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## One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court

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## One Small Step for Women:

### Female-Friendly Provisions in the Rome Statute of the International Criminal Court\*

When he was done [raping me], he inserted his hand inside me and began pinching me with his fingers, as if he wanted to pull everything out. I screamed and he grabbed my right breast and twisted it so hard that I screamed again; long afterwards my entire breast was blackened. He thrust the knife to my throat and said that, if I screamed one more time, he would slaughter me.<sup>1</sup>

#### I. INTRODUCTION

For centuries, wartime rape of women was considered an inevitable consequence of war, necessary to boost soldiers' morale, and was lumped together with property crimes.<sup>2</sup> Later, rape was considered a crime against family honor.<sup>3</sup> Not until the last half century was rape understood to be an offense against the woman, against her dignity, instead of against her family's or her husband's honor.<sup>4</sup> Recently, the Interna-

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\* Copyright © 2002 by Rana Lehr-Lehnardt. Recognition, thanks, and gratitude must be extended to Roger and Emilie Lehr and Mark Burton Lehnardt for encouraging me to make a difference in the world.

1. HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH GLOBAL REPORT ON WOMEN'S HUMAN RIGHTS 13 (1995).

A few instances of violence experienced by women, especially during conflict, are included in this discussion of the evolution of female-friendly provisions in international law. These graphic accounts help explain women's persisting desire to influence the creation of international law that can greatly affect women's lives. Some might argue that the graphic details are inappropriate because they incite emotion rather than logic. However, details in discussions of sexual violence are necessary because "[g]raphic details indelibly stamp the assaults on our minds, and often propel us to action, whereas generic terms are easily and willingly forgotten." KELLY DAWN ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS xv (1997).

2. See ASKIN, *supra* note 1, at 50; Beth Stephens, *Humanitarian Law and Gender Violence: An End to Centuries of Neglect?*, 3 HOFSTRA L. & POL'Y SYMP. 87, 89 (1999); Roy Porter, *Rape – Does It Have a Historical Meaning?*, in *Rape: A Historical and Social Enquiry* 21 (Sylvana Tomaselli & Roy Porter eds., 1986).

3. See Rhonda Copeland, *Gendered War Crimes: Reconceptualizing Rape in Time of War*, in *WOMEN'S RIGHTS, HUMAN RIGHTS* 202 (Julie Peters and Andrea Wolper eds., 1995).

4. See Cynthia Enloe, *Afterword: Have the Bosnian Rapes Opened a New Era of Feminist Consciousness?*, in *MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA* 220 (Alexandra Stiglmeier ed., Marion Faber trans., 1994).

tional Criminal Tribunal for the Former Yugoslavia (“ICTY”),<sup>5</sup> the International Criminal Tribunal for Rwanda (“ICTR”), and the International Criminal Court (“ICC”) defined rape in the international arena as a violent and torturous crime, effectively separating the concept of honor from the definition and elements of rape.

Many women’s non-governmental organizations (“NGOs”) see the formation of the ICC as a necessary step toward protecting women worldwide, as well as working toward equality.<sup>6</sup> For this reason, women’s groups have united and labored to include their proposed female-friendly language in the ICC.<sup>7</sup> During the planning years for the ICC, many feminist groups united to create the Women’s Caucus for Gender Justice in the ICC (“Women’s Caucus”), which then successfully lobbied, over “ferocious” opposition, to incorporate gender issues into the enumerated crimes, their definitions, and the procedural makeup of the ICC.<sup>8</sup> NGOs worked with the United States government concerning crimes against women.<sup>9</sup> NGOs that lobbied for women’s issues held briefings, prepared and distributed legal memoranda, and shamed unsympathetic countries in the media.<sup>10</sup> According to the Women’s Caucus and other groups, these women’s organizations were successful. “The integration of gender concerns into the Rome Statute was a concrete indication of how much progress the international women’s human rights movement has made.”<sup>11</sup>

Have the Women’s Caucus and other women’s groups accomplished as much as they say they have? After all, wartime rape has been prohib-

5. The official name of the Tribunal is the Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991.

6. See Barbara Bedont & Katherine Hall Martinez, *Ending Impunity for Gender Crimes Under the International Criminal Court*, 6 BROWN J. OF WORLD AFF. 65 (1998), [http://www.crlp.org/pub\\_art\\_icc.html](http://www.crlp.org/pub_art_icc.html); David Stoelting, *Non-Governmental Organizations and the International Criminal Court*, WORLD ORDER UNDER LAW REP. (Sept. 1999), <http://www.morganlewis.com/art11999.htm>. See generally the web site for Women’s Caucus for Gender Justice, at <http://www.iccwomen.org> (last visited Jan. 9, 2002).

7. See Bedont & Hall Martinez, *supra* note 6.

8. HUMAN RIGHTS WATCH, SUMMARY OF THE KEY PROVISIONS OF THE ICC (Sept. 1998), at <http://www.hrw.org/campaigns/icc/docs/icc-statute.htm#Crimes>. See also Nicole Eva Erb, *Gender-Based Crimes Under the Draft Statute for the Permanent International Criminal Court*, 29 COLUM. HUM. RTS. L. REV. 401, 401-03, 429, 432 (1998); Darryl Robinson, *Defining “Crimes Against Humanity” at the Rome Conference*, 93 AM. J. INT’L L. 43, 51, n.46 (Jan. 1999). See generally the web site for Women’s Caucus for Gender Justice, at <http://www.iccwomen.org> (last visited Jan. 9, 2002).

9. See David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT’L L. 12, 16 (Jan. 1999).

10. Mahnonsh H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT’L L. 22, 23 (Jan. 1999).

11. Bedont & Hall Martinez, *supra* note 6.

ited in international law since before the Civil War.<sup>12</sup> The international community acknowledged various women's groups and, due to their constant lobbying, recognized the disproportionate harm that women suffer in wartime<sup>13</sup> and acted appropriately to create avenues of justice for female victims. This in itself is a major accomplishment of the women's groups. Although the female-friendly provisions included in the formation of the ICC, some suggested by women's groups, are a necessary and appreciated step toward protecting women and creating equality in the international judicial system, they are not the great leap that some women's organizations claim. Women's groups and the international community still have much to do to protect women against violence and to punish the perpetrators of this violence, especially wartime rape.

Part II of this paper will briefly discuss the history of rape as a war crime and a crime against humanity. Part III will analyze the importance of ICTY's *Tadic* decision as the first international criminal case in which a defendant was specifically and separately charged with rape and other sexual violence. Part IV will consider the historic importance of ICTR's *Akayesu* decision that defines, for the first time in an international document, rape and sexual violence. Part V will look at how later cases in the ICTY have influenced the creation of international jurisprudence of sex crimes. Part VI will dissect the ICC statute to locate and understand some of its female-friendly provisions. Part VII will contemplate some shortcomings of the female-friendly provisions of the ICC. Finally, the paper will conclude by discussing the positive effects of women's groups in the creation of the Rome Statute of the ICC, and why their efforts were a good beginning to prosecuting violence against women, yet why they ultimately fall short of producing adequate protection and prosecution.

## II. A HISTORICAL VIEW OF RAPE AS A WAR CRIME

For every instance of beheading at the [Tokyo] trial, there were countless accounts of gang rape. Is gang rape worse than beheading? Given

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12. During the Civil War, in 1863, the United States Army adopted the Lieber Code, which was based on customary international law, as a regulation guide on the laws of land warfare. It specifically states, "all rape . . . [is] prohibited under the penalty of death." ASKIN, *supra* note 1, at 36.

13. UN HIGH COMM'R, POSITION PAPER ON THE ESTABLISHMENT OF A PERMANENT INTERNATIONAL CRIMINAL COURT ¶ 42, <http://www.unhchr.ch/html/menu2/2/iccpp.htm> (last visited April 25, 2002) [hereinafter HIGH COMMISSIONER'S PAPER].

the evidence I listened to at the IMTFE,<sup>14</sup> the answer would appear to be *yes*.<sup>15</sup>

Women have endured mass rapes during periods of armed conflict since mankind has recorded its history: in 1204, crusaders raped the women of Constantinople;<sup>16</sup> in 1937, Japanese soldiers raped the women of Nanking;<sup>17</sup> in 1971, Pakistani soldiers raped women of Bangladesh;<sup>18</sup> during World War II, German soldiers raped thousands of Jewish and Russian women; and American soldiers raped Vietnamese women.<sup>19</sup> As one author insightfully summed up, "[w]here there is war, there is always sexual assault."<sup>20</sup>

Despite the continuous use of rape as a weapon during wartime, international law made such acts illegal centuries ago. However, it was not until the inclusion of women's voices that the international community took action against wartime rape, charging, prosecuting and sentencing those accountable for rape and sexual violence in the ICTY and the ICTR. This section will briefly examine the history of international law regarding rape during war and will then consider the influence women had on these international laws.

#### *A. The Creation of Rape Laws*

The language of many international documents forbids rape. "The rule of the law of nations strictly [prohibits the] attack on the honour of women and protecting against rape has been incorporated in almost every treaty, convention and agreement dealing with the inherent dignity and inalienable rights of members of the human family."<sup>21</sup>

As far back as 1785, the United States, France, the Netherlands, and Prussia agreed in the Treaty of Amity and Commerce that "if war should arise between the two contracting parties . . . all women and children . . . shall not be molested in their persons."<sup>22</sup> The United State's General Winfield Scott's General Orders No. 20, in 1847, established a strict pun-

14. The IMTFE is the abbreviation of the International Military Tribunal for the Far East, often called the Tokyo Tribunal.

15. ASKIN, *supra* note 1, at 164 (quoting ARNOLD C. BRACKMAN, *THE OTHER NUREMBERG* 20 (1987). Brackman was a 23-year-old United Press staff correspondent covering the Tokyo Tribunal.)

16. SUSAN BROWNMILLER, *AGAINST OUR WILL, MEN, WOMEN AND RAPE* 35 (1975).

17. Interestingly, this event is commonly referred to as the "Rape of Nanking," thus focusing on the city and not on the actual victims of the rape—the women.

18. YOUNGINDRA KHUSHALANI, *DIGNITY AND HONOUR OF WOMEN AS BASIC AND FUNDAMENTAL HUMAN RIGHTS* ix (1982).

19. BROWNMILLER, *supra* note 16, at 104-06.

20. ASKIN, *supra* note 1, at 1.

21. KHUSHALANI, *supra* note 18, at ix.

22. *Id.* at 3.

ishment for rape committed by soldiers.<sup>23</sup> The Lieber Code of 1863, adopted by the United States and some European countries, declared soldiers who raped civilians would be punished by death.<sup>24</sup> The Hague Conventions of 1899 and 1907 did not specifically mention rape or sexual violence, but their general language of the duty to respect “family honour” and “religious convictions and practices” has been interpreted as granting women protection from rape and other sexual violence during wartime.<sup>25</sup>

Following the atrocities of World War I, specifically, atrocities that targeted women, the Allied Forces in 1919 established the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties. That commission placed rape and forced prostitution near the top of the thirty-two enumerated war crimes.<sup>26</sup>

Despite these writings condemning wartime violence against women, less than thirty years later some of the greatest recorded atrocities against women were again taking place.<sup>27</sup> For a second time, the Allied forces responded, this time by creating the International Military Tribunal (“Nuremberg Tribunal”) and the International Military Tribunal of the Far East (“Tokyo Tribunal”) to try defendants for war crimes. Both tribunals relied on the provisions of the Hague Convention, which they determined were part of customary international law. Despite an abundance of evidence of sex-based crimes (rape, enforced prostitution, sexual mutilation, forced sterilization, and others), these crimes were ignored at the Nuremberg Tribunal.<sup>28</sup> The Tokyo Tribunal, on the other hand, prosecuted sex crimes to a limited extent, in conjunction with other crimes.<sup>29</sup> Although rape and other sex crimes were not specifically listed in the indictments, rape was alleged to amount to “inhumane treatment,” “mistreatment,” “ill-treatment,” and “failure to respect family honour and rights” under conventional war crimes.<sup>30</sup>

The modern international community finally mentioned rape in the Geneva Convention of 1949 Relative to the Protection of Civilian Persons in Time of War. Article 27 specifies that “[w]omen shall be espe-

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23. *Id.* at 4.

24. *Id.* at 5-6; ASKIN, *supra* note 1, at 36.

25. KHUSHALANI, *supra* note 18, at 10.

26. *Id.* at 12.

27. See generally Arden B. Levy, *International Prosecution of Rape in Warfare: Nondiscriminatory Recognition and Enforcement*, 4 UCLA WOMEN'S L.J. 255 (1994); Samantha I. Ryan, *From the Furies of Nanking to the Eumenides of the International Criminal Court: The Evolution of Sexual Assaults as International Crime*, 11 PACE INT'L L. REV. 447 (1999).

28. ASKIN, *supra* note 1, at 13-14, 97.

29. See Kelly D. Askin, *Women and International Humanitarian Law*, in 1 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 52 (Kelly D. Askin & Dorean M. Koenig eds., 1999).

30. See *id.*

cially protected against any attack on their honour,<sup>31</sup> in particular against rape, enforced prostitution, or any form of indecent assault.”<sup>32</sup> Although this article demands that occupying forces protect women from rape, the Convention does not explicitly list rape and sexual violence as crimes or prohibited acts; however, such criminality can be implied in Article 3(c) that prohibits “outrages upon personal dignity.”<sup>33</sup>

Because international agreements have prohibited wartime rape for centuries, illustrating that many countries agree that wartime rape is illegal, the prohibition of wartime rape can arguably be said to be part of customary international law. Customary international law is created from the general practice of states over an extended time period where the states’ actions are based on a belief that they are legally bound to follow the practice.<sup>34</sup> Further, scholars and the international community consider the Geneva Convention as part of customary international law,<sup>35</sup> thus, the Convention’s prohibition on “outrages upon personal dignity”<sup>36</sup> and its requirement that “women [] be especially protected . . . from rape”<sup>37</sup> are part of customary international law.

“Although wartime sexual violence, particularly rape and sexual slavery, is prohibited by customary international law, international humanitarian law, international human rights law, international criminal law, and general principles of law (which regularly overlap), this gender-based violence has continued with unabated impunity.”<sup>38</sup>

### B. Women’s Involvement

Impunity continued for perpetrators of wartime rape and sexual violence until women lifted up their voices in opposition. Women’s involvement, from lobbying to occupying decision-making positions, encouraged the international community to create stronger laws and prosecute criminals under them.

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31. Even in 1949, rape was equated with personal honor; it was not recognized as a violent crime against the person. See Fionnuala Ni Aolain, *Radical Rules: The Effects of Evidential and Procedural Rules on the Regulation of Sexual Violence in War*, 60 ALB. L. REV. 883, 888 (1997).

32. The Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 27, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention].

33. See *id.* art. 3(c).

34. BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 68-69, 134-38 (3rd ed. 1999).

35. See Beth Ann Isenberg, Comment, *Genocide, Rape, and Crimes Against Humanity: An Affirmation of Individual Accountability in the Former Yugoslavia in the Karadzic Actions*, 60 ALB. L. REV. 1051, 1057 (1997); Major Christopher M. Supernor, *International Bounty Hunters for War Criminals: Privatizing the Enforcement of Justice*, 50 A.F. L. REV. 215, 220 (2001).

36. Geneva Convention, *supra* note 32, art. 3(c).

37. *Id.* art. 27.

38. See ASKIN, *supra* note 1, at 49.

During World War II, both the Germans and the Japanese raped thousands of women.<sup>39</sup> Evidence of rape and other sexual violence toward women was abundant in cases in the Nuremberg and Tokyo Tribunals; however, rape crimes were only tried in the Tokyo Tribunal.<sup>40</sup> One possible reason for the difference between how violence against women was treated at the Nuremberg and Tokyo Tribunals is that three women were included in the proceedings as assistant prosecution counsel of the Tokyo Tribunal, whereas women did not occupy influential and decision-making positions in the Nuremberg Tribunal.<sup>41</sup>

Women were also influential in the creation of the ICTY and ICTR. Following media exposure of the atrocities in the former Yugoslavia and later Rwanda, the general public and many women's groups demanded that something be done to stop and punish the perpetrators of crimes targeting women.<sup>42</sup> "Of pivotal importance during this period, women's groups around the world were involved in mobilizing, strategizing, and lobbying efforts on behalf of prosecuting gender-based violence."<sup>43</sup>

The United Nations Security Council responded to public outcry by establishing the ICTY in 1993 and the ICTR in 1994. In the statutes of these tribunals, rape is listed as a crime against humanity<sup>44</sup> when other necessary elements are proved.<sup>45</sup> Additionally, the ICTR states that rape

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39. See BROWNMILLER, *supra* note 16, at 49-62.

40. See *id.* at 13-14, 97; Askin, *supra* note 29, at 52.

41. See ASKIN, *supra* note 1, at 97-98, 180.

42. See Askin, *supra* note 29, at 65.

43. *Id.* See also Enloe, *supra* note 4, at 220. Men will also benefit from women's efforts to prosecute sexual violence. Though men experience sexual violence during armed conflict to a lesser extent than women, there are many accounts of sex crimes against men in Bosnia-Herzegovina. Men, even fathers and sons, were forced to perform homosexual acts on each other. ASKIN, *supra* note 1, at 271, n.893. To inflict pain and shame, some male prisoners were forced to bite other male prisoners' genitals. *Id.* Another form of sexual violence toward men is the application of electric shocks to the scrotum. *Id.*

44. There is no internationally accepted definition of a crime against humanity; however, several delegations during the preparatory meetings for the creation of the Statute of the ICC stated that crimes against humanity "include[] acts which are of such a serious nature that they rise to the level of international concern and shock the collective conscience of humanity." Erb, *supra* note 8, at 432.

Though some of the sexual violence targeted against men and women could be prosecuted under torture or inhumane treatment, specifically labeling these acts as sex crimes in international tribunals will increase the likelihood of conviction for those who commit these atrocities. It is easier for a judge to impose a light sentence on the well-groomed defendant sitting before her or him when that defendant is charged with a sterile label of inhumane treatment rather than the true label of sexual torture or rape. By prosecuting these crimes as sexual violence, the crime and criminal will not be able to hide under euphemistic labels, and the world will know the depravity of perpetrators of sex crimes. The resulting injury to a criminal's reputation, which has long been a part of the punishment, will stigmatize the perpetrator and act as a deterrent to the future commission of sexual violence.

45. See Statute of the International Tribunal for the Former Yugoslavia, May 25, 1993, art. 5(g), S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., at 1-2, U.N. Doc. S/RES/827 (1993) [here-

can also be prosecuted because rape violates Article 3 of the 1949 Geneva Convention, as an "outrage upon personal dignity."<sup>46</sup> Even though rape was listed as a crime, the United Nations was reluctant to address mass rape because negotiators considered it "very difficult to bring up these kinds of issues."<sup>47</sup>

Women continued their lobbying for the prosecution of sexual violence even after the ICTY and ICTR were established, perhaps fearing that even though rape was listed as a crime, it would not be enforced against perpetrators. Although women are still extremely underrepresented on the Tribunals' boards of judges, appointing two women to the ICTY's original eleven-member bench was an unprecedented event; later a woman was elected to the ICTR judicial bench.<sup>48</sup> Women can be most influential once they are admitted into decision-making arenas. In 2001, the ICTY and ICTR gender issues legal officer was a woman, Patricia Viseur Sellers. She has been a leading force ensuring that war crimes against women are punished. To do this, Ms. Sellers has improved witness protection, obtained anonymity and privacy for testifying rape survivors, and educated members of the tribunals to better understand gender issues and sensitivities.<sup>49</sup> Other women were included as criminal investigators, researchers, legal advisors, and prosecutors.<sup>50</sup> Women in decision-making roles of these ad hoc criminal tribunals have increased awareness and sensitivity of sexual crimes, which has resulted in more convictions and more protection for the victim witnesses.<sup>51</sup>

With much progress made in the ICTY and the ICTR, women's groups have lobbied to include female-friendly provisions in the Rome Statute of the ICC. Women's and men's past work for sexual equality in the ICTY and ICTR has acted as a steppingstone for the inclusion of sexual crimes in the ICC.

### III. THE FIRST CHARGE OF RAPE AND SEXUAL VIOLENCE AS WAR CRIMES

[Rape is] something you never forget. I carry it around with me in my heart, in my soul. I think of it when I go to bed and I think of it when I

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inafter ICTY Statute]; Statute of the International Tribunal for Rwanda, Nov. 8, 1994, art. 3(g), S.C. Res. 955, U.N. SCOR, 49th Sess. 3453 mtg., U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute].

46. ICTR Statute, *supra* note 45, art. 4(e).

47. ASKIN, *supra* note 1, at 301 (quoting Beatrix Campbell, *The New World Order of Intimate Warfare*, THE INDEPENDENT (U.K.), April 28, 1993, at 22).

48. *Id.* at 302.

49. Askin, *supra* note 29, at 66.

50. ASKIN, *supra* note 1, at 302.

51. *See id.*

get up. It doesn't let you go . . . They did it to humiliate us. They were showing us their power. They stuck their guns in our mouths. They tore our clothes . . . .<sup>52</sup>

The United Nations Security Council created the ICTY in 1993 for the purpose of prosecuting those responsible for serious crimes during the internal conflict in the former Yugoslavia. No new treaties were signed creating new international law with which to prosecute the numerous crimes committed during the Yugoslav conflict. Instead, the ICTY prosecuted and continues to prosecute rape and other sexual crimes primarily as a grave breach of the Geneva Convention or as a violation of customs of war.<sup>53</sup>

Using existing international law, the ICTY charged Dusko Tadic, the Tribunal's first defendant, with rape and sexual violence, among other charges, as crimes against humanity and war crimes.<sup>54</sup> This section will examine the charges brought against Tadic, the problems the ICTY faced in its prosecution, and how *Tadic* contributed to the creation of international law.

#### A. *The First Case in the ICTY*

Defendant Tadic was a member of a prominent Serb family in his community in the former Yugoslavia who espoused nationalistic ideals and became one of the leaders in the region for the Serb forces.<sup>55</sup> The indictment against Tadic alleged that Tadic participated in and aided and abetted the commission of rape, gang rape, sexual mutilation, and other sexual violence.<sup>56</sup> Rape was widespread in the camps where Tadic was assigned.<sup>57</sup> What would have been the first case in which rape was prosecuted as a war crime by an international tribunal failed because the prosecutor was forced to drop the rape charges when its only rape wit-

52. *Id.* at 268, n.886 (quoting from Alexandra Stiglmayer, *The Rapes in Bosnia-Herzegovina*, in *MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA* 92 (Alexandra Stiglmayer ed., Marion Faber trans., 1994)).

53. See Susan W. Tiefenbrun, *The Paradox of International Adjudication: Developments in the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the World Court, and the International Criminal Court*, 25 N.C. J. INT'L. LAW & COM. REG. 551, 574 (Summer 2000). The United States Department of State said, "We believe there is no need to amend the Geneva Conventions . . . because the legal basis for prosecuting troops for rape is well established under the Geneva Conventions and customary international law." Theodor Meron, Comment, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L. L. 424, 426, n.22 (July 1993).

54. Prosecutor v. Tadic, IT-94-1, Second Amended Indictment, counts 2-4, 8-9 (Dec. 14, 1995), <http://www.un.org/icty/indictment/english/tad-2ai951214e.htm>.

55. Prosecutor v. Tadic, IT-94-1, Trial Chamber, Opinion and Judgment, ¶¶ 180, 188 (May 7, 1997), <http://www.un.org/icty/tadic/trialc2/judgement/index.htm>.

56. IT-94-1, Second Amended Indictment, counts 2-4, 8-9.

57. IT-94-1, Trial Chamber, Opinion and Judgment, ¶¶ 154, 165, 175.

ness suddenly refused to testify, claiming that threats were waged against her person and her family.<sup>58</sup> Another setback to prosecuting sexual violence at the international level was the failure to obtain a conviction against Tadic for sexual mutilation and sexual violence against a male detainee.<sup>59</sup> The attack involved two male witnesses who were forced to be naked with the male victim, lick the male victim's buttock, suck the victim's penis, beat the victim's genitalia, and ultimately bite off his scrotum.<sup>60</sup> The Tribunal concluded that the prosecutor did not provide enough evidence to place Tadic at the scene of the sexual assault when it was occurring.<sup>61</sup>

### *B. Lack of Evidence Was a Problem in the First ICTY Case*

Unfortunately, despite evidence in support of Tadic's involvement in inflicting sexual violence, no charges of rape or sexual violence produced a conviction. Of the thirty-two counts levied against Tadic, the appeals court found the defendant guilty of only nine, which were all crimes of inhumane treatment or of willfully causing great suffering or serious bodily injury to body and health.<sup>62</sup> For each of the nine counts of guilty, the Tribunal sentenced Tadic to terms of six to twenty years; however, the Tribunal also declared that these sentences would be served concurrently, thus, in reality, Tadic was sentenced to only twenty years in prison.<sup>63</sup> In addition, because the tribunal granted Tadic credit for time he served while awaiting trial, this criminal could be released as early as July 14, 2007.<sup>64</sup>

### *C. Tadic Was Not a Complete Failure for Prosecuting Sexual Crimes*

Although *Tadic* looks like a failure for prosecuting sexual violence as a war crime and as a crime against humanity in an international tribunal, this case was a necessary, but small, first step toward that goal. *Tadic* showed the world that it was legally possible to charge alleged war criminals with rape and other sexual violence. In addition, it was the first

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58. William M. Walker, *Making Rapists Pay: Lessons From the Bosnian Civil War*, 12 ST. JOHN'S J. LEGAL COMMENT 449, 457 (1997).

59. *Tadic*, IT-94-1, Second Amended Indictment, ¶¶ 4.3, 5.

60. *Id.* ¶ 206.

61. IT-94-1, Trial Chamber, Opinion and Judgment, ¶¶ 198, 222.

62. Prosecutor v. Tadic, IT-94-1, Appeals Chambers, Part IX, Disposition (July 15, 1999), <http://www.un.org/icty/tadic/appeal/judgement/index.htm>. Tadic appealed his conviction. For a history of the sentencing, appeals, and judgment of the appeals in the *Tadic* case, see Prosecutor v. Tadic, IT-94-1, Appeals Chamber II, Judgment in Sentencing Appeals (Jan. 26, 2000), [http://www.un.org/icty/tadic/appeal/judgement/index\\_2.htm](http://www.un.org/icty/tadic/appeal/judgement/index_2.htm).

63. IT-94-1, Appeals Chambers, Part IX, Disposition.

64. See *id.*; IT-94-1, Appeals Chamber II, Judgment in Sentencing Appeals, ¶ 76(7).

international case allowing sex crimes to be prosecuted at an international tribunal even if the crimes occurred during an internal conflict.<sup>65</sup> This historic case also showed the world that international tribunals do have the power and authority, through existing international law to prosecute such crimes.

Further, despite the failure in *Tadic* to produce a verdict of guilt on the rape and sexual assault charges, these charges did not fail for lack of jurisdiction or for deficiencies in the international law. The rape charge failed only because there was no willing witness; many victims are killed and others are terrified to face their attackers. After seeing that a rape charge was possible in international tribunals, the ICTY prosecutor charged several other defendants with rape and other sexual violence.<sup>66</sup>

#### IV. THE FIRST DEFINITION OF RAPE AND SEXUAL VIOLENCE

[T]estimonies from survivors confirm that rape was extremely widespread [in Rwanda] and that thousands of women were individually raped, gang-raped, raped with objects such as sharpened sticks or gun barrels, held in sexual slavery (either collectively or through forced "marriage") or sexually mutilated.<sup>67</sup>

The most important case for prosecuting rape and sexual violence, that used *Tadic* as a small stepping stone, is the ICTR's *Prosecutor v. Akayesu*.<sup>68</sup> Not only did the Rwanda Tribunal convict Akayesu on dozens of sexual violence charges,<sup>69</sup> but it also stated that rape was equivalent to torture,<sup>70</sup> allowed for rape to be prosecuted as genocide in certain cases,<sup>71</sup>

65. *Prosecutor v. Tadic*, IT-94-1, Decision of the Appeals Chamber on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995), <http://www.un.org/icty/ind-e.htm>.

66. See generally *Prosecutor v. Dragan Nikolic*, IT-94-2-PT, Second Amended Indictment (Feb. 15, 2002), <http://www.un.org/icty/indictment/english/nik-2ai020215e.htm>; *Prosecutor v. Goran Borovnica*, IT-95-3, Second Amended Indictment (Dec. 14, 1995), <http://www.un.org/icty/indictment/english/tad-2ai951214e.htm>; *Prosecutor v. Goran Jelusic and Ranko Cestic*, IT-95-10, Second Amended Indictment (Oct. 19, 1998), <http://www.un.org/icty/indictment/english/jel-2ai981019e.htm>; *Prosecutor v. Kunarac*, IT-96-23, IT-96-23/1, Third Amended Indictment (Dec. 1, 1999), <http://www.un.org/icty/indictment/english/kun-iii991108e.htm>; *Prosecutor v. Kvočka*, IT-98-30/1, Second Amended Indictment (May 31, 1999), <http://www.un.org/icty/indictment/english/kvo-2ai990531e.pdf>.

67. HUMAN RIGHTS WATCH, SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH (September 1996), <http://www.hrw.org/hrw/summaries/s.rwanda969.html>. An estimated 250,000 to 500,000 women suffered rape in Rwanda and 31.4 percent of children witnessed rape or sexual violence. ColorQ, *Mass Rape in Rwanda's Civil War*, at <http://www.colorq.org/HumanRights/Rwanda/rape.htm> (last visited April 12, 2002).

68. See *Prosecutor v. Akayesu*, ICTR-96-4, Judgment (Sept. 2, 1998), <http://www.ictcr.org>.

69. See *id.* ¶¶ 691-94, 696, 733, Part 8.

70. *Id.* ¶ 597.

71. *Id.* ¶ 731.

With regard, particularly, to . . . rape and sexual violence, the Chamber wishes to under-

and provided a definition of rape<sup>72</sup> that has been cited to in all subsequent ICTY and ICTR rape charges.

### *A. Facts of the Akayesu Case*

Defendant Akayesu was the *bourgmestre* (similar to a mayor) of his district, the most powerful figure in the commune.<sup>73</sup> As such, he had exclusive control over the communal police and gendarme.<sup>74</sup> Although the original indictment did not charge Akayesu with rape or other sexual violence, the prosecutor included these charges after a witness revealed that men under the control of Akayesu raped her.<sup>75</sup>

The defense alleged that the indictment was amended to include charges of sexual violence, and that the court allowed this amendment, due to public pressure.<sup>76</sup> The Tribunal declared that the amended indictments of sexual violence as war crimes and crimes against humanity were proper despite obvious interest in the case by NGOs.<sup>77</sup> The Tribunal considered NGO attention “indicative of public concern over the historical exclusion of rape and other forms of sexual violence from the investigation and prosecution of war crimes.”<sup>78</sup>

The amended indictment stood, and the Tribunal found Akayesu guilty of dozens of counts of rape and other sexual violence.<sup>79</sup> Although the witnesses could not testify of actually observing Akayesu in the act of raping or inflicting sexual violence on victims, they could, however, testify that he was either present when the sexual violence took place or that the crimes happened where Akayesu knew or should have known

score 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 inflict harm on the victim as he or she suffers both bodily and mental harm.

*Id.*

72. *See id.* at ¶ 598.

73. *Id.* ¶¶ 2-3.

74. *Id.* ¶ 4.

75. *See id.* ¶¶ 416-17, 421; Press Release, Human Rights Watch, Human Rights Watch Applauds Rwanda Rape Verdict (Sept. 2, 1998) (on file with author). For views that these additional charges of rape should not have been pressed against Akayesu because the charges were fabricated, see Jean Paul Akayesu, Address Following the ICTR Appeals Chamber Decision (June 1, 2001), <http://www2.minorisa.es/inshuti/akayesu3a.htm> (on file with author); Stephanie Maupas, *False Testimony and Denunciation*, JUDICIAL DIPLOMACY, April 24, 2001, at <http://www.diplomatiejudiciaire.com/UK/Tpiruk/AkayesuUK14.htm>.

76. *Akayesu*, ICTR-96-4, Judgment, at ¶ 417.

77. *Id.*

78. *Id.*

79. *Id.* ¶¶ 692-93, 696-97.

about them and could have prevented them from continuously occurring.<sup>80</sup>

Witness JJ, the first witness to introduce rape into the proceedings, testified that she could not count how many times she was raped.<sup>81</sup> She testified that “each time you encountered attackers they would rape you.”<sup>82</sup> Witness JJ, as well as many other women, sought protection from attacks at the bureau communal, which Akayesu controlled.<sup>83</sup> Witness JJ was surprised to discover that attacks were even more prevalent at the communal. “[S]he recalled lying in the cultural center, having been raped repeatedly by *Interahamwe* [Hutu extremists], and hearing the cries of young girls around her, girls as young as twelve or thirteen years old.”<sup>84</sup>

The Tribunal sentenced Akayesu to life in prison,<sup>85</sup> a much harsher sentence than that received by most ICTY defendants.<sup>86</sup> The reason for this harsher sentence is not immediately apparent. It could simply be that the prosecutor was able to gather more evidence against Akayesu than the prosecutor was able to gather and use against Tadic. Improved evidence gathering might have been the result of learning from mistakes made in the *Tadic* case. Or, perhaps after what most women believed to be a disappointing outcome in the *Tadic* case, ICTR judges were more aware of public opinion and more sympathetic to the victims’ pleas. The reason for such strong statements against rape and sexual violence might simply be the result of the sensitivity of the ICTR judges and the fact that one of the ICTR judges was a woman.

### *B. Clear Definitions of Rape and Sexual Violence*

Before finding Akayesu guilty of rape and other sexual crimes, the Tribunal made history by defining rape for international tribunals, “as there is no commonly accepted definition of this term in international

80. *Id.* ¶¶ 670-97.

81. *Id.* ¶ 421.

82. *Id.*

83. *Id.* ¶ 422.

84. *Id.*

85. *Id.* ¶ Sentencing. Akayesu appealed this judgment, but the appeals chamber upheld the sentence. Prosecutor v. Akayesu, ICTR-96-4, Appeals Chamber Judgment, Part V, Disposition (June 1, 2001), <http://ictt.org>.

86. It is difficult to compare sentences because the charges are different against each defendant, the number of victims varies, and cultures differ, all of which could affect the willingness of victims to publicly vocalize crimes committed against them. Also Tribunal resources differ, allowing for more or less evidence gathering. Tadic was sentenced to prison terms ranging from six to twenty years for nine criminal counts, Furundzija received a maximum of ten years, Kunarac was sentenced to twenty-eight years, Kovac was sentenced to twenty years, Vukovic was sentenced to twelve years, and Radic received twenty-years. See *infra* Part V.

law.”<sup>87</sup> Rape, as defined by this tribunal, is “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”<sup>88</sup> With this definition, the Tribunal found Akayesu guilty of dozens of rape charges.<sup>89</sup> Akayesu did not rape the victims himself, but he was the person in command and could have stopped the rapes from happening.<sup>90</sup>

The ICTR also defined sexual violence as “any act of a sexual nature which is committed on a person under circumstances which are coercive.”<sup>91</sup> This act must be part of a “wide spread or systematic attack” “on a civilian population,” founded on discriminatory grounds.<sup>92</sup> The Tribunal also held that forced nudity is an act of sexual violence, even though there might be no physical contact with the victim.<sup>93</sup>

### *C. Rape is Expanded to Include Torture and Genocide*

In addition to defining rape and sexual violence, the Tribunal also initiated the extension of rape as torture. In dictatorial regimes and military occupation, rape has been one of the most employed methods of torture against women.<sup>94</sup> Using rape as a method of torture proves highly effective because it “attacks the integrity of the woman as a person as well as her identity as a woman”<sup>95</sup> and renders a woman “homeless in her own body.”<sup>96</sup> The Tribunal compared rape and torture and found that both are used to intimidate, degrade, humiliate, discriminate, punish, control, or destroy the victim.<sup>97</sup> “Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”<sup>98</sup>

The Tribunal also extended rape to fall under the crime of genocide when certain additional requirements are met.<sup>99</sup> Due to this enlarged view of rape, the Tribunal was able to convict Akayesu for genocide. The Trial Chambers adamantly declared that rape and sexual violence consti-

87. *Akayesu*, ICTR-96-4, Appeals Chamber Judgment, Part V, Disposition, ¶ 596.

88. *Id.* ¶ 598.

89. *Id.* ¶¶ 692-94.

90. *Id.* ¶ 691.

91. *Id.* ¶ 598.

92. *Id.*

93. *Id.* ¶ 688.

94. See Copeland, *supra* note 3, at 202.

95. *Id.*

96. *Id.* (quoting Lepa Mladjevic, a Serbian psychotherapist).

97. *Prosecutor v. Akayesu*, ICTR-96-4, Judgment, ¶ 597 (Sept. 2, 1998), <http://www.ictor.org>.

98. *Id.* ¶ 687.

99. *Id.* ¶ 731.

tute the crime of genocide “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 inflict [sic] harm on the victim as he or she suffers both bodily and mental harm.”<sup>100</sup>

Judge Pillay, the only female judge on the bench for the *Akayesu* trial, summed up the historic importance of this case: “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.”<sup>101</sup>

#### V. USING *TADIC* AND *AKAYESU* TO PROSECUTE OTHERS

Both the ICTY and the ICTR have used rape and sexual violence, torture, and genocide language that was proffered in *Akayesu*. *Tadic* and *Akayesu* have been of vital importance in prosecuting wartime sexual violence. This section will discuss several cases tried before the ICTY and observe what the Yugoslav Tribunal relied on in deciding these cases.

##### A. *Furundzija*

In concluding that rape can also be prosecuted as torture, the *Furundzija* court looked to language in the *Akayesu* court as well as to the 1984 Torture Convention for support.<sup>102</sup> *Furundzija* was the first case in the ICTY based solely on acts of sexual violence.<sup>103</sup> Like many cases pending in the ICTY and ICTR in which sexual crimes have been alleged, the *Furundzija* court followed *Akayesu*'s lead and prosecuted the defendant's rapes as crimes against humanity and as torture.<sup>104</sup>

After following *Akayesu*'s lead concerning rape and torture, the *Furundzija* court went further and created its own definition of torture during wartime, which included, perhaps for the first time, humiliation as one of the aims of torture.<sup>105</sup> By broadening the definition of torture in such a manner, the *Furundzija* court was able to officially include rape as

100. *Id.*

101. Tiefenbrun, *supra* note 53, at 589.

102. See Prosecutor v. Furundzija, IT-95-17/1, Trial Chamber II, Judgment, ¶ 159 (Dec. 10, 1988), <http://www.un.org/icty/furundzija/trialc2/judgment/index.htm>.

103. See Women's Caucus for Gender Justice, *International Legal Developments*, ICC WOMEN NEWS, September 2000, at <http://www.iccwomen.org/reports/nl200009.htm>.

104. *Furundzija*, IT-95-17/1, Trial Chamber II, Judgment, ¶¶ 159-164.

105. *Id.* ¶ 162.

torture.<sup>106</sup> Soldiers do not use rape merely as a way to fulfill unrestrained sexual appetites (which is also unacceptable); it is used “as a means of punishing, intimidating, coercing or humiliating the victim, or obtaining information, or a confession, from the victim or a third person.”<sup>107</sup> With the power of *Tadic*, *Akayesu*, and this new definition of torture, the Tribunal was able to secure charges of torture and outrages upon personal dignity for rape and other sexual assaults against Furundzija.<sup>108</sup>

In *Furundzija*, Witness A was forced to take off her clothing and remain naked while male soldiers interrogated her.<sup>109</sup> A soldier drew a knife over Witness A’s body and threatened to cut out her sexual organs if she did not answer the soldier’s questions.<sup>110</sup> While being interrogated, Witness A was repeatedly raped.<sup>111</sup> One soldier forced her to “lick his penis clean” after raping her anally.<sup>112</sup>

Although defendant Furundzija was not the soldier who performed the rapes, he was the commanding officer, was present at the time of the abuses, and did nothing to stop them.<sup>113</sup> As such, Furundzija was found guilty of aiding and abetting outrages upon personal dignity, including rape and sexual violence as a violation of the customs of war.<sup>114</sup> He was also found guilty as a co-perpetrator of torture against Witness A as a violation of the customs of war.<sup>115</sup> Furundzija was sentenced to eight years for the aiding and abetting of rape and ten years for torture, to be served concurrently, thus resulting in a mere ten years of actual prison time for commanding multiple rapes and torture upon victims.<sup>116</sup> On July 21, 2000, the Appeals Chamber of the ICTY upheld the Trial Chamber’s decision convicting Furundzija on multiple counts of rape and sexual violence.<sup>117</sup>

### *B. Kunarac, Kovac, Vukovic*

The *Kunarac, Kovac, and Vukovic* case, sometimes referred to as the “rape camp case,” is the first case in which the ICTY successfully con-

106. *See id.* ¶ 163.

107. *Id.*

108. *See id.* ¶¶ 264-75.

109. *Id.* ¶ 80.

110. *Id.* ¶ 82.

111. *Id.* ¶ 83.

112. *Id.*

113. *Id.* ¶¶ 76-89.

114. *Id.* Part IX, Disposition.

115. *Id.*

116. *Id.*

117. *See* Prosecutor v. Furundzija, IT-95-17/1, Appeals Chamber, Judgment (July 21, 2000), <http://www.un.or.icty/furundzija/appeal/judgement/index.htm>.

victed perpetrators of rape and enslavement as a crime against humanity.<sup>118</sup> To do so, the Trial Chambers quoted the definition of rape set forth in the *Akayesu* case and applied in the *Furundzija* case.<sup>119</sup> The *Kunarac* case plays a part in the development of rape law at the international level by modifying the *Akayesu* definition of rape, by broadening the element of coercion from an act of “coercion or force or threat of force against the victim or a third person” to a “non-consensual or non-voluntary” sexual act.<sup>120</sup> Thus, the definition of rape at international tribunals was broadened to reflect rape laws in jurisdictions around the world and to require *unwanted* sexual penetration instead of the more narrow and more difficult to prove element of coercion or force.<sup>121</sup> The *Kunarac* amendment to the international rape law shifted the focus to sexual autonomy,<sup>122</sup> with the emphasis being whether consent was “given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances.”<sup>123</sup> Additionally, the *Kunarac* case strengthened the *Furundzija* finding by holding, as *Furundzija* did, that “rape and other forms of sexual violence, including forced public nudity, cause severe physical or mental pain and amount to outrages upon personal dignity.”<sup>124</sup>

In the Foca region of the former Yugoslavia, where these three defendants were stationed with the military, Muslims were rounded up; women and girls were separated from the men and were placed in gymnasium transformed into a detention center.<sup>125</sup> Women and young girls were regularly and forcibly taken from the detention center to other locations and raped.<sup>126</sup>

### 1. *Dragoljub Kunarac*

The ICTY Trial Chamber found soldier Kunarac guilty of personally raping several Muslim women and girls on numerous occasions, as well as aiding and abetting gang rapes of many Muslim women and girls by

118. ICTY Press Release, Opinion Delivered by Judge Florence Mumba (Feb. 22, 2001), JL/P.I.S./566-e (on file with author).

119. Prosecutor v. Kunarac, IT-96-23 and IT-96-23/1, Trial Chamber II, Judgment, ¶¶ 2, 22, 28, 30-43 (Feb. 22, 2001), <http://www.un.org/icty/foca/trialc2/judgment/index>.

120. *Id.* ¶¶ 437-38.

121. *See id.* ¶ 440.

122. *See id.* ¶¶ 440-41.

123. *Id.* ¶ 460.

124. Prosecutor v. Furundzija, IT-95-17/1, Trial Chamber II, Judgment, ¶ 272 (Dec. 10, 1998), <http://www.un.org/icty/furundzija/trialc2/judgment/index.htm>. *See also* *Kunarac*, IT-96-23, IT-96-23/1, Trial Chamber II, Judgment, ¶¶ 766-774.

125. *Kunarac*, IT-96-23, IT-96-23/1, Trial Chamber II, Judgment, ¶¶ 2, 22, 28, 30-43.

126. *See id.*

other Serbian soldiers.<sup>127</sup> For these acts, the trial court found defendant Kunarac guilty of rape as a crime against humanity and also of torture as a crime against the laws or customs of war.<sup>128</sup> The trial court held that the same acts could give rise to cumulative convictions “only if each statutory provision involved has a materially distinct element not contained in the other,” thus Kunarac can be punished for both rape and torture for the same actions of sexual abuse.<sup>129</sup> Kunarac was also found guilty of enslavement for detaining girls for prolonged periods of time, forcing them to clean and cook, for raping them while detained, and for selling the right to other soldiers to rape them.<sup>130</sup> For these many crimes, Kunarac was sentenced to a single term of 28 years in prison.<sup>131</sup>

## 2. Radomir Kovac

The ICTY Trial Chambers found sufficient evidence to establish that Kovac detained Muslim girls in his apartment for a prolonged period of time, forced them to cook and clean, forced them to go hungry, repeatedly raped and sexually mistreated them, slapped and beat the girls, allowed others to rape them while in Kovac’s apartment, sent some of the girls with other soldiers where Kovac knew they would continue to be raped, and finally sold three of the girls to other soldiers.<sup>132</sup> One of the girls Kovac raped, abused, and eventually sold was only twelve years old.<sup>133</sup> At the time of the trial, eight years later, no one had seen or heard from the girl.<sup>134</sup> For these acts, the Trial Chambers found Kovac guilty of rape as a crime against humanity, rape as a violation of the laws or customs of war, enslavement, and outrages upon personal dignity as a violation of the laws or customs of war.<sup>135</sup> Kovac was sentenced to a single count of twenty years imprisonment.<sup>136</sup>

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127. *Id.* ¶¶ 636-56, 669-670, 672-73, 701, 711-14, 718, 724, 727.

128. *Id.* ¶ 862.

129. *Id.* ¶ 549 (quoting Prosecutor v. Delalic, IT-96-21-A, Judgement, ¶ 400 (Feb. 20, 2001)). See ICTY Statute, *supra* note 45, art. 3 (stipulating elements of a violation of the laws or customs of war), art. 5 (listing elements of a crime against humanity).

130. *Kunarac*, IT-96-23, IT-96-23/I, Trial Chamber II, Judgment, ¶¶ 728-29, 735, 742, 745.

131. *Id.* ¶ 871.

132. *Id.* ¶¶ 747-82.

133. *Id.* ¶¶ 874, 775-82.

134. ICTY Press Release, *supra* note 118.

135. *Kunarac*, IT-96-23, IT-96-23/I, Trial Chamber II, Judgment, ¶ 874.

136. *Id.* ¶ 877.

### 3. Zoran Vukovic

The ICTY Trial Chambers found defendant Vukovic guilty of raping a fifteen year old Muslim girl on a single occasion and imposed a twelve year sentence for such an act.<sup>137</sup>

#### C. Kvočka

The *Kvočka* case added to international law and the protection of women by defining what constitutes sexual violence by relying, in part, on the lists of crimes enumerated in the Rome Statute of the International Criminal Court (“Rome Statute”), thus demonstrating that although the Rome Statute had not yet received adequate votes to enter into force, it was already being treated as international law, and is proving beneficial in some charges of sexual violence.<sup>138</sup> The Tribunal used this definition to convict another soldier, Mlado Radic, for rape as a crime against humanity and for crimes of sexual violence as torture and outrages upon personal dignity.<sup>139</sup>

In the *Kvočka* case, the Trial Chambers found all of the defendants guilty of persecution for being aware of sexual violence and other crimes in the camp and not stopping them:<sup>140</sup>

[A]ny crimes that were natural or foreseeable consequences of the joint criminal enterprise of the Omarska camp, including sexual violence, can be attributable to participants in the criminal enterprise if committed during the time he participated in the enterprise . . . . [I]t would be unrealistic and contrary to all rational logic to expect that none of the women held in Omarska, placed in circumstances rendering them especially vulnerable, would be subjected to rape or other forms of sexual violence.<sup>141</sup>

Radic was the only defendant of the five in the *Kvočka* case who was charged individually for personally and physically committing crimes of sexual violence,<sup>142</sup> whereas the other four defendants were convicted for

137. *Id.* ¶¶ 878-82.

138. See Prosecutor v. Kvočka, IT-98-30/1, Trial Chamber I, Judgment, n.343 (Nov. 2, 2001), <http://www.un.org/icty/kvočka/trialC/judgement/index.htm>. See also discussion *infra* Part VI.A-B.

139. *Id.* ¶¶ 121, 579, 740.

140. *Id.* ¶¶ 752, 755, 758, 761, 764. In a previous case, the trial chamber convicted a commanding officer, in part, for the widespread sexual violence that was perpetrated by soldiers under his command. See Prosecutor v. Krstic, IT-98-33, Trial Chamber I (August 2, 2001), <http://www.un.org/icty/krstic/TrialC1/judgement/index.htm>. The *Krstic* chambers held that even if members of a joint criminal enterprise did not agree upon committing or ordering the commission of certain crimes, they were guilty of such crimes if those crimes were a foreseeable consequence of the broader ethnic cleansing campaign. *Id.* ¶ 616.

141. *Kvočka*, IT-98-30/1, Trial Chamber I, Judgment, ¶ 327.

142. *Id.* ¶ 121.

being aware of their existence and not stopping them.<sup>143</sup> Although most of the charges of sexual violence were subsumed under the persecution count, Radic was also convicted for sexual violence as a violation of crimes against humanity.<sup>144</sup> In part, because of Radic's proven involvement in sexual violence and rapes, he was given a much stiffer prison term than most of the others. Radic's sentence is a single count of twenty years, whereas the others received five to seven years, except for defendant Zigic who received a sentence of twenty-five years because of evidence proving his direct commission of multiple counts of murder and torture.<sup>145</sup>

## VI. FEMALE-FRIENDLY PROVISIONS IN THE ICC

Women were again an important voice in promoting the creation of the ICC and in demanding that a multiple of acts of violence toward women be listed as specific crimes in the Rome Statute of the ICC. Although the ICC drew heavily on rape and sexual violence language in the ICTY and ICTR Statutes (that were influenced by women's groups) and cases, the Rome Statute of the ICC did make historic steps toward prosecuting other sexual violence not addressed by the ICTY and ICTR, like trafficking in women and girls and female genital mutilation. Despite these female-friendly provisions in the ICC statute, much work remains for women's groups and the international community to adequately protect women victims and witnesses and to criminalize violence against women. This section will look at the formation of the ICC, will consider women's influence in that formation, and will examine provisions in the ICC statute that benefit women.

### *A. Creating the ICC*

The ICC was created at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, which was held in Rome ("Rome Conference") from June to July 1998. Representatives from 160 countries, seventeen intergovernmental organizations, and fourteen U.N. agencies negotiated the language and provisions of the ICC. Also present were over 200 accredited NGOs that tried to influence the language, include crimes not previously considered, and alter terms.<sup>146</sup> The Conference allowed NGOs to attend most of the working group and plenary sessions where definitions of crimes and pro-

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143. *Id.* ¶¶ 752, 755, 758, 761, 764.

144. *Id.* ¶ 761.

145. *Id.* ¶¶ 754, 757, 760, 763, 766, 764.

146. Stoelting, *supra* note 6.

cedural processes were negotiated and agreed upon.<sup>147</sup> NGOs also made use of delegates' free time and lobbied them in the cafeteria, in hallways, and at NGO receptions.<sup>148</sup> Each NGO was determined to convince UN delegates of the importance and relevance of its platforms. Feminist NGOs lobbied diligently for female-friendly provisions, such as strong language criminalizing rape and other sexual violence, protection for witnesses, and equality of female representation in the ICC.<sup>149</sup>

At the conclusion of the Rome Conference, on July 17, 1998, the UN adopted the Rome Statute of the International Criminal Court, which enumerates and defines crimes, outlines procedure, and sets forth the organization of the ICC.<sup>150</sup> Although the United States originally voted against the Rome Statute on July 17, 1998, President Clinton signed the Statute on December 31, 2001, immediately before leaving office.<sup>151</sup> The mere passage of the Rome Statute by the UN does not ensure the implementation of the ICC, instead, the treaty must first be ratified, in addition to being signed, by a minimum of sixty countries.<sup>152</sup> As of April 22, 2002, 139 countries had signed the Statute, becoming signatories, and sixty-six countries had ratified it, becoming parties to it.<sup>153</sup> Now that the Rome Statute has been ratified by over sixty countries, it will enter into force on July 1, 2002.<sup>154</sup>

Some governments and many feminist NGOs believe that a permanent international criminal court is necessary to punish those who engage in war crimes, crimes against humanity, acts of aggression, and genocide. As one supporter of the ICC reasoned, "Universal crimes deserve a universal answer."<sup>155</sup> The hope is that the existence of a permanent interna-

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147. *Id.*

148. *Id.*

149. *Id.*

150. See Rome Statute of the International Criminal Court, open for signature July 17, 1998, U.N. Doc. A/CONF.183/9, <http://www.un.org/law/icc/statute/romefra.htm> [hereinafter Rome Statute]. One hundred twenty countries voted in favor of the Statute, seven countries opposed it, and twenty-one countries abstained in the vote. BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW: SELECTED DOCUMENTS 921 (1999-2000 ed. 1999).

151. See INST. FOR GLOBAL COMMUNICATIONS INTERNET, ROME STATUTE SIGNATURE AND RATIFICATION CHART, at <http://www.igc.org/icc/rome/html/ratify.html> (last visited April 22, 2002). Although the United States is now a signatory to the Statute, it is still not a party to the Statute, being subject to all of its provisions, because the Senate has not yet undertaken necessary domestic measures to ratify it.

152. Rome Statute, *supra* note 150, art. 126.

153. For a complete and regularly updated list of countries that have signed or ratified the Rome Statute, see INST. FOR GLOBAL COMMUNICATIONS INTERNET, *supra* note 151.

154. Web Site of the Rome Statute of the International Criminal Court, at <http://www.un.org/law/icc/index.html> (providing a history of the Rome Statute, updates relating to the Statute, relevant documents and helpful links) (last updated April 11, 2002).

155. UN Foundation, *International Criminal Court: Experts Cite Need for Terror Trials*, UN WIRE, Sept. 26, 2000 (quoting Joziias Van Aartsen, Dutch Foreign Minister who discussed the need

tional criminal court will deter would-be perpetrators and perhaps even provide incentive for leaders to end bloody conflicts, thus protecting many women, children, and men. Ad hoc tribunals like the ICTR and ICTY do not have a deterrent effect because they are only established after the crimes have been committed, thus, their purpose is strictly to punish, not to deter.

### *B. Women's Influence in the Creation of the ICC*

Women's involvement in the formation of the ICC was necessary for the inclusion of female-friendly provisions. Originally, the concept behind the ICC was to simply codify existing international laws.<sup>156</sup> Several NGOs concerned with women's rights found this approach problematic because international law, created by men and for men, has historically ignored violence targeting women.<sup>157</sup> In effect, international laws and instruments do not equally represent and protect men and women.

"A major reason international laws, including humanitarian, human rights and criminal, have insufficiently protected women from gender related violence in the past is because the laws as drafted and interpreted are not truly universal, but masculine . . . [B]asic legal norms are of much greater advantage in practice and in application to males than to females."<sup>158</sup>

The almost exclusive male participation in fields of international and domestic judicial and legislative systems has significantly contributed to the failure of international law to address women's issues and has added to women's subordination and lack of recourse.<sup>159</sup> In the first Preparatory Committees for the ICC, there were few references to sexual crimes, and when they were mentioned, they were grouped under outrages upon personal dignity.<sup>160</sup> Not wanting to see yet another international document and ultimately international court be created by men and for men, women united, voiced their concerns and made advances for the inclusion of female-friendly language.

Although the ICC is still not a viable world tribunal, many women's groups nonetheless played a vital role in the creation of the ICC. NGOs concerned with female issues were present during the ICC's formation

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for establishing the ICC), at <http://www.unfoundation.org/unwire/2001/09/26/current.asp>.

156. See Barbara C. Bedont, *Gender-Specific Provisions in the Statute of the ICC*, in *ESSAYS ON THE ROME STATUTE OF THE ICC: EDITORIALE SCIENTIFICA* (F. Lattanzi & W. Schabas eds. 1999), <http://www.iccwomen.org/resources/genderprovs.htm> (last visited March 21, 2002).

157. *Id.*: see also ASKIN, *supra* note 1, at 254.

158. ASKIN, *supra* note 1, at 253.

159. See *id.* at 254-55.

160. See Bedont, *supra* note 156.

and negotiation process, thus ensuring that female-friendly provisions would be included in the final document. These NGOs deserve recognition for their efforts to produce the most fair and useable document that would establish the workings and jurisdiction of the ICC. Most often, it is those NGOs with the large numbers and funding that are most visible. As such, one observer said of a large and powerful NGO,

“the Women’s Caucus for Gender Justice deserves praise for effectively advocating positions on the definitions of crimes and the qualifications of ICC personnel designed to ensure appropriate recognition of sexual violence and gender issues. The Women’s Caucus achieved significant results, as many delegations worked with it in crafting appropriate treaty language.”<sup>161</sup>

Women’s groups, including the Women’s Caucus, took on the difficult task of showing that existing international laws were inadequate and thus should not be incorporated into the ICC, while also alleging that customary international law had progressed to such a point that it could fill in the gaps that existing treaties and conventions could not.<sup>162</sup> Many NGOs concerned with women’s rights, like Feminist Majority Foundation, Women’s Caucus, Women’s Division of Human Rights Watch, Amnesty International and others, lobbied individual delegates, protested, gave speeches, and hosted panel discussions.

In many areas, their demands for the inclusion of female-friendly provisions in the Rome Statute paid off. For example, Amnesty International submitted a paper to the ICC Preparatory Committees suggesting ways to ensure protection for witnesses and adequate training of judges and staff for dealing with victims of sexual violence.<sup>163</sup> Both of these suggestions, as well as many others, made it into the Rome Statute.<sup>164</sup> The United Nations High Commissioner submitted suggestions at the Rome Conference, including granting power to the Prosecutor to hire advisers with legal expertise in issues of violence against women.<sup>165</sup> The Rome Statute adopted this suggestion as well as many others offered by a variety of NGOs.<sup>166</sup>

161. Stoelting, *supra* note 6.

162. See Bedont, *supra* note 156.

163. See AMNESTY INT’L, THE INTERNATIONAL CRIMINAL COURT: ENSURING JUSTICE FOR WOMEN, AI-index: IOR 40/006/1998 (January 1, 1998), at <http://www.amnesty.org>.

164. See Rome Statute, *supra* note 150, art. 36(8)(b), art. 42(9), art. 54(1)(b), art. 68.

165. See High Commissioner’s Paper, *supra* note 13.

166. See Rome Statute, *supra* note 150, art. 42(9) (stating that the Prosecutor shall choose advisers with expertise in sexual violence), art. 7(1)(g) (including rape, forced prostitution, forced pregnancy, forced sterilization as crimes against humanity), art. 7(1)(h) (listing gender as an identifiable group), art. 6(d) (defining one type of genocide as preventing births within an identifiable group), art. 8(2)(b) (xxii) (including various forms of sexual violence as a war crime), art. 8(2)(e)(vi) (listing rape and other forms of sexual violence as violations of laws and customs that constitute a

*C. ICC Provisions that Advance Women's Rights*

Due in large part to the efforts of women's organizations, the Rome Statute of the ICC contains three types of protection for women: 1) establishment of sexual violence as a crime, 2) procedures for investigating and prosecuting sexual violence, and 3) provisions for fair representation of women in the ICC staff.<sup>167</sup>

*I. Enumerating sex crimes*

The sex crimes enumerated in the Rome Statute are plentiful. These crimes are listed in Part II of the Statute under crimes against humanity and war crimes (Articles 7 and 8 respectively). A war crime can only be prosecuted if committed during a war, whereas a crime against humanity can be prosecuted during times of war or peace.<sup>168</sup> These two articles list the following as sexual crimes: rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and other grave forms of sexual violence also constituting a grave breach or serious violation of the Geneva Conventions (regarding war crimes) or other forms of sexual violence of comparable gravity (regarding crimes against humanity).<sup>169</sup> Perhaps influenced by public pressure, the Rome Statute also listed trafficking of women and children as a crime against humanity.<sup>170</sup> Another crime against humanity is persecuting an identifiable group, which includes "gender" as a group.<sup>171</sup> Due to the restraining definition of gender in Article 7(3), gender means male and female, not homosexual. Thus, if during a time of peace, a country or group persecutes women for merely being women, the perpetrators of the persecution can be punished for committing a crime against humanity as defined in the Rome Statute.<sup>172</sup>

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war crime), art. 36(8)(a)(iii) (encouraging a "fair representation of female" judges), art. 36(8)(b) (suggesting that judges should have expertise in issues of violence against women), art. 43(6) (requiring the Registrar staff of the Victims and Witnesses Unit to have expertise in dealing with sexual trauma), art. 54(1)(b) (charging the Prosecutor to consider the gender of the witness and the nature of the crime, especially where the crime is sexual in nature), art. 68(1) (instructing the Court to take necessary measures to protect witnesses, especially considering gender, art. 68(2) (allowing for in camera proceedings where the witness has suffered sexual violence).

167. See Bedont, *supra* note 156.

168. Although a crime against humanity need not occur during wartime, it must occur "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." Rome Statute, *supra* note 150, art. 7(1).

169. See *id.* art. 7(1)(g), 8(xxii).

170. *Id.* art. 7(2)(c).

171. *Id.* art. 7(1)(h).

172. One example of this would be the now defunct Taliban of Afghanistan. If the ICC were functioning at the time of Taliban rule, the United States, an NGO or an international organization could have filed a complaint against Afghanistan for its subjugating treatment of women, and the ICC, theoretically, could have prosecuted the Taliban leaders.

The Rome Statute improved the possibility of obtaining a conviction for a perpetrator of rape by listing rape as both a crime against humanity and a war crime, thus divorcing rape from the notion that it is only a crime of honor and dignity. Under the ICTY and ICTR Statutes, rape is listed only as a crime against humanity, not as a war crime.<sup>173</sup> By listing rape as a crime against humanity and a war crime, prosecutors can choose to prosecute the acts under the crime that is easier to prove; normally it is easier to establish a war crime than a crime against humanity.<sup>174</sup> To prove a crime against humanity, it is necessary to prove that the rape was “part of a widespread or systematic attack,”<sup>175</sup> which is very difficult to do.<sup>176</sup> In contrast, to prove a war crime, the prosecutor only needs to show that the individual rape was part of “a plan or policy.”<sup>177</sup>

Further, listing rape as a war crime in addition to a crime against humanity was an advancement for women, because it reinforced the notion that the injury was suffered by the individual instead of by the society, or even more generally, by humanity, which is inferred by listing rape as a crime against humanity. Moreover, the Rome Statute again divorced rape from the historical tie to honor and personal dignity by not specifically listing rape as an “outrage upon personal dignity,” as the ICTR Statute did.<sup>178</sup> Defining rape as a crime against a woman’s dignity minimizes the physical and psychological pain she suffered from the rape. Additionally, “[w]hen rape is perceived as a crime against honour or morality, shame commonly ensues for the victim, who is often viewed by the community as dirty or spoiled.”<sup>179</sup> Thus, the victim is harmed a second time. This secondary harm results from community members labeling the victim as tainted, which could result in the victim’s feelings of worthlessness.

One easily overlooked, but potentially very powerful provision for protecting women is found in Article 21, which states that the ICC must interpret all of its laws in accordance with existing internationally recognized human rights.<sup>180</sup> This provision means that judges could look to the myriad of United Nations documents and resolutions for guidance in their decisions. Some women’s groups and other NGOs consider this a great victory.<sup>181</sup> However, it is unclear if the ICC can legally rely on non-

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173. See ICTR Statute, *supra* note 45, art. 3(g); ICTY Statute, *supra* note 45, art. 5(g).

174. See Meron, *supra* note 54, at 428; Ryan, *supra* note 27, at 477.

175. Rome Statute, *supra* note 150, art. 7(1).

176. See Ryan, *supra* note 27, at 477.

177. Rome Statute, *supra* note 150, art. 8(1).

178. See *id.* art. 8(2)(c)(ii).

179. Ryan, *supra* note 27, at 477.

180. Bedont, *supra* note 156.

181. See *id.*

binding international documents and conventions. Arguably, the language in many international documents and conventions is new and unqualified to be considered as customary international law because it has not been enforced throughout the world as legal, binding authority for a substantial period of time.<sup>182</sup>

## 2. *Protecting and caring for witnesses and victims of sexual violence*

The protection, both physical and psychological, of sexual violence witnesses is indeed an important inclusion into the Rome Statute. Some of these provisions were borrowed from the ICTY Statute.

Article 65 is the main portion of the Rome Statute that deals with protections for victims and witnesses. This article is of special importance in cases of rape and other sexual violence. The court has authority to protect the physical and psychological well-being of the witness and/or victim, as well as her/his dignity and privacy. Other means of protecting witnesses include in camera proceedings and presenting testimony by electronic or other means that make it possible for the victim to tell her/his story without being seen or even heard by the attacker.<sup>183</sup>

Perhaps learning a lesson from the first case of the ICTY, *Tadic*, the Rome Statute recognized that witnesses need protection and anonymity until a well-formed witness protection plan can be enacted. In *Tadic*, the prosecutor knew of many rapes and cases of other horrible sexual violence,<sup>184</sup> yet, despite this knowledge, he was forced to drop all rape charges when the last witness refused to testify due to threats against her and her family.<sup>185</sup> Unless victims and witnesses are assured protection and anonymity, they will not come forward to testify and criminals will go unpunished.

The ICTY recognized the additional trauma and embarrassment a victim of sexual assault experiences when she or he testifies:

It has been noted further that testifying about the event is often difficult, particularly in public, and can result in rejection by the victim's family and community . . . . In addition, traditional court practice and procedures have been known to exacerbate the victim's ordeal during trial. Women who have been raped and have sought justice in the legal system commonly compare this experience to being raped a second time.<sup>186</sup>

182. See CARTER & TRIMBLE, *supra* note 34, at 68-69, 134-38.

183. Rome Statute, *supra* note 150, art. 68(2).

184. See Prosecutor v. Tadic, IT-94-I, Second Amended Indictment, ¶¶ 2.6, 4.3, 5 (Dec. 14, 1995), <http://www.un.org/icty/tadic/trial/index.htm>.

185. Walker, *supra* note 58, at 457.

186. Prosecutor v. Tadic, IT-94-I-T, Decision on the Prosecutor's Motion Requesting Protec-

For this reason, most victim and witness names are not given in ICTY and ICTR cases, especially those involving sexual violence.

The protection and anonymity of witnesses is also vital because of the seemingly mild sentences imposed by the ICTY and ICTR.<sup>187</sup> One reason sentences may seem light is because defendants who receive individual sentences for multiple crimes are allowed to serve the many sentences concurrently, thus drastically reducing the effective prison sentence.<sup>188</sup> Sentences may be mild because of a lack of witnesses who are willing to testify to having seen murders and other crimes that carry more severe punishments. Without testimony from witnesses, much of the circumstantial and supporting evidence falters and the perpetrators are convicted of only minor offenses. Because there is no guarantee that the criminal will receive a severe punishment, witnesses might anticipate short sentences, which have the potential of putting the witness in future danger. The perceived danger is that the criminal will seek revenge upon the witness once he or she is released from prison. When witnesses hear of light sentences imposed on other convicted criminals, they could become less willing to testify and place their life and their family's life in jeopardy. By granting witnesses anonymity, more witnesses will be will-

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tive Measures for Victims and Witnesses, ¶ 46 (Aug. 10, 1995), <http://www.un.org/icty/ind-e.htm> (citations omitted).

187. Tadic will spend a maximum of twenty years in prison for numerous counts of torture and murder. Furundjiza will spend a maximum of ten years in prison for torture and aiding and abetting many counts of rape and sexual violence. Although out-of-court testimonies place Tadic and Furundjiza at the scene of many more crimes, witnesses were unwilling to testify to these accounts in court. Kunarac was sentenced to twenty-eight years in prison for multiple counts of rape and aiding and abetting rape, among other crimes. Kovac was sentenced to twenty years in prison for multiple counts of rape, enslavement, and selling girls as property. Vukovic was sentenced to twelve years for a single count of rape committed on a twelve year old girl. Radic received a twenty-year sentence for multiple counts of rape, aiding and abetting rape, torture and murder. *See infra* Part V.

One reason sentences for rape that the ICTY imposes appear mild is because Americans, and Europeans to a lesser degree, are accustomed to stiffer sentences for rape. Two thirds of convicted rapists in the United States receive a prison term, the average being fourteen years for a single count of rape. Lawrence A. Greenfeld, *Sex Offences and Offenders: An Analysis of Data on Rape and Sexual Assault*, 20 Bureau of Justice Statistics NCJ-163392 (February 1997). The third who are not sentenced to prison either serve time in local jails (an average of eight months) or in supervised community service. *See id.* Although rapists receive impressive sentences in the United States, government statistics show that violent criminals serve less than a fourth of their sentence. *National Corrections Reporting Program 1988*, BUREAU OF JUSTICE STATISTICS (U.S. Dep't of Justice, Washington D.C.), 1992, table 2-7 (tables reprinted in James Wootton, *Truth in Sentencing: Why States Should Make Violent Criminals Do Their Time*, 20 DAYTON L. REV. 779 (Winter 1995)). Serbia has one of the lowest penalties for rape in Europe, one to ten years, or one to twenty years if the victim suffered serious physical injury. Julie Mertus, *Human Rights of Women in Central and Eastern Europe*, 6 AM. U. J. GENDER SOC. POL'Y & L. 369, 427-28 (Spring 1998).

188. Such is the case with Tadic who was sentenced individually on nine counts, each carrying between six and twenty years. *See Prosecutor v. Tadic*, IT-94-1, Appeals Chambers, Judgement, Part IX, Disposition (July 15, 1999), <http://www.un.org/icty/tadic/appeal/judgement/index.htm>. However, because Tadic is allowed to serve the sentences concurrently, his effective sentence is only twenty years. *See id.*

ing to testify against perpetrators of crimes, which will result in an increased number of justified convictions.

One element in the Rome Statute that might not have materialized without NGO suggestions and lobbying is the creation of a Victims and Witnesses Unit.<sup>189</sup> The Statute tasks the Registry with creating the Unit, which is to provide protection, counseling, and other appropriate and necessary assistance for witnesses.<sup>190</sup> Unit staff should have training in dealing with trauma, including trauma associated with sexual violence.<sup>191</sup>

### 3. *Selecting judges and staff*

Perhaps the most important influence that women's groups had on the Rome Statute is the requirement for selecting judges. Historically, in creating international bodies, male diplomats have been very careful to ensure that "the membership of these bodies is generally balanced to reflect diversity of regions, legal or cultural systems, and stages of development," but "they are overwhelmingly male."<sup>192</sup> In selecting ICC judges, member States are instructed to not only select judges in a manner to fairly represent a diversity of legal systems and geographical areas, they are also to select judges to provide for "fair representation of female and male judges."<sup>193</sup>

This provision is of utmost importance because women's perception of rape and other sexual violence can be distinct from men's understanding. Without the insight of female judges in sexual assault cases, the men on the bench could have great difficulty understanding the victim's viewpoint. Without the perspective of female judges, male judges might not understand why the victim did not fight off the attacker, why the victim continues to feel shame and terror, or why the victim did not report the sexual assault for months or even years. Without aid from female judges, male judges might not be able to effectively question the witness without causing further humiliation and pain. Without women as judges, there might be less of an insistence to prosecute sexual violence, as is evidenced by past international war tribunals.<sup>194</sup> Additionally, female victims are likely to feel less comfortable before an all-male bench than before a bench including judges of their own gender.

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189. See Rome Statute, *supra* note 150, art. 46(6).

190. *Id.*

191. *Id.*

192. ASKIN, *supra* note 1, at 254 (quoting Andrew Byrnes, *Enforcement Through International Law and Procedures*, in HUMAN RIGHTS OF WOMEN 200 (Rebecca Cook ed., 1994)).

193. Rome Statute, *supra* note 150, art. 36(8)(a)(iii).

194. Ryan, *supra* note 27, at 469 (stating that NGOs reported that the *Akayesu* indictment was amended at the insistence of the sole female judge on the bench).

One interpretation of the Rome Statute's language of "a fair representation of female and male judges"<sup>195</sup> could mean that half of the ICC judges must be female and half male. No female judge sat on the Nuremberg or the Tokyo Tribunals. Two women judges sit on the ICTY and only one on the ICTR. Thus, with only a small minority of past international tribunal judges being women, the Rome Statute's "fair representation" language is probably not currently understood to mean that of the eighteen ICC judges half, or nine, will be women. However, as women continue to push for better representation, the international community will respond. The response might not be an equal number of judges the first year, but that should be the eventual goal. By putting even a few qualified women in positions of influence in the ICTY and the ICTR, perpetrators of wartime rape have not escaped their victims' pleas for justice.<sup>196</sup> The ICC can ensure at least the same or even improved success in punishing perpetrators of sexual violence if women are given a stronger voice as judges, prosecutors, researchers, and as other decision-makers. Judge Pillay, the only female judge on the ICTR, emphasized the importance of including women at all levels in tribunals, stating, "Who interprets the law is at least as important as who makes the law, if not more so. . . . I cannot stress how critical I consider it to be that women are represented and a gender perspective integrated at all levels of the investigation, prosecution, defense, witness protection and judiciary."<sup>197</sup>

Additionally, in selecting judges, member States shall also consider the necessity of including judges with legal knowledge in the area of gender violence.<sup>198</sup> The same considerations of fair representation between females and males and including staff with expertise in sexual violence apply to the staffing of the Registry.<sup>199</sup> The Prosecutor is authorized to appoint advisers who possess legal expertise on sexual and gender violence, among other issues.<sup>200</sup> These various provisions help to ensure that violence against women will not be tolerated during international or internal conflict.

#### VII. LANGUAGE IN THE ICC IS A SMALL STEP FORWARD FOR WOMEN

Women's involvement in the creation of the Rome Statute helped advance women's issues, but this step forward was only a small step forward. Rape still cannot be prosecuted as a crime in and of itself—as

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195. Rome Statute, *supra* note 150, art. 36(8)(a)(iii).

196. See ASKIN, *supra* note 1, at 300-02.

197. Bedont & Hall Martinez, *supra* note 6, at 65-85.

198. Rome Statute, *supra* note 150, art. 36(8)(b).

199. *Id.* art. 44(2).

200. *Id.* art. 42(9).

rape. Instead, it must be prosecuted as a subset of a war crime, a crime against humanity or genocide. Additional reasons why this step forward can arguably be classified as only a small step are because perpetrators of violence against women continue to serve relatively short sentences, because the ICC did not provide for means by which to deter future aggressors, and because protection for witnesses and victims is not yet adequate.

Women's groups and other groups concerned with women's issues united to influence the ICC's enumerated crimes, definition of those crimes, court procedures, and witness protection provisions.<sup>201</sup> As early as the formation of the ICTY, women were uniting to assure that perpetrators of sexual violence in the former Yugoslavia would be punished.<sup>202</sup> And in the *Akayesu* case of the ICTR, the court specifically noted the presence and influence of the public and NGOs.<sup>203</sup>

It is reasonable to conclude that without a tangible presence and constant lobbying, rape and other sexual violence would have again been ignored or minimized in international tribunals.<sup>204</sup> Women's voices did make a difference in the formation of the ICC. Rape is now specifically listed as a war crime and as a crime against humanity. Although rape was already listed as a crime against humanity in the ICTY and ICTR, those tribunals have a limited jurisdiction and purpose. The ICC goes beyond the enumerated crimes of the ICTY and ICTR to recognize trafficking in women and children and sexual violence that could include female genital mutilation.<sup>205</sup>

#### *A. Rape Should Be a Crime of Rape, Not a Subsection of Another Crime*

Women's groups, however, were not as influential as they perhaps wanted to be or claim to have been.<sup>206</sup> They failed to prompt the ICC to

201. See Enloe, *supra* note 4, at 220; Bedont & Hall Martinez, *supra* note 6; Brook Sari Moshan, Comment, *Women, War, and Words: The Gender Component in the Permanent International Criminal Court's Definition of Crimes Against Humanity*, 22 *FORDHAM INT'L L.J.* 154, 156 (November 1998).

202. See Enloe, *supra* note 4, at 220; Bedont & Hall Martinez, *supra* note 6; see also KATHARINE T. BARTLETT & ANGELA P. HARRIS, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 841 (2d ed. 1998).

203. Prosecutor v. Akayesu, ICTR-96-4, Judgment, ¶ 417 (Sept. 2, 1998), <http://www.icttr.org>.

204. See BARTLETT & HARRIS, *supra* note 202, at 841.

205. Rome Statute, *supra* note 150, art. 7(1)(g).

206. "The Rome Statute's gender provisions are an encouraging example of how the development of the international women's rights movement is positively impacting international human rights and humanitarian law despite the strong influence of conservative political forces." Bedont & Hall Martinez, *supra* note 6. "[T]he Women's Caucus for Gender Justice deserves praise for effectively advocating positions on the definitions of crimes and the qualifications of ICC personnel designed to ensure appropriate recognition of sexual violence and gender issues." Stoelting, *supra* note 6. See also Erb, *supra* note 8, at 401-03, 429, 432; Leila Nadya Sadat & S. Richard Carden, *The New*

recognize rape in the international community as rape, a violent act against an individual woman. Rape should be prosecuted as rape, as a crime in itself, not as a subset of a war crime or a crime against humanity. Rape is not less harmful to the victim if she is raped in an isolated incident and not part of a systematic attack or large-scale commission of rape. It seems that rapists still do not have to answer for the violence toward the individual woman but instead for the violence toward the community.

It is true that specifically listing rape and other sexual violence as war crimes and crimes against humanity was a necessary and important step toward recognizing the horror of these crimes and recognizing that crimes against women are as important as crimes against men. But because rape can only be prosecuted in the ICC if it falls under the umbrella of war crimes or crimes against humanity, many isolated rapes will not be prosecuted. For a rape to be prosecuted as a war crime, it must be part of a plan, policy, or large-scale commission of the crime.<sup>207</sup> For it to be prosecuted as a crime against humanity, it must be part of a widespread, systematic attack.<sup>208</sup> And for rape to be prosecuted as genocide, as the ICTY and ICTR said it could, the prosecutor must show how rape is being used to destroy a race.<sup>209</sup> In the ICC, ICTY, and ICTR, rape is not punishable as rape, a crime in and of itself. Because rape is listed as a crime under the two large headings of crimes against humanity and war crimes and inferred under genocide, many rapes will go unpunished because it is difficult to prove that any specific rape was part of either a policy or a systematic attack unless it was just one of many proven rapes.

### *B. Light Prison Time for Heavy Crimes*

Women's groups also failed to secure substantial prison terms for

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*International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 398, n.73 (March 2000) (both giving the Women's Caucus most of the credit for the inclusion of much of the female-friendly provisions of the Rome Statute).

Some academics have criticized NGOs, including women's groups, and their involvement at the Rome Conference. See Guy Roberts, *Assault on Sovereignty: The Clear and Present Danger of the International Criminal Court*, 17 AM. U. INT'L L. REV. 35 (2001) (pagination not yet available); Marcus R. Mumford, *Building Upon a Foundation of Sand: A Commentary on the International Criminal Court Treaty Conference*, 8 MSU-DCL J. INT'L L. 151, 167, n.57 (Spring 1999); Alessandra Stanley, *War Crimes Treaty Stalls Over Inclusion of Rape*, INT'L HERALD TRIB., July 10, 1998, at 1. See also, Jocelyn Campanaro, Note, *Women, War, and International Law: The Historical Treatment of Gender-Based War Crimes*, 89 GEO. L.J. 2557, 2587-88 (August 2001) (recognizing the impact that the Women's Caucus had on the Rome Statute, while acknowledging that important issues were not adequately discussed and incorporated).

207. Rome Statute, *supra* note 150, art. 8.

208. See *id.* art. 7.

209. See Prosecutor v. Akayesu, ICTR-96-4, Judgment, ¶ 731 (Sept. 2, 1998), <http://www.icttr.org>.

convictions of sexual violence and to secure that multiple sentences would be served successively instead of concurrently. Prison sentences in the ICTY for rape as a war crime and as a crime against humanity range from twelve years for a single count of rape<sup>210</sup> to a single sentence of twenty years for multiple counts of rape, enslavement, battery, and outrages upon personal dignity.<sup>211</sup> The flaw in the sentencing system is not necessarily the specific prison terms for rape, but allowing defendants who have been sentenced to multiple prison terms to serve them concurrently.<sup>212</sup> If a soldier commits twenty rapes and is sentenced to six years for each rape, his prison sentence should be 120 years, six years for each of twenty rapes. This means that a soldier who commits one rape and another who commits fifty rapes could serve the same prison term. Concurrent sentences do not deter additional rapes and other sexual crimes. Instead, a soldier might think that if he has already raped once, he might as well continue raping because his prison term could be the same.

Another reason the amount a guilty party spends in prison needs to be increased is that victims will likely not testify against their aggressors if they fear that the aggressors will be out of prison in ten to fifteen years. The victim will be afraid that the aggressor will once again harm her. Victims need to be assured that convicted criminals will spend many, many years in prison when the crime so justifies.

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210. See *Prosecutor v. Kunarac*, IT-96-23, IT-96-23/1, Trial Chamber II, Judgment ¶¶ 878-82 (Feb. 22, 2001), <http://www.un.org/icty/foca/trialc2/judgement/index>.

211. See *id.* ¶ 877. Because the defendant received only a single sentence of twenty years for multiple rapes and aiding and abetting rapes, as well as other crimes, it seems that the effective sentence per rape was not even a year.

212. Furundzija was sentenced to eight years for rape as outrages upon personal dignity and ten years for torture (the specific actions were of sexual violence); the sentences are to be served concurrently, meaning Furundzija will serve only ten years for the torture sentence, as though he were never convicted of the rapes. *Prosecutor v. Furundzija*, IT-95-17/1, Trial Chamber II, Judgment, ¶¶ 292-96, Part IX (Dec. 10, 1998). Tadic received multiple sentences, ranging in six to twenty-five years, for various crimes; however, these sentences are to be served concurrently. *Prosecutor v. Tadic*, IT-94-1, Trial Chamber II, Sentencing Judgment, Part V (g) (Nov. 11, 1999). Defendants in *Prosecutor v. Delalic* received judgments multiple sentences ranging from five to twenty years, to be served concurrently. IT-96-21, Trial Chamber II, Judgment, ¶ 1286 (Nov. 16, 1998). Later, these concurrent sentences were modified into a single sentence for three of the defendants. Defendant Landzo, who received multiple sentences of five, seven, and fifteen years, received a single sentence of fifteen years; Delic, who received multiple sentences ranging from seven to twenty years, was given a single sentence of eighteen years; and Mucic, who had multiple sentences of seven years, received a single sentence of nine years. *Delalic*, IT-96-21, Sentencing Judgment, Part IV-V (Oct. 9, 2001). See also *Prosecutor v. Kupreskiv*, IT-95-16, Trial Chamber II, Judgment, Part VIII (B) (Jan. 14, 2000); *Prosecutor v. Blaskic*, IT-95-14, Trial Chamber I, Judgment, ¶ 805.

Although rapists, on average, receive a much harsher sentence under the laws of the United States, they only serve about a fourth of the prison term, thus between three and four years. See *supra* note 187 and accompanying text.

### C. Other Deterrents

Another area where women's groups could have made a difference was in demanding publication of the accused and his sentence in local and international news sources. If the ICC is to be an effective deterrent, as supporters of the court hope it to be, people of the world need to know that perpetrators of crimes are currently serving time in prison.

Additionally, the ICC can only act as a deterrent if potential criminals fear going to international prison. Defendants awaiting trial before the ICTR have complained that they are not being paid for labor performed in the Arusha, Tanzania detention center, the holding facility for the ICTR, and that they are not allowed enough contact with family members.<sup>213</sup> In fact, these Rwandan detainees' greatest complaint was that they were not being treated as well as the Serb detainees in the Hague.<sup>214</sup> Milan Simic, a former detainee awaiting trial at the ICTY, described the international detention center as a pleasant place with a common room for socializing, with a dartboard, a ping-pong table, and even access to television, movies, and Playboy magazines.<sup>215</sup> Unfortunately, many prisoners are likely living more comfortably than their victims or than they would be in their countries. A prison term is not a deterrent if life is better in prison than it would be at home.

### D. Providing Protection for Witnesses

Although women's groups lobbied for witness protection and were successful in the inclusion of some beneficial provisions, such as anonymity for the witness, a Witness and Victims Unit, and ICC staff trained in dealing with victims of sexual violence, more needs to be done to physically and emotionally protect witnesses. Many rapes have been documented in the former Yugoslavia<sup>216</sup> and in Rwanda, but a large number of rape victims are unwilling to testify because of social norms that place shame on the raped woman and because there are not enough measures to protect the witness from physical threats and from societal contempt.<sup>217</sup> Even if the imprisoned criminal cannot threaten the victim

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213. UN Foundation, *Rwanda: Former Minister Transferred To U.N. For Trial: More*, UN WIRE, at [http://www.unfoundation.org/unwire/util/display\\_stories.asp?objid=18681](http://www.unfoundation.org/unwire/util/display_stories.asp?objid=18681) (on file with the author) (last visited Sept. 27, 2001).

214. *Id.* Considering the atrocities with which these defendants are charged, their complaints seem hollow. Some might even suggest that life should be harder for these charged individuals awaiting trial and the conclusion of the appeals process.

215. Mirko Klarin, *Tribunal Update*, BOSNET, Aug. 20, 1998, at <http://www.bosnet.org/archive/bosnet.w3archive/9808/msg00072.html> (on file with author).

216. It is estimated that 20,000 to 50,000 rapes occurred during the war in the former Yugoslavia. BARTLETT & HARRIS, *supra* note 202, at 841.

217. Tamara L. Tompkins, Note, *Prosecuting Rape as a War Crime: Speaking the Unspeak-*

for several years, once his friends and family know the victim has testified, they can harass the victim and the victim's family. Until there is better witness protection, victims will not come forward with their stories of horror, and many rapes and acts of sexual violence will go unprosecuted and thus unpunished.

One means of protecting witnesses is to establish an international witness protection program in which witnesses, where necessary, would be given a new identity and relocated to another area, inside or outside of the country where the crime was committed.<sup>218</sup> Possible problems that would have to be addressed if this program were established are numerous: the difficulty of finding willing countries to permanently host these protected witnesses, altering necessary documents to change witnesses' identities, obtaining visas, funding the program, paying travel costs and financial assistance, and ensuring that witnesses integrate into the new society to truly be hidden from possible future threats from past aggressors. Another problem would be ensuring that witnesses truly were witnesses of crimes and were not fabricating a story in exchange for being sent to a country where life could be easier and opportunities more abundant. Despite the problems with an international witness protection program, if established and reserved for cases of strict necessity, as done with the witness protection program in the United States, such a program could benefit individuals who could testify against much sought after powerful criminals.

Another possible means of protecting witnesses and victims is to engage in large-scale publicity campaigns to educate societies of the need to testify against criminals and especially to educate women and men that victims of sexual violence are victims and should not be treated as a shamed person. This education must succeed in shifting the shame from the victim to the perpetrator of rape. Until shame is heaped on rapists by entire societies, rape will continue. This education could protect victims by encouraging more victims and witnesses to come forward and testify so that the perpetrators of these crimes will be imprisoned. This can protect the victims from repeat attacks in the present, but could also act as a deterrent against future rapes if the potential rapists know that they are

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able. 70 NOTRE DAME L. REV. 845, 878-80 (1995); Kelly D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 AM. J. INT'L L. 97, 122-23 (January 1999); Jose E. Alvarez, *A Rush to Closure: Lessons of the Tadic Judgment*, 96 MICH. L. REV. 2031, 2072-73 (June 1998); Scott Splittgerber, *The Need for Greater Regional Protection for the Human Rights of Women: The Cases of Rape in Bosnia and Guatemala*, 15 WIS. INT'L L.J. 185, 220-22 (1996).

218. Compare Walker, *supra* note 58, at 473-74 (suggesting that asylum could be granted to witnesses and discussing potential problems with an asylum program, some of which are similar to the problems that a witness protection program could face).

likely to be identified as rapists and prosecuted for the rapes because the victim and witnesses will testify of it. Also, if the men in society, who are the fathers, husbands, brothers, and sons of the female victims, understand and internalize that victims of sexual violence have suffered a violent physical attack and that the woman has done nothing wrong and, therefore, has nothing to be ashamed of, they will stand by their women and will seek redress for these attacks, instead of trying to cover up the crime.

*E. The Exclusion of Homosexual and Abortion Provisions in the ICC Is Not a Failure for Women's Rights and Protections*

Although some women's groups might consider two issues they were pushing as unfortunate failures, these issues are not important for most women who now suffer sexual violence, and as such, these areas were not failures for female-friendly provisions in the ICC. The two issues adamantly pushed by some women's groups were the use of the term "gender" in the Rome Statute and the provision criminalizing "enforced pregnancy."<sup>219</sup> The Women's Caucus was perhaps the strongest and most vocal proponent for these two issues.

Various delegates and other NGOs opposed the broad inclusion of these terms and issues. Delegates worried that using the term "gender" and not "sex" was introducing language to protect homosexual activity, which arguably does not significantly further the protection of women in general. These fears were well founded. A member of the Women's Caucus wrote, "[c]ontrary to the wishes of some delegations that opposed the term 'gender,' the term may include sexual orientation."<sup>220</sup> The Women's Caucus lobbied to include the term "gender" and not "sex" (as in gender crimes, and gender as an identifiable group instead of sex crimes and sex as an identifiable group) because the group wanted to put forth its idea that gender does not depend on biology but rather on social constructs.<sup>221</sup> By including "gender" in the Statute and interpreting it to mean socially constructed concepts of men and women, the Women's Caucus hoped to subtly create gender crimes as crimes against homosexuality.<sup>222</sup> One possible gender crime would be discrimination toward a person for being homosexual, "[t]his would constitute discrimination on the grounds of gender."<sup>223</sup>

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219. Moshan, *supra* note 201, at 178.

220. Bedont, *supra* note 156.

221. *Id.*

222. *Id.*

223. *Id.*

Because of a lack of any international legally binding document to draw on for homosexual rights and because of a fear of including this language in the Rome Statute, diplomats agreed to include the term “gender,” but defined it in such a way that, at least for now, it means “the two sexes, male and female, within the context of society.”<sup>224</sup>

The Women’s Caucus was also the leading force behind including the crime of forced pregnancy. The Rome Statute is the first international document that recognizes this act as a crime.<sup>225</sup> According to the elements of the crime of forced pregnancy, men who forcibly make a woman pregnant with the intent of changing the ethnic composition of the woman’s group can be prosecuted under the ICC.<sup>226</sup>

The Women’s Caucus found this definition too restrictive and wanted the elements of the crime to be defined simply as a woman who is forced to remain pregnant.<sup>227</sup> The Holy See<sup>228</sup> and other delegates at the Rome Conference were concerned that this vague language would allow for abortion upon demand.<sup>229</sup> The Women’s Caucus’s reasoning for needing a vague definition for the crime of forced pregnancy relies on extraordinary events. Specifically, the Caucus argues that the broad definition is needed to protect women who become pregnant through consensual sex (thus not satisfying the “forced” element of the crime) and then whose sexual partner forcibly detains the woman during the pregnancy so the sexual partner can then sell the baby on the black market.<sup>230</sup> This situation is possible, though highly unlikely. Due to the extreme rarity of this unlikely act, a dangerously vague definition of forced pregnancy is not necessary or beneficial for most women.

Because victims of sexual violence are not generally concerned about promoting homosexual platforms or obtaining abortions, these two provisions for which the Women’s Caucus lobbied are not failures for women generally, and specifically, they are not failures for the present

224. Rome Statute, *supra* note 150, art. 7(3).

225. *See id.* art. 7(1)(g).

226. Preparatory Comm’n for the ICC, Finalized Draft of the Elements of Crimes, art. 7(1)(g)-4, U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2002), [http://www.un.org/law/icc/statute/elements/english/1\\_add2e.doc](http://www.un.org/law/icc/statute/elements/english/1_add2e.doc).

227. Bedont, *supra* note 156.

228. The Holy See is the international diplomatic branch of the Vatican City State. It is the Holy See, not the Vatican, that enters international agreements. Further, it is the Holy See that participates on behalf of that the Vatican City State at the United Nations. The Holy See has Permanent Observer status at the United Nations. For general information on the Holy See Mission to the United Nations, see Archbishop Renato R. Martino, Apostolic Nuncio, Permanent Observer of the Holy See to the United Nations, Welcoming Statements to the Holy See Mission Web site, <http://www.holyseemission.org/> (last visited March 21, 2002).

229. Bedont, *supra* note 156.

230. *Id.*

victims of sexual violence. The female-friendly provisions of the Rome Statute provide more protection to women than many national governments do, but ample room still exists for the Statute to improve its protection of victims and witnesses and its inclusion of women in positions of authority.

#### VIII. CONCLUSION

Women's groups played a vital role in improving the Rome Statute's language concerning violence against women. However, their influence was not as great as some claim it to be. Women's involvement helped in including rape as a war crime in addition to a crime against humanity. Women helped identify other sexual crimes, such as enforced pregnancy, enforced sterilization, trafficking in women and girls, sexual mutilation and thus ensured their inclusion in the Rome Statute. Women's involvement played a part in ensuring that witnesses of sexual violence could testify in camera and anonymously. Further, women's lobbying called for a Victims and Witnesses Unit with staff that was trained in counseling victims of sexual violence. Perhaps one of the greatest positive influences that women's groups had in the Rome Statute was the inclusion of measures to protect victims and the requirement of "fair representation of female and male judges."<sup>231</sup>

Despite these many steps forward, many changes still are required to ensure adequate protection and equality for women. Rape can only be prosecuted as a war crime, crime against humanity, or genocide, thus rapes that cannot be linked to a greater plan will not be prosecuted in the ICC. Because perpetrators of crimes serve concurrent sentences, there is no deterrent effect. Once a person rapes, the time served will likely not increase because the terms are served concurrently. Victims and witnesses need additional protective measures to assure their safety and allow them to testify without fear of retribution.

Moreover, because rape and other sexual violence were already contrary to customary international law, were mentioned in many international treaties, and most recently were incorporated in the Statutes of the ICTY and ICTR, the inclusion of these crimes in the Rome Statute was also not as big of a triumph as some groups contend. Nevertheless, by making rape both a crime against humanity and a war crime, prosecutors will have a better chance of obtaining a conviction.

Women's groups have helped the international community take a positive step in protecting women victims against sexual violence and

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231. Rome Statute, *supra* note 150, art. 36(8)(a).

thus treating women as equal to men. This small step forward should only be the first of many steps forward for women's worldwide fight for equality, respect, and freedom from sexual violence. Women's lobbying cannot cease. Unless women's groups are vigilant in assuring that provisions of the ICC are implemented to benefit women, that small step forward that the Rome Statute took will be halted.

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