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How far Has the International Criminal Tribunal for Rwanda Really Come since Akayesu in the Prosecution and Investigation of Sexual Offences Committed against Women? An Analysis of *Ndindiliyimana et al.*

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Abstract

During the first trial before the International Criminal Tribunal for Rwanda (ICTR), that of Jean-Paul Akayesu, it became evident that many Tutsi and moderate Hutu women had been raped, that “rape was the rule and its absence was the exception”.¹ Although, initially, not a single charge of sexual violence was proffered against Akayesu, presiding judge Navanethem Pillay interrupted the proceedings, allowing ICTR prosecutors to amend the indictment and include counts of rape and sexual violence. *Akayesu* subsequently became the first case to recognise the concept of genocidal rape.

However, post-*Akayesu*, comparatively few defendants appearing before the ICTR have been convicted of sexual violence. An analysis of the recent case of *Ndindiliyimana et al*² reveals that major shortcomings beset the investigation and prosecution procedures, so that crimes of sexual violence go unpunished, although

¹ *Report on the Situation of Human Rights in Rwanda submitted by Mr R Degni-Ségui, Special Rapporteur of the Commission on Human Rights under paragraph 20 of resolution S-3/1 of 25 May 1994 (29 Jan 1996) E/CN4/1996/68, para. 16, quoted in UN Division for the Advancement of Women Rome Department of Economic and Social Affairs Sexual Violence and Armed Conflict: United Nations Response (April 1998) p. 16.*

² *Prosecutor v. Ndindiliyimana et al*, 17 May 2011, ICTR-00-56-T, *Judgment and Sentence*.

research suggests that adequate legislation is in place at the ICTR to prosecute rape and sexual violence successfully.

Keywords

International Criminal Tribunal for Rwanda (ICTR), rape, sexual violence, investigation, prosecution, genocide.

1. Introduction

In 2005, Binaifer Nowrojee, a former researcher for HRW/Africa and expert witness on sexual violence in the Government II trial,³ lamented the poor performance of the ICTR in the prosecution of crimes of sexual violence: on the tenth anniversary of the genocide, Nowrojee calculated that “only two defendants had specifically been held responsible for their role in sexual violence crimes” committed during the genocide.⁴

This conclusion is alarming when set in the context of a genocide where, according to René Dégni-Ségui, Special Rapporteur of the United Nations Commission on Human Rights, rape was “systematic and was used as a ‘weapon’ by

³ *Prosecutor v. Casimir Bizimungu et al* ‘The Government II Trial’, 8 July 2005, ICTR-99-50-T *Decision on the admissibility of the expert testimony of Dr Binaifer Nowrojee*, para. 14 citing *Prosecutor v. Semanza*, 20 May 2005, ICTR-97-20-A, *Appeal Judgment*, para. 303.

⁴ “No rape charges were even brought by the Prosecutor’s Office in 70 per cent of those adjudicated cases. In the 30 per cent that included rape charges, only 10 per cent were found guilty for their role in the widespread sexual violence. Double that number, 20 per cent, were acquitted because the court found that the prosecutor did not properly present the evidence beyond a reasonable doubt. In real numbers, that means that, at the tenth anniversary of the genocide, only two defendants had specifically been held responsible for their role in sexual violence crimes (a third conviction was reversed on appeal), despite the tens of thousands of rapes committed during the genocide.³ As of April 2004, none of the rape acquittals had been appealed by the prosecutor. How can this be?” Binaifer Nowrojee, United Nations Research Institute for Social Development (UNRISD) Policy Report on Gender and Development: 10 Years after Beijing, “*Your justice is Too Slow*”: *Will the ICTR Fail Rwanda’s Rape Victims?* Occasional Paper Ten (published 15/11/2005) 16 <www.unrisd.org/unrisd/website/document.nsf/0/56FE32D5C0F6DCE9C125710F0045D89F? Open Document> accessed 23 January 2013.

the perpetrators of the massacres” and “according to consistent and reliable testimony, a great many women were raped; rape was the rule and its absence was the exception.”⁵ Nowrojee’s frustrations at the paucity of rape convictions are easy to understand.

It is a generally accepted fact that vast numbers of women were raped. Dégni-Ségui informs us that the Ministry for the Family and the Promotion of Women recorded 15,700 cases of women raped during the genocide.⁶ Yet this figure, already distressing enough, appears to belie reality. For medical professionals in Rwanda believe that between two and five thousand pregnancies occurred as a direct result of the sexual violence during the genocide. Given that statistics show that just one pregnancy will result from one hundred cases of rape, this would suggest that there could have been between 200,000 and 500,000 instances of rape, and it is Dégni-Ségui’s estimate that between 250,000 and 500,000 women (out of a total population of seven million⁷) were raped during the Rwandan genocide.⁸

Despite the obvious sexual violence, and despite the fact that this had been highlighted at regular intervals in the previous ten years, convictions for sexual violence continued to be relatively few and far between. In November 2008, only thirty-six of the eighty-seven people indicted for crimes committed during the genocide had been charged with rape or sexual violence. Of thirteen completed cases involving an indictment for rape in 2008, nine accused were acquitted of charges of rape or sexual violence and only four found guilty.⁹ Furthermore, a report compiled

⁵ Dégni-Ségui, *supra* note 1, para 16.

⁶ *Ibid*, para 16.

⁷ United Human Rights Council, *Genocide in Rwanda*) <www.unitedhumanrights.org/genocide/genocide_in_rwanda.htm> accessed 19 April 2012.

⁸ Dégni-Ségui, *supra* note 1, para 16.

⁹ Linda Bianchi, Roundtable on Cooperation between the International Criminal Tribunals and National Prosecuting Authorities, Arusha, 26 to 28 November 2008, *The investigation and presentation of evidence relating to sexual violence is in the interest of justice*, para 9 <ictr-archive09.library.cornell.edu/ENGLISH/international_cooperation/papers_presented/sexual-

by Gabriel Oosthuizen, Executive Director of International Criminal Law Services,¹⁰ at the request of the Division for Policy, Evaluation and Training of the United Nations' Department of Peacekeeping Operations (DPKO), states that, of twenty-four cases completed before the ICTR by March 2009, only thirteen contained sexual violence agreed facts.¹¹ There appears, therefore, to be, at least until 2009, a worryingly persistent trend which prevents sexual violence against women being punished before the ICTR.

Yet the widespread sexual violence had been brought to the attention of the Trial Chamber in the very first case to appear before it, that of Jean-Paul Akayesu, bourgmestre (mayor) of Taba commune, which concluded on 2nd September 1998.¹² This was the first time an international tribunal had enforced the United Nations 1948 Convention on the Prevention and Punishment of the Crime of Genocide.¹³ The first person to be convicted by the ICTR, Akayesu was also the first person ever to be convicted by an international tribunal of sexual violence as an instrument of genocide.¹⁴ In addition, Akayesu was the first person to be convicted of rape as a crime against humanity, and, in the absence of a clear definition of rape in

violence. pdf> accessed 24 January 2013, who refers to the ICTR-OTP Synopsis on charging and convictions for rape, June 2008.

¹⁰ International Criminal Law Services is an organisation providing legal and technical training and advice relating to war crimes, crimes against humanity and genocide <www.iclsfoundation.org/> accessed 23 January 2013.

¹¹ Gabriel Oosthuizen, *Review of the Sexual Violence Elements of the Judgments of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone in the Light of Security Council Resolution 1820* (Division for Policy, Evaluation and Training of the Department of Peacekeeping Operations, 1 September 2010) <www.unrol.org/files/32914_Review%20of%20the%20Sexual%20Violence%20Elements%20in%20the%20Light%20of%20the%20Security-Council%20resolution%201820.pdf> accessed 23 January 2013.

¹² *Prosecutor v. Akayesu*, 2 September 1998, ICTR-96-4-T, *Judgment and Sentence*.

¹³ *Convention on the Prevention and Punishment of the Crime of Genocide* (Adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention).

¹⁴ 'Akayesu, Jean-Paul' (Academic Research, The Hague Justice Portal) available at <http://www.haguejusticeportal.net/index.php?id=8778> (last visited 20 December 2012).

international law,¹⁵ the Akayesu Trial Chamber was moved to articulate the elements of the offence, providing the first definitions of rape and sexual violence under international law.¹⁶

Despite this ruling – truly groundbreaking, since rape is not specifically listed as one of the prohibited acts which may constitute genocidal acts – and the first conviction in international law of a woman on rape charges, Pauline Nyiramasuhuko, in June 2011,¹⁷ even Linda Bianchi, senior appeals counsel at the ICTR’s Office of the Prosecution (OTP), has been led to admit the conviction rate for crimes of sexual violence at the ICTR is poor in comparison to rates for other crimes.¹⁸

Criticisms made for low conviction rates at the ICTR for acts of sexual violence have in the past revolved typically around issues of poor performance by key ICTR staff.

This article attempts to assess whether these accusations still have any basis in fact and whether they continue to affect the outcomes of cases before the ICTR. It analyses the 2011 trial of *Ndindiliyimana et al*,¹⁹ which is currently under appeal, to evaluate critically the principal shortcomings in the prosecution and investigation of sexual offences committed against women during the Rwandan genocide and attempts to identify why certain charges of sexual violence failed. The study focuses on the performance of ICTR staff – judges, prosecutors and investigators.

¹⁵ Mark Ellis, ‘Breaking the silence: rape as an international crime’, 38 *Case Western Reserve Journal of International Law* (2007) 225, 229.

¹⁶ Kelly D Askin ‘Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status’, 93 *The American Journal of International Law* (1999) 97, 107.

¹⁷ *Prosecutor v. Nyiramasuhuko et al*, 24 June 2011, ICTR-98-42-T, *Judgment and Sentence*, paras. 5828-5836.

¹⁸ Bianchi, *supra* note 9.

¹⁹ *Prosecutor v. Ndindiliyimana et al*, *Judgment and Sentence*, *supra* note 2.

The article opens with a description of current legislation used to prosecute crimes of sexual violence laid out in the ICTR Statute²⁰ and its interpretation in *Akayesu*. Paragraphs from the Tribunal's Rules of Procedure and Evidence (governing the conduct of the pre-trial phase) pertinent to the prosecution of sexual violence crimes are highlighted, such as the admission of evidence and protection of witnesses and victims. Key case law from the ICTR and International Criminal Tribunal for the Former Yugoslavia (ICTY) providing definitions of the elements of rape and sexual violence is also resumed.

2. Key ICTR Legislation and Case Law

2.1 Provisions Regarding Rape and Sexual Violence in the ICTR Statute and interpretation by the Akayesu Trial Chamber

The ICTR statute provides several different routes to prosecute rape and sexual violence committed during the genocide, and during the trial of Jean-Paul Akayesu, the interpretation of these was debated at length.

On the original indictment against Akayesu, which numbered twelve counts of genocide, crimes against humanity and war crimes committed in Taba, no gender-related crimes had been entered at all, even though, at that stage, it was well-known that rape crimes had been committed systematically. When Witness J testified about the gang rape of her six-year-old daughter by three *Interahamwe* (Hutu militia) and

²⁰ *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994* (Adopted by Security Council Resolution 955 of 8 November 1994, Amended by Security Council resolutions 1165 of 30 April 1998, 1329 of 30 November 2000, 1411 of 17 May 2002 and 1431 of 14 August 2002).

informed the Trial Chamber she had also heard of many other rapes, and Witness H gave evidence that she herself had been raped and had been a witness to other rapes, Judge Navanethem Pillay, the only female judge amongst the nine elected ICTR judges, suspended Akayesu's trial in May 1997.²¹ Following further evidence that vast amounts of rapes and sexual violence had taken place in Taba in the presence of Akayesu, the indictment was amended to include charges of rape (Count 13) and inhumane acts (Count 14) as crimes against humanity, charges of outrages upon personal dignity, in particular rape, degrading and humiliating treatment and indecent assault, contravening Common Article 3 and Article 4 (2) (e) of Additional Protocol II (Count 15), and charges of genocide accompanied by acts of sexual violence (Counts 1-3).²² It is undoubtedly largely due to Judge Pillay's considerable expertise as a specialist in women's rights that gender crimes were given the prominence that they were in Akayesu's trial.²³

The provisions in the ICTR statute to prosecute rape and sexual violence are found in Articles 2, 3 and 4.

Article 2 (2) of the ICTR prohibits genocide, although it does not specifically name sexual violence as a genocidal act.²⁴ In its celebrated decision, the *Akayesu* Trial

²¹ *Prosecutor v. Akayesu, Judgment and Sentence, supra* note 12, para 416-417.

²² *Prosecutor v. Akayesu*, 17 June 1997, ICTR-96-4-I, *Amended Indictment*, Counts 1-3.

²³ Co-founder of the South African Advice Desk for Abused Women (1986) and of Equality Now (1992), an international women's rights organisation (<<http://www.equalitynow.org/>> accessed 2 March 2013).

²⁴ ICTR Statute Article 2 Genocide

1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

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

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or part;

(d) imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

3. The following acts shall be punishable:

Chamber ruled that rape and sexual violence could constitute acts of genocide “in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group targeted as such”.²⁵ Although not expressly mentioned in article 2 (2), the Trial Chamber ruled that rape and sexual violence could be prosecuted as acts of genocide under article 2 (2) (a) Killing members of a group,²⁶ under article 2 (2) (b) Causing serious bodily or mental harm to members of the group,²⁷ under article 2 (2) (d) Imposing measures intended to prevent births within the group,²⁸ and under article 2 (2) (e) Forcibly transferring children of the group to another group.²⁹

For its part, Article 3, which refers to crimes against humanity, grants the ICTR the power to prosecute persons responsible for rape (article 3 (g)) and other inhumane acts (article 3 (i)) when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.³⁰

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- (a) Genocide;
 - (b) Conspiracy to commit genocide;
 - (c) Direct and public incitement to commit genocide;
 - (d) Attempt to commit genocide;
 - (e) Complicity in genocide.

²⁵ *Prosecutor v. Akayesu, Judgment and Sentence, supra* note 12, para 731.

²⁶ “It appears clearly to the Chamber that the acts of rape and sexual violence, as other acts of serious bodily and mental harm committed against the Tutsi, reflected the determination to make Tutsi women suffer and to mutilate them even before killing them, the intent being to destroy the Tutsi group while inflicting acute suffering on its members in the process”. *Ibid*, para 733.

²⁷ “Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims... Sexual violence was an integral part of the process of destruction”. *Ibid*, para 731.

²⁸ “In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group”. *Ibid*, para 507.

²⁹ “With respect to forcibly transferring children of the group to another group, the Chamber is of the opinion that, as in the case of measures intended to prevent births, the objective is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another”. *Ibid*, para 509.

³⁰ ICTR Statute, Article 3 Crimes against humanity

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;

In addition to the specific elements of each individual crime, the perpetrator must possess the requisite *mens rea*, knowingly having committed the crime, for it to be judged as a crime against humanity; the perpetrator should have had “actual or constructive knowledge of the broader context of the attack, meaning that the Accused must know that his act(s) is part of a widespread or systematic attack on a civilian population and pursuant to some kind of policy or plan”.³¹ Isolated acts carried out for purely personal reasons are thus excluded. It is not necessary that the rapes themselves should have been widespread or systematic in order for them to amount to a crime against humanity; the requirement is that they form a part of the widespread or systematic attack against the civilian population, on national, political, ethnic, racial or religious grounds.³²

As mentioned above, Akayesu’s conviction for rape as a crime against humanity produced the first definition of the legal elements of rape at an international judicial forum: “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive”³³ – a broad definition with no attempt to define rape in the more mechanical terms common to many national jurisdictions, since:

The Chamber considers that ... the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts.³⁴

A more traditional definition of rape along terms of non consensual sexual intercourse was felt to be too narrow, since the Trial Chamber wished to include

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- (b) Extermination;
 - (c) Enslavement;
 - (d) Deportation;
 - (e) Imprisonment;
 - (f) Torture;
 - (g) Rape;
 - (h) Persecutions on political, racial and religious grounds;
 - (i) Other inhumane acts

³¹ *Prosecutor v. Kayeshima and Ruzindana*, 21 May 1999, ICTR-95-1-T, *Judgment*, paras. 133-134.

³² Kelly Dawn Askin, ‘Gender Crimes jurisprudence in the ICTR: positive developments’ 3 *Journal of International Criminal Justice* (2005) 1007, 1011.

³³ *Prosecutor v. Akayesu, Judgment and Sentence, supra* note 12, para 598.

³⁴ *Ibid*, para 597.

clearly under the definition of rape “acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual”, for example thrusting a piece of wood into the sexual organs of a woman as she lay dying.³⁵

The *Akayesu* Trial Chamber also defined sexual violence, which falls within the scope of ‘other inhumane acts’ (Article 3 (i)), as well as ‘serious bodily or mental harm’ (Article 2 (2) (b)) and ‘outrages upon personal dignity’ (Article 4 (e)).³⁶ Article 4 of the ICTR Statute reiterates Article 3 Common to the Geneva Conventions and of its Additional Protocol II, and enables the prosecution of rape and sexual violence (Article 4(e)) as war crimes.³⁷

Sexual violence, which includes rape, is defined in *Akayesu* as:

“any act of a sexual nature which is committed on a person under circumstances which are coercive and as part of a wide spread or systematic attack, on a civilian population or on certain catalogued discriminatory grounds, namely: national, ethnic, political, racial, or religious grounds.”³⁸

The indictment further clarified that “acts of sexual violence include forcible sexual penetration of the vagina, anus or oral cavity by a penis and/or of the vagina or anus by some other object, and sexual abuse, such as forced nudity”.³⁹ In its ruling, the Trial Chamber specified clearly that sexual violence did not need to involve

³⁵ *Prosecutor v. Akayesu, Judgment and Sentence, supra* note 12, para 686.

³⁶ *Ibid*, para 688.

³⁷ ICTR Statute, Article 4 Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

- (a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- (b) Collective punishments;
- (c) Taking of hostages;
- (d) Acts of terrorism;
- (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- (f) Pillage;
- (g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;
- (h) Threats to commit any of the foregoing acts.

³⁸ *Prosecutor v. Akayesu, Judgment and Sentence, supra* note 12, para 598.

³⁹ *Prosecutor v. Akayesu*, 17 June 1997, ICTR-96-4-I, *Amended Indictment* para 10A.

penetration of the human body or even physical contact, and gave the example of a student forcibly undressed by the *Interahamwe* (members of the Hutu militia) and made to do gymnastics naked in front of a crowd.⁴⁰

The *mens rea* for establishing outrages upon personal dignity is that the Accused intentionally committed or participated in an act or omission which would generally be considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity, and that he knew that the act or omission could have that effect.⁴¹ In *Musema*, the ICTR added “subjecting victims to treatment designed to subvert their self-regard” to the definition of humiliating and degrading treatment.⁴²

The issue of coercive circumstances was also debated by the *Akayesu* Trial Chamber. The Trial Chamber deemed that coercion was “inherent in certain circumstances, such as armed conflict”,⁴³ thus removing the necessity for the victim to prove that she had not consented to the sexual violence, a major step in a climate in which many victims must not have dared to resist their assailants.⁴⁴

This stance was further debated at some length in the case of *Gacumbitsi*, and the Appeal Chamber confirmed the ruling that:

It is not necessary...for the Prosecution to introduce evidence concerning the words or conduct of the victim or the victim’s relationship to the perpetrator. Nor need it introduce evidence of force. Rather, the Trial Chamber is free to infer non-consent from the background circumstances, such as an ongoing genocide campaign or the detention of the victim.⁴⁵

⁴⁰ *Prosecutor v. Akayesu, Judgment and Sentence, supra* note 12, para 688.

⁴¹ Angela M Banks *Sexual Violence and International Criminal Law: an Analysis of the Ad Hoc Tribunal’s Jurisprudence and the International Criminal Court’s Elements of Crimes* (Women’s Initiatives for Gender Justice, Amsterdam 2005) 40-41, citing *Prosecutor v. Kunarac, Kovac, Vukovic*, 22 February 2001, ICTY, IT-96-23-T and IT-96-23/1-T, *Judgment*, para. 514.

⁴² *Prosecutor v. Musema*, 27 January 2000, ICTR-96-13, *Judgment and Sentence*, para. 285.

⁴³ *Prosecutor v. Akayesu, Judgment and Sentence, supra* note 12, para 688.

⁴⁴ “The Tribunal notes in this context 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”. *Prosecutor v. Akayesu, Judgment and Sentence, supra* note 12, para 688.

⁴⁵ *Prosecutor v. Gacumbitsi*, 7 July 2006, ICTR-2001-64-A, *Appeal Judgment*, para 155.

If an Accused raises reasonable doubt by introducing evidence that the victim consented, then the Trial Chamber is free to disregard the evidence if it concludes that, under the circumstances, the consent given is not genuinely voluntary.

In addition to these important provisions, the ICTR and ICTY have also provided Rules of Procedure and Evidence which are very supportive of the victims of rape and sexual violence. The Rules govern the conduct of the pre-trial phase of the proceedings, trials and appeals, and matters such as the admission of evidence and the protection of victims and witnesses.

In matters of sexual violence, the most significant of the Rules of Procedure and Evidence is Rule 96, which states that no corroboration of the victim's testimony shall be required. It also states that, as a defence to the charges, an accused shall not be allowed to rely on the fact that the victim gave consent to a sexual act, in cases where the victim was subjected to or threatened with or had reason to fear violence, duress, detention or psychological oppression, or if she reasonably believed that someone else might be subjected to these if she did not submit. To protect the victim's identity and reputation – essential steps if victims are to be encouraged to testify – before evidence of the victim's consent to a sexual act is admitted to the Trial Chamber, the Accused is required to satisfy the Trial Chamber *in camera* that the evidence is relevant to the case and credible. Evidence as to the prior sexual conduct of the victim is quite simply not to be admitted in evidence or as a defence under any circumstances.⁴⁶

Akayesu was finally found guilty of rape as a crime against humanity (Count 13). The Trial Chamber also found that forced nudity constituted an inhumane act⁴⁷

⁴⁶ *International Criminal Tribunal for Rwanda Rules of Procedure and Evidence* (adopted 29 June 1995, entered into force 29 June 1995) UN Doc ITR/3/REV 1, Rule 96 (iv).

⁴⁷ *Prosecutor v. Akayesu, Judgment and Sentence, supra* note 12, para 688.

and convicted Akayesu for inhumane acts as a crime against humanity (Count 14).⁴⁸ The conviction for genocide emphasised that Akayesu had encouraged his men to rape Tutsi women to destroy them physically and mentally (Count 1),⁴⁹ and that many women and girls were killed or had died as a result of injuries inflicted on them in the course of rapes.⁵⁰

Thus, judicial interpretation of the Statute during the *Akayesu* trial, which formally acknowledged the use of rape and sexual violence as a means of wreaking destruction across an entire ethnic group, supported by solid Rules of Procedure and Evidence, ensured that mechanisms were in place for the successful prosecution of the many instances of rape and sexual violence committed during the genocide – as acts of genocide themselves, as specific crimes against humanity or as war crimes.

2.2 *The Elements of Rape and Sexual Violence Further Defined through Case Law*

Certain subsequent cases have been significant in assisting the ICTR to define further the crimes of rape and sexual violence in an international context: *Kayishema and Ruzindana*, *Musema*, *Semanza*, *Gacumbitsi* and *Muhimana*.

2.2.1 *Kayishema and Ruzindana*

In the joint trial of Clément Kayishema and Obed Ruzindana, which concluded on 21 May 1999, the Trial Chamber concurred, in its discussion on genocide, with the views expressed in *Akayesu*, that “acts of sexual violence, rape, mutilations and interrogations combined with beatings, and/or threats of death, were all acts that amount to serious bodily harm”⁵¹ and could thus constitute an act of genocide under

⁴⁸ *Ibid*, Verdict.

⁴⁹ *Ibid*, paras 452, 731-734.

⁵⁰ *Ibid*, para 449.

⁵¹ *Prosecutor v. Kayeshima and Ruzindana, Judgment and Sentence, supra* note 31, para. 108.

Article 2 (2) (b) of the ICTR statute if carried out with the intention to cause harm to members of an ethnic group with intent to destroy that group in whole or in part. The Trial Chamber also ruled that deliberately inflicting on an ethnic group conditions of life calculated to bring about its physical destruction in whole or in part (Article 2 (2) (c)) included methods of destruction which do not immediately lead to the death of members of the group, and that rape was one of these conditions of life, provided that it would lead to the destruction of the group in whole or in part.⁵² Thus this all-male panel of judges extended further the scope of genocide elaborated by the *Akayesu* judges.

Most regrettably, despite the numerous acts of rape and sexual violence mentioned in the Judgment,⁵³ once again the indictment contained no charges of sexual violence, focusing rather on the use of “guns, grenades, machetes, spears, cudgels and other weapons to kill the people.”⁵⁴ Consequently, the Accused could not be convicted of sexual violence. However, the gravity of the sexual violence was confirmed in the judges’ *obiter dicta*. As Kelly Dawn Askin highlights, the courtroom testimony and subsequent references to the crimes “ensures that the historical record of the crimes committed is more accurately reflected,” acknowledging that these crimes inflicted “enormous devastation” and formed part of the genocide.⁵⁵

2.2.2 *Musema*

The *Musema* Trial Chamber, which reached its verdict on 27 January 2000, also confirmed the broad definition of rape elaborated in *Akayesu*,⁵⁶ understandably, since it was presided again by Judge Pillay. It referred to “a trend in national legislation to

⁵² *Prosecutor v. Kayeshima and Ruzindana*, 21 May 1999, ICTR-95-1-T, *Judgment*, para. 116.

⁵³ *Ibid.*, paras. 294, 299, 532, 547.

⁵⁴ *Prosecutor v. Kayishema and Ruzindana*, 22 November 1995, ICTR-95-1-I, *Indictment*.

⁵⁵ Kelly Dawn Askin, *supra* note 32, 1013.

⁵⁶ *Prosecutor v. Musema, Judgment and Sentence*, *supra* note 42, paras. 226-8, 965.

broaden the definition of rape” and stated “that the Chamber considers that a conceptual definition is preferable to a mechanical definition of rape. The conceptual definition will better accommodate evolving norms of criminal justice”.⁵⁷ The *Akayesu* definition had also been endorsed in November 1998 by the ICTY in the *Delalić* case,⁵⁸ where the Trial Chamber added that rape can constitute torture under certain circumstances.⁵⁹ However, subsequent to *Delalić* and prior to *Musema*, the ICTY judges in the trial of Anto Furundžija (concluded on 10 December 1998), appeared to find that the conceptual definition in *Akayesu* did not provide elements precise enough to define rape, declaring that “no definition of rape can be found in international law.”⁶⁰

The *Furundžija* Trial Chamber chose to examine the principles of criminal law common to the major legal systems of the world to find an exact definition of rape, which would satisfy the criminal law principle of *nullum crimen sine lege stricta*.⁶¹ The *Furundžija* Trial Chamber thus concluded that the objective elements of rape consisted of:

- (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
 - (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.⁶²

⁵⁷ *Ibid*, para. 229.

⁵⁸ *Prosecutor v. Delalić et al*, 16 November 1998, ICTY, IT-96-21, *Judgment*, para. 478.

⁵⁹ *Ibid*, para. 494:

‘In view of the above discussion, the Trial Chamber therefore finds that the elements of torture, for the purposes of applying Articles 2 and 3 of the Statute, may be enumerated as follows:

- (i) There must be an act or omission that causes severe pain or suffering, whether mental or physical,
- (ii) which is inflicted intentionally,
- (iii) and for such purposes as obtaining information or a confession from the victim, or a third person, punishing the victim for an act he or she or a third person has committed or is suspected of having committed, intimidating or coercing the victim or a third person, or for any reason based on discrimination of any kind,
- (iv) and such act or omission being committed by, or at the instigation of, or with the consent or acquiescence of, an official or other person acting in an official capacity.

⁶⁰ *Prosecutor v. Furundžija*, 10 December 1998, ICTY, IT-95-17/1-T, *Judgment*, para. 175.

⁶¹ *Ibid*, para. 177.

⁶² *Ibid*, para. 185.

Judge Pillay, committed to the definition which the *Akayesu* trial Chamber had outlined, opined in *Musema* that “the definition of rape, as set forth in the *Akayesu* Judgement, clearly encompasses all the conduct described in the definition of rape set forth in *Furundzija*,”⁶³ encapsulating the *Furundzija* definition within the broader *Akayesu* definition.

However, on appeal, although it did not contest the definition of rape, the *Musema* Appeals Chamber demanded a high burden of proof for rape⁶⁴ and overturned *Musema*’s conviction for the rape of a young unmarried teacher called Nyiramusugi.⁶⁵ The Chamber did not dispute that she had been raped, but stated that the evidence presented in two out-of-court statements from Witnesses CB and EB conflicted with the testimony put to the Trial Chamber by prosecution Witness N, and gave grounds for reasonable doubt that *Musema*, and not someone else, was guilty of Nyiramusugi’s rape on the day in question.

A high burden of proof was also demanded by the Trial Chamber at first instance when *Musema* was charged with rape as a crime against humanity for encouraging his men to rape Tutsi women.⁶⁶ Due to inconsistencies in witness testimony, the Trial Chamber found that the Prosecution had failed to prove beyond reasonable doubt that “any act of rape...had been committed by *Musema*’s subordinates and that *Musema* knew or had reason to know of this act and he failed to take reasonable measures to prevent the said act”.⁶⁷ Witness J, mother of five children, accused *Musema* and his men of raping and killing her eighteen-year-old

⁶³ *Prosecutor v. Musema, Judgment and Sentence, supra* note 42, para. 227.

⁶⁴ Rebecca L Haffajee, ‘Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory’ 29 *Harvard Journal of Law and Gender* (2006) 201, 208-9.

⁶⁵ *Prosecutor v. Musema*, 16 November 2001, ICTR-96-13-A, *Appeal Judgment*, para. 193.

⁶⁶ The command responsibility offence in Article 6 (3) of the ICTR Statute holds a superior criminally responsible if he had reason to know that one of his subordinates was about to commit an act of genocide, a crime against humanity, or a violation of Common Article 3 or of Protocol II, and he failed to take the necessary and reasonable measures to prevent the act or to punish the perpetrator.

⁶⁷ *Prosecutor v. Musema, Judgment and Sentence, supra* note 42, para. 968.

daughter in Bisesero. However, she had told the Trial Chamber several times that her three oldest children, who were aged twenty-five, twenty-three and nineteen, had been killed by Charles Sikubwabo, *bourgmestre* of Gishyita, before she fled to Bisesero, and that her only children alive at the time she fled to Bisesero were aged twelve and nine. She was unable to explain this inconsistency to the Trial Chamber, which therefore questioned the accuracy of her account in respect of her daughter's rape. The Trial Chamber was reluctant to disbelieve her account, since it found her testimony to be "generally credible," and considered "that there is likely to be a reasonable explanation [for the inconsistency], based on its evaluation of the witness".⁶⁸ The Trial Chamber concluded:

recalling the high burden of proof on the Prosecutor and the lack of any other evidence produced to corroborate the account of Witness J, the Chamber cannot find beyond a reasonable doubt that the allegations have been established.⁶⁹

The broad definition of rape laid down in *Akayesu* was therefore accepted, but the Trial chamber imposed a high evidential burden on the Prosecution to bring about a successful conviction.

2.2.3 *Semanza*

Three years later, in the case of Laurent Semanza, a narrower and more mechanical definition of rape was adopted. The all-male *Semanza* Trial Chamber, which reached its verdict on 15 May 2003, followed the ICTY Appeals Chamber's decision in the 2001 case of *Kunarac*,⁷⁰ which was influenced by the ICTY case of *Furundžija*.

The *Kunarac* Trial Chamber accepted the *actus reus* of rape as defined in *Furundžija* under paragraph (i), but felt that further clarification was required

⁶⁸ *Ibid*, para. 844.

⁶⁹ *Ibid*, para. 845.

⁷⁰ *Prosecutor v. Kunarac et al*, 22 February 2001, ICTY, IT-96-23 and 23/1, *Judgement*, para. 460.

regarding the issue of coercion under paragraph (ii) and considered the matter of consent in some detail.

To clarify the issues of coercion and consent, the Trial Chamber carried out a detailed examination of the definition of rape in several major national jurisdictions. The *Kunarac* Trial Chamber followed *Furundžija*, also including oral sex as rape, but stipulated that the free will of the victim to consent must be assessed in accordance with the surrounding circumstances, and that this should not be interpreted in a narrow or restrictive way, since it is unlikely a victim would refuse to consent to a sex act in the prevailing circumstances. The *mens rea* was understood to be the intention to effect the sexual penetration, in the knowledge that it occurred without the consent of the victim.⁷¹ The *Kunarac* Appeals Chamber summed up the situation with regard to consent and force in rape charges. It was of the view that “serious violations of sexual autonomy are to be penalized”,⁷² and stated that the absence of consent was the *conditio sine qua non* of rape, and force or threat of force provided clear evidence of non consent. However, it made clear that force is not an element *per se* of rape; there could be “factors other than force which would render an act of sexual penetration *non-consensual or non-voluntary* on the part of the victim.”⁷³ The Appeals Chamber observed that a narrow, too literal focus on the use of force or threat of force to make a victim consent to a sex act could potentially permit perpetrators to evade liability for sexual activity to which the other party had not consented, if the aggressor took advantage of the pervading climate of fear and did not need to use actual physical force.⁷⁴ It agreed with the Trial Chamber’s determination that the coercive circumstances present in Yugoslavia at the time meant that victims were highly

⁷¹ *Ibid*, para 460.

⁷² *Prosecutor v. Kunarac et al*, 12 June 2002, ICTY, IT-96-23 and 23/1-A, *Appeal Judgement*, para. 126, citing *Prosecutor v. Kunarac et al, Judgement, supra* note 41, para. 457.

⁷³ *Prosecutor v. Kunarac et al, Appeal Judgement, supra* note 72, para. 129.

⁷⁴ *Ibid*, para. 129.

unlikely to have consented, of their own free will, to the sex acts which they had endured.⁷⁵ This was a major step in eliminating the issue of consent as an evidentiary factor in crimes of sexual violence before the ICTY.⁷⁶ A plea that the victim had consented was unlikely to be considered a plausible defence to rape.

Although not binding on the ICTR, ICTY case law holds persuasive authority. Thus, despite accepting that a mechanical definition of rape was rejected by the ICTR in *Akayesu*, and was subsumed into the definition in *Musema*, the *Semanza* Trial Chamber followed *Kunarac* and *Furundžija* and defined the *actus reus* 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.⁷⁷

The *Semanza* Trial Chamber recognized that other acts of sexual violence not satisfying this narrower definition of rape could be prosecuted as other crimes against humanity within the jurisdiction of the ICTR, such as torture, persecution, enslavement, or other inhumane acts. It concluded that the *mens rea* for rape as a crime against humanity was the intention to effect the prohibited sexual penetration, with the knowledge that it occurred without the consent of the victim.⁷⁸

Rebecca Haffajee, a lawyer who worked as a legal intern in the ICTR in 2004, saw this as a retrograde step. She felt that the ICTY had made it clear that the surrounding circumstances of conflict rendered it likely a victim would not have

⁷⁵ *Ibid*, para. 133.

⁷⁶ Suzanne Chenault, 'And Since Akayesu? The Development of ICTR Jurisprudence on Gender Crimes: A comparison of Akayesu an Muhimana' *New England Journal of International and Comparative Law* [2008] 221, 233.

⁷⁷ *Prosecutor v. Semanza*, 15 May 2003, ICTR-97-20-T, *Judgment and Sentence*, para. 344.

⁷⁸ *Ibid*, para. 346.

consented to the sexual act. In her opinion, the ICTR in *Semanza* demanded evidence of the lack of consent of the victim in order to find an accused guilty of rape.⁷⁹

Semanza was charged with two counts of rape as a crime against humanity (Counts 8 and 10) and two as a war crime violating Common Article 3 (Counts 9 and 13). Rape crimes were also mentioned in counts for persecution and torture. He was found guilty of one count of rape as a crime against humanity (Count 10)⁸⁰ but acquitted of the other due to ‘insufficient notice’ being given to the Accused (Count 8).⁸¹ He was found not guilty of the rape offences charged under Common Article 3: Count 13, as it was considered the rape charge was already covered under Count 10,⁸² and Count 9 as the Prosecutor had failed to introduce any evidence of the occurrence of the rapes.⁸³ Semanza was also convicted of torture as a crime against humanity by encouraging the crowd to rape Tutsi women, leading to the rape of Victim A (Count 11).⁸⁴ Although the rapes were considered to have been widespread and were mentioned frequently in the indictment, Semanza was only convicted of one specific rape, that of Victim A, as it was not proved that the other rapes had taken place at his instigation, with his knowledge and without the consent of the victims.

The extent to which it was necessary to prove lack of consent of the victim arose again in *Gacumbitsi*.

⁷⁹ “The application of this narrowed definition of the *actus reus* of rape and the high standard for *mens rea* seemed to reverse the progress made by the ICTR in *Akayesu* with regard to sexual violence crimes. Instead of recognizing rape as a crime of warfare that is committed in situations that are, by their very nature, likely coercive, *Semanza* effectively narrowed the scope of the crime to include only isolated incidents of a very specific and identifiable act of penetration in which the lack of consent of the victim is demonstrated to the perpetrator”. Haffajee, *supra* note 64, 210.

⁸⁰ *Prosecutor v. Semanza, Judgment and Sentence*, *supra* note 68, para. 479.

⁸¹ *Ibid*, para. 474.

⁸² *Ibid*, para. 552.

⁸³ *Ibid*, para. 539.

⁸⁴ *Ibid*, para. 485.

2.2.4 *Gacumbitsi*

On 17 June 2004, Sylvestre Gacumbitsi was found guilty of genocide, and extermination and rape as a crimes against humanity, each including sexual violence. It was established in court that Gacumbitsi drove around with a megaphone, urging Hutu young men whom Tutsi girls had refused to marry to “have sex with the young girls”, adding that if “they [the young girls] resisted, they had to be killed in an atrocious manner”.⁸⁵ The Trial Chamber concluded that the order given by Gacumbitsi to attack and select rape victims was discriminatory on grounds of ethnicity, since only Tutsi girls were targeted. The victims’ lack of consent to the sex acts was established by the fact that Gacumbitsi had exhorted men to kill ‘in an atrocious manner’ those who resisted them, and also by the fact that the victims were attacked by those from whom they were fleeing.⁸⁶ This constituted rape as a crime against humanity (Article 3 (g)), the Trial Chamber, presided over by female judge Andresia Vaz, claiming to apply both the *Akayesu* and *Kunarac* Appeal Chamber’s definitions of rape:

The Chamber is of the opinion that any penetration of the victim’s vagina by the rapist with his genitals or with any object constitutes rape, although the definition of rape under Article 3(g) of the Statute is not limited to such acts alone.⁸⁷

The Trial Chamber also found that the rapes committed had caused serious bodily harm to members of the Tutsi ethnic group and were thus an act of genocide under ICTR Statute Article 2 (2) (b). In defining serious bodily or mental harm, the Trial Chamber stated:

Serious bodily harm means any form of physical harm or act that causes serious bodily injury to the victim, such as torture and sexual violence. Serious bodily harm does not necessarily mean that the harm is irremediable. Similarly, serious mental harm can be construed as some type of impairment of mental faculties, or harm that causes serious injury to the mental state of the victim.⁸⁸

⁸⁵ *Prosecutor v. Gacumbitsi*, 17 June 2004, ICTR-2001-64-T, *Judgment and Sentence*, para. 215.

⁸⁶ *Ibid*, para. 325.

⁸⁷ *Ibid*, para 321.

⁸⁸ *Ibid*, para. 291.

The Trial Chamber also emphasised that many women and girls died as a result of rape, notably by inserting sticks into their genitals, incorporating this into the extermination conviction (Article 3 (b)).⁸⁹

At appeal in 2006, the *Gacumbitsi* Appeals Chamber followed the more specific *Kunarac* Appeal Judgment's definition of rape, with no reference to the broad definition in *Akayesu*, focussing rather on issues of consent. It concluded that non-consent and the knowledge of lack of consent were elements of rape, and that the Prosecution therefore bore the burden of proving these elements beyond reasonable doubt in order to obtain a conviction.⁹⁰ Rule 96 of the ICTR's Rules of Procedure and Evidence refers to consent as a defence which the Accused may plead and does not allow consent to be admitted as a defence if the victim has been subjected to, threatened with or put in fear of violence, duress, detention or psychological oppression or has reasonably believed that someone else might be so subjected, threatened or put in fear. If it was acceptable to plead as a defence that the victim had consented to the sex act, then the burden of proof would shift to the Defendant, who would need to produce evidence that the victim had consented to the sex act. However, the *Kunarac* Appeal Judgment declared this approach not "entirely consistent with traditional legal understandings of the concept of consent in rape".⁹¹ It ruled that, rather than turning what was essentially an element of the offence ('non-consent') to be proved by the Prosecution, into a defence, Rule 96 should be interpreted as outlining the circumstances under which evidence of consent of the victim would be admissible from the Accused. The *Gacumbitsi* Appeals Chamber, although accepting the burden of proof lay with the Prosecution, underlined that the Prosecution could prove non-consent of the victim beyond reasonable doubt by

⁸⁹ Kelly Dawn Askin, *supra* note 32, 1016.

⁹⁰ *Prosecutor v. Gacumbitsi, Judgment and Sentence*, *supra* note 85, paras. 153-7.

⁹¹ *Prosecutor v. Kunarac et al, Appeal Judgment*, *supra* note 72, para. 463.

proving the existence of coercive circumstances under which meaningful consent was not possible.⁹² Therefore, if the Accused raised reasonable doubt by introducing evidence that the victim consented, then the Trial Chamber was at liberty to disregard the evidence if it concluded that, under the surrounding circumstances of genocide, the consent given was not genuinely voluntary. Furthermore, as to the Accused's knowledge of the absence of consent of the victim, this could be proven if the Prosecution were able to establish beyond reasonable doubt that the Accused was aware, or had reason to be aware, of the coercive circumstances that undermined the possibility of genuine consent on the part of the victim in the context of the genocide.⁹³

2.2.5 *Muhimana*

In the 2005 case of Mikaeli Muhimana, who was also found guilty of rape as an act of genocide and a crime against humanity, the Trial Chamber endorsed the *Akayesu* definition of rape.⁹⁴ The Trial Chamber noted that *Akayesu*'s conceptual definition of rape had not been universally adopted in subsequent case law of the ICTR and ICTY, and that rape had also been interpreted with reference to physical elements of the act. The *Muhimana* Trial Chamber, under the guidance of presiding judge Khalida Khan, an eminent female judge who has published on women's rights,⁹⁵ considered that the *Kunarac* definition served to "specify the parameters of what constitutes 'a physical invasion of a sexual nature'",⁹⁶ and, as the *Musema* trial judges did, managed to

⁹² "It is not necessary...for the Prosecution to introduce evidence concerning the words or conduct of the victim or the victim's relationship to the perpetrator. Nor need it introduce evidence of force. Rather, the Trial Chamber is free to infer non-consent from the background circumstances, such as an ongoing genocide campaign or the detention of the victim". *Prosecutor v. Gacumbitsi, Appeal Judgment, supra* note 45, para. 155.

⁹³ *Ibid*, para. 157.

⁹⁴ *Prosecutor v. Muhimana*, 28 April 2005, ICTR 95-1B-T, *Judgment*, para. 537.

⁹⁵ 'Presidents' <www.ictrcaselaw.org/ContentPage.aspx?cid=6> accessed 5 March 2013.

⁹⁶ Chenault, *supra* note 76, p. 232.

combine the definitions given in both *Akayesu* and *Kunarac*, despite their apparent conflict:

Furundžija and *Kunarac*, which sometimes have been construed as departing from the *Akayesu* definition of rape...actually are substantially aligned to this definition and provide additional details on the constituent elements of acts considered to be rape. The Chamber takes the view that the *Akayesu* definition and the *Kunarac* elements are not incompatible or substantially different in their application.⁹⁷

However, even with the benefit of the expanded definition, the Trial Chamber did not find that the disemboweling of a victim by cutting her open with a machete from her breasts to her vagina constituted an act of rape. Although acquiescing that the act interfered with the sexual organs, the Chamber clarified that, in its opinion, the disemboweling did not constitute a physical invasion of a sexual nature⁹⁸ but instead represented murder as a crime against humanity. On this occasion, one might argue that murder carries a heavier penalty than rape, but it remains to be seen whether the refusal to view this as an act of sexual violence will have any repercussions on the interpretation of rape as an international crime in the future.

The Chamber went on to concur with the opinion that circumstances prevailing in most cases charged under international criminal law would be almost universally coercive, thus vitiating true consent as a defence to rape.⁹⁹

Muhimana appealed against his conviction. He raised the matter of “uncorroborated circumstantial evidence” and contested the validity of witness testimony with regard to the rape of two Tutsi girls. Witness AP had not actually been an eyewitness to the rape and could therefore not establish the *actus reus* of rape. Witness AP had seen the girls taken into Muhimana’s house, heard them scream that they did not expect the Accused “to do that” and emerge “stark naked ... walking

⁹⁷ *Prosecutor v. Muhimana*, Judgment, *supra* note 84, paras. 549-550.

⁹⁸ *Ibid*, para. 557.

⁹⁹ *Ibid*, para. 546.

‘with their legs apart’¹⁰⁰. In 2007, the Appeals Chamber ruled that it was permissible to base a conviction on circumstantial evidence. This was confirmed previously in the *Gacumbitsi, Kajelijeli, Niyitegeka and Rutaganda Appeals*,¹⁰¹ where it was stated that a Trial Chamber may prefer to hear corroboration of a witness statement, but neither the case law of the ICTR nor of the ICTY made this an obligation. If testimonies were divergent, it was the duty of the Trial Chamber hearing the witnesses to decide which evidence it deemed to be more probative, and to choose which of the versions of the same event it would admit. This has allowed considerable freedom of movement to ICTR judges in their assessment of evidence. However, the conviction for these two rapes was overturned by the Appeals Chamber in 2007: the rapes were indeed deemed to have taken place, but the Accused had not been the only person present in the house at the time, and it was not possible to be sure beyond reasonable doubt that it was Muhimana who had committed them.

The definition of rape preferred in *Muhimana* was not applied by the ICTR in *Ndindiliyimana et al*¹⁰² in 2011. The mechanical definition of the *actus reus* for rape used in *Gacumbitsi* and *Kunarac*, and subsequently *Nyiramasuhuko et al*,¹⁰³ was used by the Trial Chamber, as was the *mens rea* (the intention to effect the sexual penetration, in the knowledge that it occurred without the consent of the victim¹⁰⁴), and the position regarding consent of the victim, which should be given voluntarily and freely, assessed within the context of the surrounding circumstances, force or

¹⁰⁰ *Prosecutor v. Muhimana*, 21 May 2007, ICTR 95-1B-A, *Appeal Judgment*, paras. 46-49.

¹⁰¹ *Prosecutor v. Gacumbitsi*, *Appeal Judgment*, *supra* note 45, para. 115; *Prosecutor v. Kajelijeli*, 23 May 2005, ICTR-98-44A-A, *Appeal Judgment*, para. 170; *Prosecutor v. Niyitegeka*, 9 July 2004 ICTR-96-14-A, *Appeal Judgment*, para. 92; *Prosecutor v. Rutaganda*, 26 May 2003, ICTR 96-3-A, *Appeal Judgment*, para. 29.

¹⁰² *Prosecutor v. Ndindiliyimana et al*, *Judgment and Sentence*, *supra* note 2, paras. 2121-2122.

¹⁰³ *Ibid*, para. 2121.

¹⁰⁴ *Ibid*, para. 6075.

threat of force providing evidence of non-consent, but not being an element *per se* of rape (see Section 2.2.5).¹⁰⁵

The efforts made by the *Muhimana* Trial Chamber to reconcile the *Akayesu* and *Kunarac* definitions of rape, reiterated in *Hategekimana* in December 2010,¹⁰⁶ appear to have been abandoned, at least temporarily, in favour of a purely mechanical definition, despite the presence of a female judge, Taghrid Hikmet, on benches both of *Ndindiliyimana et al* and *Hategekimana*.

It cannot be disputed that there is now a structure in place to prosecute rape and sexual violence committed during the Rwandan genocide. The provisions of the ICTR statute coupled with the definition of rape and sexual violence elaborated by succeeding Trial Chambers provide a framework to prosecute sexual offences against women during the genocide. However, defendants continue to be acquitted on charges of rape and sexual violence in the face of vigorous accusations against them.

The following paragraphs consider factors other than the definition of the offences which may be preventing the successful prosecution of rape and sexual violence at the ICTR, focussing on the case of *Ndindiliyimana et al*.¹⁰⁷

3. Defective Indictments, Inadequate Evidence and Dubious Investigative Practices

In the recent case of *Ndindiliyimana et al*,¹⁰⁸ there were successful convictions for some of the rape charges but not for others. A close study of the *Ndindiliyimana et al*

¹⁰⁵ *Ibid*, para. 2121.

¹⁰⁶ *Prosecutor v. Hategekimana*, December 2010, ICTR-00-55B-T, *Judgment*, para. 723.

¹⁰⁷ *Prosecutor v. Ndindiliyimana et al*, *Judgment and Sentence*, *supra* note 2.

¹⁰⁸ *Ibid*.

trial reveals failings on the part of prosecutors and investigators and suggests a diffidence on the part of judges to accept charges of sexual violence.

3.1 Focus on Ndindiliyimana et al

The Trial Chamber in the case of Augustin Ndindiliyimana, Augustin Bizimungu, François-Xavier Nzuwonemeye and Innocent Sagahutu delivered its verdict in May 2011. It is currently under appeal. Nzuwonemeye, Bizimungu and Sagahutu were charged with Rape as a Crime Against Humanity (Count 6) and Rape as a Violation of Common Article 3 (Count 8). Although all were found guilty of certain offences, only Augustin Bizimungu was found guilty of Count 6 (Rape as a Crime Against Humanity) and Count 8 (Rape as a Violation of Common Article 3). Even then, he was not found guilty of all the rapes of which he stood accused.

The reasons given by the Trial Chamber for rejecting some significant charges put forward by the Prosecution are outlined below.

3.1.1 Flawed Indictments

It appears that, alarmingly frequently, even when rape and sexual violence are charged, and it is accepted that the offences did occur, they are not pleaded in such a way as to enable the Trial Chamber to conclude beyond reasonable doubt that the accused are guilty of them.¹⁰⁹

3.1.1.1 Dates of rapes outside of time period pleaded

The *Ndindiliyimana et al* indictment alleged that Rwandan Army soldiers caused serious bodily or mental harm to Tutsi women at different locations from mid-April to

¹⁰⁹ *Prosecutor v. Kajelijeli*, 1 December 2003, ICTR-98-44A-T, *Judgment and Sentence*, paras. 923-4.

late June 1994, while Augustin Bizimungu was Chief of Staff of the Rwandan Army, notably at the Josephite Brothers' compound in Kigali on 8 April 1994. Although Count 3 (Complicity in Genocide) of the indictment¹¹⁰ does not specifically allege that soldiers committed rapes at the locations identified, the Trial Chamber recognized, following the 2008 *Seromba* Appeal judgment, that nearly all convictions for causing serious bodily or mental harm involved rapes or killings.¹¹¹ Bizimungu was therefore deemed to have had sufficient notice that the alleged acts of violence causing serious bodily or mental harm in paragraphs 68 and 69 of the Indictment included rapes, in order to prepare his defence. Furthermore, the Trial Chamber also noted that the Prosecution Closing Brief had specifically included rape within the notion of "serious bodily or mental harm" for the purposes of the genocide charge.¹¹²

The Trial Chamber found that the Prosecution had proved beyond reasonable doubt that Rwandan Army soldiers killed and caused serious bodily and mental harm to Tutsi at the Josephite Brothers' compound on 8 April 1994,¹¹³ particularly the rape of a twenty-year-old girl, whose body had been found the following day,¹¹⁴ although rape was not specifically charged under Count 3, and events at the Josephite Brothers' compound had been omitted from Counts 6 (Rape as a Crime against Humanity) and 8 (Violation of Common Article: rape). However, Bizimungu was only appointed Chief of Staff, and promoted to Major General, on 16 April 1994, and occupied this office from 19 April. Thus, these rapes fell outside the time period prescribed in the

¹¹⁰ *Prosecutor v. Ndindiliyimana et al*, 23 August 2004, ICTR-00-56-I, *Amended Indictment*, paras. 68-69.

¹¹¹ "The quintessential examples of serious bodily harm are torture, rape, and non-fatal physical violence that causes disfigurement or serious injury to the external or internal organs... Indeed, nearly all convictions for the causing of serious bodily or mental harm involve rapes or killings". *Prosecutor v. Seromba*, 12 March 2008, ICTR-2001-66-A, *Appeal Judgment*, para. 46.

¹¹² "Paragraph 684 of the Closing Brief states that soldiers under Bizimungu's command "committed murders and caused serious bodily or mental harm, including rape, to many Tutsi ... in Kigali, Gitarama, Butare, Gisenyi, Cyangugu, Kibuye and Ruhengeri préfectures ...". *Prosecutor v. Ndindiliyimana et al, Judgment and Sentence, supra* note 2, footnote 1793.

¹¹³ *Ibid, supra* note 2, para. 16.

¹¹⁴ *Ibid, supra* note 2, para 1053.

indictment: his period in office, mid April to late June 1994. The Trial Chamber, consequently, refused to even consider the allegations dated 8 April 1994 in assessing Bizimungu's responsibility for rape as an act of genocide, as a superior, since he was not in office at the time.¹¹⁵

Furthermore, although this was considered regrettable, Bizimungu could not even be held criminally responsible for failing to punish the crimes afterwards: current case law¹¹⁶ precludes finding superiors responsible for failing to punish crimes committed before they assumed the position of command over the perpetrators.¹¹⁷ We may reasonably ask whether the wrong person was charged with this offence. However, Bizimungu's immediate predecessor as Chief of Staff was General Deogratias Nsabimana, who was in President Juvénal Habyarimana's aeroplane, shot down on 6 April 1994 – the event provoking the genocide. This took place two days before the attacks at the Josephite Brothers' compound. Bizimungu did occupy a position of responsibility in the military at the time of events at the Josephite Brothers' compound, having been appointed commander of military operations for the Ruhengeri *secteur* in January 1994.¹¹⁸ But the ICTR did not hold him responsible for atrocities taking place in Kigali. Charging him with offences for which he could not be prosecuted as they fell outside the time period prescribed in the indictment as his period in office as Chief of Staff and outside his geographical sphere of influence as commander of military operations for the Ruhengeri *secteur* in early April 1994 was a waste of valuable ICTR resources by prosecution staff.

¹¹⁵ *Ibid*, paras. 1140-41. "The Prosecution has proved beyond reasonable doubt that Rwandan Army soldiers killed and caused serious bodily and mental harm to Tutsi at the Josephite Brothers' compound.... However, the Chamber finds that Bizimungu is not criminally responsible for the participation of soldiers in crimes at the Josephite Brothers on 8 April...because those events took place before Bizimungu assumed his position as Chief of Staff of the Rwandan Army". *Ibid*, para. 16.

¹¹⁶ *Prosecutor v. Hadžihasanović et al*, 8 December 2005, IT-04-83-AR72, *Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility*, para. 10.

¹¹⁷ *Prosecutor v. Nindiliyimana et al*, *Judgment and Sentence*, *supra* note 2, paras. 1960-63.

¹¹⁸ *Ibid*, para. 90.

3.1.1.2 *Improper pleading of events in Butare*

Bizimungu was also charged with responsibility as a superior for causing serious bodily and mental harm including rape (Count 2) in Butare, from 19 April to late June 1994.¹¹⁹ However the Trial Chamber noted that “the Prosecution failed to sufficiently particularise and adequately specify the exact locations at which crimes were alleged to have been committed and observed...” within the three-month date range, so that “an objective reader of the Indictment would not be able to decipher where exactly the alleged crimes were observed ... and consequently what were the nature and circumstances of the crimes alleged at these locations”.¹²⁰ The pleading was “defective” with respect to the crimes alleged in Butare, Gisenyi, Cyangugu, Kibuye and Ruhengeri, and the “defects were not cured”.¹²¹ The lack of precision would have prevented Bizimungu from preparing an adequate defence to the charges and deprived him of a fair trial. Consequently, he could not be tried for the alleged rapes in Butare.

Pursuant to the ICTR Statute, an accused must be informed promptly and in detail of the nature and cause of the charges against him.¹²² The Prosecution must plead the facts and offence in the indictment with precision,¹²³ including the relationship of the accused to his subordinates, the acts and crimes of the subordinates, how the accused should know that his subordinates had committed the crimes and how he failed to prevent the crimes or punish his subordinates. Failure to plead the material facts in the indictment with sufficient specificity constitutes a

¹¹⁹ *Prosecutor v. Ndindiliyimana et al, Amended Indictment, supra* note 110, paras. 68-69.

¹²⁰ *Prosecutor v. Ndindiliyimana et al, Judgment and Sentence, supra* note 2, paras. 159-60.

¹²¹ *Ibid*, para. 1035.

¹²² *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994*, *supra* note 12, Article 20 (4) (a).

¹²³ *Prosecutor v. Ndindiliyimana et al, Judgment and Sentence, supra* note 2, para. 120.

defect in the indictment.¹²⁴ Previous ICTY and ICTR case law is clear on this,¹²⁵ stating that a defective indictment may cause the Appeals Chamber to reverse a conviction.¹²⁶ In *Bizimungu*, the Prosecution should have supported its allegations by specific evidence regarding the exact crimes and locations in which they were committed in the indictment, against which Bizimungu could prepare a defence.

The genocide charges in Count 2 included rapes committed at Gishamvu Church, Nyumba Parish, Butare, and at the Kicukiro *conseiller's* office, however the Prosecution failed to lead any evidence at all regarding the alleged crimes at those locations,¹²⁷ and those offences could not be prosecuted.

3.1.2 Evidence

The quality and quantity of the evidence presented to the Trial Chamber was not always adequate to secure a conviction for rape or sexual violence on each occasion that it was charged.

3.1.2.1 Hearsay, Circumstantial Evidence and Absence of Corroboration

With regard to the charges under Count 6 (Rape as a crime against humanity) against Bizimungu, Nzuwonemeye and Sagahutu, the Chamber found the Prosecution had not presented sufficient evidence to prove soldiers of the Rwandan Army, under the command of Nzuwonemeye and Sagahutu, committed rapes against Tutsi women at the *Centre Hospitalier de Kigali* (Kigali Hospital Complex – CHK), the only offences

¹²⁴ *Ibid*, paras. 125-127.

¹²⁵ *Prosecutor v. Kupreškić et al*, 23 October 2001, IT-95-16-A, *Appeal Judgment*, para. 88 citing *Prosecutor v. Furundžija*, 21 July 2000, IT-95-17/1A, *Appeal Judgment*, para. 147; *Prosecutor v. Ntagerura et al* 7 July 2006, ICTR-99-46-A, *Appeal Judgment*, para 22; *Prosecutor v. Niyitegeka*, *Appeal Judgment*, *supra* note 101, paras. 194-5; *Prosecutor v. Ntakirutimana*, 13 December 2004, ICTR-96-10-A and ICTR-96-17-A, *Appeal Judgment*, para. 470.

¹²⁶ *Prosecutor v. Ntakirutimana*, *Appeal Judgment*, *supra* note 125, para. 471.

¹²⁷ *Prosecutor v. Ndindiliyimana et al*, *Judgment and Sentence*, *supra* note 2, paras. 32, 1447, 1896-7.

of sexual violence against Nzuwonemeye and Sagahutu. Witness DAR was the only Prosecution witness to testify about rapes perpetrated by soldiers against Tutsi girls at CHK. The Trial Chamber did not find Witness DAR's evidence adequate to convict the accused beyond reasonable doubt. His evidence was indirect – he had not witnessed the rapes himself. In his testimony, he inferred that the Tutsi girls had been raped because he had seen “the sad demeanour of the Tutsi girls when they returned to CHK after having been abducted by soldiers.”¹²⁸ In view of the prevalence of rape during the genocide, witness DAR's conclusions were potentially well-founded. Circumstantial evidence is very often the principal evidence available in a criminal trial, from which a judge or jury must reach a verdict. However, Witness DAR's evidence was not only circumstantial but also uncorroborated by reliable witnesses. The only other witness to testify to the Trial Chamber about the killings at the CHK was Witness ZA, who, although testifying about abductions from the wards, did not mention rapes, and whose evidence was also indirect. The Trial Chamber considered it insufficiently detailed to be corroborative of any rapes.

Witness DAR also gave evidence, based on information communicated to him from three colleagues,¹²⁹ about the abduction and murder of a young Tutsi woman named Chantal, however his colleagues were not called to testify, which constitutes hearsay. Under English criminal law, hearsay is only admissible as evidence under certain specific circumstances, as witnesses should normally be available for cross-examination in court.¹³⁰ In contrast, the ICTR does not exclude hearsay evidence.¹³¹ Clearly, locating victims and witnesses can be difficult due to deaths and changes of

¹²⁸ *Ibid*, paras. 1172-3.

¹²⁹ *Ibid*, para. 1078.

¹³⁰ Section 114 (1) *Criminal Justice Act 2003*.

¹³¹ William A Schabas, *An Introduction to the International Criminal Court* (3rd edn CUP, Cambridge 2007) 294 citing *Prosecutor v. Tadić*, 5 August 1996, ICTY, Case No IT-94-1, *Decision on Defence Motion on Hearsay*, paras. 7-19; *Prosecutor v. Ndindiliyimana et al, Judgment and Sentence*, *supra* note 2, para. 113.

address engendered by the events of 1994. Furthermore, many Rwandans have been left unfit to testify physically or mentally, or are afraid of testifying for fear of reprisals.

English law also accepts that hearsay evidence is valuable in these circumstances, and allows its admission under sections 114-118 of the Criminal Justice Act 2003 (CJA). Notably, section 116 includes exceptions to the rule against hearsay, which permit relevant hearsay statements to be admitted if the person who made the statement is identified to the court's satisfaction, for example, statements made by eyewitnesses who have since died,¹³² by witnesses unfit because of their bodily or mental condition,¹³³ by witnesses who have left the country and it is not reasonable to call them back,¹³⁴ by those who cannot be traced despite reasonable attempts to locate them¹³⁵ or, with leave of the court, by witnesses too afraid to testify in person.¹³⁶

At the ICTR, the Rules of Procedure and Evidence allow any evidence to be admitted provided it is relevant and has probative value.¹³⁷ Hence, Witness DAR's hearsay evidence relating to the murder of Chantal was admissible. Corroboration is not required either, in order for evidence to be admissible, there being "no place for the Civil Law principle *unus testis, nullus testis...*"¹³⁸ in the ICTR.¹³⁹

¹³² Section 116 (2) (a) *Criminal Justice Act 2003*.

¹³³ Section 116 (2) (b) *Criminal Justice Act 2003*.

¹³⁴ Section 116 (2) (c) *Criminal Justice Act 2003*.

¹³⁵ Section 116 (2) (d) *Criminal Justice Act 2003*.

¹³⁶ Section 116 (2) (e) *Criminal Justice Act 2003*.

¹³⁷ *International Criminal Tribunal for Rwanda: Rules of Procedure and Evidence* (entered into force 29 June 1995) UN Doc ITR/3/REV, 1 Rule 89 (C).

¹³⁸ 'one witness is no witness,' Kriangsak Kittichaisaree, *International Criminal Law* (OUP, New York 2001) 302; see *Prosecutor v. Akayesu, Judgment and Sentence*, supra note 12, paras. 132-7.

¹³⁹ "The Chamber also recalls that the testimony of a single witness on a material fact does not, as a matter of law, require corroboration. However, where a single witness gives testimony concerning a particular incident, the Chamber recalls that it must act with particular care before accepting such evidence on its own when making a finding of guilt". *Prosecutor v. Ndindiliyimana et al, Judgment and Sentence*, supra note 2, para. 112 citing *Prosecutor v. Muvunyi*, 11 February 2010, ICTR-00-55A-T, *Judgment and Sentence*, para. 128.

Circumstantial evidence is treated similarly, and, consequently, a conviction could actually be based solely on uncorroborated circumstantial evidence and/or hearsay. Nonetheless the Trial Chamber, as the trier of fact, can decide that, under particular circumstances, corroboration is necessary,¹⁴⁰ and judges have the discretion to treat hearsay evidence with caution and expect corroboration.¹⁴¹ The Chamber may freely assess the relevance and credibility of all evidence presented to it.¹⁴² Hearsay evidence is admissible to the Chamber, and is only rejected if it lacks credibility rather than because it constitutes hearsay, however, in the interests of a fair trial, it was reasonable to expect satisfactory identification of Witness DAR's colleagues, in order for the hearsay evidence to be admissible. In this particular situation, although not obliged by the ICTR's Rules of Procedure and Evidence to require corroboration of witness DAR's testimony, given the indirect and limited nature of his evidence, the judges decided not to accept his evidence without corroboration.¹⁴³

The cases of *Kamuhanda*, *Kajelijeli*, *Musema* and *Niyitegeka*, where rape charges failed, demonstrate that establishing the credibility of hearsay and circumstantial evidence is not straightforward. For each prosecution witness who testified about rapes in these cases, the witnesses and the overall testimony they gave were deemed credible by the Trial Chambers, but when they gave hearsay or circumstantial evidence, this was not deemed credible.¹⁴⁴ This leads Daniel Franklin to conclude that "establishing the credibility of a witness is insufficient to establish the credibility of hearsay or circumstantial evidence from that same witness."¹⁴⁵

¹⁴⁰ *Prosecutor v. Gacumbitsi, Appeal Judgment, supra* note 45, para. 115.

¹⁴¹ *Prosecutor v. Ndindiliyimana et al, Judgment and Sentence, supra* note 2, para. 113 citing *Prosecutor v. Rutaganda, Appeal Judgment, supra* note 101, paras. 4, 275-6 and *Prosecutor v. Muvunyi, Judgment and Sentence, supra* note 139, paras. 12-3.

¹⁴² *Prosecutor v. Musema, Judgment and Sentence, supra* note 42, para. 45.

¹⁴³ *Prosecutor v. Ndindiliyimana et al, Judgment and Sentence, supra* note 2, para 1175.

¹⁴⁴ Daniel Franklin, 'Failed Rape Prosecutions at the International Criminal Tribunal for Rwanda' IX *The Georgetown Journal of Gender and the Law* (2008) 181, 213.

¹⁴⁵ *Ibid*, p. 213.

Franklin highlights a significant problem for the Prosecution: “None of these judgments [*Kamuhanda, Kajelijeli, Musema* and *Niyitegeka*] suggested what would be required to establish the credibility of hearsay or circumstantial evidence.... It thus falls upon the prosecutor to ensure that the hearsay or circumstantial evidence is itself credible”.¹⁴⁶

Catherine MacKinnon, the International Criminal Court’s (ICC) Special Adviser for Gender Affairs since 2008, speaks of “a tacit social burden of proof”,¹⁴⁷ according to which corroboration is required to a greater extent for sexual assault cases than for other offences. She feels that “at both prosecutorial and judicial levels, a tacitly higher standard of credibility for witnesses to rape pertains than for witnesses to murder”, citing *Kajelijeli*¹⁴⁸ as an example of a case where the bench (Judge Arlette Ramaroson dissenting) appeared reluctant “to hold a man responsible for a sexual violation another man committed, when it is willing to hold the same man responsible for murder committed on virtually the same evidence, at the same time and place, by and against the same people”.¹⁴⁹

There are clear reasons why Trial Chambers hesitate to accept uncorroborated hearsay and circumstantial evidence: hearsay statements are not made under oath, can be misreported in court and the speaker of the original statement cannot be cross-examined. Circumstantial evidence, for its part, can lead to a conviction based upon flawed assumptions. In *Ndindiliyimana et al*, in contrast to testimony of the events at CHK, testimony regarding rapes at Cyangugu Stadium was accepted as credible, thanks to Witnesses LBC and LAV, who gave consistent, corroborative accounts of

¹⁴⁶ *Ibid*, p. 212.

¹⁴⁷ Catherine MacKinnon ‘The ICTR’s Legacy on Sexual Violence’ 14 *New England Journal of International and Comparative Law* (2008) 211, 215.

¹⁴⁸ *Prosecutor v. Kajelijeli, Judgement and Sentence*, *supra* note 109.

¹⁴⁹ Catherine MacKinnon, *supra* note 147, p. 215.

their own rapes. Both were able to name another rape victim, Fifi.¹⁵⁰ Furthermore, Witness QBP's testimony regarding a number of girls taken by soldiers and *Interahamwe* from the *Eglise Episcopale au Rwanda* (EER), who returned "in a pitiful state", having difficulty walking, was also deemed credible. Witness QBP was able to identify three of them as the daughters of her neighbour, and name one as Suzanne.¹⁵¹ This provides a clear example of the extent of the evidence required for judges to find accusations of rape credible.

The Chamber's decision not to convict Nzuwonemeye and Sagahutu on the basis of the circumstantial evidence meant they were not convicted for rape at all. The only allegations of rape against them related to events at CHK.

3.1.2.2 *Inconsistencies and Lack of Eyewitnesses*

The Chamber also noted that Witness DAR's evidence was inconsistent¹⁵² with his pre-trial statement and was reluctant to accept his evidence without corroboration from other witnesses. The inconsistencies did not relate to the alleged rapes but to i) killings of civilians by soldiers which, in his statement, he maintained he had witnessed, yet, during live testimony, denied having seen; ii) to the identity of dead bodies; and iii) to a misremembered date.¹⁵³ These were enough to undermine his evidence and the Chamber did not consider him a credible witness. He also had no recollection of the arrival at CHK of the bodies of the Belgian UNAMIR soldiers who had been protecting Prime Minister Agathe Uwilingiyimana, before being captured, mutilated and murdered.¹⁵⁴ The Chamber felt he should have remembered such a significant event. The inconsistencies and lack of corroboration from further

¹⁵⁰ *Prosecutor v. Ndindiliyimana et al, Judgment and Sentence, supra* note 2, paras. 1517-8.

¹⁵¹ *Ibid*, para. 1450.

¹⁵² *Ibid*, para. 1175.

¹⁵³ *Ibid*, paras. 1159-64.

¹⁵⁴ *Ibid*, para. 1174.

witnesses or victims led the Chamber to question whether he had actually been at the CHK on the dates he said. Witness ZA, the only other Prosecution witness who testified about events at CHK, did not testify about any rapes and provided indirect evidence as opposed to eyewitness testimony, which was insufficiently detailed to counter the more credible evidence of the defence witnesses.¹⁵⁵

For the Prosecution to furnish solid evidence of events at CHK, it would have needed to provide detailed and precise corroborative accounts of events from several sources, preferably from eyewitnesses, and its witnesses would have needed to be credible, with no inconsistencies in their accounts prior to and during trial. In cases where more than one eyewitness is available for cross-examination, the Chamber is more likely to accept prosecution evidence. Rapes of Tutsi women at the *École des Sciences Infirmières*, Kabgayi (ESI) were seen by Eyewitness EZ, and rapes at Musambira *Commune* Office and Dispensary were observed by three Eyewitnesses, DBH, DBA, DBB. The Chamber accepted these had taken place.¹⁵⁶ Furthermore, inconsistencies in Witness DBB's testimony regarding the number of people at the Gaserge roadblock were insufficient to undermine her credibility, because it was largely corroborated by Witness DBH. The Chamber noted that "this variance may plausibly be explained by the difficulties of recalling traumatic events in precise detail years after those events occurred".¹⁵⁷ The inconsistencies in Witness DAR's testimony could also have been due to the passage of time and post traumatic stress disorder, but clearly the judges did not feel they could justify their discretionary power to accept his evidence without corroboration.

¹⁵⁵ *Ibid*, paras. 1171, 1175.

¹⁵⁶ *Ibid*, paras. 1180-1; 1185.

¹⁵⁷ *Ibid*, para. 1190.

3.1.3 Investigative Practices

Witnesses highlighted poor investigative practices, which led to subsequent problems with evidence and testimony in court.

Some inconsistencies between witnesses' statements and their live testimony in court are blamed on misunderstandings between the witness and the ICTR investigators conducting the pre-trial interviews. For example, Witness DBJ gave evidence that a soldier raped a female refugee at the Josephite Brothers' compound on 8 April 1994. The Defence maintained that Witness DBJ testified to having seen the soldier rape the girl as he walked past the building where the soldier had taken her. However, in his pre-trial statement, Witness DBJ had stated that he saw the rape while he was sitting in the Josephite Brothers' compound. According to Witness DBJ, the discrepancy was possibly the result of a misunderstanding between himself and the investigators, who may have misunderstood the passage in his statement where he said the soldier told the girl to undress at the compound, taking this to mean instead that the soldier raped her at the compound.¹⁵⁸ The Chamber accepted Witness DBJ's explanation as plausible and was satisfied he gave a credible account that a soldier raped a young girl during the attack at the Josephite Brothers compound on 8 April 1994.¹⁵⁹ However, in English law, a previous inconsistent statement – which is admissible as evidence of any matter stated of which oral evidence by the witness would be admissible¹⁶⁰ – generally undermines the credibility of witnesses, because they are proffering to the court a different account to that asserted before in their written statement. The court may believe that, on one of these occasions, the witness must have been lying. It is therefore essential that investigators draft witness

¹⁵⁸ *Ibid*, para. 1138.

¹⁵⁹ *Ibid*, para. 1138-9.

¹⁶⁰ Section 119, *Criminal Justice Act 2003*.

statements accurately and ensure they have understood fully, via detailed questioning, the witness' account.

Investigators must also devote adequate time to conducting interviews. Although her testimony was believed by the Trial Chamber, inconsistencies arose between Witness LBC's pre-trial statements and her live testimony. She ascribed these to the brevity of the interview. During her first interview, she did not tell investigators that her mother had been killed by *Interahamwe* outside Cyangugu stadium, maintaining the interview had not lasted long enough for her to provide a detailed account of the rapes, abductions, assassinations and escape attempts, taking place over several weeks.¹⁶¹ In the case of Witness LBC, her live testimony of the incident during which this massacre took place was corroborated by Witness LAV. The fact that their accounts were in general consistent bolstered their credibility.¹⁶²

Witness LBC, who testified during cross-examination that she herself had been the victim of multiple rapes at Cyangugu stadium, also explained that, when she was first interviewed, she had not told investigators about the rapes "because she was not brave enough at that time".¹⁶³ Witness DBD was also raped at the coffee co-operative TRAFIPRO, but failed to report this to investigators.¹⁶⁴ In both cases, the Prosecution was fortunate to have corroborative evidence from other witnesses, which ensured the witnesses' live testimony was believed. However, following the revelations of the *Akayesu* trial, investigators should have known that many Tutsi women had suffered sexual violence, that they would be reluctant to talk about this due to the social stigma attached to such attacks, and to secure convictions for rape

¹⁶¹ *Prosecutor v. Nindiliyimana et al, Judgment and Sentence, supra* note 2, para. 1484, footnote 2636.

¹⁶² *Ibid*, para. 1516.

¹⁶³ *Ibid*, footnote 2623.

¹⁶⁴ *Ibid*, para. 1194.

and sexual violence, specific questions should have been put to them, sensitively, to enable them to divulge such attacks.

4 Prosecution Procedure and its Shortcomings

None of the incidents outlined above are features of *Ndindiliyimana et al* alone. Human rights organisations, international observers, witnesses and victims regularly complain of stumbling blocks to successful prosecution for crimes of sexual violence, despite the progress in defining rape and sexual violence. This section will examine some of the areas of recurrent criticism.

4.1 Judges

Like Catherine MacKinnon, SáCouto and Cleary, of the War Crimes Research Office at Washington College of Law, believe judges require a higher level of proof in cases of sexual violence than in other types of cases before the *ad hoc* tribunals. They claim that judges are “reluctant to draw meaningful inferences from circumstantial evidence and appear to prefer direct or more specific evidence as to knowledge or causality, even when such evidence is not required as a matter of law”,¹⁶⁵ as we saw in *Ndindiliyimana et al*. Similarly, in *Kajelijeli*, witness testimonies provided strong circumstantial evidence that the accused authorised acts of sexual violence by his subordinates, but the Chamber required proof from the Prosecution that a specific

¹⁶⁵ Susanna SáCouto and Katherine Cleary ‘The Importance of Effective Investigation of Sexual Violence and Gender-based Crimes at the International Criminal Court’ (2009) 17 *American University Journal of Gender, Social Policy and the Law* 337, 358.

order had been issued to rape or sexually assault the victims on that day.¹⁶⁶ SáCouto and Cleary maintain that:

the jurisprudence of the ad hoc tribunals makes clear that an order, even if implicit, may be inferred from the circumstances, including from both acts and omissions of an accused. Unfortunately, while the ad hoc tribunals have used circumstantial or pattern evidence to establish that an accused ordered certain crimes, a review of sexual violence and gender-based cases before these tribunals indicates that they appear more reluctant to do so in these types of cases.¹⁶⁷

Attitudes in court have also given serious cause for concern. Nowrojee recounts how, in the Butare Trial,¹⁶⁸ the judges burst out laughing as Witness TA, a victim of multiple rapes, was “ineptly and insensitively” cross-examined by a Defence lawyer. The witness had been hiding for days and not bathed. The implication was that she could not have been raped because she smelt. No apology was forthcoming from, nor admonishment administered to, the judges.¹⁶⁹ This behaviour suggests a lack of gravity accorded to sexual violence offences and a misunderstanding of the probable purpose of the rapes – to eradicate an ethnic group – and could be attributed to the small numbers of women judges at the ICTR, although, in fact, judge Arlette Ramaroson sat in this Trial Chamber. As a result, in 2002, ten prosecution witnesses refused to testify before the same Chamber.¹⁷⁰

Furthermore, at the international tribunals, the attitudes of judges and prosecutors do not necessarily reflect a respect for women as equals, as the legislation and norms of the twenty-first-century western world demand. Xabier Aranburu, senior analyst at the Office of the Prosecutor at the ICC, recently gave a lecture to a group of experienced judges and prosecutors visiting The Hague where “references to sexual violence were met with laughter and mocking signs, and I was asked whether

¹⁶⁶ *Ibid*, p. 355 citing *Prosecutor v. Kajelijeli, Judgment and Sentence*, *supra* note 109, para. 681.

¹⁶⁷ *Ibid*, p. 354.

¹⁶⁸ *Prosecutor v. Nyiramasuhuko et al, Judgment and Sentence*, *supra* note 17.

¹⁶⁹ Nowrojee, *supra* note 4.

¹⁷⁰ ‘Ten Genocide Witnesses Refuse to Testify for UN Tribunal’ *Hirondelle News Agency*, Arusha, 3 April 2002 <www.hirondellenews.com/content/view/7842/79/> accessed 15 November 2011.

international tribunals accepted female investigators, since apparently this was not an option in their country”.¹⁷¹

Leading independent international organisation Human Rights Watch (HRW) signalled a number of issues to the UN Security Council in a letter in 2003. It criticised the judges’ lack of professionalism, maintaining some judges lacked experience in managing a courtroom, permitting lengthy and irrelevant examination of witnesses.¹⁷² HRW felt the need to recommend the recruitment of “highest quality staff”.

At the ICTR and ICTY, when women judges have been present on the bench, Trial Chambers often seem to have been more determined to prosecute crimes of sexual violence. As we have seen, Judge Pillay was credited with taking the initiative to question witnesses about rape in *Akayesu*, which led to him being charged with sexual violence. Similarly, at the ICTY, it was only on the insistence of Judge Elizabeth Odio Benito,¹⁷³ who “publicly exhorted the Office of the Prosecutor”¹⁷⁴ to include gender crimes in Dragan Nikolić’s indictment, that he was charged with and found guilty of sexual violence.¹⁷⁵ Without their determination, it would seem quite probable that investigating crimes of sexual violence would have been even less of a priority for the tribunals.

Judge Pillay supports the participation of women judges, “because of the principal of equality. You can’t keep fifty per cent of the population out of the

¹⁷¹ Xabier Agirre Aranburu, ‘Sexual Violence beyond reasonable doubt: using pattern evidence and analysis for international cases’ 23 *Leiden Journal of International Law* (2010) 609, 610.

¹⁷² ‘Rwanda and the Security Council: Changing the International Tribunal’ (Letter to Council Members on the International Criminal Tribunal for Rwanda, 1 August 2003) <www.hrw.org/news/2003/08/01/rwanda-and-security-council-changing-international-tribunal> accessed 11 November 2011.

¹⁷³ ICTY judge: 1993-98; ICC Vice President since 2003.

¹⁷⁴ Richard Goldstone, ‘Prosecuting Rape as a War Crime’ 34 *Case Western Reserve Journal of International Law* (2002) 277, 282.

¹⁷⁵ *Prosecutor v. Nikolić*, 18 December 2003, IT-94-2-S, *Sentencing Judgment*, para 5.

decision-making process. Then you have skewed justice”.¹⁷⁶ She does not believe that women and men decide differently, but that women have more sensitivity about rape, as they understand what happens to women who are raped. Rape can genuinely constitute a death sentence for some, since, aside from those rape victims who died from the physical violence accompanying the rape acts, many of Rwanda’s rape victims contracted AIDS or became HIV positive, and also were psychologically affected, feeling deep shame or becoming outcast as a result. Arguably, this understanding will lead to greater sensitivity in managing the questioning of victims of sexual violence in court, and a determination to put crimes of sexual violence on an equal footing with other violent crimes.

It appears also that women judges are more likely to impose harsher sentences for sexual offences. Nienke Grossman, Assistant Professor at the University of Baltimore School of Law, believes the sexes bring different perspectives to judging. A study of ICTY sentencing practices shows panels with female judges impose more severe sanctions on defendants who assault women, while male judges impose more severe sanctions on defendants who assault men: “Having a female judge on cases with female victims increases the sentences by about 46 months”.¹⁷⁷ A recent survey of rulings in United States sex discrimination cases showed that a complainant was ten per cent less likely to win her case if the judge was male as opposed to female,

¹⁷⁶ Quoted in Daniel Terris, Cesare PR Romano and Leigh Swigart, *The International Judge: An Introduction to the Men and Women who Decide the World’s Cases* (Brandeis, Lebanon, NH, 2007) 48.

¹⁷⁷ Nienke Grossman ‘Sex Representation on the Bench and the Legitimacy of International Criminal Courts’ 11 *International Criminal Law Review* (2011) 643, 647 citing Kimi Lynn King and Megan Greening ‘Gender Justice or Just Gender? The Role of Gender in Sexual Assault Decisions at the International Criminal Tribunal for the Former Yugoslavia’ 88 *Social Science Quarterly* (2007) 1049, 1065-66.

and that a woman's presence on a judicial panel actually causes male judges to rule in favour of sex discrimination complainants.¹⁷⁸

Judge Patricia Wald, ICTY judge between 1999 and 2001, believes that the number of women judges at international tribunals is not adequate,¹⁷⁹ with the exception of the ICC, whose statute mandates representation of women, and the Special Court for Sierra Leone, where four out of eleven judges are women. At the ICTR, only one female judge was appointed to the bench in 1996.¹⁸⁰ In 2012, only three out of thirteen permanent judges and two out of eight *ad litem* judges were women.¹⁸¹ Women, very often the victims of horrendous war crimes, consequently have little role in the punishment of them, but have to content themselves with seeing them “disguised in international law linguistics ... as outrages against dignity or honor”.¹⁸²

Article 12 ter (1) (b) of the ICTR statute includes a recommendation that States take into account the importance of a fair representation of female and male judges when proposing candidates as *ad litem* judges.¹⁸³

However, as Judge Wald points out, a balanced representation will only occur if national governments nominate women for possible selection by the international tribunals from amongst their legal professionals.¹⁸⁴

¹⁷⁸ *Ibid.*, p. 647, citing Christina Boyd, Lee Epstein, and Andrew Martin, ‘Untangling the Causal Effects of sex on Judging’ 54 *American Journal of Political Science* (2010) 389, 406.

¹⁷⁹ Patricia M Wald, ‘What do women want from international criminal justice? To help shape the law’ 5 October 2009, available at <http://www.intlawgrrls.com/2009/10/what-do-women-want-from-international.html> (last visited 27 January 2012).

¹⁸⁰ Elizabeth D Heinemann, *Sexual Violence in Conflict Zones: From the Ancient World to the Era of Human Rights* (University of Pennsylvania Press, 2011) 243.

¹⁸¹ The Chambers, available at <http://www.unictl.org/tabid/103/Default.aspx> (last visited 26 January 2012).

¹⁸² Patricia M Wald, ‘Six Not-so-easy Pieces: One Woman Judge’s Journey to the Bench and Beyond’ 36 *University of Toledo Law Review* (2005) 979, 991.

¹⁸³ ICTR Statute, Article 12 ter: Election and Appointment of *Ad litem* Judges

1. The *ad litem* judges of the International Tribunal for Rwanda shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to four candidates meeting the qualifications set out in article 12 of the present Statute, taking into account the importance of a fair representation of female and male candidates;

At any event, as Grossman states, more research into how the representation of the sexes on the bench affects outcomes of trials is essential.¹⁸⁵ The presence as one of three judges on the bench in the *Ndindiliyimana et al* trial of Taghrid Hikmat,¹⁸⁶ the first woman judge in Jordan and the first Muslim woman judge at the ICTR, did not seem to have a particularly positive impact on prosecuting sexual violence in this case as only one of the accused was convicted of rape and on only one count. It may be that the indictment was so defective as to make conviction for sexual violence virtually impossible. In contrast, there were two female judges at the trial of Pauline Nyiramasuhuko, the first woman to be found guilty of rape in an international tribunal.¹⁸⁷ In the 2012 case of Ildéphonse Nizeyimana, where there were no female judges on the bench, Nizeyimana, was found not guilty of the numerous rapes with which he was charged.¹⁸⁸ It is not suggested that a conviction for crimes of sexual violence against women will only be made where women judges are on the bench, but rather that women judges may be likely to have a more dogged approach to dealing with these crimes than their male counterparts. As there are still so few women judges at the ICTR, many trials will inevitably take place with an all male bench.

In her recent book *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions*, Professor Nancy Combs, Director of the Human Security Law Centre, William and Mary Law School, Williamsburg, advocates judge education, to acquire a deeper understanding of the culture of the victims and defendants, referring to Australian criminal trials with Aboriginal witnesses “whose cultural attributes and communication style differ sharply from those of courtroom personnel”, and maintains that “Cultural training ... can help

¹⁸⁴ Patricia M Wald, *supra* note 179.

¹⁸⁵ Grossman, *supra* note 177, p. 645.

¹⁸⁶ *Prosecutor v. Ndindiliyimana et al, Judgment and Sentence, supra* note 2, p. 1.

¹⁸⁷ *Prosecutor v. Nyiramasuhuko et al, Judgment and Sentence, supra* note 17.

¹⁸⁸ *Prosecutor v. Nizeyimana*, 19 June 2012, ICTR-2000-55C-T, *Judgment and Sentence*, para 1581.

judges to place witness demeanour into an appropriate context and to better assess testimonial deficiencies”.¹⁸⁹

Such training would surely help judges manage more fairly the cross-examination of vulnerable witnesses in court. In Combs’ experience, witnesses who have unsophisticated language skills, such as the unschooled or illiterate women amongst those testifying at the ICTR, have difficulty answering questions during cross-examination “because lawyers rarely modify the format and vocabulary of their cross-examination to take account of the witness’ language abilities”.¹⁹⁰ Using double-negatives, multi-part questions, complex syntax and difficult vocabulary may destabilize witnesses and destroy their credibility. Furthermore, she maintains many ICTR judges are former academics or government officials who have no courtroom experience, or may “hail from new democracies and developing nations that do not boast centuries of commitment to due process norms”.¹⁹¹ It is reasonable to expect some robust form of continuing professional development for judges arriving at the ICTR in these circumstances.

Regular site visits would also constitute a significant aid in understanding the context of the genocide, and would help fill information gaps created by unclear witness testimony with insufficient detail. In the *Karera* trial, a site visit enabled the judges to conclude that the prosecutor had not proved beyond reasonable doubt that Karera had observed a specific attack.¹⁹² Site visits also have the added advantage of increasing the trial’s profile locally, encouraging potential witnesses to come forward with information, and deter them from lying, since “If on-site visits were a customary

¹⁸⁹ Nancy Combs, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge University Press, 2010), 299.

¹⁹⁰ *Ibid.*, p. 299.

¹⁹¹ *Ibid.*, p. 235.

¹⁹² *Prosecutor v. Karera*, 7 December 2007, ICTR 01-74-T, *Judgement and Sentence*, para 133.

practice, witnesses would know that at least some portion of their stories would be personally verified”.¹⁹³

4.2 OTP Prosecutors

Commentators have highlighted a number of deficiencies in the prosecution of sexual violence crimes at the ICTR but in Binaifer Nowrojee’s opinion, the responsibility for the poor conviction rates lies with the OTP:

Given the overwhelming evidence of widespread sexual violence during the genocide, the lack of accountability for these crimes can only be attributed to the lack of a comprehensive strategy on the part of the Prosecutor’s Office to effectively investigate and prosecute these crimes.¹⁹⁴

International war crimes specialist Valerie Oosterveld talks of an “inconsistent prosecutorial focus” leading to inconsistent charging practices.¹⁹⁵ She claims a lack of consistency leads investigators to gather too little or the wrong kind of evidence, the result being that this does not prove all elements of the crimes, so prosecutors:

fail to keep track of the evidence over time; use inappropriate methodology; miss investigatory opportunities; and potentially create a disconnect between the charges in the indictment and what the prosecution can actually prove at trial, which results in the need to amend indictments, to drop charges, or leads to acquittals.¹⁹⁶

There are numerous occasions where the Prosecution withdraw charges of sexual violence before the trial: in *Muvunyi*,¹⁹⁷ (for insufficiency of evidence) and *Bisengimana*,¹⁹⁸ *Nzabirinda*,¹⁹⁹ *Rugambarara*,²⁰⁰ and *Serushago*²⁰¹ (as a result of plea

¹⁹³ Combs, *supra* note 189, p. 282.

¹⁹⁴ Binaifer Nowrojee ‘A lost Opportunity for Justice: why did the ICTR not prosecute gender propaganda?’ 2007, available at http://www.idrc.org/en/ev-108296-201-1-DO_TOPIC.html (last visited 11 October 2011).

¹⁹⁵ Valerie Oosterveld, ‘Gender-Sensitive Justice and the International Criminal Tribunal for Rwanda: lessons learned for the International Criminal Court’ 120 *New England Journal of International and Comparative Law* (2005) 119, 127.

¹⁹⁶ *Ibid*, p. 127.

¹⁹⁷ *Prosecutor v. Muvunyi*, 23 February 2005, ICTR 2000-55A-PT, *Decision on the Prosecutor’s Motion for Leave to File an Amended Indictment*, paras. 28-34.

¹⁹⁸ *Prosecutor v. Bisengimana*, 13 April 2006, ICTR 2000-60-T, Judgment and Sentence.

¹⁹⁹ *Prosecutor v. Nzabirinda*, 23 February 2007, ICTR-2001-77-T, *Sentencing Judgment*.

²⁰⁰ *Prosecutor v. Rugambarara*, 16 November 2007, ICTR-00-59-T, *Sentencing Judgment*.

²⁰¹ *Prosecutor v. Serushago*, 5 February 1999, ICTR-98-39-S, *Sentence*.

bargaining, in which the Accused pleaded guilty to other charges against him)²⁰² and in *Kajelijeli*²⁰³ (the OTP missed the deadline to appeal against the acquittal on rape charges).²⁰⁴ This seems to demonstrate a lack of commitment to prosecute sexual violence, echoed by Aranburu's experience at the ICTY. Two senior attorneys prevented him from including sexual violence charges in an indictment, claiming there was insufficient evidence; one subsequently explained that in his country he always avoided sexual violence because it was "very annoying and very difficult to prove".²⁰⁵

Four years after taking up office as ICTR Chief Prosecutor, Hassan Jallow set up a Committee for the Review of the Investigation and Prosecution of Sexual Violence in 2007, to tackle the worryingly low rate of conviction for crimes of sexual violence, which contrasted with the successful rates for other crimes at the Tribunal. The Committee compiled two reports on the past experiences of the OTP, before starting to implement strategies and procedures for the on-going prosecution of sexual violence, eventually producing a Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Situations of Armed Conflict in 2008 (The Manual).²⁰⁶

The Committee identified the following: the need to improve communications between investigation teams, OTP trial teams, Witnesses and Victims Support Section and the Registry's gender adviser. It recommended staff-training (of lawyers and investigators), greater respect and support for victims and better preparation of

²⁰² Oosthuizen, *supra* note 11.

²⁰³ *Prosecutor v. Kajelijeli, Judgement and Sentence, supra* note 109.

²⁰⁴ Emma Founds 'Tanzania: Prosecution of Rwanda Gender Crimes at the ICTR' (Dateline, University of Pittsburgh School of Law, 6 August 2010) <jurist.org/datetime/2010/08/tanzania-prosecution-of-gender-crimes-in-rwanda.php> accessed 14 November 2011.

²⁰⁵ Aranburu, *supra* note 171, p. 610.

²⁰⁶ Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Situations of Armed Conflict: Lessons from the International Criminal Tribunal for Rwanda 2008, available at <http://www.unict.org/Portals/0/English/News/events/Nov2008/EN/Best-Practices-Manual-Sexual-Violence.pdf> (last visited 2 February 2012).

witnesses for trial. It advocated recruitment of more female staff, with attention to gender parity at senior levels.

Yet, despite the work of the Committee, there still appears too often to be an imbalance in the representation of the sexes at the OTP. For example, there was only one woman in the five-strong prosecution team in the trial of *Ndindiliyimana et al.*,²⁰⁷ (only one successful prosecution for rape) and none at all in the *Casimir Bizimungu et al* trial²⁰⁸ (none of the four accused found guilty of rape) both completed in 2011. The OTP is clearly concerned that there may be a correlation between this under-representation of women in the prosecution teams and the inadequate preparation of sexual violence charges. In contrast, in the case of Pauline Nyiramasuhuko, the first woman to be convicted of rape by an international tribunal, there were five women on the team of prosecutors, a rare occurrence even now.²⁰⁹

The Manual states that prosecutors and investigators should have a thorough understanding of the elements of the crimes to be proven to ensure victims are not unnecessarily asked to “recount very painful experiences unless there is a reasonable chance of obtaining a conviction for those crimes”,²¹⁰ and reminds staff that corroboration of victims’ testimony is not required.²¹¹ It makes clear the responsibility of the OTP, even so far as emphasizing that prosecutors are tasked with the heavy responsibility of directing the judges in court: “It is the Prosecutor’s responsibility to

²⁰⁷ *Prosecutor v. Ndindiliyimana et al, Judgment and Sentence, supra* note 2, p. 1.

²⁰⁸ *Prosecutor v Casimir Bizimungu et al*, 30 September 2011, ICTR-99-50-T, *Summary of Judgment*, p. 1.

²⁰⁹ *Prosecutor v. Nyiramasuhuko et al, Judgment and Sentence, supra* note 17, p. 1.

²¹⁰ Maria Warren, ‘OTP Best Practice Manual,’ (Roundtable on Cooperation between the International Criminal Tribunals and National Prosecuting Authorities, Arusha, 26 to 28 November 2008) para 28 available at <http://www.unictr.org/Portals/0/English/News/events/Nov2008/EN/Best-Practices-Manual-Sexual-Violence.pdf>, (last visited 2 February 2012).

²¹¹ *International Criminal Tribunal for Rwanda Rules of Procedure and Evidence* (adopted 29 June 1995, entered into force 29 June 1995) UN Doc ITR/3/REV 1, Rule 96 (i).

monitor closely the scope of cross-examination in this regard and to bring these Rules to the Trial Chamber's attention".²¹²

Despite all these positive steps, and the fact that Bianchi does not believe sexual violence formed a "secondary category" at the ICTR, nonetheless, if the OTP had to make a choice, she admits that, in the past, a genocide charge would take priority over rape and sexual violence charges, due to limited resources. Sexual violence charges might be dropped or not pursued at all if they proved too complex to prosecute. She insists that at the OTP "we're trying to make a difference in that now".²¹³ Special training from the outset is essential to overcome the difficulties of eliciting evidence. Worryingly, since entirely dependent on the luck of the draw, she says that, in successful sexual violence prosecutions, there was "always a prosecutor who was completely dedicated to the cause, who treated the victims in a way that gave the victim a lot of support while not invading her privacy".²¹⁴

Chief Prosecutor Jallow believed that sexual violence offences should be 'fast-tracked', and dealt with 'very early' when victims still wanted justice. He felt that if there was delay, victims resettled, had families and simply did not wish to reopen an unpleasant chapter in their lives, but desired closure, which meant the OTP was unable to prosecute.²¹⁵ Unfortunately, however, the OTP did not prioritise sexual violence prosecutions in the early days, and as we seen, prosecuting these offences eighteen years after they happened gives very mixed results.

²¹² Warren, *supra* note 210, paras 44-45.

²¹³ Lisa Nathan, Interview with Linda Bianchi, appeals Counsel 'The challenges of prosecuting rape' Voices from the Rwanda Tribunal (5 November 2008) available at <http://www.tribunalvoices.org/voices/video/165> (last visited 1 February 2012).

²¹⁴ Lisa Nathan, Interview with Linda Bianchi 'The need for skilled prosecutors in securing rape convictions' Voices from the Rwanda Tribunal (5 November 2008) available at <http://www.tribunalvoices.org/voices/video/166> (last visited 1 February 2012).

²¹⁵ Hassan Jallow 'Strategies for effective prosecution of sexual violence' (Voices from the Rwanda Tribunal 2008) available at <http://www.tribunalvoices.org/voices/video/142> (last visited 1 February 2012).

4.3 *OTP Investigators*

Regular criticisms have been made regarding investigators' practices in collecting evidence from witnesses and victims. According to Oosterveld, in the early investigations, statements on sexual violence crimes were too 'cursory,' lacking important supporting evidence to prove the elements of crimes, because investigators and prosecuting lawyers did not work in close collaboration. Sexual violence charges then either had to be dropped or new evidence collected hurriedly for trial.²¹⁶

The shortage of evidence is attributed to various factors. A lack of sensitivity on the part of investigators, due to the absence of female investigators²¹⁷ (until 1998, the ICTR employed only male investigators²¹⁸), the lack of investigators with relevant experience, and the use of poorly-designed interviews were highlighted. Richard Goldstone (Chief Prosecutor, 1994-96) highlighted a 'gender bias' at the OTP in the 1990s, with large numbers of investigators, mainly police and army officers, seconded to the ICTR from all over the world, whose "culture was not such as to make them concerned about gender-related crime".²¹⁹

Some witnesses have even found genocide suspects employed by the ICTR as defence investigators. Survivor organisations *Ibuka* and AVEGA denounced fourteen ICTR defence investigators as genocide suspects, including Joseph Nzabarinda (in Sylvain Nsabimana's defence team), accused of rape and convicted of murder as a

²¹⁶ Oosterveld, *supra* note 195, p. 126 footnote 36 citing 'Conversation with Richard Renaud, ICTR Chief of Investigations', 1 December 2004.

²¹⁷ John McKay, Interview with Roger Pionana 'Female investigator teams for interviewing witnesses about rape' Voices from the Rwanda Tribunal (15 October 2008) <www.tribunalvoices.org/voices/video/192> accessed 14 November 2011.

²¹⁸ Founds, *supra* note 204.

²¹⁹ Patricia Viseur-Sellers 'Gender Strategy is Not Luxury for International Courts Symposium: Prosecuting Sexual and Gender-Based Crimes Before International/ized Criminal Courts' (2009) 17 *Journal of Gender, Social Policy and the Law* 327, footnote 26 citing Richard Goldstone 'Prosecuting Rape as a War Crime' 34 *Case Western Reserve Journal of International Law* (2002) 277, 280.

crime against humanity in 2007.²²⁰ Survivors say such ICTR employees regularly ‘leaked’ information covered by professional secrecy to suspects and their families, with the result that prosecution witnesses and their relatives were hounded from their homes, or even died in mysterious circumstances.²²¹ There have also been accusations of investigators “watering down” testimonies,²²² of nepotism and racism in the recruitment of defence investigators and of offers of bribes to testify for one side or the another.²²³

Indeed, the poor performance of investigators, who are sometimes called to the stand to testify about the procedures they followed in gathering statements, is reported in the Judgments: in *Ndindabahizi*, investigators investigating the deaths of two victims, Mukantabana and Nyiramaritete, did not realise that Mukantabana was an alias for Nyiramaritete;²²⁴ On one occasion, investigators failed to attribute statements to the statement-maker correctly.²²⁵ Similarly, in *Akayesu*, identical statements purportedly from Witness DIX and her younger brother Witness DJX were prepared and submitted by the Defence team.²²⁶

In the early days of the ICTR, when the tribunal was criticised for its slowness, performance reviews were based on the number of statements an investigator took, with renewal of contract dependent on productivity,²²⁷ and it is not

²²⁰ African Rights and Redress, ‘Survivors and post-genocide Justice in Rwanda: their experiences, perspectives and hopes’ (November 2008) <<http://www.redress.org/downloads/publications/Rwanda%20Survivors%2031%20Oct%2008.pdf>> accessed 27 February 2012; *Prosecutor v. Nzabirinda*, 23 February 2007, ICTR-2001-77-T, *Sentencing Judgment*.

²²¹ African Rights and Redress, *supra* note 220.

²²² ‘Rwanda: Ibuka threatens to cut ties with ICTR’ *The New Times*, Kigali, 21 November 2009.

²²³ ‘Shock as ICTR man turns genocide suspect’ *The East African*, 28 May 2001; ‘ICTR/Ngirabatware – Defence witness accuses prosecution investigators of intimidation’ *Hirondelle News Agency*, Arusha, 17 August 2011.

²²⁴ *Prosecutor v. Ndindabahizi*, 15 July 2004, ICTR 2001-71-I, *Judgment and Sentence*, para 40.

²²⁵ The prosecution believed it held statements from two people with the same name, the defence believed that the two statements had been made by just one person, and in reality the investigators had simply noted incorrectly the name of one of the witnesses on their statement, putting the same name on both statements. Combs, *supra* note 189, p. 127.

²²⁶ *Ibid*, p. 126 citing *Prosecutor v. Akayesu*, *Judgment and Sentence*, *supra* note 12, para 443.

²²⁷ *Ibid*, p. 127.

difficult to see that this could easily lead to hastily conducted interviews and inadequate detail.

Combs states that, although investigators probably do not make as many mistakes as witnesses claim, errors occur:

Interviews with ICTR...investigators generate off-the-record stories of investigators who at best lack an adequate understanding of the conflict they are investigating and the culture and habits of the people who are to be witnesses, and who at worst are lazy and/or incompetent.²²⁸

She suggests taping interviews, a practice which has been adopted by the Extraordinary Chambers in the Courts of Cambodia,²²⁹ whose Internal Rules go so far as to provide that, when a suspect is questioned, the interview should be audio- or video-recorded if necessary. Judges may extend this to the questioning of anyone appearing before them, in particular “where the use of such procedures could assist in reducing any subsequent traumatising of a victim of sexual or gender violence”.²³⁰

If it is impracticable to produce a taped interview, a written transcript would be beneficial. The format of written witness statements at the ICTR was debated in 2004. The *Niyitegeka* Trial Chamber noted that neither ICTR nor ICTY had provided a clear definition of the term ‘statement.’²³¹ The Appeals Chamber outlined an ideal record of a witness interview as:

...composed of all the questions that were put to a witness and of all the answers given by the witness. The time of the beginning and the end of an interview, specific events such as requests for breaks, offering and accepting of cigarettes, coffee and other events that could have an impact on the statement or its assessment should be recorded as well.²³²

The interview should be recorded in a language the witness understands, the witness should read or have it read out to him or her, make any corrections necessary, sign it

²²⁸ *Ibid*, p. 126.

²²⁹ *Ibid*, p. 280.

²³⁰ *Internal Rules of the Extraordinary Chambers of the Courts of Cambodia* Rule 25 (4) (12 June 2007 as amended 12 August 2011) available at <http://www.eccc.gov.kh/en/document/legal/internal-rules> (last visited 21 April 2012).

²³¹ *Prosecutor v Niyitegeka*, 9 July 2004, ICTR-96-14-A, *Appeal Judgment*, para 30.

²³² *Ibid*, para 31.

to attest to its truthfulness and correctness. Finally, it should be signed by the investigator and interpreter.²³³

The Chamber felt it might be impossible to assess the probative value of witnesses' answers without knowledge of the questions posed, and that the Chamber would have greater difficulty assessing the credibility of witnesses and the reliability of their testimony without a detailed record of their interviews. The Chamber concluded:

The record of the first interview with a witness is of the highest value because it is most likely to capture the witness's recollection accurately, being closest in time to the events and less vulnerable to any subsequent influence.²³⁴

Subsequent to the *Niyitegeka* Appeals Chamber remarks, the OTP has not changed the format of its witness statements, and it appears that most statements remain a summary of the information witnesses provide to investigators, without including the questions asked or other explanatory narrative detailing the circumstances in which the statement was taken.²³⁵ Where inconsistencies arise between pre-trial statements and witness testimony in court, Trial Chambers continue to place more weight on oral testimony – which is now given many years after the events – than on written statements. Trial Chambers minimise the discrepancies with pre-trial statements, which are attributed to poor interviewing techniques adopted by investigators. Were the ICTR able to rely on effectively-collected, accurate data, divergent accounts could provide a “valuable mechanism for assessing witness credibility”²³⁶ at the ICTR, where false testimony is, unfortunately, rife.

²³³ *Ibid*, para 32.

²³⁴ *Ibid*, para 33.

²³⁵ Combs, *supra* note 189, p. 280 citing interview with Peter Robinson, ICTR defence counsel (personal email correspondence 2 August 2009).

²³⁶ *Ibid*, p. 281.

As the ICTR relies on UN member states to provide investigators,²³⁷ it is especially important to have procedures in place to ensure investigators, who come from widely different backgrounds, know exactly what is required of them and all follow similar practices. To tackle this, in 2010 the ICTR began work on an International Prosecutors' Best Practice Manual for Investigation and Prosecution of International Crimes, which was due for completion by mid-2011,²³⁸ somewhat late in the day to be of great use to the ICTR, which should have completed all cases by 2014.²³⁹ The ICTR's Best Practices Manual for Sexual Violence Crimes²⁴⁰ recommends investigators be provided with a model questionnaire and a model witness statement to ensure evidence is correctly documented – this is surely a bare minimum in such circumstances.²⁴¹

There have also been geographical impracticalities. The investigations division, initially entirely based in Rwanda, was separated from the prosecution team which was based in Arusha.²⁴² Some investigators working on trials with multiple defendants have been relocated to Arusha, where they work alongside prosecutors,²⁴³ but investigators working on single-accused trials remain in Kigali, close to the crime scene. However, for the remaining trials before the ICTR, the OTP is moving away

²³⁷ Hassan B Jallow, 'Challenges of International Criminal Justice: The ICTR experience,' (Colloquium of Prosecutors of International Criminal Tribunals, Arusha 25-27 November 2004) available at <http://www.unict.org/Portals/0/English/News/events/Nov2004/jallow.pdf> (last visited 15 November 2011).

²³⁸ Statement by Hassan B Jallow (Statement to the United Nations Security Council 6 December 2010) available at <http://unict.org/Default.aspx?TabId=155&id=1182&language=en-US&mid=560&SkinSrc=%5BG%5DSkins/UNICTR/PrintSkin&ContainerSrc=%5BG%5DContainers/UNICTR/PrintContainer&dnnprintmode=true> (last visited 3 December 2011).

²³⁹ 'OTP Best Practice Manual,' (Roundtable on Cooperation between the International Criminal Tribunals and National Prosecuting Authorities, Arusha, 26 to 28 November 2008) paras 44-45, available at <http://www.unict.org/Portals/0/English/News/events/Nov2008/EN/Best-Practices-Manual-Sexual-Violence.pdf> (last visited 2 February 2012).

²⁴⁰ *Ibid.*

²⁴¹ Warren, *supra* note 210, para 25.

²⁴² Hassan Jallow, 'Session 5: Debates with Prosecutors,' (ICTR: Model or Counter Model for International Criminal Justice? The Perspectives of the Stakeholders, 11 July 2009) 10, available at <http://www.unict.org/Portals/0/English/News/events/july2009/SESSION5.pdf> (last visited 30 November 2011).

²⁴³ *Ibid.*, p. 10.

from lengthy and cumbersome trials involving multiple defendants and many witnesses in favour of single-accused trials. The investigations team will no longer be split, but, based in Kigali, will once more be separated from the prosecutors,²⁴⁴ who operate from Arusha. It remains to be seen how successfully investigators and prosecutors will be able to liaise in these conditions.

5. Conclusion

There is now legislation in place to prosecute rape and sexual violence committed during the Rwandan genocide as acts of genocide, crimes against humanity or outrages upon personal dignity, and case law has given clarification as to the elements of these offences. The conceptual definition of rape provided by the *Akayesu* Trial Chamber was a significant development in the prosecution of crimes of sexual violence at the ICTR, likewise the presumption that the surrounding circumstances of conflict are coercive and generally eliminate the necessity for prosecutors to disprove that the victim consented to the sex act. The return to a mechanical definition of rape means proving rape is more complex, in theory, although this does not appear to be the principal stumbling block to successful prosecution; there is a high burden of proof on the prosecution to prove rape, and Trial Chambers are reluctant to accept uncorroborated accounts of rape, despite being permitted to do so.

Cases such as *Ndindiliyimana et al* provide examples of barriers to successful convictions. We see evidence of indictments inaccurately and imprecisely drafted, and hear of insufficient time, care and expertise given to obtaining detailed witness statements. Inconsistencies arise between witness statements and live testimony in

²⁴⁴ *Ibid*, p. 7.

court. Eyewitnesses and corroborative accounts to boost witness credibility have often not been available. It has been argued that judges do not have the same respect for crimes of sexual violence as for other offences. This has led to poor conviction rates for charges of rape and sexual violence, and a general impression that sexual violence crimes are considered less important than other offences.

Although the ICTR has now commenced its completion strategy prior to transferring jurisdiction to Rwandan national courts, the issues investigated here are still relevant. Thirty-four accused are on trial at first instance and appeal or are at large.²⁴⁵ Many of the indictments for these cases contain counts for rape. The ICTR therefore still has reason to be diligent in ensuring that indictments have been drafted correctly, charges worded precisely and evidence gathered and presented effectively, so that a full and accurate case can be brought against those still to appear on counts of rape and sexual violence.

Françoise Ngendahayo, former ICTR adviser on gender and victim assistance, recounts her memories of a witness in the *Akayesu* trial, whom she visited afterwards as she lay dying, to take her the French version of the Judgment. Ngendahayo explains:

her reaction was contrary to my expectation. I thought she would say, “I don’t need this. I need to survive.” She told me, “Thank you. Now that I have this judgment, even if I’m unable to read French..., I will put it under my pillow and sleep on it until I die.”²⁴⁶

This is how important it is for Rwandan victims of rape and sexual violence to see justice delivered. Ngendahayo’s hope, finally, is that the achievements of the ICTR and other international criminal tribunals will “instill a fear of justice” and that it will

²⁴⁵ ‘Status of cases’, <www.unictt.org/Cases/StatusofCases/tabid/204/Default.aspx> accessed 28 April 2012.

²⁴⁶ Françoise Ngendahayo, Session 6 ‘Reconciliation,’ ICTR: Model or Counter Model of International Criminal Justice? The perspective of the stakeholders, Geneva Conference at the Institut d’étude du développement économique et social (IEDES) et UMR Développement et sociétés, Université Paris I, 9 July 2009 <genevaconference-tpir.univ-paris1.fr/spip.php?page=impression&id_article=489&lang=fr> accessed 28 April 2012.

genuinely be a case of *plus jamais ça*²⁴⁷ for sexual violence offences as much as for any others.

²⁴⁷ *Plus jamais ça* – Never again.