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## Gender Strategy is Not Luxury for International Courts Symposium: Prosecuting Sexual and Gender-Based Crimes Before International/ized Criminal Courts

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# GENDER STRATEGY IS NOT A LUXURY FOR INTERNATIONAL COURTS

A KEYNOTE ADDRESS  
BY PATRICIA VISEUR SELLERS\*

[Introduction by Susana SáCouto]

It is with tremendous pleasure and with great honor that I present to you our keynote speaker for today, Patricia Viseur Sellers. I first met Patty when I was clerking with the Officer of the Prosecutor of the Yugoslav Tribunal over a decade ago. I had read some of her work and knew that this was a person I wanted to learn from. When I finally got assigned to work on the *Furundzija* case<sup>1</sup> with her I was thrilled. Not only did I find out she speaks a number of different languages fluently, including Portuguese my native tongue, but I quickly realized she was one of the most articulate, passionate, and creative lawyers I have ever met. She quickly became and remains a source of inspiration to me and countless others who have been fortunate enough to work with her.

Throughout her career Patty has been at the forefront of the struggle to achieve justice for victims of sexual violence and gender based crimes. As the legal advisor for gender related crimes of the Yugoslav and Rwanda tribunals, she developed the legal strategies that led to the successful prosecution of, among other things, rape as a war crime, sexual violence as an act of genocide, and rape as torture. Indeed she tried the first case—the *Furundzija* case I mentioned—where rape was recognized as a war crime under the Geneva Conventions and was co-counsel and legal strategist in the case we heard about this morning, *Akayesu*,<sup>2</sup> the first international case to prosecute perpetrators of the Rwanda genocide and to hold sexual violence as an act of genocide and rape as a crime against humanity. Patty was also the legal advisor in the *Kunarac* case<sup>3</sup> and the first and only international case to date that led to a conviction of enslavement under crimes against humanity based in part on acts of sexual violence.

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1. Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment (July 21, 2000).  
2. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998).  
3. Prosecutor v. Kunarac, Kovac & Vukovic, IT-96-23/1, Judgment, ¶ 94 (Appeals Chamber, June 12, 2002).

The successful prosecution she guided and the landmark trial and appellate jurisprudence delivered by the ad hoc criminal tribunals for Yugoslavia and Rwanda are now widely recognized as the preeminent international legal standards for the sexual assault crimes of rape, torture, enslavement, persecution, and genocide. In addition to her tremendous contributions at the ad hoc tribunals, Patty took time in 2002 to serve as co-chief prosecutor responsible for the legal submissions of nine national teams from Southeast Asia in a symbolic trial held in Tokyo, Japan, that highlighted the absence of legal redress for thousands of “comfort women” who were enslaved by the Japanese army during World War II. More recently as the special legal advisor to the gender and women’s rights division of the United Nations Commission of Human Rights, a position she held throughout 2007, Patty advised on the enforcement of the Optional Trafficking Protocol and other international conventions drafted to protect the rights of women and children. During this period she played a critical role in the drafting of an amicus brief submitted in the *Lubunga* case currently, as you know, before the International Criminal Court.

Not surprisingly Patty has received numerous awards for her tremendous contributions. In 1999, she was awarded the prestigious Prominent Women in International Law awarded by the American Society of International Law, as well as the Martin Luther King Award from the University of Rutgers Law School. In 2001, she was awarded an honorary doctorate in law from the University of New York. In 2006, she became an honorary fellow for lifetime achievement from the Law School of University of Pennsylvania, and in 2007, she was awarded the U.S. National Bar Association Ron Brown International Lawyer Prize.

Now as if this list was not impressive enough, Patty in her spare time—I do not know what time that is—has authored over twenty articles on international criminal law. I could go on and on and on, but in the interest of time, time being a key issue today, I think I better stop and ask you to help me in giving Patty a very, very warm welcome in today’s keynote address.

[Patricia Viseur Sellers]

I want to thank American University Washington College of Law, the War Crimes Research Office, and, of course, Professor Susana SáCouto. I am amazed when I look around the room. We are definitely in the fourth generation of practitioners, activists, academics, and concerned people. It is not that I am getting older, but the field is just getting bigger and bigger and bigger. I see several former interns from the ICTY. There is Beth Van Schaack. I see Valerie Oosterveld. I am happy to see them with children. I see other people to whom I always looked up and now with whom I can be a colleague, like Rhonda Copelon. And I see, for one of the first times in the United States, that at least ten to fifteen percent of this crowd is male. Feminist legal conferences had always hosted a very (female) gendered crowd. In the first ten or fifteen years, and the only males present were men who walked into the wrong door and backed out. So, I welcome men into this field; it pertains to your humanity too. I am encouraged. I am a natural optimist, although I was ready to be pretty pessimistic today. Now, I think my speech might be more pessimistic than I actually feel.

Initially this conference was to occur last spring. As has been mentioned, it was to be a prelude to the American Society of International Law (ASIL) annual meeting. It was to be a gathering of participants to discuss the gender strategy of the International Criminal Court (ICC) and, in particular, to comment upon the persistent inability or reluctance of the ICC to appoint a legal advisor for gender—a position that is embedded within the Rome Statute.<sup>4</sup> I remarked to Professor SáCouto last spring, that while acknowledging the ICC's omission of not nominating a legal advisor, it was equally true that not one of the other courts or tribunals, ad hoc or mixed or internationalized or nationalized or whatever, employed such a person. So the recruitment policy of the ICC was only one example of a consolidating norm—namely that the concerted deployment of gender strategy is a luxury when adjudicating international crimes.

To comment, critique, or congratulate the ICC upon its gender strategy requires that the ICC be viewed within the sorority of judicial institutions. Thus, the sorority of institutions should also be susceptible to examination. Firstly, before we critique it, we must ask what is gender strategy? What does it do? Is it warranted? Is it a little passé? Or, is it redundant, subsumed within other tribunal strategizing? Is its presence just an absurd luxury?

Gender in the popular sense—not necessarily in the academic sense, and I am quite aware that I am in a university—is shorthand for women and girls. The word evokes comments, such as, “Oh, I read an article on gender,” or “Oh, they’ve got a new gender thing coming out, right?” It is readily understood that gender is a code word. Gender strategy, especially

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4. Rome Statute of the International Criminal Court, July 1, 2002, 2187 U.N.T.S. 90.

if gleaned from court decisions, case law, press releases, or public pronouncements of international courts or tribunals, is frequently reduced to: “Oh, were the female sexual assault charges (read rape) included in the indictment? Were they the basis of the conviction? How many years did he get (for rape)? Were there any female witnesses and how were they treated by the judges? What does the prosecutor do with *those* witnesses? How was the Victim and Witness Unit—were they really gender competent?”

Gender—and judicial institutions’ perception of gender strategies—inhabits Article 7(3)’s definition of gender that is inscribed in the Rome Statute.<sup>5</sup> Gender depends on the meaning given males and females in the context of a society. So we often speak in “reductionist” terms, reducing gender to women, and when we refer to gender strategy reducing it to sexual violence committed against women and girls. This is unfortunate. There is room for growth.

Repeatedly the raped female, the sexual assault victim/survivor, has become unforgivably reduced to embody gender strategy. This is reasonable to a certain extent. Recall in 1993, there was a clamoring demand for rape to be recognized as a war crime. This was a false demand because rape was already a war crime,<sup>6</sup> but glide over that. Alarms ensued in the book, *Shattered Lives*, about the genocide in Rwanda.<sup>7</sup> Later, there was a surge of girl soldiers in Sierra Leone and Uganda who were reduced to sexual slaves, with the misnomer of “bush wives.” There were the girls and women of Darfur, sexually tormented in their villages as they fled, and on paths in refugee camps that led to water.

Even though the reduction of gender strategy to sexual violence is too simplistic, there exists a basis of truth. However, there is an emerging, hopefully prevailing, norm that gender crimes under international criminal law and under humanitarian law should not be limited to prosecution of sexual violence. Gender crimes should not be limited, to what I call the “R word”: rape. Rape was just the beachhead; the proverbial landing at Normandy, so that we could wade ashore at Kigali. It was the enumerated provisional place where we chose to disembark while under fire and while behind enemy lines.

Remember the gender strategy at the International Criminal Tribunal for

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5. Rome Statute, *supra* note 4, art. 7(3) (“For the purpose of this Statute, 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.”).

6. For example, see the proceeding of the International Military Tribunal for the Far East Tokyo trial documents reprinted in *THE TOKYO WAR CRIMES TRIAL: THE COMPLETE TRANSCRIPT OF THE PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST* (R. John Pritchard & Sonia Zaide eds., 1981). See *1 TOKYO WAR CRIMES TRIAL: THE COMPLETE TRANSCRIPT, supra*, at 13; *20 TOKYO WAR CRIMES TRIAL: THE COMPLETE TRANSCRIPT, supra*, at 49, 605.

7. BINAIFER NOWROJEE ET AL., HUMAN RIGHTS WATCH, RWANDA: SHATTERED LIVES—SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE 103 (1996). See generally RAKIYA OMAR ET AL., AFRICAN RIGHTS & REDRESS, SURVIVORS AND POST-GENOCIDE JUSTICE IN RWANDA (2008)

the former Yugoslavia (ICTY) directly descends from the Western feminist banners that led the domestic campaigns against rape in the 1970s and 80s. Feminists exerted pressure on local, provincial, state, and federal authorities to take back the night, to stop rape, to remove the short skirt defense, to ensure witness protection, and to demand higher penalties for rape convictions. Early ICTY gender strategy was also born of a nascent slogan that “women’s rights are human rights.” In 1993, that assertion was not a given. Some thought it was an oxymoron. The early gender strategy at the ICTY teetered on the prelude and the aftermath of the Beijing Declaration. Only the Platform for Action tersely addressed the situation of women in war.<sup>8</sup> Recall that the treaty provisions of CEDAW<sup>9</sup> did not extol one word about sexual violence nor about war. Thus, the early calls for gender strategy came from limited, visible, public pronouncements.

Gender strategy, if interpreted as the legal ability to prosecute crimes committed against women and girls under humanitarian law, predates the Yugoslav Tribunal. Many of you, particularly former ICTY interns, know that when I get on my historical roll, I start in the 1400s and then zoom until about 1560. There is a little stop at 1830, and I really get hot around 1907 with the drafting of The Hague Conventions. We zip up to the Geneva Convention of 1929, and then I hang around World War II for a little bit. Then I dive into the Geneva Conventions of 1949 and the Additional Protocols of 1977. Today I will start in 1991 and 1992.

In the early 1990s, we are indebted to a unique mission of experts who were members of the Commission of Experts, headed by eminent international lawyer, Cherif Bassiouni. The team included Dutch lawyer Tenike Cleirin, American attorney Nancy Paterson, Irish attorney, Karen Kenny, interpreter Maja Drazenovic Carrieri from the former Yugoslavia, and American investigator Thomas Osario. Their combined work produced Annex IX of the Commission of Experts Report.<sup>10</sup> At that time, and maybe to date, the Commission’s work was the most thorough culling of real-time statements about wartime sexual violence assault information coupled with legal analysis. Annex IX should be considered an addendum or an extra chapter to Susan Brownmiller’s classic book on rape, *Against Our Will*.<sup>11</sup> The Commission of Experts’ Report supplemented the Secretary-General’s Report<sup>12</sup> to the United Nations Security Council. The

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8. U.N. Fourth World Conference on Women, Sept. 1995, *Beijing Declaration and Platform for Action*, Section E, ¶¶ 131-142, A/CONF.177/20 & A/CONF.177/20/Add.1 (Sept. 15, 1995).

9. Convention to End All Forms of Discrimination Against Women (CEDAW), 1249 U.N.T.S. 13, *entered into force* Sept. 3, 1981.

10. *Annex IX: Rape and Sexual Assault*, in FINAL REPORT OF THE UNITED NATIONS COMMISSION OF EXPERTS ESTABLISHED PURSUANT TO SECURITY COUNCIL RESOLUTION 780 (1992).

11. See SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975).

12. See The Secretary-General, *Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶ 9, U.N. Doc. S/25704 (1993), *reprinted in* 32 I.L.M. 1159, 1163 (May 3, 1993). In paragraph 9, the Secretary-

Secretary-General's Report benefited from letters, papers, studies, and all types of documents sent by female academics, women's groups, and individual women who urged the then Secretary-General, Kofi Annan, to enumerate crimes of sexual violence in the statute. Clamoring to create a gender competent Tribunal was not a one-person act. It never was. It could not have been.

In October 1993, the ICTY judges conferred to write the rules of procedure and evidence that would govern the tribunal's proceedings. Two female judges elected to the Yugoslav Tribunal, Judge Elizabeth Odio Benito from Costa Rica and Judge Gabrielle Kirk McDonald from the United States, listened to their own good judicial sense and to the wisdom of the papers submitted by civil society. They urged their fellow judges to include Rule 96 into the rules of procedure.<sup>13</sup> Rule 96 pertained to evidence of sexual assault. Subsection (i) allowed that the testimony of a sexual assault victim—the verbal testimony—did not have to be corroborated.<sup>14</sup> Rule 96 was groundbreaking. Indeed, it was a prototype, the first explicit procedural rule to govern sexual assault evidence at an international court or tribunal. It became a visible component of gender strategy.

Prior to the passage of national domestic rape shield laws analogous to Rule 96, rape survivors had to rely upon rape kits. They had to make sure that their skirt hems came down to their knees. A victim almost had to make sure that a police complaint was registered within 10.9 seconds of the ejaculation. However, Rule 96, a very simplistic international procedural rule firmly intoned that the testimony of a victim need not be corroborated. It thus fell upon the judges to weigh victim testimony and determine whether it was truthful or not; the victim did not need to summon bystanders, produce rape kits, or show that she was appropriately attired. During war, bystanders usually did not exist.

By 1994, Professor Theo van Boven, a former U.N. Special Rapporteur on Torture, was named the first Registrar of the Yugoslav Tribunal. Theo van Boven is a very good person. He consciously created human resource structures within the Victims and Witnesses Unit that facilitated the testimony of sexual assault survivors. He only stayed at the tribunal for a couple of months; he said he was only there symbolically. Symbolically, his imprint initiated the conscious devising of long-term gendered strategy in the Victim and Witnesses Unit. His successors followed suit.

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General's Report states, "[b]y a letter dated 9 February 1993, the Secretary-General submitted to the President of the Security Council an interim report of the Commission of Experts (S/2574), which concluded that grave breaches and other violations of international humanitarian law had been committed in the territory of the former Yugoslavia, including . . . rape . . ." *Id.*

13. See Rules of Procedure and Evidence (ICTY), R. 96: Evidence in Cases of Sexual Assault, *as amended by* U.N. Doc. IT/32 (Feb. 1, 1994); U.N. Doc. IT/32/Rev. 3 (1994); U.N. Doc. IT/32/Rev.3/Corr. 3 (1995); U.N. Doc. IT/32/Rev.22 (Dec. 13, 2001).

14. *Id.* R. 96(i) ("In cases of sexual assault . . . no corroboration of the victim's testimony shall be required.").

In 1994, after the naming of a Prosecutor, women's groups, especially European and American groups (both North and South Americans) pursued their discussions with both the Prosecutor and the Deputy Prosecutor at the ICTY. They urged the establishment of a separate prosecution unit for sexual assault investigations. Women's groups wanted to ensure that sexual assault investigations were a forethought, and not an afterthought. The vigilant contributors reiterated that the investigation and prosecution of sexual assault crimes were integral to the Tribunal's mandate.

As a result of that external and internal vigilance, in October 1994, ICTY Prosecutor Richard Goldstone and Deputy Prosecutor Graham Blewitt appointed me the Legal Advisor for Gender of the Office of the Prosecutor of the ICTY. Specifically, they tasked me to develop an investigation strategy and a prosecution strategy that would successfully address the sexual assaults that came under the statute.<sup>15</sup> Only one enumerated crime was explicitly of a sexual nature, rape, under crimes against humanity in Article 5. The conventional wisdom was that only rape as a crime against humanity would be prosecuted. That was to be it; however, they underestimated us.

From 1995 until early 1999, I performed the same function, as the Legal Advisor for Gender at the International Criminal Tribunal for Rwanda (ICTR). After my term, in 1999, ICTR Deputy Prosecutor, Bernard Muna, appointed two Legal Advisors for Gender in two years, including, a Canadian lawyer, Harriet Solloway.<sup>16</sup> Harriet and her predecessor had very limited tenures of about a year each. Neither occupied senior management positions. Even as Gender Legal Advisors, they commanded a limited sphere in which to set gender policy and monitor its execution.<sup>17</sup> In part,

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15. See *Second Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, § 2(B)(6), U.N. Doc. A/50/365-S/1995/728 (1995), reprinted in [1995] ICTY Y.B. 261.

16. During her brief tenure, Melanie Werret, ICTR Chief of Prosecutions, appointed Goretty Omala as the leader of the sexual assault team. In the Office of the Registrar, the second Registrar named Ms. Françoise Ngendahayo of Burundi as his advisor on Gender and Victim Assistance. The third, and current, Registrar, Mr. Adama Adeng, named Elsie Effange-Mbella as the Advisor on Gender and Assistance to Victims. Mr. Adeng's initiative successfully oversaw programs that would provide HIV medication to defense and prosecution witnesses who came before the Tribunal. In the Fifth Annual Report of the ICTR that covered the period of July 1999 until June 2000, the Registrar reported to the Security Council that "NGOs already operational in Rwanda have been selected to provide services in the various prefectures where the Tribunal has selected witnesses or identified potential witnesses. These NGOs provide services in legal guidance, psychological and medical rehabilitation and other forms of assistance such as resettlement. The unit monitors the provision of services to witnesses and potential witnesses by the contracted NGOs." President of the International Criminal Tribunal for Rwanda, *Fifth Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda*, ¶ 102(a), delivered to the Security Council and the General Assembly, U.N. Doc. S/2000/927, A/55/435 (Oct. 2, 2000), <http://69.94.11.53/ENGLISH/annualreports/a55/0066997e.htm>.

17. In the United Nations system, only staff posts of P-5 and above are senior management positions. Staff who are part of senior management can attend management meetings, set policy, supervise lawyers and investigators or undertake

frustration infused their departure, rather than any great sense of accomplishment of a gender policy.

Nonetheless, gender strategy factually broadened at the ad hoc Tribunals. It also legally broadened, pushing beyond the Western women's movement focus. For the Rwanda tribunal, Rakiya Omar's detailing of the massive rapes that happened during the genocide and Binaifer Nowrojee's writings in *Shattered Lives*<sup>18</sup> for Human Rights Watch shaped the ICTR gender policy. Most, Rwandan Tutsi women had been raped and many, then killed.<sup>19</sup> Accordingly, the Office of the Prosecutor at the ICTR had significant discussions with Rwandan women NGOs such as Avega,<sup>20</sup> Haguruka,<sup>21</sup> and Ministry of Family.

Here, at American University, Professor Dianne Orentlicher proposed that the Washington College of Law could undertake legal research for the Office of the Prosecutor. First, the War Crimes Research Office was under the supervision of Professor Orentlicher, then Dr. Kelly Askin, and Mr. Brian Tittmore, and now Professor Susanna SáCouto. The Prosecutor, as part of the development of a gender strategy, requested the War Crimes Research Office research issues such as slavery and forced prostitution. One inquiry was what did the prohibition of enforced prostitution mean under the Geneva Convention? These were some of the public aspects of the early gender strategy. They paralleled other less visible mechanisms of

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similar initiatives. I was not a P-5 and, formally, not in senior management. However, owed to the determination and support of Prosecutors Richard Goldstone and Louise Arbour, I attended the daily senior management meetings and had direct access to senior management during their tenures. The U.N. level of the staff position of any Legal Advisor for Gender is crucial. An effective advisor must be a member of the senior management and be unquestionably recognized by her or his U.N. colleagues as a senior manager.

18. See NOWROJEE, *supra* note 7.

19. In an internal illustration in the Fourth Annual Report of the ICTR that covered the period of July 1998 until June 1999, the Tribunal reported to the Security Council that

[i]nvestigations by the Office of the Prosecutor, conducted in December 1998, indicated that large-scale sexual crimes had been committed against Tutsi women. During the survey conducted in seven préfectures of Rwanda, the team on sexual assaults interviewed 360 women on complaints of rape. Based on information gathered, the Prosecutor believes that sexual crimes were planned, systematic and generalized and that they were committed with the active participation of the soldiers, the Interahamwe and government and administrative authorities at both local and national levels.

*Fourth Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda*, ¶ 54, delivered to the Security Council and the General Assembly, U.N. Doc. S/1999/943, A/54/315 (Sept. 7, 1999), <http://69.94.11.53/ENGLISH/annualreports/a54/9925571e.htm> (emphasis in the original).

20. See Avega-Agahozo, <http://www.avega.org.rw/English.html> Avega is a women's association originally composed of widows of the Rwandan genocide. The organization provides social and psychological services.

21. See Haguruka, <http://www.haguruka.org.rw/>. Haguruka is a women's legal aid organization based in Kigali, Rwanda, that provides legal assistance and representation to Rwandan women.

the strategy.

Soon after, I was named legal advisor by the Prosecutor, Mr. Goldstone. The then Chief of Investigation Al Millroy, an Australian, asked Nancy Patterson to head a team for sexual assault investigations. He also named Nancy, who worked as an attorney in the investigation units, to the investigation management committee. He informed the prosecutor that, “now, there would be no reason for Patti to attend our meetings.” The Chief of Investigations appointed Nancy to undercut any authority that I *might* acquire. Nancy headed of a team of investigators and lawyers. I was a solo act, in the Prosecutor’s secretariat. I did not have a team, but enjoyed the ear and support of the Prosecutor and his Deputy. I, thankfully, was assigned the occasional, dedicated feminist intern. However, Nancy and I met and resolved to work together, without making a big announcement of our collaboration.

For several weeks, Nancy and I, and certain members of her team poured over every in-house document, every NGO report, newspaper article, and each precedent that we could summon from international law. We produced an in-house report detailing several options of a strategy to investigate and prosecute the wartime sexual violence that occurred in the former Yugoslavia. We identified potential cases, but recognized that these potential cases could only be pursued if an NGO, social-psycho or psycho-social support network for the potential witnesses were to be put into place by the Office of the Prosecutor. As a first step, Nancy’s team undertook repeated missions to the field, lasting several weeks. She met numerous times with members of civil society. In particular, she and her team met with gynecologists, psychologists, other medical doctors, nurses, women’s collective members, social groups, Muslim leaders, police officers, and family members of potential witnesses. They returned to The Hague, replete with long mission reports from which emerged the start of a support network in the field.

I, on the other hand, in The Hague, pursued the international NGOs, IOs, other institutions, academics, and researchers. I, and the aforementioned dedicated interns, created a bibliography for the office lawyers and investigators on anything that had been written on wartime crimes against women. There was Kelly Askin’s book,<sup>22</sup> there were articles by Rhonda Copelon,<sup>23</sup> there were studies by Doctor Shana Swiss of Physicians for Human Rights,<sup>24</sup> a study by Jane Connors on rape laws around the world.<sup>25</sup>

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22. KELLY DAWN ASKIN, *WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS* (1997).

23. See Rhonda Copelon, *Women and War Crimes*, 69 ST. JOHN’S L. REV. 61 (1995); Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, 5 HASTINGS WOMEN’S L.J. 243 (1994).

24. See, e.g., Shana Swiss & Joan E. Giller, *Rape as a Crime of War: A Medical Perspective*, 270 JAMA 612, 612-615 (1993).

25. See, e.g., Jane Connors, *Violence Against Women*, in SOURCEBOOK ON FEMINIST JURISPRUDENCE 558 (Hilaire Barnett ed., 1997). Jane Connors was the Chief of the Women’s Rights Section at the U.N. Secretariat in New York in the mid-1990s. She is currently the Senior Human Rights Officer in the Office of the High

We examined each major and minor military trial since World War II. We studied the preparatory works of the Geneva Conventions, the Genocide Convention, and the Additional Protocols. In addition, outside trainers come to The Hague to give workshops, often to reluctant, predominately male, staff.<sup>26</sup>

We also produced internal papers and guidelines on the gender composition of investigation teams and prosecution teams. We developed guidelines on identifying, deterring, and resolving sexual or moral harassment inside the Office of the Prosecutor. Importantly, we set up a system to address internal complaints that might be brought. The basic premise of the “internal” gender strategy resided in the belief that if teams were not gender integrated, and male colleagues did not respect the work of female colleagues, then, it would be difficult to investigate and prosecute sexual violence. The other crucial prong of gender-integrated teams recognized the importance of investigation flexibility. In other words, investigations could field all male team members, or all female team members or mixed-gendered teams depending on what configuration would be more likely to obtain a witness’s evidence.<sup>27</sup>

These policy aspects were instituted. The gender integration of the investigation teams impacted the analysis of gendered or any sexual assault evidence, particularly as it pertained to troop movements, military hierarchy, or to questions of effective control of commanders versus the “frolic and detour” of individual soldiers.

As you could imagine, at times there was a backlash. Soon after Nancy and I produced our gender strategy report, a request came from a group of potential witnesses. The potential witnesses requested that they be interviewed by a team consisting of only female investigators, lawyers, and interpreters. In response, a team composed of female investigators was amassed to interview this group of sexual assault survivors located in a European country. Certain male investigators were openly adverse to the

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Commissioner for Human Rights, Treaty Branch U.N. Geneva.

26. Richard Goldstone, *Prosecuting Rape as a War Crime*, 34 CASE W. RES. J. INT’L L. 277, 280 (2002).

I was amazed at the gender bias that emerged in our international office. One of the precipitating factors was the high number of investigators amongst the staff of the office. For the most part, they were police and army officers. They came from many countries on five different continents. In all but one or two, there were no senior female investigators. Their culture was not such as to make them concerned about gender-related crime. It soon became apparent to me that it was essential to make them all aware that any form of gender discrimination or inappropriate language in the office would simply not be tolerated. I became convinced that if we did have an appropriate gender policy in the Office of the Prosecutor, we would have little chance of getting it right outside of the office.

*Id.*

27. Strategically composed teams were unabashedly used when gathering, say, military evidence. For example, potential British military witnesses were often interviewed by a lawyer, investigator, and military analyst that had similar military force experience.

“audacity” of the request and the mission composition that honored the request. Soon thereafter, Nancy was informed that she would no longer be needed on the investigation management team.

In another incident, I invited an outside expert counselor to speak to an investigation team notorious for its “masculinity” and its failure to fully integrate and respect their female colleagues. The expert spoke to the team about the importance of fairly and appropriately employing all of its investigators, male and female, in its investigations. The initiative came under our moral harassment policy. Almost immediately after the expert spoke to the team, the team lead investigator and the Chief of Investigations informed me that I was to be summoned to a surprise meeting before the Prosecutor and the Deputy Prosecutor. In a strange perversion of the internal gender policy, the Chief of Investigations, the Deputy Chief of Investigations, team leader, all males, complained that I had revealed to the outside expert, a psychologist, information about the team’s internal (gender) workings. To their credit, the Prosecutor and the Deputy Prosecutor understood that the crux of the issue was harassment of female team members that could adversely affect a teams’ ability to investigate, not any exposure of supposed confidential information about intra-team relationships.<sup>28</sup> The Deputy Prosecutor vetted each team member, in particular the woman who said she worked in a locker room atmosphere. I retained my position as Legal Advisor. One of the female investigators requested a transfer to another team.

Nevertheless, most of our colleagues were decent people. They were dedicated to their work. They were a lot of fun. I had fun. Yes, I really did have fun. Nancy refers to it as the best job she ever had. The ICTY traditionally has been a rewarding place to work, however, resistance to thoroughly normalizing the investigation and prosecution of sexual violence created a perceptible backlash. At times Prosecutor Goldstone verbally addressed the smoldering sexism to diminish its persistence. At times, throughout the years, when an anti-gender bias swelled, gender advocacy was deigned almost a personal problem of certain women and a few committed men. Imagine, such arduous struggles at a tribunal that *appointed* a Legal Advisor for Gender who enjoyed meaningful, yet intermittent, support from colleagues on the inside, and, as importantly, support from individuals and groups on the outside. Regrettably, I am sure that each woman sitting in this room, who is in a professional situation, grasps my meaning.

Irrespective of the gender atmosphere at the ICTR and ICTY, gender strategy did beget utterly crucial jurisprudence on rape under crimes against humanity,<sup>29</sup> rape as a violation of the laws and customs of war,<sup>30</sup>

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28. The psychologist had signed a confidentiality agreement prior to speaking to the team. The probative confidentiality agreement was produced at the meeting.

29. See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998).

30. See *Prosecutor v. Kunarac, Kovac & Vukovic*, Case No. IT-96-23-T & IT-96-23/1-T, Trial Chamber Judgment (Feb. 22, 2000).

sexual violence as a component of the crime genocide<sup>31</sup> and the crime of direct and public incitement to commit genocide;<sup>32</sup> sexual violence, including rape as torture, both under crimes against humanity<sup>33</sup> and as a violations of the laws and customs of war,<sup>34</sup> such as outrages upon personal dignity<sup>35</sup> or as cruel treatment under Common Article 3;<sup>36</sup> sexual violence under crimes against humanity, as enslavement,<sup>37</sup> persecution,<sup>38</sup> or inhumane acts.<sup>39</sup>

There exists room for future interpretation of the legal gender parameters, such as the factual provisions of the genocide charges recently named in the Karadzic indictment. Also, it should not be overlooked that the ICTY and the ICTR, and to a certain extent the Special Court for Sierra Leone, extended the factual breadth of the modes of liability, such as the indirect mode of command responsibility as well as the direct responsibility modes of instigation, aiding and abetting, committing, and a complex form of committing, commonly called joint criminal enterprise.

Joint criminal enterprise connects perpetrators not because they are physically present at the crime scene, but because they participated, along with others in the overall commission of the crime. Perpetrators, such as military or political leaders, can be geographically distant from acts of sexual violence that are physically committed by other participants yet still be found criminally liable. Sexual violence that is reasonably foreseeable in view of the common plan to commit the originally intended crime brokers ground for individual liability. Joint criminal enterprise has led to convictions for crimes<sup>40</sup> of sexual violence.<sup>41</sup> Therefore, when it is claimed

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31. *See* Prosecution v. Muhimana, Case No. ICTR-95-1B-T, Judgment (Apr. 25, 2005); Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-T, Judgment (June 17, 2004).

32. *See* Prosecutor v. Nahimana, Barayagwiza & Ngeze, Case No. ICTR-99-52-T, Judgment (Dec. 3, 2003).

33. *See* Prosecutor v. Kvočka et al., Case No. IT-98-30/&-T, Judgment (Nov. 2, 2001).

34. *See* Prosecutor v. Delić et al., Case No. IT-96-21-T, Judgment (Nov. 16, 1998).

35. *See* Prosecutor v. Furundžija, Case No. Case No. IT-95-17/1-T, Judgment (July 21, 2000).

36. *See* Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment (May 7, 1997).

37. *See* Prosecutor v. Kunarac, Kovac & Vuković, Case No. IT-96-23-T & IT-96-23/1-T, Trial Chamber Judgment (Feb. 22, 2000).

38. *See* Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment (Aug. 2, 2001).

39. *See* Prosecutor v. Brima, Kamara, Kanu, Case No. SCSL-04-16-A, Appeal Chamber Decision (Feb. 22, 2008).

40. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War arts. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 135.

41. *See* Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment (Mar. 22, 2006); Prosecutor v. Kvočka, Case No. IT/98-30/1-T (Nov. 2, 2005); Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment (Apr. 19, 2004); Prosecutor v. Krstić, Case No. IT-

by a lawyer or investigator that no evidence exists to connect a perpetrator to sexual violence, it must be asked, not only what crime is to be charged, but what mode of liability is alleged or omitted. It is almost impossible for an accused to participate in criminal activity that concomitantly generates sexual violence, and not be cogent that the sexual violence was reasonably foreseeable.

The drafting of the of the ad hoc Tribunals statutes caused the International Law Commission to finally dust off the Draft Code of Offenses against the Peace and Security of Mankind.<sup>42</sup> Recall, that in November 1947, the General Assembly gave the International Law Commission a homework assignment, to draw up the Draft Offenses. For forty years, no women were appointed to the ILC and not once, in their deliberations did the commission consider the “R” word, “rape,” as part of the Draft of Offenses. However, once the ad hoc Tribunals were created the Draft Offenses enumerated the crime rape under the Crimes against humanity provision. Eventually, the statutes of the ad hoc Tribunals and the ILC’s revised Draft of Offenses prompted the Preparatory Committees (prep coms) that Professor Rhonda Copelon addressed, to negotiate the inclusion of rape and other acts of sexual violence into the Rome Statute. The prep coms of course led to the permanent court, the ICC.

The successes of the ICTY and the ICTR—meaning the arrest of suspects, the adjudication of crimes based on individual responsibility, and the delivery of jurisprudence that countered impunity including impunity for sex-based crimes—are great. The success is imperfect, when the story of each witness’s interaction with the Tribunal is examined. Nevertheless, the establishment of the ICC would not be possible if the ICTY and ICTR had not existed. In turn, the ICTY and the ICTR would not have been possible if the Cold War had not ended. Even if the Cold War had ended, it would not have been possible if there had not been the eventual leadership of Kofi Annan as U.N. Secretary-General during the prosecutions phases. Still it would have been impossible, even with the support of the Secretary-General, if not for the persistence of judges, prosecutors and the registrars, and the witnesses.

So, we arrive at the Rome Statute,<sup>43</sup> whose provisions, from an ad hoc tribunal point of view, resemble legal heaven, replete with dessert. Article 7<sup>44</sup> of the Rome Statute provides for crimes against humanity with expanded provisions for sexual violence. In Article 6,<sup>45</sup> the enumeration of the crime of genocide, it is acknowledged that sexual violence could be a factual component that satisfies a legal requirement of genocide.

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98-33-T, Judgment (Aug. 2, 2001). *Cf.* Prosecutor v. Krijsnik, Case No. IT-00-39-A, Appeals Judgment, ¶¶ 162-175 (Mar. 17, 2009).

42. *See Report of the International Law Commission to the General Assembly, in 2 Y.B. INT’L. L. COMM’N 123, 134-37, U.N. Doc. A/1858 (1951).*

43. Rome Statute, *supra* note 4.

44. *Id.* art. 7.

45. *Id.* art. 6.

Article 21(3)<sup>46</sup> of the Rome Statute is prodigious. In that Article, the term Court, should be understood to address, each entity of the Court—the Chambers, the Registry and the Office of the Prosecutor. Each must share the responsibility to vigilantly gauge whether adverse gender discrimination results from the application or interpretation of substantive or procedural international laws. Noteworthy, Article 42(9), of the Rome Statute states that “the Prosecutor shall appoint advisers with legal experience on specific issues, including, but not limited to, sexual and gender violence and violence against children.”<sup>47</sup> The Rome Statute is supplemented by the elements of the crime document. Although not absolutely binding on the judges, there is less need to debate the elements of crimes, such as rape. Does rape include lack of consent as an element or not? Lastly, the ICC has procedural and evidentiary rules that address sexual violence; prototype Rule 96 now has a range of first cousins.<sup>48</sup>

Certainly the interpretation of the elements, rules, procedures and practices is still open. Be aware, much resides in the interpretation. How crimes, rules, procedures and practices are interpreted will depend upon judicial deliberation. Judges can only deliberate upon the evidence and legal matters that are properly before them. Judges cannot incorporate evidence of sexual violence that is not submitted. The statutory and regulatory framework of the ICC, on its face, provides a structure to institute a competent, functioning gender strategy. The fruit of the ICC prep coms and the work of its sister judicial institutions have primed the proverbial “well” for a potent ICC gender strategy. Even a “reductionist” gender strategy that primarily concerns sexual violence appears embedded in the ICC constitutive documents. This is good. Nevertheless, we should endeavor to ensure that the ICC gender strategy is not “reduced” to only the sexual assaults contained in the Rome Statute.

I will return to the ICC, but, will now briefly speak about the sister institutions. After having set the pace with the holdings of the *Akayesu* judgment,<sup>49</sup> the Office of the Prosecutor at the ICTR has not had a Legal

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46. *Id.* art. 21(3).

47. *Id.* art. 42(9).

48. See Rule 96: Evidence in Cases of Sexual Assault, Rules of Procedure and Evidence (ICTY), IT-32-Rev.22 (as amended Dec. 13, 2001).

49. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998). Notably, in the Sixth Annual Report of the ICTR to the Security Council, the Office of the Prosecutor does not indicate that there is a Legal Advisor for Gender, even though it is stated that

[s]ince the Akayesu judgement, investigations of sexual violence have been expanded. Experience has shown that assigning a sexual assault investigator to each team resulted in greater efficiency. Hence, during the reorganization, the Sexual Assault Team was decentralized. However, a core unit is still in place to provide coordination and supervision, as this is a highly sensitive and complex domain.

*Sixth Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda, ¶ 108, delivered to the Security Council and the General Assembly, U.N. Doc. S/2001/863, A/56/351 (Sept. 14, 2001), available at <http://www.icttr.org/ENGLISH/annualreports/a56/351e.pdf>.*

Advisor for Gender since the turn of the millennium. Gender injustice has resulted in the prosecution's mishandling of sexual assault charges in the *Cyangugu* case<sup>50</sup> and its decision not to appeal the acquittal of sexual assaults in the *Kamuhanda* case.<sup>51</sup> Lately, its sexual assault jurisprudence has been resurrected with *Nahimana*,<sup>52</sup> *Gacumbtsi*,<sup>53</sup> and *Bagasora*.<sup>54</sup> They are sexual assault landmarks, that, hopefully, will continue to be affirmed in future ICTR cases. However, the certain short-comings are regrettable, almost unforgivable.

An unfortunate ICTR judicial decision occurred in the *Kajelijeli* case.<sup>55</sup> A three judge ICTR Trial Chamber unanimously found the factual existence of rampant sexual violence. The majority, nonetheless, acquitted the accused of sexual violence. Their decision diverged along gender lines. Judge Arlette Ramaroson, the only female judge on the bench, penned a vociferous dissent. She must have been mad when she wrote it. One can almost sense the trembling pages of her dissent rife with indignation that the accused juvenile Kajelijeli was not found liable for those sexual assaults.<sup>56</sup> Judge Ramaroson said the majority's acquittal for the sexual assaults was erroneous. She argued that the acts of rape were undifferentiated from the killings that the majority attributed to this accused. The Trial Chamber's gender-laden view was compounded, later, by the prosecutor's failure to file a timely notice of appeal challenging the acquittal of the rapes. Subsequently, the Appeals Chamber further compounded the prosecutor's grave failure. The Appeals Chamber exercised their discretion and rejected the late filing by the prosecutor, holding that the application lacked good cause, even though the prosecutor pleaded that the issue was meritorious and of significance to this case and to the jurisprudence of the ICTR.<sup>57</sup>

Thus the ICTR Appeals Chamber's undue procedural strictness allowed the divisive Trial Chamber's holding to remain intact, even though the acquittal for the sexual violence rested upon a split decision. The

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50. Prosecutor v. Ntagerura, Bagambik, Imanishimwe & Munyakazi, Notice of the Prosecutor to Withdraw All Pending Motions, Case No. ICTR-99-46-T (Feb. 14, 2000); Prosecutor v. Ntagerura, Bagambik, Imanishimwe & Munyakazi, Transcript, Case No. ICTR-99-46-A (Feb. 14-13, 2001). The case is commonly called the *Cyangugu* case.

51. Prosecutor v. Kamuhanda, Case No. ICTR-95-54A-T, Judgment (Jan. 22, 2004).

52. Prosecutor v. Nahimana, Barayagwiza, & Ngeze, Case No. ICTR-99-52-T, Judgment (Dec. 3, 2003).

53. Prosecutor v. Gacumbtsi, Case No. ICTR-2001-64-T, Judgment (June 27, 2004).

54. Prosecutor v. Bagasora et al., Case No. ICTR-98-41-T, Judgment (Dec. 18, 2008).

55. Prosecutor v. Kajelijeli, Case No. ICTR 98-44A-T, Trial Chamber Judgment and Sentence (Dec. 1, 2003).

56. See Prosecutor v. Kajelijeli, Case No. ICTR 98-44A-T, Dissenting Opinion of Judge Arlette Ramaroson (Dec. 1, 2003).

57. Prosecutor v. Kajelijeli, Case No. ICTR 98-44A-A, Appeals Chamber Decision on Prosecution Urgent Motion (Jan. 23, 2004).

dissenting judge found the majority's holding lacked a basis in fact and in law. What does an appellate chamber do other than to examine the interpretation of the law that trial chamber judges cannot decide upon, especially in the face of a grave split?<sup>58</sup> A gender advisor and strategy at the Office of the Prosecutor could have immediately followed up on the split decision. Likewise, the Appeals Chamber lacked a gender competent strategy or an advisor to urge the acceptance of the filing, with proper admonishment for the prosecutor's lack of punctuality. The legal resolution of the split *was* of general interest to international law. Had there been a legal advisor, perhaps there might have been a more lucid appellate opinion.

At the Special Court for Sierra Leone, the "*Civil Defense Forces (CDF)*" decision,<sup>59</sup> and the first decision, the "*Armed Forces Revolutionary Council (AFRC)*" case<sup>60</sup> were strained by incoherent gender policy. The Special Court enjoyed, what I would say, was a very gender competent Prosecutor, David Crane. He incorporated policies and modalities to investigations of crimes committed against women. He intended to prosecute gender related crime and sexual assaults owed to their plethora during the Sierra Leone conflict and endeavored to charge even more broadly than the ICTY prosecutions. He had the statutory basis to do so.<sup>61</sup> David Crane also ensured a continual liaison between the Office of the Prosecutor and women's groups in Sierra Leone as well as a liaison between the Truth Commission of Sierra Leone and the Office of the Prosecutor. Perplexingly, the Office of the Prosecutor did not appoint a Legal advisor for Gender to consolidate and to execute gender policies and the attendant legal positions in the submissions of evidence or responses to challenges before the Trial Chambers. Errors occurred.

The failure to specifically charge sex-based crimes resulted in the Trial Chamber ruling inadmissible any testimony concerning sexual assault in the *CDF* case. The decision literally cut the witnesses in two. Witnesses could testify about other crimes, but could not broach sex-based crimes, even if they themselves had been subjected to sexual violence. It

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58. The standards of the appellate review as prescribed in article 24(1)(a) and (b) of the ICTR Statute permit appeals to be heard on the grounds of an error of law that would invalidate a Trial Chamber's decision, or on an error of fact that has occasioned a miscarriage of justice. Article 24(2) of the ICTR Statute grants the Appeals Chamber the ability to affirm a factual finding or a legal holding and to uphold, reverse, or revise the decisions taken by the Trial Chambers. *See* Statute of the International Tribunal for Rwanda arts. 24(1-2), Nov. 8, 1994, 33 I.L.M. 1598 [hereinafter ICTR Statute].

59. Prosecutor v. Fofana & Kondewa, Case No. SCSL-04-14-T, Judgment (Aug. 2, 2007)

60. Prosecutor v. Brima, Kamara & Kanu, Case No. SCSL-04-16-T, Judgment (June 20, 2007).

61. In addition to domestic crimes of sexual violence, Article 2(g) of the Statute of the Special Court lists rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence as a crime against humanity. *See* Statute of the Special Court for Sierra Leone art. 2(g), Jan. 16, 2002, 2178 U.N.T.S. 145. Article 3(e) lists outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution, and any form of indecent assault. *Id.* art. 3(e).

bifurcated the witnesses.<sup>62</sup> Once you lead a bifurcated witness's evidence, her credibility is generally troubled. She really wants to say something additional, something else that cannot be admitted. Her mouth twitters and she looks nervous. She might look like she is less than truthful.

The *AFRC* case, also, was very telling.<sup>63</sup> It alleged sexual assaults committed during the course of a prolonged brutal internal armed conflict. The prosecutor charged sexual violence under the crimes against humanity provisions of rape, sexual slavery and other forms of sexual violence, and inhumane acts under war crimes provisions consisting of terrorism, outrages against personal dignity and pillage. The Trial Chamber heard numerous witness accounts of the sexual violence, such as public rapes and abduction of young women and girl children by rebel forces for purposes of sex. They heard evidence of forced marriages, a phenomenon denominated "bush wives"—I hope we find a better term for that soon. The Trial Chamber also heard numerous occurrences of sexual mutilations and sexual threats.

Several unfortunate technical errors occurred and plagued the case. These errors are highlighted not to demonstrate the functioning of procedural faults, but rather to underscore that gender strategy is not a luxury.

First, the trial chamber dismissed the charges brought under count 7, "sexual slavery" and the residual clause "other forms of sexual violence." It deemed the charges duplicitous and vague, opining that it should have been charged as sexual slavery *or* sexual violence, not sexual slavery *and* sexual violence. The judges dismissed count 7 in its entirety, having concluded that that it rendered the indictment defective and left the accused unable to understand what evidence pertained to sexual slavery and what evidence substantiated the charge of sexual violence.<sup>64</sup> It is astounding that the accused did not know, throughout the trial, the distinguishing proof necessary to substantiate sexual slavery from just sexual violence. The defense never raised it throughout the trial. The Defense, quite to the contrary, proffered an expert witness who contrasted forced marriages to the traditional marriages, involving young women or girls, wherein nuanced and complicated relations are formed between a husband and wife<sup>65</sup> in their bid to contest the sexual slavery charge.

In the judgment, the Trial Chamber ruled that the prosecutor should have characterized those facts of forced marriage (only) as sexual slavery, even though they reiterated that there was no longer a Count 7. As a

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62. Prosecutor v. Norman et al., Case No. SCSL 03-14-I, Indictment (Feb. 4, 2004). Samuel Hinga Norman died before a judgment was delivered in his trial; for the decision for the remaining CDF accused, Moinina Fofana and Allieu Kondewa, see *Fofana*, Case No. SCSL 04-14-T, Judgment (Aug. 2, 2007).

63. Prosecutor v. Brima, Kamara & Kanu, Case No. SCSL-04-16-T, Judgment (June 20, 2007).

64. *Id.* ¶¶ 92-95. *Cf. id.* at 582, Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count Eight ("Forced Marriages").

65. *Id.* ¶ 702 (majority opinion).

consequence of the dismissal of this count 7, the trial chamber said it was obliged, to consider the evidence under count 8, denominated, “other inhumane acts” (forced marriages). However, the bench further reasoned that neither facts pertaining to sexual slavery, nor non-sexual facts relating to forced marriage legally “fit” under inhumane acts. Count 8, accordingly, was dismissed for redundancy.<sup>66</sup>

I hope you are *not* following me. The reasoning is confusing. Notwithstanding these prosecutorial errors the Trial Chamber convicted the defendant of rape as a crime against humanity, based upon the sexual slavery facts, as well as outrages upon personal dignity, a war crime, under Count 9.<sup>67</sup> The Trial Chamber relied upon the same evidence of sexual slavery to dismiss Count 7 and Count 8, yet, relied upon that evidence to convict under other provisions.

On appeal, the Appellate Chamber opined upon Trial Chamber’s holdings in regard to the characterization of forced marriages as an issue of general importance that may enrich the jurisprudence of international criminal law.<sup>68</sup> First, it held that the crimes against humanity provision of other inhumane acts did not exclude sexually violent conduct, irrespective of the extensive listing of sex-based crimes, including, “and any other form of sexual violence” under the crimes against humanity provision.<sup>69</sup> Secondly, the Appeals Chamber held the act of forced marriage<sup>70</sup> to be distinct from sexual slavery, noting that it was not subsumed in the later.<sup>71</sup> Finally, the Appeals Chamber ruled that “the forceful abduction and use of women and girls as forced conjugal partners . . . constitutes an “other inhumane act.”<sup>72</sup> The AFRC Appeal Chamber clearly intoned a thorough description of the conduct of forced marriages to determine if it fulfilled the elements of other inhumane acts under crimes against humanity. Importantly, the issues of forced marriages did not die at the trial level due to the prosecutor’s choice to raise the issues as part of a broader challenge to the dismissal of Count 7 and due to the Appeals Chamber’s recognition that the issue was of general importance for international criminal law. In his excitement, the current prosecutor, then incredulously, declared a win

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66. *Id.* ¶ 714.

67. *Id.* ¶ 572.

68. Prosecutor v. Brima, Kamara & Kanu, Case No. SCSL-2004-16-A, Judgment, ¶ 181 (Feb. 22, 2008).

69. *Id.* ¶ 186.

70. *Id.* ¶ 196 (“The Appeals Chamber finds that in the context of the Sierra Leone conflict, forced marriage describes a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim.”).

71. *Id.* ¶ 195.

72. *Id.* ¶ 202. An important distinction must be understood. Even though the Appeals Chamber recognized that an act of “forced marriage” could satisfy the legal requirements of other inhumane acts, it refrained from reversing the Trial Chamber’s acquittal and did not enter a conviction on Count 8 of the indictment.

because the crime of forced marriage had been recognized.<sup>73</sup> Well, a legal advisor for gender could have told him that an Appeals Chamber ruling does not enumerate new crimes.

The trials at the Extraordinary Chambers in the Court of Cambodia are underway. Neither the Chambers nor the Office of the Prosecutor has appointed a Legal Advisor for Gender. Planners of the Court did not anticipate that the Court's genocide evidence would encompass gender issues such as sexual violence. However, as recent press information confirms, young male and female detainees at the Khmer re-education camps were ordered to marry unknown partners, en masse, and were told to perform forced sexual acts to consummate the "marriages."<sup>74</sup> Victims' representatives intend to seek standing before the Chambers. Once again, a new scenario appears for sexual violence under international criminal law that merits a gender strategy.

Let us return to the *Lukić* case. The ICTY has not appointed a Legal Advisor for Gender since my departure. It seemingly has an ad hoc gender strategy. When Serge Brammertz, the new prosecutor came on board, he decided to file a motion to amend *Lukić* indictment.<sup>75</sup> The motion refers to Carla Del Ponte, the former prosecutor, and misguided communication she voiced in the final weeks in office. In her handling of the *Lukić* case, she took the position that her obligation to conclude the work of the Office of the Prosecutor within the time frame mandated by the U.N. Security Council prevented her from seeking to add sex-based crimes to the *Lukić* indictment. She reasoned that the sex-based charges would lengthen the trial.<sup>76</sup> Essentially, she pre-empted the possibility of amendments to include rape charges because of the Tribunal's closing strategy. To his credit, the current prosecutor reversed that policy. He directed his trial team to submit a motion to amend the *Lukić* indictment and supplemented the pleading with Security Council Resolution 1820.<sup>77</sup> The judges did not address the resolution, concluding that there was no miscarriage of justice and that the standard of law was to determine any unfair prejudice to the accused.<sup>78</sup>

After the Trial Chamber denied the motion to amend the *Lukić*

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73. Press Release, Office of the Prosecutor, Special Court for Sierra Leone, Prosecutor Welcomes Arraignment of RUF and AFRC Indictees on Charges Related to Forced Marriage (May 17, 2004).

74. See Immigration and Refugee Board of Canada, *Cambodia: Whether Forced Marriage Is Practised*, Dec. 9, 2003, <http://www.unhcr.org/refworld/docid/403dd1fd8.html>.

75. Prosecutor v. *Lukić & Lukić*, Case No. IT-98-32/1-PT, Decision on Prosecution Motion Seeking Leave to Amend the Second Amended Indictment and on Prosecution Motion to Include U.N. Security Council Resolution 1820 (2008) as Additional Supporting Material to Proposed Third Amended Indictment as well as on Milan *Lukić's* Request for Reconsideration on Certification of the Pre-Trial Judges Order of 19 June 2008 (July 8, 2008).

76. *Id.* ¶ 12.

77. See S.C. Res. 1820, U.N. Doc. S/RES/1820 (June 19, 2008).

78. *Lukić*, Case No. IT-98-21/1-PT, at n.77.

indictment,<sup>79</sup> the team filed a subsequent motion before the Trial Chamber for certification.<sup>80</sup> A certification motion, if granted allows the issue, of the proposed amendment to be heard at the appellate level. The Trial Chamber, however, denied the motion for certification. At this stage of the Tribunal's tenure sexual violence improperly omitted from an indictment, should not be justified as an act of compliance with an institutions closing strategy. Paradoxically, Security Council Resolution 1820 urges assiduous prosecution of wartime sexual assaults. What does that mean? If sexual assaults are not supposed to fall asunder amnesties, can they be circumvented the closing strategies of U.N. created ad hoc tribunals? A legal advisor for gender in the chambers would have and should have at least encouraged the judges to address Security Council Resolution 1820, and a more in-depth deliberation on exclusion of sexual assault evidence when the witnesses were already scheduled to appear to refute the defense's alibi. These issues are substantive. If nothing else, the judges might want to cover themselves from future appeals or from future criticizing law review articles penned by professors.

Returning to the ICC, as I begin to close my remarks, obviously to whom much is given—such as a multilateral, positive treaty on international criminal law—much is expected. It is notable, and I would say laudable, that in their majority, the situations before the ICC include charges of sexual violence. So do they need a Legal Advisor for Gender in the Office of the Prosecutor or in Chambers?<sup>81</sup> A gender unit assists investigators and

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79. The Trial Chamber's response to the Prosecutor's submission that calling witnesses to testify, yet barring them from giving evidence of sexual assaults committed against them, mocked "justice due the victims" by recalling that there is "no miscarriage of justice in the present situation." Furthermore, they noted that the applicable legal standard to amend an indictment is "whether the amendment results in unfair prejudice to the accused . . . viewed in light of the circumstances of the case as a whole." *Id.* ¶¶ 63-64.

80. Prosecutor v. Lukić & Lukić, Case No. IT-98-32/1-T, Decision on Prosecution Motion for Certification to Appeal the Trial Chamber's Decision on Prosecution Motion to Amend the Second Amended Indictment (Aug. 19, 2008).

81. Four weeks after this presentation was given, the Prosecutor of the ICC announced that Professor Catharine MacKinnon had been named Special Advisor on Gender to the Office of the Prosecutor of the ICC. See Press Release, Office of the Prosecutor, International Criminal Court, ICC Prosecutor appoints Prof. Catharine A. MacKinnon as Special Adviser on Gender Crimes (Nov. 26, 2008), available at <http://www.icc-cpi.int/press/pressreleases/450.html>. The Women's Initiative on Gender Justice (a member of civil society that reports, advocates, and follows the ICC proceeding from a feminist prospective) stated in its publication, *Gender Report Card 2008*,

the OTP announced the appointment of Professor Catharine MacKinnon as Special Gender Adviser to the Prosecutor. Given Professor MacKinnon's expertise, her appointment will undoubtedly enhance the gender capacity in the OTP and will specifically strengthen the presentation of charges for gender-based crimes. However, as it is a part-time position based outside The Hague, the ability of the post to influence and advise on the day-to-day decisions regarding investigation priorities, the selection of incidents and the construction of an overarching gender strategy will be extremely limited. As such, the OTP should complement this part-time position with the appointment of a Gender Legal Adviser established as a fulltime post, based within the OTP in The Hague as advertised in December 2005. Despite the urgent need for the

lawyers in cases dealing with sexual violence. Deputy Prosecutor, Mrs. Fatou Bensouda administers the gender portfolio. The ICC has regularly held gender trainings for its staff, organized often by the Women's Initiative for Gender Justice. People in this audience have participated, on several occasions, in trainings aimed at investigators, the lawyers, and, yes, the judges. Civil Society has maintained direct communication both in the public and in the private domain on gender issues, with the heads of the organs of the ICC. So, is there a need for a gender advisor with a strategy?

Well, I will attempt a list of what a Legal Advisor for Gender in the Office of the Prosecutor at the ICC might accomplish.

The first point on my list was just brilliantly articulated by Professor SáCouto in the preceding speech.<sup>82</sup> Gender complementarity, substantively and procedurally is a very serious issue. The Legal Advisor might ensure, in the admissibility of cases, and in their denial, that all matters of gender complementarity have been exhaustively examined. If cases are inadmissible, yet women do not receive legal redress, substantively or procedurally, in their national jurisdictions, and thus cannot reasonably exhaust their local remedies, or are subjected to gender "sham" trials, then it should be deemed that the ICC complementarity does not function as envisioned. The legal advisor should produce studies, develop policies and practices and implement the execution of a strategy that pays heed to a gender complementarity standard.

Second, a Legal Advisor for Gender should have a working policy on the interpretation and application of Article 21(3) of the Rome Statute. Such a policy should take into account the Banjul Charter,<sup>83</sup> the Great Lakes Accord,<sup>84</sup> the African Charter,<sup>85</sup> other regional human rights charters and declarations, as well as international human rights and international criminal and humanitarian law interpretations that address women and girls. The dual viability of 1820 and 1325<sup>86</sup> should be considered under Article 21(3)<sup>87</sup> of the Rome Statute as part of the ICC mandate.

Third, I think that a Legal Advisor for Gender at the OTP should develop

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appointment of an internal Gender Legal Adviser, no-one has been interviewed or appointed for the position.

WOMEN'S INITIATIVES FOR GENDER JUSTICE, GENDER REPORT CARD 2008, at 21 (2008), available at [http://www.iccwomen.org/news/docs/GRC08\\_web4-09\\_v3.pdf](http://www.iccwomen.org/news/docs/GRC08_web4-09_v3.pdf).

82. See Susana SáCouto & Katherine Cleary, *The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court*, 17 AM. U. J. GENDER SOC. POL'Y & L. 337 (2009).

83. African Charter on Human and Peoples' Rights [Banjul Charter], adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

84. See International Conference on the Great Lakes Region: Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children, Nov. 30, 2006, available at [http://www.icglr.org/common/docs/docs\\_repository/prot\\_sexualviolence.pdf](http://www.icglr.org/common/docs/docs_repository/prot_sexualviolence.pdf).

85. See African Charter, *supra* note 83.

86. See S.C. Res. 1325, U.N. Doc. S/RES/1325 (Oct. 31, 2000).

87. See Rome Statute, *supra* note 4, art. 21(3).

a strategy to examine non-war situations, such as the female trafficking that is endemic in Eastern and Western Europe. For years, I caught the train back and forth between The Hague and Brussels. In the early and mid-90s all of the women in the legalized prostitution windows, in Brussels, were black women from Nigeria or the Congo. By 2007 when I ended my train rides, the women were all white Eastern European women. Many of the women I see on the streets, “commercial sex workers,” or “prostitutes,” might be trafficked Eastern European women. Why aren’t these non-war crimes given their due attention?

Fourth, a Legal Advisor could examine the gendering of child soldiers, especially girls. Sex crimes committed against the girl soldier often takes place before or after the hostilities. These sex-based acts are not part of the illegality in the recruitment or conscription of child soldiers. The girl-child, who is a soldier, falls out of this illegality. Note: Security Council Resolution 1820 does not completely address the issue.<sup>88</sup> Resolution 1820 speaks only to civilians and does not eye females participating in the armed forces. The Legal Advisor should also address the sexual assaults committed upon boy soldiers and sexual assaults boy soldiers are ordered to commit as part of their training or in order to “carry out” their military missions.

A Legal Advisor for Gender in the OTP of the ICC should observe the world-wide phenomenon of persecution of women *via* economic and social human rights deprivation and environmental deprivation. Studies should be asked of war crime research offices on the gendered impact of aggressive wars, in particular when compounded with the consumption or the over-consumption, of the raw materials and natural resources, including diamonds, from Africa and other countries in the South. This greed aggravates female persecution. Such persecution should be examined as a crime against humanity, committed against women and girls. Third-parties and non-state actors should be viewed as potential suspects. Last, there should be closer ties and incorporation of Asian and African academics, within the development of the legal theory and execution of gender strategy at the OTP.

A Legal Advisor for Gender at the OTP of the ICC might ensure that the prosecution seeks a wider base of protection for NGOs and civil society who offer support witnesses and victims. The Prosecutor should, with the assistance of the Legal Advisor for Gender push to amend the rules of procedure and the administrative regulations so that witness protection includes preventing obstruction of justice whenever a civil society member who assists victims or witnesses is threatened or intimidated to dissuade witness testimony.

The Legal Advisor for Gender must ensure that more experts on gender and sexual violence are recognized and given the opportunity to testify before the courts. Fifty women should not have to testify to illustrate a

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88. See S.C. Res. 1820, U.N. Doc. S/RES/1820 (June 19, 2008).

pattern of rape. One woman who has conducted a study, or who has medically, socially, or psychologically administered to female victim/survivors in the region, or who has made a documentary film should be competent to testify. Such expertise has often been denied at ad hoc tribunals, yet, call one military witness to testify, and a red carpet is rolled out: “Oh, please come this way, general, sir.”

A legal advisor should also devise strategies for reparations, compensation, and to ensure the non-repetition of sexual violence and other gender harm. Of course, I am certain that some of you are working already on developing this area.

Lastly, much energy, laudably, has been expended on attempting to define the crime of aggression. The Legal Advisor for Gender should expend some energy to define the crime of patriarchy, so that it might be amended into the Rome Statute.<sup>89</sup>

Gender strategy cannot resolve all the ills of a judicial institution, including the ICC. Nevertheless, gender strategy is not a luxury. Its absence is an absurdity, bordering on a grant of impunity for conduct that is criminal.

Thank you very much.

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89. See Rome Statute, *supra* note 4.