6. Sexual violence

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1. INTRODUCTION

In this chapter some of the legacy of the ICTR with regard to its sexual violence prosecutions will be addressed. In particular, areas in which the ICTR made significant contributions to the interpretation of international criminal law will be discussed as well as areas where it arguably failed to do so or where its results are mixed. This chapter will start with a short introduction of the sexual violence as it took place in Rwanda during the genocide in 1994 and the ICTR's statistics on prosecuting sexual violence (sections 2 and 3, respectively), followed by the following topics seen from the ICTR's contribution – or lack thereof – to international criminal law with regard to sexual violence prosecutions: sexual violence as genocide, crimes against humanity and war crimes (section 4); the definition of rape (section 5); modes of liability in cases of sexual violence (section 6); female perpetrators of sexual violence (section 7), male victims of sexual violence (section 8); and procedural issues related to sexual violence (section 9). The chapter will conclude with some final remarks on the ICTR's contribution to sexual violence prosecutions in international criminal law.

2. SEXUAL VIOLENCE IN RWANDA IN 1994

During the 100 days of genocide that ravaged the small country of Rwanda in Central/East Africa from April till July 1994, between 800,000 and 1,000,000 Tutsi and moderate Hutu were killed,[1] while hundreds of thousands of women and girls were raped and/or experienced other forms of sexual violence. The 1996 report of the United Nations Special Rapporteur on Rwanda found that 'rape was the rule and

[1] Different reports cite different numbers. See further on this Chapter 2, by Holá and Smeulers, on 'Rwanda and the ICTR: Facts and Figures'.

its absence the exception'.[2] According to the report, 'rape was systematic and was used as a "weapon" by the perpetrators of the massacres. This can be estimated from the number and nature of the victims as well as from the forms of rape'.[3] According to the report prepared in 2000 by the International Panel of Eminent Personalities of the Organization of African Unity: 'we can be certain that almost all females who survived the genocide were direct victims of rape or other sexual violence, or were profoundly affected by it'.[4] In the 1996 UN report it was estimated, on the basis of the assumption that 100 cases of rape give rise to one pregnancy and on the basis of an estimated 2,000 and 5,000 pregnancies which were caused by rape, it could be concluded that between 250,000 and 500,000 Rwandese women and girls had been raped during the genocide.[5] A 2009 empirical study subsequently estimated the number of women raped to be at least 350,000; arguing that this number was very likely an underestimate.[6]

Within the genocidal context of Rwanda, victims of sexual violence were predominantly attacked on the basis of their ethnicity and gender. Thus, mostly Tutsi women and girls, of all ages, were sexually attacked. Of particular influence was the anti-Tutsi propaganda that preceded the 1994 genocide which called on the Hutu population to be aware of the Tutsi population, which was alleged to constitute a real threat to the Hutu community.[7] In the December 1990 issue of the newspaper *Kangura*, the

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[2] United Nations, *Report on the Situation of Human Rights in Rwanda submitted by Mr. René Degni-Segui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of resolution S-3/1 of 25 May 1994*, E/CN.4/1996/68, 29 January 1996, para. 16 (hereafter UN Report 1996).

[3] *Ibid.*

[4] Organization of African Unity (OAU), International Panel of Eminent Personalities Report, *Rwanda: The Preventable Genocide*, 2000, para. 16.20 (hereafter OAU Report 2000).

[5] UN Report 1996, *supra* note 2, para. 16.

[6] Catrien Bijleveld, Aafke Morssinkhof and Alette Smeulers, 'Counting the Countless – Rape Victimisation during the Rwandan Genocide' (2009) 19 *International Criminal Justice Review* 208–24.

[7] In 1994, the print media and radio (largely controlled by Hutu extremists) were the two most important and influential mediums in Rwanda to influence the Hutu population. See further: Llezlie L. Green, 'Gender Hate Propaganda and Sexual Violence in the Rwandan Genocide: An Argument for Intersectionality in International Law' (2002) 33 *Columbia Human Rights Law Review* 733–76.

sexuality of Tutsi women was in particular targeted through the publication of the 'Ten Commandments'.[8] In four out of the 'Ten Commandments', Tutsi women were portrayed as tools of the Tutsi community, as sexual weapons who would be used by the Tutsi to weaken and ultimately destroy the Hutu men.[9] In addition to such sex-oriented anti-Tutsi propaganda, newspapers also printed cartoons in which Tutsi women, but also the moderate Hutu Prime Minister Agathe Uwilingiyimana, were portrayed as sexual objects.[10] The use of, *inter alia*, gender hate propaganda thus incited the sexual violence to come.[11] This is most clearly evidenced by statements of the perpetrators which accompanied the rapes, such as 'You Tutsi women think that you are too good for us' and 'Let us see what a Tutsi woman tastes like', referring to the (Hutu-imposed) arrogance of Tutsi women, who were generally stereotyped to be considered more beautiful than Hutu women.[12]

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[8] *Kangura* is Kinyarwanda and literally means 'wake up' and described itself as 'the voice that seeks to awake and guide the majority people [the Hutu]'. *Kangura* was one of the most influential newspapers on hate propaganda directed against the Tutsi population. See further: Green 2002, *supra* note 7.

[9] Four of the 'Ten Commandments' dealt with Tutsi women specifically, i.e.: (1) 'Every Hutu should know that a Tutsi woman, wherever she is, works for the interest of her Tutsi ethnic group. As a result, we shall consider a traitor any Hutu who: marries a Tutsi woman; befriends a Tutsi woman; employs a Tutsi woman as a secretary or a concubine'; (2) 'Every Hutu should know that our Hutu daughters are more suitable and conscientious in their role as woman, wife, and mother of the family. Are they not beautiful, good secretaries and more honest?'; (3) 'Hutu woman, be vigilant and try to bring your husbands, brothers and sons back to reason'; and (4) 'The Rwandese Armed Forces should be exclusively Hutu. The experience of the October [1990] war has taught us a lesson. No member of the military shall marry a Tutsi.' The commandments are quoted in: African Rights, *Death, Despair and Defiance* (1995), 42–3.

[10] See, for example, the cartoon published in the December 1993 publication of 'Power', in which Tutsi women were portrayed as seductresses and RPF allies as they were having sex with the Belgian UN peacekeepers of UNAMIR, which were considered RPF supporters. Another example is the cartoon in which the moderate Hutu Prime Minister Agathe Uwilingiyimana was displayed in various sexual poses with other politicians. During the genocide, the prime minister was shot by a lieutenant of the National Police and her lower body was exposed with a beer bottle protruding from her vagina. See further: Jean-Pierre Chrétien, *Rwanda: Les Médias du Genocide* (Karthala 1995) 366, 368; and Human Rights Watch, by Alison Des Forges, *Leave None to Tell the Story: Genocide in Rwanda* (1999), 190.

[11] Green 2002, *supra* note 7.

[12] These statements became known, amongst others, through the adjudication of the cases of accused before the ICTR. See subsection 4 below for the cases.

Sexual violence was, however, at times also directed at Hutu women who were considered to be moderates; were married to Tutsi men, protected Tutsi people, or were politically affiliated with Tutsi.[13] Then there were rapes that were directed against women and girls regardless of ethnicity or affiliation with the Tutsi population and they were especially directed against young or beautiful women. These women were thus primarily attacked on the basis of their gender only, as a result of the prevailing chaos during the conflict. In some cases women were attacked as they were mistaken for being Tutsi.

Finally, it should be noted that Tutsi boys and men were also attacked in a sexual manner. The sexual violence included, *inter alia*, mutilation of the genitals, which were often displayed in public, forced sexual intercourse with dead animals, or rapes and other forms of sexual violence. In most of the male sexual violence cases the perpetrators were female. Much about the prevalence and forms of sexual violence against Tutsi men remains unknown to this day as many men do not easily talk about their experiences in a culture where being a male victim of sexual violence is considered, by and large, a taboo.[14]

Thus, although both Hutu and Tutsi women and men were sexually violated, there were considerable differences in the number of assaults as well as the underlying reasons. Yet, more research would be needed to fully understand the complete and complex picture of genocidal sexual violence in Rwanda. Evidence on, for instance, male sexual violence and female perpetrators of sexual violence is still of recent date and not yet fully understood.

The perpetrators of the sexual violence were mostly male members of the Hutu militia, the *Interahamwe*. However, rapes were also committed by military soldiers of the Rwandan Armed Forces (FAR), including the Presidential Guard, and civilians. In some cases, leaders of the militia or the military knew that rapes were being committed. Although no explicit written orders to rape and sexually violate have been found, there is quite some evidence that leaders encouraged or ordered their men to rape Tutsi or condoned the acts to take place, without making efforts to stop them. The perpetrators were not only men; also Hutu women committed rapes. They, for instance, raped boys themselves; held women down in order to

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[13] See further: HRW/FIDH Report, *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath* (Human Rights Watch 1996).

[14] For further reading on male genocidal sexual violence in Rwanda, see: Usta Kaitesi, *Genocidal Gender and Sexual Violence: The Legacy of the ICTR, Rwanda's Ordinary Courts and Gacaca Courts* (Intersentia 2013). See also subsection 8 below.

be raped by others; gave women away to be raped; or ordered men to perform acts of sexual violence against Tutsi women. These Hutu women came from all layers of society; even nuns took part.[15]

The types of sexual violence during the genocide in Rwanda included: rape; gang rape; sexual slavery; rape by means of objects such as sticks or weapons, often leading to the victims' death; sexual mutilation of, in particular, penises, breasts, vaginas or buttocks or of features considered to be Tutsi such as small noses or long fingers, often during or following the rapes. Acid was also sometimes used to mutilate women so as to prevent them from having Tutsi children. Pregnant women were not spared from sexual violence and neither did age matter. On many occasions, the victims were killed following the rapes; those whose lives were spared, were often only saved in order to be raped. Many women were raped by men who knew they were HIV-positive, and who thus sadistically tried to transmit the virus to Tutsi women and their Tutsi families.[16] These forms of sexual violence were often no isolated incidents; rather, they were usually committed more than once and/or in combination with other sexual or other acts and/or over an enduring or recurring period of time in the course of the genocide. Some women were kept as personal slaves for years after the genocide; they were forced to move to neighbouring countries after the genocide along with their captors.[17] In addition to the sexual violence, these women witnessed other crimes committed against their loved ones, such as murder and torture. Many of them lost their houses and property. Such factors contributed to the coercive circumstances under which women were raped.

The rapes and sexual violence took place all over the country. The sexual violence occurred inside the victims' or perpetrators' houses, but more often the offences were committed in plain view of others, at sites such as schools, churches, roadblocks, government buildings or in the bush. Often, the bodies of the women were, after the rapes, laid spread-eagled in public view. Considering that the sexual violence

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[15] See further: African Rights, *Not So Innocent: When Women Become Killers* (African Rights 1995).

[16] OAU Report 2000, *supra* note 4, para. 16.19.

[17] Christopher W. Mullins, '"We are Going to Rape You and Taste Tutsi Women"; Rape during the 1994 Rwandan Genocide', (2009) 49(6) *The British Journal of Criminology* 719–35. Mullins identifies three types of sexual violence, i.e. opportunistic assaults, which seemed to be a product of the disorder inherent within the conflict; episodes of sexual enslavement; and genocidal rapes.

occurred on such a massive scale in public, it is difficult to imagine anybody in Rwanda who was not aware of the sexual violence taking place.

Compared to other conflicts in the world, the sexual violence in Rwanda stands out in a number of ways: the organised nature of the propaganda that contributed significantly to fuelling sexual violence against Tutsi women, the very public nature of the rapes and the level of brutality towards the women and men.[18]

As mentioned, while many victims of sexual violence were killed following the sexual violence, those who managed to survive the genocide were left to experience, as described by many, 'a living death', which included (and for most still includes) physical and psychological harm as well as socio-economic stigma and isolation.[19]

3. ICTR STATISTICS ON SEXUAL VIOLENCE PROSECUTIONS

According to the Office of the Prosecutor of the ICTR, a total of 90 accused were indicted before the ICTR, of which 52 were charged with rape or other crimes of sexual violence.[20] Of these 52 accused, 43 proceeded to trial before the ICTR, seven cases involving an accused (including four fugitives) were referred to Rwanda or France for trial,

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[18] According to Binaifer Nowrojee who appeared as an expert witness in: *The Prosecutor v. Theoneste Bagosora et al*. ICTR-98-41-T (Transcripts, 12 July 2004), 34.

[19] For a better and more elaborate understanding of the complex sexual violence that took place in Rwanda during the genocide against the Tutsi, see, *inter alia*: HRW/FIDH Report 1996, *supra* note 13; Kaitesi 2013, *supra* note 14; Anne-Marie de Brouwer and Sandra Ka Hon Chu, *The Men Who Killed Me: Rwandan Survivors of Sexual Violence* (Douglas & McIntyre 2009). This section was to a large extent based on these sources and the ones mentioned in the footnotes above.

[20] ICTR, Office of the Prosecutor, *Prosecution of Sexual Violence, Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda*, 30 January 2014, p. 5, available 5 August 2016 at http://www.unictr.org/sites/unictr.org/files/publications/ICTR-Prosecution-of-Sexual-Violence.pdf. Note that although the ICTR itself made public that 93 individuals were indicted before the ICTR, one person was mistakenly counted twice and two cases concerned contempt of court cases. See further Chapter 2 by Holá and Smeulers on 'Rwanda and the ICTR: Facts and Figures'.

and the cases of two fugitives were transferred to the UN Mechanism for International Criminal Tribunals (MICT).[21] Based on our review of ICTR cases, the status with regard to the ICTR cases in which sexual violence was charged at the time of the ICTR's closure in December 2015, is as follows: 14 accused were convicted for sexual violence crimes,[22] 27 accused were acquitted of sexual violence charges,[23] one accused charged with sexual violence died during trial,[24] and sexual violence charges against seven accused were dropped as part of plea negotiations or through amendment of the indictments.[25] It should furthermore be noted that against at least five accused, charges of sexual violence were withdrawn before the start of the trial.[26]

These mixed results since the establishment of the Tribunal – some landmark cases, yet relatively few convictions and many acquittals for sexual violence charges – prompted the ICTR prosecutor to review the handling of sexual violence cases. In its 2014 Best Practices Manual on the prosecution of sexual violence, the ICTR prosecutor set out the

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[21] ICTR Manual on Sexual Violence 2014, *supra* note 20, p. 5 (the cases transferred to Rwanda include the following accused: Bernard Munyagishari; Aloys Ndimbati; Ladislas Ntaganzwa (Ntaganzwa was arrested in DRC in December 2015 and later transferred to Rwanda to face trial); Ryandikayo; and Pheneas Munyarugarama. The cases transferred to France include the following two accused: Wenceslas Munyeshyaka and Laurent Bucyibaruta. If arrested, the following two accused will be tried before the MICT: Protais Mpiranya and Augustin Bizimana).

[22] Jean-Paul Akayesu; Laurent Semanza; Eliézer Niyitegeka; Sylvestre Gacumbitsi; Mikaeli Muhimana; Ferdinand Nahimana; Jean Bosco Barayagwiza; Théoneste Bagosora; Augustin Bizimungu; Idelphonse Hategekimana; Pauline Nyiramasuhuko; Arsène Shalom Ntahobali; Edouard Karemera; and Matthieu Ngirumpatse.

[23] Ignace Bagilishema; Alfred Musema; Juvénal Kajelijeli; Jean Bosco Barayagwiza; Hassan Ngeze; Jean de Dieu Kamuhanda; Jean Mpambara; Tharcisse Muvunyi; Siméon Nchamihigo; Simon Bikindi; Paul Bisengimana; Joseph Nzabirinda; Juvénal Rugambarara; Gratien Kabiligi; Aloys Ntabakuze; Anatole Nsengiyumva; Tharcisse Renzaho; Emmanuel Rukundo; Jean Baptiste Gatete; Francois-Xavier Nzuwonemeye; Innocent Sagahutu; Jérôme Bicamumpaka; Prosper Mugiraneza; Casimir Bizimungu; Justin Mugenzi; Nizeyimana; and Augustin Ngirabatware.

[24] Joseph Nzirorera.

[25] Omar Serushago; Emmanuel Ndindabahizi; Paul Bisengimana; André Rwamakuba; Joseph Nzabirinda; Juvénal Rugambarara; and Callixte Nzabonimana.

[26] This was, for instance, the case with respect to the accused Emmanuel Bagambiki, Samuel Imanishimwe, Tharcisse Renzaho, François Karera and Léonidas Rusatira.

lessons learned concerning the investigation and prosecution of sexual violence.[27] Based on its successes and shortcomings, the Best Practices Manual is a valuable tool for future prosecutions of sexual violence in conflict and post-conflict situations. The Manual provides extensive recommendations on how to improve the investigation and prosecution of sexual violence. It refers, *inter alia*, to other innovative ways of dealing with witness testimony that can be considered, such as using more written statements of victims/witnesses of sexual violence in lieu of oral testimony and testimonies of other eyewitnesses on their knowledge of sexual violence.[28] Furthermore, the role of management is held to be very important, that is to have a clear and comprehensive global strategy to address sexual violence crimes, a strategy that needs to be communicated to the entire office from the outset. In addition, the lack of understanding, know-how and training for eliciting the necessary evidence that would support a conviction for sexual violence among the investigators is crucial (that is, understanding what is required for the evidence relating to the elements of a crime and available modes of liability). Cultural aspects of the region and victims, having several interviews with victims and approaching them with the necessary level of respect and care, as well as a better coordination between the investigators and prosecutors on the evidence required to fulfil the legal requirements, are all important factors to have sexual violence included among the charges. The Manual also highlights that diverse investigative teams, composed of male and female members of different ages and nationalities or regional backgrounds, provide the greatest flexibility in reaching out to and getting cooperation from victims and witnesses. Importantly, the Manual underlines that when interviewing a witness, investigators must refrain from making any assumptions about sexual violence. For instance, investigators should not assume that, because a witness is young, old, disabled, or male, the witness has not experienced sexual violence. In the Manual's concluding remarks, from the ICTR's experience, for sexual violence prosecutions to be successful it is important that:

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[27] The Manual is the final product of earlier research into the successes and shortcomings of the OTP into sexual violence prosecutions. For this purpose, in 2007 a Committee for the Review of the Prosecution of Sexual Violence was set up and two manuals were drafted, in 2008 and 2011, as a result. ICTR Manual on Sexual Violence 2014, *supra* note 20, 6–7.

[28] Also minimizing the number of victims to establish certain facts could be considered, see Marie-Bénédicte Dembour and Emily Haslam, 'Silencing Hearings? Victim-Witnesses at War Crimes Trials' (2004) 15(1) *European Journal of International Law* 151–77.

> a global approach is adopted from the outset that identifies the prosecution of rape and other crimes of sexual violence as a priority, and provides the resources necessary to recruit and train talented staff committed to ending impunity for these crimes. Partnerships with national authorities, NGOs, and civil societies are crucial not only to ensure that valuable evidence is not lost in the investigation and trial of these cases, but also to provide real and lasting justice to the many victims targeted with crimes of sexual violence as a means of perpetrating genocide, war crimes, and crimes against humanity.[29]

On a final note, it has been argued that the totality of the ICTR trial record also reflects the (broader) occurrence of sexual violence in Rwanda in 1994, even in those cases where no charges for sexual violence were laid or acquittals for sexual violence were entered.[30] Whether this indeed is the case, is a question we would also like to deal with in this chapter, after having set out some of the ICTR's legacy on sexual violence in the following sections.

4. SEXUAL VIOLENCE AS GENOCIDE, CRIMES AGAINST HUMANITY AND WAR CRIMES

The ICTR Statute specifically includes rape as a crime against humanity (Article 3(g) of the ICTR Statute). In addition, rape and enforced prostitution are recognised as falling under the war crime of 'outrages upon personal dignity' (Article 4(e) of the ICTR Statute). The ICTR has furthermore successfully convicted accused for sexual violence crimes under a plurality of sexual violence and non-sexual violence crimes constituting crimes against humanity and/or war crimes.[31] Although these

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[29] ICTR Manual on Sexual Violence 2014, *supra* note 20, p. 82. Of course, for a full understanding of this issue, the Manual would need to be read in its entirety.

[30] Doris Buss, 'Learning our Lesson? The Rwanda Tribunal Record on Prosecuting Rape', in Clare McGlynn and Vanessa Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (Routledge Cavendish 2010); Linda Bianchi, 'The Prosecution of Rape and Sexual Violence: Lessons from Prosecutions at the ICTR', in Anne-Marie de Brouwer *et al.* (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia 2013), 124–5.

[31] See for crimes against humanity, *inter alia*, the cases concerning Akayesu, Semanza, Gacumbitsi, Muhimana, Bagosora, Hategekimana, Bizimungu, Nyiramasuhuko, Ntahobali, Karemera and Ngirumpatse. See for war crimes, *inter alia*, the cases concerning Semanza, Bizimungu, Bagosora, Nyiramasuhuko and Ntahobali.

developments are important in themselves,[32] arguably the most important achievement in terms of interpreting the substantive law is the ICTR's recognition that rape and other forms of sexual violence can constitute genocide.[33]

The definition of the crime of genocide – Article 2 of the ICTR Statute – does not include specific references to rape and other forms of sexual violence and follows the definition of genocide contained in the 1948 Genocide Convention *verbatim*. For recognizing sexual violence as genocide, the 1998 *Akayesu* judgement was an enormous breakthrough in international criminal law. For the very first time in international criminal law, it was explicitly recognized in this verdict that rape and sexual violence can constitute genocide in the same way as any other act, provided that the criteria for the crime of genocide are met.[34] Thus, absent explicit enumeration of rape and sexual violence among the genocidal acts, these crimes can be charged under any of the five acts, most notably paragraphs (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') and (d) ('imposing measures intended to prevent births within the group'). In addition, for rape and sexual violence to qualify as genocide, as for any crime, a specific intent to destroy a particular group needs to be established.[35] The Trial Chamber in *Akayesu* held that:

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[32] Lack of space does not allow us to elaborate on this more here. For further information on sexual violence prosecutions as crimes against humanity and war crimes, see: Chapters 4 (on 'Crimes against Humanity' by Oosterveld), 5 (on 'War Crimes' by Ndahinda) and 15 (on 'The ICTR's elaboration of the core international crimes of genocide, crimes against humanity and war crimes and modes of liability' by Jallow) of this volume; and Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Intersentia 2005).

[33] See, *inter alia*, Kelly Askin, 'Gender Crimes Jurisprudence in the ICTR: Positive Developments' (2005) 3 *Journal of International Criminal Justice* 1007–18; Catherine A. MacKinnon, 'The ICTR's Legacy on Sexual Violence' (2007–2008) 14 *New England Journal of International & Comparative Law* 211–20; Bianchi 2013, *supra* note 30; Alex-Obote Odora, 'Rape and Sexual Violence in International Law: ICTR Contribution' (2005) 12(1) *New England Journal of International & Comparative Law* 135–59; and Chapters 3 (on 'Genocide' by Akhavan) and 15 (on 'The ICTR's elaboration of the core international crimes of genocide, crimes against humanity and war crimes and modes of liability' by Jallow) in this volume.

[34] *The Prosecutor v. Jean-Paul Akayesu* ICTR-96-4-T (Judgement, 2 September 1998), para. 731.

[35] See much more elaborately: De Brouwer 2005, *supra* note 32.

> the acts of rape and sexual violence […], were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public, in the Bureau Communal premises or in other public places, and often by more than one assailant. These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.[36]

With this judgement, it was for once and for all recognized that not only killings could constitute genocide, as was until then commonly assumed, but that genocide could also be committed through the acts of rape and other forms of sexual violence. Thus, the consequences of sexual violence – physical, mental, children born from rape, social, economic – may well have the effect of contributing significantly to the destruction of a group in whole or in part. Sexual violence is a way to destroy people's attachment to their identity; it is a way to destroy people in an intimate way, to shatter the group.[37]

After *Akayesu*, the ICTR was able to secure more convictions for sexual violence as genocide, i.e. in the cases concerning Gacumbitsi, Muhimana, Bagosora, Karemera and Ngirumpatse,[38] while in other cases no charges were made or convictions secured.[39] These are relatively few cases of sexual violence convictions for genocide in light of the genocidal sexual violence that had taken place in Rwanda in 1994 and

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[36] Akayesu ICTR-96-4-T, para. 731.

[37] Catherine MacKinnon, *Seminar on Sexual Violence under International Law*, Arusha, 15 November 2003.

[38] *The Prosecutor v. Sylvestre Gacumbitsi* ICTR-2001-64-T (Judgement, 17 June 2004), paras. 291–293; *The Prosecutor v. Mikaeli Muhimana* ICTR-95-1B-T (Judgement, 28 April 2005), paras. 513, 517–519; *The Prosecutor v. Bagosora et al.* ICTR-98-41 (Judgement and Sentence, 18 December 2008) (confirmed on appeal: *Theoneste Bagosora and Anatole Nsengiyumva v. The Prosecutor* ICTR-98-41-A (Judgement, 14 December 2011), para. 721); *The Prosecutor v. Edouard Karemera and Matthieu Ngirumpatse* ICTR-98-44-T (Judgement and Sentence, 2 February 2012), paras. 1670–1671 (confirmed on appeal: *Édouard Karemera and Matthieu Ngirumpatse v. The Prosecutor* ICTR-98-44-A (Judgement, 29 September 2014), paras. 587–636).

[39] For instance, Musema's conviction for sexual violence as genocide was squashed on appeal and for Nyiramasuhuko and Ntahobali, although charged for sexual violence as genocide, they were not convicted thereof (convictions did follow for crimes against humanity and war crimes).

arguably the ICTR could have been more meaningful here. Not recognising sexual violence as genocide, while the evidence was there, jeopardised the legitimacy of the Tribunal and made some victims reluctant to give testimony in court.[40]

The *Akayesu* recognition of rape and other forms of sexual violence to constitute genocide, however, directly inspired the ICC's interpretation of the definition of genocide. Although the Rome Statute similarly includes the definition of genocide as can be found in the 1948 Genocide Convention, the ICC's Elements of Crimes do refer to rape and sexual violence in a footnote (which has the same standing as an element), explaining that these crimes fall within the ambit of sub-heading (b) of the crime of genocide, namely 'causing serious bodily or mental harm to members of the group'. This has been an enormously important legacy of the ICTR. At the same time, one needs to be cautious in the sense that, at times, people continue to state that they do not understand how rape and other sexual violence crimes could possibly rise to the level of genocide.[41] To deny sexual violence as genocide, when it is, could seriously hamper justice for victims.

5. THE DEFINITION OF RAPE

It was also in the 1998 *Akayesu* judgement that the definition of rape (as a crime against humanity) was put forward for the very first time in the history of international criminal law. The Trial Chamber chose to formulate rape – after noticing that a commonly accepted definition of rape did not exist in international law – as follows: 'a physical invasion of a sexual nature, committed on a person under circumstances which are coercive'.[42]

Before the Chamber arrived at this definition, the judges noted that 'while rape has been historically defined in certain national jurisdictions as non-consensual intercourse, variations on the form of rape may include acts which involve the insertion of objects and/or the use of

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[40] See further: MacKinnon 2003, *supra* note 37; Kaitesi 2013, *supra* note 14, 173–4: De Brouwer 2005, *supra* note 32, 80, 225–6, 377–81.

[41] Michelle Jarvis and Elena Martin Salgado, 'Future Challenges to Prosecuting Sexual Violence under International Law: Insights from ICTY Practice', in De Brouwer *et al.* 2013, *supra* note 30, 118.

[42] Akayesu ICTR-96-4-T, paras. 598, 688.

bodily orifices not considered to be intrinsically sexual'.[43] The Chamber furthermore considered that:

> […] rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual frame work [sic] of state sanctioned violence. This approach is more useful in international law. Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[44]

The Tribunal thus explicitly rejected a mechanical definition of rape as found in many national laws, and instead chose a definition focusing on the concept of rape, which, in its view, would more accurately provide for the full protection of vulnerable persons in situations of mass violence. As to the second part of the definition of rape – the circumstances which need to be established in order for physical invasion of a sexual nature to constitute a crime – the Trial Chamber noted that:

> […] coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal.[45]

The conceptual definition of rape as put forward in the *Akayesu* case is thus broadly formulated: it is not limited to conventional notions of rape requiring penetration, nor does it require 'lack of consent' as an element of the crime of rape, despite its observance of the use thereof in certain national jurisdictions.[46] In the second place, the definition focuses on the concept of coercion, not on the element of consent. In other words, the *Akayesu* definition of rape presumes that in the context of genocide, crimes against humanity and armed conflict, sexual violence will have been committed under (threat of) force, coercion or coercive circumstances and the issue of consent becomes redundant. The definition of

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[43] *Ibid.*, paras. 598, 686.
[44] *Ibid.*, paras. 597, 687.
[45] *Ibid.*, para. 688.
[46] *Ibid*., paras. 598, 686.

rape as set out in the *Akayesu* judgement was upheld in subsequent ICTY and ICTR judgements, such as the ICTY *Čelebići* judgement (1998) and the ICTR judgements concerning *Musema* (2000), *Niyitegeka* (2003) and *Muhimana* (2005).[47]

However, the developments related to the definition of rape in international criminal law do not stop here. In the ICTY *Furundžija* case, another definition of rape was accepted, which, according to the Chamber, better took into account the common denominator of the crime of rape to be found in national jurisdictions. With this judgement, which was also pronounced in 1998 and only a few months after the *Akayesu* judgement, the focus of the definition of rape was now put on sexual penetration by and of body parts (instead of invasion) while the elements of coercion, force or threat of force remained.[48] The definition of rape as given in the *Furundžija* case was not followed up in subsequent judgements. Instead, a third definition of rape was established in the *Kunarac, Kovač and Vuković* case in 2001. In this case, the Trial Chamber's ruling on rape – which was confirmed by the Appeals Chamber in 2002 – focused on sexual penetration (like *Furundžija*), but also on 'lack of consent' as elements of the crime of rape.[49] The Chamber held that lack of consent was part of the definition of rape in the major national legal systems in the world and that the *Furundžija* judgement had mistakenly not incorporated this element in the definition.[50] This phrase would more accurately capture matters which would also result in 'the will of the victim being overcome or in the victim's submission to

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[47] *The Prosecutor v. Delalić et al.* IT-96-21-T (Judgement, 16 November 1998), paras. 478–479; *The Prosecutor v. Alfred Musema* ICTR-96-13-T (Judgement and Sentence, 27 January 2000), paras. 220, 226; *The Prosecutor v. Eliézer Niyitegeka* ICTR-96-14-T (Judgement and Sentence, 16 May 2003), para. 456; *Muhimana* ICTR-95-1B-T, paras. 535–551. Although it is common practice that Trial Chambers follow an appeal judgement once rendered (also referred to as *stare decisis*), it seems that the Niyitegeka and Muhimana Trial Chambers did not follow the 2002 Kunarac, Kovač and Vuković Appeal Judgement concerning the definition of rape (see further below).

[48] *Prosecutor v. Anto Furundžija* IT-95-17/1-T (Judgement, 10 December 1998), paras. 180, 185.

[49] *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković* IT-96-23 and IT-96-23/1 (Judgement, 22 February 2001), para. 438 (hereafter Kunarac *et al.* Judgement) (and see also paras. 440, 457–460); and *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković* IT-96-23-A and IT-96-23/1-A (Judgement, 12 June 2002), para. 128.

[50] Kunarac *et al.* IT-96-23/1, para. 440.

the act being non-voluntarily'.[51] This *Kunarac, Kovač and Vuković* definition of rape was subsequently upheld in other ICTY and ICTR judgements, such as the judgements concerning *Kvočka* (ICTY, 2001), *Semanza* (ICTR, 2003), *Kajelijeli* (ICTR, 2003), *Kamuhanda* (ICTR, 2004) and *Gacumbitsi* (ICTR, 2004/2006).[52]

In order to clarify the law on whether or not the 'absence of consent' is a constituent element of rape as an international crime, the prosecutor in the ICTR case of the accused *Gacumbitsi* requested a clarification from the Appeals Chamber.[53] The prosecutor, in fact, argued, very convincingly, for a definition of rape that omits reference to non-consent.[54] The Appeals Chamber in the *Gacumbitsi* case held, however, that it 'adopts and seeks to further elucidate the position expressed by the ICTY Appeals Chamber in the *Kunarac et al.* Appeal Judgement'.[55] This meant that the prosecution bears the burden of proving the elements of non-consent and knowledge thereof beyond reasonable doubt. According to the Appeals Chamber the prosecution can prove non-consent to rape beyond a reasonable doubt 'by proving the existence of coercive circumstances under which meaningful consent is not possible'.[56]

The *Gacumbitsi* Appeal Judgement pronouncement on the status of the law concerning the issue of consent as an element of the crime of rape was disappointing. Lack of consent as an element of the crime of rape (or any other sexual violence crime for that matter) is immaterial within the international criminal law context, especially in light of the violent and oppressive contexts in which rapes take place during genocide, crimes against humanity or armed conflict. In other words, when the common elements of these crimes are established, the issue of consent quickly becomes irrelevant. In addition, no matter how questions are phrased by the prosecutor ('Did you consent?' or 'Was it done against your will?'),

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[51] *Ibid.*, para. 457 (and see also para. 452).

[52] *Prosecutor v. Kvočka et al.* IT-98-30/1-T (Judgement, 2 November 2001), paras. 177–179; *The Prosecutor v. Laurent Semanza* ICTR-97-20-T (Judgement, 15 May 2003), paras. 344–346; *The Prosecutor v. Juvénal Kajelijeli* ICTR-98-44A-T (Judgement, 1 December 2003), para. 915; *The Prosecutor v. Jean de Dieu Kamuhanda* ICTR-95-54A-T (Judgement, 22 January 2004), paras. 709–710; Gacumbitsi ICTR-2001-64-T, para. 325, and *The Prosecutor v. Sylvestre Gacumbitsi* ICTR-2001-64-A (Judgement, 28 September 2004), para. 152.

[53] *The Prosecutor v. Sylvestre Gacumbitsi* ICTR-2001-64-A (Appellant's Brief, 28 September 2004), pp. 47–60.

[54] *Ibid.*, para. 183.

[55] *Gacumbitsi* ICTR-2001-64-A, para. 152.

[56] *Ibid.*, para. 155.

such questions may insult rape victims and may cause further traumatization, especially if questions like these are asked after the victim has already set out the coercive circumstances in which the sexual violence was inflicted. The reaction of Witness 95 in the *Kunarac, Kovač and Vuković* case to the question posed by the prosecutor (at the request of one of the judges), namely whether the sexual contact had been against her will, was met with outrage, and is illustrative in this regard: 'Please, madam, if over a period of 40 days you have sex with someone, with several individuals, do you really think that is with your own will?'[57] Witness 95 had just explained to the court that she had been selected for the purpose of rape more than 150 times in a period of 40 days. Although some have held that the *Gacumbitsi* definition of rape is to be applauded, because non-consent to rape can be proven by the existence of coercive circumstances under which meaningful consent is not possible,[58] this is only true in some circumstances; that is, where indeed all parties to the proceedings and the judges do not, in any event, inquire into the 'lack of consent' on the part of the victim. As 'lack of consent' is still an element of the crime of rape in the *Gacumbitsi* definition of rape, the scenario of inquiring into 'lack of consent' is, however, not just academic, as the above example concerning Witness 95 shows.

Once it has been established that a crime was committed, questions concerning consent become irrelevant. There may, however, still be some (rare) cases in which the defence would like to advance consent as a defence. This is still possible under the legal framework of the tribunals, but the relevance and admissibility of such evidence must first be confirmed in an *in camera* procedure (a closed session) in order to spare the victim from painful propositions which have not been tested first.[59]

A definition of rape – focusing upon the issue of 'lack of consent' – should not, therefore, be adopted in cases concerning the prosecution of conflict-related sexual violence. Including non-consent in the definition of rape is not in conformity with the nature and reality of the crime and will shun victims of sexual violence from court proceedings. In that case, the crimes committed against them will not be recognised. It is fortunate that the definition of rape in the (non-binding, but guiding) Elements of Crimes of the ICC does not focus on the issue of non-consent, but rather on force, threat of force, coercion or a coercive environment. This definition of rape, that came into being before the *Kunarac et al.*

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[57] *Prosecutor v Dragoljub Kunarac, Radomir Kovač and Zoran Vuković* IT-96-23-T and IT-96-23/1-T (Transcripts, 25 April 2000), 2235–36.

[58] Bianchi 2013, *supra* note 30, 144–5.

[59] See, for example, Rules 69 ICTR and ICTY RPE and Rule 72 ICC RPE.

definition of rape, is a mixture of the definitions provided in the ICTR *Akayesu* and ICTY *Furundžija* cases. Indeed, in 2014, before the ICC, in the case of the accused Katanga (DRC situation), this interpretation was confirmed, and again in 2016 in the *Bemba* case.[60]

Although the final word on the definition of rape in international law may not yet have been said, the discussions on this definition have been intense, with the ICTR's *Akayesu* and *Gacumbitsi* cases having been influential in shaping it.[61]

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[60] In the *Katanga* case, it was noted that, with the exception of the specific situation in which the perpetrator takes advantage of the inability of a person to give genuine consent, the Elements of Crimes do not refer to the absence of consent and this factor does therefore not need to be demonstrated. Instead, the Chamber found that it is sufficient to demonstrate one of the circumstances of a coercive nature listed in the second element of the crime of rape, noting that this interpretation is confirmed by Rule 70 of the ICC's Rules of Procedure and Evidence. See *Le Procureur c. Germain Katanga* ICC-01/04-01/07 (Jugement Rendu en Application de l'Article 74 du Statut, 7 mars 2014), paras. 964–966. In addition, the Trial Chamber in the *Bemba* case states in clear words: 'The Chamber notes that the victim's lack of consent is not a legal element of the crime of rape under the Statute. The preparatory works of the Statute demonstrate that the drafters chose not to require that the Prosecution prove the non-consent of the victim beyond reasonable doubt, on the basis that such a requirement would, in most cases, undermine efforts to bring perpetrators to justice. Therefore, where "force", "threat of force or coercion", or "taking advantage of coercive environment" is proven, the Chamber considers that the Prosecution does not need to prove the victim's lack of consent'. See *The Prosecutor v. Jean-Pierre Bemba Gombo* ICC-01/05-01/08 (Judgement pursuant to Article 74 of the Rome Statute, 21 March 2016), paras. 105–106.

[61] For more detail on discussions revolving around the definition of rape in international criminal law, see: De Brouwer 2005, *supra* note 32, 103–37; Catherine A. MacKinnon, 'Defining Rape Internationally: A Comment on Akayesu' (2006) *Columbia Journal of Transnational Law* 940–58; Wolfgang Schomburg and Ines Peterson, 'Genuine Consent to Sexual Violence under International Criminal Law' (2007) 101 *American Journal of International Law* 121–40, in particular 125, 128–31, 139 (Judge Schomburg was in fact a member of the bench in the Gacumbitsi appeal); Patricia Viseur Sellers, *The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation*, undated; Patricia Viseur Sellers, 'The "Appeal" of Sexual Violence: Akayesu/Gacumbitsi Cases', in Karen Stefiszyn (ed.), *Gender-based Violence in Africa* (University of Pretoria, 2007), 51–103; Alison Cole, '*Prosecutor v. Gacumbitsi*: The New Definition for Prosecuting Rape Under International Law' (2008) 8 *International Criminal Law Review* 55–86; Anne-Marie de Brouwer, 'Commentary on the Gacumbitsi Judgement', in André Klip and Göran Sluiter, *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for Rwanda 2005–2006 (Volume 24)* (Intersentia

6. SEXUAL VIOLENCE AND MODES OF LIABILITY

The ICTR, like other tribunals, are mainly prosecuting the leading figures responsible for the crimes, such as the military and governmental leaders, who are to a certain extent often removed from the crime scene and may, furthermore, not always have committed sexual violence themselves. A remaining challenge in the prosecution of sexual violence before international criminal tribunals generally then relates to the prosecution of sexual violence in these highly complex cases involving high level officials. Before the ICTR, as well as the ICTY, one can therefore see that many of the sexual violence cases concern direct perpetrators of sexual violence crimes or others close to the scene of the crime.[62]

Prosecuting sexual violence in high level complex cases where the perpetrators are more remote from the place where the crimes take place could, however, be done on the basis of superior/command responsibility and joint criminal enterprise theories. While convictions based on these liability modes are necessarily complicated, it has been argued that in cases of sexual violence crimes, where prosecutors and investigators may – more often than for other crimes – mischaracterize sexual violence as non-violent crimes that are incidental to the conflict, these prosecutions will definitely be bound to fail.[63]

For superior/command responsibility liability cases, the prosecution needs to prove that the superior knew or had reason to know that subordinates, over who he has effective control, were about to commit sexual violence specifically or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[64] The challenge in establishing superior/command responsibility for sexual violence cases is to prove that an accused person at least had reason to know that his subordinates would commit sexual violence crimes specifically, as opposed to other types of mistreatment. It is questionable whether establishing a generalized level or risk of the prevalence of sexual violence in conflict, by making reference to the commission of the crime in practically every conflict in

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2009), 583–94; Michael Cottier and Sabine Mzee, '(xxii) Rape and Other Forms of Sexual Violence', in Otto Triffterer and Kai Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court* (Hart 2014), 489.

[62] See, for the ICTR, for example, *Muhimana* ICTR-95-1B-T. For the ICTY, see: Jarvis and Salgado 2013, *supra* note 41, 106–17.

[63] Jarvis and Salgado 2013, *supra* note 41, 103, 122.

[64] See e.g., Article 6(3) ICTR Statute; Article 7(3) ICTY Statute; *Prosecutor v. Milutinović et al.* IT-05-87-T (Judgement, 26 February 2009), paras. 472, 1135.

history, is sufficient for establishing superior responsibility. Many of the factual situations in international prosecutions disclose, on the other hand, more concrete indicators of the risk of sexual violence crimes and could therefore be found sufficient for establishing superior responsibility, including the detention of women in camps where subordinates have uncontrolled access to them or knowledge that sexual violence has been prevalent in the recent past in a particular conflict zone.[65] For example, in the *Bagosora et al.* case, the Trial Chamber stated that 'it is well known that rape and other forms of sexual violence were widespread in Rwanda during the events in 1994'.[66] This factual finding, placing sexual violence within the genocidal context, may facilitate making the link between the accused and the sexual violence crimes. This factual finding was partly based on the expert testimony of Binaifer Nowrojee, who had conducted research into sexual violence, including for the so-called OTP Rape Database. This database, including a survey of 405 statements of Rwandan victims and witnesses of sexual violence, showed that the sexual violence in Rwanda in 1994 was so commonplace, often committed with the intent to destroy Tutsi women on the basis of both ethnicity and gender, that a superior could not have failed to know that sexual violence was occurring with genocidal intent.[67] Such a database is therefore an interesting tool to establish the widespread occurrence of sexual violence in conflict and creates a possibility to link these crimes to the accused.

Despite all of this, establishing superior/command responsibility in ICTR cases for sexual violence has proven to be difficult or not even charged by the prosecution, where it could have been.[68] For example, in the *Muvunyi* case, the sexual violence was recognized (and thus included in the record), but not that these crimes were committed by subordinates of Muvunyi, therefore acquitting him of these charges.[69] In the *Kajelijeli* case, superior/command responsibility was similarly not recognized as it was held that Kajelijeli did not know or had reason to know that *Interahamwe* under his control had committed or were about to commit

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[65] Jarvis and Salgado 2013, *supra* note 41, 108–11.

[66] *Bagosora et al.* ICTR-98-41, para. 1728.

[67] See further: De Brouwer 2005, *supra* note 32, 65.

[68] Bianchi 2013, *supra* note 30, 134–5; De Brouwer 2005, *supra* note 32, 63–5.

[69] *The Prosecutor v. Tharcisse Muvunyi* ICTR-2000-55A-T (Judgement, 12 September 2006), para. 409 (upheld on appeal).

rapes, even though the rapes were recognized to have been taken place and were thus included in the record.[70]

As mentioned, sexual violence prosecutions can also be taken on the basis of joint criminal enterprise categories I, II and III.[71] Although it is generally considered easier for a prosecutor to prove that a crime was a natural and foreseeable consequence of a joint criminal enterprise (category III) than to prove that it formed part of the common criminal purpose to which all JCE members subscribed (categories I and II), the ICTY has recognized, in a few cases, that sexual violence can constitute part of a common criminal purpose, either at the outset of the joint criminal enterprise or over time.[72] However, it is very unfortunate that sexual violence crimes are not easily seen as crimes that can be linked to JCE I and II liability modes; but rather mostly JCE III.[73] In the case of sexual violence, according to Jarvis and Salgado:

> there is a particular risk of failing to appreciate how they fit within an over-arching campaign of crimes due to […] historical assumptions […] (referring to seeing sexual violence as personal in nature and separate from the main activity of conflict). Extra attention is likely to be required on the part of the investigators and prosecutors to locate relevant witnesses and ask

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[70] *Kajelijeli* ICTR-98-44A-T, para. 924.

[71] In the Tadić Appeal Judgement, the Chamber distinguished three categories of collective criminality, which today are known as joint criminal enterprise (JCE) I, II and III. First, the *basic* form, where the participants act on the basis of a 'common design' or 'common enterprise' and with a 'common intention'. Second, the *systemic* form, the so-called 'concentration camp cases' where crimes are committed by members of military or administrative units, such as those running concentration or detention camps, on the basis of a common plan ('common purpose'). Third, the so-called *extended* JCE where one of the co-perpetrators actually engages in acts going beyond the common plan, but his acts still constitute a foreseeable consequence of the realization of the plan. See *The Prosecutor v. Dusko Tadić* IT-94-1A (Judgement, 15 July 1999), paras. 196–219; also: *The Prosecutor v. Elizaphan and Gérard Ntakirutimana* ICTR-96-10-A & ICTR-96-17-A (Judgement, 13 December 2004), para. 463.

[72] Jarvis and Salgado 2013, *supra* note 41, 112–13 (discussing the ICTY *Stakic* and *Krajisnik cases*; the latter, however, was reversed on appeal and changed to JCE III liability).

[73] Kelly Askin, 'Treatment of Sexual Violence in Armed Conflicts: A Historical Perspective and the Way Forward', in De Brouwer *et al.* 2013, *supra* note 30, 52. See generally on this: Patricia Viseur-Sellers, 'Individual(s') Liability for Collective Sexual Violence', in Karen Knop (ed.), *Gender and Human Rights*, (Oxford University Press 2004), 153–94.

> the right questions to uncover the extent to which sexual violence crimes fall within the broader pattern of crimes attributable to the JCE members.[74]

Before the ICTR, there are few cases in which JCE liability was advanced to sexual violence crimes. In the *Karemera et al.* case, Karemera (minister of the interior) and Ngirumpatse (president of MRND), although not charged with having physically perpetrated rape, were held accountable under JCE III for sexual violence in that they had been aware that genocidal rape committed throughout Rwanda was the natural and foreseeable consequence of the execution of the joint criminal enterprise (the genocidal campaign to destroy the Tutsi population) and knowingly and wilfully participated in that enterprise nevertheless.[75] Although the Chamber did not find evidence of actual reporting of the rapes to the accused, it concluded that they must have been aware of the sexual violence given the circumstances in the country, their access to information and their positions of authority. This holding was upheld on appeal[76] and allowed the Tribunal a solid basis to attach liability to the most senior responsible for sexual violence crimes taking place on the ground.[77] Yet, in the case of Augustin Ngirabatware (minister of planning), who was charged with rape as a crime against humanity through JCE III liability, although initially convicted as he had encouraged *Interahamwe* to kill and had distributed weapons to them and the rapes subsequently committed were therefore entirely foreseeable,[78] his conviction was later reversed on appeal.[79] There is one more case left involving JCE III liability for sexual violence cases (rape as genocide), and that is the case of Mpiranya, who – once apprehended – will be tried before the MICT.[80]

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[74] Jarvis and Salgado 2013, *supra* note 41, 113.

[75] *Karemera et al.* ICTR-98-44-T, paras. 1670–1671. Note that the third accused in this case, also charged with sexual violence linked to JCE III liability, Joseph Nzirorera, passed away during trial.

[76] *Karemera et al.* ICTR-98-44-A, paras. 599–636.

[77] Bianchi 2013, *supra* note 30, 135–7, 145–6; Susana SáCouto, *Prosecuting Sexual Violence before International Tribunals: The ICTR's Karemera Judgement*, IntLawGrrls, 17 May 2012, available 5 August 2016 at www.intlawgrrls.com/search?q=karemera.

[78] *The Prosecutor v. Augustin Ngirabatware* ICTR-99-54-T (Judgement, 20 December 2012), paras. 1386–1390.

[79] *Augustin Ngirabatware v. The Prosecutor* MICT-12-29-A (Judgement, 18 December 2014), para. 252.

[80] *The Prosecutor v. Protais Mpiranya* ICTR-00-56A-71bis (Amended Indictment, 30 March 2012).

7. FEMALE PERPETRATORS OF SEXUAL VIOLENCE

One of the outstanding characteristics of the genocide was the massive participation of both the leaders and their subordinates and followers in Rwanda.[81] Perpetrators ranged from senior civil servants to ordinary citizens. Women were active players in the genocide fostering the purpose and genocidal acts. Pauline Nyiramasuhuko stands out of the thousands of women perpetrators mostly because she was the only one tried by the ICTR. Rwanda's Correctional Services hosts over 2,000 female inmates convicted of genocide and over 426 female genocide convicts serve/served their sentence in community service as an alternative penalty for those that pleaded guilty.[82] Ordinary women, religious practitioners and a fellow cabinet minister like Pauline are some of those already convicted.[83]

The conviction of Pauline Nyiramasuhuko is unprecedented in international criminal and humanitarian law, especially for being the first woman to be convicted of genocide as well as rape as a crime against humanity. This fact makes the record of the ICTR weak on the knowledge of women as perpetrators of genocide generally and genocidal gender and sexual violence in particular. Note that out of the 90 persons indicted there was only one woman, that is, Pauline Nyiramasuhuko. While it might be true that women did not participate in the genocide to an extent equal to men, the judicial record in Rwanda and a few of the cases tried through universal jurisdiction in other countries reveal that a greater number of women participated in the genocide, contrary to the picture portrayed by the ICTR record.[84] The *Pauline Nyiramasuhuko*

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[81] For a discussion on massive involvement in perpetrating the genocide against Tutsi, see generally: Scott Straus, 'How Many Perpetrators were there in the Rwandan Genocide? An Estimate' (2004) 6(1) *Journal of Genocide Research* 85–98. See also: Lee Ann Fujii, *Killing Neighbors: Webs of Violence in Rwanda* (Cornell University Press 2011); and Christian Delage and Peter Goodrich, *The Scene of Mass Crime: History, Film and International Tribunals* (Routledge 2013).

[82] Rwanda Correctional Services (RCS), Statistics provided by the RCS Information and Data Service.

[83] See e.g., *Prosecutor v. Agnes Ntamabyariro*, Case No. RP/Gen.0081/04/TP/KIG, 19 January 2009. Ntamabyariro was a member of the temporary government of Rwanda during the genocide, where she served as a minister of justice.

[84] Kaitesi 2013, *supra* note 14, 166–7: the numbers of women convicted of genocide by August 2013 in Rwanda's ordinary courts were 2,656 with punishments ranging from a few years to life sentence. For more examples of women

judgement should nevertheless be celebrated as its absence would have undermined the milestone under international criminal law that outlaws the perception that women are simply innocent souls and victims of international crimes.

What was the *Nyiramasuhuko* case before the ICTR specifically about? On 24 June 2011, the Trial Chamber convicted, among others, Pauline Nyiramasuhuko for the crime of genocide, war crimes and crimes against humanity. Nyiramasuhuko was a former cabinet minister in the genocidal interim government in charge of women and family development. The indictment against Nyiramasuhuko accused her of encouraging, aiding and abetting acts of rape against Tutsi women. Prosecution evidence proved that Nyiramasuhuko, due to her superior relationship with *Interahamwe*, encouraged and ordered them to kill and rape Tutsi women. She was convicted by Trial Chamber II for rape as a crime against humanity on this basis. As mentioned, her conviction is a landmark legacy in the development of international criminal law with regard to women as perpetrators of international crimes, including acts of rape and sexual violence. The trial judges engaged in an extensive discussion on rape and sexual violence as war crimes, crimes against humanity and genocide. Even in circumstances where the prosecution failed to clearly charge Nyiramasuhuko for rape as an act of genocide, trial judges established a record to that effect. The Trial Chamber affirmed in its legal discussions on genocide, and in a bid to convey the general picture in a coherent manner, that the rape and sexual torture that Pauline Nyiramasuhuko aided, abetted and encouraged qualified as causing serious bodily and mental harm.[85] Yet, for the victims, it is very unfortunate that rape and sexual violence was not recognized in the *Nyiramasuhuko* case as genocide. Witness TA, who had testified in Arusha in the *Nyiramasuhuko et al.* case, said, more than 10 years after having given her testimony in court, that she:

> was […] shocked when the judgment in the Butare case was rendered in 2011 because there was no conviction for genocidal rape for Ntahobali and his mother Nyiramasuhuko. Witness TA wonders why the Tribunal and the

perpetrators of genocide and related crimes, see: Martin F. Neyt, 'Two Convicted Rwandan Nuns', in Carol Rittner *et al. (*eds), *Genocide in Rwanda: Complicity of the Churches?* (Paragon House 2004), 251–8; African Rights 1995, *supra* note 15; Nicole Hogg, 'Women's Participation in the Rwandan Genocide: Mothers or Monsters' (2010) 92(877) *International Review of the Red Cross* 69–102.

[85] *Prosecutor v. Nyiramasuhuko et al.* ICTR-98-42-T (Judgement and Sentence, 24 June 2011), para. 5869.

> prosecuting lawyers could not understand that genocide for them was committed through rape and sexual violence which is far worse than an immediate physical death, as it entails death from the pain of the assault, life thereafter and even the justice process itself.'[86]

On 14 December 2015, the Appeals Chamber upheld the findings in respect of the sexual violence conviction, that is, for rape as a crime against humanity.[87]

Nyiramasuhuko's case represents a new discussion in international criminal law in as far as women's criminal enterprise is concerned. Apart from revealing the reality that women were agents in the commission of acts of rape and sexual violence in the Rwandan situation, it also challenges the dominant discourse of rape and sexual violence as male crimes intended to foster male violence argued by some as a manifestation of the patriarchy system. Theories of women as victims and men as perpetrators have been challenged by this case. Our perceptions of women as generally peacemakers and innocent victims of male dominance needs to be re-theorized to capture the realities of Nyiramasuhuko and other female perpetrators.[88] The classical male domination/female subordination discourse insufficiently explains the phenomenon of female perpetrators and other power dimensions that may be at stake for women must therefore be analysed also, such as ethnic and political ideologies.[89]

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[86] Kaitesi 2013, *supra* note 14, 174.

[87] *Prosecutor v. Nyiramasuhuko et al.* ICTR-98-42-A (Judgement, 14 December 2015).

[88] For more literature on these theories/discourses and female perpetrators of international crimes, see, e.g.: Laura Sjoberg, *Women and the Genocidal Rape of Women: The Gender Dynamics of Gendered War Crimes*, p. 5, available 5 August 2016 at www.history.vt.edu/Ewing/Sjoberg_GRISTPaper.pdf; Helen Durham and Katie O'Byrne, 'The Dialogue of Difference: Gender Perspectives on International Humanitarian Law' (2010) 92(877) *International Review of the Red Cross* 1–22; Kaitesi 2013, *supra* note 14; Alette Smeulers, 'Female Perpetrators: Ordinary or Extra-ordinary Women?' (2015) 15 *International Criminal Law Review* 205–51; Anne-Marie de Brouwer and Laetitia Ruiz, 'Male Sexual Violence and Female Perpetrators of Sexual Violence in Conflict', in Solange Mouthaan and Olga Jurasz, *Sexual Violence in Transitional Justice* (Intersentia 2017).

[89] Kaitesi 2013, *supra* note 14, 168.

8. MALE VICTIMS OF SEXUAL VIOLENCE

Sexual violence against male victims in the case of Rwanda and in many other conflict and war situations remains under recognized, under reported and rarely investigated, prosecuted and consequently under judged and punished. Post genocide judicial institutions have given attention to acts of sexual violence as acts constituting the crime of genocide, war crimes and crimes against humanity in an unprecedented way. However, the judicial record of the legacy of the ICTR could have been better than it stands in many ways. In particular there is nearly no legacy for male victims of genocidal sexual violence since the case law of the ICTR is profoundly lacking. The ICTR has but only one case in which there is, still at minimum levels, a discussion about sexual violence against Tutsi men and boys. The investigators and prosecutors did not target such genocidal acts against male victims and so the chambers laboured to establish a profound record to that effect.

Witness testimonies and some publications expose, however, cases and forms of genocidal gender and sexual violence against men and boys in Rwanda. The forms of sexual violence that men suffered include sexual mutilation, forced oral or genital insertions, use of objects including dead animals and forced nudity. These acts of violence were often inflicted on the victims in full view of their loved ones. For example, the sexual organs of young boys and men were cut off in the presence of their terrified family members.[90] Caravielhe illustrates the individual and community targeting of rape and sexual violence in Rwanda in which the victim is allowed to suffer their pain and that of the ones they love by the manner of the abuse. He shows that a family experienced sexual abuse and torture of each other at the same time as theirs. For example, an 11-year-old boy watched as his father was killed and his father's genitals mutilated, then his father's killers forced the young boy to suck the mutilated genitals of his father as his young sister watched.[91] Some men were held in sexual slavery by Hutu women, forced to take drugs in order

[90] Shaharyan M. Khan, *The Shallow Graves of Rwanda* (I.B. Tauris Publishers 2000), 16.

[91] Caravielhe (a logistician with MSF-France) is cited in: Linda Melvern, *A People Betrayed: The Role of the West in Rwanda's Genocide* (Zed Books 2000), 186.

to continue performing multiple sexual intercourse with several of the abusers.[92]

The numbers of male victims of genocidal gender and sexual violence is simply unknown for many reasons, including the fact that women activists and feminists were central in monitoring the inclusion of acts of rape and other forms of sexual violence coupled with the stigmatization and taboo perceptions about male victims of sexual violence. In spite of the fact that a number of cases have become public in the Rwandan judicial mechanisms and through witness testimonies, very few cases at the ICTR made mention of male victims of genocidal sexual violence. The reality is that in two out of three cases the information was never given any attention beyond the statement of the witnesses that had spontaneously and only in relation to other allegations mentioned the evidence. In the case against Bagosora, witnesses, when asked about their observation on rape and sexual violence, mentioned evidence of male sexual violence as noticed from their observation of male dead bodies. Witnesses Beardsley and Dallaire noted, in this case, that a number of male corpses had their genitals and scrotum areas mutilated.[93] The case against Eliézer Niyitegeka is the only case that considered a male victim of sexual violence. Niyitegeka was accused of, *inter alia*, the castration and decapitation of a prominent Tutsi businessman named Assiel Kabanda. The accused was charged with the castration and decapitation of the victim as a crime against humanity, particularly qualified as other inhumane acts. Even though Eliézer Niyitegeka did not in person castrate Kabanda he was found guilty because he was with the perpetrators of the crime and rejoiced in their attack and the killing of Kabanda.

The Trial Chamber argued in its findings relating to the conviction of the accused for 'other inhumane acts' as a constitutive element for crimes against humanity and found that the accused had aided and abetted the commission of a crime against humanity. The sexual mutilation of Kabanda was considered, *inter alia*, to be tantamount to 'acts of seriousness comparable to other acts enumerated in the Article, and would cause mental suffering to civilians, in particular, Tutsi civilians, and constitute a serious attack on the human dignity of the Tutsi

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[92] See e.g., the case of Faustin, a young boy who was sexually enslaved for several days by a Hutu woman, in: De Brouwer and Ka Hon Chu 2009, *supra* note 19.

[93] See: *The Prosecutor v. Eliézer Niyitegeka* ICTR-96-14-T (Judgement, 16 May 2003), paras. 907 and 908.

community as a whole'.[94] At the sentencing stage, the castration of Kabanda was particularly considered as an aggravating circumstance.

Then, the *Mikaeli Muhimana* Trial Chamber, through one of the prosecution witnesses, heard of the castration and decapitation of Kabanda. The evidence was not given further attention because the allegations in paragraph 5(d)(vii) of the indictment were considered vague and dropped by the Tribunal. The evidence on Kabanda's experience of the genocide – had it been considered – would have given the court a rare opportunity to include in its legacy one of the most stand-out side-lined experiences of victims of genocidal gender and sexual violence. Note should be made that a prosecution witness in the case of Eliézer Niyitegeka testified that the victim Kabanda was decapitated and castrated by Mikaeli Muhimana, although this witness was never brought forth in the *Muhimana* case. Witnesses in previous cases, particularly the *Akayesu* case, gave the ICTR an opportunity to amend indictments and particularly include rape and sexual violence in most of the initial indictments that lacked such charges. If the Trial Chamber had picked up on such interests or had been alarmed by the testimony, the present record of the Tribunal would probably have been different in capturing and punishing acts of rape and sexual violence suffered by male victims.

The record of the ICTR on genocidal gender and sexual violence failed to capture the experiences of male victims of this brutal act of genocide, war crimes and crimes against humanity. Strikingly, the Tribunal failed to prosecute and punish those responsible for these acts against Tutsi boys and men which can consequently be seen as a failure in the rich legacy the Tribunal has left to the international legal order. It can therefore be concluded that justice was not provided to the victims and that perpetrators have not been held accountable for such genocidal acts in the international arena. Part of the impressive contributions of the ICTR include its conclusion that rape during the genocide achieved the physical and psychological destruction of Tutsi women, their families and their community, thus affirming that sexual violence was genocidal as an integral part of destruction of the Tutsi. This conclusion emphasises what rape and sexual violence was and why it was used and it would have been truly holistic if a similar conclusion had been reached for the experience of Tutsi male victims of gendered genocidal violence.

In an analysis of the scant narrative about male victims of genocidal sexual violence, a few factors account for its absence. There is a longstanding cultural and theoretical bias that has persistently viewed

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[94] *Ibid.*, paras. 46, 303, 312, 462.

women as the natural victims of rape and sexual violence during wars and conflict and men as perpetrators or even inviolable in culturally imbedded perception. The result is that the stigmatisation that goes along with male victims is even stronger and deeper so that it silences them much more than their female counterparts. Yet, the power discourse that informs genocidal offences including gender and sexual violence is present and responsible for the form of sexualised abuse that men, like women, face. The gendered and sexual symbols of men and boys of the targeted group determine the nature, form and space of the abuse. In the situation in Rwanda, many of the men were sexually abused in public as a means to destroy them and most importantly as an attack on the entire Tutsi population whose traditional and natural defender was the Tutsi man. Sexually abusing and mutilating them was not only successful in rendering them incapable of furthering the Tutsi in a patriarchal society such as Rwanda, but also a communication of greater defeat. A wider view of the tribunal's record is interesting as it gives mixed results in many ways and can easily be interpreted as a subjective standard prompted by the absence of a clear and comprehensive strategy in terms of trying to effectively and more comprehensively hold accountable the perpetrators; no wonder the ICTR Best Practices Manual identified and recommended such a global strategy. The judges in *Muhimana* and those in *Niyitegeka*, for the same facts and same victim, took almost no notice of the evidence, while the trial judges in the latter case were able to sustain a conviction.

9. PROCEDURAL ISSUES RELATING TO SEXUAL VIOLENCE

As one of the very first international criminal tribunals to deal with international crimes, including rape and other forms of sexual violence as constitutive elements thereof, the ICTR, like the ICTY, should be applauded for the Rules of Procedure and Evidence applicable to sexual violence cases. At the creation of both tribunals, the decision was made to create in the best possible ways an environment that would facilitate the victims and witnesses testifying at the tribunal. A special unit for the protection of victims and witnesses, especially in cases of rape and sexual violence, was set up. This unit ensured that the court environment would be sensitive to the security needs of the victims and that suitable measures be taken to that effect. The unit also ensured that victims and witnesses received the required counselling in the process. Rule 96 was also ground breaking in the rules of evidence in cases concerning rape

and other forms of sexual violence. Prior to the tribunals it was common practice in most jurisdictions to require corroboration of the testimony of the victim of rape and sexual violence. Rule 96 also departed innovatively from the evidential requirement in some national criminal laws that requires the consideration of prior sexual conduct. Rule 96 generally forbade the use of consent as a defence. The tribunal's jurisprudence elaborates that consent is inadmissible as a defence where the circumstances of the offence are coercive.[95]

The innovative Rules of Procedure and Evidence are the basis on which victims and witnesses gained acceptable ground in the court room and during investigations. Witnesses H and J in the *Akayesu* case, in the words of the prosecution, helped to link the rape and sexual violence to the actions of Akayesu, prompting the prosecution to submit a motion for the amendment of Akayesu's indictment.[96] Rule 50 of the RPE on the amendment of indictments was one of the most useful as it allowed the amendment of initial indictments, that mostly lacked charges for rape and sexual violence, to include these acts in new charges. Note, however, that in certain cases it was not possible to heal the procedural defects and errors, especially when it was thought that the procedure was too advanced and that considering evidence was not given a central place by the prosecution as it would probably prejudice the accused. In cases like those of *Nyiramasuhuko*, *Muhimana* and *Bagosora* there was evidence on rape and sexual violence, including instances concerning male victims in *Bagosora* and *Muhimana*, but there was a failure to charge the accused with genocide or other crimes on the basis of that evidence. In the case of *Nyiramasuhuko*, the Trial Chamber noted that the prosecution had failed to remedy errors for charging rape and sexual violence as acts of genocide in ample time to allow justice to be done.

In its discussion on rape as genocide the Trial Chamber in the case against Nyiramasuhuko expressed with disappointment that the Office of the Prosecution clearly and consistently failed to plead rape as genocide against Pauline Nyiramasuhuko. In the opinion of the Chamber, there was evidence affirming that rape was in the case at hand committed as a form of genocide. Explaining the prosecution's error, the Trial Chamber expressed that in its pre-trial brief and opening statement the prosecution had made reference to rape as genocide and submitted an Appendix to the Pre-Trial Brief to that effect including witness summaries submitted

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[95] See also subsection 5 above.
[96] *Akayesu* ICTR-96-4-T, para. 458.

in support of genocide alleged rapes and killings.[97] To the Chamber's dismay it remained unclear whether the prosecution had intended to charge rape as an act of genocide. Irrespective of the evidence, the prosecution failed to charge rape as an act of genocide against Nyiramasuhuko. Due to that uncorrected error, there was no accountability for rape as an act of genocide in the case of Nyiramasuhuko; a legacy that has been regarded as denying justice to the victims who worked sacrificially to bring evidence to that effect. Nevertheless there is recognition of the experiences of victims of rape as an act of genocide from the general legal findings of the Trial Chamber. Clearly, however, there were no charges of rape as genocide in this case and hence no conviction and punishment for the perpetrators in this famous *Butare* case.

Finally, as the ICTR only gave victims of sexual violence (and other crimes) a role in the court proceedings as witnesses, unfortunately they did not have the opportunity to participate in the trial to speak about the impact of the crimes on their lives; neither did they have a real meaningful right to reparation. This lack of rights has been severely criticized by many, including court officials and the victims of the genocide themselves. However, as of 2004, victims of sexual violence, who came or who were about to testify before the ICTR, were provided with general medical services, counselling and antiretroviral treatment, in the pre-trial, trial, and post-trial phases.[98]

10. FINAL REMARKS

Not all issues of relevance to the ICTR's legacy on sexual violence prosecutions may have been addressed in this chapter, but we have tried to include some of the most important ones. From the above overview it becomes obvious that the ICTR achieved many great things. As one of the first tribunals it managed to explicitly describe sexual violence as an international crime in its Statute and also to convict accused before it under both specific and non-specific sexual violence crimes as genocide, crimes against humanity and war crimes. In addition, *Akayesu* set a good

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[97] *Prosecutor v. Nyiramasuhuko et al.* ICTR-98-42-T, para. 5833.

[98] See on the issue of victims' rights in more depth: Anne-Marie de Brouwer, 'Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and their Families' (2007) 20(1) *Leiden Journal of International Law* 207–37. See also Chapter 13 on 'The Rights of Victims' by Muzigo-Morrison.

precedent as to the definition of rape in international criminal law, which – overall – seems to have been adopted and followed by the ICC. Also its Rules of Procedure contain many provisions drafted for the benefit of victims/witnesses of sexual violence, unprecedented in international criminal law at the time. At the same time, in some areas the ICTR had a less positive legacy with regard to sexual violence prosecutions. These include not adequately depicting the reality of the sexual violence as it took place in Rwanda by, *inter alia*, largely missing out on sexual violence against men and female perpetrators of sexual violence; not charging, dropping charges or not accurately charging the crimes in the way they were perceived by the victims (that is, often as genocide) which led to great disappointment for victims at times; and difficulties in establishing criminal responsibility for senior accused. A common thread throughout this chapter concerns lessons learned on biases and not seeing sexual violence for what it is: no less a crime than any other crime in international criminal law.[99] Yet, it should equally be acknowledged that the ICTR was mostly pioneering in this new field of international criminal justice and that it has also addressed its failure to sustain convictions for sexual violence crimes by establishing an OTP Rape Database, a Review Committee and by drafting Manuals with recommendations to improve sexual violence prosecutions. These lessons learned are important and should therefore be implemented in cases where conflict-related sexual violence is addressed.

[99] It has been held that the reluctance to discuss sexual violence comes very often more from court officials than from victims themselves. See e.g.: Kaitesi 2013, *supra* note 14; and Sara Sharratt, 'Voices of Court Members: A Phenomenalogical Journey – The Prosecution of Rape and Sexual Violence of the ICTY and the BIH', in De Brouwer *et al.* 2013, *supra* note 30, 365–7.