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# Stop violence against women:



## How to use international criminal law to campaign for gender-sensitive law reform

*“The gender provisions [of the Rome Statute of the International Criminal Court] could help strengthen the capacity to address violence against women at the national level via the inclusion of additional crimes of sexual and gender violence, progressive definitions of existing crimes, and more gender-sensitive procedures for the trial of these crimes ... It is thus imperative that women’s groups focusing on issues of law reform and violence against women get engaged .....*”

- Pam Spees, 2003<sup>1</sup>

### INTRODUCTION

#### ***(a) About this Guide***

Over the past decade the international community has taken unprecedented steps to address crimes of violence against women in international law. Despite the small number of individuals who have been tried and convicted of these crimes in international courts and tribunals, important standards have been set that can be used as a model for national systems. New and progressive definitions of crimes of gender-based violence have been adopted and procedural rules have been modified to remove some of the discriminatory assumptions and practices that often make prosecutions traumatic for victims and reduce the chances of conviction.<sup>2</sup>

International criminal courts such as the International Criminal Tribunals for the former Yugoslavia and Rwanda have contributed significantly to defining crimes of violence against women, in particular crimes of sexual violence, and effective procedures for victims.

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<sup>1</sup> Pam Spees, ‘Women’s advocacy in the creation of the international criminal court: Changing the landscapes of justice and power’, 28 *Signs: Journal of Women Culture and Society*, 2003, p. 1233.

<sup>2</sup> The term “victim” will be used throughout this paper, as this is the term used in international criminal law to refer to both victims of crimes under international law who survived the crimes and those who died as a result of them. Amnesty International usually uses the term “survivor” when discussing violence against women, unless the woman has been killed.

These advances are reflected and expanded upon in the Rome Statute of the International Criminal Court (Rome Statute), which was adopted in July 1998. International courts only have the capacity to try a small number of individuals. In order to end impunity it is therefore essential to ensure that national authorities effectively investigate and prosecute crimes of violence against women before national courts. Unfortunately, recent history shows that national authorities often fail to investigate and prosecute crimes of violence against women, particularly when crimes are committed in times of conflict. When they do act, the applicable laws do not define crimes adequately and procedures fail to respect the dignity of the victims.

This guide has been created as a tool for Amnesty International and other non-governmental organizations, in particular women's groups, to campaign for national legal reform on the criminalization of violence against women that meets the highest standards of international practice. It aims to provide greater detail in one specific area - criminal law - than other campaigning documents produced so far as part of Amnesty International's global Stop Violence Against Women campaign.

For more general advice on campaigning on the wide range of issues relevant to ending violence against women, please see: *Making Rights a Reality: Building Your Campaign*, AI Index: ACT 77/051/2004, June 2004.<sup>3</sup> This guide identifies the following steps that are relevant to national investigations and prosecutions for crimes of gender-based violence:

- Including gender-based crimes under international law in your country's national law
- Ensuring an end to impunity for perpetrators of violence against women by allowing prosecution in national courts regardless of where the crime was committed (universal jurisdiction)
- Adopting gender sensitive criminal procedures
- Improving the treatment of victims and witnesses in the criminal justice system
- Ensuring reparations, including compensation, for victims of gender-based violence
- Ensuring gender balance and expertise amongst staff in the criminal justice system.

No country currently applies all the relevant rules, definitions and standards laid out in this guide. Therefore, Amnesty International believes that lawyers', women's and other civil society groups in all countries will find this guide useful in planning and implementing campaigns for the legislative changes that will be relevant in your own criminal justice system.

## **(b) Background to the development of gender-sensitive standards in international courts**

*International criminal law* includes:

\* Crimes under international law, including customary and conventional law, such as genocide, crimes against humanity, war crimes, torture, enforced disappearances and extrajudicial executions

\* Conduct where treaties require states to extradite suspects or to submit the cases to their own prosecutors for the purposes of prosecution, such as counterfeiting, hijacking of aircraft and "terrorist" offences.

<sup>3</sup> Available at: <http://web.amnesty.org/library/Index/ENGACTION770512004?open&of=ENG-373>.

International criminal law on violence against women has developed over the past decade - thanks to the sustained lobbying efforts of women's organizations from around the world - in a much more gender-sensitive manner than ever before.

Rape has been prohibited under the law of armed conflict for centuries. However, until recently, gender-specific abuses committed against women in times of conflict were either seen as a natural consequence of war (and therefore not as criminal acts), or - if recognized as crimes - were generally considered crimes against a woman's "honour" or "dignity" rather than crimes of gender-based violence. The four Geneva Conventions of 1949, some of the most important treaties governing armed conflicts, do not expressly include rape or other forms of sexual assault as grave breaches. Rape and certain other forms of sexual violence committed during an international armed conflict can be prosecuted as grave breaches of the Geneva Conventions, such as torture, inhuman treatment and wilfully causing great suffering or serious injury to body or health.

However, the failure to list crimes of sexual violence as grave breaches in their own right has unfortunately sent the signal that states are not required to prosecute them as some of the most serious war crimes. Similarly, the Nuremberg Tribunal to try Nazi war criminals did not include rape as a crime in its statute, and the Tokyo Tribunal set up to prosecute Japanese war criminals tried a small number of rapes merely as violations of "family honour", rather than as crimes against the rape survivors.<sup>4</sup> There are, however, a small number of counter-examples to the general rule that gender-based violence has not been criminalized in its own right under the laws of armed conflict. The 1945 Allied Control Council Law No. 10 expressly listed rape as a crime against humanity and in 1996 the International Law Commission confirmed in its Draft Code of Crimes against the Peace and Security of Mankind that rape, enforced prostitution and other forms of sexual abuse were crimes against humanity.

The establishment of the International Criminal Tribunal for the former Yugoslavia in 1993 and the International Criminal Tribunal for Rwanda in 1994 brought about a number of significant developments with regard to addressing serious crimes of violence against women through international criminal law. The Statutes for the two international criminal tribunals incorporated gender-based violence in a relatively limited way: they included rape as a crime against humanity only and not as a war crime. They also did not expressly list any other form of gender-based violence. However, both tribunals made progress in expanding the definitions of gender-based crimes and developing procedures for the prosecution of gender-based violence through jurisprudence. The Prosecutors for both Tribunals have prosecuted rape and other forms of sexual violence as elements of genocide, torture and other inhumane acts, but the prosecution strategy and practice with regard to crimes of sexual violence in the ICTR has been criticized.<sup>5</sup>

The experience of the tribunals proved very important in the preparation by the International Law Commission of its 1994 draft statute for a permanent international criminal court and its 1996 Draft Code of Crimes against the Peace and Security of

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<sup>4</sup> Kelly Dawn Askin, *War Crimes against Women: Prosecution in War Crimes Tribunals* (The Hague: Martinus Nijhoff Publishers 1997).

<sup>5</sup> For more information see Amnesty International, *Making Rights a Reality: The duty of states to address violence against women*, AI Index: ACT 77/049/2004, 3 June 2004, available at: <http://web.amnesty.org/library/index/engact770492004>. See also Kelly Dawn Askin, *The Treatment of Gender Crimes in the ICTR: Progress or Regression? The Akayesu Legacy at Risk*, J. Int'l Crim. Jus. (Spr. 2005) (forthcoming); Binaifer Nowrojee, *Your Justice is too Slow: How the ICTR Failed Rwanda's Rape Victims* (UNRSD Zubaan Books 2005) (forthcoming).

Mankind, which included a number of crimes against humanity and war crimes of sexual violence in addition to the crime against humanity of rape. Both instruments in turn influenced the drafting of the Rome Statute of the permanent International Criminal Court (ICC).<sup>6</sup> After years of negotiation and debate, in July 1998, the international community adopted the Rome Statute, with 120 states voting in favour. The Rome Statute provides that the Court can investigate and prosecute individuals accused of genocide, crimes against humanity and war crimes, when national courts are unable or unwilling to do so. Following the 60<sup>th</sup> ratification of the Rome Statute, the Court's jurisdiction began on 1 July 2002, and the Court is now functioning in The Hague.<sup>7</sup>

After intense lobbying by non-governmental organizations working for human rights of women, including Amnesty International, the Rome Statute addresses many gender concerns, including definitions of crimes that de-link gender-based violence from concepts of "honour" and "dignity", provisions that seek to protect victims and witnesses, and recognition of the need for a fair representation of female and male judges, including judges with expertise on violence against women.<sup>8</sup> After the adoption of the Rome Statute, the Assembly of States Parties also adopted two supplementary instruments - the Rules of Procedure and Evidence, which establish in greater detail how the Court will function, and the Elements of Crimes, a non-binding instrument which is designed to assist the Court in its interpretation and application of the Rome Statute.<sup>9</sup> These two instruments will be referred to extensively in this guide, as many of the standards and procedures relevant to gender-based violence are included in these instruments. In many aspects, the Rome Statute and its Rules of Procedure and Evidence have set the bench mark on the prosecution of crimes of violence against women. The definition of crimes and many of the procedural aspects have influenced the new internationalized courts, including the Special Court for Sierra Leone and the Special Panels for East Timor.

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<sup>6</sup> Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996, U.N. G.A.O.R., 51<sup>st</sup> Sess. (Supp. No. 10), A/51/10, U.N. Doc. A/51/10 (1996), Draft Code of Crimes against the Peace and Security of Mankind (1996), Art. 18 (j) (rape, enforced prostitution and other forms of sexual abuse as crimes against humanity); Art. 20 (d) (outrages upon personal dignity in violation of international humanitarian law, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault as war crimes in international armed conflict); Art. 20 (f) (same crimes in non-international armed conflict).

<sup>7</sup> As of April 2005, the Prosecutor of the International Criminal Court had begun investigations in the Democratic Republic of Congo and Uganda. In addition, the Central African Republic had referred the situation in that country to the Prosecutor and the Côte d'Ivoire had made a declaration pursuant to Article 12 (3) of the Rome Statute recognizing the jurisdiction of the Court over crimes under international law committed in that country since September 2002. In April 2005, the United Nations Security Council referred crimes committed in Darfur, Sudan to the ICC Prosecutor. The Prosecutor had yet to make a decision to launch an investigation into these situations. Each of these situations includes serious crimes of violence against women. For more information on the activities of the Court see: <http://www.icc-cpi.int>.

<sup>8</sup> Rome Statute, Article 36(8)(b); Rules of Procedure and Evidence, Rule 17 (2) (a) (iv).

<sup>9</sup> The Elements of Crimes, a supplementary instrument adopted by the Assembly of States Parties of the International Criminal Court in September 2002, is designed, according to Article 9 (1) of the Rome Statute, to "assist the Court in the interpretation and application of articles 6 [genocide], 7 [crimes against humanity] and 8 [war crimes]". Although Article 21 (1) of the Rome Statute provides that the International Criminal Court "shall apply" as a first level of priority the Rome Statute, the Elements of Crimes and its Rules of Procedure and Evidence, Article 9 (3) makes clear that the Elements of Crimes are advisory, not binding, on the Court and that the Elements of Crimes and any amendments to them by the Assembly of States Parties "shall be consistent with [the Rome] Statute". In some respects, the elements of individual crimes of sexual violence in the Elements of Crimes are not entirely consistent with the Rome Statute or are unsatisfactory for reasons explained in this paper.

### **(c) States responsibilities in relation to international criminal law**

All states have a legal duty under international human rights law to take action to prevent, investigate and punish violence against women.<sup>10</sup> This obligation is sometimes referred to as an obligation to exercise “due diligence”. States must implement their obligation under treaties and customary international law to respect, protect and fulfill human rights in both law and practice. States must fulfill and promote rights so that they are respected by state agents and non-state actors including by maintaining an effective justice system.

This obligation can therefore be used to campaign for law reform in many areas, including reform of the criminal justice system. All of the standards and rules outlined in this guide can be used as examples of how states can meet the highest standards of international practice, and therefore as examples of how states can fulfill their obligation under international law to protect women from violence.

States parties to the Rome Statute have recognized in the Preamble that they have the duty to ensure the effective prosecution of acts of violence against women that amount to genocide, crimes against humanity and war crimes by exercising their jurisdiction over these crimes. Giving effect to this obligation means that states must enact legislation defining these crimes as crimes under national law. The process of implementation of the Rome Statute at the national level currently being conducted by many states represents the biggest opportunity for reform of national criminal law and criminal procedure in recent history. Civil society groups can use the process of national implementation of the Rome Statute to campaign for states to address weaknesses in their existing laws relating to violence against women. In order for states to avoid a finding by the International Criminal Court that they are ‘unable or unwilling’ to prosecute a particular crime, the national justice system must have the legislation available to prosecute crimes, in accordance with the procedural safeguards and fair trial standards laid down in the Rome Statute. Civil society groups can also use other provisions concerning support and protection of victims, participation of victims at all stages of the proceedings and appointment of legal experts on crimes of sexual violence as models for reform of the national criminal justice systems.

Although a state party to the Rome Statute has no binding legal obligation to extend the Rome Statute definitions of crimes of sexual violence to domestic crimes, women’s advocates can use these definitions to advocate for a change to the definition of domestic crimes as well.

- To see whether your country has already enacted legislation implementing its obligations under the Rome Statute, go to: <http://web.amnesty.org/pages/icc-implementation-eng>. If legislation already exists, this can be used to push for further reforms to domestic crimes as well as international crimes. For example, if your country has already criminalized rape, sexual slavery, forced pregnancy, enforced sterilization and other forms of sexual violence in situations of a “widespread or systematic attack”, you can argue that these horrific forms of sexual violence should also be criminalized and defined in a consistent way when they are not part of such an attack. Further guidelines on the scope and definitions of these crimes are included in the next section.

All states also have an obligation to enact and implement universal jurisdiction legislation over crimes of violence against women amounting to genocide, crimes against humanity,

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<sup>10</sup> For more information please see: *The duty of states to address violence against women, supra*, n. 5.

war crimes, torture, extra-judicial executions and disappearances. There are strong moral and logical grounds for states to extend universal jurisdiction over other crimes of violence against women not amounting to these crimes. See Section 2 of this guide for further information on universal jurisdiction.

This guide addresses the gender aspects of the Rome Statute only. For guidance on campaigning for implementation of other elements of the Rome Statute please see: Amnesty International, *International Criminal Court: Checklist for Effective Implementation*, AI Index: IOR 40/11/00, 1 August 2000.<sup>11</sup>

## **PART I. BUILDING A NATIONAL CAMPAIGN FOR LEGAL REFORM**

This section outlines some suggested steps and useful information when campaigning for gender-sensitive criminal law reform at the national level. Of course, each country and each criminal justice system is different, so only some aspects of these suggestions will be useful for each country. More detail can be found in: *Making Rights a Reality: Building your campaign*, AI Index: ACT 77/051/2004, June 2004<sup>12</sup> and the *Amnesty International Campaigning Manual*, AI Index: ACT 10/002/2001, 1 December 2001.<sup>13</sup>

### **Step 1: Identify partners**

The first step in campaigning for law reform is to identify partners that you can work with in your efforts to develop the most suitable strategy. Some possibilities include:

- Relevant Amnesty International groups or networks such as women's, lawyers, media.
- National or local women's organizations: most of these groups will have experience of lobbying government on various law reform issues.
- Amnesty International lawyers groups: members of lawyers groups will be particularly helpful in completing the evaluation included below.
- Bar associations or law societies
- Academics: legal or feminist academics may be particularly interested in assisting in law reform efforts.
- National or local NGO members of the Coalition for the International Criminal Court (CICC): for more information on how to contact these groups see: <http://www.iccnw.org>.
- Members of the Women's Initiatives for Gender Justice

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<sup>11</sup> Available at: <http://web.amnesty.org/library/index/engior40112000?open&eng-385>

<sup>12</sup> *Building your campaign*, *supra*, n. 3.

<sup>13</sup> Available at: <http://web.amnesty.org/pages/campaigning-manual-eng>.



The **Women's Initiatives for Gender Justice** (previously the Women's Caucus for Gender Justice) is an international women's human rights organization based in The Hague. The Women's Caucus was instrumental in negotiating the gender-sensitive aspects of the Rome Statute, and its successor now continues to monitor the activities of the Court to ensure gender justice. It has member organizations around the world. For more information, and to see if there are any member organizations from your country or region, see: <http://www.iccwomen.org>.

## Step 2: Evaluate your national justice system

In order to campaign for criminal law reform, you need to evaluate your national legal system to see where gaps exist and where improvements should be made. The evaluation form below describes the most common problems with criminal law in most countries. Remember to check both your country's criminal law or criminal code, as well as any legislation that may include international crimes. For example, many states will already have war crimes legislation, but it may not include all of the gender-based crimes outlined below. Some states may also include international crimes such as genocide or torture in separate legislation. States may also have legislation that seeks to implement their obligations under the Rome Statute of the International Criminal Court, but this may not reflect all the crimes and standards set out in the Rome Statute.

- If your country has legislation that deals with war crimes, you may be able to find this legislation on the International Committee of the Red Cross (ICRC) legislation database: <http://www.icrc.org/ihl-nat><sup>14</sup>
- If your country has legislation that seeks to implement its obligations under the Rome Statute, you may be able to find this legislation on the AI international justice web pages: : <http://web.amnesty.org/pages/icc-implementation-eng><sup>15</sup>

Women's organizations, human rights organizations, national criminal lawyers, legal academics, bar associations and law societies may also be able to help you in locating this information. You should be able to get a copy of the relevant legislation from your national justice department, department of constitutional affairs or equivalent government department. It may be available online directly from the department's website or through a library.

Using the information you have gathered, you will be able to compile a thorough evaluation of your national justice system. This could be done in conjunction with the partners you have identified.

The following **evaluation form** can be used to identify gaps in your national law that need to be addressed.

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<sup>14</sup> This database relies on states informing the ICRC of their national laws. Therefore, your state may have war crimes legislation that is not included in the database.

<sup>15</sup> The list on this web page is not necessarily complete. If you find legislation that implements your states obligations under the Rome Statute and it is not included on this web page, please inform the International Justice Project at Amnesty International ([ijp@amnesty.org](mailto:ijp@amnesty.org)).

<b>Crimes:</b>	<b>Part II, section</b>
Does your country include the crime of <b>rape</b> in national law, in a way that is consistent with the ICC definition? For example: <ul style="list-style-type: none"> <li>➤ Is the definition is gender-neutral?</li> <li>➤ Does the definition include penetration by any body part or object?</li> <li>➤ Does the definition include forced oral and anal penetration?</li> <li>➤ Does the definition focus on the acts of the perpetrator?</li> <li>➤ Is there no need to prove overwhelming physical force?</li> </ul>	1 (a)
Does your country include the crime of <b>sexual slavery</b> in national law, in a way that is consistent with the ICC definition?	1 (b)
Does your country include the crime of <b>enslavement</b> in national law, in a way that is consistent with the ICC definition? Importantly: <ul style="list-style-type: none"> <li>➤ Does the national definition of enslavement include the crime of <b>trafficking</b>? Is the definition of trafficking consistent with the Trafficking Protocol definition?</li> </ul>	1 (c)
Does your country include the crime of <b>forced pregnancy</b> in national law, in a way that is consistent with the ICC definition?	1 (d)
Does your country include the crime of <b>enforced sterilization</b> in national law, in a way that is consistent with the ICC definition?	1 (e)
Does your country include crimes of <b>other forms of sexual violence</b> in national law, in a way that is consistent with the ICC definitions?	1 (f)
Does your country include the crime of <b>gender-based persecution</b> in national law, in a way that is consistent with international law? Does your country recognize gender-based persecution as grounds for claiming <b>refugee status</b> ?	1 (g)

<b>For all of the above crimes:</b>	<b>Part II, section</b>
Is each of these crimes criminalized as: <ul style="list-style-type: none"> <li>➤ A <b>crime against humanity</b>?</li> <li>➤ A <b>war crime</b>?</li> <li>➤ An <b>ordinary serious crime</b>? (i.e. are national definitions of crimes such as rape consistent with international definitions?)</li> </ul>	2
Can the authorities exercise <b>universal jurisdiction</b> over these crimes: <ul style="list-style-type: none"> <li>➤ When the act is a crime against humanity?</li> <li>➤ When the act is a war crime?</li> <li>➤ When the act is genocide?</li> <li>➤ When the act is torture?</li> <li>➤ When the act is slavery?</li> <li>➤ When the act is an ordinary serious crime?</li> </ul>	2

<b>Criminal Procedure</b>	<b>Part II, section</b>
Are there rules that restrict the admission of <b>evidence of consent</b> in trials of crimes of sexual violence? Specifically: <ul style="list-style-type: none"> <li>➤ Is it impermissible to imply consent due to <b>silence</b> or a <b>lack of resistance</b> by the victim?</li> <li>➤ Can consent <b>not</b> be inferred from words or conduct of the victim where there was force, threat of force or a coercive environment?</li> <li>➤ Is the admission of such evidence considered <i>in camera</i> (closed proceedings)?</li> </ul>	3 (b)
Is evidence of <b>prior or subsequent sexual conduct</b> of the victim <b>inadmissible</b> in trials for crimes of sexual violence in a manner consistent with the Rome Statute?	3 (c)
Is <b>corroboration</b> of the victim's testimony explicitly <b>not</b> required in crimes of sexual violence?	3 (d)
Is it possible for victims of sexual violence to give their evidence in <b>closed proceedings</b> or via <b>video or audio-link</b> ?	3 (e)
Is it possible for a victim of sexual violence to be <b>accompanied</b> by another person while	3 (f)

giving evidence in court?	
<b>Other issues (may be dealt with through regulations, rules and practices rather than legislation):</b>	<b>Part II, section</b>
Do victims have any opportunity to <b>participate</b> in court proceedings? (for example, through legal representation at each stage of the proceedings and in statements)	4 (a)
Are national provisions for <b>protection, counseling and support</b> for victims sufficient?	4 (b)
Are victims of the crimes outlined above entitled to all forms of <b>reparations</b> recognized under international law and standards?	5
Are there effective measures to ensure that there <b>gender balance and expertise</b> amongst staff of the criminal justice system? Particularly, <ul style="list-style-type: none"> <li>➤ Do national law and court rules require the appointing authorities to seek to achieve a fair balance between men and women amongst prosecutors, judges and other staff of the criminal justice system?</li> <li>➤ Do national law and court rules require that court staff have expertise on issues surrounding gender-based violence?</li> <li>➤ Do national law and court rules require the adoption and implementation of effective training for staff of the criminal justice system?</li> </ul>	6

### Step 3: Map the external and internal context and set objectives

The next step is to analyse the context in which your campaign will be operating. What are the key factors that will affect the way you choose your objectives? You should consider how legal, political and economic trends in your country are having an impact on the perception of women, human rights and violence. These factors will influence what campaign objectives you think will most improve the situation in your country; and which opinion formers and decision-makers you target. You can assess the context of the campaign and the most realistic objectives with the partners you have identified.

You will also need to evaluate your internal context in order to assess what change you can realistically hope to make, depending on your resources: human, material, technical, knowledge, time, etc. A useful tool is to carry out a SWOT analysis: Strengths, Weaknesses, Opportunities and Threats. This tool combines the external and internal analysis and will provide you with a clearer picture of your overall context, the most suitable strategy and what objectives are the most realistic and achievable.

Objectives should be SMART: specific, measurable, achievable, relevant and time bound. This will help clarify what you are trying to achieve, help you plan your activities so that they bring the result you want and make evaluation easier. There are a number of tools you can use to develop your campaign strategy and key objectives. These include the “strategic campaigning cycle” and the “problem and solution tree”. More details of these tools can be found in: *Making Rights a Reality: Building your campaign*, (AI Index: ACT 77/051/2004), 3 June 2004<sup>16</sup> and the *Amnesty International Campaigning Manual*, (AI Index: ACT 10/002/2001, 1 December 2001).<sup>17</sup>

Depending on the situation in your country, objectives could be broad or narrow. Examples of objectives you could adopt include:

- Your country changes the national definition of rape to be gender-neutral, include penetration by objects and to take into account non-physical coercive circumstances.

<sup>16</sup> *Building your campaign*, *supra*, n. 3.

<sup>17</sup> Available at: <http://web.amnesty.org/pages/campaigning-manual-eng>.

- Your country includes all gender-based crimes outlined below as crimes against humanity and war crimes in national law.
- Your country adopts legislation that allows it to prosecute anyone found on its territory who has committed a crime of gender-based violence (referred to as “universal jurisdiction”).
- Your country modifies court procedures to allow victims and witnesses to give evidence via closed circuit television (CCTV) and to have a support person attend court with them.
- Your country adopts laws and procedures to provide reparations to victims of gender-based crimes.
- Your country adopts procedures to ensure more equal gender representation amongst judges and court staff.
- There is significant media coverage of the need for your country to change particular laws in order to be more gender sensitive.
- A certain number of members of parliament or government support the changes to the law that you are proposing.

#### **Step 4: Identify target audiences and approaches**

Once you have set objectives that are realistic and achievable for your country you need to identify target audiences:

- Who has the power to make the changes your objectives call for?
- Can you reach them directly? If not, who can?
- What is their current understanding of the legal situation and of violence against women?
- What barriers or misconceptions do you need to address?

The direct target audience may be a government minister or other official, or members of parliament. Those with influence over the direct target may include public servants, bar associations, judges, lawyers, media, religious or community leaders or particular groups within civil society.

In order to determine the most important target audiences, you could develop an influence map, or channels of influence diagram. Examples of these tools are included on page 13 of *Making Rights a Reality: Building your campaign* (AI Index: ACT 77/051/2004, 3 June 2004).<sup>18</sup>

#### **Step 5: Develop a plan of activities**

Your campaign should follow a logical pathway from one campaign activity to the next until you reach your objectives. You will need to think about which activities should take place first to increase the chances of success of the later activities. The pathway you adopt will show a natural flow from raising awareness to increasing pressure on decision-makers from different directions.

The tone of campaign materials should be positive about the possibility for change, respectful of those who have experienced violence and focus on infrastructure that allows these acts to occur with impunity rather than shaming perpetrators.

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<sup>18</sup> *Building your campaign, supra*, n. 3.

Some possible campaign activities that could be useful in achieving your objectives include:

- **Publicize the results of your evaluation:** inform key actors about the results of your evaluation and the aspects of national laws that need to be changed in order to bring them in line with international standards. Produce a summary of your evaluation, including recommendations for change. Develop some key messages that highlight the most important aspects of change that you are campaigning for. Engage the media in the issue, possibly by using examples of women who have experienced injustice in the criminal justice system due to flaws in the law.
- **Identify opportunities for law reform:** find out whether there are any changes to the law already being contemplated by the government or the legislature. For example, countries that have ratified the Rome Statute may be in the process of drafting legislation to implement their obligations under the Statute. This is a perfect opportunity to lobby for broad implementation of international criminal law into the national system. This process may be led by the Ministry of Foreign Affairs rather than the Ministry of Justice. Find out if there will be an opportunity to lobby formally for changes to the law, for example the draft law may be considered by a Parliamentary Committee that accepts submissions from NGOs.
- **Plan seminars:** in order to inform interested members of the public and key actors of your campaign and the need for change – engage both women and men in the issue. Find national cases or lawyers to speak about examples of why the current system is flawed. Issue a report of the seminar, meeting or conference to inform other key actors of the issues that were discussed.

## Step 6: Continuing action and feedback

Campaigning for law reform is usually a medium to long-term objective in any campaign. Getting the issue on the political agenda, drafting new laws, undertaking consultations, debate, reviews and parliamentary consideration all take time. Make sure that your campaign plan includes a long-term commitment to this work and that you have the capacity to maintain continuing action on the issue.

It is important that you monitor and evaluate your work at key milestones in the campaign. How successful has the strategy been so far? Do you need to rethink and reset your objectives? Have the internal or external contexts changed? And if so, how does that affect your original strategy and plans? Depending on the answers to these questions, the strategy will need to be revisited and changed appropriately.

For Amnesty International groups it is also important to report back to the International Secretariat what has been happening with your campaign. The International Secretariat will be sharing lessons with other parts of the Amnesty International movement and evaluating the campaign at the global level.

## PART II: GENDER-SENSITIVE ELEMENTS OF INTERNATIONAL CRIMINAL LAW

### 1. Gender-based crimes that all nations should criminalize

Not all acts of violence against women are currently considered crimes under international criminal law – for example domestic violence and sexual harassment are not dealt with as crimes in international criminal law. Therefore, there is a significant limit on the extent that the international system can be used as a model for domestic legislation. However, the crimes that are included in international criminal law are often defined in a way that is more progressive than the definitions of crimes contained in most national systems. Therefore, these crimes and definitions can be used to advocate for more comprehensive definitions of existing crimes at the national level, as well as the addition of new crimes that may not currently be included in national legislation. International criminal law includes a number of gender-based crimes that, in certain circumstances, can amount to genocide, crimes against humanity, war crimes or torture. The crimes include rape, sexual slavery, forced pregnancy, enforced sterilization, other forms of sexual violence of a comparable gravity and gender based persecution. These crimes should be included in national legislation as ordinary serious crimes, but also, where indicated below, as crimes under international law.<sup>19</sup> Gender-sensitive rules of procedure and evidence are also crucial to the successful prosecution of the crimes listed below - these rules are described in Section 3.

The crimes under international law referred to in this section are:

- **Genocide** means a specified act<sup>20</sup> committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. Although 130 states have ratified the 1948 Convention for the Prevention and Punishment of the Crime of Genocide and 98 states have ratified the Rome Statute (which incorporates the Genocide Convention definition) as of April 2005, most states parties of these treaties have not defined genocide as a crime under national law. Many of those states that have done so have not defined genocide consistently with the Genocide Convention. However, in some instances the national definitions of genocide are broader in scope, either by expanding the number of prohibited acts or by increasing the number of protected groups.
- A **crime against humanity** is one of a number of prohibited acts including rape and other crimes of sexual violence, as described below, committed as part of a widespread or systematic attack directed against a civilian population.<sup>21</sup> Most states have not defined crimes against humanity as crimes under national law and most which have done so have not defined them consistently with the Rome Statute.

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<sup>19</sup> Many of these crimes, including acts of sexual slavery, forced prostitution and gender-based persecution are very rarely criminalized in national systems. *See Spees, supra*, n. 1 at p 1233.

<sup>20</sup> These prohibited acts are: killing members of the group, causing serious bodily or mental harm to the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group or forcibly transferring children of the group to another group: Genocide Convention, Art. II; Rome Statute, Art. 6.

<sup>21</sup> Article 7 of the Rome Statute includes such a requirement as a threshold for determining which crimes against humanity fall within the jurisdiction of the ICC. Other international criminal courts have similar, but not identical, thresholds for determining which crimes against humanity fall within their jurisdiction. States must ensure that they do not set jurisdictional thresholds that are more restrictive than in the Rome Statute.

- A **war crime** is a one of a number of violations of the law of armed conflict committed during an international or non-international armed conflict. Many states have already included some war crimes committed during international armed conflict as crimes under their national legislation, but most of them have not defined war crimes committed during non-international armed conflict as crimes or included all of the crimes of sexual violence listed below in the definition of war crimes.<sup>22</sup>
- **Torture** can amount to a crime against humanity or a war crime. When it does not also constitute one of these crimes under international law, it involves the intentional infliction of severe suffering, for a prohibited purpose by a state agent or with the tacit acceptance by the state.<sup>23</sup> Although 139 states have ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, most of these states have not defined torture as a crime under national law or have not used definitions consistently with the Convention against Torture.

In certain circumstances the crimes of sexual violence described below can amount to genocide. They may also constitute torture, including torture as a crime against humanity and as a war crime. At the international level, the definitions of these crimes are included in a number of sources, including the Rome Statute, the Elements of Crimes and international court jurisprudence. Only some of these crimes are defined in the Rome Statute.

In the discussion of individual crimes of sexual violence below, the text in the boxes is taken from the Elements of Crimes of the International Criminal Court. Some elements of each crime of sexual violence form part of crimes against humanity, war crimes committed during an international armed conflict and war crimes committed during a non-international armed conflict. An exception to this is the crime of persecution. For convenience, the text in the boxes omits the common elements needed to establish that the conduct was a crime against humanity or a war crime committed during an international or a non-international armed conflict.<sup>24</sup> The text in the box also excludes the mental element necessary to prove that a person committed the crime. The mental element of these crimes, unless otherwise provided, is spelled out in Article 30 of the Rome Statute.<sup>25</sup> National definitions of crimes

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<sup>22</sup> To see if your country has enacted any legislation on war crimes, go to: <http://www.icrc.org/ihl-nat>.

<sup>23</sup> Article 1 of the UN Convention against Torture lists the following illustrative list of prohibited purposes: “obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind”. This list is illustrative, not exhaustive, and subsequent commentary and jurisprudence has identified other examples of prohibited purposes.

<sup>24</sup> The common additional elements are:

*In the case of a crime against humanity:*

“(3) The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

(4) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.”

*In the case of a war crime - international:*

“(3) The conduct took place in the context of and was associated with an international armed conflict.

(4) The perpetrator was aware of factual circumstances that established the existence of an armed conflict.”

*In the case of a war crime - non-international:*

“(3) The conduct took place in the context of and was associated with an armed conflict not of an international character.(4) The perpetrator was aware of factual circumstances that established the existence of an armed conflict.”

<sup>25</sup> Article 30 of the Rome Statute provides:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

should ensure that the applicable mental element of crimes of sexual violence is consistent with the Rome Statute.<sup>26</sup> No one should escape criminal responsibility in a national court for a crime of sexual violence because of a weaker definition of the mental element for conduct that would lead to a conviction in the International Criminal Court.

In addition to the crimes outlined below, the Rome Statute also includes the crime of forced prostitution. This crime is not discussed below, as all conduct covered by this crime could be more accurately characterised as sexual slavery or another form of sexual violence. The term 'forced prostitution' can be used to imply that women received some benefit from the act and therefore is not seen as an appropriate title by many women's groups.<sup>27</sup>

### **(a) Rape**

⇒ **Goal:** Your country should include the crime of rape in national law, in a way that is consistent with the points outlined below. Rape should be defined as genocide, a crime against humanity, a war crime, torture and a serious crime of sexual violence.

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3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

<sup>26</sup> Gerhard Werle & Florian Jessberger, 'Unless Otherwise Provided': Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law', 3 *Journal of International Criminal Justice* 2005, p. 35.

<sup>27</sup> Askin, *War Crimes against Women*, *supra*, n. 4 p. 74-75; Women's Caucus for Gender Justice in the International Criminal Court, *Recommendations and Commentary For December 1997 PrepCom On The Establishment of An International Criminal Court*, UN Headquarters 1-12 Dec. 1997, WC.5.6-9, 6-10; Machteld Boot, 'Article 7(1) (g)', in Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden: Nomos Verlagsgesellschaft 1999) (second edition forthcoming 2005), p. 143 ("The term 'prostitution' indeed suggests that sexual services are provided as part of an exchange albeit one coerced by the circumstances. Moreover, the term seems to suggest sexual activity initiated by the victim instead of by the offender.").

In June 1998, during the Rome Diplomatic Conference, the UN Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict has emphasized that sexual slavery "encompasses most, if not all forms of forced prostitution", noting that the terms "forced prostitution" and "enforced prostitution" "have been insufficiently understood and inconsistently applied" and that "'forced prostitution' generally refers to conditions of control over a person who is coerced by another to engage in sexual activity". Despite the flaws in the older definitions of forced prostitution, which focus "either in vague terms on 'immoral' attacks on a woman's 'honour', or . . . nearly indistinct from definitions that seem more accurately to describe the condition of slavery", the Special Rapporteur stated that, because these definitions were in the Geneva Conventions and their Protocols, this concept "remains a potential, albeit limited alternative tool for future prosecutions of sexual violence in armed conflict". However, a few weeks after the Special Rapporteur's report was published, the Rome Statute was adopted with its virtually identical definitions of crimes against humanity and war crimes of sexual violence. In the light of these developments, the conclusions of the Special Rapporteur on the limited usefulness of the concept of forced prostitution have been reinforced: "As a general principle it would appear that in situations of armed conflict, most factual scenarios that could be described as forced prostitution would also amount to sexual slavery and could more appropriately and more easily be characterized and prosecuted as slavery." - Final Report of the Special Rapporteur of the Working Group on Contemporary Forms of Slavery. *Systematic rape, sexual slavery and slavery-like practices during armed conflict*, U.N. Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, paras. 44-49.

One concern has been addressed in the elements of this crime by making clear that the pecuniary benefit does not have to have been received by the victim, but could have been received by someone else, such as the perpetrator. However, in the light of the concerns discussed above, in almost all, if not all, cases, conduct addressed by this concept is also sexual slavery, rape or another crime of sexual violence and should be prosecuted as such. Time will tell whether there are any instances of crimes of sexual violence that can only be prosecuted as forced prostitution.



ELEMENTS OF THE CRIME AGAINST HUMANITY AND WAR CRIME OF RAPE

(1) The perpetrator invaded\* the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

(2) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.\*\*

\* The concept of “invasion” is intended to be broad enough to be gender-neutral.

\*\* It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. This footnote also applies to the corresponding elements of article 7 (1) g-3 [enforced prostitution], 5 [enforced sterilization] and 6 [sexual violence] [of the Rome Statute.]

Rape is one of the most pervasive forms of violence against women, and has been committed repeatedly in times of conflict throughout history. Rape and other forms of sexual violence have been used as a deliberate tactic attempting to strip women of their dignity and destroy their sense of self, to terrorize populations, to humiliate communities and to destroy ethnic groups.<sup>28</sup> Defined in the Rome Statute as a crime against humanity and a war crime, rape has also been found by the international criminal tribunals in certain circumstances to amount to genocide<sup>29</sup> and torture.<sup>30</sup> These definitions and understandings depart from earlier characterization in international law of rape as a crime against a woman’s “honour” or “dignity”, rather than as a fundamental violation of her human right to bodily integrity and sexual autonomy.

The definition of rape as a crime against humanity and as a war crime in the Elements of Crimes above marks significant progress in the conception of the crime in international law. It improves on national definitions of rape in the following ways:

- The definition is gender-neutral. Rape can be committed or otherwise facilitated by a female or a male perpetrator, and the victim can be either female or male.
- The definition includes acts of penetration by objects or other body parts, not just the penis (as in many national definitions of rape).<sup>31</sup> It also includes forced oral and anal

<sup>28</sup> Amnesty International, *Lives Blown Apart: Crimes against women in times of conflict*, AI Index: ACT 77/075/2004, 8 December 2004, p. 26. For recent examples of Amnesty International reports that address rape in armed conflict, see: *Sudan: Darfur: Rape as a weapon of war - sexual violence and its consequences*, AI Index: AFR 54/076/2004, 19 July 2004; *Liberia: no impunity for rape - a crime against humanity and a war crime*, AI Index: AFR 34/017/2004, 14 December 2004; *Rwanda: ‘Marked for Death’, rape survivors living with HIV/AIDS in Rwanda*, AI Index: AFR 47/007/2004, 6 April 2004; *Democratic Republic of Congo: Mass rape - time for remedies*, AI Index: AFR 62/018/2004, 26 October 2004; *Stop violence against women: Justice shelved - impunity for rape in Bosnia-Herzegovina*, AI Index: EUR 63/005/2004, 12 October 2004; *India Justice, the victim - Gujarat state fails to protect women from violence*, AI Index: ASA 20/001/2005, 27 January 2005; *Solomon Islands: women confronting violence*, AI Index: ASA 43/001/2004, 8 November 2004.

<sup>29</sup> *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T (ICTR Chamber I, 2 September 1998), paras. 507-508.

<sup>30</sup> *Ibid.*, para 597; *Prosecutor v. Delalić*, Case No IT-96-21 (ICTY Trial Chamber II, 16 November 1998), paras. 943, 965; *Prosecutor v. Furundžija*, Case No IT-95-17/1-T (ICTY Trial Chamber, 10 December 1998), paras. 264-269.

<sup>31</sup> Kelly Dawn Askin ‘Sexual violence in decisions and indictments of the Yugoslav and Rwandan tribunals: current status’ 93 *The American Journal of International Law*, 1999, p. 97. These countries include India, Bangladesh, Pakistan and Sri Lanka: Savitri Goonesekera ‘Constitutional and legislative measures to combat violence against women in South Asia’ in UNFPA *Violence Against Women in South*

penetration.<sup>32</sup>

- The definition focuses on the actions of the perpetrator rather than the victim. This is achieved by focusing on the force, threat of force or coercive circumstances used by the perpetrator, rather than the consent or lack of consent of the victim.<sup>33</sup> For a further discussion of the role of consent in the definition of rape, see ‘Evidence of consent’ - Section 3(b) below.
- The definition covers non-physical coercive circumstances. Therefore, it is not necessary to show that the perpetrator employed overwhelming physical force to establish that rape occurred (as in some national jurisdictions).<sup>34</sup>

The first element of the definition of rape in the Elements of Crimes, which is largely based on the ICTY Trial Chamber definition in the 1999 *Furundžija* judgment, is not perfect.<sup>35</sup> It has been criticized as an overly mechanical description of body parts that narrows the similar element in the *Akayesu* definition (“A physical invasion of a sexual nature, committed on a person under circumstances which are coercive”).

Since the adoption of the Elements of Crimes, there have been a number of decisions by the ICTR and ICTY, including the recent judgment of the ICTY Trial Chamber in *Prosecutor v. Kunarac*, affirmed by the Appeals Chamber relating to the ways in which coercion can be applied to the victim in crimes of sexual violence.<sup>36</sup> In this judgment, the Trial Chamber states that it is not restricting in any way the scope of *Akayesu*, but addressing a potentially restrictive interpretation of another ICTY Trial Chamber judgment in *Furundžija*. The Trial Chamber in *Kunarac* saw rape as a violation of sexual autonomy and noted that such autonomy was “violated wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant”.<sup>37</sup> It was concerned that factors other than force, threat of force against the victim or a third person or coercion that would make the act non-voluntary or non-consensual. For example, the act could be not voluntary when the victim was particularly vulnerable or deceived.<sup>38</sup> The Appeals Chamber also provides examples of coercive circumstances used by perpetrators, including detention in prisons, military headquarters, detention centres and apartments maintained as soldiers’ residences, where there would be a

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*Asia: A Regional Analysis*, 2002, p. 40; available at:

[http://www.unfpa.org/np/pub/vaw/VAW\\_REG\\_Analysis.pdf](http://www.unfpa.org/np/pub/vaw/VAW_REG_Analysis.pdf).

<sup>32</sup> The case of *Furundžija* at the Yugoslav Tribunal found that some national jurisdictions consider this rape and others do not. The Trial Chamber found that ‘forced penetration of the mouth by the male sexual organ constitutes a most humiliating and degrading attack upon human dignity ... such an extremely serious sexual outrage as forced oral penetration should be classified as rape.’: *Furundžija, supra*, n. 30, para. 183.

<sup>33</sup> *Spees, supra*, n. 1 at p. 1233.

<sup>34</sup> Special Rapporteur on violence against women, its causes and consequences, *Integration of the human rights of women and the gender perspective: violence against women*, U.N. Doc. E/CN.4/2003/75 (2003); see Section 3 (a) below which discusses physical force and resistance in more detail.

<sup>35</sup> *Furundžija, supra*, n. 30, para. 598 (“The Trial Chamber notes the unchallenged submission of the Prosecution in its Pre-trial Brief that rape is a forcible act . . . This act is the penetration of the vagina, the anus or mouth by the penis, or of the vagina or anus by other object. In this context, it includes penetration, however slight, of the vulva, anus or oral cavity, by the penis and sexual penetration of the vulva or anus is not limited to the penis.”). This mechanical characterization of the element of the definition appears to have been based almost entirely on the brief submitted by the Prosecutor.

<sup>36</sup> *Prosecutor v. Kunarac*, Judgment, Case No. IT-96-23 (ICTY Trial Chamber, 22 February 2001), *aff’d*, Judgment (Appeals Chamber, 12 June 2002).

<sup>37</sup> *Ibid.*, paras. 393, 409.

<sup>38</sup> *Ibid.*, para. 398 (noting that a number of national jurisdictions had included circumstances such as that “the victim was put in a state of being unable to resist, was particularly vulnerable or incapable of resisting because of physical or mental incapacity, or was induced into the act by surprise or misrepresentation”), paras. 401, 404 (victim was minor).

presumption that the act was not voluntary or consensual.<sup>39</sup> It will be important for national legislation and the jurisprudence of national courts to ensure that the circumstances mentioned by the chamber in *Kunarać* will negate any apparent consent, unless freely given.<sup>40</sup> However, it will also be essential for national legislation and courts interpreting it not to make consent an element of the crime to be proved.

The Trial Chamber in the *Akayesu* judgment concluded that rape in certain circumstances could constitute genocide.<sup>41</sup>

Most national definitions of rape fall far short of these standards. Therefore, the Rome Statute and the elements of this crime in the Elements of Crimes, subject to the above caveats, can be used as an example of international best practice and as a way to call for changes in national definitions to reflect international best practice.

## **(b) Sexual slavery**

⇒ **Goal:** Your country should include sexual slavery as a crime against humanity and a war crime in national law, building upon the elements of this crime in the Elements of Crimes, but incorporating all contemporary forms of enslavement where the perpetrator caused a person or persons to engage in one or more acts of a sexual nature. Your country should make it clear that there is no necessary commercial element in the definition of the crime. In addition, sexual slavery not amounting to a crime against humanity or a war crime should be defined as a serious crime of sexual violence under national law.

### ELEMENTS OF THE CRIME AGAINST HUMANITY AND WAR CRIME OF SEXUAL SLAVERY

(1) The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.\*

(2) The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.

\* It is understood that such a deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.

<sup>39</sup> *Kunarać* (Appeals Chamber), *supra*, n. 36, at para.132.

<sup>40</sup> *Kunarać* (Trial Chamber), para. 419. One of the leading authorities on crimes of sexual violence, while noting the expressed intent of the Trial Chamber in this case in broadening the restrictive elements in the *Furundžija* judgment by use of the concept of violation of sexual autonomy, concluded that the alternative formulation actually used in *Kunarać* was “more, not less, restrictive of, the *Furundžija* elements”. Askin, *Treatment of Gender Crimes in the ICTR*, *supra*, n. 5, at p. 39 (draft).

<sup>41</sup> It explained: “507. . . . In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group. 508. Furthermore, the Chamber notes that measures intended to prevent births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.” *Akayesu*, *supra*, n. 29, at paras. 507-508.

The Rome Statute is the first international treaty expressly to include the crime of sexual slavery. Women's advocates lobbied for the inclusion of this crime independently from the separate counts of crimes of enslavement and enforced prostitution, in order to emphasize the sexual aspect of the crime of slavery, and to emphasize "the coercive element involved where women are forced to provide sexual services".<sup>42</sup> This crime is gender-based as it tends to exploit women's traditional roles as domestic service providers.<sup>43</sup> It includes situations where women and girls are forced into "marriage", domestic servitude or other forced labour, including forced sexual activity.<sup>44</sup>

Abuses amounting to sexual slavery have been committed in many armed conflicts, including in the former Yugoslavia,<sup>45</sup> Rwanda, Liberia,<sup>46</sup> the Democratic Republic of the Congo, Sierra Leone, Uganda and throughout Asia during World War II. The new Special Court for Sierra Leone has charged six people with acts of sexual slavery committed during the internal armed conflict.<sup>47</sup>

Commentators have pointed out that the first element of the crime outlined above may lead to an overly restrictive interpretation of slavery.<sup>48</sup> The illustrative list used to demonstrate the types of activity that can amount to slavery are all largely commercial in nature, potentially limiting the scope of the crime unnecessarily. Therefore, it is important that states make it clear that there is no necessary commercial element in the crime of slavery.

Sexual slavery can also involve individual acts outside the context of war. For example, the Elements of Crimes definition makes clear (in the accompanying footnote) that sexual slavery as a crime against humanity and a war crime includes the actions of people traffickers. The crime of trafficking relates to all labour sectors and not just the sex industry (see the next section for more general description of the crime of trafficking). However, it is clear that where women are recruited, transported, transferred, sold or purchased in order to

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<sup>42</sup> Barbara Bedont & Katherine Hall Martinez, 'Ending impunity for gender crimes under the International Criminal Court' VI *The Brown Journal of World Affairs*, 1999, p. 65.

<sup>43</sup> Brook Sari Moshan, 'Women, war and words: the gender component in the permanent International Criminal Court's definition of crimes against humanity' 22 *Fordham International Law Journal*, 1999, p. 154.

<sup>44</sup> Boot, *supra*, n. 27 p. 142.

<sup>45</sup> *Justice shelved - impunity for rape in Bosnia-Herzegovina*, *supra*, n. 28.

<sup>46</sup> *Liberia: no impunity for rape*, *supra*, n. 28.

<sup>47</sup> Special Court for Sierra Leone Prosecutor's indictment against Issa Hassan Sesay, Morris Kallon, Augustine Gbao, Case No SCSL-2004-15-PT, 14 May 2004; Special Court for Sierra Leone Prosecutor's indictment against Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu, Case No SCSL-2004-16-PT, 18 February 2005.

<sup>48</sup> See, e.g., Christopher Keith Hall, 'The First Five Sessions of the Preparatory Commission for the International Criminal Court', 94 *American Journal of International Law*, 2000, p. 781. The replacement of the word "includes" in the Rome Statute by "such as" in the Elements of Crimes changes the broadly worded illustrative language into a more restrictive list where, if the International Criminal Court were to follow it, only conduct in the list or similar conduct, which is largely commercial in nature, would constitute enslavement. One government delegate involved in the drafting of this provision has contended that the term "such as" makes "it clear that the list is illustrative and open-ended". Darryl Robinson, *Elements of Specific Forms of Crimes against Humanity*, in Roy S. Lee, ed., *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley, N.Y.: Transnational Publishers Inc. 2001), p. 80, 85. This interpretation, which is the only way to reconcile this language with the Rome Statute, was not universally shared by other government delegates or by non-governmental organizations with experience in working to end enslavement who remain concerned that it could be read restrictively. Another commentator, who was closely involved in the drafting of this provision, has stated that the list is "non-exhaustive", but did not discuss the change from the statutory language, but only the effect of the alternative ground. See Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (Geneva: International Committee of the Red Cross 2003), p. 328.

work in the sex industry in conditions of servitude, this amounts to a crime of sexual slavery.<sup>49</sup> States must recognize these acts as a crime committed by the trafficker, and not prosecute the victim for immigration or other offences.

*The Japanese army was responsible for thousands of acts of sexual slavery during World War II, where “comfort women” were kidnapped and forced to serve as sexual slaves. They were raped, tortured, subjected to other forms of sexual violence and many were killed in the last stages of the war. It is estimated that at least 200,000 women were victims of this brutal crime, however no-one has ever been held criminally responsible. As more and more women came forward in the 1990s to speak of what had happened to them, several Asian women’s organisations decided to establish a “people’s tribunal” for the comfort women, to allow them to tell their stories and to establish the horrific scale of this crime against humanity. The Women’s International War Crimes Tribunal was not able to impose legal accountability, however it was successful in allowing over 75 women to share their stories, in finding Emperor Hirohito responsible for these crimes and in creating an historical record of the abuse and pain of the “comfort women”.*<sup>50</sup>

### **(c) Enslavement, including trafficking**

⇒ **Goal:** Your country should include enslavement as a crime against humanity and a war crime in national law, consistent with the Elements of Crimes. Enslavement should also be defined as a serious crime in other circumstances and should expressly include the crime of trafficking within the definition, in a way that is consistent with the UN Trafficking Protocol and the Council of Europe Convention on action against trafficking in human beings.

#### ELEMENTS OF THE CRIME AGAINST HUMANITY AND WAR CRIME OF ENSLAVEMENT

Article 7(2)c) of the Rome Statute:

“Enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.

Elements:

The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.\*

\* It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children

<sup>49</sup> For a definition of trafficking that includes conduct that is not necessarily a crime against humanity or a war crime, see note 58, below.

<sup>50</sup> Christine Chinkin, ‘Women’s international tribunal of Japanese military sexual slavery’ 95 *American Journal of International Law*, 2001, p. 335. Although the “people’s tribunal” was not a court affording all the guarantees of a fair trial, it served a useful purpose by raising this issue in a highly visible forum. It should not be overlooked that the crime of sexual slavery has been committed by members of armed forces and opposition groups of other countries throughout history.

In addition to the crime of sexual slavery, the Rome Statute includes the more general crime of enslavement to cover situations of slavery that lack a sexual element. For example, women are often held captive during conflict and forced to serve as cooks, porters or minefield sweepers.<sup>51</sup> Slavery is one of the earliest human rights violations to be recognized as a crime under international law, and the definition of enslavement in the Rome Statute draws on previous definitions of slavery adopted in treaties.<sup>52</sup> The definition is unique, however, because it includes trafficking, particularly of women and girls, in the definition.<sup>53</sup>

Over the past decade, trafficking has increasingly been recognized as a serious form of abuse, and states are beginning to take steps at the inter-governmental level to combat trafficking as serious crimes under national law, but rarely – when trafficking amounts to a crime against humanity or a war crime – as a crime under international law.<sup>54</sup> The Rome Statute’s recognition of trafficking, particularly of women and children, as a crime against humanity and as a war crime should contribute to ensuring that states criminalize the actions of traffickers rather than the victims of trafficking.<sup>55</sup> States often respond to trafficking victims by charging them with violations of immigration or other laws and deporting them to their country of origin, where they may be at risk of further violations from their traffickers.<sup>56</sup> States should adopt a rights-based approach to victims of trafficking, and take seriously their obligation to prosecute those responsible for trafficking. In addition to including the crime of trafficking in national law, states should also be encouraged to adopt the definition of trafficking contained in the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol).<sup>57</sup> The UNHCHR Principles and Guidelines on Human Rights and Trafficking<sup>58</sup> and the

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<sup>51</sup> *Systematic rape, sexual slavery and slavery-like practices during armed conflict*, *supra*, n. 30, at para. 10.

<sup>52</sup> Christopher K. Hall ‘Article 7’ in Triffterer, *supra*, n. 48, at p. 132.

<sup>53</sup> Bedont & Hall Martinez, *supra*, n. 42, at p. 65.

<sup>54</sup> See United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, U.N. Doc. A/RES/55/25 (2000); Council of Europe Convention on Action against Trafficking in Human Beings. For more information on the Council of Europe Convention, see Amnesty International and Anti-Slavery International, *Council of Europe: Recommendations to Strengthen the December 2004 Draft European Convention on Action against Trafficking in Human Beings*, AI Index: IOR 61/001/2005, 1 January 2005.

<sup>55</sup> Spees, *supra*, n. 1 at p. 1233.

<sup>56</sup> UNIFEM, *Not a minute more: ending violence against women* (2003), p 43; Martina Vandenberg, ‘Complicity, corruption and human rights’ trafficking in human beings’, 34 *Case Western Reserve Journal of International Law* 2002, p. 323. See also Amnesty International, *Kosovo (Serbia and Montenegro): ‘So does this mean we have rights?’ Protecting the human rights of women and girls trafficked for forced prostitution in Kosovo*, AI Index: EUR 70/010/2004, 6 May 2004.

<sup>57</sup> For a definition of trafficking that includes conduct that is not necessarily a crime against humanity or a war crime, see Article 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime: “Article 3: For the purposes of this Protocol:

(a) ‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”.

The Council of Europe has adopted an identical definition in Article 4 (a) of its new Convention on actions against trafficking in human beings, CM (2005) 32, Add. 1 final, 3 May 2005.

<sup>58</sup> United Nations High Commissioner for Human Rights, *Principles and Guidelines on Human Rights and Trafficking*, U.N. Doc. E/2002/68/Add.1 (2002).

UNICEF trafficking guidelines<sup>59</sup> should also serve as a guide to law reform in this area, in a way that adopts a rights-based approach and respects the rights of victims of trafficking.

The same concerns noted above with the first element of sexual enslavement apply to the element above of the crime against humanity and the war crime of enslavement. States must ensure that non-commercial acts can also constitute enslavement.

*During the Bosnian conflict in 1992, many women were held captive in rape camps and used as sexual slaves. These women were sometimes kept prisoner in houses or apartments and repeatedly raped and degraded. In 2002, Dragoljub Kunarać and Radomar Kovać were convicted by the International Tribunal for the Former Yugoslavia of various crimes against humanity, including enslavement. Both men had held women and girls in their apartments for months on end for use as sexual slaves. The conviction was the first time in the history of international criminal prosecutions that individuals were found guilty of enslavement based on crimes of sexual violence. The definition of enslavement applied by the Tribunal was later largely adopted in the Rome Statute.<sup>60</sup>*

#### **(d) Forced pregnancy**

⇒ **Goal:** Your country should include the crime against humanity and the war crime of forced pregnancy as crimes under national law. In doing so, states should also define any act of confining unlawfully a person who has been forcibly made pregnant as a serious crime under national law.

#### ELEMENTS OF THE CRIME AGAINST HUMANITY AND THE WAR CRIME OF FORCED PREGNANCY

7(2)(f) “Forced pregnancy” means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.

The Rome Statute is the first international treaty expressly to include forced pregnancy as a crime. Women have been subjected to forced pregnancy in many armed conflicts, sometimes as a tool to implement deportation or forcible transfer of population. In Bosnia-Herzegovina the UN Commission of Experts reported that in some camps “captors state that they are trying to impregnate the women, pregnant women are treated better than their non-pregnant counterparts, and pregnant women are detained until it is too late in their pregnancy to obtain an abortion.”<sup>61</sup>

During the negotiations of the Rome Statute, some states that prohibit abortion in their national laws raised concerns that the definition of the crime of forced pregnancy could be used to argue that they were committing a crime of forced pregnancy by not providing access to abortion services. To allay this concern, a reference to “intent to affect the ethnic composition” of the population was incorporated in the definition.

<sup>59</sup> UNICEF, *Guidelines for Protection of the Rights of Child Victims of Trafficking in South Eastern Europe* (2003).

<sup>60</sup> *Prosecutor v. Kunarać, supra*, n. 36.

<sup>61</sup> Annexes to the Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992) vol. V, U.N. Doc: S/1994/674/Add.2, 28 December 1994, para. 15.

The definition of forced pregnancy adopted in the Elements of Crimes is thus limited in that it provides that the perpetrator must have intended to affect the ethnic composition of the population or to carry out another grave violation of international law. Amnesty International believes that any act of confining unlawfully a person who has been forcibly made pregnant as a result of rape should be considered a crime, and therefore states should not include this limitation in national law.

*Forcing women to bear children of a different ethnicity was a widespread phenomenon in the Yugoslav conflict. Women were held in rape camps and repeatedly raped until they became pregnant. They were then held until it was too late to obtain an abortion. As one woman held in such a camp remembers: "A gynaecologist would come to the hall, to one of the classrooms ... I think they were checking to see if we were pregnant ... The Serbs said to us, 'Why aren't you pregnant? See how nicely we treat women who are pregnant?' ... They wanted us to have children to stigmatize us forever."<sup>62</sup>*

### **(e) Enforced sterilization**

⇒ **Goal:** Your country should include enforced sterilization as a crime against humanity and a war crime under national law, consistent with the Elements of Crimes. In addition, enforced sterilization in other circumstances should be defined as a serious crime of sexual violence under national law.

#### ELEMENTS OF THE CRIME AGAINST HUMANITY AND WAR CRIME OF ENFORCED STERILIZATION

1. The perpetrator deprived one or more persons of biological reproductive capacity.\*
2. The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.\*\*

\* The deprivation is not intended to include birth-control measures which have a non-permanent effect in practice.

\*\* It is understood that 'genuine consent' does not include consent obtained through deception.

Enforced sterilization was recognized as a war crime during the Nuremberg trials, where perpetrators were tried for acts committed in the context of medical experiments.<sup>63</sup> Enforced sterilization was widespread in Nazi Germany, and was often carried out on those suffering from schizophrenia, epilepsy and "congenital feeble-mindedness".<sup>64</sup> The Nazi forced sterilization programs were modeled on legislation and practice in other countries. In the past century, enforced sterilization for eugenic or population control reasons was authorized and carried out in countries including Canada, China, Denmark, Finland, France, Iceland, India, Norway, Sweden, Switzerland, the United Kingdom and the United States. Support for sterilization programs was based on the view that they would "improve the human population". For example, a recent Swedish government report stated that between the

<sup>62</sup> Human Rights Watch, *War crimes in Bosnia-Herzegovina*, vol. II (1993), p. 220.

<sup>63</sup> *Hoess Trial* in UNWCC, *LRTWC*, vol. VII, p. 15; 13 AD 269. *K Brandt and Others*, in *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No 10*, vol. I, pp. 11; 14 AD 296 (cited in Dormann, *supra*, n. 48).

<sup>64</sup> Pablo Gejman and Ann Weilbaeher, 'History of the eugenic movement' 39 *The Israel Journal of Psychiatry and Related Sciences*, 2002, p. 217.



1930s and 1976, over 32,000 people, mostly women, were involuntarily sterilized, based on judgments of racial inferiority, alcoholism, epilepsy or mental retardation.<sup>65</sup>

Given the permanent and devastating consequences of forced sterilization for the victim, it is essential that all states include forced sterilization as a crime against humanity and a war crime under their national law.

*Forcible sterilization was a widespread technique of the Nazis during World War II, in order to prevent Jews from reproducing and as a form of medical experimentation. An employee of the Auschwitz infirmary gave the following testimony to the Nuremberg Tribunal:*

*"As to the experiments, I have seen ... the queue of young Jewesses from Salonika who stood waiting in front of the X-ray room for sterilization ... They sterilized women either by injections or by operation or with rays. I saw and knew several women who had been sterilized. There was a very high mortality rate among those operated on ... They said that they were trying to find the best method for sterilizing so as to replace the native population in the occupied countries by Germans after one generation, once they had made use of the inhabitants as slaves."<sup>66</sup>*

## **(f) Other forms of sexual violence**

⇒ **Goal:** Your country should include forms of sexual violence other than rape in the definition of the crimes against humanity and war crimes under national law, consistent with the Elements of Crimes. In addition, sexual violence not amounting to a crime against humanity or a war crime should be defined as a crime under national law, without including the requirement for “comparable gravity”.

### ELEMENTS OF THE CRIME AGAINST HUMANITY OF SEXUAL VIOLENCE

1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
2. Such conduct was of a gravity comparable to the other offences in Article 7 paragraph 1(g) of the Statute.

### ELEMENTS OF THE WAR CRIME DURING INTERNATIONAL ARMED CONFLICT OF SEXUAL VIOLENCE

1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
2. Such conduct was of a gravity comparable to that of a grave breach of the Geneva Conventions.

### ELEMENTS OF THE WAR CRIME DURING NON-INTERNATIONAL ARMED CONFLICT OF SEXUAL VIOLENCE

<sup>65</sup> *Ibid.*, at p. 217.

<sup>66</sup> *Trial of the Major War Criminals Before the International Military Tribunal, 1947, vol. VI p. 211.*

1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
2. Such conduct was of a gravity comparable to that of a serious violation of article 3 common to the four Geneva Conventions.

The inclusion of other forms of sexual violence as crimes against humanity and war crimes in the Rome Statute is very important in ensuring that forms of sexual violence that do not amount to rape, sexual enslavement, forced prostitution, forced pregnancy or forced sterilization do not fall outside its scope. For example, the Yugoslav and Rwanda Tribunals have convicted perpetrators of acts of sexual violence such as forced nudity<sup>67</sup> and sexual mutilation,<sup>68</sup> but have done so by relying on the crime of “inhumane treatment” which lacks the gender-sensitivity of the crime of “sexual violence”. The elements of the crimes of forced nudity and sexual mutilation cover two situations of more general relevance to the commission of crimes of sexual violence: where the perpetrator commits sexual acts against the victim and where the perpetrator caused the victim by force, threat of force or coercion to perform sexual acts.

When states have defined sexual violence as crimes against humanity and war crimes under national law, they have sometimes criminalized only rape and excluded other forms of sexual violence.<sup>69</sup> Rape is an enumerated crime under the Rome Statute in its own right. It is important that all states include forms of sexual violence not amounting to one of the enumerated crimes above as crimes against humanity and war crimes under their national law, to cover cases of sexual violence that do not amount to one of these crimes.

Element two of the crime against humanity of other forms of sexual violence states that this conduct must be of “comparable gravity” to other crimes included in the Rome Statute as a crime against humanity. National law should incorporate a broader second element of the crime of sexual violence to make clear that the comparison can be with any of the crimes in the Rome Statute, not just with the most serious of these crimes. Similarly, the second element of other forms of sexual violence as a war crime should be of comparable gravity to any war crime, not just with grave breaches or serious violations of common Article 3.<sup>70</sup> The reasons for the inclusion of this second element do not apply to crimes of sexual violence not amounting to crimes against humanity or war crimes and it should not be a part of the definition of such crimes under national law.

### **(g) Persecution based on gender**

- **Goal:** Your country should include gender-based persecution as a crime against humanity in national law. There should be no requirement that the persecution occur in connection with a crime against humanity or a war crime within the jurisdiction of the ICC (fourth element). Gender-based persecution in other circumstances

<sup>67</sup> Akayesu, *supra*, n. 29, at para. 697.

<sup>68</sup> *Prosecutor v. Tadić*, Case No IT-94-1-T (ICTY Trial Chamber, 10 August 1995), at para. 729.

<sup>69</sup> UNIFEM, *supra*, n. 56 at p. 44.

<sup>70</sup> For the background to the inclusion of the second element, see Eve La Haye, ‘Article 8 (2) (b) (xxii) – 6 – Sexual Violence’, in Lee, *supra*, n. 48, at pp.196-198; Hall, ‘The First Five Sessions’, *supra*, n. 48, at p. 779 (intention of the drafters of the Rome Statute to permit rape and other war crimes of sexual violence to be prosecuted also as grave breaches or serious violations of common Article 3 of the Geneva Conventions).

should also be defined under national law.

ELEMENTS OF THE CRIME AGAINST HUMANITY OF PERSECUTION

1. The perpetrator severely deprived, contrary to international law,\* one or more persons of fundamental rights.
2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in Article 7, paragraph 3, of the Statute,\*\* or other grounds that are universally recognized as impermissible under international law.
4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute [crimes against humanity] or any crime within the jurisdiction of the Court [genocide or war crimes].

\* This requirement is without prejudice to paragraph 6 of the General Introduction to the Elements of Crimes [Paragraph 6 states: ‘The requirement of “unlawfulness” found in the Statute or in other parts of international law, in particular international humanitarian law, is generally not specified in the elements of crimes.’]

\*\* Article 7(3): ‘it is understood that the term “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above.’

Persecution has been a crime under international law at least since 1945.<sup>71</sup> However the Rome Statute is the first international instrument to include gender as a ground of persecution. The previous lack of express recognition of the crime of gender-based persecution reflects “the tendency of international diplomats to view the persecution of women through the lens of race or ethnicity or religion, rather than on the basis of gender”.<sup>72</sup> The Rome Statute’s recognition is therefore important where women are persecuted *because they are women*. The definition of persecution adopted above makes clear that not every denial of human rights of women constitutes persecution on the basis of gender. However persecution does not need to result in physical harm. Both the Rwanda and Yugoslav tribunals have recognized acts involving mental, social and economic harm as acts of persecution.<sup>73</sup>

Due to the concern of a few states at the Rome Conference that the crime of persecution could be considered too vague,<sup>74</sup> the fourth element above was included. This element requires a connection with another serious crime within the jurisdiction of the ICC. However, this link is not a requirement of international criminal law. Persecution as a crime against humanity exists independently of any other crime, and this has been recognized by Control Council Law No. 10 for the prosecution of persons accused of war crimes and

<sup>71</sup> For example, “persecution on political, racial or religious grounds” was included as a crime against humanity in Article 6 (c) of the Nuremberg Charter.

<sup>72</sup> A Widney Brown & Laura Grenfell, ‘The international crime of gender-based persecution and the Taliban’ 4 *Melbourne Journal of International Law*, 2003, p. 347.

<sup>73</sup> *Prosecutor v. Kayishema*, Judgment, Case No ICTR-95-1-T (Trial Chamber, 21 May 1999); *Prosecutor v. Kupresikić*, Judgment, Case No IT-95-16-T (Trial Chamber, 14 January 2000); *Blaskić*, Judgment, Case No IT-95-14-T (Trial Chamber, 3 March 2000).

<sup>74</sup> Brown & Grenfell, *supra*, n. 72, p. 347. According to Rhonda Copelon, the additional element was added at the insistence of the USA, who were worried that the crime could encompass institutionalized discrimination: Rhonda Copelon, ‘Gender crimes as war crimes: integrating crimes against women into international criminal law’ 46 *McGill Law Journal*, 2000, p. 217.

crimes against humanity after the Second World War,<sup>75</sup> the Statutes of the Yugoslav and Rwandan tribunals<sup>76</sup> and in cases decided at the Yugoslav Tribunal.<sup>77</sup> Therefore, states should not include the requirement outlined above in the fourth element in their national definitions of the crime of persecution, as it unnecessarily limits the scope of the crime.

It is very important that states recognise gender-based persecution in national law, both as a crime and as a ground for granting refugee status, while making sure to distinguish between the two concepts. Persecution in relation to a claim of refugee status is a much wider concept, as the emphasis is more on the state of mind of the person being persecuted rather than the intent of the perpetrator. The concept of persecution in relation to a refugee claim refers to serious human rights violations or to a pattern of discrimination or less favourable treatment which could, on cumulative grounds, amount to persecution and warrant international protection.<sup>78</sup> However, the treatment of gender-based persecution with regard to refugee status claims will have a bearing on the interpretation of the scope of the crime of persecution based on gender. For example, the UNHCR Gender Guidelines, issued in 2002, provide a substantial analysis of the various elements of the refugee definition and will be a useful source in interpreting Article 7 (1) (h) of the Rome Statute.<sup>79</sup>

*Recent examples of gender-based persecution include the legislation and practices of the Taliban dominated government in Afghanistan, which included prohibition of women working, attending school or leaving their homes if not accompanied by a male relative. Women were also denied access to medical treatment and forced to be veiled from head to foot in public. The legislation was enforced in an arbitrary manner, such as summary beatings for women found in public violating one of these rules. Brown and Grenfell argue that the treatment of women under the Taliban regime meets all of the necessary elements of gender-based persecution in the Rome Statute, and that all states are, therefore, now obliged to investigate and prosecute those found in their territory who were responsible for such acts.<sup>80</sup>*

<sup>75</sup> Allied Control Council Law No 10: *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and against Humanity* (20 December 1945).

<sup>76</sup> Statute of the ICTY, Art 7; Statute of the ICTR, Art 3.

<sup>77</sup> *Prosecutor v. Tadic (Defence Motion for Interlocutory Appeal on Jurisdiction)* Case No IT-94-1-AR72 (2 October 1995); Kupreskić, *supra*, n. 77.

<sup>78</sup> Kupreskić, *supra*, n. 73.

<sup>79</sup> United Nations High Commissioner for Refugees, *Guidelines on International Protection: Gender Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1968 Protocol Relating to the Statue of Refugees*, U.N. Doc. HCR/GIP/02/02, 7 May 2002. The Guidelines clearly state that “there is a scope within the refugee definition to recognise both State and non-State agents of persecution. While persecution is most often perpetrated by the authorities of a country, serious discriminatory or other offensive acts committed by the local populace, or by individuals, can also be considered persecution if such acts are knowingly tolerated by the authorities, or if the authorities refuse, or are unable, to offer effective protection.” It is also stated in the guidelines that discriminatory laws, policies, practices and social norms may alone, or on a cumulative basis, amount to persecution, as may rape and other forms of gender-based violence, such as dowry-related violence, female genital mutilation, domestic violence, and trafficking. Gender-sensitive interpretations of the 1951 convention grounds are outlined by the UNHCR, for example by acknowledging that women may constitute a social group and that “political opinion should be understood in the broad sense, to incorporate any opinion on any matter in which the machinery of State, government, society, or policy may be engaged. This may include an opinion as to gender roles. It would also include non-conformist behaviour which leads the persecutor to impute a political opinion to him or her.”

<sup>80</sup> A Widney Brown & Laura Grenfell, *supra* n. 72, p. 347 and Amnesty International, *Women in Afghanistan: pawns in men’s power struggles*, AI Index: ASA 11/011/1999, 1 November 1999.

## 2. No safe haven for perpetrators of violence against women - using universal jurisdiction

- **Goal:** Your country should enact and implement legislation authorizing their courts to exercise universal jurisdiction over all crimes of gender-based violence, including those that amount to genocide, crimes against humanity, war crimes, torture or slavery.

As the Preamble of the Rome Statute makes clear, every state has the duty to exercise its jurisdiction over persons suspected of crimes under international law and to ensure effective prosecution of such crimes by taking measures at the national level to enhance international cooperation.<sup>81</sup> Articles 1 and 17 of the Rome Statute confirm that states have the primary responsibility to investigate and prosecute these crimes. Only when they are unable or unwilling to do so will the International Criminal Court investigate and prosecute these crimes. In order to fulfill this responsibility, each state has to exercise the jurisdiction over genocide, crimes against humanity and war crimes it has under international law, not just its often more limited jurisdiction under national law.

The most common form of criminal jurisdiction exercised by states is in relation to crimes committed on their own territory (territorial jurisdiction). However, international law has gradually recognized other forms of jurisdiction, such as jurisdiction over crimes committed outside the state by the state's nationals (active personality jurisdiction), crimes committed against the state's security interests (protective principle jurisdiction) and crimes committed against a state's own nationals (passive personality jurisdiction).

In addition, for more than two centuries, states have provided in national legislation that their courts can exercise universal jurisdiction over ordinary crimes recognized as criminal in most legal systems. International law has also increasingly recognized the responsibility of states to exercise jurisdiction on behalf of the entire international community - when a crime is serious enough to threaten the entire international framework of law - regardless of where the crime was committed or the nationality of the accused. International law now permits - and in some cases requires - states to exercise jurisdiction over persons suspected of such grave crimes under international law, including genocide, crimes against humanity, war crimes, torture, extrajudicial executions and "disappearances". Most states, however, have very limited provisions in national law in relation to universal jurisdiction. A worldwide survey conducted by Amnesty International in 2001 found that over 125 countries have universal jurisdiction for some crimes, but that most of these laws are incomplete or flawed.<sup>82</sup>

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<sup>81</sup> In particular, the Preamble states:

"The States Parties to this Statute, . . . .

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes . . . ."

<sup>82</sup> Amnesty International, *Universal jurisdiction: The duty of states to enact and implement legislation*, AI Index: IOR 53/002-018/2001, September 2001. The study can be found at: <http://www.amnesty.org/icc/>.

The findings of this study have recently been confirmed by the International Committee of the Red Cross study of customary international law. Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge: Cambridge University Press & International Committee of the Red Cross 2005).

The use of universal jurisdiction is an important way for states to hold perpetrators accountable for some of the worst crimes of violence against women. In some cases states have binding treaty obligations to enforce such jurisdiction, and in other cases customary international law imposes the obligation. Each category of crime and states' responsibilities in relation to gender-based violence are outlined below. All governments should be urged to enact universal jurisdiction legislation over all these crimes, including acts of violence against women.

For more information on how states should ensure the most effective universal jurisdiction legislation, please see: *Universal Jurisdiction: 14 Principles on the effective exercise of universal jurisdiction*, AI Index: IOR 53/001/1999, 1 May 1999.<sup>83</sup>

### **(a) Gender-based crimes as genocide, crimes against humanity, war crimes, torture and slavery**

#### **Genocide:**

It was recognized by states that the crime of genocide is subject to universal jurisdiction, even before the adoption of the Genocide Convention in 1948. Although the Genocide Convention does not expressly mention universal jurisdiction, the records of the negotiating history confirm that the drafters did not intend to preclude states parties from exercising universal jurisdiction over genocide. There is also overwhelming evidence, including the enactment by many states of legislation permitting the exercise of universal jurisdiction over genocide and the practice of national courts, that any state may exercise universal jurisdiction over this crime.<sup>84</sup>

It is clear that in certain circumstances some crimes of sexual violence against women can constitute genocide. In particular rape and sexual violence have been recognized as an act of genocide by the Rwanda Tribunal in the *Akayesu* case. In this decision, the Trial Chamber concluded that in certain circumstances rape and sexual violence “constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such” (see discussion above of the specific circumstances in Part II.1.a).<sup>85</sup> The crimes of sexual violence committed against women were “an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole ... - destruction of the spirit, of the will to live, and of life itself”.<sup>86</sup>

#### **Crimes against humanity:**

Crimes against humanity are also subject to universal jurisdiction. Every state has the right to exercise universal jurisdiction over these crimes, and it is increasingly recognized that states may also have a duty under international law either to do so when a suspect is found within their jurisdiction or to extradite a suspect to another country willing and able to exercise jurisdiction.<sup>87</sup> Two international treaties governing crimes against humanity explicitly permit states to exercise universal jurisdiction over particular crimes against

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<sup>83</sup> Available at: <http://web.amnesty.org/library/index/engior530011999?OpenDocument>.

<sup>84</sup> *The duty of states to enact and enforce legislation*, *supra*, n. 82, Chapter Seven (AI Index: IOR 53/010/2001). For more information on state practice in relation to genocide, see *ibid.*, Chapter Eight (AI Index: IOR 53/011/2001).

<sup>85</sup> *Akayesu*, *supra* n. 29, at para. 731.

<sup>86</sup> *Ibid.*, at para. 731-732.

<sup>87</sup> *The duty of states to enact and enforce legislation*, *supra*, n. 82, Chapter Five (AI Index: IOR 53/008/2001). For more information on state practice in relation to crimes against humanity, see *ibid.*, Chapter six (AI Index: IOR 53/009/2001).

humanity - the Apartheid Convention<sup>88</sup> and the Convention against Torture.<sup>89</sup> The Yugoslav Tribunal has also recognized the right of all states to exercise universal jurisdiction over any crime against humanity in the *Tadić* case.<sup>90</sup>

The definitions of crimes against humanity contained in the Rome Statute of the ICC are widely considered to be authoritative. In accordance with these definitions, acts of rape, sexual slavery, forced prostitution, forced sterilization, forced pregnancy, other forms of sexual violence of a comparable gravity, gender-based persecution and trafficking are all crimes against humanity when committed as part of a “widespread or systematic” attack on a civilian population.

### **War crimes:**

The four Geneva Conventions for the Protection of War Victims of 1949, which have been ratified by almost every state,<sup>91</sup> as well as Protocol I, require each state party to search for persons suspected of grave breaches of these Conventions, to bring them to justice in their own courts, to extradite them to states which have made out a *prima facie* case against them, or to surrender them to an international criminal court. This is a binding legal obligation on all states which have ratified the Geneva Conventions and Protocol I. In addition, states may exercise universal jurisdiction over violations of common Article 3 of the Geneva Conventions and of Protocol II, as well as over other war crimes committed during non-international armed conflict.<sup>92</sup>

There is no express reference to crimes of sexual violence in the list of grave breaches found in the four Geneva Conventions and Protocol I. However, the torture of women during an international armed conflict is clearly a grave breach of these treaties, and this undoubtedly includes rape and many other forms of sexual abuse, such as sexual mutilation. Rape, enforced prostitution and other forms of indecent assault are expressly prohibited in the Geneva Conventions under certain circumstances. However, these crimes are not listed as grave breaches.<sup>93</sup>

### **Torture:**

Individual acts of torture that do not constitute a crime against humanity or a war crime are still crimes under international law. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), which 140 countries had ratified as of April 2005,<sup>94</sup> requires states parties to extradite those suspected of torture found in their territories or to submit their cases to the authorities for the purpose of prosecution.<sup>95</sup> This is a legally binding obligation on states parties to the Convention.

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<sup>88</sup> International Convention on the Suppression and Punishment of the Crime of Apartheid, Article IV and V.

<sup>89</sup> See next section: torture.

<sup>90</sup> *Prosecutor v Tadić*, Decision on Defence Motion on Jurisdiction, Case No IT-94-1-T (ICTY Trial Chamber, 10 August 1995), para 42.

<sup>91</sup> To see if your country is a state party to the Geneva Conventions, see <http://www.icrc.org/ihl-nat>.

<sup>92</sup> Amnesty International, *Universal jurisdiction: the duty of states to enact and enforce legislation - Chapter Three: War crimes – the legal basis for universal jurisdiction* (AI Index: IOR 53/005/2001).

<sup>93</sup> Geneva IV, Article 27 (women from harm committed by agents of states of which they are not nationals during international armed conflict and occupation); Protocol I, Article 76(1) (women in the territory of parties to an international conflict or in occupied territory, within the scope of Protocol I); Protocol II, Article 4(2)) (women in non-international armed conflict)

<sup>94</sup> To see if your country is a state party to the Convention against Torture, see:

<http://web.amnesty.org/pages/treaty-index-eng>.

<sup>95</sup> Convention against Torture, Article 7.

Rape and other crimes of sexual violence can constitute acts of torture or ill-treatment, particularly when committed by agents of the state, such as soldiers, police and prison officers, or by others with their consent or acquiescence. Rape has been prosecuted by the Yugoslav and Rwanda Tribunals as an act of torture, either as a war crime or as a crime against humanity, and judgments have recognized that rape can constitute all of these crimes, including torture.<sup>96</sup> In the *Delalić* case, the Yugoslav Tribunal found that rape of women prisoners, including during interrogation, inflicts severe psychological and physical suffering, and that “in situations of armed conflict, when it occurs with the consent or acquiescence of an official, rape ‘inherently’ meets the purpose element of torture - that it involves punishment, coercion, discrimination or intimidation.”<sup>97</sup> This means that all states parties to the Convention against Torture have an obligation to enact laws and regulations that make clear that rape perpetrated or condoned by a state official is an act of torture, and give domestic courts the power to exercise jurisdiction over anyone suspected of such a crime, regardless of nationality.

### **Slavery**

Slavery is a crime under international law even in circumstances when it does not amount to a crime against humanity or a war crime. Slavery and slavery-like practices were among the first crimes to be recognized as part of customary international law. This customary prohibition against slavery arose partly because of the trans-national nature of the slave trade in the late nineteenth century. Therefore, international treaties prohibiting slavery permit states to exercise universal jurisdiction over the crime.<sup>98</sup> There is no need for a national authority to show a link with any type of armed conflict, or to show that the conduct occurred in the context of a “widespread or systematic attack” on a civilian population.

### **(b) Other crimes of gender-based violence**

As noted above, states can also exercise universal jurisdiction over “ordinary” crimes recognized as criminal according to general principles of law, such as individual acts of rape, sexual abuse and violence against women.

In the light of the above, all states should, therefore, enact legislation that requires their criminal justice authorities to investigate and, if there is sufficient admissible evidence, prosecute suspects in their territory or subject to their jurisdiction, unless the person is extradited to another state or surrendered to an international criminal court. The legislation should also permit those authorities when the suspect is abroad to investigate anyone suspected of these crimes, regardless of the perpetrator’s nationality or place where the crime occurred, and, if there is sufficient admissible evidence, to prosecute, provided that the person is present in the state where the court is located a sufficient time before trial to prepare a defence.

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<sup>96</sup> Cases in the ICTR: *Akayesu*, *supra* n. 29, at para. 597; Cases in the ICTY: *Prosecutor v. Delalić*, Judgment, Case No IT-96-21 (ICTY Trial Chamber II, 16 November 1998, paras. 943, 965; *Furundžija*, *supra*, n. 30, paras. 264-269.

<sup>97</sup> *Delalić*, *supra*, n. 96 at paras. 480-496, quote from Copelon, *supra*, n. 74, p. 231.

<sup>98</sup> *Systematic rape, sexual slavery and slavery-like practices during armed conflict*, *supra*, n. 27, at para. 47.



### 3. Gender-sensitive criminal procedure for crimes of gender-based violence

In addition to enacting laws to incorporate crimes of violence against women, it is equally important that states review and amend their procedural and evidentiary rules to ensure that victims are treated with respect and dignity during the judicial process, while ensuring the right of the accused to a fair trial. In many national justice systems rules of procedure and evidence in cases of sexual violence have the effect that the victim is put on trial rather than the accused. Structural rules reflect a deep suspicion of the victim.<sup>99</sup> As Barbara Bedont and Katherine Hall Martinez note:

[I]n every legal system in the world, the investigation and prosecution of sexual and gender violence has been undermined by discriminatory and patriarchal procedural and evidentiary rules .... Underlying these rules ... is the prevailing cultural view that while it is correct for society to formally outlaw rape and other crimes, governmental enforcement of these legal prohibitions threatens the prevailing male-dominated social order and the “private” or domestic sphere of relations between men and women.<sup>100</sup>

The Rome Statute tackles some of the most common problems with procedural and evidentiary rules that have traditionally made trials traumatic experiences for victims of gender-based violence. The Rules of Procedure and Evidence of the ICC build on the advances made in recent years in a few national justice systems, as well as at the Yugoslav and Rwandan Tribunals. They also reflect input from numerous non-governmental organizations working for the rights of women, including Amnesty International.<sup>101</sup> Therefore, the rules outlined below represent international best practice that all states should follow when prosecuting crimes of sexual violence.

#### **(a) Fair trial in cases involving crimes of sexual violence**

The Rome Statute strikes the appropriate balance in ensuring that trials involving crimes of sexual violence fully respect the right to fair trial of the accused and the rights of victims and witnesses and should therefore be a model for national criminal proceedings in such cases. Article 64 (2) of the Rome Statute requires the Trial Chamber to “ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses”. In addition, Article 68 contains several provisions requiring that essential steps to protect and support victims and witnesses must not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.<sup>102</sup>

<sup>99</sup> Special Rapporteur on violence against women, its causes and consequences, *Integration of the human rights of women and the gender perspective: violence against women*, E/CN.4/2003/75 (2003).

<sup>100</sup> Bedont & Hall Martinez, *supra*, n. 42, at p. 65.

<sup>101</sup> See, for example, Amnesty International, *The International Criminal Court: Ensuring an effective role for victims – Memorandum for the Paris seminar, April 1999*, AI Index: IOR 40/06/99, 1 April 1999.

<sup>102</sup> For example, Article 68 (3) provides that “Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.”

Article 68 (5) states “Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which

## **(b) Evidence of consent**

⇒ **Goal:** Your country should include provisions in its rules of procedure and evidence modeled on the ICC's Rules of Evidence and Procedure that regulate the admission of evidence of consent of the victim in a crime of sexual violence. In particular, this evidence should not be admissible in the circumstances outlined below. A closed hearing to consider the admissibility or relevance of such evidence should be available as of right, outside the presence of the jury in jurisdictions with jury trials. These rules should apply to all crimes of sexual violence, whether individual acts of sexual violence or those committed as part of a crime against humanity or war crime.

### **Rule 70: Principles of evidence in crimes of sexual violence**

(a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or by taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent.

(b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent.

(c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence.

### **Rule 72: In camera procedure to consider relevance or admissibility of evidence**

1. Where there is an intention to introduce or elicit, including by means of the questioning of a victim or witness, evidence that the victim consented to an alleged crime of sexual violence, or evidence of the words, conduct, silence or lack of resistance of a victim or witness as referred to in .. [rule 70 above] notification shall be provided to the Court which shall describe the substance of the evidence intended to be introduced or elicited and the relevance of the evidence to the case.

2. In deciding whether the evidence ... is relevant or admissible, a Chamber shall hear in camera views of the Prosecutor, the defence, the witness and victim or his or her legal representative, if any, and shall take into account whether the evidence has a sufficient degree of probative value to an issue in the case and the prejudice that such evidence may cause ...

3. Where the Chamber determines that the evidence ... is admissible in the proceedings, the Chamber shall state on the record the specific purpose for which the evidence is admissible ...

In many national justice systems, the key issue in a trial for rape and other forms of sexual violence will be whether the victim consented to the act alleged. Evidence seeking to prove consent is often used in ways that potentially draw on the decision-maker's gendered assumptions about women's ability to consent to a sexual act, and can lead to the admission of irrelevant evidence that reinforces such assumptions in a manner that seriously prejudices the impartial consideration of victims' claims. For example, evidence of what the victim said can be taken out of context to imply consent, despite evidence of the use of force or coercion by the perpetrator. In addition, the fact that the victim did not

*"The fact you are not torn limb from limb, splattered against a wall, maimed for life implies that you did not fight. The implication that you did not fight is submission. You submitted. And submission implies consent? That is absurd. ... You fight and you could be killed, you could be maimed, but if you don't fight, don't expect the courts to believe you."\**

\* Donna Stuart, 'No Real Harm Done: Sexual Assault and the Criminal Justice System' in Patricia Easta, ed., *Without Consent: Confronting Adult Sexual Violence* (1999), p. 103.

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is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."

struggle or fight with the perpetrator is often used as evidence of consent, regardless of the circumstances. Some jurisdictions require proof of physical resistance by the victim in order to prove rape.<sup>103</sup>

The Assembly of States Parties of the ICC has adopted rules on the issue of consent that are very similar to those adopted by the Yugoslav Tribunal. These rules recognize that certain types of evidence cannot be used to imply consent. For example, **silence or lack of resistance** cannot be used to imply consent. This rule has been applied in the European Court of Human Rights judgment in *MC v. Bulgaria*, where the respondent state was held to have failed its obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms because national rape laws required physical evidence of resistance to prove rape. The Court stated (referring to developments at the Yugoslav Tribunal) “ ... the evolving understanding of the manner in which rape is experienced by the victim has shown that victims of sexual abuse - in particular girls below the age of majority - often provide no physical resistance because of a variety of psychological factors or because they fear violence on the part of the perpetrator ... Moreover, the development of law and practice in that area reflects the evolution of societies towards effective equality and respect for each individual’s sexual autonomy.”<sup>104</sup> Since the 1980s many countries have also reformed their own national rape laws to exclude a requirement of resistance.<sup>105</sup>

Consent also cannot be inferred from **words or conduct** of the victim where the victim was subjected to force, threat of force or a coercive environment (which could include detention) or there were other circumstances that would make the act non-consensual, such as mental incapacity or the youth of the victim. This rule is very important because it means that words or actions of the victim cannot be taken out of context when, for example, the victim is being threatened, forced or coerced. The rules also state that if the defence wishes to introduce evidence of consent, this evidence must be considered by the judges in an ***in camera* (closed) hearing**. This means that the evidence cannot be heard by the public unless the judges decide that it is admissible and that it should be made public.

### ***(c) Evidence of prior sexual conduct***

⇒ **Goal:** Your country should ban courts from inferring the credibility, character or predisposition to sexual availability of a victim by reasons of the prior or subsequent sexual conduct of the victim. In determining whether such evidence might be relevant to some other issue, courts should conduct a closed (*in camera*) hearing. The ban on the admission of evidence regarding the prior or subsequent sexual conduct of the victim should apply to individual acts of sexual violence, as well as those that are crimes against humanity or war crimes.

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<sup>103</sup> For further discussion of the issue of the requirement of resistance and physical struggle in various national rape laws see: Interights, *Amicus Curiae in the case of MC v Bulgaria, European Court of Human Rights*, 2003, available at: <http://www.interights.org/news/MCvBulgariaamicus.htm>.

<sup>104</sup> *MC v. Bulgaria*, Application no 39272/98, judgment, 4 December 2003, paras. 163-166.

<sup>105</sup> For example, a survey of national laws conducted by Interights found that the following countries do not require proof of physical force or resistance to establish rape: Australia, Belgium, Canada, Denmark, Germany, Ireland, South Africa and 37 states in the USA: Interights, *supra*, n. 103.

**Rule 70: Principles of evidence in cases of sexual violence**

...  
(d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.

**Rule 71: Evidence of other sexual conduct**

In light of the definition and nature of the crimes within the jurisdiction of the Court, and subject to article 69, paragraph 4,\* a Chamber shall not admit evidence of the prior or subsequent sexual conduct of a victim or witness.

\* Article 69(4): The Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

Evidence of the prior or subsequent sexual conduct of the victim is admissible in many national justice systems during a trial for crimes of sexual violence. This evidence is often used in attempts to demonstrate that the victim is not credible, of poor character or predisposed to sexual availability because of that conduct. Leading commentators have noted that admission of such evidence into sexual violence trials introduces “sex stereotypes that deprive a woman of her bodily integrity”.<sup>106</sup> The assumption behind the admission of evidence of prior sexual activity is either that because the woman has consented to sex on a previous occasion she therefore did so on the occasion in question, or that because the woman has a sexual history she is an unreliable witness.<sup>107</sup>

The admission of evidence of the prior or subsequent sexual conduct of the victim also increases the trauma of testifying, as women may be humiliated and forced to expose aspects of their private lives that are completely unrelated to the crime being tried.

The ICTY was the first international court to adopt a rule prohibiting the admission of evidence relating to prior sexual conduct of the victim.<sup>108</sup> At least one country has also recently adopted a similar evidentiary rule banning this type of evidence.<sup>109</sup> Rules 70 and 71 of the ICC Rules of Procedure and Evidence together provide important safeguards preventing the ICC from inferring lack of credibility, “bad character” or predisposition to sexual availability of a victim or witness by reason of the prior or subsequent conduct of a victim or witness. These two rules were adopted in a carefully balanced consensus after intense debate between those who wished to exclude evidence of prior or subsequent sexual conduct in all instances with regard to any aspect of the case and those who wished to leave open the possibility in rare instances that the ICC could consider such evidence in circumstances when the admission of such evidence could be essential in order to ensure the right of an accused to a fair trial. Article 69 (4) of the Rome Statute, which incorporates the civil law approach of free evaluation of the evidence, rather than the common law approach with numerous rules excluding many classes of evidence from any consideration by a court, requires the International Criminal Court when ruling on the relevance or admissibility of evidence to take into account “the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence”. In making this

<sup>106</sup> Jennifer Green, Rhonda Copelon, Patrick Cotter and Beth Stephens, ‘Affecting the rules for the prosecution of rape and other gender-based violence before the International Criminal Tribunal for the former Yugoslavia: A feminist proposal and critique’ 5 *Hastings Women’s Law Journal*, 1994, p. 171.

<sup>107</sup> Fionnuala Ni Aolain, ‘Radical rules: the effects of evidential and procedural rules on the regulation of sexual violence in war’ 60 *Albany Law Review* 1997, p. 883.

<sup>108</sup> ICTY, Rules of Procedure and Evidence, Rule 96.

<sup>109</sup> See, e.g., Australian Uniform Evidence Act, sec. 37a.

determination, the ICC will need to conduct a preliminary *in camera* (closed) hearing to consider whether such conduct might be relevant to an issue other than the matters excluded by Rule 70 (d).

### **(d) Corroboration**

⇒ **Goal:** Your country should expressly provide in legislation or court rules that corroboration of the victim's testimony is not required for any crime, particularly crimes of sexual violence. This provision should apply to all crimes of sexual violence, not just those are crimes against humanity or war crimes.

**Rule 63: General provisions relating to evidence**

(4) Without prejudice to article 66, paragraph 3,<sup>110\*</sup> a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence.

Corroboration of a victim's story of sexual violence has traditionally been required in many national justice systems, particularly in common law jurisdictions.<sup>111</sup> Judges in some domestic legal systems require eyewitness accounts of the crime (which is very rare in sexual violence cases) - sometimes only male witnesses are considered<sup>112</sup> - or testimony from a doctor regarding the physical evidence of such violence. No other crime, such as assault or theft, generally requires corroboration in criminal law. The requirement of corroboration entrenches in law an inherent mistrust of women's testimony, and is based on the assumption that women lie about having been sexually assaulted.<sup>113</sup>

The ICTY was the first international court to state in its Rules of Procedure and Evidence that corroboration is not required for crimes under the tribunal's jurisdiction.<sup>114</sup> The trial chamber of the ICTY has also confirmed that corroboration is not a requirement of any crime under international law.<sup>115</sup> The ICC Rules of Procedure and Evidence adopted a similar rule. This rule holds that even though these crimes do not require corroboration, the International Criminal Court must, of course, still be satisfied of the guilt of the accused beyond reasonable doubt. Given the discriminatory nature of the requirement of corroboration, all states should expressly provide in legislation or court rules that corroboration is not required for any crime, particularly crimes of sexual violence.

### **(e) Giving evidence in closed court, or via audio or video-link**

⇒ **Goal:** Your country should enact legislation or adopt a court rule that permits victims of sexual violence to give their evidence *in camera* (closed proceedings), or via video or audio-link in a manner that fully respects the right of the accused to a fair trial. This

<sup>110</sup> Article 66 (3) of the Rome Statute provides: "In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt".

<sup>111</sup> For example, the requirement that the judge warn the jury of the dangers of convicting an accused on the basis of uncorroborated evidence in sexual assault cases was only abolished in 1994 in the United Kingdom: Criminal Justice and Public Order Act 1994, sec. 32 (1).

<sup>112</sup> *Systematic rape, sexual slavery and slavery-like practices during armed conflict*, *supra* n 27, at para. 96.

<sup>113</sup> Aolain, *supra*, n. 107, at p. 883. .

<sup>114</sup> ICTY Rules of Procedure and Evidence, Rule 96(I).

<sup>115</sup> *Tadić*, Decision on Defence Motion on Jurisdiction, *supra*, n. 93, at para. 539.

provision should apply to all crimes of sexual violence, including those that are crimes against humanity or war crimes.

**Article 68: Protection of the victims and witnesses and their participation in the proceedings**

2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

**Rule 67: Live testimony by means of audio or video-link technology**

1. In accordance with article 69, paragraph 2,<sup>116</sup> a Chamber may allow a witness to give viva voce (oral) testimony before the Chamber by means of audio or video technology, provided that such technology permit's the witness to be examined by the Prosecutor, the defence, and by the Chamber itself, at the time that the witness so testifies.

....

3. The Chamber, with the assistance of the Registry, shall ensure that the venue chosen for the conduct of the audio or video-link testimony is conducive to the giving of truthful and open testimony and to the safety, physical and psychological well-being, dignity and privacy of the witness.

The Rome Statute and the ICC Rules of Procedure and Evidence permit a victim to give evidence in closed court, or via video or audio-link, as outlined in the article and rule above, provided that “[t]hese measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”<sup>117</sup> This provision is very important not only to ensure the psychological well being of victims, but also to encourage more women to come forward and give evidence in crimes of sexual violence. Testifying about such crimes is a traumatic event for most victims, and, therefore, all states should provide the option of a closed court, video-link or audio-link for the presentation of this type of evidence, especially to minimize the stress caused to the victim by being faced with the accused and being exposed to the public in the court room. A closed court for this type of case should not, however, be mandatory, as some women may want to testify in public about their experience.<sup>118</sup>

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<sup>116</sup> Article 69 (2) of the Rome Statute provides: “The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.”

<sup>117</sup> Permissible measures, which include confidentiality, but not anonymity. See Helen Brady, ‘Protective and Special Measures for Victims and Witnesses’, in Lee, *Elements of Crimes*, *supra*, n. 48, at pp. 434-456; *Ensuring an effective role for victims – Memorandum for the Paris seminar, April 1999*, *supra*, n. 101, at Part III.A and B.

<sup>118</sup> During the Rome Conference some countries, led by Syria, argued in favour of mandatory closed hearings in all cases of sexual violence in order to protect ‘public morality’. Women’s groups argued that this would reinforce the perception of these crimes as ‘hidden’ and shameful and therefore it should be up to the Court to decide, with a presumption in favour of closed hearings: Cate Steains, ‘Gender Issues’, in Roy S. Lee, ed., *The International Criminal Court: The Making of the Rome Statute – Issues – Negotiations - Results* (The Hague/London/Boston: Kluwer Law International 1999), p. 357.

## (f) Support for victims and witnesses

⇒ **Goal:** Your country should enact legislation or adopt court rules permitting victims and witnesses to be accompanied by a person of their choice while they give evidence, particularly in cases involving crimes of sexual violence. This step should be supplementary to other measures to support victims and witnesses (see below).

### **Rule 88: Special measures**

2. A Chamber may hold a hearing on a motion or a request under sub-rule 1, if necessary in camera or ex parte, to determine whether to order any such special measure, including but not limited to an order that a counsel, a legal representative, a psychologist or a family member be permitted to attend during the testimony of the victim or the witness.

The ICC Rules of Evidence and Procedure also allow for a victim or witness to be accompanied by someone who can support them while giving their testimony. This rule is important in reducing the trauma and fear that victims and witnesses may have about testifying, by making the environment slightly less intimidating.

## 4. Improving treatment of victims and witnesses

*“I spent one year listening to sound recordings of [national] sexual assault trials. I heard women give their evidence and through the court process play the role of complainant, accuser, victim and survivor ... There were days when what I heard brought tears to my eyes, nausea to my stomach and shame – that I participate in a profession that takes degradation, dresses it up in cloaks promoting its status, buries it in a complex exclusive language and enshrines it in statute books ... The day I heard a complainant vomit in the witness box ... was the day I was convinced that things have to change.”<sup>119</sup>*

Another unique aspect of the Rome Statute is the importance it places on the treatment of victims and witnesses. Victims of violence against women have traditionally had very few rights in national justice systems, particularly in common law systems, usually serving merely as the witness for the prosecutor’s case rather than being an active participant in proceedings.<sup>120</sup> The role that victims can play in national criminal justice systems is a fundamental aspect of how that particular system functions. Therefore, it is not recommended that groups advocate that national criminal justice systems adopt in identical form each of the provisions concerning victims and witnesses in the Rome Statute and the Rules of Procedure and Evidence.<sup>121</sup> These provisions often will require adaptation to the particulars of individual justice systems. However, wherever possible, measures similar to those in the Rome Statute should be incorporated at the national level. For example, the method for nominating and electing judges to the ICC is one that can only work for the ICC, but the principle of fair representation of men and women among judges and court staff must be implemented effectively at the national level. In most instances, the provisions in the Rome Statute and in the ICC Rules of Procedure and Evidence, such as the requirement

<sup>119</sup> Pia van de Zandt, ‘Heroines of Fortitude’, in Patricia Easta, ed., *Balancing the scales: rape, law reform and Australian culture*, 1998, p. 103.

<sup>120</sup> Special Rapporteur on violence against women, its causes and consequences, *Integration of the human rights of women and the gender perspective: violence against women*, U.N. Doc. E/CN.4/2003/75 (2003). However, many civil law countries permit victims or groups representing victims to institute criminal proceedings or to participate in the proceedings and some common law countries permit victims to commence private prosecutions, although under significant restrictions, or to participate in sentencing hearings.

<sup>121</sup> The Rules of Procedure and Evidence of the ICTY and ICTR have been revised on numerous occasions over the past decade.

to appoint experts in addressing crimes of sexual violence and to establish a victims and witnesses unit, can be transferred to national criminal justice systems to ensure that the rights and needs of victims and witnesses are respected.

The ICC operates in accordance with the general principle, as outlined in the Rules of Procedure and Evidence, that all organs of the Court “shall take into account the needs of all victims and witnesses ... in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence.”<sup>122</sup> This general principle has been expanded and developed into other more specific rules and procedures - including those discussed in the previous section relating to criminal procedure.

### **(a) Participation in proceedings and legal representation**

#### **Rome Statute, Article 68 Protection of the victims and witnesses and their participation in proceedings**

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

Amnesty International made extensive recommendations during the drafting of the Rome Statute and the Rules of Procedure and Evidence concerning the participation of victims in the proceedings, some of which are now reflected in the Rome Statute and in the Rules.<sup>123</sup> As outlined in Article 68 (3), victims of crimes before the ICC can participate in the proceedings, including through a legal representative. The Rules of Procedure and Evidence state that this participation may include “the making of opening and closing statements”.<sup>124</sup> Provisions for such statements by victims after a finding of guilt have been included in several common law jurisdictions in the form of “victim impact statements”.<sup>125</sup> This is one way that victims of gender-based violence can communicate their views to the court and have an opportunity to tell their story in a less regulated way than as a witness for the prosecution.

*“I asked for a lawyer, beside the Crown, and was refused. I also asked for a closed court and was refused ... I felt like I was on trial. My character was degraded, exaggerated ... It’s not fair how you only get a Public Prosecutor and the men have top barristers who tear you to shreds for a hefty pay packet. The system’s all wrong. I wasn’t even granted any compensation and I was pregnant when the assault took place. I wouldn’t go to court again – gross injustice!!”*

Female, raped when she was 18\*

\* Patricia Easteal, *Voices of the Survivors: Powerful and moving stories from survivors of sexual assault* (1994), p. 185

<sup>122</sup> ICC Rules of Procedure and Evidence, Rule 86: General Principle.

<sup>123</sup> See, for example, Amnesty International, *Memorandum to the International Law Commission: establishing a just, fair and effective permanent international criminal tribunal*, Part IV.A.1, June 1994 (no index number, available at: <http://www.amnesty.org/icc>); Amnesty International, *Making the Right Choices – Part II – organizing the court and guaranteeing a fair trial*, AI Index: IOR 40/011/1997, July 1997; Amnesty International, *Ensuring an effective role for victims – Memorandum for the Paris seminar, April 1999, supra*, n. 105, at Part II.

<sup>124</sup> ICC Rules of Procedure and Evidence, Rule 89(1).

<sup>125</sup> These countries include: Australia, Canada, Israel (in cases of sexual abuse only), USA: Ronit D. Leichtentritt & Bilha Davidson-Arad, ‘Construction of the victim impact statement for sexually abused minors: a dramaturgy approach’, 32 *British Journal of Social Work* 2002, p. 1067. Whether the manner in which such statements are used in practice is always fully consistent with the right of the convicted person to equality of treatment is an open question.



Victims can have a legal representative, who can participate in the trial if permitted by the judge. Separate legal representation for the victim can be important for ensuring the implementation of the procedures and evidentiary rules that protect the rights of victims. The victim's interests may be distinct from those of the prosecution, and separate representation for the victim helps to ensure adherence to the procedural and evidentiary rules that operate to protect the victim.<sup>126</sup> The Rules state that when deciding whether a victims' legal representative can question a witness, the Chamber must consider "the rights of the accused, the interests of witnesses, the need for a fair, impartial and expeditious trial".<sup>127</sup> In accordance with this requirement, the Rome Statute and the ICC Rules are designed to ensure that the right of victims to have their representative participate in the trial is consistent with the right of the accused to a fair trial.

## **(b) Protective measures, counselling and support for victims**

### **Rome Statute, Article 43 The Registry**

6. The Registry shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

*"One day I found myself crying on the phone to [a counsellor]. I felt so stupid after so many years but that was quickly replaced by the feeling of sheer relief of letting the monster out. I had counselling sessions that turned my life around. It's hard to know which is worse, to be pack raped in the summer before you turn seventeen or holding on to it for all that time. ... Now I feel less like an accomplice to a crime and more like one of the many who have been wronged. I now have support to face the pain and dare to be open and tender and vulnerable again and enjoy the sexuality we all have a right to."*<sup>128</sup>

As outlined in Article 43 (6) of the Rome Statute, the ICC has a Victims and Witnesses Unit that organizes protective measures for those at risk, counselling and other assistance for victims and witnesses appearing before the Court.<sup>129</sup> The Unit also assists victims in finding legal representation and participating in proceedings and informs them of Court decisions that may have an impact on their interests.<sup>130</sup> In a national justice system these support services are provided by a wide range of actors not necessarily associated with the criminal justice system. However, the ICC system of support within the justice system can be a useful model for domestic systems, where victims often do not come forward due to their perception of the justice system as a hostile and unsupportive environment.<sup>131</sup>

<sup>126</sup> Green, Copelon, Cotter & Stephens, *supra*, n. 106, p. 171.

<sup>127</sup> ICC Rules of Procedure and Evidence, Rule 91 (3) (b).

<sup>128</sup> Patricia Eastal, *Voices of the Survivors: Powerful and moving stories from survivors of sexual assault* (1994), at pp. 103-4.

<sup>129</sup> Amnesty International strongly supported the adoption of special measures or the establishment of such a unit and effective ICC Rules to govern the unit's activities. *See, for example, Memorandum to the International Law Commission, supra*, n. 125, at Part IV.A. and B; *Making the Right Choices – Part II – organizing the court and guaranteeing a fair trial, supra*, n. 125; *Ensuring an effective role for victims – Memorandum for the Paris seminar, April 1999, supra*, n. 101, at Part II.

<sup>130</sup> ICC Rules of Procedure and Evidence, Rule 16.

<sup>131</sup> Aolain, *supra*, n. 107, at p. 883.

## 5. Reparations for victims of gender-based violence

The duty of states to provide reparations to victims for acts or omissions which can be attributed to the State, including acts of violence against women, is well established in international law. This issue is examined in detail in *Making Rights a Reality: The Duty of States to Address Violence Against Women*, AI Index: ACT 77/049/2004, 3 June 2004.<sup>132</sup> Victims' right to reparations is further strengthened by new basic principles and guidelines on the right to a remedy and reparations for victims of gross violations of international human rights law and international humanitarian law (Van Boven Principles), adopted by the Commission on Human Rights on 13 April 2005, and the recently updated Set of Principles for the protection and promotion of human rights through action to combat impunity (Joinet Principles), adopted by the Commission on 15 April 2005 which cover most crimes addressed in this guide.<sup>133</sup>

Article 75 of the Rome Statute also expressly provides that the Court can order a convicted person to provide reparations to victims of their crimes. It is important that national laws provide that victims can seek and obtain reparations against the state or the perpetrator of their crime through either criminal or civil procedures. It is important that they are not precluded from doing so by statutes of limitations, which are absolutely prohibited for crimes amounting to genocide, crimes against humanity, war crimes and torture. Furthermore, it is also important that legislation provides for the full range of reparations, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

**Restitution** should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.

**Compensation** should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

- (a) Physical or mental harm;
- (b) Lost opportunities, including employment, education and social benefits;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Moral damage;
- (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

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<sup>132</sup> Available at: <http://web.amnesty.org/library/index/engact770492004>.

<sup>133</sup> U.N. Comm'n Hum. Rts. Res. E/CN.4/2005/L.48, 13 April 2005, adopting the Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law (Van Boven Principles) and recommending that they be adopted by ECOCOC and the General Assembly; U.N. Comm'n Hum. Rts. Res. E/CN.4/2005/L.93, 15 April 2005, endorsing the Set of Principles for the protection and promotion of human rights through action to combat impunity (Joinet Principles) and recommending that they be widely disseminated by the UN High Commissioner for Human Rights and "to take them into account in relevant United Nations activities, especially in the framework of United Nations missions, field presences, as well as human rights, institution-building and capacity-building activities, in cooperation with other parts of the United Nations system, States and other relevant actors".

*“Since the rape my life has basically been ruined. I am unable to work, my personality is totally different. I feel angry at a society that continually puts women down in a sexual way. I decided to apply for compensation ... So many people have been unsupportive of my claim and have tried to put me off ... Apparently ... it is not enough to have suffered a rape. You have to show that you have suffered a ‘loss’. Because there is no official tribunal, it goes to the [government minister’s] department. There are no guidelines as to what I may receive, if anything ... Apart from the financial side, I want the society to recognise what I’ve been through ... I just wish that society could start to nurture and look after its victims, not make it a continued nightmare for compensation.”<sup>134</sup>*

**Rehabilitation** should include medical and psychological care, as well as legal and social services.

**Satisfaction** should include, where applicable, any or all of the following:

- (a) Effective measures aimed at the cessation of continuing violations;
- (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim’s relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;
- (c) The search for the whereabouts of the disappeared, discovery of the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
- (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
- (e) Public apology, including acknowledgement of the facts and acceptance of responsibility;
- (f) Judicial and administrative sanctions against persons liable for the violations;
- (g) Commemorations and tributes to the victims;
- (h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.

**Guarantees of non-repetition** should include, where applicable, any or all of the following measures, which will also contribute to prevention:

- (a) Ensuring effective civilian control of military and security forces;
- (b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
- (c) Strengthening the independence of the judiciary;
- (d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;
- (e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;
- (f) Promoting the observance of codes of conduct and ethical norms, in particular

<sup>134</sup> Eastel, *Voices of the Survivors*, *supra*, n. 128, p. 187.

international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;

(g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;

(h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

## 6. Ensuring gender balance and expertise of staff

- **Goal:** Your country should adopt effective measures to increase the numbers of female staff, prosecutors and judges in the criminal justice system; take into account expertise on sexual and gender violence when selecting staff, prosecutors and judges; and appoint experts on sexual and gender violence.

Another unique aspect of the Rome Statute that can be used as a model for national systems is the requirement that some staff of the Court have expertise on sexual and gender violence. Furthermore, there must be a “fair representation” of female and male staff. Organizations working on behalf of the rights of women lobbied for the Rome Statute to include the dual standard with regard to the choice of staff- one based on the staff members’ gender expertise and one on their gender - in order to recognise that men can and should have expertise on sexual and gender violence.<sup>135</sup> The Rome Statute states that both the Registry and the Prosecutor must have regard to appointing “a fair representation of females and males”, as well as staff who have “expertise on specific issues, including, but not limited to, violence against women or children.”<sup>136</sup> In addition, Article 42 (9) requires the ICC Prosecutor to “appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children”. After lobbying by Amnesty International and other non-governmental organizations, the ICC Prosecutor has recently agreed to appoint a gender legal adviser.

*Both of the International Tribunals have demonstrated the importance of gender awareness amongst staff and judges. At the Rwandan Tribunal Judge Navanethem Pillay – the Tribunal’s only female judge – pursued inquiries with female witnesses about crimes of rape committed during the Rwandan genocide. Originally Jean Paul Akayesu was not charged with any crimes of sexual violence and no evidence of these crimes was sought by the prosecutor. As a result of Judge Pillay’s questioning, the indictment was amended by the prosecutor to include charges of rape and Akayesu was convicted of rape as an act of genocide.*

*Similarly, Justice Richard Goldstone, the first chief prosecutor at the Yugoslav Tribunal made the integration of gender a priority matter. As Rhonda Copelon states “he participated in the training sessions that addressed these questions; he attended – not just for the few moments of his own presentations but to learn – international women’s conferences addressed to gender issues; and he made clear his respect for the gender legal adviser.”<sup>137</sup>*

These criteria are also relevant to the election procedure of the judges of the ICC. In 2002 their application led to the election of seven female judges (out of eighteen judges in

<sup>135</sup> Copelon, *supra*, n. 74, at p. 217.

<sup>136</sup> Rome Statute, Art. 44 (2) and Art. 36 (8).

<sup>137</sup> Copelon, *supra*, n. 74, at p. 230.

total).<sup>138</sup> As at February 2005, 47% of staff in the Prosecutor's office are female. Given the huge under-representation of women in almost all national justice systems, states should adopt measures nationally to increase the proportion of female staff. States should also include provisions that take into account expertise on sexual and gender violence when selecting staff, prosecutors and judges. Evidence from both the Rwandan and Yugoslav tribunals shows that female staff, as well as staff with expertise on gender issues,<sup>139</sup> were instrumental in bringing many of the cases of sexual violence and adopting and implementing gender-sensitive rules of procedure and evidence for hearing such cases.<sup>140</sup>

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<sup>138</sup> This is a significant increase in the number of female judges in other international courts and tribunals: Spees, *supra*, n. 1, at p. 1233. For example, the International Court of Justice has had only one female judge in its history, the European Court of Justice has three female judges of 23 in total and the International Tribunal for the Law of the Sea has no female judges among its 20 judges.

<sup>139</sup> Copelon, *supra*, n. 74, at p. 217.

<sup>140</sup> Bedont & Hall Martinez, *supra*, n. 42, at p. 65.