

GENDER

IN PRACTICE

Guidelines & Methods to address Gender Based Crime in Armed Conflict

Women's Initiatives for Gender Justice



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Women's Initiatives for Gender Justice

The Women's Initiatives for Gender Justice is an international women's human rights organization committed to:

- Advocating for gender justice through the International Criminal Court (ICC)
- Monitoring the ICC to ensure the Court implements the Rome Statute, including the gender-inclusive provisions
- Ensuring sexualized violence and gender based crimes are priorities in the investigations and prosecutions of the ICC
- Advocating for women victims/survivors to benefit from the reparations mechanisms and processes of the ICC
- Enhancing the capacity among women, specifically women's NGOs in countries where the ICC is conducting investigations, in use of international law particularly the Rome Statute
- Consulting with women, women's groups and NGOs most affected by conflict in situations before the ICC, to ensure their concerns, views and issues are incorporated into the investigations, prosecutions and the Court's work with victims and witnesses
- Strengthening advocacy in women's human rights and gender equality
- Promoting the gender standards of the Rome Statute and supporting national law reform promoting women's human rights through use of the Rome Statute and implementing legislation
- Influencing and strengthening the gender competence of the ICC through the recruitment and appointment of women, experts on sexual and gender violence and other personnel of the Court
- Facilitating a networks of experts on sexual and gender violence, victims and witnesses and institutional aspects of gender mainstreaming to shape the mechanisms developed by the ICC
- Working with women in conflict-affected areas to ensure they are informed of the possibilities of justice through the ICC and national processes; aware of their rights as victims and participants in the ICC; supported in their efforts towards rehabilitation; have access to legal representation competent in the area of gender based and sexual violence; and have a voice in international human rights and justice mechanisms.

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Introduction

This Training Handbook is intended to assist in working with women affected by sexualized violence and gender based crime in times of armed conflict and war.

The Handbook draws on the work of many organizations that have been working to bring to the foreground the brutality of armed conflict and its impact on women. This resource aims to complement existing resources and addresses the pre-existing conditions of gender inequality where women's diverse and multi-dimensional identities (class, race, ethnicity, sexuality, age, disability) are appropriated as the basis for specific and targeted violence against women; and examines the ways in which sexuality and gender impact on the process and outcomes of justice.

The Training Handbook aims to:

1. assist in understanding the aspects of sex role stereotyping that contribute to the nature and impact of gender based and sexual crimes
2. assist in the development of effective and gender competent investigations and prosecutions by the International Criminal Court in relation to gender-based and sexual violence
3. ensure an atmosphere of trust and consistency is afforded to victims, witnesses and investigator during the interview and justice process
4. enable an understanding of the diverse elements that influence the psychosocial settings of these crimes
5. enhance understanding of the physical and psychological consequences of sexual violence on victims and witnesses, specifically recognizing symptoms of post traumatic stress disorder and co-morbidity
5. ensure that witnesses have the appropriate support and protection needed to participate in the justice process
6. expand on the current characterizations of sexual violence in international humanitarian law.

Definitions

What is gender?

The current Compact English Oxford Dictionary defines gender as “1. a class (usually masculine, feminine, common, or neuter) into which nouns and pronouns are placed in some languages. 2. the state of being male or female (with reference to social or cultural differences). 3. the members of one or other sex.” Regarding usage, it states: “The words gender and sex both have the sense ‘the state of being male or female’, but they are typically used in slightly different ways: sex tends to refer to biological differences, while gender tends to refer to cultural or social ones.”

In the social sciences, the term ‘gender’ has been introduced to refer to differences between women and men without strictly biological connotations – socially constructed differences that correspond to the two sexes although they are not caused by biological sexual differences.

Gender relations are the rules, traditions and social relationships in societies and cultures that determine what is considered ‘feminine’ and ‘masculine’, and how power is allocated between, and used differently by, women and men. Gender refers to a social construction of femininity and masculinity that varies over time and place and is enacted through learned, rather than innate, behavior.

The great value of ‘gender’ as an analytical concept is that it directs attention towards social and cultural processes and interventions in terms of their differential effects on women and men, and the relationships between women and men. In this context, gender does not look at women in isolation, and enables differences between women and men, and between different ‘identities’ and groups of women (due, for example, to class, race, ethnicity, age, ability and sexuality) to become visible.

A gender analysis therefore, is not just a question of identifying difference (between men and women), but of analyzing how these differences have led to inequalities in power between women and men. Nonetheless, in foregrounding the interdependence of women and men in society, the approach leads to the crucial recognition that no problem or issue is gender-neutral.

[Justice] without a gender perspective is only half of [justice]: if one gender is left behind, there cannot be real [justice] even for the dominant gender. – ‘Engendering’ or ‘genderising’ an [institution or the justice process requires the process to understand and therefore change] **the gender-based power balance in the direction of greater equality.**¹

Common understandings of the meaning of gender²

Gender refers to the attributes, behaviors, personality characteristics and expectancies associated with a person’s biological sex in a given culture; these may be based on biology, may be learned, or may represent a combination of biological and cultural determinants.

Gender Identity refers to the sex with which individuals associate themselves.

Gender Stereotype Identification refers to the extent to which an individual identifies with the culture’s gender stereotypes: masculinity and femininity.

¹ Mandy Macdonald, Ireen Dubel and Ellen Sprenger *Gender and organizational development: bridging the gap between policy and practice* (Amsterdam: KIT, 1997).

² See <http://womensissues.about.com/library/weekly/aa102402a.htm>

Gender Stereotypes³

Gender stereotypes occur when you apply generic attributes, opinions or roles toward either gender. Gender stereotypes are apparent everywhere in our society and culture. Existing concurrently with these stereotypes are clearly identified gender roles which establish the way women and men are expected to behave.

Common gender stereotypes:

There are many gender stereotypes used to define each sex. Common attributes and roles include:

Gender (western-oriented) stereotypes associated with women:

- Submissive
- Emotional/interested in love
- Quiet
- Neat/clean
- Nice/agreeable
- Housewife
- Child rearing/holder of family traditions and values
- Dependent
- Weak

Gender (western-oriented) stereotypes associated with men:

- Aggressive
- Provider/in control
- No emotions
- Loud
- Messy
- Athletic
- Math and science oriented
- Money maker
- Strong/sexual

Using gender stereotypes occurs when we find ourselves making assumptions about members of our own, or the opposite, sex.

³ See <http://womensissues.about.com/cs/genderstereotypes/a/aagenderstereo.htm>

Violence Against Women - Context and Prevalence

Gender Based Violence

The CEDAW⁴ Committee defines gender-based violence as violence that is directed at a person on the basis of gender or sex. It includes acts that inflict physical, mental or sexual harm or suffering, threat of such acts, coercion and other deprivations of liberty.

Sexual violence

As a method of assault, sexual violence violates a person in a multi dimensional manner. It is simultaneously a physically, emotionally, physiologically and sexually assaulting action. Given this, the act of sexual violence is only one element of a cruel and complex concert of violent acts that together, are aimed at subjugation and degradation. The result of sexual violence is physical, emotional and psychological harm.

Violence against women

The acts of gender-based violence that are directed at women and girls include physical, sexual and psychological harm and can occur in public or private settings. Violence against women is often expressed as sexual violence.

Recognizing that violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.

UN Declaration on the Elimination of Violence against Women 1993

Understanding Sexual and Gender Based Violence

Gender-based crimes and sexual violence originate in the pre-existing social, political and cultural context in which women live. Gender-based crimes are exaggerated in armed conflict as tolerance to violence increases, and as communities begin to accept violence as a legitimate way of expressing anger, asserting ethnic dominance, addressing historical (perceived or actual) injustices, claiming political and financial control, and resolving conflict. Women's vulnerability during armed conflict is compounded by traditional attitudes to women's rights.

The pre existence of gender inequality and violence towards women in a community provides the context for targeted violence against women in armed conflict and war, and also impacts upon efforts to address gender based crime in armed conflict. Understanding the extent and operation of that violence is a fundamental step in assisting women victims and survivors who seek to be dynamic and self-determining in the process of justice and in their rehabilitation.

⁴ The Convention on the Elimination of All Forms of Discrimination against Women

Community and Social Settings of Sexual and Gender-Based Crimes

Sexual and gender-based violence includes much more than sexual assault and rape. Although it may occur in public contexts, it is largely rooted in individual attitudes that condone violence within the family, the community and the State. The root causes and consequences of sexual and gender-based violence must be understood before appropriate programs to prevent and respond to this violence can be planned.⁵

[Gender-based violence] shall be understood to encompass, but not limited to the following:

- a) Physical, sexual and psychological violence occurring **in the family**, including battering, sexual exploitation, sexual abuse of children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non spousal violence and violence related exploitation.
- b) Physical, sexual and psychological violence occurring **within the general community**, including rape, sexual abuse, sexual harassment and intimidation at work, educational institutions and elsewhere, trafficking of women and forced prostitution.
- c) Physical, sexual and psychological violence **perpetrated or condoned by the State and institutions**, wherever it occurs.⁶

Torture of women is a fundamental violation of human rights, prohibited in all circumstances under international law. Yet despite the gains that women around the world have made in asserting their rights, the torture of women is a daily reality. It is rooted in pervasive discrimination that continues to deny women full equality with men and that legitimizes violence against women.

Sometimes the perpetrators of acts of violence against women are agents of the state, such as police officers, prison guards or soldiers. Sometimes they are members of armed groups fighting against the government. However, much of the physical, mental and sexual abuse faced by women is at the hands of people they know, such as husbands, fathers, employers or neighbours.

States have a duty to ensure that no one is subjected to torture or ill treatment, whether inflicted by agents of the state or by private individuals. Yet far from protecting women, states all around the world have allowed beatings, rape and other acts of torture to continue unchecked. When a state fails to take effective measures to protect women from torture, it shares responsibility for the suffering these women endure.⁷

⁵ *Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons - Guidelines for Prevention and Response* UNHCR, May 2003, pg 7.

⁶ This definition is used by UNHCR and Implementing Partners, and is based on Articles 1 and 2 of the UN General Assembly Declaration on the Elimination of Violence Against Women (1993) and Recommendation 19, paragraph 6 of the 11th Session of the CEDAW Committee. See *Guidelines*, *ibid.* note 3 at 11.

⁷ See Amnesty International, *Broken bodies, shattered minds: Torture and ill-treatment of women*, Amnesty International Publications, London, 2001 at 2-3.

Facts and Figures⁸

Pre-existing gender context

- Approximately 540 million children in the world - one in four - live in dangerous, unstable situations (Save the Children)
- 80% of the refugees are women and children (UNHCR, 2001)
- Between 10% and 69% of women reported being physically assaulted by an intimate male partner at some point in their lives (WHO, 2002)
- Up to 70% of female murder victims are killed by their male partners (WHO, 2002)
- More than 135 million girls and women have undergone female genital mutilation, and an additional 2 million girls and women are at risk each year (6,000 every day) (UN Special Rapporteur on Violence Against Women, 2002)
- 700,000 people are trafficked each year for sexual exploitation (UN Secretary General)
- Each year 2 million girls aged between five and fifteen are introduced into the commercial sex market (UNIFEM, 2002)
- Around 20-70% of abused women never told another person about the abuse they suffered until being interviewed for the study (WHO, 2002)
- In 2003 at least 54 countries had discriminatory laws against women. (UN Special Rapporteur on Violence Against Women, 2002)
- 79 countries have no (or unknown) legislation against domestic violence. In some of these countries provisions may exist, but information was not readily available (UNIFEM, 2003)
- Marital rape is recognized specifically as a crime in only 51 countries as far as information was available (UNIFEM, 2003)
- Only nine countries have specific legislation outlawing female genital mutilation (UNIFEM, 2003)
- So called "Honour" defences (partial or complete) are found in the Penal Codes of Peru, Bangladesh, Argentina, Ecuador, Egypt, Guatemala, Iran, Israel, Jordan, Syria, Lebanon, Turkey, the West Bank and Venezuela (UN Special Rapporteur on Violence Against Women, 2002). Of these countries,

⁸ Amnesty International (2003) *Making Violence against Women Count*; Save the Children website: http://www.savethechildren.org/one_world/statistics.asp; UNHCR (2001) *Women, Children and Older Refugees*; Save the Children (2003) *State of the World's Mothers: Protecting Women and Children in War and Conflict*; UNOCHA 2003, *UN Inter-Agency mission visits the DR Congo to look into internal displacement challenge (21 February 2003)* www.reliefweb.int/w/; Human Rights Watch (1999) *Leave None to Tell the Story: Genocide in Rwanda*; Physicians for Human Rights with the support of the UN Assistance Mission in Sierra Leone (2002) *War-related Sexual Violence in Sierra Leone: A Population-Based Assessment*; UNIFEM (2001) *Experts Visit Colombia as Part of Global Assessment on the Impact of War on Women and Women's Role in Peace-building (Press Release, 26 November 2001)*; UNIFEM Portal at www.womenwarpeace.org/; IWTC, Women's GlobalNet #212. 23rd October 2002; Amnesty International, (1999) *Pakistan: Violence Against Women in the Name of Honour (AI Index: ASA 33/17/99)*; WHO (2002) *World Report on Violence and Health*; UN Special Rapporteur on Violence Against Women (2002) *Report on to Commission on Human Rights: Cultural practices in the family that are violent towards women (UN Doc. E/CN.4/2002/83)*; UN Secretary General, News Conference 25 November 2003, International Day for the Elimination of Violence Against Women; UNIFEM (2002) 'Women, War and Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace-building' in *Progress of the World's Women 2002*, Volume 1; UNIFEM (2003) *Not a Minute More: Ending Violence Against Women*; UNIFEM at <http://www.aids.undp.org/unifem.htm>; UNFPA at <http://www.unfpa.org/adolescents/facts.htm>.

5 are States Parties to the Rome Statute, and 4 have signed but not ratified the Statute.

- 51% of all people living with HIV/AIDS today (over 20 million) are women (UNIFEM, 2003)
- 55% of the 16,000 new infections occurring daily are women (UNIFEM, <http://www.aids.undp.kg/unifem.htm>)
- Over 60% of HIV-positive youth between the ages of 15-24 are women (UNFPA, <http://www.unfpa.org/adolescents/facts.htm>)

Gender and Conflict

- Close to 90 percent of war casualties are civilians - most of them women and children (Save the Children)
- In Uganda, more than 11,300 children, about one-third of them girls, have been abducted by military groups and forced into combat (Save the Children)
- At least 20,000 women and girls between the ages of 7 and 65 were raped during the conflict in the former Yugoslavia in 1992 alone (Save the Children)
- Genocide in Rwanda left an estimated 65,000 households headed by children - 90 percent of whom were girls (Save the Children)
- From 1990 to 2000, girls under 18 participated in armed conflicts in at least 39 countries; in 65 percent of those countries, there are documented cases of kidnapping and physical force being used to recruit girls (Save the Children)
- Trafficking of women and girls was reported in 85% of the conflict zones (Save the Children, 2003).
- In the Democratic Republic of Congo 5,000 cases of rape, corresponding to an average of 40 a day, were recorded in the Uvira area by women associations since October 2002 (UNOCHA, 2003).
- In Rwanda at least 250,000 women were raped during the 1994 genocide (Human Rights Watch 1999)
- In Sierra Leone 94 per cent of displaced households surveyed had experienced sexual assaults, including rape, torture and sexual slavery (Physicians for Human Rights, 2002)
- Every 14 days a Colombian woman is a victim of forced "disappearance" according to a 2001 report by the Women and Armed Conflict Work Table (UNIFEM, 2001)
- Approximately 250,000 Cambodian women were forced into marriage between 1975 and 1979. On average, two group marriages may have taken place in every Cambodian village during the Khmer Rouge regime (UNIFEM Portal)
- In Bosnia and Herzegovina 20,000 - 50,000 women were raped during five months of conflict in 1992 (IWTC, Women's GlobalNet #212. 23rd October 2002)
- In some villages in Kosovo, 30%-50% of women of child bearing age were raped by Serbian forces (Amnesty International, 27 May 1999)

The Gender Equality Traditions (GET) Indicators⁹

Women's substantive inequality in peacetime creates the basis for gender-based crimes and sexual violence in times of war and armed conflict. To understand the complexity of gender violence, the ways in which women are targeted for violence and the way gender based violence operates in armed conflict, it is crucial to examine the underlying gender context prior to the conflict and to explore the day-to-day practice of the community in which it occurs.

Understanding the status of women preceding the conflict will enable you to better understand:

- the ways in which women are targeted for violence during armed conflict;
- the immediate and long term consequences of abuse for women;
- the ways in which communities including women victims/survivors may deal with and respond to sexual violence within the conflict;
- the availability of local and national structures and remedies (legal and other) for addressing violence and therefore the community's familiarity with formal/informal 'justice' processes; and
- the local infrastructure and support services available for women victims/survivors of gender based crimes.

The GET Indicators are designed to assist you in the identification of community held belief systems and values that impact on the way in which gender based violence and rape are constructed, recognized and responded to. Its function is to identify the conditions relating to gender that exist within a community that will influence the likelihood of justice for women subjected to sexual and gender based violence before, during and after conflict. The indicators can be used for both country and local community level assessments.

Identifying the pre existing gender context of gender-based crimes and sexual violence in communities

It is important to remember that no country or community will score the highest possible ranking (28) on this test for two reasons:

1. women's rights are compromised in all communities, and
2. the powerful patterns attached to 'gender traditions' impact on self-determination in every society.

Scoring

Scores of 1 are High - indicating self-determination

Scores of 5 are Low - indicating oppression

Scores will be between 28 (highest score) and 140 (lowest score).

⁹ The GET Indicators were developed by the Women's Initiatives for Gender Justice in collaboration with Vivien Clear

PART A

1. Marriage

(a) Who determines marriage – is there a dowry or bride price exchanged?

1 _____ 2 _____ 3 _____ 4 _____ 5 _____
 Self- determined Customs/traditions Arranged/forced

(b) What is the legal age of marriage?

1 _____ 2 _____ 3 _____ 4 _____ 5 _____
 Above 18 years 18 years 15-18years Below 15 years No minimum age

(c) Is divorce legal and are women able to exercise the right to divorce?

(Consider - do women receive property settlements after divorce?)

1 _____ 2 _____ 3 _____ 4 _____ 5 _____
 Rights protected Limited protection No Rights/ honor crimes

(d) Attitudes to polygamy

1 _____ 2 _____ 3 _____ 4 _____ 5 _____
 Mutual Exists not sanctioned Men only & sanctioned

2. Abortion- available & accepted

1 _____ 2 _____ 3 _____ 4 _____ 5 _____
 Self- determined Available & accessible Illegal but available (clandestine) No Rights/dangerous

Score

3. Estimated prevalence of gender violence

Rape per year (anecdotal)	High-----%	Low-----%	Not Recorded <input type="checkbox"/>
Reported rape per year	High-----%	Low-----%	Not Recorded <input type="checkbox"/>
Convictions per year	High-----%	Low-----%	Not Recorded <input type="checkbox"/>
DV * per year (anecdotal)	High-----%	Low-----%	Not Recorded <input type="checkbox"/>
Reported DV per year	High-----%	Low-----%	Not Recorded <input type="checkbox"/>
Convictions per year	High-----%	Low-----%	Not Recorded <input type="checkbox"/>
Child abuse** per year (anecdotal)	High-----%	Low-----%	Not Recorded <input type="checkbox"/>
Reported child abuse per year	High-----%	Low-----%	Not Recorded <input type="checkbox"/>
Convictions per year	High-----%	Low-----%	Not Recorded <input type="checkbox"/>
* Including honor crimes and killings			
** Including incest			

4 .The law

(a) Are there laws protecting women and children from domestic violence? Yes No

(b) Is there constitutional equality between men and women ?

1 _____ 2 _____ 3 _____ 4 _____ 5 _____
Full equality in the Constitution Limited equality No equality recognized in the Constitution

(c) Can women own land and property?

1 _____ 2 _____ 3 _____ 4 _____ 5 _____
Entitled to own land Defined by spousal/paternal r/ship No rights to land or property

(d) Can women inherit land and property?

1 _____ 2 _____ 3 _____ 4 _____ 5 _____
Entitled to inheritance Limited and defined No rights to Inheritance

(e) Consider - Are there any current legislative reforms before Parliament that may promote or undermine gender equality- e.g reform of the constitution, penal code, family law, ownership of land or inheritance?

5.Gender Expectations

a) Education

1 _____ 2 _____ 3 _____ 4 _____ 5 _____
Compulsory Limited by gender Not offered

b) Work

1 _____ 2 _____ 3 _____ 4 _____ 5 _____
Self determined Limited by gender Unpaid & restricted

c) Mobility

1 _____ 2 _____ 3 _____ 4 _____ 5 _____
Move around freely Limited & defined Restricted by third party e.g. family, religion

d) Socializing

1 _____ 2 _____ 3 _____ 4 _____ 5 _____
Equal & liberated Limited by gender Restricted & defined

6. Sexuality

a) Sex Education

1 _____ 2 _____ 3 _____ 4 _____ 5 _____
Compulsory Widely available Limited None Illegal

b) Sex outside marriage

1 _____ 2 _____ 3 _____ 4 _____ 5 _____
Self-determined Limited Cultural taboo/dangerous

c) Average age of commencement of sexual activity

1 _____ 2 _____ 3 _____ 4 _____ 5 _____
Self-determined Legal age of consent <18 <15 <12

d) Sexual Rights & Sexual Diversity

1 _____ 2 _____ 3 _____ 4 _____ 5 _____
Legal & diversity embraced Limited legal recognition Illegal but co-exists underground Strong Taboos & dangerous Targeted violence & persecution

e) Availability of sexual and reproductive health care products – contraceptives, condoms

1 _____ 2 _____ 3 _____ 4 _____ 5 _____
Available & self-determined Exists but not approved Illegal & taboo

7. Health

a) What is the maternal death rate? (e.g. EU 6.5 per 100,000 live births, East Africa 1060 per 100,000 live births, North Africa 340 per 100,000 live births¹⁰)

1 _____ 2 _____ 3 _____ 4 _____ 5 _____
Low Above regional or international average High

b) What is the life expectancy of baby girls?

1 _____ 2 _____ 3 _____ 4 _____ 5 _____
Equal to boys Poor in comparison to boys Infanticide practiced

c) What are the reproductive rights of women?

1 _____ 2 _____ 3 _____ 4 _____ 5 _____
Self-determined Limited Defined by male partner

¹⁰ US Census Bureau. Website: <http://www.census.gov/ipc/www/>

d) Existence of harmful practices e.g. genital mutilation

1 _____ 2 _____ 3 _____ 4 _____ 5
Illegal and not Practiced rarely Frequently Legal and commonly
practiced practiced

e) HIV & AIDS – access to diagnosis, treatments and health care (compare with men of the same community)

1 _____ 2 _____ 3 _____ 4 _____ 5
Good Limited Poor

PART B.

8. Political Participation

(a) Do women have the right to vote and are they able to exercise this right?

1 _____ 2 _____ 3 _____ 4 _____ 5
Right to Vote Limited rights and/or exercise No voting rights
of voting rights

(b) Number of women in parliament?

1 _____ 2 _____ 3 _____ 4 _____ 5
50% or > Between 40-50% Between 30-40% Between 20-30% Between 10-20%

(c) Number of women in local government and district authorities?

1 _____ 2 _____ 3 _____ 4 _____ 5
50% or > Between 40-50% Between 30-40% Between 20-30% Between 10-20%

9. International Ratifications and Implementation¹¹

(a) Has the Government ratified the ICCPR, ICESCR and CAT?

1 _____ 2 _____ 3 _____ 4 _____ 5
Ratified & consistency Ratified but inconsistency Signed not Not signed
in domestic laws in domestic laws ratified

(b) Consider - Has the Government ratified the Geneva Conventions, what is its position on the use and sale of landmines, or other weapons that kill indiscriminately?

**(c) Has the Government ratified and implemented CEDAW, ERAW, CERD, CRC?
(Are there reports to, and comments from the relevant Human Rights Treaty Body for this country?)**

1 _____ 2 _____ 3 _____ 4 _____ 5
Ratified & consistency Ratified but inconsistency Signed not Not signed
in domestic laws in domestic laws ratified

Country/Community Name

¹¹ Adapted from Callamard, A., *Investigating Women's Rights Violations in Armed Conflicts* Amnesty International Publications and the International Centre for Human Rights and Democratic Development, 2001.

Total GET Score

Estimated Prevalence of Violence:

- Rape
- Domestic Violence
- "Hate" crimes
- Child abuse
- Other

Comments:

Sexual Violence and Rape in Conflict

Understanding the universal impact of sexual violence and rape in conflict

The violence of armed conflict creates an environment devoid of the social and traditional safety mechanisms that are usually present and that function to maintain boundaries against extreme and exaggerated forms of gender-based violence. It is likely that women living in communities affected by armed conflict will have either experienced or witnessed gender-based violence and the coercion, intimidation and fear that accompany it. In this environment the consequence of resistance (physical brutality or possible death) will be internalized.

During the war army men made my father sleep with me and when he refused they tied him up with ropes and put a pistol to his head and made him lie down on me. He tried to penetrate me but he could not as the army men pierced me down below with a pistol and he saw the blood and lost desire. They took my father aside and shot him with a bullet in his chest and he died.

Woman from Kasana Parish, Northern Uganda¹²

“Sexual violence was a step in the process of destruction of the Tutsi group - destruction of the spirit, of the will to live, and of life itself.”

*Prosecutor v. Jean-Paul Akayesu*¹³

Sexual Violence as an Instrument of Genocide

507. For purposes of interpreting Article 2(2)(d) of the Statute, the Chamber holds that the measures intended to prevent births within the group, should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages. In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group.

508. Furthermore, the Chamber notes that measures intended to prevent births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.

*Prosecutor v. Jean-Paul Akayesu*¹⁴

¹² Cited in Ruth Ojiambo Ochieng, *The Consequence of Armed Conflicts to Women's Health; The Case of Africa*. Forum Barcelona 2004.

¹³ *Prosecutor v. Jean-Paul Akayesu*, Judgement, ICTR Trial Chamber (2 September 1998), Case No. ICTR-96-4-T at para. 732

¹⁴ *Ibid.* at paras. 507 and 508.

Although the militia had burnt my house and took away all the property, I did not become sad as I felt when I witnessed the militia when they were attacking and raping our people...we hid among the trees and watched what was going on with three women all pregnant...they were first badly beaten...then all of them raped...until one of them aborted...then they were left. We went to save them...then another aborted...by afternoon all of them passed away, so we buried them...it was a very hard experience ... I will never forget

A Denka woman survivor in Dar Al Salam IDP camp, Western Omdurman, Sudan. ¹⁵

Evidence in Sexual Assault Cases

As emphasized by the Appeals Chamber, the Trial Chamber must interpret the Rules of Procedure and Evidence in the light of the relevant international law...It is consistent with the jurisprudence considered above and with a common sense understanding of the meaning of genuine consent that where the victim is "subjected to or threatened with or has reason to fear violence, duress, detention or psychological oppression" or "reasonably believed that if [he or she] did not submit, another might be so subjected, threatened or put in fear", any apparent consent which might be expressed by the victim is not freely given...

*Prosecutor v Dragoljub Kunarac.*¹⁶

Because sexual violence including rape is a crime against women that is present before armed conflict, it is essential to analyze community views of these crimes before its impact, trauma and criminality, can be addressed in their proper context.

Rape is an effective weapon of war precisely because it relies on community held belief systems regarding the crime to create a breakdown of the community. It does this by fracturing individual and family networks and social and cultural connections.

Analyzing the impact of rape within the context of pre existing belief systems enables:

- An understanding of mythologies and community held belief systems (norms) regarding rape and sexuality;
- An assessment of the sanctioning (by state, family and other actors) of these myths and belief systems;
- An assessment of the impact and effect these myths, belief systems and norms have on the victims/survivors and on the construction of the criminality of rape.

¹⁵ Aalya Hassan Ali. *The Psycho Social Impact of Armed Conflict in Southern Sudanese Women; a case of Dar Al Salam Internally Displaced Persons Camp, Western Omdurman, Sudan. July 2002*, at 25. Cited in Ruth Ojiambo Ochieng, *supra* note 12.

¹⁶ *Prosecutor v Dragoljub Kunarac et al.*, Judgement ICTY Trial Chamber (22 February 2001), Case No. IT-96-23-T & IT-96-23/1-T at para. 464.

Points to remember

- a) All members of the community are educated into belief systems and norms regarding sexual violence. While some may not adhere to or believe them, all know the effect they will have on the individual who is a victim of sexual violence.
- b) The perpetrator of sexual violence understands and hides behind the impact these myths will have on the victim.
- c) The myths are so powerful that the victim often chooses to remain silent rather than report the crime, even when it is extremely violent in nature.
- d) The myths result in further trauma for the victim, thus adding to the impact of the crime.
- e) The myths are not true and are often related to traditional and outdated sex role stereotypes.
- f) While all societies are affected by rape, the understanding of what is considered to be rape and the sanctions against it can be different in each community. In one region there may be several views on the criminality of rape. Even in societies that state that rape is a serious crime and believe they have effective sanctions against rape, these sanctions may not be working.

Understanding Community Belief Systems

The primary silencing tool of rape is the set of community myths that surround the crime. These myths exist in all societies.

A common presumption about myths is that they will have an opposing fact attached to them that will counterbalance the statements of the myth. This is not true, as myths are often used to support and maintain social values and cultural belief systems. Myths surrounding gender and sexuality exist in all societies and are expressed in the performance of gender roles and expectations.

The only fact in rape is that human rights are violated.

The MIVSEP Framework¹⁷

Myth → Implications → Value Statements → Effect → Patterns - MIVSEP

This framework explores the way myths operate in relation to violence against women, the community values and attitudes towards victims of this violence, and the impact these have on victims and survivors of sexual violence.

Understanding the MIVSEP framework

Myth - Common worldwide myth- *“She should have known better”*

Implications

The primary myth of sexual violence tells us that the **event of sexual violence** is unusual and that it takes place in an out of the way and dangerous place (that it occurs in an unexpected setting).

It is an individual experience, and its impact is limited to one person.

The crime remains contained to the individual, and is isolated to those extraordinary circumstances.

The victim is an adult woman.

It is a crime between heterosexual adults.

You can tell that someone is a rapist or identify a situation where rape will occur.

Value statements attached to that myth

The victim is to blame.

Only fools or reckless people are attacked.

The control of the attack is in the hands of the person attacked.

It is only women who are raped.

¹⁷ MIVSEP Framework, Vivien Clear 2004

If women operate within set guidelines they remain safe.

No one would know a rapist.

Rape is caused by sexual promiscuity.

The rapist is not as accountable as the victim is.

Effect

The victim has to prove they did not instigate the attack. The victim becomes the accused.

The crime is perceived as isolated and the impact of trauma is invisible.

The attacked person is silenced.

Belief that it is a crime only affecting young adult women.

Minimization of seriousness and extent of the crime.

Development of stereotypes of who is attacked and who does the attacking.

Patterns that develop

Victims don't report the crime.

The seriousness of rape is measured by the accompanying physical violence, which leads to the minimization of less physically violent rape.

Societies start to normalise sexual violence by accepting that it is a part of life.

Legal actions become less effective.

Sex-role stereotypes are reinforced.

Sexual violence becomes sensationalized.

Societies become less safe and incidents of rape increase.

The myth extends to the belief that sexual violence is a crime that has no ripple effect into the community.

Rapists are not held to account for the crime.

Common responses from victims

"I never thought this would ever happen to me."

Implication: I am not the type

"If I tell my husband he will think I lead him on, no one will believe me."

Implication: He is not the type

Illogical messages of sexual violence

The word 'sexual' brings with it subjective relationships and understandings which have taboos and mythologies attached to them. When the term 'sexual' is utilized in the context of rape it cloaks the true nature of rape. It further enhances the difficulty individuals have in separating sex from sexual assault.

"Sexual assault is everywhere because sex is on everyone's mind."

In this statement the conflation of sex, a natural and healthy part of human experience, and sexual violence, is at its most obvious. The lack of understanding of sexual violence as a violent crime is clear. The assumption is that less sex would produce less sexual violence.

The conflation of a cruel and violent crime with sex is like saying:

"Because you were shopping you deserve to be robbed. What were you thinking?" or

"What did you expect when you drove the car, you should have known that you would lose your legs after an accident with a drunk driver?"

Emerging Myths

An example of the operation of mythology in crimes involving sexual violence is the myth that is emerging in some communities that you will not get, or will be cured from, HIV if you have sex with a virgin.

The myth;

"You won't get HIV if you have sex with a virgin."

This myth has led to extreme violence, including the gang rape of girl babies.

Applying the MIVSEP Framework

Myth You won't get HIV if you have sex with a virgin

Implication

There are magical properties attached to virginity.

Violation of babies and children (predominantly female) is understandable and excusable.

HIV is worse than rape.

Sexual mythology is stronger than logic or fact.

Value Statements

Virgins are different.

Babies and young people have less value than adults.

Children's integrity is disposable and has little value in itself.

Young people can be exploited by adults in certain circumstances.

Only girls are virgins.

Raping a baby or child is not rape and will not have the same impact as raping an adult.

Effect

Human rights of girls are increasingly ignored/violated.

Fear/anger.

Community safety decreases.

Education programs compete with community held belief systems and become less effective.

Sex-role stereotypes are reinforced.

Young people become dehumanised.

Rape is justified.

Patterns that develop

Breakdown of human rights.

Increased violence in communities.

Sexual violence increases.

Safe sex messages are ignored, resulting in increased transmission of HIV.

Fear and anger increase and communities become fractured.

Sexual violence becomes sensationalized, creating and reinforcing myths.

This myth builds on existing myths regarding sexuality. It is a clear example of the illogical and contradictory nature of myths surrounding sexual violence, and of their profoundly dehumanising results.

Applying MIVSEP in Armed Conflict¹⁸

Myth	“Soldiers have a right to rape women”.
Implication	Women’s bodies are legitimate battlegrounds in conflict.
Value Statement	Women are property and not viewed as equal and sentient. Women are considered extensions of a male power base
Effect	More women are raped. Women increasingly become a target for gender based crime. Pre-existing gender inequalities and violence against women are reinforced.
Patterns	As conflict increases in violence, brutality towards women increases. As communities fragment, protection of women and children decreases, resulting in more violence towards women. As social structures crumble violence against women becomes invisible and justice disappears for crimes of gender and sexual violence. Women and children are dehumanized.

Other myths:

Men can’t help it, it’s their natural sex drive

Men do not get raped or sexually assaulted

The problem with rape is it is non-marital sex, not an act of violence

¹⁸ Developed for the Women’s Initiatives for Gender Justice Gender Training for the Office of the Prosecutor, International Criminal Court, January 2005.

MIVSEP

Community

Myth

Date

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Implication/s

Evidence-

Points

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Value Statement/s

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Effect

Comments

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Patterns

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STIGMATISATION OF VICTIMS OF SEXUAL VIOLENCE

In 2002 Human Rights Watch published a report that detailed sexual violence against women and girls in Eastern Congo. The report detailed the stigma experienced by women and girls who had experienced rape during the conflict.

Effects of the stigma included:

- ostracism by the wider community
- negative judgments about loss of virginity
- rejection of wives by husbands, sometimes on the pretext that they must have consented to the rape
- expulsion from their homes by their husbands
- some husbands, while allowing their wives to stay, took other wives, relegating the rape victim to a subordinate position
- widows who had been raped were rejected by their husbands families and accused of being traitors or accomplices in their husband's deaths because they had survived
- in determining how to respond to victims of rape, husbands and families often considered:
 - whether the victim had become pregnant and if so what responsibilities would be involved in raising the child
 - whether the victim had been infected with HIV or other STIs, and the burden of care this would place on the family
 - how the community in which they lived would respond to the crime
- rejection by husbands and families often lead to impoverishment and homelessness. Women were often forced into hazardous and low paying jobs, often when they were pregnant
- unmarried women and girls who became pregnant as a result of rape were far less likely to find a husband in the future. (One doctor interviewed estimated a woman who gave birth to a child of rape had only a 20% chance of becoming married)
- despite the stigma attached to having a child while unmarried, young women usually gave birth, as abortion is illegal in the predominantly Catholic DRC and not condoned culturally, even in the case of rape. Those who did decide to end pregnancies often sought abortions from unqualified practitioners, rather than doctors.

When I got home, I went to the pastor to tell him what had happened. His wife heard our conversation, and she went around and told everyone about it. Now I am an outcast. No one will come to see me or share anything with me. My second husband said he was unlucky with wives because he had already lost two wives before me. We don't get along. Sometimes he says I should go back to [my first] husband...or I should go be with another man in the forest.

Human Rights Watch interview, Goma, October 25, 2001

The War Within the War: Sexual Violence Against Women and Girls in Eastern Congo, Human Rights Watch, New York, 2002.

Investigating Gender Based Crimes and Sexual Violence in Armed Conflict

Challenges to Consider¹⁹

Even investigators, support experts and protection officers with extensive experience in relation to crimes of sexual violence in conflict situations will encounter new challenges given the different environments, diverse cultural/religious/traditional practices and working in new conditions.

Challenges may include:

- Continuing war/conflict conditions, ongoing security concerns for victims, witnesses and investigators with limited available security measures;
- Requesting participation from people when they fear retaliation and have problems finding shelter and food;
- Trauma and distress of victims;
- Dispersal of victims and witnesses among refugees or internally displaced persons;
- Lack of or disrupted infrastructure;
- Humanitarian crisis;
- Limited transportation available;
- Refusal of authorities to allow access to territories under their control;
- The issue of 'mission fatigue' among interviewees due to repetitive and sometimes insensitive interviews by a multitude of persons;
- 'Mission fatigue' of the investigation and support teams.

The two golden rules:

1. The protection needs of victims and witnesses are of paramount concern. At no time should the safety or well being of a witness be compromised for the sake of the case.
2. Never make promises that you cannot keep or that may not be possible for others to keep.

¹⁹ This material is adapted from *Sexual Violence and Exploitation* Institute for International Criminal Investigations, 2004

General principles in investigating sexual violence²⁰

- If you don't ask about sexual violence, you aren't likely to find out about it.
- The investigation of sexual violence should be treated seriously in its own right, not simply as a mechanism to get intelligence on other 'more serious' crimes.
- Keep in mind that rape and other forms of sexual violence often occur in the context of arrest and detention, torture, expulsions, mass killings, attacks on villages, when fleeing attacks, in or near IDP camps, when held in captivity and during the commission of other crimes.
- Investigators should remember they are likely to arrive long after the sexual violence occurred.
- It is recommended that gender-integrated teams investigate sexual violence.
- Victims must also be informed of their rights to participate in the Court's proceedings, including their right to have legal representation, to be kept informed of the progress of cases and to apply for reparations.
- The victim/witness must also be told what is possible or not possible in terms of support and protection measures.
- Investigators should be trained and able to demonstrate particular competence in conducting interviews with victims of sexual violence, and should receive appropriate training in recognizing patterns of trafficking and other forms of sexual slavery.
- Sexual and gender based crimes may also constitute other crimes such as torture, mutilation and enslavement. Conversely, crimes such as torture, mutilation and enslavement may be committed because of the victim's gender. It is important to canvas all of these possibilities.
- It is often best to use an indirect approach when inviting people to speak with investigators. A broad range of contacts by an advance team may provide initial leads.
- Do not make presumptions about who is or isn't a victim of sexual violence nor presume people's willingness to talk about sexual violence based on their age. Sexual taboos and mores differ greatly between cultures.

²⁰ This material is drawn in part from *Sexual Violence and Exploitation*, Institute for International Criminal Investigations, 2004

- Older women may know a lot about what has occurred in the area and be a good source of informal intelligence including knowledge of the existence of informal support structures.
- It should not be assumed that older women are not rape victims. Sometimes, the perpetrators are very young men. Rape is an act of sexual violence.
- Examinations for evidence of rape should be included in autopsies of female bodies conducted by forensic teams.
- Stigma about sexual violence often results in the assumption that victims of sexual violence will not want to retell their story. This should not be assumed. Each person will feel differently about how she/he wants to proceed. Many victims of sexual violence want to talk about what happened and to play a part in bringing perpetrators to justice.
- Both male and female witnesses of mass violence should be asked about sexual violence and exploitation. This makes it possible to address sexual violence against both genders and to capture corroborating information or new leads that might otherwise be lost.
- Women victims of sexual violence are often stigmatised and discriminated against upon their return to their community, particularly if they have had children during their time in captivity. This may make it difficult for them to be willing to participate in interviews, reluctant to speak about what happened to them and are likely to have particular support and protection needs.
- Understand how your communication and style of interaction may be perceived in the culture in which you are interviewing. For example, in Rwanda Western investigators were sometimes very direct in their questioning, which frightened people off. Police officers/investigators were often sent to Rwanda without gender training, nor training in the cultural or historical knowledge of the conflict.
- Understand that things often have to be spelled out to witnesses.
Example:

In Rwanda, some women participated in sexual acts because they were told or believed they would be protected from being killed. Some women did not perceive that they had been raped because they thought the sexual activity was consensual and did not understand the concept of 'coercion'.

Don't assume that:

- Victims who appear calm and are able to relate traumatic events without emotion have not been traumatized. They have. All victims have experienced fear, most have experienced anger, guilt, humiliation and shame.
- Victims who appear calm and are able to relate traumatic events without emotion have not been victims of grave and horrific violations (don't misinterpret their demeanor to mean the violence was not that severe, or didn't really happen).
- Older people or those with disabilities have not experienced sexual violence.
- Men have not experienced sexual violence (predominantly by other men), especially those who have been abducted, held in detention and child soldiers.
- Women can't be sexual assailants or did not participate (either by force or voluntarily) in some way.

Working with interpreters with regards to rape and sexual violence

Key Points

Not all interpreters will be appropriate when interviewing victims/witnesses of sexual violence because:

- a) Like all people, interpreters hold their own values, judgments and cultural beliefs and gender stereotypes regarding sexuality and sexual violence.

- b) Some interpreters may not have received sex education so may give inaccurate information.

- c) Not all western sexuality concepts have equivalent meaning and/or language that translates into local languages. This means the interpreter has to feel comfortable in addressing cultural taboos in a frank manner.

- d) The physical aspects of rape can be confronting. If the interpreter is unskilled in the area of sexual violence they may '*interrupt*'²¹ or inadvertently interfere with the interviewing or assessment process without the investigator knowing.

- e) An interpreter may feel it is ok to give their opinions to victims and witnesses, making judgmental or negative statements that may result in re-traumatisation; loss of confidence in the Court's investigations, support or protection processes; and contradictory witness statements in the investigation procedure.

- g) 'Judgmental' attitudes to issues such as sexuality, abortion and rape may not be helpful nor acceptable in the interviewing context. This is the case with any traditional sex-role stereotyping.

- h) If the interpreter has strong personal feelings about violence (they or someone close to them may be a victim/survivor of sexual violence) they may transfer these on to the current situation and unwittingly interrupt the accurate collection of evidence.

- g) Consider the interpreters stability to cope with the interview process

²¹ 'Interrupt' in this context means to change, skew or alter the content or meaning of the interview.

Preparing interpreters for interviews regarding sexual violence

Section A

- y n Is the interpreter a family member or close associate of the witness?
- y n Does the interpreter understand your requirements regarding confidentiality and safety ?
- y n Does the interpreter understand their role in the interview process?
- y n Have you explained how the interview will be conducted?
- y n Does the interpreter understand that any information provided during the interview must remain confidential?

Section B

Can the interpreter name the formal and informal (common) names for:

- y n Rape
- y n Vagina
- y n Penis
- y n Anus
- y n Vaginal penetration
- y n Oral penetration (fellatio)
- y n Anal penetration
- y n Uterus
- y n Menstruation
- y n Abortion
- y n Pregnancy
- y n Contraception
- y n Masturbation
- y n Does the interpreter understand they will be discussing explicit and disturbing sexual material?

Section C²²

- y n** Does the interpreter understand HIV transmission?
- y n** Does the interpreter understand safe sex?
- y n** Does the interpreter understand how to use condoms?

Section D

- y n** Have you explained the symptoms of Post Traumatic Stress Disorder?
- y n** Have you discussed literacy issues that may impact on the witness?
- y n** Does the interpreter have views that are diminishing of women and children?
- y n** Is the interpreter non judgmental about abortion?
- y n** Is the interpreter accepting of sexual diversity?

What are the interpreter's attitudes regarding sexual violence, rape and domestic violence?

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What are the interpreter's views about women who have been raped and women who have been raped and had children as a result of this?

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- y n** Have you identified cues for taking a break from the interviewing process?

Comments.....
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²² This section provides information which will likely reveal the interpreters level of knowledge regarding sexual and reproductive health issues. A sound knowledge of these issues is relevant for interviewing victims of sexual violence.

Important Pre Interview Considerations²³

- Try to avoid being pressured by local authorities, parties to the conflict and others into interviewing certain people or relying on certain authorities for protection. Stay open to new information.
- Make contact with 'credible' NGOs, meaning NGOs that are reliable, have clear analysis, are accepted by the community, have good networks and contacts directly with the community, and are bearers of community knowledge. Strong contacts with credible NGOs on the ground are essential for witness leads and victims and witness support and protection measures²⁴.
- Find out what services, formal and informal, might be available for victims of sexual violence in the area where the victim lives. These may include women's CBOs and NGOs, victim support groups, medical centers or hospitals, human rights groups and rape crisis centers. If it is appropriate and safe for victims, you may want to work with these groups to make contact with potential witnesses and for support and protection plans.
- While it is essential to liaise with local law enforcement authorities on the ground, the possibility that they are influenced by parties to the conflict, or have their own allegiances and agendas, cannot be ruled out. This is especially important when investigating gender-based crimes that have deep rooted cultural and social implications. Therefore be wary of simply 'inheriting' investigations from local authorities. Retain critical analysis. Investigators must retain their independence, ensure that all sources of information have been independently verified and source their own witnesses²⁵.
- It is preferable to have female investigators interview female victims of sexual violence and exploitation but it should not be assumed that female victims will not speak to male investigators. The use of a female interpreter by male investigators is strongly suggested however. The preference of the victim/witness and the ability of the investigator to make the victim feel comfortable enough to talk about what happened is what matters most.
- Ensure that there is an appropriate place available to hold interviews and be mindful of creating an appropriate setting e.g. have water available, is there a bathroom available ? comfortable seat ?. Provide information to the victim/witness on how to best use the setting.
- Consider how to locate the witness weeks, months or a year from the time of the interview and how to maintain contact with the witness.
- Be aware that since criminal investigators may be the last to arrive at the scene, many victims and witnesses may have been interviewed already. This has a number of implications, including mission or interview fatigue (which may affect the quality of information provided), and may also mean that other authorities and organizations are in possession of evidence or important information. The investigator should try to determine what other interviews have taken place and whether it is appropriate to ask the victim to give another statement at that time.

²³ This material is drawn in part from *Sexual Violence and Exploitation*, Institute for International Criminal Investigations, 2004

²⁴ Informal communication between Patricia Sellers, Gender Legal Advisor, ICTY and the Women's Initiatives for Gender Justice, 2004

²⁵ *Ibid*

Pre-Interview Assessment

A pre interview assessment should be conducted to assess:

- the witness' psychological and mental stability and well being,
- their physical well being,
- their capacity to endure an interview at this time,
- their immediate safety and protection issues,
- victims and witnesses concerns, fears and questions about the IC investigation and prosecution processes,
- the witness' expectations of the ICC, the interview and the process.

How will the witness get to the interview?

What are the expectations of the witness – what do they expect will happen with the information they provide, how do they understand the role of the Court and the investigation and prosecution processes?

Does the witness want to bring someone to the interview? If so, who, and what is their relationship to the witness? What is the Court's policy in this area ?

Does the witness expect any form of remuneration? (e.g. money, housing, medicine.)

Assess the witness' literacy level – do they have any literacy needs? This is important if they will be required to witness or verify written statements and other documentation, if the Court intends to provide any written information or further requests or where written referrals are made.

Does the witness have access to a home/shelter?

Does the witness have access to regular food?

Has the witness told people they are seeing the interviewer? Who? How many?

How do they appear physically? (e.g. malnourish, fatigued, traumatized, some well-being.)

Do they have trusted friends?

Do they have a family support network?

Does their ethnicity place them in danger of any kind?

Are they isolated?

Is the witness currently at risk of violence?

Interviewing Victims and Witnesses of Sexual Violence

Procedure

Ensure the witness understands your role.

The witness should be provided with any information about the Court, the investigation and any possible prosecution to enable them to make fully informed choices about whether they wish to proceed with an interview. This should include advice that:

- The interview and the information they provide might not result in investigation or prosecution by the Court of the specific crimes/violations committed against them (given that the Court will only prosecute those most responsible).
- Information they provide may be made public for purposes of Court proceedings – be frank and specific about who will receive this information and at what stage of the investigation and/or prosecution this will occur and be clear about the extent to which information will remain confidential.
- Explain how long an investigation and prosecution could take, and what might be required of them during the process.
- They should be advised about special measures that could be put into place to protect them during both investigation and prosecution.²⁶

If the witness is a child/minor you must ensure you have the relevant permission from, and accompaniment of, a parent or guardian.

Rule 75 of the Rome Statute provides against family incrimination. It is particularly important that this be explained clearly to children in order that they can make informed choices about their participation in the interview.

The witness may have participated in crime/s as part of the conflict. At the time this becomes apparent you should assess the relevant self-incrimination issues

²⁶ Article 68(1) The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial; (2) As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings *in camera* or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

Rule 88 provides that a Chamber may, taking into account the views of the victim or witness, order special measures such as, but not limited to, measures to facilitate the testimony of a traumatised victim or witness, a child, an elderly person or a victim of sexual violence, pursuant to article 68, paragraphs 1 and 2.

and requirements under Article 55 (1)(a) and (2), and Rules 74 and 112.

Ensure that the witness understands the interpreter's role and explain that there is an obligation that the interpreter will maintain confidentiality.

Explain that medical examinations may need to be carried out, sometimes more than once.

Ensure referral points are appropriate to the witness' culture and age, location, physical and psychosocial support needs, and that any risks or safety issues are adequately identified and addressed.

How does the witness make contact with you? How do you contact the witness? Do you need to make arrangements for ongoing contact that involve other people or organizations?

Discuss any safety concerns the witness has.

After the witness has told their story they may decide that they do not wish to be involved in an investigation or prosecution. Do not push them to do so.

Guide for interviewing victims and witnesses of sexual violence

This may be the first time the witness has told the full story of what happened to them. They may become distressed, have difficulty expressing themselves, they may be flooded with memories and the words may rush out, or display symptoms of PTSD during the interview.

Determine what safety cues the witness will use (for example, if the witness experiences flash backs or panic they may wish to have a drink, stand up and walk around, stop the interview).

Remain flexible with time, some people will take longer in the interview than others.

When asking questions regarding rape and sexual violence it is important to phrase the questions in a manner that allows the full experience of the victim to be stated. For example:

Could you tell me the sort of sexual violence you experienced?
What would you consider the least violent?
What were the most common experiences?
What would you consider the worst experience?

(For some victims knowing that at a certain time of the day meant they would be assaulted is the worst experience, others may find a certain look or comment the worst experience – do not assume that the brutality of the violence will be the worst part of the experience for the victim).

It is likely that the victim/witness will feel both shame and guilt. Reinforce that a crime has taken place and they are not to blame. This is important to establish rapport.

Never refer to or ask the victim about having 'had sex' with a perpetrator (the language contradicts the crime). Better and more accurate language is 'when sex occurred', 'when you were forced to have sex', or 'when sex was expected'.

Remember to use language that is easily understood by the victim.

Not all victims will have had sex education and may use 'slang' to describe sexual assault.

Ensure there is an agreement between witnesses and interviewer as to what words will be used. It may be helpful to use a body chart to establish this information.

Ensure the meanings of sexual assault, sex, rape and sexual violence are understood by the victim.

The concept of 'consensual sex' is totally unknown to many women. In a situation where a 'relationship' has been constructed (situations of slavery) and a woman has been forced to have sex (raped) repeatedly over a period of time by the same perpetrator, she may not consider this forced sex, or rape, but rather as part of the 'relational duty' (conditions of slavery). She may also 'consent' to sex to protect her child, have access to water, food, shelter etc.

Use simple language, such as 'did you want', 'were you afraid' – avoid using jargon.

Using formal terms such as 'vaginal penetration' may not be useful – use accessible language.

Tell the victim you will be using terms like sexual violence because a crime has occurred and that is how it is referred to legally.

Explain that acts of sexual violence can include:

- Being touched on the genitals, breast or buttock
- Being forced to watch someone masturbate, or forced to masturbate someone
- Being masturbated by someone else
- Being forced to watch others being raped
- Being penetrated (in the mouth, vagina or anus) by an object, finger or penis
- Being forced to conduct fellatio (on anus, penis, vagina) on someone,
- Being forced to have fellatio against the person's will, or forced to watch someone conduct fellatio on others
- Being forced to have sex against the person's will
- Being called names, being exposed to pictures or other material of a sexual nature
- Other forms of violence including physical or emotional

Sexual violence can be perpetrated on anyone of any age.

Although females are most often the victims of sexual violence boys and men can be sexually assaulted.

Remember, some people may have never talked about sex before, nor possibly rape and sexual violence. This may cause them some embarrassment and discomfort.

Summary - Stages of interviewing victims/witnesses of sexual violence

Stage one - building rapport

Discuss:

- Confidentiality – what it means
- Environment – private and uninterrupted
- How long this will take
- What is going to happen with the information
- Who the information will go to
- What the interviewers your role is
- Concerns of the witness

Stage two – the interview

Involves:

- Information gathering
- Maintaining roles
- Taking statement

Stage three - closing

Involves:

- Summarizing what the witness has said
- Reflecting back the concerns of the witness
- Acknowledging the witness participation

Address:

- Safety issues
- Contact details and arrangements
- Medical referrals

Remember:

Privacy is essential (no interruptions, no phones)

Stay with the witness (abilities and emotional state)

For best result, interview sessions should not exceed two hour sessions – be prepared for two or three sessions

Communication pointers

Never make promises you can't keep

Be reflective when listening

Quote witness statements, don't summarize

Don't interrupt unnecessarily

Don't press the witness for information they're not ready to give

Be respectful at all times

Be culturally appropriate.

Checklist and Questions²⁷

1. Details

Name.....

Female Male

Date and place of birth

.....

Language(s) spoken

.....

.....

Current residence/address

.....

Occupation/work – current or former

.....

Family status (record names, age and location, if known, of any stated family members)

Children	<input type="checkbox"/>	Brothers	<input type="checkbox"/>
Married	<input type="checkbox"/>	Grandmother	<input type="checkbox"/>
Widow	<input type="checkbox"/>	Grandfather	<input type="checkbox"/>
Mother	<input type="checkbox"/>	Aunts	<input type="checkbox"/>
Father	<input type="checkbox"/>	Uncles	<input type="checkbox"/>
Sisters	<input type="checkbox"/>	No family	<input type="checkbox"/>

Nationality

.....

Religion

.....

Ethnicity/tribal origins

.....

Physical description or photograph

Photograph Yes No

Date photograph taken

.....

Physical description

Hair

²⁷ Some material in this section is drawn generally from: Adapted from Callamard, A., *Sexual Violence Documenting Human Rights Violations by State Agents*, Amnesty International Publications and the International Centre for Human Rights and Democratic Development, 1999; *Sexual Violence and Exploitation*, Institute of International Criminal Investigations, 2004.

Eyes
Height
Features
Injuries (Drawing of body to document injuries)

- Take your time with the interview. Allow the story to unfold and have the witness tell in her/his own words what happened first, before going back and having them put events in chronological order. Come back to those points that need clarification. Avoid asking questions immediately about sexual violence unless the witness opens the topic first.
- Be aware of how the implications of sexual violence and gender-based crime in the particular culture in which the victim/witness lives might be affecting the interview process.
- Begin with less stressful questions or topics and move gradually toward the more difficult issues. Take cues from the witness about the appropriate pace of the interview.
- Always be sensitive to the difficulty witnesses have recounting violations, and try not to interrupt or suggest words, but get as many specific details as possible
- Use open-ended questions that do not suggest a particular answer

2. Location of the attack/incident/abduction

(IDP camp – which one; at home; on the way to night shelter; in the field; identify nearest village, camp; which district, province, or parish)

Date
.....

Time of day, exact time if possible
.....

3. Description of attack/incident/abduction

Can you tell me what happened?

Circumstances

- Briefly describe the events immediately preceding the incident. Where were you and what were you doing? (Collecting wood, food, water; cooking; talking with neighbors; running away)
- How were you selected or found?
- How many perpetrators were there? How did the soldiers (rebels, militia men) behave toward women? What did they do? What did they say? What happened to you?
- If a witness says, "it was a government soldier or Janjaweed that attacked us, ask, "How do you know it was a government soldier or Janjaweed ?"
- Was violence or force used? What type of force?
- Did the assailants or others with them have weapons? Did they use them, in what ways and on whom?
- Did anyone give any orders? Who were they and can you give a description? What did they say?
- During the attack/abduction did anyone report by radio or phone to a commander? If so, do you know to which commander? How do you know it was that commander?
- Did they have any vehicles, if so, did the vehicles have markings?
- What did the perpetrators say at the time of the attack/abduction? (Go over one by one.) Did anyone say why they were doing this? Did anyone say anything to you directly? What was said? What tone of voice was used?
- Did the assailant(s) demand that you answer questions, say or repeat certain things?
- Were you or others made to do anything during the attack/abduction?
- If abducted/taken away, were any others taken with you? How many? Can you identify and describe them, who were they, what they were wearing, what they said, what happened to them during the attack/abduction.
- If abducted, what happened after you were taken away?

- If anyone was taken away were they returned, and in what condition did they return?
- How did the assailant(s) control you? (What types of physical and verbal threats were used - threats to self or family members, intimidation, physical control, confinement, denial or withdrawal of food, water, shelter, menstrual aids, toilet facilities)
- Were you able to resist at any point? How? What was the response of the attacker(s)? (It is important not to imply that the victim should have resisted).²⁸
- Be aware that there may have been more than one assailant. Assist the victim to clarify who assaulted her and in what order. It is important to determine if there was penetration, however slight, of any body part of the victim (&/or the perpetrator) and what objects of penetration were used.
- Were you stripped naked at any point during the attack/abduction?
- Realize that there may be expressions of speech witnesses use to indicate rape has occurred or particular topics that hint at rape. For example, a witness may say “He disrespected me”, “He used me”, “He humiliated me”. In Bosnia, women would sometimes talk about being forced to serve food and coffee to soldiers – and this often indicated that they had been raped or forced to commit sexual acts. Women may refer to being taken away, or taken out of sight of their children. While assumptions should not be made, the investigator should be aware of indicators, especially cultural ones.
- If the victim recounts the story by saying things like “Then he dishonored me” or “He hurt me” ask, “Can you tell me how he dishonored/hurt you?”
- If the victim cannot seem to say what happened in words, she may be able to point out areas on an anatomical sketch, this may open the door to talking about the details.

²⁸ Rule 70(c) of the of the Rome Statute Rules of Procedure and Evidence provides that in cases of sexual violence the Court shall be guided by and, where appropriate, apply the following principles: (a) consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim’s ability to give voluntary and genuine consent; (b) consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent; (c) consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence; (d) credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.

- The attack/abduction may have been perpetrated in front of family members or others to further terrorize or humiliate the victim or others. Ask if anyone else was present before, during, or after the sexual violence

4. Perpetrators

- Who carried out the attack? (Description of the individuals involved , number, uniforms, armed)
- Approximate age
- Names or nicknames if known
- Description (height etc)
- Uniforms ? - describe
- Rank
- Civilian clothes ? - describe
- Language spoken
- Who seemed to take charge during the attack? Were any instructions given? By whom?
- Remember that the victim/witness of sexual violence may have detailed information about other crimes.

5. Evidence

- What happened after the rape or sexual assault? Did the woman have any type of injuries? Did she see a doctor, and if so, when and how many times? What types of examinations were performed? Was a report written? Get a doctor's name and contact information. Has the woman experienced any physical or emotional difficulties since the assault? If yes, describe in detail.
- Did the woman or anyone else keep any physical evidence of the assault? This may include clothing, and in some countries swabs and other evidence.
- Demonstrate empathy for the witness, acknowledge their participation in the interview, do not display discomfort at any emotion, don't be uncomfortable in the silences, give reassurance and prompts. Demonstrate respect.

Consider what evidence already exists:

Forensic evidence/photo's Available Y N

Did the victim report the matter to police or another government authority?
When? Where? Is there any documentation relating to this?

NGO reports or dossiers on incident or massacre?

Medical

Physical pains experienced immediately following the rape

.....
.....
.....
.....
.....

Has the victim had a medical examination post rape?

Yes

No

Does the victim have access to any medical notes stating past or past health status?

Yes

No

Has the victim had access to STI and HIV screening?

Yes

No

Did pregnancy occur?

Yes

No

Psychological Health

Mental reactions immediately following the rape

.....
.....
.....
.....
.....
.....

Has the victim had access to trauma counseling?

Yes

No

If yes

Who.....

When.....

Where.....

Are there any records/reports available Yes No

How has the trauma affected the victim's ability to function?

Home

Work.....

Relationships.....

Children.....

Personal care.....

Other

Comments

.....
.....
.....
.....
.....
.....
.....
.....
.....
.....

Observation:

Physical Injuries (body chart to mark injuries front and back)

Marks/scars/bruises

Missing hair

Disfigurement

If rape was accompanied by other forms of torture

Fracture

Deformities

Burns

Amputations

Other distinguishing marks
Medical certificates

Comments.....
.....
.....

Emotional

Tone of voice (soft, loud, emotionless, angry)
Gaze (little eye contact)
Tears (At which point during the interview)
Silence or non –stop talking
Body language (nervous movements, no movements)
Responses (hesitations after questions, asking for the questions to be repeated)
Other

Comments.....
.....
.....
.....

Signed:

Dated:

Post Interview Support

- How does the witness make contact with you?
- How do you contact the witness?
- Who will the witness contact for post interview trauma?
- What agencies or individual will support witness through the legal process?
- Is there a medical plan?
- Does the witness need physical protection?
- How often will the witness be contacted?
- Is the witness in immediate threat of violence?
- Who is the support worker and support agency?

Safety Plan (local response)

Date	Support workers	Referral
	Name Contact details 1. 2. 3.	Organizations 1. 2. 3.
	Emergency Contacts	Issues
		1. 2. 3. 4.

Next appointment

Place

Signed

Date

Report on Witness Safety (ICC use)

Issues

1

2

3

4

Health

Support

Housing

Contact

Safety Risk

High

Medium

Low

Comments.....
.....
.....
.....
.....
.....
.....
.....

Signed..... **Date**.....

Medical Referral (ICC use)

Referred by Date.....

Name

Age

Contact details

.....

Emergency Contact

.....

Referral Agency/ Professional

Support Worker if applicable

Date of Appointment

Date of return report

Resources required

Costs Approved by

Payment Plan

Signed.....Date.....

Identifying Patterns of Sexual Violence²⁹

1. Patterns with respect to the identity of the victims

Who are the most likely victims of sexual violence?

The victims of sexual violence may have a number of common characteristics, such as gender, type of political activities, profession, occupation, age, ethnicity and religious beliefs or residency in clearly defined areas. Are these or other characteristics present.

Comments

2. Patterns with respect to the circumstances surrounding the incidents or allegations

Are incidents of sexual violence usually preceded by a specific set of events, or do reports of sexual violence increase or decrease following specific events.

Comments

3. Patterns with respect to the nature of the harm

Patterns may emerge in terms of the nature of the acts of sexual violence, for instance sexual violence may consist of rape, gang rape, rape of girls or women of certain ages or all ages, sexual slavery.

Comments

²⁹ Adapted from Callamard, *Investigating Women's Rights Violations in Armed Conflicts* Amnesty International Publications and the International Centre for Human Rights and Democratic Development, 2001.

4. Patterns with respect to the locations of the incidents of sexual violence

Where are incidents most prevalent? Locations may include specific regions or cities, specific police stations, prisons, civilian homes or in secret detention.

Comments _____

5. Patterns with respect to the identity of the alleged perpetrators

Does a pattern emerge with regard to the identity of the perpetrators? The perpetrators may have a number of common points, e.g. rank, members of particular arms/branches of militia/rebel forces etc.

Comments _____

6. Patterns with respect to the methods used by perpetrators

Are similar methods used? For example, incidents may be preceded by abduction. How many perpetrators are usually involved.

Comments _____

7. Patterns with respect to the causes behind incidents of sexual violence

Is there a link between incidents and similar direct or indirect causes, i.e. the political activities of the victims, relatives of political activists, military presence, uprisings.

Comments _____

8. Patterns with respect to governmental responses to alleged cases

A pattern may emerge over time with respect to government responses to the accusations. Such a pattern may characterize official investigations or lack thereof, the absence or nature of investigations or the nature of the procedures.

Are complaints and reports of sexual violence systematically investigated, or are victims often unable to file a complaint?

Are all those alleged to have committed sexual violence charged and prosecuted?

Comments

Note circumstances of trials if conducted.

9. Patterns with respect to the gendered nature of violence

Victims may be attacked *because* they are women or because they are women of a particular ethnicity or religion etc.

Are attacks aimed at impairing reproductive capacity, at impairing features or attributes specific to the victim's gender, or are they of a type that are stigmatized along gendered lines in the culture in question.

Comments

Physical consequences of rape in war³⁰

The physical and psychological consequences of sexualised violence are closely related. However, the two aspects will be dealt with separately here, as classical distinctions drawn between the institutions providing help (medical, psychosocial/ psychotherapy) mean that they deal with these aspects separately.

Multiple forms of health impairment are seen in survivors of sexualised violence in war. The acts of violence are per se often particularly atrocious: “The most brutal use of violence in the form of blows, ill-treatment and humiliating behaviour, which in almost all cases goes far beyond the degree of violence that would have been needed to carry out the rape” (Bittenbinder 1999, p. 46). Pregnant women (and their unborn children) seem – as in the case of torture – to be the focus of particular aggression³¹. Often they do not survive rapes. Many women suffer severe physical injuries with irreversible secondary injuries and functional losses. Furthermore numerous functional disturbances occur in the hormonal and vegetative systems. The women’s physical and psychological exhaustion makes them more vulnerable to infectious diseases³². In addition during rape women may be infected with venereal diseases or HIV/AIDS. Injuries and functional impairment of the genital organs may also lead to complications later during pregnancy³³ and childbirth, and may also cause infertility³⁴.

Medical findings after rape and torture

The descriptions below stem from practical experience of medical examinations of patients who definitely experienced rape or torture involving sexualised violence. The list of findings was drawn up on the basis of documentation of case studies from the Gynaecological Unit of medica mondiale’s projects in Albania, Bosnia and Kosova.³⁵ The findings encompass the whole spectrum of injuries, functional disturbances and losses caused by injuries, symptoms that have become chronic, malign developments, as well as the broad range of psychosomatic phenomena.

³⁰ Ingeborg Joachim, *Stress and risk factors resulting from confrontation with the trauma of war-related sexualized violence in a professional context*. In medica mondiale e.V (ed.) *Violence against Women Handbook for Professionals working with Traumatized Women*. Köln 2005. Pg 72-78

³¹ An example of this can be found in Bittenbinder 1995, pp. 170ff.

³² See on this point Gannon & Pardie 1989 and Gottlieb 1997.

³³ Wibbe 1999 refers to Erfmann’s evaluation of studies on complications during pregnancy. This occurs almost twice as frequently in women who have survived sexual violence (c. 15 % compared with the usual 8 %).

³⁴ See also on this point Hauser and Griese, Chapter VI on gynaecology.

³⁵ The multi-disciplinary and multi-project gynaecological conferences organised by medica mondiale in 2002 and 2003 made a significant contribution to evaluation of work with survivors of sexualised violence in war.

This presentation does not aim to function as a set of diagnostic instruments, as the physical consequences of sexualised violence cannot be understood as a clearly defined syndrome. Instead this depiction draws attention to the diversity of possible physical consequences, which can serve as a backdrop in assessing and observing patients. Furthermore, this may provide food for thought as to how a more solid basis for the link between sexualised violence and certain functional disorders (such as e.g. chronic abdominal pain) through one's own observation and evaluation

General medical findings after rape

Injuries

Among the wide range of general injuries, particular mention should be made of:

- hearing impairment, damage to the middle ear (acute)
- self-inflicted injuries (as a consequence of post-traumatic stress disorder)

Psychosomatic disorders

- Gastrointestinal symptoms such as stomach ulcers, gastritis, diarrhoea, chronic obstipation), digestive complaints, bilious complaints
- High blood pressure, pressure in the chest, Globus hystericus
- Cardiodynia, tachycardia (increased frequency of heartbeat)
- Asthma bronchiale
- Sleep disturbances
- Dizziness
- Tinnitus (noises in the ear)
- Trembling
- Dermatological complaints such as psoriasis, neurodermatitis, eczemas of unclear origin
- Vegetative general exhaustion with susceptibility to illness and infections
- Sensory disturbances: sensory losses (pain / cold / heat)
- Reduced pain threshold: head aches, back pain, psychogenic pains, persistent muscle tension, joint pain

Gynaecological-obstetrician findings after rape

- Acute rectal and genital injuries
- Functional disturbances in the sphincter muscle (bladder and intestine)
- Haemorrhoids (after untreated genital injuries)
- Fistulisation after untreated injuries or after primary or secondary infections
- Bladder disorders, urinary incontinence
- Genital injuries with long-term consequences such as bladder and rectum insufficiency
- Venereal diseases with both acute and long-term and/or chronic consequences: infectious processes such as adnexitis (inflammation of the fallopian tubes), colpitis (inflammation of the vagina), cervicitis (inflammation of the cervix), vulvovaginitis (inflammation of the vagina)

and the external genital area), urinary tract infections, STD (sexual transmitted diseases)

- Hormonal dysfunctions: meno-metrorrhagia (increased and / or extremely lengthy menstruation and bleeding not during menstruation), hypermenorrhoea (excessive menstruation)
- Ovarian cysts
- Primary and secondary amenorrhoea (menstruation stops), dysmenorrhoea (painful menstruation)
- Dyspareunie (pains during sexual intercourse, chronic pelvic pains)
- High-risk and conflictual pregnancies, teenager pregnancies
- Disturbances of reproduction: infertility, habitual (frequent) miscarriages, cervical weaknesses, increased gestational pathology such as cervical insufficiency (weakness of uterine orifice), premature labour and premature rupture of the amnion, placenta praevia (atypical position of the placenta in the womb with the risk of mother and child bleeding to death), bleeding, pathology in delivery, difficult labour etc.
- Alterations in the cervix: leucoplakia (benign cytomorphosis)
- Pre-cancerous and/or cervical carcinoma

Carcinoma of the inner genitals, breast cancer

The time at which the above findings are ascertained is relevant. Diagnosis of injuries directly after a rape can serve as evidence before a court. In contrast, a comprehensive diagnosis, which must also encompass the run-up to the traumatising and psychosomatic aspects, is required to categorise persistent functional disturbances. This calls for both long-term observation by the doctor and a sensitive approach to the patient to motivate her to cooperate. If women and girls do not (or cannot) visit a doctor until long after the rape, it is often only possible to guess that their symptoms are linked to sexualised violence, particularly if the patients themselves do not want to talk about this or indeed are not aware of the connection. For doctors it may be helpful to record the range and frequency of findings in those patients for whom it is certain that rape has occurred. Once doctors can prove that certain symptoms occur significantly more often in this group of patients than for the average of all patients, this will provide a much sounder indicator of possible rape.

Doctors are often the first or only people to whom survivors turn for help. However, as the medical infrastructure in crisis and war zones has generally collapsed or labours under severe constraints, one must assume that in most cases raped women and girls do not receive appropriate care. This makes it

more likely that their symptoms will worsen and/or become chronic. A further aspect of the insufficient supply of acute care is that forensic aspects are overlooked in diagnosis by outpatient departments and doctors. Even where highly developed health care infrastructure exists, the forensic aspect is often still underdeveloped in the context of violence against women. In Germany for example it is only during the last few years that initiatives have been launched to raise doctors' awareness of issues relating to violence and tools introduced to assist with diagnoses relevant to forensic work in cases of rape and domestic violence.³⁶

Forensic findings are not just important in providing evidence that can be used to sentence offenders. They also provide official confirmation that the findings can be traced back to acts of violence. The disruptions to memory caused by trauma mean that victims can often no longer establish a connection between their symptoms and the traumatising situation. This type of evidence may however be required for claims for compensation, care and pensions. However, in any event this would establish that the injuries are the consequence of crimes, an assessment that counteracts the tendency for women and girls to blame themselves.

Psychological problems in connection with physical consequences

“During the first few weeks I was convinced that I should hate this child just as I hated the rest of my body. However, when I felt its movements in my stomach for the first time it was as if these fears had been wiped away. I reached out to feel this creature, enchanted. At last there was something that belonged to me alone. But it shouldn't be a girl for anything in the world! Only a woman could experience such suffering.

I vehemently refused to go and see a gynaecologist. There was no question of having a gynaecological examination. The mere thought of it made me panic. I couldn't have stood a man's hands in my abdomen. I was afraid too that the doctor might discover something unpleasant. Perhaps the child was handicapped because of my past. Perhaps it had Aids too. Because of the constant pains in my abdomen I was convinced that I had some horrible venereal disease.” (Cavelius 2001, pp. 67, 79).

³⁶ See e.g. the set for securing of evidence produced by the Institute for Forensic Medicine, Vienna. This set contains material for carrying out examinations and packing material with guidelines for examination. Instructions are given on a videocassette. Videocassette on the Viennese examination set: e-mail: richard.brenner@univie.ac.at.

Indicate your institution and a contact person to receive the material free of charge. On gynaecological examination and writing expert reports on raped women see also Beckermann et. al. 2004.

Other diagnostic guidelines refer primarily to domestic violence e.g. guidelines from the DGPF (Deutsche Gesellschaft für Psychosomatische Frauenheilkunde und Geburtshilfe/ German Society for Psychosomatic Gynaecology and Obstetrics), which also refers to principles for dealing with the patient and the problematic issues.

Doctors are also confronted in their practices with the psychological problems that can result from physical injuries:

- psychological conflicts related to deciding whether or not to have an abortion if a woman or girl has become pregnant due to rape
- fear of the social consequences of damage to the hymen
- fear of a serious or life-threatening disease as an (unidentified) result of physical symptoms
- feeling dirty inside and connected to this being afraid of being riddled with cancer³⁷
- fear and repulsion towards intercourse with one's partner
- fear of no longer being able to bear children
- fear of being pregnant, without any evidence of this
- fear of having a venereal disease or having become infected with HIV
- fear of not being able to protect oneself from further violence (domestic violence in particular)
- fear of operations

The topics cited are very often felt to be shameful, so that it is difficult for the women affected to talk about them, even if they dare to visit a doctor or gynaecologist (Hinslewood 1999). However, they risk serious consequences for their health if they do not receive medical care. Women and girls experience enormous psychological stress if they are left alone with their fears, which may also affect family relationships.

Doctors encounter both problems related to the survivors' bodies and the psychological symptoms of traumatised women. These may become apparent in the everyday behaviour of the women affected as well as in their particular reactions to medical examinations.³⁸

³⁷ medica mondiale knows of several women who experienced sexualised violence by Serbian or Croatian paramilitaries in 1993/94 and developed carcinomas 5-8 years later. Revealingly, they stated over and over again that the men were still "inside them", and that as a result they felt "dirty inside". They actually developed carcinomas of the inner genitals (uterus and/or appendages / fallopian tubes).

³⁸ See on this point Hauser and Griese, In medica mondiale e.V (ed.) Violence against Women Handbook for Professionals working with Traumatised Women. Köln 2005. Chapter VI.

Psychological Impact of Sexual Violence - Post Traumatic Stress Disorder – PTSD and Co-morbidity

Everyone you interview is likely to be traumatized, and many will have symptoms of post-traumatic stress disorder and other symptoms due to the impact of the violence they experienced. These symptoms are not only related to the stress of previous traumatic events, but also relate to the current stress caused by the witnesses' difficult life situation following the conflict.

Given this, it is essential for investigators to be aware of PTSD and co-morbidities, in order to prevent harm as much as possible to the physical and psychological health of witnesses through the investigation procedure. It is also essential that you become skilled at identifying relevant symptoms if they are present during an interview, and to have the confidence to know how to respond to and address them effectively in the interview situation.

It is important to understand that having PTSD and other symptoms or the function of traumatic memory, do not mean that a witness will be unreliable. Rather, interviewers must have skills necessary to elicit a reliable statement.³⁹

The purpose of this section is to:

- Enable investigators to create a 'safe' environment for the witness, thereby ensuring her/his confidence in both the interviewer and the interview process.
- Assist investigators to develop the knowledge and skills needed to effectively identify and respond to symptoms of PTSD and other relevant symptoms in an interview in a manner which:
 - avoids re-traumatizing the witness and endangering their physical health;
 - elicits a reliable statement.
- Assist the ICC in providing adequate and effective victim and witness support and protection in relation to PTSD considerations.
- Assist investigators to make effective referrals to local support systems and services in relation to the witnesses health needs.
- Prevents vicarious trauma on the part of the investigation team (investigator, victims support staff, and interpreter);

³⁹ The issue of PTSD and witness competence was considered in the *Furundzija* decision where it was held "when a person is suffering from PTSD, this does not mean that he or she is necessarily inaccurate in the evidence given. There is no reason why a person with PTSD cannot be a perfectly reliable witness." *Prosecutor v Anto Furundzija*, Judgement, ICTY Trial Chamber II (10 December 1998), Case. No. IT-95-17/1 at para. 109.

PTSD

PTSD is currently the most important diagnostic concept describing psychological symptoms following the exposure of a person to traumatic events.

Acute - if duration of Symptoms is 3 months or less

Chronic - if duration of symptoms is 3 months or more

Delayed onset - if onset of symptoms is at least 6 months after the event

The impact of trauma can be at all levels of the personality:

- i) Sexual
- ii) Physical
- iii) Emotional
- iv) Social (e.g. resulting in poverty, repression, isolation)
- v) Spiritual (e.g. loss of belief in god)

Criteria for the diagnosis of PTSD

(A) – relates to the traumatic events

The person has been exposed to a traumatic event in which both of the following were present:

- i) the person experienced, witnessed, or was confronted with an event or events that involved actual or threat of death or serious injury, or to the physical integrity of self or others, and
- ii) the person's response involved intense fear, helplessness or horror

(B) – relates to the symptoms

The traumatic event is persistently re-experienced in one or more of the following ways:

- i) Recurrent, intrusive and distressing recollections of the event, including images, thoughts or perceptions
- ii) Recurrent distressing dreams
- iii) A sense of reliving the experience
- iv) Intense psychological distress at exposure to an external or internal cue that symbolizes or resembles an aspect of the traumatic event
- v) Physiological reactivity on exposure to an internal or external cue that symbolizes or resembles an aspect of the traumatic event.

This group of symptoms is called **Intrusive symptoms** because they appear suddenly and are difficult to control.

Intrusive symptoms per se mean retraumatisation because the traumatic event or the panic is re-experienced like it was happening here and now, and often goes along with extreme panic and fear. These symptoms might show up during the investigation interview whenever the witnesses psychological defense system is overstrained or is triggered by memories, pictures, smells, body sensations etc.

Aversive Symptoms

These include

- avoiding thoughts, feelings or conversations related to the trauma
- being unable to remember an important aspect of the trauma
- a distinctly reduced interest in or reduced participation in important activities
- a feeling of being alienated from other people
- restricted emotions: they are less differentiated or certain emotions are entirely missing
- appraisals of one's prospects in life becomes negative, there is no longer any expectation of being able to live a normal life in future

Aversive symptoms are due to the person's tendency to avoid all stimuli that are connected with the traumatic event. They influence the witnesses memory and because of the avoiding of feelings they might lead investigators to wrongly conclude that the witness is less reliable.

Hyperarousal symptoms

- difficulty falling asleep and sleeping through the night
- increased irritability, angry outbursts
- difficulty in concentrating
- inappropriate extreme vigilance
- inappropriate extreme jumpiness

Among the **hyperarousal symptoms** increased irritability, difficulty in concentrating and inappropriate extreme vigilance are the most relevant symptoms to be aware of in the investigation procedure.

Understanding PTSD Symptoms

Research done on the functioning of the brain in situations of extreme danger has contributed to the understanding of the development of PTSD symptoms.

“In a normal process of experience an external constellation of stimuli is perceived and evaluated by the person in question with the help of the associated emotions and by drawing on earlier experiences (e.g. someone goes out walking in the forest, hears the birds twittering, perceives smells, feels the soft ground beneath their feet, enjoys it and feels safe because they know the area and know the way). Various different parts of the brain are involved in this process, each controlled by specific messenger substances. Whether and how stimuli trigger appropriate behaviour depends on how perception is evaluated (e.g. if twigs suddenly snap, it is important to be able to work out what this sound is in order to assess a potential danger). The overall context – including whether the action is successful or unsuccessful - is stored in various regions of the brain and is available for future appraisals of comparable situations and decisions to act.

If an external constellation of stimuli poses a threat (e.g. if a frightening animal or a person considered to be dangerous is spotted) a response is triggered, in particular in the limbic system, which controls survival reactions. This is closely linked to the autonomous nervous system, the sympathetic portion of which triggers fight or flight reactions, which function without any time being lost by involving the cerebrum. Activation of the sympathetic nervous system is accompanied by increased production of hormones (adrenaline and noradrenaline), accelerating the breathing rate and heart beat. Blood is transferred from the extremities of the body into the muscles to enable rapid movement. At the same time another type of process is also triggered, causing cortisol (hydrocortisone) to be released. This stops the alarm reaction and puts the vegetative system back in equilibrium once external safety has been re-established.

These processes are more complex in cases of extreme danger. If the limbic system assesses that neither fight nor flight are possible, the body “freezes”, in a manner comparable to the evolutionary reflex to play dead that has developed in many mammals. This reaction helps prey to survive. Provided that the animal attacking is not completely ravenous, it loses interest when it sees an apparently dead animal. In this frozen state movements are blocked, whilst pain and fear are also switched off or markedly reduced. This state is accompanied by the sympathetic and the parasympathetic nervous systems both being highly activated at the same time, which is very different from the normal functioning of the vegetative nervous system. Reactions that arise in cases of extreme danger, either fight, flight or freeze responses, are not based on conscious planning but are quasi-instinctive. Knowing this can take an enormous burden off survivors who reproach themselves for having felt “paralysed” in the traumatic situation and for not having resisted.

After the immediate danger has passed some traumatised individuals produce insufficient cortisol. The organism remains in a state of alarm, with the corresponding hyper-arousal and increased vigilance, and no longer returns to the normal balance of the vegetative system. Similarly, in cases of PTSD the activity of the limbic system appears not to normalise. The functioning of the hippocampus, which is responsible for ascribing an experience to the right place in the temporal dimension, is suppressed during a traumatic experience. As a consequence, traumatic memories are experienced as if the traumatic event were occurring now and not in the past. Survivors feel at the

mercy of this re-experiencing and in a sense as if they were being revictimised. It has been shown that the hippocampus may also shrink in PTSD patients and that their word recall worsens.

In contrast the amygdala, another part of the limbic system, responsible for storing highly emotional memories, is highly active during the traumatic experience. It is assumed that the control functions of the cerebrum over the limbic system are impaired by the traumatic experience and thus the amygdala's recollection mode predominates. The experience is then processed in such a way "that it is called up later in the form of isolated images, physical sensations, smells and sounds, which appear alien and without any connection to other experiences. As the hippocampus is not able to carry out its task of positioning the incoming information in space and time, the fragments continue to lead an isolated existence" (van der Kolk et. al 2000, p. 238; v.the intrusive symptoms of PTSD). Through the continuing high state of arousal and the associated increased vigilance, new associations then become triggers for the intrusive symptoms. These intrusive memories once again cause hyper-arousal, meaning that the traumatised individual develops many avoidance reactions to protect themselves from intrusive memories and the panic associated with these."⁴⁰

Research into rape survivors - PTSD criteria

94 % met PTSD criteria at 2 weeks
64% at 1 month
47% at 3 months
47% at 9 months ⁴¹

Symptoms of PTSD are not the only impact of trauma on the mental and physical health. With many traumatized persons there is a high rate of co-morbidities among which depression, psychosomatic symptoms like headaches, backaches and other kinds of physical pain in the body are often mentioned.

A wide range of impact by trauma on organic diseases are also observed like high blood pressure, diabetes, and heart disease, which are all related to ongoing high levels of stress.

⁴⁰ Ingeborg Joachim, Stress and risk factors resulting from confrontation with the trauma of war-related sexualised violence in a professional context. In medica mondiale e.V. (ed.) Violence against Women in War. Handbook for Professionals working with traumatised Women. Köln 2005. Pp. 89 – 93.

⁴¹ Drawn from Rothbaum, B., Foa, E.B., Riggs, D., Murdock, T. & Walsh, W. "A prospective examination of post-traumatic stress disorder in rape victims." *Journal of Traumatic Stress* 5 (1992) 455-475.

Long-term traumatising and the lasting impact of sexual trauma

Most witnesses are likely to have traumatic experiences over a long time space. Their traumatising can at least be divided in three sequences with special implications of the conflicts within the region they are coming from.

1. The sequence of instability when the violence happens and becomes an ongoing threat to the civil population
2. The sequence of becoming a victim of human rights violations which may last a longer period when the victims live in forced community with the perpetrators
3. The sequence after captivity/conflict when living conditions are instable and the victim is at risk of further violence and re-traumatising

*Trauma can have long-term consequences other than the onset of psychological disorders. The meaning of a threat or traumatic loss can lead to a major shift in individual internal perceptual sensitivities.*⁴²

The chronic stress of trauma makes it possible for human beings, singly or in groups, to concretize delusions as reality. Such delusions may be necessary for survival and are extremely difficult to give up once they are no longer needed.⁴³

*...clinical and biological data suggests that in a significant number of individuals PTSD causes significant psychological and neurological changes... This may include a permanent modification of individual's vulnerability to a range of psychiatric disorders...*⁴⁴

Instructive in terms of the continuation of this dissociative, delusional process in response to having become uprooted from one's culture is:

*...the story of a girl who during the war in Northern Uganda, was attacked in her local village by soldiers of the national army. Her father and brother who under threat of death refused to rape her, and were killed before her eyes. For two years she was kept and abused by the soldiers... Every night, as she experienced the [violence] of another soldier, she would withdraw into her own world. Today she is 'free' – wandering around in Uganda, aimlessly searching for her family, detached from all around her, and often wishing she were dead. This young person, uprooted from her culture cannot return to her past and seems to have little future...*⁴⁵

⁴² van der Kolk, B.A. "The compulsion to repeat trauma: Re-enactment, revictimisation and masochism." *Psychiatric Clinic of North America*, 12(2) (1989) 389-411.

⁴³ De Vries, M., "Trauma in Cultural Perspective" in van der Kolk, B., McFarlane, A., and Weisaeth, L. (eds) *Traumatic Stress: the Effects of Overwhelming Experience on Mind, Body and Society* (Guilford Publications, New York, 1996) at 411.

⁴⁴ van der Kolk, B., et al, *ibid.* at 196.

⁴⁵ Giel, R., "Psychological process in disaster" 19(1) *International Journal of Mental Health* 1990, 7-20.

“In summary, when cultural patterns, identities, and relationships are lost, life becomes unpredictable. Under normal stressful conditions, a grieving process with the aim of leaving the old and adjusting to the new takes place. With trauma, however, other patterns are activated – conservative impulses (ethnicity, etc.) at the group level, and psychopathological reactions (depression, paranoia, and aggression) at the individual level. Culture helps protect against these processes. In its absence, loss, regression, and harm occur.”⁴⁶

“There is no solution to these problems. One must endure the hardship.”
- Dinka refugee, Kakuma Camp, Kenya, 1994

Human caused trauma is harder to recover from and often results in⁴⁷ disorders and symptoms described in the concept of complex PTSD.

⁴⁶ See also Green, B., “Identifying Survivors at Risk: trauma and stressors across events” in J.P Wilson & B. Raphael (eds.), *International Handbook of Traumatic Stress Syndrome*. (New York, Plenum Press, 1993).

⁴⁷ Ibid

Complex PTSD

Causal factor - "A history of subjection to totalitarian control over a prolonged period (months to years)"⁴⁸

Impact of trauma on the individual

The traumatized person experiences changes on five interacting levels:

- 1) An alteration in physiological and neurological function
- 2) Behaviorally, a conditioned fear response
- 3) Cognitively, distortions in self and world
- 4) Socially, change & loss in interactions with others
- 5) Spiritually, loss of personal and religious beliefs

**Type I Simple Trauma
Usually one off and more likely to recover from**

**Type II Complex Trauma
Usually prolonged and multi-level - more difficult to recover from**

Armed conflict is more likely to result in Complex PTSD and various co-morbidities.

⁴⁸ Herman, J., "Complex PTSD: A Syndrome in survivors of prolonged and repeated trauma" *Journal of Traumatic Stress* 5 (1995) 377-391.

Features of complex PTSD

1. ALTERATIONS IN AFFECT REGULATION

- persistent dysphoria
- chronic suicidal preoccupation
- self-injury
- explosive or extremely inhibited anger
- compulsive or extremely inhibited sexuality

2. ALTERATIONS IN CONSCIOUSNESS

- amnesia or hyperamnesia for traumatic events
- transient dissociative episodes
- depersonalization/derealization
- reliving experiences with intrusive PTSD symptoms or ruminative preoccupation

3. ALTERATIONS IN SELF-PERCEPTION

- sense of helplessness or paralysis of initiative
- shame, guilt and self-blame
- sense of defilement or stigma
- sense of difference from others (specialness; utter aloneness; inhuman; no-one could understand)

4. ALTERATIONS IN PERCEPTION OF PERPETRATOR

- preoccupation with relationship with perpetrator
- unrealistic attribution of total power to perpetrator
- idealization or paradoxical gratitude
- sense of special or supernatural relationship
- acceptance of belief system or rationalization of perpetrator

5. ALTERATIONS IN RELATIONS WITH OTHERS

- isolation and withdrawal
- disruption in intimate relationships
- repeated search for rescuer
- persistent distrust
- repeated failures of self-protection

6. ALTERATIONS IN SYSTEMS OF MEANING

- loss of sustaining faith
- sense of hopelessness and despair

Difficulties for victims and witnesses with complex PTSD⁴⁹

- may have rapid unpredictable shifts in mood / mental state
- may be unable to name/describe feelings
- may have difficulty regulating affect
- may be phobic about emotional experiencing
- may be prone to self-harm, suicide attempts
- may have co-morbid diagnoses and personality disorders
- may lose touch with present reality - confuse past/present, fantasy/reality
- may have severe attachment problems
- may still be enmeshed with perpetrators
- little expectation of being understood or treated benignly
- may have attitude of entitlement
- risk of regression, dependency
- may evoke strong counter-transference reactions

Does the witness' story and behaviour during the investigation procedure reflect these characteristics?

Signs of decompensation/re-traumatisation during the investigation procedure

It cannot be avoided that the investigation procedure will put the witness under additional stress. Witnesses are willing to testify and therefore try to be strong but at the same time they might overestimate their capacity for containment. For the sake of the witnesses' health it is necessary that the investigation team diminishes this stress as much as possible and prevents re-traumatisation.

This can be supported by an appropriate setting for the investigation procedure and by observing alterations in the witnesses' behaviour and reactions during the procedure.

Two types of reactions have to be taken into account:

- Signs of higher arousal/excitement
- Signs of diminished reactions

⁴⁹ American Psychiatric Association [APA], *Diagnostic and Statistical Manual of Mental Disorders* (4th ed.), American Psychiatric Press, Washington, 1994).

Dissociation symptoms are due to dissociation during the traumatic events such as freezing, fainting, and 'out-of-body' experience and due to unresolved shock.

There are a wide range of dissociative symptoms:

- diminishing or loss of concentration
- alteration in the fluency of talking
- dissociative 'switching' from one issue to another, from one place or time of the story to another
- giving the impression they are no longer 'present' (eye contact, difficult to stay in contact with the investigation team)
- splitting off feelings
- shock/freezing response

Recognising minor symptoms of dissociation or raising of the arousal may help to prevent stronger reactions like the shock/freezing response and the overwhelming flashbacks and panic attacks or 'emotional storms'.

Traumatic Memory⁵⁰

The functioning of the brain during life-threatening and identity-threatening situations has an impact also on the storage and processing of memories due to the partial exclusion of the forebrain during emergency reactions.

- "Vehement emotion" interferes with information-processing on a verbal and symbolic level
- Memories can be not categorized, but splintered
- Memories can be split off from consciousness
- Memories can be stored as visual images, affective states, or body sensations
- Memory fragments can return in state dependent fashion

TRAUMATIC MEMORY	NARRATIVE (fully integrated) MEMORY
<ul style="list-style-type: none"> • Inflexible • Without context • Fragmented/dissociated • Autistic • ANS Hyperarousal • Sensory-motor/non-verbal • Developmental context in which trauma occurred • Somatic presentation • Regressed re-enactments outside of conscious awareness 	<ul style="list-style-type: none"> • Flexible • Contextual • Integrated • Relational • Minimal arousal • Symbolic/verbal • Telling a story within a relationship • Needs core sense of SELF and RELATIONSHIP SKILLS

The knowledge of these characteristics of traumatic memory will support the investigators to put their questions in a way that:

- **Does not unnecessarily raise the arousal of the witnesses**
- **Helps them to put their memory in a context**
- **Is aware of the importance of a trustful relationship between investigator and witness**
- **Is listening to the body language of the witness**

⁵⁰ Janet, P., *L'Automatisme Psychologique*. (Alcan, Paris, 1889).

Skills for Preventing Re-traumatisation

Dual awareness

Some information during the investigation process can bring forward feelings of 'unsafety'. Observing these feelings and counterbalancing them with the external reality will increase a sense of control and safety for the witness when discussing previously traumatic events. Making a distinction between the past and present will also assist with this.

<i>Van der Kolk</i> ⁵¹	“observing self” v “experiencing self”	“ I am aware that I am feeling (emotion) right now, because I am remembering (traumatic event).”
	external reality v internal reality	“ And I am looking around (focus on external reality and on the present) and can see that it is not happening right now. I am not in danger”
	past v present	“ It is not then, it is now.” “ It is because you are remembering...”⁵²

During the investigation process this will be an excellent “braking tool” which slows down the process.

Other braking-tools are:

- Getting up and walking around while talking
- Having a break.
- Having a small talk that supports re-orienting in the 'here and now'.

⁵¹ van der Kolk, B., A. (1994) “The Body Keeps Score: memory and the evolving psychobiology of post traumatic stress” *Harvard Review of Psychiatry* 1(5) (1994), 253-265.

⁵² From workshop on Somatic Trauma Therapy, Edinburgh, 1998 by Babette Rothschild, M.S.W. (Body Psychotherapist). See also Rothschild, B. "Making Trauma Therapy Safe" 27(2) *Self and Society* May 1999

Grounding and Re-orientation Techniques

For use by investigators and others working directly with victims and witnesses to:

- assist victims and witnesses displaying dissociative symptoms and symptoms of PTSD during an interview
- assist in the prevention of vicarious trauma among the investigation team

Pay attention to BODY SENSATIONS - feet on floor, body weight, posture⁵³

- refocus eyes - move gaze around room
- reconnect to SIGHTS, SOUNDS, SENSATIONS
- shift position in chair - sit upright
- take a deep breath - follow breath in body
- wriggle toes
- touch watch, ring, arm of chair, clothing
- pinch muscle between thumb and forefinger
- have something to drink
- get up and walk
- tell yourself to move out of trance (what does this feel like for you?)
- ask person if s/he feels tranced/dissociated (use witness' term)
- maintain 50 % of attention with yourself and 50 % with the witness
- MAINTAIN RELATEDNESS
- GROUNDING WITHIN MOMENT OF "NOW".

⁵³ Priscilla McCorrison, PTSD Workshop Presentation – *Working with Sexual Assault Victims*, Sydney, Australia, May 2002

Vicarious Trauma for Staff

Dealing with human rights violations and working with traumatised persons over a longer period of time will have an impact on the professionals working with them. This impact might result in burn-out syndrome or more specifically in vicarious traumatization. The latter describes the cumulative effect of witnessing traumatic experiences of others.

Vicarious traumatization may have an impact on psychological and physical health as well as on the personal beliefs and view of the world. In addition during the investigation procedure counter-transference may happen very often triggered by the professional's own experiences of violence (especially when we consider that worldwide there is a high rate of violence, including sexual violence, against women).

While empathy for the witnesses on the professional's side is necessary to build up a work relationship listening to the witnesses traumatic experiences means a challenge also for the investigator's capacity to contain. During the investigation procedure they can support themselves with the same grounding techniques mentioned above.

For professionals it is important to consciously develop individual tools to counterbalance the impact of being confronted with a high amount of traumatic material, but there is also a need of institutional care for the prevention of burn-out and vicarious traumatization.

"Thought needs to be given to the most appropriate **type of offer and working approach** for the various professional groups. In general, they need to include the following elements:

- psychological education on the issues of trauma, stress and burnout as well as vicarious traumatization
- awareness-building of personal resources and strategies in combatting stress
- techniques and methods for reinforcing personal resources
- training in techniques and methods for stress regulation and controlling potential risk of burnout
- encouragement to talk about and find expression for acutely stressful experiences (debriefing and other more creative forms of expression)
- reflection on work with clients / patients and on group processes in working teams, giving attention to counter-transference and vicarious traumatization

This can be implemented in peer counselling groups, seminars on these issues, Balint groups and primarily through supervision."⁵⁴

⁵⁴ Ingeborg Joachim, Stress and risk factors resulting from confrontation with the trauma of war-related sexualized violence in a professional context. In Medica Mondiale e.V (ed) Violence against Women in War. Handbook for Professionals working with traumatized Women. Köln 2005.Pg 213.

Women, War, Peace and HIV/AIDS

(UNIFEM – A Portal on Women, Peace and Security).⁵⁵

"Wars and armed conflicts generate fertile conditions for the spread of HIV. Rape inside or outside refugee camps has doubtless played a part in spreading the virus" - UNAIDS 1998

"Many mainstream prevention strategies are untenable; for example those based on the 'ABC' approach - abstain, be faithful, use a condom. Where sexual violence is widespread, abstinence, or insisting on condom use is not a realistic option for women and girls." – UN Secretary-General Kofi Annan, International Women's Day 2004

Fact Sheet

- On 10 January 2000, the United Nations Security Council held an Open Session on the HIV/AIDS in Africa, and in so doing recognized the pandemic as a threat to international peace and security. U.S. Vice President Al Gore opened the meeting by asserting that "we tend to think of a threat to security in terms of war and peace, yet no one can doubt that the havoc wreaked and the toll extracted by HIV/AIDS do threaten our security...We now know that the number of people who will die of AIDS in the first decade of the 21st century will rival the number that died in all the wars in all the decades of the 20th century."
- In passing resolution 1308 (2000) on 17 July 2000, the Security Council, bearing in mind its primary responsibility for the maintenance of international peace and security, and emphasizing the important roles of the General Assembly and the Economic and Social Council in addressing the social and economic factors that lead to the spread of HIV/AIDS, inter alia, recognized that the HIV/AIDS pandemic is also exacerbated by conditions of violence and instability, and stressed that the HIV/AIDS pandemic, if unchecked, may pose a risk to stability and security.
- HIV/AIDS is a human security issue. In fact, a negative synergy exists between HIV/AIDS and gender inequality, HIV/AIDS and poverty and HIV/AIDS and conflict. HIV/AIDS destabilizes society at all levels and the presence of conflict and violence hasten this destabilization.
- The use of rape as a weapon and the perception of rape as bounty spreads HIV/AIDS during wartime. For example, an association of Rwandan genocide widows found that two-thirds of its members who had been raped by Hutu militiamen were HIV positive.
- Medical conditions that arise from rape, such as fistulas, incontinence, internal bleeding and tearing of genitalia, render women more vulnerable

⁵⁵ This material is taken from UNIFEM's Portal on Women, Peace and Security at <http://www.womenwarpeace.org/issues/hiv/hiv.htm>

- to infection. The presence of other STIs leave women more likely to contract HIV after exposure to an infected partner.
- When health infrastructure is destroyed by fighting, women have less access to pre- and post-exposure prophylactics. Health care providers are unable to care for rape victims, mitigate the damage done and, thus, lessen the chance of infection from future encounters..
 - The breakdown of traditional family and kinship supports that often accompany armed conflict leave women and girls vulnerable to attack and HIV infection, especially when women and girls are displaced from their homes.
 - The scarcity of basic needs during conflict and displacement and the lack of economic opportunities for women render women and girls more likely to engage in sex in exchange for survival. Women and girls have less bargaining power over sexual encounters when their very survival may be at stake.
 - Military and peacekeeping forces can spread HIV/AIDS to areas previously unaffected. The power differential between armed personnel and local populations render women and girls vulnerable to abuse that can lead to HIV infection. Ninety percent of peacekeepers from South Africa screened in April 2001 were found to be HIV positive. Combatants in DR Congo are estimated to have a sixty percent sero-positive rate.
 - In post-conflict situations, the presence of relatively affluent international staff may lead to an increase in commercial sex, which can lead to an increase in HIV infection. For example, in Phnom Penh, Cambodia, the number of sex workers increased from 6,000 to 20,000 during the first year of UNTAC (1992-1993). Cambodia has the highest rates of HIV infection in South East Asia.
 - Women share a disproportionate burden of AIDS care. UNAIDS estimates that having an AIDS patient in the home can absorb 1/3 of all household labour, the majority of the labour being done by the women. This redistribution of labour leads to a decline in household income. Schooling for girl children is the first expense to be eliminated. This is leading to a decline in school participation throughout the world
 - Girls are more likely to be taken out of school to tend for sick relatives than are boys. When conflict disrupts education, the compounding effects for girls result in a wider gender gap in education, thus adversely affecting future generations women.

Legal Framework

Rome Statute

Article 6 Genocide

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Article 7 Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

- (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
- (b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
- (c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

- (d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
- (e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
- (f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
- (g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
- (h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
- (i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Article 8 War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
2. For the purpose of this Statute, "war crimes" means:
 - (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
 - (i) Wilful killing;
 - (ii) Torture or inhuman treatment, including biological experiments;
 - (iii) Wilfully causing great suffering, or serious injury to body or health;
 - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
 - (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
 - (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
 - (vii) Unlawful deportation or transfer or unlawful confinement;
 - (viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
- (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
- (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
- (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
- (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
- (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- (x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;
- (xii) Declaring that no quarter will be given;
- (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- (xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- (xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- (xvi) Pillaging a town or place, even when taken by assault;
- (xvii) Employing poison or poisoned weapons;

- (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
- (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;
- (xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
- (xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
- (xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- (xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
- (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

- (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (iii) Taking of hostages;
- (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international

law, namely, any of the following acts:

- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
 - (v) Pillaging a town or place, even when taken by assault;
 - (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
 - (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
 - (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
 - (ix) Killing or wounding treacherously a combatant adversary;
 - (x) Declaring that no quarter will be given;
 - (xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
 - (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;
- (f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.
3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

DEFINITIONS OF CRIMES OF SEXUAL VIOLENCE IN THE ROME STATUTE OF THE ICC – The Elements of Crimes

Crimes against humanity – The last two elements of each of these crimes state: ‘*The conduct was committed as part of a widespread or systematic attack directed against a civilian population*’ and ‘*The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population*’. However, note that the Elements of Crimes introduction to Article 7 states: ‘*The last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack*’.

RAPE	SEXUAL SLAVERY ¹⁷	ENFORCED PROSTITUTION	FORCED PREGNANCY	ENFORCED STERILIZATION
Article 7 (1) (g)-1	Article 7 (1) (g)-2	Article 7 (1) (g)-3	Article 7 (1) (g)-4	Article 7 (1) (g)-5
<p>1. The perpetrator invaded¹⁵ 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.</p> <p>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.¹⁶</p> <p>-----</p> <p>¹⁵ <i>The concept of "invasion" is intended to be broad enough to be gender-neutral.</i></p> <p>¹⁶ <i>It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. This footnote also applies to the corresponding elements of article 7(1)(g) - 3, 5 and 6.</i></p>	<p>1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.¹⁸</p> <p>2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.</p> <p>-----</p> <p>¹⁷ <i>Given the complex nature of this crime, it is recognized that its commission could involve more than one perpetrator as a part of a common criminal purpose.</i></p> <p>¹⁸ <i>It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.</i></p>	<p><i>1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature 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 persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.</i></p> <p>2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.</p>	<p><i>1. The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.</i></p>	<p>1. The perpetrator deprived one or more persons of biological reproductive capacity.¹⁹</p> <p>2. The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.²⁰</p> <p>-----</p> <p>¹⁹ <i>The deprivation is not intended to include birth-control measures which have a non-permanent effect in practice.</i></p> <p>²⁰ <i>It is understood that "genuine consent" does not include consent obtained through deception.</i></p>
SEXUAL VIOLENCE		PERSECUTION		
Article 7 (1) (g)-6		Article 7 (1) (h)		
<p>1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature 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 persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.</p>		<p><i>1. The perpetrator severely deprived, contrary to international law,²¹ one or more persons of fundamental rights.</i></p> <p><i>2. The perpetrator targeted such person or persons by reason of the identity of a group of collectivity or targeted the group or collectivity as such.</i></p> <p>3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.</p> <p>-----</p> <p>²¹ <i>This requirement is without prejudice to paragraph 6 of the General Introduction to the Elements of Crimes.</i></p>		

DEFINITIONS OF CRIMES OF SEXUAL VIOLENCE IN THE ROME STATUTE OF THE ICC – The Elements of Crimes

War crimes - The last two elements of each of these crimes require that: *‘The conduct took place in the context of and was associated with an international armed conflict’* and *‘The perpetrator was aware of factual circumstances that established the existence of an armed conflict’*. Note that the introduction to Article 8 of the Elements of Crimes states that these elements *‘Shall be interpreted within the established framework of the international law of armed conflict’*. With respect to the last two elements however, the introduction states: *‘There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international’*, *‘In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international’* and *‘There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms “took place in the context of and was associated with”.’*

RAPE	SEXUAL SLAVERY ⁵²	ENFORCED PROSTITUTION	FORCED PREGNANCY	ENFORCED STERILIZATION
<p style="text-align: center;">Article 8 (2) (b) (xxii)-1</p> <p>1. The perpetrator invaded⁵⁰ 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.</p> <p>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.⁵¹</p> <p>-----</p> <p>⁵⁰ <i>The concept of "invasion" is intended to be broad enough to be gender-neutral.</i></p> <p>⁵¹ <i>It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. This footnote also applies to the corresponding elements of article 8 (2) (b) (xxii)-3, 5 and 6.</i></p>	<p style="text-align: center;">Article 8 (2) (b) (xxii)-2</p> <p>1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.⁵³</p> <p>2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.</p> <p>-----</p> <p>⁵² <i>Given the complex nature of this crime, it is recognized that its commission could involve more than one perpetrator as a part of a common criminal purpose.</i></p> <p>⁵³ <i>It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.</i></p>	<p style="text-align: center;">Article 8 (2) (b) (xxii)-3</p> <p><i>1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature 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 persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.</i></p> <p>2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.</p>	<p style="text-align: center;">Article 8 (2) (b)(xxii)-4</p> <p><i>1. The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.</i></p>	<p style="text-align: center;">Article 8 (2) (b) (xxii)-5</p> <p>1. The perpetrator deprived one or more persons of biological reproductive capacity.⁵⁴</p> <p>2. The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.⁵⁵</p> <p>-----</p> <p>⁵⁴ <i>The deprivation is not intended to include birth-control measures which have a non-permanent effect in practice.</i></p> <p>⁵⁵ <i>It is understood that "genuine consent" does not include consent obtained through deception.</i></p>

DEFINITIONS OF CRIMES OF SEXUAL VIOLENCE IN THE ROME STATUTE OF THE ICC – The Elements of Crimes
(War Crimes cont.)

SEXUAL VIOLENCE	MUTILATION
<p style="text-align: center;">Article 8 (2) (b) (xxii)-6</p> <p>1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature 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 persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.</p> <p>2. The conduct was of a gravity comparable to that of a grave breach of Geneva Conventions.</p> <p>3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.</p>	<p style="text-align: center;">Article 8 (2) (b) (x)-1</p> <p>1. The perpetrator subjected one or more persons to mutilation, in particular by permanently disfiguring the person or persons, or by permanently disabling or removing an organ or appendage.</p> <p>2. The conduct caused death or seriously endangered the physical or mental health of such a person or persons.</p> <p>3. The conduct was neither justified by the medical, dental or hospital treatment of the person or persons concerned nor carried out in such person's or persons' interest.⁴⁶</p> <p>4. Such person or persons were in the power of an adverse party.</p> <p style="text-align: center;">-----</p> <p>⁴⁶ <i>Consent is not a defence to this crime. The crime prohibits any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the party conducting the procedure and who are in no way deprived of liberty. This footnote also applies to the same elements for Article 8 (2) (b) (x)-2.</i></p>

GENDER INTEGRATION IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

Substantive Jurisdiction (Crimes of Sexual & Gender Violence)	Procedures	Structure
<ul style="list-style-type: none"> ▪ <u>Rape, Sexual Slavery, Enforced Prostitution, Forced Pregnancy, Enforced Sterilization and other Sexual Violence.</u> The ICC Statute explicitly recognizes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other grave forms of sexual violence as war crimes in international and non-international armed conflict as well as crimes against humanity. (Articles 8(2)(b)(xxii), 8(2)(e)(vi) and 7(1)(g)) ▪ <u>Persecution and Trafficking.</u> In addition to the crimes of sexual and gender violence discussed above, persecution is included in the ICC Statute as a crime against humanity and specifically includes for the first time the recognition of gender as a basis for persecution. The ICC Statute also includes trafficking as a crime against humanity as among the crimes of enslavement. (Articles 7(1)(h), 7(1)(c) and 7(2)(c)) ▪ <u>Genocide.</u> <i>The ICC Statute adopts the definition of genocide accepted in the Genocide Convention. (Article 6)</i> ▪ <u>Non-discrimination.</u> <i>The Statute specifically states that the application and interpretation of law must be without adverse distinction on the basis of enumerated grounds, including gender. (Article 21(3))</i> 	<ul style="list-style-type: none"> ▪ <u>Witness Participation and Protection.</u> The Court has an overarching responsibility to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, taking into account all relevant factors, including age, gender, health and the nature of the crime. The Court may take appropriate protective measures in the course of a trial, including <i>in camera</i> proceedings and allowing the presentation of evidence by electronic means. In addition, the Prosecutor is required to take these concerns into account in both the investigative and the trial stage. (Article 68) ▪ <u>Victim Witness Unit.</u> The statute provides for the creation of a Victims and Witnesses Unit (VWU) within the Court's registry (in recognition that protection of witnesses should be independent of prosecutorial imperatives). The VWU will provide protective measures, security arrangements, counseling and other appropriate assistance for victims and witnesses who appear before the Court, and others at risk on account of their testimony. (Article 43) ▪ <u>Participation.</u> The statute explicitly recognizes the right of victims/survivors to participate in the justice process, directly or through legal representatives, by presenting their views and concerns at all stages which affect their personal interests. (Article 68(3)) • <u>Reparations.</u> The statute includes a provision enabling the Court to establish principles and, in certain cases, to award reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. (Article 75) 	<ul style="list-style-type: none"> ▪ <u>Women on the Court.</u> The statute requires that the need for a "fair representation of female and male judges" be taken into account in the selection process. The same provision applies to the selection of staff in the Office of the Prosecutor and in the Registry. (Article 36(8)(a)(iii); Article 44(2)) ▪ <u>Expertise in Trauma</u> <i>The Registrar is required to appoint staff with expertise in trauma, including trauma related to crimes of sexual violence. (Article 43(6))</i> ▪ <u>Legal Expertise on Violence Against Women.</u> The statute requires that, in the selection of judges, prosecutors and other staff, the need for legal expertise on violence against women or children must be taken into account. This provision is in recognition of the significance of crimes against women, and the need for expertise at every level to ensure these crimes are effectively investigated and prosecuted. To achieve this it is imperative that individuals with expertise in the investigations and prosecutions of gender crimes are recruited by the Court. (Articles 44(2) and 36(8)) ▪ <u>Legal Advisors on Sexual and Gender Violence.</u> <i>The Prosecutor is required to appoint advisers with legal expertise on specific issues, including sexual and gender violence. This is an important mechanism for ensuring both that gender crimes are properly investigated and prosecuted and victims properly respected and protected. (Article 42(9))</i> ▪ <u>Trust Fund for Victims</u> The Statute requires the establishment of a Trust Fund for the benefit of victims of crimes within the jurisdiction of the Court, and for their families. (Article 79)

VICTIMS & WITNESSES IN THE INTERNATIONAL CRIMINAL COURT

PARTICIPATION

- Victims & witnesses can participate in the court proceedings and have the right to legal representation. (Rome Statute – Article 68; Rules of Procedure, Rules 89-93)

PROTECTION

- The court must take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims & witnesses. (Rome Statute – Article 68 and 43(6); Rules of Procedure, Rules 87-88)

PROTECTION MECHANISMS

- Confidentiality
 - Anonymity – identification expunged; electronic alteration of pictures and voice; use of pseudonym.
 - Alternate means of giving evidence, including:
 - audio or video testimony
 - written transcripts
 - *in camera* proceedings
 - Relocation
- (Rome Statute – Article 69; Rules of Procedure and Evidence, Rule 87)

SUPPORT

- The Victims and Witnesses Unit within the Registry will provide protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims, and others at risk on account of testimony given by witnesses.
- The Victims and Witnesses Unit will include staff with expertise in trauma, including trauma related to crimes of sexual violence. (Rome Statute – Article 43; Rules of Procedure, Rules 16-19)

REPARATIONS

- Victims may seek reparations through the court, including compensation, restitution and rehabilitation. (Rome Statute – Article 75; Rules of Procedure, Rules 94-99)

TRUST FUND FOR VICTIMS

- The Trust Fund can carry out an order for an award for reparations made by the Court.

- Awards for reparations can be made directly to individuals, or a collective award can be made where the number of victims and the scope, forms and modalities make this type of award more appropriate.

- Awards for reparations can be made through inter-governmental, international or national organizations approved by the Trust Fund.

- Resources of the Trust Fund can be used for the benefit of victims, which may include assistance for victims independent of the judicial proceedings. (Rome Statute - Articles 75,79; Rules of Procedure and Evidence, Rule 98)

EVIDENCE IN SEXUAL VIOLENCE CASES

- The court cannot impose a requirement of corroboration of a victim's testimony.
- Evidence of a victim's prior or subsequent sexual conduct is prohibited.
- Defense of consent is limited – consent cannot be inferred.
- *In camera* proceedings required to determine whether consent or sexual conduct evidence should be allowed. (Rules of Procedure and Evidence, Rules 63, 70-72)

COUNSELLOR-PATIENT PRIVILEGE

- Rules strongly favor regarding as privileged communications between medical doctors, psychiatrists, psychologists or counsellors and victims. (Rules of Procedure and Evidence, Rule 73)

SPECIAL MEASURES

- Special measures may be ordered to facilitate testimony of a traumatized victim or witness, child, an elderly person or a victim of sexual violence.
- The Court shall be vigilant in controlling the manner of questioning a witness or victim so as to avoid harassment or intimidation, paying particularly attention to attacks on victims of crimes of sexual violence. (Rules of Procedure and Evidence, Rule 88)

The Characterization of Sexual Violence A Feminist Legal Perspective

The following is an edited excerpt from a letter by feminist legal scholars to the Chief Prosecutor of the ICTR and ICTY (Justice Louise Arbour) in 1997, at the time of the Akayesu indictment.⁵⁶ Although the Akayesu decision⁵⁷ was forward-looking in its definition of rape, (a definition reflected in the Rome Statute), the conceptualization of sexual violence outlined in this excerpt goes further than Akayesu and any other relevant international jurisprudence to date, and provides a number of significant proposals highly relevant for the prosecution of sexual violence by the International Criminal Court.

While the Rome Statute codifies specific sexual and gender based crimes, this does not preclude the characterization of sexual and gender based crimes as other recognized forms of violence within the Court's jurisdiction. These include torture (as a crime against humanity under Article 7(1)(f) and as a war crime under Articles 8(2)(a)(ii)-1 and 8(2)(c)(1)-4), mutilation (as a war crime under Articles 8(2)(b)(v)-1 and 8(2)(c)(i)-2), enslavement (as a crime against humanity under Articles 7(1)(c)), as well as willfully causing great suffering (as a war crime under Article 8(2)(a)(iii)), inhumane treatment (as a crime against humanity under Article 7(1)(k) and as a war crime under Article 8(2)(a)(ii)-2), outrages upon personal dignity (as a war crime under Article 8(2)(b)(xxi) and 8(2)(c)(ii)) and cruel treatment (as a war crime under Article 8(2)(c)(i)-3).

Edited Excerpt:

...The decision to characterize rape and sexual violence in the amended Akayesu indictment as "inhuman acts" under article 3(i) and "outrages upon personal dignity" under article 4(e) does not fairly reflect the severity and multi-faceted character of the sexual violence inflicted upon women.

...We were pleased to hear that you accept the basic premise that rape and other forms of sexual violence should be charged both as crimes in themselves (where permitted by the Statute) and as forms of other atrocious violence within the competence of the Tribunal. While we strongly endorse this approach (and...are working to have it properly articulated in the Statute of the International Criminal Court), the amended Akayesu indictment falls short of this goal. Although we respect the need to exercise prosecutorial discretion in this regard and cannot know the details that influence that

⁵⁶ Ariane Brunet, Alice Karekezi, Isabelle S. Helal, Nazneen Damji, International Centre for Human Rights and Democratic Development (Montreal, Canada and Kigali, Rwanda)

Rhonda Copelon, Mary Marrow, Connie Walsh, International Women's Human Rights Law Clinic, City University of New York (New York, USA), Annie Bunting, Valerie Oosterveld, Working Group on Engendering the Rwandan Criminal Tribunal (Toronto, Canada) Jennifer Green, Beth Stephens, Center for Constitutional Rights (New York, USA) On behalf of the NGO Coalition on Women's Human Rights in Conflict Situations, October, 1997

⁵⁷ *Prosecutor v Jean-Paul Akayesu*, Judgement, ICTR Trial Chamber (2 September 1998), Case No. ICTR-96-4-T

process, we discern a number of possible trends that, in our view, run counter to the progressive development in the law which was reflected in the ICTY's Foca (Gagovic) and Celebici (Delalic) indictments particularly.

...On th[e] basis [of the information at hand], we believe that it would have been appropriate for the OTP to charge rape and other sexual violence under article 3(f) as torture under crimes against humanity; under article 4(a) as violence to life, health and physical or mental well-being of persons, including torture and mutilation (common art. 3); and under article 2 as acts of genocide. We recognize, at the same time, that crimes such as forcing women to parade naked in the streets could qualify, depending on the circumstances, as any of these more severe crimes or, in the alternative, as inhuman or degrading treatment. It is also not clear what is meant by sexual "service" as opposed to sexual "violence" in the indictment.

The following outlines our concerns in this regard:

(a) Rape as Torture

While the issue of understanding rape as torture was only first advanced in 1986 by the Special Rapporteur on Torture, it is fully accepted as such today. In our view, this evolution warrants a presumption in favor of charging rape as torture. Taking as the standard the three substantive elements of torture delineated in article 1 of the Convention Against Torture (CAT) - severity; intent; and purpose (1) - we believe that rape alone constitutes torture. (2) The fact that Akayesu is charged with superior as opposed to personal responsibility does not change the characterization of the underlying crime.

Severity

First, the severity of rape and other similar forms of sexual violence have been consistently recognized and, indeed, emphasized in recent human rights decisions. (3) We note particularly the recent ruling of the European Court on Human Rights in [Aydin v. Turkey](#). (4) There the Court detailed the torture of the petitioner, which included one act of rape. In concluding that the petitioner was subjected to torture (and not simply inhuman treatment), the Court emphasized the particularly cruel character of rape as a form of torture. (5) The Inter-American Commission on Human Rights likewise has emphasized the severe impact which rape and sexual violence have on victims by stating that "it is clear that in the experience of torture victims, rape and sexual abuse are forms of torture which produce some of the most severe and long-lasting traumatic effects." (6)

Intent

Second, the travaux préparatoires of the CAT makes clear that specific intent to torture is not necessary. The U.S. proposed requiring specific intent to torture and this was rejected. (7) The voluntary performance of an act with foreseeable consequences amounting to torture meets the intent requirement. Thus, it does not matter that the perpetrator or his superior does not consider rape to be a form of torture. It is the objective character of the acts and suffering that they cause and are likely to cause that determines whether the crime is characterized as torture.

Purpose

Third, the sexual violence inflicted has been recognized to satisfy the criteria of purpose set forth in the CAT. Rape and sexual violence are often used as a means to punish, intimidate or coerce the victim or a third person. (8)

Rape and sexual violence are also forms of gender discrimination against women. In response to a request by the Commission on Human Rights "to examine questions concerning torture directed disproportionately or primarily against women and conditions conducive to such torture, and to make appropriate recommendations concerning prevention of gender-specific forms of torture" (9), the Special Rapporteur on Torture recognized the disparate impact rape and sexual violence have on women, stating that "[i]n some instances, the gender of an individual constituted at least part of the very motive for the torture itself". (10) The Inter-American Commission on Human Rights has also recognized rape and the threat of rape as "a brutal expression of discrimination" against women which qualifies as torture." (11)

Many reports by human rights investigators and journalists indicate that Hutu men raped Tutsi women and Hutu women sympathetic to Tutsi to punish them for their gender, their ethnicity or their sympathy to the ethnic "enemy". Rape and sexual violence were also a weapon of intimidation and terror. The fact that the rape of Tutsi women appears, in some cases, to have been claimed by Hutu men as the prize of war does not exempt it from the category of torture. Taking women as booty reduces women to property, which is a quintessential expression of gender discrimination. The rape of women during the genocide in Rwanda was thus double discrimination: they were raped for their ethnicity (or ethnic sympathies) and for their gender.

(b) Command Responsibility

Aside from issues of severity, intent and purpose, we are concerned that the OTP may be distinguishing cases where the defendant is charged with personally participating in the act from those involving command responsibility. However, as with other forms of

violence constituting torture, a superior is responsible so long as he knew or should have known that rape and other sexual violence was being committed and took no steps to stop it. The commander's intent is not at issue, nor is he required to stop the unlawful practice altogether. One doesn't re-examine the crime or violation through the eyes of the commander.

While we are unable to judge the scope of the testimony which will be used in proving the charges against Akayesu, we can see no basis for differentiating the severity of sexual violence charged as torture in the ICTY indictments from the charges of sexual violence brought against Akayesu.

(i) *Mutilation*

We are also concerned about your statement...that rape accompanied by mutilation makes a clear case of torture. ...Rape is itself a form of torture. It may also constitute the crime of mutilation under article 4(a) of the ICTR Statute where rape results in the destruction of a woman's reproductive capacity or ability to engage in sexual relations. These are terrible harms that should be recognized as mutilation, even though they are often internal and, therefore, do not mark the physical appearance or visible body. In some cases the intent to mutilate through rape is apparent; in others it is a foreseeable consequence of the rape.

In addition, acts of mutilation apart from rape are chargeable as separate offences under article 4(a), as well as chargeable as torture. It appears from Human Rights Watch's report, *Shattered Lives: Sexual Violence During the Rwandan Genocide and its Aftermath*, that, in Rwanda, rape was often accompanied by mutilation of sexual organs or other bodyparts, such as the cutting off of breasts and disfigurement of the vagina or pelvic area. [\(12\)](#) Enforcing the crime of mutilation, beyond the obvious cases, thus requires careful and sensitive inquiry with women of the impact of sexual violence. This must obviously be done by women who are appropriately trained, so as not to revictimize the women.

(ii) *Genocide*

Just as sexual violence was previously unrecognized as a form of torture, it has not been appropriately recognized as an aspect of genocide. While our research is still in progress on this point, it suggests several important directions for the Tribunal. First, under the definition of genocide in article 2 of the ICTR Statute, rape and sexual violence ought to be viewed as acts of genocide whether or not they specifically intend the death of the victim. In our view, when the genocidal context, demonstrating the intent to destroy, in whole or in part, a protected group is established, then the acts listed in (a) through (e), committed as an integral part of that assault, constitute genocide. In Rwanda, the reported facts indicate that rape and sexual violence often preceded killing and, as with other forms of torture, were intended to amplify suffering before death. For those left alive, such violence

clearly caused serious bodily and mental harm to members of the group. Depending upon the facts available, rape and sexual violence could constitute an act within the purview of (c) or (d) based on the physical consequences for the woman's (or man's) health and reproductive capacity as well as on the social-psychological potential for marginalization and despair.

Second, in investigating and documenting genocide under article 2 of the ICTR Statute, it is critically important to examine the character and impact of the propaganda on Tutsi women. The second-hand accounts available to us suggest that the general propaganda incited Hutu men to rape and, in many cases, kill Tutsi women through linking beauty and inaccessibility with treachery. [\(13\)](#)

You have indicated the intent of the OTP to charge rape and sexual violence as forms of genocide. We strongly urge you to do this quickly and effectively. As long as rape is separated from genocide, people - including your own staff - will continue to treat it as less important than killing and therefore justifiably ignored. In fact, the testimonies of women of which we are aware tell a different story; that those who survive the genocide suffer continuously and inefably from the memory and impact of a combination of atrocities - from having witnessed the genocide itself, from having lost family and members of the community, and from being raped and otherwise tortured or mutilated and left to live. It is very important to justice and the healing process that the ICTR recognize sexual violence as genocidal acts.

(c) Enslavement

Sexual and other gender violence are also chargeable as enslavement under article 3(iii) of the Statute, given that they are part of an overall attack that meets the criteria of crimes against humanity. For example, the common practice during the genocide of taking Tutsi women as "temporary wives" collectively or individually is a slavery-like practice. If this is what is meant by reference to "sexual services" in the Akayesu indictment (para. 12A), it could be charged as enslavement. Forcing, under threat of death, women to be temporary wives providing both sexual and domestic services is, in the terms of article 1(1) of the 1926 Slavery Convention, [\(14\)](#) placing the individual women in "the status or condition of a person over whom any or all of the powers attaching to the right to ownership are exercised." It also qualifies as a condition of "serfdom" under article 1(b) of the Supplementary Convention on the Abolition of Slavery. [\(15\)](#) It does not matter whether the status was initiated by agreement and, in Rwanda, any "agreement" or acquiescence to such temporary marriage was given on fear of death. The UN Special Rapporteur on Violence Against Women, Its Causes and Consequences has recognized that the "comfort women" who were forced into prostitution by the Japanese Army during World War II were subjected to sexual slavery. While this was a highly "industrialized" form of sexual slavery, the seemingly less organized nature of the practice in Rwanda does not change its essential character as a slave-like practice. [\(16\)](#)

Conclusion

There is no question that the challenges faced by the ICTR, Rwandese women's groups and individuals, and the international community to bring about justice and healing in Rwanda are formidable and urgent. The Coalition applauds the recent initiatives announced by the OTP with respect to sexual violence against women during the genocide, at the same time as we will continue to urge you to press forward in this historic endeavor.

Notes

1. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U. N. GAOR, 39th Sess., at 3, U.N. Doc. A/RES/39/46 (1984). [Back](#)
2. Because we are concerned here with the crime of torture committed in context of war and governed by humanitarian law, the CAT's criteria of state common instigation or acquiescence, applicable to holding a state responsible under human rights does not apply. The substantive definition of torture contained in the CAT has been recognized as applicable under humanitarian law. See International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, article 75(a)(ii), at 873 (citing the General Assembly's 1975 Declaration on Torture which expanded impermissible purposes by adding punishment and intimidation and noting the General Assembly's 1984 vote adopting the Convention Against Torture, which was described at that time as "without binding force of law, [but] nevertheless hav[ing] a real moral value."). [Back](#)
3. The current Special Rapporteur on Torture, Mr. Nigel Rodley, followed the lead of the former Special Rapporteur on Torture, Mr. Peter Kooijmans. Quoting from Mr. Kooijman's 1992 report, Mr. Rodley stated that "since it was clear that rape or other forms of sexual assault against women in detention were a particularly ignominious violation of the inherent dignity and the right to physical integrity of the human being, they accordingly constituted an act of torture." E/CN.4/1995/34, para. 16, quoting E/CN/1992/SR.21, para. 35. In classifying rape as torture, the Special Rapporteur includes rape with beatings, electric shock, sleep and food deprivation, and death threats, with no distinction being made between these other forms of torture and rape. E/CN.4/1997/7 10 January 1997. The Special Rapporteur on Violence Against Women stated that "[r]ape is often used as an instrument of torture" E/CN.4/1995/42, 22 November 1994, paras. 51, 173-174. [Back](#)
4. Eur. Ct. Hum. Rts. 57/1996/676/866, 25 September 1997 (relevant case excerpts attached). [Back](#)
5. Ibid. At para. 83 the Court stated: "Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally." The Court therefore concludes in para. 86 that "... the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture under the Convention. Indeed the Court would have reached this conclusion on either of these grounds taken separately." [Back](#)
6. Report on the Situation of Human Rights in Haiti, OEA/Ser.L/V.II.88, para. 134 (1995). [Back](#)

7. J. Herman Burgers and Hans Danelius, *The United Nations Convention Against Torture - A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 41 (1988). [Back](#)

8. The Inter-American Commission on Human Rights recognized rape and sexual violence against women in Haiti as forms of "reprisal, intimidation, terror, and degradation of women", (OEA/Ser.L.V.II.88, Doc. 10 rev., February 9, 1995, para. 128), and considers that "rape represents not only inhumane treatment that infringes upon physical and moral integrity under Article 4 of the [Inter-American] Convention [to Prevent and Punish Torture], but also a form of torture in the sense of Article 5(2) of that instrument" (para. 133, OEA/Ser.L.V.II.88). [Back](#)

9. Commission on Human Rights Resolution 1994/37, quoted in E/CN.4/1995/34, para. 15. [Back](#)

10. E/CN.4/1995/34, para. 18. [Back](#)

11. OEA/Ser/L/V.II.88, para. 134 [Back](#)

12. Human Rights Watch and Federation Internaitonale des Ligues des Droits de l'Homme, *Shattered Lives: Sexual Violence During the Rwandan Genocide and its Aftermath*, 62-65 (September 1996). [Back](#)

13. *Ibid.*, at 15-19. [Back](#)

14. Slavery Convention, 60 LNTS 253, entered into force March 9, 1927. [Back](#)

15. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and practices Similar to Slavery, 226 UNTS 3, entered into force April 30, 1957. In article 1(b), "serfdom" is defined as "the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person to render some determinate service to another person, whether for reward or not, and is not free to change his [or her] status". [Back](#)

16. Special Rapporteur on Violence Against Women, Its Causes and Consequences, Report on the Mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the Issue of Military Sexual Slavery, E/CN.4/1996/53/Add.1 (4 Jan. 1996) at, for example, paras. 36, 42 and 58.

**IN THE TRIAL CHAMBER OF THE
INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA**

**RE: The Prosecutor of the Tribunal against Jean-Paul
Akayesu**

**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**

The undersigned women's human rights legal scholars and non-governmental organizations, who have worked to ensure recognition of and accountability for violence against women in the UN system, and, in particular, to guarantee gender justice in the operation of the International Criminal Tribunals, hereby request, pursuant to Tribunal Rule 74, leave to file the following brief amicus curiae:

Introduction

1. Amici are concerned that the International Criminal Tribunal for Rwanda fulfill its mandate to ensure the prosecution of serious violations of humanitarian and human rights law including rape and other serious forms of sexual violence which comprise war crimes, crimes against humanity and genocide within the competence of the Tribunal under Articles 2-4 of the *Statute for the International Tribunal for Rwanda*, (Statute).

2. Amici recall that the full and fair prosecution of sexual violence, required by the Tribunal Statute and Rules, is also within the mandate of the community of nations forged at the 1993 World Conference on Human Rights. The Vienna Declaration and Programme of Action states that "the human rights of women and the girl-child are an inalienable, integral, and indivisible part of universal human rights" and that gender issues are a "priority" issue and must be integrated in all aspects of the functioning of the human rights system.

Reference: *Vienna Declaration and Programme of Action* para.18, 38. General Assembly, World Conference on Human Rights, U.N. Doc. A/Conf. 157/23 (12 July 1993) paras. 18, 38.

3. Accordingly, amici call upon the Trial Chamber to exercise its supervisory authority, under the Tribunal Statute and the Rules, to

* call upon the Prosecutor to amend the indictment against Jean-Paul Akayesu to charge rape or other serious acts of sexual violence as crimes within the competence of the Tribunal;

* evaluate whether to supplement the record on such charges either through calling its own witnesses pursuant to Tribunal Rule 98, or through calling upon the Prosecutor to consider supplementing the investigation and/or evidence in this case.

* examine why none of the indictments issued thus far have included charges of rape or other forms of sexual assault, despite reliable reports documenting widespread rape and other forms of sexual violence committed by the Hutu as part of the widespread and genocidal violence, and, thereby, indicating the availability of probative evidence, --

4. This brief will demonstrate (1) that the Trial Chamber has the authority and responsibility to ensure that rape and other forms of sexual violence be properly charged and presented at trial and (2) that a factual and legal basis exists to warrant its intervention in this regard.

5. This intervention is precipitated by concern that the Prosecutor has not charged rape and sexual violence, despite testimony in the record, and other documentation indicating the availability of other probative evidence, that sexual violence was part of a campaign of violence constituting genocide, crimes against humanity, and war crimes under Articles 2, 3, and 4 of the Statute; and despite evidence that Akayesu is criminally responsible for this violence under Article 6(1) and 6(3) of the Statute.

6. Amici rely herein on the testimony and evidence presented thus far in the Akayesu trial, as well as the documentation carried out by human rights investigators, indicating that further probative evidence is available to prove these charges. With respect to the record already made, amici are at a disadvantage because of their inability to obtain and examine the full transcript of the trial to date. Given reports that the Prosecution's case may be drawing to a close, amici have chosen to submit this brief, acknowledging our inability to examine the entire record, rather than wait and risk the possibility that amendment of the indictment and supplementation of the record, if that is required, would be barred.

I: The Trial Chamber Has Supervisory Authority to Correct the Failure of the Prosecutor to Charge and, if Necessary, Prove Rape and Other Sexual Violence

7. Article 1 of the Statute of the Tribunal states that the Rwanda Tribunal "shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States

between 1 January 1994 and 31 December 1994. . . in accordance with the provisions of the present Statute."

8. In order to accomplish this purpose, the Statute confers upon the Prosecutor the duty to investigate charges, prepare indictments and prosecutions, and upon the Trial Chamber, the responsibility to hear the cases presented and consider appeals. In so doing, the Statute and the Rules of Procedure promulgated by the Trial Chamber pursuant to the Statute, give the Chamber both explicit and inherent authority to oversee as well as supplement the work of the Prosecutor in order to ensure that the mandate of the Tribunal be fully effectuated.

Reference: *Statute*, Article 10,17
Rules of Procedure, Rule 47(A).

9. For example, the Rules of Procedure contemplate the role of the Judge or the Trial Chamber to extend beyond simply hearing and deciding upon evidence adduced at trial. Rather, a Judge or the Trial Chamber, on its own motion, may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

Reference: *Rules of Procedure*, Rule 54.

10. The Rules of Procedure also authorize the Judges of the Trial Chamber to order either party to produce additional evidence or it may, itself summon witnesses or order their attendance.

Reference: *Rules of Procedure*, Rule 98.

11. Respect for the principles of fairness and avoidance of a miscarriage of justice are at the root of the authority of the Tribunal and the Trial Chamber.

Reference: *Rules of Procedure*, Rule 5.

12. As will be set out in greater detail below, the failure to amend the indictment of the defendant Akayesu, where there has been clear evidence at trial and further evidence is indicated by the available documentation, produces unfairness and constitutes a miscarriage of justice within the general mandate of the Tribunal to prosecute persons responsible for serious violations of humanitarian law since:

(1) . . .The grave violations of human rights suffered by the women who were raped in the Taba Commune under the authority of Akayesu are ignored;

(2) . . .Jean Paul Akayesu is given effective impunity for the rapes which were committed in his Commune;

(3) . . .The community, and particularly the women of the community, are denied vindication and the satisfaction that there has been a fair trial of the issue and that justice has been done;

(4) . . .The failure by the Prosecutor to pursue investigating and convicting Akayesu on charges of rape in the face of testimony of rape at trial leaves the impression that the Tribunal does not consider rape and sexual violence to be as important an offence as other offences and is thereby discriminatory to women; and

(5) . . .Finally, since justice must be considered to have two aspects: a corrective and a normative aspect. The absence of charges of rape in the prosecution of Akayesu, therefore, not only fails to redress the harms done to women raped under Akayesu's ostensible control but also fails to normatively establish that rape is egregious and unacceptable conduct.

13. Except by way of objection from an amicus curiae or by proprio motu of a Judge or Trial Chamber, acts of the Prosecutor which are in violation of the Rules and which constitute a miscarriage of justice, but which benefit the Accused, would go unremedied.

14. Having regard, therefore, to the mandate of the Tribunal to bring to justice those persons who have violated international humanitarian law and the inherent supervisory authority that flows from this mandate; to the authority of the Judges to make declarations with respect to non-compliance with the Rules; and to the injustice which will result if Akayesu is not prosecuted on charges of rape, it is submitted that the Statute and the Rules of Procedure permit the Trial Chamber presiding over the trial of Jean Paul Akayesu to remedy acts which would result in the miscarriage of justice and to call upon the Prosecutor to add charges of rape to the indictment. Any prejudice which such an amendment would cause to the accused can be remedied by re-calling witnesses "H" and "J" and any other pertinent witnesses, if the defendant should so request.

15. It is also submitted that a Judge or the Trial Chamber has the power to supplement the record on these charges, if necessary, either through calling upon the Prosecutor to undertake further investigation and/or submission of evidence or through calling witnesses proprio motu.

II: The Prosecution of Rape and other Forms of Sexual Violence is within the Subject-Matter Jurisdiction of the Tribunal

16. The International Tribunal for Rwanda is broadly empowered to prosecute persons who have criminal responsibility for genocide, crimes against humanity, and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.

Reference: *Statute*, Articles 1, 2, 3, 4 and 6.

17. In the Statute, rape is explicitly cited as a crime against humanity and a serious violation of Article 3 common to the Geneva Conventions. It also constitutes torture and cruel treatment.

Reference: *Statute*, Articles 3(g)(f) and 4(a)(e).

18. Other forms of sexual violence fall within the purview of the Statute. For example, the mutilation of the genitalia and breasts of Tutsi women and forcing them to walk naked in the streets constitute torture and cruel treatment and are outrage to the personal dignity of the women.

Reference: *Statute*, Articles 3(f) and 4(a) and (e).

19. Rape and other forms of sexual violence, including killing pregnant women, also constitute genocide where the requirements of Article 2 are met. In the case of Rwanda, rape and sexual violence were an integral part of the genocidal campaign, inspired by hatred of Tutsi women, designed to result in death or to destroy a woman from a physical, mental or social perspective and her capacity to participate in the reproduction and production of the community.

Reference: *Statute*, Article 2(2)(a)-(d).

20. The Tribunal, therefore, is unquestionably mandated to prosecute persons who have raped or been responsible for the rape of, or other sexual violence against, Tutsi women and targeted Hutu women.

III. The Pervasive Occurrence of Rape in Rwanda and in the Taba Commune

21. Subject to the limitations discussed in regard to the trial transcripts and confidential information available to the Prosecutor and the Trial Chamber, the following facts are identified based on excerpts of the testimony from Jean-Paul Akayesu's trial as well as the referenced documentation indicating the availability of further probative evidence.

22. Rape and other forms of sexual violence were an integral and pervasive part of the widespread genocidal violence committed against Tutsi women in Rwanda from January 1994 to December 1994.

Reference: *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994)*, U.N. SCOR, 49th Sess., Annex, at 3, U.N. Doc. S/1994/1405 (1994).

Rwanda: Death, Despair and Defiance, African Rights, September 1994.

Report on Assignment to Rwanda (12 June to 24 July 1995), Maricela Daniel, Community Services Coordinator, UNHCR, Kigali.

Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath, Human Rights Watch/Africa Human Rights Watch Women's Rights Project/ Federation Internationale des ligues des Droits de l'Homme, September, 1996.

Rwanda: Killing the Evidence: Murder, Attacks, Arrests and Intimidation of Survivors and Witnesses, African Rights, April 1996.

The Genocide in Rwanda: Sexual Abuses and Violence against Rwandan Women, Kalliope Migirou, European Union Field Officer/ UN Human Rights Field Operation in Rwanda, presented at an International Conference on Violence, Abuse and Women's Citizenship, Brighton, UK, November 1996.

23. Specifically, the Prosecutor submitted some evidence and it has been otherwise documented that the Taba commune, in the prefecture of Gitarama, was one site of pervasive sexual violence committed against Tutsi women during the period between January 1994 and December 1994.

Reference: Testimony of Witness "H", Official English Version of the Transcript in *The Matter of the Trial of Jean-Paul Akayesu*, for hearing dates March 6, 1997 and March 7, 1997.

Testimony of Witness "J", Official English Version of Transcript unavailable to amici. Reuters N. American Wire, 1/27/97.

Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath, Human Rights Watch et al.

24. Indeed, the Prosecutor stated in his opening that the rape of young girls and women formed a part of the genocidal and widespread violence by the Hutu population against the Tutsi population in Rwanda.

"Our evidence will show that in 1994 in Rwanda, there was systematic and widespread murder, imprisonment, torture, persecution and sexual assault and mutilations and infliction of other inhumane acts against the Tutsi population and moderate Hutus on political and ethnic grounds".

Reference: Unofficial English Translation of *The International Criminal Tribunal For Rwanda* in the *Matter of the Trial of Jean-Paul Akayesu*, held on January 9, 1997, p. 39, lines 8-15.

IV. Evidence of Rape in the Taba Commune Presented in the Akayesu Trial

25. Witness "J" testified that she had witnessed the rape of her six-year-old daughter by three Hutu men when they came to kill her father.

Reference: Reuters North American Wire, January 27, 1997.

26. Witness "H" testified to both having been raped and having witnessed the rape of other women. Witness "H" was hiding in a banana plantation near her house when a group of attackers blew whistles and chased her and her family from their hiding places. After being discovered, Witness "H" was taken into a sorghum field and raped.

Reference: Official English Transcript of the Testimony of Witness "H" heard on March 6, 1997, p. 8
Official English Transcript of the Testimony of Witness "H" heard on March 7, 1997, p.16, 21

27. Witness "H" also testified that women who had taken refuge in the Bureau Communal, under the control of Akayesu, were held prisoner there and beaten and raped. In particular, Witness "H" testified that she "personally knew three women being raped and that she could remember the names of approximately ten of the men who committed the rapes. Some would be taken to the bush area nearby, or they would do it there on site. There were not afraid of anything."

Reference: Official English Transcript of the Testimony of Witness "H" heard on March 7, 1997, pp. 16-24.

28. Based on the aforesaid testimony, there is evidence in the trial record, and available through human rights reports, that in the Taba Commune, rape and other sexual violence occurred on a routine and notorious basis in violation of humanitarian law and as part of a genocidal campaign to destroy the Tutsi population. Because of the unavailability of the entire record, amici are unable to evaluate whether there is already sufficient probative evidence in the record that rape was widespread so as to constitute a crime against humanity in the Taba Commune; however, the documentation of rape referenced above, indicates the availability of additional testimony and evidence as to both the significance of rape in the massive and genocidal violence committed in Rwanda and in the Taba Commune itself.

V. Jean-Paul Akayesu's Criminal Responsibility for the Rape of Tutsi Women in Taba

29. Under Article 6 of the Tribunal Statute, Akayesu can be held criminally liable for the sexual violence against Tutsi and some Hutu women, if it is proven that he

(1) . . .planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of [the crimes of sexual violence encompassed] . . .in articles 2 to 4 of the present Statute...;

(2) . . .[as a superior, he] knew or had reason to know that the subordinate was about to commit such acts or had done so and [as] the superior [, he] failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

30. While amici unfortunately do not have the full record of the trial evidence available, based on the Indictment, the Prosecutor's opening statement, and the record available, it appears that evidence has been submitted to establish the following facts probative of Akayesu's criminal responsibility under Article 6:

a. The Taba commune, during the period between April 1993 and June 1994, was under the authority of Mayor (Bourgmestre) Jean-Paul Akayesu.

Reference: Description of the Accused, Indictment of the Prosecutor of the Tribunal against Jean Paul Akayesu, para. 3.

b. As Bourgmestre, Akayesu was one of the most powerful men in the commune of his region. He was charged with the performance of the executive functions and the maintenance of public order within the Taba commune. Akayesu had exclusive control over the communal police as well as any gendarmes at the disposition of the Taba commune. Akayesu was responsible for the execution of laws and regulations, and the administration of justice within the Taba commune and possessed powers beyond those prescribed by law.

Reference: Description of the Accused, Indictment of the Prosecutor of the Tribunal against Jean Paul Akayesu, para. 4.

Opening Address of the Prosecution on January 9, 1997, Unofficial English Translation, pp. 12, 29-30

c. Having regard to Akayesu's position of authority, Akayesu ordered Hutus in the Taba Commune to kill Tutsis and encouraged the Interhamwe from surrounding communes to come and incite violence.

Reference: Opening Address of the Prosecution, Unofficial English Translation, January 9, 1997, pp. 51, 52-53, 55, 56, 58.

Unofficial Translation of the Testimony of Witness "K", given on January 10, 1997, pp. 23-24 and 37, and on January 14, 1997, pp. 11-12.

Unofficial Translation of the Testimony of Witness "C" given on January 14, 1997, pp. 149-151.

d. Akayesu ordered the purchase and distribution of whistles and gave instructions for the use of the whistles in the hunt for hiding Tutsis [which whistles were referred to in the testimony of "H" referred to above.

Reference: Unofficial English Translation of the Testimony of Witness "K" heard on January 14, 1997, p.69, lines 7-10.

e. In addition, it is submitted that Akayesu's incitement of Hutus to murder Tutsi women, including pregnant women, foreseeably resulted in the rape of Tutsi women before their murder as well as apart from murder.

Reference: Opening Address of the Prosecution, January 9, 1997, Unofficial English Translation, p.55, lines 4-7.

f. As previously indicated, rape and other forms of sexual violence in the Taba Commune were openly committed, widespread, a matter of common knowledge; in addition, some of this violence against women occurred within the Bureau Communal under Akayesu's direct control.

Reference: para. 23 above.

g. Jean-Paul Akayesu was in charge of the Bureau Communal, was present at the Bureau Communal when at least some of these rapes occurred and, according to Witness "H", could have protected the women victims had he wanted to.

Reference: Official English Transcript of the Testimony of Witness "H" heard on March 6, 1997, pp. 13-14.
Official English Transcript of the Testimony of Witness "H" heard on March 7, 1997, pp. 17-19 and 23.

h. Akayesu had the power, and prior to April 18, 1994 exercised his power, to prevent the massacre, and presumably the rape, of the Tutsis under his control and authority without any risk to himself. After April 18, 1994, Akayesu chose not to exercise his power in this manner and in fact encouraged Interhamwe from surrounding communes to come and incite violence.

Reference: Opening Address of the Prosecution, Unofficial English Translation, pp. 51, 52-53, 55.
Unofficial Translation of the Testimony of Witness "K" given on January 10, 1997, pp. 17, 23-24 and 37, and on January 14, 1997, pp.-12.
Unofficial Translation of the Testimony of Witness "C" given on January 14, 1997, pp. 149-151.

i. In the words of Witness "H" when asked by Judge Aspegren as to whether Akayesu as Bourgmestre could have stopped the rapes:

"Yes, he could stop what was happening...I think that he could have stopped these events. He didn't even try."

Reference: Official English Transcript of the Testimony of Witness "H" heard on March 7, 1997, pp. 23-24.

31. In sum, amici cannot purport to judge whether the evidence in the record is sufficient to establish the guilt of Jean-Paul Akayesu for rape and other sexual violence in the Taba Commune under all the pertinent articles. It is, however, submitted that based on the testimony adduced and the evidence suggested by the available documentary evidence, there is unquestionably sufficient evidence before the Prosecutor and the Trial Chamber to prosecute Jean-Paul Akayesu on charges of rape and to warrant further presentation of evidence regarding rape and sexual violence as a war crime, crime against humanity and as an instrument of genocide.

VI. Failure of the Prosecutor to Fulfill its Duty to Prosecute Jean Paul Akayesu on Charges of Rape

32. The Prosecutor is responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in Rwanda between 1 January 1994 and 31 December 1994.

Reference: Statute, Article 15

33. Having regard to the documentary evidence cited above and, most importantly, the evidence of witnesses "H" and "J", one of whom was raped by Hutu militia and both of whom witnessed rapes committed by Hutu militia in the Taba commune in which Akayesu was responsible for maintaining order, the Prosecutor has evidence that a prima facie case exists to prosecute Akayesu on some charges of rape.

34. On the basis of the evidence of witnesses "H" and "J", on the documented cases of rape in the Taba commune and the available evidence concerning Akayesu's criminal responsibility for these acts of sexual violence, it is submitted that the Prosecutor should, as provided for by the Statute, seek leave of the Trial Chamber to add charges of rape to Akayesu's indictment.

Reference: Statute of the Tribunal, Article 17
Rules of Procedure, Rule 47 and Rule 50.

VII. The Failure to Investigate and Prosecute Rape and Sexual Violence Against Women Generally

35. Unfortunately, the absence of a charge of rape in the Akayesu indictment is not unique. Despite the widespread accounts of rape throughout Rwanda during the period of January 1, 1994 and December 31, 1994 referenced above, not a single indictment

presented to and confirmed by the Trial Chamber thus far has charged an accused with responsibility for rape or other forms of sexual violence.

36. The report by Human Rights Watch/Women's Rights Project documents and analyses the problems in the methodology and staffing of the Prosecutor's office in Kigali which contribute to the failure to charge sexual violence. The Report also identifies a range of steps that need to be taken to reverse this course.

Reference: *Shattered Lives*, para. 23 above, p. 8.

37. It is within the inherent supervisory authority of the Trial Chamber, to inquire in the context of the indictments presented to it whether the Prosecutor has established the means and the personnel to effectively investigate and prosecute sexual violence charges.

VIII. The Effect of the Failure to Prosecute Jean-Paul Akayesu for Rape

38. The Vienna Declaration and Programme of Action recognized that gender violence is a grave and pervasive violation of human rights and that gender issues must be fully integrated into all aspects of the functioning of the human rights system. Punishment of and accountability for violence against women have become, in recent years, a priority within the UN human rights system.

Reference: *Vienna Declaration and Programme of Action, General Assembly, World Conference on Human Rights*, UN. Doc. A/Conf. 157/23 (12 July 1993) paras. 18, 38.
Declaration on the Elimination of Violence Against Women, General Assembly, 48th Sess, U.N. Doc. A/Res/48/104 (23 February 1994)
Recommendation No. 19 of the Committee to End Discrimination Against Women: Violence Against Women, in *Compilation of General Comments and Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.2 (29 March 1996).

39. The failure of the Tribunal to prosecute Jean-Paul Akayesu on charges of rape in the face of clear evidence that rapes occurred in the Commune under his control raises questions about the commitment of the Tribunal to the elimination of gender-based violence as well as the protection and advancement of the human rights of women.

40. In addition, the failure to include charges of rape in the first case before the Tribunal in Arusha, despite there being evidence of rape and criminal responsibility in relation to the accused, sets an unwelcome precedent for the prosecutions to come and discourages women witnesses from participating in the further investigations and prosecutions of the Tribunal. It also sends a message to the Rwandan women who have survived and confront, on a daily basis, the devastating effects of the genocide, including the sexual violence, on their physical, mental, social and economic well-being,

that these atrocities are not sufficiently grave to warrant the attention of the Tribunal. In so doing, the Tribunal denies to these women equal justice and deprives them of the recognition and vindication of their suffering that is an essential component of their ability to rebuild their lives and their self-esteem.

41. Finally, the failure of the Prosecutor of International Criminal Tribunal for Rwanda to prosecute rape and other sexual violence in the case of Akayesu, and in every other indictment which has been confirmed thus far, is an unfortunate departure from the precedent set by the Prosecutor and International Criminal Tribunal for the Former Yugoslavia which, after initial criticism from a number of the undersigned amici curiae, have taken leadership in ensuring the prosecution of rape and other forms of sexual violence.

Reference: see for example, The Prosecutor of the Tribunal v. Gagovic et al; The Prosecutor of the Tribunal v. Meakic et al; and The Prosecutor of the Tribunal v. Tadic.

IX. Conclusion

42. In light of the above submissions of fact and law, it is respectfully submitted that the Tribunal should fulfill its mandate to prosecute those responsible for genocide and humanitarian law violations and to treat the abuses committed against men and women with an equal seriousness, by calling upon the Prosecutor to amend the indictment of Jean Paul Akayesu to charge him as follows:

- (1) for the rape of Tutsi women in Taba under Article 3(f),(g) and (h) of the Statute;
- (2) for the rape of Tutsi women in Taba under Article 4(a),(e) and (h) of the Statute;
- (3) for the mutilation of the genitalia and breasts of Tutsi women under Article 3(f) and Article 4(a) and 4(e) of the Statute; and
- (4) for parading Tutsi women naked in the streets under Article 4(a), (e),(h) and(i) of the Statute.

43. In addition, the Prosecutor should consider charging Akayesu with rape as an act of genocide pursuant to Article 2(2)(b), (c) and (d) of the Statute. The final report of the Commission of Experts recommended that: "...the Prosecutor explore fully the relation between the policy of systematic rape under a responsible command as a crime against humanity on the one hand, and such a policy as a crime of genocide on the other."

Reference: Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994), U.N. SCOR, 49th Sess., Annex, at 3, U.N. Doc. S/1994/1405 (1994) at p.29, para. 145.

Shattered Lives, para. 23 above.

Respectfully submitted,

- * AL-HAQ
- * ARAB WOMEN'S FORUM AISHA
- * ASIA WOMEN'S HUMAN RIGHTS COUNCIL
- * ASSOCIATION ALGÉRIENNE POUR LA PLANIFICATION FAMILIALE
- * ASSOCIATION DÉMOCRATIQUE DES FEMMES MAROCAINES
- * ASSOCIATION DES FEMMES JURISTES DU NIGER
- * ASSOCIATION INTERNATIONALE POUR LA DÉMOCRATIE EN AFRIQUE
- * ASSOCIATION IVOIRIENNE POUR LA DÉFENSE DES DROITS DES FEMMES
- * ASSOCIATION MAROCAINE DES DROITS DES FEMMES
- * ASSOCIATION TUNISIENNE DES FEMMES DÉMOCRATES
- * CENTER FOR CONSTITUTIONAL RIGHTS
- * CENTER FOR WOMEN'S GLOBAL LEADERSHIP
- * CITOYENS/CITOYENNES POUR UN RWANDA DÉMOCRATIQUE
- * COLLECTIF SÉNÉGALAIS DES AFRICAINES POUR LA PROMOTION DE L'ÉDUCATION RELATIVE À L'ENVIRONNEMENT
- * CONSEIL SUR LES DROITS DES FEMMES
- * ENDA
- * FEDERATION INTERNATIONALE DES LIGUES DES DROITS DE L'HOMME
- * GROUPE DE RECHERCHE FEMMES ET LOIS
- * INSTITUT AFRICAIN POUR LA DÉMOCRATIE
- * INTERNATIONAL CENTRE FOR HUMAN RIGHTS AND DEMOCRATIC DEVELOPMENT
- * INTERNATIONAL HUMAN RIGHTS LAW GROUP/ WOMEN'S RIGHTS ADVOCACY PROGRAM
- * INTERNATIONAL HUMAN RIGHTS PROJECT OF SUFFOLK UNIVERSITY LAW SCHOOL
- * INTERNATIONAL WOMEN'S HUMAN RIGHTS LAW CLINIC OF THE CITY UNIVERSITY OF NEW YORK SCHOOL OF LAW
- * JACOB BLAUSTEIN INSTITUTE FOR THE ADVANCEMENT OF HUMAN RIGHTS
- * LATIN AMERICAN AND CARIBBEAN WOMEN'S HEALTH NETWORK
- * LAWYERS' INTERNATIONAL FORUM FOR WOMEN'S HUMAN RIGHTS
- * LIGUE IVOIRIENNE DES DROITS DE L'HOMME
- * MADRE
- * MOUVEMENT BURKINABE DES DROITS DE L'HOMME ET DES PEUPLES
- * NATIONAL COUNCIL OF AFRICAN WOMEN
- * PERMANENT ARAB WOMEN'S COURT TO RESIST VIOLENCE AGAINST WOMEN
- * PRO-FEMMES/TWESE HAMWE (35 MEMBER-NGOS:list in annex)
- * RASSEMBLEMENT ALGERIEN DES FEMMES DEMOCRATIQUES
- * RASSEMBLEMENT DÉMOCRATIQUE DES FEMMES DU NIGER
- * RURAL YOUTH ASSOCIATION

- * TANZANIA GENDER NETWORKING PROGRAMME
- * UNION INTERAFRICAINNE DES DROITS DE L'HOMME
- * UNITED METHODIST OFFICE FOR THE UNITED NATIONS
- * VIMOCHANA- FORUM FOR WOMEN'S RIGHTS
- * WOMEN IN LAW AND DEVELOPMENT IN AFRICA
- * WOMEN'S INTERNATIONAL LEAGUE FOR PEACE AND FREEDOM
- * WOMEN LIVING UNDER MUSLIM LAWS
- * WOMEN REFUGEES PROJECT, CAMBRIDGE-SOMERVILLE LEGAL SERVICES
- * WORKING GROUP ON ENGENDERING THE RWANDA TRIBUNAL
- * WORLD UNIVERSITY SERVICE

As Amici Curiae.

Annex: NGO-members of Pro-Femmes/Twese Hamwe

AFCF, AFER, AGR, AHO UMWAGA UTARI, AMALIZA, ARFEM, ARBEF, ARTC-F, ARDS, ASOFERWA, AVEGA-AGAHOZO, BENIMPUHWE, BENISHYAKA, CARITAS-UMUHOZA, CCOAIB, CLUB MAMANS SPORTIVES, DUKANGUKE, DUTERIMBERE, FONDATION TUMURERE, GIRANEZA, GIRIBAMBE, HAGURUKA, ICYUZUZUO, ISANGANO-OPEC, JOC-F, RESEAU DES FEMMES OEUVRANT POUR LE DEVELOPPEMENT RURAL, RWANDA RW'EJO, RWHO, SERUKA, SOLIDAIRES BENURUGWIRO, SOS RAMIRA, SWA-IHUMURE, UMUSHUMBA MWIZA, URUMULI RW'URUKUNDO, URUSARO.

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IN THE TRIAL CHAMBER OF THE
INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

RE: PROSECUTOR V. ANTO FURUNDZIJA

CASE No. IT-95-17/1-T

**AMICUS CURIAE BRIEF
RESPECTING THE DECISION AND ORDER OF THE TRIBUNAL OF 16 JULY 1998
REQUESTING THAT THE TRIBUNAL RECONSIDER ITS DECISION
HAVING REGARD TO THE RIGHTS OF WITNESS "A" TO
EQUALITY, PRIVACY AND SECURITY OF THE PERSON,
AND TO REPRESENTATION BY COUNSEL**

The undersigned are women's human rights legal scholars and non-governmental organisations who are working to ensure the substantive and systemic recognition of and accountability for violence against women in the United Nations system and, in particular, to guarantee gender justice in the operation of the International Criminal Tribunals for the Former Yugoslavia and Rwanda. The undersigned have extensive expertise in human rights and humanitarian law, international and domestic criminal law and the gendered aspects of criminal law and criminal prosecutions. The undersigned also have considerable and valuable knowledge and expertise relating to the criminal trial process and its relationship to women's inequality.

The undersigned hereby respectfully request, pursuant to Tribunal Rule 74, leave to file the following Amicus Curiae Brief.

I. Introduction:

The Importance of this Amicus Curiae Brief to the Proper Determination of the Case.

This Amicus Curiae Brief relates to the Decision and Order of the Tribunal of 16 July 1998 in which the Tribunal ordered, with reference to the rights of the accused to a fair trial but without reference to the rights of Witness "A" to equality, privacy and security of the person, that the trial be re-opened and that Witness "A" be available for cross-examination "on any medical, psychological or psychiatric treatment or

counselling received by Witness “A””. The Tribunal also ordered that the Prosecutor “disclose any documents in its possession relating to the Material and relevant to the issue of any medical, psychological or psychiatric treatment or counselling received by Witness “A” after May 1993”.

2. The Amici recall that the Trial Chamber held in its *Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses* in the *Prosecutor v. Dusko Tadic* that the Tribunal is expected to comply with recognized standards of fundamental human rights and the Tribunal has a duty pursuant to Rules 75 and 79 of the ICTY Rules of Procedure to take measures to protect victims and witnesses. The rights and interests of victims and witnesses in this regard must be balanced against, but not subsumed by, the rights and interests of the accused to a fair trial. In its Decision, the Trial Chamber ruled that “a fair trial means not only fair treatment to the defendant but also to the prosecution and to the witnesses”.

Reference: *Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses* in the *Prosecutor v. Dusko Tadic*, paragraph 33 (10 August 1995) paragraphs 33 and 55.
Rules of Procedure of the ICTY, Rules 75, 79

3. In response to a motion by the Defence in this case, the Tribunal has ordered the production of potentially highly discriminatory, intimate and prejudicial confidential information regarding Witness “A”, the disclosure of which may cause profound harm to Witness “A” and to the criminal trial process. The Amici are concerned that the Tribunal failed to consider the motion by the Defence in this matter with due regard to the duties of the Tribunal as expressed in its Decision in Tadic referred to above.

Reference: *Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses* in the *Prosecutor v. Dusko Tadic*, paragraph 33 (10 August 1995) paragraphs 33 and 55.
Rules of Procedure of the ICTY, Rules 70(f), 75, 96

4. The Amici are, in particular, concerned that:

(a) The Trial Chamber was not alerted to nor did it consider the discriminatory assumptions and attitudes toward women victims of sexual assault which underlie requests for disclosure of otherwise irrelevant confidential information in cases of sexual assault. These assumptions may underlie the Defence request

in this case and may have unwittingly informed the Tribunal's Decision and Order of 16 July 1998. Further, the Trial Chamber was not alerted to nor did it consider the fact that the effort by Defence counsel to obtain confidential information is historically one tactic in a long line of tactics based upon discriminatory attitudes toward women and rejected by this Tribunal in Rule 96;

- (b) The Trial Chamber arrived at its Decision and Order without hearing substantive evidence or argument with respect to the balancing of the rights of the accused with the international principles concerning the rights of Witness "A" to equality, privacy and security of the person. Further the Trial Chamber arrived at its decision without the benefit of Witness "A" being provided with the opportunity to have counsel represent her rights and interests in maintaining the confidentiality of the information to which she will be subject to cross-examination. Since the interests of Witness "A" are distinct from both those of the defence *and* the prosecutor, she should have been given the opportunity to select independent representation to put her rights properly before the Tribunal;
- (c) The Trial Chamber was not presented with evidence and therefore did not consider in its Decision and Order the harm to victims which would result in the disclosure of intensely personal records and in the broad cross-examination of witnesses in respect of their medical, psychological and psychiatric records. Nor did the Trial Chamber consider in its Decision and Order the extent to which its ruling might affect the participation of victims in bringing perpetrators to justice before the ICTY and the Tribunal's mandate pursuant to Rule 75 of the ICTY Rules of Procedure to protect victims and witnesses;
- (d) The Trial Chamber arrived at its Decision and Order without considering evidence regarding the societal interest in protecting the relationship between victims of trauma and their counsellors and without considering explicit United Nations statements stressing the importance of counselling and treatment in the psychological and emotional healing process for victims of sexual assault; and
- (e) The Decision and Order of 16 July 1998 was arrived at by a procedure which is inconsistent with leading national jurisdictions that have directly considered the issue of disclosure of confidential records and the necessity to protect the rights of the witness to the confidentiality of those records. In addition, the Trial

Chamber's Decision and Order was considerably broader than would be acceptable in these jurisdictions.

5. In accordance with the above concerns, this Brief will submit that: (1) gender discrimination fundamentally informs requests for disclosure of confidential records in cases of sexual violence; (2) requests for disclosure are most often founded upon irrelevant and prejudicial rape myths and discriminatory attitudes toward women who are victims of sexual assault; (3) the cross-examination of survivors of sexual violence risks unwarranted and severe intimidation and revictimization of these witnesses, thus jeopardizing both their mental and physical integrity; and (4) the disclosure of counselling records profoundly affects (a) women's equal rights to access to justice; and (b) the goal of bringing perpetrators of sexual violence in armed conflict before the two International Criminal Tribunals.

6. As a result of the above concerns, the Amici respectfully urge the Tribunal to reconsider and rescind its Decision and Order of 16 July 1998 and to:

- (a) hold a hearing, taking into account Rules 75, 70(f) and 96(ii), prior to the commencement of the cross-examination of Witness "A" in order to consider the rights of Witness "A" to equality, privacy, security of the person and to witness protection;
- (b) ensure that Witness "A" is fully informed of her rights to equality, privacy and security of the person and to protection as a witness;
- (c) appoint Witness "A" and the holder of the records, Medica, counsel if they wish to be represented.

II. Understanding Discrimination against Women in the Prosecution of Sexual Violence

a. Sexual Violence and Sexual Inequality

7. Sexual violence is a crime which is predominantly committed against women, including during times of armed conflict. Moreover, the violence is committed against these women because of their gender, in addition to their ethnic origin or religion. Although sexual violence in armed conflict is often a tool used to subordinate a group of

people, it is *in every case* a means of subjugating, objectifying and dehumanizing women. For this reason, the Amici have argued before the ICTR and the ICTY that a failure by the Tribunals to respect the dignity and autonomy of victims of sexual violence amounts to a denial of equal justice to women. Such a failure deprives women, in this case women from the former Yugoslavia, of the recognition and vindication of their suffering that is an essential component of their ability to rebuild their lives and their self-esteem on a foundation of equality and dignity.

Reference: Amicus Curiae Brief of the Coalition for Women's Rights in Conflict Situations submitted to the International Criminal Tribunal for Rwanda in the case of the *Prosecutor v. Jean-Paul Akayesu*; Amicus Curiae Brief submitted by Rhonda Copelon, Felice Gaer, Jennifer Green and Sara Hossain in the matter of protective measures for victims and witnesses in the case of the *Prosecution v. Dusko Tadic*.

b. The Tribunal's Duty to Respect and Consider the Equality Rights of Witnesses

8. The Amici respectfully submit that prior to taking further evidence from Witness "A" in this matter, the Tribunal consider whether the taking of this evidence violates international principles concerning the equality rights of Witness "A".

9. The Amici recall that the Trial Chamber held in its *Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses* in the *Prosecutor v. Dusko Tadic* that the Tribunal is expected to comply with internationally recognized standards of fundamental human rights. This would include the internationally recognized right of non-discrimination.

Reference: *Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses* in the *Prosecutor v. Dusko Tadic*, paragraph 33 (10 August 1995) paragraph 25

10. The rights of women to equality and to non-discrimination are guaranteed by numerous international instruments and customary international law.

Reference: Charter of the United Nations, Articles 1(3) and 55(c)
Universal Declaration of Human Rights, Article 2
International Covenant on Civil and Political Rights, Article 24
International Covenant on Economic, Social and Cultural Rights, Article 3

Convention on the Elimination of Discrimination Against Women,
Articles 2, 5
United Nations Declaration on the Elimination of Violence Against
Women
Declaration of Basic Principles of Justice for Victims of Crime and
Abuse of Power, paragraph 3, adopted by General Assembly
Resolution 40/34 (29 November 1985)
Geneva Convention Relative to the Protection of Civilian Persons in
Time of War, Article 3
Askin, Kelly Dawn, *War Crimes Against Women: Prosecution in
International War Crimes Tribunals* (1997: Kluwer Law
International, The Hague) at 230-231, 236.

11. It is clear in international law that non-discrimination principles are to be applied in international criminal trial processes. For example, non-discrimination clauses are found in all four Geneva Conventions. More recently, the Statute creating the International Criminal Court states that the application and interpretation of law by the Court must be consistent with internationally recognized human rights, “and be without any adverse distinction founded on grounds such as gender”, among other grounds.

Reference: Article 21, Rome Statute of the International Criminal Court, U.N. Doc. A/Conf.183/9 (17 July 1998).

12. In addition, the United Nations has undertaken to mainstream gender into all of its mechanisms:

“The equal status of women and the human rights of women should be integrated into the mainstream of United Nations system-wide activity. These issues should be regularly and systematically addressed through relevant United Nations bodies and mechanisms”.

Reference: Vienna Declaration and Platform of Action, para. 37
U.N. Doc. A/Conf. 157/23 (12 July 1993)

13. Having regard to the above international principles recognizing and guaranteeing the rights of Witness “A” to equality and non-discrimination and the Tribunal’s *Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses*, the Amici respectfully submit that the Tribunal is obligated to consider the disclosure of confidential information in the context of the equality rights of Witness “A” and, accordingly, is bound to reconsider its decision of 16 July 1998 before the commencement of cross-examination of Witness “A”.

Reference: *Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses in the Prosecutor v. Dusko Tadic*, paragraph 33 (10 August 1995) paragraph 25

c. Insidious Discrimination in the Criminal Trial Process: The Rape Myths

14. Efforts by defence counsel to obtain confidential records and to cross-examine witnesses on these records is one of the latest in a long history of discriminatory practices used by defence counsel in rape trials. The Rules of this Tribunal, in particular Rule 96(ii) , but also Rules 70(f) and 75 are designed to prevent such discriminatory practices. These Rules should be applied in this case to prevent the discriminatory treatment of women survivors of sexual violence, in this case Witness "A".

Reference: Rules of Procedure of the ICTY, Rules 70(f), 75 and 96(ii)

15. The Rules in the ICTY statute, the academic literature, domestic legislation and the highest levels of national courts have recognized that the prosecution of sexual violence against women has been fraught with pervasive and institutionalized gender discrimination.

Reference: Rules 70(f), 75 and 96 of the Rules of Procedure of the ICTY; Consolidated Statutes of Canada, Criminal Code, S.C. 1997, ch. 30 (introduced as Bill C-46, "An Act to amend the Criminal Code (production of records in sexual assault proceedings)", ss. 278.1 to 278.91 entered into force May 12, 1997) (Hereafter referred to as Bill C-46); Evidence Act 1995, sections 126G-L, New South Wales Consolidated Acts (Australia) available at www.austlii.edu.au/legis/nsw/consol_act/ea199580/s126g.html; Draft Evidence (Confidential Communications) Amendment Bill 1998 (draft Bill to amend South Australia's Evidence Act of 1929); M. Torrey, "When Will We Be Believed? Rape Myths and the Idea of Fair Trial in Rape Prosecutions" (1991) 24 *University of California Davis Law Review* 1013; Bushby K. "Discriminatory Uses of Personal Records in Sexual Violence Cases" 9 *Canadian Journal of Women and the Law* 148 (1997); Kelly K., "You Must Be Crazy if You Think You Were Raped" 9 *Canadian Journal of Women and the Law* 178 (1997); Capoccia, R. "Piercing the Veil of Tears: The Admission of Rape Crisis Counselor Records in Acquaintance Rape" 68:1355 *Southern California Law Review* (1995); For legislation and jurisprudence in the United States, please refer to the citations contained in the Amicus Curiae Brief of the Center for Civil and Human Rights, Notre Dame University.

16. The differential and discriminatory treatment of women who appear before courts as complainants in sexual assault trials is based upon a foundational set of myths which have pervaded our “common sense” for centuries. These myths include the discriminatory presumptions that women and child victims of sexual violence are uniquely prone to lie, are susceptible to suggestion by others, and to hysteria and emotional upheavals which substantially call into question their credibility as witnesses.

Reference: See decisions of Canadian Supreme Court of Canada Justice L’Heureux Dubé in *R v. Seaboyer*, [1991] 2 S.C.R. 577 (dissent) and *R. v. O’Connor*, [1995] 4 S.C.R. 411 (dissent) [Note that, although Justice L’Heureux-Dubé was in dissent in each of these cases, her approach was incorporated into the amendments to the Canadian Criminal Code (supra), and the approach of the majority in *O’Connor* was rejected by Parliament] ; Women’s Legal Education and Action Fund, submissions to the Standing Committee on Justice and Legal Affairs, Review of Bill C-46, (March 1997); McCrimmon M., “Developments in the Law of Evidence: The 1991-92 Term, Truth, Fairness and Equality” 4 *Supreme Court Law Review* 225; Bushby, supra; Kelly, supra; Torrey, supra; Capoccia, supra.

17. In an attempt to overcome the unequal treatment of women victims of rape, it has been acknowledged by courts in Canada and other jurisdictions that, historically, the laws of criminal evidence and procedure which governed the conduct of sexual assault trials were informed by discriminatory myths and stereotypes about women. In particular, as explained by Supreme Court of Canada Justice L’Heureux-Dubé, rape myths have been used to undermine the credibility of victims of sexual violence:

Historically, a host of factors were deemed relevant to the credibility of complainants in sexual assault trials that did not bear on the credibility of witnesses in any other trial and which functioned to the prejudice of victims of sexual assault. In *Seaboyer*, I discussed at length the hurdles that complainants faced in sexual assault trials due to these unfounded presumptions. They include myths that deem certain types of women “unrapable” and others, because of their occupations or previous sexual history, unworthy of belief. These myths suggest that women by their behaviour or appearance may be responsible for the occurrence of sexual assault. They suggest that drug use or dependence on social assistance are relevant to the issue of credibility as to consent. They suggest that the presence of certain emotional reactions and immediate reporting of the assault, despite all of the barriers that might discourage such reports, lend credibility to the assault report, whereas the opposite reactions lead to the conclusion that the complainant must be fabricating the event. Furthermore, they are built on the suggestion that women, out of spite, fickleness or fantasy and despite the obvious trauma for victims in many, if not most, sexual assault trials, are inclined to lie about sexual assault. The net result has been that sexual assaults are, and continue to be, underreported and underprosecuted.

Reference: *R v. Osolin*, [1994] 4 S.C.R. 595 at 624-625 (per L'Heureux Dubé in dissent). See also the decisions of L'Heureux Dubé in *R v. Seaboyer*,*supra*, and *R. v. O'Connor*, *supra*.

18. Rule 96 of this Tribunal's Rules of Procedure recognizes the need to protect women who are victims of sexual violence from some of these discriminatory biases which pervade the prosecution of sexual assault. Rule 96 refers to "Evidence in Cases of Sexual Assault" and specifically states that no corroboration of the victim's testimony is required, consent shall not be allowed as a defence under certain circumstances, and that evidence of prior sexual conduct of the victim shall not be admitted into evidence.

Reference: E.g. Criminal Code sections 276-277, R.S.C. 1985, ch. C-46 (Canada), makes it impermissible to challenge the credibility of a complainant by adducing evidence of her sexual reputation. See also Crimes Act, 1900 ss. 409 (New South Wales, Australia) for a similar amendment. In the United States, Fed. R. Evid. 412 makes evidence of past sexual behaviour generally inadmissible in federal cases. See also State statutes: 725 Ill. Comp. Stat. Ann. 5/115-7 (1997), Mo. Ann. Stat. s. 491.015 (1996), N.J. Stat. Ann. ss. 2A:84A-32.1 (1996). See Bronitt, Simon and McSherry, Bernadette, "The Use and Abuse of Counselling Records in Sexual Assault Trials: Reconstructing the "Rape Shield" (1997) 8(2) *Criminal Law Forum* 259 at ft. 3.

19. After defence counsel were prohibited by evidentiary rules such as Rule 96 of the ICTY Rules of Procedure from attacking rape victims by raising rape myths concerning prior sexual history, defence counsel began to pursue other tactics. These tactics were grounded in dehumanizing and discriminatory attitudes toward women, especially by capitalizing upon the myth that women are inherently unreliable and prone to suggestion. Defence counsel have pursued this line of attack through requests for victims' counselling records, a matter that has received considerable attention in Canada.

Reference: Bronitt and McSherry, *supra*, at 260-262 and 265; Bushby, K. "Discriminatory Uses of Personal Records in Sexual Violence Cases" 9 *Canadian Journal of Women and the Law* 148 (1997); Evidence (Confidential Communications) Amendment Bill 1998 Report (South Australia) at 1-2: "In recent years, the law of sexual assault ... has been changed by Parliaments and, to a lesser degree the judiciary, to provide more protections for the complainants of sexual assault. Statutory provisions have [lists changes in laws with respect to prior sexual conduct evidence, consent, cross-examination in preliminary hearings, abolished

corroboration, and modified the recent complaint doctrine]...”. Not surprisingly, defence counsel have sought ways in which to circumvent these restrictions. One of the main ways in which that has been done in recent times is for the defence to seek to undermine the credibility of the complainant by gaining access to the psychiatric or treatment history rather than the sexual history of the complainant”.

20. Similarly, defence counsel in domestic jurisdictions have sought the disclosure of counselling records on the basis of the unfounded and prejudicial assumption that the very fact that a woman has sought counselling suggests that she is mentally unstable and, therefore, an unreliable witness. The pervasiveness of this discriminatory assumption is reflected by the fact that the Canadian legislation specifically prohibits disclosure simply on the basis of the fact that a woman has received counselling

Reference: Bill C-46, *supra*; see also *R v. Osolin*, *supra*, at 625

21. Because rape mythology is so much a part of the “common sense” of the sexually unequal cultures in much of the world, many legal professionals fail to realize that most of these disclosure claims rest on discriminatory generalizations. The assumption underlying most disclosure requests and orders is that victims of sexual violence as a class - overwhelmingly women and children - are inherently uncreditworthy so must be subjected to additional and extraordinary credibility testing.

Reference: McCrimmon, *supra*; *R v. Osolin*, *supra*; Women’s Legal Education and Action Fund, *supra*, at p.27;

22. The empirical evidence has borne out the prevalence of these prejudicial myths and assumptions. In Canada, for example, one study found that, of 140 cases in which production of personal records was ordered over an approximately 6 year period, 120 cases involved sexual assault and almost all involved the records of women witnesses. Requests for personal records are simply not regularly made in other domestic criminal trials and in relation to other victims and witnesses. Victims in other criminal trials are not subjected to the same oppressive and exhaustive credibility testing to prove them worthy of justice, redress and the law’s protection.

Reference: Study prepared by Diane Oleskiw for the National Association of Women and the Law, *supra*. This study was for the time period 1990-September 1996. The Amici updated this study which is attached in the Appendix to this Brief.

23. Similarly, the Amici note that in the trial of Furundzija before the Tribunal, defence counsel has sought to impeach only Witness "A" on the basis of her credibility in relation to her medical, psychological and psychiatric treatment and counselling records. The defence did not cross-examine nor request disclosure of personal records of Prosecution witness Sulejman Kavazonic, despite his testimony that he "underwent medical treatment for about 20 days, because...[he] had some mental problems".

Reference: Transcript of Proceedings, 15 June 1998, page 522, lines 10-13.

24. More importantly, the Defence counsel explicitly attempts to subvert the evidence of Witness "A" by relying on a rape myth which has been prohibited by Rule 96. At least three points in his closing argument, defence counsel argues that the evidence of Witness "A" should be discounted because her evidence is not corroborated. Defence counsel argues that "unlike most cases that you will try, there is no corroborating evidence for Witness "A". None". Later defence counsel states: "Here we are talking very much about witness memory, witness testimony, no corroboration".

Reference: Transcript of Proceedings, 22 June 1998, p.676, lines 5-6
Transcript of Proceedings, 22 June 1998, p.684, lines 3-4
Transcript of Proceedings, 22 June 1998, p.693, lines 13-15

25. Having regard to the above statements by the defence and to the prejudicial and discriminatory attitudes toward rape victims pervasive in sexual assault proceedings generally, the Amici urge the Trial Chamber to reconsider the characterization of Witness "A" and her counselling treatment by the Defence. In particular, the Amici urge the Trial Chamber to question, with an awareness of sexual equality and gender discrimination, the implicit biases which underlie the defence's attack on the credibility of Witness "A", the Defence's unfounded allegations that Witness "A" suffered from "suppressed memory" and the inferences which the defence wishes to be drawn from the fact that Witness "A" suffered "psychological trauma", and to Order that Witness "A" not be subjected to further discrimination through cross-examination.

Reference: Transcript of Proceedings, 22 June 1998, p.
Transcript of Proceedings, 22 June 1998, p.684,
Defendant's Motion to Strike the Testimony of Witness "A" due to Prosecutorial Misconduct or, in the Event of a Conviction, for a New Trial (9 July 1998), p. 1

III. Irrelevance: The Practice of Sexual Inequality in Law Distorts the Criminal Justice Process

26. In addition to the fact that requests for disclosure of confidential information and counselling records are very often motivated by discriminatory and sexist attitudes and beliefs, the relevance of such information and records must be seriously called into question. In Canada, this irrelevance has been recognized by Canadian legislation and by Supreme Court of Canada Justice L'Heureux-Dubé, whose ruling below is reflected in the Canadian legislation drafted after her decision:

...the assumption that private therapeutic or counselling records are relevant to full answer and defence is often highly questionable, in that these records may very well have a greater potential to derail than to advance the truth-seeking process:

...medical records containing statements made in the course of therapy are both hearsay and inherently problematic as regards reliability. A witness's concerns expressed in the course of therapy after the fact, even assuming they are correctly understood and reliably noted, cannot be equated with evidence given in the course of a trial...In a trial, a witness is sworn to testify to the particular events in issue. By contrast, in therapy, an entire spectrum of factors such as personal history, thought, emotions as well as particular acts may inform the dialogue between therapist and patient. Thus, there is a serious risk that such statements could be taken piecemeal out of the context in which they were made to provide a foundation for entirely unwarranted inferences by the trier of fact.

...[therapy] is not a fact finding exercise. Consequently, the vast majority of information noted during therapy sessions bears no relevance whatsoever or, at its highest, only an attenuated sense of relevance to the issues at trial. Moreover, as I have already noted elsewhere, much of this information is inherently unreliable and, therefore, may frustrate rather than further the truth-seeking process.

Reference: *R v. O'Connor*, [1995] 4 S.C.R. 481-482 & 498
R v. Osolin, [1993] 4 S.C.R. 595 at 622-623
For other non-Canadian sources discussing irrelevancy see: *Commonwealth v. Fuller* (1996), 667 N.E. (2d) 847 (S.C. Mass.)
“[t]he likelihood that the records will contain information that would help a defendant avoid an erroneous conviction may be characterized as remote”.

27. The purpose of counselling is inimical to the truth-seeking processes of the criminal justice system. Notes which are taken in the counselling process are not taken down for the purposes of, or with attention to, accuracy or detail concerning the events

described. Nor is the speaker concerned that descriptions be accurate or detailed. The notes are made for the eyes of the therapist only and not with a view to their being reviewed by others for purposes outside of the therapy relationship. Pertinent questions about facts are often not asked during the counselling session: the subject matter of therapy is the emotional landscape, not the factual basis giving rise to the need for the counselling.

28. The Trial Chamber in the case of the *Prosecutor v. Jean Paul Akayesu* at the ICTR recognized the inherent unreliability of unsworn evidence, in particular when it is used to impeach the credibility of a witness. In discounting the inconsistencies between the evidence at trial and the evidence contained in previous unsworn statements made by witnesses, the ICTR Trial Chamber held that:

“[m]oreover, the statements were not made under solemn declaration and were not taken by judicial officers. In the circumstances, the probative value attached to the statements is, in the Chamber’s view, considerably less than direct sworn testimony before the Chamber, the truth of which has been subjected to the test of cross-examination”.

Reference: *The Prosecutor vs. Jean-Paul Akayesu*, Case No. ICTR-96-4-T ,
Decision of the Trial Chamber (September 2, 1998), para. 137.

29. Moreover, defence counsel in Canada have been explicit about the fact that disclosure of confidential information and records has often not been sought for the relevancy of the information nor to protect the rights of the accused, but rather to humiliate and intimidate the witness and thereby derail the trial.

Reference: Feldthusen, Bruce, “The Best Defence is a Good Offence: Access to the Private Records of Sexual Assault Complainants under the O’Connor Guidelines and Bill C-46” (1997) *Can. Bar Rev.* 537 at 546; Kelly; supra .

30. Finally, the intersection of sexual inequality and disclosure of confidential information severely distorts the criminal justice process when the *fact* that a witness has a counselling history or a mental health record is virtually *automatically* deemed to be relevant to her credibility and a justification for the disclosure of confidential information.

31. The issue of the attack on the credibility of victims of sexual violence on the basis of their psychiatric history has been addressed by Supreme Court of Canada Justice L'Heureux Dubé:

...the competence of witnesses to testify is normally presumed and challenges to the reliability of evidence on the basis of psychiatric condition of the witness rarely form part of the trial process. Unless we are to resurrect, consciously or unconsciously, the myth that complainants in sexual assault trials are inherently more untrustworthy than witnesses in any other trial where credibility is an issue, challenges to a witness's testimony on mental or psychiatric grounds must be measured against the same standard of relevance in sexual assault trials as in the trial of any other offence. Thus, even a request, let alone an order, for the production of a complainant's medical records should be an extraordinary event.

Reference: *R v. Osolin*, supra, at 628

32. In the case before the Tribunal, Witness "A" was suffering from Post Traumatic Stress Disorder. Witness "A" is not unique in this regard. Many, if not all, victims appearing before this Tribunal have suffered severe trauma and, therefore, may often be suffering from PTSD. Such victims are not confined to victims of sexual violence. If the fact that a witness suffers from PTSD triggers an inquiry into counselling - which can be a lifeline for survivors - it should apply to all witnesses and it would negate the protections of this Tribunal's Rules which specifically authorize the Registry to provide supportive services. Beyond that, PTSD often does not affect the memory of traumatized witnesses in any significant way. In many cases, PTSD causes sufferers to have heightened memories of the events which caused the psychological trauma. In other words, it is a disorder which may in fact increase their reliability as witnesses.

Reference: Please refer to in-depth discussion of PTSD in the Amicus Curiae Brief of the Center for Civil and Human Rights, Notre Dame University.

33. Although other witnesses before the ICTY and the ICTR have suffered from PTSD⁵⁸, this is the first case in which the Tribunal is being asked to act on its duty to analyze the impact of the syndrome on the ability of witnesses to testify. In the submission of the Amici, the question with respect to PTSD and any other psychiatric disorder is whether the trauma is so severe that the witness is not *competent* to testify. PTSD alone does not trigger this concern. Rather, there must be some clear evidence in the behaviour or testimony of the witness (and not simply some inconsistencies in the

⁵⁸ e.g. General Romeo Dallaire, to name one well-known example.

witness' testimony or memories years after the event) that gives rise to a concern about competence. If such a concern is raised, it should be determined, not by delving into highly personal and potentially inflammatory records of past treatment, but rather through the appointment of a qualified professional to conduct the necessary tests. There is no issue of competence in this case and thus no warrant to permit the defendant to engage in a fishing expedition for the purposes of more broadly attacking the credibility of the witness.

Reference: Please refer to in-depth discussion of PTSD in the Amicus Curiae Brief of the Center for Civil and Human Rights, Notre Dame University.

IV. Protecting the Counselling Relationship

34. To permit defence counsel access to counselling records and other confidential information or to cross-examinations about such records is inconsistent with the Tribunal's Rules and the international recognition of the critical need of traumatized survivors for counselling in general and in connection with the giving of testimony itself.

Reference: Rules of Procedure of the ICTY, Rule 34

35. Rule 34 of the Tribunal's Rules of Procedure states that the Victims and Witnesses Unit shall be set up with qualified staff to "provide counselling and support" for victims and witnesses, "in particular in cases of rape and sexual assault". Therefore, victims of sexual assault who also agree to serve as witnesses are put in an untenable situation while under the care of the Victims and Witnesses Unit: if they are counselled by the Unit's qualified staff, they risk potential disclosure of their counselling records under the precedent set by the Trial Chamber's Decision and Order of 16 July 1998.

Reference: Rules of Procedure of the ICTY, Rule 34

36. The United Nations General Assembly and the Tribunal's Rules encourage women who have suffered sexual violence to seek counselling. General Assembly resolution 50/192 of December 1995 urges all States and relevant organizations to support the provision of "necessary medical and psychological care to victims of rape within the framework of programmes to rehabilitate women and children traumatized by war, as well as the provision of protection, counselling and support to victims and

witnesses”, as well as expresses its concern for the welfare of those who have suffered extreme trauma and “require” psychosocial and other assistance.

Reference: “Rape and Abuse of Women in the Areas of Armed Conflict in the Former Yugoslavia”, General Assembly Resolution 50/192 of 22 December 1995, paras. 7 and 8. Similar calls for the provision of counselling are also found in “Rape and Abuse of Women in the Areas of Armed Conflict in the Former Yugoslavia, Report of the Secretary General”, UN Doc. A/52/497 (17 October 1997), para. 4.

37. There is an obvious public interest in the promotion of counselling for women who have suffered sexual violence, as these women can better heal with assistance and support. The relationship between a counsellor and her client should be based on trust and be as conducive to healing as possible. However, if victims are not guaranteed confidentiality within a counselling relationship, they will likely be inhibited in their discussions and unable to receive the full benefit of that counselling. In fact, disclosure of records could prove to be a substantial disincentive for victims to even use counselling services in the first place.

Reference: Bronitt and McSherry, *supra*, at 266, citing Annie Cossins, “Contempt or Confidentiality, 21(5) Alternative L.J. 223 (1996)

38. Victims are likely to be further traumatized by the knowledge that the accused may find out about the effects of the abuse or that personal information that the victim may not have even told to her closest friends and family will be disclosed in court if they undertake counselling. The recovery process can thereby be interrupted or stalled completely and victims face the possibility of suffering long-term psychological harm.

39. If the Tribunal develops a practice of disclosing the confidential information of women who are victims of sexual violence, many women will simply choose not to report sexual violence against them, will not agree to testify before the Tribunal or will not obtain counselling. It is submitted that production applications will operate to deny women who have been sexually assaulted the right to both seek counselling and participate as a witness to the prosecution of her perpetrator. Women will, therefore, be forced into making choices unrelated to their best interests, and the public interest, in order to avoid revictimization in the court process.

40. It is submitted that, for these reasons, the precedent set by wide disclosure orders such as Disposition B(1) of the Trial Chamber’s Decision and Order of 16 July will have a chilling effect on the number of female victims of sexual assault willing to participate as witnesses in prosecutions at the International Criminal Tribunals for the Former Yugoslavia and Rwanda. Such a deterrence to participation in criminal justice proceedings will result in both a violation of the rights of victims of sexual violence to equal access to justice and in the subversion of the very purpose and mandate of the Tribunal.

V. The Equal Right of Witness “A” to Privacy

41. The right to privacy is protected under Rule 75 of the ICTY Rules of Procedure, article 12 of the Universal Declaration of Human Rights and article 17 of the International Covenant on Civil and Political Rights. Any interference with the right to privacy under Rule 34 requires the Tribunal to engage in balancing. Similarly, article 17 of the ICCPR requires the “precise balancing of the circumstances in a given case, paying regard to the principle of *proportionality*”.

Reference: Nowak, Manfred, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (1993: N.P. Engel, Publisher, U.S.A.), page 293, para. 13.

42. Moreover, “privacy protects the special, individual qualities of human existence, a person’s manner of appearance, his or her identity. Identity includes [one’s] feelings and thoughts, one’s specific past”.

Reference: Nowak, *supra*, p. 295, para. 17.

43. The Supreme Court of Canada has stated in *R v. O’Connor* that the right to privacy includes the right to maintain control over a biographical core of personal information, and is grounded in the need for physical and moral autonomy and is essential for the well-being and dignity of individuals. It also noted that the essence of privacy is that once invaded, for example by disclosure, it can seldom be regained. In the context of counselling records, there is the additional factor that the counselling relationship can be compromised by public exposure. These considerations lead to the presumption against ordering production of private records in sexual violence cases.

Reference: *R v. O'Connor*, supra. These comments were made by L'Heureux-Dube J, speaking on behalf of a minority of three justices and adopted by general agreement by the majority judges.

44. The importance of the right to privacy for sexual assault victims within the context of this Tribunal has been noted by the General Assembly, stressing “the need for the protection of the rape victims and the provision of *effective guarantees* of privacy and confidentiality of the rape victims, and desirous of facilitating their participation in the proceedings of the International Tribunal and ensuring that further traumatization will be prevented”.

Reference: “Rape and Abuse of Women in the Areas of Armed Conflict in the Former Yugoslavia”, General Assembly Resolution 50/192 of 22 December 1995, introductory para. 7 (emphasis added).

45. Male as well as female survivors of the atrocities within the jurisdiction of this Tribunal suffer trauma and need counselling. However, more women than men are victims of sexual assault, and therefore more women than men seek medical treatment and counselling following a sexual assault. The fact that medical and counselling records are routinely targeted by defence counsel in cases of sexual assault and not in other cases, results in the privacy rights of women witnesses being more often violated than those of male witnesses. As well, since it is primarily women whose privacy rights are violated in this way, the equality rights of women who are victims of sexual violence are also directly implicated and violated.

46. The victim's right to privacy was not addressed by the Trial Chamber in its Decision and Order of 16 July. The failure to consider Witness A's right to privacy presents a serious concern with respect to: 1) the finding in paragraph 18 of the Decision and Order that any evidence relating to the medical, psychiatric or psychological treatment or counselling that this witness may have received should have been disclosed to the Defence - this statement is made without any discussion of the balancing of the right of the accused to a fair trial and the right of Witness “A” to privacy; 2) the Order for further disclosure of documents relating to the issue of medical, psychological or psychiatric treatment or counselling received by Witness “A” after May 1993 (Disposition, B(1)) is also made without reference to Witness “A”'s right to privacy.

VI. The Equal Right to Security of the Person

47. The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights set out the right to security of the person in articles 3 and 9 and respectively. Security of the person is a right which must be taken into account before confidential records are disclosed, as disclosure could unintentionally reveal information about the victim which identifies her whereabouts, even if names and addresses are redacted. This information can provide enough information for the accused to locate the victim through her support people. In the Tribunal's Decision and Order of 16 July, the Tribunal did not address the issue of whether the additional information ordered disclosed from the Prosecutor would affect the victim's right to security of the person.

VII. Balancing the Rights of the Accused and the Rights of Witnesses

48. The decision of this Tribunal in *Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses* in the *Prosecutor v. Dusko Tadic* stated that the rights of accused persons to a fair trial must be balanced against the protection of victims and witnesses, especially victims of sexual assault.

Reference: *Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses* in the *Prosecutor v. Dusko Tadic*, paragraph 33 (10 August 1995) paragraph 50.

49. Having recognized the applicability of internationally recognized standards of fundamental human rights for both accused persons and victims, the Tribunal must, therefore, balance these rights. This does not mean, however, that the rights of either accused persons or victims who appear before the Tribunal can be violated, dismissed or subsumed by the rights of the other.

Reference: *Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses* in the *Prosecutor v. Dusko Tadic*, paragraph 33 (10 August 1995) paragraph 25

50. The challenge of balancing rights has been given considerable attention in Canada. The Supreme Court of Canada has held that, when approaching the balancing of rights, no particular right presumptively trumps any other constitutional right and that all constitutional rights implicated in a given case must be reconciled:

"A hierarchical approach to rights, which place some over others, must be avoided both when interpreting the *Charter* and when developing the common law. When

the protected rights of two individuals come into conflict...*Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights”.

Reference: *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835, per Lamer C.J. at 87

51. The Amici submit that the Tribunal must balance the rights of the accused and the rights of Witness “A”. Respect for the fair trial rights of the accused, however, does not mean that the defence is entitled to pursue any and every tactic simply because it may be effective.

52. Moreover, the Amici submit that where disclosure of confidential information is fundamentally justified by sexual stereotyping, there is no “conflict” between the rights of the accused and the rights of witnesses. In this case, the Defence has had full opportunity to test the credibility of Witness “A” during cross-examination and any further cross-examination risks perpetuating the rape myths and undermining both the truth-seeking function of the international criminal trial process and the meaning of a “fair trial” as defined by this Tribunal.

VIII. Conclusion

53. For the above reasons, the Amici respectfully submit that the Tribunal reconsider and rescind its Decision and Order of 16 July 1998 and accordingly:

- (a) hold a hearing taking into account Rules 75 , 70(f) and 96(ii) prior to the commencement of the cross-examination of Witness “A” in order to fully consider the rights of Witness “A” to equality, privacy, security of the person and to protection as a witness;
- (b) ensure that Witness “A” is fully informed of her rights to equality, privacy and security of the person and to protection as a witness; and
- (c) appoint Witness “A” and the holder of the records, Medica, counsel if they wish to be represented.

All of which is respectfully submitted.

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International Jurisprudence on Sexual and Gender Violence: Excerpts from Cases⁵⁹

Part I. The following excerpts relate to acts of sexual violence constituting grave breaches or their counterparts in crimes against humanity.

A. TORTURE OR INHUMAN TREATMENT, INCLUDING BIOLOGICAL EXPERIMENTATION (Art. 8(2)(a)(ii) and (c)(i))

1. From the “Celebici” judgement of the ICTY (16 November 1998).

The Indictment alleges that each of the accused is responsible for various forms of mistreatment of the detainees in the Celebici prison-camp. Such mistreatment, not resulting in death, is variously categorised and alleged as: torture, a grave breach of the Geneva Conventions punishable under Article 2(b) of the Statute, and a violation of the laws or customs of war punishable under Article 3 of the Statute, as recognised by article 3(1)(a) of the Geneva Conventions; rape as torture, a grave breach of the Geneva Conventions punishable under Article 2(b) of the Statute, and a violation of the laws or customs of war punishable under Article 3 of the Statute, as recognised by article 3(1)(a) of the Geneva Conventions; wilfully causing great suffering or serious injury, a grave breach of the Geneva Conventions punishable under Article 2(c) of the Statute; inhuman treatment, a grave breach of the Geneva Conventions punishable under Article 2(b) of the Statute; and cruel treatment, a violation of the laws or customs of war punishable under Article 3 of the Statute and recognised by article 3(1)(a) of the Geneva Conventions. (para. 440)

[...]

The Trial Chamber considers the rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity. The condemnation and punishment of rape becomes all the more urgent where it is committed by, or at the instigation of, a public official, or with the consent or acquiescence of such an official. Rape causes severe pain and suffering, both physical and psychological. The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long lasting. Furthermore, it is difficult to envisage circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation. In the view of this Trial Chamber this is inherent in situations of armed conflict. (para. 495) Accordingly, whenever rape and other forms of sexual violence meet the aforementioned criteria, then they shall constitute torture, in the same manner as any other acts that meet this criteria. (para. 496)

2. From the Akayesu judgement of the ICTR (2 September 1998):

Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official

⁵⁹ Updated by Pam Spees, Training Material, Seminar for Judges of the Special Court for Sierra Leone, International Coalition for Women's Human Rights in Conflict and the Women's Initiatives for Gender Justice, October 2004, Adapted from International Jurisprudence on Sexual and Gender Violence: Excerpts from Cases, Women's Caucus for Gender Justice, 2001.

capacity. The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. (para. 597)

3. From the Furundzija judgement of the ICTY (12 December 1998), where the rape referred to occurred in the context of an interrogation:

As evidenced by international case law, the reports of the United Nations Human Rights Committee and the United Nations Committee Against Torture, those of the Special Rapporteur, and the public statements of the European Committee for the Prevention of Torture, this vicious and ignominious practice can take on various forms. International case law, and the reports of the United Nations Special Rapporteur evince a momentum towards addressing, through legal process, the use of rape in the course of detention and interrogation as a means of torture and, therefore, as a violation of international law. Rape is resorted to either by the interrogator himself or by other persons associated with the interrogation of a detainee, as a means of punishing, intimidating, coercing or humiliating the victim, or obtaining information, or a confession, from the victim or a third person. (para. 163)

The Trial Chamber has found that the accused was also present in the pantry where the second phase of the interrogation of Witness A occurred. Witness D was taken there for a confrontation with Witness A to make her confess as 'promised' by the accused in the large room. Both Witness A and Witness D were interrogated by the accused and hit on the feet with a baton by Accused B in the course of this questioning. Accused B again assaulted Witness A who was still naked, before an audience of soldiers. He raped her by the mouth, vagina and anus and forced her to lick his penis clean. The accused continued to interrogate Witness A in the same manner as he had done earlier in the large room. As the interrogation intensified, so did the sexual assaults and the rape. (para. 266)

Additionally human rights law has recognized that in some situations rape may amount to torture. Both the European and Inter-American courts of human rights have found this to be the case.

4. From Aydin v. Turkey, Judgement of 25 September 1997, ECHR.

[w]hile being held in detention the applicant was raped by a person whose identity has still to be determined. Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally. (para. 83)

[...]

Against this background the Court is satisfied that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of article 3 of the Convention. Indeed the court would have reached this conclusion on either of these grounds taken separately. (para. 86)

5. From *Fernando and Raquel Mejia v. Peru*, Annual Report of the Inter-American Commission on Human Rights, Report No. 5/96, Case No. 10,970, 1 March 1996, p. 186, in finding the acts amounted to torture stated:

[r]ape causes physical and mental suffering in the victim. In addition to the violence suffered at the time it is committed, the victims are commonly hurt or, in some cases, are even made pregnant. The fact of being made the subject of abuse of this nature also causes a psychological trauma that results, on the one hand, from having been humiliated and victimised, and on the other, from suffering the condemnation of the members of their community if they report what has been done to them.

B. WILFUL KILLING (Art. 8(2)(a)(i) of the ICC Statute)

In the Tadic indictment of the ICTY, acts of sexual violence (sexual mutilation) were charged as wilful killing and torture. However, the Trial Chamber found that the causal relationship between the sexual violence and the victim's death were not adequately established. (See Tadic Indictments of 13 February 1995 and, as amended, 1 September 1995 and 14 Dec. 1995).

C. ENSLAVEMENT

From the Kunarac (Foca) Judgement of the ICTY, 22 February 2001:

539. In summary, the Trial Chamber finds that, at the time relevant to the indictment, enslavement as a crime against humanity in customary international law consisted of the exercise of any or all of the powers attaching to the right of ownership over a person.

540. Thus, the Trial Chamber finds that the *actus reus* of the violation is the exercise of any or all of the powers attaching to the right of ownership over a person. The *mens rea* of the violation consists in the intentional exercise of such powers.

541. This definition definition may be broader than the traditional and sometimes apparently distinct definitions of either slavery, the slave trade and servitude or forced or compulsory labour found in other areas of international law. This is evidenced in particular by the various cases from the Second World War referred to above, which have included forced or compulsory labour under enslavement as a crime against humanity. The work of the ILC, discussed above, further supports this conclusion.¹³³³

542. Under this definition, indications of enslavement include elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking. With respect to forced or compulsory labour or service, international law, including some of the provisions of Geneva Convention IV and the Additional Protocols, make clear that not all labour or service by protected persons, including civilians, in armed conflicts, is prohibited – strict conditions are, however, set for such labour or service. The “acquisition” or “disposal” of someone for monetary or other compensation, is not a requirement for enslavement. Doing so, however, is a prime

example of the exercise of the right of ownership over someone. The duration of the suspected exercise of powers attaching to the right of ownership is another factor that may be considered when determining whether someone was enslaved; however, its importance in any given case will depend on the existence of other indications of enslavement. Detaining or keeping someone in captivity, without more, would, depending on the circumstances of a case, usually not constitute enslavement.

543. The Trial Chamber is therefore in general agreement with the factors put forward by the Prosecutor, to be taken into consideration in determining whether enslavement was committed. These are the control of someone's movement,¹³³⁴ control of physical environment,¹³³⁵ psychological control,¹³³⁶ measures taken to prevent or deter escape,¹³³⁷ force, threat of force or coercion,¹³³⁸ duration,¹³³⁹ assertion of exclusivity,¹³⁴⁰ subjection to cruel treatment and abuse,¹³⁴¹ control of sexuality and ¹³⁴² forced labour.¹³⁴³ The Prosecutor also submitted that the mere ability to buy, sell, trade or inherit a person or his or her labours or services could be a relevant factor.¹³⁴⁴ The Trial Chamber considers that the *mere ability* to do so is insufficient, such actions actually occurring could be a relevant factor.

Part II. The following excerpts relate to the definitions of sexual violence crimes and their elements.

A. ON DEFINING RAPE:

1. From Akayesu:

The Tribunal considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Tribunal also notes the cultural sensitivities involved in public discussion of intimate matters and recalls the painful reluctance and inability of witnesses to disclose graphic anatomical details of sexual violence they endured. The United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual framework of state-sanctioned violence. The Tribunal finds this approach more useful in the context of international law. Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

The Tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. [emphasis added]

2. From Furundzija:

183. The Trial Chamber holds that the forced penetration of the mouth by the male sexual organ constitutes a most humiliating and degrading attack upon human dignity. The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such

outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well being of a person. It is consonant with this principle that such an extremely serious sexual outrage as forced oral penetration should be classified as rape.

184. Moreover, the Trial Chamber is of the opinion that it is not contrary to the general principle of *nullum crimen sine lege* to charge an accused with forcible oral sex as rape when in some national jurisdictions, including his own, he could only be charged with sexual assault in respect of the same acts. It is not a question of criminalising acts which were not criminal when they were committed by the accused, since forcible oral sex is in any event a crime, and indeed an extremely serious crime. Indeed, due to the nature of the International Tribunal's subject-matter jurisdiction, in prosecutions before the Tribunal forced oral sex is invariably an aggravated sexual assault as it is committed in time of armed conflict on defenceless civilians; hence it is not simple sexual assault but sexual assault as a war crime or crime against humanity. Therefore so long as an accused, who is convicted of rape for acts of forcible oral penetration, is sentenced on the factual basis of coercive oral sex - and sentenced in accordance with the sentencing practice in the former Yugoslavia for such crimes, pursuant to Article 24 of the Statute and Rule 101 of the Rules - then he is not adversely affected by the categorisation of forced oral sex as rape rather than as sexual assault. His only complaint can be that a greater stigma attaches to being a convicted rapist rather than a convicted sexual assailant. However, one should bear in mind the remarks above to the effect that forced oral sex can be just as humiliating and traumatic for a victim as vaginal or anal penetration. Thus the notion that a greater stigma attaches to a conviction for forcible vaginal or anal penetration than to a conviction for forcible oral penetration is a product of questionable attitudes. Moreover any such concern is amply outweighed by the fundamental principle of protecting human dignity, a principle which favours broadening the definition of rape.

[...]

186. As pointed out above, international criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration. It would seem that the prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity. As both these categories of acts are criminalised in international law, the distinction between them is one that is primarily material for the purposes of sentencing.

3. From Celebici:

Although the prohibition on rape under international humanitarian law is readily apparent, there is no convention or other international instrument containing a definition of the term itself. The Trial Chamber draws guidance on this question from the discussion in the recent judgement of the ICTR, in the case of the Prosecutor v. Jean-Paul Akayesu (hereafter "Akayesu Judgement") which has considered the definition of rape in the context of crimes against humanity. The Trial Chamber deciding this case found that there was no commonly accepted definition of the term in international law and acknowledged that, while "rape has been defined in certain national jurisdictions as non-consensual intercourse", there are differing definitions of the variations of such an act. [...]

This Trial Chamber . . . sees no reason to depart from the conclusion of the ICTR in the Akayesu Judgement on this issue. Thus, the Trial Chamber considers rape to constitute a physical invasion of a sexual nature, committed on a person under circumstances that are coercive... (para. 479)

4. From Kunarac:

457. An examination of the above provisions indicates that the factors referred to under the first two headings are matters which result in the will of the victim being overcome or in the victim's submission to the act being non-voluntary. The basic principle which is truly common to these legal systems is that serious violations of sexual *autonomy* are to be penalised. Sexual autonomy is violated wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant.

458. In practice, the absence of genuine and freely given consent or voluntary participation may be *evidenced* by the presence of the various factors specified in other jurisdictions – such as force, threats of force, or taking advantage of a person who is unable to resist. A clear demonstration that such factors negate true consent is found in those jurisdictions where absence of consent is an element of rape and consent is explicitly defined not to exist where factors such as use of force, the unconsciousness or inability to resist of the victim, or misrepresentation by the perpetrator.¹¹⁶⁴

459. Given that it is evident from the *Furundžija* case that the terms coercion, force, or threat of force were not to be interpreted narrowly and that coercion in particular would encompass *most* conduct which negates consent, this understanding of the international law on the subject does not differ substantially from the *Furundžija* definition.

460. In light of the above considerations, the Trial Chamber understands that the *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.

B. ON DEFINING SEXUAL VIOLENCE:

1. From Akayesu:

[S]exual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. The incident described by Witness KK in which the Accused ordered the Interahamwe to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd, constitutes sexual violence. (para. 688)

[...]

Sexual violence falls within the scope of "other inhumane acts" set forth in Article 3(i) of the Tribunal's Statute, "outrages upon personal dignity," set forth in Article 4(e) of the Statute, and "serious bodily or mental harm," set forth in Article 2(2)(b) of the Statute. (para. 688)

C. DEFINING COERCION (FORCE) ELEMENT:

From Akayesu:

[T]he tribunal notes in this context that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain

circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal.

D. RAPE AS GENOCIDE:

From Akayesu, paras 505-508, 516

505. The Chamber holds that the expression deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, should be construed as the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction.

506. For purposes of interpreting Article 2(2)(c) of the Statute, the Chamber is of the opinion that the means of deliberate inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or in part, include, inter alia, subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement.

Imposing measures intended to prevent births within the group (paragraph d)

507. For purposes of interpreting Article 2(2)(d) of the Statute, the Chamber holds that the measures intended to prevent births within the group, should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages. In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group.

508. Furthermore, the Chamber notes that measures intended to prevent births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led through threats or trauma, not to procreate.

[...]

516. Moreover, the Chamber considered whether the groups protected by the Genocide Convention, echoed in Article 2 of the Statute, should be limited to only the four groups expressly mentioned and whether they should not also include any group which is stable and permanent like the said four groups. In other words, the question that arises is whether it would be impossible to punish the physical destruction of a group as such under the Genocide Convention, if the said group, although stable and membership is by birth, does not meet the definition of any one of the four groups expressly protected by the Genocide Convention. In the opinion of the Chamber, it is particularly important to respect the intention of the drafters of the Genocide Convention, which according to the *travaux préparatoires*, was patently to ensure the protection of any stable and permanent group.

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(Important paragraphs with regard to sexual violence are highlighted. First, mentions that rape could be a means to commit genocide. Elaborates on the meaning of 'preventing births among targeted group' and includes psychological consequences on reproduction as a way to achieve this. In addition, the judgment lists the type of sexual acts that could constitute crime of 'other inhumane acts' in the event it is not rape)

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508. Furthermore, the Chamber notes that measures intended to prevent births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.

Rape

596. Considering the extent to which rape constitute crimes against humanity, pursuant to Article 3(g) of the Statute, the Chamber must define rape, as there is no commonly accepted definition of this term in international law. While rape has been defined in certain national jurisdictions as non-consensual intercourse, variations on the act of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual.

597. The Chamber considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual frame work of state sanctioned violence. This approach is more useful in international law. Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

598. The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive. This act must be committed:

- (a) as part of a wide spread or systematic attack;
- (b) on a civilian population;
- (c) on certain catalogued discriminatory grounds, namely: national, ethnic, political, racial, or religious grounds.

7.7. Count 13 (rape) and Count 14 (other inhumane acts) - Crimes against Humanity

685. In the light of its factual findings with regard to the allegations of sexual violence set forth in paragraphs 12A and 12B of the Indictment, the Tribunal considers the criminal responsibility of the Accused on Count 13, crimes against humanity (rape), punishable by Article 3(g) of the Statute of the Tribunal and Count 14, crimes against humanity (other inhumane acts), punishable by Article 3(i) of the Statute.

686. In considering the extent to which acts of sexual violence constitute crimes against humanity under Article 3(g) of its Statute, the Tribunal must define rape, as there is no commonly accepted definition of the term in international law. The Tribunal notes that many of the witnesses have used the term "rape" in their testimony. At times, the Prosecution and the Defence have also tried to elicit an explicit description of what happened in physical terms, to document what the witnesses mean by the term "rape". The Tribunal notes that while rape has been historically defined in national jurisdictions as non-consensual sexual intercourse, variations on the form of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual. An act such as that described by Witness KK in her testimony - the Interahamwe thrusting a piece of wood into the sexual organs of a woman as she lay dying - constitutes rape in the Tribunal's view.

687. The Tribunal considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Tribunal also notes the cultural sensitivities involved in public discussion of intimate matters and recalls the painful reluctance and inability of witnesses to disclose graphic anatomical details of sexual violence they endured. The United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual framework of state-sanctioned violence. The Tribunal finds this approach more useful in the context of international law. **Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.**

688. The Tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. **Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. The incident described by Witness KK in which the Accused ordered the Interahamwe to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd, constitutes sexual violence.** The Tribunal notes in this context that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal. Sexual violence falls within the scope of "other inhumane acts", set forth Article 3(i) of the Tribunal's Statute, "outrages upon personal dignity," set forth in Article 4(e) of the Statute, and "serious bodily or mental harm," set forth in Article 2(2)(b) of the Statute.

689. The Tribunal notes that as set forth by the Prosecution, Counts 13-15 are drawn on the basis of acts as described in paragraphs 12(A) and 12(B) of the Indictment. The allegations in these paragraphs of the Indictment are limited to events which took place "on or near the bureau communal premises." Many of the beatings, rapes and murders established by the evidence presented took place away from the bureau communal premises, and therefore the Tribunal does not make any legal findings with respect to these incidents pursuant to Counts 13, 14 and 15.

690. The Tribunal also notes that on the basis of acts described in paragraphs 12(A) and 12(B), the Accused is charged only pursuant to Article 3(g) (rape) and 3(i) (other inhumane acts) of its Statute, but not Article 3(a)(murder) or Article 3(f)(torture). Similarly, on the basis of acts described in paragraphs 12(A) and 12(B), the Accused is charged only pursuant to Article 4(e)(outrages upon personal dignity) of

its Statute, and not Article 4(a)(violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment). As these paragraphs are not referenced elsewhere in the Indictment in connection with these other relevant Articles of the Statute of the Tribunal, the Tribunal concludes that the Accused has not been charged with the beatings and killings which have been established as Crimes Against Humanity or Violations of Article 3 Common to the Geneva Conventions. The Tribunal notes, however, that paragraphs 12(A) and 12(B) are referenced in Counts 1-3, Genocide and it considers the beatings and killings, as well as sexual violence, in connection with those counts.

691. The Tribunal has found that the Accused had reason to know and in fact knew that acts of sexual violence were occurring on or near the premises of the bureau communal and that he took no measures to prevent these acts or punish the perpetrators of them. The Tribunal notes that it is only in consideration of Counts 13, 14 and 15 that the Accused is charged with individual criminal responsibility under Section 6(3) of its Statute. As set forth in the Indictment, under Article 6(3) "an individual is criminally responsible as a superior for the acts of a subordinate if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or punish the perpetrators thereof." Although the evidence supports a finding that a superior/subordinate relationship existed between the Accused and the Interahamwe who were at the bureau communal, the Tribunal notes that there is no allegation in the Indictment that the Interahamwe, who are referred to as "armed local militia," were subordinates of the Accused. This relationship is a fundamental element of the criminal offence set forth in Article 6(3). The amendment of the Indictment with additional charges pursuant to Article 6(3) could arguably be interpreted as implying an allegation of the command responsibility required by Article 6(3). In fairness to the Accused, the Tribunal will not make this inference. Therefore, the Tribunal finds that it cannot consider the criminal responsibility of the Accused under Article 6(3).

692. The Tribunal finds, under Article 6(1) of its Statute, that the Accused, by his own words, specifically ordered, instigated, aided and abetted the following acts of sexual violence:

- (i) the multiple acts of rape of ten girls and women, including Witness JJ, by numerous Interahamwe in the cultural center of the bureau communal;
- (ii) the rape of Witness OO by an Interahamwe named Antoine in a field near the bureau communal;
- (iii) the forced undressing and public marching of Chantal naked at the bureau communal.

693. The Tribunal finds, under Article 6(1) of its Statute, that the Accused aided and abetted the following acts of sexual violence, by allowing them to take place on or near the premises of the bureau communal, while he was present on the premises in respect of (i) and in his presence in respect of (ii) and (iii), and by facilitating the commission of these acts through his words of encouragement in other acts of sexual violence, which, by virtue of his authority, sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place:

- (i) the multiple acts of rape of fifteen girls and women, including Witness JJ, by numerous Interahamwe in the cultural center of the bureau communal;
- (ii) the rape of a woman by Interahamwe in between two buildings of the bureau communal, witnessed by Witness NN;
- (iii) the forced undressing of the wife of Tharcisse after making her sit in the mud outside the bureau communal, as witnessed by Witness KK;

694. The Tribunal finds, under Article 6(1) of its Statute, that the Accused, having had reason to know that sexual violence was occurring, aided and abetted the following acts of sexual violence, by allowing them to take place on or near the premises of the bureau communal and by facilitating the commission of such sexual violence through his words of encouragement in other acts of sexual violence which, by virtue of his authority, sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place:

- (i) the rape of Witness JJ by an Interahamwe who took her from outside the bureau communal and raped her in a nearby forest;
- (ii) the rape of the younger sister of Witness NN by an Interahamwe at the bureau communal;

707. In the opinion of the Chamber, the above-mentioned acts with which Akayesu is charged indeed render him individually criminally responsible for having abetted in the preparation or execution of the killings of members of the Tutsi group and the infliction of serious bodily and mental harm on members of said group.

731. With regard, particularly, to the acts described in paragraphs 12(A) and 12(B) of the Indictment, that is, rape and sexual violence, the Chamber wishes to underscore the fact that in its opinion, they constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflict harm on the victim as he or she suffers both bodily and mental harm. In light of all the evidence before it, the Chamber is satisfied that the acts of rape and sexual violence described above, were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public, in the Bureau Communal premises or in other public places, and often by more than one assailant. These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.

732. The rape of Tutsi women was systematic and was perpetrated against all Tutsi women and solely against them. A Tutsi woman, married to a Hutu, testified before the Chamber that she was not raped because her ethnic background was unknown. As part of the propaganda campaign geared to mobilizing the Hutu against the Tutsi, the Tutsi women were presented as sexual objects. Indeed, the Chamber was told, for an example, that before being raped and killed, Alexia, who was the wife of the Professor, Ntereye, and her two nieces, were forced by the Interahamwe to undress and ordered to run and do exercises "in order to display the thighs of Tutsi women". The Interahamwe who raped Alexia said, as he threw her on the ground and got on top of her, "let us now see what the vagina of a Tutsi woman tastes like". As stated above, Akayesu himself, speaking to the Interahamwe who were committing the rapes, said to them: "don't ever ask again what a Tutsi woman tastes like". This sexualized representation of ethnic identity graphically illustrates that tutsi women were subjected to sexual violence because they were Tutsi. Sexual violence was a step in the process of destruction of the tutsi group - destruction of the spirit, of the will to live, and of life itself.

733. On the basis of the substantial testimonies brought before it, the Chamber finds that in most cases, the rapes of Tutsi women in Taba, were accompanied with the intent to kill those women. Many rapes were perpetrated near mass graves where the women were taken to be killed . A victim testified that Tutsi women caught could be taken away by peasants and men with the promise that they would be collected later to be executed. Following an act of gang rape, a witness heard Akayesu say "tomorrow they will be killed" and they were actually killed. In this respect, it appears clearly to the Chamber that the acts of rape and sexual violence, as other acts of serious bodily and mental harm committed against the Tutsi, reflected the determination to make Tutsi women suffer and to mutilate them even before killing them, the intent being to destroy the Tutsi group while inflicting acute suffering on its members in the process.

734. In light of the foregoing, the Chamber finds firstly that the acts described *supra* are indeed acts as enumerated in Article 2 (2) of the Statute, which constitute the factual elements of the crime of genocide, namely the killings of Tutsi or the serious bodily and mental harm inflicted on the Tutsi. The Chamber is further satisfied beyond reasonable doubt that these various acts were committed by Akayesu with the specific intent to destroy the Tutsi group, as such. Consequently, the Chamber is of the opinion that the acts alleged in paragraphs 12, 12A, 12B, 16, 18, 19, 20, 22 and 23 of the Indictment and proven above, constitute the crime of genocide, but not the crime of complicity; hence, the Chamber finds Akayesu individually criminally responsible for genocide.

.....

Hutus... » et à « chercher dans les buissons, sans épargner un seul serpent... ». Il s'ensuivit immédiatement des attaques et des viols sur la personne de femmes Tutsi.

(...)

37. Aux mois d'avril, mai et juin 1994, des viols et violences sexuelles généralisés ou systématiques ont été pratiqués sur la personne des femmes Tutsi. Les agressions sexuelles étaient souvent le prélude au meurtre, et parfois la cause de la mort d'un certain nombre de civils Tutsi.

38. A une occasion en particulier, le ou vers le 17 avril 1994, Sylvestre GACUMBITSI a attiré des femmes Tutsies en un certain endroit en annonçant à l'aide d'un mégaphone que les femmes Tutsies seraient épargnées et que seuls les hommes Tutsis seraient tués. Dès qu'un certain nombre de femmes Tutsies se sont rassemblées comme suite aux exhortations de Sylvestre GACUMBITSI, elles ont été encerclées par plusieurs assaillants, violées puis tuées. Ces assaillants ont également fait subir des sévices sexuels à un certain nombre de femmes Tutsies en introduisant des objets dans leurs organes génitaux.

39. Le ou vers le 17 avril 1994, Sylvestre GACUMBITSI s'est déplacé le long de la route de Nyarubuye dans un convoi de véhicules, en disant à l'aide d'un mégaphone : « *Fouillez les buissons, n'épargnez pas un seul serpent... Les Hutus qui épargnent les Tutsi doivent être tués... Les filles Tutsi qui ont toujours refusé de coucher avec les Hutus doivent être violées et des bâtons doivent être introduits dans leurs parties intimes...* ». Après le départ de Sylvestre GACUMBITSI, un groupe d'hommes a attaqué les femmes Tutsi qui se cachaient à proximité et en ont violé plusieurs. L'une de ces femmes a été tuée et un bâton a été enfoncé dans ses parties génitales.

40. Les violences sexuelles étaient si répandues, pratiquées si ouvertement et s'inscrivaient si pleinement dans les attaques généralisées contre les civils Tutsi que Sylvestre GACUMBITSI devait ou avait dû savoir qu'elles se pratiquaient et que les auteurs en étaient ses subordonnés qui agissaient sous son autorité, son contrôle et ses ordres, d'autant que les auteurs de violence sexuelle étaient souvent les mêmes individus qui organisaient et dirigeaient les attaques généralisées contre les Tutsi ou y participaient, suivant les instructions de Sylvestre GACUMBITSI.

2. La Chambre constate qu'elle n'a pas été saisie d'éléments de preuve à l'appui du paragraphe 38 de l'Acte d'accusation. En conséquence, elle ne prendra aucune conclusion quant aux faits qui y sont allégués.

2. Éléments de preuve

3. Le **témoignage à charge TAQ** déclare avoir vu, le 17 avril 1994, vers 09h00, alors qu'elle était sous le pont entre les secteurs de Kankobwa et Nyarubuye, dans la cellule de Rubare, des gens circulant dans trois véhicules et les a entendu ordonner, à travers des mégaphones, « de couper toutes les brousses qui étaient hautes, et que celui qui tue un serpent doit lui asséner un coup sur la tête ». Le témoin affirme avoir aussi entendu ces

gens dire de rechercher les jeunes filles Tutsi qui avaient refusé d'être mariées aux Hutu, de les violer, et, en cas d'opposition de ces filles, de les tuer⁶⁰.

4. TAQ affirme avoir reconnu, parmi les voix dans les mégaphones, celle de Sylvestre Gacumbitsi, qui reprenait les mêmes injonctions, précisant que les jeunes filles Tutsi qui résistaient devaient être tuées de « manière atroce », c'est-à-dire en les empalant sur des bâtons et par le sexe⁶¹.
5. TAQ rapporte qu'immédiatement après ces faits, un groupe de plus d'une dizaine d'assaillants qui poursuivaient des vaches, les ont dénichées là où elle et les sept autres femmes et filles réfugiées se cachaient. Parmi elles, figurait une vieille femme, et six jeunes filles dont la plus âgée avait 25 ans et s'appelait Chantal, et la plus jeune 12 ans. Les assaillants les ont forcées à remonter sur la colline, où ils leur ont ordonné de choisir entre mourir et se déshabiller. Puis ils les ont dénudées en déchirant leurs habits et les ont violées.⁶²
6. TAQ dit qu'elle portait alors une grossesse à terme, et qu'elle a vomi pendant que l'un des assaillants la violait, son sexe introduit dans le sien. Le témoin ajoute que cet assaillant lui a demandé si l'enfant qu'elle portait était un garçon ou une fille, car il l'aurait éventrée pour tuer l'enfant s'il s'agissait d'un garçon. Le témoin dit n'avoir pas répondu puisqu'elle ignorait le sexe de son enfant⁶³. Lors de son contre-interrogatoire, le témoin confirme sa déclaration préalable, selon laquelle le même assaillant lui a dit vouloir se venger de sa sœur qui avait refusé de l'épouser⁶⁴. Le témoin précise qu'avec l'aide de la vieille femme, elle a accouché le soir de ce viol, et qu'elle a bénéficié de l'assistance d'un responsable de cellule⁶⁵. Ce dernier les a cachées dans la maison inachevée de son fils, et, le lendemain, les a informées, elle, la vieille femme et les deux autres jeunes filles, d'un communiqué du conseiller Isaïe Karamage demandant aux réfugiés d'aller à son domicile pour chercher un certificat devant leur permettre de regagner les ruines de leurs maisons en toute quiétude. Les trois autres réfugiées y sont allées, et le soir, le responsable de cellule est revenu dire à TAQ que, chez le conseiller, les réfugiées avaient bien obtenu le certificat, mais qu'elles avaient ensuite été conduites au bureau du secteur où elles ont été tuées et jetées dans une fosse utilisée ordinairement pour recueillir les eaux de pluie⁶⁶.
7. TAQ dit avoir vu Chantal, écartelée et empalée sur un bâton introduit dans son sexe, et trois autres jeunes filles partir avec des assaillants pour être leurs compagnes. Le témoin affirme que Chantal en est morte.⁶⁷
8. Le **témoin à charge TAO** déclare que sa femme lui a rapporté qu'à un barrage routier, en ce mois d'avril 1994, après les massacres perpétrés près de la paroisse de Nyarubuye, elle a été arrêtée et conduite chez le conseiller Isaïe Karamage. Là, elle aurait passé deux à trois jours⁶⁸ durant lesquels, tous les soirs et toutes les nuits, le conseiller l'a violée. En

⁶⁰ T. 29 juillet 2003, p. 69.

⁶¹ T. 29 juillet 2003, pp. 69-70.

⁶² T. 29 juillet 2003, p. 71 ; T. 30 juillet 2003, p. 34.

⁶³ T. 29 juillet 2003, p. 73.

⁶⁴ T. 30 juillet 2003, p. 39.

⁶⁵ T. 29 juillet 2003, p. 73. Le témoin a identifié ce responsable.

⁶⁶ T. 29 juillet 2003, pp. 73-74.

⁶⁷ T. 29 juillet 2003, pp. 71-73 ; T. 30 juillet 2003, pp. 40 et 46.

⁶⁸ T. 30 juillet 2003, pp. 66-67 ; T. 31 juillet 2003, pp. 20-21.

quittant cette concession, le conseiller lui a donné un certificat, sensé lui garantir un retour paisible, en lui promettant de lui rendre visite. Selon ce témoin, le certificat était ainsi libellé : « La nommée [...] est autorisée à aller où elle veut, librement, sans être inquiétée [par] personne. [...] [signé] Moi, le Conseiller Isaïe Karamage. » Il y avait aussi l'inscription suivante : « Les femmes ou les filles qui n'ont pas encore reçu ledit certificat doivent se dépêcher pour venir le chercher chez le Conseiller. » Le tout était accompagné d'un tampon du secteur de Nyarubuye⁶⁹.

9. Le témoin à charge TAO dit avoir revu sa femme, cinq jours après qu'elle eut été conduite chez le conseiller, dans les ruines de la maison de son grand-père, avec d'autres personnes. Il venait les y voir tous les soirs. Puis, un jour, vers 17h00, il a vu des assaillants attaquer sa maison. S'étant caché, il a assisté au viol de sa femme. Après ce viol, l'assaillant n'a pas voulu la céder à un second assaillant ; cet assaillant l'a alors tuée à coups de machette pour mettre fin à la dispute⁷⁰.
10. Le **témoin à charge TAP**, une jeune femme Tutsi⁷¹, déclare qu'un groupe d'une trentaine d'assaillants non identifiés a attaqué sa mère, et lui a enfoncé un bâton dans le sexe qui lui est sorti par la tête. Aux cris de sa mère, elle a conclu qu'elle était morte sur-le-champ. Le témoin précise que cette attaque s'est produite le lendemain du jour où, en avril 1994, après la mort du Président, elle avait entendu des bruits importants qui lui indiquaient que quelque chose de spécial se passait à la paroisse de Nyarubuye⁷².
11. TAP déclare qu'après cette attaque contre sa mère, des assaillants se sont dirigés vers elle. Trois d'entre eux, dont l'un a été identifié par le témoin, l'ont frappée. Les assaillants disaient qu'autrefois les femmes et les filles Tutsi haïssaient les hommes Hutu et refusaient de se marier avec eux et qu'à présent ils allaient abuser d'elles gratuitement. Les trois assaillants l'ont forcée à s'asseoir. Plusieurs assaillants l'ont violée, dont l'homme qu'elle avait identifié. Une branche d'un peu plus d'un mètre a été enfoncée dans son sexe, la blessant et provoquant un saignement abondant⁷³.
12. Le **témoin à charge TAS**, une Hutu mariée à un Tutsi, déclare, sans une indication précise de date, mais en évoquant un événement antérieur qui a eu lieu le 14 avril 1994, que, alors qu'elle cherchait à se cacher, elle a croisé un Hutu qui lui a dit vouloir la violer sans la tuer. Un autre Hutu est apparu qui a dit au premier que l'Accusé ne les avait autorisés à violer que les filles et femmes Tutsi, précisant qu'aucune décision n'avait été prise s'agissant des femmes Hutu mariées à des Tutsi. Le premier a arraché au témoin l'enfant qu'elle portait, a baissé son pantalon et l'a déshabillée puis violée. L'autre agresseur l'a aussi violée. Les violeurs ayant entendu un coup de sifflet sont partis. Le témoin pense qu'elle a été violée en raison de son mariage avec un Tutsi⁷⁴.
13. Les **témoins à décharge UA3, ZEZ, UHT, XW9, XW10, XW1, YCW, UPT, NG4, NG2, MQ1, XW15 et XW13** ont affirmé, sans autre détail, n'avoir pas eu connaissance d'une

⁶⁹ T. 30 juillet 2003, pp. 66-67.

⁷⁰ T. 30 juillet 2003, p. 68.

⁷¹ T. 6 août 2003, p. 7. Le témoin a identifié l'Accusé à l'audience : T. 6 août 2003, pp. 9 et 31.

⁷² T. 6 août 2003, pp. 6-13, 32 et 43.

⁷³ T. 6 août 2003, pp. 10-13 et 46 ; Pièce à conviction P10.

⁷⁴ T. 5 août 2003, pp. 18-24, 55 et 55.

instruction du bourgmestre relative au viol des Tutsi ni de cas de viol survenu dans leurs localités⁷⁵.

3. Discussion

14. La Défense allègue que le témoin à charge TAQ n'est pas crédible en raison de contradictions multiples entre sa déclaration préalable et son témoignage oral, et que son récit est invraisemblable⁷⁶. Pour cet événement en particulier, la Défense argue que le témoin a pu s'être trompé sur la voix et que, dans tous les cas, son témoignage n'est point corroboré⁷⁷, mais bien au contraire contredit par le témoin à charge TAX qui situe l'Accusé à la paroisse de Nyarubuye au même moment.
15. La Chambre rappelle le rejet des critiques de la Défense en rapport avec les contradictions du récit du témoin TAQ, car elles lui paraissent mineures et s'expliquent par l'effet du temps⁷⁸.
16. La Chambre est d'avis que le témoin TAQ connaissait suffisamment bien l'Accusé, en raison de leurs liens, pour pouvoir reconnaître sa voix à travers un mégaphone, sans le voir⁷⁹. La Chambre rappelle qu'aucune disposition du Règlement n'exige la corroboration, et est convaincue de la fiabilité du récit fait par TAQ d'autant plus qu'il s'agit d'un témoin direct.
17. Enfin, la Chambre rappelle ses conclusions à propos de la contradiction que la Défense a soulevé s'agissant des témoins à charge TAQ et TAX⁸⁰. En ce qui ne concerne que le témoin à charge TAQ, la Défense allègue de façon générale son absence de crédibilité et le caractère invraisemblable du récit, sans contester de façon spécifique cette partie de son témoignage ni soulever une quelconque contradiction. La Chambre réaffirme la crédibilité de TAQ et la fiabilité de son témoignage, et rappelle son raisonnement antérieur sur la crédibilité du témoin⁸¹. Elle est aussi d'avis qu'il n'y a aucune raison de penser que l'état de grossesse du témoin au moment des événements a pu affecter ses sens. Son récit est fiable, et TAQ est crédible au regard des actes de violence sexuelle qu'elle rapporte, et dont elle et d'autres femmes et filles Tutsi ont été victimes.
18. La Chambre conclut que, le 16 avril 1994, vers 09h00, l'Accusé circulant dans un véhicule dans la cellule de Rubare, secteur de Nyarubuye, en utilisant un mégaphone, a dit de rechercher les jeunes gens Hutu que des jeunes filles Tutsi avaient refusé d'épouser, afin qu'ils aient des relations sexuelles avec elles, en ajoutant que « si celles-ci refusaient, on devait les tuer [...] de manière atroce »⁸². Ces propos de l'Accusé constituent dans leur contexte une incitation au viol des femmes Tutsi dirigée vers la population environnante

⁷⁵ T. 1^{er} mars 2004, p. 55. Voir pour chaque témoin : T. 6 octobre 2003, p. 34 (UA3), et p. 63 (ZEZ) ; T. 7 octobre 2003, p. 14 (UHT) ; T. 13 octobre 2003, p. 17 (XW9), p. 33 (XW10), et p. 66 (XW1) ; T. 16 octobre 2003, pp. 29 et 32 (YCW) et p. 71 (UPT) ; T. 21 octobre 2003, p. 14 (NG4), p. 30 (NG2), p. 84 (MQ1) ; T. 17 novembre 2003, p. 26 (XW13) ; T. 18 novembre 2003, p. 8 (XW15).

⁷⁶ T. 1^{er} mars 2004, pp. 36-37.

⁷⁷ Mémoire final de la Défense, paras. 496 et ss.

⁷⁸ Voir *supra* : paras. 147 et ss.

⁷⁹ T. 29 juillet 2003, p. 49.

⁸⁰ Voir *supra* : para. 162 et ss.

⁸¹ Voir *supra* : para. 147 et ss.

⁸² T. 29 juillet 2003, p. 69.

sur laquelle il avait une influence. C'est bien pourquoi, juste après de tels propos, un groupe d'assaillants s'en est pris à TAQ et aux sept autres femmes et filles Tutsi avec qui elle se cachait et les ont violées. L'une d'entre elles, Chantal, est morte après avoir été empalée par le sexe avec un bâton, conformément à l'incitation de l'Accusé. Trois des jeunes filles ont été emmenées de force.

19. S'agissant des faits rapportés par le témoin TAO, ils sont de deux natures quant à la question de la preuve. Il y a d'une part, le viol dont sa femme aurait été victime chez le conseiller Isaïe Karamage, et qui lui a été rapporté par elle ; et d'autre part, le viol de sa femme dans les ruines de la maison de son grand-père dont il a été le témoin oculaire.
20. Dans le premier cas – le viol chez le conseiller Isaïe Karamage – la Chambre est d'avis que le témoin est crédible d'autant plus que des situations similaires de viol chez le même conseiller ou de rassemblement de femmes et filles chez ce conseiller sont rapportées par d'autres témoins, contrairement à l'affirmation de la Défense qu'il n'y a pas eu de corroboration. Ainsi le témoin à charge TAQ rapporte qu'un responsable de cellule l'a informée que les femmes et les filles étaient invitées à aller chercher un certificat de voyage chez ce conseiller, mais qu'une fois le certificat servi, ces personnes ont été conduites au bureau du secteur pour y être tuées et jetées dans une fosse commune⁸³. Le témoin TBH a aussi rapporté la délivrance d'un certificat de même nature à une jeune femme Tutsi qui aurait été ensuite tuée par des assaillants⁸⁴. Il ressort des circonstances de l'espèce, que les femmes et filles rassemblées chez le conseiller ont été violées.
21. Dans le second cas – le viol puis le meurtre de la femme de TAO, dans les ruines de la maison de son grand-père – la Chambre est d'avis que le témoin est crédible et son récit fiable, même en l'absence de corroboration, s'agissant d'un témoin direct et des circonstances propres à ces faits, notamment la relation entre le témoin et la victime du viol et du meurtre.
22. S'agissant des faits rapportés par le témoin à charge TAP, la Défense allègue que le témoin n'est pas crédible en raison de l'in vraisemblance de son récit, des contradictions apparues et de l'évocation pour la première fois à l'audience de son viol commis par l'Accusé⁸⁵. D'abord la Chambre rappelle que le rejet de l'allégation nouvelle faite à l'audience par le témoin n'affecte pas ses autres allégations⁸⁶. Ensuite, la Chambre est d'avis qu'il n'y a pas de contradiction entre la déclaration préalable du témoin et son témoignage, au regard de la date de ces viols, dans la mesure où elle a indiqué lors de son contre-interrogatoire que le temps passé depuis les événements ne lui permettait pas d'en certifier les dates. La Chambre est aussi d'avis que le récit de TAP paraît vraisemblable en raison des circonstances propres de l'espèce, une situation de crise extrême où tout le processus de survie de certaines victimes peut paraître extraordinaire. La Chambre en conclut que le témoin à charge TAP est crédible au regard des violences sexuelles qu'elle rapporte, et dont elle et sa mère ont été victimes⁸⁷.

⁸³ T. 29 juillet 2003, pp. 73-74.

⁸⁴ T. 25 août 2003, pp. 20, 49, 51, 62, 65-66.

⁸⁵ Mémoire final de la Défense, paras. 970-974.

⁸⁶ *Gacumbitsi*, Décision du 2 octobre 2003 (Ch.), para. 25, où la Chambre réserve sa position sur « les autres allégations faites par le témoin TAP ».

⁸⁷ La Chambre rappelle qu'elle avait déclaré dans sa décision du 2 octobre 2003 qu'elle ne tiendrait pas compte des nouvelles allégations de viol de TAP par l'Accusé, voir *supra* : para. 16.

23. La Défense nie toute crédibilité au témoin à charge TAS en prétendant d'une part que, victime, elle ne saurait faire un récit fiable des faits, et d'autre part qu'il s'agit d'un témoignage suggéré par l'Association *Ibuka*, en se fondant sur les propos du témoin à décharge RDR⁸⁸. Pour la Chambre, le statut de victime des événements de 1994 au Rwanda ne saurait affecter de façon mécanique la crédibilité d'un témoin, de sorte que son témoignage doive être exclu. La Chambre rappelle que nombre de victimes ont déjà apporté leur contribution à la manifestation de la vérité dans des procédures judiciaires, plus particulièrement devant ce Tribunal. De plus, et s'agissant plus particulièrement de l'allégation d'un témoignage suggéré par *Ibuka*, la Chambre estime que le témoignage de RDR ne suffit à en faire la démonstration⁸⁹. La Chambre considère que TAS est crédible et son récit fiable.
24. La Défense prétend aussi que les propos des deux assaillants rapportés par le témoin à charge TAS ne sauraient être retenus puisque le témoin a dit n'avoir pas entendu l'Accusé lui-même inciter au viol⁹⁰.
25. La Chambre note que le témoin TAS victime du viol est Hutu et que son mari est Tutsi. La Chambre est d'avis qu'à travers la femme, c'est le mari, un civil Tutsi, qui était visé. Ce viol s'inscrivait donc dans le cadre des attaques généralisées contre les civils Tutsi, comme le plaide le Procureur au paragraphe 40 de l'Acte d'accusation.

De façon générale, la Défense allègue qu'aucun des témoins de l'Accusation n'est crédible⁹¹ parce que, soit, ils sont victimes des événements de 1994, soit ils sont complices et, à ce titre, purgent une peine de prison ou sont en liberté conditionnelle. Elle prétend aussi que leurs témoignages sont invraisemblables⁹². Enfin elle affirme qu'ils ne sont pas non plus crédibles parce qu'ils sont les seuls à avoir connaissance de cas de viols, alors qu'aucun des témoins qu'elle a fait citer n'a entendu parler de viol ni n'en a été le témoin ou la victime⁹³. La Chambre a déjà répondu à ces allégations, à chaque fois qu'elle a dégagé des conclusions sur le témoin individuellement. Elle réitère ces raisons, et ajoute que le fait que les témoins à décharge n'aient pas été témoins ou victimes de viol ne saurait affecter la crédibilité des témoins qui, eux, ont été victime ou témoin de viol.

4. Crimes contre l'humanité – viol

26. De l'avis de la Chambre, toute pénétration du sexe de la victime par le sexe de l'agresseur ou tout objet utilisé par l'agresseur constitue un viol, même si ce ne sont pas les seuls comportements constitutifs de viol au sens de l'article 3) g) du Statut⁹⁴. En la présente espèce, la Chambre a déjà retenu que le témoin TAQ a été violée en même temps que sept autres femmes et filles Tutsi, les agresseurs ayant introduit leur sexe dans celui de chacune des victimes ou y ayant introduit un bâton ; que la femme du témoin TAO a été violée, l'agresseur ayant là aussi introduit son sexe dans celui de la victime ;

⁸⁸ Mémoire final de la Défense, para. 615.

⁸⁹ T. 21 octobre 2003, p. 71. Le témoin à décharge RDR a affirmé qu'une femme Tutsi lui a dit que le témoin à charge TAS l'aurait sollicitée pour témoigner à charge contre Sylvestre Gacumbitsi.

⁹⁰ T. 1^{er} mars 2004, p. 55.

⁹¹ T. 1^{er} mars 2004, pp. 36, 44 et 55.

⁹² T. 1^{er} mars 2004, pp. 36 et 37.

⁹³ T. 1^{er} mars 2004, p. 55.

⁹⁴ *Akayesu*, Jugement (Ch.), paras. 597-598 ; TPIY, *Kunarac et al.*, Arrêt (App.), paras. 127-133.

que TAS a été violée, de la même façon, ainsi que TAP et sa mère. Tous ces actes dont la Chambre est saisie s'inscrivent dans cette définition.

27. La Chambre réitère ses conclusions antérieures sur l'existence d'une attaque à la fois généralisée et systématique contre la population civile à Rusumo en avril 1994⁹⁵.
28. Dans ses conclusions factuelles, la Chambre avait retenu d'une part que l'attaque généralisée et systématique visait spécifiquement la population civile notamment Tutsi, et d'autre part que des viols ont été commis contre les témoins à charge TAQ, TAP et TAS, contre la femme du témoin à charge TAO, contre la mère du témoin à charge TAP, et contre sept femmes et filles Tutsi tel que rapporté par le témoin à charge TAQ. Toutes ces victimes sont des civiles comme il résulte des témoignages.⁹⁶
29. La Chambre est d'avis que ces victimes des viols ont été choisies en fonction de leur appartenance ethnique Tutsi ou de leur relation avec une personne de l'ethnie Tutsi, ce qui est le cas du témoin à charge TAS. La Chambre en conclut que le même critère discriminatoire, donné par l'Accusé aux assaillants, a prévalu dans la conduite de l'attaque et dans la sélection des victimes des viols.
30. Dans les circonstances de l'espèce, les propos tenus par l'Accusé demandant qu'en cas de résistance, les victimes soient tuées de manière atroce, et le fait que les victimes de viol aient été agressées par les mêmes assaillants qu'elles fuyaient suffit à établir leur absence de consentement aux actes sexuels dont elles ont été victimes.
31. Le Procureur soutient que l'Accusé a planifié, incité à commettre, ordonné, commis ou de toute autre manière aidé et encouragé à planifier, préparer ou exécuter le viol des victimes sus visées.
32. La Chambre est d'avis que les témoignages présentés devant elle prouvent que Sylvestre Gacumbitsi a bien incité au viol des femmes et filles Tutsi, par ses propos tels qu'entendus par le témoin à charge TAQ. Le témoin à charge TAS, de son côté, a aussi rapporté avoir entendu ses violeurs dire que l'Accusé leur avait ordonné de violer les femmes et les filles Tutsi, mais son témoignage indirect qui n'a pas été corroboré, ne suffit pas, en l'espèce, à prouver l'implication de l'Accusé.
33. La Chambre rappelle que, immédiatement après les propos de l'Accusé incitant au viol des femmes et filles Tutsi, alors qu'il était dans un convoi passant sur le pont entre les secteurs de Kankobwa et Nyarubuye, en direction de Nyarubuye, le témoin à charge TAQ et sept autres femmes et filles Tutsi ont été violées par des jeunes gens qui, étant dans les alentours, ont entendu l'incitation du bourgmestre. La Chambre en conclut que ces viols rapportés par le témoin à charge TAQ résultent bien de l'incitation faite par l'Accusé.
34. Par contre la Chambre manque d'éléments de preuve établissant le lien entre le viol du témoin à charge TAS et d'éventuels propos de l'Accusé, et ne saurait donc conclure à la responsabilité de l'Accusé à cet égard. Il en est de même pour le viol de la femme du témoin à charge TAO, et pour le viol de la mère du témoin à charge TAP. La Chambre

⁹⁵ Voir *supra* : paras. 303-306.

⁹⁶ Voir *supra* : Chapitre II, Section E. Cette référence est également pertinente pour les rappels de conclusions factuelles qui suivent.

considère cependant que ces viols sont établis et participent de l'attaque généralisée et systématique contre la population civile à Rusumo.

35. La Chambre en conclut que, sur la base de l'Article 6 1) du Statut, Sylvestre Gacumbitsi est pénalement responsable d'avoir incité au viol de TAQ et de sept autres femmes et filles Tutsi, commettant ainsi un crime contre l'humanité.
36. Quant aux autres formes de participation au crime, la Chambre considère n'avoir pas été saisie de la preuve qu'elles puissent être mises, en l'espèce, à la charge de l'Accusé.
37. La Chambre ayant conclu à la responsabilité de l'Accusé sur la base de l'Article 6 1) du Statut pour avoir incité au viol dans la Commune de Rusumo en avril 1994, elle estime ne pas devoir *examiner* si sa responsabilité est également engagée en vertu de l'Article 6 3) du Statut en raison de l'identité des faits et de l'absence de preuve d'une relation hiérarchique entre l'Accusé et les auteurs de ces viols.
38. Ainsi, s'agissant du cinquième chef d'accusation, la Chambre déclare Sylvestre Gacumbitsi, COUPABLE DE VIOL CONSTITUTIF DE CRIME CONTRE L'HUMANITÉ.

CHAPITRE IV : VERDICT

39. Par les motifs exposés dans le présent jugement et au vu de l'ensemble des preuves et arguments dont elle a été saisie par les parties, la Chambre de première instance déclare l'Accusé :

Chef d'accusation 1 (Génocide) :	COUPABLE
Chef d'accusation 2 (Complicité dans le génocide) :	CHEF REJETÉ
Chef d'accusation 3 (Extermination en tant que crime contre l'humanité) :	COUPABLE
Chef d'accusation 4 (Assassinat en tant que crime contre l'humanité) :	NON COUPABLE
Chef d'accusation 5 (Viol en tant que crime contre l'humanité) :	COUPABLE

Judgement of: THE PROSECUTOR v. ALFRED MUSEMA Case No. ICTR-96-13-A 27 January 2000

(Finds Musema guilty of crime against humanity of rape. Not guilty of command responsibility for the same crime by his subordinates as Prosecution did not prove this beyond reasonable doubt.)

5.3 Sexual crimes

797. The Chamber will now assess, one by one, four paragraphs (4.7 to 4.10) of the Indictment according to which Musema allegedly committed crimes connected with sexual offences (cf. *Annex A* to the Judgement).

General allegations of rape and of encouraging others to capture, rape and kill Tutsi women throughout April, May and June 1994 (paragraph 4.7)

798. Paragraph 4.7 of the Indictment states the following:

"At various locations within the area of Bisesero and Gisovu, in the prefecture of Kibuye, throughout April, May and June 1994, Alfred Musema, committed acts of rape and encouraged others to capture, rape and kill Tutsi women, seeking refuge from attacks within the area of Bisesero in Gisovu and Gishyita communes, Kibuye Prefecture."

799. Musema admitted that there had been mass killings at the Gisovu Tea Factory and around.

800. *Witness M* testified that during the meeting held on Karongi hill on 18 April 1994, Musema said that "those who wanted to have fun could rape their women and their children, without fearing any consequences"⁽¹⁾, referring to Tutsi women and children.

801. *Witness M* also testified that subsequently, the day after, on 19 April, two of the men who had attended this meeting, together with three other men, took part in the rape of his cousin and niece, on the hill of Rushekera, opposite to Mount Karongi. *Witness M* was hiding in the undergrowth on a hillside opposite the hillside where the rapes took place. He said that he was at no more than 300 metres from where the attackers were. In the course of the cross-examination, *witness M* confirmed that he saw the five rapists at a distance of between 250 and 300 meters. The witness explained that the women were dragged out of the bushes to a more visible area on the "terraces" on the hillside used for cultivation.

Factual Findings:

802. According to the Chamber, the Prosecutor has not proven beyond reasonable doubt that Musema was present at the meeting on 18 April 1994 on Karongi hill. The Chamber here refers to its factual findings in Section 5.2 above, under the heading "Karongi hill FM Station, 18 April 1994".

803. Under these circumstances, the Chamber considers that there is no evidence that Musema ordered the rapes.

804. Concerning the general allegations in paragraph 4.7 that Musema himself committed acts of rape throughout April, May and June 1994, the Chamber refers to its conclusions below regarding paragraphs 4.8 to 4.10 of the Indictment.

Alleged acts of rape and murder of Annunciata Mujawayezu on 14 April 1994 (paragraph 4.8)

805. Paragraph 4.8 of the Indictment reads as follows:

"On 14 April 1994, within the area of the Gisovu Tea Factory, Twumba Cellule, Gisovu Commune, Alfred Musema, in concert with others, ordered and encouraged the raping of Annunciata, a Tutsi woman, and thereafter, ordered, that she be killed together with her son Blaise".

806. *Witness I*, a 32 year-old Tutsi woman, testified that in 1994 she was working as a teacher in a primary school. Her husband worked in the Gisovu Tea Factory from 1992 to 1994, and they lived within the factory premises. The witness testified that when the killing began at the tea factory, she and her youngest child took refuge in the Guest House where they were discovered by *Interahamwe*. The *Interahamwe* showed her a list of people to be killed. The first name on the list was her husband's, and her own name was second. Next on the list were the names of Canisius, the Chief Accountant of the factory, and his wife Annunciata Mujawayezu and their children. Two of Annunciata Mujawayezu's children were killed at that time by the *Interahamwe*. Annunciata Mujawayezu escaped and went to hide in the tea plantations. The witness testified that on that day, 13 April, Canisius was killed.
807. *Witness I* was held by the *Interahamwe* to wait for the arrival of Musema, together with the children of a certain Ndoli. On the next day, 14 April, the witness saw Musema arrive in his vehicle at the tea factory. He was accompanied by two soldiers, whom she named, in a second vehicle. She said they told her that they had come for her children and for the children of Ndoli. Ndoli's children were killed on the spot by an old man who did not want them to suffer. The witness testified that Musema asked where her children were and ordered them to be taken away to be drowned or put in bags and beaten like rats. Her two children, one and three years old, were then taken from the house. The witness followed the vehicle, throwing stones at it. Though she was later reunited with her own children, *Witness I* testified that she subsequently discovered sacks which had been thrown away in the forest containing bodies of dead children, some of which had been decapitated, as well as some children still alive, in the throes of death. The witness recognized many of these children whom she named at trial.
808. When asked whether they should kill *Witness I*, the witness heard Musema say no, that they should take her with him to the guest house. The witness testified that with the help of someone called Mushoka, she was able to escape and hid in a nearby bush. She then met Annunciata Mujawayezu who said she was hiding in Ndoli's house. They decided to go and hide close to the guest house in the tea plantation so that they could hear what was being said and know where attacks would be made and where they could hide. Annunciata Mujawayezu was with her child Blaise.
809. *Witness I* testified that Musema and other people came to the bungalow, close enough for her to hear what they were saying. Annunciata Mujawayezu's child Blaise, a five year old, then began to cry from hunger, and she told *Witness I* that she did not want everyone to be killed so she was leaving with the child. She then stood up, and Musema called her from the bungalow and told her, "come we are going to kill you like the Inyenzi killed our own people." According to *Witness I*, Musema then called the Twas and told them to rape her and to cut one of her breasts off and give it to the child to eat if the child was hungry. There were then many cries. *Witness I* testified that she was sure the breast was cut because she heard them say to Annunciata Mujawayezu that since she only had one breast nobody could "treat" her for that. *Witness I* further testified that she was sure that Annunciata Mujawayezu was raped because she heard them say "you slept with the Tutsi now you have slept with the Twa."⁽¹²⁾ *Witness I* said she continued to hear the cries of Annunciata Mujawayezu and later on sounds which she described as snoring. She thought the child was killed before because she heard something like a blow and the child died immediately. *Witness I* stated that Musema then told Ndimbati and another man, called Bayingana, that they had done a good job, that the list no longer had many names and that he was going to pay them.
810. *Witness I* testified, on cross-examination, that, she recognized Musema's voice and distinctly heard the cries and comments. Although many people were speaking at the same time, and there was a lot of noise when Musema was speaking, she added that she only heard when Musema ordered Annunciata Mujawayezu's breast to be cut off. Further, the witness said that somebody else told her, after she had taken refuge at her house, that Annunciata Mujawayezu's killers had driven stakes into her corpse.
811. Still on cross-examination, *Witness I* was presented with a handwritten statement of hers dated 15 April 1995. In this statement she wrote that Musema had undressed Annunciata Mujawayezu. The *Witness* explained that in her handwritten statement she included information

she had been told but that in her testimony she had only related what she herself had seen and heard. She said she did not herself hear anything about Musema undressing Annunciata Mujawayezu. Similarly, she was presented with having written that the hands and ears of Annunciata Mujawayezu, as well as her breast, were cut off and given to her son Blaise to eat. She again explained that this handwritten statement, which she had done for a priest, was an account of everything she had heard others say, and not limited to what she herself heard, which was only related to the cutting off of the breast. Witness I was presented with another portion of the pre-trial statement in which she was recorded as saying that some men in the crowd ordered the Twas to rape Annunciata Mujawayezu without specifically mentioning Musema.

812. The Defence extensively cross-examined Witness I on her physical location and the extent to which she could have been able to see from where she was hiding. In her testimony, which she reaffirmed on cross-examination, she stated that she was approximately 1.5 metres from the bungalow. She clarified that she could not see Musema because she was lying on the ground of the plantation but that she knew and recognized his voice. She also clarified that pieces of wood were missing from the fence, differentiating it from the picture of the fence introduced by the Defence and dated 1995. When questioned about the statement made to a Swiss judge on 16 June 1995 in which she said she saw Musema on 15 April 1994 but that she was not sure of the day, Witness I acknowledged that she had thought it was the following day but had not been able to be specific with regard to the dates.
813. Defence counsel extensively questioned Witness I regarding discrepancies between her pre-trial statements and her testimony as to how she was reunited with her children the night following the death of Annunciata Mujawayezu. The witness maintained repeatedly that she had not spent the night in the forest with her children, as recorded in a statement, but that the watchman had taken the children to his home after he had come to the forest looking for her unsuccessfully. The witness noted on cross-examination that with regard to the long period of several weeks in which she was hiding it would be difficult to recount every single detail of where she stayed and when. She stated that she had in fact hidden in all of the places mentioned in her pre-trial statements at various times.
814. *Witness L*, a thirty nine year-old Hutu employed at the tea factory, testified that Musema returned to the factory around the 18th of April. Witness L said he knew Annunciata Mujawayezu. He recounted that on the day Musema returned, the bourgemestre Ndimbati arrived with some young people, and they said that they had come from Bisesero to have a drink at the guest house. He said he saw them there with Annunciata Mujawayezu and they were drinking, that Musema came and joined them there together with Annunciata Mujawayezu, all standing close to the fence which surrounded the guest house. He said Musema stood by Ndimbati but that the witness was up the road and did not hear what they were saying to each other. The witness testified that after a short while Musema went into his car but in the meantime Annunciata Mujawayezu was made to enter the guest house by those who were with her, through the back door. Witness L, who was observing from the road, continued on his way. The next morning he asked a child whether he had seen a woman in the guest house and the child replied that the woman had been killed.
815. On cross-examination, Witness L stated that he did not see Musema go into the guest house and that he did not see Musema at the guest house with Annunciata Mujawayezu.
816. On re-examination, the witness clarified that he saw Musema standing near the pergola (bungalow) and that Annunciata Mujawayezu was standing with the others behind the pergola. He added that Annunciata Mujawayezu was holding a child in her arms which he was told was hers.
817. In the course of the cross-examination, the witness also said that the killings at the tea factory started before the return of Musema and that the killing at the Guest House occurred a few days after the other killings at the tea factory.
818. In re-examination, the witness added that he was not at the Tea Factory when the killings took place there, as he was off duty. Witness L confirmed that when he saw Musema at the Guest House in the company of the *bourgemestre*, Musema had only just returned from Kigali and not even gone to his residence. The witness further said that he saw Nzamwita but not Musema with Annunciata Mujawayezu enter the Guest House.
819. *Witness PP*, a 46 year-old Hutu was employed at the Gisovu tea factory in 1994, testified that on 13 April 1994 he saw a number of bodies, including the body of Annunciata Mujawayezu, whom he knew, which was below the road near the canteen. He said her body had clothes on its lower part, and the face was turned towards the canteen. The witness testified that he did not

observe any injuries on the body from that position. Witness PP identified a number of the bodies as those of Tutsi employees of the factory. Witness PP further testified that he knew Musema was around on the evening of 14 April 1994 because he saw his vehicle near the canteen, which was below the factory. He clarified that this was the same canteen near which he saw the body of Annunciata Mujawayezu.

820. The only witness for the Defence on the allegations relating to the rape and killing of Annunciata Mujawayezu is Musema. According to his testimony, Musema was at the Guest House on 14 April 1994, talking with the *bourgmestre* Ndimbati, when they suddenly heard a woman's cough and the cry of a child. He realized later that it was Annunciata. He then saw a few people, among them a soldier and Emmanuel, a school teacher, going into the Guest House. Emmanuel came out and was wiping blood off his sword. Musema testified that he suspected some complicity between the *bourgmestre* and the others. When the others had gone, he asked his Chief of Personnel what had happened. He did not ask Emmanuel. The Chief of Personnel told him that Annunciata Mujawayezu had been killed and that they had arrived too late. No mention was made of the child.
821. On cross-examination, Musema was confronted with his other accounts of this incident, which differ substantially from his testimony. Prosecution brought forward notably three interviews of Musema given to the Swiss Judge, namely on 12 May and 13 July 1995, and on 4 March 1996, respectively.
822. In a statement he made on 12 May 1995 to Swiss authorities (Exhibit P59), Musema was reported to have said that Annunciata Mujawayezu was murdered while he was touring the factory and en route to the Guest House where the *bourgmestre* joined them. A pick-up truck arrived carrying many people including a teacher and a police inspector. People shouted that Annunciata Mujawayezu had been found and Musema said he shouted back that she was not to be killed. The people with the *bourgmestre* then ran towards her and killed her and the people at her residence. In a statement made on 13 July 1995 to Swiss authorities (Exhibit P60), Musema was reported to have said that Annunciata Mujawayezu was killed at the residence of the Chief Accountant⁽¹³⁾. People took her from the tea plantation near the guest house to the staff quarters above the guest house more than 300 metres away. He was inside the guest house together with Ndimbati and several others. He noted that the guest house referred to both the main building and the pergola (bungalow). He said that he and Ndimbati heard cries from the tea plantation, that they both stayed inside while others went out. In a statement made on 4 March 1996 to Swiss authorities (Exhibit P61), Musema was reported to have said that Annunciata Mujawayezu had been killed in her house from where the cries were heard.

Factual Findings:

823. The Chamber notes that the testimony of Witness I was confusing in certain respects, particularly with regard to the details of her movement and the chronology of events. However, her testimony was consistent on cross-examination, and she did provide reasonable and clear answers to the questions raised on cross-examination with regard to her various pre-trial statements. The Chamber noted the determination of the witness to clarify the distinction between what she had heard others say and what she herself witnessed. She also carefully indicated on numerous occasions what she did not see or hear, as well as what she did see or hear. With regard to her account concerning the rape and murder of Annunciata Mujawayezu, the Chamber finds Witness I to be clear and consistent and accepts her testimony.
824. The testimony of Witness L is limited with respect to its probative value because the witness was not able to hear Musema from where he was standing. What he saw, that is Musema standing near the pergola (bungalow), Annunciata Mujawayezu standing by the fence with the others and subsequently being taken by them into the guest house, is consistent with Witness I's much more detailed account of the event. On cross-examination, the witness clearly stated that Musema did not enter the guest house. This is not inconsistent with the other accounts, all of which indicate that he remained outside and left shortly thereafter in his vehicle.
825. It, it is clear, from Witness L's testimony, Witness I's testimony and Musema's own testimony, that Musema and Annunciata Mujawayezu were at the Guest House on 14 April 1994. It appears that Annunciata Mujawayezu was near the Guest House at the beginning but afterwards she was taken in by the back door. According to Musema's testimony to the Swiss Judge, he was inside the Guest House. The Chamber notes that Witness L places the date of this incident as around 18 April. In light of the evidence of Witness I and Musema himself that this

incident took place on the 14 April, the Chamber considers that the witness is mistaken about the date, which he indicated in any event as an estimation.

826. The testimony of Witness PP is limited with respect to its probative value because Witness PP was not present when the killing of Annunciata Mujawayezu occurred. The witness saw her body and testified that there was no clothing on the upper half of the body. This evidence would be consistent with the account of Witness I that sexual violence might have been directed to her upper body. However, Witness PP noted that he did not see injuries to the body from his position. The testimony does not make it clear whether the body was face down or on its back. For this reason, the Chamber finds that the evidence of Witness PP, while credible, is not helpful in establishing what happened other than to corroborate that Annunciata Mujawayezu was killed and that Musema was present at the factory on 14 April. The Chamber further notes that the witness testified that he saw the body of Annunciata Mujawayezu on 13 April, whereas both Witness I and Musema date the death of Annunciata Mujawayezu to 14 April. The Chamber considers that the witness is mistaken about the date.
827. The Chamber has considered the testimony of Musema in light of the pre-trial statements he made to Swiss authorities which differ not only from his testimony but from each other in material respects. In one version of the incident, Musema tried to stop the killing of Annunciata Mujawayezu. In another version, he came too late. In each version, she was killed in a different place. In light of these gross inconsistencies, for which Musema does not have any reasonable explanation, the Chamber concludes that the only reasonable explanation for the inconsistencies is that he is not being truthful.
828. Having considered the evidence, as set forth above, the Chamber finds that the Prosecution has established beyond a reasonable doubt that Musema ordered the rape of Annunciata Mujawayezu, a Tutsi woman, and the cutting off of her breast to be fed to her son. No evidence was introduced to indicate that he ordered her to be killed, although there is conclusive evidence that she was in fact killed. Considering Musema's high position in the *commune*, he must have known that his words would necessarily have had an important and even binding impact on his interlocutors.
829. There is no conclusive evidence that Annunciata Mujawayezu was raped, or that her breast was cut off, although there is some evidence to support an inference that these acts were perpetrated.

Alleged acts of rape and murder of Immaculée Mukankuzi and others on 13 May 1994 (paragraph 4.9)

1. Paragraph 4.9 of the Indictment states the following:

"On 13 May 1994, within the area of Bisesero, in Gisovu and Gishyita communes, Kibuye Prefecture, Alfred Musema, in concert with others, raped and killed Immaculée Mukankuzi Mukankuzi, a pregnant Tutsi, and thereafter ordered others accompanying him to rape and kill Tutsi women seeking refuge from attacks."

831. *Witness J*, a 49 year-old Tutsi woman, testified that she had five children, four girls and one boy. In 1994 the girls were 25, 23, 19 and 12 respectively, and the boy was 9 years old. The witness testified that she arrived in Bisesero in April 1994 seeking refuge on Muyira hill with two of her children. The other three children had been shot by Charles Sikubwabo, the *bourgmestre* of the Gishyita *Commune* on 7 April as she was fleeing.
832. Witness J testified that she first saw Musema on 13 May, leading the attackers, although she stated that she knew him previously as the managing Director of the Gisovu Tea Factory, where her husband worked. He was with about thirty young men, many *Interahamwe* wearing red shirts and white shorts and armed with clubs, sticks and machetes. Witness J testified that she was with five other Tutsi women and that when they saw Musema they ran and hid in a bush. He fired in the air, and they came out of the bush and tried to run away. Musema told his men to run after them, and they were caught. She said Musema told the men that he was going to take one of the women and rape her and that they should follow his example and do the same thing. The assailants followed the instructions. Witness J heard Musema tell them in Kinyarwanda "What I do, you will imitate after me." Musema also told the youths to take the Tutsi women and to check and note their constitution, which the witness understood to mean they were to be raped. The

witness stated that Musema regrouped and instructed the assailants by using a megaphone and a whistle, and by speaking to them.

833. According to Witness J, Musema then raped one of the women, a Tutsi woman named Immaculée Mukankusi who was 25 years old and eight months pregnant. He hit her with the butt of his gun, she fell down, he dropped his trousers and underwear to the knees and jumped on her. The witness said Immaculée was struggling and she was crying because he was saying that he was going to kill her. Musema was on top of her for about four minutes. After raping her, he put on his clothes, got up and killed her, stabbing her with the knife attached to his gun between the neck and the shoulder.
834. Witness J testified that the killing of Immaculée Mukankusi gave the men with Musema the courage to kill the other women. The other five women, including Witness J and her 18 year-old daughter, were then raped. After raping them, the men stuck sharpened sticks into their private parts. The witness said that she was raped last because the others were much younger than she was and she was considered as an old woman. She said the other women were still alive when the sticks were inserted into them and that they were screaming, and she clarified that they were killed with the sticks. Those who did not die were finished off with clubs or machetes. Witness J testified that she saw her daughter dying. The rapes, killings and other acts took place at less than two metres from her.
835. The witness said that while all this was happening Musema was further off but still in the area, shooting at the men who were fleeing. He told his men that when they had finished killing the women they should all leave. The witness testified that Musema was watching while she was raped and that her clothing was removed by her attackers. She said that the man who raped her was on top of her for four hours. On further questioning she said that because of the pain she was feeling she thought it went on for four hours and then she lost consciousness. On further questioning of the four hours, the witness said that maybe it was one year because the suffering was so much. Witness J said that nothing was inserted into her private parts because she was almost unconscious but that they cut her head with a machete and on her right shoulder and hand with a panga. She was also kicked in the stomach. When she recovered consciousness she noticed that she was bleeding and she saw the cadavers of the other victims, including that of her daughter. As a result of the attack, the witness said she has lost feeling in her arm and still has bleeding for which she cannot be treated. She said that while other widows were able to remarry she was not as she has become disabled.
836. On cross-examination, Witness J testified that her three older children - the 25 year-old, the 23 year-old and the 19 year-old were the ones shot by the *bourgmestre* when she was fleeing to Bisesero. She said the other two were killed in Bisesero. Defence counsel also questioned Witness J on the discrepancies between her testimony in court and a radio interview that she did in January 1998 for Radio Rwanda. In the interview, the witness gave an account of the killings that took place in Bisesero. Defence counsel noted that the witness did not mention certain killings, including the killing of her three children by Sikubwabo and also that she mentioned details in the interview that she had not mentioned in her testimony, such as that she went to the Mubunga church on the day she fled to Bisesero. The witness explained that she was asked questions and was not testifying against anybody, that she did not think it necessary to mention the church as she did not think there was anyone there against whom she was testifying. Defence counsel accused the witness of lying in her testimony because she felt that somebody should be responsible for her loss and injury. The witness emphatically insisted that her testimony was what she herself had witnessed and experienced. Defence counsel noted that the witness had not mentioned Musema, or the fact that she was raped or that others were raped, in the radio interview. She replied that she had not wanted to raise this matter and on re-direct examination she stated that before testifying she had not told anyone about the rape.
837. On cross-examination, Defence counsel noted that Witness J had said that her three oldest children had been shot by Sikubwabo, leaving her two children ages 12 and 9. He asked how then her 18 year-old daughter could have been raped by Musema's men subsequently. The witness responded that the child was her own baby that she had brought into this world and said that Defence counsel was trying to make her lose her mind with questions about the ages. She then said insistently that it was Musema who ordered the killing of her children, together with all those who were with her. At the request of the Chamber, the Prosecution introduced documentary evidence establishing that the witness had five children and giving their names.
838. Defence counsel questioned the witness extensively with regard to the physical location of the rape and killing showing her a number of photographs and asking her to identify Muyira hill.

She was unable to do this from the photographs, which she attributed to the fact that the hills were all similar in nature and did not have distinguishing characteristics that could be identified, such as crop plantations.

839. According to the Defence, the allegations based on Witness J' testimony falls, since the witness lacks integrity and is unfaithfull.

Factual Findings:

840. The Chamber notes that witness J is the sole witness of the rape and killing of Immaculée Mukankuzi by Musema and the rape and killing of other women by the men with him at Muyira Hill on his instruction. The Chamber found her, generally speaking, to be a balanced witness. Her evidence on direct and cross-examination was notably consistent and additional details which emerged through extensive questioning provide a clear picture of the events she was describing.
841. Yet, the Chamber notes that the witness made several time estimates which appeared to be inaccurate. For example, she testified that the man who raped her was on top of her for four hours, saying subsequently that it felt like four hours or even a day. She testified that a distance which would take a young man five minutes to cover would take her two hours. The Chamber considers that these estimates reflect a general difficulty of the witness in measuring time which do not detract from the credibility or her testimony.
842. On cross-examination, Defence counsel challenged the witness on several grounds. The Chamber considers that with regard to the interview she did on Radio Rwanda, that it is inaccurate to characterize the interview as "different" from her testimony, as if it were therefore inconsistent with her testimony. Defence pointed out that she did not say everything in the interview that she said in her testimony and that she did not say everything in her testimony that she said in the interview. The witness had a reasonable explanation for these differences - the radio interview was of short duration with a specific purpose and controlled by the interviewer. The fact that she did not mention Musema is not, in the view of the Chamber, significant, particularly in light of the fact that she did not mention the killing of her children and other very significant events to which she testified. The chamber recognizes that it is especially difficult to testify about rape and sexual violence, moreover in a public forum. No inconsistencies between the radio interview and the testimony were identified.
843. The Chamber considers that the principal inconsistency in the testimony of Witness J relates to her account of the circumstances surrounding the killing of her 19 year-old daughter by Sikubwabo and the rape and killing of her 18 year-old daughter by the young men with Musema at Muyira hill. The witness clearly testified several times that she had five children, who were aged 25, 23, 19, 12, and 9. This has further been established by documentary evidence at the request of the Chamber. She clearly testified several times that her three eldest children were killed by Sikubwabo, leaving her with two children aged 12 and 9. Yet she also testified that one of the five young women raped with her at Muyira hill was her 18 year-old daughter. On cross-examination when the question was put to her to explain how this was possible, she did not provide any answer. On re-direct examination, in reply to a specific question on this point by the Prosecutor, she provided a very general answer to the effect that Musema had ordered her children to be killed. She did not explain the apparent inconsistency.
844. While the Chamber found the testimony of Witness J to be generally credible, it is deeply troubled by this unexplained inconsistency regarding the rape of her daughter. Without any reasonable explanation, the Chamber must question the accuracy of the account. The Chamber believes that there is likely to be a reasonable explanation, based on its evaluation of the witness.
845. However, recalling the high burden of proof on the Prosecutor and the lack of any other evidence produced to corroborate the account of Witness J, the Chamber cannot find beyond a reasonable doubt that the allegations have been established relating to the rape and killing of Immaculée Mukankuzi by Musema and the rape and killing of others with her by his men and on his order on 13 May 1994.

Alleged acts of rape and murder of a woman called Nyiramusugi on 13 May 1994 (paragraph 4.10).

846. Paragraph 4.10 of the Indictment reads as follows:

"On 13 May 1994, within the area of Bisesero, in Gisovu and Gishyita communes, Kibuye prefecture, Alfred Musema, acting in concert with others, raped Nyiramusugi, a Tutsi woman, and encouraged others accompanying him to rape and kill her".

847. *Witness N*, a 39 year old Tutsi, testified that he sought refuge in the Bisesero area from 26 April to 13 May 1994. He stated that there were many attacks on Muyira hill on 13 May 1994 and that he stayed on Muyira hill until that date, after which he had to flee again. He testified that he knew Musema. He saw Musema arrive at Muyira hill aboard his red vehicle on 13 May 1994. He said that this was the first time that he had seen Musema during the attacks. He explained that he was able to hear Musema once the group moved to within a few metres of him.
848. The witness testified that Musema spoke to a policeman named Ruhindura, and asked him whether a young woman called Nyiramusugi was already dead, to which the policeman answered 'no'. He stated that Musema then asked that before anything, this girl had to be brought to him.⁽¹⁴⁾ He and the *bourgmestre* fired the first shots so the others would start shooting. Ruhindura while fighting and looking for the young woman caught her. The Witness stated that he knew Nyiramusugi. He used to see her when she walked to school and he used to take his cows to graze in front of her parents' house. He said that she was a young unmarried teacher.
849. Witness N testified that Nyiramusugi was caught around 15.30hrs. He said that he saw Ruhindura with four youths drag the young woman on the ground and take her to Musema. He said that Musema was carrying a rifle which he then handed to Ruhindura. The four people holding Nyiramusugi brought her to the ground. They pinned her down, two holding her arms and two holding her legs. The two holding her legs then spread them, and Musema placed himself between them. The witness saw Musema rip off Nyiramusugi's clothes and underclothes and then took off his own clothes. The witness stated that Musema said aloud "Today, the pride of the Tutsi shall end"⁽¹⁵⁾ and then raped the young woman. Witness N said that Nyiramusugi was a very well known Tutsi girl who was very beautiful.
850. The witness explained that because of the echo at Muyira hill, it was possible to hear everything that was said and to recognize the voice of certain of the attackers. The Witness also explained that he was able to see the rape as he had fallen in a bush when fleeing to the top of the hill. Musema was at 40 metres, bird flight, on a little hill at Muyira, walking distance being further because to get to Musema from the Witness' position on the hill, one had to walk down and back up the other side.
851. The witness affirmed that the victim was Tutsi and explained that Musema took her by force. He stated that during the rape, Nyiramusugi struggled until Musema grabbed one of her arms and held it against her neck. The four assailants who initially held down the victim watched from nearby while the policeman, Ruhindura, stood further away. Witness N stated that after the rape, which he estimated lasted forty minutes, Musema walked over to Ruhindura, took his rifle back and left with him.
852. Witness N also testified that the four other men, who initially pinned down the victim, went back to the girl and took turns raping her. She was struggling and started rolling down toward the valley. He was able to see them rape Nyiramusugi until they were out of sight. During the rape, he heard the victim scream and say "the only thing that I can do for you is only to pray for you."⁽¹⁶⁾
853. Witness N added that he later saw the four attackers on the rise of the other side of the valley and saw that Nyiramusugi had been left for dead in the valley. That night, the witness and three other people went to the victim and found her badly injured. She was cut all over her body, covered with blood and nail scratches around her neck. He stated that they took her to her mother. The witness testified that the mother died the next day and that he learnt from Nyiramusugi's brother that she had been shot.
854. On cross-examination, Defence counsel extensively questioned the witness as to how he came to testify and the circumstances of his statement which was made on 13 January 1999 to the Prosecutor. The witness explained that he had previously made a statement about Musema to the local court in 1997. The witness further testified that he was able to hear Musema as the refugees were speaking amongst themselves softly and the attackers were getting organized. Moreover, the attackers spoke loudly so that everyone could hear them.
855. The witness was asked why Nyiramusugi was not killed after she was raped. He replied that he did not know. When asked again, he replied that what they did to her was worse than killing her. When pressed further as to whether it was not strange that she was not killed he replied that in a way they did kill her, and that sometimes they would leave people to die if they thought they had been sufficiently weakened. He added that if she had been left there without any

help through the night, she would have died. The witness was asked whether he had been paid any money to come and testify, and he replied that he had not. Finally, it was put to him that he was lying, and he replied that he had not come to lie but rather to talk about what he himself had seen and that Musema would know that he was telling the truth.

856. According to the Defence, Musema was not in Kibuye during the period covering 13 May 1994. Several letters were presented in support of the alibi.

Factual Findings:

857. The Chamber accepts the testimony of Witness N as credible.

858. It is clear and consistent, and nothing emerged from the cross-examination of the witness which cast any doubt on the evidence presented. In the view of the Chamber, the reasons given by witness N as to why he waited five years to come forward with this statement, namely that he reported Musema to his local court in 1997, is satisfactory.

859. The reasons given by the witness as to how he had been able to hear Musema's exclamations are also convincing. The witness indeed explained that, *firstly*, the attacks had not yet started when Musema asked for the girl to be brought to him, *secondly*, he was able to hear Musema since the refugees were speaking amongst themselves softly and the attackers were getting organized, and *thirdly*, the attackers spoke loudly. Moreover, the witness explained that because of the echo at Muyira hill, it was possible for him to hear everything that was said and to recognize the voice of certain attackers, taking into account that the bush in which he was hiding was approximately at 40 metres bird flight from Musema. In the light of exhibits D7-A, D7-B and P21, Witness N's observation and description of the area of Muyira hill is convincing.

860. Concerning the alibi, the Chamber recalls its finding in Section 5.2 above as regards mid-May attacks. The Chamber here confirms that this alibi does not stand.

861. Based on this evidence, the Chamber finds, beyond a reasonable doubt, that Musema, acting in concert with others raped Nyiramusugi, and by his example encouraged the others to rape her on 13 May 1994.

862. According to the Chamber, there is no evidence, however, that he encouraged them to kill her, as alleged in the Indictment.

6.6 Count 7: Crime Against Humanity (rape)

962. *Count 7* of the Indictment charges Musema with *crime against humanity (rape)*, pursuant to Articles 3(g), 6(1) and 6(3) of the Statute, for the acts alleged in paragraphs 4.1 to 4.11 of the Indictment.

963. In light of its factual findings with regard to the allegations in paragraph 4.10 of the Indictment⁽¹⁸⁾, the Chamber considers the criminal responsibility of the Accused, pursuant to Articles 6(1) and 6(3) of the Statute.

964. The Chamber notes that the Defence has made certain admissions *inter alia*: that the Tutsi were a racial or ethnic group; that there were widespread or systematic attacks through out Rwanda, between the period 1 January and 31 December 1994 and these attacks were directed against civilians on the grounds of ethnic affiliation and racial origin. The Chamber finds that the Prosecutor is discharged of the burden of proving these elements in respect of crime against humanity (rape).

965. The Chamber has adopted the definition of rape set forth in the *Akayesu* Judgement, as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive"⁽¹⁹⁾ and the definition of sexual violence set forth in the *Akayesu* Judgement as "any act of a sexual nature which is committed on a person under circumstances which are coercive."⁽²⁰⁾

966. The Chamber has made the factual finding that on 13 May 1994 the Accused raped a Tutsi woman called Nyiramusugi. The Chamber recalls its finding in Section 6.3 *supra*, that the Accused had knowledge of a widespread or systematic attack on the civilian population. The Chamber finds that the rape of Nyiramusugi by the Accused was consistent with the pattern of this attack and formed a part of this attack.

967. The Chamber therefore finds, that Musema is individually criminally responsible for crime against humanity (rape), pursuant to Articles 3(g) and (6)(1) of the Statute.

968. However, the Chamber finds, that the Prosecutor has failed to prove beyond a reasonable doubt any act of rape that had been committed by Musema's subordinates and that Musema knew or had reason to know of this act and he failed to take reasonable measures to prevent the said act or to punish the perpetrators thereof, following the commission of such act. The Prosecutor has therefore not proved beyond a reasonable the individual criminal responsibility of Musema, pursuant to Articles 3(g) and 6(3) of the Statute, as charged in Count 7 of the Indictment.

Verdict

Count 7: Guilty of Crime against Humanity (rape)

Judgement of: THE PROSECUTOR V. ELIÉZER NIYITEGEKA Case No. ICTR-96-14-T 16 May 2003

(Accused found not guilty on the charge of crime against humanity as evidence presented by Prosecution was circumstantial and not of an eye witness)

6. Rape and Murder on 20 May

6.1 Testimony of Prosecution Witness DAF

292. On 20 May, Witness DAF was hiding in a bush on a hill at a place close to the house of Kabanda who was a very well-known trader. It was not far from the Gisovu-Kibuye road. At this time, he saw Interahamwe, who were accompanying the Accused, looking for people in hiding. They caught a young girl whose age he estimated at 13-15 years. They took this girl to the Accused and put her in his vehicle. The Accused was seated in his vehicle, a red jeep, with the door open. The distance between the witness and the car was about 37 metres. The Accused shut the door and was alone with the girl in his vehicle for about 30 minutes. The witness could not see what the Accused did to the girl in the vehicle because the door was closed. However, the witness stated that the Accused raped the girl and subsequently threw her in front of the vehicle and shot her with a big gun, killing her. He knew that the girl had died because as soon as the Accused shot her, she fell to the ground. She was wearing a skirt and a T-shirt. At the time that he shot the girl, the Accused was seated in his vehicle with the door open, and one leg out. His head was visible to the witness but his other leg was not. The witness reaffirmed under cross-examination that it was indeed the Accused whom he had seen in the vehicle and who had shot the girl.^[259] Later, he overheard the Interahamwe talking about the girl having been raped. When the witness came out of the bush after the Interahamwe had left the area, he found the girl in that place spread out on the ground and she was dead.^[260]

6.2. Credibility Assessment

293. The Defence suggested that Witness DAF was mistaken in his identification of the Accused. At the time that he shot the girl, the Accused was seated in his vehicle with the door open, and one leg out. His head was visible to the witness but his other leg was not. The witness reaffirmed under cross-examination that it was indeed the Accused whom he had seen in the vehicle and who had shot the girl.^[261] The witness's account of this rape and killing of the young girl by the Accused is consistent with his prior statement dated 6 February 1997. The Chamber refers to II.2.6.3 above wherein Witness DAF was found to be a credible witness.

6.3 Alibi

294. The Defence adduced alibi evidence to rebut this allegation.

Witness TEN-16

295. Witness TEN-16 said the Accused did not commit this crime and if he had, she would have been aware of it.^[262] This evidence does not provide the Accused with an alibi and does not raise a reasonable doubt that the Accused was at the scene of the alleged rape on 20 May.

Witness TEN-8

296. Witness TEN-8 stated that, during the month of April, he did not see the Accused in the region.^[263] Nor did the witness ever hear that the Accused was involved in any killing or rape, whether personally or by inciting others, during this period in Kibuye.^[264] This evidence does not provide the Accused with an alibi and does not raise a reasonable doubt that the Accused was at the scene of the alleged rape on 20 May.

Witness TEN-9

297. **As part of his functions, Witness TEN-9 signed a document to authorize the** disbursement of allowances for an official mission entrusted to the Accused and another official by the President of the Republic. The two were to travel to Goma and Gisenyi to negotiate with the Zairean authorities for a new fuel route from Goma to Gisenyi. The mission was supposed to extend from 15 May until 2 or 3 June 1994.^[265] The witness declared that he did not accompany the officials on mission. He stated that when a mission order was issued, it was executed; however, he was not in a position to confirm that this mission was in fact carried out.^[266] He stated that he did not see the Accused in

Gitarama where the Accused usually was, and where he himself was staying at the time, during the period of this mission.^[267]

298. The Chamber notes that the witness did not know if the Accused actually went on this mission. He cannot say that he knew that the Accused was in Goma at this time. In addition, the witness does not say that the Accused stayed in Goma everyday from 15 May to 2 or 3 June, even if the Accused did go on mission. The Accused could have left Goma and returned subsequently, without the witness's knowledge. The Chamber does not consider that this evidence provides the Accused with an alibi and does not raise a reasonable doubt that the Accused was at the alleged rape.

Witness TEN-10

299. The Chamber refers to the examination of TEN-10's alibi evidence for this period of time in II.2.2.3 above. In addition, Witness TEN-10 testified to a mission the Accused undertook to Goma in mid-May, from 10 to 20 May 1994.^[268] The witness had seen the mission warrant intended for Niyitegeka, but he could not remember the length of the mission, nor had he seen a mission report containing more details of the mission.^[269]

300. The Chamber notes that the witness did not know if the Accused actually went on this mission. He cannot say that he knew that the Accused was in Goma at this time. In addition, the witness did not state the exact dates of the mission and did not know the length of the mission. The Chamber does not consider that this evidence provides the Accused with an alibi and the Chamber therefore finds that the evidence does not raise a reasonable doubt that the Accused was at the scene of the alleged rape and murder of the young girl. In addition, the Chamber recalls that TEN-10 was found not to be a credible witness in II.2.2.3 above.

6.4 Factual Findings

301. The witness did not see the Accused rape the young girl. He surmised that the girl had been raped by the Accused in light of the circumstances, and because he had later heard the Interahamwe talk of the girl having been raped. The Interahamwe could not have seen the act either, since it allegedly occurred in a closed vehicle and there is no evidence that the Interahamwe had peered into the vehicle. Nor did the witness state that their reported conversation named the Accused as the perpetrator. There is insufficient evidence for a factual finding that the girl had been raped, or that the alleged rape was perpetrated by the Accused. Therefore, the Chamber finds that there is insufficient evidence to support the allegation that the Accused raped the young girl.

302. However, the Chamber accepts the eyewitness testimony as to the killing of the girl. Therefore, the Chamber finds that on 20 May 1994, the Accused shot and killed a girl of 13-15 years of age in Bisesero by the Gisovu-Kibuye road.

3.8 Count 7 – Crime Against Humanity (Rape)

455. Count 7 of the Indictment charges the Accused with rape as a crime against humanity pursuant to Article 3(g) of the Statute, in that on or between the dates of 6 April 1994 and 17 July 1994, notably, though not exclusively, in Kibuye Prefecture, Rwanda, the Accused did cause women to be raped as part of a widespread or systematic attack against a civilian population on political, ethnic or racial grounds.

456. Article 3 of the Statute provides that the crime must be committed as part of a widespread or systematic attack against a civilian population on national, political, ethnic, racial or religious grounds. The Accused need not act with discriminatory intent, but he must know that his act is part of this widespread or systematic attack. [377] In respect of this count, the Accused must have raped one or more persons, rape being "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive." [378]

457. In II.6.4 above, the Chamber found that there was insufficient evidence to find that the Accused raped a young girl on 20 May 1994 near the Gisovu-Kibuye road. Apart from this, the Prosecution led no evidence in support of its allegation that the Accused "did cause women to be raped".

458. Accordingly, the Chamber finds that the Accused is not guilty of Crime Against Humanity (Rape) as charged in Count 7 of the Indictment.

Judgement of: THE PROSECUTOR v. LAURENT SEMANZA Case No. ICTR-97-20-T
15 May 2003

(The chamber finds Semanza responsible for and therefore guilty of crime against humanity of rape of a specific victim A (Count 10). However, he was not found guilty (Count 8) for his well established conduct of general and public encouragement to rape Tutsi women before being killed amounting to instigation to rape or aiding and abetting rapes given that his such encouragement resulted in at least one rape)

E. Paragraph 3.14 of the Indictment

245. Paragraph 3.14 of the Indictment reads:

The massacres referred to in paragraphs 3.8 through 3.13, above, included killing and causing serious bodily and mental harm, including rape and other forms of sexual violence, to members of the Tutsi ethnic group. Laurent SEMANZA intended these massacres to be part of the non-international armed conflict against the RPF because he believed the Tutsi refugees to be enemies of the Government and/or accomplices of the RPF as stated in paragraphs 3.4.2 and 3.4.3 supra.

c. Rapes and Other Forms of Sexual Violence

250. The Prosecution did not lead any evidence about rapes or other forms of sexual violence during the Mwulire Hill, Musha church, or Mabare mosque massacres. Prosecution Witness VAO was the only witness to testify about rapes during the Ruhanga massacre. The Chamber recalls that she was not an eye-witness to the alleged rapes, about which she learned from a woman whom she met at a refugee camp. The Chamber finds, therefore, that the Prosecution did not prove these allegations beyond a reasonable doubt.

251. The Chamber notes that various assailants raped several Tutsi females, including Prosecution Witnesses VR, VAW, VAV, and VAO, at various locations in Bicumbi and Gikoro communes during April 1994. None of these women, however, was raped during the massacres referred to in paragraphs 3.8 through 3.13 of the Indictment as alleged in paragraph 3.14. These crimes appear to fall within the broad language of paragraphs 3.15 and 3.16 of the Indictment. However, the Chamber decided to disregard those paragraphs because they are impermissibly vague. [459]

F. Paragraph 3.17 of the Indictment

252. Paragraph 3.17 of the Indictment reads:

Between April 7 and April 30 1994, Laurent SEMANZA spoke to a small group of men in Gikoro Commune. He told them that they had killed Tutsi women but that they must also rape them before killing them. In response to Semanza's words the same men immediately went to where two Tutsi women, Victim A and Victim B, had taken refuge. One of the men raped Victim A and two men raped and murdered Victim B. Laurent SEMANZA intended the acts described in this paragraph to be part of the non-international armed conflict against the RPF as stated in subparagraphs 3.4.2. and 3.4.3 supra.

1. *Allegations*

253. Prosecution Witness VV, a Tutsi woman, stated that on the morning of the attack at Musha church in April 1994 at approximately 10:00 a.m., she overheard a discussion between the Accused, Rugambage, Bisengimana, three members of the Presidential Guard, and a crowd of others from Bicumbi and Gikoro. [460] She stated that the Accused asked the crowd how the work of killing Tutsis was

progressing, to which they responded that they were busy doing their work. [461] The witness testified that she then heard the Accused say: "Are you sure you're not killing Tutsi women and girls before sleeping with them... [y]ou should do that and even if they have some illness, you should do it with sticks." [462] The witness explained that the Accused used the Kinyarwanda word *kurongora*, which means "to marry" and also "to make love". [463]

254. Witness VV testified that three of the men who heard the Accused's instructions came to the house where she and her cousin were hiding. [464] She explained that one of the attackers stayed inside the house with the witness, while the two other men took her cousin outside. [465] The witness testified that the man told her that they had permission to rape them. [466] She stated that the man removed her clothes and had non-consensual sexual intercourse with her and told her that he would kill her if she resisted. [467] The witness explained that she could not see what the other two attackers were doing to her cousin, but heard her cousin scream that she preferred that the attackers kill her. [468] According to the witness, when she left the house, she found that her cousin had been killed and buried. [469]

255. The Accused denied any knowledge of rapes in Bicumbi commune, explaining that "[i]n Rwandan tradition or culture, rape has never existed." [470] Other Defence witnesses made similar broad assertions, stating either that rape is unknown in Rwanda [471] or that they did not see or hear of any rapes in 1994. [472]

256. The Accused denied that he was in the area during the relevant period. [473] The Accused also specifically denied that he ordered *Interahamwe* to do as they pleased with Tutsi women, including raping them, and noted that he was accused of being in multiple places at the same time on that date. [474]

2. Findings

257. The Chamber notes that Witness VV is referred to in the Indictment as Victim A, and that her cousin is Victim B.

258. The Chamber has carefully reviewed and considered the transcript of the evidence of Witness VV, which was given by deposition pursuant to Rule 71. The Chamber finds her consistent and detailed evidence to be credible and reliable. Although the witness did not specify a certain date in April 1994, the Chamber notes that she testified that the event was contemporaneous with the attack at Musha church. Therefore, the Chamber finds that the attack on Witness VV occurred on or about 13 April 1994.

259. The Chamber finds that the unsubstantiated claims of Defence witnesses that no rapes occurred in their localities or in Rwanda are not credible or reliable. The Chamber also notes that there is no reliable or credible evidence that places the Accused at another place during the meeting.

260. The Chamber has also carefully considered the Accused's alibi in relation to these events, discussed above in Chapter III. In particular, the Chamber recalls that the Accused claimed to be in Gitarama town on 13 April 1994 which was supported by Defence Witness PFM, whose testimony, in the Chamber's opinion, is biased by her close personal relationship with the Accused.

261. Upon considering all relevant evidence, including the alibi, the Chamber finds based on the testimony of Prosecution Witness VV that the Prosecutor proved beyond a reasonable doubt that on 13 April 1994 at approximately 10:00 a.m. the Accused directed a group of people to rape Tutsi women before killing them. The Chamber also finds beyond a reasonable doubt that Victim A was raped by one of the men in the group and that her cousin, Victim B, was taken outside and killed by two other men from the group.

262. Witness VV did not observe what happened to her cousin after she was taken outside, but testified that she heard Victim B screaming that she would prefer to be killed. On the basis of this evidence, the Chamber is not able to conclude beyond a reasonable doubt that Victim B was also raped and/or tortured before she was killed.

5. *Count 8: Rape*

473. Count 8 charges:

By his acts in relation to the events described in paragraphs 3.15 and 3.16 above, Laurent SEMANZA is responsible for the RAPE of civilians as part of a widespread or systematic attack against a civilian population on political, ethnic or racial grounds, and has thereby committed a CRIME AGAINST HUMANITY stipulated in Article 3(g) of the Statute of the Tribunal as a crime, attributed to him by virtue of Articles 6(1) and 6(3), and punishable in reference to Articles 22 and 23 of the same Statute.

474. In light of the Chamber's finding that paragraphs 3.15 and 3.16 provide insufficient notice to the Accused, the Chamber finds the Accused not guilty on Count 8. Moreover, the Prosecutor has not satisfied the Chamber that the Accused is responsible for any rapes, other than the rape of Victim A charged in Count 10.

6. *Count 10: Rape*

475. Count 10 charges:

By his acts in relation to the events described in paragraph 3.17 above, Laurent SEMANZA is responsible for the RAPE of Victim A and Victim B as part of a widespread or systematic attack against a civilian population on political, ethnic or racial grounds, and has thereby committed CRIMES AGAINST HUMANITY stipulated in Article 3(g) of the Statute of the Tribunal as a crime, attributed to him by virtue of Articles 6(1) and 6(3), and punishable in reference to Articles 22 and 23 of the same Statute.

476. The Chamber has found, in relation to paragraph 3.17 of the Indictment, that the Accused, in the presence of commune and military authorities, addressed a crowd and asked them how their work of killing the Tutsis was progressing and then encouraged them to rape Tutsi women before killing them. Immediately thereafter, one of the men from the crowd had non-consensual sexual intercourse with Victim A, who was hiding in a nearby home. The Chamber has found that Victim B was killed by two other men from this crowd, but has had insufficient evidence to draw any conclusions about whether she had also been raped.

477. The Chamber finds beyond a reasonable doubt that Victim A was raped by one of the assailants who heard the Accused encouraging the crowd to rape Tutsi women. In light of the generalized instructions about raping and killing Tutsis, the ethnic group targeted by the widespread attack, and the fact that the assailant arrived at Victim A's hiding place with two others who then killed Victim B, the Chamber finds that this rape was part of the widespread attack against the civilian Tutsi population and that the assailant was so aware. The Chamber therefore finds that the principal perpetrator committed rape as a crime against humanity.

478. Having regard, *inter alia*, to the influence of the Accused and to the fact that the rape of Victim A occurred directly after the Accused instructed the group to rape, the Chamber finds that the Accused's encouragement constituted instigation because it was causally connected and substantially contributed to the actions of the principal perpetrator. The assailant's statement that he had been given permission to rape Victim A is evidence of a clear link between the Accused's statement and the crime. The Chamber also finds that the Accused made his statement intentionally with the awareness that he was influencing the perpetrator to commit the crime.

479. The Chamber finds beyond a reasonable doubt that the Accused instigated the rape of Victim A as a crime against humanity. Therefore, the Chamber finds the Accused guilty on Count 10.