

Prosecution of Sexual Violence

Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions:

Lessons Learned from the Office of the Prosecutor for the
International Criminal Tribunal for Rwanda



Tribunal Pénal International
pour le Rwanda

International Criminal
Tribunal for Rwanda

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Official Release Date: 30 January 2014

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FOREWORD

Over the past 20 years, the Office of the Prosecutor (OTP) for the International Criminal Tribunal for Rwanda (ICTR or Tribunal) has indicted 93 persons who were among those most responsible for the 1994 Genocide in Rwanda. Reflecting the prevalence of rape and other forms of sexual violence as weapons of war in the genocide, more than half of our indictments charged rape and other forms of sexual violence as a means of perpetrating genocide and as crimes against humanity or war crimes.

Each case presented unique challenges. Ordinary criminal investigative techniques had to be modified to avoid the loss of crucial evidence. In attempting to present evidence from survivors, all of those involved in the Tribunal's justice system—prosecutors, judges, defence counsel, and victim-witness advocates—needed to be sensitized to the particular security, emotional, and physical needs of this highly-traumatized population. Protective orders were needed to safeguard survivors from threats and intimidation. Counseling, medical services, and even basic necessities such as food, clothing, and accommodation had to be provided when the survivors came to present their evidence in court. Sentences needed to reflect the true gravity of the crimes and, in so doing, restore a sense of justice for the victims.

The Tribunal confronted all of these challenges. It overcame some and fell short on others. In the process, it learnt valuable lessons that will assist future prosecutors and others involved in the criminal justice system to successfully investigate, prosecute, and raise awareness about rape and other crimes of sexual violence at both the international and national levels.

This best practices manual captures those lessons and provides practical recommendations to assist and guide future prosecutions. It is the product of tireless effort by my team of dedicated prosecutors, investigators, and victim-witness advocates. It also reflects the valuable contributions made through peer review by 100 experts in the field, who gathered at my invitation in Kigali, Rwanda in 2012 to review preliminary drafts of this manual.

No manual can answer all of the complicated questions likely to arise in the prosecution of these cases. It is my hope, however, that this manual will answer some of those questions and initiate an ongoing dialogue about how best to close the impunity gap that exists for perpetrators of rape and other crimes of sexual and gender-based violence. Only in this way will we deliver real and meaningful justice to the countless children, women, and men who have been and continue to be subjected to these grave crimes.

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I. INTRODUCTION

“In no other area is our collective failure to ensure effective protection for civilians more apparent... than in terms of the masses of women and girls, but also boys and men, whose lives are destroyed each year by sexual violence perpetrated in conflict.”

-United Nations Secretary-General, Ban Ki-moon, 2007

1. The United Nations Security Council has recognized that rape and other forms of sexual violence constitute grave international crimes.¹ This recognition is in line with the historical development of international criminal law and the international community’s longstanding recognition of sexual violence as an international crime.² In Resolution 1820 (2008), the Security Council observed:

Women and girls are particularly targeted by the use of sexual violence, including as a tactic of war to humiliate, dominate, instil fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group[.]³

¹ Resolution S/RES/2106 (2013), 24 June 2013, para. 2, adopted by the Security Council at its 6984th meeting on 24 June 2013 (Resolution S/RES/2106); Resolution S/RES/1820 (2008), 19 June 2008, para. 4, adopted by the Security Council at its 5916th meeting on 19 June 2008 (Resolution S/RES/1820).

² See e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287, Art. 3 (outlawing outrages upon personal dignity), Art. 27 (providing that “women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault”) available at <http://www.refworld.org/docid/3ae6b36d2.html> (last visited on 11 November 2013); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3, Art. 75(2)(b) (outlawing “[o]utrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault”), Art. 76 (declaring, amongst other things, that “[w]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault”), available at <http://www.refworld.org/docid/3ae6b36b4.html> (last visited on 11 November 2013); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609, Art. 4(2)(e) (adding rape to the list of outrages on personal dignity) available at <http://www.refworld.org/docid/3ae6b37f40.html> (last visited on 11 November 2013).

³ Resolution S/RES/1820, p. 1.

2. It also has been recognized that, “[a]lthough women and girls are predominantly affected by sexual violence, men and boys too are victims of such violence.”⁴ To combat these crimes, the Security Council has repeatedly called upon Member States to fulfil their legal and moral obligation to prosecute those responsible.⁵ Sadly, as the Security Council recognized, its calls have often fallen upon deaf ears:

despite its repeated condemnation of violence against women and children in situations of armed conflict, including sexual violence in situations of armed conflict, and despite its calls addressed to all parties to armed conflict for the cessation of such acts with immediate effect, such acts continue to occur, and in some situations have become systematic and widespread, reaching appalling levels of brutality.⁶

3. Prosecution of those responsible for unleashing this brutality is essential to preventing impunity, promoting accountability, and providing justice.⁷ By holding perpetrators responsible and imposing substantial penalties against them for their criminal conduct, others who would perpetrate similar crimes are deterred from doing so and victims are provided with a sense of justice that facilitates lasting reconciliation.

4. During the 1994 Rwandan Genocide, rape and other sexual violence crimes were committed in a widespread and systematic manner against the Tutsi ethnic group and moderate Hutus. The pervasiveness of these crimes has been well documented in official reports about the 1994

⁴ Report of the Secretary-General on Sexual Violence in Conflict, delivered to the Security Council and General Assembly, UN Doc. A/67/792, S/2013/149 14 March 2013, para. 10 (Secretary-General’s Report on Sexual Violence in Conflict). *See also* Resolution S/RES/2106, pp. 1-2.

⁵ Resolution S/RES/1820, para. 4; *see also* Secretary-General’s Report on Sexual Violence in Conflict, paras. 5, 127.

⁶ Resolution S/RES/1820, p. 2.

⁷ *See* Resolution S/RES/2106, p. 1, where the Security Council recognized that “consistent and rigorous prosecution of sexual violence crimes as well as national ownership and responsibility in addressing the root causes of sexual violence in armed conflict are central to deterrence and prevention as is challenging the myths that sexual violence in armed conflict is a cultural phenomenon or an inevitable consequence of war or a lesser crime”.

Rwandan Genocide.⁸ Thousands of women and girls were individually raped, gang-raped, raped with objects such as sharpened sticks or gun barrels, held in sexual slavery either collectively or through forced marriage, and sexually mutilated.⁹

5. Many died, but a number survived and were brave and resilient enough to testify about their ordeals before the Tribunal. The courage and perseverance of these survivors and other witnesses, who came forward to testify, enabled the Tribunal to hold accountable many of those who perpetrated or orchestrated the commission of these brutal crimes.

6. These prosecutions have significantly contributed to the development of international criminal and humanitarian law through landmark decisions where rape and other forms of sexual violence were defined and recognized as acts of genocide, crimes against humanity, and war crimes.¹⁰ In *Akayesu*, the Trial Chamber defined the elements of rape as:

a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.¹¹

It further held that acts of sexual violence can form an integral part of the process of destroying a group:

⁸ See e.g. Report on the Situation of Human Rights in Rwanda submitted by Mr. René Degni-Ségui, Special Rapporteur of the Commission on Human Rights, in paragraph 20 of Resolution S-3/1 of 25 May 1994, E/CN.4/1996/68, 29 January 1996, paras. 16-24 which focused on the prevalence of rape (Rwanda Human Rights Report).

⁹ Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath, Human Rights Watch, 24 September 1996, available at <http://www.hrw.org/legacy/reports/1996/Rwanda.htm> (last visited on 24 August 2011) (Shattered Lives).

¹⁰ *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T, Trial Judgement, 2 September 1998, paras. 507-508, 596-598, 686-688 (*Akayesu* Trial Judgement); *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001, p. 144 (*Akayesu* Appeal Judgement); *Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR 2001-64-T, Judgement, 17 June 2004, paras. 292-293, 321-333 (*Gacumbitsi* Trial Judgement); *Sylvestre Gacumbitsi v. Prosecutor*, Case No. ICTR 2001-64-A, Judgement, 7 July 2006, paras. 99-108, 126-146, 151-157, 207 (*Gacumbitsi* Appeal Judgement).

¹¹ *Akayesu* Trial Judgement, para. 598.

These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.¹²

7. The *Gacumbitsi* Appeals Chamber accepted that “non-consent and knowledge thereof are elements of rape as a crime against humanity”¹³ but clarified that “[c]onsent for this purpose must be given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.”¹⁴

8. More recently, in *Nyiramasuhuko et al.*, the Trial Chamber convicted Pauline Nyiramasuhuko, the former minister of family and women’s development for the interim government, for ordering the rapes of Tutsi women and girls—the very people she was charged with protecting. Nyiramasuhuko was the first woman to be convicted by the Tribunal, and her conviction shows that even women can use rape as a weapon to terrorise a civilian population.¹⁵ Her sentence to life imprisonment,¹⁶ which is presently on appeal, serves as a powerful deterrent to those who would commit similar crimes in the future.

9. In *Karemera*, two accused—an interim government minister and party leader—were likewise held accountable for their roles in rapes

¹² *Akayesu* Trial Judgement, para. 731.

¹³ *Gacumbitsi* Appeal Judgement, para. 153.

¹⁴ *Gacumbitsi* Appeal Judgement, para. 151 (citing *Prosecutor v. Dragoljub Kunarac, Radomir Kovac And Zoran Vukovic*, Case No. IT-96-23 & IT-96-23\1-A, Judgement, 12 June 2002, para 127 (*Kunarac* Appeal Judgement)).

¹⁵ *Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Judgement and Sentence, 24 June 2011, paras. 6088, 6186 (*Nyiramasuhuko et al.* Trial Judgement) (Appeal pending at time of publication).

¹⁶ *Nyiramasuhuko et al.* Trial Judgement, para. 6271. The ICTY also charged a woman with sexual violence crimes in the *Prosecutor v. Biljana Plavšić*. However, this case was resolved in a plea agreement in which Plavšić pleaded guilty to persecution for various acts including sexual violence and rapes committed in detention facilities. *Prosecutor v. Biljana Plavšić*, Case No. IT-00-39&40/1-S, Sentencing Judgement, 27 February 2003 paras. 15, 34, 126.

perpetrated throughout Rwanda during the genocide.¹⁷ Although these accused did not personally commit the rapes, the Trial Chamber convicted them as members of an “extended form” of joint criminal enterprise (JCE) for rapes committed by their co-perpetrators that were the natural and foreseeable consequence of the common plan to destroy the Tutsis.¹⁸ While an appeal from these convictions is still pending, the Trial Chamber’s recognition of this form of JCE liability was a significant development in international criminal law.

10. Despite these achievements, the prosecution of sexual violence at the Tribunal has not been without its challenges. In the Tribunal’s history, 52 out of the total 93 accused indicted¹⁹ were charged with rape or other crimes of sexual violence.²⁰ Out of the 52 cases where rape or other sexual violence crimes were charged:

- 43 cases have proceeded to trial;
- 7 cases (including 4 fugitive cases) were referred pursuant to Rule 11*bis* to Rwanda or France for trial;²¹ and
- 2 high-level fugitive cases have been transferred to the MICT, which assumed responsibility for all of the ICTR’s remaining

¹⁷ *The Prosecutor v. Edouard Karemera and Mathieu Ngirampatse*, Case No. ICTR-98-44T, 2 February 2012, paras. 1477, 1483-1487, 1490, 1670, 1682 (*Karemera et al.* Trial Judgement) (Appeal pending at the time of publication).

¹⁸ *Karemera et al.* Trial Judgement, paras. 1476-1477, 1490. *See also Prosecutor v. Augustin Ndirabatware*, Case No. ICTR-99-54, Judgement and Sentence, 20 December 2012, paras. 1392-1393 where Ndirabatware was convicted of rape as a crime against humanity on the basis of extended JCE liability (*Ndirabatware* Trial Judgement) (Appeal pending at the time of publication).

¹⁹ Statistics for all 93 cases prosecuted by the Tribunal are as follows: 63 have been found guilty at trial; 12 have been acquitted at trial or on appeal; 2 indictments were withdrawn prior to trial; 3 accused died prior to or during trial; 10 cases have been referred to national jurisdictions (2 to France and 8 to Rwanda); and 3 accused, who remain fugitives from justice, are to be tried by the Mechanism for International Criminal Tribunals (MICT).

²⁰ A comprehensive chart of the Tribunal’s prosecution of rape and other crimes of sexual violence is contained in Annex B.

²¹ The Tribunal’s Rule 11*bis* allows the referral of cases to national jurisdictions (a) in whose territory the crime was committed, (b) in which the accused was arrested, or (c) having jurisdiction and being willing and adequately prepared to accept the case. The Tribunal must first be satisfied that the accused will receive a fair trial in the national courts and that the death penalty will not be imposed or carried out.

tracking operations, effective as of 1 July 2012, and upon apprehension, will conduct the remaining trials.²²

11. Not all of the cases charging rape and other crimes of sexual violence prosecuted at the Tribunal resulted in convictions.²³ Since the Tribunal's inception: 13 accused have been convicted of these crimes with several appeals from those convictions still pending; 23 were acquitted with one appeal still pending; one accused died during trial; and charges in the remaining six cases were dropped as part of plea negotiations or through amendment of the indictments.

12. These mixed results prompted the ICTR Prosecutor to review how rape and other sexual violence cases were handled. In June 2007, the Prosecutor established a Committee for the Review of the Prosecution of Sexual Violence, and charged it with examining the OTP's successes, as well as its shortcomings. The Committee recommended adopting two best practices manuals to help guide future prosecutions before the Tribunal.

13. The first manual, *The Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Situations of Armed Conflict*, was produced in 2008. It emphasized the need for a clear and comprehensive global strategy to ensure that sexual violence is fully and effectively investigated and prosecuted, and that the welfare and security of victims and witnesses is safeguarded. The manual highlighted the important role of management in coordinating the work of investigators and trial attorneys, and recommended certain approaches for the conduct of investigations and court proceedings.

14. In drafting the first manual it became apparent that the management of victims and witnesses was of such critical importance that it required further attention. Accordingly, in 2011, the Committee produced a second manual entitled *Best Practices Manual on the Handling of Victims and Witnesses of Sexual Violence Testifying in International*

²² Resolution 1966 (2010), 22 December 2010, adopted by the Security Council at its 6463rd meeting on 22 December 2010.

²³ See Annex B.

Criminal Tribunals. As the title suggests, this manual focused on the management of victims and witnesses in the investigation and trial phases of the Tribunal's cases.

15. These two manuals helped guide the OTP's remaining work. Now that the Tribunal's work is coming to an end, the OTP is eager to share its lessons learnt and recommendations for best practices with a broader audience of national and international stakeholders.

16. The Prosecutor therefore convened an international workshop in Kigali, Rwanda in November 2012 to review both draft manuals. The workshop was supported by generous contributions from our partner UN Women, as well as the Open Society Justice Initiatives, the Republic of Rwanda, and the East African Community. It brought together approximately 100 experts in the field, including national and international judges, prosecutors, and defence counsel, as well as victim-witness advocates and civil society groups. Together the workshop participants identified strategic, legal, and practical recommendations for improving the OTP's draft manuals. After several days of discussion and debate, the workshop participants agreed to merge the manuals into one comprehensive document, reflecting all views where a consensus was reached.

17. This manual is the product of that collective and collaborative effort. After laying out some global observations relating to the role of management, the manual is divided into the three principal stages of the judicial process: investigation, pre-trial and trial, and appeal and post-trial stages. For each stage, we will share our experiences in prosecuting ICTR cases and make practical recommendations to assist those involved in the prosecution of similar cases at the national and international levels.

18. The manual is intended to be a resource to help achieve the international community's goal of ending impunity for those who use rape

and other forms of sexual and gender-based violence as a means of committing genocide, crimes against humanity, and war crimes.

II. GLOBAL STRATEGY

Key Recommendations:

- Given the scale and complexity of sexual violence during conflicts, a global strategy is crucial to the investigation and prosecution of sexual violence crimes.
- This global strategy must reflect an integrated approach to the investigation and prosecution of these and other crimes committed in the region.
- Senior management plays a crucial role in ensuring that staff members receive the resources, training, and direction necessary to effectively implement the office's global strategy.

a. Background

19. Rape and other crimes of sexual violence frequently occur in armed conflict situations, and their commission is often widespread as part of a systematic campaign to brutalize and destroy targeted groups.²⁴ The 1994 Rwandan Genocide illustrates this point. Rape and other forms of sexual violence were perpetrated on a massive scale. As one influential report summarized: “[r]ape was the rule and its absence the exception.”²⁵

20. Our experience shows that these offences typically involve multiple crime scenes, numerous suspects, countless victims, large numbers of potential witnesses, and substantial documentary and other physical evidence. Moreover, rape and other forms of sexual violence are not the only forms of brutality inflicted upon targeted populations during armed conflicts. These crimes are often committed in the context of a larger campaign of terror that includes forced abductions, persecution, torture, and mass murder.

21. As one of the first tribunals since Nuremburg mandated to prosecute international crimes, the ICTR faced many challenges,

²⁴ See e.g., Secretary-General's Report on Sexual Violence in Conflict.

²⁵ Rwanda Human Rights Report, para. 16.

particularly in its early years. Investigators and prosecutors came from diverse backgrounds, including both civil and common law jurisdictions. They had little or no training or experience in investigating or prosecuting sexual violence at the international level. There was hardly any international jurisprudence to guide them as to what information was needed to effectively investigate and prosecute these cases. Many investigators and prosecutors, most of whom were male, were unfamiliar with the cultural implications of sexual violence in Rwanda, and few had any practical experience working with victims or witnesses of sexual and gender-based violence crimes.

22. As a consequence, the OTP struggled at times to obtain evidence. Female victims were often reluctant to discuss sexual violence with men, particularly younger men.²⁶ Some found it difficult to open up to men from a different nationality. In addition, victims feared reprisals particularly from the accused or family members, as well as the stigma associated with being a victim of sexual violence. These concerns intensified as victims feared that their cooperation or the substance of their evidence might become public. Whilst some victims became more willing to cooperate with the OTP as systems for their support and management improved, others became increasingly reluctant to relive painful experiences, particularly with the passage of time.

23. The OTP also experienced difficulties in linking its high-level accused with the sexual violence that occurred on the ground.²⁷ The Tribunal's limited mandate and *ad hoc* nature required it to focus on those responsible for orchestrating the genocide. Accordingly, many of the OTP's indictments named senior government and military officials, as well as civilian or religious leaders. However, given their leadership positions and their alleged roles in "master-minding" the genocide, many of these

²⁶ For example, young male investigators, interpreters, prosecutors, and witness support assistants.

²⁷ See discussion in subsequent section: III. B titled Linking Higher Level Accused to the Crime, and related case examples.

accused were not physically present at the scene of the crimes. Instead, they, among other means, planned, instigated, or ordered the crimes to be committed by others.

b. Global Strategy

24. Our experience demonstrates that, given the sheer scale and complexity of sexual violence in conflict, there must be a clear and comprehensive global strategy for its investigation and prosecution as an international crime. In this regard the role of senior management is critical, both in establishing the strategy from the outset and in ensuring that it is understood and consistently implemented by all staff members.

25. Senior management must ensure that there are clear guidelines for the conduct of investigations and prosecutions. And that these guidelines are given practical effect through the provision of adequate resources and training, relating specifically to sexual violence crimes.

26. Any global strategy must recognize that sexual violence is committed not only against women but also against children and men.²⁸ It must make particular provision for the investigation and prosecution of all of these crimes. The following elements, which will be discussed in the sections below, are critical to this strategy's success:

- Integration
- Practice-Based Manuals and Ongoing Professional Development
- Diversity and Gender Parity
- Comprehensive System for Managing Victim and Witness Safety and Ensuring Access to Counseling and Medical Treatment
- Counseling and Related Services for Staff Members

²⁸ Secretary-General's Report on Sexual Violence in Conflict, para. 10. As discussed below, our investigators uncovered evidence relating to two instances of sexual violence against men. (*see below* paras. 40-41).

- Coordinating Unit or Working Group

A. Integration

27. First and foremost, the investigation and prosecution of sexual violence must form an integral part of the office's overall strategy to investigate and prosecute genocide, crimes against humanity, and war crimes.

28. Senior management must ensure that sexual violence against women, children, and men alike, is fully and fairly investigated, pleaded, and prosecuted.

the investigation and prosecution of sexual violence must form an integral part of the prosecution's overall strategy to investigate and prosecute genocide, crimes against humanity, and war crimes

These crimes must receive the same priority and attention as other crimes. At a practical level, senior management must ensure that there is close coordination between investigators and prosecutors at all stages of the investigation and trial. Investigators and prosecutors must work together to develop and implement detailed work plans that integrate the prosecution of sexual violence into the overall case strategy. Integration ensures that sexual violence is not marginalized or treated as a collateral crime but

placed firmly within any case ultimately brought against an accused, where appropriate.

29. An integrated approach also ensures that sufficient admissible evidence is obtained not only to establish the fact of sexual violence but also to establish the accused's responsibility for that sexual violence. Our experience demonstrates the importance of this point. In its early years, the OTP had a dedicated Sexual Assaults Team charged with investigating and prosecuting sexual violence. The team collected hundreds of statements concerning sexual violence across Rwanda. But, after a few years, the team was disbanded for essentially two related

reasons. On one hand, there was a tendency among some team members to focus only on collecting evidence of sexual violence, without regard to the broader investigation into genocide, crimes against humanity, and war crimes. On the other hand, some investigators who were not part of the Sexual Assaults Team tended to overlook evidence of sexual violence, viewing it as an area reserved for the specialized unit instead of placing it firmly within the broader investigation.

30. More coordination and integration of the investigative teams was necessary to capture the full extent of the sexual violence committed in Rwanda and to link it to the high-level accused being pursued. Accordingly, the OTP eventually integrated investigators, who were specially trained in sexual violence, into its overall investigation and prosecution teams.²⁹ This integrated approach helped us achieve success in later investigations and prosecutions, such as, the *Karemera* and *Nyiramasuhuko et al.* cases discussed above.³⁰

B. Practice-Based Manuals and Ongoing Professional Development through Training Programs

31. To ensure an integrated approach, all staff members should be provided with practice-based manuals supplemented and reinforced with opportunities for ongoing legal education and training in the prosecution of sexual violence cases, including the handling of victims and witnesses. Detailed practice-based recommendations in this regard are contained in Parts III, IV, and V, below.

32. Consideration should be given to retaining the services of an expert adviser or consultant, who is familiar with the legal and broader psycho-social aspects of sexual violence. This expert may assist in designing

²⁹ A number of recommendations regarding the methodology of investigations that expand on this issue of integration are included in Part III of this manual. Those recommendations include the use of crime-based as opposed to target-based investigations, the collection of evidence from a broad range of sources, and obtaining the nature of evidence required to establish the involvement of higher-level accused.

³⁰ See above paras. 8-9.

ongoing professional development and training programs relevant to the investigation and prosecution of sexual violence crimes.

33. Staff members at international tribunals often come from both common and civil law jurisdictions, and from different operational and cultural backgrounds, with varying levels of experience investigating and prosecuting sexual violence cases. Staff at the national level also will have varying levels of experience investigating and prosecuting sexual violence cases.

34. All staff must receive training in recognizing patterns of sexual violence in conflicts. Investigators and prosecutors must understand the elements of offences, modes of liability, and procedures for lawfully collecting and preserving evidence in the relevant jurisdiction.

investigators and prosecutors must be trained on how to conduct interviews to ensure that full and accurate evidence is adduced whilst also minimizing the risk of re-traumatization

35. Due to the unique trauma that victims and witnesses of sexual violence suffer (a combination of physical, mental, emotional, and psychological harm) a narration of events leading to that trauma may cause re-traumatization. Accordingly, investigators and prosecutors must be trained on how to conduct interviews with victims and witnesses to ensure that full and accurate evidence is adduced whilst also minimizing the risk of re-traumatization.

36. As a starting point, investigators and prosecutors should understand the history and nature of the conflict with which they are dealing, and the nature and extent of sexual violence in that context. Special consideration for the cultural implications of sexual violence is necessary so investigators and prosecutors can elicit full and accurate information from victims and witnesses.

37. In some societies it is taboo to talk openly about sexual intercourse. To understand the cultural implications of sexual violence in a certain

society, it is necessary to understand the euphemisms used to describe body parts and sexual matters. At the Tribunal, for example, some Rwandan rape victims would refer to rape or penetration by stating that the perpetrator ‘married me,’ ‘put his sex in me,’ ‘made me a woman,’ ‘spoiled me,’ ‘killed me with his thing,’ or ‘made me his wife.’³¹

38. The Tribunal’s experience of investigating and prosecuting sexual violence has primarily involved adult female victims. However, as noted throughout,³² investigators must recognize that sexual violence is also committed against men and children. Sexual violence against men and children during conflict, as a weapon of war, is not new and has occurred worldwide. The specific issues surrounding child and adult male victims of sexual violence require that those investigating and prosecuting these cases receive specialized training on the legal and practical challenges.

39. Adult male victims face, among other challenges, loss of status in the community, cultural shame from perceived emasculation, stigmatization based on the assumption or perception of being gay, possible criminal prosecution, ostracism and isolation by family and friends, damaging health complications, and a lack of services specifically tailored to male victims. The challenges are particularly acute in post-conflict regions where service providers, if they exist at all, are often equipped only to help female victims. As a result, in almost all cases, adult male victims, like many of their female counterparts, tend to suffer in silence.

40. Our investigators came across two incidents of sexual violence against men.³³ The first incident involved the killing and subsequent

³¹ Excerpts from confidential, closed session testimony at the ICTR (citations not publicly available).

³² See footnote 28 and paras. 2, 40-41.

³³ At the International Criminal Tribunal for the former Yugoslavia (ICTY) more incidents were discovered, and the Tribunal was able to prosecute and convict several persons for sexual violence against men. See e.g. *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Opinion and Judgement, 7 May 1997, paras. 198, 206 (the first ICTY case to prosecute sexual assault against men); *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delalić and Esad Landžo*, Case No. IT-96-21-T, Judgement, 16 November 1998,

castration of a Tutsi man in Kibuye, whose genitals were hung on a spike, visible to the public.³⁴ For this act of sexual violence, the Chamber convicted Eliézer Niyitegeka, the former minister of information in the interim government, of aiding and abetting inhumane acts as a crime against humanity.³⁵

41. The second incident involved a male victim in Kigali who was forced to live and have sexual intercourse with a female in exchange for his life. Unfortunately challenges encountered during the investigation prevented this incident from being prosecuted, and no evidence relating to this incident was presented in court.

42. Child victims likewise experience devastating short-term and long-term psychological and physical trauma. Given the vulnerable nature of

The stigma associated with sexual violence may have particularly serious consequences for children, impacting their future opportunities for education, marriage, and other fundamental aspects of life.

children and the risk of re-traumatization, investigators with specialized experience should be involved in their handling and other sources of evidence should be sought, where possible. The stigma associated with sexual violence may have particularly serious consequences for children, impacting their future opportunities for education, marriage,

and other fundamental aspects of life. Some parents and guardians may refuse to cooperate with investigators for fear of tarnishing the family

para.1066 (recognized that forced acts of male on male fellatio could constitute rape when properly pleaded).

³⁴ *The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-T, Judgement and Sentence, 16 May 2003, paras. 303, 312, 462, 467 (*Niyitegeka* Trial Judgement).

³⁵ *Niyitegeka* Trial Judgement, para. 462 (upheld on appeal). Evidence relating to this incident also was presented *The Prosecutor v. Mikaeli Muhimana*, Case No. ICTR-95-1B-T, Judgement and Sentence, 28 April 2005, paras. 443-444 (*Muhimana* Trial Judgement) (upheld on appeal). Muhimana, however, was charged with and convicted for murdering the victim, and not for any act of sexual violence. *Muhimana* Trial Judgement, paras. 570, 583.

image, particularly when the suspected perpetrator is a family member or someone known to the victim.³⁶

43. For all prosecutions of sexual violence, regular training is an important tool for ensuring that the prosecution's global strategy is understood by all staff members and applied in a consistent manner. Training programs should encourage the sharing of knowledge and experience, as well as strategies for overcoming common challenges.

44. Training programs should not be limited to investigators and prosecutors. Everyone interacting with victims and witnesses of sexual violence during the judicial process has the potential to significantly impact any sexual violence investigation and prosecution. It is crucial that victims and witnesses be approached in a respectful and non-judgmental manner and in an environment where they feel safe to reveal all aspects of their evidence, without fear of intimidation, reprisal, stigmatization, or sanction.

45. Nearly everyone interacting with victims and witnesses of sexual violence during the judicial process will enter the process with pre-conceived notions and attitudes about sexual violence. Cultural and gender biases also may affect how professionals treat and perceive victims of sexual violence. These attitudes should be discouraged and proper training provided so that biases are not unwittingly transmitted to the victim or witness.

46. Language assistants and interpreters, for instance, play a vital role in communicating evidence obtained from victims to investigators, prosecutors, and the court. They must be provided with training to ensure that they understand their roles in this regard. Furthermore, given their close interaction with victims and witnesses, they also must receive training in how to approach victims and witnesses of sexual violence.

³⁶ Investigators also should be aware of the legal requirements governing the competence of young children to give evidence in the relevant jurisdiction.

Training programs for language assistants and interpreters should include familiarization with cultural norms and euphemisms. For example, because of the different euphemisms that victims and witnesses in Rwanda used to convey sexual assaults, the OTP provided its interpreters and language assistants with lists of the common euphemisms for genitalia and sexual violence so they could recognize their use and respond appropriately.

C. Diversity and Gender Parity

47. Any global strategy for the prosecution of sexual violence crimes must include consideration of the different cultural and societal norms that may discourage or deter victims from speaking openly and freely about these crimes. As discussed below, victims and witnesses often prefer to deal with investigators and prosecutors of the same gender, age, and ethnicity as them. All investigators and prosecutors also must be aware of the cultural and societal barriers that may impede victims from disclosing highly sensitive and deeply disturbing matters.³⁷

48. To address these challenges, senior management must ensure that investigation and prosecution teams are diversely staffed. To help accomplish this goal, gender parity should be encouraged at all levels of employment, but particularly in senior leadership positions, such as, team leaders. Whenever possible, the staffing of our trial and appeals teams reflected this type of diversity and gender parity.

senior management must ensure that investigation and prosecution teams are diversely staffed

49. Additionally, all staff responsible for sexual violence cases should be familiar with the cultural norms relevant to the particular context. In our experience, this was made easier by including Rwandan staff on investigation and prosecution teams.

³⁷ See e.g., paras. 35-37, 44-46, 113-117, 131-151.

D. Comprehensive System for Managing Victim and Witness Safety and Ensuring Access to Counseling and Medical Treatment

(i.) Victim and Witness Safety

50. The dignity and safety of victims of sexual violence must be prioritized at all stages of investigation and trial.³⁸ Programs should be designed to protect victims and witnesses against potential reprisals for their cooperation and presentation of evidence.

51. Protective measures that prevent or substantially restrict the disclosure of the witnesses' identity in pre-trial, trial, and post-trial stages, are instrumental in securing a witness's willingness to cooperate with the investigation and prosecution. Victims in sexual violence cases are often subjected to public scrutiny of their sexual past, shamed with the stigma of being "dishonored," and even ostracized by their own families and communities.

Programs should be designed to protect victims and witnesses against potential reprisals for their cooperation and presentation of evidence.

52. In Rwanda, as elsewhere in the world, being a victim of rape and other sexual violence crimes carries severe social stigma. The physical and psychological injuries suffered by Rwandan rape survivors are aggravated by being ostracized and the resulting sense of isolation. Many Rwandan women who had been raped or who suffered sexual violence generally did not reveal their experiences publicly, fearing that they would be rejected by their family and wider community, and be unable to reintegrate or marry.³⁹

53. Victims of sexual violence may suffer from other dangerous stigmas as well. In Rwanda, it was sometimes said that a rape victim must have

³⁸ The Secretary-General's Report on Sexual Violence in Conflict states that a "victim-centered approach" to prosecuting sexual violence crimes is "vital". Secretary-General's Report on Sexual Violence in Conflict, para. 116.

³⁹ Shattered Lives, p. 2.

collaborated with the enemy or traded sexual relations to survive the widespread killings. Allegations like this not only silence victims but place them at risk of reprisals.

54. HIV/AIDS is another source of social stigma. Because of the nature of the crimes, victims may be presumed to be HIV positive or suffering from other sexually-transmitted diseases. In some cases, the stigma may extend to the children of sexual violence victims. The perpetuation of these stigmas may result in further traumatization and ostracism for victims and their families. HIV testing and treatment must, therefore, be conducted with great discretion.

55. Protecting the identities of victims and witnesses from disclosure helps reduce the risk of their being re-traumatized or ostracized, which may result from cooperating with investigations and presenting evidence in court.⁴⁰ The Tribunal's Rules, for instance, allowed for the use of closed session testimony and other measures aimed at protecting the victim's identity from disclosure including the following:

- expunging names and identifying information from public records;
- non-disclosure to the public of protected information;
- use of image or voice altering devices or close circuit television; and/or
- assignment of a pseudonym.⁴¹

56. Rule changes or legislation may be necessary to ensure similar measures in other jurisdictions. Consideration also must be given to the fundamental right of accused persons to know and confront their accuser.

⁴⁰ Protective measures should be ensured throughout all stages of the judicial process.

⁴¹ Rules 75 and 79 of the ICTR Rules.

57. In addition, resources must be in place, either internally or through referral procedures, for victims and witnesses to receive access to professional psychological and medical treatment and counseling services. Counseling services should be made easily (and confidentially) accessible to victims of sexual violence. As a matter of course, victims should be offered the opportunity to meet with a qualified counselor before, during, and after testimony.

resources must be in place, either internally or through referral procedures, for victims and witnesses to receive access to professional psychological and medical treatment and counseling

(ii.) *Counseling and Medical Care*

58. Tribunals or courts must provide specialized treatment for victims of sexual violence or arrange partnerships with qualified health-care institutions to fully meet this need. Proper administrative arrangements with local providers should be in place in advance to assist in the referral of witnesses for medical or psychological treatment. Procedures also should be in place to ensure that all necessary follow-up treatments are provided to witnesses. As discussed in Part V, these arrangements should be in place not only during the judicial process, but also after that process is completed.

59. At the Tribunal, witness and victim support was provided both internally and through outside referrals and partnership with national authorities.⁴² Our experience shows that witness care and protection must be a combined effort of different organs of a tribunal or court. Close cooperation is needed among prosecution, registry, national authorities, and service providers to ensure adequate support to witnesses. The

⁴² The need for ensuring post-trial access to services for victims and witnesses is discussed in Section V.

Tribunal had several different methods for ensuring that witnesses received the care and treatment they required. The Witnesses and Victims Support Section (WVSS), a section within the ICTR Registry, provided impartial assistance and support to all witnesses (both prosecution and defence) who were confirmed to testify, during pre-trial, trial, and post-trial phases. The support program for these witnesses included psychological counseling and access to medical care.

60. Additional resources were made available from the Tribunal's Trust Fund to hire a trained psychologist, gynecologist, and nurse-psychologist. The Trust Fund also bore the costs involved in medical bills and related procedures for witnesses. About one-third of the expenses incurred by the Trust Fund related to medical consultations and treatment for victims and witnesses of rape and sexual assault who tested positive for HIV/AIDS.

61. Potential prosecution witnesses received additional support from a dedicated team of professionals in the OTP's Witness Management Team (WMT). This team included licensed nurses specially trained in treating victims of sexual violence. When investigators met sexual violence victims, they notified the WMT who would provide necessary services to the victims.

62. A WMT professional would prepare a confidential preliminary medical assessment of the witness, which would include a review of the witness's medical history and treatment, including any current symptoms and medication. An assessment also would be made of the witness's ability to access alternative means of treatment. This preliminary medical assessment would be added to the witness's file, along with other personal information about the witness, including name, address, date of birth, and contact information.

63. When indicated, the WMT professional would provide counseling to the witness. A frequent concern expressed by genocide survivors was the possible transmission of HIV/AIDS. If the witness had not been tested

previously for HIV/AIDS and wanted to be tested, the WMT professional would discuss the testing process and help make the necessary arrangements.

64. Each tribunal or court must develop its own organizational framework for ensuring that witnesses receive the medical and counseling services they require. In designing that framework, particular attention should be paid to the unique needs confronting victims of sexual violence.

65. Female victims of sexual violence should receive, as a matter of course, gynecological and, where necessary, prenatal care. Some female victims of sexual violence become pregnant and many of these victims keep children born as a result of these crimes. These children—just like their mothers—may suffer stigmatization by their community and may even be a constant reminder of the suffering inflicted upon their mothers. Accordingly, both the mothers and children should be afforded specific psychological support, when necessary.

66. It also may be appropriate to extend counseling services to spouses and partners of victims so they are better equipped to deal with the secondary consequences of the crimes. In some cases at the Tribunal, rape victims who testified in public proceedings had not previously shared their ordeal with their spouses or partners. When the spouses or partners learnt that the victims had been raped, they ostracized or abandoned the victims. Extending counseling services to spouses and partners of sexual violence victims who are already aware or become aware of the crime as a result of the victim's testimony may assist them in providing positive support to the victim. It also may assist the spouse or partner to better cope with their own secondary trauma.

67. Exposure to HIV/AIDS resulting from rape and other forms of sexual violence is of particular concern. At the Tribunal, anti-retroviral treatment was provided to witnesses who testified before the Tribunal, as well as to accused persons and prisoners in UN custody. Some non-

governmental organizations (NGOs) and human rights groups saw it as acutely unjust that these life-saving and costly treatments were provided free-of-charge to perpetrators of sexual violence, while thousands of their victims were left to fend for themselves. Many believed these same treatments should have been provided to all Rwandan victims afflicted with HIV/AIDS, regardless of whether they testified.

68. If feasible, all victims of sexual violence should be provided with comprehensive medical care including access to anti-retroviral treatments for HIV/AIDS. Tribunals and courts, however, are not always the most appropriate vehicles for delivering this care; local and national authorities, NGOs, and health care providers are often better suited to meeting these needs. If that is the case, the tribunal or court should provide victims and witnesses with information about where the necessary medical care can be accessed.

69. Victims of sexual violence also may develop post-traumatic stress disorder (PTSD). PTSD is a mental health disorder primarily characterized by chronic anxiety, depression, and flashbacks that develops after experiencing significant trauma such as combat, natural disaster, or violent crime victimization. PTSD is diagnosed by a mental health professional when the biological, psychological, and social effects of trauma are severe enough to impair a survivor's social and occupational functioning.

70. In investigating and prosecuting sexual violence cases, staff members must remain vigilant to signs of PTSD when assessing the witnesses' and victims' emotional and physical needs. A witness's emotional and physical state can be detected from complaints made by the witness or observed during interactions with the witness. For instance, a witness may appear sickly or frail, be unable to sit up when talking to the investigator, be in obvious pain, or look depressed or very anxious. Prosecutors and investigators should receive training on how to recognize signs of emotional and physical distress.

71. Unattended medical and psychological conditions can precipitate a crisis that can threaten a witness's well-being. Prosecutors and investigators should follow up with potential witnesses on a regular basis to ensure that their physical and emotional needs are being met. If a problem or concern is identified, the staff member should liaise with the witness protection unit and/or other relevant court departments to ensure that the witness's needs are met.

E. Counseling and Related Services for Staff Members

72. The investigation and prosecution of sexual violence is demanding, difficult, and often deeply distressing not only to witnesses but also to the staff assigned to these cases. Staff members should be trained to recognize symptoms of secondary trauma and burn-out. Failure to do so may have negative consequences for the individual staff member concerned, as well as for the treatment of victims and witnesses, and ultimately the outcome of cases.

73. Counseling services should be made available to interpreters, investigators, prosecutors, and all those who work closely with victims and

investigation and prosecution of sexual violence is demanding, difficult, and often deeply distressing not only to victims and witnesses but also to the staff assigned to these cases

witnesses. Participation in these services should be encouraged. To ensure active participation and maximize effectiveness, it is essential that counseling services are provided on a strictly confidential basis and in general terms, without fear of any adverse administrative or professional consequences for participating.

F. Coordinating Unit or Working Group

74. In implementing a global strategy, prosecution offices should consider establishing a unit or working group responsible for coordinating sexual violence cases, and serving as a resource for investigators and

prosecutors in the management of these cases, including ensuring that victims and witnesses receive the support and treatment they require.

75. The structure and operation of the unit or working group will ultimately depend on the financial and human resources available within the particular office, as well as the organizational structure of prosecution and investigation services in the jurisdiction. Nevertheless, there are at least two (inter-related) models that may be considered.

76. Both models are comprised of investigators, prosecutors, witness support personnel, counselors, and interpreters—all of whom have specialized training in the conduct of sexual violence cases and treatment of victims. In the first model, staff members would form a dedicated unit that would liaise with focal points within the investigation and prosecution teams within the same office or agency. In the second model, members would be drawn from the investigation, prosecution, and witness support teams that may be in different offices or agencies to form a working group. The latter model may be better suited to those national jurisdictions where it is necessary to coordinate the work of different agencies, including police, prosecutors, health care providers, and other witness support services.

the role of the sexual violence unit or working group would not necessarily be to only conduct sexual violence cases but rather to ensure that the office is effectively implementing all aspects of its global strategy

77. In either case, the role of the unit or working group would not necessarily be to conduct only sexual violence cases, but rather to ensure that the office is effectively implementing all aspects of its global strategy, and that the investigation and prosecution teams are supported in their work.

78. For the coordinating unit or working group to be effective, it must be managed by staff with sufficient authority to influence policy and

decision making, both with senior management and those in charge of investigations and/or prosecutions. Senior management must nevertheless remain actively engaged in monitoring the progress of all sexual violence investigations and trials by requiring regular reports from and providing specific direction to the unit or working group and heads of teams. This coordinated approach ensures that all sexual violence investigations and prosecutions stay on track and proceed in line with office priorities.

79. In addition to providing advice on the nature of potential offences and evidence required by particular investigation or prosecution teams, the coordinating unit or working group may be well-placed to conduct research and advise management on the overall nature of sexual violence occurring in a particular region or across the country during a conflict. This research and advice could assist investigators and prosecutors to identify common victim groups, common perpetrators, and links to high-level accused.

80. The unit or working group also should be responsible for maintaining the practice-based manuals and training programs discussed above, regarding the investigation and prosecution of sexual violence in conflict, and the treatment of vulnerable victims and witnesses.⁴³ Ideally, the unit or working group should offer training, especially to investigators, before they are deployed to the field and organize cultural awareness sessions for each particular country or region where the crimes occurred.

81. Additionally, the unit or working group can play a leading role in establishing or maintaining partnerships with other organizations. A unit or working group, for example, would be well-placed to work with other UN agencies, national authorities, and third-party stakeholders to develop and implement systems for the welfare and protection of victims and witnesses.

⁴³ See above paras. 31-46.

82. As discussed in more detail below, other UN agencies, national authorities, and NGOs may already be working closely with victims and be well-placed to provide them with ongoing support. UN Women and the UN High Commissioner for Human Rights (OHCHR), for instance, often already will be providing support to victims in conflict and post-conflict regions.⁴⁴ Local authorities and NGOs in the affected region also can be crucial partners in helping coordinate the delivery of medical, psychological, and other essential support services.

83. Additionally, these partners can play an important role in educating communities about sexual violence and the role of the prosecution. Better understanding of the nature of the crimes and the prosecution's role in investigating these crimes can encourage victims and witnesses to come forward to share their evidence so perpetrators can be identified and prosecuted. Moreover, educating communities about the illegality of sexual violence crimes and the need for greater gender equality may deter its occurrence.

III. INVESTIGATION PHASE

Key Recommendations:
<ul style="list-style-type: none">• A “crime-based” investigation plan is critical and must take into account the context of the conflict, cultural implications, needs of the victims, and evidence relating to the elements of a crime and available modes of liability.• Evidence of sexual violence crimes should be collected from a broad array of sources, not just victims.

A. Implementing an Integrated Approach

84. As outlined in the preceding section, the investigation of sexual violence must form an integral part of any office's overall strategy to investigate crimes committed during a conflict.

⁴⁴ UN Women supports NGOs caring for war-time rape survivors, see <http://www.unwomen.org/en/news/stories/2012/11/protecting-witnesses-of-wartime-rape-in-bosnia-and-herzegovina/>; OHCHR prepares best practice manuals on the protection of witnesses, see <http://www.unrol.org/article.aspx?n=ohchr>.

85. Investigative work plans should be coordinated with senior management and the prosecution teams. This integrated approach ensures that investigations will be conducted in a way that reflects the overall office policy and takes into account the type of evidence required to establish the legal elements and modes of liability necessary to prove an accused’s criminal responsibility.

86. Annex C to this Manual includes a summary of the legal elements and modes of liability relevant to our prosecution of sexual violence cases. A similar analysis of the legal elements and modes of liability applicable in the relevant jurisdiction should be undertaken prior to any investigation or prosecution to ensure that critical information is not overlooked.

one method the OTP found helpful to make sure that evidence relating to sexual violence crimes was not overlooked during the broader investigation into wide scale atrocities was the adoption of a crime-based approach

87. Prosecutors and investigators should work together to develop a clear understanding of what crimes are being pursued and the types of evidence required to support the charges. Prosecutors should provide direction to investigators to ensure that relevant evidence is collected. Depending on the crimes likely to be charged and the jurisdiction, investigative strategies will depend on different evidentiary standards and require different investigative approaches.

88. Investigative work plans should include the investigation of sexual violence as a key issue to pursue. Plans like this will help ensure that investigators working in conflict or post-conflict situations investigate incidents of sexual violence within a broader spectrum of the crimes committed, such as, mass killings. It also ensures that crimes of sexual violence will not be treated as “side issues” or collateral crimes.⁴⁵

⁴⁵ A sample investigative work plan is included in Annex D.

89. One method the OTP found helpful to make sure that evidence relating to sexual violence crimes was not overlooked during the broader investigation into wide scale atrocities was the adoption of a crime-based approach to investigations, as opposed to a target-based approach. This approach also helped in establishing an evidentiary link between immediate perpetrators on the ground and those ultimately responsible for the crimes.

90. A crime-based approach starts the investigation by focusing on the crimes themselves and then, as the investigation unfolds, focuses on identifying the perpetrators. In contrast, a target-based approach starts the investigation by focusing on likely perpetrators and then, as the investigation unfolds, focuses on the perpetrators' actions or omissions.

91. Crime-based investigations are often useful in investigating mass crimes because they ensure that as many perpetrators as possible are identified and a full picture of what happened is developed. Where the surrounding facts are already mostly known, a target-based investigative approach may be beneficial so long as investigators are properly trained in investigating the background of the accused.

92. At the Tribunal, investigations were largely target-based. In this regard, investigators would ask questions regarding the activities of the particular high-level accused persons being investigated. Because not all of our accused directly committed the acts of sexual violence, evidence collected from these investigations sometimes failed to implicate them in the crimes. As a result, it was not easy to obtain convictions where the high-level leaders were charged with sexual violence offences because there was no evidentiary link between them and the relatively lower-level persons who physically perpetrated the crimes.

93. As discussed above, some investigations into sexual violence crimes were embarked upon as a separate exercise. A lot of the evidence that was collected implicated lower-level perpetrators but failed to establish any

link to the high-level accused.⁴⁶ Greater reliance on a crime-based approach, focusing less on what a particular suspect did and more on what happened, might have helped uncover additional evidence to link sexual violence crimes to the higher-level perpetrators.

94. Evidence of sexual and gender-based violence should be collected from a broad array of sources, not just from victims. Often observers or other eyewitnesses have powerful testimony that can be used in court.⁴⁷ Witnesses should routinely be questioned about their knowledge of sexual violence even in investigations of crimes other than sexual violence. Investigators and prosecutors should together develop a model interview checklist of areas to cover with witnesses to help ensure that evidence of sexual violence is properly gathered and documented.⁴⁸

95. As noted above, any investigation must take into account both the legal elements of the crimes and modes of liability applicable in the jurisdiction. The following chart identifies some of the factual areas we found useful in establishing the elements and modes of crimes under our Statute.

<p>As to the underlying crime</p>	<ul style="list-style-type: none"> • Identification of the principal perpetrator. Whether the victim or other witnesses present at the scene are able to identify the principal perpetrator. Among the factors to consider in determining the reliability of the identification include witnesses' prior knowledge of the perpetrator, the conditions of observation, and the amount of time the witnesses saw the perpetrator. • Whether penetration of the victim occurred, however slight, and the means of such penetration. • Whether the victim consented to the penetration. This includes an evaluation of whether the alleged perpetrator used force or
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⁴⁶ This difficulty is evidenced by the OTP's large database that is filled with numerous statements of witnesses and victims of rapes and other sexual assaults, but for which no linkage to the accused person was found.

⁴⁷ For example, in *Prosecutor v. Théoneste Bagosora, Anatole Nsengiyumva and Aloys Ntabakuze*, the Prosecution routinely asked witnesses what they observed at roadblocks and other massacre sites. This evidence contributed to the resulting rape and sexual violence convictions. *Prosecutor v. Théoneste Bagosora, Anatole Nsengiyumva and Aloys Ntabakuze*, Case No. ICTR-98-41-T, Judgement and Sentence, 18 December 2008, para. 2201 (*Bagosora et al.* Trial Judgement).

⁴⁸ A sample interview checklist is included in Annex E.

	<p>threatened the use of force to commit the crime, and a more general examination as to whether the existence of coercive circumstances, like an armed conflict, made meaningful consent impossible.</p> <ul style="list-style-type: none"> • The mental or physical harm or suffering done to the victim. • Note: Even if the facts do not support charges for the specific crime of rape, prosecutors and investigators should still consider that the facts may establish other forms of sexual violence not amounting to rape (such as non-penetrative sexual assault).
<p>As to the substantive international crime (genocide, crimes against humanity, and war crimes)</p>	<ul style="list-style-type: none"> • Whether the perpetrator or the accused used racial or ethnic slurs or whether other evidence exists that may be used to establish genocidal or discriminatory intent. • Whether the victim was a civilian. • Whether the victim was a member of a group defined on the basis of politics, race, or religion. • Whether the crime was part of a widespread and systematic attack against a civilian population. • Whether the crime occurred in the context of a non-international armed conflict, and whether the victims were not taking any active part in the hostilities at the time of the alleged crime.
<p>As to the relevant mode of liability</p>	<ul style="list-style-type: none"> • Whether the accused is a/the principal perpetrator. • If the principal perpetrator of the sexual offence is not the accused, ascertain the identity of the principal perpetrator and his or her affiliation, if any, with the accused. In addition, ascertain whether the accused holds a position of authority over the principal perpetrator and to what extent the accused possesses the material ability to prevent or punish the criminal conduct of the perpetrator. • Obtain a description of the principal perpetrator and any group affiliation, including uniforms, insignia, distinctive dress, and the presence of weapons. • Whether the accused or others appeared in command or gave orders. • Whether any orders were followed by the principal perpetrator(s) or others. • Whether other persons, including the accused, were present before, during, or after the crime and their proximity to the crime. • Whether the accused or anyone else assisted the principal perpetrator in committing the underlying crime before, during, or after its commission, including through words or gestures of encouragement or other forms of material support. • Whether the evidence establishes the existence of a prior plan or organization, including the persons involved in such planning and organization, and whether the actions of the perpetrator appeared coordinated with others.

B. Linking Higher Level Accused to the Crime

96. As discussed throughout, one of the key challenges for the OTP was establishing an unbroken chain between the accused and the person who physically committed the sexual violence crimes on the ground. These difficulties arose because the accused were often high-level individuals,

including senior government and military officials, as well as religious and civilian leaders, who were not always present when the crimes were committed.

97. In developing an investigative work plan, investigators and prosecutors need to consider the modes of participation that may be available in the relevant jurisdiction to link an accused to the crimes under investigation. Investigators also need to consider the evidence required to establish their involvement.

98. At the Tribunal, an accused's criminal responsibility could have been established directly or indirectly. Direct responsibility existed where the accused committed, ordered, instigated, planned, or aided and abetted the crimes. Indirect responsibility existed where the accused had superior responsibility for the crimes committed by his subordinates or where he was a member of a JCE which acted according to a common purpose involving the commission of the crime.

99. Obtaining evidence to establish the involvement of the accused, even indirectly, was not always a straightforward matter. For an accused to incur criminal responsibility as a superior it was not sufficient to just establish that the subordinate was criminally responsible for the underlying crime. The prosecution also had to prove:

- the existence of a superior-subordinate relationship;
- that the superior knew or had reason to know that the subordinate was about to commit a crime or had done so; and
- that the superior failed to take necessary and reasonable measures to prevent or punish the commission of the crime by the subordinate.

100. Proving the accuseds' knowledge of the crimes if they were not present at the crime scene and their failure to prevent or punish the perpetrators was often problematic.⁴⁹ Where there was sufficient evidence

⁴⁹ See for example *Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A-T, Judgement and Sentence, 1 December 2003, para. 924 (*Kajelijeli* Trial Judgement) (upheld on

to fulfill the legal requirements, superior responsibility provided an effective way of holding high-level authorities responsible for their actions. For example, Hategekimana, the commander of the Ngoma Military Camp, was convicted as a superior for an act of rape perpetrated by one of his soldiers during an attack that he led.⁵⁰ Similarly Bagosora, the *directeur de cabinet* of the ministry of defence, was held responsible as a superior for the rapes committed by soldiers and militiamen.⁵¹

101. In *Karemera et al.*, the Trial Chamber convicted Karemera, a government minister and party official, and Ngirumpatse, a senior party official, under the extended form of JCE. The evidence there established that the rapes and other sexual violence committed by their co-perpetrators were the natural and foreseeable consequence of the accuseds' common purpose to destroy the Tutsi population.⁵²

102. To establish an accused's direct or indirect responsibility, investigators must obtain evidence about what happened at the crime scene, for example, when, where, and how the crime was committed; the identity of the perpetrators; and evidence bearing on the perpetrator's mental state. If the accused was present at the crime scene, witnesses should be questioned about the accused's orders, direct knowledge, and facilitation of the crimes, such as, transporting, leading, directing, controlling, instructing, or rewarding the perpetrators.

103. If the accused did not physically commit the crimes and was not present at the crime scene, investigators will need to obtain evidence necessary to link the accused to the crime. Depending on the jurisdiction concerned, relevant evidence may include:

appeal). Kajelijeli was not convicted of superior responsibility for rapes committed by the *Interahamwe* because the evidence failed to show that he knew or had reason to know about the rapes.

⁵⁰ *Prosecutor v. Idelphonse Hategekimana*, Case No. ICTR-00-55B-T, Judgement and Sentence, 6 December 2010, paras. 459-464, 665, 725-730 (*Hategekimana* Trial Judgement) (upheld on appeal).

⁵¹ *Bagosora et al.* Trial Judgement, paras. 49-50, 2201-2203 (upheld on appeal).

⁵² *Karemera et al.* Trial Judgement, paras. 1477, 1483-1487, 1490, 1670, 1682 (appeal pending at the time of publication).

- the accused's position and relationship with the perpetrators;
- the accused's attitude towards the commission of the crime (i.e. desire to commit the crime, awareness that the crime would or might occur or indifference to the likelihood or commission of the crime);
- the chain of command and the means by which the accused could exercise control over the perpetrators including the power and ability to sanction the perpetrators; and
- reporting structures through which the accused may have learnt about the crimes.

104. Consideration also should be given to using contemporaneously generated documentary evidence or media coverage from press archives or radio stations. An accused's knowledge of the crimes could be established by radio or television broadcasts, broadsheet reportage or contemporaneous interviews given by the accused. For example, in *Karemera et al.* the OTP used a transcript of a radio broadcast and reports about how the *Interahamwe* raped Tutsi women across Rwanda as evidence of the accused's knowledge that these crimes were being committed.⁵³

C. Initial Identification of Witnesses

105. An initial step in any investigation is to locate victims and witnesses to be interviewed. In conflict and post-conflict regions it is difficult to locate victims and witnesses because they are often displaced or have fled the region. Some victims might still be in the location where the conflict took place, in displacement camps in the country of the conflict, or in refugee camps in neighbouring countries. Others may have relocated temporarily or permanently to another country, sometimes under a new name. The OTP found the following practices useful in identifying victims and witnesses scattered in different locations.

⁵³ *Karemera et al.* Trial Judgement, paras. 1413-1414, 1416, 1473-1490.

106. Investigators should work with organizations that are already on the ground to help identify victims and potential witnesses. Aid agencies, human rights groups, refugee and internally displaced camp officials, rape crisis centres, women's groups, and other NGOs who are active in the region may provide valuable information and assistance.

107. NGOs are usually present on the ground documenting events as the conflict unfolds and helping to deal with the immediate aftermath. NGO documentation therefore can provide important background information and leads for investigators searching for evidence of potential crimes, including the identity and location of potential witnesses and perpetrators.

investigators should work with organizations that are already on the ground to help identify victims and potential witnesses

108. In Rwanda, for instance, international human rights organizations had interviewed victims and witnesses before the Tribunal was set up. Investigators were able to rely on these interviews to help direct and focus their own criminal investigations. In similar situations, investigators should coordinate with NGOs already on the ground and work with them to identify and locate potential witnesses and other sources of information.

D. Initial Approach to Witnesses

109. An investigator's initial approach to a witness can greatly affect the witness's security and willingness to cooperate. Investigators should carefully plan how to approach a witness, bearing in mind that public association might place the witness's security at risk. An investigator who drives to the victim's home in a clearly marked UN vehicle, bearing diplomatic, government or foreign plates, is likely to draw unwanted attention to both the investigation and victim. This attention could inadvertently place the victim at risk. The OTP found the following practices helpful in initially approaching a witness.

110. Where a witness has already spoken to or been interviewed by NGOs or other groups about sexual violence, investigators should consider requesting the assistance of these groups in establishing the first contact. Investigators also can use local team members or other local contacts who are familiar with the community where the witnesses live to initiate contact. A local connection may help to put witnesses at ease and not draw as much attention as a foreign investigator, who is likely to be identified as an outsider.

111. Naturally, any local contact must abide by the same confidentiality, ethical, and protective measures as investigators and other team members. A practice direction or standard operating procedure should be drafted setting out the scope of the local contact's actions and expected code of conduct. A local contact may only act in accordance with these

investigators should carefully plan how to approach a witness, bearing in mind that public association might place the witness's security at risk

documents and should only be used to connect the investigation team to potential witnesses or other sources of evidence. The investigation team would then contact the witnesses directly to start the process of evidence collection. Any action taken by the contact should be documented

by both the investigator and the contact.

112. To develop leads, investigators can ask witnesses to identify other persons who might be able to provide useful information or evidence. However, only investigators or a member of their team should contact the persons identified by existing witnesses. Otherwise evidence may be tainted if the first witness shares what he or she told the investigator with the second witness. At the very least, using witnesses to liaise with other witnesses on behalf of the investigator risks allegations of collusion. Finally, to protect confidentiality, new witnesses should not be informed of how they came to the investigator's attention.

113. The composition of an investigative team can help facilitate witness contact. Witnesses are generally more comfortable talking to people of the same gender, age, and nationality. Diverse investigative teams, composed of male and female members of different ages and nationalities or regional backgrounds, provide the greatest flexibility in reaching out to and getting

Diverse investigative teams, composed of male and female members of different ages and nationalities or regional backgrounds, provide the greatest flexibility in reaching out to and getting cooperation from victims and witnesses.

cooperation from victims and witnesses. Wherever possible, the victim's preference for the gender of their investigators and interviewers should be taken into account when assigning staff.

114. Investigators also must understand the cultural implications of sexual violence in the particular society where it occurred. For instance, in some societies where victims of rape or sexual violence are viewed as having brought shame to their family or clan, the family members or the victims themselves may be unwilling to discuss any occurrences of sexual violence. Investigators need to be aware of these cultural sensitivities when making contact with witnesses and providing for their security.

115. As already seen in Rwanda, as in a large number of other cultures, it is taboo to talk about sexual issues in public. In these circumstances, investigators should be careful to avoid direct references to sexual violence that may offend local customs.

116. Cultural implications also may require investigators to seek "permission" from the family head before talking to female family members. Where these customs exist, investigators should talk to these authorities—be they fathers, brothers, village elders, or clan leaders—before approaching the victim or witness. Failure to seek approval in advance may result in the family head precluding the victim or witness

from cooperating with investigators or put unnecessary strain on the witness.

117. At the same time, investigators must take into account that witnesses may not have disclosed to family members that they were victims of sexual violence. When speaking to family heads, investigators must be careful not to violate the victim's privacy by unwittingly disclosing confidential information about the nature of the crimes they are investigating. This approach is particularly important because any inadvertent disclosure could endanger the victim.

E. Preparation for Interviews

118. Recounting the circumstances surrounding sexual violence can be extremely painful and humiliating for victims and witnesses. Before proceeding to interview a victim or witness, investigators and prosecutors should carefully analyse the strength of their case and review the evidence collected to date to ensure that the interview is necessary. Witnesses and victims should not be asked to recount painful experiences when there is no real prospect of a conviction. To make this decision, investigators and prosecutors must have a thorough understanding of the law on sexual violence and the elements of the crimes that must be proved at trial.

Before proceeding to interview a victim or witness, investigators and prosecutors should carefully analyse the strength of their case and review the evidence collected to date to ensure that the interview is necessary.

119. Before interviewing a victim of sexual violence, investigators should liaise with any NGOs that may have interviewed victims to establish whether a statement has already been taken from the victim. Where confidentiality concerns allow, investigators should review any earlier statement to determine whether it is sufficient or if there is a need to interview the victim again. In making this assessment, investigators

should consider whether the statement meets the procedural requirements imposed by the jurisdiction's rules or practice.

120. If another interview is deemed necessary, to the extent possible, victims should not be asked to narrate their entire ordeal again. Instead, they should be asked to review their earlier statements to confirm the accuracy of the information provided. If the earlier statement is inaccurate or incomplete, victims should be allowed to correct or supplement their earlier statement. This approach reduces the risk of further traumatizing victims by having them recount their ordeal multiple times.

121. Prior to conducting an interview, investigators should familiarize themselves with any counseling, medical, and other services that may be available in the area where the victim lives. Local rape crisis centres, women's organizations, and human rights groups may offer services that would benefit the victim. Investigators should be aware of these services and should share the information when the need arises or it is requested.

122. Investigators, in consultation with prosecutors, should outline, in a checklist, broad areas that need to be covered during the interview. The outline should take into account any prior statements the witness or other witnesses may have provided relating to the events at issue, as well as any legal elements or modes of liability that would need to be proven at trial.⁵⁴

123. In addition to preparing themselves for the interview, investigators should make sure that any interpreters who will assist them are sufficiently prepared. Interpreters who have had no experience in this area may be psychologically unprepared for what they will hear in the course of the interview. This could, in turn, affect the quality of the translation or the way in which the interpreter communicates with the witness.

⁵⁴ See Annex E. For a summary of the Tribunal's legal elements and modes of liability, see Annex C.

124. Investigators should thoroughly discuss with interpreters how the interview will be conducted and should include interpreters in the development of the work plan to:

- familiarize them with the matters the investigator will be dealing with, so the interpreters can prepare themselves and enhance the effectiveness of their work; and
- allow them to share with the investigators any knowledge they have about local conditions that might affect the mission or the witnesses to be interviewed.⁵⁵

125. Together, the investigator and the interpreter should try to:

- anticipate potential issues that may arise in the course of the interview;
- discuss how they will proceed if the witness becomes distressed;
- discuss how they will address questions and concerns; and
- discuss the kind of information on which the investigator intends to focus.

126. Investigators and interpreters should discuss the cultural constraints and subtleties in the language the victim may use to describe sexual acts, sexual violence, and genitalia. Failure to have this knowledge prior to the interview could result in important avenues not being fully explored because of a lack of understanding.

F. Selecting the Interview Location

127. The location where an interview will take place is an important consideration. Interviews must be carried out in a secure and quiet environment that will help witnesses maintain their concentration, preserve their confidentiality, and ensure their safety.

128. In some cases, an interview with a witness will take place during or soon after the initial contact. Where a conflict is ongoing and there is a

⁵⁵ Their input is important as they can also provide a valuable cultural bridge to help investigators and prosecutors frame questions in a manner that is culturally acceptable.

risk that a witness may not be available or traceable after the initial contact, investigators may need to quickly preserve the evidence. Investigators, however, should first ensure the witness's safety before proceeding with the interview. If necessary, the witness should be taken to a different venue where the interview can proceed in a safer environment.

129. Witnesses must be interviewed in a place that is safe, secure, and sufficiently private so they will be comfortable speaking openly, without fear of being overheard by third parties. Public places, like police stations, local administrative or government offices, or the witness's place of employment therefore should generally be avoided, unless arrangements can be made to afford sufficient privacy.

130. Considerations for the witness's family and work schedule also should be taken into account. Where a witness has a small child who cannot be left at home, the interview should take place in a child-friendly location with a separate room where the child can play. A separate room helps ensure that the child does not hear any distressing details recounted by the victim. To keep both the victim and child at ease, the investigator could arrange for the child to have a toy or drawing book to play with while the interview is proceeding.

G. Conducting the Interview

131. In conducting interviews and taking statements, investigators must balance two competing interests: the need to acquire as accurate an account as possible, with guarding against further traumatization of the victim. Investigators should be prepared to stop the interview if it becomes too painful or traumatic for the victim to continue. Whenever possible, victims should never be left worse off as a result of the interview. If that seems likely to happen, then the investigative process with that victim should come to a close, and

victims should never be left worse off as a result of the interview

the investigator should attempt to secure the same evidence through other sources.

132. It is important to remember that evidence of sexual violence can be collected from a broad array of sources, not just from victims. Often observers or other eyewitnesses have powerful testimony that can be used in court. The guiding principle in conducting investigations of these crimes must be to avoid, to the maximum extent possible, re-traumatizing the victims. Some re-traumatization is inevitable when recounting their ordeal. Investigators, however, must avoid putting undue pressure or strain on victims of sexual violence—especially when victims are unable or unwilling to recount their experience.

133. Investigators should take their time when interviewing victims and allow the story to unfold. Due to the trauma caused by sexual violence, victims may find it hard to narrate what happened or may feel the need to discuss other issues or events of particular importance to them, before providing the information sought. Unless victims introduce the topic themselves, investigators should therefore not ask questions immediately about the sexual violence. Rather, they could start by asking questions about what the victim saw as opposed to what they experienced.

134. When interviewing a witness, investigators must refrain from making any assumptions about sexual violence. For instance, investigators should not assume that, because a witness is young, old, disabled, or male, the witness has not experienced sexual violence. At the same time, it is important to remember that not every witness has experienced sexual violence but may nevertheless have information relevant to other crimes that were committed. Investigators should provide an open environment where every witness can narrate their own individual experience.

135. At the start of an interview, investigators should adequately explain the interview and post-interview process to the witness. It is

recommended that investigators follow a standardized interview checklist whereby the witness is informed of the role of those present (investigators, transcribers, and interpreters) and the confidentiality afforded to the interview process.⁵⁶

136. If note-taking or audio/visual recording is required, the investigator should explain why the interview is being recorded. Investigators should also explain that any statement obtained from the witness may need to be disclosed to the accused and put before the court or tribunal if the accused is indicted and the case proceeds to trial.

137. Similarly, the investigator should acknowledge that the subject matter of the interview might be uncomfortable, embarrassing, painful, or otherwise difficult for the witness. The investigator should invite the witness to ask for a break whenever necessary.

138. The investigator also should encourage the witness to seek clarification where questions are difficult to understand or the witness is confused by what is being asked. Investigators should remind victims and witnesses that it is common for witnesses to not recall every particular detail of an event, which may have occurred a long time ago. What matters is that the witness be completely candid and truthful throughout the interview.

139. From the outset of the case, victims and witnesses should be informed of their role in the judicial process; the purpose of examination-in chief and cross-examination; the scope, timing, and progress of the proceedings; and the outcome of the cases. Accordingly, before any statement is taken, investigators should explain the trial process and its requirements to the witness. Investigators should be upfront with the witness by making clear that, if the case proceeds to trial, the prosecution will have to release the witness's name at some point to the court and

⁵⁶ See Annex E.

defence as part of the judicial process. Investigators should also warn witnesses that they might have to face the accused in court.

140. These warnings are important because, as already seen, some rape or sexual violence victims may not have shared their ordeal with family members, including spouses. They also may not understand that an accused ordinarily has a right to see witnesses at trial or that identification of the accused is often done in court. Recognizing the likelihood that others may learn of their ordeal and that they will be required to confront the accused, might influence their decision as to whether they want to testify.

141. Throughout the interview process and in any interactions with the victim, investigators must demonstrate sensitivity to the psychological trauma the victim has experienced. Investigators must respond appropriately to victims when they become distressed in the course of the interview or investigation. As noted above, prior training on how to identify the symptoms of trauma or stress would assist investigators in knowing how to respond appropriately when the situation arises.⁵⁷

142. Investigators should monitor the witness's verbal and non-verbal signals. A witness's heightened tone of voice, facial expressions, nervous hand gestures, or slouching posture may signal anxiety or emotional fatigue. When observed, the investigator should determine whether to take a short break, postpone the interview to another day, or discontinue the interview altogether. The guiding factor in making this decision must be the witness's well-being.

143. Investigators also must be alert to their own verbal and non-verbal communication when conducting interviews. Language can either have a negative or positive impact on the interaction between victims or witnesses and other people. To the extent possible, investigators should use simple language and phrases to ensure that information is

⁵⁷ See above para. 70.

communicated accurately and the victim is made to feel comfortable. The investigator's choice of words should inspire trust and confidence in witnesses so they are assured that the investigator is competent and knowledgeable.

144. In addition to language, investigators should be aware of the messages their non-verbal communication may send to witnesses. In our experience in Rwanda, for example, a female investigator wearing a short dress could be seen as indecent or unprofessional and, therefore, undermine the investigator's effectiveness. Similarly, investigators who cross their legs, lean on chairs, do not pay attention, or fold their arms while talking to a witness could be perceived as being either arrogant or disinterested in what the witness has to say. Investigators should be sensitive to these unintended signals when conducting interviews.

145. Investigators also should bear in mind that highly traumatic experiences, such as rape and other forms of sexual violence, will not always be recollected in detail by the witness during one meeting. Several meetings with the witnesses, as well as rephrasing the questions in different ways, may be required to obtain an accurate and full account. During each meeting, investigators should listen carefully and patiently, avoid interruption, make use of open-ended questions so that victims can clarify their narrations in their own words, and then ask clarifying questions where necessary to ensure full and accurate testimony.

146. While listening to a witness's narration, investigators need to determine how the evidence fits within the bigger picture of the conflict and the case as a whole. In so doing, investigators must be careful not to lose sight of the individual victim or importance of the individual's circumstances. Among other things, this means that investigators should be patient and constantly alert to the witness's security, psychological, and medical concerns, and be prepared to respond appropriately to those needs.

147. Investigators should be aware and make witnesses aware that any notes they take reflecting questions actually put to the witnesses and their response may need to be disclosed to the defence prior to trial. Pursuant to the Tribunal's jurisprudence, once questions are put to a witness, they become part of the statement and should be disclosed to the defence.⁵⁸ Therefore, if notes are taken, investigators should pay particular attention to both the preparation of questions and recording of answers. The notes should accurately reflect the witness's responses, and all notes should be preserved whether or not they are later subject to the formal rules of disclosure.

148. When a statement is taken from a witness, it should be recorded in writing and read back to the witness who should be free to modify the statement to ensure its accuracy and completeness. It should be carefully explained to witnesses before they sign the statement that they need to ensure that all the details contained within it are true and correct. Investigators should explain that any omissions or inconsistencies in the statement could be used to discredit the witness during trial. Once the witness agrees with the content of the statement, the witness should sign and date it. All the other persons present at the interview, including the interpreter, should also sign the statement. Lastly, witnesses should be encouraged to contact the investigator if they subsequently recall further details or wish to make amendments to their statement at a later date.

149. Many potential witnesses before the Tribunal expressed concern about the loss of income they would experience if they agreed to travel to Arusha to testify. As a result, the Tribunal provided witnesses with a daily allowance to defray expenses and, upon verification, compensation for lost income associated with their court appearance. Offices facing similar issues, where witnesses are required to leave their home and business for multiple days, should establish or seek legislation establishing a uniform

⁵⁸ *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Judgement, 9 July 2004, paras. 30-36 (*Niyitegeka* Appeal Judgement).

policy on restitution for the income a witness will lose while appearing in court. The same policy also should apply where, during the investigation stages, a witness suffers loss of income due to meeting with investigators.

150. Before concluding an interview, investigators should reconfirm the witness's current or last known contact information. This reconfirmation is particularly important where the witness is living in a transient place, such as a refugee camp or hospital, or is in the process of relocating to another country. Recent technology of marking GPS coordinates of the witness's usual place of residence or nearby land marks could be applied. Noting these coordinates enables the witness to be subsequently located without expending more resources.

151. Following any interview with a victim of sexual violence, a trained counselor should meet with the witness to check on their physical and emotional well-being. Interviews require victims to talk about traumas that they may not have talked about openly before. It is important for witnesses to be de-briefed following an interview so their needs can be properly addressed.

IV. PRE-TRIAL AND TRIAL PHASE

Key Recommendations:

- | |
|---|
| <ul style="list-style-type: none">• The paramount consideration must be implementing a “victim-centered” approach where the needs of the victims come first.• This approach should include victim participation during the sentencing stage. |
|---|

152. During this phase, investigators “handover” witnesses to the prosecution team, who must then prepare witnesses to testify in court. Ideally, the prosecution team will have coordinated with the investigators on pertinent issues regarding the witnesses even before the handover takes place. This coordinated approach ensures that there is no gap in coverage during the critical time when the focus must be on presenting the

witness's evidence in a coherent and logical manner to the court or tribunal.

A. Handover from Investigation to Prosecution Team

153. Although it is recommended that the investigators and prosecution counsel work closely during all phases of the case, it may not always be

Preparing a formal handover file is recommended to ensure that critical information is not lost during the handover from the investigation to prosecution team.

possible for prosecution counsel to be present during all stages of the investigation or for investigators to be present at all stages of the trial. At the Tribunal, our investigators and prosecution counsel frequently worked on several cases at once. Moreover, given the *ad hoc* nature of the Tribunal's mandate, staff attrition was

a recurrent problem at all levels. Thus, not all members of the investigation and prosecution teams could be present at all stages of the case.

154. To ensure that critical information was not lost during the handover from the investigation to prosecution team, our investigators prepared a formal handover file containing all of the pertinent information about potential witnesses. We recommend this practice to other offices.

155. The handover file should be provided to the prosecution team leader and all members. At a minimum, the file should include the following information:

- A status report from the trained counselor who de-briefed the witness after the interview with the investigator.⁵⁹ This report will guide the trial attorney on how to approach the witness.
- The witness's complete contact details including all the names (nicknames and maiden names) that a witness used and uses.⁶⁰

⁵⁹ Inclusion of a status report is dependent on the witness's consent and the relevant jurisdiction's applicable confidentiality and disclosure rules.

- Details about how the witness was identified and any protective measures put in place.
- A provisional determination in writing as to witnesses' and their family members' level of risk, and details relating to the security measures put in place to address that risk, including options explored but not yet implemented, for example, relocation.
- A medical needs assessment form identifying the witness's state of health and related needs.
- The witness's language preference, and any known preference relating to the gender of the interviewer or interpreter.

B. Initial Witness Meeting with Prosecution Team

156. Counsel assigned to prosecute the case may not have previously met the witness. In these situations, particular attention must be paid so the witness will be put at ease before presenting their evidence in court.

157. At the Tribunal, many witnesses travelled from Rwanda to Arusha, Tanzania to testify. It was not uncommon that this trip was the first time the witnesses had left their village and travelled by plane. Recognizing that the witnesses were likely unsettled by these first time experiences and nervous about their testimony, our prosecution teams often found it best to limit the initial meeting to introductions and pleasantries.

158. In similar circumstances, prosecution counsel should start by first introducing themselves, enquiring about the witness's needs and arranging, where possible, for those needs to be addressed. It often helps witnesses feel at ease to ask after their well-being and comfort: Is the witness comfortable? Does the witness need some water? How was the witness's trip? Is the witness ready to talk to you today? If basic courtesies of this sort are bypassed, the witness may feel that prosecution counsel do not care about the witness as a person, but only about the case.

⁶⁰ Witnesses sometimes offer different iterations or spellings of their names in statements or other official documents, like immigration papers. When used at trial, it may not be clear that the statement or document in question belongs to the same witness. These differences may be exploited during cross-examination as a way of impeaching the witnesses' credibility.

C. Preparing Sexual Violence Witnesses for Court

159. Once the witnesses are settled, prosecution counsel should arrange follow-up meetings aimed at familiarizing the witnesses with trial proceedings and reviewing key aspects of their evidence. Even if prosecution counsel has met the witnesses before, such as during the investigation phase, counsel should nevertheless ensure that all witnesses are adequately prepared to present their evidence in court.

160. Flexibility is critical when preparing witnesses for trial, particularly victims of sexual violence. Each victim is unique and has different needs, aspirations, and fears depending on their personal circumstances. These factors should be kept in mind when preparing witnesses for trial.

161. Prosecution counsel must establish a cooperative relationship with the witness so the evidence can be presented in a coherent manner. Building this relationship is particularly important in cases of rape and sexual violence because these crimes by their very nature cause many victims to fear trusting people again. We have found the following general approaches to be useful in establishing a good rapport with witnesses:

- Prosecution counsel should demonstrate care and concern in a genuine way. The witness should be thanked for coming to the venue to meet with counsel. The witness should be asked if they are comfortable and whether they are ready to proceed with the meeting. Depending on their responses, appropriate measures and steps should be taken to make the environment more comfortable so the meeting can be productive.
- Prosecution counsel should use “ice-breakers” before delving into the details of the witness’s anticipated testimony. Counsel can touch on general topics, such as, acknowledging that the witness’s area of residence is very beautiful, or greeting the witness in their language. In Rwanda, greetings like ‘Amakuru’⁶¹ or ‘Bite,’⁶² and responses like ‘Murakoze’⁶³ or ‘Ni’meza’⁶⁴ served as effective ice breakers.

⁶¹ How are you?

⁶² How are you?

⁶³ Thank you.

⁶⁴ I am fine.

- Preparation sessions should be conducted in privacy with some comforts, like water or tea, if possible. A witness should always be interviewed in the presence of another staff member, such as an interpreter, witness support assistant, nurse, counselor, or fellow attorney.
- Prosecution counsel should invite the witness to start the process by allowing them to give an uninterrupted account. Open-ended questions should be used to help draw out necessary clarifications or amplify particular points. Due to the trauma caused by sexual violence, prosecution counsel needs to sensitively and gently probe the witness's account on important details like timelines and people's identities that will be relevant at trial.
- Prosecution counsel should be empathetic to the witness's account and frame of mind. There may be a need during the interview for counsel to recognize the witness's distress or unease. Counsel should acknowledge this by saying: "I cannot even begin to imagine the pain you felt when this happened to you" or "You are very distressed, would you like to take a break?" Counsel, however, should encourage the witness to continue by saying, for instance: "from what you are saying you are a person of strength; that was very courageous of you."

162. Another way to help establish a good rapport and put witnesses at ease is to explain the trial process, including how their evidence will be presented. Although witnesses should already have been given some of this information during the investigation phase, it is important that prosecution counsel prepare witnesses by helping them understand the trial process and what will be expected of them when they appear in court. This knowledge helps provide witnesses, particularly those who have been victimized, with some measure of control over the process.

163. Our prosecution teams would review the following procedural matters with witnesses before they testified:

- where the courtroom is, where they will be seated in the courtroom when they testify, and approximately how long they will be on the witness stand;
- who else will be in the courtroom when they testify (judges, prosecutors, defence attorneys, the accused, interpreters, stenographers, registry personnel, and security) and the role those different individuals play in the trial process;

- that the people in the courtroom speak and understand different languages and therefore that witnesses should listen carefully in the language they understand and, once they understand the question, respond slowly with pauses so that interpreters can translate their response into the other languages;
- for protected witnesses, that the information necessary to establish their identity will be presented on a document called a Personal Information Sheet, which they will be asked to review, verify, and sign;
- for protected witnesses, what protective measures are in place to ensure their anonymity;
- that before testifying they will be asked to make a solemn declaration to tell the truth, and that not telling the truth could result in their being prosecuted for false testimony;
- who will be asking them questions and in what order (examination-in-chief by the prosecutor, cross-examination by the defence attorney, re-examination by the prosecutor, and possibly the judges asking additional questions); and
- that trained individuals and counselors offering emotional and psychological support are available to help witnesses before, during, and after they testify.

164. Additionally, our prosecution teams explained that, while giving evidence, witnesses should:

- always tell the truth;
- listen carefully to the questions and answer what is being asked;
- ask for clarification if a question confuses them or is unclear;
- say if they genuinely do not know the answer to a question, and not respond by guessing or speculating;
- understand that the job of the defence attorney is to ask probing questions; and
- remain calm when being questioned, even if questions are being asked in what they think is an aggressive or disrespectful manner.

165. To help prepare witnesses for testifying before the Tribunal, our prosecutors also used a process called “proofing the witness,” whereby prosecution counsel reviewed the witness’s anticipated testimony and likely lines of cross-examination. The proofing practice is not permissible

in all jurisdictions but, where permitted, it should be part of any trial preparation.

166. In sexual violence cases, we found that a gender-sensitive approach to proofing was most effective. A gender-sensitive approach took into account the following considerations:

- the status of women in the particular region and the specific cultural or social issues that may affect them, including alienation and ostracism for speaking openly about sexual violence;
- counsel's dress, tone of voice, and demeanor should convey confidence, professionalism and empathy;
- use of non-sexist or gender-specific language that brings out the principle of equality between men and women; and
- respect for the victim by listening carefully and patiently.

167. If permissible, it is recommended that, as part of the proofing, witnesses review their prior statements and any other documents that may be used during examination. It is not uncommon for a witness to recall new evidence or clarify information in a previous statement during the proofing. When this occurs, prosecution counsel should prepare a supplemental or amended statement and disclose it to the defence as soon as possible.

168. If prosecution counsel intends to use exhibits, such as photographs, maps, or other documents, during a witness's testimony, counsel should show these exhibits to the witness beforehand so the witness can review them and understand how they will be used during the testimony. In our experience, this was particularly important with victims of sexual violence, who were already extremely anxious about their testimony. Witnesses became unsettled when exhibits they had not seen before were put before them while on the stand. Adequate pretrial preparation should identify all potential exhibits that may be used during the examination-in-chief and cross-examination so witnesses are not taken unfairly by surprise at trial.

169. A key part of proofing is preparing the witness to respond to questions. Witnesses should be told that they must listen carefully before answering questions. They should understand that in most common law jurisdictions their evidence can only be presented in response to questions posed by prosecution and defence counsel or, if clarification is required, the judges. In civil law jurisdictions, most of the questioning may be done by the judges.

170. When testifying, witnesses cannot simply present their account of the events unimpeded by counsel or the judges. For example, witnesses may want to jump from introductory questions about who they are or where they were straight to describing the details of the sexual violence. Prosecution counsel must explain that it is necessary for the evidence to be presented in a logical way and, thus, witnesses must wait for questions to be asked. If witnesses jump ahead, their testimony may be cut off and their account might be difficult for the judges to follow.

171. Witnesses should understand that objections may be lodged by opposing counsel and that their testimony will be interrupted while the judges consider the objection. Other interruptions in the proceedings, such as, side-bar conferences between counsel and the judges, or consultations with interpreters and other courtroom staff, are also likely to occur. These interruptions in their testimony are part of the normal trial process; they are not intended to be disrespectful or discourteous to the witnesses.

172. Some of the questions that will be asked in sexual violence cases may be particularly disturbing. They may require detailed descriptions of body parts and sexual acts. Witnesses must be prepared for this in advance. They should not feel ashamed, embarrassed, or outraged that they may be asked to speak openly about these matters.

173. As already seen, in some cultures like Rwanda, witnesses may prefer to speak about sensitive matters indirectly by using euphemisms. It is important for witnesses to understand that, if they use these

euphemisms, they may be pressed to explain their meaning in more direct terms. Witnesses should be encouraged to speak in a straightforward manner, whenever possible, about their experience and to avoid ambiguous language that may be misunderstood.

174. This need for clarity of language is particularly important where the elements of the crime require specificity. Under the Tribunal's jurisprudence, for instance, rape requires proof that there has been sexual penetration, however slight, of the victim's vagina or anus by the perpetrator's penis or other object, or of the victim's mouth by the perpetrator's penis.⁶⁵ Proof of these elements often requires graphic testimony that many witnesses, particularly highly traumatized victims, must be prepared to present in a straightforward manner if their testimony is to be correctly understood. Where sexual assault is charged as an act of genocide, it is also important to establish mental harm by inquiring into the witness's mental state after the assault.⁶⁶ Proof of this element may require victims to describe how they felt as a result of the sexual violence.

175. Questions from defence counsel during cross-examination may be particularly difficult for victims of sexual violence. These questions may be seen as hostile or inappropriate. Witnesses should understand that defence counsel is required to ask these questions to test the strength of the evidence against the accused, including matters of credibility.

176. Witnesses also should understand that, under the Tribunal's applicable rules of disclosure, the prosecution must provide the defence with copies of any prior statements the witness has made. A common

⁶⁵ *Gacumbitsi* Appeal Judgement, para. 151 (citing *Kunarac* Appeal Judgement, para 127).

⁶⁶ For example, in *Rukundo* the Chamber found that the witness suffered serious mental harm as a result of the accused's actions, but observed there was no direct evidence of the witness's mental state following the sexual assault because the prosecution did not ask the witness how the incident affected her life, mental well-being, subsequent sexual relationships, or put any other question to the witness to assist the Chamber in making its finding on mental harm. *Prosecutor v. Emmanuel Rukundo*, Case No. ICTR-2001-70-T, Judgement, 27 February 2009, paras. 386-389 and Judge Park's Dissent (*Rukundo* Trial Judgement).

defence strategy at the Tribunal was to point out inconsistencies between witness's testimony in court and prior statements. Witnesses need to understand that this line of questioning is generally accepted because it could be relevant to demonstrating that the witness's recollection may not be entirely accurate or reliable. They should not be argumentative or reluctant to answer defence counsel's questions. If necessary, prosecution counsel will clarify any remaining uncertainty about the witness's testimony or prior statements during re-examination.

177. If questions from the defence cross into objectionable areas or become abusive, witnesses should know that prosecution counsel will lodge an appropriate objection. They will only be required to respond if the judges overrule the objection and direct the witness to answer.

178. Witnesses also should be prepared for other potentially disturbing aspects of appearing in court. Counsel, for instance, should remind witnesses that they likely will have to face the accused and may be asked to identify the accused in open court. For many witnesses this may be the first time they have seen the accused since the incident. If the witness is not forewarned, this could prove deeply unsettling.

179. Witnesses often are not explicitly told that, although they may testify under a pseudonym, the court will require that accused know the names of all witnesses testifying against them. Witnesses should therefore be informed of this at the initial proofing stages. Disclosure of identity can have a devastating impact on witnesses so they should know at the outset that the accused will know who they are. In some cases, despite orders aimed at protecting their identities, witnesses who testified before the Tribunal were subjected to threats or intimidation as reprisals for their testimony. Many rape

No prosecutor should opt for expediency in securing witnesses' testimony by not fully informing them of possible consequences of appearing in court.

victims in Rwanda are widows who live alone and, thus, were even more vulnerable to these threats or intimidation.

180. Other consequences discussed above, such as witnesses being ostracized or stigmatized by family and community members, should be discussed with witnesses so they can make an informed decision before agreeing to testify.⁶⁷ No prosecutor should opt for expediency in securing witnesses' testimony by not fully informing them of possible consequences of appearing in court. It is more important that witnesses fully understand the risks and choose to come forward once fully informed, instead of later finding themselves unwittingly vulnerable and exposed. To allow a witness to proceed to trial without knowing the full risks of testifying is a breach of trust that cannot be tolerated.

181. Witnesses should be given an opportunity to express their concerns, questions, and expectations about testifying. These concerns and expectations should be addressed from the outset in a clear and consistent manner that accurately conveys what can be done and what is not possible. For instance, if their expectation relates to:

- medical attention: witnesses should see a qualified medical professional and receive explanation on what kind of medical attention they will get and to what extent;
- witness protection: the needs and fears of witnesses should be investigated, and they should receive an explanation of the kind of protection available; and
- daily allowance: witnesses should be informed about the exact amount of the allowance and the purpose for this allowance. Witnesses must have a clear understanding of the purpose of the daily allowance. They should be able to explain this purpose themselves in court if cross-examined. At the Tribunal, the suggestion was often made in cross-examination that the allowance for basic needs like food, accommodation, and clothing was a way of "buying" the witnesses' testimony. Witnesses needed to understand that the same allowance was provided to all witnesses before the Tribunal, regardless of the content of their testimony or whether it supported the prosecution or defence.

⁶⁷ See above paras. 22, 52-54, 114-115.

182. Prosecutors should never make promises to witnesses that they are unable to fulfill or in an effort to influence the content of their testimony.

D. Alternative Means to Oral Testimony

183. Prosecution counsel should bear in mind that evidence of sexual violence might be presented in the courtroom through a variety of sources, not only through victim testimony. As already noted, not all witnesses to sexual violence crimes are themselves victims.⁶⁸ These witnesses, therefore, provide a readily-available alternative to presenting in-court testimony from a victim who is unable or unwilling to appear.

184. Depending on the circumstances of the case and the rules applicable in the relevant jurisdiction, evidence in specific sexual violence cases also might be introduced through evidence of the general circumstances prevailing at the time of the conflict. In *Gacumbitsi*, the Tribunal recognized that, in cases where rape and other forms of sexual violence are charged as war crimes or crimes against humanity, the circumstances “will be almost universally coercive. That is to say, true consent will not be possible.”⁶⁹ This judicial finding streamlined the presentation of evidence in subsequent cases and, thereby, reduced the burden placed on witnesses having to appear in court to establish the absence of consent.

185. Although the *Gacumbitsi* Appeal Chamber retained the victim’s lack of consent and the accused’s knowledge thereof as elements of the crime, there are strong reasons to reject these elements in conflict and post-conflict environments. Unlike in domestic crimes, the absence of consent is necessarily implied by the context of widespread oppression or violence in which rapes occur in conflict situations. The focus should be on the conditions of coercion and not the victim’s state-of-mind.

186. This approach would be in line with the international crimes of torture and enslavement, and with the definition of rape contained in

⁶⁸ See above paras. 94, 132.

⁶⁹ *Gacumbitsi* Appeal Judgement, para. 151 (citing *Kunarac* Appeal Judgement, para 127).

Article 7(1)(g) of the ICC Statute, as well as the comments of the Special Rapporteur in a 1998 Report to the UN Commission for Human Rights.⁷⁰ All of these instruments support the conclusion that coercion is established where perpetrators commit rape in the context of genocide, crimes against humanity, or war crimes. In these circumstances, voluntary consent is impossible and the element of non-consent should be presumed as a matter of law.

187. To reduce the burden on witnesses, consideration should be given to the use of statements in place of *viva voce* evidence. The use of statements in place of live testimony will depend on the jurisdiction's rules and procedures. But, when available, they can streamline the presentation of evidence.

188. The Tribunal's Rule 92bis, for instance, permitted the admission of a written statement in lieu of oral testimony so long as it went to the proof

Expert testimony can be used to assist a court in better understanding and evaluating the evidence presented by factual witnesses, or to demonstrate that the victim's behavior is consistent with that of someone who has been sexually violated.

of a matter other than the acts and conduct of the accused as charged in the indictment.⁷¹ In the *Karemera et al.* trial, the OTP relied on this rule to admit 19 statements, including transcripts of previous testimony on sexual violence crimes, in lieu of calling witnesses at trial.⁷² This approach not only saved valuable court time but avoided re-traumatizing witnesses who would

otherwise have been required to testify. Where, however, witnesses

⁷⁰ *Contemporary Forms of Slavery, Systematic Rape, Sexual Slavery, and Slavery-like Practices during Armed Conflict*; Final Report submitted by Ms. Gay J. McDougall, Special Rapporteur to the Economic and Social Council Commission on Human Rights, E/CN.4/Sub.2/1998/13 (22 June 1998).

⁷¹ Rule 92bis, ICTR Rules.

⁷² *The Prosecutor v. Edouard Karemera, Mathieu Ngirumpatse, and Joseph Nzirorera*, Case No. ICTR-98-44T, Decision on Reconsideration of Admission of Written Statements in Lieu of Oral Testimony and Admission of the Testimony of Witness GAY, 28 September 2007.

referred to the direct role of the accused, admission of their statements alone were not permissible; the witnesses had to appear and be available for cross-examination.

189. The presentation of evidence from expert witnesses and medical professionals with expertise in the dynamics of sexual assault and the impact of sexual assault victimization can be another important source of evidence. Expert testimony can be used to assist a court in better understanding and evaluating the evidence presented by factual witnesses, or to demonstrate that the victim's behaviour was consistent with that of someone who had been sexually violated. Medical experts also might be called to strengthen evidence regarding the "mental harm" and "bodily harm" aspects of the crime of rape as genocide.

E. Presenting Testimony in Court

190. Once the prosecution team decides that the witness's testimony will be required at trial and the witness has been fully prepared to testify, the prosecution team must make adequate preparations to arrange for the witness's appearance in court, presentation of evidence, and post-trial care. Each aspect is discussed in this section.

(i.) Arranging for the Witness's Testimony

191. Because of protective measures and concerns about confidentiality and safety, the location where victims are placed while they wait to testify is an important consideration. At the Tribunal, WVSS arranged the logistics of every witness's travel to Arusha, and a trained witness support assistant accompanied the witness at all times during the trip. This level of personal support is important for all witnesses, many of whom are not experienced travellers; it is particularly important for young, elderly, and incapacitated witnesses.

192. Upon arrival in Arusha, WVSS provided a safe house where witnesses stayed for the duration of their testimony. Witnesses who waived their protective measures stayed at a local guest house or hotel.

193. To put witnesses at ease prior to testifying and make their stay comfortable, the following best practices are recommended:

- persons who are housed together in the safe house should be scrutinized. The victim may know or be concerned about some of the other witnesses who are at the safe house. Those concerns should be taken into account and the witness should be moved if necessary;
- where possible, witnesses should be allowed to travel with a family member or friend for emotional support;
- witnesses should be allowed to go out of the safe house with security so they do not feel like they are imprisoned; and
- the safe house should be equipped with amenities, like food, television, and radio, to make the witness's stay as pleasant as possible.

194. In some jurisdictions, NGOs have assisted witnesses by providing them with transportation and accommodation if they lived in locations far from where the court was seated. But this may not always be advisable. Fulfilling basic needs of the justice system—such as, ensuring that witnesses are able to get to court so their evidence can be heard—is a burden that properly lies with national and international authorities, not NGOs.

195. Our experience shows that over reliance on NGOs for fulfilling these basic needs is not advisable. At the Tribunal, the defence sometimes criticized the support provided to witnesses by NGOs, including victims' rights groups, as an attempt to influence the witnesses' testimony.⁷³ This criticism can be avoided by informing witnesses from the outset that any benefits that they receive are not offered as an inducement for their

⁷³ Defence arguments concerning the provision of services to witnesses can be countered by keeping clear records of any money/reimbursements or services provided to witnesses, and indicating by whom, when, and for what purpose the money or service was provided. At the Tribunal, the OTP successfully responded to defence claims that witnesses were coerced or induced to provide false evidence through illegal payments. The OTP established that the money in question was nominal reimbursement for the witness's food and travel expenses; that the money was given after the witness gave his statement; and by referring the court to the witness's testimony that he did not expect to be reimbursed for travel and food expenses and that at no point was he told the payment was made in exchange for his testimony. See *Prosecutor v. Callixte Nzabonima*, Case No. ICTR-98-44D-T, Judgement and Sentence, 31 May 2012, paras. 144-148.

testimony. Witnesses should be alerted that opposing counsel will use any perceived benefits the witnesses received from NGOs, other third parties, or the prosecution as a means of discrediting them. As noted above, witnesses should be prepared on how to deal with these types of defence questions by responding honestly and openly, without jeopardizing their credibility or that of the prosecution.⁷⁴

196. Prosecutors and investigators who deal with NGOs and other third parties should ensure that, in all interactions, the integrity of the justice system is maintained. Any third party relied upon to provide support or services to witnesses should be advised that any attempt to influence a witness's testimony through threats or inducements will not be tolerated and could, in fact, render the witness's evidence inadmissible or, at least, highly suspect at trial.

197. The prosecution team, as part of the proofing process, will already have told the witness what to expect in the courtroom.⁷⁵ However, shortly before their scheduled appearance, it is helpful to conduct a final proofing with witnesses at the safe house or other location so these and other matters relating to their testimony can be reviewed.

198. It also a good idea to arrange for witnesses to see the actual courtroom before they testify. Prosecution counsel can point out where the witness will sit, as well as where the judges, prosecution, and defence will be. Counsel could also, if necessary, point out that the witness will not be visible from the public gallery.⁷⁶

199. To minimize anxiety and trauma, a witness support assistant should accompany witnesses to court. Witnesses should not be left alone in a waiting room or other location prior to testifying. The judicial process is likely to be a new experience for most witnesses; they will be

⁷⁴ See above para. 181.

⁷⁵ See above paras. 163-169.

⁷⁶ See below paras. 209-210 and above para. 55.

understandably anxious, particularly about having to confront the accused and answer questions about painful events.

200. For witnesses with small children, who cannot be left at home, arrangements should be made in advance for child care services while the witness is testifying. These arrangements will allow witnesses to better focus on their testimony.

(ii.) Presenting the Witness's Testimony

201. Prosecution counsel and judges should ensure that rape victims are treated with sensitivity, respect, and care when they come forward to testify. All parties to the judicial process, including judges, lawyers, and interpreters, should be trained on how to deal with victims of sexual violence and recognize signs of trauma. Judges and prosecution counsel must be ready to intervene when necessary to ensure that victims of sexual violence are not unfairly treated or harassed during their testimony.

All parties to the judicial process, including judges, lawyers, and interpreters, should be trained on how to deal with victims of sexual violence and recognize signs of trauma.

202. The bench hearing crimes of sexual violence should reflect diversity, especially with regard to gender. This diversity helps minimize the intellectual, generational, or economic gaps that may exist between the victim and the bench, and helps promote a sense of equal justice.

203. Judges should be trained on the appropriate approach and decorum to adopt when questioning victims of sexual violence. This approach ensures that a delicate balance is maintained among obtaining information to assist the court in reaching a fair decision, while also protecting the rights of the accused person, as well as the victim's dignity and privacy.

204. Judges should ensure that there is a tolerant and respectful environment in the courtroom. They should take an active role in monitoring proceedings to help minimize the potential trauma the victim may face while in the courtroom.

205. One unfortunate incident at the Tribunal illustrates this point. During one rape victim's testimony, a judge was believed to be laughing at the witness's testimony.⁷⁷ The judge's behavior sparked immediate condemnation but was later found to be a misunderstanding, unrelated to the witness's testimony.⁷⁸

206. To diminish the risk of similar controversies, the following safeguards should be implemented throughout the trial process. Confidentiality is key. To the extent possible, where the witness requests to testify in camera, that request should be considered bearing in mind the accused's right to be tried in public.

207. Protective measures imposed before trial should be strictly adhered to during and after trial. No names or identifying witness information should appear on any documents or reports filed by the parties, or in any media reports relating to the proceedings.⁷⁹ Special attention should be paid to ensuring that all measures for the protection and safety of the witness, including screens or other devices to shield the victim's identity from being disclosed to the public, are in place prior to the victim's testimony.

208. In case of high security risks, the witnesses and their families should be consulted and given an option to relocate, temporarily or permanently, where possible. However, relocation poses huge challenges both for the prosecution and the individual concerned, particularly if it is a

⁷⁷ Statement of Judge Navenethem Pillay, Former President of the Tribunal, ICTR/INFO-9-3-07, 14 December 2001, (Judge Pillay's Statement) available at <http://www.unictt.org/tabid/155/Default.aspx?id=314> (last visited on 25 July 2013).

⁷⁸ Judge Pillay's Statement.

⁷⁹ If protective measures are violated, including by the media, contempt proceedings can be initiated against any person or group that was aware of the protective measures. Contempt is not restricted to parties to the proceedings. *See* Rule 77(A), ICTR Rules.

long-term relocation. From the prosecution's perspective, it can be both costly and difficult to find a safe and secure place where the witness could be relocated. For the individuals, of course, there are many challenges when building a life in a new or foreign place isolated from family and friends. Moreover, these challenges have the potential to further compound the frustration and trauma suffered by victims. All issues relating to witness security and safety, including relocation, should be taken seriously. If a witness is left vulnerable to threats or intimidation, their cooperation will cease and crucial evidence may be lost.

209. There should be a victim-friendly court environment whereby the victims are guaranteed a safe and respectful atmosphere, without compromising the rights of the accused. Where the courtroom is equipped with cameras and the witness is particularly traumatized, the witness can be shielded from seeing the accused directly by having a curtain partially drawn around the witness. In this way, the accused and his counsel will still be able to see the witness through the video monitor and the witness can elect whether or not to look at the accused through the video monitor on the witness stand. This arrangement also would prevent instances of any accused trying to intimidate a witness by giving "warning" looks.

210. Alternatively, depending on the law in the relevant jurisdiction, the witness could testify in a room set up next to the courtroom, while the judges and counsel remain in the courtroom watching the testimony via live video monitors. This alternative enables the Chamber and the defence to assess the witness's demeanor and credibility, without requiring the witness to be in the same room as the accused.

211. There should be continuous needs assessment by a qualified counselor while the witness is testifying. Witnesses should be offered the opportunity to speak with a trained counselor or witness support person before and after their testimony.

212. Some jurisdictions also allow for a witness, particularly children, to have a support person present with them whilst giving evidence in court. This support is usually subject to the court's discretion upon application by the party calling the witness. In evaluating this type of request, the court should consider: the witness's age, the nature and circumstances of the alleged offence, whether the quality of the witness's evidence is likely to be diminished by reason of fear or distress, and the right of the accused to a fair trial. Depending on the applicable rules, a support person may be a witness's friend or family member, a professional counselor, or a person from a witness support group. Strict rules usually govern their involvement. For example, a support person cannot be a witness in the case; discuss the evidence with the witness before or during the court proceedings; communicate through word or body language with the witness whilst giving evidence; or otherwise participate in the proceedings unless asked a question by the court.

213. Prosecution and defence counsel should be trained in effective ways of conducting examination-in-chief and cross-examination to minimize re-traumatization of witnesses. To effectively handle witnesses of rape and sexual violence during trial, counsel should adopt the following general approaches:

- resolve outstanding disclosure, scheduling, and other procedural issues before the witness appears so valuable courtroom time is not wasted on counsels' arguments and the witness is not inconvenienced;
- allow the witness to settle into answering questions before going straight to the traumatic incident of rape or sexual violation;
- while leading the evidence, only adduce relevant evidence thereby minimizing the witness's stress and limiting the scope of cross-examination to areas relevant to the charges;
- monitor the witness closely by maintaining polite eye contact and remaining alert to the witness's needs, including, for instance, making available a glass of water or tissue; and

- if witnesses become too distressed to proceed seek the court's indulgence for a short break in proceedings to allow them to compose themselves.

214. The conduct and scope of cross-examination merits particular attention. While the defence unquestionably has a right to cross-examine witnesses, care should be taken to ensure that the questioning of sexual violence victims is not unnecessarily repetitive or harassing.

215. Some of the trials before the Tribunal were joint trials, involving up to six accused. Victims who testified at trial were required to undergo cross-examination by several defence counsel sometimes going over the same questions again and again, for hours, days, and even weeks. If charges of rape and sexual violence are not relevant to all accused in a joint trial or if the same area already has been adequately covered, prosecution counsel should object and judges should impose reasonable restrictions on the scope of cross-examination.

216. Prosecution counsel must be alert for improper or overly aggressive lines of cross-examination. Counsel should object, for instance, to any misstatements or attempts to mislead the witness as to their prior testimony or statements. Matters that intrude too far on the witness's privacy (such as prior sexual history) or safety (such as matters that could tend to reveal the witness's identity) should be challenged.

217. At the conclusion of their testimony, judges should thank witnesses for giving evidence. This basic courtesy provides official recognition of the witnesses' contribution to the justice system, and suggests no bias or partiality.

218. Shortly after testifying, the prosecution team should arrange a debriefing session between the witness and a qualified counselor. These sessions help settle the witness and reduce anxiety about what transpired in the courtroom—allowing a smooth transition for the witness's trip home and providing some measure of closure.

219. Given the nature of international criminal proceedings, it is often the case that a witness who testified in one case may have evidence relevant to another case being prosecuted by the same authority. Consideration should therefore be given to preparing the witness for the fact that they may be called as a witness again. Witnesses should be informed about this as early as possible and kept informed as to the progress of any related proceedings that may already be ongoing. The reason for their further involvement should be explained so that witnesses do not become concerned about their past testimony or confused about their role in the next proceeding.

220. Whilst it may not be possible for the same prosecution team to deal with the same witnesses in subsequent proceedings, consideration should be given to minimizing the number of new persons with whom witnesses must deal. Where possible, arrangements should be made for the prosecution counsel who worked most closely with the witness in the first case to introduce the witness to prosecution counsel in the next case. Obviously the prosecution teams should coordinate to avoid needless repetition of the same matters that were already covered. This coordination will facilitate a smoother handover of the witness from one case to the next.

221. It also is possible that a national prosecuting authority may wish to speak to a witness in international proceedings with a view to ascertaining whether the witness could be called in their own domestic proceedings. Whilst it is important to support the work of national authorities willing and able to prosecute international crimes, it is also important that the confidentiality of witnesses is respected. At the Tribunal, statements from witnesses were only provided to foreign states if the witness consented. Where protective measures were in place, statements could only be released if the chamber allowed a variation of protective measures. Variations would only usually be allowed if the

witness consented. Exceptions to this rule were narrowly drawn and exceedingly rare.⁸⁰

(iii.) Allowing Victims a Role in Sentencing

222. While no sentence can erase the loss and pain inflicted by those who have been convicted, sentencing remains critically important to all

Sentencing delivers a sense of justice to survivors by providing official recognition from the international or national community that a grave violation of their rights was committed.

victims, particularly victims of sexual violence perpetrated as an act of genocide, crime against humanity, or war crimes. Sentencing delivers a sense of justice to survivors by providing official recognition from the international or national community that a grave violation of their rights was committed. This official recognition helps restore a sense of power

and personal dignity to those who have been victimized. Further, a sentence that reflects the gravity of the crimes can promote reconciliation by enabling survivors to move forward with their lives.

223. To promote the interests of justice and the rights of victims, international and national courts should give due consideration to the impact of the offender's criminal conduct on victims and survivors. The Tribunal's practice merged into one phase the adjudication of guilt and the imposition of sentence. No doubt efficiencies were gained by this merger in terms of decreased transportation costs and increased witness availability. But these efficiencies came at a substantial cost to victims, who were essentially deprived of any meaningful role in the sentencing process.⁸¹

⁸⁰ See e.g., *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Decision on Jacques Mungwarere's Motion for Access to Confidential Material, 17 May 2012, para. 18.

⁸¹ This merger also came at a cost to the accused who were put in the unenviable position of having to respond to matters relating to their sentencing before their guilt had been fully adjudicated.

224. The testimony of victims during the adjudication of guilt stage of trial, of course, is essential to the determination of truth. But this testimony is filtered through evidentiary rules and the adversarial process. Victims are generally restricted to only answering the questions put to them by prosecution, defence counsel and the judges. Other matters, including the victim’s personal opinion about the accused’s conduct and the impact of that conduct on the victim’s life, are generally excluded as irrelevant or too prejudicial.⁸²

225. Once guilt has been adjudicated, the Chamber in determining what sentence should be imposed must assess all of the circumstances surrounding the convicted persons’ criminal conduct, including how that conduct impacted or continues to impact any victims or survivors. Statements from victims and survivors, including those who testified at trial as well as others who have been affected, are highly relevant and beneficial at this stage of trial.

victim impact statements assist the Chamber to accurately assess the gravity of the offender’s criminal conduct

226. Most fundamentally, victim impact statements assist the Chamber to accurately assess the gravity of the offender’s criminal conduct. Crimes have real and tragic consequences for victims and their families. To humanize the victims of atrocities like those committed in the sexual and gender-based violence cases prosecuted before the Tribunal, victims and survivors should be heard at sentencing.

⁸² Open-ended questions sometimes asked by the Tribunal’s judges at the conclusion of formal questioning to the effect of “does the witness have anything else to add,” did not sufficiently remedy this deficiency. Victims who testified as witnesses rarely felt empowered or confident enough in the wake of often hostile cross-examination to take this open-ended question as an invitation to express their personal opinions or views on how or why the accused should be sentenced. Nor, in fairness, does it seem appropriate for victims to do so before the guilt of the accused had been adjudicated.

227. Allowing victims and survivors to be heard at sentencing also promotes the rehabilitation of the accused. It impresses on persons whose guilt has been adjudicated the seriousness of their conduct and provides them with an opportunity for meaningful reflection and moral education. This type of self-reflection is critical to rehabilitation because it forces those who committed the crimes to confront the human costs of their behaviour and appreciate the norms that ideally will govern their future conduct.

228. The converse is also true. Convicted persons who remain unmoved by the pain, suffering, and loss they have inflicted demonstrate to the sentencing Chamber that they are not strong candidates for rehabilitation. This lack of remorse is a valuable consideration in sentencing.⁸³

229. Lastly, allowing victims to be heard at sentencing promotes the healing process and recovery, and helps restore their personal dignity and respect. Victimization often results in feelings of powerlessness, fear, anxiety, and loss of social status. The possibility that what victims say could influence the sentence that will be imposed shows that their words have force and that the injustices inflicted on them will be punished.

230. In contrast, when sentences are handed down without victims being heard, they become alienated and disenfranchised. As the former United Nations High Commissioner for Refugees asked, “is it fair and realistic to expect the survivors to forgive and to cooperate if there is no justice?”⁸⁴ Allowing victim participation in the sentencing stage of trial promotes a sense of justice for victims irrespective of the sentence ultimately imposed.

⁸³ See *Siméon Nchamihigo v. The Prosecutor*, Case No. ICTR-2001-63-A, Judgement, 18 March 2010, para. 396 (quoting *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Judgement, 17 July 2008, paras. 365, 366).

⁸⁴ Sadako Ogata, *Preventing Future Genocide and Protecting Refugees*, Lecture at the United States Holocaust Memorial Museum, Washington, D.C. (30 April 1997), available at <http://www.ushmm.org/confront-genocide/speakers-and-events/all-speakers-and-events/preventing-future-genocide-and-protecting-refugees> (last visited on 29 October 2013).

231. While there was no provision in the Tribunal's Statute that allowed victims to be heard at the sentencing stage, national courts in both common law and civil law systems have long recognized that victims can and should have a role in the sentencing phase of trials.⁸⁵ In the United States, for example, consideration of victim impact statements during the sentencing phase of trial is commonplace, especially in capital offence cases.⁸⁶ The Court of Appeal of England and Wales has recognized the importance of knowing the impact of the offence on the victim before proceeding to sentencing.⁸⁷ A recent Ministry of Justice code of practice entitles victims to read aloud a personal statement detailing this impact, at sentencing, subject to the court's discretion.⁸⁸ In civil law systems, the concept of *Partie Civile* ensures victim representation at every stage of the trial proceedings, including sentencing.⁸⁹

232. At the international level too, there has been a growing acceptance that victim participation at every stage of trial, including sentencing, is necessary to ensure fundamental justice. The Rome Statute reflects this acceptance. Read together, Articles 68(3) and 76(2) of the Rome Statute expressly allow victim participation at every phase of the trial, including at sentencing.⁹⁰

⁸⁵ See Professor Julian V. Roberts, *Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole*, University of Chicago, 2009.

⁸⁶ *Booth v. Maryland*, 482 U.S. 496 (1987); *Gathers v. South Carolina*, 490 U.S. 805 (1989); *Payne v. Tennessee*, 501 U.S. 808 (1991). See also Crime Victims' Rights Act, 18 U.S.C. § 3771 (4) (2004) (providing victims with the right to be heard in any public proceedings relating, *inter alia*, to sentencing).

⁸⁷ *R v. Black & Gowan* (2006) EWCA Crim. 2306.

⁸⁸ Code of Practice for Victims of Crime, presented to Parliament pursuant to section 33 of the Domestic Violence, Crime and Victims Act 2004 (Ministry of Justice, October 2013), Chapter 2, Part A, Section 1(ii).

⁸⁹ See *e.g.*, *Criminal Procedure Systems in the European Community*, Christine Van Den Wyngaert (ed.) (Butterworths, 1993).

⁹⁰ See International Criminal Court Rules of Procedure and Evidence, Rules 89-93. See also *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on Sentence pursuant to Article 76 of the Statute, 10 July 2012, paras. 5, 9, 11 where the legal representatives of victims made written and oral submissions on the relevant evidence presented during the trial and their views as to the sentence to be passed on Mr Lubanga.

233. More recently, the European Court of Justice re-affirmed the right of victims to be heard at sentencing.⁹¹ Additionally, the United Nations Draft Convention on Justice and Support for Victims of Crime and Abuse of Power explicitly identifies greater victim participation in criminal proceedings as one of its overarching goals.⁹² Article 5(2)(b) of the Draft Convention recommends a right for victims to be heard and to present their concerns at “appropriate stages of the proceedings where their personal interests are affected.”

234. In sum, although the Tribunal made great progress in ensuring that victims were protected and respected at the investigative and trial stages, it could have and should have done more at the sentencing stage. Future international and national courts and tribunals should remedy this shortcoming by allowing expanded victim participation in the sentencing stage of trials.

V. APPEAL AND POST-TRIAL PHASE

Key Recommendations:

- Ongoing engagement with victims and witnesses following the trial is crucial.
- This engagement should include keeping victims and witnesses informed of the outcomes of the case, providing ongoing medical and psychological care, ensuring their security and protective measures, providing financial and training opportunities, and maintaining up-to-date contact information.
- Where appropriate, especially regarding medical and socio-economic support, partnerships should be forged with other international agencies, national or local authorities, and civil society to ensure that victims continue to get the necessary support and services.

235. Witnesses should be kept informed about the progress of proceedings throughout all phases of the judicial process. Ongoing engagement with victims and witnesses by the prosecution is important for a number of reasons, including providing information regarding the

⁹¹ *Gueye & Anor*, C-483/09, C-1/10, ECJ, 15 September 2011.

⁹² Preamble to the Draft UN Convention on Justice and Support for Victims of Crime and Abuse of Power, 14 November 2006, p. 3.

progress and outcome of proceedings, ongoing medical and psychological support, and monitoring the security of witnesses following testimony.

236. It is inevitable that witnesses who receive little or no support following their testimony will feel abandoned by the judicial process. This prospect is a matter of concern not only for the individual concerned but for the prosecution. Lack of ongoing support may further traumatize victims, and decrease the likelihood that they will participate in future proceedings where their evidence may be relevant. Moreover, a lack of ongoing support for victims has the potential to bring the prosecuting authority, and indeed the justice system itself, into disrepute.

A. Keeping Witnesses Apprised of Case Progress

237. A tribunal's responsibility towards victims and witnesses should not end with the completion of their testimony or return of the judgement. Many victims and witnesses are interested in the outcome of proceedings in which they have participated, and the outcome could affect their emotional well-being.

238. While all judicial decision must be given appropriate respect, adverse trial judgements are particularly difficult for victims and witnesses, especially if they turn on matters of witness credibility. Prosecution counsel should prepare witnesses for the possibility that the judges may not accept some or all of their testimony. Adverse findings should not be viewed as a personal attack on the witness but rather a reflection on the strength of the case overall.

239. A sufficiently knowledgeable team member should, if possible, meet with witnesses and victims to explain the outcome of the trial in easy to understand terms. In situations where the outcome may not be favorable, the prosecution counsel should be accompanied by a counselor or social worker, as hearing the news may be traumatic. In our experience in trying cases against high-level accused, the outcome often did not turn solely on credibility issues relating to whether the sexual violence occurred but,

rather, on legal issues relating to whether those incidents could be attributed to the accused. Counsel should explain these and other nuances to victims and witness, and identify what, if any, appellate avenues may exist for the prosecution to challenge the outcome.

240. Even where a trial judgement is favorable in the sense that it results in a conviction, witnesses and victims may still be discouraged if the sentence imposed is overly lenient. A lenient sentence could be viewed as implying that the victim's testimony did not matter much or that the crimes were not regarded as being particularly grave. Additionally, for some victims, a lack of opportunity to address the court on sentencing may exacerbate their disappointment at the lenient sentence.⁹³

241. Prosecution counsel should inform victims and witnesses that no trial judgement or sentence is final until the time for appeal expires or the appeal is resolved. Most victims and witnesses do not understand the appellate process. They may mistakenly think that the return of the trial judgement and sentence mark the end of the case. Prosecution counsel, therefore, should explain that all defendants have a right to appellate review, and the judgement and sentence will only be final upon delivery of the highest court's judgement. This conversation may include an assessment of both the strengths and weaknesses of any potential defence appeal so victims and witnesses have a realistic understanding of where the case stands, including the potential that the conviction could be overturned on appeal.

protocols should be established for the regular distribution of written summaries of trial and appeal judgements

242. For tribunals like ours that have a limited duration and no permanent staff, it may not always be possible for tribunal staff to conduct face-to-face meetings. Protocols, therefore, should be established for the regular distribution of written summaries of trial and appeal judgements

⁹³ See above para. 229.

in a language or languages that will be easily understood by the community where the crimes occurred. These summaries should be broadly distributed to national authorities, NGOs, victims groups, local media outlets, and posted on public websites and other social media. Outreach efforts like these help promote community awareness and understanding of prosecutions, and may ultimately contribute to the process of reconciliation.

243. Partnerships with qualified and experienced NGOs who are familiar with the court or tribunal's cases and criminal procedure may also help promote community awareness and understanding. As has been seen, NGOs often work closely with victims and witnesses.⁹⁴ If properly trained and equipped with relevant information, NGOs can be a useful partner in helping to keep sexual violence victims and witnesses apprised of the progress of cases.

B. Providing Ongoing Support to Victims and Witnesses

244. Victims and witnesses often live in the same neighbourhood as the families and friends of an accused and, in some cases, even the accused. They share their daily social and economic life with them. It is therefore essential that all reasonable measures be taken to ensure that the identity of a protected witness remains concealed after their testimony is complete and judgement is rendered.

245. Despite the best precautions, there is always a risk that it will become known that a witness testified in criminal proceedings against a particular accused. Disclosure may raise security concerns for witnesses and victims. An effective strategy must be developed to monitor the security of victims and witnesses post-trial.

246. As a general matter, it is important to identify trends in the nature, source, and extent of harassment, including in which parts of the country this has occurred. This information can be shared with national and local

⁹⁴ *See above* para. 82.

authorities, community leaders, and NGOs involved in providing witness protection services and responding to threats. If not already in existence, victim-witness help desks or hotlines should be established so victims and witnesses have a reliable means of contacting authorities in the event of a threat.

247. As discussed above, for some witnesses the act of testifying will

for the fight against impunity to be truly effective it is not enough that leaders and perpetrators of sexual violence are held accountable... many victims will continue to need ongoing medical and psychological support

assist them in the healing process.

For others, despite the best efforts of those involved, they may be further traumatized as a consequence of their participation in the court process. In either case, many witnesses will need ongoing access to psychological and medical services. All efforts should

be made to ensure that adequate care is provided on an ongoing basis following trial and, indeed, following the closure of the tribunal.

248. From an early stage, the prosecution, in particular, and tribunal, in general, should coordinate the provision of medical and psychological services with outside entities. Local and national health services, NGOs, and others may be able to provide necessary medical and related services to victims of sexual violence on a long-term basis.

249. Systems should be developed to promote awareness of and facilitate referral to these services. Information sheets should be prepared in the local language and distributed with the assistance of national authorities and NGOs.

250. In many post-conflict regions, it will be necessary to partner with the broader international community to assist local and national government officials in restoring or building the infrastructure required to deliver specialized services to victims of sexual violence in the long-term.

Education programs aimed at training counselors and other medical professionals, particularly nurses and doctors who will be based in the region, in the treatment of sexual violence are particularly encouraged.

251. Long-term services are required not only for victims but also family members. Our experience has been that children of victims of sexual violence often require long-term psychological support. Many children witnessed the violence perpetrated against their parents, usually their mother, or have been ostracized as a result of the stigma directed against their parent. They also suffer trauma as an indirect result of the trauma inflicted against their caregiver.⁹⁵ In some cases, children were victims of sexual violence themselves. Children born as a result of rape and those who have been victims of sexual violence may require particular medical and psychological care, including treatment for HIV/AIDS, PTSD, and other diseases.

252. For the fight against impunity to be truly effective it is not enough that leaders and perpetrators of sexual violence are held accountable before courts and tribunals. As discussed throughout this manual, many victims will continue to need ongoing medical and psychological support long after legal proceedings have concluded. Many will also require financial and socio-economic support if they are to rebuild their lives and become fully-integrated members of society. As the Secretary-General's Report on Sexual Violence recently observed:

International justice is as much about the hope, dignity and restoration of victims as it is about accountability of perpetrators. Reparations (including restitution, compensation, satisfaction and rehabilitation) and guarantees of non-repetition are measures that aim to repair or redress the impact of harm caused to or crimes committed against individuals.⁹⁶

⁹⁵The Secretary-General's Report on Sexual Violence in Conflict observes that children of rape victims are also "stigmatized and face social, psychological and socioeconomic consequences". Secretary-General's Report on Sexual Violence in Conflict, para. 12.

⁹⁶ Secretary-General's Report on Sexual Violence in Conflict, para. 116.

253. Some of these policy matters may not fall within the immediate scope and responsibility of international or national prosecutors, nor perhaps should they. Nevertheless, given the critical importance of witnesses to the judicial process and the prosecution's role in bringing victims and witnesses into that process, international and national prosecutors should do as much as they can to facilitate ongoing support for victims and witnesses in the long-term. Absent this basic support, there can be no real justice for victims.

254. For *ad hoc* tribunals like ours, arrangements should be put in place as early as possible with other UN agencies and government and non-government organizations to ensure the continuity of medical and counseling services, and to address the security concerns of victims and witnesses.⁹⁷ As already seen, these needs and concerns will still be there when the Tribunal closes its doors.

255. The Tribunal's closure, for instance, has necessitated the transfer of responsibility for witness support and protection to the MICT. The MICT has an office in Kigali to provide ongoing support and protection to those who testified before the Tribunal. A clinic, within the office, provides medical and psychological services, including HIV/AIDS treatment, to all former witnesses in Rwanda. Services are provided by a small team of medical professionals employed by the MICT, as well as through the use of referrals to a local hospital.

256. Our experience demonstrates that adequate provisions must be made in advance so victims and witnesses are not left without adequate support after their testimony is complete or after the tribunal has closed. Partnerships with other UN agencies, national authorities, and NGOs

⁹⁷ In this regard, the Secretary-General has called upon all Member States to "ensure, as a matter of priority, that survivors have access to medical, HIV, psychosocial, legal and other multi-sectoral services, and to support the development and strengthening of the capacities of national institutions, in particular health, judicial and social welfare systems, as well as local civil society networks, in order to provide sustainable assistance to victims of sexual violence in armed conflict and post-conflict situations". Secretary-General's Report on Sexual Violence in Conflict, para. 130(a).

should be built so survivors continue to receive the basic medical and psychological services they require after their testimony is complete.

257. At a broader level, education campaigns are required to bring attention to the issue of sexual violence. Educational campaigns can help prevent the causes of sexual violence, reduce stigma, promote the work of those investigating and prosecuting sexual violence, and encourage victims to report sexual violence and seek care. NGOs are often well placed to help conduct these outreach efforts and engage with community and religious leaders, whose support is essential if these programs are to be effective. As discussed at the outset, the prosecution should participate in or provide training and materials to support these broader prevention efforts, where appropriate.⁹⁸

258. Similarly, the prosecution should actively promote and support the development of socio-economic programs by NGOs, local and national authorities, and others, independent of the prosecution. Job training and micro-loan programs can help victims to find new ways support themselves financially and become active members of their communities. They also are instrumental in helping foster more gender tolerance and respect.

259. The Tribunal's Statute and Rules do not allow victims to obtain compensation from the Tribunal. Under the Tribunal's Rules, the Registrar's responsibility is merely to transmit the judgement to the competent authorities of the States concerned so that victims may obtain compensation by bringing an action under national legislation in a domestic court or other competent body.⁹⁹ A better system of reparations or compensation for victims of sexual violence should be established with the financial support of national authorities and the international

⁹⁸ See *above* para. 83.

⁹⁹ Rule 106, ICTR Rules. Following a request from the President of the ICTR, the International Organization for Migration proposes to carry out an assessment study on the issue of reparations for victims of international crimes committed during the Rwandan Genocide.

community.¹⁰⁰ Prosecutors should add their voices to these calls. In many ways, prosecutors are uniquely placed to report on the extent and impact of sexual violence, as experienced through their dealings with victims and witnesses in the legal context.

260. Lastly, prosecutors have a particular responsibility to assist other national and international prosecutors responsible for prosecuting sexual violence in conflicts by sharing their experiences and lessons learnt. Manuals, like this one, and workshops, like those we convened in 2012 in Kigali, Rwanda and 2014 in Kampala, Uganda to discuss this manual, should be replicated.¹⁰¹ To be most effective, the views of other stakeholders, including national and international judges, prosecutors, defence counsel, victim advocates, and NGOs, should all be heard.

VI. CONCLUSION

“The consistent and rigorous prosecution of sexual violence in conflict is essential to the fight against impunity and securing long lasting peace, justice, truth and national reconciliation.”

-UN Security Council Resolution 1820

261. The best means of preventing sexual violence is to eradicate the root causes of gender-based discrimination and inequality at all levels of society. Until this broader societal change is achieved, those responsible for perpetrating these grave crimes must continue to be held accountable in national and international courts and tribunals. Accountability can only

¹⁰⁰ For example, the International Organization of Migration has implemented large-scale victims’ reparations programs such as the German Forced Labour Compensation Program. It also provided longstanding collaboration and support to the Sierra Leone Reparations Program and, more recently, worked in collaboration with the ICTY to provide reparations for wartime victims in the Former Yugoslavia.

¹⁰¹ The OTP’s 2014 Workshop in Kampala was made possible with the generous financial support of UN Women, the Open Society Justice Initiatives, Government of Australia, Johnson & Johnson Corporate Citizen Trust, Republic of Uganda, and GIZ–German International Cooperation. The Kampala Workshop was intended to design a regional training program focused on the three goals of prevention, prosecution, and partnership discussed in this manual and essential to closing the impunity gap for sexual violence crimes.

be achieved with the cooperation and support of the victims and witnesses to these crimes.

262. As this manual has shown, the guiding principle in the investigation and prosecution of sexual violence cases must be that the well-being of victims and witnesses is paramount. Ultimately, justice will have been served if victims and witnesses testify in an enabling environment, thereby ensuring that their evidence is as accurate as possible and the risks of re-traumatization are minimized to the greatest extent possible.

263. Our own experience in prosecuting rape and other sexual violence cases at the international level shows that it is not easy to achieve this goal. However, it is achievable if a global approach is adopted from the outset that identifies the prosecution of rape and other crimes of sexual violence as a priority, and provides the resources necessary to recruit and train talented staff committed to ending impunity for these crimes. Partnerships with national authorities, NGOs, and civil societies are crucial not only to ensure that valuable evidence is not lost in the investigation and trial of these cases, but also to provide real and lasting justice to the many victims targeted with crimes of sexual violence as a means of perpetrating genocide, war crimes, and crimes against humanity.

264. By sharing our lessons learnt and making recommendations for best practices, we hope that future prosecutors and other stakeholders will benefit from our successes and learn from our shortcomings. At the very least, we hope this manual will encourage an ongoing dialogue about best practices for the prosecution of rape and other sexual violence crimes in conflict and post-conflict regions.

ANNEX A: DEFINED TERMS AND SOURCES

A – Defined Terms

Sexual Violence

The Secretary-General's Report on Sexual Violence in Conflict defines sexual violence in conflict as "rape, sexual slavery, forced prostitution, forced pregnancy, enforced sterilization and any other form of sexual violence of comparable gravity perpetrated against women, men or children with a direct or indirect (temporal, geographical or causal) link to a conflict"¹⁰².

International Criminal Tribunal for Rwanda (ICTR or Tribunal)

The International Criminal Tribunal for Rwanda, the ICTR, was established by UN Security Council Resolution 955 of 8 November 1994 for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between 1 January 1994 and 31 December 1994. The Tribunal also was charged with the prosecution of Rwandan citizens responsible for genocide and other such violations of international law committed in the neighbouring States during that same period.

Rules of Procedure and Evidence (ICTR Rules)

Rules of Procedure and Evidence, International Criminal Tribunal for Rwanda, 29 June 1995, as amended on 10 April 2013 available at <http://www.unictr.org/Legal/RulesofProcedureandEvidence/tabid/95/Default.aspx> (last visited on 31 December 2013).

Witness and Victims Support Section (WVSS)

The Witness and Victims Support Section, WVSS, was located within the Registry of the ICTR. The main function of the WVSS was to provide impartial assistance and support to all confirmed witnesses, both prosecution and defence, during pre-trial, trial, and post-trial phases. Other functions include:

- Providing administrative support services to all witnesses who were called to testify before the Tribunal;
- Recommending to the Trial and Appeal Chambers the adoption of protective measures for witnesses and ensuring the actual implementation of the ordered protective measures; and
- Ensuring that witnesses received relevant psycho-social support, including physical and psychological rehabilitation, and counseling in cases of rape and sexual assault.

¹⁰² Secretary-General's Report on Sexual Violence in Conflict, para. 5.

Witness Management Team (WMT)

The Witness Management Team, WMT, was located within the Office of the Prosecutor of the ICTR. The WMT worked very closely with the Investigation Section of the Prosecution and with the WVSS of the Registry. However, the WVSS confined its intervention to victims and witnesses who had been confirmed to testify as witnesses at the Tribunal, while the WMT handled potential Prosecution victims and witnesses who had been approached by the Tribunal but who may have testified in any proceedings before the Tribunal. The WMT provided administrative and psycho-social support, including counseling and medical treatment, to potential prosecution witnesses.

Sexual Assaults Review Committee

The Sexual Assaults Review Committee was established in May 2007 by the Prosecutor of the ICTR. The Committee's primary mandate was to review the Office of the Prosecutor's record with respect to both charging and attaining convictions for the crimes of sexual violence and rape.

ANNEX B: STATISTICS FROM THE ICTR'S RAPE AND SEXUAL VIOLENCE CASES

OVERVIEW OF CHARGES AND CONVICTIONS REGARDING RAPE AND OTHER SEXUAL VIOLENCE CRIMES AT ICTR

No.	CASE	POSITION	DATE OF TRIAL JUDGEMENT	DATE OF APPEAL JUDGEMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
1	Akayesu	<i>Bourgmaster</i> of Taba Commune	2 September 1998	1 June 2001	Count 13: Rape as a crime against humanity Count 14: Other inhumane acts as a crime against humanity	Trial Judgement, paras. 696, 697 Confirmed on appeal, Appeal Judgement, para. 214
2	Serushago	One of the leaders of <i>Interahamwe</i> in Gisenyi Prefecture	5 February 1999 Pleaded guilty	6 April 2000 (Sentence Appeal)	Count 5: Rape as a crime against humanity in the amended Indictment of 14 October 1998	None Rape Charge dropped in guilty plea negotiations
3	Musema	Director of Gisovu Tea Factory in Kibuye	27 January 2000	16 November 2001	Count 7: Rape as a crime against humanity under Articles	Trial Judgement, para. 967

No.	CASE	POSITION	DATE OF TRIAL JUDGEMENT	DATE OF APPEAL JUDGEMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
					6(1) and 6(3)	On appeal this conviction was overturned and acquittal entered on this count (see Appeal Judgement, para.194)
4	Bagilishema	<i>Bourgmestre</i> of Mabanza Commune	7 June 2001	3 July 2002	Count 7: "outrages on personal dignity of women" resulting in serious violations of Article 3 common to the Geneva Conventions of 1949 and Additional Protocol II ("Common Article 3")	None (Acquitted on all counts)
5	Semanza	Former Bourgmestre of	15 May 2003	20 May 2005	Counts 7 and 9	Guilty of Count

No.	CASE	POSITION	DATE OF TRIAL JUDGEMENT	DATE OF APPEAL JUDGEMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
		Bicumbi Commune, MRND representative to the National Assembly			include Rape as a serious violation Common Article 3 Count 8 and 10: Rape as a crime against humanity	10: 'Rape' as a crime against humanity, Trial Judgement, para. 479 Confirmed on appeal, Appeal Judgement, paras. 289, 290
6	Niyitegeka	Minister of Information of Interim Government	16 May 2003	9 July 2004	Count 7: Rape as a crime against humanity Count 8: Inhumane acts, including rape as a crime against humanity Count 9: Rape as a violation of Common Article 3, violence to life health and physical or	Guilty of Count 8: crimes against humanity other inhumane acts-'sexual violence', Trial Judgement, para. 467. Niyitegeka's appeal dismissed in its entirety.

No.	CASE	POSITION	DATE OF TRIAL JUDGEMENT	DATE OF APPEAL JUDGEMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
					<p>mental well being</p> <p>Count 10: Rape as a violation of common Article 3, outrages upon personal dignity</p>	
7	Kajelijeli	<p>Bourgestre of Mukingo Commune from June to July 1994</p> <p>One of the leaders of <i>Interahamwe</i> in Ruhengeri</p>	1 December 2003	23 May 2005	<p>Count 7: Rape as a crime against humanity</p> <p>Count 11: Humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault as a violation of Common Article 3</p>	None
8	Barayagwiza	<p>President of CDR</p> <p>Founder and Director of RTLM radio station</p>	3 December 2003	28 November 2007	Count 8: Outrages upon personal dignity as a serious violation of	<p>None</p> <p>Acquitted at 98 bis stage</p>

No.	CASE	POSITION	DATE OF TRIAL JUDGEMENT	DATE OF APPEAL JUDGEMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
					common Article 3	
9	Kamuhanda	Minister of Higher Education in Interim Government	22 January 2004	19 September 2005	Count 6: Rape as a crime against humanity Count 8: Rape, outrage upon personal dignity as a serious violation of common Article 3	None
10	Gacumbitsi	<i>Bourgmestre</i> of Rusumo Commune in Kibungo Prefecture	17 June 2004	7 July 2006	Count 5: Rape as a crime against humanity	Trial Judgement, paras. 321-333 Conviction confirmed on appeal, Appeal Judgement, paras. 99-108
11	Ndindabahizi	Minister of Finance in Interim Government	15 July 2004	16 January 2007	Count 5 of the Amended Indictment of 5 October 2001(Rape as a	None

No.	CASE	POSITION	DATE OF TRIAL JUDGEMENT	DATE OF APPEAL JUDGEMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
					crime against humanity) but Rape count dropped in the amended indictment of 1 September 2003 (Trial Judgement, paras. 9, 13).	
12	Muhimana	Conseiller of Gishyita <i>Secteur</i> , Gishyita Commune, Kibuye Prefecture	28 April 2005	21 May 2007	Count 3: Rape as a crime against humanity	Trial Judgement, paras. 552-563 Conviction confirmed on appeal (except for the rapes of Goretta Mukashyaka and Languida Kamukina, Appeal Judgement, Disposition)

No.	CASE	POSITION	DATE OF TRIAL JUDGEMENT	DATE OF APPEAL JUDGEMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
13	Bisengimana	Bourgestre of Gikoro <i>Commune</i> , Kigali-Rural <i>Prefecture</i>	13 April 2006 Pleaded guilty	Not Appealed	Count 8: Rape as a crime against humanity Count 9: Serious sexual abuse as a crime against humanity Count 11: Rape as a serious violation of Common Article 3 Count 12: Causing serious violence to life as a serious violation of common Article 3	None Rape counts dropped in guilty plea negotiations
14	Mpambara	<i>Bourgestre</i> of Rukara <i>Commune</i> in Eastern Rwanda	11 September 2006	Not Appealed	Counts 1 and 2: Rape as part of genocide	None (Acquitted on all counts)
15	Muvunyi	Colonel in Rwandan Army and Commander of ESO camp in	12 September 2006 (Muvunyi 1)	29 August 2008 (Muvunyi 1)	Count 4: Rape as a crime against	None

No.	CASE	POSITION	DATE OF TRIAL JUDGEMENT	DATE OF APPEAL JUDGEMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
		Butare			humanity	(All convictions and the sentence were set aside and a retrial of one allegation of direct and public incitement to commit genocide was ordered)
16	Rwamakuba	Minister of Primary and Secondary Education in Interim Government	20 September 2006	Not Appealed	(Joint amended indictment of ...November 2001) Count 3: Rape as a natural and foreseeable consequence of a joint criminal enterprise to commit genocide (JCE 3) Count 5: Rape as a crime against humanity	None Rape charges dropped in the separate amended indictment of 23 February 2005 (Acquitted on all counts)

No.	CASE	POSITION	DATE OF TRIAL JUDGEMENT	DATE OF APPEAL JUDGEMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
17	Nzabirinda	Employee of Ngoma Commune as <i>Encadreur</i> of Youth	23 February 2007 Pleaded guilty	Not appealed	Counts 1 and 2: Rape as part of genocide Count 4: Rape as a crime against humanity	None Rape charges dropped in guilty plea negotiations
18	Rugambarara	Bourgmestre of Bicumbi Commune, Kigali-Rural Prefecture	16 November 2007 Pleaded guilty	Not appealed	Count 7: Rape as a crime against humanity Count 9: Rape, violence to life health and physical or mental well being, outrage upon personal dignity, as a serious violation of common Article 3	None Rape charges dropped in guilty plea negotiations
19	Nchamihigo	Substitut du Procureur in Cyangugu and Interahamwe leader	12 November 2008	18 March 2010	Count 4: "genital mutilation" as part of other inhumane acts	None No evidence led on genital

No.	CASE	POSITION	DATE OF TRIAL JUDGEMENT	DATE OF APPEAL JUDGEMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
					as a crime against humanity.	mutilation, Trial Judgement, paras. 221, 361
20	Bikindi	Musician	2 December 2008	18 March 2010	Counts 2 and 3: Rape and sexual violence as part of genocide	None
21	Bagosora	Directeur de Cabinet in the Ministry of Defence	18 December 2008	14 December 2011	<p>Count 1: Rape and other crimes of a sexual nature as part of conspiracy to commit genocide</p> <p>Counts 2 and 3: Rape and other crimes of a sexual nature as part of genocide</p> <p>Count 4: Rape and other crimes of a sexual nature as part of murder as a crime against humanity</p> <p>Count 6: Rape</p>	<p>Count 2: Trial Judgement, para. 2158, under Article 6(3)</p> <p>Count 4: Trial Chamber, para. 2186</p> <p>Count 6: Trial Judgement, para. 2194</p> <p>Count 7: Trial Judgement, para. 2203, under Article 6(3)</p> <p>Count 8: Trial</p>

No.	CASE	POSITION	DATE OF TRIAL JUDGEMENT	DATE OF APPEAL JUDGEMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
					<p>and other crimes of a sexual nature as part of extermination as a crime against humanity</p> <p>Count 7: Rape as a crime against humanity</p> <p>Count 8: Rape and other crimes of a sexual nature as part of persecution as a crime against humanity</p> <p>Count 9: Rape and other crimes of a sexual nature as part of other inhumane acts as a crime against humanity</p>	<p>Judgement, para. 2213</p> <p>Count 9: Trial Judgement, para. 2224, under Article 6 (3)</p> <p>Count 10: Trial Judgement, para. 2245</p> <p>Count 12: Trial Judgement, para. 2254, under Article 6(3)</p> <p>Convictions for counts 2, 6, 7, 8, 10, 12 confirmed on appeal, Appeal Judgement, para. 721</p>

No.	CASE	POSITION	DATE OF TRIAL JUDGEMENT	DATE OF APPEAL JUDGEMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
					<p>Count 10: Killing and causing violence to health and to the physical and mental well-being as a serious violation of common Article 3</p> <p>Count 12: Outrages upon personal dignity as a serious violation of common Article 3</p>	
22	Kabiligi	Brigadier General (G3, Chief of Operations at HQ)	18 December 2008	Not appealed	<p>Count 6: Rape as a crime against humanity</p> <p>Count 8: Other inhumane acts as a crime against humanity in connection with</p>	<p>None</p> <p>Acquitted on all counts, Trial Judgement, para. 2204</p>

No.	CASE	POSITION	DATE OF TRIAL JUDGEMENT	DATE OF APPEAL JUDGEMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
					<p>the sexual assault of the prime minister</p> <p>Count 10: Outrages upon personal dignity as a serious violation of common Article 3</p>	
23	Nsengiyumva	Colonel, Chief of Operations in Gisenyi	18 December 2008	14 December 2011	<p>Count 7: Rape as a crime against humanity</p> <p>Count 9: Other inhumane acts as a crime against humanity in connection with the sexual assault of the prime minister</p> <p>Count 11: Outrages upon personal dignity</p>	None

No.	CASE	POSITION	DATE OF TRIAL JUDGEMENT	DATE OF APPEAL JUDGEMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
					as a serious violation of common Article 3	
24	Ntabakuze	Major, Commander of Para-Commando Battalion	18 December 2008	8 May 2012	<p>Counts 2 and 3: Rape as part of genocide</p> <p>Count 6: Rape as a crime against humanity</p> <p>Count 8: Other inhumane acts as a crime against humanity in connection with the sexual assault of the prime minister</p> <p>Count 10: Outrages upon personal dignity as a serious violation of common Article</p>	None

No.	CASE	POSITION	DATE OF TRIAL JUDGEMENT	DATE OF APPEAL JUDGEMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
					3	
25	Rukundo	Military Chaplain	27 February 2009	20 October 2010	Count 1: Sexual assault as part of genocide	Trial Judgement, paras 574-576 Conviction quashed on appeal, Appeal Judgement, paras. 237, 238
26	Renzaho	Prefet of Kigali-Ville	14 July 2009	1 April 2011	Count 1: Acts of sexual violence as part of genocide Count 4: Rape as a crime against humanity Count 6: Rape as a serious violation of common Article 3	Count 1: Trial Judgement, para. 779, under Article 6(3) Count 4: Trial Judgement, para. 794, under Article 6(3) Count 6: Trial Judgement, para. 811, under Article 6(3) Convictions reversed on appeal for

No.	CASE	POSITION	DATE OF TRIAL JUDGEMENT	DATE OF APPEAL JUDGEMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
						pleading issues, Appeal Judgement, para. 129
27	Hategekimana	Commander of Ngoma Camp in Butare	6 December 2010	8 May 2012	Counts 1 and 2: Rape as part of genocide Count 4: Rape as a crime against humanity.	Count 4: Trial Judgment para. 729, under Article 6(3) Confirmed on appeal, Appeal Judgment paras. 203, 204
28	Gatete	President of MRND in Murambi Commune and leader of Interahamwe	31 March 2011	9 October 2012	Count 6: Rape as crime against humanity	None
29	Bizimungu Augustin	Chief of Staff of Army	17 May 2011	Pending	Count 6: Rape as a crime against humanity Count 8: Rape and other humiliating and degrading treatment as a violation of common Article	Convicted under Article 6(3), Trial Judgment, paras. 2127 and 2161 Appeal pending

No.	CASE	POSITION	DATE OF TRIAL JUDGEMENT	DATE OF APPEAL JUDGEMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
					3	
30	Nzuwonemeye	Commander of RECCE Battalion	17 May 2011	Pending	Count 6: Rape as a crime against humanity Count 8: violation of common Article 3	None
31	Sagahutu	Second in Command of RECCE Battalion.	17 May 2011	Pending	Count 6: Rape as a crime against humanity and Count 8: violation of common Article 3	None
32	Ntahobali	Led a group of MRND militia men	24 June 2011	Pending	Count 7: Rape as a crime against humanity Count 11: Outrages upon personal dignity, rape and indecent assault	Count 7: Under Article 6(1), Trial Judgement, para. 6094 Count 11: Under Article 6(3), Trial

No.	CASE	POSITION	DATE OF TRIAL JUDGEMENT	DATE OF APPEAL JUDGEMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
					as serious violations of common Article 3	Judgement, para. 6185 Appeal pending
33	Nyiramasuhuko	Minister of Family and Women's Development and member of MRND	24 June 2011	Pending	Count 7: Rape as a crime against humanity Count 11: Outrages upon personal dignity, rape and indecent assault as serious violations of common Article 3	Under Article 6(3), Trial Judgement, para. 6093 Count 11: Under Article 6(3), Trial Judgement, para. 6183 Appeal pending
34	Bicamumpaka	Minister of Foreign Affairs	30 September 2011	Not appealed	Count 8: Rape as a crime against humanity Count 10: Outrages upon personal dignity, rape and indecent assault as serious violations of	None Acquitted at 98 bis stage (Acquitted on all counts)

No.	CASE	POSITION	DATE OF TRIAL JUDGEMENT	DATE OF APPEAL JUDGEMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
					common Article 3	
35	Mugiraneza	Minister of Civil Service	30 September 2011	4 February 2013	<p>Count 8: Rape as a crime against humanity</p> <p>Count 10: Outrages upon personal dignity, rape and indecent assault as serious violations of common Article 3</p>	<p>None</p> <p>Acquitted at 98 bis stage</p>
36	Bizimungu Casimir	Minister of Health	30 September 2011	Not appealed	<p>Count 8: Rape as a crime against humanity</p> <p>Count 10: Outrages upon personal dignity, rape and indecent assault as serious violations of common Article 3</p>	<p>None</p> <p>Acquitted at 98 bis stage</p> <p>(Acquitted on all counts)</p>

No.	CASE	POSITION	DATE OF TRIAL JUDGEMENT	DATE OF APPEAL JUDGEMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
37	Mugenzi	Minister of Trade and Commerce	30 September 2011	4 February 2013	<p>Count 8: Rape as a crime against humanity</p> <p>Count 10: Outrages upon personal dignity, rape and indecent assault as serious violations of common Article 3</p>	<p>None</p> <p>Acquitted at 98 bis stage</p>
38	Karemera	<p>Minister of Interior Affairs as of 25 May 1994</p> <p>First Vice President of MRND</p>	2 February 2012	Pending	<p>Count 3: Rape as a natural and foreseeable consequence of a joint criminal enterprise to commit genocide (JCE 3)</p> <p>Count 5: Rape as a crime against humanity</p>	<p>Count 3: Trial Judgement, paras. 1670 under Article 6(1), 1671 under Article 6(3)</p> <p>Count 5: Trial Judgement, para. 1684 under both Articles 6(1) and 6(3)</p> <p>Appeal pending</p>

No.	CASE	POSITION	DATE OF TRIAL JUDGEMENT	DATE OF APPEAL JUDGEMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
39	Ngirumpatse	President of MRND	2 February 2012	Pending	<p>Count 3: Rape as a natural and foreseeable consequence of a joint criminal enterprise to commit genocide (JCE 3)</p> <p>Count 5: Rape as a crime against humanity</p>	<p>Count 1: Trial Judgement, paras. 1670 under Article 6(1), 1671 under Article 6(3)</p> <p>Count 5: Trial Judgement, para. 1684 under both Articles 6(1) and 6(3)</p> <p>Appeal pending</p>
40	Nzirorera	National Secretary of MRND	Accused deceased during trial		<p>Count 3: Rape as a natural and foreseeable consequence of a joint criminal enterprise to commit genocide (JCE 3)</p> <p>Count 5: Rape as a crime against humanity</p>	None

No.	CASE	POSITION	DATE OF TRIAL JUDGEMENT	DATE OF APPEAL JUDGEMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
41	Nzabonimana Callixte	Minister of Youth and Associative Movements in the Interim Government	31 May 2012	Pending	Count 7 of the initial Indictment of 21 November 2001: Rape as a crime against humanity, but charge dropped in the amended indictments of 12 November 2008 and 24 July 2009, Trial Judgement, paras. 1828, 1829; and para. 1841	None Rape count dropped
42	Nizeyimana	Captain in the Forces Armées Rwandaises (" FAR"); S2/S3, in charge of intelligence and military operations at the Ecole des Sous-Officiers (ESO) in Butare Prefecture	19 June 2012	Pending	Counts 1 and 2: Acts of sexual violence as part of genocide Counts 4: Rape as a crime against humanity Count 6: Rape as	Acquitted on rape counts but appeal on rape acquittals pending

No.	CASE	POSITION	DATE OF TRIAL JUDGEMENT	DATE OF APPEAL JUDGEMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
					a serious violation of common Article 3	
43	Ngirabatware Augustin	Minister of Planning in the Interim Government	20 December 2012	Pending	Count 6: Rape as a crime against humanity (through JCE 3)	Trial Judgement paras. 1390-1393. Appeal pending
44	Bizimana Augustin	Minister of Defence	At Large		Counts 1 and 2: Rape as part of genocide Count 5: Rape as a Crime against Humanity Count 6: Torture as a crime against humanity Count 7: Other inhumane acts as a crime against humanity	If arrested, Accused will be tried before MICT

No.	CASE	POSITION	DATE OF TRIAL JUDGEMENT	DATE OF APPEAL JUDGEMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
					<p>Count 8: Persecution as a crime against humanity</p> <p>Count 10: Torture as a violation of common Article 3</p> <p>Count 11: Rape as a violation of common Article 3</p> <p>Count 12: Cruel treatment as a violation of common Article 3</p> <p>Count 13: Outrages upon personal dignity as a violation of common Article 3</p>	

No.	CASE	POSITION	DATE OF TRIAL JUDGEMENT	DATE OF APPEAL JUDGEMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
45	Munyagishari	Secretary General of the MRND for the Gisenyi City, President for the Interahamwe of Gisenyi			Counts 2 and 3: Rape as part of genocide Count 5: Rape as a crime against humanity	Case transferred to Rwanda
46	Ndimbati	Bourgmistre of Gisovu commune	At Large		Counts 1 and 2: Rape as part of genocide Count 6: Rape as a crime against humanity) Count 7: Rape as part of persecution as a crime against humanity (Rape charges added in the second amended Indictment filed on 8 May 2012)	Case transferred to Rwanda
47	Ntaganzwa	Bourgmistre of Nyakizu Commune	At Large		Counts 1 and 2: Rape as part of	Case transferred to Rwanda

No.	CASE	POSITION	DATE OF TRIAL JUDGEMENT	DATE OF APPEAL JUDGEMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
					genocide Count 5: Rape as a crime against humanity (Rape charges added in the second amended Indictment filed on 30 March 2012)	
48	Ryandikayo	Businessman in Mubuga secteur	At Large		Counts 1 and 2: Rape as part of genocide Count 6: Rape as a crime against humanity Count 7: Rape as part of persecution as a crime against humanity (Rape charges added in the	Case transferred to Rwanda

No.	CASE	POSITION	DATE OF TRIAL JUDGEMENT	DATE OF APPEAL JUDGEMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
					second amended Indictment filed on 8 May 2012)	
49	Mpiranya	Commander of the Presidential Guard Battalion of the Rwandan Armed Forces (FAR) and Commander of the Presidential Guard "Camp Kimihurura"	At Large		<p>Count 5: Rape as a crime against humanity, or alternatively Rape as a natural and foreseeable consequence of a joint criminal enterprise to commit genocide (JCE 3)</p> <p>Count 7: Other inhumane acts as a crime against humanity- including acts committed on the body of the Prime Minister , or alternatively Rape as a</p>	If arrested, Accused will be tried before MICT

No.	CASE	POSITION	DATE OF TRIAL JUDGEMENT	DATE OF APPEAL JUDGEMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
					natural and foreseeable consequence of a joint criminal enterprise to commit genocide (JCE 3)	
50	Munyarugarama	Lieutenant Colonel in the FAR, Commander of Gako Camp	At Large		Counts 1 and 2: Rape as part of genocide Count 7: Rape as a crime against humanity	Case transferred to Rwanda
51	Munyeshyaka Wenceslas	Priest, Vicar of St. Famille Parish, Kigali City	Case transferred to France (Accused residing in France)		Count 2: Rape as a crime against humanity	Case transferred to France
52	Bucyibaruta Laurent	Prefet, Gikongoro Prefecture	Case transferred to France (Accused residing in France)		Count 6: Rape as a crime against humanity	Case transferred to France

ANNEX C: RAPE AND OTHER FORMS OF SEXUAL VIOLENCE AT THE ICTR – ELEMENTS, MODES OF LIABILITY, AND EVIDENTIARY ISSUES

I. Rape and Other Forms of Sexual Violence

Under ICTR jurisprudence, the *actus reus* of rape involves the non-consensual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or 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, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* of rape is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim. The use of force, or the threat of force, provides clear evidence of non-consent, but force is not an element *per se* of rape.¹⁰³

As set out below in section B, Rape may serve as the predicate offence for genocide, crimes against humanity and war crimes.

In addition, other forms of sexual violence, not necessarily meeting the specific elements of rape, may serve as the basis for individual criminal liability under international law. Other forms of sexual violence which may serve as such a basis include, but are not limited to, non-penetrative sexual assault, sexual humiliation and forced prostitution.

II. Rape and Other Forms of Sexual Violence as Predicate Offences for International Crimes

Once the elements of rape are established, this crime may serve as the predicate offence for the crime of Genocide, Crimes against Humanity, and War Crimes. In addition, other forms of sexual violence, which do not necessarily meet the elements of rape as set out above, may constitute crimes under international law.

(i) Genocide

Under Article 2(2) of the ICTR Statute, as well as under the Genocide Convention, Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended

¹⁰³ *Gacumbitsi* Appeal Judgement, paras. 151-157 (quoting *Kunarac* Appeal Judgement, paras. 127-129, 130-132).

to prevent births within the group; or (e) Forcibly transferring children of the group to another group.

To support a conviction for genocide based upon the causation of (b), serious bodily or mental harm, the harm inflicted on members of a group must be of such a serious nature as to threaten the group's destruction in whole or in part.¹⁰⁴

The ICTR Appeals Chamber has described rape as a "quintessential" example of serious bodily harm,¹⁰⁵ and therefore the commission of rape may constitute genocide.

(ii) Crimes against Humanity

Article 3 of the ICTR Statute includes the prosecution of crimes against humanity in the Tribunal's mandate. The predicate offence of rape (Article 3(g) of the Statute) may constitute a crime against humanity. In addition, other forms of sexual violence, which do not necessarily meet the elements of rape as set out above, may constitute crimes against humanity.

To establish liability for crimes against humanity, in addition to the underlying criminal conduct, such as rape, three common elements must be established: (1) the victim was a civilian; (2) the criminal conduct was part of a widespread or systematic attack on a predominately civilian population; and (3) the physical perpetrator of the criminal conduct or other relevant actor knew that it was part of this widespread and systematic attack.

Rape and other forms of sexual violence may provide a basis for the following Crimes against Humanity:

- Rape as a Crime against Humanity:

Rape in and of itself may constitute a crime against humanity. To establish the crime of rape as a crime against humanity, the elements of the underlying offence of rape, as set out above, must be established, as well as the three common elements to all Crimes against Humanity.

- Torture as a Crime against Humanity:

To establish the crime of torture as a crime against humanity, the following elements must be established, in addition to the three common elements:

¹⁰⁴ *The Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66-A, Judgement, 12 March 2008, para.46 (*Seromba* Appeal Judgement).

¹⁰⁵ *Seromba* Appeal Judgement, para. 46.

- The physical perpetrator inflicted severe mental or physical suffering on the victim.
- The physical perpetrator intended to inflict such suffering on the victim.
- The suffering was inflicted on the victim was inflicted on the victim for a prohibited purpose, such as to discriminate.

ICTR jurisprudence has established that rape may constitute torture as a crime against humanity. In the Semanza case, the Trial Chamber found that “by encouraging a crowd to rape women because of their ethnicity, the Accused was encouraging the crowd to inflict severe physical or mental pain or suffering for discriminatory purposes. Therefore, he was instigating not only rape, but rape for a discriminatory purpose, which legally constitutes torture.”¹⁰⁶

- Persecution as a Crime against Humanity:

Rape may also constitute persecution as a crime against humanity. To establish persecution as a crime against humanity, based upon rape, the following elements must be established, in addition to the common elements:

- The elements of rape as a crime against humanity.
- The victim was, or was perceived to be, a member of a group defined on the basis of politics, race or religion.
- The physical perpetrator intended to rape the victim, or another relevant actor intended to that the victim be raped, because of the victim’s political, racial or religious identity.

In addition to rape, sexual violence not amounting to rape may also serve as the basis for persecution as a crime against humanity, as long as the physical perpetrator’s conduct was of the same gravity as the specifically listed underlying offences of crimes against humanity (such as rape and torture).¹⁰⁷

- Enslavement as a Crime against Humanity:

To establish enslavement as a crime against humanity, the following elements must be established, in addition to the common elements:

¹⁰⁶ *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgement and Sentence, 15 May 2003, para.485 (*Semanza* Trial Judgement) (upheld on appeal).

¹⁰⁷ *The Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Judgement, 1 September 2004, paras.1008, 1012 (any sexual assault falling short of rape may be punishable as persecution under international criminal law).

- The physical perpetrator exercised any or all of the powers attached to the right of ownership over the victim.
- The physical perpetrator intended to exercise such power over the victim.

Under jurisprudence applicable to the ICTR, “control of sexuality” is considered a form of enslavement.¹⁰⁸

- Other Inhumane Acts as Crimes against Humanity:

Crimes of sexual violence not amounting to rape may also qualify as “other inhumane acts” sufficient to support a conviction for crimes against humanity. To prove “other inhumane acts”:

- The physical perpetrator must intentionally or with knowledge of its probability, either cause serious mental or physical suffering to the victim or inflict a serious attack on the victim’s human dignity.

Examples of sexual violence amounting to “other inhumane acts” include forced prostitution,¹⁰⁹ and sexual violence upon a dead body which causes suffering to onlookers.¹¹⁰

(iii) War Crimes

Article 4 of the ICTR Statute includes the prosecution of Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II (“war crimes”) as part of the Tribunal’s mandate, including “outrages upon personal dignity”. Outrages upon personal dignity are constituted by any act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity. The *mens rea* requires knowledge of the possible consequences of the charged act or omission.¹¹¹

¹⁰⁸ *Kunarac* Appeal Judgement, paras. 9, 119 (finding enslavement as a crime against humanity where the defendant held women in a house and repeatedly raped them, and concluding that the defendant “deprived the women of any control over their lives and treated them as their property”).

¹⁰⁹ *The Prosecutor v. Drago Josipović, Vladimir Šantić, Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić & Dragan Papić*, Case No. IT-95-16-T, Judgement, 14 January 2000, para. 566.

¹¹⁰ *Niyitegeka* Trial Judgement, paras. 465-467.

¹¹¹ *Kunarac* Appeal Judgement, paras. 163-166.

The predicate offence of rape (Article 4(e) of the Statute) constitutes an “outrage upon human dignity” and thus may constitute a war crime, depending upon the circumstances under which the offence occurred.¹¹²

Under Article 4(e) of the Statute, enforced prostitution and indecent assault also constitute war crimes. ICTR jurisprudence has set out the elements of “indecent assault” as the “caus[ation] [...] of pain or injury by an act which was of a sexual nature and inflicted by means of coercion, force, threat or intimidation and was non-consensual.”¹¹³

III. Modes Of Liability Under International Law

In addition to the specific elements of the underlying offence and the elements of genocide, crimes against humanity and/or war crimes, as set out above, to establish criminal liability, sufficient evidence must establish the individual criminal responsibility of the accused.

Under international criminal law, including the jurisprudence of the ICTR, individual criminal responsibility may be established either directly (i.e., through committing, ordering, instigating, planning, or aiding and abetting) or indirectly (i.e., through superior responsibility or joint criminal enterprise).

At the ICTR, individual accused have been charged and found individually criminally responsible for crimes based upon rape and other sexual crimes. A review of these modes of liability and representative ICTR findings follows.

(i) *Committing*

“Committing” covers, primarily, the physical perpetration of a crime (with criminal intent) or a culpable omission.¹¹⁴ Physical perpetration can include, for example, physical commission of the crime, as well as other acts that constitute direct participation in the *actus reus* of the crime.¹¹⁵

¹¹² In connection with the crimes within the scope of Article 4 of the Statute, the following threshold elements must be established (1) the existence of a non-international armed conflict; (2) the existence of a nexus between the alleged offence and the armed conflict; and (3) that the victims were not taking any active part in the hostilities at the time of the alleged violation, and that the perpetrator know or should have been aware of this.

¹¹³ *The Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-A, Judgement and Sentence, 27 January 2000, para. 285.

¹¹⁴ *Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze v. the Prosecutor*, Case No. ICTR-99-52-A, 28 November 2007, para. 478 (*Nahimana et al.* Appeal Judgement).

¹¹⁵ *Callixte Kalimanzira v. The Prosecutor*, Case No. ICTR-05-88-A, Judgement, 20 October 2010, para. 219 (citing *Gacumbitsi* Appeal Judgement, para. 60) (*Kalimanzira* Appeal Judgement).

Relevant cases

- *Prosecutor v. Muhimana*: The Trial Chamber found Defendant Muhimana guilty of rape as genocide and rape as a crime against humanity based upon his commission of the rapes of Tutsi women.¹¹⁶ The Appeals Chamber upheld the convictions.¹¹⁷
- *Prosecutor v. Nyiramasuhuko et al.*: Defendant Ntahobali found guilty for committing rape as a crime against humanity and a war crime, where the evidence established beyond a reasonable doubt that Ntahobali personally raped Tutsi women.¹¹⁸
- *Prosecutor v. Rukundo*: Trial Chamber found Defendant Rukundo guilty of committing genocide by his personal commission of a sexual assault upon a Tutsi woman. The Appeals Chamber overturned this conviction, finding that while the sexual assault occurred, the evidence was insufficient to establish that Rukundo possessed genocidal intent when committing the sexual assault.¹¹⁹
- *Prosecutor v. Niyitegeka*: Trial Chamber acquitted Defendant Niyitegeka of rape, where the witness testimony failed to credibly and reliably prove that the Accused committed the rape at issue.¹²⁰
- *Prosecutor v. Musema*: Trial Chamber found Defendant Musema guilty of rape as a crime against humanity, based upon his commission of the predicate offence of rape.¹²¹ The Appeals Chamber overturned the conviction based upon conflicting accounts of the rape introduced as additional evidence on appeal.¹²²

(ii) Ordering

A person in a position of authority may incur responsibility for “ordering” another person to commit an offence if the order has a direct and substantial effect on the commission of the illegal act. Responsibility is also incurred when an individual in a position of authority orders an act or

¹¹⁶ *Muhimana* Trial Judgement, paras. 32, 103, 108, 513, 519, 552, 563.

¹¹⁷ *Mikaeli Muhimana v. The Prosecutor*, Case No. ICTR-95-1B-A, Judgement, 21 May 2007, paras.53, 103, 162, *disposition* (*Muhimana* Appeal Judgement). However, the Appeals Chamber reversed the Trial Chamber’s conviction for the rape of Gorette Mukashyaka and Languida Kamukina as a crime against humanity.

¹¹⁸ *Nyiramasuhuko et al.* Trial Judgement, paras. 6077, 6080, 6086 (appeal pending at time of publication).

¹¹⁹ *Emmanuel Rukundo v. The Prosecutor*, Case No. ICTR-2001-70-A, Judgement, 20 October 2010, para.237 (*Rukundo* Appeal Judgement).

¹²⁰ *Niyitegeka* Trial Judgement, para. 301.

¹²¹ *Musema* Trial Judgement, paras. 847-861.

¹²² *Alfred Musema v. The Prosecutor*, Case No. ICTR-96-13-A, Judgement, 16 November 2001, para.194, *disposition* (*Musema* Appeal Judgement).

omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, and if that crime is effectively committed subsequently by the person who received the order. It is sufficient that there is proof of a position of authority on the part of the accused that would compel another person to commit a crime following the accused's order.¹²³

Relevant cases

- *Prosecutor v. Niyitegeka*: Trial Chamber convicted Defendant Niyitegeka of other inhumane acts as a crime against humanity where Niyitegeka ordered *Interahamwe* to undress the body of a woman who had just been shot dead, to fetch and sharpen a piece of wood, which he then instructed them to insert into her genitalia. The *Interahamwe* carried out Niyitegeka's instructions. The body of the woman, with the piece of wood protruding from it, was left on the roadside for three days.¹²⁴
- *Prosecutor v. Nyiramasuhuko et al.*: Trial Chamber convicted Defendant Ntahobali of rape as a Crime against humanity, where the evidence established that he ordered *Interahamwe* to rape Tutsi women taking refuge at a *préfecture* office.¹²⁵
- *Prosecutor v. Musema*: Trial Chamber found that Defendant Musema ordered and abetted in the rape of a Tutsi woman, and thereafter ordered that she and her son be killed. However, Musema incurred no individual criminal responsibility because no evidence was adduced showing the order was carried out.¹²⁶
- *Prosecutor v. Akayesu*: Trial Chamber found Defendant Akayesu guilty of rape as a crime against humanity where Akayesu ordered, instigated, and aided and abetted acts of sexual violence, including rapes and the forced undressing and public marching of a woman.¹²⁷

(iii) Instigating

“Instigating” implies prompting another person to commit an offence. It is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused; it is sufficient to demonstrate that

¹²³ *Renzaho* Appeal Judgement, paras. 315, 480; *Kalimanzira* Appeal Judgement, para. 213; *The Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-A, Judgement, 19 May 2010, para. 164 (*Bošković & Tarčulovski* Appeal Judgement); *Nahimana et al.* Appeal Judgement, para. 481; *Semanza* Appeal Judgement, paras. 360-361, 363.

¹²⁴ *Niyitegeka* Trial Judgement, para. 316; *Niyitegeka* Appeal Judgement, para. 87

¹²⁵ *Nyiramasuhuko et al.* Trial Judgement, para. 6086.

¹²⁶ *Musema* Trial Judgement, para. 889.

¹²⁷ *Akayesu* Trial Judgement, para. 692.

the instigation was a factor substantially contributing to the conduct of another person committing the crime. The *mens rea* is the intent to instigate another person to commit a crime or, at a minimum, the awareness of the substantial likelihood that a crime will be committed in the execution of the act or omission instigated.¹²⁸

Relevant cases

- *Prosecutor v. Semanza*: Trial Chamber found Defendant Semanza guilty of instigating rape and torture as crimes against humanity, where he encouraged a crowd to rape women because of their ethnicity.¹²⁹
- *Prosecutor v. Gacumbitsi*: Trial Chamber found Defendant Gacumbitsi guilty of instigating genocide where he “publicly instigated the rape of Tutsi women and girls, and that the rape of Witness TAQ and seven other Tutsi women and girls by attackers who heeded the instigation was a direct consequence thereof.”¹³⁰

(iv) Planning

“Planning” requires that one or more persons design the criminal conduct constituting a statutory crime that is later perpetrated. It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct. The *mens rea* entails the intent to plan the commission of a crime or, at a minimum, the awareness of the substantial likelihood that a crime will be committed in the execution of the acts or omissions planned.¹³¹

(v) Aiding and Abetting

“Aiding and abetting” entails carrying out acts or omissions specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime, which have a substantial effect on the perpetration of the crime. The assistance need not serve as condition precedent for the commission of the crime and may occur before, during or after the principal crime has been perpetrated. The requisite mental element is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator. *Mens rea* can also be established if the accused is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed.

¹²⁸ *François Karera v. The Prosecutor*, Case No. ICTR-01-74-A, Judgement, 28 February 2011, para. 317 (*Karera Appeal Judgement*); *Nahimana et al. Appeal Judgement*, para. 480.

¹²⁹ *Semanza Trial Judgement*, paras. 481-485; *Semanza Appeal Judgement*, para. 288.

¹³⁰ *The Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-T, Judgement, 17 June 2004, para.292 (*Gacumbitsi Trial Judgement*); *Gacumbitsi Appeal Judgement*, para. 107.

¹³¹ *The Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Judgement, 12 November 2001, para. 268; *Nahimana et al. Appeal Judgement*, para. 479.

Specific intent crimes, such as genocide, also require that the aider and abettor must know of the principal perpetrator's specific intent.¹³²

Relevant cases

- *Prosecutor v. Muhimana*: Trial Chamber found Defendant Muhimana guilty of rape as a crime against humanity, through his presence, encouragement and actions. The Trial Chamber therefore found Muhimana aided and abetted the rapes of Tutsi women.¹³³ The Appeals Chamber upheld the convictions.¹³⁴
- *Prosecutor v. Nyiramasuhuko et al.*: Trial Chamber convicted Defendant Ntahobali of rape as crime against humanity and as a war crime, where the evidence established that, in addition to ordering, he aided and abetted *Interahamwe* to rape Tutsi women taking refuge at a *préfecture* office.¹³⁵
- *Prosecutor v. Akayesu*: Trial Chamber found Akayesu guilty of rape as a crime against humanity where he had reason to know that sexual violence was occurring, and aided and abetted acts of sexual violence by allowing them to take place on or near the premises of his commune office and by facilitating the commission of the sexual violence through his words of encouragement in other acts of sexual violence which, by virtue of his authority, sent a clear signal of official tolerance for sexual violence.¹³⁶

(vi) Superior Responsibility

For an accused to incur criminal responsibility under Article 6 (3) of the ICTR Statute, in addition to establishing beyond reasonable doubt that his or her subordinate is criminally responsible for the underlying crime, the following elements must be established beyond reasonable doubt: (1) the existence of a superior-subordinate relationship; (2) that the superior knew or had reason to know that his or her subordinate was about to commit a crime or had done so; and (3) that the superior failed to take necessary and reasonable measures to prevent or punish the commission of the crime by his or her subordinate.

¹³² *Kalimanzira* Appeal Judgement, paras. 74, 86; *Rukundo* Appeal Judgement, para. 53; *The Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Case No. IT-04-84-A, Judgement, 19 July 2010, para. 58; *Karera* Appeal Judgement, para. 321; *Nahimana et al.* Appeal Judgement, para. 482; *Muhimana* Appeal Judgement, para. 189.

¹³³ *Muhimana* Trial Judgement, paras. 553, 563.

¹³⁴ *Muhimana* Appeal Judgement, para. 190.

¹³⁵ *Nyiramasuhuko et al.* Trial Judgement, paras. 6086.

¹³⁶ *Akayesu* Trial Judgement, paras. 693-694; *Akayesu* Appeal Judgement, paras. 418

Relevant cases

- *Prosecutor v. Bagosora et al.*: Defendant Bagosora was held responsible as a superior for the rapes committed by soldiers and militiamen at roadblocks, Saint Josephite Centre, and Gikondo Parish, the sexual assault of the Prime Minister, the rapes and stripping of female refugees and for rapes at a parish, and on these bases convicted him of rape and other inhumane acts as crimes against humanity, as well as outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.¹³⁷
- *Prosecutor v. Nyiramasuhuko et al.*: Trial Chamber found that Defendants Nyiramasuhuko and Ntahobali bore superior responsibility for the rapes committed by their *Interahamwe* subordinates of Tutsi women taking refuge at a prefecture office.¹³⁸
- *Prosecutor v. Ndindiliyimana et al.*: Trial Chamber found Defendant Bizimungu responsible as a superior for rapes committed by his soldier-subordinates, and thus found him guilty of rape as a crime against humanity and as a war crime.¹³⁹
- *Prosecutor v. Kajelijeli*: Defendant Kajelijeli acquitted of superior responsibility for rapes committed by the *Interahamwe*, where Kajelijeli gave orders to kill and to exterminate but not to rape or commit “other inhumane acts”. Therefore, the evidence failed to show that Kajelijeli knew or had reason to know about the rapes or “other inhumane acts” and also failed to show that he planned, instigated, ordered, committed or aided and abetted these crimes.¹⁴⁰

(vii) Joint Criminal Enterprise

Article 6 (1) of the ICTR Statute has been interpreted to contain three forms of joint criminal enterprise: basic, systemic and extended.

The required *actus reus* for joint criminal enterprise includes three elements. The involvement of a plurality of persons in the crime, the existence of a common purpose to commit crimes provided for in the

¹³⁷ *Bagosora et al.* Trial Judgement, paras. 2202-2203, 2224, 2254; *Theoneste Bagosora and Anatole Nsengiyumva v. Prosecutor*, Case No. ICTR-98-4-A, Judgement, 14 December 2011, para. 742 (upheld on appeal).

¹³⁸ *Nyiramasuhuko et al.* Trial Judgement, paras. 6086-6088 (appeal pending at time of publication).

¹³⁹ *The Prosecutor v. Augustin Ndindiliyimana, Augustin Bizimungu, Francois-Xavier Nzuwonemeye*, Case No: ICTR-00-56-T, Judgement and Sentence, 17 May 2011, paras. 1898, 2127, 2161 (appeal pending at time of publication).

¹⁴⁰ *Kajelijeli* Trial Judgement, para. 924.

Statute, and the accused's significant participation in the common purpose.¹⁴¹

With regard to *mens rea*, the basic form of joint criminal enterprise requires the intent to perpetrate a certain crime, this intent being shared by all co-perpetrators.¹⁴² Where the underlying crime requires a special intent, such as discriminatory intent, the accused, as a member of the joint criminal enterprise, must share the special intent.¹⁴³ For the extended form of joint criminal enterprise, the accused may be found responsible provided that he participated in the common criminal purpose with the requisite intent and that, in the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or more of the persons used by him (or by any other member of the joint criminal enterprise) in order to carry out the *actus reus* of the crimes forming part of the common purpose; and (ii) the accused willingly took that risk.¹⁴⁴

Relevant cases

- *Prosecutor v. Karemera*: Trial Chamber found Defendants Karemera and Ngirumpatse guilty of committing genocide and rape as a crime against humanity, through participation in a joint criminal enterprise (extended), based upon the systematic rape and sexual assault of Tutsi women and girls.¹⁴⁵
- *Prosecutor v. Ngirabatware*: Trial Chamber found Defendant Ngirabatware guilty of rape as a crime against humanity, through participation in a joint criminal enterprise (extended), where Ngirabatware encouraged *Interahamwe* to kill and distributed weapons to them and the rapes they subsequently committed were therefore “entirely foreseeable”.¹⁴⁶

IV. Relevant Evidentiary Issues and Inquiries

As set out above, to establish an ICTR accused's criminal liability stemming from incidents of sexual violence, the Prosecution must prove not only the underlying crime, but also the specific elements of genocide,

¹⁴¹ *The Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36A-A, Judgement, 28 September 2011, para. 160; *Jean-Baptiste Gatetev. The Prosecutor*, Case No. ICTR-00-61-A, Judgement, 9 October 2012, para. 239 (*Gatete Appeal Judgement*).

¹⁴² *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Cases Nos. ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004, para. 467.

¹⁴³ *Prosecutor v. Radoslav Brdanin*, Case No. IT-99-36-A, Judgement, 3 April 2007, para. 429 (*Brdanin Appeal Judgement*).

¹⁴⁴ *The Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Judgement, 8 October 2008, para. 168; *Brdanin Appeal Judgement*, para. 411.

¹⁴⁵ *Karemera et al.* Trial Judgement, paras. 1665-1671, 1678-1684 (appeal pending at time of publication).

¹⁴⁶ *Ngirabatware* Trial Judgement, paras. 1386-1390.

crimes against humanity and/or war crimes, and the mode of liability. The Prosecution must also ensure that the elements of crimes and modes of participation are properly pleaded in an indictment. Failure to adhere to the pleading requirements may result in an accused being acquitted due to lack of sufficient notice of the charges.

Relevant facts for prosecutors and investigators to ascertain in proving these various elements include, but are not limited to, those set out in Section III (A) of this Manual.

ANNEX D: INVESTIGATIVE WORK PLAN

INVESTIGATION FILE

INVESTIGATION FILE NUMBER: **xxx/xxxx** **TITLE**

Team Leader:
Principal Investigator/s:
Prosecutor/s:

SUSPECT/ACCUSED(S) NAME:

1).....	DATE OF BIRTH ..
2).....	DATE OF BIRTH ..
3)	DATE OF BIRTH ..

CUSTODY DETAILS:

- 1) ..
- 2) ..
- 3) ..

INDEX TO FILE

- 1. Synopsis
 - 1.1 Background
 - 1.2 Potential Charges
 - 1.3 Linkages
- 2. Integrated Investigation Work Plan
 - 2.1 Preliminary Investigation
 - 2.2 Substantive Investigation
 - 2.3 Time Line and Investigation Log
 - 2.4 Resources and Challenges
- 3. Suspect/Accused(s) Profile
- 4. Record of Interview & Statements by Suspect/Accused(s)
- 5. Correspondence
- 6. Witness Statements
- 7. Photographic, Video and/or Sketch Material
- 8. Exhibit List
- 9. Any Other Material

1. Synopsis:

1.1 Background:

[Provide a brief report having regard to the following matters:

- i. Background
- ii. Geographical area of alleged crime(s) committed;
- iii. Date of alleged crime(s)
- iv. Alleged international crimes (genocide, crimes against humanity and war crimes, including sexual violence crimes)
- v. Alleged immediate perpetrator(s) and higher-level suspects, by name (if known), ethnicity, position of authority in relevant hierarchy
- vi. Alleged victims, age, gender, number, ethnicity, political, religious or other affiliation
- vii. Brief description of the crime(s) and the context in which they were committed.]

1.2 Potential Charges:

[This section should identify potential charges (genocide, crimes against humanity and war crimes, including sexual violence crimes), including a summary of legal elements and modes of liability.]

1.3 Linkages:

[This section should identify any linkages with existing or potential investigations and/or prosecutions.]

2. Integrated Investigation Work Plan:

2.1 Preliminary Investigation:

[Collate and assess all available information and evidence, including:

- Public records and reports
- Media – print/electronic
- Reports and other materials held by government agencies
- Reports and other materials held by non-government agencies
- Site visit(s)
- Information available from the Sexual Violence Coordinating Unit on sexual violence crimes

Conduct Preliminary Assessment to recommend whether further investigation is justified in accordance with office policy and available resources, having regard to the following matters:

- Potential charges, including sexual violence charges
- Likely perpetrators and higher-level accused
- Further evidence required
- Potential sources of, and means for obtaining, further evidence, see 2.2.2 to 2.2.5
- Potential lines of defence
- Input from the Sexual Violence Coordinating Unit on sexual violence crimes]

2.2 Substantive Investigation:

[In the event that further investigation is approved following the Preliminary Assessment, enquiries should be made having regard to the matters identified in 2.2.1 to 2.2.6.]

2.2.1 Documentary Evidence:

[With respect to documentary evidence collated during the Preliminary Investigation stage:

- Identify the documentary evidence upon which it is intended to rely
- Identify whether material is reliable and admissible
- Identify requirements for admissibility, eg certification, attestation, via a witness
- Where necessary, obtain a statement from the maker or a person able to produce the document as a business record

See also 2.2.3 below.

Identify further documentary evidence required, including potential sources, the enforcement and other measures required for obtaining it, eg via subpoena, and requirements for its admission:

- Public records and reports
- Media archives - print/television/radio and electronic
- Reports and other materials held by government agencies
- Reports and other materials held by non-government agencies
- Other records, eg financial, telecommunication, immigration etc.

Refer to Manual para. [102] and seek input from the Sexual Violence Coordinating Unit.]

2.2.2 Site Visits:

[If not already done as part of the Preliminary Assessment, document the alleged crime site(s), through photo/video/sketch.]

2.2.3 Identification, Location and Engagement with Potential Victims and Witnesses:

[Identify:

Witnesses who may be able to provide contextual information regarding:

- The history, nature and extent of the conflict, including experts, journalists, NGOs, and others with expertise in the region.
- The role of various individuals and/or groups during the conflict, eg military, militia, the media etc.

Witnesses who may be able to assist with respect to the assessment and/or production of documentary evidence identified in 2.2.1.

Potential fact based Witnesses: Refer Manual III C & D regarding sexual violence matters.]

2.2.4 Conduct of Witness Interviews:

[Identify witnesses for interview in order of priority, ie in general terms with respect to:

- Production of documentary evidence – see 2.2.1 and 2.2.2

- Contextual evidence – see 2.2.3
- Fact based evidence
- Persons of Interest

With respect to fact based evidence from victims and witnesses of sexual violence:

- Conduct interview and record statements having regard to Manual Chapter III, E to G
- Refer to the Manual, Annex C, Table at para. [95] of the Manual, Annex E, Interview Checklist, regarding: potential offences; the elements of those offences; modes of liability; and evidence required to establish the same.
- Seek assistance from the Sexual Violence Coordinating Unit, as required.]

2.2.5 Forensic Evidence:

[Identify forensic evidence available and/or required.]

2.2.6 Potential Lines of Defence:

[Identify:

- Potential lines of defence, including alibi
- Evidence required to establish and/or refute the above.]

2.2.7 Evidence Analysis and Review:

[Available evidence should be collated and analyzed on an ongoing basis, with input from the prosecutor(s) assigned to the team, and the Sexual Violence Coordinating Unit with respect to sexual violence matters.

Refer to the Manual, Annex C, and the table at para. [95], regarding sexual offence charges]

2.2.8 Regular Report to Management:

[Reports on the progress of investigations should be provided to management on a regular basis.]

2.2.9 Further Matters for Investigation:

[As identified following 2.2.7 and 2.2.8.]

2.2.10 Record of Interview - Suspects:

[Before a decision is taken to formally charge a suspect, he/she should be offered the opportunity to participate in a record of interview. Any such interview must be conducted in accordance with the rights of suspects and procedural requirements in the relevant jurisdiction.]

2.3 Time Line and Investigation Log:

[Identify key deadlines, eg Preliminary Assessment; Evidence Analysis and Review; Regular Report to Management, etc. Include daily log of investigative activities.]

2.4 Resources and Challenges:

2.3.1 Resources:

[Identify any anticipated extraordinary expenses, eg travel overseas to interview witnesses; external expertise required, eg forensic experts, etc.]

2.3.2 Operational challenges

[Identify any anticipated operational challenges including security issues; availability of witnesses; access to records; etc.]

2.3.3 Legal challenges

[Identify potential legal issues, eg jurisdictional issues; applicable case law; applicability of international treaties in national context; anticipated claims of privilege with respect to the execution of subpoenas and other enforcement powers, eg public interest immunity, legal professional privilege etc.]

2.3.4 Any other issues:

[Identify any other issues which may impact on the investigation.]

ANNEX E: INTERVIEW CHECKLIST

[This checklist is a guide only and may need to be adapted to the needs of the particular jurisdiction, investigation and witness concerned]

<p>Preliminary Matters</p> <ul style="list-style-type: none">• Discrete, safe and secure location; childcare services where required.• Composition of team (gender sensitive/diverse).• Introductions: name, title and role of persons present (investigators, prosecutors, interpreters).• Establish rapport.• Ensure witness comfort: physical, with people present, with location of interview.• Explain purpose of interview: nature of investigation; to ascertain whether witness may be able to assist; and to obtain a statement if that is the case.• Ascertain whether the witness has provided information and/or a statement to anyone else before – ascertain details and copy if available.• Seek permission to take notes/record interview.• Where the witness agrees to participate in the interview and provide a statement, explain:<ul style="list-style-type: none">○ That they must tell the truth○ That the statement must be given voluntarily and without expectation of reward○ That they may be required to testify before the court○ The measures available to protect their identity and information. As applicable, however, note that these are subject to the discretion of the court, and that if the matter proceeds to trial, the witness's identity and statement will be made available to the court, the accused and his lawyers○ That the witness may have to face the accused in court• Clarify purpose of any payments made, e.g. transportation costs etc: not an inducement.
<p>Formal Details</p> <ul style="list-style-type: none">• Name, age, contact details etc.
<p>Substantive Interview</p> <ul style="list-style-type: none">• Narrative: ask open-ended questions and allow the witness to tell the story in their own time. Avoid interruption. Note: It may take more than one interview to elicit full evidence. <p>Areas to Cover</p> <ul style="list-style-type: none">• Seek clarifying information to ensure an accurate and complete account having regard to potential offences and modes of liability; the evidence already available; and further evidence required.• Recall that all witnesses may hold information regarding sexual violence. Refer to Manual Annex C and the table at para. 95.• Probe the witness's narrative by asking follow-up questions aimed at clarifying the witness's account of what happened, when it happened, who was present, how the witness recognized or knew them, what was said, who did what, and other details relevant to the witness's account and ability to perceive. <p>During this process</p> <ul style="list-style-type: none">• Empathize with the witness.• Recognize that the subject matter may be difficult or painful to recount but that the witness should not feel embarrassed or ashamed.• Use simple language.

- Stress the need for clear language where required, e.g. to establish penetration.
- Encourage the witness to seek clarification if they do not understand any question.
- Remain alert, and respond to, verbal and non-verbal signs of distress by the witness.
- Remain alert to one's own verbal and non-verbal communication (language; demeanour etc).
- Take frequent breaks; suspend or abandon the interview where necessary.
- Where applicable, clarify any inconsistencies with available past statements.

Statement

- Must be recorded in writing and read back to the witness.
- Ask the witness to amend or modify the statement to ensure its accuracy and completeness
- Emphasize the need for truth and correctness: explain that omissions may be used to discredit the witness at trial.
- Once the witness agrees with the content of the statement, it should be signed and dated in the presence of those present, who should attest to the same.

Medical, Counseling and Related Services

- Wherever possible, counseling should be offered following interview.
- Inform/refer the witness to medical, counseling and other support services available in the local area.

Closing

- Provide the witness with the contact details of the investigator/prosecutors.
- Advise the witness on the likely progress of proceedings, who, when and how contact will be made etc.

ANNEX F: SOURCES AND FURTHER READING

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