

# Impunity or immunity: wartime male rape and sexual torture as a crime against humanity<sup>1</sup>

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## Abstract

This paper seeks to analyze the phenomenon of wartime rape and sexual torture of Croatian and Iraqi men and to explore the avenues for its prosecution under international humanitarian and human rights law.

Male rape, in time of war, is predominantly an assertion of power and aggression rather than an attempt on the part of the perpetrator to satisfy sexual desire. The effect of such a horrible attack is to damage the victim's psyche, rob him of his pride, and intimidate him. In Bosnia-Herzegovina, Croatia, and Iraq, therefore, male rape and sexual torture has been used as a weapon of war with dire consequences for the victim's mental, physical, and sexual health. Testimonies collected at the Medical Centre for Human Rights in Zagreb and reports received from Iraq make it clear that prisoners in these conflicts have been exposed to sexual humiliation, as well as to systematic and systemic sexual torture.

This paper calls upon the international community to combat the culture of impunity in both dictator-ruled and democratic countries by bringing the crime of wartime rape into the international arena, and by removing all barriers to justice facing the victims. Moreover, it emphasizes the fact that wartime rape is the ultimate humili-

ation that can be inflicted on a human being, and it must be regarded as one of the most grievous crimes against humanity. The international community has to consider wartime rape a crime of war and a threat to peace and security. It is in this respect that civilian community associations can fulfil their duties by encouraging victims of male rape to break their silence and address their socio-medical needs, including reparations and rehabilitation.

*Key words:* sexual torture, male rape, wartime rape, gender crimes, Croatia, Iraq

## Introduction

Wartime rape of both men and women had never been judged as a crime against humanity before the codification of the charters of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda

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(ICTR). The case law of both these tribunals has made a great contribution to the development of international humanitarian and human rights law, particularly on gender crimes and sexual assault. This development is clearly reflected in the Rome Statute of the International Criminal Court promulgated in 1998.

This paper tries to address three principle issues relating to the above topic: wartime male rape as a crime of war and a threat to peace and security under international humanitarian and human rights law; the use of wartime male rape and sexual torture as a strategic weapon of war during the Yugoslav crisis and the US-led invasion of Iraq; and, finally, potential socio-legal remedies for meeting the needs of male rape victims under national, regional, and international law, as well as civilian and psycho-social remedies within civil community associations.

### Rape as a crime against humanity

In past years, male rape in particular, and rape in general, during armed conflict have been overshadowed by other war crimes. Legally speaking, rape was never considered or prosecuted as a crime against humanity under international humanitarian law before the establishment of the ICTY and the ICTR in 1993 and 1994 respectively.<sup>3</sup> The Charter of the International Military Tribunal (IMT) of 1945, and the Charter of the International Military Tribunal of the Far East (IMTFE) of 1946,<sup>4</sup> had excluded rape from crimes against humanity, although the Control Council Law No. 10 (CCL10) did add it to its list of these crimes; nevertheless no prosecution of rape has taken place under this law.<sup>5</sup> In the last few decades, however, rape as a crime of war has been implicitly mentioned in a number of international humanitarian law conventions.<sup>6</sup> Re-

3) Article 5 of the ICTY Statute states that "The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; and (i) other inhuman acts." This article is echoed in Article 3 of the ICTR Statute. See A. Callamard, et al., *Investigating Women's Rights Violations in Armed Conflicts* (Montreal, Quebec: Rights & Democracy, Amnesty International, 2001) 119 (hereinafter Callamard); S. Sarai, *The Rape of the Balkan Women: An Argument for the Full Recognition of Wartime Rape as a War Crime* (M.A., Queen's University at Kingston, 2000) 28 (hereinafter Sarai); Statute of the International Criminal Tribunal for the Former Yugoslavia, United Nations SCOR, 48th Sess., 3175. Annex, at 40, UN Doc. S/25704, 3 May 1993. (As Amended on 19 May 2003 by Security Council's Resolution 1481) (hereinafter the ICTY Statute); Statute of the International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, UN Doc. ITR/3/REV.1 (1995), entered into force on 29 June 1995 (hereinafter the ICTR Statute).

4) Crimes against humanity are listed in Article 6 (paragraph c) of the IMT Charter. This article is literally echoed in Article 5 (paragraph C) of the IMTFE Charter. See Charter of the International Military Tribunal (IMT), in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), 8 August 1945, 58 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 280; Charter of the International Military Tribunal for the Far East (IMTFE), 19 January 1946, 26 April, 1946, T.I.A.S. No.1589, 4 Bevans 20.

5) Article II (paragraph 1/C) defines crimes against humanity as "Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhuman acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic law of the country where perpetrated. See Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945, 3 Official Gazette Control Council for Germany 50-55 (1946) (hereinafter Control Council); M. Jarvis, *Sexual Violence and Armed Conflict: United Nations Response* (New York, N.Y.: UN Division for the Advancement of Women, 1998) 4 (hereinafter Jarvis).

cently, the systematic mass rape of Bosnian and Rwandan women between 1991 and 1995 challenged and developed the case law of the ICTY and the ICTR, allowing these bodies to make a great contribution to the development of international humanitarian and human rights law, particularly on gender crimes and sexual assaults. This development has been reflected clearly in the Rome Statute of the International Criminal Court, of 1998,<sup>7</sup> and the Statute of the Special Court for Sierra Leone.<sup>8</sup>

Despite the conventions' and statutes' fine-sounding norms, however, none of them has provided an explicit definition of rape as genocide, as a war crime, or as a crime against humanity in the true sense of the term. Consequently, the case law of

the ICTY and ICTR has developed different definitions through the trials and judgments of a number of suspects charged with, or convicted for, wartime rape as a crime against humanity.<sup>9</sup>

As a matter of fact, the ICTY and the ICTR were the first ever tribunals in the history of the international judicial system to prosecute and convict wartime rape as a crime against humanity. Before developing their own definitions of rape, both tribunals turned to classical definitions in national laws, which were inadequate to prosecute this grievous crime and, consequently, inappropriate to address the needs of the victims. This was due to the lack of a comprehensive technical definition, the responsibility for which must be shared by feminist legal

6) Namely; Article 27 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV), which reads, in part: "Women shall be specially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault"; Article 76(1) of Protocol I Additional to the Geneva Conventions 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"; and Article 4 (paragraph 2/e) of Protocol II Additional to the Geneva Conventions classifies "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault." See A. Callamard, *Documenting Human Rights Violations by State Agents* (Montreal, Quebec: Rights & Democracy, and Amnesty International, 1999) 7 (hereinafter Callamard); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV), Opened for signature 12 August 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (Entered into force on 21 October 1950) (hereinafter Geneva IV); Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Opened for signature on 12 December 1977, 1125 U.N.T.S. 3 (Entered into force on 7 December 1978) (hereinafter Additional Protocol I); Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-Inter-

national Armed Conflicts, Opened for signature on 12 December 1977, 1125 U.N.T.S. 609 (Entered into force on 7 December 1978) (hereinafter Additional Protocol II); Turkey: End Sexual Violence against Women in Custody!, June 2003, AI-Index EUR 44/006/2003, at p. 13.

7) The ICC Statute broadened the concept of rape to cover other sexual assaults as crimes against humanity and war crimes. Article 7 (1/g) states that "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity," are crimes against humanity. Moreover Article 8 (2/b/xxii) considered "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," to be war crimes. See Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (17 July 1998), 37 I.L.M. 999-1069 (Entered into force on 1 July 2002) (hereinafter the Rome Statute).

8) Similarly, Article 2 (g) of the Statute of the Special Court for Sierra Leone provides that "rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence," as crimes against humanity. See Statute of the Special Court for Sierra Leone, UN Doc. S/2002/246, appendix II, 2178 U.N.T.S. 138. (06/03/2002) (hereinafter The Sierra Leone Statute).

writers and national and international legislators.<sup>10</sup>

The ICTY and the ICTR case law presented a number of rape cases, three of which alone permitted three distinct definitions of rape based on the elements of the crime.<sup>11</sup> Drawing heavily on national laws, since no comprehensive definition of rape existed in international law,<sup>12</sup> the Trial Chamber I of the ICTR defined rape in the

Akayesu Judgement of 2 September 1998,<sup>13</sup> as: “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.” At the same time, the Tribunal defined sexual violence, including rape, as “any act of [a] sexual nature which is committed on a person under circumstances which are coercive.”<sup>14</sup>

While this landmark definition of rape has restricted the elements of the crime to

9) Prosecutor v. Alfred Musema, (2000) Judgement and Sentence, 27 January 2000, ICTR-96-13-T (hereinafter Musema Judgement); Alfred Musema v. The Prosecutor, (2001) Appeal Judgement, 16 November 2001, ICTR-96-13-A (hereinafter Musema Appeal Judgement); Prosecutor v. Anto Furundžija, (1998) Judgement, 10 December 1998, IT-95-17/1-T (hereinafter Furundžija Judgement); Prosecutor v. Anto Furundžija, (2000) Appeal Judgement, 21 July 2000, IT-95-17/1-A (Furundžija Appeal Judgement); Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković (2001) Judgement, 22 February 2001, IT-96-23-T and IT-96-23/1-T (hereinafter Kunarac Judgement); Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković (2002) Appeal Judgement, 12 June 2002, IT-96-23-A and IT-96-23/1-A (hereinafter Kunarac Appeal Judgement); Prosecutor v. Duško Tadić, (1997) Opinion and Judgement, 7 May 1997, IT-94-1-T (hereinafter Tadić Judgement); Prosecutor v. Duško Tadić (1999) Appeal Judgement, 15 July 1999, IT-94-1-A (hereinafter Tadić Appeal Judgement); Prosecutor v. Eliézer Niyitegeka, (2003) Judgement and Sentence, 16 May 2003, ICTR-96-14-T (hereinafter Niyitegeka Judgement and Sentence); Eliézer Niyitegeka v. The Prosecutor, (2004) Appeal Judgement, 9 July 2004, ICTR-96-14-A (hereinafter Niyitegeka Appeal Judgement); The Prosecutor v. Jean de Dieu Kamuhanda, (2004) Judgement, 22 January 2004, ICTR-95-54A-T (hereinafter Kamuhanda Judgement); Prosecutor v. Jean-Paul Akayesu, (1998) Judgement, 2 September 1998, ICTR-96-4-T (hereinafter Akayesu Judgement); Prosecutor v. Jean-Paul Akayesu, (2001) Appeal Judgement, 1 June 2001, ICTR-96-4-A (hereinafter Akayesu Appeal Judgement); Prosecutor v. Juvénal Kajelijeli, (2003) Judgement and Sentence, 1 December 2003, ICTR-98-44A-T (hereinafter Kajelijeli Judgement and Sentence); Prosecutor v. Laurent Semanza, (2003) Judgement and Sentence, 15 May 2003, ICTR-97-20-T (hereinafter Semanza Judgement and Sentence); Laurent Semanza v. The Prosecutor, (2005) Appeal Judge-

ment, 20 May 2005, ICTR-97-20-A (hereinafter Semanza Appeal Judgement); Prosecutor v. Mikaeli Muhimana, (2005) Judgement and Sentence, 28 April 2005, ICTR-95-IB-T (hereinafter Muhimana Judgement and Sentence); Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić and Dragoljub Prcać, (2001) Judgement, 2 November 2001, IT-98-30/1-T (hereinafter Kvočka Judgement); Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić and Dragoljub Prcać, (2005) Appeal Judgement, 28 February 2005, IT-98-30/1-A (hereinafter Kvočka Appeal Judgement); Prosecutor v. Sylvestre Gacumbitsi, (2004) Judgement, 17 June 2004, ICTR-2001-64-T (hereinafter Gacumbitsi Judgement); Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo, (1998) Judgement, 16 November 1998, IT-96-21-T (hereinafter Čelebići Judgement); Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo, (2001) Appeal Judgement, 20 February 2001, IT-96-21-A (hereinafter Čelebići Appeal Judgement); Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo, (2001) Sentencing Judgement, 9 October 2001, IT-96-21-Tbis-R117 (hereinafter Čelebići Sentencing Judgement); Prosecutor v. Zdravko Mucić, Hazim Delić and Esad Landžo, (2003) Judgement on Sentence Appeal, 8 April 2003, IT-96-21-Abis (hereinafter Čelebići Judgement on Sentence Appeal).

10) N. Quénivet, *Sexual Offenses in Armed Conflict and International Law* (Ardsey, N.Y.: Transnational Publishers, 2005) 1-2 (hereinafter Quénivet).

11) A.-M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Antwerpen, Belgium: Intersentia, 2005) 105 (hereinafter de Brouwer).

12) Akayesu Judgement, *supra* note 9, at paragraph 686.

(a) a physical invasion (penetration) of sexual nature, (b) committed on a person (male or female), (c) under circumstances which are coercive (against the victim's will or without her or his consent),<sup>15</sup> the Tribunal conceded that "sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact."<sup>16</sup> Simultaneously, the Tribunal noted that "rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual." For example, the Tribunal considered "the interahamwes thrusting a piece of wood into the sexual organs of a woman as she lay dying," an act of rape.<sup>17</sup> This instrumental rape, like

other forms of sexual violence, constitutes a method of torture and sexual mutilation.<sup>18</sup>

However, this broad definition of rape, as established in the Akayesu Judgement, was the first conceptual definition that refrained from specifying sexual organs, and that did not require penetration or the lack of consent as essential elements of the crime of rape set forth in classical definitions. In contrast to the prosecution's and the defence's attempts to elicit an explicit description of rape in physical terms, the Tribunal ruled that "rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts," thereby establishing a more acceptable definition

13) Jean-Paul Akayesu, the Mayor of Taba Commune in Gitarama during the 1994 Rwandan genocide, has made history. He was the first defendant to appear before the ICTR and to be charged with rape as a crime against humanity in connection with Articles 3 (g) of the ICTR Statute, Article 4 (e) of the Protocol II Additional to the Geneva Conventions echoed in Article 4 (e) of the ICTR Statute, and Article 3 common to the 1949 Geneva Conventions. See Additional Protocol II, *supra* note 6, at Article 4 (e); Geneva IV, *supra* note 6, at Article 3; The ICTR Statute, *supra* note 3, at Article 3 (g).

14) Akayesu Judgement, *supra* note 9, at paragraph 598.

15) In the Muhimana Judgement, the Trial Chamber III of the ICTR ruled that "coercion is an element that may obviate the relevance of consent as an evidentiary factor in the crime of rape." See Muhimana Judgement, *supra* note 9, at paragraph 546.

16) The Tribunal considered the incident described by witness KK in which Akayesu ordered the interahamwe to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd, an act of sexual violence. See Akayesu Judgement, *supra* note 9, at paragraph 688; M. Karagiannakis, "The Definition of Rape and its Characterization as an Act of Genocide: A Review of the Jurisprudence of the International Criminal Tribunals for Rwanda and

the Former Yugoslavia," (1999) 12 *Leiden Journal of International Law* 479 (hereinafter Karagiannakis).

17) In this connection, in the Čelebići Judgement, the Trial Chamber II of the ICTY indicated that vaginal or anal penetration by the penis under coercive circumstances constituted rape. Moreover, the Chamber ruled that the act of forcing victims to perform fellatio on one another constituted a fundamental attack on their human dignity as an offence of inhuman and cruel treatment under Articles 2 and 3 of the ICTY Statute, and noted that such act "could constitute rape for which liability could have been found if pleaded in the appropriate manner." See Akayesu Judgement, *supra* note 9, at paragraph 686; Čelebići Judgement, *supra* note 9, at paragraphs 1065-1066 & 940. Paragraph 940 was literally echoed in paragraph 962.

18) In his report submitted to the UN Commission on Human Rights on the issue of torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur Nigel Rodly stated that he received abundant information regarding the practice of rape and sexual abuse as a weapon to punish, intimidate and humiliate the victims, who were mostly women. He added that rape and other forms of sexual abuse were apparently associated with other methods of torture. See UN Commission on Human Rights, Report of Special Rapporteur on Torture and Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. E/CN.4/1994/31, (6 January 1994), at paragraphs 431-432.

that would protect the victims, particularly in cases of mass violence, and recognize cultural diversity on the concept of rape as a violation of the victim's personal dignity. Later on, the same Trial Chamber took the same decision in the *Musema* Judgement when it asserted that "the essence of rape is not the particular details of the body parts and objects involved, but rather the aggression that is expressed in a sexual manner under conditions of coercion."<sup>19</sup> It must be emphasized that the above definition has been reflected in a number of ICTR and ICTY judgments of war crime suspects charged with rape as a crime against humanity between 1998 and 2005.<sup>20</sup> The Trial Chambers at both Tribunals had no difficulty adopting and endorsing the definition of rape and sexual violence articulated in the *Akayesu* Judgement, or agreeing with its conclusion.<sup>21</sup>

The Tribunals' case law led to a new definition of rape enacted in the *Furundžija* Judgement by the Trial Chamber II of the ICTY. Noting that no definition of rape existed in the international law, and relying on Article 5 of the ICTY Statute, Article 27 of the Geneva Convention IV, Article 76 (paragraph 1) of the Additional Protocol I, and Article 4 (paragraph 2/e) of the Additional Protocol II,<sup>22</sup> the Chamber concluded that rape "is a for-

cible act of the penetration of the vagina, the anus or mouth by the penis, or of the vagina or anus by other object."<sup>23</sup>

From what has been said, it becomes clear that the ICTY Trial Chamber definition of rape in the *Furundžija* Judgement distinguished between the actual rape resulting in the sexual penetration of the vagina or anus of the victim by the penis of the perpetrator, on the one hand, and other sexual assaults falling short of actual penetration, on the other. This was in spite of the fact that the latter constitutes a serious abuse of a sexual nature upon the physical and moral integrity of the victim by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity.<sup>24</sup> Furthermore, the *Furundžija* definition was in sharp contrast to the *Akayesu* definition of rape. While the Trial Chamber I of the ICTR explicitly rejected a mechanical definition of rape as proposed by the prosecution and found in many national laws, the *Furundžija*'s conceptual definition stated the body parts in minute detail. Based on the above discussion, one might conclude that the *Furundžija* definition is more accurate and the *Akayesu* broader; in any event, this has qualified the first as the most acceptable definition of the crime of rape in interna-

19) *Akayesu* Judgement, supra note 9, at paragraph 687; de Brouwer, supra note 11, at 107 & 109; *Musema* Judgement, supra note 9, at paragraph 226; Quénivet, supra note 10, at 8.

20) Namely, *Čelebići* Judgement, supra note 9, at paragraphs 478-479; *Musema* Judgement and Sentence, supra note 9, at paragraphs 220 & 226; *Niyitegeka* Judgement and Sentence, supra note 9, at paragraph 456; *Muhimana* Judgement and Sentence, supra note 9, at paragraphs 535-551.

21) *Čelebići* Judgement, supra note 9, at paragraphs 478-479; *Musema* Judgement, supra note 9, at para-

graphs 20-27; *Muhimana* Judgement, supra note 9, at paragraph 535.

22) *Furundžija* Judgment, supra note 9, at paragraph 175; Geneva IV, supra note 6, at Article 27; Additional Protocol I, supra note 6, at Article 76 (paragraph 1); Additional Protocol II, supra note 6, at Article 4 (paragraph 2/e).

23) *Furundžija* Judgment, supra note 9, at paragraph 174.

24) *Ibid.*, at paragraph 186.

tional law at the present time and for the foreseeable future.<sup>25</sup>

There is no doubt that the Preparatory Commission for the International Criminal Court (PrepCom) was influenced by ICTY and ICTR case law. This was reflected in the elements of crimes (EoC) prepared to help the court in its interpretation and application of Articles 6 (genocide), 7 (crimes against humanity), and 8 (war crimes) as stated in article 9 of the ICC statute, and in consistency with the PrepCom mandate.<sup>26</sup> As wartime rape in the former Yugoslavia and Rwanda fits the crime of genocide as well as crimes against humanity and war crimes under the ICC statute, the PrepCom provided three sets of EoC on the definition of rape: one according to Article 7 (paragraph 1/g), crimes against humanity; another according to Article 8 (paragraph 2/b/xxii), war crimes associated with an international armed conflict; and a third according to Article 8 (paragraph 2/e/vi), war crimes as-

sociated with an armed conflict of an international character.<sup>27</sup>

### **Rape as a strategic weapon of war**

Male rape in times of war is predominantly an assertion of power and aggression rather than an expression of satisfying the perpetrator's sexual desire. The impact of such a horrible attack can damage the victim's psyche and cause him to lose his pride, break him down, and perhaps even extend this feeling to his entire family and society.<sup>28</sup> In ancient wars and societies, male rape in times of war was considered as an absolute right of the victorious soldiers to declare the totality of the enemy's defeat and to express their own power and control. It has been used as a weapon of war and a means of punishment in many cultures. In the military context, there was a widespread belief that when a victorious soldier emasculated a vanquished enemy and sexually penetrated him, the victim would lose his

25) Akayesu Judgement, supra note 9, at paragraph 687; de Brouwer, supra note 11, at 114-115; Quéniwet, supra note 10 at 10.

26) The PrepCom was established by the Rome Conference of Plenipotentiaries on the Establishment of an International Criminal Court, and mandated by the conference to prepare proposals for the practical operation of the ICC, including: draft texts of Rules of Procedure and Evidence; Elements of Crimes, a relationship agreement; financial regulations and rules; an agreement on privileges and immunities of the court; a budget for the first financial year; the rules of procedure of the Assembly of State Parties; and proposals on a provision on aggression. On 30 June 2000, the PrepCom adopted finalized draft texts of the Rules of Procedure and Evidence (PCNICC/2000/1/Add.1) and Elements of Crimes (PCNICC/2000/1/Add.2). See de Brouwer, supra note 11, at 130; J. Lee, et al., Annotated Rome Statute of the International Criminal Court (Vancouver, B.C.: International Center for Criminal Law Reform & Criminal Justice Policy, 2002) 4 (hereinafter Lee).

27) Finalized Draft Text of the Elements of Crimes, UN Doc. PCNICC/2000/1/Add.2, (2 November 2000), at pp. 12, 34, and 43 (hereinafter Finalized Draft).

28) A. Groth & A. Burgess, "Male Rape: Offenders and Victims," (1980) 137 American Journal of Psychiatry 806 (hereinafter Groth); C. Anderson, "Males as Sexual Assault Victims: Multiple Levels of Trauma," (1982) 7:2-3 Journal of Homosexuality & Psychotherapy 145 (hereinafter Anderson); G. Lipscomb, et al., "Male Victims of Sexual Assault," (1992) 267:22 Journal of American Medical Association 3066 (hereinafter Lipscomb); G. Mezey & M. King, "The Effects of Sexual Assault on Men: A Survey of 22 Victims," (1989) 19:1 Psychological Medicine 205 (hereinafter Mezey); O. Jones, "Sex, Culture, and the Biology of Rape: Toward Explanation and Prevention," (1999) 87:4 California Law Review 829 (hereinafter Jones); S. Ben-David & P. Silfen, "Rape Death and Resurrection: Male Reaction after Disclosure of the Secret of being a Rape Victim," (1993) 12 Medicine and Law 181 (hereinafter Ben-David).

manhood, and could not be a warrior or a ruler anymore.<sup>29</sup>

For the first time in the history of international legal discourse, rape was defined in gender-neutral terms in the Tribunals' case law and in the ICC Elements of Crimes, as both men and women could be victims of rape. Although the Office of the Prosecutor has never charged any of the war crimes suspects with rape for sexual assaults on men, the Trial Chamber I of the ICTR recognized in the Akayesu case that "rape and sexual violence constitute one of the worst ways of harming the victim as he or she suffers both bodily and mental harm."<sup>30</sup>

When war finally came to an end in the former Yugoslavia, the medical records of health care centres provided evidence of

male rape and sexual torture of Croatian and Bosnian Muslim men including castration, genital beatings, and electroshock.<sup>31</sup> Testimonies collected at the Medical Center for Human Rights in Zagreb from fifty-five men who were captured by Serb militants, emphasized that they had been exposed to five categories of systematic and organized sexual torture, with the aim of expressing aggression, psychologically damaging the victims, and destroying their identity, rather than satisfying the perpetrators' lustful desires. These assaults included rape, deviant sexual acts, total and partial castrations, injuries to the testes with blunt objects, and a combination of other injuries.<sup>32</sup> In this sense, male rape was used as a weapon of war to inflict serious mental, physical, and

29) In spite of the lack of evidence on male rape incidents during war, recent studies have confirmed that men were also raped but to a much lesser extent. Some writers have controversially alluded to one of the most famous male rape cases during WWI, when the Ottoman Turks captured and sexually assaulted Thomas Edward Lawrence, known as Lawrence of Arabia, on 2 November 1917 in Deraa, Syria. He was subjected to humiliating treatment including beatings and sexual assault at the instigation of the governor. See J. Godl, Feature Articles: The Disputed Sexuality of T. E. Lawrence, Online: First World War [www.firstworldwar.com/features/telawrence.htm](http://www.firstworldwar.com/features/telawrence.htm) (Accessed on: 21 June 2006); J. Wilson, Lawrence of Arabia: The Authorized Biography of T. E. Lawrence (New York, N.Y.: Atheneum, 1990) 5 (hereinafter Wilson); L. Stermac, et al., "Sexual Assault of Adult Males," (1996) 11:1 Journal of Interpersonal Violence 52 (hereinafter Stermac); Quénivet, supra note 10, at 17.

30) Akayesu Judgement, supra note 9, at paragraph 731.

31) Different reports from the battlefield in Croatia and Bosnia-Herzegovina claimed that male captives were subjected to systematic brutal rape and sexual assaults during armed conflict. It has been estimated that more than 4,000 Croatian men were sexually abused by Serb militants. Ruling on the first case before the ICTY, the Prosecutor charged Dušku

Tadić with sexual violence against male prisoners at the Omarska concentration camp. See D. Zarkov, "The Body of the other Man: Sexual Violence and the Construction of Masculinity, Sexuality and Ethnicity," in Gender, Armed Conflict and Political Violence. A Conference Held in Washington, D.C., 10-11 June 1999 (Washington, D.C.: The World Bank, 1999), Online: World Bank [www.worldbank.org/gender/events/armedconflict.htm](http://www.worldbank.org/gender/events/armedconflict.htm) (Accessed on: 28 November 2002); E. Carlson, "Sexual Assault on Men in War," (1997) 349:9045 The Lancet 129 (hereinafter Carlson); H. van Tienhoven, "Sexual Torture of Male Victims: Dutch Refugee Health Centre First to Examine this Subject in Detail," (1993) 3:4 Torture 133 (Tienhoven); L. Wadham, "Shame of Bosnia's Raped Pow's," The Sunday Telegraph (28 April 1996) 10; M. Jarvis, Redress for Female Victims of Sexual Violence during Armed Conflict: Security Council Responses (LL.M., Faculty of Law, University of Toronto, 1997) 8 (hereinafter Jarvis); Prosecutor v. Dušku Tadić also Known as "Dule" & Goran Borovinca, Indictment of 13 February 1995, 34 I.L.M.1028, IT-94-1-I, at paragraph 2.6. (hereinafter Tadić Indictment).

32) M. Lončar, "Sexual Torture of Men in the War," in L. Arcel & G. Šimunković, eds., War Violence, Trauma and the Coping Process: Armed Conflict in Europe and Survivor Responses (Copenhagen: Rehabilitation Center for Torture Victims, 1998) 213.

sexual health consequences leading to the destruction of the victim, and to be evidence of the perpetrators' complete victory.<sup>33</sup>

In occupied Iraq, the Abu Ghraib Scandal of April 2004 revealed that rape and sexual torture of both Iraqi women and men were conducted in a systematic way to crush the spirit of the political detainees who opposed and resisted the invasion.<sup>34</sup>

Although President Bush has described the abuses at Abu Ghraib as "exceptional isolated cases" and "a disgraceful conduct by a few American troops," his administration continued the policy of deliberate coercive interrogation inside Iraq, in Afghanistan and in CIA secret prisons in other parts of the world.<sup>35</sup> Worse than this is the administration's attempt to develop outrageous

legal theories to justify torture and finally legalize it. Recently, the American president signed the Military Commissions Act of 2006 (MCA) after it had been passed by the Congress. This bill has rendered the Geneva Conventions unenforceable in court and has immunized CIA personnel from prosecution for their abuses. Section 5 of the bill provides that the Geneva Conventions and related treaties are unenforceable in court in civil cases involving the US government or its agents. Moreover, this law bars aliens held as "unlawful enemy combatants" from filing cases to challenge the legality of their detention or raise claims of torture or other abuses.<sup>36</sup>

The worst of the above is the promotion of the culture of impunity by an interna-

33) Wartime rape and sexual torture of Croatian and Bosnian Muslim men was not a new phenomenon. Case studies, interviews with involved doctors and psychologists, as well as personal contacts with victims, indicate that political prisoners in Chile, El Salvador, Greece, and Sri Lanka, were often subjected to all forms of sexual violence in the eighties and nineties of the last century. Similarly, during the years of armed conflict in the Democratic Republic of Congo, men and boys were raped and sexually assaulted in multitudes by combatants, particularly in the eastern part of the country. See G. Daugaard, et al., "Sequelae to Genital Trauma in Torture Victims," (1983) 10 Archives of Andrology 245 (hereinafter Daugaard); I. Agger, "Sexual Torture of Political Prisoners: An Overview," (1989) 2 Journal of Traumatic Stress 305 (hereinafter Agger); J. Cienfuegos & C. Monelli, "The Testimony of Political Repression as a Therapeutic Instrument," (1983) 54 American Journal of Orthopsychiatry 43 (hereinafter Cienfuegos); M. Peel, et al., "The Sexual Abuse of Men in Detention in Sri Lanka," (2000) 355:9220 The Lancet 2069 (hereinafter Peel); R. Dominguez & E. Weinstein, "Aiding Victims of Political Repression in Chile: A Psychological and Psychotherapeutic Approach," (1987) 24 Tidsskrift for Norsk Psyckologforening 75 (hereinafter Dominguez); Seeking Justice: The Prosecution of Sexual Violence in the Congo War, Human Rights Watch, March 2005, Vol. 17, No.1 (A), at p. 20-21 (hereinafter Seeking Justice).

34) A. Taguba, Hearing Article 15-6 Investigation of the 800th Military Police Brigade, Online: Global Security [www.globalsecurity.org/intell/library/reports/2004/800-mp-bde.htm](http://www.globalsecurity.org/intell/library/reports/2004/800-mp-bde.htm) (Accessed on: 25 August 2004) (hereinafter Taguba Report); A. Zagorin, "The Abu Ghraib Scandal you don't Know," Time 165:7 (14 February 2005) 36; L. Burnham, Sexual Domination in Uniform: An American Value, Online: Counterpunch (22-23 May 2004) [www.counterpunch.com/burnham05222004.html](http://www.counterpunch.com/burnham05222004.html) (Accessed on: 31 May 2004); M. Bloche & J. Marks, "Triage at Abu Ghraib," The New York Times (4 February 2005) A19; R. Mollica, "Surviving Torture," (2004) 351:1 New England Journal of Medicine 6; S. Fiske, et al., "Why Ordinary People Torture Enemy Prisoners," (2004) 306:5701 Science 1482; S. Miles, Oath Betrayed: Torture, Medical Complicity, and the War on Terror (New York, N.Y.: Random House, 2006) 27; W. Bennett, et al., "None Dare Call it Torture: Indexing and the Limits of Press Independence in the Abu Ghraib Scandal," (2006) 56:3 Journal of Communication 469.

35) D. Rose, Guantanamo: America's War on Human Rights (London: Faber & Faber, 2004) 17; M. Bowden "Lessons of Abu Ghraib," The Atlantic Monthly 293:6 (July-August 2004) 33-34; R. Kunzendorf, et al., "The Fine Line between Fantasizing Torture and Countenancing Abu Ghraib," (2004-2005) 24:4 Imagination, Cognition and Personality 301 (hereinafter Kunzendorf).

36) A. Lewis, "Making Torture Legal," *The New York Review of Books* 51:12 (15 July 2004) [www.nybooks.com/articles/17230](http://www.nybooks.com/articles/17230) (Accessed on: 29 July 2004); D. Jehl & D. Jonstone, "CIA Expands its Inquiry into Interrogation Tactics," *The New York Times* (29 August 2004) A1; J. Mariner, *The Military Commissions Act of 2006: A Short Primer*, Online: FindLaw (9 October 2006) <http://writ.news.findlaw.com/mariner/20061009.html> (Accessed on: 14 October 2006); K. Roth, "Justifying Torture," in K. Roth, et al., eds., *Torture: Does it Make us Safer? Is it Ever Ok? A Human Rights Perspective* (New York, N.Y.: Human Rights Watch, 2005) 184-185 & 190 (hereinafter Roth); N. Lewis, "Broad Use of Harsh Tactics is Described at Cuba Base," *The New York Times* (17 October 2004) A1; R. Brody, "The Road to Abu Ghraib: Torture and Impunity in U.S. Detention," in K. Roth, et al., eds., *Torture: Does it Make us Safer? Is it Ever Ok? A Human Rights Perspective* (New York, N.Y.: Human Rights Watch, 2005) 145-146; United States, *The House of Representatives, 109th Congress, 2nd Session, House of Representatives Authorization of an Act may be Cited as "Military Commissions Act of 2006,"* 3 January 2006.

37) Human Rights Watch, Press Release, "U.S. Tries to Get Off the Hook on War Crimes: Ahead of United Nations Resolution on Iraq, U.S. Tries to Exclude its Troops from Prosecution," (20 May 2004); UN Security Council's Resolution 1487 (2003), Requesting that the ICC shall for a 12 months period starting 1 July 2003 not commence or proceed with investigation or prosecution of any 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 UN established or authorized operations (12 June 2003) UN Doc. S/RES/1487 (2003). In fact, this is not a new phenomenon in the legacy of the international organization, which has also recognized and protected war crime suspects. In October 1992, the United Nations and the EC invited the Yugoslav war factions, including two war criminals, to negotiate peace in Geneva. Referring to this event, Haris Siladžić, at that time the Bosnian foreign minister and head of the Bosnian delegation said: "If you kill one person, you're prosecuted; if you kill ten people, you're a celebrity; if you kill a quarter of a million people, you're invited to a peace conference." Later on, in his opening statement at the second panel of a symposium on practical implications of universal jurisdiction, held at the UCLA School of Law on 7 March 2003, Reed Brody, a special counsel with Human Rights Watch, said something similar to Siladžić saying: "We used to say that if you kill one person, you go to jail; if you kill 20 people, they put you in an insane asylum; and if you kill 20,000

people, you get invited to a peace conference, or you get an amnesty, or you die in your sleep."

Moreover, despite its mandate to maintain peace and security, the UN Security Council waged a hidden war against Iraqi civilians by imposing US-initiated comprehensive economic sanctions on Iraq between 1991 and 2003. Until 1995, it was estimated that 567,000 Iraqi children under the age of five have died of malnutrition and preventable diseases. The genocidal effects of the UN sanctions on Iraqi children and civilians were documented by Ramsey Clark, the former US Attorney General, international advocacy groups and NGO's, the UN Food and Agriculture Organization, and the UN children's fund. See F. Boyle, "UN Abets Genocide in Rwanda," Online: Twatch-L (1998) TWATCH-L@LISTSERVE.ACSU.BUFFALO.EDU (Received on: 25 September 1998); Food and Agriculture Organization of the United Nations, *Evaluation of Food and Nutrition Situation in Iraq* (Rome: FAO Technical Cooperation Programme, 1995) 50 (hereinafter FAO); J. Mueller & K. Mueller, "Sanctions of Mass Destruction," (1999) 78:3 *Foreign Affairs* 45 (hereinafter Mueller); P. Pellett, "Sanctions, Food, Nutrition, and Health in Iraq," in A. Arnove, ed., *Iraq under Siege: The Deadly Impact of Sanctions and War* (Cambridge, Mass.: South End Press, 2000) 163 (hereinafter Pellett); R. Clark, "The Devastation of Iraq by War and Sanctions: Fire and Ice," in R. Clark, et al., eds., *Challenges to Genocide: Let Iraq Live* (New York, N.Y.: International Action Center, 1998) 29 (hereinafter Clark); R. Clark, "Report on the Impact of UN Sanctions on the Civilian Population of Iraq," A Letter to the Members of the UN Security Council from Ramsey Clark, the former US Attorney General (14 November 1997) (hereinafter Ramsey Report); R. Masri, "International Law: Sanctions are Criminal," in R. Clark, et al., eds., *Challenge to Genocide: Let Iraq Live* (New York, N.Y.: International Action Center, 1998) 37 (hereinafter Masri); S. Flounders, "Introduction: Break the Silence," in R. Clark, ed., *The Impact of Sanctions on Iraq: The Children are Dying* (New York, N.Y.: International Action Center, 1998) 1 (hereinafter Flounders); S. Lewis, "The United Nations, Human Rights and the Rights of Children," (The Sixth John Humphrey Lectureship in Human Rights, InterAmicus, Faculty of Law, McGill University, 5 November 1997); "Symposium: Justice and Sovereignty: Implications of the International Criminal Courts: Panel: Universal Jurisdiction: Practical Implications of Universal Jurisdiction," (2003) 8 *UCLA Journal of International Law and Foreign Affairs* 72; Un Children's Fund, *Disastrous Situation of Children in Iraq*, UNICEF Report PR/GVA/96/035 (4 October 1996).

tional organization. In this respect, the UN Security Council Resolution 1487 (2003) adopted on 12 June 2003 has exempted the American troops and personnel serving in any UN force in Iraq from prosecution for international war crimes under the Rome Statute of the ICC.<sup>37</sup>

However, investigations of convicted American troops involved in the disgraceful Abu Ghraib scandal revealed that the abuses of Iraqi detainees did not erupt spontaneously at the lowest levels of the military chain of command; rather it was the product of a deliberate policy drawn up at the highest levels immediately after the decision by Secretary of Defence Donald Rumsfeld to step up the hunt for “actionable intelligence” among Iraqi prisoners.<sup>38</sup>

### **Mechanisms of justice and socio-legal remedies for wartime male rape victims**

This paper provides three kinds of potential remedies available for addressing the needs of Croatian and Iraqi wartime male rape victims: legal remedies, remedies within the United Nations system, and psycho-social

remedies within civil community associations.

Under the heading of legal remedies, there are four different fora that have jurisdiction over perpetrators: national courts in Iraq, Croatia, Serbia, and the United States; national courts experiencing universal jurisdiction; regional courts; and international ad hoc and permanent courts. Although the American-led occupation laws did not give any mandate to the Iraqi national courts over the American coalition troops and personnel, these courts, according to the principles of international law, still have jurisdiction to define and punish wartime male rape crimes committed within Iraqi territory. Article 146 of the fourth Geneva Convention requires each High Contracting Party to prosecute any offence that qualifies as a grave breach of the convention. Similarly, Article 5 of the Convention on the Prevention and Punishment of the Crime of Genocide, as well as Article 5 (par.1) of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, obligates the Iraqi, Croatian, Yugoslav, and American governments, as

38) D. Rose, “American Interrogation Methods in the War on Terror,” in T. Williamson, ed., *Investigative Interviewing: Rights, Research and Regulation* (Portland, Or.: Willan Publishing, 2006) 54; J. Paust, *Abuse of Iraqi Detainees at Abu Ghraib: Will Prosecution and Cashiering of a Few Soldiers Comply with International law?*, Online: Jurist <http://jurist.law.pitt.edu/forum/paust1.php> (Accessed on: 3 June 2004); Kunzendorf, *supra* note 35, at 302; S. Hersh, “Torture at Abu Ghraib: American Soldiers Brutalized Iraqis, How Far up Does the Responsibility Go?,” *The New Yorker* (5 May 2004) A1; T. Regan, “Abu Ghraib Report: ‘Failure of leadership’ at Highest Levels,” *The Christian Science Monitor* (20 August 2004) 3.

39) Moreover, Article 14 of the Convention against Torture provides for redress and compensation for torture victims, and requires State Parties to prosecute perpetrators. It reads: “Each State Party shall ensure

in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.” See Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 39/46, 39 UN GAOR, Supp. (No.51) at 197, UN Doc. A/39/51 (1984), reprinted in 23 *International Le Aterials* 1027 (1984), Substantive changes noted in 24 *I.L.M.* 535 (1985) (Entered into force on 26 June 1987); Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, GA Res. 260A (III), 3 UN GAOR at 174, UN Doc. A/810 (1948); D. Shelton, *Remedies in International Human Rights Law* (Oxford, N.Y.: Oxford University Press, 2005) 115; Geneva IV, *supra* note 6.

state parties, to take the necessary measures to establish jurisdiction over wartime male rape crimes.<sup>39</sup>

Croatian and Iraqi victims can also institute civil lawsuits against rapists in the courts of the United States under two pieces of legislation: the Alien Tort Claims Act, passed in 1980, and the Torture Victim Protection Act, signed in March 1992.<sup>40</sup>

In this respect, the Supreme Court of Canada, in the case of *R. v. Finta*, states that: "The principle [of Universality] permits the exercise of jurisdiction by a state in respect of criminal acts committed by non-nationals against non-nationals wherever they take place". Additionally, subsection 7 (para. 3.71) of the Canadian Criminal Code provides that "every person who commits a war crime or a crime against humanity that would constitute an offence against Canadian laws in force at that time shall be deemed prosecutable as if he or she had

committed a crime in Canada at that time." Accordingly, under this provision and pursuant to both the Torture Convention 269.1 of the Canadian Criminal Code, Canadian authorities may prosecute wartime rape perpetrators found within Canadian territory.<sup>41</sup>

Before the political abuse of the Belgian universal jurisdiction in April 2003, war crime victims were able to file lawsuits against their perpetrators. Unfortunately, after a number of high-profile lawsuits were filed against the American president and his secretary of defence for alleged crimes committed during the Gulf War of 1991, the Belgian government passed an amendment in April 2003 changing the law. The new amendment provides that the victim or the defendant must be Belgian.<sup>42</sup>

On the regional level, Iraqi victims of wartime rape may file petitions with the Inter-American Court of Human Rights, which prosecutes violations of the rights to

40) Alien Tort Claims Act, Judiciary Act, ch. 20, s.9(b), 1 Stat. 73, 77 (1789) (currently, with some changes, 29 U.S.C.S. 1350 (1982)); *Doe v. Karadžić*, 866 F.Supp. 734 at 741 (U.S. Dist. 1994); E. Eric, "The Torture Victim's Protection Act, the Alien Tort Claims Act, and Foucault's Archaeology of Knowledge. (Michel Foucault) (Torture: Paradigms, Practices, and Policies)," (2003) 67:2 Albany Law Review 501; F. Kirgis, "Restitution as a Remedy in U. S. Courts for Violations of International Law," (2001) 95:2 The American Journal of International Law 341; *Filartiga v. Pena-Irala*, 630 F.2d 876 at 648 (2nd Cir 1980); J. Terry, "Torture Victims: Rights and Remedies under United States Law," (1989) 2 Harvard Human Rights Yearbook 169; *Kadic' v. Karadzic'*, 34 I.L.M. 1592 at 1600 (2nd Cir. 1994); M. Brandt, "Doe v. Karadžić: Redressing Non-State Acts of Gender-Specific Abuse under the Alien Tort Statute," (1995) 79 Minnesota Law Review 1413-1414; Torture Victim protection act, Pub. L. No. 102-256, 106 Stat, 73 (1992), (codified at 28 U.S.C., ss.1350, 1331, and 1367); War Crimes Act of 1996, 21 August 1996, 18 USC 2401, 35 I.L.M. 1539-1540.

41) Canadian Criminal Code, R.S.C., 1985, c. C-46; D. Matas, "The Case of Imre Finta," (1994) 43

University of New Brunswick Law Journal 283; I. Cotler, "War Crimes Law and the Finta (*R. v. Finta* (1994) 1 S.C.R. 701) Case," (1995) 6 The Supreme Court Law Review 577; I. Cotler, "Canada-War Crimes-Crimes against Humanity-Criminal Law-Constitutional Validity-Jurisdiction-Actus Reus-Mens Rea-Defenses-Alternative Remedies-Canadian Charter of Rights and Freedoms," (1996) 90:3 The American Journal of International Law 460; *R. v. Finta*, 1989, 50 c.c.c. (3d) 236 C.J., affd at (1992) 73 c.c.c. (3d) 65 (Ont. C.A.).

42) Belgium: Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, 10 February 1999, 38 I.L.M. 918-925; Diaz, et al. c. Pinochet, (6 November 1998), Brussels Dossier No. 216/98, Notices No. 30.99.2447/98; (1999) Journal des Tribunaux 308-311; Prosecutor c. B & C, (20 November 1997) Brussels Dossier No. 54 A. R. (C. Mlt.); Procureur c. X, (1995) Journal des Tribunaux 542 (Bruxelles, Cour d'appel, Ch. mis. acc.); Procureur c. X, (1996) Revue de droit pénal et de criminologie 198 (Bruxelles, Ct. de Cass., 2e chambre); Procureur c. X et al., (1996) Revue de droit pénal et de criminologie 906 (Bruxelles, Ct. de Cass., 2e chambre).

life and personal integrity as a remedy under Articles 1 (para.1), 8, and 25 of the American Convention on Human Rights. Under these articles, state parties are obligated to provide a fair hearing before a competent and independent court, and to make effective internal remedies to the victims.<sup>43</sup>

Croatian victims of wartime rape can file cases with the International Criminal Tribunal for the Former Yugoslavia according to Article 5 of the statute of the tribunal, which has the mandate to prosecute and indict war crime suspects for crimes against humanity, including rape and sexual torture. Moreover, rule 106 of the tribunal's Rules of Procedure and Evidence provides that the Registrar shall transmit to the competent authorities of the state concerned the judgement finding the accused guilty of a crime. After this, the victim may file a lawsuit with a national court or another competent body to obtain compensation.<sup>44</sup>

By the same token, Croatian and Iraqi victims of sexual torture have the right to receive reparations under Articles 75 and

79 of the Rome Statute of the International Criminal Court and rules 94-99 of the ICC Rules of Procedure and Evidence. Pursuant to Article 79 (para.1), the Trust Fund for victims and their families was established on 9 September 2002 under the Assembly of State Parties' Resolution 6, of 9 September 2002.<sup>45</sup>

Remedies for wartime rape victims could also be obtained within the United Nations system under both the treaty-based procedure, including the Human Rights Committee and the Commission against Torture, and the non-treaty procedure, involving the UN Commission on Human Rights and its Sub-Commission, which provides that "all victims of gross violations of human rights and fundamental freedoms should be entitled to restitution, a fair and just compensation, and the means of rehabilitation." The Human Rights Committee, which was established under the International Covenant on Civil and Political Rights, has an individual complaint procedure. Individuals of more than eighty countries that ratified the Optional

43) American Convention on Human Rights, Opened for signature 22 November 1969, O.A.S.T.S. No. 36; Reprinted in 9 I.L.M. 673 (1970) (Entered into force on 18 July 1978). *Carrocoles v. Bolivia*, (1982), Inter-American Court of Human Rights (OEA/Ser.L/V/II.57, Doc. 6 rev. 1) Case No. 7481, Report No. 30/82; *Caypani et al v. Peru*, (1990), Inter-American Court of Human Rights (OEA/Ser.L/V/II.79, Doc. 12 rev. 1) Case No. 10.308, Report No. 37/90; *Celestine v. United States*, (1989), Inter-American Court of Human Rights (OEA/Ser.L/V/II.77, Doc. 7 rev. 1) Case No. 10.031, Report No. 23/89; *Fenelon v. Haiti*, (1982), Inter-American Court of Human Rights (OEA/Ser.L/V/II.61, Doc. 22 rev.1) Case No. 6586, Report No. 48/82; *Ford et al. v. El Salvador*, (1983), Inter-American Court of Human Rights (OEA/Ser.L/V/II.61, Doc. 22 rev. 1) Case No. 7575, Report No. 17/83; *Korte v. Costa Rica*, (1987), Inter-American Court of Human Rights (OEA/Ser.L/V/II.71, Doc. 9 rev.1) Case No. 9788, Report No. 16/87; *S. Dav-*

*idson*, "Remedies for Violations of the American Convention on Human Rights," (1995) 44:2 *International and Comparative Law* 405.

44) *Compensation and Participation: Judges' Report of 13 September 2000*, Online: The International Criminal Tribunal for the Former Yugoslavia <http://www.un.org/icty/pressreal/tolb-e.htm> (Accessed on: 23 December 2006); The ICTY Statute, *supra* note 3; M. Keegan, "The Preparation of Cases for the ICTY," (1997) 7:1 *Transnational Law & Contemporary Problems* 119.

45) The Rome Statute, *supra* note 7. W. Marieke & G. Pablo, *Reparations and the International Criminal Court: A Prospective Role for the Trust Fund for Victims*, Online: International Center for Transitional Justice [www.vrwg.org/Publications/02/ICTJ%20Trust%20Fund%20Paper.pdf](http://www.vrwg.org/Publications/02/ICTJ%20Trust%20Fund%20Paper.pdf) (Accessed on: 23 December 2006).

Protocol to the Political Covenant may complain against such states to the Human Rights Committee under this procedure.<sup>46</sup> Moreover, wartime rape victims are entitled to receive psycho-social remedies, including counselling and rehabilitation.<sup>47</sup>

**Conclusion: What have we learned? What must we do to help these victims?**

At the fifty-eighth anniversary of the Universal Declaration of Human Rights, let us recall General Dallaire's critical question as stated in his book "Shake Hands with the Devil": "Are we all human, or are some more human than others?" General Dallaire asked this question after he was informed by an American officer that the lives of the 800,000 Rwandans slaughtered in the genocide were only worth risking the lives of ten American troops, in a reference to the ten Belgian blue helmets who were massacred by Hutu militias at the beginning of the Rwandan Genocide.<sup>48</sup>

To reinforce the norms of the Universal Declaration of Human Rights, stressing that all humans are equal and no one is more human than another, we should combat the culture of impunity in both dictator-ruled and democratic countries by bringing the crime of wartime rape into the international arena, and by removing all barriers to justice facing the victims. Moreover, we should emphasize the fact that wartime rape is the ultimate humiliation that can be inflicted on a human being, and it must be regarded as one of the most grievous crimes against humanity. The international community has to consider wartime rape a crime of war and a threat to peace and security. It is in this respect that civilian community associations can fulfil their duties by encouraging victims of male rape to break their silence and address their socio-medical needs, including reparations and rehabilitation.

46) In this respect, Article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights states that: "A State Party to the Covenant that becomes a Party to the Present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant." Optional Protocol to the International Covenant on Civil and Political Rights, Adopted on 16 December 1966, 999 U.N.T.S. 302 (Entered into force on 23 March 1976).

47) L. Kynes, "Letting the CAT Out of the Bag: Providing a Civil Right of Action for Torture Committed by U.S. Officials Abroad, an Obligation of the Convention Against Torture," (2005) 34:1 Georgia Journal of International and Comparative Law 187; R. Elder, et al., "Rehabilitation of the War Casualties in Croatia 1992: A Situation Analysis,"

(1993) 34:1 Croatian Medical Journal 24; S. Borrowman, "Sosa v. Alvarez-Machain and Abu Ghraib - Civil Remedies for Victims of Extraterritorial Torts by U.S. Military Personnel and Civilian Contractors," (2005) 2 Brigham Young University Law Review 371; S. Orešković, "International Rehabilitation Council for Torture Victims (IRCT): Experiences after Two Years of Providing Psychosocial Support to Women-Victims of War and their Families from Bosnia and Herzegovina and Croatia," (1996) 37:1 Croatian Medical Journal 38.

48) H. Zawati, *Gendered Violence in Ethno-National Conflicts: Systematic Wartime Rape as a Crime against Humanity* (Lewiston, N.Y.: Edwin Mellen Press, forthcoming 2007) 179; R. Dallaire & B. Beardsley, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (Toronto, Ont.: Random House Canada, 2003) 522.

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