(c) Commentary

The International War Crimes Trial of Anto Furundžija: Major Progress Toward Ending the Cycle of Impunity for Rape Crimes

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Abstract: This article reviews and analyzes the Furundžija Judgment rendered by the International Criminal Tribunal for the former Yugoslavia, the first international war crimes trial in history to focus virtually exclusively on rape. The judgment addresses what acts constitute rape, whether a non-physical perpetrator can be held individually criminally responsible for rape, and whether rape can constitute torture; it also broadens the purview of Common Article 3 crimes and considers acts which may constitute outrages upon personal dignity. This article discusses how these issues impact upon both international humanitarian law generally and gender jurisprudence specifically.

1. INTRODUCTION

The trial of Anto Furundžija began on 8 June 1998 and originally ended three weeks later on 29 June 1998. Subsequently, the Office of the Prosecutor (OTP) released two documents from Medica treatment centre relating to possible rape-trauma counseling received by the primary victim/witness in the case. The Trial Chamber determined that the late disclosure of these documents resulted in prejudice to the accused, and in a controversial Decision that prompted two *amicus* briefs from women's rights and human rights organizations, ordered the release of her medical, psychological, or psychiatric records and ordered the trial to be re-opened.[1] On 9 November 1998 the trial re-opened, and concluded four days later on 12 November. This was a comparatively short trial, lasting some

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1. Prosecutor *v.* Anto Furundžija , Decision, Case No. IT-95-17/1-T, 16 July 1998, at 8. The two documents were a statement from a psychologist from Medica Women's Therapy Centre concerning counseling Witness A received at Medica, and a redacted certificate from Medica referring to Witness A's consultation. Both documents had 1995 dates.

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11 total trial days, but, as demonstrated below, it was by no means an uncomplicated case.

On 10 December 1998, Trial Chamber II of the International Criminal Tribunal for the former Yugoslavia,[2] consisting of Judge Florence Mumba, Presiding, Judge Antonio Cassese, and Judge Richard May, rendered its Judgment against Anto Furundžija.[3] This case represents the third of four decisions rendered by a Trial Chamber of the Yugoslav Tribunal after a trial on the merits.[4] The Furundžija Judgment has important implications for future prosecutions of violations of the laws or customs of war, and it has increased significance for redressing crimes of sexual violence.

The mere fact that this crime – sexual violence against a single victim – was prosecuted in the International Criminal Tribunal for the former Yugoslavia represents an enormous moral and legal victory both for the Yugoslavian Tribunal and for women worldwide. The OTP, facing severe logistical and financial constraints and able to prosecute only the most serious violations of international humanitarian law, was criticized for prosecuting this case: the Tribunal's limited resources did not purportedly justify holding a trial for the murder or torture of a single individual and thus it similarly should not try an accused, particularly one who was neither a high level actor nor the physical perpetrator, for his alleged role in the sexual violence committed during the course of one day against a single victim. Perhaps in attempted atonement for the culture of investigative exclusion, prosecutorial neglect, and judicial silence surrounding rape crimes, perhaps out of revulsion of the facts and compassion for the survivor, or perhaps to emphasize the crime's egregiousness and the Prosecutor's awareness of the devastating impact sexualized violence has on society, the OTP maintained its principled approach in insisting that sexual violence – largely ignored by past international war crimes tribunals and in domestic courts – merited prosecution under its mandate, even when committed against a single victim, and even when the accused was not the physical perpetrator.[5]

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2. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. S/25704, annex (1993), *reprinted in* 32 ILM 1192 (1993) (hereinafter Yugoslav Statute or ICTY Statute).
3. Prosecutor *v.* Anto Furundžija, Judgment, Case No. IT-95-17/1-T, 10 December 1998.
4. Prosecutor *v.* Duško Tadić, Opinion and Judgment, Case No. IT-94-1-T, 7 May 1997 (hereinafter Tadić Judgment); Prosecutor *v.* Zejnil Delalić *et al.*, Judgment, Case No. IT-96-21-T, 16 November 1998 (hereinafter Čelebići Judgment); Furundžija Judgment, *supra* note 3; Prosecutor *v.* Zlatko Aleksovski, Judgment, 25 June 1999, Case No. IT-95-14/1-T (oral Judgment delivered 7 May 1999; *see* Prosecutor *v.* Aleksovski, Order for the Immediate Release of Zlatko Aleksovski, Case No. IT-95-14/1-T, 7 May 1999).
5. This is not to imply that the OTP should exhaust its resources by prosecuting numerous single victim cases. Clearly, the OTP must focus the majority of its efforts on prosecuting the political or military leaders who are most culpable, and others who have committed gross atrocities against a large number of victims. But this trial establishes important precedents, including serving as notice to low level

This case concerns a woman who was repeatedly raped by multiple means, a man forced to watch this assault as part of his interrogation, and charges of torture and other war crimes for the *actus reus* of rape. Crucial and indeed novel factual and legal issues were presented in this case. During the trial process (pre and post), the Defence alleged prosecutorial misconduct and judicial bias, the Trial Chamber considered issues of victim credibility when possibly suffering from Post Traumatic Stress Disorder (PTSD), the Trial Chamber allowed the Defence to subpoena confidential documents from a women's counseling centre, it considered whether a non-physical perpetrator could be held individually accountable for rape, decided whether forcible oral and anal penetration constitute rape under international law, ruled on charges of torture by means of rape, and adjudicated violations of the laws or customs of war committed against a combatant rendered *hors de combat* by a member of the same side in the conflict as the perpetrator.

1.1. Charges and key participants

The accused, a local commander of the Jokers, a special unit of the HVO (Croatian Defence Council), was charged in the Redacted/Amended Indictment, under Article 3 of the ICTY Statute, with violations of the laws or customs of war for torture and outrages upon personal dignity including rape. "[REDACTED]" in the Indictment is Accused B in the Judgment, and was a commander in one of the units of the HVO. Witness A is a Muslim civilian woman, and the primary victim in the case. Witness D in the Judgment, referred to as Victim B in the Indictment, was a HVO combatant who had been captured and detained by the ABiH (Army of Bosnia and Herzegovina) for several days. Upon release in a prisoner of war exchange, he was arrested by the Jokers and interrogated on suspicion of having betrayed them to the ABiH. He was also a friend of the sons of Witness A.[6] According to the edited version of the Indictment:

> 25. On or about 15 May 1993, at the Jokers Headquarters in Nadioci (the "Bungalow"), Anto FURUNDŽIJA the local commander of the Jokers, [REDACTED] and another soldier interrogated Witness A. While being questioned by FURUNDŽIJA, [REDACTED] rubbed his knife against Witness A's inner thigh and lower stomach and threatened to put his knife inside Witness A's vagina should she not tell the truth.
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> 26. Then Witness A and Victim B, a Bosnian Croat who had previously assisted Witness A's family, were taken to another room in the "Bungalow". Victim B had been badly beaten prior to this time. While Furundžija continued to interrogate Witness A and Victim B, [REDACTED] beat Witness A and Victim B on the feet with a baton. Then [REDACTED] forced Witness A to have oral and vaginal sexual intercourse

actors and perpetrators of sexual violence that they too may be held accountable for their crimes, even if their crimes do not amount to genocide or crimes against humanity.

6. *See especially*, Furundžija Judgment, paras. 71-74 and 262.

> with him. FURUNDŽIJA was present during this entire incident and did nothing to stop or curtail [REDACTED] actions.[7]

While the evidence at trial disclosed additional violence to that alleged in the Indictment, in limiting the charges against the accused to those contained in paragraphs 25 and 26 of the Indictment, the basis of the justiciable allegations essentially involve a day long interrogation conducted through use of sexual violence, first in the "large room" and then in the pantry.[8] It was never alleged that Furundžija himself physically perpetrated the rapes.

A charge of grave breaches had been withdrawn by the OTP, and thus there was no need to establish that the armed conflict was international in character. The two remaining charges were brought under Article 3 of the Statute for violations of the laws or customs of war. These were prosecuted as violations of Common Article 3 of the 1949 Geneva Conventions (Count 13, torture) and violations of Article 4(2)(e) of 1977 Additional Protocol II (Count 14, outrages upon personal dignity including rape.) As the *Tadić* Jurisdictional Appeal held, under the ICTY Statute, Article 3 is:

> a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5, more specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as 'grave breaches' by those Conventions, (iii) violations of common Article 3 and other customary rules on internal conflicts; (iv) violations of agreements binding upon the parties to the conflict.[9]

The *Tadić* Appeals Chamber on jurisdiction further held that the 'core' of Additional Protocol II, including the fundamental principles set out in Article 4, were undoubtedly part of customary law, applicable to internal or international armed

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7. Prosecutor *v.* Anto Furundžija, Amended Indictment (Redacted), Case No. IT-95-17/1-PT, 2 June 1998.
8. While this Indictment alleged only a couple of instances of rape, additional rape and other forms of sexual violence were testified to at trial, but the Trial Chamber did not consider, in determinations of guilt, additional evidence against the accused which were outside the scope of allegations contained in paras. 25 and 26 of the Indictment, charging vaginal and oral rape. *See* Furundžija Judgment, para. 81. (However, despite assertions to the contrary, it appears that the Trial Chamber did consider the sodomy committed against Witness A in the presence of the accused. *See e.g.*, paras. 87, 266). In addition to these assaults, further abuses, including sexual slavery, were committed against Witness A, who remained in the custody of the Jokers for several weeks. These additional crimes of physical, mental, and sexual violence were not the subject of this part of the Indictment. *See id.*, para. 89. Thus, while this trial focused on the rapes of a woman committed throughout one day, she was subjected to far more sexual violence than that which was charged in this redacted Indictment, which strictly concerned charges against Furundžija. Presumably, the larger Indictment, which remains sealed, charges Accused B and possibly others, with sex crimes committed against Witness A on this day and during her weeks in captivity.
9. Prosecutor *v.* Duško Tadić, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995 (hereinafter Tadić Jurisdictional Appeal), at para. 89.

conflicts.[10] Violations of Common Article 3 and Additional Protocol II can thus be used to sustain a charge brought under Article 3 of the Statute, regardless of whether the conflict is deemed international or internal. Common Article 3 provides:

> 1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction [...]
>
> To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; [...]
>
> (c) Outrages upon personal dignity, in particular humiliating and degrading treatment; [...] [11]

Expounding upon this, 1977 Additional Protocol II, at Article 4(2), prohibits torture and "[o]utrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault."[12] Protocol II, Article 4(1), protects "[a]ll persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted."[13] The language concerning which persons are protected by these provisions is especially important in analyzing whether a violation of the applicable provision can be committed against a member of the same side as the perpetrator and against a combatant who has been rendered *hors de combat* by that same side, since historically, war crimes could only be committed against members (civilian or combatant) of a hostile side.

1.2. Defence position

Most of the events in the Bungalow – in particular in the "large room" and pantry – are undisputed. As the Trial Chamber notes:

10. *Id.*, at paras. 98, 117, and Akayesu Judgment, *supra* note 4, at para. 610.
11. Common Article 3 (sometimes referred to as Article 3 common) is used to designate the identical language of Article 3 found in each of the four 1949 Geneva Conventions. *See, e.g.,* Convention Relative to the Protection of Civilian Persons in Time of War, adopted at Geneva 12 Aug. 1949, 6 UST 3516, 75 UNTS 287 [hereinafter Fourth Geneva Convention], art. 3.
12. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609 (hereinafter Additional Protocol II), at Art. 4(2)(a) & (e).
13. *Id.*, at Art. 4(1).

> The Defence does not deny that the accused was in the Holiday Cottage. There has been no denial that Witness A did in fact suffer the atrocities she claims were committed against her; the defence is simply that Witness A's recollection of the events is inaccurate and that the accused was not present when she was being assaulted.[14]

Furundžija's defence was simply that he was not present in the Bungalow during the time of the assaults, and thus did not participate in the interrogations. The crux of the dispute at trial was whether there was sufficient evidence to establish that Furundžija was present during the day long sexual assaults, and if so, whether his presence and his actions incurred individual criminal responsibility for the crimes alleged. More specifically, as discussed below, after disclosure of the Medica documents, the Defence claimed that Witness A was suffering from PTSD and received treatment for it, causing her memory to be affected and contaminated. As evidence, the Defence counsel pointed to inconsistencies in the testimony of Witness A.[15]

1.3. Re-opening of the case

Much of the trial was conducted in closed sessions, and there were numerous confidential submissions filed by both the Prosecution and Defence throughout the proceedings, so large portions of the pre-trial and trial proceedings remain sealed. On 5 June 1998, a mere three days before the trial commenced, the Trial Chamber issued a formal complaint asserting misconduct on the part of the Prosecution, primarily for certain tardy responses and late disclosure of specific contested documents.[16] As a result, the Chief Prosecutor apparently undertook a review of the case, which seems to be the impetus for the disclosure of the two Medica documents some three weeks later at the conclusion of the trial.[17] As a direct result of this disclosure, the Defence filed a motion to either strike the testimony of Witness A, or, in the event of a conviction, to receive a new trial.[18]

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14. Furundžija Judgment, at para. 68.
15. Furundžija Judgment, paras. 102 and 106.
16. *See* Prosecutor *v.* Anto Furundžija,, The Trial Chamber's Formal Complaint to the Prosecutor Concerning the Conduct of the Prosecution, Case No. IT-95-17/1-PT, 5 June 1998.
17. *See* Prosecutor *v.* Anto Furundžija, Prosecutor's Response to the Formal Complaint of the Trial Chamber Issued on 5 June 1998, Case No. IT-95-17/1-T, 11 December 1998, para. 20. In this Response, Chief Prosecutor Louise Arbour rejected the allegations of misconduct, stating: "[T]he issue lies at the cutting-edge of a developing body of jurisprudence concerning the balancing of important competing interests. Just how contentious is the disclosure of medical history of victims of sexual assault, is clear from the *amicus* briefs subsequently submitted in this case. Moreover, the Tribunal's Rules provide little or no assistance on the approach to be taken in this international jurisprudence." *Id.*, at para. 21.
18. *See* Prosecutor *v.* Anto Furundžija, Defendant's Motion to Strike the Testimony of Witness A Due to Prosecutorial Misconduct or, in the Event of a Conviction, for a New Trial, Case No. IT-95-17/1-T, 9 July 1998. These two documents were a redacted certificate dated July 1995 and a witness statement dated September 1995 from a psychologist from the Medica Women's Therapy Centre in Bosnia, concerning counseling or treatment Witness A had at Medica. *See* Furundžija Judgment, at para. 21.

Indeed, throughout trial proceedings, the Defence position had been that Witness A was mistaken in asserting the presence and participation of Furundžija during her mistreatment at the Bungalow. The Prosecution responded by arguing, amongst other things, that the OTP had informed the Defence that Witness A had visited Medica and that it had also provided the Defence with other documents having virtually identical and indeed more extensive information than that contained in the certificate and witness statement.[19] Ultimately, the late disclosure of these documents provided, along with the Trial Chamber's public and stunningly harsh rebuke of the Prosecution's conduct, an ideal opportunity for the Defence to claim prejudice and to attempt to discredit Witness A by alleging that she was suffering from memory deficiency as a result of the traumatic events she endured, and additionally that any counseling or treatment she received as a result of the rapes may have tainted her memory or testimony, and thus she was an unreliable witness and her testimony should be rejected.[20]

As noted previously, the Trial Chamber determined that the best remedy was to re-open the trial in order to allow the Defence the opportunity to recall any Prosecution or Defence witness regarding Witness A's possible medical, psychological, or psychiatric treatment or counseling and to also call new evidence to address these issues.[21] In this regard, the Trial Chamber stated: "[t]he accused's defence has been conducted on the basis that Witness A's memory was flawed. Any evidence relating to the medical, psychiatric or psychological treatment or counselling that this witness may have received is therefore clearly relevant and should have been disclosed to the Defence."[22]

Some of the issues raised by this Decision, including the protection of victims and witnesses, particularly victims of sexual violence, and whether the Trial Chamber was justified in re-opening the trial, were the subjects of two *amicus* briefs. One brief, submitted by eleven scholars representing various women's human rights organizations (Women's *amicus*), argued primarily that the information sought was privileged, that the trial should not be re-opened, and that re-opening the trial would serve to retraumatize the survivor.[23] The second

19. *See* Prosecutor *v.* Anto Furundžija, Prosecutor's Response to Defence Motion to Strike Testimony of Witness "A" or Order New Trial, Dated 09 July 1998, Case No. IT-95-17/1-T, 13 July 1998, at paras. 4-7, 9(ii)(iii)(vii), 10, 15-16, and 21.
20. *See* Defendant's Motion to Strike, *supra* note 18.
21. Decision, *supra* note 1, at 8. It is interesting to note that the Trial Chamber issued a confidential Order allowing the application of a *subpoena duces tecum* to Medica, and ordering that information recovered must be submitted to the Trial Chamber for *in camera* review. It is unclear if this Order was contested as being outside the authority of the Tribunal, or if counseling privilege claims were raised, but nevertheless, Medica responded to the *subpoena* and produced the documents. Furundžija Judgment, para. 25. Later, the Trial Chamber ordered the Prosecutor to disclose to the Defence the "identity of certain witnesses and the author of a certificate of psychological treatment." *Id.*, at para. 28.
22. Decision, *supra* note 1, at para. 18.
23. *See Amicus* brief submitted by Joanna Birenbaum *et al.* of the International Human Rights Programme, Faculty of Law, University of Toronto (Working Group on Engendering the Rwanda Criminal Tribunal), 4 November 1998.

amicus, filed by the Center for Civil and Human Rights (CCHR *amicus*) at Notre Dame Law School, argued, amongst other things, that the OTP does not have an automatic duty to disclose that a victim or witness has received medical, psychological, or psychiatric counseling or treatment; that traumatic events, whether or not resulting in a diagnosis of PTSD or rape trauma syndrome, are commonplace during wartime, and do not inherently undermine the ability of a victim or witness to testify accurately or truthfully; and that there should be a privilege afforded to rape counseling records.[24] The CCHR *amicus* also noted that the Defense had been told that Witness A had gone to Medica and that a video tape may be available of an interview,[25] and furthermore, it was reportedly obvious to all during pre-trial and trial proceedings that Witness A had received counseling,[26] so the late disclosure of the documents had not, in *amici's* view, in any way prejudiced the accused.[27]

While the Trial Chamber appropriately inferred that the *amicus* briefs would have been more useful if filed in a more timely manner since several points dealt with the re-opening of the case,[28] the Trial Chamber did nevertheless address issues of primary concern in the briefs, in particular recognizing the ability of persons who have experienced extreme trauma (which would include virtually all who had been victimized by war) and who may be suffering from either Post Traumatic Stress Disorder or Rape Trauma Syndrome, to testify credibly and reliably. In the Judgment, the Trial Chamber retreated from and indeed reversed certain previous inferences, thereby hopefully ensuring that its prior Decision does not prejudice trauma survivors who may give evidence before the Tribunal, and does not serve as detrimental precedent regarding the reliability of testimony of a person receiving psychiatric or psychological counseling or treatment, or regarding the release of rape counseling records to the accused.

2. FACTS ESTABLISHED AT TRIAL AND ACCEPTED IN THE JUDGMENT

As ultimately held in the Judgment to have been established beyond a reasonable doubt at trial, the facts of the case are as follows: Witness D, a HVO soldier, had been captured by the ABiH and detained for several days before being released. In mid-May 1993, Witness D was taken to the Bungalow, headquarters

24. *Amicus Curiae* Brief on Protective Measures for Victims and Witnesses of Sexual Violence and Other Traumatic Events, Submitted by the Center for Civil and Human Rights, Notre Dame Law School, November 6, 1998; Prosecutor *v.* Furundžija, Case No. IT-95-17/1-T, Order Granting Leave to File *Amicus Curiae* Brief, 11 November 1998 (hereinafter CCHR *amicus*).
25. Prosecutor's Response to Defence Motion to Strike the Testimony of Witness A, *supra* note 19.
26. Decision, *supra* note 1, at para. 18 ("In the course of the proceedings leading up to and including trial, it has been obvious that she received either counselling or treatment as a result of the events which she endured.")
27. CCHR *amicus*, *supra* note 24.
28. Furundžija Judgment, para. 107.

of the Jokers, by two members of the Jokers, including Furundžija, where he was subjected to physical violence during interrogation to determine whether he had betrayed them to the ABiH. A couple of days later, Witness A was arrested and taken to the Bungalow by several members of the Jokers.[29] Inside a large room, Witness A was interrogated by Furundžija. During the interrogation, Accused B forced Witness A to remove her clothing, and she remained naked before a large group of soldiers present in the room. The Trial Chamber noted that the purpose of the interrogation was to extract information, particularly information about her family, her connection with the ABiH, and her relationship with certain soldiers. A further purpose was to degrade and humiliate her.[30] Subsequently, the interrogation by Furundžija and the corresponding sexual violence physically perpetrated by Accused B was conducted in a pantry before "an audience of soldiers" who were apparently able to see the assaults taking place in the pantry.

During the same time, and parallel to the violence inflicted on Witness A, Witness D was interrogated by Furundžija and subjected to serious physical assaults by Accused B. In the Judgment, it was determined that the assaults by Accused B were perpetrated "in pursuance of" the verbal interrogation conducted by Furundžija, whereby the two were "divid[ing] the process of interrogation by performing different functions."[31] Further, Witness D "was made to watch rape and sexual assault perpetrated upon a women whom he knew, in order to force him to admit allegations made against her. In this regard, both witnesses were humiliated."[32] This is an important but subtle part of the Indictment, adjudicated facts, and Judgment: both Witness A and Witness D were regarded as victims of war crimes. In addition to the physical harm inflicted on each, Witness A was humiliated by the sexual violence itself, and presumably by having it perpetrated in front of both strangers and an acquaintance, and Witness D was humiliated by having to watch the rapes inflicted upon a woman he knew.

Concerning the reliability of Witness A, the Trial Chamber concluded that Witness A's "memory regarding material aspects of the events was not affected by any disorder she may have had [...] There is no evidence [...] that her memory is in any way contaminated by any treatment which she may have had."[33] Indeed, the Trial Chamber took pains to emphasize that "even when a person is suffering from PTSD, this does not mean that he or she is necessarily inaccurate in the evidence given. There is no reason why a person with PTSD cannot be a perfectly reliable witness."[34]

29. *See* Furundžija Judgment, at paras. 121-122.
30. *Id.*, at para. 124.
31. *Id.*, at paras. 128 and 130.
32. *Id.*, at para. 127.
33. *Id.*, at para. 108.
34. *Id.*, at para. 109.

In discussions concerning inconsistences in the testimony of Witness A, the Trial Chamber emphasized that "survivors of traumatic experiences cannot reasonably be expected to recall the precise minutiae of events, such as exact dates or times. Neither can they reasonably be expected to recall every single element of a complicated and traumatic sequence of events. In fact, inconsistencies may, in certain circumstances, indicate truthfulness and the absence of interference with witnesses."[35] The Trial Chamber thus determined that any inconsistencies in the sequence of events, dates, and descriptive identification of the accused, were minor and reasonable under the circumstances.

Consent was never an issue, and as the Trial Chamber noted, even had it been raised, "any form of captivity vitiates consent." Further, while Rule 96 of the Rules of Procedure and Evidence specifies that in cases of sexual assault no corroboration is required,[36] nevertheless the testimony of Witness D did confirm the testimony of Witness A.[37]

It is important to emphasize that Furundžija, while a commander of the Jokers and often referred to as the "Boss"[38] was not necessarily in a position of authority over Accused B. The OTP did not attempt to establish that Furundžija held a position of superior responsibility and therefore was responsible for crimes committed by persons under his authority. Instead, the allegations concerned whether Furundžija was present at the crime scene, and if present, whether his words, acts, or omissions played a direct and substantial role in the commission of the crime. Furundžija was charged exclusively under Article 7(1) of the Statute.

3. THE APPLICABLE LAW

Prior to a determination of guilt, the Prosecution must establish the existence of an armed conflict during the alleged commission of the crime(s) in question, and that there was a sufficient nexus between the conduct of the accused and the armed conflict.[39] In the present case, these criteria were readily established in regard to Witness A, with the Trial Chamber finding that during the time of the alleged crimes, an armed conflict existed between the HVO and the ABiH, and

35. *Id.*, at para. 113.
36. *See* Rules of Procedure and Evidence, IT/32/Rev. 14, 17 Dec. 1998. Rule 96, Evidence in Cases of Sexual Assault, states that "(i) no corroboration of the victim's testimony shall be required; (ii) consent shall not be allowed as a defence if the victim (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression. [...]"
37. Furundžija Judgment, para. 271.
38. *Id.*, at para. 78.
39. *Id.*, at paras. 59-60. *See also* Tadić Judgment, *supra* note 4, at para. 572: "For a crime to fall within the jurisdiction of the International Tribunal, a sufficient nexus must be established between the alleged offence and the armed conflict which gives rise to the applicability of international humanitarian law."

that there was sufficient evidence to link the offences committed by the accused against Witness A to the armed conflict.[40] However, the Trial Chamber failed to discuss the link between the armed conflict and the crimes committed against Witness D. Nonetheless, from the evidence accepted by the Trial Chamber, it is logical to conclude that a sufficient nexus did exist to establish that Witness D was subjected to a torturous interrogation as a direct result of the armed conflict.

3.1. Torture as a violation of Article 3

The Trial Chamber reviewed the prohibition of torture in the context of international humanitarian law and international human rights law, and noted that torture has acquired the status of a *ius cogens* norm, and its violation imposes upon states obligations *erga omnes*, such that the affirmative duty to prevent and punish torture flows toward the entire international community, individually and collectively.[41]

The *Furundžija* Trial Chamber, both in incorporating the standards articulated in the Torture Convention, and progressively developing the definition of wartime torture, held that during armed conflict, the constituent elements of torture require that the crime:

> (i) consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition
>
> (ii) this act or omission must be intentional;
>
> (iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person;
>
> (iv) it must be linked to an armed conflict;
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> (v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, *e.g.* as a de facto organ of a State or any other authority-wielding entity.[42]

This definition makes a positive contribution to international humanitarian law. First, it adds 'humiliation' to the list of prohibited purposes common to the torture regime.[43] In including humiliation, the Trial Chamber noted that the primary

40. Furundžija Judgment, paras. 59 and 65.
41. *Id.*, at paras. 144, 151, 153-156.
42. *Id.*, at para. 162.
43. It is troubling that there is an inference that there might be some "non-prohibited purposes" for torture. All torture should be prohibited, regardless of the reason behind the infliction of severe mental or physical pain and suffering, and regardless of whether state or non-state actors are involved.

purpose of international humanitarian law is to "safeguard human dignity."[44] A similar, and even more comprehensive, attribution was made by the Rwandan Trial Chamber in the *Akayesu* Judgment, which noted that "[l]ike torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person."[45] This inclusion appropriately affirms that torture, more specifically sexualized torture, is regularly committed to humiliate the victim, unwilling observers, and associated groups, particularly family members.

A second progressive aspect of the definition is the requirement that "at least one" of the persons involved in the torture process must be a state-actor "or any other authority-wielding entity." Thus, the other authority-wielding entity is broader than a state-actor, as torture is all too commonly committed by non-state actors. Further, by stipulating that "at least one" of the persons participating in the torture process must be involved allows prosecution of even the more attenuated participants,[46] and thus individual criminal liability is not limited to the person physically inflicting the pain or suffering or the person conducting the interrogation.[47] As the Judgment noted, a large number of persons tend to participate in, and have different functions regarding, contemporary instances of torture:

> [A]ccount must be taken of some modern trends in many States practicing torture: they tend to 'compartmentalise' and 'dilute' the moral and psychological burden of perpetrating torture by assigning to different individuals a partial (and sometimes relatively minor) role in the torture process. Thus, one person orders that torture be carried out, another organises the whole process at the administrative level, another asks questions while the detainee is being tortured, a fourth one provides or prepares the tools for executing torture, another physically inflicts torture or causes mental suffering, another furnishes medical assistance [...], another processes the results of interrogation known to be obtained under torture, and another procures the information gained as a result of the torture [...][48]

44. Furundžija Judgment, para. 162.
45. Akayesu Judgment, *supra* note 4, at para. 597.
46. The form of liability may differ, as to co-perpetrator, aider and abettor, etc., but "international law renders all of the [...] persons equally accountable, although some may be sentenced more severely than others, depending upon the circumstances." Furundžija Judgment, para. 254.
47. This would be consistent with the reasoning in the *Ministries* case, in which a defendant was convicted of a crime against humanity for stealing personal property of Jews in the concentration camp. The Tribunal stated: "It would be a strange doctrine indeed, if, where part of the plan and one of the objectives of murder was to obtain the property of the victim, even to the extent of using the hair from his head and the gold of his mouth, he who knowingly took part in disposing of the loot must be exonerated and held not guilty as a participant in the murder plan. Without doubt all such acts are crimes against humanity and he who participates or plays a consenting part therein is guilty." Ernst von Weizsaecker *et al.*, XIV Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 610-611(1948).
48. Furundžija Judgment, para. 253.

The Trial Chamber authoritatively recognized that rape may constitute torture. Further, the Trial Chamber noted that, depending on the facts, rape could be prosecuted in the ICTY as a crime against humanity, a grave breach, a violation of the laws or customs of war, or as genocide, when the requisite elements are met.[49] This same finding was made in regards to torture.[50] While sexualized torture and sexualized violence frequently overlap and may indeed at times be indistinguishable, they may also constitute wholly separate and independent crimes, particularly when committed for different purposes and through varied means or methods. Indeed, as evidenced in the *Akayesu* Judgment, sexual violence may constitute crimes against humanity when forming part of a widespread or systematic practice, and may constitute genocide when committed through a specific act with an intent to destroy members of a protected group.

3.2. Outrages upon personal dignity including rape as a violation of Article 3

After noting that rape is a violation of treaty law, in particular Article 27 of the Fourth Geneva Convention, Article 76(1) of Additional Protocol I, Article 4(2)(e) of Additional Protocol II, along with other implicit provisions,[51] the Trial Chamber then historically summarized its prohibition in customary law:

> The prohibition of rape and serious sexual assault in armed conflict has also evolved in customary international law. It has gradually crystallised out of the express prohibition of rape in article 44 of the Lieber Code and the general provisions contained in article 46 of the regulations annexed to Hague Convention IV, read in conjunction with the 'Martens clause' laid down in the preamble to that Convention. While rape and sexual assaults were not specifically prosecuted by the Nuremberg Tribunal, rape was expressly classified as a crime against humanity under article II(1)(c) of Control Council Law No. 10. The Tokyo International Military Tribunal convicted Generals Toyoda and Matsui of command responsibility for violations of the laws or customs of war committed by their soldiers in Nanking, which included widespread rapes and sexual assaults. The former Foreign Minister of Japan, Hirota, was also convicted for these atrocities. This decision and that of the United States Military Commission in Yamashita, along with the ripening of the fundamental prohibition of 'outrages upon personal dignity' laid down in common article 3 into customary international law, has contributed to the evolution of universally accepted norms of international law prohibiting rape as well as serious sexual assault. These norms are applicable in any armed conflict.[52]

49. *Id.*, at paras. 172-173.
50. *Id.*, at para. 141.
51. Furundžija Judgment, paras. 165-166.
52. *Id.*, at para. 168.

There is unambiguous and indisputable acknowledgement that rape is a war crime that has been prohibited by the laws and customs of war for centuries.[53]

After reviewing domestic jurisdictional treatment of what forms of sexual violence constitute rape, and noting that there is general consensus that forcible vaginal and anal penetration may constitute rape, but that a discrepancy exists as to whether forcible oral sex constitutes rape, the Trial Chamber decided that "the forced penetration of the mouth by the male sexual organ constitutes a most humiliating and degrading attack upon personal dignity [...] [S]uch an extremely serious sexual outrage as forced oral penetration should be classified as rape."[54] Indeed, the Trial Chamber noted that while a "greater stigma attaches to being a convicted rapist rather than a convicted sexual assailant[55] [...] forced oral sex can be just as humiliating and traumatic for a victim as vaginal or anal penetration."[56] Therefore, forcible or coercive fellatio, sodomy, and vaginal intercourse are all equally considered by the Trial Chamber to constitute the crime of rape.

The Trial Chamber determined that the "objective elements" of rape consist of: (i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person.[57] These elements should be interpreted in conjunction with the definition of rape espoused by the *Akayesu* Judgment of the Rwandan Tribunal, which defined rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."[58]

In considerations of guilt, the Trial Chamber necessarily determined which, if any, crimes were committed, and what type of individual criminal responsibility was attributable to the accused. Furundžija was charged with 7(1) individual criminal responsibility, even though he did not physically commit the rape, as a direct perpetrator of torture and outrages upon personal dignity including rape. When considering what form of participation for which the accused could be held accountable, the two primary forms considered by the Trial Chamber

53 *See e.g.* Th. Meron, *Rape as a Crime under International Humanitarian Law*, 87 Am. J. Int'l L. 424 (1993); K.D. Askin, War Crimes Against Women: Prosecution in International War Crimes Tribunals (1997); K. Askin, *Women and International Humanitarian Law, in* K.D. Askin & D.M. Koenig (Eds.), Women and International Human Rights Law, Vol. I (1999).

54. Furundžija Judgment, para. 183.

55. This reasoning can be applied to calls for greater specificity in pronouncing crimes of sexual violence, such that, e.g., Common Article 3 language of "outrages upon personal dignity" is not needed to prosecute crimes of sexual violence.

56. Furundžija Judgment, para. 184.

57. *Id.*, at para. 185.

58. Akayesu Judgment, *supra* note 4, at para. 688. It further elaborated: "[S]exual violence, which includes rape, [is] any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact." *Id.*

were aiding and abetting and co-perpetration. Under the terms of the Statute, 7(1) liability rests with anyone who "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime" within the jurisdiction of the Tribunal.[59] The terms "committed" and "perpetrated" are synonymous as used here in 7(1) and in the Judgment.

After examining a litany of post-World War II cases, the Trial Chamber determined that the *mens rea* for an aider and abettor does not have to share the intent of the perpetrator as "it is not necessary that the aider and abettor should know the precise crime that was intended [...]. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor."[60] Thus, knowledge (not intent) that one's act will assist the commission of the crime is the standard articulated in *Furundžija.* The *actus reus* of aiding and abetting consists of "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime."[61]

In a creative articulation of differentiating aiding and abetting the rape versus co-perpetration of torture by means of rape, the Trial Chamber stated that a co-perpetrator "partakes of the purpose behind torture," such that they act with the intent to obtain information, a confession, to punish, intimidate, coerce, or discriminate.[62] However, on the settled facts of this case, it is unclear why Furundžija was not also convicted as a co-perpetrator of outrages of personal dignity including rape, as evidence seems to indicate that, just as he partook of the purpose behind the torture, he similarly partook of the purpose behind committing outrages upon personal dignity, namely humiliating and degrading the victim.[63] Perhaps the difference is that in establishing guilt for committing outrages upon personal dignity including rape, the Prosecutor is not required to prove that the crime was committed for a particular reason, merely that an act or omission caused or resulted in humiliating and degrading treatment.

59. *See* ICTY Statute, *supra* note 2, at art. 7(1). In contradistinction, Article 7(3) imposes superior responsibility on civil or military leaders who "knew or had reason to know that the subordinate was about to commit [criminal] acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."
60. Furundžija Judgment, para. 246.
61. *Id.*, at para. 249.
62. *Id.*, at para. 252.
63. Indeed, the Trial Chamber notes that the "accused's presence and continued interrogation of Witness A encouraged Accused B and substantially contributed to the criminal acts committed by him." *Id.*, at para. 273. Upon reviewing the settled facts, Furundžija had an intent to inflict outrages upon the personal dignity including rape on Witness A.

4. JUDGMENT AND SENTENCE

In the Judgment, the Trial Chamber found Furundžija guilty as a co-perpetrator of torture of Witness A and Witness D, and guilty as an aider and abettor of outrages upon personal dignity including rape of Witness A. In regards to the physical and sexual torture of Witness A:

> The intention of the accused, as detailed above, was to obtain information from Witness A by causing her severe physical and mental suffering [...] The Trial Chamber finds that in relation to Witness A, the elements of torture have been met. Within the provisions of Article 7(1) and the findings by the Trial Chamber on liability for torture, the accused is a co-perpetrator by virtue of his interrogation of her as an integral part of the torture. The Trial Chamber finds that the accused tortured Witness A.[64]

The Trial Chamber found, consistent with other jurisprudence, that the accused "tortured Witness A" as a co-perpetrator, even though there was no evidence that he ever physically touched her. In regards to the crime(s) committed against Witness D:

> In relation to Witness D, the accused intended to extract information about his alleged betrayal of the HVO to the ABiH and his assistance to Witness A and her children [...] While the accused continued to interrogate Witness A and Witness D, Accused B beat them both on the feet with a baton. Witness D was then forced to watch Accused B's sexual attacks on Witness A [. . .] The physical attacks upon Witness D, as well as the fact that he was forced to watch sexual attacks on a woman, in particular, a woman whom he knew as a friend, caused him severe physical and mental suffering.[65]

Thus, although historically a war crime was not usually committed against a member of the same side as the accused, it is clear from the above that the Trial Chamber convicted Furundžija of crimes not only against Witness A, a member of the opposing side, but also against Witness D, a member of the same side. It is not clear, however, the reasoning upon which this is based, although presumably it is based upon the broad categorization of persons protected by Common Article 3 crimes, which prohibit certain crimes, including torture, committed against "persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat*".[66] During the time Witness D was detained, and indeed mistreated, by members of his own ethnic group, he was no longer taking an active part in the hostilities and had been rendered *hors de combat,* albeit by members of his group. While it appears Furundžija was legitimately convicted for crimes against Witness D, it would have been useful for the Trial Chamber to provide legal

64. *Id.*, at para. 267, 267(i).
65. *Id.*, at para. 267, 267(ii).
66. Common Article 3(1), *supra* note 11.

support and a reasoned analysis on this issue. Interpreting Common Article 3 to include imposing criminal liability for war crimes committed against not only an ally, but a member of the same armed forces as the perpetrator, may be too extensive, but it is nevertheless consistent with the Tribunal's practice of treating Article 3 of the Statute as an 'umbrella clause' capable of sustaining any charge amounting to a serious violation of international law which has a sufficient nexus to an armed conflict.

Furundžija was not similarly convicted of outrages upon personal dignity of Witness D. Although Witness D was not subjected to rape, he was, by the Trial Chamber's own admission, subjected to "severe physical and mental suffering," so arguably he could also have been a victim of outrages upon personal dignity, which is protected by Common Article 3.

As noted above, Furundžija was convicted of "outrages upon personal dignity including rape" of Witness A. In this regard, the Trial Chamber held that "the presence of the accused and his continued interrogation aided and abetted the crimes committed by Accused B. He is individually responsible for outrages upon personal dignity including rape, a violation of the laws or customs of war."[67]

In the sentencing part of the Judgment, Furundžija was sentenced to 10 years' imprisonment for Count 13, torture, and 8 years' imprisonment for Count 14, outrages upon personal dignity including rape.[68] The sentences are to be served concurrently instead of consecutively.[69] It is unclear why the torture charge warranted a heavier sentence than the outrages upon personal dignity including rape charge, although it appears to be because the accused was convicted of torture against two persons. In considering aggravating circumstances of each charge, the Trial Chamber noted:

> [T]he accused's role in the tortures was that of fellow perpetrator. His function was to interrogate Witness A in the large room and later in the pantry where he also interrogated Witness D, while *both* were being tortured by Accused B. In such situations, the

67. Furundžija Judgment, para. 274.
68. *Id.*, at IX, Disposition, at 112.
69. The reasoning here is not persuasive: "In the present case, Witness A was tortured by means of serious sexual assault and beatings, and the Trial Chamber has considered this to be a particularly vicious form of torture [...] On the other hand [...] the Trial Chamber has considered the fact that the sexual assault and rape amounted to a very serious offence. Therefore [sic], the sentence imposed for outrages upon personal dignity including rape shall be served concurrently with the sentence imposed for torture." *Id.*, at para. 295. For convictions relating to multiple or separate crimes, the sentences should be consecutive, not concurrent. When the accused is found guilty of the same act under different theories of liability or under articles which protect different interests (articles 7(1) and 7(3) or e.g., as grave breaches, crimes against humanity, or violations of the laws or customs of war), then concurrent sentencing is usually more appropriate. When the accused is convicted of a wholly separate crime (e.g., murder, rape, and plunder), then consecutive sentencing is not only appropriate, but preferable.) Similarly, if convicted of multiple crimes, e.g., four rapes, even if against the same victim, consecutive sentences should be imposed.

> fellow perpetrator plays a role every bit as grave as the person who actually inflicts the pain and suffering [. . .]
>
> In relation to the second count, the Trial Chamber bears in mind that the accused did not himself [physically] perpetrate acts of rape, but aided and abetted in the rapes and serious sexual assaults inflicted on Witness A. The circumstances of these attacks were particularly horrifying. A woman was brought into detention, kept naked and helpless before her interrogators and treated with the utmost cruelty and barbarity. The accused, far from preventing these crimes, played a prominent part of their commission.[70]

Due to the concurrent sentencing practice, as a practical matter, the outrages upon personal dignity including rape conviction was essentially subsumed within the torture conviction for the *actus reus* of rape. This is particularly unfortunate because this was not a single instance of rape. It was multiple instances of rape committed through various means. To accurately punish the guilty parties, each and every instance of sexual penetration should be charged in the Indictment, and when proven at trial, should warrant a conviction, as it would be disingenuous to seriously suggest that each act of rape forms the same transaction, and thus, a perpetrator, regardless of how many times and in how many ways sexually penetrates a victim, commits solely one continuing crime. The forced nudity, the publicness of the rape, and the physical violence inflicted during the course of the sexual violence could have each warranted charges of additional crimes and carried increased prison time. Here, it appears that the locations, and not the penetrations, served as the principal indicator for charges and convictions, as only two charges were brought (rape as an outrage upon personal dignity and torture by means of rape). Further, the practice of imposing concurrent sentences for collateral or separate offences should be amended. Even if the accused had been charged with and convicted of, for example, five separate crimes for each instance of penetration (thus each separate rape), with the determination that sentences are to be served concurrently instead of consecutively, this practice would essentially impose the same amount of detention time on a person convicted of multiple rapes as a person responsible for a single act of rape. The additional rapes – the additional violence and violations – merit not only additional convictions, but also increased prison time. Ignoring this reality serves to disregard the full scope of violence inflicted on the victims/survivors and sends the wrong message to convictees and potential offenders.

70. Furundžija Judgment, paras. 281-282 (emphasis added).

5. POST-TRIAL APPLICATION TO DISQUALIFY A JUDGE

On 18 December 1998, a British House of Lords set aside its previous decision in the *Pinochet* case amidst allegations of bias after one of the Law Lords was disqualified for purportedly failing to adequately disclose a close association he had with Amnesty International, an NGO that interceded in proceedings in the case.[71] Largely in reliance on this determination (which is in no way binding on the Tribunal), and wholly overlooking the fact that the particular *Pinochet* decision in dispute was a 3-2 decision, and thus disqualification of a swing vote had made the decision 2-2, whereas the Furundžija Judgment was unanimous and therefore disqualification of one judge would not affect the Judgment, after the *Furundžija* trial ended and the Judgment was pronounced, the Defence filed an application seeking to disqualify the Presiding Judge, Florence Mumba, for alleged judicial bias.

Essentially the Defence asserted that Judge Mumba was predisposed to convict the accused of a sex crime against a woman, as she was driven to advancing a legal and political agenda to protect and promote women's rights.[72] Judge Mumba, who the Application correctly noted, citing from her public Official Biography filed with the ICTY, had served as a representative of Zambia on the UN Commission on the Status of Women (CSW) from 1992-1995. During this time, the CSW had, in discharging its mandate, e.g., condemned the abhorrent practice of sexual violence committed during the Yugoslav conflict, urged the ICTY to establish a unit in the OTP to deal with war crimes against women (subsequently established and filled by Patricia Viseur Sellers, a Prosecutor in this case), and facilitated preparations for the Fourth World Conference on Women, which had a platform urging the prevention, punishment, and redress of war crimes against women.[73]

The Post-Trial Application further asserted that Judge Mumba should be disqualified because she had attended international law and women's rights conferences or meetings at the same time as various members of participants in the Women's *amicus* brief filed in the case, and a couple of conferences in which Patricia Viseur Sellers had also attended. Thus there was a strong suggestion in the Application that these associations or contacts, if any, between the various participants were improper and that these persons had colluded, along with

71. *See* C. Dyer, *Pinochet ruling set aside by Lords*, The Guardian (London), 18 December 1998, at 7; C. Randall, *British Panel Sets Aside Earlier Pinochet Ruling*, Newsday (New York), 18 December 1998, at A08. On 25 November 1998, a 3-2 decision of the House of Lords had held that Pinochet did not have immunity from prosecution. Lord Hoffmann, the disqualified Law Lord, was one of the three denying immunity, so his disqualification made the decision 2-2.

72. See Prosecutor v. Anto Furundžija, In the Bureau, Defendant's Post-Trial Application to the Bureau of the Tribunal for the Disqualification of Presiding Judge Mumba, Motion to Vacate Conviction and Sentence, and Motion for a New Trial, IT-95-17/1- A, 3 Februarry 1999.

73. *Id.*, at 13-16.

Judge Mumba, collectively and individually, to promote a common feminist agenda, and this agenda intruded into this case to the detriment of Furundžija.[74]

The predominate theme running throughout the Application is that Judge Mumba should be disqualified because she failed to recuse herself from this case, and presumably any case, which might promote or protect the rights of women or which might provide an opportunity to punish crimes committed exclusively or disproportionately against them. This theme is in direct contradiction to that espoused by 120 countries voting in favor of the Statute of the International Criminal Court,[75] adopted in Rome in July of 1998. In Article 36(8), the Statute requires not only that there be a fair representation of female and male judges on the Court, but also that judges with legal expertise in specific issues, including but not limited to violence against women or children, be taken into account. This exemplifies the international communities' recognition that expertise in a particular area, including gender-based violence, makes a positive contribution to the judicial process and the rule of law.

It is a grave disservice to insinuate that all judges who have a demonstrative commitment to the human rights of women or who advocate ending impunity for gender-based or sex-based crimes are necessarily prejudiced against persons accused of these crimes, and cannot be trusted to maintain intellectual integrity and judicial impartiality when deliberating on the accusations. To attribute bias or predisposition to judges who are experts in a particular field or who advocate certain legal or social positions, particularly those upholding or developing human rights standards, undermines the entire judicial system. Further, to attempt to remove a judge for her work toward redressing the human rights of women, something all judges should support and advance, is incredulous.

Unfortunately, instead of ruling on the merits of the Application, the Bureau not only rejected the Application on a technicality, but also included troubling language in its Decision:

> CONSIDERING that Rule 15(b) of the Rules, so far as it relates to the disqualification of a judge of a Trial Chamber, applies only to an application for disqualification made during the course of the trial and up to the time when Judgment is given,
>
> FURTHER CONSIDERING that the issue of whether Judge Mumba should have disqualified herself for the purposes of the Applicant's trial (upon which issue the Bureau expresses no opinion), *would be relevant to the fairness of that trial*,
>
> FURTHER CONSIDERING that the resolution of *the issue as to whether the trial was a fair one is not an issue which the Bureau has competence to decide*,

74. *Id.*, at 7-10, 18-22.
75. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9, *reprinted in* 37 ILM 999 (1998).

> HEREBY, without considering the merits of the Application or of the Motions, dismisses them upon the basis that they do not fall within the competence of the Bureau.[76]

Thus, the Bureau, instead of rejecting the Application on its merits, rejected it because temporal jurisdiction to consider the Application is not provided for in the Rules of Procedure and Evidence, drafted by the Judges. The language also implies, far from considering sanctions against the attorney for filing a frivolous Application, that the Application might possibly have merit had the Bureau had the competence to review it. This inference is a disservice to the Tribunal as a whole, to women and women's rights organizations in general, and to Judge Mumba in particular.[77]

6. CONCLUSION

The OTP rigorously prosecuted this trial in the face of criticism and other obstacles. This crime, and this defendant, deserved to be prosecuted and in so doing the integrity of the judicial process was upheld and the progressive development of international law was increased. For centuries, various forms of sexual violence committed during armed conflicts have been ignored, silenced, or marginalized. This trial represents the first international war crimes trial in history to focus almost exclusively on the *actus reus* of rape. The Judgment (though not necessarily the sentence) reflects the heinousness of the crime, and hopefully will serve as a deterrent for individuals assuming their random, isolated, or common crimes will go unnoticed and unpunished, or assuming no one will bother to prosecute rape crimes committed during periods of mass atrocities.

76. *See* Prosecutor *v.* Anto Furundžija, In the Bureau, Decision on Post-Trial Application by Anto Furundžija to the Bureau of the Tribunal for the Disqualification of Presiding Judge Mumba, Motion to Vacate Conviction and Sentence, and Motion for a New Trial, IT-95-17/1-T, 11 March 1999, at 2 (emphasis added).

77. This disservice extends throughout the international community. The United Nations, and the Commission on the Status of Women, should be particularly outraged at the allegations.