

American University Washington College of Law

Digital Commons @ American University Washington College of Law

Articles in Law Reviews & Other Academic Journals

Scholarship & Research

2013

International Law Weekend, American Branch of the International Law Association Perspectives on Crimes of Sexual Violence in International Law

Susana Sacouto

Follow this and additional works at: https://digitalcommons.wcl.american.edu/facsch_lawrev



Part of the [Courts Commons](#), [Criminal Law Commons](#), [International Law Commons](#), [Law and Gender Commons](#), and the [Legal History Commons](#)

INTERNATIONAL LAW WEEKEND, AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION PERSPECTIVES ON CRIMES OF SEXUAL VIOLENCE IN INTERNATIONAL LAW

Susana SáCouto^{*}

I.	INTRODUCTION.....	263
II.	PROVISIONS WITHIN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT REGARDING SEXUAL AND GENDER-BASED VIOLENCE.....	264
III.	ICC INVESTIGATION AND PROSECUTION OF SGBV	265
IV.	RECOMMENDATIONS	272
V.	CONCLUSION	275

I. INTRODUCTION

Sexual and gender-based violence (SGBV) during conflict and periods of repression has been a problem in every region of the globe.¹ Historically, these crimes were rarely prosecuted, particularly when government leaders were responsible for tolerating, encouraging, or orchestrating these crimes.² However, the last two decades have seen an incredible transformation in the treatment of SGBV under international law. Great strides have been made in the investigation and prosecution of sexual and gender-based crimes, particular by the *ad hoc* International Criminal Tribunals for the Former Yugoslavia and Rwanda, and the Special Court for

^{*} Director, War Crimes Research Office (WCRO) and Professorial Lecturer-in-Residence, American University Washington College of Law (WCL).

1. *Rape as a Weapon of War: Accountability for Sexual Violence in Conflict: Hearing on S. Before the Subcomm. on Human Rights and the Law Comm. on the Judiciary*, 110th Cong. (2008) (statement of Dr. Kelley Dawn Askin, Senior Legal Officer, Open Society Justice Initiative) [hereinafter Askin Testimony]. Although recent literature challenges the magnitude of the problem, see HUMAN SECURITY RESEARCH GROUP, HUMAN SECURITY RESEARCH REPORT 2012: SEXUAL VIOLENCE, EDUCATION AND WAR: BEYOND THE MAINSTREAM NARRATIVE (2012) (even these sources generally acknowledge that rape and other forms of sexual and gender-based violence continue, in the words of one source, “to pose a grave threat to human security in today’s wars”).

2. Askin Testimony, *supra* note 1 (“There was widespread acknowledgment that atrocities such as massacres, torture, and slave labor were prosecutable, but there was skepticism, even by legal scholars and military officials, as to whether rape was sufficiently serious to be prosecutable in an international tribunal set up to redress the worst crimes.”); Cate Steains, *Gender Issues, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 357, 358 (Roy S. Lee ed., 1999) (“[I]t was only in relatively recent times that sexual and gender violence in armed conflict shifted from the periphery of the international community’s focus towards the centre of debate, and was recognized as an important issue in serious need of redress.”).

Sierra Leone.³ This essay examines the way in which the world's permanent International Criminal Court (ICC)—which this year celebrates its tenth anniversary—has addressed these crimes and focuses on the impact that the investigative practices of the ICC's Office of the Prosecutor (OTP) have had on the investigation and prosecution of such crimes to date.

II. PROVISIONS WITHIN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT REGARDING SEXUAL AND GENDER-BASED VIOLENCE

The 1998 Rome Statute establishing the ICC enumerates a broad range of sexual and gender-based offenses as war crimes and crimes against humanity. The Rome Statute includes rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization under both the war crimes and crimes against humanity provisions and a residual "sexual violence" clause that allows the Court to exercise jurisdiction over other serious sexual assaults of comparable gravity to the named gender-based crimes.⁴ Moreover, for the first time, the Rome Statute includes "gender" within the list of prohibited grounds of persecution as a crime against humanity.⁵ Additionally, the Court's Elements of Crimes recognizes that although rape is not listed as a form of genocide under the Rome Statute, genocide committed by acts causing "serious bodily or mental harm" may include "acts of torture, rape, sexual violence or inhuman or degrading treatment."⁶

Although this list was far more extensive than the list of gender crimes in the statutes of the *ad hoc* tribunals, drafters of the Rome Statute expressed concern that the effective investigation, prosecution, and trial by

3. See U.N. DEP'T OF PEACEKEEPING OPERATIONS, REVIEW OF THE SEXUAL VIOLENCE ELEMENTS OF THE JUDGMENTS OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, AND THE SPECIAL COURT FOR SIERRA LEONE IN THE LIGHT OF SECURITY COUNCIL RESOLUTION 1820 (2010).

4. Rome Statute of the International Criminal Court, art. 7(1)(g), Jul. 17, 1998, UN Doc A/CONF.183/9, 2187 UNTS 90, [hereinafter Rome Statute] (defining crime against humanity as "any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population . . . (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity"); *id.* art. 8(2)(b) (defining war crimes as "any of the following acts: . . . (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2(f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions."). Article 8(2)(e)(vi) enumerates the same crimes as Article 8(2)(b)(xxii) committed in the context of non-international armed conflicts.

5. *Id.* art. 7(h).

6. International Criminal Court Elements of Crimes, art. 6(b), Sept. 9, 2000, UN Doc PCNICC/2000/1/Add.2 [hereinafter ICC Elements of Crimes].

the Court of sexual and gender-based crimes “would not necessarily flow automatically from the inclusion of crimes of sexual and gender violence in the Statute.”⁷ Thus, the drafters of the Rome Statute included an additional series of structural provisions designed to ensure that such crimes would be given adequate attention by the Court. For instance, Article 54(1)(b) requires that the Prosecutor “take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children,” to ensure the “effective investigation and prosecution of crimes within the jurisdiction of the Court.”⁸ The Rome Statute also provides that State Parties responsible for nominating and electing the Court’s judges “take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.”⁹ Similarly, the Prosecutor and the Registrar are to consider the importance of legal expertise on violence against women in hiring staff within their respective organs.¹⁰ At the same time, the Prosecutor must appoint “advisers with legal expertise on specific issues, including . . . sexual and gender violence,”¹¹ while the Victims and Witnesses Unit must include staff with expertise in “trauma related to crimes of sexual violence.”¹² Finally, in determining appropriate protective measures for victims and witnesses, the Court as a whole is required to take into account such factors as gender and “the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children.”¹³

III. ICC INVESTIGATION AND PROSECUTION OF SGBV

Despite the extensive substantive and procedural provisions in the Rome Statute relating to SGBV, the ICC’s record with respect to the investigation and prosecution of sexual and gender-based crimes has been mixed in its first ten years of operation. Positive developments show that thirteen of the eighteen cases that have come before the Court (about 72%) have included allegations of sexual and/or gender-based crimes. Specifically, in the *Kony* case, which is the only case brought to date in the Uganda situation, Joseph Kony, Commander-in-Chief of the Lord’s

7. Steains, *supra* note 2, at 375.

8. Rome Statute, *supra* note 4, art. 54(1)(b).

9. *Id.* art. 36(8)(b).

10. *Id.* art. 44(2).

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

12. *Id.* art. 43(6).

13. Rome Statute, *supra* note 4, art. 68(1).

Resistance Army (LRA), was charged with rape and sexual enslavement as a crime against humanity and a war crime.¹⁴

Crimes of sexual violence have also been alleged in three of the five cases pursued by the Prosecutor in the Darfur situation, including the case against sitting head of state, Omar Hassan Ahmad Al Bashir. Significantly, the arrest warrant against President Al Bashir includes allegations not only of rape as a crime against humanity,¹⁵ but also of sexual violence causing serious bodily or mental harm as an act of genocide.¹⁶ Additionally, the arrest warrants against Ahmad Muhammad Harun, former Minister of State for the Interior and Minister of State for Humanitarian Affairs, and Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”), leader of the Janjaweed militia, include allegations of rape and outrages upon personal dignity as war crimes and rape as a crime against humanity, as well as persecution by means of sexual violence as a crime against humanity.¹⁷

The third case involving allegations of sexual violence in the Darfur situation was against Abdel Raheem Muhammad Hussein, current Minister of National Defence, former Minister of the Interior and former Sudanese President’s Special Representative in Darfur and included allegations of rape and outrages upon personal dignity as war crimes and rape as a crime against humanity.¹⁸

Four of the five cases launched in connection with the situation in the Democratic Republic of Congo (DRC) have included allegations of sexual and gender-based crimes. Charges in the joint case against Germain Katanga, former commander of the Force de Résistance Patriotique en Ituri, and Mathieu Ngudjolo Chui, former leader of the Front des Nationalistes et Intégrationnistes, included sexual slavery and rape, both as a war crime and

14. 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, ¶¶ 4–5, 7 (Sept. 27, 2005) [hereinafter Warrant of Arrest for Joseph Kony]. Note that charges of sexual enslavement as a crime against humanity and rape as a war crime were also included in the arrest warrant against Vice-Chairman and Second-in-Command of the Lord’s Resistance Army, Vincent Otti, Prosecutor v. Kony, Case No. ICC-02/04-01/05, Warrant of Arrest for Vincent Otti, ¶ 42 (Jul. 8, 2005) [hereinafter Warrant of Arrest for Vincent Otti], though he is believed to be deceased.

15. Prosecutor v. Al Bashir, Case No. 02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ¶ 17(b) (Mar. 4, 2009).

16. Prosecutor v. Al Bashir, Case No. 02/05-01/09, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir (Jul. 10, 2012).

17. Prosecutor v. Harun & Kushayb, Case No. ICC-02/05-01/07, Warrant of Arrest for Ahmad Harun, ¶¶ 1, 4, 8–9, 29–30 (Apr. 27, 2007); Prosecutor v. Harun & Kushayb, Case No. ICC-02/05-01/07, Warrant of Arrest for Ali Kushayb, ¶¶ 1, 8–9, 14–15 (Apr. 27, 2007).

18. Prosecutor v. Hussein, Case No. ICC-02/05-01/12, Case Information Sheet, ¶1 (Jun. 15, 2012).

as a crime against humanity.¹⁹ Although the Prosecutor failed to include any reference to SGBV in its initial application for a warrant of arrest against Bosco Ntaganda, former Deputy Chief of the General Staff of the Forces Patriotiques pour la Libération du Congo,²⁰ the Pre-Trial Chamber recently granted a request from the Prosecutor to add the charges of, *inter alia*, rape and sexual enslavement as crimes against humanity and as war crimes to the case against the accused.²¹

Furthermore, while charges against Callixte Mbarushimana, Executive Secretary of the Forces Démocratiques pour la Libération du Rwanda (FDLR), were ultimately not confirmed,²² the arrest warrant against him contained the broadest range of sexual and gender-based crimes against any ICC suspect to date, including allegations of rape, torture, mutilation, and inhuman treatment as war crimes and rape, torture, and other inhumane acts and gender-based persecution as crimes against humanity.²³ The most recent case in the DRC situation against Sylvestre Mudacumura, Supreme Commander of the FDLR, includes allegations of mutilation and torture by means of sexual violence and rape as war crimes.²⁴ Additionally, charges of rape as a war crime and a crime against humanity have been confirmed in the case against Jean-Pierre Bemba Gombo, President and Commander-in-chief of the Mouvement de Libération du Congo and the only suspect identified thus far in the Central African Republic (CAR) situation.²⁵

19. Prosecutor v. Katanga & Ngdjulo, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶¶ 6, 9, 574, 576 (Sept. 30, 2008) (finding, by a majority of the court, “there is sufficient evidence to establish substantial grounds to believe” that the accused jointly committed the crimes of sexual slavery and rape through the acts of others in the attack on Bogoro village). Note that on 21 November 2012, Trial Chamber II severed the charges against Mathieu Ngudjolo Chui and Germain Katanga, and that on 18 December 2012, Trial Chamber II acquitted Mathieu Ngudjolo Chui of the charges of war crimes and crimes against humanity and ordered his immediate release. The Office of the Prosecutor has appealed the verdict. See ICC Situations and Cases, http://icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx (last visited Feb. 23, 2013).

20. See generally Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06-2, Warrant of Arrest for Bosco Ntaganda (Aug. 22, 2006).

21. Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Decision on the Prosecutor's Application under Article 58, ¶ 44 (Jul. 13, 2012).

22. See Prosecutor v. Mbarushimana, Case No. ICC-01/04-01/10, Decision on the Confirmation of Charges (Dec. 16, 2011) [hereinafter Prosecutor v. Mbarushimana].

23. Prosecutor v. Mbarushimana, Case No. ICC-01/04-01/10, Warrant of Arrest for Callixte Mbarushimana, ¶ 10 (Sept. 29, 2010).

24. Prosecutor v. Mudacumura, Case No. ICC-01/04-01/12, Decision on the Prosecutor's Application under Article 58, ¶ 49 (Jul. 13, 2012).

25. Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba

Similarly, charges of rape and persecution by means of rape as crimes against humanity have been confirmed in one of the two cases arising out of the situation in Kenya, namely the joint case against Francis Kirimi Muthaura, former Head of the Public Service and Secretary to the Cabinet of the Republic of Kenya, and Uhuru Muigai Kenyatta, Deputy Prime Minister and former Minister for Finance.²⁶ In the Côte d'Ivoire situation, two arrest warrants have been issued to date, notably against former President, Laurent Gbagbo, and his wife Simone Gbagbo, for charges including rape and other forms of sexual violence as crimes against humanity.²⁷

Of the eight situations currently before the court, Libya and Mali are the only ones that do not currently include any cases with allegations of sexual or gender-based crimes. Thus, the majority of cases that have come before the Court have included allegations of SGBV. More importantly these cases all involve senior level accused, meaning that the ICC is pursuing accountability for SGBV at the highest levels of authority in a majority of its cases.

Nevertheless, the ICC's OTP has suffered criticism regarding its approach to sexual violence and gender-based crimes. With respect to charging, for instance, human rights groups criticized former Prosecutor Luis Moreno Ocampo for failing to include SGBV charges in the indictment against Congolese rebel leader Thomas Lubanga Dyilo (the first person tried by the ICC), despite evidence that girls kidnapped into Lubanga's militia were often raped and/or kept as sex slaves.²⁸ Although the Pre-Trial Chamber confirmed charges against Lubanga for the limited war crimes of enlisting and conscripting children, and using them to participate actively in hostilities,²⁹ several attempts were subsequently made to introduce the issue of SGBV during the trial, including:

Gombo, ¶¶ 160, 285–86 (Jun. 15, 2009).

26. Prosecutor v. Muthaura, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶¶ 18, 22 (Jan. 23, 2012).

27. Prosecutor v. Gbagbo, Case No. ICC-02/11-01/11, Warrant of Arrest for Laurent Koudou Gbagbo, ¶ 8 (Nov. 23, 2011); Prosecutor v. Gbagbo, Case No. ICC-02/11-01/12, Warrant of Arrest for Simone Gbagbo, ¶ 7 (Feb. 29, 2012, reclassified as public Nov. 22, 2012).

28. *Avocats Sans Frontières, Joint Letter to the Chief Prosecutor of the International Criminal Court*, D.R. CONGO: ICC CHARGES RAISE CONCERN (2006), http://hrw.org/english/docs/2006/08/01/congo13891_txt.htm; Brigid Inder, *Letter from Women's Initiatives for Gender Justice to Mr. Luis Moreno Ocampo, Chief Prosecutor, International Criminal Court* (2006), http://www.iccwomen.org/documents/Prosecutor_Letter_August_2006_Redacted.pdf (last visited Feb. 23, 2013).

29. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 319 (Jan. 29, 2007).

- 1) By the Prosecutor and the legal representatives of victims in their opening statements;³⁰
- 2) Through the testimony of several Prosecution witnesses³¹ and the expert testimony of United Nations Special Representative for the Secretary General for Children in Armed Conflict;³² and
- 3) Through an unsuccessful attempt by the legal representatives of victims participating in the case to broaden the charges to include charges of sexual slavery and inhuman or cruel treatment.³³

Despite these efforts, the Trial Chamber, in its final judgment against the accused, held that the Prosecution's failure to include SGBV charges in its charging document meant the Chamber could not make "any findings of fact on the issue [of sexual violence], particularly as to whether responsibility is to be attributed to the accused."³⁴ Judge Odio Benito dissented from the majority opinion, arguing that the Chamber should have clarified that sexual violence is included within the concept of the "use to participate actively in the hostilities," even if the Chamber's decision on the guilt of the accused was limited to the facts and circumstances described in the charging document.³⁵ Despite Judge Odio Benito's interpretation of the Chamber's role and the efforts to introduce evidence of SGBV during the trial, the *Lubanga* case demonstrates that the failure to charge SGBV from the outset may lead to the absence of accountability for such crimes. Significantly, Lubanga was not held responsible for any SGBV crimes and the Trial Chamber declined to consider sexual violence as an aggravating factor for the purposes of sentencing him, noting that the Prosecutor had

30. See Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Prosecution's Closing Brief, ¶10 (Jun. 1, 2011); see also Women's Initiatives for Gender Justice, *DRC: Trial Chamber I issues first trial Judgment of the ICC—Analysis of sexual violence in the Judgment*, LEGAL EYE ON THE ICC ELETTER, SPECIAL ISSUE #1 (May 2012), <http://www.iccwomen.org/news/docs/WI-LegalEye5-12-FULL/LegalEye5-12.html> (last visited Feb 23, 2013) [hereinafter WIGJ] (discussing opening statements by Prosecutor and legal representative of victims).

31. See WIGJ, *supra* note 30 (discussing witness testimony by former child soldiers describing acts of sexual violence, primarily against girl soldiers).

32. *Id.*

33. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment on the appeals of Mr. Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 ¶¶ 57–59 (Dec. 8, 2009).

34. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Trial Judgment, ¶29 (Mar. 14, 2012) [hereinafter Lubanga Trial Judgment].

35. Lubanga Trial Judgment, *supra* note 34, at ¶¶ 16–17 (Separate and Dissenting Opinion of Judge Odio Benito).

failed to establish a sufficient link between the accused and sexual violence in the context of the charges against him.³⁶

Even in cases in which SGBV charges have been included, observers have highlighted that the charges have sometimes been too limited. For instance, although Joseph Kony was charged with sexual enslavement and rape as crimes against humanity and rape as a war crime,³⁷ and Vincent Otti was charged with sexual enslavement as a crime against humanity and rape as a war crime,³⁸ Brigid Inder, recently-appointed Special Gender Advisor to the ICC Prosecutor,³⁹ has observed that “each of the [five] indicted LRA commanders could have been charged with rape as a crime against humanity because they were all active in overseeing and enforcing this act.”⁴⁰ Others have noted that SGBV charges are often vulnerable to being withdrawn because of the limited nature of the evidence supporting them. For example, in the *Katanga & Ngudjolo* case, the Prosecutor dropped charges of sexual slavery as both a war crime and a crime against humanity after a Pre-Trial Chamber judge excluded the statements of witnesses supporting those charges on the grounds that the witnesses were not adequately protected.⁴¹ Although the situation was ultimately resolved after the witnesses were eventually accepted into the Court’s Witness Protection Programme⁴²—and the Prosecution amended its charges not only to

36. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on Sentence pursuant to Article 76 of the Statute, ¶ 75 (Jul. 10, 2012). It is worth noting, however, that the Trial Chamber later suggested that victims of sexual violence may be among the beneficiaries of a reparations order. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision establishing the principles and procedures to be applied to reparations, ¶¶ 200, 207 (Aug. 7, 2012) (noting the importance of taking into account the needs of victims of sexual and gender-based violence when formulating and implementing reparations awards).

37. See Warrant of Arrest for Joseph Kony, *supra* note 14, at ¶ 42.

38. See generally, Warrant of Arrest for Vincent Otti, *supra* note 14.

39. Press Release, International Criminal Court, Office of the Prosecutor, *ICC Prosecutor Fatou Bensouda Appoints Brigid Inder, Executive Director of the Women’s Initiatives for Gender Justice, as Special Gender Advisor*, ICC-OTP-20120821-PR833 (Aug. 21, 2012), <http://www.icc-cpi.int/NR/exeres/D053D941-1C4E-44CA-BEDC-AA289B4EDA96.htm> (last visited Feb 23, 2013)[hereinafter ICC-OTP].

40. Katy Glassborow, *ICC Investigative Strategy Under Fire*, INSTITUTE FOR WAR & PEACE REPORTING (Oct. 27, 2008), <http://iwpr.net/report-news/icc-investigative-strategy-under-fire> (last visited Feb 23, 2013).

41. Prosecutor v. Katanga & Ngudjolo, Case No. ICC-01/04-01/07, Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, ¶ 39 (Apr. 25, 2008) (allowing the testimony of a witness for whom the Prosecution could show adequate protection, but barring the statements of two other witnesses who had not been included in the Witness Protection Programme).

42. Prosecutor v. Katanga & Ngudjolo, Case No. ICC-01/04-01/07, Decision on Prosecution’s

reinstate those relating to sexual slavery but also to include allegations of rape as a war crime and a crime against humanity⁴³—observers have noted that the Prosecutor’s reliance on a limited number of witnesses to sustain SGBV charges render them vulnerable to being withdrawn or dismissed.⁴⁴

Moreover, there are cases in which SGBV charges have been alleged by the Prosecution, but some or all of the relevant charges have not survived the confirmation process⁴⁵ often because of insufficiency of the evidence put forward by the Prosecutor in support of the charges.⁴⁶ According to the Women’s Initiatives for Gender Justice (WIGJ), a nongovernmental organization that monitors the investigation and prosecution of sexual and gender-based crimes by the ICC:

[R]esearch has shown that more than 50% of the charges for gender-based crimes in cases for which confirmation hearings have been held, have been dismissed before trial, making gender-based crimes the most vulnerable category of crimes at the ICC . . . With more than half of all charges for gender-based crimes which reach the confirmation stage . . . not being successfully confirmed, no other category of charges before the ICC faces this level of dismissal and contention.⁴⁷

A few examples illustrate the point. For instance, in the *Katanga & Ngudjolo* case, the Pre-Trial Chamber declined to confirm the charge of outrages upon personal dignity as a war crime, which was based in part on

Urgent Application for the Admission of the Evidence of Witnesses 132 and 287, ¶¶ 6–7 (May 28, 2008).

43. Prosecutor v. Katanga & Ngudjolo, Case No. ICC-01/04-01/07, Submission of Amended Document Containing the Charges Pursuant to Decision, ¶¶ 32–33 (Jun. 26, 2008).

44. Susana SáCouto & Katherine A. Cleary, *The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court*, 17 AM. U. J. GENDER, SOC. POL’Y & L. 337, 342 (2009).

45. Pursuant to Article 61 of the Rome Statute, a Pre-Trial Chamber must determine whether “there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged” before committing that person to trial. Rome Statute, *supra* note 4, at art. 61(7).

46. Women’s Initiatives for Gender Justice, *Legal Eye on the ICC* (March 2012), <http://www.iccwomen.org/news/docs/WI-LegalEye3-12-FULL/LegalEye3-12.html#footnote-66> (last visited Feb. 23 2013) [hereinafter *Legal Eye on the ICC*] (noting concern about the fact that in a number of instances “charges appear to have been constructed based on a desk review of open-source information, including from UN reports, NGO reports or information provided by governments, press clippings or newspaper articles” and finding “a liberal use of open source material in cases for which charges have been dismissed, as in the Mbarushimana case”).

47. *Id.* (noting that, “[o]f the cases including charges gender-based crimes for which confirmation of charges hearings have been held (Katanga & Ngudjolo, Bemba, Mbarushimana, and Muthaura) 14 out of 29 charges of gender-based crimes have been successfully confirmed”).

the allegation that a woman “was stripped and forced to parade half naked in front” of combatants belonging to the militia led by the accused.⁴⁸ Specifically, while the Chamber determined that this incident had occurred and that it rose to the level of outrages upon personal dignity as a war crime,⁴⁹ it also found that “the Prosecution brought *no evidence* showing that the commission of [the crime] was intended by the [accused] as part of the common plan to ‘wipe out’ Bogoro village,”⁵⁰ or that the relevant acts would have occurred “in the ordinary course of events” as a result of the implementation of the accused’s common plan.⁵¹ In the *Muthaura et al.* case, the Pre-Trial Chamber significantly narrowed the “geographic scope” of the alleged SGBV charges in issuing the Summons to Appear because, “the Prosecution failed to provide evidence of their commission in certain locations, as well as the individual criminal responsibility of [the three accused] for gender-based crimes committed in other locations.”⁵² Furthermore, the Pre-Trial Chamber declined to confirm any of the thirteen charges in the *Mbarushimana* case, including eight charges for sexual and gender-based crimes, after concluding that the Prosecution had not presented sufficient evidence to establish substantial grounds to believe either that the alleged crimes were committed or that the accused bore responsibility for the crimes.⁵³

IV. RECOMMENDATIONS

As discussed by the War Crimes Research Office (WCRO) in its recent report on *Investigative Management, Strategies, and Techniques of the International Criminal Court’s Office of the Prosecutor*, “[o]ne explanation for the OTP’s failure to sufficiently investigate SGBV in a way that will ensure relevant acts are not only charged, but also survive to trial, [may be the ICC’s first] Prosecutor’s strategy of short, focused investigations”⁵⁴ As the report notes, Martin Witteveen, a former

48. Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07-717, Decision on the Confirmation of Charges, ¶ 366 (Sept. 30, 2008).

49. *Id.* at ¶¶ 374–77.

50. *Id.* at ¶ 570 (emphasis added).

51. *Id.* at ¶¶ 571–72.

52. Women’s Initiatives for Gender Justice, *Gender Report Card on the International Criminal Court*, 126 (2011) [hereinafter *Gender Report Card*].

53. See generally, Prosecutor v. Mbarushimana, *supra* note 23.

54. See War Crimes Research Office, INVESTIGATIVE MANAGEMENT, STRATEGIES, AND TECHNIQUES OF THE INTERNATIONAL CRIMINAL COURT’S OFFICE OF THE PROSECUTOR 48 (Oct. 2012) [hereinafter WCRO] (citing INTERNATIONAL CRIMINAL COURT OFFICE OF THE PROSECUTOR, REPORT ON THE ACTIVITIES PERFORMED DURING THE FIRST THREE YEARS (June 2003–June 2006), at 8 (12 Sep.

investigator in the Uganda situation, “complained in 2008 that the scope of the investigation in that country was finalized by prosecutors too early,” adding that “in Uganda, more evidence of sexual crimes could have been gathered had the investigation been broadened.”⁵⁵ As he explained,

We interviewed a number of ‘wives’ (girls forced to live with senior LRA men) but questions were focused on their relationship to commanders, not on rape and sexual enslavement We should not have limited ourselves to this kind of witness—we should have widened it out to speak to other victims of sexual violence [i.e., those who were not LRA ‘wives’].⁵⁶

Another explanation posited in the WCRO report mentioned above is a lack of adequate resources allocated for such investigations.⁵⁷ As the Women’s Initiatives for Gender Justice has argued, the high rate at which gender-based charges have been dismissed at the confirmation stage of proceedings “can be attributed in part to the Prosecution’s use of open-source information and failure to investigate thoroughly.”⁵⁸

Based on these possibilities, the OTP’s investigation of sexual and gender based violence would improve if the OTP implements several recommendations that would also arguably benefit its investigations more broadly, including: Providing investigators more time and greater flexibility on the ground and expanding the size of investigation teams.⁵⁹ Another solution that might help—particularly with respect to ensuring that SGBV crimes are charged *from the outset*—is adopting certain changes to the OTP’s process of conducting preliminary investigations into a situation *before* a decision is made to formally open an investigation. Unlike its current practice of relying primarily on secondary sources,⁶⁰ the OTP’s grasp of what is actually happening on the ground would likely improve if

2006); INTERNATIONAL CRIMINAL COURT OFFICE OF THE PROSECUTOR, REPORT ON PROSECUTORIAL STRATEGY, at 5 (14 Sep. 2006) (“The second principle guiding the Prosecutorial Strategy is that of focused investigations and prosecutions.”). See also INTERNATIONAL CRIMINAL COURT OFFICE OF THE PROSECUTOR, PROSECUTORIAL STRATEGY: 2009–2012, ¶ 20 (Feb. 2010).

55. WCRO, *supra* note 54, at 48 (citing Katy Glassborow, *ICC Investigative Strategy Under Fire*, INSTITUTE FOR WAR & PEACE REPORTING (27 Oct. 2008)).

56. *Id.* (citing Glassborow, *supra* note 55).

57. *Id.* at 48–49.

58. Women’s Initiatives for Gender Justice, *Legal Eye on the ICC*, <http://www.iccwomen.org/news/docs/W1-LegalEye3-12-FULL/LegalEye3-12.html#footnote-66> (last visited February 11, 2013).

59. See WCRO, *supra* note 54, at 7.

60. *Id.* at 41.

the OTP sent analysts to the country under examination for some period of time prior to the formal opening of an investigation, the idea being to enhance the OTP's understanding of the context in which the crimes took place and its ability to gain the trust of those who may be in a position to provide useful information.⁶¹ As the WCRO report notes, "[t]he need to establish trust among the affected community may be particularly important in situations involving crimes of sexual violence."⁶²

Yet, another solution that would likely improve the OTP's record in this area would be ensuring that the right staff, including one or more gender crimes experts, is in place on each investigation team and that this staff reflect an appropriate number of both male and female investigators.⁶³ Importantly, as the WCRO report suggests, "an absence of female investigators may make gender-based crime victims refrain from coming forward from the beginning,"⁶⁴ which may limit the potential witness pool. Finally, ongoing and mandatory training aimed at increasing all of its staff's competency in gender issues would also likely help.⁶⁵

Of course, in some circumstances, it is not possible to gather sufficient evidence from SGBV victims to substantiate a charge of sexual violence as genocide, crimes against humanity, or war crimes against the type of high-level suspects that are likely to be the subject of ICC prosecutions. However, as the WCRO report suggests, even in instances where direct victim testimony regarding SGBV is unavailable, it may still be possible to successfully investigate and prosecute sexual and gender-based crimes.⁶⁶ For instance, "the Prosecution may attempt to establish its case through hospital records, forensic evidence, and the testimony of doctors, insider witnesses, international observers, and eyewitnesses to the sexual

61. The idea is explored with respect to investigations more generally in the WCRO INVESTIGATIONS REPORT, *supra* note 54, at 43.

62. *Id.* at 43–44 n. 129 (citing Laurel Fletcher, *Human Rights Violations Against Women*, 15 WHITTIER L. REV. 319, 371 (1993) ("Many survivors [of rape and other sexual assault] are more likely to recount their experiences to someone with whom they have already developed an ongoing relationship based upon trust than to a complete stranger.")). Of course, where state cooperation is not forthcoming, perhaps the OTP could develop, as the WCRO report suggests, other means of deepening its understanding of the country's culture, politics, history, and other dynamics prior to launching a formal investigation by, for instance, sending someone to a country near the conflict, spending more time getting to know and working more closely with local actors and/or hiring country experts as consultants for the period of the preliminary examination.

63. WCRO, *supra* note 54, at 7.

64. *Id.* at 50.

65. *Id.*

66. *Id.* at 51.

violence.”⁶⁷ Significantly, there is some precedent for such prosecutions. For example, in the *Bagosora, et al.* case, the ICTR Prosecutor “successfully secured a conviction for the crime against humanity of rape against Colonel Théoneste Bagosora, despite the fact that only one of 242 witnesses in the case testified about her own sexual victimization.”⁶⁸

Finally, as the WCRO report notes, absent alternatives, where investigating and/or prosecuting SGBV is not possible due to security concerns and/or the unavailability of necessary evidence, it is important that the OTP clearly communicate these factors to the public.⁶⁹

V. CONCLUSION

To summarize, while the ICC has made significant progress in this area, the OTP has in various ways adopted approaches that have impeded the effective investigation and prosecution of sexual and gender-based crimes. Improving investigative practices may go a long way toward ensuring that SGBV allegations are charged, and survive to trial.

On a final and positive note, the Court’s second Prosecutor, Fatou Bensouda, recently nominated WIJG executive director, Brigid Inder, as Special Gender Advisor to provide strategic advice to the Office of the Prosecutor on gender issues.⁷⁰ Hopefully, this will lead to a more intensive review and improvement of the practices and procedures of the OTP relating to the investigation and prosecution of SGBV crimes in the months ahead.

67. *Id.* at 51–52.

68. WCRO, *supra* note 54, at 53 (citing Prosecutor v. Théoneste Bagosora, Judgment and Sentence, ICTR-98-41-T, at 568 (ICTR Trial Chamber, 18 December 2008)). Notably, Lubanga, the first person to be convicted at the ICC, was convicted despite the fact that the Trial Chamber excluded all testimony provided by direct victim-witnesses from its deliberations on the guilt of the accused. Prosecutor v. Thomas Lubanga Dyilo, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, ¶ 480 (Trial Chamber I, 14 March 2012). While Lubanga was not charged with SGBV crimes, his conviction demonstrates the possibility of establishing the guilt of the accused without direct victim-witness testimony regarding the crimes with which an accused is charged.

69. WCRO, *supra* note 54, at 54.

70. ICC-OTP, *supra* note 39.