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## Obstacles on the Road to Gender Justice: The International Criminal Tribunal for Rwanda as Object Lesson

Beth Van Schaak

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# OBSTACLES ON THE ROAD TO GENDER JUSTICE: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA AS OBJECT LESSON

BETH VAN SCHAACK\*

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## I. INTRODUCTION

For most of human history, the rape and sexual abuse of women associated with the enemy was an expected spoil, inevitable by-product, or legitimate tactic of war. Where gender violence was condemned, humanitarian law—which primarily reflected the male experience with armed conflict—conceptualized such conduct as an offense against a woman’s dignity or a family’s honor.<sup>1</sup> Thanks to the tireless work of committed advocates, jurists, and diplomats,<sup>2</sup> international law now treats gender violence<sup>3</sup> as a prosecutable crime against the physical and mental

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1. See INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD 17, 18 (Francis Lieber ed., Washington, Government Printing Office 1898) (1863), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/Instructions-gov-armies.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/Instructions-gov-armies.pdf). The instructions state that

[c]rimes punishable by all penal codes, such as arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery, and rape, if committed by an American soldier in a hostile country against its inhabitants, are not only punishable as at home, but in all cases in which death is not inflicted, the severer punishment shall be preferred.

*Id.* These instructions, commonly called the Lieber Code, governed the Union forces during the United States Civil War and represent one of the first efforts to codify the laws of war and designate rape as a war crime. *See id.* Subsequent codification efforts did not follow this lead. The regulations annexed to the 1907 Hague Convention on Land Warfare (IV) euphemistically indicated that “family honour and rights . . . must be respected.” *See* Hague Convention Respecting the Laws and Customs of War on Land art. 46, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631. Even the 1949 Geneva Conventions promulgated after World War II do not expressly categorize rape and other acts of sexual violence as “grave breaches” of the treaties giving rise to a duty of state parties to prosecute such crimes pursuant to principles of universal jurisdiction. *See id.* art. 146-47. Rather, such acts are specifically prohibited elsewhere in the treaties in provisions that give rise only to state responsibility. *See id.* art. 27. For example, Article 27 of the Fourth Geneva Convention states that women shall be protected against “any attack on their honor, in particular rape, enforced prostitution, or any form of sexual assault.” *Id.* The grave breaches regime does penalize a number of violent acts, including torture, inhuman treatment, and willfully causing great suffering or serious injury to body or health, that easily encompass acts of rape and other sexual violence. *See id.* art. 147. Even the statute of the ad hoc criminal tribunal for Yugoslavia did not enumerate acts of sexual violence as war crimes, although rape was listed as a crime against humanity. *See* Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, arts. 2-5, U.N. Doc. S/RES/827 (1993) [hereinafter ICTY Statute]. The Rwanda Tribunal’s Statute did enumerate rape, enforced prostitution, and other forms of indecent assault as war crimes by virtue of its reproduction of Protocol II of the Geneva Conventions governing non-international armed conflicts. *See* Statute of the International Criminal Tribunal for Rwanda art. 2-3, Nov. 8, 1994, 33 I.L.M. 1598 [hereinafter ICTR Statute]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts art. 4, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II]. As discussed more fully below, the ad hoc international tribunals have issued important rulings recognizing the existence of multiple crimes of sexual violence under customary international law.

2. *See* Barbara Bedont & Katherine Hall-Martinez, *Ending Impunity for Gender Crimes Under the International Criminal Court*, 6 BROWN J. WORLD AFFAIRS 65, 66-69 (1999) (providing a comprehensive discussion of the negotiations surrounding the gender provisions within the Rome Statute).

3. This Article will generally employ the term “gender violence” to refer to violence committed on the basis of a person’s sex or gender. Although much gender violence is sexual violence, the latter term excludes acts of persecution that are not

integrity of the victim. Indeed, with the promulgation of the Statute of the International Criminal Court (ICC) and the jurisprudence of the ad hoc criminal tribunals, there is now strong law on the books enabling gender crimes to be prosecuted as war crimes, crimes against humanity, and the predicate acts of genocide.<sup>4</sup>

Notwithstanding that such conduct is finally clearly unlawful under international criminal law, the security of women in situations of armed conflict or mass repression is little improved and in fact may have worsened.<sup>5</sup> Indeed, violence against women continues to be employed as a deliberate “tactic of war to humiliate, dominate, instill fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group,” as noted by Security Council Resolution 1820.<sup>6</sup> Even where such acts are not the result of an express governmental or group policy, gender violence is regularly tolerated by authorities as a way to reward or re-energize exhausted fighters and further terrorize, punish, or humiliate an enemy community. Violence against women thus remains inherent to situations of lawlessness as a cruel extension of the pervasive gender subordination already endemic worldwide in times of relative peace and security. In connection with the passage of Resolution 1820, Major General Patrick Cammaert, a former U.N. peacekeeping commander, testified before the Security Council that “[i]t has probably become more dangerous to be a woman than a soldier in an armed conflict.”<sup>7</sup>

Although the substantive law concerned with gender violence is now

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sexual in nature but that are still based upon sex or gender discrimination. *Accord* HEALTH & CMTY. DEV. SECTION, U.N. HIGH COMM’R FOR REFUGEES, HOW TO GUIDE: SEXUAL AND GENDER-BASED VIOLENCE PROGRAMME IN LIBERIA 7-8 (2001), available at <http://www.unhcr.org/publ/PUBL/3c4d6af24.pdf> (defining “sexual violence” and “gender-based violence”).

4. See, e.g., Rome Statute of the International Criminal Court, art. 5(1)(g), U.N. Doc. A/CONF.183/9 (July 17, 1998) [hereinafter Rome Statute] (granting the ICC jurisdiction to prosecute rape and other forms of sexual violence as crimes against humanity when such crimes are “committed as part of a widespread or systematic attack directed against any civilian population”).

5. See Avril McDonald, *The Year in Review*, 1 Y.B. OF INT’L HUMANITARIAN L. 113, 123 (1998) (noting that ninety percent of victims of today’s armed conflicts are civilians, with women constituting a disproportionate number of civilian victims); see also Mary Deutsch Schneider, *About Women, War and Darfur: The Continuing Quest for Gender Violence Justice*, 83 N.D. L. REV. 915, 915-20 (2007) (citing statistics and examples that illustrate women’s increased victimization in armed conflict and noting that while male civilians are killed, female civilians are often raped then killed).

6. See S.C. Res. 1820, intro., U.N. Doc. S/RES/1820 (June 19, 2008) (recognizing sexual violence as an issue of international security that impedes the establishment of a durable peace). Resolution 1820 follows on the heels of Resolution 1325, which considered the many ways in which conflict affects women and children, recognized women’s role in preventing and resolving conflict, called for equal participation and full involvement of women in efforts to maintain peace and security, and advocated a gender perspective in peacekeeping. See S.C. Res. 1325, ¶¶ 2-5, U.N. Doc. S/Res/1325 (Oct. 31, 2000).

7. See Transcript of Security Council Open Debate on Women, Peace and Security (June 19, 2008), [http://www.peacewomen.org/un/sc/Open\\_Debates/Sexual\\_Violence08/Cammaert.MONUC.pdf](http://www.peacewomen.org/un/sc/Open_Debates/Sexual_Violence08/Cammaert.MONUC.pdf) (promoting the inclusion of female military and police personnel in U.N. peacekeeping missions to more effectively address the increasing victimization of women and girls).

well established, and the principle of legality can no longer serve as a barrier to prosecutions for gender violence, significant obstacles remain to ensuring a robust system of gender justice in international criminal law in the face of continued violations.<sup>8</sup> These obstacles are less visible than defects in positive law because they emerge in the practice of international criminal law at crucial yet shrouded stages of the penal process: investigation, charging, pre-trial plea negotiations, trial preparation, the provision of protective measures, and appeals.<sup>9</sup> Most importantly, strong positive law is irrelevant where a commitment to gender justice does not infuse all stages of the development and implementation of a prosecutorial strategy.<sup>10</sup>

The track record of gender justice before the International Criminal Tribunal for Rwanda (ICTR) provides a forceful object lesson for prosecutors practicing before the International Criminal Court (ICC) and other international criminal law tribunals into the ways in which crimes of sexual violence can be poorly or under-prosecuted and thus rendered invisible and un-redressed.<sup>11</sup> Although gender violence in Rwanda did not receive the levels of media attention focused on similar crimes committed in the former Yugoslavia, the Rwandan statistics—inherently approximate—are stunning. Estimates range from 250,000 to 500,000 rapes during the short period of the genocide, from April to June 1994.<sup>12</sup> Rape in Rwanda was also accompanied by sexual mutilation and torture, and women and girls were often literally raped to death by perpetrators wielding machetes, sharpened sticks, broken bottles, and other

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8. See JUDITH G. GARDAM & MICHELLE J. JARVIS, *WOMEN, ARMED CONFLICT AND INTERNATIONAL LAW* 253 (2001) (recognizing the inclusion of gender violence and armed conflict in international law, but maintaining that criminal punishment does not prevent atrocities and further noting the lack of implemented legal norms to regulate gender violence).

9. For a discussion of the appellate process before the ICTR as it relates to gender crimes, see Patricia V. Sellers, *The "Appeal" of Sexual Violence: Akayesu/Gacumbitsi Cases*, in Center for Human Rights, *GENDER BASED VIOLENCE IN AFRICA: PERSPECTIVES FROM THE CONTINENT* 51, available at [http://www.chr.up.ac.za/centre\\_publications/gender/Gender-based%20violence%20in%20Africa.pdf](http://www.chr.up.ac.za/centre_publications/gender/Gender-based%20violence%20in%20Africa.pdf).

10. See Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 *BERKELEY J. INT'L L.* 288, 317 (2003) (noting that investigation, indictment, and prosecution for gender crimes in the Rwanda and Yugoslav Tribunals occurred only after widespread lobbying by women's rights organizations and feminist scholars).

11. See Stephanie K. Wood, *A Woman Scorned for the "Least Condemned" War Crime: Precedent and Problems with Prosecuting Rape as a Serious Crime in the International Criminal Tribunal for Rwanda*, 13 *COLUM. J. GENDER & L.* 274, 299-301 (2004) (explaining that the ICTR initially failed to indict perpetrators for sexual crimes, inadequately addressed the tension between legal justice and survivor interests, and delayed arresting and prosecuting perpetrators of rape warfare); Sellers, *supra* note 9, at 60 (noting the when cases are improperly investigated or processed, it "re-enforces the invisibility of the crimes and the invisibility of the mainly female victims or survivors of the sexual violence").

12. See U.N. Econ. & Soc. Council [ECOSOC], *Comm'n on Human Rights, Report on the Situation of Human Rights in Rwanda*, ¶ 16, U.N. Doc. E/CN.4/1996/68 (Jan. 29, 1996) (discussing the methodology and difficulties in estimating the number of rapes during hostilities); see also Wood, *supra* note 11, at 285-86 (citing these statistics and noting the likelihood of under-reporting).

implements.<sup>13</sup> By some accounts, virtually all female survivors—including very young girls—in Rwanda were raped or sexually assaulted during the 100 days of the genocide.<sup>14</sup>

Yet, the results of the cases before the ICTR do not reflect the high levels of gender violence in Rwanda during the genocide.<sup>15</sup> In fact, the systemic lack of gender violence charges, and the high number of acquittals for the charges that were brought, generates the opposite impression. This disconnect lies at the heart of this paper, which will discuss the many ways in which gender justice can be neglected or sidelined in international criminal law with a particular focus on the history of gender justice prosecutions before the ICTR and the decisions and practices of that Tribunal's Office of the Prosecutor. This study makes clear that where gender violence is not central to a prosecutorial strategy, potential charges become dispensable and charged crimes result in acquittals when subjected to the adversarial criminal justice process. Although it is largely too late for the women of Rwanda, the ICC—whose constitutive statute contains groundbreaking and enlightened structural, procedural, and substantive provisions to ensure gender justice—must generate better results for women victims elsewhere and ensure that the missteps, carelessness, and neglect characterizing gender justice before the ICTR are not repeated.

## II. PREVENTING SELECTIVE JUSTICE

Before commencing investigations and drafting indictments, a prosecutor must devise and continue to develop a coherent strategy for how crimes of sexual violence in the relevant region are to be investigated, charged, prosecuted, proven, and appealed in the face of acquittals. This requires a thorough knowledge of the applicable substantive law and the way in which gender violence manifested itself within the region in question. Although this process is facilitated and enhanced by the

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13. See BINAIFER NOWROJEE, U.N. RESEARCH INST. FOR SOC. DEV., "YOUR JUSTICE IS TOO SLOW": WILL THE ICTR FAIL RWANDA'S RAPE VICTIMS? 1 (2005) (quoting ICTR testimony regarding the atrocities perpetrated against women in Rwanda). Major Brent Beardsley, the assistant to Major-General Roméo Dallaire, force commander of the U.N. peacekeeping force in Rwanda, was once asked before the ICTR to describe the female corpses he saw. He responded:

when they killed women it appeared that the blows that had killed them were aimed at sexual organs, either breasts or vagina; they had been deliberately swiped or slashed in those areas . . . . [G]irls as young as six, seven years of age, their vaginas would be split and swollen from obviously multiple gang rape, and they would have been killed in that position.

*Id.*

14. See AFRICAN RIGHTS, RWANDA: DEATH, DESPAIR AND DEFIANCE (1995) (first NGO account of the extent of the genocide in Rwanda); HUMAN RIGHTS WATCH, SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH 24 (1996) (noting that the exact number of gender-based crimes perpetrated during the genocide is unknowable).

15. See NOWROJEE, *supra* note 13, at 3 (explaining that, as of May 2004, the Prosecutor's Office did not bring rape charges in seventy percent of ICTR cases and that there is only a ten percent conviction rate in the cases in which rape charges were brought).

appointment of an on-site gender expert with the appropriate rank and seniority to be effective,<sup>16</sup> any gender violence policy must be fully institutionalized and operationalized such that it infuses the hiring, training, day-to-day activities, and evaluation of all prosecutorial staff. Any gender violence prosecutorial strategy must also include the appointment of women and gender experts to positions of influence and to posts that require contact with female victims.<sup>17</sup> Such a policy must be continually monitored to ensure that different investigative and trial teams are prosecuting gender violence consistently over time.<sup>18</sup>

Although there have been setbacks in gender justice before all the ad hoc tribunals<sup>19</sup> and during all phases of the ICTR's work,<sup>20</sup> critiques by advocates of gender justice tend to focus on the tenure of Swiss jurist Carla

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16. No gender advisor within the ICTY or ICTR had a U.N. rank higher than P-4, which excluded them from high-level policy discussions.

17. See HUMAN RIGHTS WATCH, *supra* note 14, at 90 (reporting that victims indicated they would only discuss sexual violence with a female investigator); see also Wood, *supra* note 11, at 305-06 (noting that the ICTR had fewer women personnel than other tribunals and that this likely undermined the tribunal's ability to indict for sex crimes).

18. See Valerie Oosterveld, *Gender-Sensitive Justice and the International Criminal Tribunal for Rwanda: Lessons Learned for the International Criminal Court*, 12 NEW ENG. J. INT'L & COMP. L. 119, 127 (2005) (explaining that inconsistent policies result in improper gathering of evidence, missed opportunities for furthering investigations, improper methodological practices, and failed prosecutions); Letter from Human Rights Watch to U.N. Security Council Members, Rwanda and the Security Council: Changing the International Tribunal (Aug. 1, 2003), <http://www.hrw.org/en/news/2003/08/01/rwanda-and-security-council-changing-international-tribunal> (noting decline in attention to and indictments for gender crimes); see also Gaëlle Breton-LeGoff, *Analysis of Trends in Sexual Violence Prosecutions in Indictments by the International Criminal Tribunal for Rwanda (ICTR) from November 1995 to November 2002*, Nov. 28, 2002, [http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/rapeVictimssDeniedJustice/analysisoftrends\\_en.php](http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/rapeVictimssDeniedJustice/analysisoftrends_en.php) (noting that the prosecution of sexual violence in the ICTR increased between 1998 and 2001, but subsequently decreased).

19. See LaShawn R. Jefferson, *In War as in Peace: Sexual Violence and Women's Status*, in HUMAN RIGHTS WATCH WORLD REPORT 325, 337 (2004), available at <http://www.hrw.org/legacy/wr2k4/download/wr2k4.pdf> (stating that "both [the ICTR and the ICTY] have been plagued by weak investigations and neither has had an effective long-term prosecution strategy that acknowledges the degree of wartime sexual violence suffered by women").

20. See The Secretary-General, *Financing 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 and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994: Report of the Secretary-General on the Activities of the Office of Internal Oversight Services*, Annex: Summary, delivered to the General Assembly, U.N. Doc. A/51/789 (Feb. 6, 1997) (discussing administrative, leadership, and operational shortcomings of the tribunal and expressing concern about its ability to administer justice in Rwanda). The ICTR took considerable time to reach its stride in the face of allegations of nepotism, corruption, and incompetence on all fronts, not just with respect to the prosecution of gender violence. See *id.* (reporting that "serious operational deficiencies in the [m]anagement of the Tribunal . . . developed virtually from its inception"). In addition, the relentless Completion Strategy mandated by the U.N. Security Council undoubtedly has weighed against the expansion of current proceedings in any fashion. See S.C. Res. 1503, ¶¶ 3-7, U.N. Doc. S/Res/1503 (Aug. 28, 2003) (initiating completion strategy and calling upon the ICTR to complete its work by 2010).

Del Ponte as ICTR Chief Prosecutor (1999-2003).<sup>21</sup> Overall, it appears that Del Ponte and her staff in Rwanda proceeded without a coherent strategy for investigating sexual violence or a theory of how sexual violence fit into the way in which genocide, war crimes, and crimes against humanity were committed in Rwanda. As a result, during much of this time, the prosecutor's office neglected, de-emphasized, or at times botched the prosecution of crimes of sexual violence committed in Rwanda.<sup>22</sup> A 2003 letter to Del Ponte from one NGO dedicated to ensuring that the ICTR protects the rights and interests of Rwandan women memorialized these concerns: "we believe that your four-year record as ICTR prosecutor shows no concrete commitment to effectively developing evidence to bring such charges, despite the longstanding and overwhelming proof of sexual violence during the 1994 Rwandan genocide."<sup>23</sup> Several policies and practices of the Office of the Prosecutor are specifically singled out for criticism as discussed more fully below.

#### *A. The Investigation Stage*

Since a prosecutor can only charge those crimes of which he or she is

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21. See, e.g., NOWROJEE, *supra* note 13, at 8 (noting a particular lack of political will to prosecute sexual violence during Del Ponte's tenure). As originally conceived, the ad hoc criminal tribunals for Yugoslavia and Rwanda shared a Chief Prosecutor, who was located in The Hague. Justice Richard Goldstone (South Africa) first occupied this post starting in 1994. See *id.* at 9. In 1996, he was replaced by Canadian jurist Louise Arbour, who served until 1999, when Swiss former prosecutor Carla Del Ponte next occupied the position. See *id.* at 9-10. In 2003, as part of the Completion Strategy devised for the two ad hoc tribunals, the Security Council appointed Hassan Bubacar Jallow of Gambia as Chief Prosecutor for the ICTR, over Del Ponte's objection. See *id.* at 11; see also S.C. Res. 1503, Annex I, ¶4, U.N. Doc. S/RES/1503/Annex I (Aug. 28, 2003) (granting the Secretary-General the authority to nominate the tribunal prosecutor). When Del Ponte stepped down from the ICTY, Belgian prosecutor Serge Brammertz assumed the ICTY position effective January 1, 2008. See Press Release, International Criminal Tribunal for the Former Yugoslavia, Statement of Serge Brammertz, Prosecutor of the ICTY (Jan. 16, 2008), available at <http://www.un.org/icty/pressreal/2008/pr1212e.htm> (accepting appointment as Prosecutor).

22. See, e.g., NOWROJEE, *supra* note 13, at 8-19 (detailing multiple defects in the prosecutorial strategy before the ICTR, including a lack of political will to prosecute gender violence, poor investigations, prosecuting with inadequate evidence, and failure to file timely appeals after rape acquittals).

23. Letter from Ariane Brunet, Coordinator for Women's Rights, Rights & Democracy, on behalf of the Coalition for Women's Human Rights in Conflict Situations, to Carla Del Ponte, Prosecutor, International Criminal Tribunal for Rwanda (Mar. 12, 2003), available at [http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/rapeVictimssDeniedJustice/lettertoprosecutor\\_en.php](http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/rapeVictimssDeniedJustice/lettertoprosecutor_en.php). The Coalition expressed similar concerns in a letter to then Secretary-General of the United Nations, Kofi Annan, who was at the time considering Del Ponte's renewal. See Letter from Ariane Brunet, Coordinator for Women's Rights, Rights & Democracy, on behalf of the Coalition for Women's Human Rights in Conflict Situations, to Kofi Annan, U.N. Secretary General (July 24, 2003), available at [http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/rapeVictimssDeniedJustice/lettrekofiannan\\_en.php](http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/rapeVictimssDeniedJustice/lettrekofiannan_en.php).

Several days later, Annan announced the bifurcation of the Chief Prosecutor position and appointed Jallow as the Chief Prosecutor dedicated to Rwanda. See "New Rwanda Prosecutor Named," BBC NEWS, Aug. 29, 2003, <http://news.bbc.co.uk/2/hi/africa/3190833.stm> (last visited May 21, 2009) (describing Del Ponte's clashes with the Rwandan government, leading up to the Jallow appointment).



aware and that are supported by sufficient admissible and probative evidence, a thorough and effective investigation at the inception of a case is crucial to ensuring that gender crimes are fully and successfully prosecuted.<sup>24</sup> Prosecutors and investigators must coordinate to ensure that the latter are gathering the evidence upon which the former can build accurate and comprehensive indictments.<sup>25</sup> Having a coherent strategy for prosecuting gender crimes is especially important as crimes with a sexual component may be more difficult to investigate.<sup>26</sup> In particular, locating physical, documentary, and testimonial evidence that proves the commission of sexual violence may present unique challenges<sup>27</sup> as compared to other crimes of violence that may be more visible or publicly documented.<sup>28</sup> Victims of sexual violence, both male and female, are often initially unwilling to come forward to testify about such acts, and investigators may be reluctant to pressure witnesses to reveal the full scope of the harm suffered.<sup>29</sup> In addition, there is a common perception that women from patriarchal or traditional societies will simply not talk about being sexually assaulted.<sup>30</sup> Experience shows, however, that proper investigative methodologies, utilized by sensitive and dedicated staff members and support persons, can elicit valuable testimony and empower women to participate effectively in prosecutions.<sup>31</sup>

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24. See Stephanie N. Sackellares, *From Bosnia to Sudan: Sexual Violence in Modern Armed Conflict*, 20 WIS. WOMEN'S L.J. 137, 155-56 (2005) (discussing methods for improving future prosecutions for mass atrocities, such as those currently occurring in Sudan).

25. See NOWROJEE, *supra* note 13, at 12 (explaining that investigators in Kigali, Rwanda, often gathered witness statements of only a few paragraphs that were of little assistance to prosecutors). This coordination was hampered within the ICTR by the fact that many investigators were located in Kigali, Rwanda, whereas the prosecutors were more often in Arusha, Tanzania, where the Tribunal is located. *See id.*

26. See Alex Obote-Odora, *Rape and Sexual Violence in International Law: ICTR Contribution*, 12 NEW ENG. J. INT'L & COMP. L. 135, 156-57 (2005) (explaining that the highly sensitive and traumatizing nature of sexual violence paired with Rwandan women's shyness and hesitance to discuss their experiences render investigations difficult).

27. *See id.* at 140 (observing that "[s]ex-based crimes are not easily identifiable, like gunshot wounds or amputated limbs. This is because these crimes inflict physical and psychological wounds, which women can conceal to avoid further emotional anguish, ostracism, and retaliation from perpetrators who may live nearby.").

28. See ICC Office of the Prosecutor, *Annex to the "Paper on Some Policy Issues Before the Office of the Prosecutor": Referrals and Communications 1* (Sept. 2003) (noting that the ease of investigation is a factor that is taken into account when deciding on which situations to focus).

29. Binaifer Nowrojee, *We Can Do Better: Investigating and Prosecuting International Crimes of Sexual Violence* (2004), [http://www.womensrightscoalition.org/site/publications/papers/doBetter\\_en.php](http://www.womensrightscoalition.org/site/publications/papers/doBetter_en.php) (noting that many investigators are not specifically trained to elicit sensitive information from rape victims, and further highlighting that many victims fail to come forward due to fear of rejection and stigmatization).

30. See NOWROJEE, *supra* note 13, at 9 n.8 (recounting an interview with ICTR deputy prosecutor, who was quoted as saying, "African women don't want to talk about rape . . . . We haven't received any real complaints. It's rare in investigations that women refer to rape.").

31. See Nowrojee, *supra* note 29 (highlighting the effective use of an integrated prosecutorial strategy, female investigators, and a sensitive interviewing methodology).

In several early ICTR cases, evidence about uncharged acts of sexual violence emerged during trial through unsolicited witness testimony. The *Akayesu* case provides the most famous example.<sup>32</sup> There, two trial witnesses gave testimony that they had been raped or that they had witnessed the rape of others in Jean-Paul Akayesu's commune.<sup>33</sup> One victim testified that she had never been asked about rape by tribunal investigators.<sup>34</sup> Learning of this testimony, the Coalition for Women's Human Rights in Conflict Situations (Coalition)<sup>35</sup> submitted an amicus curiae brief on behalf of over forty other NGOs and law clinics urging the Trial Chamber to invite the prosecutor to amend Akayesu's indictment to charge rape as a war crime, a crime against humanity, and an act of genocide.<sup>36</sup> After continuing the trial to permit the prosecution to prepare an amended indictment and the defense to meet the new charges,<sup>37</sup> the

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for prosecuting sexual violence before the U.N. Special Court for Sierra Leone).

32. See *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Trial Chamber Judgment, ¶¶ 416-417 (Sept. 2, 1998) (stating that "allegations of sexual violence first came to the attention of the Chamber" when two witnesses were being examined, and noting that the indictment was subsequently amended to include knowledge and facilitation of sexual violence).

33. See *id.* ¶¶ 416, 421.

34. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Transcript, at pp. 00101-00102 (Jan. 27, 1997) (testimony of Witness J).

35. See Coalition for Women's Human Rights in Conflict Situations, [http://www.womensrightscoalition.org/site/main\\_en.php](http://www.womensrightscoalition.org/site/main_en.php) (last visited May. 21, 2009) (explaining that the Coalition goals are "to promote the adequate prosecution of perpetrators of gender violence in transitional justice systems based in Africa, in order to create precedents that recognise violence against women in conflict situations [and to] help find ways to obtain justice for women survivors of sexual violence").

36. Brief for Al-Haq et al. as Amici Curiae Respecting Amendment of the Indictment and Supplementation of the Evidence to Ensure the Prosecution of Rape and Other Sexual Violence within the Competence of the Tribunal, ¶ 3, *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, available at [http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/Akayesu/amicusbrief\\_en.php](http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/Akayesu/amicusbrief_en.php).

37. See *Akayesu*, Case No. ICTR 96-4-T, Trial Chamber Judgment, ¶ 417 (noting amendment of indictment in light of the testimony of Witnesses H and J). In the process of amending the indictment, both the Trial Chamber and the prosecution denied that they were responding directly to the amicus brief. See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Transcript, at p. 8 (June 17, 1997). Pierre Prosper said for the prosecution:

I would like to say to this Chamber right now and make it perfectly clear that the amicus curiae is not motivating us today. It is not motivating us today and, in fact, it can only be considered as a factor. And I say this is a factor because what it does is it reminds us of the importance of the issue of sexual violence.

*Id.* Nonetheless, the Trial Chamber acknowledged the brief in its judgment. See *Akayesu*, Case No. ICTR 96-4-T, Trial Chamber Judgment, ¶ 417.

The Chamber understands that the amendment of the indictment resulted from the spontaneous testimony of sexual violence by witness J and H during the course of this trial and the subsequent investigation of the prosecution, rather than from public pressure. Nevertheless, the Chamber takes note of the interest shown in this issue by non-governmental organizations, which it considers as indicative of public concern over the historical exclusion of rape and other forms of sexual violence from the investigation and prosecution of war crimes.

*Id.*

ICTR convicted Akayesu of aiding and abetting<sup>38</sup> crimes against humanity and genocide for acts of rape that took place in the vicinity of his office.<sup>39</sup> In this landmark ruling, which signifies the high water mark for gender justice before the ICTR, the Chamber defined rape and sexual violence under international law for the first time in history.<sup>40</sup> Similar amendments<sup>41</sup> were allowed in some subsequent cases.<sup>42</sup>

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38. See *Akayesu*, Case No. ICTR 96-4-T, Trial Chamber Judgment, ¶¶ 694-697 (finding Akayesu criminally responsible under Articles 3(g), 3(i), and 6(1) of the Rome Statute for multiple acts of gender-based violence, including rape). Specifically, the Chamber held that Akayesu was responsible for these acts “by allowing them to take place on or near the premises of the bureau communal and by facilitating the commission of such sexual violence through his words of encouragement in other acts of sexual violence which, by virtue of his authority, sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place.” *Id.* ¶ 694. The Chamber disregarded the evidence in the record concerned with sexual assaults committed outside the bureau communal on the ground that the indictment alleged only Akayesu’s responsibility for acts “on or near” the compound. See *id.* ¶ 689.

39. Akayesu was acquitted on the war crimes counts, charged as outrages upon dignity under Protocol II of the 1949 Geneva Conventions, based on the Trial Chamber’s ruling that the prosecutor had failed to demonstrate that the events in Taba Commune were sufficiently connected to the armed conflict between the Rwandan government and the Tutsi-led Rwandan Patriotic Front (RPF) being fought elsewhere in the country. See *id.* ¶¶ 640, 643. The prosecution had evidence that Akayesu wore a military jacket, carried a weapon, and assisted the members of the military upon their arrival in Taba Commune. However, this was deemed insufficient to trigger the applicability of the war crimes prohibitions in the ICTR Statute. See *id.* ¶¶ 641-644. The prosecution successfully appealed the legal standard the Trial Chamber employed when it held that the defendant must be shown to be a commander, combatant, or other member of the armed forces to be guilty of war crimes; however, the Appeals Chamber left the verdict on the war crimes counts untouched. See *Prosecutor v. Akayesu*, Case No. ICTR 96-4-A, Appeal Chamber Judgment, ¶ 445 (June 1, 2001) (finding that the Trial Chamber erred in “restricting the application of common Article 3 to a certain category of persons”).

40. See Askin, *supra* note 10, at 318 (heralding the *Akayesu* decision for its landmark recognition of sexual violence as an instrument of genocide and for formulating “seminal definitions of a rape and sexual violence under international law”). Specifically, the ICTR ruled as follows:

The Tribunal considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Tribunal also notes the cultural sensitivities involved in public discussion of intimate matters and recalls the painful reluctance and inability of witnesses to disclose graphic anatomical details of sexual violence they endured . . . . The Tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. The Tribunal considers sexual violence, which includes rape, as 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 . . . . The Tribunal notes in this context that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal.

*Akayesu*, Case No. ICTR 96-4-T, Trial Chamber Judgment, ¶¶ 687-688.

41. See, e.g., *Prosecutor v. Ndindiliyimana et al.*, Case No. ICTR 2000-56-I, Decision on Prosecutor’s Motion Under Rule 50 for Leave to Amend the Indictment Issued on 20 January 2000 and Confirmed on 28 January 2000, ¶ 26 (Mar. 26, 2004) (citing prosecutor’s reliance on the *Akayesu* proceedings in support of efforts to amend

In other cases, however, the Trial Chamber was not so generous in allowing for eleventh hour amendments on the basis of evidence emerging for the first time at trial.<sup>43</sup> In *Prosecutor v. Bagambiki* (also known as the *Cyangugu* trial), for example, female witnesses once again began giving testimony at trial about sexual violence they experienced in the relevant prefecture. Once again, the Coalition moved to appear as amicus, urging the Tribunal to call upon the prosecution to consider amending the operative indictment<sup>44</sup> to include sexual violence charges<sup>45</sup> based upon

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the indictments and subsequently amending the indictment to include rape as a crime against humanity). Although many ICTR indictments were eventually amended, often by Jallow as Chief Prosecutor, there is the impression that some amendments were hastily drafted primarily to appease international NGOs without sufficient evidentiary support. See Jefferson, *supra* note 19, at 340. Human Rights Watch notes that “NGOs have expressed concerns . . . that this strategy will undermine the tribunal’s long-term effectiveness regarding the prosecution of sexual assault.” *Id.*

42. See, e.g., *Prosecutor v. Nizeyimana & Hategekimana*, Case No. ICTR 00-55-I, Decision on the Prosecutor’s Application for Severance and Leave to Amend the Indictment Against Idelphonse Hategekimana, ¶¶ 26-30 (Sept. 25, 2007) (allowing amendment of an indictment issued in 2000 to clarify and expand the charges of rape). In *Hategekimana*, the Trial Chamber allowed Jallow to amend the existing indictment to add new rape and individual responsibility allegations (including liability for participating in a joint criminal enterprise) in support of the existing genocide and crimes against humanity counts. See *id.* ¶¶ 25, 27-28. Although the Trial Chamber ruled that some of these amendments were supported by newly obtained evidence not available to the prosecution until 2006, with respect to the allegations that were not new, the Trial Chamber ruled that the prosecution was not trying to obtain an unfair advantage by seeking to add them at the time. See *id.* ¶ 28. The Chamber determined that the allegations would “provide the accused with better notice of the case against him and allow the Defence to better focus its investigation and case.” *Id.* The prosecution’s request to refer the case to Rwanda was subsequently denied. See *Prosecutor v. Hategekimana*, Case No. ICTR 2000-55B-R11bis, Decision on Prosecutor’s Request for the Referral of the Case of Ildephonse Hategekimana to Rwanda, ¶ 78 (June 19, 2008).

43. See, e.g., *Prosecutor v. Bizimungu et al.*, Case No. ICTR 99-50-I, Indictment, ¶¶ 5.37, 6.65 (May 9, 1999) (alleging acts of sexual violence around Rwanda against Tutsi individuals and charging defendants with rape as a crime against humanity and a war crime). Jallow later sought to amend this indictment to clarify and expand upon, *inter alia*, the sexual violence allegations and to focus on the role of the accused in ordering, inciting, committing, aiding, and abetting the crimes in question. See *Prosecutor v. Bizimungu et al.*, Case No. ICTR 99-50-I, Decision on the Prosecutor’s Request for Leave to File an Amended Indictment, ¶ 5(b)-(d) (Oct. 6, 2003). The Trial Chamber denied the motion, which was filed a few months before the scheduled start of trial, on the ground that a late amendment involving substantial changes would prejudice the accused and delay the trial. See *id.* ¶ 35. The Appeals Chamber determined that the Trial Chamber did not exceed its discretion when it failed to authorize amendment under the circumstances. See *Prosecutor v. Bizimungu et al.*, Case No. ICTR 99-50-AR5, Decision on Prosecutor’s Interlocutory Appeal against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment, ¶ 21 (Feb. 12, 2004).

44. See Coalition for Women’s Human Rights in Conflict Situation, *Failure to Charge Sexual Violence in the Cyangugu Case*, [http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/index\\_en.php](http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/index_en.php) (last visited Apr. 6, 2009) (describing the Coalition’s efforts in the *Bagambiki* case). See also *Prosecutor v. Ntagerura*, Case No. ICTR 96-10-I, Amended Indictment, Count 1-6 (Jan. 26, 1998) (charging the accused persons with genocide, war crimes, and crimes against humanity for killing, exterminating, and causing bodily harm to members of the Tutsi group without explicitly charging them with sexual violence or rape); *Prosecutor v. Bagambiki & Imanishimwe*, Case No. ICTR 97-36-I, Indictment, ¶ 4 (Oct. 9, 1997). Eventually, the *Bagambiki & Imanishimwe* case and the *Ntagerura* case were joined. See *Prosecutor v. Ntagerura*, Case No. ICTR 96-10-I, *Prosecutor v. Bagambiki et al.*, Case No. ICTR 97-36-I, Decision on the Prosecutor’s Motion for Joinder, ¶ 60 (Oct. 11, 1999). The

evidence in the public domain about the prevalence of genocidal sexual violence in Cyangugu.<sup>46</sup> This time, however, the prosecution joined the defense in opposing the Coalition's motion, arguing that the choice of which charges to bring was dedicated to prosecutorial discretion.<sup>47</sup> The prosecution also indicated its intention<sup>48</sup> to submit a new indictment including rape allegations against at least two of the accused, thus mooting the *amicus*. Siding with the parties, the Chamber denied the Coalition's motion on the grounds that the question was no longer a live one and that it was beyond the Trial Chamber's power to order an amendment.<sup>49</sup> Accordingly, the Trial Chamber excluded evidence of uncharged crimes of sexual violence fearing prejudice to the accused.<sup>50</sup> This required female witnesses to artificially truncate their testimony.<sup>51</sup> The Tribunal

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Prosecutor had earlier moved to amend the indictments to charge rape, but later withdrew that motion. See Prosecutor v. Ntagerura et al., Case No. ICTR 99-46-T, Decision on the Application to File an Amicus Curiae Brief According to Rule 74 of the Rules of Procedure and Evidence Filed on Behalf of the NGO Coalition for Women's Human Rights in Conflict Situations, ¶ 9 (May 24, 2001) [hereinafter *Ntagerura et al.*, Case No. ICTR 99-46-T, Decision on the Application to File an Amicus Curiae Brief].

45. See NOWROJEE, *supra* note 13, at 14-15 (noting that strong evidence of gender violence existed, in particular against Imanishimwe, who had allegedly raped a woman himself and killed a woman by shooting a gun into her vagina).

46. See, e.g., Monique Kankera, *Sexual Violence in Cyangugu: A Testimonial*, RIGHTS & DEMOCRACY, Oct. 20, 2001, <http://www.dd-rd.ca/english/commdoc/publications/women/bulletin/vol4no1/testimonialCyangugu.html> (noting 132 cases of reported rape in Cyangugu and citing other specific instances of sexual assault).

47. See *Ntagerura et al.*, Case No. ICTR 99-46-T, Decision on the Application to File an Amicus Curiae Brief, *supra* note 44, ¶ 9.

48. See *id.* ¶ 10; see also Prosecutor v. Ntagerura et al., Case No. ICTR 99-46-T, Decision on the Coalition for Women's Human Rights in Conflict Situation's Motion for Reconsideration of the Decision on Application to File an Amicus Curiae Brief, ¶ 8 (Sept. 24, 2001) [hereinafter *Ntagerura et al.*, Case No. ICTR 99-46-T, Decision on the Coalition's Motion for Reconsideration] (noting that the prosecutor indicated her intention to submit a separate indictment "with respect to the matter in question"); Coalition for Women's Human Rights in Conflict Situations, *This Year's Monitoring Projects on Gender-Related Crimes at the ICTR*, WOMEN'S HUMAN RIGHTS IN CONFLICT SITUATIONS NEWSL. (Rts. & Democracy, Montreal, Que.), October 20, 2001, available at <http://www.dd-rd.ca/site/publications/index.php?id=1272&page=2&subsection=catalogue> (welcoming the prosecutor's assurance that charges of sexual violence would be filed).

49. See *Ntagerura et al.*, Case No. ICTR 99-46-T, Decision on the Application to File an Amicus Curiae Brief, *supra* note 44, ¶¶ 20-22 (May 24, 2001). The Coalition moved for reconsideration, arguing that the Trial Chamber had misapplied Rule 74 governing the submission of amicus briefs on the ground that its decision could be read to prohibit amicus intervention in relation to issues that are not already under consideration by the Trial Chamber, which would effectively prevent the participation of underrepresented groups in the development of the law. See *Ntagerura et al.*, Case No. ICTR 99-46-T, Decision on the Coalition's Motion for Reconsideration, *supra* note 48, ¶ 2. This motion was also denied on the ground that reconsideration was inapposite under the circumstances as "no new and potentially decisive fact" had been discovered. See *id.* ¶ 9.

50. See *Ntagerura*, Case No. ICTR 99-46-T, Decision on the Application to File an Amicus Curiae Brief, *supra* note 44, ¶¶ 23-24 (noting that the Chamber must exclude evidence of uncharged crimes).

51. Accord Michelle Staggs Kelsall & Shanee Stepakoff, "When We Wanted to Talk About Rape": Silencing Sexual Violence at the Special Court for Sierra Leone, 1 INT'L J. OF TRANSITIONAL JUST. 355, 363-74 (2007) (studying the exclusion of evidence during the Civil Defence Forces case at the Special Court for Sierra Leone and

subsequently acquitted two of three defendants for lack of evidence,<sup>52</sup> generating outrage in Cyangugu, where women's groups had meticulously gathered data on sexual crimes<sup>53</sup> committed in their community.<sup>54</sup> Ultimately, the new indictment the prosecution promised never materialized.

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demonstrating that women can be psychologically harmed when their stories of rape and sexual violence are silenced in criminal proceedings).

52. *See Prosecutor v. Ntagerura et al.*, Case No. ICTR 99-46-T, Trial Chamber Judgment, ¶¶ 804-807 (Feb. 25, 2004). In addition, many allegations in the indictment were disregarded as defective or unacceptably vague. *See id.* ¶¶ 64-68. The Appeals Chamber affirmed the acquittals and set aside several convictions of defendant Imanishimwe. *See Prosecutor v. Ntagerura et al.*, Case No. ICTR 99-46-A, Appeals Chamber Judgment, ¶ 129 (July 7, 2006).

53. *See, e.g.,* Kankera, *supra* note 46 (discussing victim testimonials about sexual violence that were gathered from local women by AVEGA-Cyangugu, an organization that works with widows in Rwanda). Indeed, subsequent Cyangugu indictments detailed acts of sexual violence committed in the region. *See Prosecutor v. Bizimungu et al.*, Case No. ICTR 2000-56-I, Amended Indictment (Joinder), ¶ 117 (Aug. 23, 2004) (stating that “[i]n Cyangugu, soldiers from the Rwandan Army and Interahamwe regularly abducted Tutsi refugee women . . . and raped them and assaulted them morally.”). The ICTR permitted Jallow to amend this indictment to add charges of rape as a crime against humanity and accordingly granted additional time to the accused to meet the new charges. *See Prosecutor v. Ndindiliyimana et al.*, Case No. ICTR 2000-56-I, Decision on Prosecutor’s Motion Under Rule 50 for Leave to Amend the Indictment Issued on 20 January 2000 and Confirmed on 28 January 2000, ¶¶ 50, 55 (Mar. 26, 2004). The case is ongoing.

54. Efforts to “fix” incomplete or weak indictments have yielded similar results in a few cases before the ICTY. The most egregious is the *Lukić* case in which the defendants were initially indicted for a number of crimes, but no crimes of gender violence. *See 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 UN Security Council Resolution 1820 (2008) as Additional Supporting Material to Proposed Third Amended Indictment as Well as on Milan Lukić’s Request for Reconsideration or Certification of the Pre-Trial Judge’s Order of 19 June 2008 (July 8, 2008) (discussing Prosecution’s motion to amend the indictment to include new charges for rape). Under the leadership of Del Ponte, the ICTY prosecutor’s office had indicated an interest in amending the indictment and was given until November 2007 to do so. No amendment was forthcoming, ostensibly because Del Ponte felt that to lengthen the prosecutor’s case would be contrary to the Completion Strategy. After Del Ponte stepped down, Brammertz attempted to amend the indictment well after the deadline for doing so. In addition to clarifying the charged forms of responsibility, Brammertz sought to add new counts concerning the crimes of rape, torture, and enslavement arising out of the defendants’ alleged establishment of a rape camp. Many of the victims and witnesses to these crimes had already been disclosed to the defendants. Indeed, eighteen of the twenty-six female witnesses on the prosecutor’s witness list apparently had testimony about the defendants’ involvement in sexual violence. In support of his untimely motion, Brammertz argued that the crimes should be charged because of their grave and systematic nature; they were integral to other persecutory policies employed in Višegrad; the prosecutor did not need to call new witnesses; the defense would have adequate time to meet the new charges; the testimony would assist the prosecutor in meeting the defendants’ apparent alibi defenses; and, most importantly, the testimony was necessary “in the interest of justice” in order to allow the witnesses to testify fully about the harm they suffered at the hands of the defendants and to establish the full truth of the defendants’ crimes. The ICTY denied the motion to amend the indictment on the ground that allowing the amendment after the prosecutor’s unjustified delay would unduly prejudice the accused. *See id.* ¶ 62. Bizarrely, the women will still testify in order to rebut the defendants’ alibi defenses, but the gender crimes they will describe will be uncharged.

The failure of prosecutorial personnel to surface allegations about sexual violence in early investigations may be because the majority of the original investigators were men drawn from national police or armed forces,<sup>55</sup> with little experience and training in taking rape testimony from female victims and making it trial ready.<sup>56</sup> Critics also point to the original lack of gender justice expertise in the ICTR's Office of the Prosecutor and the 2000 decision to disband the sexual assault investigative team.<sup>57</sup> Early errors, missteps, and omissions in the investigative phase inevitably reverberate through subsequent proceedings and cases as the lack of a complete investigation generates weaker evidence, which then justifies prioritizing other charges with stronger evidentiary support.<sup>58</sup> Collectively, these factors create a self-reinforcing cycle of under-prosecution and impunity vis-à-vis gender crimes. Properly investigating these situations *ex ante* would have obviated the need to seek amendments after indictments had been issued and even during trial, ensured cases went to trial without evidentiary gaps, and avoided due process concerns for defendants, who are entitled both to know the charges against them in advance and to a speedy trial.

### *B. The Charging Phase*

Even where investigations into gender crimes are rigorously conducted, the exercise of prosecutorial discretion with respect to which charges to

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55. See Richard J. Goldstone, *Prosecuting Rape as a War Crime*, 34 CASE W. RES. J. INT'L L. 277, 280 (2002) (noting gender bias among investigators, limited backgrounds and training of staff, and lack of female investigators); Peggy Kuo, *Prosecuting Crimes of Sexual Violence*, 34 CASE W. RES. J. INT'L L. 305, 310-11 (2002) (recounting comments such as "'I've got ten dead bodies, how do I have time for rape? That's not important,' or, 'So, a bunch of guys got riled up after a day of war, what's the big deal?'" ).

56. See NOWROJEE, *supra* note 13, at 12-13 (highlighting these problems as undermining the effective prosecution of sexual violence by the ICTR). The ICTR experienced a number of problems with their investigators. One investigator had actually been working under a false name and was later indicted by the ICTR. See, e.g., *Prosecutor v. Nchamigbo*, Case No. ICTR 2001-63-I, Amended Indictment (July 18, 2006).

57. See NOWROJEE, *supra* note 13, at 9-10 (maintaining that the Office of the Prosecutor lacked political will to investigate sexual violence during the early days of the tribunal). *But see* Goldstone, *supra* note 55, at 280 (detailing how Justice Goldstone responded to concerns about sexual violence prosecutions during his tenure as the first ICTR prosecutor by appointing in 1994 Patricia Viseur Sellers as a Legal Officer on Gender Issues for the Office of the Prosecutor to direct the indictment of individuals responsible for gender violence crimes in Yugoslavia and Rwanda). Justice Goldstone recalls that soon after he "arrived as the Chief Prosecutor in The Hague on August 15, 1994, [he] was inundated with letters and petitions from women and men in the United States, Canada, and many of the western European nations. The letters implored [him] to give adequate attention to gender-related crimes." *Id.* Prosecutor Louise Arbour, who served from 1996-1999, increased efforts to prosecute gender crimes and organized two gender training seminars for her staff in 1997. See NOWROJEE, *supra* note 13, at 9-10. The sexual violence unit was disbanded in 2000 under Del Ponte, although it was subsequently reconstituted in 2003 amid criticism of her approach to gender violence. See *id.* at 10-11.

58. See Oosterveld, *supra* note 18, at 125-28 (discussing the "negative lessons learned from the ICTR," which include the lesson that inconsistent prosecution and poor investigations lead to dropped charges and acquittals of sexual violence crimes).

bring and how to frame them under the applicable law can result in the exclusion of viable charges for gender violence.<sup>59</sup> Obviously, there are valid strategic reasons for issuing more simplified indictments and for excluding certain charges even where sufficient evidence to convict may exist.<sup>60</sup> Particularly in international criminal law, the practical reality is that prosecutorial and investigative resources are scarce, and the international and hybrid tribunals will only pursue a small fraction of the crimes committed in the relevant region or situation.<sup>61</sup> In addition, since the debacle of the *Milosević* super-indictment, international criminal law has witnessed an emerging trend toward drafting more focused, symbolic, or streamlined indictments. This seems to have occurred in the *Lubanga* case before the ICC, which addresses only the conscription, enlistment, and use of child soldiers in armed conflict, despite the fact that evidence in the public realm strongly suggested the existence of other potential charges, including charges of sexual violence. The perennial risk exists, however, that such decisions will systematically exclude gender violence charges as too difficult to prove or non-essential.<sup>62</sup> In particular, there is a tendency to view acts of gender violence committed during armed conflicts or repression as simply opportunistic or as private crimes reflecting personal motives and desires that are unconnected to, or simply capitalizing upon, the prevailing state of war—an attitude that mirrors the public/private divide that runs through much of law and society.<sup>63</sup> To ensure against the systemic exclusion of gender violence charges, such crimes must be treated as integral to any armed conflict, genocide, or campaign of ethnic cleansing rather than as isolated or peripheral phenomena. Such an approach reflects the fact that gender violence is regularly employed alongside and to exacerbate other forms of violence and repression.<sup>64</sup>

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59. Cf. NOWROJEE, *supra* note 13, at 10 (noting a significant decline in investigations of sexual violence during Carla Del Ponte’s tenure as prosecutor, despite strong evidence in support of sexual violence claims in the possession of the prosecutor’s office).

60. See, e.g., Prosecutor v. Rwamakuba, Case No. ICTR 98-44C-T, Judgment, ¶¶ 20-22 (Sept. 20, 2006) (discussing how Rwamakuba’s case was severed from a joint indictment, and a new indictment was issued, which focused more closely on the defendant’s direct responsibility for a limited number of criminal events, rather than his participation in a conspiracy or joint criminal enterprise). Although the joint indictment charged rape as a crime against humanity, the rape charges were not included in the new indictment. See *id.* ¶ 86 (stating the verdict on the counts charged).

61. See Luis Moreno-Ocampo, *A Word from the Prosecutor*, INT’L CRIM. CT. NEWSL. (In’tl Crim. Ct., The Hague, Neth.) Nov. 2006, at 2 (“My office employs a policy of focused investigations and prosecutions.”).

62. See Susan M. Pritchett, *Entrenched Hegemony, Efficient Procedure, or Selective Justice?: An Inquiry into Charges for Gender-Based Violence at the International Criminal Court*, 17 TRANSNAT’L L. & CONTEMP. PROBS. 265, 293 (2008) (observing that the frequent combination of gender violence with other war crimes encourages prosecutors to select alternative charges).

63. See *id.* at 301-02 (noting that local laws sometimes punish rape lightly, or even require rapists to marry their victims).

64. See Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Trial Chamber Judgment, ¶ 734 (Sept. 2, 1998) (noting that sexual violence was an integral part of the process of destruction of the Tutsi group in Rwanda); see also S.C. Res. 1820, *supra* note 6, ¶ 1 (noting that sexual violence against women “can significantly exacerbate situations of



Given their pervasiveness in situations of lawlessness, acts of gender violence can be cumulatively charged under multiple genus crimes (e.g., as war crimes, crimes against humanity, and genocide) to ensure a conviction where the particular circumstantial elements of each crime (e.g., the existence of an armed conflict, a widespread or systematic attack against a civilian population, or genocidal intent) might be difficult to prove.<sup>65</sup> With respect to war crimes, the drafters of the ICTR Statute borrowed directly from existing treaty law by incorporating parts of Protocol II and Common Article 3 of the Geneva Conventions.<sup>66</sup> As such, the Statute penalizes “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault,”<sup>67</sup> along with a number of generic crimes that may encompass gender violence, including the commission of violence to life, health and physical or mental well-being, cruel treatment, and torture.<sup>68</sup>

In order to convict an individual for war crimes, the prosecutor must also demonstrate some nexus between the act committed and the armed conflict.<sup>69</sup> The struggle within the ad hoc tribunals to define this link doctrinally became particularly acute in the Rwandan context, because although the genocide occurred nationwide, the actual theater of war—which pitted governmental armed forces against the Rwandan Patriotic Front (RPF)—only engulfed part of the country. This led to a number of acquittals on war crimes counts, although most defendants were convicted of genocide and crimes against humanity for the same acts, which require no link to armed conflict. In the *Kayishema* case, for example, the Trial Chamber ruled that it was insufficient to show merely a temporal concurrence between the crimes charged and the internal armed conflict being waged elsewhere in the country. Rather, the Trial Chamber required a showing of a “direct link” between crimes committed and the hostilities<sup>70</sup> and that the defendants were connected to one of the two embattled

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armed conflict and may impede the restoration of international peace and security”).

65. See Preparatory Comm’n for the Int’l Criminal Court, *Report of the Preparatory Commission for the International Criminal Court: Part II: Finalized Draft Text of the Elements of Crimes*, ¶ 9, U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000) (declaring that “particular conduct may constitute one or more crimes”).

66. See ICTR Statute, *supra* note 1, art. 4 (empowering the International Tribunal for Rwanda to prosecute persons for war crimes committed in non-international armed conflicts).

67. See *id.* art. 4, ¶ e (noting that this language is drawn from the “fundamental guarantees” contained in Article 4 of Protocol II).

68. Cf. ICTY Statute, *supra* note 1, art. 2 (noting that the ICTY Statute also incorporated a composite of the Geneva Conventions’ grave breaches regimes, which do not list rape or sexual violence as grave breaches, but rather penalize torture, inhuman treatment, willfully causing great suffering, and willfully causing serious injury to body or health).

69. See *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR 95-1-T, Judgment, ¶ 169 (May 21, 1999) (setting forth the test for an act to breach Common Article 3 and Protocol II).

70. See *id.* ¶ 185 (asserting that only crimes which occur in the context of war fall within Common Article 3).

parties.<sup>71</sup> The Trial Chamber also noted that the armed conflict had been used as pretext to unleash an official policy of genocide, but that these two phenomena were distinct within the region in question.<sup>72</sup>

The ICTY Appeals Chamber ultimately rejected this approach in the Yugoslavian context. In the *Kunarac* case, the Appeals Chamber ruled that the armed conflict must only have “played a substantial part in the perpetrator’s ability to commit [the charged crime], his decision to commit it, the manner in which it was committed or the purpose for which it was committed,” and that it was enough if, as in the present case, “the perpetrator acted in furtherance of or under the guise of the armed conflict.”<sup>73</sup> The Tribunal identified a nonexclusive series of factors that would help to guide this inquiry, which include: the perpetrator is a combatant; the victim is a noncombatant; the victim is a member of the opposing party; the act may be said to serve the ultimate goal of a military campaign; and the crime is committed as part of or in the context of the perpetrator’s official duties.<sup>74</sup> In the ICC’s Elements of Crimes, drafters settled on the following formulation: it must be shown that the charged conduct “took place in the context of and was associated with” an international or non-international armed conflict.<sup>75</sup> This formulation eases up on the strict requirements established in *Kayishema* and seems to imply the necessity of only a geographical and temporal nexus. As a result, it will facilitate the prosecution of gender crimes as war crimes.<sup>76</sup>

Acts of gender violence may also be prosecuted as crimes against humanity where they form part of a widespread or systematic attack against a civilian population and there is evidence that the defendant knew of the existence of the attack.<sup>77</sup> The criteria of “widespread or systematic” modify the attack against a civilian population, not the enumerated acts.<sup>78</sup> As a result, isolated or discrete acts of sexual violence may be prosecuted as crimes against humanity so long as they are part of a larger attack. Although rape is the only crime of gender violence specifically enumerated within the ICTR’s crimes against humanity provision,<sup>79</sup> sexual violence

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71. See *id.* ¶¶ 174-175. But see *Prosecutor v. Akayesu*, Case No. ICTR 96-4-A, Appeal Chamber Judgment, ¶¶ 425-446 (granting the prosecution’s appeal of this requirement by ruling that civilians can also be guilty of war crimes).

72. *Kayishema*, Case No. ICTR 95-1-T, Judgment, ¶ 603. These defendants were acquitted of war crimes, *id.* ¶ 615, and the prosecution did not appeal.

73. See *Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment, ¶ 58 (June 12, 2002).

74. See *id.* ¶ 59.

75. See Preparatory Comm’n for the Int’l Criminal Court, *supra* note 65, art. 8 (declaring that a perpetrator’s knowledge of this nexus, plus the necessary acts, is sufficient to establish the existence of war crimes).

76. See, e.g., *Prosecutor v. Nyiramasuhuko & Ntahobali*, Case No. ICTR 97-21-I, Amended Indictment, count 11 (Mar. 1, 2001) (accusing Nyiramasukuko and Ntahobali of the war crimes of humiliating and degrading treatment, rape, and indecent assault).

77. Preparatory Comm’n for the Int’l Criminal Court, *supra* note 65, art. 7(1)(a), ¶¶ 2-3.

78. *Id.* ¶ 2.

79. The *Bucyibaruta* and *Munyeshyaka* indictments contained extensive sexual

could also be charged under the ICTR Statute's gender-blind provisions penalizing acts of torture,<sup>80</sup> enslavement,<sup>81</sup> persecution,<sup>82</sup> and "other inhumane acts,"<sup>83</sup> because conviction for those crimes requires proof of elements additional to those of rape.<sup>84</sup> The latter "catch all" provisions of persecution and inhumane acts are particularly useful for charging acts of gender violence that fall short of rape (such as assault, forced nudity,

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violation allegations, which the prosecutor charged as crimes against humanity (rape) and genocide. Prosecutor v. Bucyibaruta, Case No. ICTR-2005-85-I (June 16, 2005); Prosecutor v. Munyeshyaka, Case No. ICTR 2005-87-I, Indictment (July 20, 2005). The cases, however, were transferred to France (where the defendants were residing) for prosecution pursuant to Rule 11bis. *Prosecutor v. Bucyibaruta*, Case No. ICTR-05-85-I, Designation of a Trial Chamber for the Referral of the Case to a State (July 11, 2007), Prosecutor v. Munyeshyaka, Case No. ICTR-2005-87-I, Decision on the Prosecutor's Request for the Referral of Wenceslas Munyeshyaka's Indictment to France (Nov. 20, 2007). France is the first country to prosecute cases referred from the ICTR in connection with the Tribunal's Completion Strategy.

80. See Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Trial Chamber Judgment, ¶ 295 (Dec. 10, 1998) (describing sexual assault as "a particularly vicious form of torture"); see also Prosecutor v. Delalić et al., Case No. IT-96-21-A, Appeals Chamber Judgment, ¶¶ 488-499 (Feb. 20, 2001) (affirming conviction of rape as torture); Semanza v. Prosecutor, Case No. ICTR 97-20-T, Trial Chamber Judgment, ¶ 506 (May 15, 2003) (entering cumulative convictions for rape and torture).

81. See Prosecutor v. Kunarac et al., Case No. IT-96-23-T & IT-96-23/1-T, Trial Chamber Judgment, ¶ 8 (Feb. 22, 2001) (convicting the defendants of gender-based crimes, including enslavement).

82. See Prosecutor v. Nahimana et al., Case No. ICTR 99-52-T, Trial Chamber Judgment and Sentence, ¶ 1079 (Dec. 3, 2003).

Tutsi women, in particular, were targeted for persecution. The portrayal of the Tutsi woman as a femme fatale, and the message that Tutsi women were seductive agents of the enemy was conveyed repeatedly by [defendants' media outlets]. The [Hutu] Ten Commandments . . . vilified and endangered Tutsi women . . . . By defining the Tutsi woman as an enemy in this way, [defendants' media outlets] articulated a framework that made the sexual attack of Tutsi women a foreseeable consequence of the role attributed to them.

*Id.* Notwithstanding this link between misogynist propaganda and sexual violence, none of the media cases charged the defendants with inciting or instigating rape. See *id.*; Prosecutor v. Ruggiu, Case No. ICTR 97-32-I, Amended Indictment, ¶ 5.7 (Dec. 10, 1998) (accusing Ruggiu of abetting the persecution of Tutsis by, among other things, broadcasting messages that called for "acts of hatred and sexual violence" against Tutsi women). See also Prosecutor v. Serugendo, Case No. ICTR 2005-84-I, Corrigendum of Indictment (July 21, 2005). Both Ruggiu and Serugendo ultimately pled guilty to incitement to genocide and persecution. Although the indictment in an additional incitement case contained a number of general allegations of sexual violence, the prosecution did not connect the alleged acts of incitement to these crimes in the specific charges. See Prosecutor v. Bikindi, Case No. ICTR 2001-72-I, Amended Indictment Pursuant to Decisions of 11 May 2005 and 10 June 2005 (June 15, 2005) (indicting the accused, a singer, for incitement). *But see* Prosecutor v. Bikindi, Case No. ICTR 2001-72-T, Trial Chamber Judgment ¶ 47 (Dec. 2, 2008) (finding that merely recording songs encouraging ethnic hatred did not necessarily demonstrate genocidal intent).

83. See, e.g., Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Trial Chamber Judgment, ¶¶ 688, 697 (Sept. 2, 1998) (remarking that "[s]exual violence falls within the scope of 'other inhumane acts,' set forth [in] Article 3(i) of the Tribunal's Statute," and emphasizing that Akayesu was judged criminally responsible under Article 3(i) for forcibly undressing women and making them parade around in public).

84. See generally Prosecutor v. Kupreškić et al., Case No. IT-95-16-T, Trial Chamber Judgment (Jan. 14, 2000) (establishing a regime for cumulative charging).

etc.).<sup>85</sup> Where more generic charges are utilized, however, there is a risk that the gendered nature of the crimes will be obscured or rendered less salient.

Finally, the *Akayesu* decision confirmed that acts of rape and sexual violence may serve as the predicate acts of genocide along with murder and assault. In particular, it ruled:

With regard [to] rape and sexual violence, the Chamber wishes to underscore the fact that in its opinion, they constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of [inflicting] harm on the victim as he or she suffers both bodily and mental harm . . . . These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.<sup>86</sup>

The Tribunal concluded that even those rapes that did not result in the death of the victim could constitute genocide where “[s]exual violence was a step in the process of destruction of the Tutsi group—destruction of the spirit, of the will to live, and of life itself.”<sup>87</sup> The Trial Chamber recognized that perpetrators often mutilated their victims before killing them.<sup>88</sup> The intent was to destroy the Tutsi group while inflicting acute physical and mental suffering on its members in the process.<sup>89</sup> In this way, the Tribunal emphasized that both the mental and physical harm associated with rape satisfied the *actus reus* of the crime of genocide.

In defending their charging decisions in the face of motions to dismiss for defects in the form of the indictment, prosecutors must be able to articulate why particular and cumulative charges are warranted under the law. In particular, prosecutors must be able to demonstrate allegations

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85. See ICTR Statute, *supra* note 1, art. 4(e) (reiterating that acts of sexual violence can be charged as the war crime of “committing outrages upon personal dignity, in particular humiliating and degrading treatment”); see also Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Trial Chamber Judgment, ¶ 295 (convicting defendant of torture and outrages upon personal dignity for being present while a woman was repeatedly raped and humiliated); Prosecutor v. Kunarac et al., Case No. IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment, ¶ 33 (convicting defendant where he forced women to dance nude on a table while others watched).

86. *Akayesu*, Case No. ICTR 96-4-T, Trial Chamber Judgment, ¶ 731.

87. *Id.* ¶ 732.

88. *Id.* ¶ 731.

89. See *id.* (emphasizing that, unlike other depictions of genocidal rape, this account of murderous genocidal rape does not depend upon rapes happening in a “traditional” or patriarchal cultural milieu that values women’s chastity or fidelity); cf. Adrienne Kalosieh, Note, *Consent to Genocide? The ICTY’s Improper Use of the Consent Paradigm to Prosecute Genocidal Rape in Foča*, 24 WOMEN’S RTS. L. REP. 121, 132 (2003) (emphasizing the religious and cultural characteristics of Bosnian Muslim society in describing the genocidal impact of rape).

relevant to all circumstantial and substantive elements of the crimes. In addition, with respect to cumulative charges, prosecutors must be prepared to educate the court about how cumulative charges can enhance the expressive function of the law, create a fuller trial record of the nature of the atrocities committed, and justify an elevated sentence where the extra elements (e.g., the specific intent to cause severe pain or suffering, whether physical or mental, for torture or the discriminatory motive for persecution) should be treated as an aggravating sentencing factor.<sup>90</sup>

Before the ICTR, many defendants<sup>91</sup> were not charged with acts of sexual violence in their initial indictments.<sup>92</sup> Rather, these charges were added by way of amendment, often upon motion by Hassan Bubacar Jallow when he took over as Chief Prosecutor of the ICTR.<sup>93</sup> In addition, there

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90. See generally ICC OFFICE OF THE PROSECUTOR, THE INTERESTS OF JUSTICE: INTERNAL OTP DISCUSSION PAPER (2006) [hereinafter OTP, THE INTERESTS OF JUSTICE] (detailing the ICC Office of the Prosecutor's bases for making the decision to open investigations and begin prosecutions while taking into account the interests of justice, the gravity of the crime, and the interests of the victim).

91. See, e.g., Prosecutor v. Ntakirutimana & Ntakirutimana, Case No. ICTR 96-17-T, Amended Indictment, ¶ 1 (July 7, 1998) (charging genocide-related crimes, crimes against humanity, and war crimes); Prosecutor v. Kambanda, Case No. ICTR 97-23-DP, Indictment, ¶ 1 (Oct. 16, 1997) (charging genocide, conspiracy to commit genocide, direct and public indictment to commit genocide, and complicity in genocide and crimes against humanity); Prosecutor v. Rutaganda, Case No. ICTR 96-3-I, Indictment (Feb. 13, 1996) (charging genocide, crimes against humanity, and war crimes); Prosecutor v. Bagilishema, Case No. ICTR 95-1A-I, Amended Indictment, ¶ 1 (Sept. 17, 1999) (charging genocide-related crimes, crimes against humanity, and war crimes). Many of these early indictments focused on particular massacres. See, e.g., Prosecutor v. Kayishema & Ruzindana, Case No. ICTR 95-1-I, First Amended Indictment, ¶ 1 (Apr. 11, 1997) (charging genocide, crimes against humanity, and war crimes); Prosecutor v. Rutagira, Case No. ICTR 95-1C-T, Trial Chamber Judgment and Sentence (Mar. 14, 2005) (confirming guilty plea for extermination); *Prosecutor v. Seromba*, Case No. ICTR-2001-66-I, Indictment (June 8, 2001) (charging genocide-related crimes); *Prosecutor v. Simba*, Case No. ICTR 2001-66-I, Indictment, ¶ 1 (June 8, 2001) (charging genocide-related crimes).

92. See, e.g., GAËLLE BRETON LE-GOFF, COALITION FOR WOMEN'S HUMAN RIGHTS IN CONFLICT SITUATIONS, ANALYSIS OF TRENDS IN SEXUAL VIOLENCE PROSECUTIONS IN INDICTMENTS BY THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (ICTR) FROM NOVEMBER 1995 TO NOVEMBER 2002 (2002), [http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/rapeVictimssDeniedJustice/analysisoftrends\\_en.php](http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/rapeVictimssDeniedJustice/analysisoftrends_en.php) (noting that "the proportion of indictments pertaining to sexual violence fell from 100% [in] 1999-2000 to 35% in 2001-2002"); letter from Ariane Brunet, Women's Rights Coordinator, Rights & Democracy, on behalf of the Coalition for Women's Human Rights in Conflict Situations et al., to Hussan Jallow, Prosecutor, ICTR (Feb. 8, 2005), [http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/rapeVictimssDeniedJustice/lettertoJallow\\_en.php](http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/rapeVictimssDeniedJustice/lettertoJallow_en.php) (indicating that the OTP failed to bring rape charges in 70% of the cases in which judgments were delivered). By way of contrast, the former Chief Prosecutor of the Special Court for Sierra Leone integrated charges of sexual violence into virtually all indictments. In addition, he successfully charged individuals with forced marriage, which is not specifically enumerated in the Statute of the Special Court. See *Prosecutor v. Alex Tamba Brima et al.*, Case No. SCSL-2004-16-A, Judgment, at ¶¶ 175-203 (Feb. 22, 2008).

93. See *Prosecutor v. Bizimungu et al.*, Case No. ICTR 2000-56-I, Amended Indictment (Joinder), ¶ 110 (Aug. 23, 2004) (accusing defendants of crimes against humanity for organizing widespread and systemic rape, among other atrocities). See also *Prosecutor v. Kabiligi & Ntabakuze*, Case Nos. ICTR 97-34-I & ICTR 97-30-I, Decision on the Prosecutor's Motion to Amend the Indictment, ¶¶ 29, 66 (Oct. 8, 1999) (adding a count of rape as a crime against humanity on motion by Del Ponte).

were instances in which the sexual violence counts were weak or poorly pled,<sup>94</sup> resulting in their dismissal. In *Semanza*, for example, the Prosecutor indicted the defendant for rape as an act of genocide, a crime against humanity, and a war crime.<sup>95</sup> The ICTR dismissed most of the rape allegations as impermissibly vague.<sup>96</sup> At trial, the Prosecution did not provide evidence with respect to other rapes and sexual assaults alleged, resulting in the rejection of those charges.<sup>97</sup> The rape of one woman did result in a conviction for instigating a crime against humanity.<sup>98</sup>

Although they have yet to be tested, provisions in the ICC Statute appear to provide for an expanded role for the Court in having an impact on which charges are brought against particular defendants.<sup>99</sup> Most notably, upon confirming the charges against an accused pursuant to Article 61 of the Statute, the Pre-Trial Chamber can request that the prosecutor conduct further investigation with respect to a particular charge or to “amend a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.”<sup>100</sup> In addition, decisions by the prosecution to decline to initiate either an investigation or prosecution are subject to some oversight by the Pre-Trial Chamber.<sup>101</sup> In such

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94. *See, e.g.*, Prosecutor v. Ntuyahaga, Case No. ICTR 98-40-I, Indictment, ¶ 6.26 (Sept. 26, 1998) (setting forth relatively pro forma sexual violence charges, not elaborated upon in substantive counts); *see also* Prosecutor v. Ntuyahaga, Case No. ICTR 98-40-T, Decision on the Prosecutor’s Motion to Withdraw the Indictment, ¶ 1 (Mar. 18, 1999) (emphasizing that this indictment was later withdrawn after all but a few counts dealing with attacks on Belgian soldiers and Agathe Uwilingiyimana, the former Rwandan Prime Minister who was killed and then apparently sexually assaulted, were dismissed at the time of confirmation). Belgium intervened in the proceedings and later convicted the accused of the murder of the peacekeepers. The murders of the peacekeepers and the Prime Minister also served as the subject of the Military I proceedings against Col. Théoneste Bagosora and his co-defendants. Prosecutor v. Bagosora et al., Case No. ICTR 98-41-T, Trial Chamber Judgment & Sentence, ¶ 576 (Dec. 18, 2008). The ICTR convicted all but Gratien Kabiligi, whose alibi defense led to his acquittal. *Id.* ¶¶ 1969-1986.

95. Prosecutor v. Semanza, Case No. ICTR 97-20-I, Third Amended Indictment, ¶ 1 (Oct. 12, 1999).

96. *See* Prosecutor v. Semanza, Case No. ICTR 97-20-T, Trial Chamber Judgment & Sentence, ¶¶ 51-52 (May 15, 2003) (noting that the broad allegations left the impression that the prosecutor had not obtained any particular information or evidence).

97. *Id.* ¶¶ 250-251.

98. *See id.* ¶¶ 475-479, 480-485, 506, 542-545, 547-548 (stating that the Appeals Chamber ruled that the Trial Chamber erred by not also entering a conviction for war crimes (outrages upon personal dignity) for this rape in light of the fact that the elements of crimes against humanity and war crimes are materially different); Prosecutor v. Semanza, Case No. ICTR 97-20-A, Appeals Chamber Judgment, ¶¶ 369, 390-395 (May 25, 2005) (emphasizing that the Appeals Chamber also found that the Trial Chamber did not exceed its discretion in sentencing the defendant to only seven years imprisonment for the rape).

99. *See generally* Rome Statute, *supra* note 4.

100. *Id.* art. 61(7)(c).

101. *See id.* art. 53(3)(a) (stating that in the case of a referral from the Security Council or a State Party, the Pre-Trial Chamber can “request the Prosecutor to reconsider [his or her] decision” not to proceed if so requested by the source of the referral); *id.* art. 53(3)(b) (adding that a decision by the Prosecutor not to proceed with an investigation or prosecution on the basis of the “interests of justice” is “effective only if confirmed by the Pre-Trial Chamber”).

circumstances, there may be enhanced opportunities for victims as well as segments of civil society to intervene and petition the Court to encourage the prosecutor to include charges of gender violence.<sup>102</sup>

### 1. Gravity

Several of the international criminal law tribunals are specifically charged in their constitutive documents with concentrating on the most serious crimes of international concern<sup>103</sup> or upon high level defendants

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102. The *Lubanga* case is not encouraging in this regard, however. Advocates for gender justice decried the limited nature of the indictment against the accused in the face of evidence of widespread sexual violence committed by his subordinates. See *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Request Submitted Pursuant to Rule 103(1) of the Rules of Procedure and Evidence for Leave to Participate as Amicus Curiae in the Article 61 Confirmation Proceedings, ¶¶ 4-21 (Sept. 7, 2006) (attempt by the Women's Initiative for Gender Justice to intervene as an amicus at the time the indictment against Lubanga was confirmed, pursuant to Rule 61 of the Rome Statute, to encourage the prosecution to include charges of sexual violence—rape and sexual assault, forced marriage, enslavement, and enforced pregnancy); *Prosecutor v. Lubanga*, Case No. ICC-01/01-01/06, Decision on Request Pursuant to Rule 103(1) of the Statute of the ICC, 3 (Sept. 26, 2006) (denying the right of intervention under Rule 103, on the ground that the request for additional gender charges “ha[d] no link with the present case”). At first, the ICC prosecutor indicated that he would keep the investigation against Lubanga open. See Luis Moreno-Ocampo, *A Word from the Prosecutor*, *supra* note 61, at 2 (noting that the indictment for using child soldiers did not “exclude the continuation of investigations into other crimes allegedly committed by Mr. Lubanga Dyilo after the current proceedings are closed”); Luis Moreno-Ocampo, *Prosecutor, Int'l Criminal Court, Address at Third Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court* (Sept. 6, 2004), available at <http://www.iccnw.org/?mod=asp3> (announcing that he would temporarily suspend further investigations until the present charges were tried and also stating that a focused prosecutorial strategy means “centering our efforts on perpetrators bearing the greatest responsibility, with a policy of short investigations, targeted indictments and expeditious trials”). In addition, Radhika Coomaraswamy, the U.N. Special Representative on Children and Armed Conflict, presented an amicus curiae brief asking the Court to include consideration of sexual violence suffered by girls abducted into militia. See United Nations Special Representative of the Secretary-General on Children and Armed Conflict, *Written Submissions of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict: Submitted in Application of Rule 103 of the Rules of Procedure and Evidence*, ¶¶ 18-26, delivered to the International Criminal Court, *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06 (Mar. 17, 2003) (raising concerns that such charges will never be brought if not brought initially, and noting that even the most narrow conception of “case” or “link” might have supported the intervention of this NGO and the proposed amendment given the fact that many girls and young women were abducted for the purpose of serving as child soldiers and were subjected to gender violence at the hands of rebels under Lubanga's command and control); see also *Lubanga*, Case No. ICC-01/04-01/06, Decision on Request Pursuant to Rule 103(1) of the Statute of the ICC (arguing that the Pre-Trial Chamber could have interpreted “case” more broadly to refer not to the existing charged crimes, but to any relevant charges that could be brought against the accused in relation to his conduct in the particular situation); Pritchett, *supra* note 62 (discussing gender violence in the Democratic Republic of Congo, the *Lubanga* proceedings, and the failed efforts to expand the charges).

103. See ICTR Statute, *supra* note 1, art. 1 (noting the ICTR, for example, is dedicated to prosecuting “persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda”); see also ICTY Statute, *supra* note 1, art. 1 (containing similar language to the ICTR Statute); ICTR Statute, *supra* note 1, art. 4 (empowering the Tribunal to prosecute “persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949”); Rome Statute, *supra* note 4, art. 5(1) (stating that the “jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole”). Admissibility under the Rome Statute also invokes the

who are most responsible for the commission of international crimes.<sup>104</sup> Where gravity is a decisive factor in choosing which charges to bring, prosecuting gender violence may be subordinated to other prosecutorial priorities if gender violence is not considered to be equal in severity and gravity to other war crimes,<sup>105</sup> such as the deliberate targeting of civilians or the torture of prisoners of war, or to other crimes against humanity, such as extermination or persecution—all crimes that happen to both men and women.

This seems to have been the case before the ICTR. Indeed, early on, there were indications that the ICTR prosecutors did not consider acts of gender violence to be “as serious” as other acts of physical violence perpetrated against members of the Tutsi group during the genocide.<sup>106</sup> In addition, it is not clear that prosecutors fully understood how rape was an integral part of the genocide in Rwanda. Even after the *Akayesu* case established that rape can serve as a predicate act of genocide,<sup>107</sup> only a

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concept of gravity and provides that a case will be considered inadmissible if it “is not of sufficient gravity to justify further action by the Court.” *Id.* art. 17(1)(d) (clarifying that the prosecutor’s decisions first to initiate an investigation and then to initiate a prosecution are premised on the case’s presumed admissibility which includes a consideration of gravity). Even further, the Rome Statute also states that the prosecutor may decline to initiate either an investigation or prosecution where there are “substantial reasons to believe that an investigation would not serve the interests of justice,” taking into account the gravity of the crime and the interests of the victims. *Id.* art. 53(1)(c). On the basis of these provisions and prevailing interpretations thereof, gravity concerns are thus relevant before the ICC at two key moments: in the identification of potential situations to investigate and in the choice of particular cases (i.e., crimes or individuals) to investigate and prosecute. *See generally id.*

104. *See* Law on the Establishment of the Extraordinary Chambers, with Inclusion of Amendments as Promulgated on 27 October 2004 (NS/RKM/1004/006) art. 1, available at [http://www.eccc.gov.kh/english/cabinet/law/4/KR\\_Law\\_as\\_amended\\_27\\_Oct\\_2004\\_Eng.pdf](http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf) [hereinafter Law on the Establishment of Extraordinary Chambers] (stating that the Extraordinary Chambers of the Courts of Cambodia are to “bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979”).

105. *See* Rome Statute, *supra* note 4, art. 8, ¶ 1. In addition to the required nexus element, the ICC’s war crimes provision contains soft threshold language indicating that “[t]he Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.” This language emerged as a compromise between delegations that wanted more binding language specifically limiting the Court’s jurisdiction to such situations and delegations that did not want any threshold specific to war crimes. Notwithstanding its non-binding nature, such language will inevitably influence prosecutorial discretion and may prevent the prosecution of sporadic acts of gender violence that cannot be shown to be the result of a plan or policy to commit war crimes. Definitions of particular international crimes also contain gravity thresholds. *See, e.g., id.* art. 6, ¶ 1(b) (setting forth the genocide *actus reus* of “causing serious bodily or mental harm” to members of a protected group); *id.* art. 7, ¶ 1(e) (including as a crime against humanity “severe deprivation of physical liberty”); *id.* art. 7, ¶ 1(g) (containing a similar provision with respect to “other form[s] of sexual violence of comparable gravity” to rape, sexual slavery, etc.).

106. *See* HUMAN RIGHTS WATCH, *supra* note 14, at 94 (“There is a widespread perception among the Tribunal investigators that rape is somehow a ‘lesser’ or ‘incidental’ crime not worth investigating.”). *See also supra* note 55.

107. *See* Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Trial Chamber Judgment, ¶ 731 (Sept. 2, 1998) (finding that rape and sexual violence constituted the infliction of



handful of subsequent defendants have been prosecuted<sup>108</sup> for and convicted of genocidal rape,<sup>109</sup> and few cases feature crimes of sexual violence at all.<sup>110</sup> To date, the ICTR has not featured any prosecutions that focus particularly on gender-based crimes as was seen before the ICTY.<sup>111</sup>

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serious bodily and mental harm on the victims and specifically that “[t]hese rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.”).

108. Muhimana, for one, was charged with crimes against humanity, but not genocide, for allegedly committing multiple acts of rape and for assisting others in the commission of rape and other forms of sexual assault. *Prosecutor v. Muhimana*, Case No. ICTR 95-1B-1, Revised Amended Indictment, ¶¶ 4-7 (Feb. 3, 2004). The ICTY has even fewer genocidal rape indictments. The current indictments against Radovan Karadžić and Ratko Mladić before the ICTY plead sexual violence as a predicate act of genocide. *See Prosecutor v. Karadžić*, Case No. IT-95-5/18, Amended Indictment, ¶ 17 (Apr. 28, 2000). The original indictments against both men had specifically mentioned the rape of women in the recitation of genocidal crimes. *See Prosecutor v. Karadžić & Mladić*, Case No. IT-95-5-1, Indictment, ¶ 19 (May 24, 1995).

109. *See Prosecutor v. Musema*, Case No. ICTR 96-13-A, Trial Chamber Judgment and Sentence, ¶ 933 (Jan. 27, 2000) (resulting in a conviction for rape as genocide and as a crime against humanity before the same Trial Chamber that heard the *Akayesu* case on the basis of a similarly amended indictment). In *Musema*, the Trial Chamber found that

acts of serious bodily and mental harm, including rape and other forms of sexual violence were often accompanied by humiliating utterances, which clearly indicated that the intention underlying each specific act was to destroy the Tutsi group as a whole. The Chamber noted, for example, that during the rape of Nyiramasugi, Musema declared: “The pride of the Tutsis will end today.” In this context, the acts of rape and sexual violence were an integral part of the plan conceived to destroy the Tutsi group. Such acts targeted Tutsi women, in particular, and specifically contributed to their destruction and therefore that of the Tutsi group as such. Witness N testified before the Chamber that Nyiramasugi, who was left for dead by those who raped her, had indeed been killed in a way. Indeed, the Witness specified that “what they did to her is worse than death.”

*Id.* On appeal, new evidence emerged that controverted the key testimony presented at trial. The Appeals Chamber ruled that a miscarriage of justice had occurred and quashed the rape as genocide conviction. *See Prosecutor v. Musema*, Case No. ICTR 96-13-A, Appeals Chamber Judgment, ¶¶ 172-194 (Nov. 6, 2001). *See also Prosecutor v. Gacumbitsi*, Case No. ICTR 2001-64-T, Trial Chamber Judgment, ¶¶ 321-333 (June 17, 2004) (convicting defendant of genocidal rape); Wood, *supra* note 11, at 303-04 (discussing the lack of charges in subsequent cases despite the *Akayesu* precedent).

110. Several indictments involving at large defendants do contain sexual violence allegations. *See, e.g., Prosecutor v. Bizimana et al.*, Case No. ICTR 98-44-I, Prosecutor’s Amended Indictment Pursuant to the Decision of Trial Chamber II on the Defence Motion, Pursuant to Rule 72 of the Rules of Procedure and Evidence, Pertaining to, *Inter Alia*, Lack of Jurisdiction and Defect in the Form of the Indictment, ¶¶ 72-107 (Nov. 21, 2001) (charging sexual violence as genocide and crimes against humanity).

111. Justice Richard Goldstone, the inaugural ICTY/ICTR prosecutor, issued from the ICTY the first international indictment focused exclusively on sexual violence committed in the town of Foča. Defendants were convicted of rape and sexual slavery as crimes against humanity. *See Prosecutor v. Kunarac et al.*, Case No. IT-96-23 & 23/1-T, Trial Chamber Judgment, ¶¶ 4-11 (Feb. 22, 2001). Likewise, *Prosecutor v. Furundžija* exclusively featured sexual violence charges. After an eleven day trial—the Tribunal’s shortest—the defendant was convicted of rape as a form of torture, a conviction upheld on appeal despite an unsuccessful challenge to the Judge’s impartiality. *Prosecutor v. Furundžija*, Case No. IT-95-17/1, Trial Chamber Judgment, ¶¶ 199-200 (July 21, 2000). On the impartiality argument, the Trial Chamber noted:

[E]ven if it were established that Judge [Florence] Mumba expressly shared the

Gendered perceptions of the relative gravity of crimes may ultimately influence proceedings before the ICC as well. At several points within the Statute of the International Criminal Court (ICC), gravity operates as an express limitation on the Court's jurisdiction and as a guide to the exercise of prosecutorial discretion.<sup>112</sup> And yet, the Court's Statute and Elements of Crimes provide little in the way of concrete guidance about the quantitative or qualitative contours of this key concept.<sup>113</sup> In his published criteria for the selection of cases and situations,<sup>114</sup> the ICC Prosecutor has indicated that in assessing gravity, he will focus in part on the number of victims with reference to the scale of the crimes and the degree of systematicity in their commission.<sup>115</sup> At the same time, he indicated that other more qualitative factors would also be relevant, such as whether the crimes are planned, cause "social alarm," are ongoing or may be repeated, exhibit particular cruelty or reflect other aggravating circumstances, target especially vulnerable victims, are discriminatory in their execution, or involve an abuse of power.<sup>116</sup> In addition, the prosecutor announced that he will consider "the broader impact of the crimes on the community and on regional peace and security, including longer term social, economic, and environmental damage."<sup>117</sup> By way of example, he noted that the situations currently under consideration in Central and East Africa involved thousands of displacements, killings, abductions, and large-scale sexual violence.<sup>118</sup>

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goals and objectives of the U.N. [Commission on the Status of Women] and the Platform for Action, in promoting and protecting the human rights of women, that inclination, being of a general nature, is distinguishable from an inclination to implement those goals and objectives as a Judge in a particular case. It follows that she could still sit on a case and impartially decide upon issues affecting women.

*Id.*

112. See, e.g., Rome Statute, *supra* note 4, art. 7, ¶ (g).

113. For a comprehensive discussion of the way in which the concept of gravity undergirds the legal, moral, and sociological legitimacy of the International Criminal Court, see Margaret M. DeGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 *FORDHAM INT'L L.J.* (forthcoming 2009) (unpublished manuscript on file with the author).

114. See ICC OFFICE OF THE PROSECUTOR, DRAFT FOR DISCUSSION: CRITERIA FOR SELECTION OF SITUATIONS AND CASES 4-5 (2006) [hereinafter DRAFT CRITERIA FOR SELECTION].

115. See OTP, THE INTERESTS OF JUSTICE, *supra* note 90, at 5 (2006) (summarizing factors for determining whether the situation is of sufficient gravity).

116. *Id.*; see also DRAFT CRITERIA FOR SELECTION, *supra* note 114.

117. DRAFT CRITERIA FOR SELECTION, *supra* note 114; Letter from Sidiki Kaba, President, International Federation for Human Rights, to Luis Moreno Ocampo, Prosecutor, International Criminal Court (Sept. 15, 2006), available at [http://www.fidh.org/IMG/pdf/FIDH\\_comments\\_-\\_selection\\_criteria\\_-\\_final.pdf](http://www.fidh.org/IMG/pdf/FIDH_comments_-_selection_criteria_-_final.pdf) (approving of the ICC's approach, particularly its consideration of "the impact of the crimes on the affected communities as well as on regional peace and security").

118. DRAFT CRITERIA FOR SELECTION, *supra* note 114; see also *Interactive Radio for Justice: Interview with Prosecutor of the International Criminal Court Luis Moreno Ocampo* (Apr. 5, 2006), [http://www.irfj.org/Programs/Program11/IRFJ\\_prg11\\_english.doc](http://www.irfj.org/Programs/Program11/IRFJ_prg11_english.doc). Ocampo took the opportunity to publicly acknowledge the gravity of sexual violence in a press interview:

The ICC adjudicated these gravity provisions for the first time in the cases arising out of the ongoing regional war being waged in the Democratic Republic of Congo. The rulings emerged in the context of the prosecutor's request to the ICC's Pre-Trial Chamber for the issuance of arrest warrants against two defendants, Thomas Dyilo Lubanga and Bosco Ntaganda, pursuant to Rule 58(1) of the ICC Statute.<sup>119</sup> In this matter of first impression, the Pre-Trial Chamber determined that it had to confirm the admissibility of the case prior to issuing any arrest warrant. In so doing, the Pre-Trial Chamber looked to several factors. First, the Pre-Trial Chamber considered the existence of systematic or large-scale crimes.<sup>120</sup> Second, the Pre-Trial Chamber indicated that it would consider the "social alarm" the relevant conduct caused within the international community.<sup>121</sup> Third, the Pre-Trial Chamber indicated that it would consider the position of the accused and whether he or she fell within the category of the most senior leaders engaged in the situation under investigation, taking into account the role of the suspect in the state or organization implicated in the abuses.<sup>122</sup> The Chamber reasoned that such an interpretation would maximize the deterrent effect of the Court by focusing on those individuals most capable of preventing the commission of international crimes.<sup>123</sup>

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I fully agree that this is one of the gravest crimes, raping women was a tool to destroy communities. Rape as it was perpetrated in Congo does not constitute only sexual abuse but it is used as a weapon of war. Because women form the basis of any community, women bring people together, and raping them is like raping the whole community. We totally agree with you on the gravity of this crime.

*Id.*

119. See Rome Statute, *supra* note 4, art. 58(1) (stating that an arrest warrant is appropriate where there "are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court" and the arrest of the person appears necessary to guarantee his or her appearance, to ensure that the individual does not endanger the investigation, or to prevent the person from continuing the commission of that or other crimes).

120. See Prosecutor v. Lubanga, Case No. ICC-01/04, Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I Entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58," ¶ 56(i) (July 13, 2006) [hereinafter *Lubanga*, Case No. ICC-01/04, Judgment on the Prosecutor's Appeal]. "Systematicity" can be interpreted to mean the crimes followed a pattern, are organized, or are being committed pursuant to a policy or plan. It seems clear that "systemic" conduct need not be pursuant to a plan, policy, common design, or conspiracy if it is a regular or repeated feature of an armed conflict or state of repression that arises naturally without exogenous impetus. The notion of "large-scale" denotes a quantitative measure and suggests that the crimes are numerous or widespread.

121. *Id.* ¶ 56(i).

122. Compare *id.* ¶¶ 56, 60, 66 (restating that the Pre-Trial Chamber's reasoning for its three criteria, which, had it remained effective, would have precluded the pyramidal prosecutorial strategy employed by many domestic prosecutors and the ICTY), with Carla Del Ponte, *Investigation and Prosecution of Large-Scale Crimes at the International Level*, 4 J. INT'L CRIM. JUST. 539, 543 (2006) (noting the common practice of building "a case against the most senior persons responsible [with] a series of cases which 'work up the ladder,' prosecuting lower-level perpetrators in the collection of evidence against the higher-level perpetrators").

123. *Lubanga*, Case No. ICC-01/04, Judgment on the Prosecutor's Appeal, ¶ 60.

Although the Pre-Trial Chamber issued the arrest warrant for Lubanga,<sup>124</sup> it determined that Ntaganda was not a central figure in the decision-making process of his group and lacked any authority over the development or implementation of policies and practices (such as the negotiation of peace agreements).<sup>125</sup> This was notwithstanding the fact that Ntaganda was in a command position over sector commanders and field officers.<sup>126</sup> As such, the Pre-Trial Chamber deemed the case against Ntaganda inadmissible, and the arrest warrant did not issue.

The Prosecutor appealed this decision, arguing that the Pre-Trial Chamber committed an error of law in defining gravity too narrowly for the purpose of determining whether to issue an arrest warrant against Ntaganda.<sup>127</sup> The Appeals Chamber ruled<sup>128</sup> as a preliminary matter that an admissibility determination was not a pre-requisite to the issuance of an arrest warrant.<sup>129</sup> Turning to the issue of gravity, the Appeals Chamber determined that the Pre-Trial Chamber had erred in its interpretation of gravity in several key respects. First, it noted that imposing requirements of systematicity or large-scale action contradicted the guiding threshold language of Article 8(1) governing war crimes—which provides for jurisdiction only “in particular” when war crimes are committed “as part of a plan or policy or as part of a large-scale commission of such crimes”—and duplicated aspects of the definition of crimes against humanity, requiring a showing that the charged acts were part of a widespread or systematic attack against a civilian population.<sup>130</sup> The Appeals Chamber also took issue with the concept of “social alarm,” which it noted depends on “subjective and contingent reactions” to crimes “rather than upon their objective gravity.”<sup>131</sup>

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124. Prosecutor v. Lubanga, Case No. ICC-01/04-02/06, Warrant of Arrest (Feb. 10, 2006). At the time the warrant was issued, Lubanga had been in the custody of Congolese authorities, who transferred him to the ICC on March 17, 2006, making him the first defendant in the custody of the ICC. His trial commenced in January 2009.

125. See *Lubanga*, Case No. ICC-01/04, Judgment on the Prosecutor’s Appeal, ¶¶ 8, 91, 92 (remanding back to the Pre-Trial Chamber the decision on whether to issue an arrest warrant because the Pre-Trial Chamber curtailed its inquiry into Ntaganda, believing the case was inadmissible).

126. See *id.* ¶¶ 75-76 (opining that the Pre-Trial Chamber’s announcement that perpetrators other than those at the very top are excluded from the exercise of the jurisdiction of the ICC placed too much emphasis on formalistic grounds).

127. *Id.* ¶ 36.

128. See *id.* This decision, which is dated 2006, appears to have been reclassified as public in April 2008 when the arrest warrant against Ntaganda was unsealed. See Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Decision to Unseal the Warrant of Arrest Against Bosco Ntaganda (April 28, 2008).

129. See *Lubanga*, Case No. ICC-01/04, Judgment on the Prosecutor’s Appeal, ¶¶ 41-42 (ruling that Article 58 contains an exhaustive list of factors to consider in issuing a warrant for arrest such that admissibility should not be treated as an additional substantive pre-requisite); *id.* ¶ 50 (noting that admissibility determinations should involve the accused, which is impossible where they are undertaken in advance of the issuance of an arrest warrant).

130. *Id.* ¶¶ 69-71.

131. *Id.* ¶ 72 (explaining that the crimes listed in the governing statute were specially selected as the most serious crimes of international concern, and opining that

Finally, the Appeals Chamber noted that the deterrent effect of the Court will be maximized where all categories of perpetrators may be brought before the Court.<sup>132</sup> It also noted that “individuals who are not at the very top of an organization may still carry considerable influence and commit, or generate the widespread commission of, very serious crimes.”<sup>133</sup> The Court thus reversed the finding of inadmissibility and remanded the case to the Pre-Trial Chamber to determine on the basis of Article 58(1) alone whether an arrest warrant against Ntaganda should issue.<sup>134</sup> The Pre-Trial Chamber subsequently unsealed an arrest warrant against Ntaganda<sup>135</sup> charging him alongside Lubanga with enlisting, conscripting, and using child soldiers in armed conflict.<sup>136</sup> In so ruling on the gravity question, the Appeals Chamber appropriately refocused this inquiry on qualitative rather than quantitative factors, ensured flexibility in pursuing cases, enhanced the deterrent power of the Court, and lessened the chances that gravity determinations will exclude cases involving sexual violence, even where they are committed by low-level perpetrators.

## *2. Most Senior Defendants*

Where a prosecutorial strategy focuses on those “most responsible” for international crimes—either out of an exercise of prosecutorial discretion or pursuant to a tribunal mandate—crimes of sexual violence may present particular problems of proof under the applicable doctrines of derivative or secondary liability where the senior official or authority may have been distant from the physical commission of the crimes. Where superiors ordered their subordinates to commit gender-based crimes, or otherwise instigated such crimes,<sup>137</sup> the direct liability of superiors for any crimes

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subjective criteria are not necessarily appropriate in determining admissibility).

132. *Id.* ¶ 73 (questioning the logic of the Pre-Trial Chamber’s assertion that deterrence would be at its zenith when high-level perpetrators are prosecuted and alternatively proposing that deterrence is best achieved when there is no such per se exclusion on prosecution).

133. *Id.* ¶ 77.

134. *Id.* ¶¶ 91-92.

135. *See* Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Decision to Unseal the Warrant of Arrest Against Bosco Ntaganda (Apr. 28, 2008).

136. Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Warrant of Arrest (Aug. 22, 2006).

137. *See* Prosecutor v. Nyiramasuhuko & Ntahobali, Case No. ICTR 97-21-I, Amended Indictment, ¶¶ 4.2, 7 (Mar. 1, 2001) (indicting Pauline Nyiramasuhuko, Minister for the Family and for the Advancement of Woman during the genocide in Rwanda and a leader in the Hutu-dominated National Republican Movement for Democracy and Development Party, for genocide, conspiracy to commit genocide, public and direct incitement to commit genocide, and various crimes against humanity, including rape, pursuant to the doctrine of superior responsibility); *see also* Peter Landesman, *A Woman’s Work*, N.Y. TIMES, Sept. 15, 2002, (Magazine), at 13. Landesman reported that Nyiramasuhuko, who was the first woman to be indicted for rape under international law, told her subordinates to rape then kill Tutsi women who had sought refuge in a Red Cross camp set up in a local stadium or who had been captured. In particular, she was reported to have said “before you kill the women, you need to rape them.” *Id.*

committed is usually clear.<sup>138</sup> By contrast, where superiors are prosecuted according to forms of derivative or secondary liability, such as pursuant to the doctrines of superior responsibility, linking the defendant to acts of sexual violence may raise particular challenges.<sup>139</sup>

For example, in addition to proving that the direct perpetrator was a legal subordinate under the “effective control” of the accused, the superior responsibility doctrine requires a showing that the accused knew, or should have known, that his subordinates were committing or were about to commit international crimes.<sup>140</sup> Difficulties in linking a high-level accused to acts of sexual violence arose in cases before the ICTR. In *Akayesu*, for example, prosecutors claimed that they knew of acts of sexual violence perpetrated in the Taba commune where Akayesu served as *bourgmestre*; however they were unable to charge Akayesu for these crimes in the absence of evidence of a relationship of subordination between Akayesu and the direct perpetrators and additional evidence proving that Akayesu knew of the crimes.<sup>141</sup> Unsolicited witness testimony during trial finally placed Akayesu in the vicinity of where crimes of sexual violence were committed, which led to the amendment of his indictment and his ultimate

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138. See Prosecutor v. Gacumbitsi, Case No. ICTR 2001-64-T, Indictment, ¶¶ 20, 21, 24, 37-40 (June 20, 2001) (indicting Gacumbitsi, the *bourgmestre* of Rusumo commune, for genocide and crimes against humanity by virtue of ordering, instigating, permitting, or failing to prevent or punish his subordinates and others for committing rape and other sexual assaults). *But see* Prosecutor v. Gacumbitsi, Case No. ICTR 2001-64-T, Trial Chamber Judgment, ¶¶ 291-293, 321-333 (June 17, 2004) (convicting the defendant of genocide and the crime against humanity of rape for instigating some of the rapes alleged, but failing to address his superior responsibility liability); Prosecutor v. Gacumbitsi, Case No. ICTR 2001-64-A, Appeals Chamber Judgment, ¶¶ 126-138 (July 7, 2006) (addressing the Prosecutor’s unsuccessful appeal of acquittal for certain rapes that were proven to have occurred but, in the Trial Chamber’s estimation, were not sufficiently linked to the accused to result in a conviction, because the rapes in question either occurred prior to the alleged act of instigation or could not be causally linked to the alleged act of instigation). The Appeals Chamber ruled that the Trial Chamber erred in not fully considering Gacumbitsi’s superior liability, especially given potential *de facto* superiority over the direct perpetrators in question, but found that the evidence did not establish the necessary relationship of subordination. *Id.* ¶¶ 141-146. Over dissents by Judges Shahabudeen and Schomburg, the Appeals Chamber also confirmed that the defendant could not be convicted of the rapes by virtue of his participation in a joint criminal enterprise, because the prosecution had not adequately pled this form of responsibility in the indictment or cured any defect therein through subsequent submissions. *Id.* ¶¶ 158-175. See Prosecutor v. Gacumbitsi, Case No. ICTR 2001-64-A, Separate Opinion of Judge Shahabudeen, ¶¶ 28-39 (July 7, 2006) (arguing that the indictment properly plead JCE liability); Prosecutor v. Gacumbitsi, Case No. ICTR 2001-64-A, Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide, ¶¶ 7-8, 15 (July 7, 2006) (same).

139. See generally Patricia Viseur Sellers, *Individual(s’) Liability for Collective Sexual Violence*, in GENDER AND HUMAN RIGHTS 153 (Karen Knop ed., 2004) (discussing how various doctrines of individual liability have resulted in convictions for sexual violence before the ICTY).

140. See The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808*, ¶ 56, U.N. Doc. S/25704, (May 3, 1993), available at <http://www.un.org/icty/legaldoc-e/basic/statut/s25704.htm> (discussing superior responsibility).

141. *Cf.* Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Trial Chamber Judgment, ¶¶ 49-77 (Sept. 2, 1998) (discussing the various *de facto* and *de jure* powers held by the town *bourgmestre*).

conviction for aiding and abetting sexual violence.<sup>142</sup>

Likewise, in *Muvunyi*, the prosecution sought to withdraw the rape charges altogether a few weeks prior to the start of trial on the grounds that witnesses could not be traced and others refused to testify.<sup>143</sup> The Trial Chamber denied the Prosecutor's request to withdraw the rape charges on the grounds that the Prosecution had not provided sufficient grounds upon which to reconsider the confirmation of the original indictment and the Defense had already expended time and resources preparing to defend the charges.<sup>144</sup> Although the Prosecution ultimately located and presented the testimony of three rape victims, whose harrowing testimony was deemed reliable by the Trial Chamber, none of the witnesses was raped by the specific group of subordinates alleged in the indictment.<sup>145</sup> Accordingly, the defendant was acquitted on these counts.<sup>146</sup> Both sides appealed, with the prosecutor alleging error in the rape acquittals, among other things. With respect to the rape charges, the Appeals Chamber agreed with the Trial Chamber that the charges proven did not correspond to the allegations in the indictment, and that variances between the evidence adduced at trial and the allegations within the indictment remained un-remedied during the pre-trial period.<sup>147</sup>

Because of difficulties proving superior responsibility, particularly with respect to the rigorous "effective control" standard in situations in which lines of command and control are blurred or ad hoc,<sup>148</sup> prosecutors have demonstrated a preference for cases involving direct evidence in more recent indictments. Foregoing superior responsibility charges may insulate leaders from sexual violence charges where subordinates committed such

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142. *See id.*

143. *See* News Release, Hironnelle News Agency, Rwanda-ICTR Honeymoon Threatens to End over Rape Charges (Feb. 11, 2005), available at [http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/rapeVictimssDeniedJustice/hironnelle050210\\_en.php](http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/rapeVictimssDeniedJustice/hironnelle050210_en.php) (recounting the uproar caused by the Prosecutor in Rwanda; even Rwanda's representative to the ICTR criticized the decision); Letter from Dr. Alex Obote-Odora, Special Assistant to the Prosecutor, ICTR, to Ariane Bruent, Coalition for Women's Human Rights in Conflict Situations (Feb. 11, 2005), available at <http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/rapeVictimssDeniedJustice/responseICTRmuvunyi.pdf> (explaining and defending the decision to withdraw sexual violence counts).

144. *Prosecutor v. Muvunyi*, Case No. ICTR 2000-55A-PT, Decision on the Prosecutor's Motion for Leave to File an Amended Indictment, ¶¶ 28-34 (Feb. 23, 2005).

145. *See Prosecutor v. Muvunyi*, Case No. ICTR 2000-55A-PT, Trial Chamber Judgment and Sentence, ¶ 409 (Sept. 12, 2006) (stating that "[t]he chamber fully understands the unique circumstances of rape victims and sympathizes with them," but that in light of the specific nature of the rape charges in the indictment, the chamber could not find Muvunyi responsible beyond a reasonable doubt).

146. *Id.* ¶¶ 400-409.

147. *Prosecutor v. Muvunyi*, Case No. ICTR 2000-55A-A, Appeals Chamber Judgment, ¶¶ 160-169 (Aug. 29, 2008).

148. *See generally* Beth Van Schaack, *Command Responsibility: The Anatomy of Proof* in *Romagoza v. Garcia*, 36 U.C. DAVIS L. REV. 1213 (2003) (discussing the challenges inherent in charging superior responsibility).

crimes and it cannot be shown that leaders ordered or instigated them.<sup>149</sup>

In lieu of superior responsibility, prosecutors (particularly before the ICTY) now regularly charge superiors with participating in a joint criminal enterprise (JCE)<sup>150</sup> as a way to hold them liable for crimes committed by others.<sup>151</sup> This has enabled the prosecution of rape and other forms of sexual violence that are committed by other individuals.<sup>152</sup> The extended form of the doctrine has the potential to be particularly useful in charging crimes of gender and sexual violence that may not be an express purpose of the joint criminal enterprise, but that are otherwise foreseeable under the circumstances.<sup>153</sup> It is not yet clear under the law whether the requirement

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149. *See, e.g.*, Prosecutor v. Gacumbitsi, Case No. ICTR 2001-64-A, Appeals Chamber Judgment, ¶¶ 144-145 (July 7, 2006) (concluding that the Prosecution was unable to show the link necessary between the accused and the specific perpetrators of particular incidents of rape, despite the fact that the accused imposed law and order over the entire commune and knew or had reason to know of the specific rapes).

150. *See* Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶¶ 220-229 (July 15, 1999) (affirming the cognizability of the joint criminal enterprise doctrine). The law now recognizes three forms of joint criminal enterprise. For the “basic” joint criminal enterprise doctrine, it is necessary to show that the accused intended to participate in a common plan aimed at the crime’s commission and intended the commission of the crime. The second (“systemic”) form provides for liability for individuals who contribute to the maintenance or essential functions of a criminal institution or system, such as a concentration or detention camp. For the “extended” version of the doctrine, which enables the prosecution of crimes that were not part of the original common plan, it is necessary to show that the crimes for which the accused is being prosecuted were a “natural and foreseeable” consequence of implementing the common plan. The defendant is held liable where he or she willingly took the risk that these unintended crimes would be committed during the course of the execution of the crimes for which the JCE was formed. *Id.* Many of the original indictments before the ICTR did not contain allegations concerning the JCE doctrine, because they were issued prior to *Tadić*. The ICTR has not allowed prosecutors to rely on the doctrine when it is introduced at trial or in closing arguments. *See* Prosecutor v. Gatete, Case No. ICTR 2000-61-I, Decision on the Prosecution’s Request for Leave to File an Amended Indictment, ¶ 5 (Apr. 21, 2005) (allowing an amended indictment in order to better plead the doctrine); Prosecutor v. Ntagerura, Bagambiki, & Imanishimwe, Case No. ICTR 99-46-T, Trial Chamber Judgment & Sentence, ¶ 34 (Feb. 25, 2004) (disallowing ICTR prosecutors from relying on the doctrine when it is introduced at trial or in closing arguments).

151. *See, e.g.*, Prosecutor v. Mpambara, Case No. ICTR 2001-65-I, Amended Indictment, ¶ 20 (Nov. 27, 2004) (charging defendant with genocide for acts of sexual violence either as a superior pursuant to the doctrine of superior responsibility or as a member of a joint criminal enterprise where such acts were a foreseeable outcome of the objectives and implementation of the JCE, in the absence of allegations that the accused participated directly in any of the crimes); *see also* Prosecutor v. Mpambara, Case No. ICTR 2001-65-A, Trial Chamber Judgment, ¶¶ 28-40 (Sept. 11, 2006). Notwithstanding allegations of direct participation, the Prosecution apparently went forward on the basis of joint criminal enterprise and aiding and abetting by omission theories of responsibility, at times linking the two. *Id.* ¶ 175.

152. Prosecutor v. Kvočka et al., Case No. IT-98-30-T2, Trial Chamber Judgment, ¶¶ 307, 319-320 (Nov. 2, 2001) (finding that one of the purposes underlying the detention of non-Serbs in Omarska prison camp was the perpetuation of rape and forced impregnation); Prosecutor v. Krišnik, Case No. IT-00-39-T, Trial Chamber Judgment, ¶¶ 965-966, 972, 1105, 1146, 1150 (Sept. 27, 2006) (noting uncharged incidents of sexual violence that were committed pursuant to the implementation of the accused’s JCE).

153. *See* Prosecutor v. Karemera et al., Case No. ICTR 98-44-T, Decision on the Prosecutor’s Motion for Leave to Amend the Indictment, Rule 50 of the Rules of Procedure and Evidence, ¶¶ 3, 18, 37, 47 (Feb. 13, 2004) (permitting the Prosecutor to amend the indictment on the basis of newly discovered evidence and new jurisprudence



of foreseeability has any limiting power, or if in a situation of mass violence or armed conflict, all international crimes are effectively foreseeable. Certainly, in light of Security Council Resolution 1820 and other consistent evidence of the pervasiveness of sexual violence during situations of armed conflict, general lawlessness, and repression, it is increasingly difficult to argue that sexual violence is not natural or foreseeable under these circumstances.<sup>154</sup> This is especially true in situations in which the common plan involves the detention of women by military or paramilitary forces.<sup>155</sup>

### *C. Plea Bargaining*

Plea bargaining is now a staple of international criminal law, despite some initial resistance to the process from civil law practitioners.<sup>156</sup> In several ICTR cases, the Prosecutor dropped or withdrew sexual violence

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on the applicability of the extended notion of joint criminal enterprise to crimes of sexual violence); Prosecutor v. Karemera et al., Case No. ICTR 98-44-R54, Scheduling Order—Oral Arguments on Rape, Complicity in Genocide and the Pleading of a Joint Criminal Enterprise in the Amended Indictment (Aug. 8, 2005) (calling for oral argument on, among other things, whether the extended form of JCE could be pled as a form of liability for a rape charge); Prosecutor v. Karemera et al., Case No. ICTR 1998-44-I, Amended Indictment of 24 August 2005, ¶¶ 67-70 (Aug. 24, 2005) (charging acts of rape, in the new indictment, as the “natural and foreseeable consequence of the object of the joint criminal enterprise to destroy the Tutsi group.”); Prosecutor v. Karemera et al., Case Nos. ICTR 98-44-AR72.5 & ICTR 98-44-AR72.6, Decision on Jurisdictional Appeals: Joint Criminal Enterprise, ¶ 8 (Apr. 12, 2006) (ruling on the defendants’ appeal of other aspects of the Trial Chamber’s JCE ruling, but not the doctrine’s applicability to charges of rape); Prosecutor v. Karemera et al., Case No. ICTR 98-44-T, Decision on Motions for Judgment of Acquittal: Rule 98bis of the Rules of Procedure and Evidence, ¶ 40 (Mar. 19, 2008) (allowing the JCE counts relating to rape to survive a trial motion for judgment of acquittal).

154. See, e.g., S.C. Res. 1820, *supra* note 6, ¶ 3 (noting that during times of armed conflict, women and girls are particularly targeted for sexual violence as a tactic of war).

155. See, e.g., Prosecutor v. Krstić, Case No. IT-98-33-T, Trial Chamber Judgment, ¶ 616 (Aug. 2, 2001) (ruling that acts of rape and other forms of abuse were not an agreed upon objective of the members of the joint criminal enterprise). The ICTY held in *Krstić*, however, that such acts were a natural and foreseeable consequence of the ethnic cleansing campaign, which was the objective of the JCE, in light of the fact that the campaign generated a highly vulnerable populace at the mercy of military and paramilitary units. *Id.* ¶¶ 616-617; see also Prosecutor v. Kvočka et al., Case No. IT-98-30/1-T, Trial Chamber Judgment, ¶ 327 (finding it inevitable that female detainees would be sexually assaulted while in the custody of “men with weapons who were often drunk, violent, and physically and mentally abusive and who were allowed to act with virtual impunity”). The *Kvočka* Trial Chamber found that even where such abuse was not inherent to the intended system of persecutory detention and ill treatment, it was alternatively a natural or foreseeable consequence of the system. *Id.* ¶¶ 325-327. See generally Kelly Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT’L L. 288 (2003).

156. The ICTR secured an important guilty plea from Jean Kambanda, the former Prime Minister of Rwanda. Kambanda pled guilty to all six counts in the indictment, none of which concerned gender-based violence. See Prosecutor v. Kambanda, Case No. ICTR 97-23-DP, Indictment (Oct. 16, 1997) (indicting defendant for genocide and crimes against humanity, but no gender-based crimes). It is unclear if he was ever asked to plea to the acts of sexual violence in Rwanda. See Prosecutor v. Kambanda, Judgment and Sentence, Case No. ICTR 97-23-S (Sept. 4, 1998) (recounting substance of plea).

counts where the defendant pled guilty on other counts. For example, the prosecution had charged Omar Serushago with various acts of rape as the predicate acts of genocide and as crimes against humanity.<sup>157</sup> The defendant subsequently pled guilty to four out of five counts, excluding the rape as a crime against humanity count. The prosecutor subsequently withdrew the rape charge.<sup>158</sup> Although rape had been charged as a predicate of genocide, none of the facts to which Serushago admitted related to the rape allegations.<sup>159</sup> Indeed, several cases manifested the same pattern in which defendants plead guilty to murder and extermination, but refuse to accept responsibility for sexual violence charges.<sup>160</sup>

#### *D. Failing to Make Testimony of Victims Trial Ready*

Even where cases are investigated and charges are brought, shoddy prosecutorial preparation and ill-prepared testimony can result in acquittals. At one point, more than half of the ICTR indictments included charges of rape and other forms of sexual violence (many involving counts added by amendment).<sup>161</sup> Many cases, however, ended in acquittal on the rape and sexual violence counts. For example, in *Prosecutor v. Kajelijeli*, the defendant was acquitted of rape (charged as a crime against humanity) because two of the judges found that the key witness lacked credibility due to inconsistencies in her testimony at trial and prior statements to investigators.<sup>162</sup> The Trial Chamber thus acquitted the defendant of rapes

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157. See *Prosecutor v. Serushago*, Case No. ICTR 98-39-I, Modified Indictment, ¶¶ 4.22, 5.11-12, 5.25-27 (Oct. 8, 1998) (indicting Serushago for crimes committed by him personally, by persons he supervised, or by his confederates, with his knowledge and consent, including rape and sexual assault of Tutsi women and girls).

158. *Prosecutor v. Serushago*, Case No. 98-39-S, Trial Chamber Sentence, ¶ 4 (Feb. 5, 1999).

159. *Id.* ¶ 25; see also *Prosecutor v. Serushago*, Case No. ICTR 98-39-A, Reasons for Judgment, ¶¶ 1, 34 (Apr. 6, 2000) (affirming the Trial Chamber's sentence of fifteen years imprisonment).

160. See *Prosecutor v. Nzabirinda*, Case No. ICTR 2001-77-T, Trial Chamber Sentencing Judgment (Feb. 23, 2007). The original December 2001 indictment against Nzabirinda contained charges, among others, of rape as a crime against humanity. On November 20, 2006, the prosecutor requested the withdrawal of the majority of the counts, with prejudice, and submitted an amended indictment that contained only one count of murder as a crime against humanity. Several weeks later, the defendant pled guilty to the single count. *Id.* ¶¶ 7, 41. The prosecutor apparently explained the withdrawal on the ground that "the evidence is not there." *Id.* ¶ 44; see also *Prosecutor v. Rugambarara*, Case No. ICTR 2000-59-I, Decision on the Prosecution Motion to Amend the Indictment, ¶ 2 (June 28, 2007) (noting abandonment of genocide and other crimes against humanity charges (including torture and rape) in favor of a single count of extermination as a crime against humanity); *Prosecutor v. Bisengimana*, Case No. ICTR 00-60-T, Trial Chamber Judgment & Sentence, ¶¶ 7, 12 (Apr. 13, 2006) (noting that prosecution withdrew rape and other charges contained in the original indictment dated July 1, 2000). In October 2005, defendant pled guilty to remaining counts of murder and extermination. *Id.*

161. See Sita Balthazar, *Gender Crimes and the International Criminal Tribunals*, 10 GONZ. J. INT'L L. 43, 43 (2006).

162. *Prosecutor v. Kajelijeli*, Case No. ICTR 98-44A-T, Trial Chamber Judgment & Sentence, ¶ 924 (Dec. 1, 2003) (acquitting the accused of individual responsibility for various rape charges either because he was not present at the incident, did not specifically order his subordinates to rape, and neither knew nor could have known that rapes were being committed by the Interahamwe).

that were proven to have occurred.<sup>163</sup> In a strong dissent, Judge Arlette Ramaroson argued that the inconsistencies were not due to a lack of credibility but to an incompetent investigation.<sup>164</sup> Later, the Prosecution missed a deadline to appeal the acquittal. Its untimely motion to allow the appeal was rejected by the Appeals Chamber for lack of good cause.<sup>165</sup>

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163. *Id.* ¶¶ 917-925 (recounting three instances of rape, including one of a young, handicapped Tutsi, for which the accused was found not guilty).

164. *See* Prosecutor v. Kajelijeli, Case No. ICTR 98-44A-T, Dissenting Opinion of Judge Arlette Ramaroson, ¶¶ 26-28, 36 (dissenting from the Trial Chamber judgment and proposing that witness GDO's trial testimony should have been considered rather than her written statements given earlier to ICTR investigators, especially in light of the fact that she was illiterate; incapable of estimating in meters; and the rape took place in a forest where visibility and hearing were difficult).

165. Prosecutor v. Kajelijeli, Case No. ICTR 98-44A-A, Decision on Prosecution Urgent Motion for Acceptance of Prosecution Notice of Appeal Out of Time (Jan. 23, 2004).

Other acquittals for rape occurred in the cases against Niyitegeka,<sup>166</sup> Muvunyi,<sup>167</sup> and Kamuhanda,<sup>168</sup> primarily because the prosecutor failed to meet the required burden of proof. The prosecution did not appeal many of these acquittals. In other cases, such as with respect to defendant Ndindabahizi,<sup>169</sup> the prosecution withdrew sexual violence counts in advance of trial where supporting evidence was determined to be unavailable or unavailing. Likewise, in *Mpambara*, the prosecution conceded that it had offered no evidence in relation to the rape allegations in the indictment, so the ICTR ruled that the defendant had no case to answer with respect to those allegations.<sup>170</sup>

Consistent with their age, health, experience with the legal process, and so on, victims and witnesses must be properly prepared to give their testimony. At all times, investigators, prosecutors, and other personnel must be trained to handle witnesses with respect and sensitivity.<sup>171</sup> Preparing witnesses to testify in advance of trial has been expressly condoned by the Appeals Chamber of the ICTR. In *Karemera*, one of the defendants sought an order from the Trial Chamber preventing the Prosecution from “proofing” its witnesses prior to their giving testimony.<sup>172</sup> Rejecting the motion, the Trial Chamber sanctioned the practice under the following conditions:

Provided that it does not amount to the manipulation of a witness’ evidence, this practice may encompass preparing and familiarizing a

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166. Prosecutor v. Niyitegeka, Case No. ICTR 96-14-T, Trial Chamber Judgment & Sentence, ¶¶ 301, 455-458 (May 16, 2003) (acquitting defendant of rape charges (pled as a crime against humanity) for insufficient evidence with respect to one victim and where the prosecution brought no other evidence that the accused “did cause women to be raped,” as alleged in the indictment). The defendant was, however, convicted of the commission of “other inhumane acts” for ordering Interahamwe members to undress a dead woman and insert a piece of wood into her vagina. *Id.* ¶¶ 7.2, 316, 463-467. He was also present when his co-attackers killed and castrated a prominent Tutsi. *Id.* ¶¶ 463-467; see also Prosecutor v. Niyitegeka, Case No. ICTR 96-14-A, Appeals Chamber Judgment, ¶ 46 (July 9, 2004) (denying an appeal of rape charges).

167. See *supra* text accompanying note 146.

168. See Prosecutor v. Kamuhanda, Case No. ICTR 95-54A-T, Trial Chamber Judgment (Jan. 22, 2004) (acquitting the defendant and his co-attackers of rape because although witnesses heard that at least one of twenty abducted girls had been raped, there was no direct evidence to this effect). In *Kamuhanda*, the rape charges survived a motion for acquittal, but the defendant was ultimately acquitted because all of the evidence in the record of his involvement in rape constituted hearsay. The prosecutor did not appeal. See Prosecutor v. Kamuhanda, Case No. ICTR-99-54A-A, Appeals Chamber Judgment (Sept. 19, 2005) (setting forth defendant’s grounds of appeal).

169. Prosecutor v. Ndindabahizi, Case No. ICTR 2001-71-I, Trial Chamber Judgment (July 15, 2004). In October 2001, the judge who confirmed the original indictment granted leave to the Prosecution to amend the charges to allege the commission of rape as a crime against humanity. *Id.* ¶ 9. In June 2003, however, the Trial Chamber granted leave to withdraw the rape counts. *Id.* ¶ 13.

170. Prosecutor v. Mpambara, Case No. ICTR 2001-65-T, Decision on the Defence’s Motion for Judgment of Acquittal, ¶ 7 (Oct. 21, 2005).

171. See NOWROJEE, *supra* note 13 (noting that rape victims may be uncomfortable with or unprepared to answer detailed questions about what was done to them physically).

172. Prosecutor v. Karemera et al., Case No. ICTR 98-44-AR73.8, Decision on Interlocutory Appeal Regarding Witness Proofing, ¶ 3 (May 11, 2007).

witness with the proceedings before the Tribunal, comparing prior statements made by a witness, detecting differences and inconsistencies in recollection of the witness, allowing a witness to refresh his or her memory in respect of the evidence he or she will give, and inquiring and disclosing to the Defence additional information and/or evidence of incriminatory or exculpatory nature in sufficient time prior to the witness' testimony.<sup>173</sup>

The Appeals Chamber affirmed,<sup>174</sup> noting that in the absence of an express rule on point, Rule 89(B) of the Tribunal's Rules of Procedure and Evidence generally confers discretion on the Trial Chamber to apply "rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law."<sup>175</sup> Indeed, a survey of national law revealed wide variations in witness preparation practices, suggesting the absence of a general principle of law and no consensus that the practice is inherently unethical or prejudicial to the accused.<sup>176</sup> The Appeals Chamber noted that the defendant is free to explore issues of witness coaching or manipulation on cross-examination.<sup>177</sup>

A Trial Chamber of the ICC has taken the opposite approach,<sup>178</sup> raising concerns with respect to witness preparation in general and with the prosecution of gender crimes in particular. In the *Lubanga* case, the Pre-Trial Chamber specifically prohibited the Prosecution from proofing its witnesses on the ground that the Prosecution had failed to show that the practice of witness proofing is a widely accepted practice in international criminal law, which would enable it to be considered part of the applicable law of the Court pursuant to Article 21(1) of the Rome Statute.<sup>179</sup> The

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173. Prosecutor v. Karemera et al., Case No. ICTR 98-44-T, Decision on Defence Motions to Prohibit Witness Proofing, Rule 73 of the Rules and Procedure of Evidence, ¶ 15 (Dec. 15, 2006).

174. See *Karemera et al.*, Case No. ICTR 98-44-AR73.8, Decision on Interlocutory Appeal Regarding Witness Proofing, ¶¶ 14-15; see also Prosecutor v. Limaj et al., Decision on Defence Motion on Prosecution Practice of "Proofing" Witnesses, Case No. IT-03-66-T (Dec. 10, 2004) (upholding the practice of witness proofing before the ICTY); Prosecutor v. Sesay et al., Case No. SCSL 04-15-T, Decision on the Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witness TF1-141, ¶ 33 (Oct. 26, 2005) (finding that "proofing witnesses prior to their testimony in court is a legitimate practice that serves the interests of justice . . . especially so given the particular circumstances of many of the witnesses in this trial who are testifying about traumatic events in an environment that can be entirely foreign and intimidating for them").

175. *Karamera et al.*, Case No. ICTR 98-44-AR73.8, Decision on Interlocutory Appeal Regarding Witness Proofing, ¶ 8.

176. See *id.* ¶ 11 (noting further that witness proofing is not incompatible with the Tribunal's Statute and Rules).

177. *Id.* ¶¶ 12-13.

178. See Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on Practices of Witness Familiarisation and Witness Proofing, ¶ 42 (Nov. 8, 2006) (stating that if any general principle of law could be drawn from a survey of the national laws of the world's various legal systems, witness proofing would be prohibited).

179. *Id.*; Rome Statute, *supra* note 4, art. 21(1) (summarizing the applicable laws that the Court may apply, ranging from the Rome Statute itself to the general principles of law derived by national courts).

Trial Chamber adopted an inquisitorial perspective and reasoned that witnesses “belong” to neither the Prosecution nor the Defense, but rather are witnesses of the Court.<sup>180</sup> The Trial Chamber affirmed the decision on reconsideration, noting that the ICC’s procedures differ markedly in a number of ways from the procedural regimes of the ad hoc tribunals.<sup>181</sup> It determined that while it may be appropriate for a witness to review his or her prior statements, there should be no discussion of the topics to be dealt with in court that might result in a “rehearsal” of trial testimony.<sup>182</sup> As it now stands before the ICC, the general familiarization with the courtroom and its proceedings are to be conducted by the Registry rather than either party.<sup>183</sup>

The ICTR approach seems the better one in the context of international criminal law, where trials may happen years from the events in question, rely heavily on oral testimony, and involve traumatized witnesses with little experience with legal institutions or processes. Allowing both parties to meet with witnesses in advance of their testimony can enable witnesses to refresh their recollections of events; review any prior statements; fully identify relevant facts (including exculpatory evidence); work on presenting their evidence in a more complete, orderly, and structured manner; and prepare for cross-examination.<sup>184</sup> Having witnesses take the stand “cold” threatens to render them unprepared to testify effectively before the Court. It may also re-traumatize victim witnesses during cross-examination or discredit them where their testimony is stilted or confused or diverges from statements that may have been taken years prior.<sup>185</sup>

The witness proofing ruling may also disparately impact women and particularly victims of sexual violence. Such victims may find it difficult to testify about what happened to them without the benefit of some prior preparation so they are not surprised or insulted by sensitive or seemingly invasive questions. Without the benefit of witness proofing, it will be crucial for the ICC judges to manage the trial process to insure that witnesses are not cross-examined so aggressively, by either side, that they are re-traumatized. Allowing ill-prepared witnesses to undergo this treatment would undermine the rehabilitative potential of participating in a

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180. See *Lubanga*, ICC-01/04-01/06, Decision on the Practices of Witness Familiarisation and Witness Proofing, ¶ 26.

181. See *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ¶ 45 (Nov. 30, 2007) (opining that the procedural framework of the Rome Statute is independent from the ad hoc procedures in preparing witnesses for trial).

182. *Id.* ¶ 51.

183. *Id.* ¶ 22.

184. *Prosecutor v. Karemera et al.*, Case No. ICTR 98-44-T, Decision on Defence Motions to Prohibit Witness Proofing: Rule 73 of the Rules of Procedure and Evidence, ¶ 15 (Dec. 15, 2006).

185. See generally B. Don Taylor, *Witness Proofing in International Criminal Law: Is Widening Procedural Divergence in International Criminal Tribunals a Cause for Concern?* (2008), <http://www.isrc.org/Papers/2008/Taylor.pdf> (questioning the desirability of the “widening procedural divergence” between the ad hoc tribunals and the ICC).

justice process.

*E. Safeguarding the Rights and Safety of Victims and Witnesses*

In addition to all the logistical impediments to investigating and proving gender crimes, the prosecutor must be able to ensure the effective participation and safety of victims and witnesses. There are a whole host of procedural protections and mechanisms that courts and prosecutors can utilize to ensure that victims are not alienated, re-traumatized, or endangered by their participation in trial,<sup>186</sup> including rape shield laws,<sup>187</sup> opportunities to testify anonymously or confidentially (e.g., through face and voice distortion), written statements in lieu of oral testimony,<sup>188</sup> pursuing the *in camera* presentation of evidence, the taking of evidence by electronic means (such as closed-circuit television), expunging identifying information from public materials, witness relocation programs, etc.<sup>189</sup> It should not be necessary for a victim or witness to demonstrate an imminent threat before these mechanisms are used. Prior to giving their testimony, victims must fully understand what the testimonial process will entail, what protective measures are available to them, and what limitations on such measures exist so that they can make an informed decision about participating. In implementing these measures, the prosecutor must continually coordinate with the Victims and Witnesses Unit of the particular tribunal (which is often housed in the Registry) to ensure their effectiveness. Ideally, the prosecutor would also offer victims and

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186. See generally ANNE-MARIE L.M. DE BROUWER, SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE: THE ICC AND THE PRACTICE OF THE ICTY AND THE ICTR 231-82 (2005) (detailing the rationale and the form of ICC protective measures available to safeguard victims who appear as witnesses).

187. See RULES AND PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, R. 96, U.N. Doc. ITR/3/Rev.1 (as amended Mar. 14, 2008) [hereinafter ICTR Rules] (containing a rape shield provision that provides that no witness corroboration is required in the face of testimony about sexual violence, consent is not a defense except in limited circumstances, and no evidence of prior sexual conduct of the victims may be introduced); see also RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL COURT, R. 70, 71, ICC-ASP/1/3 (Sept. 9, 2002) (embodying similar rape shield provisions applicable to the ICC).

188. See, e.g., Prosecutor v. Karemera, Case No. ICTR 98-44-T, Decision on Reconsideration of Admission of Written Statements in Lieu of Oral Testimony and Admission of the Testimony of Prosecution Witness Gay, ¶ 13 (Sept. 28, 2007) (allowing certain written statements regarding sexual violence to be admitted into evidence). But see Prosecutor v. Karemera et al., Case No. ICTR 1998-44-T, Decision on Prosecution Motion for Admission of Evidence of Rape and Sexual Assault Pursuant to Rule 92 *bis* of the Rules; and Order for Reduction of Prosecution Witness List, ¶ 20 (Dec. 11, 2006) (ruling that evidence of witnesses of rape must be submitted orally, because the allegations were “so pivotal to the Prosecution’s case that it would be unfair to the Accused to permit the evidence to be given in written form without an opportunity to cross-examine the witnesses”).

189. See, ICTR Rules, *supra* note 187, R. 69(A) (allowing a judge to order the non-disclosure of a witness’s identity to the defendant in pre-trial proceedings); *id.* R. 75(A)-(B) (allowing for a number of measures to ensure a witness’s privacy and protection, such as *in camera* proceedings, so long as “the measures are consistent with the rights of the accused”); see also Rome Statute, *supra* note 4, art. 68(1) (recognizing similar concerns for the “safety, physical and psychological well-being, dignity, and privacy of victims and witnesses”).

witnesses referrals to health services and psychological counseling prior, during, and after testifying, if necessary.<sup>190</sup>

Although these procedural protections are available in the ICTR, they have not been fully used in all cases. The identities of protected witnesses have been publically revealed and witnesses have been harassed and threatened after returning to Rwanda following their testimony.<sup>191</sup> One report indicated that the overwhelming sentiments expressed by rape survivors in Rwanda about their experience with the ICTR were “burning anger, deep frustration, dashed hopes, indignation and even resignation.”<sup>192</sup> Research with rape victims reveals that participation in ICTR proceedings has had the effect of exacerbating, rather than relieving victims’ suffering.<sup>193</sup>

In their interactions with victims and witnesses, prosecutors need not act alone. In addition to the Victims and Witness Unit of the tribunal, prosecutors can connect with civil society organizations *in situ* that are dedicated to supporting victims of gender crimes and to promoting gender justice.<sup>194</sup> These groups can help surface instances of gender violence, empower victims to come forward, and facilitate investigations.<sup>195</sup> Such groups can act as liaisons or conduits between the prosecution and victims and also help to provide the necessary financial, logistical, psychological, and social support for victims undertaking the difficult process of testifying against perpetrators.<sup>196</sup> Once legal proceedings are concluded, these groups can facilitate the reintegration of victims into society. Notwithstanding the value of such relationships, external relations emerge as a perennial weakness in the international justice system, in which the tribunal staff are over-extended and outreach is considered a dispensable luxury.<sup>197</sup> Indeed, in what has been described as a “witness crisis,”<sup>198</sup> several victims’ groups

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190. See Wood, *supra* note 11, at 322-23.

191. See Jefferson, *supra* note 19 (noting that the threats and harassment extend to the families of the victims as well and that improved mechanisms for protection are crucial to encourage the victims to testify at trial).

192. NOWROJEE, *supra* note 13, at 4.

193. See *id.* (explaining that the Rwandan rape victims desire an environment in the ICTR that treats them with the utmost respect and care at all stages of the legal process and allows for a public record of the crimes of sexual violence committed against them).

194. See David Backer, *Civil Society and Transitional Justice*, 2 HUM. RTS. J. 297, 300-02 (2003) (enumerating the factors that affect the involvement of civil society—including non-state actors, NGOs, and civic associations—in the transitional justice process).

195. See *id.* at 302 (noting the role that civil society organizations play in compiling data and reporting abuses).

196. See *id.* at 304 (highlighting specific examples of services such as victim-perpetrator mediation, memorials, public gatherings, medical care, and training and educational programs).

197. See generally CHRISTOPHER KEITH HALL, SUGGESTIONS CONCERNING INTERNATIONAL CRIMINAL COURT PROSECUTORIAL POLICY AND STRATEGY AND EXTERNAL RELATIONS (2003).

198. See Wood, *supra* note 11, at 300 (opining that the competing interests between the needs of legal justice and the victim’s interests impedes the function of the ICTR).



in Rwanda eventually cut off all cooperation with the Tribunal after repeated frustrating experiences.<sup>199</sup>

### III. CONCLUSION

As a result of these outcomes, only a handful of defendants have been found guilty of gender crimes, including Akayesu,<sup>200</sup> Gacumbitsi,<sup>201</sup> Semanza,<sup>202</sup> and Muhimana.<sup>203</sup> The history and the practice of the ICTR vis-à-vis gender justice provide valuable negative lessons for the ICC. As a result of the relentless work of advocates for gender justice during the multilateral drafting of the ICC Statute, that treaty is not only characterized by gender inclusiveness in its substantive law, but also in its structures and procedures.<sup>204</sup> In particular, the ICC Statute contains an expansive list of gender crimes as war crimes and crimes against humanity, rendering it the most progressive articulation of gender-based international criminal law in history.<sup>205</sup> Gender is listed as a ground—like ethnicity or race—on which

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199. See NOWROJEE, *supra* note 13, at 5 (reporting that rather than punishment and vengeance, Rwandan women wanted the ICTR to acknowledge their traumatic experience and condemn the violence committed against them).

200. Prosecutor v. Akayesu, Case No. ICTR 96-4-A, Appeal Chamber Judgment (June 1, 2001).

201. Prosecutor v. Gacumbitsi, Case No. ICTR 2001-64-T, Trial Chamber Judgment (June 17, 2004).

202. Prosecutor v. Semanza, Case No. ICTR 97-20-T, Trial Chamber Judgment and Sentence (May 15, 2003).

203. See Prosecutor v. Muhimana, Case No. ICTR 95-1B-T, Trial Chamber Judgment & Sentence, ¶¶ 534-563 (Apr. 28, 2005) (convicting the defendant of committing or abetting many of the rapes alleged, but finding that there was insufficient evidence to prove the defendant's involvement in others), *rev'd in part* Case No. ICTR 95-1B-A, Appeals Chamber Judgment, ¶¶ 46-53 (May 21, 1997) (reversing the findings of criminal responsibility for two specific rapes where it was unclear whether it was the defendant or someone else who had raped the women in question, but affirming the finding of guilt for crimes against humanity with respect to other acts of rape). Two judges dissented from the rape acquittals, arguing that it was open to the Trial Chamber to find that it was the defendant who raped the women. See Prosecutor v. Muhimana, Case No. ICTR 95-1B-A, Jointly Partly Dissenting Opinion of Judge Shahabuddeen and Judge Schomburg (May 21, 1997).

204. See World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Program of Action*, ¶ 18, U.N. Doc. A/CONF. 157/23 (July 12, 1993) (reflecting the calls by NGOs and the United Nations for the integration of a gender perspective into all aspects of the human rights system and for a focus on accountability for violence against women); see also World Conference on Human Rights, *Declaration on the Elimination of Violence against Women*, G.A. Res. 48/104, U.N. Doc. A/RES/48/104 (Feb. 23, 1994).

205. See Rome Statute, *supra* note 4, arts. 8(2)(b)(xxii), 8(2)(e)(vi) (enumerating the crimes of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and other forms of sexual violence as war crimes whether committed in international or non-international armed conflict); see also *id.* art. 7(1)(g) (listing the same set of crimes as crimes against humanity). Forced pregnancy is defined to mean “the unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.” *Id.* art. 7(2)(f). This language served as a last minute compromise to placate delegations, most notably the Vatican and Ireland, who feared that a reference to forced pregnancy would implicate national anti-abortion policies. See Bedont & Hall-Martinez, *supra* note 2, at 74. Enslavement as a crime against humanity is also defined with reference to the trafficking of women and children. See Rome Statute, *supra* note 4, art. 7(2)(c). In addition, acts of gender violence can also

an individual or collective may be persecuted.<sup>206</sup> With respect to the possibility of charging genocidal rape, the definition of genocide in Article 6 mirrors that of the Genocide Convention.<sup>207</sup> The Elements of Crimes—drafted to assist the ICC in interpreting its substantive offenses—note that serious bodily or mental harm “may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment,”<sup>208</sup> thus laying the foundation for future prosecutions of genocidal rape before the ICC. The ICC Statute also contains a non-discrimination provision stating that the ICC’s “application and interpretation” of the law must be consistent with internationally recognized human rights and be without adverse distinction founded on, *inter alia*, gender.<sup>209</sup> A number of procedural protections exist for victims and witnesses.<sup>210</sup>

In terms of personnel, the Statute requires State parties to choose judges and other staff with experience with “violence against women or children”<sup>211</sup> and calls for “fair representation of female and male judges.”<sup>212</sup> The gender composition of the Court approaches parity in several departments. Of the eighteen ICC judges, nine are now women.<sup>213</sup> This compares favorably to other international courts, whose composition is heavily dominated by men.<sup>214</sup> Forty-eight percent of professional positions are now held by women; however, women are concentrated in the lower

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be charged as the war crime of “committing outrages upon personal dignity, in particular humiliating and degrading treatment.” *Id.* art. 8(2)(b)(xxi) (defining serious violations of the laws and customs within the international armed conflicts); *id.* art. 8(2)(c)(ii) (outlining the same violations of the laws and customs of war within non-international armed conflicts).

206. See Rome Statute, *supra* note 4, art. 7(1)(h), 7(2)(g) (encompassing the “intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group of collectivity”). Before the ICC, however, persecution is not a fully autonomous crime; rather, it may only be prosecuted where it is connected to another crime against humanity or crime within the Rome Statute. *Id.* art. 7(1)(h).

207. See *id.* art. 6(a)-(b), 6(b)(1) n.3 (defining “genocide” to mean various acts “committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group . . .”); see also Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 A (III), art. 2, U.N. Doc. A/810 (Dec. 9, 1948).

208. Preparatory Comm’n for the Int’l Criminal Court, *supra* note 65, art. 6(b).

209. Rome Statute, *supra* note 4, art. 2(3).

210. See *id.* arts. 53-85 (promulgating the procedures for investigation, prosecution, trial sentencing, and appeal). In addition, victims are entitled to counsel before the ICC and may receive reparations from defendants (art. 75) or from a trust fund (arts. 79). *Id.* art. 75(2), 79(2).

211. See *id.* arts. 36(8) (judges), 42(9) (prosecutor), & 43(6) (trauma experts in Victims and Witnesses Unit).

212. *Id.* art. 36(8)(iii).

213. See The Judges–Biographical Notes (last visited Jan. 28, 2009), <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Chambers/>.

214. See Cherie Booth, *Prospects and Issues for the International Criminal Court: Lessons From Yugoslavia and Rwanda*, in FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 157, 162 (Philippe Sands ed., 2003) (citing studies conducted of international courts, currently numbering over thirty, which revealed that the vast majority of international judges are male).

professional grades.<sup>215</sup> The largest gender gap is found in the Office of the Prosecutor, which boasts only forty-two percent women.<sup>216</sup>

So far, the ICC prosecutor is actively prosecuting crimes of gender violence in most cases.<sup>217</sup> Within the Democratic Republic of Congo (DRC) situation, both Germain Katanga and Mathieu Ngudjolo Chui have been indicted for crimes against humanity and war crimes for the commission of sexual slavery, rape, and outrages upon personal dignity.<sup>218</sup> Jean-Pierre Bemba Gombo, a citizen of the DRC who is implicated for his involvement in crimes within the Central African Republic (CAR), will likely be prosecuted for rape as a crime against humanity and a war crime.<sup>219</sup> Several Ugandan defendants are to be prosecuted for crimes of sexual violence: sexual enslavement as a crime against humanity and rape as a war crime or a crime against humanity.<sup>220</sup> Both outstanding Darfur

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215. WOMEN'S INITIATIVE FOR GENDER JUSTICE, ADVANCE PRELIMINARY REPORT—STRUCTURES AND INSTITUTIONAL DEVELOPMENT OF THE INTERNATIONAL CRIMINAL COURT 6 (2009), available at [http://www.iccwomen.org/news/docs/Advance\\_Preliminary\\_Report-Web\\_Final.pdf](http://www.iccwomen.org/news/docs/Advance_Preliminary_Report-Web_Final.pdf).

216. *Id.*

217. See WOMEN'S INITIATIVES FOR GENDER JUSTICE, MAKING A STATEMENT: A REVIEW OF CHARGES AND PROSECUTIONS FOR GENDER-BASED CRIMES BEFORE THE INTERNATIONAL CRIMINAL COURT 8-9 (2008), available at [http://www.iccwomen.org/publications/articles/docs/MakingAStatement-Web\\_Final.pdf](http://www.iccwomen.org/publications/articles/docs/MakingAStatement-Web_Final.pdf) (discussing the existing and potential gender violence charges and debrying lack of gender violence charges in *Lubanga*); see also Oosterveld, *supra* note 18, at 128 (noting stronger gender violence policies within the ICC prosecutorial office).

218. See *Prosecutor v. Katanga & Chui*, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶¶ 1-60 (Sept. 30, 2008). In connection with the confirmation of the indictment against the two defendants, the Prosecutor requested protective measures from the Registry for two witnesses whose testimony was relevant to the sexual violence counts. The request was, however, rejected by the Registrar. Nonetheless, the Prosecutor himself arranged for the preventative relocation of two witnesses for their safety without authorization, citing his obligations to ensure the security of witnesses under Article 68(1) of the Rome Statute. *Id.* ¶ 167; see also *Prosecutor v. Katanga & Chui*, Case No. ICC-01/04-01/07, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventative Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, ¶¶ 18-26 (Apr. 25, 2008) (detailing the lack of authority for prosecutorial action). At the confirmation hearing, the Court ruled that even redacted or summary versions of the witnesses' testimony could not be admitted into evidence, because the witnesses were in effect "unprotected" and thus at risk. Eventually, the witnesses were relocated by the Registrar, which opened the way for their evidence to be considered and for the reintroduction of the sexual violence charges. See *Prosecutor v. Katanga & Chui*, Case No. ICC-01/04-01/07, Decision on the Applications for Leave to Appeal the Decision on the Admission of the Evidence of Witnesses 132 and 287 and on the Leave to Appeal on the Decision on the Confirmation of Charges, 11 (Oct. 24, 2008). The defendants' request to appeal these decisions was rejected. *Id.* at 18.

219. See *Prosecutor v. Bemba Gombo* Case No. ICC-01/05-01/08, Warrant of Arrest against Jean-Pierre Bemba Gombo Replacing the Warrant of Arrest Issued on 23 May 2008, ¶¶ 17-18 (June 10, 2008).

220. See, e.g., *Prosecutor v. Kony*, Case No. ICC-02/04-01/05, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as amended on 27 September 2005, ¶ 42 (Sept. 27, 2005). *Contra* *Prosecutor v. Kony*, Case No. ICC-02-04 Warrant of Arrest for Okot Odhiambo (July 8, 2005) (excluding sexual violence charges in the warrant against Okot Odhiambo and Dominic Ongwen). Two Ugandan defendants, Vincent Otti and Raska Lukwiya, have since died. See *Uganda Rebels Drop Truce Demand*, BBC NEWS, Aug. 14, 2006, <http://news.bbc.co.uk/2/hi/africa/4790049.stm> (confirming the death of Vincent Otti in late 2007).

arrest warrants include gender violence counts (*viz.* rape, outrages upon personal dignity, and persecutory gender violence).<sup>221</sup> In addition, the prosecutor has sought an indictment against Sudanese President Omar al-Bashir that features charges of gender violence, including rape as a predicate act of genocide. Chief Prosecutor Luis Moreno-Ocampo also appointed feminist law professor Catherine MacKinnon as a dedicated Gender Advisor,<sup>222</sup> although the Court has yet to appoint a Gender Legal Advisor for the entire institution.

The practice of the ICTR reveals that without a comprehensive commitment to prosecuting gender crimes, defendants will enjoy effective immunity for acts of gender violence, women will be systematically denied justice, the trial record will not provide a definitive history of the full reality of violence in the region in question, the expressive capacity of the law will be undermined, and the system of international criminal law will send a message that gender violence is not as serious or pervasive as other forms of assault and mayhem. Over time, the perception of selective justice will undermine the legitimacy of international criminal law and its institutions as well as support for prosecutions within impacted communities.<sup>223</sup> In addition, the Security Council has confirmed in Resolution 1820 that failing to prosecute crimes of gender violence constitutes a threat to international peace and security.<sup>224</sup> In that Resolution, the Security Council stressed the importance of ending impunity for such acts and ensuring women and children equal protection under the law and equal access to justice.<sup>225</sup> To this end, the Council called on states to exclude sexual violence crimes from any amnesty provisions promulgated in conflict resolution processes. By recognizing that acts of sexual violence are serious, exacerbate armed conflict, and are often the result of a deliberate policy to subjugate an entire enemy community, Resolution 1820 helps to counter arguments that sexual violence is a private or peripheral matter, unconnected to public events of international importance.<sup>226</sup> With the implementation of the Security Council-mandated

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221. See *Prosecutor v. Harun & Adb-al-Rahman*, Case No. ICC-02/05-01/07, Warrant of Arrest for Ali Kushayb, 6-16 (Apr. 27, 2007) (charging acts of rape as crimes against humanity and war crimes); *Prosecutor v. Harun & Abd-al-Rahman*, Case No. ICC-02/05-01/07, Warrant of Arrest for Ahmad Harun, 6-15 (Apr. 27, 2007) (charging the same set of crimes as Ali Kushayb); see also *Prosecutor v. Harun & Abd-al-Rahman*, Case No. ICC-02/05-01/07, Decision on the Prosecution Application under Article 58(7) of the Statute (Apr. 27, 2007).

222. See Press Release, Int'l Criminal Court, ICC Prosecutor Appoints Prof. Catharine A. MacKinnon as Special Adviser on Gender Crimes (Nov. 26, 2008), <http://www.icc-cpi.int/press/pressreleases/450.html>.

223. Wood, *supra* note 11, at 299-300 (noting that the ICTR's legacy of lack of gender justice will impact the perception of the legitimacy of the Tribunal in the eyes of the Rwandan public).

224. S.C. Res. 1820, *supra* note 6, ¶ 1, U.N. Doc. S/RES/1820 (June 19, 2008).

225. *Id.* ¶ 4.

226. See *id.* (recognizing that sexual violence may be charged as "a war crime, a crime against humanity, or a constitutive act with respect to genocide" that implicates international security concerns).

Completion Strategy, it is largely too late for Rwanda's women to enjoy gender justice. The ICC must do better for the rest of Africa's women.