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The Elements Of Rape As A Crime Against Humanity, What Witnesses Are Required To Say To Satisfy These Elements, And The Cultural Implications Of Describing Rape In Detail

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MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

ISSUE 17: THE ELEMENTS OF RAPE AS A CRIME AGAINST HUMANITY, WHAT WITNESSES ARE REQUIRED TO SAY TO SATISFY THESE ELEMENTS, AND THE CULTURAL IMPLICATIONS OF DESCRIBING RAPE IN DETAIL

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I. Introduction and Summary of Conclusions*

A. Issues

This memorandum addresses the legal elements of crimes against humanity (rape) according to the *The Prosecutor v. Semanza*,[1] which rejected the definition of rape as decided in *The Prosecutor v. Akayesu*[2] and adopted the definition of rape as decided by the Appeals Chamber in *The Prosecutor v. Kunurac*.[3] The first part of this memorandum identifies the chapeau elements of crimes against humanity and the elements of the underlying offense of rape. The second part of this memorandum considers what exactly witnesses are required to say in order to meet the legal elements of the offense. The third part of this memorandum explains and justifies the differences between the approach to rape trials in the United States and the approach to rape trials in the ICTR. The fourth part of this memorandum discusses the cultural implications of asking rape victims to testify using culturally offensive words such as "penis" and "vagina." The fifth part of this memorandum proposes ways to elicit evidence about this culturally sensitive topic.

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* ISSUE 17: Consider and discuss the legal elements of Crimes Against Humanity (Rape) adopted in The Prosecutor v. Semanza which rejected the definition of rape as decided in the Akayesu case and adopted the definition set out in the Appeals Chamber decision in Kunurac. Discuss the words and/or phrases witnesses are required to say when describing the act of rape in order to meet the legal elements of the offense (i.e., is it sufficient for a witness to say "He raped me" or must she say "His penis penetrated my vagina"). Discuss the cultural implications of asking women to use culturally offensive words such as "penis" and "vagina". Propose modes by which this evidence can be given to bridge this cultural gap.

[1] *The Prosecutor v. Laurent Semanza* (hereinafter *Semanza*), ICTR-97-20-T, Judgment, 15 May 2003. [Reproduced in the accompanying notebook at Tab 27.]

[2] *The Prosecutor v. Jean Paul Akayesu* (hereinafter *Akayesu*, ICTR-96-4-T, Judgment, 2 Sept. 1998. [Reproduced in the accompanying notebook at Tab 25.]

[3] *The Prosecutor v. Dragoljub Kunurac et. al.* (hereinafter *Kunurac*), IT-96-23, Appeal Judgment, 31 July 2003. [Reproduced in the accompanying notebook at Tab 32.]

B. Summary of Conclusions

(1) In order to meet the chapeau elements of crimes against humanity under Article 3 of the Statute for the International Criminal Tribunal for Rwanda, 1) there must be an attack, 2) the attack must be widespread or systematic, 3) the attack must be directed against any civilian population, 4) the attack must be committed on discriminatory grounds, and 5) the accused must have acted with the appropriate mens rea.

An attack is a violent course of conduct which is not limited to the use of armed force. It encompasses any inhumane treatment of any civilian population and may precede, outlast, or continue during an armed conflict. In order for the acts of the accused to count as a crime against humanity, they must form part of the attack, which means by their nature or consequences, they must be liable to further the attack.

The requirements that an attack be widespread or systematic should be read disjunctively. "Widespread" refers to the large-scale nature of the attack and the number of victims, while systematic refers to the organized nature of the attack. A civilian population must be the primary object of the attack rather than an incidental target. The attack must be directed against a civilian population on national, political, ethnical, racial, or religious grounds. To meet the mens rea requirement for crimes against humanity, the accused must have intended to commit the underlying offense and must have known that there was an attack on the civilian population and that the underlying offense comprised part of the attack.

(2) The legal elements of rape according to *The Prosecutor v. Semanza* are 1) the non-consensual penetration, however slight (a) of the vagina or anus of the victim by the penis of the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator, and 2) consent for this purpose must be given voluntarily and freely and is assessed within the context of the surrounding circumstances.

The legal elements of rape adopted in *Semanza* in 2003 are narrower than those set out in *The Prosecutor v. Akayesu* in 1998. While the Court in *Akayesu* purposefully avoided focusing on mechanical descriptions of objects and body parts in its definition of rape, the Court in *Semanza* considered a definition which focused on mechanical descriptions and lack of consent (as enunciated in *The Prosecutor v. Kunurac*) persuasive.

(3) Based on the transcripts of *The Prosecutor v. Furundzija* and *The Prosecutor v. Kunurac*, the two cases upon which the *Semanza* definition of rape is based, a rape victim must say that he/she was raped, but the naming of specific body parts may be left to careful questioning by the Prosecution.

Considering the elements of rape adopted in *Semanza*, it would seem that during trial, a witness would be required to describe the act of penetration in detail, naming the body part penetrated and what it was penetrated by. However, in practice, this has not been the case. Generally during examination and cross-examination, a rape victim can say he/she was raped, and the naming of body parts can be left to yes or no questioning posed by the Prosecution. The fact that witnesses usually do not have to go into explicit detail on the witness stand does not mean they never have to go into explicit detail at all. Prosecutors and investigators must know the particulars of the rape so that they do not encounter any surprises in the courtroom.

(4) Aggressive, sexualized American-style cross-examination would be inappropriate and useless in the ICTR.

The U.S. approach to rape victim cross-examination is rooted in the idea that rape is an easy charge to make but a difficult one to defend. U.S. defense attorneys may point to flaws in the complainant's character or testimony in an effort to cast her as a liar and make her account sound more like the defendant's version of consensual intercourse.

They may also focus on the complainant's sexuality through repeated references to body parts and provocative clothing or behavior. This is also done in an effort to convince the jury that the complainant somehow consented. Such an approach has no place in the ICTR, whose rules of procedure and evidence are not based on a distrust of rape complainants. Also, the possibility of a Rwandan woman's consent in the mass rape that took place during the genocide is remote enough to render a focus on consent in cross-examination pointless.

(5) Requiring rape victims to discuss in detail the body parts penetrated and what they were penetrate by may exacerbate the shame and rejection they already feel, therefore measures should be taken to ensure their comfort and safety.

While saying "I was raped" is difficult enough for rape victims in general, admitting to having been raped and then having to describe that rape in detail may be particularly painful for Rwandan women who face rape trauma syndrome, shame, isolation from their family and community, guilt for having survived the genocide, disfigured genitals, infertility, poverty, or an inability to remarry or reintegrate into society.

II. Factual Background

Throughout history, sexual violence has been directed against females during situations of armed conflict.[4] It has taken the form of sexual mutilation, forced pregnancy, rape or sexual slavery. It has also been used as a weapon to terrorize, degrade, and humiliate a particular community and to achieve a political end.[5] The rape

[4] Human Rights Watch, *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath* (1996) [hereinafter Human Rights Watch], *at* http://www.hrw.org/reports/1996/Rwanda.htm. [Reproduced in the accompanying notebook at Tab 36.]

of an individual woman translates into an assault upon the community because of the emphasis on a woman's sexual virtue that is present in every culture. The shame goes beyond the victim; it humiliates her family and everyone associated with her because of her ethnicity, religion, social class, or political affiliation.[6]

In the years preceding the genocide, Tutsi women were the targets of hateful propaganda. Through both written press and radio, Hutu extremists portrayed Tutsi women as spies and seductresses bent on dominating and undermining Hutu men.[7] When the violence began in 1994, so did the widespread rape of Tutsi women (and Hutu women affiliated with Tutsis through marriage, friendship or politics). They were individually raped, gang-raped, raped with objects such as knives, sticks, and guns, held as sex slaves, and/or sexually mutilated.[8]

Though the 1994 genocide campaign has ended, its devastating effects remain, especially in rape victims who have been widowed, impoverished, diseased, disfigured, or rendered infertile. Many have been rejected by their families and communities. Many live in fear of their attackers. Many have had illegal abortions or committed infanticide as a result of rape induced pregnancy. With a post-genocide population that is an estimated seventy percent female, the damage inflicted upon Rwandan society by mass rape cannot be underestimated or ignored.[9]

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[5] *Id.*, at 2.

[6] *Id.* at 10.

[7] *Id.* at 11.

[8] *Id.*at 20.

[9] *Id.* at 5.

Sexual violence against females that takes place during armed conflict or systematic persecution is a clear violation of international law. Perpetrators of sexual violence, or those responsible for the perpetration, may be prosecuted for rape as a war crime, a crime against humanity, or as an act of genocide.[10] Yet rape and other forms of sexual violence have a long history of being used as weapons of conflict and going unpunished.[11]

Recent United Nations world conferences have emphasized the gravity and prevalence of gender based violence in conflict and the obligation of individual states and the international community to take steps to prevent and punish such crimes.[12] Reports of the widespread use of rape as a war tactic in the former Yugoslavia provoked international attention, condemnation, and investigation. As a result, the judges and the chief prosecutor for the ICTY have stated a commitment to prosecuting rape[13] and the ICTY has repeatedly held that rape constitutes torture.[14]

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[10] *Id.* at 16.

[11] "During World War I, the German Army routinely raped women in Belgium and France, while Nazi and Japanese forces implemented policies of rape and forced prostitution during World War II. More recently in the former Yugoslavia, sexual assaults were committed by and against all parties to the conflict, but most egregiously by Bosnian Serb military and civilian personnel against Bosnian women." Patricia Visseur Sellers and Kaoru Okuizumi, *Symposium: Prosecuting International Crimes: An Inside View: Intentional Prosecution of Sexual Assaults*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 45, 46 (1997). [Reproduced in the accompanying notebook at Tab 16.] Though the international community was aware of the sexual assaults taking place throughout World War II, few steps were taken to prevent them from occurring or punish those guilty of committing them. Nowhere in the Charter for the International Military Tribunal at Nuremberg was "rape" or "sexual assaults" explicitly mentioned, despite numerous reports and transcripts containing evidence of rape, forced prostitution, forced sterilization, forced abortion, pornography, and sexual mutilation. Jocelyn Campanaro, *Note, Women, War, and International Law: The Historical Treatment of Gender-Based War Crimes*, 89 GEO. L.J. 2557. [Reproduced in the accompanying notebook at Tab 17.]

[12] "Both the Vienna Declaration and Programme of Action, adopted by the World Conference in Human Rights in June 1993, and the Beijing Declaration and Platform for Action adopted at the Fourth United Nations Conference on Women in September 1995 underscore that violations against women in conflict contravene international law." Human Rights Watch, *supra* note 4, at 16.

The ICTR is explicitly empowered to prosecute rape as a crime against humanity and a violation of the Geneva Conventions.[15] In *Akayesu*, the ICTR made the first conviction of either genocide or crimes against humanity for sexual violence.[16] *Akayesu* enunciated a broad definition of rape as compared to previous trials in the ICTY.[17] However, the *Akayesu* elements of rape were rejected by the ICTR in *Semanza*, which adopted the ICTY's more mechanical style of defining rape.[18] This newly narrowed definition should not prevent the ICTR from fulfilling a legal (and human) mandate to hold accountable those who are responsible for the perpetration of sexual violence.

III. The Legal Elements of Crimes Against Humanity (Rape) adopted in The Prosecutor v. Semanza

In *Semanza*, the Court found that Laurent Semanza, in the presence of commune and military authorities, encouraged a crowd to rape Tutsi women before killing them. Immediately thereafter, one of the men from the crowd raped Victim A, who was hiding in a nearby home. Victim B was killed by two other men from the crowd, but the Court felt there was insufficient evidence to prove that she too was raped.[19] In light of the generalized instructions to rape and kill Tutsis, the ethnic group targeted by the widespread attack, the Court found that the rape was part of the widespread and

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[13] *Id.*

[14] Patricia Viseur Sellers, *Sexual Violence and Peremptory Norms: The Legal Value of Rape* (hereinafter *Sexual Violence and Peremptory Norms*) (Lecture given March 2, 2002 at CWRU School of Law). [Reproduced in the accompanying notebook at Tab 37.]

[15] Human Rights Watch, *supra* note 4, at 16.

[16] Sellers, *Sexual Violence and Peremptory Norms*, *supra* note 16.

[17] *See Akayesu*, *supra* note 3.

[18] *See Semanza*, *supra* note 1.

[19] *Id.* at ¶476.

systematic attack against the civilian Tutsi population and that the assailant was so aware.[20] The Court found that Semanza, the principal perpetrator, committed rape as a crime against humanity because the following elements were met:

A. Chapeau Elements

Article 3 of the International Criminal Tribunal for Rwanda (ICTR) Statute lays out a two-tiered definition of crimes against humanity.[21] It reads:

> The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:
>
> (a) Murder;
> (b) Extermination;
> (c) Enslavement;
> (d) Deportation;
> (e) Imprisonment
> (f) Torture;
> (g) Rape
> (h) Persecutions on political, racial and religious grounds;
> (i) Other inhumane acts.[22]

The first tier of the definition contains the chapeau elements, the general requirements of the offense that make it a crime against humanity, as opposed to an ordinary crime.[23] The second tier consists of the underlying offenses, such as torture or rape, which constitute crimes against humanity if committed in the context of the chapeau elements.

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[20] *Id.* at ¶477.

[21] Guénael Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 HARV. INT'L L.J. 237, 240 (2002) (hereinafter Mettraux). [Reproduced in the accompanying notebook at Tab 8.]

[22] Statute for the International Criminal Tribunal for Rwanda (hereinafter ICTR Statute) [Annex to U.N. SCOR Res. 955] art. 28, reprinted in 33 ILM 1598 (1994). [Reproduced in the accompanying notebook at Tab 34.]

[23] Mettraux, *supra* note 21, at 240.

The specific language used in the definition of crimes against humanity in the ICTR Statute differs from other definitions of crimes against humanity in international war crimes tribunals.[24] The requirement that an attack be "widespread or systematic" had never been codified in a statute.[25] Also, the ICTR Statute, unlike the Statute for the International Criminal Tribunal for the Former Yugoslavia (ICTY), explicitly requires discriminatory intent, as an attack must be "on national, political, ethnic, racial or religious grounds," but does not require that an attack be "committed in armed conflict."[26]

Therefore, in order to meet the chapeau elements of crimes against humanity under the ICTR Statute, 1) there must be an attack (to which the acts of the accused must be linked), 2) the attack must be widespread or systematic, 3) the attack must be directed against any civilian population, 4) the attack must be committed on discriminatory grounds, and 5) the accused must have acted with the appropriate mens rea.[27]

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[24] KELLY D. ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNAL 345 (1997), *citing* the definitions of crimes against humanity in the Charter of the International Military Tribunal, the Allied Control Council Law No. 10, the Charter of the International Military Tribunal for the Far East (Tokyo), and the Statute for the International Criminal Tribunal for the Former Yugoslavia (hereinafter ICTY Statute). [Reproduced in the accompanying notebook at Tab 1.]

[25] The words "widesepread and systematic" were used in ICTY judgments and are now codified in the Rome Statute for the International Criminal Court. Jordan J. Paust, *Content and Contours of Genocide, Crimes Against Humanity, and War Crimes*, *in* INTERNATIONAL LAW IN THE POST –COLD WAR WORLD: ESSAYS IN MEMORY OF LI HAOPEI 292 (Sienho Yee and Wang Tieya eds., 2001). [Reproduced in the accompanying notebook at Tab 3.]

[26] ICTR Statute, art. 3, *supra* note 22; Statute of the International Criminal Tribunal for the Former Yugoslavia (hereinafter ICTY Statute), U.N. Doc. S/25704, art. 5. [Reproduced in the accompanying notebook at Tab 35.]

[27] *Semanza*, *supra* note 1, at ¶327.

(1) Attack

An attack is a course of conduct in which acts of violence are committed.[28] The concepts of "attack" and "armed conflict" are separate notions.[29] Under customary international law, an attack can precede, outlast, or continue during an armed conflict.[30] An attack has a different meaning in the context of crimes against humanity than in the context of war. In the context of crimes against humanity, an attack is not limited to the use of armed force. It includes any inhumane mistreatment of any civilian population.[31] Also, though an attack is an independent violation of the laws of war, it is not, by itself, a crime against humanity.[32]

In establishing whether an attack occurred against a particular population, it is irrelevant that the victimized population also committed atrocities against its opponent population. Both sides could potentially have committed crimes against humanity.[33]

(a) Linkage between the Attack and the Acts of the Accused

In order for the acts of the accused to count as a crime against humanity, they must form part of the attack.[34] To form part of the attack, an act must, by its nature or consequences, be liable to further the attack.[35] This can be assessed by considering the

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[28] Mettraux, *supra* note 21, at 244.

[29] Kunurac, *supra* note 2, at ¶86.

[30] *The Prosecutor v. Dusko Tadic* (hereinafter *Tadic*), IT-94-01, Appeal Judgment ¶251, 15 July 1999.

[31] *Semanza*, *supra* note 1, at ¶327; *Kunurac*, *supra* note 2, at ¶86.

[32] Mettraux, *supra* note 21, at 245.

[33] *Kunurac*, *supra* note 2, at ¶87.

[34] *Id.* at ¶417.

[35] Mettraux, *supra* note 21, at 251.

nature and purpose of the attack and the impact of the criminal act in question upon the attainment of that purpose.[36] A single act can form part of an attack, as long as it is not isolated or random.[37] It is not necessary that there be many victims involved,[38] that the act occur in the heat of the attack,[39] or that the victim of the act be part of the group specifically targeted in the attack.[40]

(2) Widespread or Systematic

The requirements of "widespread" and "systematic," as with customary international law, should be read disjunctively in accordance with the English version of the Statute, rather than cumulatively in accordance with the French version.[41] The inclusion of the widespread and systematic prong is another way of excluding isolated and random acts from the scope of crimes against humanity.[42] However, it is only the attack, and not the underlying act, that must be either widespread or systematic.[43] Once it is found that either requirement is met, the Court is not obliged to consider whether the alternative qualifier is also satisfied.[44]

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[36] *Id.* at n60.

[37] *Tadic*, Trial Judgment ¶649, 14 July 1997.

[38] *Id.*

[39] *The Prosecutor v. Kupreskic*, ¶550, 2000.

[40] *Akayesu*, *supra* note 3, at ¶584.

[41] *Semanza*, *supra* note 1, at ¶328.

[42] Mettraux, *supra* note 21, at 259.

[43] *Kunurac*, *supra* note 2, at ¶96.

[44] *Id.* at ¶93.

"Widespread" refers to the large-scale nature of the attack and the number of victims.[45] The attack may be widespread as a result of a series of acts, or as a result of a single act of extraordinary magnitude.[46] "Systematic" refers to the organized nature of the acts of violence and the improbability of their random occurrence. Patterns of crimes are a common expression of systematicity.[47] While the existence of a policy or plan may be evidentially relevant to proving that an attack was widespread or systematic, it is not a legal element of a crime against humanity.[48]

Assessing whether an attack was widespread or systematic depends upon how the targeted population is defined. Therefore, the Court must first identify the attacked population and, considering the means, methods, resources and result of the attack upon the population, decide whether the attack was widespread or systematic. The consequences of the attack, the number of victims, the nature of the acts, the participation of authorities or any clear patterns of crimes can be taken into account in the Court's determination.[49]

(3) Directed Against Any Civilian Population

The phrase "directed against" implies that in the context of a crime against humanity, the civilian population is the primary object of the attack rather than an

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[45] *Id*. at ¶94. *See also The Prosecutor v. Musema*, which held that "widespread"…is a massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against multiple victims, while "systematic" constitutes organized action, following a regular pattern, on the basis of a common policy and involves substantial public or private resources, at ¶203.

[46] Mettraux, *supra* note 21, at 260.

[47] *Kunurac*, *supra* note 29, at ¶94.

[48] *Semanza*, *supra* note 1, at ¶329.

[49] *Kunurac*, *supra* note 2, at ¶95.

incidental target.[50] In determining whether an attack was directed against a civilian population, the Court considers the means and methods used in the attack, the victims' status and number, the discriminatory nature of the attack, the type of crimes committed in the course of the attack, the resistance to the assailants at the time of the attack and the extent to which the attacking force complied with the precautionary mandates of the laws of war.[51]

The overall attack, not the individual acts of the accused, must be directed against a civilian population.[52] The Court must be satisfied that the attack is directed against an identifiable population rather than a loosely connected group of individuals. However, the use of the word "population" does not mean that the entire population of the geographical area being attacked must have been subjected to the attack. It is sufficient to show that the number or the manner in which individuals were targeted creates an identifiable population.[53]

(4) Committed on Discriminatory Grounds

Article 3 of the Statute requires that the attack directed against the civilian population be committed "on national, political, ethnical, racial or religious grounds."[54] This discriminatory requirement applies to the attack, not to each underlying offense. Therefore, the actual victim of the underlying offense need not be a part of the targeted national, political, ethnic, racial, or religious group, as long as the act against the outsider

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[50] *Id.*at ¶91. *See also Semanza*, *supra* note 1, at ¶330.

[51] *Id.*

[52] Mettraux, *supra* note 21, at 253.

[53] *Kunurac*, *supra* note 2, at ¶90.

[54] ICTR Statute, *supra* note 22.

supports or furthers (or is intended to support or further) the overall discriminatory attack.[55] Such a definition of crimes against humanity circumscribes the Court's jurisdiction more narrowly than customary international law, as discriminatory intent has historically been associated only with the underlying offense of persecution.[56]

(5) Mens Rea

To meet the mens rea requirement for crimes against humanity, the accused must have intended to commit the underlying offense and must have known that there was an attack on the civilian population and that the underlying offense comprised part of the attack, or at least must have risked committing an act that was part of the attack. This requirement does not entail knowledge of the details of the attack.[57]

Knowledge of the attack may be actual or constructive.[58] Circumstantial evidence may lead to an inference of knowledge, examples of which include the accused's position in the military or civilian hierarchy, participation in the takeover of villages, claims of superiority over an enemy group, etc.[59] Knowledge may also be

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[55] *Semanza*, *supra* note 1, at ¶331

[56] Mettraux, *supra* note 21, at 269. Neither the IMT, CCL10, Tokyo, ICTY, nor the ICC list discriminatory intent in their chapeau elements of crimes against humanity. However, this does not pose a problem for the ICTR, as the Court has taken judicial notice of the fact that Tutsi is an ethnic group. *See Akayesu, supra* note 3, at ¶130.

[57] *Kunurac*, *supra* note 2, at ¶102. *See also Semanza*, *supra* note 1, at ¶332.

[58] *Tadic*, *supra* note 30, at ¶657. The essential characteristic of a crime against humanity is not the intent to commit the underlying act of murder, etc., that is in effect an ordinary crime under virtually all municipal legal systems. Rather, it is the knowledge of the broader context in which that offense occurs which transforms an ordinary crime into the elevated status of a crime against humanity, not only as a matter of jurisdiction, but as a matter of the culpability that attaches to such acts. *See* Payam Akhavan, *Contributions of the International Criminal Tribunals for the Former Yugoslavia and Rwanda to Development of Definitions of Crimes Against Humanity and Genocide*, 94 AM. SOC'Y INT'L L. PROC. 279, 281 (2000). [Reproduced in the accompanying notebook at Tab 15.]

[59] Mettraux, *supra* note 21, at 262.

inferred from public knowledge, relying on the extent of media coverage, the scale of the attack, or the general historical or political environment in which the attack occurred.[60]

To impose criminal liability, the motivations of the accused are irrelevant. A crime against humanity can be committed for purely personal reasons, as it is not necessary that the accused share the purpose or goal behind the attack. Whether the accused intended to harm the targeted population or just the victim is also irrelevant. The attack, and not the act of the accused, must be directed against the civilian population; the accused need only actually or constructively know that the act is part thereof.[61]

(B) The Underlying Offense of Rape

The above chapeau elements represent the general requirements that a criminal act must meet before it may qualify as a crime against humanity. In addition, the act at the crime's foundation must be listed in Article 3 of the ICTR.[62] The underlying acts themselves need not contain the chapeau elements of the attack (widespread and systematic, directed against any civilian population, on discriminatory grounds), but must form part of the attack.[63] The individual crimes have their own specific elements.[64] The following is a discussion of the specific elements of rape.

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[60] *Id.*

[61] *Kunurac*, *supra* note 2, at ¶103 (At most, evidence that the accused had purely personal motives could indicate a rebuttable assumption that the accused was not aware that the act was part of an attack).

[62] Mettraux, *supra* note 21, at 282-283 (murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds, or other inhumane acts). It is unsettled whether the ICTR's list is exhaustive, or if offenses like disappearance or enforced prostitution recognized under customary international law could be sanctioned by the Court. *Id.*

[63] *The Prosecutor v. Clément Kayishema*, ICTR-95-1-T, Judgment ¶135, 21 May 1999. [Reproduced in the accompanying notebook at Tab 26.]

The prosecution of gender related crimes in the ICTR and ICTY has given birth to several definitions of rape and other forms of sexual violence which vary in language and in scope.[65] The *Akayesu* judgment in September, 1998, was the first conviction of either genocide or crimes against humanity for sexual violence.[66] Jean-Paul Akayesu was the bourgmaster (mayor) of Taba Commune in Rwanda. Originally, Akayesu was not charged with gender-related crimes. However, during the trial, a witness spontaneously testified about the gang rape of her six-year-old daughter by Interahamwe soldiers.[67] Another witness then said she was a victim of and witness to rape committed by Hutu militia-men. The trial was convened so that the Office of the Prosecutor could investigate and amend the indictment.[68] As a result, the Trial Chamber was able to recognize (1) sexual violence as an integral part of the genocide in Rwanda, (2) rape and other forms of sexual violence as crimes against humanity, and (3) broad, progressive definitions of rape and sexual violence.[69] The Court held:

> While rape has been defined in certain national jurisdictions as non-consensual intercourse, variations on the act of rape may include acts which involve the

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[64] *Id*. For the accused to be found guilty of a crime against humanity, the Prosecution must prove that the accused is responsible for one of the crimes charged pursuant to Article 6(1) and/or Article 6(3) of the ICTR Statute.

[65] Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraodinary Advances, Enduring Obstacles* (hereinafter *Prosecuting Wartime Rape)*, 21 BERKELEY J. INT'L L. 288, 317 (2003). [Reproduced in the accompanying notebook at Tab 11.]

[66] *Id.* at 318.

[67] Interahamwe is Kinyarwanda for "those who work together." They were groups of civilian militias who worked under the direction of Rwandan authorities. The term Interahamwe originally referred to the youth wing of the MRND, but evolved into meaning all militia participating in the genocide. *See Human Rights Watch*, *supra* note 4.

[68] Kelly D. Askin, *Prosecuting Wartime Rape*, *supra* note 65, at 318.

[69] Kelly D. Askin, *Developments in International Criminal Law: Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status* (hereinafter *Developments*), 93 A.J.I.L. 97, 107 (1999). [Reproduced in the accompanying notebook at Tab 12.]

> insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual.[70]
>
> The Chamber considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The 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 framework of state sanctioned violence. 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.[71]
>
> The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence, which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.[72]

The Court explained that coercive circumstances need not be evidenced by a show of physical force.[73] Threats, intimidation, extortion, and other forms of duress which feed on fear may constitute coercion, and coercion is inherent in circumstances such as armed conflict or military presence among refugees.[74] Applying these definitions, the Court found that the testimony by Witness KK, regarding the thrusting of a piece of wood into the "sexual organs" of a woman, constituted rape.[75]

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[70] *Akayesu*, *supra* note 3, at ¶596.

[71] *Id.* at ¶597.

[72] *Id.* at ¶598.

[73] *Id.* at ¶688.

[74] *Id.*

[75] *Id.* at ¶686. There were no allegations that Akayesu himself actually committed rape, though he could be held accountable because he ordered, instigated, or aided and abetted them through his presence, omissions or encouragement. *See* Askin, *Prosecuting Wartime Rape*, *supra* note 65, at 320.

The *Akayesu* definition of rape was considered quite broad as compared to the definition enunciated by the *Kunurac* judgment from the ICTY which was later adopted by the ICTR in *Semanza*.[76] The *Kunurac* judgment in February, 2001, rendered the first conviction of rape as a crime against humanity in the ICTY.[77] The trial was actually against Dragoljub Kunurac, Radomir Kovac, and Zoran Vukovic. During the time covered by the Amended Indictment, Kunurac was the leader of a reconnaissance unit of the Bosnian Serb Army and Kovac and Vukovic were members of a Bosnian Serb military unit in Foca.[78] In the Spring of 1992, Serb military forces took over the municipality of Foca, separated the Muslim and Croation men from women and children, and held them in detention facilities where women and girls were systematically raped.[79]

In *Kunurac*, the Court built upon the elements of rape articulated in *Furundzija*, a case involving multiple rapes committed against one woman during an interrogation. Furundzija was charged with violations of the laws and customs of war for torture and outrages upon personal dignity.[80] The *Furundzija* Trial Chamber examined trends in international jurisprudence and domestic laws from multiple jurisdictions and held that the objective elements of rape are:

> (i) 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

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[76] *Semanza*, *supra* note 1, at ¶344.

[77] It was also the first ever conviction for enslavement in conjunction with rape. Askin, *Prosecuting Wartime Rape*, *supra* note 65, at 333.

[78] *Id.*

[79] *Id.*, *citing Kunurac*, Amended Indictment, IT-96-23-T, 1 Dec. 1999 & IT-96-23/1-T, 3 Mar. 2000.

[80] *Id.* at 327, *citing The Prosecutor v. Anto Furundzija*, IT-95-17/1-PT, Indictment, Amended-Redacted, 2 June 1998.

(b) of the mouth of the victim by the penis of the perpetrator;
(ii) by coercion or force or threat of force against the victim or a third person.[81]

The Trial Chamber then found the elements of rape were met "when Accused B penetrated Witness A's mouth, vagina and anus with his penis."[82]

The elements of rape provided by the *Kunurac* Trial Chamber and affirmed by the *Kunurac* Appeals Chamber modified the *Furundzija* elements. The *Kunurac* Court concluded that:

> the *actus reus* of the crime of rape in international law is constituted by:
> the sexual penetration, however slight:
> (a) of the vagina or the anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
> (b) of the mouth of the victim by the penis of the perpetrator;
> where such sexual penetration occurs without consent of the victim. Consent for this purpose must be 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.[83]

After establishing the above elements, the Appeals Chamber elaborated on the Trial Chamber's discussion of the role of consent, or lack thereof, in rape cases:

> …with regard to the role of force in the definition of rape, the Appeals Chamber notes that the Trial Chamber appeared to depart from the Tribunal's prior definition of rape. However, in explaining its focus on the absence of consent as the *condition sine qua non* of rape, the Trial Chamber did not disavow the Tribunal's earlier jurisprudence, but instead sought to explain the relationship between force and consent. Force or threat of force provides clear evidence of non-consent, but force is not an element *per se* of rape. In particular, the Trial Chamber wished to explain that there are "factors [other than force] which would render an act of sexual penetration *non-consensual or non-voluntary* on the part of the victim." A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had

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[81] *The Prosecutor v. Furundzija* (hereinafter *Furundzija*), IT-95-17/1, Trial Judgment ¶124-130, 10 Dec. 1998. [Reproduced in the accompanying notebook at Tab 28.]

[82] Kelly D. Askin, *Prosecuting Wartime Rape*, *supra* note 65, at 328, *citing id.* at ¶185.

[83] *Kunurac*, *supra* note 2, at ¶127.

> not consented by taking advantage of coercive circumstances without relying on physical force.[84]

The *Kunurac* Trial Chamber had emphasized the importance of recognizing factors which would make a victim particularly vulnerable to an inability to refuse sex. Such circumstances would be incapacity of an enduring or qualitative nature such as mental or physical illness or young age, or of a temporary or circumstantial nature such as psychological pressure.[85] The basic principle behind the crime of rape is that violations of sexual autonomy, which occur whenever the person subjected to the act has not freely agreed or is otherwise not a voluntary participant, should be penalized.[86]

Though the ICTR Appeals Chamber affirmed the *Akayesu* Trial Chamber Judgment in June, 2001 (after *Kunurac* had been decided by the ICTY), in May, 2003, the ICTR decided to align itself with the *Kunurac* definition of rape in *The Prosecutor v. Semanza*.[87] Laurent Semanza served as bourgmestre of Bicumbi commune prior to becoming President of the greater Kigali branch of the MRND political party in 1993.[88] Semanza was found guilty of torture and murder as crimes against humanity for inciting a

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[84] *Id.* at ¶129-132. The Court went on to consider various approaches in domestic courts to rape that occurs in such coercive circumstances that evidence of apparent consent is irrelevant. "For the most part, the Appellants in this case were convicted of raping women held in *de facto* military headquarters, detention centres and apartments maintained as soldiers' residences. As the most egregious aspect of the conditions, the victims were considered the legitimate sexual prey of their captors…Such detentions amount to circumstances that were so coercive as to negate any possibility of consent."

[85] *The Prosecutor v. Kunurac* (hereinafter *Kunurac Trial*), IT-96-23, Trial Judgment ¶452, 22 Feb. 2001. [Reproduced in the accompanying notebook at Tab 31.]

[86] *Id.* at ¶457.

[87] Kelly D. Askin, *Prosecuting Wartime Rape*, *supra* note 65, at 321.

[88] Press Release, *Rwanda Tribunal Delivers Two Judgments Today*, Arusha 15 May 2003, *at* http://www.ictr.org/ENGLISH/PRESSREL/2003/344.htm. [Reproduced in the accompanying notebook at Tab 39.]

Hutu crowd in Gikoro commune to rape Tutsi women before killing them.[89] In deciding upon the definition of rape to be applied, the Trial Chamber held:

> The *Akayesu* Judgment enunciated a broad definition of rape which included any physical invasion of a sexual nature in coercive circumstances and which was not limited to forcible sexual intercourse. The Appeals Chamber of the ICTY, in contrast, affirmed a narrower interpretation, defining the material element of rape as a crime against humanity as the non-consensual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or by any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator. Consent for this purpose must be given voluntarily and freely and is assessed within the context of the surrounding circumstances.[90]
>
> While this mechanical style of defining rape was originally rejected by this Tribunal, the Chamber finds the comparative analysis in *Kunurac* to be persuasive and thus will adopt the definition of rape approved by the ICTY Appeals Chamber. In doing so, the Chamber recognizes that other acts of sexual violence that do not satisfy this narrow definition may be prosecuted as other crimes against humanity within the jurisdiction of this Tribunal such as torture, persecution, enslavement, or other inhumane acts.[91]

The Court then held that the mens rea for rape as a crime against humanity is the intention to effect the prohibited sexual penetration with the knowledge that the victim has not given consent.[92]

Of the various definitions of rape enunciated by the ICTR and the ICTY, *Akayesu* is the broadest, *Furundzija* is the strictest, and *Kunurac* is somewhere in between. In *Akayesu*, the Court made a conscious decision not to focus on "mechanical

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[89] *Id.* Though other charges of rape and sexual violence were included in the indictment in relation to the Musha Church and Mwulire Hill massacres, the Chamber ruled that the Prosecutor failed to present sufficient evidence. Immediately following Semanza's instructions, "Victim A" was raped, and "Victim B" was killed. Though Victim A claims that Victim B was also raped, the Court held that there was insufficient evidence to draw any conclusions. Semanza's intentional encouragement and instigation of the rapes/murders enabled him to be held accountable. *See Semanza*, *supra* note 1, at ¶476-478.

[90] *Semanza*, *supra* note 1, at ¶344.

[91] *Id.* at ¶345.

[92] *Id*. at ¶346.

descriptions" of objects and body parts.[93] Looking to the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, the Court recognized that its focus was on the conceptual framework of state sanctioned violence rather than on the cataloging of specific acts.[94] The Court found this approach "more useful in international law,"[95] and thus defined rape in a similarly broad spirit. In *Furundzija* and *Kunurac*, the Court looked to domestic rape laws from multiple jurisdictions, as opposed to the structure of definitions in conventions and treaties.[96] Thus, they established objective elements of rape which include the mechanical descriptions that *Akayesu* had admittedly avoided. However, the *Kunurac* Court was concerned that by not addressing consent in its definition, *Furundzija* had construed rape more narrowly than international law requires.[97] Thus, *Kunurac* explained the relationship between force and consent and incorporated into its rape definition factors other than force which could render an act of sexual penetration non-consensual.[98]

Semanza acknowledged the relative broadness of *Akayesu* and narrowness of *Kunurac*, but found *Kunurac* persuasive. Thus, the material elements of rape, according to the most recent decisions of both the ICTR and the ICTY are:

(1) the non-consensual penetration, however slight
    (a) of the vagina or anus of the victim by the penis of the perpetrator or by any other object used by the perpetrator; or

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[93] *Akayesu*, *supra* note 3, at ¶597.

[94] *Id.*

[95] *Id.*

[96] *Furundzija*, *supra* note 81, at ¶185. *See also Kunurac Trial*, *supra* note 85, at ¶127.

[97] Kelly D. Askin, *Prosecuting Wartime Rape*, *supra* note 65, at 334.

[98] *Kunurac Trial*, *supra* note 85, at ¶129.

(b) of the mouth of the victim by the penis of the perpetrator.

(2) Consent for this purpose must be given voluntarily and freely and is assessed within the context of the surrounding circumstances.[99]

IV. Words/Phrases Witnesses Are Required to Say

Considering the above elements of rape adopted by the ICTR in *Semanza*, it would seem that during trial, a witness would be required to describe the act of penetration in detail, naming the body part penetrated and what it was penetrated by. However, in practice, this has not been the case.[100] When asked about what exactly witnesses are required to say in order to satisfy the legal elements of rape, Peggy Kuo, a former Prosecutor for the ICTY who helped prosecute Kunurac, said:

> …we began the [*Kunurac*] trial with an American-style approach to rape testimony, that is, we asked witnesses about specific body parts. This, as you can imagine, was very difficult, and sometimes we had to "lead" the witness by asking, "Did he put his penis into your vagina," etc., which was very ackward, but then all they had to do was say, "yes." In a US trial, you wouldn't even be able to ask that because it's really "leading" the witness. As the trial progressed, we realized that the defense was not challenging the specific acts, so we just asked things like, "What did he do then?" and had already prepped the witnesseses that they could just say, "He raped me." This seemed sufficient until April 19, when Judge Hunt prompted the prosecution to ask whether the acts were done without the victim's consent…Thereafter, we included the question, "Did he do that against your will?" which was strange because the word "rape" especially in Bosnian/Croation/Serbian already implies lack of consent. But that seemed to be sufficient. So, because the law does not specifically require the description of specific body parts, and the defense did not challenge the nature of the acts (e.g., did penetration occur?) we were able just to elicit, "I was raped," plus "it was against my will."[101]

Ms. Kuo went on to acknowledge that there may be circumstances in which one would need to be more explicit, for example, if the defense raises a challenge, or if there was an

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[99] *Semanza*, *supra* note 1, at ¶344.

[100] Email written by Peggy Kuo to Nicole Dorsky on 24 Oct. 2003 in response to an email asking what exactly witnesses are required to say during rape trials in the ICTY (hereinafter Peggy Kuo email). [Reproduced in the accompanying notebook at Tab 40.]

[101] *Id.*

important detail such as the description of an instance of oral rape, or if the medical evidence were contested in some way.[102] However, she added that defense lawyers were often just as uncomfortable being explicit as the witnesses were.[103]

Ms. Kuo's statements are supported by the *Kunurac* transcript, as well as the transcript of *Furundzija*, the two cases upon which the *Semanza* definition of rape is based.[104] In *Furundzija*, the rape testimony was given in closed session and is therefore unavailable; however the Prosecution's opening statement helps illustrate how rape was most likely discussed. The Prosecution began by describing the unlawful interrogation for which Furundzija was indicted. The description referred to the "prolonged series of physical, mental, and serious sexual abuses, including repeated rapes" that Witness A endured.[105] At this point, the rape allegation did not contain any further details. However, later on the Prosecution elaborated upon the alleged rape by calling it "vaginal and oral penetration."[106] Throughout the opening statement, rapes were alternately referred to as either "rape" in general or "vaginal, anal, and oral penetration" specifically.[107] In response, the Defense's opening statement did not deny that sexual assault had occurred or contest any specific allegations of vaginal, anal, or oral penetration.[108] Rather, the Defense focused on proving that Furundzija was not present

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[102] *Id.*

[103] *Id.*.

[104] Transcripts of witness rape testimony has been difficult to find because it often takes place in closed session, which is not available to the general public.

[105] *Furundzija* transcript at 61. [Reproduced in the accompanying notebook at Tab 30.]

[106] *Id.* at 64.

[107] *Id.* at 65, 71, 147 (general description), at 66, 77 (specific body parts).

for any sexual assault upon Witness A.[109] The Defense referred to the alleged rape as "sexual assault" consistently throughout its opening statement.[110] The Prosecution's first witness, who did not testify in a closed session, was not a victim, but a local doctor that saw rape victims enter the hospital where he worked. Though he did not personally examine rape victims (as that was a task reserved for female physicians), he recalled a woman coming in to the hospital who had been "raped" and who "was bleeding from the vagina and anus."[111] The Defense did not object to the Doctor's description.[112]

The *Kunurac* transcript provides even more information about what exactly witnesses are required to say. As Ms. Kuo mentioned, on April 19, 2000, Judge Hunt made a statement regarding how an act of rape should be described by a witness:

> I've always understood rape to be the intercourse without consent and that if acquiescence is obtained by force, then there is no consent…You [Mr. Ryneveld, Prosecutor] or each of the prosecutors has usually allowed the witness to say she was raped…Now, if it be the fact, may I suggest that you obtain from the witnesses that they did not consent.[113]

After Judge Hunt's intervention, Ms. Kuo proceeded to examine Witness AS, a rape victim, accordingly.

Initially, Witness AS referred to what happened to her as "rape" in general.[114] She then described the number of soldiers involved, the room in which she was raped, what she was required to do afterwards, and the names of the perpetrators that she could

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[108] *Id.* at 79-87.

[109] *Id.* at 79

[110] *Id.* at 79-87

[111] *Id.* at 148.

[112] *Id.*

[113] *Kunurac* transcript at 1980. [Reproduced in the accompanying notebook at Tab 33.]

[114] *Id.* at 1999.

recall.[115] This description was followed by Ms. Kuo asking "And when you use the word 'rape', and I'm sorry to have to ask you this, what specifically do you mean they did?" Witness AS replied "They destroyed everything in me." Ms. Kuo then asked, "Just so the Court knows, since the Court needs to know specifically for the record, did they put their penises into your vagina?" Witness AS replied "Yes."[116] The Defense did not object.[117]

This method of questioning was repeated throughout the examination of Witness AS.[118] She would say she was "raped"[119] and Ms. Kuo would ask her to elaborate on the surrounding circumstances, such as who the perpetrators were and what they were wearing (civilian or uniform clothing) and where she was.[120] After Witness AS's description, Ms. Kuo would then ask her what she meant by the word rape. Sometimes Ms. Kuo would say something like "When you use the word 'rape', do you mean what you described before, what happened to you at Karaman's house?"[121] Other times, Ms. Kuo would say "And I'm sorry again, but the Court needs to know very specifically, when you used the word 'rape', do you mean that he put his penis into your

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[115] *Id.*

[116] *Id.* at 2000.

[117] *Id.*

[118] *Id.*

[119] Witness AS was raped on multiple occasions because she was a sex slave to the accused.

[120] *Kunurac* transcript at 2010, 2011, 2017, 2027.

[121] *Id.* at 2011.

vagina against your will?"[122] Witness AS would simply reply "Yes" to Ms. Kuo's questions without any objection from the Defense or the Judges.[123]

When the Defense cross-examined Witness AS, it did not attempt to disprove the specific acts of penetration relayed through the careful questioning by Ms. Kuo. Instead, the Defense concentrated on trying to discredit Witness AS's recollection of the surrounding circumstances by asking her details about the buildings and rooms in which the rapes took place.[124] Witness AS, growing frustrated with the Defense's relentless questioning about geographic details would say things like "Listen, I can't remember all the details, because I wasn't raped by the buildings. Do you understand that? I did not live in Foca."[125] The Defense never asked Witness AS to provide details of the rape itself or name the body parts penetrated or what they were penetrated by.[126]

Based on witness testimony given in open session in *Furundzija* and *Kunurac*, it appears that a rape victim must say he/she was raped, but that the naming of body parts can be left to careful yes or no questioning by the Prosecution. Since the *Semanza* definition of rape is based on *Kunurac* which is based on *Furundzija*, the same rules should apply in the ICTR. However, the fact that witnesses may not always have to go into explicit detail on the witness stand does not mean they never have to go into explicit detail at all. Ms. Kuo has said that:

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[122] *Id.* at 2017.

[123] *Id.* at 2011, 2017.

[124] *Id.* at 2042, 2043.

[125] *Id.* at 2043. Foca is the town in which Witness AS was held captive as a sex slave.

[126] *Id.*

> …we as prosecutors and investigators (almost always women) did ask the witnesses during our interviews to describe the incident in greater detail, so we would not encounter any surprises in the courtroom. For the most part, the witnesses were able to speak in "private" about these matters. A lot depended on how comfortable we were able to make them (I always tried to set up my office in a non-intimidating way: fresh flowers, cookies and coffee, at a table away from my desk). It was painful and difficult for the women, but when we got the message across that we were not judging them, they were quite open.[127]

V. Comparison to Rape Trials in U.S. Courts

Though it seems likely that ICTR defense attorneys will follow the example set by their ICTY counterparts in cases like *Kunurac* and *Furundzija*, there remains the possibility that they will urge the Court to adopt the more accused-friendly rules of procedure and evidence for rape trials required in nations such as the United States.

A. Rape as Defined by the Model Penal Code

In 1962, the American Law Institute published the Model Penal Code (MPC), "a massive effort to codify the entire criminal law," which has influenced the law of many, but not all, states.[128] Section 213.1 of the MPC reads:

> (1) Rape. A male who has sexual intercourse with a female not his wife is guilty of rape if:
> (a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or
> (b) he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or
> (c) the female is unconscious; or
> (d) the female is less than 10 years old.
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> Rape is a felony of the second degree unless (i) in the course thereof the actor inflicts serious injury upon anyone, or (ii) the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously

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[127] Peggy Kuo email, *supra* note 100.

[128] KEITH BURGESS-JACKSON, RAPE: A PHILOSOPHICAL INVESTIGATION 72 (1996). [Reproduced in the accompanying notebook at Tab 5.]

> permitted him sexual liberties, in which cases the offense is a felony of the first degree.
>
> (2) Gross Sexual Imposition. A male who has sexual intercourse with a female not his wife commits a felony of the third degree if:
> (a) he compels her to submit by any threat that would prevent resistance by a woman or ordinary resolution; or
> (b) he knows that she suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct; or
> (c) he knows that she is unaware that a sexual act is being committed upon her or that she submits because she mistakenly supposes that he is her husband.[129]

The MPC says the phrase "sexual intercourse" includes oral and anal intercourse, with some penetration, however slight. Emission is not required.[130] There is no mention of consent in the MPC sections on rape or gross sexual imposition. However, Section 2.11 of the MPC provides that "The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such consent negatives an element of the offense."[131] Since consent presumably negates the element of force or threat contained in the definition of rape, it may serve as a defense to that charge.[132]

Many individual states have departed from the exact wording of the definition of rape in the MPC. Some have made the crime sex-neutral rather than sex-specific, so that men and women can be both victims and perpetrators.[133] Most have abolished the marital rape exemption.[134] States have substituted "against her will" or "without her

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[129] MODEL PENAL CODE (hereinafter MPC) § 213.1 (Proposed Official Draft 1962). [Reproduced in the accompanying notebook at Tab 41.]

[130] *Id.*at § 213.0.

[131] MPC, *supra* note 129, at § 2.11.

[132] BURGESS-JACKSON, RAPE: A PHILOSOPHICAL INVESTIGATION, *supra* note 128, at 73.

[133] *Id.* at 78.

[134] *Id.*

consent" for the "by force" language of the MPC.[135] Yet whether the language in question is "by force," "against her will," or "without her consent," or a combination of the three, U.S. rape cases have often focused on the victim's mental state and behavior.[136]

Concern about the potential fault of the victim led to procedural and evidentiary rules such as (1) the corroboration requirement, which in practice prevents a defendant from being convicted solely on the basis of the victim's testimony; (2) the utmost-resistance requirement, which precluded a conviction of rape if the victim submitted, even if she were paralyzed with fear and did not consent; (3) prompt-notice or prompt-reporting requirements; and (4) cautionary instructions from the judge to the jury about rape being an easy charge to make but a difficult one to defend.[137]

B. The Trial Experience of Rape Victims in the U.S.

Before the advent of rape-shield laws, which make it more difficult (but by no means impossible) for the defense to expose the victim's sexual history, defense attorneys almost always tried to destroy the victim's character or reputation by connecting her to alcohol and drugs, "fast living," unfit motherhood, poor employment records, and other immoral conduct.[138] Existing rape-shield laws vary widely in scope and procedural detail. The statutes of Texas and eleven other states allow sexual conduct

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[135] *Id.*

[136] *Id.*

[137] *Id.* at 80.

[138] KEITH BURGESS-JACKSON, A MOST DETESTABLE CRIME 252 (1999). [Reproduced in the accompanying notebook at Tab 6.]

evidence subject to the discretion of the trial court judge under traditional relevancy standards (the probative value of the evidence must outweigh its prejudicial effects).[139]

Despite certain protections offered by rape-shield laws, there is an abundance of anecdotal evidence from trial records, press accounts, and personal accounts that rape victims are subject to more abusive questioning than are victims of other crimes.[140] The structure of cross-examination allows the defense to reconstruct the victim's testimony; to disconnect, overemphasize, or underemphasize certain points to confuse and discredit her presentation. Often, the goal is to cast the victim as a liar by making her account sound more like the defendant's version of consensual intercourse.[141]

A defense attorney's goal of discrediting the rape victim is aided by the cultural myths and stereotypes about men's and women's sexuality that can, and do, influence jurors.[142] Rape trials often depend on and perpetuate a paradigmatic tale of rape in which an attractive, modestly dressed victim is brutally beaten and sexually assaulted by a deviant sociopath with whom she has no prior relationship. Deviation from this paradigm, such as when the woman is dressed provocatively or is on a date with the perpetrator, frequently leads to disbelief of the woman.[143] American society has an inclination to punish those who inflict "real," or paradigmatic, rape, and an inclination to

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[139] *Id.* at 247.

[140] *Id.* at 253.

[141] *Id.*

[142] Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L.J. 663, 668 (1998). [Reproduced in the accompanying notebook at Tab 23.]

[143] *Id.* at 666.

dismiss or disbelieve other rape accounts perceived as inconsistent with the real rape standard.[144]

In an effort to distinguish a particular case from the real rape standard, defense attorneys may focus on the sexuality, or unchastity, of the victim. Feminist legal scholar Catherine MacKinnon has remarked about the pornographic nature of rape trials as the intimate details of a deviant sexual encounter are relayed to an audience.[145] The public spectacle of sexualizing the victim's body serves to question her reason and her respectability.[146] Some commentators refer to the victim's trial experience as a "second victimization."[147] Both rape and cross-examination involve unwanted invasions of the victim's autonomy and privacy.[148] A defense attorney may use cross-examination to demean or demoralize the victim by eroticizing and objectifying her traumatic experience.[149]

C. Justifications for Different Rules for Rwandan Rape Victims

The vigorous cross-examinations that characterize U.S. rape trials would be inappropriate in the ICTR. The American approach to rape trials is tailored to a single victim, single rapist (or in the case of gang rapes, multiple rapists) scenario. It would not work if applied to prosecutions of the mass rape that took place in Rwanda. The ICTR

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[144] *Id.* at 673.

[145] SUSAN EHRLICH, REPRESENTING RAPE: LANGUAGE AND SEXUAL CONSENT 21 (2001). [Reproduced in the accompanying notebook at Tab 7.]

[146] *Id.*

[147] BURGESS-JACKSON, A MOST DETESTABLE CRIME, *supra* note 138, at 255.

[148] *Id.*

[149] *Id.* at 257.

rules of procedure and evidence pertaining to rape are not rooted in a general distrust of complainant reliability. In fact, Rule 96 states that no corroborative testimony is required, that consent is allowed as a defense only in limited circumstances, and that prior sexual conduct is inadmissible as evidence.[150] The protections accorded to sexual assault victims by Rule 96 are more explicit and rigid than the variety of rape shield laws available, but often circumvented, in the U.S.

The ICTR's accommodation of rape victims can be explained in several ways. First, the ICTR does not have great reason to fear the vengeful, lying complainant that U.S. Courts seem to fear. It is an established fact that Rwandan women were subject to mass rape. Also, by publicizing their rape experiences, Rwandan women risk rejection by their families and communities and inability to remarry. The costs to Rwandan women for testifying in rape trials may have eased the ICTR's concerns about false accusations. Second, the ICTR cannot require corroboration for rape that occurred during a genocide campaign that imposed a sense of helplessness on its victims. It would be unfair to expect Rwandan women to have immediately reported their rape or sought

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[150] Rule 96 of the ICTR reads:

Rule 96
Evidence in Cases of Sexual Assault

In cases of sexual assault:
(i) notwithstanding Rule 90(C), no corroboration of the victim's testimony shall be required;
(ii) consent shall not be allowed as a defense if the victim
(a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or
(b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;
(iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible;
(iv) prior sexual conduct of the victim shall not be admitted in evidence.

MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 569 (1998), *citing* Rules of Procedure and Evidence of the Rwanda Tribunal (as amended in January and July 1996), Rule 96, U.N. Doc. ITR/3/Rev.2, *reprinted in* volume II. [Reproduced in the accompanying notebook at Tab 4.]

medical attention at a time when they must have felt the world was against them. Third, considering the genocidal atmosphere in which the mass rape of Rwandan women occurred, the likelihood of the presence of the victim's consent in the cases being prosecuted by the ICTR is slim.

American style cross-examination by defense attorneys may also be out of place in the ICTR because there is no jury. As previously discussed, cross-examinations of rape victims in the U.S. have been described as "pornographic vignettes" in which the defense attorney sexualizes the scene of the crime by repeatedly referring to the victim's body parts and provocative clothing and behavior.[151] This is done in an effort to distinguish the case at hand from the paradigmatic rape scenario ingrained in the minds of jurors, thereby raising doubt as to the victim's chastity and the accused's guilt. Such a method of cross-examination would be useless in the cases before the ICTR because rape in a genocidal context fits squarely within the confines of the rape paradigm (violence or threat of violence, strangers, helpless women, etc.).

To apply U.S. practice to rape cases before the ICTR would create an environment similar to that faced by Aboriginal rape victims in Australia. It has been said that the treatment of Aboriginal witnesses, especially women speaking of sexual assault, shows the capacity of evidence law to allow the most appalling racist and sexist stereotypes to operate unchecked in the adversarial trial.[152] Statistics suggest that Aboriginal women are more likely to be victims of sexual assault than non-Aboriginal

[151] ERLICH, REPRESENTING RAPE: LANGUAGE AND SEXUAL CONSENT, *supra* note 145, at 21.

[152] Kathy Mack, *Gender and Race in the Evidence Policy: An Australian Perspective on Feminism, Race, and Evidence*, 28 SW. U. L. REV. 367, 387 (1999). [Reproduced in the accompanying notebook at Tab 22.]

women.[153] In almost every rape trial studied in New South Wales, the complainant was asked questions about sexual organs.[154] This is particularly difficult for Aboriginal women, who are generally ashamed to discuss body parts or sexual activity in the presence of men.[155] One commentator pointed out that greater distress on the part of Aboriginal complainants is not surprising because of the qualitatively more offensive defense tactics used to discredit Aboriginal women, who are generally asked more questions about drinking, drug use, and lying than other complainants.[156] Cross-examination that asks about information previously given is perceived as confusing, rude, or pointless, so that an Aboriginal person may respond with silence, "I don't know," or agreement to be polite. This can be wrongly interpreted by juries as evidence of unreliability.[157]

The trial experience of Aboriginal rape victims led the Queensland Criminal Justice Commission to propose a detailed jury instruction to assist predominantly non-Aboriginal judges and juries in fairly assessing Aboriginal witnesses whose manner of testifying does not conform to the standard constructed by the dominant legal culture.[158] The difficulties faced by Aboriginal rape victims in Australia help illustrate the need for a culturally relative approach to rules of procedure and evidence. The aggressive questioning about sexual organs and behavior often employed by defense attorneys is

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[153] *Id.* at 379.

[154] *Id.*

[155] *Id.* at 380.

[156] *Id.*

[157] *Id.* at 382.

[158] *Id.*

usually stifling and disconcerting to the victim. Limited value should be placed on responses to questions that are designed to cause discomfort, and not to elicit truth.

The sexually intrusive cross-examinations widely used by defense attorneys in the U.S. and Australia were designed to portray the complainant as an immoral seductress who somehow shares a portion of the responsibility for the rape in question. Defense attorneys in the ICTR will probably not share this goal. Because Rule 96 allows a defense of consent only in very limited circumstances, it is not likely that consent will be argued.[159] Thus, the defense will claim either that the rape did not occur, or, assuming the victim was raped, that the accused is not responsible. Such arguments do not necessitate the pornographic vignette which, at least in the U.S. and Australia, seems to have become part of proving consent.

VI. The Cultural Implications of Rape Testimony

The *Akayesu* Court noted a couple of cultural issues arising out of witness testimony—the impact of trauma, interpretation from Kinyarwanda into French and English, and the cultural factors affecting the evidence provided by witnesses.[160] The Court considered the testimony of witnesses with an understanding that recounting traumatic experiences is likely to evoke memories of fear and pain once inflicted upon the witness and thereby affect his or her ability to recall the sequence of events in a judicial context.[161] Noting that the majority of the witnesses testified in Kinyarwanda, the Court held that the terms "gusambanya," "kurungora," "kuryamana," and "gufata ku

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[159] *See supra* note 150.

[160] *Akayesu*, *supra* note 3, at ¶142-156.

[161] *Id.* at ¶142.

ngufu" were used interchangeably by witnesses and correctly translated by the interpreters as "rape."[162] The Court also acknowledged that according to Dr. Ruzindana, an expert witness on linguistics for the ICTR, it is a particular feature of Rwandan culture that people are not always direct in answering questions, especially if the question is delicate.[163] In such cases, the Court must rely on the context, the colloquialisms of the community, the identity of and the relation between the orator and listener, and the subject matter of the question.[164]

In Rwanda, as in many other nations, victims of rape, and not perpetrators, carry the social stigma, and often end up feeling isolated and ostracized.[165] Some Rwandan women fear rejection and an inability to reintegrate or remarry.[166] Others fear their attacker or feel guilty for having survived the genocide.[167] Their guilt is reinforced by Tutsi returnees who suspect that they collaborated with Hutus to ensure their survival.[168] Many rape victims contracted sexually transmitted diseases, had their genitals mutilated, and/or were impregnated by their rapists. Since abortion is illegal in Rwanda, some women suffer serious health consequences from self-induced or clandestine abortions; others committed infanticide or have a child rejected by their family and community.[169]

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[162] *Id.* at ¶152.

[163] An example was the witnesses' reluctance to testify that the translation of the word "Inyenzi," which was often used by Hutus to describe Tutsis, is cockroach. *Id.* at ¶156.

[164] *Akayesu*, *supra* note 3, at ¶156.

[165] *Human Rights Watch*, *supra* note 4, at 3.

[166] *Id.*

[167] *Id.*

[168] *Id.*

On top of dealing with the social and physical consequences of being a rape victim, women in Rwanda must also operate under second class status. Thousands of widows and daughters have no legal claim to their deceased husbands' or fathers' property because they are women.[170] They also have difficulty obtaining their husbands' pensions because of an arduous application process combined with the intimidation of dealing authority figures.[171]

Because Tutsi women were the object of genocide propaganda spread by Hutu extremists, they may see themselves as "enemies of the state."[172] Propogandists portrayed Tutsi women as arrogant seductresses and spies who wanted to dominate and undermine the Hutu.[173] "Rape served to shatter these images by humiliating, degrading, and ultimately destroying the Tutsi women."[174] The subordinate role that Rwandan women occupy in society, combined with the shame of being the targets of hateful propaganda and sexual violence, compounded by fear of reprisals and guilt for having survived, resulted in reluctance to speak about their experience.[175]

A. The Cultural Implications of Requiring Witnesses to Use Culturally Offensive Words

As discussed above in Section IV, it is quite possible that witnesses will not be required to use words such as "penis" and "vagina" during examination or cross-

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[169] *Id.*

[170] *Id.* at 4.

[171] *Id.*

[172] *Id.* at 10.

[173] *Id.* at 10,11.

[174] *Id.* at 11.

[175] *Id.* at 15.

examination before the Judges; however, this does not mean that they will never have to confront their cultural discomfort with saying them. At some point before they are placed on the witness stand, rape victims have to describe in detail what happened to them. An adequate description necessitates words like "penis" and "vagina."

Just saying the word "rape" is difficult enough for these women, considering the shame and fear that haunts them. If they are required to use words which make them even more uncomfortable, reporting their experience could be overwhelming. Going into detail about their vagina, anus, or mouth being penetrated may bring back memories they are eager to lose. During the genocide, women were individually raped, gang-raped, raped with objects such as knives, sticks, and gun barrels, held in sexual slavery, and/or sexually mutilated.[176] This sexual violence often took place after women were forced to witness the torture and murder of their families and the destruction and looting of their homes.[177] Sometimes women were forced to kill their own children before or after being raped in front of them.[178] Many women neared death several times and in some cases begged to be killed so their suffering would end. Instead, their lives would be spared so they could be raped and humiliated.[179]

For Rwandan women, to say that someone raped them focuses on the act of the perpetrator. It is a general allegation of wrongdoing committed by someone else. However, to discuss what happened to their vagina, their anus, or their mouth focuses on the specific effects the rape had upon them, many of which are permanent. Because of

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[176] *Id.* at 20.

[177] *Id.*

[178] *Id.*

[179] *Id.*

the amount of times they were raped or the objects inserted into their vagina or anus, many women can no longer bear children. In a country where women exist mainly to function as mother and wife, acknowledging an inability to give birth could devastate their futures as infertility and loss of virginity may make them unmarriageable.[180] Women may also fear that recounting the specific details of what was done to their bodies will shame their families. Rape "has not throughout most of recorded history, been a crime against women. It has significantly however been a heinous crime against men: a humiliation inflicted upon a nation, an affront to a man's pride as guardian of his women."[181]

Some rape victims experience a form of post-traumatic stress disorder called rape trauma syndrome.[182] Rape trauma syndrome causes nightmares, inability to stop thinking about the rape, sudden panic that the rape is reoccurring, and panic associated with reminders of the rape.[183] Behavioral symptoms include difficulty sleeping and/or concentrating, angry outbursts, fear, and anxiety.[184] Discussing the details of what happened to their bodies may trigger the effects of rape trauma syndrome and thereby deter victims from testifying.

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[180] Christine Chinkin, *Rape and Sexual Abuse of Women in International Law*, 5 EUR. J. INT'L LAW 326, 330 (1994). [Reproduced in the accompanying notebook at Tab 13.]

[181] *Id.* at 338, *citing* Gibson, *The Discourse of Sex/War: Thoughts on Catherine MacKinnon's 1993 Oxford Amnesty Lecture*, 2 FEMINIST LEGAL STUDIES 179 (1993).

[182] M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 353 (1999). [Reproduced in the accompanying notebook at Tab 2.]

[183] *Id.*

[184] *Id.* at 354. Keep in mind that it is not only women who suffered from rape, but men too, who often face even greater obstacles discussing their experiences. *See also* Stuart Turner, *Surviving Sexual Assault and Sexual Torture, in* MALE VICTIMS OF SEXUAL ASSAULT 75, 81, 110 (Gillian C. Mezey & Michael B. King eds., 1992).

VII. Ways to Bridge the Cultural Gap

As Ms. Kuo remarked above, it is important to make rape victims feel safe and comfortable. Prosecutors and investigators covering rape cases should be predominantly female so as to minimize intimidation. Considering the sense of ostracism by family and community that the victim is likely to feel, the rooms where interviews are being held should not be arranged in a polarizing fashion. Perhaps there should be a couch where the victim sits with a place beside her for a prosecutor or investigator to position herself. Victims should be informed of the protections afforded to them by Rule 96 to decrease their anxiety about potential retaliation by the accused.[185] This could be accompanied by a discussion of how their testimony could help bring justice and prevent impunity for rapists.[186]

Before addressing the specifics of the actual rape, prosecutors and investigators should get to know the victim by asking questions about her family, her community, her feelings about what happened in Rwanda, her post-genocide experience, etc. After the victim has shared some personal information, prosecutors and investigators should acknowledge the difficulty of reporting a rape and commend the victim's bravery. They should assure the victim of their desire to be respectful and sensitive. Initially, general questions should be asked—who, when, and where. After the perpetrators and surrounding circumstances have been described, prosecutors and investigators should ask for details about the specific act of rape. Like the Prosecutors in *Kunurac*, they could begin by leading the victim with questions like "Did his penis enter your vagina?" The

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[185] *See supra* note 150.

[186] *Human Rights Watch*, *supra* note 4.

victim should have the opportunity to discuss the rape/s as she pleases. If her story is not explicit enough, the prosecutors and investigators may press for more information, using words like “penis” and “vagina”, but at the same time expressing an understanding of the victim’s discomfort. The victim should be reminded that the fault rests on the rapist, and that the lasting effects of the rape (i.e. mutilated genitals or infertility) are evidence of triumph over adversity and a will to survive.

If the actual trial is conducted similarly to *Kunurac*, the witness will probably not be required to use culturally offensive words during examination or cross-examination. Words like “penis” and “vagina” may be left to yes or no questions formulated by the Prosecution. However, prosecutors and investigators should be sure to warn witnesses that the Defense may contest certain allegations or medical evidence, in which case witnesses would be asked to be more explicit. Prosecutors and investigators should remind witnesses that providing more information in response to questions posed by the Defense may be uncomfortable, but will ultimately help bring the perpetrators to justice.

VIII. Conclusion

In order to meet the legal elements of rape as a crime against humanity according to *Semanza*, the Prosecutor must prove that the accused is accountable for 1) the non-consensual penetration, however slight (a) of the vagina or anus of the victim by the penis of the perpetrator or by any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator, when 2)consent for this purpose has not been given voluntarily and freely as assessed considering the surrounding circumstances. The rape must take place in the context of a widespread or systematic

attack against any civilian population on national, political, ethnical, racial, or religious grounds. The accused must be aware of the attack and know that the rape could form a part of the attack. While witnesses may not be required to use culturally offensive words such as “penis” or “vagina” during examination or cross-examination at trial due to carefully crafted yes or no questions formulated by the Prosecutor, they will have to use such words in describing the incident at some point.

Addressing the details of rape surfaces the shame and fear that victims probably feel. In Rwanda, it is the living victims of rape that carry the social stigma of having survived the genocide and suspicions of having corroborated with Hutu extremists. Many rape victims now have sexually transmitted diseases, mutilated genitals, and serious health consequences from self-induced or clandestine abortions which interfere with their ability to marry or remarry. Prosecutors and investigators must create a comfortable, accepting, and safe environment for these women to recount their painful experiences. The victims should be constantly reminded that the fault rests on the rapist, that the lasting effects of rape that weigh so heavily upon them are evidence of triumph over adversity and a will to survive, and that the more information they reveal, the easier it is to bring the perpetrator to justice.