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# GENDER-SENSITIVE JUSTICE AND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA: LESSONS LEARNED FOR THE INTERNATIONAL CRIMINAL COURT

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The International Criminal Tribunal for Rwanda [ICTR] has dealt with a number of gender-related issues in its ten years of existence. The Prosecutor has brought rape and sexual violence charges against a number of indictees,<sup>1</sup> some of whom have been convicted of these crimes.<sup>2</sup> The

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1. *E.g.*, Prosecutor v. Akayesu, Case No. ICTR 96-4-I, Amended Indictment (Jan. 1, 1996) (Jean Paul Akayesu); Prosecutor v. Bagosora, Case No. ICTR 96-7-I, Amended Indictment (Aug. 12, 1998) (Theoneste Bagosora); Prosecutor v. Bizimungu, Case No. ICTR 99-50-I, Indictment (May 7, 1999) (Casimir Bizimungu, Jérôme Bicamumpaka, Justin Mugenzi, Prosper Mugiraneza); Prosecutor v. Bizimungu, Case No. ICTR 2000-56-I, Indictment (Sept. 25, 2002) (Augustin Bizimungu, Protais Mpiranya, Francios-Xavier Nzuwonemeye, Innocent Sagahutu); Prosecutor v. Kabiligi, Case No. ICTR 97-34-I, ICTR 97-30-I, Amended Indictment (Aug. 13, 1999) (Gratien Kabiligi, Aloys Btabakuze); Prosecutor v. Muhimana, Case No. ICTR 95-1B-I, Revised Amended Indictment (July 29, 2004) (Mikaeli Muhimana); Prosecutor v. Musema, Case No. ICTR 96-13-I, Amended Indictment (Jan. 1, 1996) (Alfred Musema); Prosecutor v. Niyitegeka, Case No. ICTR 96-14-T, Prosecutor's Submission of the Harmonized Amended Indictment (Nov. 25, 2002) (Eliezer Niyitegeka); Prosecutor v. Nsengiyumva, Case No. ICTR 96-12-I, Amended Indictment (Aug. 12, 1999); Prosecutor v. Nyiramasuhuko, Case No. ICTR 97-21-I, Amended Indictment (Mar. 1, 2001) (Pauline Nyiramasuhuko, Shalom Ntahobali).

ICTR's decisions have advanced international legal understanding of the elements of crimes of sexual violence, and the linkages between such crimes as torture and rape.<sup>3</sup> The ICTR has also received criticism because of its treatment of certain female witnesses, the Office of the Prosecutor's methods of investigation for sexual violence cases, and the dropping of or failure to include sexual violence charges in certain indictments.<sup>4</sup> These positive and negative experiences provide valuable lessons for the International Criminal Court [ICC].

This article begins with an examination of positive lessons that the ICC has learned from the ICTR. The ICTR's first judgment, *Prosecutor v. Akayesu*, broke important new ground with respect to gender-based crimes through its findings that acts of sexual violence can be prosecuted as elements of a genocidal campaign, and that there are clear linkages

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2. *E.g.*, *Prosecutor v. Akayesu*, Case No. ICTR 96-4-A Judgment (June 1, 2001), *aff'g* Case No. ICTR 96-4-T, Judgment, (Sept. 2, 1998); *Prosecutor v. Muhimana*, Case No. ICTR 95-1B-T, Judgment (Apr. 28, 2005); *Prosecutor v. Semanza*, Case No. ICTR 97-20-A, Judgment (May 20, 2005), *aff'g in part, rev'd in part* Case No. ICTR 97-20-T, Judgment (May 15, 2005).
  3. The Trial Chamber in *Akayesu* affirmed that rape and sexual violence can constitute infliction of "serious bodily and mental harm" on members of the group for the crime of genocide, and that sexual violence can form an integral part of the process of destruction of a group. *Akayesu*, ICTR 96-4-T, Judgment at ¶¶ 706-07, 731-734. This was reaffirmed in *Prosecutor v. Kayishema*, Case No. ICTR 95-1-T, Judgment, ¶ 108 (May 21, 1999), and *Prosecutor v. Musema*, Case No. ICTR 96-13-A, Judgment, ¶ 156 (Jan. 27, 2000). The Trial Chamber in *Akayesu* also found that rape can amount to torture. *Akayesu*, ICTR 96-4-T, Judgment at ¶¶ 597, 687. In *Akayesu* the Trial Chamber also defined rape and sexual violence, *id.* at ¶¶ 596-598, 686-688, and in *Musema*, it further elaborated on the *Akayesu* definitions, *Musema*, Case No. ICTR 96-13-A, Judgment at ¶¶ 220-21, 226-29; *compare Semanza*, ICTR 97-20-T, Judgment at ¶¶ 344-345).
  4. *E.g.*, Binaifer Nowrojee, We Can Do Better: Investigating and Prosecuting International Crimes of Sexual Violence, Paper Presented at the Colloquium of Prosecutors of International Criminal Tribunals in Arusha, Tanzania (Nov. 25-27, 2004), available at <http://www.ictor.org/ENGLISH/colloquium04/nowrojee.htm>; AFRICAN RIGHTS, RWANDA - BROKEN BODIES, TORN SPIRITS: LIVING WITH GENOCIDE, RAPE AND HIV/AIDS, 82-85 (2004); JUDITH G. GARDAM AND MICHELLE J. JARVIS, WOMEN, ARMED CONFLICT AND INTERNATIONAL LAW 213-229 (2001); AMNESTY INTERNATIONAL, INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA: TRIALS AND TRIBULATIONS, § 4.3 (1998); U.N. Econ. & Soc. Council [ECOSOC], Commission on Human Rights *Special Rapporteur on Violence Against Women, its Causes and Consequences, Addendum: Report of the mission to Rwanda on the issues of violence against women in situations of armed conflict*, ¶¶ 39-66, E/CN.4/1998/54 Add 1 (Feb. 4, 1998); HUMAN RIGHTS WATCH/AFRICA, SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH (1996) [hereinafter HUMAN RIGHTS WATCH].

between torture and sexual violence.<sup>5</sup> The *Akayesu* case, and those that followed, had a profound impact on the drafting of the Rome Statute of the ICC,<sup>6</sup> the ICC's Elements of Crimes<sup>7</sup> and Rules of Procedure and Evidence.<sup>8</sup> This article then explores lessons that the ICC has learned from the ICTR that are more negative in nature, including lessons in the field of protection and treatment of victims and witnesses, investigations, and the issues of compensation and reparations. This article concludes that these positive and negative precedents have already assisted, and will continue to assist the ICC, allowing it to replicate and improve upon gender-sensitive practices of the ICTR and to avoid certain pitfalls. However, even though the ICC begins its work from an advantageous position in terms of gender-sensitivity, it will still face challenges as it implements new practices and procedures. The test will be whether the ICC can minimize its missteps as a result of its heightened awareness of the many interlinked components of gender-sensitive justice learned from the ICTR and other tribunals.

I. POSITIVE LESSONS LEARNED FROM THE ICTR: IMPACT OF ICTR  
CASES

The Trial Chamber issued the *Akayesu* judgment after the Rome Statute had been adopted through a multilateral negotiation process.<sup>9</sup> Even so, the *Akayesu* case put an indelible stamp on the Rome Statute. The original *Akayesu* indictment did not include charges relating to sexual violence crimes.<sup>10</sup> Questioning by the ICTR judges of prosecution

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5. *Akayesu*, ICTR 96-4-T, Judgment at ¶¶ 597, 687-88, 706-07, 731-34.
  6. *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9 (July 17, 1998), available at [www.un.org/law/icc/statute/romefra.htm](http://www.un.org/law/icc/statute/romefra.htm), [hereinafter *Rome Statute*].
  7. U.N. Preparatory Commission for the International Criminal Court, *Report of the Preparatory Commission for the International Criminal Court, Finalized Draft Text of the Elements of Crimes*, U.N. Doc. PCNICC/2000/1/Add.2 (2000) [hereinafter *Elements of Crimes*].
  8. U.N. Preparatory Commission for the International Criminal Court, *Report of the Preparatory Commission for the International Criminal Court, Finalized Draft Text of the Rules of Procedure and Evidence*, U.N. Doc. PCNICC/2000/INF/3/Add.1 (2000) [hereinafter *Rules of Procedure & Evidence*].
  9. After many years of negotiations, the Rome Statute was adopted on 17 July 1998 at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. See United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court, <http://www.un.org/icc/index.htm>. The trial of Jean Paul Akayesu began on 9 January 1997 and the Trial Chamber decision in *Prosecutor v. Akayesu* was issued on 2 September 1998. *Akayesu*, ICTR-96-4-T, Judgment at ¶ 17.
  10. The original indictment against Akayesu was submitted by the Prosecutor on 13 February 1996 and was confirmed on 16 February 1996. *Akayesu*, ICTR 96-4-T,

witnesses appearing in that case revealed evidence of rape.<sup>11</sup> Specifically, one of the judges, Judge Navanethem Pillay, recognized the indicators of potential sexual violence and felt prompted to ask questions.<sup>12</sup> As a result of evidence elicited by judicial questioning, the Prosecutor amended the indictment to include rape charges.<sup>13</sup> The drafters of the Rome Statute knew these facts, primarily due to the efforts of nongovernmental organizations.<sup>14</sup> This knowledge resulted in the inclusion of an article stating: "States Parties shall also take into account the need to include judges with legal expertise on specific issues, including . . . violence against women or children."<sup>15</sup> This discussion also led to an agreement that some ICC staff members should have similar expertise in gender-based issues, and to the inclusion of article 44(2).<sup>16</sup>

The 1998 *Akayesu* judgment is often cited for its groundbreaking recognition that acts of sexual violence can be prosecuted as elements of a genocidal campaign as well as for its linkages between torture and sexual violence.<sup>17</sup> These conclusions prompted the delegates negotiating the

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Judgment at ¶ 6. It was amended during the trial, in June 1997, with the addition of three counts (13 to 15) and three paragraphs (10A, 12A and 12B). *Id.*

11. *Id.* at ¶ 416. See also Kelly Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 AM. J. INT'L L. 97, 105-6 (1999); Coalition for Women's Human Rights in Conflict Situations, *Amicus Brief Respecting Amendment of the Indictment and Supplementation of the Evidence to Ensure the Prosecution of Rape and Other Sexual Violence within the Competence of the Tribunal*, available at [http://www.womensrightscoalition.org/index\\_en.htm](http://www.womensrightscoalition.org/index_en.htm) (last visited Oct. 1, 2005) (submitted to the ICTR following testimony of Witnesses "C", "J" and "H", 1998).
12. Barbara Bedont & Katherine Hall-Martinez, *Ending Impunity for Gender Crimes under the International Criminal Court*, 6 BROWN J. WORLD AFFAIRS 65, 80 (1999).
13. *Akayesu*, ICTR 96-4-T, Judgment at ¶ 417.
14. The Women's Caucus for Gender Justice in the International Criminal Court issued a document explaining the history of the *Akayesu* case to those state representatives negotiating the draft Statute, entitled *Recommendations and Commentary for the March 1998 PrepCom: Part II (Procedures)*, 4, 16 (1998).
15. Rome Statute, *supra* note 6, at art. 36(8)(b). The ICTR's Judge Pillay has made the point that it is crucial to include judges with expertise on gender issues: "Who interprets the law is at least as important as who makes the law, if not more so . . . I cannot stress how critical I consider it to be that women are represented and a gender perspective integrated at all levels of the investigation, defence, witness protection and judiciary." Bedont & Hall-Martinez, *supra* note 12, at 80.
16. Rome Statute, *supra* note 6, at art. 44(2) ("In the employment of staff, the Prosecutor and the Registrar shall ensure the highest standards of efficiency, competency and integrity, and shall have regard, mutatis mutandis, to the criteria set forth in article 36, paragraph 8.") (emphasis added).
17. See *Akayesu*, ICTR 96-4-T, Judgment at ¶¶ 706-07, 731-34. See also Kelly Dawn Askin, *Gender Crimes Jurisprudence in the ICTR: Positive Developments* 3 J. INT'L

ICC's Elements of Crimes document in 1999-2000 to include a specific reference linking sexual violence and torture to the crime of genocide.<sup>18</sup> They added a footnote to the elements of "[g]enocide by causing serious bodily or mental harm," stating that "[t]his conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment."<sup>19</sup> The delegates adopted this wording from the Trial Chamber in the *Akayesu* decision.<sup>20</sup> The discussion around the inclusion of this footnote was also part of a larger ongoing discussion regarding the potential overlap of crimes, which led to the inclusion in the general introduction that "[a] particular conduct may constitute one or more crimes."<sup>21</sup> Without the *Akayesu* precedent, these notations may not have been included in the final Elements of Crimes document.

The *Akayesu* case also had a positive impact on the list of sexual violence crimes included in the Rome Statute. During the Rome Statute negotiations, many delegates and nongovernmental organizations tracked developments at the ICTR and the International Criminal Tribunal for the Former Yugoslavia (ICTY).<sup>22</sup> Indictments, decisions and judgments by those Tribunals represented the most current application and interpretation of international criminal law. The Tribunals demonstrated that various forms of sexual violence could take place during times of conflict and mass violence. For example, the prosecution presented evidence of sexual

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CRIM. JUST. 1007, 1009-12 (2005).

18. These linkages were not made in the definition of genocide included in the Rome Statute. The Rome Statute's definition of genocide is simply a reproduction of the definition found in the Genocide Convention, and therefore the role that sexual violence can play in the perpetration of genocide was not explicitly recognized in the ICC's definition. Delegates were reluctant to alter the Convention definition in any way as they felt that definition had entered the realm of customary international law. Cate Steains, *Gender Issues* in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE – ISSUES, NEGOTIATIONS, RESULTS 363 (Roy S. Lee, ed., 1999).
19. *Elements of Crimes*, *supra* note 7, at art. 6(b), n. 3.
20. *Akayesu*, ICTR 96-4-T, Judgment at ¶ 504 (“[T]he Chamber takes serious bodily or mental harm, without limiting itself thereto, to mean acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution.”).
21. *Elements of Crimes*, *supra* note 7, at “General Introduction,” ¶ 9. In their explanation of the negotiating history regarding ¶ 9, Maria Kelt and Herman von Hebel state that “the conduct that amounts to rape may equally amount to torture.” Maria Kelt & Herman von Hebel, *Concours d’Infractions (Overlap of Crimes) in THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE* 39 (Roy S. Lee, ed., 2001).
22. The Women’s Caucus for Gender Justice in the International Criminal Court played a prominent role in keeping delegates informed of developments at the ICTR, through such documents as WAR CRIMES, PART III: RECOMMENDATIONS AND COMMENTARIES TO THE DECEMBER PREPARATORY COMMITTEE MEETING, DECEMBER 1-12, 1997 (1997) at 3, 8-9.

mutilation in the *Akayesu* case, and similarly referred to this type of mutilation in *Prosecutor v. Kayishema*.<sup>23</sup> The ICTY's Trial Chamber decision in *Prosecutor v. Tadic*<sup>24</sup> discussed evidence of castration, and the indictment for *Prosecutor v. Gagovic*<sup>25</sup> included evidence of sexual slavery and forced nudity. These precedents prompted delegates to decide not only to simply reproduce the references to rape and enforced prosecution found in the Geneva Conventions,<sup>26</sup> but also to include "[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization" and other forms of sexual violence as prohibited acts within the provisions on crimes against humanity and war crimes.<sup>27</sup> The delegates deliberately decided to include a "basket" clause - "or any other form of sexual violence" - to ensure that acts such as forced nudity and sexual mutilation, or any other similarly degrading acts invented by perpetrators in the future, could be prosecuted by the ICC as war crimes and crimes against humanity.

Another contribution to the ICC from the ICTR relates to the ICC's Elements of Crimes for the crime against humanity and war crime of rape. The *Akayesu* and *Musema* judgments took a broad approach when defining the elements required to prove rape. The Trial Chamber in *Akayesu* defined rape as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."<sup>28</sup> The Trial Chamber also noted that, "coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and any other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances."<sup>29</sup> The Trial Chamber in *Musema* adopted the definition of rape set forth in *Akayesu*, noting that

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23. *Akayesu*, ICTR 96-4-T, Judgment at ¶706; *Kayishema*, ICTR 95-I-T, Judgment, ¶108.

24. *Prosecutor v. Tadic*, Case No. IT-94-I-T, Judgment, ¶ 198 (May 7, 1997).

25. *Prosecutor v. Gagovic*, Case No. IT-96-23, Initial Indictment (June 26, 1996) (also referred to as the "Foca" case).

26. Under article 27 of the Fourth Geneva Convention, "[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any other form of indecent assault." Geneva Convention Relative to the Treatment of Civilian Persons in Times of War, art. 27, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. Article 75 of Additional Protocol I prohibits "[o]utrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;" while article 76 states that "[w]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 16 I.L.M. 1391, 1125 UNTS 3.

27. Rome Statute, *supra* note 6, at art. 7(1)(g), 8(2)(b)(xxii).

28. *Akayesu*, ICTR 96-4-T, Judgment at ¶¶ 598, 688.

29. *Id.* at ¶ 688.

“variations on the acts of rape may include acts which involve the insertions of objects and/or the use of bodily orifices not considered to be intrinsically sexual.”<sup>30</sup> While the ICC’s Elements of Crimes document did not adopt the same approach as found in these two cases – instead taking an approach closer to that of the ICTY’s *Prosecutor v. Furundzija* Trial Chamber judgment<sup>31</sup> - these decisions prompted a great deal of healthy analysis by states of what should constitute “rape.” The debate over whether to adopt the *Akayesu* and *Musema* approaches resulted in the adoption of a gender-neutral conduct element. This element also captures sexual mutilation with objects, and the fact that coercion does not need to be demonstrated through physical force; threats and other similar actions are enough.<sup>32</sup>

## II. NEGATIVE LESSONS LEARNED FROM THE ICTR: PRACTICE AND PROCEDURE

The ICTR’s jurisprudence had a strong, positive impact upon the development of the Rome Statute and the ICC’s Elements of Crimes document. However, the ICTR’s difficulties with respect to victims and witnesses of crimes of sexual violence and the conduct of sexual violence investigations have also provided negative guidance to those drafting the ICC’s governing documents, as well as to the ICC itself.

Lack of sensitivity to the elements of gender-based crimes in initial ICTR investigations has had a compounded negative effect on prosecutions over the years. According to early documents, this lack of sensitivity

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30. *Prosecutor v. Musema*, Case No. ICTR 96-13-A, Judgment, ¶¶ 221, 226 (Jan. 27, 2000).

31. *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Judgment, ¶ 185 (Dec. 10, 1998).

32. The ICC’s Elements of Crimes document sets out the elements of proof for each prohibited act for the crimes of genocide, crimes against humanity, and war crimes. For the crime against humanity and war crime of rape, the conduct elements state:

(1) The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body. (2) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

*Elements of Crimes*, *supra* note 7, at art. 7(1)(g)-1, 8(2)(b)(xxii)-1, 8(2)(e)(vi)-1 (citation omitted). The term “invaded” contains this footnote: “The concept of ‘invasion’ is intended to be broad enough to be gender-neutral.” *Id.* at art. 7(1)(g)-1, n. 15.

resulted from: a lack of initial resources, including a lack of female investigators and investigators with relevant experience; a lack of political will by those responsible for leading the investigations to investigate sexual violence crimes; a mistaken belief among Tribunal staff that they did not need to “devote scarce resources to investigating rape because Rwandan women [would] not come forward to talk;” and, the use of poorly designed interviewing and protection techniques when rape was actually investigated.<sup>33</sup> Although the ICTR has attempted to correct these initial failures in the planning, collection, and preservation of evidence relating to sexual violence crimes,<sup>34</sup> and has succeeded to some extent,<sup>35</sup> the initial investigatory missteps have had lasting negative results.<sup>36</sup>

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33. HUMAN RIGHTS WATCH/AFRICA, SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH (1996).
  34. For example, the ICTR’s Office of the Prosecutor held workshops on sexual violence investigations, an investigations team was assigned specifically to crimes of sexual violence, and the investigation of sexual violence crimes was deemed a priority. The President of the ICTR, *Second Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994*, ¶ 52, delivered to the Security Council and the General Assembly, U.N. Doc. A/52/582, S/1997/868 (Nov. 13 1997) [hereinafter *Second Annual Report of the ICTR*]; The President of the ICTR, *Third Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994*, ¶¶ 52,59, delivered to the Security Council and the General Assembly, UN Doc. A/53/429, S/1998/857 (Sept. 23, 1998) [hereinafter *Third Annual Report of the ICTR*].
  35. The Office of the Prosecutor’s focus on sexual violence crimes resulted in the collection of a number of witness statements regarding acts of sexual violence (eighty-five out of 328 witness statements in 1996-1997 related to sexual violence) and the addition of a number of sexual violence charges in indictments. See *Third Annual Report of the ICTR*, *supra* note 33, at ¶ 59; see also *supra* note 1.
  36. Statements collected on sexual violence crimes during early ICTR investigations tend to be too cursory and lack important supporting evidence to prove the elements of rape and other sexual violence crimes. This is related to the larger initial problem with investigation design, in which the investigators tended to work independently of the prosecuting lawyers and therefore were not aware of the various elements of crimes that required proof. The long-lasting effect is that, when the prosecutors go back to examine the evidence available to support certain charges in indictments approved almost a decade ago, they find that the statements do not contain sufficient evidence and therefore either sexual violence charges need to be dropped or new evidence collected quickly to be ready in time for trial. Conversation with Richard



In addition, inconsistent prosecutorial focus on sexual violence crimes over the past decade has led to inconsistent charging practices before the ICTR. For example, a 2002 study conducted for the nongovernmental Coalition for Women's Human Rights in Conflict Situations found that until 1997, only a few indictments included charges for acts of sexual violence, and that a majority of indictments containing these charges did so because of amendments instituted between 1995 and 1997.<sup>37</sup> Then, a period followed during which the majority of indictments incorporated charges relating to sexual violence.<sup>38</sup> However, in 2003, Human Rights Watch noted that the number of new indictments for crimes of sexual violence had declined since 1999, and that there was not adequate evidence for existing cases in which such charges had been made.<sup>39</sup> It appears that in 2005, the Office of the Prosecutor is again focusing on sexual violence crimes.<sup>40</sup> Consistency in charging strategy with respect to sexual violence crimes allows trial teams (both investigators and prosecutors) to move forward with a single, clearly articulated approach that utilizes investigative methodology conducive to eliciting rape testimonies, and permits the gathering of the type and quality of evidence needed to prove a case.<sup>41</sup> On the other hand, lack of consistency leads investigators to gather too little or the wrong kind of evidence, which does not prove all elements of the crimes; fail to keep track of the evidence over time; use inappropriate methodology; miss investigatory opportunities; and potentially create a disconnect between the charges in the indictment and what the prosecution can actually prove at trial, which results in the need to amend indictments

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Renaud, ICTR Chief of Investigations, (Dec. 1, 2004).

37. Gaëlle Breton-Le Goff, *Analysis of Trends in Sexual Violence Prosecutions in Indictments by the International Criminal Tribunal for Rwanda from November 1995 to November 2002*, Nov. 28, 2002, [http://www.womensrightscoalition.org/advocacy/Dossiers/rwanda/rapeVictimssDeniedJustice/analysisoftrends\\_en.php](http://www.womensrightscoalition.org/advocacy/Dossiers/rwanda/rapeVictimssDeniedJustice/analysisoftrends_en.php) (last visited Oct. 27, 2005).
38. *Id.*
39. Letter from Human Rights Watch to U.N. Security Council Members, *Rwanda and the Security Council: Changing the International Tribunal* (Aug. 1, 2003), available at <http://hrw.org/press/2003/08/rwanda080103ltr.htm> (last visited Oct. 27, 2005).
40. See, e.g., Hirondele News Agency, *UN Investigators Trained in Sexual Crimes Prosecution* (June 1, 2005), available at <http://fr.allafrica.com/stories/200506020129.html> (last visited Oct. 27, 2005); Prosecutor v. Karemera, Case No. ICTR 98-44-I, Amended indictment (Feb. 23, 2005); Fondation Hirondele, *ICTR Honeymoon Threatens to End over Rape Charges*, Feb. 12, 2005, <http://www.hirondele.org/arusha.nsf/LookupUrlEnglish/18958890132640F143256FA600276447?OpenDocument> (last visited Oct. 27, 2005) [hereinafter Hirondele, *Honeymoon*] (The Office of the Prosecutor has established a rape database to track its investigations of sexual violence crimes).
41. Nowrojee, *supra* note 4.

to drop charges, or leads to acquittals.<sup>42</sup> A recent example of this occurred in *Prosecutor v. Muvunyi*, an ICTR case in which the Prosecutor asked to withdraw the charge of crimes against humanity, including rape and other inhuman acts, due to insufficient evidence.<sup>43</sup>

The ICC has learned two lessons from these experiences. First, those negotiating the Rome Statute recognized the importance of taking a wide-ranging approach to ensuring gender-sensitive investigations and prosecutions.<sup>44</sup> They did this by incorporating articles relating to gender-sensitive investigations, with provisions on staffing the Court with individuals with relevant, gender-sensitive expertise. Delegates agreed that the ICC would benefit from having on-site expertise in gender issues in the Office of the Prosecutor from the very beginning. Without it, as happened at the ICTR, important crimes could be overlooked at the investigation, indictment, and prosecution stages, and victim and witness strategies might not be gender-sensitive. For this reason, the Rome Statute includes a provision stating that the "Prosecutor shall appoint advisers with legal expertise on specific issues, including but not limited to, sexual and gender violence and violence against children."<sup>45</sup> With respect to ensuring gender-sensitive investigations, the Rome Statute also includes an article requiring the Prosecutor to "respect the interests and personal circumstances of victims and witnesses, including [their] . . . gender" when investigating and prosecuting crimes.<sup>46</sup> Another article stipulates that the "Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses" with respect to a number of factors, including gender and whether the crime involved sexual or gender violence.<sup>47</sup> This precedes a provision providing for *in camera* proceedings for cases involving victims of sexual violence.<sup>48</sup> In addition, the Rules of Procedure and Evidence include a lengthy list of issues to be considered for victim and witness protection, and special measures for the presentation of evidence, which bolster the Rome Statute's provisions on

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42. *Id.*

43. *Prosecutor v. Muvunyi*, Case No. ICTR 2000-55A-PT, Decision on the Prosecutor's Motion for Leave to File an Amended Indictment, ¶¶ 28-34 (Feb. 23, 2005) (The Chamber ultimately denied the request for withdrawal of the charge); Hirondelle, *Honeymoon*, *supra* note 39 (Prosecutor's representative says that they dropped the rape charge because some of the prosecution witnesses could not be traced, while others had refused or declined to testify.).

44. In large part, special measures in cases of sexual violence were included in the Rome Statute to correct ICTR missteps. Steains, *supra* note 18, at 385.

45. Rome Statute, *supra* note 6, at art. 42(9).

46. *Id.* at art. 54(1)(b); *see also id.* at art. 68(1).

47. *Id.* at art. 68(1).

48. *Id.* at art. 68(2).

gender-sensitive investigations. Such issues include allowing a psychologist or family member to be present at the testimony of the victim or witness, and requiring that a Chamber be vigilant in controlling the manner of questioning of a victim or witness to avoid harassment or intimidation of a victim of sexual violence crimes.<sup>49</sup> The second lesson that the ICC learned was that its Office of the Prosecutor must design a prosecution strategy for sexual violence crimes and apply it from the outset. This strategy must be accompanied by continuous support from the Prosecutor, dedicated specialized staff, and a solid, sensitive support network for victims and witnesses.<sup>50</sup>

It appears that the ICC is implementing these lessons learned. It has hired advisers pursuant to article 42, who are currently situated within the Investigations Division of the Office of the Prosecutor and have oversight on gender and child-specific victims' issues.<sup>51</sup> These advisers are responsible for initiating policy, conducting training, and planning investigations on gender-based crimes.<sup>52</sup> The Prosecutor has also demonstrated his political will to prosecute crimes of sexual violence through statements, reports, and indictments.<sup>53</sup> In addition, the Office of

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49. *Rules of Procedure and Evidence*, *supra* note 8, at rule 88.

50. Nowrojee, *supra* note 4, at §§ 4-6.

51. There is a "Gender and Children Unit" located within the Planning and Operations Section of the Investigations Division. The Gender and Children Unit is preparing a policy on analysis and investigation of sexual and gender violence for the Prosecutor, for implementation in 2006. ICC, *Proposed Programme Budget for 2006 of the International Criminal Court*, ¶¶ 137, 139, ICC Doc. ICC-ASP/4/5 (Aug. 24, 2005). The placement of the Gender and Children Unit within the Office of the Prosecutor does not completely address the original point of article 42(9), because such advisers were meant to provide advice across investigations and prosecutions. However, the structure appears to be flexible enough such that the strategy prepared and advice provided by the Unit will be followed both in investigations and prosecutions. The structure also reflects the strong focus at present on investigations, given that two situations (involving the Democratic Republic of Congo and Darfur, Sudan) are presently in the investigations phase and the third situation (involving northern Uganda) is at the indictment/arrest warrant stage. ICC, *Situations and Cases*, <http://www.icc-cpi.int/cases.html> (last visited Jan. 29, 2006).

52. See comments by Serge Brammertz, ICC Deputy Prosecutor, *Report of Proceedings: Colloquium of Prosecutors of International Criminal Tribunals on "The Challenges of International Criminal Justice,"* 10, at [http://www.ictt.org/ENGLISH/colloquium\\_04/reports/final\\_report.pdf](http://www.ictt.org/ENGLISH/colloquium_04/reports/final_report.pdf) (last visited Oct. 28, 2005).

53. See, e.g. ICC, *Report on the Activities of the Court*, ICC Doc. ICC-ASP/4/16, at ¶¶ 53, 56, 58 (Sept. 16, 2005) [hereinafter *Report on the Activities of the Court*]; ICC, *Statement of the Prosecutor of the International Criminal Court Mr. Luis Moreno Ocampo to the Security Council on 29 June 2005 Pursuant to UNSCR 1593 (2005)*, at 2 (June 29, 2005); Press Release, ICC, The Hague, Office of the Prosecutor of the International Criminal Court Opens its First Investigation (June 23, 2004); Press

the Prosecutor trains its investigators in sexual violence investigations, as well as other connected issues such as cultural sensitivity and recognition of post-traumatic stress disorder.<sup>54</sup> Overall, the Prosecutor tries to ensure that the work of investigators on sexual violence is consistent and integral to the work of the prosecution team. This strategy, as well as the training, does not resolve the difficulties inherent in investigating sexual violence crimes, but it certainly helps to ensure that these crimes are not overlooked or dismissed as unimportant.

Some victims and witnesses who have cooperated with or appeared before the ICTR have complained of feeling re-violated by the experience.<sup>55</sup> This fact led to discussion among states and nongovernmental organizations, both during the drafting of the Rome Statute and the ICC's Rules of Procedure and Evidence, of how to recognize victims' agency more clearly in order to permit victims greater control over their treatment during their involvement with the ICC. These discussions resulted in the adoption of a provision in the Rome Statute allowing victims legal representation, and a right to be involved in and present views at certain stages of the proceedings. Elaboration of these

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Release, ICC, The Prosecutor, Communications Received by the Office of the Prosecutor of the ICC, at § 3 (16 July 2003); Press Release, ICC, The Hague, Warrant of Arrest Unsealed against Five LRA Commanders (Oct. 14, 2005) at <http://www.icc-cpi.int/press/pressreleases/114.html>.

54. *Report on the Activities of the Court*, *supra* note 51, at ¶ 52; Chris O'Brien, ICC Victims and Witnesses Unit, Presentation in The Hague (Jan. 29, 2005).
55. This is for a variety of reasons, including the following: Insensitive investigation methods; failure to provide adequate preparation for and explanation of the court process; failure to provide counseling and support prior to, during and after testifying; failure to adequately control cross-examination; and failure with respect to witness protection prior to and after testimony. *See, e.g.* U.N. Econ. & Soc. Council, Comm. on Human Rights, *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, Addendum, Report of the Mission to Rwanda on the issues of violence against women in situations of armed conflict*, §§ III(a)(8), (10), (15), U.N. Doc. E/CN.4/1998/54/Add.1 (February 4, 1998); CONNIE WALSH, COALITION FOR WOMEN'S HUMAN RIGHTS IN CONFLICT SITUATIONS, WITNESS PROTECTION, GENDER AND THE ICTR ¶¶ 5-7, 20, 22-24 (1997), [http://www.womensrightscoalition.org/index\\_en.htm](http://www.womensrightscoalition.org/index_en.htm) (last visited Oct. 28, 2005); COALITION FOR WOMEN'S HUMAN RIGHTS IN CONFLICT SITUATIONS, LETTER TO PROSECUTOR CARLA DEL PONTE (Mar. 12, 2003), [http://www.womensrightscoalition.org/index\\_en.htm](http://www.womensrightscoalition.org/index_en.htm). Additionally, in 2001 the treatment of female rape victims appearing before the ICTR in the *Butare* case received much press following the so-called "laughing judges" incident, to which President Pillay responded in a press release. *See* Press Release, International Criminal Tribunal for Rwanda [ICTR], Statement of Judge Pillay, President of the Tribunal, ICTR/INFO-9-3-07 (Dec. 14, 2001).

rights in the Rules of Procedure and Evidence followed.<sup>56</sup>

Calls by female Rwandan genocide survivors for compensation or reparations influenced the discussion that led to the creation of the ICC's Victims Trust Fund.<sup>57</sup> In addition to imprisonment, the ICTR Statute allows for a penalty of "the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners."<sup>58</sup> However, this provision has not been used. The judges of the ICTR have indicated their support for compensation for victims of the genocide, but have recommended that such compensation happen through channels other than the Tribunal.<sup>59</sup> Article 79 of the Rome Statute, which provides that a "Trust Fund shall be established by decision of the [ICC's] Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims," addresses the lesson learned from the ICTR's inability to respond to Rwandan requests for compensation.<sup>60</sup>

As the ICC becomes fully operational, certain issues already faced by the ICTR will come to bear on the ICC. For example, the ICC Prosecutor has announced a strategy of focusing on those individuals bearing the greatest responsibility for ICC crimes.<sup>61</sup> One of the lessons learned from the experience of the ICTR (as well as that of the ICTY and the Special Court for Sierra Leone) is that cases tend to be more focused when the indictments are shorter and charges within those indictments are fewer. This led the ICC's Prosecutor to indicate that he would bring focused

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56. Rome Statute, *supra* note 6, at art. 68(3); *Rules of Procedure and Evidence*, *supra* note 8, at rules 85-99.

57. The Victims Rights Working Group was instrumental in educating Rome Statute negotiators on issues relating to reparations, including the calls by survivors of conflicts around the world such as Rwandan women, for such redress. This was done through direct lobbying of delegates and through reports such as Redress, Promoting the Right of Reparation for Survivors of Torture: What Role for a Permanent International Criminal Court? (June, 1997).

58. *Statute of the International Criminal Tribunal for Rwanda*, S.C. Res. 955, art. 23(3), U.N. Doc. S/RES/955 (Nov. 8, 1994).

59. Security Council, *Letter dated 14 December 2000 from the Secretary-General addressed to the President of the Security Council*, UN Doc. S/2000/1198 (Dec. 15, 2000) (annexing Letter dated 9 November 2000 from the President of the International Criminal Tribunal for Rwanda addressed to the Secretary-General).

60. Rome Statute, *supra* note 6, at art. 79(1).

61. I.C.C., Office of the Prosecutor, *Paper on some policy issues before the Office of the Prosecutor*, at 7 (Sept., 2003) ("as a general rule, the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes.") (emphasis in original).

cases.<sup>62</sup> The pressure to focus on the most serious charges could lead to the exclusion of sexual violence charges because some view them as not rising to the same level as charges involving murder, persecution or extermination.<sup>63</sup> While the ICC Prosecutor's statements and actions to date indicate that he is unlikely to exclude sexual violence charges when choosing which crimes to charge, he will need to be continually vigilant on this issue as the ICC enters a period with multiple investigations, indictments and prosecutions occurring at the same time. As the ICTR experience has shown, including sexual violence charges within an indictment (whether originally or by amendment), can lead to criticism by indictees as attempting to "curry favour" with human rights organizations.<sup>64</sup> However, this kind of commentary should not deter the Prosecutor from pursuing sexual violence charges where they are otherwise warranted.

In the future, the ICC's Prosecutor may also face pressure to drop sexual violence charges in exchange for guilty pleas to other charges. In the ICTR case of *Prosecutor v. Serushago*, the charge of rape was the sole charge withdrawn in exchange for a guilty plea and the accused's cooperation with the Tribunal.<sup>65</sup> If faced with a similar case the ICC's Prosecutor, like the ICTR's Prosecutor, will have to consider his need for cooperation of the accused in other cases. Furthermore, the Prosecutor will have to consider the accused's desire not to be "tainted" by a guilty plea to rape as balanced with culpability for crimes of sexual violence. Under the

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62. Luis Moreno-Ocampo, Prosecutor, Address by Prosecutor Luis Moreno-Ocampo to the Third Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court (Sept. 6, 2004) (stating that a focused prosecutorial strategy means "centering our efforts on perpetrators bearing the greatest responsibility, with a policy of short investigations, targeted indictments and expeditious trials, and an interdisciplinary investigative approach, adjusted to the peculiarities of each situation.").
  63. HUMAN RIGHTS WATCH, *supra* note 4 (noting that in the early work of the ICTR, investigators had the mistaken perception that "rape is somehow a 'lesser' or 'incidental' crime").
  64. *E.g. ICTR: MRND Trial Goes Adrift*, INT'L JUST. TRIB., Sept. 12, 2005, available at [http://www.justicetribune.com/article\\_uk.php?id=3153](http://www.justicetribune.com/article_uk.php?id=3153) (quoting Nzizorera's defence counsel, Peter Robinson, with respect to the case of *Prosecutor v. Karemera*, Case No. ICTR 98-44-I, as accusing the Prosecutor of trying to "curry favour with human rights organisations that accuse him of failing to sufficiently investigate sexual crimes" by amending the indictment to include rape crimes.).
  65. *Prosecutor v. Serushago*, Case No. ICTR 98-39-S, Sentence, ¶ 4 (Feb. 5, 1999). Similarly, in the ICTR case of *Prosecutor v. Bisengimana*, a plea bargain resulted in conviction for the crimes against humanity of extermination and murder, and dismissal of charges of genocide and the crime against humanity of rape: "Bisengimana Pleads Guilty as Trial Chamber Dismisses Other Charges", ICTR/INFO-9-2-458.EN (Dec. 7, 2005).

Rome Statute, the ICC Prosecutor faces an additional consideration: The requirement to take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court while taking into account the nature of the crime - “in particular where it involves sexual violence” or gender-based violence.<sup>66</sup>

#### CONCLUSION

The ICTR’s experience with gender-based crimes over the past ten years provides a number of important lessons for the ICC. The ICC is facing, and will continue to face, many of the same issues as the ICTR. An example of one of these similar issues is how to access, protect, and avoid re-traumatizing victims and witnesses, many of who live in relatively remote or rural places.

As a result of lessons learned from the ICTR’s history, those involved in the ICC negotiations worked to codify positive approaches to gender-sensitive justice into the Rome Statute, the ICC’s Rules of Procedure and Evidence, and the ICC’s Elements of Crimes. It is in this way that the ICTR’s experiences are reflected in the ICC’s policies and procedures. The test will be whether such codification of lessons learned has the intended result of ensuring gender-sensitive justice. We cannot expect that the ICC will operate in a perfectly sensitive manner at all times: it will undoubtedly face new challenges not faced by the ICTR and other tribunals, and will make some missteps along the way. However, given that the ICC can rely on the lessons of the ICTR and other tribunals on the conduct of gender-sensitive investigations and prosecutions, it should experience fewer problems than its predecessor tribunals.

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66. Rome Statute, *supra* note 6, at art. 54(1)(b). This is not to say that the Prosecutor can never drop sexual violence charges to secure a plea agreement. However, he must meet the requirement of article 54(1)(b); a requirement the ICTR’s Prosecutor did not need to meet.