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BREAKING THE SILENCE: RAPE AS AN INTERNATIONAL CRIME

Mark Ellis *

I spoke to these people, I observed their reactions—[the widespread rape at the Trnopolje prison camp] had a terrible effect on them. They could [explain] when somebody steals something from them, or even beatings or even some killings. Somehow they sort of accepted it . . . , but when the rapes started they lost all hope. Until then they had hope that this war could pass, that everything would quiet down. When the rapes started, everybody lost hope, everybody in the camp, men and women. There was such fear¹

I. INTRODUCTION

In 1999, I stood among a sea of twenty thousand desperate people on a dirt airfield outside of Skopje, Macedonia, listening to one harrowing story after another. I had come to the Stenkovec refugee camp to record those stories and to help create a system for documenting atrocities in Kosovo. The refugees with whom I spoke described being robbed, beaten, herded together, and forced to flee their villages with nothing but the clothes on their backs. Yet, my most vivid memory is the lost expression on the faces of the young women and girls in the camp. At first, they did not speak a word. Their silence acted as a veil, concealing crimes that they did not have the emotional strength to recollect. Slowly, through time and the comfort found in speaking to female counselors, their stories began to emerge. The brutality and systematic consistency of the sexual violence perpetrated on these women were mind-numbing. The widespread practice of rape against Muslim women was more than a consequence of war; it was an instrument of war intent on destroying the cultural fabric of a targeted group.

Most figures regarding the magnitude of rape during the Yugoslav wars of 1991–1995 are rough estimates. These estimates are staggering,

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¹ Witness testimony of Vasif Guti, who worked in the medical unit at Trnopolje. Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment, ¶ 175 (May 7, 1997).

nonetheless, indicating the occurrence of up to sixty thousand acts of rape and sexual assault during this period.²

The magnitude of rape in civil wars during the last decade is equally horrifying. For instance, recent findings at the end of the five-year armed conflict in Congo estimate that for every three female survivors, one suffered from rape.³ In Sierra Leone, up to sixty-four thousand incidents of war-related sexual violence against women were reported during the country's decade-long internal conflict.⁴

This article examines the legal developments of the crime of rape within international law. It focuses on rape as a crime of genocide, a crime against humanity, and a war crime. The article reviews the advancement of the crime of rape as an international crime through the ad hoc Tribunals for Yugoslavia and Rwanda. It then looks at the codification of the crime of rape under the International Criminal Court (ICC).

II. SETTING THE SCENE

The first trial under the jurisdiction of the International Criminal Tribunal for the former Yugoslavia (ICTY) began on the morning of May 7, 1996. The trial was that of Dusko Tadić, a café owner and part-time karate instructor formerly residing in the Prijedor region of Bosnia-Herzegovina. He was charged with individual criminal responsibility for grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, and crimes against humanity, according to Articles 2, 3, and 5, respectively, of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY Statute).⁵

Because it was the first international war crimes trial since Nuremberg and Tokyo, the *Prosecutor v. Tadić* trial was of historic and international significance.⁶ But equally important, the *Tadić* case was the first international war crimes trial where the defendant was specifically charged with rape and sexual violence as crimes against humanity and war crimes. And even though there was insufficient evidence to prove that Tadić himself had committed crimes of rape, he was convicted of aiding and abetting crimes of sexual violence. The *Tadić* trial showed the world that it was le-

² WOMEN IN AN INSECURE WORLD: VIOLENCE AGAINST WOMEN FACTS, FIGURES AND ANALYSIS 115 (Marie Vlachová & Lea BIASON eds., DCAF 2005) [hereinafter WOMEN IN AN INSECURE WORLD].

³ *Id.*

⁴ *Id.*

⁵ Statute of the International Criminal Tribunal for the Former Yugoslavia, U.N. SCOR, 48th Sess., R.C. Res.827, arts. 2,3, & 5, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute].

⁶ Case No. IT-94-I-T, Judgment (May 7, 1997).

gally permissible to try alleged war criminals with rape and other forms of sexual violence. The case also demonstrated that international tribunals could prosecute rape crimes through existing international law.

III. DEFINING THE CRIME OF RAPE

The concept of rape as an international crime is relatively new. This is not to say that rape has never been historically prohibited, particularly in war.⁷ The 1863 Lieber Instructions, which codified customary international law of land warfare, classified rape as a crime of “troop discipline.”⁸ It specified rape as a capital crime punishable by the death penalty.⁹ The 1907 Hague Convention protected women by requiring the protection of their “honour.”¹⁰ But modern-day sensitivity to the crime of rape did not emerge until after World War II.

After World War II, when the Allies established the Nuremberg Charter, the word rape was not mentioned. The article on crimes against humanity explicitly set forth prohibited acts, but rape was not mentioned by name.¹¹ Article 6(c) of the Charter established crimes against humanity as the following:

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 the domestic law of the country where perpetrated.¹²

⁷ For example, the Treaty of Amity and Commerce Prussia and the United States provides that in time of war all women and children “shall not be molested in their persons.” The Treaty of Amity and Commerce, Between his Majesty the King of Prussia and the United States of America, art. 23, Sept. 10, 1785, U.S.-Pruss., 8 TREATIES & OTHER INT’L AGREEMENTS OF THE U.S. 78, 85, available at <http://www.yale.edu/lawweb/avalon/diplomacy/germany/prus1785.htm> (last visited Nov. 20, 2003).

⁸ David Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine*, 15 DUKE J. COMP. INT’L L. 219, 224.

⁹ *Id.* at 236.

¹⁰ “Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.” Convention (IV) Respecting the Laws & Customs of War on Land, art. 46, Oct. 18, 1907, available at <http://www.yale.edu/lawweb/avalon/lawofwar/hague04.htm#art46>.

¹¹ See generally, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

¹² *Id.* (emphasis added).

The Nuremberg Judgment did not make any reference to rape and rape was not prosecuted.¹³ The Allies did establish a commission to investigate allegations of mass rape of French and Belgian women, but it was not a serious initiative.¹⁴

It was different for the Charter of the International Military Tribunal for the Far East.¹⁵ During World War II, the Japanese government placed over two hundred thousand women and girls in military brothels to serve as "comfort women" for its troops.¹⁶ The Tribunal prosecuted rape crimes, even though its Statute did not explicitly criminalize rape.¹⁷ The Far East Tribunal held General Iwane Matsui, Commander Shunroku Hata and Foreign Minister Hirota criminally responsible for a series of crimes, including rape, committed by persons under their authority.¹⁸

Sadly, the Tribunal ignored the enforced prostitution of the "comfort women."¹⁹ For this reason, as recently as 2000, women were still trying to secure recognition of and compensation for the atrocities committed against them. In Tokyo, the Women's International War Crimes Tribunal was held in December 2000 where survivors presented testimony of being forcibly transported by the Japanese military to rape camps, which became a standard and integral part of the Japanese war efforts.²⁰ Yet, these "comfort women" and camps were not mentioned in the peace treaties with Japan. Nor have demands for official compensation, apologies, and punishment of those responsible been met by the Japanese government.²¹

The first mention of rape as a specific crime came in December 1945 when Control Council Law No. 10 included the term rape in the definition of crimes against humanity.²² Law No. 10, adopted by the four occu-

¹³ Judge Gabrielle Kirk McDonald, *The International Criminal Tribunals Crime and Punishment in the International Arena*, 7 ILSA J. INT'L COMP L. 667, at 676.

¹⁴ *Id.*

¹⁵ See Charter of the International Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. 1589.

¹⁶ Christine Chinkin, Lecture given at the London School of Economics: Women and War (March 13, 2006) (on file with author).

¹⁷ See McDonald, *supra* note 13, at 676.

¹⁸ THE TOKYO JUDGMENT: JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 445-54 (B.V.A. Roling and C.F. Ruter eds., 1977).

¹⁹ See McDonald, *supra* note 13, at 676.

²⁰ See Chinkin, *supra* note 16, at 676.

²¹ *Id.*

²² Control Council for Germany, Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Dec. 20, 1945, 3 Official Gazette Control Council for Germany 50, 53 (1946), available at <http://www1.umn.edu/humanrts/instreet/ccno10.htm> (last visited Nov. 20, 2003). This law set forth a uniform legal basis in Germany for the prosecution of war criminals and similar offenders, other than those dealt with under the International Military Tribunal. See *id.* at 50.

pying powers in Germany, was devised to establish a uniform basis for prosecuting war criminals in German courts.

The 1949 Geneva Convention Relative to the Treatment of Prisoners of War was the first modern-day international instrument to establish protections against rape for women.²³ However, the most important development in breaking the silence of rape as an international crime has come through the jurisprudence of the ICTY and the International Criminal Tribunal for Rwanda (ICTR). Both of these Tribunals have significantly advanced the crime of rape by enabling it to be prosecuted as genocide, a war crime, and a crime against humanity. The Tribunals have had to develop their own definitions of rape, since at the time of their formation, there was no internationally agreed definition.²⁴

Until very recently, the specific elements of the crime of rape were not clearly set out in international law. Based on the decisions of the ad hoc Tribunals, however, there slowly emerged a consensus on the definition of rape, both in terms of the *actus reus* and the *mens rea*, although some differences still persisted. In *Prosecutor v. Kunarac, Kovac, and Vukovic* (“*Kunarac*”),²⁵ the first ICTY case that successfully convicted individuals accused of rape as a crime against humanity, the Tribunal expanded the definition of rape from an act of coercion or force, or threat of force, against the victim to a “non-consensual or non-voluntary” sexual act. For the *Kunarac* Tribunal, the *mens rea* of rape was the intent to penetrate the victim sexually with the knowledge that it occurred without the consent of the victim.

The crime of rape was broadened to require *unwanted* sexual penetration rather than the narrower and more difficult to prove element of coercion or force.²⁶ In essence, the Tribunal rejected the argument that international law required proof of force, threat of force, or coercion.²⁷ The new focus was whether consent was “given voluntarily, as a result of the victim’s free will.”²⁸ The use of threat may be used to show non-consent, but coercive circumstances without the threat or use of force may be sufficient to demonstrate the absence of consent.²⁹ In these circumstances, the idea of implied consent becomes irrelevant.

²³ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 27, 6 U.S.T. 3316, 75 U.N.T.S. 287 (entry into force Oct. 20, 1950) [hereinafter Fourth Geneva Convention].

²⁴ See Chinkin, *supra* note 16.

²⁵ Judgment, Case No. IT-96-23/1-T (Feb. 22, 2001) available at <http://www.un.org/icty/kunarac/trialc2/judgement/kun-tj010222e.pdf>.

²⁶ *Id.* ¶ 440.

²⁷ *Id.* ¶ 438 n.1119.

²⁸ *Id.* ¶ 460.

²⁹ *Id.* ¶ 459.

Kunarac also clarified Rule 96 of the ICTY Statute dealing with consent. Rule 96 provides:

In cases of sexual assault:

- (i) no corroboration of the victim's testimony shall be required;
- (ii) consent shall not be allowed as a defense if the victim
 - (a) has been subject to or threatened with or has reason to fear violence, duress, detention or psychological oppression, or
 - (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;
- (iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible;
- (iv) prior sexual conduct of the victim shall not be admitted into evidence.³⁰

The Tribunal expressed concern that interpreting the above language to establish consent as a defense is not consistent with a general understanding of the concept of consent in rape. It is the "absence of consent" that is the element of the crime. The Tribunal ruled:

It is consistent with the jurisprudence considered above and with a common sense understanding of the meaning of genuine consent that where the victim is "subjected to or threatened with or has reason to fear violence, duress, detention or psychological oppression" or "reasonably believed that if [he or she] did not submit, another might be so subjected, threatened or put in fear", any apparent consent which might be expressed by the victim is not freely given and the second limb of the Trial Chamber's definition would be satisfied. The factors referred to in Rule 96 are also obviously not the only factors which may negate consent. However, the reference to them in the Rule serves to reinforce the requirement that consent will be considered to be absent in those circumstances unless freely given.³¹

In June 2002, the ICTY's Appeals Chamber approved the *Kunarac* Trial Chamber's definition of rape, ruling that customary international law does not require resistance on the part of the victim—to do so would be "absurd on the facts."³²

³⁰ Rules of Procedure and Evidence for the International Criminal Tribunal for the Former Yugoslavia, R. 96, U.N. Doc. IT/32/REV.38 (Feb. 11, 1994), [hereinafter ICTY Rules of Procedure and Evidence].

³¹ Prosecutor v. Kunarac, Kovac, and Vukovic, Judgment, Case No. IT-96-23/1-T (Feb. 22, 2001), ¶ 464.

³² Prosecutor v. Kunarac, Kovac, and Vukovic, Judgment, Case No. IT-96-23/1-A, ¶¶ 128-33 (Jun. 12, 2002), available at <http://www.un.org/icty/kunarac/appeal/judgement/kun-aj020612e.pdf>.

The ITCR's *Akayesu* judgment stated that "the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts."³³ Rape was defined as a "physical invasion of a sexual nature, committed on a person under circumstances that are coercive."³⁴ The Tribunal held that such acts are "not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact."³⁵

In *Furundžija*, the ICTY recognized that there was not an accurate definition of rape under customary international law and that previous ICTY judgments had not sufficiently specified the crime of rape. Accordingly, the Tribunal established a more fluid and expressive definition. The Tribunal ruled that the *actus reus* of rape constitutes:

- (i) the sexual penetration, however slight:
 - (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
 - (b) of the mouth of the victim by the penis of the perpetrator;
- (ii) by coercion or force or threat of force against the victim or a third person.³⁶

The Tribunal's decision was important because it recognized that coercion can exist whether directed toward the victim or toward third parties.³⁷ In addition, the definition of rape became more explicit than prior definitions and added oral sexual acts as a form of rape.³⁸ The work of the ICTY and the ICTR in creating a more precise definition of rape meant that the ICC could more easily establish an agreed upon definition within its Statute.

IV. RAPE AS GENOCIDE

When rape is used as an instrument of destruction, it is oftentimes within the context of a policy of ethnic cleansing. It involves terrorizing the suspect, including the use of gang rape, sexual torture, psychological torture, rape camps, and forced impregnation.³⁹ An objective of ethnic cleansing as an act of genocide becomes the destruction of a cultural group. Women are often the key link to this cultural bond and their physical and

³³ Prosecutor v. Akayesu, Case No. IT-96-4-T, Judgment, ¶ 597 (Sept. 2, 1998).

³⁴ *Id.* at ¶ 688.

³⁵ *Id.*

³⁶ Prosecutor v. Furundžija, Judgment, Case No. IT-95-17/1-T, ¶ 185 (Dec. 10, 1998), available at <http://www.un.org/icty/furundzija/trialc2/judgement/fur-tj981210e.pdf>.

³⁷ See McDonald *supra* note 13, at 680.

³⁸ See *id.* at 680

³⁹ WOMEN IN AN INSECURE WORLD, *supra* note 2, at 117.

psychological destruction quickly permeates the entire group. "Raping women in a community can be seen as raping the body of the community, in doing so, undermining the entire fabric of that community."⁴⁰

The Genocide Convention prohibits the attempt to destroy a people based on nationality, ethnicity, race, or religion.⁴¹ Among the acts of violence contained within the Convention are imposing conditions of life calculated to destroy the group and imposing measures designed to prevent births within the group.⁴² Thus, rape and other forms of gender violence constitute genocide when committed with the requisite intent.⁴³ This could include destroying a woman's ability to maintain the family unit damaging a woman's fertility, and rendering her undesirable in the eyes of her social community.⁴⁴

Prosecutor v. Akayesu, decided by the ICTR, is considered the most important case for prosecuting rape as an international crime.⁴⁵ It was also the first international tribunal case to link the crime of rape explicitly to genocide.⁴⁶ Interestingly, the Tribunal only made this link as a result of a rather unexpected turn of events. The prosecutor did not initially include rape crimes in the indictment, but the spontaneous testimony of a witness prompted the prosecutor to ask for a leave of court in order to investigate the crimes further and, if need be, amend the indictment.⁴⁷ The support of the Tribunal's only woman judge, Navanethem Pillay, ensured that new evidence would be heard.

A gruesome picture of systematic and mass rape emerged during the trial as witness after witness testified about various episodes of rape and

⁴⁰ *Id.* at 118.

⁴¹ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 2, 102 Stat. 3045, 78 U.N.T.S. 277.

⁴² *Id.*

⁴³ Beth Stephens, *Humanitarian Law and Gender Violence: An End to Centuries of Neglect?*, 3 HOFSTRA L. POL'Y SYMP. 87, 100-01 (1999).

⁴⁴ *Id.*

⁴⁵ *Prosecutor v. Akayesu*, Case No. IT-96-4-T, Judgment. *Akayesu* also provided a clear definition of rape, which has subsequently been cited by ICTY and ICTR rape cases. The significance of this case was in its expansion of prosecution for gender-based crimes. The Trial Chamber recognized sexual violence as an integral part of the genocide in Rwanda and found the accused guilty of genocide for crimes that included sexual violence. The court recognized rape and other forms of sexual violence as independent crimes consisting of crimes against humanity, for which *Akayesu* was found guilty. In the end, the court enunciated a much broader and progressive international definition of both rape and sexual violence as an international crime.

⁴⁶ See Samantha Power, Op-Ed., *The real meaning of genocide*, BOSTON GLOBE, Sept. 14, 1998, at A17.

⁴⁷ See 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, 318 (2003).

other mistreatment of women during the conflict. The Tribunal made explicit findings on the issue of rape and genocide. In the course of its judgment, it found that the acts of rape and sexual violence could constitute genocide. It stated:

With regard, particularly, to the acts described in paragraphs 12(A) and 12(B) of the Indictment, that is, rape and sexual violence, the Chamber wishes to underscore the fact that in its opinion, they 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 infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm. In light of all the evidence before it, the Chamber is satisfied that the acts of rape and sexual violence described above, were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public, in the Bureau Communal premises or in other public places, and often by more than one assailant. These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. 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 whole.⁴⁸

Not only did the Tribunal in *Akayesu* recognize that causing serious bodily or mental harm to members of the group by way of rape can constitute genocide, it also recognized that rape and sexual violence can constitute genocide as found in Article 4(d) of the ICTR Statute. This article provides that “imposing measures intended to prevent births within the group” with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group constitutes genocide.⁴⁹ The Tribunal found that “sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes, and prohibition of marriages” could be construed as measures intended to prevent births within a group.⁵⁰ It also made the critical link between rape and genocidal intent. It found:

[i]n patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent

⁴⁸ *Akayesu*, Case No. IT-96-4-T, at ¶ 731 (citations omitted).

⁴⁹ Statute of the International Criminal Tribunal for Rwanda, S.C. Doc. S/RES/955, art. 2(d), U.N. (Nov. 8 1994) [hereinafter ICTR Statute].

⁵⁰ *Akayesu*, Case No. IT-96-4-T, ¶ 507; see also ARCHBOLD: INTERNATIONAL CRIMINAL COURTS § 13–23 (Rodney Dixon, et al. eds., 2003) (“The *actus reus* of [the] offense [intending to prevent births] consists of the imposition of the conditions or measures; it need not be proven that they actually succeeded.”).

births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group.⁵¹

In another significant development, the Tribunal in *Akayesu* found that the attempt to prevent births in a particular protected group can be physical as well as mental. If a woman who has been raped refused subsequently to have children because of trauma, then a crime has been committed.⁵²

Later, the ICTY would also make the connection between forced pregnancy and genocide, solidifying its credibility in international law. In the *Karadzic and Mladic* decision, the Tribunal found that forced impregnation may constitute evidence of genocidal intent through ethnic cleansing, and it "concluded that the systematic rape of women is in some cases intended to transmit a new ethnic identity to the child, and could constitute genocide."⁵³

V. RAPE AS A CRIME AGAINST HUMANITY

As noted, *Akayesu* is considered the most important case for the prosecution of rape under international law. In that case, the Tribunal not only expressed that rape can constitute genocide, but it also found *Akayesu* responsible under Article 3(g) of the ICTR Statute for the rape of women. Article 3(g) prohibits rape committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.⁵⁴ Because Tutsi women were targeted based on their ethnicity, "the ICTR concluded that the rapes formed part of widespread and systematic attack on a civilian population . . . and that the rape crimes in *Akayesu* were punishable as crimes against humanity."⁵⁵

Kunarac, decided more than three years after *Akayesu*, was the first case in the ICTY to find a person guilty of the crime against humanity.⁵⁶ Significantly, the original indictment itself was also groundbreaking. It centered on eight accused, who were each charged with various forms of sexual

⁵¹ *Akayesu*, Case No. IT-96-4-T, ¶ 507.

⁵² *See id.* ¶ 508.

⁵³ ARCHBOLD INTERNATIONAL CRIMINAL COURTS, *supra* note 52, §13-23.

⁵⁴ ICTR Statute. S.C. Doc. S/RES/955, art. 3(g), U.N. (Nov. 8 1994).

⁵⁵ Christine Strumpfen-Darrie, *Rape: A Survey of Current International Jurisprudence*, 7 HUM. RTS. BR. 12, 13 (2000).

⁵⁶ *See* Press Release, ICTY Judgment of Trial Chamber II in the *Kunarac, Kovac, and Vukovic* Case (Feb. 22, 2001), <http://www.un.org/icty/pressreal/p566-e.htm>.

violence, and the allegations focused exclusively on sex crimes.⁵⁷ In the process of finding the defendants guilty on numerous counts of rape, the *Kunarac* Tribunal also clarified the concept of crimes against humanity under the ICTY Statute.⁵⁸

The most recent definition of crimes against humanity was constructed at the Diplomatic Conference for the establishment of a permanent International Criminal Court in Rome in August 1998. In its final version, the Rome Statute of the International Criminal Court (ICC Statute) reflects the general definition of crimes against humanity under international law.⁵⁹

For the purposes of the Statute, “crimes against humanity” means any of the following acts [which are listed thereafter] when committed as part of a widespread or systematic attack against any civilian population, with knowledge of the attack.⁶⁰

The drafters of the ICC Statute took a major step in expanding the elements composing crimes against humanity, particularly as they related to crimes against women. In comparison to the ICTY and ICTR Statutes, the expanded coverage of the ICC Statute for crimes against women is significant. In addition to the crime of rape, the ICC Statute now clearly codifies several other crimes against women, including sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and sexual violence.⁶¹

⁵⁷ Askin, *supra* note 49, at 333 (citing *Prosecutor v. Gagovic*, Indictment, Case No. IT-96-23 (June 26, 1996).

⁵⁸ In the *Kunarac* decision, the ICTY clarified the expression “an attack directed against any civilian population,” drawing mostly on the jurisprudence of *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, (Jul. 15, 1999) ¶ 251, and noted that the expression is commonly regarded as encompassing the following five elements: (i) there must be an attack; (ii) the acts of the perpetrator must be part of the attack; (iii) the attack must be “directed against any civilian population”; (iv) the attack must be “widespread or systematic”; (v) the perpetrator must know of the wider context in which his acts occur and know that his acts are part of the attack. *Prosecutor v. Kunarac, Kovac, and Vukovic*, Judgment, Case No. IT-96-23/1-A, ¶¶ 128–33 (Jun. 12, 2002), ¶ 410 (citations omitted).

⁵⁹ See e.g., Margaret McAuliffe deGuzman, *The Road from Rome: The Developing Law of Crimes against Humanity*, 22 HUM. RTS. Q. 335, 355 (2002).

⁶⁰ Rome Statute of the International Criminal Court, art. 7, July 17, 1998, 2187 U.N.T.S. 90 (addressing the situation where one person attempts ownership over one or more persons, such as by purchasing, selling, lending, or bartering such a person or persons) [hereinafter ICC Statute].

⁶¹ See *id.* art. 7(1)(g).

VI. RAPE AS A WAR CRIME

*"From time immemorial rape has been regarded as spoils of war . . . now it will be considered a war crime. We want to send out a strong signal that rape is no longer a trophy of war."*⁶²

These words, written by Judge Pillay in the ICTR's *Akayesu* case, were an important recognition of the increasing savagery of rape in times of armed conflict. Rape, which was first recorded as a war crime in 1474, was clearly emerging as a core crime within humanitarian law.⁶³

A major step in this legal development came in 1949, when rape and sexual assault were included in the Geneva Conventions. The jurisdiction to prosecute rape as a violation of laws or customs of war was clearly established.⁶⁴ Rape is included in the following acts committed against persons protected by the 1949 Geneva Conventions: "wilful killing, torture or inhuman treatment, including biological experiments; wilfully causing great suffering or serious injury to body or health."⁶⁵ Rape as a violation of the laws or customs of war generally consists of violations of Article 3 of the 1949 Geneva Conventions, which, in part, prohibits "violence to life and person, in particular . . . mutilation, cruel treatment and torture; outrages upon personal dignity, in particular humiliating and degrading treatment."⁶⁶

Article 27 of the Fourth Geneva Convention, directed at protecting civilians during time of war, states that "women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."⁶⁷

Protocol I of the Geneva Conventions continues to expand the protected rights by providing that "women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any

⁶² Bill Berkeley, *Judgment Day*, WASH. POST, Oct. 11, 1998, (Magazine), at W10.

⁶³ See Chinkin, *supra* note 16.

⁶⁴ See *Prosecutor v. Kunarac, Kovac, and Vukovic*, Judgment, Case No. IT-96-23/1-T (Feb. 22, 2001), ¶ 436 (citations omitted).

⁶⁵ Fourth Geneva Convention, *supra* note 23, art. 147.

⁶⁶ See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 3(1)(c), 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 3(1)(c), 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, art. 3(1)(c), 75 U.N.T.S. 973; Fourth Geneva Convention, *supra* note 23, art. 3(1)(c). Article 3 common to all four Geneva Conventions has attained the status of customary international law, applicable to international, or internal armed conflicts. See *Prosecutor v. Kunarac, Kovac, and Vukovic*, Judgment, Case No. IT-96-23/1-T (Feb. 22, 2001), ¶ 406 (citing *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, ¶¶ 98, 134 (Oct. 2, 1995).

⁶⁷ Fourth Geneva Convention, *supra* note 23, art. 27.

form of indecent assault.”⁶⁸ For non-international armed conflicts, Protocol II of the Geneva Conventions protects against “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.”⁶⁹

In *Prosecutor v. Furundžija*,⁷⁰ the ICTY addressed the war crime of “outrages upon personal dignity.” In that case, the prosecutor charged the defendant, Furundžija, under Article 3 of the ICTY Statute, which generally prohibits violations of the laws or customs of war, alleging that he had committed “outrages upon personal dignity including rape.”⁷¹ The charges stemmed from an incident where a woman was forced to stand naked on a table before a group of laughing soldiers. While standing on the table, one of the accused stuck a knife against the woman’s thigh and threatened her with sexual mutilation if she did not cooperate.⁷² Later in the day, she was raped several times and in multiple ways (orally, anally, and vaginally).⁷³ In light of the facts presented at trial, the Tribunal found that the woman suffered severe physical and mental pain, along with public humiliation, which amounted to outrages upon her personal dignity and sexual integrity.⁷⁴

Kunarac also addressed the war crime of outrages upon personal dignity in relation to sexual offenses.⁷⁵ The Tribunal found one defendant, Kovac, guilty of outrages upon personal dignity for acts that involved sexual humiliation. Although rape was not punished as an outrage upon personal dignity (it was punished as a separate war crime and a crime against humanity), the case remains important in the development of jurisprudence relating to crimes against women. It is also important because it provided a new definition of “outrages upon personal dignity”—a definition that may be used in future prosecutions of this crime that involve rape. In its judgment, the Tribunal held that an outrage upon personal dignity requires the following:

⁶⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Article 76(1), 1125 U.N.T.S. 4.

⁶⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Article 4(2)(e) June 8, 1977, 1125 U.N.T.S. 610.

⁷⁰ Judgment, Case No. IT-95-17/1 (Dec. 10, 1998).

⁷¹ Amended Indictment at Count 14, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-PT (June 2, 1998), available at <http://www.un.org/icty/indictment/english/fur-1a1980602e.htm> (last visited Sept. 23, 2003). See also ICTY Statute, U.N. SCOR, 48th Sess., R.C. Res.827, art. 3, U.N. Doc. S/RES/827 (May 25, 1993).

⁷² *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, ¶ 82. (Dec. 10, 1998).

⁷³ *Id.*

⁷⁴ *Id.* ¶ 272.

⁷⁵ Judgment, Case No. IT-96-23/1-T (Feb. 22, 2001).

- (i) that the accused intentionally committed or participated in an act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity, and
- (ii) that he knew that the act or omission could have that effect.⁷⁶

The Tribunal openly departed from the definition articulated in *Prosecutor v. Aleksovski*,⁷⁷ finding that “real or lasting suffering” was not an essential element of the crime:

In the view of the Trial Chamber, it is not open to regard the fact that a victim has recovered or is overcoming the effects of such an offence as indicating of itself that the relevant acts did not constitute an outrage upon personal dignity. Obviously, if the humiliation and suffering caused is only fleeting in nature, it may be difficult to accept that it is real and serious. However this does not suggest that any sort of minimum temporal requirement of the effects of an outrage upon personal dignity is an *element* of the offence.⁷⁸

Similarly, the ICC does not appear to require an outrage upon personal dignity to have a long-lasting or permanent effect. Article 8(2)(c)(ii), listing the elements of the war crime of outrages upon personal dignity, does not list it as a requirement that must be met in order to secure a conviction.⁷⁹

VII. RAPE UNDER THE ICC STATUTE

The decision of the ICC Statute’s drafters to include a specific reference 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 ICC Statute codifies much of what was first articulated in the ICTY and the ICTR, but not enumerated as a crime in their respective Statutes. The two Tribunals do not define rape as an *individual crime* and do not include other forms of sexual violence.⁸⁰ Although the Tribunals have convicted persons for behavior amounting to sexual slavery and sexual violence, neither of the two crimes is found in the ICTY or ICTR Statute.⁸¹ In a seemingly small, but very important advancement, the ICC criminalizes sexual slavery and sex-

⁷⁶ *Id.* ¶ 514.

⁷⁷ Judgment, Case No. IT-95-14/1-A (Mar. 24, 2000).

⁷⁸ Kunarac, Case No. IT-96-23/1-T ¶¶ 500-01.

⁷⁹ Preparatory Commission for the Int’l Criminal Court, *Finalized Draft Text of the Elements of Crimes*, art. 8(2)(c)(ii), U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000) [hereinafter *Elements of Crimes*].

⁸⁰ Mitchell, *supra* note 8, at 241.

⁸¹ See ICTY Statute, U.N. SCOR, 48th Sess., R.C. Res.827, U.N. Doc. S/RES/827 (May 25, 1993); ICTR Statute, S.C. Doc. S/RES/955, U.N. (Nov. 8 1994).

ual violence.⁸² It also recognizes a number of violent sexual acts generally accepted as crimes in international law.

Similar to the ICTY and ICTR Statutes, rape is codified as a crime in the ICC Statute. The ICC Statute, however, significantly enhances the crime of rape by including it as both a crime against humanity and a war crime.⁸³ Rape was not expressly considered a war crime or a grave breach of the Geneva Conventions under either the ICTY or ICTR Statutes.⁸⁴ While the Statutes explicitly refer to rape as a crime against humanity, only the ICTR Statute explicitly refers to rape as a war crime.⁸⁵ Because the burden of proof is lower for war crimes, this inclusion will allow prosecutors greater latitude in charging individuals with rape.⁸⁶

The ICC mirrors the advancements of the Tribunals in another important respect. Developing and articulating a definition of rape was one of the major achievements of the ICTY and ICTR. Unlike the ICTY and the ICTR, which had to synthesize a definition of rape by examining the crime in the legal systems of the rest of the world, the elements of rape are now codified by the ICC. The ICC will not have to concern itself with establishing its own definition of rape. Although the context of the crime differs depending on whether it is a war crime or a crime against humanity,⁸⁷ the essential elements of the act itself ultimately remain the same, regardless of whether or not it is committed in the context of war or as part of a widespread or systematic attack on a civilian population. These “unwavering” elements of rape are the following:

⁸² See ICC Statute, arts. 7(1)(g), 8(2)(b)(xxii) & 8(2)(e)(vi), July 17, 1998, 2187 U.N.T.S. 90.

⁸³ See *id.*

⁸⁴ Mitchell, *supra* note 8, at 241.

⁸⁵ ICTY Statute, U.N. SCOR, 48th Sess., R.C. Res.827, art. 5(g), U.N. Doc. S/RES/827; (rape as a crime against humanity); ICTR Statute, S.C. Doc. S/RES/955, art. 3(g), U.N. (rape as a crime against humanity); ICTR Statute, S.C. Doc. S/RES/955, art. 4(e), U.N. (rape as a war crime).

⁸⁶ Crimes against humanity require “widespread or systematic attack” and war crimes require a “plan or policy.” See *e.g.* The Prosecutor v. Tadic, Case. No. IT-94-1, Judgment, 7 May 1997, ¶ 646–47.

⁸⁷ If it is a crime against humanity, the rape must be committed as part of a widespread or systematic attack directed against a civilian population and the perpetrator must know that the conduct is part of, or intended the conduct to be part of, a widespread or systematic attack directed against a civilian population. See Elements of Crimes, *supra* note 81, arts. 7(1)(g)-(3),-(4). If a crime is committed in a war of an international character, the conduct must take place in the context of, and be associated with, an international conflict and the perpetrator must be aware of the factual circumstances that established the existence of an armed conflict. See *id.*, arts. 8(2)(b)(xxii)-1(3),(4). It is also a war crime to rape in a war not of an international character. The elements of the crime are identical to when it is an international war crime, except that the conduct must be associated with a non-international armed conflict. See *id.*, arts. 8(2)(e)(vi)-1(3),(4).

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power, against such person or another person, or by taking advantage of a coercive environment or the invasion was committed against a person incapable of giving genuine consent.⁸⁸

Ultimately, the ICC Statute contains the essential definition of rape that came out of the ICTR and ICTY cases and retains much of the language first used by these Tribunals. For example, it includes the elements of force and coercion articulated by the *Akayesu* and *Furundžija* decisions,⁸⁹ but the ICC Statute also recognizes that the inability to give consent, as illuminated by the *Kunarac* decision,⁹⁰ is an important element of rape.

The ICC Statute also establishes rape as a grave breach of the Geneva Conventions. Article 8 (2)(b)(xxii) of the Statute states:

Committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions.

In essence, the Statute attempts to codify rape as a grave breach of customary international law.⁹¹

The ICC's characterization of genocide also reflects that of the Tribunals. In line with the jurisprudence of the ICTR and the ICTY, the ICC recognizes that rape can constitute genocide. Article 6 of the ICC Statute provides that genocide can be committed by "causing serious bodily or mental harm" to members of "a national, ethnical, racial or religious group," with the "intent to destroy" that group.⁹² The accompanying elements of this crime provide further clarification of the concept. A footnote to Article 6(b) of the Elements of Crimes provides that genocide by causing serious bodily or mental harm can include the conduct of rape.⁹³

The concept of torture is another area where the ICC and the Tribunals converge. The ICTY and the ICC have adopted similar positions on the

⁸⁸ See Elements of Crimes, *supra* note 81, arts. 7(1)(f)(1)(2), 8(2)(b)(xxii)-1(1),(2) & 8(2)(e)(vi)-1(1),(2).

⁸⁹ See Prosecutor v. *Akayesu*, Case No. IT-96-4-T, Judgment, ¶ 597 (Sept. 2, 1998); Prosecutor v. *Furundžija*, Case No. IT-95-17/1-T, Judgment, ¶ 185 (Dec. 10, 1998).

⁹⁰ See Prosecutor v. *Kunarac*, *Kovac*, and *Vukovic*, Judgment, Case No. IT-96-23/1-T (Feb. 22, 2001), ¶¶ 458-60.

⁹¹ See Mitchell, *supra* note 8, at 243.

⁹² ICC Statute, art. 6(b), July 17, 1998, 2187 U.N.T.S. 90.

⁹³ Elements of Crimes, *supra* note 81, art. 6(b) n.3.

meaning of torture when it is a crime against humanity. It should be noted, however, that the ICC's definition is slightly less stringent. While both the ICC and the ICTY Statutes have purged the requirement that a public official must be inflicting the mental or physical harm, the ICC's definition also explicitly excludes other elements of torture, as found in the Torture Convention, and essentially adopts the definition used by the ICTY when it is a war crime.⁹⁴ Absent from the ICC's definition is the requirement that there be a purpose to either obtain a confession from the victim or third party, to punish the person for an act, or to intimidate or coerce the victim or third party based on discrimination of any kind.⁹⁵ Ultimately, the ICC Statute's definition should make it easier to convict rapists of torture by recognizing that the intent to cause someone severe physical or mental pain, in and of itself, is a significant crime.

The wording of the persecution prohibition in the ICC Statute is also a noteworthy contribution to international law. Unlike the Statutes of the ICTY and the ICTR, the ICC's Statute specifically prohibits persecution based on gender.⁹⁶ Article 7(1)(h) of the ICC Statute provides:

For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (h) Persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender, . . . or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.⁹⁷

Even though the persecution of women by rape has already been prosecuted in the ICTY absent a classification specifically recognizing gen-

⁹⁴ See Askin, *supra* note 49, at 328 ("In determining the appropriate definition of torture to utilize in [*Furundžija*], the Trial Chamber adopted the definition of torture found in the Torture Convention, which imposes a 'state actor' requirement."). Additionally, the ICTY expanded the list of prohibited purposes behind the Torture Convention's definition of torture by stating that "among the possible purposes of torture one must also include that of humiliating the victim." *Id.* at 329 (quoting *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, (Dec. 10, 1998)).

⁹⁵ See *generally* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46 [annex, 39 U.N. GAOR, 3rd Sess., Supp. No. 21, U.N. Doc. A/39/51 (Dec. 10, 1984)].

⁹⁶ Both the ICTY and the ICTR Statutes prohibit persecution based on political, racial, and religious grounds. ICTY Statute, U.N. SCOR, 48th Sess., R.C. Res.827, art. 5(h), U.N. Doc. S/RES/827 (May 25, 1993); ICTR Statute, S.C. Doc. S/RES/955, art. 3(h), U.N. (Nov. 8, 1994).

⁹⁷ ICC Statute, art. 7(1)(h), July 17, 1998, 2187 U.N.T.S. 90.

der as a reason for persecution,⁹⁸ its inclusion in the ICC Statute is significant. The clearly-defined prohibition of persecution based on gender in the ICC Statute will allow a broader spectrum of crimes against women to be prosecuted in the future. The treatment of women in Afghanistan under Taliban rule is one example of persecution based solely on gender. If such crimes continue to occur, it will be possible to prosecute the perpetrators under this provision (as well as many other crimes against humanity).⁹⁹ Ultimately, what is perhaps most important about this provision in the ICC Statute is that it signifies that the international community recognizes the role that gender can play in criminal behavior and is ready to prosecute gender-based violence.

VIII. OTHER ISSUES

A. *Reparations*

Because the drafters of the ICTY Statute did not concentrate on victim compensation, there has been very little focus on restitution and reparations for victims of the Bosnia and Kosovo conflicts in that court. While there has not been much effort to address victim restitution and reparation, the ICTY does provide victims with an avenue of relief. Under Rule 106 of the ICTY Rules of Procedure and Evidence, the Tribunal transmits its findings that the accused caused injury to the victim to the competent authorities of a given state.¹⁰⁰ Subsequent to this transmittal, the victim (or his/her representative) may bring an action in a national court or other competent body to obtain compensation.¹⁰¹ In the ICC, victims no longer have to resort to the national courts to receive civil damages. The Court has the authority to determine the extent of a victim's damages, including injuries,¹⁰² as well as the power to give reparations directly to victims.¹⁰³

⁹⁸ See *Prosecutor v. Kvočka*, Case No. IT-98-30/1-T, Judgment, (Nov. 2, 2001) (documenting that the Trial Chamber found the accused guilty of co-perpetrating, as part of a joint criminal enterprise, persecution against women under Article 5 of the Statute).

⁹⁹ Afghanistan acceded to the Rome Treaty on Feb. 10, 2003. See FIRST RESUMPTION OF THE FIRST SESSION OF THE ASSEMBLY OF STATES PARTIES TO THE INTERNATIONAL CRIMINAL COURT, Feb. 7, 2003, available at <http://www.un.org/law/icc/asp/firstresumed.feb03.htm>. Accordingly, if there continues to be persecution against women, there could be individual criminal responsibility in the ICC.

¹⁰⁰ ICTY Rules of Procedure and Evidence, *supra* note 31, R. 106(A).

¹⁰¹ *Id.* R. 106(B).

¹⁰² ICC Statute, art. 75(1), July 17, 1998, 2187 U.N.T.S. 90 (“[I]n its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principle on which it is acting.”).

¹⁰³ The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation, and rehabilita-

Article 75 of the ICC Statute enables the Court to make reparations to victims. It reads, in part:

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitutions, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.

A recent report from a U.N. independent expert on combating impunity supported the need to implement a progressive reparations program for victims of sexual violence,¹⁰⁴ stating that:

Recent experience has also highlighted the need to ensure that victims of sexual violence know that the violations they endured are included in reparation programmes and, more generally, to ensure that victims belonging to traditionally marginalized groups are able effectively to exercise their right to reparations. Besides ensuring the effective implementations of reparations programmes, disseminating information about applicable procedures may advance two core aims of reparations programmes in situations entailing the restoration of or transition to democracy and/or peace—providing recognition to victims as citizens who bear equal rights vis-à-vis other citizens and facilitating their trust in State institutions.¹⁰⁵

tion. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79. *Id.* art. 75(2). *See also* Preparatory Comm'n for the Int'l Criminal Court, *Finalized draft Text of the Rules of Procedure and Evidence*, R. 97(1), U.N. Doc. PCNICC/2000/1/Add.1, (Nov. 2, 2000) (providing that the court may order reparations to a victim on an individualized basis, on a collective basis, or both). *See also* Rosalind Dixon, *Rape as a Crime in International Humanitarian Law: Where To From Here?* 13 *EUR. J. INT'L L.* 697, 710 (2002) (criticizing the ICC system and noting that “[u]nder the ICC Statute, there is no provision for victims to initiate a claim for compensation, or even, once criminal proceedings have concluded, to seek compensation or to make representations on their own behalf *as of right*”).

¹⁰⁴ Diane Orentlicher, *Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, E/CN.4/2005/102/Add.1 (Feb. 18, 2005).

¹⁰⁵ *Id.* ¶ 60.

B. Protecting the Victims of Rape

The Tribunals of the ICTY and ICTR were able to see and hear about the long-lasting emotional consequences that women face after being raped and sexually assaulted. In both Tribunals, women who testified received much needed access to psychological counseling and special security protections.¹⁰⁶ The ICC judicial scheme pays the same attention to the well-being of the victims of crimes who testify before the Court.¹⁰⁷

The focus on victims' rights represents one of the most innovative aspects of the ICC Statute. The Statute provides that, "[w]here the personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court"¹⁰⁸

The ICC's Victims and Witness Unit has the responsibility of "informing victims of their rights under the Statute and Rules" and for "[e]nsuring that they are aware, in a timely manner, of the relevant decisions of the Court that may have an impact on their interests."¹⁰⁹

Like the ICTY and the ICTR, victims who testify before the ICC have access to psychological counseling.¹¹⁰ In fact, the ICC Statute recognizes the particular sensitivity of victims of sexual violence. It provides that the Victim and Witnesses Unit "shall include staff with expertise in trauma, including trauma related to crimes of sexual violence."¹¹¹

The Office of the Prosecutor of the ICC will also play a significant role in protecting and dealing with those affected by rape and other sexual

¹⁰⁶ ICTY Statute, *supra* note 5; ICTR Statute, *supra* note 49.

¹⁰⁷ See ICC Statute, art. 43(6), July 17, 1998, 2187 U.N.T.S. 90; ICC Rules of Procedure and Evidence, *supra* note 105, R. 16–19.

¹⁰⁸ See ICC Statute, art 68(3), July 17, 1998, 2187 U.N.T.S. 90.

¹⁰⁹ ICC Rules of Procedure and Evidence, *supra* note 105, R.16(2)(a)(b).

¹¹⁰ Compare ICC Statute, art. 43(6), July 17, 1998, 2187 U.N.T.S. 90, which provides, in pertinent part:

This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

with Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, R. (34)(A)(ii), U.N. Doc. ITR/3/REV.1 (1995) ("There shall be set up under the authority of the Registrar of Victims and Witnesses Support Unit consisting of qualified staff to [e]nsure that they receive relevant support, including physical and psychological rehabilitation, especially counselling in cases of rape and sexual assault"), and ICTY Rules of Procedure and Evidence, *supra* note 31, R. 34(A)(ii) ("There shall be set up under the authority of the Registrar a Victims and Witnesses Section consisting of qualified staff to . . . provide counselling and support for them, in particular cases of rape and sexual assault.").

¹¹¹ ICC Statute, art. 43(6), July 17, 1998, 2187 U.N.T.S. 90.

crimes. Article 42(9) of the ICC Statute specifically obliges the Prosecutor to “appoint advisers with legal expertise on specific issues, including . . . sexual and gender violence and violence against children.”¹¹² A Gender and Child Unit, under the Investigation Division of the Office of the Prosecutor, has been established—along with the Victims and Witness Unit, it will assist the Prosecutor in dealing specifically with issues arising from victims and witnesses of sexual crime.¹¹³

The ICC will also have to conduct an extensive and diverse outreach campaign in order to make victims of sexual violence aware of their rights within the structure of Court proceedings. Unfortunately, a large number of individuals and communities will likely be victims of sexual violence during internal or external strife. They will need to be informed of all available remedies for securing assistance as a result of being victimized by sexual violence.

The ICC, as well as the ICTY and ICTR, provides security protection to those who face danger as a result of their testimony.¹¹⁴ Article 68 of the ICC Statute provides, *inter alia*, that “[t]he Court shall take appropriate measures to protect the safety . . . [and] physical . . . well-being . . . of victims.”¹¹⁵ These measures include ensuring confidentiality (although not anonymity) through *in camera* proceedings and testifying by electronic or other means.¹¹⁶ In deciding whether to grant special protections, the ICC has to consider “relevant factors,” such as “gender” and “the nature of the crime . . . [and] whether the crime involves sexual or gender violence.”¹¹⁷

Although the ICC’s attention to the well-being of victims and their security is not unprecedented, it remains important because it signifies a

¹¹² *Id.* art. 42(9); see also THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 272 (Antonio Cassese et. al. eds., 2002).

¹¹³ There is little information on what the tasks of the Gender and Children Unit will be. According to the information posted on the Coalition of the International Criminal Court website, the Unit is to work closely with the Victims and Witnesses Unit in assisting the Office of the Prosecutor. Coalition for the International Criminal Court, Victims and Witnesses Background, <http://www.iccnw.org/?mod=victimbackground> (last visited Oct. 11, 2006).

¹¹⁴ See ICC Statute, art. 68, July 17, 1998, 2187 U.N.T.S. 90; ICC Rules of Procedure and Evidence, 105, R. 85–86; ICTY Statute, U.N. SCOR, 48th Sess., R.C. Res.827, art. 22, U.N. Doc. S/RES/827 (May 25, 1993), (Article 22 of the ICTY Statute provides *inter alia* that “protection measures shall include, but shall not be limited to, the conduct of *in camera* proceeding and the protection of a victim’s identity.”); ICTR Statute, S.C. Doc. S/RES/955, art. 21, U.N. (Nov. 8, 1994) (“The international Tribunal for Rwanda shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of the victims.”).

¹¹⁵ ICC Statute art. 68(1).

¹¹⁶ See Chinkin, *supra* note 16.

¹¹⁷ ICC Statute, art. 68(1).

recognition of victims and their continuing needs during and after the culmination of a trial, especially those who were victims of rape and sexual violence. The experience of the ICTY and ICTR “has shown how crucial it is for any international criminal tribunal to arrange for the protection and assistance of victims and witnesses who appear before the [ICC] so as to contribute to the establishment of truth about the most serious crimes existing.”¹¹⁸ It has also shown that the consequences of war leave emotional scars that are very complex and difficult, if not sometimes impossible, to repair.

The ICC is currently conducting investigations in Sudan, Uganda, the Central African Republic, and the Republic of Congo.¹¹⁹ Alleged incidents of rape and sexual violence were reported to the Office of the Prosecutor in Sudan and Uganda.¹²⁰ It will be of interest to see how the different units and organs of the ICC will function to protect alleged victims and witnesses.

IX. WHAT NEXT?

This article demonstrates that recognition of the seriousness of rape as a crime in international law has grown dramatically in the last ten years, largely through the prosecution and subsequent jurisprudence of the ICTY and the ICTR. As a result of the advancements stemming from the ICTY and ICTR, rape can be prosecuted as a subset of a war crime, as a crime against humanity, or as genocide. With the advent of the ICC, awareness and sensitivity to the crime will only continue to grow. In that Court, sexual slavery, sexual violence, and persecution based on gender can be prosecuted as named statutory crimes—something not possible in the ICTY or ICTR.

While the close of the twentieth century saw great advancements in the law of rape as an international crime—with its prosecution as crimes against humanity, genocide, and war crimes—many have noted that it cannot be prosecuted on an international level as a crime, in and of itself, as part of *jus cogens* within international law. There are those who argue that rape should stand as an international crime on its own—not as a subsection of another crime. The failure to define rape as a separate crime permits serious violence to be viewed as a “lesser” crime.¹²¹

¹¹⁸ International Criminal Court, *Victims and Witnesses Protection*, <http://www.icc-cpi.int/php/show.php?id=witnessprotection> (last visited Nov. 1, 2003).

¹¹⁹ See ICC, Situations and Cases, <http://www.icc-cpi.int/cases.html> (last visited Oct. 11, 2006).

¹²⁰ See REPORT OF THE INTERNATIONAL COMMISSION OF INQUIRY ON DARFUR TO THE UNITED NATIONS SECRETARY-GENERAL, http://www.icc-cpi.int/cases/current_situations/Darfur_Sudan.html; ICC, BACKGROUND INFORMATION ON THE SITUATION IN UGANDA, http://www.icc-cpi.int/cases/current_situations/Uganda.html (last visited Oct. 11, 2006).

¹²¹ See Mitchell, *supra* note 8, at 251.

Prosecuting rape as a subset of another crime may, in fact, seem to make the crime of rape less distinctive. However, including it as a subset of crimes against humanity, genocide, or war crimes draws attention to the heinous nature of the crime. This article shows that rape has not always been recognized as the grave crime that it is. In fact, up until the twentieth century rape was widely regarded as “the spoils of war,” and only in the last decade have people been widely prosecuted and convicted for taking part in and approving of the crime. Aligning rape with crimes that have been universally recognized as among the worst acts of mankind demonstrates that rape is equally grave. Perhaps in the future, the crime of rape will stand alone and be subject to universal jurisdictions under customary international law. The work of the ICC will assist in this objective.

Looking ahead, the ICC has great potential to serve as a deterrent and prosecutor of some of the world’s worst crimes, including rape. Now that the jurisprudential foundations have been laid (largely by the ICTY and the ICTR), the prosecutors and judges of the ICC will have the tools to effectively prosecute and punish criminals who commit rape and other gender-related crimes. As more states ratify the ICC Statute and as other states begin to utilize the Statute’s functions, the reach of the Court will increase, and the distance between the perpetrators of rape and justice will gradually dissipate. As long as perpetrators continue to commit heinous acts of violence such as rape, we should never be satisfied. However, it is equally important that we applaud the significant recent achievements of the international community.

