

“When elephants fight, it is the grass that is crushed.”ⁱ

A critical evaluation of the treatment of rape victim-witnesses by the International Criminal Court

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i. During his testimony, Witness 23 referenced an ancient proverb of the Kikuyu people of Kenya, stating “We who are simple people, or just straw, when elephants fight it is the grass that is crushed” (T-53 page 12 line 25- page 13 line 1). While many variations of this proverb currently exist, the basic premise remains the same. When those with political or military power engage in conflict, it is those without power, be it women and children, or civilians more generally, who suffer the most (Walters & Bradbury, 2008). The use of this proverb within the context of this trial proved especially poignant in light of the crimes suffered by the victim-witnesses during the conflict in the Central African Republic.

Abstract

This thesis explores whether the developments in international law, exemplified by the Rome Statutes' codification of numerous sexually violent war crimes and crimes against humanity, as well as the rights and protections afforded to victims, have been implemented as intended with respect to the treatment of rape victim-witnesses appearing before the International Criminal Court. Through a deductive content analysis of the court transcripts from *The Prosecutor v. Jean-Pierre Bemba Gombo* case currently before the court, it was determined that, with a few notable exceptions, many of the central strategies previously identified in the literature as disqualifying, limiting and discrediting the testimonies of rape victim-witnesses appearing before the International Criminal Tribunals for the former Yugoslavia and Rwanda, re-emerged within the context of the International Criminal Court.

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1 - Introduction

Increasingly, war-time sexual violence, specifically rape, has been recognized as a weapon of war (Merger, 2011; Mullins, 2009b; Chinkin, 1994). In particular, war rape is no longer viewed as an end in itself motivated by sexual desire, as the extreme levels of violence that characterize war rape indicate an intent to cause serious harm to the victims, be it physical or psychological torture and injury (Askin, 2003; Farr, 2009).¹ War rape, therefore, functions as a strategic attack perpetrated by militarized groups with intended goals that extend beyond the sexual acts themselves. Specifically, war rape involves the implicit, or explicit, intent to terrorize, destabilize, or destroy a civilian population (Askin, 2003; Chinkin, 1994; Farr, 2009; Merger, 2011; Mullins, 2009b).

This thesis explores whether the developments in international law, exemplified by the Rome Statute's codification of numerous sexually violent war crimes and crimes against humanity, as well as the rights and protections afforded to victims, have been implemented as intended with respect to the treatment of rape victim-witnesses appearing before the International Criminal Court (hereinafter ICC). As such, this thesis represents an exploratory study that seeks to determine if the issues identified in the feminist academic and theoretical literature on the treatment of rape victim-witnesses by the International Criminal Tribunal for the former Yugoslavia (hereinafter ICTY) and Rwanda (hereinafter ICTR), re-emerge within the new legal context of the ICC.

Historically, crimes of sexual violence committed during armed conflict have been largely ignored by international law and war crime tribunals (Askin, 2003; Brownmiller, 1975; Buss, 2007; Copelon, 2000; Cooper, 2002; Farwell, 2004; Haddad, 2010; Maxwell, 2010;

¹ War rape is typified by extreme violence; commonly involving the gang or multiple rapes of victims, oftentimes with the use of weapons or foreign objects (Milillo, 2006).

Nelaeva, 2010; Nowrojee, 2005). As a consequence, war rape has been considered an “invisible crime” throughout history. However, a significant shift in the treatment of rape by international law occurred in the last two decades of the twentieth century, largely on account of the highly visible rapes committed in the former Yugoslavia and Rwanda in the early 1990s and the subsequent “gender jurisprudence”² that emerged from the *ad hoc* tribunals established to address the crimes committed during these two conflicts (Askin, 2004).

These advances in international law reached a pinnacle with the adoption of the Rome Statute in 1998, and the subsequent creation of the ICC. Heavily influenced by the gender jurisprudence and case law established under the ICTY and ICTR, the Rome Statute formally codified, for the first time in the history of international law, a range of sexually violent crimes as both war crimes and crimes against humanity, and afforded numerous rights and protections to victims of war-time sexual violence. This, in combination with the court’s appointment of an unprecedented number of female judges and its mandate to ensure that women are adequately represented at all levels of the court, have led some to theorize that the ICC will act as a “beacon of hope” for victims of war-time sexual violence, as it represents a “woman-friendly institution for the victims and witnesses that appear before it” (Booth & Du Plessis, 2005, p. 242, 258).

While the gender jurisprudence established by the two *ad hoc* tribunals and the subsequent adoption of the Rome Statute represent “revolutionary” and “unparalleled” advances

² Gender jurisprudence refers to the legal advancements achieved by the ICTY and ICTR in the prosecution of sexually violent war crimes; advancements which have in turn influenced the development of the ICC and the Rome Statute. More specifically, this includes the recognition of various forms of sexual violence as both war crimes and crimes against humanity, the prosecution of individuals for these crimes, and the landmark cases that recognized sexual violence as a component of genocide (ICTR), and as a crime of torture (ICTY). Further, it includes the appointment of female judges, the push for more gender-sensitive investigations, the establishment of Victim and Witness Units, and the landmark Rule 96 – significant for its explicit prohibition of evidence concerning the victim’s prior sexual conduct, the necessity for corroboration in cases of sexual violence, and for the limitations it placed on the use of consent as a defence (Askin, 2003; Askin 2004; Copelon, 2000).

in international law – when compared to the centuries of legal silence on crimes committed against women and girls during armed conflict – it is necessary to highlight the numerous problems that have been identified with how victim-witnesses of war-time sexual violence were treated by the *ad hoc* tribunals (Askin, 2003, p. 288-289). Specifically, the feminist academic literature on the prosecution of sexual violence by the *ad hoc* tribunals has identified numerous legal and prosecutorial processes through which the testimonies and narratives of rape victim-witnesses were limited, discredited, disqualified, and therefore silenced, by these international courts.

Through a deductive content analysis of court transcripts from one case currently before the ICC,³ this thesis explores if and how the processes through which the testimonies of victim-witnesses have previously been limited, discredited and disqualified in international courts, re-emerge within the context of the ICC. Buss (2007) argues that research focused on the prosecution of sexually violent war crimes must move away from simplistic evaluations of whether or not these crimes are prosecuted, and instead focus on exploring “how sexual violence is understood and represented” in international law (p 22). Similarly, Henry (2010) argues that while the formal recognition of rape as a crime under international law is laudable, it is important “to critically assess the gap between the rhetoric of justice and the reality for victims when they come to testify at international criminal proceedings” (p. 1103-1104). This thesis, therefore, seeks to address a gap in the existing literature on sexually violent war crimes, as there has been

³ The case selected for analysis is that of *The Prosecutor v. Jean-Pierre Bemba Gombo* (ICC-01/05-01/08); this case involves crimes committed during the armed conflict in the Central African Republic. This case was selected for analysis as it is one of only two cases currently before the ICC that contained charges related to sexual violence and had proceeded to the trial phase. Further, of these two cases, *The Prosecutor v. Jean-Pierre Bemba Gombo* contained substantially more testimony relating to sexual violence than the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*. Finally, *The Prosecutor v. Jean-Pierre Bemba Gombo*, proved an important case for analysis on account of its focus on crimes of sexual violence (with two of the five charges against the accused pertaining to rape), and for its prosecution of such a high level military official (the president and commander-in-chief of the *Mouvement de Liberation du Congo*).

limited critical reflection on how the increased criminalization of war rape will affect the experiences of women who testify to their victimization (Engle, 2005, p. 784; Sharratt, 2011).

Further, this thesis endeavours to address a gap identified in the wider body of criminological research. Specifically, Mullins (2009a) and Woolford (2006) argue that the discipline of criminology has largely overlooked the topic of crimes committed during armed conflict. Moreover, the limited work done on this topic, principally by critical criminologists, has additionally failed to address “the role of sexual violence and other gendered issues” in relation to these crimes, in a meaningful way (Mullins, 2009a, p. 31). This lack of critical reflection acts to limit an understanding of how crimes of mass violence, including those that target women, continue to impact societies and perpetuate cycles of violence post-conflict (Woolford, 2006). Further, Woolford (2006) argues that this “criminological inattention contributes to a further disregard for and normalization of rape within warfare and genocide” (p. 89). Therefore, by drawing upon the existing feminist academic literature and research on this topic, this thesis seeks to contribute to the limited body of criminological research on sexually violent war crimes.

2 - War Rape and International Law

2.1 - War Rape

It is specifically rape under orders. This is not rape out of control. It is rape under control. It is also rape unto death, rape as massacre, rape to kill and to make the victims wish they were dead. It is rape as an instrument of forced exile, rape to make you leave your home and never want to go back. It is rape to be seen and heard and watched and told to others: rape as spectacle. It is rape to drive a wedge through a community, to shatter a society, to destroy a people. It is rape as genocide (MacKinnon, 1994, p. 11-12).

Increasingly, war-time sexual violence, rape in particular, has been recognized as a weapon of war. This recognition stems from an understanding that rape functions as a strategic weapon used to terrorize, displace, or destroy a civilian population (Farr, 2009; Merger, 2011). War rape is characterized by extreme violence, which in turn indicates an intention to cause serious harm, be it physical or psychological torture and injury, to the victim (Askin, 2003; Farr, 2009; Milillo, 2006). As such, war rape is not viewed as an end in itself motivated by sexual desire, but is instead recognized as a means through which strategic military goals are achieved (Mullins, 2009b, Chinkin, 1994). War-time sexual violence is a gendered phenomenon, as women and girls represent the vast majority of victims (Askin, 2003; Campanaro, 2001; Farr, 2009; Milillo, 2006; Thomas & Ralph, 1994).⁴ War rape is often understood to be a result of

⁴ While women and girls do represent the vast majority of victims, it is important to recognize that boys and men are victims of war rape and other forms of sexual violence perpetrated during armed conflicts (Carpenter, 2006). Specially, men and boys suffer various forms of sexual and gender violence, including, but not limited to: blunt force trauma to genitals; sexual mutilation, including castration; rape and other forms of sexual assault; sex-specific killings; forced conscription; and the forced rape/sexual assault of family members or other captives (Carpenter, 2006; Linos, 2009). Apart from the horrific physical consequences experienced by victims, the social and cultural consequences often prevent many men from speaking about their victimization, and from pursuing medical attention or legal justice; this silence further limits the information available on this issue (Carpenter, 2006). While being aware of Carpenter's (2006) critique that the majority of literature on war rape only mentions the victimization of men in passing, this project, due to time and length restrictions, cannot explore this issue in sufficient depth. However, in an attempt to address this discrepancy, a discussion of the common conflation of the term "gender" with "women," in relation to gender crimes, and the effect this can have on the non-recognition of male-victimization, is included. Furthermore, instances of male victimizations do appear in the transcript data and were subject to coding and analysis in order to highlight both its occurrence and its treatment by the ICC. For a more in-depth examination of the sexual victimization of men during armed conflict, please refer to Carlson (2006), Carpenter (2006), and Linos (2009).

gender inequality and patriarchal and misogynistic attitudes; further, it results in specific forms of gendered shame and stigma that significantly impact victimized women and girls, and severely limits both their ability to talk about their victimization and to pursue legal justice (Milillo, 2006).

2.2 - Historical Laws on War Rape

While instances of war rape and other forms of sexual violence have been perpetrated in the vast majority of conflicts throughout history,⁵ they have traditionally been dismissed as inevitable by-products of war and left largely unaddressed by international law and historical war crime tribunals (Askin, 2003; Buss, 2007; Copelon, 2000; Haddad, 2010; Campanaro, 2001).⁶ On the few occasions where rape was addressed by historical legal bodies or treaties, these provisions were typically underused or, more commonly, trivialized and misrepresented the concept of sexual violence in armed conflict by characterizing it as an attack against male property or against a woman's honour (Askin, 2003; Askin, 2004; Gardam, 1997).⁷

This characterization denied the physical and emotional harm caused by rape, as it placed emphasis on the issue of shame and not on the violent nature of the crime (Thomas & Ralph, 1994). Further, this characterization required a degree of sexual purity, or virginity, on the part of

⁵ While the literature supports the claim that instances of sexual violence do occur in all armed conflicts, Wood (2006;2009) highlights that the extent to which sexually violent crimes occur, and the types of crimes which are perpetrated, “varies dramatically across conflicts, armed groups within conflicts, and units within armed groups” (2009, p. 132). Therefore, it is important to bear in mind that sexually violent war crimes are not uniform in nature across conflicts; and the numbers and identities of victims will vary dependent on the wider context of the conflict.

⁶ In addition to the lack of redress offered by historical war crime tribunals, crimes against women have also been largely unaddressed by alternative post-conflict justice mechanisms. For example, Borer (2009) argues that the South African Truth and Reconciliation Commission largely failed to uncover, address, and understand the harms suffered by women under the Apartheid system, having placed emphasis on addressing civil and political violations over social rights abuses.

⁷ For example, the 1907 Hague Conventions implicitly prohibited crimes of sexual violence by stating that “family honour and rights” were to be respected in warfare (Askin, 2003). In the Fourth Geneva Convention 1949 and 1977 Additional Protocols, rape was more explicitly prohibited under Article 27, which stated that “women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault” (Thomas & Ralph, 1994, p. 94). Further, Article 4(2) (e) of Protocol II prohibited “outrages upon personal dignity, in particular humiliation and degrading treatment, rape, enforced prostitution and any form of indecent assault” (Askin, 2003, p. 304).

the victim as a precondition necessary for the loss of honour; these requirements are however, premised on social concepts “constructed by men for their own purposes,” with little regard for how women perceive or experience sexual violence (Gardam, 1997, p. 57). Thus, the emphasis placed on honour and shame reduced rape to a crime against male property, and did not recognize it as a violation of a woman’s personal autonomy or physical integrity (Askin, 2003; Bedont & Hall-Martinez, 1999; Charlesworth, 1999; Gibson, 1993; Maxwell, 2010; Ni Aolain, 1997; Thomas & Ralph, 1994). Copelon (1994) argues that the core issue responsible for the historical legal inattention paid to war rape was this “conceptualization of rape as an attack against honour, as opposed to a crime of violence” (p. 249).

The historical legal inattention signals a differential treatment of rape as a crime under international law, evidenced by both the absence of rape in legal statutes, and by the failure to prosecute rape under the guise of other legally defined crimes, to which rape often amounts in war. In particular, Thomas and Ralph (1994) argue that because rape commonly functions as a form of torture or cruel and inhumane treatment in conflict, there has long been the possibility of redress under international law (p. 88). However, the failure to prosecute rape under these categories “underscores the fact that the problem – for the most part – lies not in the absence of adequate legal prohibitions, but in the international community’s willingness to tolerate the subordination of women” (Thomas & Ralph, 1994, p. 88).

2.3 - The International Criminal Tribunals for the former Yugoslavia and Rwanda

A significant shift in the treatment of war rape by international law did, however, occur in the latter half of the twentieth century. This shift is partially attributed to a change in the nature of modern warfare; specifically, the increased strategic targeting of civilian populations by militarized groups with such attacks as mass rape (Askin, 2003; Skjelsbaek, 2001). This

strategic use of war rape was heavily evidenced in the conflicts in the former Yugoslavia and Rwanda. During the Rwandan Genocide, it is estimated that between 250,000 and 500,000 women were raped or exposed to other forms of sexual violence (Mullins, 2009a, p. 16). While many women were killed during or following their rapes, many were purposefully infected with STIs and HIV by their attackers so that their pain and suffering was prolonged. The use of rape in the Rwandan Genocide fulfilled several strategic goals, and most were planned and ordered by those who orchestrated the genocide (Mullins, 2009b). During the civil war in the former Yugoslavia, it is estimated that between 25,000 and 50,000 women were raped in Bosnia-Herzegovina alone (Snyder, 2006, p. 189). The victims were predominantly Bosnian Muslim women who were commonly held in *de facto* “rape camps,” where they were subjected to multiple rapes and were often forcibly impregnated. These rapes formed part of a wider “ethnic-cleansing” campaign perpetrated by Serbian military and militia groups against the Bosnian Muslim population (Snyder, 2006).

The ICTY and ICTR were established in the early 1990s to address the crimes committed during these two conflicts, and while the tribunals’ statutes were premised on the Geneva Accords, which largely failed to address sexually violent war crimes, the magnitude at which rape was committed during these conflicts demanded a level of redress not seen before.⁸ The tribunals have since been recognized for providing “groundbreaking redress” for crimes of sexual violence, and for their significant contributions in establishing gender jurisprudence and case law on war-time sexual violence (Askin, 2003; Balthazar, 2006; Campbell, 2002; Nelaeva, 2010). Despite these achievements, the tribunals have been criticized principally because they were not used to their fullest potential in prosecuting crimes of sexual violence, as only a small

⁸ Please refer to Askin (2003) for a thorough review of the two *ad hoc* Tribunals’ statutes.

number of offenders were tried and prosecuted, and on account of how they treated rape victim-witnesses who testified before the courts (Askin, 2003; Campbell, 2004; Reynolds, 1998).

2.3.1 - International Criminal Tribunal for the former Yugoslavia

The ICTY has generally been regarded as more successful than the ICTR when it came to the prosecution of sexual violence (Haddad, 2010). This success is associated with both the higher number of rape indictments and prosecutions achieved, and the gender jurisprudence established by the ICTY. As of 2008, 23 individuals have been convicted of rape or sexual violence as a crime against humanity or as a violation of the Geneva Conventions by the ICTY (Haddad, 2010, p. 7). The gender jurisprudence established by the ICTY is principally associated with the gender-sensitive measures that were incorporated into its operation. Specifically, the ICTY established Victim and Witness Units, which were tasked with providing counseling and support to victim-witnesses, and included Rule 96 in the Rules of Procedure and Evidence (hereinafter Rule 96) (Haddad, 2010). Rule 96 made corroboration of a rape victim's testimony unnecessary;⁹ limited consent as a defence generally, and prohibited in entirety if the victim was threatened or under duress; and made the sexual history of the victim inadmissible as evidence¹⁰ (Campanaro, 2001; Campbell, 2002; Coan, 2000; Haddad, 2010; Ni Aolain, 1997). As such, Rule 96 represents an "explicit rejection of standards of evidence which have traditionally discriminated against women," have impeded their access to justice, and contributed to their

⁹ Dispensing with the requirement of corroboration is of central importance, as it counteracts the misogynist assumption that victims of sexual violence are inherently untrustworthy or untruthful, and affords them the same presumption of reliability as victims of other crimes (Coan, 2000; Phelps, 2006).

¹⁰ The legal relevance attributed to a woman's sexual past has often been a central source of feminist legal critique, as it implies that a "woman with a sexual history was an unreliable witness," or worst, a deserving victim (Ni Aolain, 1997). While the importance of this rule is undeniable, in practice it had very little impact on the Tribunal, as the victim's prior sexual history had very little bearing on the types of rape cases tried by the Tribunal (Coan, 2000).

common resistance to report and testify to their victimization (Fitzgerald, 1997, p. 639;¹¹ Phelps, 2006). Thus, at least in theory, Rule 96 represented a progressive advancement in the prosecution of rape; however, in practice the elements of Rule 96 were not always upheld in the cases before the ICTY (Coan, 2000; Haddad, 2010).

In brief, the gender jurisprudence established by the ICTY included the recognition that sexual violence generally, and rape in particular, constituted a form of torture, a crime of genocide, and a crime against humanity. Furthermore, the ICTY established definitions for both the *actus reus* and *mens rea* of rape under international law, and was the first international court to prosecute a case exclusively for crimes of sexual violence (Campanaro, 2001; Engle, 2005; Haddad, 2010). Engle (2005) argues that there are three core judgments that represent the jurisprudence on rape established by the ICTY; the *Čelebići Judgment*; the *Furundžija Judgment*; and the *Kunarac Judgment* (p. 798).

The central elements of the *Čelebići Judgment*¹² that contributed to the gender jurisprudence established by the ICTY were its findings that rape could constitute a crime of torture and as such be considered a grave breach under international law, and for finding individuals responsible for superior command for crimes of sexual violence committed by their subordinates when they failed to prevent, halt, or punish the crimes (Askin, 2003; Askin, 2004; Engle, 2005). With reference to its findings on torture, the *Čelebići Judgment* is notable for convicting one of the accused (Delić) for torture as a grave breach for the rapes he committed

¹¹ Fitzgerald (1997) offers a thorough review of the various amendments made to Rule 96 that affected such elements as the defence of consent.

¹² The *Čelebići Judgment*, so named for the detention camp in which the crimes were committed, involved the prosecution of four accused for a number of crimes including crimes of sexual violence committed against detainees in the camp. Specifically, the crimes which were the focus of the case included the forced performance of oral sex by two male detainees on each other, and the rapes of several female detainees by the individuals accused, and those under their command (Askin, 2004). The accused included, Zejnil Delalic, Zdravko Muciae, Hazim Delić, and Esad Landzo. The Judgment was handed down on November 16, 1998 by Trial Chamber II. For a detailed account of the case and Judgment, please refer to Askin (2003; 2004).

against two women. Specifically, rape was deemed to constitute the *actus reus* for the crime of torture as the Trial Chamber concluded that the rapes were committed with the intention of obtaining information from the victims, as a form of punishment, as a means of coercion and intimidation, as a form of sex discrimination,¹³ and as a means to humiliate the women (Askin, 2004). Further, the Trial Chamber determined that, for the same reason, rape could constitute cruel treatment (Coan, 2000). The determination that rape constituted a grave breach represented an unprecedented accomplishment, as the majority of cases before the ICTY had charged rape only as a violation of the laws or customs of war (Coan, 2000).

The Furundžija case centered on the multiple rapes of Witness A, indicted as crimes of torture and outrages upon personal dignity, committed while she was being interrogated by Anto Furundžija and Accused B, both of whom were sub-commanders in the militia group known as the Jokers (Askin, 2004; Coan 2000). The *Furundžija Judgement* is notable for its acknowledgement that the crimes committed against one victim were serious enough to constitute a war crime deserving of prosecution by an international criminal tribunal (Askin, 2003; Askin, 2004). The Judgement further contributed to the gender jurisprudence of the ICTY for its developments in recognizing rape as a form of torture;¹⁴ its establishment of a legal definition of rape under international law;¹⁵ its conclusion that “any form of captivity vitiates

¹³ The Trial Chamber concluded that the rape of one female detainee was for “discriminatory purposes;” specifically it concluded that this female detainee was targeted with rape (as the means through which she was tortured) based on the fact that she was female (Askin, 2003). This signals an acknowledgement by the ICTY that women are often tortured in specific ways because of their gender and that in turn, this signals a form of sex discrimination (Askin, 2003).

¹⁴ Specifically, the Trial Chamber concluded that being forced to watch the rape of another prisoner amounted to a form of torture (Askin, 2003). Furthermore, the Appeals Chamber rejected the defence’s claim that the prosecution had failed to provide evidence that the sexual violence amounted to torture, concluding instead that it was “inconceivable that an argument could be made that sexual violence was not serious enough to amount to torture” (Askin, 2003, p. 332).

¹⁵ The Furundžija Trial Chamber concluded the elements of rape included “(i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person” (Kittichaisaree, 2001, p. 113; Schomburg & Peterson, 2007, p. 133).

consent” in cases of sexual violence; and the Appeals Chamber’s rejection of the defence’s claim that “female Judges with gender advocacy backgrounds are inherently biased against men accused of rape crimes” (Askin, 2003, p. 327-330).

The *Kunarac Judgement*,¹⁶ also referred to as the Foča case, greatly contributed to the gender jurisprudence of the ICTY, as it was the first case in which rape was prosecuted as a crime against humanity, and was the first case to “adjudicate rape and enslavement for crimes essentially constituting sexual slavery” (Askin, 2003, p. 333; Askin, 2004; Buss, 2002; Kalosieh 2003).¹⁷ Furthermore, the Judgment is notable for having expanded on the elements of rape established in previous judgments, by adding the concepts of consent and sexual autonomy (Askin, 2004). The jurisprudence established on the crime of enslavement is arguably the most groundbreaking aspect of the *Kunarac Judgement*, as it later influenced the Rome Statute’s incorporation of the crime of sexual slavery (Argibay, 2003; Askin, 2003; Dixon, 2002). Further, Dixon (2002) argues that by charging and convicting the defendants for the crime of enslavement, based on the sexual enslavement of women and girls in the detention camps, the tribunal implicitly recognized their sexual victimization as one which was inherently violent and coercive, and not one that simply violated their honour.

2.3.2 - The International Criminal Tribunal for Rwanda

Despite the rampant sexual violence perpetrated throughout the Rwandan Genocide, rape was not a central focus of the ICTR’s prosecution strategy (Balthazar, 2006; Buss, 2009; Campanaro, 2001). As of December 2008, only 15 of the 48 individuals who were charged and

¹⁶ In February 2001, the Trial Chamber convicted Dragoljub Kunarac, Radomir Kovač, and Zoran Vuković for a variety of crimes relating to the enslavement and rape of women and girls held in detention facilities in the Foča region. In particular, Kunarac, Kovač, and Vuković, were found guilty of crimes against humanity and war crimes for the rape and torture of women held in these facilities. Kunarac and Kovač were also found guilty for the crime against humanity of enslavement (Engle, 2005).

¹⁷ As the crime of sexual slavery did not exist under the ICTY statute, and the tribunal was unable to create new laws, it instead charged the Kunarac and Kovač for both rape and enslavement as crimes against humanity (Argibay, 2003).

convicted by the ICTR had charges related to rape or sexual violence, and only five of these 15 were found guilty of the rape-related charges (Buss, 2009, p. 151). The ICTR's failure to adequately address rape is partially attributed to the tribunal's preference in charging only those individuals directly responsible for crimes of sexual violence and its reluctance to charge individuals with command responsibility. This preference for individual responsibility limited the possibility for successful prosecutions as this charge requires a higher degree of evidence and corroboration, which often proved difficult to obtain in the context of the genocide (Buss, 2007; Buss, 2009; Haffajee, 2006). Furthermore, the tribunal's failure to investigate and charge rape is also attributed to insensitive and inadequate investigative procedures. Specifically, many of the ICTR investigators were male, received little to no training for interviewing rape victims, and sometimes failed to provide adequate privacy protections to witnesses, which in turn placed several women at risk for reprisals and stigmatization for testifying; more distressing, several of the investigators were in fact genocide suspects themselves (Campanaro, 2001; Haddad, 2010; Nelaeva, 2010). The ICTR also operated with a much smaller budget and under shorter time constraints, compared to the ICTY. This, coupled with the overall inexperience on the part of the ICTR staff in prosecuting sexually violent war crimes, often meant that the chief prosecutor dedicated resources to investigating other crimes which fell under the tribunal's mandate. On account of this reality, it would appear that crimes of rape and sexual violence were of a "secondary concern" for the tribunal (Nelaeva, 2010, p. 12).

However, it is necessary to note that, despite these limitations, the tribunal was able to produce several significant findings that contributed to the gender jurisprudence on war rape (Haddad, 2010). Specifically, the tribunal acknowledged in detail the mental and physical harms caused by rape; recognized the role the media played in inciting sexual violence; was the first

international court to indict a woman for crimes of rape; and handed down the landmark *Akayesu Judgement* (Askin, 2003; Balthazar, 2006).

The *Akayesu Judgement* is considered a “precedent-shattering judgement,” as it defined rape for the first time under international law and concluded that rape and other forms of sexual violence were used as instruments of genocide and constituted crimes against humanity, as they had formed part of a “widespread and systematic attack directed against civilians” (Askin, 2003, p. 318; Campanaro, 2001; Copelon, 2000; Haddad, 2010; McHenry, 2002; Mullins, 2009a, p. 23; Phelps, 2006). Therefore, Jean-Paul Akayesu¹⁸ became the first individual convicted by an international tribunal for crimes against humanity and genocide in relation to crimes of sexual violence (Askin, 2003).¹⁹ Importantly, in determining that rape could be used as an instrument of genocide the Trial Chamber did not focus on the “reproductive consequences” of rape, but instead found that sexual violence could constitute a form of genocide primarily on account of the “physical and psychological harm to the woman, and secondarily on the potential impact of this on the targeted community” (Copelon, 2000, p. 228).²⁰ While the *Akayesu Judgement* was of monumental importance for establishing gender jurisprudence under the ICTR, when the case law of the tribunal is examined as a whole, the Akayesu case represents “an anomaly within the larger pattern of neglect and silence about issues of sexual violence and rape” perpetrated during the Rwanda Genocide (Haddad, 2010, p. 7; Haffajee, 2006).

¹⁸ Jean-Paul Akayesu was the mayor of the Taba commune in Rwanda, and was charged with ordering the crimes which were perpetrated against the Tutsi population in Taba.

¹⁹ The Trial Chamber also recognized that forced nudity constituted a form of sexual violence and “inhumane acts,” and as such a crime against humanity (Askin, 2003, p. 318).

²⁰ The Trial Chamber did recognize forced pregnancy as a “potential crime,” when it was the explicit intent of sexually violent war crimes; a conclusion that had significant jurisprudential importance, as it arguably “paved the way towards explicitly including ‘forced pregnancy’ into the International Criminal Court Statute” (Balthazar, 2006, p. 46).

2.4 - Feminist Activism and International Law

Many of the advancements achieved in the prosecution of sexual violence under international law by the *ad hoc* tribunals, have been attributed to both the international pressure placed on the tribunals to address these crimes by women's organizations, feminist activists and scholars;²¹ and to the presence and hard work of female investigators, prosecutors and judges within the tribunals, who helped "ensure that gender and sex crimes [were] properly investigated, indicted, and prosecuted" (Askin, 2003, p. 346; Askin, 2004; Buss, 2007; Cooper, 2002; Copelon, 2000; Engle, 2005).²²

The advocacy work of feminist organizations continued after the two *ad hoc* tribunals, and their efforts, especially those of the Women's Caucus for Gender Justice (hereinafter the Women's Caucus)²³ had a significant influence on the adoption of the gender-sensitive provisions and laws in the Rome Statute, achieved during the Rome Conference.²⁴ Specifically,

²¹ One explanation put forward in the literature as to why the ICTY was more successful in addressing gender and sex-related crimes than the ICTR, is that there was a higher level of mobilization, and sustained level of pressure, on the part of feminist organizations around the Yugoslavian tribunal than the Rwanda tribunal (Haddad, 2010).

²² The appointment of women prosecutors and judges in the tribunals has been highlighted as a crucial step for ensuring that gender crimes and crimes of sexual violence are properly addressed under international law (Askin, 2003). This argument is supported by numerous examples from the ICTY and ICTR, where female judges and prosecutors ensured that sexually violent crimes were investigated and charged; specifically the *Akayesu*, *Čelebići*, *Eleebice*, *Furundžija*, *Kunarac*, and *Kvoeka* Judgments (Askin, 2003; 2004). Copelon (2000) also notes the influence of two of the female ICTY judges, Judge Gabrielle Kirk McDonald and Judge Elisabeth Odio-Benito, in the adoption of Rule 96 (p. 228). Furthermore, there is some evidence to suggest that "survivor-witnesses of sex crimes are less reluctant to give testimony to the courts when female jurists are present" (Askin, 2003, p. 318).

²³ The Women's Caucus is comprised of feminist scholars, activists and legal practitioners from around the world. While the Women's Caucus was only officially formed in 1997, the groups that comprised it had lobbied the 1995 "Preparatory Committee on the Establishment of an International Criminal Court" in an effort to have crimes against women properly addressed by the Statute. The Women's Caucus officially came into being in 1997, after earlier drafts of the Rome Statute demonstrated that both the government representatives and human rights groups involved were failing to address gender issues in a meaningful way and the necessity to have a more unified approach to lobbying was recognized (Bedont & Hall-Martinez, 1999; Moshan, 1999; Oosterveld, 2003; Spees, 2003).

²⁴ The Rome Conference "was the culmination of a negotiating process that began in 1989 with a request by the General Assembly of the International Law Commission to address the establishment of an international criminal court" (Arsanjani, 1999, p. 22). The Rome Conference lasted for five weeks, and on July 17, 1998, the Rome Statute of the International Criminal Court was adopted, with 120 votes for, 7 against, and 21 abstentions (Day & Reilly, 2005, p. 361; Moshan, 1999, p. 170). The Statute required 60 ratifications before it could enter into force, which was achieved on April 1, 2002; the International Criminal Court came into legal existence on July 1, 2002 (Day & Reilly, 2005, p. 361). Please refer to Oosterveld (2003) for a lengthy discussion of the various debates concerning the inclusion of sexually violent war crimes throughout the Preparatory Committee and Rome Conference.

the Women's Caucus advocated to ensure that a gendered perspective was included throughout the entirety of the Rome Statute, and that a wide range of sexually violent crimes were codified as distinct offences and also recognized as constituting other crimes including torture, enslavement, genocide, and inhumane treatment (Bedont & Hall-Martinez, 1999; Buss, 2007; Copelon, 2000; Engle, 2005; Oosterveld, 2003). In advocating these goals, the Women's Caucus drew on both the gender jurisprudence and successes of the ICTY and ICTR, as well as on the failures and perceived shortcomings of the two *ad hoc* tribunals (Bedont & Hall-Martinez, 1999; Booth & Du Plessis, 2005; Engle, 2005).

3 - Feminist Jurisprudence and Feminist Legal Theory

This thesis is grounded within a feminist theoretical perspective; specifically it draws upon the central concepts and arguments of international feminist jurisprudence and feminist legal theory, which have influenced much of the existing academic literature on the treatment of crimes against women by international law. The following section will briefly outline the general theoretical themes central to feminist jurisprudence, followed by a more thorough discussion of the central arguments contained within the feminist legal literature on the prosecution of sexual violence.

3.1 - Feminist Jurisprudence and International Feminist Legal Theory

Feminist jurisprudence and legal theory, similar to other critical legal theories, examines the political, historical, and cultural contexts in which laws are created and practiced. More specifically, feminist legal theory seeks to expose how domestic and international legal systems both perpetuate and create the unequal position of women in society, and to demonstrate how law is grounded within “patriarchy, as well as in class and ethnic divisions” (Charlesworth, Chinkin & Writght, 1991, p. 613; Smart, 1989, p. 88). While there are multiple schools of feminist jurisprudence and legal theory, most feminist scholars recognize the benefit in having a plurality of voices, perspectives, and methods to challenge the dominant legal voice and to “capture the reality of women’s experiences [and the] gender inequality perpetuated within legal systems” (Charlesworth et al., 1991, p. 613; Charlesworth, 1999).

Throughout the history of the western legal tradition, “the primary linguists of law have almost exclusively been white, educated, economically privileged men” (Finley, 1989, p. 892). These men defined, interpreted, and assigned particular meanings to law that were consistent with their perspectives and world views; as such, law and legal discourses can be understood as

“gendered,” as they privilege a masculine perspective (Charlesworth, 1999; Finley, 1989).

Feminist legal theory and jurisprudence seeks to expose the masculine underpinnings of law and the gendered nature of legal reasoning, to challenge the claim that law operates in a neutral and objective fashion, and therefore, to demonstrate how law often effectively silences the voices of those whose perspectives are not reflected or reinforced in its practicing, principally women and minority groups.

International feminist jurisprudence and legal theory more specifically focuses on exposing and documenting how international humanitarian law operates “in a discriminatory fashion in relation to women” and gender issues (Kinsella, 2006, p. 166). Further, it seeks to demonstrate how international law is “laden with explicit and implicit values alien to women’s experiences,” and to in turn expose “the invisibility of women and their experiences” in international law (Kalajdzic, 1996, p. 459-460; Charlesworth et al., 1991, p. 644). International feminist legal theory is not concerned with simply refining and reforming existing law, but instead seeks to challenge the basic assumption upon which it operates, including the assumptions of neutrality and universality, as well as exposing the biased and discriminatory attitudes present in international legal practices (Charlesworth et al., 1991, p. 644). A central normative goal that underlies this work is the possibility of providing discursive space for alternative voices to be heard, and to potentially enable the creation of alternative justice responses (Charlesworth et al., 1991).

A gendered hierarchy is evidenced in international law and post-conflict justice initiatives (Charlesworth et al., 1991; Charlesworth, 1999; Gardam, 1997). Structurally, the underrepresentation of women in international legal institutions represents “an obvious sign of power differentials between men and women” (Charlesworth, 1999, p. 381). These institutions

are patriarchal in nature, as men almost exclusively occupy the positions of power, control the creation and practice of international law, and make decisions as to which crimes will be prosecuted (Charlesworth et al., 1991). As such, international law and legal norms reflect men's experiences and perspectives of armed conflict and have remained relatively resistant to the incorporation of women's voices and feminist critique (Charlesworth, 1999; Charlesworth et al., 1991; Gardam, 1997). While women have achieved significant advancements in international law,²⁵ women as a group, defined within the discourses of international law, continue to occupy particular gendered positions, "often as victims, particularly as mothers, or potential mothers, in need of protection" (Charlesworth, 1999, p. 381; Hagay-Frey, 2011).

Further within the gendered hierarchy of international law, certain crimes and issues are prioritized and others regarded as secondary concerns. Specifically, international law privileges the "public" activities of States and state agents, as well as political and economic issues, over social and humanitarian concerns, which have commonly been regulated to the "private" sphere (Borer, 2009; Charlesworth et al., 1991; Chinkin, 1994; Gardam, 1997; Goldberg & Kelly, 1993). This public/private dichotomy evidenced in both domestic and international legal discourses, is a central binary construction critiqued by feminist legal theory (Charlesworth et al., 1991; Gardam, 1997). As violence against women has commonly been "viewed as falling on the private side of the public/private dichotomy," it has largely been shielded from "public investigation, scrutiny, and prosecution" (Haddad, 2010, p. 4). Even within the context of armed conflict, rape and other forms of sexual violence are still commonly regarded as private crimes perpetrated by individual actors (Chinkin, 1994; Goldberg & Kelly, 1993). Thus, the failure of

²⁵ As previously discussed in the context of the two *ad hoc* Tribunals, where the increased presence of female Judges and Prosecutors proved pivotal in the successful prosecution of numerous sexually violent war crimes; and further demonstrated by the influence of the Women's Caucus in the development of the Rome Statute and its adoption of gender sensitive measures (Sharratt, 2011).

international law to adequately address war-time sexual violence is often attributed to the persistent construction of it as a private crime. A consequence of this distinction intended or not, is the continued invisibility of crimes against women to international legal responses (Bedont & Hall-Martinez, 1999; Charlesworth, 1999; Chinkin, 1994; Goldberg & Kelly, 1993; Mackenzie, 2010).

On the few occasions when rape is prosecuted under international law, the private/public dichotomy is not necessarily overcome. For example, Charlesworth (1999) argues that the ICTR's prosecution of rape as a component of genocide defined rape as a crime "not because it is a crime of violence against women and a manifestation of male dominance, but because it is an assault on a community defined only by its racial, religious, national or ethnic composition" (p. 387). In effect, rape as a component of genocide enters the public sphere as it is defined as a crime against a community, and not against individual women. Thus, international legal definitions of rape in the context of war and genocide incorporate and perpetuate the private/public distinction. The collectivity, arguably defined by the men within it, is the focus, and the private realms of individual women's lives are left unexamined. Consequently, MacKinnon (1994) argues that "human rights have not been women's rights," as the formal legal recognition of crimes committed against women is often limited to the crimes that also happen to men (p. 6). Thus, crimes committed in the public sphere against men and women, especially when they involve economic and political offences, are recognized as crimes against humanity, whereas the abuses to which women are commonly subjected in their private homes by spouses and relatives are not recognized as constituting a violation against humanity (MacKinnon, 1999). Therefore, MacKinnon argues that women are not recognized as constituting humans in their

own right under international law, as “what is done to women is either too specific to women to be seen as human or too generic to human beings to be seen as specific to women” (1994, p. 6).

3.1.1 - Gender and Women

Several feminist legal theorists have drawn attention to the common tendency within both international legal discourses, and the feminist academic literature itself, to conflate the concepts of “women” and “gender” (Finley, 1998; Carpenter, 2006; Charlesworth, 2008). When attempts are made to adapt international law to incorporate women and to address the crimes committed against them, the common call is for the integration of a “gendered” approach, or for “gender-mainstreaming” (Carpenter, 2006).²⁶ However, this common association between the concepts of gender and women creates several undesirable consequences (Charlesworth, 2008). Primarily, it has the effect of reinforcing the concept of men as naturally “ungendered,” or genderless, and thereby reinforces the male ideal and perspective as natural and the legal norm (Charlesworth, 2008, Finley, 1989).

This in turn perpetuates the tendency in legal discourses to utilize and reinforce binary systems of logic: the linguistic association that is formed between gender and women, and that between men and the (international) legal norm, creates a system in which women’s issues or gender issues are “understood as partial, both in the sense of being incomplete and being biased” (Finley, 1989, p. 888). Thus, the masculine legal norm is associated with tradition, objectivity and reason, whereas women and gender issues are associated with bias, emotion and subjectivity (Finley, 1989; Sharratt, 2011). An example of this is evidenced in the ICTY’s Furundžija case; specifically in the defence’s claim that because Judge Florence Mumba had “previously severed

²⁶ For example, Resolution 1325 adopted by the United Nations’ Security Council, ensures, amongst other measures, that in negotiating and implementing peace agreements a “gender perspective” is adopted, and “gender mainstreaming” is incorporated into the process (Chinkin, 2003, p. 8). However, the particulars of “gender mainstreaming” place specific emphasis on the status and inclusion of women in the negotiation process (Chinkin, 2003). While an important emphasis in light of the past exclusion of women from peace negotiation processes, the conflation of “gender” and “women” is perpetuated.

as a member of the UN's Commission on the Status of Women, condemned rape as a war crime and urged its prosecution, she was predisposed to promote a common feminist agenda, and should have been disqualified for having at least an appearance of bias" (Askin, 2003, p. 331-332; Askin 2004). While the Appeals Chamber ultimately upheld the judgement and dismissed this allegation, the association between gender expertise and bias still demonstrates a tendency within law to uphold a male norm as the objective Truth (Askin, 2003).

The conflation of women and gender also produces undesirable consequences for men under international law. While in theory, "gender-based violence" is understood as an attack against an individual on account of their gender, and therefore should include gender attacks against men and boys, the common approach of almost exclusively linking the issues of violence against women and gender violence often acts to mask the gendered crimes committed against men (Carpenter, 2006). As such, issues of sexual mutilation, sex-selective massacres or forced conscription – crimes which target men and boys on account of their gender – are not commonly discussed through the lens of "gender crimes" (Carpenter, 2006).

Charlesworth (2008) argues that associating gender almost exclusively with women reinforces an understanding of gender as connected to biological sex, and therefore fails to highlight its social construction. Kinsella (2006) argues that the vast majority of academic literature and legal activism on international law and crimes of sexual violence remains unreflective on the conflation of gender and women, and its associated disadvantages. Thus, Carpenter (2006) argues that it is necessary to redefine "gender" in academic and advocacy discourses and to extend the understanding of who is victimized by gender crimes to be more inclusive of men, rather than continually "reifying an essentialized notion of women as victims

and men as perpetrators that feeds into all forms of gender-based violence endemic in war-affected areas” (p. 99).

3.1.2 - A Feminist Critique of Legal Rights

A central tenet of feminist theory is the normative goal of overcoming the subordination and victimization of women (Marshall, 2006). Feminist jurisprudence and legal theory strive to contribute to this normative ambition through “highlighting and critiquing law’s gender bias through the analysis of existing laws” (Marshall, 2006, p. 27-28). For this reason, Smart (1989) argues that feminist engagement with law must move away from a traditional liberal feminist focus on the acquisition of legal rights as an avenue for achieving equality for women. While the focus on legal rights was “politically appropriate in the early stages of the feminist movement,” when men and women were not afforded the same rights under law, a continued focus on rights may not benefit women presently or lead to further advancements for women’s equality (Charlesworth et al., 1991, p. 634). In particular, this focus does little to challenge or change the gendered nature of law and its inability to recognize different experiences and perspectives; nor does it address the social, political, and economic power imbalances between men and women (Charlesworth et al., 1991; Gardam, 1997; Smart, 1989). Gardam (1997) argues that attempting to base legal reforms on the concept of equal rights is a deficient model for achieving change in a world where women “do not live out their lives as equal to men” (p. 58).

Furthermore, a focus on the acquisition of legal rights may create the false impression that issues of inequality are resolved when legal rights are obtained (Smart, 1989). In particular, access to legal redress does not ensure that women’s claims will not be “de-legitimized by law at a later stage;” as the primary process through which law remains oppressive towards women is not in the denial of formal legal rights but in its ability to disqualify women’s voices (Smart, 1989, p. 144). As such, Smart (1989) argues for a feminist jurisprudence that critically engages

with law's power and ability to assert truth and disqualify alternative accounts. A feminist critical engagement with international law must therefore work to identify "features of the existing legal regime" that do not take into account the realities of women's lives, or which act to disqualify their voices and perspectives (Gardam, 1997, p. 64). This line of inquiry lends itself to the question of whether the increased criminalization of sexually violent war crimes and the additional legal rights afforded to women under international law will be implemented as intended, or whether legal processes and practices will continue to disqualify and silence those women who testify to their victimization (Engle, 2005; Gardam, 1997).

3.2 - The Limitations of "Hearing" Victims within International War Crime Trials

A central concern reiterated throughout the feminist legal literature on the treatment of rape by international law, are the processes through which court proceedings often limit the ability for victims to share their stories, or to "bear witness to war-time rape" in a meaningful way (Buss, 2002; Dembour and Haslam, 2004; Henry, 2009; Henry, 2010; Mertus, 2004). Specifically, it is argued that legal processes and practices often act to limit, discredit, or disqualify the testimony of rape victim-witnesses in court, and as a consequence war crime tribunals "effectively silence, rather than hear, victims" (Dembour & Haslam, 2004, p. 151; Henry, 2010). This continued failure to hear victims limits what can be made known about war-time rape and the consequences it has for victims. Furthermore, it contributes to the perpetuation of the international legal silence on war-time sexual violence; as the reality of testifying before international legal courts often discourages victims from coming forward and speaking about their victimization. The following sections outline the various prosecutorial processes and defence tactics that act to limit, discredit and disqualify the testimony of rape victim-witnesses as

identified in the feminist legal literature on the prosecution of sexual violence by international courts.

3.2.1 - Limited Testimony

War crime trials do not provide a space in which victim-witnesses can testify to their rapes using their own language, narrative, or pace; instead, their testimony is strictly controlled by the rules of evidence and procedure, and by the questions posed by lawyers (Henry, 2009). As such, the victim-witness is not an individual with agency, control and ownership over their own experience and narrative in court, but rather becomes an “instrument of the legal process,” with their experience of rape reduced to legal evidence (Dembour & Haslam, 2004). This in turn can recreate a sense of powerlessness for the rape victim; similar to her inability to make decisions concerning her own body and sexual autonomy during her rape, “her personal story is expropriated and converted to public property, sometimes without her consent” (Hagay-Frey, 2011, p. 33).

Dixon (2002) argues that women who testify before international courts are treated as witnesses to rape, “rather than complaints in the prosecution of crimes of sexual violence [perpetrated] against them” (p. 705). This repositioning of a woman from the one who raises the complaint of sexual violence to the one who stands witness to the crime further removes her ownership over her narrative and experience (Dixon, 2002). Ultimately, in a criminal trial a victim-witness’s testimony does not “belong to the survivor but rather to the court;” the victim-witness becomes solely a “source of information or another piece of the evidence” that makes up the prosecution’s case (Fitzgerald, 1997, p. 655; Henry, 2009, p. 125). Dauphinee (2008) argues that this process can be extended to the experience of the defendant(s) as well. Mirroring the concept of rape scripts, Dauphinee argues that within “the ontological structure of the trial” individuals fill the role of a perpetrator, a victim, or a witness, and must in turn fit their

testimony “within the limited relational frameworks offered by these categories” (2008, p. 64).

Thus, within the context of war crime tribunals, individuals are regarded as “either victims to be rescued or perpetrators to be prosecuted” (Madlingozi, 2010, p. 212).

The requirements that testimony conform to legal language and the rules of evidence and procedure are the central ways through which a victim-witness is limited in her ability to testify to her experience of rape. Specifically, the victim is seldom provided an opportunity to discuss the emotional pain and social consequences associated with their victimization, but is instead “compelled to narrowly define” what happened to them in line with predetermined legal definitions, and to fit their testimony to the expectations of the court by recounting only “what is deemed relevant in legal terms” (Mertus, 2004, p. 116; Smart, 1989). Consequently, the law fails to hear testimony which falls outside of that which is deemed legally relevant and, in turn, “fails to interpret rape as a complex experience” (Henry, 2010, p. 1106).

Conversely, testimony that does align with legal expectations typically focuses on the “corporal,” “temporal,” and “spatial” aspects of rape. The corporal refers to the description of the physical actions involved and consequences experienced during the rape, and most commonly involves a line of questioning that is “concerned about the exact degrees of penile penetration, whether ejaculation took place, which bodily orifices were penetrated, and to what effect” (Smart, 1989, p. 92). The emphasis on the corporal is grounded in traditional legal definitions of rape; definitions that reflect a “male judicial perspective,” as the central signifiers of rape – non-consent, force, and penetrative sex – are grounded in a male’s perspective of sexual violation (Finley, 1989, p. 895).²⁷

²⁷ Specifically, it is the “male’s view of whether the woman consented that is determinative of consent” in court, overriding a woman’s experience of sexual violation (Finley, 1989, p. 895). Similarly, what constitutes “force” in situations of rape is determined by male standards of force in physically violent confrontations between men. This precludes an understanding of what may be defined as “force” from a woman’s perspective, including tactics of

Rape victims are therefore, compelled to describe their rapes in detail using specific terms for sexual organs (Henry, 2010). Providing these details in front of numerous strangers in a courtroom may prove very uncomfortable and difficult for victims, “particularly when cultural and social barriers dictate what can and cannot be said in a public context” (Henry, 2010, p. 1105-1106). MacKinnon (1987) equates the emphasis on the corporal, and the imposed requirement for the victim to engage in the “sexual act” of naming parts of her body, to the creation of a “pornographic vignette” that embodies the “standard fantasy of the pleasure of abuse and sexual power” and further acts to violate the victim, as those present in the court can “gaze on her body and re-enact her violation in their imaginations” (as quoted in Smart, 1989, p. 39).

Emphasis on accuracy, in terms of “temporal and spatial recounting,” is also central to testimony deemed legally relevant in court (Dauphinee, 2008, p. 64-65). Specifically, the victim-witness is required to “accurately testify to certain events in a chronological and rational fashion,” as prosecutors and defence lawyers are centrally concerned with confirming “factual evidence, such as the order and timing of the offense, and the size and color of the room in which it took place” (Henry, 2009, p. 126; Henry, 2010). Thus, the victim-witness is expected to relay her experience “in a complete and linear fashion,” and any inconsistencies, gaps, or non-sequential ordering in her testimony is commonly taken as evidence of her unreliability or lack of credibility as a witness (Mertus, 2004, p. 120). The overemphasis on these minute aspects, characterized by numerous and repetitive questions from both prosecution and defence counsel alike, can often “lead to results that verge on the absurd” (Dembour & Haslam, 2004, p. 164).

threats, coercion, or intimidation. Finally, in defining rape, the law reflects a male understanding of sex, specifically the “penetration of the vagina by the penis, rather than women’s experience of sexualized violation” which may include other sexual acts that fall outside of this understanding (Finley, 1989, p. 895).

A related process is the “fragmentation of testimony” (Henry, 2009, p. 125).

Fragmentation refers to the frequent and numerous interruptions to testimony caused by the prosecution’s and defence counsel’s questions, objections, and requests for clarification or repetition of specific statements (Henry, 2009). Testimony is also commonly interrupted when a victim-witness’s narrative becomes “irrelevant to the purpose of assessing guilt of the accused” (Dembour & Haslam, 2004, p. 158).²⁸ What results is a process that involves lengthy repetitive lines of questioning on minute elements that have been deemed relevant facts for securing a guilty verdict; a process that disallows the victim an opportunity to construct her own continuous narrative, but instead breaks up her testimony into digestible answers to specific questions which have been “refined” to create the legal narrative of the crime (Henry, 2010; Mertus, 2004). An example of this is found in the ICTR’s Butare case, in which one victim was asked 1,194 questions by the defence counsel alone, having to repeat in detail numerous aspects of her rape until the point of exhaustion (Haddad, 2010).

When a victim is unable to recall, or remains silent about, these minute details, the defence counsel will often misinterpret this silence as evidence of the victim’s unreliability or faulty memory, instead of recognizing it as evidence of the “inherent inability” for victims to articulate certain experiences, or as symptomatic of the exhaustive lines of questioning to which they are exposed (Henry, 2010). Further, failing to disclose certain details or experiences at any point in the investigation or trial process throws the credibility of the victim-witness and the truthfulness of her testimony into question. An example of this in an ICTY case, involved a victim-witness who failed to disclose certain “details about the first time she was raped in her initial statement to ICTY investigators” (Henry, 2010, p. 1104). This oversight was used as “evidence” by the defence as to why her whole testimony should not be regarded as credible.

²⁸ Dembour and Haslam (2004) provide several examples of this through a review of ICTY court transcripts.

The victim-witness explained that this oversight stemmed from the fact that because it was the first time she was raped it was the “most painful experience” she had endured, and due to the fear, humiliation and pain she had felt, she had found it impossible to discuss it (Henry, 2010). Thus, this “failure to disclose” stemmed from the “unspeakable nature of war-time sexual violence,” and its lasting consequences of humiliation and pain, and did not represent a sign of the victim-witness’s inability to truthfully recall (Henry, 2010, p. 1104). Arguably, the vast majority of “inaccuracies,” gaps or silences identified in ICTY’s victim-witnesses’ rape testimonies stemmed from the “volumes of sexual violence they endured” and were not evidence of unreliable or untruthful witnesses (Henry, 2010, p. 1100).

Focusing on the minute details of physical acts involved, the temporal ordering of the attack, and the details of the surrounding environment in which the rape took place, fails to convey the pain and trauma experienced (Henry, 2010). The effects that this can have on a victim-witness are seldom a concern, as the legal requirement to prove guilt beyond a reasonable doubt supersedes the “individuality of the victims” and their emotional and therapeutic needs (Dembour & Haslam, 2004, p. 154). On account of these limitations placed on testimony, the narratives of war rape which emerge in international courts are “only ever partially representative” of the lived realities of victims (Dembour & Haslam, 2004).

3.2.2 - Discredited Testimony

When a victim-witness fails to accurately recount in detail the minute aspects of their rape, or fails to remember or disclose certain facts, they are often discredited and regarded as an unreliable witness (Sharratt, 2011). Discrediting a victim through the process of cross-examination, commonly through the identification of inaccurate minute details, is a principle tactic used within both domestic and international adversarial legal systems, and has been identified as a central source of the power imbalances between victim-witnesses and lawyers,

and as a primary method for silencing rape victims (Henry, 2009; Mertus, 2004; Sharratt, 2011). Challenges to a rape victim-witness's credibility and reliability are such a common occurrence in cross-examination that it would appear that the "principle objective" is to "underline a belief in the tendencies of women to mislead and prevaricate in matters relating to sex" (Raitt & Zeesyk, 2003, p. 458). As such, victims "continually struggle to not only be understood but also to have their experiences believed, recognized, and validated" (Henry, 2010, p. 1113). Apart from an outright challenge to the veracity of a victim-witness's testimony, the most common methods through which credibility and reliability are attacked include questioning the accuracy of the victim's memory of the rape, or insinuating that they were somewhat complicit in the attack by means of consent.

A common process through which a victim's memory is discredited includes questions concerning her ability to accurately remember in light of the trauma she's endured (Mertus, 2004; Raitt & Zeesyk, 2003). Law has claimed authority over how trauma is defined and interpreted within the legal arena, and has effectively linked it to the concepts of memory, truth, credibility and reliability in testimony (Henry, 2010). The interpretations of trauma, and its effects on memory as defined by law, have commonly led "to the disqualification of women's experiences and their attempts to testify to them" (Smart, 1989; Henry, 2010, p. 1111). For this reason, war crime trials further contribute "to the impossibility of bearing witness through both the appropriation of trauma and the failure of law to accommodate traumatic experiences" (Henry, 2010, p. 1098).

Claiming that a victim-witness is suffering from Post-Traumatic Stress Disorder (PTSD) is a common method used to discredit a victim through her trauma, as it pathologizes her behaviour, cast doubt on her memory, and undermines her testimony in the courtroom (Raitt &

Zeesyk, 2003). An example of this is found in the ICTY's Furundžija case, in which the defence used the issue of PTSD to claim that Victim A's memory was "flawed" in an attempt to discredit her testimony. While the defence did not deny that Victim A was raped, they claimed that her memory of the role the accused played in her rapes should be regarded as unreliable as she was suffering from PTSD (Askin, 1999; Campanaro, 2001; Campbell, 2002; Henry, 2010). The issue of PTSD arose after the original case was concluded, when it became known that the prosecution had failed to inform the defence that Witness A had received counseling following her rapes. In particular, the Trial Chamber concluded that the prosecution's nondisclosure of the evidence concerning Witness A's counseling amounted to "serious misconduct," and the only resolution to resolve the dispute over the victim's reliability was to reopen the case (Askin, 1999). This decision was justified on the understanding that Witness A's testimony and her memory of the events were "pivotal" to the prosecution's case, and the source of the defence' strategy, and as such any medical or counseling records relating to Witness A was relevant to the case and should have been disclosed to the defence (Askin, 1999). In attempting to challenge the credibility of the victim's memory, the defence argued that the "psychological and neurochemical impact of posttraumatic stress disorder posed an issue with regards to the reliability of Witness A's memory" (Campbell, 2002, p. 150). Further, the defence presented a "memory expert," who testified that "all memory, even that of non-traumatic events, is flawed and susceptible to influence, and that traumatic events cause additional memory impairment" (Askin, 1999, p. 111).

Campbell (2002) argues that admitting Witness A's medical records into evidence, and requiring that she undergo further cross-examination by the defence, meant that a higher standard of reliability and credibility was required for Witness A's testimony as compared to other witnesses who appeared before the ICTY. More distressing was the fact that it was never shown

that Witness A actually suffered from PTSD or that she received psychological treatment; in fact her medical records pertained to a one-time meeting with a counseling service, a meeting that was not sought or initiated by Witness A (Campbell, 2002).

While the Trial Chamber ultimately concluded that there was no reason to believe that Witness A's memory was affected by the trauma she suffered, and as such dismissed the defence's argument, the Furundžija case still stands as an example of how trauma can be pathologized in an attempt to discredit victims of sexual assault (Campbell, 2002). Further, it demonstrated that the protections afforded to victims of sexual assault by Rule 96, specifically that corroboration of a witness' testimony was not required, were commonly overruled in practice. As evidenced by the Furundžija case, the reliability of the memory of rape victims was still questioned, and corroboration from "other testimony and evidence [was required] to confirm the veracity of memory" (Campbell, 2002, p. 159, 168; Coan, 2000). This requirement for corroboration was also evidenced in the Čelebići case, in which "at least one other witness corroborated the testimony of each rape victim" (Coan, 2000, p. 214).

The issue of trauma also arose during the Foča trial; however, in contrast to the Furundžija trial in which the defence alleged that the victim was too traumatized to be reliable, the defence in the Foča trial argued that the 16 prosecution witnesses who testified to rape were "not credible because they had not displayed any signs of psychological trauma" and as such could not have been victimized (Henry, 2010, p. 1110). Thus, victim-witnesses of war-time rape are commonly put in a "double bind," in which they either appear too traumatized to have reliable memories, or too in control of their emotions to actually have been victimized and are in turn regarded as "calculating and lacking in credibility" (Henry, 2010, p. 1111). What results is a repeated "denial, minimization, and disbelief, where victims of war-time rape are concerned"

(Henry, 2010, p. 1111). Mertus (2004) argues that law is resistant to understanding that while trauma may alter the “nature and sequencing” of a victim’s rape testimony, it does not automatically negate the truth of her narrative (p. 121).

Challenges to the truthfulness of rape victim-witnesses memories were common throughout the ICTY and ICTR cases, and were not always associated with issues of trauma or PTSD. However, the prevalence of challenges to rape victims, more so than any other type of victim, denoted a “gendered” understanding of memory and credibility within the *ad hoc* tribunals. Campbell (2002) argues that the “legal witness is a gendered subject” in cases of sexual assault, as the vast majority of victims are women. Furthermore, Campbell argues the concept of legal memory – that which is taken as evidence of an event – becomes gendered, as the “evidential model of memory” inherently links the memory of an event to the identity of “the complainant as witness” (Campbell, 2002, p. 169).

Historically, the female complainant of rape has always been considered less credible than other victims, a reality highlighted by the rape myths that women lie about sexual violence, that they are untrustworthy, or overly emotional and irrational (Campbell, 2002, p. 172). This presumption that women are not truthful witnesses, and the inherent untrustworthiness attributed to the “gendered” witness of rape, has been a central source of law’s disqualification of women (Campbell, 2002; Smart, 1989). Victim-witness of sexual assault are treated with “unparalleled suspicion” in domestic legal systems, and aspects of this suspicion have seeped into international legal systems, in which victims of war rape are treated to similar lines of questioning that imply an inherent doubt of their reliability of credibility as witnesses (Campbell, 2002, p. 173).

Therefore, because it is the rape victim-witness that “makes the claim of a wrong,” and it is her memory and testimony of the wrong which stands as evidence, within an adversarial legal

system, “it will be *her* testimony, above all others, that is called into question [...] and most stringently judged according to notions of reliability, credibility, consistency, and corroboration” (Campbell, 2002, p. 169-170). Therefore, the credibility of the witness becomes a precondition for the reliability of her memory and testimony; and for this reason the most effective method to discredit a victim’s memory has been to attack her character (Campbell, 2002, p. 171). Campbell argues that this suspicion can be transferred to male victim-witnesses of sexual abuse, as the crime of sexual violence and its corresponding witness and victim positions have become “feminized” (2002, p. 173). Thus, what has come to constitute memory and truth in cases of sexual violence has been gendered, as the “memory as evidence” model associated with sexual violence cases is inherently tied to the feminized position of the victim-witness, who is treated with an “unparalleled suspicion” and thought of as inherently untrustworthy (Campbell, 2002, p. 174-175).

The concept of consent, which is pivotal to legal understandings of rape, has also been used to discredit victims’ claims of sexual violence. In domestic legal contexts rape is commonly defined by the consent paradigm, in which the issue of non-consent, or a violation of the victim’s sexual autonomy, is considered to be the “dividing line between legal sexual contact and punishable sexual violence” (Schomburg & Peterson, 2007, p. 124; Smart, 1989). Further to the absence of consent as the demarcation of rape is the presence of an active resistance on the part of the victim to the attack, despite the reality that “a woman’s resistance to rape can lead to very grave injuries, even death,” especially within the context of armed conflict (Hagay-Frey, 2011, p. 39).

MacKinnon (2006) contrasts the consent paradigm with one that focuses on the issue of coercion and promotes an understating of rape as a crime of inequality, be it a physical, status or

relational inequality between the victim and perpetrator. The consent paradigm has been heavily critiqued in the feminist legal literature as it inevitably focuses attention on the mental states of the victim and perpetrator through questions such as “who wanted what, who knew what when,” and shifts attention away from issues of power, dominance, force and violence, issues that coercion definitions of rape seek to illuminate (MacKinnon, 2006, p. 941). In particular, coercion definitions typically place emphasis on the physical acts of violence and the contexts surrounding the rape, asking questions such as “who did what to whom,” and often “why” (MacKinnon, 2006, p. 941). Therefore, within the context of armed conflict, in which rape is commonly used as a weapon, it is arguably more appropriate to define rape through an emphasis on coercion and violence, and not on consent (MacKinnon, 2006).

When emphasis is placed on non-consent as the condition for rape, issues of power and coercion are overlooked, and this conceptualization presupposes that women always have the ability and the “freedom to say ‘no’” (MacKinnon, 2006; Samuelson, 2007). This fails to recognize situations where power relations between men and women operate in such a way to prevent women from “articulating non-consent” (Samuelson, 2007, p. 843). In armed conflict the differential power relations between armed combatants and civilian women commonly create situations in which non-consent becomes “unspeakable.” Thus placing emphasis on sexual autonomy and consent ignores the power imbalances inherent in armed conflict. An example of this is evidenced in the ICTY *Kunarac* case, where threats and coercion were used by another soldier to force the victim into having sex with the defendant. Despite the fact that the rape took place during an ethnic cleansing, that the victim was held in a *de facto* “rape camp,” and that she was threatened by another officer – all of which spoke to a wider context of power and coercion

– the victim’s inability to “articulate non-consent” to the defendant was used as a defence by the accused for why he thought the sex was consensual (Askin, 2004; Buss, 2002).

Crimes of sexual violence, including rape, only fell under the jurisdiction of the two *ad hoc* tribunals when they occurred in the context of “genocide, armed conflict, or a widespread or systematic attack against a civilian population” (Schomburg & Peterson, 2007, p. 123).

Qualifying sexual violence as genocide, a crime against humanity, or as a war crime, should imply an understanding of the “inherently coercive” contexts in which these crimes take place, and as such negate the possibility that consent be used as a demarcation for rape (Schomburg & Peterson, 2007, p. 124). In practice, however, the issue of consent arose numerous times throughout the ICTY and ICTR proceedings; this, in combination with the fact that rape was the only crime that included the element of non-consent in the ICTY and ICTR Statutes, even when charged as a form of enslavement, torture, persecution and as “other inhumane acts,” produced a differential treatment of the crime of rape by the two *ad hoc* tribunals. For example, Schomburg and Peterson (2007) argue that it was illogical that the issue of non-consent was explored when rape was charged as crimes of torture, as it implied that a “victim’s consent distinguished legal sexual contact from torture” (p. 126).

Initially, however, the definition of rape produced by the ICTR was premised on an understanding of rape as coercive and it was only in later Judgments that rape was redefined using the consent paradigm. Specifically, the Trial Chamber in the *Akayesu Judgment* concluded that rape, “where charged as a crime against humanity, is a physical invasion of a sexual nature, committed on a person under circumstances which are coercive” (MacKinnon, 2006, p. 942). This definition was significant as it focused on coercion, the actions and intentions of the perpetrator, and the violence involved in the act; it avoided any references to consent or the

actions of the victim more generally (Copelon, 2000; Eboe-Osuji, 2007; MacKinnon, 2006, p. 943; Schomburg & Peterson, 2007). Furthermore, the Trial Chamber in the *Akayesu Judgment* emphasized that that coercion did not require physical force, and that “threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion,” and concluded that coercion may be considered inherent in situations of armed conflict, or when military personnel or militias are present (Askin, 2003, p. 319).

Despite the merits of this definition, rape was redefined using the consent paradigm by the ICTY. In particular, the Trial Chamber in the *Kunarac Judgement* redefined rape, and concluded that the elements of “force, threat of force, or coercion,” found in earlier definitions were not exhaustive factors, and that the emphasis when defining rape should be placed on the violation of the victim’s sexual autonomy, as this was the “common denominator” underlying definitions of rape in various common law systems (Askin, 2003, p. 334; Kalosieh, 2003). Thus, the *Kunarac Judgement* introduced the affirmative defence of consent, circumventing the original Rule 96,²⁹ and redefined rape to include situations in which consent is not “freely” of “voluntarily” given (Dixon, 2002, p. 700; Kalosieh, 2003). The Trial Chamber did eventually conclude that the overall pattern of abuse perpetrated by the defendants, and the enslavement of the victims, made it impossible for consent to be freely given in this case, and that generally “true consent” is not possible in cases where rape is charged as a war crime or crime against humanity (Buss, 2002; Engle, 2005; Schomburg & Peterson, 2007). However, the Chamber’s redefinition of rape to include the consent paradigm has been regarded as a “Pyrrhic victory” for

²⁹ While earlier version of Rule 96 (ii) specifically stated that consent was not an aspect of rape to be considered by the ICTY, the third version of the rule included consent as an affirmative defence, but not an element of the crime of rape (Schomburg & Peterson, 2007). When (non)consent is considered as an element of the crime of rape, the burden of proof falls on the Prosecution to “prove beyond a reasonable doubt that the victim did not consent to the conduct in question” (Schomburg & Peterson, 2007, p. 124). On the other hand, when consent is allowed as an affirmative defence, it rests on the accused “to establish on a balance of probabilities that the victim did consent” (Schomburg & Peterson, 2007, p. 124).

the prosecution of sexual violence under international law, as it focused attention, at least for part of the trial, on the actions and behaviours of the victims, a practice that has been critiqued in the feminist legal literature as a highly prejudicial aspect of cross examination that can cause more trauma for the particular victim and dissuade future victims from coming forward and testifying (Fitzgerald, 1997; Kalosieh, 20003; Schomburg & Peterson, 2007).

The inclusion of consent also damaged the tribunal's credibility with survivors and women's rights activists, as the fact that "the tribunal could imagine that rapes that were part of war, genocide, or a campaign of crimes against humanity could be consensual outraged many" (MacKinnon, 2006, p. 947). Specifically, it was argued that within the context of the Yugoslavian conflict, where rape has been largely conceptualized as a means to commit ethnic cleansing and torture with an intent to destroy the Bosnian Muslim population as a whole, the "victim's subjective consent is irrelevant, [as] one cannot legally consent to genocide or torture upon her person" (Eboe-Osuji, 2007, p. 258; Kaloseih, 2003, p. 122). By incorporating the consent paradigm into its definition of rape, the *Kunarac* Trial Chamber risked subjecting a victim of sexual assault "to the insinuation that she was complicit in the dehumanizing treatment that befell her during the genocidal rape campaign" (Kaloseih, 2003, p. 122).

3.2.3 - Disqualified Testimony

Smart (1989) argues that the rape trial epitomizes the issues with law identified by feminist theorists, in particular how legal processes act to disqualify and disempower women. The central way through which law disqualifies women's voices is its creation of one Truth of an event, and thereby law's tendency to disqualify accounts that do not conform to this narrow interpretation (Smart, 1989). Smart (1989) argues that law's "definition of rape takes precedent over women's definitions," as it asserts its ability to define the truth of a situation (p. 4). Legal processes act to disqualify accounts of rape that fall outside of the narrowly defined legal

definition, or “truth” of rape, which proves distressing as law’s treatment of rape often sets the “parameters within which rape is dealt with more generally in society” (Smart, 1989, p. 26).

A central method through which alternative accounts of sexual violence are disqualified by law includes the creation and enforcement of narrow rape scripts. Rape scripts are linguistic constructs that are used by society to explain and name sexual violence. Specifically, they are narratives of sexual violence that involve a “series of steps and signals” that have been socially constructed as the markers and indicators of “real” or “true” rapes, and thereby act to disqualify alternative accounts of sexual violence (Buss, 2009; Mardorossian, 2002). Rape is understood as a “scripted interaction” in which one individual fills the role of the victim, and another the role of the rapist, through a highly gendered understanding of who can be victimized and what form of harms will be recognized (Buss, 2009; Mardorossian, 2002). Rape scripts seldom represent the lived experience of women who are raped, but predetermine if their victimization will be recognized and how it will be understood by society (Buss, 2009).

Rape scripts further perpetuate a tendency within society to blame the victim. In particular, when incidents of sexual violence fail to adhere to the predetermined understanding of a “real rape,” they are often misinterpreted as “consensual sexual relations for which the victim bears responsibility” (Hagay-Frey, 2011, p. 32). Even when rape does adhere to these narrow scripts, a sense of guilt or responsibility persists, as “the knowledge that she became a victim of rape – despite being aware of the threat in advance – is transformed into a sense of guilt for having assisted the attacker” (Hagay-Frey, 2011, p. 32).

Rape scripts pervade the types of testimony and narratives that emerge in both domestic and international courts, as there is commonly a “narrow script that has been manufactured for the witness even before she enters the courtroom” and to which she is expected to testify to

(Henry, 2010, p. 1109). Prosecutors are typically concerned with determining the specifics of “who did what to the witness, when and how,” and as such direct or appropriate a witness’s testimony to fit into an existing schema, or understanding, of the crime predetermined by their prosecutorial strategy (Mertus, 2004, p. 115). Consequently, it is no longer the victim, as an autonomous individual, to whom the trial listens. Instead, it is the prosecutor’s “own construction of a Victim” who has essentially become or is “equivalent to the evidence” the prosecutor wishes to present (Henry, 2010, p. 1109; Mertus, 2004, p. 115). The victim-witness’s individual “subjectivity is subsequently erased through law,” as she is positioned to fill a specific role in the court process (Henry, 2010, p. 1109).

Buss (2009) utilizes the concept of rape scripts to analyze how rape and sexual violence was represented and understood by the ICTR, and how this in turn influenced and limited the jurisprudence on sexual violence which emerged from the Tribunal. Specifically, Buss (2009) argues that the concept of “genocidal rape” produced a rape script that limited how the sexual violence perpetrated during the Rwandan Genocide was understood. In particular, the genocidal rape script of the Rwanda Genocide was dominated by the understanding that “Hutu men raped Tutsi women as a means to attack and destroy the Tutsi community,” thus placing the identities of male, female, Hutu and Tutsi into specific positions and roles (Buss, 2009, p. 155). This genocidal rape script was reflected in and recreated throughout the ICTR proceedings, and had the effect of “naturalizing” rape as an “always available weapon” in genocide, and failed to recognize certain types of victims and harms (Buss, 2009, p. 155).

The genocidal rape script, while not inaccurate for the vast majority of sexual violence perpetrated during the conflict, reduced all rape and sexual violence “to the equation of Hutu (male) violence against Tutsi (feminized) victimization” (Buss, 2009, p. 155-156). Therefore,

the numerous accounts of Hutu women, and Hutu and Tutsi men who were victimized by rape and sexual torture were not made visible in the narrative of sexual violence produced by the ICTR; as only evidence and testimony that spoke to genocidal rape was presented by the prosecutor (Buss, 2009). Buss argues that the “rape script that explains the mass rape of Tutsi women as the gendered component of a genocide against the Tutsi people [required] the erasure of raped men and Hutu women who undermined the narrative coherence of the script,” as this script could not support both the concept of genocidal rape and “consider the variances and exceptions to this patternized account of rape in Rwanda” (2009, p. 155, 159-160). Buss (2009) argues that in light of the limited understanding of sexual violence produced by the ICTR’s adherence to this rape script, it is important to resist a homogenized narrative of rape in conflict. A counter approach is to focus on specific accounts of rape, allowing for a more detailed account of the various experiences of victimization to emerge; it is only through this “level of detail, with all the inconsistencies and complexities revealed that it becomes possible to imagine a situation where rape is not inevitable” (Buss, 2009, p. 161).

3.2.4 - Therapeutic and Transformative Assumptions about Testimony and War Crime Trials

In sum, the issues identified above cast doubt on the “therapeutic assumptions” that providing testimony aids in a victim’s psychological and emotional recovery (Buss, 2009; Henry, 2009). If victims are not allowed to present their narratives in their own way, and are in fact constrained and limited in what they can share, as well as questioned and challenged as to their credibility and reliability, little is done for the healing processes or empowerment of victims (Henry, 2009).³⁰ Furthermore, the processes through which the testimonies of rape victims are

³⁰The experiences of victims participating in alternative justice mechanisms, principally Truth and Reconciliation Commissions, have also been subject to similar critical analysis (French, 2009; Laplante & Theidon, 2007; Moon, 2009; Rothe & Mullins, 2008). While at times truth telling has been found to be cathartic for victims, processes similar to those detailed above that act to misinterpret or misappropriate victim’s narratives have also been identified

limited, discredited and disqualified, demonstrate how law remains oppressive towards women and highlight Smart's (1989) argument that ensuring access to legal redress, through the increased criminalization of crimes against women and equal legal rights, does little to ensure that women's claims will not be "de-legitimatized by law at a later stage" (p. 144). These processes, taken together, demonstrate how war crime tribunals can "effectively silence, rather than hear, victims" who testify to their sexual victimizations (Dembour & Haslam, 2004, p. 15).

The *ad hoc* tribunals' emphasis on "punishing the wrongdoers," as opposed to providing compensation and support to the victims, has also been highlighted as an issue (Chinkin, 1994). Arguably, achieving effective "prevention against an entrenched culture of impunity" for war-time sexual violence, cannot be realized through a legal response that holds only a few individuals responsible; "the general deterrent effects of such prosecutions seems likely to be modest and incremental, rather than dramatic and transformative," and it does little to address the larger social, economic and political issues that may have contributed to the conflict, and may in turn inhibit successful post-conflict reconstruction (Akhavan, 2001, p. 31; Fletcher & Weinstein, 2002). Ultimately, it would appear that international criminal trials do not advance the interests of survivors, and do not provide a true understanding of the nature and impact of war rape (Henry, 2009; Mertus, 2004).

(French, 2009; Laplante & Theidon, 2007; Rothe & Mullins, 2008). On account of these processes, French (2009) concludes that truth-telling processes "may well replicate dominant power relations that continue to tacitly disempower victims in unintended ways" (p. 92). The work of transitional justice experts and human rights advocates has also been subject to similar critique. Madlingozi (2010) argues that the common practice of appropriating victims' narratives in the process of lobbying and advocating for victims of human rights abuses, can act to "dehumanize victims further" by robbing individuals and local communities of their agency (p. 211-212). In particular, the act of speaking for and about victims perpetuates their disempowered and marginal position, and often acts to reinstall Western aid workers as "morally and racially superior" (Madlingozi, 2010, p. 211). Madlingozi (2010) further argues that while the intentions of advocates are often altruistic, the impact of appropriating victims' voices may prove of little use to a victim's individual healing process or search for justice.

4 - The Rome Statute and the International Criminal Court

The Rome Statute advanced international law with reference to gender issues and crimes against women, as it codified a wide range of sexually violent offenses, established gender sensitive procedures, afforded numerous protections and rights for victims, and mandated a fair representation of women in the ICC's judiciary (Askin, 2003; Copelon, 2000; Engle, 2005; Sagan, 2010). Thus, while the Rome Statute did ultimately incorporate many of the Women's Caucus' key recommendations, many of their proposed "gender provisions" were met with resistance and opposition during the Rome Conference (Bedont & Hall-Martinez, 1999; Copelon, 2002). Specifically, while the vast majority of state representatives³¹ at the Rome Conference did support the "integration of gender provisions in the statute," representatives from the Vatican, several Arab States, and several organizations were resistant to the inclusion of certain terminology and criminal offence categories (Bedont & Hall-Martinez, 1999; Copelon, 2000).³² As the Rome Conference sought to form a consensus on the statute's provisions, the refusal on the part of these representatives to "accept wording favored by the majority," necessitated negotiated or "watered down" terminology throughout the Statute (Bedont & Hall-Martinez, 1999, p. 67). For this reason, the Rome Statute is regarded as representing only a partial victory for "gender justice," as it failed to include some of the Women's Caucus's recommendations, and those it did include were adjusted so as to strike a compromise between the desires of the Women's Caucus and the more conservative delegates at the Rome Conference (Campanaro, 2001; Moshan, 1999).

³¹ While it is noted that the "vast majority" of states and representatives at the Rome Conference supported the Women's Caucus' objectives, very few of these states (specifically, only representatives from Canada, Australia, New Zealand, Bosnia-Herzegovina, the United States and Samoa) were willing to take on an active advocate role for gender provisions against the minority opposition group (Bedont & Hall-Martinez, 1999, p. 67).

³² Among others these groups included the Vatican, the Arab League countries, the U.S. based International Human Life Committee, the David M. Kennedy Center, Canada's JMJ (Jesus, Mary, and Joseph) Children's Fund and R.E.A.L. Women (Copelon, 2000, p. 233).

The Rome Statute's codification of a wide range of sexually violent crimes as both crimes against humanity and war crimes has been highlighted as one of the more significant advances achieved for women's rights in international law (Askin, 2003; Bedont & Hall-Martinez, 1999; Booth & Du Plessis, 2005; Copelon, 2000; Engle, 2005).³³ The Women's Caucus fought for the recognition of a wide spectrum of sexually violent offences as distinct crimes onto themselves, as it was considered important to recognize the characteristics of the different crimes, to acknowledge the distinct and aggravated harms experienced by someone victimized by multiple crimes, and to detach sexual violence from its historical legal association with, and subsummation within, crimes against honour or "outrages upon personal dignity or humiliating and degrading treatment (Bedont & Hall-Martinez, 1999, p. 72; Campanaro, 2001; Moshan, 1999, p. 176).

Ultimately, the Rome Statute codified rape, enforced prostitution, sexual slavery, forced pregnancy, enforced sterilization, sex trafficking, and sexual violence as both war crimes and crimes against humanity;³⁴ and included "persecution based on gender" as constituting a crime against humanity (Askin, 2003; Bedont & Hall-Martinez, 1999; Copelon, 2000; Engle, 2005; Moshan, 1999; Spees, 2003). Thus, for the first time under international law, the crimes of sexual slavery and forced pregnancy were defined and prohibited (Argibay, 2003; Askin, 2003; Bedont & Hall-Martinez, 1999; Moshan, 1999). The inclusion of sexual slavery, in addition to enslavement and enforced prostitution, was monumental as it explicitly recognized the distinct

³³ Please refer to Appendix I for a list of the relevant sections of the Rome Statute and The Rules of Evidence and Procedure.

³⁴ There are several concerns that prosecuting sexually violent offenses as crimes against humanity will prove difficult before the ICC. Specifically, the necessity to demonstrate that a crime was knowingly committed as part of a widespread or systematic attack against a group, may prove difficult in cases of sexual violence. As crimes of rape and sexual violence are sometimes committed in isolation from other crimes against civilian groups, it may be difficult to demonstrate that the perpetrator did it knowingly as part of a larger campaign of violence (Moshan, 1999).

and unique elements of this crime (Bedont & Hall-Martinez, 1999). Arguably, however, its definition places too much emphasis on the aspects of “commercial exchange or similar deprivation of liberty,” aspects that are not always reflective of the “lived experience of women and men coerced or deceived into enslavement situations and sexual slavery” (Argibay, 2003, p. 388-389; Bedont & Hall-Martinez, 1999).

The inclusion of the crime of “forced pregnancy” represented one of the central debates between the Women’s Caucus and representatives from the Vatican and Arab States (Bedont & Hall-Martinez, 1999). Specifically, the Women’s Caucus had originally sought the inclusion of the term “enforced pregnancy,” however, the Vatican and Arab States feared that this terminology would “invite the international community to challenge anti-abortion laws,” and as such fought to have the term excluded from the statute (Arsanjani, 1999; Bedont & Hall-Martinez, 1999; Carpenter, 2000; Moshan, 1999, p. 175-176). Thus the term “forced pregnancy” was included as a compromise (Arsanjani, 1999; Moshan, 1999).

The inclusion of the term gender in the statute, and its definition, was another centrally contested issue during the Rome Conference. In particular, the representatives from the Vatican and a group of Arab delegations challenged the use of the term gender, as they feared it could be read to encompass sexual orientation, and therefore condone homosexuality; this in turn would allow for discrimination based on gender identity or sexual orientation to be addressed under international law (Bedont & Hall-Martinez, 1999; Copelon, 2000; Kittichaisaree, 2001; Spees, 2003). Instead they sought to replace the term gender with “sex,” and to define it purely on the concept of biological sex differences (Bedont & Hall-Martinez, 1999; Spees, 2003). On the other hand, the Women’s Caucus, as well as the vast majority of delegations, were in favor of

including the term gender throughout the statute, and sought to define it with reference to social construction (Bedont & Hall-Martinez, 1999; Copelon, 2000).

Ultimately, the term gender was retained, and was defined as refereeing “to the two sexes, male and female, within the context of society” (Arsanjani, 1999, p. 32; Kittichaisaree, 2002, p. 51). This definition reflects another compromise within the statute, as the inclusion of “within the context of society” denotes an understanding of the social construction of gender, yet the connection between gender and the two sexes appeased the fears of the Vatican and Arabs states (Copelon, 2000; Spees, 2003). However, this association between biological sex and gender limits the ability of the court to prosecute discrimination based on gender-identity, as while it may enable the prosecution of discrimination based on biological sex, it might not allow for the prosecution of discrimination based on a person’s “decision not to behave according to a prescribed gender role” (Charlesworth, 1999; Copelon, 2000, p. 237). Another concern expressed by feminist activists is that gender is the only identity defined with reference to crimes of persecution. This “singling out of gender for definition,” in combination with its narrow definition, could “leave the ICC in a weaker position to prosecute and convict gender-based persecution as compared to other forms of persecution” (Oosterveld, 2005, p. 58).

The final contentious issue between the Women’s Caucus and certain Middle Eastern delegations,³⁵ concerned the inclusion of language referring to a “gender balanced” judiciary and a call for “expertise on sexual and gender violence” on the part of court personnel (Bedont & Hall-Martinez, 1999). A compromise saw the replacement of “gender balanced” with a “fair representation of men and women,” and “expertise on sexual and gender violence” replaced with “legal expertise on specific issues, including, but not limited to, violence against women and

³⁵ The Middle Eastern delegations that were opposed to the inclusion of these provisions, included representatives from Egypt, Iran, Oman, Syria, and the United Arab Emirates (Bedont & Hall-Martinez, 1999, p. 77).

children” (Bedont & Hall-Martinez, 1999, p. 77). While the adjustments made in the wording of the Statute may seem minor, the resistance on the part of several states to include a “gender balanced” judiciary represents a persistent opposition to “women’s equality in international institutions” (Bedont & Hall-Martinez, 1999, p. 77). Despite these compromises, the statute is still regarded as “revolutionary for requiring the expertise it does,” and the appointment of seven women during the first election of the court’s eighteen judges represents a significant advancement “in light of the traditionally low numbers of women serving as judges in international judicial institutions” (Bedont & Hall-Martinez, 1999, p. 77; Spees, 2003, p. 1243). Evidenced by the ICTR and ICTR, the presence of female judges often helps ensure that crimes of sexual violence are addressed under international law (Bedont & Hall-Martinez, 1999). Charlesworth (1999) argues that ensuring the equal participation of women in international criminal legal institutions is an important first step towards realizing accountability for human rights violations and the victimization of women in armed conflicts (p. 393). However, this participation does not necessarily ensure a change in the perspective of international law forwards sexually violent war crimes; what is equally important is a shift in legal norms and practices concerning how crimes against women are understood and addressed.

4.1 - The Rome Statute and “Gender Sensitive” Provisions

In defining the crime of rape, the Rome Statute drew upon elements from both the ICTY’s and the ICTR’s jurisprudence. Specifically, from the *Akayesu Judgement*, it drew upon the understanding that rape is an “invasion of a sexual nature under coercive circumstances” (MacKinnon, 2006). Further, it incorporated the *Furundžija Judgement*’s “mechanical descriptions of objects and body parts,” and its reference to consent (MacKinnon, 2006). As such, the Rome Statute drew upon both the coercion and consent paradigms when defining rape.

More specifically, the statute includes the terminology “genuine consent,” in defining rape, but negates the possibility for true consent to exist in situations where “force, threat of force, coercion,” or the conditions of sexual slavery are present, as these circumstances undermine the possibility for a victim to “give voluntary and genuine consent” (Oosterveld, 2003, p. 639). Furthermore, the statute states that consent cannot be inferred from silence on the part of a victim, or a lack of resistance (Oosterveld, 2003).

The limitations placed on consent as a defence are contained within Rule 70 of the Rules of Procedure and Evidence of the ICC. Rule 70 further addresses the issue of witness credibility, as it specifies that evidence of a victim’s prior or subsequent conduct, including that of a sexual nature, cannot be used to infer their “credibility, character, or predisposition to sexual availability” (Oosterveld, 2003, p. 639). Similarly, Rule 71 of the Rules of Procedure and Evidence makes evidence of the victim’s “prior or subsequent sexual conduct,” including sexual conduct between the victim and the accused, inadmissible (Kittichaisaree, 2002, p. 303). This type of information was deemed prejudicial, and inconsequential, in light of the contexts in which the types of crimes under the court’s jurisdiction are committed, specifically that of war, armed conflict and genocide. Further, it was deemed that the admission of this type of evidence would discourage victims from testifying “as they would be subject to further traumatization by the defence” (Kittichaisaree, 2002, 303-304).

Another rule related to admissible evidence is that of Rule 63, which states that the “Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence;” thus maintaining the important advancement achieved through Rule 96 of the ICTY, and reaffirming

that victims of sexual violence are afforded the same presumption of reliability as victims of other crimes (Coan, 2000; Phelps, 2006).

The numerous rights and protections afforded to victims by the ICC have also been highlighted as a major success for gender justice. Specifically, Article 68 of the Rome Statute “mandates and provides that victims and witnesses can participate in the proceedings of the court at appropriate stages,” and provides them with access to legal representation throughout the proceedings (Spees, 2003, p. 1242). This represents the first time in the history of international law that victims are provided with their own legal representation during the trial, and the opportunity to express their views and concerns during the proceedings when the court deems it appropriate (Aldana-Pindell, 2004; Garkawe, 2003; Stahn, Olasolo & Gibson, 2006). Further, the ICC has also established Victim and Witness Units, modeled on those created under the ICTY, which provide counseling and practical assistance for witnesses and victims who appear before the court (Bedont & Hall-Martinez, 1999).

Article 68 also stipulates that the Court must take measures “to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses” (Garkawe, 2003; Spees, 2003, p. 1242). These measures include a consideration of the victim’s “age, gender, health, and the nature of the crime” (Garkawe, 2003, p. 355). As such, these protective measures are more stringent, and automatically applied, in cases that involve victims of sexual violence, or child victims and witnesses (Garkawe, 2003). While “total anonymity” is not guaranteed in the statute, the court has the discretion to apply it, and typically does so for victims of sexual violence (Garkawe, 2003). This treatment of victims represents a significant shift in international law, when compared to the *ad hoc* tribunals where there was no “presumption in favor of special protective measures” for victims, and the prosecution was required to submit

applications for protective measures on behalf of witnesses and victims (Garkawe, 2003, p. 352). The ICC also provides for the possibility of reparations for victims of the crimes that fall under the court's jurisdiction, another first in the history of international law (Garkawe, 2003).

These rights and protections afforded to victims, in addition to the numerous sexually violent war crimes and crimes against humanity included in the Rome Statute, have led some to conclude that the ICC will stand as a "beacon of hope" for "the many thousands of women who are the subjects of torturous sexual violence" (Booth & Du Plessis, 2005, p. 258). Further, these advancements in international law have increased the visibility of crimes of sexual violence perpetrated in armed conflict, and have helped counteract their historical framing as mere "by-products of war" (Alison, 2007, p. 84). However, despite these advancements, crimes of sexual violence persist in armed conflict, women are still largely framed as "victims of war, requiring male protection," and men continue to dominate the institutions and practice of international law (Alson, 2007; Spees, 2003). Further, it is argued that the mere inclusion of gender norms and crimes in the Rome Statute, "will not automatically change misogynist or sexist laws;" as the institution of international law remains "fraught with problems" that may prevent it from "comprehensively and sensitively rendering justice to female victims" (Copelon, 2000, p. 239; Nowrojee, 2005, p. 87).

Thus, what remains to be seen is whether the advancements in international law, as exemplified by the Rome Statute, will be implemented as intended with respect to the treatment of rape victim-witnesses who testify before the ICC. Specifically, it is necessary to "critically assess the gap between the rhetoric of justice and the reality for victims when they come to testify at international criminal proceedings," and to explore whether the increased criminalization of war rape will benefit the women who testify to their victimization before the

court (Engle, 2005; Henry, 2010, p. 1103-1104). Therefore, this thesis explores if, and how, the processes through which the testimonies of victim-witnesses have previously been limited, discredited, disqualified, and therefore silenced in international courts re-emerge within the context of the ICC. As such, this thesis represents an exploratory study, which seeks to determine if the issues identified in the feminist academic and theoretical literature on the treatment of victim-witnesses of rape by the two *ad hoc* tribunals, re-emerge in a different legal context.

5 - Methodology

The method employed for this research project is a deductive content analysis of the ICC court transcripts for the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (ICC-01/05-01/08). This method is appropriate as a content analysis allows for the systematic analysis and interpretation of text data through the identification of underlying meanings, themes, biases and patterns (Berg, 2009; Bowen, 2009; Downe-Wamboldt, 1992; Elo & Kyngas, 2008; Maxfield & Babbie, 2006). This method, therefore, allows for the systematic analysis of the court transcripts in order to identify the existence, or lack, of the central concepts and themes identified in the broader literature on the prosecution of war-time sexual violence and the feminist theoretical literature on its treatment by international law. Further, this method is in line with the theoretical orientation of this thesis. As Neuendorf (2011) points out, content analysis is becoming an increasingly acceptable methodology for gender researchers, arguing that it provides a useful set of tools for comparing and analyzing messages containing, or pertaining to, sex and gender roles (p. 276).

A primarily deductive approach is appropriate as this thesis utilizes existing concepts informed by the feminist theoretical literature, and seeks to examine them within a new context (Elo & Kyngas, 2008). However, an iterative process was used where concepts that emerged throughout the coding process were identified, and subsequently retained and used to re-code the data. The inclusion of inductive codes emerging from a deductive content analysis is a well-established approach. Berg (2009), Hsieh and Shannon (2005), and Neuendorf (2011) all argue that researchers must allow for adjusted or additional codes based on themes that emerge from the data to be included in the coding process. Further, this inclusion of inductive codes proved

essential, as the changes in international law produced new themes not previously identified or discussed in the literature.

With respect to the process of a content analysis, this thesis was informed by Hsieh and Shannon's (2005) seven steps, including: (1) formulating the research questions; (2) selecting the sample to be analyzed; (3) defining the categories to be applied; (4) outlining the coding process; (5) implementing the coding process; (6) determining trustworthiness, and; (7) analyzing the results of the coding process (p. 1285). The details of each step are described below.

5.1 - Research Question

As stated in the previous chapter, this thesis represents an exploratory study that seeks to determine if the issues identified in the feminist academic and theoretical literature on the treatment of victim-witnesses of rape by the ICTY and ICTR, re-emerge within a different legal context. Thus, the principle research question of this thesis is whether the processes through which the testimonies of victim-witnesses have previously been limited, discredited, disqualified, and therefore silenced in international courts, re-emerge within the context of the ICC.

5.2 - Data Source

The data source for this thesis is the court transcripts from *The Prosecutor v. Jean-Pierre Bemba Gombo* (ICC-01/05-01/08) case currently before the ICC. These court transcripts are publicly accessible through the ICC website, and are available in both French and English.³⁶ The use of court transcripts is a recognized source of data within criminal justice research, and the vast majority of research studies on the prosecution of wartime sexual violence utilize the Statutes, court transcripts or court decisions from the ICTY or the ICTR as principal data sources (see for example: Askin, 1999; Buss, 2002; Buss, 2007; Buss, 2009; Campbell, 2002; Campbell,

³⁶ <http://www.icc-cpi.int/Menus/ICC>

2004; Campbell, 2007; Dembour & Haslam, 2004; Henry, 2009; Henry, 2010; Kelsall & Stepakoff, 2007; Leiby, 2009; MacKinnon, 2006; Mullins, 2009a; Mullins, 2009b). Furthermore, the use of transcripts from one specific court case for exploratory and case studies is also well established (Henry, 2009; Mullins, 2009a; Mullins, 2009b).

The use of existing primary documents, including court transcripts, when performing research on war-time sexual violence offers several benefits. Principally, it overcomes some ethical concerns that arise when working with highly vulnerable populations, as it provides a non-intrusive source of data that does not require the (re)interviewing of victims, and further allows access to a population that might not otherwise be accessible to researchers (Leiby, 2009). Further, primary documents produced by resource-rich agencies, such as the ICC, include detailed information concerning contextual factors (Leiby, 2009).

The Prosecutor v. Jean-Pierre Bemba Gombo (ICC- 01/05-01/08)³⁷ case was selected for this research project, as it included several charges related to sexual violence,³⁸ had proceeded to the trial phase,³⁹ and included testimony from multiple victims and witnesses of sexual violence. In selecting the specific transcripts to be coded all transcripts available online⁴⁰ were initially searched for specific key terms, including: rape, raping, sex (which would further find sexual assault and sexual violence), women/woman, girl, female, gender, penis, vagina, sleep/slept (in

³⁷ Information concerning this case is contained in Appendix II

³⁸ Initially the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (ICC- 01/04-01/07) was also considered for inclusion in this research study, as it also contained several charges related to sexual violence and had proceeded to the trial phase. However, upon further investigation it became apparent that the majority of witnesses who testified spoke only to the other crimes enumerated in the charges against the defendants. In fact, there were only three witnesses who testified about rape, and for one there were only partial transcripts available. Thus, it was deemed appropriate to retain only the Central African Republic case, as this provided an opportunity to examine the case as a case study, and to investigate and linkages between the multiple victim-witnesses of rape who testified.

³⁹ While there are several other cases that include charges related to sexual violence currently at the pre-trial phase, it was deemed necessary that a case had to be at the trial phase in order to be included. This requirement was necessary as during the pre-trial phase witnesses do not testify in person, or are exposed to cross-examination, but instead the prosecution only reads portions of their previous statements made to investigators.

⁴⁰ While the majority of transcripts are accessible online, there are some that are completely or partially expunged. Expunged transcripts typically include identifying information on the witnesses, or other sensitive material.

the context of “he slept with me”), and force (in the context of “he forced himself on me”).⁴¹

Transcripts that included these terms were then read in-depth and retained if they included the initial opening statements of either counsel,⁴² references to the expert witnesses on sexual violence and trauma,⁴³ or the testimony of witnesses who had either themselves been raped, or who had witnessed firsthand the rape of a family member or of another person. In total, four transcripts from the Status Conferences (with references to the expert witnesses), one transcript including the opening statements of both counsels, and the transcripts from two expert witnesses,⁴⁴ three eye-witnesses to rape,⁴⁵ and nine victim-witnesses of rape,⁴⁶ were retained and coded.

5.3 - Conceptualization of Central Themes

For this research project three central concepts informed by the existing literature were identified, defined and operationalized for the purposes of coding the court transcripts. These central concepts included limited testimony, discredited testimony, and disqualified testimony.

Limited testimony is conceptualized as referring to situations in which a victim-witness cannot testify to their experiences using their own language, narrative or pace. Instead their

⁴¹ Mullins (2009a) used a similar search strategy for court transcripts from the ICTR, searching for proceedings that dealt with sexual violence through a review of the Daily Case Minutes in the ICTR archives. Once relevant transcripts were identified they were downloaded and printed in order to be coded. A similar strategy was also used by Campbell (2007) who purposively searched for ICTY cases that included sexually violent crimes as part of the indictment.

⁴² These opening statements were deemed important to this research study as they provided insight into how sexual violence is conceptualized by the prosecution and defence counsel, and further provided information on the principal arguments concerning how rape was used in this conflict, the principle points of contention regarding evidence and facts presented by the two counsels, and who would be presented to testify to these crimes.

⁴³ This included the transcripts for the two expert witnesses, as well as the transcripts from the status conferences that included the defence counsel’s initial opposition to the presentation of these experts by the prosecution.

⁴⁴ Witnesses 221 and 229 (in order of appearance). In the analysis that follows, these witnesses will be referred to as “expert witnesses,” so as to distinguish them from the other categories of witnesses coded.

⁴⁵ Witnesses 42, 73, and 119 (in order of appearance). In the analysis that follows, these witnesses will be referred to as “eye witnesses,” so as to distinguish them from the other categories of witnesses coded.

⁴⁶ Witnesses 22, 87, 68, 23, 81, 82, 80, 79 and 29 (in order of appearance). In the analysis that follows, these witnesses will be referred to as “victim-witnesses,” so as to distinguish them from the other categories of witnesses coded.

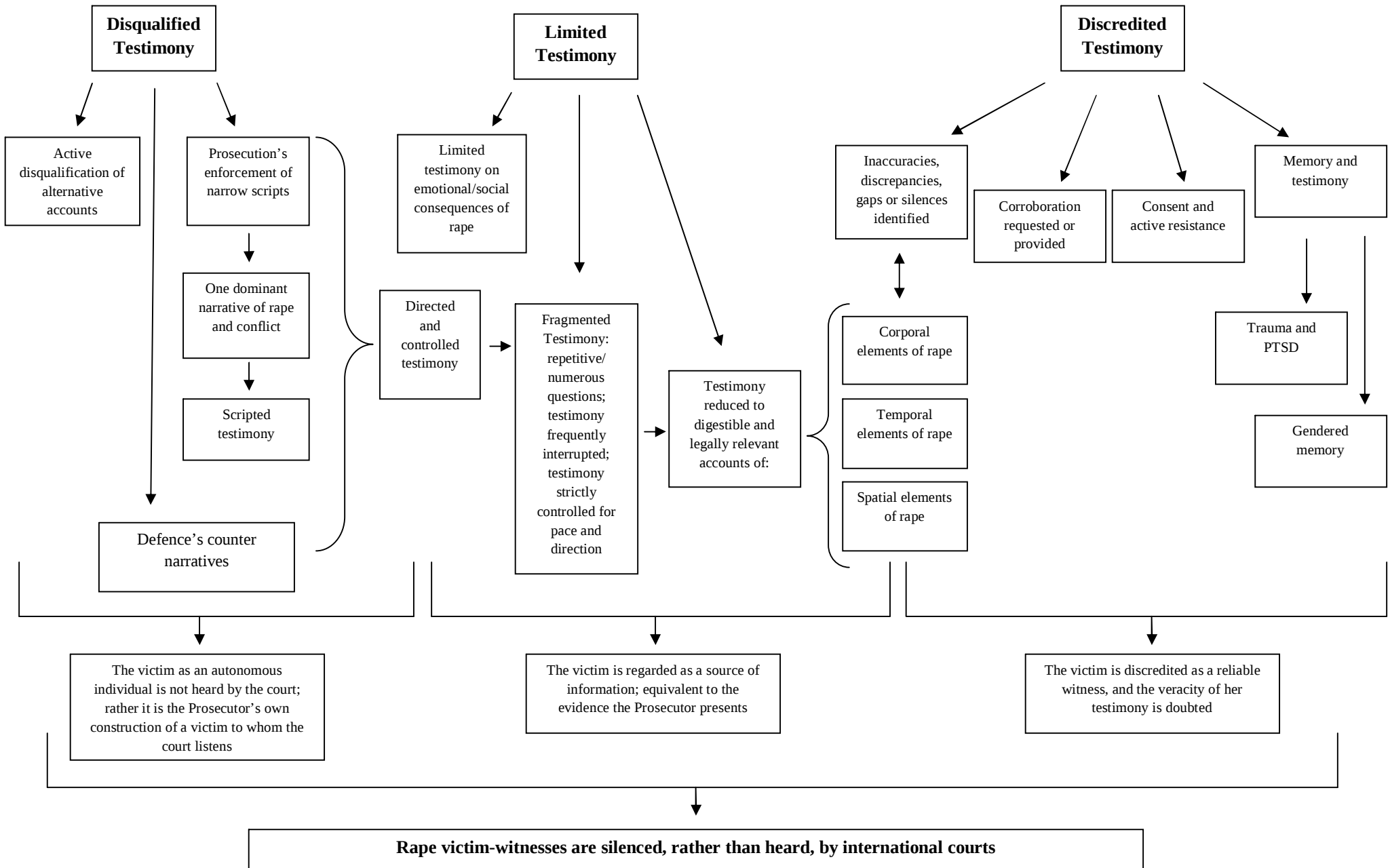
testimony is strictly controlled and fragmented by the questions posed by lawyers, which in turn often act to restrict testimony to a detailed and repetitive account of the corporal, temporal, and spatial elements of rape. Testimony is further limited when victims are required to narrowly define what happened to them in line with predetermined legal definitions, and are not permitted to testify to the emotional or social consequences of their rape(s). On account of the processes that limit testimony, the victim-witness is often reduced to an “instrument of the legal process,” a mere source of information, or reduced to a piece of evidence in the prosecutor’s case (Dembour & Haslam, 2004).

Discredited testimony is conceptualized as referring to the processes through which the reliability or credibility of a victim-witness are questioned or challenged. This includes the identification of inaccuracies, discrepancies, gaps or silences in the witness’s testimony, or between her current testimony and previous statements. Discredited testimony also includes processes that challenge the victim’s memory as unreliable on account of the trauma they have suffered, or explicit references made to the victim suffering from PTSD or another psychological disorder that impairs their ability to accurately remember their victimization. Further, discredited testimony refers to processes wherein the memories and testimonies of female victim-witnesses, or “feminized” male rape victims, are subject to increased challenge and scrutiny on account of the inherent untrustworthiness attributed to the gendered position of a rape victim-witness (Campbell, 2002). A final process through which rape victim-witnesses are discredited, include insinuations that the victim was complicit by means of consent, or through a lack of active resistance to the rape. In sum, these challenges throw the veracity of the victim-witness’s testimony into question, and discredit her as a reliable witness to her own victimization.

Disqualified testimony refers to the ability of law to define one Truth of an event, and to in turn disqualify alternative voices or accounts that fail to conform to this narrow interpretation. Within the context of a rape trial this includes both the active disqualification of accounts of rape that fall outside the narrowly defined legal Truth of rape, as well as the application and enforcement of a narrow script to which the victim-witness is expected to testify to. Specifically, the prosecution only presents evidence and testimony that aligns with an existing schema or understanding of rape predetermined by their prosecutorial strategy; and through the continued reiteration of this script by numerous witnesses, a dominant account of rape within a particular armed conflict emerges. Consequently, it is no longer the victim, as an autonomous individual, to whom the trial listens; instead, it is the prosecution's "own construction of a Victim" who has essentially become, or is "equivalent to the evidence" the prosecution wishes to present (Henry, 2010, p. 1109; Mertus, 2004, p. 115).

When the above processes through which testimony is limited, discredited, and disqualified are taken together, victims are effectively silenced, rather than heard, by international courts. Specifically, the above mentioned processes limit the ability for victims to share their narratives, or to "bear witness to wartime rape," in a meaningful way (Henry, 2010). The concept matrix below presents a visual representation of how processes interact.

5.3.1 - Concept Matrix



5.4 - Coding Scheme and Process

The central concepts were operationalized to include multiple sub-concepts, each of which included several indicators that could be measured through both the identification of their manifest presence and frequency in the transcripts, or of latent content indicative of their presence. For example, a sub-concept of limited testimony was that of multiple questions concerning the corporal aspects of the victim's rape. Indicators of corporal questions included the victim being asked to describe the rape, being asked to describe which body part the perpetrators used to penetrate the victim, which part of the victim's body was penetrated, and which position the victim was in during the rape. Commonly, these indicators were manifestly present, with the witnesses being asked these exact questions by the prosecution. However, at times the prosecution would more generally ask the victim to "describe what happened to them personally," a question that indicated the latent presence of the victim being asked to describe the rape, as this type of question was commonly accompanied by follow-up questions more directly addressing the rape if the victim had initially failed to provide a sufficiently detailed answer.

Originally, the sub-concepts and indicators of the three central concepts were deductively derived from the existing literature and research (Elo & Kyngas, 2008; Mayring, 2000). However, following the initial coding of the transcripts, additional sub-concepts and indicators were identified and these inductive codes were incorporated into the existing coding sheets.⁴⁷ For example, while disqualified testimony had initially been operationalized to include the sub-concept of the existence of a script to which the witness was expected to testify, the specific

⁴⁷ These additions were done in line with the literature on deductive content analysis. Specifically, Downe-Wamboldt (1992) argues that the researcher must remain open to adjusting or adding codes to the scheme throughout the coding process, as it is never possible to anticipate all of the categories or codes that will be evidenced in the data.

indicators of this sub-concept were only derived following the initial code, as this allowed for the identification of the typical questions asked of each witness appearing before the court.

Following the operationalization of the central concepts, coding sheets were created to include all sub-concepts and their associated indicators with space to record if the indicator was present or not in the transcripts, the number of times it appeared, by whom it was employed (i.e. the prosecution or the defence counsel) and to include the transcript reference as well as excerpts from the testimony as examples of its manifest or latent presence.⁴⁸ For a complete enumeration of the operationalized central concepts, as well as the coding sheets, please refer to Appendix III. The use of these coding sheets allowed for the systematic and consistent application of codes across all the data, which is of central importance in a content analysis (Berg, 2009).

For the initial coding, each transcript was printed and coded with the use of different coloured markers corresponding to each specific sub-concept. Printing the transcripts and coding directly onto them offered several benefits, including the ability to examine several pages at once in order to identify and count the frequency of repetitive questions corresponding to specific indicators. It was throughout this initial coding that the inductive sub-concepts were identified and listed in a separate document. Following this, the coding sheets were reformulated to include the inductive codes, and each transcript was coded again, and the presence, frequency, and examples of each indicator were recorded in the coding sheets. Performing a second coding allowed not only for the inclusion of inductive codes and their consistent application across all transcripts, but further allowed for the verification of the original coding, and the identification and inclusion of initially overlooked indicators.

⁴⁸ The coding sheets were premised on Neuendorf's (2011) outline of the necessary elements to be included in a codebook for content analysis.

This process was only used for the transcripts of victim-witnesses and eye witnesses of rape. Transcripts that corresponded to the opening statements of either counsel were coded using an inductive approach. More specifically, these transcripts were inductively coded in order to identify how either counsel conceptualized sexual violence in armed conflict, and how they conceptualized the participation of rape victims in the trial process.

The transcripts from the Status Conferences that referred to the presentation of expert witnesses, and the transcripts of the two expert witnesses themselves, were coded using deductive concepts, but were subject to a more open coding process than that used for victim-witnesses and eye witnesses. Specifically, these transcripts were coded under a sub-concept of discredited testimony; in particular, the presentation of expert witness as a possible indication of challenges to the witness's memory through the claims that they suffer from trauma. However, as opposed to recording the simple presence of this indicator and its corresponding counts and examples, the transcripts of the expert witnesses were openly coded in order to identify how they conceptualized the effects of trauma on memory, how the prosecution used their testimony to bolster their arguments, and how the defence attempted to discredit or challenge the expertise of these witnesses.

5.5 - Reliability and Trustworthiness

With reference to reliability and validity, or trustworthiness, when performing a content analysis, this research project was guided by the central principle highlighted in the methodological literature on content analysis, in particular, that of ensuring an informed development and proper implementation of a rigorous coding scheme (Duriau, Reger, & Pfarrer, 2007; Potter & Levine-Donnerstein, 1999). In order to increase reliability, a clear documentation of all decisions made concerning the sampling technique, operationalization of key concepts, and

measurement processes was conducted, as discussed above. Furthermore, the creation of extensive and exhaustive coding sheets, and their consistent application throughout the coding process was the principle strategy used to increase the reliability, and reproducibility, of this research project (Berg, 2009, Garvin, Kenedy & Cissna, 1988). To ensure their consistent application, the coding sheets were frequently reviewed prior to, during and following the coding of each transcript in order to ensure that all categories were appropriately addressed. Furthermore, coding the transcripts twice increased intra-coder reliability as it ensured the consistent application of codes across witnesses, allowed for the verification of original coding (essentially through a test-retest procedure), and the rectification of any initial errors or missed data. Finally, breaks from coding were taken to prevent fatigue and reduce any potential errors in coding.

Validity, or trustworthiness, in qualitative methods is typically assessed as the ability to achieve an authentic account of the observed phenomena (Neuman, 2011). With reference to this research project, content validity was addressed through ensuring the indicators of each sub-concept fully reflected all possible scenarios, bolstered through the inclusion of “other” or “negative cases” categories (Neuendorf, 2011). Further, ensuring that the coding scheme was informed and premised within the feminist theoretical and academic literature increased the construct validity of this project; as Potter and Levine-Donnerstein (1999) argue coding schemes that are “faithful to a theory achieve construct validity” (p. 267). Finally, the suggestion that three independent examples from the text data accompany each interpretation or conclusion drawn, in order to ensure trustworthiness, guided the analysis of the transcript data (Berg, 2009; Gray & Densten, 1998).

5.6 - Reflexivity

While the use of existing transcripts may overcome some of the ethical concerns involved with research on vulnerable populations, it is recognized that an ethical responsibility towards the victims and their narratives still exists. Specifically, while this thesis does not employ a method that directly works with the victim-witnesses, it does utilize data that contains their narratives, and as such must strive to present these narratives in a reflexive, responsible, and appropriate manner. Specifically, this thesis is cognizant of: the arguments presented by Madlingozi (2010) concerning the common appropriation of victims' narratives by transitional justice workers and the subsequent production of specific types of victims, usually those devoid of agency; Pittaway, Bartolomei and Hugman's (2010) discussion of ownership in relation to victims' stories once they have been told; Mander's (2010) argument that "people's voices and perspectives are not just anecdotal embellishments to scientific quantitative surveys" (p. 255); and finally, Narayan's (2010) argument that that western feminists who are interested in the "problems of women in other cultures" need to think critically about the kinds of Third World women's issues that "cross western borders" and the potential effects this movement may have on the issues and the women who are spoken for, in terms of misrepresentation (p. 218). Therefore, in the analysis that follows, emphasis is placed on using examples of testimony in which agency and resistance are demonstrated on the part of the victim-witnesses to the questions posed by either counsel. In addition, mindful of Mander's (2010) critique, the use of quoted testimony was never done so for embellishment but was strictly limited to what was relevant and required for analysis. Further, in order to avoid speaking for and about the victims, and consequently appropriating their stories and removing their ownership, direct quotes from the victim-witnesses' testimonies were used instead of paraphrasing. This allowed for the victim-

witnesses' words to be heard and understood as they were intended, and to avoid the researcher's interpretation of their meaning taking precedence. Instead, critical reflection and interpretation in the analysis that follows is restricted to the questions and comments of the legal practitioners within the court. This conscious effort to avoid speaking for the victims was done in an effort to address the issues identified by Narayan (2010), specifically that of misrepresentation. Thus, interpretation and critical analysis is limited to the practices of the legal practitioners of a western institution (the ICC), and has avoided cultural judgments or (mis)interpretations regarding the narratives of violence and victimization provided by the witnesses. Finally, throughout the entirety of the research project the researcher has strived to remain reflexive with regards to her position as a Western feminist academic when working with the testimonies of victim-witnesses.

5.7 - Strengths and Limitations

Many strengths and advantages to performing a content analysis have been identified in the literature. Specifically for deductive content analysis, Hsieh and Shannon (2005) argue that its principle strength is its ability to support and extend existing theory. Further, as previously mentioned, the use of existing documents for a content analysis allows for an unobtrusive and non-reactive research method (Berg, 2009; Bowen, 2009; Duriau et al., 2007). On account of being non-reactive, existing documents also have a high degree of "stability," which can help the repeatability of the study and therefore, help ensure the reliability of the method (Berg, 2009; Bowen, 2009).

Researchers must also be aware of potential limitations in performing a content analysis. Specifically for a deductive content analysis, the potential for confirmation bias created by approaching data from a particular theoretical perspective is identified as a limitation (Hsieh &

Shannon, 2005). This limitation is related to the larger issue of neutrality, objectivity, and the ability to ensure the trustworthiness of the analysis. In order to address this potential limitation, particular emphasis was placed on identifying and including negative cases throughout the coding process. For example, a sub-concept of limited testimony was the lack of testimony concerning the emotional or social impact of the victim's rape, which would be further apparent if a victim was interrupted when they attempted to address this aspect. In actuality the opposite was observed, and 10 victim-witnesses and eye witnesses were explicitly asked about the long term emotional and social consequences of their rapes. These negative cases were recorded and subject to analysis.

Another limitation identified in the analysis of existing documents, is the issue of insufficient detail. This limitation is linked to the fact that documents are produced for a specific purpose, and in consequence only contain details relevant to this original purpose, and are further subject to selective deposit and retention. As such, the documents under analysis may not include specific information necessary to answer certain research questions (Bowen, 2009). In order to address this issue, the literature suggests an approach that focuses on determining the meanings and messages contained within a specific document and exploring what insights they can provide for the larger phenomenon of interest, but to remain cautious about assuming that the document is an accurate and complete account of the larger issue of interest (Bowen, 2009).

Within the context of this research project, two aspects of this limitation were observed. First, while court transcripts are designed to record all interactions between the various parties during the trial, and as such lend themselves to the purposes of this project, portions of the transcripts under analysis were expunged and therefore, do not represent a full account of each witnesses' testimony. Specifically, as these witnesses have been identified as vulnerable

witnesses by the court, protective measures have been put in place in order to protect their identities. These protective measures include such things as voice distortion, the use of a screen to shield the witness from the public-viewing gallery, and the requirement to enter into private sessions when any identifying information may be disclosed. Thus, while the vast majority of testimony, including the descriptions of rapes, is conducted in open session and available in the transcripts, portions are expunged that may include content relevant to the central concepts. In order to address this limitation, Bowen's (2009) suggestion to remain aware of the possibility that the documents under analysis may not represent complete accounts, was observed. Thus, the analysis that follows concerns the observed content and does not seek to make generalized conclusions; further, the frequency counts produced for the observed data were recorded and discussed under the assumption that in actuality the phenomenon may have occurred at a higher frequency.

The second aspect of this limitation pertains to the fact that, as the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (ICC-01/05-01/08) is ongoing, not all of the witnesses have yet to appear before the court. However, at the time that the data was gathered for this research project, the prosecution had presented all of its witnesses and had rested its case. Further, the defence counsel's central arguments pertain to the identity of the perpetrators, the dates of entry of the MLC troops into the CAR, and under whose command they acted. The defence does not deny that rapes occurred, but refute Bemba's responsibility for them. Thus, it was deemed unlikely that the defence would present victim-witnesses of rape. With reference to the legal representatives for the victims, neither the information they present nor the testimony of the witnesses they call are held as evidence before the court, but are instead regarded as an opportunity for victims to be involved throughout the process and to have their concerns

represented. Thus, this limitation is addressed through qualifying the analysis as representative of the prosecution's case. Further, as the central concepts of limited and disqualified testimony pertain essentially to how the prosecution presents its case, and discredited testimony refers to how the defence responds to the claims made by witnesses, it was deemed sufficient to focus solely on the prosecution's witnesses.

A final limitation in using court transcripts as a data source identified by Dembour and Haslam (2004) is the tendency for transcript evidence to "flatten out" what happens in court, and its inability to convey a sense of the atmosphere (p. 155). More specifically, they highlight that court transcripts will not include such elements of testimony as gestures, visible signs of sentiment or emotion, or silences. Despite these limitations, Dembour and Haslam do argue that court transcripts preserve enough of "the mood of the proceedings" to warrant analysis of the ways in which "legal stories are fashioned" (2004, p. 155). Therefore, this limitation does not necessarily detract from the overall analysis of the transcripts, but does highlight the need to be aware of elements that might be missing from court transcripts, such as silences and displays of emotion. Furthermore, Mullins (2009b) argues that the accounts contained in transcripts may prove to be the best source of data available to researchers, and can be considered a "valid enough view of the events, [and] the sexual violence in particular, to serve as the basis" for exploratory studies (p. 724).

5.8 - Data Analysis Processes

The analysis of the transcript data was guided by Berg's (2009) suggestion that a combined qualitative and quantitative approach be used in content analysis. Specifically, entries in each coded category were counted and descriptive statistics presented in order to demonstrate the magnitude of particular themes or patterns. Then, the observed patterns and themes,

evidenced in both the descriptive statistics and text excerpts, were subject to a qualitative analysis in order to consider them in light of the literature and theory that guided the concept formation and to highlight the connections, agreements, and contradictions present (Berg, 2009).

6 - Data Analysis and Discussion

Observed in the transcript data examined, and detailed below, were many of the processes identified in the literature that act to disqualify, limit and discredit the testimony of rape victim-witnesses. However, several key strategies that have previously acted to silence rape victim-witnesses were either mitigated in their effects by the attempts of ICC court personnel to ensure a more gender-sensitive approach to the prosecution of sexually violent war crimes, or did not arise at all. Thus, while many of the processes that acted to disqualify, limit, and discredit the testimony of rape victim-witnesses appearing before the *ad hoc* tribunals did re-emerge within the new legal context of the ICC, these processes were not always consistent in their reoccurrence, and some more progressive measures in the treatment of rape victim-witnesses were observed.

6.1 - Disqualified Testimony

6.1.1 - Enforcement of Narrow Scripts

Disqualified testimony refers to law's ability to define one Truth of an event and in turn disqualify alternative voices and accounts that fail to conform to this narrow interpretation (Smart, 1989). With reference to sexual violence, this process can include both the active disqualification of accounts of rape that fall outside of the narrowly defined legal Truth of rape, or the application and enforcement of a narrow script of sexual violence. This latter process was evidenced throughout the transcript data coded, and appeared to be a central method used by the prosecution, and to a lesser extent the defence counsel, to direct the witnesses' testimonies to align with, and continually reiterate, a particular account of the events advanced in the respective arguments of either counsel.

6.1.2 - One Dominant Account of Conflict

For the prosecution this process involved the production and enforcement of two scripts, one that spoke to the wider context of the armed conflict in the CAR, and another that spoke to the nature of rape perpetrated during the conflict. The first script was applied and enforced through a series of questions asked of each witness designed to elicit specific answers in order to generate a dominant narrative of the conflict and, in part, focused on establishing both the identity of the perpetrators and Jean-Pierre Bemba's⁴⁹ guilt as their commander.

Table 1.1- Narrow script regarding armed conflict

The witness is asked...	Appears in the transcripts of ___ witnesses	Mean number of questions per witness	Range
What happened in the CAR between October 2002 and March 2003 (introductory questions in order to establish the series of events in the conflict)	12	3.25	1-6
Who the Banyamulengue are	8	3.38	1-7
Where the Banyamulengue came from (DRC ⁵⁰)	10	2.20	1-5
The uniforms/equipment of the various armed groups engaged in the conflict	12	16.58	6-33
The languages spoken by Banyamulengue and the other armed groups	12	11.00	5-20
The presence/actions of commanders amongst the various armed groups	11	6.00	1-11
The date of entry/retreat of the various armed groups	10	8.70	1-25
The military movements of the various armed groups	12	18.67	2-36
The crimes (murders and rapes) committed by the Banyamulengue against the civilian population	11	4.45	1-10
The looting committed by the Banyamulengue against the civilian population	12	10.50	3-19
The crimes committed against the civilian population by armed groups other than the Banyamulengue	10	5.40	1-17

⁴⁹ Jean-Pierre Bemba Gombo (referred to as “Bemba in the transcripts) is regarded as the supreme commander of the *Mouvement de Libération du Congo* (MLC), a group also known as the “Banyamulengue.” Bemba is officially the President and the Commander-in-Chief of the MLC and in 2002 appointed himself the rank of general. In 2002 at the request of then-President Ange-Félix Patassé, Bemba sent 1,500 of his troops into the CAR to aid against an attempted coup d'état launched by Patassé's former chief of staff, François Bozizé. This is the first case before the ICC in which the defendant is charged with command responsibility. Thus, while Bemba himself did not commit acts of rape, murder or pillage, he is held responsible for failing to control his troops, repress their actions, and punish those responsible. Furthermore, the Prosecution argues that Bemba gave explicit “licence to his troops to attack the civilians” in the CAR, and that he knowingly let “the 1,500 armed men he commanded and controlled commit hundreds of rapes” (T-32 page 11 lines 2-5).

⁵⁰ The Democratic Republic of the Congo

As evidenced in Table 1.1, the majority of witnesses were asked a series of questions concerning: the identity, home country, commanders, uniforms and language of the Banyamulengue,⁵¹ in order to distinguish them from the other armed groups present in the CAR and to firmly establish their culpability in the attacks on civilians; the movements of the various troops engaged in the conflict, as well as the dates of entry and exit of these groups in certain areas, so as to establish that the Banyamulengue was the only group present when the victims were attacked; and the crimes committed by the Banyamulengue and the possible crimes committed by other armed groups, in order to establish that it was overwhelming the Banyamulengue who attacked the civilian population.

6.1.3 - One Dominant Narrative of Rape

The other script applied and enforced by the prosecution involved a particular account of rape perpetrated in the CAR, first described in their opening statement, and then further bolstered through the testimonies of the two expert witnesses on trauma and sexual violence, and through the presentation of rape victim-witnesses and eye-witnesses whose identities and experiences reinforced this particular account of rape. In particular, during its opening statement the prosecution conceptualized rape as a weapon of war used to spread “terror and devastate communities by means of the cheapest weapon and most available ammunition” (T-32 page 10 lines 15-16).⁵² The prosecution argued that the Banyamulengue used rape as a weapon for reprisal against civilians who had allegedly supported or aided the rebels against (then) President Ange-Félix Patassé, and as a means to eliminate “any chance of a new rebellion by destroying communities they perceived as an enemy” (T-32 page 10 lines 6-7). In further detail, the

⁵¹ While Bemba’s troops are officially called the *Mouvement de Libération du Congo* (MLC), they are most commonly referred to as the Banyamulengue in the transcript data, and will therefore be referred to as such in the following analysis.

⁵² With reference to the sources listed for the transcript data, “T” refers to the particular Transcript number assigned to the PDF file containing a particular day’s transcripts found on the ICC website. “Page” and “lines” refers to the particular location within that transcript file from which the quoted testimony has been extracted.

prosecution advanced a particular rape script characterized by situations in which groups of three or four Banyamulengue went from house to house gang-raping women and girls, as well as men of power and authority in the community. These rapes were accompanied by extreme levels of violence and intimidation, and were often committed in front of the victim's family or in public so that they could be witnessed by the community. The prosecution argued that men of power were specifically targeted and raped publicly, so that the resultant shame and stigma would destroy their authority within the communities. In sum, the prosecution described these rapes as "brutal," "horrific," and "viscous," motivated by a desire to instill fear and humiliation, to degrade and to punish, and "to destroy people, families, and communities" (T-32 page 22 lines 2-3).

The prosecution utilized the testimonies of its two expert witnesses on trauma and sexual violence, Witness 229 and Witness 221, to bolster its conceptualization of rape as a weapon of war. In particular, during the questioning of Dr. André Tabo (Witness 229), Prosecutor Badibanga instructed the expert witness to define sexual violence as a weapon of war, to discuss the various motivations behind its use, and to elaborate on his research findings regarding the common characteristics of victims. In response Dr. Tabo argued that there were three central reasons why rape occurred during the armed conflict in the CAR: victims were considered to be war booty; rape proved a useful weapon to punish those suspected of supporting the rebels; and because rape proved to be an effective strategy to destabilize communities regarded as the enemy (T-100 page 41 lines 5-19). In discussing his research findings regarding the common characteristics of victims, Dr. Tabo highlighted that the vast majority were women, under the age of 30, were often married with several small children, and that nearly half of all victims were raped in front of their families or neighbours (T-100 page 17 lines 1-7). With reference to this

final characteristic the prosecution instructed Dr. Tabo to expand on the association between women being raped in front of others and the use of rape as a form of punishment, to which he responded that:

[...] this connection is almost a certainty, because raping a woman before - - in front of a member of her family meant punishing her and humiliating that member of the family, particularly as was sometimes the case that - - if that member of the family was her husband. So the woman needed to be punished, but the member of the family present also needed to be humiliated. (T-100 page 6 line 19-page 7 line 3)

The testimony of Dr. Adeyinka Moronke Akinsulure-Smith (Witness 221) was also used to reaffirm the rape script established by the prosecution during their opening statement.

Specifically, Dr. Akinsulure-Smith, prompted by the prosecution to describe the typical scenario of rape in the CAR, argued that:

[...] there was extensive sexual violence that involved the majority of women, but also men, and the types of sexual violence involved multiple gang rapes of at least two if not more perpetrators towards an individual. The type of sexual violence involved anal, vaginal, oral penetration, and, I guess if one could argue being a witness, witnessing acts of sexual violation against another individual. (T-38 page 23 line 9-page 24 line 1)

In effect, the use of expert witnesses provided legitimacy for the conceptualization of rape advanced by the prosecution. The prosecution further supported their particular conceptualization of rape through the presentation of witnesses⁵³ whose identities and experiences aligned with and reinforced this particular rape script:

⁵³ For the purposes of this analysis, the term “witnesses” refers only to the nine rape victim-witnesses and three eye-witnesses of rape presented by the Prosecution, and excludes all other witnesses presented by the prosecution, the legal representatives for the victims, and the defence counsel.

Table 1.2- Characteristics of victim-witnesses and their rapes

	Gender	Age	Number of Perpetrators	Location of rape	Rape Witnessed by Others	Victim is witness to another rape ⁵⁴
Witness 22	Female	--	3	Victim's Home	No	No
Witness 87	Female	--	3	Victim's Yard	No	No
Witness 68	Female	--	2	Stranger's Home ⁵⁵	No	No
Witness 23	Male	--	3	Victim's Home	Yes	Yes
Witness 81	Female	17	4	Victim's Home	Yes	Yes
Witness 82	Female	11	2	Victim's Yard	Yes	Yes
Witness 80	Female	--	3	Victim's Home	Yes	Yes
Witness 79	Female	23	2	Victim's Home	Yes	No
Witness 29	Female	46	3	Victim's Home	No	No

Table 1.3- Characteristics of victims and rapes witnessed by Eye Witnesses

	Rapes Witnessed	Gender of Victim	Age of Victim	Number of Perpetrators	Location of Rape
Witness 42	Daughter				
Witness 73	Witness 42's daughter	Female	10	2	Victim's Yard
	Daughter	Female	10	1	--
Witness 119	Girl from neighbouring village	Female	12	--	Outside by river
	Girl from neighbouring village	Female	13	--	Outside by river

As evidenced in Table 1.2, of the nine victim-witnesses of rape presented by the prosecution, eight were women, and the one male victim (Witness 23) held a position of authority within his community.⁵⁶ During their opening statement the prosecution drew particular attention to the testimony of Witness 23, and how his testimony acted as a “clear illustration” of the motivation behind the rape of men:

Witness 23, a father, a husband and a community leader, identified himself to the MLC soldiers as the representative of his village. They replied, and I quote, “Right, you are exactly the kind of person we are looking for because you protect the rebels.” Targeting him specifically, they raped him publicly, in front of his family. (T-32 page 28 lines 21-24)

⁵⁴ The victim witnessed the rape of another witness appearing before the court.

⁵⁵ Witness 68, while attempting to flee her neighbourhood, was seized by a group of Banyamulengue and dragged into a nearby house to be raped.

⁵⁶ Further, as demonstrated by Table 1.3, the rapes witnessed by the three eye-witnesses involved only female victims.

Thus, the prosecution's conceptualization of the use of rape, in which women and girls represented the vast majority of victims, is supported, and the existence of male victims is firmly explained as being motivated by their positions of authority. Further supportive of the prosecution's rape script, and evidenced below in Table 1.4, is the fact that the majority of victims were young, raped in the presence of others, and were raped by an average of three perpetrators (mean = 2.8). Further, these rapes were typified by extreme violence, and commonly resulted in shame, stigmatization, and the disintegration of families.⁵⁷

Table 1.4- Descriptive statistics on Victims and Rapes⁵⁸

	Mode	Mean	Range
Age of Victim ⁵⁹	10	17.75	10-46
Number of Rapists ⁶⁰	3	2.80	1-4
Gender of Victim	Female	N/A	N/A
Location of Rape	Victim's Home	N/A	N/A
Rape Witnessed by Others	Yes	N/A	N/A

Of importance, six of the witnesses presented by the prosecution were related to, or known by, one or more of the other witnesses testifying before the court. Specifically, Witness 42 and 73 were neighbours, and both testified to the attacks on each other's compounds and the rapes of their daughters. In addition, four of the rape victim-witnesses were members of the same family and were all raped during the same attack on their home. Specifically, Witness 23 was the father of Witness 81 and 82, and the husband of Witness 80. During their respective testimonies, each of these four victim-witnesses provided details concerning their own rapes, and those of their family members; thus in effect, repeating an account of rape already detailed by the victims themselves, and the other family members who witnessed it.

⁵⁷ These consequences will be discussed at length during the analysis for limited testimony.

⁵⁸ Data from both victim-witnesses and eye-witnesses

⁵⁹ Data regarding age is missing for five of the 12 witnesses; descriptive statistics provided may be impacted.

⁶⁰ Data regarding the number of rapists is missing for two of the 12 witnesses; descriptive statistics provided may be impacted.

6.1.4 - Scripted Testimony

What emerged from the transcript data was a repetitive, homogenized, and “patternized,” account of rape in the CAR. The characteristics and experiences of the witnesses presented aligned with the prosecution’s existing schema of rape detailed in their opening statement, and in turn spoke to the existence of a rape script “that had been manufactured for the witness even before she enter[ed] the court room” (Henry, 2010, p. 1109). In effect, witnesses were inherently limited to the reiteration of this particular rape script advanced by the prosecution – either through a description of their own rapes, or those they witnessed – as the vast majority of victims were female and violently gang-raped by multiple perpetrators in the presence of family members. In presenting multiple victims and witnesses that spoke to one particular script of rape the prosecution maintained control over how rape in the CAR would be understood by the court. Further, it acted to create a “patternized” account of rape in the CAR, as this homogenized account is reflected in and recreated throughout the proceedings, with little critical reflection on whether this narrative is truly representative of the forms of sexual violence committed during the conflict.⁶¹ Thus, what is observed is a continuation of the process wherein the victim-witness, as an autonomous individual, is not heard by the court; rather, it is the prosecution’s “own construction of a Victim,” who is essentially “equivalent to the evidence” or the particular narrative the prosecution wishes to present, that is called before the court to testify (Henry, 2010, p. 1109; Mertus, 2004, p. 115).

6.1.5 - Active Disqualification of Alternative Accounts

While the above indicates the application and enforcement of a narrow script, the other central indicator of disqualified testimony – the active disqualification of accounts of sexual

⁶¹ This concept of “patternized” accounts of rape is derived from Buss’s (2009) account of how a particular narrative of rape in Rwanda was generated through the ICTR’s abidance to the “genocidal rape script.”

violence that fall outside the narrowly defined legal Truth – proved more difficult to assess. Specifically, evidence of the exclusion of alternative accounts is manifested by either the interruption of witnesses who attempt to testify to divergent experiences or through the very lack of these accounts in the first place. With reference to the latter, while the absence of divergent accounts was noted, it is not possible to draw valid conclusions on this fact alone, as the “absence of evidence is not evidence of absence” (Sagan, 1997). In effect, this indicator proved impossible to assess within the confines of this project, but provides an avenue for future research, in particular, the examination of other sources of information on the conflict – be it NGO material, newspaper articles, or firsthand accounts – in order to compare and contrast the various forms of sexual violence detailed, and to draw conclusions on how representative the narrative presented by the prosecution in this particular case proves to be.

However, with reference to the former indicator, the presence of one possible negative case was identified in the transcript data. In particular, during the questioning of Witness 81, a possible reference to conditions of sexual slavery emerged and was further explored by both the prosecution and a legal representative of the victims (hereinafter the legal representative(s)). Specifically, in describing how a particular group of Banyamulengue camped outside her compound for an extended period of time, Witness 81 made the following statement:

When they arrived, after they had committed their acts of violence, they returned to sleep in our house and they obliged us to do the cooking. We had practically become their slaves. (T-55 page 16 line 25-page 17 line 2)

As this group of Banyamulengue were the very ones who had previously raped her and her family, the prosecutor followed up with several questions in order to establish if the sexual abuse continued. Similarly, Mr. Zarambaud, one of the legal representatives, asked Witness 81 the following question:

You stated that after raping you the Banyamulengue stayed for two weeks at your house and forced you, by considering you as a servant and making you a slave, to cook for them. My question is, during these two weeks did the Banyamulengue continue to rape you? (T-55 page 38 lines 18-21)

While it was ultimately established that continued sexual abuse did not take place, these questions demonstrated a willingness on the part of the prosecution and the legal representatives to follow up on possible crimes – sexual slavery in this case – that were not included in the charges against the accused, nor formed part of the larger conceptualization of sexual violence advanced by the prosecution. Apart from this one example of a negative case, no other indicators were evidenced that spoke to the active disqualification of accounts of sexual violence that fall outside the narrowly defined legal Truth, or narrative advanced by the prosecution.

6.1.6 - Defence Tactics for Disqualified Testimony; the Presentation of Counter Narratives

In contrast to the conceptualization of rape advanced by the prosecution, the defence counsel argued that rape was motivated by the sexual desires of the soldiers, and a need to “relax or unwind” (T-101 page 38 line 16). These arguments were first advanced during the initial Status Conferences, when the defence opposed the prosecution’s attempts to present an expert witness on the use of sexual violence as a weapon; arguing that this use of rape was neither a recognized area of expertise, nor relevant to the rapes committed in the CAR, and that the presentation of such evidence would be “highly prejudicial in nature” (T-21 page 17 line 9-page 18 line 2).

In support of their position, the defence utilized, and arguably misinterpreted, several aspects of Dr. Tabo’s (Witness 229) testimony. In particular, the defence argued that if Dr. Tabo questioned victims concerning their perceptions as to why they were raped, then he must have statistics concerning the number of women who believed they “were raped because the soldiers

wanted to relax or unwind” (T-101 page 38 line 15-17). Further to this, the defence highlighted a portion of the expert report Dr. Tabo’s provided to the court, in particular his conclusion that:

Rape was used during the armed conflict in the Central African Republic as a weapon of war and afforded the soldiers who were often very concentrated, under pressure and out of control, to unwind through sex. They chose young, physically attractive women, which explains why women aged under 30 were four times more likely to be raped than women over 30. (T-101 page 39 lines 4-9)

Building on the conclusion that the perpetrators “chose young, physically attractive women,” the defence proceeded to question the witness as to whether it could be concluded that the majority of rapes “were likely to have been carried out because the soldiers found the girls attractive” and that in effect there is very little difference between “raping somebody after the battle because you want to have sex with them and treating a woman as war booty” (T-101 page 40 lines 2-4 & lines 13-15). While Judge Steiner ultimately intervened and discouraged the defence from persisting with this line of questioning, highlighting that Dr. Tabo was not a specialist in rapists and could not therefore speak to their distinct motivations or psychological mind-sets, the questions and issues raised by the defence were never properly addressed, nor subject to critical engagement. In maintaining that rape was motivated by sexual desire, the defence perpetuated a historical misconception that rape is a natural by-product of war; a misconception largely responsible for the historical inattention paid to the crime by international law and war crime trials (Askin, 2003; Buss, 2007; Copelon, 2000; Thomas & Ralph, 1994). While the prosecution advanced a more progressive understanding of rape and its strategic use in warfare, the continued presence of arguments that rape is an inevitable by-product of conflict underscores a continued failure to recognize rape as a crime of violence, not one of sexual desires gone awry, and possibly signals a continued resistance to properly address rape under international law.

The defence counsel addressed the script concerning the wider context of the conflict produced by the prosecution through an approach that focused on confirming aspects of the witnesses' previous statements or testimonies that aligned with their arguments, while simultaneously discrediting aspects that spoke to the culpability of Bemba or of the Banyamulengue.⁶²

Table 1.5- Defence tactics that disqualify testimony

	Appears in the transcripts of ___ witnesses	Mean number of occurrences per witness	Range
The defence asks the witness to confirm statements from prior interviews or testimony	11	10.09	1-21
Explicit references are made to the defence's strategy in questioning the witness	2	1.00	1

With reference to the former, the defence commonly asked witnesses to confirm earlier statements regarding information that was likely speculative in nature. For example, the defence asked Witness 87 to confirm three statements she made in her initial interview with the investigators, wherein she had identified President Patassé as the individual who had informed the Banyamulengue that the rebels were in Boy-Rabé. In response, the defence thanked the witness and stated:

You have just given the Chamber insight about the person who held the military intelligence, the person who deployed the troops and gave operational instructions - - and gave instructions to go to Boy-Rabé. (T-47 page 35 lines 18-21)

As such, the defence attempted to use the witness's confirmation of her previous testimony to place the responsibility for the command of the Banyamulengue with President Patassé, and thus in turn, demonstrate that Bemba did not have operational control over his troops while they were

⁶² This second approach will be detailed during the decision of Discredited Testimony presented below.

in the CAR. However, it bears critical reflection on whether Witness 87, a civilian, would have accurate knowledge of the chain of command within a foreign army.

In addition to focusing on information possibly outside the witness's scope of knowledge, the defence placed a lot of emphasis on confirming statements regarding the uniforms and languages of the Banyamulenge. Unlike the prosecution who focused on these elements in order to distinguish the Banyamulenge from the other troops involved in the conflict, the defence sought to highlight the similarities between the uniforms of the Banyamulenge and the CAR Presidential Guard, so as to cast doubt on the identity of the perpetrators, and further focused on the ability for the witnesses to accurately identify the language of the Banyamulenge – Lingala – as this was not a language spoken in the CAR. In addition to highlighting similarities, the defence also commonly sought to highlight inaccuracies or discrepancies with respect to these important identifying features. During the testimony of Witness 119, Defence Counsel Mr. Liriss, explained their strategy in focusing on these issues:

Many of our questions may seem repetitive to you, but you will see that they are focused on two key questions in relation to the charges against our client in command. So we have to be able to determine who the people are, identify them and, as identification is based on language, you can understand why we have dwelled on this and why we shall be dwelling on it again. (T-86 page 2 lines 10-17)

6.1.7 - Directed and Controlled Testimony

In order to produce and advance their respective narratives of the conflict and conceptualizations of rape, both the prosecution and defence counsel commonly directed the witnesses through a series of questions designed to elicit particular responses. This strategy, in turn, represents a central method through which alternative accounts are disqualified; as both counsels are solely concerned with creating a particular account of what happened, and in doing so restrict testimony in order to generate the pieces of evidence necessary to advance their

respective arguments (Mullins, 2009a). With respect to the transcripts examined, several central strategies used by both the prosecution and defence to control and direct the testimony provided, were observed:

Table 1.6- Evidence of Directed/Controlled Testimony

	Appears in the transcripts of ___ witnesses	Mean number of occurrences per witness	Range
Repeated questions are asked concerning a specific issue in order to elicit a particular piece of information (includes statements that the question will be re-worded/re-phrased)	12	10.25	2-20
Either counsel directly makes reference to attempting to gain a particular piece of information/evidence from the witness	6	1.50	1-4
Either counsel states that they would like the witness to direct their attention to a specific piece of information	12	4.67	2-9
Witness is interrupted when they fail to restrict their answers to the specific question asked, and are directed to be more precise/concise	11	7.36	2-17
Either counsel provides a summary of the witness's testimony so as to highlight a specific account of rape	0	--	--

As evidenced in Table 1.6, the emphasis placed on garnering specific pieces of information was often evidenced through either counsel repeating their questions numerous times, or attempting to re-word their questions, when the witness had initially failed to understand the question or provide the desired response:

Defence Counsel Mr. Kaufman: But, Madam Witness [87], you've been giving me that same answer and I've been trying to ask you the question in a number of different formats. I'm not asking you for the area or where the wounds were; I'm asking you to point out the actual points of impact. (T-47 page 28 lines 18-21)

Prosecutor Mourad: [Witness 42], my question - - let me repeat the purpose of my question. I just want to know what the reaction of the people, the owners of the houses that the Banyamulengue stayed in. (T-64 page 10 lines 23-25)

Prosecutor Mourad: I don't know if you understood my question. I can rephrase if it's not clear [...] (T-70 page 31 line 8)

Further indications that either counsel was attempting to control or direct testimony included explicit references made to attempting to gain a particular piece of information or statement from

the witness, or when requests were made for the witness to direct their attention to a specific event:

Defence Counsel Mr. Kilolo: Your Honour, it's just a question in order to gain a particular detail. It might be - - it might have been looked at from a particular angle yesterday, but I don't see any particular difficulty if the witness chooses to reply. (T-43 page 6 lines 17-19)

Prosecutor Kneuer: Madam Witness [22], I would like to direct your attention now to what happened to the family members in your house. Can you please describe to the Court what happened to them? (T-41 page 18 lines 13-15)

A final method used to direct and control testimony observed in the transcript data, involved situations in which a witness failed to restrict their answers to the specifics of the questions posed by either counsel, and were subsequently interrupted and directed to answer in a more precise, succinct, or concise manner:

Defence Counsel Mr. Kaufman: What I want is a bit more precision. (T-47 page 28 lines 5-6)

Prosecutor Bifwoli: However, I am still going to ask for more specific details, so that the Court can understand exactly what these people did to you. (T-51 page 35 liners 7-8)

Defence Counsel Mr. Haynes: So if you will do your best to listen to the questions and answer them as concisely as you can [...] (T-57 page 3 lines 12-13)

Defence Counsel Mr. Liriss: I am not calling into doubt, Madam Witness [79], that you have things to say. May I ask you, however, once again to focus your mind upon the question – the exact question – that I am putting to you [...]. (T-77 page 52 lines 19-22)

The above methods, and their frequent use, indicate that both the prosecution and the defence counsel were principally concerned with creating a particular account of the events, and in restricting testimony to generate the necessary evidence to support these accounts. Thus, witnesses were frequently interrupted and directed to remain on point and were exposed to repetitive questions if they failed to provide the answers desired. This, in effect, acted to

disqualify or inhibit alternative accounts from emerging. Thus, what was evidenced in the transcripts was “the prosecutorial construction of the events and the defence’s response” to this construction, facilitated through a process that guided a witness’s testimony through specific questions in order to elicit specific pieces of evidence (Mullins, 2009a, p. 22). These processes that direct and control testimony, and thus disqualify and inhibit alternative accounts, are further linked to processes that fragment and limit testimony.

6.2 - Limited Testimony

In her opening statement, Prosecutor Kneuer argues that:

This trial will recognize [the victims’] suffering and empower them, transforming their accounts of rape and their experiences of violation into evidence that will allow Jean-Pierre Bemba to be held responsible for what he did. But this trial, this provision of international justice, is not just a means to recognize the crimes they endured; it will empower them today. Their painful experience of rape and humiliation will become evidence against Jean-Pierre Bemba. (T-32 page 34 lines 7-13)

As such, the prosecution envisions the act of testifying to be an empowering experience, providing the victim with an opportunity to tell her story and in turn contribute to the evidence against the person ultimately responsible for her victimization. However, as evidenced in the above statement, the prosecution’s central focus is the generation of evidence, and therefore, what is ultimately taken away from the victim-witness’s testimony must prove useful, and legally relevant, to the prosecution’s case. In consequence, the victim is ultimately not in control of her testimony, nor allowed to tell her story using her own words, emphasis or sequencing. Instead, her testimony is fragmented by repetitive and detailed questions, strictly controlled in terms of pace and direction, frequently interrupted by objections, and ultimately reduced to digestible answers concerning the corporal, temporal, and spatial elements of her rape (Henry, 2009; Henry, 2010; Mertus, 2004). Thus, while the prosecution envisioned this experience as one that

is empowering, the victim-witness is ultimately reduced to a mere source of information, or an “instrument of the legal process” (Dembour & Haslam, 2004).

6.2.1 - Fragmented Testimony

Table 2.1- Fragmented Testimony

	Appears in the transcripts of ___ witnesses	Mean number of questions per witness	Range
Witness is asked numerous and repetitive questions	12	-- ⁶³	--
The witness is instructed before their testimony that they must speak slower than normal because of the interpreters	12	2.00	1-5
The witness is asked to slow down when giving their testimony	6	3.17	1-5
The flow of the witness’s testimony is interrupted by objections	12	6.08	2-13
The flow of the witness’s testimony is interrupted for other reasons (in order to clarify certain points, due to interpretation issues, due to evidentiary issues, or issues related to time)	12	16.17	2-26

Within the transcripts examined the most frequently observed indicator of fragmented testimony included repetitive and detailed questions. In particular, all of the witnesses were asked repetitive and detailed questions concerning various aspects of their experiences or of what they witnessed. Issues concerning pace were also evidenced, as both the presiding judge and prosecution explained to each witness that they must speak slower than normal on account of the interpreters, and a failure to do so commonly resulted in an interruption and an instruction to slow down. Other observed indicators of fragmented testimony included witnesses being frequently interrupted: to clarify certain points; due to interpretation issues (apart from pace); due to evidentiary issues; or by objections from either counsel, despite the judges having instructed all parties to keep objections to a minimum.

⁶³ “Repetitive and detailed questions” was coded as present/not present. This indicator occurred for every witness examined, typically in conjunction with other concepts/indicators. For example, witnesses were commonly asked repetitive and detailed questions concerning the corporal aspects of their rapes.

While all of the processes that contribute to the “fragmentation of testimony,” as identified by Henry (2009), were evidenced in the transcripts examined, several negative cases for fragmented testimony were also observed:

Table 2.2- Negative Cases for Fragmented Testimony

	Appears in the transcripts of ___ witnesses	Mean number of questions per witness	Range
Explanations are provided to the witness concerning how questioning will be conducted	12	2.08	1-6
Judges reprimand either counsel for posing repetitive questions	7	2.71	1-6
The witness is initially able to recount a continuous narrative without interruptions using their own words, sequencing and emphasis	6	2.55	1-5
Judges instruct all parties to keep objections to a minimum	3	3.67	1-9

In particular, explanations were provided to the witnesses, by both the judges and the prosecution, concerning how questions would be asked and in consequence why testimony may become fragmented. Thus, while testimony was still ultimately fragmented, witnesses were at least informed as to why certain questions would be asked in certain ways, and that while it may seem unnatural, repetition of certain details was necessary for the court to understand what had occurred. For example, the prosecution explained to each witness at the start of their testimony how questioning would be conducted, and why this method was viewed as necessary:

Prosecutor Kneuer: Madam Witness, I will be asking you questions about experiences which you already have discussed with investigators of the Prosecution’s office. During the questioning, I will be asking types of questions. These may include, “when?”, “why?”, and “how do you know?” questions. Please do not take offence if I’m asking these questions. However, it is important for the to understand the basis of your knowledge and facts. Do you understand, Ma’am?
(T-40 page 8 lines 15-20)

Further, judges often reminded both counsels that a witness should be “guided through her testimony by using short and simple open-ended questions,” put to her in a “non-confrontational,

[and a] non-pressuring manner” (T-39 page 21 lines 8-12). Judges also at times instructed witnesses to not become distressed with repetitive or detailed questions:

Judge Steiner: I agree with you that sometimes the questions are quite repetitive and the Chamber will try to help you in not feeling angry [...] but some questions, Madam, need to be asked once, twice, because we need to be sure about all the details. So don’t take offence. (T-60 page 12 lines 4-9)

Judges would however reprimand either counsel, though typically the defence, for posing unnecessarily repetitive questions on elements deemed inconsequential or of limited probative value. For example, during the testimony of Witness 23, Presiding Judge Steiner, in addressing the defence, stated:

Maitre Liriss, you have the floor, with the strong recommendation of the Bench of not putting the witness unnecessary repetitive questions or intrusive questions. Don’t put the witness in distress because this situation is not useful for the Defence, neither for the Chamber. (T-54 page 4 line 25- page 5 line 3)

Similarly, during the testimony of Witness 119, Judge Steiner reprimanded Defence Counsel Mr. Kilolo, stating:

In relation to the last topic, the Chamber notices that the same question was put six times, six time of the witness. If the Defence continues in this line of questioning, the Chamber will start to intervene and ask for the relevance every time a repetitive question is put to the witness. (T-85 page 47 lines 11-15)

However, while reprimanding the defence counsel for unnecessarily repetitive or leading questions demonstrated a desire on the part of the Chamber to shield witnesses from feeling badgered or attacked, based on the transcripts examined, it appeared that a lawyer had to persist with these questions despite earlier warnings to elicit this response from the Chamber. While in total, nineteen separate reprimands for this type of questioning were counted, the majority – fifteen – were contained within the transcripts of three witnesses, despite the transcripts of others demonstrating similarly belligerent tactics employed by the defence, and at times the prosecution.

A final aspect observed, counter to the concept of fragmented testimony, was the ability for six witnesses to initially recount their experiences in continuous uninterrupted narratives. These uninterrupted narratives often appeared during the initial part of the witness's questioning, most often in response to requests from the prosecution for the witness to explain what had happened to them during the conflict. During these narratives, witnesses were often able to use their own words to describe their rapes, or those they witnessed, to use their own sequencing in describing the events they experienced, and to in turn place emphasis on events they deemed most important or profound. In several cases it was evidenced that rape was not always regarded as the singularly most traumatizing crime experienced by the victim-witness, as the murder of loved ones, the looting or destruction of the victim's home, or the devastation of their community, took precedent in their narratives of the events. For example, Witness 22 focused the majority of her narrative on the attack against her uncles and the looting of her home. Witness 87 placed a considerable emphasis on the murder of her brother:

He had the lamp - - the oil lamp - - and when he opened the door I looked and I saw - - he said, "They've already killed him." And then I put the lamp down, I started to scream and people started coming and I went to look at the body. I didn't know what to do. Nobody could help me [...] (T-44 page 30 lines 19-22)

Similarly, Witness 79 initially discussed the rape of her 11-year-old daughter in more detail than her own, and highlighted her helplessness in preventing her daughter's rape, and her inability to shield her other children from witnessing it, as a considerable traumatic experience. Further, Witness 79 identified the murder of her husband as something extremely traumatic, even stating that during her rape all she could think about was her husband's death:

I was - - I was thinking of the death of my husband. I'd learned - - I'd found out that my husband had been killed. I was thinking about my husband. I hadn't been able to see his corpse. I was thinking of my husband lying dead. When my husband was killed, I didn't know about it. We were, in our family, mourning

him. We were all indoors when these men came in. I don't know how to explain this. It was very difficult to bear this. (T-77 page 11 lines 12-18)

Both Engle (2005) and Sharratt (2011) have identified the conceptualization of rape as an experience “worse than death,” or as the most profound victimization experienced by women in war, as a flawed assumption often perpetuated within both the academic literature and the legal discourses surrounding the issue (Engle, 2005, p. 813). While not denying the harm and suffering experienced on account of sexual violence, Engle (2005) highlights the importance of not essentializing women's experiences of conflict to the suffering of being raped, as other forms of victimization may produce equal if not greater suffering for women. Similarly, Sharratt (2011) argues that it is necessary to critically engage with the conceptualize of rape as “the ‘worst’ or ‘defining’ crime” suffered by women in conflict, as it “renders invisible other crimes committed against them and continues to reinforce the vulnerability and ‘rapeability’ of women” (p. 2). Sharratt (2011) further argues that these discourses “homogenize the diversity” of women's experiences of rape, failing to “consider cultural factors that may make reactions more varied and contextualized” (p. 29). Thus, in part, the ability for some witnesses to initially recount their experiences in self-directed narratives, using their own words, sequencing and emphasis, allowed for other crimes and experiences deemed more traumatic by the victims to emerge in the transcript data.

However, while these six witnesses were initially able to recount these narratives, all were then re-directed by the prosecution back through their stories in a step-by-step fashion, and were required to answer detailed questions designed to elicit digestible answers on elements deemed legally relevant and important to the prosecution's narrative of sexual violence.

Table 2.3- Digestible Testimony

	Appears in the transcripts of ___ witnesses	Mean number of questions per witness	Range
Following long answers/narratives provided by the witness, either counsel instructs the witness to go back through their story step-by-step, so as to generate short and specific answers to particular questions	9	2.33	1-4

As evidenced in Table 2.3, requests that the witness recount their experiences in step-by-step fashion, or to “breakdown” their experiences into short answers, was not limited to these six witnesses, but was evidenced in the transcripts of a total of nine witnesses. For example:

Prosecutor Kneuer: Thank you, Madam Witness [22]. You provided quite a number of information to the Court and what I would like to do is to go step-by-step through this information. (T-40 page 21 lines 14-15)

Prosecutor Kneuer: Madam Witness [87], thank you very much for sharing this very comprehensive story with us. With your permission, I would like to breakdown the events that you just mentioned and ask you some follow up questions. (T-44 page 15 lines 11-13)

Prosecutor Mourad: Thank you very much, Mr. Witness [42]. That’s very helpful, indeed. I would like now to break down your answer with some short questions, if you may. (T-63 page 64 lines 2-3)

Prosecutor Carl: Madam Witness [29], thank you for sharing your experience with us. I propose that step-by-step I will go through this with you with what happened on that 5 March 2003. (T-80 page 24 lines 3-6)

As such, witnesses were often required to answer repetitive and detailed questions on aspects of their experiences already discussed during their initial narratives. These questions typically involved details on the corporal, temporal, or spatial elements of their rapes, and acted to reaffirm particular aspects of the rape script previously established by the prosecution. Thus, what was observed reaffirmed a process that limits testimony highlighted by Henry (2010) and Mertus (2004): in particular, a process that disallows the victim an opportunity to construct her own narrative – or counteracts the one she initially provided – and instead breaks up her

testimony into digestible answers to detailed and specific questions that have been “refined” to create the legal narrative of the crime.

6.2.2 - The Corporal, Temporal and Spatial

This legal narrative, as mentioned, commonly focuses on the corporal, temporal, and spatial elements of the rape, and further requires the witness to limit her testimony to “what is deemed relevant in legal terms,” and to conform to the expectations of the court and its rules of evidence and procedure (Mertus, 2004, p. 116; Smart, 1989).

Corporal elements refer to descriptions of the physical actions involved during the rape, and the physical consequences experienced afterwards. The emphasis placed on the corporal is grounded within traditional understandings of rape and a masculine perspective of sexual violation – defined through its central signifiers of non-consent, physical force and penetrative sex (Finley, 1989; Smart, 1989). This emphasis on the corporal was heavily evidenced in the transcripts examined, with victims commonly asked multiple, and arguably unnecessarily detailed, questions on every aspect of their physical violation. It is important to note that these questions were exclusively posed by the prosecution, the judges and the legal representatives; the defence counsel refrained from asking any of the victim-witnesses or eye-witnesses questions directly related to the rapes.⁶⁴

⁶⁴ This is only with reference to the transcripts available. It is recognized that corporal questions may have been asked by any party during closed session, however, this is unlikely, as all of the prosecution’s examinations of witnesses with reference to rapes were conducted in open sessions, and closed sessions were only necessary when identifying information – such as names or locations – were discussed.

Table 2.4- The corporal questions asked of witnesses⁶⁵

The witness is asked...	Appears in the transcripts of ___ witnesses	Mean number of questions per witness	Range
If they were raped and to describe their experience/ to describe the rapes they witnessed	11	6.09	1-13
The level of force used against the victim during the attack	9	3.00	1-5
The physical consequences experienced following the rape	9	4.67	1-11
Which body part the perpetrator(s) used to penetrate the victim	8	2.38	1-5
Which part of the victim's body was penetrated by the perpetrator(s)	10	2.60	1-5
To use proper terminology when describing the rape (i.e. penis, vagina, etc...)	3	2.33	1-4
How many times, and by how many perpetrators was the victim raped by	9	1.67	1-3
Which position the victim was in during the rape	4	2.25	1-3
If condoms were used, or if ejaculation into the victim took place	3	2.67	1-6
Negative Cases: Judges reference protective measures for witness- questions concerning rape must be formulated in the least embarrassing/ intrusive way	3	2.33	2-3

Witnesses were first prompted by the prosecution to begin discussing their rapes, or those they witnessed, through general requests to either “describe what happened to them personally,” or to expand on what they had meant when they had referred to being raped at an earlier point in their testimony. For several witnesses, these questions were repeated multiple times by the prosecution if the witness had failed to understand the initial prompt, or to provide sufficient information concerning their rapes. For example:

Prosecutor Bifwoli: Thank you, Madam Witness, for that explanation, but so that the record is clear I'm going to ask you follow-up questions on what you've just told the Court. Now, Madam Witness, what do you mean when you said three of them raped you? What exactly did they do?

Witness 80: The first one threw me to the ground. I had the child in my arms. The first one was on me while the two others were standing up, pointing their weapons at me.

Q. Thank you, Madam Witness. You've just said that the first one was on you. What was he doing on you?

⁶⁵ This includes questions asked of victim-witnesses concerning their own rapes and the rapes they may have witnessed, and questions asked of eye-witnesses concerning the rapes they witnessed.

A. He slept with me like one sleeps with a woman. (T-61 page 5 line 12-page 6 line 19)

Witness 82: There were three of them on me. They raped me after having made me assume a curved position. Later, I had many difficulties.

Prosecutor Bifwoli: Thank you, Madam Witness. I know it's difficult for you, but we will try together and go step-by-step so that the Court understands exactly what they did to you. Now, Madam Witness, what do you mean when you say they raped you?

A. I haven't fully understood the question. Could you speak up a little, please?

Q. Thank you, Madam Witness. A short while ago I asked you what exactly did the Banyamulengue do to you and your answer was, "There were three of them on me. They raped me after having made me assume a curved position. Later, I had many difficulties." Now, my question is this: What do you mean when you say they raped you? What do you mean by that?

A. I was still a virgin and they deprived me of my virginity."

[...]

Q. Thank you, Madam Witness. Now, how did they deprive you of your virginity?

A. They made me lie down on the ground in order to rape me. (T-58 page 14 line 20-page 15 lines 9 & T-58 page 17 lines 20-22)

Following these introductory questions, the prosecution typically sought to establish the corporal elements necessary to demonstrate the *actus reus* of the crime of rape. The Rome Statute defines rape as an invasion by means of penetration, "however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;" further, this invasion is "committed by force, or by threat of force or coercion."⁶⁶ As such, questions concerning the body parts involved, the act of penetration, and the physical force used against the victim were expected and frequently observed.

In particular, the prosecution placed a lot of emphasis on establishing the level of force used against the victim, and typically asked multiple questions regarding the physical abuse or restraint of victims, the use of threats against the victim or her family, and the use, or presence,

⁶⁶ Please refer to Appendix I for a complete account of the Rome Statutes' definition of rape as a war crime and crime against humanity

of weapons. To further demonstrate the physical violence used against the victims, the prosecution also asked questions concerning the injuries incurred on account of the rapes and any long-term health complications. This focus on physical force further acted to support the particular rape script advanced by the prosecution; as the “brutal” and “vicious” nature of the rapes was central to their conceptualization of its use as a weapon during the conflict. For example:

Prosecutor Kneuer: Yesterday, you stated - - that the first Banyamulengue pointed a weapon at your head; is that correct?

Witness 22: Yes, he pointed his weapon at my throat once I had laid down; at my neck. [...] When he appeared and I resisted, he threw me down on the bed. He took his weapon, he pressed it against my neck with his two hands, and then I crossed my legs but he separated them with his rangers. He separated my legs by force, and that’s when he slept with me there and then. When he got up, the other person came. The weapon was still in the same position when the third person arrived. (T-41 page 13 line 21- page 14 line 5)

Prosecutor Bifwoli: Which part of your body were these injuries?

Witness 82: There were injuries to my knees and the rest of my body as well.

Q. And how did the Banyamulengue inflict - - cause these injuries?

A. They had batons and, when they hit me, they hit my legs and I had - - I was injured on my knees and afterwards they raped me.
[...]

Q. Thank you, Madam Witness. What caused these injuries in your vagina?

A. When they took me, they really assaulted me sexually very violently. They took me by force and they put my arms behind me, they bent me over and they did these horrific things to me and that’s the reason why I ended up with these terrible injuries. (T-58 page 19 lines 6-10 & page 21 lines 8-22)

Questions concerning penetration and body parts were commonly asked in conjunction with each other, and manifested in two distinct ways; specifically, which body part the perpetrators body was used to penetrate the victim, and which part of the victim’s body was penetrated. For example:

Prosecutor Bala-Gaye: Which part of his body did the first Banyamulengue use?

Witness 79: Well, how does a man sleep with a woman? He used the male part of his body.

Q. Madam Witness, what did he do with this male part of the body?

A. I don't know how to explain this. He took his clothes off. He slept with me as a man sleeps with a woman, and then he got up and another took his place and did the same thing. (T-77 page 23 lines 6-15)

Prosecutor Carl: Which part of your body did the first man penetrate?

Witness 29: You've already asked me that question and I think I have replied. I am a woman. How does a man sleep with a woman? The man uses his body to penetrate the female part of the woman. Do you want me to give the specific name?

Q. No, Madam, this is fine. (T-80 page 32 lines 3-9)

Despite what is observed in the above exchange between the prosecutor and Witness 29, for three other victim-witnesses, attempting to answer these questions by referring to their body parts or those of their rapists using general terms or euphemisms, such as the "female part of my body," or "the male part of his body," was not considered sufficient detail by the prosecution. Instead, these three victim-witnesses were explicitly required to name these body parts using the proper terminology, often despite their expressed embarrassment or resistance. For example:

Prosecutor Bifwoli: Thank you, Madam Witness. Which parts of their body did they use to deprive you of your virginity?

Witness 82: They used the male part of their body.

Q. Thank you, Madam Witness. And does it have a name?

A. Yes, I can give you the name. They used their penises to sleep with me. (T-58 page 15 lines 10-14)

Prosecutor Bifwoli: Thank you, Madam Witness. And which part of your body did he use to sleep with?

Witness 80: The masculine - - the feminine part of my body.

Q. Thank you, Madam Witness. Could you please tell the Court what the feminine part of your body is; what's its name?

A. I'm ashamed to say that.

Q. Thank you, Madam Witness. We all understand, and maybe could you tell the Court normally what is the function of this body part? What is it normally used for?

A. But it's the part that a man introduces his penis into. He ejaculates.

[...]

Q: And please tell the Court from which part of your body were you bleeding.

A: Well, I tried not to say it, but it was my vagina. (T-61 page 7 lines 8-24 & page 8 lines 15-16)

Thus, what was observed was a recreation of the phenomenon described by Henry (2010), MacKinnon (1987) and Smart (1989), wherein rape victims are compelled to name their sexual organs, and those of their rapists, in front of numerous strangers without true consideration paid to possible cultural or social barriers that often “dictate what can and cannot be said in a public context” (Henry, 2010, p. 1105-1106). In fact, during its opening statement the prosecution did recognize the possible limiting effects caused by cultural barriers, but nonetheless placed emphasis on obtaining a clear account of the incident:

Prosecutor Scaliotti: [...] we also know from experience that sometimes victims, especially victims of sexual violence, when they have to address the Court with regard to the incidents that they suffered, they tend to use some euphemistic language because of cultural barrier, they end to avoid any biological terms and these sometimes makes very difficult the understanding of testimony [...] (T-30 page 20 lines 2-14)

However, the use of such euphemisms as the “female part of my body” and the “male part of his body,” often in conjunction with descriptions that the perpetrator “slept with” the victim as a “man sleeps with a woman,” leaves little room for confusion or difficulty in terms of understanding. Yet, the requirement to use explicit terminology for sexual organs in the cases of Witnesses 81, 82, and 80 was imposed by the prosecution despite the fact that other victim-witnesses and eye witnesses had previously and subsequently used similar euphemisms without issue. In truth, this example spoke to a larger phenomenon observed; an unequal application of questions and requirements between witnesses.

Another example demonstrative of this phenomenon was observed in the transcripts of Witness 23. Specifically, Witness 23, the only male rape victim-witness, was able to describe his rape in more general terms as compared to female victim-witnesses. His ability to do so was in part caused by the interruptions and objections of the judges and the defence counsel. In particular, the prosecution had approached the questioning of Witness 23 similar to that of

female victims – asking him to expand on what he had meant when he said a man “lay with him,” and that he had been sodomized – but this line of questioning was quickly put to an end by the intervention of Judge Steiner:

Prosecutor Bifwoli: Thank you Mr. Witness, for your answer. However, I am still going to ask for more specific details so that the Court can understand exactly what these people did to you. What do you mean when you say they sodomised you?

Witness 23: I said that they sodomised me because they practised, or performed -- they penetrated me from behind. They forced me to have anal relations with them. My anus was swollen and I had to get traditional treatment, the kind of treatment that is done on women who have just had a baby, and thanks to God this traditional treatment which I received allowed me -- or relieved me; helped me heal somewhat.

Presiding Judge Steiner: Sorry, it is just, of course, the Prosecutor is free to continue with its line of questioning, but just to inform that the Chamber is already satisfied with the details - the physical details - of the attack, so if the Prosecution is in a position to avoid more intrusive and direct questions in this respect. [...] Maître Liriss?

Defence Counsel Mr. Liriss: Your Honour, the Defence would adopt the same viewpoint as the Chamber. We are satisfied with the explanations that were provided.

Prosecutor Bifwoli: Thank you, Madam President, your Honours. The Prosecution has taken into account what the Chamber has stated, and in that case we will proceed to other questions. (T-51 page 34 line 22- page 36 line 3)

Therefore, while the witness does mention that his anus was penetrated, he was not exposed to questions requiring him to name the parts of the body used by the perpetrators, or to detail the three separate rapes he experienced; details which were commonly requested of female victim-witnesses. Conversely however, Witness 23 was required to describe the rapes of his wife and daughters (Witness 80, 81 and 82) using more specific language and to address aspects that were deemed unnecessary during his description of his own rape, without similar intervention from the court. For example:

Prosecutor Bifwoli: Thank you. Now, I caution you again, without mentioning any names, did anything happen to any of your wives?

Witness 23: Yes. One of them, the one who is still with me today, was raped, too, and she had a child who ended up dying. She has problems in her pelvis and still today there is no treatment for her.

Q. Sir, just for clarification, what do you mean she was raped?

A. What I meant was that they slept with her. That's it. I meant to say that they had slept with her.

[...]

Q. And when you say they slept with her, which part of her body did they use to sleep?

A. They used their penis, Mr. Prosecutor. They used their penis and introduced it into her body. (T-51 page 39 line 17- page 40 line 5)

Prosecutor Bifwoli: Did anything happen to any of your daughters?

Witness 23: Prosecutor, I said earlier on that the whole family went through these atrocities. My four daughters had to go through this that means that all of them were raped. [...]

Q. Witness, for the purpose of clarity, what do you mean when you say, "they were raped"?

A. What I meant was that they were forced to sleep with them. Whether or not the person wanted to do so, that was what was going to happen anyway.

[...]

Q. And when you say they slept with them, which part of their bodies did the Banyamulengue use to have relations with them?

A. Prosecutor, how does a man sleep with a woman? The man uses his penis to put it into the vagina of the woman. That is why I said they slept with my daughters. He used his sexual organ to touch the feminine part of the person.

Q. Thank you for those details. (T-51 page 43 line 5- page 44 line 2)

As there is only one male victim-witness testifying in this case, it is difficult to hypothesize the cause of this uneven approach, and whether it would be isolated to this one particular case. Nevertheless, it may represent evidence of reluctance on the part of the court personnel to hear a detailed description of male rape, or evidence of an underlying but persistent gendered understanding of who can be victimized, and what constitutes a "real" rape (Buss, 2009; Mardorossian, 2002).

In particular, the existence of male rape victims had previously been explained by the prosecution as motivated by the victims' positions of authority within their communities. By explicitly differentiating the existence of male rape victims from female victims – through the

provision of an explanation for male victimization different than that for female victimization – the prosecution had established the existence of male victims as different, or atypical, from the recognized category of war rape victim. Therefore, despite presenting evidence and testimony that spoke to the presence of male victims, the prosecution maintained a highly gendered understanding of who is commonly raped in conflict. The anomaly that was raped men is further maintained by Ms. Douzima-Lawson, one of the legal representatives, who argued that the rape of men during conflict “had not happened before in our country” (T-32 page 41 lines 14-15). Therefore, male rape is differentiated from the recognized script of sexual violence in conflict, and this differentiation may in turn have made details of male rape unnecessary for assessing the existence of rape, as male victimization is explained and understood as something else entirely.

The phenomenon observed, in which questions and requirements for specific details were unevenly applied across witnesses, warrants a discussion concerning what details are in fact truly necessary for establishing the existence of rape. This discussion was in part touched upon during the testimony of the first victim-witness presented by the prosecution.⁶⁷ In particular, during the prosecution’s examination of Witness 22, the Defence Counsel objected to the numerous and detailed questions asked of the witness regarding her rape, arguing that the defence did not dispute the existence of rape during the conflict – only the identity of the perpetrators – and in consequence, did not think it necessary for the prosecution to proceed with questions regarding how the victim were penetrated, how many times she was raped, and so on. In response, the prosecution argued that the previous description provided by the victim had not met “all the elements necessary” to establish “beyond a reasonable doubt that crimes occurred,” but if the defence was willing to submit in writing the elements of the crime they agreed with, they would

⁶⁷ This discussion takes place over several pages of Witness 22’s transcripts, in particular: T-41 page 10 line 17-page 13 line 2; page 23 line 23- page 27 line 4; and T-42 page 4 line 16-page 5 line 13.

be able to avoid such questions in the future. Ultimately however, the defence withdrew their “procedural concession” concerning this issue, and in consequence the prosecution proceeded with detailed questions in both their examination of Witness 22 and later victim-witnesses.

Despite this initial discussion, and several reminders on the part of Judge Steiner that either counsel refrain from making victims “repeat the details about her rape unless absolutely necessary” and to “not submit the witness to embarrassing or stressing or intrusive situations as far as possible,” corporal questions concerning aspects seemingly unnecessary for establishing the *actus reus* of the crime of rape were frequently posed by the prosecution (T-42 page 8 lines 1-6; T-50 page 3 line 24-page 4 line 1). For example, six victim-witnesses were asked questions concerning how many men had raped them:

Prosecutor Kneuer: How many of these three Banyamulengue slept with you?

Witness 68: Two of the three Banyamulengue slept with me. (T-48 page 23 lines 1-2)

Prosecutor Bifwoli: How many of them slept with you?

Witness 81: There were four of them, but - - there were five of them, but only four of them slept with me. The fifth one also wanted to, but since I was bleeding he didn’t continue. (T-55 page 11 lines 9-12)

Two of the victim-witnesses were further asked if they were raped by the multiple perpetrators in turns or at the same time:

Prosecutor Bifwoli: Did they rape you in turns or all together?

Witness 23: The first one slept with me and he ejaculated in me. Then the second one came to do the same thing. He ejaculated in me. And, finally, the third one did the same thing as the two earlier ones had done. (T-51 page 36 lines 4-9)

Prosecutor Bifwoli: And these two Banyamulengue who raped you, did they rape you at the same time, or in turns?

Witness 82: The first firstly slept with me. The second came afterwards. (T-58 page 19 lines 8-10)

These questions were asked despite the fact that it does not matter how many times or by how many men a victim is raped by; one rape is enough to qualify as a war crime if knowingly

committed in the context of an armed conflict (Sharratt, 2011). Further, establishing that victims were raped by multiple perpetrators, lead to several victim-witnesses being asked repetitive questions concerning other corporal aspects of their rapes; in particular, they were asked the same question for each distinct rapist. For example:

Prosecutor Kneuer: When the first Banyamulengue raped you, Madam Witness, in which position were you?

Witness 87: I was down on the ground and I had my two hands behind my head when he was sleeping with me.
[...]

Q. Madam Witness, when the second Banyamulengue raped you, in which position were you?

A. I was still in the same position, and the same position as the one when the first one slipped- - slept with me. I had my two hands behind my head. (T-44 page 39 line 22- page 40 line 18)

The above further illustrates another set of unnecessary corporal questions asked of four victim-witnesses; in particular, the position they were in during their rape:

Prosecutor Carl: What position were you in while the man was sleeping with you?

Witness 29: I've told you that, when he gestured at me and told - - for me to go down on the ground, I wanted to resist. He kicked me and I fell down, so I was on my back and I was looking upwards. My neck and my back were on the ground and at that time I was looking upwards. (T-80 page 32 lines 9-14)

Three victim-witnesses were also asked if the perpetrators had ejaculated inside of them, or if condoms were used. This question was only asked once for two of the victim-witnesses, but in the case of Witness 22, these questions were asked a total of six times; twice for each of the three men who raped her, thus further demonstrative of the issue identified above:

Prosecutor Kneuer: With regard to the first man, did he use a condom?

Witness 22: He didn't use anything.

Q. Did the man ejaculate in you?

A. Yes, he ejaculated into me.

Q. The second man that raped you, did he use a condom?

A. He didn't use a condom either.

Q. Did he ejaculate in you?

A. Yes, he did too.

Q. The third Banyamulengue who raped you, did he use a condom?

A. He didn't use a condom either.

Q. Did the third man ejaculate in you?

A. Yes, he also ejaculated in me. (T-41 page 13 lines 8-20)

A final unnecessary question identified concerned how the victim was dressed on the day she was raped. In particular, Witness 68 was asked this question, and Witness 73 and Witness 119 were both asked this question concerning the rapes they witnessed. In bears mentioning that these questions appeared to be, at least in the cases of Witness 73 and 119, veiled attempts by the prosecution to establish the amount of violence involved in the rapes, as they typically prompted the witnesses to describe the torn and bloody state of the girls' clothing.

Taken together, questions concerning the number of rapists, whether the victim was raped consecutively or concurrently by multiple rapists, which position the victim was in during the rape, whether condoms were used or if the rapist ejaculated into the victim, what the victim was wearing, and the necessity for three victims to name sexual organs (as discussed earlier) signal what MacKinnon (1987) referred to as the "pornographic vignette" created during the rape trial. While it was expected that victims would be asked questions concerning penetration, body parts, and physical force – necessary elements required to establish the *actus reus* of rape as defined by the Rome Statute – the questions listed above go far beyond this, and act to create an imagery of the rape, to create a spectacle of it, and to transform those listening from simple "spectator[s] into lewd voyeur[s]" (Engle, 2009; as quoted in Sharratt, 2011, p. 71). Victim-witnesses were commonly compelled to engage in the sexual act of naming parts of their bodies or detailing their rapes to such a degree that those present in the court could "re-enact her violation in their imaginations" (MacKinnon, 1987; as quoted in Smart, 1989, p. 39). Arguably the above process could lead to the possible re-traumatisation of victims, or act to (re)create a sense of violation. In light of this possibility, Sharratt's (2011) argument that international courts should "reduce

significantly the number of unnecessary details required of victims of sexual violence during testimony,” is of particular merit (p. 141)

The above further lends itself to a discussion concerning what is considered “intrusive” by the court. Continually reiterated by the Judges when referencing the protective measures afforded to victims was the necessity to spare the victims from “questions that may be embarrassing,” or intrusive, yet, as evidenced above, this was not always observed in practice (T-39 page 21 lines 12-15). However, while the above questions were exclusively posed by the prosecution and the legal representatives, it was a question posed by the defence that prompted the one and only reprimand from the Judges for intrusive questions. In particular, during the cross-examination of Witness 81, Mr. Haynes, in an attempt to establish the time line of events following the victim-witness’s rape, asked several questions concerning how long after the medical bath⁶⁸ she took to treat her injuries that she left to travel to a different town. While the defence’s intention in posing these questions appeared solely to be an attempt to establish the length of time between the victim-witness’s rape and her departure from her home, without attempts to gain details concerning the bath itself, the prosecution and Judge Steiner both objected to this line of questioning:

Prosecutor Scaliotti: Yes, Madam President. I would like to point out that the fact that this line of questioning is becoming, in the Prosecution’s view, a bit intrusive. And also considering the recommendations for special measures that were given by the Victims and Witnesses Unit with particular regard to the mode of the questioning, and the fact that intrusive questions should be avoided, in the Prosecution’s view the Defence should refrain from continuing into this line of questioning. Thank you.

Presiding Judge Steiner: I think Mr Haynes would agree that maybe it’s becoming too embarrassing for the witness. If you could, please, change a little bit the line of questioning in this respect.

⁶⁸ The medical bath refers to a traditional treatment prepared with local herbs and leafs, typically used for women who had just given birth in order to treat any internal wounds or tears to the vagina. This traditional treatment was referred to in several of the witnesses’ testimonies.

Defence Counsel Mr. Haynes: Yes. Well, I don't want to get into an argument. The question was only, "What did you do then?"
[...]

Defence Counsel Mr. Haynes: I don't want to be accused of an intrusive question, but did you go to PK22 before or after you had the bath?

Presiding Judge Steiner: Sorry, Mr Haynes. This is going too far. [...] Mr Haynes, the Chamber would very much appreciate if not only you stop with such intrusive and sometimes offensive questions, but if possible that you follow the recommendation given by VWU, taking into account the literacy level of the witness, to put to her simple, open-ended questions in order for the witness to understand exactly what you are asking for. Thank you very much. (T-56 page 38 line 6- page 42 line 4)

In part this reprimand may be attributed to a heightened level of sensitivity and scrutiny paid to how the defence questions the witness; as it is traditionally during cross-examination that a witness is exposed to challenges to her credibility, or badgering and insensitive questions (Henry, 2009; Mertus, 2004). However, the fact that this was the only apparent reprimand handed down for intrusive questions signals a lack of reflexiveness, especially on the part of the prosecution, and warrants a discussion over what is considered intrusive: questions concerning when a victim took a bath in order to establish a time line of events, or, for example, multiple questions concerning how many men ejaculated in a victim and in which position a victim was raped in. While not discounting the embarrassment Witness 81 may have felt on account of the above questions, the fact remains that the prosecution's frequent requests for corporal details far beyond what was necessary for establishing the existence of rape never received similar sanction from the Chamber, despite the judges' many reminders to refrain from exposing the witnesses "to embarrassing or stressing or intrusive situations as far as possible" (T-50 page 3 line 24- page 4 line 1).

In addition to detailed descriptions of the corporal, emphasis placed on accuracy, in terms of both "temporal and spatial recounting" is highlighted in the literature as central to testimony deemed legally relevant in court (Dauphinee, 2008, p. 64-65; Henry, 2009). This emphasis was

observed in all transcripts examined and proved a central feature of both the prosecution's and defence counsel's strategies in examining witnesses.

Table 2.5- The temporal questions asked of witnesses⁶⁹

The witness is asked...	Appears in the transcripts of ___ witnesses	Mean number of questions per witness	Range
To provide a detailed chronological account of the events prior to, during, and following the rape(s)	12	8.42	1-25
To provide details concerning her own/the victim's behaviour prior to, during, and following the rape(s) (i.e. did she seek medical attention, tell anyone about the attack, flee the area, etc...)	12	13.25	2-37
To discuss the events in sequential order, and are interrupted if they fail to do so	10	3.00	1-9
When the rape took place (i.e. the exact date and time)	9	6.33	1-14
How long the rape lasted	7	1.29	1-2

With reference to temporal recounting, witnesses were often asked questions concerning the general chronology of events, and to provide details concerning the victim's behaviour and actions prior to, during and following the rapes. Often this would include detailed and repetitive questions concerning the victim's actions. For example, Witness 87 was asked a total of thirty-five questions by the defence concerning her behaviour and actions after her rape: sixteen of these questions concerned who she had told about her rape, and when she had told them; five questions dealt with whether she saw a doctor, or received a gynaecological examine after the rape; five questions dealt with how long after her rape she remained on her front porch with her brother before the Banyamulengue returned to her home; six questions dealt with how long she watched her brother be beaten and killed by the Banyamulengue; and finally three dealt with how long she waited the next morning to return to her house to confirm that her brother was indeed dead.

⁶⁹ This includes questions asked of victim-witnesses concerning their own rapes and the rapes they may have witnessed, and questions asked of eye-witnesses concerning the rapes they witnessed.

Emphasis on proper sequential ordering was observed in the transcripts of ten witnesses, thus highlighting the expectation that a witness relay her experience “in a complete and linear fashion” (Mertus, 2004, p. 120). Witnesses were often interrupted when they attempted to discuss a certain piece of evidence not in order with the chronology of events or narrative either counsel was attempting to establish. For example, Witness 79 kept discussing the rape of her daughter when being questioned about her own rape and this prompted Prosecutor Bala-Gaye to redirect Witness 79 back to her own experiences several times:

Madam Witness, I will be asking you some questions in relation to your daughter shortly. Still in relation to what happened to you yourself [...] (T-77 page 12 lines 1-2).

A similar emphasis on proper sequential ordering was expressed by Judge Steiner who directed Witness 73 to “be more precise on chronology,” when discussing the rape of his neighbour’s daughter (T-71 page 35 line 20).

With regards to the temporal aspects of the rape themselves, six victims-witnesses and all three eye-witnesses were asked several questions concerning the exact date and time the rapes occurred. For example:

Prosecutor Kneuer: On which day did that happen?

Witness 68: It was on the 27th.

Q. Can you please also provide the month and the year?

A. It was on 27 October 2002.

Q. Is there a reason why you remember that date?

A. That’s what happened to me and I had to remember it and to keep that date in my mind, in a jealous way.

Q. Do you recall what time of the day it was?

A. It was around 1 in the afternoon, between 1 and 2 in the afternoon. (T-48 page 18 line 20-page 19 line 3)

Six victim-witnesses were also asked how long their rapes lasted. While temporal questions concerning dates possess probative value – as the dates in which the Banyamulenge entered certain neighbourhoods is a central point of contention between the prosecution and

defence counsel – questions concerning how long the rapes lasted seem unnecessary.

Specifically, because rape is defined as penetration, “however slight,” the exact duration of the sexual attack is not of importance, and further, is an aspect not often remembered by the victim.

For example:

Prosecutor Kneuer: Madam Witness, do you recall how long this first Banyamulengue slept with you?

Witness 68: I cannot remember all those details. I was being threatened with a weapon. I was crying. I was in a terrible state, so I cannot remember exactly how long these things lasted. (T-48 page 24 lines 13-17)

Prosecutor Bifwoli: And for how long did the rape take place?

Witness 82: I was a minor at the time, so I can’t remember how long it took place for. (T-58 page 18 lines 11-12)

Prosecutor Bifwoli: And for how long did these Banyamulengue rape you?

Witness 80: Well, you know, I was very troubled at the time. I have no idea what the duration was. (T-61 page 8 lines 17-19)

Table 2.6- The spatial questions asked of witnesses⁷⁰

The witness is asked...	Appears in the transcripts of ___ witnesses	Mean number of questions per witness	Range
To provide details concerning the location in which the rape(s) took place	8	10.63	1-29
If other people (i.e. members of her family) were present during the rape(s), and where they were located in relation to the victim and/or the perpetrators	10	4.90	1-18
Where the perpetrators were in relation to the victim (i.e. where the other members of the Banyamulengue were when one perpetrator was raping the victim, etc...)	7	1.57	1-5
If weapons were present, and where they were located in relation to the victim	9	2.22	1-6

In terms of spatial questions, a total of seven victim-witnesses and one eye-witness were asked questions concerning the exact location in which the rapes took place. In two cases this involved numerous questions concerning sketches the witnesses had provided. For example, Witness 22 had drawn a sketch of her home for the prosecution, and was subsequently asked

⁷⁰ This includes questions asked of victim-witnesses concerning their own rapes and the rapes they may have witnessed, and questions asked of eye-witnesses concerning the rapes they witnessed.

twenty-nine questions regarding the layout of the room she was raped in, where the Banyamulengue had entered her home, and to label each room on the sketch and identify which rooms her family members were in when the attack happened. Similarly, Witness 119 had provided a sketch of the riverbank on which she had witnessed the rapes of two girls, and was asked a total of twenty-four very specific questions by the defence, including: how tall certain plants were; how deep the river was; the distance between various landmarks; and finally where she was located in relation to these landmarks and the perpetrators.

Other spatial questions frequently observed included: if other family members were present during the rape; where the perpetrators were in relation to the victim; and the presence and location of weapons in relation to the victim during the rape. For example:

Prosecutor Bifwoli: And at the time you were being raped, where was your brother?

Witness 81: He was present. When they tried to beat me with their rifle butt, when he tried to resist they beat him. (T-55 page 14 line 24-page 15 line 1)

Prosecutor Carl: Could you see what the other two men were doing while the first man slept with you?

Witness 29: While the first one was sleeping with me, the others were standing and they were watching. (T-80 page 32 lines 15-18)

Prosecutor Kneuer: While this first perpetrator was sleeping with you, where was his gun?

Witness 87: The first person had his weapon in his right hand. They had the flashlight in the left hand, but he put the flashlight down on the ground.

Q. Where did the perpetrator put the gun while he was raping you?

A. When he raped me, he put the weapon on the ground and he protected the hand - - well, he had his hand on the weapon which was on the ground. (T-44 page 38 lines 16-21)

In sum the above examples evidence a continued emphasis placed on the corporal, temporal and spatial elements of rape; in particular, a requirement that witnesses answer detailed and repetitive questions on the physical acts involved, the temporal ordering of the attack, and on details of the surrounding environment in which the rape took place. This focus has been

highlighted in the literature as a central process that limits testimony and restricts the victim in terms of what she can convey of her experiences. However, as will be evidenced below, several processes counter to those that have traditionally been identified as limiting testimony were identified.

6.2.3 - Unlimited Testimony and Narratives of Emotional and Social Consequences

Two sets of questions counter to the processes that limit testimony were observed:

Table 2.7- Negative cases for Limited Testimony

	Appears in the transcripts of ___ witnesses	Mean number of questions per witness	Range
Witness is asked questions concerning the emotional/social consequences of their rape	10	5.40	1-13
Witness is asked if there is anything else they would want to add to their testimony	11	1.27	1-2

As evidenced in Table 2.7, the majority of witnesses were asked questions concerning the emotional and social impact of their rapes, and were provided an opportunity to add anything they wanted to their testimony. In particular, at the end of their testimony, all but one of the witnesses was asked by Judge Steiner if they had anything to add to their testimony.

While several witnesses did not have anything to add, others took this opportunity to thank the court for allowing them to come and testify. For example, Witness 79 thanked the court for providing her with the opportunity to testify and for “this opportunity to say anything that I wanted to talk about, everything I had on my heart” (T-79 page 43 lines 13-21). Others focused on the concept of justice, and what they hoped the court might accomplish. For example, Witness 42 stated:

We did not believe that justice would be done, we believed that the atrocities would go unpunished, and so it was a great joy to us to see that the Prosecutor had sent investigators to Bangui to shed light on the events that had taken place. [...] I wish the best of luck to the Court and I would like to express the wish that the Court’s activities continue with the objective of ending impunity, because nobody

is above the law. Treating human beings like animals, killing them, abusing them, is not good. (T-69 page 53 lines 1-11)

Similarly, Witness 119 stated:

My gratitude to the International Criminal Court is such that I can say that it is a body that listens to the complaints lodged by the victims. This is an institution which is working to guarantee justice and gives an opportunity to people, who have no opportunity to cry out their pain. [...] The sufferings of the Central African people, their voices and their pains will be alleviated and soothed because you will be then proclaiming justice. Thank you for your attention. (T-87 page 39 line 13-page 40 line 11)

Others identified the experience of testifying as helpful to them and their healing process. For example, Witness 29 stated:

I would like to express my gratitude to all of you, to the Judges, to the Prosecution, the Defence. I would also like to thank all the people who are here and I thank God, because I prayed to God and I told him that what had happened to me, if I ever had an opportunity to give testimony about that it would be a relief and not just for me, but also for the -- for people who are fearful, and also to ensure that similar crimes are not committed against other people. I am -- my heart is full of joy, because I have given testimony and tomorrow it will be my birthday. To conclude, once again I thank you. Thank you, everyone. (T-81 page 50 line 7-18)

Witness 73 also expressed gratitude to the court for providing him with the opportunity to testify to what he had witnessed, as it allowed him to have a “clear conscience,” knowing that he “contribute[d] to having truth emerge” (T-76 page 36 line 16-page 39 line 3). These expressions of gratitude, feelings of having contributed to the exposure of the truth, and hopes that the court would provide justice, signal a more complex experience of testifying than one which is purely negative. Sharratt (2011) argues that too often legal experts and victim advocates point out the “abuses” women experience when they stand witness, without understanding that despite these abuses the act of testifying can still be “gratifying for most women even under conditions far away from perfect” (p. 131). Thus, it is important to recognize the benefits of testifying for witnesses, while simultaneously identifying features that cause distress or that ultimately limit and restrict what a victim is able to describe.

The second set of questions observed included those concerning the emotional and social consequences of rape. The existing literature highlights the traditional lack of focus paid to the these consequences as a central process that limits testimony, as victims are seldom provided an opportunity to discuss their feelings surrounding their victimization, and are instead compelled to limit their testimony to that which is considered legally relevant for the purposes of assessing the guilt of the accused (Henry, 2010; Mertus, 2004). Thus, with reference to the transcripts examined, it is important to note that none of the witnesses were interrupted when they referred to the long-term consequences of their victimizations, and in fact ten witnesses were explicitly asked questions concerning the emotional and social consequences they, or family members, had experienced on account of being raped. For example, the prosecution typically asked questions concerning the long-term emotional struggles faced by victims:

Prosecutor Kneuer: Madam Witness, you described to us the physical harm that you suffered from after the rape. Can you describe your emotions, your state of mind, after the rapes?

Witness 68: My spirits and my mental state are poor. I'm - - I have a tendency to depression, and when I see a soldier, or a man with a weapon, I'm afraid. Even on public transit I am very, very afraid even today.

Q. How do you sleep at night?

A. At first I had nightmares. I would re-experience the events and I slept poorly. After that, things did get better. (T-48 page 40 line 16-page 41 line 1)

Prosecutor Bala-Gaye: Madam Witness, what is probably my last question on this point is how has this incident, the rape that you suffered, how has it affected your life now?

Witness 79: After what happened to me, I am not - - I don't enjoy a good state of health. I don't have a husband. I've got children I'm responsible for and I have not the wherewithal to do that properly. I have nightmares at night. I suffer from all types of illnesses. I live in worry, in a state of worry. I'm troubled. I don't know. Now, I know that I'm not right in my mind. I've got psychological problems. (T-77 page 35 lines 10-20)

Further, the prosecution explored the social consequences experienced, asking questions regarding stigma, spousal rejection and abandonment, and how victims were commonly ostracised within their communities:

Prosecutor Bifwoli: Sir, you have stated in your evidence not that this - - your second wife left. You said that, “And the second one ended up leaving me and never came back.” Now, what do you mean by this?

Witness 23: What I meant was that, once they sodomized me, she said to me, “You are no longer a man. You are a woman like myself, so I cannot live with you. I have to leave you.” And this is why she left, until her death. (T-51 page 41 line 22- page 42 line 2)

Prosecutor Bifwoli: And where is your husband now?

Witness 81: After what happened to me, he took all my children. He said that he wanted to go away and not return, and that’s the situation to this very day [...] it’s because of the sexual intercourse the Banyamulengue had with me. He thought that the Banyamulengue had sullied me. (T-55 page 16 lines 8-20)

Prosecutor Bifwoli: Madam Witness, what do people in your neighbourhood say about what happened to you and your family?

Witness 80: We were being pointed at. Before those events, my husband was rich. We ate well, we lived well, but after those events everyone was making fun of us.

Q. Thank you, Madam Witness. Please explain to the Court when you say “everyone was making fun of us,” what were they exactly doing?

A. They were making fun of us, because of what the Banyamulengue had done to us. They had gathered us all together in the house and they assaulted us. That is why people were making fun of us.

Q. Did these rapes affect your daughters in any way?

A. Even right now, as I talk to you, which kind of man is going to approach any of my daughters? Every man is afraid of my daughters. Since they were assaulted and raped by the Banyamulengue, people are afraid of them because they do not want to contract any diseases. (T-61 page 24 line 20-page 25 line 8)

Further to questioning the victim-witnesses directly, the prosecution also explored these issues during the testimonies of the two expert witnesses. In particular, Dr. Tabo (Witness 229) was questioned at length concerning the issues of spousal rejection and abandonment, the intergenerational transmission of trauma and stigma to the children of rape victims, and the feelings of guilt and shame commonly experienced by victims. With reference to spousal

abandonment, Dr. Tabo argued that breakdown of marriages are common, and attributes it to the stigma of being tainted experienced by many victims, and in many cases a belief that the sexual encounter was “tantamount to a form of adultery;” a belief compounded when the rape is common knowledge in the surrounding community with everyone knowing “that the woman, though she was compelled to do so, had slept with somebody else” (T-100 page 20 line 15- page 22 line 16). This situation was particularly acute in the CAR and many raped women came to be known as “the women of the Banyamulengue” (T-100 page 42 lines 6-13). Dr. Akinsulure-Smith (Witness 221) also discussed this issue, and identified the fear of being stigmatized or ostracized by their family and community, as the principle reason why many women, and men, kept quiet about their rapes.

Henry (2010) argues that a previous failure on the part of international courts and tribunals to hear testimony that fell outside of what was deemed legally relevant contributed to an inability to understand rape “as a complex experience,” with its consequences extending beyond the physicality of the crime (p. 1106). As such, the emphasis placed on exploring the emotional and social consequences of rape, exemplified by the prosecution’s questioning of multiple witnesses to this effect, is vital for ensuring a more in-depth understanding of rape is incorporated into the legal narrative of the crime.

While it is important to note that witnesses were provided opportunities to add anything they wanted to their testimonies and to convey the pain and trauma they experienced, the testimonies examined were still overwhelmingly dominated by repetitive questions focused on minute details of the corporal, temporal and spatial aspects of rape. Thus, while advancements in the questioning of victim-witnesses were evidenced, traditional prosecutorial strategies that limit and disqualify testimony still predominate.

6. 3 - Discredited Testimony

6.3.1 - Inaccuracies and Discrepancies in Testimony

The processes detailed above that act to disqualify and limit testimony place considerable emphasis on the witness's ability to relay her experiences "in a complete and linear fashion," providing detailed and accurate answers that reiterate a particular narrative of rape and the surrounding context advanced by prosecution (Mertus, 2004, p. 120). In response to this prosecutorial strategy a common tactic employed by the defence counsel, as discussed in the literature and evidenced in the transcripts examined, included the identification of any inaccuracies, discrepancies, gaps or silences in the witness's testimony, which are in turn argued as evidence that the witness lacks credibility or is an unreliable source of information (Henry, 2009; Mertus, 2004). Thus, the veracity of the witness's testimony is challenged when discrepancies or inaccuracies are apparent, or when the witness is unable "to remember every detail" about their victimization (Sharratt, 2011, p. 65).

With reference to the transcripts examined, while at times the prosecution or the legal representatives did highlight discrepancies, they did so to allow the witness an opportunity to explain or correct themselves. In contrast however, the defence counsel focused much of their cross-examinations on highlighting these inaccuracies and discrepancies, utilizing witnesses' previous statements, current testimonies, and the testimonies of other witnesses to challenge the witnesses' memories of the events.

Table 3.1- Inaccuracies, discrepancies, gaps or silences are identified in the witness's testimony

	Appears in the transcripts of ___ witnesses	Mean number of times per witness	Range
Parts of the witness's testimony are challenged as untrue or inaccurate	12	10.42	2-34
The witness is exposed to exhaustive lines of questioning on minute details that confuse the witness, create gaps or silences, or are related to issues unknown to the witness	10	2.70	1-5
Gaps or silences in the witness's testimony are argued as evidence of unreliable memory, or an unwillingness to disclose	5	2.80	1-6
Claims are made that the length of time between the incident and the testimony make it difficult for the witness to remember accurately or in detail	4	1.25	1-2
Differences or discrepancies between the witnesses testimony and previous statements are identified	10	5.20	1-13
Differences or discrepancies between the witnesses testimony and that of another witness are identified	7	2.14	1-3
The witness is challenged on her behaviour not aligning with being raped	6	2.50	1-8
Language is used that denotes a lack of belief in the witness's testimony (i.e. "so-called," "alleged")	8	12.88	2-45
It is implied that other people provided the witness with the information that she is testifying to	7	5.00	1-15

As evidenced in Table 3.1, every witness was challenged that aspects of their testimonies were untrue or inaccurate. These challenges typically focused on the central contentious issues of dates, locations and the identities of the perpetrators. For example, during the cross examination of Witness 87, who was challenged on thirty-four distinct aspects of her testimony, Mr. Kaufman attempted to appropriate the witness's admission that she might have forgotten some dates so as to challenge the accuracy of the dates she claimed the Banyamulengue entered her neighbourhood:

Defence Counsel Mr. Kaufman: Madam Witness, I'm now going to turn to a different topic. It's the topic of dates and in particular dates insofar as we are dealing with the events of October/November 2002, but first of all a general question. Do you consider yourself good with dates, in remembering dates?

Witness 87: We're human beings. I may have forgotten some dates, but I can more or less remember years.

Q. So could it be the case that you might have forgotten the exact dates of the events in October, the ones we have been talking about, since you only are very good with years?

A. It was on the 29th and the 31st.

Q. What was on the 29th and the 31st?

A. On the 29th, the rebels withdrew. I wasn't aware of that event. On the 30th, I heard people talking about the withdrawal of the rebels. That happened at 7 in the morning.

Q. And these dates you remember exactly, despite that you're only very good with years? (T-46 page 20 lines 6-21)

In addition to the above, the defence further utilized Witness 87's inaccurate association of certain dates with specific days in the week, as evidence of her faulty memory:

Defence Counsel Mr. Kaufman: Once again, I'm putting it to you, Madam Witness, that 30 October 2002 was in fact a Wednesday and 31 October 2002 was in fact a Thursday. What do you have to say about that?

Witness 87: Well, the events come from a very long time ago. I could have forgotten such a detail.

Q. So once again, Madam Witness, I really am forced to come back and ask you if you might not be mistaken as to the dates when you say the so-called Banyamulengue raped you and killed your brother? (T-46 page 27 lines 2-25)

This focus on dates was central to the defence's strategy for deflecting culpability away from the Banyamulengue. With so many different armed groups engaged in the conflict, it was often a matter of days, if not hours, separating the presence of certain troops in certain neighbourhoods. Thus, in identifying inaccuracies or inconsistencies with reference to the dates put forward by witnesses, the defence often claimed that it may not, or could not, have been the Banyamulengue that were present and responsible for the attacks. For example:

Defence Counsel Mr. Kilolo: Madam Witness, the Defence is of the opinion that no MLC troops arrived in the Central African Republic before 30 October 2002. If that is the case, if that is true, to your knowledge, what troops might it have been on 28 October 2002?

Witness 119: I am telling you, if they were Central African Troops I would have said so. I can recognize Central African soldiers, and they could not have committed such abuse and violent acts. If I hadn't found myself facing those Banyamulengue, I wouldn't be here to give testimony.

Q. That is your version of the events. (T-86 page 16 line 21-page 17 line 15)

Further to identifying inaccuracies with reference to dates, the defence commonly sought to challenge a witness's identification of the Banyamulengue as those responsible for the crimes.

For example, during the cross-examination of Witness 80, the defence challenged her claim that the Banyamulengue were responsible for looting her home, arguing that as the witness had not actually seen the commission of the crime, she had merely deduced that the Banyamulengue were responsible (T-63 page 19 line 18-page 20 line 18). More often, challenges as to the identities of the perpetrators focused on issues related to their uniforms or languages. In particular, the defence argued that many witnesses would be unable to properly identify the Banyamulengue based on their language – Lingala – as this was not a language spoken, or well known, in the CAR. For example:

Defence Counsel Mr. Liriss: Madam, if I tell you that you couldn't identify the troops on the basis of the language which you, yourself, didn't speak and didn't understand, what would you say to that?

Witness 79: When I saw them going past, they had scars. That's how I know that they were Sara people and that they were speaking Sara. (T-78 page 23 lines 17-21)

Defence Counsel Mr. Kilolo: Under those conditions, could you explain to the Bench how were you in a position to remember in the space of a few hours a number of sentences in a language that was unknown to you and then repeat what was said to a brother in your neighbourhood to allow him to translate and identify that language? (T-85 page 44 lines 16-20)

In addition to highlighting inaccuracies, the defence counsel also commonly exposed witnesses to exhaustive lines of questioning on minute details that a witness could not recall, or could not have possibly known in the first place. The literature identifies this common cross-examination tactic as a method used to create silences or gaps in the witness's testimony, which are in turn advanced as evidence of the witness's unreliable memory or unwillingness to disclose certain facts (Henry, 2010).

During the cross-examination of Witness 22, Mr. Haynes asked five questions regarding the date that Bozizé's rebels entered her neighbourhood. Despite Witness 22 continually stating that she did not remember the exact date, but thought it could have been a Friday, the defence

persisted with this question until she reluctantly provided the date of 26 October 2002; a date then challenged by the Mr. Haynes, who pointed out that there was no Friday on or after that date (T-42 page 24 line 3- page 26 line 13). Another example of this tactic was evidenced during the cross-examination of Witness 87. In an attempt to challenge the witness's identification of the Banyamulenge based on their language, Mr. Kaufman asked Witness 87 multiple questions concerning whether or not she knows or understands eight different languages. After the witness responded "no" to all but one of these languages, the defence argued:

Defence Counsel Mr. Kaufman: So my question to you, Madam Witness, is once again how do you know that the language that the so-called Banyamulenge were speaking was Lingala and not one of these other dialects that you don't recognize and don't speak. (T-46 page 55 line 25-page 57 line 10)

Commonly this tactic involved questions regarding events or facts the witness could not possibly have known in the first place. For example, Mr. Kilolo asked Witness 119 several times to provide the names of the Banyamulenge who looted her home, even though the witness had at no point indicated that she might have had the opportunity to have obtained such information:

Witness 119: I couldn't even give you the names of the soldiers in my own country and so, therefore, couldn't give you the names of the Banyamulenge who came from the other side of the river. How could I tell you their names? How could I know their names? [...] I don't know how to answer your question. I am not from Zaire. I am from Central African Republic. An individual coming to my country, how can I know what his name is? I talked to that individual, but I don't know his name. (T-84 page 38 lines 13-17 & page 40 lines 6-11; T-85 page 10 lines 18-22)

Similarly, during the cross examination of Witness 82, Mr. Kilolo posed a number of very specific questions regarding how much of Bozizé's rebel group was made up of Chadians and Muslims, as compared to Central Africans, a point the victim-witness would be incapable of knowing in light of her age, 11-years old, at the time of the conflict:

Witness 82: At the time of the events, I was young. This is what I have seen. This is what I am relating to you. I was very young at the time of these events. I know

some things. Other things I don't know. I can't tell you a lie. (T-59 page 30 lines 20-22)

On several occasions the defence highlighted a witness's inability to answer variations of these questions as evidence of their unreliable memories or as evidence that they did not have sufficient knowledge of an event to stand witness to it; and thus in affect appropriating silences or gaps created in the witness's testimony to their advantage. In addition to this, the defence also appropriated other aspects of witnesses' testimonies to their advantage, most commonly when a witness misspoke or provided information in line with the defence's arguments. For example, during her testimony, Witness 80 mistakenly referred to the chief of the Banyamulengue as the "chief from here." While she corrected herself and said that she meant the Chief from the DRC, thus referring to Bemba, the defence continued to use the phrase "the chief from here," throughout their questioning of the witness as this aligned with their argument that the commander of the Banyamulengue, while they operated in the CAR, was President Patassé and officers in his army. For example:

Defence Counsel Mr. Liriss: In addition to reprimands, did he also take sanctions, this chief from here?

Witness 80: I made a mistake when I said he was from here. He's not from here. If he was from here he would have spoken Sango, but he only spoke Lingala. That means that he was from the other side of the river. What do you want? Can nobody make a mistake here?

[...]

Q. Madam Witness, earlier you told us that the person who was their chief, the person who commanded them all, was Mr Patassé, President Patassé. Can we conclude there from that President Patassé commanded the Banyamulengue, or gave instructions to the Banyamulengue, through this chief who I -- I call "The one from here" to remind us of that? Is it correct to say that it is through this chief that the President Patassé gave his instructions and his orders to the Banyamulengue?

A. I didn't speak about a chief from here. I wanted to speak about a chief from the other side. Can nobody make a mistake here? I didn't want to speak about a chief from here. (T-61 page 51 lines 17-25 & page 52 lines 9-17)

Another common defence tactic highlighted in the literature are arguments to the effect that the length of time between the crime and the trial makes it difficult for a witness to recall certain details accurately. However, despite the eight year gap between the conflict and the trial, only four possible implicit references to this were evidenced in the transcripts, and were equally made by the prosecution, the legal representatives, and the defence counsel. For example:

Prosecutor Bifwoli: [...] you stated that you are human and that you may have made a mistake regarding the exact day and date that you and your family were raped, but the rape actually occurred. Now, your statement shows that you were interviewed in March 2008. Sir, between 2002 and 2008, those are how many years in-between?

Witness 23: Six years in all. I repeat, six years. (T-54 page 37 line 20- page 38 line 5)

Legal Representative for the Victims Mr. Zarambaud: You stated that you were raped for the first time when you were about 12 years old. However, you seem to remember very well what happened to you at that age, even though you were very young and you are speaking about those events today with confidence more than eight years after they occurred. How do you explain that?

Witness 82: Regarding the events that I was subjected to, I simply remember the most important aspects. (T-58 page 26 lines 13-19)

Defence Counsel Mr. Kilolo: Madam Witness, I would really like to allow you some time for reflection and put a very specific question to you. In 2008 - - and I suppose that your memory was fresher at that time and closer to the events of 2002 than it would be three years later today in 2011 [...] (T-59 page 36 lines 10-14)

Another central tactic employed by the defence during cross-examination was to highlight discrepancies within the witness's current testimony, or between her testimony and her previous statements to ICC investigators. At times this included highlighting slight differences in the descriptions of the crimes suffered by the witness, for example:

Defence Counsel Mr. Haynes: During the occasion when the soldiers came to your house, they stole some money. How much money did they steal?

Witness 42: The amount of money stolen was 90,000 francs.
[...]

Q. Then can you explain to us why, in your application to become a victim, it states in the first person that you had 180,000 francs stolen?

A. I believe this is the same thing that we realized yesterday. Yesterday I explained that at the time I filled the form, and after I filled that form, I was not given the opportunity to re-read it before signing it. (T-69 page 3 lines 20-22 & page 4 line 25-page 5 line 6)

More commonly this involved highlighting differences in reference to the sequence of events, or the dates or times of the attacks. For example:

Defence Counsel Mr. Kilolo: Could you explain this contradiction to the court? On the one hand you state that you went to PK22 at 5 in the morning, one hour after the arrival of the so-called Banyamulengue in your house, whereas three years ago you said something different to the investigators from the OTP, telling them that you stayed at home for an entire month before you went to PK22?

Witness 82: I don't think I've really understood your question. Could you repeat it so I can understand properly? (T-59 page 48 line 10- page 49 line 6)

Further, this tactic commonly involved the identification of aspects missing from previous statements but now included in the witness's testimony, or vice versa. For example, during the cross-examination of Witness 79 Mr. Liriss asked the victim-witness why she did not tell the investigators during her initial interview that her daughter was also raped; a crime she had described at length during her testimony. In response, Witness 79 argued that the defence is well aware of reasons she did not want it known that her daughter was raped; she thus, referenced the social and cultural stigma associated with being raped, and perhaps the ability to now disclose this crime because of the protective measures, most importantly anonymity, afforded to her by the court (T-79 page 17 lines 1-13). This example, and several others, demonstrate an issue highlighted by Henry (2010), in which a failure to disclose certain details or experiences at any point in the investigation or trial process can throw the credibility of the victim-witness and the truthfulness of her testimony into question. For example, at times the existence of discrepancies prompted the defence to challenge the witness as to veracity of previous statements in their entirety:

Defence Counsel Mr. Liriss: Ma'am, are you saying that the answer that I just read out to you, the answer that you yourself gave to the Prosecution investigators, a document that you signed, you said to the Chamber that that entire statement that you gave to the investigators in Bangui has been - - you had an opportunity to re-read it and that it was the truth. Are you telling us now that it is not the truth?

Witness 79: If you wish, I state - - I go back on what I said. (T-78 page 7 lines 3-7)

Similar to highlighting discrepancies between a witness's testimony and previous statements, the defence also focused on identifying discrepancies between the testimonies of several witnesses. As will be discussed in length below, the prosecution inherently corroborated the testimonies of several witnesses through the presentation of multiple witnesses from the same family, or who were otherwise known to each other. However, this also provided the defence with an opportunity to use the statements of one witness to discredit another through identifying slight differences in the various accounts of the same events. For example, during the cross-examination of Witness 81, the defence utilized the testimony of Witness 23, her father, to challenge Witness 81 on an aspect of her testimony:

Defence Counsel Mr. Liriss: Madam Witness, this is someone who apparently was with you. He has described Mr. Bemba. He was not in military uniform, as you have said. He said that he did not come by helicopter. He also added that he did not speak to the population. On the contrary, the population was not allowed to meet him. My question is as follows: Do you stand by your testimony to this Court regarding the arrival of Mr. Bemba?

Witness 81: I am not talking about the dreams of someone else. I am telling you about someone, or rather something that I witnessed myself, but if someone else has dreams I cannot interpret those dreams on their behalf.

Q. Very well, madam. Let us assume that you stand by your testimony of today. Do you still stand by your statement that Mr. Bemba had a helicopter whose colour was the same as that of the military uniforms?

A. Yes. (T-57 page 36 line 25-page 37 line 21)

The defence further utilized the testimony of Witness 80 to discredit a statement previously made by her daughter, Witness 82:

Defence Counsel Mr. Kilolo: Madam Witness, the events you experienced- and I have a question I know that you've already answered, but there's a reason why I'm going to ask it again- did it occur before, or after, you fled to PK22?

Witness 80: I've already told you, these events happened before I was able to leave with the children.

Q. Thank you. Madam, I asked you this question to check statements by another witness who said that they occurred after. (T-63 page 17 lines 18-24)

As demonstrated above, challenges with respect to important dates and the identifying features of the Banyamulengue were commonly advanced by the defence through either the identification of inaccuracies, discrepancies, or gaps of knowledge within a witness's testimony. In contrast, the defence seldom challenged witnesses as to the veracity of the rape-claims themselves, but did on occasion highlight witnesses' behaviours or actions after their rapes as questionable, or not in line with what would be expected of someone who had just been violently attacked. For example:

Defence Counsel Mr. Kaufman: Madam Witness, once again apologies for the question, but after you had been brutally raped why didn't you go and see a doctor?

Witness 87: In our country in order to see a doctor you have to have money. As all the money I had had been stolen, I couldn't go see a doctor. (T-46 page 13 lines 13-23)

Defence Counsel Mr. Kaufman: Madam Witness, once again I apologize for this question. I know it's hard for you to answer these types of questions, but after this brutal rape, why did you follow the so-called Banyamulengue back into the house? Why didn't you just run away?

Witness 87: Well, it's my house and my two brothers were still there, so I went back into the house so as to tell my brothers that they should leave the house. That's why I went into the house.

Q. They would have known that they would have to leave the house. After all, they'd been terrorized by these Banyamulengue who had stolen stuff earlier. (T-47 page 8 lines 17-24)

Defence Counsel Mr. Kilolo: Why leave PK22 two days later in order to return to the house where you were allegedly the victim of an attack?

Witness 82: We left without taking anything. We couldn't leave our house so like that, at their mercy. When we returned, we returned to get our items. It was our home. We had the right to return to our house and take care of our belongings. (T-59 page 43 lines 8-12)

In total six victim-witnesses were questioned on their actions following their rapes with little consideration paid to the surrounding context or the reality of access to medical care or legal redress during periods of conflict. Further, questioning the victim as to why she did not seek medical attention, did not report her rape, did not leave the scene of the crime, or returned to it afterwards, implies the existence of a set of expectations regarding how a rape victim should act. These expectations are further demonstrative of the existence and application of rape scripts, wherein “true” or “real” victims are expected to act in certain ways or recognize the dangers of placing themselves in certain situations (Buss, 2009; Mardorossian, 2002).

Further demonstrative of strategies used to challenge the veracity of the witnesses’ testimonies, was the defence counsel’s use of skeptical language, such as “your alleged rape,” the “so-called Banyamulengue,” or the “alleged Banyamulengue.” While it is understood that the crimes have yet to be proven in court, and one of the defence’s principle arguments concerns the identity of the perpetrators, the use of this language when questioning the witness, in particular its uneven use between witnesses, spoke more to its use as a strategy to undermine or challenge a witness’s testimony, than purely an indication of the unproven nature of the charges. For example, this type of language did not appear at all during the cross-examination of Witness 81, with the defence referring to the Banyamulengue as such without the prefaces of “alleged” or “so-called;” yet, during the cross-examination of Witness 119 this type of language was used a total of forty-five times.

A final tactic used to challenge the accuracy of a witness’s testimony, included claims made, or questions posed to the effect, by the defence counsel that the witness did not have first-hand knowledge of an event or fact, but had been told of it by another person, had heard it on the radio, or had been informed by the NGO operating for victims in the CAR (OCODEFAD). In

asking these questions, or asserting these arguments, the defence attempted to establish that certain pieces of information or evidence were in effect hearsay. For example:

Defence Counsel Mr. Haynes: So my first question is as follows, Madam Witness, who informed you that the alleged perpetrators of this act of aggression against you were Banyamulengue?

Witness 22: I didn't say that I found this out from other people. When they entered my house, I knew immediately - - I knew immediately that they were Banyamulengue. It wasn't afterwards that I found out they were Banyamulengue. On the very same day I knew that they were Banyamulengue. (T-43 page 11 line 24- page 12 line 11)

Defence Counsel Mr. Kaufman: Was this portion that I have just read out to you with respect to the dates something that came from you, or was it something that came from the investigators? First of all, do you understand my question?

Witness 87: It is my statement. They asked me the question and I told them the dates.

Q. Well, Madam Witness, you've been telling us that you don't remember months and dates, so what I'm suggesting to you is that the investigators told you the date that the rebels came and left Boy-Rabé? (T-46 page 23 line 13- page 24 line 10)

Defence Counsel Mr. Haynes: And was it correct to say, as you did in your interview, that the source of your information for all of that was OCODEFAD?

Witness 42: OCODEFAD did not give me information. OCODEFAD is an organization which brings together victims. I am also a member of that organization but that organization did not give me information. (T-67 page 50 line 25- page 51 line 8)

6.3.2 - Strategies to Counter the Presence of Discrepancies and Inaccuracies

Several strategies employed by the prosecution, and at times the legal representatives and judges, to counter the defence's identification of inaccuracies and discrepancies were identified in the transcript data, and included providing alternative explanations for discrepancies, or preemptively establishing that the witness had not been influenced in their testimony:

Table 3.2- Negative cases for inaccuracies, discrepancies, gaps or silences

	Appears in the transcripts of — witnesses	Mean number of times per witness	Range
Alternative accounts for gaps, inaccuracies or discrepancies are provided by court personnel (Judges, Prosecutor, or Legal Representative)	6	3.67	1-7
Prosecution is pre-emptive against possible defence tactic and asks witness if OCODEFAD advised her in any way on how to tell her story	6	2.83	1-5

In particular, the prosecution began to pre-emptively ask witnesses during their initial questioning whether OCODEFAD, or anyone else, had advised them on what to say during their testimony; a question to which all victims responded that, at the very most, the only advice they received was to remain calm while testifying.

Another strategy employed to counteract the defence's attempts at discrediting witnesses, specifically to diminish the weight of the discrepancies and inaccuracies highlighted by the defence, included alternative explanations for apparent inconsistencies in the witness's testimony being provided by the prosecution, the legal representatives and the judges. For example, during the testimony of Witness 87, the defence counsel claimed that they had a witness who would testify that the Banyamulengue came to Boy-Rabé on a different date than that provided by Witness 87. In response to this, Mr. Zarambaud, one of the legal representatives, provided a possible explanation for this contradiction between testimonies, pointing out that "Boy-Rabé is a very large area. It's not just because the Banyamulengue came to somebody's house on the 28th that necessarily they had to arrive at everybody's house on the 28th" (T-46 page 29 lines 16-20).

During the cross-examination of Witness 79 the defence claimed that there was a contradiction in the witness's testimony concerning the languages she understood. In response, Judge Steiner argued that the witness:

[...] has already said two or three times that she understands Lingala, and you put the question saying that there is a contradiction because she said she cannot speak

another language than Arabic and Sango. So, again, you are trying to make the witness feel confused. So if you put a question, don't say 'speak' when she says that she understands. (T-79 page 17 lines 15-25)

As demonstrated above, at times the judges would reprimand the defence for how they proceeded in their cross-examinations of witnesses. In particular, these reprimands typically followed moments when the defence did not provide opportunities for witnesses to explain themselves, expand on answers, or to say they were mistaken in earlier statements. Further, judges typically reprimanded the defence for picking and choosing "some isolated answers" from previous statements that aligned with their arguments and failing to provide the witness with the context of their earlier statements and answers (T-53 page 45 lines 7-20). Of most interest, during the cross-examination of Witness 119, Judge Steiner made the following statement:

Also, to remind the Defence that the evidence that the parties need to present to the Chamber are for the purpose to clarify the Chamber, to help the Chamber to find the truth, and the Chamber is composed by three professional judges. So not every time small contradictions, or the lack of knowledge on some not so relevant points, will impress the Chamber or will lead the Chamber to doubt the credibility of the witness. We understand that is one of the Defence needs, is to prove the witness credibility, and the Chamber has been extremely tolerant, but I want the Defence to understand that the witness has a limit. If the witness becomes distressed, tired, the Defence will not have any gain with that. (T-86 page 2 line 25- page 3 line 10)

Despite these few reprimands, the cross-examination tactics employed by the defence counsel remained focused on discrediting the witness through identifying inaccuracies, discrepancies, gaps or silences within her testimony, and through the use of skeptical language and challenges to her behaviours following her victimization. The use and prevalence of these above strategies used to challenge and discredit a victim during cross-examination, is a common defence tactic identified and critiqued in the literature with respect to the treatment of victims in both domestic and international adversarial legal systems, and it has been identified as a central

source of the power imbalances between victim-witnesses and lawyers (Henry, 2009; Mertus, 2004; Raitt & Zeesyk, 2003).

Apart from the outright challenges to the veracity of victim-witnesses' testimonies, as identified above, several other methods through which the credibility and reliability of witnesses were put into question were identified in the transcript data and included requests for corroboration, discussions of consent, and a focus on the possible ability for trauma to affect the victim's memory of the rape.

6.3.3 - Corroboration

Rule 63 of the ICC's Rules of Procedure and Evidence, which states that the "Chamber shall not impose a legal requirement that corroboration is required to prove any crime [...] in particular crimes of sexual violence," has been highlighted as a central gender-sensitive procedure affirmed by the court, having built upon the gender jurisprudence established by the ICTY, specifically under Rule 96 (Coan, 2000; Kittichaisaree, 2002). In theory, this rule affirms that victims of sexual violence are afforded the same presumption of reliability as victims of other crimes, and counteracts the misogynist assumption that victims of sexual violence are inherently untrustworthy or untruthful (Coan, 2000; Phelps, 2006). However, similar to what was observed in reference to the ICTY, in which the stipulations of Rule 96 were not always upheld in practice, questions related to corroboration appeared in the transcripts examined.⁷¹ This request for corroboration, despite Rule 63, denotes a continued perspective wherein the testimony of a rape victim-witness is not deemed sufficient to stand alone as evidence to the crime, and must be bolstered by physical evidence or corroborated by another witness.

⁷¹ As highlighted in the literature review, both Campbell (2002) and Coan (2000) discuss the continued need for corroboration evidenced throughout the ICTY trials despite the protections afforded under Rule 96.

Table 3.3- Corroboration of the witness's memory/testimony is requested or provided

	Appears in the transcripts of ___ witnesses	Mean number of times per witness	Range
The witness is asked if anyone else witnessed her rape (or another aspect/event in their testimony) and could corroborate her testimony	5	2.40	1-7
The Witness's testimony is inherently corroborated through the testimony of other witnesses appearing before the court	6	2.33	1-3
The witness is asked if they have medical records which corroborate that they were raped	6	1.83	1-4
The witness's medical records are presented before the court and entered into evidence	1	1.00	1

The issue of corroboration was most frequently evidenced through questions regarding whether the witness was aware of another person who had witnessed the crime, or another aspect of their testimony, and could corroborate their statements. Of interest, these questions were asked by both the prosecution and the defence counsel, for example:

Prosecutor Kneuer: Did anyone witness that the two Banyamulengue slept with you?

Witness 68: There was nobody there, apart from those three. (T-48 page 23 lines 3-4)

Defence Counsel Mr. Kilolo: The investigators, did they through you try to enter into contact with the two girls in order to get their statement in order to confirm your statement?

Witness 119: Those girls, after I didn't see them again and they don't live in my sector.

[...]

Q. Can you disclose to the Court the name of one or several people who witnessed the rape and that can confirm your statement? If yes, we will move into closed sessions.

A. I do not have any names to give you. I was alone to witness that scene. (T-84 page 30 lines 14-16 & page 38 lines 18-19)

In addition to the above requests for corroboration, six witnesses had their testimony inherently corroborated through the testimonies of other witnesses appearing before the court. In particular, the prosecution presented four victim-witnesses who were from the same family and were all attacked and raped during the same attack on their home, and two neighbours who had witnessed the attacks on each others' homes.

As previously mentioned, Witness 23 was the father of Witness 82 and 81, and the husband of Witness 80, and throughout each of their testimonies these four victim-witnesses were questioned at length concerning their own rapes and those of their family members. In particular, each was asked to provide specific and minute details of each others' attack and experiences, and in effect provided concrete corroboration of each other's accounts. For example: Witness 80 affirmed that her daughter (Witness 81) was raped by four men, that her daughter's husband had been able to communicate with the Banyamulengue during the attack, and that a long-lasting consequence of Witness 81's rape was an inability to conceive; Witness 23 discussed the rape of his wife (Witness 80) and the death of the baby she had just given birth to, who had died following the attack as it had been thrown to the floor; Witness 23, 80 and 81 all discussed the age of Witness 82 when she was rape, 11 years-old, and further discussed the traditional treatment given to the victim following her rape; and finally Witnesses 23, 82, and 80 all discussed the families flight to PK22 following the attack.

Similarly, Witness 73 and 42, who were neighbours, corroborated several aspects of each others' testimonies. In particular, Witness 73 saw the attack on Witness 42's compound and the rape of his daughters and provided multiple details that corroborated Witness 42's account. In turn, while Witness 42 did not witnessed first-hand the attack on Witness 73's home, he was told about it immediately after and provided several details that affirmed 73's testimony; including the fact that the Banyamulengue stole Witness 73's radio but then forced him to buy it back from them.

The strategy of using a witness's testimony to corroborate others was not limited to the prosecution. In particular, while the defence primarily used these testimonies to highlight discrepancies between the various accounts, they also corroborated several aspects that aligned

with their arguments. For example, during the testimony of Witness 80, Mr. Liriss used excerpts from Witness 23's testimony to corroborate a particular piece of information that aligned with their argument concerning the chain of command within the Banyamulengue:

Defence Counsel Mr Liriss: Madam Witness, I'll read out a statement made by a witness here simply to corroborate what you have just said. [...] The simplest question was to know whether there was a leader who was above all the Banyamulengue leaders in PK12. The witness answered that there was one, and that is enough for me [...] So, Witness, you confirmed the testimony according to which there was a chief above all the other chiefs of the Banyamulengue. I just wanted to corroborate what you said, it was correct with another statement of another witness which I shall read to you. [...] Witness -- a witness to whom we -- there's a witness to whom we asked the following question: "You stated just now that Moustapha reported to a chief at a higher level than himself. To which chief or leader did he report to?" The witness replied, "The chief in question was their Chief of Staff who was at the school." Do you think that this statement accords or is in agreement with what you have said, which I claim to be the case?

Witness 80: Yes, that is it. I repeat that the events date back to a long time ago. That's why I forgot to tell you that. (T-61 page 45 lines 2-4 & page 46 lines 11-15 & page 47 lines 2-17)

The other central line of questioning that denoted a continued requirement for corroboration of a rape victim's testimony concerned the existence of physical proof, in particular the existence of medical records. Specifically, six victim-witnesses were asked if they had medical records attesting to their victimization, and one victim-witness had their medical records submitted as evidence by the Prosecution. For example:

Prosecutor Knener: Madam Witness, let me assist you with this documents. You mentioned earlier that you have medical documents. I do not want you to read this document out loud. My question is if you recognize that this a documents that you handed over to investigators of the Office of the Prosecutor?

Witness 68: Yes, this document indicates that I underwent treatment from Médecins Sans Frontières.

Q. Your Honours, pursuant to decision 1022, this document has already been admitted into evidence prima facie, so I will move on. (T-48 page 39 lines 7-24)

Defence Counsel Mr. Liriss: Do you have some kind of medical record subsequent to the rape that you say you underwent?

Witness 79: Yes, they wrote something. I have a report, but I haven't been able to find that medical report. (T-79 page 5 lines 19-22)

Often the defence posed these questions in order to challenge the victim-witnesses through arguments that they did not in fact have any documentation or records that could corroborate their rapes. For example:

Defence Counsel Mr. Liriss: Now, would it be correct to say that you do not have any contemporaneous medical document that could attest to the reality of sexual violence against you? Excuse me, madam. I want to be clear: It is not that I am disputing the reality of what you said. It is just that I simply want to find out whether this act of violence was duly certified by a doctor. So, please, do not be offended by my question.

Witness 29: I believe that I told you, at the time of the events when I was in Mongoumba, I did not have the opportunity to see a doctor because I was ashamed of telling a doctor about that and specifically that I had been a victim of violence, or rape. (T-81 page 6 lines 16-24)

Defence Counsel Mr. Liriss: The Defence case on this issue is as follows: In reality, you did not have medical proof which could certify such an attack. What do you say to that? Okay, Madam, you have also refused to answer this question. [...]

Witness 80: I have understood, but these questions were put intentionally and that's why I decided not to answer them.

Q: Thank you, Madam Witness. You also stated that you provided medical proof of the attack. Did you provide that?

A. I told you that I didn't see a médecin -- a doctor after the attack, but I only underwent prenatal examination.

Q. Madam, if this document didn't exist, who suggested to you to say that you would try and provide them -- that you would provide them?

A. I said that I had my prenatal consultation card and I had promised that I would provide them with that. That is what I said I would do.

Q. Madam, what's written here, this isn't prenatal consultation. These are medical documentation relating to the attack. (T-63 page 29 line 20- page 30 line 18)

In sum, all but one witness was asked if they could corroborate their testimony, or had their testimony corroborated through the methods detailed above.⁷² Therefore, despite what is stipulated under Rule 63, what was observed was a continued requirement in practice for corroboration of a witness's testimony and the veracity of her memory of the events, either from another witness's testimony or through physical evidence (Campbell, 2002). Whether a result of

⁷² The one exception was that of Witness 22.

a fear on the part of the prosecution that the witness's testimony would not be sufficient to establish the factual basis of the crime, or a continued strategy deployed by the defence to cast doubt on the reliability of the witness, the result is a continued reality in which the testimonies of victims and witnesses of sexual violence are not afforded the same presumption of reliability as other witnesses (Coan, 2000; Phelps, 2006).

6.3.4 - Consent and Active Resistance

Similar to the issues identified with corroboration, wherein the protective measures afforded under the Rules of Procedure and Evidence were not maintained in practice, was how the court dealt with the issue of consent in cases of sexual violence. In defining rape, the Rome Statute stipulates that the "invasion" of the victim's body is:

[...] committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent. (The Rome Statute Article 7(1) (g)-1- element 2)

Those incapable of giving genuine consent include those "affected by natural, induced or age-related incapacity" (Article 7(1) (g)-1 footnote 16). Further to this, Rule 70 the Rules of Evidence and Procedure expound on the issue of consent, stating that:

- (a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;
- (b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
- (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;

Thus, based on the above limitations placed on the possibility for genuine consent to exist, it would be expected that if the existence of physical force, threats, or coercion against the victim or another person were established, or if the victim was shown to be child, the issue of consent

would not arise; as the very possibility for genuine consent to exist is negated by the presence of these factors. However, in practice, the prosecution repeatedly asked victims whether they had consented, even after having shown that genuine consent could not exist.

Table 3.4- Questions concerning consent

The witness is asked...	Appears in the transcripts of ___ witnesses	Mean number of questions per witness	Range
If they consented to the sexual encounter/assault	9	1.11	1-2
If they resisted the rape	4	1.00	1
If there was anything they, or another person, could have done to prevent the rape	6	1.67	1-3
If they consented to the looting of their possessions	6	2.67	1-5

As evidenced in Table 3.4, nine of the witnesses were asked if they had consented, or if those whose rapes they witnessed consented, despite the fact that every one of these witnesses were previously asked questions that established that coercion, force, violence and threats were used against them or the victim. For example, during her testimony, Witness 81 described being forced to take off her clothes, that the Banyamulengue who raped her had many weapons, and that the attempts of both her husband and her brother to prevent her rape resulted in her husband being threatened with death, and her brother severely beaten. The witness further described that on account of having just given birth only a week before, she bled profusely after being raped by four men, so much so that the fifth Banyamulengue, who had initially lined up to rape her, refused to do so because of all the blood. Yet despite this, the prosecution asks:

Prosecutor Bifwoli: And did you consent to any of them?

Witness 81: I did not give my consent. I gave birth to a child one week before then, one week before they raped me. (T-55 page 12 lines 2-4)

Similarly, Witness 80 described being thrown to the ground, the child she was holding tossed aside (which later resulted in its death), being slapped, bleeding from her vagina because of the violence used to rape her, and finally being threatened that if she resisted they would sleep with her fifty times without stopping; yet the prosecution asked:

Prosecutor Bifwoli: Did you consent to the Banyamulengue having sexual intercourse with you?

Witness 80: No, I did not consent. A woman does not have the same strength as a man. They pushed me, I fell over. That's how they slept with me. I did not consent. My husband tried to intervene, and I said I did not consent. (T-61 page 2 lines 13-17)

Witness 79 also described being thrown to the ground and having a gun pointed to her head during her rape by a group of Banyamulengue who had also raped her 11-year-old daughter and threatened her other children to remain quiet or else be shot. Yet, once again the prosecution persisted with questions concerning consent:

Prosecutor Bala-Gaye: Madam Witness, just for the sake of clarity in this regard, did you agree to these two men sleeping with you?

Witness 79: Well, how could I possibly consent? I just learnt the news of the death of my husband. I was in mourning. How could I possibly have any desire of sleeping with another man? I was forced and it was never deliberate desire on my part. (T-77 page 16 lines 15-19)

Further to the use of violence and coercion against victims as negating the possibility for genuine consent, one of the victim-witnesses, and the four victims whose rapes were witnessed by the eye witnesses, were all children at the time of their rapes and were thus incapable of giving genuine consent. Specifically, Witness 82 was 11 years old, both the daughters of Witness 73 and 42 were 10 years old, and the two girls whose rapes Witness 119 witnessed were 12 and 13 years old; yet all were asked if they, or the victims, had consented:

Prosecutor Bifwoli: And did you give them consent to sleep with you, or to rape you?

Witness 82: It was not with my consent. (T-59 page 23 lines 3-5)

Prosecutor Bala-Gaye: Madam Witness, for the sake of clarification purely, did these two girls tell you anything about whether or not they actually consented to having sexual relations with the Banyamulengue?

Witness 119: These girls were 12/13 years old. They were virgins. The Banyamulengue took them by force. The girls did not consent. (T-82 page 44 lines 15-19)

As evidenced above and in an earlier example, the prosecution at time qualified these questions as merely posed for the sake of clarity; and therefore, arguably an attempt to explicitly establish on record that the victims did not consent to their rapes. However, these questions and any responses are in effect vitiated when the presence of physical force, threats or violence are established. As such, it bears critical reflection on what is accomplished in asking these questions, as they add nothing to the prosecution's case or the establishment of the crime, and may possibly act to insult or upset the victims. As evidenced above in the response of Witness 79, there is almost disbelief that the prosecution would ask this question. Similarly, Witness 23, who continually reiterated that he felt dead inside on account of his rape, when asked by the prosecution if he had consented to his rape, responded:

Witness 23: Mr. Prosecutor, I think that if were consenting, I couldn't be here. Your Honour, I can't be here. I said to myself, "Why would I come here? Why would I come here?" In any event, I did not give my consent. (T-51 page 36 lines 19-22)

Whatever the motivation in asking these questions, the effect is to bolster an understanding of rape wherein the issue of non-consent is considered to be the dividing line between legal sexual contact and punishable sexual violence (Schomburg & Peterson, 2007; Smart, 1989). As previously discussed, defining rape within a consent paradigm is critiqued within the feminist legal literature as it focuses attention on the mental states of the victim and perpetrators, and shifts attention away from issues of power, dominance, force and violence (MacKinnon, 2006). Further, it fails to recognize situations where power relations between men and women make it impossible for women to "articulate non-consent," and specifically fails to recognize the power imbalances inherent to armed conflict (Samuleson, 2007, p. 843). Thus, in pursuing questions of consent, the prosecution has failed to recognize the lived experiences of the

victims testifying, to acknowledge the violence and fear they experienced, and in turn has reinforced an understanding of rape as that which is defined as non-consensual sex.

In addition to non-consent being conceptualized as a traditional demarcation of rape, is the demonstrated presence of an active resistance on the part of the victim to the attack (Hagay-Frey, 2011). Further demonstrative of the disregard afforded to the protections under the Rules of Evidence and Procedure – in particular element (c) of Rule 70, which clearly states that silence or the lack of resistance on the part of the victim cannot be considered evidence of consent – questions regarding resistance arose several times throughout the transcripts, as three victim-witnesses were asked if they had resisted their attackers, and an attempt to ask another witness this question was evidenced. In particular, during the testimony of Witness 68, the second victim-witness of rape that took the stand, Judge Steiner advised a legal representative that they could not ask their proposed question “relating to whether or not the witness tried to resist when she was being raped,” as this question was “not acceptable since it sets a dangerous precedent for future questioning of this nature” (T-47 page 47 lines 10-13). However, while this initial attempt was made to curb questions related to resistance, they still arose during the testimonies of later witnesses often without censor; therefore, despite an attempt to prevent a “dangerous precedent,” an apparent predisposition to ask rape victims if they resisted their attacker persisted. For example, Witness 82, despite being 11 years old and having described her attackers as having many weapons was asked:

Prosecutor Bifwoli: Madam Witness, did you resist the rape?

Witness 82: Yes, I tried to get away from them, but they seized me by force. (T-58 page 18 lines 19-20)

Similarly, Witness 80 was asked:

Prosecutor Bifwoli: Madam Witness, did you - - did you resist these Banyamulengue when they came to rape you?

Witness 80: Yes, I tried to refuse but they told me that if I did, they were going to sleep with me 50 times. (T-61 page 14 lines 1-4)

Following this question asked of Witness 80, Judge Steiner did remind the prosecution that the Chamber earlier “denied the legal representative the right to question another witness about whether the witness resisted or not,” and that the prosecution should remember “that in the scenario with weapons and threats, there is no need for this kind of question that can be seen as offensive by the witness” (T-61 page 14 lines 8-14). While an important intervention, it is significant that no similar intervention occurred when questions concerning consent were posed, as the presence of weapons and threats would similarly negate the possibility for genuine consent to exist. Further, despite this intervention, six witnesses were further asked if they could have done anything to have prevented their rapes, or those they witnessed; questions that could arguably represent veiled attempts to ascertain the level of resistance on the part of the victims, without garnering reproach from the judges. For example:

Prosecutor Bifwoli: Could you have prevented the Banyamulenge from raping your daughters?

Witness 23: Prosecutor, that was looking for your own death. That meant that you would be executed on the spot. I wouldn’t be alive here today before the Court to be able to tell the truth about what happened. (T-51 page 44 lines 2-6)

Prosecutor Bifwoli: Could you have prevented these Banyamulenge from raping you?

Witness 82: I did not have the strength to prevent them.

Q. Why?

A. But they were acting violently. They were carrying weapons and they also had arrows. There was nothing we could do. (T-58 page 22 line 22- page 23 line 2)

Questions regarding resistance or the ability for the victim to have prevented her rape, fail to both consider the victim’s circumstances and the reality of the situation. In particular, a “woman’s resistance to rape can lead to very grave injuries, even death,” a reality especially acute in the context of armed conflict (Hagay-Frey, 2011, p. 39). These consequences were in

fact discussed by expert Witness 229, who argued that resistance to rape was often met with “physical violence, blows, injuries” and in some cases murder of either the victim or of another person who had attempted to intervene (T-100 page 13 lines 7-11). In light of these consequences made clear to the court, the prosecution’s persistent attempts to ask these questions demonstrate another failure to truly appreciate the lived realities of the victims.

6.3.4.1 - Consent to Theft

The literature has highlighted questions concerning consent as evidence of a differential treatment of rape victims by international courts, as victims of other war crimes, for example torture, are not similarly exposed to questions concerning whether they were complicit in their victimization (Schomburg & Peterson, 2007). However, an interesting phenomenon, counter to this unequal application of questions concerning consent, was observed in the transcripts examined; in particular, several witnesses were also asked if they had consented to the looting of their possessions. For example:

Prosecutor Kneuer: Did these Banyamulengue take the things with your consent?

Witness 87: Well, they come into your house, they have weapons and they say, “Give us the money, give us the money and we won’t fire,” but if we don’t give them our belongings, if we put up a resistance, they will kill us. So when they came into our houses, we would just let them do what they wanted and take away our belongings. It was to save our lives. (T-44 page 35 lines 3-8)

Prosecutor Bifwoli: You’ve said that they took items from your house. Did you or your husband consent to them taking away these items?

Witness 81: We had no strength; they were armed. So as not to put our lives in danger, we had to let them do whatever they wanted. (T-55 page 9 lines 1-4)

As exemplified by the witnesses’ responses, questions concerning whether they had consented to the looting of their possessions were met with similar responses to those concerning their rapes. The ability for a victim to express non-consent or actively resist either the attacks on their person or the theft of their possessions was negated by the presence of weapons and the

very real threat of violence or death. The presence of such questions with respect to both crimes underscores a continued failure to truly appreciate the situation faced by victims, and a failure to recognize these crimes as acts of violence and abuse of power.

6.3.5 - Memory and Trauma

A central process highlighted in the literature, through which a victim's memory is commonly discredited, includes questions focused on her ability to accurately remember her victimization in light of the trauma she's endured (Mertus, 2004; Raitt & Zeesky, 2003). These questions in turn draw attention to the victim's credibility, as evidence of a deficient memory inevitably cast doubt on her reliability as a witness. While numerous examples of this process have been highlighted in the literature concerning the treatment of victims by the ICTY, similar processes were not evidenced in the ICC transcript data coded. Specifically, while two expert witnesses on trauma and memory were presented by the prosecution, and will be discussed at length below, the more common strategies in which witnesses are exposed to challenges concerning their ability to remember in light of their trauma were not explicitly evidenced in the transcripts examined. One possible exception was found in the testimony of Witness 87, in which the defence made a possible implicit suggestion that trauma had affected the victim-witness's memory:

Witness 87: I told you that I was extremely distressed during these events.

Defence Counsel Mr. Kaufman: So you don't deny that might be the case then; just that you were distressed and can't remember.

A: That is what I said. (T-46 page 28 lines 19-22)

However, apart from this one possible reference to the effects of trauma on memory, none of the other witnesses are directly challenged that the trauma they endured affected their ability to accurately recall their victimization, or made them unreliable witnesses.

The prosecution did however, present two expert witnesses who spoke to the affects trauma has on memory and the ability for witnesses to accurately testify to their experiences. The prosecution justified the presentation of these expert witnesses, arguing in turn that:

[...] understanding the circumstances affecting the testimony of a witness is a fundamental element for the proper evaluation of this evidence. As such, the implications of post-traumatic stress disorder on witnesses who directly or indirectly suffered from sexual crimes are essential to assist the Chamber in understanding the circumstances in which testimonies are given (T-21 page 8 lines 8-18).

In response to this argument, and the presentation of the expert witnesses generally, the defence argued that the prosecution was merely “trying to fill some shortcomings saying that if certain witnesses cannot remember the date [of their victimization] it is because of trauma” (T-21 page 12 lines 11-13).

The first expert witness presented was Dr. Adeyinka Moronke Akinsulure-Smith (Witness 221), a counselling psychologist with a practice in New York, who had worked at the Bellevue NYU programme for survivors of torture.⁷³ The second expert witness, Dr. André Tabo (Witness 229), a psychiatrist and the head of the Psychiatry Department of the National Hospital in Bangui, had initiated a program within the NGO established for victim, OCODEFAD, to provide psychological and social help to the victims of sexual violence in the CAR.⁷⁴

In addition to having both expert witnesses define post-traumatic-stress disorder (hereinafter PTSD) and discuss its common symptoms and side effects,⁷⁵ the prosecution focused

⁷³ Dr. Akinsulure-Smith provided the court with an expert report on gender crimes and the affects of PTSD.

⁷⁴ Dr. Tabo similarly provided the court with an expert report on the use of sexual violence as a weapon during the conflict in the CAR, and the consequences experienced by victims.

⁷⁵ Both expert witnesses attributed the onset of PTSD to episodes of extreme trauma, be it a near-death experience, a severe victimization, of having witnessed this type of event. Dr. Akinsulure-Smith (Witness 221) described in detail the symptoms and responses common of those suffering from PTSD, including: intrusive memories; flashbacks; recurrent nightmares; and avoidance and numbing. Avoidance typically involves the victim attempting to evade any reminders or memory-triggers of the event, and often includes a depersonalization or detachment from the event. Numbing is commonly typified by denial of the event, or dissociation from the memories. Dr. Akinsulure-Smith argues however, that not all victims of severe crimes suffer from PTSD and that other factors including age can have

much of their examinations of these two witnesses on issues related to trauma and memory. In particular, during the testimony of Dr. Tabo (Witness 229) the prosecution sought to determine if there was a link between psychological disorders and an inability to remember traumatic events, including sexual assault, and whether it was possible “that the memory could be affected in such a way that the victim would remember the event not in the exact factual manner in which the event took place, but by reconstructing the event by emphasising some aspects rather than others?” (T-100 pag2 38 line 18- page 39 line 5). In response, Dr. Tabo explained that memories of trauma and victimization are long lasting, and that inconsistencies are more attributed to the nature of memory generally, and that trauma does not necessarily exaggerate or worsen these inconsistencies.

In contrast, Dr. Akinsulure-Smith (Witness 221) when asked similar questions by the prosecution, but with more specificity to the affects of PTSD on memory, argued that avoidance is a common side effect and that research has shown that PTSD can affect brain functioning and create cognitive problems and memory deficits; therefore, a person’s ability to remember certain things can be impacted by extreme trauma. Further, because people suffering from PTSD commonly only retain fragments of memories, they can confuse the chronological order or sequence of events surrounding their victimization. Dr. Akinsulure-Smith, argued that many victims attempt to forget their victimization, or avoid these memories and possible triggers, as they are often accompanied by vivid memories of sensations, sounds and bodily reactions, which in turn cause the victim to re-live the events. Thus, it is not often an inability to remember, but a desire to forget, that affects the victim’s ability to recall in detail her victimization (T-29 page 10 lines 3-16).

an aggravating or mitigating effect on trauma. (T-38 page 25 line 20- page 27 line 25; T-39 page 11 line 20- page 12 line 5).

Thus, while there were no evident claims that any of the witnesses suffered from PTSD,⁷⁶ and none were asked questions concerning this, the issue of psychological disorders and their affects on memory remained a central concern for the court. The prosecution's emphasis in questioning these expert witnesses, in particular their focus on the ability of a victim to accurately remember the sequence of events surrounding her victimization, indicate what Mertus (2004) highlighted as a resistance on the part of legal practitioners to understand that while trauma can alter the "nature and sequencing" of a rape victim's testimony, it does not automatically negate the truth of her narrative (p. 121). While it is possible that the prosecution's exploration of these issues acted to pre-emptively counter a defence strategy, the continued focus on these issues perpetuates an understanding that a victim-witness's credibility is open to challenges and claims that trauma makes her an unreliable witness. Thus, in effect, it maintains the power of PTSD diagnoses to discredit a victim through her trauma, casting doubt on her memory and ultimately undermining her testimony in the court room (Raitt & Zeesyk, 2003). Finally, the prosecution's presentation of one expert witness before the presentation of victim-witnesses and eye witnesses of rape, and the other afterwards, acts to enclose all of the rape testimony within a discussion of the affects trauma has on memory. In turn, this may act to colour the witnesses' behaviours and accounts through a lens particularly attuned to these issues, or potentially create a situation in which certain actions are retrospectively explained or attributed to trauma.

6.3.6 - Gendered Position

The concept of gendered memory, advanced by Campbell (2002), refers to a heightened level of suspicion and disbelief afforded to the memories and testimonies of rape victims, who

⁷⁶ It is possible that information concerning the psychological state and possible PTSD diagnoses of the witnesses was contained in within the expunged parts of the transcripts; however, there is nothing in the rest of the transcript data to suggest that any of the victims are suffering from PTSD.

have historically been considered less credible than other victims, more likely to lie about sexual violence, or too emotional and irrational to be reliable witnesses (p. 172). Further, it calls attention to the inherent link formed between the identity of the witness, the crime she's suffered, and the testimony she provides. Thus, with reference to crimes of sexual violence, in which women represent the vast majority of victims, the position of "witness" becomes inherently gendered. The presumption that women are not truthful witnesses, and the inherent untrustworthiness attributed to the "gendered" witness of rape, has been a central source of law's ability to discredit and disqualify women who testify to their victimization (Campbell, 2002; Smart, 1989). Campbell further argues that this suspicion can be transferred to male victim-witnesses of sexual abuse, as the crime of sexual violence and its corresponding witness and victim positions have become "feminized" (2002, p. 173).

The concept of gendered memory proved difficult to measure within the confines of this project. In part this was caused by the isolated examination of rape victim-witnesses and eye witnesses, as in order to draw conclusions on a possible heightened level of mistrust afforded to rape victims – measured through the total number of challenges to the witness's testimony – compared to other victims of non-sexual crimes, it would have been necessary to examine all witnesses appearing before the court. However, due to time and length considerations this was not possible within the scope of this project; this offers a possibility for further research. Instead comparisons were drawn between female witnesses and male witnesses whose testimonies were examined. While the following represents an incomplete account, it is interesting to note that on average women were challenged more on aspects of their testimony and questioned as to whether their statements could be corroborated, than the male witnesses examined:

Table 3.5- Gendered challenges

	Average for Female Witnesses	Average for Male Witnesses	Total
Challenges ⁷⁷	38.78	21.33	34.42
Corroboration ⁷⁸	3.37	1.67	3.17

Further to this, the attributed “gendered” or “feminized” position of a rape victim-witness was evidenced several times throughout the transcripts examined. In particular, Witness 23, the only male victim-witness of rape, placed himself in the gendered position of a rape victim, stating:

They treated me as if I were a woman - - as even if I were a woman. The way they brutalized me, even if I were a woman, I would be entitled to some rest, but the abuse was severe. (T-51 page 25 lines 1-6)

The gendered position of a rape victim is further maintained by expert witness Dr. Akinsulure-Smith (Witness 221); who, when talking about the impact of sexual violence on men, argued that “it’s seen as being made to be a woman in a negative way [and] there’s fear of being viewed as homosexual” (T-38 page 25 lines 11-12). These two examples speak to a persistent gendered understanding of rape, perpetuated by a common script in which certain individuals fill the roles of victim and perpetrator, and a process wherein individuals must in turn fit their testimony “within the limited relational frameworks offered by these categories” (Dauphinee, 2008, p. 64). Thus, Witness 23, understanding rape as a crime committed against women, instinctively associates his victimization as being made to be a woman. These examples, in conjunction with the greater degree of challenges and requests for corroboration evidenced for female witnesses,

⁷⁷ “Challenges,” refers to all instances in which a witness was challenged: on an aspect of her testimony being inaccurate; that their behaviours did not align with those expected from a rape victim; through the use of skeptical language by the Defence (i.e. “so-called”); on discrepancies between their current testimony and previous statements or the testimonies of other witnesses; or when they were exposed to exhaustive lines of questions that create gaps or silences in her testimony, which were in turn argued as evidence of an unreliable memory or an unwillingness to divulge certain information.

⁷⁸ “Corroboration,” refers to all instances in which a witness was asked if anyone else could corroborate their statements; if they had medical documents attesting to their rape or had their medical records entered into evidence; or had their statements inherently corroborated through the testimonies of other witnesses appearing before the court.

represent a continued perspective wherein the position of rape victim-witness is “feminized,” and those who fill this position are treated with a heightened level of mistrust.

6.3.7 - Discredited Testimony Conclusion

In summation of the above, it is evident that processes that act to discredit testimony were recreated within the context of the ICC. The defence counsel appeared centrally concerned with highlighting – often minute and inconsequential – inaccuracies, discrepancies, and gaps within the witnesses’ testimonies in order to challenge their credibility and reliability. Of interest, this process seldom focused on the account of rape itself, but more often focused on the sequence and ordering of events before and after the attack, and the identities of the perpetrators. As issues concerning dates, locations and the identity of the Banyamulengue were central to the arguments of either counsel, this focus during cross-examination was understandable, and a possibility for future research would be to analyze the common challenges evident in cases where the above are not in question.

In addition to the emphasis placed by the defence on highlighting these inconstancies as a central strategy to discredit witnesses, it is interesting to note that strategies also employed by the prosecution, and at times the legal representatives, similarly acted to challenge the witnesses’ testimonies. In particular, the continued presence of questions related to corroboration, consent, active resistance, actions taken by the victim to prevent her attack, and the discussions surrounding trauma and its effects on memory, all act to create an increased scrutiny of the victim’s behaviours, actions, and state of mind, thus opening up the possibility for challenges to be presented and the witness discredited, and further act to displace attention away from the actions and behaviours of the perpetrators.

7 - Summary and Conclusion

This thesis explored whether the developments in international law, as exemplified by the Rome Statute's codification of numerous sexually violent war crimes and crimes against humanity, as well as the rights and protections afforded to victims, were implemented as intended with respect to the treatment of rape victim-witnesses appearing before the ICC. In particular, it sought to explore if and how the processes through which the testimonies of victim-witnesses were disqualified, limited, and discredited by the two *ad hoc* tribunals, re-emerged within the context of the ICC. Through a deductive content analysis of the transcripts for rape victim-witnesses and eye witnesses from the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*, it was determined that, with a few notable exceptions, the vast majority of the processes that disqualify, limit and discredit testimony were recreated and reproduced within the context of the ICC.

7.1 - Disqualified Testimony

The concept of disqualified testimony refers to ability of Law to define one Truth of an event, and to in turn disqualify alternative accounts that fail to conform to this narrow interpretation (Smart, 1989). Within the context of a rape trial, this includes both the active disqualification of accounts of rape that fall outside the narrowly defined legal Truth of rape, as well as the application and enforcement of a narrow script to which the victim-witness is expected to testify to.

This application and enforcement of a narrow script proved a central strategy used by the prosecution to control the narratives of sexual violence presented before the court in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*. In particular, the prosecution advanced a rape script characterized by situations in which groups of three or four Banyamulengue went from

house to house gang-raping women and girls, as well as men of power and authority within the communities. These rapes were further accompanied by extreme levels of violence and intimidation, and were commonly committed in front of the victim's family or in public so that they could further act to instill fear, humiliation and a sense of defeat both within the victim, and within the wider community.

This rape script was first advanced in the prosecution's opening statement, and was further bolstered and made credible through the presentation of two expert witnesses on trauma and sexual violence whose testimonies reaffirmed central aspects of the script. In addition, the prosecution presented rape victim-witnesses and eye witnesses whose identities and experiences reinforced this particular account of rape: as the majority of victims were female; the one male victim held a position of power within his community; the victims were raped by an average of three perpetrators; and were commonly raped in front of family members or neighbours. In addition, six of the witnesses presented by the prosecution were related to, or known by, one or more of the other witnesses testifying before the court, and were required to provide details concerning their own rapes, and those they witnessed. In presenting multiple witnesses who could testify to the rapes of other victims appearing before the court, the prosecution ensured a continued reiteration of the script they sought to advance, and in doing so, maintained control over how rape in the CAR would be understood by the court.

In contrast to the script presented by the prosecution, the defence attempted to advance an understanding of rape that rested on its historical framing as a natural by-product of war, motivated by the sexual desires of the soldiers engaged in conflict.⁷⁹ In addition to this, the defence further acted to disqualify the voices of the witnesses appearing before the court by engaging in a strategy that involved asking witnesses to merely confirm aspects of their previous

⁷⁹ T-101 page 38 line 16

statements that either aligned with the defence's account of the events or acted to create a discrepancy later used to discredit the witnesses, without further granting them the opportunity to provide additional testimony, explanations, or context to their earlier statements.

In advancing their respective narratives of the conflict and the use of sexual violence within it, both the prosecution and defence counsel commonly directed the witnesses through a series of questions designed to elicit particular responses. This strategy, in turn, represents another method through which alternative accounts are disqualified; as both counsels are solely concerned with creating a particular account of what happened, and in doing so restrict testimony in order to generate the pieces of evidence necessary to advance their respective arguments (Mullins, 2009a).

One disqualifying process not evidenced in the transcript data was the active disqualification of alternative accounts. In fact, an example counter to this process was evidenced during the examination of Witness 81, wherein both the prosecution and the legal representatives followed up on the possible existence of sexual slavery. While it was ultimately determined that conditions of sexual slavery did not exist, this example still demonstrated a willingness to follow up on crimes that were not included in the charges against the accused, nor formed part of the larger rape script advanced by the prosecution. The inability to properly evaluate this disqualifying process within the confines of this project, does however, present a possibility for future research, in particular, the examination of alternative sources of information on the conflict in order to compare and contrast the various forms of sexual violence detailed, and to in turn evaluate the representativeness of the rape script advanced by the prosecution.

In sum, witnesses were inherently limited to a reiteration of the prosecution's rape script, either through a description of their own rapes or those they witnessed, and as a consequence,

what emerged from the transcript data was a repetitive, homogenized, and patternized account of rape in the CAR. Further, the strategies used by both counsels to restrict the testimonies of witnesses to align with and provide the necessary evidence to support their respective arguments, striped the witnesses' control and ownership over their own narratives. In consequence, what was observed was the recreation of a disqualifying process detailed in the existing literature, wherein the victim heard by the court is not an autonomous individual with control and ownership over their own narrative; instead, it is the prosecution's "own construction of a victim," to whom the court listens; a victim who is essentially "equivalent to the evidence" the prosecution wishes to present or the defence wishes to refute (Henry, 2010, p. 1109; Mertus, 2004, p. 115).

7.2 - Limited Testimony

Limited testimony occurs when a victim-witness is not provided with the opportunity to testify to their experiences using their own language, narrative or pace. Instead their testimony is strictly controlled and fragmented by the questions posed by lawyers, which in turn act to restrict testimony to a detailed and repetitive account of the corporal, temporal and spatial elements of rape.

Processes that act to fragment testimony were frequently observed in the transcript data. In particular, witnesses were consistently exposed to repetitive and detailed questions; were frequently interrupted due to objections from either counsel, on account of evidentiary issues, or in order to clarify certain facts; and were instructed by both the presiding judge and prosecution to speak slower than normal to facilitate the interpretation process, and subsequently interrupted when they failed to do so. In addition, while several witnesses were initially able to provide an uninterrupted account of their experiences, all were subsequently directed back through their

accounts in a step-by-step fashion, in order to reduce their testimony to digestible answers to specific questions.

The salient facts that formed the focus of the prosecution's examination of witnesses primarily concerned the corporal, temporal, and spatial elements of the victim's rape. In particular, the observed importance attributed to ascertaining details on the temporal ordering of the rape and on the surrounding environment in which it took place reemphasize the centrality of accurate "temporal and spatial recounting" to testimony deemed legally relevant in court (Dauphinee, 2008, p. 64-65; Henry, 2009).

With reference to the corporal, while questions concerning penetration, body parts and the use of physical force were justified by the necessity to establish the *actus reus* of the crime of rape as defined by the Rome Statute, witnesses were frequently exposed to intrusively detailed questions on aspects of their physical violation unnecessary for establishing the factual basis of the crime. In particular, questions concerning whether the victim was raped consecutively or concurrently by multiple rapists, which position the victim was in during the rape, whether condoms were used or if the rapist ejaculated into the victim, and what the victim was wearing, acted to create an imagery of the rape, and signal what MacKinnon (1987) referred to as the "pornographic vignette" created during the rape trial. In light of what was observed, Sharatt's (2011) argument that international courts should "reduce significantly the number of unnecessary details required of victims of sexual violence during testimony" is of particular merit (p. 141).

While the above signal the continued presence of the central processes that limit testimony identified by the existing literature, one central process that has traditionally been highlighted was not recreated within the context of the ICC. In particular, while traditionally victims have not been permitted to testify to the emotional or social consequences of their rapes,

these consequences were explored at length by the prosecution and the legal representatives. Specifically, ten witnesses were explicitly asked questions concerning the emotional and social consequences they, or their family members, had experienced on account of being raped. Further, issues of spousal abandonment, stigmatization, and shame were explored during the prosecution's examination of the two expert witnesses on trauma and sexual violence. This focus ensures that a more in-depth understanding of rape and its consequences will be incorporated into the legal narrative produced by the court, and represents an important advancement in the treatment of rape by the ICC, when compared to the previous failures on the part of international courts to explore these issues (Henry, 2010).

While it is important to note that witnesses were provided with an opportunity to speak to the pain and emotional suffering they experienced, and were additionally afforded the opportunity to add anything at the end of their testimony, the testimonies examined were still overwhelmingly dominated by a limited focus on the corporal, temporal and spatial aspects of the rapes. As evidenced by Prosecutor Kneuer's comments in her opening statement that the trial would turn the witnesses "accounts of rape and their experiences of violation into evidence," the focus remained the generation of legally relevant facts capable of being used to prosecute Jean-Pierre Bemba Gombo for the crimes committed by his troops, the Banyamulengue. Thus, what was observed in the transcripts was a recreation of a process wherein the victim-witness is reduced to an "instrument of the legal process," a source of information whose experiences are reduced to mere evidence in the prosecution's case (Dembour & Haslamn, 2004).

7.3 - Discredited Testimony

Discredited testimony refers to the processes through which the reliability or creditability of a victim-witness are questioned or challenged, and which in turn throw the veracity of their

testimony into doubt. With reference to the transcript data examined, the principal discrediting tactics employed by the defence counsel included highlighting inaccuracies, discrepancies, gaps and silences in the witnesses' testimonies. In particular, all of the witnesses were challenged on aspects of their testimonies as being untrue or inaccurate. At times discrepancies were identified between the witness's previous statement and her current testimony, or between the testimonies of several witnesses appearing before the court who testified to the same event. Typically, these challenges focused on the central contentious issues of dates, locations and the identities of the perpetrators. In addition, the defence counsel commonly exposed witnesses to exhaustive lines of questioning on minute details or on aspects of which the witness never had knowledge. The defence utilized this particular strategy to argue that certain witnesses were unreliable or that they did not have sufficient knowledge of an event to stand witness to it.

It is important to note that the defence never questioned witnesses on the actual rapes themselves, but did on occasion call into question the victim's behaviour during or following the rape as unexpected of someone who had just been viciously attacked, and thus in effect still acted to undermine the victim's credibility. The continued presence of questions concerning why the victim did not act a certain way denote the persistent existence of victim-blaming attitudes, and the application of rape scripts, wherein "true" or "real" victims are expected to act in certain ways or recognize the dangers of placing themselves in certain situations (Buss, 2009; Mardorossian, 2002). In sum, the discrediting processes identified above typified the tactics employed by the defence counsel during the cross-examination of witnesses; however, other discrediting processes, most notably those related to corroboration, consent and the effects of trauma on memory, were employed by both the defence and the prosecution.

In particular, the prosecution presented six witnesses who were related to, or known by, one or more of the other witnesses appearing before the court. These witnesses were often instructed to testify to the events detailed in another witness's testimony, and in doing so provided corroboration. In addition, several witnesses were questioned as to whether they were aware of another person who could corroborate their statements, or if they had medical documents attesting to their rapes. Thus, the clear instructions under Rule 63 that corroboration of a witness's testimony, especially in cases of sexual violence, was unnecessary, was often circumvented in practice. This practice mirrors a similar issue identified in the treatment of victim-witnesses by the ICTY, in which the protections afforded under Rule 96 were not observed in practice and further denotes a continued perspective wherein the testimony of rape victim-witnesses are not deemed sufficient to stand alone as evidence to the crime, and must be bolstered by physical evidence or corroborated by another witness (Campbell, 2002; Coan, 2000).

In addition, the prosecution's questioning of victim-witnesses as to whether they consented to their rapes, represents another discrediting process identified in the transcript data. On account of the demonstrated presence of physical violence and threats, or on account of the victim's age, the possibility for genuine consent did not exist for any of the victim-witnesses questioned. Despite this, the prosecution persisted with asking victims whether they consented, and in doing so perpetuated an understanding of rape wherein the issue of non-consent, as opposed to coercion and violence, is considered to be the dividing line between legal sexual contact and punishable sexual violence (Schomburg & Peterson, 2007, p. 124; Smart, 1989). In addition to those concerning consent, the presence of questions concerning the active resistance on the part of the victim to the attack, or concerning whether they could have prevented their

rapes, represents a continued failure by the prosecution and defence to recognize the lived experiences of victims, to acknowledge the violence and fear they experience, and to understand that the ability to “articulate non-consent,” is often impossible in situations of armed conflict (Samuleson, 2007).

A final central process highlighted in the literature through which a victim’s memory is commonly discredited, includes questions focused on her ability to accurately remember her victimization in light of the trauma she’s endured (Mertus, 2004; Raitt & Zeesyk, 2003). While numerous examples of this process have been highlighted in the literature concerning the treatment of victims by the ICTY, similar processes were not evidenced in the ICC transcript data coded. Specifically, none of the victim-witnesses were directly questioned on issues related to trauma or PTSD. However, the prosecution did present two expert witnesses on trauma and sexual violence and in doing so ensured a continued focus on the issues of trauma and psychological disorders in rape cases, and perpetuated an understanding that a victim-witness’s credibility is open to challenges and claims that trauma makes her an unreliable witness (Raitt & Zeesyk, 2003).

Thus, in addition to those processes which disqualify and limit victim-witnesses, the emphasis placed on discrediting victim-witnesses by the defence during cross-examination, and the presence of similarly discrediting processes employed by the prosecution, ensure a continued reality in which victim-witnesses appearing before international courts “struggle to not only be understood but also to have their experiences believed, recognized, and validated” (Henry, 2010, p. 1113).

Thus, many of the central processes previously highlighted in the literature that act to disqualify, limit or discredit victim-witnesses’ testimonies, did re-emerge within the context of

the ICC. However, it is important to reemphasize that several key processes did not re-emerge in this case, most notably: the absence of processes that actively disqualify alternative accounts; the absence of processes that limit testimony on the emotional and social consequences of rape; the absence of direct challenges to victim-witnesses as to the possibility of psychological or trauma-related disorders affecting their memories; and the absence of direct challenges from the defence as to the incidents of rape themselves.

7.4 - Conclusion

This analysis has demonstrated that many of the central processes that disqualified, limited and discredited the testimonies of rape victim-witnesses appearing before the *ad hoc* tribunals, re-emerged in the context of the ICC. The continued presence of these processes despite attempts to incorporate a more gender-sensitive approach to the prosecution of sexually violent war crimes, and despite the optimistic predictions of Booth and Du Plessis' (2005) that the court would operate as a "woman-friendly institution for the victims and witnesses appearing before it," call attention to several central arguments advanced within feminist legal theory, and question whether the nature of the international legal systems inhibit a more progressive treatment of rape and the victims who testify to their experiences (p. 258).

In particular, the findings of this thesis reinforce the arguments put forward by Charlesworth et al. (1991) and Smart (1989). Specifically, the acquisition of legal protections under the Rome Statute – for example those concerning the issues of consent, resistance, and corroboration – did little to ensure that the victim-witnesses would not be exposed to questions concerning these issues designed to discredit their testimony and disqualify their accounts. Thus, the acquisition of legal protections did not guarantee that women's claims could not be "de-legitimized at a later stage" by law (Smart, 1989, p. 114). In addition, the processes detailed

above that acted to disqualify, limit and discredit the testimonies of rape victim-witnesses appearing before the court, reinforce Smart's (1989) argument that the primary process through which law remains oppressive towards women is not in the denial of formal legal rights but in its ability to disqualify women's voices. The continued presence of these processes despite changes in international law, further reinforce Charlesworth et al.'s (1991) argument that a continued focus on the acquisition of rights may not lead to a further advancement of women's equality under law.

In sum the above analysis casts doubt on the potential for the ICC to ever operate in a more progressive manner with respect to the treatment of rape victim-witnesses. Despite attempts to integrate more gender-sensitive procedures, and the more progressive rights ensured by the Rome Statute, prosecutorial processes and defence tactics, arguably innate to the adversarial model upon which the ICC is premised, ensured the continued presence of processes that disqualify, limit and discredit the testimonies of rape victim-witnesses (Mertus, 2004).

However, it bears highlighting that while several of the protective measures afforded to rape victim-witnesses were explored and found to be commonly circumvented in practice, including the limitations placed on the use of consent as a defence and requests for corroboration, many of the additional rights and protections afforded to victims were not adequately explored in this analysis, including the right to legal representation and participation throughout the trial, the protective measures granted to protect the identities and anonymity of victims, and most importantly the access to reparations. A possibility for future research could involve an evaluation of how these additional rights and protections impact and possibly improve the experience of testifying for rape victim-witnesses before the ICC. Further, as previously discussed, this project represents an exploratory study of only one case currently before the ICC,

with only the transcripts from the prosecution's witnesses examined. Thus, an additional possibility for future research would be to expand the analysis of transcript data to other cases before the ICC that include charges related to sexual violence, and to further explore the possible different tactics used to question the witnesses of the defence counsel. An examination of multiple cases would provide a more complete understanding of how the processes that disqualify, limit and discredit testimony emerge within the legal context of the ICC. A final possibility for future research would be to conduct post-trial interviews with the victim-witnesses. This would provide the victim-witnesses an opportunity to describe their experiences of testifying in their own words, and as a result provide a more complete understanding of how prosecutorial processes and defence tactics may infringe on their ability to testify to their experiences in a meaningful way.

It remains to be seen what type of impact the court and its rulings will have on the lives of the victims appearing before it. As previously argued by Henry (2009), the presence of the above processes cast doubt on the "therapeutic assumptions" that providing testimony aids in a victim's psychological and emotional recovery. In particular, when victims are limited in what they can share, and at the same time challenged as to the veracity of what they do convey, the assumption that testifying is an empowering experience is thrown into doubt. However, it is important to note that several witnesses did express gratitude for having been provided the opportunity to testify, and for the court's investigation into the crimes committed in the CAR, expressions that denote a more complex experience of testifying than one which is purely negative (Sharratt, 2011).

Yet, the narratives provided regarding the long term emotional and social consequences experienced by victims, including spousal abandonment, community stigmatization, long term

health compilations, and persistent depression, fear and shame, call into question how the everyday lives of the victim-witnesses will be impacted by the possible conviction of Jean-Pierre Bemba Gombo. Further, the focus on holding one individual accountable leaves doubt as to how the “entrenched culture of impunity” for war-time sexual violence will be ameliorated, and further bears reflection on how the larger social, political and cultural factors that create an environment in which the strategic use of rape as a weapon is sanctioned will be addressed (Akhavan, 2001, p. 31; Fletcher & Weinstein, 2002).

A normative goal that underlies feminist legal theory and academic advocacy is the possibility of providing discursive space for alternative voices to be heard, and to potentially enable the creation of alternative justice responses (Charlesworth, et al., 1991). As such, the “limitations of international tribunals,” for “the production of a narrative that reflects women’s experiences, promotes their agency and addresses their need for closure and healing,” must be recognized, and the necessity to develop of alternative justice responses that focus on improving the lives of victims must equally be emphasized (Mertus, 2004, p. 110).

Appendix I- The Rome Statute

Contained within Appendix I are the Articles of the Rome Statute and the Rules from the ICC's Rules of Procedure and Evidence, relevant to the prosecution of sexually violent war crimes and crimes against humanity.

Article 7 (1) (g)-1

Crime against humanity of rape

Elements

1. The perpetrator invaded⁸⁰ the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.⁸¹
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (1) (g)-2

Crime against humanity of sexual slavery⁸²

Elements

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.⁸³
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.

⁸⁰ The concept of 'invasion' is intended to be broad enough to be gender-neutral.

⁸¹ It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. This footnote also applies to the corresponding elements of article 7 (1) (g)-3, 5 and 6.

⁸² Given the complex nature of this crime, it is recognized that its commission could involve more than one perpetrator as a part of a common criminal purpose.

⁸³ It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.

3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (1) (g)-3

Crime against humanity of enforced prostitution

Elements

1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (1) (g)-4

Crime against humanity of forced pregnancy

Elements

1. The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (1) (g)-5

Crime against humanity of enforced sterilization

Elements

1. The perpetrator deprived one or more persons of biological reproductive capacity.⁸⁴

⁸⁴ The deprivation is not intended to include birth-control measures which have a non-permanent effect in practice.

2. The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.⁸⁵
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (1) (g)-6

Crime against humanity of sexual violence

Elements

1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
2. Such conduct was of a gravity comparable to the other offences in article 7, paragraph 1 (g), of the Statute.
3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7(1)(h)

Crime against humanity of persecution

1. The perpetrator severely deprived, contrary to international law,⁸⁶ one or more persons of fundamental rights.
2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in Article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.
4. The conduct was committed in connection with any act referred to in Article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.⁸⁷

⁸⁵ It is understood that 'genuine consent' does not include consent obtained through deception.

⁸⁶ This requirement is without prejudice to paragraph 6 of the General Introduction to the Elements of Crimes.

⁸⁷ It is understood that no additional mental element is necessary for this element other than that inherent in Element 6.

5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (3)

1. For the purpose of this Statute, it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.

Article 8 (2) (b) (xxii)-1⁸⁸

War crime of rape

Elements

1. The perpetrator invaded⁸⁹ the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.⁹⁰
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xxii)-2

War crime of sexual slavery⁹¹

Elements

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.⁹²

⁸⁸ Article 8 (2) (b) covers serious violations of the laws and customs applicable in international armed conflict.

⁸⁹ The concept of ‘invasion’ is intended to be broad enough to be gender-neutral.

⁹⁰ It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. This footnote also applies to the corresponding elements of article 8 (2) (b) (xxii)-3, 5 and 6.

⁹¹ Given the complex nature of this crime, it is recognized that its commission could involve more than one perpetrator as a part of a common criminal purpose.

2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature. The conduct took place in the context of and was associated with an international armed conflict.
3. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xxii)-3

War crime of enforced prostitution

Elements

1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xxii)-4

War crime of forced pregnancy

Elements

1. The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.
2. The conduct took place in the context of and was associated with an international armed conflict.
3. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xxii)-5

War crime of enforced sterilization

⁹² It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.

Elements

1. The perpetrator deprived one or more persons of biological reproductive capacity.⁹³
2. The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.⁹⁴
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xxii)-6

War crime of sexual violence

Elements

1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
2. The conduct was of a gravity comparable to that of a grave breach of the Geneva Conventions.
3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (vi)-1⁹⁵

War crime of rape

Elements

1. The perpetrator invaded⁹⁶ the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

⁹³ The deprivation is not intended to include birth-control measures which have a non-permanent effect in practice.

⁹⁴ It is understood that 'genuine consent' does not include consent obtained through deception.

⁹⁵ Article 8 (2) (e) covers serious violations of the laws and customs applicable in armed conflicts not of an international character.

⁹⁶ The concept of 'invasion' is intended to be broad enough to be gender-neutral.

2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.⁹⁷
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (vi)-2

War crime of sexual slavery⁹⁸

Elements

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.⁹⁹
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature. The conduct took place in the context of and was associated with an international armed conflict.
3. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (vi)-3

War crime of enforced prostitution

Elements

1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.

⁹⁷ It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. This footnote also applies to the corresponding elements of article 8 (2) (b) (xxii)-3, 5 and 6.

⁹⁸ Given the complex nature of this crime, it is recognized that its commission could involve more than one perpetrator as a part of a common criminal purpose.

⁹⁹ It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.

3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (vi)-4

War crime of forced pregnancy

Elements

1. The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.
2. The conduct took place in the context of and was associated with an international armed conflict.
3. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (vi)-5

War crime of enforced sterilization

Elements

1. The perpetrator deprived one or more persons of biological reproductive capacity.¹⁰⁰
2. The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.¹⁰¹
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (vi)-6

War crime of sexual violence

Elements

1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another

¹⁰⁰ The deprivation is not intended to include birth-control measures which have a non-permanent effect in practice.

¹⁰¹ It is understood that 'genuine consent' does not include consent obtained through deception.

person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.

2. The conduct was of a gravity comparable to that of a grave breach of the Geneva Conventions.
3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 36 (8)

- (a) The State Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:
 - (i) The representation of the principal legal systems of the world;
 - (ii) Equitable geographical representation; and
 - (iii) A fair representation of female and male judges.
- (b) State Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.

Article 43

The Registry

6. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

Article 54

Duties and powers of the Prosecutor with respect to investigations

1. The Prosecutor shall:

- (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;
- (b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and

- (c) Fully respect the rights of persons arising under this Statute.

Article 68

Protection of the victims and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.
3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.
4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.
5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information

Article 75

Reparations to victims

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the

Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.
3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.
4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.
5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.
6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

The Rules of Procedure and Evidence

Subsection 2 Victims and Witnesses Unit

Rule 16

Responsibilities of the Registrar relating to victims and witnesses

1. In relation to victims, the Registrar shall be responsible for the performance of the following functions in accordance with the Statute and these Rules:
 - a. Providing notice or notification to victims or their legal representatives;
 - b. Assisting them in obtaining legal advice and organizing their legal representation, and providing their legal representatives with adequate support, assistance and information, including such facilities as may be necessary for the direct performance of their duty, for the purpose of protecting their rights during all stages of the proceedings in accordance with rules 89 to 91;
 - c. Assisting them in participating in the different phases of the proceedings in accordance with rules 89 to 91;
 - d. Taking gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings.
2. In relation to victims, witnesses and others who are at risk on account of testimony given by such witnesses, the Registrar shall be responsible for the performance of the following functions in accordance with the Statute and these Rules:
 - a. Informing them of their rights under the Statute and the Rules, and of the existence, functions and availability of the Victims and Witnesses Unit;

- b. Ensuring that they are aware, in a timely manner, of the relevant decisions of the Court that may have an impact on their interests, subject to provisions on confidentiality.
- 3. For the fulfillment of his or her functions, the Registrar may keep a special register for victims who have expressed their intention to participate in relation to a specific case.
- 4. Agreements on relocation and provision of support services on the territory of a State of traumatized or threatened victims, witnesses and others who are at risk on account of testimony given by such witnesses may be negotiated with the States by the Registrar on behalf of the Court. Such agreements may remain confidential.

Rule 17

Functions of the Unit

- 1. The Victims and Witnesses Unit shall exercise its functions in accordance with article 43, paragraph 6.
- 2. The Victims and Witnesses Unit shall, *inter alia*, perform the following functions, in accordance with the Statute and the Rules, and in consultation with the Chamber, the Prosecutor and the defence, as appropriate:
 - a. With respect to all witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses, in accordance with their particular needs and circumstances:
 - i. Providing them with adequate protective and security measures and formulating long- and short-term plans for their protection;
 - ii. Recommending to the organs of the Court the adoption of protection measures and also advising relevant States of such measures;
 - iii. Assisting them in obtaining medical, psychological and other appropriate assistance;
 - iv. Making available to the Court and the parties training in issues of trauma, sexual violence, security and confidentiality;
 - v. Recommending, in consultation with the Office of the Prosecutor, the elaboration of a code of conduct, emphasizing the vital nature of security and confidentiality for investigators of the Court and of the defence and all intergovernmental and non-governmental organizations acting at the request of the Court, as appropriate;
 - vi. Cooperating with States, where necessary, in providing any of the measures stipulated in this rule;
 - b. With respect to witnesses:
 - i. Advising them where to obtain legal advice for the purpose of protecting their rights, in particular in relation to their testimony;
 - ii. Assisting them when they are called to testify before the Court;
 - iii. Taking gender-sensitive measures to facilitate the testimony of victims of sexual violence at all stages of the proceedings.
- 3. In performing its functions, the Unit shall give due regard to the particular needs of children, elderly persons and persons with disabilities. In order to facilitate the participation and protection of children as witnesses, the Unit may assign, as appropriate,

and with the agreement of the parents or the legal guardian, a child-support person to assist a child through all stages of the proceedings.

Rule 18

Responsibilities of the Unit

For the efficient and effective performance of its work, the Victims and Witnesses Unit shall:

- (a) Ensure that the staff in the Unit maintain confidentiality at all times;
- (b) While recognizing the specific interests of the Office of the Prosecutor, the defence and the witnesses, respect the interests of the witness, including, where necessary, by maintaining an appropriate separation of the services provided to the prosecution and defence witnesses, and act impartially when cooperating with all parties and in accordance with the rulings and decisions of the Chambers;
- (c) Have administrative and technical assistance available for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses, during all stages of the proceedings and thereafter, as reasonably appropriate;
- (d) Ensure training of its staff with respect to victims' and witnesses' security, integrity and dignity, including matters related to gender and cultural sensitivity;
- (e) Where appropriate, cooperate with intergovernmental and non-governmental organizations.

Rule 19

Expertise in the Unit

In addition to the staff mentioned in article 43, paragraph 6, and subject to article 44, the Victims and Witnesses Unit may include, as appropriate, persons with expertise, *inter alia*, in the following areas:

- (a) Witness protection and security;
- (b) Legal and administrative matters, including areas of humanitarian and criminal law;
- (c) Logistics administration;
- (d) Psychology in criminal proceedings;
- (e) Gender and cultural diversity;
- (f) Children, in particular traumatized children;
- (g) Elderly persons, in particular in connection with armed conflict and exile trauma;
- (h) Persons with disabilities;
- (i) Social work and counselling;
- (j) Health care;
- (k) Interpretation and translation.

Rule 63

General provisions relating to evidence

4. Without prejudice to article 66, paragraph 3, a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence.

Rule 70

Principles of evidence in cases of sexual violence

In cases of sexual violence, the Court shall be guided by and, where appropriate, apply the following principles:

- (a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;
- (b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
- (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence;
- (d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.

Rule 71

Evidence of other sexual conduct

In the light of the definition and nature of the crimes within the jurisdiction of the Court, and subject to article 69, paragraph 4, a Chamber shall not admit evidence of the prior or subsequent sexual conduct of a victim or witness.

Rule 72

In camera procedure to consider relevance or admissibility of evidence

1. Where there is an intention to introduce or elicit, including by means of the questioning of a victim or witness, evidence that the victim consented to an alleged crime of sexual violence, or evidence of the words, conduct, silence or lack of resistance of a victim or witness as referred to in principles (a) through (d) of rule 70, notification shall be provided to the Court which shall describe the substance of the evidence intended to be introduced or elicited and the relevance of the evidence to the issues in the case.
2. In deciding whether the evidence referred to in sub-rule 1 is relevant or admissible, a Chamber shall hear in camera the views of the Prosecutor, the defence, the witness and the victim or his or her legal representative, if any, and shall take into account whether that evidence has a sufficient degree of probative value to an issue in the case and the prejudice that such evidence may cause, in accordance with article 69, paragraph 4. For this purpose, the Chamber shall have regard to article 21, paragraph 3, and articles 67 and

68, and shall be guided by principles (a) to (d) of rule 70, especially with respect to the proposed questioning of a victim.

3. Where the Chamber determines that the evidence referred to in sub-rule 2 is admissible in the proceedings, the Chamber shall state on the record the specific purpose for which the evidence is admissible. In evaluating the evidence during the proceedings, the Chamber shall apply principles (a) to (d) of rule 70.

Appendix II- Case information

Appendix II provides information on the case *The Prosecutor v. Jean-Pierre Bemba Gombo* as detailed on the ICC website.¹⁰²

Case information on *The Prosecutor v. Jean-Pierre Bemba Gombo* (ICC-01/05-01/08)

- *The Prosecutor v. Jean-Pierre Bemba Gombo* is the only case for the Situation in the Central African Republic
- The trial began on the 22 November 2010.
- In total, 2,287 individuals have been granted the status of victims by Trial Chamber III, and have been authorized to participate in the proceedings.

Counts

- “Pre-Trial Chamber II considered that there are substantial grounds to believe that Mr. Bemba is criminally responsible as a military commander for:
 - Two crimes against humanity: rape (article 7(1)(g)) and murder (article 7(1)(1));
 - Three war crimes: rape (article 8(2)(e)(vi)), murder (article 8(2)(c)(i)) and pillaging a town or place (article 8(2)(e)(v)).”
- As evidenced by the above charges, 2 of the 5 counts are related to crimes of sexual violence; specifically charges of rape as both a crime against humanity and as a war crime.

Information concerning the case (as established by the Pre-Trial Chamber II):

The Pre-Trial Chamber II found that there existed substantial evidence to believe that between the 26 October 2002 and 15 March 2003, an armed conflict, of a non-international character, took place in the Central African Republic. During this conflict, the national armed forces led by the (then) president of the CAR, Ange-Felix Patasse, allied with the *Mouvement de Libération du Congo* (MLC) led by Jean-Pierre Bemba Gombo, against the “rebel movement” led by the former Chief-of-Staff of the Central African armed forces, François Bozizé. It was during this conflict that MLC forces, commanded by Mr. Bemba, committed crimes against the civilian population (including rape, murder and pillaging) of a widespread and systematic nature. Particularly, the attacks against the civilian populations in the Bangui, Boy-Rabé, Point Kilomètre 12 (PK 12), Point Kilomètre 22 (PK 22) and Mongoumba regions were carried out on a large enough scale and targeted a significant number of civilian victims to be deemed crimes against humanity. As Jean-Pierre Bemba was the President and Commander-in-Chief of the MLC, he effectively acted as the military commander and had authority and control over the MLC troops who committed the above mentioned crimes. As such, the Trial Chamber has

¹⁰² All of the information contained in this case summary was obtained from the official Case Information Sheet (ICC-PIDS-CIS-CAR-01-007/11_Eng Updated 15 December 2011). available at: <http://www.icc-cpi.int/iccdocs/PIDS/publications/BembaEng.pdf>

concluded that “Mr. Bemba knew the MLC troops were committing crimes and did not take all necessary and reasonable measures within his power to prevent or repress their commission.”

Appendix III- Coding Sheets

Appendix III contains all of the coding sheets developed and utilized in this research project. The central concepts and sub-concepts were deductively derived from the existing feminist theoretical and academic literature on the prosecution of sexual violence by international criminal courts.

Limited Testimony

Processes that limit testimony (Sub-Concepts):	Questions concerning (Indicators):	Evidenced in testimony: (yes/no)	# of times this occurs/# of questions:	Process employed by: (e.g. Defence Counsel, Prosecutor)	Example/Testimony reference
Lack of testimony concerning emotional/social consequences of rape	Witness is interrupted/cut off when they refer to emotional/social consequences				
	(Negative cases) Witness is asked questions concerning the emotional/social consequences				
	Other [Inductive coding]				
The witness is not allowed to use their own pace when testifying	The witness is asked to slow down when giving their testimony				
	(Negative case/explanation) The witness is instructed before testimony that they must speak slower than normal because of interpreters				
	Other [Inductive coding]				
The witness's testimony is	The witness is asked numerous (different or detailed) questions concerning specific facts	[Not Applicable] It was found that these two elements were evidenced throughout			

fragmented	The witness is asked repetitive (identical or similar) questions concerning specific facts	most of the other codes. For example, with numerous/detailed/repetitive questions concerning corporal/temporal/spatial elements of their testimony, these two aspects were coded simply as pre		
	Following long answers/narratives provided by the witness, either counsel instructs the witness to go through their story step-by-step- so as to create digestible/specific answers to specific questions			
	The flow of the witness's testimony is interrupted and they're asked to clarify specific facts			
	The flow of the witness's testimony is interrupted due to objections			Defence Counsel
				Prosecution
				Legal reps
	The flow of the witness's testimony is interrupted due to interpretation issues (not hearing the witness, witness speaking to fast, misinterpretation, etc...)			
	The flow of the witness's testimony is interrupted due to evidentiary issues (i.e. referencing something that should be in closed session, etc...)			
	The flow of the witness's testimony is interrupted due to issues concerning time (time for a recesses or end of session)			
	(Negative cases) The witness recounts a continuous narrative/provides a long answer without interruptions, and is able to describe their experiences using own words/terms, sequencing, and place emphasis on the events			

	they deem most important			
	(Negative cases) Judges instruct counsels to keep objections to a minimum			
	(Negative cases) Explanations are provided concerning how questioning will be conducted (explanations as to why it is fragmented)			
	(Negative cases) Judges reprimand either counsel for posing repetitive questions, or numerous detailed questions on inconsequential aspects			
	Other [Inductive Coding]			
Witness is asked questions concerning the corporal elements of their rapes, including: [**This is only in reference to the testimony that deals specifically with rape. It is understood that the witness is also asked to provide details concerning physical injuries other family	The witness is asked if they were raped/sexual assaulted, and to describe what that means. Also asked if they witnessed the rapes of others (family members, neighbours) and are asked to describe these rapes as well			
	Which body parts were used by the attacker to penetrate the victim; were weapons or other foreign objects used to penetrate the victim			
	Which parts of the victim's body were penetrated or assaulted			
	How many times, and by how many perpetrators was the victim raped by			
	Which position the victim was in during the rape			
	Were condoms used or did ejaculation into the victim take place			
	The level of force or violence used against the victim during the attack.			

members/ individuals known to the witness]	Physical consequences experienced following the rape (i.e. pain/injuries, contraction of STIs or HIV, pregnancy, other long term health consequences)			
	The witness is required to use medical/technical terminology to describe her rape (i.e. penis, vagina, penetration, anus, etc.)			
	(Negative cases) Judges reference aspect of protective measures for witnesses, which outline how physical questions concerning rape should be formulated (i.e. in the least embarrassing or intrusive way)			
	Other [Inductive Coding]			
The witness is asked questions concerning the temporal elements of the rape, including: [**This is only in reference to the testimony that deals specifically with rape, or the events leading up to/following it. It is understood that the witness is also asked to provide a chronological	The witness is asked to provide a detailed chronological account of the events which happened prior to, during, and following the rape(s); (counsel asks witness to walk them through the events of the rape)			
	The witness is asked questions concerning the exact time/date that the rape took place- down to the hour			
	The witness is asked questions concerning her/the victim's behaviour prior to, during and following the rape (i.e. did they attempt to flee, did they seek medical attention, did they tell anyone afterwards)			
	The witness is asked how long the rape lasted			
	The witness's testimony is interrupted when they discuss events out of sequence or attempt to discuss a certain piece of evidence not in line with the narrative the lawyer is attempting to establish- the witness is re-directed to answer using the exact sequence of events, or			

account of other events, including attacks on their town, acts of pillaging/looting, and the aftermath of the conflict]	is told that they will get to that piece of evidence at another point			
	Other [Inductive coding]			
The witness is asked questions concerning the spatial elements of the rape(s), including: [**This is only in reference to the testimony that deals specifically with rape. It is understood that the witness is also asked to provide details concerning their general surroundings, including details about distances between towns or movements of troops, etc.]	The witness is asked to provide details about the place in which the rape(s) took place (i.e., a house, in a street, in the woods, etc.)			
	Asked if other people (i.e. members of her family) were present during the rape, and where they were located in relation to the witness and the perpetrator(s)			
	The witness is asked questions concerning the position of their person in relation to their attacker(s) during the rape(s)			
	The witness is asked whether weapons were present, and where they were located in relation to the witness			
	Negative cases			
	Other [Inductive Coding]			
General	Witness is asked if there is anything else they			

Negative cases for limited testimony	would want to add to their testimony- completely open-ended question.			
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Discredited Testimony

Processes that discredit testimony:	Questions concerning:	Evidenced in testimony: (yes/no)	#of times this occurs/#of questions:	Process employed by: (e.g. Defence Counsel, Prosecutor)
Inaccuracies, discrepancies, gaps or silences are identified in the witness's testimony, including;	Specific aspects or facts in the witness's testimony are challenged as untrue/wrong/ or inaccurate by either counsel- inaccuracies are pointed out			
	The witness is challenged on her behaviour not aligning with being raped (i.e. "if you were raped wouldn't you have seen a doctor", "if you knew they were bad men why didn't you flee," etc...)			
	Language is used that denotes a lack of belief in witness's testimony (i.e. "so-called," "alleged," etc...)			
	Claims are made that the length of time between the incident and the testimony make it impossible/difficult for the witness to remember certain aspects accurately or in detail			
	The witness is exposed to exhaustive lines of questioning on minute aspects or facts that either confuse the witness, are concerning issues that the witness could not possibly know, or to which she responds that she cannot remember - thus creating 'gaps' or 'silences' in relation to certain			

	elements			
	Any gaps or silences are (explicitly or implicitly) argued as evidence of unreliable testimony, an unreliable memory, or an unwillingness on the part of the witness to disclose			
	Differences or discrepancies within the witness's testimony, or between the -witness's current testimony and previous statements made to the ICC investigators, are identified and used to challenge the witness			
	Discrepancies between witness's testimony and another witness's testimony are identified and used to challenge the veracity of the witness's account			
	The Defence implies that other people gave the witness the information that it was the Banyamulengue that attacked them, that the Banyamulengue spoke Lingala, etc...			
	(Negative cases) Alternative accounts for gaps, inaccuracies or silences, are provided by court personnel (such as cultural reasons for not wanting to provide certain details, or attributing inaccuracies to the volumes of sexual violence to which the witness was exposed)			
	[Inductive] Negative case- Prosecution is pre-emptive against possible defence tactic and asks witness if OCODEFAD advised her in any way on how to tell her story/ give her testimony			
	Other [Inductive coding]			
The witness's memory of the event is challenged	Either counsel claims that the witness is suffering from trauma generally, or from a trauma disorder specifically (including PTSD)			
	The presentation of the witness's medical or			

through claims that the witness suffers from trauma, including:	counseling records as evidence that she suffers from trauma or PTSD			
	Either counsel questions the witness concerning trauma, emotional or psychological disorders			
	Claims are made by either counsel that the witness is too traumatized to remember accurately; or that she does not display enough symptoms of trauma expected of rape-victims- casts doubt on whether she was really victimized			
	(Negative cases) The absence of these processes, or an explicit recognition that the trauma suffered by the witness does not necessarily impact her ability to remember			
	[Separate coding] The presentation of expert witnesses on trauma and memory			
	Other [Inductive coding]			
Corroboration of the witness's memory/ testimony is requested or provided, including:	The witness is asked if anyone else witnessed her raped [or another aspect/event in their testimony] and could corroborate her statement/testimony			
	The witness is asked if they have medical records which corroborate that they were raped			
	The witness's medical records are presented/ entered into evidence			
	[Inductive code] Witness's testimony is inherently corroborated through the testimony of other witnesses (relatives or neighbors that were also raped during the same attack, or witnessed the rape and testify to it).			
	Negative cases			
	Other [Inductive coding]			

Evidence is presented, or arguments made, that contravene the regulations stipulated in Rule 70 and 71, including:	Arguments or inferences drawn about the witness-witness's "credibility, character or predisposition to sexual availability [...] by reason of the sexual nature of the prior or subsequent conduct of" the victim			
	The presentation of evidence concerning the witness-witness's prior or subsequent sexual conduct			
	Negative cases			
	Other [Inductive coding]			
Questions concerning consent, including:	The witness is questioned as to whether she consented to the sexual encounter/assault; these questions are posed even if the surrounding contexts in which the rape(s) took place are described as inherently coercive [established under corporal/spatial evidence- use of weapons, threats (against witness or family) or force. Gang rape. Underage witness. Also established by presence of armed groups in neighbourhood, etc.]			
	Witness is asked whether they resisted attack. Or attempts are made to ask these questions.			
	[Latent content] Witness is asked if there was anything they, or another person, could have done to stop the rape- Active resistance.			
	Negative cases			
	Other [Inductive coding]			
Consent is used as a defence	Consent is used as a defence. Either in observance of the limitations placed on its use in Rule 70, or in a way that contravenes Rule 70.			

	Negative cases			
	Other [Inductive coding]			
Gendered Memory	Specific references are made to the victim's credibility as a witness.			
	Negative cases			
	Other [Inductive coding]			
Truth	When witness is sworn in, the Judge asks them if they understand they must tell the truth, and question them concerning the truth/accuracy of their previous statement(s)			
	Either counsel asks witness if their statement(s)/testimony is true			
	The witness makes reference to telling the truth			

Disqualified Testimony

Processes that disqualify testimony:	Questions concerning:	Evidenced in testimony: (yes/no)	# of times this occurs/# of questions:	Process employed by: (e.g. Defence Counsel, Prosecutor)
Certain types of victims or crimes are not recognized, including:	Testimony referring to victims or crimes not included in the charges against the defendant, or in the Rome Statute, is interrupted and deemed irrelevant, or not further investigated by means of follow up questions			

	Negative Cases			
	Other [Inductive coding]			
Evidence of a secondary script; The prosecution asks a similar list of questions to each witness to establish a particular account of events, including:	Prosecutor asks the witness what happened in the Central African Republic between October 2002 and March 2003, in order to establish the series of events in the conflict			
	Questions concerning the Banyamulengue. Prosecutor asks the victim to expand on who they are- asked to provide the name of the group, and asked how they knew it was the Banyamulengue			
	Questions concerning where Banyamulengue came from; i.e. Congo, Zaire, or to name the country on the “other side of the river”			
	Questions concerning appearance of each armed group; their uniforms, insignias, shoes, weapons, vehicles (including Presidential Guard, the Rebels, the CAR forces, and the Banyamulengue)			
	Questions concerning which languages the witness speaks/can understand- in order to establish that they can recognize different ones			
	Questions concerning which languages the various troops spoke- (in order to determine that			

CAR troops only spoke Sango or French, and that the Banyamulengue spoke Lingala), or questions concerning which language was spoken between witness and the Banyamulengue			
Questions concerning if the witness could identify a leader amongst various armed groups- and what these leaders did			
Questions concerning dates. Specifically, the dates that the Banyamulengue entered into/left the area, and whether other troops were still there at that time.			
Questions concerning if the CAR or Rebel forces committed crimes against population (Prosecution: to show that only the Banyamulengue committed crimes against the civilian population. Defence: to attribute blame to other groups)			
Questions concerning the movements of various troops, in order to establish who was where at what time, and which troops were fighting against each other at specific times			
Questions concerning violent attacks on civilian population by the Banyamulengue- whether murders and other rapes took place			

	Questions concerning looting by the Banyamulengue- what was taken, how it was taken, where it was taken, was it given back, were the victims compensated for it			
	Other [Inductive codes]			
	Negative Cases			
Lawyers direct the testimony of the witnesses in order to generate specific pieces of evidence, including:	A lawyer poses a number of very specific and/or repetitive questions concerning a particular aspect (of the rape or other general information) to elicit a particular piece of information. This is evidenced by multiple/repetitive questions when the witness refuses to/doesn't answer initial prompt; when the lawyer says that that they will re-word or re-phrase the question, or that perhaps the witness didn't understand and they will repeat, etc...			
	The lawyer directly makes reference to attempting to gain a particular piece of information or a particular answer			
	A lawyer states that they would like the witness to direct their attention to a specific point, piece of information, thus the controlling the evidence provided			
	The witness is interrupted when they fail to restrict their answers to the specific questions			

	asked, and are directed to respond more clearly, concisely, or to be more precise.			
	The Prosecutor, or the Defence, provides a summary of the witness's testimony, so as to highlight a specific account of rape			
	Negative cases			
	Other [Inductive coding]			
Defence tactics for disqualified testimony	The Defence asks the witness to confirm specific statements given in prior interviews with court personnel or in previous testimony- [typically includes elements that align with the Defence's account of the rape/attack, or used to set up a discrepancy/inaccuracy between prior statement and current testimony]			
	Explicit references are made to the Defence's strategy			
The narrative of rape which emerges from the transcripts is one that is "patternized," or "homogenized"	The witness is interrupted when they attempt to provide an alternative or divergent account of sexual violence perpetrated during the conflict			
	[Latent content] The witness is related to or connected to other witnesses appearing before the court- and was raped during same attack, and in a similar way. Thus multiple accounts of the same rape/attack are presented; i.e., multiple			

- a Rape Script	witnesses speak to one particular script of rape			
	Negative cases			
	Other [See below- victim characteristics]			

Evidence that a particular rape script is advanced by the Prosecution through the presentation of victims with similar characteristics/experiences of rape:

- Gender:
- Age:
- Number of rapists:
- Location of rape:
- Rape Witnessed by others:

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