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GENDER-BASED WAR CRIMES: INCIDENCE AND EFFECTIVENESS OF INTERNATIONAL CRIMINAL PROSECUTION

INTRODUCTION

War crimes and international law present legal questions of jurisdiction, precedent, and lack of authority. These questions have plagued every historical attempt to prosecute war crimes and crimes against humanity. Unfortunately, such crimes are among the largest scale and most devastating of all criminal acts.¹ Therefore, it is important to determine how to most effectively prosecute such crimes.²

Specifically, which type of prosecution can accomplish the goals of criminal liability most fully? Those goals include deterrence (both general and specific), retribution, and victim vindication.³ A variety of war crimes prosecutions have achieved varying degrees of success. The first such prosecution came after the horrors of the Holocaust and World War II, resulting in the Nuremberg and Tokyo trials.⁴ After the ethnic cleansing in the former Yugoslavia and Rwanda, the United Nations authorized the establishment of the International Criminal Tribunal for the Former Yugoslavia⁵ and the International Criminal Tribunal for Rwanda,⁶ respectively. Non-governmental organizations (NGOs) have pushed to create people's tribunals.⁷ The United Nations recently established the International Criminal Court (ICC).⁸ Though these efforts have resulted in

1. See Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 540-41 (2005) ("The prevailing paradigm views mass atrocity as something greater than the sum of its parts [M]ass violence is constructed as something extraordinarily transgressive of universal norms. . . . Acts of atrocity are characterized as crimes against the world community or, more emotively, as offenses against us all.")

2. See Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7, 7 (2001) ("[The] stigmatization of criminal conduct may have far-reaching consequences, promoting postconflict reconciliation and changing the broader rules of international relations and legitimacy.")

3. See Lynnette S. Cobun, *The Insanity Defense: Effects of Abolition Unsupported by a Moral Consensus*, 9 AM. J.L. & MED. 471, 476 (1984).

4. Jocelyn Campanaro, Note, *Women, War, and International Law: The Historical Treatment of Gender-Based War Crimes*, 89 GEO. L.J. 2557, 2560-64 (2001).

5. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993).

6. S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994).

7. See *infra* notes 116-32 and accompanying text.

8. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (2002).

considerable progress in the international prosecution of war crimes, many shortcomings remain.

Part I of this note considers one of the most glaring shortcomings in the area of war crimes and crimes against humanity: war crimes disproportionately impacting women, known as gender-based war crimes.⁹ Prosecuting these crimes is particularly difficult when no established rules, schedules, or procedures exist, which unfortunately has been true of previous international war crimes prosecutions.¹⁰ Additionally, these crimes, and particularly their victims, are typically ignored or marginalized.¹¹ Despite often being the most widespread type of war crime committed in any given conflict, gender-based war crimes are often the most overlooked.¹² The establishment of the ICC may potentially alleviate many of these obstacles, thus making prosecution of gender-based war crimes more likely and more effective. The United States' failure to ratify the Rome Statute, the formative treaty of the ICC,¹³ directly hinders the potential of the ICC in the prosecution of gender-based war crimes.

Part II of this note examines the boundaries of international criminal prosecution today and the definitions of gender-based war crimes. Such boundaries and definitions are blurred and evolving but still necessary to frame the argument. Part III examines the nature and effectiveness of ad hoc tribunals. To date, ad hoc tribunals have been the most common method for prosecuting war criminals internationally.¹⁴ These tribunals have had varied success prosecuting gender-based war crimes. Part III is divided into two

9. Campanaro, *supra* note 4, at 2557-58:

In times of war, women and girls are targeted for sexual abuse on the basis of their gender, irrespective of their age, ethnicity, or political affiliation. By virtue of their gender, women become the target of one of the most serious violations that occur during war. . . . Although there are a broad range of gender-based war crimes, each crime possesses a common element — women are exclusively or disproportionately the victims.

See also Peggy Kuo, *Prosecuting Crimes of Sexual Violence in an International Tribunal*, 34 CASE W. RES. J. INT'L L. 305, 321 (2002) ("Crimes against women are also crimes against all humanity.").

10. Campanaro, *supra* note 4, at 2559-65.

11. See, e.g., John Simpson, *War Crimes — Have We Learned Anything?*, BBC NEWS, Apr. 20, 2005, <http://news.bbc.co.uk/2/hi/europe/4456043.stm> (noting that it has only been "11 years since Rwanda, and 10 since the Bosnian Serb general, Ratko Mladic, ordered the murder of every male Muslim in Srebrenica. And [yet,] in Darfur people are dying right now").

12. Campanaro, *supra* note 4, at 2561.

13. See, e.g., Felicity Barringer, *U.S. Resolution on World Court Revives Hostility*, N.Y. TIMES, June 11, 2003, at A4 (noting "Washington's concerns that its troops could fall prey to frivolous politically motivated prosecutions").

14. See, e.g., Campanaro, *supra* note 4, at 2569.

subsections — international criminal tribunals and people's tribunals. Both are types of ad hoc tribunals that have been recently implemented. The successes and failures of each are examined in terms of their contribution to the goals of international criminal prosecution of war crimes. Part IV discusses the newly formed ICC. It examines what the ICC is designed to do and how it intends to prosecute war criminals. Part IV argues that, though still in its infancy, the ICC poses the greatest possibility of success in accomplishing the goals of international criminal prosecution and that, most importantly, the ICC may be able to deter the occurrence of future gender-based war crimes. Part IV further argues that the United States' failure to join the ICC will directly hinder the Court's potential success.

I. GENDER-BASED WAR CRIMES

Gender-based war crimes have long been recognized in some form.¹⁵ Historically, however, prosecution has focused neither on criminal liability nor the crimes' real victims.¹⁶ For example:

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. Later, rape was considered a crime against family honor. 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.¹⁷

Understanding and recognizing rape (and other gender-based war crimes) as a war crime against each victim is not sufficient; these crimes must also be defined.

The nature of international war crimes prosecution, including the lack of established rules or precedent, makes ascertaining precise definitions of many of the crimes and their elements

15. See, e.g., *id.* at 2558; Kuo, *supra* note 9, at 305-06; Julie Mertus, Book Note, 93 AM. J. INT'L LAW 740, 741 (1999) (reviewing KELLY DAWN ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS (1997)) ("[R]ape has long been considered a punishable violation of the customs of war.").

16. KELLY DAWN ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS 28 (1997); Rana Lehr-Lehnardt, *One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court*, 16 BYU J. PUB. L. 317, 317-18 (2002).

17. Lehr-Lehnardt, *supra* note 16, at 317.

difficult.¹⁸ Currently, international tribunals have the authority to prosecute grave breaches of the Geneva Conventions,¹⁹ violations of the laws or customs of war,²⁰ crimes against humanity,²¹ and genocide.²² Fortunately, this rather limited list can encompass a wide variety of crimes, including gender-based crimes, given that the definitions are not concrete.²³

Today, gender-based crimes include, but are not limited to, rape, sexual slavery, forced prostitution, forced pregnancy/childbirth, and forced sterilization.²⁴ Gender-based war crimes require particularized evaluation because the crimes are both distinct from other war

18. Definitions must be generally recognized and accepted by a majority of countries before it is possible to prosecute them internationally. *See, e.g.,* Kelly D. Askin, *Developments in International Criminal Law: Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 AM. J. INT'L L. 97, 109 (1999) ("Rape and other forms of sexual violence have never been defined under international law . . .").

19. Campanaro, *supra* note 4, at 2566-67.

20. *Id.* at 2560, 2588.

21. *Id.* at 2560-61, 2589. Crimes against humanity are generally considered to include "any of the following crimes committed as part of a widespread of systematic attack against a civilian population: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial or religious grounds, or other inhumane acts." Askin, *supra* note 18, at 97 n.5.

22. There are some general definitions of the crimes that can be prosecuted by international tribunals as genocide. The Genocide Convention defines genocide to mean:

[A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group.

Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 11, 1948, 78 U.N.T.S. 277.

23. *See* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 731 (Feb. 9, 1998) ("These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole."). *See also* Campanaro, *supra* note 4, at 2566-67 (explaining that though gender-based war crimes are not specifically listed as grave breaches of the Geneva Conventions, they are included within supporting and explanatory articles of the Conventions).

24. Askin, *supra* note 18, at 107. For example, in the International Criminal Tribunal for Rwanda, gender-based crimes included in the record (though not charged as such) were "gang rape, public rape, multiple instances of rape, rape with foreign objects, rape of girl-children as young as six years of age, forced nudity, forced abortion, forced marriage, forced miscarriage, rapes specifically intended to humiliate, sexual slavery, forced prostitution, sexual torture and sexual enslavement." *Id.* (footnote omitted).

crimes and typically ignored in post-conflict situations.²⁵ Often, these crimes are widespread, organized, and implemented by the ruling or rebelling regime.²⁶ “[S]ystematic gender-specific crimes, including sexual assault, ‘genocidal rape,’ and forced impregnation routinely occur during armed conflicts. Indeed, one commentator has described sexual violence toward women as a veritable ‘tool of war.’”²⁷ Furthermore, gender-based war crimes are often particularly egregious and numerous during ethnic cleansing,²⁸ as ruling or rebelling ethnic groups may attempt to impregnate women with children of a certain ethnic group or force abortions of children from a particular ethnic group.²⁹

25. See, e.g., Stephanie K. Wood, *A Woman Scorned for the “Least Condemned” War Crime: Precedent and Problems with Prosecuting Rape as a Serious War Crime in the International Criminal Tribunal for Rwanda*, 13 COLUM. J. GENDER & L. 274, 275 (2004).

26. See, e.g., ‘Systematic Rape’ in Sierra Leone War, BBC NEWS, Jan. 16, 2003, <http://news.bbc.co.uk/1/hi/world/africa/2662807.stm>.

27. Angela M. Higgins, Comment, “Else We Are Condemned to Go from Darkness to Darkness”: *Victims of Gender-Based War Crimes and the Need for Civil Redress in U.S. Courts*, 70 UMKC L. REV. 677, 679 (2002) (“Though the traditional notion of rape in wartime suggests that rape is perpetrated by men in the heat of battle and its aftermath, close study of recent armed conflicts proves that rape is a systematic, deliberate weapon of war.”).

28. For reference to the ethnic cleansing in the former Yugoslavia and Rwanda, see Campanaro, *supra* note 4, at 2569-70:

While rape has historically been used as a weapon of war to terrify, humiliate, degrade, destroy, and subordinate, the rapes committed during these conflicts took things one step further — they were committed as part of a deliberate system of ethnic cleansing. Women were subjected to horrifying and violent sexual abuses, often committed at the hands of men they or their families knew. These inexcusable violations were inflicted as “an official policy of war,” a policy that sought to get rid of an “unwanted” group. In both conflicts, women were the vehicles utilized to humiliate, subordinate, or emotionally destroy entire communities; to cause chaos and terror; to make people flee; and to ensure the destruction or removal of an unwanted group by forcible impregnation by a member of a different ethnic group. These sexual assaults were committed as a method of ethnic cleansing of the regions and occurred with unabashed regularity

(footnotes omitted).

29. *Id.* at 2571:

Women were often held in ‘rape camps’ or detention centers for months and suffered numerous and appalling sexual violations in hope that they would become impregnated and carry a Serbian child. Under Islamic and Muslim law, a child’s ethnicity is determined by that of the father, so children born of these sexual assaults, committed by the Serb men, would not be considered Muslim or of their mother’s ethnicity. Thus, rape was a mechanism to eliminate an entire population and replace it with a Serbian one.

(footnotes omitted) (emphasis added). See also Higgins, *supra* note 27, at 679 (“Armed forces rape for the express purpose of humiliating and demoralizing subjected peoples, and to eliminate opposing groups through rape-related injuries or forced impregnation.” (footnotes omitted)).

II. AD HOC TRIBUNALS

Ad hoc tribunals are one of the most prominent and common types of international criminal prosecution of war crimes.³⁰ After a conflict, tribunals are organized and held to prosecute the crimes stemming from that particular conflict.³¹ The tribunals are often successful in prosecuting these crimes and can be an effective deterrent against continued violence or retaliation from the parties involved.³² Unfortunately, ad hoc tribunals tend to ignore or minimize gender-based war crimes (whether consciously or as a result of procedural shortcomings) and are largely ineffective for general deterrence of war crimes.³³

A. International Criminal Tribunals

Chapter VII of the United Nations Charter provides for the handling of "any threat to the peace, breach of the peace, or act of aggression."³⁴ In May 1993, the United Nations interpreted the Chapter's authority to create the International Criminal Tribunal for the Former Yugoslavia (ICTY).³⁵ The tribunal's formative statute describes the crimes the ICTY can prosecute in articles two through five.³⁶ Significantly, the ICTY Statute also specifies that jurisdiction is granted and based on criminal responsibility for both "individual culpability and superior authority."³⁷ The ICTY is charged with prosecuting grave breaches of the Geneva Conventions, violations of laws and customs of war, charges of genocide, and crimes against humanity.³⁸

The ICTY was created to prosecute the war criminals responsible for the ethnic cleansing that occurred in the former Yugoslavia

30. See, e.g., Campanaro, *supra* note 4, at 2569. In the last fifty years, high profile ad hoc international tribunals have existed in Nuremberg, Tokyo, the former Yugoslavia, and Rwanda. *Id.* at 2559-86.

31. See *supra* notes 4-8 and accompanying text.

32. Cobun, *supra* note 3, at 477.

33. Tina R. Karkera, Comment, *The International Criminal Court's Protection of Women: The Hands of Justice at Work*, 12 AM. U. J. GENDER SOC. POL'Y & L. 197, 202 (2003).

34. U.N. Charter art. 39. See generally *id.* arts. 39-51.

35. S.C. Res. 827, *supra* note 5.

36. Statute of the International Criminal Tribunal for the Former Yugoslavia arts. 2-5, U.N. Doc. S/25704 (1993).

37. *Id.* art. 7 (addressing "[i]ndividual criminal responsibility").

38. *Id.* arts. 2-5.

in the late 1980s and 1990s.³⁹ Ethnic tension had been building since World War II, when Dictator Josip Tito unified the six republics of Serbia, Croatia, Slovenia, Bosnia-Herzegovina, Macedonia, and Montenegro into the nation of Yugoslavia.⁴⁰ After Tito's death in 1980 and the fall of the Soviet Union, tensions reached a breaking point.⁴¹ The leaders of Yugoslavia ignited conflict between Serbs, Muslims, Croats, and Jews.⁴² Slobodan Milosevic became the leader of the Serbian Communist Party in 1986 under a platform of promoting Serbian nationalism and dominance.⁴³ This led to declarations of independence by Croatia and Slovenia in 1991 and escalating violence.⁴⁴ Bosnia-Herzegovina followed suit by declaring independence in 1992.⁴⁵ Bosnian Serbs declared themselves the independent Serbian Republic of Bosnia and Herzegovina under Radovan Karadzic.⁴⁶ The Bosnian Serbs initiated attacks against the Croats and Muslims of Bosnia.⁴⁷ Non-Serbs were subjected to military attacks, internment, interrogation, and torture.⁴⁸ Gender-based war crimes also occurred during the conflict, including rape, forced sterilization, and forced pregnancy and childbirth.⁴⁹ Specifically:

39. Campanaro, *supra* note 4, at 2572. For background material on the conflict, see generally RICHARD HOLBROOKE, *TO END A WAR* (1999); CAROLE ROGEL, *THE BREAKUP OF YUGOSLAVIA AND ITS AFTERMATH* (2004); LAURA SILBER & ALLAN LITTLE, *YUGOSLAVIA: DEATH OF A NATION* (1997).

40. 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, *AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS* 18 (1995).

41. *Id.*

42. See Akhavan, *supra* note 2, at 10.

43. MORRIS & SCHARF, *supra* note 40, at 19.

44. *Id.*

45. *Id.* (recognizing that Muslims and Croats voted for independence while Bosnian Serbs boycotted the referendum).

46. *Id.* at 19-20.

47. *Id.* at 20.

48. See Akhavan, *supra* note 2, at 10-11.

49. See Higgins, *supra* note 27, at 695-96. See also Karina Michael Waller, *Intra-state Ethnic Conflicts and International Law: How the Rise of Intrastate Ethnic Conflicts Has Rendered International Human Rights Laws Ineffective, Especially Regarding Sex-Based Crimes*, 9 AM. U. J. GENDER SOC. POL'Y & L. 621, 639-40 (2001):

The act of rape as seen during the Yugoslav war was also a form of genocide, orchestrated by the combatants to not only humiliate and degrade, but to impregnate in order to destroy ethnicity. During the war, international human rights organizations learned that rape was occurring on a regular basis by factions on all sides as a weapon of war. Serb armies in particular regularly used rape as a strategy of war, both as an attempt to ethnically cleanse certain areas, and to assert Serb domination. Bosnian Muslim women were often taken to warehouses and raped repeatedly.

(footnotes omitted).

Sexual terrorism against women during armed conflict has perhaps never been more egregious nor more deliberate than in the conflict in the former Yugoslavia. Rape was "an official policy of war" in the ethnic fighting. As a tactic of intimidation and terror, Serbian forces raped Muslim women to humiliate and demoralize them and their communities. . . . Serbians used rape to "pollute and water down" the bloodline of their enemies. Serbian aggressors held their female victims captive in "rape camps" for months, until they were confirmed to be pregnant and it was too late to abort the fetuses, in an effort to "wipe out the Muslim blood" of their enemies by forcing them to bear Serbian children.⁵⁰

The extensive nature of the war crimes, particularly the gender-based war crimes, presented a significant task for the ICTY, which may partially account for its shortcomings.⁵¹ Not only was the ICTY created under what many considered the questionable authority of Chapter VII of the U.N. Charter, but it was also quickly plagued by procedural problems.⁵² The tribunal had virtually no operating budget with which to start working.⁵³ Lack of funding as well as lack of experience and precedent made staffing the ICTY difficult.⁵⁴ In the end, it took several years to get the tribunal organized and operational.⁵⁵ Even once operational, the tribunal had no precedent upon which to rely, no lower courts to look to, and no superior courts to review its decisions.⁵⁶

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

50. See Higgins, *supra* note 27, at 695-96.

51. Kate Nahapetian, Note, *Selective Justice: Prosecuting Rape in the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 14 BERKELEY WOMEN'S L.J. 126, 129-30 (1999) ("According to the Special Rapporteur on Human Rights, as many as 20,000 women were raped in the former Yugoslavia from 1992 to 1994.").

52. Richard J. Goldstone, *The Institute for Global Legal Studies Inaugural Colloquium: The UN and the Protection of Human Rights: The Role of the United Nations in the Prosecution of International War Criminals*, 5 WASH. U. J.L. & POL'Y 119, 122-23 (2001) (detailing such procedural difficulties including problems finding and approving a person for the position of Chief Prosecutor, lack of funding, and lack of established precedent).

53. *Id.* at 122.

54. *Id.* at 123.

55. *Id.* See also Waller, *supra* note 49, at 652 (noting that by December 1999, the ICTY had tried and convicted only six defendants).

56. Patricia M. Wald, *The Institute for Global Legal Studies Inaugural Colloquium: The UN and the Protection of Human Rights: The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court*, 5 WASH. U. J.L. & POL'Y 87, 114 (2001).

In addition to procedural problems specific to the ICTY, impediments have arisen that are specific to the nature of gender-based war crimes.⁵⁷ Despite the fact that “[v]ictim-witnesses are the soul of war crimes trials at the ICTY,”⁵⁸ their involvement presents many challenges. These witnesses are critical to the conviction of war criminals, since there is purposely little other evidence (such as a paper trail) of the war crimes committed.⁵⁹ Nonetheless, many factors contribute to the difficulty these victim-witnesses face in actually testifying.⁶⁰ Many of the approximately 1000 victim-witnesses who have testified to date have had to travel to The Hague from wherever they had relocated, often as refugees, after the conflict in the former Yugoslavia.⁶¹ Those who remain in the former Yugoslavia “still reside in the areas where the war crimes took place and their fear of intimidation and retaliation by friends, family, or allies of the defendants is often real.”⁶² The threats perceived by victim-witnesses stem not only from their experiences during the conflict, but also from the fact that many of the war criminals or their families still live in the same communities as their victims.⁶³

The tribunal is able to offer victim-witnesses some protection.⁶⁴ Nonetheless, those protections cannot necessarily overcome the fear, frustration, and impatience with the system that many victim-witnesses feel.⁶⁵ Furthermore, with the passage of time memories fade, and preferring to put the past behind them, some victim-witnesses become less willing to testify.⁶⁶ Finally, victims of gender-based crimes may feel a particular reluctance to testify as a result

57. *Id.* at 107.

58. *Id.*

59. *Id.*

60. See Kuo, *supra* note 9, at 317-19.

61. Wald, *supra* note 56, at 108.

62. *Id.* at 108-09.

63. *Id.*; Campanaro, *supra* note 4, at 2575 (“Under the current rules, witnesses are only protected during criminal proceedings and are offered little, if any, protection afterwards. Many of the women testifying return to small villages where, in some cases, their assailants still live.” (citation omitted)).

64. Wald, *supra* note 56, at 109:

A large percentage of witnesses in ICTY trials ask for and get some type of protection ranging from: (1) non-disclosure of their identity to the media or in the public record; (2) court orders to defense counsel to keep a log and notify the prosecutor of all contacts with witnesses; (3) facial and voice distortion of the witness on camera since the proceedings are televised to the Balkans; and (4) in extreme cases taking testimony in closed session which will not appear in the public transcripts.

See also Kuo, *supra* note 9, at 317-18.

65. Wald, *supra* note 56, at 109.

66. *Id.*

of previous ICTY rulings.⁶⁷ The tribunal has decided not to offer any privilege for the medical records of the victims, including records of psychological counseling.⁶⁸

Despite these problems, the ICTY has not been completely ineffective in prosecuting gender-based war crimes.⁶⁹ "At least half of the public indictments in the ICTY have brought charges, either separately or in connection with other charges, alleging some form of gender-based violence, particularly sexual violence."⁷⁰ One such indictment resulting in a conviction was that of Serbian Dusko Tadic.⁷¹ Tadic was charged with violations of the laws or customs of war⁷² and crimes against humanity.⁷³ These charges stemmed from Tadic's participation in (or tacit consent to) crimes that occurred at the Omarska camp where Bosnian Muslims and Croats were forced to live.⁷⁴ The crimes against humanity included gang rape, sexual assault, and humiliation.⁷⁵ "Tadic was expected to be the first international war crimes trial in history to prosecute rape separately as a war crime, and not solely in conjunction with other crimes."⁷⁶ In later ICTY indictments, gender-based war crimes were specifically included, and rape was recognized as a form of torture.⁷⁷

67. *Id.* at 107. See also Askin, *supra* note 18, at 111-12.

68. See Wald, *supra* note 56, at 107.

69. Campanaro, *supra* note 4, at 2573 ("[T]he work of the ICTY has resulted in a number of legal and procedural advances in the recognition and prosecution of gender-based crimes."). See generally RACHEL KERR, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA. AN EXERCISE IN LAW, POLITICS, AND DIPLOMACY* (2004) (giving an overall assessment of the successes of the ICTY).

70. Askin, *supra* note 18, at 99-100.

71. Prosecutor v. Tadic, Case No. IT-94-1-I, Indictment (Amended) (Dec. 14, 1995). For a discussion of the impact, successes, and failures of the ICTY after the conviction of Dusko Tadic, see Kitty Felde et al., *War Crimes Tribunals: The Record and the Prospects: The Prosecutor v. Dusko Tadic*, 13 AM. U. INT'L L. REV. 1441 (1998).

72. *Tadic*, Case No. IT-94-1-I, at counts 3, 6, 10, 13, 16, 19, 22, 25, 30, 33.

73. *Id.* at counts 1, 4, 7, 11, 14, 17, 20, 22, 26, 28, 31, 34.

74. *Id.* ¶¶ 2.2-2.5.

75. *Id.* ¶ 4.3.

76. Askin, *supra* note 18, at 101 (explaining that although indicted as such, the independent rape charge was withdrawn during the trial because the witness was afraid to testify). See also Kuo, *supra* note 9, at 314-18 (providing a first-hand account of the Kunarac trial); Campanaro, *supra* note 4, at 2580-81 (revealing that in 1996, the indictment of Serbian Commander Dragoljub Kunarac included independent rape charges as crimes against humanity and resulted in a 2001 guilty conviction).

77. See, e.g., Prosecutor v. Furundzija, Case No. IT-95-17/1-A, Judgment, ¶ 67 (July 21, 2000). See also Jonathan I. Charney, *Progress in International Criminal Law?*, 93 AM. J. INT'L L. 452, 452 (1999) (noting the importance of the conviction of Anto Furundzija, which included rape as a violation of the customs of war); Campanaro, *supra* note 4, at 2578-79 (including the indictments of Furundzija and those related to the Celebici prison camp); Nahapetian, *supra* note 51, at 131-32 (characterizing Furundzija's conviction as the first war crimes conviction based solely on rape, and noting that it was based on command theory).

Procedural advances were also achieved in the prosecution of gender-based war crimes during the ICTY.⁷⁸ The tribunal established several rules to facilitate testimony by victims.⁷⁹ Victims' prior sexual history and conduct are not admissible, and consent is not a defense if the victim perceived a threat.⁸⁰ Additionally, victim testimony need not be corroborated.⁸¹ Specifically, the tribunal ruled that any relevant evidence having probative value, as long as it is not overly prejudicial, is admissible.⁸² This ruling is particularly important for gender-based war crimes, given the difficulties of getting even one victim-witness to testify.⁸³ The tribunal declared that this ruling "accords to the testimony of a victim of sexual assault the same presumption of reliability as the testimony of victims of other crimes, something long denied to victims of sexual assault by the common law."⁸⁴

The International Criminal Tribunal for Rwanda (ICTR) was established in much the same way as the ICTY.⁸⁵ This ad hoc tribunal was established after the brutal killing of ten to fifteen percent of the population of Rwanda in less than three months in 1994.⁸⁶ The genocide was highly organized and efficient, perpetrated by the Hutu majority against the Tutsi minority.⁸⁷ Gender-based war crimes included rape, forced pregnancy, forced childbirth, and forced abortion.⁸⁸ The problems that plagued the establishment

78. Campanaro, *supra* note 4, at 2574.

79. Statute of the International Criminal Tribunal for the Former Yugoslavia, U.N. Doc. IT/32/Rev.36 R. EVID. 90 (1995), available at <http://www.un.org/icty/legaldoc-e/index.htm> (follow "Basic Legal Documents"; "Rules of Procedure and Evidence"; "Rules of Procedure and Evidence rev. 36").

80. *Id.*; Campanaro, *supra* note 4, at 2574.

81. Statute of the International Criminal Tribunal for the Former Yugoslavia, U.N. Doc. IT/32/Rev.36 R. EVID. 90 (1995), available at <http://www.un.org/icty/legaldoc-e/index.htm> (follow "Basic Legal Documents"; "Rules of Procedure and Evidence"; "Rules of Procedure and Evidence rev. 36") at R. EVID. 96(i).

82. *Id.* at R. EVID. 89(C).

83. See Wald, *supra* note 56, at 108-09.

84. Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶ 536 (May 7, 1995).

85. S.C. Res. 955, *supra* note 6, art. 14.

86. For an overview of the Rwandan genocide, see LT. GEN. ROMÉO DALLAIRE, *SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA* (2004); ALISON DES FORGES, *LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA* (1999); PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* (1998); LINDA MELVERN, *CONSPIRACY TO MURDER: THE RWANDAN GENOCIDE* (2004).

87. See, e.g., Jean Marie Kamatali, *Freedom of Expression and Its Limitations: The Case of the Rwandan Genocide*, 38 STAN. J. INT'L L. 57, 68 (2002).

88. See Higgins, *supra* note 27, at 698. See also Wood, *supra* note 25, at 274-75:

The 1994 Rwanda Genocide had devastating effects on the female population in the country due to the systematic gender-based violence

and legitimacy of the ICTY similarly plagued the ICTR.⁸⁹ The issues surrounding victim-witnesses were also similar, including delays, problems of traveling to the tribunal, release of victims' medical records, and the disclosure of victims' identities to defendants who often had the ability to seek revenge.⁹⁰

Nevertheless, important distinctions exist between the two, distinctions that generally facilitate the prosecution of gender-based war crimes.⁹¹ Most importantly, the conflict and ethnic cleansing that occurred in Rwanda was an intra-state conflict, as differentiated from the conflict in the former Yugoslavia, which had both intra- and inter-state elements.⁹² The United Nations Security Council convened a tribunal over the objection of Rwanda.⁹³ This was possible because the ICTY had been established six months prior, creating a precedent for interpreting Chapter VII of the U.N. Charter to allow for an international criminal tribunal.⁹⁴

The trial of Jean-Paul Akayesu⁹⁵ demonstrates both the advances and the hurdles facing international prosecution of gender-based war crimes.⁹⁶ Akayesu was responsible for controlling the police and maintaining public order at a commune where Tutsis were forced to live during the Rwandan genocide.⁹⁷ Initially, Akayesu was on trial for genocide, and gender-based war crimes were not explicitly included in his indictment for those crimes.⁹⁸ During the course of the trial, however, witnesses testified about rape, and reports confirmed that testimony.⁹⁹ Subsequent to further investigation, the prosecutors

endorsed and carried out by government officials. Almost one million people were killed in one hundred days and . . . nearly all female survivors — including many young girls — were raped and sexually brutalized.

(footnotes omitted).

89. See, e.g., Göran Sluiter, *The ICTR and the Protection of Witnesses*, 3 J. INT'L CRIM. JUST. 962, 962-76 (2005) (noting that, in particular, both courts encountered difficulties "in obtaining testimonial evidence").

90. See Goldstone, *supra* note 52, at 123-24.

91. See Wood, *supra* note 25, at 275 ("[T]he ICTR's efforts in prosecuting gender-based violence as crimes against humanity and tools of genocide have been unprecedented.").

92. Akhavan, *supra* note 2, at 11; Campanaro, *supra* note 4, at 2582-83. See also MORRIS & SCHARF, *supra* note 40, at 20 (noting that several republics had declared independence from Yugoslavia during the conflict and were recognized as independent by the United Nations).

93. See Goldstone, *supra* note 52, at 121.

94. *Id.*

95. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Feb. 9, 1998).

96. See Askin, *supra* note 18, at 105-06. See also Nahapetian, *supra* note 51, at 133 (observing that this trial, the first at the ICTR to include gender-based war crimes charges, did not begin until three years after the ICTR was formed).

97. Askin, *supra* note 18, at 106.

98. Akayesu, Case No. ICTR-96-4-T, ¶ 12.

99. See, e.g., Askin, *supra* note 18, at 105-07; Campanaro, *supra* note 4, at 2583.

amended the charges against Akayesu to include gender-based war crimes, specifically sexual violence,¹⁰⁰ as an element of the genocide.¹⁰¹ Akayesu was later convicted of genocide, including criminal liability for knowledge and facilitation of the sexual violence taking place at the commune,¹⁰² the first such conviction in history.

The trial and conviction of Akayesu by the ICTR represents both progress and continued setbacks in the prosecution of gender-based war crimes. It is significant that the tribunal was convened as a result of an intra-state conflict as it demonstrates an international willingness to prosecute war crimes regardless of whether they are considered international.¹⁰³ Unfortunately, there was not enough initial investigation and recognition of gender-based war crimes for these charges to be included in the indictment of Akayesu, but when evidence of such arose, the trial was halted while further investigation took place.¹⁰⁴ Most importantly, the tribunal recognized the connection between gender-based crimes, particularly sexual violence, and genocide itself.¹⁰⁵ Furthermore, Akayesu was convicted of knowing about and facilitating the sexual violence, despite insufficient evidence that Akayesu personally participated in the physical acts that led to the charges.¹⁰⁶ Attaching criminal liability to actors such as Akayesu is critical because genocide and war crimes are often perpetuated by extensive criminal networks that attempt to protect those at the highest levels by ensuring that they are giving undocumented orders, rather than carrying out the crimes themselves.¹⁰⁷

100. Prosecutor v. Akayesu, Case No. ICTR-96-4-I, Indictment, ¶ 10a (Feb. 13, 1996) (“In this indictment, acts of sexual violence include forcible sexual penetration of the vagina, anus or oral cavity by a penis and/or of the vagina or anus by some other object, and sexual abuse, such as forced nudity.”).

101. Askin, *supra* note 18, at 106 (“When the trial resumed, extensive testimony concerning rape and other forms of sexual violence was admitted into evidence. This evidence was used to establish that sexual violence was a fundamental and integral part of the genocide committed during the Rwandan conflict.”). *See also* Higgins, *supra* note 27, at 699.

102. *Akayesu*, Case No. ICTR-96-4-T, ¶ 731 (“These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.”).

103. *See, e.g.*, U.N. Charter art. 2, para. 7 (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”).

104. Askin, *supra* note 18, at 105; Campanaro, *supra* note 4, at 2583-85.

105. *See supra* note 101 and accompanying text.

106. *Akayesu*, Case No. ICTR-96-4-T, ¶ 693.

107. *See, e.g.*, Askin, *supra* note 18, at 106.

Overall, the ICTY and the ICTR have demonstrated that when international criminal prosecutions for gender-based war crimes take place, even as part of broader war crimes prosecutions, they can result in significant convictions.¹⁰⁸ These prosecutions are also largely viewed as having been fair and effective.¹⁰⁹ To a certain extent, victims are able to testify and gain vindication.¹¹⁰ The overriding problem, however, is that these tribunals are isolated and ad hoc.¹¹¹ Ad hoc tribunals are, by design, conflict specific, and to an extent they can serve to prevent conflict from breaking out again in the area in which the tribunal operates.¹¹² They can also paralyze leaders and rebels who might otherwise attempt to return to power or resume the conflict.¹¹³ This function is particularly important in war-torn areas where there is likely no other instrument for stopping war criminals.¹¹⁴ Thus, though these tribunals can be effective in deterring further war crimes during a given conflict, they offer less of a general deterrent effect for future conflicts.¹¹⁵

B. People's Tribunals

In December of 2000, the Women's International War Crimes Tribunal 2000 convened in Tokyo, Japan.¹¹⁶ The tribunal was

108. See Akhavan, *supra* note 2, at 9.

109. See, e.g., Goldstone, *supra* note 52, at 124-25 (noting that, in the author's opinion, the tribunals' "most important success is the demonstration that international courts can hold fair trials").

110. See Wald, *supra* note 56, at 109.

111. *Id.* at 114.

112. Akhavan notes:

The empirical evidence suggests that the ICTY and the ICTR have significantly contributed to peace building in postwar societies, as well as to introducing criminal accountability into the culture of international relations. Both institutions have helped to marginalize nationalist political leaders and other forces allied to ethnic war and genocide, to discourage vengeance by victim groups, and to transform criminal justice into an important element of the contemporary international agenda.

Akhavan, *supra* note 2, at 9.

113. *Id.*

114. *Id.*

115. *Id.* at 7-8 (noting that the more often criminal prosecution of war crimes takes place, the more "the preventive effects of international criminal justice can extend beyond postconflict peace building in directly affected countries. The prosecution and related political demise of such leaders sends a message that the cost of ethnic hatred and violence as an instrument of power outweighs its benefits."). See generally Mary Margaret Penrose, Note, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L L. REV. 321 (2000).

116. See, e.g., Christine M. Chinkin, *Women's International Tribunal on Japanese Military Sexual Slavery*, 95 AM. J. INT'L L. 335, 335 (2001).

“established to consider the criminal liability of leading high-ranking Japanese military and political officials and the separate responsibility of the state of Japan for rape and sexual slavery as crimes against humanity arising out of Japanese military activity in the Asia Pacific region in the 1930s and 1940s.”¹¹⁷ Specifically, the rape and sexual slavery occurred at the numerous “comfort facilities” established for the “recreation” of Japanese military forces during World War II.¹¹⁸ Women were forced and coerced from their homes throughout Southeast Asia into the sexual slavery of the comfort facilities.¹¹⁹ The Japanese government has denied responsibility for the formation and use of the comfort facilities.¹²⁰ For decades, the victims of the comfort facilities, many of whom suffered permanent physical and emotional injuries, remained silent.¹²¹

The virtual silence on the issue of comfort stations and gender-based war crimes that occurred during World War II ended in the late 1980s.¹²² NGOs proved instrumental in exposing the comfort stations, and their efforts resulted in the Women’s International War Crimes Tribunal 2000.¹²³ The tribunal assessed the criminal liability of the state of Japan and specifically Emperor Hirohito as head of state.¹²⁴ After the panel of judges heard the evidence, the state of Japan and Emperor Hirohito were “convicted” of gender-based war crimes perpetrated against 200,000 women during World War II.¹²⁵

Though this would appear to be a resounding success for the movement to criminally prosecute gender-based war crimes, upon

117. *Id.*

118. Higgins, *supra* note 27, at 681-82 (“Conditions in these ‘comfort stations’ were appallingly cruel. Young women, an estimated eighty percent of whom were between the ages of fourteen and eighteen, were forcibly confined and repeatedly raped by as many as seventy men a day. Women who resisted were beaten, stabbed, and murdered; many committed suicide.” (internal citations omitted)).

119. *Id.* at 681.

120. See Chinkin, *supra* note 116, at 335. See also Sue R. Lee, Comment, *Comforting the Comfort Women: Who Can Make Japan Pay?*, 24 U. PA. J. INT’L ECON. L. 509, 510 (2003) (“For years, Japan was able to sustain this lie because it had destroyed or concealed evidence that would reveal the truth.”).

121. See Lee, *supra* note 120, at 519. See also Higgins, *supra* note 27, at 681-82.

122. See Chinkin, *supra* note 116, at 336 (noting that war crimes were prosecuted after World War II, but gender-based war crimes were largely ignored in those proceedings); Higgins, *supra* note 27, at 699 (“The International Military Tribunal for the Far East (IMTFE), established to prosecute Japanese war crimes during World War II, failed to address one of the worst and largest-scale instances of war crimes against women in known history, the atrocities visited upon the ‘comfort women.’”).

123. Chinkin, *supra* note 116, at 336.

124. *Id.* at 338; see Higgins, *supra* note 27, at 681-82.

125. See, e.g., Chinkin, *supra* note 116, at 338; Higgins, *supra* note 27, at 682.

closer inspection the convictions were a rather hollow victory. "Peoples' tribunals [such as the Women's International War Crimes Tribunal 2000] are premised on the understanding that 'law is an instrument of civil society' that does not belong to governments Accordingly, when states fail to exercise their obligations to ensure justice, civil society can and should step in."¹²⁶ That is a commendable position, but the downside is that "[t]he tribunal lacks the legal authority to prosecute these crimes against humanity" ¹²⁷ The lack of legal authority prevented judges at the tribunal from handing down prison sentences or any definitive punishments; rather they could merely recommend reparations, which fail to adequately accomplish retribution.¹²⁸

The Women's International War Crimes Tribunal 2000 was not, however, without its successes. It was the first war crimes tribunal to focus exclusively on gender-based war crimes.¹²⁹ Perhaps most importantly, it gave a voice to the victims who had suffered in silence for fifty years.¹³⁰ In turn, the crimes committed against these victims were condemned at the international level.¹³¹ Thus, the tribunal was a moral victory for the victims but offered little in terms of deterrence, retribution, or conflict resolution.

In order to ensure that gender-based war crimes are effectively prosecuted whenever they occur, a more permanent tribunal is necessary. Further, a permanent tribunal has the potential to deter the overall occurrence of gender-based war crimes. Ad hoc tribunals have made advances in recognizing and prosecuting gender-based war crimes, but they cannot deter the initial occurrence of gender-based war crimes. At best they can only deter continued occurrences. As one scholar notes:

Recognition of rape as a serious war crime represents only the first step in creating the deterrent necessary to combat future impunity. Assessing the past in order to improve the effectiveness of future prosecutions for rape warfare is imperative as

126. Chinkin, *supra* note 116, at 339, (quoting Richard Falk, *The Rights of Peoples (In Particular Indigenous Peoples)*, in *THE RIGHTS OF PEOPLES* 17, 29 (James Crawford ed., 1988)).

127. Higgins, *supra* note 27, at 677, 683 (2002). See also Chinkin, *supra* note 116, at 338 ("Lacking legal authority, was the tribunal no more than a mock trial of little concern to serious international lawyers?").

128. See Chinkin, *supra* note 116, at 338-39 ("A peoples' tribunal cannot impose sentences or order reparations, but it can make recommendations backed by the weight of its legal findings and its moral force.").

129. *Id.* at 339 ("[The tribunal] focused on crimes of sexual violence and slavery, which have been routinely erased from the official records.").

130. See Higgins, *supra* note 27, at 683.

131. See Chinkin, *supra* note 116, at 339.

women of all ages, races, colors, creeds, and ethnicities continue to be raped during armed conflicts. Effective prosecutions will lead to more convictions, which will in turn translate into a legal vindication of women's human rights in the international community.¹³²

A permanent tribunal could achieve the overall goal of preventing gender-based war crimes from occurring at the outset.

III. THE INTERNATIONAL CRIMINAL COURT

The ICC was created by the Rome Statute in 1998.¹³³ The Rome Statute came into force on July 1, 2002.¹³⁴ The ICC is designed to be a permanent institution charged with criminal prosecution of war crimes occurring during armed conflict.¹³⁵ Specifically, the ICC can prosecute genocide, crimes against humanity, war crimes, and the crime of aggression.¹³⁶ The ICC has complementary jurisdiction.¹³⁷ Thus, if national courts are ready, able, and competent to prosecute war crimes, they will do so. If they are unable or unwilling to do so, the ICC can assert jurisdiction and prosecute.¹³⁸ Furthermore, the ICC theoretically can subject anyone who commits war crimes

132. Wood, *supra* note 25, at 277-78. See also Campanaro, *supra* note 4, at 2586 (“[T]he tribunals have limited jurisdiction, both temporally and territorially. Sexual crimes are not confined to specific regions or committed only by certain groups. The ability to investigate and prosecute these crimes should not be limited in such a manner.”).

133. Rome Statute of the International Criminal Court art. 1, July 17, 1998, 2187 U.N.T.S. 90 (2002).

134. International Criminal Court, About the Court, ICC at a Glance, <http://www.icc-cpi.int/about/ataglance/history.html> (last visited Jan. 25, 2006). The Rome Statute dictated that the ICC would enter into force sixty days after sixty states submitted ratifying documents. *Id.* The sixtieth ratifying document was submitted April 11, 2002, and the ICC's creation and jurisdiction became official and enforceable on July 1, 2002. *Id.*

135. International Criminal Court, About the Court, <http://www.icc-cpi.int/about.html> (last visited Jan. 25, 2006) (“The International Criminal Court (ICC) is the first ever permanent, treaty based, international criminal court established to promote the rule of law and ensure that the gravest international crimes do not go unpunished.”). See also Hans-Peter Kaul, *Developments at the International Criminal Court: Construction Site for More Justice: The International Criminal Court After Two Years*, 99 AM. J. INT'L L. 370 (2005) (describing the structure and early developments of the ICC by Kaul, a judge at the ICC).

136. Rome Statute of the International Criminal Court art. 5, ¶ 1, July 17, 1998, 2187 U.N.T.S. 90 (2002).

137. *Id.* art. 1 (noting that the ICC “shall be complementary to national criminal jurisdictions”).

138. *Id.* arts. 1, 17. See also Karkera, *supra* note 33, at 210-11.

within a state that has ratified or acceded to the Rome Statute to its jurisdiction.¹³⁹

The ICC offers several potential benefits to the incidence and effectiveness of gender-based war crimes prosecution, but it remains to be seen whether the potential benefits will translate into results when the ICC begins trying cases.¹⁴⁰ Significantly, gender-based war crimes are specifically included within the list of crimes the ICC can prosecute.¹⁴¹

Another benefit to prosecuting gender-based war crimes established by the ICC are the protections for victims.¹⁴² The ICC's rules concerning how and when victims testify are purposely loose in order to accommodate as many victims as possible without further traumatizing them.¹⁴³ The ICC also allows for victims to

139. Rome Statute of the International Criminal Court arts. 1, 12, July 17, 1998, 2187 U.N.T.S. 90 (2002). *See also* Karkera, *supra* note 33, at 206, 210 (noting that while the ICC has jurisdiction over individuals, rather than states, the war crimes must have been committed within a ratifying or acceding state).

140. *See* International Criminal Court, Situations and Cases, <http://www.icc-cpi.int/cases.html> (last visited Jan. 25, 2006). Currently, the ICC has had three situations referred by States Parties (the Central African Republic, the Democratic Republic of Congo (DRC), and the Republic of Uganda) and one situation referred by the United Nations Security Council (Darfur, Sudan). *Id.* Of those referrals, the ICC has opened investigations on the DRC, the Republic of Uganda, and Darfur. *Id.*

141. Rome Statute of the International Criminal Court art. 6(d), July 17, 1998, 2187 U.N.T.S. 90 (2002) (including "[i]mposing measures intended to prevent births within the group" in the definition of genocide); *id.* art. 7, ¶ 1(g) (including "[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity" in the definition of crimes against humanity); *id.* art. 8(2)(b)(xxii) (including "[c]ommitting rape, sexual slavery, enforced prostitution, forced pregnancy, . . . enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions" in the definition of war crimes). *See also* Karkera, *supra* note 33, at 207-09.

Nonetheless, as the Rome Statute failed to include specific definitions of gender-based war crimes, ascertaining how such crimes will be defined in the future will remain unclear until the ICC begins prosecuting such crimes. *See, e.g.,* Higgins, *supra* note 27, at 698 ("[I]n the International Criminal Court (ICC), murky definitions in enabling statutes will likely hinder meaningful prosecution of gender-based war crimes.").

142. International Criminal Court, Victims and Witnesses, <http://www.icc-cpi.int/victimissues.html> (last visited Jan. 25, 2006):

The victim-based provisions within the Rome Statute provide victims with the opportunity to have their voices heard and to obtain, where appropriate, some form of reparation for their suffering. It is this balance between retributive and restorative justice that will enable the ICC, not only to bring criminals to justice but also to help the victims themselves obtain justice.

143. International Criminal Court, Victims and Witnesses: Participations of Victims in Proceedings and Reparation, <http://www.icc-cpi.int/victimissues/victimsparticipation.html> (last visited Jan. 25, 2006):

For the first time in the history of international criminal justice, victims have won the right in the Statute of the International Criminal Court to make submissions directly, as well as through counsel, and to make applications for reparation. This is because the victims before the two ad hoc tribunals for the former Yugoslavia and Rwanda are in fact witnesses

have a legal representative to assist them with the process.¹⁴⁴ The creators of the ICC recognized the shortcomings of the ICTY and ICTR with respect to victims and therefore ensured that victims were protected under the Rome Statute.¹⁴⁵ Overall, the Rome Statute strives to create a court where the victims are more than mere witnesses. Rather, victims are afforded a status as an integral part of the criminal prosecution process, while also being given the protection and assistance they need to ensure that the truth comes to light.¹⁴⁶ When the victims speak fully and truthfully in court, it is more likely that justice will be effectuated and the victims will be vindicated.

The creation of the ICC represents an important step forward in retributive justice as well as the accomplishment of the other goals of international criminal prosecution of gender-based war crimes. Most importantly, the ICC is permanent¹⁴⁷ and therefore avoids repeated outlays of start-up capital (associated with ad hoc tribunals) and repeated debates over rules and procedure.¹⁴⁸ The existence of a court and established rules of procedure will better facilitate the arrest and detainment of suspected war criminals. As the ICC begins to try cases and punish war criminals, the hope is that a precedent will be set and the rule of law will become entrenched on the international level.¹⁴⁹ Potential war criminals will theoretically be on notice of criminal liability before any conflict begins.¹⁵⁰ This will expand upon the deterrent effects of ad hoc

who have no independent participation in the proceedings, but are only called on to give evidence by the parties to the proceedings.

144. Rome Statute of the International Criminal Court art. 68, ¶ 3, July 17, 1998, 2187 U.N.T.S. 90 (2002).

145. International Criminal Court, Victims and Witnesses: Victims and Witnesses Protection, <http://www.icc-cpi.int/victimsissues/witnessprotection.html> (last visited Jan. 25, 2006): [E]xperience from . . . [t]ribunals for former Yugoslavia and Rwanda has shown how crucial it is for any international criminal tribunal to arrange for the protection and assistance of victims and witnesses that appear before the Court so as to contribute to the establishment of truth about the most serious crimes existing.

Furthermore, the Rome Statute "contains revolutionary conditions so far as victims are concerned: for the first time in the history of international criminal justice, victims can participate in a procedure, including through an intermediary of counsels, and claim compensation; moreover, a Trust Fund in favour of victims has been created . . ." *Id.*

146. *See, e.g., id.*

147. Rome Statute of the International Criminal Court art. 1, July 17, 1998, 2187 U.N.T.S. 90 (2002).

148. *See* Goldstone, *supra* note 52, at 122 (detailing procedural difficulties that must be overcome in the formation and implementation of a war crimes tribunal).

149. International Criminal Court, About the Court, *supra* note 135.

150. *See* Max Frankel, *The War and the Law*, N.Y. TIMES, May 7, 1995, § 6 (Magazine), at 48 (noting that a major problem at the Nuremberg tribunals was the lack of notice in the international law context).

tribunals because criminal prosecution and liability for gender-based war crimes will no longer be sporadic, but rather a known consequence that potential war criminals should consider before acting.¹⁵¹

The ICC's ability to continue making progress in accomplishing the goals of international criminal prosecution of gender-based war crimes will be hampered by the United States' refusal to ratify the Rome Statute or join the ICC.¹⁵² Although the United States was heavily involved in the creation of the Rome Statute,¹⁵³ it is one of only seven nations to vote against it.¹⁵⁴ Among its concerns, the United States has reservations regarding the ICC's complementarity, the protection of national security information, the independence of the ICC Prosecutor, and the inclusion of the crime of aggression.¹⁵⁵ The United States' primary concern, however, is that American servicemembers will be subject to the ICC's jurisdiction.¹⁵⁶ In efforts to prevent servicemembers from coming under the ICC's jurisdiction,

151. See Akhavan, *supra* note 2, at 9 ("This spread [including the ICC] of accountability reflects the early glimmerings of an international criminal justice system and the gradual emergence of inhibitions against massive crimes hitherto tolerated or condoned by the international community.")

152. See Charney, *supra* note 77, at 460 ("If the United States and other important states do not support the court, it will face almost insurmountable obstacles as it seeks to prosecute persons for international crimes."). For a contrasting view, see Cara Levy Rodriguez, Comment, *Slaying the Monster: Why the United States Should Not Support the Rome Treaty*, 14 AM. U. INT'L L. REV. 805 (1999).

153. Lawrence Weschler, *Exceptional Cases in Rome: The United States and the Struggle for an ICC*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT 91 (Sarah B. Sewall & Carl Kaysen eds., 2000) ("The U.S. delegation [is] forty strong, and easily the best prepared and most professionally disciplined at the Conference . . .").

154. Human Rights Watch, *The United States and the International Criminal Court*, <http://www.hrw.org/campaigns/icc/us.htm> (last visited Jan. 25, 2006) (noting that the six other countries include China, Israel, Iraq, Libya, Qatar, and Yemen).

155. See, e.g., David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 15-17 (1999). See also Talitha Gray, Note, *To Keep You Is No Gain, to Kill You Is No Loss — Securing Justice Through the International Criminal Court*, 20 ARIZ. J. INT'L & COMP. L. 645, 651-53 (2003); John R. Bolton, *The United States and the International Criminal Court*, Remarks to the Federalist Society (Nov. 14, 2002), available at <http://www.state.gov/t/us/rm/15159.htm> ("U.S. military forces and civilian personnel and private citizens are currently active in peacekeeping and humanitarian missions in almost 100 countries at any given time. It is essential that we remain steadfast in preserving the independence and flexibility that America needs to defend our national interests around the world.")

156. See, e.g., Bolton, *supra* note 155, at para. 3:

The United States cooperates with many other nations to keep the peace, but we will not submit American troops to prosecutors and judges whose jurisdiction we do not accept. . . . Every person who serves under the American flag will answer to his or her own superiors and to military law, not to the rulings of an unaccountable International Criminal Court.

(quoting President George W. Bush).

the Bush administration has taken unprecedented steps.¹⁵⁷ These actions go beyond the United States' refusal to ratify the Rome Statute. They undercut the potential benefits and successes of the ICC on the international level.¹⁵⁸ Impugning American service-members diminishes the ICC's ability to act as both a general deterrent and retributive body. In order for the ICC to establish the rule of law with regard to criminal prosecution of gender-based war crimes, all countries must recognize, rather than undermine, its jurisdiction.¹⁵⁹

CONCLUSION

Though the full advantages of the ICC are still speculative, the court's potential is great, and it already offers the advantage of permanence. More than any other element, its permanence will promote the incidence and effectiveness of criminal liability for gender-based war crimes. The ICTY and ICTR have made significant progress in setting precedents in the international prosecution of gender-based war crimes, including convictions for rape and recognition of gender-based war crimes as a part of overall genocide schemes. Ad hoc international criminal tribunals have been successful in specific deterrence, while peoples' tribunals have demonstrated their ability to provide victim vindication. A permanent tribunal can build upon those successes and attain the additional goals of general deterrence and retribution, putting the world on notice that war crimes, including gender-based war crimes, will be prosecuted and punished whenever and wherever they occur.¹⁶⁰

157. See, e.g., Human Rights Watch, *United States Efforts to Undermine the International Criminal Court: Legal Analysis of Impunity Agreements*, <http://hrw.org/campaigns/icc/docs/art98analysis.htm> (last visited Jan. 25, 2006). These steps include rescinding the United States' previous signature on the Rome Statute, attempting to secure exemptions through the United Nations for Americans on U.N. peacekeeping missions, negotiating with other countries to create bilateral agreements to ensure those countries would not send Americans to the ICC, and passage of the American Servicemembers' Protection Act, which contains several specifically anti-ICC provisions. *Id.* See also Juan Forero, *Some Allies Find U.S. Policy Unjust*, INT'L HERALD TRIBUNE, Aug. 20, 2005, at 3 (adding that the United States has also cut aid to countries that do not agree to the bilateral agreements).

158. Human Rights Watch, *supra* note 157.

159. *Id.*

160. Nahapetian, *supra* note 51, at 135 ("[A]dvocates for women must continue to press the international community to enforce international law and prosecute the rape of all women as a crime against humanity, a war crime, or a form of genocide.").

In turn, hopefully the ultimate goal of decreasing the occurrence of these atrocities will be achieved. War crimes will never cease, regardless of what international criminal prosecution mechanisms are in place, and many war criminals will not be deterred simply because their actions are illegal. War criminals may, however, be deterred by the fact that criminal prosecution is now a known risk, placing actors on notice that any power they attain will be illusory if war crimes are committed. Nevertheless, the full achievement of these goals will not be possible unless all countries, especially the United States, are willing to recognize the important role the ICC can play in achieving the goals of criminal prosecution of gender-based war crimes.

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