

Evaluating the Rules of Procedure and Evidence for the International Tribunal in the Former Yugoslavia: Balancing Witnesses' Needs Against Defendants' Rights

by
ALEX C. LAKATOS*

Introduction

Since the escalating civil war in the former Yugoslavia began in 1990, the conflagration has engendered innumerable headlines reporting ethnically motivated barbarity.¹ In response to these atrocities,

* J.D. Candidate, 1995; B.A. University of Maryland, 1992. I would like to thank P.J. O'Rourke for his eloquent defense of writings on all topics horrible:

If I had a chance to visit another planet, I wouldn't want to go to Six Flags Over Mars or ride through the artificial ammonia lake in a silicone-bottomed boat at Venusian Cypress Gardens. I'd want to see the planet's principal features—what makes it tick. Well, the planet I've got a chance to visit is Earth, and Earth's principal features are chaos and war. I think I'd be a fool to spend years here and not have a look.

P.J. O'ROURKE, *HOLIDAYS IN HELL 1* (1988).

1. News stories include both statistics and individuals' stories. For a sampling of headlines, see William Drozdiak, *Serbs Raped 20,000, EC Team Says*, WASH. POST, Jan. 9, 1993, at A12; John M. Goshko, *U.S. Human Rights Report Charges Serb Drive "Borders on Genocide"*, WASH. POST, Jan. 20 1993, at A4; Peter Maass, *The Rapes in Bosnia, A Muslim School Girl's Account*, WASH. POST, Dec. 27, 1992, at A1.

Seventeen distinct ethnic minorities lived in the former Yugoslavia, making it the most diverse country in Eastern Europe. Before it disintegrated, Yugoslavia was 36.2% Serb, 19.7% Croat, 8.9% Bosnian Muslim, 7.8% Slovene, 7.7% Albanian, and 5% Macedonian, with no other ethnic group comprising more than 3% of the population. CENTRAL INTELLIGENCE AGENCY, *THE WORLD FACT BOOK 1991*, at 343 (1991) [hereinafter *FACT BOOK 1991*]; BUREAU OF PUBLIC AFFAIRS OFFICE OF PUBLIC COMMUNICATION, U.S. DEP'T OF STATE, PUB. NO. 7773, *BACKGROUND NOTES: YUGOSLAVIA 1* (1989) [hereinafter *BACKGROUND NOTES*]; Elizabeth L. Pearl, *Punishing Balkan War Criminals: Could the End of Yugoslavia Provide an End to Victors' Justice?*, 30 AM. CRIM. L. REV. 1373, 1375 (1993) (noting the condemnation by governments, the UN, and NGOs of ethnic cleansing in the former Yugoslavia).

Not everyone views the brutality in the Balkans in terms of race. For alternate perspectives, see Dognian Denitch, *Now, Bosnia Without Bosnians*, WASH. POST, Feb. 13, 1994, at C1 (arguing that (1) ethnic tensions in the Balkans are overstated, e.g., 25% of the

the United Nations created an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.² Unfortunately, however, the continued fighting in the former Yugoslavia will make bringing war criminals to justice a daunting task.³ Because the Tribunal will not try criminals *in absentia*,⁴ it must arrange for the extradition of alleged criminals from a region fraught with hostilities.⁵ Many of the accused whom the Tribunal desires to prosecute will fall within the ranks of the victors.⁶ Ethnic groups currently fighting may also seek amnesty from the Tribunal in exchange for a cease fire.⁷ In many cases, the Tribunal will be hard pressed to produce witnesses; some will have fled the ongoing hostilities, some will have been killed, and some will be scared or reluctant to testify.⁸ Likewise, relevant physical evidence will have been destroyed or lost.⁹ Along with these difficulties and a host of other challenges, the Tribunal must protect witnesses from retribution at home and from unnecessary collateral trauma caused by the stress of testifying.¹⁰

marriages in the former Yugoslavia are "mixed" and (2) casting the conflict in ethnic terms conveniently simplifies the situation for Western countries); Judy Mann, *A Different Voice at the Table*, WASH. POST, Jan. 6, 1993 (examining the conflict in terms of class, urban versus rural conflicts, and general misogyny).

2. Hereinafter referred to as the "Tribunal." S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993) [hereinafter Resolution 827]; S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (1993) [hereinafter Resolution 808]; *Tragedy Continues with No Sign of Abatement*, UN CHRON., Sept. 1993, at 13 (Resolution 827: Tribunal Created).

3. Pearl, *supra* note 1, at 1402 (difficult to "remove leaders of a sovereign state"); Abner Katzman, *War Crimes Tribunal Convenes*, S.F. CHRON., Nov. 18, 1993, at A16.

4. Resolution 827, *supra* note 2, art. 21(d) (forbidding trial *in absentia*); Aryeh Neier, *Judgment in Sarajevo? For Serbs' Victims, A War Crimes Tribunal Is the Last Hope*, WASH. POST, Apr. 18, 1993, at C3 (trial *in absentia* is unfair to the defendants and would be an error on the part of the Tribunal).

5. Currently, there are no indications that hostilities will end anytime soon. *Military Reports; Unprofor Mediator Proposes Temporary Ceasefire at Airport Talks*, BBC SUMMARY WORLD BROADCASTS, Oct. 29, 1994, at EE/2139/C, available in LEXIS, Nexis Library; *Sarajevo Radio Reports, Serb Attacks on Brcko and Sarajevo Reported*, BBC SUMMARY WORLD BROADCASTS, Oct. 29, 1994, at EE/2139/C, available in LEXIS, Nexis Library.

6. Neier, *supra* note 4, at C3 ("Architects of ethnic cleansing . . . have been winning the war."); see generally Pearl, *supra* note 1.

7. Pearl, *supra* note 1, at 1403.

8. *Id.* at 1405.

9. *Id.* at 1406.

10. Women in the Law Project of the International Human Rights Law Group, *No Justice, No Peace: Accountability for Rape and Gender Based Violence in the Former Yugoslavia*, 5 HASTINGS WOMEN'S L.J. 89, 105 (1993) [hereinafter *No Justice, No Peace*]; Jennifer Green et al., *Affecting the Rules for the Prosecution of Rape and Other Gender-Based*

A witness's involvement with the Tribunal should not amount to a second round of victimization as the witness "runs the gauntlet" of reliving a painful experience by testifying before an indifferent bureaucracy, an assaultive defense team, or an unsympathetic media. The extent to which testifying before the Tribunal will be an ordeal will depend largely upon the rules of procedure and evidence that the Tribunal recently drafted to govern its operations.¹¹ These rules, by their own terms, came into force on March 14, 1994.¹²

Focusing specifically on protecting victims of gender crimes, this Note explores some of the options that the Tribunal had when it drafted its rules of procedure and evidence. Where the rules could be more deferential to the needs of gender crime victims, particularly female rape victims, who testify before the Tribunal, this Note recommends modifications or interpretations to help these victims.

Part I of this Note sets out the history of the conflict in the former Yugoslavia and describes the horrors of war crimes being committed therein. Part II.A examines the creation of the Tribunal. Part II.B argues that the Tribunal's charter statute contains several viable paths to the successful prosecution of rapists and concludes that the Tribunal will, indeed, prosecute rape. Part II.C contends that protecting victims, especially gender crime victims, who serve as witnesses and minimizing the trauma of testifying should be a top priority for the Tribunal.

Because minimizing the trauma experienced by witnesses may be accomplished by restricting cross-examinations, Part III.A examines the confrontation rights of defendants and concludes that those rights can be limited to shield witnesses from unduly hostile and traumatizing questions. Part III.B surveys the rules currently governing defendants' confrontation rights before the Tribunal in light of the conclusions drawn in Part III.A and recommends modifications to better protect victims. Part III.C examines the Tribunal's Victims and Witnesses Unit and suggests how the Unit can ease the difficulties associated with testifying so as not to implicate confrontation rights.

Unfortunately, the suggestions in Part III, even if followed, will not solve all the problems facing the Tribunal as it struggles to protect witnesses while prosecuting criminals. Hopefully, however, these suggestions will provide some useful guidance throughout the difficult prosecutions ahead.

Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique, 5 HASTINGS WOMEN'S L.J. 171, 171 (1994) [hereinafter *Proposals*].

11. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991: Rules of Procedure and Evidence, U.N. Doc. IT/32 (Mar. 14, 1994), reprinted in 33 I.L.M. 484 (1994) [hereinafter *Rules of Procedure and Evidence*].

12. *Id.* at 484.

I. The Situation in the Former Yugoslavia¹³

A. Brief Overview of the Conflict

From the end of World War II until 1980, Yugoslavia was organized as a communist regime under Marshal Tito.¹⁴ Although the six republics and two provinces that then formed the Federative People's Republic of Yugoslavia had a long history of ethnic tensions, Tito's rule was strong enough to keep the nation together.¹⁵ Before his death in 1980, Tito organized a collective presidency to replace him.¹⁶ Each republic or province was to provide one representative to the collective presidency.¹⁷ Tito hoped that this government would stay ethnic tensions and keep the nation, as he knew it, united.¹⁸ Unfortunately, the republics soon began to vie for more sovereign powers, and the central government began to decline.¹⁹ In 1990 communist leaders in three republics (Slovenia, Croatia, and Bosnia-Herzegovina) were jettisoned, and staunch nationalists were elected to replace them.²⁰ After electing its new nationalist government, Slovenia voted to secede.²¹ This led to civil war.²²

When the war began, the Yugoslav army was controlled by hardline communist Serbs, who quickly aligned themselves with the Republic of Serbia.²³ At the same time and with the backing of the pro-Serb Yugoslav army, the Serb minority in Croatia began to divide Croatia along ethnic lines.²⁴ The Serb minority in Bosnia joined in

13. The former Yugoslavia consisted of six republics (Serbia, Croatia, Slovenia, Bosnia-Herzegovina, Montenegro, and Macedonia) and two provinces (Kosovo and Vojvodina). FACT BOOK 1991, *supra* note 1, at 343; BACKGROUND NOTES, *supra* note 1, at 4.

14. In 1946 Yugoslavia became a "People's Republic" in the Soviet style. BACKGROUND NOTES, *supra* note 1, at 3.

15. Richard Cohen, *Considering an Air Strike*, WASH. POST, Apr. 7, 1993, at A27 (after Tito died, ethnic tensions resurfaced).

16. Pearl, *supra* note 1, at 1381 n.47 (citing ALEX DRAGNICH, SERBS & CROATS 137 (1992)).

17. BACKGROUND NOTES, *supra* note 1, at 4.

18. Pearl, *supra* note 1, at 1381 n.47.

19. Opposition parties sprang up throughout the country. By 1991 there were approximately 100 opposition parties in Yugoslavia. AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REPORT 1991, at 252 (1991).

20. Human Rights Watch describes nationalism as the "linchpin" of the new governments which have emerged since Yugoslavia's demise. HUMAN RIGHTS WATCH, WORLD REPORTER (1992) [hereinafter HUMAN RIGHTS WATCH].

21. Slovenia and Croatia voted for independence on June 25, 1992. Macedonia did the same on September 8, 1992, and Bosnia-Herzegovina voted for independence that October. HUMAN RIGHTS WATCH, *supra* note 20, at 601.

22. *Id.*

23. *Id.*

24. *Id.* at 601, 603; CENTRAL INTELLIGENCE AGENCY, THE WORLD FACT BOOK 1992, at 43 (1992) [hereinafter FACT BOOK 1992].

attacking Croatia, and the conflict quickly spilled over into Bosnia.²⁵ When Western Europe recognized Bosnia-Herzegovina's independence in 1992, it only served to escalate the conflict.²⁶ Against the threat of the Yugoslav army and the Serb minorities, the Bosnian government and the Croatians formed a nominal alliance.²⁷ At present, the conflict continues; however, most commentators believe that the Serbs are the clear victors.²⁸

B. "Ethnic Cleansing" and Rape

The most notorious aspect of the continued fighting in the former Yugoslavia has been the parade of horrors euphemistically labeled "ethnic cleansing."²⁹ The term "ethnic cleansing" refers primarily to the actions of Serbs in northwest Bosnia-Herzegovina.³⁰ These Serbs are cutting a broad path across Bosnia as they attempt to reunite with Serbia to the east and are "cleansing" Bosnia of non-Serbs as they advance.³¹ Although Bosnia has borne the worst of Serb aggression, Croatia has also suffered at the hands of Serbs, and all sides of the conflagration have been cited for repeated human rights violations.³² Even the Croatians and the Bosnian Muslims, groups supposedly joined together in the fight against the Serbs, have attacked and brutalized one another.³³

The magnitude of the atrocities falling under the rubric of "ethnic cleansing" is mind-numbing. Observers have estimated that as many as 250,000 Bosnian civilians, mostly Muslims and some Croats, have been killed or are missing, although the ongoing hostilities and chaos

25. HUMAN RIGHTS WATCH, *supra* note 20, at 606 (describing the destabilizing influence of ethnic clashes in Bosnia).

26. Pearl, *supra* note 1, at 1382.

27. *No Justice, No Peace*, *supra* note 10, at 94 ("In April of 1993, for example, brutal violence erupted between Muslims and Croatians, nominal allies against Serb forces, in Central Bosnia.").

28. The conflict appears hard to resolve. By 1992, for example, the European Community had negotiated 13 cease fires, all of which failed to create a lasting peace. HUMAN RIGHTS WATCH, *supra* note 20, at 606; Pearl, *supra* note 1, at 1383.

29. HUMAN RIGHTS WATCH, *supra* note 20, at 602; Andrew BellFialkoff, *A Brief History of Ethnic Cleansing*, FOREIGN AFF., Summer 1993, at 110.

30. The Human Rights Watch states unequivocally that the Serbs are the worst offenders against human rights, noting that Serbs have been responsible for thousands of civilian deaths by summary execution. *Id.*; Katzman, *supra* note 3, at A1 ("Although all sides have committed atrocities in the Bosnian conflict, the Serbs have been blamed for most of the mass rapes and murders, tortures and uprooting of populations in their quest to purge Muslims from Serb-controlled areas of Bosnia.").

31. Pearl, *supra* note 1, at 1375.

32. *No Justice, No Peace*, *supra* note 10, at 93-94.

33. *Id.* at 94.

preclude a truly accurate count.³⁴ Two million or more have been forced to flee.³⁵ Of those who have perished, many were killed in summary executions, while others were rounded up and forced into Serb-run "detention camps."³⁶ In these camps, "detainees" are routinely tortured, starved, and executed.³⁷ Croats run similar camps.³⁸ Serb military and paramilitary groups have also looted homes and burned villages.³⁹ Cultural monuments have been targets, and Muslims have been forced to cross themselves or otherwise violate the tenets of their religion.⁴⁰ Food and medical supply shipments have been interrupted, and hospitals have been deliberately attacked.⁴¹ Rape has been widely used as a tool of ethnic cleansing.⁴² While women of all ethnic backgrounds have been raped by opposing soldiers, rapes of Muslims by Serbs are most frequently reported.⁴³ Although less commonly cited, men have also been subject to sexual violence.⁴⁴ For example, Muslim men have been forced to mutilate each others' genitals.⁴⁵

As a weapon of ethnic cleansing, rape is particularly effective for several reasons. First, it humiliates both the individual victims and the

34. FACT BOOK 1991, *supra* note 1, at 43 (noting that Muslims are being forced out of Bosnia). Recent estimates put the number dead or missing at 200,000 or a quarter million. Denitch, *supra* note 1, at C1; Lee Michael Katz, *October Deadline for Serbs*, USA TODAY, Aug. 12, 1994, at A12.

35. Katzman, *supra* note 3, at A1; Denitch, *supra* note 1, at C1 (2 million of the former Yugoslavia's 4.5 million citizens have become refugees).

36. HUMAN RIGHTS WATCH, *supra* note 20, at 604 (summary executions); *No Justice, No Peace*, *supra* note 10, at 94.

37. *No Justice, No Peace*, *supra* note 10, at 94.

38. Steven Engelberg & Chuck Sudetic, *Conflict in the Balkans: In Enemy Hands*, N.Y. TIMES, Aug. 16, 1992, at A1 (explaining that "Croats and Muslims are, to a lesser extent, setting up their own prison camps").

39. HUMAN RIGHTS WATCH, *supra* note 20, at 605 (entire villages burned, churches strafed); *No Justice, No Peace*, *supra* note 10, at 94 (looting and burning).

40. HUMAN RIGHTS WATCH, *supra* note 20, at 604 (cultural monuments destroyed); *No Justice, No Peace*, *supra* note 10, at 94 (cultural monuments destroyed).

41. Additionally, haphazard use of land mines has discouraged or disabled humanitarian missions organized by foreign governments. HUMAN RIGHTS WATCH, *supra* note 20, at 604, 605.

42. *No Justice, No Peace*, *supra* note 10, at 94-95; Maass, *supra* note 1 (the Bosnian government estimates that 30,000 women and girls have been raped, some as young as 12 years old); Roy Gutman, *Rape Camps; Evidence Leaders in Bosnia OK'd Attacks*, NEWS-DAY (N.Y.), Apr. 19, 1993, at 5 (20,000 to 50,000 incidents of rape).

43. *For the Record*, WASH. POST, Feb. 5, 1993, at A4 (quoting Margaret Larson, as she interviewed Radovan Karadzic, leader of the Bosnian Serbs: "The European Community has confirmed that there are 20,000 Muslim women who have been raped by Serbian forces as part of military strategy.").

44. *No Justice, No Peace*, *supra* note 10, at 95; Louise Branson, *New Balkan Horror: The Rape of Men*, S.F. EXAMINER, Aug. 1, 1993, at A7.

45. Branson, *supra* note 44.

communities in which they live.⁴⁶ This is especially true in the former Yugoslavia, where the stigma attached to rape is even greater than in most Western cultures.⁴⁷ For example, mass rapes by Serbs demoralize the non-Serb population, thereby potentially weakening resistance to Serb onslaught. Further, many non-Serbs flee rather than face the specter of rape, which furthers the Serb goal of creating an ethnically homogeneous corridor between Serbia and northwest Bosnia.⁴⁸ One strategy used to force non-Serbs to flee is to have paramilitary groups enter a village and publicly rape several women.⁴⁹ When the Yugoslav army comes through several days later, the army offers the non-Serb populace a chance to leave.⁵⁰ Many accept the "offer" rather than risk further gender violence against themselves or their loved ones.⁵¹ Additionally, rapes are sometimes coupled with forced pregnancy—raped women are detained until abortion is no longer legal or feasible.⁵²

II. The Tribunal

A. Creation of the Tribunal

The initial response of the United Nations—and most of the world—to the horrors in the former Yugoslavia was to condemn unequivocally the commission of all atrocities.⁵³ Shortly thereafter, the Security Council resolved that a Commission of Experts should be established to investigate the situation in the former Yugoslavia and to "provide the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law."⁵⁴

In February 1993 the Security Council passed Resolution 808, which reaffirmed the Counsel's commitment to discouraging war

46. Maass, *supra* note 1 (the Bosnian government has accused the Serbs of using rape to (1) increase troop morale and (2) humiliate women and their families).

47. *No Justice, No Peace*, *supra* note 10, at 108 & n.38; Laurel Fletcher et al., *Human Rights Violations Against Women*, 15 *WHITTIER L. REV.* 319, 321.

48. *No Justice, No Peace*, *supra* note 10, at 95.

49. Tadeusz Mazowiecki, *Report on the Situation of Human Rights in the Territory of the Former Yugoslavia*, U.N. Doc. A/48/92-5/25341, at 72 (1993).

50. *Id.*

51. *Id.*

52. Fletcher, *supra* note 47, at 321; Mazowiecki, *supra* note 49, at 70-71. There have also been reports of forced prostitution. Roy Gutman, *U.N. Forces Accused of Using Serb-Run Brothel*, *WASH. POST*, Nov. 2, 1993, at A12.

53. Pearl, *supra* note 1, at 1375 & n.7; S.C. Res. 771, U.N. SCOR, 47th Sess., 3106th mtg. at 25, U.N. Doc. S/INF/48 (1992).

54. S.C. Res. 780, U.N. SCOR, 47th Sess., 3119th mtg. at 36, U.N. Doc. S/INF/48 (1992).

crimes in the former Yugoslavia.⁵⁵ Resolution 808 also “upped the ante” by providing for the creation of a war crimes tribunal aimed at punishing violators of international humanitarian law in the former Yugoslavia.⁵⁶ Specifically, Resolution 808 requested that the Secretary-General prepare a report on all aspects of the tribunal, and the Secretary-General was encouraged to make specific proposals on the formation of the new tribunal.⁵⁷ On May 3, 1993, the Secretary-General released his report, which delineated a potential charter statute (“the statute”) for the tribunal, consisting of 34 articles.⁵⁸ The report briefly defended each article.⁵⁹ In Resolution 827, the Secretary-General’s recommendations were endorsed, and the International Tribunal was created.⁶⁰

B. Prosecution of Rape⁶¹

The Tribunal’s official function is “the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.”⁶² Specifically, the Tribunal is authorized to penalize grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide, and crimes against humanity, under Articles Two through Five of the Tribunal’s Charter, respectively.⁶³ Given this definition of the Tribunal’s role, prosecution of rape is mandated, as the rapes occurring in the former Yugoslavia violate international law on several levels.⁶⁴

Article Three of the Tribunal’s Charter, for example, allows prosecution for violations of customs or laws of war.⁶⁵ This provides an adequate basis for the prosecution of rape. History arguably establishes a custom criminalizing rape.⁶⁶ For example, rape has been pro-

55. Resolution 808, *supra* note 2 (expressing the Security Council’s alarm over “ethnic cleansing”).

56. *Id.* para. 1.

57. *Id.* para. 2.

58. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, 48th Sess., U.N. Doc. S/25704 (1993), reprinted in 32 I.L.M. 1163 (1993) [hereinafter *Secretary-General’s Report*].

59. *Id.*

60. Resolution 827, *supra* note 2, paras. 1-2.

61. See generally NATALIE KAUFMAN HEVENER, *INTERNATIONAL LAW AND THE STATUS OF WOMEN* (1983) (discussing international agreements that affect the rights of women).

62. Resolution 808, *supra* note 2, para. 1.

63. *Secretary-General’s Report*, *supra* note 58, Annex, arts. II-V.

64. Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT’L L. 424 (1993).

65. *Secretary-General’s Report*, *supra* note 58, Annex, art. III.

66. Meron, *supra* note 64, at 427 n.22 & 23; *Letter from Jordan Paust*, 88 AM. J. INT’L L. 88 (1994).

hibited in military codes ranging from “those of Richard II (1385) and Henry V (1419)” to the United States War Department’s general orders.⁶⁷ Additionally, in the wake of World War II, rape was prosecuted as a war crime in the Tokyo Tribunal and was listed as a crime against humanity in Control Council Law No. 10 by the allied powers occupying Germany.⁶⁸ Even if history is inadequate, the consensus of modern governments and theorists indicates that rape is properly viewed as a war crime.⁶⁹

Article Two, which allows for the prosecution of “persons committing or ordering to be committed grave breaches of the Geneva Conventions,” does not explicitly mention rape.⁷⁰ While making rape expressly verboten, the Geneva Conventions did not list rape as a “grave breach.”⁷¹ Nevertheless, torture, inhuman treatment, and the infliction of great suffering or serious injury to body or health are all grave breaches mentioned in Article Two.⁷² Thus, despite the conceivable textual problem of having rape listed elsewhere in the Geneva Convention, the definition of grave breaches seems broad enough to sweep rape within its ambit. Indeed, the International Red Cross has made that argument: all rape qualifies as willfully causing serious injury to health and thus is a grave breach.⁷³ One writer has advanced this argument by asserting that “if so, surely rape—in certain circumstances—can also rise to the level of such other grave breaches as torture or inhuman treatment.”⁷⁴ This argument seems especially forceful when rape is accompanied by forced pregnancy or forced maternity.

Furthermore, to the extent that rape is being used as a tool of ethnic cleansing (that is, to eliminate a given racial or religious group), rape is properly addressed under Article Four, which covers geno-

67. Meron, *supra* note 64, at 425.

68. *Id.* at 426 n.14; Allied Control Council Law No. 10, art. II, § 1(c) (Dec. 20, 1945), reprinted in 15 TRIALS FOR WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 23, 24-25 (1949) (originally in Control Council for Germany, OFFICIAL GAZETTE, Jan. 31, 1946) [hereinafter Control Council Law No. 10].

69. *Proposals*, *supra* note 10, at 189; Meron, *supra* note 64, at 427 n.22 (quoting a Jan. 27, 1993 letter from Robert A. Bradtke, Acting Assistant Secretary for Legislative Affairs to Senator Arlen Specter, which stated that the U.S. Department of State believes “the legal basis for prosecuting troops for rape is well established under . . . customary international law”).

70. *Secretary-General’s Report*, *supra* note 58, Annex 1, art. II.

71. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, arts. 27, 147, 6 U.S.T. 3516, 75 U.N.T.S. 287, 306 & 388 (protecting women against rape and defining “grave breaches,” respectively).

72. *Secretary-General’s Report*, *supra* note 58, Annex, art. II (listing grave breaches in art. 147 as crimes for which the Tribunal can prosecute).

73. International Committee of the Red Cross, Aide Memoir (Dec. 1992).

74. Meron, *supra* note 64, at 425.

cide.⁷⁵ This argument is defensible where evidence exists to support the proposition that forced pregnancy and maternity are intended to "dilute" minority group bloodlines and to increase the number of part-Serb babies born in Bosnia.

Most significantly, Article Five, listing crimes against humanity, specifically includes rape.⁷⁶ As a practical matter, Article Five may not provide the easiest means to prosecute rape because, by definition, crimes against humanity, unlike war crimes, must be "directed against any civilian population."⁷⁷ This would generally require the prosecutor to demonstrate some amount of organized state planning of mass rapes, which is a comparatively difficult process.⁷⁸ However, the explicit mention of rape highlights some important points: the Security Council has repeatedly condemned gender crimes, especially rape, in the former Yugoslavia; the Secretary-General's report defers to the needs of rape victims; and numerous countries commenting on the Tribunal's Charter advocate treating rape as a crime against humanity. Against this background, it seems likely that the Tribunal will prosecute rapists and those who encouraged or allowed the use of rape as a weapon of "ethnic cleansing."

C. The Importance of Having Rules of Procedure and Evidence that Will Protect Victims who Testify

Specifically in the prosecution of rape, but more generally in all prosecutions before the Tribunal, it is important that rules of evidence and procedure protect victims who testify. The importance of protecting victims and witnesses was not unknown to Security Council members who ratified the Tribunal's governing statute, which stresses the importance of protecting such victims to the framers of the Tribunal's rules of procedure and evidence.

That is, the rules of procedure and evidence that went into force on March 14, 1994 were authorized pursuant to Article 15 of the stat-

75. *Secretary-General's Report*, *supra* note 58, Annex, art. IV; *Proposals*, *supra* note 10, at 188 & n.64 (buttressing the argument that ethnic cleansing may be viewed as genocide by pointing to an International Court of Justice decision that warns Yugoslavia to avoid committing genocide, thereby implying official sanction to the argument that genocide is occurring). For more background, see Elizabeth A. Kohn, *Rape as a Weapon of War: Women's Human Rights During the Dissolution of Yugoslavia*, 24 *GOLDEN GATE U. L. REV.* 199 at 207 (1994) (rape should be thought of as fostering genocide because of the serious harm it causes Bosnian victims and because it is intended to destroy Muslim culture and society); Beverly Allen, *Unspeakable: When Rape Becomes a Weapon of Genocide*, *HOUS. CHRON.*, Apr. 4, 1993, at 5.

76. *Secretary-General's Report*, *supra* note 58, Annex, art. V.

77. Meron, *supra* note 64, at 428 & n.27.

78. *Id.* at 428 ("Crimes against humanity are therefore more difficult to establish"; gathering evidence of "policy planning, mass character and command responsibility" is a significant hurdle).

ute creating the Hague Tribunal. Article 15 provides a plenary grant of authority to the Tribunal's judges to write rules of procedure and evidence for the Tribunal and explicitly mentions the protection of victims and witnesses:

The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, *the protection of victims and witnesses* and other appropriate matters.⁷⁹

Moreover, Article 22 of the Tribunal's statute provides specific instructions to the judges to consider the protection of victims and witnesses when creating the Tribunal's rules:

The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of the victim's identity.⁸⁰

In justifying Article 22, the Secretary-General pointed out that the protections were needed "in light of the particular nature of the crimes committed in the former Yugoslavia."⁸¹ Further, the Secretary-General's report stated that the protections would be of the utmost importance in cases of "rape or sexual assault."⁸²

The emphasis in both the Secretary-General's report and the Tribunal's authorizing statute on the protection of witnesses and victims is not undue. In fact, when creating rules of procedure and evidence, the importance of protecting victims of war crimes who volunteer to be witnesses for the Tribunal cannot be overstated. From a humanitarian perspective, the need is obvious. The Tribunal was created to ameliorate suffering and rectify injustice, not to perpetuate the same.⁸³

Thus, the Tribunal should strive to minimize the psychological trauma associated with testifying. The formality of the court, the aggressive nature of an adversarial cross-examination, the focus of attention on the witness within the courtroom, the extrajudicial media publicity, the unfamiliar surroundings, and a host of other factors, if permitted, can make the courtroom a hostile environment in which it is extremely difficult for the most hardy witness to relive and describe

79. *Secretary-General's Report*, *supra* note 58, Annex, art. 21 (emphasis added).

80. *Id.* Annex, art. 22.

81. *Id.* para. 108.

82. *Id.*

83. *See generally* Resolution 827, *supra* note 2; Resolution 808, *supra* note 2.

a painful experience.⁸⁴ Minimizing this difficulty is extremely important in the case of rape victims.

Unfortunately, those who will attempt to prosecute military leaders for war crimes and human rights violations will face numerous obstacles, some of which are notably magnified in the case of rape.⁸⁵ Acquiring sufficient evidence to successfully prosecute is one of the most formidable obstacles; because of the fighting, witnesses are generally scattered and the perpetrators control any documentation of military abuses.⁸⁶ In the case of rape, gathering evidence is even harder because "rape survivors are overwhelmingly reluctant to talk about their experience."⁸⁷ Observers note that because of the stigmatic and traumatic nature of rape, only a few victims have come forward with their stories.⁸⁸ Silence may be a valuable coping mechanism for those attempting to deal with rape, as speech may be emotionally devastating.⁸⁹ Additionally, those who do speak may face retribution not only from the rapists, but from their families as well, particularly their husbands.⁹⁰

Luckily, the psychological need for some victims to remain silent is not always indefinite.⁹¹ At some point, a victim's need to regain power and control in her life and community may become more important than the need to avoid directly confronting her ordeal.⁹² At this point, the Tribunal can be a valuable vehicle through which women can empower themselves by taking affirmative steps to help prosecute their assailants, thereby restoring moral and political order to their communities.⁹³ Rules of procedure should respect individual witnesses' needs. Zeal to prosecute should not overshadow the need to protect the actual and potential witnesses from the stresses of the legal process. Thus, the goal of minimizing the trauma of the testifying witnesses should be pursued when it can be done without compromising the rights of the defendants.

In pursuing this goal, the Tribunal has more to gain than humanitarian benefits for its witnesses. The most immediately apparent collateral benefit of protecting witnesses is the ability to attract more

84. *No Justice, No Peace*, *supra* note 10, at 109-10; Lisa H. Thielmeyer, Note, *Beyond Maryland v. Craig: Can and Should Adult Rape Victims be Permitted to Testify on Closed-Circuit Television?*, 67 *IND. L.J.* 797, 811 (1992).

85. Pearl, *supra* note 1, at 1405; *No Justice, No Peace*, *supra* note 10, at 121.

86. Pearl, *supra* note 1, at 1406 (Serbs have in fact seized relevant paperwork); Fletcher, *supra* note 47, at 12, 44 (describing the refugee crisis).

87. *No Justice, No Peace*, *supra* note 10, at 102.

88. *Id.*

89. *Id.*

90. *Id.* at 103.

91. *Id.*

92. *Id.*

93. *Id.*

witnesses in the future.⁹⁴ If testifying before the Tribunal results in extreme psychological trauma, the Tribunal may quickly find its work dampened by a lack of victim cooperation.⁹⁵

Furthermore, the legitimacy of the Tribunal in the eyes of the world, including the former Yugoslavia, will turn in part on the Tribunal's ability to protect its witnesses. Three justifications have traditionally been advanced for the existence of international war crimes tribunals—"morality, education, and solidarity with those who are suffering."⁹⁶ The failure to protect witnesses from unnecessary trauma while testifying would significantly undercut these justifications and the Tribunal's legitimacy. To allow Tribunal proponents to argue that its existence is legitimated by a moral mandate, the Tribunal must maintain a position on the "moral high ground." Therefore, the Tribunal should distinguish itself from those it convicts; one obvious way to do that is to protect the innocent. Likewise, for the Tribunal's records to educate the world about the evils that flourished in the former Yugoslavia, thereby encouraging universal self-improvement, the records should show that improvement is feasible. If the Tribunal's records are marred with the pain of its witnesses, the lesson of promoting action to end crimes against humanity is diminished. Finally, solidarity with those who are suffering would allow the Tribunal to align itself with those who are suffering. At the least, the Tribunal can write its own rules to benefit those suffering. Ideally, the Tribunal should set a bold example of proper treatment of the disenfranchised by protecting all witnesses.

The Tribunal's legitimacy in the eyes of the world is important for several reasons. Within the former Yugoslavia, the Tribunal must be taken seriously if it is to have a maximum deterrent effect against future war crimes. To the extent that the Tribunal is viewed as illegitimate and can be thwarted by intimidating witnesses with hostile cross-examinations or by any other means, the Tribunal loses its power to deter future breaches of international law. Furthermore, one of the explanations for the level of violence and barbarity in Yugoslavia today is that incidents of ethnic violence that occurred before Tito's rule were never punished or addressed under Tito's regime and current attempts to avenge these past incidents of violence have led to vicious spirals of retribution and counter-retribution.⁹⁷ In order to achieve

94. Thielmeyer, *supra* note 84, at 811 (pointing out that rape is underreported in this country because victims fear the legal system, especially aggressive cross-examination); *No Justice, No Peace*, *supra* note 10, at 103 (victims are likewise deterred by threats of retribution from offenders and relatives).

95. *No Justice, No Peace*, *supra* note 10, at 103.

96. Pearl, *supra* note 1, at 1408.

97. *No Justice, No Peace*, *supra* note 10, at 100-01 (quoting Roger Cohen, *A Drawback to Serb Sanctions: They Don't Work*, N.Y. TIMES, Mar. 27, 1993, § 1, at 4, to the effect

long-term peace, the Tribunal must break from Tito's precedent and provide a satisfactory answer to ethnic violations of human rights. Only if the Tribunal is viewed as having legitimately addressed the concerns of the victims of human rights law abuses will it be able to quell desires for revenge and escalating attempts at extrajudicial "self help."

Some commentators have pointed out that the Tribunal's existence may be a counterincentive to peace in the former Yugoslavia for a variety of reasons.⁹⁸ First, the violators of human rights, particularly those who run detention camps, may be inspired to kill any eyewitnesses.⁹⁹ Second, Serb desire for complete conquest, rather than compromise, may be fostered by the perception that only losers are convicted of war crimes.¹⁰⁰ Third, having the international community condemn leaders in the former Yugoslavia may disgrace those leaders and lead to coups or other political difficulties in their respective nation-states.¹⁰¹ Fourth, the Tribunal may strain relations between nation-states in the former Yugoslavia and United Nations member states, resulting in isolation and a denial of the potentially stabilizing influence of membership in the world community.¹⁰² Finally, violators of international law may demand amnesty from the Tribunal before agreeing to a truce.¹⁰³

Not all of these arguments are necessarily meritorious and certainly there are counterarguments in favor of the Tribunal, some of which are articulated in this Note. Regardless of any dangers, however, the Tribunal exists, and cases are likely to be tried soon.¹⁰⁴ Given the establishment of the Tribunal, the potential dangers the Tribunal poses to peace in the former Yugoslavia indicate that the Tribunal must make every effort to strive for legitimacy. If the Tribunal is going to overcome these difficulties and play an important role in lasting peace in the former Yugoslavia, the Tribunal must be regarded seriously in the former Yugoslavia and throughout the world. In fact, as the first international war crimes tribunal in more than 40 years, the Hague Tribunal has significant precedential value; its success or failure may determine whether the world, or at least the UN, is likely to

that nationalism was never addressed, only repressed, under Tito, so it has now resurfaced).

98. Pearl, *supra* note 1, at 1399-1403 (concluding nonetheless that a War Crimes Tribunal is a "necessary step").

99. *Id.* at 1403.

100. *Id.*

101. *Id.* at 1402.

102. *Id.*

103. *Id.* at 1403.

104. Steve Coll, *In the Shadow of the Holocaust*, WASH. POST MAG., Sept. 25, 1994, at W8 (the Tribunal's first indictments are expected at the end of November 1994, and four people are currently awaiting trial in Western jails).

undertake similar efforts in the immediate future.¹⁰⁵ If the Tribunal is a paper tiger, it may well do more harm than good.

III. Shielding Witnesses from the Trauma of Testifying

A. The Right of Confrontation

The goal of protecting witnesses from the trauma of hostile cross-examination can be pursued only so far as cross-examination can be limited. Whether cross-examination can be limited in whole or in part depends on the confrontation rights of a defendant before the Tribunal. Thus, before examining the protective nature of the rules the Tribunal has written to govern its operation, a defendant's confrontation rights before the Tribunal must be ascertained. That is, the Tribunal's discretion to write rules to protect its witnesses is not unfettered.

First, the statute that creates the Tribunal is a valid exercise of the Security Council's authority under Chapter VII of the United Nations Charter.¹⁰⁶ As such, the statute has the implicit consent of the 185 United Nations member states and is binding upon the Tribunal under conventional international law.¹⁰⁷ This conclusion is in accord with mainstream principles of prudence in constitutional interpretation: a court should be bound by the instrument that creates it.

According to Article 21 of the statute (Rights of the Accused), an accused is entitled to certain "minimum guarantees" including the right "to examine, or have examined, the witnesses against him."¹⁰⁸ The proper interpretation of this right is not immediately apparent. Are the rights of an accused satisfied under this provision if, for example, a neutral fact finder examines a witness against the accused and prepares a detailed report, admissible as evidence, for both sides? Certainly, it is plausible to argue that having a neutral fact finder examine the witness adequately fulfills the "or have examined" language in Article 21. On the other hand, this right may require something more adversarial, and the "or have examined" language may refer to the ability of counsel for the accused to interrogate the witness on the defendant's behalf.

Article 21 also explicitly guarantees the accused a right to counsel. Therefore, if the framers had intended to limit the defense's examination to the accused or counsel for the accused, they hardly needed to include the "or have examined" language. Eliminating the

105. *Situation Worsens as Peace Process Continues*, UN CHRON., June 1993, at 5 (noting that the Tribunal is a first); Coll, *supra* note 104, at W8 (quoting Tribunal prosecutor Richard Goldstone, who believes that the Tribunal's success or failure will be determinative of whether similar forums are created in the future).

106. *Secretary-General's Report*, *supra* note 58, para. 22-31.

107. *Id.* para. 22-23.

108. *Id.* Annex, art. 21.

“or have examined” language would not prevent counsel for the accused from cross-examining a witness on defendant’s behalf, as the right of defense counsel to conduct a cross-examination is implicit upon granting the defendant a right to examination—any other conclusion would eviscerate the right to counsel. Unless the “or have examined” language is superfluous, there is a textual basis to interpret this clause as allowing the right of examination to be fulfilled by someone other than the accused or the accused’s counsel. One can buttress the textual argument by noting that if the “or have examined” language was intended merely for the purpose of extending power of examination to counsel, it is unnecessarily broad and ambiguous. However, accepting this argument leads to numerous difficult questions about who, other than defendant and defendant’s counsel, may satisfy the examination right and under what circumstances.

Likewise, the statute does not make clear when a person qualifies as a witness against the accused. Did the Article 21 framers intend to allow defense examination of only live witnesses or should the defendant be able to interrogate anyone who wishes to submit an affidavit? If an expert testifies based on interviews with numerous victims, should the defendant be able to examine those victims? Furthermore, once the Tribunal has decided who falls within the scope of the accused’s examination right, it remains unclear under what circumstances the examination must take place, what constitutes sufficient examination, and whether the right should be modified if the witness becomes unavailable after giving an affidavit or deposition.

When interpreting the right of confrontation under Article 21, one logical starting point is legislative intent. The Secretary-General’s report, defending Article 21, states that “it is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings.”¹⁰⁹ Additionally, the Secretary-General explains that in the interest of advancing such “internationally recognized standards,” much of the language in Article 21 was borrowed directly from the International Covenant on Civil and Political Rights.¹¹⁰ In fact, the accused’s examination right as delineated in the Tribunal’s statute is taken verbatim from the Covenant on Civil and Political Rights.¹¹¹ Thus, the examination right could potentially be viewed through the lens of the intent of those who drafted or ratified the Covenant on Civil and Political Rights; however, the number of nations involved in

109. *Id.* para. 106.

110. *Id.*

111. Interestingly, the former Yugoslavia signed the optional protocol to this instrument in March 1991. AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REPORT 1991, at 252 (1991); International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

producing the covenant, their divergent views, and varied legal systems would probably make any such attempt futile. Instead, Article 21 should be interpreted as congruent with "internationally recognized standards regarding the rights of the accused."

This conclusion is appealing for several reasons. First, because "internationally recognized standards" can be found in a broad variety of easily surveyed international instruments and similar sources, this conclusion provides a discernible paradigm for statutory interpretation. By expanding the focus of the investigation beyond the statute, covenant, and amorphous legislative histories, the search for "internationally recognized standards" provides a comparatively ample supply of normative gap fillers to be drawn from international consensus.

Further, to the extent that "internationally recognized standards" mean customary international law or general principles of international law, the Tribunal is bound by those standards.¹¹² This has two consequences. First, the search for those standards is mandated, as the Tribunal must be aware of the laws governing its function. Additionally, any controversy over the relevance of legislative intent is mooted because in so far as legislative intent is construed as a basic desire to comport with international law, legislative intent has been defined into obsolescence. Simply put, international law is binding regardless of legislative intent.¹¹³ Nor is this view of legislative intent an unnatural one, as it follows both the text of the Secretary-General's report and a popular canon of construction which provides that, whenever possible, subsequent laws should be interpreted in accord with those laws already in existence.¹¹⁴

Therefore, the search for "internationally recognized standards" should begin with a search for relevant custom or general principles concerning the defendant's right to confrontation. Although there is not universal agreement, most scholars believe that both custom and general principles of international law operate at a fairly high level of abstraction.¹¹⁵ Even at a high level of abstraction, custom and general

112. MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW ch. 3 (1988).

113. M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 237-38 (1993) [hereinafter Bassiouni, *Human Rights*] (describing how protections of human rights rise from theory to binding law).

114. Cf. RESTATEMENT (SECOND) OF UNITED STATES FOREIGN RELATION LAW § 3(3) (1965) (explaining that if "a domestic law of the United States may be interpreted either in a manner consistent with international law or in conflict with international law," consistency is preferred).

115. M. Cherif Bassiouni, *A Functional Approach to "General Principles of International Law"*, 11 MICH. J. INT'L L. 777 (1990) [hereinafter Bassiouni, *Functional Approach*] (quoting a definition of "general principles" which indicates that such principles operate at a high level of abstraction from 1 INTERNATIONAL LAW BEING THE COLLECTED PAPERS OF HERSH LAUTERPACHT 69, 74 (E. Lauterpacht ed., 1970)). Note that Bassiouni himself

principles may potentially inform the rule-making process with respect to such issues as whether the right to confrontation is absolute or in what ways it may be compromised.

Under the classical definition, customary international law is law “made over time by widespread practice of governments acting from a sense of legal obligation.”¹¹⁶ Thus, the first step in establishing a binding custom is to show that a practice is “both extensive and virtually uniform.”¹¹⁷ When taking this step, it is permissible to look to a broad range of evidence to discern consistent behavior among states. Treaties, executive agreements, diplomatic correspondence, and digests on the national practice of international law are all good sources.¹¹⁸ Unfortunately, in the area of human rights, there is often a difference between what states demand of their peers and what those states actually practice at home.¹¹⁹ This leads to confusion over whether custom is best founded on internal or international practice.¹²⁰ For simplicity, and not from a desire to take a stand in the internal versus international debate, this Note will seek customs with primarily international roots. Additionally, disagreement exists regarding when a practice is sufficiently pervasive to rise to the level of custom.

The second step in demonstrating a custom requires proof that the practice at issue is followed because of a “sense of legal obligation”—frequently referred to in Latin as *opinio juris vel necessitatis*.¹²¹ This step is difficult because a state’s true motivations are not necessarily revealed by looking at what that state tells the world; a government must be motivated by a feeling of legal duty and not by a whim or image.¹²²

However, even absent the difficulties intrinsic to the process of identifying a binding custom, it would be hard to show a custom for the right of absolute adversarial confrontation. A logical place to begin the investigation for uniform practice is with the Nuremberg and Tokyo trials, which were held in the wake of World War II. These trials show the practices of the four major allied powers, which have

concludes that general principles can be very specific, if such principles are derived by surveying correspondingly narrow provisions in relevant instruments. Bassiouni, *Human Rights*, *supra* note 113, at 245.

116. L. HENKIN, *HOW NATIONS BEHAVE* 33 (2d ed. 1979).

117. JANIS, *supra* note 112, at 39 (quoting *North Sea Continental Shelf*, 1969 I.C.J. 4, 43).

118. This is a partial list of what the U.S. Department of State considers valid sources of customary international law. *Id.* at 41.

119. Naomi Roht-Arriaza 84 (1994) (unpublished manuscript, on file with author).

120. *Id.*

121. JANIS, *supra* note 112, at 39-40 (quoting RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 102(2) (Tentative Draft No. 6, 1985)).

122. *Id.* at 40-41.

since been endorsed by scholars and nations throughout the world.¹²³ Of the various sources that might indicate universal practice, the Nuremberg and Tokyo trials present the closest parallels to the situation at hand.

The Charter of the International Military Tribunal at Nuremberg provided, in Part IV, for "Fair trial for defendants."¹²⁴ It read in relevant section: "A defendant shall have the right through himself or his Counsel to present evidence at the Trial in support of his defense, and to cross-examine any witness called by the Prosecution."¹²⁵ Like the current Hague Tribunal, the Nuremberg Tribunal had broad power to "draw up rules for its procedure . . . not . . . inconsistent with the provisions of [the Tribunal's] charter."¹²⁶ About three months after its creation, the Nuremberg Tribunal published a simple set of 11 procedural rules. Although the rules discussed the right to compulsory process at some length, they shed no additional light on the defendant's confrontation right.¹²⁷ Thus, while the above rule valued cross-examination, it also limited the ability of defendants to cross-examine those witnesses the prosecution chose to call. In fact, the Nuremberg Tribunal exercised great evidentiary freedom and flexibility under its charter, frequently permitting the admission of affidavits and thereby denying the defense any opportunity for cross-examination.¹²⁸

The Charter of the International Military Tribunal for the Far East also had a section that provided for the fair trial of an accused.¹²⁹ The confrontation clause therein read:

Evidence for the defense. An accused shall have the right, through himself or through his counsel (but not through both), to conduct his defense, including the right to examine any witness, subject to such reasonable restrictions as the Tribunal may determine.¹³⁰

The Tribunal for the Far East had the authority to draft rules of procedure. However, these rules were sparse and did not address confron-

123. ARNA TUSA & JOHN TUSA, *THE NUREMBERG TRIAL* (1984).

124. Charter of the International Military Tribunal, Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, IV, art. 16(a)-(e), *reprinted in* ROBERT H. JACKSON, *THE NUREMBERG CASE 21-29* (1947) [hereinafter Charter].

125. *Id.* at IV, art. 16(e).

126. *Id.* at II, art. 13.

127. International Military Tribunal Rules of Procedure (1945), *reprinted in* 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 19-23 (1947).

128. Charter, *supra* note 124, at V, art. 19; *No Justice, No Peace, supra* note 10, at 198 n.110.

129. Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, amended Apr. 26, 1946, at III, *reprinted in* U.S. DEP'T OF STATE, PUB. NO. 2613, TRIAL OF JAPANESE WAR CRIMINALS 39-44 (1946).

130. *Id.* at III, art. 9(d).

tation rights.¹³¹ Again, therefore, the relevant language established a practice of respecting a confrontation right, but not as an absolute right immunized against all derogation.

In addition to the international tribunals that convened in Nuremberg and Tokyo, unilateral war crimes tribunals were formed by each of the powers occupying Germany.¹³² These tribunals were authorized, in Control Council Law No. 10, by the American, Russian, French, and English governments and were administered by the Zone Commanders governing postwar Germany on behalf of the allied powers.¹³³ A brief survey of the procedures used by these tribunals reveals that the prosecutors made ample use of affidavits in proving their cases, although the defense was afforded opportunity to examine any testifying witnesses.¹³⁴ Examination of the national courts convened by allied powers in Tokyo yields the same result.¹³⁵

Of the international instruments surveyed for this Note, fourteen have provisions dealing with some matters of criminal procedure, but only two explicitly protect the defendant's right to confrontation.¹³⁶

131. Rules of Procedure of the International Military Tribunal for the Far East, reprinted in R. JOHN PRITCHARD & SONIA MAGBANAU ZAIDE, 1 THE TOKYO WAR CRIMES TRIAL (1981).

132. Control Council Law No. 10, *supra* note 68 (authorizing zone commanders to form tribunals and setting uniform standards for the prosecution of war criminals therein).

133. *Id.*

134. For example, the U.S. Military Tribunals were expressly permitted to admit affidavits and a list of other documentary evidence if the writings "appear[ed] . . . to contain information of probative value." Defendants were allowed to "cross-examine any witness called by the prosecution." Military Government-Germany, U.S. Zone Ordinance No. 7, arts. IV(e) & VII reprinted in 1 TRIAL OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at XXIII (1949).

Likewise, the British made free use of affidavits. See generally TRIAL OF GOZAWA SADAICHI AND NINE OTHERS (Colin Sleeman ed., 1948); THE PELIUS TRIAL, BRITISH MILITARY COURT FOR THE TRIAL OF WAR CRIMINALS HELD AT THE WAR CRIMES COURT, HAMBERG (Oct. 17, 1945), reprinted in 1 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 1 (1947).

135. Pearl, *supra* note 1, at 1393 (stating that there were 419 witnesses at the Tokyo trials and 779 affidavits).

136. I surveyed the 57 instruments in Human Rights: A Compilation of International Instruments, U.N. Doc. ST/HR/1/Rev.2, U.N. Sales No. E.83XIV.1 (1983).

Not all of the instruments touch on matters of criminal procedure. For example, the instruments relating to discrimination affect criminal procedure only in so far as those instruments call for all law to be dispensed even-handedly. See generally Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, G.A. Res. 34/180; Declaration on Race and Racial Prejudice, Nov. 27, 1978, UNESCO Doc. 20C/3/1.1/2; Declaration on the Elimination of Discrimination Against Women, Nov. 7, 1967, G.A. Res. 2263 (XXII); International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, G.A. Res. 2106 A (XX); United Nations Declaration on the Elimination of All Forms of Racial Discrimination, Nov. 20, 1963, G.A. Res. 1904 (XVIII).

Most of the other instruments that dealt with issues of criminal procedure did so only in a general sense, such as granting access to the courts or endorsing a due process ideal in

These two are the International Convention on Civil and Political Rights, containing the same language as the Tribunal's statute, and the American Convention on Human Rights, which is similarly worded.¹³⁷

Based on this brief survey, it seems unlikely that the level of universality prerequisite to a custom exists in the area of the right to confrontation. Thus, it is not necessary to determine whether those states that have adhered to the practice of honoring or encouraging a confrontation right through their international affairs did so out of a sense of legal obligation. Further, to the extent that the right has been recognized in international fora, the right has been construed narrowly and has never been construed to be absolute.¹³⁸ This survey both highlights the acknowledgment of the examination right in several important precedents and also stands for the proposition that the examination right is subject to reasonable limits or a narrow reading.

Similarly, an analysis of the relevant sources leads to the conclusion that no general principle of international law on point exists. "The definition of a 'general principle of the law' has been a source of considerable difficulty."¹³⁹ Article 38(1)(c) of the Statute of the International Court of Justice contains the most widely accepted formulation of the concept, referring to "the general principles of law

relevant judicial or administrative hearings. *See generally* Code of Conduct for Law Enforcement Officials, Dec. 17, 1979, G.A. Res. 34/169; Standard Minimum Rules for the Treatment of Prisoners, July 31, 1957, ECS Res. 663 C (XXIV), 2076 (LXII); Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, ESC Res. 526 A (XVII); Convention Relating to the Status of Refugees, July 28, 1951, G.A. Res. 429 (V); Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, G.A. Res. 260 A (III).

However, several instruments do make explicit procedural guarantees. International Covenant on Civil and Political Rights, Jan. 3, 1976, G.A. Res. 2200 (XXI) (among other guarantees, the confrontation right); Declaration on the Protection of All Persons from Being Subjected to Torture or Other Cruel, Inhumane or Degrading Treatment or Punishment, Dec. 9, 1975, G.A. Res. 3452 (XXX) (victim's statement obtained by torture should not be admissible to prove guilt at trial); Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217 A (III) (innocent until proven guilty, right to public trial); Proclamation of Teheran, May 13, 1968, Int'l Conf. on Human Rts. at Teheran (1968) (affirming generally the Universal Declaration and the International Covenant on Civil and Political Rights).

In addition to the instruments in the UN compilation, the American Convention on Human Rights and the International Convention for the Protection of Human Rights and Fundamental Freedoms also contained relevant guarantees. The American Convention on Human Rights, Nov. 22, 1969, O.A.S. Treaty Series No. 36 [hereinafter American Convention]; International Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 214 U.N.T.S. 221.

137. ICCPR, *supra* note 111, pt III, art. 14(c)(3); American Convention, *supra* note 136, pt. i, ch. II, art. 8(2)f.

138. *But see* Marian Nash, *U.S. Practice: Law of War*, 87 AM. J. INT'L L. 435 (1993) (articulating the value placed on cross-examination in the United States).

139. Roht-Arriaza, *supra* note 119, at 101.

recognized by civilized nations," as a valid source of binding international law.¹⁴⁰ Numerous authors have struggled to make this language scrutable.¹⁴¹ Most agree that all United Nations member states should be considered "civilized" for the purpose of this inquiry.¹⁴² Finding the general principles that these nations "recognize" is considerably more difficult.¹⁴³ The current wisdom tends to be "that a general principle of law is some proposition of law so fundamental that it will be found in virtually every legal system."¹⁴⁴ Therefore, techniques of comparative law are used and national instruments are "overlapped" in the search for a common nucleus.¹⁴⁵

For the purposes of this Note, only constitutions were surveyed; thus a conclusion contrary to my finding that no relevant general principle exists could be reached if a survey of statutes and common law throughout the "civilized" nations was completed. However, of the 180 constitutions surveyed, only 33 specifically guarantee a right to confrontation, and most do so only in general terms.¹⁴⁶ Of these constitutions, 27 placed the right of confrontation or examination among

140. Statute of the International Court of Justice, art. 38(1)(c), as annexed to the Charter of the United Nations, 59 Stat. 1055, T.S. No. 993, 3 Bevens 1153 (signed in San Francisco June 26, 1945; entered into force Oct. 24, 1945).

141. Michael Akehurst, *The Application of General Principles of Law by the Court of Justice of the European Communities* 52 BRIT. Y.B. INT'L. L. 29 (1981); Bassiouni, *Functional Approach*, *supra* note 115; Lynn Berat, *Human Rights Violators From a Predecessor Regime*, 13 B.C. THIRD WORLD L.J. 199 (1993); Wolfgang Friedman, *The Uses of "General Principles" in the Development of International Law*, 57 AM. J. INT'L L. 279 (1963); Frances T. Jalet, *The Quest for General Principles of Law Recognized by Civilized Nations—A Study*, 10 UCLA L. REV. 1041 (1963).

142. *Id.*

143. *Id.*

144. JANIS, *supra* note 112, at 47.

145. *Id.*

146. In conducting this survey, I am greatly indebted to Cherif Bassiouni, who paved a broad path (which I then followed) in his article on international procedural protections. Specifically, he examined the related right to compulsory process, but made little mention of confrontation. Because compulsory process is generally enumerated with confrontation, I was able to use his citations to locate quickly the confrontation or examination right clauses in many nations' constitutions. Bassiouni, *Human Rights*, *supra* note 113, at 278-97.

Interestingly, these clauses were often identical. Typically, they read: "Every Person who is charged with a criminal offense . . . shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before any court . . ." ANT. & BARB. CONST. ch. II, § 15(2)(e); BAH. CONST. ch. III, § 20(2)(e); BARB. CONST. ch. III, § 18(2)(e); BELIZE CONST. ch. II, § 6(3)E; BOTS. CONST. ch. II, § 10(2)(e); DOMINICA CONST. ch. I, § 8(2)(e); FIJI CONST. ch. II, § 11(2)(e); GAM. CONST. ch. III, § 20(2)(e); GREN. CONST. ch. I, § 8(2)(e); GUY. CONST. pt. II, tit. I, art. 144(2)(e); JAM. CONST. ch. III, § 20(6)(d); KENYA CONST. ch. V, § 77(2)(e); KIRIBATI CONST. ch. II, § 10(2)(e); MALTA CONST. ch. IV, § 39(6)(d); MAURITIUS CONST. ch. II, § 10(2)(e); NAURU CONST. pt. II, § 10(3)(f); NIG. CONST. ch. IV, § 33(6)(d); PAPUA N.G. CONST. pt. III(3)(B), § 37(4)(f); ST. CHRIS-NEVIS CONST. ch. II, § 10(2)(e); SIERRA LEONE CONST. ch. III, § 23(5)(d); SOLOM. IS. CONST. ch. II, § 10(2)(e); SWAZ. CONST. ch. II, § 10(2)(e); TUVALU CONST. pt. II,

a cluster of rights that included a guarantee of "equality of arms."¹⁴⁷ "Equality of arms" labels the idea that the prosecution and defense should have equal tools at their disposal.¹⁴⁸ "Equality of arms" can be interpreted as containing an independent guarantee of defense cross-examination when the prosecution is permitted to directly examine a witness.

Equality of arms is a hallmark of the modern, more adversarial process, as opposed to earlier inquisitorial systems.¹⁴⁹ In his article on international procedural protections, Cherif Bassiouni explains that among the human rights instruments he surveyed, there was "a definite move towards adversarial procedures and away from the inquisitorial mode."¹⁵⁰ Given this trend, it is not surprising that the right to confrontation has not yet found its way into the majority of the constitutions of "civilized" nations. To date, the trend does not appear to have ripened into a general principle.

Because of the failure to establish a relevant custom or general principle, those precedents favoring the examination right and those that constrain the right (or allow exceptions to it) lack the force of law. Nevertheless, those precedents are indicia of what composes "internationally recognized standards regarding the rights of the accused." Hence, they provide guidance for fulfilling the legislative

§§ 22(3)(f)(ii), 22(14)(b); UGANDA CONST. ch. III, § 15(2)(e); ZAMBIA CONST. pt. III, § 18(2)(e); ZIMB. CONST. ch. II, § 18(3)(e).

The constitutions that differed notably are listed below. JAPAN CONST. ch. III, art. 37 ("He [the accused] shall be permitted full opportunity to examine all witnesses"); LIBER. CONST. ch. III, art. 21(h) ("[T]he accused shall have the right . . . to confront the witnesses against him"); MEX. CONST. tit. I, ch. I, art. 20(IV) ("He shall be confronted with the witnesses against him, who shall testify in his presence if they are to be found in the place where the trial is held, so that he may cross-examine them in his defense"); NAMB. CONST. ch. III, art. 12(1)(d) ("All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them"); PHIL. CONST. art. IV, § 19 ("In all criminal prosecutions the accused shall . . . enjoy the right . . . to meet witnesses face to face"); U.S. CONST. amend. VI.

147. ANT. & BARB. CONST. ch. II, § 15(2)(e); BAH. CONST. ch. III, § 20(2)(e); BARB. CONST. ch. III, § 18(2)(e); BELIZE CONST. ch. II, § 6(3)E; BOTS. CONST. ch. II, § 10(2)(e); DOMINICA CONST. ch. I, § 8(2)(e); FIJI CONST. ch. II, § 11(2)(e); GAM. CONST. ch. III, § 20(2)(e); GREN. CONST. ch. I, § 8(2)(e); GUY. CONST. pt. II, tit. I, art. 144(2)(e); JAM. CONST. ch. III, § 20(6)(d); KENYA CONST. ch. V, § 77(2)(e); KIRIBATI CONST. ch. II, § 10(2)(e); MALTA CONST. ch. IV, § 39(6)(d); MAURITIUS CONST. ch. II, § 10(2)(e); NAURU CONST. pt. II, § 10(3)(f); NIG. CONST. ch. IV, § 33(6)(d); PAPUA N.G. CONST. pt. III(3)(B), § 37(4)(f); ST. CHRIS-NEVIS CONST. ch. II, § 10(2)(e); SIERRA LEONE CONST. ch. III, § 23(5)(d); SOLOM. IS. CONST. ch. II, § 10(2)(e); SWAZ. CONST. ch. II, § 10(2)(e); TUVALU CONST. pt. II, §§ 22(3)(f)(ii), 22(14)(b); UGANDA CONST. ch. III, § 15(2)(e); ZAMBIA CONST. pt. III, § 18(2)(e); ZIMB. CONST. ch. II, § 18(3)(e).

148. Bassiouni, *Human Rights*, *supra* note 113, at 277.

149. *Id.*

150. *Id.*

intent behind the right as iterated in Article 21. Thus, these precedents provide a prudent starting point for determining how to interpret the right. Overall, the search for custom or general principle reveals that the examination right is an important procedural safeguard for a fair adversarial process and should not be diminished for trivial reasons. However, where principled reasons for construing the right narrowly exist, the Tribunal's rules of procedure should reflect such concerns. As a prudential matter, a desire to protect victims who participate in the trial process provides an acceptable justification for limiting the examination right.

B. Limiting the Cross-Examination Right

Simply concluding that the confrontation right can be derogated to protect witnesses only begins the analysis. The next question is how to balance the confrontation right against the needs of witnesses. The difficulties in balancing stem from the fact that the Tribunal's legitimacy will suffer if either victims and witnesses *or* defendants are harmed.¹⁵¹ Unfortunately, maximizing shields for witnesses requires cutting into the confrontation right.

The balance struck in the rules of procedure and evidence that currently govern the Tribunal favors allowing adversarial cross-examination. For example, the rules generally require all witness testimony to be presented live before the Tribunal.¹⁵² Further, any witness before the Tribunal must present direct, cross, and re-direct testimony.¹⁵³ Only under unusual circumstances may the Tribunal allow depositions in lieu of in-Tribunal testimony.¹⁵⁴ Further, adversarial cross-examination at depositions is mandated.¹⁵⁵

151. See *supra* Part II.C.

152. Rules of Procedure and Evidence, *supra* note 11, at 533-34. Rule 90—Testimony of Witnesses states in relevant part:

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

153. Rules of Procedure and Evidence, *supra* note 11, at 531. Rule 85—Presentation of Evidence states in relevant part:

(A) Each party is entitled to call witnesses and present evidence. . . .
 (B) Examination-in-chief, cross-examination and re-examination shall be allowed in each case. It shall be for the party calling the witness to examine him in chief, but the Judge may at any stage put any question to the witness.

154. Rules of Procedure and Evidence, *supra* note 11, at 524-25. Rule 71—Depositions states in relevant part:

(A) At the request of either party, a Trial Chamber may, in exceptional circumstance and in the interests of justice, order that a deposition be taken for use at trial, and appoint, for that purpose, a Presiding Officer.

155. Rules of Procedure and Evidence, *supra* note 11, at 524-25. Rule 71—Depositions states in relevant part:

On the other hand, the rules place some limits on cross-examination. The Tribunal's judges are instructed to prevent questions that are intended to intimidate or harass.¹⁵⁶ A closed circuit, one-way television system may also be used to prevent witnesses from coming into direct contact with the defense team and defendants who previously harmed them.¹⁵⁷ Additionally, in cases of sexual assault, examination is limited by what is essentially a rape shield rule, which prevents the introduction of prior sexual conduct evidence entirely, prevents the use of consent as a defense, and dictates that evidence corroborating a victim's testimony is not necessary to obtain a conviction.¹⁵⁸

In sum, however, the balance currently favors cross-examination. The Tribunal legitimately could have imposed greater limits on confrontation.¹⁵⁹ Testimony obtained *ex parte*—from one-sided depositions or from affidavits¹⁶⁰—could have been allowed.¹⁶¹ However, the framers of the Tribunal's rules apparently felt that adversarial cross-examination was necessary—ostensibly to protect defendants and to obtain meaningful convictions.

Such emphasis on allowing cross-examination reflects the modern trend toward equality of arms: the principle that requires the defense be afforded the same opportunities as the prosecution in presenting its case.¹⁶² Likewise, Tribunal rules that restrict cross-examination stray from the principle of equality of arms because such rules inevitably disadvantage the defense. Notably, though, the Tribunal rules that do restrict cross-examination preserve the heart of the exercise: truth

(E) The Presiding Officer shall insure that the deposition is taken in accordance with the Rules and that a record is made of the deposition, including cross-examination and objections raised by either party for decision by the Trial Chamber. He shall transmit the record to the Trial Chamber.

156. Rules of Procedure and Evidence, *supra* note 11, at 527. Part Six—Proceedings Before the Trial Chambers: Rule 75—Protection of Victims and Witnesses states in relevant part:

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

157. Rules of Procedure and Evidence, *supra* note 11, at 527. Rule 75—Protection of Victims and Witnesses states in relevant part:

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

158. Rules of Procedure and Evidence, *supra* note 11, at 535-36 (Rule 96—Evidence in Cases of Sexual Assault).

159. *See supra* Part III.A.

160. *Proposals*, *supra* note 10, at 200 (“Suggested Evidentiary Rules, Proposals, 4. Efforts should be made to prove cases against the defendant with evidence other than the direct testimony of the survivors of the atrocities”).

161. *Id.*; *See generally* Thielmeyer, *supra* note 84.

162. Bassiouni, *Human Rights*, *supra* note 113, at 277.

seeking.¹⁶³ Further, Tribunal rules only restrict cross-examination when doing so significantly benefits witnesses. Therefore, derogation of equality of arms is minimized.

For example, the current rule forbidding questions that intimidate or harass¹⁶⁴ minimizes the damaging effects of cross-examination by eliminating psychologically assaultive tactics. At the same time, that rule does not interfere with the truth-seeking function of cross-examination, which is vital to the defense. Indeed, because harassment and intimidation are often the foes of truth, the rule arguably increases the value of cross-examination by the defendant. At the least, the rule does not degrade the value of cross-examination much compared to the lengths the rule goes toward minimizing the mentally damaging aspects of being cross-examined.

The other rules limiting cross-examination before the Tribunal appear to have been drafted in a similar spirit. For example, closed circuit television¹⁶⁵ does not blunt the truth-seeking process nor the Tribunal's ability to glean the nonverbal evidence that is a benefit of live testimony. At the same time, the electronic meeting is less threatening for many witnesses.

Likewise, although cutting deeper into the confrontation right, the rape shield rule¹⁶⁶ does not deviate from the principle of preserving the core functions of cross-examination. That is, the rape shield rule does not undercut the truth-seeking process when it bans consent defenses and prior sexual conduct evidence. But, nonetheless, the rape shield rule minimizes the pain experienced by an extremely vulnerable class of witnesses.

The view that the rape shield rule leaves the truth-seeking process unscathed makes several presumptions about the truth in cases of sexual assault in the war-torn former Yugoslavia: namely, that a victim did not consent to any sexual contact and that prior sexual conduct—whether it be extreme promiscuity or total lack thereof—has no bearing on whether a victim was sexually assaulted in the present case. Both of these presumptions are defensible in the case of war

163. Finding a custom or general principle in international law for truth seeking as the heart or key to any judicial process would be an interesting—and realistic—exercise for another day. Notably, in the middle of the 19th century, Dr. Hans Gross, an Austrian man often referred to as the “father of criminalistics” defined the “search for truth” as the goal of all criminal investigations. JAMES MURPHY, *THE POLYGRAPH TECHNIQUE, PAST AND PRESENT* (1980).

164. Rules of Procedure and Evidence, *supra* note 11, at 524-25 (Rule 71—Depositions); *supra* note 154.

165. Rules of Procedure and Evidence, *supra* note 11, at 524-25 (Rule 71—Depositions); *supra* note 155.

166. Rules of Procedure and Evidence, *supra* note 11, at 526 (Part Six—Proceedings Before the Trial Chambers); *supra* note 156.

crimes. These presumptions are especially defensible in the former Yugoslavia, where ethnic hatreds and conservative social mores make the chances of consensual sexual contact between defendants and witnesses de minimis.¹⁶⁷ Therefore, both the defense of “consent” and evidence of prior sexual conduct are irrelevant. Thus, the rape shield rule can be said to protect witnesses without undermining the heart of the confrontation privilege.

By enacting protective rules—like the rape shield rule—that preserve the truth-seeking function of defensive cross-examination, the framers strike a balance between defendants’ confrontation rights and witnesses’ psychological needs that respects the principle of equality of arms. That in turn secures the Tribunal against the criticism that trials before it are unfair to defendants, which is a valid goal. Therefore, if Tribunal witnesses can be adequately protected without deviating from the goal of maintaining equality of arms, that goal should be respected. On the other hand, if experience demonstrates that witnesses are not adequately protected, the Tribunal should consider sacrificing some equality of arms, which is not yet mandated under international law.

Regardless, certain additional protective limits on cross-examination could be allowed without compromising the defensive value of cross-examination. Such limits on confrontation could provide additional protections that witnesses need and deserve, while offering a superior alternative to entirely abandoning equality of arms. In fact, the overall likelihood that the Tribunal will need to consider abandoning equality of arms could be decreased by such proactive measures. This Note suggests new restrictions¹⁶⁸ on confrontation that are in keeping with the spirit of the limitations already imposed under the Tribunal’s rules. Hopefully, by implementing these suggestions, the Tribunal can offer its witnesses enough protection so the Tribunal will never need to consider sacrificing equality of arms.

One such suggestion that could greatly protect witnesses without undermining truth seeking would be to allow live testimony before the Tribunal to be videotaped and later readmitted against similarly situ-

167. *Proposals*, *supra* note 10, at 203.

168. Rules of Procedure and Evidence, *supra* note 11, at 496 (granting judges power to amend rules). Rule 6—Amendment of Rules states in relevant part:

(A) Proposals for amendment of the Rules may be made by a Judge, the Prosecutor or the Registrar and shall be adopted if agreed to by not less than seven Judges at a plenary meeting of the Tribunal convened with notice of proposal addressed to all Judges.

(B) An amendment of the rules may be otherwise adopted provided it is unanimously approved by the Judges.

(C) An amendment shall enter into force immediately, but shall not operate to prejudice the rights of the accused in any pending case.

ated defendants.¹⁶⁹ Defendants against whom previously recorded testimony was admitted could pose additional, but not redundant, questions to the witness who originally testified.¹⁷⁰ From the viewpoint of a key witness, admission of previously recorded testimony would be far superior to undergoing multiple cross-examinations, which would quickly become repetitive and draining. From the viewpoint of the Tribunal's judges, who will be weighing the validity of the testimony, videotape should be a fairly good approximation of live testimony. Moreover, a tape captures fresh testimony, whereas multiple cross-examinations will sometimes result in stale renditions of the witness's original story and sometimes in a witness who is emotionally exhausted and unable to continue.

Finally, from the viewpoint of the defendant, there are some rhetorical disadvantages to admission of prerecorded testimony because the style, manner, order, and exact wording of questions would be fixed. Substantively, however, the defendant would be largely unaffected. The defendant would have a fair chance to ask new questions, present a full story, and flush out important details. Therefore, truth seeking would not be preempted.

Additionally, the Tribunal can reduce the number of witnesses who are forced to testify before it through strategic use of expert witnesses. For example, expert witnesses could be used to establish a pattern of rape or gender crimes committed by troops associated with particular military units, thus establishing command responsibility without requiring the examination of hundreds of victims.¹⁷¹

Defendants would have ample opportunity to question experts on how conclusions were drawn. The Tribunal would gain the benefit of expert advice in drawing important conclusions. Furthermore, Tribunal resources could be conserved by efficient use of experts. If one expert does all the fieldwork and analysis to reach a key conclusion, the Tribunal is spared going through the same arduous process on an amateur level. Moreover, expert witnesses are currently contemplated by the Tribunal. The Tribunal needs merely to decide to use them in lieu of multiple lay witnesses whenever possible.

Finally, there are several things that the Tribunal could do to make more effective its efforts to weed out harassing and intimidating questions and to better enforce its rape shield rule. First, the Tribunal could amend its rules to allow the judges to request lists of proposed

169. Anecdotal evidence indicates that many defendants will be similarly situated. For example, in Serb-run camps, detained women have often been assaulted by numerous captors acting in tandem.

170. *Proposals*, *supra* note 10, at 209-10.

171. *Id.* at 200, 204; *No Justice, No Peace*, *supra* note 10, at 105-06.

questions prior to the examination of any witness.¹⁷² Thus, the Tribunal's judges would have greater opportunity to screen out inappropriate questions.

Second, counsel should not be required to adhere strictly to previously submitted questions, but rather should be allowed to improvise questions based on new information learned during examination. Thus, the Tribunal should amend its contempt rule to allow sanctions against attorneys who persist in asking inappropriate questions. This could chill adversarial cross-examination; however, if attorneys are given ample warning that the questions they are posing are inappropriate, sanctions are reasonable.

C. Victims and Witnesses Unit

Curtailing cross-examination through the mechanisms discussed in Part III.B, *supra*, is not the only means of minimizing the trauma associated with being involved in the trial process as a witness and victim. Another mechanism for protecting witnesses, which does not implicate defendants' confrontation rights and is already in place, is the Tribunal's Victims and Witnesses Unit.¹⁷³

This Unit is charged with recommending protective procedures to help victims and witnesses and with providing counseling for victims and witnesses.¹⁷⁴ Ideally, this unit should suggest a number of protections for witnesses (beyond those discussed in Part III.B, *supra*) that do not implicate defendants' confrontation rights.

For example, participation of witnesses before the Tribunal should be voluntary and with informed consent.¹⁷⁵ If participation of witnesses is not completely voluntary, if witnesses are, even inadvertently, psychologically pressured to testify, everyone will be hurt. For the witnesses, the experience would be traumatic. For the defendants and the prosecutors, an involuntary witness is a poor source of information. For the Tribunal's international image and reputation, the

172. *Proposals, supra* note 10, at 209.

173. Rules of Procedure and Evidence, *supra* note 11, at 507. Rule 34—Victims and Witnesses Unit states in relevant part:

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

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

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

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

174. *Id.*

175. *Proposals, supra* note 10, at 206.

damage to both the witnesses and the truth-seeking process would be a dual blow.

For these reasons, the Tribunal probably does not contemplate or desire involuntary witnesses. Unfortunately, the Tribunal does not provide any explicit mechanisms to counter pressures to testify. Witnesses may encounter pressure from well-meaning prosecutors who are eager to convict, from well-meaning judges who zealously pursue truth, and from well-meaning peers who have already testified, who desire conviction, and who offer moral support.

Therefore, the Victims and Witnesses Unit should take several steps to assure that witness testimony is voluntary and made with informed consent. Two changes in the rules governing witnesses should be suggested. First, an amendment to the rules should be made that would permit a witness to stop testifying at any point that testifying becomes too painful. If the witness later retakes the stand and completes cross-examination, then the testimony should be admitted as evidence. Otherwise, the testimony should be stricken.

Second, the oath given by the witness, which currently covers only truth, should be amended to reflect voluntariness, as per the rule suggested above. Specifically, the oath should include a sentence stating "I give this testimony freely and voluntarily and understand my right to cease testifying should I be, for any reason, unable to continue." This would remind everyone, including the witness involved, of the importance of voluntary participation. It would also help defray appeals or attacks of convictions on the grounds that witnesses against the defendant were coerced into giving certain testimony.

Further, the counselors that the Victims and Witnesses Unit is charged with providing should help the witness to understand the implications of giving testimony and the right to not give testimony at any time. In fact, witnesses and victims could benefit from two types of counseling—legal and psychological.¹⁷⁶

Presumably, the rule creating the Unit, which speaks of counseling in general terms, does not contemplate legal counseling.¹⁷⁷ If the Tribunal's rules contemplated providing lawyers for witnesses and victims, the role of those lawyers would probably be discussed throughout the rules, which is not the case. Nevertheless, the Victims and Witnesses Unit is certainly free to recommend the use of legal counsel for witnesses and could probably provide legal counsel to give advice outside of the Trial Chamber without the prior approval of the judges.

176. *Proposals*, *supra* note 10, at 205 (citing INT'L WOMEN'S HUMAN RIGHTS CLINIC OF THE CITY COLLEGE OF N.Y., GENDER JUSTICE AND THE CONSTITUTION OF THE WAR CRIMES TRIBUNAL PURSUANT TO SECURITY COUNCIL RESOLUTION 808 (1993); and suggesting legal counseling); *No Justice, No Peace*, *supra* note 10, at 117.

177. Rules of Procedure and Evidence, *supra* note 11; *supra* note 174.

Even if legal counsel for the witnesses were not permitted to participate in the trial, legal counsel could serve an important role. As mentioned above, the counsel could help to assure that the witness understood that testifying was voluntary. The counsel could also help prepare the witness for the rigors of the stand, sitting in on the prosecution's preparation of the witness with an eye toward the witness's rights and needs.

In the Trial Chamber, an attorney for the witness could be even more helpful. The attorney would be aware of potentially abusive and harassing questions as well as questions in violation of the rape shield rule and could make appropriate objections. Additionally, the physical presence of an attorney is comforting and may help the witness to feel that her plight is being taken seriously.

The rule that provides defendants with the right to counsel during investigation provides a good model on which to base an additional rule providing witnesses with such a right.¹⁷⁸ This is not to imply that the position of witnesses is, or should be considered, comparable to the defendants. Rather, the rule is logical for both groups. Specifically, the rule provides that defendants are entitled to counsel, shall be informed of such right, and shall not be questioned absent counsel if they desire to have counsel. Additionally, the rule provides for an interpreter if one is needed. Witnesses ought to be afforded parallel protections.

In addition to legal counseling discussed above and psychological counseling already contemplated, witnesses could benefit further from the presence of loved ones throughout Tribunal proceedings.¹⁷⁹ Again, nothing prevents the Victims and Witnesses Unit from assuring the presence of close friends or family. The Unit need only recognize the importance of such support. Similarly, the Unit would do well to

178. Rules of Procedure and Evidence, *supra* note 11, at 510-11. Rule 42—Rights of Suspect During Investigation states in relevant part:

(A) A suspect who is to be questioned by the Prosecutor shall have the following rights, of which he shall be informed by the Prosecutor prior to questioning, in a language he speaks and understands:

(i) the right to be assisted by counsel of his choice or to have legal assistance assigned to him without payment if he does not have sufficient means to pay for it; and

(ii) the right to have the free assistance of an interpreter if he cannot understand or speak the language to be used for questioning.

(B) Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or been assigned counsel.

179. *Proposals*, *supra* note 10, at 206.

consider group counseling, as witnesses will have similar experiences inside and outside of the Trial Chambers.

Further, the judges and prosecutors who will be interacting with the witnesses should be encouraged to undergo training aimed at increasing sensitivity to victims' needs and fostering awareness of the symptoms of trauma.¹⁸⁰ Such training could help the judges in making more humane and more accurate evidentiary determinations. For example, observers who are unschooled in psychiatry may perceive gaps in a witness's memory as a sign that the witness is disingenuous; however, certain memory blanks are a psychologically observable phenomenon common among witnesses who have suffered trauma.¹⁸¹ Without some basic psychological training, judges are liable to err in evaluating testimony. Likewise, this training could be useful to judges as they attempt to decide whether a witness has the psychological fortitude to withstand public scrutiny, or if the proceedings should be conducted in camera. Similarly, an understanding of victims' needs could minimize speculation about the damage a particular question might do and guide the judges in the proper application of the rape shield rule.

Conclusion

If these additional suggestions for protecting witnesses are inadequate, then it will be necessary to consider abandoning the goal of equality of arms. Hopefully, however, between these suggestions and the protective rules already implemented by the Tribunal, witnesses will be sufficiently protected.

The creation of the Tribunal was a lofty endeavor and those who participate in the Tribunal's mission hopefully will be endowed with a corresponding desire to promote universal justice. The goals for victim protection articulated in this Note are within reach. The Tribunal needs only to implement them.

180. *Proposals*, *supra* note 10, at 202 & n.113.

181. *No Justice, No Peace*, *supra* note 10, at 109.