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Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court

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INVESTIGATION AND PROSECUTION OF SEXUAL AND GENDER-BASED CRIMES BEFORE THE INTERNATIONAL CRIMINAL COURT

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Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured

– Preamble to the Rome Statute of the International Criminal Court¹

I. INTRODUCTION

The legal framework of the International Criminal Court (ICC or Court) reflects significant historical advances made in the investigation and prosecution of sexual and gender-based crimes before international criminal courts. This Article considers some of those key historical developments and how they are reflected in the ICC's legal framework.

As the Deputy Prosecutor of the Office of the Prosecutor (OTP) of the Court has stated:

Obviously, no treaty or court judgment can remedy the consequences of sexual violence or undo a society's gender attitudes that often increase the suffering to include shame and guilt. The Rome Statute and Rules of Evidence and Procedure however provide a strong basis for addressing successfully rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity. The codification of a mandate to end impunity for these acts is indeed a significant step in the right direction. It was high time that such crimes cease to be regarded as "inevitable-by-products" of war and receive the serious attention that they deserve.²

The importance of sexual and gender-based crimes to the Court is demonstrated, for instance, by the requirement under the Rome Statute of the ICC (the Statute) that appropriate measures are taken to ensure the effective investigation and prosecution of any crime within the jurisdiction of the Court "in particular where it involves sexual violence, gender violence or violence against children."³

This Article explores two complementary methods to ensure that there is an effective investigation and prosecution of this category of crimes: first, to take a "focused" approach and, second, to "mainstream" the approach to sexual and gender-based crimes throughout the process, as has been the policy of the Prosecutor of the ICC since 2003. This Article examines the example of this dual-approach taken in the investigation in Uganda, in which the OTP brought charges against members of the high command of the Lords Resistance Army (LRA).⁴

1. Rome Statute of the International Criminal Court pmb., U.N. Doc. A/CONF. 183/9, July 17, 1998, 37 I.L.M. 1002, 1030 (*entered into force* July 1, 2002) [hereinafter Rome Statute].

2. Fatou Bensouda, *Gender and Sexual Violence Under the Rome Statute*, in FROM HUMAN RIGHTS TO INTERNATIONAL CRIMINAL LAW: STUDIES IN HONOUR OF AN AFRICAN JURIST, THE LATE JUDGE LAÏTY KAMA 401, 416 (Emmanuel Decaux et al. eds., 2007).

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

4. See Press Release, Int'l Criminal Court, Warrant of Arrest Unsealed Against

Investigations undertaken in the context of armed conflicts invariably uncover instances of massive criminality, often conducted on a widespread or systematic basis. In this context, it is crucial that investigations and prosecutions are focused to be effective. Careful selections need to be made regarding the scope and focus of any investigation or prosecution in a case.

A focused approach to sexual and gender-based violent crimes must be taken from the outset, during the pre-analysis phase and before any decision is made to initiate an investigation in any country. The OTP analyzes the available information to determine, based on the standards set in the Statute for jurisdiction, admissibility, and gravity, whether there is a legal basis for investigation. The OTP has stated that it will “endeavour to do a selection of cases that represent the entire criminality and modes of victimisation” and pay particular attention to methods of investigations of sexual and gender-based crimes, as well as crimes committed against children.⁵

Once a decision is made to investigate and before the investigation commences, the OTP considers the following issues: what are the most serious of the crimes, if any, being perpetrated within the Court’s jurisdiction, including sexual and gender-based crimes? What is the most appropriate factual context for investigating those crimes, for example, what are the key factual incident(s)? Who are the groups and individuals that appear most responsible for those crimes?

The OTP’s focused and mainstreamed approach to sexual and gender-based crimes is also reflected by ensuring that the staff involved in investigation and prosecution of these crimes has the necessary expertise and knowledge. Specifically, the OTP established in-house expertise on sexual and gender-based crimes in a number of ways. The Gender and Children’s Unit was established to provide advice and assistance to the OTP divisions, including for sexual and gender-based crimes, during all phases (from the pre-analysis phase onwards). More recently, the ICC Prosecutor appointed a Special Gender Adviser, Professor Catharine MacKinnon,⁶ and the Deputy Prosecutor remains the key focal point for the OTP regarding this category of crimes. Moreover, each joint team⁷ on a

Five LRA Commanders (Oct. 13, 2005) (outlining a pattern of severe crimes committed by the LRA).

5. See THE OFFICE OF THE PROSECUTOR, REPORT ON PROSECUTORIAL STRATEGY 5, 7 (Sept. 14, 2006) (stating that a principle guiding Prosecutorial Strategy is that of “focused investigations and prosecutions”). See also Regulations of the Office of the Prosecutor, ICC-BD/05-01-09 (Apr. 23, 2009) [hereinafter OTP Regulations]. Regulation 34 provides that: “[i]n each provisional case hypothesis, the joint team shall aim to select incidents reflective of the most serious crimes and the main types of victimisation—including sexual and gender violence and violence against children—and which are the most representative of the scale and impact of the crimes.”

6. See Press Release, Int’l Criminal Court, ICC Prosecutor Appoints Prof. Catharine A. MacKinnon as Special Advisor on Gender Crimes (Nov. 26, 2008).

7. Joint teams are comprised of members of the three divisions of the OTP, the Investigations Division, Prosecutions Division, and Jurisdiction, Cooperation and Complementarity Division. Each of the joint teams—the core operational units of the

case includes focal point(s) who coordinate the work undertaken by the OTP on this category of crimes. In addition to these efforts, the OTP has sought to make all members of joint teams knowledgeable of the legal framework relevant to sexual and gender-based crimes, and to ensure that investigators implement best practices when conducting interviews with victims of sexual and gender-based crimes. To accomplish this goal, the OTP provides the relevant training to all of its investigators and lawyers.

II. HISTORICAL DEVELOPMENTS IN INVESTIGATION AND PROSECUTION OF SEXUAL AND GENDER-BASED CRIMES BEFORE INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

The gender-based nature of crimes committed during armed conflicts is not a recent phenomenon. Accounts of wars indicate that throughout history there have been instances of widespread or systematic sexual violence and a gendered-form of victimization of women and men during wartime.⁸ The United Nations Security Council (UNSC), in its most recent resolution regarding violence against women and children in situations of armed conflict, recalled the range of sexual violence offenses addressed in the Rome Statute and the statutes of the ad hoc international criminal tribunals. The UNSC reiterated its

deep concern that, despite its repeated condemnation of violence against women and children in situations of armed conflict, including sexual violence in situations of armed conflict, and despite its calls addressed to all parties to armed conflict for the cessation of such acts with immediate effect, such acts continue to occur, and in some situations have become systematic and widespread, reaching appalling levels of brutality.⁹

office—works on different cases (currently relating to the Democratic Republic of the Congo, North Uganda, Darfur, and Central African Republic) and is supported by these three divisions of the OTP. Regulation 32 of the OTP Regulations, which provides that “[e]ach joint team shall be composed of staff from the 3 Divisions in order to ensure a coordinated approach throughout the investigation Upon confirmation of the charges, an interdivisional trial team is formed to carry out prosecutions.” OTP Regulations, *supra* note 5.

8. See Bensouda, *supra* note 2, at 401; see also KELLY DAWN ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS 1, 49 (1997); Agnès Callamard, *Introduction* to AMNESTY INT’L PUBLICATIONS & THE INT’L CTR. FOR HUMAN RIGHTS & DEMOCRATIC DEV., INVESTIGATING WOMEN’S RIGHTS VIOLATIONS IN ARMED CONFLICTS 11, 12 (2001); Christine Chinkin, *Gender-Related Crimes: A Feminist Perspective*, in FROM SOVEREIGN IMPUNITY TO INTERNATIONAL ACCOUNTABILITY: THE SEARCH FOR JUSTICE IN A WORLD OF STATES 116, 122 (Ramesh Thakur & Peter Malcontent eds., 2004). See generally SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 31-113 (1975).

9. S.C. Res. 1820, ¶ 8, U.N. Doc. S/RES/1820 (June 19, 2008); see also Bensouda, *supra* note 2, at 402 (observing that, as of 2007, “despite the creation of the United Nations and the establishment of a broad range of humanitarian law and human rights instruments, rape and other forms of sexual violence during armed conflict are still common practice. Furthermore, evidence indicates that sexual violence during armed conflict has taken a new dimension”); Tamara L. Tompkins, *Prosecuting Rape as a War Crime: Speaking the Unspeakable*, 70 NOTRE DAME L. REV. 845, 847-71 (1995) (citing examples of rapes “conducted on a systematic basis and massive scales” from the ancient world’s wars, the Middle Ages, and the fifteenth through twenty-first centuries). Tompkins also refers to BROWNMILLER, *supra* note 8, at 85, who quoted a Bengali politician’s response to why many Bengali women were raped by Pakistani

However, there have been relatively few prosecutions of international crimes historically, let alone sexual and gender-based crimes, before ad hoc international criminal courts.¹⁰ In 1997, Kelly Askin observed:

[s]exual assault has been increasingly outlawed through the years, but this prohibition has rarely been enforced. Consequently, rape and other forms of sexual assault have thrived in wartime, progressing from a perceived incidental act of the conqueror, to a reward of the victor, to a discernable mighty weapon of war.¹¹

The earliest documented prosecution of sexual violence crimes before an international criminal court was in the 1474 trial of Sir Hagenbach, who was convicted for rapes committed by his troops. Yet the rapes were only considered illegal because the war itself was “undeclared,” thus considered unjust and illegal.¹² Gender-based war crimes were prosecuted, albeit to a limited extent, after World War II before an international criminal tribunal,

soldiers in 1971: “What do soldiers talk about in barracks? Women and sex. Put a gun in their hands and tell them to go out and frighten the wits out of a population and what will be the first thing that leaps to their minds?” Tompkins continues, “[t]his mindset helps explain the extensive use of rape in particularly humiliating ways during war.” Tompkins, *supra*, at 871. She further argues that wartime rape says to a woman “you are a marginal, expendable, peripheral, essentially useless, sub-human being. You are here for me to humiliate in order that *your* men understand just who is winning this war.” *See id.* at 877.

10. *See* M. Cherif Bassiouni, *History of International Investigations and Prosecution*, in 3 INTERNATIONAL CRIMINAL LAW 3, 5 (M. Cherif Bassiouni ed., Transnational Publishers 2d ed. 1999) [hereinafter Bassiouni, *History of International Investigations and Prosecution*]; *see also* Dorean M. Koenig & Kelly D. Askin, *International Criminal Law and the International Criminal Court Statute: Crimes Against Women*, in 2 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 3, 9 (Kelly D. Askin & Dorean M. Koenig eds., 2000) (“Gender-based and sex-based crimes committed predominantly against women have rarely been formally recognized and prosecuted in the international arena.”).

11. ASKIN, *supra* note 8, at 19; *see also* Eve La Haye, *Article 8(2)(b)(xxii)—Rape, Sexual Slavery, Enforced Prostitution, Forced Pregnancy, Enforced Sterilisation, and Sexual Violence*, in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 184, 185 (Roy S. Lee ed., 2001) [hereinafter ICC: CRIMES, PROCEDURE & EVIDENCE] (“Rape and sexual assaults on women have often been used as a method of warfare, and, in the words of the Special Rapporteur on the situation of human rights in the territory of the former Yugoslavia, as a means to ‘humiliate, shame, degrade, and terrify the entire . . . group.’”).

12. ASKIN, *supra* note 8, at 5, 28-29 (noting that Hagenbach’s trial was held in Breisach, Germany, before twenty-seven judges of the Holy Roman Empire, including Swiss, Alsatian, and German judges). Askin observes that it was considered “acceptable” to rape women, but that “it was because this particular war was undeclared, and thus unjust, that the abuses were considered illegal.” Askin also argues that Hagenbach’s conviction for rape perpetrated by his forces “is evidence that in customary norms of warfare, rape was considered a serious violation and commanders could be held personally responsible for failing to halt these crimes.” *Id.* *See also* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 349 (1999) (citing GEORG SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 462-66 (1968), who described the trial of 1474 in which Hagenbach, a knight in the employ of the Duke Charles of Burgundy, was charged with murder, rape, perjury, and other crimes by omission). The crimes were perpetrated by Hagenbach’s subordinates in Breisach town. Hagenbach was placed in charge of the area and had been pledged to the Duke of Burgundy by the Archduke of Austria. The court denied his defense of superior orders and he was stripped of his knighthood for failing to prevent the crimes, which was his duty as a knight. Hagenbach was executed. *Id.* *See also* Koenig & Askin, *supra* note 10, at 9 (noting that this was the first recorded international criminal court).

the International Military Tribunal for the Far East (Tokyo Tribunal).¹³ The Charter of the Tokyo Tribunal (Tokyo Charter)¹⁴ did not include explicit reference to rape.¹⁵ Nevertheless, rape charges were brought against Japanese defendants as war crimes, particularly with regard to the widespread rapes Japanese soldiers committed against civilians in Nanking in 1937.¹⁶

Rapes of civilian women and female medical personnel were successfully prosecuted in Tokyo under the categories of inhumane treatment, ill-treatment, and failure to respect family honor and rights. The then Foreign Minister Hirota, Admiral Toyoda, and General Matsui were charged with command responsibility for the violations of the laws or customs of war committed by their soldiers in Nanking. Hirota and Matsui were convicted of these charges.¹⁷ Various military tribunals of the Allied

13. ASKIN, *supra* note 8, at 14.

14. See Charter of the International Military Tribunal for the Far East art. 5, Jan. 19, 1946 (as amended Apr. 26, 1946), 4 Bevens 21, *reprinted in* 1 BENJAMIN FERENCZ, *DEFINING INTERNATIONAL AGGRESSION* 523 (1975) (referring to the “conventional war crimes: namely, violations of the laws or customs of war,” and crimes against humanity including “enslavement . . . and other inhumane acts committed against any civilian population”). With regard to crimes against humanity, the Charter provides that “[l]eaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.” *See id.*

15. Machteld Boot, *Crimes Against Humanity, Article 7(1)(g): Rape . . . or Any Other Form of Sexual Violence of Comparable Gravity*, in *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE* 159, 207 (Otto Triffterer ed., Christopher Hall rev., 2d ed. 2008) [hereinafter *COMMENTARY ON THE ROME STATUTE*].

16. *See id.*; *see also* 1 *THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST, THE TOKYO JUDGMENT* 29 APRIL 1946 – 12 NOVEMBER 1948, at 389 (B.V.A Roling & C.F.Ruter eds., 1977) (finding that “[a]pproximately 20,000 cases of rape occurred within the city during the first month of occupation,” and that “[m]any women were killed after the act and their bodies mutilated”); BROWNMILLER, *supra* note 8, at 57-62 (noting that this case came to be known as the “Rape of Nanking”); Callamard, *supra* note 8, at 41-42 (observing that the U.N. Commission of Experts established to investigate rape and sexual assault in the former Yugoslavia noted that during the Tokyo trials, rape was considered a violation of the “laws and customs of war” and arguing that the charges indicated that rape was seen as a crime as serious as torture and murder); Catherine N. Niarchos, *Women, War, and Rape: Challenges Facing the International Tribunal for Former Yugoslavia*, 17 *HUM. RTS. Q.* 649, 666 (1995) (“These charges did not include evidence concerning the ‘comfort women,’ a term which refers to the forced prostitution of women in brothels by the Japanese government before and during the Second World War.”).

17. *See* *THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST*, *supra* note 16, at 445-46. Although there is no explicit reference to rape, Commander Hata was also found responsible for war crimes perpetrated in 1938 and from 1941 to 1944 when he was in command of expeditionary forces in China. Atrocities were “committed on a large scale by the troops under his command and were spread over a long period of time.” *Id.* He was found guilty under count fifty-five as he either “knew of these things and took no steps to prevent their occurrence, or he was indifferent and made no provision for learning whether orders for the humane treatment of prisoners of war and civilians were obeyed.” *Id.* *See also* Bensouda, *supra* note 2, at 404 (explaining that Commander Hata was found responsible for criminal acts including rape); Michael Cottier, *Article 8: War Crimes, para. 2(b)(xxii): Rape and Other Forms of Sexual Violence*, in *COMMENTARY ON THE ROME STATUTE*, *supra* note 15, at 433; BASSIOUNI, *supra* note 12, at 348. He refers in particular to the cases against General Yamashita and Admiral Toyoda (citing William Parks, *Command Responsibility for War Crimes*,

forces also prosecuted rape cases, including the U.S. Military Commission, which convicted General Yamashita for command responsibility for rape as a war crime,¹⁸ and the Chinese Military Tribunal, which convicted Takashi Sakai for rape and mutilation of women.¹⁹

Foreign Minister Hirota and General Matsui, the Commander-in-Chief of the Central China Area Army, were prosecuted before the Tokyo Tribunal. Hirota was found liable for inaction amounting to criminal negligence for relying on assurances from the Japanese War Ministry to stop atrocities that he knew were not being implemented.²⁰ General Matsui and his troops captured Nanking in 1937. Matsui was found criminally responsible for failure in his duty to “control his troops and protect” the civilians of Nanking. The Tokyo Tribunal found that he must have known that thousands of rapes and other atrocities were happening and that, although he issued orders for his troops to act with “propriety,” he must have known that his orders were of no effect.²¹

28 MIL. L. REV. 1, 69-73 (1973), who refers to Admiral Toyoda’s trial, in which he was acquitted on all charges).

18. See Cottier, *supra* note 17, at 433 n.795 (citing 2 THE LAW OF WAR: A DOCUMENTARY HISTORY (Leon Friedman ed., 1972)) (noting that in the *Yamashita* case, the U.S. Military Commission stated that “where murder and rape . . . are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops . . .”). See generally BASSIOUNI, *supra* note 12, at 348 (citing the cases against Admiral Toyoda and General Yamashita and referring to the details of the case against Admiral Toyoda as described by Parks, *supra* note 17, at 69-73).

19. See NOËLLE N.R. QUENIVET, SEXUAL OFFENCES IN ARMED CONFLICT & INTERNATIONAL LAW 77 (2005) (referring to the case against Takashi Sakai before the Chinese War Crimes Military Tribunal of the Ministry of National Defense, Nanking, 29 August 1946, reprinted in the *U.N. War Crimes Commission*, 13 LAW REPORTS OF TRIALS OF WAR CRIMINALS, Case No. 79, at 138).

20. See THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST, *supra* note 16, at 448. Hirota was found guilty of count fifty-five, which charged him with rape. He received reports of atrocities immediately after Japanese forces entered Nanking in 1937. Though Hirota received assurances from the War Ministry that the atrocities would be stopped, they continued for at least a month. *Id.* The Tokyo Tribunal decided that

Hirota was derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the same result. He was content to rely on assurances which he knew were not being implemented whilst hundreds of murders, violations of women, and other atrocities were being committed daily. His inaction amounts to criminal negligence.

Id.

21. See THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST, *supra* note 16, at 453-54. The Tokyo Tribunal said, with regard to the thousands of rapes and other atrocities, that Matsui was in Nanking City for five to seven days and that

[f]rom his own observations and from the reports of his staff he must have been aware of what was happening The Tribunal is satisfied that Matsui knew what was happening. He did nothing, or nothing effective to abate these horrors. He did issue orders before the capture of the City enjoining propriety of conduct upon his troops and later he issued further orders to the same purport. These orders were of no effect as it is now known, and as he must have known He had the power, as he had the duty, to control his troops and to protect the unfortunate citizens of Nanking. He must be held criminally

Despite the express charge of rape, not one of the female victims was called to give evidence before the Tokyo Tribunal.²² Rape was essentially subsumed under the general charges of command responsibility for the atrocities in Nanking²³ and seen as ancillary to the other war crimes.²⁴ Moreover, the Tokyo Tribunal did not consider any of the evidence regarding the thousands of so-called “comfort women” forced into sexual slavery or enforced prostitution in Japanese military brothels.²⁵

The Charter of the International Military Tribunal of Nuremberg (Nuremberg Charter),²⁶ and Nuremberg Principles²⁷ also did not contain any explicit reference to rape or other crimes of sexual violence.²⁸ Nevertheless, Cherif Bassiouni argues that rape was implicitly included in both the Nuremberg and Tokyo Charters as a crime against humanity by being “subsumed within the words ‘or other inhumane acts’”;²⁹ he argues that rape and sexual violence “clearly constitute ‘inhumane acts.’”³⁰ Bassiouni also argues that rape was also implicitly included as a war crime by being subsumed within the term “ill treatment.”³¹

In her treatise on prosecution of war crimes against women before international criminal tribunals, Kelly Askin excerpts transcripts from the trial of the German Major War Criminals before the International Military Tribunal at Nuremberg (Nuremberg Tribunal). French and Soviet prosecutors introduced evidence of sexual and gender-based crimes which Askin describes as “evidence of vile and tortuous rape, forced prostitution, forced sterilization, forced abortion, pornography, sexual mutilation, and sexual sadism.”³² In spite of this evidence, no defendants were explicitly

responsible for his failure to discharge this duty.

Id. Matsui was found guilty of count fifty-five, which also related to the rapes. In regard to the widespread nature of the crimes, the Tokyo Tribunal observed that although there was an attempt to claim that the atrocities were not extensive, that “contrary evidence of neutral witnesses of different nationalities and undoubted responsibility is overwhelming.” *Id.*

22. See BROWNMILLER, *supra* note 8, at 58.

23. See Richard J. Goldstone, *Prosecuting Rape as a War Crime*, 34 CASE W. RES. J. INT’L L. 277, 279 (2002).

24. See BASSIOUNI, *supra* note 12, at 348 (noting the grey area between responsibility and exoneration in international law).

25. See Goldstone, *supra* note 23, at 279; see also Bensouda, *supra* note 2, at 404; Tompkins, *supra* note 9, at 864-65.

26. See M. Cherif Bassiouni, *International Criminal Investigations and Prosecutions: From Versailles to Rwanda*, in INTERNATIONAL CRIMINAL LAW, *supra* note 10, at 69-71, app. 3 (reprinting Charter of the International Military Tribunal, Annexed to the London Agreement, 1945).

27. *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, [1950] 2 Y.B. INT’L L. COMM’N 374, ILC Report A/1316 (A/5/12).

28. See Boot, *supra* note 15, at 207.

29. See ASKIN, *supra* note 8, at 125 (citing BASSIOUNI, *supra* note 12, at 164).

30. See BASSIOUNI, *supra* note 12, at 344.

31. See *id.* at 348; see also Tompkins, *supra* note 9, at 883 (stating that sexual atrocities were proscribed by Principle IV(b) of the Nuremberg Charter, which referred to ill treatment, and Principle IV(c), which referred to inhumane acts).

32. ASKIN, *supra* note 8, at 97.

prosecuted or convicted for sexual crimes before the Nuremberg Tribunal.³³ Askin argues that the failure to explicitly prosecute these crimes was compounded by the prosecutors' frequent failure to publicly document the crimes.³⁴ Askin concludes, "[w]hether it was out of shyness, prudishness, reserve, ignorance, revulsion, confusion, or intentional omission, the lack of both public documentation and official prosecution gave impetus to the notion that sexual assaults were less important crimes."³⁵ The judgment of the Nuremberg Tribunal (Nuremberg Judgment) makes no explicit mention of rape and it has been argued it was not prosecuted at all before the Nuremberg Tribunal.³⁶ Nevertheless, even though rape was not explicitly referred to in the indictment, the transcripts of the proceedings show that rape was indeed prosecuted. Susan Brownmiller states that Soviet prosecutors tried to show that the rape of Russian women was part of "a systematic Nazi campaign of terror and genocide."³⁷ Brownmiller further argues that the French prosecution showed how rape was used as a form of "military retaliation or reprisal."³⁸

Although rape was not explicitly mentioned, it was arguably encompassed by the Nuremberg Tribunal's general findings of war crimes as ill treatment, including protection of family honor and rights, and the crime against humanity, inhumane treatment.³⁹ The Nuremberg Judgment

33. See Goldstone, *supra* note 23, at 279; see also BASSIOUNI, *supra* note 12, at 345-46.

34. See ASKIN, *supra* note 8, at 97.

As the French prosecutor sifted through his documents, the standard censoring mechanism that men employ when dealing with the rape of women was put into effect. "The Tribunal will forgive me if I avoid citing the atrocious details," he said with gallantry. "A medical certificate from Doctor Nicolaides who examined the women who were raped in this region—I will pass on."

Id.

35. *Id.* at 97-98.

36. See Goldstone, *supra* note 23, at 279; see also Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 425-26 (1993).

37. See BROWNMILLER, *supra* note 8, at 69 (stating that captured German documents presented at Nuremberg corroborated the "routine use of rape as a weapon of terror").

38. See *id.* at 56.

39. See Patricia Viseur Sellers, *Individual(s) Liability for Collective Sexual Violence*, in GENDER AND HUMAN RIGHTS 153, 163 (Karen Knop ed., 2004).

The Nuremberg Tribunal, but more particularly the Tokyo Tribunal and several subsequent national trials, produced judgments that held sexually violent conduct during armed conflict to constitute war crimes or crimes against humanity. Unfortunately, little strenuous legal analysis has been produced about these judicial pronouncements, engendering the mistaken belief among many scholars and practitioners that sex crimes were omitted, almost entirely, from previously rendered humanitarian law jurisprudence.

Id. See also Koenig & Askin, *supra* note 10, at 10 (arguing that the fact that the trial transcripts of the Nuremberg and Tokyo trials included numerous references to instances of sexual violence provides a "compelling argument . . . that, even though the crimes were not specifically enumerated within the Charters, various forms of sexual violence were indeed prosecuted in the post-World War II trials"); Tompkins, *supra* note 9, at 850 (observing that although rape was not formally prosecuted at the Nuremberg trials, allegations of rape were submitted in affidavits and entered into

referred to how civilian populations in occupied territories were ill-treated, tortured, murdered, and used as slave labor, and that civilian hostages were taken in large numbers.⁴⁰ In particular, the Nuremberg Tribunal referred to ill treatment, killings, and wanton destruction of property as war crimes under Article 6(b) of the Charter. The tribunal stated that “these provisions are merely declaratory of the existing laws of war as expressed by the Hague Convention, Article 46, which stated: ‘Family honour and rights, the lives of persons and private property, as well as religious convictions and practices must be respected.’”⁴¹ The phrase “family honour and rights” has been found to cover rape.⁴² The Nuremberg Tribunal found that war crimes and crimes against humanity were committed on a vast scale, and that inhumane acts not amounting to war crimes were crimes against humanity.⁴³ In finding that defendants committed crimes against humanity of persecution of Jewish people, the Tribunal explicitly referred to the sterilization of Jewish men and women.⁴⁴

Before finding the Major War Criminals guilty of war crimes and crimes against humanity, the Nuremberg Tribunal made a number of factual findings regarding the charges against the defendants that were in some instances stated in general terms that may encompass rape and other sexual or gender-based crimes.⁴⁵ For example, in the case of Keitel, the former Chief of Staff to Nazi Germany’s Minister of War, the Nuremberg Tribunal referred to an order Keitel issued stating that prosecution of German soldiers for “offences against civilians” was unnecessary.⁴⁶ Rosenberg, the Nazi party’s ideologist and representative for Foreign Affairs, was found to have “knowledge of the brutal treatment and terror to which the Eastern people were subjected.” Frank, the Chief Civil Administration Officer for occupied Polish territory was found to be a “willing and knowing participant in the use of terrorism in Poland . . .”⁴⁷ Similarly, Frick, the Reich Minister of the Interior and “Reich Protector of Bohemia and Moravia” was found responsible for “acts of oppression,” including “terrorism of the population” and “slave labour.”⁴⁸ Von Neurath, the former Minister of Foreign Affairs and Reich Minister Without Portfolio

evidence).

40. See INT’L MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 30 SEPTEMBER – 1 OCTOBER 1946, at 45 (1948) [hereinafter NUREMBERG JUDGMENT].

41. *Id.* at 48.

42. See Meron, *supra* note 36, at 425.

43. See NUREMBERG JUDGMENT, *supra* note 40, at 65.

44. See *id.* at 63 (noting that Allied forces found victims in mass graves).

45. See generally *id.* at 84-131. However, usually specific examples were given, in particular in the context of mass killings, persecution, concentration camps, and forced labor.

46. See *id.* at 92.

47. See *id.* at 98.

48. See *id.* at 98-100 (holding that Frink was responsible because he knew of the Reich’s policies and carried them out).

and “Reich Protector of Bohemia and Moravia,” as the chief German official in the Protectorate of Czechoslovakia, was found to play an important role in the “wars of aggression which Germany was waging in the East knowing that war crimes and crimes against humanity were being committed under his authority.”⁴⁹ Bormann, the head of the Nazi party Chancellery, was found responsible for the transfer of 500,000 female workers from “the East” to Germany as part of the slave labor program.⁵⁰

It has been argued that women were “nearly invisible” in the proceedings before the Nuremberg Tribunal.⁵¹ The Allied Control Council Law No. 10, which allowed the Allies to prosecute German nationals in their respective zones of occupation,⁵² explicitly referred to “rape, or other inhumane acts committed against any civilian population” as a crime against humanity and “ill treatment” of civilians,⁵³ but no prosecutions were explicitly brought for rape on this basis.⁵⁴

The first known international criminal law prosecution for “forced prostitution” took place before the Batavia Military Tribunal in 1948. Japanese defendants were prosecuted for the forcible abductions of Dutch women living in “Dutch Indonesia” for rape and the “war crime of enforced prostitution.”⁵⁵

Cases of enforced sterilization were punished during the war crimes trials in which crimes related to medical experiments conducted on prisoners in concentration camps during the Second World War were prosecuted. Prosecution of these crimes was before U.S., Chinese, and Polish military courts, in addition to the Nuremberg Tribunal.⁵⁶ Forced

49. *See id.* at 124-26.

50. *See id.* at 128-30.

51. *See* Peggy Kuo, *Prosecuting Crimes of Sexual Violence in an International Tribunal*, 34 CASE W. RES. J. INT’L L. 305, 308 (2002) (observing that in contrast to the Nuremberg Tribunal, the ICTY has a clear presence of women as judges, lawyers, investigators, and witnesses).

52. *See* Bassiouni, *supra* note 26, at 45-46.

53. *See id.* at 79; *see also* Article II (1)(b)-(c), Appendix 6, Allied Control Council Law No. 10 (1945).

54. *See* Boot, *supra* note 15, at 207 (observing that rape was defined as a crime against humanity, but not a war crime, under Control Council Law No. 10; yet there were no prosecutions for rape in the trials conducted on the basis of this instrument).

55. *See* ASKIN, *supra* note 8, at 85; *see also* Cottier, *supra* note 17, at 447. The defendant Awochi was found guilty of the war crime of enforced prostitution for forcing Dutch women to practice prostitution in the premises of the club-restaurant in Batavia occupied by Japanese forces. The women were said to be unable to leave freely. The war crime was defined as “[a]bduction of girls and women for the purpose of enforced prostitution.” *Id.*

56. *See* Cottier, *supra* note 17, at 451; *see generally* U.S. Military Tribunal 1, K. Brandt et al. (Medical Case, Case No. 1), 1-2 TRIALS OF WAR CRIMINALS BEFORE THE NEURNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1950); Article II of the Chinese War Crimes Law (October 24, 1946), U.N. WAR CRIMES COMM’N, 14 LAW REPORTS OF TRIALS OF WAR CRIMINALS 153 (1949) (referring to the war crime of “destroying [people’s] power of procreation”); Supreme National Tribunal of Poland, Rudolf F.F. Hoess (11-29 March 1947), U.N. WAR CRIMES COMM’N, 7 LAW REPORTS OF TRIALS OF WAR CRIMINALS 153 (1948).

abortion was also prosecuted and sexual mutilation mentioned.⁵⁷

In 1974, the U.N. General Assembly Resolution 3318, called on states to make “[a]ll efforts . . . to spare women and children from the ravages of war,” proclaiming that “[a]ll forms of repression and cruel and inhuman treatment of women and children . . . committed by belligerents in the course of military operations or in occupied territories shall be considered criminal.”⁵⁸ It was more than forty years after Tokyo and Nuremburg that sexual and gender-based crimes were prosecuted before an ad hoc international criminal tribunal. At the time of the creation of the International Criminal Tribunal for Former Yugoslavia (ICTY), there were additional international declarations calling for crimes of sexual violence, including rape, sexual slavery, and forced pregnancy, to be dealt with as war crimes and crimes against humanity.⁵⁹ The UNSC resolution leading to the establishment of the ICTY contained the first condemnation by the

57. See Bensouda, *supra* note 2, at 404; see generally U.S. v. Brandt (1946), in 1-2 TRIALS OF WAR CRIMINALS BEFORE THE NEURNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, *supra* note 56 (noting forced sterilization and castration); U.S. v. Pohl (1947), in 5 TRIALS OF WAR CRIMINALS BEFORE THE NEURNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1950) (evidence of forced abortion and concentration camp “brothels”); U.S. v. Greifelt (1948), in 5 TRIALS OF WAR CRIMINALS BEFORE THE NEURNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1950) (forced abortion, gender and ethnic persecutions, genocide, and reproductive crimes).

58. See Cottier, *supra* note 17, at 434 (referring to the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, G.A. Res. 3318, U.N. Doc. A/9631 (Dec. 14, 1974)).

59. See Boot, *supra* note 15, at 207 (referring to the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights, ¶ 38, U.N. Doc. A/CONF.157/23 (June 25, 1993)). The Declaration and Programme of Action stated that “[v]iolations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, including in particular murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response.” *Id.* Boot also references the U.N. General Assembly Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. Doc. A/48/49 (1993), adopted Feb. 23, 1994, and its broad definition of “violence against women” and the call for states to take measures to prevent and punish such violence. See also U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on Prevention of Discrimination and Protection of Minorities, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict*, U.N. Doc. E/CN.4/Sub.2/1998/13 (June 22, 1998) (prepared by Gay J. McDougall) [hereinafter *U.N. Slavery Special Rapporteur Report*]; ECOSOC, Comm’n on Human Rights, *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission, Alternative Approaches and Ways and Means Within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms*, U.N. Doc. E/CN.4/1998/54/Add.1 (Feb. 4, 1998) (prepared by Radhika Coomaraswamy); ECOSOC, Comm’n on Human Rights, *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission, Alternative Approaches and Ways and Means Within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms*, U.N. Doc. E/CN.4/1998/54 (Jan. 26, 1998) (prepared by Radhika Coomaraswamy); Koenig & Askin, *supra* note 10, at 11 (referring as well to the Beijing Declaration and Platform for Action, ¶¶ 131-149, U.N. Doc. A/CONF.177/20 (Oct. 17, 1995)); Meron, *supra* note 36, at 424-28 (stating that “the massive and systematic practice of rape and its use as a ‘national’ instrument of ‘ethnic cleansing’ qualify it to be defined and prosecuted as a crime against humanity”).

UNSC of rape during war. Bringing to justice perpetrators of crimes such as rape was one of the reasons that the UNSC established the ICTY.⁶⁰

The ICTY statute refers explicitly to rape, as does the statute of the International Criminal Tribunal for Rwanda (ICTR), which explicitly refers to rape and enforced prostitution.⁶¹ Both statutes classify rape as a crime against humanity, an act that was described as ground-breaking,⁶² and followed the example of the Allied Control Council Law No. 10.⁶³ The ICTR Statute also defines rape, enforced prostitution, and “any form of indecent assault” as violations of Article 3 common to the 1949 Geneva Conventions.⁶⁴ Otherwise, these sexual violence crimes were not explicitly referred to as war crimes; there were no explicit references to any of the other sexual violence crimes in the statutes of the ad hoc tribunals.⁶⁵

The former Chief Prosecutor of the ICTY and ICTR, Richard Goldstone, said that in the early years of both tribunals he believed that there was a “gender bias” within his office. He referred to the lack of senior female investigators and criticized the attitude among his investigators, stating that “[t]heir culture was not such as to make them concerned about gender-related crime.”⁶⁶ Nevertheless, rape and other sexual violence crimes were prosecuted before the ad hoc tribunals as war crimes, crimes against

60. See S.C. Res. 827, pmb., U.N. Doc. S/RES/827 (May 25, 1993); Goldstone, *supra* note 23, at 278; see also Chinkin, *supra* note 8, at 118 (referring to Prosecutor v. Furundzija, Case No. IT-95-17/1-A, Appeals Chamber Judgment, ¶ 201 (July 21, 2000), where the ICTY Appeals Chamber stated, “[t]he general question of bringing justice to the perpetrators of crimes [such as rape] was one of the reasons that the Security Council established the Tribunal”); Koenig & Askin, *supra* note 10, at 5 (observing that sexual violence against women was a major impetus for the establishment of the ICTY).

61. See Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, art. 5(g), U.N. Doc. S/RES/827 (1993) [hereinafter ICTY Statute]; see also Statute of the International Tribunal for Rwanda arts. 3(g) and 4(e), Nov. 8, 1994, 33 I.L.M. 1598 [hereinafter ICTR Statute].

62. See Goldstone, *supra* note 23, at 278-79; see also Tompkins, *supra* note 9, at 850 (“The inclusion of rape as one of the enumerated crimes against humanity in Article 5 of the Statute . . . mark[s] a watershed moment for women.”). But see Cate Steains, *Gender Issues, Chapter Twelve*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 357, 362-63 (Roy S. Lee ed., 1999) (arguing that defining these crimes as crimes against humanity rather than war crimes imposed a higher threshold to be met making it more difficult for cases to be brought in relation to sexual violence).

63. See Patricia Viseur Sellers, *Sexual Violence and Peremptory Norms: The Legal Value of Rape*, 34 CASE W. RES. J. INT’L L. 287, 299 (2002).

64. See ICTR Statute, art. 4(e), *supra* note 61; Goldstone, *supra* note 23, at 279.

65. See Boot, *supra* note 15, at 208.

66. See Goldstone, *supra* note 23, at 280 (stating that as Chief Prosecutor of the ICTY and ICTR between 1994 to 1996, he decided to have an appropriate gender policy for the Office of the Prosecutor and in this regard appointed Patricia Sellers as the legal advisor to the Office of the Prosecutor for Gender Crimes); see also Koenig & Askin, *supra* note 10, at 6 (citing Patricia Sellers, Presentation at the WILIG Luncheon at the 93rd ASIL Annual Meeting on March 27, 1999, who stated “[i]t’s no longer acceptable for the Tribunal investigators and trial teams to be gender-sensitive—they need to be competent”); Kuo, *supra* note 51, at 310-11 (referring to investigators’ reluctance to deal with rapes).

humanity, and as genocide.⁶⁷ Goldstone explains that the first indictment brought by the ICTY Office of the Prosecutor, against Dragan Nikolic, included no charges for gender crimes because his office believed there was insufficient evidence to support such charges.⁶⁸ However, Goldstone recalls that the female judge, Justice Odio Benito, with the agreement of her two male colleagues, called upon the Prosecution to review its indictment to add gender crimes, either as a crime against humanity or as a grave breach or war crime. Goldstone remarked that this was a welcome “invitation,” as prior to that “[r]ape was not traditionally regarded as a war crime on its own, and . . . was never included amongst the . . . [grave breaches].”⁶⁹

The first indictment for rape as a war crime was in *Prosecutor v. Gagovic et al. (Foca)*. There, the prosecutor focused exclusively on sexual assault and qualified rape as a violation of the ICTY’s grave breaches provision,⁷⁰ a violation of the laws and customs of war,⁷¹ as well as a crime against humanity.⁷² The ICTY Trial Chamber found the three accused guilty of the war crimes and crimes against humanity of sexual violence.⁷³

Similarly, Goldstone describes how the female judge, Justice Pillay of the ICTR Trial Chamber, in *Prosecutor v. Akayesu*, elicited evidence from witnesses from the bench regarding sexual and gender-based crimes. Here too, the Tribunal requested that the Prosecution amend the indictments to include crimes of sexual violence.⁷⁴ The ICTR first found in the *Akayesu*

67. See Boot, *supra* note 15, at 208 n.228 (remarking that the ICTR Trial Chamber in *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Trial Chamber Judgment, ¶¶ 735-744 (Sept. 2, 1998), was the first to render a judgment finding the defendant criminally responsible for rape as a crime against humanity. The Prosecutor qualified rape as a violation of the grave breaches provision (article 2), a violation of the laws and customs of war (article 3), and as a crime against humanity (article 5) in *Prosecutor v. Gagovic (Foca)*, No. IT-96-23-I, Indictment (June 26, 1996)); see also Goldstone, *supra* note 23, at 278 (remarking that as of 2002, the ICTR had indicted seventeen men and one woman for gender crimes, charging them with genocide, crimes against humanity, and war crimes). The ICTY by then had convicted eight perpetrators of rape, held sexual slavery to be a crime against humanity, and more than half of its public indictments, including those against Radovan Karadzic, the former head of the Republika Srpska, and Ratko Mladic, his army chief, incorporated gender crimes. See *id.*; Koenig & Askin, *supra* note 10, at 6 (observing in 1999 that in the ICTY, half of the indictments charged various forms of sexual violence, while in the ICTR less than ten percent of the indictments charged sexual violence).

68. See Goldstone, *supra* note 23, at 281 (explaining that the indictment was for multiple murders and the torture of innocent civilians).

69. See *Prosecutor v. Nikolić*, Case No. IT-94-2-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, ¶¶ 5-23 (Oct. 20, 1995); Goldstone, *supra* note 23, at 282 (noting that this was a “huge step forward”).

70. See ICTY Statute, *supra* note 61, art. 2; Boot, *supra* note 15, at 208 n.228.

71. See ICTY Statute, *supra* note 61, art. 3; see Boot, *supra* note 15, at 208 n.228.

72. See ICTY Statute, *supra* note 61, art. 5; *Prosecutor v. Gagovic*, Case No. IT-96-23-1, Indictment, ¶ 4.8 (June 26, 1998); Boot, *supra* note 15, at 208 n.228; see also Goldstone, *supra* note 23, at 283 (noting activism from judges and the Office of the Prosecutor in the area of gender-related crimes).

73. See Kuo, *supra* note 51, at 305 (questioning whether the ICTY’s verdict marked progress).

74. See Goldstone, *supra* note 23, at 282 (remarking that this led to the postponement of the trial and amendment of the indictment to include charges of sexual

case a defendant criminally responsible for rape as a crime against humanity.⁷⁵ The Trial Chamber held in the *Akayesu* case, and later in the *Prosecutor v. Gacumbitsi*, that rape can constitute a form of genocide.⁷⁶ Enslavement was included as a charge in several indictments issued by the ICTR and ICTY. For example, in *Prosecutor v. Gagovic et al. (Foca)*, charges were included in the indictment for forcible sexual penetration of a person or forcing a person to penetrate another sexually.⁷⁷ The Trial Chamber found that rape was used as an “instrument of terror” in the course of ethnic cleansing, and defined slavery.⁷⁸

Sexual violence has been prosecuted before the ad hoc tribunals as acts of genocide,⁷⁹ rape,⁸⁰ torture,⁸¹ enslavement,⁸² persecution,⁸³ inhumane acts as crimes against humanity and war crimes,⁸⁴ other acts of sexual violence such as forced nudity,⁸⁵ and other grave breaches, or violations of the laws

violence against displaced women who sought refuge at the Taba Commune); *see also* Bensouda, *supra* note 2, at 406 (describing how two witnesses spontaneously gave evidence regarding sexual violence, prompting the judges to question these witnesses and invite the prosecution to consider investigating gender crimes and amending the indictment).

75. *See* *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Trial Chamber Judgment, ¶¶ 735-744 (Sept. 2, 1998); *see also* Boot, *supra* note 15, at 208 n.228.

76. *See Akayesu*, Case No. ICTR 96-4-T, Trial Chamber Judgment, ¶ 733; *see also* *Prosecutor v. Gacumbitsi*, Case No. ICTR 2001-64-T, Judgment, ¶¶ 291-293 (June 17, 2004); Bensouda, *supra* note 2, at 407 (explaining how the *Akayesu* Trial Chamber Judgment punished sexual violence as a war crime in the context of an internal armed conflict, confirming that sexual violence could be prosecuted irrespective of whether it was an internal or international armed conflict). *See generally* Catherine MacKinnon, *The ICTR's Legacy on Sexual Violence*, 14 *NEW ENG. J. INT'L & COMP. L.* 211 (2008).

77. *See* *Prosecutor v. Gagovic et al.*, Case No. IT-96-23-I, Indictment, ¶ 4.8 (June 26, 1996); Christopher Hall, *Crimes Against Humanity, Article 7(1)(c): Enslavement*, in *COMMENTARY ON THE ROME STATUTE*, *supra* note 15, at 193 n.152; *see also* Koenig & Askin, *supra* note 10, at 18 (referring to the indictment for enslavement in *Prosecutor v. Kunarac*, Case No. IT-96-23-I, Amended Indictment, ¶¶ 9.1, 10.1 (July 13, 1998), stating the charges of crimes against humanity and enslavement).

78. *See* Kuo, *supra* note 51, at 318-19; *see also* Chinkin, *supra* note 8, at 122 (referencing the *Prosecutor v. Kunarac et al.*, Trial Chamber Judgment, Case Nos. IT-96-23/T & IT-96-23/1-T, ¶ 576 (Feb. 22, 2001); *Prosecutor v. Karadzic & Mladic*, Case Nos. IT-95-5-R61 & IT-95-18-R61, Review of Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence (July 11, 1996); *Prosecutor v. Karadzic & Mladic*, Case Nos. IT-95-18-R61 & IT-95-5-R61, Transcript of Hearing, ¶ 64 (July 2, 1996)).

79. *See* Sellers, *supra* note 39, at 163 (referencing *Akayesu*, Case No. ICTR 96-4-T, Trial Chamber Judgment, ¶ 731).

80. *See id.* (referencing *Akayesu*, Case No. ICTR 96-4-T, Trial Chamber Judgment, ¶ 686; *Kunarac et al.*, Case Nos. IT-96-23-T & IT-96-23/1-T, Trial Chamber Judgment, ¶ 655).

81. *See id.* (referencing, e.g., *Prosecutor v. Kvocka et al.*, Case No. IT-98-30/1-T, Trial Chamber Judgment (Nov. 2, 2001)).

82. *See id.* (referencing *Kunarac et al.*, Case Nos. IT-96-23/1-T & IT-96-23/1-T, ¶¶ 738-739, 742).

83. *See id.* (referencing *Kvocka et al.*, Case No. IT-98-30/1-T, Trial Chamber Judgment).

84. *See id.* (referencing *Prosecutor v. Furundzija*, Case No. IT-95-17/-A, Appeals Chamber Judgment, ¶¶ 210-272 (July 21, 2000); *Prosecutor v. Delalic et al.* (“Celebici Trial Chamber Judgment”), Case No. IT-96-21-T, Judgment, ¶ 1066 (Nov. 16 1998)).

85. *See Akayesu*, Case No. ICTR 96-4-T, Trial Chamber Judgment, ¶ 10A.

and customs of war such as outrages upon personal dignity, cruel treatment, and wilfully causing great suffering.⁸⁶ In 2002, Richard Goldstone remarked upon key successes of both ad hoc tribunals:⁸⁷

[m]en had written the laws of war in an age when rape was regarded as being no more than an inevitable consequence of war. The two UN Tribunals truly represent a distinct shift in mindset. They are characterized as having the specific intent to prosecute the perpetrators of sexual assaults. In fulfilling that intent, the Tribunals have advanced the substance of international humanitarian law through defining rape, sexual violence, and sexual slavery and broadening the categories of international crime under which judicial bodies can prosecute gender crimes I would suggest the jurisprudence of the Tribunals in this important area is positive. They have also not avoided telling the detail of the stories of the witnesses and victims.

Nevertheless, Goldstone, and other former ICTY staff, also describe certain prosecutorial challenges faced by the ad hoc tribunals. Goldstone states that one of the problems faced by the Office of the Prosecutor of the ICTY and ICTR in charging rape as a war crime, before *Akayesu*, was that the crime did not have an explicit definition under international law at the time. He observes that the Trial Chamber in *Akayesu* “took a major step toward filling this gap in the law.”⁸⁸ Goldstone refers in particular to their definition of rape as a “physical invasion of a sexual nature committed on a person under circumstances which are coercive.”⁸⁹

Former ICTY Prosecutor Peggy Kuo observed that in the early years of the ICTY one policy concern considered was whether crimes against women should be kept separate or “incorporated and mainstreamed into other indictments.”⁹⁰ In the end, both approaches were implemented simultaneously.⁹¹ The former ICTY Gender Legal Expert Patricia Visser Sellers described how individuals were held accountable before the ICTY for “collective sexual violence.”⁹² She argues that war, systematic attacks

86. See Boot, *supra* note 15, at 208 n.228 (referencing Prosecutor v. Gagovic et al., Case No. IT-96-23-1, Indictment, ¶ 7.12 (June 26, 1996) (the defendants were charged with rape as a specific and separate crime, as a violation of the grave breaches provision (art. 2), a violation of the laws and customs of war (art. 3), and as a crime against humanity (art. 5)).

87. See Goldstone, *supra* note 23, at 279, 284; see also Koenig & Askin, *supra* note 10, at 5-6 (stating “[t]he traditional culture of silencing or ignoring crimes against women is increasingly being remedied in the 1990s. Due especially to concentrated lobbying by women’s groups and the broader participation and presence of women in various international fora, crimes committed predominantly against women are being condemned and prosecuted.”).

88. See Goldstone, *supra* note 23, at 283.

89. See *id.* (noting how the ICTR Trial Chamber held that “the central elements of the crime of rape should not be captured in a mechanical description of objects and body parts”; and that “[s]exual violence, which includes rape, is considered to be any act of a sexual nature, which is committed on a person under circumstances which are coercive”).

90. See Kuo, *supra* note 51, at 310.

91. See *id.* (stating that initially the concern was whether separating or mainstreaming would give too much or too little prominence to such crimes).

92. See Sellers, *supra* note 39, at 153.

on civilians, and genocide “breed collective criminal conduct,” and that in this context “the susceptibility of sexual violence to collective conduct seems predictable. The number of individuals eventually charged and tried for these crimes, in truth, only hint at the total number of perpetrators.”⁹³ Viseur Sellers also observed that before the ICTY, the Trial Chambers and Appeals Chamber dealt with the phenomenon of collective sexual violence by using a form of direct liability not expressly provided for under the ICTY statute, against military and political superiors, namely, “co-perpetration or joint criminal enterprise . . . based upon a perpetrator undertaking to participate in criminal conduct with a plurality of actors.”⁹⁴ She argues further that the common purpose doctrine could be an “engine of liability for sexual violence” in cases against leaders.⁹⁵ In *Prosecutor v. Krsztic*, the ICTY Trial Chamber found General Krsztic liable for “incidental” rapes and other crimes that resulted from a joint criminal enterprise to execute forced transfers.⁹⁶ Viseur Sellers observed that the Trial Chamber chose not to place any relevance on General Krsztic’s specific knowledge, or lack thereof, of sexual violence and instead “reasoned that because of his acquiescence to the collective plan to cleanse the area he knowingly assumed the risk that other crimes, such as sex-based crimes, would occur.”⁹⁷ Viseur Sellers concluded “[t]hat wartime sexual assault crimes are ostensibly characterised as the natural and foreseeable consequences of other violations is landmark jurisprudence. It reverses the inevitable conventional belief that wartime sexual abuse is either the

93. See *id.*; see also Chinkin, *supra* note 8, at 121 (arguing that “the cases before the ad hoc tribunals present a number of reasons for sexual violence” and “confirm that rape and sexual abuse of the civilian population are public crimes of violence inherent in the aims of the warring parties. They are not the private or personal acts of individual fighters that can somehow be distanced from the broader picture.”).

94. See Sellers, *supra* note 39, at 176-77. Sellers describes that the Appeals Chamber in *Prosecutor v. Tadic*, Case No. IT-94-I-A, Appeals Chamber Judgment, ¶¶ 196-204 (July 15, 1999), found three forms of common purpose doctrine: first, co-perpetration where all participants in the common design possess the same criminal intent to commit a crime; second, the “concentration camp” cases, where there is knowledge of the nature of the system of ill treatment and intent to further the common design of ill treatment (which intent can be proved by inference from the accused’s authority within the camp or organization hierarchy); and third, where there is intent to take part in a joint criminal enterprise and the possible commission by other members of the enterprise of other offences that do not constitute the objects of the common criminal purpose are foreseeable and nevertheless willingly took the risk. *Id.* Sellers describes that the Appeals Chamber in *Tadic* found that the

actus reus of the common purpose doctrine is satisfied when there exist: plurality of persons; a plan, design or purpose that may have been previously arranged or that may materialize extemporaneously; and participation of the accused in the common purpose by commission, or assistance in, or contribution to a specific crime under the Statute.

Id. There was no need for evidence of a prior agreement. See also *Prosecutor v. Tadic*, Case No. IT-94-I-A, Appeals Chamber Judgment, ¶ 227 (July 15, 1999).

95. See Sellers, *supra* note 39, at 156 (referring specifically to the potential use of the common purpose doctrine in the *Milosevic* case).

96. *Id.* at 182-85; see *Prosecutor v. Krstic*, Case No. IT-98-33-T, Trial Chamber Judgment, ¶ 2 (Aug. 2, 2001).

97. See Sellers, *supra* note 39, at 184.

unrelated, variant conduct of individual soldiers, or the consequence of soldiers obeying superior orders.”⁹⁸ She also refers to *Prosecutor v. Kvočka*, in which the ICTY Trial Chamber found the accused liable as a co-perpetrator where “the presence of female detainees and the unruly demeanour of the guards would presage the occurrence of sexual violence.”⁹⁹ Visser-Sellers argues that there exists a

myth [that] . . . sexual violence is not justiciable unless there is proof of a superior’s order, or proof that rapes were systematic. The common purpose doctrine trounces that myth. Sexual violence as a natural and foreseeable consequence of other crimes, comes close to being the legal description of the inevitable wartime sexual violence. When random or rampant sexual violence . . . happens, as long as a co-perpetrator knowingly assumes the risk of its occurrence, it lies within, not beyond, the reach of humanitarian law.¹⁰⁰

Catharine MacKinnon also addresses issues in relation to the prosecution of senior commanders for the perpetration of rape committed by their forces before the ICTR. She argues that certain ICTR decisions reflect “the pervasive reluctance to hold men responsible for their sex acts, exacerbated by a distinct resistance to finding vicarious responsibility for sex acts other men commit.”¹⁰¹ She further argues that there is a

seeming reluctance of the Tribunal, at times, to hold a man responsible for a sexual violation another man committed, when it is willing to hold the same man responsible for murder committed on virtually the same evidence, at the same time and place, by and against the same people An underlying sense also emerges that, while all these men would not likely have killed without direct orders, perhaps they would rape women en masse all on their own, without the supportive context of the defendant’s authority.¹⁰²

98. See *id.* at 182-85 (noting that similarly in *Krstić*, Case No. IT-98-33-T, Trial Chamber Judgment, ¶ 2, the Trial Chamber found the accused guilty for crimes that were a “natural and foreseeable consequence of the enterprise”). The accused was also found guilty of the “incidental murders, rapes, beatings and abuses.” *Id.* Additionally, Sellers observes

[t]he Trial Chamber found [that] . . . the sexual violence and sexual terrorization . . . were foreseeable and consistent with the presence of a massive, vulnerable refugee population, combined with the army and paramilitary presence The situational context primed the foreseeability of these crimes, even though they were beyond the scope of the original plan.

Id. at 184.

99. See *id.* at 186-88 (observing that the Trial Chamber in *Kvočka* considered the defendants’ authority, knowledge, and intentional furtherance of the system of ill treatment indicative of specific crimes and found that liability extended to anyone who knowingly participated in a significant way in the enterprise); see also Bensouda, *supra* note 2, at 407 (noting that the perpetrator convicted for a rape need not be the “physical perpetrator” of the rape and describing how Furundžija was convicted despite the fact that he was not a superior to the physical perpetrator nor did he touch the woman himself).

100. See Sellers, *supra* note 39, at 192.

101. See MacKinnon, *supra* note 76, at 214.

102. See *id.* at 214-15 (citing in support of this contention Judge Ramaroson’s dissent in *Prosecutor v. Kajelijeli*, Case No. ICTR 98-44A-T, Dissenting Opinion of Judge Ramaroson, ¶¶ 69-78 (Dec. 1, 2003)); see also *Prosecutor v. Muvunyi*, Case No.

MacKinnon considers that it is important to ensure that superiors are successfully prosecuted and held responsible for rapes committed by their subordinates to avoid sending a signal to the subordinates who rape “not only that there is no chance they will be held responsible for each rape they commit, but also that there is only a small chance their superiors will be [held responsible].”¹⁰³ MacKinnon opines that part of the problem lies in the fact that although the nature of conflicts have changed and groups do not always display the chain of command or formal hierarchical ordering that characterizes traditional armed conflict per se, “the liability rules for these crimes have observably remained subliminally stuck in their original wartime setting.”¹⁰⁴ She concludes, “[t]he breakthrough that would correspond to the *Akayesu* achievement on the substantive level has yet to take place on the level of accountability.”¹⁰⁵

MacKinnon also refers to the lack of convictions before the ICTR of superiors who raped victims themselves, arguing that the “tacit social burden of proof in sexual assault cases seems to have survived the formal non-existence of corroboration requirements.”¹⁰⁶ Nevertheless, as MacKinnon acknowledges, “[t]he fact the ICC even exists, with its prohibitions on sexual violence . . . is due in no small part to the impetus provided by the ad hoc tribunals, and those who gave them life by believing in them enough to testify before them.”¹⁰⁷

III. THE ICC’S LEGAL FRAMEWORK FOR DEALING WITH SEXUAL AND GENDER-BASED CRIMES

The legal framework of the ICC reflects some of the key historical developments in investigating and prosecuting sexual and gender-based

ICTR 00-55A-T, Trial Chamber Judgment & Sentence, ¶ 531 (Sept. 12, 2006) (finding the defendant guilty of genocide for murders, but not for rape as a crime against humanity); Prosecutor v. Niyitegeka, Case No. ICTR 96-14-T, Trial Chamber Judgment & Sentence, ¶ 480 (May 16, 2003).

103. See MacKinnon, *supra* note 76, at 216-17.

104. See *id.* at 217.

105. See *id.*

106. See *id.* at 215; see also Kelly Dawn Askin, *Gender Crimes Jurisprudence in the ICTR: Positive Developments*, 3 J. INT’L CRIM. JUST. 1007, 1008 (2005) (“[M]any indictments fail to bring rape charges, primarily because there has been very little genuine and rigorous investigation of the crime by the Prosecutor’s office. This has resulted in rape acquittals, dropped charges and other missed opportunities and debacles.”).

107. See MacKinnon, *supra* note 76, at 220. MacKinnon observed that

[w]omen have achieved monumental advances in each of these bodies of law in recent years, and crimes against women are now prosecuted on the international stage at levels unparalleled in history. Perhaps the most significant reason for the trend—from silencing or ignoring gender-based and sex-based crimes to demanding and receiving accountability for at least some of these crimes—is the growing awareness that the harm caused by sexualized violence permeates every level of society, and that it is not only the victim and close family and friends who suffer, but local and global society as a whole.

Id.; see also Koenig & Askin, *supra* note 10, at 29 (referring to international criminal law, international human rights law and international humanitarian law).

crimes before international criminal courts. In particular, the impetus to effectively deal with these crimes and advancements in the relevant law are reflected under the Rome Statute, the Rules of Procedure and Evidence of the Court (Rules), and Elements of Crimes (Elements), and have been taken forward by the Office of the Prosecutor of the International Criminal Court since 2003.¹⁰⁸

A. Gender Experts

The Statute requires that experts on sexual and gender violence participate in all organs of the Court,¹⁰⁹ including amongst the judges, where there should also be a fair representation of females,¹¹⁰ staff of the Victims and Witnesses Unit within the Registry,¹¹¹ and advisers within the OTP.¹¹²

108. See Pam Spees, *Mainstreaming Gender in the Pursuit of International Justice and Accountability*, AFR. LEGAL AID Q., Jan.-Mar. 2003, at 21, 23 (identifying ways in which these rules will help to facilitate witness testimony in sexual violence cases and arguing that gender issues are mainstreamed in the Rome Statute).

109. See Bensouda, *supra* note 2, at 412-13 (noting that the Rome Statute is the first international treaty establishing an international criminal court in which principles of female representation and gender expertise have been explicitly incorporated). Bensouda also observes that at the ICC, seven out of eighteen judges are female, many with expertise in gender crimes. In the OTP, the Deputy Prosecutor is female; among the budgeted posts, fifty-four percent are held by females and thirty-four percent of the professional staff are also female. *Id.* See also Spees, *supra* note 108, at 23-24; Steains, *supra* note 62, at 375-83.

110. See Rome Statute, *supra* note 1, art. 36(8)(a)(iii) (requiring a “fair representation of female and male judges” on the International Criminal Court); *id.* art. 36(8)(b) (providing that “[s]tate parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women and children”); see also Koenig & Askin, *supra* note 10, at 12.

111. See Rome Statute, *supra* note 1, art. 43(6) (providing that the Victims and Witnesses Unit within the Registry “shall include staff with expertise in trauma, including trauma related to crimes of sexual violence”); Koenig & Askin, *supra* note 10, at 12 (referring to Article 44(2) of the Statute, which requires that the OTP and Registry have qualified staff ensuring “the highest standards of efficiency, competency and integrity”); David Tolbert, *Article 43: The Registry*, in COMMENTARY ON THE ROME STATUTE, *supra* note 15, at 981, 990 (citing Rule 34 of the ICTY). Tolbert noted

[i]t was recognized at the Preparatory Committee that, in view of the types of crimes over which the Court has jurisdiction, the staff of the Victims and Witnesses Unit would need expertise in areas such as trauma and sexual violence. This has also been recognized by rules of the ad hoc Tribunals, which provide that “due consideration be given to the employment of women” and note the areas of expertise in which counseling will need to be provided.

Id.

112. See Rome Statute, *supra* note 1, art. 42(9) (providing that the Prosecutor “shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children”); see Morten Bergsmo & Frederik Harhoff, *Article 42: The Office of the Prosecutor*, in COMMENTARY ON THE ROME STATUTE, *supra* note 15, at 971, 979.

Provided that the required expertise is available among the experts appointed as members of the Prosecutor’s Office, article 42, ¶ 9 would seem to be satisfied and the Prosecutor would have full authority over the utilization of all available positions within his or her Office and gratis personnel, as required by the Statute. It may be useful if the relevant expertise includes experience in working with traumas and psychological or physical disorders in a judicial context.

B. Effective Investigation and Prosecution of Sexual and Gender-Based Crimes

As noted above, this has been a key element of Luis Moreno-Ocampo's prosecutorial strategy.¹¹³ The Prosecutor is required to take appropriate measures to ensure the effective investigation and prosecution of crimes within the Court's jurisdiction, taking account of the nature of the crime, in particular where it involves sexual violence, gender violence, or violence against children.¹¹⁴ In doing so, there must be respect for "the interests and personal circumstances of victims and witnesses, including their age, gender . . . and health."¹¹⁵

C. Sexual and Gender-Based Crimes Under the Statute

The various crimes listed under the Statute also reflect important developments made before international criminal courts regarding sexual and gender-based crimes. These crimes are considered among the "most serious crimes of concern to the international community as a whole."¹¹⁶

1. The Range of Sexual and Gender-Based Crimes Under the Statute

The Statute reflects key historical developments by the range of offenses under which sexual violence and gender-based crimes can be prosecuted. As Prosecutor Moreno-Ocampo stated in his June 2007 speech in Nuremberg, "Building a Future on Peace and Justice,"

[s]ubstantial law has been codified in one detailed text [the Rome Statute]; the content of different international conventions such as the Genocide Convention and the Geneva Conventions have been incorporated; elements of the crimes have been meticulously defined; based on the jurisprudence by the ad hoc tribunals the definition of sexual violence has been further elaborated; special emphasis has been put on crimes against children."¹¹⁷

a. Explicit List of Sexual Violence and Gender-Based Offences

First, the Rome Statute provides the most comprehensive and explicit list of sexual violence and gender-based offenses under the jurisdiction of an international criminal court. The Statute was the first to specifically enumerate within the same instrument both sexual violence and gender-based crimes in their own right as forms of genocide, crimes against

Id.

113. See THE OFFICE OF THE PROSECUTOR, REPORT ON PROSECUTORIAL STRATEGY, *supra* note 5, at 3.

114. See Rome Statute, *supra* note 1, art. 54(1)(b).

115. See *id.*; Steains, *supra* note 62, at 386.

116. See Rome Statute, *supra* note 1, at pmbl.; see also Spees, *supra* note 108, at 21 (recognizing that the Rome Statute has equipped the ICC with tools reflecting a gender perspective).

117. See Luis Moreno-Ocampo, Prosecutor, Int'l Criminal Court, Address: Building a Future on Peace and Justice (June 24-25, 2007).

humanity, as well as war crimes—in both international and non-international armed conflicts.¹¹⁸ These explicitly named sexual and gender-based crimes include the following.¹¹⁹

Imposing measures intended to prevent births within the group is a form of “biological genocide.”¹²⁰ Testimony before the ICTY and observations

118. See Boot, *supra* note 15, at 208 (referencing in particular Article 7(1)(g) and (2)(f), as well as crimes of sexual violence dealt with under Article 8 as war crimes, under Article 6 as genocide, and also as the crimes against humanity of torture, persecution on the basis of gender, and “inhumane acts”); see also Bensouda, *supra* note 2, at 410-11; Goldstone, *supra* note 23, at 285.

The statute for the [ICC] has forwardly advanced the work of the U.N. Tribunals. Gender crimes are no longer subsumed under outrages on personal dignity. Rape, sexual slavery, forced pregnancy, forced sterilization and other forms of sexual violence are now expressly enumerated as crimes against humanity in Article 7 and as war crimes relating to both international armed conflict and non-international armed conflict.

Id.; Koenig & Askin, *supra* note 10, at 12 (observing that the Women’s Caucus for Gender Justice in the ICC was a driving force behind the inclusion of the broad array of sex crimes within the Court’s jurisdiction, specifically as crimes against humanity and war crimes); La Haye, *supra* note 11, at 185-99.

119. See Koenig & Askin, *supra* note 10, at 7 (stating that the Rome Statute “marks a victory for humankind in that it, among other advances, acknowledges the criminality of several gender-based and sex-based crimes and integrates those crimes into the jurisdiction of the [ICC]”); Boot, *supra* note 15, at 208 & n.231.

The inclusion of rape and other crimes of sexual violence in the Rome Statute is an important advance over previous treatment by international instruments as violations of the honour and reputation of women, instead of as criminal acts aimed at the physical and mental integrity of a person, which, more often than not, constitute torture.

Id. Boot observed that the Rome Statute led to the inclusion of crimes of sexual violence as crimes against humanity in other instruments establishing international criminal courts, including Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea art. 5, U.N. Doc. RES/57/228 (Dec. 18, 2002) [hereinafter Extraordinary Chambers in the Courts of Cambodia]; Statute of the Special Court for Sierra Leone art. 2, Jan. 16, 2002, 2178 U.N.T.S. 145 (classifying as crimes against humanity “[r]ape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence”); U.N. Transitional Admin. in E. Timor Regulation 2000/15, On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offenses §§ 5.1(g), 5.2(e), U.N. Doc. UNTAET/REG/2000/15 (June 6, 2000) [hereinafter UNTAET] (“[C]rimes against humanity’ means [*inter alia*] . . . [r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity”). Cottier argues that the list of sexual violence crimes

constituted a great advance for the protection of the rights of women in times of armed conflict. The list reflects a new awareness about the seriousness of these sexual offences in times of armed conflict and the fact that they frequently remained unpunished. Delegations at the Rome Conference were determined to signal to the world that such violence amounts to most serious crimes of concern to the international community as a whole that must not go unpunished. The progressive list and definition of the offences relating to sexual violence is not least the result of sustained lobbying by the women’s rights movement.

See Cottier, *supra* note 17, at 431.

120. See Rome Statute, *supra* note 1, art. 6(d); William A. Schabas, *Article 6 Genocide*, in COMMENTARY ON THE ROME STATUTE, *supra* note 15, at 143, 153 (noting that the *travaux préparatoires* of the 1948 Genocide Convention suggested that such measures to prevent births could include sterilization, compulsory abortion, segregation of the sexes, and obstacles to marriages). Schabas refers to examples of cases from the

made by the Trial Chamber of the ICTR in *Prosecutor v. Akayesu* has suggested that rapes can be used systematically to change the ethnic character of the population by impregnating women or by preventing women from procreating, including where women subsequently refuse to procreate.¹²¹

Articles 6(b) and (c) of the Rome Statute, reflecting the Genocide Convention, stipulate that both “causing serious bodily or mental harm to members of the group” and “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part” constitute genocide.¹²² The Statute defines the crime genocide to include causing serious bodily or mental harm to members of the group,¹²³ and the Elements of Crimes explicitly stipulate that this may include rape and sexual violence.¹²⁴ The ICTY Trial Chamber, in its 1996 decision

Second World War in which individuals were prosecuted for preventing births as a form of genocide. *Id.* Specifically, Schabas cites *A.G. Israel v. Eichmann*, 36 I.L.R. 18 (D.C.), 1968, ¶ 244, in which Eichmann was charged for “devising measures the purpose of which was to prevent child-bearing among Jews by his instruction forbidding births and for the interruption of pregnancy of Jewish women in the Theresin Ghetto with intent to exterminate the Jewish people.” Schabas, *supra*. See Boot, *supra* note 15, at 214 (classifying the sexual violence crime of enforced sterilization as tantamount to the crime of genocide when the crime is committed with the requisite intent to destroy a particular group in whole or in part because enforced sterilization “impos[ed] measures intended to prevent births within the group”); Cottier, *supra* note 17, at 436 (stating that sexual violence may amount to genocidal acts, in particular where forced pregnancy, rape, or enforced sterilization qualifies as “imposing measures intended to prevent births within the group”).

121. See Schabas, *supra* note 120, at 154 (referring to *Prosecutor v. Karadzic & Mladic*, Case Nos. IT-95-18-R61 & IT-95-5-R61, Transcript of Hearing, ¶ 19 (July 2, 1996)). In *Karadzic & Mladic*, witness Cleirin, a member of the Commission of Experts, was asked during a hearing of the ICTY whether rape was used systematically in the former Yugoslavia to change the ethnic character of the population, by impregnating women. Ms. Cleirin responded, “The Commission did not have enough information to verify, let us say, these testimonies, who spoke in these terms. I guess it is possible that both happened.” *Id.* Similarly, Schabas refers to *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Trial Chamber Judgment, ¶ 507 (Sept. 2, 1998), in which the Trial Chamber observed

[i]n patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother’s group. Furthermore, the Chamber notes that measures intended to prevent births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped refused subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.

Id.; see also WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIMES OF CRIMES 172-75 (2009) [hereinafter SCHABAS, GENOCIDE IN INTERNATIONAL LAW]; Chinkin, *supra* note 8, at 122; Koenig & Askin, *supra* note 10, at 26-27; Sherrie L. Russell-Brown, *Rape as an Act of Genocide*, 21 BERKELEY J. INT’L L. 350, 364-65 (2003).

122. See Rome Statute, *supra* note 1, art. 6(b)-(c).

123. See Rome Statute, *supra* note 1, art. 6(b).

124. See Rome Statute of the International Criminal Court, Elements of Crimes, art. 6(b) n.3, U.N. Doc. A/CONF.183/9 (July 17, 1998) [hereinafter Elements of Crimes] (stating “[t]his conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment”); Charles Garraway, *The*

reviewing the indictment in *Prosecutor v. Karadzic and Mladic*, considered rape as a possible act of genocide.¹²⁵ The ICTR, in *Prosecutor v. Akayesu*, stated that the notion of bodily and mental harm as a form of genocide includes rape and other forms of sexual violence.¹²⁶ The ICTR found the accused in *Prosecutor v. Gacumbitsi* guilty of rape as genocide.¹²⁷ The International Court of Justice (ICJ) has also acknowledged that rape and other crimes of sexual violence can constitute a form of genocide, namely causing serious bodily or mental harm.¹²⁸ Articles 6(b) and (c) form one of the main bases of the Prosecutor's request for an arrest warrant against Sudanese President Al Bashir in the second Darfur case.¹²⁹

Elements of Genocide: Elements of the Specific Forms of Genocide, in ICC: CRIMES, PROCEDURE & EVIDENCE, *supra* note 11, at 41, 50-51 (referring to the discussions that took place during the Preparatory Commission). Garraway states that footnote 3 is drawn from *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Trial Chamber Judgment, ¶ 504 (Sept. 2, 1998), where the ICTR Trial Chamber held that “[t]he Chamber takes serious bodily or mental harm, without limiting itself thereto, to mean acts of torture, be they bodily or mental, inhumane or degrading treatment, rape, sexual violence, persecution.” Garraway, *supra*; see also Koenig & Askin, *supra* note 10, at 25 (observing that the crime of genocide under Article 6 of the Statute does not explicitly refer to “gender” or “sex” or other identifiable groups but refers to the *Akayesu*, Case No. ICTR-96-4-T, Trial Chamber Judgment, ¶ 516, as providing guidance of the intent of the drafters of the Genocide Convention as being “patently to ensure the protection of any stable and permanent group”); SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 121, at 170.

125. See Boot, *supra* note 15, at 215 (referring to *Prosecutor v. Karadzic & Mladic*, Case Nos. IT-95-5-R-61 & IT-95-18-R-61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, ¶¶ 93-94 (July 11, 1996), in which the Trial Chamber 1 of the ICTY determined that rape is considered a possible act of genocide).

126. See *Akayesu*, Case No. ICTR 96-4-T, Trial Chamber Judgment, ¶¶ 731-734.

[T]hey 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 These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities Sexual violence was a step in the process of destruction of the [T]utsi group—destruction of the spirit, of the will to live, and of life itself.

Id. The Trial Chamber found that the acts described were acts enumerated in Article 2(2) of the ICTR Statute, *supra* note 61, which used the 1948 Genocide Convention definition of genocide, and that the acts were committed with the requisite intent. *Id.* See also Koenig & Askin, *supra* note 10, at 25-27.

127. See *Prosecutor v. Gacumbitsi*, Case No. ICTR 2001-64-T, Trial Chamber Judgment, ¶¶ 291-293 (June 17, 2004); MacKinnon, *supra* note 76, at 213.

128. See Schabas, *supra* note 120, at 152-53 (describing a case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia & Herzegovina v. Serbia & Montenegro*, Preliminary Exceptions, ¶ 319, 2007 I.C.J. 1 (Feb. 26)). However, the ICJ found on the facts in the case that it had not been established conclusively that the atrocities were committed with the requisite specific intent to destroy the group in whole or in part. *Id.*; see also Askin, *supra* note 106, at 1016.

129. See *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09 (Mar. 4, 2009). In its application for Al Bashir's warrant for arrest, the OTP claimed:

Al Bashir's forces and agents subjected those approximately 2.5 million living in IDP [internally displaced persons] camps, including a substantial part of the target groups, to serious bodily and mental harm through rape and other forms of sexual violence against thousands of women in the camps. Rapes are under-reported. They are used as a weapon, a silent weapon, to destroy the target groups in and around the IDP camps.

Militia/Janjaweed, which Al Bashir has recruited, armed, and

The following sexual violence offenses¹³⁰ are explicitly proscribed as crimes against humanity¹³¹ and as war crimes in the context of both

purposefully failed to disarm, are stationed in the vicinity of the camps. Periodic reports and testimonies conclude that rape has been committed systematically and continuously for 5 years. Women and girls going to collect firewood, grass or water are repeatedly raped by Militia/Janjaweed, Armed Forces and other GoS security agents: “when we see them, we run. Some of us succeed in getting away, and some are caught and taken to be raped—gang-raped. Maybe around 20 men rape one woman These things are normal for us here in Darfur. These things happen all the time. I have seen rapes too. It does not matter who sees them raping the women—they don't care. They rape women in front of their mothers and fathers.”

Between March and October 2005, a health specialist treated at least 28 victims of rape and sexual trauma in IDP camps in Darfur. She told the Prosecution that most of the victims exhibited symptoms of post-traumatic stress disorder, including extreme shame, grief, hopelessness, anger and rage, flashbacks, nightmares, and inability to interpret their environment. The witness noted that many of the girls who had been raped when they went to get firewood outside IDP camps were repeatedly re-traumatized because they had no choice but to revisit the places where they had been raped. She recalled the situation of an 18-year-old girl in one of the camps. As explained by the girl's sister, their village had been attacked and bombed by an airplane. The girl was raped, beaten, and left to die. Members of the community eventually found her, but from that day she had not spoken. The girl was psychotic from her trauma and displayed no initiative. She was robotic and had to be told to dress and eat.

Babies born as a result of these assaults have been termed “Janjaweed babies” and are rarely accepted as members of the community. The high number of such unwanted babies has led to an explosion of infanticides and abandonment of babies in Darfur. As one victim explained: “they kill our males and dilute our blood with rape. [They] . . . want to finish us as a people, end our history.”

The mental harm caused by rape has been compounded by the impunity afforded to the perpetrators. As depicted by one victim: “those who rape you wear fatigues and those who protect you wear fatigues. We don't know any more who to run from and who to run to.”

Rape is an integral part of the pattern of destruction that Al Bashir is inflicting upon the target groups in Darfur. As described by the ICTR in the Akayesu case, rape is used to “kill the will, the spirit, and life itself.” Particularly in view of the social stigma associated with rape and other forms of sexual violence among the Fur, Masalit and Zaghawa, these acts caused significant and irreversible harm, to individual women, and also to their communities.

.....
In accordance with established jurisprudence, the magnitude of the rapes and sexual assaults carried out by forces and agents under the control of Al Bashir during attacks on villages and around IDP settlements and camps, indicates an intent to destroy the target groups as such.

See Situation in Darfur, Sudan, Case No. ICC-02/05-157-Annex A, Public Redacted Version of the Prosecutor's Application Under Article 58, ¶¶ 23-28, 56 (July 14, 2008).

130. See Boot, *supra* note 15, at 206-16; see also Kelly D. Askin, *Crimes Within the Jurisdiction of the International Criminal Court*, 10 CRIM. L. F. 33, 41 (1999) (observing that “most sexual and gender-based crimes are explicitly prohibited and codified as crimes against humanity under the ICC Statute, while other crimes, particularly crimes of sexualized violence, have been implicitly prohibited as clearly contrary to international law”).

131. See Rome Statute, *supra* note 1, art. 7(1)(g). See Boot, *supra* note 15, at 206-08 (emphasizing that the list of sexual violence offenses as crimes against humanity refers to “any other form of sexual violence of comparable gravity”).

international¹³² and non-international armed conflicts.¹³³

Rape: The Rome Statute was the first international instrument of an international criminal court to explicitly proscribe the crime of rape as both a war crime¹³⁴ and a crime against humanity, within the same instrument. Nevertheless, it is arguable that the customary international law status of rape as an international crime is evidenced by a number of international conventions and the practice of punishing rape as an international crime.¹³⁵ Rape had been proscribed as a war crime in various international (and national) instruments prior to the Second World War.¹³⁶ Rape and other

132. See Rome Statute, *supra* note 1, art. 8(2)(b)(xxii). See Cottier, *supra* note 17, at 431-54 (noting that article 8(2)(b)(xxii) of the Rome Statute list of sexual violence offenses as war crimes in an international armed conflict includes “any other form of sexual violence also constituting a grave breach of the Geneva Conventions”) (emphasis added).

133. See Rome Statute, *supra* note 1, art. 8(2)(e)(vi). See Andreas Zimmerman, *Article 8(2)(c)-(f) and para. 3: War Crimes Committed in an Armed Conflict Not of an International Character*, in COMMENTARY ON THE ROME STATUTE, *supra* note 15, at 475, 495-96 (noting that the list of sexual violence offenses as war crimes in a non-international armed conflict within Article 8(2)(e)(vi) of the Rome Statute refers to “any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions”).

134. See Koenig & Askin, *supra* note 10, at 22.

[W]hilst the grave breach provisions of the ICC Statute do not contain an explicit reference to sexual violence crimes as their language is imported from the Geneva Conventions, that the explicit enumeration of the sexual violence crimes at article 8(2)(b)(xxii) and reference to any other form of sexual violence also constituting a grave breach of the Geneva Conventions is a major accomplishment in that it clearly acknowledges that sexual violence is subsumed within the grave breach provisions.

Id.

135. See BASSIUNI, *supra* note 12, at 349-50; see also KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 45 (2001); Koenig & Askin, *supra* note 10, at 9 (arguing that in 1999, rape was likely among the crimes considered to be subject to universal jurisdiction); Meron, *supra* note 36, at 425 (observing that rape was prohibited by law of war for centuries); David S. Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine*, 15 DUKE J. COMP. & INT'L L. 219, 225 (2005).

136. See BASSIUNI, *supra* note 12, at 347-48 (noting that “[t]he Declaration of Brussels in 1874 attempted to codify the laws of war on an international level and protected a woman’s right to ‘dignity and honour’”). This was codified in the 1907 Hague Convention on the Laws and Customs of War on Land article 46, Oct. 18, 1907, 36 Stat. 2277, 3 Martens Nouveau Recueil (ser. 3) 461, *reprinted in* 2 AM. J. INT’L L. 90 (1908) [hereinafter 1907 Hague Convention IV], which called for armies to respect “family honour and rights,” which was generally understood to encompass rape. *Id.* at 348; see also Boot, *supra* note 15, at 206-07 & nn.206, 216 & 218 (observing that the crime of rape had been prohibited as a war crime in various national and international instruments before the Second World War; including the prohibition of rape as a violation of the laws of war in the 1863 Lieber Code). FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (LEIBER CODE) art. XLIV (1863), *available at* http://avalon.law.yale.edu/19th_century/lieber.asp (stating that “[a]ll wanton violence . . . all rape, wounding, maiming or killing . . . [is] prohibited under penalty of death, or other such severe punishment as may be seen adequate”). The Lieber Code contained one of the first explicit prohibitions against rape, and although this was a national military code promulgated during the American Civil War, it was subsequently replicated by other nations’ militaries. Furthermore, the rape and abduction of girls and women for the purpose of enforced prostitution was expressly recognized as a violation of the laws of humanity under the 1919 Paris Peace Conference Commission Report. See Koenig & Askin, *supra* note 10, at 6 (observing that customary law acknowledging that rape is a war

sexual offenses, however, were usually not explicitly listed as war crimes, but instead were covered indirectly as attacks on honor rather than physical crimes.¹³⁷ Rape was first explicitly recognized as a violation of the “laws of humanity” in the 1919 Peace Conference Commission Report.¹³⁸ Rape was not explicitly included in the definitions of crimes in the Nuremberg Charter, the Nuremberg Principles, or the Tokyo Charter, but was prosecuted under the terms of other inhumane acts, ill-treatment, and failure to respect family honor and rights.¹³⁹ Rape was also explicitly defined as a crime against humanity, but not as a war crime under Allied Control Council Law No. 10.¹⁴⁰ Although rape was not explicitly included as a grave breach or violation of Common Article 3 of the four Geneva

crime dates back at least to the fifteenth century); Kuo, *supra* note 51, at 306; Meron, *supra* note 36, at 427-28; Spees, *supra* note 108, at 21-22.

137. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea art. 51, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War arts. 14, 130, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 27, 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 135 [hereinafter Geneva Convention IV]; see also ASKIN, *supra* note 8, at 51 n.180 (observing that rape was often treated like property crimes or crimes against a man’s honor); Boot, *supra* note 15, at 206-07 & nn.217, 223 (commenting that other crimes of sexual violence were often included only “in an elliptical fashion and categorised as attacks on honour rather than as crimes of sexual violence against personal autonomy of the victim”). Boot cites as an example of these “elliptical” references The Declaration of Brussels of 1874, article XXXVII (“[t]he honour and rights of the family . . . should be respected”). The 1907 Hague Regulations annexed to Hague Convention IV included crimes of sexual violence implicitly by expressing that “[f]amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice must be respected”; 1907 Hague Convention IV, *supra* note 136, art. 46. Boot, *supra* note 15, at 206 n.217. Boot observes that rape was not expressly included as a grave breach or violation of common article 3 of the four Geneva Conventions of 1949. Boot further observes that the two Protocols to the Geneva Conventions of 1977 include prohibitions on rape and other crimes of sexual violence in international and national armed conflict, but continued to treat them as attacks on honor and dignity. This included “outrages upon personal dignity, enforced prostitution and any form of indecent assault.” *Id.* at 207 & n.223. Boot notes that the only indirect reference to rape and other sexual offences is in Article 27 of the Fourth Geneva Convention, which is not a grave breach provision, states that women shall be protected against “any attack on their honour, in particular, rape, enforced prostitution or any other form of sexual assault.” *Id.* at 207. See also Koenig & Askin, *supra* note 10, at 10 (arguing that the “terminology is hampered by the possible harm caused by association or equation of crimes of sexual violence with crimes against honor or outrages upon one’s dignity”). “The ICC Statute makes great progress in delinking language applied to sexual violence from language concerning crimes against honor or dignity. The terminology demonstrates the crucial need to redress the discriminatory and patriarchal language of many international instruments, which are overwhelmingly lacking in gender-sensitivity or gender-awareness.” *Id.* at 11; Meron, *supra* note 36, at 427.

138. See Boot, *supra* note 15, at 167, 206-07 & nn.5, 217-18 (citing to the Commission of the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference (1919 Peace Conference Commission Report), Versailles, March 1919, Conference of Paris, Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 32, Annex, p. 214).

139. See Boot, *supra* note 15, at 207; see also Cottier, *supra* note 17, at 433.

140. See Boot, *supra* note 15, at 207; see also La Haye, *supra* note 11, at 187.

Conventions of 1949, the ICTY and ICTR found rape was covered under these provisions as torture, an inhumane act, inhuman or cruel treatment, wilfully causing great suffering or injury, or an outrage upon personal dignity.¹⁴¹ There is an explicit reference in Article 27 of the Fourth Geneva Convention, but this is not a grave breach provision. Article 27 calls for protection of women against sexual violence, including rape, in terms of an attack on a woman's honor.¹⁴² The two Additional Protocols to the Geneva Conventions of 1977 do include prohibitions on rape and other sexual violence crimes during international and non-international armed conflicts, again, treating them as attacks on honor and dignity.¹⁴³ Article 5(g) of the ICTY statute and Article 3(g) of the ICTR statute expressly include rape as a crime against humanity, but none of the sexual crimes are explicitly listed as war crimes in their own right.¹⁴⁴ Article 4(e) of the ICTR statute refers to "rape, enforced prostitution and any form of indecent assault" as types of outrages upon personal dignity or violations of Common Article 3 to the Geneva Conventions.¹⁴⁵ There is no explicit reference to other crimes of sexual violence. However rape and other sexual violence crimes have been prosecuted before the ICTY and ICTR as war crimes under other provisions of these statutes, including as grave breaches and violations of Common Article 3.¹⁴⁶

Sexual slavery: The Rome Statute provided the first explicit prohibition by an international criminal court on sexual slavery. Although sexual

141. See Boot, *supra* note 15, at 207 & n.223. Boot observes that rape was not expressly included as a grave breach or violation of common article 3 of the four Geneva Conventions of 1949. See Koenig & Askin, *supra* note 10, at 10; La Haye, *supra* note 11, at 187 (referring to the Prosecutor v. Delalic et al, Case No. IT-96-21, Trial Chambers Judgment, ¶¶ 476-477 (Nov. 16, 1998) (*Celibici* trial), where the ICTY stated that "there can be no doubt that rape and other forms of sexual assault are expressly prohibited under international humanitarian law However, the relevant provisions do not define rape.").

142. See Boot, *supra* note 15, at 207. Boot notes that the only indirect reference to rape and other sexual offences is in Article 27 of the Fourth Geneva Convention, which is not a grave breach provision, and states that women shall be protected against "any attack on their honour, in particular, rape, enforced prostitution or any other form of sexual assault."

143. See Boot, *supra* note 15, at 207 & n.223 (citing the Additional Protocol I, Article 75(2)(b) (prohibiting at all times outrages upon personal dignity, enforced prostitution, and any form of indecent assault), Article 76 (claiming special protection of women from rape, forced prostitution and any other form of indecent assault), neither of which are grave breach provisions. Additional Protocol II, Article 4(2)(e) (outrages upon personal dignity, in particular, rape, enforced prostitution or any other form of indecent assault), which extends protections of common article 3 to the Geneva Conventions). See also Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Victims of International Armed Conflicts arts. 75(2)(b) & 76, June 8, 1977, 1125 U.N.T.S. 3 [Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts art. 4(2)(3), June 8, 1977, 1125 U.N.T.S. 609 [Additional Protocol II]; La Haye, *supra* note 11, at 187; Sellers, *supra* note 63, at 298-99.

144. See ICTY Statute, *supra* note 61, art. 5(g); see also ICTR Statute, *supra* note 66, art. 3(g).

145. ICTR Statute, *supra* note 61, art. 4(e).

146. Boot, *supra* note 15, at 208.

slavery had not been explicitly defined under international humanitarian law or other international law treaties in those terms, it is considered to have been prohibited as a particular form of enslavement, the prohibition of which is considered a *jus cogens* norm in customary international law.¹⁴⁷ Antonio Cassese noted that the crime of sexual slavery was prohibited under customary international law.¹⁴⁸ Prior to the Statute, the slavery of women, including in the form of trafficking, was also explicitly prohibited by various international instruments.¹⁴⁹

Enforced prostitution: The Rome Statute provides the first explicit prohibition by an international criminal court on enforced prostitution as both a war crime and crime against humanity. Abduction of females for the purpose of enforced prostitution was expressly recognized as a violation of the laws of humanity by the 1919 Peace Conference Commission Report.¹⁵⁰ Article 27 of the Fourth Geneva Convention, which is not a grave breach provision, also referred to the need for women to be protected against attacks on the woman's honor, such as enforced prostitution.¹⁵¹ The crime was also punishable, for instance, under

147. See Boot, *supra* note 15, at 211 (referring to the 1919 Peace Conference Commission Report); see also Cottier, *supra* note 17, at 441-42 (observing that "sexual slavery" was not defined under international humanitarian law treaties or other international conventions, whilst the more generic concept of "slavery" has been defined in various conventions and is considered a *jus cogens* norm in customary international law). The war crime of sexual slavery can be regarded as a particular form of slavery. *Id.*

148. See Antonio Cassese, *Crimes Against Humanity*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 353, 374-75 (Antonio Cassese et al. eds., 2002)) (observing that according to the *Furundzija* Trial Chamber Judgment, various forms of sexual violence are criminalized by international law, including sexual slavery, enforced prostitution, enforced sterilization, and "any other form of sexual violence of comparable gravity"); see also Cottier, *supra* note 17, at 441 n.837 (citing the 1998 U.N. Slavery Rapporteur Report, ¶ 28 and *Update to the 1998 UN Slavery Rapporteur Report*, Annex ¶¶ 9, 12, 51 U.N. Doc. E/CN.4/Sub.2/2000/21 (Jun. 6, 2000)) (qualifying sexual slavery "as an international crime and a violation of *jus cogens* norms in the exact same manner as slavery"); Valerie Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 25 MICH. J. INT'L L. 605, 608 (2004).

149. See Cottier, *supra* note 17, at 441 & nn.839, 842. Cottier refers to "new" forms of slavery such as the use of "comfort women stations" by the Japanese during World War II, the use of slave labor by Nazi Germany, and "instances of slavery and sexual slavery" in the "rape camps" in former Yugoslavia, *Prosecutor v. Kunarac et al.*, Case No. IT-96-23-T & IT-96-23/1-T, Trial Chamber Judgment, ¶¶ 515-543, 728-744, (Feb. 22, 2001), and the Rwanda and Liberia conflicts, *U.N. Slavery Special Rapporteur Report*, *supra* note 59, ¶ 30. International instruments evolved to address these particular forms of slavery, such as the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 7 September 1956; Article 8 of the International Covenant on Civil and Political Rights (prohibiting slavery, slave-trade, servitude, and forced or compulsory labor); Article 4 of the European Convention on Human Rights (prohibiting slavery, servitude, forced or compulsory labour); and Article 6 of the African Charter of Human Rights (prohibiting slavery, involuntary servitude, slave trade, traffic in women, and forced or compulsory labor).

150. See Boot, *supra* note 15, at 206-07 n.218 (citing to the 1919 Peace Conference Commission Report).

151. See *id.* at 207; see also La Haye, *supra* note 11, at 192 (highlighting that "enforced prostitution appears in article 27(2) of Geneva Convention IV" as an attack upon personal dignity and causing "humiliating and degrading treatment").

Australian and Chinese war crimes laws of 1945 and 1946.¹⁵² The two Additional Protocols to the Geneva Conventions of 1977 also referred to prohibitions on enforced prostitution.¹⁵³ Boot observes that the 1996 Draft Statute of the International Law Commission was the first instrument to expressly include enforced prostitution and other forms of sexual abuse in addition to rape as crimes against humanity.¹⁵⁴ Enforced prostitution has been described as being a form of sexual slavery or enslavement,¹⁵⁵ which as explained in a later section, was one of the first crimes prohibited under international law.

Forced pregnancy: This offense was referred to in a number of international declarations and resolutions.¹⁵⁶ As described above, forcible impregnation when used to change the ethnic composition of a group has been previously found to constitute a form of genocide.¹⁵⁷ The Statute, however, provides the first explicit prohibition on forced pregnancy as a war crime and crime against humanity in an international instrument.¹⁵⁸

Enforced sterilization: Enforced sterilization was prosecuted at

152. See Cottier, *supra* note 17, at 447 n.882 (citing to the *Commonwealth of Australia War Crimes Act of 1945*, V LAW REPORTS 94-95 (1948), and *Chinese Law Governing the Trial of War Criminals of 24 October 1946*, 14 LAW REPORTS OF TRIALS OF WAR CRIMINALS 154 (1949)) (determining that under Australian and Chinese law the abduction of women and girls for the purpose of prostitution was defined as a crime).

153. See Additional Protocol I, *supra* note 143, art. 75(2)(b) (including “outrages upon personal dignity, enforced prostitution, and any form of indecent assault”); *id.* art. 76 (criminalizing “rape, forced prostitution and any other form of indecent assault”); Additional Protocol II, *supra* note 143, art. 4(2)(e) (criminalizing “rape, enforced prostitution or any other form of indecent assault”); see also Boot, *supra* note 15, at 207 n.223.

154. Boot, *supra* note 15, at 208.

155. See U.N. Slavery Special Rapporteur Report, *supra* note 59, ¶ 32; Boot, *supra* note 15, at 212 & n.244 (referring to the argument made by the U.N. Slavery Special Rapporteur “that sexual slavery encompasses most, if not all form of ‘forced prostitution,’ which ‘generally refers to conditions of control over a person who is coerced by another to engage in sexual activity’”). The U.N. Slavery Special Rapporteur observes “that older definitions of enforced prostitution are nearly indistinct from definitions that more accurately describe the condition of slavery.” See also Boot, *supra* note 15 at 214; see also Cassese, *supra* note 148, at 374-75 (referring to the *Furundzija* Trial Chamber Judgment, the author observes that various forms of sexual violence are criminalized by international law, including sexual slavery, enforced prostitution, enforced sterilization, and any other form of sexual violence of comparable gravity); Oosterveld, *supra* note 148, at 621 (observing that the argument to retain the crime of enforced prostitution, in spite of being covered by sexual slavery in most cases, covers situations involving “less than slave-like conditions”).

156. See Machteld Boot, *Crimes Against Humanity, Article 7(2)(f): Forced Pregnancy*, in COMMENTARY ON THE ROME STATUTE, *supra* note 15, at 255 n.488 (citing to the Vienna Declaration, World Conference on Human Rights ¶¶ 18, 38, June 14-25, 1993, U.N. Doc. A/CONF.157/24, and The Elimination of Violence Against Women, U.N. Comm’n on Human Rights Res. 1998/52 ¶ 4, U.N. Doc. E/CN.4/1998/52 (1998)); see also Cottier, *supra* note 17, at 448-50.

157. See Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Trial Chamber Judgment, ¶ 507 (Sept. 2, 1998) (describing how forcible pregnancy could constitute genocide in particular patriarchal societies where a woman is deliberately impregnated by a man of another group with the intent to give birth to a child who will consequently not be accepted as belonging to its mother’s group).

158. See Chinkin, *supra* note 8, at 121-22; Cottier, *supra* note 17, at 448.

Nuremberg under Allied Control Council Law 10, as both a war crime and a crime against humanity.¹⁵⁹ Enforced sterilization may also constitute genocide, where it is committed with the intent to destroy a particular group in whole or in part. This form of genocide has been dealt with under the crime of imposing measures intended to prevent births within the group.¹⁶⁰ The Rome Statute provides the first explicit prohibition of enforced sterilization as both a war crime and crime against humanity by an international court.

Any other form of sexual violence: The first international instrument to explicitly refer to protections against “any form of sexual assault” was Article 27 of the Fourth Geneva Convention.¹⁶¹ The two Additional Protocols to the Geneva Conventions of 1977 both refer to prohibitions on “any other form of indecent assault.”¹⁶² Article 4(2) of the ICTY Statute also prohibited outrages upon personal dignity including “any form of indecent assault.”¹⁶³ The ICTY Trial Chamber in *Delalic* stated that rape “and other forms of sexual assault are expressly prohibited under international humanitarian law.”¹⁶⁴ Similarly, the ICTY Trial Chamber in *Furundzija* held that “international criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration.”¹⁶⁵

The crime against humanity of gender persecution:¹⁶⁶ Persecution has been included as a crime against humanity in previous international instruments including the Nuremberg and Tokyo Charters, Allied Control Council Law No. 10 and the Nuremberg Principles.¹⁶⁷ It was also

159. See Boot, *supra* note 15, at 214 n.255 (noting that in the “Medical Case,” several defendants were found guilty of having committed war crimes and crimes against humanity involving different kinds of medical experiments, including under sterilization experiments); see also U.S. v. Brandt (1946), in 1-2 TRIALS OF WAR CRIMINALS BEFORE THE NEURNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, *supra* note 56.

160. See Boot, *supra* note 15, at 214.

161. Geneva Convention IV, *supra* note 137, at 27.

162. See Additional Protocol I, *supra* note 143, arts. 75(2)(b), 76; Additional Protocol II, *supra* note 143, art. 4(2)(e); see also Boot, *supra* note 15, at 207 n.223; La Haye, *supra* note 11, at 197.

163. ICTY Statute, *supra* note 61, art. 4(2).

164. La Haye, *supra* note 11, at 187.

165. See Prosecutor v. Furundzija, Case No. IT-95-17/I-T, Trial Chamber Judgment, ¶ 186 (Dec. 10, 1998); see also Prosecutor v. Delalic, Case No. IT-96-21-T, Trial Chamber Judgment, ¶ 476 (Nov. 16, 1998); Cottier, *supra* note 17, at 452; Koenig & Askin, *supra* note 10, at 24-25; La Haye, *supra* note 11, at 197 & n.144 (referencing the *Furundzija* Trial Chamber Judgment, ¶ 186, where the ICTY found that “sexual assault” should “embrace all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim’s dignity”).

166. See Boot, *supra* note 15, at 216 (noting that Article 7(1)(h) of the Rome Statute, *supra* note 1, states that “[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court”) (emphasis added).

167. *Id.* at 216.

explicitly included in the statutes of the ICTY and ICTR as a crime against humanity.¹⁶⁸ The ICTY and ICTR have accepted that “serious bodily and mental harm and infringements upon freedom” are included in the crime of persecution.¹⁶⁹ The ICTY has determined that the crime of persecution includes rape¹⁷⁰ and sexual assaults.¹⁷¹ Moreover, crimes previously recognized to constitute persecution include crimes that can encompass sexual violence and gender-based crimes. For instance, the ICTY has determined that the crime of persecution includes enslavement,¹⁷² torture,¹⁷³ physical violence not constituting torture,¹⁷⁴ cruel and inhumane treatment or subjection to inhumane conditions,¹⁷⁵ constant humiliation and degradation,¹⁷⁶ unlawful arrest, detention, imprisonment or confinement of civilians,¹⁷⁷ forced labor,¹⁷⁸ and deliberate attacks on civilians and

168. *See id.* at 216 n.270 (citing ICTY Statute, *supra* note 61, art. 5(h), and ICTR Statute, *supra* note 61, art. 3(h), as both recognizing the crime of persecution in the list of crimes against humanity).

169. *Id.* at 258-59.

170. *See id.* (referencing, in particular, Prosecutor v. Stakic, Case No. IT-97-24-A, Appeals Chamber Judgment, ¶¶ 105-109 (Mar. 22, 2006); Prosecutor v. Stakic, Case No. IT-97-24-T, Trial Chamber Judgment, ¶¶ 754-757 (July 31, 2003) (conviction of persecution for rape); Prosecutor v. Nikolic, Case No. IT-94-2-S, Trial Chamber Sentencing Judgment, ¶ 119 (Dec. 18, 2003) (conviction of persecution for aiding and abetting rape)).

171. *See Sellers*, *supra* note 39, at 186 (highlighting that the *Krstic* Trial Chamber Judgment had condemned sexual assaults as persecutory acts).

172. *See Boot*, *supra* note 156, at 259 n.518 (citing Prosecutor v. Blaskic, Case No. IT-95-14, Trial Chamber Judgment, ¶ 224 (Mar. 3, 2000)); *International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT’L L. 172, 245-46, 249 (1947) (finding the use of slave laborers, including in concentration camps, to be a form of persecution). *See generally* Att’y Gen. v. Eichmann, Supreme Court of Israel, 36 I.L.R. 277 (1968).

173. *See Boot*, *supra* note 156, at 258-59 n.523 (referring to the Nuremberg Judgment for the proposition that “beating and torture” amount to persecution; the *Stakic* Appeals Chamber Judgment, in which the court upheld the persecution conviction for torture; the *Blaskic* Appeals Chamber Judgment; and the *Blaskic* Trial Chamber Judgment).

174. *See id.* at 258-59 n.525 (including “‘serious bodily and mental harm’ and other serious acts on the person such as those presently enumerated in Article 5 of the ICTY Statute”). *Boot* also refers to *Stakic* Appeals Chamber Judgment, ¶¶ 105-109 (“upholding [a] persecution conviction for physical violence”); *Blaskic* Appeals Chamber Judgment, ¶ 143 (stating that “[i]t is clear in the jurisprudence of the International Tribunal that acts of serious bodily and mental harm are of sufficient gravity as compared to the other crimes enumerated in Article 5 of the Statute and therefore may constitute persecutions”); *Stakic* Trial Chamber Judgment, ¶ 753; *Simic* Trial Chamber Judgment, ¶ 234. *Boot*, *supra* note 15, at 258-59 n. 525.

175. *See Boot*, *supra* note 156, at 260 n.526 (noting examples, such as the *Nikolic* Trial Chamber Sentencing Judgment, ¶ 119, where the court handed down a conviction of persecution for subjecting victims to inhumane conditions, and the *Blagojevic* Trial Chamber Judgment, ¶ 620, finding that cruel and inhumane treatment constitutes persecution).

176. *See id.* at 260 n.527 (“subjecting detainees to ‘physical or psychological abuse and intimidation’” (citing the *Blaskic* Appeals Chamber Judgment, ¶ 155)). *Boot* also cites to the *Stakic* Appeals Chamber Judgment, ¶¶ 105-109, and to the *Stakic* Trial Chamber Judgment, ¶ 760. *Boot*, *supra*.

177. *See Boot*, *supra* note 156, at 260 n.529 (citing examples to the Nuremberg Judgment (the arrest of prominent Jewish businessmen); the *Simic* Appeals Chamber Judgment, ¶¶ 106-118 (upholding the conviction for persecution based on unlawful arrests and detention); and the *Blaskic* Trial Chamber Judgment, ¶ 234 (finding that the

indiscriminate attacks on undefended civilian localities.¹⁷⁹ Accordingly, The Rome Statute provides the first explicit reference to the ground of gender in a statute of an international criminal court.¹⁸⁰

The crime against humanity of enslavement: The Statute also prohibits the crime against humanity of enslavement, which is stated under the Statute and the Elements of Crimes to include the exercise of power of ownership over a person in the course of “trafficking of persons, in particular women and children.”¹⁸¹ Slavery was one of the first recognized crimes under international law and was covered by the 1926 Slavery Convention,¹⁸² which has been stated to cover slavery-like practices such as trafficking women.¹⁸³ Article 6(c) of the Nuremberg Charter and Article 5(c) of the Tokyo Charter included enslavement as a crime against humanity, and deportation to forced labor as a war crime.¹⁸⁴ Slavery has been prohibited under international human rights and humanitarian law,

unlawful detention of civilians as a form of persecution means unlawfully depriving a group of discriminated civilians of their freedom)).

178. See *Boot*, *supra* note 156, at 260 n.533 (referencing the *Simic* Appeals Chamber Judgment, ¶¶ 139-159, upholding the conviction of persecution for forced labor).

179. See *id.* at 260 n.528 (“unlawful attack[s] launched deliberately against civilians or civilian objects may constitute a crime of persecution” (citing examples from the *Kordic* Appeals Chamber Judgment, ¶ 105)). *Boot* also cites to the *Blaskic* Appeals Chamber Judgment, ¶ 159, stating that “attacks in which civilians are targeted, as well as indiscriminate attacks on cities, towns, and villages, may constitute persecutions as a crime against humanity.” *Id.*

180. See *id.* at 220.

[P]ersecution on gender grounds as the term is generally understood in other international instruments and UN usage may fall within the jurisdiction of the Court to the extent that such discrimination would be based on one of the “other grounds that are universally recognized as impermissible under international law” . . . or involved “other inhumane acts”

Id.

181. See Elements of Crimes, *supra* note 124, art. 7(1)(g)-2 & n.18, art. 8(2)(b)(xxii)-2 & n.53, art. 8(2)(e)(vi)-2 & n.65. Article 7(2)(c) of the Rome Statute, *supra* note 1, defines enslavement for the purpose of article 7(1)(c) as “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the court of trafficking in persons, in particular women and children.” See Hall, *supra* note 77, at 193-94 (remarking that the Court’s jurisdiction is not limited to the practice of traditional forms of slavery); Darryl Robinson, *The Elements of Crimes Against Humanity*, in ICC: CRIMES, PROCEDURE & EVIDENCE, *supra* note 11, at 57, 84-85 (noting the additional language regarding trafficking, in particular women and children, proposed by Italy, and observing that “[t]his language highlights one of the most persistent forms of enslavement today”). Robinson also notes that the formulation for the material element for the crime against humanity of enslavement was drawn from the war crime of sexual slavery, which had previously been negotiated. *Id.*

182. See Hall, *supra* note 77, at 191; see also Robinson, *supra* note 181, at 85 (defining the term “servile status” as “clarified by reference to its origin, the 1956 Supplementary Slavery Convention, which at articles 1 and 7, includes forced marriage, child exploitation, debt bondage and serfdom”).

183. See Hall, *supra* note 77, at 193; see also Robinson, *supra* note 181, at 85 (outlining the discussions at the Preparatory Commission, and saying that “similar deprivation of liberty” was intended to expressly capture a multitude of situations that can amount to enslavement including trafficking, exacting forced labor, and reducing a person to a servile status).

184. See Hall, *supra* note 77, at 192; see also Cottier, *supra* note 17, at 441.

including under Article 4(2)(f) of the second Additional Protocol of 1977 to the Geneva Conventions.¹⁸⁵ It has been explicitly recognized as a crime against humanity in subsequent instruments, including the statutes of the ICTY and ICTR.¹⁸⁶ As described previously, the ICTY in *Prosecutor v. Kunarac* found that various forms of sexual violence constitute enslavement.¹⁸⁷

b. Other Crimes that Also Cover Prohibitions on Sexual Violence

In addition, the ad hoc international criminal tribunals have held that other offenses also included in the Rome Statute include prohibitions against sexual violence, such as rape, particularly, the following offenses enumerated under the Statute.

First, rape, as previously described, constitutes genocide in certain cases. Second, rape has also been held to be a form of torture.¹⁸⁸ The ICTR in *Prosecutor v. Akayesu* and the ICTY in *Prosecutor v. Delalic et al.* (the Celebici case),¹⁸⁹ *Prosecutor v. Furundzija*, and *Prosecutor v. Kunarac*,¹⁹⁰

185. See Additional Protocol II, *supra* note 143, art. 4(2)(e)-(f) (prohibiting “slavery and the slave trade in all their forms” in non-international armed conflict); see also Hall, *supra* note 77, at 192 (describing examples of international human rights instruments prohibiting slavery, including the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, entered into force Apr. 30, 1957, 226 U.N.T.S. 3, and general human rights instruments, such as International Covenant on Civil and Political Rights art. 8, entered into force Mar. 23, 1976, 999 U.N.T.S. 171).

186. See Extraordinary Chambers in the Courts of Cambodia, *supra* note 119, art. 5; see also Statute for the Special Court for Sierra Leone, *supra* note 119, art. 2(c); UNTAET, *supra* note 119, ¶¶ 5.1(c), 5.2(b); ICTR Statute, *supra* note 61, art. 3(c); ICTY Statute, *supra* note 61, art. 5(c); Hall, *supra* note 77, at 193.

187. See *Prosecutor v. Kunarac et al.*, Case Nos. IT-96-23-T & IT-96-23/1-T, Trial Chamber Judgment, ¶¶ 515-43 (Feb. 22, 2001); see also Chinkin, *supra* note 8, at 123, 127-28.

188. See Rome Statute, *supra* note 1, art. 7(1)(f) (torture as a crime against humanity), art. 8(2)(a)(ii) (torture as a grave breach of the four 1949 Geneva Conventions in situations of international armed conflict), art. 8(2)(c)(i) (torture as a violation of article 3 common to the four 1949 Geneva Conventions in situations of non-international armed conflict); see also Boot, *supra* note 15, at 215 (stating that rape can be considered as constituting torture); Cottier, *supra* note 17, at 434-36 (indicating that in the 1990s, it became increasingly recognized that rape and other forms of sexual violence amounted to war crimes and grave breaches such as torture as well as inhuman treatment and willfully causing great suffering or serious injury to body or health). Cottier also observes that the war crime of sexual violence may also qualify as the general forms of mistreatment such as torture or inhuman treatment, willfully causing great suffering or serious injury to body or health, or outrages upon personal dignity. *Id.*; Koenig & Askin, *supra* note 10, at 22 n.82; Zimmermann, *supra* note 133, at 490.

189. See *Prosecutor v. Delalic*, Case No. IT-96-21-T, Trial Chamber Judgment, ¶¶ 480-496 (Nov. 16, 1998) (noting that rape and other forms of sexual violence and other acts constitute torture when fulfilling other requirements of torture). The *Delalic* Trial Chamber also stated that it was difficult to envision circumstances where rape by or at the instigation of a public official, or with the consent or acquiescence of an official, does not involve punishment, coercion, intimidation, or discrimination and that this is inherent in situations of armed conflict. *Id.*; see also Boot, *supra* note 15, at 215 (referring to the *Akayesu* Trial Chamber Judgment, ¶ 597, as stating that “[l]ike torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”); Zimmermann, *supra* note 133, at 490 & n.1105.

held that rape can constitute a form of torture.

Third, forms of sexual violence have been found to constitute inhumane acts.¹⁹¹ The ICTR and ICTY have held that “other inhumane acts” constituting crimes against humanity, include: enforced prostitution,¹⁹² other acts of sexual violence¹⁹³ (including acts of violence to, and mutilation of, a dead body causing mental suffering to eye-witnesses¹⁹⁴), and inhumane acts of sexual mutilation and other forms of sexual violence committed against prisoners.¹⁹⁵ Rape and other forms of sexual violence have also been held to constitute inhuman treatment as a grave breach, or cruel treatment as violation of the laws or customs of war under Common Article 3 of the Geneva Conventions.¹⁹⁶

190. See *Kunarac et al.*, Case Nos. IT-96-23-T & IT-96-23/1-T, Trial Chamber Judgment, ¶ 294; see also Koenig & Askin, *supra* note 10, at 18-19; Sellers, *supra* note 63, at 295 (observing that sexual violence has been held to satisfy elements of torture in several cases including under the jurisprudence of the European Court of Human Rights and the Inter-American Court of Human Rights). See generally *Prosecutor v. Furundzija*, Case. No. IT-95-17/I-A, Appeals Chamber Judgment (July 21, 2000); *Prosecutor v. Furundzija*, Case. No. IT-95-17/IT, Trial Chamber Judgment (Dec. 10, 1998).

191. See Machteld Boot, *Crimes Against Humanity, Article 7(1)(k): Other Inhumane Acts*, in COMMENTARY ON THE ROME STATUTE, *supra* note 15, at 231 (“[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” (citing Rome Statute, *supra* note 1, art. 7(1)(k)); see also BASSIOUNI, *supra* note 12, at 353-54.

192. See *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, Trial Chamber Judgment, ¶ 566 (Feb. 21, 2001); see also Boot, *supra* note 191, at 231.

193. See *Prosecutor v. Kajelijeli*, Case No. ICTR 98-44A-T, Trial Chamber Judgment and Sentence, ¶ 916 (Dec. 1, 2003) (stating that “[o]ther acts of sexual violence which may fall outside of this specific definition [of rape] may of course be prosecuted . . . as *other inhumane acts*”) (emphasis added); see also Boot, *supra* note 191, at 231.

194. See *Kajelijeli*, Case No. ICTR 98-44A-T, Trial Chamber Judgment and Sentence, ¶ 936; see also Boot, *supra* note 191, at 231.

195. See *Prosecutor v. Tadic*, Case No. IT-94-1-T, Trial Chamber Judgment, ¶¶ 198, 206 (May 7, 1997) (describing sexual mutilation and other forms of sexual violence committed against male prisoners, including an incident where two prisoners were forced to commit oral sexual acts on another prisoner and then were forced to bite off one of that prisoner’s testicles); Koenig & Askin, *supra* note 10, at 21 (referring to various forms of sexual violence charged as crimes against humanity in ICTY indictments constituting “inhumane acts”).

196. Rome Statute, *supra* note 1, arts. 8(2)(a)(ii) (including inhuman treatment, which is one of the grave breaches of the four 1949 Geneva Conventions in an international armed conflict), 8(2)(c)(i) (including cruel treatment, which is one of the violations of art. 3 common to the four 1949 Geneva Conventions in situations of non-international armed conflicts); BASSIOUNI, *supra* note 12, at 359-60; Chinkin, *supra* note 8, at 123 n.59 (referring to *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Trial Chamber Judgment, ¶¶ 692, 695, 700 (Mar. 3, 2000); *Prosecutor v. Delalic*, Case No. IT-96-21-T, Trial Chamber Judgment, ¶ 1066 (Nov. 16, 1998); *Tadic*, Case No. IT-94-1-T, Trial Chamber Judgment, ¶¶ 724-726). See also Cottier, *supra* note 17, at 432, 434, 435 (observing that rape and other forms of sexual violence were not previously explicitly articulated as such and often subsumed under general forms of mistreatment such as inhuman and degrading treatment). Cottier also states that in the 1990s, it became increasingly recognized that rape and other forms of sexual violence amounted to war crimes and grave breaches such as inhuman treatment, torture, and willfully causing great suffering or serious injury to body or health. *Id.* Cottier further noted that the war crime of sexual violence may also qualify as a general form of mistreatment such as torture, inhuman treatment, willfully causing great suffering, or serious injury to body or health or outrages upon personal dignity. *Id.* Koenig &

Fourth, rape and other forms of sexual violence have also been held to constitute a form of grave breach of the four Geneva Conventions of “wilfully causing great suffering or serious injury to body or health.”¹⁹⁷ Cottier argues it may also be encompassed by the grave breach of wounding a person *hors de combat*.¹⁹⁸

Fifth, rape and other forms of sexual violence have also been held to constitute outrages upon personal dignity.¹⁹⁹ Article 27 of the Fourth Geneva Convention and Article 4(2) of Additional Protocol II of 1977 to the Geneva Conventions (which is said to reinforce and supplement Common Article 3 to the Geneva Conventions of 1949) explicitly state that outrages upon personal dignity include rape, enforced prostitution, humiliating and degrading treatment, and “any form of indecent assault.”²⁰⁰ Article 75(2) of Additional Protocol I to the Geneva Conventions also refers to enforced prostitution, humiliating and degrading treatment, and any form of indecent assault.²⁰¹ Article 4(e) of the ICTR Statute explicitly describe outrages upon personal dignity as including rape, enforced

Askin, *supra* note 10, at 22-24 & nn.82-84, 88-91 (referring to charges brought before the ICTY for rape as “inhuman treatment” (grave breach), and referencing indictments brought for charges for sexual violence as grave breaches, as constituting torture, inhuman treatment, and wilfully causing great suffering or serious injury to body or health). Koenig and Askin also reference indictments brought for charges for sexual violence as violation of common article 3 of the Geneva Conventions, as constituting cruel treatment, torture, humiliating and degrading treatment, and outrages upon personal dignity. Koenig & Askin, *supra*.

197. Rome Statute, *supra* note 1, art. 8(2)(a)(iii); see Cottier, *supra* note 17, at 432-36, 452 (stating that rape and other forms of sexual violence were often subsumed under general forms of mistreatment including “wilfully causing great suffering or serious injury to body or health”). Cottier also notes, however, that in the 1990s it became increasingly recognized that rape and other forms of sexual violence amounted to war crimes and grave breaches such as willfully causing great suffering or serious injury to body or health (and torture and inhuman treatment). *Id.* Cottier also observes that although the ICTR and ICTY statutes did not explicitly provide that forms of sexual violence are war crimes, the ICTY and ICTR have prosecuted rape and other forms of sexual violence as grave breaches or serious violations of the laws and customs of war. *Id.* Furthermore, Cottier observes that the war crime of sexual violence may also qualify as general forms of mistreatment, such as willfully causing great suffering or serious injury to body or health, torture, inhuman treatment, or outrages upon personal dignity. *Id.* See also BASSIOUNI, *supra* note 12, at 353-54; Koenig & Askin, *supra* note 10, at 22 n.84.

198. Rome Statute, *supra* note 1, art. 8(2)(b)(vi); see Cottier, *supra* note 17, at 436.

199. Rome Statute, *supra* note 1, art. 8(2)(b)(xxi) (applying to situations of international armed conflict); *id.* art. 8(2)(c) (applying to situations of non-international armed conflict); Int’l Criminal Court, *Report of the Preparatory Commission for the International Criminal Court*, art. 8(2)(b)(xxi), U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000) [hereinafter ICC, *Report of the Preparatory Commission*] (defining this crime as situations where the “perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons”; and “[t]he severity of the humiliation, degradation or other violation was of such degree to be generally recognized as an outrage upon personal dignity”). *Id.*; Cottier, *supra* note 17, at 435 (observing that the war crime of sexual violence may also qualify as the general forms of mistreatment such as outrages upon personal dignity, torture, inhuman treatment, or willfully causing great suffering or serious injury to body or health); see also BASSIOUNI, *supra* note 12, at 359-60.

200. Geneva Convention IV, *supra* note 137, art. 27; Additional Protocol II, *supra* note 143, art. 4(2)(e).

201. Additional Protocol II, *supra* note 143, art. 75(2)(b).

prostitution, and any form of indecent assault.²⁰² The ICTR and ICTY have also found that rape and other acts of sexual violence can amount to outrages upon personal dignity. The ICTR Trial Chamber in *Prosecutor v. Akayesu* found that forcing women to publicly perform gymnastics in the nude constituted an outrage upon their personal dignity.²⁰³ The ICTY Trial Chamber in *Prosecutor v. Furundzija* convicted the accused of torture and outrages upon personal dignity, including rape.²⁰⁴ In *Prosecutor v. Kunarac*, the ICTY Trial Chamber found that rape, forcing victims to dance naked on a table, and lending and selling victims to other men constituted outrages upon personal dignity.²⁰⁵ In *Prosecutor v. Delalic*, forcing brothers to perform oral sex on each other before other prisoners constituted outrages upon personal dignity.²⁰⁶

Finally, rape and other forms of sexual violence may in some circumstances also constitute a violation of the prohibitions under Common Article 3 to the Geneva Conventions, including violence to life and person, which also covers mutilation, cruel treatment, and torture.²⁰⁷

c. Other Gendered Crimes

There are additional crimes enumerated under the Rome Statute, which may in some circumstances take a gendered-nature.

Attacks on the civilian population, which constitute a war crime in international²⁰⁸ and non-international²⁰⁹ conflicts, have been said to have a particular impact on women, children and the elderly because women usually comprise the majority of the civilian population and because of the gendered-nature an attack may assume.²¹⁰ The UNSC in its 2008

202. See *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Trial Chamber Judgment, ¶ 688 (Sept. 2, 1998); Patricia Viseur Sellers & Elizabeth Bennion, *Article 8(2)(b)(xxi): Outrages upon Personal Dignity*, in COMMENTARY ON THE ROME STATUTE, *supra* note 15, at 428; see also Statute for the Special Court for Sierra Leone, *supra* note 119, art. 3(e).

203. See *Akayesu*, Case No. ICTR 96-4-T, Trial Chamber Judgment, ¶ 697; Sellers & Bennion, *supra* note 202, at 426; see also Koenig & Askin, *supra* note 10, at 21.

204. *Prosecutor v. Furundzija*, Case No. IT-95-17/IT, Trial Chamber Judgment, ¶¶ 183, 272 (Dec. 10, 1998) (finding that sexual assaults committed publicly amounted to outrages upon the victim's personal dignity); Sellers & Bennion, *supra* note 202, at 428.

205. *Prosecutor v. Kunarac et al.*, Case Nos. IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment, ¶ 159 (June 12, 2002); Sellers & Bennion, *supra* note 202, at 428.

206. *Prosecutor v. Delalic*, Case No. IT-96-21-T, Trial Chamber Judgment, ¶¶ 1062-1066; see Sellers & Bennion, *supra* note 202, at 429.

207. Rome Statute, *supra* note 1, art. 8(2)(c)(i); see Zimmermann, *supra* note 133, at 489.

208. Rome Statute, *supra* note 1, art. 8(2)(b)(i).

209. *Id.* art. 8(2)(e)(i).

210. See ASKIN, *supra* note 8, at 12-13.

Throughout the history of war, while male civilians are killed, female civilians typically are raped, then killed. In torturous interrogations, males are savagely beaten. Females are savagely beaten and raped. Conclusively, all civilians are not treated similarly This law that applies to all civilians has tended not to recognize the sexual abuses routinely committed against over half of the

Resolution 1820 noted that

civilians account for the vast majority of those adversely affected by armed conflict; that women and girls are particularly targeted by the use of sexual violence, including as a tactic of war to humiliate, dominate, instill fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group; and that sexual violence perpetrated in this manner may in some instances persist after the cessation of hostilities.²¹¹

The use of child soldiers, which is itself a war crime in international²¹² and non-international²¹³ armed conflicts, can also take a gendered-form. For instance, female child soldiers may also be used for other slave-like practices, including sexual and domestic enslavement. Male child soldiers may in some instances be used for more active combat roles.

Similarly abductions of males and females (prohibited as, for example, a form of enslavement,²¹⁴ sexual slavery, imprisonment,²¹⁵ or taking of hostages²¹⁶) can occur with a specific gender-use in mind, such as for child soldiers and sex slaves.

Genital and sexual mutilation of males and females may amount to the war crime of subjecting persons to physical mutilation.²¹⁷ The Trial Chamber of the ICTR also found that mutilations of and acts of sexual violence to a dead body amounted to a crime against humanity under the category of other inhumane acts because of the mental suffering to eye-

civilian population—the women.

Id.; see also Callamard, *supra* note 8, at 67, 93 (stating that “[a]lthough women are less likely than men to be combatants, women are more likely to form the greatest proportion of the adult civilian population killed in war and targeted for abuse,” thus “[a]s the majority of the civilian population, women, children, and older people are particularly vulnerable to attacks by either part to the conflict”); Judith Gardam, *The Neglected Aspect of Women and Armed Conflict: Progressive Development of the Law*, 53 NETH. INT’L L. REV. 197, 208-09 (2005) (referring to the study of the INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC), WOMEN FACING WAR: ICRC STUDY ON THE IMPACT OF ARMED CONFLICT ON WOMEN (2001), in which the ICRC referred to specific needs of women in times of armed conflict derived from “socially defined or constructed sex roles, attitudes and values . . . ascribe[d] as appropriate for one sex or the other”); Michelle Jarvis, *An Emerging Gender Perspective on International Crimes*, in INTERNATIONAL CRIMINAL LAW DEVELOPMENTS IN THE CASE LAW OF THE ICTY 157, 186-87 (Gideon Boas & William A. Schabas eds., 2003).

211. S.C. Res. 1820, ¶ 7, U.N. Doc. S/RES/1820 (June 19, 2008).

212. Rome Statute, *supra* note 1, art. 8(2)(b)(xxvi).

213. *Id.* art. 8(2)(e)(vii).

214. *Id.* art. 7(1)(c) (defining enslavement directed against a civilian population as a crime against humanity).

215. *Id.* art. 7(1)(e).

216. *Id.* art. 8(2)(a)(viii) (defining the taking of hostages as one of the grave breaches of the four 1949 Geneva Conventions, *supra* note 137).

217. *Id.* arts. 8(2)(b)(x), 8(2)(e)(xi) (applying to international and non-international armed conflicts, respectively).

Subjecting persons who are in the power of an adverse party to physical mutilation . . . which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons.

Id. art. 8(2)(b)(x).

witnesses of the same ethnic group.²¹⁸

2. Defining the Sexual Violence and Gender-Based Crimes

The Rome Statute and Elements of Crimes also provided the first explicitly stated definitions in the legal framework of an international criminal court of the listed sexual violence and gender-based crimes described below.²¹⁹ All of the sexual violence crimes—except for forced pregnancy, which by definition can only be committed against women—are defined in gender-neutral terms so that victims and perpetrators may be of either sex or gender.²²⁰

a. Rape

Before rape was defined under the Elements of Crimes, there was no explicitly stated definition of rape under international humanitarian or human rights law instruments.²²¹ The definition of rape under the Elements of Crimes reflects a number of prior developments in the law on rape before international criminal courts. First, the definition of rape includes the concept of a physical *invasion* of the victim's body.²²² The Trial Chamber of the ICTR in *Prosecutor v. Akayesu* defined rape as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”²²³

218. See *Prosecutor v. Kajelijeli*, Case No. ICTR 98-44A-T, Trial Chamber Judgment and Sentence, ¶ 936 (Dec. 1, 2003) (finding that piercing the side and sexual organs of the body of a woman victim and cutting off the breast of a girl were acts that “constitute a serious attack on the human dignity of the Tutsi community as a whole” and “are nefarious acts of a comparable gravity to the other acts listed as crimes against humanity, which would clearly cause great mental suffering to any members of the Tutsi community who observed them”); see also Boot, *supra* note 191, at 231.

219. See Rome Statute, *supra* note 1, arts. 9, 21(1)(a); Cottier, *supra* note 17, at 435; see also Herman von Hebel, *The Making of the Elements of Crimes*, in ICC: CRIMES, PROCEDURE & EVIDENCE, *supra* note 11, at 7-8, 13 (dealing with the status of the Elements of Crimes).

220. See Cottier, *supra* note 17, at 436 (referring to the U.N. Slavery Special Rapporteur Report, *supra* note 59, ¶ 24, which states that “it must be noted that women are more at risk of being victims of sexually violent crimes and face gender-specific obstacles in seeking redress”).

221. See Boot, *supra* note 15, at 209 & n.233 (observing that the definition of rape was influenced by the U.N. Slavery Special Rapporteur's Report, in which she defined rape as “the insertion, under conditions of force, coercion or duress, of any object, including but not limited to a penis, into a victim's vagina or anus; or the insertion, under conditions of force, coercion or duress, of a penis into the mouth of the victim”). The U.N. Slavery Special Rapporteur's Report further provides that this definition reflected current international elaborations including working definitions of rape used by the Offices of the Prosecutor of the ICTY and ICTR. See U.N. Slavery Special Rapporteur Report, *supra* note 59, ¶ 24; see also Cottier, *supra* note 17, at 436 (stating that there was no definition of rape in international humanitarian or human rights law instruments prior to the Elements of Crimes, *supra* note 124, and domestic legal systems contained different definitions of rape).

222. ICC, *Report of the Preparatory Commission*, *supra* note 199, art. 7(1)(g)-1 (“[t]he perpetrator invaded the body of a person”); see Boot, *supra* note 15, at 209 n.232 (citing RAPE AND SEXUAL ASSAULT: A LEGAL STUDY, FINAL REPORT OF THE UNITED NATIONS COMMISSION OF EXPERTS ESTABLISHED PURSUANT TO SECURITY COUNCIL RESOLUTION 780 (1992), U.N. Doc. S/1994/674/Add.2, Vol. I, annex II).

223. See *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Trial Chamber Judgment,

Second, rape as defined does not require that the physical invasion be committed by physical force, but instead can be perpetrated by a “threat of force or coercion . . . or by taking advantage of a coercive environment, or . . . against a person incapable of giving genuine consent.”²²⁴ In *Akayesu*, the Trial Chamber defined rape as involving circumstances that are coercive, and stated that coercive circumstances did not need to be evidenced by a show of force.²²⁵ In particular, the Trial Chamber observed that “[t]hreats, 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 military presence.”²²⁶

Third, the definition of rape is not based on concepts related to the consent of the victim. The only reference to consent is to clarify circumstances in which individuals are said to be incapable of consent.²²⁷

¶ 688 (Sept. 2, 1998); Boot, *supra* note 15, at 209 (observing that the Trial Chamber decided *Akayesu* six weeks after the Rome Diplomatic Conference and that the Trial Chamber, after noting that there was no commonly accepted definition of rape under international law, reflected in part on the approach of the U.N. Special Rapporteur on Slavery, and legal arguments submitted by non-governmental organizations); La Haye, *supra* note 11, at 188.

224. ICC, *Report of the Preparatory Commission*, *supra* note 199, arts. 7(1)(g)-1 n.16, 8(2)(b)(xxii)-1 n.51, 8(2)(e)(vi)-1 n.63 (notes 16, 61, and 63 state that “[i]t is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity”); *see also* La Haye, *supra* note 11, at 189 (stating that “[t]he intention of the drafters here is clearly to point out that coercive circumstances are not restricted to the use of physical force”).

225. *See Akayesu*, Case No. ICTR 96-4-T, Trial Chamber Judgment, ¶¶ 596, 688; Boot, *supra* note 15, at 209.

226. *See Akayesu*, Case No. ICTR 96-4-T, Trial Chamber Judgment, ¶ 688 (stating that “the manifestly coercive circumstances that exist in all armed conflict situations establish a presumption of non-consent and negates the need for the prosecution to establish a lack of consent as an element of the crime”); Boot, *supra* note 15, at 209; *see also* U.N. *Slavery Special Rapporteur Report*, *supra* note 59, ¶ 25; Cottier, *supra* note 17, at 440-41 (stating that coercive environment “can be understood as referring to, *inter alia*, vertical power relations between troops conquering a village and the inhabitants of that village or between a detained person and his or her guards”).

227. *See* Prosecutor v. Gacumbitsi, Case No. ICTR 2001-64-T, Trial Chamber Judgment, ¶¶ 155-157 (June 17, 2004); Prosecutor v. Kunarac et al., Case Nos. IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgment, ¶ 130 (June 12, 2002); Prosecutor v. Kunarac et al., Case Nos. IT-96-23-T & IT-96-23/1-T, Trial Chamber Judgment, ¶¶ 457-458 (Feb. 22, 2001); Rules of Procedure and Evidence, R. 72, ICC-ASP/1/3 (Sept. 9, 2002) [hereinafter ICC Rules of Procedure and Evidence] (providing that the Chamber must be satisfied that any evidence regarding “consent” is relevant or admissible and of sufficient probative value, and must take into account any potential prejudice of that evidence in accordance with Article 69(4), must have regard to Articles 67, 68, 21(3), and Rules 70(a) through (d), and must consider the views of the Prosecutor, Defense, and witness or victim); *see also* Boot, *supra* note 15, at 209-10 (referring to the definitions of rape used by the U.N. Slavery Special Rapporteur and *Akayesu* Trial Chamber Judgment, as reflected in the ICC’s Elements of Crimes, *supra* note 124). Boot asserts that “[n]either definition was based on outdated concepts of consent by the victim, which often led in practice in national courts to the burden of proof perversely shifting to the victim to demonstrate that he or she had not consented and to coerced ‘consent’ being a defence to a charge of rape.” Boot also observed that the Appeals Chamber in the ICTY decision in *Kunarac* and ICTR decision in *Gacumbitsi* approved the reintroduction of the concept of non-consent by the Trial Chambers, but at the same time indicated that circumstances in which crimes against humanity took place were almost always coercive. *See* Boot, *supra* note 15, at 209-10; *see also* Cottier, *supra* note 17, at 438-41 (considering the manner in which the ICTY

Cottier states that the Preparatory Commission decided not to frame the issue of consent in terms of a ground for excluding criminal responsibility.²²⁸ Catharine MacKinnon declares “[t]he recognition that consent is meaningless for acts of a sexual nature that have a nexus to genocide, armed conflict, and crimes against humanity was a tremendous breakthrough.”²²⁹

Fourth, rape involves not just penetration of a perpetrator’s penis into a female victim’s vagina, but relates to *any part* of the victim’s body or perpetrator’s body with a sexual organ, or of the anal or genital opening of the victim *with any object or any other part of the body*.²³⁰ In *Akayesu*, the Trial Chamber of the ICTR observed that acts of rape may include acts that involve the insertion of objects and/or use of bodily orifices not considered intrinsically sexual.²³¹ The Trial Chamber also found that the insertion of a piece of wood into the sexual organs of a dying woman amounted to rape.²³² In *Furundzija*, the ICTY Trial Chamber also qualified forced oral penetration with a male sexual organ as rape.²³³ Furthermore, rape includes

dealt with consent and criminal responsibility concerning sexual activity in armed conflict and observing that the ICTY Appeals Chamber in the *Kunarac* Appeals Chamber Judgment clarified that there was no requirement for showing “resistance” by the victim, nor a requirement to show any force, and that it sufficed to show coercive circumstances); Cottier also cites to several national criminal provisions establishing strict liability of a person in an unequal power position engaging in sexual acts with a victim who is under their influence because of that unequal power position. *See id.* Cottier further declares that the *Furundzija* Trial Chamber Judgment suggests “a non-refutable and abstract presumption of non-consent when stating that ‘any form of captivity vitiates consent.’” *Id.* Cottier also states that the Trial Chamber in *Akayesu* similarly only required that rape be committed under coercive circumstances. *Id.* Cottier refers to the *U.N. Slavery Special Rapporteur’s Report* which states that “[t]he manifestly coercive circumstances that exist in all armed conflict situations establish a presumption of non-consent and negates the need for the prosecution to establish a lack of consent as an element of the crime.” *See La Haye, supra* note 11, at 189 (stating that non-consent is not an element of the crime of rape when coercive circumstances are involved); Spees, *supra* note 108, at 25.

228. Cottier, *supra* note 17, at 440.

229. MacKinnon, *supra* note 76, at 212-13 (observing that the Appeals Chamber of the ICTY in *Gacumbitsi* sustained *Akayesu* by holding that “as a matter of fact if not law, that under coercive circumstances nonconsent is not a separate element to be proven, but can be inferred from those circumstances”); *Gacumbitsi*, Case No. ICTR 2001-64-T, Trial Chamber Judgment, ¶¶ 291-293; *see also* Chinkin, *supra* note 8, at 124-26.

230. ICC, *Report of the Preparatory Commission, supra* note 199, art. 7(1)(g)-1 (emphasis added) (defining the elements of the crime of rape as “conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body”).

231. *See Akayesu*, Case No. ICTR 96-4-T, Trial Chamber Judgment, ¶¶ 596, 686-687; *see also* Boot, *supra* note 15, at 209 (stating that “[t]he Chamber considered 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”).

232. *See Akayesu*, Case No. ICTR 96-4-T, Trial Chamber Judgment, ¶ 686; Cottier, *supra* note 17, at 438; *see also* La Haye, *supra* note 11, at 189 (explaining that “following sexual atrocities committed in armed conflicts such as in Rwanda, [it was considered that] rape can consist of the penetration of the anal or genital opening of the victim with any object or any other part of the body”).

233. *See* Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Trial Chamber Judgment, ¶¶ 174, 183 (Dec. 10, 1998); Cottier, *supra* note 17, at 437; Goldstone, *supra* note 23,

all penetration, however slight.²³⁴

Finally, the definition of rape includes both male and female victims of the crime.²³⁵ The Elements of Crimes, including the identity of the victim and perpetrator are stated in gender-neutral terms. Moreover, the Elements of the Crimes explicitly state that “[t]he concept of ‘invasion’ is intended to be broad enough to be gender-neutral.”²³⁶

b. Sexual Slavery

The Elements of Crimes define sexual slavery as the exercise by the perpetrator of “any or all of the powers attaching to the right of ownership over one or more persons.”²³⁷ Examples given are purchasing, selling, lending, or bartering such person(s) “or by imposing on them a similar deprivation of liberty.”²³⁸ The Elements of Crimes of sexual slavery stipulate that the phrase, “deprivation of liberty” may include exacting forced labor or otherwise reducing individuals to a servile status as defined under the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956.²³⁹ It is also explicitly said to include trafficking in persons, in particular women and children.²⁴⁰ The elements of the crime of sexual slavery provide that

at 284; *see also* La Haye, *supra* note 11, at 189 (asserting that the intent of the drafters was to include oral penetration in the definition of rape).

234. ICC, *Report of the Preparatory Commission*, *supra* note 199, art. 7(1)(g)-1 (referring to “conduct resulting in penetration, however slight”); *see also* Boot, *supra* note 15, at 209 (states that during the Rome Diplomatic Conference, one state defined the actus reus of rape as the “forcible penetration, however slight, of any part of the body of another by the accused’s sexual organ, or forcible penetration, however slight, of any part of the body of another by the accused’s sexual organ, or forcible penetration, however slight of the anal or genital opening of another by an object”); Cottier, *supra* note 17, at 437-38 (observing that the Elements of Crimes reflect the definition of rape of the Trial Chamber in Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Trial Chamber Judgment, ¶¶ 174, 183 (Dec. 10, 1998), which defined rape as sexual penetration, however slight).

235. *See* Boot, *supra* note 15, at 210 (stating that the essential gender-neutral aspects of this crime are the physical invasion of the body of the victim and coercion, with a focus on the action by the perpetrator); *see also* Cottier, *supra* note 17, at 438 (stating the long formulation was due to the Preparatory Commission’s intention to formulate a gender-neutral definition, and noting that the Elements of Crimes also cover sexual intercourse forced on a man by a woman); La Haye, *supra* note 11, at 188 (observing that an important aspect of the word “invasion” is its “gender-neutral” nature, “as all delegations clearly wanted to cover rape against a victim of either sex” and that the Trial Chamber in Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Trial Chamber Judgment, ¶ 180 (Dec. 10, 1998), recognized that rape can be committed against a man or woman).

236. ICC, *Report of the Preparatory Commission*, *supra* note 199, arts. 7(1)(g)-1 n.15, 8(2)(b)(xxii)-1 n.50, 8(2)(e)(vi)-1 n.62 (“The concept of ‘invasion’ is intended to be broad enough to be gender-neutral.”).

237. *See id.* art. 7(1)(g)-2, art. 8(2)(b)(xxii)-2, art. 8(2)(e)(vi)-2.

238. *See id.* art. 7(1)(g)-2, art. 8(2)(b)(xxii)-2, art. 8(2)(e)(vi)-2.

239. *See id.* art. 7(1)(g)-2 n.18, art. 8(2)(b)(xxii)-2 n.53, art 8(2)(e)(vi)-2 n.65.

240. *See id.* arts. 7(1)(g)-2 n.18, 8(2)(b)(xxii)-2 n.53, 8(2)(e)(vi)-2 n.65.

It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is

the perpetrator need only have caused the person(s) to engage in one or more acts of a sexual nature.²⁴¹ Boot argues that there is no requirement to prove rape for this crime.²⁴² There is also no requirement to prove that the perpetrator coerced the victim.²⁴³ In the Elements of Crimes it is stipulated that this category of crime can “involve more than one perpetrator as a part of a common criminal purpose.”²⁴⁴

Sexual slavery as a form of enslavement denotes limitations on one’s autonomy, freedom of movement, and power to decide on matters relating to one’s sexual activity.²⁴⁵ Sexual slavery also encompasses “situations where women and girls are forced into ‘marriage’, domestic servitude or other forced labour, that involves forced sexual activity, including rape, by their captors.”²⁴⁶ The Special Rapporteur of the Working Group on Contemporary Forms of Slavery (UN Slavery Rapporteur) stated that practices such as detention of women in rape camps or “comfort stations,” forced marriages to soldiers, and other practices involving treating women as chattel are “in fact and in law forms of slavery and as such, violations of the peremptory norm prohibiting slavery.”²⁴⁷

also understood that the conduct described in this element includes trafficking in persons, in particular women and children.

Id. at nn.11, 18, 53, 65; *see also id.* art. 7(2)(c) (referring explicitly to the crime against humanity of enslavement as including “the exercise of such power in the course of trafficking in persons, in particular women and children”); Cottier, *supra* note 17, at 445-46; *see also* La Haye, *supra* note 11, at 190-92 (observing that the Swiss proposal included aspects of the definition of sexual slavery provided in *U.N. Slavery Special Rapporteur Report*, *supra* note 59, ¶ 27 (“the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including sexual access through rape or other forms of sexual violence”) and observing that delegations expressed the view that the phrase “similar deprivation of liberty” should not exclude the situation in the Rwandan and Bosnian conflicts in which sexually abused women were not locked in a particular place and were “free to go” but were in fact deprived of their liberty as they had nowhere else to go and feared for their lives”); Oosterveld, *supra* note 155, at 634-35; Steains, *supra* note 62, at 370 (observing that this specific reference to trafficking in persons in the context of enslavement, in particular trafficking in women and children, represented an important embodiment of developments in international law).

241. ICC, *Report of the Preparatory Commission*, *supra* note 199, arts. 7(1)(g)-2, 8(2)(b)(xxii)-2, 8(2)(e)(vi)-2.

242. *See* Boot, *supra* note 15, at 213.

243. *Compare* Boot, *supra* note 15, at 212, with Cottier, *supra* note 17, at 444. *See* Oosterveld, *supra* note 155, at 640 (stating that “[p]rima facie, a finding of enslavement means that a victim has no ability to give voluntary or genuine consent.”). In reference to the decisions of the Trial and Appeals Chambers in the ICTY in *Kunarac*, *Kovac*, and *Vukovic*, Oosterveld observed “the fact that consent cannot serve as a defense to the crime of sexual slavery is another advance in international law”. *See* Oosterveld, *supra*.

244. ICC, *Report of the Preparatory Commission*, *supra* note 199, arts. 7(1)(g)-2 n.17, 8(2)(b)(xxii)-2 n.52, 8(2)(e)(vi)-2 n.64 (stating that “[g]iven the complex nature of this crime, it is recognized that its commission could involve more than one perpetrator as a part of a common criminal purpose”).

245. *See* Boot, *supra* note 15, at 211; *see also* Cottier, *supra* note 17, at 443 (asserting that exercise of ownership is akin to treatment of chattel and that “control and deprivation of one’s autonomy,” such as restrictions on freedom of movement or control of sexual access, can be considered essential elements of slavery).

246. *See* Boot, *supra* note 15, at 211.

247. *See id.*; *U.N. Slavery Special Rapporteur Report*, *supra* note 59, ¶¶ 8, 30; *see*

c. Enforced Prostitution

The Elements of Crimes define enforced prostitution as situations in which the perpetrator caused one or more persons to engage in one or more acts of a sexual nature.²⁴⁸ This crime does not require that force was used, and it is enough to demonstrate “threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power . . . or by taking advantage of a coercive environment.”²⁴⁹ Similar to the crime of rape, this crime is not based on concepts of consent and consent is only mentioned to clarify where a person is incapable of giving “genuine consent.”²⁵⁰

The second non-contextual element of this crime is that “the perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.”²⁵¹ Machteld Boot argues that the crime of enforced prostitution, like the crime of sexual slavery, does not require proof of rape and that it can constitute a continuing offense or separate act.²⁵² Cottier states that in contrast to rape, a victim of enforced prostitution may not be aware of any coercive circumstances.²⁵³

d. Forced Pregnancy

The Elements of Crimes define forced pregnancy as situations in which the perpetrator “confined one or more women forcibly made pregnant.”²⁵⁴ Boot argues that “unlawful confinement” should be interpreted as any form

also Cottier, *supra* note 17, at 446 (referring to the example of “forced marriages” as forming a category of sexual slavery that reduces a person to servile status). Cottier also cites to the *U.N. Slavery Special Rapporteur Report*, *supra* note 59, ¶ 13, which states that “[t]he repeated rape and sexual abuse of women and girls under the guise of ‘marriage’ constitutes slavery, as the victims do not have the freedom to leave, to refuse the sham ‘marriage’ or to decide whether and on what terms to engage in sexual activity.” *See also* Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 266 U.N.T.S. 3, art. 1 (1956).

248. ICC, *Report of the Preparatory Commission*, *supra* note 199, art. 7(1)(g)-3, art. 8(2)(b)(xxii)-3, art. 8(2)(e)(vi)-3.

249. *See* Boot, *supra* note 15, at 212 (referring to the argument found in *U.N. Slavery Special Rapporteur Report*, *supra* note 59, ¶ 31, that this crime generally refers to “conditions of control over a person who is coerced by another to engage in sexual activity”). Boot argues that while most, if not all, forms of “forced prostitution” are encompassed by “sexual slavery,” there may be situations in which forced prostitution does not amount to “slavery,” but is still prohibited because the victim was compelled to perform sexual acts. *See id.*; *see also* La Haye, *supra* note 11, at 192-93; Oosterveld, *supra* note 155, at 644.

250. ICC, *Report of the Preparatory Commission*, *supra* note 199, arts. 7(1)(g)-4, 8(2)(b)(xxii)-4, 8(2)(e)(vi)-4.

251. *See* La Haye, *supra* note 11, at 193 (stating that some delegations at the Preparatory Commission stressed that “the ‘other person’ expecting an advantage can also be the victim herself or himself, hoping simply not to be killed”).

252. *See* Boot, *supra* note 15, at 213.

253. *See also* Cottier, *supra* note 17, at 448.

254. ICC, *Report of the Preparatory Commission*, *supra* note 199, arts. 7(1)(g)-4, 8(2)(b)(xxii)-4, 8(2)(e)(vi)-4. Article 7(2)(f) repeats the same objective elements, but in addition, adds that “[t]his definition shall not in any way be interpreted as affecting national laws relating to pregnancy.”

of deprivation of physical liberty contrary to international law and standards and does not require the deprivation of liberty to be severe.²⁵⁵ He asserts that to be forcibly made pregnant does not require the use of violence but includes any form of coercion.²⁵⁶ He argues that while consent is not relevant to this crime, coercion negates consent, as it does in any form of captivity.²⁵⁷ Boot further observes that the act of forcibly impregnating a woman does not necessarily have to be committed by the person confining the woman²⁵⁸ and that the forcible impregnation may involve rape or “any other form of sexual violence of comparable gravity.”²⁵⁹

The elements of the crime of forced pregnancy require that the perpetrator confined the victim forcibly made pregnant “with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.”²⁶⁰ Boot argues that these other grave violations of international law include the crime of genocide, crimes against humanity, and war crimes, including torture and enforced disappearances.²⁶¹

e. Enforced Sterilization

The Elements of Crimes define enforced sterilization as the perpetrator depriving one or more persons of biological reproductive capacity²⁶² where

255. See Boot, *supra* note 156, at 255; see also La Haye, *supra* note 11, at 193 (observing that the term “forced or enforced pregnancy” was used previously in international documents such as the Vienna Declaration and Platform for Action, the Beijing Platform for Action, and resolutions of the U.N. Commission on Human Rights on the Elimination of Violence Against Women in 1995, 1996, 1997, and 1998).

256. See Boot, *supra* note 156, at 256.

257. See *id.* (stating that “[f]orcibly” means ‘done by or involving force’ which does not necessarily require the use of violence, but includes any form of coercion . . . [and] any form of ‘coercion or force or threat of force against the victim or a third person’ negates consent and any form of captivity negates consent”); Cottier, *supra* note 17, at 450.

258. See Boot, *supra* note 156, at 256; see also La Haye, *supra* note 11, at 194 (stating that the separate elements of forced pregnancy “made it clear that the accused need not be the person who made the woman or women pregnant”).

259. See Boot, *supra* note 156, at 256.

260. ICC, *Report of the Preparatory Commission*, *supra* note 199, arts. 7(1)(g)-4, 8(2)(b)(xxii)-4, 8(2)(e)(vi)-4.

261. See Boot, *supra* note 156, at 256.

262. See Elements of Crimes, *supra* note 124, arts. 7(1)(g)-(5) n.19, 8(2)(b)(xxii)-5 n.54, 8(2)(e)(vi)-5 n.66 (providing that “[t]he deprivation is not intended to include birth-control measures which have a non-permanent effect in practice”).

It is doubtful, however, whether the exception in footnote 19 is consistent with international law. Even imposing non-permanent measures intended to prevent births within a protected group could be used to commit genocide by reducing the birth rate within that group. In addition, such non-permanent measures could violate a wide variety of human rights to personal autonomy even when imposed on a non-discriminatory basis, including the right not to be subjected to arbitrary interference with one’s family.

Boot, *supra* note 15, at 214; see also Universal Declaration of Human Rights, G.A. Res. 217A, art. 12, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948); Cottier, *supra* note 17, at 451; La Haye, *supra* note 11, at 196 (stating

that conduct was not justified by the medical or hospital treatment of the person concerned and was not carried out with the victim's genuine consent. It is explicitly stated that "genuine consent" does not include consent obtained through deception.²⁶³

f. Any Other Form of Sexual Violence

The Elements of Crimes define any other form of "sexual violence" as where the perpetrator committed an act of a sexual nature against one or more persons or caused such person(s) to engage in an act of a sexual nature.²⁶⁴ The Elements of Crimes do not require the use of force; it suffices if the crime was committed "by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power . . . or by taking advantage of a coercive environment."²⁶⁵ The definition of sexual violence is not based on concepts of consent. In fact, the only reference to consent is to clarify that the act may also occur where a person is incapable of giving genuine consent.²⁶⁶

The ICTR, in *Prosecutor v. Akayesu*, considered sexual violence, which includes rape, as any act of a sexual nature committed on a person under coercive circumstances.²⁶⁷ The UN Slavery Rapporteur has stated that sexual violence includes both physical and psychological violence carried out through sexual means or by targeting sexuality, and includes both physical and psychological attacks directed at a person's sexual characteristics.²⁶⁸

that "[t]he definition covers cases of temporary or permanent sterilization alike and is not restricted to the surgical removal of the reproductive organs. It will encompass any means or measures, which have the effect of depriving a person of his or her biological reproductive capacity.").

263. See Elements of Crimes, *supra* note 124, arts. 7(1)(g)-5 n.20, 8(2)(b)(xxii)-5 n.55, 8(2)(e)(vi)-5 n.67 (noting that "[i]t is understood that 'genuine consent' does not include consent obtained through deception"); see also La Haye, *supra* note 11, at 196.

264. See ICC, *Report of the Preparatory Commission*, *supra* note 199, arts. 7(1)(g)-6, 8(2)(b)(xxii)-6, 8(2)(e)(vi)-6; see also La Haye, *supra* note 11, at 197-98 (observing that the term sexual "violence" was preferred to sexual "assault" because the term "assault" might not include such acts as forcible nudity, which delegations believed should be open to prosecution under the crime of sexual violence).

265. See Boot, *supra* note 15, at 215.

266. See *id.* at 214.

267. See *id.*; see also *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Trial Chamber Judgment, ¶ 688 (Sept. 2, 1998) (noting that in this context coercive circumstances need not be evidenced by a show of physical force, and that "[t]hreats, 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").

268. See Boot, *supra* note 15, at 214; see also ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 38-39 (2d ed. 2008) (stating that sexual violence includes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence of comparable gravity); Cassese, *supra* note 148, at 374-75; Cottier, *supra* note 17, at 452 (describing public forcible nudity, genital mutilation, and slicing off a woman's breasts (citing the discussion in *U.N. Slavery Special Rapporteur Report*, *supra* note 59, ¶¶ 21-22)).

In *Akayesu*, the ICTR also found that sexual violence does not require physical invasion, penetration, or physical contact.²⁶⁹ *Akayesu* was found criminally responsible for ordering his subordinates to undress a female and force her to do gymnastics naked before a crowd in the public courtyard of the bureau communal.²⁷⁰ Similarly the ICTY Trial Chamber in *Prosecutor v. Furundzija* found that sexual assault “falling short of actual penetration” is also prohibited, and that this prohibition “embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat, force, or intimidation in a way that is degrading and humiliating for the victim’s dignity.”²⁷¹ The ICTY Trial Chamber held in *Prosecutor v. Kvočka* that sexual violence includes sexual mutilation (where it does not amount to enforced sterilization), forced marriage (insofar as it does not amount to sexual slavery), forced abortion, and sexual molestation.²⁷² In *Prosecutor v. Todorovic*, the Trial Chamber also qualified biting into a penis and kicking in the genital area as sexual assault.²⁷³

In *Akayesu* the ICTR Trial Chamber found that “sexual violence” can constitute the crime against humanity of inhumane acts, as well as acts amounting to outrages upon personal dignity in violation of Common Article 3 to the Geneva Conventions or Additional Protocol II, and the crime of genocide of serious bodily or mental harm.²⁷⁴

D. Modes of Liability

The modes of liability under the Rome Statute make no express reference to any of the crimes within the Court’s jurisdiction. Nevertheless, as those deemed liable for sexual and gender-based crimes may be the commanders or superiors responsible for the sexual and gender-

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

270. See *id.* ¶¶ 688, 692-694 (finding that *Akayesu* was found responsible for these acts under Article 3(i) of the ICTR Statute, *supra* note 61); see also *Boot*, *supra* note 15, at 214 n.258; Koenig & Askin, *supra* note 10, at 25.

271. See *Boot*, *supra* note 15, at 214-15; see also *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Trial Chamber Judgment, ¶ 186 (Dec. 10, 1998).

272. See *Cottier*, *supra* note 17, at 452; see also *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Trial Chamber Judgment, ¶ 180 (Nov. 2, 2001) (holding that “sexual violence is broader than rape and includes such crimes as sexual slavery or molestation”).

273. See *Prosecutor v. Todorovic*, Case No. IT-95-9/I-S, Trial Chamber Sentencing Judgment, ¶¶ 38, 66 (July 31, 2001); see also *Cottier*, *supra* note 17, at 452.

274. See *Akayesu*, Case No. ICTR 96-4-T, Trial Chamber Judgment, ¶ 688 (holding that sexual violence falls within the scope of the crimes against humanity of “other inhumane acts” included in Article 3(i), “outrages upon personal dignity” under Article 4(e) of the ICTR Statute, *supra* note 61, which are also violations of Common Article 3 to the Geneva Conventions, *supra* note 137, and of Additional Protocol II, *supra* note 143, and of the genocide of “serious bodily or mental harm” included in Article 2(2)(b) of the ICTR Statute, *supra* note 61); see also *Boot*, *supra* note 15, at 214 n.258; Chinkin, *supra* note 8, at 126-27 (referring to the *Akayesu* decision, which stated that sexual violence could include forced nudity, forced sterilisation or experimentation, sexual mutilation, sexual threats, rapes, and so forth).

based crimes their subordinates physically perpetrate,²⁷⁵ it is useful to refer to the following two key provisions.

Article 25 of the Statute²⁷⁶ provides for individual criminal responsibility, in particular where an individual:

- Commits a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- Orders, solicits, or induces the commission of such a crime which in fact occurs or is attempted;
- For the purpose of facilitating the commission of such a crime, aids, abets, or otherwise assists in its commission or attempted commission, including by providing the means for its commission;
- In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose.

Article 28 of the Statute ascribes criminal responsibility to commanders and other superiors for crimes committed by forces/subordinates under the superiors' effective authority and control (or effective command and control), for crimes committed as a result of his or her failure to exercise control properly.²⁷⁷

E. Protective and Special Measures to Protect Victims and Witnesses

Article 68(1) of the Rome Statute stipulates that the Court take "appropriate measures" to protect the safety, physical and psychological well-being, dignity, and privacy of victims and witnesses.²⁷⁸ The Court is required to consider all relevant factors including gender and the nature of the crime, particularly where the crime involves sexual or gender violence or violence against children.²⁷⁹ Donat-Cattin states that "appropriate measures" have been interpreted, *inter alia*, to include those set out in the following Rules and Regulations.²⁸⁰

Rule 112(4) for recording of questioning. This includes use of audio-video recording to reduce "re-traumatisation of a victim of sexual or gender violence",²⁸¹

275. See ICC, Office of the Prosecutor, *Paper on Some Policy Issues Before the Office of the Prosecutor* 6-7 (Sept. 2003) (stating that "as a general rule [the OTP] should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organization allegedly responsible for those crimes").

276. See Rome Statute, *supra* note 1, art. 25(3)(a-d).

277. See *id.* art. 28(a-b).

278. See *id.* art. 68(1).

279. See Steains, *supra* note 62, at 387; see also Bensouda, *supra* note 2, at 415.

280. See David Donat-Cattin, *Article 68: Protection of Victims and Witnesses and Their Participation in the Proceedings*, in COMMENTARY ON THE ROME STATUTE, *supra* note 15, at 1275, 1281.

281. See Hakan Friman, *Investigation and Prosecution*, in ICC: CRIMES, PROCEDURE & EVIDENCE, *supra* note 11, at 493, 514-15 (stating that the intention behind this amendment was that "the recorded testimonies of such persons might be later used at

Rule 87 Protective measures can include expunging the person's identity from the public records; presentation of testimony by electronic or other special means including alteration of pictures or voice; use of audio-video technology (e.g., video-conferencing and closed-circuit television); exclusive use of sound media; use of a pseudonym; and proceedings conducted in camera;²⁸²

Rule 88 Special measures can include the facilitation of the testimony of a traumatized victim or witness, including a victim of sexual violence. For instance, a lawyer, legal representative, psychologist, or family member may be permitted to be present during the testimony of the victim or witness. Rule 88(4) provides that the Chamber must be "vigilant in controlling the manner of questioning a witness or victim to avoid any harassment or intimidation, paying particular attention to attacks on victims of crimes of sexual violence."²⁸³

Regulations of the Court

Regulation 21 Protection of sensitive information in broadcasts of audio or video-recordings;²⁸⁴

Regulation 41 Victims and Witnesses Unit may bring to the Chamber's attention the need for special measures under Rules 87 and 88;²⁸⁵

Regulation 42 Applications and variations of protective measures;²⁸⁶

Regulation 101 Restrictions on access to news and contact.²⁸⁷

Regulations of the Registry

Regulation 79 Enabling witnesses to testify without further harm, suffering, or trauma;²⁸⁸

Regulation 100 Protection and security of victims.²⁸⁹

Donat-Cattin also argues that there is room for "any other arrangement that may be made through innovative technology or building upon methods of victims' protection experimented in domestic justice systems."²⁹⁰

Regulation 94 of the Regulations of the Registry also lists various protective measures that may be included pursuant to an order under Rule 87, including pseudonyms, facial and voice distortions, private sessions, closed sessions, videoconferences, expunction from the public record of the person's identity, and any combination of protective measures that are technically feasible.²⁹¹

Article 64 of the Statute requires the Trial Chamber to ensure that the

trial, if the Court so allowed, without having to go over once again their painful experience. This could assist in reducing any subsequent traumatization.").

282. See ICC Rules of Procedure and Evidence, *supra* note 228, R. 87.

283. See *id.* R. 88.

284. See ICC Regulations of the Court Reg. 21, ICC-BD/01-01-04 (May 26, 2005) [hereinafter ICC Regulations].

285. See *id.* Reg. 41.

286. See *id.* Reg. 42.

287. See *id.* Reg. 101.

288. See ICC Regulations of the Registry, ICC-BD/03-01-06 (2006) [hereinafter Registry Regulations]; *id.* Reg. 79.

289. See *id.* Reg. 100.

290. See Donat-Cattin, *supra* note 280, at 1281.

291. See Registry Regulations, *supra* note 288, Reg. 94.

trial is conducted showing due regard for the protection of victims and witnesses, including for the protection of confidential information.²⁹² In *Prosecutor v. Tadic*, the ICTY Trial Chamber recognized the special needs of victims and witnesses of rape and sexual assault, particularly in terms of the consequences of the crime on the victim and the consequences of testifying.²⁹³ Such witnesses' rights have also been affirmed by the U.N. and under international human rights law.²⁹⁴

Article 68(2) of the Rome Statute also envisages an exception to the principle of public hearings provided for in Article 67 by protecting victims, witnesses, or even the accused, by allowing for proceedings in camera, or presentation of evidence by electronic or other special means.²⁹⁵ It is stated that "in particular, such measures shall be implemented in the case of a victim of sexual violence," or a child victim or witness.²⁹⁶ Other

292. See Bensouda, *supra* note 2, at 415.

293. See *Prosecutor v. Tadic*, Case No. IT-94-I-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, ¶ 46 (Aug. 10, 1995).

The existence of special concerns for victims and witnesses of sexual assault is evident in the Report of the Secretary-General, which states that protection for victims and witnesses should be granted, "especially in cases of rape and sexual assault" It has been noted that rape and sexual assault often have particularly devastating consequences which, in certain instances, may have a permanent detrimental impact on the victim It has been noted further that testifying about the event is often difficult, particularly in public, and can result in rejection by the victim's family and community In addition, traditional court practice and procedures have been known to exacerbate the victim's ordeal during trial. Women who have been raped and have sought justice in the legal system commonly compare the experience to being raped a second time.

Id.; see also RICHARD MAY & MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE 185-88 (2002) (noting that in *Tadic*, the Court referred to appropriate measures in these circumstances as including "in camera proceedings, devices to avoid confrontation with the accused in court and careful control of cross-examination").

294. See Helen Brady, *Protective and Special Measures for Victims and Witnesses*, in ICC: CRIMES, PROCEDURE & EVIDENCE, *supra* note 11, at 435 (referencing the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, art. 6(d), U.N. Doc. A/RES/40/34 (Nov. 29, 1985)) (arguing that international law demands that victims and witnesses be provided with the necessary "protection and support to minimize serious risks to their security, avoid serious incursions of their privacy and dignity, and reduce trauma associated with giving testimony"); see also *Baegen v. the Netherlands*, App. No. 16696/90, Eur. Comm'n H.R. Dec. & Rep., ¶ 77 (1994) (finding that where the accused was able to confront the victim of sexual abuse but could not question her, the European Commission of Human Rights had regard to "the special features of rape and sexual offences trials and accepted that in criminal proceedings concerning sexual abuse measures may be taken to protect the victim provided such are reconcilable with an adequate and effective exercise of the rights of the defence"); KAREN REID, A PRACTITIONER'S GUIDE TO THE EUROPEAN CONVENTION OF HUMAN RIGHTS 142 (2003).

295. See Rome Statute, *supra* note 1, art. 68(2).

296. See Donat-Cattin, *supra* note 280, at 1284. Donat-Cattin argues that the identity of the witness needs to be disclosed to the defense, unless

anonymity is assessed as the only available measure of protection to comply with the obligation [under Article 68(1) of the Rome Statute], the relevant Chamber should order to maintain it and, at the same time, ensure that the testimony rendered by the anonymous victim or witness shall be weighted against this factor and never be the sole proof that would suffice to convict an

provisions of the Statute deal more generally with the protection of victims and witnesses during an investigation and prosecution,²⁹⁷ which can also be of relevance to sexual and gender-based crime victims. The Office of the Prosecutor attaches particular importance to its prevailing obligations concerning the security of victims. Pursuant to Article 68(1) of the Statute, which provides that “[t]he Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses,” the standard of protection of the court should be the elimination of any foreseeable risk.²⁹⁸ Further, the Presidency, the Registry, and the Prosecution committed in the Strategic Plan of the Court to “put in place a system to address all security risks, striving for maximum security of all participants.”²⁹⁹

F. Evidentiary Rules and Rules of Interpretation

A number of key evidentiary rules also reflect developments in the law related to prosecution of sexual and gender-based crimes before international criminal courts,³⁰⁰ including the following:

Consent: Rule 70 stipulates the principles of evidence in cases of sexual violence, in particular the circumstances where consent cannot be inferred, including where there was a coercive environment.³⁰¹

individual for any specific charge.

Id.; see also Brady, *supra* note 295, at 450-53 (observing that there was a difference of opinion on the issue of anonymous witnesses at trial, and the decision was to remain silent on the issue under Rule 88 “thereby leaving it up to the Court.”); MAY & WIERDA, *supra* note 293, at 282-86.

297. See Brady, *supra* note 295, at 437 (citing Rome Statute, *supra* note 1, arts. 18(1), 54(1)(b), 57(3)(c), 64(2), 64(6)(e), 68, 69(2)).

298. See Rome Statute, *supra* note 1, art. 68(1).

299. ICC, Assembly of States Parties, *Strategic Plan of the International Criminal Court*, ICC-ASP/5/6, at 6 (Aug. 4, 2006), available at http://www2.icc-cpi.int/iccdocs/asp_docs/Library/asp/ICC-ASP-5-6_English.pdf.

300. See Steains, *supra* note 62, at 384-85 (noting that the ICTY and the ICTR have adopted rules of evidence and procedure that emphasize protection of victims).

301. See ICC Rules of Procedure and Evidence, *supra* note 228, at R. 70.

In cases of sexual violence, the Court shall be guided by and, where appropriate, apply the following principles: (a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim’s ability to give voluntary and genuine consent; (b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent; (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence

Id.; see also Goldstone, *supra* note 23, at 284 (citing Rule 96 of the ICTY and ICTR, both of which deal with consent). Goldstone states

[t]his starts from the premise that consent cannot be a defence if the victim had experienced or had reason to fear violence, duress, detention or psychological aggression. The procedure by which evidence of consent may be admitted requires the defendant overcome the burden of proving to the Trial Chamber . . . that the evidence is relevant and credible. Consequently the opportunity is there, but the burden of proof is placed very clearly on the defendant to establish why, in that war situation, consent is at all relevant to

Prior or subsequent sexual conduct of the victim or witness: Rule 70(d) also states that the “[c]redibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.” Similarly, Rule 71 specifies that, subject to Article 69(4), a chamber shall not admit evidence of the prior or subsequent sexual conduct of a victim or witness.³⁰²

Privileged communications: Rule 73 provides that communications occurring in the context of professional or other confidential relationships are to be regarded as privileged. The Court shall give particular regard to recognizing as privileged communications made in the context of a professional relationship between a person and his or her medical doctor, psychiatrist, psychologist, or counsellor.³⁰³

Corroboration: Rule 63(4) provides that, without prejudice to Article 66(3) (regarding the presumption of innocence and need to prove the guilt of the accused beyond all reasonable doubt), a chamber shall not impose a legal requirement that corroboration is required to prove any crime within the Court’s jurisdiction, “in particular, crimes of sexual violence.”³⁰⁴ This is a further progression from Rule 96 of the Rules of Procedure and Evidence of the ad hoc tribunals, which provides that the tribunals of the ICTY and ICTR need not require corroboration from sexual violence victims.³⁰⁵

Finally, Article 21(3) requires that the application and interpretation of law be consistent with international human rights law, and without any adverse distinction founded on grounds such as gender.³⁰⁶

G. Victims’ Participation

Victims, including victims of sexual and gender-based crimes, whose personal interests are affected, may be permitted to express their views and

the defence.

Id.; ICC Rules of Procedure and Evidence, *supra* note 228, R. 72 (requiring the Court to be notified of any intention to elicit evidence of consent and to hear the views in camera of the prosecutor, defense, and the victim-witness, and to take into account whether that evidence has sufficient probative value, what prejudice that evidence may cause, and to take account of arts. 21(3), 67, 68, and the principles of Rule 70).

302. See ICC Rules of Procedure and Evidence, *supra* note 228, R. 71 (stating that evidence of other sexual conduct “[i]n the light of the definition and nature of the crimes within the jurisdiction of the Court, and subject to article 69, paragraph 4, a Chamber shall not admit evidence of the prior or subsequent sexual conduct of a victim or witness”); see also Goldstone, *supra* note 23, at 284 (observing that Rule 96 of the Rules of Procedure and Evidence of the ICTY and ICTR excluded admissibility of prior sexual conduct of the victim “dispensing with the implication that a woman with a sexual history is an unreliable witness”).

303. See ICC Rules of Procedure and Evidence, *supra* note 228, R. 73.

304. See *id.* R. 63(4).

305. See Goldstone, *supra* note 23, at 283 (noting that the provision that corroboration is not required for sexual violence testimony is a departure from domestic practice of many countries); see also KITICHAISAREE, *supra* note 135, at 302 (recognizing that this provision affords “the testimony of a victim of sexual assault the same presumption of reliability as the testimony of the victims of other crimes”).

306. See Steains, *supra* note 62, at 371-75 (noting that this distinction came only after significant compromise and negotiations at the Rome Conference).

concerns at appropriate stages of the proceedings.³⁰⁷ The Court may provide for reparations to victims.³⁰⁸

IV. MAINSTREAMING AND TAKING A FOCUSED APPROACH TO SEXUAL AND GENDER-BASED CRIMES FROM THE PRE-ANALYSIS PHASE ONWARD

Investigations in the Uganda case provide an example of the manner in which the OTP has sought to ensure effective investigations and prosecutions by mainstreaming and taking a focussed approach to sexual and gender-based crimes from the pre-analysis phase onward.³⁰⁹

A. Pre-Investigative Analysis

During the pre-investigative analysis phase of the Uganda case, available information was assessed regarding the key types of alleged crimes being committed in northern Uganda, including alleged sexual and gender-based crimes. The OTP has stated that it will endeavor to try a selection of cases that represent the entire criminality and modes of victimization and pay particular attention to methods of investigation of sexual and gender-based crimes, and crimes committed against children.³¹⁰

B. Knowledge of the Crimes and Best Practices to Conduct Interviews

The Gender and Children's Unit (GCU) was established to provide advice and assistance, including on sexual and gender-based crimes, to the different divisions of the OTP.³¹¹ Moreover, focal points within joint teams have been used to assist in coordinating the investigations and prosecutions of sexual and gender-based crimes. The Deputy Prosecutor herself remains the overall focal point for sexual and gender-based crimes within the OTP. Special Gender Adviser Catharine A. MacKinnon also provides special assistance to the Prosecutor on the subject.³¹²

In addition to the aforementioned actions, the OTP's approach has been to ensure that all members of joint teams have knowledge of sexual and gender-based crimes. The OTP has also sought to make all investigators knowledgeable of best practices to conduct interviews with victims of

307. Rome Statute, *supra* note 1, art. 68(3); *see* ICC Rules of Procedure and Evidence, *supra* note 228, R. 85 & R. 89.

308. *See* Rome Statute, *supra* note 1, art. 75.

309. *See, e.g.,* Prosecutor v. Kony et al., Case No. ICC-02/04-01/05, Warrant of Arrest for Joseph Kony, ¶ 7 (Sept. 27, 2005). As this case is on-going, no details can be provided regarding any information collected during that investigation beyond what is publicly available.

310. *See* THE OFFICE OF THE PROSECUTOR, REPORT ON PROSECUTORIAL STRATEGY, *supra* note 5, at 5, 7 (stating that a principle guiding Prosecutorial Strategy is that of "focused investigations and prosecutions").

311. *See* Bensouda, *supra* note 2, at 413-14 (describing the GCU's strategy of developing compliance standards, assisting victims in communication with the Registry, and supporting investigation teams).

312. Press Release, Int'l Criminal Court, *supra* note 6.

sexual and gender-based crimes (or crime-base witnesses).³¹³ Accordingly, training has been provided to all members of the teams on the ICC's legal framework with regard to sexual and gender-based crimes. In addition, the GCU coordinated training for all investigators of the Uganda team by experts outside the OTP. The trainings focused on interview methods and potential problems in dealing with sexual violence victims. Specific training was provided as well on methods for interviewing children. Training was also provided to all members of the joint team on the specific cultural context within Uganda to ensure their cultural understanding prior to investigations.

As an additional tool to mainstream the approach to sexual and gender-based crimes during investigations, the OTP, with input from GCU and external experts in gender issues, drafted guidelines and questionnaires for the team's investigators to use during the course of investigation. The guidelines and questionnaires cover the information required in all categories of sexual violence and gender-based crimes from all types of witnesses, namely: victim crime-base witnesses, insiders (i.e. former members of the LRA), and overview witnesses (including, e.g., police witnesses).

C. A Focused Approach to Selecting the Factual Context for Investigations

After undertaking pre-analysis of available data, the OTP selected the appropriate factual contexts in which to focus its investigation in an effort to adequately reflect the key potential forms of criminality (including sexual violence and gender-based crimes), different types of victims, and the link to those initially identified as potentially being the most responsible for such crimes. In addition, specific information-collection missions were conducted to collect evidence related to sexual and gender-based crimes.

D. Focused Approach to Selection of Witnesses

The OTP chose witnesses for interviews because of the information they could provide with regard to the investigation of sexual violence crimes, including insiders, overview, and crime-based witnesses.

E. Mainstreaming Sexual and Gender-Based Crimes in Witness Interviews

The draft questionnaire, described above, was devised to cover all types of witnesses, including crime-base, insiders, and overview witnesses. The purpose of raising questions on sexual and gender-based crimes with all types of witnesses was to ensure that relevant information was obtained not only on crime-base evidence, but also to find "linkage" evidence connecting witnesses to identified suspects, and to collect contextual evidence regarding the link to the armed conflict and to the widespread or

313. See Bensouda, *supra* note 2, at 414.

systematic phenomenon of sexual violence crimes in the Uganda case.

F. The Focused Approach to Preparation for Sexual and Gender-Based Crime Interviews

Moreover, a very focused approach was taken to selecting witnesses and preparing for investigative missions to try and avoid having individuals unnecessarily exposed to ICC staff, unless they had information of value or were likely to be able to be witnesses. Prior to leaving on mission and before the final selection of witnesses was made, wherever possible, investigators sought the following relevant information regarding potential interviewees':

- likely areas of evidence relevant to sexual crimes and potential linkage information on identified suspects;
- personal security situation; and
- psychological and physical health.

In addition, investigators sought to determine in advance, wherever possible, the interviewees':

- need for any prior consent to be interviewed from parents or guardians, where relevant;
- interview location needs (i.e. identifying the most suitable interview location based primarily on security and privacy-confidentiality, and where possible, providing for comfort, convenience, and familiarity);
- any special needs (e.g., childcare during the interview);
- preferences for potential support person(s); and
- preferences for the team's gender composition for interviewers and interpreters.³¹⁴

Interpreters in the relevant languages were used. Interpreters were selected based, where possible, on their prior experience in interpreting for victims of sexual or gender-based crimes. Interpreters received briefings before interviews were conducted with crime-base witnesses on methods for approaching sexual crimes interviews: including adopting non-judgmental behavior,³¹⁵ using verbatim translations where possible, and avoiding the use of euphemisms to describe the sexual acts that took place.

G. A Focused Approach to the Interview Process

1. Prior Informed Consent

Before conducting an interview, the investigator sought prior informed consent for the interview from the interviewee and from any parent or

314. See Rome Statute, *supra* note 1, art. 68(1) (requiring that the Court "take appropriate measures to protect the safety, physical, psychological well-being, dignity and privacy of victims and witnesses . . . having regard to all relevant factors including age, gender . . . and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes.").

315. See *id.*

guardian in the case of children or any other interviewees expressing a wish for prior family consent. During the introduction by the interviewers, considerable time was taken to explain the Court and potential consequences of cooperation, and to ensure informed consent and voluntariness in undertaking an interview. In particular, special approaches were used to give explanations during interviews with children and any others needing more detailed explanations.

2. *Prior Assessment*

Moreover, before an interview is conducted with a victim of sexual violence, there is an assessment of their psychological and physical well-being, as well as the security of their situation to determine if an interview is appropriate.

3. *Use of Questionnaires*

Team members used the questionnaire, which covers all potential sexual violence and gender-based crimes under the Statute, with all witnesses to elicit necessary information regarding the witnesses' experiences of sexual and gender-based crimes, and the wider context in which those crimes may have been perpetrated.

4. *Support Person(s)*

Sexual violence victim witnesses were given the option of having a support person present during the interview if they wished. In all situations in which support persons were present, they were advised of the importance of only being present to support the witness while the witness recounted his or her experiences and not to respond to questions the investigators asked.

5. *Conducting the Interview*

The interviewer of a victim witness followed specified steps in conducting the interview. At the beginning, the interviewer would seek to establish a rapport with the witness. The interviewer first elicited a free narrative from the victim before following up with open-ended and specific, non-leading questions. The interviewer also considered whether there were any inconsistencies in the witness's statement,³¹⁶ provided

316. Chinkin observed that

judges [on ad hoc tribunals] have been understanding about inconsistencies in evidence, implicitly rejecting stereotypes of women as unreliable and hysterical witnesses. They have accepted that inconsistencies can be rationally explained by the difficulties of recollecting precise details several years later, trauma, the difficulties of translation, and illiteracy. In the *Kunarac* Trial Chamber Judgment, the ICTY accepted that the very nature of the ordeal might inhibit precise details of the detention, such as the sequence of events, exact times and dates.

Chinkin, *supra* note 8, at 126. Chinkin also cites the *Furundzija* Trial Chamber Judgment in which the ICTY Trial Chamber found that post-traumatic stress disorder

sufficient breaks for the witness during the interview, and used diagrams of the body where necessary, though such use was uncommon. Additionally, certain questions were adapted to cater to certain cultural and case-specific aspects, including clarifying distances, dates, and times.

H. The Gendered-Nature of Crimes in Uganda

The information collected in Uganda indicated that some of the crimes perpetrated by the LRA were gendered in nature.

I. Investigative Challenges

The team conducting the investigation of gender-based crimes in Uganda faced a number of challenges, including security. The security of the team was an inherent problem in the context of investigation in an on-going conflict situation.³¹⁷ It was also important for the investigative team to avoid making presumptions in the course of the sexual violence interviews they conducted. For example, a number of witnesses expressed a preference for female-only investigative teams. However, some witnesses stated that they were indifferent, and one female witness initially expressed a preference for a male-only team. The lesson learned in that situation is that a victim should be provided the choice of a male or female interviewer, wherever possible, to ensure that they feel most comfortable sharing their experiences of sexual violence. Accordingly, it was important that all investigators, male and female, were trained to conduct sexual violence interviews with both male and female victims.

The questionnaire the investigative team used to conduct interviews included questions about the sexual violence experienced by male victims, including insiders, both as perpetrators and as victims. It is important to ask questions routinely about sexual and gender-based crimes from all relevant witnesses, including male insiders of military groups allegedly perpetrating the crimes, to cover any potential victims, female or male, of these crimes. For instance, a male forcibly conscripted into a military group

(PTSD) can impact memory and reliability of treatment and that “[t]here is no reason why a person with PTSD cannot be a perfectly reliable witness.” *Id.* at 126 n.83; see also *Prosecutor v. Kunarac et al.*, Case Nos. IT 96-23-I & IT 96-23/1-A, Appeals Chamber Judgment, ¶ 324 (June 12, 2002); *Prosecutor v. Kunarac et al.*, Case Nos. IT 96-23-T & IT 96-23/1-T, Trial Chamber Judgment, ¶ 679 (Feb. 22, 2001); *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Trial Chamber Judgment, ¶¶ 108-109 (Dec. 10, 1998); *Prosecutor v. Musema*, Case No. ICTR 96-13-A, Trial Chamber Judgment & Sentence, ¶¶ 100-101 (Jan. 27, 2000); KITTICHAISAREE, *supra* note 135, at 302 (noting that any inconsistency in the traumatized survivors accounts can be regarded as indicating truthfulness and absence of interference, and that the ad hoc tribunals have found no reason why a witness affected by post-traumatic stress disorder cannot be reliable); MAY & WIERDA, *supra* note 293, at 170-71, 237 (noting that, in *Prosecutor v. Bagilishema*, Case No. ICTR 95-1A-T, Trial Chamber Judgment, ¶ 24 (June 7, 2001), the Court found that differences between earlier statements and later testimony in court could be explained by many factors including “lapse of time, the language used, the questions put to the witnesses and the interpretation and transcription, and the impact of trauma on the witness” and opining that “some inconsistency is tolerable and may in fact speak to the credibility of the evidence”).

317. See Rome Statute, *supra* note 1, art. 68(1).

could himself be a victim of sexual crimes or may have crucial information regarding other victims of such crimes (female or male). In addition to the challenges interviewers face during the course of an interview, the OTP must also use necessary forethought to ensure the protection of the witness after the interview. It has been important to have ongoing follow-up contact with witnesses to ensure that their security and other needs are met.

J. Prosecutions

1. Charging

The charges in the Arrest Warrants against five of the senior members of the LRA reflected both sexual violence and gender-based crimes.³¹⁸ There were three counts of sexual violence offenses: one count of sexual enslavement constituting a crime against humanity; one count of rape constituting a crime against humanity; and one count of inducing rape as a war crime.³¹⁹ In addition to those three charges, the five senior members of the LRA were also charged with one count of the use of child soldiers, a crime which further reflects the gendered-nature of the LRA's crimes.³²⁰

2. Modes of Liability

In the Uganda case, there were LRA policies regarding sexual and gender crimes and key suspects were directly involved in committing those crimes. They were charged with liability under Article 25(3)(a) and (b) of the Rome Statute.³²¹

V. CONCLUSION

The Court has been granted an important mandate in the investigation and prosecution of sexual and gender-based crimes under international criminal law, by virtue of its progressive legal framework. The OTP has implemented this positive framework and built upon past experience to ensure the effective investigation and prosecution of sexual and gender-based crimes before the ICC.

The Uganda case has provided some useful lessons for future ICC investigations. First, it is extremely important to have assistance throughout the process from sexual and gender-based crime experts, as well as to have team- and OTP-wide focal points dealing with these crimes. At

318. Prosecutor v. Kony, Otti, Odhiambo & Ongwen, Case No. ICC-02/04-01/05, Warrant of Arrest for Joseph Kony, ¶ 5 (July 8, 2005), Warrant of Arrest for Vincent Otti, (May 6, 2005), Warrant of Arrest for Okot Odhiambo (July 8, 2005), Warrant of Arrest for Dominic Ongwen (July 8, 2005) [hereinafter *Kony et al.*, Warrants for Arrest]. The Pre-Trial Chamber II decided to discontinue proceedings against Raska Lukwiya after confirmation of his death. See *Kony*, Case No. ICC-02/04-01/05-248 (July 11, 2007).

319. *Kony et al.*, Warrants for Arrest, *supra* note 318, ¶ 5.

320. *Id.* ¶ 42.

321. *Id.*

the same time, it is crucial to mainstream across the whole of every joint team detailed knowledge of the relevant legal framework for sexual and gender-based crimes as well as the best practices for conducting interviews of sexual violence victims and child witnesses. Male and female investigators must be able to properly conduct sexual violence interviews and collect all necessary evidence.

Second, it is also important to ensure that investigators collect all of the key relevant evidence required to establish the elements of the crimes allegedly committed, and modes of liability for sexual and gender-based crimes. For this purpose, all investigators must routinely collect evidence on each of the crimes committed, and from all categories of witnesses: not just victim crime-base witnesses, but also from insiders and overview witnesses. By following these methods, the investigative team will conduct an effective investigation to establish the elements of crimes of sexual and gender-based crimes. In particular by eliciting:

- any personal experiences of the witness of sexual violence and gender-based crimes (including from any male direct perpetrator or victim);
- “linkage” evidence linking suspects to the crimes, in particular regarding any role and knowledge of those crimes; and
- evidence regarding the wider context, in particular the nexus between the sexual and gender-based crimes and the wider armed conflict, and the widespread or systematic nature of those crimes.

Third, great care should also be taken before an investigation commences to make the appropriate selections, including the correct factual incident(s) or context(s) on which to focus investigations of sexual and gender-based crimes, those most responsible for the crimes, and the appropriate witnesses to interview. Witness selection will include prior analysis of available information regarding that witness.

The ICC has built upon lessons learnt and has moved onwards. The dual focused and mainstreamed approach has been adopted in all ICC investigations. As a result, important charges regarding sexual and gender-based crimes have been brought, including charges in the Darfur case of rape as a form of genocide;³²² charges in the Central African Republic case of rape as a crime against humanity and as a war crime, rape constituting torture as both a crime against humanity and war crime, and rape as the war crime of outrages upon personal dignity;³²³ and charges in the second Democratic Republic of Congo of sexual slavery and rape as both crimes against humanity and war crimes.³²⁴

322. See *Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09 (Mar. 4, 2009); *Prosecutor v. Harun & Abd-al-Rahman*, Case No. ICC-02/05-01/07, Warrant of Arrest for Ahmad Harun and Abd-al-Rahman, at 3 (May 2, 2007).

323. See *Prosecutor v. Bemba Gombo*, Case No. ICC-01/05-01/08, Warrant of Arrest for Jean-Pierre Bemba Gombo Replacing the Warrant of Arrest Issued on 23 May 2008, ¶ 2 (June 10, 2008).

324. *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, Warrant of Arrest for

Nevertheless, history will be the ultimate judge as to whether the Court effectively investigates and prosecutes sexual and gender-based crimes. Cherif Bassiouni provides a sober reminder regarding investigation and prosecution of any international crime, equally pertinent to sexual and gender-based crimes: “if we cannot learn from the lessons of the past and stop the practice of impunity, we are condemned to repeat the same mistakes and to suffer their consequences.”³²⁵

Germain Katanga, at 6 (July 2, 2007); Prosecutor v. Ngudjolo, Case No. ICC-01/04-01/07, Warrant of Arrest for Mathieu Ngudjolo Chui, at 6 (July 6, 2007).

325. See Bassiouni, *supra* note 10, at 29.