Prosecuting Rape in International Criminal Tribunals: The Need to Balance Victim's Rights with the Due Process Rights of the Accused

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INTRODUCTION

After the end of the Second World War, when the world bore witness to the incredible horror and destruction capable of being inflicted in times of war, countries emerging from devastating conflict have utilized international and domestic tribunals in order to prosecute genocide, war crimes, crimes against humanity, and other human rights violations arising out of the conflict.1 In addition to acting as punitive bodies, tribunals were

1 See INTERNATIONALIZED CRIMINAL COURTS (Cesare P.R. Romano et al. eds., Oxford University Press 2004) (providing a general discussion of international tribunals including the Tokyo and Nuremberg Tribunals, The Special Court for Sierra Leone, Special Tribunal for Cambodia, Iraq High Tribunal, South Africa Truth and Reconciliation Commission, and the International Criminal Tribunals for Rwanda and the Former Yugoslavia.). See generally Christopher C. Joyner, Redressing Impunity for Civil Rights Violations: The Universal Declaration and the Search for Accountability, 26 DENV.
created to serve as a symbol of justice and reconciliation for victims.²

In order to achieve legitimacy and effectiveness under international law, these tribunals must adhere to international standards of due process,³ including the right of the accused to confront the witnesses against him.⁴ Problems arise in the context of war crimes tribunals when witnesses are also victims living within the context of ongoing terror. Witnesses are frequently intimidated and fear reprisal from the defendant’s sympathizers, and tribunals commonly lack the means to protect victims from retribution. Such challenges to testimonial evidence mean that these tribunals have to be ever more aware of the needs of victims and witnesses, and must be willing to implement and monitor a creative and expansive witness protection program. The inclusion and participation of victims and witnesses in these programs is necessary in order for these trials to serve as a mechanism for reconciliation and justice while also compelling credible witness testimony.


² See http://www.caii-dc.com/CAIIStaff/Dashboard_GIROAdminCAIIStaff/Dashboard_CAIIAdminDatabase/resources/ghai/toolbox23.htm (stating that war crimes tribunals contribute to reconciliation and help to provide victims of war-time offenses with "a sense of justice and catharsis"); see also Laura Bingham, Strategy or Process? Closing the International Criminal Tribunals for the former Yugoslavia and Rwanda, 24 BERKELEY J. INT’L L. 687, 690-91 (2006) (asserting that tribunals served as symbols of validation against crimes against humanity).

³ See Universal Declaration of Human Rights, G.A. Res. 217A, at 73, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) (declaring that “everyone is entitled in full equity to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him,” and that “everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.”); see also International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 10.1, U.N. Doc. A/6316 (Dec. 16, 1966) (stating “[i]n the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equity . . . (d) To be tried in his presence, and to defend himself in person or through legal assistance . . . [and] (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”).

This problem is exacerbated when it comes to victims of gender violence. Rape and sexual violence have been elements of war since biblical times—both as symptoms of war and as "tools of war."5 Their presence as elements of warfare has permitted historians, politicians, and war crimes prosecutors to gloss over their existence. Only recently has rape been recognized as a war crime and a crime against humanity in international humanitarian law.6 However, the ability to prosecute this crime is hindered by several obstacles, including reluctance to provide adequate protections to victims, lack of gender sensitive training, and insufficient procedural protections in the language of the statutes.7 The lack of such procedural safeguards, coupled with fear of retribution and societal exposure experienced by rape victims, continues to inhibit effective investigation and prosecution. The prosecution of rape crimes by war crimes tribunals must now be made a priority, and victim-witnesses must be accorded additional protections in order to elicit the credible testimony needed to effectively prosecute these crimes.

Part I of this comment examines the cultural history of rape in warfare and the measures by which some governments and international conventions have attempted to limit or prosecute wartime rape, including current international tribunals. Part II outlines the current measures utilized to protect victims and witnesses of gender violence by the International Criminal Court and the ad hoc International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia. Finally, Part III examines the uniqueness of rape as a crime and examines how the effects of rape require a different approach in

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5 See Laurel Fletcher, et al., Human Rights Violations Against Women, 15 WHITTIER L. REV. 319, 320 (1994) (stating that rape is a tool of war and has traditionally been used in situations of conflict).
7 See Fletcher supra note 5, at 372 (specifying the need for gender sensitivity and special training for work with rape victims); see also Zoglin, supra note 6, at 327-28 (noting that trial procedures and witness protection have met great resistance in the International Criminal Tribunal for the former Yugoslavia).
analyzing the due process concerns of both the defendants and the victim-witness.

I. CULTURAL ACCEPTANCE OF RAPE AS AN ELEMENT OF WAR

A. A Brief History of Rape in War

Rape has been prominently featured in the history of warfare and is often portrayed as a "heroic" act throughout popular mythology, religion and art. Nicolas Poussin's famous painting the "Rape of the Sabine Women" immortalized the founding myth of Rome through abduction and forced marriage, depicting women walking away arm-in-arm with their rapists, suggesting "that the abducted women soon accepted their assailants as husbands." Early civilizations did not stigmatize abduction or forced marriage as a means of obtaining wives and concubines, as evidenced by Biblical and Koranic depictions of (and

8 Peter Monaghan, Casting a Critical Eye of Canonized Works, a Scholar Reinterprets Images of Rape in Art, THE CHRON. OF HIGHER EDUC., Mar. 12, 1999, at A13 (positing that artists from the 15th to 17th centuries portrayed rape as heroic); see Andrew E. Taslitz, Patriarchal Stories I: Cultural Rape Narratives in the Courtroom, 5 S. CAL. REV. L. & WOMEN'S STUD. 387, 396 (1996) (describing the depiction of sexual violence in forms of media such as movies, television, popular literature, mythology . . . ).

9 Monaghan, supra note 8, at A13; see also Patricia H. Davis, Comment, The Politics of Prosecuting Rape as a War Crime, 34 INT'L LAW 1223, 1226 (2000) (stating that "[r]ape is part of the founding myth of Rome").

10 See Davis, supra note 9, at 1226.

11 21 Judges 14:21 ("Benjamin returned at that time, and they gave them the women whom they had kept alive from the women of Jabesh-gilead; yet they were not enough for them . . . And they commanded the sons of Benjamin, saying, 'Go and lie in wait in the vineyards, and watch; and behold, if the daughters of Shiloh come out to take part in the dances, then you shall come out of the vineyards and each of you shall catch his wife from the daughters of Shiloh, and go to the land of Benjamin.'"); 31 Numbers 17:18 ("Now therefore, kill every male among the little ones, and kill every woman who has known man intimately, But all the girls who have not known man intimately, spare for yourselves."); 20 Deuteronomy 14 ("Only the women and the children and the animals and all that is in the city, all its spoil, you shall take as booty for yourself; and you shall use the spoil of your enemies which the LORD your God has given you."); 14 Zechariah 1-2 ("Behold, a day is coming for the LORD when the spoil taken from you will be divided among you. For I will gather all the nations against Jerusalem to battle, and the city will be captured, the houses plundered, the women ravished and half of the city exiled, but the rest of the people will not be cut off from the city."); see also Davis, supra note 9, at 1226 (noting that "[t]he Bible provides many narratives of women and young girls being sacrificed by their families, raped, and then murdered by enemy armies in ancient Israel. The Bible records intertribal warfare that involves the capturing and raping of women as the ultimate signification of victory.").

12 Koran 3:50 ("O Prophet! Lo! We have made lawful unto thee thy wives unto whom thou hast paid their dowries, and those whom thy right hand possesseth of those whom Allah hath given thee as spoils of war.").
acceptance of) the forced taking of women as wives and spoils of war from conquered villages.

It is not surprising then, that rape and other forms of sexual violence emanating from war have historically been undocumented and unpunished crimes. Rape has been viewed as a reward or “spoil of war.”\textsuperscript{13} The phrase to “rape and pillage” denotes what is expected of and what is due the conqueror – rape is part of the booty of war.\textsuperscript{14} It is also seen “as an incentive for soldiers to enlist, and as a way to celebrate victory in battle.”\textsuperscript{15} This acceptance of rape as “pillaging” is most likely strongly correlated to the traditional view of rape as a “crime against the possession of property, a woman being considered the property of her father or of her husband.”\textsuperscript{16} In a society that views female chastity and physical property as the lawful possessions of men, one can easily perceive the two as a single spoil due the victorious soldier.

Although modern war strategy and international norms have altered the language of warfare, not much has changed to improve the treatment of non-combatant women in times of war. Take, for example, the so-called “Comfort Women”\textsuperscript{17} of World War II. In Japan, over two hundred thousand women of non-Japanese origin were abducted from Japanese territories, raped, and often held against their will at so-called “comfort stations,” or rape camps. These women were forced “to follow the troops on the battlefield and were subject to repeated rape, sometimes as often as forty times per day, as well as the domestic servicing of

\textsuperscript{13} See Davis, supra note 9, at 1226 (observing that “[r]ape was a spoil of war during the Crusades”).

\textsuperscript{14} Beth Stephens, \textit{Humanitarian Law and Gender Violence: An End To Centuries of Neglect}, 3 HOFSTRA L. & POL’Y SYMP. 87, 89 (1999) (“Most armies have viewed rape as a legitimate ‘perk’ of battle.”).

\textsuperscript{15} Davis, supra note 9, at 1227.


\textsuperscript{17} Rhonda Copelon, \textit{Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law; Hate, Genocide and Human Rights Fifty Years Later: What Have We Learned? What Must We Do?}, 46 MCGILL L.J. 217, 221–24 (2000) (stating that “[t]he comfort women system illustrates, however, in a highly systematized and brutal way, that the rape of women, as booty or as the reward for the penultimate expression of the norm of masculinity, is also an integral part of the arsenal of war.”).
the Japanese troops.” These crimes were never charged or prosecuted and for years revisionist history declared the “comfort women” prostitutes, and the rape camps brothels.

Recent history has also exposed rape to be more than a simple by-product of war; it has become a weapon with which to wage an effective and devastating campaign. Rape, sexual enslavement, molestation and other crimes of sexual violence have a two-fold effect. Principally, rape is an offense against the woman herself, a means of demoralizing and subjugating her. It is also an “act of aggression, hostility, and humiliation against [her] husbands, sons, fathers and brothers.” Soldiers have used it “as a means of humiliating male opponents, as a way of reaffirming the manhood of soldiers, [and] as a means of destroying the opponent’s culture.” The rapist seeks to destroy the very heart of the family, symbolized by wife and mother, by “ensur[ing] the family would never return to its home again.” Consequently, “the sexual violation of individuals in wartime is not simply a sexual assault on the victim, but a message to and an attack on the community as well” aimed at ultimately destabilizing the society as a whole.

At its most extreme, rape can be a form of genocide wherein it is used to exterminate a population by destroying a “woman’s fertility, preventing future births, either by rendering her undesirable in the eyes of her society, by inflicting physical damage, or by forced impregnation by the rapist.” The emergence of forced pregnancy is a new aspect of modern warfare and prevalent “where racial and ethnic purity are valued.”

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18 Id. at 222.
19 Id. at 223 (“Calling the ‘comfort stations’ brothels, not rape camps, and referring to the women as prostitutes and not sexual slaves, obfuscated the horrors of the system through a suggestion of immorality and voluntariness.”).
21 See Davis, supra note 9, at 1227.
22 Clodagh Mulvey, 'Perfect Gentleman' on Trial 2, THE IRISH TIMES, Feb. 16, 2002 at 52.
24 Stephens, supra note 14, at 100–01; see Davis, supra note 9, at 1227 n.31 (“Forced impregnation results from such tactics as withdrawing or withholding contraception form the women being raped, and is enforced by the detention of pregnant women beyond the time when they could safely receive abortions.”).
pregnant, women and girls may be detained in war camps until it is too late to receive an abortion. Rape is rarely about gender, or sex alone, "[i]t is rather a complex intertwining of gender, race, ethnicity, and culture." The rape is ancillary to the ultimate purpose women serve, as "pawns in genocidal warfare." The widespread and systematic use of rape in Bosnia, Rwanda and the Sudan is unmistakable evidence of the opposing forces' intent to extinguish their opponents through rape. Statistics show that seventy percent of Rwandan rape survivors are now HIV positive as a result of a purposeful campaign of rape by infected soldiers as a slow and effective means of eradicating the Tutsi population.

B. Attempts at Regulating Rape in Warfare

History's willful ignorance of these abuses is not evidence of a general naïveté on the part of the international community. Wartime rape has been punishable since as early as the 1800's. The Lieber Codes made rape punishable by death during the

26 See Mulvey, supra note 22, at 52 (noting that during the civil war in Yugoslavia the Bosnian Muslim "women were detained en masse until they were impregnated and held until it was impossible to have a termination").

27 See Ruth Seifert, War and Rape, Analytical Approaches (1992), http://www.wilpf.int.ch/publications/1992rutherseifert.htm ("When trying to find out the reasons for rape, one comes upon a host of myths and ideologies. The most popular and probably most effective myth is that rape has something to do with an irrepressible male sexual drive which, if not restrained, will regrettably but inevitably have its way. In actual fact there are good reasons to assume that rape neither has very much to do with nature not with sexuality. Rather, it is an extreme act of violence perpetrated by sexual means."); see also Antony Beevor, They raped every German female from eight to 80', GUARDIAN (London), May 1, 2002, available at http://www.guardian.co.uk/g2/story/0,3604,707835,00.html (noting that there is limited information to suggest that some men, in committing these rapes may not characterize the act as "rape" as one Soviet major, speaking to a British journalist stated, "Our fellows were so sex-starved ... that they often raped old women of sixty, seventy or even eighty - much to these grandmothers' surprise, if not downright delight").

28 Kirk, supra note 20, at 323.

29 Mulvey, supra note 22, at 52.

30 Boon supra note 23, at 671 (revealing the atrocities of other gender-based violence women face such as forced pregnancies); Stephanie K. Wood, A Woman Scorned for the "Least Condemned" War Crime: Precedent and Problems with Prosecuting Rape as a Serious War Crime in the International Criminal Tribunal for Rwanda, 13 COLUM. J. GENDER & L. 274, 286 (2004) (explaining further that these statistics do not reflect the true amount of gender-based violence suffered by Rwandan women).


net/Wmov/RCoomaraswamyOnHonour.html.
American Revolution. The Hague Convention of 1907\(^{32}\) and the Geneva Conventions\(^{33}\) implicitly criminalized the act of rape, although relegating the crime to an offense against "family honor and rights."\(^{34}\) Two subsequent protocols reiterated the Geneva Convention's prohibition against rape, stating, "[w]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and other forms of indecent assault"\(^{35}\) including "outrages upon personal dignity... degrading treatment [and] rape."\(^{36}\) International conventions and treaties "regulating armed conflict either minimally incorporate, inappropriately characterize, or wholly fail to mention"\(^{37}\) crimes of sexual violence, nor does the international convention recognize the physical and psychological effects of the rape on the victim.\(^{38}\)

Despite the minimal protections ascribed to women on paper, "[w]omen and girls have habitually been sexually violated during wartime."\(^{39}\) The first major war crimes tribunals after World War II, the Nuremberg Tribunal and Tokyo Tribunals, although based on these international conventions and norms, failed to address the sexual violence perpetrated by the Axis powers.

http://www.au.af.mil/aulawc/awcgate/law/liebercode.htm ("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.").

\(^{32}\) Hague Convention Respecting the Laws and Customs of War on Land, art. 46, Oct. 18, 1907, 1907 U.S.T. LEXIS 29 ("Family honour and rights, the lives of persons, and private property, as well as religious conviction and practice must be respected.").

\(^{33}\) The Geneva Convention Relative to the Treatment of Prisoners of War, art. 27, Aug. 12, 1949, 6 U.S.T. 3516 (stating that "woman shall be especially protected against any attack on their honor, in particular against rape... [and] any form of indecent assault").

\(^{34}\) Copelon, supra note 17, at 221.


\(^{38}\) Zoglin, supra note 6, at 326 (revealing that the purpose "of international humanitarian law is to try to make war more humane"); see Boon, supra note 23, at 627 (noting that prior to 1998, international conventions did not "explicitly recognize the fact that sexual atrocities are acts of violence that violate victims' bodily security and autonomy, as well as their honor").

\(^{39}\) Askin, supra note 37, at 295.
during the war. Importantly, no prosecutorial body recognized the war crimes perpetrated by Allied forces. Some of the greatest abuses against women were perpetrated by Allied troops and forces under Allied command. For example, reports tell of 182 Catholic nuns raped after Soviet troops conquered Silesia. In a similar event in Dahlem, "[n]uns, young girls, old women, pregnant women and mothers who had just given birth were all raped without pity" by Soviet forces. Senate testimony in the summer of 1945 also revealed that French Colonial troops under General Eisenhower's command in the German city of Stuttgart, "herded German women into the subways and raped some two thousand of them. In Stuttgart alone, troops under Eisenhower's command raped more women in one week than troops under German command raped in all of France for four entire years."

The emerging recognition of rape in warfare as an independent crime has been greatly influenced by both the creation of the United Nations and the women's rights movement. After World

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40 See Nicola Eva Erb, Gender-Based Crimes Under the Draft Statute for the Permanent International Criminal Court, 29 Colum. Hum. Rts. L. Rev. 401, 410 (1998) (noting that some “Japanese officials were found guilty of rape ‘because they failed to carry out their duty to ensure that their subordinates complied with international law.’ While the recognition of rape as a war crime distinguished the Tokyo trials from those at Nuremberg, rape was not a major focus of the proceedings.”); see also Hon. Richard J. Goldstone, Prosecuting Rape as a War Crime, 34 Case W. Res. J. Int’l L. 277, 279 (2002) (“The Tokyo Tribunal expressly charged rape, but not one of the women victims was called to give evidence. The judgment records that approximately 20,000 cases of rape occurred in the city of Nanking during the first month of the occupation.”).

41 This phenomenon was repeated again during the Vietnam War, one of the longest and deadliest in United States history. Nevertheless, “much of the mainstream historical literature dealing with Vietnam War atrocities . . . has been marginalized to a great extent.” Nick Turse, The Tip of the Iceberg: Toledo Blade Report on Vietnam War “Tiger Force” Atrocity if Only the Beginning (Nov. 10, 2003), available at http://www.zmag.org/content/showarticle.cfm?ItemID=4481. As Seymour Hersh noted regarding the publication of the above-referenced report of the Toledo Blade, “[n]one of the four major television networks have picked it up (although CBS and NBC have been in touch with the Blade), and most major newspapers have either ignored the story or limited themselves to publishing an Associated Press summary. Seymour Hersh, Uncovered, NEW YORKER, Nov. 10, 2003, at 41. It is important when seeking to do justice that the world does not turn a blind eye to the atrocities committed by the victorious party. Justice to all victims of war is essential both because each and every victim is deserving of such and because the prosecution and enforcement of international law can have no legitimacy if the party trying the accused is as culpable as the accused. Id.


43 Beevor, supra note 27.

44 See Strom, supra note 42. Other stories of Allied abuse include accusation that “[b]lack American troops, stationed in Naples, were allowed by their superiors free access to poor, hungry, and humiliated Italian women,” which resulted in a generation of mixed-race children. Id.
War II, the international community, seeking to prevent another global cataclysm, established the United Nations ("UN") to police the world's gravest human rights abuses.45 Beginning in the 1970's, the feminist movement swept the United States and most of Western Europe, marking the start of an evolution of how men, women, and the justice system categorize sex and sex crimes. Notably, the feminist movement "provided the starting point for the victim's rights movement which aims to improve the position of the victim (and of the witnesses) within the criminal justice system" because of its focus on the female rape victim.46 Subsequently, the general trend in domestic law has been towards a re-characterization of rape as a crime against human dignity, as most western nations no longer characterize rape as a form of property crime or as an outrage on honor alone.

Despite the authority of the UN to intervene in domestic and international conflicts and the alleged increase in vigilance of gender and human rights activists, wars and grave human rights abuses continue to be perpetrated throughout the world. In particular, ongoing conflicts throughout Asia, Africa, South America, and Eastern Europe continue to cause pressing concern.47 International tribunals largely failed to prosecute such war crimes for roughly 50 years, until the international community was forced to acknowledge the atrocities in the former Yugoslavia and Rwanda,48 via the formation of ad hoc


48 See Zoglin, supra note 6, at 327; see also Women and Armed Conflict, supra note 47 ("Until recently, many viewed violence against women as an inevitable, if regrettable, consequence of war. This attitude guaranteed impunity for perpetrators, effectively silencing women who suffered gruesome sexual and physical abuses. The creation of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court hold out some hope that
tribunals in the former Yugoslavia ("ICTY") and Rwanda ("ICTR"). Even with the lack of specificity in the ICTY and ICTR statutes criminalizing rape as a war crime, crime against humanity, or a crime of genocide, both tribunals redefined how rape would be categorized and prosecuted in international criminal tribunals.

Following widespread allegations in the 1990s of "gross violations of humanitarian law... including evidence of widespread or systematic rape to further policies of 'ethnic cleansing'" wherein women were gang-raped while being taunted with racial and ethnic slurs, the United Nations established the ICTY to investigate and try war crimes resulting from the conflict "that erupted in the former Yugoslavia" between the six self-declared independent states. "Acting under Chapter VII of the UN Charter" the Security Council unanimously passed Resolution 827, establishing the ICTY.

Similarly, the UN Security Council called for the establishment of the ICTR in 1994 following "evidence that over 600,000 people had been slaughtered during a nearly 100-day period in Rwanda." Human Rights Watch and the Federation Internationale des Ligues des Droits de l'Homme (FIDH), two

women in war-torn countries might finally gain greater access to justice for crimes of sexual violence.

See Zoglin, supra note 6, at 327; see also Women and Armed Conflict, supra note 47. Askin, supra note 37, at 305; see Boon, supra note 23, at 628–29 (concluding that "[o]verwhelming evidence demonstrates that these brutal rapes and sexual attacks were sanctioned by the highest authorities and were often connected to policies of ethnic cleansing").


Askin, supra note 37, at 305.


Askin, supra note 37, at 305–06 (noting security counsel was compelled to create international tribunal by large number of deaths in Rwanda). See Rwanda:HIV/AIDS Relief for Some Genocide Victims, AFRICA NEWS, Jan. 25, 2005, at 1 (asserting purpose of international tribunal in Rwanda was to prosecute those responsible for 1994 massacres).
independent non-governmental organizations ("NGOs"), uncovered evidence of widespread rape where women were "individually raped, gang-raped, raped with objects such as sharpened sticks or gun barrels, held in sexual slavery or sexually mutilated," and often after watching the torture and murder of family members. The brutalization, raping, and mutilation of thousands of Tutsi women was preceded by an intense propaganda campaign demonizing Tutsi women and portraying them as temptresses and seductresses.

The tribunals were given jurisdiction over crimes of genocide, war crimes, and crimes against humanity. The ICTR first addressed the issue of rape in *Prosecutor v. Jean-Paul Akayesu*, holding that "rape and other crimes of sexual violence... could be considered instruments of genocide... and also the crimes formed part of a widespread and systematic attack directed against civilians, constituting crimes against humanity." Akayesu was sentenced to life imprisonment for his role in permitting and encouraging these rapes with the "intent to humiliate, harm, and ultimately destroy, physically or mentally,

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59 See Zoglin, supra note 6, at 327 (noting jurisdiction of international criminal tribunal in Rwanda); see also Askin, supra note 37, at 306 (highlighting prosecutorial power of international tribunal in Rwanda).

60 See Prosecutor v. Jean-Paul Akayesu, Case No: ICTR-96-4-T, Judgment, ¶ 685 (Sep. 2, 1998) (demonstrating rape was included in crimes against humanity); see also Rhonda Copelon, Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law; Hate, Genocide and Human Rights Fifty Years Later: What Have We Learned? What Must We Do?, MCGILL L.J., Nov. 1, 2000, at 217 (identifying Akayesu as the first judgment to recognize rape and sexual violence as acts of genocide).

61 Askin, supra note 37, at 318. According to the tribunal in Akayesu, one element of genocide included "[m]easures intended to prevent births within the group" includes acts of "sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages." Jean-Paul Akayesu, Case No: ICTR-96-4-T, at ¶ 507.
the Tutsi group.” The Tribunal’s judgment “unambiguously recognized that sexual violence causes extensive harm, and it is intentionally used during periods of mass violence to subjugate and devastate a collective enemy group — in this case, members of the Tutsi group and their sympathizers.” Akayesu was also “the first case in international law” to provide “a definition of rape... as ‘a physical invasion of a sexual nature, committed on a person under circumstances, which are coercive’... [and] sexual violence as ‘any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration of even physical contact.’” The ICTY court handed down a series of judgments on the heels of the Akayesu decision, in which the court explicitly recognized rape as a war crime and crime against humanity. The Celebici and the Furundzija judgments declared that rape could be tried as both torture and a war crime even when the accused had not committed the rapes, but had played a substantial role in facilitating the rapes. The Kunarac ruling,


63 Askin, supra note 37, at 320.

64 Alex Obote-Odora, Rape and Sexual Violence in International Law: ICTR Contribution, 12 NEW ENGL. INST. & COMP. L. 135, 147 (2005) (citing Jean-Paul Akayesu, Case No: ICTR-96-4-T, at ¶ 688. See Jean-Paul Akayesu, Case No: ICTR-96-4-T, at ¶ 687) (concluding “rape is a form of aggression and [like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity.”) (Footnote omitted).


66 Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, (Dec. 10, 1998). The Furundzija court set forth a different definition of rape than that of the Akayesu court: “(i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of 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.” Obote-Odora, supra note 64, at 150–51.

67 See Askin, supra note 37, at 328 (describing how rape could be tried as “a means of torture” and as “a crime against humanity”); see also Janet Haller et al., From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism, 29 HARV. J.L. & GENDER 335, 379–380 (2006) (highlighting that ICTY holdings in “Celebic”, “Furundzija and Kunarac” have “recognize[d] that rape can be the actus reus of various higher-level crimes in humanitarian law, specifically... crimes against humanity and torture.”).

handed down in 2001, further held that sexualized torture constituted "a war crime and a crime against humanity."\(^6\)

Although these declarations by the ICTR and ICTY offered new hope to women across the world that rape in war would no longer be tolerated by the international community, the record has been disappointing. In the midst of Colombia's ongoing civil conflict, women and girls continue to be raped as part of a strategy; "[t]hey are often rejected by their family, humiliated by the legal system, refused medical care, and rarely see their attacker brought to justice."\(^7\) In the Democratic Republic of Congo (DRC), the conflict over control has "claimed more lives than any conflict since the end of World War II, yet receives almost no attention outside central Africa."\(^8\) The violence against women has been particularly brutal there according to Amnesty International research which reports that "there has been more rape [there] than in any other conflict."\(^9\) Women are suffering on a massive scale from irreparable fistulas, tears or openings in the vaginal wall, because, in the DRC, rape is oftentimes accompanied by severe brutalization and molestation with objects, including broken bottles and guns which are discharged inside the victim's vagina.\(^10\)

The UN has done little to keep this problem in check. "There is a United Nations peacekeeping mission charged with maintaining order, but it has 12,000 soldiers for an area the size of Western Europe (the U.N. mission to tiny Kosovo, by contrast, had 40,000 troops)."\(^11\) The mission is further hampered by allegations that UN troops have engaged in sexual abuse; over 150 allegations were made against peacekeepers from nations as

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\(^6\) Askin, supra note 37, at 337 ("The Tribunal subsequently found Vukovic guilty of torture as a war crime and a crime against humanity for the sexual torture he inflicted upon his victims.").


\(^9\) Id.

\(^10\) See id. (describing how each armed group has "a trademark manner of violating" the victims); see also Rod Nordland, More Vicious than Rape, NEWSWEEK, Nov. 13, 2006, available at http://www.newsweek.com/id/44653 ("[T]he damage is caused by the deliberate introduction of objects into the victim's vagina when the rape itself is over. The objects might be sticks or pipes. Or gun barrels. In many cases the attackers shoot the victim in the vagina at point-blank range after [the rape is completed].").

\(^11\) Nolen, supra note 71.
diverse as "Morocco, Nepal, Pakistan, South Africa, Tunisia and Uruguay." The same situation raged throughout Liberia, which was engaged in a bloody conflict for control spanning almost 14 years. In 2004, a study by the UN and Liberian NGOs "found that between 60 and 70 per cent of the civilian population had been raped or had suffered other sexual violence... Most were women and girls, and many had been gang-raped." Even after Liberia's transition to a stable government, neither Liberia nor the international community has taken adequate steps to protect victims and punish the perpetrators of the extensive violence. The prevalence of rape in war does not appear to be waning; "while sexual violence in wartime is not new, there is evidence it is becoming more common." This trend will not cease without consistent and effective investigations and prosecutions of wartime rape.

II. RIGHTS CURRENTLY IN PLACE FOR VICTIMS AND WITNESSES UNDER THE ICT AND THE ICC

Until recently, rape crimes have been almost wholly ignored in international law. As a result, the rights ascribed to victims and witnesses of rape crimes are a new development in international law. There are some limited protections for victims and witnesses provided for in the ICTR, ICTY and ICC Tribunals' Statutes and Rule of Procedure and Evidence.


76 See LIBERIA, supra note 76.

77 See REUTERS, LIBERIA MUST DO MORE TO PUNISH WAR CRIMES- AMNESTY, Feb. 15, 2007, http://www.alertnet.org/theneu/newsdesk/L14597079.htm (noting hundreds of thousands of cases of rape and sexual abuse that have gone unpunished after the civil war's end); see also AMNESTY INTERNATIONAL, LIBERIA: TRUTH, JUSTICE, REPARATION FOR LIBERIA'S VICTIMS, AI Index: AFR 34/001/2007, Feb. 15, 2007, available at http://web.amnesty.org/library/Index/ENGAFR340012007 (lamenting that although Liberia has ratified the Rome Statute of the International Criminal Court, it has not adopted its provisions as national law).

Article 20 of the ICTY statute ensures "proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses."80 The juxtaposition of the rights of the accused and the protection of victims and witnesses is a unique addition to the traditional due process model. In this legal paradigm, both the accused and accuser are afforded a measure of protection by the tribunal that must be balanced in order to achieve a just end.

The protections provided for by the ICTY "include, but [are] not... limited to, the conduct of in camera proceedings and the protection of the victim's identity."81 The Rules of Procedure and Evidence:

address the procedural and structural framework for such protection. Under these rules the ICTR or ICTY may... order appropriate measures to safeguard the privacy and security of victims and witnesses... The measures specifically mentioned... include: in camera proceedings, nondisclosure to the public of any records that might identify the victim, image or voice altering devices, closed circuit television, or the use of pseudonyms. Furthermore, according to the Rules, the Trial Chamber may order that all or part of the proceedings occur during closed sessions for reasons of: '(i) public order or morality; (ii) safety, security or non-disclosure...; or (iii) the protection of the interests of justice.'82

Additionally, Rule 69 explicitly provides that "[i]n exceptional circumstances, the Prosecutor may apply to a Trial Chamber to order the nondisclosure of the identity of the victim or witness who may be in danger or at risk until such person is brought

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81 STATUTE OF INT'L CRIM. TRIBUNAL., supra note 80, at art. 22; see Bachrach, supra note 80, at 12; see also Creta, supra note 52, at 393.

under the protection of the Tribunal." Reading these rules "in tandem," nondisclosure may entail withholding the identity of the victim from the defendant as well as the public at large.

In addition to witness anonymity, the Rules provide for a "Witness and Victims Unit" to: "(i) recommend protective measures for victims and witnesses in accordance with Article 22 of the Statute; and (ii) provide counseling and support for them, in particular in cases of rape and sexual assault." The rules also specify that in "the appointment of staff, due consideration should be given to employing qualified women;" including women on staff, particularly in the Witness and Victims Unit, who could be vital to working with victims of gender violence. The ICTR, while it has identical or similar provisions in its Articles of Incorporation and Rules of Procedure and Evidence, offers further protection by mandating "physical and psychological rehabilitation" as well as "short and long term plans for the protection of witnesses who have testified before the Tribunal and who fear a threat to their life, property or family." The International Criminal Court ("ICC") is independent from the ICTY and ICTR and represents the practical realization by the United Nations and its member states that war and genocide will continue to be a part of our world. The creation of the ICC is intended to serve as a permanent international war crimes tribunal, thus obviating the need for ad hoc tribunals. The ICC

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84 See Creta, supra note 52, at 394 (noting that a Chamber may withhold victim or witness identity from the media and public); see also Rule 69, supra note 83 (allowing prosecutors to move to have the identity of witnesses or victims suppressed).
86 See Bachrach, supra note 80, at 12; see also Statute of Int'l Crim. Tribunal., supra note 80, at art. 22 (providing for in camera proceedings and the protection of the victim's identity).
87 See Bachrach, supra note 80, at 13 (calling for due consideration to be given to women who are qualified for employment in support groups for victims and witnesses of sexual violence); see also Rule 34, supra note 85.
88 See Bachrach, supra note 80, at 13 (noting that Rule 34 of the ICTR provides for creation of a "Victims and Witnesses Unit"); see also Rule 34, supra note 85 (mandating the creation of a "Victims and Witnesses Unit" comprised of qualified staff).
89 Bachrach, supra note 80, at 13.
90 See Coalition For the International Criminal Court: About the Court, http://www.iccnow.org/?mod=court (last visited Oct. 15, 2007) (explaining that the ICC is the first international court to try war crimes when national courts can not); see also
Statute “was drafted against the backdrop of the atrocities in Rwanda and the former Yugoslavia and thus was heavily influenced by the structure of the ICTY and ICTR”91 and includes within its framework a balancing of the rights of the accused with the need to protect victims and witnesses.92 However, the ICC is distinct from the ad hoc tribunals in that the tribunals were created by the Security Council Resolution, whereas “the ICC Statute is the product of an arduous four-year process.”93 This is important for two reasons. First, the ICC statute is a product of negotiation and compromise. Second, the impact of decisions rendered by the ICC is arguably greater and has more precedential value than the decisions rendered by the ad hoc tribunals.

Also, unlike the ad hoc tribunals, the ICC specifically enumerates “conduct such as sex crimes, the rape of women as a weapon of war, enforced pregnancy and forced prostitution . . . as genocide and as crimes against humanity.”94 Before the ICC, no international instrument recognized crimes of sexual violence against women as genocide or crimes against humanity.95 Additionally, the ICC Statute recognizes each of these crimes as war crimes if they occur during an armed conflict.96 For the first

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91 Boon, supra note 23, at 629.

92 See United Nations: Rome Statute of the International Criminal Court, art. 64, U.N. Doc. A/CONF. 183/9, 37 I.L.M. 999, Jul. 17, 1998 (directing that “the Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.”); see also Bachrach, supra note 80, at 12 (discussing that the International Criminal Tribunals were designed with both the victims and the accused in mind).

93 Boon, supra note 23, at 630.


time "[w]ithin international humanitarian law, sexual and gender violence was treated as crimes as serious as homicide, torture, inhuman treatment, mutilation and slavery."97

The ICC further incorporates some of the ideals of "gender mainstreaming" undertaken at the United Nations since the 1995 UN World Conference on Women in Beijing, and therefore an article providing for the 'fair representation of female and male judges' was adopted."98 The inclusion of women is meant to "assist the Court in undertaking informed prosecutions with respect to crimes such as rape, slavery, and forced recruitment that particularly target women and children."99 As such, the ICC statute includes articles requiring the inclusion of judges, advisors, and staff with "expertise on specific issues, including, but not limited to, violence against women or children."100 The ICC, looking at the futures of victims of war crimes, implemented a Trust Fund for Victims which aims to provide "them with help and compensation to enable them to rebuild lives often shattered by war."101 This includes victims who, as a result of rape, "need[] not just for the material loss in a war, but for trauma counseling."102

In 2004, the ICC began its first formal investigations into the Ituri massacre in the Democratic Republic of Congo (DRC),103

97 Obando, supra note 94.
99 Id.
100 Id.
101 Human Rights Pro Bono Law Protect, International Criminal Court, Trust Fund for Victims, http://www.gistprobono.org/id93.html#tru (last visited Oct. 18, 2007) [hereinafter Trust Fund for Victims]; see Nsongurua J. Udombana, Pay Back Time in Sudan? Darfur in the International Criminal Court, 13 TULSA J. COMP. & INT'L L. 1, 47, 47 (2005). "... [T]he ICC has established a Victims Trust Fund (VTF) ... The aim of the VTF is to channel money to victims ... Providing justice to these victims is important, but a component of that justice must include the provision of help and compensation to enable them to rebuild lives often shattered by war." Id.
102 Trust Fund for Victims, supra note 101; see Udombana, supra note 101, at 46. "However, a careful reading of the ICC Statute itself shows that 'victims' are broadly defined ... They include rape victims needing help, not just for the material loss in a war, but also for trauma counseling." Id.
103 See Obando, supra note 94 (stating that on "June 23 of this year [2004], the Office of the Prosecutor ... announced the beginning of formal investigations by the ICC into the situation in the Democratic Republic of Congo (DRC) ... [and] will investigate crimes under the jurisdiction of the ICC committed in DRC territory ... "); see also Aaraon Ezekiel, Article, The Application of International Criminal Law to Resource Exploitation: Ituri, Democratic Republic of the Congo, 47 NAT. RESOURCES J. 225, 225 (2007) (noting that atrocities committed in the Ituri Province of Congo since 1998 "... became the focus
where the United Nations has confirmed that "at least 50,000 people have been killed since 1999 and 40,000 women and girls have been raped." This investigation was soon followed by another in Uganda, culminating in the issuance of arrest warrants against the Lord's Resistance Army in northern Uganda. The ongoing security problems in the area resulted in the sealing of indictments against Kony and the LRA for over three months in order to allow time for the ICC to establish a witness protection program which would "protect the identities of witnesses as long as possible, [and redact] details of dates, places and names" from public records. In 2006, the ICC decided that the "witnesses in the trial of LRA leaders [would] be anonymous to protect them from reprisals by other rebels at large and sympathizers."

The ICC's most recent investigation into the conflict in the Sudan highlights some problems with the ICC's victim protection measures. Evidence of "large-scale massacres" and hundreds of

of the first formal investigation by the Office of the Prosecutor of the International Criminal Court (ICC)"

Obando, supra note 94; see David R. Morgan, Amnesty Report on Rape and HIV Risks in the Democratic Republic of Congo, AIDS & HEPATITIS DIG., 2005 WLNR 687621 (Jan. 1, 2005) (describing how "[t]he systematic rape and torture of at least 40,000 women and girls during the last six years of civil conflict in the Democratic Republic of Congo (DRC) has created a public health crisis . . .").


Douglass W. Cassel Jr., First Step on Long, Arduous Trip, CHICAGO DAILY LAW BULLETIN, Oct. 21, 2005, at 5; see H. Abigail Moy, The International Criminal Court's Arrest Warrants and Uganda's Lord's Resistance Army: Renewing the Debate Over Amnesty and Complementarity, 19 HARV. HUM. RTS. J. 267, 267 (2006). "On October 13, 2005, the International Criminal Court (ICC) unsealed the arrest warrants for five senior leaders of the Lord's Resistance Army (LRA) . . ." Id. Furthermore, the five arrest warrants were sealed for nearly three months and, currently, remain heavily redacted "[t]o ensure the safety of witnesses and victims vulnerable to retaliatory attacks . . . until adequate security measures could be implemented." Id.

Jude Etyang, Uganda; Kony Witnesses to be Anonymous - ICC, AFRICA NEWS, Apr. 5, 2006. See generally, J. Alex Little, Balancing Accountability and Victim Autonomy at the International Criminal Court, 38 GEO. J. INT'L L. 363, 371 (2007). There exists great necessity to preserve respect for the rights of victims in ICC and for Prosecutor and Court to account for victims' interests. Id. " . . . [I]n all instances the Court can issue any necessary order that 'provide[s] for the protection and privacy of victims and witnesses' . . . [because] the responsibility to serve and protect victims endures throughout the judicial process." Id.
allegations of rape are being investigated, however, "many rape victims may opt to remain silent at the risk of being ostracized and rebuked." Another factor preventing the investigation and ultimate prosecution of the rapes occurring in the Sudan is "the continuing insecurity in Darfur" although there are investigation mechanisms in place to respond to direct complaints, "there is a reluctance or inability on the part of witnesses to come forward with complaints and in some cases there are allegations of intimidation and harassment of complaints." The ICC investigation in the Sudan is severely hampered by the lack of an "effective system of witness and victim protection," the result being that most investigations and statements have been taken outside of the Sudan.

The ICC clearly recognizes the need for witness anonymity and an adequate witness protection procedure. However, how, and to what extent, the ICC will implement such procedures in the long term remains to be seen. Many scholars and advocates oppose the implementation of additional protections for victims and witnesses of rape and sexual violence as violative of international due process norms.

108 Inter Press Service News Agency, Fritzroy A. Sterling, Sudan: ICC Reports Evidence of Large Scale Massacres (Jun. 15, 2006), http://www.ipsnews.net/print.asp?idnews=33635; see We Have Proof of Genocide in Darfur, THE AUSTRALIAN, Jun. 16, 2006, at 10 [hereinafter We Have Proof of Genocide] (discussing documentation of "large-scale massacres and hundreds of rape cases in Sudan's Darfur region" and describing how such massacres caused "witnesses and victims – particularly rape victims" in the region to be "subject to harassment").

109 See Wasana Punyasena, Conflict Prevention and the International Criminal Court: Deterrence in a Changing World, 14 MICH. ST. J. INT'L L. 39, 62 (2006) ("The continuing insecurity in the region has forced the Prosecutor to conduct his investigations outside of Sudan, since it has impeded his ability to implement an effective system of victim and witness protection."); see also Sudan; Witness Protection Vital for Probe into Darfur Rights Abuses, UN Reports, AFRICA NEWS, Dec. 13, 2005 (noting that effective system of witness and victim protection is essential since "continuing insecurity" prevents Prosecutor of the ICC from entering Darfur to gather facts, thus further prohibiting "the establishment of an effective system for protecting victims and witnesses").

111 See Gregory S. Gordon, Toward an International Criminal Procedure: Due Process Aspirations and Limitations, 45 COLUM. J. TRANSNAT'L L. 635, 698 (2007) (explaining inherent risk to due process when rights of victims and accused conflict and highlighting possibilities that morphing "... 'ICC victims' bill of rights' into criminal procedural stages of its criminal litigation schema... may adulterate, and ultimately dilute, basic structural due process protections of ICC defendants"); see also Laura Moranchek, Essay, Protecting National Security Evidence While Prosecuting War Crimes: Problems and Lessons for International Justice from ICTY, 31 YALE J. INT'L L. 477, 499 (2006) (comparing ICC and International Criminal Tribunal for the Former Yugoslavia (ICTY) and declaring that provisions in Rome Statute now codifies as law "... one of the most troubling due process concerns in the ICTY rules – that they allow even exculpatory
III. CONFLICT BETWEEN DUE PROCESS AND VICTIM PROTECTION:
RAPE AND FEMINISM CONCERNS

It is said that "[a]t its core, International Criminal Law exists for two purposes: to end impunity in order to prosecute the perpetrators of the world's most horrendous crimes and to bring some form of justice and solace to their victims."112 True justice requires the meaningful inclusion and participation of victims and witnesses in the prosecution of the accused. These tribunals, however, necessarily operate in an atmosphere of ongoing terror and witnesses are often threatened and fear retribution by the defendant's sympathizers. Tribunals must be responsive to the needs of victims and witnesses and must implement measures capable of providing protections sufficient to compel credible witness testimony.

Crimes of sexual violence compound the problems of victim testimony. Rape is a unique crime in that the impact of rape extends beyond the physical trauma associated with the initial assault.113 The psychological effects of rape have been widely documented and characterized as Rape Trauma Syndrome (RTS).114 The later phases of rape recovery are often "characterized by nightmares, phobic reactions, and sexual fears . . . [which can] persist for decades and throughout her [the victim's] lifetime."115 The trauma associated with a particularly

information to be withheld from the accused if that information was provided to the prosecutor in confidence by a state [victims and witnesses] . . . ").
112 Bachrach, supra note 80, at 7; see Trust Fund for Victims, supra note 101 (positing that adoption of Rome Statute created two independent institutions, the ICC, "for prosecuting those responsible for these crimes," and Trust Fund for Victims, "for helping victims of these crimes," and emphasizing recognition that "prosecution is only one element of justice for victims . . . ").
113 See CHARLES W. DEAN AND MARY DEBRUYN-KOPS, THE CRIME AND THE CONSEQUENCES OF RAPE (Charles C. Thomas Books 1982) (positing that rape is particularly devastating because victim may suffer from emotional damage and continual fear for years after initial attack); see also Patricia Davis, supra note 9, at 1225 (suggesting that rape is unlike any other crime because it "stigmatizes the victim as well as perpetrator").
114 Kathryn M. Davis, Rape, Resurrection, and the Quest for Truth: The Law and Science of Rape Trauma Syndrome in Constitutional Balance With the Rights of the Accused, 49 HASTINGS L.J. 1511, 1516, 1518 (1998) [hereinafter Rape and Resurrection] (explaining that "Rape Trauma Syndrome" or "RTS" emerged in the 1970's as model for understanding recovery stages for rape victims, but now refers to range of physical and emotional symptoms experienced by victim of forcible rape); see also Rape Abuse & Incest National Network (RAINN), Rape Trauma Syndrome, http://www.rainn.org/effects-of-rape/rape-trauma-syndrome.html (last visited Oct. 17, 2007) (noting that Rape Trauma Syndrome is common reaction to rape and sexual assault).
115 Rape and Resurrection, supra note 114, at 1518–19.
brutal rape "of sufficient magnitude to evoke 'intense fear, helplessness, or horror' in the victim"\(^{116}\) can also intensify and "lead to the development of posttraumatic stress disorder (PTSD),"\(^{117}\) typified by flashbacks, nightmares, social withdrawal, sleeplessness, anger, hyper-vigilance, or exaggerated startle.\(^ {118}\)

While these effects are largely internal, the victim may also acutely feel the external effects of the rape emanating from her community. Women are often socially isolated after crimes of ethnic sexual violence and, in some cases, “prevented from engaging in sexual relations with members of their communities after war, especially in cultures that emphasize virginity and chastity before marriage.”\(^ {119}\) They are “vilified by their own communities as the ultimate ‘damaged goods.’”\(^ {120}\) Some women consider rape to be a fate worse than death, believing that a raped woman loses all value in her community.\(^ {121}\) “A woman who has been raped or who has borne a child by a member of another ethnic group may even be permanently ostracized from her community.”\(^ {122}\) Furthermore, a “[f]orced impregnation makes the humiliation of rape more complete . . . [and] subjects the victim to the certainty of physical pain and to a risk of death or serious injury not present at the time of the original rape.”\(^ {123}\)

The stigma associated with rape oftentimes prevents women from testifying. Others find that the process of testifying is like

\(^{116}\) Id. at 1519.
\(^{117}\) Id. at 1518.
\(^{119}\) Boon, supra note 23, at 642 (arguing that rape committed in context of armed conflict is often characterized by public aspects, such as destruction of victim's virginity in particularly conservative community or commission of a rape in front of victim's family, which result in a crime that is more than an assault on the individual, but a crime that offends entire community to which victim belongs); see also Lehr-Lehnardt, supra note 16, at 341 (asserting that rape victim often suffers “secondary harm” which is community's treatment of victim as “tainted,” “dirty” or “spoiled”).
\(^{120}\) Kirk, supra note 20, at 323.
\(^{121}\) Wood, supra note 30, at 286 (summarizing interviews of Rwandan Genocide rape survivors conducted by Human Rights Watch, including statements from survivor that "after rape, you don't have value in the community"); see Stephen Farrell, Corporal Wins the Trust of Raped Muslims, TIMES (London), Sept. 4, 1999 (reporting that young Albanian Muslim woman who had been raped by Serbian forces told British military policewoman, “I don't want to live, I wish someone would take my soul away”).
\(^{122}\) Boon, supra note 23, at 642.
\(^{123}\) Stephens, supra note 10, at 98.
"being raped a second time"\textsuperscript{124} and wish "to leave the war's horrors in the past."\textsuperscript{125} They continue to be traumatized by the communities that may reject them, and possibly by the justice system itself, which does not know how to deal with victims of sex crimes. The nature of rape and its effects on victims and the community require special consideration to be given to victims and witnesses participating in war crimes tribunals.

\textbf{A. Witness Anonymity}

Procedural rules in the ICTY and ICTR, and prospectively in the ICC, allow for judicial discretion in granting witness anonymity. Rape victims testifying before the tribunal have sought anonymity as a means of shielding themselves from disgrace within their communities as well as protecting themselves from the retribution of their rapists and their cohorts. Critics argue that witness anonymity "can hardly be reconciled with the statutory mandate that the accused receive a fair trial, or with broader notions of justice in a criminal proceeding."\textsuperscript{126} Procedural rules which ensure a fair trial and which demand "that protective measures must be 'consistent with the rights of the accused'" are inconsistent with witness anonymity,\textsuperscript{127} which is in direct conflict with the right of confrontation. The right to confront one's accusers is so closely allied with the notion of due process that "[o]ne can scarcely conceive of a court action less consistent with a defendant's right to mount an effective defense."\textsuperscript{128} The gravity of harm associated with witness

\textsuperscript{124} Lehr-Lehnardt, \textit{supra} note 16, at 342 (noting that ICTY expressly acknowledged that female rape victims who have testified in court liken experience of testifying to "being raped a second time").

\textsuperscript{125} Mulvey, \textit{supra} note 22, at 52.

\textsuperscript{126} Creta, \textit{supra} note 52, at 395; \textit{see} Lusty, \textit{supra} note 4, at 375 ("Whilst there is little contemporary commentary on the right of confrontation outside the United States, it is beyond question that the right is a central and defining feature of common law criminal procedure.").

\textsuperscript{127} Creta, \textit{supra} note 52, at 396 (quoting rule 75(A) of the Rules of Procedure and Evidence of the International Tribunal, \textit{available at} http://www.un.org/icty/index.html); \textit{see} Jeremy Blumenthal, Comment, \textit{Reading the Text of the Confrontation Clause: 'To Be' or Not 'To Be'? 3 U. PA. J. CONST. L. 722, 730 (2001) (positing that the right of the accused to face his accuser is deeply rooted in American constitutional law, in order to 'ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.'").

anonymity is exemplified by the *Tadic* case where the witness, who was granted anonymity, was later discovered by the defense to have "lied after government forces threatened to execute him unless he claimed to be an eyewitness." Scholars argue that, "had the defense followed the anonymity order," this deception would never have been discovered. Witness anonymity faces incredible criticism as a violation of due process, and also as to the possibility of convicting "persons on the basis of tainted evidence."  

Furthermore the right of confrontation is explicit within the statutory framework which states that "[e]xamination-in-chief, cross-examination and re-examination shall be allowed in each case," and grants the accused the "right to examine . . . the witnesses against him." The Rules of Procedure and Evidence for the ICTY, ICTR and the ICC "incorporate[] throughout guarantees for the conduct of proceedings in accordance with international standards of fair trial and due process" More
importantly, international standards of due process and fairness include the right of the accused to confront his accuser.\textsuperscript{136} International treaties such as the European Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights affirm the right of the accused to a fair trial.\textsuperscript{137} The United States Supreme Court has also held this right to be nearly inviolable and has "stressed that witness confrontation upholds the values of both symbolic and functional justice."\textsuperscript{138} Granting witness anonymity ties the figurative hands of the defense, severely impairing its ability to impeach and cross-examine the witness.\textsuperscript{139}

A defendant's right to confront witnesses against him has been read as implying "a right to meet face-to-face all those who appear and give evidence at trial,"\textsuperscript{140} but this has not meant an \textit{absolute} right to confront \textit{all} witnesses.\textsuperscript{141} For example, the U.S. Supreme Court has held that abused children who would "suffer serious emotional trauma because of the presence of the alleged victimizer and therefore communicate less effectively" may testify at trial via closed circuit television.\textsuperscript{142} In so holding, the U.S. Supreme Court recognized the countervailing interests of the child, and found that procedure sufficient to preserve the

\textsuperscript{136} See Creta, \textit{supra} note 52, at 397 ("Fundamental notions of fairness and international standards of due process should prevent the prosecution's use of testimony if the witness is unknown to the defense throughout the trial."); see also Lusty, \textit{supra} note 4, at 375 (positing that "confrontation is so basic to the common law system of trial that the right to engage in it may properly be described as 'constitutional,' even in countries where it is not expressly entrenched in a written document called 'the Constitution'.").

\textsuperscript{137} See Sherman, \textit{supra} note 129, at 868–70 (outlining the Tribunal rules and the protection measures for witnesses). \textit{See generally} Chinkin, \textit{supra} note 132, at 75 (citing various international instruments that have laid out the human rights standards for international tribunal proceedings).

\textsuperscript{138} Creta, \textit{supra} note 52, at 399 (citing Lee v. Illinois, 476 U.S. 530, 540 (1986)).

\textsuperscript{139} \textit{Id.} at 396 (arguing that granting witness anonymity is the single court action most antithetical "with a defendant's right to mount an effective defense"); see \textit{Lee}, 476 U.S. at 540 (stating that an open and even contest in a criminal trial can "not be based on the charges of unseen and unknown -- and hence unchallengeable -- individuals").

\textsuperscript{140} Demleitner, \textit{supra} note 46, at 654 (quoting Coy v. Iowa, 487 U.S. 1012, 1021 (1988)).

\textsuperscript{141} Maryland v. Craig, 497 U.S. 836, 844 (1990) (clarifying that the Supreme Court has "never held, however, that the \textit{Confrontation Clause} guarantees criminal defendants the \textit{absolute} right to a face-to-face meeting with witnesses against them"); see also \textit{Ohio v. Roberts}, 448 U.S. 56, 62–63 (1980) (declaring that literally applying the Confrontation Clause to exclude any statement that is not made by a declarant present at trial is "a result long rejected as unintended and too extreme").

\textsuperscript{142} Demleitner, \textit{supra} note 46, at 655.
intent of the Sixth Amendment's Confrontation Clause.\textsuperscript{143} Similarly, the admission at trial of hearsay evidence\textsuperscript{144} is a common exception to the common law right of confrontation.\textsuperscript{145} However, any exceptions to the right of confrontation "must be 'necessary to further an important public policy,'"\textsuperscript{146} and courts have been \textit{extremely} reticent to abridge this right.

Critics do not deny that war crimes tribunals must employ special means to protect the rights of victims and witnesses, but argue that witness anonymity is not the appropriate solution.\textsuperscript{147} These scholars draw a fine line between witness anonymity\textsuperscript{148} and witness confidentiality,\textsuperscript{149} although confidentiality must also be balanced against the due process rights of the accused to a public hearing.\textsuperscript{150}

\textsuperscript{143} See Craig, 497 U.S. at 853 (concluding that "a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court."); see also Roberts, 448 U.S. at 64 (declaring that "[t]he Court, however, has recognized that competing interests, if 'closely examined' may warrant dispensing with confrontation at trial" (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973))).

\textsuperscript{144} See Roberts, 448 U.S. at 62 (defining "hearsay evidence 'testimony in court, or written evidence, of a statement made out of court, the statement being offered in evidence to prove the truth of the matter asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter.'") (quoting E. McCLeary, MCCORMICK ON EVIDENCE 246, 584 (2d ed. 1972)); see also FED R. EVID. R 801(c) (establishing "[h]earsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offering in evidence to prove the truth of the matter asserted.").

\textsuperscript{145} Lisa Hamilton Thielmeyer, Beyond Maryland v. Craig: Can and Should Adult Rape Victims Be Permitted to Testify by Closed-Circuit Television?, 67 IND. L.J. 797, 800 (1992) (asserting that statements made by unavailable declarants are common law hearsay exceptions); see Roberts, 448 U.S. at 62 (summarizing that "[t]he basic rule against hearsay, of course, is riddled with exceptions developed over three centuries").


\textsuperscript{147} Creta, supra note 52, at 400 (claiming that balancing the interests involved in war crime tribunals should not result in "conceal[ing] the identities of victims and witnesses"); see Lusty, supra note 4, at 423 (reasoning that the uniqueness of international criminal tribunals does not justify granting witness anonymity because doing so is "unfairly balanced against the accused").

\textsuperscript{148} Anonymity is the non-disclosure of the victim-witness identity to the defendant. See Vesna Nikolic-Ristanovic, Victimization by War Rape: the International Criminal Tribunal for the former Yugoslavia CANADIAN WOMAN STUD. 4, 28-35 (Jan. 2000); Creta, supra note 52, at 395.

\textsuperscript{149} Confidentiality concerns measures intended to protect victim-witness privacy. See Nikolic-Ristanovic, supra note 148. Confidentiality measures involve non-disclosure to the public. See Creta, supra note 52, at 395.

\textsuperscript{150} Creta, supra note 52, at 395 ("Noting that the discretion to grant anonymity 'must be exercised fairly, and [that] only in exceptional circumstances can the Trial Chamber restrict the right of the accused to examine or have examined witnesses against him,' the Trial Chamber balanced the interests of the defendant against the interests of society and witnesses."); see, e.g., Demleitner, supra note 46, at 641("When a threat to a witness emanates from unrelated third parties, as might be the case for undercover agents, the courts permit the exclusion of such spectators or a total closure of the proceedings to the
Critics to witness anonymity also suggest implementing a "relocation program to remove victims, witnesses, and their families to other regions or countries at their own request." However, any alternatives to witness anonymity must be viewed in light of the realistic capabilities of the tribunals. There is no doubt that these mechanisms must be in place, but such procedures take tremendous financial resources that these tribunals currently do not possess. Although the tribunals have recognized the need for victim and witness sensitivity, its “record has been spotty at best.” Financial limitations have made it impossible to offer the support services and protection required by witnesses. Moreover, the sensitivity reflected in the Tribunal’s original mandate has not always been reflected in its practice.

Though the tribunals have attempted to respond to such criticisms, any realistic change is untenable without a substantial financial commitment to “staff hiring and training and both support services and protection for survivors.”

Although witness anonymity might not be appropriate in domestic rape trials, for all of the abovementioned reasons, there are several distinguishing characteristics that make application of the traditional due process model inapposite to international war crimes tribunals. Before examining the right of confrontation, it is important to understand where and how the right of confrontation developed. Most national constitutions do not contain a textual right to confront one’s accusers; however many countries’ case law has followed the trend in the United States against permitting witness anonymity. The right to confront one’s accusers is an ancient right rooted in Roman tradition; “under Roman law, ‘anonymous accusations were not actionable, because, among other things, the accused . . . had the right to confront his accuser.” However, European tradition

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151 Creta, supra note 52, at 400 (suggesting that U.N. establish relocation program modeled after U.S.).
152 Stephens, supra note 14, at 107 (identifying financial limitations and lack of sensitivity as Tribunal’s main obstacles).
153 Id. (indicating lack of world commitment to necessities of program).
154 Lusty, supra note 4, at 364 (tracing Roman view of anonymous accusations).
pulled away from such procedural safeguards in the Middle Ages, a period marked by secret inquisitions by both Church and State. Fifteenth Century England and the closed trials of the Star Chamber fueled the Framers' fear of witness anonymity. It was in reaction to the abuses of the British Crown that the Framers of the Constitution purposely enshrined the right to confront one's accusers in the United States Constitution, and the Supreme Court has been hesitant to limit that right in any substantial way. Most western nations adhere to this principle and continue to protect the right of confrontation against common law encroachment. Reading history in this light, the right to confront one's accusers developed out of the belief that "[o]ne technique which is always used to maintain absolute power in totalitarian governments is the use of anonymous information by the government against those who are obnoxious to the rulers." This view on a near-absolute right of confrontation is inapplicable to rape prosecutions in war crimes tribunals for a myriad of reasons.

First, in international war crimes tribunals, there is no danger of a single totalitarian government utilizing private information in order to repress dissidents. A collective governing body is the trier of fact, and the trials are monitored by international bodies, national governments, and NGOs.

Second, in wartime rape crimes, identity does not become a crucial factor, as it does in regular domestic rape cases. Within

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155 See generally id. at 364-69 (recounting history of the Inquisition and attitudes towards witness anonymity).
156 See generally id. at 370-72 ("The Star Chamber was originally popular because it convicted offenders who were too powerful to be brought to justice at common law. However, it came to be used as an instrument of oppression by the Crown to strike at its political opponents... It was in these politically charged state trials, both before the Star Chamber and at common law, that the battle for the right of confrontation was most vigorously fought and eventually won.").
157 See U.S. CONST. amend. VI. See generally id. at 375-77 (illustrating the Supreme Court's adherence to right of confrontation).
individual rape cases, the accused should have the right to challenge the witness' allegations and version of the events. On the other hand, consent in armed conflict rape does not appear to be a factor, as it is in domestic rape proceedings.159

Some victims might "not know the actual identity of their rapists."160 In domestic rape proceedings, the judiciary must decide whether to withhold evidence from the jury, such as that which is mandated by state rape shield laws,161 which often implicates the issue of consent, and is therefore necessary to the defendant's right to mount a defense. However, consent is often not at issue in war crimes tribunals as "it is 'extremely hard to envisage a situation where evidence of consent would 'be relevant and credible.'"162 For example, in trying abuses perpetrated against victims interred in veritable rape camps and subjected to repeated rape, the defense would hardly be able to argue that these women "consented" to the abuse they sustained.

Third, witnesses face an increased chance of retaliation.163 This type of rape,

involves state and military involvement that does not exist within non-conflict situations. As a result, the threat and fear of these victims escalates substantially because state actors have more power which will more readily in extermination, harm or harassment of the victim if she testifies. Thus, allowing the use of a name in official documentation and other forms of

160 Id. (using example of armed conflict rape victims in Yugoslavia).
163 See Pieslak, supra note 159, at 171 (noting that victims of rapes committed during armed conflict require a greater amount of protection because of possibly retaliation by the perpetrator); see also Symposium, Human Rights Violations Against Women, 15 WHITTIER L. REV. 319, 361 (1994) (stating that many rape victims are reluctant to speak out due to an increased fear of retaliation by their perpetrators).
documentation makes it accessible for these state actors to find a rape victim and in turn, facilitates revenge.\textsuperscript{164}

Fear of "reprisal"\textsuperscript{165} against the victim or her family is a very real threat "[e]ven if the imprisoned criminal cannot threaten the victim for several years, [because] once his friends and family know the victim has testified, they can harass the victim and the victim's family."\textsuperscript{166}

Victims and potential witnesses are also subject to other outside pressures, which the ICC and other international tribunals ought to recognize. For instance, societal pressures and social norms, particularly in Islamic countries and in cultures which place tremendous value on women's sexual purity, may subject a victim to "physical threats," "social contempt,"\textsuperscript{167} "severe traumatization, feelings of guilt and shame . . . [and] the fear of rejection by husband or family."\textsuperscript{168} For example, in the former Yugoslavia, women who have admitted to being raped have suffered greatly at the hands of their own families.

There have been several reports of women being abused violently by their spouses after revealing that they had been raped. Similarly, women who have come forward and testified publicly about being raped have been ostracized . . . [H]usbands have killed or abandoned their wives, young unmarried women have been disowned by their families, women of all ages are kept from suicide only by sedatives, and others have been driven crazy by their experiences and the pressure to maintain silences about those experiences.\textsuperscript{169}

Familial pressure to silence rape victims impacts the decision of women who might otherwise wish to testify. Knowing that

\textsuperscript{164} Pieslak, \textit{supra} note 159.

\textsuperscript{165} See Chinkin, \textit{supra} note 132, at 78 (discussing the UN Special Rapporteur's findings that rape victims suffer from the fear of reprisal against themselves and their families); Jamie O'Connell, \textit{Gambling With The Psyche: Does Protecting Human Rights Violators Console Their Victims?}, 46 HARV. INT'L L.J. 295, 335-36 (2005) (finding that initiating a judicial proceeding against rape perpetrator may result in threatened or actual reprisals against the victim).

\textsuperscript{166} Lehr-Lehnardt, \textit{supra} note 16, at 349-50.

\textsuperscript{167} Lehr-Lehnardt, \textit{supra} note 16, at 349.

\textsuperscript{168} \textit{Protective Measures}, \textit{supra} note 162, at 181.

testifying may lead to permanent ostracization, many women may prefer to suffer in silence; in fact, investigators have been most successful in extracting testimony from women immune from such societal pressures, specifically “divorced women, widows, and unmarried women.” In domestic rape prosecutions, state-backed police forces and militias can offer adequate protection to the rape victim (usually one). International tribunals, including the ICC, deal with victims on a massive scale and lack the financial resources to maintain an independent police force with the ability to protect the victim-witness in the midst of an ongoing conflict.

Protecting the victim-witness is necessary in order to fulfill the tribunals’ mission to “put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them.” War crimes tribunals must have witnesses willing to testify in order to successfully prosecute those who have been indicted. “[L]ive witness testimony is the lifeblood of the tribunals and essential to preserving the integrity and legacy of the institutions.” Often, International tribunals conduct prosecutions within the context of an ongoing conflict, and unlike domestic courts, which are backed by the police power of their respective states, cannot offer adequate protection from reprisal. Therefore they must respond with a tool which they do possess in their arsenal - the ability to mask the identity of the victim testifying. One solution is to set forth guidelines for

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170 Id. at 806.
171 See generally Neil Gilbert, Article, Advocacy Research and Social Policy, 22 CRIME & JUST. 101, 142 (1997) (stating the Violence Against Women Act designates federal funds for prevention and education programs both for college communities and to protect and serve women in the broader community); Aya Gruber, Article, Pink Elephants In The Rape Trial: The Problem of Tort-Type Defenses In The Criminal Law Of Rape, 4 WM. & MARY J. OF WOMEN & L. 203, 244 (1997) (noting that the government provides a certain level of education for society and protection for victims of crime).
172 Protective Measures, supra note 162, at 181.
173 Id.
175 Chinkin, supra note 132, at 76 (comparing the protection afforded witnesses under domestic jurisdictions and those under the Tribunal); O'Connell, supra note 165, at, 335-36 (explaining that “[m]any survivors decline to initiate or join legal cases or give testimony against their abusers out of fear for their or their family's safety. Those who do may face threats or actual violence.”).
176 Chinkin, supra note 132, at 77 (noting the procedural guidelines involved when taking testimony from an anonymous witness); Gregory S. Gordon, Toward an International Criminal Procedure: Due Process Aspirations and Limitations, 45 COLUM. J.
the judiciary to balance the rights of the accused and the rights of the victims to determine if witness anonymity is necessary and appropriate in a given case. The right of confrontation ought not to be "absolute but may have to be balanced against other important interests."  

The Tadic court held that the "identities of several victims and witnesses could be indefinitely withheld from the accused and his counsel." The court held that because the ICTY statute affirms that proceedings be conducted "with full respect for the rights of the accused and due regard for the protection of victims and witnesses," the accused's right to a fair trial must be balanced against the right of protection afforded to victims and witnesses. Such a careful balancing test can offer protection to the victim as well preserve the defense's right to a fair trial:

First, there must be a real fear for the safety of the witness. The chamber added that 'the ruthless character of an alleged crime justifies such fear of the accused and his accomplices.' Second, the prosecutor must demonstrate the importance of the witness to proving the counts of the indictment to which the evidence relates. Third, there must be no evidence to suggest that the witness is untrustworthy. Fourth, the Tribunal itself is in no position to offer protection to the witnesses or their families after receiving their testimony.  

This case-by-case determination ensures that the court will not abuse its discretion, permitting anonymity in only the most extreme cases. Moreover, the chamber enumerated guidelines for cases in which anonymity is granted, further ensuring that the defense is not stripped of its procedural guarantee of a fair trial.

The judges must know each witness's identity and must be able to observe the witnesses' demeanor to assess the reliability of testimony. In absence of a
trial by jury, the judges are the decision makers as to both fact and law, and confidence in their ability to weigh all aspects of the evidence is crucial to the credibility of the Tribunal. The defense must be given ample opportunity to question the witness on issues unrelated to identity and current whereabouts... Finally, anonymity is not to be permanent, but it will last only so long as there is reason to fear for the witness's security.\textsuperscript{181}

A balancing test ensures that witness anonymity will be reserved for the most egregious of cases where the victim is placed in significant peril by testifying publicly. The use of additional guidelines to check the use of witness anonymity further insures that witness anonymity will not be abused. The defense retains the ability to question the witness and the judge must be assured of the credibility and the reliability of the witness.

\textbf{B. Other Areas of Reform}

While allowing for witness anonymity would vastly increase war crimes prosecutors' ability to compel victim testimony, there are still many other issues of which the ICC and other international war crimes tribunals must be cognizant when investigating and prosecuting crimes of rape and sexual violence.

i. Interrogation

Further concerns include the method by which victims are questioned while testifying. Trial interrogation often results in "the retraumatization of a victim through having to confront her alleged rapist at trial, and describe what he did to her in the face of hostile defense questioning."\textsuperscript{182} The very act of testifying can produce intense psychological strain.\textsuperscript{183} Defense attorneys

\textsuperscript{181} Id. at 77-78.

\textsuperscript{182} Chinkin, supra note 132, at 78; see O'Connell, supra note 165, at 333 (arguing that "[o]nce someone's been tortured, the vulnerability remains with them the rest of their life, and there can be stressors or triggers that bring it all back." (quoting Telephone Interview with Mary Fabri, clinical psychologist, Marjorie Kovler Center for the Treatment of Survivors of Torture (May 3, 2000))).

\textsuperscript{183} See O'Connell, supra note 165, at 331-33 (quoting Judith Lewis Herman, The Mental Health of Crime Victims: Impact of Legal Intervention, 16 J. TRAUMATIC STRESS 159, 159-60 (2003));
purposefully ask questions seeking unnecessary and excessive details of the rape in order to stun or incapacitate the victim on the stand, making her seem unreliable or contradictory. Another tactic is to defame or destroy a woman's credibility by highlighting her prior use of contraceptives and/or prior abortions and by insinuating that the sexual encounter was consensual. For example, one witness testifying at the ICTY, "described how she was not selected to be raped one night, [and] the defense counselor asked if she was jealous of the woman who was chosen." Additionally, women who have sought counseling in order to deal with the trauma are often asked about the counseling in order to "cast doubt upon their testimony."

Perhaps the greatest insult is the extreme lack of sensitivity with which victims, who do choose to testify, are treated by the

The mental health needs of crime victims are often diametrically opposed to the requirements of legal proceedings. Victims need social acknowledgement and support; the court requires them to endure a public challenge to their credibility. Victims need to establish a sense of power and control over their lives' the court requires them to submit to a complex set of rules and procedures that they may not understand, and over which they have no control. Victims need an opportunity to tell their stories in their own way, in a setting of their choice; the court requires them to respond to a set of yes or no questions that break down any personal attempt to construct a coherent and meaningful narrative. Victims often need to control or limit their exposure to specific reminders of the trauma; the court requires them to relive the experience by directly confronting the perpetrator.;


See Nikolic-Ristanovic, supra note 148; O'Connell, supra note 165, at 336 (positing that human rights defendants might be able to use the adversarial process and "use invasive discovery in bad faith, hoping that the resulting emotional stress would induce survivors to drop their cases or decline to testify.").

See Nikolic-Ristanovic, supra note 148.

Ethan A. Heinz, Comment, The Conflicting Mandates of FRE 412 and FRCP 26: Should Courts Allow Discovery of a Sexual Harassment Plaintiff's Sexual History?, 1999 U CHI. LEGAL F. 519, 523 (1999) (highlighting that "defendants frequently pursued a 'nut or slut' strategy that portrayed plaintiffs either as hypersensitive and overimaginative, or as promiscuous and welcoming of the advances."); O'Connell, supra note 165, at 335 (noting that survivors who testify "feel like they're not believed" (quoting Telephone Interview with Mary Fabri, clinical psychologist, Marjorie Kovler Center for the Treatment of Survivors of Torture (May 3, 2000))).

Wood, supra note 30, at 311-12.

Roger C. Park, Perspectives on Proposed Federal Rules of Evidence 413-415: The Crime Bill of 1994 and the Law of Character Evidence: Congress was Right About Consent Defense Cases, 22 FORDHAM URB. L.J. 271, 276 (1995) (commenting that defendants "may seek a psychiatric examination or psychiatric records in an attempt to impeach the victim's credibility"); Wood, supra note 30, at 311 (explaining that defense counsels use tactics to "further traumatize sexual violence survivors" by using evidence of their psychological counseling to place doubt upon their testimony).
Tribunal judges have been accused of callously questioning witnesses; “some of the women who have testified before ad hoc war crimes tribunals have felt dominated by the Tribunal’s efforts to render their testimony relevant and concise when they sought to narrate their pain and their suffering.” Prosecutors are also guilty of insensitively examining “witnesses to dissect facts in a perpetrator-driven narrative according to the basic rules of evidence” without regard for the victim’s emotional well-being. This practice tends to “alienate[] and disembod[y]” witnesses. Many victims who testify may need or want to testify in a narrative that is incompatible with the traditional legal model. The witness may feel that she is being violated a second time which only compounds the sense of “victimization for people who have suffered sexual violence.”

Only two women were appointed to the ICTY court and a single woman was elected to the ICTR. Having women on the bench, as well as individuals with expertise in the area of sexual violence (as the ICC statute requires), would greatly influence the method by which victims were questioned.

**ii. Investigation and Prosecution**

Although the evidence of rape in both the former Yugoslavia and Rwanda has been widespread, there has been “relatively
little investigation of those violations."\(^{196}\) Both the ICTY and ICTR have been criticized for failing to investigate sexual violence and rape.\(^{197}\) Additionally, Human Rights Watch has accused tribunal investigators of being insensitive to the women they question. More women need to be used as investigators and interpreters in order to create a sense of intimacy and trust that is conducive to helping victims feel comfortable enough to share their stories with investigators. "According to survivors, interacting with female investigators would increase the likelihood that they would report the sexual violence they endured."\(^{198}\)

The tribunals have also failed to incorporate the evidence gathered by independent NGOs such as Human Rights Watch.\(^{199}\) The massive amounts of information gathered by NGOs "should be reviewed by the Prosecutor’s Office . . . the Prosecutor’s Office should rely on the NGOs’ fact-finding so as not to duplicate efforts and authenticate the information when necessary before including it in an indictment."\(^{200}\) Using the NGOs as a valuable source of information would provide Prosecutors access to information that they could not reasonably gather on their own due to funding restrictions, and would reduce the need of the tribunal to hire many female interpreters and investigators.\(^{201}\)

\(^{196}\) Major Michael L. Schmidt, *The International Criminal Court: An Effective Means of Deterrence?*, 167 MIL. L. REV. 156, 187 (2001) (highlighting that although the ICTY "has been in existence for over seven years.... [it] did 'not adequately deter the warring factions from committing rape, torture, forced expulsion, forced displacement, genocide, murder and other war crimes'."); Zoglin, *supra* note 6, at 327 (noting that although "rape was widespread, there is relatively little investigation of those violations.").

\(^{197}\) Jocelyn Campanaro, *Note, Women, War, and International Law: The Historical Treatment of Gender-Based War Crimes*, 89 GEO. L.J. 2557, 2585 (2001) (commenting that the ICTR "has faced criticism for failing to adequately investigate and amend indictments to charge rape and other sexual violence."); Franke, *supra* note 190, at 818–19 (discussing that the ICTR and ICTY have been subjected to criticisms “for failing to investigate sexual violence and rape”).

\(^{198}\) Wood, *supra* note 30, at 318.

\(^{199}\) See id. at 318–20 (noting that NGO research and reports are tremendously valuable to the International Criminal Tribunal for Rowanda ("ICTR")). See *generally* Symposium, *War Crime Tribunals: The Record and the Prospects: Conference Convention*, 13 AM. U. INT’L L. REV. 1383 (1998) (advocating that the inefficiencies at the ICTR could be fixed by using NGO research.).


\(^{201}\) See id. at 318–20 (asserting an option which could incorporate the knowledge of NGO’s fact-finding in a beneficial and neutral way). See *generally* Mary Hartnett, *The Need for International Woman’s Human Rights Lawyers: Now More Than Ever*, 29 HUM. RTS. 21 (2002) (urging training of more lawyers to use the international framework to ensure that women’s rights are provided, protected, and promoted in the context of cultures and societies across the globe).
Although the ICTY and ICTR have made tremendous advances in punishing rape as a war crime, there have been relatively few prosecutions when compared to the actual extent, severity and number of rapes. Prosecutors must view mass rape and sexual violence as equally damnable as murder, and must pursue crimes of sexual violence with "more vigorous prosecutions." If the international community truly intends to criminalize rape, tribunals must take their mandate to investigate and prosecute such crimes seriously.

iii. Long Term Witness Protection

These tribunals must also offer long-term protections for victims, including relocation programs for victims of the most egregious crimes. First and foremost, money must be earmarked for Witness Protection Units.

Failure to provide sufficient funds will have two consequences. First, the international community will forfeit the opportunity to provide justice and retribution for thousands of women and girl victims of rape, many of whom died as a result of sexual violence. Second, it will lose the opportunity to create a significant body of international law that establishes violence against women as a war crime.

A major hurdle in many investigations is the "slow and difficult procedures for obtaining refugee status, as well as the

202 Amy Ray suggests that the difference between rape and murder prosecution is the result of international law's distinction between the public and private sphere. Since "international law historically regulates matters between nation-states and does not 'interfere' in what are deemed to be domestic matters", nor does it "apply to violence or discrimination within the family" rape and other crimes of sexual violence have fallen outside the traditional purview of international prosecutions. The solution is to rethink that which underlies international law and to "recognize that violence against women is always political, regardless of where it occurs, because it affects the way women view themselves and their role in the world, as well as the lives they lead in the so-called public sphere." Ray, supra note 168, at 830-37. "Because of the historic respect international law has given to the principle of noninterference in states' domestic affairs... the injustices that women experience under domestic laws and practices has gone largely unrecognized by international lawyers" (using "domestic" to refer to matters considered internal to a nation-state). Rebecca J. Cook, State Responsibility for Violations if Women's Human Rights, 7 HARV. HUM. RTS. J 125, 134 (1994).

203 Kirk, supra note 20, at 327.

204 Jane Kronenberger and Katherine Moseley, The Key to Prosecuting Rape as a War Crime, CHRT. SCI. MONITOR (Boston), Apr. 6, 1995, at 19.
uncertainty of their residency in asylum countries." Many victims of war crimes eventually become refugees in neighboring countries or western European countries that have granted them temporary protections. Victims are understandably reluctant to offer testimony when they are unsure of their status in their host country. The possibility that they will have to return to the locus of the crime where their rapist, his family and his friends continue to reside chills the most stalwart of women. "The most important form of victim protection – secure immigrant status and defense against deportation into the hands of perpetrators – does not exist."

Detractors note that care must be taken when implementing an asylum program so as not to encourage false accusations in order to secure asylum, which would "thereby undermin[e] the credibility of legitimate victims." They also note that the vast numbers of victims in some cases may make an established asylum prohibitive. Some commentators have suggested establishing a witness protection program, similar to that of the United States, "in which witnesses, where necessary, would be given a new identity and relocated to another area, inside or outside of the country where the crime was committed."

iv. Gender Sensitive Language

Feminist theorists contend that international law is inherently biased because in the creation of the text of international law, women "were spoken for by men and by agencies and institutions

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205 Nikolic-Ristanovic, supra note 148.
206 Id.
208 See id. (observing many reasons, including resistance to leaving home for uncertain futures, in addition to the sheer number of rape victims which would "make a broad asylum program impossible."); see also Sharon A. Healey, Prosecuting Rape Under the Statute of the War Crimes Tribunal for the Former Yugoslavia, 21 BROOK. J. INT'L L. 327, 361–62 (stating a collection of results from various surveys estimating the number of rapes in Bosnia).
210 See Hilary Charlesworth, Christine Chinkin, & Shelly Wright, Feminist Approaches to International Law, 85 AM. J. INT'L L. 613, 625 (1991) (arguing that the structure of international law has allowed women-oriented matters such as sex discrimination, domestic violence, and sexual degradation to be ignored); see also Aaron Xavier Fellmeth, Feminism and International Law: Theory, Methodology, and Substantive Reform, 22 HUM. RTS. Q. 658, 667 (2000) (stating that most feminists who challenge international law claim that its very inception is biased against women).
that catered to men's interests and in which men prevailed," rather than given their own voice.\textsuperscript{211} The failure of the international community to address crimes of sexual violence may be the result of men "drafting and enforcing of humanitarian law provisions; thus, it was primarily men who neglected to enumerate, condemn, and prosecute these crimes."\textsuperscript{212} Women have been historically excluded from lawmaking bodies, particularly in the international realm. The result of this male "domination of all bodies wielding political power nationally and internationally means that issues traditionally of concern to men become seen as general human concerns, while 'women's concerns' are relegated to a special, limited category."\textsuperscript{213} As such, international conventions have dealt with sexual violence in terms of honor, "reinforcing the notion of women as men's property" rather than as a form of violence.\textsuperscript{214} Furthermore, male domination of the political system has given men the ability to create a male-centric version of history. Men "hold the hegemonic positions of a culture [and] have the power to define. This power over discourse allows them to define experience, to determine limits and values, to assign each thing its place and its qualities, to determine what can and what cannot be expressed, even to control perception itself."\textsuperscript{215} Men have the ability to ascribe value, or not, to certain crimes and to determine which of these are worthy of international repudiation.

Some commentators argue that this gender bias permeates the ICTY, ICTR, and ICC statutes because, although they represent a tremendous step forward, the language of the statutes is simply insufficient to cover the breadth of sexual crimes being perpetrated against women in times of war.

The perception that rape is only a crime against humanity and the linkage of prosecutions primarily with cases of mass rapes and/or genocidal rapes has provoked the concern of some commentators and

\textsuperscript{211} See Cook, \textit{supra} note 202, at 130.

\textsuperscript{212} Askin, \textit{supra} note 37, at 295.

\textsuperscript{213} Charlesworth et al., \textit{supra} note 210, at 625.


victims... that acknowledging rape on the basis of a particular program and with reference only to mass figures obscures the real number of rapes... as well as those which do not fit these parameters.\(^{216}\)

Thus, sexual violence is only addressed in international criminal law when the act is on such a massive scale as to lead to "the destruction of a community."\(^{217}\) For instance, the prosecution of rape as a form of genocide leads to the implication that rape is not a wrong in itself, but is wrong "because it is an assault on a community defined only by its racial, religious, national or ethnic composition... the violation of a woman's body is secondary to the humiliation of the group."\(^{218}\) The recognition of rape as a form of genocide, "rests, at least in some part, on an understanding of the meaning of rape and forced pregnancy in the context of a patriarchal family and society."\(^{219}\)

Although the courts have interpreted the statutes liberally, and have handed down historic judgments, interpretation is not enough "and an amendment is needed to explicitly acknowledge rape as a grave breach of law... [and] as gender-specific violence."\(^{220}\)

**CONCLUSION**

Rape and War have been inextricably linked for centuries. But as international humanitarian law continues to develop, and as the number of countries who are signatories to the ICC increases, the international community's condemnation for the use of rape as a tool of war should intensify.

The creation of the International Criminal Court will hopefully obviate the need for *ad hoc* tribunals and the future of international war crimes tribunals will lie with the ICC. Whether a gender-sensitive approach to victims of sexual crimes is even possible, depends upon the nature of the ICC, which is composed of member states, whose national, religious, and political ideologies infuse the rules of evidence and procedure of


\(^{217}\) *Feminist Methods, supra* note 214, at 387.

\(^{218}\) *Id.* at 387.


the ICC. There are over 104 signatories to the ICC Statute from diverse nations in Africa, Asia, Latin America, and Western and Eastern Europe. The question that now confronts the international community is whether the ICC is capable of instituting progressive gender reforms when the individual nations which comprise the ICC have legal traditions and procedures anathema to the gender-sensitive approaches herein advocated due to a “range of cultural and political assumptions that inform [their] municipal criminal laws.”

Regardless of these ideological differences, the international community must continue to press forward in its prosecution of rape and other crimes of sexual violence. To be successful doing so, however, requires these courts to compel credible witness testimony from victims. Compelling such testimony in the midst of ongoing terror requires international war crimes tribunals to take special consideration of the needs of victims and witnesses while still maintaining the integrity of the adjudicative process.


See Boon, supra note 23, at 637. Stated succinctly, one of the central problems in creating effective measures to criminalize, prosecute, and deter sexual atrocities in international law arises from the range of cultural and political assumptions that inform municipal criminal laws. These differences could not have been more apparent during the negotiations concerning sexual crimes within the ICC Statute... Sexual crimes were amongst the most contentious provisions considered for the ICC Statute because of the delegates' fundamentally different philosophical, legal, and cultural approaches.

See also id. at 639, 658–59. Coming to a consensus on crimes of sexual violence is particularly difficult, when certain crimes conflict with the religious tenets which inform government policy. For example, “[c]ertain delegates from countries in the Arab Bloc stated that in their national legal systems, all sex during marriage is consensual by definition” and Catholic delegates criticized the inclusion of enforced pregnancy, ultimately yielding to the term “forced” pregnancy.
and preserving the defendant's due process rights. One of the most effective means of compelling testimony is to offer victims anonymity, even from the defense, when the probability of danger to the victim substantially outweighs the defendant's need to confront the witness, or, in the alternative, offer permanent relocation or witness protection. Tribunals must also heed the advice of many critics and include female interpreters and investigators in order to more easily compel victim testimony as well and appoint judges who are sensitive and trained in eliciting testimony from victims in a manner that recognizes the psychological impact of rape. The ICC will soon confront these issues in pending prosecutions and it is incumbent upon the international community, NGOs, and human rights workers and advocates to continue to press for special procedural safeguards for victims of rape and sexual violence who chose to testify before the ICC and other war crimes tribunals.