

**We Can Do Better**  
**Investigating and Prosecuting International Crimes of Sexual Violence**

by

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“African women will not talk about rape.”

“We haven’t received any real complaints [about rape].”

“We don’t have the evidence.”

“Criminal prosecutors are here to get convictions, not make political statements.”

“We don’t have the evidence.”

“Women’s rights activists are trying to make the issue of rape more important than it should be.”

“Of course we are committed to prosecuting rape, but you’re barking up the wrong tree with this guy [Akayesu].”

“The rapes were a case of libido, not genocide crimes.”

“We don’t have the evidence.”

“We need to cut the unnecessary charges, like rape.”

“They [the accused] are going to be convicted of genocide anyway, so why do we need to bring rape charges?”

These are a few of the statements that I have heard over the years from international investigators and prosecutors about why the rape charges should not be pursued in their cases.

As any good international prosecutor knows, sexual violence against women and girls in situations of armed conflict constitutes a clear breach of international law. Perpetrators of sexual violence can be convicted for rape as a war crime, a crime against humanity (including enslavement), or as an act of genocide or torture, if their actions meet the elements of each. Leaders in positions of command responsibility who knew or had reason to know of such abuses and who took no steps to stop subordinates who committed sex crimes can, and should, be held accountable.

It is therefore part of the mandate of international justice institutions to address sexual violence. It is the job of every international prosecutor to effectively investigate and prosecute this crime with the same seriousness as other international crimes under his or her brief. International courts are examining the most egregious atrocities committed in the course of some of the world’s worst conflicts. Without exception in these places, combatants have terrorized women and girls with rape and other forms of sexual violence.

Thousands of women and girls are routinely subjected to brutal rapes, sexual assaults, sexual slavery, and mutilation during conflict. Rape and other forms of sexual violence are regularly used as weapons of war, instruments of terror, serving to further military and political goals of the conflict. Rape of women in wartime is a deliberate act of dominance and violence that targets women’s sexuality and gender roles.

Given its routine widespread and systematic use, virtually every case coming before the international criminal courts should seek accountability for sexual violence crimes. Yet, this is in fact not the case. Sexual violence remains the invisible war crime. It remains a continuing challenge in the fight against invisibility to ensure that women's experiences are not ignored in this era of international justice.

Much has been written by legal scholars celebrating the international tribunals and the International Criminal Court as an important step forward in ending impunity and establish deterrence for sexual violence against women. It must be acknowledged that there have been some commendable efforts made at various periods by international investigators and prosecutors, but the problem is that they have not been consistently pursued nor institutionalized. And while it is true that there have been some gains made in that these institutions formally recognize that sexual violence is a crime, and even nominally include such charges, their efforts have still been fraught with problems that have prevented them from comprehensively and sensitively rendering justice to women victims.

Despite the repeated pronouncements by international prosecutors expressing a commitment to prosecuting rape and the gains that have been made, the record unfortunately also includes the following: Squandered opportunities, periods of neglect, and repeated mistakes that have caused major setbacks to effective investigations and prosecutions. Sexual violence charges are not always brought by international prosecutors, sometimes even when a prosecuting attorney is in possession of evidence. If brought, these charges are often added belatedly, as an afterthought, in amendments that are not properly integrated into cases. At the outset, prosecutors do not always craft and follow a consistently defined strategy of how this crime fits into the policies of the accused war criminals. As a result, no single identified work plan is pursued consistently by all investigators and trial lawyers that integrates sexual violence charges appropriately into all the cases. Different trial teams adopt even different approaches to prosecuting the rapes. Investigators are not always trained in dealing with this issue and do not pay sufficient attention to consistently employing effective investigative techniques to fully document the crimes against women. This results in a situation where shoddy investigative work later contributes to rape charges being withdrawn by trial attorneys that are not interested or able to rectify the investigative shortfalls. As pressure mounts on prosecuting teams at the ad hoc tribunals to speed up trials and to cut unnecessary charges, sexual violence charges are sometimes seen to be in that category. How, and whether, rape charges get included in a case often is based on the individual commitment of an investigator or trial attorney rather than an institutional policy.

Historically, there has been a silence surrounding the sex crimes against women that downplays their suffering and renders them invisible. Sexual violence is often dismissed as the private act of a combatant or an unfortunate by-product of war. In a post-conflict situation, this silence usually continues, exacerbated by the stigma attached to rape. Although rape and other forms of sexual violence often constitute torture, genocide, mutilation and enslavement, they have, with rare exception, not been punished with the same seriousness as other war crimes. That continues to remain the case.

Reversing this legacy remains the obligation of every transitional justice institution charged with prosecuting crimes committed during conflict. Below are some steps that can provide a model of best practices to international prosecutors and investigators.

## **1. Political Will on the Part of the Prosecutor**

One of the most important indicators of whether an institutional policy will be enacted is if the head of the organization makes an issue a priority. Sexual violence prosecutions need to be made a concerted priority by the leadership in a prosecutor's office to ensure that investigative efforts are effective and that all the trial teams move forward with a single, clearly articulated prosecution strategy.

What has been clear in examining the record of the international courts to date is that when a Prosecutor and their senior staff make it clear that sexual violence crimes are of importance and are part of the mandate, then the rest of the staff in the prosecutor's office follow suit. Where there is greater political will on the part of a prosecutor and senior staff to continually emphasize responsibility for crimes of sexual violence at the highest levels of authority and to make this issue a policy priority within the office, there is a corresponding rise in the number of sexual violence charges in indictments. Conversely, when the Prosecutor and senior staff do not consistently and continually ensure that this issue is included and integrated into the workplan, there is demonstrable evidence that sexual violence investigations and prosecutions falter.

How does political will manifest itself in concrete terms beyond mere pronouncements? It means that the detailed action strategies and work plans should always include a comprehensive analysis of the sexual violence charges—which cases have sexual violence evidence, which do not, what legal approaches the office should adopt in the courtroom, which cases to concentrate on, and which charges to drop. When retreats and workshops are held to discuss strategy and approach, time must be devoted to highlighting this issue. It means that the prosecutor and senior staff foster discussions to craft a unified prosecution approach to the sexual violence charges that can then be followed consistently by all teams: It is a genocide crime or just a crime against humanity? Will only rape be charged or also other forms of sexual violence such as sexual slavery? Are the rape charges consistently brought to address acts by all factions and to cover other forms of sexual violence? Are rape acquittals being appealed? Are all new staff receiving training on the distinct legal and investigative aspects of this issue? Is new jurisprudence in this area being brought to the attention of all staff?

## **2. Designing a Prosecution Strategy for Rape at the Outset**

Key to the inclusion of sexual violence charges is a comprehensive prosecution strategy at the outset to ensure the consistent inclusion of such charges in the indictments. This allows trial teams to move forward with a single, clearly articulated prosecution strategy for prosecuting rape and other forms of sexual violence. Prosecutors can then work closely with investigators to ensure that the type and quality of sexual violence evidence that they need is gathered. Without a master plan of sorts, that includes sexual violence as one aspect, investigative teams do not always pursue rape testimonies or utilize investigative methodology that is conducive to eliciting rape testimonies. What is also required is continuous and sustained attention to the collection and compilation of sexual violence evidence. Investigators require direction from senior prosecutors on what sort of evidence needs to be collected: for example should testimony be elicited from only rape victims or also rape perpetrators and other witnesses? Is the prosecutor's office looking for a qualitative approach or a quantitative one (for widespread and systematic)? Are testimonies needed to fulfill the elements of a genocide crime or a sexual slavery crime against humanity?

Different prosecution strategies will require different evidentiary standards and investigative approaches. Without a unified prosecution strategy on the sexual violence charges, different teams will pursue different, and perhaps even contradictory, approaches.

A comprehensive prosecution strategy also precludes the problem of a lack of coordination and interaction between investigation teams and trial teams that can undermine prosecutions. For example, trial lawyers do not want to be in a position where they have to build a case based on a strategy that was designed without their input by investigators. A prosecution strategy can provide the bridge to increase contact and coordination between the prosecuting attorneys and the investigators who are investigating the cases they work on. This will ultimately ensure that the quality of evidence of sexual violence necessary for the requisite standard of proof is produced.

### **3. Training for All Staff**

Generally, investigators and prosecutors receive little or no systematic training focused on their substantive responsibilities when they start working at an international court. In particular, there is no standard training to develop skills in sexual violence investigations and jurisprudence, and knowledge tends to be based on individual experience and initiative developed on the job. Sexual violence trainings tend to be held sporadically and inconsistently by international courts rather than being a standard and regular part of the training received by all relevant employees. The quality and content of these trainings, when they are offered, is different from court to court and there has been no effort to create a standard module that can be used by all international courts for staff.

Proper investigations are the foundation to the success of every case. One of the major stumbling blocks in prosecuting rape is the lack of consistent attention to this issue by the investigations division in a prosecutor's office. One of the major challenges investigators face in collecting sexual violence evidence is a lack of skills on how to effectively pursue such evidence.

Investigators often receive no training on interviewing methodology for rape victims, and the majority of investigators are male. Often times, investigators come from backgrounds where they have not had any experience with this issue or they believe that this is not one of the crimes that deserves serious attention. Many investigators, though fully equipped with necessary skills to investigate cases, lack training and direction on how to elicit information about sexual violence from witnesses.

Without consistent and sustained investigative work—the diligent and painstaking collection of information relevant to prove the cases, coupled with a thorough analysis and processing of witness statements, trial attorneys are not able to effectively prosecute rape charges. In some cases, sexual violence investigations have been poor in quality and are often not trial-ready when handed to prosecutors. The lack of a comprehensive prosecution strategy for the sexual violence has meant that the information collected has been of varying utility to prosecuting attorneys. In some cases, investigators have opted to collect statements in areas with a higher stipend, and so other areas, have been neglected despite high levels of sexual violence. Sometimes, investigators have opted for quantity, not quality, and witness statements are no more than a paragraph or two offering close to no information that could assist a prosecuting attorney, which contributes to the mistaken assumption that there is no rape evidence. Another problem with witness statements is

that most are presented in narrative form, so the attorney cannot distinguish between the witness's observations and hearsay. In some cases, trial attorneys have to conduct their own investigations, sometimes even during trial to try and salvage the sexual violence charges, defeating the purpose of having an investigations division.

Trial attorneys also need training in the emerging jurisprudence on gender-based violence and prosecution strategies. Lawyers come to international tribunals with a variety of criminal law backgrounds. Some have worked with victim services, others have never worked with victims. Some have prosecuted sexual violence crimes before, others have no experience with this issue. Training equalizes these differences so that sexual violence policies can then be carried through all teams, not just teams where the lead attorney has an interest or experience in prosecuting sexual violence crimes. Training also has the added benefit of communicating clearly to all prosecuting attorneys that sexual violence crimes are a part of their mandate and not some extra or unnecessary bother.

It is further important for trial attorneys not to limit themselves to domestic national methods of rape prosecution, which typically focuses on evidence from the rape victim and the perpetrator's witnesses, revolving around the issue of consent. Proving rape in the international criminal context especially with regard to the responsibility of leaders of an armed conflict or genocide, requires a broader collation of evidence. Innovative methods are required for proving the coercive circumstances integral to the rape prosecutions, such as asking witnesses not typically associated with rape evidence whether they were aware of rape taking place or public attacks on women, and demonstrating the targeting of women for sexual violence through media propaganda.

#### **4. Dedicated Specialized Staff**

Having a dedicated team of sexual assault investigators and prosecutors that are competent and experienced in sexual violence investigations and prosecutions is one way—although not the only way—to strengthen attention to this issue. The key here is to ensure that the gender-specialized appointments are carefully made and filled with staff that are committed, competent and experienced enough to be effective contributors. Since rape victims often—although not always—feel more comfortable recounting their testimony to other females, this also points to the need to recruit more competent and experienced female investigators with a background in this issue.

Some international courts have opted for a dedicated sexual violence investigations team. Others have a dedicated prosecutor for gender crimes. Some have both. Some have none. There is no single way to deal with this issue. However, when there is a dedicated sexual violence team or gender advisor, there is more sustained attention paid to the issue. However, care needs to be taken to ensure that the team is provided with senior enough staff to be effective and to be taken seriously at all levels of the institution. Attention must be paid by senior management to ensure that the dedicated gender team interfaces effectively with other investigative and trial teams, and that their work is integrated into the larger workplan of the organization. If this is not done, experience has shown that the sexual assault team can investigate rape to its heart's content and a dedicated gender advisor can craft innovative prosecution strategies, but that their work will never be fully utilized or integrated by the trial teams.

Having a dedicated gender team should not preclude training in dealing with sexual violence witnesses for all investigative and prosecutorial staff members. Even with a dedicated team dealing with the sexual violence charges, other investigators and lawyers will still need to be in contact and interact with rape victims.

### **5. Care for the Well-being, Safety, and Dignity of Rape Victims**

Justice cannot only be measured by judgments. It must be reached through a process that is fair and that upholds the rights and dignity of those who come before it. This is particularly of concern for international justice mechanisms that seek to provide redress to conflict-affected victims that have been degraded, demeaned, and dehumanized. Utmost care must be taken to ensure that international justice mechanisms adopt humane processes that do not, in any way, further contribute to the suffering. One of the goals of international justice should be to restore dignity and humanity to victims who have been stripped of these things. The experience of testifying at an international court should not be a dehumanizing and disempowering experience. If we do injustice to rape victims in the process of providing international justice, then we are doing wrong. Attention to the issue of process is critical to the ability of an international court to obtain strong witnesses, to undertake effective investigations and prosecution of crimes of sexual violence, and to ensure a more effective witness protection program.

Unfortunately, little about the institutional culture of any adversarial court system places the well being of the victims/witnesses foremost. Witnesses are always treated as cogs in the larger machine rather than placed central to the process. World over, rape victims commonly encounter difficulties in the process of securing justice through the courts in their country. Women are often deterred from coming forward to report sexual violence due to the stigma. In many countries, national laws mischaracterize rape as a crime against honor or custom, rather than a crime of physical harm to the victim, thus minimizing its seriousness. Negligent investigative work by police investigators and procedural hurdles frequently impede the ability of a rape victim to prosecute. Even when reported, investigators and prosecutors often do not treat sexual violence crimes seriously and excuse the actions of rapists or blame the victim. More often than not, a woman's honor is put on trial rather than the alleged rapist's actions. Women who allege rape are commonly subjected to disbelief, public scrutiny of their sexual past, or shamed with the stigma of being "dishonored" or "tainted" for admitting they have been raped. Legal redress and a judicial process that respects the dignity of the rape victim are hard to come by in most countries.

International courts, ostensibly set up for the victims of mass atrocities, must take care to ensure that its processes put the dignity and safety of the victim at the forefront. There are a few ways to do this:

#### **Information**

Generally, despite some commendable efforts, little or no information about international trials reaches the conflict-affected population at large. Greater efforts have to be made by international courts to provide information to the victims and witnesses. For courts that are not situated in-situ, this challenge is even greater. Rape victims who have sought to cooperate with international courts complain that they have little or no regular information or updates about what happens in the cases that they help the prosecutor's office with and that contact with the

prosecutor's office. The lack of information and silence contributes to a sense of alienation from international justice and its relevance to the victims. Further, it fosters a feeling of having been used or exploited among those rape victims who testify.

## **Agency**

Agency is the process through which people are empowered in order to make fully informed decisions about things that affect them. When deciding whether to testify before an international court, survivors have to weigh the risks and benefits in order to make their decision. In some cases, however, survivors are not fully informed by a prosecutor's office in order to make their decision. Pre-trial witnesses are often assured by the prosecutor's office that their identity will be kept confidential when they testify. That is true: They testify behind a curtain, they are given a pseudonym, and their names are never publicly disclosed.

What they are often *not* told is that the rules of the court require that the accused know the names of the witnesses who are testifying against him or her. This means that often by the time a witness returns, their name is known in their home area as someone who has testified. Although it is a violation of the rules for the defendant or defense counsel to disclose the name of a witness, the reality is that these names get leaked.

This can have a devastating impact on the witness. First, it is a betrayal of the trust that the witness has placed in the international justice institution. Second, it puts the witness at risk of reprisal for having testified. Rape victims are often widows living alone and are even more vulnerable to violence. Third, because of the stigma attached to being a rape victim, a number of the women who agree to testify have not notified their families or their intimate partners that they were raped. One rape victim who testified based upon the promise that her identity would be confidential was exposed as a rape victim upon returning after testifying. When her fiancée discovered she was a rape victim, he abandoned her. For many of these rape victims, their ability to rebuild their lives in a post-conflict situation is dependent on their marriageability.

There is no easy answer to this problem. The due process rights of the defense require that the defendant know who is accusing him or her. It is close to impossible to prove the leak came from the defense in order to prevent or punish this breach. What should be done, however, is that there should be full disclosure to the witness and an explicit warning provided by the prosecutor's office that their identity could be leaked. Give rape victims the agency to make their decision to testify based on the full information. No international prosecutor should opt for expediency in securing witnesses by misleading them. If the cost of full disclosure is that the prosecutor's office loses some witnesses, then so be it. It is more important that rape survivors understand fully the risks that they take and choose to come forward fully informed, then later find themselves unwittingly vulnerable and exposed as has happened.

## **Witness Preparation**

Worldwide, rape carries a stigma. Rape victims are often silent about the violence against them for fear of being isolated or stigmatised as a rape victim. Rape victims fear being rejected by their intimate partners or finding themselves less marriageable as a result. Speaking about what happened to them—particularly in a trial setting which may require a detailed discussion of what occurred—is often difficult. Every culture utilizes euphemisms to describe sexual acts, genitals, or the act of rape. Rape victims may just say they were “taken by a man.” Sexual slaves may refer to

themselves as “wives.”

It is important that investigators and trial attorneys adequately prepare rape victims who will testify about the international legal process. Women coming forward need to be told and be prepared for detailed questions that require descriptions of sexual body parts and acts. In some cases, rape witnesses who have not been prepared have felt shamed, humiliated, or outraged that they were asked to speak bluntly in a public setting about being raped. Adequate witness preparation can help to alleviate this problem

## **Support and Protection Services**

The lives of the victim witnesses who come forward to testify in international courts are often marked by acute material needs, physical damage and psychological trauma. The statutes setting up international courts have commendably recognized the need to provide a form of justice that takes into account the health needs of the victims coming forward. Support and protection services remain a critical part of providing rape victims with a more holistic international justice. Rape victims should have access to counselling services as well as gynaecological and other health services. Of particular concern to rape victims is the issue of HIV/AIDs contracted as a result of being raped. There has been a big debate as to whether international courts should provide anti-retroviral drugs as part of the medical care provided to victim witnesses. The accused in U.N. custody receive such medication. For many rape victims, they see this as a glaring injustice: the men responsible for giving them this death sentence are receiving anti-retrovirals, while they, the victims of these men, are left to die of AIDS. There have been some recent and tentative steps to begin to redress the inequity of this. It is an issue that is not going to go away. International courts need to either provide such medication to victim witnesses or to make adequate provisions for relevant health-care institutions to fully meet this need.

While the international courts tend to provide good protection for witnesses during trial, there is often little sustained follow up to ensure the protection of witness's post-trial. Witnesses continue to complain of harassment in the form of verbal or other threats they receive after testifying. However, there is much less protection after trial. International justice mechanisms need to develop a better tracking system to follow-up post-trial in order to know definitively how many witnesses have faced harassment, what sort of threats they are receiving, and in which parts of the country this is occurring. Though such a system more effective post-trial mechanisms could be designed within the context of each situation.

## **6. An Enabling Courtroom Environment**

It requires significant courage for a rape victim to come forward and to publicly speak about the sexual assault against them. World over, rape victims have difficulty in speaking out because of the stigma attached to being a rape victim and the taboo of speaking publicly about sex. Often, women who allege rape are subjected to disbelief, public scrutiny of their sexual past, or shamed for admitting they have been raped.

It is important that judges create an enabling courtroom environment where rape victims are treated with sensitivity, respect, and care when they come forward to testify. Judges and prosecuting attorneys must intervene when necessary to ensure that rape victims are not harangued and harassed on the stand by defense counsel. Because some of the trials are joint trials with numerous defendants, rape victims are often subjected to hours, days, and weeks on



the stand being cross-examined by several defense counsel, sometimes going over the same questions again and again. In one case with six defendants, a prosecution lawyer noted that a rape victim whom she led on the stand was asked 1,194 questions by the defense counsel. While clearly the defense has a right to cross-examine witnesses, care should be taken by judges to ensure that questioning of rape victims is not excessively or gratuitously repetitive. If rape charges are not being brought against all the defendants in a joint trial, the cross-examination of the sexual assault should be limited to those charged with rape.

When judges do not limit or restrain excessive cross-examination, rape victims who have testified leave the stand feeling violated for a second time, expressing outrage at the fact that they had to endure days of repeated, detailed questioning about the intimate details of the rapes they endured.

It should go without saying that judges should ensure that their decorum in the courtroom is appropriately empathetic towards women victims describing how they were raped. Judges should refrain from laughing or other inappropriate behavior, such as asking if further testimony from the rape victim is for their 'amusement.' If such an incident does occur, they should immediately provide an apology to the rape victim on the stand.

## **Conclusion**

Lest it be said that such crimes are too difficult to investigate or prosecute, a look at the U.N. Special Court for Sierra Leone best illustrates what can be achieved by a prosecutor with political will to address this issue, competent and experienced investigators, and dedicated prosecutors. That court was set up in 2002 by the U.N. to hold accountable those with the greatest responsibility for the atrocities committed during the Sierra Leonean civil war. Despite significantly less resources and staff at his disposal than the ad hoc tribunals, Prosecutor David Crane made a concerted decision that justice would be delivered to Sierra Leonean victims of sexual violence.

Under his watch, a prosecution strategy that incorporated sexual violence crimes was devised *at the outset and consistently followed through*. With only ten investigators in the team, two competent and experienced female investigators were immediately dedicated to sexual assault investigations (some twenty percent of his investigations team). These two gender investigators used interviewing methodology that was conducive to eliciting rape statements. After only one year in existence, 75 percent of the indictments included sexual violence charges brought as original indictments. At the prosecutorial level, David Crane has a dedicated trial attorney tasked with the prosecution plan for the sexual violence crimes. The prosecutor's office is planning to not only bring rape charges, but to fully prosecute the sexual violence and to set out arguments that seek to broaden and expand the existing international law.

In Sierra Leone, when the Special Court talks about outreach and information, they don't mean a big building, or U.N. documents in English and French. In Sierra Leone, outreach is the prosecutor and a Krio interpreter traveling to remote outlying areas where they address the population in the local language and explain in simple comprehensible language what the court is doing. Prosecutor David Crane has visited and addressed people in every province in the country. At all of those meetings, he talks about how his mandate is to provide justice to his client, the Sierra Leonean people.

What David Crane shows is that political will by the prosecutor and a dedicated, effective, competent staff can make all the difference, even working under constrained conditions.

International prosecutors must ensure that they deliver inclusive and non-discriminatory justice. International justice that ignores or denies responsibility for the violence directed at women is not full and fair justice. The permanent International Criminal Court, established by the U.N. in 2003, has pledged a commitment to gender inclusive justice at the highest level. The voices of the thousands of rape victims who courageously speak about their ordeals should be a constant reminder to us of why we set up these institutions. A large proportion of the genocide survivors are women, and if justice can best serve the living, surely the international community has a duty and an obligation to effectively and vigorously prosecute those responsible for the mass rapes that occur routinely in conflicts around the world.

So instead of saying “We don’t have the evidence,” international prosecutors should ask themselves instead: “The evidence is out there. Why don’t I have it? What did I do wrong? How can I fix it?”

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