *Foca*. Essentially,

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<sup>71</sup> *Furundzija*, Case No. IT-95-17/1-T, ¶ 183.

<sup>72</sup> *Id.* ¶ 184.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* ¶ 186.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* ¶ 187.

<sup>78</sup> *Id.* ¶ 185.

the *Foca* definition of rape was accepted as the primary definition.<sup>79</sup> This encompassed the *Akayesu* Tribunal's definition of "a physical invasion of a sexual nature, committed under circumstances which are coercive," as well as the *Furundzija* objective elements of sexual penetration.<sup>80</sup> However, *Foca* rejected the restrictive notion of the requirement of force, rather opining that rape will be found "where such sexual penetration occurs without the consent of the victim."<sup>81</sup>

In *Kvočka*, the Chamber merged the *Celebici* decision, which stated coercive conditions are inherent in situations of armed conflict, with the *Furundzija* decision, which adjudged that "any form of captivity vitiates consent."<sup>82</sup> The *mens rea* of rape was determined to require that the perpetrator intended to sexually penetrate the victim with the knowledge this act was without the consent of the victim. This definition, as formulated by the Chamber, is a rather comprehensive definition as it encompasses all of the most appropriate elements of the previous ICTR and ICTY decisions: coercion, lack of consent, and sexual violation, without any mentions of such notions as honor.

The Appellants in *Foca* argued force or a threat of force is an essential element of rape.<sup>83</sup> The Prosecutor (as the Respondent during the Appeal) referred to the Trial Chamber's decision that any consent is nullified by force, threat of force or coercion, but that force is not an essential element of the crime.<sup>84</sup> The Appellate Chamber agreed with the Trial Chamber, and rejected the notion that resistance is necessary to prove rape, stating: "[t]he Appellants' bald assertion that nothing short of continuous resistance provides adequate notice to the perpetrator that his attentions are unwanted is wrong on the law and absurd on the facts."<sup>85</sup> While force provides clear evidence the act was non-consensual, the Chamber noted that "force is not an element *per se* of rape."<sup>86</sup> Narrowing the focus of

<sup>79</sup> See *Kvočka*, Case No. IT-98-30/1-T, ¶¶ 175-77.

<sup>80</sup> *Foca*, Case Nos. IT-96-23 & IT-96-23/1-A, ¶ 437.

<sup>81</sup> *Id.* ¶ 460.

<sup>82</sup> *Kvočka*, Case No. IT-98-30/1-T, ¶ 178.

<sup>83</sup> See *Foca*, Case Nos. IT-96-23 & IT-96-23/1-A, ¶ 125.

<sup>84</sup> *Id.* ¶ 126.

<sup>85</sup> *Id.* ¶ 128.

<sup>86</sup> *Id.* ¶ 129.

rape only to situations where force was used would allow perpetrators to evade conviction in situations where force was not used.

In the *Foca* appeal, the Appeals Chamber found most crimes defined as war crimes or crimes against humanity are coercive crimes that render consent impossible.<sup>87</sup> Taking into account the laws in certain domestic jurisdictions, the Chamber stressed the need to presume non-consent in a situation of power inequalities, such as incidents involving detainees and their captors.<sup>88</sup> The most egregious element of these crimes was that women were treated as the legitimate property of the soldiers; therefore the rapes were multiple and occurred with regularity. These facts also negate any possibility of consent and the circumstances of captivity meant a perpetrator could not assume intercourse was consensual.

In the *Foca* case, defendant Kovac argued his relationship with witness FWS-87 was one of love, a statement that emphasizes the gender gulf, and demonstrates the differing views between the

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<sup>87</sup> *Id.* ¶ 130.

<sup>88</sup> *State v. Martin*, 561 A.2d 631, 636 (N.J. 1989). State and federal laws of the United States prohibit sex between a prison guard and an inmate. This was recognized by the Court which acknowledged that unequal positions of power may negate consent. *See also* Strafgesetzbuch [StGB] [Penal Code], Nov. 13, 1998, Reichsgesetzblatt [RGBl.] § 174(a) (F.R.G.). This section states:

Sexual Abuse of Prisoners, Persons in the Custody of a Public Authority, and Persons in Institutions Who are Ill or in Need of Assistance

(1) Whoever commits sexual acts on a prisoner or a person in custody upon order of a public authority, who is entrusted to him for upbringing, education, supervision or care, by abusing his position, or allows them to be committed on himself by the prisoner or person in custody, shall be punished with imprisonment for not more than five years or a fine.

(2) Whoever abuses a person who has been admitted as an inpatient to an institution for persons who are ill or in need of assistance and entrusted to him for supervision or care, in that he commits sexual acts on the person by exploiting the person's illness or need of assistance, or allows them to be committed on himself by the person, shall be similarly punished.

(3) An attempt shall be punishable.

*Id.*

experiences of men and women. However, the Appeals Chamber agreed with the Trial Chamber in that it was “rather one of cruel opportunism on Kovac’s part, of constant abuses and domination over a girl who, at the relevant time, was only about 15 years old.”<sup>89</sup>

The Prep Com concluded that, along with the following elements of article 7(1)(g)-1, crimes against humanity which constitutes rape are:

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.<sup>90</sup>

The only concrete example of any action being taken against a peacekeeper related to the rape of a girl is the case of United States Army Staff Sergeant Frank J. Ronghi (“Ronghi”) in 2000.<sup>91</sup> In a United States military court, convened in Germany, Ronghi admitted to raping and murdering 11 year-old ethnic Albanian, Merita Shabiu, while on peacekeeping duty in Kosovo.<sup>92</sup> According to testimony, Ronghi took Shabiu to an abandoned apartment building, where he raped her and then killed her to stop her screaming.<sup>93</sup> A fellow peacekeeper assisted him in returning to the scene of the crime to retrieve and bury the girl’s body.<sup>94</sup> Ronghi’s sentence, handed down by a panel of six officers, was life in prison without parole, as well as

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<sup>89</sup> *Foca*, Case Nos. IT-96-23 & IT-96-23/1-A, ¶ 762.

<sup>90</sup> Elements of Crimes, *supra* note 18, art. 7 (1)(g)-1.

<sup>91</sup> See *United States v. Ronghi*, 60 M.J. 83 (C.A.A.F. 2004).

<sup>92</sup> *Id.* at 84.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

a reduction in military rank, forfeiture of all pay and allowances, and a dishonorable discharge.<sup>95</sup>

Aside from incidents involving blatant rape, such as the Rhongi case, it could be argued that peacekeeping personnel who are the clients of victims of forced prostitution and sexual slavery, are also guilty of rape. This is because these women are not providing sexual services voluntarily and are often beaten and threatened with further violence by brothel owners. It is far too well known that many of these women are trafficked and held against their will. If a peacekeeper uses a prostitute who is not a native, (which would be evident from the language differences), there is a high probability the woman has been trafficked. This situation could fall under “taking advantage of a coercive environment,” or may even be considered an invasion against a person incapable of giving genuine consent.<sup>96</sup> While, it is understood a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity, these women are incapable of giving genuine consent to the sexual activity when they are forced, through violence, to undertake this type of work.<sup>97</sup>

#### D. Sexual Slavery

Slavery and slave-like practices constitute crimes, which historically were among the very first to be prohibited under peremptory norms of customary international law. Such prohibitions began in the 19<sup>th</sup> Century, and obtained the status of *jus cogens* by the second half of the 20<sup>th</sup> Century.<sup>98</sup> The *ad hoc* Tribunals, however, have not

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<sup>95</sup> *Id.*

<sup>96</sup> Elements of Crimes, *supra* note 18, art. 7(1)(g)-3(1).

<sup>97</sup> *Id.*

<sup>98</sup> See U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination and Prot. of Minorities, Working Group on Minorities, *Working Paper: Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict: Final Report*, ¶ 30, U.N. GAOR, 50th Sess., Provisional Agenda Item 6, U.N. Doc. E/CN.4/Sub.2/1998/13 (June 22, 1998) (prepared by Ms. Gay J. McDougall) [hereinafter *Contemporary Forms of Slavery 1998 Report*]; see also U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination and Prot. of Minorities, Working Group on Minorities, *Working Paper: Contemporary Forms of Slavery: Systematic Rape,*

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made any convictions for sexual slavery as a crime in its own right. The Tribunal statutes only refer to enslavement, and do not enumerate sexual slavery as an express crime. However, sexual slavery has been incorporated into the definition of enslavement by the ICTY. In *Foca*, each of the defendants was convicted of crimes against humanity consisting of enslavement, based on acts of sexual slavery.

Defendant Kovac kept young women in his apartment, where they were repeatedly raped, humiliated, and degraded.<sup>99</sup> He also “lent and sold [the women] to other men” for sexual purposes.<sup>100</sup> Defendant Kunarac took women to a predetermined house, where he and numerous other soldiers raped them.<sup>101</sup> Similarly, defendant Vukovic abducted women from the Sports Hall to a house where he and other soldiers raped and tortured them. Vukovic also raped some of the women in Kovac’s apartment.<sup>102</sup>

The ICTY Appeals Chamber found enslavement does not have to be for the purposes of sexual acts, but instead it can be considered as the exercise of power through ownership.<sup>103</sup> Conse-

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*Sexual Slavery and Slavery-like Practices During Armed Conflict: Update to the Final Report*, ¶ 9, U.N. GAOR, 52d Sess., Provisional Agenda Item 6, U.N. Doc. E/CN.4/Sub.2/2000/21 (June 6, 2000) (prepared by Ms. Gay J. McDougall) [hereinafter *Contemporary Forms of Slavery 2000 Report*].

<sup>99</sup> See generally *Foca*, Case Nos. IT-96-23 & IT-96-23/1-A, ¶ 159. These crimes were also considered to be outrages upon personal dignity, because the women were repeatedly raped, humiliated and degraded while held in Kovac’s apartment. The mental element required for this crime is that the perpetrator must be aware that their treatment of the victim, either by act or omission, could be perceived by the victim as humiliating or degrading. That is, the perpetrator need not know the actual consequences of his behavior, just the possible consequences. The subjective test is whether the victim was humiliated or degraded. However, a victim will experience different levels of humiliation or degradation, depending on their own sensitivity. Thus, an objective test is also applied; that is, would the reasonable person be outraged, humiliated, and degraded. The difficulty of this test is that there is no neutral standard that can be applied to crimes that occur only against women. The test for these crimes really should be the objective woman, considering the gender-specificity of the crimes.

<sup>100</sup> *Id.* ¶ 159.

<sup>101</sup> *Id.* ¶ 207.

<sup>102</sup> *Id.* ¶¶ 301-03 (Vukovic was convicted of rape as a war crime and crime against humanity).

<sup>103</sup> *Id.* ¶ 122.

quently, even if the enslavement is based on sexual exploitation, the two are considered crimes independent of each other.<sup>104</sup> These differences represent a vital distinction made by the Chamber, which provides the jurisprudential authority for both the separation and recognition of the range of crimes committed against women. Furthermore, although the duration of the enslavement was determined not to be an element of the crime, it was adjudged that the longer the period of enslavement, the more serious the offense.<sup>105</sup> This correlation results from the fact that the Chamber considered the length of time of enslavement to be an aggravating factor in sentencing.<sup>106</sup>

In examining the definition of enslavement, the Appeals Chamber agreed with the Trial Chamber that the 1926 Slavery Convention<sup>107</sup> provides the base definition, which has “evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership.”<sup>108</sup> There is no exhaustive list of these contemporary forms of slavery, but they may include “control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.”<sup>109</sup>

The Appellants in the aforementioned case contended that “lack of resistance or the absence of a clear or constant lack of consent during the entire time of the detention can be interpreted as a sign of consent.”<sup>110</sup> This argument was categorically rejected by the Appeals Chamber, as the Chamber did not see lack of consent as an element of the crimes, concentrating solely on the concept of ownership as the essential element to the crimes charged.<sup>111</sup> The mental

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<sup>104</sup> *Id.* ¶ 186.

<sup>105</sup> *Id.* ¶ 121.

<sup>106</sup> *Id.* ¶ 356.

<sup>107</sup> Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention, art. 1, Sept. 25, 1926, 60 L.N.T.S. 253 (*entered into force* Mar. 9, 1927) [hereinafter Slavery Convention].

<sup>108</sup> *Foca*, Case Nos. IT-96-23 & IT-96-23/1-A, ¶ 117.

<sup>109</sup> *Id.* ¶ 119.

<sup>110</sup> *Id.* ¶ 120.

<sup>111</sup> *Id.*

element relates only to the perpetrator, with the *mens rea* consisting of the “intentional exercise of a power attaching to the right of ownership.”<sup>112</sup> Additionally, “[i]t is not required to prove that the accused intended to detain the victims under constant control for a prolonged period of time in order to use them for sexual acts.”<sup>113</sup>

However, it must be noted that despite the Special Rapporteur for slavery declaring sexual slavery to be a form of slavery and not a specific crime,<sup>114</sup> this last aspect cannot be applied to the crime of sexual slavery in relation to the ICC. The specific wording of the Rome Statute expressly provides for sexual slavery as a crime within itself when the purpose of the enslavement is to use the person for sexual acts.<sup>115</sup>

Finally, the Appeals Chamber cited a case from the Nuremberg Military Tribunal, where it was held that “[s]laves may be well fed, well clothed, and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint . . . . There is no such thing as benevolent slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery.”<sup>116</sup> This holding is particularly relevant to peacekeepers that purchase women and then claim that the women were acting freely, even though the women were required to provide sexual services.

An example of this frequently occurring behaviour is found in a case arising in Bosnia-Herzegovina, where evidence showed women were purchased from brothel owners by International Police Task Force (“IPTF”) monitors. In more than one incident, the monitors admitted to their IPTF superiors and United Nations Mission to Bosnia and Herzegovina (“UNMIBH”) superiors that they actually had purchased the women, claiming it was for the purpose of sending

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<sup>112</sup> *Id.* ¶ 122.

<sup>113</sup> *Id.*

<sup>114</sup> *Contemporary Forms of Slavery 1998 Report*, *supra* note 98, ¶ 30; *Contemporary Forms of Slavery 2000 Report*, *supra* note 98, ¶ 16.

<sup>115</sup> See Rome Statute, *supra* note 2, art. 7(1)(g); Elements of Crimes, *supra* note 18, art. 7(1)(g)-2(2).

<sup>116</sup> *Foca*, Case Nos. IT-96-23 & IT-96-23/1-A, ¶ 123 (citing *U.S. v. Oswald Pohl et al.*, Case No. 4, Judgment, Nov. 3, 1947, 5 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 958 (1997)).

them home.<sup>117</sup> The offenders did not face any disciplinary action in these cases. In addition, in 2001, an Argentinean monitor purchased a woman from a brothel and, following an investigation, the monitor was sent back to Argentina to face criminal charges.<sup>118</sup>

An IPTF human rights officer, Kathryn Bolkovac, dealt with a case involving an American monitor who purchased a woman for 6,000 Deutschmarks in Illidja by paying off the woman's contract.<sup>119</sup> The woman in that case was either Moldovan or Romanian. According to Bolkovac, an investigation was held, but the report was later buried, and the American was talked into returning home and resigning in order to prevent further embarrassment to his employer, DynCorp, a company that recruits civilians for American peacekeeping missions.<sup>120</sup>

So far, there has been no evidence of involvement in trafficking-related offenses by soldiers of SFOR (NATO-led Stabilisation Force in Bosnia-Herzegovina). However, United States civilians contracted to SFOR, and provided by DynCorp, were not prohibited from visiting nightclubs. These contractors had much more freedom of movement in the Bosnia-Herzegovina area than the officers, and thus became more involved in the trafficking business. According to reports, several members of DynCorp who lived off-base purchased women from brothels and kept them in their homes. When bored with the women, the purchasers would then sell them back to their previous owners.<sup>121</sup>

In 1999, DynCorp repatriated five personnel contracted to SFOR following allegations of purchasing women.<sup>122</sup> The men claimed they purchased the women to save them from forced prostitution, with intentions of marriage. A DynCorp manager even de-

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<sup>117</sup> HUMAN RIGHTS WATCH, *HOPES BETRAYED: TRAFFICKING OF WOMEN AND GIRLS TO POST-CONFLICT BOSNIA AND HERZEGOVINA FOR FORCED PROSTITUTION*, Vol.14, No.9 (D), at 52 (2002) [hereinafter *HOPES BETRAYED*].

<sup>118</sup> *Id.* at 52 n. 276.

<sup>119</sup> *Id.* at 53.

<sup>120</sup> *See id.* at 53. Information about Dyncorp can be found on their website, <http://dyn-intl.com/> (last visited Mar. 28, 2006).

<sup>121</sup> *See HOPES BETRAYED*, *supra* note 117, at 62.

<sup>122</sup> *Id.* at 65.

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fended the men, stating the purchases were for the purposes of freeing the women. However, co-worker Ben Johnston stated, “[a]t that time I heard you could purchase women [as sex slaves], that they knew a way . . . they’d [sic] buy the women’s passports and they [then] owned them and would sell them to each other.”<sup>123</sup> According to Johnson, a number of his co-workers owned girls “who couldn’t have been more than fourteen years old.”<sup>124</sup>

More precise definitions of sexual slavery are to be found in the reports of the Special Rapporteur on contemporary forms of slavery. The 1998 and 2000 reports of Gay McDougall on systematic rape, sexual slavery, and slavery-like practices during armed conflict confirm that the “critical elements in the definition of slavery are limitations on autonomy and on the power to decide matters relating to one’s sexual activity and bodily integrity.”<sup>125</sup> The reports emphasised the following:

The term “sexual” is used in this report as an adjective to describe a form of slavery. In all respects and in all circumstances, sexual slavery is slavery and its prohibition is a *jus cogens* norm. The legal effect of *jus cogens* is that slavery, as well as crimes against humanity, genocide and torture, are prohibited at all times and in all places . . . . Sexual slavery also encompasses situations where women and girls are forced into “marriage”, domestic servitude or other forced labour that ultimately involves forced sexual activity, including rape by their captors . . . .<sup>126</sup>

The Prep Com’s final draft of the elements of the crimes against humanity consisting of sexual slavery contains the following elements:

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<sup>123</sup> *Id.*; Kelly Patricia O’Meara, *DynCorp Disgrace*, INSIGHT ON THE NEWS, Aug. 19, 2003 [hereinafter O’Meara].

<sup>124</sup> O’Meara, *supra* note 123.

<sup>125</sup> *Contemporary Forms of Slavery 2000 Report*, *supra* note 98, ¶ 8.

<sup>126</sup> *Id.* ¶ 9; *see also Contemporary Forms of Slavery 2000 Report*, *supra* note - 98, ¶ 30. Clearly there can be no distinction that implies that slavery for the purposes of physical labour is a *jus cogens* crime, whereas slavery for the purposes of rape and sexual abuse is not.

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.<sup>127</sup>
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.<sup>128</sup>

There are no guidelines or precedents as to whether the test for slavery is subjective or objective. However, an appropriate standard would likely resemble the tests applied to the crime of “outrages upon personal dignity.”<sup>129</sup> This would involve using the subjective opinion of the person being held in slavery, rather than that of the captor. The reasonable person standard would temper the analysis, with regard to whether the situation would rise to the level of slavery in the eyes of a reasonable third person.

Clearly the behavior of the IPTF and SFOR personnel, in purchasing women and their passports, and then using these women for sex, falls within this definition of sexual slavery. However, these men defended their actions by declaring the women were free to leave if they wished, and that the men had, in fact, purchased the women in order to secure their freedom. Nevertheless, a woman is, by principle, deprived of her liberty when she and her passport have been purchased as the perpetrators have treated her like chattel, or personal property. Such deprivation is exacerbated by the fact that

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<sup>127</sup> Elements of Crimes, *supra* note 18, art. 7 (1)(g)-2 n. 18. This states:

It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.

*Id.*

<sup>128</sup> *Id.* n. 23. The footnote for the title of the article states: “[g]iven the complex nature of this crime, it is recognized that its commission could involve more than one perpetrator as a part of a common criminal purpose.” *Id.*

<sup>129</sup> Prosecutor v. Aleksovski, at ¶ 54, Case No. IT-95-14/1-T, Judgment, (June 25, 1999) [hereinafter *Aleksovski*].

the victims in these cases normally do not speak the language of their purchasers. Therefore, it is highly unlikely they will even comprehend they are free, even if such a situation exists. Emerging from a system where they are accustomed to being bought and sold, how are victims to know that peacekeepers, who have purchased them, are any different from any other purchaser?

### *E. Chapeau Elements*

To be classified as a crime against humanity, such crimes must satisfy particular common criteria, referred to as the chapeau elements: “2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population. 3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.”<sup>130</sup> Therefore, even if a crime complies with the basic elements of other crimes, such as rape, sexual slavery, enforced prostitution, and trafficking, as discussed above, the crime will not be considered a crime against humanity unless these chapeau elements are satisfied. In addition, in cases involving peacekeepers committing these crimes, it will be very difficult to show these common elements have been satisfied, particularly pertaining to the first element.

The first common element is the most important; that the conduct was committed as part of a widespread or systematic attack directed against a civilian population. As stated by the *Tadic* Tribunal: “it is now well established that the requirement that the acts be directed against a civilian ‘population’ can be fulfilled if the acts occur on either a widespread basis or in a systematic manner. Either one of these is sufficient to exclude isolated or random acts.”<sup>131</sup> This does not exclude one act from qualifying as a crime against humanity, provided it is committed as part of a widespread or systematic attack.

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<sup>130</sup> Elements of Crimes, *supra* note 18, art. 7(1)(a)(2)-(3).

<sup>131</sup> Prosecutor v. Tadic, Case No. IT-94-1, Trial Chamber, ¶ 646 (May 7, 1997), [hereinafter *Tadic*].

Accordingly, the previously cited isolated act of United States soldier, Ronghi, involving the rape and murder of a girl in Kosovo, would not be considered a crime against humanity, because there was no evident widespread or systematic attack on the civilian population. Thus, as stated in *Tadic*, “the emphasis is not on the individual victim but rather on the collective, the individual being victimised not because of his individual attributes but rather because of his membership of a targeted civilian population.”<sup>132</sup> Therefore, the distinct concept of the crime is to exclude isolated and random incidents, which, in reality, may involve crimes committed by peacekeepers. As defended in *Tadic*, the term “civilian population” applies specifically to non-combatants.<sup>133</sup>

It would then appear that the only way a crime committed by a peacekeeper could be deemed a crime against humanity would be if the operation in which the peacekeeper is participating was being conducted before peace had been brought to the territory in question. Therefore, if within such an environment groups were still conducting widespread or systematic attacks against the civilian population, previously described criminal behavior by peacekeepers could be seen as part of that attack. Within this context, it would be impossible to argue that the peacekeepers were unaware of the existence of the widespread or systematic attack, given that the peacekeeping operations were required to specifically stop such attacks from occurring.

It is often the case that crimes against humanity are committed during armed conflicts; hence the need for peacekeeping operations. Although widespread or systematic attacks on the civilian population are an intrinsic element of armed conflict, it is generally accepted within customary international law that no specific nexus between the two is required.<sup>134</sup> Echoing this principle of customary international law, crimes against humanity, under the Rome Statute,

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<sup>132</sup> *Id.* ¶ 644.

<sup>133</sup> *See id.* ¶ 644; *see also* Margaret McAuliffe de Guzman, *The Road from Rome: The Developing Law of Crimes Against Humanity*, 22 HUM. RTS. Q. 335, 361 (2000) [hereinafter *Road from Rome*].

<sup>134</sup> *See Tadic*, Case No. IT-94-1-I, Trial Chamber, ¶ 644; *Road from Rome*, *supra* note , at 355-60.

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also does not require a nexus with armed conflict, and can be committed during times of peace.<sup>135</sup>

The question could then be raised as to whether peacekeeping personnel, by soliciting prostitutes during times of peace, would be guilty of aiding and abetting enforced prostitution and sexual slavery under the auspices of crimes against humanity. The use of prostitutes by peacekeeping personnel may be considered widespread, as supported by the examples given above. However, it is a far stretch and would be difficult to establish, since the solicitation of prostitution itself would have to be considered part of the widespread attack on a civilian population. In this case, the civilian population would consist of the women who are trafficked and used for forced prostitution and sexual slavery. The term “population” does not refer to the entire population, rather “the ‘population’ element is intended to imply crimes of a collective nature and thus excludes single or isolated acts which, although possibly constituting war crimes or crimes against national penal legislation, do not rise to the level of crimes against humanity.”<sup>136</sup>

Crimes against humanity go beyond the basic concept of being widespread or systematic. The principal aspect of crimes against humanity is that they are so horrific they shock the conscience of humanity. As defined in *Tadic*, crimes against humanity are “only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind.”<sup>137</sup> The Elements of Crimes paper states: “crimes against humanity as defined in Article 7, are among the most serious crimes of concern to the international community as a whole.”<sup>138</sup> This sets a very high standard, and the Court is not likely to impose a light judgment on such crimes that carry such heavy disgrace and penalty. In fact, Article. 7(1)(d) allows for

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<sup>135</sup> See Elements of Crimes, *supra* note 18, art. 7, introduction ¶ 3. Of course, this does seem to be a contradictory statement, as “peace” could not really exist in the circumstances of a widespread or systematic attack on the civilian population.

<sup>136</sup> *Tadic*, Case No. IT-94-1-I, Trial Chamber, ¶ 644.

<sup>137</sup> *Id.* (citing to the United Nations War Crimes Commission).

<sup>138</sup> Elements of Crimes, *supra* note 18, art. 7, introduction ¶ 1.

a case to be declared inadmissible if it “is not of sufficient gravity to justify further action by the Court.”<sup>139</sup> It is unlikely the Court would adjudge the use of prostitutes to be a crime so shocking to the international community and to humanity itself, especially given prostitution is legal in many countries.

Conversely, both the acts of holding a woman in sexual slavery and rape may be viewed as shocking to humanity, as evidenced by the fact these crimes are expressly prohibited in the Statute. However, these acts would still have to meet the qualification of a systematic or widespread attack upon a civilian population. As a result, it is highly unlikely the crimes of enforced prostitution, rape, and sexual slavery committed by peacekeepers, would be deemed by the ICC to satisfy the high standards of the elements of crimes against humanity.

The true crimes committed in the examples provided above could not be considered crimes against humanity because there is no association with a widespread or systematic attack. According to the Elements of Crimes paper, the widespread or systematic attack must be “pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. It is understood ‘policy to commit such attack’ requires that the State or organization actively promote or encourage such an attack against a civilian population.”<sup>140</sup>

Therefore, contrary to arguments that State action or policy is an essential characteristic of crimes against humanity,<sup>141</sup> under ICC jurisdiction, State or governmental action is not necessary. The wording of the Elements of Crimes allows for the attack to be formulated by a non-state organization, extending the reach of the ICC beyond State actors. This application is much more comprehensive, as it is not always State actors or policies that are imputable for such attacks. In fact, rebel or revolutionary groups, consisting of private citizens, are behind many attacks on civilian populations.

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<sup>139</sup> *Id.* art. 7(1)(d).

<sup>140</sup> Elements of Crimes, *supra* note 18, art. 7, introduction ¶ 3.

<sup>141</sup> M. CHERIF BASSIOUNI, 1 CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 236, 529 (2d ed. 1999).

The final question is whether trafficking, as an inherently inhumane act, could be considered a crime against humanity with regard to being widespread or systematic. In this case, the targeted civilian group would be women, and in particular, women from poor areas of the world. The prevalence of trafficking in some areas is quite phenomenal, especially in areas, such as south-eastern Europe. Trafficking in these areas is indeed a systematic occurrence, run by organized crime groups, and actively promoted and encouraged by these factions. It has become a widespread problem, with hundreds of women falling victim to traffickers, duped by false promises of a better life in Western European countries. Coordinators of peacekeeping operations are very aware of the problem and have developed special departments and programs dedicated to combating such trafficking.<sup>142</sup>

For the purposes of criminal liability, it has been stated perpetrators merely have to possess knowledge of the existence of a wider attack, of the broader context in which his crime occurs.<sup>143</sup> There is no requirement of a specific intent to form a part of that widespread or systematic attack or to contribute to the attack's objectives, nor is there a requirement of knowledge of the policy behind the attack.<sup>144</sup>

Under this position, in the case involving the Russian KFOR soldiers, if it can be proven the soldiers possessed prior knowledge of the trafficking problem in their affected area, or they should have known of the problem, the Russian KFOR soldiers' actions could be deemed to have contributed to a wider attack on these women. Given this applicable rationale, and the specified elements of knowledge and intent, it may be argued trafficking, under these circumstances, may be shocking enough to qualify as a crime against humanity under the Rome Statute.

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<sup>142</sup> See generally *Trafficking in South-Eastern Europe*, *supra* note 31; see also UNICEF, UNOHCHR & ODIHR, *Trafficking in Human Beings in South-Eastern Europe: Current Situation and Responses to Trafficking in Human Beings*, available at <http://www.unicef.org/ceecis/Trafficking.Report.2005.pdf>; The Secretary-General, *Report of the Secretary-General on Trafficking in Women and Girls*, ¶ 1, U.N. Doc. A/57/170 (Dec. 4, 2000).

<sup>143</sup> *Tadic*, Case No. IT-94-1-I, Trial Chamber, ¶ 656.

<sup>144</sup> *Road from Rome*, *supra* note , at 379-80, 389.

### *III. War Crimes*

Article 8 of the Rome Statute covers war crimes.<sup>145</sup> It is an extensive and detailed provision, divided into applicable standards for international and non-international armed conflicts.

#### *A. Trafficking*

The discussion above on trafficking, which precedes sexual slavery, applies equally to trafficking as a war crime (art. 8 (2)(b)(xxii)). However, as a war crime, it would also be possible to consider the prosecution of trafficking under outrages upon personal dignity, in particular, humiliating and degrading treatment (art. 8(b)(xxi)). Further possibilities include serious violations of the laws and customs applicable in international armed conflict, inhuman treatment (art. 8(a)(ii)), which involves wilfully causing great suffering or serious injury to body or health (art. 8(a)(iii)), and unlawful deportation or transfer (art. 8(a)(vii)).<sup>146</sup>

In the case of an armed conflict of a non-international character, the applicable provisions are enumerated in Article 8(c)(i), which prohibits “violence to life and person, in particular . . . cruel treatment.”<sup>147</sup> In addition, Article 8(c)(ii) prohibits “outrages upon personal dignity, in particular, humiliating and degrading treatment, as a serious violation of Common Article 3 of the Geneva Conventions.”<sup>148</sup> However, as peacekeepers are considered to be part of in-

<sup>145</sup> Rome Statute, *supra* note 2, art. 8.

<sup>146</sup> Rome Statute, *supra* note 2, art. 8(b)(viii). There is another similar provision to deportation and forcible transfer of population, however under war crimes it is limited to transfers relating to the Occupying Power’s own population, and the population of the occupied territory, and thus does not apply to the concept of trafficking. If the law of occupation is applied, as by the Australian Defense Force, the wording of the provision (art. 8 (b)(viii)) is too limited to include trafficking from outside the occupied territory into that territory.

<sup>147</sup> Rome Statute, *supra* note 2, art. 8(2)(c)(i).

<sup>148</sup> *Id.* at art. 8(2)(c)(ii); Geneva Convention IV, *supra* note 54, art. 3. This article states in relevant part:

In the case of armed conflict not of an international character . . . the following acts are and shall be prohibited at any time and in any place whatsoever . . . a) violence to life and person, in particular murder of all kinds, mutilation, cruel treat-

ternational armed conflict, only the relevant international armed conflict provisions will be considered within the context of this analysis.

The notions relating to trafficking being an outrage upon personal dignity and willfully causing great suffering or serious injury are similar to notions relating to other inhumane acts under crimes against humanity. The elements of outrages upon personal dignity are as follows: “(1) The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons; (2) The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity.”<sup>149</sup>

In the *Foca* case, the ICTY Trial Chamber found the victims were repeatedly raped, humiliated, and degraded while held in Kovac’s apartment.<sup>150</sup> The mental element required for this crime is that the perpetrator must be aware of their treatment of the victim, either by act or omission, could be perceived by the victim as humiliating or degrading.<sup>151</sup> That is, the perpetrator need not know the actual consequences of his behavior, just the possible consequences. This is confirmed in the Elements of Crimes paper, which states the perpetrator does not have to be aware of the actual existence of the humiliation or degradation.<sup>152</sup> Under this definition, a subjective test was applied, as to whether the victim felt humiliated or degraded. However, the results of this test differed, depending on the sensitivity levels of each victim. Thus, an objective test was applied by the ICTY to determine whether a “reasonable person” would be outraged, humiliated, or degraded.<sup>153</sup>

The difficulty of this test is that there is no neutral standard that can be applied to crimes against women. While trafficking can occur to men, the trafficking being considered in this paper is the trafficking of women for the purposes of sexual slavery and enforced

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ment and torture; c) outrages upon personal dignity, in particular humiliating and degrading treatment.

*Id.*

<sup>149</sup> Elements of Crimes, *supra* note 18, art. 8(2)(b)(xxi).

<sup>150</sup> See *Foca*, Case Nos. IT-96-23 & IT-96-23/1-A, ¶ 159.

<sup>151</sup> *Id.*

<sup>152</sup> See Elements of Crimes, *supra* note 18, art. 8(2)(b)(xxi).

<sup>153</sup> See *Aleksovski*, Case No. IT-95-14/1-A, ¶ 56.

prostitution. The experience of trafficking will be perceived completely differently by the women who are trafficked than by her trafficker (who may be male or female). The test for these specific crimes against women really should be the objective woman, considering the gender-specificity of the crimes. In considering such trafficking, the humiliation and degradation involving forced nudity, rape, enslavement, and being treated like property, is self-evident.

The *actus reus* of the crime of outrages upon personal dignity was defined by the Prep Com as the humiliation, degradation, or violation of dignity of a person.<sup>154</sup> In the *Aleksovski* case, the ICTY held:

An outrage upon personal dignity within Article 3 of the Statute is a *species* of inhuman treatment that is deplorable, occasioning more serious suffering than most prohibited acts falling within the *genus*. It is unquestionable that the prohibition of acts constituting outrages upon personal dignity safeguards an important value. Indeed, it is difficult to conceive of a more important value than that of respect for the human personality . . . an objective component to the *actus reus* is apposite: the humiliation to the victim must be so intense that the reasonable person would be outraged.<sup>155</sup>

In its brief for the *Foca* case, the Prosecution stated that the safeguarding of personal dignity could be flexible enough to encompass “any act or omission which would be *generally* considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity.”<sup>156</sup>

In *Aleksovski*, the Tribunal addressed the seriousness of the conduct required when it stated the following:

The seriousness of an act and its consequences may arise either from the nature of the act per se or from the repetition of an act or from a combination of dif-

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<sup>154</sup> See *Aleksovski*, Case No. IT-95-14/1-T, ¶ 54.

<sup>155</sup> *Id.* ¶ 54 & 56.

<sup>156</sup> *Foca*, Case Nos. IT-96-23 & IT-96-23/1-A, ¶ 163.

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ferent acts which, taken individually, would not constitute a crime within the meaning of Article 3 of the Statute. The form, severity and duration of the violence, the intensity and duration of the physical or mental suffering, shall serve as a basis for assessing whether crimes were committed.<sup>157</sup>

It is difficult to imagine that trafficking would not be considered an outrage upon personal dignity, given the humiliating and degrading aspects of the crime. Likewise, the seriousness of the crime is undeniable, in particular the aspect of selling people as if they were property. It is a crime run by a network of people, thus containing a more conspiratorial aspect.

Inhuman treatment as a war crime has also been discussed in the *ad hoc* Tribunals, where it was decided that inhumane treatment has to involve serious pain or suffering.<sup>158</sup> However, the ICC has gone further, stating it must be severe pain or suffering.<sup>159</sup> Inhuman treatment is differentiated from torture by the purposive aspect of the crime. The crimes of torture or inhumane treatment are each derived directly from the Geneva Conventions.<sup>160</sup> In fact, the ICTY has held that “in order to determine the essence of the offence of inhuman treatment, the terminology must be placed within the context of the relevant provisions of the Geneva Conventions and Additional Protocols.”<sup>161</sup> In *Celebici*, the ICTY also found that “humane treatment is the cornerstone of all four Conventions, and is defined in the negative in relation to a general, non-exhaustive catalogue of deplorable acts which are inconsistent with it, these constituting inhuman treatment.”<sup>162</sup> The Tribunal further held that:

inhuman treatment is an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or

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<sup>157</sup> *Aleksovski*, Case No. IT-95-14/1-T, ¶ 57.

<sup>158</sup> Elements of Crimes, *supra* note 18, art. 7(1)(k).

<sup>159</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art.1, June 26, 1987, 1465 U.N.T.S. 85.

<sup>160</sup> Geneva Convention IV, *supra* note 54, art. 3(1)(a).

<sup>161</sup> *Celebici*, Case No. IT-96-21-T, ¶ 520.

<sup>162</sup> *Id.* ¶ 532.

physical suffering or injury or constitutes a serious attack on human dignity. The plain, ordinary meaning of the term inhuman treatment in the Geneva Conventions confirms this approach and clarifies the meaning of the offence. Thus, inhuman treatment is intentional treatment which does not conform with the fundamental principle of humanity, and forms the umbrella under which the remainder of the listed ‘grave breaches’ in the Convention fall. Hence, acts characterised in the Conventions and Commentaries as inhuman, or which are inconsistent with the principles of humanity, constitute examples of actions that can be characterised as inhuman treatment.<sup>163</sup>

The Geneva Conventions provide that all protected persons must be treated with humanity, and inhuman treatment is contrary to this. The Commentary on the Geneva Conventions states the following:

[It] could not mean, it seems, solely treatment constituting an attack on physical integrity or health; the aim of the Convention is certainly to grant civilians in enemy hands a protection which will preserve their human dignity and prevent them being brought down to the level of animals. That leads to the conclusion that by “inhuman treatment” the Convention does not mean only physical injury or injury to health . . . .<sup>164</sup>

The Commentary goes on to say that “[c]ertain measures, for example, which might cut the civilian internees off completely from the outside world and in particular from their families, or which caused grave injury to their human dignity, could conceivably be considered as inhuman treatment.”<sup>165</sup> The crimes analyzed here can hardly be considered to be consistent with the principles of human-

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<sup>163</sup> *Id.* ¶ 543.

<sup>164</sup> See *Celebici*, Case No. IT-96-21-T, ¶ 521 (citing to ICRC, COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 598 (Jean Pictet ed., 1958)).

<sup>165</sup> *Id.*

ity. Indeed, trafficking, enforced prostitution, and sexual slavery fit within the exact example given in the Geneva Conventions Commentary, as these are acts which cut women off from the outside world, and cause grave injury to their dignity.

Indeed, in the case of *Eichmann*, enslavement and deportation was considered to be degrading and a cause of inhumane suffering and torture.<sup>166</sup> When considering trafficking, the suffering of the victim is evident, through the existence of poor health, physical abuse, and mental anguish. In addition, serious injury resulting from malnutrition, rape, and physical abuse is prevalent.

One difference found within these provisions is the use of the word “willfully” as it applies to the prohibition of great suffering or serious injury. This differentiation embodies the concept of a special criminal intent. That is, the perpetrator must intend to bring about great suffering, or serious injury to body or health. Therefore, a trafficker who abuses and enslaves a trafficking victim cannot deny that they did not intend to bring about great suffering or serious injury. Even if the perpetrator “merely” transported the victim without the infliction of physical abuse, the established framework of international law pertaining to the legal concept of recklessness must be considered. This concept arises when someone performs an action, despite awareness of the likely consequences of this action.

Given the criminal aspects of trafficking, which include forced abduction, and hiding victims in locked rooms and vehicles, it would be highly unlikely traffickers could argue they were not aware of the likely consequences of their conduct. In particular, a peacekeeper would also be well aware of the consequences, as the point of trafficking is to exploit the victim.<sup>167</sup> Therefore, it can be said that the Russian KFOR soldiers, in the example above, trafficked women with the specific purpose of using them for sexual slavery purposes, which would evidently bring about great suffering to the victims.

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<sup>166</sup> See generally *Attorney General of Israel v. Eichmann* [1961], 36 ILR 18, 50 (1968) (District Court of Jerusalem); *aff'd Attorney General v. Eichmann* [1962], 36 ILR 277, 340 (1968) (Supreme Court of Israel).

<sup>167</sup> See Palermo Protocol, *supra* note 22.

Allegations arose in 2000 involving two United States police officers and a Romanian officer, claiming they aided a brothel owner in the trafficking of women. The regional police unit conducted an investigation, and then turned the investigation over to the Internal Investigation Department. It was later reported one of the United States officers had been transporting trafficked women between Kosovo and Serbia, using an UNMIK police vehicle. According to this case, the other United States officer notified the brothel owner of police investigations and information relating to trafficking operations.<sup>168</sup>

The Romanian officer informed the brothel owner of his pending arrest, which enabled him to close the club before the police raid, thus escaping prosecution. UNMIK announced, in 2001, that the two officers were repatriated for violating the Code of Conduct. The other two officers involved in the case received only letters of reprimand. None of the officers, however, faced any criminal charges. The United States and Romanian UNMIK officers, who assisted the brothel owner in the trafficking of women, must have been unmistakably familiar with the brothel, and thus, fully aware of the injurious affects these trafficked women would have suffered.<sup>169</sup>

In cases involving trafficking, it may also be sufficient to argue gross or culpable negligence (*culpa gravis*).<sup>170</sup> This legal standard involves the perpetrator lacking the criminal intent to ensure the prohibited consequence will occur, despite being aware of the risks involved by the conduct. In the *Blaskic* case, the ICTY held “[t]he *mens rea* constituting all the violations of Article 2 of the Statute [containing the grave breaches] includes both guilty intent and recklessness which may be likened to serious criminal negligence.”<sup>171</sup>

This standard could be applied in a case involving a person who contends he was just “giving a lift” to a friend, who happens to be a trafficking victim, or in the case of command responsibility,

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<sup>168</sup> *Protecting the Rights of Women*, *supra* note 29, at 247-48

<sup>169</sup> *Id.*

<sup>170</sup> ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 58 (2003) [hereinafter CASSESE].

<sup>171</sup> *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgment, ¶ 152 (Mar. 3, 2000).

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where a superior should have known of the commission of war crimes by his/her subordinates.<sup>172</sup> Therefore, even with the additional burden of proving intent, or at a minimum, recklessness, trafficking would certainly fit within the boundaries of Article 8(a)(iii). Likewise, trafficking would fall under Article 8(b)(xxi). However, it would be preferable to see trafficking prosecuted as a grave breach, as described in *Blaskic*, which would cement the status of trafficking as one of the more serious crimes under international law.

Another way in which trafficking could be prosecuted as a grave breach is under Article 8(2)(a)(vii), unlawful deportation and transfer, which uses the direct interpretation of Article 147 of Geneva Convention IV in conjunction with Article 49 of the same Convention.<sup>173</sup> The Element of Crimes Paper defines the parameters of the crime as the following: “1. The perpetrator deported or transferred one or more persons to another State or to another location. 2. Such person or persons were protected under one or more of the Geneva Conventions of 1949. 3. The perpetrator was aware of the factual circumstances that established that protected status.”<sup>174</sup> This provision is somewhat broader than the similar provision under crimes against humanity, in that there is no requirement trafficked persons be lawfully within the territory from which they were moved. This broader definition will further enable the prosecution of traffickers at any stage of the trafficking process.

Trafficking committed as a grave breach under Article 8(b)(iii) and (vii) would have to be perpetrated against a person protected under the Geneva Conventions. In trafficking cases, women are civilians, or non-combatants, and thus would fall within the category of protected persons under these Conventions.<sup>175</sup> This fact would undoubtedly be evident to military peacekeepers, who commit the acts of trafficking.

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<sup>172</sup> See Rome Statute, *supra* note 2, art. 28.

<sup>173</sup> *Id.* art. 8(2)(a)(vii).

<sup>174</sup> Elements of Crimes, *supra* note 18, art. 8(2)(a)(vii)-1.

<sup>175</sup> See, e.g., Geneva Convention IV, *supra* note 54, arts. 48, 50 & 51.

*B. Rape, Sexual Slavery and Enforced Prostitution*

The crimes of rape, sexual slavery, and enforced prostitution are expressly included as war crimes under the Rome Statute, both in international (art. 8 (2)(b)(xxii)) and non-international armed conflicts (art. 8(2)(e)(vi)).<sup>176</sup> The references to these crimes are identical, whether prohibited during an international or non-international armed conflict.<sup>177</sup> The definitions provided in the Elements of Crimes paper are identical to those as discussed above under crimes against humanity.

*C. Chapeau Elements*

Like crimes against humanity, war crimes contain two chapeau elements: “1. The conduct took place in the context of and was associated with an international armed conflict/ an armed conflict not of an international character. 2. The perpetrator was aware of factual

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<sup>176</sup> Rome Statute, *supra* note 2, art. 8(2). For the purpose of this Statute “war crimes” means:

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions; (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions.

*Id.*

<sup>177</sup> Rome Statute, *supra* note 2, arts. 8(2)(b)(xxii) & (e)(vi). The prohibition of “any other form of sexual violence” differs. In the case of international armed conflicts, sexual violence is prohibited if it also constitutes a grave breach of Common Article 3 of the four Geneva Conventions.

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circumstances that established the existence of an armed conflict.”<sup>178</sup> The first important determination to be made is whether the conflict was international or internal in character. Such a determination will define the type of crime a soldier can be charged with.<sup>179</sup> Popular opinion swings toward the notion that involvement of international peacekeepers renders any conflict international and the author supports this interpretation.<sup>180</sup>

In the Appeals Chambers judgment of *Tadic*, the ICTY agreed with this principle, stating that “an armed conflict is international if it takes place between two states. In addition, in case of an internal armed conflict . . . it may become international . . . if, (i) another state intervenes in that conflict through its troops, or alternatively if, (ii) some of the participants in the internal armed conflict act on behalf of that other state.”<sup>181</sup>

The fact peacekeeping troops are considered to be subject to international humanitarian law substantiates this opinion. War crimes committed under the Rome Statute, during an international armed conflict, are deemed to be either grave breaches of the Geneva Conventions or other serious violations of customary international law.<sup>182</sup> Therefore, in regards to international jurisdiction of *jus cogens* war crimes and crimes against humanity, peacekeepers taking part in human trafficking may be held criminally culpable under the auspices of international law.

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<sup>178</sup> Elements of Crimes, *supra* note 18, at art. 8(2)(a)(i)(4)-(5); *see generally* Rome Statute, *supra* note 2, at art. 8.

<sup>179</sup> The distinction made by the Rome Statute between these types of armed conflict is unnecessary. For a discussion of this point, please see CASSESE, *supra* note 170, at 61.

<sup>180</sup> *See* ICRC, *Application of International Humanitarian Law and International Human Rights Law to UN-Mandated Forces: Report on the Expert Meeting on Multinational Peace Operations*, INT’L. REV. RED CROSS, Mar. 2004, at 209. Experts are divided as to whether this is the case or whether internationalization depends upon the status of other parties to the conflict. *But see* Ray Murphy, *United Nations Military Operations and International Humanitarian Law: What Rules Apply to Peacekeepers?*, 14 CRIM. L. F. 153, 184 (2003). More experts support the automatic internationalization view.

<sup>181</sup> Prosecutor v. *Tadic*, Case No. IT-94-1-AR72, Appeals Chamber, 84 (Feb. 27, 2001).

<sup>182</sup> Geneva Convention IV, *supra* note 54, at art. 3.

In *Celebici*, the ICTY stated: “it is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.”<sup>183</sup> The Chamber went on to emphasize:

[I]t is not necessary that a crime ‘be part of a policy or of a practice officially endorsed or tolerated by one of the parties to the conflict, or that the act be in actual furtherance of a policy associated with the conduct of war or in the actual interest of a party to the conflict.’<sup>184</sup>

For clarification, the ICTR has held that

the term nexus should not be understood as something vague and indefinite. A direct connection between the alleged crimes, referred to in the Indictment, and the armed conflict should be established factually. No test, therefore, can be defined *in abstracto*. It is for the Trial Chamber, on a case-by-case basis, to adjudge on the facts submitted as to whether a nexus existed. It is incumbent upon the Prosecution to present those facts and to prove, beyond a reasonable doubt, that such a nexus exists.<sup>185</sup>

If the words of the ICTR are to be followed, then it would be more difficult to prove trafficking as a war crime. However, the definition is too restrictive to apply automatically when assessing the particular circumstances of each criminal act. In *Celebici*, the ICTY offers a different interpretation that still allows for a nexus with the armed conflict, yet does not require the crimes to be strictly a part of the armed conflict.<sup>186</sup> The ICC has adopted a definition closer to that of the ICTY, rather than the more restrictive view of the ICTR. The *Tadic* Appeals Chamber interpreted the words “in the context of” in the elements supporting the concept that “international humanitarian

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<sup>183</sup> *Celebici*, Case No. IT-96-21-T, ¶ 193.

<sup>184</sup> *Id.* ¶ 196.

<sup>185</sup> *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Judgment, ¶ 188, (May 21, 1999).

<sup>186</sup> *Celebici*, Case No. IT-96-21-T, ¶ 16.

law applies from the initiation of . . . armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached.”<sup>187</sup> Therefore, it can be stated a peacekeeping mission is always conducted within the context of armed conflict, even if it is after the cessation of hostilities. As a result, these crimes will fall within the realm of war crimes, even when actual circumstances do not amount to hostilities.

There exists an undeniable link between armed conflict and trafficking, rape, enforced prostitution, and sexual slavery. As stated in UNIFEM’s Issue Brief on Trafficking:

Trafficking and sexual slavery are inextricably linked to conflict. Armed conflict increases the risk of women being trafficked across international border to be used in forced labour schemes that often include sexual slavery and/or forced prostitution. Trafficking has flourished in environments created by the breakdown of law and order, police functions and border controls during conflict, combined with globalisation’s free markets and open borders. As well, criminal networks involved in the arms or drug trades often expand their business to include trafficking in persons.<sup>188</sup>

The situations in which peacekeepers find themselves are ones of instability and disorder caused by armed conflict, in territories with little or no legal infrastructure. It is well noted the economic desperation of these affected regions creates a breeding ground for trafficking and forced prostitution.

#### *IV. Conclusion*

As is evident, many issues arise when considering whether peacekeepers can be prosecuted in the ICC for crimes against women

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<sup>187</sup> *Tadic*, Case No. IT-94-1-AR72, ¶ 84; Elements of Crimes, *supra* note 18, art. 8 (using the term “in the context of . . .”).

<sup>188</sup> UNIFEM, *A Portal on Women, Peace and Security: Women, War, Peace and Trafficking*, available at <http://www.womenwarpeace.org/issues/trafficking/trafficking.htm> (last visited Mar. 28, 2006).

involving trafficking, sexual slavery, enforced prostitution, and rape. In fact, the question is raised of whether peacekeepers were envisaged as possible defendants before the ICC. Out of all the cases of sexual slavery, rape, trafficking, and enforced prostitution that have been documented, only two have resulted in relevant criminal prosecution: a Civilian Police officer in East Timor and Frank Rhongi in Kosovo. Notably, both of these cases involved rape. None of the previously described cases of trafficking, sexual slavery, and enforced prostitution resulted in effective disciplinary or criminal action.

Traditionally, cases involving the violation of women's rights have largely been ignored, or considered subsidiary to other crimes. It is only through the advancement of women's rights that attention has been brought to these crimes, and pressure is being placed on States and organizations to ensure some degree of accountability. Unfortunately, this is a slow process, as changing the mechanics of the system requires a metamorphosis of prevalent attitudes. The unwillingness of governments to admit to atrocities or to compensate women, despite public recognition of the commission of these crimes, shows that much more work is needed.<sup>189</sup>

The *ad hoc* criminal tribunals have represented an excellent beginning to the process of prosecuting crimes against women, and confirm the hard work and pressure exercised by women's rights groups<sup>190</sup> in obtaining the inclusion of these crimes in the Rome Statute of the ICC. Consistent pressure from NGOs and the public as a whole will ensure that Inter-Governmental Organizations and States are continuously aware such behavior toward women is unacceptable, and any legal immunities for peacekeepers who commit these crimes must be waived.

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<sup>189</sup> It is the author's opinion that this also occurred in the Tokyo Women's Tribunal.

<sup>190</sup> The Women's Caucus for Gender Justice in the International Criminal Court, [www.iccnw.org](http://www.iccnw.org) (last visited Feb. 28, 2006). The Women's Caucus was one of many NGOs to participate in the negotiations of the ICC Statute. Others include: Amnesty International, Human Rights Watch, Fédération Internationale des Ligues des Droits de l'Homme, the International Commission of Jurists, the Lawyers Committee for Human Rights, No Peace Without Justice, Parliamentarians for Global Action, and the World Federalist Movement.

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The newly adopted Negotiated Relationship Agreement between the International Criminal Court and the United Nations<sup>191</sup> may result in the lifting of immunities by the U.N., however, this does not guarantee a crime committed by a peacekeeper will satisfy the particular elements of the crimes under the Rome Statute. The apparent difficulties of peacekeeper crimes and their applicability within the subject matter jurisdiction of the ICC is clear, particularly in relation to the chapeau elements, which impose a high standard on the definition of such crimes.

The purpose of the Rome Statute is to deal with only the most severe of crimes, which, by definition, possess the extra element of being linked to armed conflict, or widespread or systematic attack. Given this high requirement, it is then highly unlikely that a peacekeeper will ever be prosecuted for a crime against humanity. A peacekeeper being convicted of a war crime is much more likely, and entirely possible. This will, of course, depend upon the attitude of the Court in considering the circumstances of a peacekeeping mission as falling within “the context of” armed conflict. Given that international humanitarian law is applicable to peacekeeping personnel,<sup>192</sup> it is highly improbable the Court would not consider the applicable crimes of peacekeepers to constitute war crimes. Therefore, rape, trafficking, and sexual slavery would easily be considered war crimes if committed within the contextual definitions of the Court.

Prosecution for trafficking, however, offers a significant challenge. It is a stated example of “enslavement,” though, and it is also found in a footnote of the elements of crimes of “sexual slavery.” It would be more difficult to charge a trafficker with “enforced prostitution;” a successful prosecution would depend entirely upon the contextual circumstances of the crime, and whether the required pecuniary or other advantage elements were satisfied.

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<sup>191</sup> See generally Negotiated Relationship Agreement between the International Criminal Court and the United Nations, U.N. Doc. ICC-ASP/3/Res.1 (previously U.N. Doc. PCNICC/2001/1/Add.1) (entered into force Oct. 4, 2004).

<sup>192</sup> This is a highly debated issue, but the author subscribes to the theory that it does apply.

In summary, it is extremely difficult to envision peacekeepers can or will be prosecuted by the ICC for these aforementioned reasons. Contextually, few of these crimes fall within the particular subject matter jurisdiction of the ICC. Most importantly, it is unlikely the Chief Prosecutor of the ICC, Luis Moreno-Ocampo, will take steps to prosecute peacekeepers.<sup>193</sup> His prioritized agenda concentrates efforts on the prosecution of regime leaders committing crimes of genocide, crimes against humanity, and war crimes on a massive scale. In addition, Moreno-Ocampo seems to place more emphasis on cooperating with nation-states and encouraging them to prosecute these peacekeepers at the national level, rather than charging these offenders in the ICC.

Despite many suggestions that the ICC should fill the lacuna created by unwilling nation-states and a troubled UN accountability system, the ICC should not be looked upon as a real solution to the problem of prosecuting peacekeepers for crimes against women involving sexual slavery, trafficking, rape, and enforced prostitution. Instead, the onus must be placed upon the U.N. to vastly improve its disciplinary system, as well as the individual states to take appropriate action to prevent and properly prosecute these heinous crimes.

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<sup>193</sup> Interview with Luis Moreno-Ocampo, Chief Prosecutor, Den Haag (Sept. 26, 2004) (on file with the author).