

## When Adding Women Matters: Women's Participation in the International Criminal Tribunal for the Former Yugoslavia

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### I. INTRODUCTION

Although reports of wartime atrocities in the former Yugoslavia began circulating at the onset of the conflict in 1991, it was not until news stories began featuring evidence of widespread rape and sexual violence that the general public began pressuring their leaders to effectively respond.<sup>1</sup> Women's groups around the world were particularly vocal in demanding that the international community take action to stop the rapes and to hold accountable those responsible.<sup>2</sup>

On December 18, 1992, the U.N. Security Council (Security Council) issued a declaration condemning wartime rape, describing the rapes taking place in the former Yugoslavia as "massive, organized and systematic,"<sup>3</sup> and implicitly threatening military intervention should the violations continue.<sup>4</sup> The "horrific methods of 'ethnic cleansing'"<sup>5</sup> continued, and no state or international body proved willing to "stop th[e] carnage."<sup>6</sup> Unwilling to take military action it

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<sup>1</sup> See ROY GUTMAN, A WITNESS TO GENOCIDE: THE 1993 PULITZER PRIZE-WINNING DISPATCHES ON THE "ETHNIC CLEANSING" OF BOSNIA (1993).

<sup>2</sup> KELLY DAWN ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTIONS IN INTERNATIONAL WAR CRIMES TRIBUNALS 292-94 (1997).

<sup>3</sup> S.C. Res. 798, pmbl., U.N. Doc. S/RES/798 (Dec. 18, 1992).

<sup>4</sup> *Id.* ¶ 3.

<sup>5</sup> Gabrielle Kirk McDonald, Former President and Judge of the Int'l Criminal Tribunal for the Former Yugo., *Crimes of Sexual Violence: The Experience of the International Criminal Tribunal*, in 39 COLUM. J. TRANSNAT'L L. 1, 3 (2000).

<sup>6</sup> *Id.*

self, the Security Council issued Resolution 808, expressing “grave concern” over the “treatment of Muslim women in the former Yugoslavia,”<sup>7</sup> and declaring that “an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.”<sup>8</sup> Resolution 808 thus established the International Criminal Tribunal for the Former Yugoslavia (ICTY).

This Essay examines the impact of women on the creation and operation of the ICTY. Many scholars and practitioners of post-conflict peace building—including the author of the present study—have been harshly critical of the “add woman and stir” approach to the inclusion of “women’s interests” in peace building and transitional justice.<sup>9</sup> In most cases, this critique is justified because simply adding a woman guarantees nothing. As the author observed more than a dozen years ago:

Repeated attempts to “add women” to traditional categories and accounts expose the extent to which those accounts take male experiences as the norm . . . “[A]dding women” without altering existing frameworks for analysis requires women to force themselves into constraining, and often inaccurate categories, in order to make a connection between what is being described and their own realities and experiences. Often even a false, forced fusion is simply not possible.<sup>10</sup>

Squeezing women’s experiences of abuse into the narrow confines of traditional legal cases requires a willingness, on the women’s part, to give up on telling the *whole* story, i.e., in their words and with their individual priorities. However, experiences with the ICTY demonstrate that women are willing to exchange some of their narrative heard in the short-run for justice over the long-run. This Essay argues that international criminal tribunals, like the ICTY, may evidence the success of the “add woman and stir” approach, especially if “success” is defined as drawing greater attention to and the use of different skills, interests, and experiences that women bring to the peacemaking table. After a brief introduction to the ICTY, this Essay identifies three ways in which the simple addition of women benefits

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<sup>7</sup> S.C. Res. 808, pmbl., U.N. Doc. S/RES/808 (Feb. 22, 1993).

<sup>8</sup> *Id.* ¶ 1.

<sup>9</sup> *E.g.*, JULIE A. MERTUS, WAR’S OFFENSIVE ON WOMEN: THE HUMANITARIAN CHALLENGE IN BOSNIA, KOSOVO, AND AFGHANISTAN (2000).

<sup>10</sup> Julie Mertus & Pamela Goldberg, *A Perspective on Women and International Human Rights After the Vienna Declaration: The Inside/Outside Construct*, 26 N.Y.U. J. INT’L L. & POL. 201, 230–31 (1994).

international criminal courts: the inclusion of women as (1) gender experts and other staff positions at Tribunal, (2) witnesses in specific cases, and (3) counsel seeking to improve the treatment of wartime rape under international law. The Essay then concludes with an emphasis on the ways in which the participation of indigenous, nongovernmental organizations significantly impacts international tribunals.

## II. INTRODUCTION TO ICTY

The U.N. Office of Legal Affairs drafted the Statute of the ICTY (the Statute) in 1993 after seeking comments from state governments and from nongovernmental organizations, with international women's rights advocacy groups playing a key role. The Security Council approved the statute on May 25, 1993, as Resolution 827.<sup>11</sup> The Statute grants the Tribunal the authority to prosecute persons who committed or ordered the commission of grave breaches of the Geneva Conventions of 1949 or violations of laws or customs of war, such as genocide and crimes against humanity.<sup>12</sup>

Located in The Hague, Netherlands, the Tribunal operates through three organs: (1) the Chamber, comprised of two Trial Chambers and one Appeals Chamber,<sup>13</sup> where the judge presides and tries cases; (2) the Office of the Prosecutor,<sup>14</sup> where staff members investigate evidence and attorneys assemble cases and issue indictments; and (3) the Registry,<sup>15</sup> which serves as an administrative clerk to both Trial Chambers and to the Office of the Prosecutor. The Registry also oversees the Tribunal's Detention Unit and the Victims and Witnesses Section. The independent prosecutor submits an indictment against an accused to a judge, who then determines whether the case is strong enough to proceed.<sup>16</sup> Trials are conducted by a panel of three judges without a jury<sup>17</sup> and with the assistance of an independent prosecutor who is responsible for initiating investiga-

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<sup>11</sup> S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

<sup>12</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7(1), *annexed to the Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993)*, U.N. SCOR, 48th Sess., U.N. Doc. S/25704 (1993) [hereinafter *ICTY Statute*]; *see also* Statute for the International Criminal Tribunal for Rwanda, art. 6(1), *in* S.C. Res. 955, U.N. SCOR, 49th Sess., at 15, U.N. Doc. S/INF/50 (1994) (The Rwanda Statute is similar, but not identical, to the *ICTY Statute*).

<sup>13</sup> *ICTY Statute*, *supra* note 12, art. 11.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* arts. 18–19.

<sup>17</sup> *Id.* art. 23.

tions and formulating indictments.<sup>18</sup> The U.N. General Assembly elects judges from a pool of candidates nominated by member states.<sup>19</sup> Judges hold their posts for a four-year term and are eligible for re-election.<sup>20</sup> National courts have “concurrent jurisdiction” with the tribunals; therefore, war crimes cases can still be heard in local courts in Bosnia.<sup>21</sup> The Tribunal, however, has the authority to request that national courts defer cases and its request is given priority.<sup>22</sup>

It is no exaggeration, attests long-time women’s rights advocate Charlotte Bunch, to say that “women’s groups were more active in the formation of the new international institution than ever in history.”<sup>23</sup> Aided by a communications revolution and the power of the Internet, fueled by increased financial resources, building on years of organizing and training, and drawing on extensive scholarship,<sup>24</sup> advocates for women’s rights were well situated for an international campaign of great magnitude. Although the 1993 U.N. Conference on Human Rights in Vienna provided a focus and opportunity for the advocates seeking to draw attention to sexual violence in the Balkan wars, the groundwork for the advocacy campaign began before (and reached far beyond) the Vienna meeting. Transnational networks in solidarity with the women of Yugoslavia provided the backbone for the campaign, which emerged in 1992 under various banners, including the influential New York-based Women’s Coalition Against Crimes Against Women in the Former Yugoslavia.<sup>25</sup>

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<sup>18</sup> *Id.* art. 18.

<sup>19</sup> ICTY Statute, *supra* note 12, art. 13.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* art. 9.

<sup>22</sup> *Id.*

<sup>23</sup> Telephone Interview with Charlotte Bunch, Founder & Executive Dir., Ctr. for Women’s Global Leadership at Rutgers, the State Univ. of N.J. (Feb. 2004).

<sup>24</sup> See THE AFTERMATH: WOMEN IN POST-CONFLICT TRANSFORMATION (Sheila Meintjes et al. eds., 2001); SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE (2006); SITES OF VIOLENCE: GENDER AND CONFLICT ZONES (Wenona Mary Giles & Jennifer Hyndman eds., 2004); STATE OF CONFLICT: GENDER, VIOLENCE AND RESISTANCE (Susie Jacobs et al. eds., 2000); MEREDITH TURSHEN & CLOTILDE TWAGIRAMARIYA, WHAT WOMEN DO IN WARTIME: GENDER AND CONFLICT IN AFRICA (1998); VICTIMS, PERPETRATORS OR ACTORS?: GENDER, ARMED CONFLICT AND POLITICAL VIOLENCE (Caroline O.N. Moser & Fiona C. Clark eds., 2001); WOMEN IN AN INSECURE WORLD: VIOLENCE AGAINST WOMEN FACTS, FIGURES AND ANALYSIS (Marie Vlachova & Lee Bason eds., 2005).

<sup>25</sup> This coalition continued its work during the 1997 Women’s Caucus for Gender Justice at the negotiations for an International Criminal Court. Ruth B. Phillips, *Too Close to Home? International Criminal Law, War Crimes and Family Violence*, 24 T. JEFFERSON L. REV. 229, 235 n.21 (2002).

Women's involvement in the ICTY led to a significant shift in the way that international organizations, particularly international courts, think about: (1) the inclusion of women and gender expertise among Tribunal staff, (2) the inclusion and valuation of women witnesses, (3) the treatment of wartime rape and sexual violence under international law, and (4) the participation of indigenous, nongovernmental organizations, i.e., local women's groups. Each of these is discussed in-turn below.

### III. THREE WAYS IN WHICH "ADDING WOMEN" MATTERS

#### A. *The Inclusion of Women and Gender Expertise at the Tribunal*

Although men still dominated the top posts at each level of the Tribunal's operations, the degree to which women and gender expertise were integrated came at a historic high. The Tribunal's inclusion of women judges was a particularly noteworthy development. The Chambers consisted of sixteen permanent judges and a maximum of nine ad litem judges.<sup>26</sup> The sixteen permanent judges are elected by the General Assembly of the United Nations for a term of four years and can be re-elected. The 1993 election of female judges to serve on the ICTY marks the first time women judges entered the international judicial arena, despite the forty-eight year existence of the International Court of Justice. At no point were there more than two female, permanent judges—usually only one of the permanent judges was female. Significantly, however, the group of judges responsible for writing the rules of evidence and procedure for the court was led by an American woman, Gabrielle Kirk McDonald. Other female judges included: Elizabeth Odio-Benito of Costa Rica; Florence Mumba of Zambia; Patricia Wald of the United States; Sharon Williams of Canada; Carmen Argibay of Argentina; Maureen Harding Clark of Ireland; Ivana Janu of the Czech Republic; Chikako Taya of Japan; Christine van den Wyngaert of Belgium; and Fatoumata Diarra of Mali.

Women figured prominently in other high level positions at the Tribunal. Two Chief Prosecutors were women, Louise Arbour of Canada and Carla del Ponte of Switzerland. One of the three Regis-

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<sup>26</sup> The ad litem judges are drawn from a pool of between twenty-two and thirty-three. ICTY Statute, *supra* note 12, art. 13. They are also elected by the General Assembly of the United Nations for a term of four years; they are eligible for re-election. *Id.* An ad litem judge may only serve at the ICTY, on one or several specific trials, for a period of up to four years following his or her appointment by the Secretary General on the recommendation of the President of the Tribunal. *Id.*

trars at the ICTY was Dorothy De Sampayo of the Netherlands. And one woman, Gabrielle Kirk McDonald of the United States, in addition to her role as a drafter of the rules of evidence and procedure, served as President of the Tribunal. A number of women have served the Tribunal in other critical positions, including as investigators, trial lawyers, prosecutors, legal advisors, translators, and counselors.

While there was no clear policy about recruiting staff with gender expertise for the office of the Chambers, many of the judge's legal assistants were hired precisely because they had expertise on gender issues. Moreover, although there is no regular training for judges or other staff on gender issues, these topics have (albeit sparsely) appeared in the training curriculum for judges. Furthermore, each of the aforementioned, permanent judges as well as several of the *ad litem* judges were either sensitive to, or experts in, gender related crimes.

### 1. Toward an Integrated Approach

The attempt to promote women to positions of power at the ICTY raised the question of how best to accomplish the task. The peace-building field has recognized two separate responses: (1) the establishment of a "Gender Focal Point" or gender unit within an organization, and (2) the "mainstreaming" of gender throughout all organizations and all programs. Gender Focal Points refer to the creation of at least one central place in each organization charged with addressing gender issues. The gender unit could offer technical assistance and expertise on gender issues to other parts of the organization as well. Gender mainstreaming, in contrast, focuses on "taking account of gender concerns in all policy, program, administrative and financial activities, and in organizational procedures, thereby contributing to a profound organizational transformation."<sup>27</sup> Mainstreaming began as an effort to increase the impact and effectiveness of development programs by incorporating women and women's issues. Today, the concept is applied to international institutions to refer generally to achieving women's full participation in decision-making issues, to making women's issues central to any agenda, and to putting women on par with men in initiating activities.<sup>28</sup>

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<sup>27</sup> U.N. DEV. PROGRAMME, GENDER IN DEVELOPMENT PROGRAMME, LEARNING AND INFORMATION PACK, GENDER MAINSTREAMING 16 (2000), available at [http://www.undp.org/women/docs/GM\\_INFOPACK/Mainstreaming1.doc](http://www.undp.org/women/docs/GM_INFOPACK/Mainstreaming1.doc).

<sup>28</sup> See, e.g., MARY ANDERSON, FOCUSING ON WOMEN: UNIFEM'S EXPERIENCE IN MAINSTREAMING (1993). The concept of mainstreaming gender or women's concerns has been applied to the human rights system generally. In 1996, at its fifty-second session, the Commission on Human Rights called for the intensified effort at

Both the mainstreaming and the focal point approaches have drawbacks.<sup>29</sup> On one hand, mainstreaming risks submerging gender within the organization to the point that gender concerns are no longer identified and addressed. It may also result in words on paper but few actual changes in programming. On the other hand, the focal point approach risks marginalizing gender within the organization to the extent that gender is treated as something special that is not to be addressed at all, unless within the specified unit. Where women-specific programs exist, there is little to guarantee that gender will be found in any other projects. Recognizing the limitations of both approaches, some international institutions have adopted a hybrid focal point/mainstreaming approach.

In practice, the ICTY evidences the benefit of combining both approaches to achieve gender integration. Patricia Sellers's role as the Gender Advisor in the Office of the Prosecutor (OTP) has provided a prominent example of the focal point/mainstreaming approach. Appointed by former Chief Prosecutor Richard Goldstone, Sellers "was charged with developing the law through formulating the approach of the OTP to the investigation and indictment of gender crimes. She also devised the approach of the OTP to gender issues within the office itself."<sup>30</sup> In her own words, Sellers served as a "one-stop information source for gender issues,"<sup>31</sup> while also undertaking specific activities to further the mainstreaming of gender expertise throughout the ICTY.<sup>32</sup> "Patty's role on the Tribunal was absolutely essential for its operations," recalled Richard Goldstone, the first Chief Prosecutor for the Tribunal.<sup>33</sup> Sellers and Goldstone were part of an "inner cabinet" at the Tribunal that met every morning in The Hague.<sup>34</sup> Goldstone emphasized that while Sellers had an influence on gender issues, her impact was felt even more broadly in overall

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the international level to mainstream the rights of women into U.N. system-wide activity. See Econ. & Soc. Council [ECOSOC], *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms Including the Question of the Programme and Methods of Work of the Commission: Integrating the Human Rights of Women Throughout the United Nations System*, U.N. Doc. E/CN.4/1997/40 (Dec. 20, 1996).

<sup>29</sup> See Anne Gallagher, *Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System*, 19 HUM. RTS. Q. 283, 317 (1997).

<sup>30</sup> Richard J. Goldstone & Estelle A. Dehon, *Engendering Accountability: Gender Crimes Under International Criminal Law*, 19 NEW ENG. J. PUB. POL'Y. 121, 123 (2003).

<sup>31</sup> Interview with Richard J. Goldstone, Former Chief Prosecutor, Int'l Criminal Tribunal for the Former Yugo. (ICTY), in The Hague, Neth. (Mar. 2004).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

improvements in the administration of justice.<sup>35</sup> Pierre-Richard Prosper, war crimes prosecutor at the International Criminal Tribunal for Rwanda and later appointed by President George W. Bush as the United States Ambassador-at-Large for War Crimes, agreed that Sellers played an “absolutely essential role” in the Tribunal’s operations.<sup>36</sup>

Another example of the focal point/mainstreaming approach concerns the investigatory teams. For the purposes of coordinating on-sight evidence gathering, the ICTY divided investigators into specific teams. For example, one team might be assigned to examine all atrocities in the town of Foča, and another might be directed to investigate all issues related to a specific detention camp. “We had tremendous difficulty staffing women investigators, because we were insisting that all field investigators have ten years of experience . . . and there was only one country in the world where women had this kind of experience—the United States,” Goldstone explained.<sup>37</sup>

In 1995, in response to this staffing issue and in recognition of the need to hold perpetrators of gender-based crimes accountable, the Tribunal established a “sexual investigation team” composed exclusively of women with extensive experience on gender crimes. Nancy Paterson, a leader of this team, explained that sexual crimes were still within the ambit of other teams, but that a specialized team was needed to ensure that rape and other forms of sexual violence were not overlooked. She explained that “many of the investigators were police who had never done [sexual violence investigations] before.”<sup>38</sup> After a few years of intense focus on sexual violence, the sexual investigation team was dissolved at the urging of Paterson and other members of the team. By that time, awareness of how to investigate and try sexual violence cases had grown appreciably among many of the investigators. Thus, over time, the ICTY staff had learned that it could address gender issues more thoroughly and effectively by fostering gender expertise and integrating gender awareness throughout the organization through a policy that set its long-term sights on mainstreaming while also utilizing focal points as needed.

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<sup>35</sup> *Id.*

<sup>36</sup> Interview with Pierre-Richard Prosper, Former Ambassador-at-Large for War Crimes Issues, U.S. Dep’t of State, in The Hague, Neth. (Mar. 2004).

<sup>37</sup> Interview with Richard J. Goldstone, *supra* note 31.

<sup>38</sup> Interview with Nancy Paterson, Former Senior Trial Att’y, ICTY, in D.C. (Feb. 2004).



The female, human rights advocates interviewed for this study recalled the supportive efforts of men, such as Judge Almiro Rodrigues and Judge Fouad Riad, who drew from prior experience in family law matters when considering rape and other sexual violence issues before the Tribunal. Richard Goldstone, the first Chief Prosecutor for the Tribunal, also drew praise for creating the position of the Gender Focal Point and for responding to outside pressure to investigate rape and other forms of sexual violence. "Richard Goldstone was open to criticism and to ideas [from women's groups],"<sup>39</sup> said Rhonda Copelon, an international lawyer who argued that gender issues should receive attention before the Tribunal. Without Goldstone's leadership in the initial stages, the ICTY would have been a much different place.<sup>40</sup> Yet, even as important as men are to the successful integration of gender expertise in an international institution, the presence of women *as women* matters.

## 2. The Impact of Inclusion

Never before had an international body of great stature incorporated gender expertise in its central operations. As an official in the OTP, the Gender Focal Point enhanced the ability of prosecutors to bring successful charges against perpetrators of sexual violence. ICTY staff members with gender expertise helped identify witnesses, analyze evidence, elicit testimony, and support those who testified. Equally significant, the inclusion of individuals (male or female) with gender expertise—ranging from the Gender Focal Point to legal interns—was crucial for building capacity throughout the OTP on related issues. Although far from perfect, the ICTY made an effort to integrate gender issues throughout the investigatory teams and in other parts of the Tribunal.<sup>41</sup> "After a while," Sellers says, "[the ICTY's legal staff and investigators] did not have to consult us on everything pertaining to sexual violence."<sup>42</sup> For successful prosecutions in specific cases and long-term staff development, insisting on gender analysis had a lasting impact.

Barbara Bedont and Katherine Hall-Martinez have observed a relationship between participation rates of women and the existence of

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<sup>39</sup> Interview with Rhonda Copelon, Professor of Law, City Univ. of N.Y., in New York, NY (Apr. 2004).

<sup>40</sup> *Id.*

<sup>41</sup> "Just think what could have happened if the gender mainstreaming had really been complete." Interview with Patricia Sellers, Gender Legal Advisor & Trial Att'y, ICTY, in The Hague, Neth. (Dec. 2003).

<sup>42</sup> *Id.*

serious investigations into sexual violence, writing, “The gradual shift toward taking rape and other sexual crimes seriously and investigating them zealously can be traced to the participation of women in the ICTY and [the International Criminal Tribunal for Rwanda] as investigators, researchers, judges, legal advisors, and prosecutors.”<sup>43</sup> Every case involving rape or other forms of sexual violence has involved women. Indeed, Chief Prosecutor Richard Goldstone remembers that if a woman had not been on the Tribunal in its early years, there may not have been *any* indictments for gender-based crimes.<sup>44</sup> He points to the Office of the Prosecutor’s decision to indict Dragan Nikolić, the Commander of the Sušica detention camp in Vlasenica, without charging him with gender crimes.

As witnesses began to testify before the ICTY, however, evidence began to emerge that many of the women detained in the camp were subjected to sexual assaults, including rape. This spurred Judge Odio-Benito, one of two women judges on the Tribunal at that time, to publicly exhort the [OTP] to include gender crimes in the indictment.<sup>45</sup>

Throughout the proceedings, Judge Odio-Benito and her staff used every opportunity to call for the Nikolić indictment to be amended to include gender-based crimes. Eventually, her male colleagues on the three-judge panel shared her concerns. In the proceedings for re-confirmation of the Nikolić indictment, the judges commented:

From multiple testimony and the witness statements submitted by the Prosecutor to this Trial Chamber, it appears that women (and girls) were subjected to rape and other forms of sexual assault during their detention at Sušica camp. Dragan Nikolić and other persons connected with the camp are alleged to have been directly involved in some of these rapes or sexual assaults. These allegations do not seem to relate solely to isolated instances. . . . The Trial Chamber feels that the prosecutor may be well-advised to review these statements carefully with a view to ascertaining whether to charge Dragan Nikolić with rape and other forms of sexual assault, either as a crime against humanity or as grave breaches or war crimes.<sup>46</sup>

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<sup>43</sup> Katherine Hall-Martinez & Barbara Bedont, *Ending Impunity for Gender Crimes Under the International Criminal Court*, 6 BROWN J. WORLD AFF. 65, 75–76 (1999).

<sup>44</sup> Interview with Richard J. Goldstone, *supra* note 31.

<sup>45</sup> Goldstone & Dehon, *supra* note 30, at 123–24.

<sup>46</sup> Prosecutor v. Nikolić, Case No. IT-94-2-R61, Review of Indictment Pursuant to Rule 61, ¶ 33 (Oct. 20, 1995).

This statement is “remarkable in its activist concern for the prosecution of gender crimes,”<sup>47</sup> as well as “remarkable in its suggestion that the judges would be open to considering the indictment of rape and sexual violence beyond the enumerated ground of a crime against humanity.”<sup>48</sup>

In addition to influencing the OTP, the inclusion of women judges had an impact upon the behavior of other Tribunal staff; particularly, defense attorneys and defense witnesses. Defense attorneys from the region had a reputation for treating female witnesses with disrespect and for being dismissive of claims of sexual violence. Counseled by their attorneys, defense witnesses made offensive remarks such as, “I wouldn’t rape her! I would rather rape a bicycle.”<sup>49</sup> A pattern of this behavior threatened to create an atmosphere derisive of women and of gender-based crimes. One restraint on such behavior was the presence of a woman judge in the courtroom. An illustration of this phenomenon concerns the Omarska case, which involved the prison camp “Omarska” where many male prisoners were tortured and killed, and a small number of female prisoners were raped and sexually tortured. In that case, the defense attorney questioned why the court had jurisdiction over the treatment of the women because the ICTY was just for “serious crimes,” and rape and sexual fondling was not “serious.”<sup>50</sup> Judge Wald, the sole female judge on the panel, immediately rejected this argument, reminding the courtroom that the court had been created to cover precisely such offenses. Judge Wald felt that, while she could not prevent all offensive behavior, her presence made a difference.<sup>51</sup>

In noting the need for women witnesses as well as judges, Ambassador Pierre-Richard Prosper observed that “war is not a man’s issue . . . women are harmed by war, too . . . [Thus,] you need a cross-representation of victims.”<sup>52</sup> And as to the essential role played by women advocates and judges, Prosper urged that for fair and full investigations, “it is necessary for all of humanity to be speaking out.”<sup>53</sup> Moreover, he suggested that women tend to be more capable than men at empathizing with the victims. “I’m not saying that all women can empathize with victims of sexual abuse, or that all men can’t do

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<sup>47</sup> Goldstone & Dehon, *supra* note 30, at 124.

<sup>48</sup> *Id.*

<sup>49</sup> Interview with Patricia Wald, Former Judge, ICTY, in D.C. (Apr. 2004).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Interview with Pierre-Richard Prosper, *supra* note 36.

<sup>53</sup> *Id.*

so,” said Prosper, “but women tend to be better at it because they are closer to the victims’ experiences. . . . So, yes, having women [appointed as Tribunal investigators, prosecutors, and judges] makes a difference.”<sup>54</sup>

The inclusion of women at the Tribunal has not been free from difficulty. On the contrary, according to numerous people interviewed for this study, including Richard Goldstone, the culture of the Tribunal is still not very conducive to women. Women tend to be hired at lower levels than men, and then they face great difficulties in achieving promotions. Moreover, “women tend to come under the greatest scrutiny, especially [when they are] at high levels,”<sup>55</sup> one ICTY former staff member remarked. One of the most dramatic illustrations of this “gender spotlight” was the attempt to disqualify a female judge during the *Furundžija* case, essentially for knowing too much about women’s issues.<sup>56</sup> That time, however, the Tribunal’s decision served to support the role of women and men with gender expertise before the Tribunal and underscored the centrality of gender issues to the Tribunal’s mission.

The *Furundžija* defense team argued that the defendant’s conviction should be vacated because Florence Mumba, one of the Trial Chamber judges, should have been disqualified.<sup>57</sup> Prior to joining the Tribunal, Judge Mumba had worked with the U.N. Commission on the Status of Women (CSW) and, the defense contended, because the CSW issued reports on rape during the conflict in the former Yugoslavia, the appearance of bias existed. In considering these allegations, the Appeals Chamber reviewed the standards for unacceptable appearance of bias, which is where:

- i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge’s decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties . . . [; or]
- ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.<sup>58</sup>

Based on these criteria, the Appeals Chamber rejected the allegations of bias.<sup>59</sup> The Appeals Chamber reasoned that Judge Mumba served

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<sup>54</sup> *Id.*

<sup>55</sup> Interview with anonymous ICTY staff member, The Hague, Neth. (Mar. 2004).

<sup>56</sup> See *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgment, ¶¶ 164, 169–70 (July 21, 2001).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* ¶ 189.

<sup>59</sup> *Id.* ¶ 215.

as a representative of her country and not in her personal capacity, and, thus, there was no evidence that her work with the CSW impeded her impartiality.<sup>60</sup> The Appeals Chamber emphasized that the desire to prosecute perpetrators of crimes against women was one motivating factor for the establishment of the Tribunal and, thus, the inclusion of a judge with expertise on gender issues only furthered the Tribunal's central purpose.<sup>61</sup>

*B. The Inclusion of Women Witnesses*

The experience of women witnesses before the ICTY provides several lessons for the International Criminal Court (ICC) and other international courts beyond just protection issues. At the outset, these experiences are good examples of why the presence of women matters. According to ICTY staff, the prosecutors have become increasingly aware that women's experiences of war are valuable and that they span far beyond the issue of rape. However, with the relatively low number of women witnesses in The Hague trials, it has also become clear that most of their experiences were not being heard. Patricia Sellers admonishes that "women should be called as witnesses for many reasons, not just because they are the victims of rape and other sex crimes."<sup>62</sup> Wendy Lobwein, from her six years as a Tribunal counselor, recalls cases where "wives [who accompanied their husbands who had been called to The Hague as witnesses] were converted into witnesses."<sup>63</sup> Still, Tribunal staff members concede that the number of women witnesses is far too low, and that the Tribunal is "losing a lot from not hearing from the women."<sup>64</sup> Future international criminal tribunals, following the ICC's lead, should "think about women witnesses from the beginning, and remember that they have valuable information about a variety of crimes."<sup>65</sup>

Rule 34 of the Rules of Procedure and Evidence provides for the creation of a Victims and Witnesses Unit within the Registry, the Tribunal's administrative organ.<sup>66</sup> The explicit purpose of this unit is to

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<sup>60</sup> See *id.* ¶ 199.

<sup>61</sup> See *id.* ¶¶ 202, 205.

<sup>62</sup> Interview with Patricia Sellers, *supra* note 41.

<sup>63</sup> Interview with Wendy Lobwein, Counselor, ICTY, in The Hague, Neth. (Dec. 2003).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, Rules of Procedure and Evidence, at Rule 34, U.N. Doc. IT/32/Rev. 38 (June 13, 2006).

“[p]rovide counseling and support for [victims and witnesses], in particular[,] in cases of rape and sexual assault.”<sup>67</sup> In the creation of such a unit, “[d]ue consideration shall be given, in the appointment of staff, to the employment of qualified women.”<sup>68</sup> The unit may provide care for children and dependent persons, support for accompanying persons, relocation of witnesses, and attendance allowances—flat fees paid to witnesses for costs incurred from being absent from home.<sup>69</sup>

### 1. Encouraging Participation

Enhancing the participation of women as witnesses entails a consideration of the women’s traditional roles in their communities. “They are not here to be exhibited. We know they are humans who are capable of being hurt. We’ve learned to set our practices to respect these witnesses, so they can come in and give their evidence and go away as soon as possible.”<sup>70</sup> The ICTY staff members credit the Tribunal’s practice of paying a small daily allowance for child care and for other family care as a major factor in enabling women to participate.<sup>71</sup> However, staffers maintain that the ICTY should be doing more to recognize that significant family responsibilities prevent many women from leaving home. In the words of one staff member, the ICTY could “pay greater attention to what prevents women from testifying before the Tribunal.”<sup>72</sup>

Furthermore, the design of the Tribunal’s facilities is significant. The ICTY began receiving witnesses “without anything in place with regard to their physical and psychological comfort and security.”<sup>73</sup> The ICTY was wholly focused on finding witnesses and delivering them to The Hague. This was no easy task because most witnesses were without proper travel documents and without any means of obtaining them in a time of ongoing war and chaos. “We put the first sets of witnesses in bullet proof vests and got them in a helicopter to Split [in Croatia], where they could be photographed and issued identification, and then brought them back to Bosnia for transport to The Hague,”<sup>74</sup> one staff member recalls. Once the witnesses arrived

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<sup>67</sup> *Id.* Rule 34(A)(ii).

<sup>68</sup> *Id.* Rule 34(B).

<sup>69</sup> *Id.*

<sup>70</sup> Interview with Florence Mumba, Judge, ICTY, in The Hague, Neth. (Dec. 2003).

<sup>71</sup> Interview with Wendy Lobwein, *supra* note 63.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

in The Hague, "it was like, what do we do next?"<sup>75</sup> There were no witness waiting rooms, for example, and once these rooms were constructed, they were without access to bathrooms, food and drinks, or adequately ventilated smoking areas. "All of these factors, which might seem like very little things [to outsiders], are in fact huge factors when it comes to the dignity of witnesses."<sup>76</sup>

Addressing the relationship between support staff and protection staff is also crucial. Traditionally, their approaches toward witnesses differed, and in many cases were in direct conflict. "In the thinking of support staff, witnesses need as much information as possible [about the trial and their role in it] for as long as possible. More information increases decision making capacity and enhances empowerment."<sup>77</sup> For staff members with a protection mandate (i.e., staff charged with enhancing security and rights of witnesses), "more information and more contact is bad," as more information and contact may present security risks.<sup>78</sup> Where support staffers would like to continue their relationship with the witnesses beyond the trial, protection staffers view their role in more limited terms. These fundamentally different approaches to working with witnesses need to be reconciled with greatest attention to the interests of witnesses.

## 2. Diverse Motivations

The experiences and motivations of women witnesses vary; thus, there can be no single best practice or approach to accommodating an "essential woman witness." Wendy Lobwein pointed to four separate motivations that encourage women to testify.<sup>79</sup> Interviews with Bosnian NGOs (the self-termed "victims' groups" and supportive "women's" and "psychosocial counseling" NGOs) support these categorizations.<sup>80</sup>

First, some women seek to speak for the dead. Many, but not all, of these women are motivated by religious convictions: "God let me survive so that I could bear witness," they might reason. These witnesses, like nearly all witnesses in this context, suffer from post-traumatic stress disorder, which does not disappear after testifying.

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Interview with Wendy Lobwein, *supra* note 63.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Interview with Mirha Pojškić, Therapist, Medica Zenica, in The Hague, Neth. (Dec. 2003). See also Margaret U. Walker, *Truth and Voice in Women's Rights, in RECOGNITION, RESPONSIBILITY, AND RIGHTS: FEMINIST ETHICS AND SOCIAL THEORY* 169–78 (Robin N. Fiore & Hilde L. Nelson eds., 2003).

Nonetheless, they tend to leave the Tribunal satisfied—at least they have spoken for the dead. As Mirha Pojškić, a therapist at Medica Zenica, a women's NGO that has worked with witnesses, observed: "For some women, the Tribunal is indeed a healing process. There are women whose family members were killed during the war. For these women, they feel like they do something positive by speaking for the dead. They overcome a feeling of helplessness."<sup>81</sup>

The second type of witness wants to tell what happened, that is, to make a public and authoritative statement of her experiences. As Pojškić recounted, "Some witnesses go, not because they think they should for the family, but for truth. These are the witnesses who are disappointed."<sup>82</sup> The courtroom experience rarely permits them to tell what happened, at least not according to their perspective as victims and survivors. Rather, the criminal law experience focuses narrowly on the actions of the perpetrator and on whether those actions fit the elements of the crime. Witnesses' disappointment would not be such a problem if they were adequately prepared for their participation.

The third type of witness "looks for justice in the present."<sup>83</sup> She tends to be very unsatisfied by many aspects of the Tribunal, including what is perceived as lenient sentencing, a small number of prosecutions, and a failure to prosecute certain key protagonists.

The act of witnessing alone can cause trauma. As Judge Wald observed, participation in adversarial criminal proceedings rarely helps survivors to "feel better":

Many of the witnesses are physically and emotionally fragile—in the aftermath of their fractured lives. They frequently break down on the stand. The accused are there in the courtroom only a few feet away. One witness openly pled with the court to stop the accused from threatening her with his eyes. . . . Some of the witnesses say they are relieved to testify before us. Some express a humbling confidence that we will bring justice to their suffering. Others seem to find their courtroom experience with its stress on legal subtleties anti-climatic and frustrating.<sup>84</sup>

Nonetheless, "the potential for witnessing to re-traumatize can be overstated," says Wendy Lobwein, who stresses that even in the most

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<sup>81</sup> Interview with Mirha Pojškić, *supra* note 80.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Patricia Wald, *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, 109 (2001).



traumatic situations, women still exercise agency.<sup>85</sup> Lobwein remembers one witness who kept screaming and fainting during her testimony:

The judge eventually said, "Look, we have to stop this." When I told the witness we had to stop, she pled with me to convince the judge to let her continue. She fainted a couple more times, but somehow she got through her testimony. When she was done, she thanked me and said, "Now I can live again."<sup>86</sup>

While wary of re-traumatizing witnesses, Mirha Pojškić of Medica Zenica, an NGO, agrees that women should be able to make their own decisions on whether to testify.<sup>87</sup> She said that the women who take the opportunity to speak in The Hague make the most of it, despite the limitations of law. "The witnesses are prepared and are told to answer just the questions that are as asked. And they are told they have to fit their stories into the language of law. But they still find a way to say what they want to say."<sup>88</sup> Lobwein provides another illustration of this important point: "There is the example of the woman who saw her husband murdered and in court she was asked what the murderer looked like. She answered, 'If this happened to you, who would you look at? The murderer, or would you have one last look at the man you love?'"<sup>89</sup> Ultimately, with appropriate privacy safeguards and health services, the experience of testifying can be empowering for women and crucial for advancing the goals of the Tribunal.<sup>90</sup>

The vast majority of ICTY staff and Bosnian women interviewed for this Essay were impressed with the safeguards afforded witnesses at the Tribunal. Where problems with protection continue to exist, they are largely due to inadequacies in Bosnian criminal law and practice, not with defects in international law. As one Bosnian woman who has worked in a support position for two witnesses described, "As long as [the witnesses are] in The Hague, everything is OK, but as soon as they enter that plane to ride home, everything [related to protection] begins to fall apart."<sup>91</sup> The fact that the Tribunal staff has few resources to follow up with witnesses has drawn considerable criticism, both within and outside the region.

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<sup>85</sup> Interview with Wendy Lobwein, *supra* note 63.

<sup>86</sup> *Id.*

<sup>87</sup> Interview with Mirha Pojškić, *supra* note 80.

<sup>88</sup> *Id.*

<sup>89</sup> Interview with Wendy Lobwein, *supra* note 63.

<sup>90</sup> See Debra L. DeLaet, *Gender Justice: A Gendered Assessment of Truth-Telling Mechanisms*, in *TELLING THE TRUTHS: TRUTH TELLING AND PEACE BUILDING IN POST-CONFLICT SOCIETIES*, 151, 151–81 (Tristan A. Borer ed., 2006).

<sup>91</sup> Interview with Mirha Pojškić, *supra* note 80.

C. *The Impact of Women on the Jurisprudence of the Tribunal*

Although their approaches varied, women's human rights advocates made central to their campaign the explicit recognition of rape as a violation of international law and not a mere by-product of conflict. In the 1907 Hague Conventions and 1949 Geneva Conventions, rape and sexual violence are treated as an affront to personal dignity and honor.<sup>92</sup>

Catherine N. Niarchos underscores many of the pitfalls in linking rape and honor. One danger is that reality and the woman's true injury may be sacrificed. Rape begins to look like seduction with "just a little persuading"<sup>93</sup> rather than a massive and brutal assault on the body and psyche. However, she explains, "violations of honor and modesty are wholly inadequate concepts to express the suffering of women raped during war."<sup>94</sup> This downgrading of the severity of rape is deliberate. As Niarchos further observes:

by presenting honor as the interest to be protected, the injury is defined from society's viewpoint, and the notion that the raped woman is soiled or disgraced is resurrected . . . . [O]n the scale of wartime violence, rape as a mere injury to honor or reputation appears less worthy of prosecution than injuries to the person."<sup>95</sup>

More modern humanitarian law, as reflected in the 1977 Protocols to the Geneva Conventions, illustrates a slightly more enlight-

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<sup>92</sup> For example, Article 46 of The Hague Regulations of 1899 and 1907 requires respect for "[f]amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice . . ." Convention Respecting the Laws and Customs of War on Land art. 46, Oct. 18, 1907, 36 Stat. 2277, 2306-07, 205 Consol. T.S. 277. The Fourth Geneva Convention of 1949 incorporated these concepts in a provision giving women special protection against rape. Article 27 states:

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 27, Aug. 12, 1949, 6 U.S.T. 3516, 3536, 75 U.N.T.S. 287, 306.

<sup>93</sup> Catherine N. Niarchos, *Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia*, 17 HUM. RTS. Q. 649, 674 (1995).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

ened approach by using the term “dignity” instead of “honor.”<sup>96</sup> This formulation is nonetheless troubling for women’s human rights advocates: “[A]lthough dignity is a more germane referent than honor, it does not adequately express the fact that sexual assault is a violent crime; indeed, the Protocols *distinguish* sexual assaults from crimes of violence.”<sup>97</sup> Through their advocacy around the ICTY, human rights proponents did not seek to deny that rape is a violation of dignity; rather, they sought to underscore that rape is primarily a physical assault and hence a crime of violence. By the time of the drafting of the ICC Statute in Rome in 1998, women’s advocates had delinked rape with crimes against honor or dignity. Nonetheless, the solution fashioned was far from perfect.

The Tribunal’s subject matter jurisdiction is set forth in four articles, giving it jurisdiction over grave breaches of the Geneva Conventions of 1949 (Article 2),<sup>98</sup> violations of the laws or customs of war (Article 3),<sup>99</sup> genocide (Article 4),<sup>100</sup> and crimes against humanity (Article 5).<sup>101</sup> Advocates were successful with respect to their demand that rape be explicitly listed as a crime against humanity. Thus, Article 5 defines crimes against humanity in armed conflict as “(a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial, and religious grounds; [and] (i) other inhumane acts.”<sup>102</sup> The term “rape” was still omitted from both Articles 2 and 3, which are the provisions relating to grave breaches of the Geneva Conventions and other war crimes.<sup>103</sup> This was problematic because rape could be prosecuted as a crime against humanity only when committed as part of a widespread or systematic attack directed against a civilian population.<sup>104</sup>

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<sup>96</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 75(2)(b), June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 4(2)(e), June 8, 1977, 1125 U.N.T.S. 609.

<sup>97</sup> Niarchos, *supra* note 93, at 675 (footnote omitted).

<sup>98</sup> ICTY Statute, *supra* note 12, art. 2.

<sup>99</sup> *Id.* art. 3.

<sup>100</sup> *Id.* art. 4.

<sup>101</sup> *Id.* art. 5.

<sup>102</sup> *Id.*

<sup>103</sup> *See id.* arts. 2–3.

<sup>104</sup> ICTY Statute, *supra* note 12, art. 5.

### 1. Prosecuting Rape

Over time, the omission of the term “rape” from Articles 2 and 3 presented few difficulties for prosecutors. In practice, the OTP adopted the approach that sexual violence could be prosecuted not only as a crime against humanity but also under the other provisions of the statute—genocide and grave breaches to, or violations of, the laws and customs of war. Increasingly, the practice of the prosecution is to charge violations of laws or customs of war under Article 3 instead of as grave breaches under Article 2. “The reason for this,” as Kelly Dawn Askin has observed, “is that Article 3 charges do not require the prosecution to undertake the lengthy process of proving that the armed conflict was international in character at the time and place of the crimes alleged in the indictment.”<sup>105</sup> This strategy has allowed for more successful sexual violence prosecutions in war crimes cases.

Article 4, the genocide provision, also provides a possible avenue for the prosecution of wartime rape, but international advocates are split over the utilization of this approach. At the forefront of demands that the rapes of Muslim women in Bosnia be recognized as genocidal rape, Catherine MacKinnon declared:

This is ethnic rape as an official policy of war in a genocidal campaign for political control. . . . It is specifically rape under orders. This is not rape out of control. It is rape under control. It is also rape unto death, rape as massacre, rape to kill and to make the victims wish they were dead. It is rape as an instrument of forced exile, rape to make you leave your home and never want to go back. It is rape to be seen and heard and watched and told to others: rape as spectacle. It is rape to drive a wedge through a community, to shatter a society, to destroy a people.<sup>106</sup>

Opponents of this approach did not deny that women were targeted for rape because of their real or perceived ethnicity. Nor did they deny that rape could be an element of genocide. However, it was agreed that to insist on a “genocidal rape” formulation would raise the burden of proof and undermine attempts to prosecute many cases of wartime rape. Rhonda Copelon, one of the leaders of the opposition camp, warned that with an overemphasis on “genocidal rape,” the gendered nature of the crime of rape—a violent crime committed against women, as women—could become obscured, ren-

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<sup>105</sup> Kelly D. Askin, *Reflections on Some of the Most Significant Achievements of the ICTY*, 37 NEW ENG. L. REV. 903, 913 (2003).

<sup>106</sup> Catharine A. MacKinnon, *Rape, Genocide, and Women's Human Rights*, 17 HARV. WOMEN'S L.J. 5, 11–12 (1994).

dering invisible the rapes committed in an armed conflict outside of the context of a genocide.<sup>107</sup> The latter view prevailed in that the term “genocidal rape” does not appear in the text. Nonetheless, as it has been in cases of war crimes and grave breaches, the Tribunal may consider claims of genocidal rape in specific cases and, in practice, the Tribunal has discussed rape as an instrument of genocide.<sup>108</sup>

## 2. Expanding Liability

Advocates have also played a role in the ICTY's incorporation of an expanded notion of liability for rape and sexual violence. Under the Statute, individual liability may be imposed on any person who “[p]lanned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime . . . .”<sup>109</sup> Command responsibility applies if a superior “knew or had reason to know that [a] subordinate was about to commit” a crime or had committed a crime and failed to take reasonable measures to prevent the crime or punish the perpetrator.<sup>110</sup> Under command responsibility, guilt may be assigned to attackers who claim to be acting under orders, to persons who “aid and abet” a rape, and to persons in authority who fail to take action to prevent or to punish those responsible for rape. The Tribunal also has prosecuted individuals under the “joint criminal enterprise” theory of responsibility, in which persons who knowingly have participated in a joint criminal enterprise can be held criminally responsible for all acts committed either in furtherance of the criminal endeavor or which were foreseeable consequences thereof, including rape crimes.<sup>111</sup> Indeed, the *Krstić* and *Kvočka* judgments held the accused responsible for sexual violence,

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<sup>107</sup> Rhonda Copelon, *Gendered War Crimes: Reconceptualizing Rape in Time of War*, in *WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES* 197, 199 (Julie Peters & Andrea Wolper eds., 1995).

<sup>108</sup> Indeed, the *Akayesu* Judgment of the Rwanda Tribunal found that rape crimes were committed as an instrument of the genocide in Rwanda, and the Tribunal convicted the accused of genocide and crimes against humanity for crimes including sexual violence. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 731–34 (Sept. 2, 1998). The *Kvočka* Judgment of the ICTY noted that rape can constitute genocide if committed with the requisite intent. See Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Judgment, ¶ 190 & n.365 (Nov. 2, 2001), *rev'd*, Case No. IT-98-30/1-A, Judgment, ¶ 334 (Feb. 28, 2005).

<sup>109</sup> ICTY Statute, *supra* note 12, art. 7(1).

<sup>110</sup> *Id.* art. 7(3).

<sup>111</sup> Prosecutor v. Kvočka, Case No. IT-98-30/1-A, Judgment, ¶ 334 (Feb. 28, 2005) (affirming at paragraph 86 the general proposition that a person may be responsible for crimes committed that are natural and foreseeable consequences of the joint criminal enterprise).

which was committed as a foreseeable consequence of a joint criminal enterprise.<sup>112</sup>

The ICTY delivered several landmark decisions expanding the understanding of sexual violence under international law.<sup>113</sup> Each case bears the imprint of women acting in very public positions as judges, prosecutors, investigators, and witnesses and behind the scenes as advocates.<sup>114</sup> Three cases that serve as good examples in this regard are the *Tadić*, *Furundžija*, and *Čelebići* judgments.

The issue of commander responsibility was of prime concern to women's human rights advocates. The notion that a person can be convicted for having encouraged crimes of sexual violence, even if they did not participate directly, was confirmed early on in the *Tadić* case, which was the first trial conducted by the ICTY.<sup>115</sup> Dusko Tadić, a Serbian cafe owner, was brought before the Tribunal for his alleged participation in the repeated beating, rape, murder, and torture of detainees at the Omarska, Keraterm, and Trnopolje detention camps in Bosnia-Herzegovina.<sup>116</sup> In that case, the accused was found not guilty of rape because the prosecution failed to prove that the victims were protected persons under the relevant law.<sup>117</sup> Nonetheless, the case remains a significant precedent for gender violence in wartime because Mr. Tadić was convicted of inhuman and cruel treatment for his involvement in the sexual mutilation of a male prisoner.<sup>118</sup> In reaching its decision, the Trial Chamber reasoned that sexual assault constituted the war crime of inhumane treatment and was a grave breach of the Geneva Conventions.<sup>119</sup> The Trial Chamber also stated

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<sup>112</sup> Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 616 (Aug. 2, 2001), *aff'd*, Case No. IT-98-33-A, Judgment, ¶ 150–51 (Apr. 19, 2004); *Kvočka*, Case No. IT-98-30/1-A at ¶ 334.

<sup>113</sup> See generally ANGELA BANKS, WOMEN'S INITIATIVES FOR GENDER JUSTICE, SEXUAL VIOLENCE AND INTERNATIONAL CRIMINAL LAW: AN ANALYSIS OF THE AD HOC TRIBUNAL'S JURISPRUDENCE & THE INTERNATIONAL CRIMINAL COURT'S ELEMENTS OF CRIMES (2005), [http://www.iccwomen.org/publications/resources/docs/Overview\\_Sexual\\_Violence\\_and\\_International\\_Criminal\\_Law.doc](http://www.iccwomen.org/publications/resources/docs/Overview_Sexual_Violence_and_International_Criminal_Law.doc); Dorean M. Koenig & Kelly D. Askin, *International Criminal Law and the International Criminal Court Statute: Crimes Against Women*, in 2 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 3, 15 (Kelly D. Askin & Dorean M. Koenig eds., 2000).

<sup>114</sup> Human Rights Watch describes the Tribunal's record as "lackluster and inconsistent . . . on investigating and prosecuting crimes of sexual violence." *Bosnia: Landmark Verdicts for Rape, Torture, and Sexual Enslavement*, HUM. RTS. NEWS, Feb. 22, 2001, <http://hrw.org/english/docs/2001/02/22/bosher256.htm>.

<sup>115</sup> Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment, ¶ 237 (May 7, 1997).

<sup>116</sup> *Id.* ¶ 38.

<sup>117</sup> *Id.* ¶ 720.

<sup>118</sup> *Id.* ¶¶ 198, 243, 726–30.

<sup>119</sup> See *id.* ¶ 726.

that rape was a war crime even when committed by non-state actors and in non-international armed conflict.<sup>120</sup> Significantly, the case highlighted the prevalence of male-on-male sexual violence in wartime.<sup>121</sup> According to Judge Gabrielle Kirk McDonald, however, the importance of the case “[f]rom a broader perspective . . . is that the *Tadić* trial gave the Tribunal the first opportunity to apply the rules it crafted especially the rules of evidence—in a way that protected the accused’s right to a fair trial, thereby demonstrating that international criminal justice was possible.”<sup>122</sup>

Two other issues of prime concern to women’s rights advocates, the elements of wartime rape and the connection between wartime rape and torture, were addressed in *Prosecutor v. Mucic*, which is known as one of the Čelebići prison camp cases. In those cases, four men were charged with participation in atrocities at the Čelebići prison camp, where officials killed, tortured, sexually assaulted, beat, and otherwise subjected detainees to cruel and inhuman treatment.<sup>123</sup> Among other holdings, the Trial Chamber convicted one of the accused of war crimes and grave breaches of the Geneva Conventions for forcing male inmates to perform fellatio and other sexually humiliating acts on each other. The Trial Chambers found that such conduct constituted “at least, a fundamental attack on . . . [the victims’] human dignity.”<sup>124</sup> The Trial Chamber emphasized that if the indictment had charged the forced fellatio as rape instead of inhuman treatment, it would have convicted the accused of rape instead of as the more obscure crime. The Čelebići prison camp cases are also noteworthy for recognizing wartime rape as a form of torture when women were sexually violated as a form of punishment, to gain information, and to discriminate against them as women.<sup>125</sup> To prove torture, one must show that the act in question, e.g., rape or other inhumane treatment, was inflicted for some designated purpose other than the act itself. The judges in the Čelebići cases reasoned this requirement is satisfied in a rape case because violence directed against women is discrimination.<sup>126</sup> It should be emphasized that the

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<sup>120</sup> *Id.* ¶ 655, 725.

<sup>121</sup> *Tadić*, Case No. IT-94-1-T at ¶¶ 198, 206.

<sup>122</sup> Gabrielle Kirk McDonald, *The International Criminal Tribunals: Crime and Punishment in the International Arena*, 7 ILSAJ. INT’L & COMP. L. 667, 673 (2001).

<sup>123</sup> *Prosecutor v. Mucic*, Case No. IT-96-21-T *bis*-R117, Sentencing Judgment, ¶¶ 13–18 (Oct. 9, 2001).

<sup>124</sup> *Prosecutor v. Mucic*, Case No. IT-96-21-T, Judgment, ¶ 1066 (Nov. 16, 1998).

<sup>125</sup> *Id.* ¶¶ 494, 496.

<sup>126</sup> *Id.* ¶¶ 493, 495.

accused were convicted of failing their responsibility as superiors to prevent or punish sex crimes committed by subordinates.

#### IV. EVALUATING PARTICIPATION OF INDIGENOUS NGOS AND LOCAL WOMEN'S GROUPS

The relationship between Tribunal investigators and Bosnian women's groups also provides several lessons for future international courts. In the Bosnian context, women's groups served to work as a channel between the investigators and witnesses.<sup>127</sup> The investigators interviewed for this Essay made clear that were it not for the work of local NGOs, there would have been few, any, witnesses in sexual violence cases specifically and in many other cases generally.<sup>128</sup> At the same time, the interviews with the Bosnian NGOs indicate that their potential to provide a supportive role was largely untapped and that, in fact, they were able and willing to do much more.

Bosnian women's groups exhibited the ability to play a key role in supporting witnesses. Although the availability of psycho-social services to survivors of sexual assault and other forms of wartime violence was scarce, it was a handful of women's groups that had principal or exclusive contact with central witnesses in sexual violence cases. Representatives of these groups—who asked not to be identified in fear of retaliation—described ICTY investigators in favorable terms, such as sensitive and “appropriate” in approaching potential witnesses.<sup>129</sup> “We saw maybe three-hundred women who were raped in war,” said one Bosnian therapist, “and maybe thirty would talk to the Tribunal and two or three would end up testifying . . . very few [women] wanted to do it.”<sup>130</sup> But once women decided to speak with the investigators, “they had it in their mind to do it” and “this was something they needed to do and no one could stop them.”<sup>131</sup>

The Bosnian therapists interviewed for this Essay were generally of the opinion that the women who testified in The Hague about their experiences did so willingly and with informed consent. “Yes, some of the women were broken by [going to The Hague to testify], but you can't say anyone forced them,” said one therapist with a

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<sup>127</sup> KVINNA TILL KVINNA, GETTING IT RIGHT? A GENDER APPROACH TO UNMIK ADMINISTRATION IN KOSOVO 5 (2001), available at <http://www.iktk.se/publikationer/rappporter/pdf/Kosovorapport.pdf>.

<sup>128</sup> See *id.* at 19.

<sup>129</sup> Interview with anonymous ICTY staff member, in The Hague, Neth. (Dec. 2003).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*



women's group.<sup>132</sup> Many witnesses were frustrated by the legal process, which made it hard to talk about their experiences in their own terms. Nonetheless, this therapist contended, "For some [witnesses], it was liberating, like a burden rising from their shoulders."<sup>133</sup> Similarly, another woman who has worked with a Bosnian women's organization asserted that the notion that women witnesses are "used" by the Tribunal can be condescending: "It's like [the witnesses] can't make decisions for themselves, but they can and they do."<sup>134</sup>

Experience suggests that the increased participation by local NGOs in the ICTY would both enhance the ability of local NGOs to prepare witnesses and enhance the potential of the Tribunal to influence local processes in long-lasting and positive ways. The experiences of Bosnian psychotherapists and psychologists sent to The Hague in December 2003 are instructive. Private donors funded the trip, wholly separate from the Tribunal's standard budget, which did not contemplate the necessity of such an exchange. In an experience that all involved parties rated as "highly meaningful," the therapists were given a tour of The Hague and received personal instruction on the operations of the Tribunal.<sup>135</sup> Many of the participants lamented that the exchange had not occurred earlier. "This was the first time in six years that we were able to see what they are doing there."<sup>136</sup>

The visit had two benefits. First, as one therapist in attendance explained, "it gave [the local professionals working with victims] a picture of what a victim-witness could expect there."<sup>137</sup> This enhanced the ability of the people working with victims to prepare them for what was to come in The Hague. "It was more than a little better than we expected," said Mirha Pojškić of Medica Zenica.<sup>138</sup>

Second, the trip provided them with an "awareness of possibilities," for "ideas for protection of witnesses [in Bosnia]."<sup>139</sup> They returned home with a drive to improve local laws and practices for witnesses and the knowledge to make it a reality. International support of local NGOs, therefore, is one tangible way to further the broader goals of promoting justice. Alisa Muratčauš, the coordinator of the

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> Interview with anonymous ICTY staff member, in The Hague, Neth. (Dec. 2003).

<sup>136</sup> *Id.*

<sup>137</sup> Interview with Mirha Pojškić, *supra* note 80.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

Section of Women Former Prisoners of Concentration Camps,<sup>140</sup> expressed the opinion of many indigenous NGOs interviewed for this study when she stated that her overall opinion about The Hague Tribunal is that “it is good that it exists,” and that problems rested with Bosnian law, not with international law:

The problem with witnesses going to The Hague is that the Tribunal does not take care of them after they testify. Very often women from The Hague are put on the very same plane as the war criminals against whom they are testifying. When they return to Bosnia they are told to return to the same town from which they came, or they can go to a third country.<sup>141</sup>

Alisa Muratčauš recognizes that local law must change. Her association is working to change local laws and practices to enable women who want to return to Bosnia (but to a city other than their hometown) to receive the kind of residency status they need for healthcare and other social benefits.<sup>142</sup>

Local participation in transitional justice mechanisms like the Tribunal enhances the legitimacy of such processes. The citizens who were more involved in the Tribunal were more likely to recognize its role in promoting reconciliation. For example, Nuna Zvizdić, a leader of Žene Ženama, a Sarajevo-based women’s group active in advocacy on issues of transitional justice and the Tribunal, noted:

The Tribunal is trying to show everyone that justice is defined differently from different standpoints. We have to learn these differences. What is important now is from our vantage point in both entities. We have been listening to this [the Tribunal proceedings], we have been talking more openly about our fears [in

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<sup>140</sup> Interview with Alisa Muratčauš, President, Section of Women Former Prisoners of Concentration Camps, The Hague, Neth. (Dec. 2003).

Q: How did you start working with women former political prisoners?

A: I did not intend to work with women. I was in a camp and got out and wanted to do something. In 1997, I started working with the Association of concentration camp victims. There were six thousand men and one thousand women. I noticed that about eighty percent of these women had been raped (the victims would fill out an information form to “register” with the Association) so I knew that there were a lot of women and that they had their own experiences and so I tried to set up some kind of support system for them. It is a very difficult life for these women. Most of them are completely marginalized in their communities. They have not official residency in Sarajevo.

*Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

relation to the past]. We need to hear the facts so that we may go forward into the future.<sup>143</sup>

Zvizdić viewed the Tribunal as a first step. “You need time for reconciliation,” she said, “Everything really is happening very quickly; but for the internationals, it is too slow.”<sup>144</sup>

Although an Outreach Program was established in September 1999, with a coordinator based in The Hague and offices in Croatia and Bosnia, the flow of information has been inadequate. Poor communication between the ICTY and Bosnia has hindered the potential for the Tribunal to serve the local needs for reconciliation. In addition, the poor communications have created unrealistic local expectations for the ICTY, observes Judith Armatta, pointing out that support for the Tribunal is greater among people with greater knowledge of its purpose.<sup>145</sup> Indeed, individuals who provided information for the present research were most likely to be supportive of the Tribunal as a mechanism for reconciliation if they had more information about its operations.

## V. CONCLUSION

Reports of mass rape and other gender-based crimes galvanized the international community into creating the ICTY. As the first international tribunal in fifty years, it has made significant contributions to international justice. As Gabrielle Kirk McDonald notes the most far-reaching contribution of the ICTY, is that its establishment “signaled the beginning of the end of the cycle of impunity.” She further stated:

Those responsible for committing or ordering the commission of horrific acts of violence against innocent civilians, simply because of the happenstance of their birth, their ethnicity, their religious beliefs, or their gender, are now for the first time being called to account for their criminal deeds . . . .

The [ICTY has] also demonstrated that the rule of law has been an integral part of the peace process; expanded the jurisprudence of international humanitarian law; raised the international community's level of consciousness regarding the need of

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<sup>143</sup> Interview with Nuna Zvizdić, Coordinator, Žene Ženama, in Sarajevo, Bosn. & Herz. (Nov. 2003).

<sup>144</sup> *Id.*

<sup>145</sup> Interview with Judith Armatta, Advocate, Coalition for International Justice, in The Hague, Neth. (Dec. 2003).

states to enforce international norms; and accelerated the development of the permanent International Criminal Court.<sup>146</sup>

In lobbying for the establishment of the court, and through their presence at its creation and participation in its operation, women have helped set important precedents. "Women's expectations have been raised [by the ICTY]. What was once unimaginable is now not only imaginable, but expected," observes women's rights leader Charlotte Bunch.<sup>147</sup> With the ICTY success as their guide, women now demand that they be included in international justice mechanisms at all levels of decision-making and operations, that gender expertise be better integrated throughout international institutions, and that international bodies take allegations of rape and sexual violence in war seriously as grave violations of international law and not merely as by-products of war.

The involvement of women in the ICTY provides important lessons for other current and future international tribunals. An international criminal court functions better when women are included in all roles and at all levels. Male and female judges interviewed for this Essay agree that some witnesses (frequently women in sexual violence cases, but sometimes times men as well) speak more freely to a woman judge. Further, male defense attorneys often communicate more respectfully with female witnesses when a woman judge presides.

Women judges drafted rules of procedure for the Tribunal, requiring not only a higher level of sensitivity to gender issues but also greater sophistication in witness protection and evidentiary precision than found previously in international processes. Women investigators and prosecutors played key roles in gathering and presenting evidence in historic cases that would refine international humanitarian law on several issues, from command responsibility for wartime abuses to the international definition of the crime of rape. And, significantly, these cases were driven by the resolve of women witnesses and the translators, counselors, and other individuals in The Hague and in Bosnia and Herzegovina (BiH) who supported them. In the words of Patricia Sellers, the gender adviser for the Office of the Prosecutor, "the involvement of women in the Tribunal is a good example of a case where women's presence changed the course of history."<sup>148</sup>

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<sup>146</sup> McDonald, *supra* note 122, at 682–83.

<sup>147</sup> Interview with Charlotte Bunch, *supra* note 23.

<sup>148</sup> Interview with Patricia Sellers, *supra* note 41.

Both the male and female investigators interviewed for this Essay agreed that women also added a valuable perspective at the Tribunal because, in the words of one investigator, “[W]omen see things that men do not.”<sup>149</sup> Broadly speaking, because of differences in lived experiences, social roles, and other gender-based distinctions, women view the world through a different lens than men. Likewise, women witnesses *literally* saw things that men did not. Nancy Paterson, a lawyer who worked at the Tribunal for nearly seven years, found that “while the male prisoners [in concentration camps] were kept in windowless rooms, huddled on the floor, blindfolded with their heads in their hands, the women were kept in places where they could see everything.”<sup>150</sup> Patterson recalled that in the early days of the Tribunal, “whenever the prosecutors thought about women witnesses, it had to be some kind of sexual violence case, but over time, they learned that women can be central witnesses in all kinds of cases.”<sup>151</sup>

Finally, the experience of the ICTY revealed the importance of developing connections between international bodies and indigenous groups. In BiH, local women’s groups were particularly active in counseling and materially supporting survivors of wartime abuses. Because they had already forged relationships with victims and survivors, members of these groups were in the position to serve as witnesses. Investigators interviewed for this Essay spoke of Bosnian women’s groups as important “communication links” between The Hague and the Bosnian people and, in many cases, as “partners” in the investigatory process.

Though Bosnian women have served as witnesses, investigators, and advocates, their participation in the activities of the ICTY has been rare and is declining as the Tribunal continues to lose the confidence of the population it was established to serve. Focus group research supports the conclusion that the Tribunal still lacks legitimacy among the local population and that there is little knowledge among people in BiH of how the Tribunal operates. Though Bosnian women’s groups helped to locate and prepare many ICTY witnesses, the Tribunal has failed to develop fully its relationship with these organizations. To improve the Tribunal going forward, the communication process should be viewed as a two-way process in which the ICTY staff not only supports and teaches local activists more about

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<sup>149</sup> Interview with Wendy Lobwein, *supra* note 63.

<sup>150</sup> Interview with Nancy Paterson, *supra* note 38.

<sup>151</sup> *Id.*

the court, but they also learn *from* them about the community and issues facing potential witnesses.

The most pressing shortcoming of the Tribunal was its failure to develop more fully its relationship with indigenous women's organizations. Though Bosnian women's groups helped to locate and prepare many ICTY witnesses, the Tribunal has failed to develop fully its relationship with these organizations. "One wonders what could have happened if we had better mechanisms for providing information to [indigenous groups] . . . and if we truly tapped their potential," observed one investigator.<sup>152</sup> "We were so focused on getting the Tribunal started, and—you have to remember, it was the middle of the war—it took a great deal of effort to do anything," stated another investigator, who admitted that communication with Bosnian women's groups was "never a top priority" and that "there were missed opportunities."<sup>153</sup> Future international courts will enhance their credibility and effectiveness by improving communication with the "local" population they purport to serve.

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<sup>152</sup> Interview with anonymous ICTY staff member, The Hague, Neth. (Dec. 2003).

<sup>153</sup> *Id.*