International Journal of Law and Legal Jurisprudence Studies: ISSN:2348-8212 (Volume 1 Issue 6)

The Evolving Jurisprudence of Rape as a War Crime

Gitanjali Ghosh[*] and Shishir Tiwari[†]

[*] Researcher, Centre for Women and the Law, National Law School of India University, Bangalore 560072, INDIA; E-mail: gitanjalighosh@nls.ac.in

[†] Assistant Professor, Department of Law, North-Eastern Hill University, Shillong 793022, INDIA; E-mail: shishirlaw@gmail.com

Abstract

Rape has always served as a weapon in war to crush the will of one's opponents and to leave behind scars, the mere mention of which is sufficient to send shudders down the spine of an entire community for times to come in the future. A look into the history of war crimes evidences that they both omitted, trivialized or mischaracterized rape and sexual assault and considered them to be the inevitable collateral damage of war and crimes of secondary importance to other crimes. It is only recently that international law has made significant strides in defining and prosecuting rape which is evident in the judgmentsdelivered by the international tribunals and criminal courts. This paper seeks to examine the evolving jurisprudence of rape as a war crime. In this endeavour, the researchers intend to look at the evolution of war crimes and also construct the history of rape as a weapon of war. The paper also examines the conceptual framework of rape as contained in several international instruments and the views held by international tribunals and criminal courts in this regard. However, the main focus of the paper lies in analyzing the evolution of rape as a war crime and the accomplishments made by the international tribunals and criminal court in prosecuting rape as a war crime.

Keywords: rape, war crime, ICTY, ICTR, ICC

I. Introduction

For centuries, rape has served as a weapon of war, despite criminal prohibitions forbidding its use. Historically, the laws of war either omitted, trivialized or mischaracterized rape and sexual assault. These crimes were long considered to be an inevitable collateral damage of war and crimes of secondary importance to other crimes.Nevertheless, only in recent decades has international law made significant strides in defining and prosecuting rape as a war crime and crime against humanity. International criminal tribunals prosecuting crimes of sexual violence in prior conflict zones such as Rwanda and the former Yugoslavia have struggled to develop a coherent definition of the elements of rape which is evident from the various landmark decisions delivered by them. Taking cue from these, the Rome Statute of the International Criminal Court (hereinafter Rome Statute) makes rape an individual crime, including other forms of sexual violence and explicitly defines rape as a war crime and a crime against humanity.In this background an in-depth study of the same is desirable in order to get a proper understanding of the subject matter.

Part I provides an introduction to the paper and the research methodology as well. Part II furnishes the notion and origin of war crimes. Part III constructs the history of rape as a weapon of war. Part IV provides provide a conceptual framework of the term 'Rape' based on the views held by the International Criminal Tribunal for Rwanda (hereinafter ICTR), the International Criminal Tribunal for Yugoslavia (hereinafter ICTY) and the International Criminal Court (hereinafter ICC). Part V contains an analysis of the accomplishments of the ICTY in prosecuting rape as a war crime. Part VI comprises of an analysis of the accomplishments of the ICTR in prosecuting rape as a war crime. Part VII evaluates the views of the ICC on rape as a war crime. Part VIII concludes the paper.

II. The Notion and Origin of War Crimes

The laws of war have been developing for thousands of years. Ancient cultures promulgated codes of conduct for warfare while the 'just war theory" governed wars during the Middle Ages.[1] In the sixteenth and seventeenth centuries, individual European nations began a trend toward codifying a body of laws governing war.[2] The bulk of these laws, however, were concerned with the conduct of combatants against one another. Not until the nineteenth century did the notion of outlawing harm to civilians gain credence.[3]

War crimes gradually emerged in the second half of the nineteenth century. Together with piracy, it constituted the first exception to the concept of 'collective responsibility' prevailing in the international community. Two factors contributed to the emergence of the class of war crimes. The first was the codification of the customary law of warfare at both private and state level.[4] At the private level, the first systematic attempt to define a broad range of war crimes was the Instructions for the Government of Armies of the United States in the Field, also known as the "Lieber Code" after its main author Francis Lieber, which was issued by U.S. President Abraham Lincoln and distributed among Union military personnel in 1863.[5] At the state level, the Hague Conventions of 1899 and 1907 laid down the rules

[1]Howard S. Levie, TERRORISM IN WAR: THE LAW OF WAR CRIMES, 10 (1st edn., 1992).

[2]*Id*.

[3]*Id*, at 15.

[4]Antonio Cassese, INTERNATIONAL CRIMINAL LAW, 28 (2nd edn., 2008).

[5]War Crime, *available at* http://www.britannica.com/EBchecked/topic/635621/war-crime#toc224686(Last visited on September 7, 2014).

relating to the conduct of warfare.[6] Secondly, some important trials were held at the end of the American Civil War, notably that of Henry Wirz, which was heard by a US Military Commission in 1865. Later, several cases were brought before US Courts Martial in 1902 at the end of the US armed conflict against insurgents in the Philippines.[7]

Traditionally war crimes were defined as violations of the laws of warfare committed by combatants in international armed conflicts. War crimes entailed two things. Firstly, individuals acting as state officials could be brought to trial and punished for alleged violation violations of the laws of warfare by the enemy belligerent. Secondly, individuals could be punished not only by the enemy state but also by their own state.[8]

At the Paris Peace Conference, held at the conclusion of World War I, the Allies established a Commission to investigate reports of atrocities committed "in violation of the laws and customs of war by Germany and its allies."[9] The Commission concluded that gross violations of the rights of both combatants and civilians had occurred. It recommended that an international court be set up to prosecute "all authorities…who ordered, or, with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting to an end or repressing, violations of the laws or customs of war."[10] Although the Allies formally demanded the extradition of 896 Germans accused of violating the laws of war, a compromise struck during the signing of the Versailles Treaty led them to drop the effort.[11]

Throughout World War II, the Allies repeatedly warned leaders of the Axis powers against the commission of barbaric acts and expressed their resolve to prosecute and punish responsible individuals.[12] At Yalta, the Allies agreed that an international tribunal should be

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[6]Cassese, *supra* note 4, at 29.

[7]*Id*.

[8]*Id*.

[9]Sir Thomas Hetherington &William Chalmers, WAR CRIMES: REPORT OF THE WAR CRIMES INQUIRY, 46 (1st edn., 1989).

[10]*Id*.

[11]*Id*.

[12]Whitney R. Harris, *A Call for An International War Crimes Court: Learning From Nuremberg*, 23 U. TOL L REV. 229, 237 (1992).

established to "bring all war criminals to just and swift punishment."[13] The Tribunals were to deal only with major war criminals; trials of so-called lesser criminals were left to the courts of the various occupying powers.[14]

Following World War II, the victorious Allied governments established the first international criminal tribunals to prosecute high-level political officials and military authorities for war crimes and other wartime atrocities. The four major Allied powers, France, the Soviet Union, the United Kingdom, and the United States, set up the International Military Tribunal[15] (hereinafter IMT) in Nuremberg, Germany, to prosecute and punish "the major war criminals of the European Axis." The IMT presided over a combined trial of senior Nazi political and military leaders, as well as several Nazi organizations. The lesser-known International Military Tribunal for the Far East[16] (IMTFE) was created in Tokyo, Japan, pursuant to a 1946 proclamation by U.S. Army General Douglas MacArthur, Supreme Commander for the Allied Powers in occupied Japan. The IMTFE presided over a series of trials of senior Japanese political and military leaders pursuant to its authority "to try and punish Far Eastern war criminals."

The Charter of the International Military Tribunal (or Nuremberg Charter) was annexed to the 1945 London Agreement and outlined the tribunal's constitution, functions, and jurisdiction. The Nuremberg Charter also provided that the IMT had the authority to try and punish persons who "committed any of the following crimes:"

1. Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing;
2. War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for

[13] *Id*, at 239.

[14] WAR CRIMES, WAR CRIMINALS, AND WAR CRIMES TRIALS, 5 (Norman E. Tutorowed., 1986).

[15] United Nations, *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement")*, August 8, 1945.

[16] International Military Tribunal for the Far East Charter, *available at* http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/00206653-00206660.pdf(Last visited on September 7, 2014).

any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity;

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

Unlike the IMT, the IMTFE was not created by an international agreement, but it nonetheless emerged from international agreements to try Japanese war criminals. In July 1945, China, the United Kingdom, and the United States signed the Potsdam Declaration, in which they demanded Japan's "unconditional surrender" and stated that "stern justice shall be meted out to all war criminals." At the time that the Potsdam Declaration was signed, the war in Europe had ended but the war with Japan was continuing.

At the subsequent Moscow Conference, held in December 1945, the Soviet Union, the United Kingdom, and the United States (with concurrence from China) agreed to a basic structure for the occupation of Japan. General MacArthur, as Supreme Commander of the Allied Powers, was granted authority to "issue all orders for the implementation of the Terms of Surrender, the occupation and control of Japan, and all directives supplementary thereto."

In January 1946, acting pursuant to this authority, General MacArthur issued a special proclamation that established the IMTFE. The Charter for the International Military Tribunal for the Far East was annexed to the proclamation and it laid out the composition, jurisdiction, and functions of the tribunal.

The Charter provided for MacArthur to appoint judges to the IMTFE from the countries that had signed Japan's instrument of surrender: Australia, Canada, China, France, India, the Netherlands, Philippines, the Soviet Union, the United Kingdom, and the United States. Each of these countries also had a prosecution team.

As with the IMT, the IMTFE had jurisdiction to try individuals for Crimes Against Peace, War Crimes, and Crimes Against Humanity,[17] and the definitions were nearly verbatim to those contained in the Nuremberg Charter.

1. Crimes Against Peace: namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
2. War Crimes: namely, violations of the laws or customs of war;
3. Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.

The experience of World War II as well as the introduction of the notion of crimes against humanity at Nuremberg led the International Red Cross in 1949 to promulgate the four Geneva Conventions of 1949. These Conventions with their two Additional Protocols of 1977 represent the most comprehensive codification of the rules and regulations of warfare till date.

More recently, definitions of war crimes have been codified in international statutes, such as those creating the ICC and the war crimes tribunals in Yugoslavia and Rwanda, for use in international war crimes tribunals. In contrast to earlier definitions, modern definitions are more expansive and criminalize certain behaviours committed by civilians as well as by military personnel.

Under State practice and *opinio juris*, war crimes are serious violations of International Humanitarian Law (hereinafter IHL). IHL is that branch of international law which deals with the conduct of armed conflict whether international or non-international. An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. IHL applies from the initiation of such armed conflicts and

[17]Article 5, International Military Tribunal for the Far East Charter.

extends beyond the cessation of hostilities until a general conclusion of peace is reached in case of International Armed Conflict (IAC) or a peaceful settlement is achieved in case of Non- International Armed Conflict (NIAC). Until then, IHL continues to apply in the whole territory of the warring States in case of IAC or the whole territory under the control of a party, whether or not actual combat takes place there, in case of NIAC.[18]

Only serious violations of IHL are considered war crimes that entail individual criminal responsibility of the perpetrator. Serious violations mean those which amount to grave deviations from a rule protecting important values and involving serious consequences for the victim.[19] Serious violations can be divided into two categories. Firstly, violations of customary and treaty law applicable to armed conflicts. This law evolved from the Hague Conventions of 1899 and 1907 which deal with means and methods of warfare and the treatment of persons who are no longer taking active part in the hostilities. The contemporary sources are the four Geneva Conventions dealing with the sick, wounded, civilians and prisoners of war which were further complemented by two Additional Protocols in 1977. Secondly, violations of those conventional rules which have attained the status of custom and are applicable regardless of ratification by States. Each State has the right to prosecute this type of war crime.[20]

A subset of the serious violations is the grave breaches regime contained in the Geneva Conventions and in Additional Protocol I. A grave breach is a serious violation of the Geneva Conventions or of the Additional Protocol I (Article 85). The regime of grave breaches imposes on all States the international obligation to prosecute or extradite persons accused of having committed them, regardless of the nationality of the perpetrator or the victim or the place of commission of the crime. Grave breaches include wilful killing, torture, cruel treatment, mutilations or extensive destruction of property.[21]

The notion of grave breaches of the Geneva Conventions was also enshrined in Article 2 of the Statute of the ICTY. Article 3 of the ICTY Statute lists other violations of the

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[18] Antonio Cassese et al, INTERNATIONAL CRIMINAL LAW: CASES AND COMMENTARY, 117 (1st edn., 2011).

[19] *Id.*

[20] *Id.*

[21] *Id,* at 118.

laws or customs of war which were meant to capture war crimes under customary law not enshrined in the grave breaches regime.[22]

According to the Appeals Chamber of the ICTY in Tadic:[23]

1. War crimes must consist of 'a serious infringement' of an international rule i.e. it must constitute a breach of a rule protecting important values.
2. The breach must involve grave consequences for the victim.
3. The rule violated must either belong to the corpus of customary law or be part of an applicable treaty.
4. The violation must entail the individual criminal responsibility of the person breaching the rule.

Traditionally, war crimes were held to embrace only violations of international rules regulating international armed conflicts. After the ICTY Appeals Chamber decision in Tadic, war crimes also embrace violations of international rules regulating internal armed conflicts, if the relevant conduct has been criminalized. Thus, war crimes may be perpetrated in the course of either international or internal armed conflicts.

War crimes may be perpetrated by military personnel against enemy military or civilians, by civilians against enemy military or civilians.

III. The History of Rape as a Weapon of War

Rape is a crime unlike many others in that it stigmatizes not just the perpetrator but the victim as well. Being raped is a defining experience for women, it causes survivors' communities to feel differently about them, and it often causes the women to feel differently about themselves.[24] Being raped is being violated in the most intimate way possible. Being raped causes women to experience great fear- fear of future harm, fear of retribution from the perpetrator, and fear of being revealed as a victim.[25]

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[22] *Id.*

[23] *Id*, at 118-119.

[24] Judith Lewis Herman, TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE FROM DOMESTIC ABUSE TO POLITICAL TERROR, 69 (1993).

[25] *Id.*

The effects of rape on survivors and their communities have been successfully exploited by those engaged in war for thousands of years. Rape and other forms of sexual abuse of conquered women and children have been common, tragic aspects of warfare for as long as there has been written history of war.[26] The 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.[27] Rape is part of the founding myth of Rome, and was considered by the ancient Greeks to be an acceptable part of war by which they could gain wives, concubines, or trophies.[28]Homer's *Iliad* and Poussin's great masterpiece, "The Rape of the Sabines", are testaments to the tragedy of rape in historical and cultural memory.

Rape was a spoil of war during the Crusades.[29] In the Hundred Years War between England and France, knights were honored for protecting highborn women from rape by lowborn enemies.[30] George Washington sentenced a soldier to death for committing rape during the American Revolution.[31] Rape was used to create terror by the German army marching through Belgium in World War I.[32] In World War II, the Japanese invasion of China incorporated rape as a strategy of domination.[33]

Rape in war has been viewed as one of the spoils, as an incentive for soldiers to enlist, and as a way to celebrate victory in battle.[34] It is understood as a part of the rules of the game,

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[26] Nicole E. Erb, *Gender-Based Crimes Under the Draft Statute for the Permanent International Criminal Court*, 29 COLUM. HUM. RTS. L. REV. 401 (1998).

[27]Patricia H. Davis, *The Politics of Prosecuting Rape as a War Crime*, 34(4) THE INTERNATIONAL LAWYER 1223 (2000).

[28] Susan Brownmiller, AGAINST OUR WILL: MEN, WOMEN, AND RAPE, 33-34 (1st edn., 1975).

[29]*Id*, at 31.

[30]*Id*, at 37.

[31]*Id*, at 31.

[32]*Id*, at 32.

[33] Iris Chang, THE RAPE OF NANKING: THE FORGOTTEN HOLOCAUST OF WORLD WAR II (1st edn., 1997).

[34] Simon Chesterman, *Never Again…and Again: Law, Order, and the Gender of War Crimes in Bosnia and Beyond*, 22 YALE J. INT'L L. 299, 325 (1997).

as a means of humiliating male opponents, as a way of reaffirming the manhood of soldiers, as a means of destroying the opponent's culture, and as a way for soldiers to act out their deep-seated contempt for women in general.[35] Repeated rapes and the consequent forced impregnation of captured women have become a means of literally occupying captured women's wombs.[36] For combatants, rape has been the ultimate mark of pain and humiliation, hurting the women and shaming the nation. Rape has served the tactical function of demonstrating the totality of victory over enemies.[37] In one act of aggression, the collective spirit of both the women and the nation is broken, leaving a reminder long after the troops depart. The victim of wartime rape becomes to her people evidence of the enemy's bestiality, symbol of her nation's defeat, a pariah, damaged property, a pawn in the subtle wars of international propaganda.[38]

Historically, the laws of war either omitted, trivialized or mischaracterized rape and sexual assault. These crimes were long considered to be an inevitable collateral damage of war and crimes of secondary importance to other crimes. In spite of the devastating effects of rape as a weapon of war, it has been overlooked by the international community until recently. The outlawing of rape as a crime of war has begun to gain more widespread recognition only recently.The prosecution of rape used as a weapon of war, however, is not a simple matter. The political environment in which the international tribunals operate impinges directly on their effectiveness in securing justice for the survivors of rape.

IV. Rape- A Conceptual Framework

One of the first and most important mentions of rape as a punishable offence during wartime is included in the Lieber Code, the military code of the Union Army during the American Civil War, in which rape was designated a capital offense.[39] In addition, the need for “special

[35] Ruth Seifert, *War and Rape: A Preliminary Analysis* in MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA, 54, 58-66 (Roy Gutman, ed., 1994).

[36] Siobhan K. Fisher, *Occupation of the Womb: Forced Impregnation as Genocide*, 46 DUKE L.T. 91, 93 (1996).

[37] Chesterman, *supra* note 34, at 325.

[38] Susan Brownmiller, *Making Female Bodies the Battlefield* in MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA, 180, 181(Roy Gutman, ed., 1994).

[39] U.S. WAR DEPARTMENT, ADJUTANT GENERAL'S OFFICE, GENERAL ORDERS No. 100, April 24, 1863, Article 44 (popularly known as Lieber Code).

protection" of women was recognized. The first implicit prohibition on rape and sexual assault can be found in Article 46 of the Regulations Annex to the 1907 Hague Convention (IV)[40]that provides for the protection of family honour and rights. After World War I, the Allies established a commission to investigate reports of mass rape of French and Belgian women by other troops but it failed to take any real action.[41] The 1929 Geneva Convention[42] contained a general provision in its Article 3 which provides that prisoners of war have the right to have their person and their honour respected and that women shall be treated with due regard to their sex.

Similar to after World War I, after World War II as well, it became evident that soldiers of certain countries had engaged in wide scale sexual violence against women. Although rape was not mentioned in the Nuremberg Charter, the French and Soviet prosecution brought to the Nuremberg trial significant evidence of mass rape, which was written into the trial record.[43] The French prosecution specifically asked forgiveness from the Tribunal for their decision to "avoid citing the atrocious details which follow" when they quoted an exhibit referring to a gang rape of 54 young women between 13-15 years of age by German soldiers although they had no problem reciting atrocious details of other war crimes. Yet, the 179 page long Nuremberg Judgment does not contain even a single reference to rape.[44]

The International Military Tribunal for the Far East, which sat at Tokyo, found several high-ranking officials guilty of violations of the laws and customs of war for their responsibility for widespread rapes and sexual assaults by Japanese soldiers, although its Charter did not explicitly criminalize rape. These assaults involved the notorious "rape of Nanking", during which Japanese soldiers raped approximately 20,000 women and children

[40]Regulations Respecting the Laws and Customs of War on Land, Annex to the Hague Convention Respecting the Laws and Customs of War on land (Hague IV), October 18, 1907.

[41]Gabrielle Kirk McDonald, *Friedmann Award Address Crimes of Sexual Violence: The Experience of the International Criminal Tribunal*, 39 COLUM. J. TRANSNAT'L L. 1, 10 (2000).

[42]Convention Relative to the Treatment of Prisoner of War of July 27, 1929.

[43]Leo Van den hole, *A Case Study of Rape and Sexual Assault*, 1 EYES ON THE ICC 54, 56 (2004).

[44]McDonald, *supra* note 41, at 10; Frances T. Pilch, *The Crime of Rape in International Humanitarian Law*, 9 USAFA J. LEG. STUD. 99, 103-104 (1999).

and later killed most of them.[45] Yet, the Tribunal completely ignored the forced prostitution of "comfort women" kept by Japanese soldiers.[46]

The seed for future normative development of prosecution of rape was sown in Control Council Law No. 10 of December 20, 1945. This Control Council Law, adopted by the four occupying powers in Germany as a Charter for war crime trials by their own courts in Germany, expanded the list of crimes against humanity found in the Nuremberg Charter to include rape in its Article II(1)(c).[47] However, it did not include either rape or other forms of sexual violence as a war crime. Further, there were no prosecutions under Article II(1)(c).[48]

Rape and sexual assault were further outlawed by the 1949 Geneva Conventions and their 1977 Additional Protocols.[49] A list of the relevant provisions follows hereafter:

a. Common Article 3(1)(c) of the Geneva Conventions prohibits outrages upon personal dignity at any time and in any place.
b. The fourth paragraph of Article 12 of the First Geneva Convention[50] requires that women shall be treated with due consideration to their sex. Article 50 considers "inhuman treatment" to be a grave breach to the Convention.
c. The same principle is contained in the Second Geneva Convention.[51]The fourth paragraph of Article 12 requires that women shall be treated with due consideration to their sex, and Article 51 considers "inhuman treatment" to be a grave breach to the Convention.

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[45]International Military Tribunal for the Far East, *The United States of America and others* v. *Araki Sadao and others*, 1011-1019 (judgment of November 4-12, 1948), Dissenting Opinion by Judge Pal, 1112-1120, and Records of Proceedings, 3904-3944, 4459-4479, 4498, 4501-4507, 4512-4515, 4526-4536, 4544.

[46] McDonald, *supra* note 41, at 10.

[47]Theodor Meron, *Rape as a Crime under International Humanitarian Law*, 87 AM. J. INT'L. L. 424, 426 (1993).

[48] McDonald, *supra* note 41, at 10.

[49]Scott Splittgerber, *The Need for Greater Regional Protection for the Human Rights of Women: the Cases of Rape in Bosnia and Guatemala*, 15 WIS. INT'L L. J. 185, 195-203 (1996).

[50] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.

[51] Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85.

d. The first paragraph of Article 14 of the Third Geneva Convention[52] requires that prisoners of war are entitled to respect for their person and their honour in all circumstances. The second paragraph of Article 14 requires that women shall be treated with due regard to their sex. Further, "inhuman treatment" is considered by Article 130 to be a grave breach to the Convention.

e. The terms of the second paragraph of Article 27 of the Fourth Geneva Convention[53] established an unequivocal prohibition of rape. It protects women against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault. Article 32 prohibits the High Contracting Parties from taking any other measures of brutality whether applied by civilian or military agents. Article 147 considers "inhuman treatment" (but not explicitly rape) to be a grave breach to the Convention.

f. Article 75(2)(b) of Additional Protocol I[54]prohibits outrages upon personal dignity. Article 76(1) requires further that women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault. Article 85(4)(c) states that these practices of...other inhuman and degrading practices involving outrages upon personal dignity constitute grave breaches of Additional Protocol I, when they are based on racial discrimination.

g. A prohibition on outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault is also found in Article 4(2)(e) of Additional Protocol II.[55]Moreover, Additional Protocol II implicitly prohibits rape and sexual assault in Article 4(1) which states that all persons are entitled to respect for their person, honour,...[56]

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[52] Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[53]Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, 3536, 75 U.N.T.S. 287.

[54]Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) June 8, 1977 1125 U.N.T.S 3.

[55]Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) June 8, 19771125 U.N.T.S. 609.

[56]*Prosecutor* v. *Celebici*, Trial Judgment, IT-96-21, November 16, 1998 (International Criminal Tribunal for Yugoslavia) [Hereinafter "*Celebici*"] ¶ 476.

The establishment of the International Criminal Tribunal for the Former Yugoslavia[57] in 1993 and of the ICTR[58] in 1994 has given teeth to these paper tigers. Similar to Control Council Law No. 10, the ICTY and ICTR Statutes do not mention sexual assault, and include the crime of rape only explicitly as a crime against humanity and as a serious violation of Common Article 3 and of Additional Protocol II (for the ICTR), and implicitly as a war crime by reference to the Geneva Conventions (for the ICTY).

Rape is punishable under Article 5(g) of the ICTY Statute and under Article 3(g) of the ICTR Statute as a crime against humanity. Further, it is punishable under Article 3 of the ICTY Statute as a war crime and under Article 4(e) of the ICTR Statute by reference to Common Article 3 and Article 4(2)(e) of Additional Protocol I.

However, there is no definition of rape either in the ICTY or the ICTR Statute or in the 1907 Hague Convention and the Geneva Conventions and their Additional Protocols. Therefore, to elaborate the objective and subjective elements of the crime of rape was an objective of the Tribunals. Both the ad hoc Tribunals had to define "rape" for the application of their Statutes and came more or less to the same conclusion.

A. The view of the ICTR and ICTY

The first case to identify the elements of rape in an international setting was *Prosecutor* v. *Akayesu*,[59] prosecuted before the ICTR in 1998. In *Akayesu*, the accused was convicted of rape as a crime against humanity, in addition to genocide with rape as a predicate crime.[60]

The accused, Jean Paul Akayesu, served as mayor of the Taba commune from April 1993 until June 1994. He was charged with the performance of executive functions and the maintenance of public order within his commune. He had exclusive control over the communal police and gendarmes placed at the disposition of the commune. Between April 7

[57] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, SC res. 827, UN SCOR 48th sess., 3217th mtg. at 1-2 (1993).

[58]Statute of the International Criminal Tribunal for Rwanda, SC res. 955, UN SCOR 49th sess., 3453rd mtg, U.N. Doc. S/Res/955 (1994).

[59]*Prosecutor*v. *Akayesu*, Trial Judgment, ICTR-96-4-T, September 2, 1998 (International Criminal Tribunal for Rwanda) [Hereinafter "*Akayesu*"].

[60]*Akayesu*, ¶¶ 696, 734.

and the end of June, 1994, at least 2,000 Tutsis were killed in Taba, while Akayesu was in power. Hundreds of displaced civilians, the majority of them Tutsis, sought refuge in the town hall. The armed local militia and the communal police took the female civilians out of the town hall and subjected them to sexual violence. These acts of sexual violence were generally accompanied by explicit threats of death or bodily harm. The displaced female civilians lived in constant fear and their physical and psychological health deteriorated as a result of the sexual violence and threat of beatings and killings.

On the charge of rape,[61] the Akayesu Trial Chamber held that the Chamber must define rape, as there is an absence of a commonly accepted definition of this term in international law.[62] The Akayesu Trial Chamber held:

> While rape has been defined in certain national jurisdictions as non-consensual intercourse, variations on the act of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual. The Trial Chamber considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts...The Trial Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.[63]

The Chamber further explained that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women.[64]

By adopting the phrase "a physical invasion of a sexual nature," the Trial Chamber rejected the traditional definition of rape.[65] Traditionally, rape had been limited not only in terms of the gender of the perpetrator and victim but also in terms of the prohibited act or acts. Reasoning that "the central elements of the crime of rape cannot be captured in a mechanical

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[61]*Akayesu*, ¶ 10.

[62]*Akayesu*, ¶ 596.

[63]*Akayesu*, ¶¶ 596-598 and 686-688. Followed by *Celebici*, ¶¶ 478- 479.

[64]*Akayesu*, ¶ 688.

[65]Phillip Weiner, *The Evolving Jurisprudence of the Crime of Rape in International Criminal Law*, 54(3) BOSTON COLLEGE LAW REVIEW, 1207, 1209 (2013).

description of objects or body parts," the Trial Chamber provided broad latitude for the nature of the sexual acts included within the crime of rape.[66]

The *Akayesu* Trial Chamber's expansive definition of rape diverges from the traditional definition in two specific ways.[67] Firstly, the Chamber's definition includes forced oral or anal sex, as well as the insertion of a finger or tongue into the vagina. In contrast, under the traditional common law approach, those acts are classified as various sexual offenses, including sodomy or some other form of sexual violence.[68] Secondly, since the *Akayesu* definition is gender neutral, a male could be a victim and a female could be a perpetrator.[69] This diverges from the traditional common law understanding of rape as a crime that a male commits upon a female, allowing for conviction of a female only as an accomplice.[70]

The ICTR's decision in *Akayesu* had two other notable features. First, although *Akayesu* required that the acts be committed under coercive circumstances, the decision provided significant latitude in determining what constitutes coercion.[71] Second, the Trial Chamber's definition did not address the elements of lack of consent or *mens rea*, and the appeal in *Akayesu* did not raise any issues relating to the elements of the crime of rape.[72]

Four months after the ICTR Trial Chamber decision in *Akayesu*, in December 1998, a trial panel of the ICTY in *Prosecutor v. Furundžija*[73]charged the crime of rape as a violation of Common Article III of the Geneva Conventions.[74] After having followed the decision

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[66]*Akayesu*,¶ 597.

[67]Joshua Dressler, UNDERSTANDING CRIMINAL LAW, 567 (6thedn., 2012).

[68]*Id*.

[69]*Akayesu*,¶ 597.

[70] Weiner, *supra* note 65, at 1210.

[71]*Akayesu*, ¶ 688.

[72]*Prosecutor* v. *Akayesu*, Appeal Judgment, ICTR-96-4-T, ¶10, June 1, 2001 (International Criminal Tribunal for Rwanda).

[73]*Prosecutor*v. *Furundžija*, Trial Judgment, IT-95-17/1-T, July 21, 2002 (International Criminal Tribunal for Yugoslavia) [Hereinafter "*Furundžija*"].

[74]*Furundžija* , ¶¶ 43, 274.

rendered in the Akayesu case in the *Celebici* Trial Judgment, the Trial Chamber of the ICTY came up with its own definition of rape in the *Furundžija* case.

Anto *Furundžija*, the local commander of the Jokers, a Croatian military police unit, was indicted for having tortured by way of rape a female Muslim prisoner, referred to as Witness A. *Furundžija* and other soldiers questioned Witness A. During this interrogation, a soldier rubbed his knife against Witness A's inner thigh and lower stomach and threatened to put his knife inside Witness A's vagina should she not tell the truth about the whereabouts and the activities of members of her family. Then, Witness A was taken to another room in the headquarters of the Jokers. Another soldier beat Witness A on the feet with a baton while *Furundžija* continued to interrogate her. Then another soldier forced Witness A to have oral and vaginal sexual intercourse with him. *Furundžija* was present during the entire incident and did not stop or curtail the soldier's actions. The prosecution submitted that *Furundžija* be held individually responsible for the torture by way of rape under Article 7(1) of the ICTY Statute, because *Furundžija* "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the ICTY Statute."[75]

The *Furundžija* Trial Chamber held that no definition of rape can be found in international law.[76] The Trial Chamber drew guidance from the holdings in the Akayesu Trial Judgment and the Celebici Trial Judgment, the ICTY drew "upon the general concepts and legal institutions common to all the major legal systems of the world and looked for principles of criminal law common to the major legal systems of the world.[77] The *Furundžija* Trial Chamber held that these objective elements of rape are:

i. the sexual penetration, however slight
   a. of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
   b. of the mouth of the victim by the penis of the perpetrator;

[75]*Furundžija*, ¶ 42.

[76]*Furundžija*, ¶ 175.

[77]*Furundžija*, ¶ 176.

ii. by coercion or force or threat of force against the victim or a third person.[78]

This definition followed more closely the traditional common law understanding of rape than did the ICTR's definition of rape in Akayesu.[79] For example, the *Furundžija* definition required that the perpetrator be male unless a female had used an object or had served as an accessory. Also, under the *Furundžija* definition, certain forms of sexual activity such as forced digital penetration did not constitute rape. Furthermore, under the *Furundžija* definition, force or coercion was clearly an element of the crime.[80]

The *Furundžija* Trial Chamber's definition of rape went beyond the traditional definition of rape. For example, the decision classified forced oral sex as rape even though it noted that forced oral sex constitutes only sexual assault in some countries[81] and justified this classification based on the serious nature of the act.[82] Moreover, the *Furundžija* trial judgment went beyond the traditional common law definition of rape by including "threats of force against…a third person," to acknowledge the situation in which a woman agrees to sexual relations only in response to a threat made against her child or another family member.[83] As in the ICTR's *Akayesu* case, the appeal in *Furundžija* did not raise issues related to the ICTY Trial Chamber's definition of the crime of rape.[84]

The ICTY corrected this definition in the *Kunarac* case where three Serb soldiers were charged with rape. The first accused, DragoljubKunarac, was indicted of having removed women from the Partizan Sports Hall (which served as a detention centre to which most Muslim women from the Foca High School were transferred) and for taking them to a house in the Foca municipality (the house served as the soldiers' headquarters and meeting point where they lived more or less permanently; women and girls were taken and raped there

[78]*Furundžija*, ¶ 185.

[79]Cassia C. Spohn, *The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms*, 39 JURIMETRICS 119, 122 (1999).

[80]*Furundžija*, ¶ 185.

[81]*Furundžija*, ¶ 183.

[82]*Furundžija*, ¶ 184.

[83]*Furundžija*, ¶ 174.

[84]*Prosecutor* v. *Furundžija*, Appeal Judgment, IT-95-17/1-A, ¶ 207, July 21, 2000 (International Criminal Tribunal for Yugoslavia).

on several occasions). Another soldier, RadomirKovac, was indicted of having detained several women in his apartment in Foca, where they had to perform household chores and were sexually assaulted and raped. The third accused, Zoran Vukovic was indicted of having raped several women.[85]

The *Kunarac* Trial Chamber held again that the specific elements of the crime of rape...are neither set out in the Statute nor in international humanitarian law or human rights instruments.[86] The *Kunarac* Trial Chamber drew guidance from the holdings in the Akayesu Trial Judgement, the *Celebici* Trial Judgment and the *Furundžija* Trial Judgement,[87] and followed the objective elements of rape, stated by the *Furundžija* Trial Chamber in paragraph 185 of the Judgment, but considered that it was necessary to clarify its understanding of the element in paragraph (ii) of the *Furundžija* definition.

The *Kunarac* Trial Chamber considered that the *Furundžija* definition, although appropriate to the circumstances of that case, was in one respect more narrowly stated than is required by international law. In stating that the relevant act of sexual penetration would constitute rape only if accompanied by coercion or force or threat of force against the victim or a third person, the *Furundžija* definition did not refer to other factors which would render "an act of sexual penetration *non-consensual or non-voluntary* on the part of the victim, which...is in the opinion of this Trial Chamber the accurate scope of this aspect of the definition in international law."[88]

The *Kunarac* Trial Chamber examined the crime of rape in a number of jurisdictions and held that the sexual autonomy is violated wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant.[89]

The *Kunarac* Trial Chamber held that:

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[85]Leo Van den hole, *A Case Study of Rape and Sexual Assault*, 1 EYES ON THE ICC 54, 56 (2004).

[86]*Prosecutor* v. *Kunarac*,Trial Judgment, IT-96-23, ¶ 437, June 12, 2002 (International Criminal Tribunal for Yugoslavia) [Hereinafter "*Kunarac*"].

[87]*Kunarac*, ¶ 437.

[88]*Kunarac*, ¶ 438.

[89]*Kunarac*, ¶ 457.

> "the*actus reus* of the crime of rape in international law is constituted by the sexual penetration, however slight:
>
> a. of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
> b. of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim.
>
> Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the content of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim."[90]

In 2005, in *Prosecutor* v. *Muhimana*,[91] an ICTR trial panel again considered the proper definition of the crime of rape. In that case, the accused was charged with rape as a crime against humanity.[92] At trial, both the prosecution and the accused endorsed the definition of rape as adopted in *Akayesu*.[93] The Trial Chamber in *Muhimana* concluded that the two working definitions of rape (in *Akayesu* and *Kunarac*) are not incompatible.[94]The chamber further noted that, although the *Kunarac*definition had been viewed as a departure from the definition of rape adopted in *Akayesu*, the two definitions are actually "substantially aligned."[95]

The Trial Chamber explained the matter as follows:

> "The Chamber takes the view that the *Akayesu* definition and the *Kunarac*elements are not incompatible or substantially different in their application. Whereas *Akayesu* referred broadly to a "physical invasion of a sexual nature", *Kunarac*went on to articulate the parameters of what would constitute a physical invasion of a sexual nature amounting to rape."[96]

However, the Trial Chamber did not explain how it reconciled the differing definitions of the crime of rape in *Akayesu* and *Kunarac*. Additionally, it did not explain how it applied

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[90]*Kunarac*, ¶ 460.

[91]*Prosecutor* v.*Muhimana* , Trial Judgment , ICTR-95-1B-T, April 28, 2005 (International Criminal Tribunal for Rwanda) [Hereinafter "*Muhimana"*].

[92]*Muhimana*, ¶ 534.

[93]*Muhimana*, ¶ 535.

[94]*Muhimana*, ¶ 550.

[95]*Muhimana*, ¶ 549.

[96]*Muhimana*, ¶ 550.

the resulting definition to the facts of the case before it. Consequently, the Trial Chamber in *Muhimana* left more questions about the elements of rape under international law open and undecided.

In 2006, in *Gacumbitsi v. Prosecutor*,[97] the ICTR Appeals Chamber finally determined the proper definition of rape.[98] In *Gacumbitsi*, the accused was convicted of rape as a crime against humanity.[99] Arguing on appeal that the judgment should be affirmed, the prosecutor submitted that lack of consent and the accused's knowledge thereof are not elements of the crime of rape. Instead, the prosecutor argued that rape should be viewed in the same manner "as torture or enslavement, for which the Prosecution is not required to establish absence of consent."[100]

The Appeals Chamber rejected the prosecution's argument, thus adopting the *Kunarac*definition of rape. The Appeals Chamber explained that "*Kunarac*establishes that non-consent and knowledge thereof are elements of rape as a crime against humanity. The import of this is that the Prosecution bears the burden of proving these elements beyond reasonable doubt."[101]

Gacumbitsi finally reconciled the two divergent definitions of rape used in the ICTY and ICTR.[102] The *Gacumbitsi* appeal judgment established that a more traditional definition of rape-as opposed to the more expansive definition in Akayesu-applies in both the ICTY and ICTR.

B. The view of the ICC

Those who established the ICC had the opportunity to review and consider the ICTY and ICTR cases when they developed the elements of the ICC, the elements of rape are the same,

[97]*Gacumbitsi* v. *Prosecutor*, Appeal Judgment, ICTR-2001-64-A, July 7, 2006 (International Criminal Tribunal for Rwanda).[Hereinafter "*Gacumbitsi*"].

[98]*Gacumbitsi*, ¶ 152.

[99]*Gacumbitsi*, ¶ 3.

[100]*Gacumbitsi*, ¶¶ 147, 149.

[101]*Gacumbitsi*, ¶ 153.

[102]*Gacumbitsi*, ¶¶ 152, 153.

regardless of whether rape is prosecuted as a war crime or as a crime against humanity. The ICC defines the actus reus of rape as:[103]

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

The ICC derived this definition from the *Akayesu*, *Furundžija*, and *Kunarac*judgments. The first paragraph effects a compromise between the traditional and the more expansive definitions of the sexual act of rape by allowing for prosecution of various forms of forced sexual activity not covered under most traditional definitions. Specifically, the reference to sexual penetration by "any part of the body" would allow for the prosecution of rape when the forced act is by means of a finger or the tongue. The definition is also gender neutral as to both perpetrator and victim.[104]

Unlike the definition of rape used in the ICTY and ICTR which requires "absence of consent", the ICC utilizes "force or coercion" as an element. The ICC's definition gives broad latitude to the terms "coercion" and "force" in order to anticipate the full range of circumstances arising in wartime. In particular, a threat against a third person is sufficient to satisfy this element.

Finally, the ICC's definition and treatment of consent tracks trends in domestic approaches to rape. By including language concerning acts "committed against a person incapable of giving genuine consent,'' the ICC's definition recognizes that certain persons, due to age, mental or physical condition, or infirmity, are incapable of providing consent to sexual activity.[105]

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[103] Rome Statute of the International Criminal Court, Article 8 (2) (b) (xxii)-1 and Article 8 (2) (e) (vi)-1.

[104] Weiner, *supra* note 65, at 1218.

[105] *Id*.

Although *mens rea* is not included within the elements of the crime, Article 30 of the Rome Statute of the ICC (hereinafter "Rome Statute") requires that the "material elements are committed with intent and knowledge."[106] Therefore, to have the required *mens rea*, the perpetrator must (1) intend to invade the body of a person resulting in penetration, and (2) know that the invasion was committed through the use of force, threats, coercion, or by taking advantage of a coercive environment, or a person incapable of voluntarily consenting. Thus, although the ICC definition of rape does not explicitly require knowledge of "lack of consent," it does provide a two-part *mens rea* requirement that allows for a mistake of fact defense.[107]

V. Rape as a War Crime in the ICTY

A. Jurisdiction of the ICTY

The U.N. Security Council gave the ICTY authority to try alleged offenders for crimes enumerated in Articles 2-5 of its Statute:[108] (1) grave breaches of the 1949 Geneva Conventions, (2) violations of the laws or customs of war, (3) genocide, and (4) crimes against humanity.[109]

1. Grave Breaches of the Geneva Conventions of 1949

These include "wilful killing; torture or inhuman treatment, including biological experiments; and wilfully causing great suffering or serious injury to body or health."[110] The ICTY enumerated the elements of a grave breach in the Dusko Tadic trial: One of the above-

[106]Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, Art.30(1).

[107]Rosanna Cavallaro, *A Big Mistake: Eroding the Defense of Mistake of Fact About Consent in Rape*, 86 J. CRIM. L. & CRIMINOLOGY 815, 817 (1996).

[108] William J. Fenrick, *Should Crimes Against Humanity Replace War Crimes?*37 COLUM. J. TRANSNAT'L L. 767, 768 (1999).

[109] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, SC res. 827, UN SCOR 48th sess., 3217th mtg. at 1-2 (1993).

[110]Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, Art.147, 6 U.S.T. 3516, 75 U.N.T.S. 287.

listed crimes must have been committed in the context of an international armed conflict, and the act must have been committed against a protected person or property.[111]

2. Laws or customs of war (war crimes)

Gender-based crimes in this category consist of violations of Common Article 3 of the 1949 Geneva Convention which prohibits "violence to life and person, in particular...mutilation, cruel treatment and torture; outrages upon personal dignity, in particular humiliating and degrading treatment."[112]

3. Genocide

The definition of genocide is taken from the Genocide Convention[113] and reproduced in the ICTY Statutes. For the ICTY it means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious groups, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group.[114]

4. Crimes against humanity

These have never been defined specifically in international law.[115] In the Dusko Tadic trial, the ICTY set forth the elements necessary to establish a crime against humanity pursuant to its Charter: (a) that one of the charges be for inhumane acts, murder, rape,

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[111]*Prosecutor* v. *Tadic*, Trial Judgment, IT-94-1-T, May 7, 1997 (International Criminal Tribunal for Yugoslavia) [Hereinafter "*Tadic*"].

[112] Common Article 3 is held in common in all four of the Geneva Conventions: Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, 3536, 75 U.N.T.S. 287.

[113]Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948, Art. II, 78 U.N.T.S. 277.

[114]*Id.*

[115] Kelly D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 AM. J. INT'L L. 97, 102 (1999).

enslavement, deportation, persecution for political, racial, national, religious, or ethnic reasons; (b) that the act be committed in the context of armed conflict; (c) that at the time of the offense there was widespread attack on the noncombatants which included discrimination; (d) that the accused had knowledge (or should have had knowledge) that he/she was participating in this wider attack; and (e) that there is individual criminal responsibility.[116]

This marks the first time that rape was specifically recognized as any kind of war crime offense.

B. Rape as a War Crime in the trials before ICTY

The ICTY, to date, has conducted two major trials that have set important precedents for the prosecution of rape as a war crime in the former Yugoslavia. In the first trial (of Dusko Tadic), the ICTY established that aiding and abetting the crime of rape was sufficient to be found guilty of rape.[117] The second trial (of Anto Furundžija) established that the mental distress suffered by a victim of rape does not automatically disqualify her from being a competent witness against her rapist.[118]

1. The Dusko Tadic Trial

Dusko Tadic's trial was the first for the ICTY and the most important for setting precedent for the future prosecution of rape and crimes of sexual violence, even though Tadic, himself, was not a high-level officer. Tadic was a police functionary (civilian traffic officer) for the Serbian army during 1992. As a result of his actions during the conflict, thirty-one counts were brought against him including crimes against humanity, grave breaches, and violations of the laws and customs of war. He pleaded not guilty to all of the charges. On May 7, 1997, he was convicted on eleven of the counts and sentenced to twenty years in prison.[119] Both the defense and the prosecution appealed the judgment.

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[116] *Tadic*.

[117] *Tadic*.

[118] *Furundžija*.

[119] *Tadic*, ¶¶ 176-79.

The Amended Indictments against Tadic that relate to rape or gender crimes included the following:

Count 1 alleged a crime against humanity (persecution on political, racial, and/or religious grounds) for taking part in a "campaign of terror which included killings, torture, sexual assaults, and other physical and psychological abuse"[120] and for participating in "the torture of more than 12 female detainees, including several gang rapes."[121] Counts 2-4 alleged that Tadic had subjected a woman (F) to "forcible sexual inter-course."[122] The specific crimes included allegations of a grave breach (inhuman treatment), violation of the laws or customs of war (cruel treatment), and crime against humanity (rape). Count 8 alleged a grave breach for torture or inhumane treatment for participating along with others in beating prisoners, including FikretHarambasic, and forcing two prisoners to commit oral sexual acts on Harambasic and to mutilate him sexually.[123] Count 9 alleged a grave breach for willfully causing great suffering or serious injury to body and health related to the crimes in Count 8. Count 10 alleged violations of the laws or customs of war for cruel treatment related to the same crimes. Count 11 alleged crimes against humanity for inhumane acts related to the same crimes.[124]

Tadic was expected to be the first international alleged war criminal tried for the crime of rape as a separate charge. The rape charges in Counts 2-4 were dropped, however, because the victim, Witness F, was too frightened to testify. It is instructive that she felt threatened even though the judges had granted her such protection as allowing her name to be withheld from the defense until shortly before the trial, withholding her identity from the public and the media, and keeping her and her family's whereabouts secret from the defense and the public.[125]

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[120] *Tadic*, ¶ 4.

[121] *Tadic*, ¶¶ 4. 3.

[122] *Tadic*, ¶ 5.

[123] *Tadic*, ¶ 6.

[124] Askin, *supra* note 115, at 100-01.

[125] Prosecutor v. *Tadic*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, No. IT-94~1-T, ¶¶ 28, 53, 90, August 10, 1995 (International Criminal Tribunal for Yugoslavia).

Tadic was not shown to have taken part personally in the rapes or mutilation, but it was shown that: (1) he participated in imprisonment and seizure of the people in the camps, (2) the Serbian forces' treatment of people in the camps was brutal, (3) he was aware of a policy to discriminate against non-Serb people, and (4) he was criminally culpable with regards to the sexual mutilation.

2. The Anto *Furundžija* Trial

Anto *Furundžija* was the local commander of a special unit of the military police of the Croatian Defence Council (HVO) known as the 'Jokers.' He was arrested on December 18, 1997, by members of the multinational Stabilization Force (SFOR) pursuant to a war- rant issued by the ICTY. He was charged with grave breach of the Geneva Convention, violations of the laws or customs of war (torture and inhumane treatment, torture, and outrages upon personal dignity including rape) in connection with aiding and abetting acts alleged to have happened at the 'Jokers' headquarters.[126]

The factual allegations include that in May 1993,*Furundžija'*sunit arrested a woman (Witness A) and took her to their headquarters where she was detained in the company of a group of soldiers. *Furundžija* is alleged to have arrived to interrogate Witness A about a list of Croatian names and the activities of her sons. While he was present a soldier beat Witness A and another witness, and then forced her to have oral and vaginal intercourse with him. The accused did nothing to prevent these acts.[127]

The tribunal found him guilty on both the charges of grave breach and violations of the laws or customs of war.[128]

The most interesting aspect of this trial from the perspective of women's advocates is that in June 1998, after the trial had been concluded, but before the verdict had been rendered, the prosecution revealed to the defense that Witness A had been receiving counseling for post-traumatic stress disorder (PTSD) related to the rape and interrogation.[129]

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[126]*Furundžija*, ¶¶ 2, 3.

[127]*Furundžija*, ¶¶ 39, 40, 41.

[128]*Furundžija*, ¶¶ 269, 275.

[129] Post-Traumatic Stress Disorder (PTSD) is the psychiatric diagnosis given to a complex set of symptoms usually suffered by persons who have undergone a trauma of a limited-time nature, for example, a rape, a

The defense filed a motion to strike the testimony of Witness A, or in the event of a conviction, to receive a new trial. The Trial Chamber found that the evidence about psychological treatment was relevant to the issue of Witness A's credibility, and so reopened the proceedings. Significantly, after hearing the testimony of the prosecution that Witness A's credibility was diminished as a result of her disease and therapy, the Trial Chamber responded very strongly in the following words:

> "PTSD does not render a person's memory of traumatic events unworthy of belief. In fact, the expert evidence indicated that intense experiences such as the events in this case are often remembered accurately despite some inconsistencies."[130] With regard to the reliability of a witness suffering from PTSD, the Trial Chamber stated that "even when a person is suffering from PTSD, this does not mean that he or she is necessarily inaccurate in the evidence given. There is no reason why a person with PTSD cannot be a perfectly reliable witness."[131]

C. Accomplishments of the ICTY in Prosecuting Rape as a War Crime

Tadic is an important but rather odd one for women's advocates, in that the most striking convictions for sexual violence came as the result of Tadic's participation in the sexual violence against other men. The two most important results of this trial for advocates of victims of rape are:

1. that rape was declared a crime against humanity, marking the first time in international war crimes trials that rape was specifically recognized as a war crime offense;[132] and
2. that after Tadic anyone, including non-state actors and low-level participants, may be convicted of aiding and abetting crimes of physical, mental and sexual violence through continued and knowing participation in, or tacit encouragement of, these crimes.[133]

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disaster, or combat. The symptoms of PTSD for a woman who has been raped are similar to symptoms of soldiers who suffer from what was formerly called "shell shock": insomnia, nausea, startle responses, nightmares, dissociative disorders, psychological numbing, intrusive memories, hyper arousal.

[130] *Furundžija*, ¶¶ 105, 108.

[131] *Furundžija*, ¶ 109.

[132] Marsha V. Mills, *War Crimes in the 21st Century*, 3 HOFSTRA L. & POL'Y SYMP.47, 66 (1999).

[133] Askin, *supra* note 114, at 105.

Another important precedent from Tadic is that sexual mutilation was specifically found to be a violation of the laws and customs of war.[134]

Although women's advocates criticize the Trial Chamber in the *Furundžija* trial for responding positively to the defense's motion on the issue of whether Witness A was competent, the Trial Chamber's final statement solidifies the position of all inevitably traumatized witnesses in rape cases that post-traumatic stress disorder, by itself, is not enough to disqualify a witness.[135]

The most severe criticism of the ICTYs handling of rape and other sexual violence in these and other trials comes from those who feel that despite the judges' intentions to the contrary, the tribunal has still not dealt with the issue of gender violence directly or adequately. For example, one commentary on the Tadic trial severely condemns the judges for not breaking free from the constraints imposed by international law with respect to the gender-neutral definitions of crimes - even in a context where sexual violence against women was a major weapon of war:

The Trial Chamber's judgment perpetuates the inadequacies of international humanitarian law with respect to the treatment of women. The judges' preliminary findings and their account of the Serbian policies in which Tadic joined focus only on issues of ethnicity, race, religion, or politics, but not gender…The stories of how mass rape and its threat have been used in the Balkans - as a tool of expulsion; of how forced impregnation became a weapon of genocide and territorial and emotional conquest; of how sexual invasion has been employed as a device to undermine the honor of both victim and her family and as symbolic castration of her spouse - were not addressed in the tribunal's account of the rise of 'ethnic conflict' in the region…Guided by the gender-neutral definitions of relevant crimes, which foil to recognize explicitly these acts as cognizable crimes, the narrow confines of the specific charges against Tadic and the dismissal of the sole charge of rape, the Tadic bench suppressed the stories of many victims in its preliminary findings. It rendered gender-specific violence and its many forms of victimization nearly invisible.[136]

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[134] *Id*, at 102.

[135] *Furundžija*, ¶ 109.

[136] Jose E. Alvarez, *Rush to Closure: Lessons of the Tadic Judgment*, 96 MICH. L. REV. 2031, 2072-73 (1998).

Even though advances were made for the cause of prosecuting rape as a war crime in these two trials, the judges still seem not to have got it regarding the relative importance of the sexual crimes compared to the other kinds of crimes prosecuted. While several rapes and incidences of sexual violence were prosecuted, the enormity of the situation and the horrors involved in things such as rape camps and routine and systematic raping of women were never allowed to be addressed.[137]

VI. Rape as a War Crime in the ICTR

The ICTR, based in Arusha, Tanzania, was created in 1994 by the U.N. Security Council and given authority to prosecute serious violations of humanitarian law committed in Rwanda (or outside the borders of Rwanda, if by a Rwandan citizen in 1994.[138]

A. Jurisdiction of the ICTR

Unlike the ICTY, the ICTR was established to have jurisdiction in a conflict that was considered to be internal and not international. Therefore, the ICTR has more limited powers of prosecution, and its jurisdiction does not include grave breaches which require international armed conflict.[139]

The ICTR was established to try defendants for crimes enunciated in articles 2-4 of its Statute, which include: (1) genocide, (2) crimes against humanity, and (3) violations of Common Article 3 of the Geneva Conventions and of Additional Protocol II, which incorporates violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation…outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.[140]

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[137] *Id.*

[138] Statute of the International Criminal Tribunal for Rwanda, SC res. 955, UN SCOR 49th sess., 3453rd mtg, U.N. Doc. S/Res/955 (1994).

[139] Mills, *supra* note 131, at 51, 68.

[140] Askin, *supra* note 114, at 98.

Under the ICTR Statute, the attack must be committed on national, political, ethnic, racial, or religious grounds.[141]

B. Rape as a War Crime in the trials before ICTR

The tribunal has indicted forty-five individuals, thirty-eight of whom are in custody at Arusha. The tribunal has convicted five individuals, including former prime minister Jean Kambanda, who was sentenced to life imprisonment for genocide and crimes against humanity, and Jean-Paul Akayesu, the mayor of a predominantly Hutu commune.[142]

1. Jean-Paul Akayesu Trial

The Akayesu trial was the first international war crimes trial to try a defendant for the crime of genocide.[143] Akayesu was the burgermeistre (mayor) of the Taba commune. As mayor, he had control over communal police and responsibility for maintaining public order in the commune. He allegedly abused this power by conducting house-to-house searches, interrogating and beating people in an attempt to force them to reveal information about others, and burning the homes and killing family members of individuals for whom he was searching. Five teachers were killed as a result of his encouragement to kill influential and/or intellectual people.[144]

During his trial, evidence of rape came forward and the trial was adjourned to investigate crimes of sexual violence. In June 1997, the indictment was amended to include charges of sexual violence viz. "forcible sexual penetration of the vagina, anus or oral cavity by a penis and/or of the vagina or anus by some other object, and sexual abuse, such as forced nudity."[145] The indictments included the following specific charges:

> When Tutsi civilian women sought refuge at the bureau communal building they were regularly taken by armed local militia and/or communal police and subjected to sexual violence, and/or beaten on or near the bureau communal

[141] *Id*.

[142] Davis, *supra* note 27, at 1243.

[143] Askin, *supra* note 114, at 105.

[144] The Prosecutor for the Tribunal v. Jean-Paul Akayesu, Indictment, ICTR-96-4-T, February 13, 1996 (International Criminal Tribunal for Rwanda).

[145] *Id*, ¶ 10A.

> premises…Many women were forced to endure multiple acts of sexual violence which were at times committed by more than one assailant. These acts of sexual violence were generally accompanied by explicit threats of death or bodily harm. The female displaced civilians lived in constant fear and their physical and psychological health deteriorated.[146]

Akayesu was accused of knowing that sexually violent acts were being committed, and of being present when some of these acts were committed or of having facilitated the commission of the sexual violence, beatings and murders by allowing the sexual violence and beatings and murders to occur on or near the bureau communal premises and of having encouraged these acts by not preventing them.[147]

Five of the counts in the indictment against Akayesu were related to sexual violence. Counts 1 and 2 alleged genocide (genocide and complicity in genocide); Count 3 alleged crimes against humanity (extermination); and Counts 13 and 14 alleged crimes against humanity (rape and inhumane acts).[148]

In its judgment against Akayesu, the tribunal found him guilty of encouraging rape and stated: "Tutsi women were systematically raped…Further, it is proven that on several occasions, by his presence, his attitude and his utterances, Akayesu encouraged such acts…In the opinion of the Chamber, this constitutes tacit encouragement to the rapes that were being committed."[149]

In addition, the tribunal established that these rapes and the other sexual violence against Tutsi women were integral parts of the genocide committed in Rwanda:

> "[Rape crimes] constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute…one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm…Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a

[146] *Id*, ¶ 12A.

[147] *Id*, ¶ 12B.

[148] *Id*.

[149] *Id*, ¶¶ 733-34.

> whole…In Taba sexual violence was a step in the process of destruction of the Tutsi group, destruction of the spirit, of the will to live, and of life itself."[150]

Akayesu was also found guilty of crimes against humanity for rape and other forms of sexual violence, charged as rape (Count 13) and other inhumane acts (Count 14). When the decision of the tribunal was announced, Akayesu became the first person convicted of genocide by an international war crimes tribunal; he is currently appealing three life sentences.

C. Accomplishments of the ICTR regarding Rape as a War Crime

The trial of Jean-Paul Akayesu resulted in several major steps forward towards the prosecution of rape as a war crime. His was the first conviction for the crime of genocide, and, more significantly, sexual violence was included as an integral part of that crime. The tribunal also recognized rape and other forms of sexual violence as independent crimes under the category of crimes against humanity.[151] Perhaps most importantly, the tribunal promulgated a broad international definition of both rape and sexual violence as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence, which includes rape, is considered to be any act of a sexual nature which is com- mitted on a person under circumstances which are coercive.[152]

This definition is broad enough that a wide range of criminal sexual acts can be encompassed by it; it will assure that sexual violence can be prosecuted even if there was no rape, per se.[153]

VII. Rape as a War Crime in the ICC

The 1998 Rome Statute of the ICC builds on the advancements made in the area of protecting women made in the ICTY and ICTR. The ICC Statute makes rape an individual crime, including other forms of sexual violence and explicitly defines rape as a war crime and a crime against humanity. The ICC incorporates mechanisms to facilitate victim reparation and to protect victim rights.

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[150] *Id*, ¶¶ 731-32.

[151] Askin, *supra* note 114, at 107.

[152] *Id*, ¶ 598.

[153] Askin, *supra* note 114, at 109-110.

The work of the ICC drafters with respect to gender crimes "is a defining moment in history and an indication of how far the issue of women's human rights has progressed."

The Rome Statute was able to take advantage of the work of the two tribunals in establishing a definition of rape in international law. The definition of rape in the Rome Statute includes two key elements:[154]

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

One of the most significant aspects of the above elements is the presence of the "coercive environment" and the inability of a person to given consent. This moves away from an assumption of implied consent and recognizes that under certain coercive circumstances the assumption works the other way *viz.*, the assumption that the sex was unwanted.

While progress has been made by the ICC in the prosecution of sexual violence crimes, the court's prosecutors continue to struggle to collect the necessary evidence to secure convictions.

In the past, the ICC has been widely criticised for a lack of emphasis on crimes of sexual violence perpetrated against the female population in countries where it has sought to prosecute atrocities, particularly in the Democratic Republic of Congo, DRC.

In the first case at the ICC involving Congolese warlord, **Thomas Lubanga**, no sexual violence charges were brought despite evidence which has come out during the trial suggesting that young girls were raped and sexually assaulted by troops under his command.

The second case to go to trial at the ICC, that of **Germain Katanga**, alleged leader of the Forces for Patriotic Resistance, FRPI, in the DRC does contain charges of sexual violence. The Pre-Trial Chamber confirmed that there was sufficient evidence to establish

[154] Rome Statute of the International Criminal Court, Article 8 (2) (b) (xxii)-1 and Article 8 (2) (e) (vi)-1.

substantial grounds to believe that during the aforementioned attack, Germain Katanga and Mathieu Ngudjolo jointly committed through other persons, within the meaning of Article 25(3)(a) of the Statute, the following crimes in the knowledge that they would occur in the ordinary course of events:

- sexual slavery as a war crime under Article 8(2)(b)(xxii) of the Statute;
- sexual slavery as a crime against humanity under Article 7(1)(g) of the Statute;
- rape as a war crime under Article 8(2)(b)(xxii) of the Statute; and
- rape as a crime against humanity under Article 7(1)(g) of the Statute

However, the ICC unanimously did not find the accused guilty, within the meaning of article 25(3)(d) of the Statute, as an accessory to the crimes of:

- Rape and sexual slavery as crimes against humanity under Article 7(1)(g) of the Statute;
- Rape and sexual slavery as war crimes under Article 8(2)(e)(vi) of the Statute.[155]

Sexual violence crimes are also included in the indictment against **Jean-Pierre Bemba**, a former vice-president of the DRC, who is charged with atrocities in the Central African Republic. Jean-Pierre Bemba Gombo is currently the sole person charged by the ICC in the Central African Republic (CAR) situation. Bemba was the President and Commander-in-Chief of the "Mouvement de Libération du Congo" (MLC) and is the former Vice-president of the Democratic Republic of the Congo (DRC). On 15 June, 2009, ICC Pre-Trial Chamber II confirmed the charges of crimes against humanity (rape and murder) and war crimes (rape, murder and pillaging) against Bemba, sending his case to trial. The trial began on 22 November 2010 and is ongoing.[156]

Other alleged perpetrators of sexual violence have also been brought before the ICC recently. **Callixte Mbarushimana**, a member of the Democratic Liberation Forces of

[155]Summary of Trial Chamber II's Judgment of 7 March 2014, pursuant to Article 74 of the Statute in the case of The Prosecutor v. Germain Katanga, *available at* http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/986/14_0259_ENG_summary_judgment.pdf(Last visited on September 7, 2014).

[156]*Available at*http://coalitionfortheicc.org/?mod=bemba(Last visited on September 7, 2014).

Rwanda (FDLR) and leadership was arrested on October 11, 2010 by French authorities. He was transferred to The Hague where he is accused of 13 counts of war crimes and crimes against humanity, including rape. He is said to have committed atrocities in the east of DRC, notably in the Walikale territory of the Kivus where more than 250 women were allegedly raped by FDLR troops under his command. On 16 December 2011, Pre-Trial Chamber I decided by Majority to decline to confirm the charges against Mr. Mbarushimana. Mr. Mbarushimana was released from the ICC's custody on 23 December 2011, upon the completion of the necessary arrangements, as ordered by Pre-Trial Chamber I.[157]

While some difficulties in prosecuting sexual violence are linked to investigation procedures, others stem directly from the victims traumatic experience and the fact that they do not want to talk about it. An additional problem in gathering the necessary evidence of rape stems from the fact that most of the victims fail to go to hospital to see a doctor. This makes it difficult for prosecutors to prove beyond doubt that a rape took place.

VIII. Conclusion

Sexual violence against women becomes massive and atrocious during warfare. Violence appears throughout the world and takes a variety of forms. Rape has been used as a weapon because of its social character and as a means of ethnic cleansing because of women's reproductive capability. At the same time, the dark reality of the rape of men in war has also surfaced which requires attention of the international community as well.

The international tribunals and the ICC deserve and need respect and support from the international community in order to attain and maintain the status of legitimate judicial bodies, and ultimately, to provide justice for victims, including victims of rape. The tribunals need to continue down the path of defining sexual violence perpetrated during armed conflict as war crimes, in and of themselves. To improve fairness and effectiveness in prosecutions of rape as a war crime, international criminal tribunals should strengthen other substantive and procedural rules to enhance equitable results and to better align with many modern domestic laws in line of the ones they have already adopted such as gender-neutral evaluations and rejection of a resistance requirement. Specifically, they should strengthen rape shield rules,

[157] Prosecutor v. Callixte Mbarushimana, *available at* http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc01040110/Pages/icc01040110.aspx(Last visited on September 7, 2014).

forbid evidence of a woman's decision not to abort, and eliminate the requirement of knowledge of lack of consent. They should investigate and prosecute these crimes as aggressively as other atrocities. They also need to fight for the protection and security of the witnesses, especially the victims of sexual violence. This must be done through the continuing reform of the prosecutor's and investigator's offices, tribunal policies, and security procedures for those who testify; it will mean lobbying for more financial and personnel support. The international legal community must decide that these reforms and safeguards are worthwhile if the prosecution of rape and sexual violence as war crimes is to continue. To prosecute the crimes without providing adequate security and protection to the survivors is to make them even more vulnerable. Adequate safeguards must be in place for each survivor/witness and her family. When a victim's safety and life are at stake, limited or merely symbolic victories can never be enough.

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