HEALING WITH ACCOUNTABILITY: IMPROVING METHODS OF PROSECUTING SEXUAL VIOLENCE POST-CONFLICT

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Prosecutions for sexual violence post-conflict rarely result in successful convictions. If this trend were to continue, survivors may feel that they will never find a reliable path to justice. International criminal law has evolved quickly, and it continues to expand its approaches to justice post-conflict. Each step forward, however, still fails to find its footing for prosecutions related to sexual violence. A specialized chamber for sexual violence should be implemented in all ad hoc criminal tribunals that are built as justice mechanisms post-conflict. Important scholars, such as Chiseche Salome Mibenge, have identified this disappointing trend of failed prosecutions and highlighted some of its core contributing factors. However, no scholar has recommended the creation of a specialized and separate chamber as a solution.

The significance of this proposed chamber lies not just its specialization, which would provide trauma-informed training to staff at every level of the tribunal, but also its separation. By severing the sexual-violence chamber from other chambers, this framework tackles the issue of courts prioritizing prosecution of crimes that are "easier" to prove. It can implement procedures that address the unique nature of these crimes while giving additional support to survivors as they navigate this traumatizing process. The existing landscape of international criminal law continues to improve its approach to sexual violence, but it has not been enough. This suggested solution provides a robust discussion of the issues and a possible road to redemption for the international legal community.

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I. INTRODUCTION

Standing at the front of the courtroom, facing a sea of men, Khadidja Hassan Zidane looked Chad's former head of state Hissène Habré in the eye as she recounted the four separate occasions in which he had raped her.[1] She offered to lift her garments to show scars from when he had stabbed her with a pen—her punishment for resisting.[2] As if sharing the scars would distribute the shame's weight and she would no longer bear the burden of carrying it alone. As she described each assault, Habré sat defiantly in silence, his eyes shielded by sunglasses.[3] On the second day of her testimony, she endured 100 minutes of cross-examination by the court-appointed defense team.[4] They pressed her about multiple issues, including her inconsistent reporting of dates and the fact that she waited until the trial process to disclose the rapes.[5] She firmly told the defense counsel it did not matter what day he attacked her, nor how old she was at the time, and that those details did not change

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1. Celeste Hicks, *Courage of Sexual Violence Victims Transforms Trial of Chad's Ex-president*, GLOB. OBSERVATORY (June 16, 2016), https://theglobalobservatory.org/2016/06/chad-hissene-habre-human-rights/.

2. Kim Thuy Seelinger, *Rape and the President: The Remarkable Trial and (Partial) Acquittal of Hissène Habré*, WORLD POL'Y J. (2017) 16, 19; CELESTE HICKS, THE TRIAL OF HISSÈNE HABRÉ: HOW THE PEOPLE OF CHAD BROUGHT A TYRANT TO JUSTICE 95 (2018).

3. Reed Brody, *Breaking the Silence to Convict a Dictator*, HUFFINGTON POST (June 22, 2016, 9:17 AM), https://www.huffpost.com/entry/breaking-the-silence-to-c_b_10610010.

4. HICKS, *supra* note 2, at 95.

5. *Id.* at 95–96.

the reality of what happened to her.[6] She explained that it was shame that forced her to wait until this moment to disclose the sexual assaults.[7]

Khadidja's testimony was the most shocking moment in the Extraordinary African Chambers' trial of Hissène Habré.[8] The Extraordinary African Chambers (EAC) was established in August 2012 by Senegal and the African Union for the purpose of "prosecution of international crimes committed in Chad during the period from 7 June 1982 to 1 December 1990."[9] Although incidents of rape and other sexual abuses lingered in whispered stories from Habré's reign, this account was the first public accusation to result in a conviction.[10] The triumph of his victims was palpable when he was found guilty of raping and torturing Khadidja.[11] Unfortunately, the victory was short-lived, and the conviction was overturned.[12] Not long after the Trial Chamber issued its judgment, Khadidja joined the long list of women who courageously testified against their abusers only to find that their words would not result in a final conviction.[13] She felt the same disappointment and despair of the survivors who came before her; they had all received empty promises made by each tribunal.[14] On appeal, the EAC Appeals Chamber upheld all of the charges against Habré, except for one: the conviction for raping Khadidja.[15] The Appeals Chamber

6. *Id.* at 96.

7. *Id.*

8. *Id.* at 95.

9. *See* Agreement on the Establishment of the Extraordinary African Chambers Within the Senegalese Judicial System Between the Government of the Republic of Senegal and the African Union, Statute of the Extraordinary African Chambers, African Union-Sen. art. 1, Jan. 30, 2013, 52 I.L.M. 1024 (reiterating topics a potential tribunal should consider in its adjudication of international crimes).

10. *See, e.g.*, Seelinger, *supra* note 2, at 18 (discussing the prevalence of sexual offenses throughout Habré's reign); Inna Lazareva, *Chad's Survivors of Torture and Rape Seek Justice for Fellow Africans*, REUTERS (Oct. 26, 2017, 3:52 AM), https://www.reuters.com/article/us-chad-politics-rights/chads-survivors-of-torture-and-rape-seek-justice-for-fellow-africans-idUSKBN1CV0TJ (discussing Habré's trial, his reign, and the abuses survived by his victims); *Hissène Habré Trial Before the Extraordinary African Chambers: October Hearings*, INT'L JUSTICE MONITOR (Dec. 15, 2015), https://www.ijmonitor.org/2015/12/10583/ (introducing four survivors who testified against Habré and parts of their testimonies).

11. *See* HICKS, *supra* note 2, at 104–05 (stating Habré was found guilty of sexual assault and rape under the third category of joint criminal enterprise liability).

12. *Id.* at 112.

13. *See, e.g.*, Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgement and Sentence, (Jan. 27, 2000) (demonstrating that there were no convictions for sexually violent crimes, despite their initial inclusion in the indictment); Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08 A, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo Against Trial Chamber III's "Judgment Pursuant to Article 74 of the Statute," (June 8, 2018) (acquitting Bemba of all charges, including charges of sexual violence); INT'L FED'N FOR HUM. RTS., NO. 721A, UNHEARD, UNACCOUNTED: TOWARDS ACCOUNTABILITY FOR SEXUAL AND GENDER-BASED VIOLENCE AT THE ICC AND BEYOND 18–19 (2018) (listing all cases in the ICC where there was evidence of sexual and gender-based violence (SGBV) and demonstrating that, nonetheless, the vast majority did not result in a conviction).

14. *See* HICKS, *supra* note 2, at 117–18 (noting the prevalence of unfulfilled promises of compensation to victims of SGBV).

15. *Id.* at 112.

insisted that they found her story credible, but due to procedural requirements, could not uphold the charge.[16] However, as Celeste Hicks, a prominent freelance journalist, wrote in her book *The Trial of Hissène Habré*, "the fact that the conviction was overturned has led to some suspicion that there may have been political pressure applied to spare Habré the shame of going down in history as a convicted rapist."[17] If this suspicion is correct, it would mean that the Appeals Chamber balanced the shame Khadidja would experience by returning to her community as a known survivor of rape[18] with the shame of an already-convicted former head of state and concluded that it was more important to protect the perpetrator. Effectively, the Appeals Chamber acknowledged that, while crimes against humanity are an affront to society, it would go too far to label Habré a rapist. His reputation was more important than Khadidja's safety.

Habré's trial was revolutionary for several reasons. Prior to the appeal, holding that a former head of state was guilty of committing rape was one of its biggest achievements. It did not take long for the Appeals Chamber to quietly erase the conviction from its list of triumphs for women, however.[19] Survivors like Khadidja who come forward with stories of assault during a trial are often re-traumatized by the process. This trauma can be further intensified when the accused are not convicted for the harm they caused. It further cements the idea that the victim of sexual and gender-based violence (SGBV) is powerless. A study of female rape survivors in the United States, performed by Annemiek Richters, showed that their experiences of assault made them suddenly more aware of the "little rapes" that women face daily.[20] She writes:

> 'Little rapes' are defined as encounters with phenomena such as sexist jokes and pornography, which were only interpreted as negative after the experience of actual rape. The rape experience made the women realise that their lifeworld and their language is full of symbols of objectification and degradation of women, out of which arises the potential for rape . . . . The women in this study realized that they were not only victims of an individual perpetrator, but of male hegemony within society at large.[21]

Surviving assault forced an acute awareness that they were not only victims of their

16. Kim Thuy Seelinger, *Hissène Habré's Rape Acquittal Must Not Be Quietly Airbrushed from History*, GUARDIAN (May 10, 2017, 7:52 AM), https://www.theguardian.com/global-development/2017/may/10/hissene-habre-acquittal-not-airbrushed-from-history-khadidja-zidane-kim-thuy-seelinger ("[The Tribunal] said the new facts Zidane offered in her trial testimony came too late to be included within the new charges of sexual violence, so they could not serve as the basis for a conviction.").

17. HICKS, *supra* note 2, at 113.

18. *See id.* at 97–98 (explaining that admitting history of sexual violence is incredibly shameful in Chadian society).

19. The main focus of this paper is sexual violence against women in developing countries, so women and survivors may be used interchangeably. However, sexual violence is perpetrated against individuals of all genders and gender identities.

20. Annemiek Richters, *Sexual Violence in Wartime. Psycho-Sociocultural Wounds and Healing Processes: The Example of the Former Yugoslavia*, *in* RETHINKING THE TRAUMA OF WAR 112, 114 (Patrick J. Bracken & Celia Petty eds., 1998).

21. *Id.*

perpetrators, but also of the political and social systems that enable this gender-based violence.[22]

In this article, I argue that every time a woman testifies about her experiences of sexual violence in front of a tribunal only to have the charges dropped for reasons beyond her control, she experiences another "little rape." These tribunals address numerous atrocities, but the lack of convictions for sexual violence effectively tells the survivors that what happened to them is not as serious as the other crimes at bar. These women deserve better, and the international community owes it to them to adequately address this problem and find a solution. Critics of international law's treatment of sexual violence have stated:

> [T]he law has traditionally taken a dominant masculine experience as a norm, considering all other experiences as devalued or deserving repression. Thus, the hegemony of men in the public sphere means that rights have been traditionally defined by them, and that women have been denied the space to express the specific violations they suffer. As a result, advocates and lawyers must develop strategies to use international law in a more inclusive way, considering the needs of women.[23]

Historically, tribunals fail to adequately address victims concerns at every stage of judicial proceedings. The investigations fail to prioritize SGBV, and as a result, indictments do not include such charges. In the event prosecutors do move forward with sex and gender-based charges, witnesses do not receive protection and survivors receive insufficient trauma-informed treatment. I suggest that the best option to provide justice for survivors is to create a separate chamber within the assigned regional and ad hoc tribunals: a chamber dedicated solely to prosecuting crimes of sexual violence. This chamber should have different procedural mechanisms, specifically tailored rules of evidence, and staff at every level who are trained in gender competency and trauma-informed work.

The narrative each tribunal tries to craft directly influences what charges they bring and how they prioritize investigations. Creating a separate chamber for sexual violence would allow for the narrative surrounding SGBV to exist apart from any other characterization of the conflict.[24] Such separation is necessary because these crimes are unique in their duality both as an individual attack and as a mechanism of systematic persecution. If the international criminal law continues to acknowledge that they are unique but fails to treat them as such, then it is doing a disservice to every survivor that agrees to participate in an investigation.

Part II of this Comment discusses the different international tribunals and their approaches to sexual violence during armed conflict. Each institution approaches the issue in a unique way, both through the statutes that bring the courts into existence and through enforcement of these statutes. Part III discusses why domestic courts

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22. *Id.*

23. Teresa Fernández Paredes, *Sexual Violence Through a Gender Lens*, *in* (UN)FORGOTTEN: ANNUAL REPORT ON THE PROSECUTION OF SEXUAL VIOLENCE AS AN INTERNATIONAL CRIME 24, 25 (2019) [hereinafter (UN)FORGOTTEN].

24. See *infra* Section II.C for a discussion of the way in which the International Criminal Tribunal for Rwanda (ICTR) ignored instances of sexual assault that did not fit into the narrative of ethnic persecution.

and the International Criminal Court are ill-equipped to address SGBV that occurs during a period of armed conflict. It explains why ad hoc tribunals are better suited to address this issue. The final section of this Comment, Part IV, discusses the proposed separate chamber for SGBV within hybrid or ad hoc tribunals. This proposed solution could lead to higher conviction rates, which can be a first step in a healing process—although convictions cannot undo the harm suffered by the victims.

II. A SURVEY OF JUSTICE MECHANISMS' SGBV PROSECUTIONS

Throughout history, rape was simply considered a part of war.[25] Society viewed it as a negligible consequence when compared to the mass casualties suffered by communities in conflict.[26] Over time, the international community has come to understand that sexual violence is a weapon of armed conflict and that this atrocity merits attention.[27] In 1994, the United Nations Commission on Human Rights released a preliminary report submitted by Special Rapporteur Radhika Coomaraswamy on violence against women.[28] In this report, Ms. Coomaraswamy stated that "although rape is one of the most widely used types of violence against women and girls, it remains the least condemned war crime."[29] In a March 2019 report, the United Nations Secretary-General stated that "despite some progress, impunity for the perpetrators of conflict-related sexual violence continues to be the norm."[30] This Section discusses different transnational justice mechanisms and how sexual violence has been treated over the years by those mechanisms. More generally, this Comment will question whether these mechanisms are willing or able to treat women equally, given how such a prevalent atrocity continues to go unpunished.[31] Sexual violence is a side effect of gender inequality, and it is not preventable if the institutions built to address it do not treat men and women as deserving of the same protections.[32] Once identified, the shortcomings of these mechanisms can be used as a guide to help craft recommendations for a specialized chamber, as discussed in Part IV of this Comment.

A. International Military Tribunal

After the atrocities of World War II, the world needed an unprecedented justice

25. OLIVERA SIMIĆ, SILENCED VICTIMS OF WARTIME SEXUAL VIOLENCE 13 (2018).

26. *Id.*

27. *See generally* U.N. Secretary-General, *Conflict-Related Sexual Violence*, U.N. Doc S/2019/280 (Mar. 29, 2019) (describing the prevalence of gender-based sexual violence and proposing responses) [hereinafter *Conflict-Related Sexual Violence*].

28. Radhika Coomaraswamy (Special Rapporteur on Violence Against Women, Its Causes and Consequences), *Preliminary Rep.*, U.N. Doc. E/CN.4/1995/42 (Nov. 22, 1994).

29. *Id.* ¶ 263.

30. *Conflict-Related Sexual Violence*, *supra* note 27, ¶ 8.

31. *See* CHISECHE SALOME MIBENGE, SEX AND INTERNATIONAL TRIBUNALS: THE ERASURE OF GENDER FROM THE WAR NARRATIVE 9 (2013) (describing factors that serve as obstacles to justice for victims of sexual violence).

32. *Conflict-Related Sexual Violence*, *supra* note 27, ¶¶ 2–3.

mechanism.[33] Initially, the Allied Powers disagreed on which road to take but eventually decided that designating a military tribunal would be the best course of action.[34] As the discussion surrounding the nature of crimes evolved, U.S. Chief Prosecutor Robert H. Jackson suggested that the prosecutor's purpose was to document the history of crimes that had "shocked the world."[35] The Nuremberg Charter—the statute written to create the International Military Tribunal (IMT)—included the charges of crimes against peace, war crimes, and crimes against humanity.[36] It was the first international criminal institution that sought to pursue individual criminal liability.[37] The Charter did not reference rape or sexual violence.[38] This silence was not due to a lack of evidence: rape was woven into the fabric of witness testimony during trial[39] and otherwise heavily documented.[40] Rather than prosecuting these crimes, the IMT bunched sexual violence under the umbrella of "atrocity" and "ill treatment."[41]

The IMT trial is the first of many examples in which international criminal courts excluded sexual violence from their recitation of the facts. Like each ad hoc justice mechanism discussed in this Comment, the IMT served as an account of the armed conflict that spurred its creation. The focus of this tribunal was the ethnic persecution during World War II, and sexual violence did not fit neatly into its narrative.[42] Rather than expanding the story in a way that would facilitate the

33. *See* Adrian L. Jones, *Paradigm Shift and the Nuremberg Trials: The Emergence of the Individual as a Subject and Object of International Law*, *in* EMPIRES AND AUTONOMY: MOMENTS IN THE HISTORY OF GLOBALIZATION 177, 178 (Steven M. Streeter & John C. Weaver eds., 2009) (noting gravity of atrocities that occurred during the war).

34. *See* JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 477 (4th ed. 2015) (acknowledging different proposed solutions and the compromise of a military tribunal approach).

35. TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR 54 (1992).

36. Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter IMT Charter].

37. *See* Robert H. Jackson, *Statement of Chief U.S. Counsel upon Signing of the Agreement*, 19 TEMP. L.Q. 169, 169 (1946) (noting that IMT Charter first established principle of individual responsibility in international criminal law).

38. Alison Cole, *International Criminal Law and Sexual Violence: An Overview*, *in* RETHINKING RAPE LAW: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 47, 49 (Clare McGlynn & Vanessa E. Munro eds., 2010); *see* IMT Charter, *supra* note 36 (failing to address crimes of rape or sexual violence).

39. Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT'L L. 288, 295 (2003).

40. *See, e.g.*, Regina Mühlhäuser, *The Unquestioned Crime: Sexual Violence by German Soldiers During the War of Annihilation in the Soviet Union, 1941–45*, *in* RAPE IN WARTIME 34 (Raphaëlle Branche & Fabrice Virgili eds., 2012) (describing patterns of sexual violence perpetrated by German invasion force and occupiers in the Soviet Union).

41. Patricia Viseur-Sellers, *The Context of Sexual Violence: Sexual Violence as Violations of International Humanitarian Law*, *in* 1 SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW: THE EXPERIENCE OF INTERNATIONAL AND CRIMINAL COURTS 263, 281–90 (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2001).

42. It is possible that rape crimes were not vigorously prosecuted at the IMT because the Allies

inclusion of crimes of sexual violence, the IMT erased it.[43] The prosecution at Nuremberg did not bring rape charges against any of the defendants, despite the prevalence of rape during the commission of the offenses at bar.[44]

B. International Criminal Tribunal of Former Yugoslavia

On May 25, 1993, the United Nations Security Council, with Resolution 827, established the International Criminal Tribunal for the former Yugoslavia (ICTY).[45] This tribunal was created for the "sole purpose of prosecuting persons responsible for serious violations of international humanitarian law" in the former Yugoslavia in the 1990s.[46] The ICTY Statute defined rape as a "crime against humanity," but failed to expressly mention other crimes of sexual violence under this heading.[47] Overall, the ICTY moved the law forward in its treatment of sexual violence and showed survivors it was possible to obtain justice for what happened to them through international law.[48]

This Section discusses where room for improvement remains. First, in many instances, the ICTY used evidence of rape merely to establish context, rather than to support SGBV charges. Additionally, the ICTY would disregard instances of rape, at times, if they did not fit into the tribunal's narrative of ethnic persecution. Second, ICTY officials mishandled interactions with witnesses and survivors, though the inclusion of female staff members did contribute to successful prosecutions. Lastly, the ICTY did not offer a forum that encouraged defendants to speak about crimes of sexual violence.

1. ICTY Failure to Support SGBV Charges

Despite the prevalence of SGBV during this armed conflict, tribunals frequently used evidence of SGBV solely to provide context. For example, in its very first trial, *Prosecutor v. Tadić*, the ICTY wasted an opportunity to show the international community that SGBV crimes were serious and would be treated as

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wanted to avoid prosecuting crimes that Allied soldiers themselves had committed during and after the war. KELLY DAWN ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS 163 (1997).

43. Cole, *supra* note 38, at 50.

44. *Id.* at 48–49.

45. *See* S.C. Res. 827, ¶ 2 (May 25, 1993) [hereinafter S.C. Resolution 827] (establishing an international tribunal to prosecute persons who violated humanitarian law in the former Yugoslavia).

46. *Id.*; *see also* Janine Natalya Clark, *The ICTY and Reconciliation in Croatia: A Case Study of Vukovar*, 10 J. INT'L CRIM. JUST. 397, 397 (2012) (describing how ICTY indicted 161 individuals since its founding in 1993).

47. SARA SHARRATT, GENDER, SHAME AND SEXUAL VIOLENCE: THE VOICES OF WITNESSES AND COURT MEMBERS AT WAR CRIMES TRIBUNALS 18 (2011); *see also* U.N. Updated Statute of the International Criminal Tribunal for the Former Yugoslavia art. 5, Sep. 2009, https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (last visited Nov. 30, 2019) (listing rape as only enumerated sexually violent crime against humanity).

48. *See* Cole, *supra* note 38, at 53 (explaining how this change in law expanded how sexual violence can be prosecuted, increasing the likelihood of prosecution).

such.[49] The tribunal presented rape merely as a foundational issue to set the scene but did not include it in the indictment.[50] Rape charges were added to the list of crimes only after three prominent advocates in the field filed an amicus curiae brief.[51] However, they were not upheld because the witness was no longer willing to testify.[52] Notably, although the tribunal did not convict Duško Tadić of committing crimes of sexual violence directly, it held him responsible for his "general campaign of terror, manifested by murder, rape, torture, and other forms of violence."[53]

In another case, *Prosecutor v. Kunarac*,[54] the tribunal failed to convey the sexual aspect of the enslavement that women had suffered.[55] Rather, the sexual abuse the women faced was simply used as a factor to support the charge of enslavement.[56] In other words, instead of recognizing sexual enslavement as an experience the victims survived, the tribunal used the evidence of continued rapes as an element to confirm the general crime of enslavement. The tribunal also characterized the crimes committed against the victims to fit within the narrative of genocide and ethnic cleansing—and although it is true that the violence was based on the persecution of Muslims—it is clear that Kunarac and others targeted Muslim women in a precise way.[57] The tribunal's prosecutions did not indicate this focus on women as a persecuted group.

2. ICTY Mistreatment of Witnesses

ICTY staff failed to appropriately manage crimes of SGBV when they mistreated witnesses and survivors throughout the progression of the proceedings. The witness in the *Tadić* case was no longer willing to testify about her rape because she was afraid.[58] ICTY staff could have ensured her safety at the outset through anonymity, voice distortion, and other security means, but they neglected to adequately care for her as a witness.[59] This lesson shows that dedication to a successful prosecution must start at the very beginning, in the investigatory stages, to successfully obtain a conviction.[60] Merely including the crime of rape in a statute

49. Case No. IT-94-1-T, Opinion and Judgement, (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

50. Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law*, 46 MCGILL L.J. 217, 229 (2000).

51. *Id.* (describing the amicus brief filed by Jennie Green of the Center for Constitutional Rights alongside Felice Gaer, Director of the Jacob Blaustein Institute, and Rhonda Copelon, Director of the International Women's Human Rights Law Clinic (IWHR)).

52. Cole, *supra* note 38, at 51.

53. Kelly D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 AM. J. INT'L L. 97, 104 (1999).

54. Case No. IT-96-23-T & IT-96-23/1-T, Judgement, (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001).

55. MIBENGE, *supra* note 31, at 148.

56. Askin, *supra* note 39, at 338–40.

57. *See* MIBENGE, *supra* note 31, at 149 (noting that certain abuses were only suffered by women).

58. Cole, *supra* note 38, at 51.

59. *Id.*

60. *Id.*

does not ensure that justice will prevail.

Victims often received problematic treatment in the ICTY. In the *Čelebići trial*, as a witness was testifying about one of the accused raping her, the defense attorney said, "[b]ut he only raped you once and did not hurt you."[61] These comments demonstrate the limited objectivity about and clear disregard of the harms that result from sexual violence prevalent in courts around the world.[62] A senior female judge on the ICTY tribunal shared her difficulties in questioning witnesses: "[y]ou have to test her side of the story and in rape it's frustrating[. . . .] 'Did you invite this or really how much did you put yourself in [this] situation . . . .'"[63] To ask a rape survivor if she invited the assault demonstrates how the ICTY tailored gendered crimes to fit within a male-dominated institution that did not have a victim-centered approach.[64]

3. ICTY Failure to Require Defendants to Acknowledge SBGV Crimes

Tribunal officials also failed to press defendants and prosecutors to speak of these gendered crimes.[65] Some of the perpetrators publicly apologized to the court after their convictions in "statements of guilt."[66] However, even when rape was among their convictions, they did not include it in their apology.[67] Dragan Zelenović, who violently abused women who resisted his sexual assaults and was found guilty of numerous rapes, "was unable to utter the word rape in his statement of guilt."[68] One female judge from the ICTY stated: "They do not plead guilty to the rape but do to genocide. It is a shame crime and they know that it is wrong. It also embarrasses them."[69] By allowing the defendants to avoid admitting guilt for their SGBV crimes in their statements, court officials took a sheltering approach toward the accused—as if the added punishment of feeling shame for what they had done was too harsh, too inhumane.

One positive factor that impacted the ICTY proceedings was involving women in the process.[70] Former judges Nusreta Sivac and Jadranka Cigelj, survivors of conflict-related sexual violence themselves, gathered evidence and testimony from female witnesses and presented it to the tribunal.[71] These women's efforts led to

61. SHARRATT, *supra* note 47, at 34.

62. *See* Binaifer Nowrojee, *"Your Justice is Too Slow": Will the ICTR Fail Rwanda's Rape Victims?*, at 1, 26 (United Nations Research Inst. for Soc. Dev., Occasional Paper 10, 2005) ("Even when sexual crimes are reported, investigators and prosecutors often do not treat them seriously . . . . More often than not, a woman's honour is put on trial rather than the alleged rapist's actions.").

63. SHARRATT, *supra* note 47, at 64 (alteration in original).

64. *Id.* at 19.

65. *See id.* at 64 (describing ICTY officials' lack of empathy or concern for SGBV victims).

66. *Id.* at 30.

67. *Id.*

68. *Id.* at 30–31.

69. *Id.* at 64.

70. SIMIĆ, *supra* note 25, at 23; *see also* SHARRATT, *supra* note 47, at 143 (recommending involvement of women at all levels of future tribunals as critical).

71. SIMIĆ, *supra* note 25, at 23.

international law recognizing rape as a war crime.[72] A female judge, Elizabeth Odio Benito, was one of the three judges in the *Dragan Nikolić* case who confirmed the indictment against him.[73] She ensured that the testimony of rape survivors was heard, and although Nikolić was not originally charged with SGBV crimes, the Trial Chamber encouraged the Prosecutor to amend the indictment to include those crimes.[74] In the *Čelebići* case, Judge Benito moved for rape to be charged as torture.[75] This decision categorized the SGBV crime as a grave breach—the most serious war crime.[76] A female judge's involvement in the case changed the outcome and was instrumental in pushing international law to recognize and indict sexually violent war crimes.

In all, the ICTY indicted 161 individuals, but sentenced only 90 of them.[77] In 2001, the tribunal convicted only three Bosnian Serb men of SGBV crimes: rape, sexual enslavement, and torture of Bosnian Muslim women and girls held in detention centers in 1992.[78] The Tribunal sentenced these men to between twelve and twenty-eight years of incarceration.[79]

C. International Criminal Tribunal for Rwanda

In 1994, within a span of 100 days, approximately 800,000 individuals were killed during the Rwandan genocide.[80] Members of the majority Hutu group targeted the minority Tutsi ethnic group, who had a long history of holding positions of power.[81] As the conflict came to a close, United Nations Security Council Resolution 955 established the International Criminal Tribunal for Rwanda (ICTR) with the aim of peace and reconciliation.[82] Similar to the ICTY, the ICTR included sex crimes in its establishing statute: Article 3(g) included rape, under the provision of crimes against humanity, and Article 4(e) included it as an outrage to personal dignity in violation of the Geneva Conventions' Common Article 3.[83] Grounded in customary international law, the statute followed the growing trend of recognizing SGBV as an aspect of armed conflict.[84] However, categorizing rape as a crime against humanity required that the crime be committed as part of a widespread and systemic attack.[85]

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72. *Id.*

73. SHARRATT, *supra* note 47, at 39.

74. *Id.*

75. *Id.*

76. *Id.*

77. *ICTY Facts and Figures*, INT'L CRIMINAL TRIBUNAL FOR FORMER YUGOSLAVIA, https://www.icty.org/sites/icty.org/files/images/content/Infographic_facts_figures_en.pdf (Nov. 2017).

78. SIMIĆ, *supra* note 25, at 17.

79. *Id.*

80. *Rwanda Genocide: 100 Days of Slaughter*, BBC NEWS (Apr. 4, 2019) https://www.bbc.com/news/world-africa-26875506.

81. *Id.*

82. S.C. Res. 955 (Nov. 8, 1994) [hereinafter ICTR Statute].

83. *Id.* arts. 3(g), 4(e).

84. MIBENGE, *supra* note 31, at 62–63.

85. ICTR Statute, *supra* note 82, art. 3(g).

In Rwanda's ethnic conflict, Hutu forces used rape as a weapon against the Tutsi population.[86]

Sexual violence toward women was rife throughout the conflict.[87] Given this prevalence, the low number of convictions for SGBV is disappointing. Only five out of forty-eight convictions were made for SGBV crimes, and none of the individuals were actually *sentenced* for SGBV crimes.[88] This section will discuss the factors that contributed to this low conviction rate. First, the ICTR disregarded instances that did not fit into its narrative of ethnic persecution of Tutsis by Hutus.[89] Second, ICTR staff failed to prioritize SGBV crimes from the beginning, which resulted in faulty evidence and weak investigations.[90] Third, even in situations where defendants were successfully indicted for SGBV crimes, court officials offered them deals to drop the SGBV convictions in exchange for guilty pleas to other crimes.[91] Each misstep is another disservice to the survivors of SGBV who came forward with their trauma in an attempt to find justice, and eventually, peace.

1. ICTR Failure to Consider SGBV Crimes That Fell Outside Its Narrative

The ICTR is another example of courts prioritizing the continuity of the narrative over justice for the actual victims. The tribunal's narrow conception of rape as a crime against humanity ensured that the narrative cast the Tutsi as the victims and the Hutu as the perpetrators.[92] The SGBV had to occur as part of a widespread or systematic attack against the targeted Tutsi group for the tribunal to prosecute it.[93] Anyone who tried to shift the narrative's perspective risked being considered a denier of genocide.[94] As a result, rapes of Hutu women were tucked away, erased,

86. *See* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, ¶¶ 598, 695 (Sept. 2, 1998) (defining rape and acts of sexual violence; finding rape and other inhumane acts committed during attacks on Tutsis).

87. SIMIĆ, *supra* note 25, at 21–22.

88. Doris Buss, *Learning Our Lessons?: The Rwanda Tribunal Record on Prosecuting Rape*, *in* RETHINKING RAPE LAW: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 61, 63 (Clare McGlynn & Vanessa E. Munro eds., 2010).

89. *See id.* at 22 (describing ICTR's narrow recognition of rapes by Hutu men against Hutu women who had married Tutsi men).

90. Nowrojee, *supra* note 62, at 9–13.

91. Doris E. Buss, *Rethinking 'Rape as a Weapon of War'*, 17 FEMINIST LEGAL STUD. 145, 151 (2009).

92. SIMIĆ, *supra* note 25, at 22.

93. *See* ICTR Statute, *supra* note 82, art. 3 (requiring widespread or systematic attack as an element of crimes against humanity).

94. *See* Johan , *Escape from Genocide: The Politics of Identity in Rwanda's Massacres*, *in* VIOLENCE AND BELONGING: THE QUEST FOR IDENTITY IN POST-COLONIAL AFRICA 195, 210 (Vigdis Broch-Due ed., 2004) ("Rwanda's official discourse on the events of 1994 recognises four social categories only: *rescapés* (Tutsi genocide survivors), old caseload refugees (Tutsi returned from exile), new caseload returnees (Hutu returned from the refugee camps that sprung up in 1994) and *génocidaires* (the Hutu perpetrators of that genocide). Anyone departing from this rigid typology, or offering a more nuanced reading of Rwanda's post-genocide social fabric, risks being accused of denying that genocide occurred, even risks being labelled *génocidaire*.").

and forgotten.[95] The only permitted storyline cast Tutsi women as victims of ethnic violence, not gender-based violence, thus ignoring the reality of their experiences and denying the vulnerability of all women in the conflict, Tutsi and Hutu alike.[96] To promote the chosen narrative, the Office of the Prosecutor (OTP) neglected to participate in good-faith investigations or prosecutions of gender-based crimes that did not fall within this framework.[97]

Even so, SGBV, regardless of the victims' Tutsi or Hutu identity, was prevalent throughout the cases brought before the tribunal.[98] Chiseche Salome Mibenge wrote about one example found in the treatment of Prime Minister Agathe Uwilingiyimana's murder.[99] Prime Minister Uwilingiyimana was killed along with the minister of information, minister of agriculture, minister of labor and communications, and the president of the Constitutional Court.[100] They were targeted by Hutu forces because of their moderate political status and their positions of power, but some of them were Hutu, themselves—such as the Prime Minister.[101] The Prime Minister was the only woman in this group and the only one who was sexually assaulted.[102] The fact that her attackers did not sexually assault the other ministers demonstrates that their treatment and abuse of her differed not because of her political affiliation or her perceived status of wealth, but because she was a woman.[103] Her gender was the only thing that set her apart. Despite the evidentiary record of her sexual assault from witness testimony, it was left out of the official legal findings.[104] While the OTP and the tribunal included her murder, they excluded the sexual assault of the Prime Minister because her Hutu identity failed to conform with the ethnic-based narrative of Hutu aggressors targeting their sexual violence exclusively against Tutsi victims.[105]

In another case, Witness BJ, a teenaged Hutu woman, testified about her experience with SGBV during the war.[106] As Hutu soldiers raided near her home,

95. *See* SIMIĆ, *supra* note 25, at 22 (describing international community's disregard for experiences of Hutu women raped by Hutu men during genocide in Rwanda, and their absence from the feminist discourse on rapes in Rwanda).

96. MIBENGE, *supra* note 31, at 62.

97. *Id.* at 86.

98. *See* SIMIĆ, *supra* note 25, at 21–22 (describing widespread SGBV against Tutsi and Hutu women in Rwanda).

99. MIBENGE, *supra* note 31, at 77.

100. *Id.*

101. *Id.* at 77–78.

102. *Id.*

103. *Id.* Prime Minister Uwilingiyimana's body was found riddled with bullets and with a bottle shoved into her vagina. *Id.* In a separate case, the tribunal determined that inserting a piece of wood inside a dying woman constituted rape. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, ¶ 686 (Sept. 2, 1998). However, the court did not consider the similar assault on Prime Minister Uwilingiyimana as legally significant, apparently because she belonged to the Hutu ethnic group. *See* MIBENGE, *supra* note 31, at 77 (noting that similar assaults on Tutsi women were considered legally significant).

104. MIBENGE, *supra* note 31, at 77.

105. *Id.*

106. *Id.* at 83.

she ran into a hospital to hide with two Tutsi women.[107] When the Hutu soldiers found them, they raped all three women alongside one another.[108] When one soldier was about to kill Witness BJ along with the Tutsi women, another soldier identified her as Hutu.[109] The soldier let her go and apologized for his mistake.[110] The OTP only used this testimony to support the narrative of ethnic rape rather than rape as a broader, gendered weapon and accordingly a SGBV crime.[111] However, the soldier had raped her without knowing her ethnicity.[112] Her status as a girl with no power sufficed. He only chose not to kill her because she was Hutu.

Another example is the story of Laetitia, a Tutsi woman who could pass for Hutu.[113] She traveled with forged documents identifying her as a Hutu.[114] However, her papers did not protect her from being raped by soldiers.[115] In this conflict, she and others like her were raped not because they were ethnically targeted, but because of their status as women. The tribunal did not recognize Hutu women as victims of SGBV crimes, unless their rapes were defined, in the rare context of an ethnically-motivated attack on their Tutsi husbands.[116] Men seeking to assert their dominance in any way possible victimized these women and used their bodies to gain power in an unbalanced, war-torn country. By excluding the stories of Hutu women from the legal narrative, the ICTR ignored the significant impact of the armed conflict on women's security.[117]

2. ICTR Failure to Prioritize SGBV Crimes

Even when SGBV fit within the narrative of an ethnic attack, prosecutors failed to obtain convictions.[118] A dominant justification for the low number of SGBV-related convictions was incorrectly-plead charges in the indictments.[119] The Trial Chambers frequently dropped sexual and gender-based charges on the grounds that the timeframe, facts, and identities provided lacked acceptable specificity.[120] A remaining question is what level of specificity was used to find culpability for other crimes, such as mass murder. If defendants were convicted under command responsibility because of the thousands of civilians slaughtered under their supervision, it is curious that mass rapes could not have been included using the same approach.

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107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. Pottier, *supra* note 94, at 207.
114. *Id.*
115. *Id.*
116. Buss, *supra* note 88, at 70.
117. MIBENGE, *supra* note 31, at 79.
118. Buss, *supra* note 88, at 71.
119. *Id.* at 65.
120. *See id.* (describing insufficiencies in indictments as primary reason for dropping SGBV charges).

On its face, insufficient evidence of SGBV may be a valid justification. But it is important to question how that could be true given the fact that rape was so prevalent during this conflict. Perhaps it is not that sufficient proof did not exist, but that the tribunal did not pursue, obtain, or properly utilize the available evidence of SGBV. Perhaps prosecutors and court staff did not prioritize SGBV charges from the beginning.

Prominent human rights lawyer and author Binaifer Nowrojee has vocalized disappointment at the tribunal for its frequent acquittals of sexual violence crimes and the lack of gender-based charges in its indictments.[121] Nowrojee criticized Carla del Ponte for her decisions as Chief Prosecutor from 1999 to 2003, including how she chose to dissolve the sexual assault investigations team in 2000.[122] Even when the team was reinstated, it remained underfunded.[123] Moreover, Del Ponte often decided not to pursue charges of sexual violence even when confronted with substantial evidence.[124] The OTP, rather than looking inward when faced with its low conviction rate, placed blame on the Rwandan women's cultural mores, which created a barrier to obtaining their accounts of sexual violence.[125] However, countless researchers and investigators, as well as the survivors who have come forward with thousands of stories to tell, have disproved the OTP's cultural sensitivities claim.[126] Mibenge argues that the OTP believed sexual violence was the least offensive grave crime, and therefore made the active choice not to investigate it.[127] Similar to the phenomenon in the *Tadić* case at the ICTY, if the investigation or follow up was insufficient, the resulting conviction at the ICTR did not include SGBV crimes.

3. ICTR Dropping SGBV Charges in Exchange for Plea Deals

Even when charges were obtained, the ICTR did a disservice to survivors by providing defendants the option to drop SGBV charges in exchange for guilty pleas for other crimes. As of December 2008, only fifteen out of forty-eight trials and guilty pleas included charges for SGBV crimes, and only five men had been found guilty of SGBV charges.[128] "[E]ight men have pleaded guilty before the Tribunal, five of whom were charged with sexually violent crimes."[129] All five of them, however, exchanged guilty pleas on other counts in order to have the SGBV-related charges dropped.[130] Not a single defendant has pled guilty to any sexually violent

121. *See* Nowrojee, *supra* note 62, at 8 (criticizing the high number of acquittals for gender-based crimes).

122. *Id.* at 10.

123. AFRICAN RIGHTS & REDRESS, SURVIVORS AND POST-GENOCIDE JUSTICE IN RWANDA: THEIR EXPERIENCES, PERSPECTIVES AND HOPES 96 (Nov. 2008).

124. Nowrojee, *supra* note 62, at 10.

125. *See* MIBENGE, *supra* note 31, at 67 (indicating that the sensitivity surrounding the subject prevented Rwandan women from disclosing their assaults).

126. *Id.*

127. *Id.*

128. Buss, *supra* note 88, at 63.

129. *Id.*

130. *Id.*

crimes.[131]

The combination of the OTP's lack of will, inadequate investigations, incomplete indictments, and ignored evidence meant that charges were dropped at each stage of the legal process, until a sparing few remained.[132] Generally, as rape charges drop at each stage of the judicial process, the women that come forward report feeling insignificant and invisible.[133] The former gender advisor at the tribunal, Elsie Effange-Mbella, remarked that the process of testifying oftentimes had a lasting impact on the survivors:[134] "little rapes" that traumatize survivors all over again. Effange-Mbella stated that the stigma the women experienced from their families and communities would remain with them forever.[135] For example, despite the assurances given by investigators and prosecutors, witnesses often complained of repercussions when they returned home from giving their testimony.[136] Alex Obote-Odora said the ICTR could be used as a tool to transfer the shame and stigma felt by the survivor onto the perpetrator.[137] A report released by the United Nations stated that if perpetrators are found legally responsible, the shame they experience as a result might lessen the burdensome weight of shame carried by the survivors.[138]

As a whole, the ICTR took important steps in the quest for justice for survivors of sexual violence. However, as with the ICTY, "the gap between documented cases of sexual violence and criminal prosecutions of this crime was unacceptably wide."[139] National and international courts have referenced both of these tribunals for their definitions of sexual violence and rape in armed conflict.[140] Their statutes were groundbreaking, but the judicial process was disappointing. Thus, pushing international criminal law forward cannot be achieved simply through a statute; the implementation of these laws is just as important, if not more so.

D. The International Criminal Court

The International Criminal Court (ICC) was founded in 1998 to prosecute crimes that "deeply shock the conscience of humanity."[141] The Rome Statute is

131. *Id.*

132. *Id.* at 67.

133. Karen Engle & Annelies Lottmann, *The Force of Shame*, *in* RETHINKING RAPE LAW: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 76, 81 (Clare McGlynn & Vanessa E. Munro eds., 2010).

134. *Id.* at 80–81.

135. *Id.*

136. Radhika Coomaraswamy (Special Rapporteur on Violence Against Women, Its Causes and Consequences), *Addendum Rep. of the Mission to Rwanda on the Issues of Violence Against Women in Situations of Armed Conflict*, ¶¶ 51–54, UN Doc. E/CN.4/1998/54/Add.1 (Feb. 4, 1998).

137. Alex Obote-Odora, *Rape and Sexual Violence in International Law: The ICTR Contribution*, 12 NEW ENG. J. INT'L & COMPAR. L. 135, 157 (2005).

138. *See* CHRISTOPHER HORWOOD ET AL., U.N. OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, THE SHAME OF WAR: SEXUAL VIOLENCE AGAINST WOMEN AND GIRLS IN CONFLICT 65 (2007) (arguing that domestic prosecutions for international crimes can help).

139. MIBENGE, *supra* note 31, at 24.

140. *Id.* at 18.

141. Rome Statute of the International Criminal Court pmbl., July 17, 1998, 2187 U.N.T.S. 38544 [hereinafter Rome Statute].

considered by women's advocates, such as the Women's Caucus for Gender Justice, to be partially successful in its encompassment of sexually violent crimes.[142] For example, women's groups pressed the importance of including enforced pregnancy as a crime against humanity.[143] Despite pushback from Arab states and the Vatican, the Rome Conference incorporated the term "forced pregnancy" into the definition of crimes within the Court's jurisdiction.[144] It expressly includes sexual violence under Articles 7 and 8, as a crime against humanity and a war crime.[145] In addition, the Rome Statute created a pathway for victims to participate in proceedings, included safeguards to protect them, and highlighted the need for gender-informed practices.[146]

Despite its progressive statute, however, scholars have criticized the ICC for its treatment of SGBV.[147] In the beginning, then-prosecutor Luis Moreno Ocampo did not prioritize crimes of this nature.[148] One theory posited that he was under pressure to develop cases in a short time frame in order to give the institution momentum, so he focused on cases that were more obvious and easier to investigate.[149] Perhaps to combat this perception, the current Prosecutor, Fatou Bensouda, released a policy paper on Sexual Gender-Based Crimes in 2014 to demonstrate the Court's dedication to pursuing justice for SGBV survivors.[150]

As of this writing, the Court has tried four cases involving sexual violence.[151] One of the more recent cases, the prosecution and subsequent conviction of former Congolese vice president Jean-Pierre Bemba Gombo, brought about hope that

142. Mary Deutsch Schneider, *About Women, War and Darfur: The Continuing Quest for Gender Violence Justice*, 83 N.D. L. REV. 915, 933 (2007); *see* Brook Sari Moshan, Comment, *Women, War, and Words: The Gender Component in the Permanent International Criminal Court's Definition of Crimes Against Humanity*, 22 FORDHAM INT'L L.J. 154, 175 (1998) (describing the Rome Statute as a partial success given its incorporation of several recommendations made by Women's Caucus and other women's advocates).

143. Moshan, *supra* note 142, at 175–76.

144. *Id.* at 176.

145. Rome Statute, *supra* note 141, at arts. 5(b)–(c), 7(g), 8(2)(b)(xxi)–(xxii).

146. *See* Copelon, *supra* note 50, at 233.

147. *See, e.g.*, Susana Sacouto, *The Impact of the Appeals Chamber Decision in Bemba: Impunity for Sexual and Gender-Based Crimes?*, INT'L JUSTICE MONITOR (June 22, 2018), https://www.ijmonitor.org/2018/06/the-impact-of-the-appeals-chamber-decision-in-bemba-impunity-for-sexual-and-gender-based-crimes/ (describing the appeal in the *Bemba* case and its ill-boding for trying cases of sexual violence in the future).

148. Mariasole Forlani, *Prosecution of Sexual Violence by the ICC: Hope for a Better Future?*, MUKWEGE FOUND., https://www.mukwegefoundation.org/guest-blog-prosecution-sexual-violence-icc-problems/ (last visited Mar. 22, 2021).

149. *Id.*

150. *See* Office of the Prosecutor of International Criminal Court, *Policy Paper on Sexual and Gender-Based Crimes*, at 5–8, (June 2014) https://www.icc-cpi.int/iccdocs/otp/Policy_Paper_on_Sexual_and_Gender-Based_Crimes-20_June_2014-ENG.pdf (providing the "Executive Summary" of the Office's stance on SGBV).

151. Ariane Puccini & Camille Jourdan, *The Forgotten Victims of the International Criminal Court,* ZERO IMPUNITY, https://zeroimpunity.com/the-forgotten-victims-of-the-international-criminal-court/?lang=en (last visited Mar. 22, 2021).

changes were on the horizon.[152] On March 21, 2016, the Trial Chamber convicted Bemba of murder and rape as crimes against humanity and of war crimes of murder, rape, and pillaging committed by the troops of the Movement for Liberation of Congo in the Central African Republic.[153] The guilty charges were considered a victory, but unfortunately that victory was short-lived.[154] The Appeals Chamber overturned the judgment in June of 2018 and acquitted Bemba of all charges.[155] It was the first conviction for sexual violence at the ICC,[156] and it was reversed.[157] The Chamber held that the conviction was outside the scope of permissible charges because the OTP had brought them after the pre-trial confirmation of charges, which is not permitted procedurally.[158] This decision has highlighted the existing challenges the Prosecutor faces: it is not uncommon for allegations related to sexual violence to emerge later in the judicial process, oftentimes for reasons outside of her control.[159] Article 69(3) allows the Court to broaden its scope of admissible evidence, and it should apply this provision in a consistent manner.[160]

The Women's Initiative for Gender Justice releases a semi-annual Report Card to provide the ICC with a cohesive guide to current situations.[161] Beginning in 2005, a report was released each year, aside from a gap spanning 2015 to 2017.[162] The Report also informs the ICC of its standing in terms of investigations, convictions, and acquittals.[163] In 2018, it urged the Court to adopt:

> [A] Court wide gender mainstreaming strategy to inform budget and resource allocations, outreach and victim participation, as well as the overall gender responsive capacity of the various units. There is a need for consistent approaches to be undertaken across all areas of the Court to

152. *See id.* (describing the trial of Bemba).

153. Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, Judgment Pursuant to Article 74 of the Statute, ¶¶ 741–42, 752 (Mar. 21, 2016), https://www.icc-cpi.int/courtrecords/cr2016_02238.pdf.

154. *See* Puccini & Jourdan, *supra* note 151 (describing the *Bemba* trial as bringing justice to Bemba's victims).

155. Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08-A, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo Against Trial Chamber III's "Judgment Pursuant to Article 74 of the Statute" (June 8, 2018), https://www.icc-cpi.int/courtrecords/cr2018_02984.pdf.

156. *See* Puccini & Jourdan, *supra* note 151 ("[O]ut of the only three cases including charges of sexual violence tried by the court, two ended with acquittals . . . .").

157. *See Bemba Appeals Judgement Highlights the Challenges of Charging Sexual Violence Crimes*, AMNESTY INT'L (Oct. 3, 2018), https://hrij.amnesty.nl/bemba-case-highlights-challenges-charging-sexual-violence-crimes/ (discussing overturning of Bemba's conviction).

158. *Id.*

159. *See* Rosemary Grey et al., *Evidence of Sexual Violence Against Men and Boys Rejected in Ongwen,* AMNESTY INT'L (Apr. 10, 2018), https://hrij.amnesty.nl/evidence-sexual-violence-men-boys-rejected-ongwen/ (stating that social stigma is an obstacle to collecting evidence of sexual based violence).

160. *See id.* (explaining how the ICC could allow victims to get evidence of their assaults into the proceedings through Article 69(3)).

161 . WOMEN'S INITIATIVES FOR GENDER JUSTICE, GENDER REPORT CARD ON THE INTERNATIONAL CRIMINAL COURT (2018).

162. *See id.* at 9 (mentioning report cards produced from 2005 to 2014).

163. *See generally id.*

> demonstrate its commitment to gender equality. This can be enhanced through measures such as consistent reporting on gender specific tasks and responsibilities in all management meetings, strengthening gender specific capacities of all staff, and evaluating gender responsive capacities at staff performance evaluations.[164]

The Court's first successful conviction for SGBV charges suggests it may be heeding this advice. On July 8, 2019, the ICC ended its long run of impunity for sexual and gender-based crimes. The Trial Chamber convicted Bosco Ntaganda, from the Democratic Republic of the Congo, of eighteen counts including charges of rape and sexual slavery as war crimes and crimes against humanity.[165] Hopefully, this conviction will help deter continued systematic sexual and gender-based violence.

E. Special Court of Sierra Leone

In 2002, the United Nations helped create the Special Court of Sierra Leone (SCSL) as an international and domestic court hybrid to address the decade-long armed conflict between the Revolutionary United Front (RUF), the Armed Forces Revolutionary Council (AFRC), and the Civil Defense Forces (CDF).[166] Three years prior, in July of 1999, the government of Sierra Leone and the RUF rebel group reached the Lomé Peace Agreement, which established the Sierra Leonean Truth and Reconciliation Commission (TRC).[167] The SCSL was meant to complement the TRC. The United Nations Secretary-General wrote that "[t]hese two institutions are mutually reinforcing instruments through which impunity will be brought to an end and long-term reconciliation may be achieved."[168] The TRC's mandate was to create a report on human rights violations and to provide a safe forum for both victims and perpetrators.[169] The TRC held sessions throughout the country, and it seemed to have a unique benefit because it was more connected to the local communities than an ad hoc international tribunal could be.[170] The SCSL, perhaps due to its collaboration with the TRC, is considered the tribunal that best considers the recommendations of the Beijing Declaration, which described rape as a war tactic and broadened

164. *Id.* at 163.

165. Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Judgement, ¶¶ 535–39 (July 8, 2019).

166. *See* Agreement Between the United Nations and Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone art. 1, Jan. 16, 2002, 2178 U.N.T.S. 137 (describing purpose of Special Court as being for prosecution of those who committed serious violations of international law).

167. Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone art. XXVI (Jul. 7, 1999), *reprinted in* Letter dated July 12, 1999 from the Chargé D'Affaires Ad Interim of the Permanent Mission of Togo to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/1999/777 (July 12, 1999) [hereinafter Lomé Peace Agreement].

168. U.N. Secretary-General, *Eleventh Report of the Secretary-General on the United Nations Mission in Sierra Leone*, ¶ 66, U.N. Doc. S/2001/857 (Sept. 7, 2001).

169. Lomé Peace Agreement, *supra* note 167, art. XXVI.

170. *See* MIBENGE, *supra* note 31, at 93 (stating that TRC could claim to possess knowledge ad hoc international tribunals could not).

consideration of women's unique harms suffered in armed conflict.[171] The tribunal took the rape-related crimes provided by the ICTY and ICTR statutes and expanded upon them.[172] The SCSL made ample progress but, like the other tribunals, also made mistakes. For one, the Court chose to prioritize the narrative it wished to tell over actual justice for the victims.[173] Court officials also shielded defendants from the shame associated with perpetrating sexual violence.[174]

Similar to the ICTR and ICTY, the SCSL excluded crimes of sexual violence when they did not fit within its current narrative of the conflict.[175] The CDF leaders were seen as the heroes of the story, and therefore they could not be convicted of sexual violence.[176] Although the TRC and the SCSL were meant to be complementary bodies, if the TRC presented findings that told a different story from the Court's narrative, they would be blatantly disregarded.[177] The TRC made it abundantly clear that sexual violence was not confined to the bounds of rebel factions.[178] The report concluded that armed forces from all sides deliberately targeted women and girls.[179] Despite this reality, the prosecutor did not indict a single CDF leader for sexually violent crimes.[180] The absence of SGBV charges brought against the CDF leaders has led many in Sierra Leone to believe the Court gave preferential treatment over the pursuit of justice for the women and girls that survived the violence.[181]

Not only did the prosecutor bring charges selectively, but court officials also aimed to protect certain defendants from the stigma associated with perpetrating sexual violence. The case of *Prosecutor v. Norman* exemplifies this decision to shield an accused from an SGBV-related conviction, even when a conviction was warranted.[182] Sam Hinga Norman was one of the leaders of the CDF and the Deputy

171. *Id.* at 129; *see also* Fourth World Conference on Women, *Report of the Fourth World Conference on Women*, ¶ 135, U.N. Doc. A/CONF.177/20 (Sept. 15, 1995) (describing the social, economic, and psychological impacts that victims of violence against women experience).

172. MIBENGE, *supra* note 31, at 129.

173. *See id.* at 135 (arguing that prosecution chose female victims who fit its predetermined narrative rather than listening to the victims' own narratives).

174. *See id.* at 137 (discussing omission of crimes of sexual violence in prosecutor's indictment).

175. *Id.*

176. *See id.* at 141 (stating that many Sierra Leoneans viewed CDF fighters as heroes following the conflict).

177. *See id.* at 137 (discussing TRC's findings regarding sexual violence that were disregarded by SCSL).

178. *See* Sierra Leone Truth & Reconciliation Comm'n, *Witness to Truth Volume Two, Chapter 3: Recommendations*, ¶ 316 (Oct. 5, 2004) (stating how women and girls were specific targets of domestic violence and rape by all armed groups during conflict).

179. *Id.*

180. MIBENGE, *supra* note 31, at 137.

181. *Id.* at 143.

182. *See* Valerie Oosterveld, *Lessons from the Special Court for Sierra Leone on the Prosecution of Gender-Based Crimes*, 17 AM. U. J. GENDER, SOC. POL'Y & L. 407, 421 (2009) (providing quotes from international tribunal judge about why they would not admit evidence of SGBV).

Defense Minister to President Alhaji Ahmad Tejan Kabbah.[183] When the SCSL indicted Norman, a number of Sierra Leoneans were deeply disturbed.[184] They believed he should be recognized for his sacrifices in fighting against the rebels and not prosecuted for his crimes.[185] This perception potentially explains the presiding judge's strong reaction to the request to include sexually violent crimes among the charges brought. The Prosecutor sought permission from the Court to introduce evidence of gender-based violence to help satisfy the requisite elements for crimes against humanity.[186] The request was denied, and Justice Itoe equated "gender evidence" with "prejudicial evidence."[187] In his reasoning, he implied that evidence of gender-based crimes would damage the reputation of the defendants more than evidence of other crimes.[188] He wrote:

> [I]t is evident that evidence is not necessarily prejudicial because it is incriminating but because it is considered, even if it were relevant at all, being unfairly compromising of the interests and the status of innocence or the good standing of the victim of such evidence.
>
> In Black Law's Dictionary 7th Ed., undue prejudice is defined as the 'harm resulting from a fact Trier being exposed to evidence that is persuasive but inadmissible or that so arouses the emotions that calm and logical reasoning is abandoned.[189]

Again, as in the other tribunals, some justices were more concerned with protecting the defendants from what they perceived to be unnecessary shame rather than obtaining a complete and accurate record of what Sierra Leonean women survived during the conflict.

Despite its shortcomings, the SCSL moved international law forward by raising awareness of how men and women experience gender-based violence throughout armed conflicts.[190] The SCSL, the TRC, and the resolutions of the Security Council all relied on the ICTR and ICTY as precedent but took steps in a more progressive direction.[191] The SCSL continues to demonstrate that progress can be made as each conflict is addressed, although it should be evaluated and analyzed at every stage.

F. Extraordinary African Chambers

As discussed in the introduction, the Senegalese government established the

183. Charles C. Jalloh, *Special Court for Sierra Leone: Achieving Justice?*, 32 MICH. J. INT'L L. 395, 425 (2011).

184. INT'L CRISIS GRP., THE SPECIAL COURT FOR SIERRA LEONE: PROMISES AND PITFALLS OF A "NEW MODEL" 6 (2003).

185. Jalloh, *supra* note 183.

186. Oosterveld, *supra* note 182, at 419–20.

187. Prosecutor v. Norman, Case No. SCSL-04-14-T, Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe, Presiding Judge, on the Chamber Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, ¶ 78 (May 24, 2005).

188. *See id.* ¶ 65 (providing that evidence that unfairly compromises the victim's—in this context, the person being accused of crimes—innocence and good standing is prejudicial, a precursory idea to the conclusion that evidence of SGBV itself is prejudicial).

189. *Id.* ¶¶ 65–66.

190. MIBENGE, *supra* note 31, at 18.

191. *Id.*

Extraordinary African Chambers (EAC) to try the former dictator of Chad, Hissène Habré.[192] It was the first court of this nature established by an African nation.[193] The creation of the Court was historic, which made it that much more disappointing when the EAC Appeals Chamber chose to overturn the conviction for raping Khadidja Zidane.[194] The court had been lauded for its requalification of the original charges against Habré to include rape as a crime against humanity.[195] In the Appeal, Judge Wafi Ougadeye emphasized that the court found Zidane's testimony to be credible, but that the EAC statute did not allow for new facts to be added if they were not in the original indictment.[196] The Chamber concluded that despite the successful appeal on this particular charge, there would be no change in Habré's sentence.[197] It is important for the legitimacy of the court to stay true to the statute. However, there must be a way to balance the rights of the victims and the rights of the defendants so that these convictions do not continue to be cast aside.

III. THE ABSENCE OF OTHER FORA FOR SUCCESSFUL POST-CONFLICT SGBV PROSECUTION

Too many barriers exist that prevent courts from successfully prosecuting SGBV.[198] Domestic courts grapple with gender inequities or a lack of available mechanisms.[199] Sexual violence in conflicts occurs more frequently in communities where cultural gender inequality already exists.[200] A domestic court built to address a conflict's aftermath, with already-existing disadvantages for women, would likely have that inequality built into its foundation. In an in-depth study on violence against women, the United Nations Secretary-General found that reasons for the continued prevalence of gendered violence included patriarchal systems, economic inequality, and cultural norms and practices.[201] The way that culture impacts the perception of gendered violence is evident in former Ugandan Vice President Specioza Kazibwe's

192. Agreement on the Establishment of the Extraordinary African Chambers Within the Courts of Senegal Between the Government of the Republic of Senegal and the African Union art. 1(1), Aug. 22, 2012, 52 I.L.M. 1024; Statute of the Extraordinary African Chambers within the Courts of Senegal Created to Prosecute International Crimes Committed in Chad Between 7 June 1982 and 1 December 1990, African Union-Sen., art. 1, Jan. 30, 2013, 52 I.L.M. 1028.

193. Sarah Williams, *The Extraordinary African Chambers in the Senegalese Courts: An African Solution to an African Problem*, 11 J. INT'L CRIM. JUST. 1139, 1148 (2013).

194. Procurer Générale c. Habré, Appeals Judgment, ¶¶ 417–531 (Extraordinary African Chambers Apr. 27, 2017).

195. HICKS, *supra* note 2, at 104–05.

196. Ruth Maclean, *Ex-Chad Dictator's Conviction for Crimes Against Humanity Upheld by Dakar Court*, GUARDIAN (Apr. 27, 2017, 12:53 PM), https://www.theguardian.com/world/2017/apr/27/conviction-chad-hissene-habre-crimes-against-humanity-upheld/.

197. *Id.*

198. *See, e.g.*, INT'L FED'N FOR HUMAN RIGHTS, *supra* note 13, at 9 ("[T]he fight for accountability for sexual and gender-based violence is far from over.").

199. Jasmine Garsd, *The Future of the International Criminal Court Is in Question, and That's Bad News for Women*, WORLD (Feb. 24, 2017, 2:45 PM), https://www.pri.org/stories/2017-02-24/future-international-criminal-court-question-and-thats-bad-news-women.

200. U.N. Secretary-General, *Ending Violence Against Women: From Words to Action*, 27 (2006).

201. *Id.* at 27–35.

case.[202] In 2002, former Vice President Kazibwe publicly spoke about her history with domestic violence and shared that her husband physically assaulted her.[203] Although some women's groups voiced their support for her honest and open discussion of her experiences, some Ugandans said that she had acted incorrectly in discussing a private domestic matter in a public forum.[204] Her husband then came forward and characterized his abuse as "only" slapping her when it was warranted.[205] This reaction demonstrates that there is still a traditional conceptualization of what makes an acceptable wife: someone who does not challenge gender roles or act defiantly.[206] Even as the vice president of an entire country, Kazibwe lost her power once she passed the threshold into her home. This perception regarding gender roles is not unique to Uganda but is prevalent in countries all over the world.[207] A history of systemic flaws that disproportionately serves one gender over another is what prevents justice from moving forward.[208]

As domestic courts fail to provide survivors with unbiased justice mechanisms, the ICC struggles with its restricted capacity regarding which crimes it can prosecute. Monica Feltz, the executive director of the International Justice Project, believes that the ICC is an important resource for women.[209] As an example, Feltz stated, "I mean the domestic courts in Darfur are a joke. I think it's very hard for many women to gain any sort of justice at the local level if there aren't mechanisms in place for it. Which is where the ICC comes in."[210] She is not the only advocate to believe that the ICC is a solution for women and survivors.[211] The institution is too limited in its abilities to investigate numerous situations.[212] It has a massive workload and there is no shortage of human rights violations that still need to be addressed.[213] There is also concern that the ICC's chief prosecutor, Fatou Bensouda, already struggles with the near-impossible task of choosing which situations to investigate, given the Court's restricted capacity.[214] Survivors of sexual violence deserve an institution that is able to provide its full attention and resources without

202. Heléne Combrinck, *Rape Law Reform in Africa: 'More of the Same' or New Opportunities?*, *in* RETHINKING RAPE LAW: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 122, 123 (Clare McGlynn & Vanessa E. Munro eds., 2010).

203. *Id.*

204. *Id.*

205. *Id.*

206. FAREDA BANDA, WOMEN, LAW, AND HUMAN RIGHTS: AN AFRICAN PERSPECTIVE 159 (2005).

207. Combrinck, *supra* note 202, at 122.

208. *See id.* at 122–23 (describing how systemic flaws such as cultural norms and economic inequalities between genders lead to greater violence and injustice).

209. Garsd, *supra* note 199.

210. *Id.*

211. *See id.* (quoting multiple sources supportive of the ICC as mechanism to deliver justice for women).

212. Elizabeth Evenson & Jonathan O'Donohue, *The International Criminal Court at Risk*, OPENDEMOCRACY (May 6, 2015), https://www.opendemocracy.net/en/openglobalrights-openpage/international-criminal-court-at-risk/.

213. *Id.*

214. *Id.*

having to allocate priorities based on structural constraints.

Even though SGBV crimes are recognized and written into the statutes of international tribunals, courts ignore their unique nature. Sexual violence prosecutions at the ICTY, ICTR, EAC, and ICC are all flawed in that charges are frequently added too late, thereby violating the rules of evidence. As a result, the charges are either not included in the indictments or, if they are, their inclusions are disputed later on appeal.[215]

IV. RECOMMENDATION TO CREATE A SEPARATE SGBV CHAMBER WITHIN AD HOC TRIBUNALS

This Comment has identified the history of violence against women in conflict and the inadequate responses from existing legal systems thus far. Although some groundbreaking steps have been taken in the international tribunal context, an unacceptable gap remains between the prevalence of SGBV crimes and the number of successful convictions, a phenomenon known as the law's "uneven development."[216] Developments in the legal field are made, but these progressive steps are undermined by regression in another legal area.[217] An example is the ICTR and its revolutionary move to include rape as a breach under the overarching genocide and crimes against humanity core crimes.[218] However, the OTP at this very same revolutionary institution simultaneously failed to even investigate sexual violence crimes.[219] Thus, the courts' under-investigation of these crimes perpetuates oppression and maintains gendered inequality. It is another "little rape" that creates further trauma for witnesses and disregards their experiences.[220]

I suggest that in the instances where a tribunal or regional hybrid court is created after an armed conflict, there should be a separate chamber dedicated to the sole purpose of investigating and prosecuting SGBV crimes. A distinct and separate chamber for sexual assault crimes within ad hoc tribunals would provide a way for resources to be devoted to one institution with the same mission. In a 2019 report, TRIAL International emphasizes this type of collaboration's importance, presenting a cohesive analysis of prosecuting sexual violence in the international criminal law context. [221] In the introduction, the authors disclose that investigations and prosecutions of such violence continue to increase.[222] They note positive movement forward, "in contexts where all interested stakeholders, and more specifically civil

215. See *supra* Part II for a discussion of these cases.

216. CAROL SMART, LAW, CRIME AND SEXUALITY: ESSAYS IN FEMINISM 154–55 (1995).

217. *Id.*

218. Buss, *supra* note 88, at 71.

219. *See, e.g.*, Binaifer Nowrojee, *Shattered Lives: Sexual Violence During the Rwandan Genocide and its Aftermath*, HUMAN RIGHTS WATCH (Sept. 24, 1996), https://www.hrw.org/sites/default/files/reports/1996_Rwanda_%20Shattered%20Lives.pdf (recommending that the Tribunal properly investigates these crimes, amends current indictments to include sexually violent charges, and treat these crimes as gravely as others being investigated and prosecuted).

220. *See* Richters, *supra* note 20 (discussing "little rapes" as encounters involving objectification and degradation, which women face on a daily basis).

221. *See generally* (UN)FORGOTTEN, *supra* note 23.

222. *Id.* at 8.

society organizations, coalesce around the legal process and coordinate their efforts in order to provide survivors with the necessary support that allows them to step forward as actors of change."[223]

For too long, women have been told that they matter enough to be heard but not enough to merit justice for what has happened to them: for the invasion upon their bodies, for subhuman treatment, or for soldiers trying to rob them of their dignity. A separate chamber could be the solution that empowers survivors while also improving the efficacy of international courts through successful prosecutions.

A. Using the South African Model as a Framework

This section proposes a model for a separate specialized SGBV chamber that is currently used in South Africa. In the early 1990s, South Africa had one of the highest rape rates in the world.[224] In response to this crime's high prevalence, women's rights activists lobbied for the judicial system to take notice and create better legal resources for survivors.[225] Their advocacy led the attorney general of the Western Cape to create a pilot program for a specialized court to see if it would increase successful convictions.[226] In 2018, 74 or 75 specialized courts for sexual offenses existed in South Africa, and their Department of Justice reported that they had a 72.7% conviction rate.[227] Thus, the Department has lauded the development of these specialized courts as a success.[228] This high success rate demonstrates that specialized courts are not only possible, but effective as well.

Although specialized sexual offenses courts have existed since the 1990s, there were no official legislative frameworks to regulate them until recently.[229] As a result, courts did not have a uniform structure or cohesive understanding of what services should be offered to survivors.[230] This lack of structure changed when the South African Department of Justice announced that Section 55A, the proposed

223. *Id.*

224. *See, e.g.*, Graeme Simpson, *Explaining Endemic Violence in South Africa*, CTR. FOR STUDY OF VIOLENCE & RECONCILIATION (1993), https://www.csvr.org.za/publications/1799-explaining-endemic-violence-in-south-africa; Rachel Jewkes & Naeema Abrahams, *The Epidemiology of Rape and Sexual Coercion in South Africa: An Overview*, 55 SOC. SCI. & MED. 1231, 1231 (2002) (discussing South Africa's estimated comparative rape rates in the early 1990s).

225. Jen Thorpe, *Part 1: The History of Sexual Offences Courts in South Africa*, RAPE CRISIS CAPE TOWN TR., https://rapecrisis.org.za/part-1-the-history-of-sexual-offences-courts-in-south-africa/ (last visited Mar. 23, 2021).

226. *Part 4: The Future of Sexual Offences Courts in South Africa*, RAPE CRISIS CAPE TOWN TR., https://rapecrisis.org.za/part-4-the-future-of-sexual-offences-courts-in-south-africa/ (last accessed Mar. 23, 2021).

227. *Id.*

228. *See, e.g.*, Oyama Buso, *Cape Town Opens SA's First Sexual Offences Court*, 702 (Nov. 29, 2018, 5:36 PM), http://www.702.co.za/articles/329072/cape-town-opens-sa-s-first-sexual-offences-court ("Director of Victim Support and Specialised Services at the Department of Justice said the sexual offences court [sic] are now fully effective programs of the Department of Justice.").

229. *Press Release: Sexual Offences Courts Officially Signed into Regulation*, RAPE CRISIS CAPE TOWN TR., https://rapecrisis.org.za/press-release-sexual-offences-courts-officially-signed-into-regulation/ (last visited Mar. 23, 2021).

230. *Id.*

amendment to the Criminal Law (Sexual Offences and Related Matters) Amendment Act, would go into effect on January 31, 2020.[231] Section 55A authorizes regulations related to sexual offenses courts, which went into effect when they were officially published in the *Government Gazette* on February 7, 2020.[232]

The South African model has also been considered in other world regions. In the Canadian province of Québec, politicians have discussed creating such a tribunal within the domestic courts in the wake of the #MeToo movement.[233] When fourteen women came forward to accuse comedian Gilbert Rozon of sexual assault, many criticized Québec's justice system for failing the survivors.[234] Actress Patricia Tulasne stated in an interview with Radio Canada, "[t]hey ask us to come forward, they congratulate us [. . .] and then they say, 'We believe you, but sorry, there's nothing we can do.'"[235] The tribunal has not yet been created, but there is a demand for it across all political parties.[236] Advocates for the separate chamber cited South Africa's sexual offenses courts as a source of inspiration.[237]

1. Court Preparation Program

A specialized chamber would incorporate a court preparation program to support and guide witnesses and complainants as they navigate the proceedings. The chamber would mandate that its program be provided to a complainant prior to her participation in the judicial process.[238] The program would facilitate cooperation and communication with witnesses for investigators, prosecutors, and other relevant court staff.[239] The general framework would follow the South African model, which has regulations describing the program's goal as "familiarising complainants and witnesses in sexual offence cases with the court environment, with a view to preparing them to testify in court and providing assistance and support to them, in line with the standard operating procedures for court preparation officers."[240] The witness would be properly informed about the process and his or her needs would be documented and made available for the prosecution team. Finally, upon each trial's completion, staff and participating witnesses would complete an evaluation.[241]

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231. *Id.*

232. Regulations Relating to Sexual Offences Courts, GN R.108 of GG 43000 (7 Feb. 2020) (S. Afr.).

233. *Quebec MNAs from All Parties Meet to Discuss Possibility of Sexual Violence Tribunal*, CBC NEWS (Jan. 14, 2019, 9:06 AM), https://www.cbc.ca/news/canada/montreal/quebec-parties-discuss-sexual-violence-tribunal-1.4976935.

234. Jonathan Montpetit, *Idea for Special Sexual Assault Court Gains Steam in Quebec in Wake of #MeToo*, CBC NEWS (Jan. 24, 2019, 5:00 AM), https://www.cbc.ca/news/canada/montreal/idea-for-special-sexual-assault-court-gains-steam-in-quebec-in-wake-of-metoo-1.4990459.

235. *Id.*

236. *See id.* (showing that demand through the fact that there was an all-party meeting).

237. *Id.*

238. Regulations Relating to Sexual Offences Courts, *supra* note 232, § 15(6).

239. *Id.* § 15(8).

240. *Id.* § 15(1).

241. *See* SHARRATT, *supra* note 47, at 139 (recommending that court evaluations be conducted on a regular basis to assess court efficacy).

This data could inform preparatory practices for the next case. This program would have many benefits. In her book *Gender, Shame and Sexual Violence,* Sarah Sharratt suggests that sessions between the witness and prosecutor serve to prepare witnesses for the proceedings.[242] This process would allow witnesses to feel more in control of the process so that they would not be fumbling in the dark through a foreign and painful ordeal.

Additionally, the extra preparation means that investigators could take the time to fully and comprehensively explain the judicial process to witnesses. This necessary step could prevent witnesses from coming forward too late in the process, which renders their testimonies null and void. This happened during Habré's trial when Zidane understandably waited to testify about her own rape. Unfortunately, because she did not reveal that she was waiting, or indicate that she had this weight to offload, she could not be properly advised as to the consequences of coming forward too late in this process—namely, that these new charges offered in her trial testimony could not actually serve as the basis for a conviction. Even though the indictment was amended, the charges were reversed in a swift appeal.[243]

A program with a specialized chamber for survivors would aim to prevent minor procedural issues from allowing what would otherwise be successful convictions. FIDH's report addressing the impact of litigating sexual violence states that "[t]he challenges faced . . . regionally largely remain procedural in nature and are therefore not impossible to overcome."[244] Effectively explaining the procedural process to witnesses could assist this specialized chamber in its effective prosecution pursuits.

2. Trauma-Informed and Gender-Competency Mandates

Multiple NGOs have emphasized gender-competency training's importance for every court member in international institutions.[245] The specialized chamber would be dedicated to ensuring that staff at every level are trained in trauma-informed treatment and gender-competent practices. Its mandate would follow the South African model, which requires that, when interacting with a witness or complainant, court officials must use simple language that is appropriate for the maturity and comprehension level of the complainant or witness, ensure that questions and information are understood, and be sensitive to the fact that the complainant or witness may be intimidated by the atmosphere or distressed by the process.[246]

By having specially trained investigators, court officials could make sure important evidence would not be overlooked in the interest of taking the simplest route to prosecution. Investigators would know how to effectively interview witnesses because they would understand how to work with trauma survivors.

242. *Id.* at 140.

243. *See* Seelinger, *supra* note 16 (telling Zidane's story).

244. INT'L FED'N FOR HUM. RTS., NO. 742A, THE IMPACT OF LITIGATION ON COMBATTING SEXUAL VIOLENCE AND ITS CONSEQUENCES IN AFRICA 90 (2019).

245. *See, e.g.*, INT'L FED'N FOR HUM. RTS., *supra* note 13 (discussing ICC's failure to properly address SGBV issues).

246. Regulations Relating to Sexual Offences Courts, *supra* note 232, § 25.

Prosecutors, defense attorneys, and judges would also be trained, so that they would know the proper way to respond to witnesses. Sexual violence survivors are often perceived as traumatized, broken, and unable to provide an accurate account of what has happened to them.[247] Yet research has shown that treating survivors as if they are shattered or need elaborate protections can be detrimental to their recovery, and it is recommended that court officials emphasize victims' strengths as they work with them through the judicial process.[248]

Judges perhaps would benefit from gender-competent training the most. Concerned NGOs reviewing the ICC have highlighted that a judge's lack of background in this specialized area can lead to dismissing or withdrawing SGBV-related charges.[249] Training would decrease the likelihood of such occurrences. Training may also guide judges' approaches to discussing these crimes in their decisions. Judges presiding over SGBV cases should strongly condemn convicted rapists rather than trying to explain away their behavior as a side effect stemming from the conflict itself.[250] A strong stance against rape would send a message to the international community that it would not be tolerated, no matter the circumstance.

Specialized training would also encourage witnesses to testify when they otherwise might not feel willing to do so. Nowrojee, in her study of the Rwandan conflict, stated that the common claim that women do not want to testify is false; rather, they just need to be able to do so under the right circumstances.[251] Such circumstances involve discouraging the inclusion of unnecessary detail about the assault during the victim's testimony.[252] Otherwise, the witness may be subjected to further trauma, which could impact her willingness to participate in the proceedings. Survivors should also feel supported throughout the process rather than shamed or berated. Training can teach attorneys how to inquire about an incident without questioning a witness's integrity.

In addition, such training would increase the chamber's overall efficacy, given that trauma-informed training for court staff has been considered imperative in securing SGBV convictions.[253] Both prioritizing these crimes' proper investigation and effectively training court staff would allow for indictments to move past that

247. *See, e.g.*, SHARRATT, *supra* note 47 (discussing multiple factors that hurt witness credibility, such as perceived frailty, dishonesty, and reluctance to give useful information); INT'L FED'N FOR HUM. RTS., *supra* note 13, at 34–36 (recognizing such misconceptions about SGBV witnesses and victims and discussing better approaches to supporting them in the legal process).

248. SHARRATT, *supra* note 47, at 139.

249. INT'L FED'N FOR HUM. RTS., *supra* note 13, at 30.

250. SHARRATT, *supra* note 47, at 141.

251. *See* Nowrojee, *supra* note 62, at 14, 20–26 (discussing barriers Rwandan women face in testifying in SGBV cases).

252. *See* SHARRATT, *supra* note 47, at 141 (recommending that witnesses not be required to recount unnecessary details).

253. *See, e.g.*, INT'L FED'N FOR HUM. RTS., *supra* note 13, at 30 ("SGBV expertise of ICC staff and judges is instrumental in achieving accountability for these crimes. For instance, participants have expressed continuing concerns about the receptiveness of judges to SGBV issues. Notably, many participants noted their concerns about the impact of conservative interpretations of key crimes and provisions by the judges, leading to the dismissal or withdrawal of SGBV charges.").

initial necessary step—the point at which tribunals have faltered in the past, and, as a result, have failed survivors. Gender competency training's benefits can be seen in a comparison of the SCSL with the ICTR and the ICTY. Out of its sexual violence prosecutions, the SCSL was found to have more successful convictions.[254] This success is partially attributable to the decisions to assign two investigators to work solely on gender-based crimes and give all investigators gender-competency training.[255]

3. Witness Intermediary Services and Relocation Programs

Intermediary services would be offered to every witness that participated in proceedings in this specialized chamber. Again referring to the South African model, an intermediary's responsibility is to protect the witness's interests in court and monitor her well-being.[256] The intermediary or advocate is aware of the witness's limitations, vulnerabilities, and needs.[257] They build rapport with survivors and communicates any mental or physical changes that may occur during the judicial process that could impact proceedings.[258] They are also responsible for requesting a recess during the trial or testimony if it appears that the witness is stressed or fatigued.[259] An added expectation for the intermediary, which is not included in the South African model, would be for them to collaborate with other institutions to provide financial and emotional support, as well as employment opportunities for witnesses.[260] These resources could not only help survivors through the process of a trial but also provide them with the tools they need to move forward with their lives once the proceedings come to a close.

Staff would also be put in place to implement a witness relocation program if needed. The existence of such a program helps balance protecting the interest of survivors while also recognizing defendants' rights. If witnesses knew that they could permanently relocate, they might be more willing to testify in court.[261] Such a program would negate the need to develop elaborate protection plans for each individual, which could delay the proceedings and hurt a defendant's right to an expeditious trial.[262] A specialized SGBV chamber would likely rely heavily on

254. *See* Cole, *supra* note 38, at 57 ("Overall, the SCSL has made a marked effort to include sexual violence crimes in its cases . . . . That convictions have been entered for all such charges demonstrates that it is possible both to investigate sex crimes and to bring successful prosecutions under international criminal law, including against high-level accused who may not have been the direct perpetrators.").

255. Engle & Lottman, *supra* note 133, at 83.

256. *See* Regulations Relating to Sexual Offences Courts, *supra* note 232, § 25 (outlining court officials' duties to witnesses).

257. *Id.* § 18 (describing the responsibilities of intermediary services for witnesses).

258. *Id.*

259. *Id.*

260. SHARRATT, *supra* note 47, at 143.

261. William M. Walker, *Making Rapists Pay: Lessons from the Bosnian Civil War*, 12 ST. JOHN'S J. LEGAL COMMENT. 449, 473–74 (1997) (arguing for the existence of limited asylum program for witnesses testifying at the ICTY).

262. Ruth Wedgwood, *Prosecuting War Crimes*, Conference Paper, 149 MIL. L. REV. 217, 221 (1995).

witness testimony. Other tribunals have struggled to convince witnesses to come forward out of fear of reprisal, making a witness relocation program all the more important.[263] With a relocation program already in existence, witnesses are reassured from the beginning that they have options should they feel their safety is compromised. A relocation program would also solve problems similar to those that had emerged in the ICC's *Prosecutor v. Kenyatta* case, where witness tampering was believed to be one of the main reasons that the charges were eventually dropped.[264]

B. Aspects of The Proposed Chamber that Break from the South African Model

1. An Evidentiary Standard that Accounts for the Unique Nature of SGBV in Conflict

When an international court begins to investigate situations from an armed conflict, whether or not genocide has occurred is not difficult to discern. Bodies litter the roadways and occupy mass graves.[265] Similarly, deportation as a crime against humanity is demonstrated by the hordes of men and women forced from their homes.[266] Gathering evidence of genocide or crimes against humanity, such as deportation, is therefore not a difficult process. Post-conflict countries are, however, overwhelmed by the sheer volume of the endeavor.[267] These crimes do not require the words of another to confirm that they happened. The dilemma of prosecuting gendered crimes lies in the difference of proof. There is evidence of sexual violence in conflict, and it is just as prevalent as evidence of genocide and deportation. But in these cases, the evidence is the word of the survivors and witnesses. The questions that typically arise in a rape prosecution about consent or corroboration do not apply to the circumstances in an armed conflict.[268] Thus, these requirements should be

263 . Minna Schrag, *The Yugoslav War Crimes Tribunal: An Interim Assessment*, 7 TRANSNAT'L. L. & CONTEMP. PROBS. 15, 21 (1997).

264. OPEN SOC'Y JUSTICE INITIATIVE, BRIEFING PAPER: WITNESS INTERFERENCE IN CASES BEFORE THE INTERNATIONAL CRIMINAL COURT (2016), https://www.justiceinitiative.org/publications/witness-interference-cases-international-criminal-court; Marlise Simons & Jeffery Gettleman, *International Court Ends Case Against Kenyan President in Election Unrest*, N.Y. TIMES (Dec. 5, 2014), https://www.nytimes.com/2014/12/06/world/africa/uhuru-kenyatta-kenya-international-criminal-court-withdraws-charges-of-crimes-against-humanity.html.

265. *See, e.g.*, *Rwanda 'Genocide-Era' Mass Graves Found*, BBC NEWS (Apr. 25, 2018), https://www.bbc.com/news/world-africa-43894989 (describing mass graves discovered from the civil war in Rwanda).

266. *See, e.g.*, Rana F. Sweis, *Jordan Deports Sudanese Asylum Seekers, Spurring Outcry*, N.Y. TIMES (Dec. 18, 2015), https://www.nytimes.com/2015/12/19/world/middleeast/jordan-deports-sudanese-asylum-seekers-spurring-outcry.html ("At least five million people were forcibly displaced from their homes in the first half of the year . . . .").

267. *See, e.g.*, Julian Bedford, *Rwandan Camp Littered with Hutu Corpses*, INDEPENDENT (Apr. 23, 1995, 11:02 PM), https://www.independent.co.uk/news/world/rwandan-camp-littered-with-hutu-corpses-1616863.html ("Though government troops and United Nations forces had been burying the dead all day yesterday, about 2,000 bodies were still waiting to be collected as evening approached.").

268. *See* Cole, *supra* note 38, at 54 ("According to the *Akayesu* judgment, the key focus is on the context of the acts, in particular focusing on factors which establish the existence of coercive

reconsidered both in the statute that defines SGBV crimes and in the methods the tribunal pursues justice.

In the context of armed conflicts, rape ought to be approached in the same way that other crimes such as torture or enslavement are viewed: there is no requirement to prove a lack of consent.[269] Within an armed conflict, the entire circumstance is coercive in nature and therefore this lack of consent does not need to be demonstrated.[270] Lack of consent does not always mean that there was physical force, but rather that there were circumstances creating an imbalanced power dynamic which made it impossible for survivors to have a say in what was happening to them.[271] Proper investigation, of course, is necessary but the totality of the circumstances (e.g. the existence of an armed conflict) should be considered. Both the tribunals in Rwanda and the former Yugoslavia recognized that these crimes, prosecuted in this context, cannot be treated in the same manner as they would be in a peaceful state.[272] Judge Wolfgang Schomburg of the ICTY wrote that "sexual violence that qualifies as genocide, a crime against humanity, or a war crime occurs under circumstances that are inherently coercive and negate any possibility of genuine consent."[273] Judges in the ICTR Trial Chamber I considered that in the context of genocide, crimes against humanity, or armed conflict, it would be unreasonable to require proving a lack of consent.[274]

As it is unreasonable to demand proof of absent consent, it is unreasonable to require testimony to be corroborated. A hurdle that needs to be overcome in this specialized chamber is a court's tendency to consider prosecution of SGBV without taking the context of the conflict into account.[275] Corroboration may not be as necessary to prove rape in armed conflict, given the widespread nature of the crimes in addition to the very public setting where these assaults often take place.[276] This approach has been adopted by tribunals. The ICTY broke from the traditional

circumstances. This approach is especially warranted in relation to international crimes, which typically occur during armed conflict.").

269. *See, e.g.*, Gacumbitsi v. Prosecutor, Case No. ICTR-2001-64-A, Judgement, ¶ 155–57 (Sept. 28, 2004) (discussing the manner in which non-consent must be proven to establish rape).

270. INT'L FED'N FOR HUM. RTS., NO. 742A, *supra* note 244, at 7.

271. *See* INT'L CRIM. CT., ELEMENTS OF CRIMES art. 7(1)(g)-1 (2013) (listing different elements of the crime against humanity of rape, including the circumstances under which consent does not exist).

272. *See* Wolfgang Schomburg & Ines Peterson, *Genuine Consent to Sexual Violence Under International Criminal Law*, 101 AM. J. INT'L L. 121, 122 (2007) (explaining that these two tribunals were the first to handle crimes of sexual violence during periods of armed conflict).

273. *See id.* at 124.

274. INT'L FED'N FOR HUM. RTS., NO. 742A, *supra* note 244, at 7.

275. *See generally* Phillip Weiner, *The Evolving Jurisprudence of the Crime of Rape in International Criminal Law*, 54 B.C. L. REV. 1207 (2013) (discussing the difficulties of developing a clear definition of the crime of rape within the unique context of armed conflict).

276. Corroboration requirements are not uncommon, and even in domestic courts it has been cited as a barrier for rape survivors in the United States. *See, e.g.*, Patricia J. Falk, *"Because Ladies Lie": Eliminating Vestiges of the Corroboration and Resistance Requirements from Ohio's Sexual Offenses*, 62 CLEV. ST. L. REV. 343, 344–45 (2014) (stating that corroboration requirements are an obstacle for rape survivors seeking prosecution).

corroboration requirement with Rule 96 of the statute.[277] This rule is the main provision that outlines presentation of evidence for sexually violent crimes. Rule 96 states that corroboration of a survivor's testimony is not required.[278] Although some critics believe that corroboration is necessary, without it, a crime like rape is difficult to prove due to its private nature.[279]

This departure from a more traditional evidentiary approach should be adopted by a specialized chamber. However, as discussed throughout this Comment, there is a vast difference between writing a statute and applying it. The prosecution of cases at the ICTY demonstrates that a de facto corroboration requirement existed since no survivor's testimony standing alone was seen as credible.[280] Court officials would have to ensure that de facto requirements do not arise in how the crimes are prosecuted.

2. Investigations That Prioritize Gathering SGBV Evidence

The tribunals' lack of successful investigations demonstrates why a specialized approach is imperative to the success of this chamber. The ICTR cited faulty investigating as one of the main reasons why it failed to effectively convict individuals for crimes of sexual violence.[281] In the SCSL, the prosecution argued that there was insufficient support for indictments of sexual violence despite the fact that limited evidence was available as early as one year into the creation of the tribunal.[282] Tadić, from the ICTY, demonstrates the importance of using gender-competent investigation strategies such as ensuring potential witnesses that they will be protected.[283] If not, the consequence may be that charges are dropped when a scared individual refuses to testify.[284] In *Prosecutor v. Lubanga*, critics believe that the Office of the Prosecutor's ambition to advance the ICC's first case led to pursuing the "easiest" charges, prioritizing the legitimacy of the court over justice for the defendant's victims.[285] In the EAC, despite the fact that sexual violence was a main tactic during Habré's rule, it was not a priority for the investigators.[286]

277. *See* Int'l Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, Rule 96(i), U.N. Doc. IT/32/Rev.50 (July 8, 2015) ("In cases of sexual assault, no corroboration of the victim's testimony shall be required . . . .").

278. *Id.*

279. Daniel D. Ntanda Nsereko, *Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia*, 5 CRIM. L.F. 507, 547–48 (1994).

280. Christin B. Coan, *Rethinking the Spoils of War: Prosecuting Rape as a War Crime in the International Criminal Tribunal for the Former Yugoslavia*, 26 N.C. J. INT'L L. & COM. REG. 183, 215 (2000).

281. Buss, *supra* note 88, at 64.

282. *See* Michelle S. Kelsall & Shanee Stepakoff, *'When We Wanted to Talk About Rape': Silencing Sexual Violence at the Special Court for Sierra Leone*, 1 INT'L J. TRANSITIONAL JUST. 355, 360 (2007) ("In the majority decision, the prosecution is heavily penalized for submitting its motion to amend in February 2004, despite the availability of evidence of sexual violence as early as June 2003.").

283. Cole, *supra* note 38, at 51.

284. *Id.*

285. INT'L FED'N FOR HUMAN RIGHTS, *supra* note 13, at 14.

286. Marion Volkmann, *Including Sexual and Gender-Based Violence from the Onset of an*

Habré's original indictment did not include rape, sexual slavery, or other gendered forms of violence.[287] Due to the efforts of survivors, their lawyers, and a handful of NGOs, the charges were amended to include allegations of SGBV.[288]

Evidentiary rules catered to the unique circumstances of SGBV would guide the early investigation process. The tribunals' decision to categorize SGBV among crimes against humanity or genocide was an important step in legitimizing the gravity of systemic sexual assaults.[289] This approach effectively put the crimes on the same platform, but then numerous investigations proceeded to approach rape as if it had not occurring during an armed conflict. In an investigation of war crimes or crimes against humanity in armed conflict, SGBV crimes must be prioritized from the very beginning. If investigators prioritize gender-based violence, it would raise awareness in the international community about the prevalence of gendered attacks and encourage survivors to tell their stories because their experiences would become a priority for investigators.[290] Sexual violence used in a systemic manner is a *discriminatory* attack, where targets are chosen based on their *gender*.[291] The violence they experience is specific to their sex and reproductive capabilities.[292] In Rwanda, both Tutsi and Hutu women were assaulted because, as women, they were seen as vulnerable; their ethnic identity was irrelevant.[293] This aspect of the crime gives it an added complexity that merits its own investigatory approach. The result is that prosecutions were ineffective, and the charges were eventually dropped.[294] It is an injustice to the survivors.

3. Eliminate the Prioritization of Pursuing Other Charges

SGBV crimes clearly have not been historically prioritized in post-conflict institutions.[295] The judicial process is focused on punishment, on the condemnation of defendants. The easiest crimes to prosecute are those that leave an undeniable path of destruction in their wake: mass graves and scorched villages. A conviction is a conviction, and as long as there is punishment, some consider it to be enough. But these tribunals should not simply be about punishing the guilty but also about supporting the victims in the aftermath. Tribunals have the ability to acknowledge the harms survivors endured and demonstrate that someone will bear the weight of consequence. If a separate chamber were created for the sole purpose of prosecuting

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Investigation, *in* (UN)FORGOTTEN, *supra* note 23, at 18.

287. *Id.*

288. *Id.* at 19.

289. *See* Int'l Criminal Tribunal for the former Yugoslavia, *supra* note 276, Rule 96(i) ("In cases of sexual assault, no corroboration of the victim's testimony shall be required . . . .").

290. Volkmann, *supra* note 286, at 19.

291. *See* Nowrojee, *supra* note 62, at 10 (referencing gender-based propaganda encouraging attacks on Tutsi women).

292. (UN)FORGOTTEN, *supra* note 23, at 25.

293. See *supra* Section II.C for a discussion on the treatment of sexual assault that did not fit into the narrative of ethnic persecution in the International Criminal Tribunal for Rwanda (ICTR).

294. *See* Buss, *supra* note 88, at 63 (explaining that at the ICTR, all perpetrators of rape had their charges dropped in plea bargains).

295. See *supra* Section IV.B.2 for a detailed discussion on the low priority of SGBV crimes.

crimes of sexual violence, no other charges would take precedence.

International law scholars like Sarah Sharratt have recommended that courts cease the practice of allowing for plea bargains that would eliminate rape charges first.[296] Defendants should not be permitted to bargain away the shame of being labeled a rapist, in the face of overwhelming evidence. This trend was all too common at the ICTR and ICTY.[297] In communities where sexual assault survivors are stigmatized, they have to bear the burden of knowing their attackers were spared. Eliminating rape charges may prevent victims from trusting the institution in the future.

A specialized chamber prioritizing SGBV would address the concern voiced by feminists that standalone rape charges may not be considered worth prosecuting as their own offense in the international tribunal setting without evidence of something else, like violent injury, that would qualify the rape as torture.[298] As an example, in *Čelebići*, from the ICTY, all the elements of torture were met if women were raped *in addition* to being detained and interrogated.[299] Had they only been raped, it is fair to speculate about how these crimes would have been prosecuted, if at all.[300] In the proposed chamber, rape would not require these added considerations in order to be considered worth the effort of prosecution, as long as it is being used as a weapon of war during an armed conflict. A specialized chamber would eliminate the likelihood that crimes lose their gendered nature for the sake of simplifying indictments. The strategy would no longer be about taking the "easiest" route to secure a conviction but about effectively investigating sexual violations so that proper charges could be brought.

This prioritization of SGBV over other crimes could instill trust in survivors. Witnesses hesitate to come forward at the beginning of the judicial process. This pause is understandable, given the amount of potential stigma survivors may face in their communities once they identify themselves as survivors of rape.[301] Survivors may wait until the court appears to be a legitimate institution that is seriously prosecuting defendants. Corrupt officials have made too many empty promises to communities healing from conflict, so survivors do not trust these courts, and they wait to see if the effort for justice is genuine.[302] Survivors coming forward later in

296. SHARRATT, *supra* note 47, at 141; see also *supra* Section II.C for Buss' discussion of how, in the ICTR, sexual violence charges were the first convictions dropped in the plea bargain process.

297. *See, e.g.*, SHARRATT, *supra* note 47, at 141 (referencing common practice of dropping rape charges first in plea bargains).

298. Beth Stephens, *Humanitarian Law and Gender Violence: An End to Centuries of Neglect?*, 3 HOFSTRA L. & POL'Y SYMP. 87, 102 (1999).

299. Coan, *supra* note 280, at 209.

300. *See id.* ("Under ICTY jurisprudence, however, it remains unclear how and if these rapes would have been charged had the women not been detained or interrogated.").

301. *See, e.g.*, *id.* at 186 ("At the very least, Muslim rape victims feel isolated by the personal physical and emotional trauma of rape, while at worst, they may be asked to leave their communities as a result of the profound social stigma Muslim culture attaches to rape victims.").

302. *See generally* Kelsall & Stepakoff, *supra* note 282, at 256 (exploring the consequences of judges' decisions to exclude testimonies about rape at the SCSL).

the proceedings, however, has contributed to overturned convictions, as was the case with Habré.[303] Amending indictments later in the process is not a solution because defendants' rights would not be sufficiently protected, which damages the legitimacy of any institution.[304]

4. Prioritization of Female Staff

Each tribunal has shown that involving more women in the judicial process leads to more effective prosecution of sexual crimes. Women prioritize prosecution of violent gender-based atrocities and are more apt in recognizing more nuanced circumstances surrounding these complicated situations.[305] The United Nations Secretary-General, in his Resolution to create the ICTY, recommended that women be employed for every level of the court so that they may adequately approach "the sensitivities of victims of rape and sexual assault."[306] A similarity shared by the ICTY and the ICTR is that the inclusion of women in the judicial process seemed to yield better results. Judge Navanethem Pillay, during the *Akasyesu* trial, sent the case back to the prosecutors so that the charges could be amended to include sexually violent crimes.[307] Thus, rape was prosecuted as an element of genocide.[308] She stated: "I do think that women come with a particular sensitivity and understanding about what happens to people who get raped."[309] A female judge at the ICTY was one of the three judges that, in *Nikolić*, confirmed the indictments related to sexual violence against the defendant.[310] Including more women in the judicial process is fundamental for the successful prosecution of SGBV post-conflict. This chamber would prioritize hiring women and ensuring they are employed at every stage of the tribunal.

C. Potential Concerns Regarding a Separate Specialized Chamber

1. Funding

One possible concern regarding a separate chamber created for SGBV crimes is that of funding. Generally, ad hoc tribunals have proven to be very expensive. The

303. See *supra* Section I for detailed retelling of Khadidja Hassan Zidane's late testimony against Habré.

304. Aaron Fichtelberg, *Democratic Legitimacy and the International Criminal Court: A Liberal Defense*, 4 J. INT'L CRIM. JUST. 765, 775 (2006) ("Provided that judges are ruling fairly and respecting the rights of citizens, the court itself is legitimate. The criteria for a legitimate trial is that it is conducted in a fair way – fair in the sense that it respects the rights of the individuals, providing them with due process and the opportunity to mount a robust defence.").

305. *See* SHARRATT, *supra* note 47, at 39 ("All the major cases of sexual violence in the ICTY, as previously noted, involved the presence of women on the bench and in the famous Akayesu decision in the ad hoc Tribunal for Rwanda, the presence of a woman was also decisive.").

306. U.N. Security Council, *Report of the Sec'y Gen. Pursuant to Paragraph 2 of Sec. Council Resolution 808 (1993)*, ¶ 88, U.N. Doc. S/25704 (1993).

307. SHARRATT, *supra* note 47, at 39.

308. *Id.*

309. *Id.*

310. *Id.*

ICTY cost about $1.2 billion USD and the ICTR cost $1 billion USD.[311] The regional courts were less costly: SCSL was approximately $222 million USD[312] and the EAC for Habré's trial was $11.4 million USD over the duration of their operation.[313] Regional Court budgets have also been significantly less when compared to the ICC's annual budget of approximately EUR €200 million.[314] However, despite the potential added expense, is that the additional chamber may not add significant costs to the current court administration budget. Regional courts created ad hoc have proven to be less expensive overall compared to permanent courts like the ICC.[315] In addition, gendered crimes are already being investigated and prosecuted, but ineffectively in existing tribunals. The separate chamber would simply ensure that financial resources are properly and efficiently allocated so the money is not wasted on unsuccessful endeavors. Increasing costs marginally to hire additional staff may be unappealing initially, but increasing the competency and legitimacy of the courts over time is a worthwhile investment.

The cost of violence against women is a burdensome weight on every country. The United Nations Secretary-General stated that "[t]he failure to address violence against women has serious economic consequences, highlighting the need for determined and sustained preventative action."[316] Effective prosecution for SGBV crimes in the separate chamber could potentially deter reoccurrences of SGBV crimes by demonstrating to the international legal community that these crimes will no longer be brushed aside or grouped under the general concept of war-time atrocities. Spending more money initially to create this chamber could also eventually decrease the overall cost to each individual nation as the prevalence of their commission decreases. In addition, separate organizations that exist to prevent and support victims of SGBV crimes, such as U.N. Women, could use their funding explicitly for this chamber so there is an assurance that funds are properly allocated to the goals they are trying to achieve.

2. Efficiency in the Case of Multiple Potential Convictions

Another issue is the event of multiple convictions. For example, a former general is arrested post-conflict and indicted by an ad hoc tribunal. He is accused of genocide, war crimes, and also crimes of sexual violence that fall within those

311. Rupert Skilbeck, *Funding Justice: The Price of War Crimes Trials*, 15 HUMAN RIGHTS BRIEF 6, at 6 (2008).

312. Theresa M. Clark, *Assessing the Special Court's Contribution to Achieving Transitional Justice*, *in* THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY: THE IMPACT FOR AFRICA AND INTERNATIONAL CRIMINAL LAW 746, 765 (Charles C. Jalloh ed., 2014).

313. *Q&A: The Case of Hissène Habré Before the Extraordinary African Chambers in Senegal*, HUMAN RIGHTS WATCH (May 3, 2016, 6:00 AM), https://www.hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal.

314 . *Myths and Facts About ICC*, COAL. FOR THE INT'L CRIMINAL COURT, http://www.coalitionfortheicc.org/explore/icc-myths (last visited Mar. 19, 2020).

315. *Compare* Skilbeck, *supra* note 311, at 1 (stating that annual funding for the ICC in 2007 was $146 million), *with* Clark, *supra* note 312, at 765 (stating that the total cost of the SCSL, a regional court, was $222 million).

316. U.N. Secretary-General, *supra* note 200, at 64.

categories. Prosecutors would have to make a choice: to prosecute the former general in the specialized tribunal for sexual violence or to prosecute him in the tribunal that is dedicated to the other crimes. The methodology that could be used to make that decision is beyond the scope of this Comment. However, regardless of how a decision is reached, it would be imperative for prosecutors to be candid and transparent about why they chose which chamber. It would not be efficient to force a defendant through proceedings in two separate chambers. Some may argue that regular chambers could handle prosecution for all of these crimes, but case history demonstrates that the single-chamber approach often leads to the drop of SGBV charges. Investigations do not prioritize them. Witnesses receive no assurances that they will be safe if they testify. Prosecutors elect to pursue other crimes that are easier to prove. For all of the above-mentioned reasons, this regular chamber is not likely to effectively try the general for crimes of SGBV in addition to other crimes.

One criticism of the specialized tribunal approach is that it may still not give the survivors of sexual violence justice if there is no prosecution of SGBV crimes whatsoever. A potential solution would be to offer truth commissions to survivors as an alternative to prosecution if the perpetrators are not indicted in the specialized chamber.[317] One potentially beneficial difference is that survivors would still have a platform to tell their stories, but they would have a choice of telling it anonymously, if they choose to. Truth commissions have been identified as a mechanism that allows survivors to promote awareness without being exposed to an adversarial system. [318] Judicial proceedings where witnesses come forward to testify anonymously have the added complication of their information being seen as less precise and therefore less probative. But if the purpose of telling the story is not for the sole sake of prosecution, survivors have a choice. They can be heard, their stories can be told, but it is possible that they will be saved from the cultural stigma of being a known rape survivor. The commission would be in place in the event that a certain defendant was not charged with these specialized crimes. However, if an accused is indicted in the sexually violent crimes chamber, hopefully while implementing the recommended changes, the likelihood of successful conviction will be much higher. In addition, survivors will interact with a staff that has received trauma-informed training and therefore will reduce the possibility of re-traumatization as they navigate the judicial process. The testimonies survivors give would have a purpose; they would contribute to the successful conviction of a defendant for what they did to the victims. In the event the defendant is charged in the separate tribunal, the women still have a place to tell their story while also having the choice to protect their identities. It is a system that will need adjustments as procedures move forward, but an imperfect system is better than no system at all.

V. CONCLUSION

This Comment has focused on prosecution of sexual violence in transitional

317. *See* Coan, *supra* note 280, at 234 ("Truth Commissions could also bring closure to rape victims in the former Yugoslavia by providing a means for the complication and dissemination of information about the regional conflict in a non-adversarial manner.").

318. *Id.*

justice mechanisms such as ad hoc tribunals. This particular corner of the legal world needs a solution for its struggle to convict perpetrators of SGBV, a problem that continues year after year.[319] Victims cannot be assured by the international legal community that they are worthwhile, that the world cares about what they have endured, and that it wants justice for them when they are frequently failed by its flawed institutions. Research articles, policy papers, and studies addressing unsuccessful prosecution of sexual violence have been circling in the international criminal law world for years.[320] Recommendations are made, courts are chastised, and yet everything continues as it always has. Small steps forward may be taken, but they are predominantly symbolic in nature and rarely result in higher rates of successful conviction. The international legal community's role is to continue its advocacy for vulnerable populations. But its responsibility is also to ensure this advocacy is sufficient, thoughtful, and deliberate. International advocates cannot do the bare minimum and decide that trying is enough. It is not enough when tools exist to implement a better, more effective process, and yet these tools are not put to use.

The mere fact that survivors are able to move forward after everything they experience deserves recognition and admiration. Mibenge describes their experience in conflict: "[t]hey are raped because it is a fate worse than death; perpetrators of rape tell women they will die from sadness, and there is no need to waste bullets on them."[321] Rape is a method of attempting to destroy their dignity, of stigmatizing them in their own homes and making them belong nowhere. Survivors carry the scars of the armed conflict on their bodies, branded and bruised. But despite all of the hurdles placed before them, they persevere. We owe these survivors a justice system that legitimizes the suffering they endured.

319. That being said, prosecution of sexually violent crimes is problematically low in a number of countries, including the United States. *See* Liza Anderson, *Why Are We So Bad at Prosecuting Sexual Assault?*, DALL. MORNING NEWS (Sept. 15, 2019, 2:00 AM), https://www.dallasnews.com/opinion/commentary/2019/09/15/why-are-we-so-bad-at-prosecuting-sexual-assault/ (stating that in the United States, less than 1% of sexual assaults lead to a conviction). If a specialized chamber is possible for tribunals, maybe this model can be repeated on a domestic level as well. More countries should look to South Africa's success and model solutions based on its impressive gains in this area.

320. In the year 2019 alone, multiple reports were released to continue to address this issue and suggest solutions. *See generally* (UN)FORGOTTEN, *supra* note 23; INT'L FED'N FOR HUM. RTS., NO. 742A, *supra* note 244; *Conflict-Related Sexual Violence*, *supra* note 27.

321. MIBENGE, *supra* note 31, at 7.