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# Prosecuting Crimes of Sexual Violence in an International Tribunal

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## PROSECUTING CRIMES OF SEXUAL VIOLENCE IN AN INTERNATIONAL TRIBUNAL

*Peggy Kuo, Esq.\**

Thank you. It is an honor and a pleasure to address you today at the law school. It is also a great honor for me to be among the speakers in this series, such as Justice Richard Goldstone and Professor Harold Koh, both of whom are extraordinarily distinguished in their careers in human rights.

I would like to talk to you today about women and war crimes, with a specific focus on a trial which I helped conduct last year. On February 22, 2001, a trial chamber at the International Criminal Tribunal for the Former Yugoslavia found three Bosnian Serb soldiers guilty of war crimes and crimes against humanity for sexual violence perpetrated in Eastern Bosnia against Muslim women and girls in 1992 and 1993. *The New York Times* called this case, sometimes referred to as the “Foca rape case” after the municipality where the incidents occurred, a “landmark ruling on rape.”<sup>1</sup> It stated in an editorial, “The decision shows the progress that women’s issues have made in international justice, which used to ignore mass rape, considering it a natural occurrence in war.”<sup>2</sup> I would like to address whether this is indeed progress, what progress has been made, and what progress still needs to be made.

Rape during wartime is as old as war itself, and so is sexual enslavement, in which women were treated as the booty of war. In *The Iliad*, which describes war in ancient Greece, the conflict which sets the whole plot into action is between two military leaders over a woman captured from the enemy who was enslaved as a result of the army going in and conquering that land. In more modern times, there was the invasion of Nanking during World War II. This incident became known as the Rape of Nanking, using rape not just as a metaphor, but also because the Japanese troops committed rape against the civilian Chinese population on a massive scale.<sup>3</sup> If you walk through any art museum in Europe, you will see classical paintings depicting wartime and the atrocities that occurred during war, including rape. Rape was considered for centuries not only as a

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<sup>1</sup> *A Landmark Ruling on Rape*, N.Y. TIMES, Feb. 24, 2001, at A12.

<sup>2</sup> *Id.*

<sup>3</sup> See, e.g., IRIS CHANG, *THE RAPE OF NANKING: THE FORGOTTEN HOLOCAUST OF WORLD WAR II* 6 (1997).

natural part of war, but in some cases, as part of a romanticized version of war.

So, does this mean rape has always been an *accepted* occurrence in war? In modern history, during the American Civil War, President Lincoln enacted the Lieber Code to deal with the conduct of Union soldiers.<sup>4</sup> Among the prohibitions was that against rape. While there have always been prohibitions in the codes of conduct of war regarding atrocities, for example, against murdering civilians and requiring respect for people not involved in the combat, the Lieber Code contains one of the first *explicit* prohibitions against rape.<sup>5</sup> Thereafter, in conventions and treaties such as the Fourth Hague Convention of 1907, there is the concept of protection of family honor and rights.<sup>6</sup> People understood what this term meant, even without specific reference to rape.

Up until after World War II, there were really few enforcement mechanisms except by the military commanders themselves. So, under the Lieber Code, for example, rape, along with other atrocities, was punishable by the military commanders who were given the power to execute a soldier immediately if that person committed one of the prohibited acts.<sup>7</sup>

After World War II, as you know, there were two international military tribunals set up, one in Nuremberg<sup>8</sup> and the other in Tokyo.<sup>9</sup> In neither of

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<sup>4</sup> U.S. Dep't of Army, Gen. Orders No. 100, art. 44 (1863), *reprinted in* THE LAWS OF ARMED CONFLICT (D. Schindler & J. Toman eds., 3rd ed. 1988), *available at* <http://www.civilwarhome.com/liebercode.htm> (last visited Sept. 3, 2003) [hereinafter Lieber Code]. Art. 44 states: "All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense. A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior." Article 37 holds: "The United States acknowledge and protect, in hostile countries occupied by them, religion and morality, strictly private property; the persons of the inhabitants, especially those of women, and the sacredness of domestic relations. Offenses to the contrary shall be rigorously punished."

<sup>5</sup> *Id.*

<sup>6</sup> Hague Convention with Respect to the Laws and Customs of War on Land, Oct. 18, 1907, art. 46, 36 Stat. 2277, T.S. No. 539 [hereinafter Hague Convention IV] ("Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.").

<sup>7</sup> Lieber Code, *supra* note 4.

<sup>8</sup> See Judgement of the International Military Tribunal at Nuremberg, *reprinted in* TRIALS OF MAJOR WAR CRIMINALS BEFORE THE INT'L MILITARY TRIBUNAL, Nuremberg, Nov. 14, 1945-October 1, 1946, Vol. 22, at 411-589 (1947).

the judgments of those tribunals was there specific mention of rape. There was evidence presented during those trials and, in fact, rape is included among the atrocities that occurred and that the defendants were found guilty of in Tokyo, but the judges in those cases shied away from dealing with the matter explicitly. Rather, they dealt more thoroughly with what they considered greater crimes – murder, mass deportation, and mass enslavement. In the Tokyo judgment, rape was included but only as part of the greater atrocities committed by the top military commanders.

So, the crimes of sexual violence during wartime did not really receive attention in proportion to their occurrence. In fact, the abuse of the so-called “comfort women” by the Japanese military during World War II was not addressed until very recently. Last year, there was a symbolic trial held in Tokyo in which the victims were given the opportunity to tell their stories.<sup>10</sup> Many of victims were elderly women in their seventies, who at the time were young women and were taken by the Japanese military to serve the sexual needs of the Army. Even though the accused – the potential defendants in those cases – are long dead and even though there was not much cooperation from the Japanese military, the women were called forth to testify and tell their stories so that the world could hear what happened and so that their testimony could be preserved.

Up to this point, there has not been much attention paid in the legal sphere or in the context of criminal trials that would serve as a way of setting down testimony and evidence which would have real concrete consequences for individuals so that individuals could be brought to justice and account for the things that they did. To be sure, back in the times of post-World War II, the world was very different, and many of the things that we take for granted regarding crimes committed against women and the way the legal system deals with them did not exist. For instance, the rape shield laws that exist today to protect rape victims did not exist; women did not have the right in the United States to serve on juries,<sup>11</sup> and there were very few women judges, lawyers, or investigators.

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<sup>9</sup> See generally 2 PRICHARD, THE TOKYO MAJOR WAR CRIMES TRIAL, THE RECORDS OF THE RECORDS OF THE INT’L MILITARY TRIBUNAL FOR THE FAR EAST WITH AN AUTHORITATIVE COMMENTARY AND COMPREHENSIVE GUIDE §8, (1988).

<sup>10</sup> See <http://www.crimesofwar.org/onnews/comfort.html> (last visited Oct. 5, 2003) for more information on the Women’s International War Crimes Tribunal.

<sup>11</sup> *Taylor v. Louisiana*, 419 U.S. 522, 532 (1975). The Court reversed its 1961 position about the Sixth Amendment rights of criminal defendants and held that exclusion of women from juries is impermissible. Women are a “distinctive group” and “sufficiently numerous and distinct from men” that jury pools without them are a violation of a defendant’s right to be tried before a true cross-section of the community. “If it was ever the case that women were unqualified to sit on juries or were so situated that none of them should be required to perform jury service, that time has long since passed.”

Fifty years later in 1992, the legal world in which the atrocities in the Balkans occurred had changed dramatically. That certainly helped contribute to a change in people's attitudes. Certainly, the attention paid to what happened to women in the Balkans was a direct consequence of the outrage by the international community, non-governmental organizations, women's groups, the media, and individual journalists who had the courage to go into the war zones, talk to women, record their testimony, and bring the information to the world. Also, there was a great change because women were more willing, having been given this voice, to speak out and let the world know that this was happening. This kind of change in the entire legal community and society at large made the kind of prosecution that occurred in the Foca case possible.

If you look at proceedings at the International Military Tribunal in Nuremberg, for instance, women were nearly invisible. In a book of photographs from that trial, there are pictures of the defendants, the lawyers, the judges – all men.<sup>12</sup> You might see a woman as a stenographer or interpreter here and there. One photograph stood out because it shows all women: it was taken in one of the back rooms where the secretaries were compiling documents. In contrast, the photographs of the Tribunal today show the presence of women as judges, lawyers, investigators, and witnesses. That is a big difference.

When war broke out in the Balkans in 1991, what shocked the world was not just the fact that the war had occurred, but also the reports of atrocities that were happening there. We all saw the pictures of emaciated men in concentration camps, which brought back memories of the Nazi concentration camps. But those pictures were not the only things that shocked the world. We also heard about so-called “rape camps,” where women and girls were reportedly held specifically for the purpose of being raped.<sup>13</sup>

Calls went out in the international community that something had to be done. In response, the U.N. Security Council passed a resolution creating the first International Criminal Tribunal since Nuremberg and Tokyo, dealing specifically with the crimes in the Former Yugoslavia.<sup>14</sup> Among the crimes that the U.N. Security Council included in its mandate to the Tribunal was rape. In his report, the Secretary-General of the United Nations specifically condemned the systematic rape of women, stating, “The Security Council condemned once again all violations of international humanitarian law including, in particular, the practice of ‘ethnic cleansing’

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<sup>12</sup> RAY D'ADDARIO & KLAUS KASTNER, *DER NUERNBERGER PROZESS: DAS VERFAHREN GEGEN DIE HAUPTKRIEGSVERBRECHER 1945-1946 / Mit 200 Abbildungen* (2000).

<sup>13</sup> See, e.g., ROY GUTMAN, *A WITNESS TO GENOCIDE* (1993); See also MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HEREGOVINA (Alexandra Stiglmyer, ed., 1994).

<sup>14</sup> S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg. at 1, U.N. Doc. S/RES/808 (1993).

and the massive, organized and systematic detention and rape of women.”<sup>15</sup> So, imbedded in the very foundations of the Tribunal was an emphasis on the crimes against women, including rape.<sup>16</sup>

You have heard Justice Goldstone talk about the early days of the Tribunal and the difficulties they faced. In a nutshell, when the Tribunal was created in 1993, no one knew whether it would survive or not. In fact, there were probably people who hoped it would not. It seems sometimes as if it were an unwanted child left in the woods to die, but who by some miracle was picked up and adopted by a kindly woodcutter and his wife. Thus, the child grew to maturity.

And grow we have. In 1993, the budget for the Tribunal was \$276,000; today, it is \$96 million.<sup>17</sup> It has a staff of 1,100 people, and that includes judges, security guards, lawyers, investigators, and computer experts. It is probably the largest component of the U.N. and certainly the largest part of their budget. And the UN is not happy about it. We always have problems going to U.N. Headquarters in New York and asking for money for the budget. The U.N. says, “Well, we gave you a mandate, but we really wanted you to do it for under a million dollars, and we hoped you could do it in maybe three years.” But we are still here and we are still going strong. That is good news and bad news, I think, because it would have been nice to have finished everything, but there is a lot of work still to be done. At the moment, we have about forty-seven people in custody, including former Yugoslav President Slobodan Milosevic, whose trial will take a long time, perhaps several years. And he is not the only person whose trial is coming up. The whole process will take many more years, and that is unexpected for many people.

So what place has actually been given at the Tribunal for crimes against women? The first Chief Prosecutor, Richard Goldstone, was

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<sup>15</sup> *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, 48th Sess., at ¶ 11, U.N. Doc. S/25704 (1993), available at <http://www.un.org/icty/basic/statut/S25704.htm> (last visited Sept. 17, 2003) [hereinafter Report]. The report also asserted, “Given the nature of the crimes committed and the sensitivities of victims of rape and sexual assault, due consideration should be given in the appointment of staff to the employment of qualified women.” *Id.* at ¶ 88. Further, “[n]ecessary protection measures” were also called for, “especially in cases of rape or sexual assault.” *Id.* at ¶ 108.

<sup>16</sup> See *Prosecution v. Furundzija*, Judgement, I.C.T.Y., No. IT-95-17/1A at ¶ 201 (2000), available at <http://www.un.org/icty/ind-e.htm> (last visited Mar. 25, 2002) [hereinafter *Furundzija*]. The Tribunal Appeals Chamber claimed, “The general question of bringing justice to the perpetrators of crimes such as rape was one of the reasons that the Security Council established the Tribunal.”

<sup>17</sup> INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, *The ICTY at a Glance: General Information*, at <http://www.un.org/icty/glance/index.htm> (last visited Mar. 25, 2002).

receptive to many of the suggestions and demands of the international community. He has already spoken to you about how he responded directly to meetings with human rights organizations and women's groups in creating the position of Legal Advisor on Gender, to which my colleague, Patricia Sellers, was appointed and still serves. Due to her efforts, as well as many other individuals whom I will name later, the crimes committed against women in the Balkans received a prominent position in the Office of the Prosecutor.

One of the first issues that my colleagues confronted was how to frame the crimes against women – whether they should be given a special focus and separated out into a particular case or whether they should be incorporated and mainstreamed into other indictments. There are, obviously, dangers to each approach. If you isolate the charges into a single charging document, you run the risk of either giving that particular case too much prominence or perhaps diminished prominence. If you incorporate the charges into existing or larger indictments, you risk losing emphasis on it, so that people might say, “Well, there are so many other crimes being committed, this is just a really small component of it.”

So, this is one of the policy questions that were confronted by my colleagues in those early days. However, as it turns out, both approaches were implemented simultaneously. For example, the case that I ended up being involved with when I joined the Tribunal in 1998 was a direct outgrowth of the investigation into the municipality of Foca, which was not only about the women of Foca, but about what happened to everybody in Foca, the men and the women. We ended up with two trials against different defendants – one that focused on the women and the rapes that occurred when they were held in detention camps<sup>18</sup> and the other that followed immediately covering the story of the men – the fathers, husbands and sons of the women – and what happened to them.<sup>19</sup> The men were taken to a prison camp, simply because they were Muslim, and kept there for several months, sometimes years, under inhumane conditions. Many were tortured or killed. So, the investigation covered the big picture, an essential part of which was what happened to the women.

Those lawyers and investigators who worked in the early days on the sex crimes cases had full support from Justice Goldstone and the top management, but among their colleagues, they often faced resistance. There were comments made by investigators, who were admittedly overworked at the time, saying things like, “I've got ten dead bodies, how

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<sup>18</sup> Prosecutor v. Kunarac, Judgement, I.C.T.Y., No. IT-96-23-T & IT-96-23/1-T at ¶ 564 (2001), available at <http://www.un.org/icty/ind-e.htm> (last visited March 25, 2002) [hereinafter Kunarac].

<sup>19</sup> Prosecutor v. Milorad Krnojelac, Judgement, I.C.T.Y., No. IT-97-25-T (2002), available at <http://www.un.org/icty/krnjelac/trailc2/judgement/krn-tj020315e-1.htm> (last visited Mar. 25, 2002) [hereinafter Krnojelac].

do I have time for rape? That's not as important," or, "So a bunch of guys got riled up after a day of war, what's the big deal?" But they persisted and my American colleagues, Nancy Paterson and Brenda Hollis, both prosecutors who left their jobs in the United States to work at the Tribunal, along with Patricia Sellers, made significant contributions in pushing these cases and making sure that those investigations did not completely fade away or disappear.

The person who was leading the Foca investigation was a German colleague, Hildegard Uertz-Retzlaff, a woman and a federal prosecutor in Germany. My colleagues at the Tribunal come from seventy-five different countries, and it is often a challenge to work with experienced lawyers from different cultures and with different assumptions. Hildegard and I, in particular, because she comes from a civil law country and I come from a common law country, had many discussions and disagreements at the beginning about how to present the case. The Tribunal cases are essentially presented in an adversarial manner, with prosecutors and defense lawyers presenting their case. This is unlike the German system, which is much more investigative, with a judge conducting the trial and asking questions of the witnesses based on written statements. But as with many of my other colleagues, we were able to talk through a lot of these issues and benefit from each other's experiences.

So for example, in a civil law country, the rules of evidence are very simple. If it is relevant, it comes in; if it is overly prejudicial, it is kept out; and the judges decide everything. That is much easier than in the American courtroom where you have complex and detailed rules of evidence. I was able to benefit from that kind of contribution from a civil law country. On the other hand, Hildegard learned to cross-examine, because that is not a skill that is developed in civil law countries among lawyers. The judges, not lawyers, put questions to the witness, and prosecutors are not used to trying to point out the loopholes in a witness's testimony. That is one of the things that has made working at the Tribunal so exciting – being able to talk with different people and in that process, challenge my assumptions about what a legal system must be, and broaden my vision of what it can be. One of the goals of the Tribunal is ultimately to find the best of both systems and apply it to international justice.

Over the course of about two years, Hildegard and a handful of investigators, including American-trained Nepalese lawyer Tejshree Thapa, used the statements gathered by NGOs and refugee organizations and found the witnesses and talked personally with them. The women were scattered all over the world as refugees – Germany, Sweden, Turkey, the United States – so it entailed a great deal of travel to talk to them. We had to bring interpreters so that we could communicate, and most of the time, although not always, we used female staff members to make the women feel more comfortable and able to open up. We also had to convince them to trust us even though we were an untested and new institution. Due to the efforts of



these investigators, many women agreed to come and testify as witnesses. The only thing we could promise them was that their contribution would be important to our work and essential for justice.

The initial indictment arising from all this investigation included three hundred counts and twenty-five defendants. During the initial indictment review, which is the process whereby any proposed indictment is discussed and put to a vote by lawyers, the first proposal was found to be completely unwieldy. As a result of discussion, the case was whittled down to about fifty counts and eight defendants who were at least commanders and sub-commanders and had committed multiple crimes.<sup>20</sup> The other targeted defendants were cut out simply because we lack the resources to charge everybody against whom we have even overwhelming evidence.

Our efforts were not lost, however, because we were able to share our evidence with local prosecutors in Sarajevo who could then bring their own prosecutions. Not long ago, for example, we helped provide information and access to a witness against one of those men for rape which resulted in a successful prosecution in Sarajevo. We try to work closely with local prosecutors and the domestic judicial systems to make sure the cases we cannot handle – because we simply do not have the capacity to handle everything – get handled by someone else.

When I joined the Tribunal, the first accused in the rape indictment had turned himself in. His name was Dragoljub Kunarac. We had to put the case together in preparation for trial. One of the first things we had to do was iron out the legal issues, so we had discussions about rape as torture. When does rape constitute torture?

We also charged him with enslavement, so we had to come up with a definition of slavery. I remember being tasked with writing a pretrial brief and thinking, “What is enslavement?” I looked at the Slavery Convention of 1926, which basically defines slavery as the exercise of the powers of ownership over another person. But what does it *mean* when you exercise ownership over someone? Normally, when you have a legal issue like this, you can just go to the library and look up precedent or some statutory directive for an answer, but in this case there was none. I thought, “Now what do I do? How do we come up with some kind of answer, or at least a description that might help the judges understand slavery when they see it?” So, I went home and put a chair in the middle of the room. I thought, “If I own that, what can I do with it?” I simply made a list based on what I understood about property law. “I can move it where I want, I can prevent other people from using it, and I can destroy it. I can do anything to it. I can deface it, throw it out the window, and lock it up.” We included such a

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<sup>20</sup> Prosecutor v. Dragan Gagovic, Indictment, I.C.T.Y., No. IT-96-23-I (1996), available at <http://www.un.org/icty/indictment/english/foc-ii960626e.htm> (last visited Apr. 11, 2002).

list in the brief which we submitted to the Court and said, "These are the indicia of slavery."

The definition is very blunt; it is ownership. But how do you know slavery when you see it? We gave the judges a list of things that made sense. When the Court rendered its judgment, it accepted pretty much everything as we described it.<sup>21</sup> That is another one of those strange things that occurs in the International Tribunal when there is so much unexplored territory that you sort of end up making some things up as you go. You see how it works and then when it works, you think, "That's pretty cool." So, that makes things interesting.

Again, there was some resistance among my colleagues. There was one colleague who said, "Well slavery, you know it when you see it. Why do you have to define it? Why are you wasting all of this paper?" It seemed important to us, especially in the first case, to actually set forth what we thought it was. We had also charged as one of the acts indicating slavery that the women were kept by particular commanders where they were not only raped on a regular basis and abused and locked up, but they were forced to do household chores. We had some colleagues saying, "So now doing dishes is slavery?" That misses the point. Doing dishes was not important, but what it showed about ownership and the humiliation inflicted upon the women was that they were forced to do things against their will and forced to serve the same people who were abusing them.

Despite some of the naysayers and the initial difficulties, we opened the trial in March 2000. By that point we had convinced quite a few women to come testify. We presented about thirty-three witnesses, including sixteen rape victims. The trial, including the defense case, lasted until November of 2000.

At this point, the legal developments of the Tribunals both in The Hague and in Rwanda<sup>22</sup> had set the stage for what we were doing. Rape was beginning to become more clearly defined. There was already a judgment in the *Furundzija* case, which involved a single act of rape.<sup>23</sup> There, the Court defined rape as being penetration under force, threat of force, or coercive circumstances. We had a definition in the *Akayesu* case in the Rwanda Tribunal that defined rape as sexual violation.<sup>24</sup> The Court there had also already found that rape can constitute a crime against

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<sup>21</sup> *Kunarac*, No. IT-96-23-T & IT-96-23/1-T at ¶ 543.

<sup>22</sup> S.C. Res. 955, U.N. SCOR 49th Sess., U.N. Doc. S/RES/955 (1994) (establishing the Criminal Tribunal for Rwanda ("ICTR")).

<sup>23</sup> *Furundzija*, No. IT-95-17/1A.

<sup>24</sup> Prosecutor v. Akayesu, Judgment, I.C.T.R., No. ICTR-96-4 (2001), available at <http://www.ictr.org/default.htm> [hereinafter Akayesu].

humanity. And in both *Akayesu* and in *Furundzija*,<sup>25</sup> as well as in *Celebici*,<sup>26</sup> the courts found that sexual assault could constitute a war crime.

So these legal issues, while not completely settled, had been discussed by other trial chambers. The stage was set. With the progression of the jurisprudence, the courts were getting more and more comfortable with dealing with rape as a war crime and as a crime against humanity. They were getting more and more comfortable speaking the unspeakable – just saying rape, coming right out and saying it.

In some of these early cases, like in *Furundzija*, we did not charge rape directly as a war crime; we charged rape as an act of outrage against personal dignity, which was a war crime.<sup>27</sup> We always had to go through this intermediate step because we could not find an applicable international document that actually talked about rape. But, by the time we got to the Foca trial, the Trial Chamber was ready to just come out and say rape on its own can be a war crime. Rape, even a single act of rape, can be a crime against humanity if it is in the context of a widespread or systematic attack. So, a lot of the legal climate was there and we benefited from the work of our colleagues before us.

I will give you a very quick summary of the facts of the Foca rape case, so you have a flavor of what it was like. In the spring of 1992, war broke out in Bosnia. In the Eastern Bosnia municipality of Foca, the Serb forces overtook the Muslim forces. In the town of Foca, which previously had been 50 percent Serbian and 50 percent Muslim, the Serb forces took over the entire town and took over the top positions in the military and the positions of political power. In the course of taking over the town, they attacked many small villages. Some of them were primarily Muslim villages. The houses were burned, the people were rounded up. Many of the men were executed on the spot. Some of the men were taken to detention centers, and the women and the children and the elderly were taken to detention centers where they were kept before people could figure out exactly what to do with them.

The rapes began immediately when the villages were attacked. The women and the girls, some of them as young as fifteen or sixteen years old, were taken to barracks during the course of being transported to a central holding place. They were told they were going to be interrogated. The only questions they were asked were things like, “Are you a virgin?” The soldiers then raped them. Once the women and the girls were taken to the camps, they were held there under guard and the soldiers would come in on

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<sup>25</sup> Prosecutor v. *Furundzija*, Judgement, Trial Chamber II, No. IT-95-17/1-T at ¶ 113 (1998), available at <http://www.un.org/icty/furundzija/trialc2/judgement/fur-tj981210e.htm>, (last visited March 25, 2002)[hereinafter *Furundzija II*].

<sup>26</sup> Prosecutor v. *Delalic*, Judgement, I.C.T.Y., No. IT-96-21-A, (2001) [hereinafter *Celebici*].

<sup>27</sup> *Furundzija II*, No. IT-95-17/1-T.

a regular basis during the night to pick out girls and women to take to abandoned houses to rape them.

Some of the witnesses told us about being there in the evenings, especially when it was completely dark, and being terrified when they would hear soldiers coming and how they would try to hide; how mothers tried to hide their daughters; how daughters – especially the young girls because they knew they would be specifically picked out – would try to hide under their grandmothers' skirts. The soldiers would hold up cigarette lighters or fold up newspapers to make torches and go person by person and pick out the ones whom they wanted to take out to rape. In many cases they were former neighbors, so the soldiers knew exactly which girls they wanted. This went on for several weeks.

In one of the incidents we charged, a soldier came looking for a particular girl and threatened to kill the mother if she would not turn over her daughter. So, the mother had to bring her daughter out of the bathroom where she was hiding and turn her over to the soldier who raped her. She was fifteen years old. The witnesses also talked about being brought back exhausted from a night of being continually raped. There were witnesses who talked about some of the girls brought back bloody, crying, and hysterical. Some of the girls did not say what had happened to them at that time, and when we asked why they did not, they said it was not necessary because everyone knew.

The descriptions of the rapes were also horrifying. There were girls who were raped by several men at the same time; there were men who put cigarette burns on the girls or threatened to carve crosses on their backs as a form of humiliation. There were also houses that were run by certain military commanders. They were called brothels, but they really were not brothels *per se*; they were houses where the girls were simply enslaved and the soldiers could come and go as they wanted so that they could rape them.

After several weeks in these detention centers, most of the women were exchanged, but there were some girls who were kept behind. They were taken out by the soldiers and commanders and kept as personal sex slaves. In some cases, the mothers resisted being sent away unless their daughters went with them, but they had no choice. The soldiers kept the girls in abandoned apartments which they had taken over as their own. There, the girls were enslaved, forced to perform sexual acts and keep house. They were not fed on a regular basis. The girls described how cold it was that winter, how they could not do anything because they did not have the energy. They would just lie in bed under the blankets to get through the day.

Of the people who were charged, three accused were eventually arrested. Kunarac, whom I have already mentioned, was a commander who was responsible for bringing a lot of the girls to a particular house to be raped and brought back to the detention centers. He also kept a girl as his sex slave personally. The second, Radomir Kovac, was also a sub-

commander of a military group. He was responsible for bringing four girls to a particular house where they were kept as slaves. He let his soldiers come and rape the girls and eventually sold them for a few hundred dollars each. One of the girls was twelve years old. No one ever heard from her after she was sold. When her mother came and testified at trial, we showed her a photograph of her daughter, which she herself had provided us. She completely broke down and we were forced to stop the court proceedings. In the photograph, which was taken shortly before the war, one could see that she was a little girl in pigtails and ankle socks. The description from the other girls of what happened to her was devastating. Kovac also forced the girls to dance naked on a table and marched them down to the river, threatening to kill them. He did nearly all the things that we described as indicia of enslavement, by treating them as chattel rather than as human beings. The third soldier, Zoran Vukovic, was accused of several incidents of rape, including the one where the mother was forced to turn over her daughter.

I will describe briefly some of the problems we faced with the witnesses. First, many of the witnesses, as you can imagine, were reluctant to testify. They were reluctant to talk to anybody. It had been eight years since the incidents, and many of them wanted to put what had happened behind them. Many also downplayed what had happened to them. They would talk about what happened to their fathers or their brothers or other relatives who were killed and add, "Oh, by the way, I was raped." It was instructive for me and also shocking to see that in their list of horrors, what happened to them was something they placed at the bottom. We had to convince potential witnesses that what they had to say, what they had to tell the world, was actually important. Some, though not many, had not told their families; so they really did not want to be involved in the Tribunal and did not want anybody to know what happened to them. They told us that they wanted to spare their loved ones the pain.

Shame was also involved. One girl told us finally at trial about an incident of oral rape which she had never told anybody, including the investigators who had interviewed her several times over three or four years. When we asked her, "Why didn't you tell anyone?" she said, "I was just too ashamed. I felt so dirty; I didn't know how to explain it. But now that I'm here at the Tribunal and I know that this is my one chance to tell the truth and the whole truth, I'm going to say it," which she did.

There were many, many more victims than we were able to convince to come in to testify. There were many, many more victims whom we were not able to identify and there were many, many perpetrators whom no one could identify – people who came and went at night, whose faces the girls were not able to see or whom they knew only by a nickname or a vague description. We were not able to call those victims as witnesses. This highlights one of the limitations of using criminal law and trials to address mass atrocities. You can only handle a few at a time and the cases are only

as good as the witnesses' ability to remember, describe, and testify honestly.

Working on the trial, I was impressed with the strength and courage of the witnesses, many of whom are still very young, twenty-three or twenty-four years old, and some of whom had not left their villages before the war. They were able to come to the Tribunal, a completely alien environment, where proceedings are conducted in a language that they did not understand (English and French). Everything had to be translated for them and yet they were able to confront the perpetrators.

Many of them were really scared from the outset. They said, "I don't know what I'm going to do when I see him." We had planned to ask them to identify the defendants if they saw them in the courtroom. So we said, "If you can't do it, we won't force you to. Just look at the prosecutor while we're asking the questions and don't look over at where the defendant is sitting, if that's going to upset you." We also told them that the defendants would have to sit and listen and would not be able to say anything during their testimony. There was one witness in particular who was scared and said she did not want to look. Then, as the defendant was being brought in and as she was sitting at the witness stand, she glanced over. It was really amazing because she looked and she sat up. We could see her getting angry and strong, and we could almost read her thoughts, as if thinking, "You did this horrible thing to me and you thought you could get away with it, but look at me now. I am here in the courtroom and am about to tell the court and the whole world what you did to me, and you can't say anything while you are surrounded by armed guards." It was a great empowering moment for all of us to see that the process we were bringing about was having an immediate effect on individuals. She was able to testify and we were not planning to ask her to identify the defendant until later. But, she seemed so anxious to point him out that we asked her early in her testimony. After we got that over with, we were able to continue with her testimony calmly.

We also had many protective measures for the witnesses because even for those who were willing to participate, there was still some lingering question about how they would be perceived by the greater world if their identities were known. We gave them all pseudonyms, and they were assigned numbers. Almost all of them also had digitalized distortion of their faces, with squares that blocked their faces, when our proceedings were broadcast over video. Many of them had the voices electronically masked as well so their voices could not be recognized.<sup>28</sup> A few witnesses testified in closed session, an exceptional measure whereby the courtroom is closed off to the public. So, while the accused, judges and prosecution could see and hear the proceedings, they were not broadcast or available to

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<sup>28</sup> See RULES OF EVIDENCE AND PROCEDURE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA Rule 75 (amended 1999) (addressing measures for protecting witnesses); *Kunarac*, No. IT-96-23-T and IT-96-23/1-T at ¶ 893.

the outside world. In an extreme circumstance, one witness had to be relocated to a secret country where she is permitted limited contact with her family because of security concerns.

The defenses were not as strong as we had feared. They resembled defenses that one might see in a domestic criminal trial. Kovac, who had enslaved the girls, claimed that the girls were actually in love with him. As evidence, he argued that one of the girls had written him a letter saying, "Thank you for saving me from this horrible rape house." That, of course, was completely ridiculous, and we recalled that witness to refute it. When the defense lawyer confronted her with that, she was so indignant that we did not bother to object to that improper question. We just let her express her outrage naturally, which probably made a good impression on the court.

Kunarac presented a weirder defense. There was one particular girl who was forced by the deputy commander to perform sexual acts on Kunarac. He would come in every so often and say, "You have to please my commander." It was a particularly humiliating form of rape because she was forced into sexual acts against her will, yet it looked like she was taking the initiative. Kunarac testified that this nineteen year old Muslim girl simply made sexual advances toward him and he did not resist her. Judge Florence Ndepele Mwachande Mumba, the presiding judge from Zambia, had not been asking many questions of the witnesses up to that point. When Kunarac made his claim, however, Judge Mumba interrupted him, leaned over and said, "Mr. Kunarac, are you telling us that she seduced you?" He looked up and he said, "Well, no. I guess you could say that I was forced to have sex against my will."

After the trial was over, the court convicted all three defendants. Kunarac was sentenced to twenty-eight years in jail, partly because of his command responsibility and the fact that his actions while he held a position of authority encouraged his subordinates to rape young girls. Kovac was sentenced to twenty years. In particular, the court cited the egregiousness of his actions and the complete immorality of how he treated the twelve year old girl, the way in which he sold her and did not care whether she or the other girls lived or died. Vukovic was convicted of a single act of rape and sentenced to twelve years.

The Court found that rape was used not as a "weapon of war," in the sense that particular orders were given as part of the combat duties to commit rape, but they found that it was used as an "instrument of terror"<sup>29</sup> in the course of the ethnic cleansing to drive people away from a place and make sure that they would never come back. The Court also enunciated for

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<sup>29</sup> Trial Transcript of Feb. 22, 2001 at 6559, Prosecutor v. Kunarac, I.C.T.Y., No. IT-26-93, available at <http://www.un.org/icty/ind-e.htm> (last visited Sept. 17, 2003) [hereafter Kunarac Transcript].

the first time in an international tribunal a clear definition of slavery, including the indicia that I talked about previously.

The Court also did another interesting thing by redefining rape or putting a different spin on the definition of rape than what had been given in *Furundzija* or *Akayesu*. They surveyed the domestic laws of several countries, including places as diverse as India, Belgium, South Africa, Uruguay, and Estonia, and came up with a definition that described rape as sexual penetration without the consent of the victim. They required that consent would have to be given “voluntarily as a result of free will, taking into account all of the circumstances.”<sup>30</sup> In fact, that turned out to be a much broader definition of rape than we had dared to put to the Court. We were afraid of using lack of consent as the definition because we were afraid it would open the floodgates to instances where a defendant could claim that a victim looked like she was consenting because she did not actively resist. But, the way the Court defined consent and lack of consent is actually quite progressive. It takes into account all the circumstances in assessing whether the victim could indeed exercise her will freely and voluntarily, including whether she was in detention, subjected to psychological pressure, or any other condition whereby she would not be able truly to consent.

All the defendants have appealed their verdicts, but the Prosecution was satisfied with the judgment and did not appeal anything, although it has a right to under the Tribunal’s rules.<sup>31</sup> (Ed. Note: On June 12, 2002, the Appeals Chamber upheld all the convictions.<sup>32</sup>)

So, what lessons have we learned from the Foca trial and where do we go from here? First, NGOs can have a great influence. They were effective in giving us information and making sure that people paid attention. They helped us locate witnesses and gave us support throughout the course of trial. They helped our Victim Witness Section at the Tribunal. We had psychologists on call, whom we never needed to call, but it was good to know that we had a support system that we could offer witnesses and victims who came forward.

The Trial Chamber in the *Akayesu* case specifically described the role of NGOs in response to a defense allegation that charges regarding sexual violence were added because of public pressure. They said it was not because of public pressure, but they said, “Nevertheless, the Chamber takes

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<sup>30</sup> *Kunarac*, No. IT-96-23-T & IT-96-23/1-T at ¶ 127.

<sup>31</sup> RULES OF EVIDENCE AND PROCEDURE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA Rules 107-118 (addressing Appellate Proceedings are not limited to appeals by the defendant).

<sup>32</sup> *Prosecutor v. Kunarac*, Judgment, I.C.T.Y., No. IT-96-23 & IT-96-23/1-A (2002), available at <http://www.un.org/icty/foca/appeal/judgement/kun-aj020612e.pdf> (last visited Oct. 4, 2003).



note of the interest shown in this issue by non-governmental organizations, which it considers as indicative of public concern over the historical exclusion of rape and other forms of sexual violence from the investigation and prosecution of war crimes; the investigation and prosecution of evidence pertaining to sexual violence is in the interest of justice.”<sup>33</sup> The fact that so many people in the world were outraged gave an indication to the International Tribunal that this was an international norm that had to be followed.

We learned how better to deal with witnesses, the kinds of things that we need to talk about with them and admit about limitations on what we can offer them. We always emphasized how important the individual witnesses are for the process to work. The fact that we were able to bring this prosecution and get the result that we did should give encouragement to potential witnesses in the future to come forward and testify, so that we can bring to justice future perpetrators.

How can we measure success in this case? One of the frustrations that I face as a prosecutor is that I know there are so many crimes being committed and so much suffering, yet there is so little we can do. At the end of the day I have to be content that we are doing our small part in sending a clear message to the world, and hopefully it will have some ripple effect not only in the Former Yugoslavia, but also in other parts of the world.

In Sierra Leone and Cambodia, efforts are underway to create some system of justice to address atrocities in a courtroom where our experiences, both good and bad, will provide valuable guidance. In those places they have not chosen to use the model that we have used in Yugoslavia and Rwanda because there are obviously a lot of problems related to setting up this kind of tribunal. Instead, they have set up hybrid tribunals where there is a combination of local prosecutors and judges, with international help.<sup>34</sup> Hopefully, there will be more dialogue and more assistance to build a lasting judicial system so that when an *ad hoc* tribunal like ours disappears, there will be something left behind in these other countries that can go on and address not only wartime, but peacetime crimes as well.

The other thing that keeps us going is the knowledge that we are letting the world know what happened and that we are telling the full story of the war. Just as a history that includes only the history of men is only half of the truth, trials about wars that contain only crimes against men is only half of the truth. In order to tell the whole story about what happened to everybody in the war, men and women must be included. How we handle rape during wartime as well as in peacetime is a strong measure of

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<sup>33</sup> *Akayesu*, No. ICTR-96-4 at ¶ 417.

<sup>34</sup> OPEN SOCIETY JUSTICE INITIATIVE, *Hybrid Tribunals*, at <http://www.justiceinitiative.org/activities/ij/hybrid> (last visited Sept. 3, 2003).

how we regard women in society. Crimes against women are also crimes against all humanity.

I would like to leave you with the words of Eleanor Roosevelt, which Judge Mumba quoted when she gave the oral judgment in the Kunarac case. She asked, "Where, after all, do universal human rights begin?" Her answer was, "In small places close to home."<sup>35</sup> I hope that what we are doing in places far away from here, in The Hague, in Arusha, in places where many of you perhaps will never go, will have some effect on places that are close to home, so that we learn to value women in their role in society, not just as victims, but as a fundamental part of society and a fundamental part of who we are.

Thank you.

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<sup>35</sup> Kunarac Transcript, *supra* note 29, at 6561.

