

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

Amanda Beltz

Follow this and additional works at: <https://scholarship.law.stjohns.edu/jcred>

This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Civil Rights and Economic Development by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

NOTES

PROSECUTING RAPE IN INTERNATIONAL CRIMINAL TRIBUNALS: THE NEED TO BALANCE VICTIM'S RIGHTS WITH THE DUE PROCESS RIGHTS OF THE ACCUSED

AMANDA BELTZ

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.

J. INT'L L. & POL'Y 591, 593 (1998) (describing a scope of human rights crimes that include genocide, non judicial executions, and torture).

² See http://www.caii-dc.com/CAIISTaff/Dashboard_GIROAdminCAIISTaff/Dashboard_CAIIDatabase/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.").

⁴ See International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 10.1, U.N. Doc. A/6316 (Dec. 16, 1966) (noting the right of the accused to "examine" . . . "the witnesses against him"); see also David Lusty, Note, *Anonymous Accusers: An Historical & Comparative Analysis of Secret Witnesses in Criminal Tribunals*, 24 SYDNEY L. REV. 361, 361 (2002) (providing an extensive analysis of the right to confront in various jurisdictions, and declaring that the right to confront one's accusers has become an international fundamental right enshrined in the ICCPR, European Convention of Human Rights, American Convention on Human Rights, and international case law).

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

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).

⁶ See Katie Zoglin, Symposium: *Women and War: A Critical Discourse: Panel One – Tools of War*, 20 BERKELEY J. GENDER L. & JUST. 322, 327 (2005) (noting that, in 1988, the Rwanda tribunal was the first international tribunal to state that rape is a war crime); see also Alex C. Lakatos, *Evaluating the Rules of Procedure and Evidence for the International Tribunal in the Former Yugoslavia: Balancing Witnesses’ Needs Against Defendants’ Rights*, 46 HASTINGS L.J. 909, 918 (1995) (explaining that the International Criminal Tribunal for the former Yugoslavia includes rape as a crime against humanity).

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"⁸ 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."⁹ Early civilizations did not stigmatize abduction or forced marriage as a means of obtaining wives and concubines,¹⁰ as evidenced by Biblical¹¹ and Koranic¹² 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.”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.¹⁴ It is also seen “as an incentive for soldiers to enlist, and as a way to celebrate victory in battle.”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.”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”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

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

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

¹⁵ Davis, *supra* note 9, at 1227.

¹⁶ Doreen Marguerite Koenig, Symposium, *Two Transformations of Sexual Assault—The First in Domestic Law and the Second in the United Nations International Criminal Courts for Yugoslavia & Rwanda & the ICC Treaty*, 50 WAYNE L. REV. 185, 187–88 (2004); see Rana Lehr-Lehnart, *One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court*, 16 BYU J. PUB. L. 317, 317 (2002).

¹⁷ 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?*, 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.”¹⁸ These crimes were never charged or prosecuted and for years revisionist history declared the “comfort women” prostitutes, and the rape camps brothels.¹⁹

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.”²⁰ 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.”²¹ 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.”²² 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.²³

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.”²⁴ The emergence of forced pregnancy is a new aspect of modern warfare and prevalent “where racial and ethnic purity are valued.”²⁵ Once

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.”).

²⁰ Gwyn Kirk, *The Tools of War: Rape, Imperialism and Domination*, 20 BERKELEY J. GENDER L. & JUST. 322, 323 (2005).

²¹ See Davis, *supra* note 9, at 1227.

²² Clodagh Mulvey, *‘Perfect Gentleman’ on Trial 2*, THE IRISH TIMES, Feb. 16, 2002 at 52.

²³ Kristen Boon, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and Consent*, 32 COLUM. HUM. RTS L. REV. 625, 642 (2001).

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 from the women being raped, and is enforced by the detention of pregnant women beyond the time when they could safely receive abortions.”).

²⁵ Radhika Coomaraswamy, *A Question of Honor: Women, Ethnicity and Armed Conflict*, Address at the Third Minority Rights Lecture (May 25, 1999), <http://www.sacw>.

pregnant, women and girls may be detained in war camps until it is too late to receive an abortion.²⁶ Rape is rarely about gender, or sex alone,²⁷ “[i]t is rather a complex intertwining of gender, race, ethnicity, and culture.”²⁸ The rape is ancillary to the ultimate purpose women serve, as “pawns in genocidal warfare.”²⁹ 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.³⁰

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 Codes³¹ made rape punishable by death during the

net/Wmov/RCoomaraswamyOnHonour.html.

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/1992ruthseifert.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).

³¹ See INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (Government Printing Office 1898) (1863), reprinted in *THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS 2-44* (Dietrich Schindler & Jiri Toman eds., 1988) [hereinafter Lieber Code], available at

American Revolution. The Hague Convention of 1907³² and the Geneva Conventions³³ 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/au/awc/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.

³⁵ Diplomatic Conference and Development of International Humanitarian Law Applicable in Armed Conflict: Protocols I and II to the Geneva Conventions, *open for signature*, art. 76, Dec. 12, 1977, 16 I.L.M. 1391.

³⁶ Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of Non-international Armed Conflicts, art. 4, June 10, 1977, 1977 U.S.T. LEXIS 465.

³⁷ Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT’L L. 288, 295 (2003).

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.⁴⁰ 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.⁴¹ For example, reports tell of 182 Catholic nuns raped after Soviet troops conquered Silesia.⁴² 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.⁴³ 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.”⁴⁴

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

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.*

⁴² See Kevin Alfred Strom, *The Greatest Mass Rape in History*, FREE SPEECH, Vol. I, No. 12 (Dec. 1995), available at <http://www.natvan.com/free-speech/fs9512d.html>.

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*

⁴⁵ See United Nations Charter, preamble, available at <http://www.un.org/aboutun/charter/> ("We the people of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind."); see also What the UN does for Justice, Human Rights & International Law, UN In Brief, CH. 3.A, http://www.un.org/Overview/uninbrief/chapter3_humanrights.html (last visited Oct. 14, 2007) (describing the UN's efforts for human rights).

⁴⁶ Nora V. Demleitner, *Witness Protection in Criminal Cases: Anonymity, Disguise or Other Options*, 46 AM. J. COMP. L. 641, 642 (1998).

⁴⁷ See, e.g., Women and Armed Conflict; International Justice, <http://www.hrw.org/women/conflict.html> (last visited Oct. 14, 2007) [hereinafter Women and Armed Conflict] (noting that women in current conflict zones continue to report rape and sexual violence inflicted by soldiers and paramilitaries); Human Rights Watch, Human Rights Watch World Report, 1-5 (2007), available at <http://www.hrw.org/wr2k7/wr2007master.pdf> (discussing the various continuing challenges to human rights around the world).

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”).⁴⁹ 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’”⁵⁰ wherein women were gang-raped while being taunted with racial and ethnic slurs,⁵¹ the United Nations established the ICTY to investigate and try war crimes resulting from the conflict “that erupted in the former Yugoslavia”⁵² between the six self-declared independent states. “Acting under Chapter VII of the UN Charter”⁵³ the Security Council unanimously passed Resolution 827, establishing the ICTY.⁵⁴

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.”⁵⁵ 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.”).

⁴⁹ See Zoglin, *supra* note 6, at 327; see also Women and Armed Conflict, *supra* note 47.

⁵⁰ 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”).

⁵¹ Stephens, *supra* note 14, at 91; see also Human Rights Watch, The Human Rights Watch Global Report on Women’s Human Rights, 10 (1995), available at <http://www.hrw.org/reports/pdfs/g/general/general958.pdf>.

⁵² Vincent M. Creta, *The Search for Justice in the Former Yugoslavia and Beyond: Analyzing the Rights of the Accused Under the Statute and the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia*, 20 HOUS. J. INT’L L. 381, 387 (1998); Zoglin, *supra* note 6, at 327.

⁵³ Askin, *supra* note 37, at 305.

⁵⁴ See Creta, *supra* note 52, at 391 (noting Resolution 827 created international tribunal for Yugoslavia). see also M. Cherif Bassiouni, *A Critical Study of the International Tribunal for the Former Yugoslavia: The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia*, 5 CRIM L.F. 279, 282 (1994) (highlighting sole purpose of Resolution 827 was to prosecute persons responsible for violation of international humanitarian laws).

⁵⁵ 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.⁵⁶ The brutalization, raping, and mutilation of thousands of Tutsi women was preceded by an intense propaganda campaign demonizing Tutsi women⁵⁷ and portraying them as temptresses and seductresses.⁵⁸

The tribunals were given jurisdiction over crimes of genocide, war crimes, and crimes against humanity.⁵⁹ The ICTR first addressed the issue of rape in *Prosecutor v. Jean-Paul Akayesu*,⁶⁰ 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.”⁶¹ 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,

⁵⁶ *Rwanda; Human Rights Watch Chronicles Abuses of Rwanda's Women*, AFRICA NEWS, Sept. 25, 1996, at 1; see Victoria Brittain, *Private View: West Leaves Afghan Women to Fate*, THE GUARDIAN, Oct. 12, 1996, at 16 (highlighting human rights watch report detailing widespread rape in Rwanda during 1994).

⁵⁷ See Beth Stephens, *Humanitarian Law and Gender Violence: An End to Centuries of Neglect?*, 3 HOFSTRA L. & POL'Y SYMP. 87, 92 (1999) (noting repeated demonization of Tutsi women before 1994); see also Mike Edwards, *Ghana; Africa's Perpetual Cycle of Violence*, AFRICA NEWS, Jan. 14, 2000, at 2 (highlighting demonization of Tutsi starting in 1992).

⁵⁸ See 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, 284–85. “[P]ropaganda portrayed Tutsi females as condescending seductresses inaccessible to Hutu men.” *Id.* For an in depth look at the propaganda campaign which preceded the genocide in Rwanda, see Llezlie L. Green, *Gender Hate Propaganda and Sexual Violence in the Rwandan Genocide: An Argument for Intersectionality in International Law*, 33 COLUM. HUMAN RIGHTS L. REV. 733, 733 (2002).

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.”⁶² 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.”⁶³ *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.’”⁶⁴ 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*⁶⁵ and the *Furundzija*⁶⁶ 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.⁶⁷ The *Kunarac*⁶⁸ ruling,

⁶² Kelly D. Askin, *A Decade In Human Rights Law: A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003*, 11 HUM. RTS. BR. 16, 17 (Spring 2004). See Jean-Paul Akayesu, Case No: ICTR-96-4-T, at ¶ 507 (noting accused was adjudged criminally responsible for multiple incidents of rape).

⁶³ Askin, *supra* note 37, at 320.

⁶⁴ Alex Obote-Odora, *Rape and Sexual Violence in International Law: ICTR Contribution*, 12 NEW ENG. J. INT’L & 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 [l]ike 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).

⁶⁵ Prosecutor v. Delalic (*Celebici*), Case No. IT-96-21-T, Judgment, (Nov. 16, 1998). In “*Celebici*” the ICTY found rape to constitute torture and thus a grave breach . . .” Karen Engle, *Feminism and its (Dis) Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, 99 AM. J. INT’L L. 778, 798 (2005).

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 “*C celebici*”, *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.”).

⁶⁸ Prosecutor v. Kunarac, Case No. IT-96-23-T, Judgment, (Feb. 22, 2001).

handed down in 2001, further held that sexualized torture constituted “a war crime and a crime against humanity.”⁶⁹

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.”⁷⁰ 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.”⁷¹ 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.”⁷² 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.⁷³

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).”⁷⁴ 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

⁶⁹ 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.”).

⁷⁰ *Rape ‘a weapon in Colombia war’*, BRIT. BROADCASTING CORP. NEWS, Oct. 13, 2004, available at <http://news.Bbc.co.uk/go/pr/fr/-/2/hi/Americas/3741092.stm>.

⁷¹ Stephanie Nolen, “Not Women Anymore. . .”, MS. MAGAZINE, Spring 2005, available at <http://www.ms magazine.com/spring2005/congo.asp>.

⁷² *Id.*

⁷³ 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].”).

⁷⁴ Nolen, *supra* note 71.

diverse as “Morocco, Nepal, Pakistan, South Africa, Tunisia and Uruguay.”⁷⁵ The same situation raged throughout Liberia, which was engaged in a bloody conflict for control spanning almost 14 years.⁷⁶ 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.”⁷⁷ 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.⁷⁸ 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.”⁷⁹ 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.

⁷⁵ *Id.*

⁷⁶ See AMNESTY INTERNATIONAL, STOP VIOLENCE AGAINST WOMEN: LIBERIA: RAPE IS A WAR CRIME – THERE CAN BE NO IMPUNITY, AI Index AFR 34/016/2004, Dec. 8, 2004, available at [http://web.amnesty.org/library/pdf/AFR340162004ENGLISH/\\$file/AFR3401604.pdf](http://web.amnesty.org/library/pdf/AFR340162004ENGLISH/$file/AFR3401604.pdf) [hereinafter LIBERIA] (“Thousands of women and girls were raped, forced into sexual slavery or subjected to other forms of sexual violence during 14 years of almost continuous conflict in Liberia.”); see also Joshua H. Joseph, *Rethinking Yamashita: Holding Military Leaders Accountable for Wartime Rape*, 28 WOMEN’S RTS. L. REP. 107, 107 (2007) (highlighting that “combatants have used rape to ‘terrorize and control civilian populations’ in Liberia).

⁷⁷ See LIBERIA, *supra* note 76.

⁷⁸ See REUTERS, LIBERIA MUST DO MORE TO PUNISH WAR CRIMES- AMNESTY, Feb. 15, 2007, <http://www.alertnet.org/thenews/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).

⁷⁹ BBC News, *Rape in War ‘A Growing Problem’*, Jun. 22, 2006, <http://news.bbc.co.uk/2/hi/europe/5105102.stm>.

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

⁸⁰ STATUTE OF THE INT’L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA (emphasis added), art. 20(1), May 25, 1993, available at <http://www.ohchr.org/english/law/itfy.htm> [hereinafter STATUTE OF INT’L CRIM. TRIBUNAL]; see Michael Bachrach, *The Protection and Rights of Victims under International Criminal Law*, 34 INT’L LAW. 7, 12 (2000); see also Creta, *supra* note 52, at 393.

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.

⁸² Bachrach, *supra* note 80, at 13–14; International Criminal Tribunal for the Former Yugoslavia Rules of Procedure and Evidence, Rule 79, Mar. 14, 1994, available at <http://www1.umn.edu/humanrts/icty/ct-rules7.html>.

under the protection of the Tribunal.”⁸³ Reading these rules “in tandem,” nondisclosure may entail withholding the identity of the victim from the defendant as well as the public at large.⁸⁴

In addition to witness anonymity, the Rules provide for a “Witness and Victims Unit”⁸⁵ 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.”⁸⁶ 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.⁸⁷ The ICTR, while it has identical or similar provisions in its Articles of Incorporation and Rules of Procedure and Evidence,⁸⁸ 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.”⁸⁹

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.⁹⁰ The ICC

⁸³ International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, Rule 69, Mar. 14, 1994, available at <http://www1.umn.edu/humanrts/icty/ct-rules7.html> [hereinafter Rule 69]; Creta, *supra* note 52, at 393.

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).

⁸⁵ International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, Rule 34, Mar. 14, 1994, available at <http://www1.umn.edu/humanrts/icty/ct-rules7.html> [hereinafter Rule 34]; Bachrach, *supra* note 80, at 12.

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 ITCR 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.iccnw.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

United Nations, Overview of the Rome Statute of the International Criminal Courts, <http://www.un.org/law/icc/general/overview.htm> (last visited Oct. 15, 2007) (noting that the ICC remedies the problems that arise when time is taken to set up *ad hoc* tribunals, such as the loss of crucial evidence, and perpetrators seizing an opportunity to escape).

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.

⁹⁴ Ana Elena Obando, *The International Criminal Court: an opportunity for women*, WOMEN'S HUMAN RIGHTS NET, Aug. 2004, available at http://www.whrnet.org/docs/issue-international_court.html.

⁹⁵ See Mark Ellis, *International Justice and Shifting Paradigms Breaking the Silence: Rape as an International Crime*, 38 CASE W. RES. J. INT'L L. 225, 235 (2006/2007) (opining that the ICC took a “major step” by recognizing sexual violence against women as a crime against humanity); see also International Justice for Women, <http://web.amnesty.org/pages/icc-women-eng> (last visited Oct. 15, 2007) (discussing that the ICC treats “serious acts of violence against women as crimes against humanity and war crimes”).

⁹⁶ See The International Criminal Court, Fact Sheet 7, Ensuring Justice for Women, <http://web.amnesty.org/library/Index/engIOR400082000> (last visited Oct. 16, 2007) (explaining that the ICC treats sexual crimes against women as crimes of war); see also Amnesty International: International Justice for Women, <http://web.amnesty.org/pages/icc-women-eng> (last visited Oct. 15, 2007) (noting that the ICC recognizes the idea that sexual violence against women can even amount to genocide).

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.

⁹⁸ Philippe Kirsch and Valerie Oosterveld, *Negotiating an Institution for the Twenty-First Century: Multilateral Diplomacy and the International Criminal Court*, 46 MCGILL L.J. 1141, 1150 (2001).

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.”¹⁰⁴ 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.¹⁰⁵ 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.¹⁰⁶ 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.”¹⁰⁷

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”).

¹⁰⁴ 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 . . .”).

¹⁰⁵ See International Criminal Court, *Warrant of Arrest Unsealed Against Five LRA Commanders* (Oct. 14, 2005) <http://www.icc-cpi.int/press/pressreleases/114.html> (stating that, on July 8, 2005, the first arrest warrants were issued by ICC requesting arrests of five senior leaders of Lord’s Resistance Army (LRA) for Crimes against Humanity and War Crimes committed in Uganda); see also Judge Marilyn J. Kaman, Craig Resnick, Mark Winston & Bruce Zagaris, *International Criminal Law*, 41 INT’L LAW. 317, 319 (2007) (“[T]he Court’s [ICC] first warrants of arrest [were issued] against members of Uganda’s Lord’s Resistance Army (LRA): Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, and Raska Lukwiya.”).

¹⁰⁶ 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.*

¹⁰⁷ 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.”¹⁰⁸ 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.”¹⁰⁹ The ICC investigation in the Sudan is severely hampered by the lack of an “effective system of witness and victim protection,”¹¹⁰ 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.¹¹¹

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 Sterling, *supra* note 108; see *We Have Proof of Genocide*, *supra* note 108.

¹¹⁰ 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.

¹¹⁸ *Id.* at 1519–20; see Rape Abuse & Incest National Network (RAINN), *Effects of Rape*, <http://www.rainn.org/statistics/effects-of-rape.html> (last visited Oct. 16, 2007).

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”¹²⁴ and wish “to leave the war’s horrors in the past.”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.

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.”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,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.”¹²⁸ The gravity of harm associated with witness

¹²⁴ Lehr-Lehnardt, *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”).

¹²⁵ Mulvey, *supra* note 22, at 52.

¹²⁶ Creta, *supra* note 52, at 395; see Lusty, *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.”).

¹²⁷ Creta, *supra* note 52, at 396 (quoting rule 75(A) of the Rules of Procedure and Evidence of the International Tribunal, available at <http://www.un.org/icty/index.html>); see Jeremy Blumenthal, Comment, *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.”).

¹²⁸ Creta, *supra* note 52, at 396. “The right of a defendant to face one’s accusers is a venerable tradition.” *Id.* at 397. See Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia Since 1991, Rule 85, available at <http://www.un.org>

anonymity is exemplified by the *Tadic*¹²⁹ 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.”¹³⁰ Scholars argue that, “had the defense followed the anonymity order,” this deception would never have been discovered.¹³¹ 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.”¹³²

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,”¹³³ and grants the accused the “right to examine . . . the witnesses against him.”¹³⁴ 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”¹³⁵ More

/icty/index.html) [hereinafter Rule 85]. The rule entitles each party to “call witnesses and present evidence,” allowing for cross-examination and re-examination in each case.

¹²⁹ Prosecutor v. Dusko Tadic, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, United Nations Case No: IT-94-1-T (1999); see Court TV News, www.courtstv.com/archive/casefiles/warcrimes/reports/ (last visited Mar. 26, 2008). Provides a week-by-week synopsis of the *Tadic* proceedings.

¹³⁰ Creta, *supra* note 52, at 399. Tadic’s accuser was not subject to cross-examination, thereby preventing Tadic’s lawyers from impeachment. *Id.* See Antonia Sherman, Comment, *Sympathy for the Devil: Examining a Defendant’s Right to Confront Before the International War Crimes Tribunal*, 10 EMORY INT’L. L. REV. 833, 860 (1996). “[T]he Court has continually connected the right to confront witnesses with a jury’s need to assess the credibility of a witness . . . Moreover, the confrontation right serves to ensure truthful testimony because it is more difficult for a witness to lie when confronted by a defendant.” *Id.*

¹³¹ Creta, *supra* note 52, at 399–400; see Sherman, *supra* note 129, at 860 (“The jury deciding the fate of a defendant must be able to observe a witness to decide how much weight to give the testimony.”).

¹³² Christine Chinkin, Editorial Comment: *Due Process and Witness Anonymity*, 91 A.J.I.L. 75, 75 (1997); see Creta, *supra* note 52, at 398 (referring to the dangers of counsel losing the ability to cross examine witnesses, and the Confrontation Clause of the Sixth Amendment: “In all criminal prosecutions, the accused shall . . . be confronted with the witnesses against him . . .”).

¹³³ Rule 85, *supra* note 128; see Creta, *supra* note 52, at 397.

¹³⁴ See Creta, *supra* note 52, at 396; see also Sherman, *supra* note 129, at 870 (“From the circularity of this group of rules, it appears that the Tribunal may order non-disclosure of the witness’ identity even to a defendant.”).

¹³⁵ Chinkin, *supra* note 132, at 75; see Sherman, *supra* note 129, at 850 (“While it is clear that the Tribunal is a legitimate body with legal jurisdiction over the conflict and the individuals involved, the legitimacy of the Tribunal is not proven solely by demonstrating that it has been legally established; its legitimacy also depends on the procedural protections it grants to defendants.”).

importantly, international standards of due process and fairness include the right of the accused to confront his accuser.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.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.”¹³⁸ Granting witness anonymity ties the figurative hands of the defense, severely impairing its ability to impeach and cross-examine the witness.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,”¹⁴⁰ but this has not meant an *absolute* right to confront *all* witnesses.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.¹⁴² In so holding, the U.S. Supreme Court recognized the countervailing interests of the child, and found that procedure sufficient to preserve the

¹³⁶ See *Creta*, *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*, *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.’”).

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

¹³⁸ *Creta*, *supra* note 52, at 399 (citing *Lee v. Illinois*, 476 U.S. 530, 540 (1986)).

¹³⁹ *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 *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”).

¹⁴⁰ *Demleitner*, *supra* note 46, at 654 (quoting *Coy v. Iowa*, 487 U.S. 1012, 1021 (1988)).

¹⁴¹ *Maryland v. Craig*, 497 U.S. 836, 844 (1990) (clarifying that the Supreme Court has “never held, however, that the *Confrontation Clause* guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them”); see also *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”).

¹⁴² *Demleitner*, *supra* note 46, at 655.

intent of the Sixth Amendment's Confrontation Clause.¹⁴³ Similarly, the admission at trial of hearsay evidence¹⁴⁴ is a common exception to the common law right of confrontation.¹⁴⁵ However, any exceptions to the right of confrontation "must be 'necessary to further an important public policy,'"¹⁴⁶ and courts have been *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.¹⁴⁷ These scholars draw a fine line between witness anonymity¹⁴⁸ and witness confidentiality,¹⁴⁹ although confidentiality must also be balanced against the due process rights of the accused to a public hearing.¹⁵⁰

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))).

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 as an assertion to show the truth of matters 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.").

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").

¹⁴⁶ Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369 (1991) (quoting *Coy v. Iowa*, 487 U.S. 1012 (1988)).

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").

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* 19 CANADIAN WOMAN STUD. 4, 28-35 (Jan. 2000); Creta, *supra* note 52, at 395.

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.

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.”¹⁵¹ 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.”¹⁵² 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.”¹⁵³

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.’”¹⁵⁴ However, European tradition

public.”); Peggy Kuo, *Prosecuting Crimes of Sexual Violence in an International Tribunal*, 34 CASE W. RES. J. INT’L L. 305, 317 (2002) (“[Witnesses testifying at the ICTY were given] pseudonyms, and they were assigned numbers. Almost all of them also had digitalized distortion of their faces, with squares that blocked their faces, when . . . proceedings were broadcast over video . . . A few witnesses testified in closed session, an exceptional measure whereby the courtroom is closed off to the public.”).

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.¹⁵⁵ Fifteenth Century England and the closed trials of the Star Chamber fueled the Framers' fear of witness anonymity.¹⁵⁶ 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.¹⁵⁷ 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."¹⁵⁸ 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

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).

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. *Id.*

¹⁵⁸ *Jay v. Boyd*, 351 U.S. 345, 367 (1956) (Black, J., dissenting) (inferring from statement by Nikita Khrushchev to 20th Communist Party Congress).

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

¹⁵⁹ Sylvia Pieslak, *The International Criminal Court's Quest to Protect Rape Victims of Armed Conflict: Anonymity as the Solution*, 2 SANTA CLARA J. INT'L L. 138, 171 (2004) (differentiating wartime rape crimes from domestic rape charges).

¹⁶⁰ *Id.* (using example of armed conflict rape victims in Yugoslavia).

¹⁶¹ See Elizabeth Kessler, *Pattern of Sexual Conduct Evidence and Present Consent: Limiting the Admissibility of Sexual History Evidence in Rape Prosecutions*, 14 WOMEN'S RTS. L. REP. 79, 81-82 (1992) (citing and analyzing 46 state statutes); see also Douglas E. Beloof, *Beyond Prosecution: Sexual Assault Victim's Rights in Theory and Practice Symposium: Enabling Rape Shield Procedures Under Crime Victims' Constitutional Privacy Rights*, 38 SUFFOLK U. L. REV. 291, 291-92 (2005) (advocating reform to rape shield laws).

¹⁶² Christine Chinkin, *International Tribunal for the Former Yugoslavia: Amicus Curæ Brief on Protective Measures for Victims and Witnesses*, 7 CRIM. L.F. 179, 210 (1996) [hereinafter *Protective Measures*].

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.¹⁶⁴

Fear of “reprisal”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.”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,”¹⁶⁷ “severe traumatization, feelings of guilt and shame . . . [and] the fear of rejection by husband or family.”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.¹⁶⁹

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

¹⁶⁴ Pieslak, *supra* note 159.

¹⁶⁵ See Chinkin, *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, *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).

¹⁶⁶ Lehr-Lehnardt, *supra* note 16, at 349–50.

¹⁶⁷ Lehr-Lehnardt, *supra* note 16, at 349.

¹⁶⁸ *Protective Measures*, *supra* note 162, at 181.

¹⁶⁹ Amy E. Ray, *The Shame of It: Gender-Based Terrorism in the Former Yugoslavia and the Failure of International Human Rights Law to Comprehend the Injuries*, 46 AM. U.L. REV. 793, 805 (1997).

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.”¹⁷⁰ In domestic rape prosecutions, state-backed police forces and militias can offer adequate protection to the rape victim (usually one).¹⁷¹ 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.”¹⁷² War crimes tribunals must have witnesses willing to testify in order to successfully prosecute those who have been indicted.¹⁷³ “[L]ive witness testimony is the lifeblood of the tribunals and essential to preserving the integrity and legacy of the institutions.”¹⁷⁴ 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.¹⁷⁵ Therefore they must respond with a tool which they *do* possess in their arsenal - the ability to mask the identity of the victim testifying.¹⁷⁶ One solution is to set forth guidelines for

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.*

¹⁷⁴ Wood, *supra* note 30, at 307.

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.”¹⁷⁷

The *Tadic* court held that the “identities of several victims and witnesses c[ould] be indefinitely withheld from the accused and his counsel.”¹⁷⁸ 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,”¹⁷⁹ 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.¹⁸⁰

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

TRANSNAT’L L. 635, 694 (2007) (referencing the *Tadic* Trial Chamber’s rationale in providing for witness protection).

¹⁷⁷ Chinkin, *supra* note 132, at 75.

¹⁷⁸ Monroe Leigh, *The Yugoslav Tribunal: Use of Unnamed Witnesses Against Accused*, 90 A.J.I.L. 235, 236 (1996).

¹⁷⁹ Chinkin, *supra* note 132, at 76 (quoting Article 20 of the Statute of the Tribunal).

¹⁸⁰ *Id.* at 77.

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.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.

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."¹⁸² The very act of testifying can produce intense psychological strain.¹⁸³ Defense attorneys

¹⁸¹ *Id.* at 77–78.

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))).

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,¹⁸⁴ 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 abortions¹⁸⁵ and by insinuating that the sexual encounter was consensual.¹⁸⁶ 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."¹⁸⁷ 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."¹⁸⁸

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 acknowledgment 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 also Katrina Anderson, *Gender and Transitional Justice: Turning Reconciliation on Its Head: Responding to Sexual Violence Under the Khmer Rouge*, 3 SEATTLE J. SOC. JUST. 785, 787 (2005) (linking difficulty of collecting evidence to emotional and psychological impact of testifying for victims).

¹⁸⁴ 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").

¹⁸⁵ See Nikolic-Ristanovic, *supra* note 148.

¹⁸⁶ 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))).

¹⁸⁷ Wood, *supra* note 30, at 311-12.

¹⁸⁸ 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).

court.¹⁸⁹ 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.”¹⁹⁰ Prosecutors are also guilty of insensitively examining “witnesses to dissect facts in a perpetrator[]driven narrative according to the basic rules of evidence”¹⁹¹ without regard for the victim’s emotional well-being. This practice tends to “alienate[] and disembod[y]” witnesses.¹⁹² Many victims who testify may need or want to testify in a narrative that is incompatible with the traditional legal model.¹⁹³ 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.”¹⁹⁴

Only two women were appointed to the ICTY court and a single woman was elected to the ICTR.¹⁹⁵ 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

¹⁸⁹ O’Connell, *supra* note 165, at 336 (discussing that “parties in U.S. civil suits readily make litigation unpleasant as a means to drive their opponents to drop cases or settle.”); see Ethan A. Heinz, *supra* note 186, at 523 (suggesting that defense attorneys make threatening inquiries “not only to intimate the plaintiff but also to diminish her character in the eyes of the jury” and also to “coerce the plaintiff to drop her suit or to settle for an unfairly low amount.”).

¹⁹⁰ Katherine M. Franke, *Gendered Subjects of Transitional Justice*, 15 COLUM. J. GENDER & L. 813, 819 (2006).

¹⁹¹ Wood, *supra* note 30, at 311.

¹⁹² *Id.*

¹⁹³ Wood, *supra* note 30, at 311 (commenting that “prosecutors need a linear narrative without memory discrepancies” but “many traumatized survivors’ give non-linear testimony with inconsistencies due to post-traumatic stress syndrome.”); see Ilene Durst, *Lost in Translation: Why Due Process Demands Deference to the Refugee’s Narrative*, 53 RUTGERS L. REV. 127, 149–50 (2000) (noting that “memories of trauma survivors have proven to resist verbal linear storytelling”).

¹⁹⁴ Franke, *supra* note 190, at 819–20.

¹⁹⁵ Lehr-Lehnardt, *supra* note 16, at 324 (recognizing that two women were appointed to ICTY’s original eleven-member bench while one woman was elected to the ICTR judicial bench); see Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT’L L.J. 271, 278 (2003) (explaining that “the relatively low number of female judges on international courts and tribunals” is a “nomination and selection issue worthy of attention”).

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.).

²⁰⁰ Wood, *supra* note 30, at 319.

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,²⁰² and must pursue crimes of sexual violence with “more vigorous prosecutions.”²⁰³ 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.²⁰⁴

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 of 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*, CHRIT. SCI. MONITOR (Boston), Apr. 6, 1995, at 19.

uncertainty of their residency in asylum countries.”²⁰⁵ 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.”²⁰⁶

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.”²⁰⁷ They also note that the vast numbers of victims in some cases may make an established asylum prohibitive.²⁰⁸ 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.”²⁰⁹

iv. Gender Sensitive Language

Feminist theorists contend that international law is inherently biased²¹⁰ because in the creation of the text of international law, women “were spoken for by men and by agencies and institutions

²⁰⁵ Nikolic-Ristanovic, *supra* note 148.

²⁰⁶ *Id.*

²⁰⁷ William M. Walker, *Making Rapists Pay: Lessons from the Bosnian Civil War*, 12 ST. JOHN'S J. LEGAL COMMENT. 449, 473 (1997).

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).

²⁰⁹ Lehr-Lehnardt, *supra* note 16, at 350.

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.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."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."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.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."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

²¹¹ See Cook, *supra* note 202, at 130.

²¹² Askin, *supra* note 37, at 295.

²¹³ Charlesworth et al., *supra* note 210, at 625.

²¹⁴ Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT'L L. 379, 386 (1999) [hereinafter *Feminist Methods*].

²¹⁵ Ruth Seifert, *War and Rape, Analytical Approaches*, Women's International League for Peace and Freedom, <http://www.wilpf.int.ch/publications/1992ruthseifert.htm> (last visited Mar. 26, 2008).

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

²¹⁶ Nikolic-Ristanovic, *supra* note 148.

²¹⁷ *Feminist Methods*, *supra* note 214, at 387.

²¹⁸ *Id.* at 387.

²¹⁹ Rosalind Dixon, *Rape as a Crime in International Humanitarian Law: Where To From Here?*, 13 EUR. J. INT’L L. 697, 703 (2002).

²²⁰ Nikolic-Ristanovic, *supra* note 148.

the ICC. There are over 104 signatories to the ICC Statute from diverse nations in Africa, Asia, Latin America, and Western and Eastern Europe.²²¹ 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."²²²

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

²²¹ See State Parties to the Rome Statute of the ICC: African States: Benin, Botswana, Burkina Faso, Burundi, Central African Republic, Chad, Congo, Comoros, Democratic Republic of Congo, Djibouti, Gabon, Ghana, Guinea, Kenya, Lesotho, Liberia, Malawi, Mali, Mauritius, Namibia, Niger, Nigeria, Senegal, Sierra Leone, South Africa, Tanzania, Uganda, Zambia; Latin American and Caribbean States: Antigua & Barbuda, Argentina, Barbados, Belize, Bolivia, Brazil, Columbia, Costa Rica, Dominica, Dominican Republic, Ecuador, Guyana, Honduras, Mexico, Panama, Paraguay, Peru, St. Kitts & Nevis, St. Vincent & Grenadines, Trinidad & Tobago, Uruguay, Venezuela; Asian States: Afghanistan, Cambodia, Cyprus, Fiji, Jordan, Marshall Islands, Mongolia, Nauru, Rep. of Korea, Samoa, Tajikistan, Timor-Leste; Eastern European States: Albania, Bosnia-Herzegovina, Bulgaria, Croatia, Estonia, Georgia, Hungary, Latvia, Lithuania, Macedonia, Montenegro, Poland, Romania, Serbia, Slovakia, Slovenia; Western European and Other States: Andorra, Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, New Zealand, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, United Kingdom; see also *Ratification and Signature of the Agreement on the Privileges and Immunities of the Court (APIC)*, Coalition for the International Criminal Court, available at <http://www.iccnw.org/?mod=fsdoc>.

²²² See Boon, *supra* note 23, at 637. Stated succinctly,

[o]ne 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.

