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Affecting the Rules for the Prosecution of Rape and Other Gender-Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique

Jennifer Green, Rhonda Copelon, Patrick Cotter, and Beth Stephens*

PREFACE

What follows is a proposal submitted to the judges of the International Criminal Tribunal for the former Yugoslavia (the “International Tribunal” or “Tribunal”)¹ for the purpose of influencing the rules adopted by the Tribunal for the prosecution of rape and other sex crimes. Prepared by feminist human rights lawyers and scholars, it is based upon decades of feminist work — psychological, rehabilitative, political, and legal — with women survivors of sexual torture and abuse. The proposal advocates rules to enhance the possibility that what may be the first international prosecution of rape will be effective, tolerable, and just for survivors without sacrificing the legitimate rights of the accused.

The proposal is prefaced by a brief history of the international efforts by women’s groups and their supporters to ensure that the International Tribunal addresses crimes of gender, thus exemplifying the ways in which women can affect and make international law. In order to assist the reader,

* These materials were compiled by Jennifer Green, Rhonda Copelon, and Patrick Cotter. The Preface and Conclusion were written by Jennifer Green, Rhonda Copelon and Patrick Cotter. The Proposal itself was written by Rhonda Copelon and the International Women’s Human Rights Clinic at the City University of New York, Jennifer Green, Patrick Cotter, Kathleen Pratt, and Beth Stephens, assisted by the individuals and organizations acknowledged in note 44, infra.

the preface also sketches the Tribunal's structure. The proposal itself then appears in largely its original form with brief additional commentary on international law included in footnotes. An afterword notes how Tribunal judges have incorporated concerns about sex crimes and victims and witnesses, as well as the areas of our continuing concern. Appendix A sets forth rules actually adopted which are particularly relevant to the prosecution of sex crimes, and Appendix B provides the text of earlier recommendations made during the formulation of the Tribunal.

I. FEMINIST ADVOCACY AND THE EVOLUTION OF THE TRIBUNAL

The establishment of this Tribunal is historic. It is the first international tribunal held since the Nuremberg and Tokyo Tribunals dealt with selected atrocities committed by the Axis powers during World War II. In the intervening half-century, nongovernmental organizations (NGOs) have argued unsuccessfully for the trial of other war criminals — United States government officials for war crimes in Vietnam and the 1991 Gulf War, and the Khmer Rouge for genocide in Cambodia, for example — as well as for the establishment of an international criminal court. In the absence of an official response, independent nongovernmental tribunals such as the one organized by Bertrand Russell to "try" the United States for war crimes in Vietnam have sought to make violators accountable at least to the public. It is problematic that this new Tribunal is ad hoc, but its formation is nonetheless significant as a step toward the establishment of


3. See generally BERTRAND RUSSELL, WAR CRIMES IN VIETNAM (1967). Other nongovernmental organizations have pursued strategies such as publicizing war crimes through the Commission on Human Rights. Khader v. United States, Petition and Statement Submitted to the Commission on Human Rights by the International Fellowship for Reconciliation (February 1992) (On file with the Center for Constitutional Rights).
accountability for human rights violators. The expansion of the Tribunal’s jurisdiction to include the recent human rights atrocities in Rwanda increases its significance in this regard.

The Tribunal on the former Yugoslavia is the first international tribunal to put parties on trial during an ongoing conflict and to try the victors as well as the vanquished. Its very existence reflects the fact-finding and advocacy work of human rights NGOs and their insistence, still more a hope than a reality, that impunity should not be traded for peace at the bargaining table.

The Tribunal is also historic in that it is the first to give distinct attention to gender-based crimes. This is in no small measure the result of the persistent efforts of survivors and their advocates, as well as the growing global campaign for women’s human rights, which has made violence against women a major international issue. It reflects the work


5. Rape and forced prostitution were not recognized as offenses by the Nuremberg tribunal. Rape was recognized as a crime against humanity in Local Council Law No. 10, which governed the subsequent trials of lower-level Nazis held by the Allied military powers; however, none of the accused was charged with rape. Agreement on Punishment of Persons Guilty of War Crimes, Jan. 31, 1946, Control Council for Germany, No. 3, 50-55 (adopted by the allied powers Dec. 20, 1945, establishing the jurisdiction of military tribunals operating in the occupation zones). See generally ADALBERT RUCKERL, THE INVESTIGATION OF NAZI CRIMES 1945-1978 (1980).

The Indictment for the International Military Tribunal for the Far East (the Tokyo Tribunal) describes as “violation[s] of recognized customs and conventions of war” the following offenses: “mass murder, rape, pillage, brigandage, torture and other barbaric cruelties upon the helpless civilian population of the over-run countries.” THE TOKYO WAR CRIMES TRIAL, Indictment at 1 (R. John Pritchard & Sonia Magbanna Zaide eds. 1981). This indictment also had a separate provision for subjecting civilians to “indignities,” the major category in which rape and other sexual assaults against women have traditionally been included.

Evidence of rape was used by the Tokyo Tribunal to support convictions on charges of war crimes and “crimes against humanity.” For example, Defendant Matsui was found guilty of violations of the laws of war because as leader of the capture of Nanking, he knew of atrocities, including the rape of thousands of women, and “did nothing, or nothing effective to abate these horrors.” THE TOKYO WAR CRIMES TRIAL, Judgment at 49,814-816. Defendant Hirota was found guilty of violations of the laws of war because “he was content to rely on assurances which he knew were not being implemented while hundreds of murders, violations of women, and other atrocities were being committed daily.” Id. at 49,791. However, even though subsequent investigations revealed extensive “military sexual slavery,” the trial of rape was not a major focus. See generally Shana Swiss and Joan E. Giller, Rape as a Crime of War: A Medical Perspective, 270 JAMA 612 (1993); W.H. Parks, Command Responsibility for War Crimes, MIL. L. REV. 1, 69-70 (Fall 1973).

For an excellent overview of the widespread use of rape during war, see Dorothy Q. Thomas & Regan E. Ralph, Rape in War: Challenging the Tradition of Impunity, 14 SAIS REVIEW 81 (1994).

6. The global campaign for women’s human rights refers to a loosely knit convergence of groups which identified the 1993 Vienna World Conference on Human Rights as a target both for grass roots organizing on behalf of women’s human rights and for transforming the
of feminist journalists who broke through media barriers with testimonies of rape, forced prostitution, and forced pregnancy; of women’s support groups based in the various countries of the former Yugoslavia, in Europe and outside the region; and of women’s projects at human rights organizations. In response to disregard for rape in early reprisal atrocities in the former Yugoslavia, a number of fact-finding missions, both intergovernmental and nongovernmental, were established with the exclusive or primary purpose of investigating the abuse of women. Reports of rape and other sexual and reproductive abuse were documented by a wide range of journalists, NGOs, and governmental and intergovernmental groups.7

Because attention to rape in time of war can quickly dissipate, persistent efforts were required to keep the issue on the international

human rights platform by the integration of the rights of women. The issue of women in war was already a significant focus of its activities prior to the atrocities in Bosnia-Herzegovina, notably in the major effort, spearheaded by Korean and Filipina women and men to hold the Japanese accountable for the sexual slavery of “comfort” women during the Second World War. See generally WAR CRIMES ON ASIAN WOMEN: MILITARY SEXUAL SLAVERY BY JAPAN DURING WORLD WAR II—THE CASE OF THE FILIPINO COMFORT WOMEN (Dan P. Calica & Nelia Sancho eds., 1993); Maria Rosa Luna Henson et. al. v. Government of Japan, Petition filed with the United Nations Commission on Human Rights Pursuant to Resolution 1503 (Oct. 26, 1994).

agenda. The call for human rights monitoring was accompanied by a
demand for humanitarian interventions attentive to the sex-specific needs
of raped women who were refugees from both their homelands and their
bodies.\footnote{The work of groups throughout the former Yugoslavia and Europe has provided
support to women refugees and advocated for the effective prosecution of sex crimes. Their
work includes providing psychological counselling, physical support, and legal advice for
those who wish to prosecute, and finding legal assistance for refugees seeking asylum.}

The United Nations ("U.N.") undertook several initiatives to address
human rights atrocities, including those against women in the former
Yugoslavia. A Special Rapporteur (or investigator) was appointed to report
to the Commission on Human Rights.\footnote{In August 1992, the Commission on Human Rights held the first emergency Special
Session in its history and asked for the appointment of a Special Rapporteur. After his
appointment, Tadeusz Mazowiecki began what have become continuing investigations into
the atrocities in the former Yugoslavia. To date, Mazowiecki has issued fifteen reports.}
In October 1992, the Security Council authorized the Secretary-General to establish a Commission of
Experts to investigate human rights violations and advise the Secretary-
General on future steps. Beginning in December 1992, the Security
Council and General Assembly passed numerous resolutions specifically
protesting the widespread rape. In February 1994, the Commission of
Experts undertook a specific investigation of crimes against women.\footnote{In addition, a special investigative delegation of the European Community focused
specifically on widespread rape and other sexual assault in the former Yugoslavia.}

A pronounced international outcry for action to punish the perpetrators
of these brutal abuses placed tremendous pressure on the U.N. to establish
an international tribunal.\footnote{The idea for a war crimes tribunal followed several resolutions by the U.N. Security
Council which affirmed the duties of all parties to the Yugoslavian conflict under
S/INF/47 (1992) (stated that all parties to a conflict must comply with international
humanitarian law and persons who commit or order the commission of grave breaches of
the Conventions are individually responsible for their acts); S. Res. 771, U.N. SCOR, 47th
called upon international humanitarian organizations to collect information on violations);
General to establish an independent Commission of Experts to analyze and collect
information on humanitarian law violations). For a summary of the relevant resolutions, see
UNA-USA'S PROJECT ON EAST AND CENTRAL EUROPE, SUMMARY OF U.N. RESOLUTIONS
CONCERNING YUGOSLAVIA (Aug. 9, 1993).} This outcry prompted the Security Council to
pass two resolutions pursuant to Chapter VII of the U.N. Charter, which
gives the Council authority to take international action to restore and
maintain international peace and security.\footnote{U.N. CHARTER, art. 39.}

Security Council Resolution 808 set out the Council's decision to
establish a tribunal and asked the U.N. Secretary-General to submit a
comprehensive report to the Security Council within sixty days.\textsuperscript{13} At this point, many women's groups turned to the task of ensuring that rape and related crimes against women would be recognized within the jurisdiction of the future Tribunal. An international call for "Gender Justice"\textsuperscript{14} was widely circulated and helped to focus on the specific issues raised by rape and other sexual and reproductive abuses of women. Consultations were held with the U.N. Office of Legal Counsel and representatives of various governments, including the U.S. State Department, which were active in the development of the Tribunal. The pressure of women's groups was designed to ensure that abuses against women could not be forgotten as they had been in previous wars.

The statute creating the Tribunal and defining its jurisdiction, adopted as Security Council Resolution 827 (the Tribunal Statute) on May 25, 1993, named rape as a "crime against humanity."\textsuperscript{15} Rape was not, however, explicitly named in the Article on grave breaches of humanitarian law based on the Geneva Conventions or named as a violation of the "customs and laws of war."\textsuperscript{16} Thus, the status of rape and other sexual and reproductive crimes against women will need to be litigated in the context of specific indictments and will require the continuing input of women as the Tribunal develops its legal analyses and begins to hear cases.

Article 22 of the Tribunal Statute articulated broad principles for protecting the rights of victims and witnesses, and Article 15 left to future Tribunal members the development of further rules, procedures, and substantive law. Additional resolutions dealt in more depth with the budget,\textsuperscript{17} the appointment of a prosecutor and registrar, and continuing concern about ongoing human rights abuses.\textsuperscript{18}

While women's human rights fact-finding and humanitarian groups continued to support survivors in the former Yugoslavia, attention began to focus on the composition of the Tribunal. Despite calls for gender parity, the list of 23 people nominated by the member states for the eleven Tribunal judgeships contained only two women. Feminist groups immediately mobilized to insist upon the election of the two women nominees. The U.S. candidate, Gabrielle Kirk McDonald, an African-
American former federal judge, was handily elected on the first ballot. Any assumption that two women would be easily elected was abandoned when the Costa Rican candidate, Elizabeth Odio-Benito, a Minister of Justice with a long history in U.N. human rights work and a current member of the U.N. Committee Against Torture, was elected late in the balloting and only after heavy political negotiations eliminated far less qualified nominees from other Latin American countries.

After the Tribunal was composed, the next issue was the development of the Rules of Procedure and Evidence. At a Fall 1993 meeting in Boston which specifically focused on crimes against women, the Task Force for Accountability for War Crimes in the Balkans decided that a sub-group should draft a proposal to the Tribunal on the substantive, procedural, and evidentiary rules required for the prosecution of sex crimes against women. While a number of human rights NGOs, governments, and other organizations, including the American Bar Association, planned to make submissions to the Tribunal including the issue of sex crimes, the Task Force believed the issues at hand required focus as well as the assurance that feminist legal theory and practice would be fully explored and incorporated where relevant.

The International Women’s Human Rights Law Clinic at the City University of New York (CUNY) School of Law and staff and students at the Harvard Law School Human Rights Program undertook the responsibility of organizing this submission. We drew together a variety of legal experts who contributed in different critical ways to shaping the proposal. Together we had experience in feminist anti-violence work, general human rights advocacy, litigation of human rights claims, including rape, in the U.S. courts, direct fact-finding experience in the former Yugoslavia, familiarity with the testimonies of raped women, and experience as both prosecutor and defense counsel in rape and organized crime cases in federal and state courts in the United States. We sought the advice of other lawyers, and of women experienced in the treatment and support of traumatized witnesses and rape survivors, and were generously assisted by law students who threw themselves into this project on very short notice.

Knowing that the Tribunal would look to Nuremberg procedures as precedent and would draw from both common law and civil law systems, we examined the strengths and weaknesses of these systems from the perspective of effective, fair, and respectful prosecution of gender crimes.

Our proposal is reproduced here largely in its original form.19 Our goal was to propose rules specific to the wars in the former Yugoslavia.

19. A preliminary draft of this document was submitted to the Tribunal judges during their first session in November-December, 1993. It was then refined and sent to the judges for their second session in early 1994.
At the same time, given the increasing attention in the U.N. system to gender violence, we recognized that the Tribunal rules would serve as a model for future international and national prosecutions of sexual crimes against women and provide international standards for national law reform regarding the prosecution of sex crimes in civil society.\(^{20}\)

Central to our efforts was the need to strike a fair and respectful balance between the interests of victims and witnesses and those of the accused. Our proposal focuses on the needs and rights of victims. This focus meant developing standards and procedures which would fairly screen out sex-stereotyped and discriminatory presuppositions and protect victims and witnesses against the inflammatory and harassing examinations so typical of rape prosecutions. We sought to recognize victims' dignity and courage, and to address the profound physical, emotional, and social risks (including the reliving of trauma and the separation from and possibly rejection by families and communities, and the risk of retaliation against themselves or loved ones, heightened by an ongoing vicious war) that participation would entail.

In brief, our goals in preparing this proposal were to

- encourage victims of abuse to participate by creating rules and procedures that allow them to feel safe,
- lead to the proper conviction of the guilty,
- mitigate the trauma for victims and witnesses, and
- provide the accused with a full and fair defense.

Although this is not a model code for the prosecution of sex crimes, we hope that those working on the prosecution of sex crimes in other international fora or in domestic courts may find the recommendations helpful in their work. We hope these recommendations raise issues and contribute to the efforts of feminist activists, lawyers, and judges to move the prosecution of sex crimes forward in a way that is more sensitive to the needs of victims and witnesses in order to make the process more accessible to them and more insulated from gender-based stereotypes.

II. MANDATE AND ORGANIZATION OF THE TRIBUNAL

The Tribunal is empowered to prosecute persons accused of four categories of crimes: grave breaches of the Geneva Conventions of 1949,\(^{21}\) violations of the laws or customs of war,\(^{22}\) genocide,\(^{23}\) and crimes

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21. Tribunal Statute, \textit{supra} note 1, art. 2.
22. \textit{Id.} art. 3.
23. \textit{Id.} art. 4.
against humanity. Only the article on crimes against humanity includes a specific reference to rape; we advocated the explicit inclusion of rape in the other articles as part of a greater focus on gender-based crimes.

The Tribunal Statute divides the Tribunal into three sections: the judicial branch, the prosecutor's office, and a registry. There are still many open questions about the functioning of the Tribunal. None of the three branches is fully operational: staff are still being hired, and processes and lines of authority are as yet undetermined. However, significant progress has been made and all three branches have been responsive to the inquiries and suggestions of nongovernmental organizations.

A. JUDICIAL BRANCH

The eleven Tribunal judges are divided into two trial chambers of three judges each and an appellate chamber of five judges. The judges were selected by the U.N. General Assembly on September 17, 1993, for four-year terms expiring November 17, 1997. At their first meeting, held in the Hague from November through December 1993, the judges were sworn in, elected a president and a vice-president and began work on the rules of evidence and procedure applicable to the cases before the Tribunal. These rules were adopted at the close of the second session, which was held in January and February 1994. At the third session, held in April and May 1994, the judges revised the rule pertaining to evidence in cases of sexual assault (Rule 96), established rules pertaining to the detention of

24. *Id.* art. 5.
25. *See* Part II, *infra*.
26. Tribunal Statute, *supra* note 1, art. 11.
27. *Id.* art. 11, 12.
28. The General Assembly elected the 11 judges from a list of 23 names submitted to them by the Security Council. International women's organizations protested the fact that only two of the nominees were women and lobbied for the election of the two women, Elizabeth Odio-Benito (Costa Rica) and Gabrielle Kirk McDonald (United States). Both women were elected, as were Georges Michel Abi-Saab (Egypt), Antonio Cassese (Italy), Jules Deschenes (Canada), Adolphus Godwin Karibi-Whyte (Nigeria), Germain Le Foyer de Costil (France), Li Haopei (China), Rustan S. Sidhwa (Pakistan), Sir Ninian Stephen (Australia) and Lal Chand Vohran (Malaysia). On January 28, 1994, Secretary-General Boutros Boutros-Ghali appointed French jurist Claude Jorda to replace Germain Le Foyer de Costil, who asked to step down. *Australian May Become U.N. War Crimes Prosecutor*, *Reuters*, Jan. 28, 1994.
29. Antonio Cassese (Italy), a prominent scholar and author on humanitarian law.
30. Elizabeth Odio-Benito (Costa Rica).
the accused, and established guidelines for the assignment of counsel for indigent detainees. At the fourth plenary meeting, held in July 1994, the judges focused on practical arrangements for trials and other administrative matters and worked on the first annual report of the Tribunal, issued in late August 1994. At that session the judges set up a five-member Inter-Session Working Group to discuss further proposals for revisions to the rules of procedure and evidence. On November 8, 1994, the Tribunal held its first hearing on a motion by the prosecutor asking that the German government defer jurisdiction over an alleged war criminal in custody in Germany. The prosecutor's approach to rape raised serious questions.

The fifth plenary meeting was held in January 1995. This session focused on infrastructure arrangements to allow the Tribunal to proceed. The judges revised the Rules of Procedure and Evidence, including Rule 96, and added one additional rule. They also adopted a declaration expressing their "concern about the urgency with which appropriate indictments should be issued."

B. OFFICE OF THE PROSECUTOR

According to the Tribunal Statute, the prosecutor's office is responsible for all investigations and prosecutions of persons accused of serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. It has the power to initiate investigations; question suspects, victims and witnesses; collect evidence; conduct on-site investigations; and issue indictments.

The Chief Prosecutor, Richard Goldstone, was named, after much delay, in July 1994. A South African judge, he had been the head of investigatory commissions on ethnic violence and police corruption. Graham Blewitt, formerly the head of the Australian government's unit to prosecute Nazi war criminals, was named Deputy Prosecutor and took up

36. Tribunal Statute, supra note 1, art. 16(1).
37. Id. art. 18.
his post in February 1994. Since February, the prosecutor’s office has been putting together prosecution and investigation teams, gathering evidence, and analyzing the myriad legal and practical questions that confront them. About 100 persons have already been hired, and the staff continues to grow. Most of the legal staff are white and male, drawn from more developed Anglo-American countries. The office issued its first indictments in late 1994. As of February 1995, three indictments against alleged perpetrators had been issued. The Tribunal expects trials to begin in early 1995.

C. REGISTRY

The Registry is the unit responsible for the administration and servicing of the Tribunal, as well as for “public information and external relations.” The first Registrar, or head of the unit, was Theo van Boven, a long-time human rights scholar, former director of the U.N. Human Rights Centre in Geneva and former representative of the Netherlands to the Sub-Commission for Prevention of Discrimination and Protection of Minorities. At the end of 1994, van Boven resigned. He was replaced in January 1995 by Dorothee de Sampayo, Vice-President of the Court of Appeal of the Hague.

The Registry includes a Victims and Witnesses Unit. However, the unit is inadequate at present because its funding has been left almost exclusively to “voluntary contributions” by governments rather than allocations from general U.N. funds. The U.N. has agreed to provide funding for a skeletal unit to coordinate all protection and counselling functions. Thus far, funding has been allocated for only three staff positions and $140,000 for consultants to provide counselling services.

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In sum, the creation of the Tribunal is a watershed and will hopefully pave the way for a permanent International Criminal Tribunal to prosecute grave violations of humanitarian and human rights law. It is our hope that

39. Tribunal Statute, supra note 1, art. 17.
40. Press Release, supra note 35.
the vigilance of feminist advocates will ensure that the work of both
Prosecutor and judges establishes a model for the proper treatment of
sexual violence against women under humanitarian law, and for the proper
treatment in practice of the women who endure this violence and suffer its
traumas. The rules adopted by the Tribunal, while not perfect, in our
opinion, do reflect sensitivity to the problems of discrimination and
harassment in the prosecution of sexual violence. Their proper application
will require constant monitoring and interventions by women, informally
and as *amici curiae*, to which both the Tribunal and the Prosecutor have
been heretofore responsive. Beyond the rules, we remain concerned about
the gender and racial composition of the Prosecutor’s staff, the functioning
of the victim and witness unit, the capacity of the Tribunal to provide
compensation for the full range of human rights violations, and the
Prosecutor’s characterizations of sexual violence. These concerns are
briefly discussed in the Afterword to the original proposal, which follows.
PROPOSALS RELATING TO THE PROSECUTION OF RAPE AND OTHER GENDER-BASED VIOLENCE TO THE JUDGES OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

I. INTRODUCTION

This document identifies a number of issues relating to prosecutions by this Tribunal of rape and other gender-based violence perpetrated in the former Yugoslavia. It suggests approaches for (1) articulating and defining the subject-matter jurisdiction of the Tribunal for gender-specific violations under international law; (2) developing certain rules of procedure and evidence for the Tribunal; (3) adopting mechanisms for protection of witnesses and victims who provide testimony to the Tribunal, while maintaining fair due process standards for the accused; and (4) providing appropriate redress, including compensation, to victims of these crimes.

These suggestions are presented to assist the judges of the International Tribunal in developing rules and mechanisms which make explicit the application of established international law principles to violations of women’s human rights, reflect the gender-specific nature of certain violations, and properly implement the imperatives of precluding gender

42. These proposals are submitted by a U.S.-based working group of legal scholars and attorneys associated with non-governmental human rights organizations. The contributors include Professor Rhonda Copelon and law student members Karen Lesley-Loyd, Leila Maldonado, and Katya Plotnik, on behalf of the International Women's Human Rights Law Clinic (IWHRLC) of City University of New York Law School (CUNY), Queens, New York; Jennifer Green, Administrative Director of the Harvard Law School Human Rights Program, Cambridge, Massachusetts; Kathleen Pratt, associated with the International Human Rights Law Group, Washington, D.C.; Patrick Cotter, former prosecutor and Visiting Assistant Professor, Chicago-Kent College of Law, Chicago, Illinois; and Beth Stephens, Staff Attorney at the Center for Constitutional Rights, New York, New York. The authors also wish to acknowledge the contributions of Carin Kahgan, former prosecutor in Miami, Florida; Professor Christopher Blakesley of the University of Louisiana; Rachel Pine of the Center for Reproductive Law and Policy; Jennifer Schirmer, Center for European Studies, Harvard University; Regan Ralph of the Women's Rights Project of Human Rights Watch; Harvard Law School students Inbar Schwartz, Deborah Solomon and David Weinstein, and Yale Law School students Bethany Berger, Natalie Coburn, Tim Holbrook, Wesley Hsu, Heidi Kitrosser, Steven Parker, Giovanni Seinelli, and Wendy Wesler, working with the Lowenstein International Human Rights Clinic.

bias to protect both the dignity and security of witnesses and the rights of the accused.

Specifically, in devising the substantive rules for the prosecution of these offenses, the Tribunal must guard against adopting standards which are the product of sex discrimination and sex-stereotyping. International guarantees against sex discrimination preclude countries, and through them the International Tribunal, from employing sex-stereotyped or sex-discriminatory rules. Moreover, the 1993 World Conference of Human Rights in Vienna recognized the pervasiveness and gravity of gender-based violence and the duty of all international and national institutions to eliminate it, thus underscoring the obligation of the Tribunal to carefully fashion these rules on the prosecution of gender-based crimes.

This proposal builds on the substantive analyses and suggestions already put forth by other nongovernmental organizations and governmental entities. It only identifies problems and suggests solutions; it does not purport to be a thorough analysis of the problem or a comprehensive survey of newer approaches to the issue. We urge, therefore, that as it drafts the rules about the prosecution of sex crimes, the Tribunal seek the advice of persons having expertise in the fair and effective prosecution of sex crimes. Sex-stereotyped misconceptions about crimes of sexual violence are common in the absence of particular experience and expertise in this area of criminal law. The rules established for the investigation, trial, and protection of witnesses, and the understanding by all the judges of the need

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for those rules, will determine whether war crimes of sexual violence will be fairly redressed with due regard for both the rights of the accused and the protection of the victims. These rules will thus be a very significant factor in whether women ultimately come forward as complainants.

II. SCOPE OF JURISDICTION

A. INTRODUCTION

Article 1 of the Tribunal Statute, titled "Competence of the International Tribunal," gives the Tribunal power "to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute."48 The Statute then delineates, in Articles 2-5, the categories of violations over which the Tribunal has jurisdiction.49

Rape is explicitly identified as a crime only in the definition of Crimes Against Humanity, contained in Article 5 of the Tribunal Statute. However, as discussed below, several articles contain provisions which implicitly authorize prosecuting rape and other gender-specific violations as crimes under the Tribunal's jurisdiction: Article 2 (Grave Breaches), Article 3 (Violations of the Laws and Customs of War), Article 4 (Genocide), and Article 5 (Crimes against Humanity).50 It is critical that this implicit authority be made explicit, through adoption of rules of procedure which incorporate and articulate customary and conventional international law principles recognizing that rape and other gender-based violence constitute international law violations.51

Customary and conventional international law52 recognizes that rape and other gender-specific crimes, such as forced impregnation and forced

48. Tribunal Statute, supra note 1, art. 1, para. 32.
49. Tribunal Statute, supra note 1, art. 2-5.
50. Id.
51. The judges of the Tribunal have the authority to perform such interpretive functions.
52. Conventional law is the law of treaties, conventions, covenants, and other written bilateral or multilateral signed agreements between nations. Customary international law is that which is considered accepted as the law of nations; it is derived from the usage of nations, judicial opinions and the works of jurists. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702; Filartiga v. Peña-Irala, 630 F.2d 876, 884 (2d Cir. 1980).
maternity, are prohibited acts.\textsuperscript{53} International human rights principles that are widely recognized as part of customary international law are applicable in characterizing the nature of rape and other gender-specific violations. Rape and other gender-specific crimes violate the prohibition against "torture and other cruel, inhuman, or degrading treatment or punishment," set forth in both the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.\textsuperscript{54} The former Yugoslavia was a party to both of these conventions, and the successor states have recognized that they are bound by these treaties' provisions.\textsuperscript{55}

B. PROPOSALS AND COMMENTARY

1. Rape, forced impregnation, and forced maternity should be explicitly recognized as "grave breaches" under Article 2.

Rape is encompassed in provisions of the Geneva Conventions designating as a "grave breach"\textsuperscript{56} of the Conventions, \textit{inter alia}, torture or inhuman treatment\textsuperscript{57} and "willfully causing great suffering or serious

\textsuperscript{53} Section II(B)(1) is a slightly-modified adaptation of Section I(B) of No Justice, No Peace, \textit{supra} note 7.


\textsuperscript{55} Statement on respect of humanitarian principles made by the Presidents of the six republics in the Hague on 5 November 1991; Memorandum of Understanding, dated 27 November 1991, signed in Geneva by representatives of the Republic of Croatia, Federal Republic of Yugoslavia and Republic of Serbia; Addendum to the Memorandum of Understanding of 27 November 1991, signed by representatives of the Federal Republic of Yugoslavia and the Republic of Croatia; Agreement reached under International Committee of the Red Cross auspices on 28 & 29 July 1992, signed by Prime Minister of Federal Republic of Yugoslavia and Vice-Prime Minister of Republic of Croatia; Agreement signed on 22 May 1992 by representatives of the Presidency of the Republic of Bosnia-Herzegovina, the Serbian Democratic Party, the Party of Democratic Action and the Croatian Democratic Community (all of the above on file with authors).

\textsuperscript{56} To designate a crime a "grave breach" gives all countries the right, and some argue the duty, to try these crimes (i.e., there is "universal jurisdiction" over grave breaches).

injury to body or health\(^58\) when committed against "protected persons."\(^59\) Significantly, the Security Council has repeatedly referred to these provisions as applicable to the former Yugoslavia.\(^60\) Forced pregnancy and forced maternity resulting from rape should be designated as additional violations of these grave breach provisions.\(^61\)

2. Rape, forced impregnation, and forced maternity should be recognized as violations of the laws and customs of war under Article 3.

The laws and customs of war adopted by Article 3 of the Tribunal Statute, make it clear that, irrespective of the nature of the conflict (international, internal, or some hybrid thereof), certain acts — such as torture and willfully causing great suffering or serious injury to body or health — are strictly prohibited. Rape has consistently been treated as a violation of these laws and customs of war.\(^62\) Furthermore, rape is

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58. See INTERNATIONAL COMMITTEE OF THE RED CROSS, UPDATE ON THE AIDE MEMOIRE (1992) [hereinafter AIDE MEMOIRE]. The ICRC recognized that the act of rape is an extremely serious violation of international humanitarian law, as it violates the mandate in Article 27 of the Fourth Geneva Convention providing special protection for women against "any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault." \(^{Id.}\) In addition, the ICRC explicitly acknowledged that the "grave breaches" definition in Article 147 "obviously covers not only rape, but also any other attack on a woman's dignity." \(^{Id.}\) at para. 2 (emphasis added). As acts which clearly attack a woman's dignity and "willfully caus[e] great suffering or serious injury to body or health," forced impregnation and forced maternity would thus qualify as "grave breaches" when committed against "protected persons." \(^{Id.}\)


To dispel any remaining ambiguity over whether the provisions governing international or internal armed conflicts apply to specific violations, the authors of this document urge that the various parties to the conflict in the former Yugoslavia be affirmatively held to their earlier agreement to be governed by the provisions of the Geneva Conventions relating to international armed conflict, including the "grave breaches" provision.


62. See Meron, supra note 57, at 425 (rape by soldiers has been prohibited by the laws of war for centuries); YOUGINDRA KHUSHALANI, DIGNITY AND HONOUR OF WOMEN AS BASIC AND FUNDAMENTAL HUMAN RIGHTS (1982).
explicitly prohibited in the Geneva Convention of 1949 and its two subsequent Protocols.63

3. Rape, forced impregnation and forced maternity, when committed as part of a campaign of genocide, should be explicitly acknowledged as genocidal acts under Article 4.

To the extent that rape, forced impregnation, and/or forced maternity have been committed as part of a campaign “to destroy, in whole or in part,” a national, religious, or ethnic group “as such,” these acts also constitute genocide as defined under the Convention on the Prevention and Punishment of the Crime of Genocide and under customary international law.64

63. Fourth Geneva Convention, supra note 59, art. 27 at 6 U.S.T. 3536 (as to international armed conflicts: “Women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault.”) “Protected persons” are “those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.” Id., art. 4 at 6 U.S.T. 3536; Protocol I Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature Dec. 12, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978) [hereinafter Protocol I], art. 76(1) (as to international conflicts, article 76(2) provides, “women shall be the object of special respect and shall be protected in particular against rape, forced prostitution, and any other form of indecent assault”); Protocol II Additional to the Geneva Conventions of Aug. 12, 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature, Dec. 12, 1977, 1125 U.N.T.S. 609, 612 [hereinafter Protocol II] (as to non-international armed conflicts, art. 4(2)(e) prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault” when committed against persons who do not take a direct part or who have ceased to take part in hostilities).

64. On April 8, 1993, the International Court of Justice issued a provisional ruling that implied, without actually finding, that Yugoslavian Serbs were committing acts in violation of the Genocide Convention by virtue of their involvement in “ethnic cleansing” in Bosnia. The Court, by a vote of 13 to 1, held that

The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should . . . ensure that any military, paramilitary or irregular armed units which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethical, racial or religious group.

4. The crimes of forced prostitution and forced impregnation should be specifically enumerated as crimes against humanity covered by Article 5 of the Tribunal Statute.

As defined under customary international law, "crimes against humanity" include rape committed on a widespread or systematic scale. Where committed on a widespread or systematic scale, forced impregnation and forced maternity should also be recognized as crimes against humanity, as they (like rape) are inhumane acts on the same level of severity as murder and torture. Standing alone, each of these crimes should also be recognized as persecution based on gender. Where, as in the former Yugoslavia, rape and other sex crimes are tactics of genocide, they also constitute "racial or religious" persecution.

III. SUGGESTED PROCEDURAL RULES

A. SUBSTANTIVE DEFINITIONS OF GENDER-SPECIFIC OFFENSES

Defining rape and other gender-specific crimes is a critical task for the Tribunal. Because rape and other gender-specific crimes have not been separately charged and tried before other international tribunals, international law does not provide specific codifications from which to draw. The Report of the Secretary-General provides that the Tribunal shall apply international law. Thus, in developing rules and procedures for adjudicating rape and other sex crimes, the Tribunal must interpret and develop international law consistent with the principle nullem crimen sine lege.

Guidance for this definitional task can be found in the Revised Draft Statute for an International Criminal Court and the 1953 Report of the drafting committee. The Report of the Committee makes the exposition

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65. Tribunal Statute, supra note 2, art. 5(g). As interpreted by the International Military Tribunal and U.S. Military Tribunals in Nuremberg, "crimes against humanity" as defined in the Nuremberg Charter and Control Council Law No. 10, supra note 5, consist of inhumane acts on the same level of severity as murder and torture, committed on a mass scale against civilians, particularly when carried out as part of a pattern of persecution or discrimination. See Diane F. Orentlicher, Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime, 100 YALE L.J. 2537, 2587-2588 (1991).
66. See Part III(A), infra, for definitions of rape, forced impregnation and forced maternity. See ABA Report, supra note 46 (advocating that art. 5(h), which identifies the categories of persecution-based offenses, should be modified to explicitly include rape, enforced prostitution, enforced pregnancy, and other forms of sexual assault).
67. See COPELON, supra note 16.
68. ABA Report, supra note 46, art. 5(h), at 19.
69. Secretary-General Report, supra note 43, para. 29.
70. Id. at para. 34.
of international law the primary concern. For example, Article 2 of the Revised Draft provides: "The Court shall apply international law, including international criminal law, and, where appropriate, national law."72 Further, the debate among the drafters makes clear that national law was intended to apply only in very limited circumstances, such as where the international instrument specifically requires it or where a state party to the instrument specifically requests it.73 Developing international law in this area is important to providing stability, permanence, independence, effectiveness, and universality.74

In applying international law, the Tribunal follows Article 38(1) of the Statute of the International Court of Justice (ICJ). According to the ICJ statute, applicable law includes international conventions, international custom, "the general principles of law recognized by civilized nations; . . . judicial decisions and the teachings of the most highly qualified publicists."75

Moreover, because criminal responsibility is at issue, the Tribunal must develop criteria consistent with the principle against retrospective responsibility.76 In this respect, international law, as noted in the Secretary-General’s Report and Part I of this article, as well as the laws of the former Yugoslavia, provide clear notice that the acts defined above constitute grave wrongdoing. International law violations were explicitly encompassed in Yugoslavia’s constitutional and criminal laws, and, in some cases, the domestic definition of offenses included a wider range of elements than did international law.77 The Yugoslav criminal codes not
only punished the sex crimes at issue here as domestic crimes; they also identified them separately and punished these sex crimes more harshly as war crimes. Accordingly, there is no issue of retrospective responsibility.

In discerning and applying international law standards for the prosecution of these recognized offenses, care must be taken not to perpetuate the traditional sex-stereotype and sex-discriminatory treatment of crimes of sexual violence. Attention should focus, therefore, on newer developments in national laws relating to the prosecution of sexual violence as well as on the writings of jurists over the past 25 years who have elucidated problems and potential solutions. This approach is entirely consistent with the principle against retrospective liability. Our recommendations are limited to assuring fair prosecution of these atrocious and recognized crimes, guarding against the introduction of prejudicial, inflammatory and irrelevant evidence, and protecting the complainants and witnesses from harassment and humiliation, none of which serves a legitimate prosecutorial purpose or protects legitimate rights of the accused.

Yugoslavia not only ratified the Genocide Convention without qualification on August 29, 1950, but it also expanded the definition of genocide in its domestic law to include forcible displacement or deportation as genocidal acts. See Criminal Code, ch. 11, art. 124 (Yugo.) [hereinafter 1962 Code]; Criminal Law, Socialist [sic] Federative Republic of Yugoslavia, 16th Heading, art. 141, THE PEOPLE’S NEWSPAPER (1978) [hereinafter 1978 Code]. Moreover, the Constitution prohibited other violations of protected rights, as did the criminal codes. The most recent criminal code of the Federal Republic of Yugoslavia was adopted in 1993 and retains the earlier code’s provisions on crimes against humanity. Bosnia-Herzegovina also retains these provisions of the criminal code of the former Yugoslavia. See Carol W. Rose, An International Survey of Criminal Procedure Codes and Witness/Victim Protection in Rape Trials (unpublished manuscript, on file with the Human Rights Program, Harvard Law School).

78. 1962 Code, supra, ch. 16, Offenses Against the Dignity of the Person and Morality.
79. Id. ch. 11, Criminal Offenses Against Humanity and International Law; 1978 Code, supra, Criminal Acts Against Humanity and International Law. See also Penalties, Part VI, infra. Both codes explicitly included rape and forced prostitution, while forced impregnation and other sex crimes were encompassed within “tortures or inhuman treatment of the civilian population, causing great suffering or serious injury to body or health, use of measures of intimidation and terror, unlawful taking to concentration camps and other unlawful confinements, coercion to compulsive labor.” 1962 Code, supra note 77, ch. 11.
The crimes which constitute or are constitutive of sexual torture\(^\text{80}\) (and their substantive definitions) include:

1. **Rape**

   a. Rape is any form of forced sexual intercourse. The requisite coercion can be shown through evidence of force, deceit, deprivation, or threats of any of the above, as well as promise of better treatment.\(^\text{81}\)

   b. Rape encompasses a range of non-consensual sexual acts or conduct including the introduction of the penis into the mouth, vagina or anus of the victim or the introduction of other parts of the body or of weapons or objects into the vagina or anus of the victim.\(^\text{82}\)

   c. Rape occurs when there is introduction (described above) to any extent. Proof of rape does not require penetration or the emission of semen.\(^\text{83}\)

2. **Forced Prostitution**

Forced Prostitution may consist of any of the following:

   a. Subjecting a person to repeated acts of rape;

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\(^{80}\) The United Nations has defined torture as:
any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Torture Convention, *supra* note 54.

Rape has been identified in international law as a form of torture. *See supra* note 12. Sexual torture can also include a range of sexual abuse involving physical, psychological, and verbal methods, against the person or against persons close to the person, including forced commission of sexual assaults on others close to the person, forced nudity and other forms of exposure designed to punish, humiliate, degrade, and intimidate the person.

81. The law of Bosnia-Herzegovina provides in Chapter XI, "Whoever coerces a female person with whom he is not married to, into sexual intercourse by force or threat to endanger her life or body of that or someone close to her will be sentenced to between one to ten years in prison." Smail Sokolovic, Krivici zakon SRBiH (Socialist Republic of Bosnia and Herzegovina) Sarajevo, 1988 (on file with authors). For the evidentiary implications of this standard, see Part IV(B), *infra*.

82. *See, e.g.*, Crimes Act, VICT. STAT., No. 6231, sec. 36 (1958) (Austl.)

83. *See, e.g.*, *id.* at sec. 37(2), 36(3).
b. Forcing a person to comport herself or himself in such a way as to invite or solicit and engage in sex in an apparently voluntary way; or

c. Detaining a person for the purpose of or under threat of subjecting her or him to repeated acts of rape or to comporting herself or himself so as to invite, solicit, or engage in sex in an apparently voluntary way.

3. Forced Impregnation and Attempted Forced Impregnation

Forced impregnation may be shown by the following:\(^84\)

a. An impregnation that results from an assault or series of assaults on a woman perpetrated with the intent that she become pregnant. The assault may take the form of rape, including forced insemination.\(^85\)

b. As long as the intent to impregnate can be established, the crime of attempted forced impregnation may be shown even if pregnancy does not result.

4. Abduction or Detention for Sexual Purposes

Abduction or detention accompanied by sexual abuse or the threat thereof is an exacerbated form of unnecessary detention.\(^86\)

5. Genocide

As previously discussed, rape, forced prostitution and forced pregnancy are not only war crimes and crimes against humanity in and of themselves; in the context of the war in the former Yugoslavia, they are also one of the

\(^84\). See Goldstein, supra note 61.

\(^85\). The requisite criminal intent can be established either directly, through admissions or statements of the perpetrators, or indirectly, through circumstantial evidence. Forcible removal of a woman’s IUD or contraceptive implant, or destruction of other means of birth control or access to birth control, would constitute evidence of intent to impregnate. The intentional detention of a pregnant woman until she was beyond the time limit in which local law or practice permitted abortion would also constitute evidence of violation. Mandatory pregnancy tests following a rape, or attempts to keep track of a detained woman’s menstrual cycle, especially if she were assaulted more frequently around the time she ovulated, similarly would constitute evidence of the requisite intent.

\(^86\). Detention of civilians beyond what is strictly necessary is a violation of the Geneva Conventions. See Tribunal Statute, supra note 1, art. 2(g). Article 42 of the Fourth Geneva Convention, supra note 59, provides: “[t]he internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.” Where the practice or threat of sexual abuse is involved, the crime is distinct and more severe.
most potent means of accomplishing genocide.87 These crimes "caus[e] serious bodily and mental harm to the members of the group" and "deliberately inflict . . . on the group conditions of life calculated to bring about its physical destruction in whole or in part."88 They do this to women and through women with the intent to destroy the group. Moreover, specifically threatening to impregnate women with children of another ethnicity and using rape to drive women from their families and communities are measures "intended to prevent births within the group" as well as a means of "forcibly transferring children to another group."89 For these reasons, it is important that sex crimes be recognized as potential acts of genocide.

B. CONSPIRACY, INCITEMENT, ATTEMPTS, AND COMPLICITY SHOULD BE CHARGED AS GENDER-SPECIFIC CRIMES

1. Proposal

Those who have committed acts of conspiracy, incitement, attempts, and complicity should also be prosecuted for gender-based crimes. Such prosecutions are consistent with the U.N. Security Council Resolution establishing this Tribunal, international law, and historic precedent.90 The known evidence about the nature and extent of the crimes in the former Yugoslavia underscores the importance of these prosecutions. We, therefore, recommend adoption of a rule comparable to that embodied in the Charter for the International Military Tribunal for the Far East (the Tokyo Charter), which extended the jurisdiction of the Military Tribunal to:

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.91

2. Commentary

The enormity and nature of the evidence showing that mass or systematic rape, forced pregnancy, and forced prostitution have been and continue to be used as a military and political tool in the former Yugoslavia

87. GOLDSTEIN, supra note 61.
88. Genocide Convention, supra note 64, art. II(B)-(C).
89. Id. art. II(d)-(e).
90. See, e.g., TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, Official Documents at 171 (1947); THE TOKYO WAR CRIMES TRIAL, supra note 5, Judgment (1948).
91. Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, art. V(c), 4 Bevans 20, 23. (This Tribunal was set up in Tokyo after World War II to try Japanese leaders for war crimes committed during the war.) See also THE TOKYO WAR CRIMES TRIAL, supra note 5, Indictment at 2; TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, supra, Official Documents at 29.
demands that these crimes be prosecuted not only against the individual perpetrators of the attacks, but also against all persons who conspired to carry out such crimes, and all those who incited, attempted, demonstrated complicity or had command responsibility in those crimes. Failure to so charge would result in culpable parties evading justice and would fail to serve the legitimate goal of deterring future war crimes, as mandated by the Tribunal Statute.

In establishing this Tribunal, the U.N. recognized the propriety of charges of conspiracy, incitement, attempts, and complicity with regard to war crimes. Article 4 of the Tribunal Statute establishes that the Tribunal "shall have the power to prosecute persons committing genocide," including those committing "conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; complicity in genocide." Further, the Tribunal has the power to punish persons responsible for crimes against humanity, including "torture[,] rape," and "other inhumane acts."

The Tribunal Statute also explicitly relies upon "international humanitarian law," and international customary and conventional law, to set forth the basis of its competence. Because the crimes of conspiracy, incitement, attempt, and complicity as to all types of war crimes are recognized in both customary and conventional international law, such charges fall within the Tribunal's jurisdiction.

C. COMMAND RESPONSIBILITY FOR GENDER-SPECIFIC VIOLATIONS

The Tribunal Statute states that a superior will be held responsible for the acts of his subordinate,

if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

92. Tribunal Statute, supra note 1, art. 4.
93. Tribunal Statute, supra note 1, art. 5.
94. Tribunal Statute, supra note 1, art. 1(A).
95. Conspiracies to commit various war crimes (including war crimes which encompass rape, forced pregnancy, and forced prostitution) were successfully prosecuted at Nuremberg and Tokyo. The Nuremberg Indictment charged the defendants with being: [L]eaders, organizers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy to commit, or which involved the commission of, Crimes against Peace, War Crimes, and Crimes against Humanity.

96. Tribunal Statute, supra note 1, art. 7(3).
This standard is adapted from the one applied in the Nuremberg and Tokyo proceedings and has been incorporated into the Geneva Conventions and their subsequent Protocols, as well as the military codes of many nations.

1. Proposals

a. Civilian leaders as well as military commanders must be held responsible for the actions of their subordinates. The Genocide Convention states that those responsible shall be punished “whether they are constitutionally responsible rulers, public officials or private individuals.”

b. Superior officers bear a high level of responsibility for the actions of their forces. One Canadian case concluded that the fact that a war crime had been committed by a subordinate established prima facie evidence of the commander’s responsibility.

c. A commander has a duty to obtain information about what is happening under his or her command. He or she “will not ordinarily be permitted to deny knowledge of reports received at his headquarters . . . [or] happenings within the area of his command while he is present therein.” In sum, “[h]e cannot ignore obvious facts and plead ignorance as a defense.”

d. Commanding officers are responsible for educating their forces about the laws of war. The laws of the former Yugoslavia, as well as humanitarian law treaties and customary international law, require a commanding officer to inform his or her subordinates that rape and other sexual abuse constitute war crimes and that they are subject to punishment should they commit these offenses.

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97. Genocide Convention, supra note 64, art. 4.
100. Id. at 1256. As applied to the former Yugoslavia, from the time that widespread rapes and other sexual abuse in Bosnia received international publicity, if not before, all superior officials should be presumed to have known of them. They thus should be held liable for their failure to punish those responsible and for their failure to take reasonable measures to prevent future rapes.
101. Protocol I, supra note 63, art. 87(2). The United States Army, for example, requires commanding officers to provide instruction in the laws of war, to:

insure that your men are aware of the law of war, of their duty to disobey orders that would require them to commit acts in violation of that law, and of their obligation to report any such violator of which they become aware. Army Subject Schedule 27-1; see also Fourth Geneva Convention, supra note 59.
e. Superior officers are criminally liable for the failure to punish war crimes, as well as the failure to prevent them. At a minimum, superior officers have an obligation to investigate reports of widespread rapes and punish those responsible. Failure to do so constitutes a war crime.

f. Command responsibility requires taking all necessary steps to prevent war crimes; empty gestures, such as issuing orders which the subordinates know are not serious, are not adequate. As stated in the judgment of the Tokyo tribunal, when a commander knows of the criminal action of his forces, his duty ‘is not discharged by the mere issue of routine orders.’

g. It is not sufficient to report abuses and simply rely on assurances by others that the criminal activity has stopped.

h. Command responsibility covers all forces under the superiors’ command and ‘under their control’. When a military unit occupies a territory, it is responsible for the actions of all forces within that area, even if they are not directly under the officer’s command. Further, control can be

102. Protocol I, supra, note 63, art. 87(3).
103. 2 JUDGMENT OF THE IMT FOR THE FAR EAST 1176 (1948). Similarly, convictions in United States v. List were based on the commander’s failure to investigate incidents and “to take effective steps to prevent their execution or recurrence.” 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS supra note 99, at 1257 (emphasis added). Similarly, General Matsui, Commander-in-Chief of the Central China Area Army which captured and occupied Nanking, was convicted for failure to protect the civilian population even though he ordered his forces to conduct themselves in accordance with the law, since he knew or should have known that his orders were ineffective. THE TOKYO JUDGMENT: THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 454 (B.Y.A. Roling & C.F. Ruter eds. 1977).
104. For example, immediately after Japanese forces entered Nanking in December 1937, Foreign Minister Hirota informed the War Ministry of widespread abuses and was assured that the misconduct would cease. He was found guilty of criminal negligence for relying on this assurance and failing to take effective action to stop the criminal activity. THE TOKYO JUDGMENT, supra, at 447-8.
105. Protocol I, supra note 63, art. 87(1) (emphasis added).
106. See 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNAL, supra note 99, at 759, 1256, 1260, 1271. In United States v. List, the court found that:

The commanding general of occupied territory, having executive authority as well as military command, will not be heard to say that a unit taking unlawful orders from someone other than himself was responsible for the crime and that he is therefore absolved from responsibility. It is claimed, for example, that certain SS units under the direct command of Heinrich Himmler committed certain of the atrocities herein charged without the knowledge, consent or approval or these defendants. But this cannot be a defense for the commanding general . . . [whose] responsibility is general and not limited to control of units directly under his command . . .

Id. at 1257. The same analysis can be adopted by this Tribunal.
shown through evidence other than that for chain of command. If, as in the Shabra and Shatilla massacres, if superior officers allow paramilitary and civilian groups to commit rape and other sexual abuse, the superior officers may be held responsible for those crimes.

2. **Commentary**

Explicitly acknowledging that these principles of command responsibility are applicable to rape and other gender-specific crimes is critical. If the Tribunal fails to do so, it risks implicitly enforcing the dangerous misperception that rape and other sexual abuse of women are a normal and uncontrollable product of warfare. This erroneous perception flies in the face of both conventional and customary international law, which condemn such abuses and hold commanding officers responsible for preventing and punishing such behavior by their forces. For a discussion of some of the evidentiary implications of this standard, see section IV(A) and (C), infra.

**IV. SUGGESTED EVIDENTIARY RULES**

**A. ADMISSIBILITY OF EVIDENCE**

Article 15 of the Tribunal Statute grants judges of the Tribunal broad authority to determine the evidentiary standards that will govern the prosecutorial process. Given the extraordinary circumstances that wartime imposes on the gathering of evidence, and the particular needs of victims and witnesses of sex crimes, it is necessary and appropriate to adopt a flexible standard.

107. For example, the Israeli government's investigation of the 1982 massacres committed by Phalangist military forces in the Shabra and Shatilla refugee camps in Lebanon found Israeli military officials responsible for failing to stop the massacres — even though the Phalangists were not a part of the Israeli military — because the Israeli investigators found a "symbiotic relationship" between the two forces. *The Commission of Inquiry into the Events at the Refugee Camps in Beirut 1983: Final Report, reprinted in The Jerusalem Post*, (supp. Feb. 9, 1983).

Recently published information details the link between supposedly independent paramilitary groups and the government of Serbia, including both the Serbian army and police. *Rival Serbs Are Admitting Bosnia-Croatia Atrocities*, N.Y. Times, Nov. 13, 1993, at 6. Further evidence of this link could be developed by examining who has profited from the commission of atrocities, as recent reports indicate that senior officials of the Yugoslavian government have profited from the pillage of Bosnian and Croatian villages. *Id.*

108. See *Aide Memoire*, supra note 58.

109. *Tribunal Statute*, supra note 1, art. 15; see also *Section I*, supra.

110. The precedent set by the International Military Tribunal (IMT) of the Nuremberg trials supports application of a flexible standard. As the first modern international tribunal for the prosecution of war crimes, the IMT offers an appropriate starting point for analyzing admissibility of evidence for this Tribunal. The IMT operated under a very liberal standard. Article 18 of the Charter of the IMT allowed the IMT to admit any evidence which it deemed to have probative value. The article states:
We recommend, consistent with the due process rights of defendants, that judges exercise their discretion in favor of the protection of victims or other witnesses at all stages of the proceedings. All of the recommendations should apply throughout the proceedings, from the pre-trial phase through trials, appeals, and sentencing.

1. **With the exceptions and conditions specified hereinafter, the Tribunal should admit all relevant evidence and then assess its weight.**

   The fact that all cases will be heard by judges makes it unnecessary to provide the type of rigid evidentiary rules of admissibility developed to prevent lay juries from misinterpreting the proper legal significance of evidence.

2. **Notwithstanding the foregoing general principle, the Tribunal should not admit evidence which threatens serious harm to a witness or victim, including both physical danger (e.g., a fear of retaliation for testifying) and psychological harm.**

   The Tribunal should also exclude evidence which is so tainted by sexual stereotypes that it is of no evidentiary value, is inflammatory, impedes the process of the case, or threatens harm to the victim or witness.

3. **To ensure a fair but flexible standard of admissibility, the Tribunal should, upon motion of counsel or upon its own motion, at any time, hold a separate hearing, in camera if appropriate, to consider the probative value of proffered evidence.**

   The Tribunal shall then determine whether the evidence should be excluded for any of the reasons set forth in point IV(A)(2)(b) or, if received, what protection may be necessary for the victims, witnesses, and defendants.

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

*See Trials of War Criminals Before the Nuremberg Military Tribunals, supra* note 99.

It should be noted that the need for a liberal standard is even greater for this Tribunal than for the Nuremberg Tribunal; the latter had access, when official records were released at the war’s end, to Nazi documentation of atrocities. The authors recognize, however, that the standard is subject to certain limitations imposed by the Tribunal Statute and other agreements, such as the ICCPR, *supra*. These include provisions which protect the right of the defendant to a fair trial (*see* ABA Report, *supra* note 46, at 30), and the rights of the rape victim, such as limits on the admissibility of the victim’s sexual history. *See* Part V, *infra.*
4. **Efforts should be made to prove charges against the defendant with admissible evidence other than the direct testimony of survivors of the alleged atrocities.**

Such evidence might include, but is not limited to, documentary evidence, eyewitness testimony, medical records, and spontaneous utterances. The sufficiency of these alternative forms of proof should be considered before the Tribunal requires the victim to testify.

5. **Hearsay evidence, unsworn statements, or, in some cases, ex parte affidavits should be allowed wherever there are sufficient indicia of reliability such as, but not limited to, other corroborating hearsay statements, lack of motive to lie, or significant supporting circumstantial evidence.**

Such a rule is in keeping with the Nuremberg standard which admits evidence of “any probative value” while safeguarding the defendants’ interests in not having to confront unreliable hearsay evidence.

6. **Expert testimony should be admitted to explain relevant aspects of the impact of coercive circumstances and the resulting atrocities on the victims and witnesses.**

The use of experts in international tribunals is acknowledged and well-accepted.  

**B. SPECIFIC EVIDENTIARY CONSIDERATIONS FOR SEX CRIMES**

By contrast to other types of trials where liberal rules of admissibility are both fair and necessary, certain aspects of the trial of sexual violence require strict limits to protect against the introduction of traditional stereotypes and misconceptions masquerading as evidence. These include traditional beliefs that women invite and fabricate rape and that the “good” woman is chaste and resists to the utmost. These prejudices have given rise to rules requiring corroboration of the victim’s testimony and permitting introduction of evidence of her prior sexual conduct to show consent as well as lack of credibility. They have also justified inflammatory, suggestive and humiliating cross-examination of the complainant, which has been increasingly recognized as exceeding the defendant’s legitimate rights. Without strict limits, women inevitably will be discouraged from bringing their cases to the Tribunal. Even if evidence is insulated from some of its prejudicial effect because the Tribunal is the

111. See generally GILLIAM M. WHITE, THE USE OF EXPERTS BY INTERNATIONAL TRIBUNALS (1965); DURWARD V. SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS (1975).

112. See, e.g., SUSAN ESTRICH, REAL RAPE (1987).
trier of fact, its very solicitation and introduction inflicts trauma and harm on the victim or witness. Beyond that, strict rules are important because sexual biases about rape have deep roots and are difficult to extirpate. It is, therefore, imperative that the Tribunal make clear its rejection of sex-stereotypes and discrimination as bases for receiving evidence in the prosecution of war crimes. The Tribunal should also consider consulting with experts who can provide training to ensure its own understanding of the fallacies, prejudice, and harm that traditional approaches to sex crime cases may cause traumatized witnesses.

1. Proposals

a. In determining whether the charged sexual conduct is forced or coerced, it is sufficient if the woman says “no” or if the act(s) were committed under conditions where the victim reasonably believed that she was not free to leave or refuse without risk of harm to herself or another person. Coercion may be established by the fact of detention, the appearance of authority, or the conduct of the accused and others acting in concert with him. The victim need not resist to establish coercion.

b. When evidence of coercion has been presented, the Tribunal shall not permit the defendant to cross-examine the victim as to the possibility of consent or otherwise raise a consent defense, unless he first submits to the Tribunal in camera evidence of consent apart from the victim’s proposed testimony, and the Tribunal makes a determination that he has presented sufficient evidence to find that consent was likely in the particular case.

c. If the Tribunal determines that the defense of consent may be raised, it shall exclude all evidence of prior sexual conduct of the victim with the accused or others, except evidence which tends to demonstrate voluntary sexual relations with the defendant within a reasonable period of time. The Tribunal shall not infer from such an act or acts of voluntary intercourse that subsequent sexual acts are voluntary, but rather must scrutinize the circumstances to assure that each occasion of sexual intercourse was consensual. Evidence of sexual conduct with anyone other than the accused shall not be admitted.

d. Corroboration of victim testimony as to the elements of these offenses is not required.
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e. Expert evidence relating to trauma should be admissible to inform the Tribunal about the particular impact of trauma. 113 Its absence should not be seen as establishing the defendant's innocence.

2. Commentary

a. Coercion, which includes force, threats of force, deceit, deprivation, or promise of reward or better treatment, can be established by evidence of the totality of the circumstances of the war, detention, occupation, and other acts of terror against the civilian population. It also may be established by evidence of coercive conduct directed at particular victims or witnesses.

b. A finding of coercive circumstances shall give rise to a rebuttable evidentiary presumption against consent (i.e., it was more likely than not that there was no consent). Defendants may present evidence in an in camera proceeding (described supra) to rebut the presumption. Such a presumption reflects the likelihood of intimidation of civilians by persons with official authority, as well as the extremely small probability of consent under such coercive circumstances. Examples of similar presumptions of non-consent found in international law include the provisions of the Geneva Conventions which treat as a "grave breach" any form of medical experimentation on prisoners, even where some form of consent is given, 114 as well as proposed U.N. General Assembly rules concerning the treatment of prisoners outside the context of war, which do not recognize the possibility of "consent" to illegal treatment. 115

113. For example, sexual violence can produce extreme shame, numbness, and denial which may, alone or with fear of reprisal or the absence of an accountable or regularly functioning judicial system, preclude or be inconsistent with prompt reporting. In addition, experts on post-traumatic stress syndrome and other relevant evidence may aid the Tribunal in understanding the ability of a victim or witness to remember clearly the appearance of the perpetrator but to blur surrounding details of the attack. This is particularly useful where, to those unfamiliar with the effect of trauma, such details appear to be "unforgettable." Expert evidence may also help the Tribunal place in proper perspective the possible existence of discrepancies within and among victim accounts of traumatic sexual assaults; such "discrepancies" may result from differing recall at various stages of physical and psychological recovery. Expert testimony might also be used to explain the "unusual demeanor" of victims and witnesses.

114. Art. 11(2) prohibits "medical or scientific experiments" on persons in the power of an adverse party who are deprived of liberty "even with their consent." This is subject to an exception where the procedure is necessitated by health and consistent with accepted medical standards that would apply to the party's nationals who are not deprived of their liberty. Protocol II, supra note 63.

115. The Working Group of the General Assembly's Sixth (Legal) Committee, which revised the Draft Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, proposed: "No detained or imprisoned person shall, even with his consent, be subjected to any medical or scientific experimentation which may be detrimental to his health." U.N. Doc. A/C.6/39/L.10, para. 20 (1984) (emphasis added). See also NIGEL S. RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW 232-
c. A strong presumption against consent is appropriate because, in the circumstances of sex crimes in the former Yugoslavia, the possibility of non-coercive or voluntary sexual intercourse is extremely remote. Beyond that, the possibility that false charges will be brought or that they will survive the investigative process is made more remote by the powerful obstacles faced by complainants. Paramount among these are the emotional effect on survivors, often shared by direct witnesses. Human rights reports have emphasized the profound shame, denial, and trauma, as well as the well-founded fear of publicity, exploitation, and re-traumatization. Bringing a claim before the Tribunal carries additional obstacles which victims or witnesses may experience, including the alien nature and formality of the legal process; the anticipation of repeated and hostile questioning; the trauma of confrontation with the perpetrator; the need to leave one's home or community; the possibility of not being believed; the lack of confidence in the possibility of redress; and the fear of retaliation.

d. Strictly limiting the circumstances under which the presumption of coercion may be overcome and a defense of consent may be entertained is fair to the accused and essential to the dignity and participation of the victims and witnesses. Cross-examination of the complainant as to possible consent should be allowed only where the accused can show that it was more likely than not that the sexual activity was not coerced. Furthermore, the appearance of voluntary meetings or a personal "relationship" between the accused and the complainant must be strictly scrutinized before a consent defense is permitted, given the pervasiveness of fear and the probable unequal power of the parties — both as men and women and as conquerors and conquered.

e. Evidence of prior sexual conduct with anyone other than the defendant should be excluded because it is irrelevant and inflammatory. Any alleged relevance is based upon sex-stereotypes which deprive a woman of her right to bodily integrity. The impact of eliciting this testimony from the complainants would act as a severe barrier to their participation in criminal proceedings.\(^\text{116}\)

\(^{116}\) See, e.g., ESTRICH, supra note 112; H. FIELD & L. BIENEN, JURORS AND RAPE: A STUDY IN PSYCHOLOGY AND LAW (1980). Strict controls in non-emergency contexts can be found, for example, in the Australian Evidence Act, 37a No. 6248 (1958); LAN 107-458 (1980).
C. EVIDENTIARY CONSIDERATIONS FOR PROVING COMMAND RESPONSIBILITY

1. Proposals and Commentary

a. Evidence of a policy or pattern of ordering, authorizing, tolerating, encouraging, or failing to punish rape and other sexual abuse may prove command responsibility for the crimes. This evidence can be found in witnesses’ testimonies stating that commanders had knowledge of rapes and did little or nothing to stop them, ordered rapes, or participated in rapes themselves. Much of this testimony may come in the form of hearsay and unsworn statements. The Tribunal should adopt the evidentiary standards discussed above, allowing such testimony when sufficient indicia of reliability are present.

b. Relevance of evidence should be construed broadly to allow for the wide range of evidence required to show a relationship between the rapes and military activity. Evidence should be allowed to show the timing of rapes in relation to troop movements and military takeovers of the relevant territory in order to establish patterns and evidence of coordinated activities. Similarly, evidence should also be admitted to show contemporaneous violations of international humanitarian law in prison camps, battlefields and civilian regions of occupied areas where the rapes were perpetrated.

c. Expert testimony should be admitted to show the psychological effects of rape. This information is relevant to prove a policy of using or permitting rape as a weapon of war. Rape is an effective means of destroying and driving out whole communities, an outcome which is consistent with an ethnic cleansing strategy. These psychological effects are allegedly a significant reason commanders chose to use or allow rape in their campaigns.

d. Media reports (newspapers, radio, and video) should be admitted to show that commanders had, or should have had, knowledge of the occurrence of gender-specific crimes. The existence of widely disseminated media reports of mass rapes and other gender specific crimes in particular areas of the former Yugoslavia should be admitted as circumstantial evidence that responsible civil and military authorities had reason to be aware of, at a minimum, the significant possibility that such crimes were occurring in areas under their control. Such awareness is a key element of establishing command responsibility for these crimes.
V. SUGGESTED MECHANISMS FOR PROTECTION OF VICTIMS AND WITNESSES

A. GENERAL PROTECTIONS - PROPOSALS AND COMMENTARY

The physical security and psychological well-being of victims and witnesses must be protected at all stages of the criminal proceedings. While some victims and witnesses may regard public accusation of those who committed atrocities as an important part of their recovery, others may consider it as an exacerbation of the trauma they have suffered. Variations in the desire to come forward must be physically protected and provided with the necessary support services in such a way so as to allow their testimony to expedite their recovery rather than to be a source of re-traumatization. Victims and witnesses who do not wish to come forward to testify or present evidence should not be pressured to do so. The desire of those who wish to testify anonymously must also be respected to the extent consistent with the rights of the accused.

1. A security system should be implemented to protect those giving testimony and preparing documentation.\(^{118}\)

Those giving testimony and preparing documentation should be protected. This protection should include the use of U.N. guards, and the issuance and enforcement of restraining orders.\(^{119}\) If necessary, victims, witnesses, and their families should be physically relocated.\(^{120}\)

2. Victims should have a right to representation.\(^{121}\)

To fully protect the rights of victims and witnesses, they, like defendants, should have the right to representation. Representation would help ensure implementation of the procedures and evidentiary rules, protecting any rights and interests of victims and witnesses that may be distinct from those of the prosecution. Victim and witness advocates would also work to ensure that physical and psychological needs are met during the investigation and trial process.

\(^{117}\) No Justice, No Peace, supra note 7; CUNY Report, Appendix B, infra.
\(^{118}\) ABA Report, supra note 46, at 37-44; AI Memorandum, supra note 2, at 6, 27-28; No Justice, No Peace, supra note 7.
\(^{119}\) Helsinki Watch I, supra note 2, at 10.
\(^{120}\) ABA Report, supra note 46, at 45; Helsinki Watch I, supra note 2, at 13.
\(^{121}\) CUNY Report, Appendix B, infra.
3. All participation by victims and witnesses must be voluntary and
given with fully informed consent.\textsuperscript{122}

Victims and witnesses should receive careful counselling about the
implications of participating in the Tribunal or relinquishing their
anonymity before informed consent may be deemed given. Such counsel­
ling could be done by victim and witness advocates, as described above.

4. The confidentiality of the victims and witnesses should be guarded.

To protect both their security and privacy, victims and witnesses should
not be publicly identified without their consent. They have a right to keep
their identity from the public and, in extreme cases, from the alleged
perpetrator.\textsuperscript{123}

5. There must be a commitment to witnesses and victims throughout
and after the investigation and trial process.\textsuperscript{124}

The Tribunal should commit itself to minimizing the trauma of those
participating in all phases of the Tribunal process. The Tribunal should
assure that victims and witnesses are accompanied through the Tribunal
process by a family member or other person of their choice and that
separation from their communities is minimized (unless, of course, people
are afraid to return to their communities). It should also provide services
to assist victims and witnesses through the Tribunal process and help them
rebuild their lives during and after trial through services such as trauma
counselling and other health care, assistance with relocation, and assistance
with political asylum claims.\textsuperscript{125} This may be accomplished, in part,
through the appointment of counsel for victims.

B. PRE-TRIAL PHASE - PROPOSALS AND COMMENTARY

1. Interviews to collect evidence should be done in a manner sensitive
to victims’ and witnesses’ needs.

Interviewers should be experienced or trained in working with victims
of sex crimes. Interviewers must try to ascertain the treatment needs of the
person they are interviewing and must not simply “extract” the information
necessary to proceed with a prosecution. Interviewers should clearly tell
a rape survivor that she need not speak of her ordeal at all and can end the
interview at any time she chooses. A victim should be assured that she has
complete control over the future use of her testimony, including the terms

\begin{itemize}
\item \textsuperscript{122} No Justice, No Peace, supra note 7; CUNY Report, Appendix B, infra.
\item \textsuperscript{123} No Justice, No Peace, supra note 7; CUNY Report, Appendix B, infra.
\item \textsuperscript{124} ABA Report, supra note 46, at 44; Helsinki Watch II, supra note 2, at 9; AI
Memorandum, supra note 2, at 27-28; CUNY Report, Appendix B, infra.
\item \textsuperscript{125} Helsinki Watch I, supra note 2, at 9.
\end{itemize}
of confidentiality. If the Tribunal should rule that, in a particular case, due process requires the disclosure of the identity of a participating victim or witness, the victim or witness should retain the right to withdraw her participation in the case and maintain confidentiality, even if such a decision is detrimental to the prosecution’s case.

2. Interviewers should be women.

Women victims should be interviewed by women who have been trained in how to work with women victims and survivors.

3. Videotaped depositions should be permissible.

Depositions may be videotaped if it will assist the victim or witness in avoiding testifying in public and in the presence of her alleged attacker. This type of deposition has been allowed in U.S. and other courts.

C. TRIALS AND APPEALS - PROPOSALS AND COMMENTARY

It is important not to ignore or exaggerate the critical tension between the security and privacy rights of victims and witnesses on the one hand and the due process rights of the defendant on the other, particularly in the context of a defendant’s right to confront his or her accuser. We are committed to protecting the rights of defendants as well as the rights of victims and witnesses. We believe, however, that once the likely probative value of the evidence is weighed against the potential harm to the victim or witness, there will be few instances of serious conflict between the due process rights of the accused and the security and privacy rights of victims and witnesses. Numerous criminal codes have established procedures which strike this balance, such as those of Australia, Canada and the United States. Human rights organizations have also addressed these issues. The following procedures supplement the protections discussed in Section IV, Suggested Evidentiary Rules.

1. In camera proceedings should be allowed to protect the privacy interests of victims and witnesses.

The Tribunal Statute gives the Trial Chamber discretion to close hearings to the public: the hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of

126. No Justice, No Peace, supra note 7.
127. No Justice, No Peace, supra note 7; AI Memorandum, supra note 2, at 7, 29.
128. ABA Report, supra note 46, at 40.
129. ABA Report, supra note 46, at 41-42; AI Memorandum, supra note 2, at 6, 27; CUNY Report, Appendix B, infra.; Helsinki Watch I, supra note 2, at 10; No Justice, No Peace, supra note 7. See ABA Report, supra, note for discussion of sexual assault cases as an exception of the U.S. constitutional right of access to criminal trials.
procedure and evidence (emphasis added). Article 22 explicitly provides for in camera proceedings. The Tribunal’s procedural rules should make clear that the detrimental psychological impact of a public hearing on a victim or witness justifies closing the proceedings to the press and/or general public.

2. Other mechanisms to conceal the identity of victims and witnesses from the public and press should be allowed.

These mechanisms include alteration of a witness’ image or voice in a video or audio tape presented at trial and sealing or expunging witnesses’ names from public records. Records identifying the victim should be secured and kept from the public.

3. The identity of certain victims or witnesses should be withheld from the defendant.

As mentioned above, many victims and witnesses fear retribution by the defendants, or find it extremely traumatic (endangering their psychological and/or physical survival) to confront their alleged attacker(s). For both their physical safety and psychological well-being, as well as that of their family and friends, in some of the most extreme cases it may be necessary for the Tribunal to conceal a victim’s or witness’ identity from the defendant and his or her attorneys.

Possible procedures include testimony by one-way observation methods and closed circuit television, use of screens so that the defendant and the public cannot see the victim or witness, and the use of pseudonyms. Because of the serious implications for the due process rights of the defendants, these procedures should be implemented only after an in camera hearing in which the Tribunal assesses the compatibility of these procedures with the defendant’s rights as well as the danger to the victim and/or witness.

130. Tribunal Statute, supra note 1, art. 20.
131. Id., art. 22.
132. Helsinki Watch I, supra note 2, at 11.
133. ABA Report, supra note 46, at 42; No Justice, No Peace, supra note 7.
134. ABA Report, supra note 146, at 39; AI Memorandum, supra note 2, at 27; CUNY Report, Appendix B, infra; No Justice, No Peace supra note 7. The American Bar Association and International Human Rights Law Group reports discuss these methods in the context of protecting the privacy of the victims and witnesses; they do not advocate concealing identification from defendants. The ABA Report discusses the use of one-way observation methods and closed-circuit television in U.S. courts.
135. Helsinki Watch I, supra note 2, at 11-12.
136. ABA Report, supra note 46, at 42; Blakesley Report, supra note 46, at 7; Helsinki Watch I, supra note 2, at 12.
4. *Reasonable limitations should be enforced as to the examination of victims and witnesses.*

The Tribunal should adopt procedures to protect witnesses and victims from the further brutalization of harassing and irrelevant questioning which can occur during rape trial proceedings.\(^{137}\) Specifically, the Tribunal is urged to consider the following procedures:

a. The Tribunal should adopt a format which vests in the Tribunal the sole, or at least primary, responsibility for questioning victims, witnesses, and defendants. Many legal systems now use this format. Counsel for all parties should be allowed to submit proposed questions to the Tribunal, but the Tribunal must be the final authority in deciding what questions are relevant. Such a format and procedure would provide for a full and fair opportunity for parties to have all relevant questions put to victims and witnesses in as non-threatening a manner as possible.

b. Tribunal judges should have, and exercise, wide discretion to limit the questioning of victims and witnesses as to evidentiary matters directly related to the substantive charges against the defendants. This standard should be adopted whether the Tribunal itself poses all the questions, as suggested above, or the parties' counsel are allowed to question the victims and witnesses. Questions related to victims' or witnesses' background, character, past sexual history, and other irrelevant considerations should be expressly prohibited.

c. Repetitious questioning of victims and witnesses, which exacerbate the trauma of recounting the atrocities committed against them and discourage other victims and witnesses from coming forward, should be prevented. This will be particularly important in situations where victims and witnesses are testifying against numerous defendants in the same, or separate, proceedings. Such situations are inevitable given the many instances of mass or successive rapes currently alleged and likely to come before the Tribunal.

d. Victims' and witnesses' testimony, both under direct and cross-examination, should be held admissible against all similarly situated defendants. Additional and successive defendants should be required to submit additional, non-repetitive, relevant questions to be put to the Tribunal for a determination of admissibility. Such a procedure protects the rights of the defendants while limiting the further suffering of victims and

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\(^{137}\) See Part IV(B)(1), *supra.*
witnesses. This could encourage witnesses and victims to come forward, or at least eliminate one potential barrier to their doing so.

VI. PROPOSED PENALTIES

The Tribunal Statute provides that the Trial Chambers "shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia."138 While the Tribunal Statute does not make Yugoslavian law the exclusive source of penalty, and the Tribunal should preserve the power to apply international law in case of discrepancy, Yugoslavian law appears to provide the court with broad discretion in sentencing.

Most importantly, war crimes under Yugoslavian law carry penalties from five years imprisonment to the death penalty.139 Rape and forced prostitution are explicitly listed as war crimes and are, therefore, subject to much greater penalty than the ten-year maximum applied to rape as a domestic crime.140

A. AGGRAVATING FACTORS

The laws of the former Yugoslavia also recognize a broad range of aggravating factors which will enhance the penalties for rape and other gender-specific crimes. Where rape is committed together with lewd acts,141 unnatural concupiscence or sodomy,142 carnal knowledge or unnatural concupiscence with a minor under fourteen years of age,143 or upon a helpless person who is unable to resist,144 or if the rape occurred through the misuse of the perpetrator's position,145 the basic sentence for the crime can be enhanced.146 The intermediation, or recruiting, inducing, inciting, or luring of women to prostitution,147 and, if the female was under fourteen years of age, the procuring and/or pandering of such a

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138. Tribunal Statute, supra note 1, art. 24(1).
139. 1962 Code, supra note 77, Chap. 11, art. 123; 1978 Code, supra note 77, 16th Heading, art. 142. We agree with the Tribunal Statute that no matter how heinous the offense, the death penalty should not applied. Tribunal Statute, supra note 1, art. 24(1).
140. 1962 Code, supra note 77, Chap. 16, art. 179(1)(2). As a purely domestic crime, there is no minimum sentence for forcible rape; a minimum of three years is required where grievous bodily injury or death was inflicted upon the woman. [Author's note: Subsequent to the submission of this Memorandum to the Tribunal, it came to our attention that the 1974 Yugoslavian Constitution relegated rape to the local codes.]
141. Id. art. 183.
142. Id. art. 186.
143. Id. art. 181.
144. Id. art. 180.
145. Id. art. 182.
146. Id. art. 46.
147. Id. art. 188.
female for illicit sex\textsuperscript{148} are also offenses justifying enhanced penalties.\textsuperscript{149} In addition, Yugoslavian law provides greater penalties if the crimes are made "exceptionally dangerous" due to the perpetrator's particular determination, persistence, ruthlessness, or if particularly grave circumstances attached to the crime.\textsuperscript{150}

Extrapolating from the breadth of aggravating factors recognized under Yugoslavian law and applying them to the circumstances of the current war in the former Yugoslavia, the following are aggravating factors that ought to result in enhanced sentences under Article 24 (2):

1. The possession of arms, offensive weapons, explosives, or imitations thereof;

2. Acts or threats to inflict additional violence to the life or well-being of the victim(s) or others;

3. Acts or threats accompanying the physical sexual attack which are intended or likely to inflict additional degradation or humiliation on the victim(s) or others;

4. A prior relationship between the victim(s) and the defendant;\textsuperscript{151}

5. The presence of other persons during the crime, including family members and intimates of the victim(s), bystanders, or aiders and abettors;

6. Communicating the fact of the rape to others under circumstances where the identity of the victim is revealed or could be surmised;

7. The consequence of forced pregnancy;\textsuperscript{152}

8. Detaining the victim(s) and the circumstances of the detention; and,

9. The victim being a minor child under the age of fourteen years.

B. MITIGATING CIRCUMSTANCES

With regard to factors which should mitigate the offense under Article 24(2) of the Tribunal Statute, it is significant that the Yugoslavian Criminal

\textsuperscript{148} ld. art. 187.
\textsuperscript{149} Id. arts. 181-188.
\textsuperscript{150} Id. art. 41.
\textsuperscript{151} Evidence indicates that trauma is enhanced by the breach of an earlier relationship involving an element of trust. See Copelon, supra note 16.
\textsuperscript{152} See Section III(A)(2) supra, for definition.
Code recognized a soldier’s obligation to follow superior orders or face up to a year of imprisonment. Under the Yugoslav law, no punishment would be imposed if a criminal offense was committed under the orders of a superior officer unless that order was directed at committing a war crime or any other grave criminal offense. In such an instance it would be the subordinate’s responsibility to refuse to execute the order.

While recognizing the inherent lack of precision in this approach, the Tribunal should attempt to acknowledge the reality, and possible mitigating effect, of such orders to commit crimes. We therefore urge, in accord with the Yugoslavian Criminal Code, that a soldier ordered to commit a crime which is not a war crime (e.g., simple theft or assault) not be held criminally responsible. On the other hand, and again, in accord with the Yugoslavian Criminal Code, this limited defense of obedience to otherwise legitimate orders should not be available where the soldier is ordered to commit a war crime, such as murder or rape of non-combatants.

While no defense of obedience to orders is available to those who commit war crimes, it should be considered a mitigating factor in imposing a sentence on a soldier who reasonably believed, based on the information available at the time, that he or she was facing imminent bodily harm or death if he or she refused to carry out the orders of a superior officer. However, no mitigating factor should be found where the individual merely faced humiliation or embarrassment in front of other military personnel or civilians.

Other mitigating circumstances should include:

1. The defendant’s youth;
2. Whether the defendant was coerced to enter the military;
3. Where the defendant is of borderline legal competence; and
4. The defendant’s level of education.

VII. COMPENSATION FOR VICTIMS

It is also necessary to establish a method for compensating victims of war crimes and crimes against humanity. The Tribunal Statute provides:

153. 1962 Code, supra note 77, at ch. 25, art. 327.
154. Id. art. 352.
In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners. 155

A. PROPOSALS

1. The Tribunal should be empowered, as part of their sentencing authority, to order compensation to victims, to be paid by convicted defendants.

Such orders of compensation should be enforced by the U.N. using the mechanisms of collective member-states' action with which other U.N. actions are enforced. 156

2. The Tribunal should request that United Nations create a fund or compensation commission to compensate victims' losses.

B. COMMENTARY

As a result of the gender-specific crimes perpetrated against them, women are suffering both tangible and intangible losses. They have lost their bodily integrity; their physical and mental health; their self-esteem; their sexuality; their right to personal security; and their right of sexual, ethnic, and religious equality. They have lost or been forced to separate from family members; they have lost or fear the loss of their capacity to form families or bear children in the future. They have been forced to leave behind their homes, their work, their possessions, and the security of their identities in their communities.

These losses must be recognized in interpreting Article 24 (3) of the Tribunal Statute. In accord with basic principles of humanitarian and human rights law, the concept of "property and proceeds" should be expanded by the Tribunal. To do this the Tribunal would interpret the concept of "property" to encompass rights or entitlements. We acknowledge our part and in traditional jurisprudence, however, a certain discomfort with categorizing rights as property. Alternatively, the Tribunal could request that the Security Council either expand its jurisdiction to grant compensation or establish a separate compensation mechanism to ensure that reparations are made for these types of injuries. Any other result privileges property loss over the deprivation of human rights, and ignores the principle of reparation embodied in Article 24(3) and in other international instruments.

155. Tribunal Statute, supra note 1, art. 24(3).
156. See Tribunal Statute, supra note 1.
The right to compensation is codified in numerous international human rights instruments and is supported by the decisions and commentary of various international human rights bodies. Illustrative of the scope of damages previously granted are the German reparations paid to Holocaust victims and the establishment of the Compensation Commission for Victims of the 1991 Gulf War.

Laws of the Federal Republic of Germany compensated "loss of life, damage to limb or health, loss of liberty, property or possessions, or harm to professional or economic prospects." German reparations also included "death caused by a deterioration in health resulting from emigration or from living conditions detrimental to health...[and] suicide prompted by persecution, including suicide caused by economic difficulties which the victim could not overcome in the country to which he emigrated."

The Compensation Commission established in the aftermath of the 1991 Gulf War is also instructive. The U.N. included in its definition of damages "serious personal injury and mental pain and anguish." Serious personal injury includes "dismemberment; permanent or temporary significant disfigurement, such as substantial change in one's outward


158. Such human rights entities include the UN Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee against Torture, the Committee on the Elimination of Discrimination Against Women, the Commission of Inquiry established under the Constitution of the International Labour Organization, the European Court of Human Rights, and the Inter-American Court of Human Rights. See ESCOR Study, supra, at 21-36.

159. Id. at 107.

160. Id. These categories encompass at least some of the victims of the atrocities in the former Yugoslavia. "Damage to limb or health" includes "lasting impairment of the victim's mental or physical faculties" (i.e., post-traumatic stress disorder). "Damage to liberty" includes detention in concentration camps, forced stay in ghettos, forced labor, and having to live "underground." This definition of damages can be applied to women who were deprived of their liberty by being detained in camps where they were repeatedly raped, as well as to those who were detained in their own homes or elsewhere and raped or otherwise subjected to sexual torture and cruel, inhuman or degrading treatment. It applies as well to the losses suffered as a result of flight and the victims' need to reestablish their lives in new or foreign settings.
appearance; Permanent or temporary significant loss of use or limitation of use of a body organ, member, function or system; and any injury which, if left untreated, is unlikely to result in the full recovery of the injured body area, or is likely to prolong such full recovery." In addition, "serious personal injury also includes instances of physical or mental injury arising from sexual assault, torture, aggravated physical assault, hostage-taking, or illegal detention . . . or being forced to hide . . . ."  

The Compensation Commission provided compensation for mental pain and anguish for both financial losses (such as loss of income and medical expenses) and non-financial losses (in cases where "(a) a spouse, child or parent of the individual suffered death; (b) the individual suffered serious personal injury involving dismemberment, permanent or temporary disfigurement, or permanent or temporary significant loss of use or limitation of use of a body organ, member, function or system; (c) the individual suffered a sexual assault or aggravated assault or torture").  

Gender-based violence in the former Yugoslavia, both in itself and as part of a campaign of genocide, falls within these categories: 1) "sexual assault," 2) "mental pain and anguish," 3) "aggravated physical assault," 4) "torture," 5) "hostage-taking," 6) "illegal detention," and 7) serious personal injury.

In order to effect the rights to reparation and compensation recognized in international law, the Tribunal should request that the U.N. Security Council establish a fund, to be administered either by the Tribunal itself or by some other entity (such as the Compensation Commission).

**AFTERWORD: THE RULES ADOPTED**

Tribunal judges began consideration of their Rules of Procedure and Evidence in the fall of 1993 and finalized them on February 14, 1994. Concern for the protection of victims and witnesses appears to have been a high priority: the rules include specific protections for victims and witnesses, and one evidentiary rule specifically deals with evidence in the prosecution of cases of sexual assault.

**I. RULES FOR THE PROTECTION OF VICTIMS AND WITNESSES**

**A. VICTIMS AND WITNESSES UNIT**

Rule 34 provides that a Victims and Witnesses Unit be set up under the authority of the Registrar to "recommend protective measures for victims".

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161. *Id.* at 99.
162. *Id.* at 100.
163. *Id.* at 101 (emphasis added).
164. Appendix A, *infra.*
and witnesses” and to “provide counselling and support for them, in particular in cases of rape and sexual assault.”

B. RULES FOR PHYSICAL PROTECTION AND PSYCHOLOGICAL WELL-BEING

Several rules provide for specific protective measures: Rule 40 states that during the conduct of an investigation “the Prosecutor may request any State to take all necessary measures to prevent the escape of a suspect or any accused, injury to or intimidation of a victim or witness, or the destruction of evidence.” Rule 69 deals with the protection of victims and witnesses during the production of evidence, and states that “the Trial Chamber may 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.”

Some of the rules contain broad provisions, for example, about the “interests of justice,” which could imply protections for victims and witnesses. For example, Rule 53(B), on Nondisclosure of Indictment, provides that

A Judge or Trial Chamber may, in consultation with the Prosecutor, also order that there be no public disclosure of an indictment, or part thereof, or of any particular document or information, if satisfied that the making of such an order is in the interests of justice.

Several rules combine protection of the physical safety and psychological well-being of victims and witnesses. Rule 75 provides for protection of victims and witnesses in the proceedings before trial chambers, allowing that a judge or Trial Chamber may take measures for the privacy and safety of victims and witnesses, including closed sessions, one-way closed circuit television, keeping identities from the public, and controlling the manner of questioning “to avoid any harassment or intimidation.” Rule 79 gives the Trial Chamber discretion to exclude the press and the public from trial proceedings to protect the “safety, security or nondisclosure of the identity of a victim or witness.”

The Rules also provide for the prevention of harassment of witnesses. Rule 77 states that “[t]he Chamber may, however, relieve the witness of the duty to answer, for reasons which it deems appropriate.” Rule 46 also

165. Id.
166. Id.
167. Id.
168. Id.
169. Id.
170. Id.
171. Id.
gives the Chamber power to sanction abusive behavior by counsel. We have concerns about the ability of the Chamber to remove a lawyer whose conduct harasses a victim or witness, since this issue is not specifically mentioned in Rule 76 or Rule 85 on cross-examination. Rule 98 gives the Trial Chamber discretion on questions of evidence and could be interpreted to empower the Chamber to question witnesses if the defense counsel harasses victims or witnesses.

Rule 80, Control of Proceedings, may include prevention of harassment of victim. The Rule allows the Trial Chamber to exclude a person if the accused has “persisted in disruptive conduct.”

II. THE RULE ON EVIDENCE IN CASES OF SEXUAL ASSAULT

Our group deliberated long and intensely about the delicate balance between the need for the elimination of gender-stereotypes, recognition of the coercive circumstances in which women were sexually assaulted in the former Yugoslavia, and fairness to the alleged perpetrator in allowing the presentation of a complete defense. After much discussion, we formulated our recommendations to provide for a strong presumption against the defense of consent. We emphasized the improbability that false charges would either be made or survive the investigative processes of the Tribunal. We believed that, in general, the coerciveness of the circumstances — detention, or the threat of force or deprivation — would preclude any defense of consent. But we stopped short of creating an absolutely irrebuttable presumption of force in all circumstances, because we could not deny that voluntary sexual relationships have occurred between enemies in war.

Thus we proposed that once a broad range of circumstances recognized as coercive has been shown, the presumption of coercion can be overcome and a defense of consent permitted only if the defendant can demonstrate at an in camera hearing that he can prove consent on evidence, independent of the victim’s testimony, that a sexual relationship not tainted by coercive circumstances occurred. This standard of proof is very exacting and, in our view, eliminates the defense of consent in all but the most unusual cases. This procedural requirement is intended to preclude harassment and retraumatization of victims.

The Tribunal’s first set of rules totally precluded the defense of consent. It drew criticism from a number of commentators and we learned that the Tribunal intended to reconsider Rule 96(ii) at its April 1994.

172. Id.
173. Id.
174. Id.
175. Id.
session. Fearing this would cause the Tribunal to abandon its presumption and, consistent with our original proposal, we again wrote to the Tribunal emphasizing the improbability of consent and the need for procedural safeguards to prohibit the harassment of victims and witnesses. We commended the sensitivity of the Tribunal judges to the needs of victims of sex crimes and recommended a procedure to allow the defense of consent in the extremely narrow circumstances where it might be relevant.

At their third plenary session, April 25 - May 5, 1994, the judges revised Rule 96(ii). The revision stated that evidence of consent is not admissible where the victim was subject to coercion, including actual or threatened psychological harm to the victim or another person. However, the judges did not formulate rules specifying that the burden of proof remains with the defendant or creating a procedure for strictly scrutinizing the admission of evidence on this defense. Establishing a rule and procedure which provide the maximum protection to the victim while still protecting the rights of the defendant continues to be a focus of our efforts.

The issue of how and whether to permit a defense of consent in these circumstances continues to be debated. In July 1994, the women's rights organization Equality Now proposed that the revision of Rule 96 be revoked, calling it "a misguided application of civil law to a military law context in which it has no meaning." The organization urged that the focus shift to the definition of war crimes. Equality Now argued further that "the very nature of rape as a war crime presupposes circumstances of war which make consent a non-issue," and the organization sent a letter expressing its concerns to the judges during the fourth plenary session. The Coordination for Women's Advocacy, based in Europe, sent a similar letter to the judges during the fifth plenary session. The Coordination's letter also argued that "a plea of consent in cases such as those with which the Tribunal is dealing will create a very real problem of confidence concerning the Tribunal process, not least among survivors of such crimes."

Two of the authors of this article argued for a revised version of Rule 96(ii) which would have required that an irrebuttable presumption of lack of consent arise when the victim was in custody, detention, or under comparable circumstances of coercion, or when the victim was under the legal age of consent. In all other circumstances, strict procedural safeguards would be applied, including provisions that 1) the defendant must make a motion to interpose the defense of consent during the pre-trial stage and the Tribunal must resolve the question at this stage; 2) the

176. Some commentators have noted that this is the only rule which was objected to so strenuously. In fact, it is the only rule thus far subject to any revision.

177. Letters from Equality Now and The Coordination for Women's Advocacy (on file with authors).
defendant should bear the burden of proof of consent given the inherently coercive circumstances and inequality between occupier and occupied; 3) to establish consent, the defendant must (a) negate the existence or impact of any of the coercive circumstances outlined in Rule 96(ii), and (b) demonstrate consent through objective evidence of affirmative speech or action of the victim, and 4) to prevent harassment, the defendant must establish the basis for his defense of consent using evidence other than the victim's testimony. We believe that although a legitimate defense of consent is exceedingly unlikely, allowing a strictly limited exception for this defense is important for the legitimacy of the Tribunal's process and will make it more relevant as a precedent — to other armed conflict situations and to "peacetime."

Efforts to establish an adequate rule which protects victims throughout the process and allows them the opportunity to testify if they freely choose to do so will continue. Options are being explored and further research conducted to ascertain the best possible approach to protect victims, witnesses, and the accused. As this journal goes to press, the fifth plenary session has completed additional revisions.178

III. CONTINUING CONCERNS

Issues which require continued monitoring by feminists include the investigation and interpretation of some of the rules on the conduct of investigations and trials as well as the implementation of protective mechanisms. The rules designed to screen out discrimination and harassment, particularly the rule concerning the defense of consent, must be carefully monitored. Although we are pleased that two of the Prosecutor's initial indictments have charged rape as a grave breach of the Geneva Conventions as well as a violation of the laws and customs of war and a crime against humanity, we are concerned that in applying an unreasonably high standard for torture across the board he has failed to recognize rape and other sexual abuse as torture.179 Several additional concerns warrant comment here:

A. THE U.N. MUST PROVIDE ADEQUATE SUPPORT FOR THE VICTIMS AND WITNESSES UNIT

A primary concern continues to be the lack of funding, staff, and other necessities for the Victims and Witnesses Unit, even though prosecution and investigation teams have begun work. Three indictments have been issued (against a total of twenty-one defendants). It is essential that the office is provided with necessary resources and other support so that it may

178. The revision of Rule 96(ii) is noted in Appendix A, infra.
179. See Copelon, supra note 34.
be fully operational as soon as possible. There are a number of open questions about the physical security and psychological protection of survivors and witnesses which make delayed establishment of the Victims and Witnesses Unit particularly critical.

B. LEGAL ADVOCACY FOR VICTIMS AND WITNESSES

The Victims and Witnesses Unit provides for counselling, but not for legal advice or representation. We hope that the "counselling" function includes legal aspects. Indeed, to ensure the effective representation and protection of the rights of survivors and witnesses throughout the process, we reiterate our recommendation that survivors and witnesses have legal counsel independent of the prosecutor's office. While we have faith in that office's integrity, professionalism, and commitment to victims and witnesses, we also recognize that in any prosecutorial process the interests of the prosecutor may differ from those of the victims and witnesses. In addition, in order to ensure the full right of victims to compensation, we would recommend a system similar to the French system — parti civil — allowing legal representation to the victim throughout the criminal process.

Rules 89 and 90 provide that only live testimony may be provided. Do these rules allow for the admission of any testimony, sworn or unsworn, from a victim or witness who has been killed before trial? There have been reports that witnesses have been killed and if the testimony is not allowed, there is an even greater incentive for a perpetrator to murder witnesses.

C. STAFFING THE TRIBUNAL AND TRAINING ALL PERSONNEL IN ISSUES OF GENDER-BASED CRIMES

Throughout the process of the creation of the Tribunal, we have advocated for gender parity in the selection of judges and personnel for the Prosecutor's office and the Registry. We continue to press for the hiring of women at all levels. For example, we have advocated for the appointment of a Deputy Prosecutor with experience in sex crimes. This is particularly important because sexual violence against women in war settings is an issue which must be explored with respect to every potential indictment. The effective prosecution of sexual violence cannot be relegated to a separate "sex crimes unit" as many prosecutor's offices in the United States have done. The appointment of women in these important offices can ensure that gender concerns are properly recognized and integrated throughout the Tribunal's work. A woman has recently been appointed at a high level within the Prosecutor's office, and another woman attorney serves as a legal adviser on gender issues. Although the

180. Appendix A, infra.
Prosecutor’s office has indicated its commitment to increasing the participation of women and people from the South, staff diversity remains a serious issue. It is imperative that women and people from diverse regions be hired in equal number so as to assure the integration of gender concerns in all aspects and stages of the investigative and trial process.

D. CONCERNS ABOUT CONVICTION AND POST-CONVICTION PHASE AND COMPENSATION FOR VICTIMS

The provision on compensation for injury to victims, Rule 106, is extremely weak. The current delegation of enforcement of judgments and claims for compensation to national tribunals runs the serious risk of allowing the Tribunal to abdicate responsibility at a particularly critical phase — when issues of restitution, compensation, and rehabilitation are considered. The strength of Rule 105 for the restitution of property is important and commendable, especially considering that reports have indicated that so much of the property lost was homes and personal effects. We argue that Rule 106 must be strengthened to an equal level. It is also significant that the rule on Judgments, Rule 88, only makes a reference to Rule 105 and ignores 106.181

Finally, the provision on the standards for granting pardon or commutation, Rule 125, mentions neither continuing threat of danger or trauma to the victims or witnesses nor the access of victims and witnesses to the process of making such decisions.

181. Id.
Appendix A: Excerpts from the Rules Of Procedure And Evidence

PART III: ORGANIZATION OF THE TRIBUNAL

Section 5: The Registry

Rule 34: Victims and Witnesses Unit

(A) There shall be set up under the authority of the Registrar a Victims and Witnesses Unit consisting of qualified staff to:

(i) recommend protective measures for victims and witnesses in accordance with Article 22 of the Statute; and

(ii) provide counseling and support for them, in particular in cases of rape and sexual assault;

(iii) due consideration shall be given, in the appointment of staff to the employment of qualified women.

PART IV: INVESTIGATIONS AND RIGHTS OF SUSPECTS

Section 1: Investigations

Rule 39: Conduct of Investigations

In the conduct of an investigation, the Prosecutor may:

(i) summon and question suspects, victims and witnesses and record their statements, collect evidence and conduct on-site investigations;

1. These excerpts contain only the rules most directly relevant to the prosecution of sex crimes and the protection of victims and witnesses.

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(ii) undertake such other matters as may appear necessary for completing the investigation and the preparation and conduct of the prosecution at the trial;

Commentary: How is the Victims and Witnesses Unit involved in the investigations described in (i)? Does “other matters” in (ii) include the involvement of Victims and Witnesses Unit?

Rule 40: Provisional Measures

In case of urgency, the Prosecutor may request any State:

(i) to arrest a suspect provisionally;

(ii) to seize physical evidence;

(iii) to take all necessary measures to prevent the escape of a suspect or any accused, injury to or intimidation of a victim or witness, or the destruction of evidence.

Commentary: Can the Victims and Witnesses Unit present an urgent situation to the Prosecutor? Is there a process for victim or witness or NGO to indicate an urgent situation to the Prosecutor? How is “urgency” defined? Is the Tribunal empowered to take any action on his own? Are there any enforcement mechanisms contemplated for requests which are ignored or denied? What is the process through which a state could object/dissent?

Rule 41: Retention of Information

The Prosecutor shall be responsible for the retention, storage and security of information and physical evidence obtained in the course of his investigations.

Commentary: What are the precautions to be taken for the protection of victims and witnesses?

Section 2: Of Counsel

Rule 46: Misconduct of Counsel

(A) A Chamber may, after a warning, refuse audience to counsel if, in its opinion, his conduct is offensive, abusive, or otherwise obstructs the proper conduct of the proceedings.
(B) A Judge or a Chamber may also, with the approval of the President, communicate any misconduct of counsel to the professional body regulating the conduct of counsel in his State of Admission or, if a professor and not otherwise admitted to the profession, to the governing body of his University.

Commentary: What constitutes "offensive, abusive or obstruct[ive]" conduct? Are there any other measures — e.g., removing ability to question from counsel conducting questioning in a harassing manner?

PART V: PRE-TRIAL PROCEEDINGS

Section 1: Indictments

Rule 47: Submission of Indictment by the Prosecutor

Commentary: Is there any role for the victim in preventing indictment from going forward? (Prevention of physical danger or psychological trauma?)

Rule 51: Withdrawal of Indictment (Prosecutor must get leave of Judge or Trial Chamber and must notify suspect or accused and counsel)

Commentary: What is the involvement of the victim?

Rule 53: Nondisclosure of Indictment

(B) A Judge or Trial Chamber may, in consultation with the Prosecutor, also order that there be no public disclosure of an indictment, or part thereof, or of any particular document or information, if satisfied that the making of such an order is in the interests of justice.

Commentary: Does "interests of justice" include the protection of victims and witnesses? Is there any consultation with victims and witnesses?

Section 2: Orders and Warrants

Rule 59: Failure to Execute a Warrant

Rule 61: Procedure in Case of Failure to Execute a Warrant

Commentary: Is there recognition that if a victim or witness cooperates and a warrant is prepared and the defendant is able to evade, there could be repercussions
against the complaining victim or witness? Have protective mechanisms for this circumstance been contemplated?

Rule 64: Detention on Remand

Upon his transfer to the seat of the Tribunal, the accused shall be detained in facilities provided by the host country, or by another country. The President may, on the application of a party, request modification of the conditions of detention of an accused.

Comments: What is the channel of communication if the victims or witnesses want greater security mechanisms for the accused?

Rule 65: Provisional Release

(B) Release may be ordered by a Trial Chamber only in exceptional circumstances, and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.

(C) The Trial Chamber may impose such conditions upon the release of the accused as it may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure his presence for trial and the protection of others.

Commentary: What is the channel of communication for the victims or witnesses about their perceptions of the danger the accused poses to them?

Section 3: Production of Evidence

Rule 66: Disclosure by the Prosecutor

(A) The Prosecutor shall make available to the defence [sic], as soon as practicable after the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought.

(B) The Prosecutor shall on request permit the defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.
Commentary: Can any evidence be withheld for the protection or privacy of the victims or witnesses (besides identity of the victim or witness, as provided for in Rule 69)?

Rule 67: Reciprocal Disclosure

(A) As early as reasonable, practicable, and in any event prior to the commencement of the trial:

(i) the Prosecutor shall notify the defence of the names of the witnesses that he intends to call in proof of the guilt of the accused and in rebuttal of any defence plea of which the Prosecutor has received notice in accordance with Sub-rule (ii) below;

(ii) the defence shall notify the Prosecutor of its intent to offer:

(a) the defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;

(b) any special defence . . . specify the names and addresses of witnesses . . .

Commentary: Can any evidence be withheld for the protection or privacy of the victims or witnesses?

Rule 69: Protection of Victims and Witnesses

(A) 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.

(B) 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.

Commentary: Who defines/monitors protection? Does this protection apply to defense witnesses (see Rule 67)?
Section 4: Depositions

Rule 71: Depositions (may be taken in "exceptional circumstances and in the interests of justice")

(C) If the motion is granted, the party at whose request the deposition is to be taken shall give reasonable notice to the other party, who shall have the right to attend the taking of the deposition and cross-examine the person whose deposition is being taken.

(E) The Presiding Officer shall ensure that the deposition is taken in accordance with the Rules.

Commentary: Should there be a specific limitation on offensive or harassing cross-examination questions specifically provided for in this rule?

PART VI: PROCEEDINGS BEFORE TRIAL CHAMBERS

Section 1: General Provisions

Rule 75: Protection of Victims and Witnesses

(A) A Judge or a Chamber may proprio motu, or at the request of either party, or of the victim or witness concerned, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.

(B) A Chamber may hold an ex parte (non-contradictoire) proceeding to determine whether to order:

(i) measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with him by such means as:

(a) expunging names and identifying information from the Chamber's public records;

(b) nondisclosure to the public of any records identifying the victim;
(c) giving of testimony through image- or voice-altering devices or closed circuit television; and

(d) assignment of a pseudonym;

(ii) closed sessions, in accordance with Rule 79;

(iii) appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.

(C) A Chamber shall, whenever necessary, control the manner of questioning to avoid any harassment or intimidation.

*Commentary:* Should (C) include language to allow the Chamber to remove the power to question from a lawyer whose conduct harasses a victim or witness?

Rule 77: Contempt of Court

(B) The Chamber may, however, relieve the witness of the duty to answer, for reasons which it deems appropriate.

*Commentary:* Do these reasons include the trauma to the witness of answering questions?

Rule 79: Closed Sessions

(A) The Trial Chamber may order that the press and the public be excluded from all or part of the proceedings for reasons 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.

(B) The Trial Chamber shall make public the reasons for its order.

*Commentary:* Can individual members of the public be excluded? (*Cf.* Rule 80).

Rule 80: Control of Proceedings
(A) The Trial Chamber may exclude a person from the courtroom in order to protect the right of the accused to a fair and public trial, or to maintain the dignity and decorum of the proceedings.

(B) The Trial Chamber may order the removal of an accused from the courtroom and continue the proceedings in his absence if he has persisted in disruptive conduct following a warning that he may be removed.

Commentary: Does removal of person "to maintain the dignity and decorum of the proceedings" include trauma to victims or witnesses?

Rule 81: Records of Proceedings and Evidence

Commentary: Do there need to be specific provisions about security?

Rule 85: Presentation of Evidence

(B) Examination-in-chief, cross-examination and re-examination shall be allowed in each case. It shall be for the party calling a witness to examine him in chief, but a Judge may at any stage put any question to the witness.

Commentary: Should there be limitations on the type of cross-examination here?

Rule 88: Judgment

(B) If the Trial Chamber finds the accused guilty of a crime and concludes from the evidence that unlawful taking of property by the accused was associated with it, it shall make a specific finding to that effect in its judgment. The Trial Chamber may order restitution as provided in Rule 105.

Commentary: The only provision for restitution is for property loss? What about for compensation, provision for rehabilitation, punitive damages?

Section 3: Rules of Evidence

Rule 89: General Provisions

(B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determi-
nation of the matter before it and are consonant with the spirit of
the Statute and the general principles of law.

(C) A Chamber may admit any relevant evidence which it deems
to have probative value.

(D) A Chamber may exclude evidence if its probative value is
substantially outweighed by the need to ensure a fair trial.

(E) A Chamber may request verification of the authenticity of
evidence obtained out of court.

Commentary: Do these rules allow for the admission of
any testimony (sworn or unsworn) from a victim or witness
who has been killed before trial? There have been reports
that witnesses have been killed and if the testimony is not
allowed, it is an even greater incentive to eliminate
witnesses.

Rule 90: Testimony of Witnesses

(A) Witnesses shall, in principle be heard directly by the Chamber.
In cases, however, where it is not possible to secure the presence
of a witness, a Chamber may order that the witness be heard by
means of a deposition as provided for in Rule 71.

Commentary: Is a deposition the only alternative to live
testimony? See commentary to Rule 89.

Rule 93: Evidence of Consistent Pattern of Conduct

Evidence of a consistent pattern of conduct may be admissible in
the interests of justice.

Commentary: What may be admitted? Could unsworn
testimony come in here (e.g., where witnesses were killed)?

Rule 96: Evidence in Cases of Sexual Assault

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;²

(iii) before evidence of the victim’s consent is admitted, the accused shall satisfy the Trial Chamber that the evidence is relevant and credible.³

(iv) prior sexual conduct of the victim shall not be admitted in evidence.

Rule 98: Power of Chambers to Order Production of Additional Evidence

A Trial Chamber may order either party to produce additional evidence. It may itself summon witnesses and order their attendance.

Section 4: Sentencing Procedure

Rule 100: Pre-sentencing Procedure

If a Trial Chamber finds the accused guilty of a crime, the Prosecutor and the defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence.

Rule 104: Supervision of Imprisonment

All sentences of imprisonment shall be supervised by the Tribunal or a body designated by it.

Rule 105: Restitution of Property

(A) After a judgment of conviction containing a specific finding as provided in Sub-rule 88(B), the Trial Chamber shall, at the request of the Prosecutor, or may, at its own initiative, hold a special hearing to determine the matter of the restitution of the

². Rule 96(ii) was revised during the Third Session, 25 April - 5 May 1994. The revisions made at this session are noted in italics.
³. Section 96(iii) was added during the judges’ Fifth Plenary Session, held in January 1995.
property or the proceeds thereof, and may in the meantime order such provisional measures for the preservation and protection of the property or proceeds as it considers appropriate.

(B) The determination may extend to such property or its proceeds, even in the hands of third parties not otherwise connected with the crime of which the convicted person has been found guilty.

(C) Such third parties shall be summoned before the Trial Chamber and given an opportunity to justify their claim to the property or its proceeds.

(D) Should the Trial Chamber be able to determine the rightful owner on the balance of probabilities, it shall order the restitution either of the property or the proceeds as appropriate.

(E) Should the Trial Chamber not be able to determine ownership, it shall notify the competent national authorities and request them so to determine.

(F) The Registrar shall transmit to the competent national authorities any summonses, orders and requests issued by a Trial Chamber pursuant to Sub-rules (C), (D), and (E).

Rule 106: Compensation to Victims

(A) The Registrar shall transmit to the competent authorities the States concerned the judgment finding the accused guilty of a crime which has caused injury to a victim.

(B) Pursuant to the relevant national legislation, a victim or persons claiming through him may bring an action in a national court or other competent body to obtain compensation.

(C) For the purposes of a claim made under Sub-rule (B) the judgment of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury.

PART IX: PARDON AND COMMUTATION OF SENTENCE

Rule 124: Determination by the President
The President shall, upon such notice [by the State of the convicted person], determine, in consultation with the Judges, whether pardon or commutation is appropriate.

Rule 125: General Standards for Granting Pardon of Commutation

In determining whether pardon or commutation is appropriate, the President shall take into account, *inter alia*, the gravity of the crime or crimes for which the prisoner was convicted, the treatment of similarly-situated prisoners, the prisoner’s demonstration of rehabilitation, as well as any substantial cooperation of the prisoner with the Prosecutor.
Appendix B: Gender Justice And The Constitution Of The War Crimes Tribunal Pursuant To Security Council Resolution 808

A Memorandum Prepared by the International Women's Human Rights Clinic of CUNY Law School*

The undersigned fully endorse Security Council Resolution 808 calling for the establishment of a war crimes tribunal to prosecute "persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991" and calling for a report recommending the "effective and expeditious implementation" of a tribunal by April 22, 1993. We condemn all the atrocities committed by all sides in this war and note the particularly systematic and mass nature of those committed by Serbian forces.

Having studied the January 1993 Report of the Commission of Experts and the proposals submitted to date, we are concerned, however, that the effective condemnation, prosecution and redress of gender-specific crimes, particularly rape, forced prostitution, and forced pregnancy, requires more considered attention as well as the equal participation of women in every aspect of the process. We note that despite the fact that rape and forced prostitution have been previously recognized as war crimes, they have rarely been effectively prosecuted. This results, in part, from the fact that the rape and sexual abuse of women are so characteristic of war that nations are loathe to condemn them for fear of condemning their own troops. It also results from the tendency, despite explicit sanction and short-lived outrage, not to view rape as among the gravest offenses against human rights and humanitarian law. Thus we are concerned that in establishing the jurisdiction of the tribunal to prosecute war crimes and crimes against humanity arising out of the conflict in the former Yugoslavia-

* This Memorandum was widely circulated among women's groups and was submitted to the Secretary-General of the United Nations, the United Nations Commission of Experts, the United Nations Security Council, and the United Nations Office of Legal Counsel. Copies of the original can be obtained from the International Human Rights Clinic of CUNY Law School, 65-21 Main Street, Flushing, NY, 11367.
via, that rape be identified in its two-fold aspects—as a crime against women and as a tactic of ethnic cleansing.

The establishment of an ad hoc war crimes tribunal to try violations committed in the former Yugoslavia is thus an occasion not only to assure full justice to women in the former Yugoslavia who have been and continue to be brutalized in sex-specific ways, but also to correct the historic trivialization of the abuse of women in war.

To this end, we specifically call upon all relevant parties to embody the following principles and concerns in the constitution of the war crimes tribunal:

1. That rape, forced prostitution and forced pregnancy be viewed as crimes against humanity and grave breaches of the laws of war whether or not they are associated with the abominable practice of “ethnic cleansing.” Where rape, forced prostitution and forced pregnancy are vehicles of ethnic cleansing, they are genocidal crimes and, as such, constitute the “grave breaches” of humanitarian law as well as crimes against humanity. But it must be likewise recognized and charged that apart from ethnic cleansing, rape, forced prostitution and forced pregnancy constitute war crimes and crimes against humanity because they are crimes of gender hatred, violence, discrimination, and dehumanization perpetrated against women as a class.

—Within the framework of “grave breaches” against the civilian population recognized by the Fourth Geneva Convention, rape, forced prostitution and forced pregnancy are not simply crimes against “honor,” but also crimes of violence. They constitute forms of “willful torture and inhuman treatment” and they “willfully caus[e] great suffering or serious injury to body or health.” Rape in detention has been recognized as a form of torture, often among the most debilitating. Moreover, these abuses are intended to be and frequently are devastating to women’s physical and mental health as well as life-threatening. They cause physical suffering, injury, incapacitation, infection with HIV and sexually transmitted diseases, sterility, and involuntary pregnancy and maternity, all of which produce profound emotional suffering and trauma as well as terrible economic and social dislocation and hardship. Every act of rape in war -- whether a consequence of indiscipline, retaliation, or genocidal policies -- is a “grave breach,” a principle that has been recently reaffirmed by international scholars and the International Committee of the Red Cross.
—Sexual and reproductive abuses of women, when they are mass or systematic, should also be prosecuted as “crimes against humanity.” They qualify, on the one hand, as egregious crimes of violence against women as members of the civilian population, as recognized in Allied Control Council Law No. 10. On the other hand, they qualify as persecution-based offenses because they constitute discrimination on the basis of gender. The concept of “crimes against humanity” is an evolving one. The previous lack of regard for women as suffering wrongs and having rights as a group explains the failure heretofore to mention sex along with religious, ethnic racial and other identifiable groups in the standard definition of persecution-based “crimes against humanity.” The gender-specific inhumanity of sexual and reproductive abuse and their potentially life-long effect on women does not depend on their being an aspect of ethnic cleansing as the experience of the “comfort” women forced into prostitution by the Japanese and other women raped as part of the plunder of war demonstrate.

2. That rape and forced prostitution be separately identified as crimes to be investigated and prosecuted by the Tribunal. Although crimes involving the sexual abuse of women are implicit in the more general categories of “grave breach” and “crimes against humanity,” they should also be identified separately in the statement of the substantive jurisdiction of the war crimes tribunal. The explicit recognition of these crimes is essential to assuring their full prosecution as well as to undoing the legacy of disregard.

3. The offense of forced pregnancy should also be separately identified in order to assure its full investigation and separate condemnation both as a crime of gender and a crime of genocide. Forced pregnancy is always a potential and foreseeable consequence and is, therefore, an ever-present aspect of the crime of rape. In the instant conflict, there are reports that rape, particularly of Muslim women in Bosnia, has been committed with the expressed intent to impregnate the women, to mark the rape upon their bodies and lives, to force them to suffer pregnancy and/or childbirth, to bear part-Serbian babies, and to further humiliate them and threaten their capacity to remain in their communities and bear children voluntarily in the future. This must be recognized as a distinct or aggravated offense against the lives, integrity and dignity of women as humans at the same time as it is a tactic of ethnic cleansing.

4. That there be full and equal participation of women at every level and in every aspect of the Tribunal’s functions. The Secretary General has
recognized the importance of gender parity at every level of UN functioning. The creation of a War Crimes Tribunal provides a fresh occasion to put that principle into operation. Moreover, the nature of the Tribunal’s function, the prevalence of gender-specific violations in this war, and the pervasiveness and subtlety of the gender-specific issues presented (as only partially illustrated by this list of concerns) adds urgency to the implementation of gender parity.

Most immediately, given their significance in the process of establishing the Tribunal, the presently all-male Commission of Experts must have its membership supplemented by an equal number of women and the Office of Legal Counsel, and the Security Council, should likewise assure the equal participation of women at all phases of the shaping of their proposal for the Tribunal.

5. To encourage victims of sexual and reproductive violence to lodge and pursue claims and to ensure the sensitivity of their treatment, all investigatory, prosecutorial and judicial personnel should have gender-sensitivity training and there should be established a special sex crimes unit staffed primarily by women experienced in the particularities of proving these offenses and mitigating trauma to the victims. Experience in many countries throughout the world has made it clear that without a receptive, sensitive process, women and other victims of sexual abuse will not come forward, and, if they do, they may be further traumatized by the experience. Given the prevalence of rape and sexual abuse in the present conflict and the risks of violent retaliation as well as public shaming involved for the women who come forward, it is critical that all personnel involved in the effort to bring perpetrators to justice be trained in understanding these crimes and their effects from the perspective of women affected. This requires both gender and culturally specific sensitization. In addition, the establishment of women’s police precincts in Brazil and of special multi-disciplinary sex-crimes units in prosecutor’s offices in a number of countries suggest models for minimizing harm and assisting victims to reconstruct their lives. These approaches have been endorsed, inter alia, in the proposed UN Declaration on Violence Against Women and should be explicitly provided for in this context.

The necessity of establishing immediately an adequately resourced as well as gender-balanced and gender/culturally-sensitive prosecutorial agency to do the necessary fact-finding and preparation of cases for prosecution cannot be under emphasized.

6. In accordance with the Covenant on Political and Civil Rights, the procedures of the tribunal must strike a balance between the rights of the accused and respect for the integrity of the victims. It is important that the
procedures and evidentiary rules devised for prosecuting these offenses be constructed with the specific context in mind. Use of existing penal statutes—such as those applicable in the former Socialist Republic of Yugoslavia—are an instructive source for the jurisdiction of the Tribunal particularly to the extent that they recognize international law and preclude claims that persons will be tried for conduct which was not previously criminal. But most domestic legislation is defective in significant respects where issues of gender-specific violence and particularly rape and sexual abuse is concerned. For this reason, it is crucial that the substantive jurisdiction and procedures of this Tribunal be constructed in light of international principles, taking into account the recent international work designed to improve the effectiveness of state responses to gender-based violence.

Many of those participating as prosecuting or supporting witnesses have been recently and grossly traumatized by the conduct of those accused. Rape and sexual abuse (whether of women or men) are particularly shattering events. While for some, public accusation of the aggressor will be an important and empowering event, for others it will be impossible or exacerbate the trauma suffered. Accordingly, certain measures, consistent with the rights of the accused, are in order to provide for the fair prosecution of rape and minimize the possibility of further traumatization. For example:

—victims should not be publicly identified without their consent.

—where it is impossible to shield the victims’ identity, or where the victims are not able to appear in public, the proceedings should be held in camera with safeguards to prevent abuse.

—victims should be able to testify without face-to-face confrontation with the defendant, while preserving the defendant’s rights through video and one-way observation methods.

—the inherently coercive circumstances of the crimes, the tenacity of sexist assumptions, and the need to safeguard the mental integrity and privacy of victims of rape and sexual abuse should be recognized in developing appropriate evidentiary rules, including but not limited to rules forbidding the introduction of evidence of the victim’s prior sexual conduct or reputation, restricting the consent defense, and controlling cross-examination to prevent abuse of the witnesses as well as misleading and inflammatory innuendo.
—expert testimony on the traumatic effects of rape and sexual abuse should be permitted but not required.

—victims should be entitled to their own counsel or recognized advocate to assist their participation and to protect their rights and interests that may be distinct from that of the prosecution.

7. The structure of the War Crimes Tribunal should accommodate prosecution of both those who directly perpetrate the crimes and those who are guilty though command or political responsibility. As in the post-World War II tribunals, it is critical to provide for the prosecution of both the direct actors and those with overall responsibility for the atrocities, i.e. of those who ordered, encouraged, assisted, condoned or failed to take effective measures to prevent them. Notwithstanding the difficulty of bringing both classes of perpetrators to justice, the issuance and pendency of indictments is important to vindicate victims and to, at the least, constrict the lives and liberty of the accused who evade the Tribunal’s process.

8. The War Crimes Tribunal must be established consistent with the principle that there is no statute of limitations for war crimes and crimes against humanity. Statutes of limitations are precluded with respect to offenses of this dimension in order to prevent wrongdoers from escaping justice. With crimes of this nature, the traumatization of the victims may also delay the very bringing of charges, as it can take years, if not decades, for women to be able to remember such events or to overcome the shame that they inflict. Thus, it is critical to provide that the War Crimes Tribunal and its subsidiaries must continue for a substantial period of years and that a continuing mechanism for receiving and prosecuting complaints or referring them and, thereafter, be empowered to refer cases to appropriate national tribunals under circumstances that guarantee fair and just implementation of international law.

9. That the War Crimes Tribunal be mandated to consider claims for compensation, including rehabilitation, of victims. International law guarantees compensation to victims, yet the same problem that requires establishment of an international body to prosecute criminally—the hostility and unreliability of national tribunals—also requires that the system established by the tribunal provide for the award of compensation to victims. This does not mean that the Tribunal itself must consider claims for compensation, but rather that auxiliary mechanisms be explicitly created to fulfill this function.
10. That the Security Council establish a fund for the benefit and compensation of victims of war crimes and crimes against humanity through seizing the assets of the aggressor governments and political entities and empowering the Tribunal to order the forfeiture of property and payment of fines. Adequate compensation to victims to enable them to reconstruct their lives is a key aspect of doing justice. Funds for this purpose can be acquired through different means, drawing upon the precedents established in the post-World War proceedings and the recently constituted Compensation Commission set up by the United Nations to compensate victims of the aggression against Kuwait.