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## **A Shift Toward Gender Equality in Prosecutions: Realizing Legitimate Enforcement of Crimes Committed Against Women in Municipal and International Criminal Law**

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# A SHIFT TOWARDS GENDER EQUALITY IN PROSECUTIONS: REALIZING LEGITIMATE ENFORCEMENT OF CRIMES COMMITTED AGAINST WOMEN IN MUNICIPAL AND INTERNATIONAL CRIMINAL LAW

Tamara F. Lawson\*

## I. INTRODUCTION

In 2002, during the “Crimes Against Women Under International Law Symposium” at the University of California, Berkeley, Louise Arbour, the former Chief Prosecutor for the International Criminal Court for the former Yugoslavia (ICTY), spoke about an important connection between national and international criminal prosecutions. She acknowledged that the Office of the Prosecutor at the ICTY struggled with certain issues when prosecuting crimes against women. Although the ICTY, and the International Criminal Tribunal for Rwanda (ICTR), have obtained successful judgments on important cases alleging crimes against women,<sup>1</sup> Arbour attributes this success to the foundational or grassroots work done in national legal systems. Arbour stated that the advancements achieved at the international level were possible because of the years of advocacy on behalf of women at the national level on these issues:

[I]n domestic jurisdictions, it took us 100 years to get to that level of sophistication with respect to the relevance of certain materials in the

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1. Prosecutor v. Akayesu, Case No. ICTR 96-4 (Sept. 2 1998).

prosecution and the defense of sexual violence. . . . In the end, it's probably a good thing that these international institutions are catching on to the cutting-edge litigation that is taking place in our own [national] systems.<sup>2</sup>

History is full of horrific examples of violence against women,<sup>3</sup> yet except for very recent efforts,<sup>4</sup> the world has failed to prosecute the offenders. This article explores the reasons behind the recent progress toward genuine prosecution of crimes against women. The heightened societal awareness of gender-specific violence, as well as the increased political will of prosecutors to criminally sanction such conduct, has changed how crimes against women

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2. The Honorable Madam Justice Louise Arbour Supreme Court of Canada, *Stephan A. Riesenfeld Award Lecture—Crimes Against Women Under International Law*, 21 BERKELEY J. INT. L. 196, 205 (2003) [hereinafter Arbour] (Louise Arbour is the former Chief Prosecutor of the ICTY/R, in the Hague, from 1996–1999, and she is currently the UN High Commissioner for Human Rights in Geneva, Switzerland.).
  3. UN ECOSOC Commission on Human Rights, *An Analysis of the Legal Liability of the Government of Japan for Comfort Women Stations established during the Second World War*, E/CN.4/Sub.2/1998/13 (22 June 1998) (“Between 1932 and the end of the Second World War, the Japanese Imperial Army forced over 200,000 women into sexual slavery in the rape centres throughout Asia.”); Karen Parker & Jennifer F. Chew, *Compensation for Japan’s World War II*, 17 HASTINGS INT’L & COMP. L. REV. 497, 498–509 (Spring 1994). “Comfort women” were abducted from their homes and were routinely raped multiple times a day for years at time. They ranged in age as young as 12 years old. Many suffered permanent injuries such as infertility as well as sexually transmitted diseases. *Id.* See generally ANNE-MARIE DE BROUWER, *SUPERNATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE: THE ICC AND THE PRACTICE OF THE ICTY* 4–9 (INTERSENTIA 2005).
  4. “In 1993, there were 1.1 million non-fatal violent crimes against women by intimate partners. In 2001, this number had dropped to 588,490.” Bureau of Justice Statistics Crime Data Brief, *Intimate Partner Violence, 1993–2001* (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf>.

are commonly understood,<sup>5</sup> articulated in criminal statutes,<sup>6</sup> investigated,<sup>7</sup> litigated,<sup>8</sup> and ultimately punished.<sup>9</sup>

This Article will describe the universal problem of violence against women, and the demise of impunity in both municipal and international legal systems.<sup>10</sup> This change coincides with the increased focus on the human rights

5. Anne Rousseve, *Sixth Annual Review Of Gender And Sexuality Law: II. Criminal Law Chapter: Domestic Violence And The States*, 6 GEO. J. GENDER & L. 440 (2005) (citing Christine O'Connor, Note, Domestic Violence No-Contact Orders and the Autonomy Rights of Victims, 40 B.C. L. REV. 937, 939 (1999)) ("By 1920, all states had prohibited wife-beating, but it was not until the 1970s and 1980s that the criminal justice system abandoned its policy of non-intervention and began to treat domestic violence as a public crime.").
6. *Infra* notes 65, 70.
7. Teri Breuer, Note, *The End Of Frye the Beginning of Successful Sexual Assault Prosecution*, 2 S. CAL. L. & WOMEN'S STUD. 333, 364 (1992) (describing California's implementation of the Sexual Assault Response Team comprised of a law enforcement officer, a sexual assault advocate and a sexual assault nurse examiner); see also Leslie Keesling, *Special Teams Would Ease Trauma of Rape Victims at Hospitals*, Courts, L.A. TIMES, Mar. 16, 1991, Metro Part B at 10; Catherine Popham Durant, *When To Arrest: What Influences Police Determination To Arrest When There Is A Report Of Domestic Violence?*, 12 S. CAL. REV. L. & WOMEN'S STUD. 301, 306 (2003) ("Throughout the 1960s, 1970s and 1980s, law enforcement officers believed and were taught that domestic violence was a private matter between the parties in which the police should not interfere."); Laurie Kohn, *The Justice System & Domestic Violence: Engaging the Case But Divorcing the Victim*, 32 N.Y.U. REV. L. & SOC. CHANGE 191, 247 & n.258 (2008) (describing the D.C. Coalition Against Domestic Violence's efforts in training police officers regarding the dynamics of domestic violence, stalking, and primary aggressor determinations). Cf. Lenora M. Lapidus, *The Role of International Bodies in Influencing U.S. Policy to End Violence Against Women*, 77 FORDHAM L. REV. 529, 550 (2008) (arguing at the international human rights level that the lack of proper gender-sensitive training of United States' police officers regarding protection of domestic violence victims and their children contributed to the deaths of Jessica Gonzales' three children who were kidnapped by Jessica's estranged husband and killed).
8. See generally Kristin Little et al., *Assessing Justice System Response to Violence Against Women: A Tool for Law Enforcement, Prosecution & the Courts to Use in Developing Effective Responses* (1998), available at <http://www.vaw.umn.edu/documents/promise/pplaw/pplaw.pdf> (last visited Mar. 4, 2009). Nationally, many prosecutors' offices have specialized units dedicated to only prosecuting crimes against women. When these types of units were first developed they were often called Crimes Against Women and Children units. *Id.* However, many offices have changed the name of these units to the gender neutral title of the Special Victims Unit. *Id.* There is even a Law and Order television series entitled SVU, for special victims unit and the plot of programming for the shows always include the prosecution of crimes committed against women. *Id.* Internationally, the Office of the Prosecutor at the ICTY was the first to establish a gender issues legal officer, Patricia Viseur Sellers. *Infra* note 127.
9. NEV. REV. STAT. ANN. § 200.485 (West 2009) (providing an example of the modern trend towards mandatory minimum sentencing in domestic violence cases that also mandatorily increases for repeat offenders).
10. Before analyzing the modern prosecution of crimes against women as a means of enforcing the human rights of women, one should consider the contextual backdrop behind this issue. One significant factor that has helped to advance the status and priority of these types of cases is the work of advocates in non-governmental organizations (NGOs) who have raised the consciousness and urged governmental agencies to effectively address the unique needs of women victims. Therefore, it is impossible to discuss the progress made at the prosecutorial level without first acknowledging the

of women and gender equality in law enforcement.<sup>11</sup> In examining this shift, it additionally becomes relevant to note the changing composition of entities within the legal system. The acceptance of women as participants is one factor that impacted the modern juridical environment regarding the prosecution of crimes that most specifically affect women.<sup>12</sup>

This Article identifies the role of the prosecutor as one of the most important functions within the justice system—largely because prosecutors are uniquely endowed with enormous discretionary authority to redress wrongs.<sup>13</sup> The importance of gender equality in prosecutions is acutely illustrated when focus is placed on how, and when, criminal prosecutors exercise their discretion in charging cases that involve violence against women. This Article urges that a modern era of enforcement of crimes against women is emerging. This shift has increased the ability of female victims to realize justice against domestic violence abusers, rapists, and other human rights violators.

The central analysis of this article will examine the most vital function of the prosecutor, his or her discretion to file, or not file charges,<sup>14</sup> and the

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grassroots efforts of NGOs and other women's advocacy groups that compelled law enforcement agencies, prosecutors, and judges, to pay attention to the issue of crimes against women and further demanded effective redress of these types of crimes. See generally M.E. HAWKENS WORK, GLOBALIZATION AND FEMINIST ACTIVISM (2006); Römken, *infra* note 60; Gruber, *infra* note 60.

11. Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT'L L. 288, n.40 (2003). One anecdotal by-product of gender sensitive enforcement policies is the increased number of women in the role of decision-maker and policy shaper throughout the world. *Id.* See also *infra* Section IV. *Advocacy in Modern International Criminal Law*.
12. Askin, *supra* note 11, at 288 (citing numerous women in decision-making positions in modern international tribunals). *Cf. infra* note 123 (highlighting historic international tribunals had no women in positions of power and crimes against women were not seriously prosecuted).
13. Prosecutorial discretion is universally allowed with wide latitude provided the prosecutor does not make his or her discretionary decisions based on vindictive reasons or purposeful discriminatory reasons. R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS 20 (2005). Citizens may bring a writ of mandamus seeking to order the prosecution to file criminal charges in a specific case. *Id.* at 13. These writs are rarely successful. *Id.*; *Inmates of Attica Correctional Facility v. Rockefeller*, 474 F.2d 375 (2d Cir. 1973); *Leeke v. Timmerman*, 454 U.S. 83 (1981) ("a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another"). Selective enforcement has also been constitutionally challenged. *Wayte v. United States*, 470 U.S. 598, 608 (1985). The United States Supreme Court generally upheld wide prosecutorial discretion and only forbade the exercise of prosecutorial discretion "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler v. Boles*, 368 U.S. 448, 506 (1962). However, purposeful discrimination on the part of the prosecutor is very difficult to successfully establish. *Wayte*, 470 U.S. 598 (1985); *United States v. Armstrong*, 517 U.S. 456 (1996). Notwithstanding the courts allowing vast prosecutorial discretion, vindictive prosecution is not allowed. *Blackledge v. Perry*, 417 U.S. 21 (1974); *North Carolina v. Pearce*, 395 U.S. 711 (1969). However, even in those instances wherein the prosecutor possesses an ill motive behind his or her discretionary decision making, it is very difficult for the accused to prove or successfully challenge. *Armstrong*, 517 U.S. at 468.
14. MODEL RULES OF PROF'L CONDUCT R. 3.8 (2006) (Special Responsibilities of a Prosecutor).

impact these decisions have on the larger landscape of justice.<sup>15</sup> Further, the analysis will demonstrate how the movement toward gender equality built the foundation for the shift toward more aggressive and effective prosecutions of crimes against women, both in national and international tribunals.

Following the Introduction, Section II of this Article will lay out the role of the prosecutor and the authority this position carries. Further, it will discuss sexual assault and domestic violence cases in the United States as an example of how progressive policies enacted to target gender-specific violence and mandate enforcement can improve prosecutions. This is the type of development in national legal systems about which Arbour eluded. This showcases one national criminal justice system's achievements towards more effective and gender neutral prosecutions of crimes against women.<sup>16</sup> International prosecutors and advocates have been able to use the theories established in national courts to successfully punish the most serious international offenders.<sup>17</sup> Section III will give a historic background of rape

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15. Prosecutors literally have the ability to shape the debate, *i.e.* frame the legal issues of the enforcement of human rights, based upon their subjective and discretionary decisions regarding which defendants to pursue and which violations to litigate.
  16. The legal authority to prosecute crimes against women has long existed and pre-dates the Nuremberg trials. However, the issue of enforcement is a totally different question than whether there is legal authority to criminalize the alleged conduct. My analysis does not ignore the fact that the law criminalizing the abuse of women has long existed; instead I intend to highlight that notwithstanding this clearly articulated proscription in the law, enforcement of these laws was not forthwith—either nationally or internationally. With the goal of true enforcement of the human rights of women in mind, advocates, largely female advocates, have made significant progress in effectively prosecuting and punishing the abusers of women—*i.e.* effectively enforcing the existing established principles of international law and human rights.
  17. ICTY Rules of Procedure 96 (iii); WILLIAM A. SCHABAS, *THE UN INTERNATIONAL CRIMINAL TRIBUNALS, THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE* 499 (CAMBRIDGE UNIVERSITY PRESS, 2006) (citing international criminal law version of rape shield concept codified in ICTY RPE Rule 96(iii) which protects rape victims from aggressive cross-examination tactics and exploration into irrelevant prior sexual conduct during rape prosecutions); *The Prosecutor v. Delaïc*, Case. No. IT-96-21-T, Judgment, Para. 495 (Nov. 16, 1998) (echoing the modern view of rape in both the statutory articulation of the crime and the international tribunal's interpretation of the conduct) *available at* <http://www.un.org/icty/celebici/trialc2/judgement/index.htm> (last visited March 16, 2009).

The Trial Chamber considers the rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity. The condemnation and punishment of rape becomes all the more urgent where it is committed by, or at the instigation of, a public official, or with the consent or acquiescence of such an official. Rape causes severe pain and suffering, both physical and psychological. The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long lasting. Furthermore, it is difficult to envisage circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way,

as a war crime and its previously neglected attention by international criminal tribunals. This section will also analyze the status of the law on rape, as a crime against humanity and as genocide. The rulings of the International Tribunal for the former Yugoslavia (ICTY) and the International Tribunal for Rwanda (ICTR) exhibit these new laws. Section IV will discuss the reshaped landscape of advocacy in modern international criminal law. The gender mainstreaming in the personnel and policies of the ICTY will be highlighted as one of the first examples of this emerging shift in international criminal law.<sup>18</sup> In conclusion, in Section V, it is argued that the shift toward gender equality in criminal prosecutions and legitimate enforcement of crimes committed against women is a multi-dimensional task encompassing change in the understanding of the crime, investigation of the crime, articulation of the crime within the statutes, as well as desire to litigate and ability to effectively prosecute the charge. In sum, both municipal and international criminal laws have embarked upon a new era—"an era of enforcement" of the human rights of women.<sup>19</sup>

## II. THE ROLE AND DISCRETIONARY AUTHORITY OF THE PROSECUTOR

By examining the prosecution of criminals that victimize women, this Article seeks to add another layer to the discourse regarding the effective enforcement of the international human rights of women. In particular, this analysis illuminates an evident, yet seldom isolated truth, that the importance of diversity within and among decision makers and law enforcers is critical to equality and justice. In reality, more is often revealed by examining specifically, *who*<sup>20</sup> is empowered to enforce the laws than examining the actual laws "on the books" available to be enforced. In criminal law, it is within the exercise of a prosecutor's discretionary authority to file a case. This decision truly has the most profound impact upon the realization of actual justice. The prosecutor determines which criminals to pursue and which charges to file. Additionally, there is almost no judicial remedy available to undo the

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involve punishment, coercion, discrimination or intimidation. In the view of this Trial Chamber this is inherent in situations of armed conflict. *Id.*

18. DE BROUWER, *supra* note 3. The ICC has begun investigations in multiple conflicts in Africa, e.g. Democratic Republic of Congo, the Republic of Uganda and Sudan. There are allegations of mass rape and other forms of sexual violence in each of these conflicts. *Id.* at 22.

19. Arbour, *supra* note 2, at 203.

20. The individual enforcing the law need not be a woman in order to effectuate gender equality. Instead, the individual enforcing the law must be aware of and sensitive to the issues of female victims and equally enthusiastic to enforce crimes committed against women and crimes committed against men.

prosecutor's discretionary charging decisions.<sup>21</sup> The exercise of prosecutorial discretion is nearly absolute.<sup>22</sup>

This section will examine the process of selective prosecution and its positive and negative consequences. It will intentionally limit attention to the function of prosecutorial discretion in the municipal context. By eliminating the additional complications of international criminal law and international politics, one may easily observe the bare and essential function of the prosecutor. The extreme subjectivity, including both political and social biases, that is intertwined within the exercise of the discretionary function will no longer remain clandestine. The same issues that exist at the municipal level also manifest in the international context, yet with even more complexity.<sup>23</sup>

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21. *See generally* *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375 (1973) (a prosecutor has discretion not to file charges; court will not order prosecutor to investigate or to charge; court unwilling to substitute judicial discretion for prosecutorial discretion. Court will review prosecutor's decision only on due process or discrimination basis.); *United States v. Cox*, 342 F.2d 167 (1965) (separation of powers doctrine prevents courts from interfering with the discretionary power of the prosecutor; selective prosecution is okay so long as it is not based on a constitutionally invalid reason); *United States v. Goodwin*, 457 U.S. 368 (1982) (objective evidence needed to prove vindictive prosecution; difficult standard for an accused to successfully establish). Another interesting example of the power of prosecutorial discretion was former Chief Prosecutor of the ICTR Louise Arbour's decision not to pursue an investigation or charges against the current President of Rwanda, Tutsi President Kagame, for his alleged involvement in shooting down the plane of former Rwandan President Juvenal Habyarimana, which is thought to have sparked the Rwandan Genocide. Although her decision was controversial and still creates debate, there is no redress for Arbour's decision, and she declines to comment about it due to confidentiality. Sebastian Rotella, *Rwanda genocide accusation causes an uproar: A French judge says the current Rwanda leader plotted the '94 chaos that left 800,000 dead*, LOS ANGELES TIMES, Feb. 17, 2007, available at [http://africanamerica.org/groupee\\_files/attachments/6/9/0/6901070134/6901070134\\_Rwanda\\_genocide\\_accusation\\_causes\\_an\\_uproar.pdf?ts=49AE046F&key=AB27B66CFCA82619891099A8B0AD4299&referrer=http%3A%2F%2Fafricanamerica.org%2Fev%2Fforums%2Fa%2Fga%2Ful%2F7901070134%2FRwanda\\_genocide\\_accusation\\_causes\\_an\\_uproar.pdf](http://africanamerica.org/groupee_files/attachments/6/9/0/6901070134/6901070134_Rwanda_genocide_accusation_causes_an_uproar.pdf?ts=49AE046F&key=AB27B66CFCA82619891099A8B0AD4299&referrer=http%3A%2F%2Fafricanamerica.org%2Fev%2Fforums%2Fa%2Fga%2Ful%2F7901070134%2FRwanda_genocide_accusation_causes_an_uproar.pdf) (last visited Mar. 3, 2009).
  22. Prosecutors are typically motivated only to pursue cases they can win, and arguably those are the cases which contain the most legitimate evidence of guilt. Additionally, prosecutors are ethically bound to only file a case when there is sufficient admissible evidence to support the charge. However, there are always isolated examples of rogue prosecutors that are exceptions to the general rule. In very limited circumstances in U.S. law, defendants can seek relief from the courts alleging theories of selective or vindictive prosecution. *See id.*
  23. The international criminal prosecutor's jurisdictional authority is primarily limited to the most serious offenses, such as: crimes against humanity, and genocide, predicated on underlying crimes of rape and murder. ICTY Art. 5; ICTR Art. 2(2)(a-e), 3; ICC Statute Art. 7(g); *see also infra* note 112. However, one must be mindful of one distinct difference between municipal and international legal systems—the governmental structure, or lack thereof. In international law there is not a true equivalent of a legislature, an executive or a judiciary; although some may argue that the United Nations could serve as a comparable international governmental structure. Without tackling that debate here, it is sufficient to understand that there are structural and political differences between the source of authority for national and international prosecutors to function. These differences correspondingly impact the exercise of prosecutorial discretion to file a case.



## A. Prosecutorial Discretion

Criminal law, whether domestic or international, yields one constant—there is never a shortage of crimes to prosecute.<sup>24</sup> Instead, daily, criminal prosecutors are confronted with the opposite problem—always more crimes and criminals to process than there are police officers, investigators, prosecutors, judges and juries to properly handle them. Due to this dynamic, prosecutors are forced to select only a limited number of cases among the many crimes and criminals. Some crimes are large and some are small, some crimes are violent and some are non-violent, some criminals are repeat offenders and some are first offenders; yet, among these many well deserving cases prosecutors must pluck out the most appropriate cases to charge.<sup>25</sup>

When selecting cases, the individual character and sensibilities of the prosecutor often comes into play. The gender, social background, political predilections, and personal experiences of the individual lawyers who exercise prosecutorial discretion, intentionally or unintentionally, factor into their ultimate choice of which crimes, and correspondingly, which victims, are most deserving of redress.<sup>26</sup> Decisions regarding which case(s) to litigate attempt to accomplish multiple goals, such as: punishing the individual criminal actor, vindicating the injury of the victim, and alerting the public in an effort to deter future crime.<sup>27</sup> Despite the many interests or various constituents that must be

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24. U.S. Department of Justice Federal Bureau of Investigations, *Crime in the United States*, September 2008, available at [http://www.fbi.gov/ucr/cius2007/offenses/violent\\_crime/index.html](http://www.fbi.gov/ucr/cius2007/offenses/violent_crime/index.html) (In the United States, “[n]ationwide, an estimated 1,408,337 violent crimes occurred in 2007.”) (last visited Jan. 28, 2009).
  25. The same is true in the international criminal context: “The offenses in the former Yugoslavia and Rwanda that fell within our jurisdiction were so numerous and deserving of prosecution that we had to be very strict about how we prioritized cases. In general terms, we determined that we had to concentrate on the most serious offenses that could bring us to the highest possible echelons of command.” Arbour, *supra* note 2, at 203.
  26. An example of one such bias was captured in a survey of attorneys: “Seventy-seven percent of women attorneys, 64% of men attorneys, and 62% of judges responding to the survey agree that prosecutors are less likely to pursue a sexual assault when the alleged offender is the husband. Even larger majorities of attorneys and judges agree that prosecutors are less likely to proceed on charges of rape by an acquaintance.” *Case Comment: A Difference in Perceptions: The Final Report of the North Dakota Commission on Gender Fairness in the Courts*, 72 N. D. L. REV. 1113, 1219 (1996) (a report submitted to The North Dakota Supreme Court by the North Dakota Commission on Gender Fairness in the Courts, October 24, 1996).
  27. Consider the example of the well-known prosecution of domestic-diva Martha Stewart. *United States v. Martha Stewart and Peter Bacanovic*, United States District Court Southern District of New York, Case No. 03 Cr. 717 (MGC). One of the objectives of the prosecutor was to “send a message” that “insider trading” or fraudulent conduct regarding the stock market would not be tolerated regardless of whether the perpetrator was a big or small fish, public or private figure, etc. The prosecutors in the

satisfied, prosecutors have historically neglected the special needs of victimized women and failed to give their cases adequate attention.

Law, in general, and criminal law in particular, has long been a male dominated field. As a profession, the law has not always welcomed the participation of women. Consider that in 1872, the United States Supreme Court denied Mrs. Myra Bradwell's request for a license to practice law, stating: "The nature and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . . The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is a law of the Creator."<sup>28</sup> With this historic case in mind, as one example of gender inequality in the law, it does not take much to imagine why crimes that mainly affected women could easily be devalued and given minimum attention.

Traditionally, the law enforcement environment, both police officers and prosecutors, was entirely male and its decision making in the area of crimes against women reflected its narrow and exclusive composition.<sup>29</sup> However, the inclusion of women as both police officers on the street and prosecutors in the courtroom has fostered a new era in which sexual assault and domestic violence cases are aggressively charged and vigorously litigated by both male and female prosecutors specially trained for the task.<sup>30</sup>

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Martha Stewart case were seeking to do more than just sanction Martha's conduct, but instead wanted to warn others and deter further violations of the law. Because of the limited prosecutorial resources available and the reality that not every case can be prosecuted, this is a legitimate goal imbedded in the exercise of prosecutorial discretion and the ultimate decision of which cases are the most "appropriate" to file. International prosecutors face the dilemma of selecting to prosecute the cases that will have the most societal impact, and thus try to indict as high up the chain of command as possible. See generally Arbour, *supra* note 2, at 203.

28. *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872); see also *Case Comment: A Difference in Perceptions: The Final Report of the North Dakota Commission on Gender Fairness in the Courts*, 72 N. D. L. REV. 1113 (1996).
29. See generally KATHRYN E. SCARBOROUGH & PAMELA A. COLLINS, *WOMEN IN PUBLIC & PRIVATE LAW ENFORCEMENT* (BUTTERWORTH-HEINEMANN 2002).
30. National District Attorney's Association and Minnesota Domestic Violence Project conduct specific training courses for law enforcement and prosecutors that handle domestic violence and sexual assault cases. These courses are conducted with a certain philosophy that there is one "correct" way to handle these cases. But cf. Arbour, *supra* note 2, at 203. (Her speech exposes the policy debate among international prosecutors regarding how crimes against women should be handled: "One of the debates that we had constantly in the office of the prosecutor was: should we 'normalize' the prosecution of sexual violence, or should we keep nurturing it as a separate issue? . . . The question of how sexual offenses should be investigated. Should we investigate them as we would any other crime, or, alternatively, because of the difficulty of investigating sexual offenses, should we continue to use a team that is particularly trained and sensitive to the special need of this kind of investigation, one that will ensure that these investigations are not neglected? We have these policy debates all the time.") *Id.*

The charging decision is indeed an extremely important one.<sup>31</sup> However, this decision is laced with many difficult and often competing political, social, and practical concerns. Yet, the evident inequalities in the prosecution of crimes that victimize women are embroiled in the deeper patriarchal<sup>32</sup> construct of the legal system<sup>33</sup> and the nearly global "attitude that abuse of women is a private, cultural issue which does not require or demand state action."<sup>34</sup> Additionally, it is important to keep in mind that the prosecutor's discretionary function to file criminal charges is confounded by multiple discretionary decisions made by other members of the "enforcement arm" of the law.<sup>35</sup>

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31. "The decision whether to file formal criminal charges is a vitally important stage in the criminal process. It provides an opportunity to screen out cases in which the accused is apparently innocent, and it is at this stage that the prosecutor must decide in cases of apparent guilt whether criminal sanctions are appropriate. In making this decision, the prosecutor must decide: (1) whether there is sufficient evidence to support a prosecution; (2) if so, whether there are nonetheless reasons for not subjecting the defendant to the criminal process; (3) if so, whether nonprosecution should be conditioned upon the defendant's participation in a diversion program; and (4) if prosecution is to be undertaken, with what offense or offenses the defendant should be charged." YALE KAMISAR ET AL., *ADVANCED CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS* 846 (2002); *see generally* LAFAYE ET AL., *CRIMINAL PROCEDURE* THIRD EDITION, 668-702 (2000); American Bar Association Standards for Criminal Justice The Prosecution Function, 3-3.9 (3d ed. 1993), *reprinted in* JOSHUA DRESSLER AND GEORGE C. THOMAS III, *CRIMINAL PROCEDURE: PROSECUTING CRIME* 779-782 (2003).
  32. FRANCES OLSEN, *The Sex of Law*, in *THE POLITICS OF LAW—A PROGRESSIVE CRITIQUE* 453, 461. "Patriarchy" is defined as "social organization marked by the supremacy of the father in the clan or family, the legal dependence of wives and children, and the reckoning of descent and inheritance in the male line." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 863 (9th ed. 1986).
  33. "Although the image of Justice may be in the form of a woman, popular ideology states that Law is male, not female. It is not difficult to understand the correlation, because for years the social, practical, and intellectual practices that comprise Law were dominated almost exclusively by men. . . . [T]he normative structures of international law has allowed women's issues to be left unattended. Because men are not traditionally victims of gender discrimination, sexual degradation, or domestic violence, these matters have been ignored within the international community." Kathleen M. McCauley, *Women on the European Commission and Court of Human Rights: Would Equal Representation Provide More Effective Remedies?*, 13 DICK. J. INT'L L. 151, 161-63 (1994).
  34. *Id.* at 159; *see also* Rebecca J. Cook, *Women's International Human Rights Law: The Way Forward*, 15 HUM. RTS. Q. 230, 259 (1990) (Suggesting the following prerequisites for reform in international human rights law in order to properly incorporate and properly consider the international human rights of women: (1) improving education of human rights law and processes, (2) providing legal services to specifically help women; (3) researching facts and publishing the findings; (4) promoting the female presence on international human rights committees, courts and commissions.).
  35. "Case screening, in the broadest sense, occurs at every point in the criminal process and all the time. Police decide whether to stop a suspicious person in an alley; if they stop him, they must decide whether to question or search; if they question or search, they must decide whether any statements made or items found create sufficient indicia of serious activity to justify full-fledge arrest. If a search reveals a very small quantity of marijuana, for example, many police in urban areas will decide to ignore the evidence. When police ignore evidence of a relatively minor crime, they are, or course, engaged in "case screening." They are making an assessment that in their city or precinct, the

[N]ote must also be taken of discretionary enforcement by the police, for it is clear beyond question that discretion is regularly exercised by the police in deciding when to arrest and that such decisions have profound effect upon prosecution policy. This is so [because] the police determine what cases come to the attention of the prosecutor.<sup>36</sup>

Therefore, as a practical matter, in order for the focus on crimes against women to be elevated from its previously neglected status, the mindset of many agencies within law enforcement have had to shift. The first step toward effective enforcement must be the purging of old biases and prejudices regarding the crimes of sexual assault and domestic violence. Eliminating stereotypical ideas of stigma and shame against the victims of these crimes is crucial to this initial process. Secondly, reeducation is required to enable gender neutral investigation and prosecution of these cases.<sup>37</sup> The inclusion of women in these various agencies has helped in the transition; however, in order to adequately protect women and punish their abusers, all members of law enforcement, male and female, law and order, must embrace the fundamental principles of women's human rights:<sup>38</sup>

States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and

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resources of the police, the prosecutors, and the courts are better used in other cases. You may believe (a) that police should not take it upon themselves to make this kind of decision, or (b) that this [is] an incorrect police decision. It is nonetheless true that in a real-world environment, no one can stop police from this kind of case screening; it is human nature to weigh the costs and benefits of our actions." JOSHUA DRESSLER AND GEORGE C. THOMAS III, *CRIMINAL PROCEDURE: PROSECUTING CRIME* 775 (2003). YALE KAMISAR ET AL., *ADVANCED CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS* 846 (2002) ("[Most] cases come to the attention of the prosecutor only after the police have instituted the criminal process by arresting a suspect. \*\*\* As a consequence, the police exercise a very important influence over the initial decision as to whether to invoke the criminal process . . .").

36. LAFAVE ET AL., *CRIMINAL PROCEDURE* 672 (3d ed. 2000). *But cf.* In the international context the discretionary authority of "police officers" has little or no impact upon the case filings by an international prosecutor. For example, at the ICTY/R and the ICC, the Prosecutor makes both discretionary decisions to investigate and prosecute the case. ICC Statute, Art. 53–54.
37. Epstein, *infra* note 42.
38. "Women are entitled to the equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. These rights include: the right to equality; the right to liberty and security of person; the right to equal protection under the law; the right to be free from all forms of discrimination; the right not to be subjected to torture, or other cruel, inhumane or degrading treatment or punishment." Declaration on the Elimination of Violence Against Women, Art. 3(b), (c), (e), (h) (U.N. 1993).

without delay a policy of eliminating violence against women, and to this end, should:

- Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons;
- Develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence; women who are subjected to violence should be provided with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm that they have suffered; States should also inform women of their rights in seeking redress through such mechanisms;
- Include in government budgets adequate resources for their activities related to the elimination of violence against women, and;
- Take measures to ensure that law enforcement officers and public officials responsible for implementing policies to prevent, investigate and punish violence against women receive training to sensitize them to the needs of women.<sup>39</sup>

Consequently, the discretionary decisions of law enforcement to investigate and the prosecutor to file charges are not isolated. Instead, the decisions are connected to larger human rights issues and international obligations to legitimately enforce criminal violations that affect all victims, including women.

In addition to the aforementioned prejudices of the criminal justice systems' "insiders," the general public's opinion and biases regarding crimes against women further weigh into the analysis of which crimes to charge.<sup>40</sup> In legal systems where the jury consists of members of the general public, this factor is even more important because average citizens, once selected, instantly become the deciders of guilt and innocence for all crimes, including crimes against women.<sup>41</sup> Although international prosecutors present their cases before

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39. *Id.* Art. 4(c), (d), (h), (i).

40. *Infra* note 43.

41. This is an important area where municipal criminal law and international criminal law are distinctly different. In international criminal tribunals the trier of fact is a professional trial chamber made up of appointed judges, not the general public. Thus, although international prosecutors must still deal with political pressures of which cases to pursue based on the overall sentiment of the international community and issues of general legitimacy in their decisions, international prosecutions do not involve the participation of the "average citizen" in any decision making capacity. ICTY Statute Art. 12-14.

professional judges and not lay juries, a similar dynamic still exists for cases presented to judges.<sup>42</sup> Thus, international prosecutors must remain aware of the general prejudices that weigh against female victims and, therefore, strategically consider these realities, not only in the discretionary decision to file certain charges, but also in tactical decisions regarding how to present the case.

The decision to prosecute is indeed influenced by the popular views, including unfair biases present in the main stream population.<sup>43</sup> Thus, the issue of success at trial creates a curious dilemma for a prosecutor to reconcile. For example, prosecutors must weigh not only the strength of the evidence but also the likelihood that it will be favorably received by the jurors and result in a conviction at trial. This stage of evaluating the appropriateness of the case is based on issues separate and apart from the true legal worthiness of the case. Notwithstanding this reality, the American Bar Association's (ABA) Standards instruct American prosecutors not to be persuaded by the societal prejudices of the jury pool, stating: "In cases which involve a serious threat to the community, the prosecutor should not be deterred from prosecution by the fact that in the jurisdiction juries have tended to acquit persons accused of the particular kind of criminal act in question."<sup>44</sup>

Every prosecutor must closely evaluate the competing interests involved in protecting the human rights of *all* citizens regardless of the ingrained prejudices that may attach to female victims. Prosecutors must fight the urge to avoid pursuing sexual assault or domestic violence cases simply because they are more difficult and less "winnable" cases. Juries in domestic violence

42. Judges are susceptible to the same prejudices that befall jurors. Some shocking examples of how U.S. judges have treated domestic violence victim illustrate this point. "Most judges come to the bench with little understanding of the social and psychological dynamics of domestic violence and, instead, bring with them a lifetime of exposure to the myths that have long shaped the public's attitude toward the problem . . . . Judges similarly mistreat domestic violence victims. When cases are brought by women who have dropped charges on previous occasions, judges have made such comments as: 'oh, it's you again,' or 'how long are you going to stay with him this time,' or 'you want to go back and get beat up again.' Others have gone so far as to threaten victims with sanctions for repeated use of the court system. A particularly egregious example occurred in North Dakota, where a judge is reported to have told a domestic violence petitioner, 'If you go back [to the perpetrator] one more time, I'll hit you myself.'" Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 39-40 (1999).
43. See generally Alana Bowman, *A Matter Of Justice: Overcoming Juror Bias In Prosecutions Of Battered Through Expert Witness Testimony Of The Common Experiences Of Battered Women*, 2 S. CAL. REV. L. & WOMEN'S STUD. 219 (1992).
44. AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE: THE PROSECUTION FUNCTION 3-3.9(c) (3d ed. 1993), reprinted in JOSHUA DRESSLER & GEORGE C. THOMAS III, *CRIMINAL PROCEDURE: PROSECUTING CRIME* 779 (2003).

and sexual assault cases have been known to unfairly blame the victim(s) for being raped or beaten.<sup>45</sup> In other words, jurors vote to acquit defendants in order to express their contempt for the victim, instead of because their belief in the defendant's innocence.<sup>46</sup> This is a real problem prosecutors must confront in order to properly exercise their discretionary function.

Modern prosecutors have fought the urge to dismiss charges on hard to convict abusers of women and instead have begun the process of educating judges and juries about these crimes.<sup>47</sup> The prosecution's presentation of expert witnesses, such as battered women's syndrome<sup>48</sup> experts and rape trauma experts, provide courtroom depictions of the realities that victimized women truly endure at the hands of their abusers.<sup>49</sup> Arguably, these assertive trial strategies awaken a preemptory norm within international human rights law that is regularly ignored in many nations—the human rights of women are equal to the human rights of men.<sup>50</sup> Under principles of human rights law

45. Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 104 (2002) (illustrating three relevant studies from 1982 to 1995 wherein mock jurors voiced bias against victims whose sexual histories reveal "promiscuity" and in turn viewed the violence committed against them as less serious).

46. "The jury in a criminal case has uncontrolled discretion to acquit the guilty. An empirical study has shown that juries acquit the guilty because: (1) they sympathize with the defendant as a person; (2) they apply personal attitudes as to when self-defense should be recognized; (3) they take into account the contributory fault of the victim; (4) they believe the offense is de minimis; (5) they take into account the fact that the statute violated an unpopular law; (6) they feel the defendant has already been punished enough; (7) they feel the defendant was subjected to improper police or prosecution practices; (8) they refuse to apply strict liability statutes to inadvertent conduct; (9) they apply their own standards as to when mental illness or intoxication should be a defense; and (10) they believe the offense is accepted conduct in the subculture of the defendant and victim." WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* 672 (3d ed. 2000).

47. Cf. However, the legislative mandates in domestic violence laws initiated the changing attitudes towards these historically neglected cases. See generally *infra* note 70.

48. Legal scholars urge the title and scope of this evidence should be changed from "Battered Women's Syndrome" to "Expert Testimony on Battering and Its Effects." One reason cited is the social science advances in this area: "Not only have the limitations and inaccuracies of battered woman syndrome been exposed, but the body of scientific literature concerning domestic violence has grown at a rapid rate. This knowledge base, incorporating new and revised theories, empirical findings, and clinical observations, has developed greatly since battered woman syndrome was originally defined." Paula Finley Mangum, *Reconceptualizing Battered Woman Syndrome Evidence: Prosecution Use of Expert Testimony on Battering*, 19 B.C. THIRD WORLD L. J. 593, 610-19 (1999), reprinted in NANCY K.D. LEMON, *DOMESTIC VIOLENCE LAW* 610 (2001). The second reason to retitle this type of expert testimony is because its use has changed from a self-defense theory used by female defendants to a prosecution tool to convict male batterers: "Introducing expert testimony to describe the lives and experiences of battered women has a potentially broader application in the prosecution of batterers than in the defense of battered women." *Id.*

49. See generally *Ibn-Tamas v. United States*, 455 A.2d 893 (D.C. Cir. 1983) (discussing the role of battered women syndrome experts).

50. Universal Declaration of Human Rights, G.A. Res. 217A, at Art. 7, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

equality must be reflected in the government's prosecution of crimes that affect women, not just those that affect men. "[T]here is increasing evidence that sexual violence has now reached the level of a *jus cogens*<sup>51</sup> norm." Furthermore, "[g]ender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men,"<sup>52</sup> and cannot be allowed to continue unpunished. Although there have been great advancements in this area, one reason for the slow progress is that "discrimination based on gender is often overlooked or considered less of an affront to humanity."<sup>53</sup>

While exploring the evolving relationship between prosecutorial discretion and crimes against women, thought should be given to whether the progressive actions of modern prosecutors stem from public outcry, moral benevolence or actual legal obligations. Women's organizations' lobbying efforts directed at legislatures and law enforcement agencies have worked to develop some of the ideas and policies now embedded within this modern era of enforcement of crimes against women. Yet, legal obligations, outside the cries of these constituencies, suggest an additional mandate for their needed shift in focus. Scholars have argued that international human rights obligations exist which require prosecutors, as state actors, "to exercise due diligence to prevent, investigate, punish, and remedy gender-specific acts of violence against women as perpetrated by private actors."<sup>54</sup> Anthony P. Ewing argues in his article, *Establishing State Responsibility For Private Acts Of Violence Against Women Under The American Convention On Human Rights*,<sup>55</sup> that the American Convention on Human Rights establishes a duty upon states to prosecute private acts of violence against women. Although a state cannot be held directly responsible for the private acts of violence of its citizens, state responsibility can flow from the state's actions or omissions in response to these private acts of violence, particularly when they disproportionately harm women. Ewing urges that "[i]f the American

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51. Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT'L L. 288, 294 (2003). The significance of giving a crime *jus cogens* status is that it makes it a crime prohibited at all times, in all places. Further, all people are deemed to be on notice of *jus cogens* crimes whether or not a specific jurisdiction has codified the offense. *Id.* at 293. Sexual violence is not only committed against women; however, women are more often victims of this type of crime than men. Therefore, the status of the crime and its likelihood of enforcement impact the human rights of women.

52. Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 19* (11th Session, 1992).

53. McCauley, *supra* note 33, at 152.

54. Anthony P. Ewing, *Establishing State Responsibility for Private Acts of Violence Against Women Under the American Convention on Human Rights*, 26 COLUM. HUM. RTS. L. REV. 751, 754 (1995).

55. *Id.*



Convention is to be a truly effective tool for redressing violence against women in its most prevalent forms, it must be applied to acts of private violence."<sup>56</sup> In this regard, the diligent and gender-sensitive exercise of prosecutorial discretion is a critical and necessary ingredient toward achieving legitimate enforcement of the human rights of women.

## B. Progress Toward Effective Prosecution Of Crimes Against Women In The United States

This sub-section will focus on sexual assault and domestic violence prosecutions in the United States. Specifically, changes in the laws and policies that help to create effective and vigorous prosecution of crimes against women will be highlighted.<sup>57</sup> Keep in mind while there have been recent improvements to the United States' laws regarding crimes against women, domestic violence and sexual assault have long been codified as criminal offenses both under federal and state statutes.<sup>58</sup> However, these crimes have traditionally been under-charged, under-investigated and under-prosecuted.<sup>59</sup> It has not been until recently, roughly the last three decades, that law

56. *Id.* at 769.

57. Again, one can point to the inclusion of women as legally trained advocates, prosecutors and judges, and their active participation in decision-making and policy changing as a reason for this progress. However, the emersion of compelling female voices is not a phenomenon unique to the United States; women around the world, in various nations, are making progress within their legal systems. Instead, this example is intended to serve as a microcosm to demonstrate how the inclusion of women in the law can have a larger effect beyond national borders.

58. ALI Model Penal Code § 213.1, Rape and Related Offenses.

*Rape:*

(1) A male who has sexual intercourse with a female not his wife is guilty of rape if:

(a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or  
 (b) he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or  
 (c) the female is unconscious; or  
 (d) the female is less than ten years old

Rape is a felony of the second degree unless (i) in the course thereof the actor inflicts serious bodily injury upon anyone, or (ii) the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties, in which cases the offense is a felony of the first degree. *Cf.* Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J. L. & FEMINISM 3, 9 (1999) (discussing older American and European laws in fact endorsed physical abuse of wives and children) (citing R. EMERSON DOBASH & RUSSELL DOBASH, *VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY* 59 (1979)).

59. For example, "the problem of rape was virtually ignored before the feminist movement of the 1970s helped to define it as a significant social problem." Christine Alder, *The Convicted Rapist: A Sexual or Violent Offender?*, 11 CRIM. JUST. & BEHAV. 157 (1984).

enforcement and prosecutors have seriously treated crimes against women with any priority or urgency.<sup>60</sup>

Domestic violence and sexual assault are crimes that disproportionately affect women; therefore, failing to effectively sanction the physical and mental abusers of women triggers human rights concerns.<sup>61</sup>

Many forms of violence that are gender-specific, however, traditionally have not been viewed as violations of human rights imputable to states under international law. Sexual assault and domestic violence, for example, which are suffered overwhelmingly by women have not been addressed effectively at the international level as human rights violations.<sup>62</sup>

Historically, the United States was no exception. The United States' law enforcers failed to take seriously the needs of victimized women. In domestic abuse situations, law enforcement played a passive role of counselor or peacemaker instead of the affirmative role of law enforcer. Police officers were trained to mediate the dispute instead of arrest an abuser.<sup>63</sup> As one example of this dynamic, a study of law enforcement in the District of Columbia in 1990 revealed that:

[P]olice were arresting accused batterers in only five percent of all domestic violence cases. They failed to arrest in more than eighty-five percent of the cases in which the victim had sustained serious injuries that were visible when the police arrived on the scene. Police were more likely to arrest the perpetrator in situations where he insulted an officer or damaged a vehicle.<sup>64</sup>

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60. René Römkens, *Law as a Trojan Horse: Unintended Consequences of Right-based Intervention to Support Battered Women*, 13 YALE J. L. & FEMINISM 265, 265 (2001) ("After 30 years of feminist advocacy and politics, a small but historic change has taken place: domestic violence has entered mainstream international and national politics as a matter of legitimate public concern . . ."); see generally Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 747–48 (2007).

61. "[T]he definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence." Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 12*, Art. 6. (8th Session, 1989).

62. Ewing, *supra* note 54, at 752.

63. *Development in the Law-Legal Response to Domestic Violence*, 106 HARV. L. REV. 1498, 1535–36 (1993) (explaining that historically police were trained to mediate, not arrest, when called to domestic disturbances).

64. Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J. L. & FEMINISM 3, 14 (1999) (citing Sandra Jean Sands et al., *Police Response to Domestic Violence* 9 n. 15 (June 1990)) (presented at Institute for Women's Policy Research Second Annual Women's Policy Conference) (unpublished manuscript,

The inadequacy of law enforcement's response to domestic violence as well as the gender inequity in their actions is further evidenced by the articulated language in the current California Penal Code:

Every law enforcement agency in this state shall develop, adopt, and implement written policies and standards for officers' responses to domestic violence calls by January 1, 1986. These policies shall reflect that domestic violence is alleged criminal conduct. Further, they shall reflect existing policy that a request for assistance in a situation involving domestic violence is the same as any other request for assistance where violence has occurred.<sup>65</sup>

The cultural mores and deeply ingrained attitudes that domestic violence should be treated as a private, instead of a public concern helped to reduce law enforcement's response to the needs of abused women.<sup>66</sup> Therefore, instead of addressing the violence against women as criminal, it was typically treated as a "part of life," *i.e.* product of marriage, etc. For these reasons, the suffering of these victimized women was largely ignored. Consequently, inadequate governmental resources were allocated to its prevention or punishment, notwithstanding the high mortality rate that stems from domestic violence.<sup>67</sup>

The California legislature's statutory language confirms that domestic violence cases were being neglected. None of their other criminal statutes include statements reminding police officers of their obvious duties: that a domestic violence victim's call for help should be treated "the same as any

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on file with Deborah Epstein).

65. CAL. PENAL CODE §13701(a).

66. "It was not until the late nineteenth century that states finally began to move away from actually condoning a husband's use of physical force to discipline his wife. But many [states] still clung to the position that in the absence of 'serious' violence, the government should not interfere in the private, family realm. As late as 1874, the North Carolina Supreme Court stated: 'If no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive.' This view predominated most states well into the twentieth century." Epstein, *supra* note 58, at 10-11 (quoting *State v. Oliver*, 70 N.C. 60, 61-62 (1874)).

67. On average, more than three women are murdered by their husbands or boyfriends in this country every day. In 2000, 1,247 women were killed by an intimate partner. The same year, 440 men were killed by an intimate partner. Women are much more likely than men to be killed by an intimate partner. In 2000, intimate partner homicides accounted for 33.5 percent of the murders of women and less than four percent of the murders of men. Family Violence Prevention Fund, *The Facts on Domestic Violence*, available at [http://endabuse.org/userfiles/file/Children\\_and\\_Families/DomesticViolence.pdf](http://endabuse.org/userfiles/file/Children_and_Families/DomesticViolence.pdf). Additionally, the number of women killed by an intimate was stable for two decades but declined after 1993. Callie Marie Rennison, *Intimate Partner Violence, 1993-2001, Bureau of Justice Statistics: Crime Data Brief* (Feb. 2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf>. Between 1976 and 2000, the number of women murdered by intimates fell 22% from 1,600 to 1,247. *Id.*

other request for assistance where violence has occurred.”<sup>68</sup> Beyond telling officers to provide gender neutral assistance to victims, the legislature also specifically reminded officers that domestic violence is a crime. The bluntness of the statute shifts the focus toward gender equality in the enforcement of criminal violations and censures police officers for their unacceptable neglect of women as victims of crime.

Advocates have succeeded in realizing a more legitimate governmental response to domestic violence cases.<sup>69</sup> Many states now have laws urging police officers to arrest domestic violence abusers and “no drop policies” which oblige prosecutors to charge and prosecute all domestic violence cases.<sup>70</sup> Due to the previous gender bias in the exercise of discretion, these mandatory policies were specifically designed to limit, if not completely eliminate, both the police officer’s and prosecutor’s discretion to punish the violence. Although these advances have not solved the pandemic of domestic violence, they represent progress toward equal enforcement of the laws that affect women.

Similarly, sexual assault cases have their own history of neglect by law enforcement in the United States.<sup>71</sup> In order to effect change regarding rape prosecutions, society had to first renew its mind regarding the concept of rape

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68. *Id.*

69. “The written policies shall encourage the arrest of domestic violence offenders if there is probable cause that an offense has been committed. These policies also shall require the arrest of an offender . . . . These policies shall discourage, when appropriate, but not prohibit, dual arrests. Peace officers shall make reasonable efforts to identify the dominant aggressor in any incident. The dominant aggressor is the person determined to be the most significant, rather than the first, aggressor. In identifying the dominant aggressor, an officer shall consider the intent of the law to protect victims of domestic violence from continuing abuse, the threats creating fear of physical injury, the history of domestic violence between the persons involved, and whether either person acted in self-defense. These arrest policies shall be developed, adopted, and implemented by July 1, 1996. . . . Law enforcement agencies shall develop these policies with the input of local domestic violence agencies.” CAL. PENAL CODE § 13701(b); *see also* Durant, *supra* note 7, at 307 (“In an effort to force police to arrest in response to domestic violence incidents, victims began filing lawsuits against police departments in the 1970s. In 1976, after some wrongful death claim attempts failed, legal aid attorneys filed for declaratory and injunctive relief against both the Oakland and New York City police departments in an attempt to force police officers to enforce the law. Both cases were settled and most of the plaintiffs’ requested relief was granted; including agreements that the police would make an arrest whenever an officer had probable cause to believe that a felonious assault had occurred.”).

70. NEV. REV. STAT. ANN. § 200.485.7 (West 2009): “If a person is charged with committing a battery which constitutes domestic violence . . . , a prosecuting attorney shall not dismiss such a charge in exchange for a plea of guilty, guilty but mentally ill or nolo contendere to a lesser charge or for any other reason unless he knows, or it is obvious, that the charge is not supported by probable cause or cannot be proved at the time of trial.”

71. This section discusses the prosecution of peacetime rape in the United States. Sections II & III will discuss wartime rape and its prosecution as a war crime.

as a violent crime and not merely a sexual act.<sup>72</sup> Acknowledging rape as a violent assault is an important step toward “disentangling rape from sex, and therefore harm from pleasure, in the minds of many.”<sup>73</sup> Only after the initial step of removing societal bias has been accomplished can a rape victim and her allegations be given respect and treated “as a report of a violent crime, rather than an implausible allegation of an unreliable female seductress.”<sup>74</sup> Even more significantly, substantive criminal laws changed to reflect this new enlightened understanding rape as a violent crime<sup>75</sup> and not a product of promiscuity or revealing clothing.<sup>76</sup> Additionally, the type of evidence that can be admitted against a rape victim has meaningfully improved due to the “rape shield law,”<sup>77</sup> passed by Congress in 1978, which was incorporated into the Federal Rules of Evidence as a prohibition against the defense tactic of using a rape victim’s irrelevant prior sexual history in court. Not only did the “rape shield law” encourage more women to report rapes, one of the intended

72. Beth Stephens, *Humanitarian Law and Gender Violence: An End to Centuries of Neglect?*, 3 HOFSTRA L. & POL’Y SYMP. 87, 93 (1999). In *Baby v. State*, 172 Md. App. 588 (2007), the court recently re-affirmed old attitudes about rape, consent, and criminal culpability of sex offenders when it held that if a woman consents to sexual intercourse before penetration and withdraws her consent afterwards, there is no rape.

73. Lynne Henderson, *Rape and Responsibility*, 11 L. & PHIL. 127, 156 (1992).

74. Stephens, *supra* note 72, at 93–94. See also, GEORGE FISHER, EVIDENCE (2002). Römckens, *supra* note 60.

75. The crime of rape is codified in both the Model Penal Code and the California criminal code as being a violent crime. In California, one of the situations in which a rape occurs is when one accomplishes sexual intercourse with one not his or her spouse “where it is accomplished against a person’s will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.” CAL. PENAL CODE § 261(a)(2) (2007). The MPC mimics this language as circumstances in which a rape occurs to include submission by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping.

In the MPC, rape is a felony of the second degree unless the perpetrator inflicts serious bodily injury upon anyone while committing the rape or when the victim is not a “voluntary social companion” of the perpetrator and the victim had not previously permitted him sexual liberties. In these two scenarios, the offense is a felony of the first degree. MODEL PENAL CODE § 213.1.

In California, rape is punishable by imprisonment in the state prison for three, six, or eight years. CAL. PENAL CODE § 264. One scenario which enhances the appropriate charge is when one kidnaps a victim for the purpose of raping them. Doing so is punishable by an additional term of nine years. CAL. PENAL CODE § 667.8.

In re John Z, 60 P.3d 183 (2003) (ruling that victim’s post-penetration withdrawal of consent, if clearly communicated to the accused, and the accused fails to stop intercourse, may still constitute the crime of rape); see also *State v. Baby*, 946 A.2d 463 (2008) (analyzing the law regarding post-penetration withdrawal of consent).

76. Cf. *Commonwealth v. King*, 834 N.E.2d 1175, 1195 (2005).

77. FED. R. EVID. 412(a): “The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct . . . : (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior. (2) Evidence offered to prove any alleged victim’s sexual predisposition.”

public policy benefits,<sup>78</sup> but it also improved the prosecution's ability to convict. It eliminated a common defense ploy wherein the defense attorney would attempt to make the focus of the trial about the victim's past sexual partners, *i.e.* playing into the aforementioned gender biases against female victims.<sup>79</sup> The intended outcome of the tactic would be for the jury to acquit the defendant out of sheer disgust or distaste for the victim and her sexual past and ignore any relevant facts about the defendant's alleged violent acts of rape.<sup>80</sup> The "rape shield law" in American jurisprudence has helped protect the dignity of the rape victim during the litigation process and yield more convictions and punishment of sexual offenders.<sup>81</sup>

The progress made in the United States in domestic violence and sexual assault prosecutions illustrate the dramatic difference that policies aimed at addressing gender-specific crimes have upon the exercise of justice. Mandating law enforcement to legitimately investigate and prosecute domestic

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78. FRE 412 advisory committee's note: "The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact-finding process. By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders."
  79. FRE 412 is not a complete bar to the admission of a victim's past sexual history, but does require such history to be extremely necessary and relevant to the case before admissibility will be granted. *See State v. Smith*, 743 So.2d 199 (La. 1999) (prior false rape allegation is allowed as impeachment evidence and not barred by FRE 412); *Olden v. Kentucky*, 488 U.S. 227 (1988) (confrontation clause does not allow the defendant to wage a general credibility attack on victim, but an attack on the victim's bias and/or motive to lie is allowed and not barred by FRE 412); *Boggs v. Collins*, 226 F.3d 728 (6th Cir.), *cert. denied*, 532 U.S. 913 (2001).
  80. This type of jury response relates back to this article's earlier discussion about the practical reasons behind a prosecutor's discretionary choice to decline prosecution of difficult to win cases.
  81. Consistent with Louise Arbour's comments, this Article argues that the progress towards gender neutral prosecutions in municipal justice systems has trickled up and encouraged gender neutral prosecutions in international criminal law. There are methods in place for protecting the victims and witnesses of gender violence by the International criminal court, the ICTR, and the ICTY. Amanda Beltz, *Prosecuting Rape In International Criminal Tribunals: The Need to Balance Victim's Rights With the Due Process Rights of the Accused*, 23 ST. JOHN'S J.LEGAL COMMENT 167 (2008). In the ICTY and ICTR, some of these measures are conducting in camera proceedings, protecting the identity of victims, and image and voice altering devices. Some rape victims in these courts, however, request anonymity. The article defines the problem with this being a due process one. "Procedural rules which ensure a fair trial and which demand "that protective measures must be "consistent with the rights of the accused" are inconsistent with witness anonymity, which is in direct conflict with the right of confrontation." *Id.* at 190. As for the dignity of victims, there are numerous areas of concern. One is interrogation, for the victim will have to recount the events at issue as well as confront the defendant while being questioned by defense. The judges are not always cognizant of the often-fragile psyches of the victims. "Only two women were appointed to the ICTY court and a single woman was elected to the ICTR. Having women on the bench, as well as individuals with expertise in the area of sexual violence (as the ICC statute requires), would greatly influence the method by which victims were questioned." *Id.* at 202.

violence brought awareness to the victimization of women and the need for real punishment.

Additionally, the substantive laws and the procedures that shield a rape victim have been revamped and modernized in American criminal statutes.<sup>82</sup> These legal advances, although incomplete, were accomplished mainly through the women's movement which brought these issues to the forefront.<sup>83</sup> The work done by advocates in the United States has produced a stronger law enforcement response for victimized women. The benefits of these advancements extend into the larger international community.<sup>84</sup>

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82. FED. R. EVID. 412.

83. "[T]he Women's Caucus for Gender Justice deserves praise for effectively advocating positions on the definitions of crimes and the qualifications of ICC personnel designed to ensure appropriate recognition of sexual violence and gender issues. The Women's Caucus achieved significant results, as many delegations worked with it in crafting appropriate treaty language. Women's groups, including the Women's Caucus, took on the difficult task of showing that existing international laws were inadequate and thus should not be incorporated into the ICC, while also alleging that customary international law had progressed to such a point that it could fill in the gaps that existing treaties and conventions could not. Many NGOs concerned with women's rights, like Feminist Majority Foundation, Women's Caucus, Women's Division of Human Rights Watch, Amnesty International and others, lobbied individual delegates, protested, gave speeches, and hosted panel discussions." Rana Lehr-Lehnardt, *One Small Step for Women: Female-Friendly Provisions in the Rome Statute of the International Criminal Court*, 16 BYU J. PUB. L. 317, 329 (2002).

Additionally, women gained access to graduate school education which correspondingly created lawyers, judges, legal scholars and law professors who further advocate for equality of women. The representation of women in the profession grew to 29.1% of all lawyers in the United States, from 23% in 1994. Moreover, as the statistics below illustrate, women have increased their presence in law schools, in law firm partnerships, as general counsels of major corporations, and in the judiciary. From approximately 1994 to 2002: (1) the percentage of law school entrants who were women increased from 45% to 50%; (2) the percentage of women in tenured positions at law schools increased from 5.9% to 25.1%; (3) the percentage of women partners in major law firms increased from 12.91% to 16.3%; (4) the percentage of women general counsels in Fortune 500 companies increased from 4% to 15%; (5) the percentage of women in the federal judiciary—Supreme Court remains at 22 (until 2006); (6) the percentage of women in the federal judiciary—U.S. Court of Appeals increased from 13% to 17.4%; and the percentage of women in the federal judiciary—U.S. District Courts increased from 12% to 16.2%. American Bar Association Commission on Women in the Profession, *Charting Our Progress: The Status of Women in the Profession Today* (2006), available at <http://www.abanet.org/women/ChartingOurProgress.pdf>.

84. For example, the international equivalent of the "rape shield law" is articulated in the ICTY's Rules of Evidence and Procedure Rule 96(iv): "prior sexual conduct of the victim shall not be admitted in evidence."

### III. RAPE AS A WAR CRIME

#### A. The Historic Neglect Of Prosecuting Wartime Rape

When discussing crimes against women one cannot ignore the atrocity of wartime rape. There are many horrors of war that both men and women suffer, but there are clear distinctions regarding women and their unique victimization. For example, in wars where civilians are illegally targeted,<sup>85</sup> men are killed, but women are raped and killed;<sup>86</sup> women that are not killed are forced into sexual slavery and/or subjected to other forms of sexual violence.<sup>87</sup> Along with the historic neglect of prosecuting domestic violence and sexual assault during peacetime, punishing wartime rape has traditionally been neglected by international prosecutors.

Virtually all wars have used rape and other violence against women<sup>88</sup> as a tactic of war. The practice is so widespread that it is more accurate to say that the rape of women and girls is the rule, rather than the exception, of wartime conflicts.<sup>89</sup> “Most armies have viewed rape as a legitimate ‘perk’ of battle . . . .”<sup>90</sup> “Massive wartime rapes include the Rape of Nanking, the enslavement and repeated rape of 200,000 “comfort women” by the Japanese military during World War II, [and] the rape of hundreds of thousands of women in Bangladesh during the 1971 war.”<sup>91</sup>

85. ICTY Statute Art. 5 (proscribing “crimes . . . directed against any civilian population.”).

86. “When women and girls are murdered during armed conflict, their deaths often have a sexualized component, such as having their breasts cut off, fetuses ripped from their wombs, weapons thrust up their vaginas, or their sexual organs impaled.” Kelly D. Askin, *The Quest For Post-Conflict Gender Justice*, 41 COLUM. J. TRANSNAT’L L. 509, 512 (2003).

87. “Sex crimes are exceedingly commonplace during periods of international and internal armed conflict, with the crimes committed both opportunistically and purposefully, randomly and calculatedly, and by persons in control or those out of control. Such crimes are committed regardless of whether there are orders or encouragement to commit rape or whether such assaults are expressly forbidden by superiors. Sexual violence is committed by military personnel and civilians alike on all sides of armed conflict, whether to achieve political and military objectives or simply for personal motivations or gratifications. . . . Evidence is incontrovertible that in conflicts as diverse as those in Sierra Leone, East Timor, Colombia, Afghanistan, Kosovo, Peru, Mozambique, Bangladesh, Congo, Nicaragua, Sudan, Bosnia, Haiti, Rwanda, Chechnya, Somalia, Guatemala, Angola, Argentina, Ethiopia, Iraq, and Cambodia, among a myriad of others, sexual violence is committed in strikingly comparable contexts.” *Id.* at 509–11.

88. Other forms of sexual violence include: sexual slavery in the forms of forced marriage and forced prostitution, sexual mutilation, forced sterilization, forced pregnancy or abortion. Askin, *supra* note 86, at 512.

89. Stephens, *supra* note 72, at 88.

90. *Id.*

91. *Id.* at 88–89.



It is undisputed that rape itself is a serious crime.<sup>92</sup> “[B]efore international humanitarian law was codified, the customs of war prohibited rape crimes.”<sup>93</sup> Numerous laws of war and domestic military codes addressed the issue of wartime rape-prohibiting the conduct and creating harsh punishments for it.<sup>94</sup> Yet, little, if anything, was actually done to stop wartime rape, or punish it when it occurred. It was routinely ignored as a crime, and instead viewed as an inevitable consequence of the nature of war and the sexual urges or needs of men.<sup>95</sup> Based on this warped view of acceptable treatment of women, neither prevention nor punishment was a priority of national or international legal systems. Thus, notwithstanding the unquestionable and documented existence of rape during major wars and the strict proscription and severe penalties articulated in international law and military codes, acts of sexual violence against women were largely ignored by the historic war crimes tribunals of Nuremberg and Tokyo.<sup>96</sup> While Nuremberg and Tokyo stand as paramount examples for the advancement of international criminal law principles, such as individual criminal responsibility

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92. “International criminal law has always encompassed crimes of sexual violence: rape can be a violation of the 1949 Geneva Conventions, the 1948 Genocide Convention, the 1984 Torture Convention, and a crime against humanity under the Nuremberg Charter. After World War II, the International Military Tribunal at Nuremberg established rape as a crime against humanity but did not actually prosecute it.” *Human Rights Watch Applauds Rwanda Rape Verdict: Sets International Precedent for Punishing Sexual Violence as a War Crime*, September 2, 1998, available at <http://www.hrw.org/en/news/1998/09/01/human-rights-watch-applauds-rwanda-rape-verdict>.

93. Askin, *supra* note 11, at 299.

94. “For example, in the 1300s, Italian lawyer Lucas de Penna urged that wartime rape be punished as severely as peacetime rape; in the 1474 trial of Sir Peter Hagenbach, an international military court sentenced Hagenbach to death for war crimes, including rape, committed by his troops. In the 1500s, eminent jurist Alberico Gentili surveyed the literature on wartime rape and contended that it was unlawful to rape women in wartime, even if the women were combatants; in the 1600s international law pioneer Hugo Grotius concluded that sexual violence committed in wartime and peacetime alike must be punished. In 1863, the United States codified international customary laws of war into the U.S. Army regulations on the laws of land warfare. These regulations, known as the Lieber Code, were the cornerstone for many subsequent war codes. The Lieber Code listed rape by a belligerent as one of the most serious war crimes. Article 44 of the Code declared that “all rape . . . is prohibited under the penalty of death,” and Article 47 dictated that “[c]rimes punishable by all penal codes, such as . . . rape . . . are not only punishable as at home, but in all cases in which death is not inflicted, the severer punishment shall be preferred.” Wartime rape was thus considered so serious that it warranted the death penalty.” *Id.*

95. *Id.* at 289.

96. *Id.* at 295 (noting that crimes of sexual violence against women were extensively documented in the transcripts of the Nuremberg and the Tokyo Trials); see also *id.* n.36 and 37; Cf. “The Military Tribunal for the Far East (the Tokyo Tribunal) did convict Japanese officers of rape.” *Human Rights Watch Applauds Rwanda Rape Verdict: Sets International Precedent for Punishing Sexual Violence as a War Crime*, September 2, 1998, available at <http://www.hrw.org/en/news/1998/09/01/human-rights-watch-applauds-rwanda-rape-verdict>.

for violating the *law of nations* and the establishment of *jus cogens* norms,<sup>97</sup> both tribunals totally failed to address any of the atrocities that occurred as distinct and specific crimes against women.<sup>98</sup>

Despite this historic neglect and indifference about the suffering and abuse of women during times of war, the international community began to slowly take notice of the violent torment of women in specific regions of the world. Modern “on-the-scene” media coverage of the Yugoslav conflict sparked public attention—the type of coverage that exposed the crimes as they were happening for a shocked world to see.<sup>99</sup> The up-close media coverage created “public outrage engendered by the widespread and systematic use of rape and sexual abuse as a tool of war subordination and subjugation . . . .”<sup>100</sup>

In 1992, the “systematic employment of gender violence as a tool of genocide in the former Yugoslavia brought new attention to the age-old practice”<sup>101</sup> of using rape as a weapon of warfare. Additionally, “the genocide in Rwanda in 1994 also involved the utilization of widespread violence against women, including rapes, sexual slavery and mutilations.”<sup>102</sup> In addition to the media coverage, international awareness was heightened due to the impact of NGOs and their advocacy on behalf of the rights of women.<sup>103</sup> Impunity would no longer be tolerated; instead, actual adjudication and punishment would befall the perpetrators of wartime sexual violence against women. The

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97. The Nuremberg Principles were “codified” by the International Law Commission in 1950. See Report of the International Law Commission, U.N. GAOR, V, Supp. 12 (A/1316), at 11–14 (1950), reprinted in EDWARD M. WISE AND ELLEN S. PODGOR, *INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS* 531–2 (2000).

98. “Half a century before, in Nuremberg and Tokyo, extensive crimes against women were acknowledged and documented as violations of the customary norms of international law but usually buried in the indictments and presented under generic labels such as inhumane treatment or crimes against honor.” PATRICIA M. WALD, *The Anonymous Past: Women and International Justice*, in *GENDER MATTERS: WOMEN AND YALE IN ITS THIRD CENTURY* 115 (2001).

99. *Id.* at 117.

100. *Id.*

101. Stephens, *supra* note 72, at 91.

102. *Id.* at 92.

103. “Women are now represented in more international power positions than in any other time in recorded history, but their numbers are neither equitable nor comparable to men by any measure.” Wald, *supra* note 98, at 115–16. See generally Hawkenswork, *supra* note 10; ABA Commission on Women in the Profession, *supra* note 83.

Yugoslav<sup>104</sup> and Rwandan<sup>105</sup> conflicts marked the turning point for the international community.

## B. Modern International Tribunals Have Begun to Successfully Litigate Crimes Against Women As Real Crimes And Not Merely Consequences Of War

The former Yugoslavia and Rwanda were the first regions in which a specific and contemporaneous effort was made by the international community to put an end to the tradition of impunity and prosecute wartime rape. In May 1993, the United Nations (UN) responded, via Security Council (SC) resolution, under its Chapter VII peacekeeping authority, and established the first international war crimes tribunal since the Nuremberg and Tokyo trials—the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>106</sup>

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104. "During the conflict in the former Yugoslavia, there were an estimated 20,000 victims of sexual assault; an international expert panel concluded that practically every female over the age of 12 who survived the genocide in Rwanda had been raped." *Id.* at 116.
  105. The total number of Tutsis killed throughout Rwanda is estimated as high as one million. Prosecutor v. Akayesu, Int'l Crim. Trib. For Rwanda, Case No. ICTR-96-4-T, Judgment (Sept. 2 1998), available at <http://www.ictr.org>. See generally David L. Nersessian, *The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals*, 37 TEX. INT'L L.J. 231, 232 (2002) (citing Panel, *Effectuating International Criminal Law Through International and Domestic Fora: Realities, Needs and Prospects*, 91 AM. SOC'Y INT'L L. PROC. 259, 259-60 (1998)), available at <http://heinonline.org/HeinOnline/show.pl?handle=hein.journals/asil91&id=269&size=4> (remarks by M. Cherif Bassiouni); Symposium, *The Genocide Convention After Fifty Years: Contemporary Strategies for Combating a Crime Against Humanity*, 92 AM. SOC'Y INT'L L. PROC. 1 (1998); Catherine Cisse, *The End of a Culture of Impunity in Rwanda?*, 1 Y.B. INT'L HUMANITARIAN L. 161, 162 (1998).
  106. See Geoffrey R. Watson, *The Changing Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 37 NEW ENG. L. REV. 871 (2003) (article provides a summary of the accomplishments of the ICTY over the last ten years); see also Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995), reprinted in 35 I.L.M. 32 paras. 21-24 (1996) (ICTY Appeal Chamber rules on the jurisdictional authority of the ICTY and affirms that the establishment of the court was legally authorized under the United Nations Charter, Chapter VII authority); but cf. Certain Expenses of the United Nations, 1962 I.C.J. 151, 155 (July 20, 1962) ("the Expenses Advisory Opinion"); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16, 45 (Advisory Opinion of 21 June) (the "Namibia Advisory Opinion"); *Libya v. United States*, 1992 I.C.J. 114 (these ICJ cases discuss the lack of real judicial review of the I.C.J. over the validity of the acts of the organs of United Nations); see generally Geoffrey R. Watson, *The Humanitarian Law of the Yugoslavia War Crimes Tribunal: Jurisdiction in Prosecutor v. Tadic*, 36 VA. J. INT'L L. 687 (1996) (article questions the validity of a subsidiary organ's ability to judge the validity of a UN SC resolution).

The UN SC resolution for the ICTY<sup>107</sup> authorized the ad hoc criminal tribunal to adjudicate perpetrators of horrific war crimes, crimes against humanity and genocide, specifically including acts intended to “ethnically cleanse” the region<sup>108</sup> as well as addressing rape as a crime against humanity.<sup>109</sup> In 1994, the UN SC authorized a similar tribunal, the International Criminal Tribunal for Rwanda (ICTR),<sup>110</sup> to prosecute individuals responsible for the genocidal killing of the Tutsi people in Rwanda. The dynamics of each conflict were different, and the way the war crimes manifested also varied. Thus, the statutes drafted for each tribunal were respectively tailored to address the criminal conduct that occurred in each region. However, both the ICTY Statute and the ICTR Statute contain specific language to address crimes against women.

Both the ICTY Statute and the ICTR Statute specifically list rape as a crime against humanity:

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) *rape*;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.<sup>111</sup>

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107. United Nations Security Council resolution 808, (S/Res/808(808)) (Adopted 22 February 1993), available at <http://www.un.org/icty/legaldoc-e/index.htm>; ICTY Statute available at <http://www.un.org/icty/legaldoc-e/basic/statut/statute-feb08-e.pdf>.

108. One of the major cases being tried at the ICTY is the former head of state for the former Yugoslavia, Slobodan Milosevic. Case No. IT-02-54, available at [http://www.icty.org/x/cases/slobodan\\_milosevic/tdec/en/reg-11102002.htm](http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/reg-11102002.htm). The consolidated indictment of Milosevic alleges “the former head of state was a leader of a joint criminal enterprise with an objective of making Serbs the dominant group in Yugoslavia by exterminating, confining, deporting, sexually assaulting, subjugating, and otherwise terrorizing and persecuting non-Serbs in the territories.” Kelly Askin, *The Milosevic Trial—Part I*, Crimes of War Project, March 13, 2002, available at <http://www.crimesofwar.org/print/onnews/milosevic2-print>.

109. ICTY Statute Art. 5(g).

110. United Nations Security Council Resolution 955, (S/Res/955 (1994)) (8 November 1994).

111. ICTY Art. 5; ICTR Art. 3 (emphasis added).

The ICTY and the ICTR have each indicted and convicted individual(s) for acts of sexual violence under the charge of crimes against humanity.<sup>112</sup> However, the ICTR prosecutors have also used the genocide statute as a means to charge the acts of sexual violence perpetrated against Tutsi women as genocidal acts of violence committed with the intent to destroy the Tutsi people, as a group.<sup>113</sup> ICTR Statute Article 2 proscribes the crime of genocide:

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.<sup>114</sup>

One significant ICTR case charged Jean-Paul Akayesu, the political equivalent of a city mayor, in the Taba region of Rwanda, of vicious gang rapes and genocide.<sup>115</sup> Akayesu was found guilty of nine counts of genocide, crimes against humanity and war crimes. The *Akayesu* verdict was “the first verdict of the ICTR; the first conviction for genocide by an international court,<sup>116</sup> the

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112. Some examples include: *Prosecutor v. Kunarac, Kovac, and Vukovic*, Case No. IT-96-23 & IT-96-23/1, 2000 WL 33706075 (ICTY, Nov. 2000); *Prosecutor v. Furundzija*, Case No. IT-95-17/1, 2000 WL 33705648 (ICTY, March 2000); *Prosecutor v. Tadic*, Case No. IT-94-1-T (ICTY, May 1997), available at <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf>.

113. “The Rwanda Tribunal was initially reluctant to indict Akayesu for rape. When Akayesu was first charged in 1996, the twelve counts in his indictment did not include sexual violence—despite the fact that Human Rights Watch, and other rights groups had documented widespread rape during the genocide. . . . Under pressure from Rwanda and international rights groups, the Office of the Prosecutor finally amended the charges against Akayesu to include sexual violence in June 1997. During the *Akayesu* trial Rwandan women testified that they had been subjected to repeated collective rape by militia in and around the commune office, including in view of Akayesu. They spoke of witnessing other women being gang-raped and murdered while Akayesu stood by, reportedly saying to the rapists at one point “don’t complain to me now that you don’t know what a Tutsi woman tastes like.” *Human Rights Watch Applauds Rwanda Rape Verdict: Sets International Precedent for Punishing Sexual Violence as a War Crime*, September 1, 1998, available at <http://www.hrw.org/en/news/1998/09/01/human-rights-watch-applauds-rwanda-rape-verdict>.

114. ICTR Art. 2(2)(a-c).

115. *Prosecutor v. Akayesu*, Int’l Crim. Trib. For Rwanda, Case No. ICTR-96-4-T, Judgment (Sept. 2 1998), available at <http://www.ictr.org>.

116. Jose E. Alvarez, *Lessons from the Akayesu Judgment*, 5 ILSA J. INT’L & COMP. L. 359 (1999), citing STEVEN RATNER AND JASON ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 25 (1997) (Noting although the Nuremberg trials are generally known for convicting Nazi war criminal for “genocide,” genocide was not articulated in any of the Nuremberg

first time an international court punished sexual violence in a civil war; and the first time that rape was found to be an act of genocide to destroy a group.”<sup>117</sup> The ICTR three-judge Trial Chamber, composed of two men and one woman, clarified for the world that rape during internal armed conflict can constitute genocide as well as a crime against humanity.<sup>118</sup> The *Akayesu* Trial Chamber specifically found that the raping of Tutsi women were genocidal acts.<sup>119</sup>

This ruling in 1998 was legally important because of its strength and substance regarding the enforcement of the international human rights of women. Additionally, the *Akayesu* judgment greatly influenced the pending “Rome Statute negotiations” wherein the Statute for the International Criminal Court (ICC) was being drafted. Based upon the *Akayesu* precedent and the hard work of effective advocates urging stronger enforcement of the human rights of women and prosecution of the crimes against women, the ICC Statute contains the most progressive statutory proscriptions of sexual violence in international criminal law. For example, in the article proscribing crimes against humanity, the ICC Statute articulates sexual violence in a more expansive and progressive manner than the ICTY and ICTR. The statutory language captures additional acts of sexual violence beyond traditional “rape”

judgments although reference to it was made in the indictments. Subsequent national/municipal prosecutions in Germany of Nazi defendants do include charges of genocide; but those judgments are not international adjudications and thus not wholly comparable to the significance of the *Akayesu* conviction.).

117. *Human Rights Watch Applauds Rwanda Rape Verdict: Sets International Precedent for Punishing Sexual Violence as a War Crime*, September 1, 1998, available at <http://www.hrw.org/en/news/1998/09/01/human-rights-watch-applauds-rwanda-rape-verdict>.
118. Alvarez, *supra* note 116, at 362.

[T]he judges note that while there is “no commonly accepted definition of rape in international law, it includes acts used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. The judges define rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. For this purpose, the judges affirm that rape when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity constitutes torture. *Id.*

In *Akayesu*, the evidence supported the allegation that the sexual violence of forced impregnations was done with the genocidal intent, that being “a step in the process of destruction [of] the Tutsi group.” *Akayesu*, ICTR-96-4-T, at para 507-508.

The *Akayesu* court referenced the ICTY’s judgment in *Tadic*:

[I]n patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother’s group. *Id.*

See *Prosecutor v. Tadic*, Case No. IT-94-I-T, Opinion and Judgment (Trial Chamber, ICTY, May 7, 1997), available at [www.icty.org/x/cases/tadic/trans/en/970507IT.htm](http://www.icty.org/x/cases/tadic/trans/en/970507IT.htm).

119. *Akayesu*, ICTR-96-4-T, at para 507-08.

definitions, identifying “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity”<sup>120</sup> as acts that can constitute a crime against humanity.

#### IV. ADVOCACY IN MODERN INTERNATIONAL CRIMINAL LAW

“While the post-World War II trials held in Nuremberg and Tokyo largely neglected sexual violence, the Yugoslav and Rwanda Tribunals have successfully prosecuted various forms of sexual violence as instruments of genocide, crimes against humanity, means of torture, forms of persecution and enslavement, and crimes of war.”<sup>121</sup> One factor in the realization of legitimate enforcement of crimes against women is the increased involvement of women.<sup>122</sup> Having women in important decision-making positions made a positive impact upon the ability to enforce human rights abuses. This point is dramatically demonstrated by comparing the gender composition of the participants in the Nuremberg and Tokyo trials to the modern international tribunals such as the ICTY and ICTR. At Nuremberg and Tokyo, “no women held positions of power and gender crimes were given only cursory treatment by those tribunals.”<sup>123</sup> The modern tribunals have a strikingly different composition.

For example, two of the three Chief Prosecutors of the ICTY/R Tribunals have been women (Louise Arbour from Canada and Carla del Ponte from Switzerland), one of the three Registrars of the ICTY has been a woman (Dorothy De Sampayo from the Netherlands), and both the ICTY and ICTR have had a woman as President of the Tribunal (Gabrielle Kirk McDonald from the U.S. (ICTY) and Navaethem Pillay from South Africa (ICTR)), and several other women have been permanent judges (Elizabeth Odio-Benito from Costa Rica, Florence Mumba from Zambia, and Patricia Wald from the U.S. to the ICTY and Arlette Ramaroson from Madagascar and Andresia Vaz from Senegal to the ICTR) as well as ad litem judges (Sharon Williams from Canada, Carmen Argibay from Argentina, Maureen Harding Clark from Ireland, Ivana Janu from Czech Republic, Chikako Taya from Japan, and Fatoumata Diarra from Mali). The ICTY Prosecutor’s Office also created the vital position of gender issues legal advisor, held by Patricia Viseur Sellers from the U.S. In 2001, for the first time in over fifty years, the UN’s

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120. ICC Statute Art. 7(g).

121. Askin, *supra* note 11, at 288.

122. Diversity of perspectives in the exercise of prosecutorial discretion is needed in order to effectively pursue justice.

123. See KELLY D. ASKIN, *WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS* (1997).

influential International Law Commission elected women (Paula Escarameia from Portugal and Xue Hanqin from China), and the International Court of Justice elected a female judge in 1995 (Rosalyn Higgins from the UK). These are modest advances but revolutionary nonetheless when considering for decades, no women held high (or typically even mid- or low-level) positions of power in international law bodies or courts.<sup>124</sup>

Women now participate within the international criminal justice system, not just as secretaries, but as key players. The inclusion of women as real contributors is a positive accomplishment of modern international tribunals. Although the accused war criminals continue to be overwhelmingly male,<sup>125</sup> women, alongside men, work in critical positions such as prosecutors, investigators, legal advisors, victim's advocates, and judges.<sup>126</sup>

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124. Askin, *supra* note 11, n.40; *see also* statistical delineations in Jan Linehan, Women in Public Litigation, P.I.C.T. (July 13, 2001), *available at* <http://www.pict-pecti.org/publications>; Thordis Ingadottir, The International Criminal Court, The Nomination and Election of Judges, P.I.C.T. (June 2002), *available at* <http://www.pict-pecti.org/publications>.

125. "It is important to note that women are increasingly recognized as actors, enablers, and even perpetrators, instead of simply as victims, of wartime violence. As more women participate as combatants and government officials, women are being accused of responsibility for war crimes, crimes against humanity, and genocide, including crimes involving sexual violence." Askin, *supra* note 86, at 513. (Two women have been charged with war crimes including sexual violence by these modern international tribunal, one at the ICTY and one at the ICTR. Pauline Nyiramasuhuko, former Minister of Women and Family Affairs in Rwanda, is charged before the ICTR with "rape as a crime against humanity for inciting, encouraging, ordering, and instigating rape crimes" as well as genocidal sexual violence. *See* Prosecutor v. Nyiramasuhuko & Ntahobali, Case No. ICTR-9-21-I, Amended Indictment (Mar. 1, 2002). "Biljana Plavsic, former acting President of the Serbian Republic of Bosnia and Herzegovina, was charged with genocide, crimes against humanity, and war crimes for a series of crimes, including rape crimes committed by Serb military, political, and governmental authorities and agents." She pled guilty to one count of persecution as a crime against humanity and the charge encompassed alleged acts of sexual violence against women. *See* Prosecutor v. Krajisnik & Plavsic, Case No. IT-00-39 & 40-PT, Consolidated Indictment (Mar. 7, 2002); *see also* Prosecutor v. Plavsic, Case No. IT-00-40, plea agreement (Sept. 30, 2002); *id.* at n.29.

126. Askin, *supra* note 86, at 509, n.30. "[E]ast Timor, Sierra Leone, and Kosovo, also has females participating as high level prosecutors and judges. More precisely, in East Timor, Maria Natércia Gusmao from East Timor is a Judge on the Serious Crimes Panels, and Siri Frigaard from Norway is Deputy Prosecutor for the United Nations Transitional Authority in East Timor's Serious Crime Unit; in Sierra Leone, of the eight local and international judges appointed to the Special Court, one is female Renate Winter, from Austria; Elizabeth Muyovwe from Zambia is an alternative judge for the Special Court; in Kosovo, of the thirteen international judges, four are women (Agnieszka Klonowiecka-Milart from Poland, Hajnalka Karpati from Hungary, Marilyn Kaman from the United States and Lolita Dumlao from the Philippines; three other female international judges recently left: Catherine Marchi-Uhel from France, Birgit Lange-Klepsch from Germany, and Renate Winter from Austria) and two of the thirteen international prosecutors are women (Cecilia Tallada from the Philippines and Elizabeth Rennie from Canada; Jane Mitchell and Lorna Pickering, both from the U.K., left at the end of 2002." *Id.*; *see also* Jan Linehan, *Women and Public International Litigation* (2001) (background article for the Project on International Courts and Tribunals), *available at* [http://www.pict-pecti.org/publications/PICT\\_articles/Women1.pdf](http://www.pict-pecti.org/publications/PICT_articles/Women1.pdf); Thordis Ingadottir, *The*



Another significant change within the Office of the Prosecutor in the ICTY, compared to Nuremberg, is the establishment of a gender issues legal officer, Patricia Viseur Sellers from the United States.<sup>127</sup> An international legal officer dedicated to gender issues had never been done until Prosecutor Richard Goldstone, the first Chief Prosecutor of the ICTY, created the position and appointed Sellers to it. With a specific and conscious effort being made to address crimes against women, the ICTY's success in prosecuting wartime rape is not accidental. Sellers describes that the nine ICTY investigation teams are "gender-integrated [and] tend to look at the sexual assault component of investigations earlier and with more profundity."<sup>128</sup> The procedures set in place by former Prosecutor Richard Goldstone are important and necessary in order to counteract the inherent biases against these difficult cases.<sup>129</sup> The ICTY addresses the issues of female victims in three important but distinct areas: investigation, charging decisions, and witness protection.<sup>130</sup> Witness protection is an extremely necessary component of an effective prosecution. Here is a snapshot of how the ICTY's Office of the Prosecutor seeks to protect testifying witnesses, who are primarily women:

To help rape and sexual assault victims testify at The Hague, a Victims and Witnesses Unit was established in early 1995. Protective measures for victims and witnesses were adopted in August 1995 to prevent their retraumatization by avoiding confrontation with the accused. These include the use of pseudonyms and the redaction of court transcripts to expunge any reference to the victim's identity; *in camera* proceedings; testimony by one-way closed circuit television; scrambling of victim's or witness's voice and image; a bar on photographs, sketches or videotapes of victims while in the precinct of the ICTY, etc. After having testified in The Hague, the victims

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*International Criminal Court, The Nomination and Election of Judges* (2002) (ICC Discussion Paper #4, Project on International Courts and Tribunals,), available at [http://www.pict-pcti.org/publications/ICC\\_papers/election.pdf](http://www.pict-pcti.org/publications/ICC_papers/election.pdf).

127. Chief Deputy Prosecutor Patricia Viseur Sellers is still actively prosecuting cases at the ICTY. She is one of the few prosecutors that has been there since the tribunal started in 1993. She writes articles, speaks at conferences, and teaches summer courses at Oxford, on gender issues and war crimes prosecutions. Her most recent article is published as a book chapter: PATRICIA VISEUR SELLERS, *Individual(s') Liability for Collective Sexual Violence*, in GENDER AND HUMAN RIGHTS 153 (2004).
128. ICTY Bulletin Number 7, *Sexual Assaults and the ICTY* (quoting Patricia Viseur Sellers), available at <http://www.un.org/icty/BL/07art1e.htm>.
129. Prosecutor Goldstone understood the historic significance of the ICTY and took his role as Prosecutor quite seriously, stating: "We have always regarded it as an important part of our mission to redefine and consolidate the place of these offenses in humanitarian law." *Id.*
130. Cf. HELENA COBBAN, AMESTY AFTER ATROCITY?: HEALING NATIONS AFTER GENOCIDE AND WAR CRIMES (PARADIGM 2006) (discussing how the criminal litigation process at the ICTR created revictimization for the victims of the Rwandan genocide).

of rape and other types of sexual assault are given psychological counseling and support by NGOs back in their countries.<sup>131</sup>

The procedures in place at the ICTY to address the unique needs of women victimized by wartime rape are truly extraordinary when compared to the nearly complete neglect of these issues by their predecessor tribunals.<sup>132</sup>

Former ICTY deputy prosecutor and legal scholar Dr. Kelly Askin has written extensively on the issue of prosecuting war crimes committed against women. In her article entitled, *Prosecuting Wartime Rape And Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*,<sup>133</sup> she highlights that the inclusion of women in the advocacy process has literally changed the landscape of justice for women at the international level. She states, “[i]t is impossible to overemphasize how crucial it is to women’s issues, gender crimes, and the law in general to have women in decision-making positions in international fora, particularly within the United Nations structure, and as judges, prosecutors, and peacemakers.”<sup>134</sup> However, the appointment of women to these international posts is not disconnected from the grassroots advocacy of women’s movements and female lawyers at the national level. Instead, the success of women in various national legal systems created a platform from which many competent female advocates, litigators, jurists, and legal scholars have been able to establish their voice and effectively participate<sup>135</sup> in the international movement toward worldwide equality for women through effective law enforcement.<sup>136</sup>

131. *Id.*

132. See generally Sam Garkawe, *Victim-Related Provisions of the Statute of the International Criminal Court: A Victimological Analysis*, 8 INT’L REV. VICTIMOLOGY 269 (2001).

133. Askin, *supra* note 11.

134. *Id.* at 296.

135. Mona Zulficar, *From the Human Rights to Program Reality: Vienna, Cairo, and Beijing in Perspective*, 44 AM. U. L. REV. 1017, 1036 (1995); Prosecutor v. Anto Furundzija, Case No. IT-95-17/1-T, Amicus Curiae Brief Respecting The Decision And Order Of The Tribunal Of 16 July 1998 Requesting That The Tribunal Reconsider Its Decision Having Regard To The Rights Of Witness “A” To Equality, Privacy And Security Of The Person And To Representation By Counsel (briefing done by women’s human rights legal scholars and non-governmental organizations advocating gender equality in the prosecution of war crimes) available at <http://www.womensrightscoalition.org/site/advocacyDossiers/formerYugoslavia/Furundzija/micusbrief.php> (last visited Mar. 11, 2009). See generally International Alliance of Women available at [www.womenalliance.org](http://www.womenalliance.org) (last visited Mar. 16, 2009).

136. Cf. KELLY DAWN ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS 257 (1997) (“Even though progress has been realized, there should be no false illusion that women are not vulnerable to grave gender specific abuses in every nation. Abuses against women are not rigorously punished in international humanitarian law partially because they are not sufficiently protected or punished by either domestic law or international human rights law. In even nations progressive on human rights, women are still routinely subjected to sexual violence,

In reviewing the progress of these international tribunals, analyzing the exercise of prosecutorial discretion remains central to the discussion. In the modern international tribunals, like the ICTY, ICTR, and ICC, the decisions regarding which cases to file and which resources to allocate to crimes against women has changed; it has broadened and expanded into a more inclusive conversation. Female prosecutors like Patricia Viseur Sellers are in fact leading the conversation. Furthermore, current international prosecutors, both male and female, are motivated to consciously choose to expend their limited resources on crimes against women.<sup>137</sup> There has been a measurable shift to include crimes against women in the category of "appropriate cases" to charge and aggressively litigate.

As Louise Arbour describes it, the international community was ready to seriously attack the issue of crimes against women, in large part because many national legal systems had long been fighting for the equality of women and effective prosecution of the defendants that victimize women. In addition to the heightened national awareness, a certain level of international awareness had been achieved by NGOs and feminist scholars illuminating the horrors women were suffering during wartime without any retribution—lessons learned from Nuremberg and Tokyo, not to be repeated in the Yugoslav and Rwandan tribunals. Timing is everything; it was time to include women in the pool of victims worthy of justice—a true step forward for in the enforcement of the international human rights of women.

A large part of the success of the ICTY and the ICTR is simply their ability to specifically address the wrongs suffered by *all* victims, including women, in the former Yugoslavia and Rwanda. Yet, the most legally important legacy of the ICTY/R rests in the decisions handed down by their respective Trial and Appeals Chambers that help to define sexual assault crimes and advance the rule of law and the human rights of women.<sup>138</sup> Long lasting progress toward punishing abusers of women is articulated in their decisions.<sup>139</sup> Additionally, the legal judgments of these international fora legitimate the long cry of women for equality and justice, and further serve as an international statement that their voices as victims will no longer be ignored

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domestic assault, and other forms of gender discrimination. In no nation of the world do women enjoy, in practice, full recognition of economic, social, cultural, political and civil rights.").

137. "Part of the debate concerned whether prosecuting the direct perpetrators of sexual offenses was an equally appropriate prosecutorial strategy. We discussed whether there was more to be gained by prosecuting actual perpetrators, the Mr. Nobodies who actually committed the crimes, rather than deciding that the goal of prosecution was to move up the chain of command." Arbour, *supra* note 2, at 203.

138. *Supra* notes 17, 112, 118.

139. *Id.*

or discounted as less significant. Their voices as advocates have put an end to the past era of impunity, and spawned the new era of enforcement.

It is an important accomplishment for international criminal law, and correspondingly for the enforcement of the international human rights of women, that modern international tribunals achieve progressive and positive judgments. The national courts of the countries in which the atrocities occur, even when they are willing to pursue these types of charges, are usually functionally unable to issue any juridical response due to the hardship and devastation of war.<sup>140</sup> The new permanent international criminal tribunal, the International Criminal Court (ICC), will step in to fill the void and enforce the punishment for war crimes committed against women and all people. However, without modern international tribunals, the non-adjudication of these war crimes and war criminals would further promulgate the tradition of impunity of the victimization of crimes against women.

## V. CONCLUSION

A positive shift in priorities regarding the enforcement of the crimes that impact women has begun. This shift has directly impacted the exercise of prosecutorial discretion. Prosecutors are giving priority to and extending resources for the prosecution of these crimes. This shift toward gender equality in prosecutions has created a window, through which the criminal victimization of women is being exposed and seriously addressed first in municipal legal systems and correspondingly in international criminal law. Modern international tribunals are boldly pursuing indictments alleging sexual violence and changing the status quo of wartime rape where impunity was the rule instead of the exception. Although there is still much work to be done, as one esteemed jurist stated, it is “an era of enforcement”<sup>141</sup> of the human rights of women.

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140. Alvarez, *supra* note 116, at 363 (“it is futile to expect countries that have been involved in mass atrocities to themselves make credible efforts at providing criminal accountability.”).

141. Arbour, *supra* note 2.

