

## The Importance of Understanding Sexual Violence in Conflict for Investigation and Prosecution Purposes

Anne-Marie De Brouwer

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### Recommended Citation

De Brouwer, Anne-Marie (2015) "The Importance of Understanding Sexual Violence in Conflict for Investigation and Prosecution Purposes," *Cornell International Law Journal*: Vol. 48 : Iss. 3 , Article 4.  
Available at: <http://scholarship.law.cornell.edu/cilj/vol48/iss3/4>

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# The Importance of Understanding Sexual Violence in Conflict for Investigation and Prosecution Purposes

Anne-Marie de Brouwer†

In many conflicts around the world, sexual violence has been committed against women, men, and children alike. Yet, despite the high occurrence of sexual violence in conflict and its enormous potential to destroy individual lives and communities and societies at large, perpetrators of these crimes have often not been prosecuted. Prosecutions before international criminal tribunals are relatively few, although prosecutions are increasing. On the national level, prosecution of sexual violence is very often even minimal or non-existent. The investigation and prosecution of conflict-related sexual violence, however, has recently received more attention all over the world, in particular through the United Kingdom's Preventing Sexual Violence Initiative. Nevertheless, before we can effectively improve the investigation and prosecution of sexual violence in conflict, we need to understand what we are discussing. This Article discusses some of the least addressed realities surrounding sexual violence in conflict, which are important to examine in order to investigate and prosecute fully the variety of sexual violence on national and international levels. Part I will focus on the variety of sexual violence in conflict, by looking at male sexual violence and female perpetrators of sexual violence. Thereafter, Part II will focus on the reluctance to address sexual violence in conflict and from where this reluctance may be stemming. Finally, Part III will focus on the ways forward in investigating and prosecuting sexual violence in conflict with the varieties, realities, and complexities of sexual violence in conflict in mind.

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## Introduction

In many conflicts around the world, sexual violence has been committed against women, men, and children alike. Reported instances include conflicts that have taken place in Europe during World War I (1914-1918); in Asia and Europe during World War II (1939-1945); Bangladesh (1971); Colombia (1964-today); Cambodia (1975-1979); Uganda (1987-today); Sierra Leone (1991-2001); Bosnia-Herzegovina (1992-1995); Rwanda (1994); Kosovo (1998-1999); Democratic Republic of the Congo (1998-today); Timor-Leste (1999); Liberia (1999-2003); Central African Republic (2002-2003; 2012-today); Sudan (2003-today); Burundi (2004-2007); Syria (2011-today); Iraq (2011-today); and South Sudan (2013-today), to name a few.<sup>1</sup> As a matter of fact, a recent study on armed groups' involvement in conflict-related sexual violence reported a total of 129 active conflicts in the period 1989-2009 alone.<sup>2</sup>

Despite the high occurrence of sexual violence in conflict and its enormous potential to destroy individual lives, communities, and societies at large, perpetrators of these crimes have often not been prosecuted.<sup>3</sup> Prose-

1. See, e.g., THE MEN WHO KILLED ME: RWANDAN SURVIVORS OF SEXUAL VIOLENCE 23-26 (Anne-Marie de Brouwer & Sandra Ka Hon Chu eds., 2009); OLGA AMPARO SANCHEZ ET AL., FIRST SURVEY OF PREVALENCE, SEXUAL VIOLENCE AGAINST WOMEN IN THE CONTEXT OF THE COLOMBIAN ARMED CONFLICT 2001-2009, 7 (2011), <http://www.usofficeoncolombia.org/uploads/application-pdf/2011-03-23-Report-English.pdf>; United Nations, *Central African Republic: Sexual Violence is Constant Threat*, UN Envoy Warns, U.N. NEWS CTR. (Mar. 21, 2014), <http://www.un.org/apps/news/story.asp?NewsID=47408>; United Nations, *'Barbaric' Sexual Violence Perpetrated by Islamic State Militants in Iraq-UN*, U.N. NEWS CTR. (Aug. 13, 2014); Paul Wood, *Islamic State: Yazidi Women Tell of Sex-slavery Trauma*, BBC NEWS (Dec. 22, 2014), <http://www.bbc.com/news/world-middle-east-30573385>; Waakhe Simon Wudu, *Horrific Sexual Violence in South Sudan*, UN Envoy Says, VOICE OF AMERICA (Oct. 27, 2014), <http://www.voanews.com/content/south-sudan-women-children-sexual-violence-united-nations/2482221.html>.

2. Dara Kay Cohen & Ragnhild Nordas, *Sexual Violence in Armed Conflict: Introducing the SVAC Dataset, 1989-2009*, 51 J. OF PEACE RES. 418, 418-19 (2014). The authors looked at intrastate, internationalized internal, and interstate conflicts.

3. See, e.g., ASHLEY DALLMAN, PROSECUTING CONFLICT-RELATED SEXUAL VIOLENCE AT THE INTERNATIONAL CRIMINAL COURT 2 (2009), <http://books.sipri.org/files/insight/SIPRIInsight0901.pdf>.

cutions before international criminal tribunals are relatively few, although the number of prosecutions is increasing.<sup>4</sup> On the national level, prosecution of sexual violence is very often minimal or non-existent.<sup>5</sup> The investigation and prosecution of conflict-related sexual violence, however, has recently received more attention all over the world, in part due to the United Kingdom's Preventing Sexual Violence Initiative.<sup>6</sup> Nevertheless, before we can effectively improve the investigation and prosecution of sexual violence in conflict, we need to understand what we are discussing. This Article examines some of the least addressed realities surrounding sexual violence in conflict, which are important to discuss in order to investigate and prosecute fully the variety of sexual violence on national and international levels. Part I will focus on the variety of sexual violence in conflict by looking at male sexual violence and female perpetrators of sexual violence. Thereafter, Part II will focus on the reluctance to address sexual violence in conflict and from where this reluctance may be stemming. Part III will focus on the ways forward in investigating and prosecuting sexual violence in conflict with the varieties, realities, and complexities of sexual violence in conflict in mind. Finally, Part IV will offer some concluding remarks.

## I. Understanding the Variety of Sexual Violence in Conflict

For a very long time, conflict-related sexual violence crimes were not recognized as independent international crimes constituting genocide, crimes against humanity, or war crimes, and as such were not or were very rarely prosecuted before international criminal tribunals.<sup>7</sup> It took until the 1990s before the statutes of international criminal tribunals explicitly labeled conflict-related forms of sexual violence as international crimes.<sup>8</sup>

4. See *id.* at 2, 6.

5. See, e.g., THE WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION 2 (2014); Eileen Meier, *Prosecuting Sexual Violence Crimes During War and Conflict: New Possibilities for Progress*, 10 INT'L LEGAL THEORY 83, 117-24 (2004).

6. See discussion *infra* Part IV discussing the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict that was a result of a U.K. initiative.

7. See, e.g., Kelly Askin, *Treatment of Sexual Violence in Armed Conflicts: A Historical Perspective and the Way Forward*, in SEXUAL VIOLENCE AS AN INTERNATIONAL CRIME: INTERDISCIPLINARY APPROACHES 19 (Anne-Marie de Brouwer et al. eds., 2013).

8. See, e.g., Updated Statute of the International Tribunal for the Former Yugoslavia art. 5(g), Sept. 2009, [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept\\_09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept_09_en.pdf) (providing that "Rape" is a "Crime[ ] against Humanity"; Statute of the International Tribunal for Rwanda art. 3(g), 4(e), Jan. 31, 2010, [http://www.unict.org/sites/unict.org/files/legal-library/100131\\_Statute\\_en\\_fr\\_0.pdf](http://www.unict.org/sites/unict.org/files/legal-library/100131_Statute_en_fr_0.pdf) (providing that "Rape" is a "Crime[ ] against Humanity" and further providing that "Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault" is a "Violation[ ] of Article 3 common to the Geneva Conventions and of Additional Protocol II) (amended Aug. 14, 2002); Statute of the Special Court for Sierra Leone art. 2(g), 3(e), 5, Aug. 14, 2000, <http://www.rscsl.org/Documents/scsl-statute.pdf> (providing that "Rape, sexual slavery, enforced prostitution, forced pregnancy and other form of sexual violence" are "Crimes against Humanity" and

In the Rome Statute of the permanent International Criminal Court (ICC), sexual violence crimes are now recognized as crimes against humanity and war crimes, and they encompass rape, sexual slavery, enforced prostitution, forced pregnancy, forced sterilization, or any other form of sexual violence of comparable gravity.<sup>9</sup> In addition, persecution against any identifiable group or collectivity on the ground of gender, and the crime of enslavement (which may include trafficking in persons, in particular women and children), are prohibited as crimes against humanity.<sup>10</sup> Although the Rome Statute definition of genocide (which follows verbatim the 1948 Genocide Convention) does not include specific sexual violence crimes amongst its acts, the ICC's guiding Elements of Crimes do recognize that rape and other forms of sexual violence could be prosecuted as such.<sup>11</sup> Notwithstanding this important recognition, most of the time people conceptualize sexual violence crimes as crimes committed by men against women, and they are prosecuted when they fit that model.<sup>12</sup> Research over the past few years indicates, however, that the picture on sexual violence in conflict is far more nuanced than what commentators often have assumed.<sup>13</sup> Therefore, before one can think of judicial or other responses to these crimes, it is important to understand what sexual violence in conflict really entails, which may be different in each and every conflict situation. This Part will therefore set out some of the realities that are least addressed when talking about sexual violence in conflict, with a focus on male victims of sexual violence and female perpetrators of sexual violence.<sup>14</sup>

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further providing that Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault" are "Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II"). Furthermore, Article 5 lists several offenses related to the abuse of girls as crimes under Sierra Leonean Law.

9. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Statute of the International Criminal Court, art. 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi), July 17, 1998, U.N.Doc.A/CONF.183/9.

10. *Id.* at art. 7(1)(h), 7(1)(c). *See id.* art. 7(2)(c), 7(2)(g), 7(3).

11. *See id.* at art. 6 (definition of genocide). *See also* Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, Elements of Crimes part II.B, U.N. Sales No. E.03.V.2 (Sept. 3-10, 2002), which allows for rapes and sexual violence crimes to be prosecuted as such.

12. *See, e.g.,* CHISECHE SALOME MIBENGE, SEX AND INTERNATIONAL TRIBUNALS: THE ERA-SURE OF GENDER FROM THE WAR NARRATIVE (2013); Rosemary Grey & Laura J. Shepherd, "Stop Rape Now?": Masculinity, Responsibility, and Conflict-related Sexual Violence, 16 MEN & MASCULINITIES 115, 115-35 (2012).

13. In addition, although not further discussed in this contribution, the general perception is that these crimes are typically committed in Africa and inevitably in times of conflict; neither are accurate. *See, e.g.,* Dara Kay Cohen et al., *Wartime Sexual Violence: Misconceptions, Implications, and Ways Forward*, in UNITED STATES INSTITUTE OF PEACE SPECIAL REPORT 323, 3 (Feb. 2013), <http://www.usip.org/sites/default/files/resources/SR323.pdf>.

14. There are certainly more topics that could be dealt with here, including the sexual victimization of children (boys and girls) specifically. For further reading on this issue, *see, e.g.,* Michelle G. Grossmann, *Responding to the Most Vulnerable: Child Victims of International Crimes*, in VICTIMOLOGICAL APPROACHES TO INTERNATIONAL CRIMES: AFRICA 353-84 (Rianne Letschert et al. eds., 2011); and Diane Marie Amann, *Children and the*

## A. Male Victims of Sexual Violence

Although for a long time conflict-related sexual violence against women and girls was in the center of virtually exclusive attention, research has indicated that the picture is much more diverse: men and boys fall victim to sexual violence in conflict as well, perpetrated by men and women alike.<sup>15</sup> The forms of sexual violence perpetrated against men and boys, including rape, forced sterilization, forced nudity, forced masturbation, sexual slavery, forced marriage, and genital mutilation, can be extremely brutal.<sup>16</sup> In the Democratic Republic of the Congo (DRC) and Uganda, for instance, cases have been reported in which men were “forced to penetrate holes in banana trees that run with acidic sap, to sit with their genitals over a fire, to drag rocks tied to their penis, to give oral sex to queues of soldiers, [and] to be penetrated with screwdrivers and sticks.”<sup>17</sup> In Rwanda, where most cases of male sexual violence were committed by women,<sup>18</sup> the following has been reported:

Many cases are known of young boys who were beaten into erection in order to make it possible to have sexual intercourse against their will. Examples include cases of boys as young as seven being forced into sexual intercourse with their mothers. In one case the *interahamwe* intended to have the mother transmit HIV/AIDS to her seven year old son since she had just been raped by an HIV/AIDS positive *interahamwe*. One of the torturous cases, though not unique in any one region, concerned mutilating the sexual organs of a man, often husband, and forcing their wives to use the mutilated organs to rape themselves. Such cases included both male and female *interahamwe*. Some were forced to have sexual intercourse with their children, parents, and enemies. They were mutilated, castrated, hanged by their sexual organs and forced into sexual relations with dead animals.<sup>19</sup>

In international criminal tribunals, male sexual violence has been prosecuted, even if most of the tribunal cases relate to sexual violence against women.<sup>20</sup> While the International Criminal Tribunal for the former Yugoslavia (ICTY) prosecuted and convicted several accused of sexual violence

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*First Verdict of the International Criminal Court*, 12 WASH. U. GLOBAL STUD. L. REV. 411 (2014). See generally HELEN BECKMANN-HAMZEI, *THE CHILD IN ICC PROCEEDINGS* (2015).

15. Eric Stener Carlson, *The Hidden Prevalence of Male Sexual Assault During War*, 46 BRITISH J. CRIMINOLOGY 16, 16–18 (2005); R. Charli Carpenter, *Recognizing Gender-Based Violence Against Civilian Men and Boys in Conflict Situations*, 37 SEC. DIALOGUE 83, 83–86, 90–94 (2006); Sandesh Sivakumaran, *Sexual Violence Against Men in Armed Conflict*, 18 EUR. J. INT’L L. 253, 255–59, 275 (2007) [hereinafter Sivakumaran 2007]; Hilmi M. Zawati, *Impunity or Immunity: Wartime Male Rape and Sexual Torture as a Crime against Humanity*, 17 TORTURE Q. J. ON REHABILITATION OF TORTURE VICTIMS & PREVENTION OF TORTURE 27, 34 (2007).

16. See, e.g., Sivakumaran 2007, *supra* note 15, at 254.

17. Will Storr, *The Rape of Men: The Darkest Secret of War*, THE GUARDIAN (July 16, 2011), <http://www.theguardian.com/society/2011/jul/17/the-rape-of-men>.

18. USTA KAITESI, *GENOCIDAL GENDER AND SEXUAL VIOLENCE: THE LEGACY OF THE ICTR, RWANDA’S ORDINARY COURTS AND GACACA COURTS* 166 (2014).

19. Usta Kaitesi & Roelof Haveman, *Prosecution of Genocidal Rape and Sexual Torture before the Gacaca Tribunals in Rwanda*, in *VICTIMOLOGICAL APPROACHES TO INTERNATIONAL CRIMES: AFRICA* 387, 406 (Rianne Letschert et al. eds., 2011).

20. ANNE-MARIE DE BROUWER, *SUPRANATIONAL CRIMINAL PROSECUTION OF SEXUAL VIOLENCE: THE ICC AND THE PRACTICE OF THE ICTY AND THE ICTR* 330–38 (2005).

perpetrated against males, the International Criminal Tribunal for Rwanda (ICTR) saw only one conviction and the Special Court for Sierra Leone none.<sup>21</sup> In the ICC, male sexual violence is currently being charged in the *Bemba Gombo* case (Central African Republic), yet was not included among the facts in the charges of sexual violence, despite seemingly available evidence of male sexual violence in the conflicts.<sup>22</sup>

Like sexual violence against women and girls, sexual violence against men and boys has a long history and a much higher number of incidents than has always been presumed; yet attention to and recognition of this phenomenon is fairly recent.<sup>23</sup> Sexual violence in conflict and other tense situations has been reported in at least twenty-five situations in the last three decades alone with varying forms of intensity—in Argentina, Burundi, Central African Republic, Chechnya, Chile, DRC, East Timor-Indonesia, El Salvador, Greece, Guatemala, Iran, Iraq-Coalition, Iraq-Kuwait, Kenya, Liberia, Northern Ireland, Peru, Rwanda, Sierra Leone, South Africa, Sri Lanka, Sudan, Turkey, Uganda, the former Yugoslavia, and Zimbabwe.<sup>24</sup> Of the few available prevalent studies, the statistics clearly illustrate that the cases of male sexual violence were not isolated cases. For example, in Liberia, 32.6 percent of surveyed male combatants reported being subjected to some form of sexual violence.<sup>25</sup> In a camp in the Sarajevo canton, eighty percent of 5,000 male detainees reported being raped.<sup>26</sup>

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21. Sexual violence against men was examined in, *inter alia*, the *Tadic*, *Češić*, *Mucić*, *Todorović*, and *Simić* cases in front of the ICTY. At the ICTR, sexual violence against a man was examined in the *Niyitegeka* and *Muhimana* cases, dealing with the same incident. For an overview of the cases, see, e.g., Sandesh Sivakumaran, *Prosecuting Sexual Violence against Men and Boys*, in *SEXUAL VIOLENCE AS AN INTERNATIONAL CRIME: INTERDISCIPLINARY APPROACHES* 79, 79–97 (Anne-Marie de Brouwer et al. eds., 2013) [hereinafter Sivakumaran 2013]; DE BROUWER, *supra* note 20; KAITESI, *supra* note 18.

22. Sivakumaran 2013, *supra* note 21, at 95–97; Grey & Shepherd, *supra* note 12, at 126–28. For example, in the *Lubanga* case, male sexual violence was not addressed, while in the *Ntaganda* case, sexual violence charges are included, but in the facts supporting the charges, there is no mention of male sexual violence. See also Parisa Zangeneh, *The Ntaganda Case: Prosecutorial Discretion at the ICC, and the Recognition of Sexual Violence against Males*, INTLAWGRRRLS (Nov. 25, 2014), <http://ilg2.org/2014/11/25/the-ntaganda-case-prosecutorial-discretion-at-the-icc-and-the-recognition-of-sexual-violence-against-males/>. In the *Kenyatta* case before the ICC, male sexual violence was included among the charges, but the charges against Kenyatta have been withdrawn.

23. U.N. Office for the Coordination of Humanitarian Affairs (UN-OCHA), OCHA Policy and Studies Branch, *Use of Sexual Violence in Armed Conflict: Identifying Gaps in Research to Inform More Effective Interventions, The Nature, Scope, and Motivation for Sexual Violence against Men and Boys in Armed Conflict*, (June 26, 2008); Sivakumaran 2013, *supra* note 21, at 95–97.

24. See Lara Stemple, *Male Rape and Human Rights*, 60 HASTINGS L.J. 605, 611–15 (2009).

25. Kirsten Johnson et al., *Association of Combatant Status and Sexual Violence With Health and Mental Health Outcomes in Postconflict Liberia*, 304 J. AM. MED. ASS'N 676, 676 (2008).

26. Zeljka Mudrovic, *Sexual and Gender-Based Violence in Post-Conflict Regions: the Bosnia and Herzegovina Case*, in *THE IMPACT OF ARMED CONFLICT ON WOMEN AND GIRLS: A UNFPA STRATEGY FOR GENDER MAINSTREAMING IN AREAS OF CONFLICT AND RECONSTRUCTION* 64 (2001).

Male sexual violence can be committed for reasons not comparable to sexual violence against women and girls, namely to make people think the victim is homosexual.<sup>27</sup> Sexual violence against men and boys, however, is often carried out for many of the same reasons as it is inflicted upon women and girls (such as humiliating or degrading victims, preventing procreation, and disempowering victims).<sup>28</sup> In addition, not all forms of sexual violence against men and the underlying reasons for it are fully known. For example, in Rwanda, some cases came to light in which men and boys were raped by women who wished to have a Tutsi baby; the baby would then be one of the few remaining Tutsis alive after the genocide, which the women subsequently believed they could sell for a lot of money.<sup>29</sup> Furthermore, forced sex with dead animals exposed sexual violence in Rwanda.<sup>30</sup> According to Kaitesi and Haveman,

[b]estiality is unaccepted and even unimagined in Rwandan society. The genocide apparently allowed the perpetrators to humiliate their victims into doing anything unacceptable in the community. Some middle aged men were in different places laid down nude and forced to have sex with dead animals like dogs and cats specifically killed for that purpose by the perpetrators, while the family members of the victims were forced to watch.<sup>31</sup>

More commonly, a man abducted by rebels in the DRC was raped by eleven men every night for nine consecutive days.<sup>32</sup> He never dared tell his relatives what happened to him as he was too afraid he would no longer be considered a man.<sup>33</sup> In patriarchal societies, gender roles are strictly defined:

In Africa no man is allowed to be vulnerable . . . . You have to be masculine, strong. You should never break down or cry. A man must be a leader and provide for the whole family. When he fails to reach that set standard, society perceives that there is something wrong.<sup>34</sup>

Faustin Kayihura, a Rwandan genocide survivor of sexual violence, said:

I don't know of any other men who experienced sexual violence during the genocide, but I know they wouldn't talk about it if they had. It was a very

27. Sivakumaran 2013, *supra* note 21, at 95-97.

28. *Id.* at 81; Stemple, *supra* note 24, at 614-15.

29. Interview with Beata Mukarubuga, Counselor, Solace Ministries (Jan. 18-19, 2012) (on file with author). Beata Mukarubuga is a counselor at Solace Ministries, a survivor-run organization for Rwandan genocide survivors. Solace Ministries supports genocide survivors, including male genocide survivors of sexual violence.

30. Kaitesi & Haveman, *supra* note 19, at 406.

31. *Id.* at 406.

32. Storr, *supra* note 17 (detailing how the man received support from Makerere University's Refugee Law Project with Dr. Chris Dolan as its director).

33. *Id.* See also KAITESI, *supra* note 18, at 80 ("[S]ocial and cultural beliefs continue to reflect rape and sexual violence as crimes against women committed by men. From that perspective male victims will be much more traumatized if they openly narrate their sexual ordeal, for doing so will attest that they have lost their manliness. The consequence is that most male victims, like some female victims, opt to envelop their experience in secrecy.").

34. Storr, *supra* note 17.



difficult experience, and not all men are brave enough to talk about it. It is considered shameful to be raped by a woman.<sup>35</sup>

According to Beata Mukarubuga, a counselor working with a survivor-run organization in Rwanda that supports genocide survivors, there are three reasons that make it difficult for men who experienced sexual violence during the genocide to open up: “(1) In Rwandan culture, the tears of men flow from the inside, they do not go out; (2) [b]eing raped by a woman as a man, goes beyond a man’s understanding. It humiliates men; and (3) [t]he men feel as if they lost their manhood.”<sup>36</sup> In some societies it regularly happens that once the wives of the men discover that the men have been raped, the women decide to leave their husbands.<sup>37</sup> The women tend to say things like: “So now how am I going to live with him? As what? Is this still a husband? Is it a wife? . . . If he can be raped, who is protecting me?”<sup>38</sup> The silence surrounding these crimes can thus partly be found in the victims’ fear of stigma by family and society, perceived homosexuality (and in some countries where homosexuality is still criminalized, the concomitant fear of prosecution), and emasculation.<sup>39</sup> Underreporting of this crime by male victims is therefore very likely and assumed to be often the case.<sup>40</sup>

## B. Female Perpetrators of Sexual Violence

Like men and boys, women and girls are equally capable of committing atrocious forms of conflict-related sexual violence against men, boys, women, and girls alike. Although sexual violence in conflict was long considered to be committed by men and boys only, in several studies women and girls were identified as the physical perpetrators of conflict-related sexual violence, the co-perpetrators by helping others to inflict sexual violence on the victims, or the ones ordering sexual violence.<sup>41</sup> Conflict areas

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35. De Brouwer & Chu, *supra* note 1, at 91.

36. Interview with Beata Mukarubuga, *supra* note 29.

37. Storr, *supra* note 17.

38. *Id.* See also Jeffrey Gettleman, *Symbol of Unhealed Congo: Male Rape Victims*, N.Y. TIMES (Aug. 4, 2009), <http://www.nytimes.com/2009/08/05/world/africa/05congo.html>.

39. Sandesh Sivakumaran, *Lost in Translation: UN Responses to Sexual Violence against Men and Boys in Situations of Armed Conflict*, 92 INT’L REV. RED CROSS 259, 266 (2010). Other factors outside the reach of male victims of sexual violence themselves, however, also contribute to silencing this crime, and will be discussed in Part II *infra*.

40. *Id.*

41. For examples of descriptions of sexual violence as crimes committed by men and boys, see, e.g., Samuel Totten, *The Plight and Fate of Females During and Following the 1994 Rwandan Genocide*, in *PLIGHT AND FATE OF WOMEN DURING AND FOLLOWING GENOCIDE* 107-35 (Samuel Totten ed., 2009); African Rights, *Rwanda: Broken Bodies, Torn Spirits: Living with Genocide, HIV/AIDS and Rape*, RELIEFWEB (Apr. 15, 2004), <http://www.reliefweb.int/report/rwanda/rwanda-broken-bodies-torn-spirits-living-genocide-rape-and-hivaids>. For examples of works identifying women as perpetrators of sexual violence crimes, see, e.g., Helen Durham & Katie O’Byrne, *The Dialogue of Difference: Gender Perspectives on International Humanitarian Law*, 92 INT’L REV. RED CROSS 31, 37-38, 40-43 (2010); Nicole Hogg, *Women’s Participation in the Rwandan Genocide: Mothers or Monsters?* 92 INT’L REV. RED CROSS 69, 77-83, 89-99 (2010).

where women and girls committed sexual violence include Sierra Leone, DRC, Iraq, Rwanda, Liberia, Haiti, Ivory Coast, and the former Yugoslavia.<sup>42</sup> In a DRC prevalence study, researchers reported that “by simply asking respondents to report the sex of the perpetrator, we found that 40% of the female survivors reported the perpetrator as female, and 15% of the male survivors reported the perpetrator as female”; seventeen percent of the survivors of sexual violence perpetrated by the militia group Mai-Mai named females as the perpetrators.<sup>43</sup> In Rwanda, cases are known in which women aided and abetted perpetrators of sexual violence crimes by delivering women to be raped or by holding them to the ground for others to rape them.<sup>44</sup> A notorious woman convicted by the ICTR for crimes against humanity for, *inter alia*, ordering the rape of Tutsi women is Pauline Nyiramasuhuko, the then-Minister of Family and Women’s Development.<sup>45</sup> As mentioned, women have also been the physical perpetrators of sexual violence. For example, at the age of thirteen, Faustin Kayihura, cited above, was raped by a woman three times a day over the course of three days.<sup>46</sup> In Sierra Leone, women have been known to be involved in gang rapes and rapes performed with the use of bottles and sticks.<sup>47</sup> In the former Yugoslavia, a well-known case involved a female camp commander who took female prisoners to the front lines for soldiers to rape them.<sup>48</sup> In a high profile case before the ICTY, the Serbian politician Biljana Plavsic pleaded guilty to persecution as a crime against humanity, which included sexual assaults and rapes.<sup>49</sup> In Haiti, women have been reported to have committed sexual violence, including gang rape, against other women and members of enemy gangs.<sup>50</sup> Simone Gbagbo, a member of the inner circle of Laurent Gbagbo (her husband and the former President of Ivory Coast),

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42. See, e.g., Dara Cohen, *Female Combatants in Armed Groups: Women and Wartime Rape in the Sierra Leone Civil War*, 65 *WORLD POL.* 383-415 (2013); Alette Smeulders, *Female Perpetrators: Ordinary or Extra-ordinary Women?*, 15 *INT’L CRIM. L. REV.* 207, 220-25 (2015).

43. Lawry et al., *Evidence-Based Documentation of Gender-based Violence, in SEXUAL VIOLENCE AS AN INTERNATIONAL CRIME: INTERDISCIPLINARY APPROACHES* 243, 258 (Anne-Marie de Brouwer et al. eds., 2013). See also Kirsten Johnson et al., *Association of Sexual Violence and Human Rights Violations with Physical and Mental Health in Territories of the Eastern Democratic Republic of the Congo*, 304 *J. AM. MED. ASS’N* 553, 538 (2010).

44. KAITESI, *supra* note 18, at 169 (“Hutu women gave their sons, husbands, Interahamwe and social outcasts Tutsi women to sexually assault”); KAITESI, *supra* note 18, at 166 (“Out of a total of 4,060 current female inmates, 2,230 are genocide indictees serving jail sentences ranging from a few years to life imprisonment and most of these women are first category offenders including those convicted of rape and sexual torture.”); Anne-Marie de Brouwer & Etienne Rubebana, *The Legacy of the Gacaca Courts in Rwanda: Survivors’ Views*, 13 *INT’L CRIM. L. REV.* 937, 949 (2013).

45. See KAITESI, *supra* note 18, at 158-74 (discussing this case extensively).

46. De Brouwer & Chu, *supra* note 1, at 93-94.

47. Cohen, *supra* note 42, at 404.

48. Merima Husejnovic, *Bosnian War’s Wicked Women Get Off Lightly*, *BALKAN INSIGHT* (Feb. 7, 2011), <http://www.balkaninsight.com/en/article/bosnian-war-s-wicked-women-get-off-lightly>.

49. DE BROUWER, *supra* note 20, at 490.

50. Benedetta Faedi Duramy, *From Violence against Women to Women’s Violence in Haiti*, 19 *COLUM. J. OF GENDER & L.* 1029, 1052 (2010).

is wanted by the ICC for crimes against humanity, including rape and other acts of sexual violence, which were allegedly committed during post-electoral violence in Ivory Coast between December 16, 2010 and April 12, 2011.<sup>51</sup> Because of the absence of prevalence studies inquiring about the sex of the perpetrators of sexual violence in conflict (the DRC study cited above being the exception), it remains unclear how extensive the phenomenon of females as perpetrators of sexual violence really is. What is clear, however, is that the number of female perpetrators of sexual violence is much larger than has been generally thought to date.<sup>52</sup> The reason why many more men have been involved in committing international crimes is likely because the main organizations (militarized units) responsible for the physical perpetration of international crimes are still male dominated.<sup>53</sup> The reason why only one percent of all the people convicted by international criminal courts and tribunals are female is because these tribunals focus on those in leadership positions, and the physical executioners and women are underrepresented amongst these two groups.<sup>54</sup> This may change over time.

### C. The Complex Varieties of Conflict-related Sexual Violence

From the previous sections, it can be concluded that, unlike the initial conceptualization of sexual violence during times of conflict as inherently masculine, recent research reveals a more complex picture, severing the essentialist notion that victims of sexual violence during conflict are always women and perpetrators are always men.<sup>55</sup> Although it is still true that women and girls constitute the majority of victims of sexual violence in conflict and that men and boys constitute the majority of perpetrators, sexual violence must always be assessed on the basis of the facts. What matters is that sexual violence, once committed, should be seen, investigated, and prosecuted as the crime that it is. Sexual violence in conflict can be committed in many different ways, for many different reasons, by anyone (women, girls, men, boys) and against anyone (women, girls, men, boys). As argued by Durham and O'Byrne:

A gender perspective on [International Humanitarian Law] provides the capacity to consider different experiences of both women and men in order

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51. Prosecutor v. Simone Gbagbo, ICC-02/11-01/12, Warrant of Arrest, ¶ 7 (Feb. 29, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1344439.pdf>. Ivory Coast refused to hand her over to the ICC and tried her in a domestic court for undermining state security. The trial started in December 2014 and she was sentenced to twenty years in prison in March 2015. See *Ivory Coast Trial of Simone Gbagbo Begins*, BBC NEWS (Dec. 26, 2014), <http://www.bbc.com/news/world-africa-30604755>; *Ivory Coast's former First Lady Simone Gbagbo jailed*, BBC NEWS (Mar. 10, 2015), <http://www.bbc.com/news/world-africa-31809073>.

52. Smeulers, *supra* note 42, at 252.

53. *Id.*

54. *Id.*

55. In feminist literature, it is often argued that rape and sexual violence are weapons of male dominance against women. See, e.g., SUSAN BROWN MILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 5 (1980); Catharine A. MacKinnon, *Reflections on Sex Equality under Law*, 100 YALE L.J. 1281, 1302 (1991).

to break down stereotypes about how men and women ‘should’ operate, and the complex ways in which conflict impacts upon them. This advances the whole cause of gender justice, because it rejects perceptions of women and men that derive from dangerous and sexist assumptions, and are often the root of discrimination, sexual violence and torture.<sup>56</sup>

In addition, Stemple importantly stated that:

ignoring male rape not only neglects men, it also harms women by reinforcing a viewpoint that equates ‘female’ with ‘victim,’ thus hampering our ability to see women as strong and empowered. In the same way, silence about male victims reinforces unhealthy expectations about men and their supposed invulnerability.<sup>57</sup>

As every conflict is different, so is the sexual violence committed when it takes place. Research into sexual violence perpetrated by women, sexual violence committed against men, and sexual violence committed against children is still relatively limited, and more research is needed to establish the extent of these types of sexual violence, the reasons that they happen, and why they are less discussed.<sup>58</sup> Only then will we more fully understand some of the complexities of conflict-related sexual violence and develop ways to prevent it.

## II. The Reluctance to Address Conflict-related Sexual Violence

Conflict-related sexual violence is generally not a topic that is easily discussed by either those who have experienced it, or those who have not. In this Part, I explore the underlying reasons behind why it is so difficult to speak and hear about sexual violence, and explain why it is so important to address this topic.

### A. The Difficulty to Speak and Hear about Sexual Violence

Speaking about conflict-related sexual violence, in and outside legal settings, has generally proven to be a difficult undertaking, foremost for those who experienced such crimes. Many survivors of conflict-related sexual violence suffer from depression, anxiety, post-traumatic stress disorder, low self-esteem, and suicidal thoughts, and speaking about the atrocities brings back painful and traumatic memories.<sup>59</sup> Furthermore, when victims speak in court, the demanding legal structure may require victims to speak before complete strangers in detail about very intimate and pain-

56. Durham & O’Byrne, *supra* note 41, at 52.

57. See Lara Stemple’s statement in Storr, *supra* note 17.

58. KAITESI, *supra* note 18, at 80; Smeulers, *supra* note 42, at 251.

59. On trauma with conflict-related sexual violence survivors, see, e.g., Philipp Kuwert et al., *Long-Term Effects of Conflict-Related Sexual Violence Compared with Non-Sexual War Trauma in Female World War II Survivors: A Matched Pairs Study*, 43 ARCHIVES OF SEXUAL BEHAV. (Mar. 7, 2014), <http://www.researchgate.net/profile/PhilippKuwert/publication/260611225>; Evelyne Josse, ‘They Came With Two Guns’: *The Consequences of Sexual Violence for the Mental Health of Women in Armed Conflicts*, 92 INT’L REV. RED CROSS 177, 183 (2010).

ful experiences.<sup>60</sup> Even more so than for victims of other international crimes, victims of sexual violence may also experience stigmatization, isolation, and rejection from their spouses, families, and communities if they find out what happened to the victim.<sup>61</sup> For victims of sexual violence, this stigmatization may include ridicule; becoming unmarriageable; having children of rape, who moreover become the society's laughingstock; discrimination because of their HIV/AIDS status; and even convictions of adultery, homosexuality, or some other crime.<sup>62</sup> In far too many societies, sexual violence victims are looked down upon as if they did something wrong, thereby placing the guilt and shame on the victim instead of the perpetrator.

It has slowly become clear, however, that not only victims of sexual violence may find it difficult to speak or hear about sexual violence. Others in different capacities (within the legal settings of tribunals or otherwise) and who have had no involvement in sexual violence as such find it similarly difficult to speak or hear about conflict-related sexual violence. For example, during the Nuremberg war crimes trials after World War II, where sexual violence was not prosecuted despite evidence available, a prosecutor—shortly after reporting one or more rapes on three different occasions—simply remarked as follows: “The Tribunal will forgive me if I avoid citing the atrocious details which follow . . . I will not mention any more of the atrocities described in this document,” and “I pass on.”<sup>63</sup> A study which included interviews with court officials of the ICTY and the Bosnian War Crimes Court, revealed that most prosecutors did not like to prosecute sexual violence cases and that some judges also did not particularly like to deal with such cases.<sup>64</sup>

Another example relates to the genocidal sexual violence that took place in Rwanda in 1994.<sup>65</sup> ICTR prosecutors admitted in the *Akayesu* case—where sexual violence was only later introduced as part of the charges against the accused Akayesu (a former mayor) due to the testimony

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60. See DE BROUWER, *supra* note 20, at 231–82 (discussing the aggressive role defense lawyers at times applied when cross-examining victims of sexual violence in court); KAITESI, *supra* note 18, at 171.

61. See, e.g., DE BROUWER, *supra* note 20, at 234 (quoting Marie Immaculée Ingabire, *The Rape of Tutsi Women: A Weapon of the 1994 Genocide*, April 2004 (filed under ICTR-95-1B-T, *Muhimana* case, Apr. 27, 2004)); Sandra Ka Hon Chu et al., *Survivors of Sexual Violence in Conflict: Challenges in Prevention and International Criminal Prosecution*, in *VICTIMOLOGICAL APPROACHES TO INTERNATIONAL CRIMES: AFRICA* 527, 535–39 (Rianne Letschert et al. eds., 2011).

62. Chu, *supra* note 61. For an example of adultery, see Ian Black, *Iman al-Obeidi Faces Criminal Charges over Libya Rape Claim*, THE GUARDIAN (Mar. 29, 2011), <http://www.theguardian.com/world/2011/mar/29/iman-al-obeidi-libya-rape-claim-charges>.

63. Askin, *supra* note 7, at 33.

64. Sara Sharratt, *Voices of Court Members: A Phenomenological Journey—The Prosecution of Rape and Sexual Violence of the ICTY and the BIH*, in *SEXUAL VIOLENCE AS AN INTERNATIONAL CRIME: INTERDISCIPLINARY APPROACHES* 353, 365–67 (Anne-Marie de Brouwer et al. eds., 2013).

65. Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T, Judgment, ¶ 417 (Sept. 2, 1998), <http://www.unict.org/sites/unict.org/files/case-documents/ictr-96-4/trial-judgements/en/980902.pdf>.

of victims of sexual violence in court—that they were not as sensitive as they should have been on the issue of investigating sexual violence.<sup>66</sup> Roméo Dallaire, the former United Nations Assistance Mission for Rwanda (UNAMIR) Force Commander in Rwanda during the genocide, testified as an expert witness before the ICTR on, *inter alia*, the sexual violence he came across.<sup>67</sup> He mentioned that the sexual violence, which he had not witnessed directly himself but which he saw evidenced in the way the corpses were displayed, was one of the most difficult things to witness.<sup>68</sup> Dallaire’s former executive assistant, Major Brent Beardsley, similarly confirmed this in court during a later hearing.<sup>69</sup> Probably because of his difficulty dealing with instances of sexual violence, however, Dallaire was only able to write about sexual violence that he witnessed on one page of his over-five hundred page volume on the genocide in Rwanda:

I don’t know when I began to clearly see the evidence of another crime besides murder among the bodies in the ditches and the mass graves. I know that for a long time I sealed away from my mind all the signs of this crime, instructing myself not to recognize what was there in front of me. The crime was rape, on a scale that deeply affected me . . . . For a long time I completely wiped the death masks of raped and sexually mutilated girls and women from my mind as if what had been done to them was the last thing that would send me over the edge. But if you looked, you could see the evidence, even in the whitened skeletons. The legs bent and apart. A broken bottle, a rough branch, even a knife between them. Where the bodies were fresh, we saw what must have been semen pooled on and near the dead women and girls. There was always a lot of blood. Some male corpses had their genitals cut off, but many women and young girls had their breasts chopped off and their genitals crudely cut apart. They died in a position of total vulnerability, flat on their backs, with their legs bent and knees wide apart. It was the expressions on their dead faces that assaulted me the most, a frieze of shock, pain and humiliation.<sup>70</sup>

The Rwandan government recognized that sexual violence cases would be among the most difficult cases for judges in Rwanda to try and also that they would be potentially very traumatizing for the victims involved.<sup>71</sup> Therefore it was decided in early 2008 that the judges in the local *gacaca*

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66. *Id.* (“The Prosecution stated that evidence previously available was not sufficient to link the Accused to acts of sexual violence and acknowledged that factors to explain this lack of evidence might include the shame that accompanies acts of sexual violence as well as insensitivity in the investigation of sexual violence.”).

67. See Prosecutor v. Théoneste Bagosora, Gratién Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva, ICTR-98-41-T, Examination-in-Chief of General Roméo Dallaire (Jan. 20, 2004).

68. *Id.*

69. Prosecutor v. Théoneste Bagosora, Gratién Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva, ICTR-98-41-T, Examination-in-Chief of Major Brent Beardsley, ¶ 51–52 (Feb. 3, 2004) (“ . . . amongst all of us the hardest thing that we had to deal with was not so much the bodies of people, the murder of people—I know that can sound bad, but that wasn’t as bad to us as the rape and especially the systematic rape and gang rape of children. Massacres kill the body and rape kills the soul. And there was a lot of rape . . . ”).

70. ROMÉO DALLAIRE, *SHAKE HANDS WITH THE DEVIL* 430 (2003).

71. Kaitesi & Haveman, *supra* note 19, at 385.

courts were to receive training—with legal and psychological components—about how to deal with cases of rape and sexual torture that would come before them.<sup>72</sup> Kaitesi, a trainer of trainees who would in their turn train many of the *gacaca* judges in Rwanda, said that hearing the experiences of victims of sexual violence was for both the trainers and trainees “frustrating, emotional and left most of us speechless”; during the trainings there was a “deep pain and fear that rape and sexual narrative gathered.”<sup>73</sup> Indeed, Marie Mukabatsinda, a survivor of sexual violence with first-hand experience in *gacaca*—both as a victim testifying against those who had raped her and as a *gacaca* judge presiding over cases of sexual violence—said, “Especially the cases dealing with sexual violence I found very difficult to deal with.”<sup>74</sup> Moreover, it is interesting to see that memorial centers, history books, and other media (such as movies and documentaries) similarly do not (adequately) memorialize the complexities and scale of sexual violence during the Rwandan genocide against the Tutsi.<sup>75</sup>

## B. Where Does This Reluctance Come From?

First of all, it should be borne in mind that despite the traumatic character of speaking or testifying about sexual violence, there are still many victims of sexual violence who wish to speak about what happened to them or testify in court, the latter with or without protective measures made available to them. In fact, some victims of sexual violence who testify in international tribunals do not wish for confidentiality measures to protect their identity at all because they do not mind others hearing their stories; rather, they want others to know what happened to them.<sup>76</sup> In 1999, Patricia Viseur Sellers, then-ICTY Senior Trial Attorney and Gender Legal Advisor, said, “most [ICTY] witnesses request confidentiality . . . . Meanwhile, some women want to be identified and seen, not only by the defendant but also by the public. ‘What do I have to be ashamed of and why should I hide?’ they might ask.”<sup>77</sup> For instance, Witness 087, a survivor of sexual violence who testified in the ICTY *Kunarac* case stated: “I simply cannot

72. *Id.*

73. KAITESI, *supra* note 18, at 86. Kaitesi also supplies more background information on the *gacaca* courts generally.

74. De Brouwer & Ruvebana, *supra* note 44, at 959.

75. Many movies depicting the Rwandan genocide do not address the sexual violence committed during the genocide. Two notable exceptions are “100 Days” (2001) and “A Sunday in Kigali” (2006). Another exception is “Intended Consequences” (2008), an important documentary by Jonathan Torgovnik focusing on sexual violence committed against women in Rwanda, and the children born as a result. See INTENDED CONSEQUENCES (Mediastorm 2008), <http://mediastorm.com/publication/intended-consequences> (last visited Oct. 15, 2015). See also, Anne-Marie de Brouwer & Sandra Ka Hon Chu, *Gacaca Courts in Rwanda: 18 Years After the Genocide, Is There Justice and Reconciliation for Survivors of Sexual Violence?*, INTLAWGRRRLS (Apr. 7, 2012) [hereinafter *Gacaca Courts in Rwanda*], <http://www.intlawgrrrls.com/2012/04/gacaca-courts-in-rwanda-18-years-after.html>.

76. Sara Sharratt, *Interview with Patricia Viseur-Sellers, Legal Officer on Gender Issues*, in ASSAULT ON THE SOUL: WOMEN IN THE FORMER YUGOSLAVIA 53, 70 (Sara Sharratt & Ellyn Kaschak eds., 1999).

77. *Id.*

think about these things because I was exposed to so much torture. But I'm proud to be here. Let the world know what they did."<sup>78</sup> According to the ICTY, after testimony many (but not all) victims and witnesses of sexual violence felt an incredible sense of relief.<sup>79</sup> As Wendy Lobwein, former Witness Support Officer explained:

[Victims and witnesses of sexual violence] have done what they really believed they couldn't do. And what we've been able to learn as we follow them up is that some keep that feeling of strength. For some, I've had letters, even from their medical practitioners saying it was a 'groundbreaking moment in their life' and that their psychological and physical health has improved with their testimony.<sup>80</sup>

In May 2012, in the ICC *Bemba Gombo* trial, a victim testified about being gang-raped twice by soldiers of the Movement for the Liberation of Congo (MLC).<sup>81</sup> She testified under pseudonym, but in full public view.<sup>82</sup> When asked by her lawyer why she decided to take part in the ICC proceedings, the witness said that it was an opportunity to tell the court and the whole world what she had suffered.<sup>83</sup> She said, "I was treated like an animal, and I cannot live normally. I was a woman with dignity, but I lost my dignity. I suffered inhuman treatment."<sup>84</sup> As a result, she told the court, she had been stigmatized by her community, referred to as a wife of Banyamulenge (Tutsi Congolese) and people sometimes spit on her.<sup>85</sup> Despite all of this, she chose not to keep silent.<sup>86</sup> Other direct victims of sexual violence testified before the ICC about the treatment they received, both in open and closed sessions.<sup>87</sup> In Rwanda, a female survivor of sexual violence of the Rwandan genocide said that the *gacaca* proceedings, while not easy, allowed her to "free her heart" by speaking about what had happened to her.<sup>88</sup> Participating and testifying in *gacaca* brought her a sense of justice and reconciliation; she felt that the *gacaca* procedure had

78. *Reliving the Past*, ICTY, <http://www.icty.org/sid/10608> (last visited Oct. 15, 2015).

79. *Id.*

80. *Id.*

81. Wakabi Wairagala, *Victim Tells Bemba Trial She Was Gang Raped by Congolese Soldiers*, INT'L JUST. MONITOR (May 1, 2012), <http://www.ijmonitor.org/2012/05/victim-tells-bemba-trial-she-was-gang-raped-by-congolese-soldiers/>.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. It should be noted here that at all times the court has an active role in informing the potential victim or witnesses of the confidentiality measures available and possible risks involved when testifying. See ICC R. P. & EVID. 87(1).

87. For summaries of their testimonies, see the Gender Report Cards of the Women's Initiatives for Gender Justice, including WOMEN'S INITIATIVES FOR GENDER JUSTICE, GENDER REPORT ON THE INTERNATIONAL CRIMINAL COURT 2010 165-77 (2010); WOMEN'S INITIATIVES FOR GENDER JUSTICE, GENDER REPORT ON THE INTERNATIONAL CRIMINAL COURT 2011 226-28 (2011); and WOMEN'S INITIATIVES FOR GENDER JUSTICE, GENDER REPORT ON THE INTERNATIONAL CRIMINAL COURT 2014 167-71 (2014).

88. Anne-Marie de Brouwer & Sandra Ka Hon Chu, *Survivor's Views on Gacaca*, INTLAWGRRLS (Apr. 8, 2012), <http://www.intlawgrrls.com/2012/04/survivors-views-on-gacaca.html>.



been effective, that the men who raped her were given the right sentence (namely, life imprisonment) and that she was now even able to reconcile with her attackers.<sup>89</sup> Furthermore, it should be noted that for a number of Rwandan survivors of sexual violence, neighbors knew what had happened to them as the sexual violence was conducted in public view; for some survivors, this meant that they saw no reason to testify in closed session, but rather testify about the sexual violence in public as they had nothing to hide.<sup>90</sup> In the ICTR, many victims of sexual violence have been willing to testify before the court and, in fact, “victims in Rwanda have been more willing to testify than has often been depicted despite the stigma attached.”<sup>91</sup>

The above cited survivors’ time in court provided them—and many other victims of sexual violence who testified before international, national, and local tribunals—a space to tell judges, society, and the world the truth of what happened to them and provided them recognition for the harm committed against them, and therefore a sense of justice.<sup>92</sup> Many victims also saw the opportunity to face their attacker in court as empowering.<sup>93</sup> When done under the right circumstances, testifying in court—and participating in court to express one’s views and concerns—can indeed be an empowering experience for victims of sexual violence.<sup>94</sup> Speaking up

89. *Gacaca Courts in Rwanda*, *supra* note 75.

90. *Id.*

91. KAITESI, *supra* note 18, at 137. The initial claims of ICTR staff that rape victims just did not want to give their testimonies was proven wrong in the early days of the Tribunal’s existence when human rights researchers conducted hundreds of interviews with survivors of sexual violence of the genocide in Rwanda in a sensitive manner where survivors felt comfortable to talk. See Allison Cole, *Myth-Buster: Rwanda Tribunal Judgment Establishes New Prohibitions of Wartime Rape*, INTLAWGRRLS (Apr. 10, 2012), <http://www.intlawgrlls.com/2012/04/myth-buster-rwanda-tribunal-judgment.html>. For the report with interviews, see HUMAN RIGHTS WATCH, *SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH* (1996).

92. See e.g., Marc Groenhuijsen, *Victims Rights and the International Criminal Court: The Model of the Rome Statute and its Operation*, in *CRIMINAL JURISDICTION 100 YEARS AFTER THE 1907 HAGUE PEACE CONFERENCE* 300-09 (2009), for a discussion on the importance of a role for victims in criminal proceedings.

93. See Sharratt, *supra* note 64, at 366; SARA SHARRATT, *GENDER, SHAME AND SEXUAL VIOLENCE: THE VOICES OF WITNESSES AND COURT MEMBERS AT WAR CRIMES TRIBUNALS* 115 (2011).

94. See HUMAN RIGHTS CTR., U.C. BERKELEY SCH. OF L., *BEARING WITNESS AT THE INTERNATIONAL CRIMINAL COURT: AN INTERVIEW SURVEY OF 109 WITNESSES* 6 (2014); Marie-Bénédicte Dembour & Emily Haslam, *Silencing Hearings? Victim-Witnesses at War Crimes Trials*, 15 EUR. J. INT’L L. 151, 151-77 (2004) (discussing how victims of sexual violence are effectively silenced at war crimes trials); *Reliving the Past: the Challenges of Testifying*, ICTY, <http://www.icty.org/sid/10608>. See e.g., KAITESI, *supra* note 18, at 137; Yael Danieli, *Massive Trauma and the Healing Role of Reparative Justice*, in *VICTIMOLOGICAL APPROACHES TO INTERNATIONAL CRIMES: AFRICA* 235, 235-59 (Rianne Letschert et al. eds., 2011); Sharratt, *supra* note 64, at 366; Nicola Henry, *Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence*, 3 INT’L J. TRANSITIONAL JUST. 114-34 (2009) (analyzing the significance of testimony at international war crimes trials and discussing the experiences of victims who choose to give testimonies); *Gacaca Courts In Rwanda*, *supra* note 75. But see Julie Mertus, *Shouting from the Bottom of the Well: The Impact of International Trials for Wartime Rape on*

rightfully contributes to taking away openly the shame and stigma that perpetrators of sexual violence and others so often inflict on the victims.

It should be noted, however, that many survivors of sexual violence may not even end up in court at all.<sup>95</sup> There are a number of reasons for this, including not knowing one's attackers, escape or death of the attackers, or (in the case of international criminal tribunals) a lack of evidence which implicates the senior-level accused standing trial.<sup>96</sup> Survivors of sexual violence, nevertheless, may also wish to share what happened to them and many of them have done so. They can share their experiences in different ways, for example, by giving testimonials but withholding their identifying details in NGO reports,<sup>97</sup> or by doing so in full disclosure in books,<sup>98</sup> or by attending support groups or organizations where survivors have a space to open up among peers and others supportive of them.<sup>99</sup>

The often-heard and unfounded claim that victims of sexual violence simply do not wish to testify<sup>100</sup> is therefore not entirely true. Moreover, such assumptions can rather keep the sexual violence committed in conflict situations under-documented and under-represented in cases before international criminal tribunals. Therefore, one could ask whether the reluctance to discuss and take up cases of sexual violence possibly needs to be found elsewhere. Primo Levi captured the paradox of the need to give voice to unspeakable cruelties in his autobiographical account of the atrocities he endured in Auschwitz.<sup>101</sup> Levi wrote that he had an "urgent impulse" to tell and share his story that motivated him to write a lucid analysis of human cruelty and deprivation. His book, however, mostly fell on deaf ears in Italy upon its initial publication in 1947. Only in the early 1970s was the book widely distributed in Italy.<sup>102</sup> Presumably, there was a strong will to forget the most severe war time cruelties, fuelled by the limited ability of most people to accept feelings of powerlessness that are inevitably elicited by reading reports of incredibly brutal violence humans inflict upon each other. A similar response of avoidance and outright denial was observed upon the release of a 1954 autobiographical account

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*Women's Agency*, 6 INT'L FEMINIST J. POL. 110-28 (2004) (discussing negative reactions from testifying victims of sexual violence before tribunals).

95. Dembour & Haslam, *supra* note 94, at 161-62.

96. See e.g., ICTY R. P. & EVID. 92bis; *Gacaca Courts in Rwanda*, *supra* note 75; Dembour & Haslam, *supra* note 94, at 162, 167; Michelle Jarvis & Elena Martin Salgado, *Future Challenges to Prosecuting Sexual Violence under International Law: Insights from ICTY Practice*, in *SEXUAL VIOLENCE AS AN INTERNATIONAL CRIME: INTERDISCIPLINARY APPROACHES* 101, 101-22 (Anne-Marie de Brouwer et al. eds., 2013).

97. HUMAN RIGHTS WATCH, *supra* note 91, at 42-68, n.66.

98. See e.g., de Brouwer & Chu, *supra* note 1, at 4 (describing the book's premise of interviewing seventeen Rwandan genocide survivors, with fourteen of them displaying identifying photos).

99. See HUMAN RIGHTS WATCH, *supra* note 91, at 71.

100. Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 417 (Sept. 2, 1998), <http://www.unict.org/sites/unict.org/files/case-documents/ictr-96-4/trial-judgements/en/980902.pdf>; Sharratt, *supra* note 64, at 366-67.

101. See generally PRIMO LEVI, *IF THIS IS A MAN* (Stuart Woolf trans., 1959).

102. It took more than ten years before it was translated into German and English in the late 1950s.

of the rape of women in Berlin at the hands of Russian military forces during the final months of World War II.<sup>103</sup> People not only responded with disapproval (“[H]ow could the Germans make any claim to victimization?”), but also blamed the author for her own victimization<sup>104</sup> when she succeeded in shielding herself from worse attacks by sexually submitting to a highly-ranked officer from the occupying forces.<sup>105</sup> Because the author, like most women in Berlin, had managed to cope with her ordeal, she was met with suspicion and the idea that she was not a “real” victim.<sup>106</sup> Confronted with harsh responses to her book, the author vowed to remain anonymous (which the publisher respected), a decision that reflected a context marred by shame, blame, and anger.<sup>107</sup> It took almost fifty years, after the growing recognition of the widespread nature of gender-based violence in conflicts, for the book to be republished in 2003,<sup>108</sup> an event that the author did not live to witness. The stereotypical image of “real” victims is often equated with being weak and helpless.<sup>109</sup> Exceptionally strong and resilient survivors of sexual violence, such as Mukhtar Mai (a Pakistani survivor of gang rape) and Natascha Kampusch (an Austrian woman who was held captive and sexually abused for eight years), often confront ambiguous and even angry reactions from people, as if the survivors are somehow responsible for their experiences of sexual assault.<sup>110</sup>

In response to the question on the reluctance to discuss sexual violence by court officials, Sharratt seems to give a partial answer in one of the few, if not only, empirical studies on this issue (albeit principally focusing on female victims of sexual violence). She claims that interviews with judges, prosecutors, investigators, victims, and witnesses who are unit members of the ICTY and the Bosnian War Crimes Court (BIH) revealed that many of them accept rape myths, hold misogynistic views about women, and feel ambivalent and uncomfortable when dealing with cases of

103. See generally ANONYMOUS, *A WOMAN IN BERLIN* (James Stern trans., 1954).

104. Joseph Kanan, ‘A Woman in Berlin’: My City of Ruins, N.Y. TIMES (Aug. 14, 2005), [www.nytimes.com/2005/08/14/books/review/a-woman-in-berlin-my-city-of-ruins.html?\\_r=1](http://www.nytimes.com/2005/08/14/books/review/a-woman-in-berlin-my-city-of-ruins.html?_r=1).

105. ANONYMOUS, *supra* note 103, at 87, 103, 132–38.

106. Luke Harding, *Row over Rape Author*, THE GUARDIAN (Oct. 4, 2003), [www.theguardian.com/world/2003/oct/05/historybooks.germany](http://www.theguardian.com/world/2003/oct/05/historybooks.germany).

107. Kanan, *supra* note 104.

108. Holger Pötzsch, *Rearticulating the Experience of War in Anonyma: Eine Frau in Berlin*, 30 NORDLIT 15, 15, 17 (2012) (noting also that the movie “Anonyma—Eine Frau in Berlin,” directed by Max Farberböck, was released in 2008).

109. Jan van Dijk, *Free the Victim: A Critique of the Western Conception of Victimhood*, 16 INT’L REV. VICTIMOLOGY 1, 2, 19–21 (2009).

110. *Id.* at 8. See Carolyn L. Hafer and Laurent Begue, *Experimental Research on Just-World Theory: Problems, Developments, and Future Challenges*, 131 PSYCHOL. BULL. 128, 146 (2005). See generally NATASCHA KAMPUSCH, 3096 TAGE (2010); MUKHTAR MAI WITH MARIE-THERÈSE CUNY, IN THE NAME OF HONOUR: A MEMOIR 9–10, 13, 137 (Linda Coverdale trans., 2006). In addition, for these kinds of situations, “psychological distancing” from the victim may possibly be applicable, which is a coping mechanism that may reduce the threat posed by innocent suffering by providing a rationale for dismissing thoughts of the victim (such as “He or she is not like me; therefore, I do not have to concern myself with his or her fate”).

rape and sexual violence.<sup>111</sup> Several prosecutors and judges alike made statements like: “It is so hard to look into [survivors’ or witness’] eyes,” “it is too close” (a male prosecutor referencing men being the perpetrators in many of the sexual violence cases), “I get embarrassed asking questions to rape victims,” “they hardly talk about sex in front of strangers, even when as prosecutors they have to talk to victims,” and “I would prefer only murder cases. I am more sensitive with women who have been raped.”<sup>112</sup> According to Sharratt, the ghost of sexuality, with notions of chastity and purity required of women, permeates the proceedings and judgments.<sup>113</sup> To overcome such attitudes, a mandatory training in gender competence and psycho-social capacity building should therefore be obligatory for all parties involved in the judicial system.

Others have similarly examined the reluctance that results from dealing with conflict-related sexual violence in court. According to Askin, during the Nuremberg trials, “discomfort, prudishness, confusion, or other reason” seemed to be among the reasons not to prosecute sexual violence or to regard these as less important crimes.<sup>114</sup> It seemed that, at the time, the subject of conflict-related sexual violence was considered “too distasteful” by the court officials in charge of prosecuting these crimes.<sup>115</sup> For current international criminal proceedings, however, Askin also makes a similar statement: “sexist attitudes and ignorance surrounding sex crimes continue to be common, alongside harmful stereotypes and archaic practices.”<sup>116</sup> Her comment is substantiated by others who work inside the international tribunals.<sup>117</sup>

Also outside international criminal tribunals, for non-court officials there is a level of reluctance to deal with conflict-related sexual violence. Roméo Dallaire refers to his “mind sealing away” from the crime of sexual violence, being unable to deal with it.<sup>118</sup> Some of the reactions to the book I co-edited, *The Men Who Killed Me: Rwandan Survivors of Sexual Violence*, which features seventeen testimonials of Rwandan genocide survivors, attracted similar reactions;<sup>119</sup> some people simply did not want to read the stories of the seventeen survivors of sexual violence included in the book as they believed it would be a too difficult to face. Kaitesi frames the answer to the reluctance issue as follows: “from speaking with the victims

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111. Sharratt, *supra* note 64. Sharratt interviewed fourteen judges (seven women and seven men) and twelve prosecutors (seven women and six men) in both courts, and most of them were involved in the most prominent sexual violence cases before these courts.

112. *Id.* at 366-67.

113. *Id.*

114. Askin, *supra* note 7, at 33.

115. Sita Balthazar, *Gender Crimes and the International Criminal Tribunals*, 10 GONZ. J. INT’L L. 44 (2006).

116. Askin, *supra* note 7, at 52.

117. Jarvis & Salgado, *supra* note 96, at 101-22. See Maxine Marcus, *Investigation of Crimes of Sexual and Gender-Based Violence Under International Criminal Law*, in *SEXUAL VIOLENCE AS AN INTERNATIONAL CRIME: INTERDISCIPLINARY APPROACHES* 211, 211-42 (Anne-Marie de Brouwer et al. eds., 2013).

118. DALLAIRE, *supra* note 70, at 43.

119. See de Brouwer & Chu, *supra* note 1.

the fear of hearing the worst overshadows us.”<sup>120</sup>

Furthermore, it should be stressed that the problem of sexual violence against men in particular remains hidden, and investigators’ lack of knowledge or discomfort with the issue is a major obstacle for the effective prosecution of these crimes, probably even more so than for cases involving female victims of sexual violence.<sup>121</sup> In the ICTR, there are known cases in which the prosecution asked the witnesses about the sexual violence committed against women specifically, thereby leaving out men in the formulation of their questions completely.<sup>122</sup> The issue of male sexual violence has hardly been given the attention given to female victims of sexual violence.<sup>123</sup> One study states that only three percent of 4,076 NGOs that address conflict-related sexual violence mention sexual violence against men in their materials, and usually only as a passing reference.<sup>124</sup> Those supporting male survivors of sexual violence mention that people often did not want to hear about it, or that they were even silenced by governments, aid agencies, and human rights defenders at the United Nations when presenting their findings on the occurrence of male sexual violence in conflict.<sup>125</sup> Sivakumaran states that although the reasons to give attention to female victims of sexual violence may be understandable—as a focus on male victims of sexual violence may take away the hard-fought time, attention, and resources dedicated to female victims of sexual violence—this approach is no longer tenable and is slowly changing.<sup>126</sup>

In addition, as mentioned before, studies on female perpetrators of international crimes reveal that women have played a much larger role as perpetrators of international crimes than has generally been assumed, and that women, just like men, are capable of committing terrible atrocities like sexual violence.<sup>127</sup> Although women are generally far less involved than men in mass atrocities and are often acting in a supporting capacity, many women have displayed more active roles as leaders and instigators, or even as the physical perpetrators of the crimes.<sup>128</sup> Pauline Nyiramasuhuko is an example of such a female leader who ordered mass rape; yet, in her defense, she—like many other women in a similar position—claimed that

120. KAITESI, *supra* note 18, at 238.

121. Sivakumaran 2013, *supra* note 21, at 81-82.

122. KAITESI, *supra* note 18, at 80.

123. See *id.* at 80; Monica Adhiambo Onyango & Karen Hampanda, *Social Constructions of Masculinity and Male Survivors of Wartime Sexual Violence: An Analytical Review*, 23 INT’L J. SEXUAL HEALTH 237, 237-47 (2011). See, e.g., Sivakumaran 2013, *supra* note 21, at 79-82.

124. Stemple, *supra* note 24, at 612.

125. See the statement of Chris Dolan in Storr, *supra* note 17. In the OCHA-Policy Development and Studies Branch, the concern was expressed that, by studying male sexual violence, attention from sexual violence against women and girls may be diverted. OCHA-Policy Development and Studies Branch, *Use of Sexual Violence in Conflict: Identifying Research Priorities to Inform More Effective Interventions*, 6 (June 26, 2008).

126. Sivakumaran 2013, *supra* note 21, at 82.

127. Smeulers, *supra* note 42.

128. *Id.*

as a mother, she was incapable of saying such things and that she was powerless in a male-dominated government, and thus could not have stopped the genocide.<sup>129</sup> According to Smeulers, characterizing female perpetrators as lacking agency or as mentally disturbed sadists, as has sometimes been done, is an oversimplification:

It is time to accept that many female perpetrators are ordinary women and that ordinary women just like ordinary men can become involved in mass atrocities for a number of reasons (personal or political) and under a number of different circumstances (involving extreme (group) pressure or out of free will) and can be just as ruthless and cruel as ordinary men.<sup>130</sup>

Kaitesi urges that the classical male domination-female subordination discourse insufficiently explains the phenomenon of female perpetrators and states that other power dimensions that may be at stake for women must be analyzed as well, such as ethnic and political ideologies.<sup>131</sup> Indeed, conflict-related sexual violence—committed by women, men, girls, and boys against women, men, girls, and boys—should be seen for what it really is, which can only be judged from the facts at hand, in each and every situation.

### C. Importance of Understanding and Addressing Sexual Violence

Historically, victims of conflict-related sexual violence have been silenced because others have rarely granted victims voice for the unspeakable atrocities they have suffered.<sup>132</sup> This response may be compounded by countertransference dynamics; victims and witnesses describe situations in which bystanders cannot bear to speak about or hear of accounts that evoke a sense of powerlessness, pain, ambivalence, and discomfort. As previously stated, however, there is an emerging shift marked by victims of sexual violence who increasingly speak out against the atrocities committed against them—in and outside of the legal context. For example, survivors of sexual violence of the Rwandan genocide in *The Men Who Killed Me* found that sharing their experiences was very empowering for them.<sup>133</sup> They felt it enabled them to relieve their hearts, to have their experiences and their suffering during the genocide recognized, and to urge others to act to prevent these crimes from ever happening again.<sup>134</sup> In turn, the public is gradually beginning to comprehend the significance of hearing these stories in order to respond effectively to widespread sexual violence, no matter how graphic these stories may be.<sup>135</sup>

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129. KAITESI, *supra* note 18, at 169-70.

130. *Id.* at 170 (“Women play the double-sided coin of using power to commit violent crimes and denying its presence when faced with accountability.”). See Cohen, *supra* note 42; Smeulers, *supra* note 42, at 252.

131. KAITESI, *supra* note 18, at 168.

132. Carolyn Nordstrom, *Rape: Politics and Theory in War and Peace*, 23 *AUSTL. FEMINIST STUD.* 147, 147 (1996).

133. See de Brouwer & Chu, *supra* note 1.

134. *Id.* at 3-5.

135. See generally Edna Erez & Tikva Meroz-Aharoni, *Primary and Secondary Victims and Victimization during Protracted Conflict: National Trauma through Literary Lens in*

Kaitesi adequately describes the importance of giving voice to survivors of sexual violence in the context of the judicial setting:

Even as a trainer [on sexual violence] I wished that I did not have to do this, but the greatest challenge for justice, especially criminal justice and more so transitional justice, is that detailed accounts are required of issues that we are neither prepared to speak about nor to hear. Consequently, those with the power to decide or even help tend to silence victims by not creating mechanisms through which they may receive justice or by silencing them even when they want to have access to such mechanisms because we have socially labeled their experiences as unspeakable or unbearable.<sup>136</sup>

Despite the complexity and difficulty of speaking and hearing testimony of victims of conflict-related sexual violence, it is important to do justice to them and offer them, at a minimum, mechanisms to address the crimes committed against them in accordance with the reality of the crimes committed against them.<sup>137</sup> This will also take away the shame so often left with the victims and put it openly where it belongs: with the perpetrators.

### III. Investigating and Prosecuting Sexual Violence

Since the late 1990s, the successful prosecutions of sexual violence as war crimes, crimes against humanity, and genocide by the ICTY and ICTR opened a new phase of development in this area of international criminal law.<sup>138</sup> Both the ICTY and ICTR, as well as other tribunals, have been applauded for several breakthroughs in international criminal law and procedure related to sexual violence investigation and prosecution.<sup>139</sup> They, however, have also received criticism for inadequate and incoherent investigation and prosecution policies that fail to include charges of sexual violence in the indictments against the accused, dropped charges of sexual violence over the course of proceedings, charges not being representative of the sexual violence committed, and the inability to link the sexual violence crimes to the accused.<sup>140</sup> These failings are partly due to the perception

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*Jerusalem and Kigali*, in VICTIMOLOGICAL APPROACHES TO INTERNATIONAL CRIMES: AFRICA 117, 117-39 (Rianne Letschert et al. eds., 2011); Kimberley A. Ducey, *Dilemmas of Teaching the "Greatest Silence": Rape-as-Genocide in Rwanda, Darfur, and Congo*, 5 GENOCIDE STUD. & PREVENTION: INT'L J. 310, 310-22 (2010).

136. KAITESI, *supra* note 18, at 239.

137. *Id.* at 173-74 (highlighting the complexity of linking the reality of conflict-related sexual violence within the available legal language of the courts). In addition, Kaitesi highlights the importance of the victim's perspective regarding prosecuting the crimes for what they really are, not a lesser or other crime. *See also* DE BROUWER, *supra* note 20, at 377-81; HILMI M. ZAWATI, *SYMBOLIC JUDGEMENTS OR JUDGING SYMBOLS: FAIR LABELLING AND THE DILEMMA OF PROSECUTING GENDER-BASED CRIMES UNDER THE STATUTES OF THE INTERNATIONAL CRIMINAL TRIBUNALS* (2010).

138. LEYLA M. SADAT, *THE LEGACY OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA* 6 (2012).

139. For a more comprehensive overview of the achievements, see Askin, *supra* note 7.

140. *See generally* Amanda Beltz, *Prosecuting Rape in International Criminal Tribunals: The Need to Balance Victim's Rights with the Due Process Rights of the Accused*, 23 ST. JOHN'S J. C.R. & ECON. DEV. 167, 167-209 (2008); Doris Buss, *Rethinking "Rape as a Weapon of War"*, 17 FEMINIST LEGAL STUD. 145, 145-63 (2009); Jarvis & Salgado, *supra* note 96, at 101-22; Binaifer Nowrojee, *"Your Justice is Too Slow": Will the ICTR Fail*

that sexual violence crimes are lesser crimes and a continued tendency to mischaracterize sexual violence crimes as incidental, non-violent crimes.<sup>141</sup> This Part will confront two important issues that must be addressed in order to improve the investigation and prosecution of sexual violence before international tribunals: the gathering of evidence during the investigation phase and the evidence required to link sexual violence to high-level accused.<sup>142</sup>

#### A. Remaining Challenges in the Investigation of Sexual Violence

It is argued that international criminal tribunals investigate sexual violence crimes less than other international crimes.<sup>143</sup> In the ICTY, seventy-eight out of 161 accused individuals (forty-eight percent) had charges of sexual violence included in their indictments;<sup>144</sup> in the ICTR, forty out of eighty-seven indictees (forty-six percent) faced charges of sexual violence;<sup>145</sup> and in the ICC, eighteen out of thirty-one accused individuals (fifty-eight percent) faced charges of sexual violence.<sup>146</sup> Yet acquittals before these tribunals on sexual violence charges are relatively high.<sup>147</sup> As

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*Rwanda's Rape Victims?* (Boston Consortium for Gender, Security and Hum. Rts., Working Paper No. 105, 2003).

141. See e.g., Askin, *supra* note 7, at 52 (“sexist attitudes and ignorance surrounding sex crimes continue to be common, alongside harmful stereotypes and archaic practices”); Jarvis & Salgado, *supra* note 96, at 102-03 (“... Unless we can further dismantle the historical assumptions that tend to pull our thinking in the opposite direction, they will present significant obstacles to successful prosecutions in highly complex cases.”). Jarvis and Salgado note:

In training courses that we have conducted external to the ICTY, the notion that sexual violence can constitute genocide is by far the most discussed aspect of developments in sexual violence prosecutions over the past two decades. Questions range from concerns that prosecuting sexual violence as genocide will water-down the seriousness of genocide to genuine confusion in understanding how sexual violence could meet the elements of genocide. These perceptions confirm the continued tendency to mischaracterize sexual violence as incidental non-violent crimes.

*Id.* at 118. Refer to Part II *supra* for further information.

142. There are certainly more important issues that still need further improvement, such as methods to gather evidence. For further reading on other important issues, see Marcus, *supra* note 117.

143. See e.g., Patricia Viseur-Sellers, *Gender Strategy is Not a Luxury for International Courts*, 17 AM. U. GENDER, SOC. POL'Y & L. 301, 301-25 (2009).

144. In *Numbers*, ICTY, <http://www.icty.org/sid/10586> (statistics as of Feb. 2014). Of these seventy-eight individuals, thirty were convicted, thirteen had their indictments withdrawn or were declared deceased before trial, fourteen were acquitted of sexual violence charges, fourteen are in ongoing proceedings, and six were referred to a national jurisdiction.

145. Linda Bianchi, *The Prosecution of Rape and Sexual Violence: Lessons from Prosecutions at the ICTR*, in *SEXUAL VIOLENCE AS AN INTERNATIONAL CRIME: INTERDISCIPLINARY APPROACHES* 123, 128 (Anne-Marie de Brouwer et al. eds., 2013). Bianchi mentions that of the thirty-three completed cases, twelve accused have been convicted and twenty-two accused have been acquitted. *Id.*

146. Women's Initiatives for Gender Justice, *Gender Report Card on the International Criminal Court 2014* (Dec. 8, 2014), <http://iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2014.pdf>.

147. See generally *id.*



stated by Maxine Marcus, who has more than fourteen years of experience as an international criminal investigator and prosecutor, investigators and prosecutors shy away from sexual violence evidence and therefore these crimes “are under-documented and under-included in cases that are brought before international jurisdictions.”<sup>148</sup> This, she argues, is remarkable in light of the fact that gathering evidence for such crimes does not pose any additional legal burden and need not pose any additional investigative challenge when compared to other international crimes.<sup>149</sup> The key to including sexual violence crimes in indictments requires an investigative plan that includes and is open to evidence of these crimes, includes preparation in advance of the field investigation, and relies on a checklist of elements of crimes to be proven.<sup>150</sup> Furthermore, while gathering evidence, the needs of the survivor must be prioritized to the extent possible. In addition, as mentioned, investigations and prosecutions of male sexual violence have been rare, and when they did take place, were prosecuted under other non-specific sexual violence crimes, such as cruel treatment.<sup>151</sup> It is therefore imperative that investigators are also open to the fact that male sexual violence may have occurred. Additionally, women may be the perpetrators of sexual violence crimes, so inquiries into the sex of the perpetrators are therefore also necessary. It is important to understand that sexual violence can be perpetrated by anyone (men, women, boys, and girls) against anyone (men, women, boys, and girls), which requires all parties concerned to have knowledge of and experience in dealing with crimes of sexual and gender-based violence. According to Marcus, “the investigation and prosecution of crimes of sexual and gender-based violence is crucial to closing the impunity gap.”<sup>152</sup>

#### B. Remaining Challenges in the Prosecution of Sexual Violence: Linking Sexual Violence to High-Level Accused

Another remaining challenge in the prosecution of sexual violence before international criminal tribunals relates to the prosecution of sexual violence in highly complex cases involving high-level officials, and crimes that require linking sexual violence with a broader campaign of crimes. For example, in the ICTY, the bulk of sexual violence cases today include direct perpetrators of sexual violence crimes or others close to the scene of the crime.<sup>153</sup> Prosecuting sexual violence in high-level, complex cases in which the perpetrators are more remote from the crime scene, however, could be done on the basis of respondeat superior and joint criminal enterprise theories. Although convictions based on these liability modes are necessarily complicated, prosecutions are bound to fail in cases of sexual

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148. Marcus, *supra* note 117, at 211.

149. *Id.* at 211-42.

150. *Id.*

151. Sivakumaran 2013, *supra* note 21, at 93.

152. *Id.* at 93.

153. Anne-Marie de Brouwer, Remarks at NIOD/Kriterion, Amsterdam, Sexual Violence and International Justice: How to Move Forward? (Mar. 10, 2013), <http://www.niod.nl/sites/niod.nl/files/Presentation%20Anne-Marie%20de%20Brouwer.pdf>.

violence crimes where prosecutors and investigators mischaracterize sexual violence as non-violent crimes that are incidental to the conflict.<sup>154</sup> The challenge in establishing liability under respondeat superior for sexual violence cases is proving that an accused person at least had reason to know of the risk that his subordinates would commit specifically sexual violence crimes, as opposed to other types of mistreatment. Although establishing a generalized level or risk of the prevalence of sexual violence in conflict is unlikely to be sufficient for establishing liability under respondeat superior, many of the facts in international prosecutions disclose more concrete indicators of the risk of sexual violence crimes, including the detention of women in camps where subordinates have uncontrolled access to them or knowledge that sexual violence recently had been prevalent in a particular conflict zone.<sup>155</sup> Furthermore, sexual violence prosecutions on the basis of joint criminal enterprise (JCE) categories I, II, and III can be improved. Although proving that a crime was a natural and foreseeable consequence of a joint criminal enterprise (category III) is generally considered easier than proving that a crime formed part of the common criminal purpose to which all JCE members subscribed (categories I and II), the ICTY has recognized that sexual violence can constitute part of a common criminal purpose, either at the outset of the joint criminal enterprise or over time.<sup>156</sup>

Yet there are few ICTY cases in which this has occurred.<sup>157</sup> In the case of sexual violence, according to Jarvis and Salgado:

[T]here is a particular risk of failing to appreciate how [sexual violence crimes] fit within an over-arching campaign of crimes due to the historical assumptions outlined above [referring to seeing sexual violence as personal in nature and separate from the main activity of conflict]. Investigators and prosecutors will likely have to dedicate extra attention to locate relevant witnesses and ask the right questions to uncover the extent to which sexual violence crimes fall within the broader pattern of crimes attributable to JCE members.<sup>158</sup>

In the ICTR, prosecutions based on command responsibility and joint criminal enterprise theory for sexual violence crimes have been very difficult and rare but in the ICTR's more recent prosecutions, prosecutors have been putting more emphasis on putting rapes *within* the context of the genocide to help the judges accept that the rapes were within the sphere of the genocidal campaign, and not outside.<sup>159</sup>

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154. Jarvis & Salgado, *supra* note 96, at 103, 122.

155. *Id.* at 108–11.

156. *Id.* at 112–13.

157. *Id.* (discussing the limited ICTY case law containing “positive signals regarding the prosecution of sexual violence as part of a common criminal purpose”).

158. *Id.* at 113.

159. Bianchi, *supra* note 145, at 134–36. In the *Karempera* case, the only judgment on JCE so far, the tribunal held responsible under JCE III two accused—a former Minister of the Interior and the President of the governing political party—for rapes which the accused did not personally commit but instead oversaw during the 1994 genocide. See also Susana SáCouto, *Prosecuting Sexual Violence before International Tribunals: The ICTR's Karempera Judgment*, INTLAWGRRLS (May 17, 2012, 7:00 AM), <http://www.intlawgrrls.com/2012/05/prosecuting-sexual-violence-before.html>.

#### IV. Final Remarks

Despite the drawbacks in the investigation and prosecution of sexual violence before international criminal tribunals due to unfortunate misunderstandings related to sexual violence crimes, the tribunals have made great strides and efforts to acknowledge the difficulties in investigating and prosecuting sexual violence.<sup>160</sup> This has resulted in, amongst other things, a number of manuals that help guide the tribunals and future courts with the investigation and prosecution of sexual violence crimes. For example, at the ICTR, in light of the seemingly low conviction rate for sexual violence crimes compared to the high conviction rate for other crimes, the Prosecutor of the ICTR in 2007 set up a Committee for the Review of the Investigation and Prosecution of Sexual Violence.<sup>161</sup> The work of this committee resulted in a Best Practices Manual on the investigation and prosecution of sexual violence,<sup>162</sup> with a final version of the Manual released in January 2014.<sup>163</sup> The Manual extensively provides recommendations on how to improve the investigation and prosecution of sexual violence.<sup>164</sup> It refers to other innovative ways of dealing with witness testimony that can be considered, such as using more written statements of victims or witnesses of sexual violence in lieu of oral testimony and testimonies of other eyewitnesses on their knowledge of sexual violence.<sup>165</sup> Furthermore, the role of management is very important, that is, to have a clear and comprehensive global strategy to address sexual violence crimes, and to communicate this strategy to the entire office from the outset. In addition, the lack of understanding, know-how, and training among investigators to elicit the necessary evidence that would support a conviction for sexual violence—such as understanding how the evidence relates to the elements of a crime and applicable modes of liability—is an ongoing concern. Cultural aspects of the region in question and of the victims, conducting several interviews with victims and approaching them with the necessary level of respect and care, as well as a better coordination between the investigators and prosecutors on the evidence required to fulfill the legal requirements, are all important factors to including successful sexual

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160. See e.g., Muna Ndulo, *The United Nations Responses to the Sexual Abuse and Exploitation of Women and Girls by Peacekeepers during Peacekeeping Missions*, 27 *BERKELEY J. INT'L L.* 127, 133 (2009) (underlining that “great strides were made with the ICTY and the ICTR in developing the law regarding violence against women in conflicts”).

161. Bianchi, *supra* note 145, at 129–34.

162. Office of the Prosecutor of the ICTR, *Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Situations of Armed Conflict: Lessons from the International Criminal Tribunal for Rwanda* (2008), [http://www.lexglobal.org/files/](http://www.lexglobal.org/files/Renifa%20Madenga-ICTR%20Practice%20Manual.pdf)

163. Office of the Prosecutor of the ICTR, *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* (2014) [hereinafter *Best Practices Manual 2014*], <http://www.unict.org/sites/unict.org/files/publications/ICTR-Prosecution-of-Sexual-Violence.pdf>.

164. *Id.*

165. Also minimizing the number of victims to establish certain facts could be considered. See *id.* at 59; Dembour & Haslam, *supra* note 94, at 151–77.

violence charges within a given indictment. The Manual also highlights that diverse investigative teams, composed of male and female members of different ages and nationalities or regional backgrounds, provide the greatest flexibility in reaching out to and soliciting cooperation from victims and witnesses. Importantly, the Manual underscores that when interviewing a witness, investigators must refrain from making any assumptions about sexual violence.<sup>166</sup> For instance, investigators should not assume that, because a witness is young, old, disabled, or male, the witness has not experienced sexual violence.<sup>167</sup>

At the ICTY, a similar project is currently ongoing in order to evaluate the ICTY's accomplishments; study lessons learned; and also expose "ongoing obstacles in the prosecution of sexual violence crimes, such as inconsistent approaches during investigations and prosecutions, the tendency to mischaracterize gender crimes as 'incidental,' and the challenges of linking sexual violence crimes to senior officials."<sup>168</sup> Finally and importantly, the ICC in 2014 issued a Policy Paper on Sexual and Gender-Based Crimes in which the ICC recognized the challenges and obstacles to effective investigation and prosecution of sexual and gender-based crimes, and elevated the issue to one of its key strategic goals in its Strategic Plan 2012–2015.<sup>169</sup> The Policy Paper makes clear that a "gender perspective" must be applied in the investigation and prosecution of sexual violence, and that sexual violence against men and boys will not be overlooked in the ICC's future indictments and strategy.<sup>170</sup> These developments coupled with other global initiatives are very promising—a key initiative is the development of an International Protocol on the Documentation and Investigation of Sexual Violence in Conflict which aims to support national and international investigations of sexual violence,<sup>171</sup> as well as the (slight increase in) national prosecutions of sexual violence in several countries where conflict-related sexual violence was committed.<sup>172</sup> It is therefore

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166. Best Practices Manual 2014, *supra* note 163, ¶ 134.

167. *Id.* ¶ 187. For further reading on how to improve the investigation and prosecution of sexual violence before international criminal tribunals, see e.g., Viseur-Sellers, *supra* note 143, at 322–25; Susana SáCouto & Katherine Cleary, *The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court*, 17 AM. U. J. GENDER SOC. POLICY & L. 339, 357 (2009); Kim Thuy Seelinger et al., *The Investigation and Prosecution of Sexual Violence* 22–29, 37–40 (Univ. of Cal. Berkeley Hum. Rts. Ctr. Working Paper, 2011), <http://www.usip.org/sites/default/files/missing-peace/seelinger-the-investigation.pdf>.

168. Office of the Prosecutor, Int'l Crim. Trib. for the former Yugoslavia, *Prosecuting Sexual Violence Legacy Project*, 3 (2015).

169. Office of the Prosecutor, Int'l Crim. Ct., *Policy Paper on Sexual and Gender-Based Crimes*, ¶ 5 (2014).

170. *Id.* ¶¶ 16, 20, 27, 28.

171. See generally FOREIGN & COMMONWEALTH OFFICE, INTERNATIONAL PROTOCOL ON THE DOCUMENTATION AND INVESTIGATION OF SEXUAL VIOLENCE IN CONFLICT: BASIC STANDARDS OF BEST PRACTICE ON THE DOCUMENTATION OF SEXUAL VIOLENCE AS A CRIME UNDER INTERNATIONAL LAW (2014) (UK).

172. For DRC and gender mobile courts, see e.g., Askin, *supra* note 7, at 54; *UN envoys welcome conviction of Congolese army officer for crimes against humanity*, U.N. NEWS CTR. (Dec. 16, 2014), [www.un.org/apps/news/story.asp?NewsID=49620](http://www.un.org/apps/news/story.asp?NewsID=49620). For

important to keep the momentum alive, to make sure that understandings of conflict-related sexual violence are in conformity with the reality of the crimes, and that signs of reluctance to deal with conflict-related sexual violence are countered. Only then can sexual violence crimes be adequately included in the investigation and prosecution before national and international criminal tribunals.

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Rwanda and the prosecution of some 7,000 cases of sexual violence, see KAITESI, *supra* note 18, at 82.