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**THE INVESTIGATION AND PROSECUTION OF  
SEXUAL VIOLENCE**

**Sexual Violence & Accountability Project  
Working Paper Series**

**By**

**Kim Thuy Seelinger  
Helene Silverberg  
Robin Mejia**

The Human Rights Center investigates war crimes and other serious violations of human rights and international humanitarian law. Our empirical studies recommend specific policy measures to hold perpetrators accountable, protect vulnerable populations, and help rebuild war-torn societies.

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**A Working Paper of the Sexual Violence & Accountability Project  
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## **ABSTRACT**

Despite the increasing acceptance of sexual violence as a crime under both national and international law, many victims still encounter great difficulty obtaining justice. This paper explores specific challenges that can arise in the investigation and prosecution of sexual violence, as well as promising responses to these challenges. It reviews the barriers that deter victims from bringing sexual violence cases, the obstacles to coherent and gender-sensitive investigation and prosecution of sexual violence-based crimes, and the challenges—especially for victims—of ensuring successful trials. Ultimately, the outcome of these prosecutions can have legal, historical, psychosocial and security implications that reach well beyond those victims who testify.

This paper is part of a Working Paper Series published by the Sexual Violence and Accountability Project, at the Human Rights Center, University of California, Berkeley Law School. Along with three other Working Papers, it was drafted in preparation for the “Sexual Offences Act Implementation Workshop” to be hosted by the Human Rights Center in Kenya, in May 2011. It will be presented to the cross-sectoral stakeholders tasked with responding to sexual and gender-based violence in Kenya, with a view to introducing key issues arising in the investigation and prosecution of sex crimes in both “domestic” and “international” contexts. We welcome your feedback, which can be sent to [ktseelinger@berkeley.edu](mailto:ktseelinger@berkeley.edu).



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## I. INTRODUCTION

Sexual violence occurs all over the world. A form of gender-based violence,<sup>1</sup> sexual violence has been defined as “any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic a person’s sexuality, using coercion, threats of harm or physical force, by any person regardless of relationship to the victim, in any setting, including but not limited to home and work.”<sup>2</sup> It takes myriad forms – for example, sexual assault, rape, forced marriage, genital mutilation, sexual slavery or trafficking. It can happen in a bedroom, alleyway or war zone. And, though the vast majority of victims are women, men and boys can also be victims, and women can be perpetrators.<sup>3</sup>

In this paper, we review the many challenges of prosecuting crimes of sexual violence, describing those challenges at each stage of the “life-cycle” of a sexual violence case.<sup>4</sup> Although the creation of the International Criminal Court (ICC) has greatly increased the international community’s ability to prosecute sexual violence, national courts remain the principal site for rendering individuals accountable. The experience of the ICC and other international tribunals

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<sup>1</sup> Gender-based violence has been defined as “any harm that is perpetrated against a person’s will, and that results from power inequities that are based on gender roles.” Reproductive Health Response in Conflict (RHRC) Consortium, *Gender-based Violence Tools Manual* (New York: RHRC Consortium, 2003): 9.

<sup>2</sup> Inter-Agency Standing Committee. *Guidelines for Gender-based Violence Interventions in Humanitarian Settings: Focusing on Prevention of and Response to Sexual Violence in Emergencies* (Geneva: Inter-Agency Standing Committee, 2005.)

<sup>3</sup> For studies finding male victimization and/or female perpetration of sexual violence, see, *inter alia*, 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,” *Journal of the American Medical Association* 304, no. 5 (2010): 553-562; Jill Keesbury and Ian Askew, *Comprehensive responses to gender based violence in low-resource settings: Lessons learned from implementation* (Lusaka, Zambia: Population Council, 2010). For additional discussion of the issues and implications of male victimization, see Dustin A. Lewis, “Unrecognized Victims: Sexual Violence Against Men in Conflict Settings Under International Law,” *Wisconsin International Law Journal* 27, no. 1 (2009): 1-49; Sandesh Sivakurmaran, “Lost in Translation: UN Responses to Sexual Violence Against Men and Boys in Situations of Armed Conflict,” *International Review of the Red Cross* 92, no. 877 (2010): 259-277.

<sup>4</sup> In many parts of the world, victims of sexual violence pursue relief through local or traditional justice mechanisms that operate independently of the formal judicial system. For example, mediation and arbitration by a clan’s “council of elders” provide a type of informal dispute resolution for Kenyans who either do not have access to the formal justice system or who prefer to resolve disputes through traditional, community-based means. For more discussion of the role of informal justice mechanisms in redressing sexual violence claims, see Julie Freccero et al., *Community Approaches to Sexual Violence* (Berkeley: Human Rights Center, 2011), another paper in this series.

provides key lessons in how these cases should be prosecuted, and we draw on them extensively in this paper. However, our ultimate goal is to highlight some promising practices for the effective prosecution of sexual violence crimes in national courts.

National courts have long been the primary fora for the prosecution of sexual violence.<sup>5</sup> Until recently, the chief exception was the International Military Tribunal for the Far East (Tokyo Tribunal), created in 1946 by General Douglas MacArthur to try the leaders of Japan following World War II. Like the Charter of the International Military Tribunal at Nuremberg, the charter of the Tokyo Tribunal contained no specific reference to rape or sexual violence. Nevertheless, the Tribunal tried several Japanese leaders for mass sexual violence and other crimes committed by Japanese troops, including the sexual atrocities that are collectively known as the Rape of Nanking.<sup>6</sup> Once the Tokyo Tribunal completed its work in 1948, however, no prosecutions before international tribunals occurred again until the 1990s. During the intervening period, national courts once more became the primary fora for prosecuting sexual violence.

In the early 1990s, the United Nations Security Council created two ad hoc international tribunals to prosecute international crimes<sup>7</sup>—including mass sexual violence—committed in Yugoslavia and Rwanda. The International Criminal Tribunal for the former Yugoslavia (Yugoslavia Tribunal) and the International Criminal Tribunal for Rwanda (Rwanda Tribunal) became unprecedented sources of institutional and jurisprudential innovation in the prosecution of sexual violence.<sup>8</sup> Their statutes expressly recognized for the first time that rape could amount

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<sup>5</sup> This is because rape and other forms of sexual violence were recognized as crimes under national law long before they were so recognized in multilateral treaty-based international law. For example, see Clare McGlynn and Vanessa E. Munro (eds.), *Rethinking Rape Law: International and Comparative Perspectives* (New York: Routledge, 2010), Pt. III; Elizabeth Barad and Elisa Slattery, *Gender-Based Violence Laws in Sub-Saharan Africa*. Report prepared for the Committee on African Affairs of the New York City Bar Association (2007).

<sup>6</sup> Yuma Totani, *The Tokyo War Crimes Trials: The Pursuit of Justice in the Wake of World War II* (Cambridge: Harvard University Press, 2008).

<sup>7</sup> Throughout our paper, we differentiate between two categories of sexual violence crimes: “international sex crimes” and “domestic crimes of sexual violence.” The term international sex crimes refers specifically to forms of sexual violence that can amount to an international crime, that is, can be charged as genocide, crimes against humanity, or war crimes. The term domestic crimes of sexual violence refers to all other forms of sexual violence, such as marital rape, sexual harassment and incest. We recognize that these terms are not without ambiguity. For example, as we emphasize below, international sex crimes can now be prosecuted in the domestic courts of many countries. Nonetheless, we have adopted these terms for the sake of consistency in this paper and because they are the terms used in the literature in this field.

<sup>8</sup> The scholarly literature on sexual violence prosecutions at these tribunals is vast. For example, see Catherine MacKinnon, *Are Women Human? And Other International Dialogues* (Cambridge: Harvard University Press, 2006); Beth Van Schaack, “Obstacles on the Road to Gender Justice:

to a war crime or crime against humanity,<sup>9</sup> and the pioneering judgment in the Rwanda Tribunal's *Akayesu* case recognized that rape and other forms of sexual violence could amount to genocide.<sup>10</sup> The tribunals also applied the theories of command (or superior) responsibility and common purpose liability to sexual violence for the first time, confirming that defendants who were not the physical perpetrators could be held liable for sexual violence committed by a subordinate or associate.<sup>11</sup> Finally, the tribunals elaborated new rules, procedures, and institutions to support victims of sexual violence, including new protective measures for victims who testified at trial and a specific unit devoted to the needs of victims. Many of these innovations were later incorporated into the Rome Statute, the multilateral treaty that established the ICC in 2002.<sup>12</sup>

Significantly, the creation of the ICC has not displaced national courts as the primary venue for the prosecution of sexual violence, for at least three reasons. First, under the Rome Statute's principle of complementarity, each state party to the statute remains responsible for investigating and prosecuting serious international crimes committed on its territory or by its nationals. The ICC is a court of last resort; it may only step in where national courts cannot or will not do so.<sup>13</sup> Second, even when the ICC decides to intervene, effective investigation and prosecution at the national level remains essential. In practice, the ICC is only able to prosecute the handful of individuals bearing the most responsibility for the international crimes committed. Prosecution of the lower level, and more numerous, perpetrators necessarily falls to national authorities. Third, and equally important, many crimes of sexual violence—such as marital rape,

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The International Criminal Tribunal for Rwanda As Object Lesson," *American University Journal of Gender, Social Policy and the Law* 17 (2009): 361-406.

<sup>9</sup> Specifically, the Statute of the Yugoslavia Tribunal recognized rape as a crime against humanity. Statute of the International Criminal Tribunal for the Former Yugoslavia, Art. 5. The Statute of the Rwanda Tribunal recognized rape as a crime against humanity and both rape and enforced prostitution as war crimes. Statute of the International Criminal Tribunal for Rwanda, Arts. 3-4.

<sup>10</sup> *Prosecutor v. Jean-Paul Akayesu*, Trial Chamber Judgment, International Criminal Tribunal for Rwanda, ICTR-96-4-T, 731 (Sept. 2, 1998).

<sup>11</sup> *Prosecutor v. Delalic*, Trial Chamber Judgment, International Criminal Tribunal for the Former Yugoslavia, IT-96-21-T (Nov. 16, 1998).

<sup>12</sup> Rome Statute of the International Criminal Court, adopted July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002 (entered into force July 1, 2002) ("Rome Statute"). Available at <http://untreaty.un.org/cod/icc/statute/romefra.htm>.

<sup>13</sup> Article 1 of the Rome Statute states that the ICC "shall be complementary to national criminal jurisdictions." To give effect to this principle, the ICC may only exercise jurisdiction where a state is "unwilling or unable" to genuinely carry out the prosecution of an international crime within the Court's jurisdiction. Rome Statute, Art. 17. For a discussion of the principle of complementarity in relationship to the Democratic Republic of Congo, Uganda, and Kenya, see Open Society Justice Initiative, *Putting Complementarity into Practice: Domestic Justice for International Crimes in DRC, Uganda, and Kenya* (New York: Open Society Foundation, 2011).

domestic violence, sexual harassment, trafficking, gang rape and incest—fall outside the ICC’s jurisdiction. The ICC’s jurisdiction is expressly limited to war crimes, crimes against humanity, genocide and crimes of aggression.<sup>14</sup>

By contrast, many national courts may now exercise jurisdiction over the full range of crimes of sexual violence. Many countries have used national legislation implementing their obligations under the Rome Statute to also grant their domestic courts jurisdiction over international crimes. For example, Kenya’s International Crimes Act, enacted in 2008 to ensure Kenya’s cooperation with the ICC, confers on Kenyan courts jurisdiction over acts of genocide, war crimes and crimes against humanity committed in Kenya.<sup>15</sup> The Act does not define these international crimes, but instead refers to the Rome Statute.<sup>16</sup> Consequently, mass rape, sexual slavery, enforced prostitution and other forms of sexual violence that have been recognized as international crimes can now be prosecuted in Kenyan courts. Many, though not all, states parties to the Rome Statute have incorporated international sex crimes into their national law in the same manner.<sup>17</sup> Consequently, the ICC has not replaced national courts; rather, domestication of the Rome Statute has helped to expand the sexual violence crimes that can be prosecuted in them.

The significance of national prosecutions has also increased recently due to the reform of national sexual violence laws in many countries. Notably, in the last decade, several sub-Saharan African states have modernized their domestic penal codes to better reflect new international norms against sexual violence. For example, Kenya’s Sexual Offenses Act of 2006 redefined rape to include both males and females as possible victims and perpetrators and recognizes that coercive contexts implicitly suggest a lack of consent. The Act also added new offenses: gang rape, sodomy, trafficking for sexual exploitation, and child pornography can now be prosecuted in the Kenyan courts.<sup>18</sup> The Democratic Republic of the Congo, Burundi, Namibia, Lesotho, and South Africa have also recently reformed their domestic penal codes to reflect new definitions of rape and other forms of sexual violence and to add new sex-related offences.<sup>19</sup>

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<sup>14</sup> Rome Statute, Art. 5 (“Crimes within the jurisdiction of the Court”).

<sup>15</sup> Such crimes can also be prosecuted in Kenyan courts when committed outside Kenya if either the perpetrators or the victims are Kenyan. International Crimes Act (2008), § 8.

<sup>16</sup> *Ibid.*, § 6.

<sup>17</sup> A list of countries that have enacted national legislation implementing the Rome Statute may be found at <http://www.legal-tools.org/en/access-to-the-tools/national-implementing-legislation-database>.

<sup>18</sup> Kenya Sexual Offenses Act (2006).

<sup>19</sup> Barad and Slattery, *Gender-Based Violence Laws in Sub-Saharan Africa*: Pts. 4-5; Karen Stefiszyn, *A Brief Overview of Recent Developments in Sexual Offences Legislation in Southern Africa: Expert Paper prepared for Expert Group Meeting on Good Practices in Legislation on Violence against Women*, U.N. Doc. EGM/GPLVAW/2008/EP.04 (May 12, 2008).

These developments have by no means ensured that all crimes relating to sexual violence will be prosecuted effectively in national courts. Significant practical challenges remain. For example, though Kenya's 2006 Sexual Offences Act provides a clarified definition of, and enhanced sentencing for, rape, women's rights groups believe that 95% of rapes still go unreported. Prosecution rates under the Kenyan Act are astonishingly low, with only a few known convictions.<sup>20</sup> One obstacle to the successful prosecution of these cases is the difficulty presenting sufficient evidence. Aside from lack of police capacity to collect and preserve physical evidence of rape, additional problems occur due to the requirement that medical evidence of rape (i.e., examination, report, and in-court testimony) come from a "police doctor." This can pose significant challenges – particularly since there is only one "police doctor" in all of Nairobi. The few cases that do proceed to court often risk being dismissed due to the "police doctor's" failure to appear on the stand.<sup>21</sup>

In the Democratic Republic of the Congo, where another relatively progressive and far-reaching sexual offences law was passed in 2006, rates of sexual violence remain high (e.g., 17,500 reported rapes in 2009 alone) while rates of actual prosecutions under the law remain low.<sup>22</sup> In Burundi, despite strong criminal penalties, sex offence cases drop off precipitously along the path to conviction. For example, a local NGO reported that 60 percent of persons accused of rape in 2010 were arrested, but only 30 percent of these were eventually prosecuted.<sup>23</sup>

Prosecutions of international sex crimes in national courts have confronted similar challenges. A study of sexual violence prosecutions at the War Crimes Chamber of Bosnia-Herzegovina found a wide range of problems.<sup>24</sup> The crimes recognized in the national penal

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<sup>20</sup> Discussions of Kim Thuy Seelinger with lawyers from the Federation of Women Lawyers – Kenya, Coalition on Violence Against Women, and International Justice Mission (Nairobi, Kenya), October 2010.

<sup>21</sup> United States Department of State Bureau of Democracy, Human Rights, and Labor, *2010 Country Report on Human Rights Practices: Kenya*, accessed April 21, 2011, <http://www.state.gov/g/drl/rls/hrrpt/2010/af/154352.htm>; Carol Ajema et al., "Challenges experienced by service providers in the delivery of medico-legal services to survivors of sexual violence in Kenya," *Journal of Forensic and Legal Medicine* (in press, 2011), doi:10.1016/j.j\_m.2011.02.004.

<sup>22</sup> United States Department of State Bureau of Democracy, Human Rights, and Labor, *2010 Country Report on Human Rights Practices: Democratic Republic of the Congo*, accessed April 21, 2011, <http://www.state.gov/g/drl/rls/hrrpt/2010/af/154340.htm>.

<sup>23</sup> United States Department of State Bureau of Democracy, Human Rights, and Labor, *2010 Country Report on Human Rights Practices: Burundi*, accessed April 21, 2011 <http://www.state.gov/g/drl/rls/hrrpt/2010/af/154334.htm>.

<sup>24</sup> Gabriela Mischkowski and Gorana Mlinarevic, "and that it does not happen to anyone anywhere in the world": *The Trouble with Rape Trials—Views of Witnesses, Prosecutors and*

code were too limited to permit prosecution of the full range of sexual violence offenses. Evidentiary rules did not address issues specific to sexual violence cases such as whether corroboration of victims' testimony was required, and protection and security measures for victims were inadequate. Prosecutors often failed to articulate and pursue a consistent strategy concerning sexual violence crimes. Finally, both judges and prosecutors were often ill-prepared to deal with victims of sexual violence; consequently, victims reported that they felt treated disrespectfully. In short, while the statutory and jurisprudential framework for prosecuting sexual violence has dramatically improved in recent years, significant challenges remain.

This paper addresses the challenges faced in the investigation and prosecution of sexual violence crimes in national courts. It begins with a brief discussion of the conceptual differences between international sex crimes and domestic crimes of sexual violence. Though this paper focuses primarily on the challenges these crimes share, their differences can sometimes affect investigation and prosecution strategies. The paper then explores the central challenges at each stage of the "life-cycle" of a sexual violence case: (1) the pre-investigation stage, when victims must decide if, and how, they will seek accountability for the crime committed against them; (2) the investigation and prosecution phase, when investigators must explore the often intimate factual aspects of an assault and prosecutors must formulate a coherent and gender-sensitive strategy to prove the charged offenses; (3) the trial phase, during which victims are called on to revisit painful memories, often in front of skeptical judges, harassing defense attorneys and the perpetrator of the crime; and, finally, (4) the post-trial phase, when courts must determine appropriate sentences and review appeals. At each phase of this "life-cycle," the paper considers both the distinct challenges that arise during sexual violence prosecutions as well as some programs and practices that have been (and could be) used to address them.

## **II. FORMS OF SEXUAL VIOLENCE: IMPLICATIONS FOR NATIONAL PROSECUTIONS**

Sexual violence takes many forms, including rape, sexual slavery, or forced pregnancy, as well as defilement, sexual harassment, sexual assault, incest and trafficking.<sup>25</sup> Sexual violence also varies by scale and context. For example, rape can be committed by an intimate partner within the family or by a colleague or supervisor at work. Rape can also occur on a vast scale

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*Judges on Prosecuting Sexualised Violence during the War in the Former Yugoslavia* (Cologne: medica mondiale e.V., 2009).

<sup>25</sup> Some of the many forms of sexual violence can be seen by reviewing the different crimes identified in, for example, the Rome Statute of the International Criminal Court and Kenya's Sexual Offenses Act.

involving thousands of victims, with perpetrators operating in organizational forms as different as state armies, para-military groups, local police units or youth gangs.<sup>26</sup> Finally, sexual violence can take place during peacetime, during periods of social or political unrest (such as during election periods, as observed in Zimbabwe, Haiti, or Kenya), or during times of extreme, organized collective violence, as happened in the Balkans and Rwanda in the early 1990s.

The form, scale and context of sexual violence fundamentally shapes how it is legally conceptualized and prosecuted in national courts. Because of their link to large-scale violence, international crimes (war crimes, crimes against humanity, and genocide) are generally used to prosecute mass sexual violence;<sup>27</sup> domestic charges of sexual violence are used most often to prosecute “peacetime” or threshold forms of sexual violence such as marital rape, incest or sexual harassment. Significantly, as discussed above, both international sex crimes and domestic crimes of sexual violence can be prosecuted in national courts, assuming the national penal code has been amended to recognize war crimes, crimes against humanity and genocide. From the point of view of prosecutors assembling their cases for prosecution of these crimes in national court, however, international sex crimes and domestic crimes of sexual violence differ in several respects. Among them are:

(1) Legal requirements: In domestic crimes of sexual violence, such as marital rape, sexual harassment or incest, the prosecutor must prove only that the charged act(s) of sexual violence occurred, and the direct perpetrator’s intent to commit it. In cases of mass sexual violence charged as an international sex crime, however, the prosecutor must prove that the charged acts of sexual violence occurred, but—in *addition*—must link those acts to a particular *context*. That is, the act(s) of sexual violence must be shown to have been committed against a particular group with an intent to destroy it (if charged as genocide), in a widespread or

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<sup>26</sup> On the role of local police units and youth gangs in mass sexual violence, see Kenya National Commission on Human Rights, *On the Brink of the Precipice: A Human Rights Account of Kenya’s Post-2007 Election Violence* (Final Report) (Nairobi: Kenya National Commission on Human Rights 2008): 5; on the role of state militaries in mass sexual violence, see Human Rights Watch, *Soldiers Who Rape, Commanders Who Condone: Sexual Violence and Military Reform in the Democratic Republic of Congo* (New York: 2009).

<sup>27</sup> It should be noted that the legal definition of genocide does not appear to require a link to large-scale violence; acts are made “genocidal” not by being large in number but by their intent to destroy the targeted group. Convention on the Prevention and Punishment of the Crime of Genocide (entered into force December 9, 1948), Art. 2 (“genocide means any of the [enumerated] acts committed with the intent to destroy, in whole or in part” a protected group). Historically, however, genocide prosecutions have been reserved for periods of mass violence, and most commentators conclude that an act committed against a single individual would not constitute genocide. See Steven Ratner, Jason Abrams and James Bischoff, *Accountability for Human Rights Atrocities in International Law* 3<sup>rd</sup> ed. (New York: Oxford University Press, 2009): 41.

systematic manner (if charged as a crime against humanity) or during an armed conflict (if charged as a war crime).<sup>28</sup>

(2) The nature of criminal responsibility: The defendant in a case concerning a domestic crime of sexual violence is usually the physical perpetrator of the sexual act. In cases involving international sex crimes, by contrast, the defendant is frequently *not* the individual who physically committed the act of sexual violence. More often, the defendant is a leader or other influential figure who organized or encouraged the sexual violence, or held some position of authority over the physical perpetrator(s) and did not prevent or punish the act. Where the defendant did not physically commit the act(s) of sexual violence at issue in the case, the prosecution must link him to those acts through other forms of legal responsibility such as aiding and abetting, joint criminal enterprise or command/superior responsibility.<sup>29</sup>

(3) The social significance of sexual violence: every act of sexual violence inflicts significant harm on the victim and his or her family. However, acts of sexual violence amounting to an international sex crime also inflict great harm on entire communities. International sex crimes are most often committed during periods of mass violence involving large numbers of a country's citizens, and they are often committed against particular groups, even if they are not committed with the intention to destroy them.<sup>30</sup> Because of both their scale and the group-based nature of the violence, international sex crimes create enduring, communal scars that can undermine long-term national stability.

These different legal requirements, forms of responsibility, and social significance create important practical differences at each stage of the life-cycle of a sexual violence case. International and domestic cases involve different forms of evidence, require different investigation and prosecution strategies, and call for somewhat different protective measures for victims. This paper focuses on challenges common to prosecuting all forms of sexual violence. However, we highlight the most significant differences between prosecuting international sex crimes and domestic crimes of sexual violence in each of the following sections.

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<sup>28</sup> It is for this reason that pattern evidence is essential to the prosecution of international crimes. See Xabier Agirre Aranburu, "Sexual Violence beyond Reasonable Doubt: Using Pattern Evidence and Analysis for International Cases," *Leiden Journal of International Law* 23 (2010): 609–627.

<sup>29</sup> Patricia Viseur Sellers, "Individual(s') Liability for Collective Sexual Violence," in *Gender and Human Rights*, ed. Karen Knop (Oxford: Oxford University Press, 2004).

<sup>30</sup> For example, the Kenyan National Commission on Human Rights found that much of the 2007 post-election violence, including the sexual violence, was targeted at particular ethnic groups as punishment for their perceived political affiliation. See Kenya National Commission on Human Rights, *On the Brink of the Precipice*: 41.

## ANATOMY OF A CRIMINAL CASE IN DOMESTIC COURTS

In both civil and common law systems, the investigation and prosecution of a crime roughly progresses according to the following basic stages<sup>31</sup>:

### **1. Entry of the case into the formal legal system**

This happens when the crime is reported to the police, usually by the victim.

### **2. Investigation of the facts**

In a common law system, police investigators and, later, prosecutors interview witnesses and collect evidence. Similarly, in a civil law system, a government official (who could be a judge) collects and examines evidence in order to determine whether sufficient evidence exists to charge the accused.

### **3. Preparation of the case**

In a common law system, prosecutors examine the facts of the case and the evidence collected. They may continue to work with police investigators at this stage. If they believe they have enough evidence, they decide what charges to file. They then determine the legal strategies they believe have the best chance of success and prepare for trial. The civil law context provides for an examination period as well – however, it is a judge who reviews the record and decides whether to proceed to trial. During this time, the judge may question the accused person as well as any witnesses. The record evolves and is fully accessible to all parties to the case.

### **4. The trial or the entry of a plea agreement**

In a common law context, the case then goes to trial, with presentation of evidence and legal argument relating to the guilt or innocence of the defendant. Or, in some jurisdictions, the defendant has the option of entering into an agreement to plead to a specific charge or charges, usually in exchange for the prosecutors' agreement to support a specific sentencing recommendation.

In civil law systems, the “trial” period is slightly different in that the record has already been established in the earlier “examination” stage. The trial thus serves as an occasion to present the full case to the trial judge and to deliver oral argument.

### **5. Judgment, Sentencing, and Appeal**

If the defendant pleads guilty or is found guilty at trial, the judge delivers a sentence. The judge may have wide discretion in imposing a sentence or may be restricted by the law. For example, a conviction for certain crimes may require a judge to deliver at least a specified “minimum sentence.”

*These steps can overlap, and the order is not absolute. For example, police might hear about a crime from other sources and seek out victims. However, all steps must be followed for the successful completion of a case. Conversely, a case can fall out of the system at any step.*

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<sup>31</sup> We note that the distinction between civil law and common law systems is rapidly disintegrating in many ways. Acknowledging the increasing emergence of “hybrid” systems, we outline traditional differences between the two systems here.

### III. PHASE ONE: ENTERING THE JUSTICE SYSTEM

Providing redress for sexual offences is a tremendous challenge; even during times of relative peace, such cases are heavily underreported and underprosecuted. For example, in 2002, the Federation of Women Lawyers in Kenya surveyed women seeking care in antenatal clinics and emergency rooms who had experienced gender-based violence. Fifty-six percent of the women had never reported the violence to anyone.<sup>32</sup> Unfortunately, these numbers are not unusual. A World Health Organization (WHO) study in 10 countries found that 55 percent of women who experience gender-based abuse never report it to legal officials or anyone in a position of authority.<sup>33</sup> In the United States, it is even lower - only 15 per cent of female rape victims report their attacks.<sup>34</sup>

#### A. Challenges

Victims of sexual violence can face myriad obstacles to reporting an assault. In much of the world, women are viewed as keepers of the family virtue and female modesty is enshrined in law or tradition. A woman may suffer if she reports a crime: she may lose status in her community or her husband may leave her. She may even be killed. Where female sexuality itself is taboo, women may not be able to discuss sexual crimes with male authorities. Too often, women view violence, including sexual violence, as a fact of life. Under these circumstances women sometimes elect, or are pressured by their families or communities, not to report sexual violence to authorities.<sup>35</sup>

For victims living in small or remote villages, physical access to the legal system may be difficult, as well. If a victim does not live near a police station or courthouse, the travel required to report a crime (as well as seek medical treatment) can be a significant obstacle. She may not have access to transportation, and, if she has children, she is likely responsible for their care during the day. She may not even know where to go.

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<sup>32</sup> Kenya Institute of Economic Affairs, *Status of Gender Desks at Police Stations in Kenya: A Case Study of Nairobi Province* (Nairobi 2009): 7.

<sup>33</sup> Claudia Garcia-Moreno et al., "Prevalence of intimate partner violence: findings from the WHO multi-country study on women's health and domestic violence," *The Lancet*, 368 (2006): 1260-9.

<sup>34</sup> D. Kilpatrick and J. McCauley, "Understanding National Rape Statistics," (USA: National Online Resource Center on Violence against Women, 2009), available at [http://new.vawnet.org/Assoc\\_Files\\_VAWnet/AR\\_RapeStatistics.pdf](http://new.vawnet.org/Assoc_Files_VAWnet/AR_RapeStatistics.pdf).

<sup>35</sup> Liz Kelly, "Promising Practices addressing sexual violence" (paper presented at the expert group meeting, UN Division for the Advancement of Women in collaboration with UN Office on Drugs and Crime, Vienna, Austria, May 17-20, 2005): 4.

Many victims have no prior experience with the legal system and do not know how to proceed in sexual violence cases. The insensitive attitudes of police officers may deter women from coming forward or prevent them from pursuing a case.<sup>36</sup> A study by the Institute of Economic Affairs in Kenya of victims who had reported gender-based crimes (including forms of sexual violence) found that 51.9 percent of women felt that police officers “were not helpful.” Twenty-eight percent said they were “humiliated” by the police and 20 percent reported being asked for bribes.<sup>37</sup> This situation is not an anomaly. In the 1970s, feminist organizations in Brazil began reporting that most women who sought support services for domestic violence did not report the crimes to the police, fearing they would not be believed or would be humiliated.<sup>38</sup> In the worst circumstances, police or other officials may be perpetrators. This can leave victims with no neutral authority to approach for assistance or protection.

Even more innocuously, lack of resources in law enforcement may discourage victims from reporting crimes, generally. In Burundi, for example, it can be prohibitively expensive to pursue a case. In addition to costs associated with filing a case or securing certified medical reports to suppose a claim, it is reported that police and magistrates in Burundi often require victims to pay for the food and incarceration costs of the very people they had accused of rape.<sup>39</sup>

The law itself may create disincentives to reporting rape. For example, Article 38 of Kenya’s Sexual Offences Act provides that, where someone is deemed to have made a “false allegation” of sexual offence, the complainant is liable for the same sentence as would have been imposed in the case of conviction. This risk of reverse penalty (referred to by some women’s rights advocates as a “boomerang” provision) can have a chilling effect on victims of sexual violence who know that if they ultimately lose in court and conviction does not ensue, they may themselves be penalized for “false allegation.” The provision is currently being challenged by the Federation of Women Lawyers-Kenya (FIDA-K).<sup>40</sup>

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<sup>36</sup> Kelly, Liz, Jo Lovett, and Linda Regan, “A gap or a chasm? Attrition in reported rape cases,” Home Office Research Study 293 (London: UK Home Office Research, Development and Statistics Directorate, 2005): x-xi.

<sup>37</sup> *Status of Gender Desks at Police Stations in Kenya*, 22.

<sup>38</sup> United Nations Office of Drugs and Crime. *Handbook on effective police responses to violence against women* (New York: UNODC, 2010): 53.

<sup>39</sup> US Department of State, 2010 Country Report for Burundi.

<sup>40</sup> Discussions between Kim Thuy Seelinger and attorneys at the Federation of Women Lawyers-Kenya, Nairobi, October 2010.

## **B. Promising Strategies**

### *Improving Coordination Between the Medical and Legal Sectors*

In areas characterized by a lack of confidence in the law enforcement or judiciary, victims of sexual violence may be more likely to seek medical care than police or legal assistance right after the attack.<sup>41</sup> Consequently, strengthening the links between the legal system and the hospitals and clinics where victims seek medical care can increase the number of sexual violence cases that are ultimately filed in court. These linkages establish an entry point into the legal system for victims who decide to pursue a claim after seeking medical attention; they can also help ensure that case-related information is transferred properly between the medical sector and the legal sector.

One structural innovation is the “integrated model” of medical and legal services. The WHO’s Guidelines for Medico-Legal Care for Victims of Sexual Violence urge policymakers to adopt such a model, arguing, “The ideal is that the medico-legal and the health services are provided simultaneously; that is to say, at the same time, in the same location, and by the same health practitioner.”<sup>42</sup>

A number of countries offer such integrated models, even providing legal and supportive services under the same roof. These are sometimes referred to as “one-stop shops.” They can come in a variety of forms. For example, the Thuthuzela Care Centres in South Africa provide the most direct access to legal services. The centers are located in public hospitals, have a trained investigator on staff, and are directly linked to a specialized court that tries sexual violence cases. The centers’ direct link to the specialized courts is designed to support speedier, more sensitive and effective prosecutions.<sup>43</sup> Similarly, the HEAL Africa hospital in the Democratic Republic of the Congo (DRC) offers on-site legal assistance to survivors through an on-site legal clinic run by the American Bar Association’s (ABA) Rule of Law Initiative. This model resembles the Thuthuzela Care Centres in terms of in-hospital provision of legal support, but it does not feature the additional direct linkage to a specialized court. According to HEAL Africa, this ‘one stop shop’ approach within the hospital has increased prosecutions more than tenfold from 2008 to

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<sup>41</sup> The importance of obtaining medical and psychosocial care immediately after a sexual attack is discussed in more detail in Lauren Harris and Julie Freccero, *Sexual Violence: Medical and Psychosocial Support* (Berkeley: Human Rights Center, 2011), another paper in this Working Paper Series.

<sup>42</sup> World Health Organization. *Guidelines for Medico-Legal Care for Victims of Domestic Violence* (Geneva: World Health Organization, 2003).

<sup>43</sup> South Africa National Prosecuting Authority. *Thuthuzela Care Centres: Turning Victims Into Survivors*, available at [http://www.info.gov.za/events/2009/TCC\\_2009.pdf](http://www.info.gov.za/events/2009/TCC_2009.pdf).

2009.<sup>44</sup> A third approach relies on health professionals to refer victims for legal assistance. In eastern DRC, for example, the ABA works with the Congolese medical authorities to train health professionals about the legal aspects of sexual crimes and how to refer victims to legal clinics.

From a purely investigatory and prosecutorial standpoint, the integrated model has several advantages. The presence of such units in hospitals enables outreach and education about the legal system. Victims receive emotional and psychological support and practical assistance moving their cases into the legal system. Such systems also facilitate the proper collection of evidence needed for any eventual prosecutions.

Access to the judicial system can also be created through the use of specifically trained *individuals* working within existing healthcare systems. One emerging figure is the Sexual Assault Nurse Examiner (SANE), a trained professional appearing in more and more healthcare facilities across the United States and Canada – as well as a few in Kenya.<sup>45</sup> SANEs are trained to provide first-response medical care to patients who have suffered a sexual assault as well as collect forensic evidence to support potential prosecution. However, SANEs can also facilitate a victim's entry into the legal system. For example, a study of an urban hospital in the United States found that patients seen by a SANE were significantly more likely to be tested for sexually transmitted diseases, receive pregnancy prophylaxis *and be referred to a rape crisis center*.<sup>46</sup> Once referred to a rape crisis center, a victim can obtain advice about how to file a claim and obtain legal assistance.<sup>47</sup>

### *Creating Additional Access Points*

Legal service providers are also working to create new access points for victims of sexual violence. For example, small legal clinics located in remote regions have increased access to the judicial sector. In the DRC, for example, the American Bar Association has funded and operated legal clinics in almost a dozen villages and small cities that provide pro bono legal services to survivors of sexual and gender-based violence. The clinic attorneys obtain medical documents, take victim and witness statements and then transmit cases to the police. Clinic attorneys also

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<sup>44</sup> Available at <http://www.healafrika.org/about-heal-africa-p-1.html>.

<sup>45</sup> For a glimpse of SANE program activity in Kenya, see <http://www.bcit.ca/update/node/997>. For an assessment of the potential role of forensic nurses in Colombia, see Nancy B. Cabelus and Gary T. Sheridan, "Forensic Investigation of Sex Crimes In Colombia," *Journal of Forensic Nursing*, 3, nos. 3 & 4 (2007): 112–116.

<sup>46</sup> K. Bechtel, E. Ryan, and D. Gallagher, "The impact of sexual assault nurse examiners on the evaluation of sexual assault in a pediatric emergency department," *Pediatric Emergency Care*, 24 (2008): 442-7.

<sup>47</sup> The benefits and limitations of the SANE model are discussed in more detail in Harris, *Sexual Violence: Medical and Psychosocial Support*.

follow up with the police. Once the police complete any additional investigation, the clinic transports the case files to the local courthouse for filing. The results look promising: from April 2009 to June 2010, a clinic in Butembo, DRC, provided legal counseling to 329 survivors and filed 209 cases: 152 were pending as of October 2010, and of the 29 cases that have gone to trial so far, there have been 21 convictions.<sup>48</sup> Though far from a comprehensive or generalizable fix, this intervention seems to be a small bright spot in an otherwise bleak and under-resourced legal system.

In rural areas, access to courts can be a problem. To address this issue in the DRC, the American Bar Association has established mobile courts to allow court officials to travel to remote areas to hear cases. The system enables judges, prosecutors, magistrates, clerks, and stenographers normally based at a municipal or village courthouse to travel periodically to remote areas within their jurisdiction. Mobile courts also have significant educational value. In many of these locations, they mark the first time that a community has had any access to a formal court, and provide an opportunity for communities to learn about court processes.<sup>49</sup>

In order to avoid the stigma that could attach to specialized “sex offense” courts, the DRC’s mobile courts welcome a variety of claims. However, the vast majority of the cases they hear are in fact related to sexual violence.<sup>50</sup> Preliminary data on these mobile courts is modest, but promising. Between October 2009 and October 2010, the ABA facilitated seven mobile courts in South Kivu Providence. During that period, those courts held 86 trials resulting in 70 convictions.<sup>51</sup> Again, though the Congolese justice system is broken in many ways, these mobile courts may be a small way of increasing access to justice for some. Whether they are sustainable without foreign donor support is obviously another question.<sup>52</sup>

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<sup>48</sup> American Bar Association, Rule of Law Initiative, Mobile Courts Program in Eastern Democratic Republic of the Congo (n.d.), 2.

<sup>49</sup> American Bar Association, Rule of Law Initiative, Mobile Courts Program in Eastern Democratic Republic of Congo (n.d.), 2.

<sup>50</sup> Natacha Thys (Deputy Director, Africa Division, ABA ROLI), interview by Helene Silverberg, October 6, 2010.

<sup>51</sup> ABA ROLI Programs in DRC (9/2010), 2.

<sup>52</sup> They can also be funded by governments. For example, the Indian government has adopted a limited mobile court program. These mobile courts also do not focus exclusively on sexual violence, but can nevertheless increase access to the judicial system for victims of these crimes. See Manisha Jha, “India’s first mobile court inaugurated,” *The Hindu*, August 5, 2007. Available at: [www.hinduonnet.com/2007/08/05/stories/2007080560301200.htm](http://www.hinduonnet.com/2007/08/05/stories/2007080560301200.htm); see also Rama Lakshmi, “Bus Expedites Wheels of Justice,” *The Star*, August 23, 2007. Available at: [star.com.jo/main/index.php?option=com\\_content&view=article&id=11175](http://star.com.jo/main/index.php?option=com_content&view=article&id=11175).

### *Increasing Police Receptivity*

Entering the legal system can prove meaningless without attentive, sensitive law enforcement to take up the investigation. Two strategies may especially improve the experience of reporting sex crimes: a) increasing the number of female police officers on the force and b) creating specialized gender units within police stations. The goals underlying the first strategy are to provide communities with female officers, to assist those female victims who feel more comfortable reporting sexual violence to a woman, and to change the culture of the police force through the presence of women officers. The second strategy is based on the belief that specialized units trained in gender-violence issues are better equipped to address sex crimes.

Notably, increasing female representation in law enforcement has become a priority in many places. In the Balkans, for example, the Organization for Security and Cooperation in Europe has focused on recruiting women to the police force in Kosovo. Recent national police academy classes have been about 18 percent female, which is “unprecedented.”<sup>53</sup>

The participation of women in United Nations peacekeeping missions, as encouraged by Security Council Resolution 1325, can also have a positive impact. For example, India made headlines by sending an all-female police unit to Liberia in 2007 as part of the United Nations mission there. The increased visibility and community presence of female peacekeepers has been said to enable Liberian women to come forward and report cases of violence.<sup>54</sup> It has also coincided with, if not helped to bring about, an increase in the female presence on Liberia’s national police forces – from 12% in 2008 to 15% in 2009.<sup>55</sup> While the presence of female officers does not always guarantee a sensitive response to gender-based claims, mainstreaming gender issues into any law enforcement context is meaningless, if not impossible, without it.

Specialized “gender desks” are another promising strategy aimed at improving police treatment of sexual violence claims. In the 1980s in Brazil, when feminists lamented the weak police response to a wave of sexual violence cases that had occurred in the 1970s, the government of Sao Paulo set up specialized units called “women’s police stations.” The stations are usually a separate floor or unit inside an existing station, staffed by specially trained intake officers, investigators, and counselors, all of whom are female. Since then, more than 300 women’s police

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<sup>53</sup> UNODC, *Handbook on effective police responses*, 43.

<sup>54</sup> UNODC, *Handbook on effective police responses*, 9.

<sup>55</sup> See <http://www.mediaglobal.org/article/2010-03-18/female-peacekeepers-empower-liberian-women-to-participate-in-national-security>.

stations have opened throughout Brazil.<sup>56</sup> In 2006, approximately 290,000 cases were brought in these stations.<sup>57</sup> In Rwanda, which experienced pervasive sexual violence during the 1994 genocide, a gender office with specially trained police officers is supported by an adviser funded by the United Nations Development Fund for Women (UNIFEM) and the United Nations Development Programme (UNDP) as part of a national effort to apply human rights standards to sexual violence.<sup>58</sup>

In Kenya, the government has been active in establishing gender desks at police stations. Interviews of victims in Kenya found that those who interacted with an officer at a gender desk were more likely to be satisfied with their experience than those who interacted with the general force. However, many complainants still experience corruption.<sup>59</sup> Further, the desks are often under-funded and understaffed. In addition to trained personnel, a successful gender desk requires a commitment of physical resources: for example, adequate space for interviewing, computer-assisted work, and file storage. In Kenya, an analysis of 2005-2009 budget allocations for the Ministry of State for Provincial Administration and Security found no specific allocations for gender desks. Visits by researchers to gender desks in five police divisions in 2009 found that one trained officer was responsible for each desk; when that officer was not present, victims were passed off to the general force.<sup>60</sup>

Similarly, support from “victim advocates” within the community can help guide women through the steps of the investigation and eventual trial. Victim advocates are usually not attorneys, but rather volunteers from local community organizations who have received enough training to emotionally and psychologically support victims of sexual violence and to help shepherd victims through the process of reporting and prosecuting a crime.<sup>61</sup>

#### **IV. PHASE TWO: INVESTIGATIONS AND PROSECUTIONS**

Even when a victim of sexual assault is willing to come forward and pursue her or his attacker in court, myriad challenges can obstruct the road to justice. The investigation itself can be difficult – the collection of testimony and evidence in sexual violence cases can pose unique

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<sup>56</sup> UNODC, *Handbook on effective police responses*, 53. Also, Andrew Downie, “A police station of their own,” *Christian Science Monitor*, (July, 20, 2005), available at <http://www.csmonitor.com/2005/0720/p15s02-woam.html>.

<sup>57</sup> Downie, “A police station of their own.”

<sup>58</sup> UNODC, *Handbook on effective police responses*, 72.

<sup>59</sup> Kenya Institute of Economic Affairs, *Status of Gender Desks*, 26.

<sup>60</sup> *Ibid.*, 23.

<sup>61</sup> These advocates are discussed in further detail in Freccero, *Responding to Sexual Violence: Community Approaches*.

challenges. These problems can be compounded in times of political unrest and armed conflict, when authority structures are disrupted and authorities may even be the perpetrators. In some cases, investigators and prosecutors may bear the same gender biases or rape myths prevalent in their community,<sup>62</sup> treating sexual violence cases as personal matters or as less important than other crimes. Further, a lack of coordination between prosecutors and investigators can also create problems with evidence collection, causing eventual prosecutions to suffer.

This section explores recurrent challenges to both the investigation and prosecution of both domestic crimes of sexual violence and international sex crimes, as well as promising strategies emerging in both international and national court systems. These strategies involve both focused approaches (whereby training and resources may be targeted at specific cadres of specialized investigators or prosecutors) and mainstreamed approaches (whereby gender perspectives and sexual violence issues are incorporated across the board for general exposure within the investigations and prosecutions ranks).<sup>63</sup>

### **INVESTIGATION OBJECTIVES**

Generally speaking, investigators consider legal strategy, factual objectives, and operational tactics when investigating a crime.

#### **Strategy and Ethics**

Any investigation – in either a common or civil law context - should support fair, intellectually honest proceedings. In practical terms, this means the investigating body has a moral and legal responsibility to investigate each case fully, and to look for evidence of both guilt and innocence. When dealing with cases of violent crime, including sexual violence, factfinders must investigate the victim’s experience and at the same time strive to avoid re-traumatizing the victim. They should also evaluate risks posed to any potential witness, whose participation in an investigation or prosecution could lead to retaliation, ostracism, or other harm.

#### **Objectives**

Investigations are conducted with the objective of supporting the trial process. This means investigators collect, confirm, and analyze facts with the goal of producing compelling evidence. They interview victims and witnesses and, in some situations, prepare them for trial. They may investigate the crime scene and assess physical evidence, and they may gather information from a variety of sources, including nongovernmental organizations, public records, and experts. In international sex crimes cases, they may also look for patterns showing systematic violation.

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<sup>62</sup> An illustrative list of common rape myths can be found in *Guidelines for the medico-legal care of victims of sexual violence* (Geneva: World Health Organization, 2003): 11. See also, Janice Du Mont and Deborah White, *Uses & Impact of Medico-Legal Evidence* (Geneva: Sexual Violence Research Initiative and World Health Organization, 2007): 7.

<sup>63</sup> “Gender Mainstreaming,” United Nations, Office of the Special Advisor on Gender Issues and Advancement of Women Department of Economic and Social Affairs, <http://un.org/womenwatch/osagi/gendermainstreaming.htm>.

### **Tactics**

In an adversarial system, an investigator for the prosecution must anticipate likely defense arguments and uncover responsive evidence. Investigators for the defense must likewise anticipate and prepare to counter prosecutorial arguments.<sup>64</sup>

Strategies and techniques may differ depending on whether a case is collective or individual, or relating to a child victim as opposed to an adult victim.

## **A. Investigations**

Whether a crime of sexual violence occurred in a bedroom or in the public square, investigators must engage a range of fact-finding efforts to produce evidence to support the case. This fact-finding usually involves gathering legally relevant historical and circumstantial facts surrounding the crime (as with victims' and witnesses' statements), as well as proof of the physical aspects of the crime (as with crime scene evidence or the medical condition of victim). The latter includes forensic evidence, such as physical crime scene material and DNA samples, which investigators and healthcare professionals collect and forward for analysis and use in court. In this section, we discuss challenges and strategies concerning both prongs of fact-finding.

### **i. Interview-Based Evidence**

As with many other kinds of criminal investigation, the primary tool used to elicit the historical narrative surrounding an act of sexual violence is the victim or witness interview. In most domestic crimes of sexual violence, the key proof objective is usually either identity of the aggressor or the victim's lack of consent to sexual contact.<sup>65</sup> Investigation of international sex crimes requires additional fact-finding to satisfy the contextual elements of the offence, as well.<sup>66</sup>

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<sup>64</sup> Bill Wiley, "The Investigation of International Sex Crimes" (panel presentation, Forum for International Criminal and Humanitarian Law seminar: Proving International Sex Crimes, Yale University, New Haven, CT, October 16, 2010).

<sup>65</sup> Consent in international sex crimes is an evolving issue. For discussion, see K. Alexa Koenig, Ryan Lincoln, and Lauren Groth, *The Jurisprudence of Sexual Violence* (Berkeley: Human Rights Center, 2011), another paper in this series.

<sup>66</sup> For the elements of various sexual-violence related international crimes, see Koenig et al., *The Jurisprudence of Sexual Violence*.

## Challenges

A threshold challenge in the investigation of sexual violence is that, due to the particularly sensitive nature of these experiences, victims may have greater difficulty speaking about their ordeal than victims of less intimate and/or stigmatized crimes.

Also, most investigators tend to be male, creating a gender dynamic that may be especially uncomfortable for a woman who has suffered sexual violence at the hands of a man. Or, regardless of gender, the investigator simply may not be trained for or sensitive to issues of sexual violence.

Reticence to speak may be compounded where victims live in the same community as their aggressors and fear retaliation for having made a report to the police. Even non-victim witnesses can feel nervous about speaking with an investigating officer, for fear of their own safety.

Finally, the impact of trauma may affect a victim's ability to coherently or fully recount her experience. Memory can suffer; emotional numbness can complicate responsiveness to questioning.<sup>67</sup> Investigators may not be trained to work through an interviewee's psychological difficulties, or may not know how and when to refer a traumatized witness for supportive counseling. Investigators may themselves suffer vicarious traumatization from repeatedly listening to accounts of rape, sexual mutilation, or other violence.

Interpretation can also complicate cases where an investigator does not speak the witness' first language. Obviously, flawed interpretations can easily lead to confusion, misunderstanding, and even unjustified concerns about witness credibility. Just as critically, the introduction of interpreters can present challenges for comprehension, rapport-building, and a witness's willingness to proceed. This is true in any interviewing context, but is particularly relevant in cases of sexual violence, where terminology can be vague, colloquial, or embarrassing and where cultural taboos or judgments may affect both the witness and interpreter. Finally, security or confidentiality can be compromised if the witness and interpreter are from the same community.

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<sup>67</sup> For example, see Wakabi Wairagala, "Expert Describes Trauma Among Central African Rape Victims," *The Trial of Jean-Pierre Bemba Gombo: A Project of the Open Society Justice Initiative*, <http://www.bembatrial.org/2010/11/expert-describes-trauma-among-central-african-rape-victims/>. See also, Stuart L. Lustig, "Symptoms of Trauma Among Political Asylum Applicants: Don't Be Fooled," 31 *Hastings Int'l & Comp. L. Rev.* 725 (2008) and R. Karl Hanson, "The Psychological Impact of Sexual Assault On Women and Children: A Review," 3 *Sex Abuse* 187-232 (1990). Additional resources are available on the Sexual Violence Research Initiative website about mental health consequences of sexual assault, at <http://www.svri.org/mental.htm>.

Investigators of international sex crimes can face a wide range of factfinding challenges that may differ from a typical domestic crime of sexual violence. Describing unique challenges in the investigation of international sex crimes, Nick Koumjian, Senior Trial Attorney at the Special Court for Sierra Leone, states simply,

First, it's first a question of sheer volume and scope. The average sexual assault in a domestic trial might involve a single perpetrator and a single victim over the course of ten minutes. [In an international crime case], there are many victims – most of whom, understandably, choose not to report the crimes. There are also many perpetrators. The sexual violence may have occurred over a period of weeks, months, years.<sup>68</sup>

The investigation of international crimes has traditionally taken on something of an “historic” aspect, as well. Investigation is often initiated years after an individual crime was committed, only after the broader, contextual violence is considered for prosecution before an international tribunal. By then, physical evidence is largely lost; communities may have been displaced from the scene of the crimes; memories may have faded, even where several eyewitnesses may have observed collective acts of public sexual violence.

In addition, an investigator researching an international crime must prove more than the underlying sexual act; she must seek evidence as to whether the violence meets requirements of international crimes and whether liability can be proven beyond the direct physical individual perpetrator. For this reason, there may be less emphasis in an international sex crimes investigation on proving the identity of an individual attacker than in a domestic case, and it is less likely that the defense will seek to introduce evidence of the past sexual conduct of the individual victims—issues that frequently arise in domestic cases. Instead, where seeking to prove sexual violence as a crime against humanity, an international investigator must secure evidence of widespread or systemic sexual violence; where charging it as a war crime, she seeks evidence indicating a nexus between the sexual violence charged and the broader plan or policy underlying the armed conflict itself.

Theories of liability can also differ for international sex crimes where the defendant is not the direct perpetrator of the sexual violence charged. For example, to prove a commander's liability under various modes of individual or command responsibility, evidence must be gathered to establish a commander's intent or knowledge that a sexual violation occurred, or that he failed to punish or prevent such crimes.<sup>69</sup>

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<sup>68</sup> Nick Koumjian (Senior Trial Attorney, Special Court for Sierra Leone), interview by Kim Thuy Seelinger, the Hague, Netherlands, November 11, 2010.

<sup>69</sup> Brenda Hollis (The Prosecutor, Special Court for Sierra Leone), Nick Koumjian and Mohamed Bangura (Trial Attorneys, Special Court for Sierra Leone), interview by Kim Thuy Seelinger, the

One other difference between investigating international sex crimes and domestic crimes of sexual violence is that, in the former, sexual violence may not be on an investigator's radar screen from the outset. The investigation might have been initiated to explore accounts of genocide or torture or mass displacement, instead. It can be a challenge to detect facts related to sexual violence where they are not explicitly offered by a victim, especially when he or she is being interviewed because of other harms suffered. Also, it can be a challenge to know how to ask about sexual violence that a victim has not mentioned, and at what point to do this.<sup>70</sup>

Finally, teams investigating international crimes can face significant security risks and logistical challenges if evidence must be gathered during an on-going conflict. The violations they examine often occurred in places of precarious stability. Aside from even reaching the target area, investigators must operate swiftly and safely, attracting as little attention as possible to themselves and their interviewees.<sup>71</sup>

#### INTERVIEWING RECOMMENDATIONS

Specific interviewing recommendations include:

- gender-sensitivity training for all investigating officers;
- using a preliminary assessment to explore interviewees' needs and capacities;
- choosing a safe, inviting interview location – preferably not one used for interrogations, or likely to be intruded upon by others;
- selecting appropriate, vetted, trained interpreters where necessary;
- ensuring confidentiality;
- explaining the objectives of the interview and allowing for follow-up meetings as necessary;
- putting the victim at ease by using safe, supportive language;
- avoiding judgment and expressing non-judgment to the victim;
- permitting free narration by the victim, without interruption by the interviewer;
- seeking clarification with open-ended questions (allowing the victim to control the flow of information and avoiding the risk of imposing the investigator's personal views of what the victim means to say);
- identifying risk factors, as well as other potential sources of information (obtaining consent to discuss the attack with others, where appropriate);
- taking careful notes throughout the interview of everything communicated, not just those pieces of information that seem helpful to the case;
- concluding the interview by asking the victim if there is anything else he/she knows or wants to share that was not covered;
- thanking the victim for his / her time and explaining next steps.<sup>72</sup>

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Hague, Netherlands, November 11, 2010. For more on theories of liability commonly used for international crimes, see Koenig, et al., *The Jurisprudence of Sexual Violence*.

<sup>70</sup> Carry Spork (Investigator, International Criminal Tribunal for the Former Yugoslavia), interview by Kim Thuy Seelinger, the Hague, Netherlands, November 11, 2010.

<sup>71</sup> Bill Wiley, presentation.

<sup>72</sup> Adapted, in part, from UNODC, *Handbook on effective police responses*.

### *Promising Strategies*

To address the challenges discussed above in the specific context of investigating sexual violence, one can draw from the wealth of literature that has developed regarding interviewing techniques aimed at establishing rapport with victims—while still enabling an investigator to obtain the information necessary to support a successful prosecution. This guidance includes theoretical, academic material, such as the cognitive interviewing techniques put forth by experts like Rebecca Milne and Ray Bull, who discuss investigative interviewing within the contexts of memory and social psychology.<sup>73</sup> It also takes the form of several handbooks from local to international law enforcement organizations, ranging from municipal police department training materials to resources published by critical international human rights nongovernmental organizations like the Women’s Initiative for Gender Justice and the United Nations Office on Drugs and Crime.<sup>74</sup> The following are some key concrete measures suggested in the literature as well as in successful investigative practice.

1. Use of Standard Investigations Guidelines and Training

The value of having a standardized protocol or training for interviewing sexual violence victims is multifold. First, it establishes expectations for sensitivity and professionalism around the issue of sexual violence and can provide an opportunity to address entrenched rape myths or gender biases the investigators themselves may hold. Second, it helps provide the victim or witness with a thorough, sensitive interview experience. Third, it increases the likelihood that, regardless of experience, any investigator will come away with the information she needs in order to support the prosecution, thus minimizing the need for repeated interviews. Fourth, a thorough protocol or training on sexual violence-related interviewing can help put the investigatory process into context for investigators: it can help connect their work to a victim’s broader journey towards justice and to anticipate what needs she may have along the way. Susan Kemp, who helped develop the first victim questionnaires for the ICC, cautions that even the best interview tools can in no way substitute for interviewer experience and ability to ask responsive follow-up questions; she emphasizes the value of constant revision and updating of interview guides, as well as ongoing role-playing practice among investigators.<sup>75</sup>

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<sup>73</sup> Rebecca Milne & Ray Bull, *Investigative Interviewing: Psychology and Practice* (London: John Wiley & Sons, Ltd. 1999).

<sup>74</sup> See more on the Women’s Initiatives for Gender Justice and UNODC websites at <http://www.iccwomen.org/> and <http://www.unodc.org/unodc/en/justice-and-prison-reform/tools.html?ref=menuse>, respectively.

<sup>75</sup> Susan Kemp, Impunity Watch Advisory Board Member, correspondence with Kim Thuy Seelinger, March 2011.

Training on sexual violence can be targeted at a specialized unit of investigators and/or mainstreamed into general investigations work. Specialized sex crimes investigations units exist in the United Kingdom, Canada, and in many jurisdictions in the United States, for example.<sup>76</sup> Guidance from the International Criminal Tribunal for Rwanda recommends that a sex crimes team be comprised of prosecution counsel, investigators, doctors, nurses, counselors, interpreters, and witness assistants – all of whom should undergo specialized training on how to handle sexual violence victims and witnesses.<sup>77</sup>

Alternately, mainstreaming sexual violence training provides certain benefits: a) any trained investigator can learn to detect and address sexual violence if it arises in other investigative contexts, b) all investigators can learn when and how to affirmatively inquire about sexual violence in the course of interviewing about seemingly unrelated crimes, and c) inclusion of sexual violence in standard training materials elevates its seriousness to the same level as other, traditionally “high priority” crimes. Mainstreaming sexual violence awareness among all investigators can be appropriate in contexts where there are insufficient resources for the creation of specialized sex crimes units. As part of the mainstreaming process, guidance from the Rwanda Tribunal suggests that *all* investigators be provided with ongoing trainings regarding relevant sexual crimes jurisprudence, as well as interviewing methodology best suited for sexual violence victims. It further recommends that all investigators be provided with model questionnaires and witness statements to use until they are comfortable approaching sexual violence fact-finding.<sup>78</sup>

## 2. Gender Diversity of Investigative Team

Having gender diversity on any investigative team is generally seen to be critical, as many (though not all) sexual violence victims may feel more comfortable speaking with a female investigator. Patricia Viseur Sellers, former Legal Advisor on Gender- Related Crimes at the Yugoslavia Tribunal, suggests that the most important thing is to create a diverse pool of trained investigators with excellent skills; from this integrated team, individually-tailored teams can be made for each witness.<sup>79</sup> Susan Kemp agrees, noting the dangers of developing expertise according to gender, which can lead to the marginalization of female staff at all levels (whether

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<sup>76</sup> See various websites for police department sex crimes units, such as: <http://www.calgarypolice.ca/sectionsandunits.html#sexcrimes> (Calgary, Canada), <http://www.torontopolice.on.ca/sexcrimes/> (Toronto, Canada), <http://www.sanantonio.gov/sapd/SexCrime.asp?res=1280&ver=true> (San Antonio, Texas).

<sup>77</sup> *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*, Arusha: International Criminal Court for Rwanda, 2008: 4-6.

<sup>78</sup> *2008 Rwanda Tribunal Best Practices*: 5-6.

<sup>79</sup> Patricia Viseur Sellers, former Gender Advisor to the Yugoslavia Tribunal, telephone interview by authors, September 28, 2010.

police, investigators, prosecutors, or judges) and feed assumptions that they are better suited to “softer” gender-based crimes or victim support work. This stereotyping can result in a gender imbalance in other departments or even exclusion of female staff from “harder,” more traditionally masculine specializations like homicide prosecution.<sup>80</sup>

### 3. Use of Preliminary Assessments

One way to increase sensitivity to a potential witness’s needs at the initiation of an investigation is the use of a “preliminary assessment” before in-depth interviewing commences. For example, in the course of investigating a domestic crime of sexual violence, a police officer may conduct a preliminary assessment to ascertain critical, basic information: a) whether the victim is in risk of danger, b) whether the suspect still has access to the victim, c) whether the victim needs medical attention, d) whether there is potential for loss and/or destruction of evidence, e) whether the suspect is known versus unknown.<sup>81</sup> After attending to the victim’s immediate security needs, the officer may then focus the investigatory strategy around either the issue of perpetrator identity (if the assailant was unknown to the victim) or the issue of consent (if there was some prior relationship between the victim and attacker).<sup>82</sup> A follow-up interview may occur to clarify and expand understanding after the initial evidence is assessed.

### 4. Psychological Support for Witnesses *and* Investigators

Protecting the mental health of victims and witnesses prior to, during, and after trial is both ethical and critical to the process of justice. In-depth discussion of victims’ access to psychological support can be found in *Sexual Violence: Medical and Psychosocial Support*,<sup>83</sup> another paper in this series and therefore will not be elaborated on here. It is also worth noting the longterm psychological health of those working with victims of sexual violence, especially investigators who have initial and extensive contact with victims. The ICC has in-house counselors who are accessible at any time by staff who wish to talk about their experiences on cases, in the field, etc.<sup>84</sup> In any context, though, it may be good practice to tend to the psychological health of individuals routinely exposed to accounts of severe brutality.<sup>85</sup>

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<sup>80</sup> Susan Kemp, correspondence with Kim Thuy Seelinger.

<sup>81</sup> See, for example, *Guidelines for Sexual Assault Investigation*, California Commission on Peace Officer Standards and Training (1999): 4.

<sup>82</sup> See, for example, “Model Guidelines and Sex Crimes Investigation Manual for Illinois Law Enforcement,” Illinois Law Enforcement and Standards Training Board (1996): Chapter 5.

<sup>83</sup> See Harris, *Sexual Violence: Medical and Psychosocial Support*.

<sup>84</sup> Gloria Atiba-Davies (Victims Expert, ICC Gender and Children Unit), interview by Kim Thuy Seelinger, the Hague, Netherlands, November 11, 2010.

<sup>85</sup> For an interesting discussion of the longterm psychological impact of working with victims of trauma, see Charles R. Figley, “Compassion Fatigue as Secondary Traumatic Stress Disorder: An Overview,” in *Compassion Fatigue: Coping with Traumatic Stress Disorder in Those Who Treat*

### ICC PRELIMINARY ASSESSMENTS AND INTERVIEW-BASED PSYCHOLOGICAL SUPPORT

At the ICC, pre-investigative screening of sex crimes witnesses helps ensure that individuals who have suffered sexual violence are not needlessly exposed to ICC staff. Before a potential witness is formally engaged in the investigative process, she is assessed as to whether a) she is likely to provide evidence of sexual crimes or information linking crimes to identified suspects, b) she bears personal security risks, and c) she possesses the requisite physical and psychological health to undergo the investigative and prosecutorial process.<sup>86</sup>

Some potential witnesses will be ruled out if they do not seem to have useful evidentiary information. Others who might provide helpful information might be passed over as well: If the prospect of in-depth investigation and an eventual trial seems to pose a risk to a prospective witness's mental wellbeing or risk a collapse on the witness stand, the psychologist may advise the investigating and prosecuting teams not to pursue the at-risk witness.

If the victim or witness is found to be fit to continue, however, an ICC investigator will then screen that individual about his or her personal interview needs. For example, the investigator will ask about the interviewee's preferences with respect to location, childcare, presence of a support person, and gender of investigators.<sup>87</sup> This information is then incorporated into that individual's interview plan.

The team psychologist may then sit in on investigatory interviews to assist the interviewer in posing difficult questions and to monitor the psychological response of the witness, intervening as necessary.<sup>88</sup>

It should be noted that significant logistical and ethical complications can arise from the practice of sending psychological assessors into the field at the outset. Susan Kemp observes that even where a victim or witness ultimately decides (or is advised) not to participate in the case, she may already have been imputed as a "police collaborator" by virtue of the initial visit by an assessor. Perception as having collaborated with foreign investigators can bring great risk of harm.<sup>89</sup>

Kemp also notes the ethical dilemma that can arise where, once an assessor has engaged a victim or witness in an initial psychological evaluation, he or she may not be in a position to promise ongoing psychosocial support should she need it.<sup>90</sup>

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*the Traumatized*, ed. Charles R. Figley (Brunner / Mazel, 1995): 1-20. See also, Andrew P. Levin & Scott Greisberg, "Vicarious Trauma in Attorneys," *Pace Law Review* 24 (2003): 245.

<sup>86</sup> Dianne Luping, "Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court," *American University Journal of Gender, Social Policy & the Law* 17 (2009): 486.

<sup>87</sup> *Ibid.*, 486.

<sup>88</sup> Gloria Atiba-Davies, interview by Kim Thuy Seelinger; Xabier Agirre Aranburu, (Head of the ICC Investigative Strategies & Analysis Unit, International Criminal Court) interview by Kim Thuy Seelinger, the Hague, Netherlands, November 12, 2010.

<sup>89</sup> Susan Kemp, correspondence with Kim Thuy Seelinger.

<sup>90</sup> Susan Kemp, correspondence with Kim Thuy Seelinger.

## 5. Vetting Interpreters

In order to avoid flawed communication and/or confidentiality risks, it is important to thoroughly vet interpreters. Despite its considerable practical and ethical implications, this is an area of investigative work that can often be overlooked. One helpful example comes from Queensland Legal Aid in Australia, which offers the following recommendations about working with interpreters in sexual assault interviews:

- Check out with the client whether the interpreter is appropriate or not. In some small community groups, there may be issues about maintaining the client's confidentiality and the interpreter being associated with all the parties involved.
- Check to see if a client from a non-English-speaking background is comfortable to proceed without an interpreter. Organize a telephone interpreter if required.
- Consider asking for an interpreter of the same gender as the client. Check whether the client has any gender preference for the interpreter.
- Ensure the client feels comfortable with the interpreter and that there are no gender, religious, political, or privacy concerns. Ensure the interpreter speaks the same first language or dialect as the client.
- Make every effort to have the same interpreter for each interview if the client agrees with this.
- Allow double time for the interview if you are using an interpreter.<sup>91</sup>

The need for accurate, sensitive interpretation from a third party who also understands the importance of confidentiality cannot be underestimated. A client and interpreter may come from the same community—either in the country of residence or in the country of origin—and so the need for confidentiality regarding the client's experience is paramount. There may be additional concerns at the international sex crimes level, as well. For example, where mass sexual violence occurred in the context of political or ethnic turbulence, interpreters should be carefully screened in the event that their political or ethnic background may cause unease to the witness in question.<sup>92</sup>

## 6. Gathering Evidence Regarding Contextual Elements of Sexual Violence

Again, proof of contextual elements apart from the actual sexual violation is generally more relevant in the context of international sex crimes investigations than in domestic crimes of sexual violence. To address the challenge of establishing systemic or widespread violence to support a charge of crimes against humanity, for example, experienced investigators at the international tribunals have started to look for “pattern evidence”—illustration of recurrence and distribution of violence provided by sampling surveys, medical data, crime reports, public reports, and or certain findings by nongovernmental organizations tracking conflict-related violence.

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<sup>91</sup> For more guidance, see website of Queensland Legal Aid.

<sup>92</sup> Carry Spork, interview by Kim Thuy Seelinger.

When patterns of violence are then compared with information about perpetrator activities or troop movement, certain correlations may emerge.<sup>93</sup> For example, one might learn that a particular security force moved through Region A during the same period that clusters of armed rapes in Region A were reported. This correlation might then open the door for more causal linkage if, in the course of interviewing residents in a few of Region A's villages, victims and other witnesses are able to identify the perpetrators as belonging to that particular security force. Their testimony may be strengthened by the layers of pattern evidence related to the same timeframe – e.g., information about troop movement and rape report data from local clinic records.<sup>94</sup>

Similarly, investigators of international crimes may look for contextual evidence to support a mode of liability such as “command responsibility.”<sup>95</sup> In these cases, where connections between a defendant and the lower-ranked, direct perpetrators must be established, investigators increasingly seek evidence of public announcements, internal communications, and information about strength of chain of command. These can help establish commanders' knowledge of, and liability for, sexual violence committed by their subordinates.

#### 7. Detecting and Exploring Sexual Violence Amid Other Violence

Whether someone has been sexually violated is often not apparent. There are obviously cases in which a victim contacts the police to report she has been raped. However, someone might also contact the police because she has been brutally beaten by her husband. The police may appear, write up an incident of domestic violence, and focus on the beating the victim has suffered. Where the woman has also been raped by her husband – either that day, or over time – she may not initially be forthcoming about the sexual aspects of her abuse for many reasons. An investigator should be trained to detect and explore the possibility of sexual violence even if it is not an explicit part of the initial fact pattern.

This is equally – if not more so – the case in the context of international crimes, where rape and other acts of sexual violence rarely occur in isolation. More often than not, mass sexual attack is part of a broad spectrum of violence including expulsion, internment, killings, beatings,

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<sup>93</sup> Brenda Hollis (Prosecutor, Special Court for Sierra Leone), interview by Kim Thuy Seelinger, the Hague, Netherlands, November 11, 2010.

<sup>94</sup> Again, for an excellent discussion of use and analysis of “pattern evidence,” see Xabier Agirre Aranburu, “Sexual Violence beyond Reasonable Doubt: Using Pattern Evidence and Analysis for International Cases.”

<sup>95</sup> For a comprehensive treatment of this mode of liability before the international courts, see Guénael Mettraux, *The Law of Command Responsibility* (Oxford: Oxford University Press, 2009).

or forced labor. A victim in an international crime case may therefore not initially be identified as a victim of sexual violence. Rather, she may be sought out for an interview because of her knowledge or experience of other forms of harm inflicted upon herself or her community. Thus, the investigator of international crimes must be trained to detect and sensitively explore a victim's experience of sexual violence in the context of the rest of her suffering.

Through training, most investigators can become mindful of the ever-present possibility of sexual violence. Use of the open, non-directive questions discussed above can help cast a wide net in an interview and ensure that a witness has the space to describe *all* the violence she has suffered. Trudie Gillissen, an investigator with the Yugoslavia Tribunal for over fifteen years, notes that starting with open queries such as, "tell me what happened" often reveals brief or subtle mention of sexual harm amid descriptions of other painful experiences. Such slight references to sexual violence should be noted, then unpacked sensitively, alongside other, nonsexual experiences so as not to impose emphasis on a crime that the witness herself might not prioritize. Gillissen also notes that role-playing these challenging interviews beforehand can give investigators, interpreters and prosecutors a much better sense of how to gently draw out relevant details, as well as how a witness may feel about being asked about a rape incident she had not planned to discuss.<sup>96</sup>

Gillissen and her colleague, investigator Carry Spork, remind that factfinders must use discretion when interviewing members of a family together or when others are in the room. Even if an interviewee has separately noted to the investigating team that she was raped, it must not be assumed that her husband, children, and neighbors are aware of this aspect of her experience. Depending on the circumstances of any given meeting, then, it may not be appropriate to pursue certain lines of questioning unless the victim has clearly indicated it is acceptable to do so with others present.<sup>97</sup> When victims are interviewed in a group setting, offering to follow up separately with each individual can provide an additional opportunity to explore any hints of sexual violence later, in private.

#### 8. Confidentiality and Disclosure

Investigators in any criminal case must clearly and candidly explain both the limits of confidentiality and any required disclosures. Due to the particularly private nature of sexual violence, this discussion is ethically imperative.

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<sup>96</sup> Trudie Gillissen (Investigations Team Leader, International Criminal Tribunal for the former Yugoslavia), interview by Kim Thuy Seelinger, the Hague, Netherlands, January 20, 2011.

<sup>97</sup> Trudie Gillissen and Carry Spork, interviews by Kim Thuy Seelinger.

A discussion about confidentiality might include information about who besides the investigating officer will have eventual knowledge of the sexual violation, and why. Normally, during the investigative stage, a victim's statement will be kept highly secured within the assigned investigation and prosecution team. However, the victim should understand from the outset that, should the case proceed (or, in the international crimes context, should sex crimes provide a basis for part of an indictment), her statement will ultimately be disclosed to the defense. In addition, even if charges related to sexual violence are *not* included in the indictment, there is the possibility that any additional information she provides—including “exculpatory” information—will be disclosed.<sup>98</sup>

## 9. Security

The security measures an investigating team must take when conducting witness interviews in the field vary according to context. However, one overarching security principle is to optimize any single witness interaction and minimize the number of times an investigator must return to the field for factfinding that can pose a danger to either the witness or the investigator herself. This may be particularly true for international crimes investigations, which can involve fieldwork in crisis situations or bringing unwanted attention to local witnesses. This is one reason that an investigations team should be in close coordination with the prosecution team from the outset, as discussed below.<sup>99</sup>

### ii. Forensic evidence<sup>100</sup>

The fact that sexual violence usually leaves physical evidence is both a blessing and a challenge. When it is present, DNA evidence can place a perpetrator at a crime scene with more certainty than eyewitness testimony. However, many factors can limit the availability of DNA evidence, and it is important to remember that an investigation can continue even in the absence of DNA samples. In many places, victims who seek medical treatment undergo examination by a doctor or nurse for the purposes of clinical care. In order to obtain evidence for possible prosecution, victims may also need to submit to a forensic examination, which is defined as a “medical examination conducted in the knowledge of the possibility of judicial proceedings in the

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<sup>98</sup> Ibid.

<sup>99</sup> Patricia Viseur Sellers, interview with authors.

<sup>100</sup> It should be noted that medico-legal evidence and DNA testing does not yet feature in the context of international sex crimes. These measures are traditionally seen as relevant when attempting to establish that a sexual assault occurred, the identity of the attacker, or the victim's lack of consent. As discussed above and in “The Jurisprudence of Sexual Violence,” these issues are often not the focus of international sex crimes prosecution. However, the Human Rights Center is currently exploring the potential value of forensic evidence in international sex crimes.

future requiring medical opinion.”<sup>101</sup> Forensic evidence can include samples of hair, or trace blood, semen, or saliva (which can contain the perpetrator’s DNA); foreign material from the crime scene; urinalysis evidence of victim sedation or other poisoning; and other physical evidence. It can establish whether an assault occurred. It can place the accused at the crime scene. It can even indicate the use of force or the lack of ability to consent.<sup>102</sup>

One common tool is the “rape examination kit,” a standardized package of medical supplies that can collect available forensic evidence of the attack. Ideally, the samples obtained by the kit are forwarded to a forensic evaluation lab.<sup>103</sup> If the accused party’s DNA is discovered, it can link him to a crime scene.

The value of forensic evidence is more established in cases of domestic sexual crimes, particularly where DNA evidence can help confirm the identity of an individual perpetrator. However, the Human Rights Center is currently working with forensic experts at the California Department of Justice to explore the potential value of DNA evidence relevant to international sex crimes charged as crimes against humanity, as well. For instance, it is theoretically possible to obtain a DNA profile of a *group* of perpetrators as they move through a region. Assuming that DNA samples could be taken from victims and their regular sexual partners to subtract out innocent parties’ DNA from a post-rape sample, remaining DNA obtained from any particular victim should belong to the perpetrator(s). Gathering samples from multiple victims in a mass attack should provide the collective DNA of the attacking group. Generated DNA profiles could be saved, then later compared to DNA evidence obtained from other mass attacks occurring in the region over time.

Such aggregated data, when overlaid with additional eyewitness testimony about perpetrator identity or information about troop movement, medical records, etc., may more closely link attacks throughout a region through recurring profiles of perpetrators’ DNA – even though individual perpetrators’ identities remain unknown. Such tracking of “group DNA profiles” may help link a pattern of rapes to a roving group of recidivist perpetrators. If matched with pattern evidence regarding the movement of a particular armed group, such evidence may help indicate the widespread or systemic nature of a campaign of sexual violence and also direct or command responsibility of that group’s leader. Obviously, there are tremendous contextual and

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<sup>101</sup> WHO, *Guidelines for medico-legal care*: 56.

<sup>102</sup> Janice Du Mont and Deborah White, *Uses & Impact of Medico-Legal Evidence*: 9-10. For an excellent chart outlining the types of medico-legal evidence that can be obtained upon examination and what purposes they can serve, see Table 3.1 on page 10.

<sup>103</sup> A more detailed description of the forensic rape examination is provided in Harris, *Sexual Violence: Medical and Psychosocial Support*.

logistical challenges to obtaining DNA samples in a situation of armed conflict or political unrest. However, in addition to testing the conceptual value of such an evidentiary effort, the Human Rights Center is currently exploring the ways in which modern forensic technology may be adapted to crisis settings.<sup>104</sup>

### *Challenges*

There are several challenges to the collection of forensic evidence in any sexual violence case. First, timing is critical. Ideally, evidence should be collected within the first 72 hours after assault; evidence can be lost if a victim bathes or even uses the bathroom before undergoing a medical exam. Second, where first-line health care providers handle a victim's clinical examination but do not also collect the medico-legal or forensic samples, the victim is forced to submit to an entirely separate forensic exam afterwards if she wants to collect evidence for possible investigation and prosecution. This can lead to additional frustration when the victim does not know where to go for additional examination. It can also unnecessarily subject a victim to repeated discomfort and humiliation. Third, victims may be unsure of how to file a police report, or may be intimidated by the idea of initiating a process alone – in many countries, if a police report is never filed, the forensic evidence a victim has supplied will never be sent for analysis. In the context of armed conflict or unrest, it is even more difficult for a victim to access threshold medical care at all, much less initiate a local investigation.

Further, even where a woman has proceeded with a forensic examination and is determined to pursue her case in court, her efforts can be stymied. Forensic and DNA analysis is a costly process – it requires an equipped laboratory, trained technicians, and constant supply and maintenance. Where a forensic laboratory is underfunded or lacks properly trained personnel, forensic analysis capacity may be minimal or unreliable. Substandard laboratory procedures can result in destruction of evidence, backlog in the court system, and even wrongful convictions.<sup>105</sup> Even where sufficient technology and resources do exist, evidence can be wasted. For example, “rape examination kits” are often not even processed – two reports by Human Rights Watch in 2009 and 2010 reveal that tens of thousands of rape kits collected in Illinois state and Los

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<sup>104</sup> The Human Rights Center is working with Dr. Cristian Orrego at the California Department of Justice to more fully develop these theories and their practical implications. We are also exploring these ideas with investigators and prosecutors at the ICC and Yugoslavia Tribunal.

<sup>105</sup> Steve McVicker and Roman Khanna, “Independent review sought for HPD lab,” *Houston Chronicle*, September 2, 2004.

Angeles County, California, were never analyzed, despite the availability of appropriate laboratories.<sup>106</sup>

Finally, legal requirements regarding collection of medico-legal evidence can restrict which health-care providers may testify in court, impose mandatory reporting of certain categories of allegations, dictate how forensic evidence must be collected and stored, etc. Healthcare providers may not be well-versed in relevant legal requirements – ignorance which may result in anxiety for the victim, confusion of procedures, or even inadmissibility of evidence.

#### *Promising Practices*

##### 1. Streamlining medico-legal examinations and the provision of health services

The fewer trips and examinations a victim of sexual violence must undertake, the better. As part of this streamlining, it is both logistically and procedurally sensible for the provider of medical care to also perform the forensic examination, in the event that the victim will later choose to pursue legal action. Whether the exam is performed by a Sexual Assault Nurse Examiner or by a medical doctor, the World Health Organization strongly recommends that the examiner be properly trained in sexual violence forensic examination.<sup>107</sup> The examiner must also be capable of balancing her dual function of providing therapeutic care with collecting forensic evidence, which can be an arduous and uncomfortable process for the victim / patient.<sup>108</sup>

##### 2. Improved linkages between medical and legal sectors

To further streamline a victim's experience, linkages between the medical and legal sectors can be strengthened. The one-stop shop and Sexual Assault Referral Center models (further discussed in Harris, *Sexual Violence: Medical and Psychosocial Support*) are effective ways to coordinate a victim's resources: she can come to a clinic for care and forensic examination, then be passed seamlessly on to legal assistance or law enforcement partners should she decide to pursue her case in court.

Typically, these linkage mechanisms are envisioned as being based in the medical service center. However, there are also innovative models in which inter-sectoral linkage mechanisms are rooted in the legal service organization. For example, the Bureau des Avocats Internationaux, in Port-au-Prince, Haiti, often receives rape victims directly referred by local women's organizations working in the internally displaced persons camps, as part of its new Rape Accountability and Protection Project. A paralegal affiliated with the organization performs an

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<sup>106</sup> Human Rights Watch. *Testing Justice: The Rape Kit Backlog in Los Angeles City and County* (USA: Human Rights Watch, 2009); Human Rights Watch. *I Used to Think the Law Would Protect Me: Illinois's Failure to Test Rape Kits* (USA: Human Rights Watch, 2010).

<sup>107</sup> WHO, *Guidelines for medico-legal care*, 18.

<sup>108</sup> *Ibid.*; see also Kelly, "Promising Practices," 5.

intake interview with the woman to open her legal case. If it is found that the woman has not yet sought medical care, the paralegal accompanies her to the hospital for examination and treatment. The paralegal also files a request for medical certification, in case it is necessary later for litigation.<sup>109</sup>

A similar model is found with International Justice Mission, an international human rights organization with a presence in Kenya. Primarily a legal service organization, the International Justice Mission litigates the sexual assault of minors as part of its caseload. Once a child is referred to the organization, either through grassroots contacts or a national child abuse hotline, the child is provided a cross-service team of a lawyer, mental health specialist, and case manager. Before the lawyers initiate the legal case, the case managers ensure that the child receives necessary medical care and forensic examination. The mental health specialists then provide ongoing counseling support and psychological evidence as appropriate.<sup>110</sup>

Even the administrative systems used by medical care providers and law enforcement to record key facts of a sexual assault can be streamlined for optimal coordination. This includes documentation tools: do the forms used by the medical care providers complement the forms used by police? What is the relationship between the two paperwork systems, and do they work together to simplify the process and maximize evidentiary value?

In the Kenyan context, for example, there are two separate forms used to document a sexual attack. First, there is the Kenya Police Medical Examination Form, or “P3” form, which is a general legal document found in police stations that doctors complete when examining crime survivors in order to later prove, corroborate, or even disprove an alleged attack. It is not specific to sexual crimes.<sup>111</sup> A second form, the “Post Rape Care” Form, or “PRC 1,” affords Kenyan healthcare providers the opportunity to record details relevant to a sexual attack when a victim comes forward for care. However, the PRC form – though more responsive to sexual violence documentation – does not yet carry the evidentiary weight of the P3 form, and in practice is often treated as an optional “supplement” to the primary police document. The relationship between the two forms – as well as restrictions as to who must fill them out to preserve admissibility in court – is a source of confusion at this time. Failure to present coherent, properly-completed

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<sup>109</sup> Personal observations of Kim Thuy Seelinger, Port-au-Prince, Haiti, August 2010.

<sup>110</sup> Joseph Kibugu, Country Director, IJM-Kenya, interview with Kim Thuy Seelinger, Nairobi, Kenya, October, 2010.

<sup>111</sup> Carol Ajema et al., *Standards required in maintaining the chain of evidence in the context of post rape care services: Findings of a study conducted in Kenya* (Nairobi: Liverpool VCT, the Division of Reproductive Health, and Population Council, 2009): vii.

documentation can thus cause the prosecution of sex crimes in Kenya to fall apart for lack of sufficient evidence.<sup>112</sup>

Finally, linkage between legal and medical sectors is also important in terms of keeping health care providers up to date about legal requirements governing the collection and presentation of forensic evidence in sexual violence cases. Collaborations of medical care providers, lawyers, and law enforcement can create an opportunity for information exchange and mutual training.

### 3. Increasing forensic analysis capacity

Improved collection, storage, and analysis of forensic evidence starts with improved capacity at the point of initial victim contact. For example, doctors and nurses with specialized training in sexual assault cases are more likely to collect evidence and to provide referrals to police and legal services. They are also more sensitized to how the medical exam, a physically invasive procedure, can re-traumatize a victim. Other studies indicate that Sexual Assault Nurse Examiner programs lead to improved psychological outcomes for victims and better collection of forensic evidence and expert testimony.<sup>113</sup>

A fully-operational forensics lab then requires adequate equipment, trained personnel, and maintenance – all of which require adequate funding. Ideally, a lab performing analysis for criminal cases should be internationally accredited to ensure quality control in such high stakes conclusions. However, alternative measures can be undertaken while a national forensics lab is brought up to standard. One possibility is contracting forensic analysis out to private laboratories – either domestically or abroad. Another possibility may lie in sharing a more advanced government laboratory elsewhere in the region. This latter option may be particularly relevant where countries experiencing conflict are either unable to provide analysis due to collapsed infrastructure or political sensitivity.

Intermediary steps may be possible, as well. For example, even a basic lab can be trained to accurately perform the initial, preparatory DNA extraction and storage work required for later analysis (when the same lab becomes fully functional) or elsewhere (if the actual analysis is to be contracted out).<sup>114</sup>

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<sup>112</sup> Carol Ajema et al., “Challenges experienced by service providers.”

<sup>113</sup> R. Campbell, D. Patterson and L.F. Lichty, “The effectiveness of sexual assault nurse examiner (SANE) programs: a review of psychological, medical, legal, and community outcomes,” *Trauma Violence Abuse* 6 (2005): 313-29.

<sup>114</sup> Dr. Cristian Orrego (Criminalist supervisor in forensic genetics, California State Department of Justice DNA Laboratory), interview by Kim Thuy Seelinger, December 3, 2010, Richmond, California.

## PROSECUTOR OBJECTIVES

### **Punishing the person or people who committed crimes**

In the case of coordinated or mass sexual violence, as can occur in times of war or political unrest, this can include both the individuals who directly violated victims as well as higher ups who orchestrated, allowed, or failed to punish the acts.

### **Vindicating the rights of the victim**

By punishing the perpetrator, prosecutors hope to help victims move forward. However, prosecutors should remain mindful of the victim's own objectives at each stage of the process and avoid retraumatizing the victim along the way.

### **Educating the public and deterring future criminal offences**

Holding perpetrators accountable for their crimes can aid in diminishing the culture of impunity that develops during conflict and political unrest, and that more broadly surrounds the problem of sexual violence in some countries even in peacetime.<sup>115</sup>

### **Creating beneficial jurisprudence**

In a common law system, one case can set an important precedent for how future cases can be tried. This can help future prosecutions and deter future crimes if potential perpetrators believe they are likely to be punished.

### **Challenging biases and stereotypes**

Too often judges, jury members, and even expert witnesses harbor stereotypes regarding sexual crimes. Prosecutors frequently must address these stereotypes to ensure a successful case. Ideally, such efforts address these issues at an institutional level.

## **B. Prosecutions**

### *Challenges*

Lack of political or institutional will can impair the prosecution of both international sex crimes and domestic crimes of sexual violence. Resistance can stem from the prosecutor's office itself: A frequently-invoked example of inconsistent commitment to the prosecution of sexual violence is the Rwanda Tribunal, where inclusion of sex crimes charges rose and fell with changes in chief prosecutor.<sup>116</sup> However, more often than not, failure to prosecute derives from the state and the forces of power, including:

- Cultural paradigms: Gender, class, and ethnic dynamics can create an entrenched sense of impunity and lead to general disinterest in the prosecution of crimes committed against marginalized groups;

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<sup>115</sup> Tamara Lawson, "A Shift Towards Gender Equality in Prosecutions: Realizing Legitimate Enforcement of Crimes Committed Against Women in Municipal and International Criminal Law," 33 *Southern Illinois University Law Journal* (2009): 188.

<sup>116</sup> Binaifer Nowrojee, *Occasional Paper 10: Your Justice is Too Slow: Will the ICTR Fail Rwanda's Rape Victims?* (Geneva: United Nations Research Institute for Social Development, 2005.)

- Cultural norms surrounding sexual violence: A perception of sexual violence as either taboo or a low-value crime affects engagement in training, sensitization, and prioritization;
- State perpetrators: The will to prosecute can languish when state actors are implicated in the sexual violence, or where perpetrators are otherwise affiliated with the authorities;
- Corruption / limited resources: Low salaries for police and judicial officers can impact whether sexual violence is investigated and prosecuted (where perpetrators either bribe them, or where limited resources lead to prosecutors' prioritization of other crimes that seem more "serious").

Even once initiated, prosecution of sexual violence cases can be plagued by lack of sufficient evidence. Forensic evidence can be inadequate due to poor collection or preservation techniques; testimonial or factual evidence can suffer due to lack of skills on the part of the investigator (interviewing methodology, scope of inquiry, etc.).<sup>117</sup> Also, evidence can suffer from a "quantity v. quality" tradeoff that can cripple a prosecution, as observed at the Rwanda Tribunal. There, some witness statements contained no more than a few paragraphs, "offering close to no information that could help a prosecuting attorney."<sup>118</sup>

Lack of adequate investigation can result in flawed or incomplete indictments which may not reflect the sexual violence actually committed. This problem arose in the early days of the Yugoslavia and Rwanda Tribunals: even where evidence of sexual violence was later discovered, prosecutors' requests to amend original indictments were routinely denied by the tribunals. As a result, victims who wanted their experience of sexual violence to be included among the charges were denied their "day in court."<sup>119</sup>

There may also be strategic challenges in determining an indictment in an international case involving sexual violence, where rape, for example, may have been committed in the context of other widespread violence, such as expulsions, internment, torture. The prosecution might need to decide whether to charge an incident as rape, or whether the sexual assault should instead be presented as a component of a broader persecution campaign. This decision may rest in part on

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<sup>117</sup> Ibid., 12.

<sup>118</sup> Ibid.

<sup>119</sup> The Rwanda Tribunal *Akayesu* case is perhaps the classic example of inadequate investigation creating the need to amend an original indictment to include sexual violence. In the course of trial, witness after witness mentioned sexual violence during oral testimony. Sexual violence had never been included in the scope of investigation, and thus had not been reflected in the ensuing indictments. However, the sitting judges noted the unanticipated mentions and pointed them out to the prosecution, which moved to amend the original indictments to include sexual violence offences. This amendment was permitted – a rare success in situations of late-obtained evidence. See Susana SaCouto and Katherine Cleary, "The Importance of Effective Investigation of Sexual Violence and Gender-based Crimes at the International Criminal Court," 17 *American University Journal of Gender, Social Policy and the Law* (2009): 349.

the anticipated capacity of a witness to testify in detail about the rape itself—if rape is raised as an independent count, more detailed testimony of the attack might be required in court.<sup>120</sup>

Finally, and perhaps obviously, lack of adequate staffing and prosecutorial capacity is a challenge in both national and international tribunals all over the world.

### *Promising Strategies*

#### 1. Gender Training

Specialized training of an entire prosecutorial team increases awareness and comfort with the prosecution of sexual crimes and can equalize staff members' familiarity where individuals may come with diverse experience with gender issues. In addition, inclusion of sexual and gender-based violence issues in mandatory training can send the message that these cases are part of the core prosecution work – they are not “extraneous” or somehow extracurricular.<sup>121</sup>

Beyond promoting gender sensitivity, specialized training can also be a quick and targeted way of transferring specialized legal expertise to prosecutors and judges. In the Democratic Republic of the Congo, for example, the American Bar Association Rule of Law Initiative (ABA ROLI) runs training programs for police, lawyers, prosecutors and judges that focus specifically on the law and legal issues related to gender-based violence.<sup>122</sup> Another example can be found in the Philippines, where the Department of Justice offers “gender-sensitivity” training for all members of the National Prosecution Service – especially those who handle sexual violence cases in the family courts. The training offers continuing legal education credits, which are mandatory for good standing within the Philippino bar. Among the family court prosecutors who receive training, a select few will receive additional guidance and support to extend training to new attorneys who join the prosecutor's office.<sup>123</sup>

Similarly, the Women's Initiative for Gender Justice provides gender training seminars for judges, prosecutors and staff at both the ICC and the Special Court for Sierra Leone.<sup>124</sup>

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<sup>120</sup> Carry Spork, interview by Kim Thuy Seelinger.

<sup>121</sup> *2008 Rwanda Tribunal Best Practices*, 3.

<sup>122</sup> ABA Rule of Law Initiative Update, “DRC's Mobile Courts Strike a Blow Against Rape and Related Crimes,” November 2009.

<sup>123</sup> See Seagen Waves, “Philippines: Enhancing Gender-Responsiveness in the Justice Sector,” October 2009. Available at <http://www.adb.org/Documents/Periodicals/SEA-GEN/vol03/article09.asp>

<sup>124</sup> See <http://www.iccwomen.org/whatwedo/training/index.php>.

## 2. Gender Advisors

Another way to build awareness about gender-related issues like sexual violence throughout a judicial system is through the use of in-house experts. This can be particularly useful in prosecutorial branches, where understanding about the elements and proof requirements of sexual violence – and how to include them into the overall prosecutorial strategy – is critical to the formulation of effective indictments. As per Article 42(9) of the Rome Statute, the ICC Office of the Prosecutor is staffed with a gender advisor to work with the Gender and Children Unit, developing a comprehensive gender approach throughout the Prosecutor’s work.

## 3. Integration of sexual and gender-based violence into strategy at outset

Even where it may not be possible to have an actual “gender advisor” on a prosecutorial staff, senior management can take measures to ensure that acts of sexual and gender-based violence are considered along with other forms of violence when crafting a prosecutorial strategy, if evidence indicates that such harm featured in the facts of a case.

Experience at the international tribunals suggests that the prosecution must have a coherent theory – including the role gender plays in the conflict in question - from the outset. Trial teams working to prosecute war crimes, crimes against humanity, and genocide can be overwhelmed by the breadth and volume of evidence gathered by investigators. To streamline their task and allocate resources as best they can, prosecutors often focus on developing “high value” or familiar crimes such as murder, forced displacement, or torture presented in the facts. To ensure that crimes of sexual violence receive the same degree of consideration by a trial team, senior management can require that prosecutors devise detailed action strategies and work plans that include a comprehensive analysis of sexual or gender based violence charges at the outset, where the facts so warrant.<sup>125</sup>

## 4. Coordination with Investigators For More Effective Evidence Collection

Having a clear theory of the role gender plays in the crimes before the prosecutors can help inform investigation strategy as a case develops. Therefore, close coordination between investigators and prosecutors is essential to the successful prosecution of sex crimes. For trial teams at both international and domestic courts, this coordination can be enhanced by a number of concrete measures: establishment of clear lines of contact, as through team liaisons or periodic

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<sup>125</sup> *2008 Rwanda Tribunal Best Practices: 2-3.*

meetings; engagement in joint trainings; clear and regular communication at the outset regarding provisional case theory, etc.<sup>126</sup>

There are also some tools that prosecutors and investigators can use to clarify the relationship between prosecutorial strategy and the evidence to be collected, including:

- (1) a “proof sheet” to map the investigation strategy for investigators and ensure it is closely coordinated with the legal elements of each case which is drafted by the prosecutor early in the case (well prior to the issuance of the indictment) but is subject to revision as the case evolves, and
- (2) use of standard interview protocols and checklists for investigators, who should execute interviews with overall prosecutorial strategy in mind.

Brenda Hollis, Prosecutor at the Special Court for Sierra Leone, suggests that in the international crimes context, the division between “investigating team” and “prosecuting team” be collapsed into a single, lawyer-directed unit to ensure full coordination and exploration of factual and legal avenues from case inception.<sup>127</sup>

#### 5. Increasing the Scope of Evidence

Evidence of sexual violence should come from diverse sources in addition to direct victim testimony. This can include testimony from other witnesses, research conducted by human rights and health groups, and testimony from experts versed in science, psychology, history, etc.

It can be extremely helpful to have expert testimony regarding physical health, mental health, and other impacts of sexual violence. This testimony can assist the adjudicator in understanding the victim’s behavior, demeanor, choices, and needs. It can also help establish the nature of non-physical harm sustained by sexual violence, which may not be apparent but may help establish various elements of an offense.

#### 6. Increasing Prosecutorial Capacity

A prosecutorial team can also be hamstrung by limited staffing and resources.<sup>128</sup> The following strategies have been developed to maximize the labor force necessary for litigation:

- Training Paralegals to Perform Basic Legal Tasks

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<sup>126</sup> 2008 *Rwanda Tribunal Best Practices*, generally.

<sup>127</sup> Brenda Hollis, interview with Kim Thuy Seelinger.

<sup>128</sup> Ironically, this can also happen when donor funds are disproportionately channeled to support one kind of case over another. Recently, in certain countries, specific donor financing of sexual and gender-based violence prosecution can outweigh support channeled to support general prosecutorial capacity. It may be prudent for legal sector stakeholders to be aware of these unintended disparities and seek more mainstreaming of sexual and gender-based cases – not only to increase the knowledge base among all prosecutorial staff, but also in the interest of consistent resource allocation.

Paralegals can carry out a wide range of essential legal tasks, permitting attorneys to concentrate on work that requires formal legal training. Paralegals need only a basic education and can be paid considerably less than a licensed attorney. In the Democratic Republic of the Congo, for example, the American Bar Association has helped train local women to do in-take work for local legal clinics. Similar paralegal programs have been rolled out in Kenya, whereby members of rural communities are trained by civil society organizations like the Coalition on Violence Against Women (COVAW) to provide basic legal support and act as guides for victims of sexual and gender-based violence who need to navigate the health, law enforcement, and legal fields. These paralegals are supervised remotely by practicing attorneys based in Nairobi and become local experts on response to gender-based violence in their home communities.

In December 2010, the Open Society Justice Initiative published a very helpful practitioners' guide, which presents a blueprint for setting up a community-based paralegal program.<sup>129</sup>

- Developing Pro Bono Resources

Many jurisdictions promote pro bono community service on the part of private attorneys. One way to encourage this practice and alleviate a local sexual violence caseload is by creating a pro bono referral program. Such programs are often organized through the courts; a court coordinator assembles a list of attorneys willing to take cases and then matches cases and volunteer attorneys as appropriate.<sup>130</sup> The Public Interest Law Institute, located in New York City, has provided technical assistance to law offices and bar associations seeking to establish pro bono programs in Hungary, Russia, China and the Czech Republic.<sup>131</sup>

A pro bono program can also utilize the services of law students and recent law graduates. In Nigeria, for example, all law graduates under 30 years of age are required to spend one year in service to the state. The new lawyers, after a one-month training course, are posted to various government departments and private sector organizations, with the government paying part of their salary. The Nigerian National Youth Service Corps is currently running a pilot program that sends young lawyers to targeted areas where they provide necessary legal services under the supervision of the local Legal Aid Council Directors.

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<sup>129</sup> Open Society Justice Initiative at [http://www.soros.org/initiatives/justice/focus/legal\\_capacity/articles\\_publications/publications/paralegals-manual-20101208](http://www.soros.org/initiatives/justice/focus/legal_capacity/articles_publications/publications/paralegals-manual-20101208).

<sup>130</sup> Funds are often available to reimburse counsel for reasonable and necessary out of pocket expenses, including preparation of the briefs and travel to oral argument. See Ninth Circuit Court of Appeals Pro Bono Program, at [www.ca9.uscourts.gov/datastore/uploads/1\\_pro\\_bono\\_handbook.pdf](http://www.ca9.uscourts.gov/datastore/uploads/1_pro_bono_handbook.pdf).

<sup>131</sup> <http://www.pili.org>.

### **WORLD HEALTH ORGANIZATION'S EIGHT SAFETY AND ETHICAL RECOMMENDATIONS**

The World Health Organization has highlighted ethical considerations pertaining to questioning and fact-gathering in sexual violence cases, particularly in emergency or conflict situations.

1. The benefits to respondents or communities of documenting sexual violence must be greater than the risks to respondents and communities.
2. Information gathering and documentation must be done in a manner that presents the least risk to respondents, is methodologically sound, and builds on current experience and good practice.
3. Basic care and support for survivors/victims must be available locally before commencing any activity that may involve individuals disclosing information about their experiences of sexual violence.
4. The safety and security of all those involved in information gathering about sexual violence is of paramount concern and should be continuously monitored, especially in emergency settings.
5. The confidentiality of individuals who provide information about sexual violence must be protected at all times.
6. Anyone providing information about sexual violence must give informed consent before participating in the data-gathering activity.
7. All members of the data collection team must be carefully selected and receive relevant and sufficient specialized training and ongoing support.
8. Additional safeguards must be put into place if children (i.e. those under 18 years) are the subject of information gathering.<sup>132</sup>

#### **V. PHASE THREE: TRIAL AND ITS ALTERNATIVES**

Ultimately, investigation and prosecution strategies are designed to obtain a judicial finding of the defendant's guilt or innocence. Though casting their net widely to gather evidence, prosecutors must build their case with an eye toward a judge's or jury's determination of its sufficiency to support the charged offenses. Consequently, as in most cases, the next step in the lifecycle of a sexual violence case is the trial. In many countries, however, prosecutors and defendants have an alternative to trial. Specifically, they may agree that the defendant will enter a guilty plea in lieu of trial, in exchange for a lighter sentence. This section therefore begins with a discussion of plea bargaining in sexual violence cases. It then explores the challenges that arise during trials involving sexual violence as well as some promising practices for addressing those challenges.

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<sup>132</sup> World Health Organization, *WHO ethical and safety recommendations for researching, documenting and monitoring sexual violence in emergencies* (Geneva: WHO, 2007): 9.

## A. Plea Bargaining

Plea bargaining is a well-established alternative to trial in common law countries, and procedures resembling plea bargaining have developed in many civil law jurisdictions as well.<sup>133</sup> In a plea bargain, a defendant agrees to plead guilty to a specific charge or charges in exchange for the prosecutor's agreement to (1) drop one of the charged offenses (called charge-bargaining) or (2) recommend a reduced sentence (called sentence bargaining), or both. Plea bargaining is especially attractive in contexts where there are limited judicial resources, the trials of numerous defendants will place a great burden on the judicial system (as in post-conflict prosecutions), or mandatory minimum sentences encourage defendants to bargain for a lighter punishment. Plea bargaining has also been justified as a means to spare victims the pain of trial testimony and, in the context of international crimes, as a means to further national reconciliation.<sup>134</sup>

### *Challenges*

Plea bargaining in sexual violence cases raises several distinct challenges. Where prosecutors do not take sexual violence seriously, these charges are often prosecutors' preferred bargaining chip with defendants: these cases may be settled more often through a plea agreement, or charges related to sexual violence may be dropped more frequently in exchange for a guilty plea. Studies of judgments at both the Rwanda Tribunal and the War Crimes Chamber of the Court of Bosnia and Herzegovina found that where defendants pled guilty to offenses such as murder and extermination, charges related to sexual violence were the ones most often withdrawn or abandoned.<sup>135</sup> This systematic bargaining-away of sexual violence charges has several important consequences.

First, charge-bargaining robs victims of the chance to have the injury of sexual violence socially acknowledged. Victims come forward in sexual violence cases because they want to tell "what really happened" in a place "where it would make a difference," in the words of one victim who testified at the Yugoslavia Tribunal.<sup>136</sup> Because plea bargaining procedures generally

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<sup>133</sup> Alphons Orie, "Accusatorial v. Inquisitorial Approaches in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings Before the ICC," in Antonio Cassese, Paola Gaeta and John R.W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002): 1447-48.

<sup>134</sup> Michael P. Scharf, "Trading Justice for Efficiency: Plea-Bargaining and International Tribunals," *Journal of International Criminal Justice* 2 (December 2004): 1076.

<sup>135</sup> Van Schaack, "Obstacles on the Road to Gender Justice," 395; Mischkowski and Mlinarevic, *The Trouble with Rape Trials* 22. While these studies document the effects of plea bargaining for international sex crimes, there is little systematic research about plea bargaining specifically in cases of domestic crimes of sexual violence in resource-poor countries.

<sup>136</sup> Mischkowski and Mlinarevic, *The Trouble with Rape Trials*, 52.

exclude victims, victims are deprived of the rehabilitative potential of participating in a public process of holding perpetrators accountable. Second, the shorter sentences that often result from plea bargains add to victims' feelings of dissatisfaction with the court proceedings. Particularly because their views are not considered during the plea negotiations, the resulting light sentences often exacerbate victims' sense of grievance.<sup>137</sup> Finally, in cases concerning international sex crimes, plea bargaining can distort the historical record about the scale and scope of sexual violence during the armed conflict or political unrest. The presentation of evidence by both parties during a public trial produces a more complete (and arguably more reliable) record of events than a plea agreement. To the extent trials can contribute to peacebuilding by revealing and recording the truth about national atrocities, the systematic bargaining-away of sexual violence charges can have the unintended but important effect of leaving sexual violence historically unacknowledged.

### *Promising Practices*

National plea bargaining practices have received much scholarly analysis. Although little of this material relates specifically to sexual violence cases, some practices appear relevant and adaptable to prevent gender bias in plea bargaining in such cases. If followed consistently, these practices could help reduce systematic gender bias the process.

Countries as varied as Australia, the United States and Bosnia and Herzegovina (where plea bargaining has just been introduced) have instituted national guidelines to ensure consistency and limit prosecutors' discretion to negotiate with an accused. These guidelines are formulated at the policy-making level of the national prosecutors' office and establish criteria for evaluating which charges may legitimately be subject to bargaining. These criteria include:<sup>138</sup>

- The adequacy and admissibility of the relevant evidence;
- The reasonable prospects of conviction on the charge; and
- The representativeness of the charge with respect to the totality of the defendant's conduct.

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<sup>137</sup> *Ibid.*, 22, 32-33, 52-55.

<sup>138</sup> David Schwendiman, "Prosecuting Atrocity Crimes in National Courts: Looking Back on 2009 in Bosnia and Herzegovina," *Northwestern University Journal of International Human Rights* 8 (Summer 2010): 53-57.

These guidelines also include a mandatory review process: at some point prior to the presentation of the agreement to the court, the head of the prosecutors' office must approve the plea agreement.<sup>139</sup>

Many countries and sub-national units have also refashioned their plea procedures to include victims.<sup>140</sup> The plea bargaining policy of Bosnia and Herzegovina, for example, requires prosecutors to meet with victims to explain the plea agreement and to answer their questions.<sup>141</sup> Many states in the United States have gone even further. By law (not merely at the prosecutor's discretion), victims can comment on the proposed plea during the plea negotiations between the prosecutor and the defendant, and during the court hearing when the defendant enters his plea.<sup>142</sup> The Rome Statute of the ICC also appears to permit victims to participate in the plea bargaining process, although this question has not yet been decided by the Court.<sup>143</sup> Because victims' opposition to plea agreements stems largely from their exclusion from the bargaining process, victims' inclusion would do much to mitigate their resistance to such agreements.

Finally, plea bargaining need not seriously compromise the historical record in cases where documenting mass sexual violence is important. For example, prosecutors at the Yugoslavia Tribunal have insisted that some plea agreements contain a detailed recitation of facts supporting *both* the charges to which the accused pled guilty *as well as* those the Prosecutor's Office agreed to drop.<sup>144</sup> In addition, entire plea agreements, along with background facts that provide the context in which to understand the defendants' admissions, have sometimes been included in the trial chambers' judgments. While these judgments are shorter than those that would follow a full-scale trial, they nonetheless provide substantial information about the crimes

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<sup>139</sup> Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process* (November 2008): 18-20. Available at [www.cdpp.gov.au/Publications/ProsecutionPolicy/](http://www.cdpp.gov.au/Publications/ProsecutionPolicy/).

<sup>140</sup> Many countries recognize the importance of victims' participation in criminal proceedings, but have not explicitly extended this participation to plea bargaining. For example, Kenya's Sexual Offenses Act requires that the victim's impact statement be considered in determining a defendant's sentence, but is silent on the issue of victims' participation in any plea bargaining process. Sexual Offenses Act, Art. 33(b); Sexual Offenses Regulations, 2008, Sec. 3(2)(e).

<sup>141</sup> Schwendiman, "Prosecuting Atrocity Crimes in National Courts," 55.

<sup>142</sup> Victims can, for example, comment on the proposed plea at either or both of these stages. U.S. Department of Justice, Office of Justice Programs, Office for Victims of Crime, *Victim Input Into Plea Agreements* (OVS Legal Series Bulletin #7) (November 2002). Available at [www.ncjrs.gov/ovc\\_archives/bulletins/legalseries/bulletin7/ncj189188.pdf](http://www.ncjrs.gov/ovc_archives/bulletins/legalseries/bulletin7/ncj189188.pdf).

<sup>143</sup> Article 68(3) of the Rome Statute states: "Where the personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."

<sup>144</sup> Janine Natalya Clark, "Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation," *European Journal of International Law* 20 (April 2009): 428.

and can contribute to the creation of a historical record.<sup>145</sup> These practices seem equally appropriate to plea agreements reached in a national court and could be applied to plea agreements involving sexual violence offenses.

## **B. “An Enabling Courtroom Environment”<sup>146</sup>**

Unless a defendant’s guilty plea has been accepted by the court, the next step in the life-cycle of a sexual violence case is the trial. Regardless of whether the charged offense is an international or domestic sex crime, the trial is the culmination of the truth-seeking process, and victims’ participation is essential. But trial and trial-related practices often discourage women from testifying and retraumatize those who bravely choose to do so. As one study insightfully concluded,

More often than not, courts are reluctant to admit their own responsibility in the numerous cases where survivors of sexualized violence refuse to testify. Instead of analyzing why [victims decline to testify] . . . courts turn to convenient stereotypes blaming the women themselves or society as a whole.<sup>147</sup>

Studies of victims who testified at the Yugoslavia and Rwanda Tribunals found that many victims of sexual violence were highly motivated to speak about their experience in court.<sup>148</sup> Though the extent to which this is true may depend on the nature of the sexual violence—victims of collective sexual violence seek to testify in part to gain recognition of the harm to their community and often have the support of other victims,<sup>149</sup> whereas victims of an individual act of sexual violence may lack this motivation and support—all victims legitimately expect the court to respect their privacy and dignity and to ensure their safety. The following discussion identifies some challenges encountered during sexual violence trials and explores measures that can be used to address them.

### **i. Protective Measures**

Although motivated to testify, trial can be an emotionally difficult experience for victims of sexual violence, as well as a dangerous one. Victims often face rejection by their family and community. Sometimes they face physical intimidation from the perpetrator’s family or

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<sup>145</sup> Examples include *Prosecutor v. Jelusic*, Case No. IT-95-10-PT, Factual Basis for the Charges to Which Goran Jelusic Intends to Plead Guilty (Sept. 29, 1998) and *Prosecutor v. Ruggiu*, Case No. ICTR-97-32-DP, Plea Agreement Between Georges Ruggiu and the Office of the Prosecutor, (May 12, 2000).

<sup>146</sup> 2008 Rwanda Tribunal *Best Practices*, 15.

<sup>147</sup> Mischkowski and Mlinarevic, *The Trouble with Rape Trials*, 6.

<sup>148</sup> *Ibid.*, chap. 5; Nowrojee, *Your Justice is Too Slow*, 14, 21.

<sup>149</sup> Mischkowski and Mlinarevic, *The Trouble with Rape Trials*, chap. 5.

supporters. They are sometimes treated disrespectfully by insensitive prosecutors during trial preparation and humiliated by judges or defense counsel during trial.<sup>150</sup> Studies confirm that victims are more likely to testify, and feel better about the experience, with protective measures that help create the conditions for safe and effective testimony.<sup>151</sup>

Courts have developed a wide range of measures to ease victims' experience of trial and related activities. These measures can be classified into three groups: (1) confidentiality measures, (2) privacy measures, and (3) victim support measures.

*Confidentiality measures* are designed to protect the identity of the victim from the press and the public, who often condemn or ostracize victims of sexual violence. Confidentiality measures include:<sup>152</sup>

- Removing any identifying information such as names and addresses from the court's public records and withholding them from media and the public and in exceptional cases also from the accused;
- Using a pseudonym for a victim;
- Prohibiting the disclosure of the identity of the victim (or identifying information) to a third party;
- Permitting victims to testify behind screens or through electronic or other special methods;
- Allowing any part of the trial to be held *in camera*, i.e., excluding the public from part or all of the victim's testimony. These "closed sessions" would mean not only excluding the public from hearing the victim's testimony but also removing her testimony from all public records.

*Privacy measures* are special evidentiary rules designed to limit the questions that can be posed to a victim during her trial testimony. Privacy measures are especially important for victims of sexual violence because they prevent defense counsel from challenging the victim's credibility with painful and irrelevant questions based on sexist stereotypes about women's sexual conduct. Privacy measures include:<sup>153</sup>

- Prohibiting questions about the victim's prior or subsequent sexual conduct;
- Prohibiting questions about whether she consented to the sexual violence;
- Not requiring corroboration of the victim's testimony.

*Victim support measures* are designed to ease victims' experience during their testimony. These measures recognize that victims of sexual violence have suffered great trauma, and are

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<sup>150</sup> Mischkowski and Mlinarevic, *The Trouble with Rape Trials*, 59; Nowrojee, *Your Justice is Too Slow*, 4.

<sup>151</sup> Mischkowski and Mlinarevic, *The Trouble with Rape Trials*, 82-86.

<sup>152</sup> Anne-Marie De Brouwer, *Supranational Criminal Prosecution of Sexual Violence* (Antwerp: Intersentia 2005): 238-48.

<sup>153</sup> *Ibid.*, 260-69.

intended to safeguard their psychological and emotional well-being during their testimony.

Victim support measures include:<sup>154</sup>

- Permitting the victim to testify in a manner that allows her to avoid seeing the accused;
- Limiting the frequency, manner and length of questioning;
- Permitting a support person such as a family member or friend to attend the trial with the victim.

Notably, most protective measures take the form of procedural or evidentiary rules and can be instituted through a revision of the relevant national statute or body of rules. That is, they do not require the expenditure of additional resources and are therefore appropriate for resource-constrained judicial systems. While studies of the international tribunals often discuss their use of expensive new technologies (such as closed-circuit television to enable the victim to avoid close proximity to the defendant), most protective measures can be implemented in other, simpler ways. For example, the installation of temporary screens in the courtroom to shield the victim from the defendant has been found by many courts to be consistent with a defendant's due process rights.<sup>155</sup>

## ii. **Preparing Victims for Trial**

Even under the best of circumstances, testifying at trial can be an intimidating experience. Most witnesses are unfamiliar with courts and trial proceedings, and their ignorance of the process leaves them feeling fearful and vulnerable. For victims of sexual violence, feelings of emotional vulnerability are especially traumatic. Studies of victims of sexual violence who testified at trial found that victims' feelings of vulnerability, rather than of shame, was among the primary deterrents to testifying.<sup>156</sup> Victims who agree to testify want to prepare themselves emotionally, enabling them to testify more effectively. Consequently, prosecutors as well as victims have a stake in good witness trial preparation.

Courts have developed a wide range of practices to prepare witnesses for trial. These practices are known by different names in the civil law and common law traditions, but include "witness trial preparation" and "witness proofing."<sup>157</sup> The goals and specific practices of witness preparation can be divided into two groups. The first aim is to help witnesses testify with full

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<sup>154</sup> Ibid.

<sup>155</sup> Ibid., 258-59.

<sup>156</sup> Ibid., 9.

<sup>157</sup> For a brief but excellent discussion of these practices, see *Prosecutor v. Thomas Lubanga Dyilo*, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, Case No. ICC-01/04-01/06 (November 30, 2007). For a more extended discussion, see Kai Ambos, "Witness proofing' before the ICC: Neither legally admissible nor necessary," in Carsten Stahn and Goran Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Leiden: Martinus Nijhoff, 2009): 599-614.

comprehension of court proceedings. This goal recognizes that witnesses' lack of familiarity with the trial process can undermine their ability to testify to the best of their ability. Consequently, helping witnesses feel more comfortable with the process helps them testify more confidently, and so enhances the truth-finding purposes of the trial. This goal is most often accomplished through the following measures:

- Giving the victim a chance to meet the trial lawyer who will examine him/her in court;
- Familiarizing the victim with the courtroom, the court staff, and all aspects of the court proceedings (for example, explaining the process of examination and cross-examination);
- Familiarizing the witness with the roles and responsibilities of all participants in the court proceedings;
- Familiarizing the witness with her own role, rights and responsibilities (for example, her obligation to tell the truth when testifying);
- Discussing matters related to the victim's security and safety, in order to determine the need for protective measures.

A second goal of witness trial preparation is to assist with the process of human recollection. This second goal recognizes that victims of sexual violence in particular may need help with the substance of their testimony, not just with its manner of presentation. Particularly in prosecutions of international sex crimes, the need to refresh a victim's memory may be especially great. The legal proceedings in these cases typically occur over a long period of time, victims may be asked to testify about multiple events that took place years prior to their appearance at trial, and they may have given their initial statement to an unsympathetic investigator or under conditions of great stress or trauma, which may have affected the consistency of their statements.<sup>158</sup> This second goal is most often accomplished through the following measures:

- Allowing the victim to review her prior statements before she testifies in order to refresh her memory and to identify deficiencies and inconsistencies in them;
- Having the prosecutor ask the victim the questions the prosecutor intends to ask her during trial and/or show the victim potential exhibits about which she will be asked during trial.

Views of these protective measures vary by national legal system. Practices that familiarize witnesses with the courtroom, court personnel and trial procedures are well-accepted; they have been adopted by the international tribunals, including the ICC, and are common practice in both common law and civil law countries.<sup>159</sup> By contrast, practices that relate to the *substance* of a victim's testimony are much less accepted. Common law countries (as well as the

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<sup>158</sup> Mischkowski and Mlinarevic, *The Trouble with Rape Trials*, chap. 5.

<sup>159</sup> *Prosecutor v. Lubanga*, ¶¶ 29-34.

Rwanda and Yugoslavia Tribunals) generally permit lawyers on both sides of a case great leeway in preparing their witnesses to testify, viewing this preparation as helpful to the truth-seeking process of the trial. However, most civil law countries reject this view. They regard attorney contact with witnesses about the content of their testimony as an impermissible form of witness coaching and therefore strictly prohibit it.<sup>160</sup>

A hybrid approach to witness preparation was adopted in 2007 by Trial Chamber I of the ICC, and remains controversial. Measures that familiarize a witness with the courtroom and trial procedures, such as a visit to the courtroom and discussion about the process of examination, are permitted but must be conducted by the ICC's Victims and Witnesses Unit, not the Prosecutor's Office.<sup>161</sup> Witnesses may also review their prior statements but, again, this material is to be provided through the Victims and Witnesses Unit, not the Prosecutor's Office. Moreover, once the witness familiarization process has begun, any meetings between lawyers and their witnesses outside of court are prohibited.<sup>162</sup>

As this approach was only recently adopted, its effects cannot yet be determined. Its full adoption by national courts seems doubtful, as few national court systems have units analogous to the ICC's Victims and Witnesses Unit to which witness familiarization practices could be assigned.<sup>163</sup> However, some scholars have expressed concern that rules barring witnesses from reviewing the substance of their testimony prior to trial will particularly harm victims of sexual violence. Such victims may find it especially difficult to testify about their experiences without the benefit of measures that relieve their anxiety about being taken by surprise or retraumatized by insensitive questions.<sup>164</sup>

Victims of sexual violence report that they wish to have the full range of protective measures available to them. These measures help them feel more confident and, consequently,

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<sup>160</sup> A discussion of the divergent views of the common law and civil law systems can be found in *Ibid.*, ¶¶ 29-42. However, some scholars argue that many common law countries prohibit (or at least discourage) these practices as well. See Ambos, "Witness proofing before the ICC," 605-612.

<sup>161</sup> The Court reasoned that "witnesses are not attributable to parties, but rather are witnesses of the Court." *Prosecutor v. Lubanga*, ¶ 34.

<sup>162</sup> *Ibid.*, ¶¶ 53-57.

<sup>163</sup> For example, neither Kenya's International Crimes Act (2008) nor Uganda's International Criminal Court Act (2010) specifically establish a specialized unit for victims and witnesses. On the Ugandan Act, see Victims' Rights Working Group, "The Ugandan International Criminal Court Act 2010: What does it mean for victims?" (October 20, 2010). Available at <http://www.vrwg.org/smartweb/home/home/post/21-the-ugandan-international-criminal-court-act-2010-what-does-it-mean-for-victims/>. Kenya's Witness Protection (Amendment) Act of 2010 establishes a new Witness Protection Agency, but it does not appear that witness familiarization practices fall within its authority. Witness Protection (Amendment) Act of 2010, §§ 3(C)-(D).

<sup>164</sup> Van Schaack, "Obstacles on the Road to Gender Justice," 400.

less traumatized by their experience of testifying.<sup>165</sup> Consequently, regardless of whether the national system follows the civil law or common law tradition, protective measures are an essential aspect of successfully prosecuting crimes of sexual violence.<sup>166</sup>

### 3. The Crucial Role of Judges

Finally, but no less important, are the judges who preside over trials involving crimes of sexual violence. Judges can play a crucial role in managing the trial in ways that can either support or undermine effective prosecution of these cases. However, judges are often ill-prepared to preside sensitively over these trials. Like other court personnel, they are often uncomfortable with sex-related topics and can be distrustful of women alleging rape and other forms of sexual violence.<sup>167</sup> Because of their authority in the courtroom, their own disrespectful conduct toward victims can be especially harmful; more generally, their failure to control defense counsel can leave victims facing harassment and intimidation. Moreover, judges' unconscious gender biases may affect their rulings on pre-trial and trial-related motions which can, in turn, affect the outcome of trial.<sup>168</sup>

Three measures are widely recommended to address these challenges. First, the assignment of women judges to cases involving sexual violence may create a more hospitable courtroom climate for victims of sexual violence. Studies of victims who have testified at trial report they feel more comfortable, and do a more effective job, testifying before women judges.<sup>169</sup> Moreover, as the interventions of Judges McDonald, Pillay and Odio-Benito at the Yugoslavia and Rwanda Tribunals seem to indicate, women judges are often more sensitive to the needs of vulnerable witnesses and may evaluate evidence related to sexual violence differently from male judges.<sup>170</sup>

Second, *all* judges should receive training in the nature and effects of sexual violence. Even victims who are highly motivated to testify may exhibit trauma-induced behavior during

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<sup>165</sup> Mischkowski and Mlinarevic, *The Trouble with Rape Trials*, chap. 5.

<sup>166</sup> Many, though not all, of the protective measures discussed in this section are permitted in Kenya, either under the Sexual Offenses Act of 2006, §§ 31-36, or the Witness Protection (Amendment) Act of 2010, §6(3).

<sup>167</sup> Mischkowski and Mlinarevic, *The Trouble with Rape Trials*, 41, 47, 72.

<sup>168</sup> One study of the Yugoslavia and Rwanda tribunals concluded that judges implicitly required the prosecution to meet higher evidentiary standards in sexual offenses cases than in other types of cases. See Susana SáCouto, "The Importance of Effective Investigation of Sexual Violence," 353-58.

<sup>169</sup> Mischkowski and Mlinarevic, *The Trouble with Rape Trials*, 25, 70.

<sup>170</sup> Rhonda Copelon, "Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law," *McGill Law Journal* 46 (November 2000): 228.

their testimony and judges must be knowledgeable about sexual violence in order to manage these trials. This training can take many forms, ranging from formal seminars run by international NGOs to short, informal workshops run by local experts that need not be costly.<sup>171</sup> Moreover, at least one study has found that many judges would welcome this training.<sup>172</sup> Regardless of form, however, the content should educate judges about the emotional and psychological impact of sexual violence, how to recognize trauma, and the best means to assist victims who may experience the effects of trauma during their trial testimony.<sup>173</sup>

Third, studies of sexual violence trials recommend that judges assume an active role during victims' testimony to ensure that they are not harassed by defense counsel.<sup>174</sup> Although an accused has a right to cross-examine all witnesses, including victims of sexual violence, judges must be ready to intervene when necessary (for example, if prosecution counsel has not). Civil law countries already assign judges an active role during trial, and training about the effects of sexual violence may be sufficient to motivate them to control their courtroom in this way.<sup>175</sup> Common law countries, where judges are more frequently viewed as neutral referees, may need to consider new trial rules to permit and encourage judges to assume this role. The Rules of Procedure and Evidence of the Yugoslavia Tribunal can provide a model for such a rule. Rule 75(D) of the Tribunal's Rules of Procedure and Evidence states: "A Chamber shall, whenever necessary, control the manner of questioning to avoid any harassment or intimidation."<sup>176</sup>

## VI. PHASE FOUR: POST-TRIAL ISSUES

Regardless of whether a case concerns an international sex crime or a domestic crime of sexual violence, or follows common law or civil law rules, its effective prosecution in national court does not end when the trial is over. Even when trial has resulted in a conviction, post-trial challenges remain. Among them are: (1) determining a fair sentence for the defendant, and (2)

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<sup>171</sup> There are currently several groups that provide formal training to judges about sexual violence. One such organization is the Women's Initiative for Gender Justice, which has provided training to the judges at the Special Court for Sierra Leone and the ICC. ([www.iccwomen.org/whatwedo/training/index.php](http://www.iccwomen.org/whatwedo/training/index.php)). However, one study reported that judges had found conversations with colleagues with experience in sexual violence trials especially helpful, and recommended that courts facilitate such conversation with informal workshops. Mischkowski and Mlinarevic, *The Trouble with Rape Trials*, 70.

<sup>172</sup> *Ibid.*

<sup>173</sup> *Ibid.*, 66-70; *2008 Rwanda Tribunal Best Practices Guide*, 63- 64.

<sup>174</sup> Mischkowski and Mlinarevic, *The Trouble with Rape Trials*, 95.

<sup>175</sup> Anecdotal evidence suggests that targeted training about sexual violence empowers judges to take a more active role in managing their courtroom during sexual violence trials. *Ibid.*, 66.

<sup>176</sup> International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, Art. 75(D).

defending the conviction during appeal. These challenges are, of course, a part of every criminal case, not only ones involving sexual violence. However, sexual violence cases present very distinct forms of each of them.

### **A. Sentencing**

The first post-trial challenge concerns sentences. Several factors play a role in determining the appropriate sentence for a crime of sexual violence: (1) any mandatory minimum or maximum sentence set by law, (2) any specific factors that could enhance or lower the sentence (i.e., aggravating or mitigating factors), and (3) the general objectives or purposes of punishment.<sup>177</sup> Because aggravating or mitigating factors will vary with each case, courts must still determine the appropriate sentence for the specific act(s) of sexual violence for which the defendant has been found guilty, even where minimum sentences are statutorily required. In Kenya, for example, the Sexual Offenses Act imposes mandatory minimum sentences for those convicted under the statute. However, the court retains discretion to enhance the minimum, and its discretion is guided only by the non-exhaustive list of factors enumerated in the Act's implementing regulations.<sup>178</sup>

Additional challenges arise when national courts must sentence perpetrators for mass sexual violence that has been prosecuted as an international sex crime. The Rome Statute contains penalties for international crimes, but signatory countries are allowed to determine their own national penalties.<sup>179</sup> Many countries, including Kenya, neither expressly adopted the Rome Statute's penalties nor set out their own penalties for these crimes in their implementing statutes.<sup>180</sup> Thus their national courts must now determine how to approach sentencing decisions for them. Equally important, sentencing decisions in cases involving mass sexual violence are often expected to satisfy broader purposes than simply punishing the perpetrators. Victims, especially, hope to see sentences both acknowledge their suffering and challenge any culture of impunity.<sup>181</sup>

A full analysis of best sentencing practices for crimes of sexual violence is beyond the scope of this paper. National sentencing practices for rape and other forms of sexual violence

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<sup>177</sup> de Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, 323-24.

<sup>178</sup> The Sexual Offenses Regulations, 2008, Sec. 3(2).

<sup>179</sup> Rolf Einar Fife, "Article 80: Non-prejudice to national application of penalties and national laws," in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2<sup>nd</sup> ed. (Oxford: Hart Publishing, 2008): 1443-48.

<sup>180</sup> de Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, 326. The Kenyan Penal Code does not contain any provisions that define or provide for penalties for international crimes. Antonina Okuta, "National Legislation for Prosecution of International Crimes in Kenya," *Journal of International Criminal Justice* 7 (2009): 1065.

<sup>181</sup> de Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, 324-25.

vary greatly, and sentencing practices at the Rwanda and Yugoslavia Tribunals have been subject to criticism on several grounds.<sup>182</sup> However, studies of sentencing practices at both the international criminal tribunals and national courts raise the following general concerns.

First, where a single sentence is imposed for the totality of a defendant's conduct, rather than specific sentences imposed for each count on which he was found (or pled) guilty, the sentence should be sufficiently long to recognize the *additional* and *full* harm of the sexual violence.<sup>183</sup> This principle should apply regardless of whether the sexual violence at issue involved a single or collective act.<sup>184</sup>

Second, the principle of equality before the law is best served through the imposition of uniform penalties for all persons convicted for the same type of sexual violence. While this principle is well-recognized for domestic crimes, it should arguably also apply across national jurisdictions for cases involving international sex crimes. The Rome Statute does not refer to national law in the article establishing the penalties the ICC may impose. The drafters of the Rome Statute sought instead to create a "uniform penalties regime" for the Court, that is, to ensure the same penalty for all persons convicted of the same crime by the Court, regardless of their nationality or the place where the crime occurred.<sup>185</sup> Though the Rome Statute permits states parties to determine the punishment their domestic courts may impose for international crimes, as noted above, different penalties for similar international sex crimes is arguably at odds with minimum standards of international justice for victims of sexual violence.<sup>186</sup> Consequently,

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<sup>182</sup> For example, *ibid.*, 377-81.

<sup>183</sup> *Ibid.*, 375-77.

<sup>184</sup> One study of sentences at the Yugoslavia and Rwanda Tribunals found that the Tribunals' sentences for mass sexual violence charged as a crime against humanity or a war crime approximated in length the sentence for a single rape under national law during peacetime. The study criticized the Tribunals' sentences for failing to acknowledge the special nature of sexual violence that amounts to an international crime. *Ibid.*, pp. 356-58.

<sup>185</sup> Rolf Einar Fife, "Article 77: Applicable penalties," in Otto Triffterer (ed.) 2<sup>nd</sup> ed. *Commentary on the Rome Statute of the International Criminal Court* (Oxford: Hart Publishing, 2008): 1420.

<sup>186</sup> Because the domestication of Rome Statute crimes is quite recent, the tension between international consistency and deference to national law and custom in sentencing for international crimes has been considered almost exclusively from the perspective of the pre-ICC international and hybrid tribunals. For example, Jessica Leinwand, "Punishing Horrific Crime: Reconciling International Prosecutions with National Sentencing Practices," *Columbia Human Rights Law Review* 40 (Spring 2009): 799-852. Particularly for the wholly international tribunals, concerns about the legitimacy of international justice institutions as well as the need to foster support for prosecutions from distant communities may counsel strong consideration of national sentencing norms for these crimes. But where the international crime is prosecuted in national court under national law by national prosecutors, these concerns are less pressing, and uniform and consistent sentences may be both more legitimate and more crucial.

national courts' consideration of new international sentencing norms for international sex crimes may play an important future role in closing the impunity gap for such crimes.

## **B. Appeals: Ensuring Legal Coherence**

The second post-trial issue involves appeals. The right to appeal from a trial verdict is a common feature of both civil law and common law legal systems. Appellate review serves two crucial purposes. First, it ensures respect for the due process rights of the accused by submitting the trial proceedings to examination by a higher court. Equally important, appellate review helps ensure coherence in the law. Although in civil law countries appellate jurisprudence is not formally binding precedent, as it is in common law countries, in practice, courts in both legal systems use their own prior decisions, as well as those of higher courts, to guide their decisionmaking process.<sup>187</sup> Consequently, appellate review in both legal systems helps to provide certainty and predictability in the application of the law.<sup>188</sup> However, appeals in sexual violence cases face a distinct challenge.

Such appeals arise in the context of a rapidly evolving legal framework. In countries that have recently modernized their domestic sexual violence statutes, such as Kenya, national courts must grapple with new crimes, new definitions of old crimes and new sentencing requirements.<sup>189</sup> Definitions of international sex crimes are also quickly changing.<sup>190</sup> This uncertain legal environment creates significant risks for all actors in the legal system: it can complicate

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<sup>187</sup> S. Reamey, "Innovation or Renovation in Criminal Procedure: Is the World Moving Toward a New Model of Adjudication?" *Arizona Journal of International & Comparative Law* 27 (Fall 2010): 701-705.

<sup>188</sup> Patricia V. Sellers, "The 'Appeal' of Sexual Violence: The *Akayesu/Gacumbitsi* cases," in Karen Stefisyn (ed.), *Gender-Based Violence in Africa* (Pretoria: University of Pretoria 2007): 54-58. Though this discussion specifically concerns the "harmonizing" role of appellate review at the Yugoslavia and Rwanda Tribunals, which require appellate and trial chambers to follow the principle of *stare decisis*, appellate review can have a similar, though more moderate harmonizing effect, even where this principle is not followed, as noted above.

<sup>189</sup> For a discussion of challenges faced by Kenyan courts interpreting the Sexual Offences Act, see Kiarie Waweru Kiarie, "The Sexual Offences Act: Omissions and Ambiguities." Available at [www.kenyalaw.org/Articles](http://www.kenyalaw.org/Articles). On challenges faced by South African courts interpreting recent laws requiring minimum and mandatory sentences for rape, see Lisa Vetten and Francois van Jaarsveld, *The (Mis)measure of Harm: An Analysis of Rape Sentences Handed Down in the Regional and High Courts of Gauteng Province*, Tshwaranang Legal Advocacy Centre Working Paper No. 1 (January 2008). Available at [http://www.tlac.org.za/images/documents/mismeasure\\_of\\_harm.pdf](http://www.tlac.org.za/images/documents/mismeasure_of_harm.pdf).

<sup>190</sup> For a discussion of changing definitions of rape under international law, see Catharine MacKinnon, "Defining Rape Internationally: A Comment on *Akayesu*," *Columbia Journal of Transnational Law* 44 (2006): 940-957; Sellers, "The 'Appeal' of Sexual Violence."

prosecutors' task of preparing their cases, it can impair defendants' right to a fair trial and it can hinder trial courts' ability to apply the law in a consistent and predictable manner.<sup>191</sup>

Experience from the international criminal tribunals suggests several measures—applicable in national courts—that can ensure proper appellate review in cases involving both international sex crimes and domestic crimes of sexual violence. First, prosecutors should review all cases involving sexual violence crimes to determine whether any aspect of the court's ruling on the sexual violence charge should be appealed. Appellate issues should be chosen based on the alleged error's impact on national jurisprudence concerning sexual violence or on the overall interests of justice, in addition to the result in a particular case.<sup>192</sup> Second, prosecutors responsible for appeals should be trained and expected to keep themselves current on new developments in the law related to sexual violence, both international and domestic. Only in this way will they be in a position to identify issues appropriate for appeal.<sup>193</sup> Third, generally, but particularly where the sexual violence has been prosecuted as an international crime, national courts should look to the sexual violence appellate jurisprudence of the international tribunals. This jurisprudence now sets a well-developed appellate standard of review for both substantive and procedural law concerning the international law of sexual violence. Consequently, it can serve as “a Rosetta stone” for national courts' own appellate practices regarding international sex crimes.<sup>194</sup>

## VII. CONCLUSION

The process of taking a claim of sexual violence into the formal legal arena can be a harrowing proposition for many victims. Not only may they experience tremendous psychological strain from having to come forward and recount their personal violation, but they may be forced to do so in the face of entrenched gender biases and rape myths underlying the very system charged with providing them with justice. The obstacles to proceeding are multifold: lack of effective linkages between medical care providers and the legal system; structural and resource limitations in law enforcement, forensic analysis, and the courts themselves; poor coordination between investigators and prosecutors and the consequent weakness of evidence or indictment;

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<sup>191</sup> See quotation from the Appeal Judgment in *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A (March 24, 2000), in Sellers, “The ‘Appeal’ of Sexual Violence,” 56.

<sup>192</sup> Brenda Hollis, “International Criminal Courts / Lessons Learned - Elements of a Crime: Analyzing and Proving Your Case” (Judicial Training Materials in possession of the Human Right Center): 29; *2008 Rwanda Tribunal Best Practices Manual*, 48.

<sup>193</sup> *2008 Rwanda Tribunal Best Practices Manual*, 47.

<sup>194</sup> Sellers, “The ‘Appeal’ of Sexual Violence,” 102.

and, finally, insensitive trial procedures that compound a victim's trauma, should she make it that far.

Apart from the victims themselves, investigators and prosecutors may encounter specific challenges when moving a sexual violence case through the legal system. Factfinding is wrought with difficulty in even the most straightforward cases: the often private nature of rape, for example, rarely affords eyewitness or documentary support that might be unearthed in other crimes. And whether the issue is the perpetrator's identity or a lack of consent to sexual contact, prosecutors may struggle against a jury or adjudicator's gender biases or misconceptions about the nature of sexual violence. Further, in terms of proving international sex crimes, distinct evidentiary challenges exist: How does one gather coherent evidence of a crime committed against countless victims, over several years? How does one aggregate scattered harm, or attribute responsibility to a commander who may have never uttered a specific order to rape?

This paper has highlighted several promising strategies in the handling of sexual violence cases. These strategies have emerged in both the domestic and international contexts. These range from attempts to mainstream awareness about sexual violence (as with universal training throughout an investigations agency or the roll-out of mobile courts into remote districts) to tactics aimed at developing focused expertise on sexual violence within a corps of specialists (as with the proliferation of Sexual Assault Nurse Examiner programs in hospital settings or the establishment of police gender desks). Further, many innovations at the international tribunal level can inform future developments in national and local systems, including greater use of gender experts, increased coordination between prosecutors and investigators, and protective measures for victim-witnesses at trial.

However, none of these measures is sustainable or effective without the political will and dedication of resources to support victims' access to justice. It is a comprehensive journey that must be supported. A one-stop shop cannot truly link medical and legal support if there is no police gender desk on site. A police gender desk is of no use unless there is a properly trained and equipped officer posted there. The physical evidence collected by a sexual assault nurse practitioner and handed over to the police is useless unless there is also a functioning laboratory to perform forensic analysis that can be used in court. The analyzed evidence will never make it to court if prosecutors do not actively pursue sexual violence claims. And, finally, even properly analyzed and presented evidence may be wasted where a judiciary is not sensitized to, or versed in the laws of, sexual violence. Thus, the achievement of justice for victims of sexual violence in both domestic and international contexts requires discrete innovation, as well as the long-term commitment of resources and attention.

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