

Problems Of Prosecution and Adjudication of Rape and Other Sexual Assaults under International Law

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Copious media coverage of hostilities in the former Yugoslavia placed the issue of rape in war firmly on the international agenda and foreshadowed the advent of a tribunal¹ with explicit international jurisdiction to adjudicate rape and other sexual assaults. Consequently, the international community is now grappling with many of the dilemmas faced domestically in the prosecution and adjudication of these crimes together with a host of new difficulties, both substantive and procedural, which ensue from an international jurisdiction. These difficulties must be confronted by a global community considering the diversity of opinion, culture and expectations of justice that such community entails.

This article will examine some of the problems inherent in the international prosecution and adjudication of rape and other sexual assaults² and, where relevant, how they are being addressed by the International Criminal Tribunal for the Former Yugoslavia (the 'Tribunal'). By examining four broad areas - limits on evidence able to be led in cases of sexual assault, protection for victims and witnesses, collection of evidence and judicial education - it will be demonstrated that a progressive legislative framework is not necessarily sufficient to ensure successful international prosecution and adjudication of rape and other sexual assaults.

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1 Pursuant to Resolution 808, UN Doc S/RES/808 (1993), the Security Council decided to create an international Tribunal with limited competence to undertake 'the prosecution of persons responsible for serious violations of international humanitarian law committed in the Former Yugoslavia since 1991'. The Statute of the International Tribunal for the Former Yugoslavia was approved and adopted by SC Res. 827, UN Doc S/RES/827 (1993), as an enforcement measure under Chapter VII of the UN Charter.

2 While there is no doubt that men are subjected to sexual assault (Annex to the Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc S/1994/674/Annexes, 27 May 1994, Vol 5 Annex IX Rape and Sexual Assault at para. 20) and that women perpetrate or participate in attacks, (see J. Ruff-O'Herne, *50 Years of Silence* (1994), 79) this article assumes rape and sexual assault of women as perpetrated by men. The reason behind this assumption is that the majority of attacks are of this nature (see Amnesty International, *Rape and Sexual Assault by Armed Forces* (1993), 5) and that gender plays a decisive role in the nature of an attack being sexual. In any event, much of the discussion is as applicable to assaults against men as it is to those against women.

I. Introduction

Although the Statute of the International Tribunal for the Former Yugoslavia (the 'Statute') was adopted by a resolution of the Security Council,³ the judges of the Tribunal were responsible for drafting the Rules of Procedure and Evidence (the 'Rules').⁴ A dearth of statutory or precedential international law meant that they had to draw from criminal procedure employed in a cross-section of national jurisdictions while also paying particular attention to the situation in the former Yugoslavia. The rules as they stand represent an attempt to balance the rights of the accused and the victims and witnesses and the interests of the international community.

The Rules govern all proceedings before the Trial and Appeal Chambers, including the evidentiary standards relevant to the prosecutorial process. The general standard for the admissibility of evidence is consistent with the analogous provision⁵ of the Nuremberg Charter.⁶ However, due to the Charter's broad nature it is of limited assistance and many of the detailed provisions reflect subsequent developments in evidentiary rules.⁷ One example of this is Rule 96, which imposes limits on evidence that may be led in cases of sexual assault.⁸

II. Rule 96: Evidence in Cases of Sexual Assault

Rule 96 has undergone several amendments since the original drafting of the Rules. It represents explicit rejection of standards of evidence which have traditionally discriminated against women and impeded their access to criminal justice systems do-

3 *Supra* note 1.

4 Article 15 of the Statute. The Rules were adopted on 11 February 1994, amended 5 May 1994, further amended 4 October 1994, revised 30 January 1995, amended 3 May 1995, further amended 15 June 1995, amended 6 October 1995, further amended 18 January 1996, amended 23 April 1996, amended 25 June 1996 and 5 July 1996, amended 3 December 1996 and further amended 25 July 1997.

5 Article 19 of the Nuremberg Charter provides:

The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value.

6 Article 89 of the Rules.

7 Article 89 states that evidentiary questions not specifically addressed in the Rules are to be determined on the basis of fairness, the spirit of the Statute and general principles of law.

8 There are wider associated concerns in relation to distinguishing between sexual violence and non-sexual violence for the purpose of substantive international offences on which the author has written separately, see Chapter 2 of unpublished thesis. However, this article only considers the procedural provisions which attempt to overcome difficulties which have traditionally impeded effective prosecution of crimes involving sexual violence.

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mestically. In so doing, the Rule attempts to incorporate and fortify domestic reform to protect women in court and thereby encourage them to come forward and testify. An analysis of Rule 96 as it now stands is best undertaken by a study of its development.

The first version of Rule 96 was proposed by the judges on 11 February 1994.⁹ Headed 'Evidence in Cases of Sexual Assault', it stated:

In cases of sexual assault:

- (i) no corroboration of the victim's testimony shall be required;
- (ii) consent shall not be allowed as a defence;
- (iii) prior sexual conduct of the victim shall not be admitted in evidence.

A revised version of the Rule was adopted on 5 May 1994¹⁰ to include a defence of consent which is automatically negated in certain defined circumstances. The rule provided (amendments shown in italics):

In cases of sexual assault:

- (i) no corroboration of the victim's testimony shall be required;
- (ii) *consent shall not be allowed as a defence if the victim*
 - (a) *has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or*
 - (b) *reasonably believed that if she did not submit, another might be so subjected, threatened or put in fear;*
- (iii) prior sexual conduct of the victim shall not be admitted in evidence.

After pressure to reinstate the original provision a third rendition was adopted on 30 January 1995.¹¹ It is the standing rule and provides as follows (amendments shown in italics):

In cases of sexual assault:

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

9 UN Doc IT/32 (1994).

10 UN Doc IT/32/Rev 1 (1994).

11 UN Doc IT/Rev 3 (1995).

A. Consent: Rule 96 (ii) and (iii)

If the most controversial issue is considered that which is subject to the most change, then it is undoubtedly the question of consent.¹²

1. First Version

The first adopted draft of Rule 96 reflected the view that the context of war makes consent irrelevant to the prosecution of sexual assaults. That is, even in the absence of particular physical violence toward or psychological constraint over a victim, the wartime circumstances in their entirety suggest sexual coercion. Accordingly, the provision established an irrefutable presumption that in war, when an entire population is subject to duress and coercion by attacking forces and there is widespread sexual assault, the voluntary consent of one individual victim is immaterial. The appropriate defence, if the factual circumstances of the case warrant a consideration of the issue of consent, is that the surrounding situation is not one of war. Those promulgating this view contend that the framework of military law and procedure must reflect the crucial differences between peacetime rape and that which occurs in conflict.

As well as according weight to the wartime circumstances, the first draft of Rule 96 also represented an attempt to eliminate gender prejudice. Cross-examination of victims as to consent is one of the most traumatizing and prejudicial aspects of a rape hearing. Independently of the numerous obstacles which must be confronted at trial, the humiliation in having to recount publicly the details of an assault cannot be underestimated¹³ and being subjected to forceful allegations of consent only compounds the humiliation. Regardless of the control exercised by presiding judges over proceedings, it would be difficult to assure already traumatized witnesses that they would not suffer further attack upon their dignity by unimpeded defence examination as to consent.

2. Second Version

The interests of the defendant demand, however, that all available defences remain open to him and that he be judged on the basis of his individual behaviour for which he is responsible. The second draft of Rule 96 exhibits a swing in the direction of these interests. Still considering it appropriate that the wartime context *limit* the circumstances in which a defence of consent should be entertained, it appears to have been accepted that to exclude it entirely threatens due process rights. While by no means supporting the contention that women fabricate rape as a matter of course, in war as in peace, there is undoubtedly the chance, regardless of how slight, that a

12 In this article consent is referred to as a defence which seems consistent with Rule 96. However, at least in common law jurisdictions, an absence of consent is usually treated as an element of the offence required to be proved by the prosecution.

13 J.L. Herman, *Trauma and Recovery* (1989).

woman may claim falsely that she has been raped.¹⁴ Regardless of how insignificant the actual number of false reports may be, to deny their possibility leaves the Tribunal open to criticism as denying due process rights and encourages the wholesale rejection of its progressive stance toward the prosecution of rape and sexual assaults.

Further, Rule 96, as originally drafted, can be said to invade the rights of a defendant by deeming him guilty upon a finding of a 'widespread context of violence',¹⁵ rather than in relation to his own actions. Determination of guilt under the first version of Rule 96 would be dependent on an analysis of the surrounding situation, not on the specific actions of the accused. The second version remedies this defect by focusing on the individual's behaviour, while at the same time recognizing that it occurs within a context of war. The context of war justifies the enumerated situations which eradicate the possibility of reliance on a defence of consent. Therefore, in addition to satisfying procedural fairness, the second version of the Rule also reflects the reality of the situation in the former Yugoslavia. The situations precluding a defence of consent are broadly drafted and directed to circumstances where common sense dictates that pursuit of the defence is not justified. The question remained as to how victims might be protected when examined about a defence of consent when raised in circumstances not encapsulated within the exceptions.

3. Third Version

The solution appears to have been found in the third and current version of Rule 96. It retains a limited defence of consent in the absence of the elucidated circumstances. However, it stipulates that such a defence must be assessed as being 'relevant and credible' in an *in camera* hearing before being admitted at trial. The benefits of the Rule as it now stands are twofold.

First, it protects the victim from flagrantly offensive allegations. By implementing a control mechanism, namely the judges, insinuations of consent cannot be used wantonly to harass a witness and impede honest testimony. Second, though directed to a wartime situation, similar standards for the introduction of evidence of consent could conceivably be applied in peace at a domestic level. By according due process rights the provision ensures more comprehensive acceptance and is therefore better placed to influence national laws.

14 For example, to gain asylum or revenge. This may be said to be particularly relevant when the 'politicization' of the rapes in the former Yugoslavia is considered. Each side has countered claims of rape levelled against them with allegations of more victims from their own side. Interview in Belgrade April 1995 with Dr. Mitar Kokolj, author of advice entitled *Establishment of an International Criminal Court for the Former Yugoslavia*, where attention was drawn to alleged crimes of opposition forces to refute allegations of rape by the Serbian army. D. Jovanic *et al.*, *The Eradication of the Serbs in Bosnia and Herzegovina 1992-1993* (1994), at 39, 138-144, 226-7 (list of alleged brothels where Serb women are kept) and 244-255 (statements from raped women) and Stigl-mayer, 'The War in the Former Yugoslavia', in A. Stigl-mayer (ed.), *Mass Rape-The War against Women in Bosnia-Herzegovina* (1994), at xiii.

15 This notion is vague and there is no indication of the evidence which would be necessary to establish it.

4. Operation of The Defence

However, uncertainties remain as to the practical implementation of Rule 96. First, it is not clear whether a defence of consent is prohibited absolutely when the alleged offence occurred within the range of exclusionary circumstances or whether a defence of consent may be raised in every case. It is suggested that the former is the correct interpretation to adopt. To assume otherwise is to make sub-rule (ii) redundant. If this assumption is correct the working practice of the rule might be that, once the prosecutor satisfies Rule 96(ii), the presumption arises that no defence of consent can be advanced. Therefore, to admit evidence of consent before the Trial Chamber, the defendant must first negate the presumption raised under sub-rule (ii).

If successful in rebutting the initial presumption, a reading of sub-rule (iii) suggests that the defendant bears the burden of proof regarding the defence as he must 'satisfy the Trial Chamber' that the evidence is 'relevant and credible'. Though not explicitly mentioned within the provision, it is assumed that the defendant retains the burden if the judges deem the issue of consent appropriate for determination within the trial proper.

5. Behaviour Constituting Consent

Defining the behaviour that will constitute consent requires further clarification, as the concept differs markedly among national jurisdictions.¹⁶ A complex tapestry of social and sexual mores, as well as individual desire, dictates our response to sexual interactions.¹⁷ Domestic courts and legislators have in many instances failed to formalize rules about this aspect of behaviour equitably.¹⁸ It is suggested that interna-

16 This is so even within the supposedly 'uniform' common law world. See, e.g., Naffine, 'Possession: Erotic Love in the Law of Rape', 57 *Modern Law Review* (1994) 10, at 27; Kaur, 'Rape: A Critical Analysis', 28 *Civic and Military Journal* (1992) 32. See also Armstrong, 'A Note on Several Aspects of Rape in Swaziland', 9 *CILSA* (1986) 474; Nissen, 'The Rape of Women in Kenya: A Conflict Between Customary Law and Criminal Law', 13 *NYL Sch J Int'l and Comp. L* (1992) 401; M. Schuler, *Freedom from Violence: Women's Strategies from Around the World* (1992); Amnesty International, *Rape and Sexual Abuse: Torture and Ill-treatment of Women in Detention*, December 1991 AI Index: ACT 77/11/91, at 7; Americas Watch and Women's Rights Project, *Criminal Injustice: Violence against Women in Brazil* (1991), at 5 and 153; Volpp, '(Mis)identifying Culture: Asian Women and the „Cultural Defence“', 17 *Harvard Women's Law Journal* (1994) 57; and Trevison, 'Changing Sexual Assault Law and the Hmong', 27 *Indiana Law Review* (1993) 393. For example, in Swaziland the ceremony of courtship reflects the fact that women are taught to repel the advances of a man, even if she is attracted to him, the Hmong have 'catch hand' marriage and 'mock resistance' associated with sexual intercourse and in Kenya the question of consent is considered against a cultural background where men are taught of their right to 'take' women.

17 Naffine, *supra* note 16.

18 *Ibid.*, at 27, 35 and 36. Consent is described as an 'impoverished concept' in need of legislative intervention to overcome the present common law understanding in Australia that consent is consistent with a 'multitude' of pressures. Some Australian states have passed such legislation. For example, s2A of the Tasmanian Criminal Code defines consent, *inter alia*, as being freely given when it is not procured by 'force, fraud, or threats of any kind' and in Victoria, the 1992 amendment to the Crimes Act, s37(a), requires a judge in relevant circumstances to direct the jury that 'the fact that a person did not say or do anything to indicate free agreement to a sexual act is nor-

tional jurisdiction requires an understanding of human relations within a particular culture¹⁹ as well as an appreciation of the way in which women have been discriminated against by traditional interpretations of behaviour constituting consent.

Enduring gender stereotypes have required active or earnest resistance²⁰ on the part of the victim²¹ in order to negate consent. Such a requirement has been criticized.²² First, it ignores the fact that women submit to intercourse out of fear of greater harm. Women who resist sexual assault run a higher risk of being killed by their attacker.²³ Reports to that effect have come from the former Yugoslavia.²⁴ Second, it fails to acknowledge the range of coercive circumstances in which women are sexually assaulted. Proponents for domestic reform seek recognition of the fact that sexual intercourse induced by duress of a non-violent nature is inconsistent with consent²⁵ and it is imperative this be continued internationally. Accordingly, it is suggested that the Tribunal should not find a defence of consent to be substantiated unless there is at least some form of affirmative speech or action on the part of the victim, rather than from an inference of passivity or acquiescence.²⁶

mally enough to show that the act took place without that person's free agreement'. See also Scalo, 'What Does „No“ Mean In Pennsylvania? - The Pennsylvania Supreme Court's Interpretation of Rape and the Effectiveness of the Legislature's Response', 40 *Villanova Law Review* (1995) 193; Sheehy, 'Legalising Justice for All Women: Canadian Women's Struggle for Democratic Rape Law Reforms', 6 *Australian Feminist Law Journal* (1996) 87.

- 19 The first charges of sexual violence were laid before the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994 on 17 June 1997 with an amendment to the indictment against Jean-Paul Akayesu.
- 20 This was to ensure that the lack of consent was genuine and not feigned; see L. Fairstein, *Sexual Violence: Our War against Rape* (1993), at 127 and Estrich, 'Rape', 95 *Yale Law Journal* (1986) 1087. Recognition that a woman submitting to sexual assault to save her life is not consenting to sex has occurred only during the last two decades in some jurisdictions (see Fairstein, at 128 and Estrich, at 1121-32).
- 21 See Estrich, *supra* note 20, who clarifies the manner in which this discriminates against a woman by focusing on her actions rather than on those of the accused; see also Fairstein, *supra* note 20, at 110.
- 22 See Estrich, *supra* note 20 and Naffine, *supra* note 16.
- 23 In fact, many self defence classes instruct women to curb their physical resistance as the unequal strength between men and women, obviously exacerbated when a weapon is involved, will result in more harm being done to them. If women adopt this stance and then survive to prosecute they have often been discriminated against for not resisting enough to make the attack rape. See Estrich, *supra* note 20; S. Brownmiller, *Our War against Rape* (1975), at 358.
- 24 Amnesty International, *supra* note 2.
- 25 Naffine, *supra* note 16, at 36-37 and Estrich, *supra* note 20.
- 26 Of additional concern in relation to consent is the absence of any stipulation preventing consent by children under a particular age. This would appear to be an oversight, given the number of reports surfacing that girls as young as ten and twelve years of age have been raped in the former Yugoslavia.

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6. *In Camera* Hearing

It is not clear from Rule 96(iii) whether the victim is party to the *in camera* hearing, and is able to be cross-examined by the defendant, or whether evidence must be produced which is independent of the victim's testimony to raise the issue of consent at trial proper. The second course of action would seem preferable as it is the solicitation of such evidence which is traumatic for the victim, not merely the public forum of the courtroom. In other words, insulation from the public solves the problem only in part. If the victim must be questioned during the *in camera* hearing the judges should enforce strict limitations on the nature of the questioning to protect the victim from humiliating suggestions.

7. *Mens Rea*

Pursuant to Rule 96 the Tribunal must judge the state of mind of both the victim and the accused in ascertaining the existence of consent.

Of interest in relation to the victim's state of mind is the manner in which the 'fear' and 'belief', articulated in Rule 96(ii)(a) and (b) respectively as being necessary to preclude a defence of consent, will be judged. It is suggested that sub-rule (ii)(a) will involve an objective assessment of whether the subjective belief was actually held by the victim. Sub-rule (ii)(b) requires an element of 'reasonableness', which suggests an objective assessment based on what the court determines a reasonable woman in the circumstances of the victim, rather than the victim herself, would have believed. In making both of these assessments, it is suggested that the Tribunal be alert to the fact that judicial findings of what constitutes violence frequently differ from what women perceive as violent behaviour.²⁷ The impact of violence of a sexual nature against women has often been minimized or trivialized in domestic legal systems.²⁸ This legal legitimization of the perpetrator's perspective of violence has been referred to as 'the cultural facilitation of violence'²⁹ and can have a major effect on a woman's ability to access a criminal justice system and feel secure testifying within it.

A significant omission is that there is no indication in the Rules of the mental standard required by the accused to rely on a defence of consent. It may be found sufficient that the defendant subjectively believed the victim to be consenting. Alternatively, an objective standard, based on the Court's assessment of what a

27 See *infra* Section IV regarding judicial education; Naffine, *supra* note 16; Estrich, *supra* note 20. For a discussion of the judicial interpretation of 'serious violence' under s5(1) of the Criminal Justice Act 1985 (NZ) see Busch, "Don't Throw Bouquets at Me ... (Judges) Will Say We're in Love": An Analysis of New Zealand Judges' Attitudes Towards Domestic Violence', in J. Stubbs (ed.), *Women, Male Violence and the Law*, Institute of Criminology Monograph Series No. 6, (1994), at 104.

28 Mahoney, 'R v McCraw: Rape Fantasies v. Fear of Sexual Assault', 1 *Ottawa Law Review* (1990) 207.

29 E. Pence, *The Justice System's Response to Domestic Assault Cases: A Guide for Policy Development* (1986) 1-8.

reasonable man in the defendant's position would believe, may be necessary. Despite problems which will arise in recognizing and applying cultural differences, the latter standard is suggested as the preferable approach to adopt.

B. Corroboration: Rule 96(i)

Traditionally, in common law jurisdictions, to sustain a conviction for rape a rule of procedure required a judicial direction to the jury of the danger of convicting on the uncorroborated evidence of the complainant. This involved evidence which logically made each element of the offence more probable. The approach was based on an opinion of Sir Matthew Hale³⁰ in 1671 that rape must be examined with greater caution than any other crime as it is easy to charge and difficult to defend.³¹ In other words, the evidentiary rules concerning corroboration and fresh complaint³² were created to address the unsubstantiated stereotype that women fabricate allegations of sexual assault. Rape as the most intimate of all assaults is the least likely to be witnessed and so the corroborative requirement is often incongruous with effective prosecution.³³ It has been removed as a mandatory warning from many jurisdictions, though it remains as a matter of judicial discretion. The practical result of this is that judges may still issue the admonition to the jury as a matter of course.

By explicitly removing the need for corroboration the Tribunal has made an important statement that it is dedicated to providing justice in a non-discriminatory manner. Rule 96(i) is a progressive legislative advancement and challenges the belief that the credibility and honesty of women is to be doubted as a matter of course.

C. Prior Sexual Conduct: Rule 96(iv)

Rule 96(iv) prohibits introduction of evidence of the victim's prior sexual conduct and, in so doing, codifies for international law another achievement in the evolution towards equality before the law.³⁴ Archaic notions of chastity have allowed a victim

30 Lord Chief Justice of the King's Bench in England.

31 See Fairstein, *supra* note 20, at 15 and note that this opinion has been reflected in criminal law textbooks. Glanville Williams, the English authority in this area, states in his current edition (1983) that a woman's consent to sex is 'a hazy concept', their intentions are vacillating, ill-defined and unreliable and women have 'obscure psychological reasons' for behaving the way they do; G. Williams, *Textbook of Criminal Law* (2nd ed., 1983) as quoted in Naffine, *supra* note 16, at 28. Naffine cites similar understanding of a woman's 'outward reluctance to consent' as not really indicating her true sexual wishes in the leading Australian criminal law text (B. Fisse, *Howard's Criminal Law* 5th ed., 1990, at 112) *supra* note 16, at 29.

32 An adverse inference as to the woman's credibility may be drawn if a woman did not report the assault right away.

33 Fairstein, *supra* note 20, at 15.

34 On 5 June 1997, in *Delelic & Ors Case IT-96-21-T* the Trial Chamber determined that the prohibition is absolute and further that it encompasses information about a witness' abortion, thus rendering such information inadmissible.

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to be questioned as to her sexual history, the understanding being that a woman who has consented to sex previously is more likely to have consented to the incident in question.³⁵ Such evidence has been used not only to determine the likelihood of consent but also to assess the gravity of the offence, attack the credibility of the victim and as a consideration in sentencing. Trying a victim for her 'promiscuity' was an effective method of removing the attention of the jury from the defendant. It also prevented many women from seeking legal redress as they did not want to subject the private details of their lives to scrutiny.³⁶

Argument may be raised that, in failing to articulate circumstances where past sexual conduct may be relevant, the rights of the accused are infringed by Rule 96(iv). There is possibly some merit in this view, given the fact that there is no jury to influence and the evidence could be screened by the judges in an *in camera* hearing.³⁷ However, the argument is not persuasive. Sexual habits are irrelevant to the assessment of a victim's credibility. A legitimate line of inquiry might be not whether the complainant is celibate but whether she is in the habit of making false allegations of sexual assault. Further, the provision as it now stands acknowledges the fact that relations before the war are irrelevant to the wartime situation. The provision should alleviate some of the fears held about testifying as women can be safe in the knowledge that indecent innuendoes about their private life will not be the subject of international press reports.³⁸

III. Protection and Support for Victims and Witnesses

Another problem facing the Tribunal is that of ensuring the willingness of victims and witnesses to testify by furnishing them with protection and support.³⁹ Provision of services for victims and witnesses has been categorically recognized by a host of governments and non-governmental organizations⁴⁰ as one of the most critical tasks

35 See Brownmiller, *supra* note 23, at 369; McDonald, 'Gender Bias and the Law of Evidence: The Link Between Sexuality and Credibility', 24 *VUWLR* (1994) 175.

36 Fairstein, *supra* note 20, at 85-93, 123. 'Rape shield laws', which exclude evidence of the prior sexual conduct of the victim, constitute an attempt to reduce suggestive and irrelevant evidence of this nature to particular delineated circumstances or when it is fundamentally unfair to exclude it. See Lausch, 'Stephens v Miller: The Need to Shield Rape Victims, Defend Accused Offenders, and Define a Workable Constitutional Standard', 90 *NWLR* (1995) 346; Sheehy, *supra* note 18.

37 By requiring judicial determination of the probative nature of the evidence as weighed against its prejudicial or offensive effect to the victim before its presentation in open court.

38 This is particularly true given that, while protective measures may be invoked to withhold the names of some victims, there is no blanket prohibition preventing publication of the names of rape victims.

39 This article does not consider whether or not it is appropriate for the Tribunal as a judicial body to provide these services, but merely considers the difficulties the Tribunal might face given its mandate to do so.

40 For example, Amnesty International, *Memorandum to the United Nations: The Question of Justice and Fairness in the International War Crimes Tribunal for the Former Yugoslavia*, April 1993 AI Index: EUR 48/02/93, at 13; Section of International Law and Practice American Bar Association, *Report on the International Tribunal to Adjudicate War Crimes Committed in the Former Yu-*

faced by the Tribunal and one which the world will judge harshly if it is not executed unerringly. Aside from moral arguments that the international community has a duty to protect witnesses who come forward, it is in the Tribunal's own interest to carry out this assignment meticulously for without willing witnesses the trials will come to a standstill. Witness testimony will be very important in the work of the Tribunal as detailed documentary evidence, similar to that submitted to the Nuremberg Tribunal, is not likely to be available.

The significance assigned to this duty can be gleaned from a cursory reading of the Statute. Article 15, in granting the judges of the Tribunal authority to adopt rules of procedure and evidence, includes specific reference to '*the protection of victims and witnesses*'. Article 22 reiterates that

[t]he International Tribunal shall provide in its rules of procedure and evidence for *the protection of victims and witnesses*. Such protection measures shall include, but not be limited to, the conduct of *in camera* hearings and the protection of the victim's identity.

The relevant provisions of the Rules reflect those of the Statute and accord much attention to the protection and support of victims and witnesses. However, legal and practical constraints may ultimately frustrate their effectiveness.

A. Victims and Witnesses Unit

Pursuant to Rule 34 A, a Victims and Witnesses Unit (the 'Unit') consisting of qualified staff⁴¹ is established under the auspices of the Registry to:

- (i) recommend protective measures for victims and witnesses in accordance with Article 22 of the Statute; and
- (ii) provide counselling and support for them, in particular in cases of rape and sexual assault.

Thus the dual role of the Unit, to recommend protective measures and to provide support, is explicitly articulated. A victim is defined in Rule 2(A) as

A person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed.

There is, however, no definition of witness nor any indication of the time that a person qualifies as coming under the supervision of the Unit. Whether the title of wit-

goslavia (1993); Helsinki Watch, *Procedural and Evidentiary Issues for the Yugoslav War Crimes Tribunal* (1993); R. Copelon *et al.*, *Proposals Relating to the Prosecution of Rape and Other Gender-based Offences to the 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* (1993); Letter Dated 31 March 1993 from the Charge d'Affaires A.I. of the Permanent Mission of Canada to the United Nations Addressed to the Secretary-General, UN Doc S/25504, at 25.

41 Rule 34(B) contains explicit direction that 'due consideration be given, in the appointment of staff, to the employment of qualified women'.

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ness attaches after initial contact with the Prosecutor's Office,⁴² after decision to use an individual's testimony at trial, or only after a person is sworn before the Tribunal and about to testify will obviously affect the scope and effectiveness of the services provided by the Unit.

1. Status of the Unit

Of concern is the manner in which the Unit will function, given its position within the Tribunal. Under the umbrella control of the Registry, the Unit remains independent and its services are available for both prosecution and defence witnesses. In practical terms its success will undoubtedly depend on both parties placing significant trust in the Unit. It is hard, if not impossible, to imagine that protective or support measures will be able to be effectively recommended or implemented without a great deal of background knowledge about the witnesses concerned, their threat levels and their proposed role in the judicial proceedings. It is questionable whether either party will be willing, or indeed able, to divulge such information to an 'external' body prior to trial.

Not unrelated to the above dilemma is the direct implication that the location of the Unit will have on the provision of counselling and support facilities to the witnesses. The implementation of such services is explicitly stated as necessary in cases of rape and sexual assault.⁴³ An important element in the restructuring of sex crimes units domestically has been the creation of a vertical structure where the same person is responsible for dealing with a victim from start to finish.⁴⁴ Effective lawyering and counselling both depend on developing a relationship of trust which necessarily occurs over time. Difficulties in establishing such relationships may be exacerbated in the international context where different languages and cultures require extensive use of interpreters.⁴⁵ By the time they come before the Tribunal the witnesses will presumably have established relationships with either the prosecution or defence representatives and forging fresh alliances in a short period may be impossible and even harmful for them.⁴⁶ Regardless of the qualifications of the personnel involved, to provide effective counselling the Unit needs to work closely with the witnesses from the time they are first contacted. For this reason, coupled with considerations of confidentiality, it is suggested that separate Units for the prosecution and the defence are warranted. The Units could coordinate measures to prevent wastage of resources, while remaining independent and working closely within each team as cases are prepared.

42 This would appear not to be the case, given the description 'potential witness' in Rule 39(ii).

43 Rule 34(A)(ii).

44 Fairstein, *supra* note 20.

45 See *infra* Section IV on judicial education.

46 Of overriding importance in the counselling of trauma victims is that counselling not be given unless effective support can be maintained over a period of time.

2. Protection: Importance in Cases of Rape and Sexual Assault

Procedural safeguards as well as witness protection schemes fall within the ambit of 'protection'. It is important not to underrate the extent to which a variety of measures may be necessary to protect the witnesses, and their families, before, during and after testifying. Continuing, if not open, hostilities, an uncooperative government and a firmly entrenched international mafia all constitute justification for a comprehensive witness protection scheme able to respond to varying threat levels. This service should include relocation of witnesses, which is recognized internationally as the most effective form of protection.⁴⁷ Incidental to the provision of protection is the responsibility to inform every witness, but particularly those for whom adequate protection cannot be provided, of the risks they may encounter by testifying.

The availability of adequate procedural safeguards may be a decisive factor in a woman's decision to testify before the Tribunal. Without guarantees that her identity will be protected a witness may face reprisals,⁴⁸ not only from those against whom she testifies but from her husband, family and society. In communities where a woman's value is defined according to her virginity and chastity, raped women suffer rejection. For male victims, the sexual assault challenges notions of manhood and virility. The additional stigma that many cultures attach to homosexuality will undoubtedly influence a decision to testify.

3. Support: Importance in Cases of Rape and Sexual Assault

Many are reluctant to testify about their experiences as victims of violence⁴⁹ as they feel degraded and ashamed or fear they will suffer social ostracism⁵⁰ if they disclose what has happened to them.⁵¹ Some wish to obliterate the experiences from their memories.⁵² For others, testifying is an important facet of regaining control over their lives. However, revelation of abuses should not take place in the absence of longer-term support or the victim is liable to suffer additional psychological harm.⁵³

47 Criminal Justice Commission (QLD), *Annual Report 1993/4*, at 42.

48 See, e.g., Americas Watch and Women's Rights Project, *Untold Terror Violence Against Women in Peru's Armed Conflict* (1992), at 22.

49 Amnesty International, *supra* note 2; European Community Investigative Mission into the Treatment of Muslim Women in the Former Yugoslavia (headed by Dame Ann Warburton), *Report to European Community Foreign Ministers*, January 1993; UN Commission on Human Rights Special Rapporteur on the Former Yugoslavia, *Report to 49th Session of Commission on Human Rights*, Annex II, UN Doc: E/CN.4/1993/50.

50 Reports have arisen of women being ostracized in the refugee camps in which they are living for having testified publicly about having been raped, as the other residents did not want their camp to be perceived as one for 'rape victims'. See International Human Rights Group, *No Justice, No Peace: Accountability for Rape and Gender Based Violence in the Former Yugoslavia* (1993), at 24.

51 Amnesty International, *Women in the Front-line*, AI Index: ACT 77/01/91, March 1991, at 18-24.

52 *Ibid.*, at 28; Amnesty International, *supra* note 2, at 1.

53 Victims in ongoing conflict retain defence mechanisms to combat the uncertainty of day-to-day existence. Psychotherapeutic interventions often involve a process of recounting the traumatic events, which takes the victim through a period of extreme vulnerability as defences are removed. For this reason, it is recommended not to interview a victim about her experience until such time

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Further, it is essential to remember that sexual violence is just one element in a range of traumatizing experiences⁵⁴ affecting the victim's life. Support, both psychological and practical, should reflect this.

Practical assistance, including long-term medical and child care, education and job care, is also vital. Programmes should not only focus on the immediate physical and psychological consequences of sexual assault but also aim to equip survivors with skills to assist their reintegration as productive members of society.⁵⁵ It is essential that the Unit coordinate extensively with indigenous organizations to facilitate its provision of support services. This is important not only to supplement its resources, but also to absorb essential local knowledge so that the Unit can operate a culturally appropriate network. The collateral benefit of local organizations is that they have ready access to survivors and can develop an ongoing relationship of trust with them for long-term support.⁵⁶

4. Budget

The above is merely a rudimentary guide to services which might be provided by the Victims and Witnesses Unit to survivors of rape and other sexual assaults.

Common sense dictates that to provide even a minimum of the envisaged services an enormous amount of funding is required. While it is beyond the scope of this article to discuss all the implications of the fact that there have been shortcomings in the budget arrangements for the Tribunal, some of these affect the operation of the Unit.⁵⁷ First, there is no separate budget allocation for the Unit; rather it is included

as professional help is available. Women have been reported to have suffered breakdowns and attempted suicide after talking to reporters and fact-finding delegations of their experiences. See, e.g., International Human Rights Group, *supra* note 50, at 26; Herman, *supra* note 13, and G.R. Randall and E.L. Lutz *Serving Survivors of Torture: A Practical Manual for Health Professions and Other Services* (1992).

54 Of additional impact on the victim is the fact that they must travel to the Netherlands, a foreign country, to testify before the Tribunal, a foreign court. Though interpreted, proceedings will be conducted in a language other than their own which will compound the alienation.

55 Wing and Merchan, 'Rape, Ethnicity and Culture: Spirit Injury from Bosnia to Black America', 25 *Columbia Human Rights Law Review* (1993) 45. An example is provided of the Bengali Bangladesh women raped by Indian Punjabi soldiers. To combat the lack of acceptance of the women and their 'mixed' children, a women's group was formed to teach the predominantly illiterate women skills such as handicrafts, shorthand and typing to help them survive on their own. Many ended up in brothels. Similarly, many of the surviving 'comfort women' enslaved by the Japanese army remained silent, keeping up the pretence that they had waitressed or nursed as initially recruited. One author explains: 'In a society dominated by patriarchal views of chastity and morality, and a lack of openness about sex, the shame of the whole repugnant experience silenced many women'; see G. Hicks, *The Comfort Women* (1995), at 125.

56 International Human Rights Group, *supra* note 50, at 20-21.

57 *Report of the 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* ('Annual Report') S/1995/728, 23 August 1995, at para. 108. *Financing of the 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 - Report of the Secretary-General as Requested by the General Assembly in Resolution 48/251*, UN Doc

within the Registry budget. It is therefore difficult, if not impossible, to ascertain exactly how much funding is available. Second, to date the Unit has only five staff, none of whom are interpreters.⁵⁸ Third, there is no funding explicitly designated for the purpose of creating a witness protection programme. This has serious ramifications⁵⁹ as procedural safeguards will, in many situations, fall short of adequate protection due to the competing legal interests of the accused. Witness protection schemes are expensive when implemented domestically within a pre-existing police or security structure.⁶⁰ Internationally it is difficult to conceive of all the difficulties which might arise in the creation of such a scheme, let alone find practical solutions to them. The one certainty is that the measures will be expensive. Given the stated importance of protecting victims and witnesses, it is curious that specific resources have not been allocated for this function and remains overwhelmingly difficult to imagine how the Unit will function to provide protective measures where procedural safeguards are insufficient.

B. Procedural Protective Measures under the Statute

The Statute explicitly recognizes the competing legal interests of the accused and the witnesses that will testify. However, prior to the decision of the Trial Chamber on Protective Measures for Victims and Witnesses in the *Tadic* case⁶¹ there was no indication as to how these competing interests might be reconciled. In the preliminary motion leading to that judgment the Prosecutor sought a variety of protective measures for victims and witnesses.⁶² There are two levels of procedural protection available under the Rules. First, protection of identity from the media and general public and, second, protection from disclosure of identity to the accused.

A/C.5/49/42 of 5 December 1994. Effective for the biennium 1994-5. A total of \$48.5 million net was appropriated to the Tribunal for 1997, *Annual Report, A/52/375-S/1997/729*, at para. 103.

58 *Annual Report, supra* note 57, at para. 93. During trials and other hearings the Unit provides a 24 hour, live-in support programme which includes witness assistants who speak Serbo-Croatian. However, the programme is funded by the European Union through a grant to the Rehabilitation and Research Centre for Torture Victims in Denmark (para. 94).

59 Acknowledged in the judgment of the Tribunal on 10 August 1995 in the matter of Dusan Tadic, Case No IT-94-I-T, Decision on the Prosecutor's Motion, Protective Measures for Victims and Witnesses at paras. 27, 42, 65 and 77.

60 One example is the Witness Protection scheme operating in Queensland, Australia. It has not been possible to obtain the exact costs involved as this information is not publicly available. However, such schemes are renowned for their expense and involve an enormous amount of organization. See Criminal Justice Commission, *Annual Report 1993/4*, at 42-43; and Witness Protection Act 1994 (Cth).

61 The Prosecutor filed a motion seeking non-disclosure orders for some witnesses in the *Tadic* case on 18 May 1995, the defence response was filed on 2 June 1995 and on 21 June 1995 an *in camera* hearing was held to consider the merits of these motions. As noted earlier, judgment was handed down on 10 August 1995. In determining whether to grant the protective measures, the Tribunal paid special regard to the issues affecting victims of rape and sexual assault, *supra* note 57, paras. 45-52.

62 These included requests that witnesses be heard *in camera* or through image and voice-altering devices, be assigned pseudonyms, have their names expunged from public record or have their identity withheld from the accused or his counsel.

C. The Competing Interests

Article 20(1) of the Statute states that

The Trial Chamber shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

Article 21 continues to enumerate the rights of the accused. These are modelled on Article 14 of the International Covenant on Civil and Political Rights and include, *inter alia*, the right of a defendant to a fair and public hearing⁶³ and 'to examine or have examined, the witnesses against him . . .'⁶⁴

However, the right to a fair and public hearing is expressed as being 'subject to Article 22 of the Statute',⁶⁵ which, as noted earlier, dictates the need for protective measures for the victim and witnesses to be included in the Rules of Procedure and Evidence.

1. Non-Disclosure to the Public

Article 20(4) of the Statute states that, 'The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.' The Victims and Witnesses Unit is empowered to recommend protective measures in accordance with Article 22 of the Statute⁶⁶ and these are stated to 'include but not be limited to, the conduct of *in camera* proceedings and the protection of the victim's identity'.

Rule 79(A), Closed Sessions, permits the Trial Chamber to exclude the press and public from proceedings⁶⁷ on grounds of:

- (i) public order or morality;
- (ii) safety, security or non-disclosure of the identity of a victim or witness as provided in Rule 75; or
- (iii) the protection of the interests of justice.

Rule 75(B) details various measures which may be imposed by a Chamber to prevent disclosure of the identity or the whereabouts of victims and witnesses to the public and media. Pursuant to Rule 75(B)(i) these include:

- (a) expunging names and identifying information from the Chamber's public records;
- (b) non-disclosure to the public of any records identifying the victim;

63 Article 21(2) of the Statute.

64 Article 21(4)(e) of the Statute.

65 Article 21(2) of the Statute.

66 Rule 34(1) of the Rules.

67 The reasons for such an order must be made public according to Rule 79(B).

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- (c) giving of testimony through image- or voice- altering devices or closed circuit television; and
- (d) assignment of a pseudonym.

Rule 75(B)(ii) provides for closed sessions 'in accordance with Rule 79' while Rule 75(B)(iii) permits measures 'such as one-way closed circuit television' to 'facilitate the testimony of vulnerable victims and witnesses'.

2. Non-Disclosure to the Accused

(a) During the Investigations

Rule 39 governs the conduct of investigations and provides in subsection (ii) that the Prosecutor may

undertake such other matters as may appear necessary for completing the investigation and the preparation and conduct of the prosecution at the trial, *including the taking of special measures to provide for the safety of potential witnesses and informants.*

Rule 47A(ii) stipulates that an indictment submitted before a judge for consideration must include, *inter alia*, 'a concise statement of the facts of the case and of the crime with which the suspect is charged'.

Rule 53 permits a judge or Trial Chamber to order that there be no disclosure of the indictment to the public until it is served on the accused.⁶⁸ Also permissible is an order that there be

no disclosure of an indictment, or part thereof, or of all or any part of any particular document or information, if satisfied that the making of such an order is required to give effect to a provision of the Rules, *to protect confidential information obtained by the Prosecutor, or is otherwise necessary in the interests of justice.*⁶⁹

The scope designated to the judges and the prosecutor⁷⁰ here is wide and though protection of the identity of victims and witnesses might be justified under the provision there is no guide as to how the discretion is to be exercised or what is needed to satisfy the exceptions to disclosure.

(b) Trial

Rule 69(A) permits the withholding of the name of a victim or witness temporarily. It provides:

In exceptional circumstances, the Prosecutor may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal.

⁶⁸ Rule 53(A).

⁶⁹ Rule 53(B) and (C).

⁷⁰ The provision states that the judge may make the orders 'in consultation with the Prosecutor'.

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It is suggested that this rule is somewhat of a 'false friend' as its effective operation presupposes several factors. First, that the identity of the victim or witness has been preserved until the trial stage.⁷¹ Second, in terminating protection once a witness is under 'the control of the Tribunal', it is assumed that the Tribunal has a witness protection scheme or a protective force capable of providing security. As outlined earlier this is not the case. The fact that many of the witnesses may be refugees or otherwise relocated to countries all over the world does not ameliorate the problem as states may be unwilling to engage in witness protection. Further, witnesses may not physically come 'under the protection of the Tribunal' until just before trial and it is imagined they will depart soon after. If someone is intent on retribution this small period of protection while in the Netherlands may prove futile.

The third false assumption is that the Prosecutor's interests are those of the victims. Without casting any aspersions on the Prosecutors of the Tribunal, their primary concern, as a prosecuting body, is to secure convictions of those guilty. They are in effect representing the wider international interests. It is becoming increasingly recognized that a victim is often treated as no more than a 'source of information' or another piece of evidence⁷² within a domestic criminal justice system and that their rights are subsumed by those of the defendant. Some domestic jurisdictions have introduced laws to provide representation for victims in an effort to combat this inequality.⁷³ The addition of Rule 69(B)⁷⁴ has redressed this problem to a limited extent as the Trial Chamber may consult the Victims and Witnesses Unit in making its determination. However, measures must first be requested by the Prosecutor in relation to a particular witness in order for the Unit to intervene. The Unit would appear to have no standing in cases where no protection is sought. The absence of guidelines delineating what constitutes 'exceptional circumstances' leaves substantial prosecutorial discretion.

Subsection (C) of Rule 69 requires that 'the identity of the victim or witness shall be disclosed in sufficient time to prepare for trial'. The use of the word 'shall' indicates that this is a mandatory requirement, however, it is expressed as being 'subject to Rule 75'.

71 For example, Rule 66A requires the Prosecutor to make witness statements available to the defence as soon as practicable after the first appearance of the accused. See discussion of the *Blaskic* case in *Annual Report*, *supra* note 57, at paras. 42 and 43. In the *Tadic* case, protection was sought for witnesses whose identity had previously been revealed. See motion of the Prosecutor, 18 May 1995, Case IT-94-1-I. In *Delalic & Ors* Case IT-96-21-T transcript of 7 August 1997 at 1-14 a witness was denied the use of pseudonym on the basis that it would serve little purpose as his name had been previously released.

72 Bohmer, 'Judicial Attitudes toward Rape Victims', 57 *Judicature* (1974) 302.

73 The Danish Procedural Code, Article 741, provides that a lawyer must be appointed in cases of sexual assault at the victim's request. The lawyer is entitled to represent the victim at all stages of the police proceedings and the case. In Sweden counsel for the victim is funded by the state. Other examples are Germany, see Kirchhoff and Ferdinand, 'The United Nations Declaration on Victims and the Reform of German Penal Procedure of 1986', in B. David, S. Kirchhoff and G. Ferdinand (eds.), *International Faces of Victimology* (1992) and the former Yugoslavia see Casey, 'Victims' Rights', 7 *Oxford Today* (1995) 24.

74 Amended 15 June 1995. This consultation is discretionary on the part of the judges.

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Rule 75 is the pivotal provision in that it seeks to address both aspects of concern, namely, protection for the witnesses from the public and from the accused while also recognizing that any measures adopted must be 'consistent with the rights of the accused'. The provision can be invoked by a judge or Chamber, either party, the victims or witnesses, or by the Victims and Witnesses Unit.

Arguably, Rule 75 does not permit the identity or whereabouts of a witness to be withheld from the accused as such measures are not explicitly provided for. Rule 75(B) sanctions the Trial Chamber to adopt a variety of measures to prevent disclosure 'to the public or the media' of the identity or whereabouts of a victim or witness or their family.⁷⁵ Rule 75(A) permits, more generally, for the Trial Chamber to order appropriate measures 'for the privacy and protection of the victims and witnesses'. However, Rule 69(C) provides that 'subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence'. The implication follows that Rule 75 is sufficiently broad to encompass withholding witness identity from the accused. In contrast to Rule 69, there is no requirement that the non-disclosure measures are confined to that period before a victim or witness is brought 'under the protection of the Tribunal'.

The Trial Chamber decision on the preliminary motion of the Prosecutor (Judge McDonald and Judge Vohrah; Judge Stephen dissenting)⁷⁶ determined that under the Statute and Rules of the Tribunal it was possible to protect the identity of witnesses from the public and from the accused.

The majority judgment considered the various interests to be reconciled, the role of the Tribunal and its unique jurisdiction and acknowledged that it was necessary to engage in a balancing act⁷⁷ to make just determinations based on the specific considerations of each case. They set out various guidelines to aid this process. For example, the role of the witness in the proceedings (that is, whether their testimony is crucial to the prosecution), their refugee or citizenship status, country of residence, living arrangements and available family and community support. Also found to be relevant factors are the perceived fears of the witness involved and whether these relate to past threats or future reprisals. General concerns to be accorded weight include the persisting tensions in the region, the fact that the Tribunal does not have the resources to relocate those in need of protection and the overriding purpose of the Tribunal to administer justice and punish those responsible for massive violations of human rights.

75 These measures include use of a pseudonym, expunging names and identifying information from the public record and similar measures. The rule also permits the use of closed proceedings and other appropriate measures such as closed circuit television to facilitate the testimony of vulnerable witnesses.

76 *Supra* note 59.

77 It is suggested that a process needs to be developed whereby information placed before the court to substantiate a request for non-disclosure is released to the accused only in the event that the non-disclosure order is made. Not to do so places the witnesses at heightened risk as the accused becomes aware of the exact nature of their fears.

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The decision has been the subject of criticism⁷⁸ and Judge Stephen, while acknowledging many of the considerations relied upon by the majority as valid, delivered a strong dissenting judgment. However, it is doubted that the conditions elaborated by the majority to be fulfilled before identity may be withheld will be satisfied in many cases. Further, it is questionable whether the procedural protections will afford the security necessary to encourage a potential witness to testify.⁷⁹ At every stage, the substantial prosecutorial and judicial discretion must temper the rights of the witnesses with those of the accused, and thus protection of this nature is not able to be guaranteed. Accordingly, it is suggested that procedural safeguards should only be relied upon as a secondary means of protection, particularly from public identification, and sufficient funding for an effective witness protection and relocation scheme should become a priority. This is essential to ensure that witnesses come forward to report and ultimately testify as to violations inflicted against them, which in turn will enable effective prosecution of those responsible.

C. Collection of Evidence

Pursuant to Article 18(1) of the Statute, the Prosecutor may initiate investigations

ex officio or on the basis of information obtained from any source, particularly from Governments,⁸⁰ United Nations organs,⁸¹ inter-governmental and non-governmental organisations.⁸²

This provision permits the Prosecutor to avail himself of the already substantial information that has been amassed by various entities. However, it may be of only limited assistance as it has been collected for purposes other than initiating prosecution and must therefore be re-evaluated to determine whether it is sufficient to warrant further action.⁸³

78 Leigh, 'The Yugoslav Tribunal: Use of Unnamed Witnesses against Accused', 90 *AJIL* (1996) 235-8; cf. Chinkin, 'Editorial Comment: Due Process and Witness Anonymity', 91 *AJIL* (1997) 75.

79 Press Release CC/P10/204-E of 29 May 1997 which explains an adjournment in *Delalic & Ors* Case IT-96-21-T following the leak of a list of prosecution witnesses (including protected witnesses) to Slobada Herzegovina. The President of the Tribunal recommended contempt proceedings against the accused but the Trial Chamber did not accept this finding.

80 E.g., in accordance with SC Res. 771 (1992).

81 E.g., the Commission established pursuant to SC Res. 780 (1992) UN Doc S/25274, 10 February 1992 and the Report of the Special Rapporteur appointed by the United Nations Human Rights Commission (Mazowiecki Report).

82 The CSCE and EC provide examples of the former and Amnesty International and Helsinki Watch of the latter.

83 Carter, 'Proof Beyond Reasonable Doubt?: Collecting Evidence for the International Criminal Tribunal for the Former Yugoslavia', 31 *The Canadian Yearbook of International Law* (1993) 235; Cleiren and Tijssen, 'Rape and Other Forms of Sexual Assault in the Armed Conflict in the Former Yugoslavia: Legal, Procedural, and Evidentiary Issues', 5 *Criminal Law Forum* (1994) 471, at 504.

Several additional factors combine to make difficult the collection of evidence for trials before the Tribunal.⁸⁴ These formidable challenges are exacerbated in cases of rape and sexual assault,⁸⁵ where efforts must also be made to ensure the documentation is pursued in a manner consistent with the psychological needs of the survivors.

The predominant obstacle is the lack of cooperation from those in the territory.⁸⁶ Contrary to the situation at Nuremberg, the Tribunal does not have control of the area in which investigations must take place and those responsible for the violations are in control of much of the evidence.⁸⁷ Consequently, concerns have been raised as to the preservation and continuity of evidence.⁸⁸ Persisting tensions further complicate collection as does the fact that many witnesses are dispersed as refugees.

Rape, and other offences of a sexual nature, are notoriously under-reported in almost every society. This under-reporting is 'exacerbated in direct proportion to the degree a society denigrates a victim for the offence perpetrated upon him or her', as violence of a sexual nature engenders multiple levels of shame to the victims, their families and communities.⁸⁹ It is crucial that the investigators be aware of the pre-

84 Meron, 'Rape as a Crime Under International Humanitarian Law', 87 *AJIL* (1993) 424; Amnesty International, *supra* note 2, at 3-4. Factors include administrative chaos preventing the systematic collection of data and the use of atrocities as a propaganda weapon.

85 Maserati, 'No Justice in Rape Cases?', *The Atlanta Journal and Const.*, (1993), at A8. This is evidenced by the widely differing numbers of victims reported.

86 Letter dated 31 March 1993 from the Charge d'Affaires A.I. of the Permanent Mission of Canada to the United Nations Addressed to the Secretary-General, UN Doc S/25504 of 1 April 1993, and International Meeting of Experts on the Establishment of an International Criminal Tribunal, Vancouver, British Columbia (Canada), 22-26 March 1993, at 23 and 24.

87 See *supra* note 14 and Kapidzic and Diadzic, 'BISER: A Conversation with Bosnian Women Living in Exile', 5 *Hastings Women's Law Journal* (1994) 53, at 59.

88 *Ibid.*, at 24 and see the Application of the Prosecutor for a Formal Request for Deferral by the Government of the Republic of Bosnia and Herzegovina and its Investigations and Criminal Proceedings in the Matters of Radovan Karadzic, Ratko Mladic and Mico Stanistic, Case IT-95-5-D para. 3.2.5 and in the Lasva Valley Investigation, Case IT-95-4-D para. 3.2.5.

89 *Ibid.*, at 23. This shame is evident in all societies to some extent, regardless of nationality and culture, but is exacerbated in those which reflect a dominant patriarchal structure where women are valued according to their chastity and virginity and rape is considered a crime against the honour of a whole family. Husbands and families reject the women as soiled after rape has occurred. See, e.g., Human Rights Watch, A Helsinki Watch Report, *War Crimes in Bosnia Herzegovina* (1993), at 177-8; Americas Watch and Women's Rights Project, *supra* note 48, at 3, 10 and 42; Executive Committee of the High Commissioner's Programme, *Note on Certain Aspects of Sexual Violence against Refugee Women*, A/AC.96/822 of 12 October 1993. Document issued at the request of the 44th Session of the Executive Committee of the High Commissioner's Programme (A/AC.96/821, para. 21(m)) and presented to the Sub-Committee of the Whole on International Protection as document EC/1993/SCP/CRP.2 at paras. 17 and 22; Physicians for Human Rights, 'Liberia: Women and Children Gravely Mistreated', 4 *RECORD* (1991) 4; Africa Watch Women's Rights Project, *Seeking Refuge, Finding Terror The Widespread Rape of Somali Women Refugees in North Eastern Kenya*, vol. 5 no. 13 (October 4 1994), at 17; and Asia Watch and Physicians for Human Rights, *Rape in Kashmir A Crime of War* (1993), at 1 and 14. One example, though by no means a unique one, of the operation of this 'conspiracy of shame' can be seen in O'Herne, *supra* note 2. In her autobiography, Ruff O'Herne describes her internment in, and survival from, a Japanese rape camp during the Second World War. Release was by no means the end of the pain for these women as they were engulfed by a cloak of silence. First the Japanese soldiers threatened to kill the girls and their families if they told anyone of their ordeal (p. 108). The 'silence deepened' after she told her mother, who obviously could not cope with her daughter's experience (p. 111) and the

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vailing cultural attitudes and that they collect evidence with sensitivity.⁹⁰ This is not just to accord respect and to minimize the trauma for victims but to ensure effective investigations.⁹¹ Effective and sensitive investigations also require that there should be women on the teams.⁹²

The reticence to speak, which some view as instrumental to a victim's recovery,⁹³ can be attributed not only to the sense of shame engulfing the victims but also to post traumatic stress disorder (PTSD).⁹⁴ PTSD is a psychological disorder resulting from situations of extreme stress and its symptoms include memory impairment, sleep disorders, numbing of responses and anxiety verging on paranoia. Symptoms are intensified by exposure to circumstances which prompt reliving the event.

The trauma and stress of the women is exacerbated by the repeated questioning and inquiry by fact-finding missions and the press. As the UN Special Rapporteur on the former Yugoslavia reported:

Fear of reprisals against themselves and their families, some of whom may still be in the areas affected by the conflict, also makes victims unwilling to speak.... Some of the women met by the team of experts feel exploited by the media and the many missions 'studying' rape in the former Yugoslavia. Furthermore, health care providers were concerned about the effects on the women of repeatedly recounting their experiences without adequate psychological and social support systems in place.⁹⁵

humiliation increased as they were kept separate from other women to keep the story from leaking out. The other women referred to the section as the 'Camp of Whores' and rejected them, thinking that they were receiving preferential treatment (pp. 115 and 126). The Church confirmed her sense of being soiled by denying her the chance to become a nun because of her experiences (p. 126). Regardless of the enduring shame and with the support of her husband, Ruff O'Herne reported the experience to the British Army Police who deemed the ordeal as unworthy of attention (p. 131). The shame and silence were complete. It is little wonder that it was not until 1992, almost 50 years later, that she broke the silence and recounted the experience to her family.

90 Amnesty International, *supra* note 40, at 29.

91 See Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992). Annex IX.B Rape Pilot Study (Sarajevo), UN Doc S/1994/674/Annex IX.B at paras. 21-25. E.g., investigators should be aware of the effect of social stigmatization on a victim's willingness to report a rape, the associated need to maintain contact with medical, social, and religious organizations who are more readily contacted by victims (as well as being in a position to help them) and methods such as the use of euphemisms to talk about sexual matters by young and/or inexperienced victims.

92 Pilot Study, *supra* note 91, at 27(c), concluded that the most effective means of gathering information is 'small teams, including a high proportion of personnel, deployed for extended periods in specific geographic locations'.

93 International Human Rights Group, *supra* note 50, at 13, where it is noted that in the opinion of a UN psychiatric social worker, stationed in Croatia, the Muslim refugee community is engaging in a 'collective conspiracy of silence' to avoid retraumatizing survivors of rape.

94 See Herman *supra* note 13, where analogy is drawn between victims of sexual assault and concentration camp survivors, refugee populations and Vietnam veterans. Continued circumstances of uncertainty, day-to-day life in a war situation, is thought to delay and impair emotional recovery.

95 UN Commission on Human Rights Special Rapporteur on the Former Yugoslavia, *supra* note 49, at paras. 51-2. See also *Rape and Abuse in the Former Yugoslavia. Report of the Secretary General E/CN.4/1994/5*, 30 June 1995, at para. 13; Submissions of the Prosecutor in the Bosnian Serb Leadership Investigation, Case No. IT-95-5-D, at para. 3.1.2 and the Lasva River Valley Investigation, Case No. IT-95-4-D, at para 3.1.2; and Amnesty International, *supra* note 2, at 2.

To some extent this problem may be reduced now that world media attention is no longer focused on the former Yugoslavia. However, as a general rule, there needs to be greater coordination among individuals, non-governmental organizations and government agents documenting human rights abuses⁹⁶ and the development of a common, standardized fact-finding methodology to be employed in this process.⁹⁷

A consequence of the above difficulties is that medical evidence becomes even more vital to substantiate claims of rape.⁹⁸ However, the realities of war obviously prevent easy access to medical facilities⁹⁹ and many hospitals and their records have been destroyed.¹⁰⁰ When women have access to physicians they become a valuable source of information,¹⁰¹ but strict regard must be had to the confidentiality of the physician/patient relationship.¹⁰²

Several principles for documenting violations of women's rights have been elaborated:¹⁰³ only those victims who clearly want to speak and whose testimony is given voluntarily should be interviewed; assurances as to the confidentiality and future use of the testimony should be given (it goes without saying that these assurances should be respected); the entire context of a woman's suffering should be examined, not just the circumstances surrounding her sexual assault, in order to avoid further stigmatization; and interviews should only be conducted when there is an established system to ensure appropriate follow-up and support in order to minimize the potentially harmful psychological consequences of the documentation process.

96 Lawyers Committee for Human Rights Europe, *International Tribunal On War Crimes in the Former Yugoslavia - Preliminary Observations on the Role of Non-Governmental Organisations* - A memorandum submitted to the Round Table on the International War Crimes Tribunal, organized by the Centre for Anti-War Action-Belgrade in Brussels, 3-4 March 1994.

97 International Human Rights Group, *supra* note 50, at 17-18.

98 Annex to the Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc S/1994/674/Annexes, 27 May 1994, vol 5, Annex IX Rape and Sexual Assault, at para. 26. Even questions of identification become more difficult as soldiers may go by war names and may not wear identifiable uniforms, Americas Watch and Women's Rights Project, *supra* note 48, at 34. Some victims say they can identify their attackers by their cologne or other habits, such as putting on loud music before the rape; see Americas Watch and Women's Rights Project, *supra* note 48, at 32.

99 Moore, 'Obstacles to Prosecuting Rapists as War Criminals', *The Irish Times*, 17 April 1993, at 6. The time lapse between the rape and the first medical examination is often too long to gather evidence.

100 Physicians for Human Rights, 'Medical Data Verify Widespread Rape of Women', *RECORD* (1993) 5.

101 See Swiss and Giller, 'Rape as a Crime of War: A Medical Perspective', 270 *Journal of the American Medical Association* (1993) 612, at 612-614 and Hicks, *supra* note 55.

102 International Human Rights Group, *supra* note 50, at 37-43.

103 *Ibid.*, at 27-36.

IV. Judicial Education

A. Domestic Application

Regardless of the laws in force and the procedure prescribed to implement them, community attitudes, and in particular the individual attitudes of those responsible for enforcing the law, have had significant influence on the prosecution of rape and sexual assaults in domestic jurisdictions.¹⁰⁴ In some jurisdictions, growing awareness of the legal treatment of violence against women has created an unprecedented crisis of public confidence in the judiciary,¹⁰⁵ leading to calls for 'judicial education'.¹⁰⁶ A detailed analysis of the justification for and composition of such programmes is beyond the scope of this article. Suffice it to say that the programmes have been operating in the common law world as a way of redressing 'gender bias' in the courts.¹⁰⁷ They are not designed to weaken public faith in the judiciary by suggesting that judges need 'educating'. Nor are they an attempt to undermine the independence of judges by instructing them on how to make decisions. The programmes are simply an attempt to demonstrate to judges how their own beliefs and attitudes affect impartiality and fairness and, in so doing, broaden their perspective beyond the limits of their own experience. The aim is to reduce discrimination which occurs due to the perpetuation of inappropriate stereotypes of, for example, female behaviour.¹⁰⁸ Madam Justice L'Heureux-Dube of the Canadian Supreme Court considered the myths associated with rape cases and the need to dispel them:

In summary, the assumption underlying these stereotypes and that of the lying woman is a classical, harmful stereotype judicial education programs attempt to purge from judicial decision making.¹⁰⁹

104 The under-reporting of the crime of rape represents a prime example. While women choose not to report an assault for a number of reasons (including fear of reprisal, self-blame, depression), the prevalent reason is concern about the justice system and the way in which they will be treated by police and judges. Mahoney, 'Gender Issues in the Administration of Justice', Seminar held at University of Calgary Faculty of Law, 20 May 1993.

105 Australian Law Reform Commission, 'Equality Before the Law: Women's Access to the Legal System', *Discussion Paper, No. 67* (1994), at paras. 1.16-1.23.

106 For example, the United States of America, Canada and, more recently, Australia. The programmes are not merely directed to eliminating gender bias but also focus on the delivery of justice to other marginalized groups in society, such as Aboriginal people.

107 In Australia, the Australian Institute of Judicial Administration and the Family Court of Australia as well as the Supreme Courts of other states have been involved with gender awareness programmes. Judicial exchanges have been held with the Western Judicial Education Centre, which organizes programmes for Provincial and Territorial Judges from Western and North-western Canada.

108 As Madam Justice Bertha Wilson, now retired from the Supreme Court of Canada, stated: Some aspects of the criminal law in particular cry out for change since they are based on pre-suppositions, about the nature of women and women's sexuality that in this day and age are little short of ridiculous.

Wilson, 'Will Women Judges Make a Difference?', The Fourth Annual Barbara Betcherman Memorial Lecture, Osgoode Hall Law School, 8 February 1990.

109 Mahoney, *supra* note 104, at 45.

B. International Application

Similarly, international law does not act in a vacuum and, as demonstrated above, judicial discretion will play a significant role in the operation of the Tribunal. Legal principles must be linked to the social context which they attempt to regulate. Administering justice in an international environment of armed conflict demands an understanding of issues that judges may not have encountered domestically.

Of importance to the adjudication of cases of rape and sexual assault is an awareness of the particular cultural mores, which operate as an impediment to testifying on matters of sexual assault, as well as the impact and range of effects that severe trauma has on a person's memory.¹¹⁰

Of wider applicability is the impact of the use of different languages within a courtroom. Language, or perhaps more correctly its effective manipulation, is of crucial importance in a legal forum as it is the means by which the observations and memories constituting evidence are expressed and challenged.¹¹¹ Body language, non-verbal communication skills and appropriate language usage¹¹² differ markedly from culture to culture and it is increasingly being realized in multi-cultural societies, such as Australia, that inadequate understanding of these differences can result in injustice.¹¹³

Not unrelated is the further layer of complexity that interpreters add to the investigative and judicial process. The scope of their influence can be substantial¹¹⁴ and the exact nature of their role not always clear. While officially recognized as mere 'conduits' of language, interpreters often engage in a much more complicated communication exercise involving their knowledge of culture, as well as the linguistics, of both languages.¹¹⁵ This can be attributed to the expectations of all involved as well as to linguistic necessity.¹¹⁶

110 International Human Rights Group, *supra* note 50, at 19. Gaps in the memory of a rape survivor or blurred details may be an indication of trauma and should be understood as such rather than being used to discredit her account.

111 K. Laster and V. Taylor, *Interpreters and the Legal System* (1994), at 172. For instance, in an Israeli rape trial the prosecutor referred to the sexual act as 'sexual torture', while the defendant characterized it as 'romance'.

112 For example, questioning techniques.

113 D. Eades, *Forensic Linguistics in Australia: An Overview* (1994), at 113-132; *Idem*, *Aboriginal English and the Law: Communicating with Aboriginal English Speaking Clients: A Handbook for Legal Practitioners* (1992).

114 This goes far beyond the necessary delay between question and answer and has been acknowledged by the Prosecutor in the Application for Deferral of the Bosnian Leadership, IT-95-5-D and that of the Lasva Valley, IT-95-4-D, both at para. 3.1.3.

115 Laster and Taylor, *supra* note 111, at 122-124.

116 Where direct translation from one language to another is impossible or results in a different meaning being received than that intended. See *ibid*.

V. Conclusion

Numerous legal, social, political, financial and logistical obstacles are posed by the international prosecution of rape and other sexual assaults. Some of these have been previously confronted in domestic jurisdictions with varying degrees of success. Others are unique because of the international nature of the Tribunal and the specific subject matter of its jurisdiction. There is no doubt that the Statute and Rules of the Tribunal represent a progressive legislative framework. However, many of the problems will not find their solution rooted in legislative enactment. The nature of the judicial forum and the crimes to be heard before it will make testifying a difficult experience. Ultimately, success can only be measured by the prosecution and adjudication of these crimes, which in turn will only occur when women trust the international criminal justice system as an effective and secure avenue of redress.