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Domestic Adjudication of Sexual and Gender-based Violence in Armed Conflict: Considerations for Prosecutors and Judges

Evelyn W. Kamau*

Appeals Counsel, Office of the Prosecutor, ICTR, Arusha, Tanzania

Abstract

The increased domestication of international core crimes like genocide, crimes against humanity and war crimes has placed national prosecutors and judges on unfamiliar ground. Specifically, though very welcome, the recognition of acts of sexual and gender-based violence (SGBV) as constituting core international crimes poses a further challenge. The circumstances surrounding the commission of SGBV as international core crimes, coupled with their unique elements and manner of proof, makes their domestic prosecution seem that much more difficult. An understanding of how acts of SGBV constitute international core crimes, their constituent elements and the manner of proving them, coupled with how to treat victims and witnesses of SGBV, goes a long way in easing the perceived challenge of domestically prosecuting them. This article is geared towards achieving that and is directed at people who are involved in or are considering carrying out domestic prosecutions and adjudications of SGBV as international core crimes.

Keywords

sexual and gender-based violence (SGBV); genocide; crimes against humanity; war crimes; prosecution; domestication; victims; witnesses

1. Introduction

With the increasing domestication of international core crimes such as genocide, crimes against humanity and war crimes,¹ national prosecutors and judges are finding themselves on unfamiliar ground. This is more so when acts of sexual and gender-based violence (SGBV), which were usually perceived as crimes of a “personal nature” (almost in the same light as domestic violence cases), are recognized as constituting acts of core international crimes. With these international crimes, factors like the number of victims and perpetrators, the usually organized nature of the perpetrators, the manner in which the crimes are committed, the

*) Evelyn Kamau is also one of the founding members of the Committee for the Review of the Investigation and Prosecution of Sexual Violence, set up within the Office of the Prosecutor in June 2007. E-mail: kamaue@un.org

¹⁾ See e.g. Uganda's International Criminal Court Bill, 2010; Kenya's International Crimes Act, 2008; South Africa's Implementation of the Rome Statute of the International Criminal Court Act, 2002.

circumstances surrounding their commission, the sheer scale of the crimes, coupled with the unique elements of some of those crimes, are factors drastically different from those considered at the national level. This makes the domestic prosecution of international core crimes seem that much more difficult. An understanding therefore, of what the international core crimes are, their constituent elements, the manner of proving them, coupled with how to treat victims and witnesses, goes a long way in easing the perceived challenge of domestically prosecuting such crimes. This article is geared towards achieving that and is directed at people who are involved in or are considering carrying out domestic prosecutions and adjudications of these international core crimes.

The article starts by discussing the definitions of SGBV since an understanding of what it is differs according to country, community and legal context, the forms of violence envisioned within it and its treatment in national jurisdictions during times of peace. It then looks at the causes and forms of SGBV within the context of armed conflict. In looking at the causes of SGBV in both peace time and armed conflict, the article helps to provide further support for the argument that the existence and notoriety of SGBV during peace time provides an impetus and launching pad for its occurrence during armed conflict. This emphasizes the need to pursue prosecutions of SGBV, be they as national or international crimes, at the domestic level so as to stem their occurrence. In addressing the need for accountability of such crimes when committed during armed conflict, the article will focus on the international legal framework governing such crimes, including discussing SGBV as acts of genocide, crimes against humanity and war crimes.

Lastly and of paramount importance are the victims and witnesses of SGBV. Since the commission of SGBV during armed conflict is quite different occasioning aggravated harm and trauma, there is a need to have an understanding of what the victims and witnesses suffer and therefore how to handle them. How they are handled during international prosecutions of SGBV, for instance before international criminal tribunals, would be applicable to how they could be handled in national jurisdictions where the international core crimes have been domesticated. This article will therefore conclude by discussing the treatment of victims and witnesses of SGBV during international prosecutions, giving recommendations on how best to handle them including how to create a gender-sensitive, victim-friendly courtroom, to avoid further re-traumatization.

1.1. *Definitions*

The terms 'sexual violence' and 'gender-based violence' are in many cases used interchangeably. There is no single or universal definition of gender-based or sexual violence, and understandings of what they are differ according to country, community and legal context.² In discussing these concepts, it is therefore impor-

² Population Council, *Sexual and Gender Based Violence in Africa: Literature Review*, February 2008, p. 4.

tant to have an understanding of the different definitions used and to see what types of violence are encompassed in those definitions.

‘Gender-based violence’ is used to distinguish violence that targets individuals or groups of individuals on the basis of their sex, gender or gender roles, from other forms of violence.³ In its simplest form, gender-based violence can be defined as any form of violence, including sexual violence, which targets a person or groups of persons on the basis of their sex, gender or gender roles in society and which is caused by power/gender imbalances, or inequities between males and females.⁴ It can be directed at adult men and women, and male and female children. Gender-based violence has also been defined as any harm that is perpetrated against a person’s will that is the result of power imbalances that exploit the distinction between males and females, and amongst males, and amongst females.⁵ It is the result of unequal power relations⁶ between men and women, and its occurrence further re-enforces those inequities.⁷ It has a negative impact on the physical or psychological health, dignity, security, and identity of the person.⁸

Gender-based violence takes on many forms and can generally be divided into five categories.⁹ The first category is that of physical violence, which includes domestic violence; physical assaults; trafficking of men and women, girls and boys; slavery; forced abortions; and torture. Sexual violence is the second category

³ UNHCR, *Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons*, Geneva, 2003, p. 11 (“UNHCR Report”).

⁴ The term ‘sex’ refers to those characteristics that are *biologically determined*, whereas ‘gender’ refers to those characteristics of men and women that are *socially determined*. [On gender, see UN Entity for Gender Equity and the Empowerment of Women, Gender Mainstreaming, *Concepts and Definitions*, <http://www.un.org/womenwatch/osagi/conceptsanddefinitions.htm> [last visited 17 January 2011]; on ‘gender’ v/s ‘sex’, see International Council of Voluntary Agencies (ICVA), *Reach Out Refugee Protection Training Kit, (Optional Module – Gender-Based Violence)*, pp. 11–12; http://www.icva.ch/ro_23_gbvmodule.doc, [last visited 23 July 2010] (“ICVA Report”).]. The socially determined characteristics (“gender”) include culturally accepted attitudes and behaviors dealing with roles, status, responsibilities, advantages and disadvantages assigned to men and women in society. Gender roles are learned through socialization and vary from culture to culture and over time.

⁵ Save The Children, *Gender-Based Violence: Care & Protection of Children in Emergencies*; http://www.savethechildren.org/publications/technical-resources/emergencies-protection/Gender_Based_Violence_Final.pdf [Last visited 23 July, 2010] (“Save the Children Report”), quoting Jeanne Ward (2002), *If not Now, When? Addressing Gender-Based Violence in Refugee, Internally Displaced and Post-Conflict Settings*. See also UNFPA State of World Population 2005 Report, *The Promise of Equality: Gender Equity, Reproductive Health and the Millennium Development Goals*, p. 65, http://www.unfpa.org/webdav/site/global/shared/documents/publications/2005/swp05_eng.pdf [last visited 21 July 2010] (“UNFPA Report”).

⁶ These unequal power relations can be physical (might/strength); financial; material means; education; and ranks, among others. Women rarely have the same economic resources, political rights, authority or control over their environment and needs as men. See Amnesty International, *Lives Blown Apart: Crimes against Women in Times of Conflict*, Stop Violence against Women, 2004, p. 14, <http://www.amnesty.org/en/library/asset/ACT77/075/2004/en/944d7605-d57f-11dd-bb24-1fb85fe8fa05/act770752004en.pdf>, [last visited 20 July 2010] (“Amnesty Report 2004”).

⁷ *Supra*, note 4.

⁸ *Ibid*; Save the Children, *supra* note 5 and Ward, *supra* note 5.

⁹ See e.g. UNFPA, *Reproductive Health in Refugee Situations: An Inter-Agency Field Manual*, ch. 4, <http://www.unfpa.org/emergencies/manual>; [last visited 23 July 2010] (“UNFPA Field Manual”).

and it encompasses acts of rape; molestation; incest; sexual assault and harassment; defilement; sexual exploitation; sexual threats; forced prostitution; forced marriage; insertion of objects into genital openings; enforced sterilization, forced pregnancies; sexual exploitation; and intentional HIV transmission. Some examples of emotional and psychological violence include humiliation and verbal abuse. The fourth category is that of socio-economic violence, which includes acts of exploitation or discrimination based on gender. Harmful traditional practices form the fifth category and include acts of female genital mutilation/cutting; early marriage; and bride inheritance. The above categories overlap, sometimes significantly. For instance, many forms of physical violence go hand in hand with sexual violence. Forced prostitution is not only a heinous form of sexual violence; it is also a type of socio-economic exploitation.

The term sexual violence, on the other hand, is used to define any act of a sexual nature, including rape, committed on a person under circumstances which are coercive.¹⁰ Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact, such as forced nudity.¹¹ It denotes ‘sexual exploitation and sexual abuse’, and also refers to “any act, attempt or threat of a sexual nature that results, or is likely to result in, physical, psychological and emotional [harm]”.¹² Since sexual violence is violence of a sexual nature that is directed at an individual or groups of individuals on the basis of their sex or gender, it can therefore be viewed as a form of gender-based violence. For purposes of this article, ‘gender-based violence’ will be used to include forms of sexual violence.

1.2. *Criminalization of Gender-Based Violence at National Levels*

It is important to note that the forms of gender-based violence described above prevalently take place within the local setting, i.e. within national jurisdictions. Most countries have passed laws prohibiting certain forms of sexual violence,¹³ and some have passed laws that target the wider category of gender-based violence.¹⁴ The elements and proof of these crimes under domestic laws might, however, understandably differ from country to country. For instance, the age of maturity in countries differs such that what constitutes early marriage would differ from country to country depending on the recognized age. As well, in many developing countries the laws prohibiting child trafficking may not be broad

¹⁰ *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T, *Judgement*, 2 September 1998, para. 688 (“*Akayesu Trial Judgement*, *supra* note 10,”).

¹¹ *Ibid.*

¹² *Our Bodies – Their Battleground: Gender-based Violence in Conflict Zones*, IRIN Web Special on Violence against Women and Girls During and After Conflict; September 2004, p. 3 (“IRIN Report”).

¹³ For instance the crime of rape is widely prohibited in many countries.

¹⁴ See e.g. The Sexual Offences Act (2006), Kenya.

enough to offer protection to underage girls from the rural areas who are “taken” by their relatives to work in the city as domestic workers. Those girls are usually under-age, their salaries are sent back to their parents in the rural area, and they are more often than not, not permitted to pursue education.¹⁵

2. Gender-based Violence in Armed Conflict

There are many reasons why gender-based violence occurs in armed conflict and they vary as widely as the actors involved and their different motivations for engaging in the conflict. These motivations range from the actors using gender-based violence as an organized weapon of war, to the actors viewing it as a random spoil of war. Regardless of the motive, in every country there is an *existing pattern of discrimination and violence* – particularly against women – which gives gender-based violence an environment in which to thrive during armed conflict. This observation has been well summarized by Amnesty International:

Evidence gathered... in recent years supports the view that conflict reinforces and exacerbates *existing patterns* of discrimination and violence against women. The violence women suffer in conflict is an *extreme manifestation* of the discrimination and abuse women face in peacetime, and the unequal power relations between men and women in most societies. In peacetime, such attitudes contribute to the widespread acceptance of domestic violence, rape and other forms of sexual abuse against women. When political tensions and increasing militarization spill over into outright conflict, these habitual attitudes and abuses take on new dimensions and distinct patterns, and all forms of violence increase, including rape and other forms of sexual violence against women.¹⁶

This existence of a discrimination continuum is, essentially, the impetus for gender-based violence in armed conflict. There are, however, other reasons.

The conditions brought about by war further exacerbate the tendencies towards gender-based violence. During times of conflict, normal social restraints erode; there is a breakdown of social and moral systems. For instance, acts that would normally be viewed as culturally taboo, e.g. the rape or sexual assault of elderly women or babies (some even as young as six months), occur and become utilized as weapons of war. In the Special Court for Sierra Leone’s Revolutionary United Front case, judges noted that the RUF intentionally used taboo forms of violence to terrorize the civilian population to assert RUF control.¹⁷

In many instances, gender-based violence has empirically been shown not to be an incidental by-product of conflict, but a frequently used ‘weapon of war’.¹⁸ The

¹⁵ See e.g. U.S. State Department Trafficking in Persons Report, June 2009.

¹⁶ Amnesty Report 2004, *supra* note 6, p. 5 (emphasis added).

¹⁷ *Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, Case No. SCSL-04-15-T, Judgement, 2 March 2009, See e.g. paras. 709–710.

¹⁸ Judge Wolfgang Schomburg and Ines Peterson, *Genuine Consent to Sexual Violence Under International Law*, January 2007 Edition, American Journal of International Law, Vol. 101:1, p. 121.

Security Council noted that, “women and girls are particularly targeted by the use of sexual violence, including as a tactic of war to humiliate, dominate, instil fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group”.¹⁹ Systemic rape is particularly notorious. It has been used as a weapon of war to destabilize populations, destroy family bonds, and to humiliate and demoralize families and communities.²⁰ In many cases men are even forced to watch the rape of their wives or daughters:

Women and girls are singled out because the harm and humiliation inflicted not only hurts them, but also deeply harms and affects the men in the targeted community... Such sexual violation of women erodes the fabric of a community in a way that few weapons can.²¹

Gender-based violence has also increasingly become prevalent in armed conflict due to the evolving nature of conflicts. Historically, conflicts were fought at the “front line” away from the civilians. Today most conflicts have moved to the villages, in educational and religious institutions, market places and other social venues, thereby exposing civilians – particularly non-combatant women and children – to violence. In Rwanda, women were raped in every *préfecture* throughout the Genocide, most often in the open in plain view including at roadblocks, in official and governmental buildings such as military camps, churches, schools and university premises, hospitals, health clinics, stadiums, and marketplaces.²² Additionally, like in northern Uganda where there has been armed conflict between the Lord’s Resistance Army (LRA) rebels and Government forces, some parties to the conflict have deliberately turned to civilians as a source of “manpower” – as soldiers, forced wives, slaves, or as spoils of war.²³

Civilians, particularly women, may also be targeted in retaliation for their perceived support of the opposing side. This was evidenced in the organized campaigns of mass rape in the former Yugoslavia where sexual assault was committed “in order to punish a group of civilians for perceived sympathies with armed insurgents”.²⁴ In Peru during the 1980s and 1990s, security agents targeted for sexual abuse women whom they suspected of supporting the opposition armed group.²⁵

Some studies suggest that the widely held gender-biased concept of “honour” may be responsible, in part, for much of the world’s conflict-related violence

¹⁹ UN Doc. S/RES/1820 (2008), 19 June 2008, p. 1.

²⁰ See generally, IRIN Report, *supra* note 12.

²¹ *Ibid.*

²² Linda Bianchi, *The Prosecution of Rape and Sexual Violence: Lessons from Prosecutions at the ICTR*, p. 3 (awaiting publication).

²³ See Warrant of Arrest for Joseph Kony issued on 8th July 2005 as amended on 27th September 2005, ICC-02/04-01/05-53.

²⁴ IRIN Report, *supra* note 12, p. 14.

²⁵ Amnesty Report 2004, *supra* note 6, ch. 3.

against women.²⁶ As a recent report points out, the gender-specific notion of honour – women as the holders of family honour and men as the holders of community honour – creates both the need for men to protect their “wives and daughters,” and also provides the impetus for fighters to violate the enemy’s “wives and daughters.”²⁷ Thus women become the “spoils” of war as well as the reason to fight – if the women are attacked, the assailants will have succeeded in attacking the group the women belong to. In Rwanda, sexually subjugating and mutilating Tutsi women was seen as both a way to punish the women and also to attack the ethnic group; it was a means of dehumanizing and subjugating ALL Tutsi.²⁸ As was stated in the *Akayesu* Trial Judgement, the

[S]exualized representation of ethnic identity graphically illustrates that Tutsi women were subjected to sexual violence because they were Tutsi. Sexual violence was a step in the process of destruction of the Tutsi group – destruction of the spirit, of the will to live, and of life itself.²⁹

In conflicts where ethnicity is a key factor, gender-based violence may also be used to perpetuate hatred against a particular ethnic group. This was the case in Rwanda where the Hutus raped, tortured and killed Tutsis during the 1994 Genocide. The hate propaganda prior to and during the Genocide demonized Tutsi women’s sexuality and made the sexual attacks that were subsequently carried out against the Tutsi women a foreseeable consequence.³⁰ The Trial Chamber, in what is known as the *Media* case, noted that:

Tutsi women, in particular, were targeted for persecution. The portrayal of the Tutsi woman as a *femme fatale*, and the message that Tutsi women were seductive agents of the enemy was conveyed repeatedly by RTLM and Kangura. The Ten Commandments, broadcast on RTLM and published in Kangura, vilified and endangered Tutsi women, as evidenced by Witness AHI’s testimony that a Tutsi woman was killed by CDR members who spared her husband’s life and told him “do not worry, we are going to find another wife, a Hutu for you”. By defining the Tutsi woman as an enemy in this way, RTLM and *Kangura* articulated a framework that made the sexual attack of Tutsi women a foreseeable consequence of the role attributed to them.³¹

Some forms of sexual violence in armed conflict are also used as a deliberate effort to destroy a people and their culture.³² For a long time in Darfur there have

²⁶ Save The Children Report, *supra* note 5, p. 6.

²⁷ *Ibid.*

²⁸ *Sexual Violence Crimes During the Rwandan Genocide*, Expert Report of Binaifer Nowrojee, Human Rights Watch, June 2004, paras. 36–47 (“Binaifer Expert Report”). See also Alex Obote-Odora, *Rape and Sexual Violence in International Law: ICTR Contribution*, NEW ENG. J. INT’L & COMP. L. 131, Vol. 12:1, pp. 131–132 (“Obote-Odora”).

²⁹ *Akayesu* Trial Judgement, *supra* note 10, para. 732.

³⁰ Binaifer Nowrojee, *A Lost Opportunity for Justice: Why Did the ICTR not Prosecute Gender Propaganda?*

³¹ *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, Case No. ICTR-99-52-T, Judgement and Sentence, 3 December 2003, para. 1079 (“*Media* Trial Judgement”).

³² IRIN Report, *supra* note 12.

been unabated and widespread sexual attacks despite the presence of international observers and thousands of aid workers. In some of those attacks, Arab militias forced female genital mutilation upon their non-Arab victims.³³ In Kenya, during post-election violence there were reports of forced circumcision on men from communities that did not practice it.³⁴ In the build up to the election, there had been ethnic propaganda which sought to influence people to “oppose” being led by a “boy” – the commonly used phrase in certain communities for an uncircumcised man – such that during the violence men from that ethnic group suffered forced circumcision. In Bosnia, Muslim women were systematically raped as part of the ‘ethnic cleansing’ campaign by Serb forces.³⁵ Over 20,000 women are thought to have been raped during the war in order to humiliate and intimidate Bosnian Muslims, where they were forcibly impregnated with half-Serbian children in order to dilute the Bosniak identity in the former Yugoslav Republics.³⁶ In Bosnia, sons and fathers were forced to commit sexual atrocities against each other.³⁷

The context within which armed forces operate also fosters attitudes conducive to violence against women.³⁸ In situations of military occupation or peacekeeping, for example, male soldiers are removed from their communities, homes, families and partners, and are at the same time often surrounded by a civilian population mostly made up of women and girls, which is either seen as the enemy or as inferior. The extra resources often at the disposal of the occupying army or the peacekeepers and the destitution of many women in conflict or post-conflict settings can easily facilitate sexual violence or exploitation of the women. A good example is the accusations of sexual abuse levelled against some of the UN peacekeeping troops in the DRC.³⁹

Just as there are varied reasons why gender-based violence occurs in armed conflict, there are also different forms of gender-based violence that occur in it. The most common forms include: rape (including mass and systematic rape), forced pregnancy, sexual slavery, enforced prostitution, enforced sterilization, sexual mutilation, forced abortions, trafficking in women, girls and boys, and intentional HIV transmission. It is interesting to note that despite the region of the conflict, the era and the different actors, there seems to be a similarity in the

³³) *Ibid.*

³⁴) See generally, OHCHR, *Report from the OHCHR Fact-Finding Mission to Kenya, 6–28 February 2008*, pg. 13.

³⁵) IRIN Report, *supra* note 12.

³⁶) *Ibid.*

³⁷) *Ibid.*

³⁸) Amnesty Report 2004, *supra* note 6, p. 18.

³⁹) See The Secretary-General, Report of the Secretary-General on the Activities of the Office of Internal Oversight Services: Investigation by the Office of the Internal Oversight Services into Allegations of Sexual Exploitation and Abuse in the United Nations Organization Mission in the Democratic Republic of the Congo, U.N. Doc. A/59/661 (5 Jan. 2005).

most prevalent forms. During the Second World War, mass rapes, sexualized torture, forced abortions, forced sterilization, and sexual slavery were prevalent.⁴⁰ In the context of Rwanda, the forms of gender-based and sexual violence were varied and included individual rapes; gang-rapes; rape with sticks, guns, or other objects; sexual enslavement; forced marriage; forced labour; forced nudity and sexual mutilation.⁴¹ In the former Yugoslavia, gender-based violence took the form of rapes, repeated rapes and gang rapes, sexual torture, sexual slavery, forced impregnation, forced abortion, forced marriage, sexual mutilation, molestation, sexual humiliation, and forced nudity.⁴² The occurrence of gender-based violence is therefore endemic regardless of the region, conflict or parties and there is a serious need to stem its occurrence. One way of achieving this is to hold the perpetrators accountable.

3. The International Legal Frameworks for Gender-based Violence Cases

3.1. Introduction

Acts of gender-based violence violate a number of principles enshrined in international and regional human rights instruments, including the right to life, equality, security of the person, equal protection under the law, and freedom from torture and other cruel, inhuman, or degrading treatment.⁴³ Additionally, the manner in which some of these acts of gender-based violence are carried out in armed conflict, have caused them to be recognized as serious crimes under international criminal law. In other words, they rise above the level where they are national crimes, and attain the seriousness and fulfil the elements of the international core crimes of genocide, crimes against humanity and war crimes.⁴⁴ For the purposes of this article, therefore, discussions will focus on the forms of gender-based violence that constitute acts of genocide, crimes against humanity and war crimes.

⁴⁰ Kelly D. Askin, *A Decade of the Development of Gender Crimes in International Courts and Tribunals – 1993 to 2003*, Human Rights Brief, Vol. 11, issue 3 (American University, Washington College Law) Spring 2004, pp. 16–19 (“Kelly Askins: Gender Crimes”).

⁴¹ See e.g. *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T, *Judgement*, 2 September 1998; *The Prosecutor v. Mikaeli Muhimana*, Case No. ICTR-95-1; Human Rights Watch, *Struggling to Survive: Barriers to Justice for Rape Victims in Rwanda*, September 2004, p. 7 (“HRW Report of September 2004”), citing Human Rights Watch, *Shattered Lives, Sexual Violence During the Rwandan Genocide and its Aftermath*, September 1996 (“HRW Report: Shattered Lives”).

⁴² See e.g. *The Prosecutor v. Kunarac et al.*, IT-96-23/1A; Askins, *supra* note 40.

⁴³ See e.g. The International Covenant on Civil and Political Rights; ICVA Report, *supra* note 4, p. 2.

⁴⁴ Rome Statute, Articles 6, 7 and 8 respectively.

3.2. *The International Legal Framework*

The importance of ending impunity for acts of sexual violence has been stressed by the United Nations to be part of a comprehensive approach towards seeking sustainable peace, justice, truth and national reconciliation. The Security Council emphasized in Resolution 1820 that, “rape and other forms of sexual violence can constitute a war crime, crime against humanity, or a constitutive act with respect to genocide” and stressed the need “for the exclusion of sexual violence crimes from amnesty provisions in the context of conflict resolution processes”.⁴⁵ The Security Council also required all Member States to comply with their obligations for prosecuting persons responsible for such acts so as to ensure that all victims of sexual violence, particularly women and girls, had equal protection under the law and equal access to justice.⁴⁶

At the international level, the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) have played a key role in ensuring that perpetrators of gender-based violence are brought to justice. Prior to the passing of Resolution 1820, the work of the Tribunals had already enabled the recognition that sexual violence can constitute a war crime, a crime against humanity or a constituent act of genocide in international law. Through the extensive and groundbreaking jurisprudence coming out of the ad hoc Tribunals, the Judges have been able to provide judicial interpretation on the elements of the crimes and to make findings on what acts of gender-based violence constitute those crimes.⁴⁷ The jurisprudence of these Tribunals therefore provide good precedence for national systems involved in prosecuting acts of gender-based violence as international crimes.⁴⁸ The Statute of the International Criminal Court (ICC) has also enabled many forms of gender-based violence to be expressly legislated as constituting international crimes.⁴⁹

For purposes of this article, the discussion will focus on the international legal framework of the Statutes of the ICC and those of the ad hoc Tribunals, and also on jurisprudence arising from the ICTR and ICTY. The discussion will not involve a discussion of the elements of the main crimes,⁵⁰ but will rather use those elements to illustrate how one form of gender-based violence can constitute

⁴⁵ UN Doc. S/RES/1820 (2008), 19 June 2008, p. 3.

⁴⁶ *Ibid.*

⁴⁷ See e.g. ICTR case of *Akayesu* where rape was found to constitute an act of genocide, discussed further below under section dealing with “Acts of Gender-Based Violence as Genocide”; ICTY case of *Kunarac* where the Appeals Chamber held that acts of sexual violence could be prosecuted as Torture which was a Crime against Humanity (discussed further below under section dealing with “Acts of Gender-Based Violence as Crimes against Humanity”).

⁴⁸ Though non-binding, they can be highly authoritative.

⁴⁹ Rome Statute, Articles 7(1)(g) and (h) for Crimes against Humanity, and Article 8(2)(b)(xxii), 8(2)(e)(vi) for War Crimes.

⁵⁰ That is, the elements of genocide, crimes against humanity and war crimes. The ICC’s Elements of Crimes Document provides a clear breakdown of the elements.

several crimes at the same time as long as the constitute elements of the crimes (i.e. of genocide, crimes against humanity and war crimes) are met.⁵¹

3.3. *Acts of Gender-based Violence as Genocide*

The statutes of the ICC, ICTR and the ICTY define genocide as follows:⁵²

'Genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Though a plain reading of the definition demonstrates that all three statutes do not expressly criminalize acts of gender-based violence as constituting acts of genocide, the Rome Statute through the Elements of Crimes document, and the International Criminal Tribunals through judicial interpretation have been able to recognize several forms of gender-based violence as constituting acts of genocide.

In one of the most significant applications of international criminal law to crimes of sexual violence, the ICTR judges in the *Akayesu* case found that rape and sexual violence can constitute genocide, in much the same way as any other act.⁵³ The only caveat, similar to other acts, is that such rapes and other sexual violence must be committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such.⁵⁴ The Trial Chamber in the *Akayesu* case recognized that rape and other sexual violence can cause the infliction of serious bodily and mental harm to the victims, one of the prohibited acts, thus

⁵¹ It is important to bear in mind that one form of gender-based violence – such as rape – can constitute more than one international crime. The determining factor is the *manner* in which the form of gender-based violence e.g. the rape is committed. Does the manner in which it was committed allow it to meet the elements of more than one crime category? Was the rape part of a widespread or systematic attack? In carrying out the rape, was the intention of the perpetrator to destroy in whole or in part the wider protected group the victim belonged to? An understanding of the elements of genocide, crimes against humanity and war crimes, is therefore important in enabling one to understand how to prosecute acts of gender-based violence as international crimes as opposed to as national crimes.

⁵² Article 6, ICC Statute; Article 2, ICTR Statute; and Article 4, ICTY Statute. This definition is essentially a copy of Article II of the Convention on the Prevention and Punishment of the Crime of Genocide (1948). The Statutes of the ICTR and ICTY also set out that, in addition to the acts of genocide being punishable, conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; and complicity in genocide; are also punishable.

⁵³ Bianchi, *Prosecution of Rape*, *supra* note 22, p. 13.

⁵⁴ *Akayesu* Trial Judgement, *supra* note 10, para. 731.

constituting genocide.⁵⁵ The significance of this groundbreaking Judgement is that, while rape is not included as a prohibited act in the Genocide Convention of 1948 nor is gender included as a protected group, the Trial Chamber found that the rapes and other sexual violence were committed against Tutsi women, resulting in their physical and psychological destruction, and that of their families and communities. It stated that sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.⁵⁶

The ICC, on the other hand, has expressly recognized in the Elements of Crimes that acts of torture, rape, sexual violence or inhuman or degrading treatment could constitute the genocidal act of “causing serious bodily or mental harm to members of the group”.⁵⁷ This is a groundbreaking step and sets the stage for national jurisdictions, when legislating on international core crimes, to incorporate acts of gender-based violence.

In determining whether an act of gender-based violence can constitute an act of genocide, one must first establish the constituent acts of the gender-based violence crime itself. For instance, if the act of gender-based violence is rape, one must establish the elements of rape, and thereafter establish that the rape fulfils the elements of genocide. It is therefore important to understand the elements of the crime of genocide. International jurisprudence, particularly that coming from the ICTR and ICTY as seen above, provide a major resource of how the elements of the crimes have been interpreted and applied in practice.

Table 1 provides a practical illustration of the different things that need to be proved in determining whether an act of gender-based violence amounts to genocide.⁵⁸

3.4. *Acts of Gender-based Violence as Crimes against Humanity*

The ICTR, ICTY and ICC statutes recognize various acts of gender-based violence as constituting crimes against humanity. The ICTR and ICTY statutes expressly recognize rape;⁵⁹ while the ICC Statute goes a step further and expressly recognizes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization,

⁵⁵) *Ibid.*

⁵⁶) *Ibid.*

⁵⁷) Elements of Crimes, Article 6(b)(1) fn. 3.

⁵⁸) *Practical Tools for Investigating Crimes of Sexual Violence*, IICI Course, Max Marcus, May 2008 (with some modifications for purposes of this article).

⁵⁹) Article 3, ICTR Statute; Article 5, ICTY Statute. In both statutes the following crimes are listed as crimes against humanity: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial and religious grounds; other inhumane acts.

Table 1. Rape as an Act of Genocide

<u>Specific Elements of Rape</u> 1. the perpetrator invaded the body of a person by 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, AND 2. the invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.⁶⁰
AND <u>Common Elements of Genocide</u> 1. rape amounts to one of the constituent acts⁶¹ of genocide 2. crime (rape) committed with specific intent to destroy in whole or in part 3. rape victim belonged to a national, ethnic, racial or religious group
AND <u>Elements of Individual Criminal Responsibility – Linkage Elements</u> <u>Direct responsibility</u> The accused committed, ordered, solicited or induced, aided and abetted or otherwise assisted in the commission (or attempt) of the crime or Contributed to a group with a common purpose to commit (or attempt) the crime OR <u>Command responsibility</u> 1. the accused had effective control over the direct perpetrators 2. the accused knew or had reason to know that the direct perpetrators were committing crimes AND 3. the accused failed to either prevent or punish the commission of these crimes

⁶⁰ This definition is taken from the ICC Elements of Crimes document, Article 7(1)(g)(1) and (2) which discusses the *actus reus* of rape. As will be discussed further below in the section dealing with “Elements of the Crime of Rape”, the ICTY and ICTR have adopted different elements of the crime of rape which have developed through jurisprudence.

⁶¹ “(a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.”

or any other form of sexual violence of comparable gravity.⁶² The ICC Statute also recognizes gender-based persecution as a crime against humanity.⁶³

One might notice that the definitions of crimes against humanity seem to differ in the ICTR, ICTY and the ICC statutes. The ICTR requires the crimes to have been “committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds”; the ICTY for the crimes to have been “committed in armed conflict, whether international or internal in character, and directed against any civilian population”; and the ICC for the crimes to have been “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”. This was influenced by the purpose of each institution. The ICTR and ICTY were addressing the specific situations that existed in Rwanda and the former Yugoslavia, respectively, and as such were tailored to them. The ICC which is the permanent court and which would address all sorts of different situations understandably takes on a broader definition.

At the ICTR, though the Statute only specifically defines rape as a crime against humanity, other forms of sexual violence have been charged as crimes against humanity under the provisions criminalizing torture (Article 3 (f)), persecutions on political, racial and religious grounds (Article 3 (h)), and other inhumane acts (Article 3 (i)). The Office of the Prosecutor (OTP) has been successful in prosecuting and in holding accused criminally culpable for acts of rape as crimes against humanity in the following cases: *Akayesu*,⁶⁴ *Semanza*,⁶⁵ *Gacumbitsi*,⁶⁶ *Muhimana*,⁶⁷ *Bagosora*,⁶⁸ and *Renzaho*.⁶⁹ The ICTY Appeals Chamber in the *Kunarac* case held that sexual violence can be prosecuted as an act of torture, constituting a crime against humanity.⁷⁰ They stated that sexual violence necessarily

⁶² Rome Statute, Article 7. The following crimes are listed as crimes against humanity: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; Persecution 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; Enforced disappearance of persons; The crime of apartheid; Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

⁶³ Rome Statute, Article 7(1)(h).

⁶⁴ *Akayesu Trial Judgement*, *supra* note 10, paras. 691 to 695.

⁶⁵ *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgement and Sentence, 15 May 2003 paras. 476 to 479 and paras. 481 to 484 where a conviction for torture was entered for the instigation of rapes (“*Semanza Trial Judgement*”).

⁶⁶ *Gacumbitsi Trial Judgement*, paras. 321 to 332.

⁶⁷ *Muhimana Trial Judgement*, para. 562.

⁶⁸ *The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabkuzze and Anatole Nsengiyumva*, Case No. ICTR-98-41-T, Judgement and Sentence, 18 December 2008, para. 2203 (“*Bagosora et al. Trial Judgement*”).

⁶⁹ *Renzaho Trial Judgement*, paras. 793 and 794.

⁷⁰ *The Prosecutor v. Kunarac et al.*, IT-96-23/1A, Appeals Judgment, 12 June 2002, para. 150.

gives rise to severe pain or suffering, whether physical or mental, adding that it was not necessary to provide visual evidence of suffering by the victim, as this could be assumed.⁷¹ The Tribunals have also interpreted the crime of ‘other inhumane acts’ to also include some acts of gender-based violence. In the ICTY case of *Kupreskic*, the Trial Chamber held that enforced prostitution also amounted to inhumane acts, even though it was not listed as a crime against humanity.⁷² In the ICTR case of *Akayesu* ‘other inhumane acts’ were found to encompass such behaviour as forced nakedness of Tutsi women.⁷³

A key element of crimes against humanity relates to knowledge. For the perpetrator of gender-based violence to be found liable for crimes against humanity, he must be found to have knowledge that the act of gender-based violence was part of a widespread or systematic attack on a civilian population.⁷⁴ He need not have “knowledge of all [the] characteristics of the attack or the precise details of the plan or policy of the State or organization” but he must be aware that his action formed part of it.⁷⁵

Like for genocide, in establishing that an act of gender-based violence amounts to crimes against humanity, one must establish the individual elements of the crime itself, as well as the common elements of the international core crime. Table 2 further illustrates this.⁷⁶

3.5. *Acts of Gender-based Violence as War Crimes*

The Statute of the ICC has marked a turning point with regard to the criminalization of acts of gender-based violence as war crimes. It explicitly recognizes that rape, sexual slavery, enforced prostitution, forced pregnancy, or any other form of sexual violence committed in either an international or non-international armed conflict would amount to a war crime.⁷⁷ The ICTR Statute explicitly recognizes that acts of rape, enforced prostitution and any form of indecent assault would amount to outrages upon personal dignity amounting to war crimes.⁷⁸ The OTP has succeeded in prosecuting and in holding accused criminally culpable for different acts of sexual violence as war crimes: *Renzaho* as rape,⁷⁹ *Bagosora* as outrages upon personal dignity,⁸⁰ and *Semanza*, as violence to life, health and

⁷¹ *Ibid.*; see also William A. Schabas, *An Introduction to the International Criminal Court*, 3rd Ed. (2007) p. 107.

⁷² *The Prosecutor v. Kupreskic et al.*, IT-95-16-T, Trial Judgment, 14 January 2000, para. 566.

⁷³ *Akayesu* Trial Judgment.

⁷⁴ On crimes against humanity knowledge requirement, see Schabas, *supra* note 71, p. 104.

⁷⁵ *Ibid.*, referring to ICC Element of Crimes, para. 2.

⁷⁶ *Supra*, note 58.

⁷⁷ Article 8, ICC Statute.

⁷⁸ Article 4, ICTR Statute.

⁷⁹ *Renzaho* Trial Judgement, para. 810.

⁸⁰ *Bagosora et al.* Trial Judgement, para. 2254.

Table 2. Rape as a Crime against Humanity

<u>Specific Elements of Rape</u> 1. the perpetrator invaded the body of a person by 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, AND 2. the invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.
AND <u>Common Elements of Crimes Against Humanity</u> 1. crime (rape) amounts to one of the enumerated crimes in the statute⁸¹ 2. the crime (rape) was committed as part of widespread or systematic attack 3. the attack was against any civilian population 4. the direct perpetrator knew of the attack against the civilian population
AND Elements of Individual Criminal Responsibility – <u>Linkage Elements</u> <u>Direct responsibility</u> The accused committed, ordered, solicited or induced, aided and abetted or otherwise assisted in the commission (or attempt) of the crime or Contributed to a group with a common purpose to commit (or attempt) the crime OR <u>Command responsibility</u> 1. the accused had effective control over the direct perpetrators 2. the accused knew or had reason to know that the direct perpetrators were committing crimes AND 3. the accused failed to either prevent or punish the commission of these crimes

⁸¹⁾ E.g., either Murder; Extermination; Enslavement; Deportation; Imprisonment; Torture; Rape; Persecutions on political, racial and religious grounds; Other inhumane acts.

physical or mental well-being.⁸² The ICTY Statute does not explicitly recognize acts of gender-based violence as war crimes; however through judicial interpretation convictions have been obtained.⁸³ Convictions for rape as torture, causing wilful suffering, inhuman treatment, and as outrages upon personal dignity, have been entered at the ICTY including in the *Celebici*,⁸⁴ *Furundzija*,⁸⁵ and *Kunarac* cases.⁸⁶

Just like with genocide and crimes against humanity, in establishing that an act of gender-based violence amounts to a war crime, one must establish the individual elements of the crime itself, as well as the common elements of the war crimes. Table 3 further illustrates this.⁸⁷

As has been seen above in the discussions dealing with gender-based violence as acts of genocide, crimes against humanity and war crimes, even where a statute does not explicitly list an act of gender-based violence as an international core crime, the prosecution is not stopped from charging the act as such, as long as the elements of the international crime are met. As well, an act of gender-based violence can amount to more than crime, e.g. rape can be charged as genocide, a crime against humanity and as a war crime.

3.6. *Elements of the Crime of Rape*⁸⁸

Since rape is one of the most prevalent and notorious forms of sexual violence that occurs in armed conflict, it is important to discuss some of the jurisprudence with regard to its elements.

The *Akayesu* Trial Judgement of the ICTR was a landmark decision in establishing the constituent elements of the crime of rape. The Prosecution had always advocated a conceptual approach in that respect, in order to move away from a mere 'body parts' definition, and not to be required to establish the absence of consent. The *Akayesu* case indeed moved away from a mere 'body parts' definition, and defined rape as a physical invasion of a sexual nature, committed on a person in circumstances that are coercive.⁸⁹ In the Trial Chamber's view, an act of thrusting a piece of wood into the sexual organs of a woman as she lay dying, therefore, constituted rape.⁹⁰ Further, the Trial Chamber considered sexual violence, which includes rape, to be any act of a sexual nature which is committed

⁸² *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Appeal Judgement, 20 May 2005, paras. 370 and 371. The conviction was entered on appeal.

⁸³ Articles 2 and 3.

⁸⁴ *The Prosecutor v. Celebici et al.*, IT-96-21-T.

⁸⁵ *The Prosecutor v. Anto Furundzija*, IT-95-17/1-T.

⁸⁶ *The Prosecutor v. Kunarac et al.*, IT-96-23-T and IT-96-23/1T.

⁸⁷ *Supra* note 58.

⁸⁸ Discussion on this is drawn from Bianchi, *Prosecution of Rape*, *supra* note 22.

⁸⁹ *Akayesu* Trial Judgement, *supra* note 1, para. 688.

⁹⁰ *Ibid.*

Table 3. Rape as a War Crime

<u>Specific Elements of Rape</u> 1. the perpetrator invaded the body of a person by 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, AND 2. the invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.
AND <u>Common Elements of War Crimes</u> 1. crime (rape) amounts to one of the enumerated crimes in the statute 2. the crime was committed in the context of and associated with armed conflict 3. the victims were protected persons (for international armed conflict) or were taking no part in direct hostilities (for internal armed conflict) AND 4. Direct perpetrator was aware of the factual circumstances that established the situation as one of armed conflict (for grave breaches – international armed conflict)
AND Elements of Individual Criminal Responsibility – <u>Linkage Elements</u> <u>Direct responsibility</u> The accused committed, ordered, solicited or induced, aided and abetted or otherwise assisted in the commission (or attempt) of the crime or Contributed to a group with a common purpose to commit (or attempt) the crime OR <u>Command responsibility</u> 1. the accused had effective control over the direct perpetrators 2. the accused knew or had reason to know that the direct perpetrators were committing crimes AND 3 the accused failed to either prevent or punish the commission of these crimes

on a person under circumstances which are coercive. Sexual violence is not limited to the physical invasion of the human body and may include acts which do not involve penetration or even physical contact.⁹¹ According to the Trial Chamber, the incident in which a student was undressed and forced to do gymnastics in the public courtyard of the bureau communal, in front of a crowd, constituted sexual violence.⁹² The Trial Chamber observed that coercive circumstances may be inherent in certain circumstances, such as armed conflict.⁹³ Following this interpretation, proving the non-consent of the victim was not a matter tasked to the Prosecution.

Nonetheless, some later ICTR Trial Chambers, such as in *Semanza*, *Kajelijeli*, *Kamuhanda* and *Gacumbitsi*,⁹⁴ seemingly reverted to a more traditional understanding of rape with a mechanical approach as expressly rejected by *Akayesu*, and adopted a narrower consent-based definition endorsed by the ICTY Appeals Chamber in *Kunarac*.⁹⁵ This latter jurisprudence inserted the issue of non-consent as an element in the definition of the crime of rape.⁹⁶

Confronted with these different approaches to the requisite elements of the crime of rape, the ICTR OTP seized the opportunity in the case of *Gacumbitsi* to seek a clarification of the law relating to rape as an act of genocide, crime against humanity or a war crime.⁹⁷ The Prosecution argued that non-consent of the victim and the perpetrator's knowledge thereof should not be considered elements of the offence that must be proved by the Prosecution.⁹⁸ It added that the crime of

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T; *The Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A; *The Prosecutor v. Jean De Dieu Kamuhanda*, Case No. ICTR-99-54 and *The Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-01-64, respectively.

⁹⁵ *The Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-T, Judgement, para. 460; *The Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Appeal Judgement, paras. 129 and 130 (“*Kunarac* Appeal Judgement”). Several cases of the ICTR then followed the approach introduced at the ICTY: *Semanza* Trial Judgement, paras. 344 to 346; *Kajelijeli* Trial Judgement, para. 914; *Kamuhanda* Trial Judgement, para. 708; and, *Gacumbitsi* Trial Judgement, paras. 321 to 333, while others continued to follow *Akayesu*: *Alfred Musema v. The Prosecutor*, Case No. ICTR-96-13, Judgement and Sentence, 27 January 2000, para. 226; and *Muhimana* Trial Judgement, para. 551. In the ICTY, the first case to consider the *Akayesu* definition was *The Prosecutor v. Zejnil Delalic et al.*, Case No. IT-96-21-T, Judgement, 16 November 1998, which endorsed the *Akayesu* formulation of the definition. See: paras. 478 and 479.

⁹⁶ See *Kunarac* Appeal Judgement, paras. 129 and 130. The Appeals Chamber endorsed the Trial Chamber's definition as follows: the *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.

⁹⁷ *Gacumbitsi* Appeal Judgement, para. 147.

⁹⁸ *Ibid.*, para. 147.

rape only came within the Tribunal's jurisdiction when it occurred in the context of genocide, armed conflict or a widespread or systematic attack against a civilian population – circumstances in which genuine consent was impossible.⁹⁹ The Prosecution submitted that rape should be viewed in the same way as other violations of international criminal law, such as torture and enslavement, for which the Prosecution was not required to establish absence of consent.¹⁰⁰

In considering the issues, the *Gacumbitsi* Appeals Chamber distinguished the following two questions: first, are non-consent and knowledge thereof elements of the crime of rape, and, second, if they are elements, how may they be proved? With respect to the first question, the Appeals Chamber adopted the *Kunarac* definition of rape, establishing non-consent and knowledge as elements of rape. As a result, the Prosecution does in fact bear the burden of proving non-consent and knowledge thereof beyond reasonable doubt.¹⁰¹

However, very importantly with respect to the second question, the Appeals Chamber held that the Prosecution may prove non-consent by proving the existence of coercive circumstances under which meaningful consent was not possible.¹⁰² It is not necessary for the Prosecution to either introduce evidence on the words and conduct of the victim or his/her relationship with the perpetrator, or introduce evidence on force.¹⁰³ The Trial Chamber is instead free to consider all relevant evidence, and infer non-consent from background circumstances such as an ongoing Genocide campaign or the detention of the victim.¹⁰⁴ Similarly, knowledge of non-consent on the part of an accused may be proved if the Prosecution establishes beyond reasonable doubt that the accused is aware, or had reason to be aware, of the coercive circumstances that undermined the possibility of genuine consent.¹⁰⁵

Following this progressive approach to prosecuting rape, it is absolutely not required to question any victim of sexual assault or rape whether or not, he/she consented to the sexual activity. Such questions would serve to re-traumatize the victim and would likely be quite offensive to a victim who underwent such brutal treatment in those coercive circumstances. According to this standard, the Prosecution need only establish the existence of coercive circumstances which vitiates the possibility of meaningful consent. Instead of discussing the personal circumstances of the victim, such as to ask whether or not the victim did consent, the line of questioning can focus on eliciting the existence of coercive circumstances to create the presumption that there was a lack of consent. The Appeals Chamber

⁹⁹ *Ibid.*, para. 148.

¹⁰⁰ *Ibid.*, para. 149.

¹⁰¹ *Ibid.*, para. 153.

¹⁰² *Ibid.*, para. 155.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*, para. 157.

acknowledged that genocide, crimes against humanity and war crimes in general and conditions of detention constitute coercive circumstances.¹⁰⁶

3.7. *Nature of Evidence of Gender-based Violence Crimes: National vs. International Prosecutions*

Due to the elements of the international core crimes, i.e. of genocide, crimes against humanity and war crimes, and the context within which they occur, i.e. usually in armed conflict, the *nature of evidence* relied upon for gender-based violence as international crimes will differ as compared to that of gender-based violence at the national level. For instance, for a rape case in national jurisdictions, a victim will need to have seen a doctor as soon as possible after the rape, obtained a medical report, filed a complaint with the police, and identified an offender. This is rarely possible when the rape has occurred as part of an international crime.

In armed conflict, a victim will rarely have seen a doctor, and if she will, it will most likely be days, if not months, after the assault. The victim will rarely be able to get a medical report, or will not think of getting one due to the circumstances. This could either be caused by the fact that many victims of rape do not want anyone to know of their ordeal and thus would not seek medical assistance so as to avoid stigmatization. On the other hand, it could be that the victim may not be able to get a medical report, because s/he might be too busy trying to survive. In terms of filing a complaint, law and order will have broken down so there may be no place to file any complaint. Additionally, the people in authority might be the perpetrators – government and administrative officials, religious and educational leaders, soldiers and policemen, rebels who are in charge of regions, etc. The perpetrator(s) could be one, they could be many, and the likelihood of the victim being able to recognize them may be slim. The perpetrators, as well, might all belong to the same group, e.g. the soldiers of the attacking army.

After the conflict, the focus of the national authorities will usually be on building up infrastructure and not on prosecuting perpetrators, so there might be no complaint filed even then. The complaint might only be “filed” years later, if at all, when the criminal justice system is up and running. The rape as well may not be an isolated incident but might be part of a pattern – there could be several rapes, or there could be several different types of attacks (rapes, assaults, killings) targeting one group of people by another group of people, or being carried out in a systematic way. The situation is therefore very different when dealing with gender-based violence as an international crime, which in turn will affect the type of evidence collected and the manner of proof.

¹⁰⁶ See generally, *Gacumbitsi* (AC), paras. 150–152.

As an international core crime, the focus will somewhat shift from the victim to the perpetrator and to the elements of the international crime, with the rape needing to be viewed in the broader context of the international crimes. For instance in dealing with rape as an act of genocide one would need to consider:

- whether the victim belongs to any of the protected groups (i.e. national, ethnic, racial or religious group);
- whether the perpetrator was targeting the victim because the victim belonged to one of the protected groups;
- whether by committing the rape the perpetrator was intending to actually destroy the victim's group (in whole or in part).

In considering the above, it becomes immaterial whether the rape was reported immediately after the attack or years later. As well, the victim may not need to remember/know the name of the perpetrator nor be able to give a physical description of him/her that would identify him/her as “so and so”. The perpetrator's identity becomes less important than the group s/he belongs to. It is enough for the perpetrator to have been identified in a category/group, e.g. the victim can state that the perpetrator was a soldier, belonged to this army, or describe his uniform in a way that identifies which group he belonged to, or if they can identify his ethnic group.

Additionally, the sources of evidence for gender-based violence crimes during conflict need not be limited to the victims themselves. It can be collected or seen from the corpses of the victims, from other survivor victims, and from other people who witnessed the rapes.¹⁰⁷ Due to the manner in which the crimes are committed during conflict – usually very openly and at times in a widespread or a systematic way – there would also be many people who would have witnessed them. For instance in Rwanda, women and girls were raped openly at roadblocks, pregnant women had their bellies ripped apart to remove fetuses and were then left to die by the roadside, while other victims were raped, sexually mutilated with objects being placed in their genitalia and then left to die at the roadside.¹⁰⁸

In the ICTR case of *Bagosora et al.*, evidence of rapes and sexual violence crimes was elicited through witnesses who were not necessarily victims themselves.¹⁰⁹ In that case, almost every witness was asked to relate what they saw with respect to the occurrence of sexual violence crimes. The Trial Chamber found that sexual assaults occurred at civilian roadblocks in Kigali on the basis of the evidence of General Dallaire and Major Brent Beardsley, who testified about what they saw at the roadblocks. No victim of sexual violence at these roadblocks was called in this

¹⁰⁷ Kelly Askin: *Gender Crimes*, pp. 16–19.

¹⁰⁸ See generally, *Bagosora et al.* case; *Prosecutor v. Mikaeli Muhimana*, Case No. ICTR-95-1B.

¹⁰⁹ *Bagosora et al.* Trial Judgement.

trial. One of the defendants, Bagosora, was convicted on the basis of the evidence of Dallaire and Beardsley for the sexual assaults carried out by his subordinates at these roadblocks.¹¹⁰ Questions should therefore routinely be asked of all witnesses about their knowledge of sexual assaults. This strategy works particularly well in light of supporting a charge that the rapes were widespread or systematic.

The *Bagosora et al.* case is a good example of the role witnesses can play in providing evidence without having to rely on victims to narrate their ordeal. In obtaining evidence to establish the crimes, the victims and witnesses will play a key role and the manner in which they are handled throughout the trial process will greatly determine the evidence adduced as well as whether they suffer re-traumatization. It is therefore also important to consider, when discussing gender-based violence in armed conflict, how to handle the victims and witnesses.

4. Treatment of Victims and Witnesses of Gender-based Violence

Gender-based violence has acute physical, psychological and social consequences.¹¹¹ Survivors may experience deep psychological trauma, depression, terror, guilt, shame and loss of esteem. They may be rejected by spouses and families, ostracized, subjected to further exploitation or to punishment. In many societies, they may become socially marginalized because they are viewed as being unmarriageable or without virtue or honour.¹¹² Some survivors commit suicide rather than bear the burden of societal shame. Other gender-based violence survivors who witness this social marginalization are unlikely to report the incidents themselves and, therefore, will not receive the support services they need. They may also suffer from unwanted pregnancy, unsafe abortion, sexually transmitted diseases (including HIV), sexual dysfunction, trauma to the reproductive tract, and chronic infections leading to pelvic inflammatory disease and infertility.¹¹³ The above is but a fraction of what victims and witnesses of gender-based violence endure.

Now, consider all the above factors in the context of armed conflict. The conditions brought about by conflict exacerbate them, further aggravating the harm suffered by victims and witnesses. In armed conflict a victim of gender-based violence will most likely have suffered other harm including witnessing the torture and violent murder of their family members, assault on themselves, loss of property, and the destruction of their homes. It is therefore very important to bear in mind the context within which victims of gender-based violence of armed conflict are coming from, in order to be able to handle them properly, avoiding

¹¹⁰ See *Bagosora et al.* Trial Judgement, paras. 1908, 1920–1924. The *Karemera et al.* case adopted a similar strategy eliciting such evidence through eye-witnesses other than victims.

¹¹¹ UNFPA Field Manual, ch. 4.

¹¹² *Ibid.*

¹¹³ *Ibid.*

causing them more harm while being able to obtain the best testimony possible in the circumstances.

In the discussion that follows, suggestions will be shared on how best to handle victims and witnesses of gender-based violence during the whole judicial process, with particular emphasis on international prosecutions. These suggestions arise from lessons learnt by the ICTR OTP in the course of prosecuting sexual violence crimes.¹¹⁴ They will be discussed in two categories. The first will deal with key common issues that were found to apply to the treatment of victims and witnesses throughout the whole process. The second set will be more “phase” oriented. It will consider the different key phases of the judicial process – the investigation, pre-trial, trial and post-trial phases – and suggest for each phase, some of the best ways of handling the victims and witnesses.¹¹⁵ Since it is phase oriented, it will also inevitably focus on the key actors involved in handling the victims in each phase, and will share lessons learnt on what each of the actors should do.

4.1. Recommendations Arising from Key Themes that Affect Victims and Witnesses throughout the Whole Judicial Process

4.1.1. Creation of a Specialized Sexual Offences Unit

Victims and witnesses of gender-based violence, particularly those of armed conflict, have special needs and concerns. In most cases not only will they have suffered physical, mental and sexual harm, they are also left with residual trauma that affects all aspects of their lives, including curtailing their will to live. The very personal nature of the violence, especially sexual violence, including the fact that it attacks the very honour and dignity not only of the victim but of their family and the society as a whole, can cause the victims and witnesses to shy away from speaking about the violence after the events. It is therefore very important, due to these unique circumstances, to have a specialized unit consisting of members specially trained to handle the victims and witnesses of gender-based violence.

The specialized unit would consist of trial attorneys, investigators, doctors, nurses, counsellors, interpreters and witness assistants, who would have undergone specialized training on how to handle the victims. It should be kept in mind, based on the ICTR experience, that while many victims expressed a greater willingness and comfort level to engage with other women, men should also be

¹¹⁴ Discussions are partly based on: Jane Mukangira, *Cultural Aspects that Should Be Taken into Account when Proofing a Witness Who Is a Victim of Sexual Violence and/or Rape*, June 2007; Renifa Madenga, *Court Room Environment: Lessons from the Muhimana Trial*; Renifa Madenga, *Seminar on Violence against Women in Conflict Situations: Lessons Learnt from the ICTR Experience Prosecuting Rape*, April 2008; The Office of the Prosecutor's *Best Practice Manual: Treatment of Victims and Witnesses of Sexual Violence in International Prosecutions* (internal draft); Special Court for Sierra Leone, *Best-Practice Recommendations for the Protection & Support of Witnesses, An Evaluation of the Witness & Victims Section*, May 2008.

¹¹⁵ The suggestions are however, not exhaustive.

included in the unit and involved in the work to the extent possible in each circumstance. Creating a specialized unit would also have the added benefit of the witnesses having familiar and consistent faces that they are comfortable with and reduce the number of people the witness would have to encounter in the course of giving their evidence.¹¹⁶

A specialized unit would help ensure that the necessary evidence is garnered while maintaining the appropriate care and safety of the victims. Successful prosecution and convictions are more likely to result from specially-trained investigators conducting their investigation under guidelines specially formulated particularly for the handling of rape and other forms of sexual violence.¹¹⁷

4.1.2. *Attitude of Persons in the Judicial Process*

The attitudes of all persons interacting with the victims and witnesses of gender-based violence during the judicial process, as well as the mindsets of the victims and witnesses themselves and the community at large, is a key aspect that will have an impact on the success of any investigation and prosecution.

Nearly all persons interacting with the victims and witnesses of sexual violence during the judicial process enter the process with preconceived notions and attitudes about sexual violence. Cultural and gender biases may also skew how professionals treat and perceive victims of sexual assault. In a bid to distance themselves from suffering the trauma suffered by the victims and witnesses, personnel dealing with them might also create a “screen” or emotional barrier so that they do not “feel” the pain or get “too” affected by it. These attitudes may be transmitted unknowingly to the victim or witness.

It is therefore important for any person involved in the judicial process to be consciously aware of any mindsets they might have about gender-based violence, about the victims and witnesses of the same, and of the fact that their attitudes may be transmitted unknowingly to the victim or witness. They should also undergo specialized training to enable them understand/perceive what mindsets the victims and witnesses may have, where they are coming from, as well as to learn of the proper ways of engaging the victims and witnesses.

4.1.3. *Medical Concerns*

Since victims of sexual violence often suffer physical and psychological trauma or harm, they should have access to counselling, gynaecological and other health

¹¹⁶ At the ICTR, the average witness encounters approximately thirty tribunal employees in the course of being a witness.

¹¹⁷ A Sexual Assaults Team existed at the ICTR from about 1997, but was disbanded in 2000 by the previous Prosecutor at the ICTR. In 2003, a new investigative sexual assaults team was formed with 3 female investigators. Given the Completion Strategy of the ICTR, the investigative stage of the Tribunal's work drew to an end all new investigations by 2005 and thus the investigative team's mandate came to an end. Had it been envisioned as a full sexual offences unit, as opposed to an investigative one only, it would have continued operating throughout the trials.

services from the moment they are first contacted, throughout the trial and thereafter. Special awareness should be given to the fact that many rape victims get infected with HIV and thus victims of sexual violence should be entitled to anti-retroviral medication.

Having a policy that allows for victim/witness entitlement to medical attention from the moment they are first contacted and throughout the process (as opposed to giving them when they testify), is beneficial to both the victim and to the cause of justice. The success of prosecutions is largely dependent on those who can testify to the events. Where a victim's health and wellbeing is taken care of, they will recover better and faster, and will be empowered to face the challenge of recounting what happened. As well, many a good witness have been known to pass away due to poverty and lack of medical care, thereby passing on with critical information that could have convicted an accused. Having a victim or witness die before their time due to lack of medical care is therefore a loss both to the victim and witness, and to justice as a whole.

4.1.4. *Counselling*

It should be noted that rape and other forms of sexual violence often have particularly devastating consequences which, in certain cases, may have a permanent impact on the victim or witness.¹¹⁸ Such impact is further compounded by the difficult situation the victims find themselves in during interviews with investigators, while giving testimony in court, or after the trial. The victims may experience fear or rejection by the family and the community. Such an ordeal increases the stigma attached to rape and sexual assault. Moreover, many witnesses may fear reprisals if they testify such that it curtails their willingness to speak with investigators, or to travel and testify in court, or even to go back and face the community. There is therefore need for comprehensive psychological rehabilitation through counselling.

The counselling should be both legal and social. The legal aspect should involve explaining to the witnesses how to present their testimony before the tribunals, while the social counselling will involve trauma counselling. As well, trauma counselling should also be extended to the close relatives or dependants of the victims and witnesses during every stage of the trial. For instance, providing family counselling to the spouse of a victim of sexual violence could enable them accept the victim. In addition to the counsellors, all persons interacting with the victims and witnesses should be trained and have clear guidelines on how to best handle such victims and witnesses.

¹¹⁸ Such was the case of witness FH, who testified on March 31st 2004 in the ICTR case of *The Prosecutor v. Mkaeli Muhimana*, Case No. ICTR-95-1B-T. When describing her ordeal of rape at the hands of the accused Muhimana, she stated as follows: "I felt so humiliated. I had lost my family, now I was losing my dignity. It was as if I was being killed twice."

4.1.5. *Communication*

The channels of communication between victims and witnesses on the one hand, and personnel involved in the judicial process on the other, must always be left open. It must be remembered that the manner in which personnel communicate with the victims and witnesses will greatly impact on the quality of the information given by them and on whether the victim or witness subsequently suffer further traumatization. Right from the onset of the case the victims should be informed of their role in the judicial process, the scope of it, the timing and progress of the proceedings, and eventually the disposition of the cases. In explaining the role of the witness, the court system should also be explained to them as well as the purpose of direct and cross-examination, and how it will be conducted.

Persons handling victims or witnesses must also bear in mind that highly traumatic experiences such as rape and other forms of sexual violence will not always be recollected in detail or within a short time. As such, several visits with the victims and witnesses should be anticipated. In each visit the persons handling them should listen carefully and with patience; avoid interruption to the extent possible; make use of open ended questions so that victims can clarify their narrations in their own words; and avoid excessive, repetitive or improper questioning.

Language is also a key issue in communication and can either impact negatively or positively on the interaction between victims or witnesses of sexual violence and other persons. It should be noted that non verbal language (including tone of voice, gestures, and posture) often conveys more meaning than the spoken word. There is non-verbal communication that is culturally specific and all persons dealing with the witnesses should take time to learn the culturally specific body language in order to communicate with the witness effectively. For example in Rwanda a female investigator wearing a short dress will generally be seen as indecent and therefore limit the openness of the witness. An attorney who crosses their legs, leans on the chair, and folds his arms while talking to a witness will generally be viewed as arrogant and uninterested in the plight of the witness.

To the extent possible, simple language and phrases should be used in order to ensure that information is communicated accurately and to make the victim feel comfortable. As well, the language used must inspire trust and confidence in the witness or victim such that they feel secure knowing that the people approaching them are competent. A balance in the language used should therefore be struck.

4.1.6. *Expectations of Victims and Witnesses*

Victims and witnesses of sexual violence should always be given the opportunity to express their expectations, which should then be listened to, clearly heard and understood. In turn, clear, consistent and repeated instructions should always be

provided to the witness and victim on what s/he will actually receive throughout the process. However, no promises should be made.

For instance, if their expectations relate to receiving medical attention, the witness or victim should see a qualified medical professional and receive an explanation on what kind of medical attention they will get and to what extent. Where witness protection concerns are raised, the needs and fears of the witness should be investigated and the victims/witnesses should receive an explanation on what kind of protection is available. Concerns relating to daily allowances should also not be underestimated. The witness should be informed about the exact amount of the allowance and the purpose for it. It is especially important for victims or witnesses to have a clear understanding of the purpose of the daily allowance so that they are able to explain themselves in court if they are cross-examined about it. This would prevent them from feeling as if the allowance was a way of the prosecution “buying” their testimony. From the ICTR experience many defense attorneys have used the issue of payments to witnesses as a way of challenging the witness’ motive for testifying.

4.1.7. *Security*

Appropriate measures to protect the physical and psychological well-being, dignity and privacy of victims and witnesses, should be put in place. However, of particular importance is the granting of protection against identity disclosure. Victims who allege rape are often subjected to public scrutiny of their sexual past. They are shamed with the stigma of being “dishonoured” and are at times even ostracized by their own families. Thus protection of witnesses from identity disclosure, especially those who specifically request it, should be honoured to the extent possible throughout the whole trial process and is instrumental in the willingness of these victims to testify.

4.2. *Treatment of Victims and Witnesses during the Different Phases of the Judicial Process*

4.2.1. *Investigation Phase*¹¹⁹

Investigators are usually the first people to make contact with victims and witnesses as they look for evidence. How the investigators make that initial contact will be vital in the overall attitude of the witness towards the justice system. Investigators also continue to interact with victims and witnesses during the course of trial although that interaction diminishes as the trial proceeds.¹²⁰ The investiga-

¹¹⁹ The discussions and recommendations here have arisen out of the work of the ICTR, with a part of it being drawn from the experiences of the International Institute for Criminal Investigators (IICI). The IICI specializes in training and sending out investigators to investigate serious violations of International Humanitarian Law including rape, sexual violence and other forms of gender-based violence.

¹²⁰ It is however recommended that for consistency in approach, the Trial Attorney’s or legal advisers

tors therefore play a key role in the initial perception of the witness of how the judicial process is, and also partly determine what kind of experience the witness will have with the justice system. Witness support personnel and language assistants are also other people who come into contact with the victims and witnesses early in the judicial process and continue interacting with them during trial.¹²¹ They usually work hand in hand with the investigators, particularly so when the investigators identify a need for them, and they also play a key role in the initial perception of the victim on the justice system. The investigators, witness support personnel and language assistants must therefore bear these factors in mind when they approach and handle witnesses.

The victims need not to be re-traumatized by the narration of the events must be considered. It should not be placed secondary to the investigator's task of acquiring as accurate testimony as possible from the victim. Even if there is much pressure to get a statement and to pursue a case, the mental and physical well-being of the victim should always come first. The investigator should therefore understand that s/he has an obligation to ensure that the victim is never left worse off as a result of the investigation. If it seems likely to happen, then the investigative process with that victim should end. The guiding principle must be a "do no harm" approach to victims and witnesses. The investigators should even be prepared to stop the interview if it becomes too painful or traumatic for the victim to continue. The investigator can then explore whether the witness needs a short break or whether the investigator should return on a different day. Where it becomes impossible for the witness to continue, whether the same day or on a different one, then the investigator should seek an alternative avenue to access the same or similar information. Throughout this whole process the guiding factor should be the needs of the witness and the appropriate medical or psychological support should be accorded to them.

The witnesses should also be treated with sensitivity and the investigator should endeavour to conduct the interview with empathy and understanding. Though it sounds straight forward, it can sometimes be a challenge for investigators since they are usually on the ground and see firsthand the atrocities that occurred. As well, since they end up interacting closely with the victims and at times the perpetrators, they can easily become partisan to the conflict. In attempting to deal with the trauma and to prevent secondary traumatization, they also likely develop

should be in constant communication with the investigators regarding the status of witnesses as early as possible, and not only when the case is coming up for trial.

¹²¹⁾ At the ICTR there are two "sections" that handle witnesses. The main department being the Witness and Victim Support Section (WVSS) which is located within the Registry organ of the ICTR, and the Witness Management Team (WMT) which is a much smaller team located within the Investigation Division under the Office of the Prosecutor. The WVSS caters for witnesses who have been identified and confirmed to testify in a specific case, whereas the WMT handles all witnesses, confirmed and potential. The latter group of witnesses is inevitably more though the budgetary allocations do not reflect this.

an emotional barrier between them and the victim to prevent the trauma affecting them. They may also cease to believe victim's statements (having reached their psychological limit for hearing about atrocities). It is at this point that they can easily be seen to be un-empathetic or "cold". To assist the investigators move past this, they should be given training on how to recognize and cope with the trauma as well as on ways of expressing empathy.¹²² The investigator should also respond appropriately to the victim if they become distressed in the course of the interview or the investigation. Prior training on how to identify such symptoms would then assist the investigator in knowing how to respond "appropriately".

If the witness to be seen is still in the conflict or post conflict environment, the investigator should approach them with caution bearing in mind that the victim's open association with the investigators could place his/her security at risk. To the extent possible non-official vehicles should be used when going to the villages of witnesses, and the investigators should visit several locations, not only that of the particular witness, in order to avoid drawing attention to the person. In order to avoid the victim from being "punished", the investigator must seek to understand the cultural dynamics of the community. Where one has to seek "permission" from the family head before talking to female members, the investigator must talk to these authorities, be they fathers, brothers, village elders or clan elders so as to ensure that the investigator gets cooperation from the victims. However in cultures where rape or sexual assault is seen as shame on the family, then investigators should bear this in mind and devise an appropriate strategy of speaking with these authorities without getting into the issue of the rapes or sexual assaults so that the authorities still "allow" their societal members to speak with the investigators.

Witnesses should be interviewed in appropriate places. Places such as police stations or the witness' place of employment should be avoided because the witness may not feel as free in that environment. Considerations for family should also be taken into account. For instance where a witness has a small baby who cannot be left at home, the interview should take place in a baby friendly place with some room for the child to play. In addition, the investigator could carry a toy or drawing paper for the child to play with while the interview is proceeding. Where a witness has had to travel a long distance for the interview, the investigator must ensure that some food and water is available for the witness, and that the venue for the interview is comfortable. The thoughtfulness expressed by the investigator in ensuring the physical comfort of the witness also goes a long way in assuring empathy and psychological comfort.

The witnesses should be heard with an open mind and certain assumptions with regard to sexual violence should not be placed on them. For instance, the

¹²² Empathy can be expressed in different ways including verbally, using eye contact, gestures, tone of voice, and pauses between questioning to allow witnesses to compose themselves.

investigator should not assume that women have experienced sexual violence and thus every female witness before the investigator has, or that women have not experienced sexual violence, especially, older or disabled women. The following assumptions should also not be made: that men have not experienced sexual violence, in particular, especially those who have been in detention; or that the interpreter assigned to the team is comfortable interviewing victims of sexual violence or has experience doing so; that the victim of violence will not be willing to share information with a person of the opposite gender;¹²³ or that victims of sexual violence do not have knowledge of other types of crimes. Investigators should therefore not forget to ask victims and witnesses questions pertaining to the wider investigation.

In the course of the interview, the witness' security and medical concerns should be evaluated and responded to appropriately. The investigator can deduce these concerns from the issues raised by the witness or from the facts on the ground.

4.2.2. *Pre-trial Phase*

This is usually when the investigator “hands over” the witness to the trial attorney.¹²⁴ At this point, the trial attorney has read the case file, gone through the witness statements, and identified any gaps or areas which need further exploration with the witness. The attorney is focused on taking the case to court.

The attorney should first establish trust before moving on to hear the testimony. This is very important because rapes and sexual assaults are by their nature very intrusive causing their victims to fear trusting people again. As well, the victim will already have been questioned by the investigator, possibly even maybe more than once, such that speaking with the trial attorney is almost seen as being repetitive or intrusive. The trial attorney should thus invite the witness or victim to start by allowing them to give an uninterrupted story and thereafter to reconfirm their testimony.

During witness briefing, the trial attorney should utilize open ended questions so that the witness can elaborate and clarify their narrations without feeling as if their ordeals are being doubted. Due to the trauma caused by sexual violence, victims and witnesses tend to “mentally block” certain aspects of their ordeals, particularly those closely linked to the harm. Trial attorneys will therefore need to

¹²³ However, whenever possible, interviews of rape victims should be conducted by a person of the same gender with training in rape investigations. Since this cannot always be the case and because some victims might actually be more comfortable talking to a person of the opposite gender, all investigators should be trained on how to conduct an interview with a person of the opposite gender who has suffered rape or sexual violence. What is important is the ability of the investigator to make the victim feel comfortable enough to talk about their ordeal.

¹²⁴ Ideally, the Trial attorney should be in communication with the investigator on pertinent issues regarding the witness even before the witness is handed over to the trial section.

gently go back into the witness' account to clarify certain details like timelines, sequence of events and people's identities.

The interviews themselves should be conducted in a gender sensitive manner taking into account the following: the status of women in that society and the specific cultural or social issues which may affect them; the trial attorney's dressing, tone of voice and demeanour during witness proofing; an understanding of the social, cultural, moral and political environment victims endure as a result of sexual assault and the extraordinary pressures and ostracism; the need for patience and to spend quality time listening; an understanding of the cycle of violence and to assess what stage the victim is in the cycle, and thereafter to constantly re-strategize to "meet" the victim where they are; and the need to adopt and promote gender sensitive language by use of non-sexist language which brings out the principle of equality between men and women. Such language also empowers the victims to pick up the shattered pieces of their lives, take control and forge ahead with life. The need to respect the victim is also very important and the victims and witnesses should be informed of all their choices, and once they choose, those choices should be respected.

4.2.3. *Trial Phase (Including Appeals)*

The key actors in this phase are the judges, the prosecuting counsel, defense attorneys, court clerks and witness support personnel. At this point, the case file is ready, the witness is brought to the town where the proceeding will take place and the victim or witness testifies.

4.2.3.1. Disclosure Regime

Before transferring the victim or witness to come and testify they need to be advised of the disclosure regime. Due to disclosure regimes that have been implemented in most of the international tribunals, the prosecuting team has an obligation to disclose to the perpetrator's attorney a list of potential witnesses – including their statements (redacted and un-redacted) – prior to the commencement of trial. These list and statements will necessarily include those of the victim of sexual assault so it is important to alert them that their statements will be disclosed.

4.2.3.2. Safe Houses

The Witnesses and Victims' Support Section should provide a safe house where the witnesses are housed temporarily during the duration of their testimony. At this location the witness has debriefing sessions with the Trial Attorney and generally gets prepared for trial.

To make their stay most comfortable care should be taken with regard to several factors. Persons who are housed together with the victim in the safe house should be scrutinized. Where a victim has concerns about other witnesses at the

safe house, the concerns should be taken into account and the witness moved if possible. The witness should also be monitored throughout the duration of their testimony and provision made for their medical care and physiological support. Where possible they should travel with a family member for emotional support. The witness should be allowed to go out of the safe house with security should they request to do so in order not to feel as though they are imprisoned.

The safe house should also be comfortable with provision of amenities to make the stay of the witness as relaxing as possible. Travelling to new towns, and in the case of ICTR and ICTY witnesses to a new country, causes the victim to undergo culture shock of varying degrees. To help minimize this as much of the victim's local/cultural things should be considered. For instance, the local food of the victim should be included in the menu at the safe house.

4.2.3.3. Court Room Orientation

Prior to the trial, the witnesses should be introduced to the court room. Roles of different persons who will be in the court room during the trial should be explained. They also need to be told that the perpetrator will be present in the court room and will see them clearly. This is important since imposing on witnesses a court process without them identifying with it dis-empowers them.

In order to minimize anxiety and trauma, witnesses should not be left alone in a waiting room prior to their testifying. This is because to most of them the judicial process is a new experience which further heightens their anxiety, coupled with the growing anxiety of having to see the perpetrator/accused.

4.2.3.4. Confidentiality & Anonymity

Protective and special measures which had been applied for and granted by the court before trial should be strictly adhered to during and after trial. No names or revealing witness information should appear on any documents or reports, even after the court proceedings have concluded, and such information should be sealed.

To the extent possible, where the witness requests to testify in camera, that request should be considered bearing in mind the accused' right to be tried in public.

4.2.3.5. Counselling

There should be a continuous needs assessment by a qualified counsellor throughout the duration of a victim or witness' testimony, depending on the nature of the case and the time at which a victim or witness starts their testimony, since some testimonies span several days. As well, victims react differently as they testify; others get liberated and acquire more courage as their testimonies progress, while others suffer re-traumatization and might even be unable to complete their testimony. There is therefore a need for continuous assessment of the victim's state

and counselling sessions should be given as per the assessments or if requested by the witness.

4.2.3.6. Security

In case of high security risk the witness and their family should be consulted and given the option to relocate where possible. Relocation does not have to be out of the country but could even include being relocated to a different region but within the same country. Issues relating to witness security and safety should be taken very seriously since lack of security results in witnesses refusing to testify in court.

4.2.3.7. Victim Friendly Court Room

There should be a victim friendly court environment whereby the victims should be guaranteed a 'safe' and comfortable atmosphere without, at the same time, compromising the right of the accused. Where possible and especially where the witness is particularly traumatized, the witness can be shielded from seeing the accused directly by having a curtain partially drawn around her while still having the camera focus on her. In this way, the accused and his counsel would still see the victim through the video monitor on their desks and the victim if s/he chooses, can also see the accused/perpetrator but through the video screen. This would also prevent instances where an accused would try intimidating a victim by giving him/her "warning" looks. Alternatively, the victims can testify in a room next to the courtroom which would have a court officer as well as personnel from the witness support section. The bench and the accused would be able to see the victim via the video monitors and thus still be able to assess their demeanour.

4.2.3.8. Witness Support

The victim should have adequate support while they are testifying and a witness support assistant and/or a counsellor should be present in the court room to give support and assurance to the witness. The following suggestions should also be borne in mind. There should be consistent eye contact with the witness by witness support personnel so as to ensure constant re-assurance. Frequent recesses should be allowed, if needed depending on the specific victim or witness, thereby giving a chance for the witness to recompose.

The trial attorney should also set the proper tone in questioning such that it would be difficult for the defence to use an aggressive approach on the witness. For instance, the trial attorney can command respect, object on repetitive questions, object on any misstatements or any misguidance of witnesses by the defense and on any improper questioning. The trial attorney can also guard on privacy and safety issues like questions on prior sexual history. Throughout the trial, the trial attorney needs to validate the witness and acknowledge the impact of rape on them while maintaining the necessary impartiality, remaining firm, fair, open and professional. All attorneys should exercise due diligence in court when presenting

victim testimonies so as to ensure that confidentiality, security and victim safety and integrity is maintained throughout the judicial process. They should also utilize all legal frame-works which are provided for victim protection. Poor relations between the defense and prosecuting counsel can also impact negatively on witnesses. There should therefore be increased co-operation between the Defence and Prosecution to avoid unnecessary consumption of time on issues relating to disclosure and oral motions. This in turn would reduce any unnecessary delays in proceedings and in making victims sit in court for long durations.

4.2.3.9. Examination in Chief and Cross Examination

Both trial attorneys and defense lawyers should be trained in effective ways of conducting examinations in chief and cross examinations to minimize re-traumatization of the witnesses. To effectively handle witnesses of rape during trial the attorney needs to take into account several factors. While leading the evidence, attorneys should only adduce relevant evidence in order to minimize the witness' psychological stress. They should also adopt a multi-disciplinary approach and co-ordinate services with other sections involved in handling the witnesses e.g. the counsellors, so that they are available and on hand to assist the witness when the need arises. Prosecution counsel should constantly monitor the proceedings so that there are no excessive and unnecessary interruptions from the Defence, with the counsel objecting to improper or aggressive cross examination by the defence. Additionally, a prosecution adviser with legal and gender expertise should also be monitoring proceedings and advising accordingly.

4.2.3.10. De-briefing Sessions

Victims and witnesses should have de-briefing sessions with a qualified counsellor soon after testifying. Recounting their ordeal in court can at times have the effect of causing them to relive the trauma while in others of finally allowing them to have closure. A counsellor would therefore assess the victim and meet them where they are. The counsellor would also settle the witness so that s/he does not remain anxious of what transpired in court.

4.2.4. *Post-Trial Phase*

The key actors involved in this phase are the trial attorneys and witness support personnel.

If the pre-trial phase appears to be the most critical in the approach and dialogue with the victim, the post-trial phase is not any different. Its difficult nature is multi-faceted. First, the person responsible for the protection and the follow-up of the victim might fall into a mental state of satisfaction and assume that the work is accomplished since the witness testified. This is understandable since the stress of the person handling the victim is more severe before and during the trial because there is no certainty of how the victim will react to the questions of the

judges or the defense lawyers. Secondly, the victim can come out of the courtroom either relieved psychologically by his/her testimony before the judges or affected by it. Thirdly, the return of the victim to their home also has a significant impact on his/her psychological status and immediate environment, especially if it becomes known for the first time that they are a victim of rape or sexual violence. The persons responsible for the protection and the follow-up of that victim must therefore necessarily understand these factors and also try to address the following expectations of the victim.

4.2.4.1. Recognition of the Pain of Victims and Witnesses

By coming to testify before the Tribunal, the witness expects that their story will be heard, and that their pain will be recognized by the judges and the prosecutor. The witness also feels accomplished: that they came and represented the victims and revealed the truth. It is therefore necessary to thank the witness for coming and testifying, for standing up for the victims who did not make it, and more importantly, for bringing out the truth. Having noted that, the staff member must make the witness understand that the competence of assessing the weight of the testimony rests with the judges.

4.2.4.2. Outcome of the Trial

By accepting to testify before the judges, the witness expects and even believes that the accused will be sentenced for the crimes s/he has committed. It is therefore important that the lawyers or witness support personnel follow-up with the witness and give him/her a summary of the judgment. This moment is very critical and the victim may become quite emotional. It requires a lot of attention and discernment on the part of the personnel to assess how the witness is doing and how to handle them.

The sentencing or the acquittal of the accused can also cause terrible psychological shock to the witness. Experience has shown that an acquittal causes more damage as far as the mental situation of the witness is concerned. The personnel responsible for the follow-up must be able to explain the reason(s) why the judges acquitted the accused and especially make the witness understand that the acquittal does not challenge the veracity of his/her testimony, i.e., that the acquittal does not negate the witness' own account of the tragic events.

4.2.4.3. Impact of Testimony on the Traumatized State of the Witness

Testifying before a court can cause further trauma to a witness. For many witnesses, testifying brings back the past nightmares that the witness had tried to forget. A qualified psychologist from the witness support section must assess the witness and establish whether due to testifying, the witness has suffered further trauma greater than the one s/he had suffered before the testimony, and thereafter prescribe treatment.

4.2.4.4. Implementation of “Care Taking” Procedure

If testifying before the court has a negative impact on the witness, the psychologist must put in place a psycho-social or medical procedure, as the case may be, aimed at taking care of the re-traumatized witness. This requires some previous knowledge of the psychological problems of the witness.

The victims and witnesses continue to be important even after the cases have been concluded. Efforts should be made to continue any medical and psychological support through counselling. This can be accomplished by partnering with other governmental, non-governmental and United Nations bodies to ensure continuity.

The post-trial phase is also a particularly important part in the process of protecting victims and witnesses. Victims should not have the impression that people have an interest in them only before they testify. Hence more attention should be given to the witnesses after they have testified to prevent them from feeling “used”.

4.2.4.5. Insecurity Caused by Appearance before the Court

The witness support section should take all possible measures to ensure that the identity of the protected witness remains concealed. However, despite all the precautions, sometimes it happens that the witness’ family members and neighbours are well-informed of the fact that the witness had gone to give testimony before the tribunal. In some cases, the witness is not exposed to any risk but if the family members of the perpetrator live in the vicinity of the witness, the security of the latter can be at risk. The personnel of the witness support section must therefore be able to evaluate the risks the witness might be exposed to and be able to quickly take the required protective measures.

5. Conclusions

Acts of gender-based violence, particularly those of sexual violence, have alarmingly become prevalent in armed conflict. International law recognizes that many forms of gender-based violence also amount to international crimes. To end impunity there is a need to ensure that perpetrators are brought to justice. Jurisprudence from the ad hoc tribunals, like the ICTR and ICTY, provide good precedence on how gender-based violence crimes have been prosecuted and convictions entered. Through judicial interpretation the Judges have in many cases extensively defined the elements of the gender-based crimes as international crimes. The stage is set and national jurisdictions have road maps to follow.

Fighting impunity also provides justice for the victims and witnesses. Gender-based violence has acute physical, psychological and social consequences. Survivors may experience deep psychological trauma, depression, terror, guilt, shame and loss of esteem. They may be rejected by spouses and families, ostracized,

subjected to further exploitation or to punishment. It is therefore very important to understand the context within which victims of gender-based violence of armed conflict are coming from, in order to be able to handle them properly to avoid further re-traumatization.

The well-being of victims and witnesses can be influenced by all persons who come into contact with them during the judicial process simply through friendly and supportive interaction. The “do no harm” approach should be the guiding principle such that their well-being is given priority. At the end of the day, justice will have been served since the victim will have testified in an enabling environment thereby ensuring that the testimony elicited is as accurate to the greatest extent and that the chances of the victim suffering re-traumatization are minimized.