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A Comparative Study Of Sexual Violence Trials In The ICTY And ICTR Comparing Six Particular Issues

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MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR OF THE I.C.T.R.

ISSUE 25: A COMPARATIVE STUDY OF SEXUAL VIOLENCE TRIALS IN THE ICTY AND ICTR COMPARING SIX PARTICULAR ISSUES

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39. *Prosecutor v. Meakic*, Amended Indictment, No. IT-02-65 (July 18, 2001).

APPENDIX A: Convictions and Sentences for Crimes involving Sexual Violence

I. Introduction*

A. Issues

This memorandum compares six issues relating to sexual violence trials in the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"). The first part of this memorandum compares the jurisprudence of substantive sexual assaults in ICTY and ICTR decisions. The second part compares ICTY and ICTR judgments on superior responsibility and individual criminal responsibility for crimes of sexual violence. The third explores evidential procedures for minors. The fourth discusses the admissibility of evidence of a rape victim's prior sexual conduct in the Tribunals. The fifth compares sentencing issues between the Tribunals. The sixth addresses judicial impartiality and gender bias in sexual violence trials.

B. Conclusions

The ICTY and ICTR have substantially expanded international humanitarian law relating to sexual violence. The Tribunals have made enormous strides just by acknowledging the role of sexual violence in ethnic

* ISSUE 25: A comparative study of sexual violence trials in the ICTY and ICTR comparing the following issues: (a) Jurisprudence of substantive sexual assaults, particularly the new cases after July 2001; (b) Superior responsibility/ individual criminal responsibility for sexual violence; (c) Evidential procedures for minors; (d) Prior sexual conduct; (e) Sentencing issues; and (f) Judicial impartiality and gender bias.

cleansing and genocide, and by convicting defendants of individual acts of rape and assault. It is an excellent sign that some ICTR indictments are being amended to include charges of sexual violence, that ICTR judges have been increasingly willing to accept these amended indictments, and that many pending ICTY cases also contain charges for rape and sexual offenses.[2] However, there are still concerns that Tribunal investigators have not made enough progress in interviewing victims of sexual attacks, especially at the ICTR, and that prosecutors do not include enough charges for sexual violence.[3] There have also been many calls for stronger protective measures for witnesses, which would increase the number of victims willing to testify in cases of sexual assault. Also, increasing the number of female investigators and interpreters, and training all staff to deal with rape victims in a sensitive manner, would lead to more effective witness testimony in cases of sexual violence.

In sum, gender sensitivity and perseverance are required in order to bring the perpetrators of rape and other sexual war crimes to justice. A more aggressive approach to investigation, prosecution, and punishment would show that the Tribunals recognize the seriousness of sexual violence against civilians during armed conflicts.

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[2] *See e.g., Prosecutor v. Nyiramasuhuto and Ntahobali,* Amended Indictment, No. ICTR-97-21-I (May 26, 1997); *cited by* Jocelyn Campanaro, *Women, War, and International Law,* 89 Geo. L.J. 2557, 2565 (2001). [Reproduced in the accompanying notebook at Tab 8.]; *Prosecutor v. Meakic*, Amended Indictment, No. IT-02-65 (July 18, 2001). [Reproduced in the accompanying notebook at Tab 39.]

[3] *See e.g.,* Campanaro, *supra* note 2, at 2565.

C. Factual Background

The Yugoslav and Rwandan Tribunals were established by the mandate of the United Nations to prosecute violations of international humanitarian law in the territories of the former Yugoslavia and Rwanda.[1] These violations included widespread and systematic rapes and other forms of sexual violence against civilians, the majority of whom were women. Thousands of women and girls in the former Yugoslavia, as well as many men, were raped and sexually assaulted during the Serb campaign of ethnic cleansing. Many of these women were confined in what were essentially rape camps, which were intended to "cleanse" the Muslim population by forcing women to bear Serb infants.[4] Likewise, thousands of Rwandan women were targeted for rape and sexual mutilation during the ethnic violence against Tutsi civilians.[5] In both Yugoslavia and Rwanda, women were often raped before being killed.[6]

Although sexual attacks against civilians have been a part of warfare and ethnic violence for centuries, military officers who have ordered or perpetrated these acts have rarely been punished.[7] Despite evidence of widespread rapes

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[4] *See e.g.,* Campanaro, *supra* note 2, at 2571.

[5] *See e.g.,* Margaret A. Lyons, *Hearing the Cry Without Answering the Call: Rape, Genocide, and the Rwandan Tribunal,* 28 Syracuse J. Int'l. L. & Com. 99, 105-106 (2001). [Reproduced in the accompanying notebook at Tab 9.]

[6] *See e.g., Prosecutor v. Akayesu*, Amended Indictment, No. ICTR-96-4-I (Feb. 13, 1996). [Reproduced in the accompanying notebook at Tab 23.]

[7] *See* Campanaro, *supra* note 2, at 2558.

and forced prostitution by Axis soldiers during the Second World War, neither of the international military tribunals that convened after the war decided to prosecute sexual assaults as independent crimes.[8] The ICTY and ICTR have been the first international tribunals to specifically address and punish sexual violence against civilians, to the acclaim of human rights activists. The legal recognition of the relationship between sexual violence and ethnic cleansing in Yugoslavia, and between sexual violence and genocide in Rwanda, has been an enormous step forward for international justice. The Tribunals' recent decisions have dramatically changed the jurisprudence of sexual violence in international humanitarian law. The judgments of the Tribunals also suggest that the international community finally recognizes the seriousness of rape and sexual crimes against civilians during armed conflicts.

II. Jurisprudence of Substantive Sexual Assaults

A. Recognition of Rape and Gender Crimes

(1) Jurisdiction of the Tribunals to Prosecute Crimes of Sexual Violence

The ICTY has subject-matter jurisdiction over grave breaches of the Geneva Conventions of 1949 (Article 2), violations of the laws or customs of war

[8] *See* Campanaro, *supra* note 2, at 2561-2562 (referring to the International Military Tribunals at Nuremberg and Tokyo.)

(Article 3), genocide (Article 4), and crimes against humanity (Article 5).[9] The ICTR has jurisdiction over three articles, namely, genocide (Article 2), crimes against humanity (Article 3), and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (Article 4).[10] The Tribunals' jurisdiction in regard to crimes against humanity is circumscribed by customary international law. [11]

The ICTY Statute contains only one article that specifically mentions sexual violence: rape as a crime against humanity.[12] The ICTR Statute lists rape as a crime against humanity as well, but also includes the sexual offenses of "rape, enforced prostitution, and any form of indecent assault" as outrages upon personal dignity, and hence as war crimes.[13] However, the Office of the Prosecutor has gone beyond the explicitly enumerated sexual crimes, and has

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[9] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of the International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704, Annex (1993), *reprinted in* 32 I.L.M. 1192 (1993) [hereinafter ICTY Statute or Yugoslav Statute]. [Reproduced in the accompanying notebook at Tab 1.]

[10] Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, Between 1 January 1994 and 31 December 1994, S.C. Res. 955, Annex, U.N. SCOR, 49th Sess., Res. and Dec., at 15, U.N. Doc. S/INF/50 Annex (1994), *reprinted in* 33 I.L.M. 1602 (1994), at arts. 2-4. [hereinafter ICTR Statute or Rwandan Statute]. [Reproduced in the accompanying notebook at Tab 2.]

[11] Guenael Mettraux, Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, 43 Harv. Int'l. L.J. 237 (2002). [Reproduced in the accompanying notebook at Tab 17.]

[12] ICTY Statute, *supra* note 9, art. 5(g).

[13] ICTR Statute, *supra* note 10, arts. 3(g) and 4(e), respectively.

indicted suspected sexual offenders under other articles as well.[14] Depending on the particular circumstances, an incident of rape may also constitute: (a) a violation of the laws or customs of war, (b) a grave breach of the Geneva Conventions, (c) torture, (d) enslavement, or (e) an element of genocide.[15] The possibility of multiple charges reflects the fact that rapes committed during an armed conflict may have different motivations and contexts.

(2) First ICTY and ICTR convictions for crimes of sexual violence

(a) ICTY- *Prosecutor v. Tadic*

Dusko Tadic was the first person to be tried by the ICTY and was also the first to be convicted by either Tribunal for crimes of sexual violence.[16] Tadic's indictment alleged that he participated and assisted in the general campaign of "killings, torture, sexual assaults, and other physical and psychological abuse" of Muslims and Croats.[17] The indictment also alleged that Tadic ordered two male prisoners to perform sexual acts and sexual mutilation on another male

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[14] *See e.g.*, Doris Buss, *Prosecuting Mass Rape Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, 10 Feminist Leg. Stud. 91, 93-94 (2002). [Reproduced in the accompanying notebook at Tab 5.]

[15] *Id.*

[16] *Prosecutor v. Tadic*, Second Amended Indictment, No. IT-94-1-T (Dec. 14, 1995). [Reproduced in the accompanying notebook at Tab 18.]

[17] *Id.* at paras. 4 and 4.3.

prisoner.[18] Tadic was charged with rape,[19] inhuman treatment, and cruel treatment,[20] and was additionally charged with torture or inhuman treatment, cruel treatment, and inhumane acts for ordering the sexual mutilation.[21]

The Trial Chamber produced several important holdings and dicta in *Tadic* relating to sexual violence. For example, Tadic's presence at the scene of the mutilation and abuse of the male prisoner was found sufficient to convict him of cruel treatment.[22] Also, the Trial Chamber held that a crime against humanity must be committed as part of a widespread and systematic attack on civilians for discriminatory reasons.[23] One concern raised by the Chamber's decision was its ruling that discriminatory intent on the grounds of race, religion, or politics was a required element of any crime against humanity.[24] On appeal, however, it was held that discriminatory intent was only a required element of

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[18] *Prosecutor v. Tadic*, Second Amended Indictment, *supra* note 16, at para. 6.

[19] *Id.* at para. 5 (count 2 of indictment).

[20] *Id.* (counts 3 and 4 of indictment).

[21] *Prosecutor v. Tadic*, Second Amended Indictment, *supra* note 16, at para. 6 *(* counts 8- 11 of indictment).

[22] *Prosecutor v. Tadic*, Trial Chamber I, Opinion and Judgment, No. IT-94-1-T (May 7, 1997), at para. 726. [Reproduced in accompanying notebook at Tab 19.]

[23] *Id.* at para. 730.

[24] *Id.* at paras. 694-713.

Article 5(h), crimes against humanity (persecution), and that crimes committed for purely personal reasons could also constitute crimes against humanity.[25]

Another important decision was the Trial Chamber's ruling that customary international law imposes "direct individual criminal responsibility and personal culpability for assisting, aiding and abetting, or participating in a criminal... act."[26] The chamber therefore held Tadic individually criminally responsible for the acts of others, opening the door for other low-ranking military officers to be prosecuted under similar circumstances. [27]

An important procedural decision to come out of the *Tadic* judgment was the ruling that no corroboration would be needed for the testimony of rape victims.[28] The Chamber upheld Rule 96(I) of the ICTY's Rules of Procedure and Evidence,[29] which states that the testimony of rape victims will not be subject to the requirement of corroboration.[30]

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[25] *Prosecutor v. Tadic,* Appeals Judgment, No. IT-94-1 (July 15, 1999), at 327. [Reproduced in the accompanying notebook at Tab 21.]

[26] *Prosecutor v. Tadic*, Opinion and Judgment, *supra* note 22, at para. 666.

[27] *Id.* at paras. 667-690.

[28] *Id.* at para. 536.

[29] International Tribunal for the Prosecution of Persons Responsible for Serious Violations of the International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991: Rules of Procedure and Evidence, Rule 96, U.N. Doc. IT/32 (1994), amended by U.N. Doc. IT/32/Rev.10 (1996). [hereinafter ICTY Rules of Procedure and Evidence or ICTY Rules.] [Reproduced in the accompanying notebook at Tab 3.]

[30] *Prosecutor v. Tadic*, Opinion and Judgment, *supra* note 22, at para. 536.

The Trial Chamber's judgment in *Tadic* gave important judicial acknowledgment to the role that sexual violence played in the wider campaign of ethnic cleansing by the Serbs. The trial judges found the evidence of widespread and systematic rape in the Serb camps to be highly credible, citing evidence that "both male and female prisoners were subjected to severe mistreatment, [including] beatings, sexual assaults, torture, and executions."[31] The judges acknowledged that female prisoners the Omarska camp were routinely and savagely raped by prison guards and soldiers, and recognized that the women and girls in the Serb camps endured terrible pain and suffering as a result of widespread sexual violence.[32] The judicial acknowledgment and punishment of rape during an armed conflict was historic, and was also a vitally important precedent for both the ICTY and ICTR in regard to sexual violence trials.

(b) ICTR- *Prosecutor v. Akayesu*

Jean Paul Akayesu was the first person to be indicted by the ICTR and the first ever to be convicted of the crime of genocide. The indictment against

[31] *Prosecutor v. Tadic*, Opinion and Judgment, *supra* note 22, at para. 154.

[32] *Id.* at paras. 165 and 175.

Akayesu arose from his official responsibility for the Taba commune in Rwanda, which was the site of massacres, beatings, and sexual assaults of civilians by local police and militias.[33] Akayesu, as the *bourgmestre* of Taba, had control over the local police force and the responsibility of maintaining order within the commune.[34] The indictment alleged that Akayesu knew that acts of sexual violence were being committed, that he was occasionally present at the assaults,[35] and that he facilitated and encouraged the commission of sexual offenses.[36] Akayesu was therefore charged with genocide, complicity in genocide, and extermination for acts including sexual violence.[37] For his acts or omissions relating to rape and sexual assaults, Akayesu was charged with rape and inhumane acts and outrages upon personal dignity. [38]

The Trial Chamber's judgment in *Akayesu* produced several important rulings relating to sexual violence. First, the Chamber recognized that sexual violence was an integral part of the Rwandan genocide,[39] and found Akayesu

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[33] *Prosecutor v. Akayesu,* Amended Indictment, *supra* note 6, at paras. 3 and 4.

[34] *Id.* at paras. 3 -4.

[35] *Id.* at para. 12A.

[36] *Prosecutor v. Akayesu,* Amended Indictment, *supra* note 6, at para. 12B.

[37] *Id.* at counts 1-3 of indictment.

[38] *Id.* at counts 13-15 of indictment.

[39] *Prosecutor v. Akayesu*, Judgment, No. ICTR-96-4-T (Sept. 2, 1998), at para. 731. [Reproduced in the accompanying notebook at Tab 24.]

guilty of genocide for crimes including rape and sexual assaults. [40] The judges found that rapes of Tutsi women and girls had been widespread and systematic, and that Akayesu had been present at many of the rapes.[41] His presence, attitude, and words were equated to encouragement of sexual violence by the chamber.[42] In finding Akayesu individually criminally responsible for genocide, the Chamber noted that he had "ordered, instigated, and otherwise aided and abetted sexual violence."[43]

Importantly, the Trial Chamber recognized rape and sexual assaults as independent crimes. Akayesu was convicted of crimes against humanity for rape and other inhumane acts,[44] and the Chamber noted that sexual violence could also constitute "serious bodily and mental harm" and "outrages upon personal dignity" under the ICTR Statute.[45] The Chamber suggested that sexual assault could also be charged as torture, violence to life, health and physical or mental well-being of persons, or cruel treatment.[46] Akayesu was not convicted of cruel treatment or for outrages upon personal dignity, however.

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[40] *Prosecutor v. Akayesu*, Judgment, supra *note* 39, at para. 734.

[41] *Id.* at para. 460.

[42] *Id.* at para. 708.

[43] *Prosecutor v. Akayesu*, Judgment, *supra* note 39, at para. 452.

[44] *Id.* (counts 13-14).

[45] *Id.* at para. 692 (under art. 2 and 4).

[46] *Prosecutor v. Akayesu*, Judgment, *supra* note 39, at para. 692 (under art. 2-4).

Controversially, the Trial Chamber held that it was not adequately established that Akayesu belonged to the class of persons who could be held responsible for serious violations of Article 3.[47] In a controversial holding, the Chamber reasoned that an active support of the war effort was a requirement for a penalty under Article 3.[48]

The *Akayesu* Chamber also noted that rape could constitute torture if inflicted or ordered by, or with the consent or acquiescence of, a public official or other person acting in an official capacity.[49]

B. Rules of Procedure and Evidence Relating to the Prosecution of Rape

(1) Comparison of ICTY/ ICTR Rules

(a) Rule 96- Evidence in cases of sexual assault

The rules of procedure and evidence for the Tribunals were designed to give substantial protection to victims of sexual violence, in order to encourage them to testify. Under Rule 96 of both the ICTY and ICTR Rules of Procedure

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[47] *Prosecutor v. Akayesu*, Judgment, *supra* note 39, at paras. 631-35.

[48] *Id.*

[49] *Id.* at para. 597.

and Evidence, no corroboration of a rape victim's testimony is required[50] (unlike many domestic courts, which often abide by the *unus testis, nullus testis* rule.[51])

Both Tribunals forbid defendants from claiming as a defense that a rape victim consented to sexual intercourse, with some narrow exceptions. Under the ICTY and ICTR Rules, consent is not allowed as a defense if: (a) the victim was subjected to, threatened with, or had reason to fear violence, duress, detention or psychological oppression; or (b) the victim reasonably believed that someone else might be so subjected or put in fear, if she did not consent.[52] In the limited circumstances where consent might legitimately be used as a defense, the defendant must first satisfy either the ICTY or ICTR judges *in camera* that evidence of consent would be relevant and credible.[53]

A rape victim's previous sexual history or conduct is not allowed into evidence or allowed to be used as a defense under either the ICTY or ICTR

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[50] ICTY Rules of Procedure and Evidence, *supra* note 29, at Rule 96; International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, Between 1 January 1994 and 31 December 1994: Rules of Procedure and Evidence, Rule 96, U.N. Doc. ____ , *amended by* U.N. Doc.____ (2003). [hereinafter ICTR Rules of Procedure and Evidence or ICTR Rules]. [Reproduced in the accompanying notebook at Tab 4.]

[51] i.e., One witness is no witness. Black's Law Dictionary (7th ed.), St. Paul, Minn.: West, 2000.

[52] ICTY Rules, *supra* note 29, Rule 96(ii); and ICTR Rules, *supra* note 50, Rule 96(ii).

[53] *Id.* at Rule 96(iii).

Rules.[54] (*See* Section V below for further discussion.) Rule 96 has been extremely important in the Tribunals' prosecution of rape, as victims in jurisdictions with less protective rules are often too frightened, ashamed, or embarrassed to testify to their experiences. The provisions of Rule 96 make it less likely that irrelevant, embarrassing, or prejudicial evidence about rape victims will be heard in court, or that victims will be harassed during cross-examination.

(b) Other rules that protect rape victims and witnesses

Several rules provide additional protection for victims and witnesses of sexual violence. Rule 34 provides for a support center for each Tribunal, where victims and witnesses of sexual assaults can receive protective measures and psychological counseling.[55] The identities of victims and witnesses may be kept secret while they are thought to be in danger,[56] although their names must generally be revealed to the defense.[57] The original Tribunal policy allowing the total anonymity of witnesses was amended after widespread complaints that

[54] ICTY Rules, *supra* note 29, and ICTR Rules, *supra* note 50, at Rule 96(iv).

[55] ICTY Rules, *supra* note 29, Rule 34 (Victims and Witnesses Section); and ICTR Rules, *supra* note 50, Rule 34 (Victims and Witnesses Support Unit.)

[56] *Id.,* Rule 69 (Protection of Victims and Witnesses).

[57] *Id.,* Rules 69 (Protection of Victims and Witnesses) and 75 (Measures for the Protection of Victims and Witnesses).

defendants' rights were being abridged.[58] Defendants now generally have the right to know their accuser's identity in time to make preparations for defense. The adequacy of witness protection has been a very controversial issue, as many witnesses have been threatened or killed during the course of the trials. Many witnesses still live within the territories of the former Yugoslavia and Rwanda, and fear that they or their families will be harmed as a result of their testimony.[59]

Judges at the ICTY and ICTR have the discretion to order several types of protective measures in order to safeguard victims and witnesses. Written depositions are increasingly accepted at the ICTY rather than live testimony, although the ICTR Rules still specify that a written deposition should only replace live testimony in exceptional circumstances.[60] A chamber may order the excision of a witness's name from the public record, the replacement of a witness's name with a pseudonym, or a closed trial.[61] Witnesses may be allowed to testify through closed-circuit television or video, or with a voice- or image-

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[58] *See* Mercedes Momeni, *Balancing the Procedural Rights of the Accused Against a Mandate to Protect Victims and Witnesses: An Examination of the Anonymity Rules of the International Criminal Tribunal for the Former Yugoslavia,* 41 How. L.J. 155 (1997). [Reproduced in the accompanying notebook at Tab 11.]

[59] *See id.* at 174.

[60] *See* Patricia M. Wald, *To "Establish Incredible Events by Credible Evidence": The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings*, 42 Harv. Int'l. L.J. 535 (2001). [Reproduced in the accompanying notebook at Tab 12]; ICTY Rules, *supra* note 29, Rule 71 (Depositions); and ICTR Rules, *supra* note 50, Rule 71 (Depositions).

[61] *Id.,* Rules 75 (Measures for the Protection of Victims and Witnesses) and 79 (Closed Sessions).

altering device under both the ICTY and ICTR Rules.[62] Trial chambers are instructed to control questioning so that witnesses are not harassed or intimidated during their testimony.[63] These measures are all designed to encourage reluctant witnesses to come forward, as witness testimony is often the only evidence available to prosecutors (especially in cases of rape and sexual assault.)

C. Major Decisions of the Tribunals

(1) Tribunal Definitions of Rape, Sexual Assault, and Coercion

In *Prosecutor v. Furundzija*, the ICTY Trial Chamber defined *rape* as a forcible act, meaning that the act "is accomplished by force or threats of force against the victim or a third person, such threats being express or implied and must place the victim in reasonable fear that he, she or a third person will be subjected to violence, detention, duress or psychological oppression."[64] The act of rape was defined as "the penetration of the vagina, the anus or mouth by the penis, or of the vagina or anus by other object. In this context, it includes

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[62] ICTY Rules, *supra* note 29, Rules 71 *bis* and 75 (Measures for the Protection of Victims and Witnesses); ICTR Rules, *supra* note 50, Rule 75 (Measures for the Protection of Victims and Witnesses).

[63] *Id.*

[64] Opinion and Judgment, No. IT-95-17/1-T (Dec. 10, 1998), at para. 174. [Reproduced in the accompanying notebook at Tab 27.]

penetration, however slight, of the vulva, anus or oral cavity, by the penis and sexual penetration of the vulva or anus is not limited to the penis."[65] The *Furundzija* definition was criticized by the Chamber in *Prosecutor v. Kunarac*, et al., which held that it did not adequately address factors that might "render an act of sexual penetration *non-consensual.*"[66] The *Kunarac* Chamber held that, in determining consent to sexual penetration, the test should be whether a victim's "sexual autonomy" was violated.[67] The autonomy test allowed the Chamber to consider a wider range of factors that might negate consent than under the *Furundzija* definition.

The ICTR Trial Chamber defined *rape* and *sexual violence* in broad and progressive terms in *Akayesu*. Moving away from traditional definitions, the Chamber stated that "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."[68] The judges defined rape as a "physical invasion of a sexual nature, committed on a person under circumstances which are coercive," and sexual violence as "any act of a sexual nature which is committed on a

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[65] *Prosecutor v. Furundzija,* Opinion and Judgment, *supra* note 64, at para. 174.

[66] *Prosecutor v. Kunarac,* Judgment, No. IT-96-23-T & IT-96-23/1-T (June 12, 2000), at para. 438 (emphasis in original.) [Reproduced in the accompanying notebook at Tab 33.]

[67] *Id.* at para. 457.

[68] *Prosecutor v. Akayesu*, Judgment, *supra* note 39, at para. 596.

person under circumstances which are coercive."[69] Acts of sexual violence could include "forcible sexual penetration of the vagina, anus or oral cavity by a penis and/or of the vagina or anus by some other object, and sexual abuse, such as forced nudity." The Chamber also held that coercion could include not only physical force, but also threats, intimidations, and other types of duress.[70]

The term *enslavement* was defined broadly by the *Kunarac* Chamber as "the exercise of any or all of the powers attached to the right of ownership over a person," including such factors as control of movement, threats of force or coercion, forced labor, and control of sexuality.[71] *Cruel treatment*, according to the *Tadic* Trial Chamber, included inhumane acts that caused "injury to a human being in terms of physical or mental integrity, health or human dignity."[72] Under this definition, sexual mutilation constituted an inhumane act.[73]

(2) Comparisons of ICTY/ ICTR rulings on crimes of sexual violence

The Office of the Prosecutor has determined that sexual violence can be prosecuted either as an independent crime or implicitly as an element of other

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[69] *Prosecutor v. Akayesu*, Judgment, *supra* note 39, at para. 598.

[70] *Id.* at para. 52.

[71] *Prosecutor v. Kunarac,* Judgment, *supra* note 66, at para. 450.

[72] *Prosecutor v. Tadic*, Opinion and Judgment, *supra* note 22, at 729.

[73] *Id.*

crimes, under all four types of crimes within the ICTY's jurisdiction (i.e., grave breaches, violations of the laws or customs of war, crimes against humanity, and genocide).[74] Sexual violence may also be prosecuted explicitly or implicitly under all three types of crimes within the ICTR's jurisdiction (i.e., crimes against humanity, genocide, and violations of the Geneva Conventions and Additional Protocol II).

a.) Genocide (ICTY Article 4/ ICTR Article 2)

i.) Genocide

Under the ICTY and ICTR Statutes, genocide consists of acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, including: (a) killing members of the group; (b) causing serious bodily or mental harm to members to the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and (d) imposing measures intended to prevent births within the group.[75]

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[74] Patricia Viseur Sellers and Kaoru Okizumi, *Intentional Prosecution of Sexual Assaults,* 7 Transnat'l. L. & Contemp. Probs. 45, 57-58 (1997). [Reproduced in the accompanying notebook at Tab 10.]

[75] ICTY Statute, *supra* note 9, art. 4; ICTR Statute, *supra* note 10, art. 2.

If a defendant committed sexual violence during a genocidal campaign, evidence of sexual offenses may help to establish an element of genocide. For example, acts of rape and sexual assault may fall under either subsections (b) (causing serious bodily or mental harm to members of a group) or (c) (deliberately inflicting on a group conditions of life calculated to bring about its physical destruction in whole or in part) of the required *actus reus*.[76]

The ICTR has obtained four convictions for genocide in which sexual violence against civilians played a significant role. *Akayesu* was the first of these cases, and the first trial ever to find a defendant guilty of genocide based partly on acts of rape. The Chamber relied heavily on testimony by victims of sexual violence in finding the defendant guilty of genocide. In regard to sexual assaults on Tutsi women at the Taba commune, the Chamber held that they constituted serious bodily or mental harm under the genocide statute, and that Akayesu had encouraged such crimes through his presence, words, and attitudes.[77] As Akayesu had official control of the area where the acts occurred, the Chamber found him individually criminally responsible for the serious bodily and mental harm to the victims of sexual violence.[78]

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[76] Sellers (1997), *supra* note 74, at 57-58.

[77] *Prosecutor v. Akayesu*, Judgment, *supra* note 39, at para. 504.

[78] *See* discussion of *Akayesu*, *supra* at Section II (A) (2).

The *Akayesu* Chamber held that the Genocide Convention, upon which the tribunal's genocide statute was based, is "undeniably" a part of customary international law,[79] and the ICTY has agreed to this proposition in several cases well.[80] In order to convict a defendant of genocide under the ICTR ruling, a prosecutor must show that the accused aided, abetted, encouraged, or directly participated in acts designed to destroy a particular national, ethnic, racial or religious group.[81] Also, the prosecutor must show that the defendant possessed the specific intent to destroy the group, in whole or in part, at the time the genocidal acts took place.[82] Those requirements were upheld by subsequent ICTR cases, including *Prosecutor v. Musema* (where the defendant was also convicted).[83] The ICTY has upheld very similar requirements for genocide, also echoing the ICTR in holding that a specific intent may be inferred from facts, circumstances, or "a pattern of purposeful action."[84] These facts can include incidents of sexual violence against a protected group.

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[79] *Prosecutor v. Akayesu*, Judgment, *supra* note 39, at para. 495.

[80] *See e.g., Prosecutor v. Stakic,* Judgment, No. IT-97-24-PT (July 31, 2003), at para. 500. [Reproduced in the accompanying notebook at Tab 36]; *Prosecutor v. Goran Jelisic*, Case No. IT-95-10, Judgement, 14 December 1999 ("*Jelisic* Trial Judgement") para. 60, *cited by Prosecutor v. Stakic,* Judgment, No. IT-97-24-PT.

[81] ICTR Statute, *supra* at 10, at art. 2.

[82] *Prosecutor v. Akayesu*, Judgment, *supra* note 39, at para. 498.

[83] *Prosecutor v. Musema,* Judgment and Sentence, No. ICTR-96-13 (January 27, 2000). [Reproduced in the accompanying notebook at Tab 28.]

[84] *Prosecutor v. Stakic,* Judgment, *supra* note 80, at para. 526.

ii.) Complicity in genocide

The *Akayesu* Chamber held that charges of genocide and complicity in genocide were mutually exclusive for the same act, and that a defendant could not be found guilty of both for the same acts or omissions.[85] However, according to *Prosecutor v. Semanza*, there is no material distinction between complicity in genocide and "the broad definition accorded to aiding and abetting" in the more serious charge of genocide.[86] Semanza was convicted of complicity in genocide because the Chamber considered him to be a mere accomplice, rather than a principal perpetrator.[87] Semanza was not found guilty of genocide, as the charge of complicity arose out of the same factual allegations.[88]

In *Musema,* the defendant was convicted of both genocide and complicity in genocide; the Chamber found the defendant guilty of complicity because he knowingly and voluntarily aided, abetted, or instigated others to commit genocide, while knowing that such persons were committing genocide. [89] The Chamber ruled that the specific intent to destroy a group was not a requirement

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[85] *Prosecutor v. Akayesu*, Judgment, *supra* note 39, at para. 532.

[86] *Prosecutor v. Semanza,* Judgment, No. ICTR-97-20 (May 15, 2003), at para. 394. [Reproduced in the accompanying notebook at Tab 32.]

[87] *Id.* at para. 436.

[88] *Id.*

[89] *Prosecutor v. Musema,* Judgment and Sentence, *supra* note 83, at para. 887.

for complicity.[90] Since Musema was found to be both the *de jure* and *de facto* superior of employees who committed genocidal acts, and was personally present at the attack sites, the Chamber found it sufficient that Musema knew or had reason to know that his subordinates were about to commit genocidal acts or had done so already.[91] The Chamber held Musema accountable for failing to take necessary and reasonable measures to prevent the commission of the genocidal acts by his subordinates.[92]

iii.) Conspiracy to commit genocide

The Trial Chamber in *Musema* held that a defendant could not be convicted of conspiracy for the same acts or omissions alleged in a complicity conviction, as the two were mutually exclusive.[93] The Chamber defined a conspiracy to commit genocide as "an agreement between two or more persons to commit the crime of genocide," with a *mens rea* of the specific intent to commit genocide.[94] The Chamber held that an act of conspiracy would theoretically be punishable even if the substantive offense did not actually occur.[95]

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[90] *Prosecutor v. Musema,* Judgment and Sentence, *supra* note 83, at para. 887.

[91] *Id.* at para. 894.

[92] *Id.* at para. 894.

[93] *Prosecutor v. Musema,* Judgment and Sentence, *supra* note 83, at para. 198.

[94] *Id.* at para. 191.

[95] *Id.* at para. 194.

The Chamber in *Prosecutor v. Niyitegeka* found the defendant guilty of genocide for leading and participating in attacks against Tutsi refugees.[96] The Chamber also found Niyitegeka guilty of conspiracy to commit genocide for attending and speaking at meetings, and for planning, leading, and participating in attacks against Tutsi civilians.[97]

iv.) Direct and public incitement to genocide

The Trial Chamber in *Akayesu* held that a conviction for direct and public incitement to commit genocide depended on two factors: the place where the incitement occurred and whether or not assistance was selective or limited.[98] According to the Chamber, the required *mens rea* for incitement would be the intent to directly prompt or provoke another to commit genocide, and the act of incitement would be punishable even if it failed to produce the result expected by the perpetrator.[99] Following the guidelines from *Akayesu*, the Trial Chamber in *Niyitegeka* convicted the defendant of direct and public incitement to commit genocide for public statements he made urging attackers to "work" (a euphemism for killing Tutsis.)[100] The defendant in *Prosecutor v. Ruggiu* was also

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[96] Judgment and Sentence, No. ICTR-96-14 (May 16, 2003), at para. 420. [Reproduced in the accompanying notebook at Tab 29.]

[97] *Id.* at para. 429.

[98] *Prosecutor v. Akayesu*, Judgment, *supra* note 39, at para. 688.

[99] *Id.* at para. 688.

convicted of direct and public incitement to genocide for making inflammatory radio broadcasts urging the massacre of Tutsis, and specifically calling for rape and sexual assaults of Tutsi women.[101] Charges of conspiracy and complicity in genocide against Ruggiu were dismissed after he pled guilty to the charge of incitement.[102]

To date, no ICTY defendants have been convicted under Article 4 for genocidal crimes involving sexual violence, although some scholars believe that several defendants who were not charged with genocidal crimes could have been convicted.[103] The only ICTY defendants charged with such crimes have either been acquitted due to insufficient evidence of genocidal intent[104] or else the charges have been withdrawn as part of a plea bargain.[105]

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[100] *Prosecutor v. Niyitegeka*, Judgment and Sentence, *supra* note 96, at para. 437.

[101] *Prosecutor v. Ruggiu,* Judgment and Sentence, No. ICTR-97-32 (June 1, 2000). [Reproduced in the accompanying notebook at Tab 31.]

[102] *Id.*

[103] *See e.g.,* Kelly D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 A.J.I.L. 97 (1999). [Reproduced in accompanying notebook at Tab 6.]

[104] *See Prosecutor v. Krajisnik & Plavic,* Sentencing Judgment, No. IT-00-39 & 40/1 (Feb.27, 2003). [Reproduced in the accompanying notebook at Tab 37.]

[105] *See Prosecutor v. Stakic,* Judgment, *supra* note 80.

b.) <u>Crimes Against Humanity (ICTY Article 5/ ICTR Article 3)</u>

According to the ICTR, a crime against humanity consists of an act that is: (1) inhumane in nature and character, causing great suffering, or serious injury to body or to mental or physical health, (2) committed as part of a wide spread or systematic attack, (3) committed against members of the civilian population, and (4) committed on one or more discriminatory grounds, namely, national, political, ethnic, racial or religious grounds (or against persons not falling within one of these groups, if the perpetrator's intention was to further his attacks on the group discriminated against on one of the grounds mentioned in Article 3 of the Statute.)[106] The ICTY requirements are more or less identical; in *Stakic,* five separate elements were specified: (1) There must be an attack; (2) The acts of the perpetrator must be part of that attack; (3) The attack must be directed against any civilian population; (4) The attack must be widespread or systematic; and (5) The perpetrator must know that his acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population and know that his acts fit into such a pattern.[107] Additionally, for a conviction by the ICTY, an attack must take place during an armed conflict, and there must be a nexus between the armed conflict and the attack.[108]

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[106] *Prosecutor v. Akayesu*, Judgment, *supra* note 39, at paras. 578 and 583-84.

[107] *Prosecutor v. Stakic,* Judgment, *supra* note 80, at para. 621.

[108] *Id.* at para. 626.

Rape is specifically listed as a crime against humanity in both the Yugoslav and Rwandan Statutes under subsection (g), but can also be charged implicitly under other provisions.[109]

i.) **Extermination as a Crime against Humanity**

Four ICTR defendants (Akayesu, Musema, Niyitegeka, and Semanza) and one ICTY defendant (Stakic) have been convicted of extermination where sexual violence was a component of the crimes. According to *Akayesu*, extermination is a crime directed against a group of individuals, which requires an element of mass destruction.[110] In order for a defendant to be convicted of extermination, *Akayesu* held the prosecution must show that: (1) the accused or his subordinate participated in the killing of certain civilians, (2) the act or omission was unlawful and intentional, (3) the unlawful act or omission was part of a widespread or systematic attack, and (4) the attack was based on discriminatory grounds (namely: national, political, ethnic, racial, or religious grounds.)[111] The widespread rapes and assaults of Tutsi women were considered to be a part of the "mass destruction" of a population needed for extermination.

The ICTY Trial Chamber espoused similar requirements in *Stakic*, adding that the *mens rea* required for extermination was the intent to kill persons on a

[109] Sellers (1997), *supra* note 74, at 57-58.

[110] *Prosecutor v. Akayesu*, Judgment, *supra* note 39, at paras. 591-92.

[111] *Id.*

massive scale or to create conditions of life that lead to the death of large numbers of individuals.[112] Stakic was found guilty of extermination for a "campaign of annihilation of non-Serbs," which included sexual violence against civilians by Serb police and military forces.[113]

ii.) Enslavement as a Crime against Humanity

Kunarac and *Kovac,* two ICTY defendants, were found guilty of enslavement in connection with their confinement of several women in an abandoned house.[114] The Chamber found that the women were regularly raped by the soldiers over a period of several months and that the defendants had total control over them.[115] Since the statute did not explicitly define enslavement, the *Kunarac* Trial Chamber explored customary international law and defined the crime as "the exercise of any or all of the powers attaching to the right of ownership over a person."[116] The Chamber found Kunarac and Kovac guilty of enslavement for exercising rights of ownership over the women, including the

[112] *Prosecutor v. Stakic,* Judgment, *supra* note 80, at para. 653.

[113] *Id.* at para. 655.

[114] *Prosecutor v. Kunarac*, et al., Judgment, *supra* note 66, at para. 742.

[115] *Id.*

[116] *Id.* at para. 539.

restriction of movement, sexual exploitation, sale of sexual services, and forced domestic labor.[117]

iii.) Torture as a Crime against Humanity

Two ICTY defendants, *Kunarac* and *Vukovic*, were convicted of torture in connection with sexual assaults at the Partizan sports hall where women were imprisoned and repeatedly raped.[118] The *Kunarac* Trial Chamber held that torture was a violation of conventional and customary international law, as well as a violation of the natural law of *jus cogens.*[119] According to the Chamber, the elements of torture included: (1) The infliction, by act or omission, of severe pain or suffering, whether physical or mental, (2) an intent to inflict such pain and suffering, and (3) the purpose of either obtaining information or a confession; punishing, intimidating or coercing a victim; or discriminating, on any ground, against a victim.[120] The Trial Chamber in *Prosecutor v. Furundzija* additionally held that humiliating the victim or a third person constituted a prohibited purpose for torture under international humanitarian law,[121] and the *Celebici* Trial Chamber stated that the prohibited purposes listed in the Torture

[117] *Prosecutor v. Kunarac*, et al., Judgment, *supra* note 66, at para. 742.

[118] *Id.* at para. 883.

[119] *Id.* at para. 466.

[120] *Prosecutor v. Kunarac*, et al., Judgment, *supra* note 66, at para. 497.

[121] *Prosecutor v. Furundzija*, Opinion and Judgment, *supra* note 64, at para. 162.

Convention as reflected by customary international law "do not constitute an exhaustive list, and should be regarded as merely representative."[122]

Kunarac held that the presence of a state official or person in authority was not necessary in order for acts to constitute torture under international humanitarian law, in contrast to earlier ICTY and ICTR decisions.[123] The Chamber reasoned that the state actor requirement was inconsistent with the application of individual criminal responsibility for international crimes.[124] It is therefore possible for regular soldiers and civilians to be convicted of torture, if the other requirements are met.

The *Kunarac* Chamber ruled that rape can constitute torture because it caused victims severe mental and physical pain and suffering, and added that "rape is one of the worst sufferings a human being can inflict upon another."[125] Regarding mental suffering, the *Furundzija* Trial Chamber ruled that being forced to watch serious sexual attacks inflicted on a female acquaintance also constituted torture for the forced observer.[126] Because the defendants in *Kunarac* acted intentionally and with the aim of discriminating against the Muslims

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[122] *Prosecutor v. Delalic,* et al. ("Celebici"), Opinion and Judgment, No. IT-96-21 (November 16, 1998), at para. 470. [Reproduced in the accompanying notebook at Tab 26.]

[123] *Prosecutor v. Kunarac*, et al., Judgment, *supra* note 66, at para. 496.

[124] *Id.*

[125] *Id.* at para. 655.

[126] *Prosecutor v. Furundzija*, Opinion and Judgment, *supra* note 64, at para. 162.

detained at the sports hall (in particular women and girls), they were found to have the requisite *mens rea* for a torture conviction for their acts of rape.[127] The Chamber held that it did not matter if discriminatory intent formed only part of the motivation for a sexual attack, as long as it was a substantial part.[128]

The ICTR stated in *Akayesu* that:

> 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.[129]

Two ICTR defendants, Serushago and Semanza, were convicted of torture for the rapes of several Tutsi women during outbreaks of genocidal violence. The *Semanza* Chamber defined torture as the intentional infliction of severe physical or mental pain or suffering for prohibited purposes (the same three purposes outlined in *Kunarac,*) and found the defendant guilty for encouraged a crowd to rape Tutsi women before killing them.[130] Defendant Serushago pled guilty to a count of torture relating to sexual violence at the Commune Rouge.[131]

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[127] *Prosecutor v. Kunarac*, et al., Judgment, *supra* note 66, at para. 654.

[128] *Id.*

[129] *Prosecutor v. Akayesu*, Judgment, *supra* note 39, at para. 597.

[130] *Prosecutor v. Semanza*, Judgment, *supra* note 86, at paras. 343 and 481.

[131] *Prosecutor v. Serushago,* Judgment and Sentence, No. ICTR-98-39 (Feb. 5, 1999). [Reproduced in the accompanying notebook at Tab 30.]

iv.) Rape as a Crime against Humanity

Seven charges of rape as a crime against humanity have been successfully prosecuted at the ICTY (against defendants Cesic, Kunarac, Kovic, Nikolic, and Vukovic). Many ICTY and ICTR Trial Chambers have accepted the broad definition of rape provided in *Akayesu*.[132] Three ICTR defendants have been convicted of rape (Akayesu, Musema, and Semanza). Seven charges of rape have either been withdrawn or defendants acquitted. In many cases, rape victims have decided not to testify, or charges have been dropped as part of a plea bargain.

The success of the charge of rape depends very heavily on the availability of victim testimony and any additional evidence. In some cases, judges have held that evidence was insufficient to convict a defendant of an individual act of rape, even when the judges acknowledged that widespread or systematic rapes were being committed in the same location or even by the same individuals.[133] The fairness of these acquittals has been widely criticized by victims' advocates, given the context of mass rape in the Yugoslav and Rwandan conflicts. Arguably, the standards of evidence should be somewhat relaxed, since women were often raped repeatedly by multiple attackers, and should not be reasonably expected to remember precise details of each incident. However, others believe

[132] *See supra* note 69. ("A physical invasion of a sexual nature, committed on a person under circumstances which are coercive.")

[133] *See e.g., Prosecutor v. Kunarac*, et al., Judgment, *supra* note 66 (rape of Witness FWS-48.)

that proving individual cases of rape beyond a reasonable doubt is necessary for a fair trial.

v.) Persecution as a Crime against Humanity

According to the ICTY, persecution involves an act or omission that: (1) discriminates in fact and denies or infringes upon a fundamental right laid down in customary international or treaty law (the *actus reus*); and (2) is carried out deliberately with the intent to discriminate on political, racial and religious grounds (*mens rea*).[134]

Persecution has been the most successfully prosecuted crime against humanity involving sexual violence, due to the fact that seven defendants have pled guilty as part of a plea bargain, in exchange for the withdrawal of other charges.[135] Six more ICTY defendants have been convicted of persecution (Kvocka, Prcac, Kos, Radic, and Zigic), for acts including sexual violence in the Omarska, Keraterm and Trnopolje detention camps.[136] Rape, sexual assault, harassment, humiliation, and psychological abuse have been considered as acts of persecution in several ICTY cases. Only two ICTR defendants have been charged with persecution involving sexual violence (Ruggiu and Semanza),

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[134] *Prosecutor v. Stakic,* Judgment, *supra* note 80, at para. 732.

[135] Defendants Dosen, Kolundzija, Plavsic, Nikolic, Ruggiu, Sikirica, and Todorovic.

[136] *Prosecutor v. Kvocka* et al., Judgment, No. IT-98-30/1 (Nov. 2, 2001). [Reproduced in the accompanying notebook at Tab 38.]

probably due to the fact that ICTR defendants have been more likely to be charged with crimes of genocide, which carry heavier penalties.

vi.) Other Inhumane Acts

Two ICTY defendants have been convicted of "other inhumane acts" for such acts as forcing two male prisoners to perform sex acts and then sexually mutilate another male prisoner (*Tadic*),[137] and for allowing soldiers and other men to rape female detainees at the Susica camp (*Nikolic*).[138] The *Tadic* Chamber looked for guidance to the International Law Commission Draft Statute for a Permanent International Criminal Court, which noted that "the notion of other inhumane acts is circumscribed by two requirements. First, this category of acts is intended to include only additional acts that are similar in gravity to those listed in the preceding subparagraphs [e.g., torture, rape]. Secondly, the act must in fact cause injury to a human being in terms of physical or mental integrity, health or human dignity."[139] The Chamber held that sexual mutilation of the prisoner fell within these two requirements.[140] Two ICTR defendants

[137] *See* note 18, *supra*.

[138] *Prosecutor v. Nikolic,* No. IT-94-2-PT [Sentence pending, Nov. 2003.]

[139] *Prosecutor v. Tadic*, Opinion and Judgment, *supra* note 22, at para. 729.

[140] *See* note 72, *supra*.

have also been convicted of "other inhumane acts" involving responsibility for rapes and sexual assaults of Tutsi women and girls (Akayesu and Niyitegeka).[141]

c.) Grave Breaches of the Geneva Conventions of 1949 (ICTY Article 2)

A grave breach of the Geneva Convention requires: (1) an international conflict, and (2) a grave breach perpetrated against persons or property defined as "protected" by any of the four Geneva Conventions of 1949. Article 4(1) of Geneva Convention IV (protection of civilians) defines "protected persons" as those "in the hands of a Party to the conflict or Occupying Power of which they are not nationals."[142] Rape and sexual assault can constitute grave breaches under subsections (b) (torture or inhumane treatment) and (c) (willfully causing great suffering or serious injury to bodily health) of the ICTY Statute.[143]

The ICTY has obtained six convictions for grave breaches of the Geneva Conventions for acts of sexual violence and torture. Tadic was charged under subsections (b) and (c) for ordering the sexual abuse and mutilation of male prisoners, but the Trial Chamber initially found him not guilty because it did not classify the victims as protected persons under the Conventions.[144] However,

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[141] *Prosecutor v. Akayesu*, Judgment, *supra* note 39; *Prosecutor v. Niyitegeka,* Judgment and Sentence, *supra* note 96.

[142] *Prosecutor v. Tadic,* Appeals Judgment, *supra* note 25, at para. 164.

[143] Sellers (1997), *supra* note 74, at 57-58.

[144] *Prosecutor v. Tadic*, Opinion and Judgment, *supra* note 22, at para. 608.

the Appeals Chamber held that the victims were protected persons, and found Tadic guilty of torture and inhumane treatment and also of willfully causing great suffering.

The majority of the *Tadic* Appeals Chamber found that grave breaches of the Geneva Conventions could only be committed in international armed conflicts, and that the requirement was an integral part of Article 2.[145] However, Judge Abi-Saab stated in his Separate Opinion that a strong case could be made for the application of Article 2 to an internal conflict.[146] The majority recognized that customary international law might be changing to accept the broadening of scope of the Geneva Conventions to include internal conflicts, and the *Celebici* Trial Chamber stated that this possible change in customary international law should be recognized.[147]

In *Prosecutor v. Delalic* et al., the defendant Delic was convicted of two counts of torture or inhumane treatment for the rapes of two women in the Celebici prison camp.[148] Delic and another defendant, Delalic, were found not guilty for two acts of sexual violence at the camp: in the first incident, brothers in the camp were forced to perform sex acts on each other, and in the second, a

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[145] *Prosecutor v. Tadic,* Appeals Judgment, *supra* note 25; *cited by Prosecutor v. Delalic,* et al. ("Celebici"), Opinion and Judgment, *supra* note 122, at Sect. VI (Judgment).

[146] *Prosecutor v. Delalic,* et al. ("Celebici"), Opinion and Judgment, *supra* note 122, at para. 202.

[147] *Id.*

[148] *Id.*

prisoner was given electric shocks on his genitals.[149] Their co-defendant, Mucic, however, was convicted of torture or inhumane treatment for the first of the acts, and of willfully causing great suffering for the second.[150] The Trial Chamber held that forcing the relatives to commit sexual acts was a fundamental attack on their human dignity, and that the act constituted inhuman treatment under Article 2 of the Statute.[151] The Trial Chamber noted that the act could have also constituted rape, if it had been charged by the Office of the Prosecutor.[152]

D.) Violations of Common Article 3 and Additional Protocol II (ICTR Art. 4)

Sexual violence can theoretically constitute a serious violation of Common Article 3 and Additional Protocol II, under subsections (a) (violence to life, health, and physical or mental well-being) and (e) (outrages upon personal dignity.) However, although eight such violations of Common Article 3 and Additional Protocol II have been alleged in ICTR indictments, no defendant has yet been convicted under this portion of the Statute for crimes of sexual violence.

[149] *Prosecutor v. Delalic,* et al. ("Celebici"), Opinion and Judgment, *supra* note 122, Sect. VI (Judgment).

[150] *Id.*

[151] *Id*. at para. 1066.

[152] *Prosecutor v. Delalic,* et al. ("Celebici"), Opinion and Judgment, *supra* note 122, at para. 1066.

Three defendants (Musema, Niyitegeka, and Semanza) have been acquitted of the charge of violence to life, health and physical or mental well-being for sexual offenses against civilians. Likewise, none of the four charges of outrages upon personal dignity have led to convictions in *Akayesu, Musema, Niyitegeka,* or *Semanza.*

The Akayesu Trial Chamber held that the norms of Common Article 3 have acquired the status of customary international law, a view also shared by the ICTY Trial Chambers and Appeals Chamber.[153] In regard to Additional Protocol II (dealing with non-international conflict), the *Akayesu* Chamber stated that the fundamental guarantees formed part of existing customary international law.[154] In order for an offense to be covered by this section of the ICTR Statute, the requirements for both Common Article 3 and Additional Protocol II must be met.[155]

In cases involving sexual violence charged under ICTR Article 4, the Prosecution has had the difficult burden of showing that: (1) an armed conflict took place in Rwanda between its armed forces and dissenting armed forces or other organized armed groups; and (2) that the dissident armed forces or other

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[153] *Prosecutor v. Musema,* Judgment and Sentence, *supra* note 83, at para. 240.

[154] *Id.*

[155] *Id.* at para. 244.

organized armed groups were: (a) under responsible command, (b) able to exercise such control over a part of their territory as to enable them to carry out sustained and concerted military operations, and (c) able to implement Additional Protocol II.[156]

The Prosecutor also has the burden of proving a nexus between a defendant's act and a broader armed conflict, and, if necessary, that the alleged perpetrator and victim belonged to certain classes.[157] Under Common Article 3 of the Geneva Conventions, the perpetrator must belong to a "party to the conflict," whereas under Additional Protocol II, the perpetrator must be a member of the "armed forces" of either the government or the dissidents.[158] The *Akayesu* Trial Chamber held that the perpetrator class should include individuals who were legitimate public officials, agents, or persons with *de facto* authority representing the Government to support or fulfill the war efforts.[159] The ICTR Appeals Chamber disagreed and expanded the applicability of Article 4, stating that criminal responsibility did not depend on any particular classification of the alleged perpetrator.[160] In *Musema*, the Trial Chamber upheld

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[156] *Prosecutor v. Musema,* Judgment and Sentence, *supra* note 83, at para. 245.

[157] *Id.* at para. 263.

[158] *Id.* at para. 264.

[159] *Prosecutor v. Musema,* Judgment and Sentence, *supra* note 83, at para. 266.

[160] *Prosecutor v. Semanza*, Judgment, *supra* note 86, at para. 360.

this view and found that Article 4 could be applied to civilians.[161] The *Musema* Trial Chamber also defined the class of possible victims negatively, as any persons outside the class of perpetrators.[162] The *Semanza* Trial Chamber held that the class of victims could include "*any* individual[s] not taking part in the hostilities," guided by an identical ICTY Trial Chamber ruling in the *Celebici* case.[163]

The *Musema* Chamber found the defendant not guilty of violations of Common Article 3 and Additional Protocol II, because the Prosecutor had failed to show that there had been a nexus between the alleged offense and the armed conflict.[164] The Trial Chamber in *Semanza* agreed with the ICTY's observation in *Kunarac* that a nexus existed between an alleged offence and a non-international armed conflict when the alleged offence was closely related to the hostilities.[165] In determining whether the requisite close relation existed, the Chamber quoted *Kunarac:*

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[161] *Prosecutor v. Musema,* Judgment and Sentence, *supra* note 83, at para. 275.

[162] *Id.* at para. 280.

[163] *Prosecutor v. Delalic*, Judgment, *supra* note 122, at para. 420 [emphasis in original]; *quoted in Prosecutor v. Semanza*, Judgment, *supra* note 84, at para. 365.

[164] *Prosecutor v. Musema,* Judgment and Sentence, *supra* note 83, at para. 974.

[165] *Prosecutor v. Kunarac,* Judgment, *supra* note 66, at para. 58; *quoted in Prosecutor v. Semanza*, Judgment, *supra* note 86, at para. 517.

> [T]he existence of armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit [the offence], his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established … that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict.[166]

The ICTR Chamber acknowledged a nexus between the armed conflict and Semanza's acts, but found him not guilty of rape and sexual assaults as violations of Article 4 due to insufficient evidence.[167]

E.) Violations of the Laws or Customs of War (ICTY Article 3)

The Appeals Chamber for the *Delalic* case held that the defendants could be convicted under either Article 3 or Article 5 for the same incidents of rape and torture, since each Article had at least one materially distinct element that did not appear in the other.[168] This view was shared by ICTY Trial Chambers in subsequent cases.

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[166] *Prosecutor v. Kunarac*, et al., Judgment, *supra* note 66; *quoted in Prosecutor v. Semanza*, Judgment, *supra* note 86, at para. 517

[167] *Prosecutor v. Semanza*, Judgment, *supra* note 86, at para. 534.

[168] *See e.g.*, *Prosecutor v. Kunarac*, Judgment, *supra* note 66, at para. 557.

Sexual violence may be prosecuted implicitly as a violation of the laws or customs of war as either: (1) violations of the Hague law; (2) infringements of provisions of the Geneva Conventions other than those classified as "grave breaches" by those conventions; (3) violations of common Article 3 of the Geneva Conventions and other customary rules on internal conflicts; or (4) violations of agreements binding upon the parties to the conflict, considered qua treaty law, (i.e., agreements which have not turned into customary law).[169] Common Article 3 of the Geneva Conventions proscribes a number of acts committed within an armed conflict (including rape, torture, and outrages upon personal dignity), if the acts have a close connection to the armed conflict and are committed against persons who take no active part in hostilities.[170]

In order to fulfill the requirements of Article 3, the ICTY Appeals Chamber has held that: (1) a violation must constitute an infringement of a rule of international humanitarian law; (2) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (3) the violation must be "serious", i.e., it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and (4) the violation of the rule must entail, under customary or conventional law, the

[169] Sellers (1997), *supra* note 74, at 57-58.

[170] *Prosecutor v. Tadic*, Judgment, *supra* note 22, at para. 614.

individual criminal responsibility of the person breaching the rule.[171] Also, there must be a close nexus between an individual violation and a broader armed conflict, and the violation must be committed against persons taking no active part in the hostilities.[172] Under the provisions of Article 3, ICTY defendants have been charged variously with: (a) cruel treatment, (b) rape, (c) torture, (c) outrages upon personal dignity, (d) unlawfully inflicting terror upon civilians, and (e) humiliating or degrading treatment, for acts of sexual violence committed during the armed conflict in Yugoslavia.

Three charges of cruel treatment as a violation of the laws or customs of war have been successfully prosecuted in the ICTY for sexual offenses. In *Tadic,* the defendant was convicted of cruel treatment in connection with the abuse and genital mutilation of a male prisoner, but an identical charge for an act of rape was withdrawn after the witness refused to testify.[173] The ICTY Chamber held that cruel treatment included "violence to the 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."[174] Defendant Mucic

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[171] *Prosecutor v. Tadic*, Judgment, *supra* note 22, at para. 610.

[172] *Prosecutor v. Kunarac*, Judgment, *supra* note 66, at para. 407.

[173] *See* note 18, *supra.*

[174] Article 4 of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II); *quoted in Prosecutor v. Tadic*, Judgment, *supra* note 22, at para 725.

was also found guilty of cruel treatment for torturing prisoners and forcing them to commit sexual acts at the Celebici detention camp.[175]

Rape is expressly prohibited under the Fourth Geneva Convention and Additional Protocol II. ICTY Trial Chambers have held that rape is a violation of the laws and customs of war under customary international law, and six counts of rape have been successfully prosecuted under Article 3. Defendant Kunarac was convicted of four counts of rape under Article 3, and his co-defendants Kovac and Vukovic of one count each, for attacks on women in the municipality of Foca. The *Kunarac* Trial Chamber held that there was "no doubt" that rape constituted a serious violation of common Article 3.[176] (Kunarac and his co-defendant, Vukovic, were also acquitted of one count each of rape due to inconsistencies in the alleged victim's testimony and her inability to remember exact details of the incidents).[177]

Seven ICTY defendants have been convicted of torture under Article 3 in connection with sexual assaults. Torture is prohibited by both conventional and customary international law, in both internal and international armed conflicts.[178] Rape and sexual assault have been held to constitute torture under

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[175] *See* notes 149-50, *supra.*

[176] *Prosecutor v. Kunarac*, Judgment, *supra* note 66, at para. 408.

[177] *Id.* at para. 693.

[178] *Prosecutor v. Delalic*, Judgment, *supra* note 122, at paras. 446 and 452.

Article 3 in several ICTY decisions such as *Delalic,* in which the defendant Delic was convicted of two counts of torture for raping two female detainees in the Celebici camp. The *Delalic* Chamber held that rape could constitute torture under Article 3, if the act: (1) caused severe pain or suffering, whether mental or physical; (2) was inflicted intentionally; (3) was intended to obtain information or a confession from the victim, or to punish, intimidate, or coerce the victim or a third person, or was based on discrimination of any kind; and (4) was committed by, or at the instigation of, or with the consent or acquiescence of, an official or other person acting in an official capacity.[179] The Chamber added that rape struck "at the very core of human dignity and physical integrity," and undoubtedly caused severe physical and psychological suffering to victims.[180] The *Furundzija* Trial Chamber also held that rape constituted torture under certain circumstances, and additionally held that the humiliation of the victim was a prohibited purpose.[181]

According to the *Delalic* Trial Chamber, all of the rape victims were "persons protected" by the Fourth Geneva Convention of 1949. The chamber held that the women were in the hands of a party to the conflict of which they

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[179] *Prosecutor v. Delalic*, Judgment, *supra* note 122, at para. 494.

[180] *Id.* at para. 495.

[181] *See* note 121, *supra.*

were not nationals, as they were Bosnian Serbs detained during an international armed conflict by a party to that conflict, the State of Bosnia and Herzegovina.

Two defendants have been convicted of sexual offenses constituting outrages upon personal dignity, including rape in *Furundzija* and sexual exploitation and humiliation in *Kunarac.* The Trial Chamber in *Kunarac* noted that the charge was broader than that of inhuman treatment under Common Article 3, and defined an outrage upon personal dignity as any intentional act that would generally be considered seriously humiliating, degrading, or otherwise a serious attack on human dignity.[182] The Chamber also held that the accused must have had knowledge that the act could cause such an effect on the victim.[183]

Article 3 has also encompassed one count of humiliating or degrading treatment at the ICTY. Defendant Cesic pled guilty to this offense for forcing two brothers at the Luka detention camp to beat each other and perform sexual acts on each other in the presence of others, causing them great humiliation and degradation.[184]

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[182] *Prosecutor v. Kunarac*, Judgment, *supra* note 66, at para. 507.

[183] *Id.*

[184] *Prosecutor v. Cesic*, Sentencing Judgment, No. IT-95-10/1 (Dec. 14, 1999), Count 7. [Reproduced in the accompanying notebook at Tab 35.]

(3) Controversial issues in sexual violence trials

a. Gender as a protected class

Female victims of sexual violence during the Yugoslav and Rwandan Conflicts were attacked not only because of their religious and ethnic backgrounds, but also because of their gender. Although some men in the conflicts were sexually abused, women and girls were disproportionately targeted for rapes and assaults. Many scholars maintain that gender should be added to the classes protected from persecution, given the fact that rape is such a frequent and widespread occurrence during armed conflicts.[185] The thousands of rapes committed in the former Yugoslavia and Rwanda reflected not only a desire to persecute people of another ethnicity or religion, but also a desire to humiliate and terrorize women specifically because of their gender. The view that gender should be added to the list of classes protected from persecution is supported by the *Delalic* case (in which the Trial Chamber recognized that gender formed a basis of discrimination for the offense of torture.)[186]

b. The requirement of official participation in torture

The earlier Tribunal cases such as *Delalic* required that an official be present during an act of rape, or that an official participate in or instigate the act,

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[185] *See e.g.,* Askin (1999), *supra* note 103 , at 123.

[186] *Prosecutor v. Delalic*, Judgment, *supra* note 122, at para. 963.

in order for the assault to constitute torture. After *Kunarac* and *Akayesu*, however, the requirement seems to be losing favor. These newer cases suggest that any person, including civilians and low-ranking officers, can be prosecuted for rape as an act of torture if other requirements are met.

c. Forced pregnancy as a tool of ethnic cleansing

The *Akayesu* Chamber noted that, under Article 2 of the ICTR Statute, measures intended to prevent births within the group would include such acts as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages.[187] The Chamber also included deliberate impregnation in this list, if committed against a member of a patriarchal society where membership of a group is determined by the identity of the father.[188] In such a case, a woman of a particular group might be raped in order to deliberately impregnate her with a child who would consequently not belong to its mother's group. Since thousands of women in Yugoslavia and Rwanda were raped for this very purpose, it is extremely important that forced impregnation should be clearly recognized in the Tribunal statutes and reflected in indictments for rape and sexual violence.

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[187] *Prosecutor v. Akayesu*, Judgment, *supra* note 39, at para. 507.

[188] *Id.* at para. 507.

d. Dismissal of individual rape cases for lack of evidence

Many charges of rape have been dismissed, or defendants acquitted, because the Tribunal chambers found the evidence of individual acts of rape insufficient. Advocates for rape victims have complained that it makes little sense for judges to acknowledge that mass rapes occurred during the Yugoslav and Rwandan violence, and even to acknowledge that Serb camps existed for the purpose of systematic rape, and yet to dismiss individual cases where a victim has testified that a defendant raped her. As mentioned above, the standards of evidence should be relaxed somewhat in favor of victims in situations where rape was endemic in an area, and where thousands of rapes were perpetrated in order to terrorize an entire group.

III. Superior Responsibility and Individual Criminal Responsibility for Sexual Violence

A. ICTY/ ICTR rulings on superior responsibility for sexual violence

The foremost precedent for superior responsibility for sexual violence was the conviction of General Tomoyuki Yamashita at the International Military Tribunal for the Far East.[189] Yamashita was held responsible for war crimes,

[189] Campanaro, *supra* note 2, at 2559.

including rapes and sexual assaults, committed against Filipino civilians by soldiers under his command.[190] This case was the first to hold a military commander accountable for his failure to prevent or punish sexual crimes that he knew (or should have known) about. However, the Tokyo Tribunal included rape only among other charges, and did not focus on prosecuting crimes of sexual violence.

Superior responsibility was incorporated into the statutes of the Yugoslav and Rwandan Tribunals, and several Tribunal defendants have been charged with responsibility for rape and sexual violence committed by subordinates. Article 7(3) of the ICTY Statute states that a superior may be held responsible for his subordinates' criminal acts under Articles 2 through 5, if he (1) knew or had reason to know that the subordinate was about to commit such acts or had done so, and (2) if he failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators. Article 6(3) of the ICTR Statute contains nearly identical language, and applies to Articles 2 through 4 of the ICTR Statute.

The first ICTY case to rule on the superior responsibility of a military commander for crimes of sexual violence was *Delalic*. The defendant Delalic was charged with superior responsibility for crimes at the Celebici prison camp including rape and torture, but the Trial Chamber found insufficient evidence that the defendant actually held the alleged position of superior authority at the

[190] Campanaro, *supra* note 2, at 2559.

camp.[191] However, the Chamber held that command responsibility was a norm of both customary and conventional international law, and that command responsibility existed where: (1) there was a superior-subordinate relationship; (2) the superior knew or had reason to know that the criminal act was about to be or had been committed; and (3) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.[192]

Delalic did not hold all superiors strictly liable for the acts of their subordinates, but concluded that a superior possessed the necessary *mens rea* if: (1) he had actual knowledge, either through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes, or (2) he possessed information that should have put him on notice of the risk of such offences.[193] If a superior did have such information, the Chamber held he had a duty to investigate whether such crimes were committed or were about to be committed by his subordinates.[194]

The ICTR has enumerated very similar requirements for a military superior's criminal responsibility. The *Musema* Trial Chamber, for example, held that the Prosecutor must show that: (1) the superior's subordinate

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[191] *Prosecutor v. Delalic*, Opinion and Judgment, *supra* note 122, at para. 669.

[192] *Id.* at para. 346.

[193] *Id.* at para. 383.

[194] *Prosecutor v. Delalic*, Opinion and Judgment, *supra* note 122, at para. 383.

committed a criminal act; (2) the superior knew or had reason to know that the subordinate was about to commit such an act, or had committed it; and (3) the superior failed to take necessary and reasonable steps to prevent the act or to punish the subordinate.[195] The *Musema* Chamber also found that a superior's participation could consist of planning or instigating crimes, ordering that crimes be committed, or aiding and abetting a subordinate in the commission of criminal acts.[196] Musema was held individually criminally responsible for sexual crimes committed by his subordinates, since the Trial Chamber found that he had both *de jure* and *de facto* power over his civilian subordinates, and also that he had abetted in the commission of the acts by his presence and personal participation.[197]

In regard to non-military superiors, both the ICTY and ICTR have held that a civilian can only be convicted for superior responsibility if he had effective control (either *de jure* or *de facto*) over the subordinates committing the criminal acts. The *Delalic* Chamber was the first Tribunal case to extend command responsibility to individuals in non-military positions of superior authority,[198] and this view was adopted in subsequent cases at both the ICTY and ICTR.[199]

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[195] *Prosecutor v. Musema*, Judgment, *supra* note 83, at para. 127.

[196] *Id.* at para. 117.

[197] *Id.* at para. 894.

[198] *Prosecutor v. Delalic*, Opinion and Judgment, *supra* note 122, at para. 363.

[199] *See e.g., Prosecutor v. Musema*, Judgment, *supra* note 83, at para. 141.

According to the ICTY Appeals Chamber, a superior with effective control over subordinates would be responsible for the commission of the crimes if he failed to exercise his abilities of control, to the extent that he could either prevent his subordinates from committing crimes or punish them afterwards.[200] The responsibility of civilian superiors with effective control has been upheld in the most recent Tribunals cases, such as *Stakic*.[201]

Defendants may be charged with criminal responsibility for the same crimes under both subsections (1) and (3) of the Statutes on individual criminal responsibility.[202] The defendants in *Kvocka*, for example, were charged under ICTY Article 7(1) for participating in sexual violence, and alternatively or additionally under Article 7(3) for superior responsibility.

B. ICTY/ ICTR rulings on individual responsibility for sexual violence

Article 7(1) of the ICTY Statute states that a person who plans, instigates, orders, commits or otherwise aides and abets in the planning, preparation or execution of a crime covered by Articles 2 through 5 shall be individually responsible for the crime. Article 6(1) of the ICTR Statute holds individuals responsible under the same criteria for crimes under Articles 2 through 4.

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[200] *Prosecutor v. Delalic*, Opinion and Judgment, *supra* note 122, at para. 198.

[201] *Prosecutor v. Stakic*, Judgment, *supra* note 80, at paras. 462-63.

[202] *Id.*

The ICTY stated in *Furundzija* that defendants could be held individually criminally responsible for planning, ordering, instigating, or aiding and abetting rape and sexual assault, as well as for the actual commission of the acts.[203] According to the *Delalic* Trial Chamber, individual criminal responsibility for sexual violence required that an individual's participation directly and substantially affected the commission of a sexual crime (the *actus reus)*, and that the individual participated with the knowledge that he was assisting the principal offender in the commission of the crime (the *mens rea*).[204] Hence, a defendant must have had "awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime."[205] The ICTR similarly held in *Semanza* that, in order to satisfy ICTR Article 6(1), an individual's participation in a crime must have substantially contributed to, or had a substantial effect on, the completion of the act.[206] In order for defendants to be held individually criminally responsible for acts of sexual violence, they must have committed a specified *actus reus* and must have also possessed the requisite intent.

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[203] *Prosecutor v. Furundzija,* Judgment, *supra* note 64, at para. 187.

[204] *Prosecutor v. Delalic*, Opinion and Judgment, *supra* note 122, at para. 326.

[205] *Id.* at para. 327.

[206] *Prosecutor v. Semanza*, Judgment, *supra* note 86, at para. 379.

In the jurisprudence of the Tribunals, "committing" a crime can mean either physically perpetrating a crime or engendering a crime by omission.[207] The Appeals Chamber in *Tadic* found that Article 7(1) "covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law."[208] The *actus reus* required for committing a crime is that the accused directly participated (either individually or jointly) in the material elements of a crime, either through positive acts or omissions.[209]

The *actus reus* required for "instigation" is any conduct that prompts another person to commit a crime, including such behavior as urging, encouraging, or prompting.[210] The required *mens rea* is that the defendant intended to provoke or induce the commission of a crime, or was aware of the substantial likelihood that the commission of a crime would results from his acts.[211] The *Akayesu* Chamber additionally held that instigation need not be

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[207] *Prosecutor v. Kvocka* et al., Judgment, *supra* note 136, at para. 243.

[208] *Prosecutor v. Tadic,* Appeals Chamber Judgment, *supra* note 25, at para. 188.

[209] *Prosecutor v. Kvocka* et al., Judgment, *supra* note 136, at para. 251.

[210] *Prosecutor v. Akayesu*, Judgment, *supra* note 39, at para. 482.

[211] *See e.g., Prosecutor v. Krstic,* Trial Chamber Judgment, para. 601; and *Prosecutor v. Akayesu,* Trial Chamber I, Judgment, para. 482; *cited by Prosecutor v. Kvocka* et al., Judgment, *supra* note 136, at para. 243.

direct and public, and that proof was required of a causal connection between instigation by the defendant and the commission of the crime.[212]

"Aiding and abetting" is a form of accomplice liability, and the *actus reus* consists of providing practical assistance, encouragement, or moral support that has a substantial effect on the perpetration of the crime.[213] The *mens rea* required is the knowledge that these acts assist or facilitate the commission of the offence.[214] The *Delalic* Trial Chamber determined that aiding and abetting included all acts of assistance lending encouragement or support, including physical acts and psychological support through words or physical presence.[215] The *Akayesu* Trial Chamber Judgment stated that aiding and abetting were distinct offenses; aiding was defined as giving assistance, while abetting involved facilitating the commission of an act by being sympathetic.[216] According to *Kunarac*, a defendant's presence at the scene of a crime was not conclusive of aiding or abetting, unless the presence significantly legitimized or encouraged the principal.[217]

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[212] *Prosecutor v. Kvocka* et al., Judgment, *supra* note 136, at paras. 478-482.

[213] *Id.* at para. 253.

[214] *Id.*

[215] *Prosecutor v. Delalic*, Opinion and Judgment, *supra* note 122, at para. 327.

[216] *Prosecutor v. Akayesu*, Judgment, *supra* note 39, at para. 484.

[217] *Prosecutor v. Kunarac,* Judgment, *supra* note 66, at para. 393.

"Ordering" refers to a situation where an individual in a position of authority uses that authority to order and compel another individual, who is subject to that authority, to commit a crime.[218] Criminal responsibility for ordering the commission of an act implies that a superior-subordinate relationship existed between the individual who gave the order and the one who carried it out.[219]

The notion of joint criminal enterprise has been espoused in cases where a defendant was charged with individual criminal responsibility as a co-perpetrator of an offense. The *Tadic* Appeals Chamber found joint criminal enterprise liability to be implicit within Article 7(1) of the ICTY Statute, observing that the commission of a crime might also occur through participation in "the realisation of a common design or purpose."[220] According to the Chamber, a joint criminal enterprise required that a plurality of persons have a common plan to commit a crime, and a defendant who participated in the execution of the plan would be criminally responsible.[221] The ICTY Trial

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[218] *Prosecutor v. Semanza,* Judgment, *supra* note 86, at para. 382.

[219] *Id.*

[220] *Prosecutor v. Tadic,* Appeals Chamber Judgment, *supra* note 25, at paras. 185-229.

[221] *Id*. at para. 227.

Chamber in *Kvocka* recently upheld the existence of joint criminal enterprise liability under Article 7(1).[222]

IV. Evidential Procedures for Minors

Children were often the victims of sexual violence in both the Yugoslav and Rwandan conflicts,[223] but there are very few provisions in the ICTY and ICTR Rules of Procedure and Evidence that relate specifically to the testimony of minors at the Tribunals. Because there is little paper documentation of the ethnic cleansing and genocide that happened in those conflicts, the testimony of witnesses has been the primary source of evidence for the Tribunals. The testimony of minors is essential if any sexual assailants of children are to be punished, but special care must be taken with child witnesses to prepare them to give evidence in a potentially frightening and overwhelming environment.

The protections that are generally afforded to victims and witnesses under the ICTY and ICTR Rules of Procedure and Evidence apply to minors, such as the counseling services offered by the victims and witnesses support units. (See Section II (B), *supra.)* Rule 90 (Testimony of Witnesses) exempts children from

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[222] *Prosecutor v. Kvocka* et al., Judgment, *supra* note 136, at para. 246

[223] *See e.g., Prosecutor v. Akayesu*, Judgment, *supra* note 39, at paras. 416-417 (testimony of Witness J. that girls as young as six were raped by Hutu soldiers); *Prosecutor v. Tadic*, Opinion and Judgment, *supra* note 22, at para. 175 (testimony of a doctor at the Trnopolje camp that girls as young as twelve were raped by Serb soldiers).

making the usual solemn declaration[224] before giving evidence, if the chamber believes that they are too young to understand the nature of the declaration.[225] The Rule states that, in circumstances where a minor has not made the declaration, a judgment cannot be made solely on the basis of the minor's testimony.[226] These provisions aside, the testimony of minors raises several procedural and evidentiary issues not dealt with explicitly in the Rules of Procedure and Evidence.

A. Hearsay Rule and Possible Exceptions for Minors

The admission of hearsay evidence is especially important when children are testifying to crimes of sexual violence. Children who were sexually assaulted during the Yugoslav and Rwanda conflicts may have later been medically examined or interviewed. The hearsay evidence that a doctor, aid worker, or interviewer might provide could be extremely important in supporting a child's claim of sexual assault.

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[224] ICTY Rules, *supra* note 29, and ICTR Rules, *supra* note 50, Rule 90 (B): "I solemnly declare that I will speak the truth, the whole truth and nothing but the truth."

[225] ICTY Rules, *supra* note 29, and ICTR Rules, *supra* note 50, Rule 90(C).

[226] *Id.*

Hearsay evidence[227] is ordinarily inadmissible in many domestic courts, especially in common law jurisdictions. However, according to Judge Richard May, the International Criminal Tribunals have "adopted a liberal approach" to matters of evidence, "not fettered by common law rules."[228] Under Rule 89(C), the ICTY and ICTR chambers are granted a great deal of leeway to admit hearsay evidence (possibly because judges are the triers of fact, and therefore less likely to be prejudiced by probative evidence than a jury). In *Prosecutor v. Tadic*, the Trial Chamber ruled that hearsay evidence could be admitted as long as it was relevant, probative, and thought to be reliable.[229] The chamber stated that:

> In [determining the admissibility of hearsay evidence], the Trial Chamber will hear both the circumstances under which the evidence arose as well as the context of the statement. The Trial Chamber may be guided by, but not bound to, hearsay exceptions generally recognized by some national legal systems, as well as the truthfulness, voluntariness, and trustworthiness of the evidence, as appropriate. In bench trial before the international tribunal, this is the most efficient and fair method to determine the admissibility of out-of-court statements.[230]

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[227] Hearsay evidence was defined by the ICTY as the "statement of a person made otherwise than in the proceedings in which it is being tendered, but nevertheless being tendered in those proceedings in order to establish the truth of what the person says." *Prosecutor v. Aleksovski*, Decision on Prosecutor's Appeal on Admissibility of Evidence, No. IT95-95-14/1-AR73 (Feb. 16, 1999), para. 25; *quoted in* Gideon Boas, *Creating Laws of Evidence for International Criminal Law: The ICTY and the Principle of Flexibility*, 12 Crim. L.F. 41, 50 (2001). [Reproduced in the accompanying notebook at Tab 14.]

[228] R. May and M. Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha,* 37 Columbia J. Transnat'l. L. 727, 745 (1999); *quoted in* Gideon Boas, *supra* note 227, at 47.

[229] *Prosecutor v. Tadic,* Decision on the Defence Motion on Hearsay, No. IT-94-1 (Aug. 7, 1996), at para. 7; *quoted in* Gideon Boas, *supra* note 227, at 51.

[230] *Id.* at 55-56.

The admission of hearsay evidence was upheld in several subsequent ICTY cases, and has arguably helped to shorten the length of trials and to expedite the backlog of cases at the Tribunal.[231] Hearsay evidence should be admitted in relation to a child's testimony, in accordance with the same rules, if the evidence is probative, relevant, and believed to be credible.

B. Guidelines for Interviewing Minors and Preparing them for Trial [232]

Interviews with minors must be handled sensitively and age-appropriately, considering a child's feelings as well as their maturity and understanding of the legal process. This is especially true where a child has suffered a physical or emotional trauma like rape or sexual abuse.

An investigator should begin by considering the possible admissibility of any statements that the child makes to doctors, aid workers, or other adults. The investigator should endeavor to speak with any person who has examined or interviewed the child. If it is possible to speak with a doctor before a child is examined, the interviewer should make sure that the doctor does not ask any leading questions, and that she takes careful notes, paying attention to the words

[231] *See* Boas, *supra* note 227, at 57.

[232] Unless indicated, guidelines are from Judge Advocate General's School, U.S. Army, *The Art of Trial Advocacy: Preparing the Young Child-Victim for Trial,* 2002 Army Law. 42 (2002). [Reproduced in the accompanying notebook at Tab 13.]

that the child uses. The investigator should also obtain statements made by any other witnesses in the case.

In order for the investigator's interview with the child to be admitted into evidence, it must seem reliable to judges. This requires advance planning and preparation by the interviewer, especially if the interviewer is not experienced in dealing with children. The interview should be videotaped if possible, and should include some preliminary time for the child and interviewer to establish a rapport. The interview plan should address: (1) who will be present in the interview room; (2) who will ask questions; (3) who will videotape the interview; (4) how questions will be formulated; (5) what props are necessary, such as crayons and paper; (6) when and where the child will take breaks; (7) who will remain with the child during breaks, and (8) how the preliminary time will be conducted.

Before conducting the interview with the child, the interviewer should speak to whomever has been caring for the child and make sure that this guardian understands the trial process and what may be required of the child, including any travel arrangements that might be necessary. The investigator should be familiar with protective measures that might be provided if a child testifies, and should discuss these protective options with the child's guardian. Also, learning about the child's likes, dislikes, or hobbies may help to establish a rapport during the interview.

If the child has seen a counselor or psychologist, the interviewer should also meet with him for advice on how best to interview the child. The degree of trauma that a child has suffered and how the child is coping with it should influence the investigator's approach to the interview. The investigator should discuss the child's ability to testify in open court against the accused.

Ideally, an investigator should meet with a child at least once before the actual interview, in order to establish trust. The meeting should take place in the presence of another adult whom the child trusts. This adult should explain who the investigator is and why he needs to see the child. The investigator should not discuss the sexual abuse at the first meeting, but should engage in talk and make the child feel at ease.

At the actual interview, the interviewer should use direct and simple language, including precise anatomical terms. When questioning the child, the interviewer should: (1) use the active rather than passive voice; (2) avoid negatives and double negatives; (3) Include only one query per questions; (4) Use simple words; (5) Use simple phrases; (6) Use the terms the child uses; and (7) be alert to any signals that the child is having difficulty understanding the questions.[233] Also, the interviewer should avoid changing the subject or time frame without making the child aware of the switch.

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[233] Nancy E. Walker and Matthew Nguyen, *Interviewing the Child Witness: The Do's and the Don't's, the How's and the Why's,* 29 Creighton L.Rev. 1587 (1996); *quoted in* Nancy E. Walker, *Forensic Interviews of Children: The Components of Scientific Validity and Legal Admission*, 65 Law & Contemp. Prob. 149, 165 (2002). [Reproduced in the accompanying notebook at Tab 15.]

In order to prepare a child to testify at trial, the investigator must talk with the child about the sexual abuse, familiarize the child with the courtroom, and explain what to expect while testifying. Ideally, the trial preparation should involve the help of a counselor or psychologist. The child should know in advance that the testimony may be given in front of other people. If possible, the next several interviews should be conducted in a courtroom setting, in order to familiarize the child with the formal environment. The child will be more reliable as a witness if she feels engaged in the proceedings, so the investigator should try to make the interviews interesting (e.g., making a game, letting the child ask and answer questions, etc.) If a child gets upset during an interview, the investigator should remain calm, stop the interview, and try again later.

At some point, the investigator should educate the child about her role in the trial, about making a solemn oath, and about the necessity of telling the truth in the courtroom. If the Chamber finds that the child does not understand the nature of the solemn oath it may allow her testimony to proceed without it; however, any testimony then given cannot be used as a sole basis for conviction under the Rules of Procedure and Evidence.[234]

[234] *See* note 81, *supra*

C. Use of Written Statements and Closed-circuit/Video Technology

Formal courtroom proceedings can be very intimidating and frightening for young witnesses, and the fear can be magnified enormously if a child has to face a defendant who sexually assaulted her. In recent years, the ICTY has allowed alternatives to live oral testimony for vulnerable witnesses, including written statements and testimony via closed-circuit television and video. The ICTY Rules of Procedure and Evidence no longer state a preference for live oral testimony, but instead allow written statements to be used "where the interests of justice allow."[235] Rule 92 *bis* (Proof of Facts Other than by Oral Evidence) was adopted by the ICTY in 2000, allowing a Trial Chamber to admit written statements into evidence that contain evidence normally given orally. The ICTR has been less willing to accept written statements when live witnesses are available[236], but does also allow the use of closed-circuit television and video.[237]

Victims of sexual violence are among the most vulnerable of witnesses, and child victims of sexual attacks are doubly vulnerable. As long as alternatives to live testimony are permitted by the Tribunals, they should be used liberally to prevent child victims of sexual assault from having to be in the same room as

[235] ICTY Rules, *supra* note 29, and ICTR Rules, *supra* note 50, Rule 89(F) (General Provisions).

[236] *See* note 96, *supra.*

[237] ICTR Rules, *supra* note 50, Rule 75(B)(iii).

their assailants. A child's testimony is more likely to be reliable if it is given under conditions that are free from stress and fear.

V. Prior Sexual Conduct in Evidence

A. ICTY/ ICTR Statutes Forbid Evidence of a Rape Victim's Sexual History

Under Rule 96 of both the ICTY and ICTR Rules of Procedure and Evidence, evidence of a rape victim's previous sexual history is not admissible. This rule was designed to prevent victims of sexual assaults from being harassed or embarrassed by defendants. Evidence of a rape victim's prior sexual conduct is widely considered to be irrelevant to the circumstances of rape, as well as being unduly invasive and possibly prejudicial to the victim. Forbidding such evidence from being admitted increases the likelihood that rape victims will be willing to testify at the Tribunals.

VI. Sentencing Issues

When the *ad hoc* International Criminal Tribunals began to indict suspected war criminals from the former Yugoslavia and Rwanda, there was little precedent for sentencing those convicted of rape or sexual assault. Since the military tribunals at Nuremberg and Tokyo did not generally prosecute sexual

violence, the Tribunals have had to develop their own fledgling sentencing policies for war crimes involving sexual violence.[238]

A. Sentencing Guidelines Used by the ICTY and ICTR

The ICTY has concurrent jurisdiction with the courts of the former Yugoslavia over serious violations of international humanitarian law.[239] ICTY Trial Chambers have recourse to the general sentencing practices in the judicial system of the former Yugoslavia.[240] The ICTR has concurrent jurisdiction with the Rwandan courts, and has recourse to the sentencing practices of the domestic judicial system.[241] ICTR Trial Chambers have recourse to the general sentencing practices in the domestic courts of Rwanda, with the notable exception of the death penalty.[242]

B. Comparison of ICTY and ICTR Sentencing Rules

The Tribunals operate with the sentencing system used in most civil law jurisdictions, whereby sentencing takes place as part of the judgment phase of a

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[238] *See e.g.,* Mark A. Drumbl and Kenneth S. Gallant, *Sentencing Policies and Practices in the International Criminal Tribunals*, 15 Fed. Sent. R. 140, 140-141 (2002). [Reproduced in the accompanying notebook at Tab 16.]

[239] ICTY Statute, *supra* note 9, at art. 9(1).

[240] *Id.*

[241] *Id.* at art. 8.

[242] ICTY Statute, *supra* note 9, at art. 23(1).

trial.[243] The maximum sentence that may be handed down in either Tribunal is life imprisonment.[244] Although the death penalty is allowed under Rwandan domestic law, it is not available to the ICTR.[245] Both the ICTY and ICTR Statutes provide that the gravity of the offense and individual circumstances should be taken into account in sentencing, and the Trial Chambers of both Tribunals are allowed to consider any aggravating or mitigating circumstances.[246] Defendants can also be credited with time they have already served.[247] The ICTY and ICTR Statutes both provide that judges will indicate if sentences are to be served concurrently or consecutively, and both allow Trial Chambers to impose a single sentence that reflects the sum total of a defendant's criminal conduct.

C. Comparison of ICTY and ICTR Sentencing Practices

A sentence handed down by a Trial Chamber for a case involving sexual violence may not provide much guidance for another Chamber passing sentence on a similar case. Since the Chambers have the discretion to give out a single sentence reflecting all of a defendant's crimes, the Tribunal judgments rarely discuss the sentence that each individual crime of sexual violence should receive.

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[243] *See* Drumbl and Gallant, *supra* note 238, at 143.

[244] ICTY Statute, *supra* note 9, art. 24(1); ICTR Statute, *supra* note 10, art. 23(1).

[245] ICTR Statute, *supra* note 10, at art. 23(1).

[246] ICTY Rules, *supra* note 29, and ICTR Rules, *supra* note 50, Rule 101 (Penalties).

[247] *Id.*

This lack of guidance makes sentencing difficult and extremely subjective for Tribunal judges, who are allowed to consider (but are not strictly bound by) the sentencing guidelines of domestic courts.

Total sentences for defendants convicted of sexual violence have ranged from three years to life imprisonment at the ICTY (*Sikirica* et al. to *Stakic)*, while sentences for similar defendants at the ICTR have ranged from 12 years to life imprisonment. (*Ruggiu* to e.g., *Akayesu.)* The ICTY has convicted 34 defendants in total and the ICTR 11; of these, 13 ICTY defendants and six ICTR defendants have been convicted of charges relating to sexual violence. Excluding one life sentence, the average sentence for ICTY defendants convicted of rape and related crimes is 13.41 years. Among the five ICTR defendants convicted of crimes relating to sexual violence, three received life sentences and two received sentences of 12 and 15 years, respectively.

Only a small number of defendants have been given individual sentences for rape and sexual assault. For crimes against humanity, defendants have been given sentences of 15 years for rape,[248] and 10 years for other inhumane acts.[249] For grave breaches of the Geneva Conventions, sentences have included seven to

[248] *Prosecutor v. Akayesu*, Sentence, No. ICTR-96-4-I (Oct. 2, 1998), Count 13. [Reproduced in the accompanying notebook at Tab 25.]

[249] *Prosecutor v. Akayesu*, Sentence, *supra* note 248, Count 14; *Prosecutor v. Tadic*, Trial Chamber I, Sentencing Judgment, No. IT-94-1-T (July 14, 1997), Count 11. [Reproduced in the accompanying notebook at Tab 20.]

15 years for torture or inhuman treatment,[250] and seven to nine years for willfully causing great suffering.[251] For violations of the laws or customs of war, defendants have been sentenced to seven to nine years for cruel treatment,[252] to 10 to 15 years for torture,[253] and to 8 years for outrages upon personal dignity.[254]

As discussed in Section II, several defendants have pled guilty to the charge of crimes against humanity (persecution) involving sexual violence, in exchange for the dropping of other charges.[255] The sentences for these defendants have ranged from three to 15 years, with an average sentence of 9.4 years.[256]

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[250] *Prosecutor v. Delalic,* et al. ("Celebici"), Opinion and Judgment, *supra* note 122, Counts 18, 21, and 44; *Prosecutor v. Tadic*, Trial Chamber II, Sentencing Judgment, No. IT-94-1-T (Nov. 11, 1999), Count 8. [Reproduced in the accompanying notebook at Tab 22.]

[251] *Prosecutor v. Delalic,* et al. ("Celebici"), Opinion and Judgment, *supra* note 122, Count 38; *Prosecutor v. Tadic*, Trial Chamber II, Sentencing Judgment, *supra* note 250, Count 9.

[252] *Prosecutor v. Delalic,* et al. ("Celebici"), Opinion and Judgment, *supra* note 122, Count 39; *Prosecutor v. Tadic*, Trial Chamber I, Sentencing Judgment, *supra* note 249, Count 9.

[253] *Prosecutor v. Delalic,* et al. ("Celebici"), Opinion and Judgment, *supra* note 122, Counts 19 and 20; *Prosecutor v. Furundzija*, Opinion and Judgment, *supra* note 64, Count 13.

[254] *Prosecutor v. Furundzija*, Opinion and Judgment, *supra* note 64, Count 14.

[255] *See* note 135, *supra.*

[256] *Prosecutor v. Sikirica* et al. ("Keraterm"), Sentencing Judgment, IT-95-8 (Nov. 13, 2001) [Reproduced in the accompanying notebook at Tab 34]; *Prosecutor v. Krajisnik & Plavic,* Sentencing Judgment, *supra* note 104; *Prosecutor v. Kvocka*, Judgment, *supra* note 136; and *Prosecutor v. Ruggiu,* Judgment and Sentence, *supra* note 101.

D. Controversial Issues in Sentencing

There have been many complaints about the sentencing practices of the Tribunals, particularly when sentences for sexual violence are involved. The ICTY's sentences are perceived to be inordinately light in some parts of the world, given the gravity of war crimes and the expense of holding trials at the Tribunals. Criticism has been especially strong from the United States, where sentences tend to be longer for sexual offenses and served in more unpleasant conditions. The ICTR's sentences have tended to be longer, given the convictions for genocide and associated crimes with larger penalties.

Some scholars have argued that the practice of concurrent sentencing makes individual sentences for sexual violence meaningless.[257] For example, Delic's 15-year sentence for rape as torture is entirely subsumed within his 20-year sentence for willful killing and murder, and Mucic will serve his eleven distinct seven-year sentences within the space of seven years.[258] In such cases, a conviction for sexual violence makes no discernable impact on the defendants' punishment. Increasing the penalties for sexual crimes, avoiding the use of concurrent sentences, or incorporating sexual crimes into a single sentence would ameliorate this problem.

Since the ICTR has been forbidden to impose the death penalty, there have been fears that the Rwandan government will be less likely to cooperate with the

[257] *See e.g.,* Askin (1999), *supra* note 103, at 115.

[258] *Id*.

Tribunal. Some commentators have noted that lower-level participants in genocide may consequently receive harsher penalties from the domestic Rwandan courts than the masterminds and top generals behind the ethnic violence. This result strikes many scholars as unfair. However, many countries that support the Tribunals have abolished the death penalty in their own domestic courts, so strong international support remains for the ICTR's death penalty restriction.

VII. Judicial Impartiality and Gender Bias

A question of impartiality and possible gender bias arose in the *Furundzija* case, in connection with Judge Florence Mumba's participation in the U.N.'s Commission on the Status of Women.[259] Because the Commission had condemned the rapes in the former Yugoslavia and advocated the prosecution of sexual violence, Furundzija claimed that Judge Mumba was using her judicial position to promote an agenda of women's rights.[260] The defendant argued that

[259] Kelly Dawn Askin, *Women's Issues in International Criminal Law: Recent Developments and the Potential Contribution of the ICC*, in Dinah Shelton (ed.), International Crimes, Peace, and Human Rights: The Role of the International Criminal Court (2000), at 56-7. [Reproduced in the accompanying notebook at Tab 7.]

[260] *Id.*

the judge had been biased due to her feminist views, and sought to disqualify her and vacate his conviction.[261]

Furundzija also suggested that Judge Mumba was colluding with the prosecuting attorney, a legal advisor, and others because they had all participated in the Commission on the Status of Women or the Beijing Conference on sexual violence.[262] As Askin states, "The defense clearly insinuated that women judges, particularly women who have attempted to redress human rights violations against women, cannot be impartial because they are predisposed to promote a feminist agenda, and therefore they should be recused from adjudicating any cases involving violence against women."[263] Unfortunately, no decision was made on the merits of Furundzija's application, as it was denied on a technicality.[264] Therefore, no light was shed on the issue of whether a judge's personal interest in women's rights could lead to gender bias against a defendant. A ruling that a judge's advocacy of women's rights could be construed as impartiality would be devastating, as it would drastically limit the gender-sensitive input of female judges and Tribunal staff.

This exception aside, concerns about gender bias have generally worked the other way, and women's advocates have often been concerned that gender

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[261] Askin (2000), *supra* note 259, at 56-7.

[262] *Id.*

[263] *Id.*

[264] Askin (2000), *supra* note 261, at 56-7.

crimes were not taken seriously under international law. When the International Military Tribunals were established following the Second World War, the rape of civilians was widely thought to be deplorable, but was not generally prosecuted (except in conjunction with other crimes).[265] This reluctance to prosecute was due to the attitude that rapes and sexual assaults were private acts rather than war crimes, and that they were also less important offenses.[266] It was also thought that public trials for rape would be too embarrassing and personal for the participants.

When the Yugoslav and Rwandan Tribunals were first created, the Office of the Prosecutor was similarly reluctant to investigate and include charges of sexual violence in the indictments due to remnants of the same attitudes. However, the international outcry over media reports of mass rape in the former Yugoslavia and Rwanda spurred the Prosecutor to charge defendants for sexual violence. The participation of women in the Tribunals as judges, investigators, prosecutors, and legal advisors has had a strong impact on the gender-conscious prosecution of sexual violence.[267] A prime example is the role of Judge Navanethem Pillay in amending the *Akayesu* indictment to include charges of sexual violence, and in developing broader definitions of rape and sexual violence during the trial. A small number of female judges have been invaluable

[265] *See* Campanaro, *supra* note 2, at 2559.

[266] *Id.*

[267] *Id.* at 2564.

in shaping the jurisprudence of rape and sexual assault, and in strengthening the human rights of women. Women have also served as heads of the Registry, the Judges Chamber, and the Office of the Prosecutor for the Tribunals, and have helped to expand the jurisprudence of gender crimes in those capacities.[268]

[268] *See* Askin (2000), *supra* note 259, at 47.

APPENDIX A:
Convictions and Sentences for Crimes involving Sexual Violence

Defendant	Count of indictment	Guilty/ Not Guilty	Sentence (if individual)

Genocide (ICTY Art. 4/ ICTR Art. 2)

(a) Genocide;

Akayesu	(1)	GUILTY	
Krajisnik & Plavsic	(1)	(Dismissed due to plea bargain)	
Musema	(1)	GUILTY	
Niyitegeka	(1)	GUILTY	
Semanza	(1)	NOT GUILTY	
Serushago	(1)	(Pled GUILTY)	
Stakic	(1)*	NOT GUILTY	

(*Alternate charge--> complicity in genocide- NOT GUILTY)

(b) Conspiracy to commit genocide;

Musema	(3)	NOT GUILTY	
Niyitegeka	(3)	GUILTY	
Ruggiu	(1)	(Dismissed)	

(c) Direct and public incitement to commit genocide;

Ruggiu	(2)	(Pled GUILTY)	12 years (concurrent)
Semanza	(2)	NOT GUILTY	

(e) Complicity in genocide.

Akayesu	(2)	NOT GUILTY	
Krajisnik & Plavsic	(2)	(Dismissed due to plea bargain)	
Musema	(2)	NOT GUILTY	
Niyitegeka	(2)	NOT GUILTY	
Ruggiu	(3)	(Dismissed)	
Semanza	(3)	GUILTY	

Crimes Against Humanity (ICTY Art. 5/ ICTR Art. 3)

(b) Extermination;

Akayesu	(3)	GUILTY	Life imprisonment
Musema	(5)	GUILTY	
Niyitegeka	(6)	GUILTY	
Ruggiu	(6)	(Dismissed)	
Semanza	(5)	GUILTY	
Serushago	(3)	(Pled GUILTY)	
Stakic	(4)	GUILTY	

(c) Enslavement;

Kunarac	(14)	(Dismissed)
Kunarac	(18)	GUILTY
Kovac	(22)	GUILTY

(f) Torture;

Kunarac	(1)	GUILTY	
Kunarac	(5)	NOT GUILTY	
Radic	(14)	(Dismissed)	
Serushago	(4)	(Pled GUILTY)	
Semanza	(11)	GUILTY	
Vukovic	(21)	NOT GUILTY	
Vukovic	(33)	GUILTY	

(g) Rape;

Akayesu	(13)	GUILTY	15 years
Cesic	(8)	(Pled GUILTY)	
Kunarac	(2)	GUILTY	
Kunarac	(6)	NOT GUILTY	
Kunarac	(9)	GUILTY	
Kunarac	(15)	(Dismissed)	
Kunarac	(19)	GUILTY	
Kovac	(23)	GUILTY	
Musema	(7)	GUILTY--> Found NOT GUILTY on appeal	
Nikolic	(4)	(Pled GUILTY)	(Sentencing 11/2003)
Niyitegeka	(7)	NOT GUILTY	
Radic	(15)	(Dismissed)	
Semanza	(8)	NOT GUILTY	

(g) Rape; (cont'd)

Semanza	(10)	GUILTY	
Serushago	(5)	(Withdrawn)	
Tadic	(4)	(Withdrawn)	
Vukovic	(22)	NOT GUILTY	
Vukovic	(34)	GUILTY	

(h) Persecutions on political, racial and religious grounds;

Sikirica et al.-			
Dosen		(Pled GUILTY)	5 years
Kolundzija		(Pled GUILTY)	3 years
Krajisnik & Plavsic	(2)		
Plavsic		(Pled GUILTY)	11 years
Kvocka et al.	(1)		
Kvocka		GUILTY	
Prcac		GUILTY	
Kos		GUILTY	
Radic		GUILTY	
Zigic		GUILTY	
Nikolic	(1)	(Pled GUILTY)	(Sentencing 11/2003)
Ruggiu	(5)	(Pled GUILTY)	12 years (concurrent)
Semanza	(6)	NOT GUILTY	
Sikirica		(Pled GUILTY)	15 years

(h) Persecutions on political, racial and religious grounds; (cont'd.)

Stakic	(6)	GUILTY	
Tadic	(1)	(Withdrawn)	
Todorovic		(Pled GUILTY)	10 years

(i) Other inhumane acts.

Akayesu	(14)	GUILTY	10 years
Kvocka, et al.	(2)	(Dismissed)	
Musema	(6)	NOT GUILTY	
Nikolic	(5)	(Pled GUILTY)	(Sentencing 11/2003)
Niyitegeka	(8)	GUILTY	
Tadic	(11)	GUILTY	10 years

Grave Breaches of the Geneva Convention (ICTY Art. 2)

(b) Torture or inhuman treatment, including biological experiments;

Delic	(18)	GUILTY	15 years
Delic	(21)	GUILTY	15 years
Delic et al.	(44)		
Delic		NOT GUILTY	
Delalic		NOT GUILTY	
Mucic		GUILTY	7 years
Tadic	(2)	(Withdrawn)	

Tadic	(8)	Inapplicable --> Found GUILTY on appeal	9 years

(c) Willfully causing great suffering or serious injury to body or health;

Delic et al.	(38)		
	Delalic	NOT GUILTY	
	Delic	NOT GUILTY	
	Mucic	GUILTY	7 years
Tadic	(9)	Inapplicable--> Found GUILTY on appeal	9 years

Violations of the Laws/ Customs of War (ICTY Art. 3)

(a) Employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

Cruel treatment - Geneva Conventions of 1949

Delic	(20)	(Dismissed)	
Delic	(23)	(Dismissed)	
Delic et al.	(39)		
	Delalic	NOT GUILTY	
	Delic	NOT GUILTY	
	Mucic	GUILTY	7 years
Delic et al.	(45)		
	Delalic	NOT GUILTY	
	Delic	NOT GUILTY	
	Mucic	GUILTY	7 years

Cruel treatment - Geneva Conventions of 1949 (cont'd.)

Tadic	(3)	(Withdrawn)	
Tadic	(10)	GUILTY	9 years

Rape

Kunarac & Kovac	(4)		
Kunarac		GUILTY	
Kunarac	(8)	NOT GUILTY	
Kunarac	(10)	GUILTY	
Kunarac	(12)	GUILTY	
Kunarac	(16)	(Dismissed)	
Kunarac	(20)	GUILTY	
Kovac	(24)	GUILTY	
Vukovic	(23)	NOT GUILTY	
Vukovic	(36)	GUILTY	

Torture

Delic	(19)	GUILTY	15 years
Delic	(22)	GUILTY	15 years
Furundzija	(13)	GUILTY	10 years
Kunarac	(3)	GUILTY	
Kunarac	(7)	NOT GUILTY	
Kunarac	(11)	GUILTY	

Torture (cont'd.)

Radic	(16)	GUILTY	
Vukovic	(24)	NOT GUILTY	
Vukovic	(35)	GUILTY	

Outrages upon person dignity

Furundzija	(14)	GUILTY	8 years
Kunarac	(17)	(Dismissed)	
Kunarac	(21)	NOT GUILTY	
Kovac	(25)	GUILTY	
Kvocka et al.	(3)	(Dismissed)	

Humiliating or degrading treatment

Cesic	(7)	(Pled GUILTY)

Violations of Common Art. 3 & Addt'l Protocol II (ICTR Art. 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;**

Musema	(8)	NOT GUILTY
Niyitegeka	(9)	NOT GUILTY
Semanza	(7)	NOT GUILTY
Semanza	(13)	NOT GUILTY

(e) Outrages upon personal dignity

Akayesu	(15)	NOT GUILTY
Musema	(9)	NOT GUILTY
Niyitegeka	(10)	NOT GUILTY
Semanza	(9)	NOT GUILTY

Sentences for Defendants Convicted of Crimes involving Sexual Violence

Defendant	Sentence	Type of Sentence
Akayesu	Life imprisonment	Individual sentence (concurrent)
Delic	20 years (--> 18 on appeal)	Individual sentence (concurrent)
Furundzija	10 & 8 years	Individual sentence (concurrent)
Kovac	20 years	Single sentence
Kunarac	28 years	Single sentence
Mucic	7 years (--> 9 years on appeal)	Individual sentences (concurrent)
Musema	Life imprisonment	Single sentence
Niyitegeka	Life imprisonment	Single sentence
Plavsic	11 years	Individual sentence
Ruggiu	12 years	Individual sentences (concurrent)
Serushago	15 years	Single sentence
Sikirica et al.-		
3 Defendants:	15, 5, and 3 years	Individual sentences
Stakic	Life imprisonment	Single sentence
Tadic	20 years	Individual sentences (concurrent)
	+ 2 9-year sentences on appeal (concurrent w/ all previous sentences)	
Todorovic	10 years	Individual sentence
Vukovic	12 years	Single sentence