

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**

1. The Office of the Prosecutor of the International Criminal Tribunal for Rwanda has developed this Best Practices Manual on the prosecution of sexual violence crimes in the context of genocide, crimes against humanity and war crimes in order to advance the successful prosecution of charges of sexual violence and to take into consideration the needs of victims of such violence. The prosecution of sexual violence is a specialized issue that requires focused and particularized attention to ensure that the crimes are prosecuted fairly, adequately and with sensitivity.

2. The pervasiveness of sexual violence and rape as means of committing genocide and as crimes against humanity and war crimes during the Rwandan conflict of 1994 is well-documented.¹ Indeed, in general, the Security Council of the United Nations, in its Resolution 1820 (2008) recognized that:

Women and girls are particularly targeted by the use of sexual violence, including as a tactic of war to humiliate, dominate, instill fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group²;

and

Despite its repeated condemnation of violence against women and children in situations of armed conflict, including sexual violence in situations of armed conflict, and despite its calls addressed to all parties to armed conflict for the cessation of such acts with immediate effect, such acts continue to occur, and in some situations have become systematic and widespread, reaching appalling levels of brutality.³

3. The United Nations Resolution went on to call for an end to impunity for these atrocious acts and noted that:

Rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide, *stresses the need for* the exclusion of sexual violence crimes from amnesty provisions in the

¹See *Report of the Special Rapporteur on the situation of Human Rights in Rwanda*, E/CN.4/1996/68,29 January 1996, paras. 16-24, in *The United Nations and Rwanda 1993-1996*, Department of Public Information, United Nations (New York, 1996), Document 167.

² S/RES/1820 (2008), 19 June 2008, page 1.

³ *Ibid*, page 2.

context of conflict resolution processes, and *calls upon* Member States to comply with their obligations for prosecuting persons responsible for such acts, to ensure that all victims of sexual violence, particularly women and girls, have equal protection under the law and equal access to justice, and *stresses* the importance of ending impunity for such acts as part of comprehensive approach to seeking sustainable peace, justice, truth and national reconciliation.⁴

4. The following recommendations are made to Senior Management, all trial attorneys, appeals counsel and investigators in the Office of the Prosecutor in order to ensure that the prosecution of sexual violence is managed in an effective manner so as to end impunity for these acts and to afford these crimes the attention deserved while maintaining the dignity, safety and protection of the victims of these horrific crimes.
5. It is foreseen and hoped that these recommendations will be shared with external interested parties, such as other international courts and national prosecution services, to allow the international community to benefit from the lessons learned by the Office of the Prosecutor in an effort to globally and widely combat the commission of rape and sexual violence as crimes against humanity, war crimes or as means of committing genocide.

Recommendations for Senior Management

6. Senior Management must determine a prosecution approach *at the outset* to ensure that sexual violence crimes are comprehensively integrated into the investigations and prosecution strategy for the overall office. There must be a clear and comprehensive global strategy on how to proceed with charges of sexual violence crimes, and this strategy must be communicated to the entire office.
7. Senior Management must ensure that sexual violence crimes, including rape, sexual slavery and sexual mutilation are fully and fairly investigated and prosecuted, where appropriate, as crimes against humanity, genocide crimes, or war crimes.

⁴ S/RES/1820 (2008), 19 June 2008, paragraph 4, page 3.

8. The charge of sexual violence crimes has been often abandoned or overlooked. The prosecution of crimes against humanity, war crimes and genocide are complicated and complex and thus trial teams can be overwhelmed with the collection and analysis of evidence in general. This can have the effect of treating sexual violence as a “secondary” crime such that these crimes are not actively pursued. In order to combat this, adequate resources, including sufficient staffing, need to be ensured to enable trial teams to focus on the prosecution of sexual violence crimes. Senior Management must ensure the creation of detailed action strategies and work plans that include a comprehensive analysis of sexual violence charges. Senior Management must ensure that sexual violence crimes are integrated, where appropriate, into the workplan of all trial teams.

9. Senior Management must ensure close coordination and interaction between the investigation teams and trial teams to ensure that the necessary evidence is obtained and correctly documented to prosecute sexual violence. Investigators and trial lawyers must be tasked with working closely together to build a case based on a strategy that was designed through their joint input. A prosecution strategy can provide the bridge to increase contact and coordination between the prosecuting attorneys and the investigators who are investigating the cases they work on.

10. Senior Management must ensure continuing legal education on a regular basis for trial lawyers and investigators on the issue of sexual violence crimes. Lawyers come to international courts with a variety of criminal law backgrounds. Some have worked with victim services, others have never worked with victims. Some have prosecuted sexual violence crimes before, others have no experience with this issue. Training equalizes these differences so that sexual violence policies can then be carried through all teams, not only teams where the lead attorney has an interest or experience in prosecuting sexual violence crimes. Training also has the added benefit of communicating clearly to all prosecuting attorneys that sexual violence crimes are a part of their mandate and not extraneous to their core duties.

11. Senior Management must ensure gender parity in employment at the senior management levels, to ensure that women with experience in this area are working at

senior levels of management. Gender parity also needs to be taken into consideration for all levels of employment.

12. Senior Management must create a working environment of collaboration and coordination with the other arms of the court, including the witness protection unit, the gender advisor in the Registry, and the Chambers.

13. Senior Management must streamline the system to ensure that rape witnesses are not unnecessarily exposed to recounting their testimony numerous times. At the ICTR the average witness encounters somewhere in the range of thirty tribunal employees in the course of being a witness. This is unacceptable.

14. Senior Management must monitor developments in cases involving sexual violence and require regular reports from the trial teams in this regard. Where direction or focus are lacking or teams have questions about how to proceed Senior Management must take steps to answer questions or remedy the situation.

15. Senior Management must take steps to ensure that victims are treated with respect and courtesy by investigators and trial teams.

16. Senior Management should actively support, and actively seek funding for, programs which provide assistance to victims, including programs that deal with victims who have finished testifying.

Dedicated Investigations and Prosecutions Team

17. Having a dedicated team of sexual assault investigators and prosecutors that are competent and experienced in the investigation and prosecution of sexual violence is one way, although not the only way, to increase attention to this issue and ensure that dedicated and well-trained professionals tackle the sensitive prosecution of sexual violence crimes.

18. It is recommended that the dedicated investigation and prosecution team should be composed of prosecution counsel, investigators, doctors, nurses, counsellors, interpreters and witness assistants. Noting paragraph 13 above, and keeping in mind the

importance of minimizing the number of court staff that a victim would encounter, a particular sub-team of professionals should be established for each victim/witness so that the victim/witness will work with and deal with primarily those same people throughout the victim/witness's involvement with the international court.

19. Each member of the team would need to undergo a specialised training on how to handle sexual assault victims and witnesses.

20. The key is to ensure that gender-specialized appointments are carefully made and filled with staff that are committed, competent and experienced enough to be effective contributors. Since rape victims often, although not always, feel more comfortable recounting their testimony to other females, this also points to the need to recruit more competent and experienced female investigators with a background in this issue.

21. Some international courts have opted for a dedicated sexual violence investigations team. Others have a dedicated prosecutor for gender crimes. Some have both. Some have none. There is no single way to deal with this issue. However, when there is a dedicated sexual violence team or gender advisor, there is more sustained attention paid to the issue. However, care needs to be taken to ensure that the team is provided with staff who are senior enough to be effective and to be taken seriously at all levels of the institution. Senior Management must ensure that the dedicated team interfaces effectively with other investigative and trial teams, and that their work is integrated into the larger workplan of the organization. Having a dedicated team should not preclude training in dealing with sexual violence witnesses for all investigative and prosecutorial staff members.

22. Such a specialized team would then coordinate closely with prosecution teams to ensure that the evidence collected corresponds and responds to the needs of prosecution teams.

Investigations

23. A gender perspective should be integrated into investigations to ensure that *all* investigators are provided with ongoing training to understand the international law and

interviewing methodology for rape victims. One of the major challenges investigators face in collecting sexual violence evidence is a lack of skills on how to effectively pursue such evidence. Investigators often receive no training on interviewing methodology for rape victims, and the majority of investigators are male. Oftentimes, investigators come from backgrounds where they have not had any experience with this issue or they believe that this is not one of the crimes that deserve serious attention. Many investigators, though fully equipped with necessary skills to investigate cases, lack training and direction on how to elicit information about sexual violence from witnesses.

24. Victims of sexual violence must be provided with enough privacy and comfort while being interviewed to give their testimony. Rape survivors should be given the requisite time and privacy to relate the crimes committed against them to investigators.

25. Investigative methodology and procedures must be conducive to elicit testimony from rape victims. Investigators should be provided with a model questionnaire and a model witness statement to help ensure that sexual violence evidence is properly gathered and documented.

26. Special considerations for the cultural aspects of the region and victims being handled is necessary if the investigators are to elicit accurate information from the victims and witnesses. Investigators will need to understand how issues/topics of rape/body parts, especially genitalia and gender, are handled in order to be able to approach the victims well and to understand what any euphemisms used might mean.

27. Investigations of rape and other forms of sexual assault should be conducted by teams that include trained prosecution counsel, investigators and interpreters (preferably women) that are skilled in interviewing women survivors. Such an early involvement of prosecution counsel would also enable them to gain the trust and confidence of the witnesses involved. It is believed that in this way, the necessary evidence could be properly elicited from these witnesses in order to prosecute the crimes and support a conviction.

28. Prosecution counsel and investigators should work closely together to analyze the strength of a case and of the evidence to ensure that victims are not unnecessarily dragged through the process and asked to recount very painful experiences unless there is a reasonable chance of obtaining a conviction for those crimes. This would require a thorough understanding of the law on sexual violence and the elements of the crimes that would need to be proved. For instance, for rape in international law, the prosecutors would not need to prove non-consent on the part of the victim, but could instead establish the existence of coercive circumstances surrounding the rapes under which meaningful consent is not possible.⁵ A court is free to infer non-consent from the background circumstances, such as an on-going genocide campaign or the detention of the victim.⁶ In this way the witness would not have to be questioned about any consent issues further traumatizing them.

29. Sexual violence evidence should be collected from a broad array of sources, not just from rape victims. Often observers or other eyewitnesses have powerful testimony that can be used in the courtroom. Questions should routinely be asked of all witnesses about their knowledge of sexual assaults.

30. Special attention must be paid to the possibility and reality that in many situations, such as in Rwanda, males and children may also be victims of sexual violence crimes. These cases would present special problems through the investigation and prosecution stage and would require particular considerations and adaptation on the part of prosecutors and investigators. If such prosecutions are to be pursued, Senior Management must devise a specialized mandate in order to investigate and prosecute these cases, and must provide training specifically with respect to these specialized cases.

Witness Preparation

31. In order to ensure co-operation of witnesses, based upon understanding, it is important to explain, already at the stage of evidence gathering, the trial process and its

⁵ *Prosecutor v. Sylvestre Gacumbitsi*, Appeal Judgement, Case No. ICTR-2001-64-A, 7 July 2006, paragraph 155.

⁶ *Ibid*, paragraph 155.

requirements to witnesses. Moreover, it is crucial that witnesses relate their evidence to as few people as possible. Therefore, it is required that witnesses are handled consistently by as few people as possible and, preferably, such people would come from the dedicated investigation and prosecution team, should such a team exist. In this way, the witnesses would have familiar and consistent faces with which they would feel comfortable and the evidence obtained would be more consistent and precise.

32. Investigators and prosecution counsel should adequately prepare rape victims who will testify. Women coming to the stand need to be prepared for detailed questions that will require descriptions of sexual body parts and acts. In some cases, rape witnesses who have not been prepared have felt shamed, humiliated, or outraged that they were asked to speak bluntly in a public setting about being raped. Adequate witness preparation can help to alleviate this problem. Worldwide, rape carries a stigma. Rape victims are often silent about the violence against them for fear of being isolated or stigmatised as a rape victim. Rape victims fear being rejected by their intimate partners or finding themselves less marriageable as a result. Speaking about what happened to them, particularly in a trial setting which may require a detailed discussion of what occurred, is often difficult.

33. Witnesses speaking about rape in the courtroom must be prepared to speak straightforwardly about events that have happened rather than use euphemisms that do not clearly describe what happened. Every culture utilizes euphemisms to describe sexual acts, genitals, or the act of rape. For example, in the Rwandan context, rape victims may just say they were “made to sit down” or “taken by a man.” Sexual slaves may refer to themselves as “wives.”

34. This demonstrates, once more, that both investigators and prosecution counsel should receive specialized training on how to interview such witnesses properly and effectively, on the culture in the region and of the people they are interviewing, and on how to recognize symptoms of trauma. Sensitivity training for all actors involved in the investigating and prosecuting process, including for language assistants, should be

required, to equip them to deal with witnesses and victims of sexual violence more effectively, despite trauma and cultural obstacles.

Trial Chamber Prosecutions

35. If a dedicated specialized team is formed, all trial teams must consult and work with the specialized team in regards to the sexual violence charges in their respective cases.

36. All trial teams should move forward with a single, clearly articulated prosecution strategy for prosecuting rape and other forms of sexual violence. Without a unified prosecution strategy on the sexual violence charges, teams pursue different, and sometimes even contradictory, approaches.

37. Trial teams need to coordinate closely with investigators to ensure that the evidence collected corresponds and responds to the needs of the prosecution teams. Prosecution counsel should work closely with investigators to ensure that the type and quality of sexual violence evidence that they need is gathered.

38. Prosecution counsel should provide direction to investigators on what sort of evidence needs to be collected: for example, should testimony be elicited from only rape victims or also rape perpetrators and other witnesses? Is the team looking for a qualitative approach or a quantitative one (for widespread and systematic)? Are testimonies needed to fulfill the elements of a genocide crime or a sexual slavery crime against humanity? Different prosecution strategies will require different evidentiary standards and investigative approaches.

39. Prosecution counsel should review cases at an early stage to determine whether charges of sexual crimes are warranted in order to avoid the need for unnecessary requests for amendments of indictments at a later stage.

40. Prosecution counsel and investigators need to follow up with potential witnesses on a regular basis to ensure that their needs are being met and that they feel they are making a positive contribution to the process.

41. Prosecution counsel and investigators also need to liaise with witness protection and other critical court departments to ensure that witnesses' needs are met.

42. Evidence of sexual violence should be brought into the courtroom through a variety of sources, not just rape victim testimonies. Depending on the circumstances of the case, evidence could be brought forward through Judicial Notice provisions or through witnesses who are not necessarily victims themselves. Consideration could be given to using statements where appropriate instead of *viva voce* evidence. If direct testimony is deemed to be necessary and appropriate, consideration must be given as to how to elicit the required evidence in a manner that is sensitive to the needs of the witness.

43. Prosecution counsel should also, whenever possible, bring evidence from expert witnesses and medical professionals such as physicians, physicians' assistants, psychologists, psychiatrists, clinical social workers, psychiatric nurses, and other mental health professionals such as counselors, researchers, and college professors with expertise in the dynamics of sexual assault crimes and the impact of sexual assault victimization. Such testimony can be used in the following ways:

- a) to assist the Chamber in better understanding and evaluating the evidence presented by factual witnesses to demonstrate that the victim's behavior is consistent with that of someone who has been sexually assaulted and thus bolster witness testimony; and,
- b) medical professionals such as physicians can be called to enhance our evidence on the "mental harm" and "bodily harm" aspects of the crime of rape as Genocide. Expert testimony can help to establish a proper record on the impact of sexual assault victimization and the long term physical and mental effects.

44. Prosecution counsel should also be aware of Rule 96 of the Rules of Procedure and Evidence, which requires no corroboration of victim's testimony and restricts the defence of consent in sexual assault cases.

45. Prosecution counsel should further be aware that according to Rule 96(iv), "Prior sexual conduct of the victim shall not be admitted into evidence or as defence," and be prepared to intervene on this basis whenever necessary. It is the Prosecutor's responsibility to monitor closely the scope of cross-examination in this regard and to bring these Rules to the Trial Chamber's attention if necessary.

46. Training and regular updates should be provided to prosecution counsel to ensure that they are appraised of the existing and emerging jurisprudence around the issue of sexual violence. Prosecution counsel should also receive training on how to direct such witnesses in trial.

Appeals Section

47. All Prosecution counsel in the appeals division of the OTP should be trained and expected to keep themselves up to date on recent jurisprudential developments on the issue of sexual violence.

48. All appeal cases should be reviewed with the aim of determining whether any aspects of the sexual violence charges should be appealed.

Language Assistants/Interpreters

49. Language assistants and interpreters should work closely with the investigators and prosecution counsel to ensure that interviews with rape victims are conducive to eliciting testimony. Attention should be paid to creating an environment that is culturally empathetic and comfortable for the rape victim. Interpreters can provide a cultural bridge to help investigators and prosecutors to correctly ask questions in a manner that is acceptable. The competence and honesty of language assistants and interpreters are crucial to the integrity of the entire process of investigation and prosecution.

50. In order to improve the ability of language assistants to perform effectively with investigators in the field, language assistants should also be involved directly in investigative *mission planning* to:

- familiarize them with the matters the investigator will be dealing with, so the language assistants can prepare themselves for interpretation tasks in order to enhance the effectiveness of their work;
- allow them to share with the investigators, at the mission planning stage, any knowledge they have about local conditions that might affect the mission or the witnesses to be interviewed; and,
- allow them to identify and plan for matters that would engage cultural sensitivities, especially in relation to dealing with matters of sexual violence.

51. Sexual violence victims and others often utilize euphemisms to describe body parts or acts of sex. Interpreters should work closely with investigators and prosecutors to draw up a list of words and the various euphemisms that are used in the culture. This list should be distributed to all staff working on sexual violence investigations and prosecutions. Specialized training of interpreters and language assistance would help them to become more sensitive and adept in dealing with sexual violence victims and witnesses.

Witness Care and Protection⁷

52. The dignity and safety of the victim of sexual violence must always be put at the forefront by investigators and prosecutors. Priority must be placed on witness care to ensure that in the handling of victims, all staff is empathetic, respectful, and careful not to retraumatize victims. All staff that interacts with witnesses should be trained to acknowledge and demonstrate concern in response to distress that witnesses may exhibit.

53. Protection programs should be designed to protect the victims and witnesses against potential reprisals and be capable of responding to various protection needs. In addition, investigators should stay in touch with witnesses, to remain aware of their whereabouts and personal problems.

⁷ A separate and specialized Protocol is being prepared on the crucial issue of witness care and protection. This Protocol will be distributed once it is finalized.

54. Witnesses should be fully informed about the risks they take when they testify in order to make a fully informed decision. They are often *not* explicitly told that although they testify under a pseudonym, the court requires that the accused know the names of the witness testifying against him or her. The risk exists that by the time a witness returns, their name has been leaked in their home area as someone who has testified. This can have a devastating impact on the witness. First, it is a betrayal of the trust that the witness has placed in the international justice institution. Second, it puts the witness at risk of reprisal for having testified. Rape victims are often widows living alone and are even more vulnerable to violence. Third, because of the stigma attached to being a rape victim, a number of the women who agree to testify have not notified their families or their intimate partners that they were raped. For many rape victims, their ability to rebuild their lives in a post-conflict situation is dependent on their marriageability, which drastically diminishes when you are known to be a rape victim.

55. No (international) prosecutor should opt for expediency in securing witnesses by misleading them. If the cost of full disclosure is that the Office of the Prosecutor loses some witnesses, then so be it. It is more important that rape survivors understand fully the risks that they take and choose to come forward fully informed, then later find themselves unwittingly vulnerable and exposed as has happened. In this respect, it is also important to stress that it is unacceptable to make promises to witnesses, in order to persuade them to give testimony, which are not followed up after the given testimony (such as promises of relocation, building of houses, payment of school fees, medical treatment).

56. Counseling services should be made easily accessible to rape victims. As a matter of course, rape victims should be offered the opportunity to meet with a qualified counselor before, during and after testimony. At the ICTR, in a number of cases, rape witnesses who have testified have had their identity revealed which has prompted their intimate partners, previously unaware that they were raped, to leave them. Where appropriate, counseling services should be provided to couples to assist men who have difficulty accepting their partners after discovering they are rape victims.

57. Specialized medical care should be made available to rape witnesses, which should encompass both physical and psychological assistance. Rape victims should receive as a matter of course gynecological care, including HIV testing if they choose it. Of particular concern to rape victims is the issue of HIV/AIDS most likely contracted as a result of being raped. There has been much debate as to whether international tribunals should provide anti-retroviral drugs as part of the medical care provided to victim witnesses. The accused in U.N. custody receive such medication, and for many rape victims, it is seen as a glaring injustice that the men responsible for giving them this death sentence are receiving anti-retrovirals, while they, the victims of these men, are left to die of AIDS. International tribunals need to either provide such medication to victim witnesses or make adequate provisions for relevant health-care institutions to fully meet this need. In addition, proper medical support should be guaranteed after the close of the Tribunal or international court.

58. A tracking system should be developed to follow-up with witnesses' post-trial in order to inform witnesses about the outcome of the case, to provide medical assistance, and most importantly, in order to know definitively how many witnesses have faced harassment, what sort of threats they are receiving, and in which parts of the country this is occurring. Monitoring the safety of witnesses on a regular basis is essential. While the international courts tend to provide good protection for witnesses during trial, there is often little sustained follow up to ensure the protection of witness's post-trial. Witnesses continue to complain of harassment in the form of verbal or other threats they receive after testifying. An effective post-trial mechanism should be designed within the context of each situation.

59. Effective dissemination of information should be provided to witnesses at every critical stage of the case from initial appearance to trial and judgment.

60. Witness care and protection should be a combined effort of different organs of the Tribunal, in particular between the Prosecutor and the Registrar. Closer co-operation between these organs is necessary in order to ensure support to witnesses. It is important to note that so-called *potential* witnesses, namely individuals interviewed by the

Prosecutor who have the potential to give evidence, but who have not yet been formally identified as witnesses in a case, should have access to services provided by the Registrar, such as counseling and medical care.

61. The Tribunal should liaise with local women's and other organizations that can provide support and assistance to women witnesses after the close of the trial in which the witness testified, and, eventually after the close of the Tribunal. Continuing and permanent care should be provided to these witnesses, also after the closure of this Tribunal. In that respect, the Tribunal has to co-ordinate with such agencies in order to ensure adequate continuing care, after witnesses have finished testifying.

62. The Tribunal should create an information sheet that provides information to rape victims in their language about medical or other services that they can obtain in their home areas. Local women's and other organizations could assist the Tribunal in creating this.

An Enabling Courtroom Environment

63. Prosecution counsel and judges should ensure that rape victims are treated with sensitivity, respect, and care when they come forward to testify. In that respect, all parties being part of the judicial process, being judges, lawyers or interpreters, should be trained on how to handle such victims and how to recognize trauma. It requires significant courage for a rape victim to publicly speak about the sexual assault against them due to the stigma and taboo. Judges and prosecution counsel must intervene when necessary to ensure that rape victims are not harangued and harassed on the stand by defense counsel.

64. While clearly the defense has a right to cross-examine witnesses, care should be taken to ensure that the questioning of rape victims is not excessively or gratuitously repetitive. Because some of the trials are joint trials with numerous defendants, rape victims are often subjected to hours, days, and weeks on the stand being cross-examined by several defense counsel, sometimes going over the same questions again and again. If rape charges are not being brought against all the defendants in a joint trial, the cross-examination of the sexual assault should be limited to those charged with rape. It is

believed that if judges could be sensitized, they should be able to control/moderate the nature of the cross-examination of such victims.

65. Courtroom cooperation should be ensured between defence and prosecution to diminish unnecessary time being spent on issues relating to disclosure, etc. in order to limit the need for victims to sit in court for long durations.

66. When handling rape victims, prosecution counsel should strive to create a friendly and reassuring atmosphere. Such an atmosphere would relax the witness, while also winning his/her confidence to talk freely about his/her experience. In addition, it is recommended that witnesses should be given a brief familiarization tour in order to prepare them for the courtroom experience. A good and effective orientation session with respect to the proceedings and the courtroom experience will ultimately affect the evidence the witnesses are able to give on the stand. Rape witnesses should be permitted to have a witness care assistant seated next to them, if necessary, while they testify.

67. Counseling and other services should be provided throughout the trial.

68. Courtroom television screens on the witness stand, which periodically show the face of the accused on the screen, should be turned off if they are upsetting a rape witness. Tissues and water should be provided on the witness stand.