

2008

The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court

Susana L. SaCouto

THE IMPORTANCE OF EFFECTIVE INVESTIGATION OF SEXUAL VIOLENCE AND GENDER-BASED CRIMES AT THE INTERNATIONAL CRIMINAL COURT

SUSANA SÁCOUTO AND KATHERINE CLEARY*

I. Introduction	338
II. The Principle of Complementarity in the Context of Sexual Violence and Gender-Based Crimes.....	343
A. Situation Stage	344
B. Case Stage	345
III. Ineffective Investigations Lead to Ongoing Challenges to the Successful Prosecution of Sexual Violence and Gender-Based Crimes at the International Level.....	347
A. Prosecutorial Omissions and Errors in the Investigation, Charging and Prosecution of Sexual Violence and Gender- Based Crimes.....	348
B. The Tendency of Chambers to Require a Higher Level of Proof in Cases of Sexual and Gender-Based Violence than in Other Types of Cases.....	353
IV. Conclusion.....	358

* Susana SáCouto is the Director and Katherine Cleary is the Assistant Director of the War Crimes Research Office, American University Washington College of Law. The opinions expressed are those of the authors alone. This Article is based largely on a presentation delivered by Ms. SáCouto at the Conference on Prosecuting Sexual and Gender-Based Crimes before Internationalized Criminal Courts, held by the American University Washington College of Law (Oct. 14, 2008). The authors would like to thank Erica Morgan, Jenny Norako, and Jabeen Reza for their research assistance.

I. INTRODUCTION

Several provisions in the Rome Statute of the International Criminal Court (ICC or the Court) indicate that the statute's drafters intended sexual violence and gender-based crimes to be given specific attention during the investigation of potential cases before the Court. For instance, Article 54(1)(b) requires that, in ensuring the "effective investigation and prosecution of crimes within the jurisdiction of the Court," the Prosecutor "take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children."¹ The Rome Statute also provides that States Parties, which are responsible for nominating and electing the Court's judges, must "take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children."² Similarly, the Prosecutor and the Registrar are to consider the importance of legal expertise on violence against women in hiring staff within their respective organs.³ At the same time, the Prosecutor must appoint "advisers with legal expertise on specific issues, including . . . sexual and gender violence,"⁴ while the Victims and Witnesses Unit must include staff with expertise in "trauma related to crimes of sexual violence."⁵ Finally, in determining appropriate protective measures for victims and witnesses, the Court as a whole is required to take into account such factors as gender and "the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children."⁶

These provisions, along with the enumeration in the Rome Statute of a broad range of sexual violence and gender-based crimes as war crimes and crimes against humanity,⁷ have been described as a response to decades of

1. Rome Statute of the International Criminal Court art. 54(1)(b), U.N. Doc. A/CONF.183/9, July 17, 1998, 37 I.L.M. 1002, 1030 (*entered into force* July 1, 2002) [hereinafter Rome Statute].

2. *Id.* art. 36(8)(b).

3. *Id.* art. 44(2).

4. *Id.* art. 42(9).

5. *Id.* art. 43(6).

6. *Id.* art. 68(1).

7. *See id.* art. 7(1).

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

...
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.

Id.; *see also id.* art. 8(2)(b). Art. 8(2)(b) of the Rome Statute defines "war crimes" as including

Other serious violations of the laws and customs applicable in international

inadequate investigation and prosecution of rape and other forms of sexual violence at the international level.⁸ With respect to the structural provisions cited above in particular, one account of the Rome Statute negotiations includes the following observation:

The experience of the [International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda], as well as the post-Second World War prosecutions under control Council Law No. 10, suggested that [the effective investigation, prosecution, and trial by the Court of sexual and gender violence crimes] would not necessarily flow automatically from the inclusion of crimes of sexual and gender violence in the Statute. A number of delegations at the PrepCom [(Preparatory Commission)] and at the Diplomatic Conference therefore attached importance to the inclusion of such special structural mechanisms⁹

armed conflict, within the established framework of international law, namely, any of the following acts:

. . . .
(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions.

Id. Furthermore, Article 8(2)(e) of the Rome Statute defines “war crimes” as including

Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

. . . .
(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2(f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions.

Id. art. 8(2)(e); *see also* International Criminal Court, Elements of Crimes, art. 6(b)(1) n.3, Doc. PCNICC/2000/1/Add.2 (2000) (noting that although rape was not listed as a form of genocide under Article 6 of the Rome Statute, genocide committed by acts causing “serious bodily or mental harm” may include “acts of torture, rape, sexual violence or inhuman or degrading treatment”).

8. *See* Barbara Bedont & Katherine Hall-Martinez, *Ending Impunity for Gender Crimes Under the International Criminal Court*, 6 BROWN J. WORLD AFF. 65, 66 (1999) (describing the positive international impact of the gender provisions in the Rome Statute, which recognize sexual violence and rape as “among the most serious crimes under international humanitarian law”); Cate Steains, *Gender Issues, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 357, 364-65, 375-83 (Roy S. Lee ed., 1999).

9. Steains, *supra* note 8, at 375; *see also* Bedont & Hall-Martinez, *supra* note 8, at 71.

[I]n the tribunals established after the Second World War to prosecute German and Japanese war criminals, gender crimes were not pursued with the same degree of diligence as other crimes. Rape was included in the indictments of some of the individuals tried by the Tokyo Tribunal but not in any of the indictments of the Nuremberg Tribunal. As another example, despite the overwhelming evidence of mass rapes during the 1994 genocide in Rwanda, the ICTR did not include any charges of rape in its indictments until 1997 after concerted pressure from civil society.

Thus, although initial drafts of the Rome Statute largely overlooked gender-based and sexual-violence crimes, by the time the final version of the Statute was being debated, “the momentum had built to the point where most delegations accepted the necessity of including certain gender references in the [S]tatute.”¹⁰ Indeed, it appears from the drafting history that, while there were intense negotiations over certain aspects of the provisions relating to gender and sexual violence—most notably, the definition of “gender” and whether to criminalize forced pregnancy¹¹—there was general consensus on the Rome Statute’s recognition of these crimes as serious international crimes.¹²

Despite these advances in the drafting of the Rome Statute, however, the Court’s record with respect to the investigation of sexual violence and gender-based crimes has been mixed in its first years of operation. Positive developments include the fact that two of the four persons charged thus far in connection with the situation in the Democratic Republic of Congo (DRC) have been charged with sexual slavery and rape, both as a war crime and as a crime against humanity.¹³ Rape allegations have been brought against all three of the individuals pursued by the Prosecutor in the Darfur situation, including the sitting head of state, Omar Hassan Ahmad al Bashir.¹⁴ Similarly, allegations involving rape and sexual slavery are included in the arrest warrant against Joseph Kony in the Uganda situation.¹⁵ Lastly, charges of rape as a war crime and a crime against humanity have been levied against Jean-Pierre Bemba Gombo, the only

Id.

10. Steains, *supra* note 8, at 361.

11. *See id.* at 365-69, 371-75.

12. *See id.* at 365 (noting that with the exception of forced pregnancy, “[t]here was no serious opposition to including these sexual and gender crimes [in the Rome Statute], nor to their characterization under the articles on crimes against humanity and war crimes”).

13. *See Prosecutor v. Katanga & Chui*, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶¶ 576, 580 (Sept. 30, 2008) (finding, by a majority of the court, that “there is sufficient evidence to establish substantial grounds to believe” that the accused jointly committed the crimes of sexual slavery and rape through the acts of others in the attack on Bogoro village).

14. *See Situation in Darfur, The Sudan*, Case No. ICC-02/05-157, Public Redacted Version of Prosecution’s Application under Article 58 filed on 14 July 2008, Annex A, at 1, 20-22 (Sept. 12, 2008); *Prosecutor v. Harun & Kushayb*, Case No. ICC-02/05-01/07, Warrant of Arrest for Ahmad Harun, ¶¶ 1, 8-9, 14 (Apr. 27, 2007); *Prosecutor v. Harun & Kushayb*, Case No. ICC-02/05-01/07, Warrant of Arrest for Ali Kushayb, ¶¶ 1, 8-9, 14-15 (Apr. 27, 2007).

15. *See Prosecutor v. Kony, Lukwiya, Odhiambo & Ongweny*, Case No. ICC-02/04-01/05, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, ¶ 42 (Sept. 27, 2005) (stating that sufficient evidence existed to provide reasonable grounds to conclude that Joseph Kony ordered or induced the commission of crimes against humanity and war crimes, including, for example, sexual slavery, rape, enlistment of children, pillaging, and murder).

suspect identified so far in the Central African Republic situation.¹⁶

Nevertheless, the Court has also suffered criticism with regard to its approach to sexual violence and gender-based crimes. For example, in the case of Thomas Lubanga Dyilo, the first person arrested by the ICC, human rights groups criticized the Office of the Prosecutor (OTP) for failing to include sexual violence charges in the indictment against Lubanga, despite allegations that girls had been kidnapped into Lubanga's militia and were often raped and/or kept as sex slaves.¹⁷ In light of the World Bank's estimate that over a third of child soldiers (12,500 of the 30,000) in the DRC in 2006 were girls, organizations critiqued the Court for failing to recognize the systematic sexual violence girls had been subject to during that conflict.¹⁸ More generally, a recent report cites anonymous "former ICC investigators" as saying that the first series of investigations

16. See Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, Warrant of Arrest for Jean-Pierre Bemba Gombo, ¶ 21 (May 23, 2008) (authorizing the arrest of Bemba Gombo on the following grounds: rape as a crime against humanity, rape as a war crime, torture as a crime against humanity, torture as a war crime, committing outrages upon personal dignity, and pillaging a town or place as a war crime).

17. See generally Joint Letter from Avocats Sans Frontières et al. to the Chief Prosecutor of the International Criminal Court, D.R. Congo: ICC Charges Raise Concern (July 31, 2006), available at http://hrw.org/english/docs/2006/08/01/congo13891_txt.htm.

We are disappointed that two years of investigation by your office in the DRC has not yielded a broader range of charges against Mr. Lubanga We believe that you, as the prosecutor, must send a clear signal to the victims in Ituri and the people of the DRC that those who perpetrate crimes such as rape, torture and summary executions will be held to account.

Id.; see also Press Statement, Redress, ICC Prosecutor Leaves Unfinished Business in Ituri, DRC (Feb. 13, 2008) (Revised Feb. 20, 2008) <http://www.redress.org> (click link to "News & Events," click link to "New Releases," click on link to Press Statement dated Feb. 15, 2008) [hereinafter Press Statement, Redress] ("There is resentment that Thomas Lubanga and the UPC militia that he led are getting away too lightly. Arrested by the ICC in March 2006, Lubanga is said to be responsible for widespread killings and countless incidents of sexual violence. Yet, Lubanga has only been charged with recruiting and using child soldiers."); Press Release, Women's Initiatives for Gender Justice, Statement by the Women's Initiatives for Gender Justice on the Arrest of Germain Katanga (Oct. 18, 2007), available at http://www.iccwomen.org/news/docs/Arrest_of_Katanga.pdf.

The lack of charges for sexual violence against Lubanga was seen by many local DRC NGOs and ourselves to be a significant omission given the availability of information, witnesses and documentation from multiple sources including the United Nations and various human rights organizations showing the widespread commission of rape and other forms of sexualized violence by the UPC militia group.

Id.

18. See Katy Glassborow, *Plight of Girl Soldiers "Overlooked,"* INST. FOR WAR & PEACE REPORTING, Oct. 31, 2006, http://www.iwpr.net/index.php?m=p&o=324983&s=f&apc_state=henfacr324983 [hereinafter Glassborow, *Plight of Girl Soldiers*] (arguing that while the international community recognizes the abuses faced by child soldiers, the unique situation faced by female child soldiers who face sexual violence does not receive appropriate international attention).

undertaken by the Prosecution were launched “before sufficient planning had been done,” resulting in the lack of an effective strategy regarding the investigation of sexual violence and gender-based crimes.¹⁹ Furthermore, even where sexual violence has been charged, challenges have arisen, threatening removal of those charges from the case. Specifically, in the case against militia leaders Germain Katanga and Mathieu Ngudjolo, the Prosecutor dropped charges of sexual slavery as both a war crime and a crime against humanity after a Pre-Trial Chamber judge excluded the statements of witnesses supporting those charges on the grounds that the witnesses were not adequately protected.²⁰ The situation was resolved after the witnesses were eventually accepted into the Court’s Witness Protection Programme,²¹ and the Prosecution amended its charges not only to reinstate those relating to sexual slavery but also to include allegations of rape as a war crime and a crime against humanity.²² The tug-of-war over these victims’ statements, however, indicates the vulnerability of sexual violence charges if the supporting evidence is limited and subject to challenge.

It seems clear, therefore, that the provisions of the Rome Statute cited in the opening of this Article will not alone guarantee the effective investigation and prosecution of sexual violence and gender-based crimes before the ICC. This raises the question of whether the Court is adequately equipped to ensure proper investigation and prosecution of such crimes, as required by the Statute. If not, what would be required to allow effective investigations of such crimes to take place? In the context of the ICC, this question requires an examination not only of the rules, policies, and practices that are aimed at trying these types of cases, but also those that are designed to assess whether the “admissibility thresholds” of the ICC have been met. Indeed, under the Rome Statute, a case is inadmissible if it

19. Katy Glassborow, Inst. for War & Peace Reporting, *ICC Investigative Strategy Under Fire*, in SPECIAL REPORT: SEXUAL VIOLENCE IN THE DEMOCRATIC REPUBLIC OF CONGO 8, 8-9 (Caroline Tosh & Yigal Chazan eds., 2008).

20. See Prosecutor v. Katanga & Chui, Case No. ICC-01/04-01/07, Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, ¶ 39 (Apr. 25, 2008) (allowing the testimony of a witness for whom the Prosecution could show adequate protection, but barring the statements of two other witnesses who had not been included in the Witness Protection Programme).

21. See Prosecutor v. Katanga & Chui, Case No. ICC-01/04-01/07, Decision on Prosecution’s Urgent Application for the Admission of the Evidence of Witnesses 132 and 287, ¶¶ 6-7 (May 28, 2008) (finding that with the acceptance of two witnesses to the Witness Protection Programme, the security concerns that previously barred the testimony of the witnesses no longer existed).

22. See Prosecutor v. Katanga & Chui, Case No. ICC-01/04-01/07, Submission of Amended Document Containing the Charges Pursuant to Decision, ¶¶ 32-33 (June 26, 2008) (classifying the crimes of sexual slavery and rape as crimes against humanity and war crimes).

“is not of sufficient gravity to justify further action by the Court,”²³ or if national proceedings are being genuinely carried out with respect to that case.²⁴ Thus, cases involving sexual violence or gender-based crimes may never come to the attention of the Court if these admissibility standards are not met. Consequently, this Article focuses on two interrelated issues: first, it explores whether the policies of the OTP and the jurisprudence of the Court adequately permit cases of sexual violence and gender-based crimes to be brought before the Court, particularly with regard to how national proceedings are evaluated for purposes of assessing admissibility; second, it examines ongoing challenges in the successful prosecution of sexual violence and gender-based crimes in the context of other international criminal bodies, stressing that, in light of such challenges, the need for thorough and effective investigative strategies is critical from the outset—not just to meet the complementarity test, but also to adequately prosecute these cases.

II. THE PRINCIPLE OF COMPLEMENTARITY IN THE CONTEXT OF SEXUAL VIOLENCE AND GENDER-BASED CRIMES

The ICC is not intended to replace national courts. In fact, the Court is only permitted to step in when a national justice system is unable or unwilling to conduct its own investigations and prosecutions.²⁵ This

23. Rome Statute, *supra* note 1, art. 17(1)(d).

24. *See id.* arts. 17(1)(a)-(b).

25. *See id.* art. 17(1).

[T]he Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; [or] (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute

Id. This was a consistent theme throughout the drafting of the Rome Statute. *See* Int’l Comm’n of Jurists, THE INTERNATIONAL CRIMINAL COURT: THIRD ICJ POSITION PAPER 25 (Aug. 24, 1995), <http://www.iccnw.org/documents/1PrepCmt3rdPositionPaperICJ.pdf> (“[T]he Court is envisioned as a body which will complement existing national jurisdictions and existing procedures for international judicial co-operation in criminal matters [I]t is intended to operate in cases where there is no prospect of persons accused of committing serious crimes of international concern being duly tried in national courts.”); Ad Hoc Comm. on the Establishment of an Int’l Crim. Ct., *Draft Report of the Ad Hoc Committee*, ¶ 12, U.N. Doc. A/AC.244/CRP.5 (Aug. 22, 1995) (prepared by Kuniko Saeki) [hereinafter *Draft Report of the Ad Hoc Committee*] (noting that the delegations only envisaged the ICC “to operate in cases in which there was no prospect that alleged perpetrators of serious crimes would be duly tried in national courts” and stressing that “the exercise of national jurisdiction encompassed decisions not to prosecute”); Preparatory Comm. on the Establishment of and Int’l Crim. Ct., *Decisions Taken by the Preparatory Committee at its Session Held from 4 to 15 August 1997*, U.N. Doc. A/AC.249/1997/L.8/Rev.1, at 1, 12 (Aug. 14, 1997) (“The Court has no jurisdiction where the case in question is being investigated or prosecuted, or has been prosecuted, by a State which has jurisdiction over it.”).

principle—commonly known as the principle of “complementarity”—must be satisfied in every case brought before the Court.²⁶ However, as the Office of the Prosecution has recognized, the admissibility of an individual case is likely to be affected by “the broader context, laws, procedures, practices and standards of the State concerned.”²⁷ Thus, in practice, the Prosecution is likely to perform a complementarity analysis at two different stages: once in deciding whether to formally initiate an investigation in a given country or region, and again for each case selected for prosecution arising from that investigation. As described below, without a thorough investigation of all crimes within the jurisdiction of the Court—including crimes of gender-based and sexual violence—both at the situation stage and the case stage, such crimes may remain unaddressed by the Court.

A. Situation Stage

The Prosecution’s initial inquiry into a state’s willingness and capacity to prosecute those crimes that would fall within the ICC’s jurisdiction is likely to be rather general: are national institutions genuinely carrying out proceedings against the types of perpetrators that the ICC would likely investigate? Of course, there is no bright-line rule as to how in-depth this inquiry should or must be. On one hand, it seems clear that the drafters of the Rome Statute did not want the ICC to scrutinize their entire legal systems.²⁸ On the other hand, even if a state has a functioning legal system and seems willing to prosecute at least some perpetrators of ICC crimes, must the Prosecutor dig deeper? Given its responsibility to pay particular attention to sexual violence and gender-based crimes, it would seem that the Prosecution should examine a state’s laws, procedures, and policies governing the investigation and prosecution of sexual violence and gender-based crimes, even where the State seems capable and willing to try other crimes.

For instance, despite reform efforts aimed at improving the capacity of the judicial system in Kosovo, human rights organizations have highlighted the enduring failure of the system to investigate and prosecute sexual violence crimes. As a recent report from Amnesty International noted,

[d]espite extensive documentation by women’s groups, non-governmental organizations and NATO of rape and other crimes of

26. Rome Statute, *supra* note 1, art. 17(1).

27. Int’l Criminal Court, Office of the Prosecutor, *Informal Expert Paper: The Principle of Complementarity in Practice*, ¶ 35, (2003) <http://www.icc-cpi.int/iccdocs/doc/doc654724.PDF> [hereinafter *Principle of Complementarity*].

28. See, e.g., Draft Report of the Ad hoc Committee, *supra* note 25, at 5 (“[T]he standards set by the [International Law] Commission were not intended to establish a hierarchy between the international criminal court and national courts, or allow the international criminal court to pass judgment on the operation of the national courts.”).

sexual violence committed on a large scale during the conflict in Kosovo . . . it appears that there had, up to April 2007[,] been only one indictment including a charge of rape or sexual violence as a war crime or crime against humanity.²⁹

What is the impact of this history on Kosovo's ability to investigate and prosecute more recent cases of trafficking or sexual slavery? If all the ICC was required to do in terms of a complementarity analysis was to examine the ability and willingness of Kosovo to address serious international crimes in general—rather than examining its response to trafficking and sexual slavery crimes in particular—those crimes may never come to the attention of the ICC, no matter how serious the failure to address those crimes may be. Such a result appears inconsistent with the Prosecution's duty to "ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, . . . in particular where it involves sexual violence, gender violence or violence against children."³⁰

B. Case Stage

The second stage at which the complementarity analysis is conducted is when a specific case against a particular suspect is being considered. There, the inquiry is more specific. In fact, the Pre-Trial Chambers of the Court have stated that a case against a particular suspect is inadmissible only if the national proceedings directed against the same person are for the same crimes that the ICC Prosecutor intends to pursue against that person.³¹

Of course, this creates an odd incentive for states. Indeed, it seems that as long as national proceedings are instituted against the same person for the same crimes that the Prosecution has charged, there is little incentive for the state in question to pursue the same perpetrator for other crimes or other perpetrators for similar or related crimes. In light of its broad geographical mandate and limited resources, the ICC can only realistically pursue a limited number of perpetrators in each situation. Thus, if a state is

29. AMNESTY INTERNATIONAL, SERBIA (KOSOVO): THE CHALLENGE TO FIX A FAILED UN JUSTICE MISSION 75 (2008), available at <http://www.unhcr.org/refworld/docid/47a0584a2.html>.

30. Rome Statute, *supra* note 1, art. 54(1)(b).

31. See Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, ¶ 21 (June 10, 2008) ("The Chamber considers that the circumstances in the instant case justify it in ruling on the admissibility of the case, and finds that there is no reason to conclude that Mr Jean-Pierre Bemba's case is not admissible, particularly since there is nothing to indicate that he is already being prosecuted at national level for the crimes referred to in the Prosecutor's Application.") (emphasis added); see also Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06-37, Decision on Prosecutor's Application for a Warrant of Arrest, ¶ 31 (Feb. 10, 2006) ("[T]he Chamber considers that it is a *conditio sine qua non* for a case arising from the investigation of a situation to be inadmissible that national proceedings encompass both the person and the conduct which is the subject of the case before the Court.").

interested in avoiding prosecution by the ICC, it need only pursue the limited number of perpetrators for the limited number of crimes that the ICC intends to prosecute. The result is likely an impunity gap, which is, of course, contrary to one of the principal purposes of the complementarity regime: to “serve[] as a mechanism to encourage and facilitate the compliance of States with their primary responsibility to investigate and prosecute core crimes.”³²

The problem is not simply theoretical. For instance, consider the case of rape and sexual slavery committed against girl soldiers in the DRC. As mentioned above, the case against Thomas Lubanga Dyilo does not include sexual violence charges despite allegations that girls were kidnapped into Lubanga’s militia and often raped and/or kept as sex slaves.³³ Thus, these crimes are not being tried by the ICC. There may be good reason for this, such as lack of available evidence tying the crimes to the accused. The problem is that these crimes may never be tried. If, for instance, the DRC were to institute proceedings against Lubanga in order to challenge the admissibility of the case before the ICC, it need only demonstrate that it is genuinely pursuing Lubanga for the same crimes with which the ICC has charged him. Indeed, as long as the sexual violence and gender-based crimes committed against girl soldiers are not the subject of ICC proceedings, the DRC has little incentive to pursue Lubanga (or any other perpetrators) for those crimes. Thus, they may remain entirely unaddressed at both the international and national levels.

The Prosecutor is aware of this potential “impunity gap.” In fact, in a policy paper, the OTP has acknowledged that despite its strategic focus on those who bear the most responsibility for ICC crimes, “[i]n some cases the focus of an investigation by the Office of the Prosecutor may go wider than high-ranking officers *if, for example, investigation of certain types of crimes or those officers lower down the chain of command is necessary for the whole case.*”³⁴

The question, then, is how the Prosecutor is assessing whether an expansion of the original investigation is “necessary.” How much

32. *Principle of Complementarity*, *supra* note 27, at 3.

33. Glassborow, *Plight of Girl Soldiers*, *supra* note 18 (stating that charges of the use of child soldiers cannot be distinguished from rape and sexual exploitation because female child soldiers are only recruited for sexual purposes); Press Statement, Redress, *supra* note 17 (calling upon the Prosecution to bring charges of sexual violence and torture against Lubanga); Press Release, Women’s Initiatives for Gender Justice, *supra* note 17 (observing that many DRC NGOs questioned the omission of charges for sexual violence given the availability of witnesses, information, and documentation of such crimes).

34. Int’l Criminal Court, Office of the Prosecutor, Paper on Some Policy Issues Before the Office of the Prosecutor 7 (Sept. 2003) [hereinafter *Paper on Some Policy Issues Before the Office of the Prosecutor*] (emphasis added).

expertise, flexibility and/or resources are given to OTP investigators to allow them to pursue the kind of evidence that would trigger an examination of whether the investigation should include additional crimes, particularly sexual violence and gender-based crimes, which are notoriously difficult to investigate given the reluctance of many victims to discuss them? Without the necessary means and knowledge regarding how to adequately investigate, charge and prosecute such crimes, they are likely to remain unaddressed not only by the ICC, but also by national jurisdictions, which, in light of the Court's interpretation of complementarity, have little incentive to pursue perpetrators for these kinds of crimes if they are not already the subject of ICC proceedings.

III. INEFFECTIVE INVESTIGATIONS LEAD TO ONGOING CHALLENGES TO THE SUCCESSFUL PROSECUTION OF SEXUAL VIOLENCE AND GENDER-BASED CRIMES AT THE INTERNATIONAL LEVEL

Some commentators have argued that many of the difficulties in prosecuting sexual violence and gender-based crimes stem from the fact that, historically, acts of sexual violence were often viewed as "a detour, a deviation, or the acts of renegade soldiers . . . pegged to private wrongs and . . . [thus] not really the subject of international humanitarian law."³⁵ Moreover, some commentators suggest that this has led to the characterization of such crimes as "incidental" or "opportunistic" in relation to other "core" crimes.³⁶ A survey of conflicts over the last several decades indicates an additional challenge: sexual violence in the context of such conflicts is often tacitly encouraged or tolerated, even if not officially

35. Patricia Viseur Sellers, *Individual(s') Liability for Collective Sexual Violence*, in GENDER AND HUMAN RIGHTS 153, 190 (Karen Knop ed., 2004); see also Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law*, 46 MCGILL L.J. 217, 223 (2000) (noting that only after rape began being discussed as a "weapon of war" in the former Yugoslavia was it transformed "from private, off-duty, collateral, and inevitable excess to something that is public or 'political' in the traditional sense"); Press Release, Human Rights Watch, Human Rights Watch Applauds Rwanda Rape Verdict (Sept. 1, 1998), <http://www.hrw.org/press98/sept/rrape902.htm> (noting that "[d]espite these legal precedents, rape has long been mischaracterized and dismissed by military and political leaders as a private crime, the ignoble act of the occasional soldier. Worse still, it has been accepted precisely because it is so commonplace. Longstanding discriminatory attitudes have viewed crimes against women as incidental or less serious violations").

36. See Patricia Viseur Sellers & Kaoru Okuizumi, *International Prosecution of Sexual Assaults*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 45, 61-62 (1997) (noting that "[s]exual assaults committed during armed conflict are often rationalized as the result of a perpetrator's lust, libidinal needs, or stress"); Chile Eboe-Osuji, Guest Lecture Series of the Office of the Prosecutor, Rape and Superior Responsibility: International Criminal Law in Need of Adjustment, Int'l Criminal Court 6 (June 20, 2005) (arguing that "the theory of individualistic opportunism proceeds . . . from the . . . modest premise that rape is a crime of opportunity which, during conflict, is frequently committed by arms-bearing men, indulging their libidos, under cover of the chaotic circumstances of armed conflict").

sanctioned. Yet, when left unpunished by those in positions of authority, sexual violence can quickly become a central means of waging war. As one commentator notes,

[o]nce it becomes clear that superiors do not disapprove of sexual violence, the opportunistic rapes typically then become more public, more frequent, and more violent, growing indistinguishable from and becoming part of the organized rapes committed at least in part to inflict widespread terror and harm on the targeted group.³⁷

The absence of explicit orders in these cases often makes it challenging for prosecutors to link the perpetrator with the crime. Although these difficulties are not insurmountable, a review of the prosecution of sexual violence and gender-based crimes by other international criminal tribunals indicates that while there have been significant improvements in the prosecution of such crimes by such tribunals, particularly in the last fifteen years,³⁸ these cases continue to be plagued by prosecutorial omissions and errors as well as by a tendency on the part of the judges to require that the prosecution meet higher evidentiary standards in these cases than in other types of cases.³⁹ This suggests that the need for thorough and effective investigative strategies is critical from the outset, not just to meet the complementarity test but also to adequately prosecute these cases.

A. Prosecutorial Omissions and Errors in the Investigation, Charging and Prosecution of Sexual Violence and Gender-Based Crimes

Despite the many advances made through the work of prosecutors before the ICTY, ICTR, and Special Court for Sierra Leone (SCSL) in cases involving sexual violence and gender-based crimes, it is certainly not the

37. Kelly Dawn Askin, *Prosecuting Gender Crimes Committed in Darfur: Holding Leaders Accountable for Sexual Violence*, in GENOCIDE IN DARFUR 141, 144 (Samuel Totten et al. eds., 2006).

38. See Steains, *supra* note 8, at 361-64 (concluding that because earlier international law failed to do so, the Statute's inclusion of "a range of sexual violence crimes, in addition to rape, under crimes against humanity creates an important new precedent"); 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, 294-95 (2003) (demonstrating that although international humanitarian law provides guidelines on the treatment of protected persons during periods of armed conflict, the protections offered to women are minimal and weak).

39. Indeed, despite evidence of the widespread use of rape in the Balkans conflict and during the Rwandan genocide, the record is quite mixed with respect to the ability of the *ad hoc* criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) to successfully prosecute sexual violence. For example, despite the widely acknowledged use of rape and sexual violence as an integral part of the genocide in Rwanda, ten years into the Rwanda tribunal's history, only 10% of completed cases resulting in a sentence contained rape convictions and "[n]o rape charges were even brought by the Prosecutor's office in 70 per cent of . . . adjudicated cases." Binaifer Nowrojee, U.N. Research Inst. For Soc. Dev., "Your Justice Is Too Slow": Will the ICTR Fail Rwanda's Rape Victims?, 3 (Nov. 2005).

case that such crimes have been charged in every case where the charges were warranted. Perhaps the most well known example of a failure on the part of a prosecutor to investigate and charge acts of sexual violence, at least in the first instance, is the *Akayesu* case, tried before the ICTR.⁴⁰ John Paul Akayesu, who served as *bourgmestre* of Taba Commune during Rwanda's 1994 genocide, was among the first individuals arrested and brought to trial by the ICTR. His trial began in January 1997 on the basis of the crimes charged against him at the time of his arrest, namely: direct responsibility for genocide, complicity in genocide, incitement to genocide, the crimes against humanity of extermination and murder, and the war crime of murder.⁴¹ However, shortly after the start of trial, a witness called to testify about the murder of most members of her family mentioned, "in an almost offhand way," that her six-year-old daughter was raped.⁴² In response to questioning by members of the Tribunal, which included Judge Navanethem Pillay, the only female judge on the ICTR at the time, the witness stated that she was never questioned about the rape by ICTR investigators.⁴³ She further testified that she "had heard that other girls had been raped in Akayesu's *bureau communal*, but she had not seen it herself."⁴⁴ Two months later, another prosecution witness was called to testify about an attack on her house, which her family had tried to flee, and ended up telling the story of her capture, rape, and abandonment.⁴⁵ This witness also discussed her attempt to find refuge in the *bureau communal*, where she witnessed women and girls being raped by communal police and *Interahamwe* in the presence of the accused.⁴⁶ Although neither the Prosecution nor the Defense followed up on this testimony, the three judges asked her to elaborate on Akayesu's whereabouts and actions during the rapes.⁴⁷ The judges then adjourned the trial until May 12, 1997, during

40. See generally Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998).

41. See *id.* art. 1.41, ¶ 10 (indicting Akayesu for crimes committed during the time that he was the *bourgmestre* of the Taba commune).

42. Beth Van Schaack, *Engendering Genocide: Akayesu and the Affirmation of Genocidal Rape*, in HUMAN RIGHTS ADVOCACY STORIES 193, 199 (Deena R. Hurwitz et al. eds., 2008).

43. See *id.* (testifying that the witness was six months pregnant when the genocide occurred and that she only survived by hiding in a tree and scavenging for food with her six-year-old daughter).

44. *Id.* at 7.

45. See *id.* (recalling that after escaping her house and hiding in the bushes, Witness H was discovered, raped, and abandoned).

46. See *id.* (stating that the parties themselves were silent regarding the sexual violence that occurred, and the trial judges brought attention to the violence through questioning).

47. See *id.* (noting that if Witness J had failed to mention that her daughter had been raped, the formal record might never have reflected the sexual violence that occurred in the Taba commune).

which time the Coalition for Women's Human Rights in Conflict Situations submitted to the Tribunal an *amicus curiae* brief on behalf of over forty other non-governmental organizations and legal clinics, "call[ing] upon the Trial Chamber to exercise its inherent supervisory authority to invite the Prosecutor to amend the indictment against Akayesu to charge rape and other serious acts of violence."⁴⁸

Ultimately, the Prosecution requested leave from the Tribunal to amend the indictment, which was granted.⁴⁹ In October 1997, the Prosecution filed an amended indictment, including three new charges: rape and other inhumane acts as crimes against humanity and the war crime of outrages upon personal dignity, in particular, rape, degrading treatment, and indecent assault.⁵⁰ Although the amended indictment did not include any new charges of genocide, it did include new allegations of fact regarding sexual violence, which eventually permitted the Trial Chamber to convict Akayesu, *inter alia*, for genocide based in part on the acts of rape and sexual violence for which he was determined to be responsible.⁵¹

Following *Akayesu*, a number of amended indictments were filed in cases before the ICTR to include charges of rape and other forms of sexual violence.⁵² However, the problem was not altogether resolved in the later years of the ICTR. Indeed, according to a detailed analysis of trends in the prosecution of sexual violence in the ICTR from November 1995 through November 2002, the number of indictments of sexual violence leveled-off between 1996 and 2001, and then decreased sharply through the end of 2002.⁵³ Finally, in two of the later cases in which crimes of sexual violence

48. *Id.* at 8-9; see also Brief for Working Group on Engendering the Rwanda Tribunal et al. as Amicus Respecting Amendment of the Indictment and Supplementation of the Evidence to Ensure the Prosecution of Rape and Other Sexual Violence within the Competence of the Tribunal, ¶ 3, *Prosecutor v. Akayesu*, Case No. ICTR 96-4-I, available at http://www.iccwomen.org/publications/briefs/docs/Prosecutor_v_Akayesu_ICTR.pdf (stating that rape and sexual violence were an integral and pervasive part of the genocide committed in Rwanda).

49. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, art. 1.41, ¶ 23 (Sept. 2, 1998) (enumerating the charges that the Prosecutor sought to add, including genocide).

50. *Id.*

51. See, e.g., Van Schaack, *supra* note 42, at 204-05 (concluding that even where rape does not result in the death of the victim, the act could still constitute genocide as a step in destroying the spirit, will to live, and life itself of the Tutsi group, and that the goal of many acts of sexual violence was to mutilate the women prior to their deaths).

52. See GAËLLE BRETON-LE GOFF, COAL. FOR WOMEN'S HUMAN RIGHTS IN CONFLICT SITUATIONS, ANALYSIS OF TRENDS IN SEXUAL VIOLENCE PROSECUTIONS IN INDICTMENTS BY THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (ICTR) FROM NOVEMBER 1995 TO NOVEMBER 2002, at 1 (2002), available at http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/rapeVictimssDeniedJustice/analysisof trends_en.php (noting that following *Akayesu*, sexual violence has been prosecuted as an act of genocide, and criminal sanctions have been sought in conspiracy to commit genocide and complicity in genocide).

53. *Id.* at 3; see also Valerie Oosterveld, *Gender-Sensitive Justice and the*

were charged, the Prosecution later sought to withdraw the charges due to insufficient evidence.⁵⁴

Similar problems plagued the early operations of the SCSL, with the result that all evidence relating to crimes of sexual violence committed by the Civilian Defense Force (CDF) was excluded from the trial of that group's leaders. Notably, the Statute of the Special Court, like the Rome Statute, includes a range of gender-based crimes against humanity and war crimes⁵⁵ and expressly requires that "due consideration" be given to "the employment of prosecutors and investigators experienced in gender-related crimes"⁵⁶ Nevertheless, the Prosecution omitted any allegations with respect to these crimes in its initial indictment against the three leaders of the CDF.⁵⁷ While subsequent investigations led the Prosecution to seek to amend the indictment to add charges based on evidence regarding the subjection of women and girls to various forms of sexual violence, the Trial Chamber refused to allow the amendment.⁵⁸ In its decision, the Chamber noted it was "pre-eminently conscious of the importance that gender crimes occupy in international criminal justice given the very high casualty rates of females in sexual and other brutal gender-related abuses during internal and international conflicts,"⁵⁹ but held that adding the new charges would result in undue delay and would prejudice the rights of the accused to a fair and expeditious trial.⁶⁰ The Prosecution then moved to introduce evidence of sexual violence to support the charges of inhumane acts as a crime

International Criminal Tribunal for Rwanda: Lessons Learned for the International Criminal Court, 12 NEW ENG. INT'L & COMP. L. ANN. 119, 127 (2005) (citing Letter from Human Rights Watch to U.N. Security Council Members, Rwanda and the Security Council: Changing the International Tribunal (Aug. 1, 2003)) (noting a significant drop in the number of indictments including charges for crimes of sexual violence from 1999 to 2003).

54. *Compare* Prosecutor v. Ndindabahizi, Case No. ICTR-2001-71-I, Decision on Prosecution Motion for Leave to Amend Indictment, ¶ 1 (Aug. 20, 2003) (granting the motion to withdraw counts concerning incitement to commit genocide, crimes against humanity (rape), and the charge of superior responsibility because the defense did not oppose the motion), *with* Prosecutor v. Muvunyi, Case No. ICTR 2000-55A-PT, Decision on the Prosecutor's Motion for Leave to File an Amended Indictment, ¶ 54 (Feb. 23, 2005) (denying the motion because the Chamber foresaw negative effects of allowing the motion, and did not think that the amendment to the indictment would serve the interest of justice).

55. Statute of the Special Court for Sierra Leone, arts. 2-3, Jan. 16, 2002, 2178 U.N.T.S. 145.

56. *Id.* art. 15(4).

57. *See* Prosecutor v. Norman, Case No. SCSL-03-14-I, Indictment, ¶¶ 22-29 (Feb. 4, 2004) (describing the multiple charges filed against Norman, Fofana, and Kondewa, including murder).

58. *See* Prosecutor v. Norman, Case No. SCSL-04-14-PT, Decision on Prosecution Request for Leave to Amend the Indictment, ¶ 10 (May 20, 2004) (describing various crimes that were committed including rape, sexual slavery, and other inhumane acts).

59. *Id.* ¶ 82.

60. *See id.* ¶ 86 (stating that the prosecution did not provide sufficient evidence).

against humanity and/or violence to life, health and physical or mental well-being of persons as a war crime, which had been included in the original indictment.⁶¹ Yet the Trial Chamber rejected the request, noting that the indictment did not allege any facts relating to sexual violence in support of the relevant charges and that permitting the evidence would cause undue prejudice to the accused.⁶²

While prosecutions before the ICTY have generally included charges of sexual violence where appropriate, it should be noted that such charges were omitted in the original indictment and two amended indictments filed in the *Lukić* case, despite evidence implicating the accused in “very serious sex crimes.”⁶³ A recent attempt by the Prosecution to amend the indictment a third time to include charges reflecting this evidence was rejected by the Trial Chamber on the grounds that the late amendment would prejudice the right of the accused to an expeditious trial.⁶⁴

A second problem hindering the successful prosecution of sexual violence and gender-based crimes, seen in both the ICTR and the ICTY, is that even when relevant charges are brought, the facts supporting those charges in the Prosecutor’s indictment are too often inconsistent with the evidence adduced at trial. For instance, in the *Muvunyi* case tried before the ICTR, the Prosecution charged the accused with rape as a crime against humanity, alleging in the indictment that Muvunyi bore superior responsibility for acts of rape committed by “*Interahamwe* and soldiers from the Ngoma Camp.”⁶⁵ Yet at trial, the totality of the evidence adduced regarding acts of rape concerned acts committed by a different set of soldiers, namely those from the “ESO Camp.”⁶⁶ The Trial Chamber

61. See *Prosecutor v. Norman*, Case No. SCSL-04-14-PT, Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, ¶ 3 (May 24, 2005) (explaining that when sexual violence has been perpetrated against a civilian, the ICTR has routinely found that the acts fall within crimes against humanity).

62. See *id.* ¶ 19 (delineating a separate category of sexual offenses under Article 2(g) that the accused must have been charged with to allege acts of sexual violence).

63. See *Prosecutor v. Lukić*, Case No. IT-98-32/1-PT, Decision on Prosecution Motion Seeking Leave to Amend the Second Amended Indictment and on Prosecution Motion to Include UN Security Council Resolution 1820 (2008) as Additional Supporting Material to Proposed Third Amended Indictment as well as on Milan Lukić’s Request for Reconsideration or Certification of the Pretrial Judge’s Order of 19 June 2008, ¶¶ 59, 60 (July 8, 2008) (explaining that the prosecutor had substantial evidence that the accused had been implicated in sex crimes).

64. See *id.* ¶ 62 (holding that the granting of the amendment would adversely affect the accused’s right under Article 21 to be tried swiftly).

65. See *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-T, Judgment and Sentence, ¶ 378 (Sept. 12, 2006) (stating that Muvunyi must have known about the rapes and sexual assault because of his position of authority).

66. See *id.* ¶¶ 379-399 (retelling a witness’s account of her encounter with the soldiers from the ESO who beat and raped her).

therefore acquitted the accused of rape as a crime against humanity, holding that the allegation that the ESO soldiers committed rape was “a material fact that should have been pleaded in the Indictment, not a mere evidential [sic] detail that could be introduced at a later stage.”⁶⁷ Similarly, in the Vukovar Hospital case, the ICTY Prosecution charged the three accused with the crime against humanity of persecution, based in part on allegations that the accused were responsible for acts of sexual assault against Croats and other non-Serbs.⁶⁸ However, the ICTY Trial Chamber dismissed the charge on the ground that the victims of the alleged persecution were prisoners of war, rather than civilians, meaning that the acts should have been charged as a war crime rather than a crime against humanity.⁶⁹

B. The Tendency of Chambers to Require a Higher Level of Proof in Cases of Sexual and Gender-Based Violence than in Other Types of Cases

Another challenge to the successful prosecution of sexual violence and gender-based crimes has been the tendency of the tribunals to require that the prosecution meet higher evidentiary standards in these cases than in other types of cases. As indicated earlier, sexual violence in the context of conflict or repression is often tacitly encouraged or tolerated, even if not officially sanctioned, and the absence of explicit orders in these cases often makes it more difficult for the prosecution to link the perpetrator with the crime.⁷⁰ Nevertheless, the jurisprudence of the *ad hoc* tribunals makes clear that an order, even if implicit, may be inferred from the circumstances, including from both acts and omissions of an accused.⁷¹ Unfortunately, while the *ad hoc* tribunals have used circumstantial or pattern evidence to establish that an accused ordered certain crimes, a review of sexual violence and gender-based cases before these tribunals

67. See *id.* ¶ 401 (positing that it is necessary to introduce material facts in the indictment so as not to cause undue delay in the trial of the accused).

68. See *Prosecutor v. Mrkšić*, Case No. IT-95-13/a-I, Amended Indictment, ¶¶ 31, 32 (Dec. 2, 1997) (charging that Mrkšić persecuted people based on political, racial, and religious grounds, which amount to crimes against humanity).

69. See *Prosecutor v. Mrkšić*, Case No. IT-95-13/a-I, Judgment, ¶¶ 481, 484 (Sept. 27, 2007); see also *id.* ¶¶ 315-320 (convicting accused of cruel treatment as a war crime, but noting that the allegations of sexual assault pled in support of the crime were not considered by the Trial Chamber because the Prosecution had alleged that the relevant acts took place at Kamenica Camp, whereas the evidence showed that the sexual assaults occurred at the Vatrostalna facility).

70. See generally *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Judgment (Dec. 1, 2003) (holding that there was not sufficient evidence to convict the accused of sexual assault despite evidence of implied orders).

71. See *Prosecutor v. Galic*, Case No. IT-98-29-A, Appeals Judgment (Dec. 5, 2003) (finding that an omission does not constitute an order, but that the omission can be used as circumstantial evidence that an order was given to commit a crime).

indicates that they appear more reluctant to do so in these types of cases.

For instance, in the *Galic* case,⁷² the ICTY used the fact that crimes were executed in a widespread manner and over a long period of time by soldiers under the control of the accused to infer that the accused had ordered his troops to target civilians.⁷³ No direct evidence was entered to support a conclusion that Stanislav Galic had ordered his troops to target civilians,⁷⁴ but the striking “similarity of pattern” in the manner of commission of the crimes led the Trial Chamber to conclude that the acts could not have been “sporadic acts” of individual soldiers, but “must have emanated from a higher authority or at least had its approval.”⁷⁵ In contrast, in the *Kajelijeli* case,⁷⁶ the ICTR declined to find that the accused had ordered the rape of certain victims notwithstanding credible evidence that soldiers under the effective control of the accused had committed a series of rapes and sexual assaults over a period of days.⁷⁷ Indeed, although the combination of several witness testimonies provided strong circumstantial evidence to show that Juvenal Kajelijeli was not only aware that his subordinates were committing acts of sexual violence but also that he authorized such acts,⁷⁸ the Trial Chamber found the evidence insufficient to prove that the accused had ordered them, in one case noting that the Prosecution had failed to prove that the accused had “issued a *specific order* to rape or sexually

72. Prosecutor v. Galic, Case No. IT-98-29-T, Judgment (Dec. 5, 2003).

73. See *id.* ¶ 741 (indicating that this was evidence that these were not sporadic acts of soldiers out of control).

74. See *id.* ¶¶ 739, 740 (stating that while there was no direct evidence of written orders, authorities do not have to issue commands in a particular format for the command to constitute an order).

75. See *Galic*, Case No. IT-98-29-A, Appeals Judgment, ¶¶ 177-178, 389 (affirming the trial court’s finding that an omission can serve as circumstantial evidence that an order was issued).

76. See Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Judgment and Sentence, ¶ 923 (Dec. 1, 2003) (holding that the Prosecution failed to prove beyond a reasonable doubt that the accused had any connection with the rapes that were found to have occurred).

77. See *id.* ¶¶ 683, 780 (finding that sexual assaults occurred continuously at communes under the accused’s control).

78. See Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Dissenting Opinion of Judge Arlette Ramaroson, ¶ 19 (Dec. 1, 2003) (noting the testimony of Witness ACM who was long acquainted with the accused and saw him order the *Interahamwe* to kill Tutsis and then transfer the survivors to Busogo Parish, where he subsequently stood by while the *Interahamwe* told a line of victims that they would be raped); see also *Kajelijeli*, Case No. ICTR-98-44A-T, Judgment and Sentence (majority opinion) (stating that “[a]lthough Kajelijeli may or may not have heard the comments made by his *Interahamwe* [to the survivors], such comments pointed to the prevailing tension at the time, including the *Interahamwe*’s intent not to only kill Tutsi women, but also to rape them, as Kajelijeli had ordered and incited them to do”); Nowrojee, *supra* note 39, at iv, 2 (reporting that although the Prosecutor’s Office initially intended to appeal, the Office “inexplicably missed the deadline” and the Appeals Chamber denied its late motion).

assault [the victims] on that day.”⁷⁹

A similar trend is perceptible with respect to cases of sexual violence involving other modes of criminal responsibility. For instance, with respect to instigation, which involves prompting another person to commit an offense,⁸⁰ the *ad hoc* tribunals have also tended to evaluate the evidence in sexual violence cases differently from other types of cases. In discussing the necessary causal link between the instigating conduct and the crime committed, the ICTY Appeals Chamber has stated that “it is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused, [rather] it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.”⁸¹ In the *Brdjanin* case,⁸² the ICTY Trial Chamber found the accused responsible for instigation of the crime against humanity of persecution⁸³ based on decisions of his Autonomous Region of Krajina (ARK)⁸⁴ staff requesting municipal authorities to disarm, dismiss from employment, and resettle non-Serbs.⁸⁵ Notably, the Trial Chamber did not require proof that the municipal authorities followed ARK staff decisions in direct response to Brdjanin’s inflammatory statements about non-Serbs or that they were even aware of such statements. Rather, the causal link between Brdjanin’s statements and the deportation and forcible transfer of non-Serbs appears to have rested entirely on the accused’s position of authority in the ARK and his influence over municipal authorities.⁸⁶ Having considered the accused’s position of authority and his

79. See *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Judgment and Sentence, ¶ 681 (emphasis added) (describing how a witness’s account of her sexual assault is not sufficient to prove the existence of an order to commit that particular sexual assault).

80. See *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-A, Appeals Judgment, ¶ 27 (Dec. 17, 2004) (noting that instigation cannot be proven without the prompting of an act of another).

81. See *id.* ¶ 27 (stating that instigation does not require “but for” causation, but rather that the accused’s conduct contributed to the commission of the crime).

82. *Prosecutor v. Brdjanin*, Case No. IT-99-36-T, Judgment (Sept. 1, 2004).

83. See *id.* ¶¶ 577, 1054 (basing judgment in part on the underlying acts of forcible transfer and deportation).

84. See *id.* ¶ 2 (noting that the ARK was made up of several municipalities forming part of a separate Serbian entity within Bosnia and Herzegovina).

85. See *id.* ¶¶ 316, 359, 572, 574 (stating that ARK exerted *de facto* control over the police and municipal authorities, and that these authorities then implemented ARK’s decisions by dismissing non-Serb professionals, selectively disarming non-Serbian paramilitary units and individuals, as well as resettling the non-Serbian population).

86. See *id.* ¶ 302 (“By virtue of his position as President of the ARK Crisis Staff and particularly as a result of the fact that the Accused was the key figure of the ARK Crisis Staff and the driving force behind its decisions, he exercised *de facto* authority over the municipal authorities and the police and had great influence over the [1st Krajina Corps of the VRS (Bosnian Serb) army]”).

repeated “inflammatory and discriminatory” statements, “*inter alia*, advocating the dismissal of non-Serbs from employment, and stating that only a few non-Serbs would be permitted to stay,” the Trial Chamber concluded that his “statements could only be understood by the physical perpetrators as a direct invitation and prompting to [deport and forcibly transfer non-Serbs].”⁸⁷

Comparatively, in the *Gacumbitsi* case,⁸⁸ where the accused was charged with instigating rape and sexual degradation of Tutsi women based on his driving around with a megaphone telling Hutu men to rape Tutsis, kill those who resisted, and insert sticks into the genitals of young girls, the ICTR Appeals Chambers appeared to require a closer connection between the accused’s instigation and the acts of the physical perpetrators. The Appeals Chamber determined that although some of the rapes in question “appear to have been committed after the Appellant instigated rape, there is no evidence that the Appellant’s instigation substantially contributed to them.”⁸⁹ In its view, the required causal link between the instigating conduct and the commission of the crime was missing because there was no evidence proving that those who committed the rapes were aware of the accused’s statements prior to or during the commission of the crime.⁹⁰ Thus, it rejected as “speculative” the Prosecution’s argument that “even if some perpetrators of [these] rapes did not directly hear the [Appellant]’s instigation, they were told by others about it, or were inspired by the actions of others who had heard it.”⁹¹

The tendency to require that the prosecution meet a higher evidentiary standard in cases of sexual violence and gender based crimes has also

87. See *Prosecutor v. Brdjanin*, Case No. IT-99-36-A, Appeals Judgment, ¶ 361 (Apr. 3, 2007) (stating that the parties failed to address on appeal whether the accused’s statements could only have been understood by the parties who physically perpetrated the acts as direct instructions).

88. See generally *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-A, Appeals Judgment (July 7, 2006).

89. See *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-T, Trial Judgment (June 17, 2004), *aff’g in part, rev’g in part*, *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-A, Judgment, ¶¶ 133, 135, 137-138 (July 7, 2006) (accepting the Trial Chamber’s finding that the Prosecution failed to prove a link between the Appellant’s statements and the commission of the rapes as to Witness TAO’s testimony and determining that there was no evidence establishing that the rapes of Witness TAP and her mother took place after Gacumbitsi’s instigation). The Trial Judgment also found Witness TAS’s testimony not credible as to the timing of her rape and concluded that “no evidence that the rape of witness TAS took place after the Appellant’s statements instigating rapes on 17 April 1994, and no direct evidence that, prior to that date, the Appellant instigated rape.” *Id.* ¶¶ 137-138.

90. See *Gacumbitsi*, Case No. ICTR-2001-64-A, Judgment, ¶ 138 (rejecting as too speculative the Prosecution’s argument that Gacumbitsi’s statement could have inspired rapes among people who had not directly heard the statement).

91. See *id.* (noting that no nexus was proven between Gacumbitsi’s allegedly instigating statement and the rapes).

arisen in cases where the accused has been charged under the theory of superior or command responsibility. Under this doctrine, a superior can be held responsible for the acts of his or her subordinates where: (1) a superior-subordinate relationship exists, (2) the superior knew or had reason to know that the criminal act was about to be or had been committed, and (3) the superior failed to take the necessary and reasonable measures to prevent the criminal act or to punish the physical perpetrator thereof.⁹² The second element of this test may be shown by evidence that a superior had actual knowledge, or by information putting him or her on notice, of crimes committed or about to be committed by his or her subordinates.⁹³ While both actual and constructive knowledge can be established through circumstantial evidence,⁹⁴ in at least one case involving allegations of sexual violence, the ICTR has appeared to require evidence of a superior's direct knowledge of his subordinates' actions—in the form of either physical presence of the accused at the scene of the crime or evidence of direct orders to commit the crime. Indeed, in the *Kajelijeli* case,⁹⁵ the ICTR Trial Chamber found the Prosecutor failed to prove that Kajelijeli knew or had reason to know of numerous acts of sexual violence committed by his subordinates.⁹⁶ The Chamber emphasized that the Prosecutor had not shown that Kajelijeli was physically present during any of the rapes or sexual mutilations.⁹⁷ The Trial Chamber also noted that it had not been established that Kajelijeli had ordered the rapes; rather it found his instructions to the *Interahamwe* whom he had gathered for the attack “were, in general, to kill or exterminate.”⁹⁸ Thus, it found that it was “not possible on the evidence and in the circumstances to infer that the Accused knew or had reason to know that these rapes were being

92. See, e.g., Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-A, Judgment, ¶ 839 (Dec. 17, 2004).

93. See Prosecutor v. Delalic et al., Case No. IT-96-21-A, Judgment, ¶¶ 223, 241 (Feb. 20, 2001) (explaining that in order for the accused to have “reason to know” and thus be eligible to be held criminally responsible for his subordinate’s actions, he had to have information that put him on notice that the offenses were being committed, which may be proved by direct or circumstantial evidence).

94. See Prosecutor v. Galic, Case No. IT-98-29-A, Judgment, ¶¶ 117, 182 n.518 (Nov. 30, 2006) (affirming, at least in principle, that a conviction of superior responsibility may be made on the basis of circumstantial evidence alone).

95. Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Judgment and Sentence (Dec. 1, 2003).

96. See *id.* ¶¶ 677-683, 918-922, 924, 938 (finding that multiple acts of sexual violence had been committed, including several rapes and acts of sexual mutilation, despite questioning the reliability of some witness testimony).

97. See *id.* ¶¶ 683, 924 (noting the defense’s argument that the evidence that placed the accused at the scene of the crimes was fabricated).

98. See *id.* ¶ 924 (stating that the *Interahamwe* committed rapes after receiving general instructions from the accused to kill or exterminate).

committed by members of the *Interahamwe*.⁹⁹ Notably, in her dissent to the majority opinion, Judge Arlette Ramaroson found the circumstantial evidence presented sufficient to show that Kajelijeli “clearly knew, or had reason to know . . . that the rapes were about to take place.”¹⁰⁰ Notwithstanding her findings, the Prosecution failed to appeal this issue. The Trial Chamber’s judgment is not only inconsistent with other jurisprudence regarding the manner in which knowledge may be established, but it also appears to reflect the view that sexual violence is a “private” crime falling outside a superior’s scope of authority.

In sum, the jurisprudence of the *ad hoc* tribunals suggests that, in cases of sexual violence and gender-based crimes, international tribunals may be reluctant to draw meaningful inferences from circumstantial evidence and appear to prefer direct or more specific evidence as to knowledge or causality, even when such evidence is not required as a matter of law.¹⁰¹ Thus, without a thorough investigation, significant expertise, and intensive analysis of evidence relating to these crimes—including the broader context which makes clear that the sexual violence is an integral part of the organized war effort rather than mere “incidental” or “opportunistic” incidents—these cases are unlikely to be pursued or successfully prosecuted.

IV. CONCLUSION

As discussed in the introduction, the ICC’s record with respect to the investigation of sexual violence and gender-based crimes in its early years has been mixed, suggesting that some of the challenges discussed above may also affect the prosecution of these crimes before the ICC. Indeed, some of these challenges have already come up in the context of *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*.¹⁰² Although the majority of the judges of Pre-Trial Chamber I recently confirmed the charges of rape and sexual slavery against Katanga and Ngudjolo,¹⁰³ Judge

99. See *id.* (holding that the Prosecution failed to meet its burden to establish individual criminal responsibility necessary to prove the charge of rape as a crime against humanity).

100. See *id.* ¶ 77 (Ramaroson, J., dissenting) (arguing that the prosecution established, by both direct and circumstantial evidence, that the accused gave instructions for the *Interahamwe* to carry out rapes, and knew that his followers were doing so).

101. See Viseur Sellers, *supra* note 35, at 192 (finding that there is a myth associated with wartime sexual violence that it “is not justiciable unless there is [*inter alia*] proof of a superior’s order”).

102. Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges (Sept. 30, 2008).

103. See *id.* ¶¶ 211-212 (holding there was sufficient evidence to support charges against the accused of sexual slavery as a war crime, rape as a crime against humanity, and rape as a war crime).

Anita Ušacka dissented from this conclusion, finding the evidence insufficient to link the accused with rape and sexual slavery.¹⁰⁴ Despite evidence of a widespread practice of rape and sexual enslavement by combatants and commanders in the region,¹⁰⁵ and a statement from one witness that Katanga knew rapes occurred,¹⁰⁶ the judge found the evidence insufficient to establish that the suspects either intended or knew that rape and sexual slavery would be committed by their subordinates.¹⁰⁷ Although in this case, the majority was convinced that the evidence was sufficient to confirm the charges, the dissenting opinion highlights that the tendency of the *ad hoc* tribunals to prefer direct evidence that a superior either ordered sexual violence or was present during the crime may well continue at the ICC, particularly when the evidence is reviewed under the higher standard required not just to confirm the charges but to convict an accused.

If the Court is to fulfill its obligation to adequately investigate and prosecute sexual violence and gender-based crimes, it must ensure that the expertise and resources are in place that will allow it to overcome these kinds of challenges. Otherwise, the Court risks failing to achieve one of the most fundamental aims of the Rome Statute, set forth in its Preamble, that “the most serious crimes of concern to the international community as a whole must not go unpunished.”¹⁰⁸

104. *See id.* ¶¶ 14, 19, 21 (Ušacka, J., dissenting) (finding evidence insufficient to establish the suspect’s knowledge that such acts would be committed by their subordinates, that the suspect intended rape or sexual slavery to be part of a common plan of attack, or that the suspects expressly agreed that rape or sexual slavery would be committed during or after the attack or that they were present during such acts).

105. *See id.* ¶ 21 (agreeing with the majority that the Prosecution had proved that members of the FRPI/FNI militia committed rape and sexual slavery).

106. *See id.* ¶ 23 (arguing that evidence culled from an anonymous witness, when the Prosecution did not explain how the witness was in a position to know the information, was insufficient to support allegations of crimes of rape and sexual slavery).

107. *See id.* ¶¶ 22-26 (“[There is a] fundamental difference between the perpetrator’s cognitive awareness that the action will result with certainty and an awareness that undertaking a course of conduct carries with it an unjustifiable risk of producing harmful consequences.”).

108. *See Rome Statute, supra* note 1, pmbl. (stating that in order to ensure proper prosecution of serious international crimes, measures must be taken at the national level and there must be enhanced international cooperation).

