

*"The investigation and presentation of evidence relating to sexual violence is in the interest of justice." (Prosecutor v. Akayesu, Judgement, Case No. ICTR-96-4-T, T. Ch. I, 2 Sep. 1998, para. 417)*

1. The goal of this conference has repeatedly been stated to be closing the impunity gap and ensuring greater accountability for international crimes. There has been talk of how prosecuting these crimes will help to deter the commission of such crimes in future. We want to highlight that the dialogue between international and national prosecutors must include specialized consideration of crimes of sexual violence as the investigation and prosecution of these crimes present additional and particular concerns and obstacles which make what are already challenging prosecutions that much more difficult.

2. We emphasize the need for the prosecution of these crimes as a key component to stopping the global violence against women. Rape and sexual violence must be punished and be seen to be punished, if the cycle of sexual violence and other forms of violence is to be halted.

3. The Security Council has very recently emphasised the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls.<sup>1</sup> The Security Council passed Resolution 1820 earlier this year, where all Member States are required to comply with their obligations for prosecuting persons responsible for such acts, to ensure that all victims of sexual violence, particularly women and girls, have equal protection under the law and equal access to justice, recognizing that:

Women and girls are particularly targeted by the use of sexual violence, including as a tactic of war to humiliate, dominate, instil fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group<sup>2</sup>;

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<sup>1</sup> S/RES/1820 (2008), 19 June 2008, para. 11.

<sup>2</sup> *Ibid.*, page 1.

4. The importance of ending impunity for acts of sexual violence was stressed as part of a comprehensive approach towards seeking sustainable peace, justice, truth and national reconciliation.<sup>3</sup>

5. Indeed, the pervasiveness of sexual violence and rape as means of committing genocide and as crimes against humanity and war crimes during the Rwandan conflict of 1994 is well-documented.<sup>4</sup>

6. It has been estimated that between 250,000 and 500,000 women were raped during the Rwandan genocide.<sup>5</sup> This is a staggering estimate, that is reflected in the report by the United Nations Special Rapporteur that “rape was the rule and its absence the exception.”<sup>6</sup>

7. There can be no question that crimes of sexual violence were used as weapons of conflict on a vast scale during the genocide in Rwanda, as has been true of nearly every armed conflict throughout history. However, while such crimes have been commonplace, they have rarely been punished, which is a trend that should be reversed, and which is why we want to raise these issues specifically in this conference, particularly as national prosecutions take on a greater role in the fight against impunity.

8. Looking at the record of the ICTR, while sexual violence was unquestionably widespread during the Rwandan genocide, the success rate for prosecutions of such allegations, and the sentencing for convictions of such violence have been varied, due to numerous factors which make these types of prosecutions particularly challenging.

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<sup>3</sup> *Ibid.*

<sup>4</sup> See *Report of the Special Rapporteur on the situation of Human Rights in Rwanda*, E/CN.4/1996/68,29 January 1996, paras. 16-24, in *The United Nations and Rwanda 1993-1996*, Department of Public Information, United Nations (New York, 1996), Document 167.

<sup>5</sup> Alex Obote-Odora, “Rape and Sexual Violence in International Law: ICTR Contribution”, *NEW ENG.J. INT’L & COMP. L.* 131, Vol. 12:1, p.137, *citing* Rhonda Copelon, “Surfacing Gender: Reengraving Crimes against Women in Humanitarian Law” in N. Dombrowski (ed.), *Women and War in the Twentieth Century: Enlisted with or without her Consent* (1999).

<sup>6</sup> See *Report of the Special Rapporteur on the situation of Human Rights in Rwanda*, E/CN.4/1996/68,29 January 1996, paras. 16-24, in *The United Nations and Rwanda 1993-1996*, Department of Public Information, United Nations (New York, 1996), Document 167.

9. At the ICTR:

- out of a total of 87 indictees, 36 of them have been charged with rape and other sexual violence crimes;
- 23 of these 36 cases involving charges of rape have not yet been fully adjudicated;
- There has been a charge of rape involved in the indictments of 13 completed cases;
- Of these 13 completed cases, 4 accused have been convicted of rape or sexual violence as either an act of genocide, CAH or war crime;
- 9 Accused have been acquitted of rape or charges of sexual violence.<sup>7</sup>

10. Due to the seemingly low rate of conviction for crimes of sexual violence, particularly in light of the successful conviction rate for other crimes within the Tribunal's jurisdiction, the Prosecutor put in place a Committee for the Review of the Investigation and Prosecution of Sexual Violence in June 2007. Both Renifa and myself have been members of this Committee from its inception.

11. The committee's mandate was to look into all of the cases of the ICTR, since the beginning, as well as the experiences of the Office of the Prosecutor, to identify the successes and failures of the office, and the reasons attributable to these successes and failures. The committee has submitted two separate reports to the Prosecutor on the past experiences of the OTP and is now in the third phase of the mandate, working on implementing strategies and procedures for the on-going and future prosecution of sexual violence crimes.

12. To this end, the Committee submitted a Best Practices Manual on the Investigation and Prosecution of Sexual Violence crimes to the Prosecutor, which has

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<sup>7</sup> Refer to the ICTR-OTP Synopsis on charging and convictions for rape, June 2008.

been adopted by the Prosecutor. This Best Practices Manual has been distributed as part of the package materials for this conference.

13. I will just highlight a few of the more salient points arising from the Committee's work and which have formed the basis of the Best Practices Manual in order to give you a brief overview of the lessons learned and to assist you in understanding the recommendations found therein.

*a) Investigations*

14. Crimes of a sexually violent nature have seemingly been overlooked in favor of prosecuting other crimes. This has been attributed to many factors, including to the perceived unwillingness of rape victims to talk to investigators, difficulties collecting evidence, as well as a general lack of understanding among prosecutors and investigators as to how sexual violence can be successfully investigated and prosecuted in the context of an armed conflict. Since the prosecution of international crimes in general are so complex there seems to be a general tendency to try to "simplify" the charges and focus on other crimes, such as murder, rather than include crimes of sexual violence, which are sometimes seen as complicating matters.

15. However, if done properly, investigating crimes of sexual violence need not be overly burdensome or difficult. Investigations for crimes committed in conflicts such as occurred in Rwanda, should focus from the beginning on rape and sexual violence alongside the other crimes.

16. A prosecution approach must be established *at the outset* to ensure that sexual violence crimes are comprehensively integrated into the investigations and prosecution strategy for the overall office.

17. The Committee found that one of the reasons that the Prosecutor may have had a low conviction rate was, not because of the lack of the evidence, but more because of the lack of experience in how to properly elicit the necessary evidence that would support a conviction.

18. One issue we learned was that investigators and trial lawyers must work closely together to build a case based on a strategy that was designed through their joint input.

19. One of the most important issues that arose from the Committee's review was that the quality of the evidence elicited is dependent first and foremost on the manner of the conduct of the investigations and the interviewing of the witnesses. Proper evidence can only come from the necessary time and energy being spent with the witnesses. In Rwandan society, sexual violence crimes carry strong stigmas and there is a powerful taboo against speaking about these crimes. As such, victims must be approached in a very delicate, culturally-sensitive manner. This is true for all victims but even more so for victims of sexual violence. For example, we have found that it often takes several interviews and meetings with a victim before she feels safe enough to open up about her experiences. Prosecutors and investigators must be alive to this issue and approach these victims with the appropriate and necessary level of respect and care in order to be able to even elicit the evidence in the first place.

20. Rwandan women have also expressed in general a greater willingness to talk with other women. Due to cultural factors, these women have great difficulty in relaying their experiences to men, so, often, they will not tell of their experiences at all. Also, from a cultural standpoint, women who have suffered these crimes often talk around the event, such as using special phrases as "he made me sit down" or "he married me" to indicate they were raped. It is important to be aware that these women find it difficult to name the crime as such. If these cultural issues are not understood, the evidence will not be elicited and the crimes overlooked.

21. Given the unique circumstances surrounding the handling of victims of sexual violence, the Committee recommended the creation of a specialised unit to investigate and handle victims of rape and sexual violence.

22. A specialised unit would help ensure that the necessary evidence is garnered while maintaining the appropriate care and safety of the victims. The specialized unit is envisaged as consisting of lawyers, investigators, doctors, nurses, counsellors, interpreters and witness assistants, who would have undergone specialised training on

how to handle the victims. It should be kept in mind that while many victims expressed a greater willingness and comfort level to engage with other women, men should be included in the Unit and involved in the work to the extent possible in each circumstance. In creating a specialized unit, it would also have the added benefit of the witnesses having familiar and consistent faces that they are comfortable with and reduce the number of people the witness would have to encounter in the course of giving their evidence.

23. Many more consideration must be had, particularly with respect to the care and well-being of witnesses but this is further elaborated upon in the Best Practices Manual and in the additional Best Practices Manual that is being prepared specifically on the issue of the Care and Protection of Witnesses.

***b) Other Means of Eliciting Evidence***

24. We have found that even when the Office succeeded in eliciting the evidence, there were challenges in bringing this evidence into the courtroom in a way that would meet the stringent requirements of the rules of evidence and procedure and yet protect and care for these victims. Due to the extreme sensitivity of eliciting and obtaining this type of evidence, and the detrimental impact and re-traumatization providing such evidence often has on a victim, thought should be had as to alternative methods by which to bring evidence of sexual violence into the courtroom. A variety of sources have been used at the ICTR, not just rape victim testimonies.

25. Depending on the circumstances of the case, evidence could be brought forward through Judicial Notice provisions, that is, using adjudicated facts as found in other cases.

26. Also, as was done in the Military I case here, the evidence of rapes and sexual violence crimes can be elicited through witnesses who are not necessarily victims themselves, particularly in light of supporting a charge that the rapes were widespread or systematic. In that case, almost every witness called by the Prosecution was asked to relate what they saw with respect to the occurrence of sexual violence crimes.

27. Also, consideration could be given to using statements where appropriate instead of *viva voce* evidence. For example, in the *Karemera* case, the written statements of 16 rape victims were admitted into evidence under Rule 92*bis* of the ICTR Rules of Procedure and Evidence. The team also brought in evidence of rape through adjudicated facts from previous trials.

28. In 2003, the OTP undertook to document the occurrence of crimes of sexual violence throughout Rwanda for use in its prosecutions. The OTP collected 405 statements from rape victims, eye-witnesses to rape and other corroborative witnesses. These testimonies—referred to as the OTP Rape Database—represent a sample of a larger number of rape statements collected by the OTP.

29. The database also includes:

- Ms. Binaifer Noworjee’s independent research and report on rape;
- U.N Reports, such as those of special rapporteurs (e.g. Degni Segui) describing the widespread and systematic phenomenon of rape during the 1994 events in Rwanda; and,
- Evidence on rape from completed trials, such as *Akayesu*, *Musema*, *Media*, *Gacumbitsi*, *Muhimana* and *Semanza*. The evidence in those cases includes findings on the occurrence of rape, as well as on stereotyping of Tutsi women as part of demonization of the Tutsi ethnic group, which arguably prepared the ground for the rape and sexual violence targeting Tutsis (e.g. the *Media case*).

30. Therefore, in any prosecution related to Rwanda, the practitioner should be aware of the ‘rape database’. This database should be available for use in national prosecutions and would be accessible through the mechanisms discussed at length yesterday. However, it must be noted that issues of witness protection are raised in using this database and there is a need and requirement to protect these witnesses who gave evidence to the ICTR.

31. As has been discussed repeatedly, cooperation with NGOs has proved to be very useful and beneficial. I note 2 NGOs in this respect, AVEGA and IBUKA whom we

have worked with and who I would encourage national prosecuting authorities to work with in identifying and locating potential witnesses.

32. Prosecution counsel should also, whenever possible, bring evidence from expert witnesses and medical professionals such as physicians, physicians' assistants, psychologists, psychiatrists, clinical social workers, psychiatric nurses, and other mental health professionals such as counselors, researchers, and college professors with expertise in the dynamics of sexual assault crimes and the impact of sexual assault victimization. Such testimony can be used in the following ways:

- a) to assist a Court in better understanding and evaluating the evidence presented by factual witnesses to demonstrate that the victim's behavior is consistent with that of someone who has been sexually assaulted and thus bolster witness testimony; and,
- b) medical professionals such as physicians can be called to enhance evidence on the “mental harm” and “bodily harm” aspects of the crime of rape as Genocide. Expert testimony can help to establish a proper record on the impact of sexual assault victimization and the long term physical and mental effects.

c) ***Legal Framework***

33. I will turn now to the legal framework for the prosecution of these crimes. Any national jurisdiction must at the outset be aware of what sexual violence related charges are available to it under international law. Rape as a crime against humanity and as a war crime should always be considered where appropriate. Instances of sexual violence have been charged as a crime against humanity under the clauses criminalizing torture, rape, persecutions on political, racial and religious grounds, and other inhumane acts. Such cases where convictions were entered on these bases are: *Akayesu*, *Semanza*, *Niyitegeka*, *Gacumbitsi*, and *Muhimana*.

34. Also, crimes of sexual violence, can be prosecuted pursuant to Article 3 Common to the Geneva Convention and of Additional Protocol II as a war crime. Here, sexual violence may be charged under section (a) violence to life, health, and physical or mental

well-being of persons...cruel treatment such as torture, mutilation, or any form of corporal punishment and section and (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault. Such cases where convictions were entered on these bases are: *Semanza* (on appeal).

35. However, potentially the most significant application of international law to crimes of sexual violence is the doctrine of rape as an act of genocide under Article 2 of the ICTR Statute.

36. The *Akayesu* case provided the breakthrough interpretation that rape and sexual violence can constitute genocide, in much the same way as other acts. The only caveat, similar to other acts, is that such rapes and other sexual violence must be committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such.<sup>8</sup> The Trial Chamber thus recognised that rape and other sexual violence can cause the infliction of serious bodily and mental harm to the victims, thus constituting genocide.<sup>9</sup> In this case, it was found that the rapes and other sexual violence were committed only against *Tutsi* women, resulting in their physical and psychological destruction, their families and communities and leading to the destruction of the *Tutsi* group as a whole.<sup>10</sup> The other cases thus far to follow this line have been *Gacumbitsi* and *Muhimana*.

On another note, the OTP has fought a long battle with respect to the constituent elements of the crime of rape. Starting with the *Akayesu* case, the case law of the International Tribunals has twisted and turned in relation specifically to the element of non-consent and the prosecutor's burden of how to prove the existence of non-consent.

37. The *Gacumbitsi Appeals* Chamber on 7 July 2006, clarified the law such that the Prosecution does, in fact, bear the burden of proving non-consent and knowledge of non-consent beyond reasonable doubt.<sup>11</sup> However, very importantly, the Appeals Chamber held that the Prosecution may prove non-consent by proving the existence of coercive

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<sup>8</sup> *Akayesu* (TC), para. 731.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*, para. 153.

circumstances under which meaningful consent is not possible.<sup>12</sup> It is not necessary for the Prosecution to either introduce evidence on the words and conduct of the victim or her relationship with the perpetrator, or introduce evidence on force.<sup>13</sup> The Trial Chamber is instead free to consider all relevant evidence, and infer non-consent from background circumstances such as an ongoing genocide campaign or the detention of the victim.<sup>14</sup> Similarly, knowledge of non-consent on the part of an accused may be proved, if the Prosecution establishes beyond reasonable doubt that the accused is aware, or had reason to be aware, of the coercive circumstances that undermined the possibility of genuine consent.<sup>15</sup>

38. Following this progressive approach to prosecuting rape, it is absolutely not required to question any victim of sexual assault or rape whether, or not, she consented to the sexual activity. Such questions would serve to re-traumatize the victim and would likely be quite offensive to a victim who underwent such brutal treatment in these coercive circumstances. According to this standard, the Prosecution need only establish the existence of coercive circumstances which vitiates the possibility of meaningful consent. The Appeals Chamber acknowledged that genocide, crimes against humanity and war crimes in general and conditions of detention constitute coercive circumstances.

39. In conclusion, the investigation and prosecution of sexual violence crimes warrants particular attention and special care in order to combat impunity for these crimes. We are happy to maintain a dialogue with all of you in this respect and welcome you to contact us in any regard if we can be of assistance to you.

40. I will now turn the matter over to my colleague Renifa Madenga to offer further thoughts and to briefly conclude our presentation.

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<sup>12</sup> *Ibid*, para. 155.

<sup>13</sup> *Ibid*, para. 155.

<sup>14</sup> *Ibid*, para. 155.

<sup>15</sup> *Ibid*, para. 157.