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Shared Dilemmas: Justice for Rape Victims Under International Law and Protection for Rape Victims Seeking Asylum

By LINDSAY PETERSON

I. Introduction

Duško Tadić was a member of a prominent Serb family in the former Yugoslavia, whose nationalistic ideals earned him a leadership position in the Serb Democratic Party.1 During April and May of 1992, Tadic and his troops aided in the hostile takeover of the Prijedor Municipality, as part of the “Greater Serbia Plan” to eliminate all non-Serbs (Muslims and Croats) from Prijedor.2

In 1995, Tadić became the first defendant indicted before the International Criminal Tribunal for the former Yugoslavia for allegedly participating in, aiding and abetting rape, gang rape, sexual mutilation, and other sexual violence at the detention camps where he was assigned.3 Witnesses described being raped by Tadić and forced, under Tadić’s command, to be naked with other detainees, to perform sex acts on other detainees, and to brutally sexually mutilate other detainees.4 What would have been the first case in history where rape was prosecuted as a war crime failed, because the key witness refused to testify due to violent threats made against her and

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2. ICTY homepage, supra note 1.

3. Lehr-Lehnardt, supra note 1.

4. Id.
Although Tadić was sentenced to a maximum of twenty years imprisonment based on his conviction for crimes against humanity and war crimes, Tadić's rape victims were left without justice.  

Rodi Alvarado Peña is a Guatemalan native who married a Guatemalan army officer when she was sixteen. Her husband repeatedly raped her, attempted to abort their child by kicking her in the spine, tried to cut off her hands with a machete, and kicked her in the genitals. He tried to intimidate her by bragging about his ability to kill innocent civilians with impunity. Rodi continually sought help and protection from the Guatemalan government, but her complaints were ignored and the abuse continued. Even when these violent attacks took place in public, the police refused to help her. In 1999, Rodi fled Guatemala and applied for asylum in the United States. Despite the court's findings that Rodi was a credible witness and suffered the alleged abuse, the Board of Immigration Appeals denied her application for asylum because they found that the abuse she suffered resulted from personal circumstances and had no larger societal relevance.  

These two horrific stories of rape and gender-related violence highlight a common dilemma in international law and United States domestic refugee law: how to adequately protect and provide justice for rape victims. Admittedly, the first place rape victims should seek justice is within their home countries; but when one's own country either cannot or will not prosecute these crimes, women are forced to turn to international or refugee law.  

Rape is prohibited in every major domestic legal system and has long been a violation of customary international law, yet it is rarely prosecuted in either context. The lack of political will to prosecute

5. Id. at 325-36.
6. See Id. at 326.
8. Id.
9. Id.
10. Id.
11. Id.
12. Id.
13. Id. at 207, 221.
rape as a violent crime stems from the historical conception of rape as a crime against honor rather than one of violence.\textsuperscript{15} This theory is rooted in the tradition that considers women property of men, and thus rape was thought of as a violation of a man’s property right in his woman.\textsuperscript{16} Over time, this theory evolved, albeit insufficiently, to recognize that rape is a crime against a woman’s own honor, rather than her husband’s.\textsuperscript{17} It was not until the 1990s, when women became actively involved in the international community through lobbying and occupying leadership positions, that this warped idea of rape as a crime against honor was reevaluated and modified to recognize rape as a violent crime.\textsuperscript{18} Despite advances in international recognition of the violent nature of rape, “[w]omen’s lives remain undervalued such that the application of gender law at the international level continues to be limited and selective, and the persistence and proliferation of gender violence remains insufficiently addressed.”\textsuperscript{19}

The first part of this paper will discuss the successes and failures of rape prosecutions in ad hoc international criminal war tribunals. Specifically, this section will highlight some of the landmark cases before the International Criminal Tribunal for the former Yugoslavia (hereinafter, “ICTY”) and the International Criminal Tribunal for Rwanda (hereinafter, “ICTR”), and discuss how each case influenced the newly developing jurisprudence in the area of international rape prosecution. The second part will outline the formation of the International Criminal Court (hereinafter, “ICC”) and look at how lessons learned from the ICTY and ICTR in prosecuting rape have been incorporated in the Rome Statute. The third part will consider the current status of U.S. refugee law and evaluate the common problems rape victims face when trying to establish asylum based on prior incidents of rape. The fourth part will contemplate the shared dilemmas in international law and U.S. refugee law related to the protection of and justice for rape victims. The paper will conclude by discussing recommendations for improvement in both areas of law to ensure that rape victims are afforded the protection and justice they deserve.

\textsuperscript{15} Adrienne Kalosieh, Note, \textit{Consent to Genocide?: The ICTY’s Improper Use of the Consent Paradigm to Prosecute Genocidal Rape in Foca}, 24 \textit{WOMEN’S RIGHTS L. REP.} 121, 122 (2003).
\textsuperscript{16} \textit{Id.}
\textsuperscript{17} \textit{Id.}
\textsuperscript{18} Lehr-Lehnardt, \textit{supra} note 1, at 322.
\textsuperscript{19} Mitchell, \textit{supra} note 14.
II. Prosecuting Rape in Ad Hoc Tribunals

A. The International Criminal Tribunal for the Former Yugoslavia

After World War II, Dictator Josip Tito united the republics of Serbia, Croatia, Slovenia, Bosnia-Herzegovina, Macedonia, and Montenegro to create the nation of Yugoslavia.\textsuperscript{20} Ethnic tension immediately began building in the newly unified nation and intensified in 1980 with Tito's death and the fall of the Soviet Union.\textsuperscript{21} In the late 1980s and early 1990s, Croatia, Slovenia, and Bosnia declared independence and Bosnian Serbs initiated a policy of ethnic cleansing to rid the nation of Croats and Muslims.\textsuperscript{22} Non-Serbs were subjected to internment, torture, forced sterilization, forced pregnancy, and rape.\textsuperscript{23} Sexual violence against women was not just a byproduct of this conflict; it was used as a deliberate and official tool of war.\textsuperscript{24}

The United Nations Security Council established the ICTY in 1993 to prosecute grave breaches of the Geneva Conventions, violations of laws and customs of war, genocide, and crimes against humanity that had occurred in the territory since 1991.\textsuperscript{25} Upon learning of the atrocities committed in the former Yugoslavia, members of the international community were shocked and horrified, and they demanded that the United Nations take action.\textsuperscript{26} Unlike the tribunals established at Nuremburg and Tokyo after World War II, the ICTY prosecuted criminals on all sides of the conflict.\textsuperscript{27} Furthermore, it was the first ad hoc tribunal in history to give special attention to gender-based crimes and to prosecute rape.\textsuperscript{28}


\textsuperscript{21} Id.

\textsuperscript{22} Id.

\textsuperscript{23} Id.

\textsuperscript{24} Id.

\textsuperscript{25} Id. at 504.

\textsuperscript{26} See JUDITH G. GARDAM & MICHELLE J. JARVIS, WOMEN, ARMED CONFLICT AND INTERNATIONAL LAW 208-09 (Kluwer Law International 2001).

\textsuperscript{27} ASTRID AAFUES, GENDER VIOLENCE: THE HIDDEN WAR CRIME 97 (Anne Tierney Goldstein & Margaret A. Schuler eds., Women, Law & Development International 1998).

\textsuperscript{28} Id. at 97-98.
In May 1996, Duško Tadić became the first defendant to be prosecuted in the ICTY. In a historic decision, the ICTY prosecutor used existing international law to indict Tadić on charges of rape and sexual violence, among other crimes, as war crimes and crimes against humanity. Although the prosecutor was forced to drop the rape charges when the key witness refused to testify, the Tadić case was not a complete failure for gender-related criminal prosecution because it proved that it is legally possible to charge war criminals with rape under international law.

The ICTY continued to build precedent for prosecuting rape under international law in 1998 in the Čelebici case, based on crimes committed by four soldiers at the Čelebici prison camp in Bosnia. Specifically, Hazim Delić, a worker in the prison camp, was charged and convicted of torture, based on witness testimony from two female detainees whom he raped. Additionally, the Čelebici trial chamber established that superiors may be held criminally liable for failing to adequately train, monitor, supervise, control and punish subordinates who commit rape.

Just one month after the Čelebici decision, the ICTY rendered its judgment in the Furundžija case. The defendant, Furundžija, was a member of a special military police unit of the Croatian Defense Council who was involved with the rape and interrogation of a civilian Bosnian woman. Furundžija verbally interrogated the victim while his cohorts raped her orally, vaginally, and anally, with a group of laughing soldiers standing by. Although Furundžija never actually touched the victim and was not superior to the men who did, he was still convicted of rape (as torture and a war crime) due to the role he played in facilitating the rape and allowing it to continue.

29. ICTY homepage, supra note 1.
30. Lehr-Lehnardt, supra note 1, at 325.
31. Id. at 326.
33. Id. at 322-24.
34. Id. at 327.
36. Symposium, supra note 32, at 327.
37. Askin, supra note 35, at 18.
38. Id.
Moreover, the Furundžiša case established that the rape of a single woman is a serious violation of international law and can be prosecuted in an international criminal court.\textsuperscript{39} In February 2001, the ICTY took another important step in solidifying precedent and further developing case law in the area of gender-related crimes when the Kunarac trial chamber handed down its judgment.\textsuperscript{40} The accused were members of the military who took part in the takeover and detention of civilians in the town of Foća, Bosnia.\textsuperscript{41} The judges found that the defendants took women and girls (who had typically already been raped and gang-raped) from the detention camps and kept them captive in their own private homes as sex slaves.\textsuperscript{42} The indictment in the Kunarac case focused exclusively on gender-related crimes and, for the first time, defendants were convicted of rape as a crime against humanity.\textsuperscript{43}

While the ICTY made significant strides in advancing the jurisprudence related to rape prosecutions under international law, the tribunal found itself crippled by many procedural problems specific to the crime of rape.\textsuperscript{44} One of the chief problems the prosecutor faced was ensuring the presence of key witnesses at trial.\textsuperscript{45} Because of the nature of rape, victim-witnesses play a critical role in the prosecutor's cases, as there is rarely any other evidence of the crime.\textsuperscript{46} However, many witnesses refused to testify or would suddenly back out because of fear of intimidation and retaliation by friends, family, and allies of their attackers.\textsuperscript{47} Some victim-witnesses felt particularly pressured not to testify, as their attackers still lived in the same community as they did.\textsuperscript{48} Even though the ICTY did offer witness protection, the protection ended with the trial's conclusion, and thus many witnesses remained unwilling to testify.\textsuperscript{49} While the ICTY clearly had some successes, it also highlighted the problems that needed to be solved to enable the successful prosecution of rape

\textsuperscript{39} Symposium, supra note 32, at 332.
\textsuperscript{40} Askin, supra note 35, at 18.
\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{43} Id.
\textsuperscript{44} See Phelps, supra note 20, at 507-08.
\textsuperscript{45} Id. at 507.
\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} Aafjes, supra note 27, at 99.
in international tribunals.

B. The International Criminal Tribunal for Rwanda

Rwanda is one of the world’s poorest countries, and one of the most densely populated. Two major ethnic groups, the Hutu and the Tutsi, lived together in relative peace until ethnic tensions erupted in April 1994. Between April and June approximately one million Rwandan men, women, and children were murdered as part of a systematic plan to rid Rwanda of the Tutsi minority. In addition, the perpetrators of the Rwandan genocide used rape as a weapon of terror and degradation, and reports estimate that between 250,000 and 500,000 women were raped during this three-month period.

On November 8, 1994, the United Nations Security Council created the ICTR to render justice, restore peace, and establish the historical truth of what happened in Rwanda in 1994. Much like the ICTY, the tribunal’s subject matter jurisdiction is limited to the prosecution of genocide, crimes against humanity, and violations of Article 3 of the Geneva Convention. The ICTR’s jurisdiction is further limited to crimes committed by Rwandans or non-Rwandans within Rwanda, or by Rwandans in neighboring countries. Finally, the tribunal’s jurisdiction is limited temporally to crimes committed between January 1, 1994 and December 31, 1994.

The ICTR’s first judgment in Prosecutor v. Akayesu is often cited as the tribunal’s most groundbreaking decision. Jean-Paul Akayesu’s original indictment alleged twelve counts of war crimes,
crimes against humanity and genocide for extermination, murder, torture, and cruel treatment committed against Tutsis in Taba, a commune in Rwanda where he served as mayor. However, the questioning of prosecution witnesses by the ICTR judges revealed evidence of sexual violence, and therefore the prosecutor amended Akayesu's indictment to include rape charges. The Trial Chamber noted that there was no precise definition of rape in international law, and thus defined rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive." On September 2, 1998, the ICTR convicted Akayesu of rape as an element of genocide and as a crime against humanity. For the first time in history, an international criminal tribunal explicitly recognized rape as an instrument of genocide, where it is committed with the specific intent to destroy a particular group.

In a series of subsequent cases, the ICTR both strengthened and weakened the precedent established in the Akayesu case. First, in the Gacumbitsi case, the Trial Chamber found the defendant guilty of rape as a crime against humanity, based upon a finding that he had incited others to rape. In its opinion, the Court broadened the definition of rape to include penetration of the sexual organs of the victim by that of an aggressor or by a foreign object. Soon thereafter, the ICTR issued its judgment in the Kayishema case, finding the two defendants guilty of rape as an instrument of genocide, thereby strengthening and building upon the foundation previously set in Akayesu.

After Kayishema, the ICTR began to retreat slightly from the vigorous prosecution of rape as an instrument of genocide and as a crime against humanity. For example, in the Musema case, the Appellate Court overturned the Trial Chamber's conviction of rape as a crime against humanity. Although the Court found the victim

60. Oosterveld, supra note 58.
61. Askin, supra note 35, at 17.
62. Id.
63. Milne, supra note 53, at 117.
64. See Id. at 118-25.
65. Id. at 118.
66. Id.
67. Id. at 119.
68. See Id. at 118-25.
69. Id. at 120.
to be credible generally, it found that the prosecutor had not established the rape allegations beyond a reasonable doubt because of the inconsistencies in the victim’s statement, coupled with the lack of any other corroborating evidence.\textsuperscript{70} In the \textit{Muvunyi} case, the prosecutor was forced to drop the rape charges because of the inability to locate some prosecution witnesses and the refusal of other witnesses to testify.\textsuperscript{71} Finally, in the \textit{Serushago} case, the ICTR prosecutor indicated a discouraging lack of political will to prosecute rape.\textsuperscript{72} The defendant, Omar Serushago, was prepared to plead guilty to genocide, murder, extermination and torture as crimes against humanity, but he refused to plead guilty to rape.\textsuperscript{73} In an effort to ensure a conviction, the Prosecution decided to drop the charge of rape in exchange for a guilty plea on the other four counts.\textsuperscript{74}

\textbf{C. Combined Successes and Failures}

The experiences of prosecutors in the ICTY and ICTR have highlighted the principal problems in prosecuting rape in ad hoc war tribunals. First, the failure to promptly investigate alleged rapes has proven fatal to many cases because without a timely investigation, the factual record remains void of any evidence of rape, and thus the prosecutor has a skewed view of the individual defendant’s crimes.\textsuperscript{75} This slow investigation leads to fewer initial indictments for rape and weaker evidence to support rape allegations.\textsuperscript{76} Second, the lack of female staffing and personnel experienced in dealing with victims of gender violence leads some women to refrain from reporting rape, causing fewer indictments and fewer prosecutions for rape.\textsuperscript{77} Finally, the disparities that exist between the demands of the legal system and the interests of rape victims discourage many victims from seeking justice under international law.\textsuperscript{78} Whether it be the inadequacy of the witness protection unit, the prosecutor’s disregard of the victims’ emotional well-being, or the frustration victims feel when trial procedure prevents them from telling their story in court, it is clear

\begin{itemize}
  \item \textsuperscript{70} \textit{Id.}
  \item \textsuperscript{71} \textit{Id.} at 121.
  \item \textsuperscript{72} \textit{Id.} at 125.
  \item \textsuperscript{73} \textit{Id.}
  \item \textsuperscript{74} \textit{See Id.}
  \item \textsuperscript{75} Wood, supra note 51, at 302-04.
  \item \textsuperscript{76} \textit{See Id.} at 304.
  \item \textsuperscript{77} \textit{See Id.} at 305.
  \item \textsuperscript{78} \textit{Id.} at 309-11.
\end{itemize}
that the failure of the tribunals to meet victims' expectations prevents others from reporting their rape at all.99

In spite of difficulties the prosecutors in the ICTY and ICTR faced in convicting defendants of rape, the tribunals did develop important precedent for future rape prosecutions under international law.80 In particular, these ad hoc tribunals broadened the definition of crimes against humanity and genocide to include rape; recognized rape as a specific tool of warfare rather than an unfortunate byproduct of armed conflict; and succeeded in appointing women to high-level leadership positions within the tribunals.81 The various cases before the tribunals confirmed that both males and females can be raped; that one can be convicted of rape without being the physical perpetrator; that superiors can be held criminally responsible for rapes committed by others under their supervision; that rape includes penetration committed using foreign objects; and that the rape of a single victim can give rise to a conviction for war crimes.82

The ICTY and ICTR established important procedural rules applicable to international rape prosecutions as well.83 The tribunals developed special procedures to protect victims of gender-based crimes such as: allowing victims to speak to an investigator with whom they feel comfortable; allowing victims to use pseudonyms and have their voices or images altered in order to protect their identity; and allowing some victims to testify via deposition.84 The courts also prohibited evidence of the victims' prior sexual conduct, eliminated consent as a defense in any case where coercion is shown, and ruled that no corroboration of rape victims' testimony is required for a conviction.85 In sum, the cases brought before the ICTY and ICTR highlighted both the suitability and the incompatibility of prosecuting rape in international criminal tribunals.

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79. See Id.
80. See Mitchell, supra note 14, at 239-40.
81. Id. at 240.
82. Askin, supra note 35, at 19.
83. See Aafijes, supra note 27, at 98-100.
84. Id.
85. Id.
III. Formation of the International Criminal Court

A. Establishment and Jurisdiction

The United Nations General Assembly originally delegated the task of creating an International Criminal Court (hereinafter, “ICC”) to the International Law Commission in 1948. In 1995, the General Assembly created a Preparatory Committee to continue the International Law Commission’s work and prepare a consolidated text. However, the United Nations did not adopt a draft text on the establishment of an international criminal court until approximately 1998. When governments and organizations from around the world convened in Rome on July 17, 1998, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court adopted the Rome Statute, thereby establishing the ICC.

The Rome Statute was put into effect on July 1, 2002. The statute enumerates and defines crimes, outlines procedure, and describes the organization of the ICC. Because the Statute is an international treaty, it is only binding on parties who expressly agree to be bound by its provisions. When the statute went into effect, sixty states had become parties to the statute. Today, there are one hundred and four parties, not including the United States.

The ICC has jurisdiction over both the accused and any alleged accomplices who commit genocide, crimes against humanity, or war crimes. However, the court can only exercise its jurisdiction in three situations: (1) when the accused is a national of a state that is a party

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87. Id.
88. See Id.
90. International Criminal Court, supra note 89.
91. Lehr-Lehnardt, supra note 1, at 337.
92. International Criminal Court, supra note 89.
93. Id.
94. Id.
to the Rome Statute, or a state otherwise accepting the court’s jurisdiction; (2) the crime occurred within the borders of a party state or a state otherwise accepting jurisdiction; or (3) the United Nations Security Council has referred the situation to the ICC Prosecutor, regardless of the nationality of the accused or the location of the crime.96 The ICC’s jurisdiction is also limited temporally, and therefore the court can only prosecute crimes taking place after July 1, 2002.97 If a state became a party after July 1, 2002, then the court only has jurisdiction over crimes occurring after the state became a party to the statute.98

The final prerequisite that must be met in order for the ICC to act is referred to as “complimentarity.”99 This principle simply states that the Court won’t act if the case is being or has been investigated or prosecuted by the state with original jurisdiction.100 However, if the investigation or prosecution is not genuine, the ICC can still exercise jurisdiction.101

B. Protection for Rape Victims under the Rome Statute

The active participation of women and feminist NGO’s in the creation of the Rome Statute was perhaps the most significant factor in guaranteeing the inclusion of provisions designed to protect rape victims and enable the prosecution of rape in the ICC.102 NGO’s concerned with women’s rights advocated vigorously on behalf of their cause at the Rome Conference, lobbying individual delegates, protesting, giving speeches, and hosting panel discussions.103 The work of these women’s rights activists paid off when gender-based crimes were specifically included within the list of crimes the ICC can prosecute.104

Article 7 of the Rome Statute defines crimes against humanity as “particular act[s] committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the

96. Id.
97. Id.
98. Id.
99. See Id.
100. Id.
101. Id.
102. See Lehr-Lehnardt, supra note 1, at 337-39.
103. See Id. at 339.
104. See Phelps, supra note 20, at 516.
Gender crimes, including rape, are specifically listed as crimes against humanity and can be prosecuted regardless of whether they occur during an armed conflict. Article 8 identifies four categories of war crimes: grave breaches of the Geneva Conventions; serious violations of the laws and customs applicable in international armed conflict; serious violations of Article 3 common to the Geneva Conventions committed during a non-international armed conflict against non-hostile parties; and other serious violations in non-international armed conflicts. By listing rape as a war crime, the Rome Statute has improved the possibility of obtaining convictions for rapists because war crimes are traditionally easier to prove than crimes against humanity, which must be part of a systematic pattern of violence. Although the ICC prosecutor is also authorized to prosecute rape under Article 8, the rape must occur during an armed conflict to come within the purview of Article 8.

Not only does the Rome Statute establish sexual violence as a prosecutable crime, it also creates procedures for investigating and prosecuting sexual violence and contains provisions for fair representation of women on the ICC staff. The drafters of the Rome Statute likely drew on the experiences of the ICTY and ICTR in recognizing a need for a Victim and Witness Unit. It became clear through the prosecution of cases before the ICTY and ICTR that witness protection and anonymity are essential to the prosecutor’s ability to successfully convict rapists, and thus the Rome Statute provides for witness and victim counseling, protection, and in camera proceedings. The Rome Statute also requires that the ICC reflect a fair balance of male and female judges and that a judge’s and staff member’s knowledge in the area of gender violence be considered in the selection process. This female presence on the ICC’s staff will not only make some female victims more comfortable discussing their attack, but it will also ensure the presence of a much-needed female perspective to help male judges understand the

105. Karkera, supra note 86, at 207.
106. See Id. at 207, 213.
107. Id. at 208.
108. Lehr-Lehnardt, supra note 1, at 341.
110. Lehr-Lehnardt, supra note 1, at 340.
111. See Id. at 342-43.
112. See Id.
113. See Id. at 344-45.
victim's viewpoints and reactions to their attacks. To date, there have been no prosecutions involving rape under the ICC, and therefore the resolve of the tribunal to prosecute such actions, and its success in obtaining justice for rape victims remains to be seen.

IV. Obtaining Political Asylum as a Rape Victim

A. Statutory Background and Requirements

The development of refugee law began with the drafting of the 1951 Convention Relating to the Status of Refugees, in response to the flood of post-World War II refugees. Until 1962, the United States Immigration and Nationality Act did not contain any provisions regulating the admission of refugees into the country; instead, the Attorney General used his discretionary power to create special enactments allowing refugees to stay in the United States temporarily. These enactments did not provide a permanent solution, however, because they were biased in favor of refugees fleeing communist and Middle Eastern countries, and the safe haven they provided was only temporary. In 1962, the United States enacted the Migration and Refugee Assistance Act, which allowed for admission of refugees from non-communist states. Finally, in 1968, the U.S. ratified the United Nations Protocol Relating to the Status of Refugees, thereby binding itself to the requirements listed therein. Throughout the 1960's and 1970's, the United States' refugee law was reformed, resulting in the enactment of the Refugee Act of 1980, which still serves as the basis for refugee law today.

Pursuant to the Refugee Act of 1980, a refugee is defined as a

114. See Id.
117. See Id.
118. Id.
119. Id. at 360.
120. Id.
121. The distinction between "refugee" and "asylee" rests solely on the location from which the person applies for relief. A refugee is a person who applies for refugee status while still overseas, whereas an asylee is a person who seeks refugee status from within the United States or upon seeking entry into the United States.
person having a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. In *INS v. Cardoza-Fonesca*, the U.S. Supreme Court interpreted “well-founded fear” to mean that a person has either suffered past persecution or can show a good reason why she fears future persecution. Furthermore, the court noted that the applicant need not prove the probability of persecution is more than fifty percent; she simply must prove that a reasonable person under the circumstances would fear persecution. Thus, “well-founded fear” contains both a subjective and objective component: the applicant’s fear must be genuine (subjective) and it must rest on some rational basis (objective).

After establishing a well-founded fear, an asylum applicant must prove that the harm she suffered or fears she will suffer amounts to persecution. The United Nations defines “persecution” as a threat to life, freedom, or some other serious violation of human rights. In addition to proving a well-founded fear, the applicant also carries the burden of proving that she has been or will be persecuted by an agent of her national government or a group or individual that the government is unwilling or unable to control.

The final hurdle asylum applicants must overcome is proving that the persecution (or fear of persecution) she has suffered is on account of one of the five enumerated grounds: race, religion, nationality, political opinion, or membership in a particular social group. Noticeably absent from this list is the category of gender. Gender was not deliberately excluded as a ground for persecution in the

The legal test for both refugees and asylees is the same, and thus this paper will not distinguish between the two in discussing the definition of refugee and the elements applicants must prove to achieve lawful status in the U.S. See Jenny-Brooke Condon, Comment, *Asylum Law’s Gender Paradox*, 33 Seton Hall L. Rev. 207, 213-14 (2002); Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 Cornell Int’l L.J. 625, 634-36 (1993).

122. *Id.* at 361.


drafting of the 1951 Refugee convention; it was not even considered. 129 This lack of foresight is attributable to a combination of the fact that the drafters were all male, that they didn't consider gender persecution to have international significance, and that they were very focused on persecution based on race and religion, in the wake of World War II. 130 Because gender is not one of the five enumerated grounds, women are often forced to seek asylum based on persecution on account of their political opinion or their membership in a particular social group. 131

B. Predicaments Unique to Rape Victims Applying for Asylum

The typical image of a human rights victim is a male, tortured for his religious or political beliefs or his race or nationality. The torture that this man faces – beating, burning, rape and mental abuse, are all perceived as forms of persecution. Worldwide, governments have recognized that no one should be persecuted for these reasons and have extended asylum protection to these victims. Yet, throughout the world when a woman is beaten, burnt, mentally abused or genitally mutilated, by her government or by another citizen, it is called a private matter or cultural anomaly. Despite the fact that over half of the 19 million refugees in the world are women, almost all nations extend asylum protection in a manner that discriminates against women. 132

Women’s asylum claims differ from men’s because often they suffer harms that are either unique to women or are simply more commonly inflicted upon women. 133 Particularly in the case of rape, victims are not targeted because of their race, religion, nationality, or political beliefs; often their status as women alone subjects them to this form of persecution. 134

To establish persecution on account of political opinion, an applicant must prove a connection between the persecution they suffer and their political opinion. 135 Although some rape victims have

130. See Id.
131. Bosi, supra note 124, at 791.
132. Id. at 778-79.
133. Id. at 793-94.
135. Bosi, supra note 124, at 786.
attempted to seek asylum using the political opinion rubric, their efforts have generally been thwarted by the Board of Immigration Appeals (hereinafter, "BIA") and the United States Federal Courts. Thus, it seems that the only remaining option for female rape victims is to seek asylum based on membership in a particular social group.

For an applicant to qualify for asylum based on membership in a particular social group, she must prove that she identifies with the social group, that she is in fact a member of the social group, and that her persecution is based on her membership in the particular social group. Although neither the Refugee Act nor the regulations promulgated by the Bureau of Citizenship and Immigration Services (formerly known as the Immigration and Nationality Service) provide a specific definition of "social group," the BIA has stated that "membership in a particular social group" should be interpreted broadly. Additionally, the BIA clarified in In Re R-A that although the starting point for "social group" analysis is the existence of a fundamental or immutable individual characteristic shared by members of the social group, courts may also take into account additional considerations that help determine whether a "social group" should be recognized.

Despite language by the BIA supporting the recognition of women as a particular social group, lower immigration courts continue to issue inconsistent rulings on this issue, leaving female asylum seekers without strong precedent on which to base their claims. Female rape victims attempt to overcome this obstacle by defining smaller "social groups" consisting of, for example, women who have been raped by guerilla forces. But these classifications also tend to fail because the applicant cannot show that this shared characteristic is identifiable by would-be persecutors, or that her past

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136. See Mulligan, supra note 116, at 369-74 (discussion of Sofia Campos-Guardado v. INS, 809 F.2d 285 (5th Cir. 1987)).
137. Bosi, supra note 124, at 786.
140. In re R-A, supra note 139, at 919.
141. Bosi, supra note 124, at 791.
142. See, e.g. Gomez v. INS, 947 F.2d 660 (2d Cir. 1991).
persecution makes her a target for future persecution.\textsuperscript{143} Therefore, until gender is recognized as a particular social group in the context of asylum law, women will continue to confront contradictory notions of their status as rape victims as either too narrow or too broad to justify qualification as refugees.\textsuperscript{144}

V. Shared Dilemmas

Although the problems inherent to prosecuting rape pursuant to international law and those inherent to seeking protection under domestic refugee law as a rape victim are distinct, the nature of rape itself and the trauma victims suffer creates many similarities. Before any progress can genuinely be made in either area, the international community must recognize that rape is not a private sexual act; it is a violent crime whose victims deserve justice.\textsuperscript{145} Most women's claims for asylum based on rape are denied because rape is considered a personal act of violence as opposed to persecution on account of political opinion or membership in a particular social group.\textsuperscript{146} But as the cases before the ICTY and ICTR have made abundantly clear, rape is used as a systematic tool of war and domination,\textsuperscript{147} so this conception of rape as a private crime is clearly not consistent with today's reality. Therefore, judges sitting on both the ICC and U.S. immigration courts must overcome their difficulty in perceiving rape as a violent crime and their tendency to infer personal motivation for rape.\textsuperscript{148}

Another key obstacle prosecutors and rape victims face under international law and domestic asylum law is establishing evidence legally sufficient to prove rape. Because of the personal nature of rape, often the only evidence that exists is the testimony of the victim (especially in the realm of asylum applicants).\textsuperscript{149} Corroboration of the victim's story is not technically required under either framework, however the victim must establish her credibility in order to succeed.\textsuperscript{150} Establishing credibility can be especially difficult when a

\textsuperscript{143} Bosi, supra note 124, at 792.
\textsuperscript{144} Condon, supra note 128, at 208.
\textsuperscript{145} Sidun, supra note 133, at 113.
\textsuperscript{146} Fox, supra note 115, at 126.
\textsuperscript{147} See Phelps, supra note 20, at 505.
\textsuperscript{148} See Kelly, supra note 138, at 641.
\textsuperscript{149} See Phelps, supra note 20, at 507; see also Kelly, supra note 138, at 628.
\textsuperscript{150} See Phelps, supra note 20, at 507-509; Reinert, supra note 123, at 368.
victim's sincerity is attacked on the basis of her failure to seek recourse from the government in her home country, or in cases where the defendant raises the defense of consent.\textsuperscript{151} Additionally, courts in both jurisdictions tend to put significant emphasis on the precise details of a victim's story, and thus any inconsistencies can be detrimental to a victim's case. This understanding of the significance of inconsistencies in victims' stories, however, reveals some judges' careless conclusions about the source of such discrepancies, which are in reality often caused by a victim's nervousness or incorrect translation.\textsuperscript{152}

Lastly, rape prosecutions under international law and rape victims seeking asylum in the United States both suffer from issues relating to sensitivity. For many female rape victims, relating the story of their sexual assault to a male, whom they've never met, entails extreme shame and embarrassment.\textsuperscript{153} Culture and language gaps between the victim and the investigator can also cause misunderstandings, and investigators sometimes interpret the victim's behavior as indicating dishonesty when in reality the victim is struggling with the trauma induced by her assault and the pain of recounting the event.\textsuperscript{154} Even after some rape victims do come forward to tell their story, it's not uncommon for them to later decline to testify about the assault out of fear of being ostracized and shamed.\textsuperscript{155} Therefore, the lack of female investigators and judges remains a serious problem in both areas, and sometimes even prevents women from reporting their rape – allowing rapists to go free and preventing asylum seekers from finding refuge in America.

VI. Recommendations and Conclusions

The drafters of the Rome Statute recognized many of the problems faced in prosecuting rape in the ICTY and ICTR, and attempted to remedy these difficulties with the creation of the ICC.\textsuperscript{156} The Rome Statute includes provisions for staffing the court with people who have gender-sensitive expertise; it allows \textit{in camera} proceedings for cases involving victims of sexual violence; it requires

\begin{itemize}
\item \textsuperscript{151} See Kelly, \textit{supra} note 138, at 646; see generally Kalosieh, \textit{supra} note 15.
\item \textsuperscript{152} See Kelly, \textit{supra} note 138, at 630.
\item \textsuperscript{153} See Miller, \textit{supra} note 50, at 357; Kelly, \textit{supra} note 138, at 630.
\item \textsuperscript{154} See generally, Kelly, \textit{supra} note 138.
\item \textsuperscript{155} See Miller, \textit{supra} note 50, at 357.
\item \textsuperscript{156} See generally, Oosterveld, \textit{supra} note 58.
\end{itemize}
prosecutors to respect the victims and their circumstances when investigating and prosecuting crimes; and it allows a family member or psychologist to be present during questioning of the victim. Because the ICC prosecutor has yet to prosecute any rape cases to date, it remains to be seen how effective these provisions will be in resolving the shortcomings of the ICTY and ICTR. However, the inclusion of such victim-friendly provisions certainly indicates the international community’s willingness to address the needs of rape victims that have for so long been ignored.

The procedures for asylum applicants in the United States should likewise be updated to respond to the special needs of rape victims. For example, female investigators and interpreters should be made available to handle the asylum applicants who claim persecution based on gender. Additionally, interviewers and investigators should be trained in gender-sensitivity and made aware of the cultural differences in the country from which the asylum applicant has fled. This change alone could help prevent misunderstandings due to incorrect translations and could induce more women to share their story, despite their fear, shame, and embarrassment.

In the context of domestic asylum law, however, procedural changes are only the first step. Until gender is recognized as either a sixth category on which persecution may be based, or gender is accepted as a valid “social group,” rape victims will continue to find no protection in the United States from their rapists in their home country. This shift in the conceptual framework of refugee law may seem infeasible, but it is really no more of a shift than has already occurred in international law with respect to the conception of rape as a violent crime, used as a tool of war. Even in the face of strong opposition, ad hoc tribunals like the ICTY and ICTR, and now the ICC, have taken the first steps in debunking the myth that rape is a crime against honor and that it is a personal matter.

Moreover, the United Nations and even some individual member states support the recognition of gender as a social group – and have proven the classification is workable in the context of asylum law.

158. See Bosi, supra note 124, at 805.
159. See Id. at 806.
160. See Id. at 805.
161. See Condon, supra note 128, at 249; Bosi, supra note 124, at 804.
162. See Aafijes, supra note 27, at 76; Sidun, supra note 133, at 128.
Despite identical language in the relevant statutes, Canada and Australia have construed “social group” to include gender. The United States argues that recognizing gender as a “social group” will open the floodgates to a massive group of potential asylum applicants, thereby making the classification unworkable. The fact that a categorization includes a large group of people, however, is irrelevant in the context of race, religion, political opinion, and nationality, so why is the standard for “social group” stricter? In fact, the Refugee Convention was drafted with the specific intent to protect such large groups, such as the Jews who suffered so much during World War II. Thus, the floodgates argument is unpersuasive, given that Canada has experienced no such surge after the recognition of gender as a social group and the fact that asylum applicants still must overcome strict procedural and substantive burdens.

Just as international law has evolved to protect rape victims in both international and internal disputes, so too should American asylum law be updated to reflect current understandings of rape as a tool of domination, degradation, and persecution.

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163. Sidun, supra note 133, at 128.
165. See Sidun, supra note 133, at 137-40.
167. Id. at 255.
168. See Bosi, supra note 124, at 811.