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3 Challenges to Successful Outcomes in Sexual Violence Cases

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(p. 33) 3 Challenges to Successful Outcomes in Sexual Violence Cases

A. Introduction

In theory, prosecuting conflict-related sexual violence crimes should not be more difficult than prosecuting any other category of crimes under international criminal law. In practice, our experience has been that many factors, including misconceptions about the nature of conflict-related sexual violence, combine to reduce the chances of successful outcomes in these cases.

Our experience also reveals that misconceptions and other barriers to successful sexual violence prosecutions will likely have a significant impact in the context of international criminal law. Investigators and prosecutors working on conflict-related atrocities are generally confronted with an overwhelming volume of criminality to address, combined with considerable resource constraints and the ever-intensifying need to reduce the size and length of investigations and prosecutions. As a result, tough choices constantly have to be made about where priorities should lie and prosecutorial discretion takes on unique dimensions.

In addition, there are many fundamental operational challenges for those working in international criminal justice environments that inevitably divert attention and consume resources. For the Office of the Prosecutor (OTP) at the International Criminal Tribunal for the former Yugoslavia (ICTY), basic things such as accessing crime scenes and documentary evidence, arresting fugitives, building capacity for forensic investigations, dealing with witness interference, securing continued support and resources from the international community and, in the final phase of our work, retaining the qualified staff needed for mandate completion have been almost overwhelming challenges. Amid such a cocktail of pressing demands, any perceptions that sexual violence crimes are a lower priority or too difficult to pursue have a greater impact. This gives rise to many pressure points throughout the investigation and prosecution process where sexual violence charges are particularly at risk of being omitted, diluted, or eliminated.

In this chapter, we explore the factors that, from our experience in the OTP, can pose challenges for successful sexual violence prosecutions under international criminal law. If we are to improve accountability for these crimes, we must clearly understand (p. 34) the factors at play. While our work confirms that sexual violence cases present a number of specific difficulties, our record also confirms that these difficulties are neither insurmountable barriers nor a justification for inaction. Success is possible but, as will be explored further in Chapter 4, it requires determined strategies and constant attention.

B. Misconceptions about Sexual Violence that Can Impede Accountability

Looking back, we can see misconceptions about the nature of conflict-related sexual violence that, at times, negatively affected our approach to these crimes. Although the misconceptions manifested themselves in many different ways and were not uniformly observed across the OTP, we have identified four main themes sufficiently prevalent to warrant careful reflection. As we explain further below, these themes apply particularly when it comes to sexual violence committed against females. Our experience shows that

sexual violence against males is not generally subject to the same misconceptions, although other misconceptions may apply, as explored further below.

At the heart of the problem is the notion that rape is more a sexual matter involving damage to a woman's honour than a violent crime.[2] This can lead to discounting the seriousness of sexual violence; assuming it is necessarily an 'opportunistic' and 'personally motivated' crime, rather than something connected to a broader pattern of violent conduct; and disregarding sexual violence unless it is perceived to be large scale, systematic and/or committed pursuant to orders.

We have all been, and remain, susceptible to these misconceptions. Back in 1993 when the OTP was created, the international community's consciousness around the issue of conflict-related sexual violence was very new. Most staff members recruited into the OTP encountered the issue for the first time, with little guidance available to promote a clear and effective approach to this investigative and prosecutorial challenge. The near absence of previous sexual violence prosecutions under international law also led to uncertainty regarding the elements of crimes under which sexual violence could be charged and the types of evidence that could be used to prove them, which compounded the difficulties. It is not surprising that our understanding of conflict-related sexual violence has evolved over the course of our work. However, even while developing the material for this book, we have confronted our own continuing (p. 35) tendency to unwittingly apply a different approach to our analysis of sexual violence crimes than to other crime categories.

It is therefore imperative that international criminal justice actors commence an honest and well informed discussion about misconceptions concerning the nature and seriousness of conflict-related sexual violence crimes. These misconceptions are a reality that any prosecution office in the future will have to grapple with. One of the most fundamental lessons learned by the OTP is that dismantling misconceptions, particularly those dicussed below, is the key to improving accountability outcomes for this category of crimes.

1. 'Rape and similar acts are matters of honour rather than violent crimes'

Anyone reading some of the harrowing accounts of rape in conflict zones from Rwanda[3] to Syria[4] might struggle to imagine how the violent aspect of the crime could be overlooked. Certainly, confronted with evidence of rape committed with spears, rifles, baseball bats, and the like—leaving victims bloody and horribly mutilated—we have no trouble classifying these acts as violent crimes, alongside all the other violent physical assaults committed during conflict. However, the perception can be different when rape involves penetration by bodily organs,[5] especially when it is not committed on a large scale or in public. In these circumstances, the apparent sexual nature of, and perceived sexual motivation behind, the act can obscure the fundamental reality that any non-consensual bodily invasion is inherently a violent assault.[6]

The misconception that rape is more a matter of honour than a violent act, may explain the shame and ostracism experienced by many survivors of sexual violence (p. 36) crimes.[7] As we have seen in our work in the OTP, the fear of stigma is sometimes so strong that survivors will conceal the very fact of the assault from their families.[8] However, this misconception is not confined to communities caught up in conflict. We have also seen it played out in the framework of international law. We only have to look back to the 1949 Geneva Conventions to see acts such as rape and enforced prostitution defined, not as violent crimes of grave concern, but as attacks on 'honour'[9] that are incompatible with the 'modesty' and 'dignity' of women.[10] More generally, this misconception has been reflected in legal frameworks governing national rape prosecutions, which result in notoriously low rates of conviction.[11] Advocates around the world have fought for many years to dispel

views of sexual assault complainants as inherently untrustworthy and prone to fabrication over matters of sexual integrity.[12]

As explained in the following sections, the misconception that obscures the violent nature of rape and similar acts is connected to three related misconceptions that present obstacles to successful outcomes in sexual violence cases.

2. ‘Conflict-related sexual violence is not as serious as other crimes’

If we view rape as a matter of honour rather than as a violent physical assault, we tend to discount its seriousness and we are less likely to accord it priority.[13] As explained more fully below, this is an enormous problem in the context of conflict-related atrocity, where investigators and prosecutors are usually confronted with an overwhelming volume of criminality to address with limited resources.

Unsurprisingly, given its pervasiveness, this misconception is something the OTP has grappled with over the years. The instinctive approach, as in many prosecution offices around the world, was to create a hierarchy of crimes, with murder at the pinnacle. Generally, the number of killings became a measure of the seriousness of the ‘crime base’.[14] Sexual violence was, at times, regarded as well down the hierarchy.[15] (p. 37) Consistent with this, when the question of charging sexual violence as an underlying act of genocide was first raised, strong views were expressed that this would water down the gravity of the crime.[16] This was so even though the *actus reus* of genocide indisputably extends beyond killings to include, among other things, serious bodily or mental harm.[17]

Early on, some staff within the OTP held the perception that working on sexual violence cases was a ‘soft’ or less prestigious assignment, reflecting hierarchies imported from domestic criminal law offices.[18] Some lawyers had a strong preference for working on murder cases and some sought to avoid sexual violence investigations.[19] Defence Counsel also challenged the appropriateness of international jurisdiction over sexual violence crimes, arguing that they are insufficiently serious.[20]

In reality, investigators and prosecutors will always have to make judgment calls about what crimes to prioritize. There will be occasions when it is not possible to pursue crimes of sexual violence in the same way that it will not always be possible to pursue other categories of crimes. However, this assessment must be made on the basis of valid criteria and must not be improperly influenced by misconceptions that distort the nature and seriousness of sexual violence crimes.

3. ‘Sexual violence is necessarily a “personally motivated” and/or “opportunistic” crime’

If we view rape and similar acts as purely sexual matters rather than violent physical assaults, we tend to assume they are ‘opportunistic’ or ‘personally motivated’ and something ‘qualitatively’[21] different from other violent acts committed during conflict.[22] As a result, we are likely to overlook valid connections between these acts and broader patterns of violent crimes unleashed during conflict.[23]

(p. 38) Several OTP staff members interviewed by the Prosecuting Sexual Violence Working Group (PSV Working Group) recalled perceptions within the OTP that sexual violence, particularly rape, was an inherently ‘opportunistic’ crime.[24] Some staff members had difficulty seeing sexual violence as integral to the expulsion campaigns unleashed during the conflicts, as opposed to being committed randomly by individual soldiers taking advantage of the lawlessness that reigned during the conflicts.[25] This was particularly the case with sexual violence that was not committed in a prison-type setting.[26] Where sexual violence investigations were pursued, some prosecutors were initially reluctant to charge the crime as anything other than an isolated war crime. As discussed further in Chapter 4, the landmark ruling on sexual enslavement as a crime against humanity in the *Kunarac et*

al. case[27] almost did not eventuate in the face of divergent opinions within the OTP as to whether rape should be charged as enslavement.[28]

As a result, evidentiary leads regarding sexual violence were not always followed up on the basis that they were insufficiently connected to the case theory.[29] We see similar perceptions reflected in ICTY judgments accepting that violent acts such as murder and beatings carried out in the midst of a violent ethnic cleansing campaign were intended to target the victim because of their ethnicity, but that acts of sexual violence were not.[30] We also see such perceptions reflected in findings accepting that violent acts such as murder and property damage carried out in the midst of a violent ethnic cleansing campaign were foreseeable to senior officials—invoking their criminal responsibility—but that acts of sexual violence were not.[31]

The impact of the misconception may be minimal in cases involving lower level accused persons charged with the physical commission of individual acts of sexual violence (direct perpetrators). However, the failure to accurately see the connection between sexual violence and other violent crimes can cause significant problems when trying to link crimes to senior political or military leaders who are not direct perpetrators. The success of these cases, leadership cases, often depends on accurately seeing sexual violence in context and understanding the role it played in the violent (p. 39) campaign unleashed by the senior official.[32] While our discussions with sexual violence victims have emphasized the importance of holding the direct physical perpetrators of their assault accountable, it is equally important to ensure that senior officials are held to account for the role they play. Furthermore, at least at the international level, future investigations and prosecutions are likely to be more heavily focused on senior officials than direct perpetrators, which will potentially magnify the impact of the misconception.[33]

Reflecting this problem, as the OTP moved from the direct perpetrator cases of the early years to the mid-level and then senior leadership cases of more recent times, concerns about whether *mens rea* elements could be proved became a key conceptual barrier to pursuing sexual violence crimes.[34] Some views were expressed that linking sexual violence to senior officials who were not direct perpetrators posed an insurmountable problem.[35] Others believed that the only way of holding senior officials accountable for rape was to prove it was a foreseeable consequence of the expulsion campaigns that characterized large parts of the conflicts, through a joint criminal enterprise (JCE) (Category 3) framework.[36] Similar concerns were not expressed in relation to holding senior officials accountable for any other category of crimes, confirming instinctive perceptions of sexual violence as something separate and apart from the main agenda of the warring parties. As a result, there was concern that it would be difficult, if not impossible, to succeed in holding senior leaders accountable.

The fact that sexual violence occurs in the midst of a conflict does not of course mean that it is always connected to the conflict, or that it is necessarily connected to a broader campaign of violent crimes for which senior leaders should be held accountable. Like any other crime, it is possible that sexual violence can be an isolated act that does not form part of a broader pattern. However, based on our experience, there is a disproportionate tendency to assume that sexual violence is an isolated act when compared to other crimes. Similarly, the fact that sexual violence was motivated in whole or in part by sexual desire does not mean it cannot be prosecuted as a war crime, crime against humanity, or genocide, or that it should not be prioritized for prosecution.[37] These assumptions are obstacles that we have worked to overcome in our efforts to establish accountability for sexual violence crimes.

(p. 40) 4. ‘Conflict-related sexual violence can only be prosecuted if it is systematic/widespread or committed pursuant to orders’

A corollary of the view that sexual violence is usually just a ‘private’ act motivated by the perpetrator’s sexual desire is the perception that an international court should only address it in extreme cases when it is widespread, systematic, or committed pursuant to orders. Under these circumstances, we have less difficulty understanding the connections between the sexual violence and the conflict. We see this dynamic at play in the media reports concerning the conflict in the former Yugoslavia, particularly Bosnia and Herzegovina (BiH), and the international community’s reaction to those reports. The reportedly mass and systematic nature of the rapes and the suggestion that rape might have been committed pursuant to orders captured the international community’s attention in a new way and, for the first time, prompted popular recognition of the seriousness of conflict-related sexual violence.[38]

Although it is certainly true that sexual violence committed systematically or pursuant to orders is serious and warrants attention, it is a trap to assume that sexual violence is disconnected from a broader campaign of crimes and cannot be linked to senior officials unless those characteristics are present. A single act of rape, or a limited number of rapes, could very well form part of a pattern of violent crime intended, for example, to persecute a population and cause people to flee. In a fact pattern often reflected in ICTY cases, forces sweeping through a village might go from one house to the next, mistreating the inhabitants in a variety of ways. Some might be killed, others beaten, and some might be raped. At the same time, property is looted, houses are burned, and the remaining inhabitants are expelled. In a scenario like this, the number of rapes might be small, with no evidence that they were officially ordered. However, viewed in proper context, they are as integral to the expulsion campaign as all of the other violent and persecutory acts. We are unlikely to consider that a small number of beatings or murders committed in such circumstances did not form part of the criminal campaign. We have to guard against the tendency to subject sexual violence to a higher numerical threshold before drawing the same conclusion.

5. OTP documentation confirming the challenge presented by misconceptions of sexual violence

In the midst of its work, the OTP expressed awareness of the risk of misconceptions concerning the nature of conflict-related sexual violence and took steps to dispel them among its staff members. In particular, giving a unique glimpse into the OTP’s understanding of the problem, a 2004 OTP training programme on sexual violence crimes (Table 3.1) included a ‘True or False’ exercise in which the trainers formulated questions for the participants, designed to highlight and dispel the prevailing misconceptions. As set out below, many of the questions pick up on issues concerning the comparative gravity of rape vis-à-vis other crimes, the tendency to treat the rape of women differently to other violent crimes, the assumption that sexual violence is (p. 41)

Table 3.1. 2004 OTP training programme on sexual violence crimes

SEXUAL ASSAULT: TRUE OR FALSE

1. Rapes must be systematic or widespread to be charged.
2. The name of the rape victim must be known.
3. The name of the perpetrator must be known.

SEXUAL ASSAULT: TRUE OR FALSE

4. You must use victim testimony.
5. You can't use hearsay evidence of sexual assaults.
6. You can't use uncorroborated victim testimony.
7. Under the rules eyewitness and third party testimony must be corroborated.
8. Rapes must be systematic and widespread to be charges [sic].
9. Sexual assault/rapes/gender-related crimes are issues and not crimes.
10. That certain troops, paramilitary etc., might have a reputation for sexual assaults is not constructive notice.
11. Male sexual assaults are torture and female sexual assaults are not.
12. Guards can perpetrate sexual assaults as independent, 'off duty' (i.e. not under command authority) acts in detention centres or allow others to do so.
13. A soldier can be off duty while taking over a town, or retreating.
14. Sexual assaults are prompted by an individual's sexual desires, similar to looting a candelabra that is prompted by an individual soldier's kleptomania impulse.
15. Sexual assault victims must be protected from appropriate legal terminology so as not to offend them.

inherently 'opportunistic', and the erroneous perception that sexual violence must be systematic to be prosecuted.[39]

6. Misconceptions concerning sexual violence against males

As described further below, we have seen less evidence in our work that the sexual violence against males prosecuted by the OTP was affected by the same misconceptions as those applying to sexual violence directed against females. We did not encounter the same tendency to assume that sexual violence against males is not a violent crime, that it is comparatively less serious, that it is disconnected from the conflict, and that it can only be prosecuted if it occurs in large numbers.

However, as noted by commentators, the OTP missed some opportunities to characterize sexual violence against males as rape in appropriate cases, and sometimes to lay charges in respect of evidence of sexual violence against males at all.[40] We see (p. 42) similar failures at other international courts to reference the sexual component of the harm inflicted on male victims.[41] These examples suggest a risk that prosecutors may fail to acknowledge, or mischaracterize, the sexual component of harm done to males. Gendered assumptions that only women are raped or subjected to sexual violence in conflict may have influenced some of these outcomes.[42] These outcomes may also be influenced by a concern to avoid labelling victims as sexual violence—particularly rape—victims, in order to avoid the adverse social consequences directed at them in a particular society. These are complex issues that deserve much more attention in the future, particularly as our awareness and understanding of sexual violence against males grows.[43]

C. Other Barriers to Successful Sexual Violence Prosecutions

Conflict-related sexual violence investigations and prosecutions can require the investment of significant time and resources because evidence from sexual violence victims can be comparatively more difficult to obtain than from victims of other crimes. As described in more detail in Chapter 5, prosecutors face a variety of specific challenges in securing sexual violence evidence, as well as facing more general barriers that can take on particular significance for this category of crimes. It is important to emphasize, however, that prosecutors should not make assumptions that sexual violence victims are unwilling witnesses or that excessive time and resources will necessarily be required to secure their evidence. Our experience strongly reinforces the fact that each sexual violence victim has

different requirements and makes individual choices based upon their own personal circumstances.[44]

Victims and witnesses may be reluctant to come forward with evidence of sexual violence because of societal and other barriers which have a particular significance for this category of crimes. The detrimental impact that disclosure of sexual violence may have on a victim's family or their standing and authority within a community, as well as exacerbated security concerns, can mean that some victims are reluctant to report crimes, let alone testify about them in court.[45] In some communities, sexual violence may be a 'public secret', in that its incidence is known but it is not spoken about openly. There may be other personal reasons why victims are unwilling to disclose the crimes or to testify about them in criminal proceedings. These include trauma, the fatigue of dealing with the many issues arising for conflict survivors more generally and insufficient support mechanisms. Lack of familiarity with the court process can also inhibit victims coming forward, especially when the court is situated in a foreign country as with the ICTY. Such inhibitions can be particularly acute when a new court is initially established, and has yet to establish a track record in effective witness protection.

(p. 43) The OTP's experience bears out the reality of these barriers.[46] There were cases where witnesses of other crimes disclosed for the first time that they were also victims of sexual violence when reviewing their evidence with prosecutors immediately before their testimony. The witnesses' reasons for initially withholding sexual violence evidence varied from deep personal embarrassment in recounting the details of their experience, to fear that family members, including children, would find out about the assault.[47] It was not uncommon for ICTY investigators or prosecutors to be the first person a victim had ever told about experiencing sexual violence crimes during the conflicts. Even after recounting their experience to the OTP, some victims were reluctant to testify in court because it would require re-living the events when they were focused on moving on with their lives.[48]

The multiplicity of actors involved in documenting international crimes compared with domestic offences can add to the challenge of eliciting evidence of conflict-related sexual violence.[49] In national jurisdictions, police and prosecuting authorities have sole authority to investigate and prosecute crimes and have almost exclusive access to evidence. At the international level, local and international non-governmental organizations (NGOs), journalists, United Nations (UN) sanctioned bodies, and potentially the International Criminal Court (ICC) or other international courts and tribunals may all be seeking evidence to pursue their mandates, often duplicating each other's work by interviewing the same witnesses about the same events. This problem may escalate in the future, given the increased priority accorded to fact-finding processes by the UN, states, and non-governmental organizations as a tool for strengthening peace, security, and the rule of law.[50]

The different bodies documenting international crimes have different mandates and approaches to investigations and limited capacity to coordinate their work. The impact upon victims and witnesses can be significant, potentially exposing them to public scrutiny and fatigue from multiple interviews. Differences, however slight, between witness statements may also be exploited by the defence to challenge the (p. 44) witness's evidence in cross-examination.[51] The adverse impacts of an uncoordinated approach may be exacerbated in the case of sexual violence victims, given the high degree of trauma often associated with speaking out. At the ICTY, we have experienced some of these problems first-hand. Although, overall, NGOs were a valuable source of potential witnesses for our cases, some NGOs were unwilling to facilitate the OTP's contact with relevant witnesses.[52] In the context of our investigation of crimes in Kosovo, we were largely able to overcome this problem by providing questionnaires to willing NGOs designed to facilitate the identification of witnesses and the provision of contact details to us.[53] We also had to address problems arising from differences between statements made by witnesses to us, to

the media, and to NGOs. These differences arose for a myriad of reasons reflecting the different purposes for which the statements were made. For example, in some statements witnesses sought to emphasize information most relevant to their asylum applications. In others, the material covered reflected the limited range of questions asked by the interviewer or difficulties with interpretation. Our practice was to address any issues arising out of previous statements directly in the statements we subsequently took from the witness or during their courtroom testimony.[54]

Other challenges common to the investigation of all international crimes have presented additional complications in our sexual violence cases. At the beginning of our work, we had restricted access to the territory of the former Yugoslavia and were reliant on witnesses located in the Netherlands, cooperative third countries, or refugee camps where there was little space for privacy when interviewing sexual violence victims.[55] When access to the former Yugoslavia was possible, it was still difficult to find secure and private locations for interviews that would not expose victims to public scrutiny. The OTP also had scarce resources. The Office started with few investigators, and lawyers were used as investigators to meet needs. This made it more difficult for investigators and lawyers to spend time building necessary rapport with victims.[56] The ICTY's initial difficulties taking indicted persons into custody also meant that many accused persons were tried separately despite links between their cases. As a result, sexual violence victims were asked to testify in multiple cases, exposing them to the trauma of recounting their story multiple times and compounding any associated witness fatigue. For example, sexual violence victims who gave evidence in *Slobodan Milošević* became increasingly reluctant to be involved in the later *Milutinović et al*. and then *Đorđević* trials, which covered the same incidents of sexual violence.[57]

It is important that a prosecution office remains alert to the full spectrum of potential issues that sexual violence victims may be experiencing and avoids making assumptions about what victims will want or need. Whether male or female, some victims were empowered by the prospect of speaking publicly about their experience and openly associating the shame of sexual violence with perpetrators. For others, (p. 45) confidentiality was critically important. We have found that most barriers can be overcome with persistence and the use of thoughtful strategies. For example, as we progressed through our work, the ICTY developed a range of practical measures to encourage sexual violence victims to testify, including providing support persons and child care, as well as measures to keep their stay in The Hague to a minimum.[58] We also saw improved readiness among victims to testify after ICTY practice had established that protective measures and support persons for sexual violence victims could work.[59]

Creating the right conditions for sexual violence victims to come forward can require significant time and resources. However, it is important to keep this in proper perspective. As explained in Chapter 1, securing evidence from some other categories of witnesses, such as 'insiders' can also require the investment of significant time and resources. We see this as necessary and core investigative work. We should view the time and resources spent eliciting evidence of sexual violence in the same way. Related to this, it is important that, in their approach to sexual violence victims, investigators and prosecutors do not unwittingly buy into the social stigma paradigm and reinforce stereotypes which pose evidentiary barriers.[60]

Overall, our experience underscores that the difficulties associated with sexual violence investigations are not insurmountable barriers and are not a justification for failing to investigate. Rather, determined strategies reflecting a witness-centred approach are required in the same way as for other categories of potentially reluctant witnesses. Commitment will be required to meet these challenges and to ensure that each witness is approached as an individual with individual needs.[61] As awareness and competence within the office increases, the time taken to secure evidence of sexual violence will decrease,

particularly if the office has strategies in place to ensure reflection on lessons learned as its work progresses.

D. The Impact of Prosecutorial Discretion throughout the Process

In conflict-related sexual violence cases, the detrimental impact of the misconceptions and other barriers identified above is often magnified by prosecutorial discretion, which requires investigators and prosecutors to continuously make choices about which crimes to prioritize in their work. In the demanding and complex environment in which international criminal law practitioners function, perceptions that sexual violence is not as serious as other crimes, or that it is too difficult to prove or to link to senior officials, will inevitably increase the risk that it will not receive adequate attention. Our experience shows the importance of clearly identifying the pressure points that exist for sexual violence crimes and taking proactive steps to ensure that sexual violence charges are not disproportionately omitted, diluted, or eliminated through the investigation and prosecution process.

(p. 46) 1. The nature of prosecutorial discretion in international criminal law cases

Prosecutorial discretion ordinarily plays a significant role in criminal cases. In the context of conflict, it takes on extra dimensions due to the massive number of crimes and the multiplicity of perpetrator groups which act within complex hierarchical structures. Inevitably the volume of criminal conduct far exceeds the resources, time, and capacity of any prosecution office. External factors add to this already limited ability to address the volume of crimes comprehensively. Consequently, investigators and prosecutors constantly have to make tough choices about what crimes to prioritize and in what way.

(a) Overwhelming volume of criminality

The ICTY was given broad jurisdiction over crimes committed during the conflicts in the entire territory of the former Yugoslavia. The only limitation imposed by the Security Council on the ICTY's mandate was that it must prosecute 'serious' violations of international humanitarian law,[62] which was undefined in the Statute of the ICTY (ICTY Statute). The Appeals Chamber in *Tadić* clarified in 1995 that a 'serious' violation must constitute a breach of a rule protecting important values and involving grave consequences for the victims.[63] The Prosecution interpreted the term to refer to both the underlying crime and the level of responsibility of the accused.[64] Even so, the Chief Prosecutor was left with a massive number of crimes and perpetrators to investigate and a correspondingly broad discretion about what to pursue.[65]

Sexual violence crimes were just one component of the broader picture of systematic violence inflicted throughout the conflicts. The discretion exercised by individuals conducting investigations, determining charges, and running trials and appeals became a significant factor influencing the extent to which sexual violence crimes were addressed. Inevitably, an individual's perception about the 'seriousness' of sexual violence crimes had the potential to play an important role in determining whether such crimes were pursued.[66] This underscores the importance of any prosecutor's office (p. 47) explicitly recognizing sexual violence crimes as serious from the outset and ensuring that all staff understand this view.

(b) Competing priorities in the ICTY Office of the Prosecutor and implications for the approach to sexual violence cases

Early on, the OTP was faced with many competing priorities which impacted upon the direction of its investigations and the scope of its indictments. The completion strategy adopted in 2002 operated as a further constraint on the OTP's work. As borne out by the OTP's experience, these factors influenced the extent to which it allocated time and resources to investigating sexual violence crimes.

(i) Time pressure to issue an indictment and secure the ICTY's continued existence

In the ICTY's first year of operation, the Chief Prosecutor came under considerable time pressure from the Security Council, the international community and the judges to issue an indictment, partly in the hope that it would act as a circuit breaker in the conflict and help to dismantle the warring factions.[67] The UN had intimated that continued funding for the ICTY would depend on indictments being issued by the end of 1994.[68] At the same time, the judges had been in office for one year and were understandably eager to have a case before them.[69]

This intense time pressure to issue an indictment was at odds with the reality that sexual violence investigations may require the investment of significant time and resources. The fact that the OTP had not yet had time to set up effective policies and operational procedures regarding sexual violence[70] further increased the chance of sexual violence being overlooked in the first crucial indictment.

In the face of the significant external expectations of seeing a first case brought, Prosecutor Goldstone prioritized completion of the investigation that could most quickly lead to an indictment. This investigation concerned alleged crimes committed at the Sušica camp in Vlasenica, BiH, as detailed in the Commission of Experts Report. At that time, the OTP had a team of 23 staff members, only some of whom were trained investigators.[71] The investigation focused on lower-level perpetrators, including Dragan Nikolić, and was facilitated by the fact that witnesses from the Sušica camp were easily accessible to investigators.[72]

The initial indictment did not include sexual violence charges.[73] According to those involved in the case at the time, the OTP was aware of public allegations of sexual violence at Sušica camp but the victims and witnesses were in countries where it was (p. 48) difficult to conduct investigations.[74] Nevertheless, evidence of sexual violence surfaced in the course of the Rule 61 indictment review hearings,[75] which Judge Odio Benito noted and subsequently pursued in questioning witnesses.[76] In its decision on review, the Trial Chamber invited the Prosecution to amend the Initial Indictment to include sexual violence charges.[77] The Chamber's invitation gave the OTP more time to obtain evidence of sexual violence[78] and the First Amended Indictment was issued on 12 February 1999 containing sexual violence charges including persecution, torture, other crimes against humanity, and war crimes.[79] Although the first *Dragan Nikolić* indictment provides a vivid illustration of the manner in which time pressures, other competing priorities, and insufficiently developed policies and procedures can negatively impact upon sexual violence investigations, it also shows that an active trial chamber can initiate steps to overcome these problems.

There were also positive developments within the OTP between the issuance of the first *Dragan Nikolić* indictment and the Trial Chamber's intervention in the Rule 61 hearing, further underscoring the importance of having sufficient time and policies in place for sexual violence investigations. During this period, the OTP issued indictments including charges of sexual violence against 26 accused persons and, in the years following, issued a

further spate of indictments including sexual violence charges against both lower-level and more senior accused.[80]

(ii) Moving investigations to more senior officials

The OTP's efforts to increase its focus on military, police, and political leaders also impacted the OTP's prioritization of sexual violence crimes. Soon after the *Dragan Nikolić* indictment was issued, the ICTY judges strongly encouraged the OTP to focus more on senior leaders. In early 1995, the Chief Prosecutor met with the judges *in camera* where they expressed their dissatisfaction with what they saw as his 'bottom up' approach of targeting low-level suspects first. In their view, a top-down approach (p. 49) was required by the Statute.[81] In the following years, the Chief Prosecutor and his successors expressed their ongoing commitment to focusing on senior leadership cases and persons responsible for exceptionally brutal offences.[82] Prosecutor Arbour adopted case selection criteria related to the seniority of the suspect[83] and, in 1998, withdrew charges against 14 accused in the Omarska and Keraterm prison camp Indictments, which included sexual violence charges.[84] The prioritization of leadership cases became particularly critical as fugitive arrests and the voluntary transfer of indicted persons to The Hague increased in 1998 and OTP resources were stretched.[85]

The switch to top-down investigations posed some practical and conceptual challenges for sexual violence cases. The OTP's initial successes in sexual violence cases against direct perpetrators[86] did not necessarily translate into success against leadership figures. The OTP confronted the evidentiary difficulty of connecting crimes committed by others to leaders through their acts, intent, and knowledge. While many of the investigations focusing on senior officials revealed that sexual violence was a component of a criminal pattern,[87] in some cases initial perceptions that it was (p. 50) difficult or impossible to prove intent for sexual violence crimes on the part of senior officials became a conceptual barrier that influenced whether and how such crimes were pursued.[88] The same conceptual barriers did not arise in relation to linking other crimes, such as murder and destruction of property committed during expulsion campaigns, to senior officials. Additionally, the range of potential allegations against more senior officials was significantly larger than against direct perpetrators—they often involved a larger number of murders and other violent crimes—raising the risk that incidents of sexual violence would be overlooked. Thus the shift towards senior leadership cases posed the risk that staff members would stop asking questions about sexual violence, particularly as the OTP became increasingly concerned with managing time pressures.[89]

Moving beyond the question of whether senior officials could be charged with sexual violence, questions arose as to whether sexual violence should be charged under the umbrella of more general provisions, such as persecution as a crime against humanity, or whether it should be the subject of stand-alone charges, such as rape as a crime against humanity or as a war crime. This debate further reflects the degree of prosecutorial discretion at issue in international criminal law. Ultimately, the OTP did not charge sexual violence as stand-alone crimes like rape in many leadership cases, but charged these crimes as persecution and/or forcible transfer or deportation. While this accurately reflected the role that sexual violence played in a broader criminal campaign, there were some negative consequences. First, there was a risk that sexual violence would not receive the prominence it had in the indictments charging direct perpetrators, where it was usually included as a stand-alone crime. Second, there was a risk that an acquittal would ensue if the Prosecution failed to prove the more onerous discriminatory intent requirement for persecution. Our overall experience underscores the desirability of charging sexual violence using both

umbrella provisions such as persecution[90] as well as stand-alone sexual violence charges in order to maximize the prospects of successful outcomes.

(iii) The ICTY completion strategy

The ICTY's completion strategy had an impact on sexual violence cases by significantly intensifying the time pressure on the OTP to complete both its investigations and prosecutions. The completion strategy also prompted an assessment of cases for possible transfer back to national systems, interrupting the OTP's continued investigation of cases pending decisions on transfer. As detailed below, this had some adverse consequences for sexual violence prosecutions.

The ICTY's completion strategy started taking shape by the turn of the millennium. At that stage, the OTP had a backlog of cases, many of which still focused on lower-level accused.[91] As a result, consideration was given to ways of accelerating (p. 51) cases, and the organs of the court began considering the ICTY's exit strategy. In 2002, the Security Council endorsed the ICTY's initial proposal to complete investigations by the end of 2004 and trials by the end of 2008.[92] Accordingly, the OTP was unable to issue any further indictments after 2004. This limited the allocation of resources for the investigation of all crimes but had particular consequences for sexual violence investigations, which were recovering from a slow start and required time and resources to make up for lost ground.

In a bid to meet the 2004 deadline, the OTP issued a flurry of indictments. The assumption that these indictments could be amended later if necessary proved to be problematic for sexual violence charges, as demonstrated by the *Lukić and Lukić* case.[93] This indictment had no sexual violence charges although there was information in the public domain that sexual violence had been committed in conjunction with the crimes already charged. In particular, there were public reports about the repeated rape of many women and girls detained in Višegrad, and Milan Lukić was named by the Commission of Experts as a perpetrator.[94]

There were many factors that contributed to the omission of sexual violence charges from the *Lukić and Lukić* Indictment. These included difficulty in securing witnesses to the crimes, partly because of security[95] concerns, as well as the victims' fear of confronting the accused and revealing the crimes to their families.[96] However, the tight filing deadlines imposed by the completion strategy were also a factor. Overcoming the very real obstacles to collecting the evidence would have required time and resources that were not made available. Instead, the OTP focused on investigating other crimes.[97] The OTP also prioritized leadership cases, rather than lower level direct perpetrators such as the Lukić cousins.[98]

(p. 52) Amending the indictment to include sexual violence was initially not considered feasible in light of pressure to streamline indictments and meet the completion strategy deadline for the trials.[99] However, after the accused were arrested and raised alibi defences, the OTP's investigations into the alibi claims exposed widespread sexual violence committed by both accused.[100] Powerful evidence was revealed by one of the alibi rebuttal witnesses who had been raped by Milan Lukić three times in locations in and around Višegrad, where Lukić claimed he was not present.[101] In June 2008, Prosecutor Brammertz, who had recently assumed duties as Chief Prosecutor, sought to amend the indictment to include charges of rape, enslavement, and torture of Bosnian Muslim women and girls based on the newly collected evidence.[102] Even then, witness reluctance continued to be a very real factor. Some witnesses only agreed to testify a week before the Prosecution's motion to amend the indictment and another on the day the Prosecution's motion was filed.[103]

The Prosecution's application to add sexual violence charges to the indictment was rejected by the Trial Chamber out of concern that an amendment would delay the trial.[104] The Chamber was not satisfied that excluding the charges would result in a miscarriage of justice.[105] This was despite the significant personal cost to the sexual violence victims, who in any event would have to testify to refute the alibi.[106] The Chamber also found that the OTP had not acted with 'the required diligence' because it had information about the sexual violence crimes before the expiration of the Chamber's 15 November 2007 deadline to amend the Second Amended Indictment.[107] The OTP had decided not to seek an amendment at that time because it would lengthen the trial, contrary to the completion strategy.[108] The Prosecution's efforts to appeal the decision were unsuccessful.[109] In the end, (p. 53) the Prosecution called six female sexual violence victims to testify, but their evidence only went to rebut the defence alibi claims. Sexual violence was not charged as such in the case.[110] The sexual violence crimes committed against the women were fully documented on the trial record but no convictions for sexual violence were entered.[111]

The unsatisfactory result in the *Lukić and Lukić* case was also influenced by the OTP's unsuccessful application to transfer the case to BiH, pursuant to the newly adopted Rule 11*bis*. This Rule enabled the ICTY to transfer cases back to national authorities in countries of the former Yugoslavia for completion, taking into account the gravity of the crimes and the accused's level of responsibility.[112] The OTP ceased its investigation in the *Lukić and Lukić* case once it determined that it would seek to transfer the case. Continued investigations could not be justified given the OTP's already stretched resources. However, the Appeals Chamber determined that the case against Milan Lukić should proceed at the ICTY on the basis that he was a significant paramilitary leader, combined with the gravity of the crimes.[113] As explained above, as the case proceeded at the ICTY, the alibi defences were raised, triggering renewed investigations that ultimately revealed the sexual violence evidence.

2. Identifying pressure points for sexual violence charges throughout the investigation and prosecution process

Based on our experience in the OTP, we have identified points inherent in the ICTY investigation, trial, and appeal process where prosecutorial discretion comes into play and sexual violence charges are particularly at risk of being omitted from the outset, or of being diluted or eliminated altogether through the course of the proceedings. These pressure points reflect the key stages in our investigation and prosecution process where choices have to be made about what crimes to prioritize. While the specific pressure points will differ between jurisdictions, those experienced by the OTP reveal many lessons transferable to other contexts.

(p. 54) (a) The investigation phase: Risk of failing to uncover evidence of sexual violence

There is a risk that evidence of sexual violence will be overlooked in the investigation phase. This stems from the overwhelming volume of crimes usually at issue and the large degree of discretion resting upon individual investigators to determin how to commence an investigation, what crimes to prioritize, which perpetrators to pursue, and what evidence to collect. The absence of sexual violence charges from the *Dragan Nikolić* and *Lukić and Lukić* indictments described above illustrates this point. At the ICTY, we have not seen a similar pattern of omissions in relation to other specific crime categories, underscoring the particular risk that sexual violence may be overlooked.

There are also other examples of sexual violence crimes being initially overlooked or receiving minimal attention during the investigation phase. For example, when the first *Karadžić and Mladić* indictment was issued in 1995, the 80 pages of supporting materials contained little reference to sexual violence, despite widespread reports of sexual violence occurring in the municipalities of BiH at issue in the case in 1992. A limited amount of

material may have been collected in the lead up to the 1995 indictment because there was no consistent practice of asking, or following up with, witnesses about rape allegations.[114] Similarly, in 1999, despite public reports of widespread sexual violence in Kosovo, little information was initially collected prior to issuance of the first Kosovo-related indictment.[115] Interview conditions were marred by privacy and security concerns because most witnesses were living in refugee camps.[116] When explaining why they had located only a small number of sexual violence witnesses, investigators said that they struggled to find more women willing to talk about sexual violence and were therefore unable to find evidence to prove the pattern of sexual violence they considered necessary[117] in every municipality charged.[118] Given the reality of the ongoing conflict, the time pressure to issue an indictment and limited resources to properly investigate the scope of sexual violence, other crimes received greater priority.[119] Despite the slow start, the evidence of sexual violence ultimately uncovered by the OTP in the Kosovo cases shows that investigations can be successful when the right strategies are adopted.

The OTP's experience also reveals other factors that influence the prospect of uncovering sexual violence evidence during investigations and which implicitly affect the priority given to it by investigators and prosecutors. In particular, the OTP's investigations into prison-type settings were relatively successful in uncovering sexual violence.[120] One significant factor was that there were more witnesses who could provide direct, hearsay, or circumstantial evidence of sexual violence crimes in prison-type settings. In Foča, for example, women were imprisoned in large numbers over prolonged periods of time and the sexual violence became so notorious it could not be disregarded. Everyone the investigators spoke to referred to 'girls being taken' away for periods of time,[121] some of whom returned visibly distressed. This contrasts with fact patterns such as those in Kosovo and Srebrenica, which did not involve the (p. 55) systematic imprisonment of women and where evidence of sexual violence was far less forthcoming. Although much of the sexual violence against females committed outside prison-type settings was also committed in the presence of others, they included family members, including children, who may have been reluctant or unable to speak about what was done to the victim. Notably, aside from a few incidents of men being forced to undress,[122] the OTP did not charge sexual violence against men outside of prison settings, possibly indicating a greater reluctance by family members who were witnesses to report these crimes if they occurred.

The OTP's early investigative focus on prison settings may also provide an explanation for the sexual violence against males included in the ICTY's first cases.[123] Sexual violence against males, including sexual mutilation, was often committed in the presence of guards and other prisoners or involved forcing two prisoners to commit sexual violence against each other as a form of humiliation.[124] This increased the number of potential witnesses compared with the rapes of women, which were often committed out of view of the other prisoners. So even if male sexual violence victims were reluctant to disclose the crime, given the OTP's initial focus on prison-type settings, male sexual violence was less difficult to uncover even in the absence of a specific strategy for doing so.[125]

(b) The indictment phase: Risk of failing to include or failing to properly characterize sexual violence charges

When formulating indictments, strategic decisions have to be made about what to prioritize and what to exclude, particularly when faced with investigations of an overwhelming breadth. Misconceptions around the seriousness of sexual violence and assumptions that it is necessarily an 'opportunistic' crime rather than something linked to the broader conflict can continue to negatively influence whether, and in what way, sexual violence crimes are pursued. At this stage there is the added difficulty that investigative decisions have likely

already determined the availability, strength, or weakness of evidence and therefore the possibility of charging sexual violence at all.

(i) Inclusion of sexual violence charges

Overall, the OTP's achievements in charging sexual violence are significant, with over half of the ICTY's indictments containing relevant charges.[126] Nevertheless, the simple reality of resource constraints in combination with the overwhelming volume of criminality at issue meant leaving out many sexual violence charges. For example, while the first draft of the *Kunarac et al*. indictment included around 300 counts relating to sexual violence and 25 defendants, it was reduced to about 50 counts and eight defendants, of (p. 56) whom three were eventually tried at the ICTY.[127] Further, although corroboration of the evidence of sexual violence victims is not required as a matter of law,[128] according to some OTP staff, the availability of corroborative evidence served as a benchmark for proceeding to charge an incident.[129] While this practice was broadly applied across all indictment charges, prosecutors should be alert to the risk that such general evidentiary assessments may adversely affect the charging of sexual violence, which may more often be committed out of sight of persons other than the victim and perpetrator.

The risk of inadequately charging sexual violence intensified as investigations increasingly focused on senior officials and the parameters of prosecutorial discretion expanded further. As the potential scope of the crimes in leadership cases was immense—numerically, geographically, and temporally—the focus was firmly on crimes perceived to be the most serious, particularly murder, and those forming part of an overarching strategy, such as persecution and genocide. Assessments as to whether sexual violence crimes were linked to other crimes or sufficiently violent and serious increasingly impacted the extent to which sexual violence was charged or emphasized. Even in the *Slobodan Milošević* case—by far the most extensive leadership case attempted by the OTP encompassing crimes committed in Bosnia and Herzegovina, Croatia, and Kosovo[130]—a massive number of crimes were omitted. This had implications for the inclusion of sexual violence charges in the indictment relating to Kosovo (Kosovo Indictment). The first drafts of the Kosovo Indictment did not contain sexual violence charges, partly as a result of investigative difficulties and the prioritization of other crimes.[131] It was not until Slobodan Milošević was arrested in 2001 and NGOs made allegations of sexual violence in the Kosovo conflict[132] that further investigations were conducted and a second amended indictment charging sexual assault as persecution was issued.[133]

There are also instances where the OTP was criticized for apparently prioritizing charges involving sexual violence crimes against men over those committed against women. For example, women's groups criticized the OTP for inappropriately emphasizing the sexual violence crimes against male victims over those against female victims in its application for deferral of the *Tadić* case from Germany.[134] At (p. 57) the hearing, Judge Odio Benito encouraged the OTP to clearly describe rape as an essential instrument of the ethnic cleansing policy in the indictment to be issued, noting that '[t]here will be no justice unless women are part of [it]'.[135] Three months later the indictment against Tadić was confirmed, charging him with one incident of sexual violence against one woman[136] and one incident of sexual violence against three men[137] with arguably equal emphasis. The final indictment issued later that year included more sexual violence incidents, including additional crimes committed against women.[138]

Looking back, we can also see scope for more consistency in the way in which sexual violence crimes against women and girls were pursued across our cases. For example, the OTP charged Ranko Češić for sexual violence crimes he perpetrated against male prisoners at Luka camp,[139] but not for the crimes he committed against females even though we charged Biljana Plavšić, Mićo Stanišić, and Stojan Župljanin for them.[140] In the Češić sentencing hearing following his guilty plea,[141] the evidence of sexual violence against females was used only to dispute the Defence's evidence of Češić's good character as a

mitigating circumstance.[142] As of 2 February 2013, women accounted for only 13 per cent of witnesses testifying in ICTY proceedings.[143] While the reasons for the emphasis on men in this and other cases is likely manifold, for the future, it is worth factoring in the likelihood that male investigators may be more likely to speak with male witnesses. Male investigators might more readily see the (p. 58) seriousness of sexual violence against males when it comes in forms that do not resemble sexual intercourse, such as sexual mutilation. Overall, our experience suggests that sexual violence against males may not be subject to the same misconceptions as sexual violence against females, although this category of crimes has its own inherent difficulties. As discussed above, it is also important to be alert to whether investigation strategies, such as focusing on prison settings, may be more likely to uncover evidence of sexual violence against males than sexual violence against females and to adjust strategies to pursue an appropriate balance.

Beyond inconsistencies in approaches to sexual violence against males versus females, there is also a risk of more general inconsistencies in charging practice concerning sexual violence. For example, in the *Delalić et al*. case, Esad Landžo, a camp guard who sexually assaulted male prisoners, was not charged with these crimes,[144] even though camp commander Zdravko Mucić was charged and convicted for them as his superior.[145] Examples such as these demonstrate the extent of prosecutorial discretion in international criminal law cases and the need for policies and internal review processes to guide and monitor the work of a prosecution office.

(ii) Characterizing sexual violence

The relative dearth of jurisprudence regarding conflict-related sexual violence crimes vis-à-vis other crimes prior to the ICTY's establishment meant the OTP had little guidance in formulating charges but latitude to be creative.[146] While this raised a risk that sexual violence charges would be inadequately pleaded in indictments, overall the OTP's charging practice has been relatively progressive. In addition to charging rape as a crime against humanity in accordance with Article 5 (g) of the ICTY Statute, we charged sexual violence as many other crimes, such as cruel treatment, torture, persecution, enslavement, and genocide—leading to the rapid development of sexual violence jurisprudence.[147]

This is reflected in the early indictments which included sexual violence charges under many of the available crime categories.[148] The *Dragan Nikolić* indictment for (p. 59) example, charged sexual violence under 29 counts of grave breaches, war crimes, and crimes against humanity. Prosecutor Goldstone was encouraged by the Rule 61 Trial Chamber to charge rape outside the express rape as a crime against humanity provision in Article 5 (g). Although it was not yet clear that cumulative and alternative charging would be permitted, the OTP decided to charge sexual violence under many different crime categories.[149]

As pressure mounted to focus on the leadership, streamline indictments, and finalize cases, and as the challenge of linking sexual violence crimes to senior officials grew, some perceived it would be easier to prove linkage to senior leaders if sexual violence was charged as persecution as a crime against humanity and, where appropriate, genocide.[150] However, practice in the OTP varied. In some cases, such as *Karadžić* and *Mladić*, sexual violence was charged as persecution, genocide, deportation, and forcible transfer,[151] whereas in the *Slobodan Milošević* case, it was additionally charged as torture, inhuman acts, and a number of other war crimes and crimes against humanity, based on the same criminal conduct.[152] It has been comparatively less common for the OTP to bring specific charges of underlying crimes of sexual violence in addition to persecution or genocide as compared with some other crimes.[153]

The OTP's rationale for using the 'umbrella charges' approach was that it would be easier to link sexual violence crimes to senior leaders if they were presented as part of a campaign of crimes, such as a persecutory or genocidal strategy, particularly in prison camp settings.[154] While there are benefits to this approach, there have also been resultant difficulties for the OTP to navigate. In particular, the specific intent requirements for these crimes can make proof more onerous than for standalone sexual violence charges, such as rape as a crime against humanity or war crime, giving rise to a risk of acquittal if the more onerous standard is not met.[155] Unless approached carefully, the use of umbrella charges could also reduce the prominence afforded to the crimes and obscure their gendered nature.[156] Nevertheless, particularly in a legal framework where alternative and cumulative charging is permissible, we have found that it is (p. 60) prudent to consider including stand-alone charges for sexual violence crimes, in addition to situating the crimes as part of a broader campaign through crime categories such as persecution and genocide.[157]

When determining how to characterize sexual violence crimes, a prosecution office also has to determine its strategy for presenting them in specific counts in the indictment. With some exceptions, in its early indictments and particularly those against direct perpetrators such as the *Kunarac et al*. accused, the OTP charged each incident of sexual violence under its own count or grouped them by a common factor such as location. Later on, the OTP's charging practice shifted to grouping a considerable number of crimes and incidents under one count, particularly in leadership cases. For example, in the *Karadžić* case, the massive number of crimes committed in BiH from 1992 to 1995 are charged under just 11 counts.[158] In most cases such as these, it is only possible to discern the number of incidents or victims by looking at annexes to the indictment, some of which are classified as confidential and therefore not available to the public. In deciding how to structure counts concerning sexual violence—as with all other crime categories—a prosecution office will have to factor in the practicality of charging incidents under separate counts. It will also have to weigh the advocacy benefits and disadvantages of grouping multiple incidents together. In addition to the practical advantages of dealing with a smaller number of charges, the benefits to combining multiple incidents in one count include more easily demonstrating the connection between the crimes in a persecutory or genocidal campaign. The disadvantages will include potentially obscuring the sheer volume of the crimes, which may have negative implications for the sentence imposed.[159] Certainly, if multiple crime incidents are charged under one count, a prosecutor's office should ensure they are publicly enumerated elsewhere as part of the indictment if possible.

(c) The pre-trial phase

In the pre-trial phase at the ICTY, the OTP had to make decisions regarding the scope and conduct of a case, including whether to amend an indictment, which evidence to present during the trial and, possibly, whether to enter into a plea agreement with an accused. Strategic choices are made about what aspects of a case require the most detailed focus. Many factors impacted the extent to which sexual violence charges (p. 61) were prioritized during the pre-trial phase, most notably an escalating emphasis on reducing the size of cases and shortening the length of trials. As a result, the risk of minimizing the prominence of sexual violence crimes and failing to elicit evidence of sexual violence increased.[160] This led, in some cases, to the reduction or removal of sexual violence charges or the presentation of only a minimal amount of evidence in relation to them. While reductions also occurred regarding other crime categories, our experience confirms the need for particular attention to ensuring that sexual violence crimes are not disproportionately affected.

(i) Pressure to reduce the size of the case: Risk of cutting sexual violence crimes

The withdrawal of sexual violence charges during the pre-trial phase was most prevalent in leadership cases, which generally charged a massive number of crimes occurring across the geographic and temporal spectrum of the conflict. Slobodan Milošević, one of the first leadership figures to go on trial, was charged with sixty six counts of war crimes, crimes against humanity, and genocide in three indictments covering Croatia, BiH, and Kosovo.[161] After the Trial Chamber decided that the indictments should be jointly prosecuted in one trial, the Chamber asked the OTP to consider reducing the number of municipalities about which it would lead evidence to make them representative—rather than exhaustive—of the crime pattern charged, as well as to reduce the number of witnesses called.[162] As a result, the OTP not only cut witnesses from the witness list,[163] but amended the indictment for BiH to remove fifty one crimes sites,[164] including incidents of sexual violence.[165] This left a reduced number of crimes to show the widespread and systematic nature of the campaign.

The Trial Chamber's intervention in the scope of the Prosecution's case—an area traditionally reserved for the Chief Prosecutor—was subsequently formalized in 2006 with the amendment of Rule 73*bis*(D). This allowed the Trial Chamber to invite the OTP to reduce the indictment to be representative of the crimes charged.[166] Trial chambers have used this rule on numerous occasions and invitations have almost always been heeded by the OTP.

(p. 62) By the time the last cases were being prepared for trial, the completion strategy was well entrenched and the Prosecution was making significant efforts to streamline indictments. Upon the arrests of Karadžić and Mladić, the Prosecution thoroughly examined the respective indictments against them to determine which crime base incidents it could withdraw and still ensure a representative—but not exhaustive—approach. The component of the *Mladić* case dealing with crimes committed in municipalities throughout BiH was reduced from twenty-three municipalities to fifteen[167] and, in *Karadžić*, the corresponding component was reduced from twenty seven to twenty.[168] Victims groups were naturally disappointed by the decision to significantly reduce the scope of crimes in the indictments and substantial discussions between the Chief Prosecutor and victims' representatives were required to explain the reasons for it.

A range of priorities had to be balanced in the process of reducing the indictments, including the strength of the evidence linking the accused to the crimes in each municipality and the extent to which the OTP could rely upon adjudicated facts established in other cases.[169] Importantly, recognizing the risk of sexual violence charges being disproportionately eliminated in this process, the Chief Prosecutor made a policy decision to ensure indictments remained representative of crimes against both men and women and, accordingly, that attention was paid to retaining a proportionate number of sexual violence incidents.[170]

(ii) Guilty plea negotiations: The risk of bargaining away sexual violence charges

Guilty pleas are a potential pressure point for sexual violence charges because they involve a bargaining process where concessions may be made to secure the benefits of the plea.[171] Crimes viewed as more serious or easier to prove may be prioritized to the detriment of crimes considered less serious or too difficult or resource intensive to prosecute. The accused may also have a particular incentive to avoid crimes which label them in a particular way, such as sexually deviant,[172] giving rise to additional pressure (p. 63) to drop sexual violence charges. The risk associated with plea agreements within the OTP was heightened when completing cases became a priority at the turn of the millennium and

particularly after the Completion Strategy was adopted in 2003, when the majority of plea agreements were made.[173]

Although not perfect, overall the OTP's practice on guilty pleas suggests some success in circumventing the potential risk of attrition for sexual violence charges. In cases charging sexual violence, nine out of twelve plea agreements retained at least one charge of sexual violence.[174] In these cases, to the extent that other sexual violence charges were dropped, there were obvious reasons, such as the charges being cumulative of other counts[175] or evidentiary difficulties.[176] Of the three guilty pleas where sexual violence charges were dropped entirely as part of the plea bargaining process, it is difficult to discern a pattern of disproportionately discounting sexual violence crimes or favouring sexual violence against males over sexual violence against females. For example, Došen and Kolundžija entered their pleas on a reduced factual basis that excluded sexual violence against both men and women, but also excluded some other crimes such as murder.[177]

(p. 64) Nonetheless, at times within the OTP, pressure had to be resisted to ensure sexual violence charges were not dropped or minimized in the context of plea bargaining.[178] There were also instances where the OTP had to take a tough stance on attempts by an accused person to offer a plea only if sexual violence charges were removed.[179] The significant discretion involved in plea bargaining and the potential pressure to reduce or withdraw sexual violence charges underscores the need for proactive policies guiding prosecutorial discretion to navigate the potential pitfalls for sexual violence crimes.[180]

(d) The trial phase

At the ICTY, once a case is prepared and the trial commences, ongoing decisions have to be made, often daily, about what evidence to lead and what to reduce or exclude. Carefully prepared exhibit and witness lists are further streamlined and the emphasis on some aspects of the evidence is inevitably greater than on others. The impact of investigative deficiencies and decisions made at the indictment and pre-trial stage are often irreversible at trial because the scope for amending exhibit and witness lists is limited, generally confining trial teams to what has already been identified. Complex leadership cases, where linkage evidence is the focus, present challenges for ensuring that evidence supporting all the elements (including contextual elements) of crimes is presented and can be integrated in closing briefs and submissions. While there is a risk of sexual violence evidence not being led in cases against lower level accused, the risk of omitting or overlooking this evidence increases as cases become more complex. For these cases, the challenge of reducing the volume and length of trials is greater. Our cases against senior officials also posed particular challenges in terms of witness fatigue, since senior officials tended to be tried after completion of the direct perpetrator cases and many victims had already testified multiple times.

(i) Risk of not adducing sufficient evidence of sexual violence

The risk of not adducing sufficient evidence of sexual violence at trial or failing to sufficiently emphasize sexual violence charges is reflected in ICTY cases. Some accused were acquitted of sexual violence incidents at trial when the Trial Chamber found that evidence was not led to substantiate the charges.[181]

(p. 65) Even with the significant cuts to the *Slobodan Milošević* indictments, throughout the trial the Chamber continued to advocate reductions to the OTP's case. The trial team met each day to determine how to further streamline the case.[182] As a result, not all evidence was led on the remaining charges[183] and the OTP had to concede its failure to prove a number of factual allegations at the halfway point in the trial during proceedings under Rule 98*bis*.[184] The Trial Chamber consequently acquitted the accused of 130 crime

incidents, which included sexual violence.[185] These time pressures have been even more significant as the final ICTY trials are being completed.

Leading insufficient evidence on sexual violence does not, of course, always signal a failure in decision-making on the part of the prosecution. Witness reluctance and other difficulties, particularly in the context of sexual violence crimes also pose a barrier to presenting evidence. However, overall our experience underscores the importance of being alert to potential problems and having strategies to ensure that sexual violence crimes are not disproportionately affected. Time and resources may be needed to navigate potential problems in sexual violence cases and to neutralize the risk that extra effort may not always be forthcoming in the face of many other pressing demands. It also underscores the need for creative approaches to presenting evidence in the face of time pressures, such as through statistical expert evidence and victimization surveys,[186] which could provide expedited evidence of the incidence and prevalence of sexual violence in a particular situation.

(ii) Reliance on written evidence: Risk of obscuring sexual violence and disempowering victims

Although live testimony is still relied upon, the pressure to reduce the length of trials has increasingly led the OTP to tender witness evidence in written form pursuant to Rules 92*bis* and 92*ter* of the ICTY Rules of Procedure and Evidence.[187] Live testimony from victims also became less central in cases involving senior leaders where evidence about the fact that crimes occurred was often not in issue and where precious time had to be prioritized on presenting evidence linking the accused to the crimes.[188] In later cases, we have also been able to rely on facts about the crime base adjudicated in previous cases[189] to alleviate the risk of having insufficient evidence, which has become an increasingly accepted part of ICTY practice. Decisions (p. 66) made in the exercise of prosecutorial discretion to reduce victim evidence to writing, even when coupled with cross-examination of the victim, or to rely upon adjudicated facts, can have significant implications for sexual violence crimes. These implications are discussed in Chapter 5.

(e) Sentencing

The sentencing component of a case also constitutes a pressure point for sexual violence crimes. In formulating sentencing submissions and recommending an appropriate term of imprisonment for the accused, the Prosecution must make an assessment about the gravity of the crimes committed. Given the reality of time and word limits for sentencing submissions in our proceedings, we have also had to make choices about how much emphasis to give specific crimes in making sentencing arguments. These competing priorities, and the implications for sexual violence cases, are discussed in detail in Chapter 8.

(f) The appeal phase

While prosecutorial discretion is more limited in scope at the appeal stage, it still takes on important dimensions. By this time, decisions made during the investigation, pre-trial, and trial stages are irreversible and the scope for review of trial judgments on legal and factual errors is limited. On appeal, prosecutorial discretion involves making judgment calls about what is most significant for the outcomes of cases and the development of the ICTY's jurisprudence. This decision-making is further circumscribed by the realities of tight filing deadlines and limits on internal resources for appellate work. Additionally, the decision to withdraw an appeal may constitute a pressure point on sexual violence charges.

In this framework of limited appellate capacity, there is a risk that appealing acquittals on sexual violence charges will not be seen as a priority. However, here also, the OTP's record is generally positive. The OTP has regularly pursued sexual violence acquittals on appeal where there are reasonable grounds for doing so, although our experience confirms the

possibility that extra attention may be needed to ensure that all appropriate appeals relating to sexual violence crimes are brought.[190]

Consistent with the appellate framework, the OTP will most often appeal sexual violence acquittals where a trial chamber has committed a legal error or a mixed error of fact and law. The OTP has appealed incorrect determinations of the elements of modes of liability in sexual violence cases, as well as procedural errors including failure to consider evidence and failure to admit evidence in rebuttal.[191]

(p. 67) The OTP has also appealed some factual errors, such as misreading the evidence or mixed errors of fact and law, such as a flawed application of the law to the facts.[192] In *Đorđević*, for example, the OTP successfully appealed the Trial Chamber's failure to take into account the evidence of a rape victim who testified to her belief that two other women taken away with her were also sexually assaulted[193] and the Trial Chamber's dismissal of circumstantial evidence of sexual assault.[194]

The acquittals the OTP has not appealed were largely based on a lack of evidence[195] or pleading failures.[196] However, a trial chamber's finding that there was insufficient evidence does not, per se, determine whether or not to appeal. For example, the OTP appealed the *Haradinaj et al*. Trial Chamber's finding[197] that the evidence was inconsistent with respect to one instance of rape[198] but not their finding that evidence with respect to another instance of sexual violence was inconsistent and inconclusive.[199] Decisions regarding whether to appeal acquittals based on insufficient evidence are, obviously, heavily tied to the strength or weakness of the particular evidence. This evidence must be considered in the context of the standard of review on appeal, which imposes a high burden on the OTP to show that a reasonable trial chamber could not have reached the same conclusion as the Trial Chamber.

(p. 68) E. Conclusions and Fundamental Insights for the Future

Prosecuting conflict-related sexual violence involves significant challenges arising from the combined impact of misconceptions and other barriers and the unique nature of prosecutorial discretion in the context of international crimes. This complex equation of factors affects the prioritization of, and approach to, sexual violence crimes. If we are to make progress in securing more successful outcomes in sexual violence cases in the future, it is critically important that we clearly understand the factors at play.

While the challenges we have described in this chapter inevitably reflect some characteristics unique to the OTP's context, similar issues have arisen at other courts and tribunals. For example, in the *Norman et al*. case at the Special Court for Sierra Leone, the Prosecution's failure to include sexual violence crimes in the indictment could not be remedied at a later stage. The Trial Chamber rejected the Prosecution's application to amend the indictment to include sexual violence charges prior to commencement of the trial. The Chamber found that, among other things, the evidence should have been uncovered through the ordinary exercise of due diligence during the investigation and that 'creating exceptions' because of the 'sensitivity' of gender offences would be 'abusive of the entrenched rights of accused persons'.[200] Concerns have also been expressed about sexual violence charges being bargained away at other international courts and tribunals.[201] For example, according to information compiled by the ICTR Office of the Prosecutor, sexual violence charges were dropped in all four of their cases subject to guilty plea negotiations[202] and no evidence was led on sexual violence charges in some other cases.[203]

(p. 69) Many insights from this chapter will be relevant—even if they take on their own specific dimensions—for other prosecution offices dealing with similar cases in the future. For example, for the ICC, the adverse consequences of failing to properly investigate sexual violence from the outset may be particularly severe. In particular, once a Document Containing the Charges (DCC) is submitted to the Court for confirmation, there is limited

scope for the Prosecution to subsequently amend it.[204] Consequently, if the Prosecution submits a DCC with no sexual violence charges, or inadequately developed sexual violence charges or sexual violence charges based on insufficient evidence for which confirmation is denied, there will likely be no opportunity to correct this later.[205] The known risks of sexual violence being omitted or inadequately dealt with during the investigation phase may therefore justify extra care and assessment by the Prosecution prior to submitting a DCC for confirmation to ensure the Office will not be subsequently locked into a trial where—contrary to the interests of justice—sexual violence crimes cannot be addressed.

Looking back over the OTP's experience, we have distilled the following fundamental insights about the obstacles to successful sexual violence prosecutions. Here we focus on summarizing key problems for any prosecution office working on conflict-related (p. 70) sexual violence cases to be aware of, since awareness is the first critical step. Our experience also discloses some insights for the international community. In later chapters we look at concrete strategies for overcoming the potential problems:

The importance of clearly understanding the obstacles to successful sexual violence prosecutions: the interplay of misconceptions, other barriers and prosecutorial discretion

- Understanding the complex interplay of factors impacting upon sexual violence investigations and prosecutions is fundamental to improving accountability outcomes for sexual violence crimes. These factors include inaccurate perceptions or assumptions about the nature and impact of conflict-related sexual violence, the wide array of factors that can influence the reactions and preferences of sexual violence victims and the wide degree of discretion that rests with the individuals involved in the investigation and prosecution of international crimes.

- Misconceptions about the nature of conflict-related sexual violence stemming from the failure to accurately characterize rape and similar crimes as violent acts are a reality that every prosecution office will likely have to grapple with. A prosecution office must ensure that sexual violence crimes are expressly recognized as serious, violent crimes and prioritized from the outset of its work.

- There may also be other misconceptions about conflict-related sexual violence crimes in the specific context in which the prosecution office is operating. It is important for the office to clearly identify these misconceptions and take corrective action.

- A more fulsome dialogue among international criminal justice actors at both the international and national levels about the misconceptions that influence approaches to sexual violence crimes would assist in promoting better practices in the future.

- Assumptions should not be made about victims' willingness to disclose or testify about sexual violence crimes. However, the prospect that some victims will exhibit reluctance is a reality and prosecution offices should allocate sufficient time and resources to address this problem. Similarly, assumptions should not be made that sexual violence victims always experience stigma. However, prosecutors should be prepared for the impact of stigma and develop strategies for overcoming witness reluctance flowing from it, while taking care not to reinforce it.

- Investigating and prosecuting sexual violence against males may not be subject to the same misconceptions as sexual violence against females, but this category of crimes raises its own set of difficulties that must also be clearly understood to ensure effective outcomes.

- In the absence of structural reforms at the international level to coordinate the multiplicity of actors potentially involved in documenting conflict-related sexual violence crimes, prosecution offices should adopt measures to coordinate with other actors pursuing overlapping mandates and to find pragmatic ways to navigate the problems that limited coordination among them could pose.

(p. 71) *Navigating prosecutorial discretion to enhance outcomes in sexual violence cases*

- The extensive volume of criminality usually at issue in conflict-related investigations and prosecutions, coupled with many fundamental operational challenges and the broad scope of prosecutorial discretion, increase the risk of inadequate attention to sexual violence crimes.
- Time and resource pressures are realities that most prosecution offices dealing with conflict-related sexual violence crimes will have to face. Affirmative strategies will be needed to ensure sexual violence crimes are not disproportionately affected in the face of these pressures.
- It is especially important to entrench good practices for the investigation and prosecution of sexual violence crimes from the very beginning of the accountability process. Extra attention should be paid to ensuring the effective investigation of these crimes and to ensuring they are adequately pleaded in indictments. Making up for lost time and remedying deficiencies in the investigation and indictment phases will likely be more difficult or impossible as time goes on.
- Investigators and prosecutors should be alert to hidden factors in investigation strategies that affect (either positively or negatively) the degree to which sexual violence is pursued, such as a focus on prison settings. The gendered consequences of all investigative strategies should be assessed and factored into the decision-making process on an on-going basis.
- A balanced approach to interviewing both male and female witnesses should be adopted to help circumvent hidden biases in the exercise of prosecutorial discretion.
- In exercising discretion about how to frame sexual violence charges in an indictment, the most inclusive possible approach should be preferred, to maximize the prospects of adequate visibility and successful outcomes for these crimes.
- Sexual violence does not have to be mass or systematic to be prosecuted as an international crime. Prosecutors should decide what priority to give to sexual violence by looking at it in its full context and not by only considering its scale or connection to a criminal policy.
- Prosecutors should not decide to de-prioritize sexual violence due to perceived difficulties inherent in presenting these cases. Obstacles can often be overcome with persistence and effective strategies, in the same way that they can be overcome for other categories of potentially reluctant witnesses.
- The impact of misconceptions, other barriers, and prosecutorial discretion is potentially magnified in senior leadership cases, which depend on being able to accurately view sexual violence in context. The magnitude and complexity of these cases also increases the risk of sexual violence being overlooked or inadequately charged or prioritized. Prosecution offices should develop concrete strategies to circumvent the heightened risks of poor outcomes in senior leadership cases.

Identifying pressure points in the investigation and prosecution process

- A prosecution office should regularly identify the pressure points for sexual violence cases that exist within its specific operational framework. These pressure (p. 72) points will arise at any juncture where the office must decide which crimes to prioritize, including as a result of time and resource limitations.
- At each pressure point identified, the office should look for strategies that will help to reduce the disproportionate risk of overlooking, reducing, or eliminating sexual violence charges.
- While pressure points will vary depending upon the particular framework within which the Office operates, the investigation and charging phases and guilty plea negotiations present particular risks for sexual violence crimes.

Insights for the international community

- Structural reform to reduce the degree of overlap in the investigation of international crimes, including sexual violence crimes, and to improve coordination between the various relevant actors is urgently needed.
- As part of the procedure for finalizing the work of an international criminal court, the international community should require an assessment of the work already done on sexual violence crimes and ensure that any required corrective action is built into the completion strategy process.

Footnotes:

1 Priya Gopalan assisted in compiling some of the citations for this chapter. Najwa Nabti also contributed material relied on in this chapter.

2 Commentators have noted that, traditionally, sexual violence has been viewed as damaging the honour and dignity not only of the female victim but also of the men with whom she is closely associated. See e.g. Nancy Farwell, 'War Rape: New Conceptualizations and Responses' (2004) 19(4) *Affilia* 389 (Farwell) 394–5. See also Catherine Niarchos, 'Women, War, and Rape: Challenges Facing The International Criminal Tribunal for the Former Yugoslavia' (1995) 17(4) *Hum Rts Q* 649 (Niarchos) 674; Judith Gardam and Michelle Jarvis, *Women, Armed Conflict and International Law* (Kluwer Law International 2001) (Gardam and Jarvis, *Women, Armed Conflict and International Law*) 107–10 (examining notions of 'honour' as reflected in international humanitarian law: 'The notion of women's honour that we find in IHL is a masculine construct that bears little relation to the reality of sexual violence for women').

3 See e.g. Human Rights Watch, 'Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath' (September 1996) 2 <www.hrw.org/sites/default/files/reports/1996_Rwanda_%20Shattered%20Lives.pdf> accessed 20 May 2015 (noting that women were raped with sharpened sticks or gun barrels and that rapes were sometimes followed by sexual mutilation with machetes, knives, sticks, boiling water, and in one case, acid).

4 Human Rights Watch, 'Torture Archipelago: Arbitrary Arrests, Torture and Enforced Disappearances in Syria's Underground Prisons since March 2011' (July 2012) 26, 28, 67 <www.hrw.org/sites/default/files/reports/syria0712webwcover.pdf> accessed 20 May 2015 (noting that detainees were subjected to rape, penetration with objects, electroshock, and beatings to genitalia).

5 Elisabeth J. Wood, 'Rape During War is Not Inevitable: Variation in Wartime Sexual Violence' in Morten Bergsmo, Alf Butenschøn Skre, and Elisabeth J. Wood (eds.), *Understanding and Proving International Sex Crimes* (Torkel Opsahl Academic EPublisher 2012) 414 (noting that soldiers distinguish 'lust' rapes involving sexual intercourse from rapes involving 'mutilation and gratuitous violence', the former being regarded as 'somehow more "ok"' in their eyes).

6 Commentators have also noted the importance of properly characterizing rape as a violent act. See e.g. Niarchos (n 2) 650; Francisco Jose Leandro, 'Gender Based Crimes as "Tools of War" in Armed Conflicts' in *Gender Violence in Armed Conflicts* (Instituto da Defesa Nacional 2013) (Leandro) 148, 150; Tineke Cleiren and Melanie Tijssen, 'Rape and Other Forms of Sexual Assault in the Armed Conflict in the Former Yugoslavia: Legal, Procedural, and Evidentiary Issues' (1994) 5 *Crim L Forum* 471, 474; Alona Hagay-Frey, *Sex and Gender Crimes in the New International Law* (Martinus Nijhoff Publishers 2011) 107; Doris Buss, 'Rethinking "Rape as a Weapon of War"' (2009) 17(2) *Fem Legal Stud* 145, 151; Dorothy Thomas and Regan Ralph, 'Rape in War: Challenging the Tradition of Impunity' (1994) 14(1) *SAIS Rev* 81 (Thomas and Ralph) 92.

7 While our discussion in this part focuses primarily on the experiences of female sexual violence victims, we note that male victims of sexual violence also frequently experience shame which compounds their difficulty in recounting their experiences. While notions of honour vary across gender roles, we see manifestations of it for both men and women. See p 11 in Ch. 1 and pp 113–14 in Ch. 5.

8 See p 43.

9 See Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 21 October 1950) 75 UNTS 287 (Fourth Geneva Convention) art 27(2) ('[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault').

10 Jean Pictet (ed.), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War: Commentary* (International Committee of the Red Cross 1958) 206.

11 See e.g. Niamh Hayes, 'The Impact of Prosecutorial Strategy on the Investigation and Prosecution of Sexual Violence at International Criminal Tribunals' in Morten Bergsmo (ed.), *Thematic Prosecution of International Sex Crimes* (Torkel Opsahl Academic EPublisher 2012) (Hayes) 409–10 (noting alarmingly low rates of conviction in sexual violence cases around the world).

12 See pp 111, 113 in Ch. 5.

13 Commentators have also noted the tendency to see sexual violence as a less serious offence due to its characterization as a matter of honour. See e.g. Leandro (n 6) 150.

14 Prosecuting Sexual Violence Working Group (PSVWG) Interviews, on file with authors. 'Crime base' is a term used within the office to describe the crimes that occurred and that are at issue in a given case.

15 PSVWG Interviews, on file with authors. See also Peggy Kuo, 'Prosecuting Crimes of Sexual Violence in an International Tribunal' (2002) 34 *Case W Res JIL* 305 (Kuo), 310–11; Mohammed Ayat, 'Quelques apports des Tribunaux pénaux internationaux, ad hoc et notamment le TPIR, à la lutte contre les violences sexuelles subies par les femmes durant les génocides et les conflits armés' (2010) 10(5) *Intl Crim L Rev* 787, 796–7 (noting perceptions among investigators at the International Criminal Tribunal for Rwanda that sexual violence was less grave than other crimes).

16 PSVWG Interviews, on file with authors.

17 Ibid. See p 92 in Ch 4.

18 PSVWG Interviews, on file with authors.

19 Kuo (n 15) 310–11. See also Xabier Agirre Aranburu, 'Beyond Dogma and Taboo: Criteria for the Effective Investigation of Sexual Violence' in Morten Bergsmo, Alf Butenschøn Skre, and Elisabeth J. Wood (eds.), *Understanding and Proving International Sex Crimes* (Torkel Opsahl Academic EPublisher 2012) 269 (recounting comments made by lawyers within the OTP that they sought to avoid sexual violence because it was 'very annoying and difficult to prove').

20 Julie Mertus, 'When Adding Women Matters: Women's Participation in the International Criminal Tribunal for the Former Yugoslavia' (2008) 38(4) *Seton Hall L Rev* 1297, 1307. See also Margaret M. deGuzman, 'Giving Priority to Sex Crime Prosecutions at International Courts: The Philosophical Foundations of a Feminist Agenda' (2001) 11 *Intl Crim L Rev* 515, 517.

21 *Prosecutor* v *Rukundo*, ICTR-2001-70-A, Appeal Judgment (20 October 2010) (*Rukundo* Appeal Judgment) para 236 (referring to a sexual assault committed against a woman during the Rwandan genocide as 'qualitatively different from the other acts of genocide perpetrated by Rukundo' and finding that the act could 'reasonably be construed as an opportunistic crime that was not accompanied by the specific intent to commit genocide'). Contrast Partially Dissenting Opinion of Judge Pocar, para 4 (finding that the majority's 'attempts to differentiate Rukundo's sexual assault from other acts of genocide perpetrated by him is not reasonable' and constitutes a conflation of motive and intent).

22 Farwell (n 2) 389; Thomas and Ralph (n 6) 84.

23 In referring to the link between sexual violence and broader patterns of crime, we do not suggest that sexual violence falling outside a broader pattern of crimes should not be addressed. As noted in Chapter 1, our objective should be to respond appropriately to sexual violence, whatever its nature (see p 6 in Ch. 1).

24 PSVWG Interviews, on file with the authors.

25 Ibid. See also Kuo (n 15) 311.

26 Ibid.

27 *Prosecutor v Kunarac et al.*, ICTY-96-23&23/1, Trial Judgment (22 February 2001) (*Kunarac* Trial Judgment) paras 539–43.

28 PSVWG Interviews, on file with the authors. See p 77 in Ch. 4.

29 Ibid.

30 *Prosecutor v Đorđević*, ICTY-05-87/1, Trial Judgment (23 February 2011) (*Đorđević* Trial Judgment) paras 832–8, 1780–1, 1790, 1792, 1794, 1796, 1854-6, 2150; *Prosecutor v Milutinović et al.*, ICTY-05-87, Judgment (26 February 2009) (*Milutinović* Trial Judgment) Vol. II paras 1234, 1245, 1259–62. Contrast *Prosecutor v Đorđević*, ICTY-05-87/1-A, Judgment (27 January 2014) (*Đorđević* Appeal Judgment) paras 877, 886–98, 901; *Prosecutor v Šainović et al.*, ICTY-05-87, Judgment (23 January 2014) (*Šainović* Appeal Judgment) paras 580, 584–6, 591, 593, 597, 599–600 (correcting these errors and emphasizing the importance of ensuring that sexual violence crimes are not subjected to higher evidentiary standards simply because of their sexual component). On appeal, the *Milutinović et al*. was known as *Šainović et al*. See also pp 208–9 in Ch. 6.

31 *Đorđević* Trial Judgment (n 30) paras 2139–47, 2149–53; *Milutinović* Trial Judgment (n 30) vol 3, paras 470–3, 476–7, 1134–6, 1139–40. Contrast *Đorđević* Appeal Judgment (n 30) paras 920–6, 929; *Šainović* Appeal Judgment (n 30) paras 1581–2, 1591–2, 1602–4. See also

Rukundo Appeal Judgment (n 21) paras 227–38, and Partially Dissenting Opinion of Judge Pocar; pp 248–9 in Ch. 7.

32 See pp 174–5, 177, 203 in Ch. 6 and p 220 in Ch. 7.

33 In particular, the International Criminal Court (ICC) OTP's strategy has focused on those with the greatest responsibility, such as 'leaders of the State or organization allegedly responsible for those crimes'. See ICC Office of the Prosecutor, Paper on Some Policy Issues before the Office of the Prosecutor (September 2003) 7; ICC Office of the Prosecutor, Report on Prosecutorial Strategy (14 September 2006) 5; ICC Prosecutorial Strategy 2009–2012 (1 February 2010) 5–6. More recently, the ICC OTP has allowed for the possibility of also bringing a limited number of cases against lower level perpetrators to build the cases in a given situation upwards or to address notorious crimes. See ICC Office of the Prosecutor Strategic Plan June 2012–2015 (11 October 2013) 6, 13–14. Nevertheless, the primary focus remains on the most senior level perpetrators.

34 PSVWG Interviews, on file with authors.

35 Ibid.

36 Ibid. For a further discussion of JCE responsibility in the context of sexual violence cases, see pp 221–31 in Ch. 7.

37 See pp 203, pp 218 in Ch. 6.

38 See pp 20–4, 32 in Ch. 2.

39 The questions also pick up on the tendency to subject sexual violence crimes to higher evidentiary standards than other crimes and to stereotype victims of sexual violence. These themes are taken up in Chapter 5.

40 See e.g. Valerie Oosterveld, 'Sexual Violence Directed Against Men and Boys in Armed Conflict or Mass Atrocity: Addressing a Gendered Harm in International Criminal Tribunals' (2014) 10 *JILIR* 107 (Oosterveld) 111 (referring to the omission of male rape charges in the *Delalić et al*. and *Simić et al*. cases, and the failure to lay charges to cover the harm experienced by a male victim forced to rape a female victim in the *Brđanin* case).

41 See e.g. Oosterveld (n 40) 113 (referring to the *Muhimana* case before the ICTR and the Trial Chamber's omission of a reference to the fact that a victim's genitals were amputated and hung on a pole in the course of the victim's shooting and beheading).

42 Ibid., 115.

43 See further pp 113–14 in Ch. 5.

44 See pp 113–14 in Ch. 5.

45 See pp 112–14 in Ch. 5.

46 PSVWG Interviews, on file with authors.

47 Ibid.

48 Ibid.

49 See also p 21 in Ch. 2.

50 See UNGA 'Declaration on the Prevention and Removal of Disputes and Situations which May Threaten International Peace and Security and on the Role of the United Nations in the Field' (5 December 1988) UN Doc A/RES/43/51; UNGA 'Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of Peace and Security' (9 December 1991) UN Doc A/RES/46/59 para 7; UNSG 'An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping: Report of the Secretary General Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992' (17 June 1992) UN Doc A/47/277-S/24111 para 25(a) and (c). The United Nations restructured the UN

system (for example, through the creation of the Peacebuilding Commission and the creation of the Rapid Response Unit of the Office of the High Commissioner for Human Rights for rapid deployment to deteriorating human rights situations) and broadened the mandates of existing bodies (for example, by integrating human rights and international humanitarian law monitoring into peace operations led by the Department of Peace-Keeping Operations—UNSC 'Report of the Panel on United Nations Peace Operations' (21 August 2000) UN Doc A/55/305-S/2000/809 para 244—and expanding the Human Rights Council's special procedures for human rights monitoring and reporting and initiating the Universal Periodic Review process to assess human rights situations in each state). Accompanying these developments has been the proliferation of investigative and fact-finding commissions by the United Nations and regional bodies. Over the past twenty five years, the UN has conducted over thirty fact-finding missions. See generally, Rob Grace and Claude Bruderlein, 'HPCR Draft Working Paper: Building Effective Monitoring, Reporting and Fact-Finding Mechanisms' (Program on Humanitarian Policy and Conflict Research, Harvard University, April 2012) 1 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2038854> accessed 5 August 2015.

51 See pp 140–2 in Ch. 5.

52 PSVWG Interviews, on file with authors.

53 Ibid.

54 Ibid.

55 Ibid.

56 Ibid.

57 Ibid.

58 Ibid.

59 See pp 117–19 in Ch. 5.

60 See pp 114, 122 in Ch. 5.

61 See pp 111–30 in Ch. 5.

62 Statute of the ICTY, Adopted 25 May 1993 by UNSC Res 827 (25 May 1993) UN Doc S/RES/827, last amended 7 July 2009 by UNSC Res 1877 (7 July 2009) UN Doc S/RES/1877) art 1. The ICTY's mandate was relatively textually unrestrained when compared with subsequent courts and tribunals, such as the Special Court for Sierra Leone (SCSL), which had jurisdiction over 'persons bearing the greatest responsibility' (Statute of the SCSL, art 1(1)), and the Extraordinary Chambers of the Courts of Cambodia, which has jurisdiction over 'senior leaders of the Democratic Kampuchea and those … most responsible for crimes' (Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of the Democratic Kampuchea (27 October 2004) arts 1–2).

63 *Prosecutor v Duško Tadić*, ICTY-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) para 94(iii).

64 See e.g. ICTY Press Release, 'Statement by the Prosecutor following the withdrawal of charges against 14 accused' (8 May 1998) <http://www.icty.org/sid/7671> accessed 5 August 2015.

65 See Carla Del Ponte, 'Investigation and Prosecution of Large-Scale Crimes at the International Level: The Experience of the ICTY' (2006) 4 *JICJ* 539 (Del Ponte), 541–3.

66 PSVWG Interviews, on file with authors.

67 Ibid.

68 Richard J Goldstone, 'Prosecuting Rape as a War Crime' (2002) 34 *Case W Res JIL* 277 ('Goldstone, Prosecuting Rape as a War Crime'), 281; Frederiek de Vlaming, 'The Yugoslav Tribunal and the Selection of Defendants' (2012) 4(2) *Amsterdam L Forum* 89, 93.

69 PSVWG Interviews, on file with authors.

70 See Ch. 4.

71 Goldstone, 'Prosecuting Rape as a War Crime' (n 68) 281.

72 PSVWG Interviews, on file with authors.

73 *Prosecutor v Dragan Nikolić*, ICTY-94-2-I, Initial Indictment (4 November 1994).

74 PSVWG Interviews, on file with authors.

75 Ibid. Under Rule 61 of the ICTY Rules of Procedure and Evidence, where a warrant of arrest has not been executed within a reasonable time, a Trial Chamber could conduct a review of the evidence upon which the indictment was confirmed to determine whether there were reasonable grounds to believe the accused committed all or any of the crimes charged in the indictment and to issue an international arrest warrant. See ICTY Rules of Procedure and Evidence (adopted on 11 February 1994, last amended on 10 July 2015) (ICTY Rules) r 61.

76 *Prosecutor v Dragan Nikolić*, ICTY-94-2-R61, Testimony of Sead Ambešković (11 October 1995) transcript pp 410–11; *Prosecutor v Dragan Nikolić*, ICTY-94-2-R61, Testimony of Zehra Smajlović (13 October 1995) transcript pp 736–8.

77 *Prosecutor v Dragan Nikolić*, ICTY-94-2-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence (20 October 1995) (*Dragan Nikolić* Review of Indictment) para 33; Goldstone, 'Prosecuting Rape as a War Crime' (n 68) 281.

78 PSVWG Interviews, on file with authors.

79 *Prosecutor v Dragan Nikolić*, ICTY-94-2-PT, First Amended Indictment (12 February 1999).

80 See Annex B. For example, on 13 February 1995, Duško Tadić, a camp guard and low level perpetrator, was charged with sexual violence characterized as wilfully causing great suffering as a grave breach of the 1949 Geneva Conventions, torture, and cruel treatment as war crimes, and torture, and inhumane treatment as crimes against humanity. Germany arrested Duško Tadić and the OTP requested that his case be transferred to the ICTY before issuance of the Dragan Nikolić Indictment. On 24 July 1995, Radovan Karadžić and Ratko Mladić were charged with persecution as a crime against humanity for sexual violence.

81 Antonio Cassese, 'The ICTY: A Living and Vital Reality' (2004) 2 *JICJ* 585 (Cassese), 586; Claudia Angermaier, 'Case Selection and Prioritization Criteria in the Work of the International Criminal Tribunal for the Former Yugoslavia' in Morten Bergsmo (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases* (Torkel Opsahl Academic EPublisher 2010) (Angermaier) 29. See also ICTY Press Release, 'The Judges of the Tribunal for the former Yugoslavia express their concern regarding the substance of their programme of judicial work for 1995' (1 February 1995) <http://www.icty.org/sid/7251> accessed 5 August 2015; UNSC 'Letter dated 17 June 2002 from the Secretary-General addressed to the President of the Security Council', Annex Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts (19 June 2002) UN Doc S/2002/678 (Report

on the Judicial Status of the ICTY and the Prospects for Referring Certain Cases to National Courts) para 2.

82 Louise Arbour, 'The Crucial Years' (2004) 2(2) *JICJ* 396 (Arbour), 398; ICTY Press Release, 'Statement by Carla Del Ponte Prosecutor of the International Criminal Tribunal for the former Yugoslavia on the investigation and prosecution of crimes committed in Kosovo' (29 September 1999) <http://www.icty.org/sid/7733> accessed 5 August 2015; Del Ponte (n 65) 543. In 2001, Del Ponte expressed her hesitation at 'polarising accused into big fish and small fish' given some small fish 'played a very nasty role somewhere in between these two extremes'. ICTY Press Release, 'Address by the Prosecutor of the International Criminal Tribunal for the former Yugoslavia, Carla del Ponte, to the UN Security Council' (27 November 2001) (Press Release, Address by Carla del Ponte to UNSC) <http://www.icty.org/sid/7926> accessed 5 August 2015.

83 Angermaier (n 81) 31–3, citing Morten Bergsmo et al., *The Back-log of Core International Crimes Cases in Bosnia and Herzegovina* (2nd edn, Torkel Opsahl Academic EPublisher 2010) 99.

84 ICTY Press Release, 'Statement by the Prosecutor following the withdrawal of charges against 14 accused' (8 May 1998) <http://www.icty.org/sid/7671> accessed 5 August 2015. The remaining accused were prosecuted in *Prosecutor v Kvočka et al.*, ICTY-98-30/1 and *Prosecutor v Sikirica et al.*, ICTY-95-8.

85 Arbour (n 82) 398.

86 See e.g. *Prosecutor v Kvočka et al.*, ICTY-98-30/1-T, Trial Judgment (2 November 2001) (*Kvočka* Trial Judgment) paras 559–60 and *Prosecutor v Kvočka et al.*, ICTY-98-30/1-A, Appeal Judgment (28 February 2005) (*Kvočka* Appeal Judgment) paras 370, 393–410 (regarding accused Radić); *Kunarac* Trial Judgment (n 27) paras 630–87, 699–745 and *Prosecutor v Kunarac et al.*, ICTY-96-23&23/1-A, Appeal Judgment (12 June 2002) (*Kunarac* Appeal Judgment) paras 207–56 (regarding accused Kunarac); *Kunarac* Trial Judgment (n 27) paras 746–82 and *Kunarac* Appeal Judgment (n 86) paras 257–90 (regarding accused Kovač); *Kunarac* Trial Judgment (n 27) paras 811–17 and *Kunarac* Appeals Judgment (n 86) paras 308–13 (regarding accused Vuković); *Prosecutor v Delalić et al.*, ICTY-96-21-T, Trial Judgment (16 November 1998) (*Delalić* Trial Judgment) paras 936–43, 955–65 and *Prosecutor v Delalić et al.*, ICTY-96-21-A, Appeal Judgment (20 February 2001) (*Delalić* Appeal Judgment) paras 488–507 (regarding accused H. Delić).

87 PSVWG Interviews, on file with authors.

88 See p 39.

89 PSVWG Interviews, on file with authors.

90 See pp 202–9 in Ch. 6.

91 Patricia M Wald, 'The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court' (2001) 5 *JL & Pol* 87, 101; Cassese (n 81) 595; ICTY Press Release, 'Speech by his Excellency, Mr. Claude Jorda, President of the International Criminal Tribunal for the former Yugoslavia, to the UN Security-Council' (20 June 2000) <http://www.icty.org/sid/7842> accessed 5 August 2015. See also UNSC Res 1329 (5 December 2000) UN Doc S/RES/1329 preambular paras 7–8.

92 UNSC Presidential Statement 21 (2002) UN Doc S/PRST/2002/21; UN Press Release, 'Security Council Endorses Proposed Strategy for Transfer to National Courts of Certain Cases Involving Humanitarian Crimes in the Former Yugoslavia SC/7461 (23 July 2002);

Report on the Judicial Status of the ICTY and the Prospects for Referring Certain Cases to National Courts (n 81).

93 See further pp 55–60.

94 UNSC 'Letter Dated 24 May 1994 from the Secretary-General to the President of the Security Council' Addendum: Annexes to the Final Report of the Commission of Experts (27 May 1994) UN Doc S/1994/674 Established Pursuant to Security Council Resolution 780 (1992) Annex III.A on Special Forces' (27 May 1994) UN Doc S/1994/674/Annex III.A (vol I) (relevant excerpts comprise Exhibit P49 in the *Vasiljević* case) paras 245–7. See also Peter Maass, 'The Rapes in Bosnia: A Muslim Schoolgirl's Account' *The Washington Post* (Washington DC, 27 December 1992). This report, and others, were issued four years before the first indictment was confirmed against Milan and Sredoje Lukić in 1998, and more than ten years before the most recent amendment in 2006; *Prosecutor v Lukić and Lukić*, ICTY-98-32/1-PT, Prosecution Motion Seeking Leave to Amend the Second Amended Indictment (Public with Confidential Annexes) (16 June 2008) (*Lukić* Motion to Amend Second Indictment) paras 60 (fn 52), 62–4.

95 PSVWG Interviews, on file with authors. *Lukić* Motion to Amend Second Indictment (n 94) paras 18, 68.

96 *Lukić* Motion to Amend Second Indictment (n 94) para 18; *Prosecutor v Lukić and Lukić*, ICTY-98-32/1-PT, Prosecution Consolidated Reply on Amendment to the Second Amended Indictment and Rule 115 Motion, and Response to Milan Lukić's Request for Reconsideration or Certification to Appeal (3 July 2008) (*Lukić* Reply on Amendment to Second Indictment) para 48.

97 PSVWG Interviews, on file with authors.

98 Ibid.

99 *Prosecutor v Lukić and Lukić*, ICTY-98-32/1-PT, Decision on Prosecution Motion Seeking Leave to Amend the Second Amended Indictment and on Prosecution Motion to Include UN Security Council Resolution 1820 (2008) as Additional Supporting Material to Proposed Third Amended Indictment as well as on Milan Lukić's Request for Reconsideration or Certification of the Pre-Trial Judge's Order of 19 June 2008 (8 July 2008) (*Lukić* Decision on Motion to Amend Second Indictment) para 52; PSVWG Interviews, on file with authors; Patricia Viseur Sellers, 'Gender Strategy is not a Luxury for International Courts Symposium: Prosecuting Sexual and Gender-Based Crimes Before Internationalized Criminal Courts' (2009) 17(2) *AUJ Gender Soc Pol & L* 301, 319.

100 *Lukić* Motion to Amend Second Indictment (n 94) para 16.

101 PSVWG Interviews, on file with authors; *Lukić* Motion to Amend Second Indictment (n 94) para 16; *Lukić* Reply on Amendment to Second Indictment (n 95) para 41. See Annex A for a discussion of the evidence.

102 *Lukić* Motion to Amend Second Indictment (n 94) paras 42–3.

103 Ibid., paras 18, 68.

104 *Lukić* Decision on Motion to Amend Second Indictment (n 99) para 62.

105 Ibid., para 63.

106 *Lukić* Motion to Amend Second Indictment (n 94) paras 18, 39, 45–6, 48, 56–7, 66. The Prosecutor also cited Security Council Resolution 1820, in which the Security Council reaffirmed its commitment 'to eliminate all forms of violence against women and girls, including by ending impunity' and called upon states to ensure effective prosecution of

sexual violence (UNSC Res 1820 (19 June 2008) UN Doc S/RES/1820 p 1). The judges did not address the resolution.

107 *Lukić* Decision on Motion to Amend Second Indictment (n 99) paras 51–2, 60–2.

108 Ibid., paras 60–1.

109 *Prosecutor v Lukić and Lukić*, ICTY-98-32/1-T, Decision on Prosecution Motion for Certification to Appeal the Trial Chamber's Decision on Prosecution Motion to Amend the Second Amended Indictment (19 August 2008) para 18.

110 PSVWG Interviews, on file with authors.

111 *Prosecutor v Lukić and Lukić*, ICTY-98-32/1-T, Trial Judgment (20 July 2009) para 37.

112 Until the adoption of Rule 11*bis*, the President and Prosecutor expressed concern at leaving lower level perpetrators to be prosecuted by states in the region given their limited commitment to prosecuting conflict-related crimes, including the lack of suitable judicial processes available. See ICTY Press Release, 'Speech by his Excellency, Mr. Claude Jorda, President of the International Criminal Tribunal for the former Yugoslavia, to the UN Security-Council' (20 June 2000) <http://www.icty.org/sid/7842> accessed 6 August 2015; Press Release, Address by Carla del Ponte to UNSC (n 82). See also pp 346–54 in Ch. 10.

113 See *Prosecutor v Lukić and Lukić*, ICTY-98-32/1-AR11*bis*.1, Decision on Milan Lukić's Appeal Regarding Referral (11 July 2007) paras 22, 25–6. The Prosecutor subsequently applied to revoke the Referral Bench's decision to transfer the case against Sredoje Lukić given the links between the Milan Lukić and Sredoje Lukić cases, the impact upon witnesses of conducting two separate trials and the risk of judicial inconsistency arising from two separate judgements. This request was granted. See *Prosecutor v Lukić and Lukić*, ICTY-98-32/1-PT, Decision on Prosecutor's Request Pursuant to Rule 11*bis*(F) with Regard to Sredoje Lukić and Incorporated Decision Vacating Scheduling Order (20 July 2007). See also PSVWG Interviews, on file with authors.

114 Ibid.

115 Ibid.

116 Ibid. See also p 44.

117 See further pp 182–3 in Ch. 6.

118 PSVWG Interviews, on file with authors.

119 Ibid.

120 Ibid.

121 Ibid.

122 See Annex B (*Prosecutor v Đorđević*; *Prosecutor v Milutinović*; *Prosecutor v Haradinaj*).

123 See Gabriela Mischkowski and Gorana Mlinarević, *The Trouble with Rape Trials – Views of Witnesses, Prosecutors and Judges on Prosecuting Sexualised Violence During the War in the former Yugoslavia* (Medica Mondiale 2009) (Mischkowski and Mlinarević) 30–1.

124 Ibid., 32.

125 See p 95 in Ch. 4 and pp 151–2 in Ch. 5.

126 See Annex B.

127 See *Prosecutor v Kunarac et al.*, ICTY-96-23-PT, Amended Indictment (8 November 1999); *Prosecutor v Vuković*, ICTY-96-23/1-PT, Amended Indictment (5 October 1999); Kuo (n 15) 312. The indictments against two of the other accused (Janković and Stanković) were transferred to authorities in the former Yugoslavia, and the other accused originally forming part of the Foča indictment either pleaded guilty (Zelenović) or died (Gagović and Janić). Investigative information about sexual violence crimes was provided to national authorities (Category II cases) and some convictions resulted. For example, information relating to sexual violence committed in Vojno assisted a successful prosecution in BiH. See pp 346–54 in Ch. 10 for a further discussion of Rule 11*bis* and Category 2 cases.

128 See pp 136–8 in Ch. 5.

129 PSVWG Interviews, on file with authors.

130 See p 61.

131 PSVWG Interviews, on file with authors.

132 Ibid. See e.g. Human Rights Watch, Women's Rights Division, 'Kosovo: Rape as a Weapon of "Ethnic Cleansing"' (1 March 2000) <https://www.hrw.org/report/2000/03/01/kosovo-rape-weapon-ethnic-cleansing> accessed 17 August 2015.

133 PSVWG Interviews, on file with authors. *Prosecutor v Slobodan Milošević*, ICTY-99-37-PT, Second Amended Indictment (Kosovo) (16 October 2001) (*Slobodan Milošević* Second Amended Indictment (Kosovo)) Count 5.

134 Richard Goldstone, 'The United Nations War Crimes Tribunals: An Assessment' (1997) 12(2) *Connecticut JIL* 227, 231. See also *Prosecutor v Duško Tadić*, ICTY-94-1-D, An Application for Deferral by the Federal Republic of Germany in the Matter of Duško Tadić also Known by the Names Dušan 'Dule' Tadić (11 October 1994) annex 'MK 1' para 5.7; *Prosecutor v Duško Tadić*, ICTY-94-1-D, Deferral Hearing (8 November 1994) (*Tadić* Deferral Hearing) transcript p 7; *Prosecutor v Duško Tadić*, ICTY-94-1-T, Brief Amici Curiae of Jacob Blaustein Institute for the Advancement of Human Rights of the American Jewish Committee, Center for Constitutional Rights, International Women's Human Rights Law Clinic of the City University of New York, Women Refugees Project of the Harvard Immigration and Refugee Program and Cambridge and Somerville Legal Services, on the Motion of the Prosecutor Requesting Protective Measures for Victims and Witnesses (19 June 1995); Rhonda Copelon, 'Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law' (2000) 46 *McGill LJ* 217, 229–30.

135 *Tadić* Deferral Hearing (n 134) transcript pp 27–8. That same month the Prosecutor wrote to Rhonda Copelon, Felice Gaer, and Jennifer Green, from the International Human Rights Law Clinic and the Harvard Human Rights Program concurring with their comments as to the characterization of rape. Letter from Justice Richard Goldstone, Prosecutor, to Rhonda Copelon, Felice Gaer, and Jennifer Green, dated 22 November 1994, cited in Rhonda Copelon, 'Surfacing Gender: Reconceptualizing Crimes against Women in Time of War' in Alexandra Stiglmayer (ed.), *Mass Rape: The War Against Women in Bosnia and Herzegovina* (University of Nebraska Press 1994) 253–4, fn 46.

136 *Prosecutor v Duško Tadić*, ICTY-94-1-I, Indictment (13 February 1995) paras 4.1–4.4—wilfully causing great suffering (grave breach), cruel treatment (war crime), and rape (crime against humanity).

137 Ibid., paras 5.1, 5.23–5.25, 5.29–5.31, 5.32–5.34 (torture, inhuman treatment, cruel treatment, and inhumane acts as grave breaches of the 1949 Geneva Conventions, war crimes, and crimes against humanity).

138 *Prosecutor v Duško Tadić*, ICTY-94-1-I, Indictment (Amended) (14 December 1995) paras 4.2–4.3 (persecution).

139 *Prosecutor v Češić*, ICTY-95-10/1-S, Sentencing Judgment (11 March 2004) (*Češić* Sentencing Judgment) paras 4, 13–14.

140 *Prosecutor v Plavšić*, ICTY-00-39&40/1-S, Sentencing Judgment (27 February 2003) (*Plavšić* Sentencing Judgment) paras 5, 8 and Corrigendum to Sentencing Judgment (18 March 2003) p 2; *Prosecutor v Plavšić*, ICTY-00-39&40-PT, Amended Consolidated Indictment (7 March 2002) para 19 and sch C; *Prosecutor v Stanišić and Župljanin*, ICTY-08-91-T, Trial Judgment (27 March 2013) (*Stanišić and Župljanin* Trial Judgment) vol 1 paras 1087–8, 1106.

141 *Češić* Sentencing Judgment (n 140) paras 4, 13–14.

142 Ibid., paras 70–3, 76.

143 See ICTY Witness Statistics <http://icty.org/sid/10175> accessed 6 August 2015.

144 *Delalić* Trial Judgment (n 86) paras 1039–40, 1065–6, 1275.

145 Ibid., paras 1039–40, 1047, 1065–6, 1237, 1285. Further, the OTP did not charge some sexual violence crimes, such as forced pregnancy, despite documentation of the crime by the Commission of Experts and relevant evidence emerging in some ICTY cases. See pp 328–9 in Ch. 9. See also UNSC 'Letter Dated 24 May 1994 from the Secretary-General to the President of the Security Council' (27 May 1994) UN Doc S/1994/674 Annex: Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) paras 248, 250(b); UNSC 'Letter Dated 24 May 1994 from the Secretary-General to the President of the Security Council' Addendum: Annexes to the Final Report of the Commission of Experts (27 May 1994) UN Doc S/1994/674 Established Pursuant to Security Council Resolution 780 (1992) Annexes IX to XII UN Doc S/1994/674/Add.2 (vol V) Annex IX: Rape and Sexual Assault para 15; *Prosecutor v Brđanin*, ICTY-99-36-T, Trial Judgment (1 September 2004) (*Brđanin* Trial Judgment) para 1011 (relying on use of pejorative language used by perpetrators, including a remark to a Bosnian Muslim woman that she would 'give birth to a little Serb' when finding that rapes constituted persecution); *Kunarac* Trial Judgment (n 27) paras 583, 654. Some types of sexual violence against males were also not prosecuted, such as being forced to run a gauntlet naked.

146 This part focuses on crimes charged, rather than modes of liability, since the former was the OTP's main area of focus, particularly in the early years, and since we ordinarily charged accused under every mode of liability. For discussion of modes of liability, see Ch. 7.

147 See Ch. 6.

148 PSVWG Interviews, on file with authors.

149 Ibid. See *Dragan Nikolić* Review of Indictment (n 77) para 33.

150 It also provided a way to capture many criminal acts in one charge.

151 See *Prosecutor v Karadžić and Mladić*, ICTY-95-5-I, Initial Indictment (24 July 1995) Counts 1-2; *Prosecutor v Karadžić*, ICTY-95-5/18-PT, Third Amended Indictment (27 February 2009) (*Karadžić* Third Amended Indictment) Counts 1, 3, 7, 8; *Prosecutor v Mladić*, ICTY-09-92-PT, Fourth Amended Indictment (16 December 2011) (*Mladić* Fourth Amended Indictment) Counts 1, 3, 7, 8.

152 See *Prosecutor v Slobodan Milošević*, ICTY-02-54-T, Amended Indictment (22 November 2002) Counts 1, 2, 3, 9, 10, 12–15.

153 For example, in *Karadžić* and *Mladić*, the OTP included separate counts for murder even though murder formed an underlying act of genocide and persecution. *Karadžić* Third Amended Indictment (n 151) Counts 5–6; *Mladić* Fourth Amended Indictment (n 151) Counts 5–6. See also Annex B.

154 PSVWG Interviews, on file with authors. See also Susana SáCouto, 'Advances and Missed Opportunities in the International Prosecution of Gender-Based Crimes' (2007) 10(1) *Gonzaga JIL* 49, 52.

155 Michelle Jarvis and Elena Martin Salgado, 'Future Challenges to Prosecuting Sexual Violence under International Law: Insights from ICTY Practice' in Anne-Marie de Brouwer (ed.), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia 2013) 107. The *Milutinović et al*. and *Đorđević* cases are illustrative of this point, insofar as the Trial Chambers found that the OTP failed to prove the discriminatory intent required for persecution. See pp 208–9 in Ch. 6.

156 See pp 7–8 at Ch. 1.

157 Compare the *Mrkšić et al*. case, where the OTP charged sexual assault as persecution (Count 1) and as torture and inhumane treatment as war crimes (Counts 7 and 8 respectively). The Trial Chamber found persecution was not proved because the chapeau requirements for crimes against humanity were not made out. *Prosecutor v Mrkšić et al.*, ICTY-95-13/1-T, Trial Judgment (27 September 2007) (*Mrkšić* Trial Judgment) para 484. However, the Trial Chamber continued to consider whether the accused were liable for sexual violence as inhumane treatment (as well as torture), albeit ultimately finding insufficient evidence was presented to prove the crimes occurred. Ibid., paras 529, 539, 629, 632, 674, 710–16; *Prosecutor v Mrkšić et al.*, ICTY-95-13/1, Consolidated Amended Indictment (9 February 2004) para 46. See also *Mrkšić* Trial Judgment (n 157) para 520; *Prosecutor v Mrkšić et al.*, ICTY-95-13/1-PT, Third Consolidated Amended Indictment (15 November 2004) para 41.

158 In particular, genocide (Counts 1–2) persecutions (Count 3), extermination (Count 4), murder (Counts 5–6), deportation (Count 7), inhumane acts (forcible transfer) (Count 8), acts of violence the primary purpose of which is to spread terror among the civilian population (Count 9), unlawful attacks on civilians (Count 10), and taking of hostages (Count 11).

159 See pp 274–5 in Ch. 8.

160 PSVWG Interviews, on file with authors.

161 *Slobodan Milošević* Second Amended Indictment (Kosovo) (n 133) (5 counts); *Prosecutor v Slobodan Milošević*, ICTY-02-54-T, Second Amended Indictment (Croatia) (28 July 2004) (32 counts); *Prosecutor v Slobodan Milošević*, ICTY-02-54-T, Amended Indictment (Bosnia) (22 November 2002) (*Slobodan Milošević* Amended Indictment (Bosnia)) (29 counts).

162 *Prosecutor v Slobodan Milošević*, ICTY-02-54 (July 25 2002) transcript pp 8610–11. See also *Prosecutor v Slobodan Milošević*, ICTY-02-54-AR73, Reasons for Refusal of Leave to Appeal from Decision to Impose Time Limit (Appeals Chamber) (16 May 2002) para 2.

163 *Prosecutor v Slobodan Milošević*, ICTY-02-54, OTP submissions (25 July 2002) transcript pp 8614–15 (The OTP noted that it was able to present its Kosovo case in under 100 hours in part by 'reviewing witness lists and … cutting witnesses whenever possible and cutting the evidence from particular witnesses whenever possible.'); Dermot M. Groome, 'Re-Evaluating the Theoretical Basis and Methodology of International Criminal Trials' (2007) 25(4) *Penn State Intl L Rev* 791 (Groome), 792.

164 Compare *Prosecutor v Slobodan Milošević*, ICTY-02-54-T, Initial Indictment (Bosnia) (22 November 2001) with *Slobodan Milošević* Amended Indictment (Bosnia) (n 161).

165 PSVWG Interviews, on file with authors.

166 ICTY Press Release, 'Statement by Tribunal's Prosecutor Carla Del Ponte to the Security Council' (7 June 2006) <http://www.icty.org/x/file/Press/PR_attachments/p1085e-annex.htm> accessed 6 August 2015.

167 See *Prosecutor v Mladić*, ICTY-09-92-PT, Third Amended Indictment (20 October 2011) para 47; *Mladić* Fourth Amended Indictment (n 151) para 47.

168 See *Prosecutor v Karadžić*, ICTY-95-5/18-PT, Prosecution's Second Amended Indictment (18 February 2009) para 48; *Karadžić* Third Amended Indictment (n 151) para 48.

169 For a discussion of adjudicated facts, see pp 129–30 in Ch. 5, p 319 in Ch. 9, and pp 370–1 in Ch. 10.

170 PSVWG Interviews, on file with authors.

171 Although this discussion is placed in the section on pre-trial pressures, guilty plea negotiations may occur at any stage of the trial.

172 For example, in BiH, some courts have determined that evidence of sexual violence victims should be led in closed session to protect the 'intimate life' of accused persons pursuant to Article 235 of the Criminal Procedure Code of Bosnia and Herzegovina. Article 235 provides that the public can be excluded from a trial 'if it is to protect the public peace and order, to preserve morality in the democratic society, to protect the personal and intimate life of the accused or the injured or to protect the interest of a minor or a witness'. In the trial against Marijan Brnjić, Martin Barukčić, Pavo Glavaš, and Ilija Glavaš, the Chamber determined that the testimony of a sexual violence victim would be partially closed to the public to protect the intimate life of the four defendants despite the fact that the victim wanted to testify in public. The trial is ongoing. See Albina Sorguč, 'Bosnian Court Protects Defendants' Intimate Life' (*Justice Report*, 11 November 2014) <http://www.justice-report.com/en/articles/bosnian-court-protects-war-crime-defendants-intimate-life> accessed 13 April 2015; Denis Džidić and Albina Sorguč, 'Bosnian Court Criticised for Shielding Sex-Case Indictees' (*Balkan Transitional Justice*, 8 January 2015) <http://www.balkaninsight.com/en/article/bosnian-court-favours-defendant-over-victim-s-rights/1455/6> accessed 13 April 2015. See further *Prosecutor v Sam Hinga Norman et al.*, SCSL-04-14-PT, Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe (24 May 2005) para 78(vi) (commenting that the sexual violence evidence the Prosecution seeks to admit is prejudicial to the accused because it 'is … of a nature to cast a dark cloud of doubt on the image of innocence that the Accused enjoys under the law until the contrary is proved'); Valerie Oosterveld, 'The Influence of Domestic Legal Traditions on the Gender Jurisprudence of International Criminal Tribunals' (2013) 2(4) *Cambridge J Intl & Comp L* 825, 840–1; Marija Taušan, 'International Prosecutor Jallow: Admitting Genocide Easier Than Rape' *Justice Report* (Sarajevo, 3 July 2015) <http://www.justice-report.com/en/articles/international-prosecutor-hassan-jallow-admitting-genocide-easier-than-rape> accessed 8 July 2015 (stating that '[i] n guilty plea negotiations, even though sexual violence was widespread, none of those who pleaded guilty agreed to plead guilty to sexual violence. They rather pleaded guilty to genocide').

173 Of a total of twenty plea agreements, only two were concluded prior to 2000, both involving sexual violence charges: *Prosecutor v Todorović et al.*, ICTY-95-9 and *Prosecutor v Milan Simić*, ICTY-95-9/2. Eight pleas were agreed in 2003, of which three involved sexual violence charges: *Prosecutor v Banović et al.*, ICTY-02-65, *Prosecutor v Češić*, ICTY-95-10/1,

and *Prosecutor v Dragan Nikolić*, ICTY-94-2. The last guilty plea, which involved sexual violence charges, was entered in 2006: *Prosecutor v Zelenović*, ICTY-96-23/2.

174 *Plavšić* Sentencing Judgment (n 140) paras 5, 27, 29, 34, 120; *Prosecutor v Dragan Nikolić*, ICTY-94-2-S, Sentencing Judgment (18 December 2003) paras 36, 117–8; *Prosecutor v Zelenović*, ICTY-96-23/2-S, Sentencing Judgment (4 April 2007) (*Zelenović* Sentencing Judgment) paras 10–13; *Prosecutor v Bralo*, ICTY-95-17-S, Sentencing Judgment (7 December 2005) para 3; *Češić* Sentencing Judgment (n 140) paras 8, 13–14; *Prosecutor v Rajić*, ICTY-95-12-S, Sentencing Judgment (8 May 2006) (*Rajić* Sentencing Judgment) paras 13, 48–9, 53; *Prosecutor v Milan Simić*, ICTY-95-9/2-S, Sentencing Judgment (17 October 2002) paras 10–11; *Prosecutor v Todorović*, ICTY-95-9/1-S, Sentencing Judgment (31 July 2001) (*Todorović* Sentencing Judgment) paras 5, 9, 12, 17, 36–40; *Prosecutor v Sikirica et al.*, ICTY-95-8-S, Sentencing Judgment (13 November 2001) paras 18, 22, 125.

175 For example, in *Zelenović*, war crimes charges were dropped in favour of torture and rape as crimes against humanity (*Zelenović* Sentencing Judgment (n 174) para 13 and *Prosecutor v Zelenović*, ICTY-96-23/2-S, Prosecution's Submissions Regarding Withdrawal of Charges (17 January 2007) paras 3, 5); in *Todorović*, a range of crimes against humanity and war crimes were dropped in favour of persecution as a crime against humanity (*Todorović* Sentencing Judgment (n 174) paras 5, 9, 12, 17, 36–40; *Prosecutor v Simić et al.*, ICTY-95-9, Second Amended Indictment (11 December 1998)); and in *Rajić* outrages upon personal dignity as a war crime was dropped in favour of inhumane treatment as a Grave Breach of the Geneva Conventions—*Rajić* Sentencing Judgment (n 174) para 13; also paras 48–9, 53; *Prosecutor v Rajić*, ICTY-95-12-PT, Amended Indictment (13 January 2004).

176 See e.g. *Zelenović* Sentencing Judgment (n 174) paras 10–12.

177 The OTP dropped sexual violence charges against Predrag Banović altogether but retained the persecution charge for murder and beatings in which he directly participated in the Keraterm camp: *Prosecutor v Banović et al.*, ICTY-02-65-PT, Joint Motion for the Consideration of a Plea Agreement between Predrag Banović and the Office of the Prosecutor and Annex 1 (Factual Basis of Plea Agreement) (2 June 2003) (filed 18 June 2003); *Prosecutor v Banović*, ICTY-02-65/1-S, Sentencing Judgment (28 October 2003) para 6. The remaining seven accused who pleaded guilty were not charged with sexual violence.

178 PSVWG Interviews, on file with authors.

179 Ibid.

180 See pp 99–100 in Ch. 4.

181 *Prosecutor v Prlić et al.*, ICTY-04-74-T, Trial Judgment (29 May 2013) vol 3 paras 1665–6 (no evidence of sexual violence at Vojno was led even though it was charged and investigators had obtained statements from Vojno rape victims. These rapes were prosecuted and led to convictions at the BiH state court: see pp 355–6 in Ch. 10); *Milutinović* Trial Judgment (n 30) vol 2 paras 287, 730 (no evidence was led regarding sexual violence in Prizren or Kosovska Mitrovica/Mitrovicë despite having charged it and the accused were acquitted of these crimes); *Đorđević* Trial Judgment (n 30) para 1795 (similar to *Milutinović et al.*). See also *Prosecutor v Duško Tadić*, ICTY-94-1-T, Trial Judgment (7 May 1997) paras 398, 427—the Prosecution failed to present any evidence to substantiate the charge of persecution for sexual violence crimes in Omarska camp (as alleged in paragraph 4.2 of the Indictment) it found the accused was responsible for.

182 Groome (n 163) 792.

183 PSVWG Interviews, on file with authors.

184 Rule 98*bis* of the ICTY Rules (n 75) provides: 'At the close of the Prosecutor's case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction.'

185 *Prosecutor v Slobodan Milošević*, ICTY-02-54-T, Decision on Motion for Judgment of Acquittal (16 June 2004) paras 81–2, 116, 309–16, schs A-F.

186 For example, prosecutors at the SCSL successfully relied on the expert evidence of Beth Vann to prove widespread rape in Kono District in the *Taylor* case. Vann conducted research by interviewing victims of sexual violence and conducting focus group sessions in refugee camps, which she used to compile statistics on victims of sexual violence and the identities of the perpetrators. While her survey was not sufficient to prove any individual instances of rape, it demonstrated that rape was committed on a widespread basis in the area and may be relevant as corroboration for specific instances of rape described by witnesses testifying before the Trial Chamber. See *Prosecutor v Taylor*, SCSL-03-01-T, Judgment (18 May 2012) para 885. For a discussion of expert evidence, see pp 152–5 in Ch. 5.

187 See pp 127–9 in Ch. 5.

188 See pp 121, 127–8 in Ch. 5.

189 See pp 129–30 in Ch. 5.

190 See p 77 in Ch. 4.

191 The OTP appealed the *Delalić et al*. Trial Chamber's finding that Delalić did not have superior responsibility on the basis that it made an error of law with respect to the superior-subordinate relationship and alternatively that the *Delalić et al*. Trial Chamber erred in refusing to admit rebuttal evidence relevant to the accused's superior responsibility for sexual violence crimes. *Delalić* Appeal Judgment (n 86) paras 242–5. The appeal was dismissed. Ibid., paras 267, 293.

192 In *Stanišić and Simatović*, no convictions resulted despite findings of sexual violence underlying charges of deportation and forcible transfer because the Trial Chamber found that the *mens rea* for the JCE to forcibly and permanently remove the majority of non-Serbs from large areas of Croatia and BiH through the commission of crimes including sexual violence (as persecution) had not been proved. *Prosecutor v Stanišić and Simatović*, ICTY-03-69-T, Trial Judgment (30 May 2013) vol 2 paras 2354, 2336. The Prosecution has appealed the Trial Chamber's finding that the accused were not JCE members, implicitly also appealing the forced displacement acquittals. See *Prosecutor v Stanišić and Simatović*, ICTY-03-69-A, Prosecution Appeal Brief (25 September 2013) ground 1.

193 See *Đorđević* Trial Judgment (n 30) para 1151; *Đorđević* Appeal Judgment (n 30) para 866.

194 Ibid., paras 832, 1792. See pp 150–1 in Ch. 5 for more detail.

195 See e.g. *Kvočka* Trial Judgment (n 86) para 574 (noting that some allegations charged in the Amended Indictment were not addressed or established at trial); *Mrkšić* Trial Judgment (n 157) para 529 (noting that there was no evidence to establish that Markobašić was sexually abused before she was killed); *Brđanin* Trial Judgment (n 145) paras 755, 761, fn 1855 (noting that 'references in the Prosecution Final Brief contain no information on these events. The Trial Chamber has been unable to find any indication of these events in the evidence.'). See also *Stanišić and Župljanin* Trial Judgment (n 140) vol 1 paras 170–93

(detailing horrendous living conditions, severe mistreatment, and killings at Manjača camp, with no mention of sexual violence).

196 For example, in *Delić*, the Trial Chamber disregarded sexual assaults that occurred at the Vatrostalna facility because the indictment had alleged that these acts were perpetrated at a different location (the Kamenica camp, prior to the victims' transfer to Vatrostalna). *Prosecutor v Rasim Delić*, ICTY-04-83-PT, Amended Indictment (14 July 2006) para 48; *Prosecutor v Rasim Delić*, ICTY-04-83-T, Trial Judgment (15 September 2008) (*Delić* Trial Judgment) paras 315–20.

197 The *Haradinaj et al*. case was subject to two trials, a first instance trial and a re-trial conducted upon the Appeals Chamber's order following its finding that the Trial Chamber's failure to appropriately deal with witness intimidation undermined the fairness of the proceedings and resulted in a miscarriage of justice. *Prosecutor v Haradinaj et al.*, ICTY-04-84-A, Appeal Judgment (19 July 2010) paras 49–50.

198 *Prosecutor v Haradinaj et al.*, ICTY-04-84, Trial Judgment (3 April 2008) para 469. See also *Prosecutor v Haradinaj et al.*, ICTY-04-84-A, Notice of Filing of Public Redacted Version of Prosecution Appeal Brief (17 July 2008) Ground 3.

199 Ibid., para 170.

200 *Prosecutor v Sam Hinga Norman et al.*, SCSL-04-14-PT, Decision on the Prosecution Request for Leave to Amend the Indictment (20 May 2004) para 84. See also paras 10, 58, 83, 85–7. The Prosecution had argued that the witnesses were reluctant to come forward earlier and that the amendments would not prejudice the expeditiousness of the trial because its commencement date had not yet been set: paras 10(c), 21. But see *Prosecutor v Sam Hinga Norman et al.*, SCSL-04-14-PT, Dissenting Opinion of Judge Pierre Boutet on the Decision on Prosecution Request for Leave to Amend the Indictment (31 May 2004) paras 24–5, 26, 34–41. The Prosecution's application for leave to appeal the decision was rejected: *Prosecutor v Sam Hinga Norman et al.*, SCSL-04-14-T, Majority Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave To Amend the Indictment Against Samuel Hinga Norman, Moinina Fofana, and Allieu Kondewa (2 August 2004) paras 33, 38–9.

201 The Women's Initiatives for Gender Justice, for example, criticized the ICC for withdrawing their appeal in the *Katanga* case, which involved sexual violence charges. See Women's Initiatives for Gender Justice, 'Appeals Withdrawn by Prosecution and Defence: *The Prosecutor vs Germain Katanga*' (26 June 2014).

202 See ICTR Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions (2014) Annex B <http://www.unictr.org/en/documents/best-practices-manuals-and-conference-reports> accessed 6 August 2015, referring to *Prosecutor v Bisengimana*, ICTR-00-60-S, Judgment and Sentence (13 April 2006) paras 7, 209, 219, 228–9, 231; *Prosecutor v Nzabirinda*, ICTR-2001-77-T, Sentencing Judgment (23 February 2007) paras 3–4, 41; *Prosecutor v Rugambarara*, ICTR-0059-T, Sentencing Judgment (16 November 2007) paras 2–3 and *Prosecutor v Rugambarara*, ICTR-0059-I, Decision on the Prosecution Motion to Amend the Indictment (28 June 2007) paras 2, 9; *Prosecutor v Serushago*, ICTR-98-39-S, Sentence (5 February 1999) para 4; *Prosecutor v Serushago*, ICTR-98-39-T, Decision Relating to a Plea of Guilty (14 December 1998).

203 See e.g. *Prosecutor v Nchamihigo*, ICTR-01-63, Judgment and Sentence (12 November 2008) paras 221, 361 (on the charge of genital mutilation).

204 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute) art 61(9). See also *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Confirmation of Charges (29 January 2007) paras 155–6; *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-915, Decision on the Prosecution and Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges (24 May 2007) paras 21, 43; War Crimes Research Office, Washington College of Law, American University, *The Confirmation of Charges Process at the International Criminal Court* (WCRO Report 5, October 2008) 73–5.

205 For example, throughout the *Lubanga* trial, the Prosecutor and the legal representatives of victims made several attempts to correct the absence of sexual violence charges in the DCC, but the Chamber ultimately found that the Prosecution's failure to charge sexual violence in the DCC meant it would not make 'any findings of fact on the issue'. *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute (14 March 2012) para 896; *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, Prosecution's Closing Brief (1 June 2011) para 10. See also *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on Sentence Pursuant to Article 76 of the Statute (10 July 2012) para 75. Following one of these attempts by the victim participants, the Appeals Chamber determined that Regulation 55 cannot be used to alter the legal characterization of the facts by 'exceed[ing] the facts and circumstances described in the charges'. *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2205, Judgment on the Appeals of Mr. Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court' (8 December 2009) para 1; see also paras 57–9. For other cases in which pre-trial chambers have declined to confirm charges without appeal, see *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (15 June 2009) paras 209, 291–4, p 185; *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-532, Decision on Prosecutor's Application for Leave to Appeal the 'Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo' (18 September 2009) paras 12, 70, 83, 86. Pre-trial chambers have also refused to confirm sexual violence charges in other cases, based on a lack of evidence. See e.g. *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-717, Decision on the Confirmation of Charges (30 September 2008) paras 570–2, 577, p 211. In *Katanga and Ngudjolo*, Judge Ušacka issued a separate opinion stating that she would have adjourned the hearing and requested the Prosecutor to provide further evidence. *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-717, Decision on the Confirmation of Charges: Partly Dissenting Opinion of Judge Anita Ušacka (30 September 2008) para 29. See also Women's Initiatives for Gender Justice, 'Gender Report Card on the International Criminal Court 2011' (November 2011) 125–8 <http://www.iccwomen.org/publications/> accessed 16 April 2015.

5

Proving Crimes of Sexual Violence

Priya Gopalan, Daniela Kravetz, and Aditya Menon[1]

A. Introduction

Successful outcomes for sexual violence prosecutions depend upon effective contributions from many different actors throughout the legal process. Victims play a key role and are at the heart of many sexual violence prosecutions. As each victim is impacted differently by sexual violence, the Office of the Prosecutor (OTP) has been guided by a witness-centred approach, tailored to the needs of each individual. Working alongside the ICTY's Victim and Witness Section (VWS) our lawyers, investigators, interpreters, and support staff have sought to create an enabling environment allowing victims to provide the best possible evidence. The process of ensuring such an environment begins well before the witness enters the courtroom and continues long after the victim leaves the courtroom. The roles played by prosecutors in eliciting evidence and by judges in controlling the trial process, while safeguarding the interests of the victim and the accused, are particularly important.

A witness centred trial preparation can enhance the willingness of witnesses to testify and their ability to do so effectively.[2] This requires that investigators and prosecutors gain the trust of victims, understand their trauma, avoid making assumptions about the victim, and help them focus on their strength.

In the course of proving its sexual violence cases, the OTP has had to navigate many evidentiary challenges specific to these types of crimes. While evidentiary issues play a crucial role in any criminal case, they take on additional dimensions in sexual violence cases because of the common assumption that victims are unwilling to speak about their experiences due to the stigma that often attaches to these crimes. Stereotypes and myths about victims of sexual violence can also create unique evidentiary barriers that infiltrate the courtroom and undermine their evidence. Victim evidence is often seen as unreliable and the crimes against them as too difficult to pursue. Our experience, however, has been different, and underscores that victims often want to testify and that these challenges can be overcome. Our success in sexual violence cases has depended on creating the right conditions to bring forward evidence.

[1] Grace Harbour provided assistance with the section on documentary evidence in this chapter.

[2] See International Criminal Tribunal for Rwanda (ICTR), Prosecution of Sexual Violence Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions (30 January 2014) <http://www.unictr.org/en/documents/best-practices-manuals-and-conference-reports> accessed 18 August 2015 (ICTR Best Practices Manual on Sexual Violence Crimes).

Our work has been greatly facilitated by the adoption of a specialized procedural framework to address the unique evidentiary challenges of proving sexual violence crimes. Rule 96 of the ICTY Rules of Procedure and Evidence (ICTY Rules),[3] a pioneering procedural rule on conflict-related sexual violence, spearheaded our efforts to combat discriminatory trial tactics that exploit gender stereotypes and myths. In the early cases involving accused who were physical perpetrators, aspects of the rule addressing issues such as corroboration, consent, and prior sexual conduct were particularly important. While we had many successes in these cases, with hindsight, we can see room for more vigilance and decisiveness in addressing the evidentiary and procedural challenges that arose.

As we came to prosecute higher-level accused, different issues came to the forefront. We made greater use of written evidence such as witness statements and transcripts of prior victim testimony, as well as adjudicated facts from earlier ICTY cases. These modalities of evidence have been useful in ensuring that victims who previously testified were not re-traumatized by having to give oral evidence again, but also brought challenges of their own.

Overall we have found that, while victims are an important source of evidence in sexual violence cases, diversifying our sources of evidence has improved our ability to secure sexual violence convictions. In this regard we believe the evidence of non-victim witnesses and experts, as well as documentary and forensic evidence, must not be overlooked and there is scope to improve upon our approach to these sources in the future.

B. Victim Evidence

Victims have played a prominent role in establishing charges of sexual violence in our cases.[4] It takes courage and strength for sexual violence victims to testify. Without victims coming forward to speak to investigators and then testify, a court's capacity to bring justice and end impunity will be impaired.

Referring to the victims in the *Kunarac et al.* case, former ICTY prosecutor Peggy Kuo explained:

> Sometimes people will talk about how the women were humiliated. But I always try to turn that around and say, 'The perpetrators tried to humiliate them and they tried to take away their human dignity. But the people who came and testified were able to maintain their dignity. And they didn't let the perpetrators take their humanity away from them. So yes, in one sense they were victims, but in another sense, they were the strong ones. They survived.'[5]

[3] ICTY Rules of Procedure and Evidence (adopted on 11 February 1994, last amended on 10 July 2015) (ICTY Rules).

[4] See Patricia Wald, 'Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal' (2002) 5 *Yale HRDLJ* 217, 219. While the tribunals in Nuremberg and Tokyo relied primarily on documentary evidence, the modern international tribunals have made extensive use of victim and witness testimonies to establish the facts. See Richard May, 'The Collection and Admissibility of Evidence and the Rights of the Accused' in Mark Lattimer and Philippe Sands (eds.), *Justice for Crimes against Humanity* (Hart Publishing 2003) 161, 165.

[5] PBS documentary, 'I came to testify' in *Women, War & Peace in Bosnia Series* (11 October 2011) (PBS documentary, 'I came to testify') 31.16 <https://www.youtube.com/watch?v=ayMCtiVzG2s /> accessed 7 September 2015.

An important step in this process is clarifying the victim's expectations of the judicial process, explaining what testifying will involve and giving victims an opportunity to decide for themselves whether they want to come forward. Ultimately, victims must be allowed to make the decision to cooperate when they are fully ready.[6] Former ICTY research officer Tej shree Thapa described the courage of the victims who testified at the *Kunarac et al.* trial:

> These women did it. They did it. For me they are heroes. I am so in awe of their fight, of their having done what they did. Of facing up to their demons and, you know, just refusing to back down from it. For me, it always is still about them.[7]

1. Testifying about crimes of sexual violence

The experience of testifying about traumatic violent incidents can impact victims differently. Some may find it aids their recovery process. Others may be retraumatized. In light of the varying motivations, needs, and expectations of victims, it falls on investigators, prosecutors, and others involved in the judicial process to assess the individual needs of victims, and tailor their treatment of victims to meet those needs.[8]

Each victim will have his or her own reasons for testifying. Some have come to the ICTY seeking justice, or public recognition of their suffering.[9] Others have come with the hope that no other person would have to suffer as they did,[10] or felt compelled by a 'moral duty' to speak for those who did not survive.[11] While some victims have been willing witnesses, others have been reluctant and required encouragement. The reasons preventing victims from coming forward are personal and varied. Some victims may be unwilling to give evidence because they fear being ostracized by their communities, shamed within their family, and rendered unable to marry. Others may want to avoid reliving the past. Some may lack trust in the justice system. Like female survivors, male survivors may find it difficult to speak about their experiences. Gender roles and identities within their community may impact a victim's willingness to

[6] PSVWG Interviews, on file with authors.

[7] PBS documentary, 'I came to testify' (n 5) 42.14.

[8] Referring to witnesses who have testified before the ICTY, Eric Stover notes that, 'when prosecutors paid more attention to the needs of their witnesses, a higher degree of witness satisfaction resulted'. Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (University of Pennsylvania Press 2005) (Stover) 90.

[9] To speak the truth also means to prove, as one woman said, 'that rape is not your shame, but that of the criminal himself'. Gabriela Mischkowski and Goraua Mlinarević, *The Trouble with Rape Trials – Views of Witnesses, Prosecutors and Judges on Prosecuting Sexualised Violence During the War in the Former Yugoslavia* (Medica Mondiale 2009) (Mischowski and Mlinarević) 55.

[10] Ibid., 52.

[11] See Stover (n 8) 76. See also PBS documentary, 'I came to testify' (n 5); Wendy Lobwein, 'The Work of the Victims and Witness Section of the International Criminal Tribunal for the Former Yugoslavia' in *Der Internationale Strafgerichtshof: Fünf Jahre nach Rom* (27–28 June 2003) 70 <www.institut-fuer-menschenrechte.de/uploads/tx_commerce/dokumentation_der_internationale_strafgerichtshof.pdf> accessed 22 May 2015.

come forward.[12] Prosecutors and their teams must take these factors into account and adopt strategies to overcome the barriers impeding victims in coming forward.

It is important to accurately explain to the court the specific reasons why an individual victim has been reluctant to come forward with evidence earlier, without assuming that the reasons always relate to shame and stigma. An unfortunate consequence might otherwise be to reinforce judges' expectations that credible sexual violence victims respond in a uniform way when testifying and entrench stereotypes. Ideally, investigators and prosecutors should, through their informed approach to cases, assist in breaking down stereotypes about sexual violence victims and guide the court to contribute to this process.

(a) Preparing sexual violence victims for court

Preparing sexual violence victims for court requires that prosecutors adopt a flexible approach and focus on building a relationship of trust. Over time, we have learned that when prosecutors establish a good rapport with victims prior to their testimony, victims will feel more at ease and their testimony will proceed in a smoother fashion.

(i) Proofing sessions

Our practice of meeting with witnesses prior to their court testimony (which is referred to in the ICTY context as a proofing session) has been pivotal in preparing them for court, particularly in the case of sexual violence victims.

Sexual violence victims in our cases have required different levels of support before testifying. Many left their village or town and travelled abroad for the first time when they travelled to The Hague to testify in ICTY proceedings. In some instances, several years had elapsed between the time when they provided a statement to an OTP investigator and their appearance in court. Many female victims were not used to having a public role in their communities and to recounting their experiences in public. Due to the nature of sexual violence crimes, some had difficulty trusting people. Proofing sessions have helped us overcome these challenges. These sessions have enabled our lawyers to familiarize the victims with the court process, allow them to review their evidence, prepare them for the questioning process they will be subjected to during their testimony and explain how any applicable protective measures will work in the courtroom. It has also provided an opportunity to explain the prosecution's disclosure obligations as they impact the victim.[13] Meeting with prosecution counsel prior

[12] For example, in the case of male victims, their reluctance to speak about their experiences may at times be rooted in perceptions of masculinity within their communities which they may find to be incompatible with their sexual victimization. See Chapters 1 and 3. See further Eric Stener Carlson, 'The Hidden Prevalence of Male Sexual Assault During War: Observations on Blunt Trauma to the Male Genitals' (2006) 46(1) *British J Criminology* 16 (Stener Carlson), 22–3; Sandesh Sivakumaran, 'Sexual Violence Against Men in Armed Conflict' (2007) 18(2) *Eur J Intl L* 253 (Sivakumaran), 255; Valerie Oosterveld, 'Sexual Violence Directed Against Men and Boys in Armed Conflict or Mass Atrocity: Addressing a Gendered Harm in International Criminal Tribunals' (2014) 10 *JILIR* 107 (Oosterveld, 'Sexual Violence Directed Against Men and Boys in Armed Conflict or Mass Atrocity'), 119.

[13] ICTY judges have accepted that in order to enhance the fairness and the expeditiousness of the trial, it is essential for witnesses to be given the opportunity to familiarize themselves with the court proceedings and their prior statements so that their testimony proceeds in a smoother fashion. See *Prosecutor v Limaj*,

to their testimony has also spared victims the additional burden of being questioned by a complete stranger in a formal and unfamiliar courtroom setting about highly traumatic matters.

We have also found it useful to develop a relationship with those who have played a role in supporting the victims. For example, in the *Lukić and Lukić* case, we worked closely with a victim's psychologist and solicited her advice on how to minimize the impact the process might have on the victim.[14] We also made a motion for the psychologist to be in the courtroom during the victim's testimony which proved important when the victim began to experience flashbacks in court.[15]

Knowing what to expect from the court process helps alleviate the stress and anxiety of testifying and ensures the coherent presentation of evidence. During proofing prosecutors have explained to witnesses how their evidence will be presented in court. Witnesses have also reviewed their evidence, clarified key aspects of it and have been shown exhibits, such as photographs or documents, that the prosecutor intends to show them during their testimony. This has allowed witnesses to be prepared and to avoid being surprised by the questions asked of them during their court appearance. Witnesses have also appreciated seeing the courtroom and being informed about courtroom procedure, as it has helped them prepare emotionally to testify and feel less intimidated.[16]

We have found that victims are more comfortable during the proofing session if they know at the outset how the session will proceed.[17] Prosecutors should inform victims whether they will be asked about the incident(s) of sexual violence in proofing, the estimated length of this discussion and that a break may be taken following this discussion.[18] It is useful for victims to be told whether they will also be asked about matters other than sexual violence.

When going over the evidence with witnesses, prosecutors have been careful not to influence the content of their testimony and have operated within strict guidelines.[19] Many witnesses have given the OTP several statements. Allowing witnesses

ICTY-03-66-T, Decision on Defence Motion on Prosecution Practice of 'Proofing' Witnesses (10 December 2004) 2; *Prosecutor v Milutinović et al.*, ICTY-05-87-T, Decision on Ojdanić Motion to Prohibit Witnesses Proofing (12 December 2006) paras 20, 22; *Prosecutor v Haradinaj et al.*, ICTY-04-84-T, Decision on Defence Request for Audio-Recording of Prosecution Witness Proofing Sessions (23 May 2007) para 8. The proofing practice was also part of trial preparation at the ICTR. See ICTR Best Practices Manual on Sexual Violence Crimes (n 2) paras 159–82. Judges at the International Criminal Court (ICC) have been divided on the issue of witness proofing. It was prohibited at the ICC in the *Lubanga, Katanga and Ngudjolo*, and *Bemba* cases. See e.g. *Prosecutor v Lubanga Dyilo*, ICC-01/04-01/06-1049, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial (30 November 2007) para 12. However, in two recent Kenya cases, Trial Chamber V departed from previous case law and determined that witness preparation should be permitted. This decision followed a request by the Prosecution for the judges to adopt a regime allowing for more extensive witness preparation than in previous ICC cases. As a safeguard, Trial Chamber V annexed a Witness Preparation Protocol to its decisions, which set out permitted and prohibited conduct, and dealt with disclosure issues arising from the witness preparation sessions, among other issues. See *Prosecutor v Ruto and Sang*, ICC-01/09-01/11-524, Decision on Witness Preparation (2 January 2013) para 50; *Prosecutor v Muthaura and Kenyatta*, ICC-01/09-02/11-588, Decision on Witness Preparation (2 January 2013) para 52.

[14] PSVWG Interviews, on file with authors.

[15] Ibid.

[16] See Mischkowski and Mlinarević (n 9) 62.

[17] PSVWG Interviews, on file with authors.

[18] Ibid.

[19] See *Prosecutor v Haradinaj et al.*, ICTY-04-84-T, Prosecution's Written Submissions in Response Opposing Verbatim Recording of 'Proofing' Sessions with Witnesses, Annex (Prosecutor's Policy and Procedures 'Proofing Witnesses') (28 March 2007).

to re-read their statements has been important in preparing them for their court appearance. By refreshing their memory, witnesses tend to feel more self-assured when testifying.

Once in court, we have found that some victims have had difficulty speaking about their experiences. When prosecutors have known that a victim would need to provide a great amount of detail in court about the acts of sexual violence they experienced, they have prepared the witness for this type of questioning and helped them understand why the court needs to hear such detail. In addition, we have used proofing sessions to clarify that their testimony would proceed on the basis of questions from both parties and that they would not be allowed to simply recount their story in full to the judges. This explanation has helped to minimize the frustration witnesses may feel at not being able to tell their story as they wished.

The use of protective measures in court, such as pseudonyms, image and/or voice distortion or closed session, may be disorienting for witnesses and cause further stress. Prosecutors should explain to witnesses how protective measures operate in the courtroom. For example, we have explained the difference between testifying publicly and confidentially,[20] and we have told witnesses that we can ask the Court for a confidentiality order regarding their testimony describing the details of the sexual violence crimes. This has been an important measure for some sexual violence victims who have preferred that their account not be made public, although it has been equally important that prosecutors not assume all victims prefer this approach.[21] In addition, we have informed witnesses that they should let the judges know if they felt any discomfort or required breaks during testimony, and that a doctor or counselor could be made available if needed.

On occasion during the proofing session, witnesses have recalled new evidence or have clarified information in a previous statement. When this has occurred, our practice has been to prepare a proofing note which we have disclosed to the defence as soon as possible. We have also informed witnesses of our disclosure obligations, and have explained that they may be questioned about any inconsistencies between the various statements they have given and that the defence is entitled to put forward such questions in order to test the strength of the witness's evidence. This has been important so that the witnesses do not unnecessarily perceive defence questioning to be hostile, inappropriate, or personal.

During proofing, witnesses have also been given an opportunity to express their concerns and expectations about testifying. Providing clear and consistent information at the outset about what the OTP can and cannot do to assist in addressing these

[20] At the ICTY, confidential testimony can be provided in two ways. Witnesses can provide testimony in private session, which means that the public can watch the proceedings from the public gallery but cannot hear the testimony being given in the courtroom, or in closed session, which means that blinds are drawn around the courtroom so that the public can no longer see or hear from the gallery what is happening in the courtroom. The transcripts of both private and closed session testimony are confidential. While witnesses have also theoretically had the possibility of testifying from a separate room outside the courtroom, this modality has not been used in any ICTY cases.

[21] See pp 159–61.

concerns and expectations can avoid frustration and disappointment on a victim's part at a later stage.[22]

(ii) Working with the Victim and Witness Section (VWS)

When preparing victims for court, we have worked closely with the ICTY's VWS, an organ within the Registry that supports victims and witnesses through the process of giving evidence. The OTP did not establish a specialized team to address the medical and psychosocial needs of victims[23] and therefore depended on VWS staff to provide professional support focused on the specific needs and concerns of victims and witnesses.[24] Through its work, the VWS has enhanced the witness-centred approach in ICTY proceedings, thereby facilitating effective testimony from sexual violence victims.

Our experience underscores the importance of liaising with the VWS at the pre-trial stage. VWS's early involvement has allowed victims to receive adequate support in advance of trial, which in turn has empowered them to come forward.[25] VWS involvement during the pre-trial phase has been particularly crucial in cases where sexual violence victims were reluctant to testify, as VWS support officers have helped alleviate victim fears and solved practical issues linked with their travel to The Hague and their court appearance, including the provision of a support person to travel with them to The Hague.[26] In several instances, VWS support officers have visited victims in their homes to discuss and overcome obstacles preventing them from coming forward.[27] Although the VWS has not provided sexual violence victims with support prior to the filing of the Prosecution's witness list, we believe the medical and psychosocial support they offer should be given at the earliest possible stages of an investigation.

[22] See also ICTR Best Practices Manual on Sexual Violence Crimes (n 2) para 181.

[23] In contrast, the ICTR OTP established a Witness Management Team (WMT), a dedicated team of professionals in charge of providing the necessary support services to potential witnesses. The team included investigators and licensed nurses specially trained in dealing with sexual violence victims. The WMT worked closely with the Investigation Section of the OTP and with the Registry's Witness and Victims Section. While the Registry's Witness and Victims Section confined its work to witnesses who had agreed to testify before the ICTR, the OTP's WMT also handled potential prosecution witnesses. It provided administrative and psychosocial support, including counselling and medical assistance, to these prosecution witnesses. ICTR Best Practices Manual on Sexual Violence Crimes (n 2) paras 61–3, Annex A 2. We are informed that the WMT also maintained regular contact with witnesses after their testimony and worked to locate witnesses who were required to attend in subsequent cases. Such support was crucial in convincing victims to come forward, and in maintaining contact with witnesses who were required to testify again in subsequent cases.

[24] From the outset, the Section paid special attention to the recruitment of qualified female professionals with expertise in dealing with victims of sexual violence. See ICTY Annual Report (17 August 1994) UN Doc A/49/342 S/1994/1007 para 81, <http://www.icty.org/en/documents/annual-reports> accessed 2 December 2015; ICTY Annual Report (14 August 1995) UN Doc A/50/365 S/1995/728 para 111, <http://www.icty.org/en/documents/annual-reports> accessed 2 December 2015.

[25] In order to improve communication with witnesses, VWS is assisted by a field office established in Sarajevo in 2002. Informing witnesses in advance of what to expect of the process empowered them to later deal with their testimony in court. PSVWG Interviews, on file with authors.

[26] PSVWG Interviews, on file with authors; see also PBS documentary, 'I came to testify' (n 5).

[27] PSVWG Interviews, on file with authors. However, despite VWS's efforts, in some instances victims have been unwilling to come forward. PSVWG Interviews, on file with authors.

VWS support staff have also played a particularly important role in the lead-up to testimony. Waiting for several days in The Hague before taking the stand can make victims very anxious. For some, the days immediately prior to testifying may be the most difficult.[28] We have tried to reduce the waiting time for sexual violence victims prior to testifying by having them travel close to their scheduled appearance in court and by giving them priority in the witness schedule. When this has not been possible, we have liaised with the VWS to keep victims informed of developments in the courtroom that impact the scheduling of their testimony. VWS support staff have regularly monitored victims and have provided a visible and independent supportive presence throughout their stay in The Hague both inside and outside the courtroom.[29] This support has made witnesses feel valued and respected, and has helped reduce the anxiety of waiting to testify.[30] The VWS has also been able to provide professional psychological support to victims when required, which our trial teams have been unable to provide because the OTP has not had professional staff with the necessary training.

VWS staff members have monitored the physical and psychological state of victims during their court appearance. This support has been important because, at the ICTY, the prosecution is not allowed to speak with a witness outside of the courtroom proceedings while their testimony is ongoing. As an independent and neutral ICTY organ, the VWS has advocated on behalf of witnesses, without influencing the substance of their testimony. Based on advice from the VWS, judges have allowed some sexual violence victims to have a VWS support officer sit next to them in the courtroom as they testified.[31] In some instances, the VWS has alerted the judges and parties to factors preventing the testimony of a victim from continuing or issues requiring immediate action. For example, in one case, a sexual violence victim was so traumatized in court that the presiding judge decided to end the testimony to protect her from further trauma.[32] VWS support staff intervened to explain that the victim wanted to testify. A support officer was then allowed to sit beside the victim, enabling her to continue her testimony.[33]

While VWS support has been vital at times, victims have not had a legal representative in court to advocate on their behalf. Unlike other international courts,[34] the ICTY

[28] See Mischkowski and Mlinarević (n 9) 57.

[29] Ibid., 62–3. See also PBS documentary, 'I came to testify' (n 5).

[30] A study conducted by Medica Mondiale indicated that, in the early years, complaints about lack of protection and support by the ICTY were the norm among sexual violence victims. However, in more recent years, the victims described feeling valued and respected by court officials. Mischkowski and Mlinarević (n 9) 61.

[31] See e.g. *Prosecutor v Krajišnik*, ICTY-00-39-T, Testimony of Witness 224 (6 February 2004) (*Krajišnik* Testimony of Witness 224) transcript pp 588–90. In the *Kvočka et al.* case, the judges allowed the victim's support person, who was her therapist, to sit in the technical booth and follow the testimony, provided that the support person signed a statement of confidentiality. See *Prosecutor v Kvočka et al.*, ICTY-98-30/1-T, Testimony of Witness F (13 September 2000) transcript pp 5340–2.

[32] PSVWG Interviews, on file with authors. [33] Ibid.

[34] Unlike the ICTY and ICTR Statutes, the ICC Rome Statute potentially gives victims roles as witnesses, courtroom participants and reparations beneficiaries. Most victims participate in court proceedings through legal representatives, but in limited cases, victim-participants have addressed the Court directly. See Rome Statute of the International Criminal Court (1998) 2187 UNTS 90 (adopted 17 July 1998, entered into force 1 July 2002) (Rome Statute) art 68; ICC Rules of Procedure and Evidence (adopted 9 September 2002) (ICC Rules) rr 88, 90–3; *Prosecutor v Lubanga Dyilo*, ICC-01/04-01/06-1119, Decision on Victims' Participation (18 January 2008) paras 93–5. The Special Tribunal for Lebanon (STL) and the

Statute[35] does not contemplate a scheme of legal representation for victims. Victims have only participated in proceedings as witnesses.[36] There is, however, growing international consensus that victim participation plays an important role in achieving justice for victims.[37] While direct victim representation has not heen a feature in ICTY proceedings, our experience underscores that any strategy giving a voice to victims who want to be heard in the proceedings should be seriously pursued in future international and national proceedings, including those dealing with conflict-related sexual violence.

(iii) The importance of maintaining regular contact with victims

Our experience reveals that maintaining regular contact with victims during the pretrial phase and in the period leading up to their testimony is often crucial to maintaining their trust. Victims have been more reluctant to testify in circumstances when they were only contacted again well after being initially interviewed by the OTP, as by then they had moved on with their lives.[38] While some delay may be unavoidable in commencing court proceedings, victims have been more willing to come forward when we have been in frequent contact with them to explain the reasons for the delay.[39]

Related to this, we have found that reducing the number of staff members in contact with victims has helped us build a stronger rapport and ensure greater consistency in our approach to dealing with victims.[40] At times victims have expressed a preference to work with an investigator and interpreter of a particular sex and to deal only with the same investigator and/or interpreter. Respecting this preference has helped maintain the trust of victims.

(b) Questioning victims in court

We have been more successful in eliciting evidence from victims and proving the charges when we have taken the needs and preferences of our victims into account. To tell previously unknown people—such as judges, counsel for both parties to the proceedings, and all others present in the courtroom—about incidents of sexual violence

Extraordinary Chambers in the Courts of Cambodia (ECCC) allow victims to participate as civil parties. See Statute of the Special Tribunal for Lebanon, art 17; STL Rules of Procedure and Evidence (adopted 3 April 2014, amended 12 February 2015) r 86; ECCC Internal Rules (adopted 12 June 2007, amended 16 January 2015) r 23(2); ECCC, Case File 001/18-7-2007/ECCC/TC, Judgment (26 July 2010) paras 637–8.

[35] Statute of the ICTY (Adopted 25 May 1993 by UNSC Res 827 (25 May 1993) UN Doc S/RES/827, amended 7 July 2009 by UNSC Res 1877 (7 July 2009) UN Doc S/RES/1877) (ICTY Statute).

[36] In certain instances, other categories of witnesses, such as representatives of international organizations or government officials, have had their own legal representatives in court.

[37] See ICC Report of the Court on the Strategy in Relation to Victims ICC-ASP/8/45 (10 November 2009) Introduction para 3. See also United Nations (UN) Draft Convention on Justice and Support for Victims of Crime and Abuse of Power (8 February 2010) art 5(2)(b) (recommending a right for victims to be heard and to present their concerns at 'appropriate stages of the proceedings where their personal interests are affected'); ICC OTP Policy Paper on Victim Participation <www.icc-cpi.int/iccdocs/asp_docs/RC2010/Stocktaking/RC-ST-V-M.1-ENG.pdf> accessed 22 May 2015; Eric Stover and others, 'The impact of the Rome Statute system on victims and affected communities' (Review Conference of the Rome Statute, Uganda 30 May 2010) <www.icc-cpi.int/iccdocs/asp_docs/RC2010/Stocktaking/RC-ST-V-INF.4-ENG.pdf> accessed 22 May 2015 (examining the impact of the ICC's victim participation scheme in affected communities).

[38] PSVWG Interviews, on file with authors. [39] Ibid. [40] Ibid.

is an undoubtedly difficult and stressful experience for any victim.[41] A witness-centred approach benefits both the victim and the prosecution. It improves the victim's courtroom experience which in turn ensures that the victim is able to give more effective testimony.

Prosecutors must consider a range of other factors when preparing to question victims in court. Prosecutors should assess the level of evidentiary detail required to establish the sexual violence charges without assuming that every detail regarding the sexual violence incident must be elicited. They should adapt their questioning depending on the matters at issue in the case. At the same time, prosecutors should bear in mind that a comprehensive discussion of the crime may be relevant to sentencing.[42] Moreover, prosecutors should not assume that a victim can only give evidence about the sexual violence incident in question and should consider the broad range of evidentiary matters relevant to the case on which the victim may be able to comment.

(i) Level of detail required to establish charges of sexual violence

In determining the level of detail required to establish sexual violence charges, prosecutors should consider the matters at issue between the parties and focus on adducing evidence to establish those facts. This requires understanding the evidence needed to prove the legal elements of the charged crimes and modes of liability as well as being proactive in securing the defence's agreement to certain facts in advance of the victim testifying.

In ICTY cases, the level of evidentiary detail required about an incident of sexual violence has often depended on the nature of the case. In cases involving accused who were physical perpetrators, prosecutors have often needed to elicit more detail about the specific crimes[43] than in leadership cases where the accused were not alleged to have physically committed the act of sexual violence. In leadership cases, the accused have been less inclined to challenge the occurrence of sexual violence. In physical perpetrator cases, prosecutors have also needed to address matters surrounding the commission of the crimes, such as proof of non-consent[44] and victim

[41] See *Prosecutor v Stakić*, ICTY-97-24-T, Judgment (31 July 2003) (*Stakić* Trial Judgment) para 804.

[42] See Ch. 8.

[43] See e.g. *Prosecutor v Kunarac et al.*, ICTY-96/23-T & ICTY-96-23/1-T, Testimony of FWS-50 (29 March 2000) transcript pp 1243–4, 1252 ('Q. I'm sorry to have to ask you some specifics, but the Court will need to know. Can you describe what he did? A. Yes. He pushed me onto one of the beds. He asked me to put his penis into my mouth. Q. And did he do that? A. He did it himself. Q. How long did that last? A. I don't know. Q. Did he say anything while this was happening? A. He was saying things like: What am I afraid of? Don't I know what sex is? Haven't I done it before? That kind of thing. "Let's enjoy it." That kind of thing … Q. I apologise again for asking you specifics, but the Court needs to know. Can you describe what he did? A. This time he raped me vaginally. Q. Do you mean that he put his penis into your vagina? A. Yes.'); *Prosecutor v Kvočka et al.*, ICTY-98-30/1-T, Testimony of Witness U (3 October 2000) transcript pp 6198–9 ('Q. And what happened after you entered this other room with Nedeljko Timarac? A. In that office there was a table. I could feel it with my fingers, because it was dark. He told me to climb on the table, and he raped me on that table. Q. After Nedeljko Timarac raped you on that table, what happened later that evening? A. He left without saying a word. I remained on the table. After that, other men came in. I don't know exactly how many —there were many—who also raped me. Q. Witness U, when you say that these men raped you, do you mean that they penetrated you with their penis? A. Yes.').

[44] See *Prosecutor v Kunarac et al.*, ICTY-96-23-T & ICTY-96-23/1-T, Testimony of Witness AS (19 April 2000) transcript p 2000 ('Q. And when you used the word "rape", and I'm sorry I have to ask you this, what specifically do you mean that they did? A. They destroyed everything in me. Q. Just so the Court knows, since the Court needs to know specifically for the record, did they put their penises into your

credibility,[45] because these matters have been more at issue in such cases.[46] Eliciting identification evidence has also been crucial to determining an accused's responsibility in these cases.[47]

Where defence counsel have not challenged certain aspects of the sexual violence incident, or have agreed to stipulate to the elements of the crimes,[48] prosecutors have limited their questioning to specific issues requiring clarification without delving into the details of the incident. Inter-partes agreements regarding certain facts have often been reached in the course of a victim's testimony, once it became clear that the victim was experiencing trauma in court. However, there is significant scope for prosecutors to proactively explore the possibility of inter-partes agreements in advance of the victim's testimony. The defence has been more willing to stipulate to the sexual violence incident when the accused was not alleged to be the physical perpetrator, or was not alleged to have been present at the crime scene.

As ICTY prosecutions progressed towards cases against political and military leaders, prosecutors have focused on legal strategies capable of linking sexual violence to the accused.[49] The manner in which we have established the participation of political and military leaders in sexual violence crimes has depended on the mode of liability charged. For example, in some joint criminal enterprise cases, we have had to establish that the perpetrators were part of a hierarchical structure under the accused's control (such as the army or the police), or closely cooperated in the commission of the crimes with the members of an organization controlled by the accused. In these cases, it has been sufficient for prosecutors to elicit evidence on the affiliation of the physical perpetrators, but evidence on the perpetrators' individual identity was not required.[50]

vagina? A. Yes. Q. And that was against your will? A. Yes.'). *Prosecutor v Kvočka et al.*, ICTY-98-30/1-T, Testimony of Witness J (5 September 2000) transcript p 4782 ('Q. Did he also take out his penis? A. Yes, he did. Q. Did he, at that time, attempt to rape you? A. Yes, he did. Q. Did he penetrate your vagina? A. No, he didn't. Q. Did he ejaculate? A. Yes, he did. Q. Was that, again, on your legs? A. Yes. It was on my thighs and on my legs. Q. And after he ejaculated, did he let you go? A. Yes, he did. Q. Throughout this assault, were you attempting to get away? A. Yes, of course. All the time I was trying to get away, pleading with him to let me go, but he said that he can also act differently if I should continue that way, that he can also be rough, much rougher than he was on that occasion.').

[45] See e.g. *Prosecutor v Furundžija*, ICTY-95-17/1-T, Judgment (10 December 1998) (*Furundžija* Trial Judgment), paras 110–16.

[46] See pp 138–9.

[47] See e.g. *Prosecutor v Kunarac et al.*, ICTY-96-23-T & ICTY-96-23/1-T, Testimony of FWS-50 (29 March 2000) transcript pp 1242, 1263 ('Q. Who took you out? A. Am I supposed to say the name? Q. If you know the name, please say it. A. A man named Zoran Vuković took me out. Q. Did you know this man from before the war? A. I might have seen him before the war. The face seemed very familiar to me. Whether I knew it from before, I don't know .... Q. Can you—would you be able to recognise Zoran Vuković today? A. Yes, I could. Q. I'm going to ask you to look around the courtroom, and please take your time. Let us know if you recognise somebody here who was the Zoran Vuković you have described. A. If I look from the door going down, the first person next to the guard with dark hair, is Zoran Vuković. Q. To help clarify the record, could you just describe something he's wearing? A. He is wearing a light blue shirt, a dark blue suit.').

[48] See pp 126–7. [49] See Ch. 7.

[50] See e.g. *Prosecutor v Đorđević*, ICTY-05-87/1, Trial Judgment (23 February 2011) (*Đorđević* Trial Judgment) para 833 ('During this case the witness was unable to identify the same uniforms that had previously heen identified in the *Slobodan Milošević* case, however, when this inconsistency was suggested, the witness was able to confirm that both VJ and MUP were present and she described the police uniforms again. The Chamber is therefore satisfied with the witness's recollection of the uniforms and accepts as reliable the description given of the police uniforms. These divergences in the evidence are

Moreover, as explained in Chapters 6 and 7, the success of these leadership cases has depended on accurately seeing sexual violence in context and understanding the role it played in the violent campaign unleashed by senior officials. Prosecutors have therefore led evidence demonstrating this context, such as evidence showing the purpose and nature of the campaign; the circumstances surrounding the acts of sexual violence; the vulnerability of the victims; other violent acts committed against the targeted population; the prevailing culture of impunity among perpetrator groups; and their propensity to commit similar violent acts. Such evidence has allowed us to place the acts of sexual violence in their proper context: as violent crimes perpetrated in a violent campaign.

In connecting sexual violence crimes to a broader campaign, we have also found it necessary to emphasize the violent reality of these crimes. We have seen in our work that there is a tendency to view sexual violence, particularly the rape of women and girls, more as a matter of honour than as a violent assault on a person's physical integrity.[51] At times, influenced by this misconception, fact-finders view sexual violence as a private act, disconnected from the broader campaign of violence. This is particularly the case when the crime is not committed in public or on a large scale. We have been more successful in overcoming this misconception when we have led evidence that emphasizes for the fact-finder the violent nature of the act as experienced by the victim, especially in circumstances where there is no evidence of use of force. For example, we have led evidence on the devastating impact of the rape on the victim and on the consequences—sometimes permanent—for the victim as a result of the rape. We have also found it important to avoid reinforcing the stigma surrounding these crimes in our questions to witnesses and in our submissions to the court. This can be done by avoiding describing the sexual violence as a 'private', 'intimate', or 'personal' act and rather choosing language that stresses the traumatic reality for the victims. By clearly identifying the violent nature of these crimes, prosecutors can assist fact-finders to view sexual violence in the same manner as other violent attacks on physical integrity.

(ii) Impact of victims' testimonies on sentencing and early release

An additional factor to consider in questioning victims is whether a fuller description of the crime could persuade judges to impose a higher sentence due to the gravity of the crimes.[52] Judges may take into account evidence regarding the mental, emotional and physical suffering of victims as an aggravating factor in sentencing.[53] In the *Delalić et al.* case, the Chamber considered the heinous nature of sexual violence against male victims in assessing the accused Landžo's depravity for the purposes of sentencing.[54] In the *Furundžija* case, the fact that the victim was 'kept naked and

explainable, in the Chamber's view, in light of the traumatic nature of the events, the passage of ten years since the events and seven years since her testimony in the *Milošević* case.').

[51] See pp 34–6 in Ch. 3.

[52] For a detailed discussion of sentencing, including issues concerning early release, see Ch. 8.

[53] See ICTY Rules (n 3) rr 101, 125.

[54] *Prosecutor v Delalić et al.*, ICTY-96-21-T, Judgment (16 November 1998) (*Delalić* Trial Judgment) para 1275. See also para 1262 (considering exacerbated suffering caused by the rape of a witness in front of others, brutality and the repeated nature of the sexual violence, and a witness's public testimony that the accused 'trampled on my pride and I will never be able to be the woman that I was').

helpless' was considered an aggravating factor.[55] Other chambers have followed a similar approach.[56]

Prosecutors should also consider whether a fuller description of the crimes could ultimately weigh against early release being granted in the event the accused is convicted and sentenced to a term of imprisonment.[57] In some of our cases, judges have acknowledged the particular brutality of the offences as a factor militating against early release. For example, the ICTY President rejected Zelenović's early release in part because of the gravity of his crimes of sexual violence and the vulnerability of the victims.[58] The President also found that the gravity of Žigić's crimes was a factor weighing against granting him early release.[59] On balance, however, the President has granted early release requests where an accused has served two-thirds of the sentence imposed, notwithstanding the gravity of the crimes concerned.

(iii) Eliciting all relevant evidence

Prosecutors aud their teams should consider whether victims are able to provide evidence relevant to establishing other aspects of the case beyond the charges of sexual violence. We have seen in our work the risk of assuming that sexual violence victims are only able to speak about their experiences of sexual violence, meaning that investigators and prosecutors focus their questions too narrowly. Prosecutors and their teams should avoid making assumptions about what victims know and should explore all potentially relevant aspects of the case with them. For example, in our

[55] *Furundžija* Trial Judgment (n 45) para 282.

[56] *Prosecutor v Kunarac et al.*, ICTY-96-23&23/1, Trial Judgment (22 February 2001) (*Kunarac* Trial Judgment) para 858 (considering in aggravation the seriousness of the offences against 'the most vulnerable of persons in any conflict, namely, women and girls'); *Prosecutor v Milan Simić*, ICTY-95-9/2-T, Sentencing Judgment (17 October 2002) para 63 (considering the 'sexual, violent and humiliating natnre of the acts' in aggravation); *Prosecutor v Dragan Nikolić*, ICTY-94-2-S, Sentencing Judgment (18 December 2003) para 194 (considering brutality of sexual violence and other crimes as well as abuse of position of power over the female detainees); *Prosecutor v Bralo*, ICTY-95-17-S, Sentencing Judgment (7 December 2005) para 34.

[57] The ICTY President decides on applications for early release, in consultation with other judges. In assessing such applications, the President takes into account, among other factors, the gravity of the crime or crimes for which the convicted person was sentenced, the treatment of similarly-situated convicted persons, his or her demonstration of rehabilitation, as well as any substantial cooperation of the convicted person with the Prosecutor. See ICTY Rules (n 3) r 125; ICTY Statute (n 35) art 28. See further Ch. 8.

[58] At the time, Zelenović was serving his sentence in Belgium. According to Belgian law, convicted persons can apply for early release after serving one-third of their sentence. The Belgian Ministry of Justice notified the ICTY President that Zelenović had served more than one-third of his sentence and was eligible for early release. In rejecting this request, the President took into account, among other factors, that Zelenović had not yet served two-thirds of his sentence. *Prosecutor v Zelenović*, ICTY-96-23/2-ES, Décision du Président du Tribunal relative a la Libération Anticipée de Dragan Zelenović (21 October 2011) paras 17–20, 32. See also *Prosecutor v Zelenović*, ICTY-96-23/2-ES, Decision of President on Early Release of Dragan Zelenović (30 November 2012) paras 11–13, 22.

[59] *Prosecutor v Žigić*, ICTY-98-30/1-ES, Decision of President on Early Release of Zoran Žigić (8 November 2010) paras 13–15, 22. See also *Prosecutor v Radić*, ICTY-98-30/1-ES, Decision of President on Application for Pardon or Commutation of Sentence for Mlado Radić (23 April 2010) paras 12, 21 (denying Radić's application for early release because, among other factors, he had failed to demonstrate signs of rehabilitation and continued to deny the crimes for which he was convicted, in particular the rapes and sexual assault). An additional factor weighing against the granting of early release was the fact that these accused had not served two-thirds of their sentence.

cases, sexual violence victims were able to provide key evidence regarding events leading up to the armed conflict in their region; other crimes committed against their communities or ethnic groups by the perpetrators; the forces present in their region, the chains of command of these forces, and the identity and position of the perpetrators. In some cases, sexual violence victims witnessed crimes against family members, such as killings, and could recount these incidents in detail. This evidence was relevant to proving the *chapeau* (contextual) elements of the crimes, demonstrating patterns of crimes and establishing the individual criminal responsibility of the accused. Overall, a more comprehensive approach to questioning victims of sexual violence has helped explain the depth of the harm caused to them and their communities and, in turn, has informed sentencing.

(iv) Adopting strategies to minimize the risk of re-traumatization for victims

Due to the traumatic nature of sexual violence crimes, there is a risk that victims will experience additional trauma when testifying in court. Testifying can trigger painful memories[60] and, as a result, victims may find it difficult to recount their experiences. Even witnesses who are initially willing to give evidence may sometimes become fatigued by repeatedly recounting their story. Consequently, they may be unwilling to give evidence in subsequent cases. This is a reality that prosecutors must take into account whenever they are working in a system where there are likely to be multiple trials dealing with overlapping factual allegations.

The potential for experiencing courtroom trauma and the difficulties faced by victims called to testify is best summed up by a witness recounting her experience in having to provide a detailed description of the sexual violence perpetrated against her:

> They asked me, what happened exactly? And I had to tell literally everything.... I had to say it was rape and also to describe how it happened and to explain the position of my body and his body. It was really hard for me to say and to hear my voice... Oh, my god. Horrible, horrible, horrible. I had to say it, and I hated myself when I talked about that, and when I heard myself. I don't know. I hated myself. It would be better for me just to say, yes, I was sexually abused, or I was raped, just that. But I understand it is the law and I must do it.[61]

In order to minimize the risk of re-traumatization and to avoid witness fatigue, we have adopted different modalities of introducing victim evidence. We have sought to limit the scope of oral testimony and the time victims spend on the stand by seeking the defence's consent and leave from the chamber to ask leading questions[62] and by

[60] Eric Stover notes that '[i]ndividuals who testify in war crimes trials may not realize how profoundly they have been affected by the violent crime(s) they experienced or witnessed and the extent to which testifying can trigger past memories of these painful events'. Stover (n 8) 72.

[61] Mischkowski and Mlinarević (n 9) 57. The quoted victim appeared as a witness in a national trial in BiH, before the ICTY, or both. The authors of the report did not identify the victims in order to preserve their confidentiality.

[62] In the adversarial system, a leading questiou is a question that suggests a particular answer to the witness or contains information the Prosecutor seek to have confirmed by the witness. Leading questions are usually only allowed in cross-examination when dealing with witnesses of the opposing side. However, as explained in this section, ICTY judges have allowed prosecutors to pose leading questions

asking the defence to stipulate to portions of the victims' evidence. In addition, we have established incidents of sexual violence through written evidence to avoid having to call victims to testify in person.[63] This practice has become entrenched in our cases against senior officials.

However, this does not mean that prosecutors can assume that victims do not want to testify and will always require protection. Our experience shows that some witnesses were empowered by the opportunity to tell their full story to the judges. In the *Krajišnik* case, following a break in her testimony, a rape victim from Luka camp (Brčko municipality) explained to the Presiding Judge why she felt the need to continue (after describing a mass execution that she survived and before describing her own rape):

> All my life I dedicated to working and helping ... people, and for the first time I met—I faced something that was inconceivable, so I experienced a terrible shock, and I still feel the pain. It was a really painful experience. And now having to go through this just revives this pain. But I still want to continue with this testimony. I want to tell the truth and nothing but the truth. I want to inform you about the truth. I want the criminals to be punished. I want the crime to be punished.[64]

Our experience also shows that when witnesses wanted to more fully describe the crimes against them, limiting the scope of their testimony—including by adducing their evidence-in-chief in writing rather than orally—undermined their confidence and brought disappointment. It was frustrating for some when their only experience of the courtroom was a harsh cross-examination by the defence without any opportunity to tell their story in their own words first.[65] Abbreviating the testimony of witnesses who were willing to fully testify also had the unintended effect of purging the record of details regarding the gravity of the crimes, relevant to sentencing and the public trial record more generally. The overuse of written evidence at times rendered the crimes of sexual violence, and the victims, invisible to the public.

Curtailing the testimony of victims who are prepared to provide their full account reflects the erroneous assumption that victims are weak and always require protection.[66] Our experience underscores that each survivor of sexual violence has different needs. Prosecutors must assess these needs and focus on addressing the individual circumstances of each witness. Most importantly, to the extent possible, prosecutors should take into account the witness's preference as to how to introduce their evidence in court. When possible, prosecutors should be proactive and discuss the

during their examination-in-chief in certain circumstances, for example to abbreviate the testimony of a prosecution witness who is experiencing trauma.

[63] See pp 127–30. [64] *Krajišnik* Testimony of Witness 224 (n 31) transcript p 590.

[65] In many leadership cases, trial chambers have imposed time limits on the Prosecution to present its case-in-chief, and have instructed the Prosecution to streamline the presentation of its case and tender certain evidence in written form. In order to comply with these instructions, the Prosecution has chosen to call certain witnesses pursuant to Rule 92*ter* of the ICTY Rules (n 3), which allows the Prosecution to tender evidence primarily in writing but with limited direct examination and with the requirement that the witness is available for cross-examination. This has resulted in witnesses not having the opportunity to tell their full story to the court before being cross-examined. See pp 128–9.

[66] See pp 42–5 in Ch. 3.

modalities of presenting a victim's evidence with the defence and the judges before the victim testifies, with a view to ensuring that the evidence proceeds in a smooth fashion. Prosecutors should also be mindful of striking a balance between written and oral testimony to ensure fact-finders hear first-hand from some of the victims and so that their evidence is sufficiently reflected in the public proceedings.

With these considerations in mind, some of the modalities of introducing victim evidence of sexual violence that have been accepted at the ICTY are described below.

a. Asking leading questions about incidents of sexual violence

When victims have had difficulty continuing with their testimony in court, prosecutors have asked the court for permission to pose leading questions regarding the sexual violence incidents. This is an exception to the usual procedure that applies in the ICTY's largely adversarial system. Leading questions have also been used when victims testified about events they had recounted in prior ICTY proceedings. For example, in *Stanišić and Župljanin*, Prosecution Counsel asked the Presiding Judge for leave to ask the victim a series of leading questions concerning two sexual violence incidents and asked the victim to confirm their veracity. The defence did not object to this request. This procedure allowed the prosecutor to concisely summarize the victim's prior account regarding the sexual violence incidents without requiring her to recall every detail afresh.[67]

b. Seeking defence stipulations to portions of the evidence

In cases where the incidents of sexual violence were not challenged by the defence, as in some of our leadership cases, the parties have agreed to certain facts based on victim testimony. For example, we have reached agreements that the victim was raped, or about other details showing that the elements of the crime were met, thereby avoiding details likely to distress the victim. By not contesting that a victim was raped or sexually assaulted, an accused does not admit their liability. The defence can cross-examine the witness about other aspects of their evidence, such as the identification of the perpetrators, the time and place of the incident, and other issues relevant to the accused's liability for the crime.

Stipulations have been secured in several ICTY sexual violence cases. For example, in the *Brđanin* case, the defence agreed not to question a victim on the details of the sexual violence and limited cross-examination to other matters.[68] The Presiding Judge explained that the victim was not going to be questioned about the sexual violence because the judges had read her statement and wanted to spare her from retelling her story if it was not necessary.[69] Similarly, in the *Stanišić and Župljanin* case, upon the

[67] *Prosecutor v Stanišić and Župljanin*, ICTY-08-91-T, Testimony of Witness ST-56 (1 October 2009) transcript pp 630–4.

[68] *Prosecutor v Brđanin*, ICTY-99-36-T (25 June 2003) transcript p 18178 ('Mr. Ackerman: Your Honour, with regard to the first issue that was raised by Ms. Korner, I can just say as a general proposition that in every such instance, we have basically agreed to the testimony regarding the actual sexual assaults themselves. My only concern would be the peripheral matters that might be contained in those statements.').

[69] *Prosecutor v Brđanin*, ICTY-99-36-T, Testimony Witness BT-71 (16 June 2003) transcript pp 17613–14.

Judges' invitation, Defence Counsel agreed not to question a victim on the details of the rapes at issue. Defence Counsel explained:

> Our defence is *not* that she was not raped.[70] ... We are very, very mindful about the stressful situation that the witness is going through ... I can tell you that we are not going to cross-examine this witness about these details.[71]

The Prosecution then read the relevant parts of her statement into the record, which the witness then confirmed.[72] Finally, in the *Krajišnik* case, the defence stipulated that a witness's reference to 'rape' meant physical acts meeting the legal definition of rape, and did not object to the Prosecution asking leading questions to the witness through this aspect of her testimony.[73]

c. Tendering evidence in written form

The ICTY Rules provide for several means of introducing evidence, including of sexual violence, without requiring the witness's live testimony. The relevant provisions have allowed prosecutors to avoid calling sexual violence victims to testify in person or calling a victim to testify again in a subsequent ICTY case. Alongside these benefits to using written evidence is the limitation that live witness testimony has a greater capacity than written material to convey context and the violent and grave nature of the crime as well as its impact which is relevant to sentencing.[74]

Rule 92*bis*[75] is one of the ICTY provisions that allows judges to admit written witness statements and prior transcripts instead of oral testimony, without requiring the witness to testify in court.[76] For example, in the *Slobodan Milošević* case, the OTP tendered the transcripts of testimony of two rape victims from the earlier

[70] *Prosecutor v Stanišić and Župljanin*, ICTY-08-91-T, Testimony of Witness ST-56 (1 October 2009) transcript p 627 (emphasis added).

[71] Ibid., p 629.

[72] Ibid., pp 630–4. In the *Stakić* case, the defence similarly agreed not to cross-examine the witness on the details of her rapes, but sought to question her credibility related to other matters. *Prosecutor v Stakić*, ICTY-97-24-T, Defence submission (5 June 2002) transcript pp 3983–6. In the *Haradinaj et al.* case, the Presiding Judge asked the defence whether every detail pertaining to the rapes from the witness's statement would have to be repeated in court, or whether there would be cross-examination on details. Defence Counsel agreed with the court's proposal that Prosecution Counsel could 'just briefly summarize what he finds in the statement, put that to the witness, and ask her whether that's what happened'. *Prosecutor v Haradinaj et al.*, ICTY-04-84-T, Testimony of Witness W-61 (11 May 2007) transcript pp 3994–5.

[73] *Krajišnik* Testimony of Witness 224 (n 31) transcript pp 615–16.

[74] PSVWG Interviews, on file with authors.

[75] Pursuant to Rule 92*bis*(A), the statement of a witness and/or the transcript of the witness's prior testimony may be admitted so long as the witness's evidence does not relate to the acts, conduct or mental state of the accused. If this condition is satisfied, the trial chamber must still exercise its discretion by deciding whether to admit the witness's evidence without allowing the accused to cross-examine the witness. The interests of the accused are critical to the manner in which trial chambers exercise their discretion. However, the risk of re-traumatizing victims of sexual violence is also a relevant factor. See *Prosecutor v Galić*, ICTY-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C) (7 June 2002) paras 9–15; *Prosecutor v Slobodan Milošević*, ICTY-02-54-T, Decision on Prosecution Motion for the Admission of Transcripts in Lieu of Viva Voce Testimony Pursuant to 92*bis*(D)—Foča Transcripts (30 June 2003) (*Slobodan Milošević* Decision on Foča Transcripts) paras 39–48.

[76] *Slobodan Milošević* Decision on Foča Transcripts (n 75) para 24.

Kunarac et al. trial under Rule 92*bis*. Given that Milošević was not alleged to be a physical perpetrator of the rapes, the OTP argued that the witnesses' evidence was not proximate to the accused, that the prior cross-examination was undertaken by an accused with a sufficiently common interest to Milošević, and that crime base evidence was not sufficiently important to justify further cross-examination in the context of the case in question. The Trial Chamber acknowledged the use of Rule 92*bis* as a means of avoiding the re-traumatization of sexual violence victims.[77] It accepted the OTP's arguments[78] and admitted this evidence over Milošević's objection. The Trial Chamber found that the witnesses were 'victims of multiple rapes who have been significantly traumatized by their experiences' and did not need to be called to testify in person.[79]

Prosecutors have also relied on Rule 92*bis* to tender evidence of sexual violence in writing in some leadership cases and the defence have chosen not to cross-examine the victims. For example, in the *Brđanin* and *Krajišnik* cases, which featured accused who were alleged to have contributed to a criminal campaign in Bosnia and Herzegovina (BiH) through their prominent political positions, prosecutors adduced much written victim evidence concerning sexual violence and this evidence was admitted without any objection from the defence.[80]

Rule 92*ter*[81] is a mechanism to tender evidence primarily in writing but with limited direct examination and with the requirement that the victim must be available for cross-examination. This modality avoids having victims retell their story in detail and has also been used as an alternative following an unsuccessful Rule 92*bis* application.[82] In some cases, prosecutors have tendered transcripts of victims' prior ICTY testimony. To ensure that sufficient details of the account are heard publicly as part of the

[77] Ibid., para 48. [78] Ibid., paras 39–41. [79] Ibid., para 47.

[80] See e.g. *Prosecutor v Krajišnik*, ICTY-00-39-T, Oral Decision on Rule 92*bis* Motion (10 December 2004) transcript pp 9474–80; *Prosecutor v Krajišnik*, ICTY-00-39-T, Oral Decision on Rule 92*bis* Motion (21 March 2005) transcript pp 10823–7; *Prosecutor v Krajišnik*, ICTY-00-39-T, Trial Judgment (27 September 2006) (*Krajišnik* Trial Judgment) paras 547, 638.

[81] Pursuant to Rule 92*ter*, a Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement or transcript of evidence given by a witness in proceedings before the ICTY, under the following conditions: (i) the witness is present in court; (ii) the witness is available for cross-examination and any questioning by the Judges; and (iii) the witness attests that the written statement or transcript accurately reflects that witness's declaration and what the witness would say if examined. As opposed to Rule 92*bis*, the evidence admitted under this Rule may include evidence that goes to proof of the acts and conduct of the accused as charged in the indictment.

[82] For example, in the *Milutinović et al.* trial, although the accused were senior military, police and political leaders, who were not directly implicated in the charged crimes, sexual violence victims had to appear for cross-examination. The Trial Chamber found their evidence related to a 'critical element of the Prosecution's case' because the accused 'deny that any alleged crimes for which they could be held responsible were committed in the course of the events described in the Indictment'. *Prosecutor v Milutinović et al.*, ICTY-05-87-PT, Decision on Prosecution's Rule 92*bis* Motion (4 July 2006) para 18. Similarly, in the *Đorđević* case, where the accused was a senior police official, the Trial Chamber found it necessary for a rape victim to appear for cross-examination. The Trial Chamber considered the identity of the physical perpetrators to be a potentially material issue in the case. The victim was also the only witness who would provide evidence about the rape of Kosovo Albanian women during expulsions from the municipality of Priština. *Prosecutor v Đorđević*, ICTY-05-87/1-T, Decision on Prosecution's Motion for Admission of Written Evidence of Witness K14 in Lieu of Oral Testimony Pursuant to Rule 92*bis* (18 March 2009) para 16.

courtroom proceedings, prosecutors have read out a summary of the evidence into the court record.[83]

Another mechanism the OTP has used to prove sexual violence without calling victims to testify is to ask the Chamber, pursuant to Rule 94(B), to take judicial notice of adjudicated facts from other completed ICTY cases. Adjudicated facts have been used heavily in leadership cases, where the accused are physically distant from the crime scene.[84] To prepare applications for adjudicated facts, we have surveyed trial and appeal judgments to identify facts relevant to the issues in a given case that have been subject to a final determination in another case. Once admitted, an adjudicated fact operates as a rebuttable presumption of the fact in question. The opposing party can disprove an adjudicated fact through reliable and credible evidence to the contrary.[85] For example, in the *Krajišnik*,[86] *Stanišić and Župljanin*,[87] and *Stanišić and Simatović*[88] cases, we used adjudicated facts to establish the general occurrence of sexual violence[89] and specific incidents of sexual violence, although with a varying amount of detail including as to the identity and affiliation of the physical and other immediate

[83] See e.g. *Prosecutor v Krajišnik*, ICTY-00-39-T, Testimony of Witness 382 (31 March 2005) transcript pp 11222–5; *Prosecutor v Mladić*, ICTY-09-92-T, Testimony of Witness RM070 (30 September 2013) transcript pp 17625–7.

[84] For example, thousands of adjudicated facts were accepted in *Karadžić* as compared with only 162 facts in *Slobodan Milošević*. See *Prosecutor v Slobodan Milošević*, ICTY-95-5/18-T, Final Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts (16 December 2003) para 20; *Prosecutor v Karadžić*, ICTY-95-5/18-T, Decision on Three Accused's Motions for Reconsideration of Decisions on Judicial Notice of Adjudicated Facts (4 May 2012) para 18; *Prosecutor v Karadžić*, ICTY-95-5/18-T, Decision on Fifth Prosecution Motion for Judicial Notice of Adjudicated Facts (14 June 2010) para 56, annex; *Prosecutor v Karadžić*, ICTY-95-5/18-T, Decision on Fourth Prosecution Motion for Judicial Notice of Adjudicated Facts (14 June 2010) (*Karadžić* Decision on Fourth Prosecution Motion) para 98, app A; *Prosecutor v Karadžić*, ICTY-95-5/18-T, Decision on Third Prosecution Motion for Judicial Notice of Adjudicated Facts (9 July 2009) para 63, annex; *Prosecutor v Karadžić*, ICTY-95-5/18-T, Decision on Second Prosecution Motion for Judicial Notice of Adjudicated Facts (9 October 2009) (*Karadžić* Decision on Second Prosecution Motion) para 54, annex; *Prosecutor v Karadžić*, ICTY-95-5/18-T, Decision on First Prosecution Motion for Judicial Notice of Adjudicated Facts (5 June 2009) para 39, annex.

[85] See *Prosecutor v Karemera et al.*, ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice (16 June 2006) (*Karemera* Appeal Decision on Judicial Notice) para 42.

[86] *Krajišnik* Trial Judgment (n 80) fns 1105, 1115, 1131, 1437–8, 1440, 1445, 1447–8, 1450, 1527, 1584 (citing to adjudicated facts) paras 499, 652, 667, 701 (findings based on adjudicated facts). For the text of the cited adjudicated facts, see *Prosecutor v Krajišnik*, ICTY-00-39-T, Submission of Reduced List of Adjudicated Facts (8 December 2004) (*Krajišnik* Adjudicated Fact List).

[87] *Prosecutor v Stanišić and Župljanin*, ICTY-08-91-T, Trial Judgment (27 March 2013) (*Stanišić and Župljanin* Trial Judgment) vol 1 fns 883, 965, 1391, 1437–9, 1465, 1507–9, 1519, 2034, 3222, 3288, 3694 (citing to adjudicated facts) paras 475–6, 669, 678–9, 682, 916, 1399, 1402, 1547 (findings based on adjudicated facts). For the text of the cited adjudicated facts, see *Prosecutor v Stanišić and Župljanin*, ICTY-08-91-T, Decision Granting in Part Prosecution's Motions for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B) (1 April 2010) (*Stanišić and Župljanin* Adjudicated Fact Decision).

[88] *Prosecutor v Stanišić and Simatović*, ICTY-03-69-T, Judgment (30 May 2013) vol 1 fns 825, 1242, 1416 (citing to adjudicated facts) paras 387, 598, 685 (findings based on adjudicated facts).

[89] See e.g. *Krajišnik* Adjudicated Fact List (n 86) annex pp 17 (fact 194), 49 (fact 639); *Stanišić and Župljanin* Adjudicated Fact Decision (n 87) annex A pp 33 (fact 372), 61 (fact 716), 73 (fact 867), 75 (fact 893), 76 (facts 902–3), 88 (fact 1028), 107 (facts 1200, 1202), 139 (fact 1436); *Prosecutor v Stanišić and Simatović*, ICTY-03-69-T, Second Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex (11 December 2008) annex pp 24–5 (fact 203).

perpetrator(s).[90] Adjudicated facts relating to sexual violence have also been judicially noticed in the ongoing *Karadžić*[91] and *Mladić*[92] cases.

In practice, the utility of adjudicated facts in our cases has been mixed, as chambers have not taken a consistent approach regarding the probative value of adjudicated facts and have not always relied on adjudicated facts in their findings. When adjudicated facts from a related case are used, there is a risk of the defence calling evidence to rebut the evidentiary presumption associated with the fact, without an opportunity for the prosecution to reopen the case to adduce rejoinder evidence.[93] Judicially noticing adjudicated facts is also a modality that may have limited application in other contexts, unless the prosecution office has a series of cases conducted over time dealing with overlapping factual allegations, as we have had at the ICTY. Nevertheless, the underlying idea that prosecutors should think strategically about how judicial notice can be used to advance sexual violence prosecutions is a valuable one with potentially broader application in the future. For example, although not done in our work, there could be scope to ask a court to judicially notice the occurrence of widespread or systematic rape—or other patterns of rape—in a particular conflict zone.[94]

2. Challenges to victim evidence

Alongside the practical challenges of preparing sexual violence victims for testimony,[95] evidentiary challenges impact the successful prosecution of these crimes. Once a victim has agreed to testify and is prepared for their testimony, prosecutors face a number of hurdles in eliciting the most relevant and reliable evidence in court. Some of the defence challenges—that the victim consented or that prior sexual conduct undermines the victim's credibility—are unique to crimes of sexual violence. Others—such as lack of corroboration, credibility attacks based on inconsistencies between statements, the impact of trauma and perceived inducements provided to a victim—are not, per se, unique to sexual violence cases but may take on a greater dimension due

[90] See e.g. *Krajišnik* Adjudicated Fact List (n 86) annex pp 22 (fact 262), 35 (fact 461), 46 (fact 596), 47 (facts 599–601, 606); *Stanišić and Župljanin* Adjudicated Fact Decision (n 87) pp 33 (fact 373), 74 (facts 881–2), 76 (fact 900), 88 (facts 1028, 1029), 126 (fact 1345), 123–4 (fact 1327); *Prosecutor v Stanišić and Simatović*, ICTY-03-69-T, Third Prosecution Motion for Judicial Notice of Adjudicated Facts with Annex (5 January 2010) annex A p 30 (fact 276).

[91] *Karadžić* Decision on Second Prosecution Motion (n 84) (accepting facts 787, 792, 794, 797, 800–1, 803, 805, 808–12, 814, 819, 1037, 1168, 1183, 1213, 1238–41); *Karadžić* Decision on Fourth Prosecution Motion (n 84) (accepting facts 2256, 2509–10, 2585, 2616, 2654).

[92] *Prosecutor v Mladić*, ICTY-09-92-PT, First Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts (28 February 2012) (accepting facts 511, 581, 598–9, 605, 608–12, 614, 621, 742, 870, 1000, 1018, 1048, 1074–6, 1133–4); for the text of these facts, see *Prosecutor v Mladić*, ICTY-09-92-PT, Prosecution Motion for Judicial Notice of Adjudicated Facts (9 December 2011).

[93] *Prosecutor v Karadžić*, ICTY-95-5/18-T, Decision on Prosecution's Motion to Admit Evidence in Rebuttal (21 March 2014) paras 10–11, 40, 45. See also paras 25, 30, 35, 52, 57, 63, 67, 73, 81, 89 (where the OTP had also relied upon Rule 92*bis* and 92*ter* witnesses).

[94] At the ICTR, the judges took judicial notice of several facts of common knowledge relating to the Rwandan conflict, including the existence of genocide in Rwanda in 1994 against the Tutsi ethnic group. See *Karemera* Appeal Decision on Judicial Notice (n 85).

[95] See pp 114–19.

to misconceptions, assumptions, and stereotypes about sexual violence crimes and victims.

We have regularly faced these challenges when relying on the evidence of sexual violence victims. As discussed below, while we have had some success in navigating these challenges, we can also identify areas for improvement. We have not been fully successful in freeing the courtroom of trial tactics that exploit gender stereotypes and myths—a shortcoming that is partly linked to limitations in the substance and application of Rule 96. We can also, in hindsight, identify areas where there was scope for the OTP to be more persistent in pressing evidentiary points before the Court. While some of our experiences might be particular to the practices and procedures of the ICTY, many could also translate to general insights for other prosecution offices.

(a) The importance of a specialized procedural framework

Stereotypes, myths, and preconceived notions regarding sexual violence victims can infiltrate the courtroom and undermine their evidence. They often manifest in discriminatory trial tactics that discredit victims of sexual violence. These strategies put victims on trial by focusing on their behaviour instead of the conduct of the accused.[96] A well-developed procedural framework can serve as a bulwark against such challenges.[97]

In this regard, Rule 96 of the ICTY Rules, focusing on evidence in cases of 'sexual assault', has been integral to our efforts to improve accountability for sexual violence crimes. This was the first rule expressly governing evidence of sexual violence in international proceedings.[98] It provided a foundation for dismantling many of the barriers and misconceptions that permeated the courtroom—a reality that any prosecution office must address in order to improve accountability.[99]

> Rule 96 provides that in cases of sexual assault:
> (i) no corroboration of the victim's testimony shall be required;
> (ii) consent shall not be allowed as a defence if the victim

[96] These issues have been present in domestic prosecutions. See e.g. Kate Fitzgerald, 'Problems of Prosecution and Adjudication of Rape and Other Sexual Assaults under International Law' (1997) 8 *Eur J Intl L* 638 (Fitzgerald), 646–7. See also Ivana Radačić and Ksenija Turković, 'Rethinking Croatian Rape Laws: Force, Consent, and the "Contribution of the Victim"' in Clare McGlynn and Vanessa E Munro (eds.), *Rethinking Rape Law, International and Comparative Perspectives* (Routledge 2010) (Radačić and Turković) 178.

[97] The importance of such procedural rules has been acknowledged in other legal frameworks. For example, Rules 70 to 72 of the ICC Rules (n 34) contain specific safeguards for victims testifying about sexual violence crimes, including the non-admissibility of evidence of prior or subsequent sexual conduct. These same rules are also present in domestic systems. For instance, Article 19 of the Colombian Law on Sexual Violence in Armed Conflict (Law 1719 of 2014) incorporates provisions analogous to Rule 96 of the ICTY Rules (n 3).

[98] Patricia Viseur Sellers, 'Gender Strategy is not a Luxury for International Courts Symposium: Prosecuting Sexual and Gender-Based Crimes Before Internationalized Criminal Courts' (2009) 17(2) *AUJ Gender Soc Pol & L* 301 (Viseur Sellers, 'Gender Strategy is not a Luxury for International Courts'), 306.

[99] See Ch. 3.

a. has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or
b. reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;

(iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible;
(iv) prior sexual conduct of the victim shall not be admitted in evidence.

Rule 96 underscores the importance of a specialized procedural framework that is attuned to the particular challenges of victim evidence in sexual violence cases. The rule seeks to avoid the practice in some domestic systems of requiring that a victim's testimony be corroborated and bars the defence from introducing evidence of a victim's prior sexual conduct.[100] It also restricts the circumstances in which evidence of consent may be adduced. At its core, Rule 96 seeks to protect victims from irrelevant and intrusive questioning. Comparable to domestic rape shield laws,[101] it strives to overcome the myriad of myths and stereotypes that preyed upon victims of sexual violence in domestic systems.[102] With no other crime is blame and shame transferred with such ease from the perpetrator to the victim.[103] Recognizing that sexual violence has a particularly devastating and often permanent impact on victims, Rule 96 protects victims of sexual violence who may fear reprisals, re-traumatization and shame.[104]

While Rule 96 seeks to limit the accused's ability to adduce evidence of consent in order to protect the victim from needless questions about their conduct,[105] its application has not always been straightforward in practice.[106] For example, in the *Kunarac et al.* case, as noted below,[107] when cross-examining one of the victims, Counsel for

[100] *Prosecutor v Delalić et al.*, ICTY-96-21-T, Decision on the Prosecution's Motion for the Redaction of the Public Record (5 June 1997) (*Delalić* Decision for the Redaction of Public Record) paras 47, 49–53.

[101] Viseur Sellers, 'Gender Strategy is not a Luxury for International Courts' (n 98) 306. The *Tadić* Trial Chamber highlighted that 'the need to show special consideration to individuals testifying about rape and sexual assault has been increasingly recognized in the domestic law of some States'. *Prosecutor v Tadić*, ICTY-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses (10 August 1995) (*Tadić* Decision on Protective Measures) paras 46, 47, 49.

[102] *R v Seaboyer*, 7 C.R. (4th) 117 (1991). Misconceptions about sexual assault and sexual complainants are a key factor identified as underlying the high level of attrition of sexual assault cases, at all stages of the criminal justice system in Canada, Australia, the United States, and a number of other countries (e.g. New Zealand, Scotland, England, and Wales). See Regina A. Schuller and others, 'Judgments of Sexual Assault: The Impact of Complainant Emotional Demeanor, Gender, and Victim Stereotypes' (2010) 13(4) *New Crim L Rev* 759 (Schuller), 760.

[103] Mischkowski and Mlinarević (n 9) 18.

[104] *Delalić* Decision for the Redaction of Public Record (n 100) paras 23, 45–7 referring, inter alia, to the UNSC 'Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808' (1992) (3 May 1993) UN Doc S/25704 para 108.

[105] See pp 133–6.

[106] Rule 96(ii) does not allow the accused to rely on evidence of consent when the victim is 'subjected to or threatened with or has reason to fear violence, duress, detention or psychological oppression' or 'reasonably believed that if [he or she] did not submit, another might be so subjected, threatened or put in fear'. Rule 96(iii) states that evidence of the victim's consent shall be admitted when the accused satisfies the trial chamber, *in camera*, that the evidence is relevant and credible.

[107] See pp 138–9.

the accused Kovač alleged that she was in love with Kovač and that their relationship had been consensual. The victim was repeatedly cross-examined on this allegation, which she denied.[108] Despite later rejecting the substance of the accused's argument,[109] the Chamber nevertheless considered this evidence.[110] The OTP did not object to this line of questioning. Our approach was informed by the prevailing view that the Prosecution bore the burden of proving non-consent under the rule and that we would have to rely on the witness's evidence of non-consent to meet this burden.[111]

This precedent underscores the tension between the full application of progressive evidentiary and procedural frameworks for sexual violence cases and the pragmatic concerns that govern the day-to-day realities of trials. Our experience confirms that prosecutors must pay heightened attention to ensuring that protections incorporated into procedural rules are also implemented in practice—an assessment that has to be made on a case-by-case basis. In light of the unique evidentiary hurdles that may arise from stereotypes and myths about victims of sexual violence, all parties to the proceedings as well as the judges bear a responsibility to ensure appropriate approaches.

(b) Evidentiary challenges to victim evidence

(i) Proving non-consent

In our cases, we have been required to prove the non-consent of the victim in order to establish the crime of rape. In the absence of a clear definition of rape in international criminal law, ICTY judges turned to domestic rape law to flesh out the definition of this crime and constructed a definition that required proof of non-consent.[112]

Strong and persuasive views were expressed within the OTP that proof of non-consent should not be an affirmative requirement for rape as a crime under international criminal law where the context clearly demonstrates that the person was forced to participate in the sexual act. An internal OTP memorandum describing this approach noted:

> Why don't we ask robbery victims or physical assault victims if they consented? Are we really going to ask two male victims in Omarska who were forced to perform oral sex acts on each other, under the threat of force, if they *consented* to doing these acts?[113]

Nonetheless, ICTY jurisprudence took a different approach and determined that the burden of proof of non-consent fell on the Prosecution. The *Kunarac et al.* Trial Chamber found that, despite the reference in Rule 96(ii) to the 'defence' of consent in rape cases, non-consent is an element that must be proved by the Prosecution.[114] The Trial Chamber understood the reference to consent as a 'defence' in the rule to relate to

[108] *Prosecutor v Kunarac et al.*, ICTY-96-23-T & ICTY-96-23/1-T, Testimony of Witness 87 (23 October 2000) transcript pp 6132–4.

[109] *Kunarac* Trial Judgment (n 56) para 762. [110] Ibid., paras 141–2, 762–5.

[111] See n 114. [112] *Furundžija* Trial Judgment (n 45) paras 175–86.

[113] Internal documentation, on file with authors.

[114] The Chamber found that 'the reference in the Rule [96] to consent as a "defence" is not entirely consistent with traditional legal understandings of the concept of consent in rape. Where consent is an

the circumstances under which evidence of consent will be admissible.[115] Specifically, the *Kunarac et al.* Trial Chamber found that the definition of rape required proof that sexual penetration occurred 'without the consent of the victim'.[116]

While ICTY jurisprudence placed the burden of proving non-consent on the Prosecution, it confirmed that non-consent could be inferred from the surrounding circumstances, rather than requiring the Prosecution to lead evidence, such as evidence of resistance by the victim. Noting the Prosecution's argument that force, threats of force, or coercion nullifies true consent,[117] the *Kunarac et al.* Appeals Chamber concluded that the circumstances of detention in the case were so coercive that they negated any possibility of consent.[118] The *Kunarac et al.* Appeals Chamber also found that circumstances prevailing in most cases charged as either war crimes or crimes against humanity will be almost universally coercive—making true consent impossible.[119] This approach takes into account the context in which sexual violence occurs by allowing judges to infer non-consent from the surrounding coercive circumstances, without requiring proof that the perpetrator used threats, or force, or that the victim resisted.

As the *Kunarac et al.* Appeals Chamber explained:

> A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.[120]

It also avoids witness trauma flowing from direct questions about non-consent when the circumstances surrounding the crime were clearly coercive. However, as illustrated by the *Kunarac et al.* example discussed above,[121] care must still be taken to ensure that evidence of consent is not inappropriately admitted even when the surrounding circumstances are clearly coercive.

aspect of the definition of rape in national jurisdictions, it is generally understood … to be *absence of consent* which is an *element* of the crime. The use of the word "defence", which in its technical sense carries an implication of the shifting of the burden of proof to the accused, is inconsistent with this understanding. The Trial Chamber does not understand the reference to consent as a "defence" in Rule 96 to have been used in this technical way'. *Kunarac* Trial Judgment (n 56) para 463 (emphasis in original). See also statement by Judge Hunt noting that the Prosecution bears the onus of proving non-consent and, to this end, should elicit from the witness a clear statement of non-consent, beyond implying it through the use of the term 'rape' *Prosecutor v Kunarac et al.*, ICTY-96-23-T & ICTY-96-23/1-T, Judge Hunt (19 April 2000) transcript pp 1979–82. However, as will be discussed below, the *Kunarac et al.* Trial Chamber ultimately did not seem to require such an explicit statement and instead inferred non-consent from the coercive circumstances that made consent impossible.

[115] *Kunarac* Trial Judgment (n 56) para 464 confirmed in *Prosecutor v Gacumbitsi*, ICTR-2001-64-A, Judgment (7 July 2006) (*Gacumbitsi* Appeal Judgment) para 154 ('Rather than changing the definition of the crime by turning an element into a defence, Rule 96 of the Rules must simply be read to define the circumstances under which evidence of consent will be admissible.').

[116] *Kunarac* Trial Judgment (n 56) para 460. This definition was confirmed on appeal. See *Prosecutor vs Kunarac et al.*, ICTY-96-23 & ICTY-96-23/1-A, Appeal Judgment (12 June 2002) (*Kunarac* Appeal Judgment) para 128.

[117] *Kunarac* Appeal Judgment (n 116) para 126. [118] Ibid., para 132.

[119] Ibid., para 130. The Appeals Chamber in *Gacumbitsi* confirmed 'non-consent' as an element of the crime of rape, though evidence of coercive circumstances under which no meaningful consent would be possible would suffice to prove non-consent. *Gacumbitsi* Appeal Judgment (n 115) paras 152–7.

[120] *Kunarac* Appeal Judgment (n 116) para 129. [121] See p 132.

In seeking to prove non-consent, we have presented a range of evidence on 'coercive circumstances' that made consent impossible.[122] Evidence of any form of coercion, including acts or threats of (physical or psychological) violence, abuse of power, any other forms of duress, and generally oppressive circumstances, may indicate lack of consent.[123] Even when a victim actively seeks sexual contact with the accused, the conditions surrounding the act(s) can vitiate consent. For instance, this will be the case when a victim is held captive, targeted for multiple acts of sexual violence, and initiated contact with the accused only because she had been threatened with death should she not satisfy his desires.[124] Other examples include evidence that the sexual violence took place in captivity,[125] detention,[126] during attacks on towns,[127] or during ongoing expulsion[128] or genocide campaigns.[129] As non-consent may be inferred from a complex factual matrix, prosecutors must pay particular attention to adducing evidence on coercive conditions.

Notwithstanding the ICTY's common sense approach to inferring non-consent from coercive circumstances, a real question remains about the validity of requiring non-consent as an element of rape under international criminal law.[130] This is a question that should be given further careful consideration in the future. There are good reasons why rape should be viewed in the same way as other violations of international criminal law, such as torture or enslavement, where proving non-consent is not required.[131] In his critique of the *Gacumbitsi* Appeals decision at the International

[122] See *Kunarac* Appeal Judgment (n 116) paras 132–3, 409—affirming *Kunarac* Trial Judgment (n 56).

[123] *Prosecutor v Đorđević*, ICTY-05-87/1-A, Appeal Judgment (27 January 2014) (*Đorđević* Appeal Judgment) para 852 citing to *Prosecutor v Milutinović et al.*, ICTY-05-87, Trial Judgment (26 February 2009) (*Milutinović* Trial Judgment) vol 1 para 200.

[124] *Kunarac* Trial Judgment (n 56) paras 644–7.

[125] The *Furundžija* Trial Chamber found that 'any form of captivity vitiates consent'. *Furundžija* Trial Judgment (n 45) para 271.

[126] *Kunarac* Appeal Judgment (n 116) para 132: 'For the most part, the Appellants in this case were convicted of raping women held in *de facto* military headquarters, detention centres and apartments maintained as soldiers' residences. As the most egregious aspect of the conditions, the victims were considered the legitimate sexual prey of their captors. Typically, the women were raped by more than one perpetrator and with a regularity that is nearly inconceivable. (Those who initially sought help or resisted were treated to an extra level of brutality.) Such detentions amount to circumstances that were so coercive as to negate any possibility of consent.' See also *Prosecutor v Kvočka et al.*, ICTY-98-30/1-A, Appeal Judgment (28 February 2005) para 396; *Kunarac* Appeal Judgment (n 116) paras 132–3; *Milutinović* Trial Judgment (n 123) vol 1 para 200; *Stanišić and Župljanin* Trial Judgment (n 87) vol 1 paras 430, 432, 489, 587, 603, 629–30; *Krajišnik* Trial Judgment (n 80) para 333.

[127] *Krajišnik* Trial Judgment (n 80) para 309; *Prosecutor v Prlić et al.*, ICTY-04-74-T, Trial Judgment (29 May 2013) (*Prlić* Trial Judgment) vol 3 paras 426–9.

[128] *Stanišić and Župljanin* Trial Judgment (n 87) vol 1 paras 428, 633.

[129] The *Gacumbitsi* Appeals Chamber found that consent may be inferred from the background circumstances, such as an ongoing genocide campaign or the detention of the victim. *Gacumbitsi* Appeal Judgment (n 115) para 155.

[130] Kirsten Campbell, 'The Gender of Transitional Justice: Law, Sexual Violence and the International Criminal Tribunal for the Former Yugoslavia' (2007) 1 *Intl J Transitional Justice* 411 (Campbell), 418.

[131] The definition of rape in the ICC's Rome Statute (n 34) does not include the element of non-consent, but rather focuses on coercive circumstances. The ICC's Elements of Crimes provide that the sexual penetration must be committed: '… *by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power,* against such person or another person, or by taking advantage of a coercive environment, or … against a person incapable of giving genuine consent'. ICC Elements of Crimes (adopted 9 September 2002) arts 7(1)(g)-1, 8(2)(b)(xxii)-1, 8(2)(e)(vi)-1 (emphasis added).

Criminal Tribunal for Rwanda (ICTR), former ICTY Judge Wolfgang Schomburg noted that, to establish an act of sexual violence under international criminal law, the Prosecution must adduce evidence of the coercive circumstances to satisfy the *chapeau* (contextual) elements (nexus to armed conflict, part of a widespread or systematic attack or committed with intent to destroy a group).[132] As Judge Schomburg persuasively argued, '[a] definition of sexual violence that includes non-consent unnecessarily points to the behaviour of the victim and ultimately contradicts itself'.[133]

The inclusion of non-consent as an element of the crime of rape underscores the danger of the wholesale transfer of domestic concepts to international crimes.[134] This is an area where perhaps the OTP could have paid more attention to persuasively explaining to chambers the limitations of incorporating domestic law concepts that are not well suited for the distinctive framework of international criminal law. This issue is likely to emerge in the future in other international and domestic tribunals prosecuting conflict-related sexual violence.

(ii) Corroboration

Sexual violence is a crime that often occurs without witnesses.[135] For this reason, incidents of sexual violence are often difficult to corroborate. Historically there has been a tendency to require more corroboration for sexual violence than for other types of crimes.[136] The experience in certain national jurisdictions has been that, 'without corroborative evidence, rape victims are, more often than not, suspected of making false allegations'.[137]

In light of this historic evidentiary hurdle, Rule 96(i) provides that '[i]n cases of sexual assault … no corroboration of the victim's testimony shall be required'.[138] Rule 96(i) functions to accord 'the testimony of a victim of sexual assault the same presumption

[132] Wolfgang Schomburg and Ines Peterson, 'Genuine Consent to Sexual Violence under International Criminal Law' (2007) 101 *AJIL* 121, 140.

[133] Ibid.

[134] Serge Brammertz and Michelle Jarvis, 'Lessons Learned in Prosecuting Gender Crimes under International Law: Experiences from the ICTY' in Chile Eboe-Osuji (ed.), *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay* (Martinus Nijhoff Publishers 2010) 106–8.

[135] Daniel D. Ntanda Nsereko, 'Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia' (1994) 5 *Crim L Forum* 507, 547. See also Mischkowski and Mlinarević (n 9) 18 (noting that because most rapes happen without witnesses many women do not report the attack. This is a reason why rape is one of the most underreported crimes worldwide in domestic jurisdictions); UNSG Report on Sexual Violence in Conflict pursuant to paragraph 18 of UNSC 1920 (14 March 2013) UN Doc A/67/792-S/2013/149 para 13 (finding that sexual violence is almost universally underreported).

[136] Fitzgerald (n 96) 646 (highlighting the historical view that 'rape must be examined with greater caution than any other crime as it is easy to charge and difficult to defend') (internal citations omitted).

[137] See Mischkowski and Mlinarević (n 9) 18, 47 ('In some judgments, it seems that any inconsistency casts doubt on the truthfulness of the testimony of a rape survivor.'). For a discussion on gender stereotypes and rape myths, including the rape myth that women often fabricate rape, see Radačić and Turković (n 96) 178–9. See also Lucinda Vandervort, 'Honest Beliefs, Credible Lies and Culpable Awareness: Rhetoric, Inequality, and *Mens Rea* in Sexual Assault' (2004) 42(4) *Osgoode Hall LJ* 625 (Vandervort).

[138] *Delalić* Trial Judgment (n 54) para 936 (noting that Rule 96(i) provides that no corroboration of the testimony of a victim of sexual assault shall be required). The more recent manifestation of this international standard is in Rule 63(4) of the ICC Rules (n 34) which states that: 'a Chamber shall not impose a

of reliability as the testimony of victims of other crimes'.[139] It seeks to confirm that, 'contrary to the position taken in some domestic jurisdictions, the testimony of victims of sexual assault is not, as a general rule, less reliable than the testimony of any other witness'.[140] The absence of a corroboration requirement is consistent with the general ICTY evidentiary principle that 'there is no legal requirement that the testimony of a single witness on a material fact be corroborated before it can be accepted as evidence'.[141] Sexual violence crimes should not be subjected to higher evidentiary standards than any other type of crime.[142]

Although corroboration is not a legal requirement, we have found it useful to lead corroborative evidence to support a victim's account, whenever such evidence is available, as it has assisted the judges in reaching their findings.[143] This is the same approach that we would adopt for any other category of crime. The notion of corroboration should be interpreted broadly. For instance, in the *Delalić et al.* prison camp case, when endorsing the Trial Chamber's conclusion that Hazim Delić had been adequately identified by a rape victim, the Appeals Chamber noted that the victim's description of Delić as 'the man with a crutch' was corroborated by other witnesses.[144] Furthermore, in the *Kunarac et al.* case, the Trial Chamber found that rape victim FWS-95's evidence identifying Dragoljub Kunarac was supported by FWS-105. This witness was present at the house where FWS-95 was raped, and testified that she saw a man there being addressed by Kunarac's nickname 'Žaga'.[145] FWS-105's ability to place Kunarac at the location where FWS-95 was raped assured the Chamber of the reliability of FWS-95's identification evidence.[146] Admissions made by an accused can also be useful in corroborating the victim's account.[147]

The ICTY Appeals Chamber has declared that the absence of corroboration is a factor to be taken into consideration by the Trial Chamber in weighing the evidence and arriving at its determination of witness credibility.[148] Therefore leading corroborative evidence may protect against appeal, particularly where the victim's testimony is the only evidence of a particular crime by an accused.

We recommend that, as with all categories of crimes, prosecutors should adduce any available supporting evidence to ensure that the strongest possible case is put forward. While corroborative evidence should be relied upon when it is available,

legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence'.

[139] *Prosecutor v Tadić*, ICTY-94-1-T, Trial Judgment (7 May 1997) (*Tadić* Trial Judgment) para 536.

[140] *Prosecutor v Delalić et al.*, ICTY-96-21-A, Appeal Judgment (20 February 2001) (*Delalić Appeal* Judgment) para 505. See also para 504, quoting the *Delalić* Trial Judgment (n 54) para 956 (agreeing with the view of other Chambers that Rule 96(i) 'accords to the testimony of a victim of sexual assault the same presumption of reliability as the testimony of other crimes, something long been denied to victims of sexual assault by the common law') (footnote omitted).

[141] *Delalić* Appeal Judgment (n 140) paras 504, 506; *Prosecutor v Aleksovski*, ICTY-95-14/1-A, Appeal Judgment (24 March 2000) para 62; *Prosecutor v Kupreškić et al.*, ICTY-95-16-A, Appeal Judgment (23 October 2001) (*Kupreškić* Appeal Judgment) para 220.

[142] *Đorđević* Appeal Judgment (n 123) para 887.

[143] See pp 151–2.

[144] *Delalić* Appeal Judgment (n 140) paras 493, 495.

[145] *Kunarac* Trial Judgment (n 56) paras 318, 677.

[146] Ibid., para 677.

[147] Ibid., paras 64, 67, 131–2, 140, 664, 676.

[148] *Kupreškić* Appeal Judgment (n 141) para 220.

prosecutors should refrain from creating *de facto* corroboration requirements by hesitating to raise charges of sexual violence merely because no corroborative testimony exists to bolster the victim's account. Prosecutors must also make clear in their argument before the court that any corroboration adduced is not legally required. In this way, prosecutors can ensure that perceptions do not become entrenched over time that corroboration is required.

(c) Credibility challenges

(i) Defence strategies

Defence counsel have relied on a variety of strategies to challenge the evidence of victims of sexual violence. These strategies have often varied depending on the accused's physical proximity to the crime. Many of the strategies employed in our physical perpetrator cases are similar to those that have been employed in domestic systems, including unwarranted attacks on the credibility of survivors or other approaches primarily designed to humiliate and intimidate them.

Prosecutors have the responsibility to object to improper or overly-aggressive cross-examination of sexual violence victims.[149] This includes holding defence counsel to their ethical obligation not to use any 'means that have no substantial purpose other than to embarrass, delay or burden victims and witnesses'.[150] In trials involving more than one accused person, if charges of sexual violence are not relevant to all accused, or if the same area has already been adequately covered by the cross-examination conducted on behalf of another accused person, prosecution counsel should object to inappropriately duplicative questioning, requesting that judges impose reasonable restrictions on the scope of cross-examination.

Although not all victims of sexual violence are spared adverse treatment during cross-examination,[151] aggressive cross-examination tactics are rarely effective. For example:

- In the *Kunarac et al.* case, one of the accused, Kovač, argued that one of his alleged rape victims was in love with him and had sent him a letter with a heart drawn

[149] Prosecutors are likewise charged with taking measures to protect the privacy and ensure the security of witnesses and their families and to treat victims with compassion. See ICTY Standards of Professional Conduct of Prosecution Counsel, Prosecutor's Regulation No 2 (14 September 1999) para 2(g); MICT Standards of Professional Conduct of Prosecution Counsel, Prosecutor's Regulation No 1 (29 November 2013) para 2(g).

[150] ICTY Code of Professional Conduct for Counsel Appearing before the International Tribunal (as amended on 22 July 2009) IT/125 Rev.3 art 28(A). See also American Bar Association Model Rules of Professional Conduct r 4.4(a). Chambers are entrusted with controlling the manner of questioning of witnesses in court 'to avoid any harassment or intimidation'. ICTY Rules (n 3) r 75(D). Article 7(2) of the new MICT Code of Professional Conduct for the Judges of the Mechanism (11 May 2015) includes a provision that 'Judges shall exercise vigilance in controlling the manner of questioning of witnesses, particularly when they are victims, in accordance with the Rules and give special attention to the right of participants to equal protection and benefit of the law'.

[151] See e.g. *Prosecutor v Delalić et al.*, ICTY-96-21-T, Testimony of Milojka Antić (14 April 1997) transcript pp 1825 (Defence counsel: 'She alleged in her statement to the Prosecutor she was raped on multiple occasions. She has testified here twice that it only occurred three times. I am just asking her why she exaggerated and why she told the untruth to the investigator for the Prosecutor.'), 1834–6 (reflecting aggressive and accusatory questioning and resulting interventions by the Presiding Judge); *Delalić* Trial Judgment (n 54) paras 936, 957 (accepting victims' testimony as reliable).

on the envelope. Although the victim denied this allegation, she faced aggressive cross-examination.[152] The Chamber later found that no such letter was sent and that the relationship between the victim and the accused was 'not one of love as the Defence suggested, but rather one of cruel opportunism on [the defendant's part], of constant abuses and domination over a girl who, at the relevant time, was only about 15 years old'.[153]

- Again in *Kunarac et al.*, seeking to undermine a witness's claim that she did not become pregnant after being raped, the defence relied on a medical report concerning the witness.[154] The Presiding Judge stopped this line of questioning considering the report to be a private matter that did not further the defence case.[155] The Chamber also denied a defence application to order the medical and psychological examination of sexual violence victims because it was unconvinced that these 'highly intrusive examinations' were justified.[156]

In contrast, in cases against senior officials, issues such as the proof of non-consent and victim credibility have been less at issue. Cross-examination has focused on links between the crimes and the accused, such as the affiliation of perpetrator groups involving issues such as a description of their uniforms. The substantive legal challenge in higher-level accused cases has been establishing the accused's criminal responsibility for the sexual violence crimes through their leadership role.[157]

Cases of self-represented accused have raised the issue of the appropriateness of allowing the accused to question victims. Whether or not the accused was charged with physically perpetrating the crimes has been a key factor in this assessment. Allowing an accused physical perpetrator to cross-examine a victim increases the risk of re-traumatization during cross-examination. For this reason, the Trial Chamber in the *Stanković* case determined that the self-represented accused—who had been charged as a physical perpetrator of sexual violence crimes in Foča municipality[158]—would not be permitted to cross-examine the victim. The Chamber expressed doubts that it would be appropriate for the accused representing himself in person to cross-examine at trial witnesses who are also alleged victims of these crimes and ordered that legal counsel be imposed.[159]

In cases where self-represented accused were not charged as physical perpetrators—for example, the *Slobodan Milošević, Šešelj,* and *Karadžić* cases—judges have allowed the accused to cross-examine victims. Although these accused were not the direct perpetrators, some victims felt threatened and intimidated during cross-examination

[152] *Prosecutor v Kunarac et al.*, ICTY-96-23-T & ICTY-96-23/1-T, Testimony of Witness 75 (23 October 2000) transcript pp 6132–4.

[153] *Kunarac* Trial Judgment (n 56) para 762.

[154] *Prosecutor v Kunarac et al.*, ICTY-96-23-T & ICTY-96-23/1-T, Testimony of Witness 105 (13 June 2000) transcript pp 4285–8.

[155] *Prosecutor v Kunarac et al.*, ICTY-96-23-T, Testimony of Witness 105 (13 June 2000) transcript p 4286.

[156] *Kunarac* Trial Judgment (n 56) para 917. See also pp 163–5.

[157] See Ch. 7.

[158] The *Stanković* case was later transferred to the State Court of BiH and adjudicated there so this issue became moot for the ICTY proceedings. See pp 348–50 in Ch. 10.

[159] *Prosecutor v Janković and Stanković*, ICTY-96-23/2-PT, Decision Following Registrar's Notification of Radovan Stanković's Request for Self-Representation (19 August 2005) paras 21, 25.

because of the position these accused held in the region during the conflict.[160] Victims often viewed these accused as persons of power responsible for orchestrating the violence in their communities. We have been vigilant in objecting to inappropriate lines of questioning and in requesting that appropriate limits be imposed on cross-examination. In order to protect victims, the judges have often imposed such limits.[161] Among other things, the judges have ordered that questions relevant to the sexual violence incidents be led in closed session. They have also often controlled the tone and scope of the questions posed.[162]

(ii) Inconsistencies in victim evidence

Often sexual violence victims have provided multiple statements. Many were initially interviewed by external local and international non-governmental organizations (NGOs), and later provided statements to the OTP. The varying level of detail between the initial interviews provided to the NGOs and those later obtained by the OTP triggered credibility challenges by the defence based on perceived inconsistencies in the different statements.[163]

Whether these inconsistencies undermine the victim's reliability depends on the nature of the inconsistencies. Minor inconsistencies, including those relating to the date on which an incident took place, the precise sequence of events, or other peripheral details,[164] have been insufficient to undermine the victim's account. In our experience there are a variety of reasons for these types of inconsistencies—many of which relate to the nature of sexual violence in conflict and its impact on victims. First, crimes of sexual violence often take place while the victims are detained for prolonged periods 'without knowledge of dates or access to clocks, and without the opportunity to record their experiences'.[165] Second, there is the obvious 'difficulty, in the absence of documentary evidence, of reconstructing events several years after they occurred'.[166] Furthermore, 'survivors of … traumatic experiences cannot reasonably be expected to recall the precise minutiae of events, such as exact dates or times', nor 'every single element of a complicated and traumatic sequence of events'.[167] Third, the fact that sexual violence crimes are often 'continuous' or of a 'repetitive nature' can affect the victim's ability to remember precise details.[168] Finally, in many instances victims were minors when the crimes occurred, and so the '[t]he level of detail which such witnesses could be expected to recall is different to that expected of witnesses who were more mature at the relevant time'.[169]

[160] PSVWG Interviews, on file with authors.

[161] Ibid. [162] Ibid. [163] See pp 43–4 in Ch. 3 and pp 88–9 in Ch. 4.

[164] *Kunarac* Trial Judgment (n 56) paras 564, 712, 733; *Kunarac* Appeal Judgment (n 116) paras 208–10, 215 217, 243; *Furundžija* Trial Judgment (n 45) para 113; *Milutinović* Trial Judgment (n 123) vol 2 para 629.

[165] *Kunarac* Trial Judgment (n 56) para 564. See also para 733.

[166] *Kunarac* Appeal Judgment (n 116) paras 208–10, 215–17; *Kunarac* Trial Judgment (n 56) para 564.

[167] *Furundžija* Trial Judgment (n 45) para 113. See also *Kunarac* Trial Judgment (n 56) para 679; *Kunarac* Appeal Judgment (n 116) paras 302, 311.

[168] *Kunarac* Appeal Judgment (n 116) para 267.

[169] *Kunarac* Trial Judgment (n 56) para 565. The Inter-American Court of Human Rights has followed a similar approach in assessing inconsistencies in the evidence of victims of sexual violence. In *Cantú v Mexico*, it considered 'that the facts narrated by Mrs. Rosendo Cantú refer to a traumatic moment she

Minor inconsistencies may in fact serve to enhance a victim's reliability. For instance, in the *Kunarac et al.* case, the defence challenged a rape victim's reliability because she did not testify about certain inessential details which had appeared in her statement. The Appeals Chamber concluded that these matters were not 'sufficiently significant to cast any doubt upon' the victim's credibility.[170] Rather, it explained how 'the absence of such natural discrepancies could form the basis for suspicion as to the credibility of a testimony'.[171]

While minor inconsistencies do not necessarily undermine reliability, providing reliable and accurate evidence on the identity of the physical perpetrator will often be crucial to witness reliability. For instance, in the *Đorđević* case, the defence challenged a victim's ability to identify the perpetrators of her sexual assault. During her prior testimony in the *Slobodan Milošević* case, she had described the police uniforms of some of the perpetrators, but she did not describe the same uniforms during her testimony in the *Đorđević* case. When this inconsistency was put to the witness, she proceeded to describe the police uniforms again. This satisfied the Chamber that the witness could recall the uniforms and confirmed the reliability of her description. The Chamber found the divergence in her evidence explainable in light of the traumatic nature of the events, the passage of ten years since the events and seven years since her testimony in the *Slobodan Milošević* case. It thus found her evidence of her sexual assault and her identification of the perpetrators reliable.[172] In contrast, in the *Haradinaj et al.* case, the Trial Chamber rejected a victim's evidence that Idriz Balaj raped her because of shortcomings in her recollection of the perpetrator's physical characteristics. In rejecting her evidence, the Trial Chamber referred to her failure to recognize Balaj on an ICTY photo board as well as to her testimony that Balaj did not look like the man who raped her, but looked older when she saw him on television seven years after the rape, prior to the start of trial.[173] The Chamber also referred to the fact that she had stated in court that she would no longer be able to recognize the man who raped her.[174] Similarly, in the *Kunarac et al.* case, the Trial Chamber rejected a rape victim's testimony identifying Zoran Vuković as the physical perpetrator of a rape she suffered in part because of an inconsistency about whether she knew Vuković before the war.[175] When confronted

suffered and the impact, upon recalling it, can lead to some inaccuracies; these statements were rendered at different times between 2002 and 2010'. The Court also took into account the fact that at the time of the events of this case, Mrs. Rosendo Cantú was a minor. It concluded that the differences in the accounts provided in her statements were not substantive and consistently conveyed certain material facts. *Rosendo Cantú et al. v Mexico*, IACtHR Series C No 216, Preliminary Objections, Merits, Reparations and Costs (31 August 2010) (*Cantú v Mexico*) paras 91–2.

[170] *Kunarac* Appeal Judgment (n 116) para 309.

[171] Ibid., see also para 254 ('These minor discrepancies do not cast any doubt on the testimony and thereby on the findings of the Trial Chamber. On the contrary, given that discrepancies may be expected to result from an inability to recall everything in the same way at different times, such discrepancies could be taken as indicative of the credibility of the substance of the statements containing them.'); *Furundžija* Trial Judgment (n 45) para 113 ('[I]nconsisteucies may, in certain circumstances, indicate truthfulness and the absence of interference with witnesses.').

[172] *Đorđević* Trial Judgment (n 50) para 833.

[173] *Prosecutor v Haradinaj et al.*, ICTY-04-84, Trial Judgment (3 April 2008) (*Haradinaj* Trial Judgment) para 469. See *Prosecutor v Haradinaj et al.*, ICTY-04-84-T, Testimony of Witness 61 (11 May 2007) transcript pp 4050–1.

[174] *Haradinaj* Trial Judgment para 469.

[175] *Kunarac* Trial Judgment (n 56) paras 787–8, 791–2.

with this inconsistency, the victim could only indicate that she 'possibly ... might have seen' Vuković prior to the war but that she was not 'sure of that'.[176]

Where a court believes there are material inconsistencies in one part of a victim's account, it can reject that part without rejecting the remainder of the victim's evidence.[177] In the *Stakić* case, although the Trial Chamber expressed some reservations as to the accuracy of an aspect of the rape victim's testimony it found her evidence to be credible overall. The Trial Chamber found that one detail—that on successive nights she found clothes in the house she was being held in to replace the ones ripped off her body right before she was raped—did not seem credible.[178] However, it found that her testimony about her repeated rapes while being held in this house to be credible as a whole.[179]

(iii) The impact of trauma on credibility

Defence counsel have argued that a traumatized victim of sexual violence cannot be a reliable and credible witness. In *Furundžija*, the Defence argued that the sexual violence victim, Witness A, was unreliable and could not be believed because she had received counselling for post-traumatic stress disorder (PTSD).[180] In evaluating Witness A's credibility, the Trial Chamber considered evidence relating to the victim's psychological condition. It found that there was no evidence of brain damage or contamination of memory due to any treatments.[181] In determining the impact that the witness's psychological condition had on the reliability of her evidence, the Trial Chamber considered the substance of Witness A's evidence to ascertain whether there were material inconsistencies in it. Having done so, the Trial Chamber found 'that Witness A's memory regarding material aspects of the events was not affected by any disorder which she may have had'.[182] Significantly, the Chamber concluded that 'there is no reason why a person with PTSD cannot be a perfectly reliable witness'.[183] The Appeals Chamber has subsequently come to similar conclusions regarding witnesses suffering from PTSD for reasons other than sexual violence.[184]

[176] *Prosecutor v Kunarac et al.*, ICTY-96-23-T, Testimony of Witness 87 (4 April 2000) transcript p 1682. See also *Kunarac* Trial Judgment (n 56) paras 787–8.

[177] *Kunarac* Appeal Judgment (n 116) para 228. [178] *Stakić* Trial Judgment (n 41) para 796.

[179] Ibid., paras 805–6. [180] See *Furundžija* Trial Judgment (n 45) paras 110–16.

[181] *Prosecutor v Furundžija*, ICTY-95-17/1, Appeal Judgment (21 July 2000) (*Furundžija* Appeal Judgment) para 122, citing *Furundžija* Trial Judgment (n 45) para 108.

[182] *Furundžija* Trial Judgment (n 45) para 108.

[183] *Furundžija* Appeal Judgment (n 181) para 122, citing *Furundžija* Trial Judgment (n 45) para 109.

[184] See e.g. *Prosecutor v Blagoje Simić et al.*, ICTY-95-9-A, Appeal Judgment (28 November 2006) para 229 ('The Appeals Chamber recalls that an individual suffering from PTSD may, nonetheless, be a perfectly credible witness.'). See pp 163–5. Interestingly, instead of viewing trauma as a factor that might undermine credibility, the Inter-American Court of Human Rights has relied on evidence of trauma as an element of proof that supports the victim's credibility. In *Cantú v Mexico*, the Court considered the credibility of the victim was supported by a medical psychiatric report, which stated, among other information, that the victim suffered 'acute post-traumatic stress' and a 'major depressive episode' as a 'consequence of traumatic life experiences' and indicated that she was 'exposed to a traumatic experience even though there is no physical evidence to show that this experience constituted rape'. *Cantú v Mexico* (n 169) para 99.

(iv) Prior sexual conduct of a victim is inadmissible

In contrast to the general presumption of admissibility which governs the ICTY Rules, evidence of the victim's prior sexual conduct is inadmissible under Rule 96(iv).[185] This rule recognizes that such evidence inappropriately seeks to call into question the reputation of the victim and potentially subjects the victim to irrelevant and intrusive questioning on personal matters. The rule provides that '[i]n cases of sexual assault … prior sexual conduct of the victim shall not be admitted in evidence'.

In the *Delalić et al.* case, the Trial Chamber gave guidance concerning the application of Rule 96(iv) when granting a Prosecution motion to expunge testimony regarding the prior sexual conduct of a victim. In finding that the evidence of a victim's prior sexual conduct was irrelevant and inadmissible, the Chamber recalled the purpose of this rule as follows:

> [T]he Judges considered that the prime objective of this provision is to adequately protect the victims from harassment, embarrassment and humiliation by the presentation of evidence which relates to past sexual conduct. Sub-rule 96(iv) seeks to prevent situations where the admission of certain evideuce may lead to a confusion of the issues, therefore offending the fairness of the proceedings. Furthermore, when adopting Sub-rule 96(iv), due regard was given to the fact that in rape or other sexual assault cases evidence of prior sexual conduct of the victims mainly serves to call the reputation of the victim into question. Moreover, it was considered that the value, if any, of information about the prior sexual conduct of a witness in the context of trials of this nature was nullified by the potential danger of further causing distress and emotional damage to the witnesses.[186]

Challenges based on prior sexual conduct reflect the stereotype that women are more likely to be believed if seen as chaste and respectable.[187] Consequently, rape victims have frequently been subjected to intrusive and irrelevant questioning about their sexual history on the basis that a victim who has consented to sex in the past is more likely to have consented to the alleged incident. Such tactics deter women from reporting sexual violence so as to avoid their private lives being put on trial.[188]

The *Delalić et al.* case highlights the importance of prosecution vigilance at all times and immediately objecting if evidence of prior sexual conduct is adduced. Our experience confirms that the prosecution must not become complacent because a progressive legal framework exists for sexual violence crimes. Persistence has been required to ensure that judges, in applying Rule 96(iv), gave practical effect to the protection it seeks to confer.

(v) Perceived inducements provided to sexual violence victims

The OTP has not provided its witnesses with benefits. Nevertheless, defence counsel have challenged victim credibility based on alleged inducements to testify. They have

[185] *Delalić* Decision for the Redaction of Public Record (n 100) para 43.
[186] Ibid., para 48.
[187] These issues have arisen in domestic prosecutions. See Schuller (n 102) 763–4.
[188] Fitzgerald (n 96) 646–7 (internal citations omitted).

argued that a victim's testimony is not reliable when the victim has obtained a perceived benefit for being a prosecution witness. Given the general propensity to view sexual violence victims as unreliable,[189] there is an increased tendency to suspect fabrication by victims in order to obtain benefits.

Under Rule 68 of the ICTY Rules, any material in the prosecutor's possession establishing that the victim requested and/or received a perceived benefit from being a prosecution witness must be disclosed to the defence. ICTY jurisprudence has interpreted this obligation expansively to include any information that may relate to even tangential benefits to witnesses. This includes any support provided by the OTP to the victims, such as any correspondence connected to immigration-related matters. The credibility of a witness may also be challenged where a third person or organization has provided that witness with a benefit for being a prosecution witness.[190]

While the OTP has an affirmative obligation to disclose such material to the defence, the mere fact that a victim received a benefit does not per se undermine the victim's credibility. The credibility assessment will depend on whether the benefit caused the victims to change their evidence. For instance, in the *Lukić and Lukić* case, rape victims VG094 and VG131 were members of the Women Victims of War Association (WVW Association) in BiH. They were entitled to a monthly stipend given to all victims of sexual violence in BiH.[191] The stipend was provided to rape victims pursuant to legislation to enable these victims to pay the costs associated with their recovery from the crime.[192] The WVW Association was empowered by this legislation to verify whether claimants were in fact rape victims.[193] The defence alleged that the President of the WVW Association may have granted rape victim status and the consequent benefits associated with that status to coerce victims to give false statements of crimes.[194] Both VG094 and VG131 agreed that they joined the WVW Association in order to claim monetary benefits.[195] However, the Appeals Chamber concluded that the WVW Association did not influence the evidence provided by these victims because their evidence had not materially changed after they came into contact with the WVW Association.[196]

We have sought to minimize allegations of witness inducements by having a neutral body, the VWS, deal with issues that could be perceived as involving benefits. As an independent unit at the ICTY, which assists witnesses for both the prosecution and the defence, the VWS is better placed than the OTP to navigate problems associated with witness benefits minimizing the potential impact on witness credibility.[197] The VWS

[189] Mischkowski and Mlinarević (n 9) 18 ('Without corroborative evidence, rape victims are more often than not suspected of making false allegations.'); 47 ('In some judgments, it seems that any inconsistency casts doubt on the truthfulness of the testimony of a rape survivor.'). For a discussion on gender stereotypes and rape myths, including the rape myth that women often fabricate rape, see Radačić and Turković (n 96) 178–9. See also Fitzgerald (n 96) 646 (noting 'the unsubstantiated stereotype that women fabricate allegations of sexual assault'); Vandervort (n 137) 625–60.

[190] See *Prosecutor v Karadžić*, ICTY-95-5/18-T, Decision on Accused's Sixtieth, Sixty-First, Sixty-Third, and Sixty-Fourth Disclosure Violation Motions (22 November 2011) para 23; ICTR Best Practices Manual on Sexual Violence Crimes (n 2) para 195; ICTY Manual on Developed Practices (2009) para 52 <http://www.icty.org/sid/10145> accessed 19 August 2015.

[191] PSVWG Interviews, on file with authors. [192] Ibid. [193] Ibid.

[194] See *Prosecutor v Lukić and Lukić*, ICTY-98-32/1-A, Appeal Judgment (4 December 2012) (*Lukić and Lukić* Appeal Judgment) paras 53, 57.

[195] Ibid., fn 202. [196] Ibid., paras 101, 471. [197] See pp 117–18.

is able to liaise with external agencies and organizations—for example to relocate victims facing serious security risks to third countries—without this being considered a benefit or an inducement for being a prosecution witness. We believe it is important that prosecutors insulate themselves from information about what the VWS is doing to assist witnesses unless there is a good reason to know this information. This helps break the link between the prosecution and the perceived benefit.

3. Role of the judges

Judges play a crucial role in managing the trial and in ensuring that victims are treated with respect and dignity in court. Because of their authority in the courtroom, the judges' interventions can have a powerful impact on a victim's experience. By controlling inappropriate questioning or encouraging parties to take steps to abbreviate testimony, judges can make the experience of testifying easier for victims. By allowing breaks and the presence in court of a support person when necessary, as well as by showing empathy, judges can create a more respectful courtroom environment for victims and acknowledge their courage.

However, we have been confronted with situations where judges appear uncomfortable with details of accounts of sexual violence in court and rush prosecutors in their questioning of witnesses.[198] On occasion, the judges' failure to control defence counsel has left victims feeling harassed.[199] Further, due to unconscious gender biases, some judges have sometimes required a higher level of proof in cases of sexual violence than in other types of cases.[200] This sends victims the wrong message—that their experiences are seen as qualitatively different to those of other war crimes victims.

From our perspective, two factors in the appointment of judges to international courts and tribunals are key to the successful prosecution of sexual violence cases: gender parity on the bench and the gender competency of judges.

The inclusion of women judges on ICTY Benches has made a difference in how sexual violence trials have been handled. For example, Judges Gabrielle McDonald, Florence Mumba, and Elizabeth Odio Benito sat on cases involving sexual violence and their perspectives and experience played an important role in ensuring that sexual violence charges were included in early indictments and that evidence was elicited in an appropriate manner.[201] Judges Odio Benito and McDonald were also instrumental in the

[198] PSVWG Interviews, on file with authors. [199] Ibid.

[200] See Ch. 6 and Ch. 7. See also Susana SáCouto and Katherine Cleary, 'The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court' (2009) 17(2) *AUJ Gender Soc Pol & L* 339 (SáCouto and Cleary), 354.

[201] ICTY Judge Fausto Pocar noted that '[i]t has been very important in the cases to have women judges, and the court would have not been able to achieve the same results without them. In *Kunarac et al.* Judge Mumba and in *Akayesu* Judge Navi Pillay were crucial to coming to the results, and the idea of rape as genocide was suggested by Judge Pillay'. See *Notes from ASIL-AU CLE Institute Course Series on Human Rights, The Prosecution of Gender-based Crimes by International Criminal Courts: An Assessment of Successes and Failures,* Speakers Fausto Pocar and Elizabeth Odio Benito, 12 June 2013 (Washington DC). See also Kim Thuy Seelinger and others, *The Investigation and Prosecution of Sexual Violence: Sexual Violence & Accountability Project Working Paper Series* (Human Rights Center University of California Berkeley 2011) 50 (highlighting the important role that women judges have played at the ICTY and ICTR).

adoption of Rule 96.[202] We have also seen that, in some cases, the presence of women judges on the bench made sexual violence victims feel more at ease when testifying.[203] The contribution of these judges also highlights the benefits of gender-integrated teams at all levels of legal proceedings, including staff in Chambers, and of pursuing a policy of gender parity in the staffing of international criminal justice mechanisms.[204]

However, gender parity alone is insufficient and must be coupled with gender competency on the bench. Our work underscores the need for experienced and qualified judges presiding over sexual violence cases. When judges were experienced in conducting trials involving sexual violence and attuned to the specific characteristics of these cases, this made a real difference in the manner in which they handled victims on the stand. Gender competent judges were not only better equipped to understand the emotional and psychological impact of sexual violence on witnesses in court,[205] they were also better equipped to assess their evidence. They handled witnesses affected by trauma with more sensitivity.[206] They were able to evaluate victim evidence pragmatically by avoiding common stereotypes about victims and by accepting that victims will exhibit a range of reactions to the judicial process. They also understood the manner in which victims give their evidence, why victims may not always speak about their experiences the first time they are asked, and why they may provide inconsistent accounts. Gender competent judges have tended to also be particularly vigilant during cross-examination of victims, and have halted improper or overly aggressive questioning by defence counsel when it occurred.[207]

[202] Viseur Sellers, 'Gender Strategy is not a Luxury for International Courts' (n 98) 306; Rhonda Copelon, 'Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law' (2000) 46 *McGill LJ* 217, 228 (noting that in the start-up period, the ICTY judges, under the tutelage of Judge Gabrielle McDonald and Judge Elizabeth Odio Benito, adopted evidentiary rules, such as Rule 96, to prevent harassment of and discrimination against victims and witnesses in sexual violence cases).

[203] See PBS documentary, 'I came to testify' (n 5) (noting that the presence of women judges on the bench has often made victims feel more comfortable in court). See also Christine Chinkin, 'The Protection of Victims and Witnesses' in Gabrielle McDonald and Olivia Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts* (Kluwer Law International 2000) 459 (noting that testifying before an all-male panel of judges can at times inhibit women victims of sexual assault from recounting their stories).

[204] Judge Navanethem Pillay has noted how critical it is 'that women are represented and a gender perspective integrated at all levels of investigation, prosecution, defence, witness protection and the judiciary'. Susana SáCouto, 'Advances and Missed Opportunities in the International Prosecution of Gender-Based Crimes' (2006) 10(1) *Gonzaga JIL* 49, 56.

[205] See e.g. *Prosecutor v Kvočka et al.*, ICTY-98-30/1, Oral Ruling (13 September 2000) transcript pp 5339–40 ('The Chamber has already taken account of the special situation of this witness who is coming to testify once again by granting a very high level of protection; however, in this case, it seems important that both the Prosecution and the Defence can proceed with the examination-in-chief and cross-examination of the witness in such a way as they are able to properly present their arguments before the Chamber. However, the Chamber wishes to note that persons who have suffered such painful events are especially vulnerable. The Chamber wishes to appeal to the parties not to ask questions which are unnecessary, and that the question be—questions be asked in such a way that is fully appropriate in respect of the circumstances.').

[206] PSVWG Interviews, on file with authors.

[207] See e.g. *Prosecutor v Delalić et al.*, ICTY-96-21-T, Testimony of Milojka Antić (14 April 1997) transcript pp 1824–5. ('Q. So you decided to exaggerate; is that not correct? A. Maybe at that time I stated it that way. Maybe I did not even know that I did that, because I was re-experiencing that shock and the trouble that I had in 1992. Q. So, ma'am, what I am saying is, if nothing else, the statement you gave on February 20th 1996 to the investigator of the Office of the Prosecutor was not correct in that regard, was it? JUDGE KARIBI-WHYTE: Let us correct this. The correctness of the act itself or the number

In *Furundžija*, the Appeals Chamber recognized the importance of having judges with adequate experience presiding over sexual violence trials. On appeal, the defence challenged the independence of Judge Mumba because of her prior work and experience on women's rights issues.[208] While a member of the United Nations (UN) Commission on the Status of Women, Judge Mumba participated in drafting the Beijing Platform for Action, which advocated the vigorous prosecution of sexual and gender-based crimes. The defence requested Judge Mumba's recusal on the basis that she was biased. They argued that by sitting on the *Furundžija* case, which was primarily a sexual violence case, she was advocating a political agenda—the prosecution of rape as a war crime—that was detrimental to the accused. The Appeals Chamber found that the defence's challenge lacked merit.[209] It found that '[t]o endorse the view that rape as a crime is abhorrent and that those responsible for it should be prosecuted within the constraints of the law cannot in itself constitute grounds for disqualification'.[210] Importantly, it stressed that the possession of relevant experience and qualifications by a judge plays an integral role in satisfying the eligibility requirements and cannot be grounds for disqualification.[211]

We have also seen particularly good examples of judges assessing crimes of sexual violence from the proper perspective: as crimes of violence, rather than as purely sexually-motivated crimes that are necessarily incidental to the conflicts in which they occur.[212] Judge Fausto Pocar in the ICTR's *Rukundo* case[213] and Judge Ali Nawaz Chowhan in the ICTY's *Milutinović et al.* case[214] stressed the point that sexual violence crimes should be assessed in the same manner as other violent crimes committed against the targeted population in the same context.

of times she was raped. MR. MORAN: She alleged in her statement to the Prosecutor she was raped on multiple occasions. She has testified here twice that it only occurred three times. I am just asking her why she exaggerated and why she told the untruth to the investigator for the Prosecutor. JUDGE ODIO BENITO: Can I ask how many times are for you multiple occasions? MR. MORAN: When they are—the statement said this happened—JUDGE ODIO BENITO: Talking about rapes, multiple occasions. MR. MORAN: More than once. JUDGE ODIO BENITO: Thank you'.) See also transcript pp 1834–6 (reflecting the defence's aggressive and accusatory questioning and resulting interventions by the Presiding Judge).

[208] See *Furundžija* Appeal Judgment (n 181) paras 164–215.

[209] Ibid., para 189. In deciding this issue, it adopted the test to be used in subsequent decisions on motions for the disqualification of judges.

[210] Ibid., para 202.

[211] Article 13(1) of the ICTY Statute (n 35) refers to the importance of appointing judges with adequate experience. It provides that '[i]n the overall composition of the Chambers and sections of the Trial Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law'. See *Furundžija* Appeal Judgment (n 181) para 205 (indicating that Judge Mumba's membership of the UN Commission on the Status of Women and, in general, her previous experience in the area of women's rights were relevant to the requirement under Article 13(1) of the Statute for experience in international law, including human rights law. The possession of this experience is a statutory requirement for Judges to be elected to the ICTY). See also *Delalić* Appeal Judgment (n 140) para 702 (indicating that Judge Odio Benito's membership of the Board of Trustees of the Victims of Torture Fund and her experience in human rights were relevant to her judicial appointment, and did not constitute a basis for her disqualification).

[212] See *Đorđević* Appeal Judgment (n 123) para 887.

[213] *Prosecutor v Rukundo*, ICTR-2001-70-A, Appeal Judgment (20 October 2010) Partially Dissenting Opinion of Judge Pocar.

[214] *Milutinović* Trial Judgment (n 123) vol 3 Partially Dissenting Opinion of Judge Chowhan.

For these reasons, in our view, the gender competency of judges should be an important consideration in the selection and appointment of judges to cases of sexual violence before international courts. It is equally important for Chambers legal officers assigned to sexual violence cases to be gender competent as they support the work of judges in their assessment of the evidence.

4. Post-testimony follow-up and post-trial phase

After witnesses complete their testimony, we have routinely met with them to debrief and thank them. Where possible, arrangements have been made so that the team members who worked most closely with the witness are present at the debriefing.

This debriefing has been particularly necessary when dealing with victims of sexual violence, who experience a range of emotions after testifying. Many are relieved their testimony is over, and feel a sense of accomplishment.[215] Some can feel sadness as they were reminded of painful events, or anger when they had no opportunity to talk about what they thought was important in their testimony.[216] The debriefing session provides the prosecution team with the opportunity to acknowledge the victims' courage and their contribution to the judicial process.[217] The session assists in settling victims after the stress of their testimony and courtroom experience and provides scope for addressing any questions about what happened in the courtroom, facilitating an easier transition home.[218] While we have tried to meet victims immediately after their testimony, in certain circumstances we have found it appropriate to avoid lengthy conversations at that stage and instead meet with the victims later in the day.

Victims have also been given an opportunity to debrief with a VWS support officer. To complete the process of testifying, the support officer spends time with the victim to ensure that they leave the ICTY with a sense of closure. [219]

In general, we recognize that it is after testifying—once they are back in their daily lives—that victims are most likely to require additional support. Our experience has shown a crucial need to maintain ongoing engagement with the victims following their testimony. This includes keeping victims informed of the outcome of cases, addressing protection and security concerns and referring victims to adequate medical and psychological care.[220] Many victims are interested in the outcome of the proceedings in which they participated.[221] While all prosecution teams meet with witnesses after their testimony, the OTP could have employed a more consistent and well-enforced protocol regarding follow-up with witnesses after they return home. We could also have been more consistent in asking witnesses in advance whether or

[215] PSVWG Interviews, on file with authors. [216] Ibid.

[217] A sexual violence survivor who testified before the ICTY explained why the debriefing session was important to her: 'Can you imagine how I felt when the prosecutor came to greet me afterwards to say thank you, and to accompany me when I was going back? I mean I felt like a human.' Mischkowski and Mlinarević (n 9) 62.

[218] See also ICTR Best Practices Manual on Sexual Violence Crimes (n 2) p 67.

[219] PBS documentary, 'I came to testify' (n 5).

[220] ICTR Best Practices Manual on Sexual Violence Crimes (n 2) 73. [221] Ibid., 74–6.

not they wish to be contacted after their testimony. Prosecution teams have taken different approaches, depending on the individual engagement and personal training and experiences of the staff members in question. While in some cases prosecution teams have remained in contact with victims and informed them of the outcome of the case,[222] other teams have not.[223] As a result, victims have at times felt disappointed and abandoned.[224]

Since 2009, the VWS has established a follow-up policy of calling several weeks after the witness returns home to assess their well-being.[225] For the victims most in need of support, a member of the VWS Field Office in Sarajevo[226] visits the witness, either at home or at another location. The VWS has also worked with relevant local authorities and NGOs to establish a network of agencies to provide ongoing counselling and/or psychological support to witnesses as needed in the country where they reside. For example, the VWS Field Office has developed a network of international and national agencies, including NGOs in the region of the former Yugoslavia and in third countries, to which witnesses can be referred for legal, medical, or social assistance. In cooperation with the University of North Texas, the VWS launched a pilot study into the long-term impacts of testimony on witnesses who came before the ICTY.[227]

Adequate post-testimony follow-up is also important when victims will be called as a witness again in subsequent proceedings.[228] Given the overlapping nature of ICTY cases, victims have often been recalled to testify in subsequent proceedings dealing with the same crimes as their initial testimony. We have found it important to prepare victims for this. Our investigators have been more successful in convincing victims to return to testify in a subsequent case when they have: informed the victim about the prospect of testifying again early on; maintained contact with the victims between cases; kept them informed about the progress of the related case; and addressed security concerns that have arisen between cases. In contrast, when we have failed to maintain adequate contact with victims, they have understandably been more reluctant, or have simply refused, to testify again in another case. This has in turn impacted the OTP's ability to prove its charges in the subsequent case.

We have found it equally important to coordinate the provision of medical and psychological support through external agencies together with the VWS. Many victims require ongoing medical and psychological support and counselling long after the proceedings are concluded. At the ICTY, this has been achieved through the establishment of partnerships with qualified and experienced agencies in the region. However,

[222] PSVWG Interviews, on file with authors. [223] Ibid.

[224] See Stover (n 8) 95–6; Mischkowski and Mlinarević (n 9) 63, 93.

[225] PSVWG Interviews, on file with authors.

[226] The VWS Field Office in Sarajevo provides victims and witnesses from all regions in the former Yugoslavia with easier access to VWS protection and support services, both before and after they testify before the ICTY.

[227] PSVWG Interviews, on file with authors. The Pilot Study will target 300 witnesses and is expected to be publicly available in 2016.

[228] Ibid.

such measures have been put in place on an ad hoc basis. A lesson learned from our practice is that consistent policies must be established to ensure that such support is provided and sustained over time.

C. Other Forms of Evidence

1. Non-victim witnesses

Alongside victim evidence, the evidence of other witnesses has an important role to play in proving crimes of sexual violence. Relying solely on victim evidence increases the risk that charges will have to be withdrawn if a victim decides not to testify.[229] As a matter of good practice, prosecutors and investigators should collect as much witness evidence as possible in support of sexual violence charges.[230]

We have used non-victim evidence to prove sexual violence charges. For example, in the *Đorđević* case, in order to establish that a young Kosovo Albanian girl had been sexually assaulted,[231] we led the evidence of a witness who had observed the young girl being removed from a convoy of displaced persons and taken to the woods by two armed men.[232] In the absence of direct evidence as to what transpired in the woods, the Trial Chamber found it was unable to conclude that the young girl had been sexually assaulted. This was despite evidence that the witness heard the girl 'screaming and crying', and indicated that the girl returned 'wrapped in a blanket and appeared to be naked'.[233] Following an appeal by the Prosecution, the Appeals Chamber found that the Trial Chamber had committed a factual error.[234] The Appeals Chamber found that it was unreasonable not to conclude that the young girl had been 'subjected to mistreatment that was sexual in nature'.[235] This was the first time the ICTY Appeals

[229] At the ICTY, prosecutors have not subpoenaed victims of sexual violence to testify when they have refused to attend voluntarily.

[230] See also ICTR Best Practices-Manual on Sexual Violence Crimes (n 2) para 94 (indicating that '[e]vidence of sexual and gender-based violence should be collected from a broad array of sources, not just from victims. Often observers or other eyewitnesses have powerful testimony that can be used in court'); ICC Policy Paper on Sexual and Gender-Based Crimes (June 2014) (ICC Policy Paper on Sexual and Gender-Based Crimes) paras 52, 65 <www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf> accessed 29 June 2015.

[231] In this case, the Prosecution charged persecution through sexual assault under count 5 of the Indictment.

[232] See *Đorđević* Trial Judgment (n 50) para 832.

[233] Ibid. See also *Stakić* Trial Judgment (n 41) para 244 (where the Trial Chamber expressed its reluctance to conclude that sexual violence had occurred at Trnopolje camp in Prijedor Municipality on the basis of hearsay evidence alone, but noted that it had in fact heard from a rape victim).

[234] *Đorđević* Appeal Judgment (n 123) paras 853–9. With respect to two other incidents of sexual assault that the Trial Chamber found had not been established, the *Đorđević* Appeals Chamber relied on circumstantial and hearsay evidence to establish that the assaults had occurred. One of the witnesses who gave circumstantial evidence concerning these assaults was herself a victim who heard 'the screams of the other two women' while she was being raped. She later saw one of these women whom she described as seeming 'a little bit lost'. Another witness whom the Appeals Chamber relied upon was held with these women. She was not sexually assaulted, but gave relevant circumstantial and hearsay evidence. She saw 'young girls' being taken away in small groups for lengthy periods of time. She also saw these girls when they returned and stated that they appeared dishevelled and that she saw them crying. The witness heard one of the girls tell her mother that she had been raped (see ibid., paras 866–7).

[235] Ibid., para 857.

Chamber confirmed that a crime of sexual violence could be established through circumstantial evidence. The Appeals Chamber also affirmed in the context of sexual violence charges 'that there is no requirement that an alleged victim personally testify in a case for a trial chamber to make a finding that a crime was committed'.[236]

While the precedent in *Đorđević* is important, in many cases victim evidence will be central and it should, as in cases involving all crime categories, be supported by all other available evidence. We have learnt that the specific context in which sexual violence occurs will influence the type of supporting evidence available; certain contexts may be more difficult to investigate than others. Reflecting this, the OTP's early sexual violence prosecutions focused on camp guards and camp commanders because evidence of sexual violence was easier to uncover in a prison-type setting.[237] In these cases it was easier to identify other witnesses who either saw incidents of sexual violence being perpetrated, or could otherwise provide relevant indirect evidence. For instance, in the *Brđanin* case, we convinced the Trial Chamber that 'many' incidents of rape occurred at the Trnopolje camp in Prijedor Municipality based on the evidence of a single victim as well as non-victim evidence.[238] One of the non-victim witnesses upon whom the Trial Chamber relied worked at a clinic in Trnopolje camp and had seen men 'visit[ing] the sleeping quarters of the women at night ... flash[ing] their torch lights at them, and ... tak[ing] the women out'.[239] He recounted how some of the women later sought assistance at the clinic for the abuse they suffered.[240]

A factor that influences the type of available evidence in a prison-type context is whether the crimes involve male or female sexual violence victims. In this setting, we have found that sexual violence directed against males tends to be perpetrated publicly, as a way of shaming the victim, whereas sexual violence directed against women tends to be perpetrated less openly.[241] Accordingly, there may be more direct eyewitness evidence available of sexual violence against males than in cases involving sexual violence against females.[242] Nonetheless, challenges remain in investigating and prosecuting sexual violence against males. Evidence may be hard to uncover because male victims may have great difficulty speaking about their experiences which they consider incompatible with their masculine identity.[243] Regarding sexual violence against females, despite fewer direct eyewitnesses being available, we have found that women victimized in groups may be able to take courage from each other and may be able

[236] Ibid., see also para 858, and *Cantú v Mexico* (n 169) para 102 ("The Court has established as legitimate the use of circumstantial evidence, evidence and presumptions to reach a Judgment "when consistent conclusions regarding the facts can be inferred"').

[237] PSVWG Interviews, on file with authors.

[238] *Prosecutor v Brđanin*, ICTY-99-36-T, Judgment (1 September 2004) para 514.

[239] *Prosecutor v Brđanin*, ICTY-99-36-T, Exhibit P1148 transcript p 7761.

[240] Ibid.

[241] PSVWG Interviews, on file with authors. See Oosterveld, 'Sexual Violence Directed Against Men and Boys in Armed Conflict or Mass Atrocity' (n 12) 110. For an early discussion on the ICTY's statistics on the prosecution of sexual violence against males, see Campbell (n 130) 422–7.

[242] PSVWG Interviews, on file with authors.

[243] See Stener Carlson (n 12) 22–3; Sivakumaran (n 12) 255–6. For a discussion on the reasons for the underreporting of male sexual violence, see UN Special Representative of the Secretary-General on Sexual Violence in Conflict, Report on Workshop on Sexual Violence against Men and Boys in Conflict 25–26 July 2013 (New York December 2013) 8–9.

to speak out in a way that they would not otherwise have done had they felt alone in their experience.[244] Female prisoners have been able to testify about how others were 'called out' just as they were and to describe the physical and emotional condition of these other victims.[245] This type of evidence is a very powerful form of corroboration.

2. Expert evidence

The OTP has had limited experience in presenting expert evidence in sexual violence cases. Nonetheless, we believe that experts can and should play a more important role in future cases. Looking back, our limited use of expert evidence is likely a reflection of not fully seeing sexual violence as a core crime and not approaching it analytically and evidentially in the same way as any other crime category.[246] As a result, less attention was paid to determining how expert evidence might facilitate proving sexual violence charges and to identifying experts capable of supporting charges of sexual violence as an international crime. Most of our efforts were aimed at identifying experts for the non-sexual violence aspects of our cases.

Despite our limited experience with presenting expert evidence to prove sexual violence charges, we believe that experts can play an important role in bolstering victim credibility and in connecting sexual violence with the broader campaign of violence.[247] We have also found that expert evidence can be useful for sentencing by demonstrating the impact of sexual violence crimes on victims, particularly where there is an absence of specific victim impact information.[248]

We used expert evidence to bolster victim credibility in the *Furundžija* case.[249] Both the OTP and the defence called medical experts to testify about whether the rape victim in the case, Witness A, was suffering from PTSD and, if so, whether this affected her memory.[250] The defence presented expert evidence that PTSD had an adverse effect on memory and that witnesses suffering from this disorder were prone to greater inconsistency in their testimony.[251] Conversely, the OTP presented expert evidence to argue that PTSD does not render a person's memory of traumatic events unworthy of belief. To the contrary, a person remembers more meaningful experiences with greater accuracy.[252] The Trial Chamber accepted the OTP's argument[253] that Witness A's account of events was reliable.

Expert evidence can also be useful in bolstering witness credibility by demonstrating how external factors can genuinely inhibit a victim from speaking about the sexual violence they have suffered.[254] This type of evidence can help judges understand

[244] PSVWG Interviews, on file with authors. See also Mischkowski and Mlinarević (n 9) 60–1 (discussing how survivors got mutual support and strength from other survivors who were victimized with them).

[245] See e.g. *Prosecutor v Kvočka et al.*, ICTY-98-30/1-T, Trial Judgment (2 November 2001) (*Kvočka* Trial Judgment) paras 98–100, 104, 107–8.

[246] See Ch. 3 and Ch. 4.

[247] See also ICC Policy Paper on Sexual and Gender-Based Crimes (n 230) para 97.

[248] The use of expert evidence to demonstrate victim impact is addressed in Ch. 8 pp 278–9.

[249] See p 142. [250] See *Furundžija* Trial Judgment (n 45) paras 90–5.

[251] Ibid., paras 102–3. [252] Ibid., para 104. [253] Ibid., para 108.

[254] See also ICTR Best Practices Manual on Sexual Violence Crimes (n 2) para 189 (indicating that '[t]he presentation of evidence from expert witnesses and medical professionals with expertise in the

why a victim was able to give a detailed account of a sexual violence crime on the witness stand, after having failed to provide such information in an earlier statement. Although the OTP has not presented expert evidence of this nature, other developments in our cases confirm the potential utility of such evidence. For example, in the *Đorđević* case the Appeals Chamber considered journal articles, academic papers, and practitioner's research reports to surmise that 'it is not uncommon for women to refrain from disclosing that they were sexually assaulted depending on, among other things, personal feelings of shame or fear, religious views, sociocultural background, and the intensity and severity of attack'.[255]

Expert evidence can also be useful in proving the widespread nature of sexual violence crimes. In the *Milutinović et al.* case, the OTP offered the expert evidence of psychotherapist Dr. Ingeborg Joachim, with the aim of demonstrating that rapes occurred on a widespread basis throughout Kosovo.[256] However, the content of Dr. Joachim's report was limited to the incidence of sexual violence in a municipality that was not charged in the case.[257] None of the witnesses whom the OTP intended to call were expected to testify about the incidence of sexual violence in this municipality. As a result, when considering the value of Dr. Joachim's evidence, the Trial Chamber highlighted the difficulty of reaching a conclusion about the widespread nature of sexual violence in Kosovo, without direct evidence of a single rape in the municipality about which Dr. Joachim was to give evidence.[258] The Trial Chamber also questioned the reliability of Dr. Joachim's underlying data because the core function of the organization that she worked for—Medica Mondiale—was to support victims who presented allegations of sexual violence. As a result, the Trial Chamber expressed doubt as to whether the veracity of the allegations underlying Dr. Joachim's report had been tested.[259] Given the Trial Chamber's concerns, the OTP decided not to present Dr. Joachim's evidence. This experience demonstrates the importance of ensuring that an expert's evidence is based on objective and tested data and that the geographic scope of the expert's evidence closely corresponds or connects with the charges in the indictment.

dynamics of sexual assault and the impact of sexual assault victimization can be another important source of evidence. Expert testimony can be used to assist a court in better understanding and evaluating the evidence presented by factual witnesses, or to demonstrate that the victim's behaviour was consistent with that of someone who had been sexually violated').

[255] *Đorđević* Appeal Judgment (n 123) para 866. See also *Kvočka* Trial Judgment (n 245) para 552 (finding it irrelevant that Witness K had not mentioned the rape she suffered to a journalist who interviewed her after the incident. According to the Trial Chamber Witness K's reaction was understandable given 'the sexual and intensely personal nature of the crime'); *Kunarac* Appeal Judgment (n 116) paras 235 ('With regard to the discrepancy between FWS-87's statements in 1996 and 1998, identified by the Appellant, the Appeals Chamber notes that each testimony complements the other, and that the fact that FWS-87 identified the Appellant later rather than sooner does not render that identification incredible.'), 309 ('The Appeals Chamber takes the view that, based upon her testimony, it was not unreasonable for the Trial Chamber to conclude that this first rape was particularly painful and frightening for FWS-50, and that this omission in her first statement did not affect her reliability.'); *Prosecutor v Lukić and Lukić*, ICTY-98-32/1-T, Trial Judgment (20 July 2009) paras 697, 728 (where the Trial Chamber accepted rape victim VG035's explanation that she failed to identify Milan Lukić in a prior statement because 'she was genuinely very much afraid and distraught when giving her statement').

[256] See *Prosecutor v Milutinović et al.*, ICTY-05-87-PT, Pre-Trial Conference (7 July 2006) transcript p 292.

[257] Ibid. [258] Ibid., pp 292–4. [259] Ibid., pp 292–3.

Dr. Joachim was not the first expert the OTP tried to call to demonstrate the widespread incidence of sexual violence. In the *Kunarac et al.* case, we offered the expert evidence of Dr. Christine Cleiren to establish the widespread incidence of sexual violence in BiH.[260] Dr. Cleiren had served as a commissioner for the UN Commission of Experts and was the author of the legal study on sexual violence which had formed part of the Commission's final report.[261] The Trial Chamber in the *Kunarac et al.* case questioned the value of Dr. Cleiren's evidence insofar as it was based on unverified allegations.[262] The Trial Chamber indicated that it would only accept Dr. Cleiren as an expert if she were able to demonstrate that a pattern of allegations shows the truth of the underlying allegations.[263] Given the Trial Chamber's concerns, the OTP withdrew Dr. Cleiren as a witness.

The OTP had successfully presented Dr. Cleiren's evidence in the earlier *Karadžić and Mladić* Rule 61 proceedings. The Trial Chamber hearing these proceedings relied[264] upon her evidence to infer that sexual violence had occurred in a systematic fashion and was part of a widespread policy of ethnic cleansing.[265] However, the Chamber's positive treatment of Dr. Cleiren's evidence in the *Karadžić and Mladić* Rule 61 proceedings may reflect the nature of these proceedings, which did not result in a finding of guilt beyond a reasonable doubt.[266] Nevertheless, the manner in which Dr. Cleiren's evidence was relied upon in the *Karadžić and Mladić* Rule 61 proceedings illustrates the potential value of expert evidence that connects sexual violence with the broader campaign of violence.

Finally, expert evidence can be useful in establishing patterns of sexual violence and in demonstrating the connections between sexual violence and a broader campaign of violence.[267] Expert evidence can demonstrate the broader context by highlighting that sexual violence is an integral part of the crimes that occur in a conflict rather than

[260] See *Prosecutor v Kunarac et al.*, ICTY-96-23-T, Pre-Trial Conference (29 May 2000) transcript pp 4146, 4154–5.

[261] *Prosecutor v Kunarac et al.*, ICTY-96-23-PT, Prosecutor's Submission of Expert Witness Statement under Rnle 94*bis* (12 November 1999) para 2.

[262] See *Prosecutor v Kunarac et al.*, ICTY-96-23-T (29 May 2000) transcript pp 4148–9, 4155–62.

[263] Ibid., pp 4169–70.

[264] See *Prosecutor v Karadžić and Mladić*, ICTY-95-18-R61 & ICTY-95-5-R61, Rnle 61 Decision Hearing (11 July 1996) (*Karadžić and Mladić* Rule 61 Decision Hearing) transcript p 919.

[265] Ibid., pp 959–60, 992. In its Rule 61 decision, the Trial Chamber confirmed all counts of the indictments and issued an international arrest warrant for Karadžić and Mladić.

[266] These proceedings were convened when a warrant for the arrest of an accused had not been executed and a Trial Chamber needed to determine whether to issue an international arrest warrant. In a Rule 61 proceeding, the Trial Chamber examined the indictment and the supporting evidence in public, and, if it determined there were reasonable grounds for believing the accused committed any or all of the crimes charged, confirmed the indictment and issued the international arrest warrant for the arrest of the accused.

[267] Other international courts have relied on expert evidence for this purpose. For example, in the ICC's *Bemba* case, the Prosecution called expert witness André Tabo to explain, among other things, the use of rape as a tool of war in the Central African Republic conflict. See e.g. *Prosecutor v Bemba*, ICC-01/05-01/08-T-100-ENG Testimony of André Tabo (13 April 2011) transcript pp 3–9 <www.icc-cpi.int/iccdocs/doc/doc1096776.pdf> accessed 22 May 2015. Prosecutors at the SCSL successfully relied on the expert opinion of Beth Vann to prove widespread rape in Kono District in the *Taylor* case. *Prosecutor v Taylor*, SCSL-03-01-T, Trial Judgment (18 May 2012) (*Taylor* Trial Judgment) paras 879–85. The expert's research methodology included interviewing victims of sexual violence and conducting focus group sessions in refugee camps. In its judgment, the Trial Chamber concluded that while Vann's evidence was

necessarily 'incidental' or 'opportunistic'.[268] Statistical evidence is one type of expert evidence that can be used to show patterns of sexual violence. As with other types of expert evidence, this is an effective approach insofar as the underlying data is reliable.[269] Although the OTP has not relied on statistical evidence in its sexual violence cases, it has successfully used demographics statistics to establish patterns for other types of offences such as killings, forcible displacement, and deportation.[270] We have seen that when assured of the objectivity and reliability of the underlying data, judges are more willing to draw inferences from expert evidence that provides a broader contextual background. Prosecutors should therefore take steps to put forward probative expert evidence based on robust data which in turn might encourage judges to make the necessary inferences. Articulating a clear, consistent, and specific probative value to the expert evidence is essential.

3. Documentary evidence

Documentary evidence can be used in a number of ways in sexual violence cases. This evidence has been particularly important in cases against high level accused[271] to establish the occurrence of sexual violence crimes, the accused's *mens rea*, and the linkage between the physical perpetrators and the accused.

First, we have used documentary evidence to demonstrate the occurrence and extent of sexual violence in localities charged in the indictment. In particular, we have relied on reports by the local authorities, or armed forces,[272] and by international observers[273] to show that sexual violence was taking place in such localities. For example, in the *Prlić et al.* case, the Prosecution tendered a military security service report recounting that women and girls were taken daily from collection centers to houses where they were 'raped, abused and humiliated', acts that had 'been happening systematically for a considerable time'.[274] The Trial Chamber relied on this and other

not sufficiently specific to prove any individual instances of rape, it demonstrated that rape was committed on a widespread basis in the area and may be relevant as corroboration for specific instances of rape described by witnesses testifying before the Trial Chamber. *Taylor* Trial Judgment (n 267) para 885.

[268] See SáCouto and Cleary (n 200) 358.

[269] Xabier Agirre Aranburu, 'Sexual Violence beyond Reasonable Doubt: Using Pattern Evidence and Analysis for International Cases' (2010) 23 *Leiden JIL* 609 (Aranburu), 623–6.

[270] See e.g. in *Galić*, the Trial Chamber accepted the main conclusions of an expert report on the number of civilians killed or injured during the siege of Sarajevo, *Prosecutor v Galić*, ICTY-98-29-T, Trial Judgment (5 December 2003) paras 578–81 (referring to the report entitled 'Population Losses in the "Siege" of Sarajevo, 10 September 1992 to 10 August 1994, dated 10 May 2002'). In *Krstić*, considering, among other things, the evidence of Professor Helge Brunborg, a demographics expert, the Trial Chamber made findings on the killings of thousands of Bosnian Muslim men from Srebrenica. *Prosecutor v Krstić et al.*, ICTY-98-33-T, Trial Judgment (2 August 2001) paras 74–9. See also B Mijatović, 'Statistical Evidence for the Investigation of International Crimes', cited in Aranburu (n 269) 623.

[271] In cases against direct perpetrators, we have relied primarily on testimonial rather than documentary evidence to prove sexual violence charges.

[272] See e.g. *Prlić* Trial Judgment (n 127) vol 2 paras 235–6, 250, 252, 291.

[273] See e.g. *Stanišić and Župljanin* Trial Judgment (n 87) vol 1 para 653 (referring to a report by the Special Rapporteur to the UN noting that displaced Muslims from Travnik were driven in buses by Serb forces to Muslim-controlled territory, and in some instances were beaten, raped, and even killed during transport); *Prlić* Trial Judgment (n 127) vol 3 paras 426–9.

[274] *Prlić* Trial Judgment (n 127) vol 2 para 235 citing Exhibit P4177.

evidence in concluding that Bosnian Muslim women and girls were sexually abused during the period and in the village charged in the Indictment.[275]

Second, we have used different types of contemporaneous documents to establish the accused's *mens rea* for sexual violence crimes. We have in turn relied on this evidence to hold the accused accountable under different forms of liability.[276]

Documents authored or received by the accused have been particularly probative of the accused's knowledge. In the *Mladić* case,[277] the Prosecution tendered evidence of *Mladić's* direct knowledge of individual victims of sexual violence through entries Mladić had recorded in his war-time notebooks. In particular, one entry regarding a meeting with Slobodan Milošević identified a woman held in 'ELEZ's prison'—a reference to a rape camp.[278] Another notebook entry named two women who other witnesses had testified were held in Foča as sex slaves.[279] The Prosecution relies on this evidence to show that Mladić not only knew his subordinates were keeping Muslim women as sex slaves, but also that he even knew the names of some of the victims. The trial is ongoing at the time of writing.

More commonly, we have used documents addressed to the accused that recount incidents of sexual violence to demonstrate they, or their co-perpetrators, had knowledge of these crimes. For example, in both the on-going *Mladić* and *Karadžić* cases, the Prosecution is relying on a report the Republika Srpska Prime Minister wrote to Mladić complaining about Army of Republika Srpska (VRS) soldiers committing rapes in Novo Sarajevo.[280] Mladić's notebook reflected a meeting with the Prime Minister to discuss the same issue,[281] while the minutes of a military meeting Mladić later attended reflected rapes by soldiers in Novo Sarajevo as 'going unpunished'.[282] As corroborating evidence, the Prosecution tendered the Prime Minister's related report to the police and the relevant corps command.[283]

In some cases involving large-scale ethnic cleansing campaigns, we have relied on documentary evidence at the disposal of the accused to argue that sexual violence crimes were foreseeable to them.[284] For example, in the *Milutinović et al.* case, among other evidence,

[275] Ibid., para 253. [276] See Ch. 7.

[277] The charges against Mladić under Article 7(1) of the Statute include rape and sexual violence as underlying acts of persecution (*Prosecutor v Mladić*, ICTY-09-92-PT, Fourth Amended Indictment (16 December 2011) para 59(c)) under joint criminal enterprise (JCE) (Category 1) (alternatively JCE (Category 3)) (paras 8–9, 49) and as underlying acts of deportation and forcible transfer (para 70) under JCE (Category 1) (para 8). He is additionally charged with superior liability for all charged crimes pursuant to Article 7(3) of the ICTY Statute (n 35).

[278] *Prosecutor v Mladić*, ICTY-09-92-T, Exhibit P357 p 67.

[279] *Prosecutor v Mladić*, ICTY-09-92-T, 98*bis* Decision (15 April 2014) transcript p 20936 citing Exhibit P359 p 13.

[280] *Prosecutor v Mladić*, ICTY-09-92-T, Exhibit D638; *Prosecutor v Karadžić*, ICTY-95-05/18-T, Exhibit D3574.

[281] *Prosecutor v Mladić*, ICTY-09-92-T, Exhibit P346 p 158; *Prosecutor v Karadžić*, ICTY-95-05/18-T, Exhibit P1474 p 158.

[282] *Prosecutor v Mladić*, ICTY-09-92-T, Exhibit P1967 p 12; *Prosecutor v Karadžić*, ICTY-95-05/18-T, Public Redacted Version of Prosecution Final Trial Brief (23 September 2014) para 521 citing Exhibit P5065 p 12. See also app A (Novo Sarajevo) para 13 citing Exhibits P5065 p 12, D3574, P1474 pp 157–8.

[283] *Prosecutor v Mladić*, ICTY-09-92-T, Exhibit P6732.

[284] It is not necessary to show that an accused had previously been informed that incidents of sexual violence were taking place to infer foreseeability. *Prosecutor v Šainović et al.*, ICTY-05-87, Appeal Judgment (23 January 2014) (*Šainović* Appeal Judgment) paras 1081, 1545. However, when such evidence has been available, we have used it to argue that the accused's awareness of the possibility that a crime might be committed was sufficiently substantial. See pp 245–55 in Ch. 7.

the Prosecution relied on an order by Third Army Commander Nebojša Pavković ostensibly aimed at preventing rape, and on his reports of incidents of rape. We argued that, accordingly, it was reasonably foreseeable to the accused that these crimes might be committed against Kosovo Albanians during their forcible displacement.[285] On the basis of this and other evidence, the Trial Chamber found that sexual violence crimes were foreseeable to him in the context of the forcible expulsion campaign against Kosovo Albanians.[286] More broadly, we have used documentary evidence to show the accused were on notice of other indicators that should have alerted them to the risk of sexual violence. For example, in the *Đorđević* case, the Prosecution tendered NGO and media reports documenting crimes against Kosovo Albanian civilians to argue that the accused was well aware of the prevailing contextual factors which made sexual violence foreseeable in that case.[287]

Finally, we have used documentary evidence to link sexual violence crimes to the accused.[288] We have established this link most easily where the document addressing sexual violence also identified the perpetrators of sexual violence crimes or their affiliation. Where the connection was not so explicit, several pieces of evidence were required to establish the link. In the example of Mladić's notes naming women who were kept as sex slaves, next to one name Mladić had written, 'She is in Elez's prison in Miljevina'.[289] The Prosecution tendered a number of documents addressing Pero Elez's incorporation into the VRS in order to establish that he was a subordinate of Mladić, linking Mladić to the sexual violence.[290]

Drawing from the examples above, prosecutors should bear in mind that military and police records, as well as records belonging to other armed groups, can provide important evidence and valuable diversification of evidentiary sources in sexual violence cases. Such evidence also facilitates the presentation of a more solid case and ultimately the proof of sexual violence needed to demonstrate the responsibility of the accused.

4. Forensic evidence

Forensic evidence[291] can be useful in proving sexual violence charges, but it must not be assumed that forensic evidence is a pre-condition for bringing a sexual

[285] *Milutinović* Trial Judgment (n 123) vol 3 para 785 citing Exhibits P1448 p 2, P1459, P1938.

[286] Ibid. See also *Šainović* Appeal Judgment (n 284) paras 1599–1600. See also, in the *Šainović* Appeal Judgment, the Prosecution relied on, among other things, reports describing incidents of sexual violence sent by MUP Staff Head Sreten Lukić to his superiors to argue that the commission of such crimes was foreseeable to him (para 1591). The Prosecution also relied on his orders to his subordinates requesting detailed reports on the serious crimes, including rape, committed in their respective areas of responsibility (para 1591). The Appeals Chamber considered this and other evidence in finding that the commission of sexual assault was foreseeable to him (para 1592).

[287] See e.g. *Đorđević* Trial Judgment (n 50) paras 1996–9 (relying on Human Rights Watch and media reports to infer the accused was on notice of crimes). See p 249 in Ch. 7.

[288] See pp 230–1 in Ch. 7. [289] *Prosecutor v Mladić*, ICTY-09-92-T, Exhibit P357 p 67.

[290] See e.g. *Prosecutor v Mladić*, ICTY-09-92-T, Exhibit P4153 (police report about an incident involving Elez, which described him as commander of the 7th Battalion of the Foča Serb Army); *Prosecutor v Mladić*, ICTY-09-92-T, Exhibit P6812 (certificate stating the period when Elez took part in the Republika Srpska armed forces); *Prosecutor v Mladić*, ICTY-09-92-T, Exhibit P2857 pp 6–7 (newspaper article following Elez's death describing his contributions to the conflict as 'a commander in the Republika Srpska Army').

[291] Forensic evidence refers to evidence that is obtained through scientific testing. Medical evidence is a sub-category of forensic evidence and is acquired through the medical examination of a victim or physical perpetrator.

violence charge.[292] It may be difficult or impossible for prosecutors and investigators in conflict-related sexual violence cases to access such evidence.[293] There were many factors that limited our ability to collect forensic evidence of sexual violence crimes in the former Yugoslavia. First, the investigations generally began years after the crimes had occurred. By then, most forensic evidence relating to sexual violence had been lost. Second, at the time the crimes were committed it was difficult, if not impossible, for victims to access hospitals or clinics. Even where accessible, wartime hospitals or clinics often lacked the expertise, technical ability, or facilities to collect and store such evidence.[294] Many of our cases involved sexual violence in prisons, where many victims were unable to access any medical care. Third, the fact that national law enforcement personnel were among the perpetrators of sexual violence meant it was unlikely they collected and preserved forensic evidence of sexual violence. Even where law enforcement personnel were open to collecting such evidence, the breakdown of law and order in the region meant there was no capacity to do so.

Reflecting these factors, the only instances in which we relied upon forensic evidence to prove sexual violence charges were in the *Milutinović et al.* and *Slobodan Milošević* trials.[295] These cases concerned sexual violence committed during the 1999 conflict in Kosovo when the ICTY was already in full operation. We used forensic evidence in these cases to convince the Trial Chamber that two young girls who died after being thrown into a well had been sexually assaulted.[296] Despite our limited use of forensic evidence, if available, we believe that it can be a useful way of proving or corroborating sexual violence charges. However, forensic evidence should not be considered crucial to the proof of conflict-related sexual violence charges and it has been the exception, rather than the rule, in our cases.[297]

D. Protective Measures

Our successful sexual violence prosecutions have depended upon the adequate protection of victims and witnesses complemented by a witness-centred approach. Such an approach allows victims and witnesses to make an informed choice about the available protective measures.

[292] Some domestic legal frameworks may impose a requirement to adduce forensic evidence in cases of sexual violence. We consider that this is an area for law reform and that pragmatic approaches are required to apply such evidentiary standards so that they do not render proof of conflict-related sexual violence untenable.

[293] See also ICC Policy Paper on Sexual and Gender-Based Crimes (n 230) para 50.

[294] PSVWG Interviews, on file with authors.

[295] The same incident had been charged in both the *Milutinović et al.* and *Slobodan Milošević* cases.

[296] *Milutinović* Trial Judgment (n 123) vol 2 paras 645, 688–9, 1224.

[297] See also *J v Peru*, IACtHR Series C No 275, Preliminary Objection, Merits, Reparations and Costs (27 November 2013) para 333: 'Therefore, the failure to perform a medical examination on a person who was in the State's custody or the performance of this examination without complying with the applicable standards, cannot be used to cast doubts on the truth of the presumed victim's allegations of ill-treatment … Likewise, in cases in which sexual abuse is alleged, the lack of medical evidence does not take away from the truth of the presumed victim's allegations' (internal citations omitted).

1. Trial-related protective measures

(a) Tailoring protective measures to meet the needs of victims and witnesses

A witness-centred approach is crucial in determining whether protective measures should be requested. The available measures should be discussed with victim witnesses before the trial so that they can make an informed choice.[298] Not all sexual violence victims have wanted to remain anonymous through the use of protective measures, discussed below, or to have the public or press excluded from the proceedings.[299] Some sexual violence victims testified because they wanted to tell their story and sought public recognition of their suffering. These victims felt empowered by publicly speaking about their experiences without any protective measures.[300] Prosecutors should therefore avoid assuming that all victims require protection and instead tailor requests for protective measures to meet the needs of witnesses.

Prosecutors must understand the expectations and needs of sexual violence witnesses when deciding what types of protective measures to request. In our cases different witnesses have had different confidentiality and security concerns. In some instances, cultural and social factors have significantly influenced the concerns of victims. For example, in our Kosovo cases, when determining what protective measures to seek, we considered that the victims often came from close-knit communities and feared ostracization if their identities were revealed to the public.

(b) Types of measures available

At the ICTY, there is a range of trial-related protective measures available for sexual violence witnesses[301] who want to conceal their identities from the public.[302] Some victims have testified under pseudonyms and have had their voice and image distorted

[298] PSVWG Interviews, on file with authors.

[299] Anne-Marie de Brouwer, *Supranational Criminal Prosecutions of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Intersentia 2005) 243.

[300] Former ICTY prosecutor Patricia Viseur Sellers noted: 'most witnesses request confidentiality... Meanwhile, some women want to be identified and seen, not only by the defendant but also by the public. "What do I have to be ashamed of and why should I hide", they might ask' (quoted in Sara Sharratt and Ellyn Kaschak (eds.), *Assault on the Soul: Women in the Former Yugoslavia* (Routledge 2013) 70). See Mischkowski and Mlinarević (n 9) 72, 76.

[301] Article 20(1) of the ICTY's Statute requires a trial chamber to ensure that proceedings are conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses. Article 21(2) entitles the accused to a fair and public hearing, subject to Article 22, which requires the ICTY to adopt measures for the protection of victims and witnesses. The rationale for Article 22 was set out in paragraph 108 of the UN Secretary General's report regarding the establishment of the ICTY, which stated: 'In the light of the particular nature of the crimes committed in the former Yugoslavia, it will be necessary for the International Tribunal to ensure the protection of victims and witnesses. Necessary protection measures should therefore be provided in the rules of procedure and evidence for victims and witnesses, *especially in cases of rape and sexual assault...*'. See UNSC 'Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)' (3 May 1993) UN Doc S/25704, para 108 (emphasis added). See also Elisabeth Rehn, Special Rapporteur of the Commission on Human Rights, Situation of Human Rights in the Territory of the former Yugoslavia (22 October 1996) UN Doc E/CN.4/1997/9 para 28.

[302] Rule 75 of the ICTY Rules provides for various measures that limit the audience that is privy to the witness's identity, including: (a) expunging names and identifying information from the ICTY's public records; (b) non-disclosure to the public of any records identifying the witness; and (c) allowing

so that public broadcasts of their testimony do not reveal their identities. Some have also testified confidentially either in private session or closed session.[303] The use of screens to shield the victims from the accused has also been granted in a few cases.[304] In requesting these measures, prosecutors have sought to minimize the public exposure of sexual violence victims during trial.[305] At the ICTY the most commonly used measures for victims of sexual violence have been pseudonyms and closed session testimony.

In some of our cases, we have requested that the entire testimony be held in closed session.[306] In others, victims have testified in open session on matters that do not reveal their identity to the public,[307] moving into private session only when the testimony may reveal their identity, that of another protected witness, or details of the sexual violence.[308] Although the latter approach enhances transparency, caution is required because it has compounded the stress on witnesses who must ensure that they do not reveal their own identities or those of other protected witnesses while testifying in open session. The parties too are not immune from inadvertently asking questions of a witness testifying in open session that may generate a risk of public disclosure of confidential information.[309] This has also been an issue where self-represented accused are allowed to cross-examine witnesses. While information revealed in open session can be redacted from the record, it has been irretrievably disclosed to anyone in the public gallery at the time of the testimony.[310] This creates a risk that it may appear in the media. Similar problems have arisen in national proceedings, where the identities

witnesses to give testimony through image or voice distortion or in closed session. Closed session, which excludes the press and the public, can be ordered for reasons of public order or morality; safety, security, or non-disclosure of the identity of a victim or witness; and protection of the interests of justice. See ICTY Rules (n 3) r 79.

[303] See n 20.

[304] *Tadić* Decision on Protective Measures (n 101) para 51; *Prosecutor v Delalić et al.*, ICTY-96-21-T, Decision on the Motions by the Prosecution for Protective Measures for Prosecution Witnesses Pseudonymed 'B' through 'M' (28 April 1997) (*Delalić* Decision for Protective Measures) para 50.

[305] The *Tadić* Trial Chamber recognized the existence of special concerns for victims and witnesses of sexual assault. It noted that these concerns are evident in the Report of the Secretary-General recommending the ICTY's creation, which stated that protection for victims and witnesses should be granted, 'especially in cases of rape or sexual assault'. The Chamber noted that testifying about the event is often difficult, particularly in public, and can result in rejection by the victim, family and community. In addition, it stated that traditional court practices and procedures have been known to exacerbate the victim's ordeal during trial. *Tadić* Decision on Protective Measures (n 101) para 46.

[306] See e.g. *Prosecutor v Furundžija*, ICTY-95-17/1-T (12 June 1998); *Prosecutor v Slobodan Milošević*, ICTY-02-54-T (8 April 2002).

[307] *Kvočka* Trial Judgment (n 245) para 795.

[308] See e.g. *Prosecutor v Lukić and Lukić*, ICTY-98-32/1-T, Testimony of Witness VG-35 (15 September 2008) transcript pp 1643–4; *Prosecutor v Kvočka et al.*, ICTY-98-30-1-T, Testimony of Witness AT (3 October 2000) transcript p 6113.

[309] See e.g. *Prosecutor v Kunarac et al.*, ICTY-96-23/1-T, Testimony of Witness 51 (29 March 2000) transcript pp 1298–9 (Defence Counsel elicited the names of the parents of another victim described by the witness, and the Presiding Judge had to intervene to ensure the victim was not identified in open session because it could reveal the testifying witness's identity); *Prosecutor v Stanišić and Župljanin*, ICTY-08-91-T, Testimony of Witness ST-56 (1 October 2009) transcript p 639 (redactions and moving into private session were required where the witness revealed names of persons from her hometown that could expose her identity). See also *Prosecutor v Kvočka et al.*, ICTY-98-30-1-T, Testimony of Witness AT (3 October 2000) transcript pp 6113–19.

[310] See *Delalić et al.* Decision for the Redaction of the Public Record (n 100); *Delalić* Trial Judgment (n 54) para 70.

of witnesses using pseudonyms were exposed intentionally or unintentionally by the parties during their public testimony.[311] The better approach in these circumstances is to request that the examination be conducted in closed session and that a carefully redacted transcript be made available to the public at the conclusion of the testimony.[312] This preserves the public character of the proceedings while guaranteeing that the witness's identity is not revealed to the public. Although available resources will inevitably impact the extent to which such a practice can be implemented, it should be given priority in sexual violence cases given the unique challenges posed by these cases. Adopting such a practice would also facilitate the prosecution's ability to deal with defence requests for access to confidential materials in related cases, as well as requests by authorities in national proceedings to access confidential witness information.[313]

While closed or private session testimony is a useful tool for encouraging witnesses to speak freely, it should not be imposed against a witness's will.[314] The overuse of closed or private session can render the accounts and the suffering of victims invisible to the public, diminishing the transparency of the proceedings. It can also reinforce the notion that sexual violence crimes are secret and shameful, potentially increasing the stigma of victims as a category.[315] In this regard, ICTY judges have acknowledged the need to respect the wishes of victims. For example, the *Tadić* Trial Chamber stressed that '[t]he obligation of the International Tribunal to protect witnesses should not go beyond the level of protection they are actually seeking'.[316] Similarly, in the *Kvočka et al.* case, the Trial Chamber reminded the parties that they should not request protective measures such as closed session if the witnesses would be satisfied with lesser measures such as electronic voice and image distortion.[317]

(c) Disclosure of the identity and statements of sexual violence witnesses

The ICTY practice has been for the OTP to disclose to the defence the statements of its witnesses well in advance of trial. However, where a victim witness has been at risk, prosecutors have requested permission to delay the disclosure of their identity to the defence until a time closer to their scheduled testimony. A similar procedure

[311] See Mischkowski and Mlinarević (n 9) 80, 85.

[312] See *Tadić* Trial Judgment (n 139) para 30; *Prosecutor v Kunarac et al.*, ICTY-96-23-PT, Decision Granting Protective Measures for Witness FWS-191 (20 November 1998) (*Kunarac* Decision on Protective Measures).

[313] See pp 165–66.

[314] In addition, prosecutors should take into account the fact that protection can become stigmatizing and disempowering when victims who opt for closed session to protect their interests have to prove vulnerability to justify the protective measures order. See Mischkowski and Mlinarević (n 9) 78–80.

[315] Gabriela Mischkowski noted that, 'in the end, the protection issue is part of a larger contentious question regarding the role of victim witnesses within legal proceedings. Are they reduced to living evidence or do they have space to communicate the meaning *they* give to the harms committed?' Gabriela Mischkowski, 'The Trouble with Rape Trials—The Prosecution of Sexual Violence in Armed Conflict from the Perspectives of Female Witnesses' (The Bangladesh Genocide and the Issue of Justice—International Conference Heidelberg 4–5 July 2013) 5.

[316] *Tadić* Decision on Protective Measures (n 101) para 80.

[317] *Kvočka* Trial Judgment (n 245) para 795.

has also been used for other categories of vulnerable witnesses, such as insiders.[318] These applications have been made under Rule 69 of the ICTY Rules, which requires a showing of 'exceptional circumstances'.[319] The purpose of such delayed disclosure orders has been to protect witnesses, as well as other protected persons referred to in witness statements, from intimidation, retaliation, and potential interference in the period leading up to the witness's testimony. When granting delayed disclosure to the accused, trial chambers have found that the rights of the accused are respected as long as the defence obtains the confidential information in time to prepare a defence.[320]

Owing to the impact that it may have on the rights of the accused, we have sought full anonymity for sexual violence victims only in the *Tadić* case, the ICTY's first trial. In granting the request, the *Tadić* Chamber, by majority, decided that the identities of four witnesses could be withheld indefinitely from the accused and his counsel.[321] Two of these witnesses, Witnesses G and H,[322] were victims of sexual violence. The Chamber found that they faced real security threats and that these concerns justified the granting of anonymity.[323] In practice, of the four witnesses, one testified in open session without any protective measures, and Witness G and another witness were not called to give evidence.[324] The remaining witness, Witness H, was heard in closed session and was shielded from the view of the accused but not from defence counsel.[325] The Trial Chamber subsequently released the written transcript of

[318] See p 8 in Ch. 1 and p 45 in Ch. 3.

[319] *Prosecutor v Karadžić*, ICTY-95-5/18-PT, Decision on Protective Measures for Witnesses (30 October 2008) para 19 citing *Prosecutor v Brđanin*, ICTY-99-36-PT, Decision on Motion by Prosecution for Protective Measures (3 July 2000) para 11.

[320] See *Kunarac* Decision on Protective Measures (n 312); *Prosecutor v Brđanin*, ICTY-99-36-PT, Order (23 February 2001) (granting delayed disclosure to several witnesses, including a sexual violence victim, on the basis that the witnesses 'either live in, or have relatives currently residing in, or propose to return to, or travel to, municipalities in Republika Srpska which the Office of the High Representative assesses as dangerous').

[321] *Tadić* Decision on Protective Measures (n 101) paras 84–5. An additional witness in the *Tadić* case, Witness L, was added to the Prosecution's witness list to provide evidence relating to crimes committed at the Trnopolje camp and surrounding area which included sexual violence crimes. While the Prosecution initially sought anonymity for Witness L, it subsequently withdrew this request. Witness L was granted confidentiality (protection of identity from the public and the media), but not anonymity (protection of identity from the accused). The defence was provided the identity of Witness L prior to the commencement of trial and four months prior to his court testimony. See *Prosecutor v Tadić*, ICTY-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Witness L (14 November 1995).

[322] Witnesses G and H were forced to participate in the sexual mutilation of another prisoner at Omarska camp. *Tadić* Trial Judgment (n 139) para 198. While Defence Counsel were aware of the true name of Witness G—as he had previously appeared in the media without disguising his identity—they were unaware of his new identity under a national witness protection programme. It is this new identity that the Trial Chamber ordered be witheld from the defence. *Tadić* Decision on Protective Measures (n 101) paras 78–9.

[323] *Tadić* Decision on Protective Measures (n 101) paras 50, 78, 79.

[324] *Tadić* Trial Judgment (n 139) para 30.

[325] Ibid. The practical arrangements in the courtroom were modified so that Defence Counsel could view the witness but the accused could not, although he could hear the testimony in the original language and without any distortion. This was achieved by hearing the evidence of Witness H in closed session, adjusting the position of the accused in the courtroom and using screening around the witness box. Y.M.O. Featherstone, 'Recent Developments in Witness Protection' (1997) 10(1) *Leiden JIL* 179, 186. See also *Prosecutor v Tadić*, ICTY-94-1-T, Decision on the Prosecutor's Motion to Withdraw Protective Measures for Witness K (12 November 1996).

his testimony within forty-eight hours, after review by the Prosecution and the VWS and the redaction of material disclosing his identity.[326]

The Majority's decision in *Tadić* was controversial[327] and was criticized by practitioners.[328] In subsequent cases, and in view of the developing effectiveness of the ICTY's maturing witness protection system, prosecutors have worked within the boundaries of other protective measures. No other chamber has granted such a measure since.

2. Balancing a sexual violence victim's right to privacy with disclosure obligations concerning personal victim information

In discharging our disclosure obligations, we have been confronted with the need to adequately protect the victim's privacy and security. The OTP has an onerous and far-reaching duty to disclose potentially exculpatory material to the defence under Rule 68 of the Rules of Procedure and Evidence. However, striking the right balance between disclosing material and respecting a sexual violence victim's privacy is a difficult issue that requires further consideration in future international criminal justice proceedings.

The *Furundžija* case, discussed above,[329] illustrates the potential complexities. In this case, a disclosure issue arose at the end of trial when the OTP belatedly disclosed that Witness A, a rape victim and key witness in the case, had been diagnosed with, and treated for, PTSD. Rejecting the Prosecution's argument that the material was inadmissible because the probative value was minimal and disclosure would have been a gross invasion of the witness's privacy,[330] the Trial Chamber found the defence had been prejudiced by the late disclosure.[331]

As a remedy, the Trial Chamber ordered the OTP to disclose the records of Witness A's medical, psychological, or psychiatric treatment or counselling and re-opened the case.[332] The Trial Chamber also granted the defence application to subpoena Witness A's records at the Medica Women's Therapy Centre where she had been treated.[333]

[326] *Tadić* Trial Judgment (n 139) para 30.

[327] One of the judges on the Bench, Judge Stephen, appended a strong dissent. See *Prosecutor v Tadić*, ICTY-94-1-T, Separate Opinion of Judge Stephen on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses (10 August 1995).

[328] See e.g. Monroe Leigh, 'Witness Anonymity is Inconsistent with Due Process' (1997) 91 *AJIL* 80–3; Florence Mumba, 'Ensuring a Fair Trial whilst Protecting Victims and Witnesses – Balancing of Interests?' in Richard May and others (eds.), *Essays on ICTY Procedure and Evidence: In Honour of Gabrielle Kirk McDonald* (Kluwer Law International 2001) 359–71; Salvatore Zappalà, 'The Rights of the Accused' in Antonio Cassese and others (eds.), *The Rome Statute of the International Criminal Court* (Oxford University Press 2002) 1330–3; Joanna Pozen, 'Justice Obscured: The Non-Disclosure of Witnesses' Identities in ICTR Trials' (2006) 38 *IL & Politics* 281, 287–94. Other scholars supported the decision. See e.g. Christine Chinkin, 'Due Process and Witness Anonymity' (1997) 91(1) *AJIL* 75–9.

[329] See pp 142, 152.

[330] *Prosecutor v Furundžija*, ICTY-95-17/1-T, Decision on Defendant's Motion to Strike the Testimony of Witness A Due to Prosecutorial Misconduct or, in the Event to a Conviction, for a New Trial (16 July 1998) (*Furundžija* Defence Motion to Strike) para 10.

[331] The Chamber found the defence was unable to fully cross-examine Witness A and to call evidence to deal with the PTSD issue, which it considered relevant to Witness A's credibility. *Furundžija* Trial Judgment (n 45) para 92. See *Furundžija* Defence Motion to Strike (n 330) para 6.

[332] *Furundžija* Trial Judgment (n 45) para 22. [333] Ibid., para 25.

Following an *in camera* review of the records, the Trial Chamber disclosed the relevant subpoenaed documents to both parties, 'having balanced the interests of medical confidentiality and fairness to the accused'.[334]

The decision was contentious. Contesting the propriety of this disclosure, a group of human rights legal scholars and NGOs submitted a joint *amicus curiae* brief asking the Chamber to reconsider its disclosure order and respect Witness A's rights to privacy, security, and equality.[335] The *amici* stressed that there was contrary practice in several national jurisdictions precluding the disclosure of medical, therapeutic, or counselling records of sexual violence victims and that there were alternate ways of protecting the Accused's interests.[336] However, the *amici*'s submissions had no impact as they were received after the proceedings had been reopened.[337] Relying on the material disclosed, the defence challenged Witness A's credibility, albeit unsuccessfully as explained above.[338]

Learning from this, prosecutors must be mindful that they may have to disclose personal medical information of sexual violence victims and should take this into account when confronted with such material. However, some other prosecution offices may have the obligation to collect both incriminating and exculpatory evidence under their procedural rules.[339] Finding strategies for balancing the rights of victims against these obligations will require careful thought.

When in possession of counselling or medical records relating to sexual violence victims, prosecutors should advocate for non-disclosure by clearly explaining to the court why disclosure is unwarranted in the circumstances. At the ICTY, some chambers have denied the accused access to such material because of the victim's privacy concerns.[340] However, prosecutors should ensure that they put the material before the court *in camera* and seek direction before refraining from disclosure. Even in cases where disclosure is ordered, prosecutors should request all possible measures to minimize the intrusion on the privacy rights of the victim, for example by seeking a ruling

[334] Ibid., para 27.

[335] *Prosecutor v Furundžija*, ICTY-95-17/1-T, Amicus Curiae Brief Respecting the Decision and Order of the Tribunal of 16 July 1998 Requesting that the Tribunal Reconsider its Decision Having Regard to the Right of Witness 'A' to Equality, Privacy and Security of the Person, and to Representation by Counsel (6 November 1998) (*Furundžija* Amicus Brief) para 4. Specifically, the Amici urged that the Chamber (i) did not consider the discriminatory assumptions and attitudes towards women victims of sexual assault that underlie requests for disclosure of medical files; (ii) did not balance the rights of Witness A to equality, privacy, and security; (iii) did not consider the social interest in protecting the relationship between victims of trauma and their counsellors despite UN statements stressing the importance of counselling and treatment in the healing process of victims; (iv) made a decision inconsistent with the procedures implemented in leading national jurisdictions; and (v) failed to give Witness A an opportunity to be heard before making the decision.

[336] Ibid., 33. For example, the Amici cited legislation from New South Wales (Australia), which protects counselling communications made by a person who is the alleged victim of a sexual offence.

[337] *Furundžija* Trial Judgment (n 45) para 107.

[338] *Furundžija* Appeal Judgment (n 181) para 122 (citing *Furundžija* Trial Judgment (n 45) para 108).

[339] See e.g. Rome Statute (n 34) art 54(1)(a) ('The Prosecutor shall: (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, *investigate incriminating and exonerating circumstances equally*' (emphasis added)).

[340] See e.g. *Prosecutor v Kunarac et al.*, ICTY-96-23-I, Testimony of Witness 105 (13 June 2000) transcript p 4286; *Kunarac* Trial Judgment (n 56) para 917.

from the trial chamber to implement appropriate redactions before the material is handed over to the defence.

3. Protecting the rights of sexual violence victims in the context of cross-case access requests

In the ICTY context, strategies for preserving the effect of protective measures have been adopted to deal with requests by parties in related proceedings to access evidence given by sexual violence victims. This issue has arisen in the context of defence requests to access confidential materials in related ICTY cases and requests by authorities in national proceedings in the former Yugoslavia to access confidential witness information from ICTY cases.

Part-way through the ICTY's operations, defence teams began to seek judicial authorization to access confidential evidentiary and other material in related ICTY cases. Such access has been liberally granted upon showing that the requesting accused has a legitimate forensic interest in the confidential material in the related case.[341] These access requests raised the prospect that sensitive victim material, including in relation to sexual violence victims, would be provided to defence teams in other cases, thus extending access to the victim's testimony beyond what may have been initially envisaged by the victim when agreeing to testify. To ensure that the access regime did not undermine protective measures granted to sexual violence victims, the OTP adopted a practice of requesting that certain categories of confidential material, including material relating to sexual violence victims, be excluded from access orders unless the defence team seeking access made a more specific showing that it was relevant to their case, beyond the low general threshold of forensic interest. Where access to such material was granted, the OTP requested that the existing protective measures remain in place and, at times, also requested permission to redact the material before providing it to the requesting accused. More generally, it became important for the OTP to explain to sexual violence victims in advance of their testimony that, even with protective measures in place, other defence teams in ICTY cases could be granted access to their testimony in the future, so that they were prepared for this eventuality.

National prosecutors from the former Yugoslavia also continue to seek access to confidential material concerning protected witnesses in our cases that are relevant to their national proceedings. The OTP's capacity building efforts have included the transfer of evidence and the ongoing provision of information requested by national prosecutors to assist them in their war crimes cases. The regime in place at the ICTY ensures that confidential material is not provided to a national authority unless the VWS has verified that the witness consents.[342] When ICTY cases have been referred to national jurisdictions

[341] See *Prosecutor v Stanišić and Simatović*, ICTY-03-69-T, Decision on Motion by Radovan Karadžić for Access to Confidential Materials in the *Stanišić and Simatović* Case (16 July 2009) para 16.

[342] However, on the basis of a compelling showing of exigent circumstances or where a miscarriage of justice would otherwise result, a chamber may, in exceptional circumstances, order *proprio motu* the rescission, variation, or augmentation of protective measures in the absence of such consent—ICTY Rules (n 3) r 75 (J). This exception has rarely been exercised.

pursuant to Rule 11*bis*,[343] we have asked the Referral Bench to order that ICTY protective measures remain in force during the national proceedings. We have found this to be an effective way of ensuring the privacy and security of our protected witnesses.

4. Enforcing protective measures for sexual violence victims

Our experience has shown that mechanisms should be in place to punish those who violate protective measure orders for all witnesses, including sexual violence victims. At the ICTY, contempt of court proceedings are used to punish individuals who violate ICTY decisions.[344] While there have been no contempt cases concerning sexual violence witnesses at the ICTY, contempt proceedings have been initiated in other cases where individuals have disclosed confidential information in knowing violation of a court order.[345] Contempt proceedings have also been instituted regarding associates of the defendants[346] and their legal counsel[347] for their role in witness interference. Disregarding a chamber's order to remove confidential material from the public domain has also been grounds for contempt proceedings.[348]

Addressing witness interference and intimidation remains one of the most significant challenges in international criminal law proceedings.[349] Further consideration should be given to developing effective strategies aimed at addressing witness interference and violations of protective measures. The potential for intimidation is particularly acute for sexual violence victims. To ensure the integrity of the proceedings and the trust of the victims, prosecutors must be especially vigilant in following up with victims both before and after they testify to determine whether they have faced any testimony-related threats. Following-up with victims in this way will also facilitate their willingness to testify in a subsequent case.

[343] See pp 346–54 in Ch. 10.

[344] Once a trial chamber has granted protective conditions on a witness's testimony, these can only be lifted by a court order. The orders for protective measures apply to all persons coming into possession of protected information, including those who were not a party to the proceedings in which the orders were issued. Rule 77 of the ICTY's Rules of Procedure and Evidence gives judges the power of holding in contempt those who knowingly and wilfully interfere with the ICTY's administration of justice. See e.g. *Prosecutor v Margetić*, ICTY-95-14-R77.6.

[345] *Prosecutor v Jović*, ICTY-95-14 & ICTY-14/2-R77-A, Appeal Judgment (15 March 2007) para 22.

[346] See *Prosecutor v Beqaj*, ICTY-03-66-T-R77, Judgment on Contempt Allegations (27 May 2005); *Prosecutor v Haraqija and Morina*, ICTY-04-84-R77.4, Judgment on Allegations of Contempt (17 December 2008).

[347] See *Prosecutor v Avramović and Simić*, ICTY-95-9-R77, Judgment in the Matter of Contempt Allegations against an Accused and his Counsel (30 June 2000); *Prosecutor v Brđanin*, ICTY-99-36/R77, Order Instigating Proceedings against Milka Maglov (8 May 2003); *Prosecutor v Rašić*, ICTY-98-32/1-R77.2, Indictment (8 July 2010). See also *Prosecutor v Tabaković*, ICTY-98-32/1-R77.1, Sentencing Judgment (18 March 2010).

[348] *Prosecutor v Šešelj*, ICTY-03-67-R77.4, Public Edited Version of 'Decision on Failure to Remove Confidential Information from Public Website and Order in Lieu of Indictment' Issued on 9 May 2011 (24 May 2011) p 10.

[349] See e.g. ICC, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Warrant of Arrest issued against Walter Barasa, 2 October 2013 <https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/statement-OTP-02-10-2013.aspx> accessed 2 February 2016; *Prosecutor v Bemba et al.*, ICC-01/05-01/13, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute (11 November 2014) paras 51–106.

E. Conclusions and Fundamental Insights for the Future

Proving charges of sexual violence involves significant challenges arising from the impact of assumptions that victims of these crimes do not want to speak about their experiences, that victim evidence is inherently problematic and unreliable, and that crimes can only be established through victim evidence. We have found that in order to successfully prosecute these crimes, it is crucial that we clearly understand the impact of these factors and that we create favourable conditions to bring forward victim evidence while at the same time diversifying our sources of evidence.

Many fundamental insights for the future can be drawn from the sexual violence prosecutions conducted at the ICTY as set out below:

Preparing victims for court

- Prosecutors and investigators should adopt a 'witness-centred' approach in sexual violence cases. Victims have varying motivations, needs, and expectations, and it falls on investigators and prosecutors to assess their individual needs and tailor the treatment of the victims to meet those needs.
- A witness-centred trial preparation process enhances the ability of victims to decide to testify, and to then testify effectively. Ultimately, victims must be given decision-making power over whether and when to cooperate.
- Victims who are reluctant to testify have individual reasons for their views. Prosecutors should not assume that victims do not want to speak about their experiences, but rather should focus on adopting strategies to overcome the barriers preventing them from testifying.
- Maintaining regular contact with victims during the pre-trial phase and in the period leading up to testimony is often crucial to maintaining trust. Reducing the number of staff members who contact the victims also contributes to building rapport with the victims. Victims may have a preference for the investigator and interpreter to be of a particular sex, and to only deal with the same investigator and/or interpreter. Respecting this preference helps maintain the trust of victims.
- It is good practice for prosecutors to meet with witnesses prior to their court testimony to prepare them for court. This preparation is particularly important for sexual violence victims. Knowing what to expect from the court process can alleviate the stress and anxiety of testifying and ensure that the evidence is presented in a coherent manner.
- When witnesses recall new evidence or clarify information in a previous statement prior to testifying, it must be disclosed to the defence as soon as possible. It is equally important to inform witnesses that the prosecution is obliged to disclose this information to the defence.
- Having a specialized victim and witness section staffed by professionals focused on the specific needs and concerns of victims and witnesses promotes a witness-centred approach. The early involvement of such staff in the trial preparation

allows victims to receive adequate support in advance of the trial, which in turn empowers them to come forward.

Considering different types of evidence

- Victim evidence is important to establishing crimes of sexual violence. However, when prosecutors rely solely on victim evidence there is a risk that charges will have to be withdrawn if a victim decides not to testify. To avoid this, prosecutors and investigators should collect as much evidence as possible from a variety of different sources in support of sexual violence charges.
- The evidence of non-victim witnesses must not be overlooked as they too have an important role to play in proving sexual violence crimes. Prosecutors should also bear in mind the possibility of establishing sexual violence crimes through circumstantial evidence. The specific context in which sexual violence occurs may influence the type of supporting evidence available.
- Expert evidence can play an important role in bolstering victim credibility and in connecting sexual violence with a broader campaign of violence. It can also be useful for sentencing by demonstrating the impact of sexual violence crimes on victims, particularly where there is an absence of specific victim impact information.
- Documentary and forensic evidence can be useful in proving sexual violence charges. Effectively used, these types of evidence strengthen the prosecution's case by diversifying the sources of evidence relied upon. However, neither should be a pre-requisite for bringing conflict-related sexual violence charges. Where such requirement exists in domestic law, consideration should be given to law reform. Pragmatic approaches are required to applying such evidentiary standards so that they do not render proof of conflict-related sexual violence untenable.

Eliciting evidence in court

- In eliciting evidence from victims and proving the charges, it is important to take into account their needs and preferences. Continuing a witness-centred approach throughout the trial improves the courtroom experience of the victim, leading to more effective testimony and a fuller account, which benefits the prosecution's case.
- In questioning victims in court, prosecutors should assess the level of detail required to establish the charges. Prosecutors should not assume that every detail regarding the sexual violence incident is required. They should adapt their questioning depending on the matters at issue in the case and focus on adducing evidence to establish those facts. This assessment requires clearly understanding the evidence required to prove the legal elements of the crimes and the modes of liability charged, the nature of the case, and the matters in dispute between the parties. At the same time, prosecutors should bear in mind that a comprehensive discussion of the crime may assist in sentencing.

- Prosecutors should adapt the manner in which they elicit evidence from victims in court to minimize the risk of re-traumatization. Prosecutors should bear in mind that each survivor of sexual violence has different needs and expectations of the judicial process. To the extent possible, prosecutors should take into account the witness's preference as to how to introduce the evidence in court. While limiting the scope of oral testimony and the time victims spend on the witness stand can be an important measure for some victims, it can bring disappointment and frustration to others. Prosecutors should be mindful of the misperception that victims are weak and necessarily require protection.
- Where possible, prosecutors should be proactive and discuss the modalities of introducing a victim's evidence with the defence and the Bench before the victim testifies. Prosecutors should also be mindful of striking a balance between written and oral testimony to make sure fact-finders hear first-hand from some of the victims and also so that their evidence is sufficiently reflected in the public proceedings.
- Prosecutors should not make assumptions about the scope of the evidence a sexual violence victim can give in relation to the matters at issue in the case and should not confine their questioning of victims to the incidents of sexual violence. Rather, they should ensure that all relevant evidence is adduced. A more comprehensive approach to the evidence of victims can help explain the depth of the harm caused to them and their communities and, in turn, can inform sentencing.
- In most conflict-related sexual violence cases, it will be important for prosecutors to adduce evidence to demonstrate the context in which sexual violence takes place and the role it played in a broader violent campaign.
- In connecting sexual violence crimes to a broader campaign, prosecutors should also emphasize the violent reality of these crimes and avoid reinforcing the stigma surrounding these crimes and the misconception that sexual violence is a matter of the victim's honour. In particular, they should avoid describing sexual violence as a 'private', 'intimate', or 'personal' act, and instead choose language that stresses the traumatic and violent reality for the victims. By clearly identifying the violent nature of these crimes, prosecutors can assist fact-finders to view sexual violence in the same manner as other violent attacks on physical integrity and to promote an approach that disconnects sexual violence from concepts of honour or morality.

Assessing victim evidence

- Corroboration should not be required to prove a sexual violence crime. However, as with all categories of crimes, prosecutors should adduce any available supporting evidence to ensure that the strongest possible case is put forward. While corroborative evidence should be relied upon when it is available, prosecutors should also refrain from creating *de facto* corroboration requirements by failing to raise charges of sexual violence merely because no corroborative evidence exists to bolster the victim's testimony.

- Prosecutors should be mindful of assumptions and stereotypes regarding sexual violence victims and recognize that these can create unique evidentiary barriers that contribute to unsatisfactory accountability outcomes. Such assumptions and stereotypes can influence the manner in which the judges assess victim evidence and can undermine the probative value of the evidence. A specialized procedural framework to address the evidentiary challenges of proving sexual violence crimes is important to serve as a bulwark against such misconceptions. Where such a framework exists, prosecutors must insist on a rigorous application of the specialized procedural rules, including by utilizing the appeal process if necessary.
- Sexual violence impacts each individual victim differently. Prosecutors must persuasively explain to the court that inconsistencies in a victim's account and their demeanour in the courtroom need to be assessed with this consideration in mind. Reliability should also not be assessed by minor inconsistencies in dates, precise sequences of events, or other peripheral detail. These inconsistencies are understandable given the nature of conflict-based sexual violence and the fact that these crimes are often prosecuted years after their commission.
- Credibility challenges based on a victim's prior sexual conduct are inappropriate and should not be permitted. If the applicable legal framework does not recognize this, efforts should be undertaken to reform the law. In the meantime, prosecutors should promote a common sense approach to the issue aimed to ameliorate the effect of problematic legal frameworks.
- The credibility of a victim should not, per se, he undermined by the fact that the victim has PTSD or has received henefits connected with their status as a war victim. Rather a court should take into account whether there has been a material change in the victim's evidence due to the medical condition or the nature and circumstances of the benefit.
- If required as a legal element for sexual violence crimes, a victim's non-consent can be established by the surrounding coercive circumstances, not only by the words and deeds of the accused. As non-consent may be inferred from a complex factual matrix, prosecutors must pay particular attention to adducing evidence on coercive conditions. Potentially intrusive and traumatizing questions focusing unnecessarily on the victim's response to the assault should be avoided. Evidence of the use of force by the accused or resistance by the victim is not required.

Protecting victims and witnesses

- The adequate protection of victims and witnesses is a key factor for the successful prosecution of sexual violence crimes. Prosecutors should make victim and witness protection measures a priority for consideration before, during, and after court proceedings. A witness-centred approach that allows victims and witnesses to make an informed choice about the applicable protective measures is crucial.
- Prosecutors should not assume that all victims are unwilling to speak publicly and require protection. They should seek protective measures in a way that maximizes transparency and respects the rights of the accused while also minimizing

the witness's anxiety and the risk of disclosing protected identities. While the balance is a difficult one to strike, each witness's needs should be assessed on a case-by-case basis and requests for protective measures should be tailored to address those needs.

- Prosecutors must understand the expectations and needs of sexual violence victims when deciding what types of protective measures to request. Victims may have different security and confidentiality concerns. In some instances, cultural and social factors may play a significant role in a victim's requirements.
- Prosecutors must be mindful of the potential disclosure obligations that may arise from personal material relating to the victim and should consider these obligations before taking possession of such material. In certain circumstances, it may be preferable for a prosecution team not to accept such material from witnesses or agencies in order to avoid potential disclosure implications at trial.
- Mechanisms should be in place to address violations of protective measures orders for all victims. Prosecutors must be especially vigilant in ensuring compliance with protective measures orders for sexual violence victims to ensure the integrity of the proceedings and the trust of the victims. This includes initiating swift and effective contempt of court proceedings to punish violators of such orders.

Post-testimony follow-up

- A post-testimony debriefing session provides the prosecution team with the opportunity to acknowledge the victims' courage and their contribution to the judicial process. It also assists in settling victims after the stress of their courtroom experience and facilitates an easier transition back home. In addition, prosecutors should put in place procedures for post-testimony follow-up with victims, as well as mechanisms for the proper enforcement of protective measures outside the courtroom. It is after testifying—once they are back in their daily lives—that witnesses are more likely to require additional support. Adequate post-testimony follow-up is also necessary with a view to calling victims to testify again in subsequent proceedings.

Role of judges

- Fact-finders play a crucial role in trial management and in ensuring that victims are treated with respect and dignity in court. To this end, they can show empathy and control inappropriate questioning. Gender parity on the bench and gender competency of judges are critical to successfully prosecute sexual violence crimes. All judges assigned to sexual violence cases and their staff must be adequately trained in the nature and effects of sexual violence, and in recognizing trauma, so that they are equipped to assess evidence and handle traumatized witnesses in court. Experienced and trained judges are able to assess crimes of sexual violence from the proper perspective: as crimes of violence, rather than as purely sexually-motivated crimes incidental to the conflicts in which they occur.