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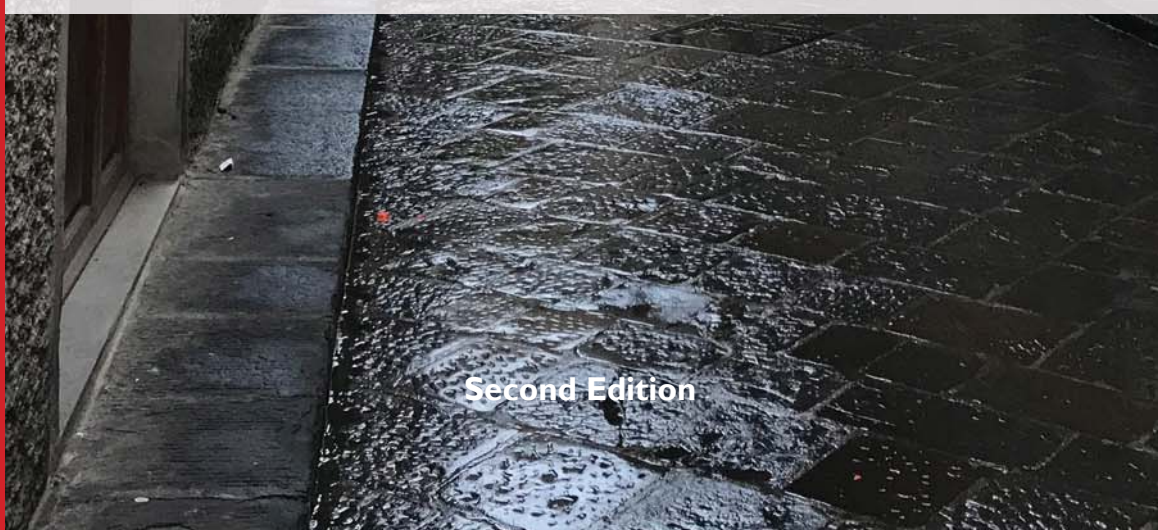

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Contextualising Sexual Violence in the Prosecution of International Crimes

Valerie Oosterveld[*]

Sexual violence taking place during conflict or mass atrocities is usually part of a wider picture of complex victimisation. Rape, sexual slavery, sexual mutilation and other similar acts are often accompanied by, or intersect with, other prohibited acts. For example, sexual violence crimes may have occurred alongside or be used to facilitate the crime against humanity of murder, enslavement, torture or persecution. Further, seemingly gender-neutral prohibited acts may have been carried out in gender-specific ways or may have gendered outcomes. For these reasons, conscious contextualisation of sexual violence within international criminal prosecutions is crucial: by pursuing investigations and prosecutions in which sexual violence is explored within the context of other genocidal acts, crimes against humanity or war crimes, both the serious nature of sexual violence and the potentially gendered nature of other crimes can be highlighted and understood.

This chapter explores the value of pursuing the prosecution of sexual violence within the context of related charges of genocide, crimes against humanity or war crimes. It begins by arguing that there may be specific factual circumstances in which exclusive, or nearly exclusive, prosecutorial focus on sexual violence charges may be valuable. However, generally, sexual violence charges should be situated within a narrative explaining the multitude of violations in a given atrocity scenario. This approach is more reflective of the realities of those who suffered the sexual violence crimes: they are not only, for instance, survivors of rape, but

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also usually simultaneous victims of other serious acts such as pillage, cruel treatment or enslavement. Each violation has a place within the narrative. A comprehensive understanding of the violations helps to explain the depth of harm caused to the victims and, in turn, can and should inform sentencing. This chapter then turns to an exploration of two recent positive examples, within international and internationalised tribunals, of nuanced contextualisation of sexual violence crimes. It concludes by discussing the need for heightened gender competence and gender expertise within all offices, whether international or domestic, focused on the investigation and prosecution of genocide, crimes against humanity and war crimes, as well as among counsel for victims and within judiciaries.

9.1. Prosecution and Contextualisation of Sexual Violence Crimes

When faced with a multitude of violations of international criminal law, there are a number of interrelated reasons for selecting acts of sexual violence for prosecution. First, these acts are serious violations of physical and/or psychological integrity and are therefore similar in harm and effect to other prohibited acts of genocide, crimes against humanity and war crimes involving grave personal injury.[1] Prosecuting them assists in exposing the depth of harm to victims, their families and their communities.[2] Second, historically, sexual violence offences directed against girls and women were ignored, mislabelled as an inevitable consequence of war, or deemed as less important than other forms of violence.[3] Sexual violence

1 International Criminal Tribunal for Rwanda ('ICTR'), *Prosecutor v. Emmanuel Rukundo*, Appeals Chamber, Judgment (Judge Pocar's Partially Dissenting Opinion), ICTR-01-70, 20 October 2010, paras. 4, 9 ('*Rukundo* Appeals Judgment') (http://www.legal-tools.org/doc/d5b969/).

2 On harms to families and communities, see Special Court for Sierra Leone ('SCSL'), *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Trial Chamber, Judgment, SCSL-04-15, 2 March 2009, para. 1349 ('*RUF* Judgment') (http://www.legal-tools.org/doc/7f05b7/). On emotional harms to victims, harms to the victim's home and personal spaces, harms to the victim's children and to those to whom female victims are intimately connected, see Fionnuala Ní Aoláin, Dina Francesca Haynes and Naomi Cahn, "Criminal Justice for Gendered Violence and Beyond", in *International Criminal Law Review*, 2011, vol. 11, no. 3, p. 426.

3 Kelly D. Askin, *War Crimes against Women: Prosecution in International War Crimes Tribunals*, Martinus Nijhoff Publishers, The Hague, 1997, p. 377.

directed against men and boys was similarly silenced.[4] More recently, these views of sexual violence have been demonstrated to be not only the result of discriminatory and incorrect assumptions, but also harmful to the discovery of the truth of what actually happened in any given conflict or atrocity scenario.[5] In other words, the discrimination inherent in the perpetration of acts of sexual violence was compounded by discriminatory lack of recognition of these acts within international and domestic criminal prosecutions. Thus, the prosecution of sexual violence crimes today demonstrates a break with these past mistakes and therefore a break in this discriminatory chain. Prosecution publicly 'surfaces'[6] sexual violence and its harm and denotes how conflict has gender-specific impacts upon individuals, communities and nations.[7]

The third justification for the prosecution of sexual violence crimes occurring within genocide, war or other situations of atrocity is explored by Margaret deGuzman in this volume: there is an important expressive function inherent in the prosecution of sexual violence crimes. The prosecution of sexual violence crimes serves to express to the international community generally that these acts are illegal and those who committed or permitted them are to be held accountable and condemned.[8] As Doris Buss explains:

> In international criminal prosecutions, rape and other forms of sexual harm are identified *as harms*, they are prosecuted

4 Sandesh Sivakumaran, "Sexual Violence Against Men in Armed Conflict", in *European Journal of International Law*, 2007, vol. 18, no. 2, pp. 255–56.

5 Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Manchester University Press, Manchester, 2000, pp. 251–52, 328, 334. See also Kelly D. Askin, "The Jurisprudence of the International War Crimes Tribunals: Securing Gender Justice for Some Survivors", in Helen Durham and Tracey Gurd (eds.), *Listening to the Silences: Women and War*, Martinus Nijhoff Publishers, New York, 2005, pp. 126, 152–53.

6 This important notion of 'surfacing' gender-based violence in conflict was introduced by Rhonda Copelon in "Surfacing Gender: Re-engraving Crimes Against Women in Humanitarian Law", in *Hastings Women's Law Journal*, 1994, vol. 5, pp. 243–65.

7 Doris Buss, "Performing Legal Order: Some Feminist Thoughts on International Criminal Law", in *International Criminal Law Review*, 2011, vol. 11, no. 3, p. 412.

8 Buss describes this as "social meanings communicated and interpreted through legal processes": *Ibid.*, p. 411.

> *as crimes*, and they result in punishment through years of incarceration for those found guilty.[9]

Critically, prosecution of these acts also illustrates to the victims and their communities that their suffering was the result of illegal activity.[10] This naming is an important step in the dismantling of discriminatory stereotypes – and stigma – that surround raped women, girls, men and boys in many societies.[11] Fair and accurate labelling of crimes is one of the underlying goals of international criminal law,[12] and this labelling must include the public labelling of sexual violence crimes.

These justifications can support the choice of prosecuting sexual violence crimes among charges for other acts or on their own. There are very strong justifications for the prosecution, in a contextual manner, of sexual violence crimes among charges for other acts. Thus, this choice will be explored first. One reason for choosing to prosecute sexual violence crimes among other charges is that individuals who suffer sexual violence crimes often also suffer other forms of violation. These other forms of harm may have facilitated the carrying out of the sexual violence (for example, illegal detention), may have accompanied the sexual violence (for example, torture or murder), may have surrounded the sexual violence (for example, sexual violence occurring amid pillage), or may have preceded or followed the sexual violence.

Second, sexual violence crimes may have been just one aspect of the larger gendered nature or outcomes of a particular episode in a conflict or mass violation. When determining or telling the story of a particular episode in a conflict or mass atrocity and the role of the accused in that episode, it is important to be aware of the intersection of gender, rather than just sexual violence, with that scenario. Gender is a complex and multi-layered concept, involving socially constructed ideas of 'maleness' and 'femaleness' that can vary across cultures and over time.[13] If investi-

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9 *Ibid.*, p. 414.

10 Buss notes that this may also be seen as "political recognition": *Ibid.*, p. 414.

11 This stigma was described by the *RUF* Judgment, para. 1349, see *supra* note 2.

12 Darryl Robinson, "The Identity Crisis of International Criminal Law", in *Leiden Journal of International Law*, 2008, vol. 21, no. 4, p. 942.

13 See United Nations Entity for Gender Equality and the Empowerment of Women, "Gender Mainstreaming: Concepts and Definitions", which defines the term 'gender' as:

gators and prosecutors are sensitive to how assumptions about gender underlie the choice of crime or explain targeting, then they will better understand both the role of sexual violence crimes and the role of seemingly gender-neutral crimes within a conflict or mass violation. For example, men and boys may be targeted for certain forms of violence for reasons related either to overarching assumptions about 'maleness' – for example, an assumption by the perpetrators that all males are inclined to pick up weapons and fight if given the opportunity – and/or assumptions about how the means of targeting will affect the victims and be received by males and females in the victims' communities. Similarly, women and girls are also targeted on the basis of assumptions about 'femaleness', usually related to the subordinate position of women and girls, and/or because of how such victimisation will be received in the victims' communities.[14]

Some examples might be helpful here. In some cases before the International Criminal Tribunal for Rwanda ('ICTR'), the evidence demonstrated that men and boys were killed in different ways than women and girls, with men being targeted for direct machete attacks and women and

> the social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys, as well as the relations between women and those between men. These attributes, opportunities and relationships are socially constructed and are learned through socialization processes. They are context/ time-specific and changeable. Gender determines what is expected, allowed and valued in a women or a man in a given context. In most societies there are differences and inequalities between women and men in responsibilities assigned, activities undertaken, access to and control over resources, as well as decision-making opportunities. Gender is part of the broader socio-cultural context. Other important criteria for socio-cultural analysis include class, race, poverty level, ethnic group and age.

[14] Ní Aoláin *et al.*, 2011, p. 429, see *supra* note 2:

> […] the horrors that many women experienced during conflict are augmented by the insight that their cultural and social mores were as much the target of sexual violation as their physical bodies. Men do not generally experience systematic sexual violation in this way, and the cultural constructs of harm to men's bodies have differing social meanings in the theatre of war. Not only do combatants target a women's body but, equally, in the fray is the body politic she represents.

girls for rape or sexual mutilation leading to death.[15] In the International Criminal Tribunal for the former Yugoslavia ('ICTY'), some cases illustrate different treatment for detained men and women,[16] or different acts being directed against men and against women in order to eliminate a cultural community.[17] That said, different outcomes are not necessary for the identification of the gendered nature of crimes. The exploration of forced marriage by the Extraordinary Chambers in the Courts of Cambodia is a good example. The Khmer Rouge believed that marriage was a necessary precursor to procreation and thus forced individuals to marry in order to increase the population of ideal citizens.[18] The negative effects experienced by both male and female victims of this act were sometimes gender differentiated, but often were similar.[19] And yet the act of forced marriage is a gendered act because it is based on societal norms of 'femaleness' and 'maleness'.

Third, harms are connected.[20] Therefore, the victim of sexual violence is often also a victim of a number of other violations, and she or he often feels that all of these wrongs should be addressed in some manner.[21] The victim's subjective experiences are multifaceted: harms are not easily

15 See, for example, ICTR, *Prosecutor v. Théoneste Bagosora et al*., Trial Chamber, Transcript, ICTR-98-41, 3 February 2004, pp. 51–52 (Examination-in-Chief of Major Brent Beardsley).

16 For example, in the Čelebići prison camp in Bosnia and Herzegovina, male and female detainees were mistreated and sometimes that mistreatment took gender-specific forms such as rape of women and suffocation of men: International Criminal Tribunal for the former Yugoslavia ('ICTY'), *Prosecutor v. Zdravko Mucić et al*., Trial Chamber, Judgment, IT-96-21, 16 November 1998, paras. 936–37, 957–62, 970–77 (http://www.legal-tools.org/doc/6b4a33/).

17 For example, in eastern Bosnia, able-bodied Bosnian Muslim men and boys between the ages of 15 and 65 were targeted for death, while Muslim women and girls, as well as young Muslim boys and senior males, were targeted for forcible transfer away from their homes. This differential treatment had profound implications, both for those murdered and for the survivors: ICTY, *Prosecutor v. Vujadin Popović et al*., Trial Chamber, Judgment, IT-05-88, 10 June 2010, paras. 779, 841, 844, 846–47, 856–62, 883–86 (http://www.legal-tools.org/doc/481867/).

18 Extraordinary Chambers in the Courts of Cambodia ('ECCC'), *Prosecutor v. Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith* (Case 002), Closing Order, 002/19-09-2007/ECCC, 15 September 2011, paras. 216–20, 1442–47.

19 *Ibid*.

20 Ní Aoláin *et al.*, 2011, p. 426, see *supra* note 2.

21 *Ibid*., pp. 430–32, 442.

divided into pieces that can be measured independently.[22] Prosecutions in international criminal tribunals have, for the most part, been broadly contextual insofar as they have tended to focus on a representative sampling of serious violations[23] in a particular geographic area within a specific time period.[24] However, these prosecutions have not always placed the sexual violence crimes in nuanced context (when sexual violence has actually been reflected in indictments or arrest warrants)[25] by examining the interrelationships between the sexual violence and the other violations, nor have they always explored how the harms caused by sexual violence can be compounded by other violations, and vice versa.

It is important to note that nuanced contextualisation as advocated in this chapter, while providing definite advantages in explaining the gendered nature of violations and better telling the victims' stories, has its inherent limits. Feminist theory highlights that violence against women and girls happens in a larger social and global context underpinned by

[22] This was the experience of female victims and witnesses of sexual violence in the SCSL trial in *Prosecutor v. Moinina Fofana and Allieu Kondewa*, SCSL-2004-14 (commonly referred to as the Civil Defence Forces ('CDF') case). As a result of a series of questionable motions decisions by the majority judges, these victim-witnesses were asked to bifurcate their evidence into non-sexual violence and sexual violence evidence, with the latter evidence excluded from the proceedings. These women suffered psychological distress as a result of being unable to describe the full nature of the harms done to them. See Michelle Staggs Kelsall and Shanee Stepakoff, "'When We Wanted to Talk About Rape': Silencing Sexual Violence at the Special Court for Sierra Leone", in *International Journal of Transitional Justice*, 2007, vol. 1, no. 3, pp. 355–74. It is also crucial to note here that not all of the wrongs experienced by victims may qualify as international crimes; addressing the totality of harms therefore requires multifaceted responses beyond the criminal trial: Ní Aoláin *et al.*, 2011, p. 426, see *supra* note 2.

[23] This is reflected by the use of gravity criteria by the ICC Office of the Prosecutor. See Paul Seils, "The Selection and Prioritization of Cases by the Office of the Prosecutor of the International Criminal Court", in Morten Bergsmo (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, Torkel Opsahl Academic EPublisher, Oslo, 2010, p. 72.

[24] On the use of geographic sampling by the ICTR, see Alex Obote-Odora, "Case Selection and Prioritization Criteria at the International Criminal Tribunal for Rwanda", in Morten Bergsmo (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, Torkel Opsahl Academic EPublisher, Oslo, 2010, pp. 59–60.

[25] Sexual violence has not always been charged even when it forms an important part of the context, or it has been charged but the charges have not been (effectively) pursued: Ní Aoláin *et al.*, 2011, pp. 437–40, see *supra* note 2. See also Beth van Schaack, "Obstacles on the Road to Gender Justice: The International Criminal Tribunal for Rwanda as Object Lesson", in *American University Journal of Gender, Social Policy and the Law*, 2009, vol. 17, no. 2, pp. 375, 381–82.

gender, and other, inequality.[26] The individualised international criminal trial tends not to address this overarching context.[27] This means that the role of such discrimination in creating the room for sexual violence during conflict is largely left unexplored. Thus, individualised international criminal justice "can also dangerously distract international attention from the large-scale, systemic failures that underpin conflict".[28] In addition, some of the violations suffered by victims may not qualify as international crimes, and yet may be felt just as keenly by those victims. While harms to the body may be recognised as crimes, "emotional harms, harms to the home and personal spaces, harms to children and to those with whom women are intimately connected" may not be.[29] Addressing the entirety of the harms therefore requires multifaceted responses beyond the criminal trial.[30]

Having made the argument for a nuanced contextualisation of sexual violence charges, there are times when a particular prosecution may usefully focus exclusively, or nearly exclusively, on sexual violence. To date, such thematic prosecutions have been relatively rare.[31] Of the concluded proceedings for 126 accused,[32] the ICTY has focused only two trials exclusively on acts of sexual and gender-based violence.[33] At the International Criminal Court ('ICC'), two cases focus predominately on crimes of sexual and gender-based violence.[34] The experiences of the ICC and ICTY to date illustrate that a sexual violence-specific thematic prose-

26 Charlesworth and Chinkin, 2000, pp. 4, 12–14, see *supra* note 5.

27 Buss, 2011, p. 416, see *supra* note 7.

28 *Ibid*., p. 419.

29 Ní Aoláin *et al.*, 2011, p. 426, see *supra* note 2.

30 *Ibid.*

31 It may therefore be premature to analyse the merits or demerits of sexual violence-only prosecutions.

32 ICTY, "Key Figures of the Cases" (http://www.icty.org/en/cases/key-figures-cases).

33 ICTY, *Prosecutor v. Anto Furundžija*, Trial Chamber, Judgment, IT-95-17/1, 21 July 2000 and 10 December 1998 (http://www.legal-tools.org/doc/e6081b/); ICTY, *Prosecutor v. Dragoljub Kunarać, Zoran Vuković and Radomir Kovač*, Trial Chamber, Judgment, IT-96-23 & 23/1, 12 June 2002 and 22 February 2001 (http://www.legal-tools.org/doc/fd881d/).

34 ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Pre-Trial Chamber, Warrant of Arrest, ICC-01/05-01/08, 23 March 2008, para. 21 (http://www.legal-tools.org/doc/1b66ef/); ICC, Pre-Trial Chamber, *Prosecutor v. Callixte Mbarushimana*, Warrant of Arrest, ICC-01/04-01/10, 9 April 2012, paras. 7(iii), 10(vii), 10 (viii) ('*Mbarushimana* Arrest Warrant') (http://www.legal-tools.org/doc/27b448/).

cution may make sense in certain factual circumstances: for example, when the aspect of the conflict being investigated demonstrates that a representative sample of the most serious crimes will naturally focus on a range of sexual violence crimes; where the best evidence for a particular accused bearing the greatest responsibility is focused on sexual violence; or where there are a number of prosecutions focused on a particular attack or geographic time period and these prosecutions are chosen to highlight a diversity of experiences, including those of sexual violence.

In sum, while there are times when a prosecution focused largely or exclusively on sexual violence is useful or necessary, at other times it is helpful to integrate sexual violence charges among charges for other violations occurring in the same attack or geographical area, in order to place the sexual violence crimes and, indeed, all of the violations, in context, to best explain the cumulative harms faced by victims.

9.2. Contextualisation of Sexual Violence Crimes: A Method

Contextualisation of sexual violence crimes helps to explain the serious nature of sexual violence and the potentially gendered nature of other crimes. Such contextualisation makes sense, given the practice often followed within international criminal tribunals of prosecuting a representative sample of serious incidents. For example, the ICC's Office of the Prosecutor has indicated that its goal is "to provide a sample that reflects the gravest incidents and the main types of victimization" in selecting incidents for trial.[35] As established above, sexual violence is serious and is often present alongside other forms of victimisation. It therefore follows that sexual violence crimes should be included in the sample of grave incidents in a given crime scenario, such as an attack on civilians.

Contextualisation is important and necessary, but there are not many good examples to date of nuanced contextualisation within international criminal law. One exception can be found in the ICC's *Mbarushimana* indictment. Callixte Mbarushimana is alleged to have been a very senior member of Forces démocratiques pour la libération du Rwanda (Democratic Forces for the Liberation of Rwanda), "the most recent incarnation of Rwandan rebel groups established by former *génocidaires*

[35] ICC, Office of the Prosecutor, Report of Prosecutorial Strategy: 2009–2012, 1 February 2010, para. 20 (http://www.legal-tools.org/doc/6e3bf4/).

who fled Rwanda after the 1994 genocide", and therefore accused of contributing to the implementation of a common plan to carry out the group's atrocities.[36] The group is accused of carrying out a series of attacks in the Kivu provinces of the Democratic Republic of the Congo in 2009 involving murders, rapes, gender-based persecution, torture, other inhumane acts, inhuman treatment and destruction of property.[37] The prosecutor has placed the sexual violence crimes – rape, sexual torture and sexual mutilation – within the context of other acts, showing how they are interlinked.[38] At the same time, he also intends to demonstrate the role of mass sexual violence in the group's strategic aims to gain political power.[39] In other words, he plans to look at sexual violence up close, through witness testimony of specific acts, and from afar, by examining the effect of sexual violence crimes in subjugating the civilian population.

Another helpful example of contextualisation can be found in the judgment of the Trial Chamber of the Special Court for Sierra Leone in *Prosecutor v. Sesay and Others*.[40] In that judgment, the judges examined the evidence of sexual violence and concluded that this violence was "not intended merely for personal satisfaction or a means of sexual gratification for the fighter".[41] Rather, the Revolutionary United Front adopted a "calculated and concerted pattern […] to use sexual violence as a weapon of terror" against civilians, resulting in an "atmosphere in which violence, oppression and lawlessness prevailed".[42] The Revolutionary United Front used "perverse methods of sexual violence against women and men of all ages", including "brutal gang rapes, the insertion of various objects into victims' genitalia, the raping of pregnant women and forced sexual intercourse between male and female civilian abductees".[43] These methods also involved the routine capture and abduction of women and girls, who

36 ICC, Office of the Prosecutor, "New ICC Arrest: Leader of Movement Involved in Massive Rapes in the DRC is Apprehended in Paris", Press Release, 11 October 2010.

37 *Mbarushimana* Arrest Warrant, paras. 2, 7, 10, see supra note 34.

38 ICC, *Prosecutor v. Callixte Mbarushimana*, Pre-Trial Chamber, Transcript, ICC-01/04-01/10, 19 September 2011, pp. 17–18, 22, 25 (http://www.legal-tools.org/doc/3bc3bf/).

39 ICC, Office of the Prosecutor, 2010, see *supra* note 36.

40 *RUF* Judgment, see *supra* note 2.

41 *Ibid*., para. 1348.

42 *Ibid.*, para. 1347.

43 *Ibid.* (footnotes in original not included).

were then forced into prolonged exclusive conjugal relationships with rebels as so-called "wives".[44] The Trial Chamber further argued:

> [T]he savage nature [of the sexual violence] demonstrates that these acts were committed with the specific intent of spreading fear amongst the civilian population as a whole, in order to break the will of the population and ensure their submission to AFRC/RUF control.[45]

Combined with other forms of violence by the Revolutionary United Front, the sexual violence "effectively disempowered the civilian population and had a direct effect of instilling fear on entire communities".[46] The Revolutionary United Front relied on the cascading effect of their sexual and non-sexual violations: their crimes not only "abused, debased and isolated the individual victim", but also demonstrated that the male members of the civilian community "were unable to protect their own wives, daughters, mothers and sisters", and "deliberately destroyed the existing family nucleus" by relying upon the societal stigma associated with sexual violence to ensure that "[v]ictims of sexual violence were ostracised, husbands left their wives, and daughters and young girls were unable to marry within their community".[47] In turn, these effects undermined "the cultural values and relationships which held the [Sierra Leonean] societies together".[48] The Trial Chamber concluded that "rape, sexual slavery, 'forced marriages' and outrages upon personal dignity, when committed against a civilian population with the specific intent to terrorise, amount to acts of terror".[49]

Through this reasoning, the Trial Chamber placed the sexual violence in context by examining: who were the targeted victims (largely ci-

44 *Ibid.*, para. 1351.

45 *Ibid.*, para. 1348.

46 *Ibid.* See also para. 1351, which refers to the pattern of sexual enslavement as a "deliberate system intended to spread terror".

47 *Ibid.*, paras. 1349–50. See also the reference in para. 1349 to the Revolutionary United Front's "calculated consequences" of sexual violence.

48 *Ibid.*, para. 1349.

49 *Ibid.*, para. 1352. This holding was upheld by SCSL, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Appeals Chamber, Judgment, SCSL-04-15, 26 October 2009, para. 990 (http://www.legal-tools.org/doc/133b48/).

vilian women and girls, but also men and boys);[50] what other acts often took place alongside the sexual violence; how these victims were affected by the sexual violence and how that victimisation was compounded by pre-existing societal discrimination; how the experience of these victims was also compounded by other violations; and how the perpetrators relied on the compounding effects of sexual violence combined with other violence and discrimination. In order to do this, the Trial Chamber had to look at sexual violence up close, by examining witness testimony of specific acts, and from afar, by examining the terrorising effect of those crimes on the entire civilian population. By looking closely at individual acts and looking more widely at patterns and overarching effects, the actual role and consequences of gender-based violence were more deeply explained than if only the individual acts were examined.[51]

There may be a concern that contextualisation of sexual violence crimes could result in trivialising or otherwise losing sight of them among the other violations. However, the type of nuanced and gender-sensitive contextualisation advocated in this chapter is meant to avoid such a scenario. If good contextualisation practices are followed, then the correct questions are asked and answered by investigators, prosecutors, victims counsel and judges to not only reveal the sexual violence crimes, but also the connection between these crimes and the other indicted violations, as well as the cumulative harm.

9.3. Enhanced Gender Competence and Gender Expertise

The type of gender-sensitive contextualisation advocated in this chapter has rarely been achieved within international and internationalised tribunals. Simply investigating and including sexual violence charges in an indictment is not enough. Bringing evidence of sexual violence is also not enough. A clear example of this unfortunately occurred in the appeals judgment of the ICTR in *Prosecutor v. Emmanuel Rukundo*. In that judgment, it appears that the majority judges failed to understand a particular sexual assault in context and ended up relying on a regressive, decontex-

[50] *RUF* Judgment, paras. 1207–1208, 1304–1305, see *supra* note 2, on the sexual mutilation of male genitals and forced sex by male civilians.

[51] Valerie Oosterveld, "The Gender Jurisprudence of the Special Court for Sierra Leone: Progress in the Revolutionary United Front Judgments", in *Cornell International Law Journal*, 2011, vol. 44, no. 1, p. 70.

tualised characterisation of the sexual violence. Rukundo, an ordained priest and military chaplain for the Rwandan armed forces, had been convicted at trial of committing genocide by causing serious mental harm to a young Tutsi woman when he sexually assaulted her in May 1994 at a seminary in Gitarama prefecture.[52] The victim had testified that, when he arrived at the seminary, she had asked Rukundo to hide her in his room as she feared for her life.[53] He told that he could not help her as her entire family had to be killed.[54] She helped him carry some items to his room, in the hope that he would change his mind. Once in the room, he locked the door, placed his pistol on the table, forced the victim onto his bed, opened the zipper to his trousers, and tried to spread her legs and have sexual intercourse. She resisted and instead he rubbed himself against her until he ejaculated. She testified that she felt that she could not escape because he had physically pinned her down and because he was "in a position of authority and had a gun".[55] A majority of the Trial Chamber interpreted this evidence in light of the "highly charged, oppressive and other circumstances surrounding the sexual assault", especially the context of mass violence directed against Tutsis in the area and the specifics of Rukundo's words prior to the assault, and entered a conviction.[56]

A majority of the Appeals Chamber overturned this conviction, finding the "general context of mass violence" against Tutsis to be irrelevant to genocidal intent with respect to this incident.[57] The majority judges characterised Rukundo's actions against the young woman as "unplanned and spontaneous": "an opportunistic crime that was not accompanied by the specific intent to commit genocide".[58] In doing so, the judges in effect placed a higher burden of proof on the linkage of sexual violence to genocidal intent than they had for other types of prohibited genocidal acts. They found that the sexual assault was "qualitatively different"

52 *Rukundo* Appeals Judgment, para. 227, *supra* note 1. See also ICTR, *Prosecutor v. Emmanuel Rukundo*, Trial Chamber, Judgment, ICTR-01-70, 27 February 2009, paras. 4, 574–576 ('*Rukundo* Trial Judgment') (http://www.legal-tools.org/doc/1c7819/).

53 *Rukundo* Trial Judgment, paras. 373, 384, see *supra* note 52.

54 *Ibid.*, para. 373.

55 *Ibid.*

56 *Ibid.*, paras. 388, 576.

57 *Rukundo* Appeals Judgment, para. 236, see *supra* note 1.

58 *Ibid.*

from Rukundo's other acts of genocide (such as the search for, and subsequent assault or murder of, Tutsis) and therefore separate from and unlinked to those other acts.[59] In other words, the majority appeals judges succumbed to a time-worn but incorrect view of sexual violence as somehow "private" (because it deals with "intimate aspects of our bodies and minds"[60]) and therefore distinguishable from and unlinked to other forms of violence. They decontextualised the sexual violence. Unfortunately, this is not the first time decontextualisation of sexual violence has happened at the ICTR as this was also an issue in *Prosecutor v. Juvénal Kajelijeli*.[61]

Judge Pocar issued a strong and convincing partially dissenting opinion in *Prosecutor v. Emmanuel Rukundo* that illustrated a gender-sensitive contextual understanding of the situation. In his view, Rukundo's words "clearly conveyed Rukundo's knowledge that his victim was Tutsi and that she and the other members of her family should be killed for this reason alone".[62] These words were to be considered in the context of: 1) violence in the surrounding area in which Tutsis were being hunted down; 2) the victim's state (she was "dirty and hungry and her place of refuge was not safe"); 3) her previous knowledge of and trust in Rukundo; 4) the fact that Rukundo was armed; and 5) the use of force by Rukundo against her to commit a sexual act.[63] Judge Pocar felt that the majority's classification of the assault as an opportunistic crime indicated that the majority "does not fully appreciate the seriousness of the crime" and misunderstands the distinction between motive and intent: even if the perpetrator's motivation is entirely sexual, it does not follow that the perpetra-

59 *Ibid.*

60 Xabier Agirre Aranburu, "Sexual Violence beyond Reasonable Doubt: Using Pattern Evidence and Analysis for International Cases", in *Leiden Journal of International Law*, 2010, vol. 23, no. 3, p. 612.

61 Compare the consideration and interpretation of the evidence by a majority of the Trial Chamber with that of dissenting Judge Ramaroson: ICTR, *Prosecutor v. Juvénal Kajelijeli*, Trial Chamber, Judgment and Sentence, ICTR-98-44A, 1 December 2003, paras. 679–83, 917–25 (http://www.legal-tools.org/doc/afa827/); and ICTR, *Prosecutor v. Juvénal Kajelijeli*, Trial Chamber, Dissenting Opinion of Judge Arlette Ramaroson, ICTR-98-44A, 1 December 2003 (http://www.legal-tools.org/doc/e4797f/), in its entirety, including the discussion in para. 99 of the context of the sexual violence.

62 *Rukundo* Appeals Judgment, para. 3 of Judge Pocar's Partially Dissenting Opinion, see *supra* note 1.

63 *Ibid.*, paras. 5–8.

tor does not have the requisite intent or that his conduct does not cause severe pain and suffering.[64] While Judge Pocar's analysis did not undo the damage, caused by the majority judges, to the analysis of harm by Rukundo, to the victim whose evidence (and violation) was deemed unrelated to the genocide, and to international criminal law's understanding of gender, it does provide a model for gender-sensitive contextual analysis. Judge Pocar answered these key questions. What does the evidence show happened to the victim? What was the effect? What was the situation of the victim at the time of the violation? Was the victim's vulnerability to the sexual violence linked to the overarching context? Are there linkages between the sexual violence and other prohibited acts? Was the perpetrator acting with intent linked to that overarching context?

To be clear, to argue for a gender-sensitive contextual analysis of sexual violence during genocide, crimes against humanity or war crimes is not to somehow argue for an easing of the standards of proof for these acts: in fact, in cases of sexual violence, the international tribunals have often required more (rather than less) evidence than is actually required, particularly when it comes to an analysis of the evidence for purposes of individual or superior criminal responsibility.[65] Rather, the argument for contextual analysis is an argument for a better, deeper, more nuanced understanding of when, why and how sexual violence takes place during genocide, war or other forms of atrocity. Investigations, prosecutions and judicial deliberations should examine *actus reus* and *mens rea* through the lens of the questions inherently asked by Judge Pocar. This requires increased gender competence and gender expertise within investigators, prosecutors, victims' counsel and judges tasked at the international, regional and domestic levels with examining international crimes. The term 'gender competence' refers to "the capacity to identify where difference on the basis of gender is significant, and act in ways that produce more equitable outcomes for men and women".[66] Gender competence should be present in all investigators, prosecutors, victims' counsel and judges. In-

64 *Ibid.*, para. 10.

65 Susana SáCouto and Katherine Cleary, "The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court", in *American University Journal of Gender, Social Policy and the Law*, 2009, vol. 17, no. 2, pp. 353–58.

66 Monash University Medicine, Nursing and Health Sciences, "Gender Competence" (http://www.med.monash.edu.au/gendermed/competence.html).

deed, this competence should be present at the hiring or appointment stage, at least for some positions.[67] Since this is not presently the case at the international tribunals,[68] increased training is urgently needed and must be maintained over time and despite staff turnover. Gender competence increases the capacity of investigators and prosecutors to uncover how gender-based violence is part of a continuum of violence. Gender expertise is also needed, in addition to institution-wide gender competence. That is, there should be at least some investigators, prosecutors, victims' counsel and judges who have experience and applied knowledge that goes much deeper than gender competence, in order to put into place a workable "gender strategy".[69] For example, Xabier Agirre Aranburu has outlined the importance of having, on staff, investigators trained in gathering and analysing pattern evidence of sexual violence.[70]

The benefits of increased gender competence and deeper gender expertise are clear: the presence of both are likely to lead to a better and more nuanced understanding of when, why and how sexual violence takes place during genocide, war or other forms of atrocity. This fuller understanding helps to explain the interconnected and cumulative nature of harms in any given conflict or scenario of mass violation, and therefore allows for a better evaluation of appropriate sentencing. It also creates a more accurate portrayal of what occurred in a particular situation, explaining not only the effect on the victim(s) but also the intent of the perpetrator(s). The stronger this capacity, the more we will understand that gender-based violence is not only about violence directed toward women: it is about why and how men, women, girls and boys are targeted for different crimes.

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67 "Awareness of the seriousness of sexual violence should be a precondition of work in the investigation of international crimes"; see Agirre Aranburu, 2010, p. 627, *supra* note 60.

68 Women's Initiative for Gender Justice, "Gender Report Card on the International Criminal Court 2010", The Hague, November 2010, pp. 50–51, 62–64. See also van Schaack, 2009, pp. 367, 375, 385 and 406, see *supra* note 25.

69 On the necessity for gender strategies within international criminal tribunals, see Patricia Viseur Sellers, "Gender Strategy is Not a Luxury for International Courts", in *American University Journal of Gender, Social Policy and the Law*, 2009, vol. 17, no. 2, pp. 303–25. On the necessity of gender competence and gender expertise among investigative and prosecutorial staff, see ICTR, Office of the Prosecutor, "Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Situations of Armed Conflict: Lessons from the International Criminal Tribunal for Rwanda", 2008, paras. 17–30, 36, 47.

70 Agirre Aranburu, 2010, p. 627, see *supra* note 60.

9.4. Conclusion

Janet Halley has argued that an emphasis on the prosecution of rape during conflict

> can background other bad things: to import the idea that 'rape is a fate worse than death' into the setting of armed conflict - for example, to declare that the panoramic violence of the Yugoslav conflict was a 'war against women' - is to background the death that armed conflict brings to people generally, and specifically to the death it brings to men.[71]

While this assumption can be both questioned and decisively countered,[72] it is also true that nuanced and gender-specific contextualisation directly addresses this concern by foregrounding both murder and rape. Indeed, such contextualisation explores the linkages between murder and rape, the harms stemming from each, and the compounded harms coming from both together. In so doing, it addresses victimisation from the point of view of the perpetrator by asking whether and how these forms of violation fit together, and from the point of view of the victim by examining the place of each crime in the individual and overall victimisation.

Sexual violence is a crime rooted in a specific social construction of gender roles and in discrimination, especially the social, economic and political subordination of women and girls. It is therefore a specific expression of gender-based discrimination. There may be situations in which a prosecution focused only on sexual violence crimes may be useful or natural: for example, when prosecuting an attack in which sexual violence was the dominant form of violation. At other times, however, the placement of sexual violence crimes within a larger context of other genocidal acts, crimes against humanity or war crimes, better explains the sexual violence. It may also better explain the other forms of violence, which may also similarly be expressions of gender-based discrimination while appearing on their surface to be gender neutral. By exploring the linkages between the crimes, the gendered nature of these crimes (and not only of

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71 Janet Halley, "Rape in Berlin: Reconsidering the Criminalization of Rape in the International Law of Armed Conflict", in *Melbourne Journal of International Law*, 2008, vol. 9, no. 1, p. 80.

72 See, for example, a critique by Maria Grahn-Farley, "The Politics of Inevitability", in Sari Kouvo and Zoe Pearson (eds.), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance?*, Hart Publishing, Oxford, 2011, pp. 109–29.

the sexual violence) may become clearer. Undertaking a truly gender-sensitive form of contextualisation requires improved gender competence and deeper gender expertise within all tribunals and courts tasked with prosecuting genocide, crimes against humanity and war crimes. Gender competence and expertise must be present from the point of the initial investigations through to the phases of judgment and sentencing, so as to better uncover and explain the role of gender in serious crimes today.

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Thematic Prosecution of International Sex Crimes

Morten Bergsmo (editor)

By singling out the theme of recruitment and use of child soldiers in its first case (against Mr. Lubanga Dyilo), the International Criminal Court legitimized the very idea of thematic prosecution at the international and national levels. The Court convicted the accused of a narrow range of criminality, to the exclusion of killings and physical-integrity violations such as rape that characterized the conflict in which the accused was an actor. Can specific prosecutorial themes be meaningfully pursued by criminal justice?

This is the first book to deal with the topic of thematic prosecution of core international crimes. Its focus is on international sex crimes. It is important to justify the singling out of a narrow range of criminality for prosecution. Thematic prosecutions should be explained to the public. Absent proper justification, the thematic prosecution of core international crimes is likely to generate increasing controversy. This book offers different justifications that jurisdictions can turn to as they develop policies that include thematic prosecution. It goes to the heart of discussions on prioritisation of cases, prosecutorial discretion, and accountability for violations against children and women.

The 2012 first edition has helped to raise awareness and generate discussion about the possibilities and challenges of the use of thematic prosecution. This second edition contains 125 pages of new material, including three new chapters.

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