



1-1-2004

# The International Criminal Court's Quest to Protect Rape Victims of Armed Conflict: Anonymity as the Solution

Sylvia Pieslak

Follow this and additional works at: <http://digitalcommons.law.scu.edu/scujil>

### Recommended Citation

Sylvia Pieslak, Comment, *The International Criminal Court's Quest to Protect Rape Victims of Armed Conflict: Anonymity as the Solution*, 2 SANTA CLARA J. INT'L L. 138 (2004).

Available at: <http://digitalcommons.law.scu.edu/scujil/vol2/iss1/5>

This Comment is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Journal of International Law by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact [sculawlibrarian@gmail.com](mailto:sculawlibrarian@gmail.com).

**COMMENT: THE INTERNATIONAL CRIMINAL  
COURT'S QUEST TO PROTECT RAPE VICTIMS OF  
ARMED CONFLICT: ANONYMITY AS THE SOLUTION**

*Sylvia Pieslack*

**Introduction:**

Society often does not understand the impact of rape during armed conflict because most of us have lived in a society free from war. We cannot diminish the tragedy of suffering from rape in non-conflict situations. However, rape during an armed conflict can take on a different meaning, as shown below:

[T]hey brought her fourteen-year-old son and forced him to rape her. . . . On [another] occasion, I was raped with a gun by one of the three men. . . in the room. . . . Others stood watching. Some spat on us. They were raping me, the mother and her daughter at the same time. Sometimes you had to accept ten men, sometimes three. . . . I felt I wanted to die. . . . The Serbs said to us, "Why aren't you pregnant?". . . . I think they wanted to know who was pregnant in case anyone was hiding it. They wanted women to have children to stigmatize us forever. The child is a reminder of what happened.<sup>1</sup>

History abounds with examples of armed conflict rape. For thousands of years, in wars that span the globe, women have suffered the cruel effects of wartime rape.<sup>2</sup> During World War II, German soldiers raped Belgian women in order to terrorize the whole population. While men have repeatedly raped Liberian women in the ethnic violence of that country's civil war, men have raped and killed women of East Timor since

---

<sup>1</sup> See Barbara Bedont & Katherine Hall Martinez, *Ending Impunity for Gender Crimes Under the International Criminal Court*, 6 Brown J. World Aff. 65 (1999).

<sup>2</sup> Kelly Dawn Askin, *Women in International Humanitarian Law*, in *WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW* 54 (Kelly Dawn Askin & Doreen M. Koenig eds., 1999).

the occupation by Indonesia commenced in 1975.<sup>3</sup> The armed conflicts that transpired within in Yugoslavia and Rwanda “soiled the souls of women” as soldiers raped women as a form of ethnic cleansing.<sup>4</sup>

Throughout history, rape in armed conflict has not occurred as a matter of chance, merely due to the fact that a woman freely placed herself in a compromising situation.<sup>5</sup> Rather, it has originated from a desire by man to control and have power over women derived from masculine privilege only exacerbated by military power structures.<sup>6</sup> Furthermore, “wartime rape...is a political crime against the concept, a means of destroying a nation through shame, pollution, and destruction of organized family and community life.”<sup>7</sup>

As a response to the use of rape as a wartime strategy, several laws and customs have emerged to condemn rape as a crime, when used as a tactic during war. After World War II, The Geneva Convention of 1949 and various other conventions classified rape as a grave war crime.<sup>8</sup> Furthermore, in the 1990s the International Criminal Tribunal for the former Yugoslavia (ICTY) as well as the International Criminal Tribunal for Rwanda (ICTR) came into being as a result of gross human rights violations because of the conflicts that occurred within these regions. These tribunals have classified rape as a crime against humanity and a form of genocide within their respective Statutes and have successfully prosecuted several cases involving wartime rape.

---

<sup>3</sup> Christine Chinkin, *Rape and Sexual Abuse of Women In International Law*, 5 EJIL 326 (1994).

<sup>4</sup> See Darren Anne Nebesar, *Gender-Based Violence as a Weapon of War*, 4 U.C. DAVIS J. INT'L L. & POL'Y 147, 148 (1998).

<sup>5</sup> Chinkin, *supra* note 3, at 326.

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

<sup>7</sup> See Mary Ann Tetreault, *Justice for All: Wartime Rape and Women's Human Rights*, 3 GLOBAL GOVERNANCE 197, 203 (1997).

<sup>8</sup> Askin, *supra* note 2, at 54.

While the tribunals have prosecuted several wartime rape criminals, the international human rights movement has a long way to go in prosecuting myriad rapes in armed conflict, often left unaccounted for. However, the International Criminal Court may open the door to justice for rape victims. Even though the ICTY and ICTR have prosecuted some wartime rape crimes, such tribunals have a limited jurisdiction within only the former Yugoslavia and Rwanda. The International Criminal Court (ICC) can prosecute rape crimes in armed conflict across the globe. However, the ICC cannot prosecute rape crimes without testimony from the victims. Witness protection functions as an effective mechanism to encourage rape victims to participate in the proceeding. With its global power, the International Criminal Court must strive to protect these victims, in order to deter the evils of rape.

This article begins with a discussion of the origins of witness and victim protection for the International Criminal Court. It will compare the provisions of the ICTY and ICTR Statutes as well as the ICTY and ICTR Rules of Procedure and Evidence with those of the ICC Statute and Rules of Procedure and Evidence, in order to show that the ICC both borrowed and built upon the provisions of these two tribunals. Comparing and contrasting the ICC provisions from the ICTY and the ICTR will show not only how the ICC created a more comprehensive victim protection program than that of the ICTY and the ICTR, but also allow for a deeper insight into the possible shortcomings of the ICC witness/ victim protection program. Section II briefly sets forth the purpose of the article in assessing the effectiveness of ICC protection for rape victims in armed conflict. Section III analyzes each provision of witness and victim protection under the ICC Statute as well as the ICC Rules and Procedure and Evidence and how each provision specifically protects rape victims during armed conflict. It also discusses an ambiguity discovered within

Rule 81 of the ICC Rules of Procedure and Evidence. Section IV seeks to resolve the ambiguity within Rule 81 of ICC Rules of Procedure and Evidence, by setting forth an interpretative schema that the ICC can effectively utilize for armed conflict rape victims. This paper lastly discusses the future of the ICC for the protection of rape victims during armed conflict.

All in all, while analyzing myriad provisions of the International Criminal Court's Statute and Rules of Procedure, this paper will attempt to uncover an ambiguity within Rule 81 of the ICC Rules of Procedure and Evidence and then try to propose an interpretative schema of this rule. It is necessary to create an interpretative schema for rape victims of armed conflict because anonymity for such victims requires a higher standard than that of other types of victims.

### **I. Background**

United Nations Secretary General Kofi Annan characterized the International Criminal Court as “a gift of hope to future generations and a giant step forward in the march towards universal human rights and the rule of law” when it was ratified on July 1, 2002.<sup>9</sup> Anon and other ardent supporters of the ICC hoped that it would strive to halt any nation state from abusing human rights with impunity.<sup>10</sup> As a result, individuals who have committed grave crimes will be held accountable and victims may finally feel safe under a veil of justice.<sup>11</sup> Even though international crimes have continued to rage in numerous armed conflicts in the past fifty years, with approximately 250 conflicts since World War II and casualties

---

<sup>9</sup> See Kofi Annan, *The Gift of Hope to Future Generations*, Address at the United Nations Diplomatic Conference for the adoption of the Statute of the International Criminal Court (July 18, 1998).

<sup>10</sup> Kofi Annan, *Address at the International Bar Association* (June 11, 1997).

numbering upwards of 170 million people, accountability for such crimes has almost become non-existent.<sup>12</sup> This section will first examine those tribunals that lay the foundation for prosecuting such ghastly crimes, International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), and then compare and contrast the provisions within their respective Statutes and Rules of Procedure and Evidence formulated by both bodies with that of the Statute and the Rules of Procedure and Evidence of the International Criminal Court.

Prosecutions for war crimes are rare, despite the fact that many states have incorporated prohibitions on war crimes within their national laws. In 1993 and 1994, respectively, the UN Security Council created both the ICTY and ICTR, for the purpose of finally prosecuting these horrific war crimes, that no other international tribunal had yet addressed.<sup>13</sup> Such tribunals have dealt with these ghastly crimes on a smaller scale, by bringing those individuals who committed crimes of war within these specific regions to justice. However, no broader scale court, dedicated to international criminal prosecution, has ever existed. The International Criminal Court was charged with the task of enforcing legal standards and ensuring a commitment from states and organizations that they will uphold certain standards, and as a result, clearly indicate that no nation and no individual may be above the law.<sup>14</sup> Thus, the ICC strives to deter global crime and aid in the restoration of peace and security by punishing those responsible for international crimes committed during

---

<sup>11</sup> *Id.*

<sup>12</sup> Dinah L. Shelton, *Introduction to INTERNATIONAL CRIMES, PEACE AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT* ix-x (Dinah Shelton ed., 2000).

<sup>13</sup> *Id.* at x.

<sup>14</sup> Coalition for the International Criminal Court website, *available at* <http://www.iccnw.org/Introduction.html> (last accessed on March 14, 2003).

armed conflicts.<sup>15</sup> The International Criminal Court (ICC) punishes crimes of genocide, crimes against humanity, war crimes and crimes of aggression. These crimes include acts such as murder, extermination, enslavement, deportation or forcible transfer a population, imprisonment, torture, rape, sexual slavery, enforced prostitution and other such acts.<sup>16</sup>

While the ICC has focused its efforts on deterring and remedying any crimes perpetrated against individuals, the Statute has especially “taken further strides in identifying and potentially redressing crimes exclusively or disproportionately against women and girls.”<sup>17</sup> Several provisions within the statute both explicitly and implicitly prosecute gender based crimes by “incorporate[ing] language guaranteeing certain protection to victims of these crimes and mandates the inclusion of women in different organs in the court.”<sup>18</sup> Both Article 7 and Article 8 depict the crimes committed against women that the court may prosecute. Article 7 concerns crimes against humanity and depicts those crimes against women that the court hopes to prosecute.<sup>19</sup> Article 8 depicts those war crimes committed in international and non-international armed conflicts, mentioning those specifically perpetrated against women.<sup>20</sup>

Article 21, Article 36, and Article 54 specifically discuss the judges and Prosecutor and their respective roles in prohibiting gender

---

<sup>15</sup> Shelton, *supra* note 12, at xi.

<sup>16</sup> Rome Statute of the International Criminal Court, arts. 5-8, U.N. Doc. A/CONF. 183/9 (1998), *reprinted* in 37 I.L.M. 999 [hereinafter ICC Statute].

<sup>17</sup> See Kelly Dawn Askin, *Women's Issues in International Criminal Law: Recent Developments and the Potential Contribution of the ICC*, in INTERNATIONAL CRIMES, PEACE AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT 49 (Dinah Shelton ed., 2000).

<sup>18</sup> *See id.*

<sup>19</sup> ICC Statute art. 7(1)(g). Such crimes include “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity.”

<sup>20</sup> ICC Statute art. 8(2)(b)(xxii), art. 8(2)(e)(vi) Grave breaches in international armed conflict include “committing rape, sexual slavery, enforced prostitution, forced pregnancy...enforced sterilization or any other form of sexual violence.”

discrimination in the courtroom and in paying special attention to cases of violence against women. Article 21 requires the court not to apply and interpret the law in a gender discriminating fashion.<sup>21</sup> Article 36 not only mandates an equal representation of female and male,<sup>22</sup> but it also states that the court will include judges with legal expertise in areas such as violence against women.<sup>23</sup> Article 54 compels the Prosecutor to consider the nature of violent crimes against women, when rendering decisions.<sup>24</sup> Article 42 states that the Prosecutor will recruit expert advisers in issues such as sexual violence.<sup>25</sup> Lastly, Articles 43 and 68 address female witness/victim protection services. While Article 68 requires the court to take measures necessary to protect the dignity and privacy of sex crime victims,<sup>26</sup> Article 43 creates the Victims and Witnesses Unit in the Registry, requiring that the Unit have experts in trauma such as that resulting from sexually violent crimes.<sup>27</sup>

The ICC Draft Rules of Procedure and Evidence also set forth several provisions that specifically protect women and girls and more generally, created a Victims and Witnesses Unit. In terms of witness protection, Rules 16 and 17 both discuss the importance of utilizing gender-sensitive measures to facilitate the participation and testimony of

---

<sup>21</sup> ICC Statute art. 21(3). This provision states that “the application and interpretation of law...must be without any adverse discrimination founded on grounds such as gender.”

<sup>22</sup> ICC Statute art. 36(8)(a)(iii). The provision requires that there be a “fair representation of male and female judges.”

<sup>23</sup> ICC Statute art. 36(8)(b). This statute says that “States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women.”

<sup>24</sup> ICC Statute art. 54(1)(B). Article 54(1)(B) states that the Prosecutor shall “take into account the nature of the crime, in particular where it involves sexual violence, gender violence” when making decisions.

<sup>25</sup> ICC Statute art. 42(9). This Article stipulates that the Prosecutor “shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence.”

<sup>26</sup> Askin, *supra* note 17, at 63.

sexual violence victims.<sup>28</sup> Other additional witness protection provisions directed at women include Rules 18 and 19 that ensure training of the Victims and Witness Unit staff regarding matters related to gender and may include experts in “gender and cultural diversity.”<sup>29</sup> With respect to evidentiary provisions, Rule 63 states that the court will not require corroboration in sexual violence cases.<sup>30</sup> Rule 70 defines the nature of consent in rape prosecutions, in order to protect women and also stipulates that the court may not use prior sexual conduct.<sup>31</sup> Additionally, Rule 71 states that the court will not admit evidence of prior or subsequent sexual conduct.<sup>32</sup> Under Section III: Witness and Victims of the ICC Rules of Procedure and Evidence, Rule 86 requires the court to take into account the needs of sexual or gender violence victims in their decisions.<sup>33</sup> Under

---

<sup>27</sup> See ICC Statute art. 43(6). This provision says that the Victims and Witnesses Unit “shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.”

<sup>28</sup> See International Criminal Court, Rules of Procedure and Evidence, U.N. Doc. PCNICC/2001/Add. 1, Rules 16-17 (2000) [hereinafter ICC Rules]. Rule 16 (1)(d) states that “in relation to victims, the Registrar shall be responsible for the performance of the following functions in accordance with the Statute and these Rules (d) Taking gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings.” Rule 17 (2)(iv) states that when dealing with witnesses that it will utilize “gender-sensitive measures to facilitate the testimony of victims of sexual violence at all stages of the proceedings.”

<sup>29</sup> See ICC Rules, Rule 18(d), Rule 19(e). Rule 18(d) stipulates that “for the efficient and effective performance of its work, the Victims and Witnesses Unit shall: (d) Ensure training of its staff with respect to victims' and witnesses' security, integrity and dignity, including matters related to gender and cultural sensitivity.” Rule 19(e) states that the “Victims and Witnesses Unit may include, as appropriate, persons with expertise in (e) Gender and cultural diversity.”

<sup>30</sup> ICC Rules, Rule 63(4). Rule 63(4) states that “a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence.”

<sup>31</sup> ICC Rules, Rule 70. Rule 70 stipulates that “credibility, character, or predisposition to sexual availability of a victim... cannot be inferred by reason of sexual nature of prior or subsequent conduct of a victim.”

<sup>32</sup> ICC Rules, Rule 71. Rule 71 states that it will not admit evidence “of prior or subsequent sexual conduct of a victim or witness.”

<sup>33</sup> ICC Rules, Rule 86. Rule 86 stipulates that “a Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with

rule 88, the court states that the court must pay attention to the views of victims, so as to order measures that might facilitate the testimony of a sexual violence victim.<sup>34</sup> Thus, both the ICC Statute and the Rules of Procedure and Evidence include provisions that will allow for the effective prosecution of sexual violence crimes against women. The court might then bring those perpetrators of sexual violence crimes against women to justice.

The court has crafted provisions, both specifically and generally, for the protection of female victims, when they act as witnesses in their own trials. These witness protection provisions are essential not only because without them a large number of female rape victims would not testify because of social norms that place shame on these women, but also because there are not enough measures to protect the witness from physical threats and from societal contempt.<sup>35</sup> Therefore, the ICC has crafted several provisions that protect women during the trial process.

*Looking to the ICTY and the ICTR: The Roots of the ICC Witness Protection Schema*

The International Criminal Court's witness protection schema has originated from the Statutes and Rules of Procedure and Evidence of both the International Criminal Tribunal for Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR). The Security Council

---

article 68, in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence.”

<sup>34</sup> ICC Rules, Rule 88(1). Rule 88(1) states that “upon the motion of the Prosecutor or the defense, or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may, taking into account the views of the victim or witness, order special measures such as, but not limited to, measures to facilitate the testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence, pursuant to article 68, paras 1 and 2.”

<sup>35</sup> Rena Leher-Lenhardt, *One Small Step for Woman: Female Friendly Provisions in the Rome Statute of the International Criminal Court*, 16 *BYU J. PUB. L.* 317, 349 (2002).

of the United Nations passed Resolution 827, which created the ICTY on May 25, 1993, as a result of grave violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.<sup>36</sup> In addition, the Security Council passed Resolution 955, which formed the ICTR on November 8, 1994 for the purpose of national reconciliation and maintenance of peace in Rwanda and the surrounding region.<sup>37</sup> While The ICTY set forth the prosecution of genocide, crimes against humanity, violation of laws or customs of war, and grave breaches of the Geneva Convention of 1949 within its Statute,<sup>38</sup> the ICTR set forth the prosecution of genocide, crimes against humanity, and Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II.<sup>39</sup> Both the ICTY and ICTR explicitly mention rape as a crime against humanity. Furthermore, both the ICTY and ICTR Statutes and Rules of Procedure and Evidence have created witness protection programs and specific provisions for the protection of female victims. The International Criminal Court gleaned its fundamental witness protection provisions from these Statutes and has created its own provisions from the case outcomes and experiences of both the ICTY and ICTR.

*ICC v. ICTY and ICTR: Where They Coincide*

---

<sup>36</sup> The International Criminal Tribunal for Yugoslavia website, at <http://www.un.org/icty/glance/index.htm> (last accessed March 14, 2003 ).

<sup>37</sup> The International Criminal Tribunal for Rwanda website, at <http://www.icttr.org/wwwroot/ENGLISH/geninfo/intro.htm> (last accessed March 14, 2003).

<sup>38</sup> International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. Doc. S/25704, Annex (1993), *reprinted in* 32 I.L.M. 1192 (1993) [hereinafter ICTY Statute].

<sup>39</sup> International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States. Between 1 January 1994 and 31 December 1994, S.C. Resolution 955, Annex, U.N. SCOR, 49 th Session, Res. & Dec. at 15, U.N. Doc. S/INF/50 Annex (1994), *reprinted in* 33 I.L.M 1602 (1994) [hereinafter ICTR Statute].

The ICC has borrowed various witness and victim provisions from the ICTY Statute and Rules of Procedure and Evidence as well as the ICTY Statute and Rules of Procedure and Evidence. Some of the provisions compared here are general witness and victim protection provisions, while others specifically protect women.

The ICC adopted provisions from both the ICTY and ICTR, stating that the trial Chamber will ensure a fair and expeditious trial in conjunction with due regard for the protection of victims and witnesses.<sup>40</sup> Additionally, both tribunals and the ICC generally allow for the protection of witnesses and victims through specific measures.<sup>41</sup> The ICC Statute as well as the ICC Rules of Procedure and Evidence (ICC Rules) have adopted many provisions that are similar to both the ICTY Rules of Procedure and Evidence (ICTY Rules) and the ICTR Rules of Procedure and Evidence (ICTR Rules). For example, Article 43(4) of the ICC Statute

---

<sup>40</sup> ICC Statute art. 64(2); ICTY Statute art. 20(1); ICTR Statute art. 19(1). ICC Statute Article 64(2) states that “the Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.” ICTY Statute Article 20(1) states that “the Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.” ICTR Statute Article 19(1) stipulates that “the Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused with due regard for the protection of victims and witnesses.”

<sup>41</sup> ICC Statute art. 68(1); ICTY Statute art. 22; ICTR Statute art. 21. ICC Statute Article 68(1) stipulates that “the Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children.” ICTY Statute Article 22 states that “the International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.” ICTR Statute Article 21 stipulates that “the International Tribunal for Rwanda shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.”

requires that the Registrar will create a Victims and Witnesses Unit that will provide protective measures, security arrangements, and counseling.<sup>42</sup> This particular provision is similar to that of Rule 34 of both the ICTY Rules and the ICTR Rules in that they also set up the Victims and Witnesses Section through the Registrar with a qualified staff who will recommend protective measures for victims and witnesses and will provide counseling and support for them.<sup>43</sup> Furthermore, the ICC Statute encompasses both ICTY and ICTR provisions, which states that a court may order protective measures for the victim, provided that these measures will not infringe upon the rights of the accused.<sup>44</sup> In addition to these protective mechanisms, the ICC Rules, parallel to the ICTY and

---

<sup>42</sup> ICC Statute art. 43(6). ICC Statute Article 43 states that “the Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.”

<sup>43</sup> International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, Rule 34, U.N. Doc. IT/32/REV.26 (2003) [hereinafter ICTY Rules]; International Criminal Tribunal for Rwanda, Rule 34, U.N. Doc. ITR/3/REV.11 (2002)[hereinafter ICTR Rules]. ICTY Rule 34 states that “There shall be set up under the authority of the Registrar a Victims and Witnesses Section 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.” ICTR Rule 34 states that “there shall be set up under the authority of the Registrar a Victims and Witnesses Support Unit consisting of qualified staff to:(i)Recommend the adoption of protective measures for victims and witnesses in accordance with Article 21 of the Statute; (ii)Ensure that they receive relevant support, including physical and psychological rehabilitation, especially counseling in cases of rape and sexual assault; and (iii)Develop short term and long term plans for the protection of witnesses who have testified before the Tribunal and who fear a threat to their life, property or family.”

<sup>44</sup> ICC Statute art. 68; ICTY Rules, Rule 75 (A); ICTR Rules, Rule 75 (A). ICC Statute Article 68 (1) states that “the Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.” ICTY Rule 75(A) states that “a Judge or a Chamber may, proprio motu or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Section, order appropriate measures for the privacy and protection of victims and witnesses,

ICTR Rules, allows a Chamber to hold *in camera* proceedings in order to determine whether to disclose certain information to the public and/or media, whether to expel names from public records and whether to assign a pseudonym which would protect the victim from exposure in the media.<sup>45</sup> Also the ICC Rules, comparable to the ICTY and the ICTR, require controlling the questioning of a witness to avoid harassment and intimidation.<sup>46</sup> With respect to non-disclosure of a victim's identity before trial, the ICC, the ICTY and ICTR Rules allow the Prosecutor to apply to the Trial Chamber for the non-disclosure of the victim's identity before

---

provided that the measures are consistent with the rights of the accused.” ICTR Rule 75(A) mirrors that of ICTR Rule 75(A).

<sup>45</sup> ICC Rules, Rule 87(3); ICTY Rules, Rule 75(B); ICTR Rules, Rule 75(B). ICC Rule 87(3) stipulates that “a Chamber may, on a motion or request under sub-rule 1, hold a hearing, which shall be conducted in camera, to determine whether to order measures to prevent the release to the public or press and information agencies, of the identity or the location of a victim, a witness or other person at risk on account of testimony given by a witness by ordering *inter alia* : (a) That the name of the victim, witness or other person at risk on account of testimony given by a witness or any information which could lead to his or her identification, be expunged from the public records of the Chamber;(b)That the Prosecutor, the defense or any other participant in the proceedings be prohibited from disclosing such information to a third party; (c)That testimony be presented by electronic or other special means, including the use of technical means enabling the alteration of pictures or voice, the use of audio-visual technology, in particular videoconferencing and closed-circuit television, and the exclusive use of the sound media; (d) That a pseudonym be used for a victim, a witness or other person at risk on account of testimony given by a witness; or (e)That a Chamber conduct part of its proceedings in camera.” ICTY Rule 75(B) and ICTR Rule 75(B) state that “Chamber may hold an in camera 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 a victim or witness by such means as expunging names and identifying information from the Tribunal's public records; non-disclosure to the public of any records identifying the victim; giving of testimony through image- or voice- altering devices or closed circuit television; and 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.”

<sup>46</sup> ICC Rules, Rule 88 (5); ICTY Rules, Rule 75(C); ICTR Rules, Rule 75(C). ICC Rule 88(5) says that “taking into consideration that violations of the privacy of a witness or victim may create risk to his or her security, a Chamber shall be vigilant in controlling the manner of questioning a witness or victim so as to avoid any harassment or intimidation, paying particular attention to attacks on victims of crimes of sexual violence.” Both ICTY Rule 75(C) and ICTR Rule 75(C) state that “a Chamber shall, whenever necessary, control the manner of questioning to avoid any harassment or intimidation.”

trial to protect the safety of these victims.<sup>47</sup> In reference to sexual crimes specifically perpetrated against women, the ICC Rules, similar to the ICTY and the ICTR, refer to the consent principle, especially when it may not be utilized as a defense, and also stipulate that the court will not admit evidence of prior sexual conduct.<sup>48</sup> Lastly, the ICC, like the ICTY and ICTR do not impose a requirement of corroboration for crimes of sexual violence.<sup>49</sup> All in all, many similarities exist between the ICC Statute and Rules of Evidence and Procedure when compared to the ICTY Statute and Rules of Evidence and Procedure and ICTR Statute and Rules of Evidence and Procedure.

---

<sup>47</sup> ICC Rules, Rule 81(4); ICTY Rules, Rule 69(A); ICTR, Rule 69(A). ICC Rule 81(4) stipulates that “the Chamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of the trial.” Both ICTY Rule 69(A) and ICTR Rule 69(A) state that “in exceptional circumstances, the Prosecutor may apply to a Judge or 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.”

<sup>48</sup> ICC Rules, Rule 70; ICTY Rules, Rule 96; ICTR Rules, Rule 96. ICC Rule 70 states that “in cases of sexual violence, the Court shall be guided by and, where appropriate, apply the following principles:(a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent; (b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent; (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence; (d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness. Both ICTY Rule 96 and ICTR Rule 96 stipulate that “in cases of sexual assault: (i) no corroboration of the victim's testimony shall be required;(ii) consent shall not be allowed as a defense if the victim has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear; (iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible;(iv) prior sexual conduct of the victim shall not be admitted in evidence.”

<sup>49</sup> ICC Rules, Rule 63(4); ICTY Rules, Rule 96(i); ICTR Rules, Rule 96(i). ICC Rule 63(4) states that “without prejudice to article 66, paragraph 3, a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence.”

*ICC v. ICTY and the ICTR: Where they Diverge*

In many respects the ICC has adopted provisions from the ICTY and ICTR; however, it has also forged its own path and created further witness protection elements. In many respects the ICC has elaborated on much of both the ICTY and ICTR Statutes and Rules of Procedure and Evidence.

The International Criminal Court has developed its witness and victim protection more thoroughly in comparison to both the ICTY and ICTR. Specifically, unlike the ICTY or the ICTR, the ICC Statute and Rules allows the court to consider the view and concerns of victims at all stages of the proceedings, so long as these views are not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.<sup>50</sup> Furthermore, the ICC Statute diverges from the ICTY and the ICTR when evidence becomes dangerous to specific witnesses; the prosecutor may withhold such evidence and instead submit a summary of the contents.<sup>51</sup>

The ICC Rules of Procedure and Evidence contains numerous provisions, not included within the ICTY or the ICTR Rules. Rule 16 of the ICC Rules provides that the Registrar should be responsible for the following: assisting and providing them with a legal representative who will ensure their rights will be protected throughout the proceedings, informing them of their rights, ensuring that they are aware of relevant

---

<sup>50</sup> ICC Statute art. 68(3)

<sup>51</sup> ICC Statute art. 68(5). Article 68(5) stipulates that “where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”

decisions of the court, and relocating victims.<sup>52</sup> In addition, also not covered by the ICTY and the ICTR, Rule 18 of the ICC Rules states that the responsibilities of the Victims and Witnesses Unit include ensuring that the staff in the Unit maintain confidentiality at all times and making sure that they are properly trained to deal with gender issues.<sup>53</sup>

Even though neither the ICTY nor the ICTR require the staff of the witness protection section to have expertise in certain fields to better aid victims of certain crimes, the ICC requires its staff to have expertise, and states the specific requirements in detail within Rule 19 of the ICC

---

<sup>52</sup> ICC Rules, Rule 16. Rule 16 states that “(1) In relation to victims, the Registrar shall be responsible for the performance of the following functions in accordance with the Statute and these Rules: (a) Providing notice or notification to victims or their legal representatives; (b) Assisting them in obtaining legal advice and organizing their legal representation, and providing their legal representatives with adequate support, assistance and information, including such facilities as may be necessary for the direct performance of their duty, for the purpose of protecting their rights during all stages of the proceedings in accordance with rules 89 to 91; (c) Assisting them in participating in the different phases of the proceedings in accordance with rules 89 to 91; (d) Taking gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings. (2) In relation to victims, witnesses and others who are at risk on account of testimony given by such witnesses, the Registrar shall be responsible for the performance of the following functions in accordance with the Statute and these Rules: (a) Informing them of their rights under the Statute and the Rules, and of the existence, functions and availability of the Victims and Witnesses Unit; (b) Ensuring that they are aware, in a timely manner, of the relevant decisions of the Court that may have an impact on their interests, subject to provisions on confidentiality. (4) Agreements on relocation and provision of support services on the territory of a State of traumatized or threatened victims, witnesses and others who are at risk on account of testimony given by such witnesses may be negotiated with the States by the Registrar on behalf of the Court. Such agreements may remain confidential.”

<sup>53</sup> ICC Rules, Rule 18. It states that “for the efficient and effective performance of its work, the Victims and Witnesses Unit shall: (a) Ensure that the staff in the Unit maintain confidentiality at all times; (b) While recognizing the specific interests of the Office of the Prosecutor, the defense and the witnesses, respect the interests of the witness, including, where necessary, by maintaining an appropriate separation of the services provided to the prosecution and defense witnesses, and act impartially when cooperating with all parties and in accordance with the rulings and decisions of the Chambers; (c) Have administrative and technical assistance available for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses, during all stages of the proceedings and thereafter, as reasonably appropriate (d) Ensure training of its staff with respect to victims' and witnesses' security, integrity

Rules.<sup>54</sup> Furthermore, Rule 90 stipulates that a victim or group who lacks the necessary means to pay for a common legal representative chosen by the court may receive financial assistance, as needed.<sup>55</sup> However, both the ICTY and ICTR do not include such a provision within their respective Statutes and Rules.

Thus, through its Statute and Rules of Procedure and Evidence, the International Criminal Court protects witnesses and victims more thoroughly than the ICTY and the ICTR. The ICC not only protects female rape victims through general victim and witness provisions, but it also places special emphasis upon female victims through female specific provisions which ensure adequate protection before, during, as well as after the trial.

## II. ICC Victim Protection:

### Extending to Rape Victims of Armed Conflict

The general and specific provisions for victim protection, oriented towards victims of rape and sexual crimes, have built upon the witness protection provisions of both the ICTY and ICTR. As a result of the ICC borrowing and expanding upon the victim protection rules set forth under the ICTY and the ICTR, it has a more thorough protective mechanism than any global courts to date. Even though the International Criminal Court has instituted a very effective witness and victim protection

---

and dignity, including matters related to gender and cultural sensitivity (e) Where appropriate, cooperate with intergovernmental and non-governmental organizations.”

<sup>54</sup> ICC Rules, Rule 19. Rule 19 stipulates that “in addition to the staff mentioned in article 43, paragraph 6, and subject to article 44, the Victims and Witnesses Unit may include, as appropriate, persons with expertise, *inter alia*, in the following areas: (a) Witness protection and security (b) Legal and administrative matters, including areas of humanitarian and criminal law (c) Logistics administration; (d) Psychology in criminal proceedings (e) Gender and cultural diversity; (f) Children, in particular traumatized children; (g) Elderly persons, in particular in connection with armed conflict and exile trauma (h) Persons with disabilities; (i) Social work and counseling; (j) Health care; (k) Interpretation and translation.”

<sup>55</sup> ICC Rules, Rule 90.

program, on the whole, it still remains to be seen whether the program will adequately protect female victims of mass war rape crimes.

Military forces intentionally utilize rape, as a war tactic, in most wars.<sup>56</sup> Women become vehicles for “communicating the dominance of particular male groups to their enemies” and as a result, women's bodies become the battleground.<sup>57</sup> For example, in the former Yugoslavia “rape was used as part of a carefully conceived plan to terrorize entire communities, driving them from their homes and demonstrating the power of the invading forces.”<sup>58</sup> Furthermore, rape functioned as a policy of war; rape in the time of war was “rape under orders,...not rape out of control, [but] rape under control.”<sup>59</sup> It is rape “to drive a wedge through a community, to shatter a society, to destroy a people.”<sup>60</sup> In wartime, rape under orders stems from a higher authority or governmental entity and does not come from only one individual. Therefore, when women come to testify in trials against military and governmental perpetrators, they are bringing claims against higher authority. Female victims are already understandably hesitant to testify in a traditional rape prosecution scenario. Confronting an authority figure in court only serves to make them more so, due to the fear of repercussions that might result. Furthermore, women are unwilling to testify not only because there are not enough measures to protect them from physical threats, but also because of the social norms that place shame upon raped women.<sup>61</sup> In short,

---

<sup>56</sup>Susan Brownmiller, *Against Our Will: Men, Women, and Rape* 31-113 (Fawcett Columbine, 1975).

<sup>57</sup> Nebesar, *supra* note 4, at 151.

<sup>58</sup> See Amy E. Ray, *The Shame of It: Gender-Based Terrorism in the Former Yugoslavia and the Failure of the International Human Rights Law to Comprehend the Injuries*, AM.U.L.REV. 793, 804 (1997).

<sup>59</sup> See Catherine MacKinnon, *Rape, Genocide, and Women's Human Rights*, 17 HARV. WOMEN'S L.J. 5, 12 (1994).

<sup>60</sup> See *id*

<sup>61</sup> Kelly Dawn Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 AM. J. INT'L L. 97, 122-23 (January 1999).

women do not want to testify because they fear for their lives and do not want their homelands to scorn them. Thus, the ICC has instituted a witness protection unit, in order to protect these women. However, the efficacy of this unit and the adequacy of the protectionary provisions must still be assessed. A successful court would increase numbers of female victims testifying comfortably without fear.

### **III. Assessing the Effectiveness of ICC Victim Protection for Armed Conflict Rape Victims**

Each relevant provision of both the ICC Statute and ICC Rules of Procedure must be individually analyzed, in order to assess the effectiveness of the International Criminal Court's witness protection program for female victims of wartime rape crimes. This section examines Article 43 (which provides protective measures and counseling for victims), Article 64 (which discusses the fair trial rights of the accused) and Article 68 (the primary provision of witness protection) of the ICC Statute as well as various provisions of the ICC Rules of Procedure and Evidence and assesses how each provision may or may not help protect rape victims of armed conflict.

#### *Articles 43, 64, & 68: For or Against Female Rape Victims?*

Article 43 authorizes the creation of Victims and Witnesses Unit and provides protective measures, counseling, and trauma expertise for victims of sexual violence.<sup>62</sup> This particular provision will generally help mass rape victims because the protective measures and security arrangements for such victims during the trial phase will help to minimize their fears. Because Article 43 will also provide counseling from qualified individuals with expertise in sexual violence trauma, it better protects those women who have suffered a rape crime.

---

<sup>62</sup>ICC Statute art. 43(6).

In addition to Article 43, Article 64 discusses the importance of a fair trial that balances the rights of the accused with the protection of victims and witnesses.<sup>63</sup> This could be detrimental to rape victims because the court could interpret this particular provision in a manner that would not allow a female victim to testify anonymously at trial. However, this article does ensure the presumption of innocence before proven guilty, a fundamental principle law.

Article 68 of the ICC Statute acts as the primary provision of the Statute dedicated to protection of victims and witnesses, whereas Articles 43 and 64 merely mention witness protection. Article 68(1) requires the court to take measures to protect the safety, as well as the physical and psychological well-being of victims and witnesses.<sup>64</sup> In doing so, particularly during the investigation and prosecution of such crimes, it shall regard several factors such as age, gender and the nature of the crime.<sup>65</sup> Such a provision protects the rights of female rape victims on several levels. Personal safety is of prime importance to these victims because they fear for their lives. The court must address this concern in order to provide adequate protective mechanisms. Physical and psychological well-being are also important because female rape victims suffer not only physical pain but emotional scars as well. Furthermore, because many countries have created societal norms that place shame upon raped women,<sup>66</sup> the protection of a woman's dignity is also

---

<sup>63</sup> ICC Statute art. 64(2). ICC Statute Article 64(2) says that “the Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.”

<sup>64</sup> ICC Statute art. 68(1). This article states that “the Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children.”

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

<sup>66</sup> Askin, *supra* note 60, at 122-23.

appropriate in order to fully protect a female rape victim. Thus, the protection of women at all these levels thoroughly safeguards the rights of female rape victims. Also by regarding gender and the nature of sexual violence crimes, the court will more adequately attend to the needs and as a result, protect rape victims.

Article 68(2) builds upon Article 68(1), in that it articulates specific mechanisms, including conducting “any part of the proceedings *in camera* or allow[ing] the presentation of evidence by electronic or special means.”<sup>67</sup> These measures shall specifically focus upon sexual violence victims.<sup>68</sup> These *in camera* proceedings along with the presentation of evidence by electronic or other means will reduce the anxiety of rape victims, so they will not be subject to the media, jurors or other individuals which would only further victimize them. Such proceedings and methods do not absolutely bar opposing counsel, especially since not allowing the presence of the accused might infringe upon the rights of the accused.<sup>69</sup> Furthermore, by directing alternate means for the presentation of evidence, the ICC has shown its dedication to and focus on addressing the needs of women who have suffered rape crimes.

The preservation of personal interests of individual victims is also essential for adequate protection. Article 68(3) states that where the personal interests may be affected, the court will utilize the views and concerns of victims at all stages of the proceedings.<sup>70</sup> The court must

---

<sup>67</sup> See ICC Statute art. 68(2). *In camera* proceedings allow the judge to privately facilitate part of the testimony within his chambers without jurors or spectators.

<sup>68</sup> *Id.*

<sup>69</sup> Joseph L. Falvey, Jr, *United Nations Justice or Military Justice: Which is the Oxymoron? An Analysis of the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia*, 19 FORDHAM INT'L L.J. 475, 487 (December 1995).

<sup>70</sup> ICC Statute art. 68(3). Article 68(3) says that “where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”

account for the personal interests of rape victims, since each individual case of rape varies. Article 68(3) will allow for an individual assessment of each rape victim. The other applicable portion of the provision, Article 68(5) allows the Prosecutor to withhold such evidence or information and instead submit a summary when the presentation of such evidence might lead to danger for the witness or her family.<sup>71</sup> For rape victims, this provision will prevent the presentation of evidence that might endanger their lives. This provision also intends to encourage female victims of wartime rape to testify, since the court will not consider evidence that might endanger their lives. Thus, Article 68 of the ICC Statute adequately provides for female victims of rape, especially with respect to the portions of the Article that specifically protect female victims of sexual crimes.

*ICC Rules of Procedure and Evidence: Favorable to Female Rape Victims?*

In addition to the ICC Statute, the ICC Rules of Procedure and Evidence also set forth provisions, intended to protect witnesses and victims.<sup>72</sup> Because many more witness and victim protection provisions exist within the ICC Rules than within the ICC statute, it is best to classify these provisions within groups. With respect to victim rights, Rule 16 states that the Registrar should be responsible for informing victims of their rights and ensuring that they are aware of any decisions that may impact them.<sup>73</sup> By notifying rape victims of decisions that might impact their interests in a negative fashion, victims can choose whether or not to

---

<sup>71</sup> ICC Statute art. 68(5). Article 68(5) states that “where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”

<sup>72</sup> Such provisions include Rules 16, 17, 18, 19, 63, 70, 71, 81, 87, and 88.

<sup>73</sup> ICC Rules, Rule 16(2).

proceed with the trial. As a result, this information will protect their well-being and interests. In addition to the rights of victims, measures taken in order to promote their safety allow for their protection of victims. Rule 87 generally authorizes protective measures for victims upon the motion of a Prosecutor.<sup>74</sup> More specifically, Rule 88 authorizes special measures for victims, taking into account the victim's views in order to facilitate their testimony during trial.<sup>75</sup> These measures include but are not limited to creating long-term and/or short-term plans for their protection,<sup>76</sup> agreements upon relocation,<sup>77</sup> and taking gender-sensitive measures that will facilitate the testimony of victims.<sup>78</sup> Generally, rape victims require protective measures so they can be assured of their safety, and thus, be more willing to testify. More specifically, long-term and short-term plans allow rape victims to more comfortably testify, by worrying less in the present and future, since the court will account for them during and after trial, if need be. In addition, with the possibility of witness relocation, it encourages the rape victim to testify, knowing that the perpetrator of the crime will not have knowledge of her whereabouts and will not harm her in retaliation for her testimony. Furthermore, by taking “gender-sensitive measures to facilitate the participation of sexual violence at all stages of the proceedings,”<sup>79</sup> this particular provision aids rape victims because it

---

<sup>74</sup> ICC Rules, Rule 87. Rule 87 states that “upon the motion of the Prosecutor or the defense or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may order measures to protect a victim, a witness or another person at risk on account of testimony given by a witness.”

<sup>75</sup> ICC Rules, Rule 88, *supra* note 34.

<sup>76</sup> ICC Rules, Rule 17(2)(a)(i). This rule stipulates that “with respect to all witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses, in accordance with their particular needs and circumstances (i) Providing them with adequate protective and security measures and formulating long- and short-term plans for their protection.”

<sup>77</sup> ICC Rules, Rule 16(4). Refer to note 52.

<sup>78</sup> ICC Rules, Rule 16(1)(d). Refer to note 52.

<sup>79</sup> *See* ICC Rules, Rule 16(1)(d). Refer to note 52.

specifically commands the Registrar to employ specific measures for rape victims, so that they might participate at all stages of the proceedings. It is evident that those individuals who drafted this particular provision took into account the fear of victims and designed it in order to reduce the resistance of rape victims with respect to testifying. Lastly, perhaps the most significant protective mechanism by the court controls questioning of witnesses or victims, especially of sexual violence victims, to avoid any harassment or intimidation.<sup>80</sup> Once again, crafting a line of questioning so as to minimize the fear of a rape victim will allow the victim to fully and accurately recount the event of rape.

Confidentiality measures under Rules 17 and 18 will also encourage the rape victim to testify because they require the witness protection unit to ensure that its staff maintains confidentiality at all times.<sup>81</sup> Ensuring rape victims that their cases will remain confidential will more readily encourage them to come forward and freely testify.

Even though confidentiality facilitates the participation of rape victims within proceedings, staff training and expertise allows for sounder protective mechanisms of rape victims. While Rule 18 ensures the training of its staff in terms of victims' security,<sup>82</sup> Rule 19 may solicit the involvement of persons with expertise in "witness protection and security," "logistics administration," "gender and cultural diversity" and others.<sup>83</sup> Well-trained and qualified staff will provide better protection for rape victims, since they can better understand the circumstances of armed conflict rape crimes, and as a result, better cater to the needs of rape victims.

---

<sup>80</sup> ICC Rules, Rule 88(5). Refer to note 34.

<sup>81</sup> ICC Rules, Rule 17, Rule 18. Refer to note 52 and note 53.

<sup>82</sup> ICC Rules, Rule 18, para (d). Refer to 53.

<sup>83</sup> See ICC Rules, Rule 19.

Even though protective measures, confidentiality, and expertise all help protect the rape victim, the ICC Rules have also designed several evidentiary provisions, barring certain types of evidence for sexual crimes, in order to protect their victims. Rule 70 specifically tailors the definition of consent in rape cases to favor the rape victim.<sup>84</sup> Rules 70 and 71 state that character cannot be inferred by prior or past sexual conduct,<sup>85</sup> and as a result, the court will not admit evidence of such conduct.<sup>86</sup> This rape shield law protects rape victims from excessive cross-examination.<sup>87</sup>

Besides the rape shield laws adopted by the court, the ICC Rules have also formulated other miscellaneous provisions. Rule 17 assists victims in obtaining both medical and psychological help.<sup>88</sup> By ensuring such support, victims will more readily heal from the rape crimes both physically and mentally. Additionally, Rule 18 states that the court will have both technical and administrative assistance for at risk victims.<sup>89</sup> This rule will also help facilitate the trial process for rape victims.

These provisions adequately protect rape victims, clearly stating how they might protect victims, especially those victims of sexual crimes. Each provision intends to facilitate the trial process for rape victims, whether the provision states this intent specifically or generally. However, one provision, Rule 81(4) does not clearly set forth how it intends to protect a victim. This particular provision stipulates that the court may “in accordance with Article 68, protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of

---

<sup>84</sup> ICC Rules, Rule 70(a)-(c). Refer to note 31.

<sup>85</sup> ICC Rules, Rule 70(d). Refer to note 31.

<sup>86</sup> ICC Rules, Rule 71. Refer to note 32.

<sup>87</sup> Shacara Boone, *New Jersey Rape Shield Legislation: From Past To Present - The Pros and Cons*, 17 WOMEN'S RTS. L. REP. 223, 226 (Spring, 1996).

<sup>88</sup> ICC Rules, Rule 17(2)(a)(iii). This particular rule states that the Victim and Witnesses Unit will aid victims by “assisting them in obtaining medical, psychological and other appropriate assistance.”

<sup>89</sup> ICC Rules, Rule 18 (c). Refer to note 53.

their identity prior to commencement of trial.”<sup>90</sup> This provision does not clearly state whether the court will protect the victim only within the pre-trial proceedings and disclose after the trial begins or whether it will protect the victim throughout all trial proceedings, after authorizing such non-disclosure within the pre-trial phase. To guide the ICC in future interpretations of Rule 81 consistent with its goals, an adequate interpretive schema should be crafted, so as to guarantee the proper protection of rape victims through this particular provision.

#### **IV. Proposing a New and Improved Schema for Rule 81**

In order to determine whether there is a need for an interpretive schema of Rule 81, the past legislative history, comparisons to similar provisions of the ICTY and ICTR, and court decisions might shed light upon whether the drafters had a clear vision of Rule 81(4), when they drafted it. This section will analyze this legislative history, provisions of the ICTY and ICTR and selected court decisions and then set forth a proposal of interpreting Rule 81, so that both the ICC may adequately serve the interests of both armed conflict rape victims and the rights of the accused.

*Did the drafters intend for Rule 81 to apply victim anonymity only to pre-trial procedures or to the entire trial?*

The first draft, of what later became rule 81 in the final draft of the ICC Rules, stipulated that the court would “in accordance with Article 68, ...protect the safety of witnesses and victims and member of their families, by authorizing the non-disclosure of their identity.”<sup>91</sup> Within this provision, the drafters did not mention “prior to commencement of the trial” as they did within the finalized version.<sup>92</sup> However, the drafters

---

<sup>90</sup> See ICC Rules, Rule 81(4).

<sup>91</sup> See First Draft of the ICC Rules, Rule 5.32(k).

<sup>92</sup> See ICC Rules, Rule 81(4).

marked the provision with a footnote, stating that the rule “may need to be revised after the comprehensive discussion on victims, in particular on the issue of non-disclosure of the identity of witnesses.”<sup>93</sup> Furthermore, the second draft of the ICC Rules includes Rule 5.32, identical to the Rule 5.32 of the first draft.<sup>94</sup> Furthermore, the drafters continued adding a similar footnote as the first draft, stipulating that “the rule may need to be revised after the comprehensive discussion on witnesses, in particular on the issue of non-disclosure of the identity of witnesses.”<sup>95</sup> The final draft of the ICC Rules renamed the rule and added “prior to the commencement of trial.”<sup>96</sup>

Because the first two drafts of the ICC Rules did not mention “prior to commencement to trial,” the drafters' intent may be inferred to mean that they wanted to protect the victims throughout the trial process.<sup>97</sup> However, after the drafters conducted the aforementioned comprehensive discussion on victims, they decided to add the phrase ‘prior to commencement to trial’ which might lend the provision a different meaning.<sup>98</sup> On its face, it is altogether unclear whether the drafters desired the provision to be read as pre-trial non-disclosure of a victim's identity and full disclosure during the proceedings. The drafters might have also intended that a victim's identity should not be disclosed prior to trial, so that their anonymous identity could continue throughout the entire trial phase. However, since the legislative history does not lead to a concrete answer, perhaps the ICTY and ICTR, rules from which the ICC Rules originated, might prove useful in assessing this perplexing question.

---

<sup>93</sup> See First Draft of ICC Rules, Rule 5.32. Refer to note 79.

<sup>94</sup> Second Draft of ICC Rules, Rule 5.32(k).

<sup>95</sup> See Second Draft of ICC Rules, Rule 5.32. Refer to note 42.

<sup>96</sup> See ICC Rules, Rule 81(4).

<sup>97</sup> See *id.*

*Non-Disclosure Within the ICTY : Full or Partial Anonymity?*

In order to determine whether the ICC could have drafted a clearer statute, one should look at the ICTY Rules of Procedure and Evidence.

Rule 69 of the ICTY addresses the issue of non-disclosure by stipulating within the first portion of the rule that the court 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.”<sup>99</sup> Additionally, within the second portion, it states that “ the identity of the victim or witness shall be disclosed within such time as determined by Trial Chamber to allow adequate time for preparation of the defence.”<sup>100</sup> Because this particular provision falls under the “Pre-trial Proceedings” section of the ICTY Rules, this article may be interpreted as only allowing non-disclosure of a victim's identity prior to trial and subsequent disclosure at the commencement of trial. Through this provision, it would seem that the drafters only intended to allow for non-disclosure in pre-trial proceedings.

However, in *Prosecutor v. Tadic* , decided under the tribunal, in its *Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses*, Judge MacDonald, writing for the majority, granted the Prosecutor's motion for full anonymity during the entire trial and non-disclosure of information for four of the seven witnesses.<sup>101</sup> Within this decision, the court set forth factors that each witness must satisfy, so that the witness might obtain anonymity. The first factor required the presence of real fear for the safety of the witness or his/her

---

<sup>98</sup> Second Draft of ICC Rules, Rule 5.32. Refer to note 42.

<sup>99</sup> See ICTY Rules, Rule 69(A).

<sup>100</sup> See ICTY Rules, Rule 69(C).

<sup>101</sup> *Prosecutor v. Tadic*, No IT 94-I-T, at para. 52 (Aug. 10, 1995) (Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses) [hereinafter Decision on Motion for Protective Measures].

family.<sup>102</sup> Second, the witness testimony must be important to the Prosecutor's case.<sup>103</sup> The next factor necessitates that there exist “no prima facie evidence that the witness is untrustworthy.”<sup>104</sup> Furthermore, the court requires that the “lack or non-existence of a witness protection programme...has a considerable bearing on any decision to grant anonymity in this case.”<sup>105</sup> The fifth factor stipulates that “any measures taken should be strictly necessary.”<sup>106</sup> The last factor ensures that “the protective measures have to be balanced with the rights of the accused.”<sup>107</sup> Thus, the court decided to allow for the anonymity of four witnesses due to the fulfilment of all these factors.

In addition, the court interpreted both Rules 69 and rule 75 of the ICTY Rules together in order to grant anonymity during both the pre-trial and actual trial proceedings. As stipulated within the majority *Decision on Motion for Protective Measures of Tadic*, Rule 69(C) allows for “the right of the accused to learn the identities of the witnesses against him in sufficient time prior to the trial is made subject to a decision under Rule 75, thereby extending the power to grant anonymity to a witness at the trial stage to the pre-trial stage.”<sup>108</sup> Thus, the court based its decision for full anonymity upon the premise that rule 75(A) and 75(B)(iii) would allow for anonymity during the trial phase.

On the other hand, Justice Stephens, also at the *Tadic* court dissented and concluded that anonymity is only acceptable in the situation of the ‘fortuitous bystander.’<sup>109</sup> He disagreed with the granting of victim anonymity for several reasons. First, he recognized the significance of

---

<sup>102</sup> Decision on Motion for Protective Measures, at para. 62.

<sup>103</sup> Decision on Motion for Protective Measures, at para. 63.

<sup>104</sup> See Decision on Motion for Protective Measures, at para. 64.

<sup>105</sup> See Decision on Motion for Protective Measures, at para. 65.

<sup>106</sup> See Decision on Motion for Protective Measures, at para. 66.

<sup>107</sup> See Decision on Motion for Protective Measures, at para. 67.

<sup>108</sup> See Decision on Motion for Protective Measures, at para. 59.

adhering to internationally recognized standards of what constitutes a fair trial, especially as contained within Article 14 of the International Covenant on Civil and Political Rights which includes the right to confront witnesses.<sup>110</sup> He believed that granting anonymity would directly conflict with the standard norms of the international legal community. Secondly, he recognized the tension between allowing for full protection of witnesses and victims as well as the rights of a fair and impartial trial for the accused. Therefore, he concluded that even though the Statute allows for protective measures, such measures do not necessarily justify anonymity, especially when they might negatively impact the accused.<sup>111</sup> Lastly, he critiqued the majority decision's interpretation of Rule 69 coupled with Rule 75. He interpreted Rule 69 as “telling in its very partial nature of its exception to full disclosure,” that it becomes “confined to [only] to exceptional circumstances,”<sup>112</sup>

However, he then stated that Rule 75 (B)(iii) may only relieve a witness from “the ordeal of confrontation,” in order to facilitate the testimony of vulnerable witnesses and victims.<sup>113</sup> Judge Stephen also believed that “relieving a witness from an ordeal of face to face confrontation...would also extend to non-disclosure of their names where this does not in a real sense effect the rights of the accused.”<sup>114</sup> However, in the *Tadic* decision, he did not deem the non-disclosure of victims' identity to be fair to the accused. As a result, he suggested that instead of fully separating the accused and the victim during trial, that the court should “grant an order providing for the shielding of those vulnerable

---

<sup>109</sup> A “fortuitous bystander” is one that witnesses a crime by chance or by accident.

<sup>110</sup> *Prosecutor v. Tadic*, No IT 94-I-T, at 2 ( Aug. 10, 1995 ) (Separate Opinion of Judge Stephen the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses) [hereinafter Separate Opinion].

<sup>111</sup> Separate Opinion at 8.

<sup>112</sup> See Separate Opinion at 8.

<sup>113</sup> See *id.*

witnesses...by providing a one-way shielding device permitting the accused to see the witness but not requiring the witness to see the accused.”<sup>115</sup>

As a result, the *Tadic* majority decision interpreted both Rules 69 and 75 to allow for full anonymity of victims.

*What about the ICTR and anonymity?*

Rule 69(A) of the ICTR Rules stipulates almost verbatim the contents of rule 69(A) of the ICTY Rules.<sup>116</sup> However, unlike the ICTY, in numerous decisions for protection of witnesses and victims, the ICTR has tended to base its decisions upon Judge Stephen's opinion from *Tadic* . For example, within *Prosecutor v. Rutaganda* in the *Decision on the Preliminary Motion submitted by the Prosecutor for Protective Measures for Witnesses*, the Tribunal granted protective measures such as not allowing the disclosure of “names, addresses and whereabouts” to the public and by expunging such information from public records.<sup>117</sup>

However, the court held that “[the] Prosecutor shall disclose the names and unredacted statements of the witnesses to the defense in sufficient time to allow the defense to prepare for trial, subject to Rule 69.”<sup>118</sup> Furthermore, in many more decisions such as *Prosecutor v. Akayesu* and again in *Prosecutor v Rutaganda* , the court allowed for numerous protective measures, but had to disclose the names of the victims to the defence prior to trial.

---

<sup>114</sup> *See id.*

<sup>115</sup> *See* Separate Opinion at 14.

<sup>116</sup> ICTR Rules, Rule 69(A).

<sup>117</sup> *See Prosecutor v. Rutaganda*, No. ICTR-96-3-T, para. 1, para. 5 (September 26, 1996) (Decision on the Preliminary Motion submitted by the Prosecutor for Protective Measures for Witnesses ) [hereinafter Decision on Motion for Protective Measures].

<sup>118</sup> *See* Decision on Motion for Protective Measures, *supra* note 100, at para. 7.

Thus, unlike *Tadic*, the ICTR granted protective measures but did not allow for the extension of anonymity to trial proceedings which virtually renders such pre-trial protections meaningless.

*Anonymity and the ICC: Which Standard to Apply*

Unfortunately, international anonymity standards have swung on a pendulum from the Article 14 of ICCPR to *Tadic* and back to the ICTR decisions such as *Akayesu*, not allowing the adoption of clear norms for the International Criminal Court. When it came into force on March 23, 1976, Article 14 of the ICCPR, set the standard for the international community by stipulating that “ everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”<sup>119</sup> This fair trial includes the right “ to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”<sup>120</sup>

The *Tadic* case departed from the standard set forth within Article 14 of the ICCPR, by allowing for the full non-disclosure of victim identity in “exceptional circumstances.” The ICTR then utilized the factors within the *Tadic* case, so as to grant anonymity within the pre-trial stage and then fully disclose a victim's identity for the actual trial.

On its face, Rule 81 of the ICC Rules does not clearly set forth the standard for anonymity of victims. Thus, an interpretive schema is in order for those victims of wartime rape, because the protective shield of anonymity requires a different standard for these victims than other types of victims.

---

<sup>119</sup> See International Covenant for Civil and Political Rights, art. 14 (1), G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (March 23, 1976).

*The Rights of the Accused v. Victims' Rights*

Under Article 64, the ICC Statute stipulates that the trial chamber will allow for a fair trial with respect of the rights of the accused balanced with the protection of victims and witnesses.<sup>121</sup> While many within the international community believe that full victim anonymity would sacrifice the right of a fair trial for the accused, this belief neglects the fact that a fair trial should balance the rights of the victims with those of the accused. After all, a “free trial according to law does not mean a perfect trial, free from possible detriment or disadvantage of any kind or degree of the accused.”<sup>122</sup> In some exceptional cases, the balancing act will come in favor of the victim, due to the nature of the crime committed against them. As a result, “where there are conflicts of human rights, priorities have to be decided and in these circumstances, where effective justice may not be attainable without witness protection, priority should be accorded to the lives and security of the witnesses.”<sup>123</sup> The factors within *Tadic* ensure a proper balancing of victims' rights with that of the accused, advocating the position that “non-disclosure to the accused can be made compatible with the right to a fair trial and is justified by policy considerations in sexual assault cases.”<sup>124</sup>

Sexual assault cases tend to turn the balance in terms of anonymity for rape victims, especially in terms of wartime rape crimes. Men of one side against the opposing side commit organized and systemic detention

---

<sup>120</sup> See *id.* art. 14(2)(e).

<sup>121</sup> ICC Statute art. 64(2). Refer to note 63.

<sup>122</sup> See *Jarvie and Another v. Magistrates Court of Victoria at Brunswick and Others*, [1994] V.R. 90 (Vict.).

<sup>123</sup> See Christine Chinkin, *International Tribunal for the Former Yugoslavia : Amicus Curiae Brief on Protective Measures for Victims and Witnesses*, 7 *Crim. L.F.* 179, 209 (1996).

<sup>124</sup> See Decision on Motion for Protective Measures, *supra* note 100, at para. 10.

and rape during armed conflict.<sup>125</sup> Rape during armed conflict occurs precisely because the community views such a rape as a crime against itself and as a result, rape becomes a destruction of the fundamental elements of society and culture.”<sup>126</sup> As a result, rape during armed conflict differs vastly from that of normal domestic rape charges.<sup>127</sup>

First, in wartime rape crimes, identity does not become a crucial factor, as it does in regular domestic rape cases. Within individual rape cases, the accused should have the right to challenge the witnesses' allegations and version of the events.<sup>128</sup> On the other hand, consent in armed conflict rape does not appear to be a factor, as it is in domestic rape proceedings. In fact, when placing it in terms of forced detention, which often becomes inextricably linked to rapes during armed conflict, it is “extremely hard to envisage a situation where evidence of consent would “be relevant and credible.”<sup>129</sup> For example, armed conflict rape victims within Yugoslavia did not know the actual identity of their rapists. Second, victims of rapes committed in armed conflict merit a greater amount of protection due to the possible retaliation of the perpetrator. Retaliation becomes a greater factor than that of a non-conflict rape trial because armed conflict rapes are not “individual acts of violence or their wartime aggregate.”<sup>130</sup> On the other hand, this rape category involves state and military involvement that does not exist within non-conflict situations.<sup>131</sup> As a result, the threat and fear of these victims escalates

---

<sup>125</sup> Tamara Tompkins, *Prosecuting Rape as a War Crime: Speaking the Unspeakable*, 70 Notre Dame L. Rev. 845, 859 (1995).

<sup>126</sup> See Beth Stephens, *Humanitarian Law and Gender Violence: An End to Centuries of Neglect?* 3 HOFSTRA L.& POL'Y SYMP. 87, 90 (1999).

<sup>127</sup> Chinkin, *supra* note 122, at 210.

<sup>128</sup> *Id.*

<sup>129</sup> *See id.*

<sup>130</sup> See Kristin Boon, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and Consent*, 32 COLUM. HUM. RTS. L.REV. 625, 631 (Summer 2001).

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

substantially because state actors have more power which will result more readily in extermination, harm or harassment of the victim if she testifies. Thus, allowing the use of a name in official documentation and other forms of documentation makes it accessible for these state actors to find a rape victim and in turn, facilitates revenge.<sup>132</sup>

Due to the fact that armed conflict rape differs than that of non-conflict rape, Rule 81 of the ICC Rules should be interpreted in favor of armed conflict rape victims, so as to ensure their protection and testimony. *The Quest for an Interpretative Schema of Rule 81: Pre-Trial Balancing in the ICC*

In order to balance the rights of the accused with the protection of armed conflict rape victims, Rule 81 shall be interpreted in a manner to ensure fairness for both the victims and the accused. The court should interpret anonymity for these armed conflict rape victims, while taking into account the rights of the accused. In order to ensure a proper balance in this manner, the court should employ a balancing mechanism.

In order to ensure fairness, the ICC should first evaluate each rape victim and her credibility. After the Prosecution applies for a motion of anonymity for an armed conflict rape victim, the court must evaluate credibility and the necessity of full anonymity through the *Tadic* factors as well as other necessary factors. Within the Chambers in closed session, absent the accused or defense council, the Judges will then ask multiple questions that will aid him or her in searching for answers to the factors, mentioned above. In addition to this closed session process, the Judges shall also take into account the evidence that the Prosecutor has presented regarding the witness. As a result, the Judges will have adequate

---

<sup>132</sup> Chinkin, *supra* note 122, at 211.

information to balance specific factors and determine whether to grant the victim full anonymity.

First, the Judges shall determine whether great fear for the personal safety exists for the victim.<sup>133</sup> As in *Tadic*, they shall employ an objective standard to determine if a victim's fear qualifies as a reasonable one.<sup>134</sup> In cases of wartime rape, the Judges will place an emphasis on the fact that a rape victim may legitimately fear government power, especially due to the ease of which such an entity might harm, intimidate or even exterminate the victim, either before, during or after the trial.

Second, as in *Tadic*, the Judges must determine whether the testimony is sufficiently important to the Prosecutor's case.<sup>135</sup> This factor especially assesses whether the Prosecutor so significantly depends upon the testimony of the rape victim that the Prosecution could not proceed without it.

Third and probably most importantly, the Trial Chamber must assess the trustworthiness of the rape victim. As in *Tadic*, the Prosecutor "must have examined the background of the witness" as carefully as the situation shall permit.<sup>136</sup> As stipulated within *Tadic*, "there should be no grounds for supposing that the witness is not impartial or has an axe to the ground."<sup>137</sup> During this time, the Judge shall pay special attention to the demeanor of the rape victim.<sup>138</sup> They shall also assess the identity of the victim, in order to assess the reliability of the witness.<sup>139</sup> As a result, this process will allow the Judges to determine whether the rape victim harbors

---

<sup>133</sup> Decision on Motion for Protective Measures, *supra* note 100, at para. 62.

<sup>134</sup> Mercedeh Momeni, *Balancing the Procedural Rights of the Accused Against a Mandate to Protect Victims and Witnesses: An Examination of the Anonymity Rules of the International Criminal Tribunal for Rwanda*, 41 How L.J. 155, 171 (1997).

<sup>135</sup> Decision on Motion for Protective Measures, *supra* note 100, at para. 63.

<sup>136</sup> See Decision on Motion for Protective Measures, at para. 64.

<sup>137</sup> See *id.*

<sup>138</sup> Decision on Motion for Protective Measures, at para. 71.

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

ulterior motives against the accused. The Judges want to ensure that a witness does not implicate the defendant due to a personal vendetta or for other similar reasons.

Fourth, the Judges will determine whether anonymity “should be strictly necessary,” in order to protect the rape victim.<sup>140</sup> Many other jurisdictions have utilized less restrictive measures than anonymity. For example, in some jurisdictions, only the defense counsel, not the accused, will know the identity of the rape victim and can in turn, cross-examine the witness without the accused.<sup>141</sup> However, in most cases, defense counsel claims that the disclosure of the victim identity to only him or her would negatively affect the relationship with the accused. Defense counsel might feel that partial disclosure of victim identity will compromise his or her relationship with the accused, especially when accused of grave crimes such as murder. For example, defense counsel in the *Tadic* case would not continue to represent Tadic, if he and not Tadic was made aware of the victim's identity because the attorney felt that such semi-disclosure of identity would negatively affect his ability to represent his client adequately.<sup>142</sup> As a result, full anonymity might become the only answer.

Fifth, the Judge shall take into account the differences between rape victims from non-conflict situations and rape victims of armed conflict situations. As discussed previously, the need to protect rape victims of armed conflict situations is greater because governmental entities have greater power and can utilize such power to intimidate, threaten, or retaliate against the rape victim. Due to this fact, rape victims will be less likely to testify.

---

<sup>140</sup> See Decision on Motion for Protective Measures , at para. 66.

<sup>141</sup> Momeni, *supra* note 133, at 175.

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

Finally, the Judges must assess whether identity acts as a crucial factor in allowing the accused to confront the victim. In most cases, the accused has the right to confront the victim because of the personal nature of the crime. However, in situations, such as rape crimes during armed conflict, rape victims do not usually know the identity of their rapists. Where a personal relationship exists between the rapist and the victim in armed conflicts, the Judges may consider not granting anonymity in such cases. However, where the relationship is not personal, then the Judges may consider granting anonymity.

Thus, the Judges must balance these factors in determining the reliability of the victim, the need of the victim to testify within the trial, and the type of the rape involved. As a result, the Judges can assess whether to grant anonymity for an armed conflict rape victim.

*Full Anonymity: What does it mean for the rape victim during the trial?*

During trial, the Trial Chamber should employ several measures, in order to ensure full anonymity of the rape victim. Many find inherent unfairness of full anonymity because the defense council can not cross-examine the victim. As a result, the accused loses his right to confrontation. In order to overcome this obstacle, the court can employ the Judges of the Trial Chambers as the “cross-examiners.” In this case, the defense counsel may prepare questions for the victims. The Judges will then act as a substitute for the defense counsel by cross-examining the victim with the questions formulated by the defense council and then relay the answers back to the defense counsel.<sup>143</sup> While asking the questions, the Judges shall pay special attention to the demeanor and facial expressions of the victim, in order to assess the credibility of the witness. Even though the Judges have already assessed the credibility in the pre-trial

---

<sup>143</sup> Chinkin, *supra* note 122, at 211.

proceedings, they will continue to ensure that the victim has reliably presented her testimony.

Furthermore, in addition to having the Judges act as “cross-examiners,” the court may appoint an impartial individual to act as a “cross-examiner” for the defense. This third party will merely take the questions of the defense and pose them to the victim in front of the Judges, without the accused and the defense present. The impartial “cross-examiner” may then relay the answers back to the defense. Once again the Judges of the Trial Chamber can observe the demeanor of the victim for reliability.

In the alternative, the defense counsel could question victims located behind screens with their voices distorted.<sup>144</sup> The Trial Chamber will still be able to observe the demeanor of the victim, since she will remain in the view of the Judges.

Thus, the International Criminal Court can employ mechanisms to preserve the confrontation right of the accused. In this manner, full anonymity will provide protection for the victims as well as preserve the rights of the accused.

### **Conclusion**

Even though victim protection programs and anonymity provisions for rape victims in armed conflict may not extinguish rape altogether, they will help shield those rape victims from the fear of testifying. More women testifying will lead to more prosecutions, for the more evidence to convict, the more convictions that will follow. The ICC must lead the battle in prosecuting these unlawful rape crimes and ensure justice for those who suffer these crimes all too often. They must strive to punish those who continue to rape as a war tactic, who rape as a way of achieving

---

<sup>144</sup> *Id.* at 212.

the battle goal. One twenty-eight year old Croatian-Muslim woman recounted what Serbian soldiers said, as they raped her:

They were telling me 'Croatia needs to be crushed again. Balijas need to be crushed again completely. You are half of this and half of that. You need to be crushed to the end. Because you're Croatian, you should be raped by five different men-and because you're Bula, you should be raped by five more.'<sup>145</sup>

The international legal community cannot continue to ignore cases such as these. The International Criminal Court should protect these armed conflict rape victims, by ensuring that the cases will go to trial. The perpetrators cannot continue to rape with impunity. Witness protection and anonymity will help pave the road to justice for rape victims. Through victim protection and subsequent prosecution, the International Criminal Court can attempt to halt the infliction of future pain and scars that permanently mark the memory and souls of rape victims.

---

<sup>145</sup> See Tompkins, *supra* note 124, 867-868.