GENOCIDAL GENDER AND SEXUAL VIOLENCE

The legacy of the ICTR, Rwanda's ordinary courts and *gacaca* courts

Cover illustration: Francisco De Goya (1746-1828), Etching, Plate 52 from 'Los desastres de la guerra'

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Genocidal Gender and Sexual Violence

The legacy of the ICTR, Rwanda's ordinary courts and *gacaca* courts

Gendergerelateerd en seksueel geweld als genocide

De erfenis van het ICTR, Rwanda's gewone rechtbanken en *gacaca* rechtbanken

Proefschrift

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te Kampala, Uganda

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Co-promotor: Dr. R.H. Haveman

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To my dearest friend and husband Richard, and to our girls.
Because of your enjoyable love, patience, self-sacrifice, unwavering support
and the smiles you bring.

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CONTENTS

ABBREVIATIONS

AI	Amnesty International
AU	African Union
ASF	Avocats Sans Frontières
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Court for the Former Yugoslavia
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
HRW	Human Rights Watch
OTP	Office of the Prosecutor
RPF	Rwandese Patriotic Front
PRI	Penal Reform International
MDR	Movement Democratique Republician
MRND	Movement Revolutionaire National pour le Development
MINJUST	Ministry of Justice
RTLM	Radio-Télévision Libre de Mille Collines
CNLG	Commission Nationale de Lutte contre le Genocide
SNJG	Service Nationale de Jurisdiction *Gacaca*
UN	United Nations
UNGA	United Nations General Assembly
UNSCR	United Nations Security Council Resolution
UNTS	United Nations Treaty Series
WWII	World War II

1 INTRODUCTION

1.1 INTRODUCTION

> *Discourse is a group of statements, which provide language for talking about something- a way of representing the knowledge about a particular historical moment. Discourse does not only construct the topic but it also directs the way the topic can be meaningfully talked or reasoned about, and it does this by ruling in and ruling out certain ways of talking about a topic.*[1]

International criminal justice happening at the international level and within Rwanda's domestic systems of justice is by far the most outstanding approach that dealt with the legacy of the genocide. In these systems the realities of the genocide have been discussed characterised and condemned. The way we understand Rwanda's experience of the genocide is mostly informed by the judicial discourse happening in Arusha and in Rwanda. From that perspective this study puts the discourse analysis within the perpective of the power of judicial discourse to shape the way we know and interpret reality. Similarly, the study puts in perspective the contribution of victims in these criminal justice systems hence expanding the way we know about genocidal gender and sexual violence that happened in Rwanda.

That gender and sexual violence happens against women and girls during conflict and wars is well documented. The common narrative in Rwanda does not explain that some Tutsi men were victims of genocidal gender and sexual violence and that some women perpetrated those crimes against men, women and children. The common discourse on gender and sexual violence in terms of literature and judicial practice must be analysed in order to better explain and develop knowledge on genocidal gender and sexual violence in Rwanda.

The rampancy of gender and sexual violence crimes during wars and ethnically-based conflicts has attracted considerable academic, policy and activism attention. There is a consensus that in all wars gender and sexual violence occur, but its extent, form and purpose differs dramatically. The victims and perpetrators differ on the basis of what the rape intends to achieve. Commonly mentioned is that in nearly all wars civilian women are raped and sexually abused by all parties to the conflict. What was less said is that gender and sexual violence adopt wider dimensions including the victimisation of men as well as the participation of women as perpetrators although this is less reported and discussed.

1 Foucault, M. (1980), *Herculine Barbin* (New York; Colophon) at 130.

The international criminal tribunals for Rwanda[2] and for the former Yugoslavia[3] established in 1993 and 1994 respectively, have contributed tremendously to the understanding and condemnation of gender and sexual violence during war and genocide. Whereas gender and sexual abuse has always been rampant in all conflict and war situations it was not until the events in Rwanda and the former Yugoslavia that those crimes attracted international attention.

The experiences of victims of gender and sexual violence in Rwanda and particularly their exceptional courage to testify about sexual violence have contributed to securing a better and stronger place in the academic and judicial discourse on the subject. The massive use of sexual violence and ethnic cleansing during the genocide in Rwanda and the war in the former Yugoslavia have graced humanity with a body of jurisprudence emanating from the sister *ad hoc* Tribunals charged with holding accountable those most responsible for genocide, crimes against humanity and serious violations of humanitarian law. The tribunals have ruled that rape and sexual violence constitute genocide, crimes against humanity and war crimes. The International Criminal Tribunal for Rwanda in its groundbreaking decision and the first of its kind ruled that:

> *Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.*[4]

On the domestic platform in Rwanda sexual torture and rape have been gravely condemned through their categorisation amongst the most serious of the genocide offences. The ordinary courts outlawed the vice of rape and sexual violence as well as the *gacaca* courts.

While supranational and domestic judicial responses to gender and sexual violence deserve appraisal, it is similarly important to analyse their legacy in order to understand how much the achievements we celebrate have qualified the problem and condemn it. The courts that tried genocide have, through their judicial decisions, recorded and interpreted the experiences of the victims. In the exercise of their duties, judicial officers have been informed by the experiences of the victims, the law and expert knowledge about the topic. The interaction of reality, theory and practice has certainly generated new knowledge on the subject of this

2 *The Statute of the International Criminal Tribunal for Rwanda*, Annexed to Security Council Resolution 955 (1994), adopted on 8 November 1994, SC Res. 955 UN SCOR, 1994, UN Doc. S/RES/955. The International Criminal Tribunal for Rwanda was established by United Nations Security Council Resolution acting under Chapter VII of the United Nations Charter.

3 The United Nations International Criminal Tribunal for the Former Yugoslavia established for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, was established according to: U.N. SCOR, 48th Sess., 3178th mtg. at 1, U.N. Doc. S/RES/808 (1993), The Statute of the Tribunal was annexed to this Resolution.

4 *The Prosecutor v. Jean Paul Akayesu* (1998), Case No. ICTR 96-4-T, Trial Camber I, Judgment (2 September 1998), para 731.

study. How the new knowledge explains the phenomenon, exposes the limits of theory and hence expands it by way of what it includes or excludes is important in explaining what happened in Rwanda.

1.2 THE RESEARCH PROBLEM AND RESEARCH QUESTIONS

Research on gender and sexual violence during the genocide has been massive yet inadequate. So far the phenomenon of gender and sexual violence has been attributed and explained largely on the basis of pre-genocide anti-Tutsi campaigns in which Tutsi women were described as Tutsi sexual weapons against the Hutu, dangerous, arrogant and seductive. This narrative does not explain why such specific targeting of Tutsi women was necessary in the policies of the 'genocidaires', yet Rwanda is a patriarchal society.[5] The Rwandan conflict's point of departure was ethnicity and not gender. In pre-genocide Rwanda sites of power were legitimised and organised around predominantly ethnic grounds and to some extent regional lines. An analytical approach that takes into account both gender and ethnicity in Rwanda will be engaged on this matter.

Existing literature[6] and the judicial discourses on Rwanda do not discuss the use of sexual and gender violence against Tutsi men and what it intended to achieve for the male victim and his group. The lack of the story of male victims of genocidal gender and sexual violence calls for an analysis of the discourse about the problem, the social and theoretical activism that informed the legal systems. The discourse theory[7] will contribute to the explanation for naming the phenomenon socially and legally.

Anyway, the dominant discourse has historically considered men as sexually inviolable. Secondly, the story of male victims does not promote the central intention of feminist scholars and women activists who seek to expose gender and sexual violence as a woman's experience. However, ignoring men as victims of genocidal gender and sexual violence is absurd because combating genocide demands that it must be exposed in its entirety, including such experiences that are not extensive in number and that challenge pre-existing social, legal and cultural perceptions.

The theoretical and legal platform has not adequately discussed the participation of Hutu women in directing, perpetrating and inciting others to commit gender

5 According to family traditions in Rwanda children take the family clan of their father except in cases of a child whose father is unknown for which the maternal grandfather line will be considered as his own clan.

6 See for example Degui-Segui, R., "Report of the Special Rapporteur on the Situation of Human Rights in Rwanda" in: *The United Nations and Rwanda 1993-1996* (New York: Department of Public Information, United Nations, 26 January 1996), Document 167, (Herein after "Degui-Sugui Report"). See also IPEP/OAU, 2000 *Rwanda: the Preventable Genocide*, OAU, Addis Ababa, Ethiopia, and available also online at: www.oau-oua.org, accessed on 15 June 2009.

7 *Supra* note 1 at 131.

and sexual violence. The ICTR case of Pauline Nyiramasuko is a recent and so far the only development at the international level in the case of Rwanda. Cultural, traditional and social perspectives and discourses have continuously painted the 'mother' image and non-violent narrative concerning women.

An analysis of women as perpetrators of genocidal gender and sexual violence is commendable. It is certainly necessary to try and unleash why and how women so socially informed of their motherly and non-violent perception become 'genocidaires' committing such grave crimes as rape and sexual violence against fellow women and, more socially challenging, against Tutsi women.

Exposing the extent, nature and scope of gender and sexual violence during genocide and wars has been a central element in dealing with this scourge. This research is partly an effort to further highlight the extent, nature and scope of genocidal gender and sexual violence that Tutsi women and some of their brothers experienced during the genocide. Because there is a need to expand existing knowledge on the genocidal experiences of Rwanda it is contended that in order to explain, expose and probably understand the phenomenon of genocidal gender and sexual violence in a wider and more realistic manner, the experiences of victims is an important source of knowledge.

Victims of genocidal gender and sexual violence have learnt a great deal from their genocidal experience. No wonder that it is true as the common English saying goes: "*experience is the best teacher.*" By recounting some of their experiences their knowledge is shared and expanded. The complexity of genocidal gender and sexual violence is most exposed by details shared by the victims of the genocide. Most existing narratives pursue a given end generally bringing the story in as far as it pursues that end. Victims simply want to share their story and for that reason sharing some of their experiences pursues that new empirical knowledge.

I believe that in analysing the legacy of major post-genocide judicial institutions I will be able to further expand the reality of Rwanda on the basis of viewing what the courts have been able to account for and what they have not and the factors that influence the presence or absence of, for example, gender and sexual violence crimes as genocide or not. Similarly, an analysis of the male dominance in the victimisation of women and their participation in the judicial process, of men as perpetrators, their almost complete absence in the victim narrative and the minimal presence of female perpetrators is worthwhile.

Therefore, this study sets out to analyse the legacy of the supranational and Rwandan domestic courts in adjudicating genocidal gender and sexual violence. The genocide in Rwanda stands out because of its massive use of gender and sexual violence. Many genocidal victims experienced sexualised and gendered forms of violence.[8]

8 See generally De Brouwer, A.L.M and Ka Hon Chu, S. (2009), *The men who killed me: Rwanda Survivors of Sexual Violence* (Vancouver, Toronto, Berkeley: Douglas and McIntyre, 2009). See also

The experiences of victims and feminist legal theory on gender and sexual violence are the contextual and theoretical framework guiding this study. The study seeks to elaborate whether the law and the jurisprudence of post-genocide courts treat rape and sexual violence as a part and means used to foster the destruction of the Tutsi. The study of the legacy and record of the courts demonstrates the genocidal nature of gender and sexual violence in Rwanda.

Since 1994 Rwanda has struggled for justice in order to combat impunity and ensure that in the future the rule of law will prevail. The need for justice was sparked off by the experience of genocide in Rwanda, crimes against humanity and related crimes of violence that claimed over a million lives, predominantly Tutsi.[9] Many of the survivors of those atrocities were seriously injured, handicapped and homeless. People from all walks of life, including ordinary citizens, religious, military and government leaders, all participated in the attempt to destroy the Tutsi and anyone else who stood in the way, especially the moderate Hutu and a few foreigners living in Rwanda during that period.

Genocide in Rwanda distinguishes itself by the massive use of gender and sexual violence. It has been stated that: "Sexual violence was a step in the process of destruction of the Tutsi group – destruction of the spirit of the will to live and of life itself."[10] Tutsi women were specifically targeted and exposed by genocide propaganda that was a prelude to their physical destruction. It is noteworthy that Tutsi men and children also suffered genocidal gender and sexual violence, albeit less so than Tutsi women. Some Hutu women were also sexually abused either because the perpetrators believed them to be sympathizers[11] of the Tutsi or were married to Tutsi men, in which case they were considered to be traitors to the Hutu cause or in rare circumstances were raped because the perpetrators wrongfully thought that their victims were Tutsi.[12]

In the aftermath of the atrocities, justice was seen as an essential element in Rwanda's reconstruction and nation building. The experiences of Rwanda and the former Yugoslavia introduced in the mainstream consciousness a desire to end impunity for massive human rights abuses. Feminist legal scholars and activists vigorously sought to make visible[13] the scourge of rape and sexual violence and

Human Rights Watch/Africa, *Shattered Lives; Sexual Violence during the Rwandan Genocide and its Aftermath, 1996; Struggling to Survive: Barriers to Justice for Rape victims in Rwanda* (New York: Human Rights Watch, September 2004) Vol. 16, No. 10 (A).

9 National Service of *Gacaca* Courts, summary of the report presented at the closing of *gacaca* courts activities, 2012, Kigali at 25.

10 *Supra* note 4 para 734.

11 *Supra* note 8 at 78-82 (Testimonial of Marie Mukabatsinda).

12 The *Prosecutor v. Mikaeli Muhimana,* Case No. ICTR 96-IB-T, Judgment, Trial Chamber III (28 April 2005) paras 283-292.

13 See for example Capelon, R. (1994), Surfacing Gender: Reconceptualising Crimes against Women in Time of War, in: Lorentzen, L.A. and Turpin, J. (eds.), *Women and War Reader* (New York: New York University Press). See also Brownmiller S., Making Female Bodies the Battle Field in Mass Rape: The War against Women in Bosnia-Herzegovina, in: Stiglmayer, A. (ed.), *Against Women in Bosnia-Herzegovina* (Lincoln: University of Nebraska Press, 1994).

demanded that legal action be taken to that effect.[14] Consequently, international and national accountability mechanisms were introduced as an attempt to deal with past violence through punishing those responsible for genocide and related crimes in Rwanda. Sarkin highlights that in order to ensure the rule of law in the future, post-conflict societies must create policies that effectively deal with past human rights abuses.[15]

Acts of gender and sexual violence were one of the essential means in which the genocide against the Tutsi was committed in Rwanda. An essential backdrop for this study is to try and locate the judicial response within the unique context of Rwanda. The importance of reflecting on the context for which the judicial response was developed is believed, as suggested by Jones, to be central in explaining and understanding that specific response.[16]

Judicial responses are more meaningful when they address the context and reality of the problem they seek to solve. In the same argument Fionnuala warns that "for law to be effective it must co-relate sanction to the experience of the victim."[17] This implies that sanctions should be imposed taking into consideration the offence that the perpetrator subjected the victim to. It would therefore be inappropriate if a perpetrator who committed genocide is sanctioned for crimes against humanity as the general purpose of justice, especially on the part of the perpetrator and victim, would be undermined. It is on that basis that this research seeks to explore whether acts of gender and sexual violence committed to foster genocide have indeed been adequately sanctioned.

To that effect Fionnuala[18] emphasizes that post-conflict justice should consider, at the centre of its approach to justice, the experiences of the victims. It is believed that the experiences of victims contribute to a better understanding of the context of crimes suffered by victims. Drumbl captures the importance of understanding contextual factors as a prerequisite in fostering effective responses noting that:

> *(Each) genocide is unique. This uniqueness manifests itself in the differences of experiences of genocide survivors, the level of social mobilization of aggressors, the public or secretive nature of aggression, and the historical context from*

14 Seifert, R. (1994), War and Rape: A preliminary Analysis in: Stiglmayer, A. (ed.), *Against Women in Bosnia-Herzegovina* (Lincoln: University of Nebraska Press) at 54-57.

15 Sarkin, J. (2004), *Carrots and Sticks: The TRC and the South African Amnesty Process* (Antwerp: Intersentia) at 1.

16 Jones, N. (2010), *The Courts of Genocide politics and the rule of law in Rwanda and Arusha* (Oxfordshire: Routledge) at 8.

17 Ni Aolain, F. (2000), "Sex-based Violence and the Holocaust – A Re-evaluation of Harms and Rights in International Law" (2000) *The Yale Journal of International Law*, Vol. 12: YY, at 2.

18 Ni Aolain, F. (2012), Gendered Under-Enforcement in the Transitional Justice Context, in: Bubkley-Zistel, S. and Stanley, R. (eds.), *Gender in Transitional Justice* 58-87 (Palgrave: MacMillan, 2012) at 58-87.

> *which the violence emerged. Post genocidal policy instruments, including those designed to promote the rule of law therefore should be contextual.*[19]

To this effect, Drumbl explains[20] that the uniqueness of different forms of genocide is due to the contextual factors surrounding the experiences of genocide within a given community in which it took place.[21] Historical, social and political factors play important roles in the identification of the victims, the making of perpetrators and the means used in achieving the genocidal end.

Rwanda's historical factors were taken into consideration when, for example, in 1994 specific propaganda targeted Tutsi women warning the genocidaires not to repeat the mistakes of 1959. The so-called mistakes of 1959 referred to the fact that during 1959 the violence targeted Tutsi men and allowed women and children to flee. In 1994 the extremists – the *Interahamwe* militia – used rape and sexual violence targeting predominantly Tutsi women in a manner unprecedented in earlier violent attacks against the Tutsi. No wonder the perpetrators had been mobilized to believe that Tutsi women were a sexualized tool to undermine and weaken Hutu men and their identity.[22] Tutsi women were accused of using their sexual weapon to enslave Hutu men for the promotion of Tutsi supremacy.

The aforementioned propaganda against Tutsi women made it possible to mobilise perpetrators of genocide to use atrocious and merciless violence and to kill mainly Tutsi women in unimaginable forms of sexualized violence. Daly notes that the genocide in Rwanda stands out from other atrocities in a number of ways including the fact that it was "astounding in the number and concentration of the killing, (and) the extensive use of rape as a form of ethnic violence and the massive involvement of the Rwandan population."[23]

The extent, nature and central role played by rape and other forms of sexual violence to advance the genocide against the Tutsi calls for a specific analysis. The experiences of victims are an essential backdrop in explaining the genocidal realities of Rwanda. This study takes the training for the *Inyangamugayo* conducted by myself in 2008 (the training experience is discussed in detail in chapter three) as

19 Drumbl, M.A. (2000), "Punishment, postgenocide: from guilt to shame to civis in Rwanda" *New York Law Review* (heinonline) vol. 75: 1221-1326, accessed on 23 November 2011, at: www.nyu.edu/pages/lawreview/75/5/drumbl.pdf**,** accessed on 30 June 2012, at 1224.

20 *Ibid.*

21 *Ibid* at 1225.

22 The sexual abuse of the Tutsi was promoted by the perception that they were beautiful, provocative and seductive. Discriminatory propaganda had depicted these women as an instrument of Tutsi domination, therefore by means of their sexual abuse the dominant were being dominated in the most egregious manner. The inferiority complex of the abusers also played a role as they believed the anti-Tutsi women narrative and, as a result, employed gender and sexual violence as a means of conquest and a sense of achieving an impossible objective.

23 Daly, E. (2001-2), "Between punitive and reconstructive justice: The Gacaca Courts in Rwanda" *New York University Journal of International Law and Politics* 34: 355.

a point of departure because it was an experience that brought me face to face with the realities of genocidal gender and sexual violence like never before.

This training and its insights made me think about how feminist legal theory (the theoretical basis of this research) explains the Rwandan experience and its relation to the three main legal responses to the genocide in Rwanda. I realised that it is necessary to explain that gender and sexual violence within a genocide context is different from ordinary and other forms of gender violence.

I was able to see that violence against the Tutsi took into consideration the strategic role that each group member – men, women and children – played in the social and biological continuation of the Tutsi, hence informing the nature of and the justification for each attack. For example, Tutsi women were raped while the rest of their family members were forced to watch in order to make them a social outcast if they happened to survive the violence.

On the other hand, Tutsi men, considered to be the stronghold and source of security for the Tutsi, were sexually mutilated and/or forced to rape animals in full view of their families and community in order to communicate the fact that the Tutsi had been rendered defenceless. Gender stereotypes in Rwanda view men as a symbol and source of security for their communities hence the abuse of the Tutsi "*myugariro*"[24] was a sign to communicate defeat. This work contributes to the academic debate on genocidal gender and sexual violence from the perspective of the contextual understanding of the experiences of the victims gathered especially during the training for the *Inyangamugayo*.[25]

The central role of the training is based on the realization that it helps in telling the story. Through the training I was able to see things I never saw through theory and law in practice, which changed my perspective. The training brought me closer to the incomprehensible nature of sexual and gender violence, and enhanced the need to contribute to the task to try and explain that complex and incomprehensible realty. I therefore wish to add to, and in a broader sense, the discussions on genocidal gender and sexual violence in Rwanda.

Legally speaking, the duty to prosecute and judge perpetrators for what they purposed to commit the *mens rea*) is one of the principal elements of criminal responsibility – the moral element. Gender and sexual violence against the Tutsi

24 *Myugariro* is a *Kinyarwanda* word that literally means a number of very hard and often big logs that every home uses to secure the homestead. They are the traditional locks of the homestead. In Rwandan culture a man is referred to as the *myugariro* of the home to the extent that in Rwandan families a husband was always required to sleep on the nearside of the bed, first of all to ensure the safety of the wife within the house, but also that in case of any attack from outside he would be able to flee without hindrance. This was the virtue of the Rwandan man that was socially constructed.

25 The *Inyangamugayo* are the judges of the *gacaca*, the popular tribunals that tried nearly 2 million cases of genocide and crimes against humanity.

were a material element of genocide. It is therefore important to understand the realities of the genocide and to correctly qualify them from a legal point of view.

The theoretical framework of this research is based on feminist legal theory. The contribution and influence of feminist legal theory on understanding and addressing gender and sexual violence is paramount for this study. Feminist theory is chosen on the basis of its role in seeking to explain the value of and understanding the experiences of women. The feminist method is relevant because it gives considerable value to narratives. The narratives of victims of gender and sexual violence form the cornerstone of this study. This approach fosters the feminist method of challenging the assumption of the role of law in the lives of individuals by analysing the role of the position vis-à-vis the experiences of Rwandan victims.

The practice of post-genocide judicial bodies for Rwanda regarding the prosecution of genocide and the underlying considerations in the prosecution and qualification of rape and sexual violence serves to provide a better understanding of the relationship between reality, theory and practice.

Impressions and reflections gathered during the training of the trainers of the *Inyangamugayo* form the underlying reason for writing about the topic of genocidal sexual violence. Apparently something was missing. The legal response and theoretical framework that I had studied seemed to be lacking when viewed from the realities of the victims with whom I had come face to face. Obviously Rwanda was not being explained in detail because, for example, the discourse on male violence was missing.

The training experience helped me to see things I had never seen before and in a context that is not evident in practice and theory. This study explores Rwanda's experience of gender and sexual violence, how its experience is reflected in feminist legal theory and how the law recognised and judged that experience. On the basis of the complex reality of gender and sexual violence in Rwanda, this study seeks to answer the following two major questions.

- How do feminist theories explain genocidal sexual violence and what is the contribution of feminist theories in solving the problem of genocidal gender and sexual violence in the case of Rwanda?
- How has post-genocide justice acknowledged the experiences of victims' genocidal sexual violence?

1.3 RESEARCH OBJECTIVES AND THE STUDY METHOD

The use of gender and sexual violence during the genocide in Rwanda increased but information thereon remained scant, particularly in relation to gender and sexual violence as a means of genocide. As noted earlier the widespread experiences of Tutsi women because of pre-genocide anti-Tutsi propaganda are the dominant

discourse. While the specific targeting of Tutsi women is very important in specific ways, it is inadequate in explaining and exposing the entire picture of especially the forms of violence those women suffered, and neither does it explain how and why Tutsi men were targeted albeit in smaller numbers and why Hutu women went against the cultural and social perception of motherhood in enthusiastically perpetrating and aiding and abetting gender and sexual violence. The complexity of the phenomenon of genocidal rape and sexual violence became more realistic to me during the informative training that I conducted in 2008 and which was intended to prepare the *Inyangamugayo* for the mandate to try cases of rape and sexual violence.

On the basis of the above, the objectives of this study include: Firstly, to contribute in exposing the complex nature of the phenomenon of genocidal gender and sexual violence on the basis of testimonies gathered during the training. Secondly, from the standpoint that theoretical discourse influences the explanation for the problem and influences the solution, I will inquire into how existing theoretical literature has described the phenomenon of gender and sexual violence in Rwanda. Thirdly and lastly, an inquiry into the laws and decisions of the courts will be made in order to contribute to the knowledge about what the Rwandan experience and the legacy of the courts offer for the understanding of gender and sexual violence in the context of genocide.

The study engages in an empirical exploration of the experiences of victims of genocidal gender and sexual violence. The empirical experiences of victims were gathered through the training and through documents, personal conversations and interviews with victims and other resourceful persons. I gathered fifty victim testimonies during the *gacaca* court training from trauma counsellors and district coordinators of the *gacaca* courts sharing the experiences confided in them by the victims or through information gathered by the *gacaca* courts. I also conducted individual interviews with thirty persons, all of whom were survivors of gender and sexual violence.[26] This method was used because of the central role that victims play in informing reality and judicial and academic discourse. This method intends to use victims' testimonies as a source of knowledge that better explains the context and realities of genocide in Rwanda.

Documentary analysis was also employed, especially concerning the existing literature on ethnic identity, gender, gender and sexual violence and the laws of the courts and their case law. This has been conducted by means of an analysis of the relevant literature and by an examination of the law and practice of post-genocide judicial institutions.

Further, the analysis has adopted the method of analysing the cases decided by the courts and the related literature and law.

26 Throughout the research I managed to gather 50 victim testimonies and conducted more than 30 interviews and conversations with victims, trauma counselors and *gacaca* jurists.

The study uses feminist theory and feminist legal theory more particularly. The legal framework, including the laws and the case law of the ICTR, the ordinary courts and the *gacaca* courts, is analysed. The work of these courts is voluminous hence only a few cases will be studied where it is deemed that they enhance the purpose of the topic which is the subject of this study.

This study does not give an overall account of the genocidal experiences of Rwanda or of all acts of gender and sexual violence; for example, while recognising that some Hutu women were raped, the research deliberately focuses on gender and sexual violence experiences suffered by Tutsi women and men and in order to elaborate on the genocidal use of rape and sexual violence during the genocide in Rwanda. The choice is intended to unmask certain complexities of the genocide through the experiences of victims of genocidal gender and sexual violence with the focus being on the challenges enshrined in doing justice to that specific aspect of the Rwandan situation.

1.4 RESEARCH ORIGINALITY

This research will add to existing studies on the lack of experience and context from an insider's appreciation. It studies the complex nature of genocidal sexual and gender violence from a personal encounter with the problem experienced through the training of the trainers of the *Inyangamugayo*, the *gacaca* court judges who were to adjudicate cases of rape and sexual torture. What is unique in this research is the researcher's familiarity with the practical complexities, historical and contextual framework surrounding the topic studied. My past experience in researching the topic of gender and genocide coupled with personal participation in the *gacaca* as a Rwandan and acting in the capacity of an *Inyangamugayo* gives me the confidence to study something that happened in my own culture and language.

Moreover, I speak the language, which very few foreigners do, and I am part of the culture in which, for example, sexuality has to be assessed. Where most researchers only access primary material through interpreters, my linguistic advantage allowed this research to directly consult, for example, the parliamentary discussions on relevant laws, and to fully participate in the *gacaca* and in discussions with the victims directly. Moreover, as a trainer I participated in the training of the *nyangamugayo*, which due to the specific nature and content of the training was closed to other 'outsiders'.

Whereas the background against which this research emanates – the training – can be considered as the least scientific part of this study, within the perspective of legal research its contribution to the understanding and application of theory and judicial practice in post-genocide Rwanda and other related situations cannot be underestimated. It provides a unique experience of measuring legal practice and legal theory from an empirical background. This research tries to expand an academic debate on dealing with the problem of genocidal gender and sexual

violence and seeks to incite a discussion on the intersection between theories and reality with regard to the present subject.

It should be noted that while it is an advantage to write about a situation of which the researcher understands the historical, social and cultural context, it is also challenging because there is the inherent risk of bias based on that closeness. Throughout this study, I am conscious of that risk. The importance of telling the Rwandan story by a Rwandan supersedes the above-mentioned risk. The opportunity to face the reality enhanced a deeper responsibility to discuss this topic.

I have chosen to employ the intersection of both my personal and professional experience in this research because of the uniqueness that it provides in terms of the subject-matter of this topic. The objective of the study is served by engaging both forms of knowledge especially because of the already mentioned interaction between theory and reality. This study considers a situation where there is reality, a theoretical description thereof and a practical approach to solve the problem legally. It therefore makes a generous contribution because the author, by means of the training, had an exceptional opportunity to face the reality of the problem studied, to participate practically and scientifically in the judicial response mandated to redress the problem and, on an academic level, to have been involved in studying the topic and related theories.

1.5 DEFINITION OF KEY TERMS

Genocide, Crimes against Humanity and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II form the threshold of international crimes committed in Rwanda during the genocide. The three core crimes have also been referred to as crimes against the peace and security of mankind[27] and international or supranational crimes.[28] These crimes are generally regarded as punishable under customary international law. The prohibition and punishment of such supranational crimes has arguably been considered as a peremptory norm of international law (*jus cogens*) for which no derogation is permitted.[29]

While the focus of this study is on genocide and gender and sexual violence, in the interest of clarity and precision the definitions the other two international core crimes being Crime against Humanity and violations of humanitarian law

27 Lukashuk, I.I., Contemporary International Criminal Law: concept and general features in Ginsburgs, G. *et al.* (eds.), *International and National Law in Russia and Eastern Europe: Essays in honour of George Ginsburgs* (The Hague; Boston: M. Nijhoff Publishers, 2001) at 273.

28 See generally Haveman, R. and Kavran, O., *Supranational criminal law: a system suis generis,* (Antwerp: Intersentia, 2003) see also Sellers, V.P. (2002), "Sexual Violence and Peremptory Norms: The Legal Value of Rape" *Case Western Reserve Journal of International Law* 34: 287-303.

29 Peremptory is defined as: "Final; absolute; conclusive; incontrovertible; not requiring any shown cause, Garner, A.B. (ed.), *Black's Law Dictionary* 7th edition (St. Paul, Minn: West Group, 1999).

applicable in conflicts of an internal character are as well discussed. This is done in order to illustrate that the three crimes are different in their elements and the people they intend to protect. The ICTR in Akayesu expressed that genocide protects some groups against destruction or it attempt. A crime against Humanity particularly protects civilians from persecution. The prohibition against violations of Article 3 common to the Geneva Conventions and its Additional Protocol II exists to protect civilians and other non-combatants from war crimes.[30]

1.5.1 GENOCIDE

Genocide was first coined by Raphael Lemkin in 1944. His innovation brought together the Greek word *genus* meaning race or tribe and the Latin suffix *cide* that refers to killing. Lemkin's definition of genocide was "a coordinated plan aimed at the destruction of national groups."[31] In Lemkin's opinion, and rightly so, genocide is directed against a national group as an entity claiming that the attack against individuals is but a result of their membership of a specific group.

Shocked by the atrocities suffered by the Jews during World War II,[32] the United Nations encapsulated genocide and its participatory forms in the Genocide Convention of 1948.[33] The initial definition of the crime of genocide is set forth in Article II of the 1948 Genocide Convention[34] and is *verbatim* reproduced in Article 2 of the ICTR statute,[35] Article 6 ICC statute,[36] and Article 114 of the Rwandan Penal Code.[37] Apart from its statutory character, genocide is a crime under customary international law.[38]

The central characteristics of the crime of genocide are first the specific intent to destroy a group and, second, the existence of a distinct or specific group that is national, ethnical, racial or religious. Acts enumerated by Article II (a) to (e) are only tantamount to genocide once the perpetrator possesses the specific intent (*dolus specialis*)[39] to destroy (part of) a group protected by the convention. For an act to be qualified as genocide there must be both the prohibited act and the

30 *Supra* note 4 para 469.
31 Schabas, A.W., *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2004) at 36.
32 A general Assembly Resolution requested the Economic and Social Council to consider the formulation of a draft convention on the crime of genocide.
33 Genocide is defined by *The Convention on the Prevention and Punishment of the Crime of Genocide (herein after Genocide Convention)*, 9 December 1948, 78 U.N.T.S. 277.
34 *Ibid* Article II.
35 *Supra* note 2 Article 2(2).
36 *The Rome Statute of the International Criminal Court*, Article 6, a at: www.icc-cpi.int. RomeStatutEng1.pdf, accessed on 10 May 2013.
37 *Organic Law 01/2012/OL of 02/05/2012 instituting the Penal Code*, OG no. special of 14 June, Article 114.
38 Dinstein, Y., "International Criminal Law" (1975) *5 Israel Y.B. on Hum. Rts*. 55 at 62.
39 *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3-T, Judgement and Sentence (6 December1999), paras 59-61. See also *supra* note 4, para 498.

specific genocidal intent.[40] It should be noted, however, that those who drafted the genocide convention did not define what was meant by intent, motive or special intent to commit genocide.[41]

The commission of acts prohibited by the genocide convention can only qualify as genocide if the Court is convinced that a particular motive is present – to destroy in part or whole a specified group. Proving this special intent is far from simple in the absence of a confession on the part of the perpetrator. The method adopted by the Akayesu Trial chamber is one of inference. The trial chamber concluded that genocidal intent can be inferred from the general context in which alleged acts are systematically directed against the same group, the scale of the atrocities committed and their general nature, the actions, and the targeting of members of a particular group to the exclusion of others by the perpetrators of the punishable acts.[42] In the opinion of the ICTY special intent to destroy in whole or in part as a requirement for genocide can be established through "the combined effect of speeches or projects laying the groundwork for and justifying the acts, from the massive scale of their destructive effect and from their specific nature, which aims at undermining what is considered to be the foundation of the group".[43]

George Mugwanya is of the opinion that the special intent is what makes genocide a crime of crimes.[44] Mugwanya is not alone in this conclusion; the ICTR trial chamber also noted in the Kambanda case that in its opinion genocide constitutes the crime of crimes.[45] William Schabas in his book "*Genocide in International law: The crime of crimes*" notes that genocide is a particular crime against humanity that carries a special intent intended for the destruction of a specific group.[46]

Note should also be made of the character of groups protected by genocide; this is important because the jurisprudence of the ICTR and ICTY has embarked on this matter. The question before the chambers was whether protected groups would be strictly interpreted as exclusively those mentioned in the Convention. The ICTR chose to adopt a subjective standard and concluded that any stable and permanent group in a manner similar to the four conventional ones would be protected even if such a group failed to meet the definitions of the four groups expressly mentioned by the convention.[47]

40 *The Prosecutor v. Ignance Bagilishema*, Case No. ICTR-95-1-A-T, Trial Chamber I, Judgment (7 June 2001), para 55.

41 Greenawalt A.K.A, "Rethinking Genocidal Intent: The Case for a Knowledge-based Interpretation" (1999) 99 *Colum. L. Rev.* 2259, at 2279.

42 *Supra* note 4 para 523.

43 *The Prosecutor v. Radovan Karadzic and Ratko Mladic*, Case No. IT-95-5-R61, IT-95-18-R61 Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, paras 94 and 95.

44 Mugwanya, G., *The Crime of Genocide at International Law: Appraising the Contribution of the UN Tribunal for Rwanda* (London: Cameron May Ltd, 2007) at 130.

45 *The Prosecutor v. Jean Kambanda*, Case No. ICTR 97-23-S, Sentence, 4 September 1998 para 16.

46 See generally Schabas W.A., *Genocide in International law: The crime of crimes* (London: Cambridge University Press, 2000).

47 *Supra* note 4 para 523.

1.5.2 GENOCIDAL GENDER AND SEXUAL VIOLENCE

Genocidal gender and sexual violence in this research means genocidal acts of violence that target the gender and sex of the victims. Gender and sexual violence committed with intent to destroy in part or in whole a national, ethnical, religious or racial group. This definition is shared by de Londras who as well defines genocidal sexual violence as sexual violence committed with the intention to destroy a group protected by the genocide convention.[48] Some of the literature on gender violence uses the term to refer to violence against women. This research prefers the neutral meaning of gender as defined by the ICC Statute. Article 7(3) of the ICC Statute defines gender as "the two sexes male and female within the context of society."[49] Similarly, Peterson and Runyna define gender as the socially learned behaviour and expectations that distinguish masculinity and femininity. Yet sex refers to the biological distinction between male and female.[50] It therefore follows that gender violence targets both males and females based on their socially constructed roles, while sexual violence is based on the victims' biological make-up. Rwandan law defines gender-based violence as "any act that results in a bodily, psychological, sexual and economic harm to somebody just because they are female or male."[51]

Sexual violence was defined by the Akayesu trial chamber as "any act of a sexual nature which is committed on a person under circumstances which are coercive."[52] While rape was defined separately, the trial chamber noted that sexual violence includes rape. Separately though, rape was defined as "a physical invasion of a sexual nature under circumstances which are coercive." trial chamber 1 in Akayesu significantly determined that the lack of consent as an element of the crime of rape or in inference other acts of sexual violence should be rejected where such violence takes place during genocide.[53]

The ICC adopted the non-requirement of the absence of consent for rape as a crime against humanity or war crime where it is stated that "taking advantage of a coercive environment" is in itself sufficient proof of force and hence of the absence of consent.[54] The ICC defines sexual violence under the elements of crimes against humanity as:

48 De Londras, F., "Telling Stories and Hearing Truths: Providing an Effective Remedy to Genocidal Sexual Violence against Women" in Henham, R. and Behrens, P. (eds.), *The Criminal Law of Genocide: International, Comparative and Contextual Aspects* (Aldershot: Ashgate, 2007) at 115.

49 *Supra* note 36 Article 7(3).

50 Peterson, V.S. and Runyan, A.S., *Global Gender Issues in the New Millennium (Dilemmas in the World Politics)* (Boulder: Westview Press, 2009).

51 *Law on the Prevention and Punishment of Gender Based Violence, No. 59/2008* of 10/09/2008, O. G., no. 14 of 06/04/2009, Article 2.

52 *Supra* note 4 para 598.

53 De Brouwer, A.M., *Supranational criminal prosecution of sexual violence: The ICC and the practice of the ICTY and the ICTR* (Antwerp: Intersentia, 2005) at 455.

54 *Supra* note 36 Article 7 para 1 (g)-(h).

> *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.*[55]

The above definitions of rape, sexual violence and gender violence are specific to crimes against humanity. There is therefore no such international definition of rape and sexual violence as acts of genocide. It can be argued that rape and sexual violence are simply material elements of genocide and should not necessarily be defined. This is however ambiguous because the same reasons that motivated the adoption of a definition of rape and sexual violence as crimes against humanity are present for the same acts as genocide. It is not clear what rape and sexual violence mean and entail apart from being committed with the intent to destroy, in whole or in part, an ethnic group.

Gender and sexual violence remain common practice especially during wars and genocide. Rape and other forms of sexual violence were overwhelmingly employed during the ethnic cleansing in the Former Yugoslavia and the genocide in Rwanda. Sexual and gender violence including rape, sexual torture, genital mutilation, gang rape and enforced prostitution, to name but a few, continue to occur in Darfur,[56] the Democratic Republic of Congo and other recent conflicts.[57] Yet such violence is far from recent; earlier reminders of such events include the Rape of Nanking and the comfort women.

The use of rape and other forms of sexual violence in genocide is far from normal, the forms and nature of gendered or sexualised violence are too barbaric to be anything normal. Nevertheless, it is not the barbaric nature thereof that makes rape and sexual and gender violence genocidal, but the fact that such violence is committed with the intent to destroy a part or the whole of a group protected by the genocide convention.

In the convention genocidal gender and sexual violence refers to when gender and sexual violence crimes are employed as a tactic to destroy or annihilate a group of people so protected by the genocide convention. In cases where violent acts

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55 *Ibid* Annex, Elements of Crimes.

56 See generally Ducey, K.A. (2010), Dilemmas of teaching the "Greatest Silence": Rape-as-Genocide, in: Rwanda, Darfur and Congo, *Genocide Studies and Prevention*, 5 (3), 310-322. See also Rothe, D.L. and Mullins, C.W. (2008) Genocide War Crimes and Crimes against Humanity in Central Africa: A Criminological Exploration, in: Smeulers, A. and Haveman, R. (eds.), *Supranational Criminology: Towards a Criminology of International Crimes* (Portland: Intersentia, 2006) 135-158 at Amnesty International, Sudan, Darfur: Rape as a weapon of War: Sexual violence and its consequences (London, 2004).

57 Lawry, L. *et al*., "Association of Sexual Violence and Human Rights Violations With Physical and Mental Health in Territories of Eastern Democratic Republic of the Congo" (2010) American Medical Association, reprinted in *JAMA,* Vol. 304, No. 5. 553 see www.jama.com, accessed on 4 August 2010.

of a gender and/or sexualised nature are used as a weapon to destroy a specific group, such acts qualify as genocidal gender and sexual violence. Genocidal gender and sexual violence includes rape, sexual torture, forced public nudity, enforced prostitution, forced marriage, and many other forms of gendered and sexualised violence.

Genocidal gender and sexual violence targets either, but often both, the sex and the gender in a given community. Obviously peacetime gender perceptions influence the treatment and selection of means of genocide used against men and women. Catherine MacKinnon explains genocidal rape (not that this is true for other forms of genocidal gender and sexual violence) as:

> *… 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.*[58]

Along the same lines Claudia Card[59] explains that genocidal rape (logically speaking the same applies to gender and sexual violence) serves both as a form of mass murder through killing members of a protected group and the destruction of a group identity through tearing apart the group's social and cultural bonds.[60]

Genocidal gender and sexual violence for the present study is used to reflect on all forms of genocide-based violence that has taken sexualized and gendered forms. Both 'rape and sexual violence' and 'rape and sexual torture' are used interchangeably with gender and sexual violence. Rape and sexual torture is mainly used in relation to the Ordinary and *gacaca* courts in Rwanda because the genocide laws and judicial decisions use the two to reflect acts of gender and sexual violence.

Genocidal gender and sexual violence is used by the perpetrators of genocide to annihilate, terrorise, eliminate, dehumanise, destroy the desire to procreate, spoil the identity of the victims, alter family lineage in patriarch societies, humiliate, instil fear, kill and ultimately destroy individuals and their societies at the same time. While the existing literature predominantly refers to genocidal rape, the present study considers genocidal rape as one among many forms of genocidal sexual and gender violence.

Because the ICTR statute reproduces the genocide convention verbatim, it fails to explicitly include gender and sexual violence as constituent elements of the crime of genocide. Instead the Statute defines rape as a crime against humanity and as a

58 MacKinnon, C., Rape, genocide, and women's rights in: Stiglmayer, A. (ed.), *Against Women in Bosnia-Herzegovina* (Lincoln: University of Nebraska Press, 1994) at 190.
59 Card, C. (1996), "Rape as a Weapon of War" *Hypatia* 11(4): 5-18.
60 *Ibid* at 10.

violation of Article 3 common to the Geneva Conventions and of its Additional Protocol II. Nevertheless, the ICTR made its novel contribution by deciding beyond the Statute's narrow confinement when it established that rape and sexual violence are constitutive elements of the crime of genocide once committed with the required special intent of genocide.

1.5.3 CRIMES AGAINST HUMANITY

Since their introduction after World War II, crimes against humanity lack a common definition.[61] A central characteristic of Crimes against Humanity is the requirement that prohibited acts should be committed as part of a widespread or systematic attack against a civilian population.[62] Different legal instruments have defined crimes against humanity differently on the basis of acts enumerated as the *actus reus*. The ICTR Statute includes the following among the punishable acts: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecution on political, racial, and religious grounds; and other inhumane acts.[63]

Article 120 of the 2012 Rwandan Penal Code reproduces the definition of crimes against humanity set forth by Article 7 of the ICC Statute. Apart from the common crime against humanity of rape, the ICC and the Rwandan Penal Code extend the list to also include sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and/or any other form of sexual violence of comparable gravity.[64] Note, though, that until 2012 Rwandan laws did not contain a definition of crimes against humanity. The only reference to crimes against humanity was a reference to the Convention on the non-statutory limitations to war crimes and crimes against humanity of 26 November 1968.

The ICTY requires the existence of an armed conflict for crimes against humanity,[65] but according to the tribunal's case law the armed conflict need not necessarily be of an international character hence a non-international armed conflict qualifies as required proof for the existence of war when the crime against humanity was committed. On the contrary, the ICTR and ICC do not require the existence of

61 Bassiouni, M.C., "Crimes against Humanity: the need for a specialised convention", (1994) 31, *Colum. J. Transnat'l L.* at 457-458.

62 See Article 5(c) The International Military Tribunal for the Far East (The IMTFE Charter) available at www.stephen-stratford.co.uk/imtfe_charter.htm, accessed on 20 May 2013. See also Article 6(c) of the Nurenberg Charter, in: The Charter and Judgments of the Nurnberg Tribunal, history and analysis, at: http://untreaty.un.org/ilc/documentation/english/a_cn4_5.pdf accessed on 20 May 2013. See also *supra* note 2, Article 3 ICTR, *supra* note 3 Article 5 and *supra* note 36 Art. 7.

63 *Supra* note 2 Article 3.

64 *Supra* note 52, under its Chapter 2 for a detailed discussion of crimes having the nature of sexual violence under the ICC statute.

65 For a detailed discussion of the requirement of a nexus to an armed conflict see generally Chesterman, S., "An altogether different order: Defining the elements of crimes against humanity" (1999-2000), *Duke Journal of Comparative and International Law*, Vol. 10, 307-344.

a war nor a nexus to war in cases of crimes against humanity, meaning that such crimes can be committed even in so-called times of peace.[66]
The ICTR has defined widespread, as a component of crimes against humanity, to mean a "massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims,"[67] whereas systematic has been defined as a "thoroughly organized action, following a regular pattern on the basis of a common policy and involving substantial public or private resources."[68] The tribunal further observed that an "attack is an unlawful act of the kind enumerated in Article 3(a) to (i) of the Statute, such as murder, extermination, enslavement ... ."[69] It noted that an attack need not be violent.[70] According to Semanza and Kunarac the *ad hoc* tribunals established that the perpetrator must know of the attack against a civilian population and should be aware that he/she is committing a prohibited act as part of the attack. It is argued that the reason why the perpetrator committed the prohibited acts is not what matters but the fact that the act is part of a widespread and systematic attack.[71]

It is noteworthy to mention that the relationship between genocide and crimes against humanity has often overlapped. Some refer to genocide as a special crime against humanity while others have branded genocide as the crime of crimes,[72] yet the worst form of crimes against humanity. Rwanda's post-genocide laws took this approach of considering genocide as one of the crimes against humanity by entitling the genocide laws as "genocide and other crimes against humanity". This explains why in Rwanda there is no differentiation between genocide and crimes against humanity even though genocide is clearly the major situation and crimes against humanity more the incidental one.

1.5.4 SERIOUS VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II

War is as old as humanity itself and nations have always engaged others and different armed groups have fought against each other or governments. War crimes are international crimes based on the use of prohibited means and methods of warfare,[73] and a violation or an attack against persons protected by humanitarian

66 *Supra* note 4 para 578.
67 *Ibid* para 580.
68 *Ibid.*
69 *Ibid* para 581.
70 *Ibid.*
71 *The Prosecutor v. Dragol Jub et al,* Case No. IT-96-23 and IT-96-23/1-T, Judgment, (ICTY) 22 February 2001, para 103. See also *The Prosecutor v. Tihomir Blaskic,* Case No. IT-95-14-T, Judgment (ICTY, 3 March 2000) para 124.
72 *The Prosecutor v. Jean Kambanda*, Case No. ICTR 97-23-S, 4 September 1998 para 16.
73 *Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land*. The Hague, 18 October 1907, available online at: www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/1d1726425f6955aec125641e0038bfd6?OpenDocument, accessed on 18 April 2013.

law.[74] International humanitarian law establishes the rules and norms relating to the rights and duties of combatants, on the one hand, and the obligation to protect victims of war: the wounded, sick, shipwrecked, prisoners of war and civilians.

Article 4 of the ICTR Statute is the legal basis for prosecuting violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II.[75] Note that the ICTR stands out as the first international attempt to criminalise violations of common Article 3 and of additional protocol II.[76]

Violations of humanitarian law, as per Article 4 of the Statute, include: violence to life, the health, and physical or mental well-being of persons, in particular murder, torture, or mutilation; collective punishments; the taking of hostages; acts of terrorism; outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution, and any form of indecent assault; pillage; sentences or executions rendered without due process of the law; and threats to commit any of the foregoing acts.[77] Some acts of a sexual violent nature like rape, mutilation, enforced prostitution and indecent assault are explicitly mentioned in Article 4 of the ICTR Statute.[78]

War crimes or violations of humanitarian rules only occur during a period of armed conflict, whether this is international or internal. Similarly such crimes must have been committed to foster the objectives of the armed conflict at hand. The ICTR took judicial notice of the fact that the armed conflict in Rwanda was internal in nature.[79] In that case the applicable rules of humanitarian law are the serious violations of Article 3 common to the four 1949 Geneva Conventions and of Additional Protocol II of 1977.

The obligation to respect rules of humanitarian law remains, regardless of the international or internal nature of the armed conflict.

74 See Common Article 3 to the *Geneva Conventions* of 12 August 1949, 6 UST 3516, TIAS No. 3365, 75 UNTS 287 and *Protocol I Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflict*, opened for signature 12 December 1977, 1125 U.N.T.S. 609.

75 *Supra* note 2 Article 4.

76 Major, M.V.M., "War Crimes in the 21st Century" (1999) *Hofstra L. and Pol'y Symp.,* 47 at 50.

77 *Supra* note 2 Article 4.

78 For a more detailed analysis of sexual violence as genocide, a crime against humanity and war crimes see, *supra* note 52 at 41-220.

79 *The Prosecutor vs. Laurent Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence, Trial Chamber II (15 May 2003) paras 192 and 198.

2 FRAMEWORK AND OVERVIEW

This chapter provides an overview of the context of the genocide in Rwanda. An introduction to the theoretical framework – as well as an overview of the judicial mechanisms mandated to respond to the genocide against the Tutsi – is provided.

2.1 INTRODUCTION

The misfortune that befell Rwanda during the genocide did not happen in a vacuum. Issues of gender and sexuality have had a central role within Rwandan society since time immemorial. The notions of manhood and womanhood were the ultimate ends that society members were taught to pursue from an early age. Men have been trained as the strongholds of families and the community and are in charge of security, property and general administrative matters.

On the other hand, motherhood and sexual purity are fundamental virtues in Rwandan society. Gender and sexual violence did not seem to be a problem affecting men as much as women. Certain traditional practices attest that Rwandan women have endured abuses stemming from cultural, sexual and social perceptions and practices. Examples include the practice of drowning pregnant unmarried girls in the name of saving the family's honour and dignity. A traditional saying is "*Impfizi ntiyimirwa*"[1] whereby males were permitted to have sexual intercourse with the wives of their brothers or friends without the permission of the wife as long as the husband would be informed by leaving a spear at the entrance of the homestead. Rwanda's Family law maintained the husband as the head of the family,[2] thereby placing the wife in a secondary position and re-enforcing patriarchy and male dominance. The abrogated Article 345 of the Penal Code that imposed more severe penalties for women perpetrators of adultery[3] as opposed to their male counterparts is proof of the traditional society's emphasis on the chaste and virtuous woman.

1 *Impfizi ntiyimirwa* literary means that the bull cannot be stopped and this saying was used to justify those men had the freedom to have access to sex on an unlimited basis. Brothers and friends allowed sexual intercourse with their wives without seeking the consent and opinion of the woman.

2 *Itegeko No. 42/1988 Interuro y'ibanze n'igitabo cyambere cy'urwunge rw'amategeko mbonezamubano* (Rwandan Civil Code Book 1) of 27/10/1988, O.G., 1989 at 9, Article 345.

3 Penal Code, of 18/08/1977, O.G., 1978, Article 345, available at: www.amategeko.net, accessed on 7 April 2012 (this Article was declared anti-constitutional by the Supreme Court in the Murorunkwere decision in the case in which Murorunkwere requested for its abolition) RS/Inconst/Pen.0001/08/CS, Murorunkwere Speciose, Gusaba gukuraho ingingo ya 354 y'itegeko Teka No. 21/77 ryo ku wa 18/08/1977 rishyiraho igitabo cy'amategeko ahana ibyaha mu Rwanda kuko inyuranyije n'itegeko Nshinga rya Repubulika y'u Rwanda ryo ku wa 04/06/2003 nk' uko ryahinduwe kandi rikuzuzwa kugeza ubu. Note that the 1977 Penal Code has been abrogated by *Organic Law No. 01/2012/OL of 02/05/2012 Organic Law Instituting the Penal Code*, O.G. No.

Yet this is not the entire story of Rwanda; the experiences of Tutsi women and to some extent Tutsi men and the agency of Hutu women goes beyond ordinary comprehension of rape, sexual violence, patriarchal or male dominance and the chastity and virtuousness of women. Indeed genocidal gender and sexual violence encompasses some traditional and social perceptions of gender and sex but mostly once viewed from the contextual realities of the victims, clearly the common norm and practice was violated. The nature, circumstances and other details of gender and sexual violence that happened during the genocide in Rwanda deserves a contextually-based analysis in order to capture its complexity and to expose its character.

The training for the *Inyangamugayo* that forms the cornerstone of this study became an important contextual inquiry in the realities of gender and sexual violence during the genocide in Rwanda. Testimonies that were shared by the participants, and reflections and other impressions gathered throughout the training reveals the complexity of the situation and the specific aspects of Rwanda's experience of the genocide and more specifically of genocidal gender and sexual violence.

Tutsi women were predominantly targeted and suffered acts of genocidal gender and sexual violence. Prior to the massive genocidal violence, the genocidal media propaganda directly attacked the sexuality of Tutsi women treating them as seductive and sexual weapons used to enhance the interests of the Tutsi. Tutsi women were gang raped, raped with objects, forced to endure public nudity, taken into sexual captivity by their abusers and often forced to remain with them throughout the genocidal period. Many of the victims were killed after being raped or sexually abused, they were sexually mutilated and had their wombs opened in cases of pregnancy. Through the training, details of some individual cases were shared; similarly under chapter 3 of this study such cases will be shared in order to further reveal the complexities of gender and sexual violence in Rwanda.

Some Tutsi men suffered different forms of rape and sexual violence. A traditional assumption exists in Rwanda where it is often said that men cannot be sexually abused. Genocidal reality reveals the contrary, however. During the training I was able to hear different testimonies from abused men.[4]

Anne-Marie De Brouwer and Sandra Ka Hon Chu in their book "*The men who killed me*"[5] narrate the testimony of Faustin Kayihura, a Tutsi man who was raped by a Hutu woman. Like other male victims Kayihura notes that the horrors he experienced were more than he could endure noting that he has no words to describe it.[6] Kayihura is not alone in this; during the training I was able to hear more testimonies of males subjected to violence.

special of 14 June 2012, Article 245 Institutes the same penalty for anyone convicted of adultery without discrimination based on sex.

4 *Infra* chapter 3.

5 *Supra* note 11.

6 *Ibid* at 91-97.

Capturing the realities of Rwanda also calls for the victimisation of Tutsi men by means of gender and sexual crimes perpetrated by female and male 'genocidaires' to be explored and explained. There is almost no theory and literature on Rwanda's male victims of genocidal gender and sexual violence. The fact that feminist scholarship dominates the theoretical platform in explaining rape and sexual violence seems to be largely accountable for this invisibility. Peculiarities like sexual violence against Tutsi men challenge the mainstream feminist narratives explaining sexual violence from the perspective of women as victims and the perpetual perpetrator status of men.[7]

In addition to the dominant narrative of Tutsi women this work extends the scholarship by including the experiences of Tutsi men as victims of gender and sexual violence, and a discussion about a part of the realities of genocidal violence that so far remains scarce in judicial decisions and literature on Rwanda is in order.

Including male victims of genocidal gender and sexual violence is after all within the reasoning of Resolution 1820 of the UN Security Council which requires member States to ensure that "all victims of sexual violence (…) have equal protection under the law and equal access to justice."[8]

Another complex reality of the genocide against the Tutsi in Rwanda concerns the perpetrators. In Rwandan society men have commonly committed acts of sexual violence, sometimes without serious condemnation. It seems that culture tends to tolerate a lack of sexual control in men when the victim is a woman. What is uncommon is women as perpetrators of sexual violence against fellow women and Tutsi men. This reality also calls for an analysis in order to give a more elaborate Rwandan story.

The training illustrated that there are no definitions of sexual and gender-specific crimes at least at the domestic level and certainly there are in reality disparities in the definition of rape and sexual violence at the ICTR level. The absences of consistent legal definitions represent ambiguities in the efforts to record and judge cases of gender and sexual violence as genocide. On the domestic level, for example, the absence of legal or judicial definitions of rape and sexual torture is polemic leading to varying applications and interpretations of facts and law.

Similarly, but from a different angle, legal concepts emanating from traditional criminal law seem insufficient when viewed from the realities of Rwanda. For example, the meaning of rape remains insufficient *vis-à-vis* the Rwandan

7 MacKinnon, C.A. (1991), "Reflections on Sex Equality under Law" 100 *Yale Law Journal* 1302, the general narrative here is that sexual violence enhances patriarch and male dominance over women. See also Donat, P.L.N. and D'Emilio, J. (1998). A feminist redefinition of rape and sexual assault: Historical foundations and change. In Odem, M.E. and Clay-Warner, J. (eds.), *Confronting Rape and Sexual Assault,* (Lanham, MD: Rowman and Littlefield) pp. 35-49 at 36-41.

8 UN Security Council Resolution 1820 (2008), adopted by the Security Council at its 5916th meeting, on 19 June 2008, S/RES/1820 (2008) para 11.

experiences. Similarly, recent concepts of sexual violence and sexual torture, although more elaborate in terms of describing reality, lack a legalistic perspective, a judicial history and an elaborate legal framework.

There is so far no Rwandan theory on the topic of gender and sexual violence. Theorising Rwanda is at an initial stage and requires taking into serious consideration the fact that Rwandans wish to record and understand their history. I offer a further academic discussion on Rwanda's experience of genocidal gender and sexual violence.

2.2 HISTORICAL OVERVIEW

This section delves into Rwanda's long history with the purpose of bringing to light the constructed ethnicity and ethnocentric hatred that culminated in the genocide in Rwanda in the 1990s. This section begins with a discussion of the theoretical debates on ethnicity in Rwanda, and then discusses the horizons of Rwanda's history dating from before colonialism in which ethnic identification was not rigidly applicable to the time of genocide when ethnocentric hatred was legtimised. I conclude that ethnicity in Rwanda is a result of a constructionist approach to the identification of Rwandan citizenry.

2.2.1 ETHNICITY DEBATES ON RWANDA

The context in which gender and sexual crimes were committed in Rwanda was genocide, in particular genocide against the Tutsi, one of the three ethnic groups in Rwanda. It is necessary to begin by briefly discussing the debates in the literature on ethnic violence. This flows from the reasoning that gender and sexual violence during the genocide in Rwanda was both gendered and ethnically based. Victims were primarily targeted because of their ethnicity through gendered and sexualised forms of violence.

It is of course a pertinent question to ask what the Tutsi and Hutu are in terms of ethnicity. It is indeed well documented that the genocide against the Tutsi in Rwanda was intended to annihilate the Tutsi as an ethnic group. To understand the concept of ethnic groups in Rwanda demands a brief analysis of the theoretical discussions on ethnicity and identity in general. Three major approaches have developed in ethnic studies to theoretically explain ethnicity and ethnic violence.

The primordials view ethnicity as natural in which members are linked by blood kinship. Ethnicity is ancient, innate, given, and immutable and is engrained in human history and experience.[9] Accordingly these objective factors predetermine

9 Wollf, S., *Ethnic Conflict: A global perspective* (Oxford: Oxford Publications, 2006) at 33.

a group's identity and render it distinct from other populations.[10] The primordial school of thought has a static and naturalist view of ethnicity.[11] There is a strong non-rational and emotional quality attached to an ethnic bond. Primordial's considers that once the objective elements of an ethnic group are threatened, violence will be used in search of self-defence.[12]

Primordials have been criticised for theorising too much on the formation and causes of ethnic groups that account for the causes of ethnic violence. Horowitz criticises that primordialists do not distinguish between affirming internal identity within the primordial ethnic and pursuing conflict. To this effect, Horowitz notes that ethnicity is not primordial but members experience it primordially.[13]

Horowitz's observation of the distinction between the primordial nature of groups and the perspective of group members experiencing ethnicity as primordial is pertinent within the discussions about the nature of Tutsi-Hutu relations. An analysis of Rwandan history presents us with some practices that lead to the conclusion that the Hutu and Tutsi are not primordial ethnic groups. By the time of the genocide, most propaganda had shaped the feeling and belief that ethnicity was real, and members of each group felt deeply and emotionally attached to their group. Similarly external, the genocide was mistakenly misrepresented as "*a tribal war emanating from ancient and unchangeable hatreds*."[14]

Opposing the natural and static qualification of ethnicity, the instrumentalist theory identifying ethnic identity as a social and political construct of the elites emerges. This school posits that elites seeking political or economic gains construct ethnic identities. Ethnic identity is suggested as an instrument through which individuals or groups pursue economic or political ends; ethnicity is simply an instrument employed in order to obtain material gains.

The instrumental theorist Cohen[15] explains that ethnic groups represent an informal political organisation that employs cultural values for material motives. What matters in this is not the ethnic group per se but the motives that informs its making. It is on that basis that it is noted that the elite leaders who employ ethnic identities do not need to believe in ethnicity itself. This school of thought

10 Geertz, C. (ed.), *The Integrative Revolution in Old and New States* (New York: Free Press, 1963) at 105-157.

11 Eller, J. and Coughlan, R. (1993), "The poverty of primordialism: The demystification of Ethnic Attachment", *Ethnic and Racial Studies*, 16(2) 183-202 at 200.

12 Geertz, C. (1967*),* "Politics past, Politics Preset: Some Notes on the Contribution of Anthropology to the Study of a New State" *European Journal of Sociology*, 8(1), 1-14, at 8.

13 Horowitz, D.L., Ethnic *Groups in Conflict* (London: University of California Press Ltd, 2002). See also Anthias, F., Yuval-Davis, N., *Racialised Boundaries: Race, Nation, Gender, Colour and Class and the Anti Racist Struggle* (New York: Routledge Publishers, 2012).

14 Frontline, Ghosts of Rwanda, Interview with Boutros Boutros-Ghali, www.pbs.org/wgbh/pages/frontline/shows/ghosts/interviews/ghali.html, accessed on 10 December 2011.

15 Cohen, A. (1974), the Lesson of Ethnicity in: Cohen, A., (ed.), *Urban Ethnicity*, (London: Tavistock, 1974). See also Eriksen T.H., *Ethnicity and Nationalism: Anthropological Perspectives*, 2nd ed., (London: Pluto Press, 2002).

believes that ethnic groups are not permanent as posited by the primordialists, but are rather flexible and change over time. With the same reasoning Wolff[16]explains that ethic identity should rather be seen as:

> *something that has roots in the group's culture, historical experiences and traditions, but that is also dependent upon contemporary opportunities that can be a useful instrument for mobilizing people for social, political or economic purposes that may or may not be directly related to their ethnic origins.*[17]

Thus, instrumentalists envisage that conceptions of ethnicity can change depending on the political and economic tone. This school explains ethnic conflict and violence as a tool used by leaders who mobilise citizens alongside ethnic identities on the basis of competition for material resources in which some are deprived or are perceived to be deprived.

In the Rwandan context, traditional systems and their subsequent manipulation by the colonialists can be partly used to explain the presence of instrumentalist theory. The language of genocide campaigns reminds the Hutu of the possibility that if the Tutsi returned to Rwanda they would reinstate subordination and servitude for the Hutu.

Upon an analysis of both the primordialists and the instrumentalists it becomes evident that neither of the two schools persuasively explains ethnicity and ethnic violence or its absence in some societies. It is easy to conclude that these two schools are scanty in explaining ethnicity in Rwanda. A caveat must however be drawn when this conclusion is made about Rwanda, for the conclusion can be seen to be subjective once one examines the discourse of pre-genocide and post-genocide governments in Rwanda. As will be illustrated by the Rwandan history discussed in the present chapter, by 1994 ethnicity in Rwanda had gained an in-depth conviction on the part of the citizenry.

The constructivist theory describes ethnic groups as a result of interactions between different social groups. While the primordialists insist on the natural and static nature of ethnic groups and the instrumentalists emphasise the use of ethnicity for political and economic gains, being disinterested in whether ethnic groups are real or simply perceived, constructivism considers ethnic identity as something which is made rather than given. This school of thought argues that ethnicity emerges from an evolution based on differences and similarities in group interaction. The key proposition of constructivists is that ethnic groups are a social construct and, to this effect, it is argued that different situations determine the importance attached to a particular ethnic identity.[18]

16 *Supra* note 88 at 87.
17 *Ibid* at 36-37.
18 Jenkins, R., *Re-thinking ethnicity: Arguments and explorations* (London: Sage Publications, 1997) at 11.

Constructivists are more specific and elaborate in theorising ethnic relations in post-colonial ethnic societies. Constructivism asserts that ethnic cleavages in post-colonial societies are a creation of colonial powers. Mamdani's analysis of the Hutu and Tutsi illustrates that the genocide in Rwanda was a result of the Belgian reconstruction of ethnicity in Rwanda. Mamdani's theory locates ethnic construction in Rwanda in the 1930s when the Belgians codified the Hutu and Tutsi as different ethnic groups on the basis of subjective factors of counting the number of cows, physical measurements and loyalty to the Catholic Church.[19] After the issuing of identity cards, the Hutu and Tutsi acquired stability and a fixed ethnic status.

In drawing a conclusion on the theories of ethnic identity and ethnic conflict, it is noted that the theories are not mutually exclusive of each other. One theory may capture ethnic sentiments at a given stage and the other at a different moment in time. After all, each of the theories has its downfalls in sometimes failing to explain specific details. Jenkins' caution is particularly relevant if one is to understand ethnicity. In his opinion in order to understand ethnic identity and ethnic conflicts there is no point in dismissing any of the schools because as he explains depending on a number of factors all the three schools of thought illustrate the real nature of ethnicity.

Scholars elsewhere warn against considering one way of explaining ethnicity. For example, Rothschild is of the view that ethnicity should be understood within the perspective of the history of the people so as to understand the present or the time in question, the politicization of ethnicity including the preservation of ethnic groups and their distinctiveness, and the transformation of ethnic groups into political conflicts.[20]

In the sections that follow a brief description of Rwanda's history is presented putting emphasis on the developments relating to the relations between the Hutu and Tutsi. This section seeks to establish a context in which the following question can be answered: who *are the Hutu and Tutsi in Rwanda? And how have they been defined within the political discourse of Rwanda*?[21]

19 See generally Mamdani, M., *When victims become killers: Colonialism, Nativism, and the Genocide in Rwanda* (Kampala: Fountain Publishers, 2002).

20 Rothschild, J., *Ethno politics: A Conceptual Framework* (New York: Columbia University Press, 1981).

21 For a thorough analysis of the questions raised see *supra* note 97 at 120-128.

2.2.2 RWANDAN HISTORY

2.2.2.1 An Overview

Around the 15th century Rwanda already exhibited a complex and an advanced monarchy.[22] The king ruled through his representatives in different regions of the country. Fundamental to the success of the kingdom was the deep-rooted political culture of loyalty to the king.[23] The kingdom had an organized army, a judicial system and a systematic administrative structure.[24]

During this early period Rwanda was inhabited by the Abahutu, Abatutsi and Abatwa, as commonly referred to in Kinyarwanda, the common local language of Rwandans. Ancient Rwanda employed the word ubwoko that was later institutionalised to mean ethnicity, to refer to the 18 clans defined on the basis of kinship.[25] Members of each clan believed that they share a common ancestor;[26] in nearly all clans there are members from the Tutsi, Twa and Hutu.

Rwandan kings were exclusively Tutsi-born from the Abanyinginya clan and succeeded the throne on the basis of hereditary rights. Inheriting the throne was on the basis of the patriarchal line and was preserved for only male ascendants. There was an administrative myth that a future king was recognized at birth as he would be born with a symbol of the seed in his hand. This manner of succeeding to the throne was sustained and resulted in a successful and peaceful power transition between kings. For centuries, one family lineage maintained unchallenged access to the throne.

The authority of the king and other kingdom policies were altered by the presence of European colonialists until 1959 when the King was abducted forcing him into exile together with a multitude of Tutsi. Earlier on, the Germans and subsequently the Belgians had developed administrative and education policies that undermined the majority Hutu and favoured the Tutsi minority that they considered to be more intelligent and competent leaders.

Anti-Tutsi grievances and subsequent violence were openly manifested in the late 1950s when the Belgians shifted allegiance to the Hutu. Earlier discriminatory policies fuelled the 1959 violence and resulted in large numbers of the Tutsi being forced into exile and death. These grievances, despite the many years of Hutu political control, remained and played a significant role in the period of the genocide. Vividly, the Hutu extremist propaganda tapped into the pre-1959

22 *The Prosecutor v. Jean Paul Akayesu* (1998), Case No. ICTR 96-4-T, Trial Camber I, Judgment (2 September 1998), para 80.
23 *Ibid*.
24 Kagame, P., "The Great Lakes conflicts: Factors, Actors and Challenges" an Inaugural lecture, Nigeria War College (Abuja, 2002).
25 Heltfelt, D., *Les Clans du Rwanda ancien* (Tervuren: 1960).
26 Muzungu, B., "Le problème des races au Rwanda" *Cahiers Lumière et Société* 42, (2009) at 51.

situations to instigate the fear of renewed Tutsi servitude in case they failed to defeat and destroy the Tutsis.

At the time of colonialism and within the policies of successive governments until the genocide, ethnicity remained the central and main factor for accessing or being denied political and social benefits. Yet the discussion on whether the Hutu and Tutsi constitute ethnic groups remained. In fact the ICTR in Akayesu was faced with the need to determine whether the Tutsi qualified as a protected group. In the sections that follow I will elaborate on the discussion of Hutu-Tutsi relations and the evolution of those groups into identities on the basis of which genocide was perpetrated. It will be noted that prior to the colonial powers the Hutu and Tutsi denoted social and economic status as opposed to ethnic differences ushering into violent politics.

Rwanda has three ethnic groups: the Hutu, Tutsi and Twa. Debates on whom and what the Hutu, Tutsi and Twa are have dominated the literature on Rwanda. Politicians in different periods of Rwanda's political life have interpreted and defined those groups in various ways.

The Hutu and Tutsi have not always been considered as distinct ethnic groups in Rwanda. The Hutu and Tutsi evolved over time. In terms of a description they have been qualified as races, ethnicities, sources of political power, social economic status as well as being explained through ethnic migration patterns. Apparently what each of these groups mean and how they were formed to take the character and history that resulted in genocide calls for specific attention. The ICTR judges in the media case explain:

> *... (T)he emergence of Hutu, Tutsi, and Twa ethnic group identity over the course of Rwandan history, and the concomitant ethnic prejudice that resulted from the differential distribution of social and political privilege along ethnic lines, fostered by and during colonial rule. The history of Rwanda in the twentieth century has been shaped by a complex interplay of political power and ethnic consciousness. The Chamber observesthat political forces have greatly contributed to the transformation of ethnic consciousness into ethnic hatred.*[27]

2.2.2.2 Hutu-Tutsi: the Social Class Narrative

Hutu and Tutsi relations have not always been about discrimination and dehumanization in the sense of genocide. In fact the use of Hutu and Tutsi in Rwanda is as old as Rwanda itself. Before colonial times, Hutu, Tutsi and Twa were labels referring to social and economic classes instead of ethnic groups, as will be argued below.

27 *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Ngeze Hassan*, Case No. ICTR-99-52-T, para 108.

The dominant traditional explanation of the origins of the Hutu, Tutsi and Twa is a myth that suggests a common father –Kigwa who had three sons, Gahutu from whom the Hutu originate, Gatutsi the forefather of the Tutsi and Gatwa of the Abatwa.[28] According to De Lacager, one of the earliest observers of the people of Rwanda:

> *Les indigènes de ce pays (Rwanda) ont le sentiment de ne former qu'un seul peuple, celui des banyarwanda, qui a donné ce nom au territoire. Ce sentiment prend la forme qu'il revêt normalement chez les sédentaires d'attachement au sol, non pas seulement au foyer, à la commune ou à la province mais au territoire entier, obéissant au même prince.*[29]

De Lacager's sentiment explains that the indigenous Rwandans termed as Banyarwanda are but one people. His observation was reinstated in 1924 by the "*rapport sur l'administration Belge du Ruanda-Urundi*"[30] submitted to the "*Chambre de Representants*" in its 1925-26 session by the "*Ministre des Colonies.*" The report illustrated that in the case of *Banyaruanda, Mututsi* and *Muhutu* do not necessarily represent races but social classes, noting that "it is not unlikely to find a non-contested Tutsi family that has Hutu ancestors."[31]

Similarly, the ICTR in its first case explained that the Hutu and Tutsi existed in early Rwanda but referred to individuals rather than groups.[32] The Tribunal further observed: "[*I]ndeed, the demarcation line was blurred: one could move from one status to another, as one became rich or poor, or even through marriage.*"[33]

Occupation-wise the Hutu, Tutsi and Twa had different and specific occupations in the early Rwandan economy. The Tutsi were herdsmen, the Twa were artisans specializing in pottery while the Hutu tilled the land. Given the survival mechanisms of the time, each depended on the other because certain needs could only be met by the exchange of milk for food or of a pot for either food or milk. Nevertheless, the most prestigious property possession was cattle, thus putting the herdsmen at the top of the social classes. In this line of thinking Evariste Ntakirutimana and Josias Semujanga argue that the terms referred to as ethnicities today existed in pre-colonial Rwanda but were ambiguous and lacked a definition. Accordingly

28 *Supra* note 97 at 79-80. For a detailed discussion of the Banyarwanda myths see, s*upra* note 104 at 61- 67.

29 De Lacager "*Rwanda: ancien et modern*" (Kabgayi: imprimatur, 1960).

30 The main focus of the report was studying what had been termed as the three races in Ruanda-Urundi; the report concluded that the so-called races were instead social classes, a narrative favoured by present-day political elites in Rwanda.

31 *Rapport sur L'administration Belge du Ruanda- Urundi Pendant L'Année 1924 Présente aux Chambre Par M. Le Ministre de Colonies, Bruxelles, Etablissements* Généraux D'Imprimerie, S.A. Rue D' Or, 14 du 1925-26 p. 50 (available at the Rwanda National Archives, Ministry of Youth and Culture).

32 *Supra* note 22 para 81.

33 *Ibid* paras 81-82. See also Kayihura, M. (2004), Composantes et Relations Sociales au Rwanda Pré-colonial, Colonial et Post-Colonial, in: Byanafashe, D. (dir.), *Les Defis de l'Historiographie Rwandaise* (Butare: l'Edition de l'Université National du Rwanda) at 163-191.

Tutsi referred to pastoralists owning herds of cattle, Hutu cultivated land while Twa were the artisans surviving on pottery.[34]

According to the social class narrative the groups were based on occupation instead of racial differences.[35] The Hutu and Tutsi could not have qualified if measured along the lines of ethnicities because they lack the distinctive features from each other that make up an ethnic group. They (the Hutu, Tutsi and Twa) share the same language, cultural practices and religious beliefs, they live alongside each other and intermarriages were and remain common.[36]

The notions of Kwihutura and Gucupira discussed by Mamdani attest to the social class narrative. Mamdani notes: "The rare Hutu who was able to accumulate cattle and rise through the social-economic hierarchy could kwihutura." Kwihutura means the shading of Hutuness and achieving the status of being a Tutsi. The same practice was noted by the colonial government in its report in the mid-1920's, in which it was mentioned that it was common practice for persons initially known to be Hutu to declare themselves to be Tutsi because of a change in their social status through gaining more cattle.[37] Similarly, once a Tutsi lost his social and economic status he would cease to be a Tutsi and become a "*gucupira*", a synonym for the loss of Tutsi status.

On another note, intermarriages also changed one's class or status. For example, once a Hutu man married into a Tutsi family, the intermarriage would elevate the Hutu man into the social class of his Tutsi wife. Ordinarily Rwanda is a patriarchal society and if ethnicities were indeed natural, intermarriages would mean that the Tutsi woman becomes a Hutu. Within the natural clan line the patriarch was actually maintained despite the change in the economic and social status. The Hutu man becoming Tutsi through intermarriage maintained his clan and the children born from that marriage took the clan lineage of their father while continuing to be Tutsi like their father.

The social class narrative challenges the primordialists' theory that claims that there has been ancient and natural hatred between the groups. Howard Adelman explains the impact using the theory of ancient and natural hatreds as used by some in explaining the genocide in Rwanda where he argues that "if an event is a result of a continuing, long-term, chronic problem seemingly immune from correction, then contemplating intervention to change the situation seems futile."[38] The impact

34 Semujanga, J. (1998), *Recits fondateur du drame rwandais Discours Socials, Ideologies et stereotypes* (Montreal: L'Harmattan, 1998) at 34.

35 *Ibid.*

36 Christien, J. P., Hutu et Tutsi au Rwanda et au Burundi, in: Amselle, J.L. and Bokolo, E.M. (eds.), *Au Cœur de l'Ethnie: Ethnies, Tribalisme et Etat en Afrique* (Paris: Editions La Découverte, 1985, 1999). In the opinions of Bokolo and Amselle, Hutu and Tutsi are polotical labels that must be understood in a particular historical context.

37 *Supra* note 109 at 50.

38 Adelman, H. and Suhrke, A. (eds.), (1999), *The Path of a Genocide: The Rwanda Crisis from Uganda to Zaire,* (New Brunswick: Transaction Books, 1999).

of this misrepresentation of Rwanda's groups as naturally antagonistic can largely be blamed for withholding possible action and intervention thus leading to a failure to prevent atrocities that were otherwise described as "preventable genocide."[39] A misconception of the Rwandan reality is, as warned by Adelman, the presumption that both groups are equally involved in violence hence inviting neutrality from anyone who would otherwise have been obliged to intervene on humanitarian grounds.

The genocide was partly made possible because the social class narrative no longer held true within the political elites and citizens through continued discriminatory policies. The possibility for individuals to move from one class to the other could not be maintained in the aftermath of ethnic registration in the national identity cards issued in the 1930s. The genocide in the early 1990s is proof that Hutu and Tutsi had taken on a different meaning altogether. In the colonial and post-colonial political era the Hutu, Tutsi and Twa evolved into ethnic groups but in a new and subjective manner.

2.2.2.3 Colonisation: the Invention of Ethnicity

The Hutu, Tutsi and Twa have always been part and parcel of Rwandan society. However, these terms lost their pre-colonial context when the Germans and the Belgians occupied Rwanda. Colonialists did not invent Hutu, Tutsi and Twa, instead they invented the perception that these groups constitute ethnic groups as perceived on the basis of European racial theories.[40] Chabal and Daloz observed that European policies and narratives about the population of Rwanda should be seen as an "invention of ethnicity."[41] Anastase Shyaka notes as well that European colonizers contributed to conflict in Rwanda through the ideological line of the Hamitic theory which he argues is the root of the political instrumentalisation of ethnicity.[42]

National, ethnic, racial and religious groups are the collectives which the Genocide Convention intends to protect. The Convention does not however define any of these protected groups. Definitions of each of the groups are today a result of the international Criminal Tribunal for Rwanda case law.

Trial chamber I defined an ethnic group as one "whose membership share a common language or culture."[43] The chamber further explained that even if the Tutsi population does not have its own language and culture different from

39 IPEP/OAU, 2000 *Rwanda: the Preventable Genocide*, OAU, Addis Ababa, Ethiopia, Available also online at: www.oau-oua.org, accessed on June 2009.

40 *Supra* note 112 at 83.

41 Chabal, P. and Daloz, J.P., *Africa Works: Disorder as Political Instrument* (Indiana: University Press, 1999) at 95.

42 Shyaka, A., "The Rwandan Conflict origin, development, exit strategies" available at: http://repositories.lib.utexas.edu/bitstream/handle/2152/4746/3833.pdf?sequence=1.

43 *Supra* note 22 at para 513.

other Rwandans, it is nevertheless a protected group in the sense of the genocide definition. In reaching this conclusion, the Akayesu justices studied the drafters' intention, through the *traveaux préparatoire* of the 1948 Genocide Convention, as to who they actually intended to protect. The chamber observed that it was the intention of the drafters of the convention to extend legal protection under the convention to any stable and permanent group. The question then was whether the Tutsi would be qualified as a stable and permanent group in Rwanda.

To answer the above question, trial chamber I embarked on an analysis of the status and process through which the Tutsi, an initially non-stable and permanent group, had evolved into a stable and permanent group. The ICTR considered some objective indicators on the basis of which the Tutsi could be seen as a distinct population. On the basis of its factual findings, the Tribunal explained that proof of ethnic identity included the fact that each Rwandan by 1994 was required to carry an identity card mentioning principally, among other things, the ethnicity of the card holder which was Hutu, Tutsi or Twa. Also the fact that Rwandan laws relating to the identification of persons required the inclusion of ethnicities was considered to be an objective indicator for the existence of the Tutsi group in Rwanda.

Taking cognizance of the fact that before colonialism the labels Hutu and Tutsi did not qualify as ethnic groups, the chamber explained that the Tutsi were a group because customary practice, legal provisions and the fact that the perpetrators and victims conceived the Tutsi as an ethnic group had transformed the character of the Tutsi in colonial and post-colonial eras.

Rwanda was placed under German rule in 1885 at the Berlin Conference where Africa was partitioned among European Countries. After the defeat of Germany at the end of the First World War, the League of Nations placed Rwanda under the mandate of Belgium. During their occupation of Rwanda, the Germans and the Belgians tried to understand the indigenous population through racial and ethnic perceptions. In the process the indigenous people were divided and treated differently on the basis of those European perceptions and the policies subsequently employed. Perceptions of the Tutsi as the alien colonizers and superior leaders and the undermining of the Hutu as slavish, childish, and subordinate became major determinants in the political and social discriminatory and genocidal policies in the name of the search for decolonisation from Tutsi dominance.

Richard Kandt, the first German administrator, described the Tutsi as "whites in a black skin, superior, intelligent and colonizers of the mass peasants – the Hutu".[44] Further he stated that the Rwandan population is: "A considerable population, hundreds of thousands of Bantu Negroes, the Wahutus', in slavish subordination

44 Semujanga, J., *et al.* (2010), *Le Manifesto de Bahutu et la Diffusion de l'Ideology de la Haine au Rwanda (1957-2007)* (Butare: Editions de l'Universite Nationale du Rwanda, 2010).

to the Watutsis – A foreign caste, the Watusis, governs and exploits ruthlessly the Wahutus and the Watwas, that Tribe of Dwarfs."[45]

The tone set by Kandt was supported by León Classe when he explained that "Tutsis' are not Bantu but Africans with strongest Hamitic indices."[46] On the same note, in 1948 Dr. J. Sassereth, a Belgian doctor, explained in his observation of the Tutsi and Hutu:

> *The Hamites (Tutsi) are 1.90 metres tall. They are slim. They have straight noses, high foreheads, and thin lips. The Hamites seem distant, reserved, polite and refined. The Bantu (Hutu) were a different people possessing all characteristics of the Negro: flat noses, thick lips, low foreheads, brachycephallic skulls. They are like children, shy and lazy and usually dirty.*[47]

At that time, the European continent was flooded with racial anthropological research. Racial theories had caricatured the image of a black person into either genuine Negroes or the somehow less genuine Negroes who were "Caucasoid white" in type. It is within the same theories that the Tutsi were arguably the Caucasoid-Hamitic and the Hutu were the genuine Negroes.[48] For Dr. Sassereth, the Tutsi were foreigners because of their physical features and their highly organised administrative leadership revealing a greater sense of civilization.

It was argued that such administrative and society organisation could not be attributed to typically black Africans hence a foreign invasion of Rwanda by the non-Negroe population, the Tutsi. Both Kandt and Seligman promoted white supremacy ideas and the Hamitic theory.[49] To them, Rwanda's political, social and economic organization proved superior norms that could not originate from the Dark Continent. In fact in the opinion of Seligman, a British ethnological scholar, Africa's advanced developments were the work of Hamites, the pastoral European groups.[50]

Having been persuaded by their theories of the superiority of the Tutsi, the European administrators and missionaries favoured the Tutsi in leadership and education. Education and administrative power and privilege were reserved to the Tutsi. Classe's letter to Mortehan gives his perception of the Tutsi and justifies why he engineered undermining Hutu children in formal education. Classe writes "[I]f we want to position ourselves at the practical point of view and seek the country's

45 *Supra* note 121 at 6.

46 Classe, L., Les Rwanda est ses habitant *Congo: Revue generale de la Colonie belge* I, no. 5 (May 1922) at 680-681.

47 Destexhe, A., *Rwanda and genocide in the twentieth century* (Pluto Press) at 39.

48 See generally Pages, A., *Un royaume hamite au centre de l'Afrique* (Bruxelles: Institut Royal Colonial Belge,1933).

49 See Rutayisire, P., "Le Tutsi étranger dans le pays de ses aïeux, " *Les Cahiers: Evangile et Société: Les Idéologies*, no. 4 (Dec. 1996): 42-55. See also Sanders, R., "The Hamitic Hypothesis: its origin and functions in time perspective" *Journal of African History* (1969) at 521-32.

50 Seligman, C.G., *Races of Africa* 4th ed., (London: Oxford University Press, 1966).

interest, we have in the Mututsi youth an incomparable element of progress, which no one who knows Rwanda can underestimate."[51]

In the exercise of his conviction of not underestimating the Mututsi, Classe instructed school head masters to give priority to the Tutsi in schools with the following instruction:

> *Education of the Bahutu is necessary to train catechists, Schoolmasters and tutors, and in order to instruct and train the youth in general. Schooling for the Batutsi must take precedence over schooling of Bahutu. The Father in charge of schools must set his heart on the development of this schooling.*[52]

Similarly, administrative power was consolidated in the Tutsi in which Belgian administrators removed all traditional Hutu chiefs and replaced them with new Tutsi chiefs. Hutus were predominantly performing forced labour under the direct supervision of the Tutsi commanded by European administrators.

Belgian and Tutsi alliances gradually broke down. Tutsi elites were demanding independence and requesting a non-extension of the Belgian mandate from the League of Nations mainly because the colonizers had initiated a political reform that was undermining and diminishing the powers of the King through creating parallel colonial administrative organs.

The new administrative system employed an electoral process through which the Hutu majority came to power. This process gave more power to the Hutu who at this moment had gained the favouritism of both the Belgians and the Catholic Church. Hutus were converted *en mass* to Catholicism and subsequently education privileges were shifted to them. Local civil servants were recruited on the basis of their Catholic faith which resulted in ushering a good number of Hutu elites into the civil service. Subsequently, the Hutu became more conscious of their undermined status and the fact that they were the majority in terms of numbers.

Politically, a dual wave swept the country, on the one side the Hutu demanding the end of monarchy rule, and on the other the Tutsi demanding independence from the Belgians, a wave that was sweeping through the African continent at the time. Tensions which were growing between the 'ethnic' groups led to the birth of political parties that were built largely along ethnic lines. The Tutsi formed two political parties, one radical and in favour of the continuity of the kingdom and another that was rather moderate.

The Hutu also created political parties that were very outspoken about the undermined political and social status of the Hutu population. In fact, prior to the

51 Letter to Resident Mortehan of Rwanda from Leon Classe on 21 September 1927.

52 Mbonimana, G., *L'instauration d'un royaume chrétien au Rwanda (1900-1931)*, Thèse Doctorat, Université Catholique de Louvain 1981, at 325. Un official translation by Alphonse Munyentwari, NUR- Butare, 12 April 2011.

creation of political parties The Hutu Manifesto,[53] authored mainly by Gregoire Kayibanda and his compatriots, was published and it demanded democracy and freedom for the Hutu. In 1957 the Social Muhutu Movement was created turning into Parmuhutu in 1959 and years later becoming the MDR-Parmehutu (Mouvement Démocratique Républicain).

Considering the political and social status of the Hutu at the time, it was natural that seeking freedom and democracy was a long awaited and noble cause. Gregoire Kayibanda and his partisans had at the forefront of their political activities what they called the emancipation of the Bahutu from Tutsi colonizers. They sought freedom of expression and an end to Hutu subjugation and exclusion in school. Interestingly, when Hutu elites came to power they did not seek the end of any mention of ethnicity on identity cards. At the time, they wanted to be able to check whether the Hutu would get their share of all jobs and functions according to the 'ethnic' ratio.

2.2.2.4 Ethnicity in the First and Second Republics

Antoine Mugesera notes that ethnic discrimination is a seed that was sown by the colonialists but blames the first and second Republics for harvesting that bad seed and instead of discarding it, the then Rwandan leaders continued to enjoy; plant and fertilise ethnic discrimination until it resulted in genocide.[54] Ethnic politics more seriously emerged before independence in 1957, and Hutu-Tutsi relations were severed. Conflicts between the supporters of the Hutu Manifesto and those supporting the monarchy, even though they were still isolated incidents, were becoming more rampant.[55]

Power dimensions in Rwanda changed tremendously in the 1950s. The rule of the King was abolished, many Tutsi were exiled to neighbouring countries and political and social power was consolidated in the hands of Hutu elites who had successfully led a social revolution with the help of their Belgian allies. The alliance of Belgians was expressed by Logiest, the then Special Resident in Rwanda, when he exclaimed that: "We must undertake an action in favour of the Hutu, who live in a state of ignorance and under oppressive influences. By virtue of this situation, we are obliged to take sides. We cannot stay neutral and sit."[56] Survivors of the 1959-63 violence often recall the use of Belgian Helicopters in finding hiding victims.

53 Semujanga, J. *et al*. (2010), *Le Manifesto des Bahutu et la Diffusion de l'ideologie de la Haine au Rwanda* (Butare: Editions de l'Université Nationale du Rwanda, 2010) at 200-212.

54 Mugesera, A., *Imibereho y'Abatutsi kuri Repubulika ya mbere n'iya kabiri (1959-1990)* (Kigali: Les Editions Rwandaises, 2004) at 366, Mugesera discusses the living conditions of the Tutsi during the first and second Republics in Rwanda.

55 *Ibid*.

56 Colonel Logiest statement, quoted in Lemarchand, R., *Rwanda and Burundi* (New York: Preager Publishers, 1970a) at 175.

Identity politics were clearly in the consciousness and policies of the new political elites. President Kayibanda explained that the role of his party Parmehutu was not to create an egalitarian Republic but a Republic of Rwandan Hutu.[57] In his explanation of their political life, Kayibanda explained:

> *Our political life must be based on democratic principles, on the management of state affairs by the electoral majority and not on the principles of equality between Hutu and Tutsi or on the principle of ethnic quotas.*[58]

The so-called democratic government was vehemently denying the application of the principle of equality and the possibility of sharing national resources on the basis of quotas. Tutsi extremist sentiments were probably still fresh within the minds of President Kayibanda. The deceased Rwandan king had been a believer of national unity even though some Tutsi extremists at the time of the presentation of the Bahutu Manifesto had responded that the relationship between the Tutsi and Hutu was based on serfdom, not on brotherhood, therefore claiming that the Hutu had no right to claim a share of the national heritage.

Kayibanda considered the Tutsi and Hutu to be alien to each other. He once stated:

> *Two nations in a single state, two nations between whom there is no intercourse and no sympathy, who are as ignorant of each other's habits, thoughts and feelings as if they were dwellers of different zones, or inhabitants of different planets.*[59]

The Kayibanda regime and subsequent years were marked by enormous violence against the Tutsi. What had started as social classes had been transformed in political minds and in reality into antagonistic ethnic groups.

In relation to the violence against the Tutsi at that time Pope Paul VI, Bertrand Russell and his fellow Nobel Peace Prize winner Jean-Paul Sartre warned that what had happened in Rwanda were the most atrocious acts of genocide since that of the Jews during the Second World War.[60] Similarly Dennis Vuillemin reported that:

> *In Gikongoro it was a 'veritable genocide' where the prefect, the bourgmestres and the party officials from Paremehutu had encouraged bands of killers to undertake a systematic extermination of Tutsi. … Some Rwandese officials were directly and actively involved in the reprisals.*[61]

57 *Supra* note 131 at 53-54.
58 ICTR-99-52-T, Proj. EXH P 115/6 A, 4.6.03, kO1 4498-1499. Translated from French.
59 Speech by President Gregoire Kayibanda, on 27 November 1959.
60 Nkubito Bakuramutsa, Rwanda delegate to the United Nations, comments during the voting of the creation of the ICTR, UN Doc.
61 Viullemin, D., article in Le Monde, 4 February 1964.

Vuillemin's observation reveals that State-sanctioned ethnic violence was already happening in Rwanda. Unfortunately, as noted earlier, the statement by Logiest is proof that state violence had instead been endorsed by the colonialists as a social revolution. The impact, according to Rene Lemarchard, was that: "Once the Belgian administrators on the spot had decided that the peasants uprising were a revolution (which they obviously were not), the real revolution could no longer be averted."[62]

The first and second Republics endorsed racist theories introduced by Western colonialists. Political narratives of the time insisted on ethnic differences and divisions. Political ideologues supported Hutu unity and the exclusion of the Tutsi. The political ideology in Rwanda can be discerned from various speeches. Philip Verwimp rightfully observes that Rwandan politicians advocated their policies through political speeches.[63] Verwimp is of the view that the speeches by President Habyarimana, Kayibanda's successor, provide an answer to the question of where the genocidal strategy came from. This answer lies in Habyarimana's ideology of transforming Rwanda into a purely agricultural society, in which rural peasant ship was encouraged in promotion of the philosophy that Hutu were naturally tillers of the land.

President Habyarimana rejected ethnic unity, claiming that:

> *The unity of ethnic groups is not possible without the unity of the majority. Just as we note that no Tutsi recognizes regional belonging, it is imperative the Hutu majority forge unity, so that they are able to wade off any attempt to return them into slavery.*[64]

In his appeal to the Hutu majority, Habyarimana reminded his partisans of the Hamitic theory when he explained that there was no Tutsi who recognised regional belonging. He focused on the Tutsi as the enemy.

Habyarimana had ousted President Kayibanda, one of the founder members of Paarmehutu. The coup d'état created wrangles and enmity between the southerners and northerners from which the two leaders respectively came from. Hutu unity, although it was intended to be permanent, was infected by regional divisions. Habyarimana concentrated power within his Northern region, more specifically within the family of his in-laws, the so-called Akazu,[65] as the previous President had concentrated power in the Southern region.

62 *Supra* note 135 at 146.

63 Verwimp, P. (2000), "Development Ideology, the peasantry and genocide: Rwanda represented in Habyarimana's speeches" *Journal of Genocide Research* 2 (3) at 325-361.

64 *Ibid*.

65 *Akazu* means a small house and during Habyarimana's regime it was believed that political power lay in the hands of that group of people whose unity was based on regional and family ties.

Both the first and second republics resorted to the instrument of ethnicity in order to pursue political control.

Extremist speech resurfaced in the early 1990s following the attack by the Rwandan Patriotic Army (RPA), the majority of which were descendants of Tutsi refugees from 1959, and subsequent years of violence against the Tutsi followed. The RPA claimed that the peaceful repatriation of refugees had failed during over thirty years of exile, so the only choice was the military option, hence the launching of the October 1990 invasion.

Verwimp is of the opinion that the civil war merely offered the pretext and an occasion to execute the final solution.[66] Verwimp claims that "Habyarimana's genocidal policy in 1990-1994 was an extreme implementation of policies that already existed in the 1973-1990 period."[67] Indeed the RPA attack legitimised Rwanda's defensive military actions but not the extermination of an entire civilian population.

Habyarimana's *discours* was reinforced by other political speeches and Hutu extremist propaganda. The Military Commission established by President Habyarimana on 4 December 1991, headed by Colonel Bagosora, who was later convicted by the ICTR, in answering the question of "who is the enemy and what must be done to vanquish him militarily, political and in the media ? " explained that:

> *(L)'ennemi principal est le Tutsi de l'intérieur ou de l'extérieur, extrémiste et nostalgique du pouvoir, qui n'a jamais reconnu et ne reconnaît encore les réalités de la Révolution Sociale de 1959, et qui veut le pouvoir au Rwanda par tous les moyens, y compris les armes « (et plus généralement) » les Tutsi de l'intérieur, les Hutu mécontents du régime en place, les étrangers mariés aux femmes Tutsi.*[68]

From the above, it is clear that the principal enemy was not in the eyes of the commission the Rwandan Patriotic Army that had already been fighting for a year by then, but all the Tutsi living in and outside the country. What is remarkable about this description of the enemy is the officers' reference to the 1959 social revolution and what they refer to as the Tutsis' hunger for power and their failure to recognise the lessons of the said social revolution.

In the same anti-Tutsi propaganda, Leon Mugesera, a university professor and vice president of MRND in Gisenyi *prefecture*, in November 1992 at Kabaya while addressing MRND partisans made an explicit appeal to annihilate the Tutsi. Part of his speech reads:

66 *Supra* note 142 at 4.

67 *Ibid* at 5.

68 Lanotte, O., *La France au Rwanda (1990-1994)* (Peter Lang, 2007) at 89. See also Melvern, L.R., *A people Betrayed: The role of the west in Rwanda's genocide* (London: Zed Books, 2000) at 61.

> *The mistake we made in 1959, when I was still a child, is to let you leave. I asked him if he had not heard of the story of the Falashas, who returned home to Israel from Ethiopia? He replied that he knew nothing about it! I told him [translation] So don't you know how to listen or read? I am telling you that your home is in Ethiopia, that we will send you by the Nyabarongo so you can get there quickly.*[69]

Political speeches in the two post-colonial republics clearly reflect an appeal to ethnic hatred, the demonization of the Tutsi, resorting to Hamitic theories and justifying Tutsi violence by referring to learning from the mistakes of the so-called 1959 Hutu revolution. Advocating the destruction of the Tutsi as an enemy who should not be spared is well elaborated. An appeal for Hutu unity, even at the birth of multi-parties, led to the creation of Hutu power wings within many opposition parties. The Hutu power wings were central elements in the execution of the genocide in 1994.

The ethnic process in Rwanda evolved in a direction that, if uninterrupted, would definitely lead to genocide, as indeed it did. Political and social policies seriously toiled the genocide terrain. As mentioned earlier, by 1994 the Tutsi had been socially destroyed in the minds of many who subsequently took an active role in the physical destruction during the 1994 genocide against the Tutsi.

2.2.2.5 Ethnicity in Rwandan Laws

Pre-genocide Rwandan laws reflected the existence of ethnic groups in Rwanda. The Rwandan Constitution and Rwanda's law of 1988 relating to persons and their registration are important examples. Another relevant but clearly discriminatory Rwandan law is the 1963 amnesty law that will be discussed further in this section.

The Rwandan law on civil registration under the preliminary title of the Civil Code required the registration of ethnic belonging. Civil registrars required citizens on the basis of Articles 57, 118 and 137(1) to declare their ethnicity as part of the registration requirements. Article 118 relating to birth registration required that parents had to mention the ethnicity of their child, since there was no law mentioning who determines the child's ethnicity Article 3, resorting to custom in the absence of written law, would be employed and hence the ethnicity of the father on the basis of the fact that Rwanda is a patriarchy-driven society would be registered. Upon marriage the parties were also required by Article 137 to declare their ethnicity to the registrar. In many other official documents, including in

69 Decay, J.A., translation of Mugesera's Speech on the basis of Prof. Thomas Kamanzi's translation, which is officially accepted as the French Canadian Translation. Decay made the English translation in his reasons for the Judgment (2004) 1 F.C.R. 3 p. 17. For another related translation see Annex III of the Judgment of the Supreme Court of Canada of 28 June 2005 in the Minister of Citizenship and *Immigration vs Leon Mugesera*. Melvern, L.R. (2000), *A people Betrayed: The role of the west in Rwanda's genocide* (London: Zed Books, 2000) at 47, this also provides a related translation of Mugesera's speech.

hospitals, in work-related files and judicial files, one's ethnicity was always declared and registered.

The mentioning of ethnicity in official and public records was abrogated by Article 16 of the Arusha Accords that partly became part of Rwanda's fundamental law in 1994 until the coming in force of Rwanda's new Constitution in 2003.[70]

As mentioned earlier, violence against the Tutsi took shape in 1959 and continued sporadically until the genocide. Violence against the Tutsi in 1959-63 and in early 1970 was qualified by some international prominent personalities, including the Pope at that time and two Nobel Peace Prize winners, as genocide. No judicial proceedings were initiated to that effect, instead amnesty laws were introduced.

In the aftermath of such violence, the government responded by adopting amnesty laws. It has been argued that the culture of impunity for violence against the Tutsi was promoted by these laws. In fact Martin Ngoga calls Rwanda's amnesty laws "legislations of impunity."[71] The 1963 law is particularly informative on discrimination imbedded in a particular law.

On 20 May 1963 an amnesty law was passed granting general and unconditional amnesty for what the law qualified as political crimes committed between 1 October 1959 and 1 January 1962. As mentioned earlier, these years were dominated by ethnic tensions leading up to the death and fleeing of multitudes of Tutsi. The Hutu revolution, the ousting of the King and retaliation attacks from Tutsi refugees occurred within the period covered by the amnesty law. Two articles of this law are relevant.

Article 1 provides:

> *Unconditional and general amnesty is given for all offenses committed during the Social Revolution between October 1, 1959, and July 1, 1962, that due to their nature, their motives, their circumstances, or what inspired them are part of the fight for national liberation and take on a political character even though these offenses are an infringement of the common law.*[72]

70 Article 16 of the Arusha Accord (Peace Agreements between the Government of the Republic of Rwanda and the Rwanda Patriotic Front). This article generally mentions that from the date of the assumption of office by the transitional National Broad-based government, ethnicity would be removed from all official documents which made a reference to ethnicity.

71 Ngoga, M. (2008), The institutionalization of Impunity: a judicial perspective on the Rwandan Genocide, in: Clark, P. and Kaufman (eds.), *After Genocide Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond* (London: Hurst and Company) at 322.

72 Brannigan, A. and Jones, A.N., "Genocide and the Legal Process in Rwanda From Genocide Amnesty to the New Rule of Law", *International Criminal Justice Review*, Vol. 19, No. 2, 2009, 192-207, at 195. The original French version of Article 1 of *Loi du 20 mai 1963 portant Amnistie général des infractions politiques commises entre le 1er octobre 1959 et le 1er Juillet 1962* (J.O, 1963, at 299) reads: "*Amnistie générale et inconditionnelle est accordée pour toutes les infractions commises à l'occasion de la Révolution Sociale pendant la période du 1er octobre 1959 au 1er juillet 1962 et qui en raison de leur nature, de leur mobile, des circonstances ou des motifs qui les ont inspirées, rentrent*

Article 2 stipulates:

> *Offenses committed during this period by people opposing the liberation of the oppressed masses from feudal-colonial domination are not covered by the amnesty given in the first article of this law.*[73]

Amnesty laws can be and have been a transitional justice tool to foster peace in some countries facing past periods of massive violence, but they are employed by other regimes to legalise impunity for human rights violations committed by members of their political organizations, as was the case in Rwanda as the above-mentioned Article 1 illustrates.

An analysis of Article 1 above reveals that the amnesty somehow justifies as necessary the cause of the human rights violations committed against the Tutsi in Rwanda at the time. Massive violence against the Tutsi was justified by the circumstances, motives and the ideology that inspired the perpetrators of such violence. Contextually it is important to remember that the said social revolution which is the accepted reason for the violence was a Hutu revolution against the minority Tutsi monarchy.

The impunity aspect of the amnesty law is made obvious by its Article 2 which openly denies any amnesty to Tutsi who committed crimes including retaliation crimes and war crimes committed within the context of the social revolution.

The two articles take ethnic violence and discrimination to a legal level by the fact that an amnesty was granted for the Hutu who had committed crimes in pursuance of Hutu dominance, while such as amnesty was rejected for the Tutsi. Interesting is the distinction in the qualification of the crimes, in which those committed by the pro-revolutionaries were deemed political while those committed against the revolution were not. The legacy of this specific amnesty law has been far reaching, as it sent a message of tolerable violence by the Hutu against the Tutsi in Rwanda.

The lack of accountability for ethnic violence is believed to have fuelled the genocide. In fact many perpetrators have testified that they became involved in the genocide because they believed that they were not going to be held accountable.[74] Amnesty laws and other forms of legal inaction in the case of violence against the Tutsi had succeeded in legally preparing *génocidaires*. The lack of criminal accountability created in the Rwandan consciousness an absence of the preventive impact of criminal laws. Perpetrators did not anticipate any accountability and victims lost any sense of justice in their interest. A *génocidaire* explained to Hatzfeld

dans le cadre de la participation à la lutte de libération nationale et revêtent ainsi un caractère politique même si elles constituent des infractions de droit commun."

73 *Ibid* Article 2.

74 See generally Hatzfeld, J. (2005), *Machete season: The killers in Rwanda speak* (New York: Farrar, Straus and Giroux, 2005).

that: "it gave me no pleasure, I knew I would not be punished, I was killing without consequences."[75]

2.2.2.6 Concluding Remarks

By the time of the genocide distinct groups, including mainly the Hutu and Tutsi, existed in Rwanda within the political, legal, social and historical discourse. Political ideology had constructed the Hutu as the native and the Tutsi as the alien enemy and colonialist. To ensure the protection of the Hutu the Tutsi had to be exterminated. The voices of exclusiveness defeated those of the believers of social construction in the 1950s and more so with a great deal of extremism in 1994. The discourse of the second Republic that ushered in the genocide was a "people power" discourse that transformed into "Hutu power" extremist wings of the dominant genocidal political parties.

A conclusion on the politics of ethnic identity and its construction in Rwanda is most captured by Michel Foucault's work on the relationship between power and knowledge and how the social order is constituted by the discourse of power.[76] As discussed earlier the terms Hutu and Tutsi are not an innovation of the colonial discourse; what is important, however, is that what those words became is largely a result of different statements made to describe the indigenous people of Rwanda by the colonialists and the surrounding power discourse.

2.3 INTRODUCTION TO THEORY

Theories on gender and sexual violence suffice centrally in a range of different feminist theories. This study is conceived within the discipline of law, hence feminist legal theory is the most relevant. Note that because chapter 4 is in fact the detailed theoretical framework of this study, the present section only has an introductory and context-setting purpose.

2.3.1 OVERVIEW OF APPLICABLE FEMINIST THEORY

Feminist theories on gender and sexual violence take a wide range, at times portraying similar subjects differently and giving variant explanations and evaluations to similar facts. Feminists' approaches to the difference between the situations of men and women differ on hand arguing that they are natural and unchangeable and on the other that thet are socially constructed.[77] A study of feminist theories necessitates bearing in mind that feminism is a very controversial

75 *Ibid* at 51.

76 *Supra* note 1 at 130.

77 MacKinnon, C. (1987), *Feminism unmodified discourses on life and Law* (Massachusetts: Harvard University Press, 1987) at 21.

discipline that adopts different approaches to similar matters as explained above by MacKinnon.

Feminist legal theory will be used in this study as the theoretical basis that explains gender and sexual violence. I have chosen feminist legal theory because of its outstanding critical views in explaining rape and sexual violence and their efforts in trying to shape and influence judicial approaches to wartime and genocidal gender and sexual violence.

To illustrate the important work done by feminists in international and human rights law, Mary Robinson observed that:

> *As a result of the hard work and dedication of many feminist scholars and activists we now have in place a healthier international human rights regime, one that is prepared to rethink its human rights mandate more fully to comprehend and address the human rights of all.*[78]

Note, however, that feminist's cannot claim to fully account for gender and sexual violence. Sharlach warns that feminists should refrain from the traditional understanding of women as peacekeepers, calling them to "fully examine the implications for feminists' theory of catastrophes such as Rwanda in which women are both victims and villains."[79]

Although diverse and often contradictory, feminists share a common goal which is to include the experiences of women and to search for solutions in order to achieve better human rights for women. All feminists in one way or another seek to do what Bartlett calls the "woman question." The major point of departure is founded on questioning women's inequality and seeking to remedy that. Divergence among feminists is mostly felt in what causes women's inequality and the most effective means of combating it.

In feminist literature the primordial approach to gender and sexual violence is the one whereby men are natural aggressors against women. Thus, rape and sexual violence is explained as innate in men that employ it to pursue and maintain dominance against women. Susan Brownmiller, for example, contends that rape is embedded in the universal male desire to dominate, humiliate, and maintain social control over all women.

Instrumentalist feminism describes gender and sexual violence as a deliberate strategy used by political elites to attain a specific end. Rape is an instrument and a means by which to achieve, for example in the case of Rwanda, genocide. Genocidal

78 Buss, D., Manji, A. (eds.), (2005), *International Law and Modern Feminists Approaches* (Oxford: Hart Publishing, 2005) see Foreword by Mary Robinson.

79 Sharlach, L. (1999), "Gender and Genocide in Rwanda: Women as Agents and Objects of Genocide", *Journal of Genocide Research* 1:3, 387-399, at 388.

gender and sexual violence is explained within feminism as an instrumentalist argument.

Feminists who take a constructivist approach to gender and sexual violence observe that wartime or ethnic gender and sexual violence requires an analysis of the wider socio-cultural framework in which it has/is happening in order for it to be understood. The constructivists demand that in cases of genocide one must expose the intersection between one's gender and the ethnic power imbalances therein.[80] It is this school that breeds the intersectional school of thought.

Note that the above feminist schools remain limited in their view concerning the realities of Rwanda. The first wave offers an insufficient explanation through their universalistic view of all men as perpetrators and all women as victims. They fail to illustrate why in the Rwandan reality some Tutsi men were sexually abused and why some Hutu women perpetrated and aided and abetted the commission of gender and sexual crimes? This school also ignores the role and presence of multiple identities beyond gender, yet they are fundamental in determining the status of the victim and perpetrator.

The instrumentalist approach that explains gender and sexual violence on the basis of political elites mobilising perpetrators to rape in order for those elites to attain a specific economic or political aim is criticised for failing to explain why the population follow the political elites so passionately. Further, it does not explain the absence of visible mobilisation encouraging Hutu women to rape Tutsi men. Similarly, this theory does not explain the unfortunate creativity that perpetrators used in committing sexual violence and the extent it took.

The constructionist proposition is also not without fault. The social structural framework in Rwanda is patriarchal sites of power dominated by ethnic and gender. Propagandists relied on the prevailing sanctity; with the motherliness and simplicity of the Hutu woman constructionists do not explain the making of women perpetrators.

2.3.2 INTRODUCING FEMINIST DEBATES ON GENOCIDAL RAPE

As mentioned in Chapter one, this study intends to examine whether genocidal gender and sexual violence were indeed addressed as such. The debate on whether wartime rape should be qualified as genocide or not[81] commenced within feminism as different feminists sought ways of recognizing and considering war time rape

80 Nagel, J., *Race Ethnicity, and Sexuality: Intimate Intersections, Forbidden Frontiers* (New York: Oxford University Press, 2003) at 1.

81 For discussions on Rwanda see generally Lyon, M.A., "Hearing the Cry without Answering the Call: Rape, Genocide and the Rwandan Tribunal, *Syracuse Journal of International Law and Commerce*, 28: 99-124, at 104-105.

especially the rape of Bosnian Muslim women by Serbian forces.[82] This debate clearly emerged within the realities of the former Yugoslavia discourse with the creation of the ICTY[83] and is relevant in different ways. This debate has influenced the law and practice relating to gender and sexual violence emanating from war and genocide.[84]

Two competing positions existed between scholars demanding the recognition of genocidal rape and those opposed to that approach. The opinion of scholars' forehead by Catherine MacKinnon[85] positioned that the rape of Bosnian Muslim women by Serbs was genocidal because it intended to destroy the victim and her Bosnian Muslim community. In contrast Rhonda Capelon[86] and her proponents wanted the rape of Bosnian Muslim women to be seen as an ordinary and habitual crime even though it was committed on a large scale. The Engle[87] and Capelon group pursued the condemnation of all rape irrespective of the group that committed it. According to this school of thought women were the victims and they argue that there is no difference between rape in wartime and rape in peacetime; moreover, rape entails male domination and female subordination.

MacKinnon and those sharing her school of thought observed that it is important to consider the intersectionality between gender and other identities of the victim. Crenshaw's[88] intersectionality theory is employed to explain gender and sexual violence. This theory connotes that it is necessary to qualify gender and sexual violence as genocide where they fulfil the genocidal intent. In this way, the intersection between one's gender and ethnicity is seen as a factor which aggravates the situation of the victim. Multiple identity factors are seen, from this perspective, as aggravating circumstances for which women victims face sexual violence. Crenshaw is of the opinion that the experience of women of colour is not incidental to race or gender but is a result of the intersection between their gender and race.[89]

An entirely opposite school of thought shared by Capelon and Engle opposes the qualification of rape and sexual violence as genocide. Their desire is to see a serious condemnation of rape as a stand-alone crime as they argue that to call rape genocidal is to undermine rape and render it invisible.[90] They are preoccupied

82 Engle, K. (2005), "Feminism and its (Dis) Contents: Criminalising Wartime Rape in Bosnia and Herzegovina" The *American Journal of International Law* 99: 778-816 at 784-785.

83 Allen, B. (1996), *Rape Warfare: The Hidden Genocide in Bosnia-Herzegovina and Croatia* (Minneapolis: University of Minnesota Press, 1996) at 62.

84 Salzman, T. (2000), Rape Camps, Forced Impregnation, and Ethnic Cleansing: Religious, Cultural, and Ethnic Responses to Rape Victims in the Former Yugoslavia, in: Barstow, A.L., *Wars Dirty Secret: Rape, Prostitution, and other Crimes against Women* (Cleveland: The Pilgrim Press, 2000) at 74.

85 MacKinnon, C.A. (2006), *Are Women Human? And Other International Dialogues* (Cambridge M.A: The Belknap Press of Harvard University Press, 2006) at 188-189.

86 *Supra* note 13 at 197-218.

87 *Supra* note 161 at 779, 786.

88 *Supra* note 167 at 114.

89 Crenshaw, K., "Mapping the Margins: Intersectionality, Identity politics and Violence against Women of Color" (1991), 43, *Stan. L. Rev.* 1241, at 1241.

90 *Supra* note 161 at 786.

with the essentialists' approach of promoting womanhood as a homogenous victim group. In her opinion, Capelon suggests that rape occurs against women not because of the group they belong to, but because they are women.[91] Capelon argues that an emphasis on the genocidal nature of rape and sexual violence can potentially make rape invisible.[92] Similarly, Engle explains that qualifying rape and sexual violence as genocide downplays the extent to which all women raped during the conflicts were victims.[93]

A critical analysis of MacKinnon and Crenshaw's school of thought on gender and sexual violence as genocidal crimes and that of Capelon and Engle will be employed in chapter four in order to fully expose the extent to which existing theory has influenced the understanding of Rwanda's experience and in order to analyse the impact and influence of those theories in redressing and explaining the Rwandan reality.

2.4 INTRODUCTION TO POST-GENOCIDE LEGAL RESPONSES

> *If justice is not done, there might be no end to hatred, atrocities could go on and on, with the executioners believing they are immune to prosecution and the victims thirst for revenge fueled by a sense of injustice and the idea that an entire ethnic group is responsible for the atrocities committed against them. In this regard it is of paramount importance that justice be done, because it will help replace the idea of collective responsibility with the idea of individual criminal responsibility.*[94]

After the genocide, dilemmas of justice, national reconstruction and enhancing unity and reconciliation for Rwandans were issues of urgency. This section introduces genocide-related criminal justice approaches. The creation, structure and procedure of each of the three approaches are presented here.

Post-genocide Rwanda was confronted with how to deal with the legacy of the genocide against the Tutsi and crimes against humanity and other serious violation of international law that claimed over a million victims and left every aspect of the nation devastated. The question of how justice could be done for the victims, survivors and numerous suspects in detention was gigantic. The Rwandan challenge is best captured by Schabas below:

> *It should be kept in mind that no judicial system, anywhere in the world, has been designed to cope with the requirement to prosecute genocide. Criminal*

91 *Supra* note 164 at 207.
92 *Ibid*.
93 *Supra* note 161 at 779 and 786.
94 Speech by Judge Laity Kama, President of the International Criminal Tribunal for Rwanda, before the General Assembly of the United Nations, 10 December 1996.

> *justice systems exist to deal with crime on an individual level. They are unsuited for crimes committed by tens of thousands, and directed against hundreds of thousands. (…). Even a prosperous country, with a sophisticated judicial system, would be required to seek special and innovative solutions to criminal law prosecutions on such a scale.*[95]

Despite insurmountable challenges in pursuit of justice for Rwanda, the option of no justice or amnesty was not an option at all in Rwanda's approach to genocide. Pre-genocide Rwanda was known for a long-standing culture of impunity where violence against the Tutsi had gone unpunished for decades. It is believed that this culture of impunity was a significant contributory factor in the extent and magnitude of the genocide against the Tutsi.

On the basis of consultations three innovative criminal justice responses, an international and two domestic initiatives, were created to render justice in cases of genocide and related crimes. The International Criminal Tribunal for Rwanda[96] was created by the United Nations Security Council once it was convinced that what had transpired in Rwanda constituted a threat to international peace and security.

Two years after the halting of the genocide, and after one year of the existence of the ICTR, Rwanda made its first domestic legal attempt towards punishing genocide. Organic law No. 08/96 of 30 August 1996, relating to the organisation of prosecutions for offences constituting the crime of Genocide or Crimes against Humanity committed since 1 October 1990 was promulgated. This law established specialised chambers in Rwanda's ordinary courts to carry out the genocide-related justice mandate.[97]

Within five years of the operation of Organic Law No. 08/96, the genocide-related caseload remained gigantic. Only about 6,000 of the 120,000 detained suspects had been tried; at this pace, trying all detained suspects would last longer than a century. The search for a better and more expeditious judicial solution ushered in the *gacaca* courts.[98]

The *gacaca* jurisdictions are a *sui generis* system taking some of their practices from Rwanda's customary conflict resolution method and modified aspects of the ordinary criminal justice system in Rwanda. *Gacaca* is unprecedented in many ways, even though it is not a perfect system and is not alone in its imperfections because there is no penal system in the world that is entirely perfect.[99]

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95 Schabas, W. (1998), Justice, Democracy and impunity in post-genocide Rwanda: Searching for solutions to impossible problems*, 7 CRIM. L.F.* at 534.

96 See *infra* at section 1.4.1 of this study.

97 *Infra* Rwanda Ordinary Courts, at section 1.4.2.

98 *Infra* Gacaca Courts, at section 1.4.3.

99 Haveman, R., Doing Justice to Gacaca, in: Smeulers, A. and Haveman, R. (eds.), *Supranational Criminology; Towards a Criminology of International Crimes*, (Antwerp: Intersentia, 2008) at

The International Criminal Tribunal for Rwanda as well as the ordinary and *gacaca* courts has allowed the international community and Rwanda to exercise their obligation to punish and prosecute genocide as required by Articles I and VI of the Convention on the Prevention and punishment of the crime of genocide.[100]
These judicial bodies share a common goal of holding accountable those who are responsible for genocide, fostering deterrence and encouraging reconciliation. Concerning post-conflict judicial mechanisms Bassiouni suggests, "whichever mechanism or combination of mechanisms is chosen, it is chosen to achieve a particular outcome which is, in part, justice, and, whenever possible reconciliation and ultimately, peace."[101] In the sections that follow, I will introduce the International Criminal Tribunal for Rwanda, Rwanda's ordinary courts and the *gacaca* courts. While I am aware that some countries through the exercise of universal jurisdiction have tried cases relating to the genocide in Rwanda, I should mention that their analysis is outside the scope of this study.

2.4.1 THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

The International Criminal Tribunal for Rwanda (hereinafter the ICTR)[102] was the international community's response to the atrocities in Rwanda: genocide and related crimes claimed over one million Rwandans, mostly Tutsi. Acting under Chapter VII of the United Nations Charter, the UN Security Council established the ICTR in November 1994 by means of Resolution 955.[103] The Security Council is mandated to take action including the creation of Tribunals once it believes that the action taken will lead to maintaining peace and security.[104]

Drumbl and Fitzgerald are of the view that the Arusha-based Tribunal was created by the United Nations to partly respond to criticism directed at the United Nations' inaction when the genocide unfolded.[105] The world failed to stop and condemn

357-398. See also Clark, P., The Rules and Politics of Engagement, in: Clark, P. and Kaufman, Z.D., *After Genocide; Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond* (London: Hurst and Company, 2009) at 297-320.

100 Article I. Article VI of the Convention on the Prevention and punishment of the crime of genocide, adopted by the United Nations general Assembly on 9 December 1948, 78 U.N.T.S 277 (hereinafter the Genocide Convention) states that "Persons committing genocide or any other acts enumerated in Article 3 shall be punished whether they are constitutionally responsible rulers, public officials or private individuals". Rwanda has been a party to the Genocide Convention since 1975 when it was ratified by *Décret-loi no. 8/75 de 12 Février 1975 Journal Officière 230*. See for example for violations of humanitarian law, M. Scharf (1996) 59 Law and Contemporary Probs. See also Bassiouni, M.C. and Wise, E.M. (1995), *Aut dedere Aut Judicare: The duty to extradite or prosecute in international Law* (The Hague: Maritnus Nijhoff, 1995).

101 Bassiouni, M.C. (1996), "International Crimes: Jus Cogens and Erga Omnes" 59 *Law and Contemporarey Problems* 63-72.

102 *Supra* note 2.

103 *Ibid*.

104 Chapter VII, United Nations Charter. Note that the defense contested the authority of the UN Security Council to create such judicial organs in the Kanyabashi Case. The trial judges at the ICTR discussed this matter and concluded that the ICTR had been legitimately established.

105 Drumbl, M.A. (2000), "Sclerosis: Retributive Justice and the Rwandan Genocide" *Punishment and Society,* 2(3) at 287-307.

the genocide in Rwanda as it was happening. Boutros Boutros-Ghali in retrospect notes that "for us genocide was the gas chamber – what happened in Germany. We were not able to realise that with a machete you can create genocide."[106] Having failed in its duty to prevent the genocide in Rwanda, the international community resolved to exercise its duty to punish, through the ICTR.

The ICTR was established to hold accountable those most responsible for genocide, crimes against humanity and violations of international humanitarian law committed between 1 January and 31 December 1994 in Rwanda and in neighbouring countries by Rwandans.

2.4.1.1 The Establishment of the ICTR

In his report on the situation in Rwanda of 31 May 1994, the United Nations Secretary-General observed that:

> *The magnitude of the human calamity that has engulfed Rwanda might be unimaginable but for its having transpired. On the basis of evidence that has emerged, there can be little doubt that it constitutes genocide, since there have been large-scale killings of communities and families belonging to a particular ethnic group.*[107]

A Commission of Experts established by the Secretary-General after a five-month investigation period concluded that there was a great deal of evidence revealing that acts of genocide had been committed against the Tutsi ethnic group by Hutu elements in a concerted, planned, systematic and methodical way.[108] The Independent Commission of Experts recommended the establishment of an international tribunal.

Earlier, the transitional broad-based Government of Rwanda had requested the creation of an international tribunal on the basis of which the International Criminal Tribunal for the former Yugoslavia had been developed. Rwanda posited that the establishment of an international tribunal was required because genocide necessitated a collective response from the international community as this was an attack on all humankind.

On 8 November 1994, Resolution 955 was adopted, establishing the International Criminal Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and

106 Boutros Boutros-Ghali, Front-line Interview (PBS), (21 January 2004).
107 Report of the Secretary-General on the Situation in Rwanda, UNSC, UN Doc. S/1994/640 (1994) para 36.
108 Final Report of the Commission of experts established by Security Council Resolution 935 (1994), UNSC, UN Doc. S/1994/1405(1994.).

Rwandan citizens responsible for such violations in neighbouring countries.[109] Out of the fifteen members of the Security Council thirteen voted in favour, one abstained, while only Rwanda voted against the establishment of the tribunal.[110]

Rwanda's reasons[111] for rejecting the establishment of a tribunal which it had requested were prompted by the failure to incorporate in the final draft some of Rwanda's major concerns.[112] The rejection of Rwanda's proposal for the tribunal to have temporal jurisdiction; the structure and the link of some of the tribunal's bodies with the ICTY; the manner and process in which judges were to be selected; the absence of capital punishment; and the physical absence of the tribunal in Rwanda as its seat (it was to be in Arusha, Tanzania) influenced Rwanda's negative vote.

During negotiations on the ICTR statute, Rwanda requested that the temporal jurisdiction (*ratione temporis*) should include the period from 1 October 1990 to 31 December 1994 emphasizing that such a period would allow the punishment of the planners of genocide and those responsible for the so-called genocide pilot projects which took place earlier than 1994.[113] Rwanda's request was rejected and the temporal jurisdiction of the ICTR was fixed for the period from 1 January to 31 December 1994.

On the structure of the ICTR, Rwanda claimed that the proposed structure was inappropriate and ineffective because it was small and shared a common appeals chamber and prosecutor with the ICTY. Given this structure, Rwanda argued, it would be impossible for the tribunal to handle its work in an exemplary and speedy manner. Further, it objected to the possibility that some countries that Rwanda accused of having taken an active role in its atrocities had proposed candidates for judges and was to participate in the election of the said judges.[114]

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109 For Rwanda's position and argument, see: the Statement of the Permanent Representative of Rwanda after the vote to create the International Criminal Tribunal for Rwanda, UNSC, 3453 mtg. UN Doc. S/PV.3453 of 8 November 1994.

110 *Ibid.*

111 *Ibid*, see the statement by Rwanda's Permanent Representative at the voting of Resolution 955 establishing the ICTR to the UN in whixh He expressed that: "*An international tribunal which refuses to consider the causes of the genocide in Rwanda and its planning, and that refuses to consider the pilot projects that preceded the major genocide of April 1994, cannot be of any use to Rwanda, because it will not contribute to eradicating the culture of impunity or creating a climate conducive to national reconciliation*." He submitted several reasons why Rwanda was uncomfortable with the ICTR in the nature that it was being finally adopted and hence declared that: "*Although Rwanda wants and believes in an international tribunal for Rwanda, and although the Government of Rwanda is convinced that such a tribunal could be organized taking into account the concerns of the Rwandese people without impairing its international nature and its independence, my Government decided to vote against the draft resolution*."

112 *Ibid*.

113 *Ibid* at 14.

114 *Ibid* at 15.

Nevertheless, on 8 November 1994 the ICTR was established and was mandated to contribute to peace and reconciliation in Rwanda and the Great Lakes region of Africa.[115] A relevant question remained, however: how an international tribunal could contribute to peace and reconciliation in the aftermath of genocide. The important role of international tribunals and probably of any justice system mandated to judge such massive atrocities lies in holding perpetrators individually accountable in order to avoid collective guilt and acknowledging the painful experiences of victims.

While the quantification of the extent to which the ICTR contributed to national reconciliation remains obscure, at least the individualization of guilt has been attained. Condemning an entire population for genocide – the Hutu in Rwanda– would be detrimental to the process of reconciliation yet it could not be avoided if the guilty had not been identified from the innocent.[116] The role of individualizing guilt in enhancing national reconciliation was further expressed by Judge Richard Goldstone in his reference to the legacy of the International Military Tribunal at Nuremberg:

> *The trials of war criminals ensured that guilt was personalized – when one looks at the emotive photographs of the accused in the dock at Nuremberg one sees a group of criminal. One does not see a group of representatives of the German people – the people who produced Goethe or Heine or Beethoven. The Nuremberg Trials were a meaningful instrument for avoiding Nazis being ascribed to the whole German people. Then, too, the Nuremberg Trials played an important role in enabling the victims of the Holocaust to obtain official acknowledgment of what befell them.*[117]

The contribution of the ICTR, while ground-breaking in many ways, should not be romanticized; the tribunal did not prosecute all suspects and it failed to fully account for and qualify genocidal gender and sexual violence in all relevant cases; there is for example not a conviction regarding male victims of gender and sexual violence; all cases of guilty pleas dropped charges of rape and sexual violence and there is a low level of convictions for acts of rape and sexual violence.[118] These factors coupled with the limited information within the Rwandan community about the ICTR and negative sentiments attached to the work of the tribunal for

115 Government of Rwanda, Minister of Justice Letter of 6th August 1994 addressed to the Secretary-General. See also Letter from the Permanent representative of Rwanda to the Security Council, 28 September 1994 UNSC, UN Doc. S/1994/1115 (1994).

116 Kamatali, J.M.V. (2003), "The Challenges of Linking International Criminal Justice and Reconciliation: The case of the ICTR" *Leiden Journal of International Law*, at 115-133.

117 Goldstone, R.J., 50 years after Nuremberg: A new international Criminal Tribunal for Human Rights criminals, in: Jongman, A.J. (ed.), (1996), *Contemporary Genocides: Causes, Cases, Consequences* at 215 cited by Akhavan, P. (1997) 7 Duke J. of Comp. and Int' L p. 375.

118 Bianca, L. (2013), The prosecution of rape and sexual violence: Lessons from prosecutions at ICTR, in: De Brouwer, A.M. *et al.*, *Sexual violence as an international crime: Interdisciplinary Approaches*, (Cambridge, Antwerp, Portland: Intersentia, 2012), at 143 and 168.

some,[119] suggest a modest contribution of the ICTR towards reconciliation in Rwanda.

2.4.1.2 The Structure of the Tribunal

The International Criminal Tribunal for Rwanda is made up of three main organs; the chambers, the Office of the Prosecutor and the Registry.[120] This section gives a brief description of the functioning of each of the three bodies.

The ICTR is composed of trial chambers and an appeals chamber. Trial chambers are based in Arusha, Tanzania. The appeals chamber sits in The Hague, the Netherlands, because it also serves as the appeals chamber for the ICTY. The ICTR has a president elected by other judges for a four-year mandate. The chambers have sixteen permanent members, seven of whom serve at the appeals chamber and nine *ad litem* judges.[121] It is prohibited for any two judges to have the same nationality.

At first instance level, three trial chambers exist, the third trial chamber having been added later to facilitate the reduction of the heavy caseload as the tribunal was approaching its completion stages. Each trial chamber is composed of at least three permanent judges and at most six *ad litem* judges.[122] Each trial chamber can be subdivided into sections of three in order to allow multiple trials to run at the same time. Each section operates under and in the same manner as the chamber it is attached to. In their day to day activities, trial chambers review and confirm indictments; conduct trials; decide on motions submitted by parties and render judgments in cases they have tried.

Article 13(4) of the ICTR Statute provides that members of the appeals chamber of the ICTY also serve as the appeals chamber of the ICTR. Article 24(a) and (b) provides that the appeals chamber hears appeals on matters of law or fact submitted by the prosecution and/or from persons convicted by the trial chambers. It adjudicates matters as the last resort level. Article 24(2) of the ICTR statute gives the appeals chamber the capacity to reverse or revise the decisions of the trial chambers or to uphold the lower chamber's decision if it deems this to be necessary and to affirm a factual or legal decision.

When the ICTR was created in 1994, the UN Security Council decided that it would share a common prosecutor with the ICTY.[123] One prosecutor for both tribunals was in place until 2003 when the UN Security Council determined, through

119 Longman, T., The Domestic Impact of the International Criminal Tribunal for Rwanda, in: Ratne, S.R. and Bischoff, J.L. (eds.), (2003) *International War Crimes Trials: Making a difference*? at 33, 37, 38.
120 *Supra* note 2 Article 10.
121 Security Council, Resolution 1431 (2002) adopted by the Security Council at its 4601st meeting of 14 August 2002, S/RES/1432 (2002).
122 *Ibid*.
123 *Supra* note 2 at Article 15(3).

resolution 1503 of 28 August that the ICTY and ICTR would be most effective and expeditious in performing their duties if each had a separate prosecutor.[124] The ICTR prosecutor is appointed by the Security Council upon nomination by the Secretary-General of the United Nations.

The office of the prosecutor has the duty to investigate and prosecute crimes of genocide and serious violations of International Humanitarian Law.[125] The investigation division of the OTP is located in Kigali, while the OTP senior management and prosecution division seat is in Arusha. In his duties the Prosecutor acts independently, it does not therefore seek or receive instructions from either governments or any others. The OTP is also in charge of lodging appeals to the ICTR appeals chamber and contesting appeals lodged by the defence before the tribunal's appellate chamber.

The office of the prosecutor is responsible for establishing a coherent and prosecutorial strategy to investigate charge, indict, prosecute, prove and appeal in the case of lenient sentences or acquittals in order to foster a comprehensive and sensitive approach to acts of gender and sexual violence. The OTP has a duty to investigate and prosecute gender and sexual violence with the same seriousness as other criminal acts within its mandate. The need to properly investigate and prosecute crimes of gender and sexual violence is mirrored by Sellers where she notes that: "When cases are improperly investigated or processed, it re-enforces the invisibility of the crimes and the invisibility of the mainly female victims or survivors of the sexual violence."[126]

The Registry generally provides judicial and administrative support to both the chambers and the prosecution. Both the office of the prosecutor and the registry are located in Arusha; for investigation and liaison matters an office of the Tribunal was established in Kigali, Rwanda.

2.4.1.3 The Jurisdiction of the ICTR

The ICTR has material jurisdiction (*ratione materiae*) over genocide, crimes against humanity and violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II committed in Rwanda in 1994.

According to the ICTR Statute, Article 3(g), rape constitutes a crime against humanity. Rape, enforced prostitution and any kind of indecent assault also constitute violations of Article 3 common to the Geneva Conventions of 12 August 1949 and of Additional Protocol II of 8 June 1977. In relation to Genocide the

124 Security Council, Resolution 1503, Annex 1 (2003), (S/RES/1503), adopted by the Security Council in its 4817th Meeting, on 14 August 2003.

125 *Supra* note 2 Articles 1, 2, 3, 4 and 15.

126 Sellers, P.V., *"The 'Appeal' of sexual violence: Akayesu/Gacumbitsi Cases"* in: Center for Human Rights, Gender Based Violence in Africa: Perspectives from the Continent, p. 60. Available at: www.chr.up.ac.za/centre_publications/gender/Gender-based%20violence%20in%20africa.pdf.

ICTR Statute reproduces *verbatim* the Genocide Convention's definition hence failing to explicitly criminalise acts of rape and sexual violence as genocide. Apart from prosecuting sexual and gender violence under the statutory provisions, rape and other forms of sexual violence can and have indeed been judged as genocide.

The ICC Statute similarly fails to extend the definition of genocide to include acts of sexual and gender violence. However, the ICC Statute is more extensive in its enumeration of gender and sexual violence acts constituting Crimes against Humanity (Article 7 subsection 1(g)) and War Crimes (Article 8 subsection 2(1), (e), (vi)). The ICC Statute provides that "sexual slavery, enforced sterilization or any other form of sexual violence of comparable gravity," amount to crimes against humanity and war crimes. Articles 7 and 8, interestingly, are open-ended and hence they can be interpreted as allowing, during prosecution, the inclusion of other gender and sexual acts not considered at the drafting stage as long as the prosecution deems such acts to be of comparable gravity with those explicitly mentioned in the Statute.

Article 1 of the ICTR Statute mandates the tribunal to try crimes committed between 1 January and 31 December 1994 – Its *ratione temporis*. The temporal jurisdiction of the ICTR is different from that of Rwanda's domestic courts; Rwandan courts have temporal jurisdiction over crimes committed between 1 October 1990 and 31 December 1994. The reasons for the difference in temporal jurisdiction between the ICTR and the Rwandan domestic systems is discussed in the section relating to the establishment of the ICTR as one of the reasons why Rwanda voted against the establishment of the Tribunal. In brief Rwanda was of the view that the ICTR's limited temporal jurisdiction fails to account for criminal activities including the planning of genocide that dates back earlier than 1994.[127]

The ICTR has personal jurisdiction (*ratione personae*) over Rwandans and non- Rwandans whose criminal actions took place between 1 January 1990 and 31 December 1990. Note that only natural persons[128] and not legal entities can be prosecuted at the ICTR. The tribunal's mandate covers crimes committed on Rwandan territory by either Rwandans or foreigners and on the territory of neighbouring countries committed by Rwandan nationals, hence its territorial jurisdiction (*ratione loci*).

Article 8 of the Statute provides that the ICTR and national courts shall have concurrent jurisdiction but allows the primacy of the ICTR over national courts. The primacy of the ICTR allows its Prosecutor to request national systems to forward a case under their investigation or prosecution that the ICTR wishes to prosecute following the procedural requirements laid down in the ICTR rules.[129]

127 Morris, M.H., "The Trials of Concurrent Jurisdiction: The Case of Rwanda." *Duke Journal of Comparative and International Law* 7 (1997): 349-374.

128 *Supra* note 2, Article 5.

129 *Supra* note 2, Article 28 and RPE Articles 8-10.

Note, though, that the ICTR has never employed this primacy rule in any case before national courts.

2.4.1.4 ICTR Rules of Procedure and Evidence Relating to Gender and Sexual Violence

The Rules of Procedure and Evidence (hereinafter RPE) of the ICTR were adopted and subsequently amended by the judges of the ICTR, pursuant to Article 14 of its statute.[130] The Tribunal's RPE determine all matters of judicial process. While all the RPE are relevant to all cases at the ICTR, some rules are directly relevant in adjudicating acts of gender and sexual violence.

Rule 34 concerning victims and the witness support unit require that victims and witnesses receive necessary support including physical, psychological, rehabilitation and more specifically counselling in cases of rape and sexual assault. Paragraph B of this rule calls for ensuring a gendered approach towards victims and witnesses as well as providing protective and supportive measures.

Rule 50 concerning the amendment of indictments, although not specifically linked to cases including gender and sexual violence, has been fundamentally useful in cases including rape and sexual violence because on its basis indictments have been amended to include allegations of rape and other acts of sexual violence. Note that all rape and sexual violence cases were initially included after the issuing of the initial indictments.

Another very important rule in cases of rape and sexual violence is Rule 96, often termed as the "rape shield rule," because it has been designed with the purpose of providing protection for victims and witnesses in a way that would encourage them to come forth and testify. This rule specifically concerns evidence which is applicable in cases of sexual violence. Rule 96 reads:

> *In cases of sexual assault: (i) Notwithstanding Rule 90(C), no corroboration of the victim's testimony shall be required; (ii) Consent shall not be allowed as a defence if the victim: (a) Has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression; or (b) Reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear. (iii) Before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible; (iv) Prior sexual conduct of the victim shall not be admitted in evidence or as defence.*

Rule 96 is intended to provide a shield against evidential rules that have remained applicable in most domestic courts and that limit or discourage victims of rape, for example the victim having to prove an absence of consent.

130 *Supra* note, Article 14.

Clearly, Rule 96, with limited exceptions, forbids defendants from using the consent of the victim as a defence. Thus far, the consent of the victim was no longer seen as an exclusive element but one that must be understood on the basis of the circumstances in which the crime of rape occurred. Consent is therefore not admissible where the victim was "subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression or reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear."[131] Rule 96 seems to have promised to provide receptive and supportive theatres within which women's violence stories would be heard.[132] In some cases, however, this was not at all the case in Arusha.

Other rules of evidence and procedure relevant in ensuring the smooth rendering of justice in cases of rape and sexual violence include Rules 69 and 73. Rule 69 relates to the non-disclosure of the identity of victims and witnesses, on the basis of which rule, in all cases including rape and sexual violence, the victims' and/or witnesses' names are replaced by pseudonyms. Their names must nevertheless be revealed to the defence to ensure respect for fair trial standards. Rule 75 allows the ICTR judges to order appropriate measures intended to ensure the security and privacy of witnesses and victims.

2.4.2 RWANDA'S ORDINARY COURTS

Rwanda's first initiative to adjudicate was to establish specialised chambers within its ordinary court system. The ordinary court system continued and still continues to deal with some genocide-related cases before, during and in the aftermath of the *gacaca* courts. This section introduces the specialised chambers established in the ordinary courts in 1996 with a mandate to deal with the genocide-related caseload.

The precursor to the establishment of specialised chambers was most expressed by Schabas's in the quote mentioned in the third paragraph of section 2.4, Schabas truely expressed the limits of existing judicial systems in handling matters so immense and complex as the genocide in Rwanda hence suggested the need to devise special and innovative solutions in order to enhance criminal prosecution for such a large scale of cases.[133]

It should be noted that any judicial system, however well equipped, would have ground to a standstill due to the workload awaiting the almost entirely destroyed Rwandan judiciary immediately after the genocide. Even before 1994, the Rwandan judiciary was certainly not an efficient system. The prosecution and judiciary were

131 Rule 96 of the ICTR rules of procedure and evidence.

132 Fineman, M.A., *Transcending the Boundaries of Law Generations of Feminism and Legal theory*, (Abingdon, Oxon: Routldge, 2011) at 302.

133 Schabas, W.A. (1998), "Justice, Democracy and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems," 7 *Crim. L.F.,* at 534.

composed of a modest number of magistrates and judges, of which not more than 50 had attained a formal legal education.[134]

Certainly, with a weak and politically-driven judicial system, Rwanda had not established any national mechanisms charged with the prosecution of and effectively punishing the genocide as obligated by Article V of the Genocide Convention,[135] even though it had been a party to the Genocide Convention since 1975.[136]

In the aftermath of the genocide, the already ill-equipped justice system was seriously destroyed. Some employees were killed; others had taken part in the genocide and had either been detained or had fled the country. Rwanda was therefore faced with having to reconstruct its judiciary to allow an ordinary criminal justice system to operate if it was to be a state committed to enhancing the rule of law. Most importantly Rwanda, as Schabas suggests above, was required to look for special and innovative solutions to deal with the genocide-related caseload.

Clearly, there was no readily available answer. The search for what would be most effective was a challenge on its own. In the sections that follow, I will discuss the establishment of the specialised chambers and the major innovations of Rwanda's first genocide-related judicial system.

2.4.2.1 The Quest for a Judicial Response

The quest for a justice system equipped to deal with the genocide-related caseload was a phantom in the eyes of Rwanda's transitional government. Dead bodies filled the streets and countryside, the number of wounded was enormous with minimum medical care, orphans and widows were left threatened and homeless; water, electricity and schools were not operational; and prisons and detention facilities had been filled with genocide suspects. The detained and their families demanded justice with the same urgency as the demand from survivors. Clearly, one of Rwanda's major challenges was how to deal with the legacy of the genocide. Yet the scale of the genocide and the manner in which it affected the entire country in terms of human and infrastructure destruction presented unfathomable obstacles.

Rwanda was faced with the crucial question of how to ensure justice for the victims and perpetrators. With which judicial mechanism, and how could that mechanism be effective, given the magnitude of the challenge? With a history of impunity in cases of ethnic violence, it goes without saying that the need for justice was urgent; however, ensuring justice in cases of genocide and related crimes is enormously

134 *Supra* note 212 at 533.

135 Article V of the Genocide Convention provides that: The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III.

136 Rwanda ratified and rendered the Genocide Convention applicable in Rwanda in 1975, See *Decree-loi, no. 8/75, Fevrier 12, 1975, Journal Officielle, (J.O) no. 230.*

difficult because of the extraordinary scale of the crimes and the damage that such crimes cause.

Crucial questions on how to deal with post-genocide justice were raised during the Kigali International Conference organised by the government of Rwanda in 1995 and which was intended to make a collective and reflective search for a solution by national stakeholders and international experts.[137]

The Kigali conference considered fundamental questions including whether impunity had facilitated the development of genocide and how to prevent this impunity; what international obligations exist for new governments that succeed previous governments that have perpetrated massive human rights violations; and how to analyse existing mechanisms elsewhere where massive violations of human rights have taken place. Another point of discussion concerned what strategies would be employed in holding accountable citizens from all walks of life who had participated in the genocide?

Three major principles lay at the heart of the search for a judicial solution to the genocide in Rwanda during the discussions at the Kigali conference. After several discussions the participants resolved:

> *There shall be no impunity for these crimes. Those who are guilty have a rendez-vous with justice. Any regime of accountability must seek to balance the imperative need for justice with the stability of the society and the inevitable limitations of resources. (and) Given the enormity of the crimes, the finite resources available to the government of Rwanda and the need to act with dispatch, it is necessary to prioritize the demands of justice and, in appropriate circumstances, to enlist alternatives to the traditional system of criminal trials.*[138]

From a variety of recommendations for a judicial response – including the establishment of an independent specialised tribunal; an office of a special prosecutor; an assize court or, the creation of a specialised chamber within Rwanda's ordinary judiciary – the latter was prioritized leading to the establishment of specialised chambers in August 1996.

137 Office of the President, *Recommendations of the Conference Held in Kigali from 1 to 5 November 1995 on: "Genocide, Impunity and Accountability: Dialogue for a National and International Response*" (1995). One hundred sixty five persons participated in this meeting, from within and outside Rwanda. At 20.

138 Haveman, R., Gacaca in Rwanda: Customary Law in Case of Rwanda, in: Fenrich, J.M., Galizzi, P. and Higgins, T. (eds.), *The Future of Customary Law in Africa* (Cambridge: Cambridge University Press, 2011) at 387-420.

2.4.2.2 The Normative Framework

On 30 August 1996, Organic Law No. 08/96 responsible for the organisation of prosecutions for offences constituting the crime of Genocide or Crimes against Humanity committed since 1 October 1990 came into force.[139]

The preamble notes that "to achieve reconciliation and justice in Rwanda, the culture of impunity must be eradicated forever." *Vis-à-vis* the applicable law in terms of punishable acts and fundamental criminal law principles, Organic Law No. 08/96 notes that any prosecution will be based on existing laws including the Genocide Convention, the 1949 Geneva Conventions and Additional Protocol II, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 26 November 1968 and the Rwandan Penal Code.[140]

In terms of judicial process, however, it was noted that "the exceptional situation in the country requires the adoption of specially adapted measures to satisfy the need for justice of the people of Rwanda."[141] The specifically adopted measures in this organic law, as will be discussed further, mainly include: the establishment of specialised chambers in Rwanda's ordinary and military courts; the categorisation of offenders according to the gravity of their criminal participation; and the introduction of the process of confession and a guilty plea for suspects of genocide and crimes against humanity. These measures were introduced in order to facilitate the process of justice to be more effective and expeditious given the circumstances.

2.4.2.3 Structure and Functioning of Specialised Chambers

Specialised chambers were the preferred option compared to the establishment of a totally independent special Court. Participants recommended that specialised chambers would be more convenient because they would safeguard the integrity of the judiciary and would be more cost-effective as they would enable an economic use of material and human resources.

Rwanda's ordinary criminal jurisdiction was composed of the following: the *Tribunaux de Canton* competent to hear minor criminal cases and a range of civil suits; the *Tribunaux de premiere instance,* having the territorial jurisdiction at the *prefecture* level and material jurisdiction over all criminal matters save for a few enjoying privileged jurisdiction or those within the mandate of the *Tribunaux de Canton;* the *Cours d'Appel* and the *Cours de Cassation*. In 1996 the law establishing

139 Organic Law No. 08/1996 of 30 August 1996, On the Organisation of Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity committed since 1 October 1990, O.G No. 17 of 1 September 1996. See also *supra* note 217 at 390.

140 *Ibid*. Article 39 which states that: "Unless otherwise provided in this organic law, all laws including the penal code, code of criminal procedure and the Code of Judicial Organisation and Jurisdiction shall apply before the specialised chambers."

141 *Ibid*.

specialised chambers at the first instance court and within the Military Tribunal was instituted. At the same time the Court of Cassation was replaced by re-establishing the Supreme Court that had five sections: the *Cour de Cassation*, the *Conseil d'Etat*, the *Cour de Compte*, the *Cour Constitutionnelle* and the section in charge of the *Cours et Tribunaux*.[142]

Article 19 of Organic Law No. 08/96 establishes specialised chambers within the jurisdictions of the courts of first instance and military courts. As stipulated by Article 1 of that Organic Law, the specialised chambers adjudicate genocide or crimes against humanity perpetrated by civilians in ordinary civilian courts. Similar crimes perpetrated by members of the defence forces and their accomplices are adjudicated by specialised chambers of the military courts.

Under Article 1 the crimes adjudicated before the specialised chambers are those that were committed during the period between 1 October 1990 and 31 October 1994. The temporal jurisdiction of the specialised chambers catered for the four-year period of the genocide, as perceived by the Rwandan government that had earlier been rejected by the members of the UN Security Council when the ICTR was created.

The courts of first instance were managed by the president and his deputy, the vice president. Judges for the specialised chambers were chosen from the ordinary judges of the court of first instance. Once attached to the specialised chambers, they would be led by the vice president of the court who by law became the president of the specialised chambers. Several benches of a specialised chamber could adjudicate matters simultaneously.

Each case before the specialised chambers was presided over by a bench of three judges, who would hear a case either at the seat of the court of first instance in which the bench operates or anywhere within the territorial jurisdiction as an iterant chamber. Itinerant chambers were often encouraged due to their convenience for the population who often had to travel long distances as witnesses, but they were also an option in allowing people to see justice being done.

In order to cater for the special needs of juvenile offenders accused of genocide or crimes against humanity, specialised chambers were required to have specific chambers charged with adjudicating cases in which minor offenders were involved. According to the then Rwandan Penal Code, criminal responsibility was set at the age of 14, hence children of that age and above who had participated in the genocide were prosecuted and punished with a penalty that was half of that imposed against an adult accused of the same acts.[143]

142 *Supra* note 216.
143 *Supra* note 82, Article 77.

Decisions by the specialised chambers could be subject to an appeal and/or review. An appeal had to be lodged in one of the five appeal courts on the basis of questions of law or a flagrant error of fact. The appeal period for cases of genocide or crimes against humanity was reduced to 15 days as opposed to 30 days permitted in ordinary criminal cases.[144]

Since the law did not define what a flagrant error of fact was, it was up to the appeals chamber to determine within three months of the submission of the appeal on the basis of the submitted documents if the appeal was admissible.[145] Once an appeal was granted, the appeals court then examined the appeal on the basis of the documents submitted before it without necessarily having the parties present for a trial. Decisions from the appeals chamber were not appealable except in very limited cases where a review was admissible.

The Court of Cassation admitted applications for a review from the accused convicted by the appeals court following an acquittal at the first instance level. Such extreme decisions allowed the convicted person, within fifteen days, to seek a third judicial opinion. If the review was granted then the case could be submitted to another Court of Appeal for a retrial.[146] The prosecution also reserved a right to apply for a review before the Court of Cassation in the interest of law in cases where the Appeals Court had reached decisions which contradicted the law.[147] This kind of review would be submitted by the prosecution within three months of the decision of which its review was sought.

2.4.2.4 Categorisation

As far as possible, the eradication of impunity was necessary in all cases. While all levels of Rwandan society had participated in the genocide, a realistic accountability approach necessitated that consideration had to be given to the actors in the genocide at their different levels of criminal participation and the gravity of the offences in question. Some perpetrators had planned the crimes, killed, tortured, raped and/or looted or destroyed property. Some of these acts called for the most serious of punishments while others required less stringent sentences.

Article 2 of Organic Law No. 08/96 sets the parameters within which participants in the genocide or crimes against humanity are categorized in four categories depending on the level of their criminal participation. Note that all categorized acts were presumably committed as part of the genocide.[148]

144 *Supra* note 218, Article 24.
145 *Ibid*.
146 *Ibid*, Article 25.
147 *Ibid*, Article 26.
148 *Ibid*, Article 2. See also *supra* note 217, Roelof Haveman discusses in detail the three major categories of genocide offenders and the punishments thereof.

The first category encompasses persons whose criminal participation qualify them as planners, organizers, instigators, supervisors and leaders of the crime of genocide or a crime against humanity. It includes persons who, through their leadership positions at central or local government administrative level, in a political party, the army, religious organizations or in a militia, perpetrated or enhanced the commission of genocide or crimes against humanity. Category one also includes the so-called notorious killers "who committed genocide and related crimes zealously and/or with excessive malice and lastly but not least those who committed acts of sexual torture".[149] The second category includes persons who committed intentional homicide or serious assault causing death and those who conspired with the perpetrators or the accomplices.[150] Category three refers to individuals guilty of serious assault against a person and category four concerns persons who committed property offences.[151]

The initial categories were subsequently amended as will be discussed further in this work, removing some groups from a given category, adding criminal acts like rape where in the first law only sexual torture had been mentioned and merging two categories to leave only three in subsequent laws.

2.4.2.5 Confession and Guilty Plea

The procedure of a confession and guilty plea[152] was introduced in the Rwandan penal system by the 1996 genocide law. The procedure allows persons accused of any of the criminal acts enumerated in Article 1 of the law to enter a confession and guilty plea. A confession and guilty plea could be entered at any time before the accusation was officially made to the court. Anyone pleading guilty reserved the right to revoke his plea as long as a judgment had not yet been rendered. The right to plead guilty was exercisable only once, and in the case of a withdrawal of the plea the prosecution or the court were barred from using evidence submitted in the plea. Critics of the confession and guilty plea procedures feared that the process would be employed abusively or would enhance self-incrimination, thereby jeopardizing due process.

A complete and admissible guilty plea required a detailed account of the crimes committed, information regarding accomplices and conspirators intended to facilitate the prosecution and an apology for the offences committed. Once a confession and guilty plea was considered admissible by the president of the Competent Court, a generous reduction in penalties would be applicable but only for persons falling under categories 2-4. Therefore, even though category 1 offenders also had a right to plead guilty, their plea could not win them a reduction in penalties. Confessions and guilty pleas were central to the genocide law because

149 *Ibid*, Article 2, Category 1 paras (a) to (d).
150 *Ibid*.
151 *Ibid*.
152 *Ibid*, Articles 4-9.

they were intended to expedite cases and foster reconciliation because of making an apology.

2.4.3 *GACACA* COURTS

> *We must learn from history, we can only punish the perpetrators of genocide, we cannot eliminate them otherwise, it would be the Hamurabi way of handling state affairs. We must by all means learn how to handle such situation as they come by. Those who took part in planning and executing genocide are not there today to play a role in the task ahead of rebuilding this nation. Therefore gacaca must be prepared to handle a great deal of work.*[153]

2.4.3.1 The Establishment of Gacaca *Courts*

Gacaca courts were created by Organic Law No. 40/2000 on 26 January 2001. Similar to Organic Law No. 08/96, the *gacaca* law governs the prosecution of genocide and other crimes against humanity committed in Rwanda between 1 October 1990 and 31 December 1994. Organic Law No. 40/2000 established a four-level *gacaca* court matching the then administrative levels of the country; that is the *gacaca* court of the Cell, Sector, District/town and the province/Kigali City.[154]

Faced with the impairments of the ICTR and the specialised chambers, the Government of Rwanda resorted to searching for a more effective judicial mechanism. *Gacaca* courts are a hybrid of the traditional *gacaca* and some elements of ordinary criminal law principles applicable in Rwanda's national criminal justice system. *Gacaca* etymologically means a green lawn commonly grown in traditional homesteads in Rwanda. Families, neighbours and villagers often meet there to relax, celebrate or discuss matters of concern to the community.

Traditional *gacaca* is a conflict resolution mechanism conducted by elderly men of integrity with the aim of doing justice, reconciling and restoring harmony that would have been jeopardised by the wrong done. *Gacaca* courts were established according to the same philosophical thinking of the traditional *gacaca* of doing retributive justice, in a manner that allowed local communities to participate in doing justice.

Gacaca courts are an alternative which were obligated by the imperfections of earlier post-genocide judicial systems. The *gacaca* courts reflect a reconciliatory and punitive system of justice and one intended to foster the speeding up of

153 Kararsira, P., "Gacaca: Justice for all or injustice for some" available at: www.inkiko-gacaca.gov.rw/En/EnGacaca.htm, accessed on 29 June 2009.

154 *Organic Law No. 40/2000 of 26/01/2001 setting up 'Gacaca Jurisdictions' and organizing prosecutions for offences constituting the crime of genocide or crimes against humanity committed between 1 October 1990 and 31 December 1994*; and *Organic Law No. 33/2001 of 22/6/2001 modifying and completing Organic Law No. 40/2000 of 26 January 2001*.

genocide trials. Note that *gacaca* courts have worked concurrently with the ICTR and specialised chambers.

The *gacaca* courts officially started to operate nationwide in January 2005, following a pilot phase at the level of one sector per province.[155] The pilot phase was carried out as a measure to evaluate if indeed these new courts were a possibility. Five months later, the pilot phase increased its size from 12 to 118 sectors. By then the *gacaca* courts were not only up and running in each province but also in each district, town and municipality. The fact that the 12 pilot-phase courts proved a possibility further encouraged and extended the pilot phase, eventually leading to *gacaca* courts operating on a nationwide basis.

2.4.3.2 Objectives of Gacaca *Courts*

Gacaca courts were established to accomplish the specific objectives of revealing the truth about what happened during the genocide; speeding up genocide cases through the establishment of many courts; eradicating the culture of impunity; the reconciliation of Rwandans and reinforcing their unity; and proving that Rwandan society has the capacity through home-grown initiatives to solve its own problems. The preamble to the law establishing the *gacaca* courts notes that:

> *Considering the necessity to eradicate for ever the culture of impunity in order to achieve justice and reconciliation in Rwanda, and thus to adopt provisions enabling rapid prosecutions and trials of perpetrators and accomplices of genocide, not only with the aim of providing punishment, but also reconstructing the Rwandan Society that had been destroyed by bad leaders who incited the population into exterminating part of the Society.*[156]

In his national address on 3 October 2001 on the eve of the election of *gacaca* judges known as the *Inyangamugayo*, President Paul Kagame further highlighted Rwanda's expectations and the contribution of the *gacaca* courts:

> *What Rwanda expects from the gacaca courts is to establish the truth about what happened, to expedite the backlog of Genocide cases, to eradicate the culture of impunity and to consolidate the unity of our people. Furthermore, if the gacaca courts function as we anticipate, it will be an important contribution to the understanding and advancement of international law.*[157]

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155 The pilot phase started in June 2002 with an information phase in 751 *gacaca* courts in 118 (initially 12) sectors, with the trial phase starting in March 2005.

156 Preamble, Organic Law No. 16/2004 of 19/6/2004 establishing the organization, competence and functioning of gacaca courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between 1 October 1990 and 31 December 1994 (O.G. Special No. of 19/6/2004).

157 Address to the Nation by H.E. Paul Kagame, President of the Republic of Rwanda on the eve of the election of Gacaca Judges on 3 October 2001, available at: www.rwanda1.com/government/07 11 01 add.htm.

The establishment of about 11,000 *gacaca* courts handling the majority of cases that would initially have remained the task of the 12 specialised chambers would undoubtedly speed up the judicial process. *Gacaca* courts were to empower ordinary citizens, the majority of whom were eyewitnesses to the genocide, to play an important role in discovering the truth. On the basis of the truth, citizens would condemn and punish the guilty.

It was therefore agreed that the *gacaca* court system, as a matter of policy, would be the adequate responsive approach to the Rwandan situation. It is perhaps important to remind the reader that Rwanda's post-genocide situation was largely characterised by an unknown, but unquestionably large number of victims and suspects as well, plus a shattered judicial system. Notwithstanding this, Rwandan society expected not only a fair judicial process but also a speedy one so as to roll back the long established culture of impunity.

The expected justice could not have functioned without, of course, sufficient facts about the alleged crimes committed and about the alleged suspects. The set objectives of establishing the truth and rendering more expeditious justice had to be satisfied, on the one hand, without diminishing the other objective of unity and reconciliation, on the other. Thus *gacaca* courts were historically and circumstantially brought within the perspective of the contemporary judicial system of Rwanda.

In a bid to attain their objectives and improve their efficiency, it has been necessary since the introduction of the *gacaca* courts for Parliament to amend the law relating to *gacaca* jurisdictions on several occasions. This shows the rapidly developing character of the *gacaca* courts, with decision makers trying to cope with problems that emerge during the process or which have already been foreseen before that moment. Such changes demonstrated that this apparently most reliable solution was also not without challenges.

After ten years of *gacaca* jurisdictions, the genocide caseload had greatly diminished. Perceptions about the work of the *gacaca* courts varied from appreciation to criticism. Some praise them for facilitating information about the nature, place and time of death of victims; some victims have been relieved because they have been able to know the whereabouts of the remains of the victims and have buried them with decency and respect. Perpetrators have benefited from a speedy trial, reduced sentences and the alternative to imprisonment of commuting the custodial sentence into community service, a right which can only be enjoyed by those tried by the *gacaca* courts. Others criticise the *gacaca* courts for opening up fresh wounds and, consequently, fuelling hatred between neighbours.

According to an evaluation study, the *gacaca* courts attained their objectives with an average of over 85%.[158] Some researchers have attested to the success of *gacaca* courts.[159] Many would agree that the *gacaca* courts were fundamentally debilitated by a number of obstacles. International human rights groups and observers were at the forefront in criticising the *gacaca* courts right from their inception. Human Rights Watch in its report "*Justice compromised*" noted in 2011 that its concern was based on the *gacaca* courts' lack of fair trial safeguards which limited the defendants' ability to effectively defend themselves.[160]

In earlier criticisms, the use of lay judges (non-lawyers) in such serious criminal cases attracted attention. The *gacaca* is a form of participative justice. Every citizen is obliged to take part in the *gacaca*.[161] This is not as strange as it may seem. Before 2006 Rwanda's judiciary still had non-lawyers serving as prosecutors and judges. Note, however, that the use of lay judges is commonplace in serious criminal cases in other judicial systems, for example the *Cour d'assiz* in Belgium and the right to a trial by a jury in the USA and the United Kingdom.

2.4.3.3 Structure and Jurisdiction[162]

The Organic Law No. 40/2000 on *gacaca* courts established four levels of the courts: The cellule (cell) courts, the sector district or town and the highest being the provincial/City of Kigali *gacaca* courts. The four *gacaca* court levels matched the provincial and local administrative structures in Rwanda at the time.[163] Following the constitutional and judicial reforms in Rwanda in 2003 and 2004 the *gacaca* law was amended thereby replacing the four levels with three: the *gacaca* court of the Cell, the *gacaca* court of the sector and the *gacaca* court of appeal having the same territorial jurisdiction as the *gacaca* court of the cell but only at the appeal level.[164]

Gacaca judges (*Inyangamugayo*) were elected throughout the country on 4 October 2001; eligible to vote and to be elected were all citizens aged eighteen years and

158 For a summary of the achievements of *gacaca* courts see Gacaca Courts Genesis Impementation and Achievements, available at: http://rpfinkotanyi.org/wp/?p=1958, accessed on 30 May 2013.

159 De Brouwer, A-M. and Ka Hon Chu, S., Gacaca Courts in Rwanda: 18 Years after the Genocide, is there Justice and Reconciliation for Survivors of Sexual Violence? Available on The Men Who Killed Me website at: www.menwhokilledme.com/news/reconnecting-wit-the-survivors-featured-in-%e2%80%9cthe-men-who-killed-me%e2%80%9d, accessed on April 2012. See also Clark, P., *The Gacaca Courts, Post Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers* (Cambridge: Cambridge University Press, 2011).

160 Human Rights Watch, *Justice compromised: The legacy of Rwanda's community-based Gacaca Courts*, (New York, 2011) at 143.

161 *Supra* note 235, Article 29.

162 A part of this section reproduces what has already been published; see Kaitesi, U. and Haveman, R., Prosecution of Genocidal Rape and Sexual Torture before the Gacaca Tribunals in Rwanda, in: Letschert, R., Haveman, R., De Brouwer, A.M., Pemberton, A., *Victimological Approaches to International Crimes: Africa*, (Antwerp: Intersentia, 2011) at 387-412.

163 Revu la loi n° 47/2000 du 19/12/2000 modifiant et complétant la loi du 15/04/1963 portant structures de la République du Rwanda telle que modifiée et complétée à ce jour.

164 *Supra* note 235, Articles 3 and 4.

above. The *Inyangamugayo* were elected on the basis of their personal integrity in values and relationships with their neighbours. *Inyangamugayo* are lay citizens charged with the duty to try genocide and related crimes within the jurisdiction of the *gacaca* courts. The *Inyangamugayo* received basic training in the laws and procedures of the *gacaca* courts. The work of the *Inyangamugayo* was largely voluntary with limited and very minimal financial incentives.

Organic Law No. 40/2000 served as an amendment to Organic Law No. 08/96; in relation to the categorisation introduced by the 1996 law, the 2001 *gacaca* law reduced the categories from four to three whereby categories two and three were merged to form category 2. Organic Law No. 16/2004 of 19 June 2004 replaced Organic Law 40/2001, and the law was continuously amended until the inclusion of some category one cases within the competence of the *gacaca* courts in 2008.

The crimes covered by the *gacaca* law are crimes against humanity and acts of genocide committed between 1 October 1990 and 31 December 1994 that is starting on the day when the RPA/RPF invaded Rwanda and the war started. Rwandan Law neither requires proof of the specific intent to destroy a group in cases of genocide nor acts having been committed as part of a widespread and systematic attack directed against the civilian population for crimes against humanity. The overarching assumption in the law is that these acts were committed as part of a widespread or systematic attack or with the intent to destroy, in whole or in part, a racial or ethnical group, and therefore constitute crimes against humanity and acts of genocide. From a legal point of view the crimes to be prosecuted and tried before the *gacaca* are in fact "ordinary" crimes. As Rwanda had ratified the relevant international conventions, but not yet provided for sanctions, the basis of any prosecution was the Penal Code.

Criminal participation has been grouped in three categories.[165] The *first category* is formed by those who planned and organised the genocide, those who committed crimes as high-ranked officials within religious or state institutions or in militia, or incited crimes to be committed, or supervised and led others in executing the genocide. Those who committed rape and sexual torture fall within this category and stand out as a group that does not reflect its role in influencing others but rather for the gravity given to the act that they committed or aided and abetted. This category comprises an estimated 10,000 suspects of whom 7,000 were suspected of sexual torture and rape and have been tried accordingly.[166] Note that *Chapter 7* of

165 Art. 11 of Organic Law No. 10/2007 of 01/03/2007. Initially (art. 51 of Organic Law No. 40/2000 of 26/01/2001) there were four categories. These four categories have been refined and, broadly speaking, by combining the initial 2nd and 3rd category, have been brought back to three categories.

166 Until Organic Law No. 10/2007 of 01/03/2007 the 1st category entailed also those who distinguished themselves by the zealousness or excessive wickedness with which they took part in the genocide, and violators of corpses. As at the end of the information phase of the *gacaca* this category turned out to be too large – about 70-80,000 suspects – to be tried by the regular courts within a reasonable time (as 1st category cases are), the 1st category has been diminished, and these two groups have been shifted to the 2nd category.

this study details the legacy of the *gacaca* courts in dealing with rape and sexual torture including parliamentary discussions on the matter.

The *second category* entails those who distinguished themselves by the zealousness or excessive wickedness with which they took part in the genocide, the torturers – except the sexual torturers falling within the first category –, violators of corpses, those who "just" killed someone else, and those who acted with the intention to kill but did not succeed, and other criminal acts against persons without the intention to kill.

The *third category* is formed by those who committed acts against property. Although traditionally speaking acts against property do not fall under the definitions of genocide, genocide laws in Rwanda have included this category especially because the destruction of property was based on the same reasons as to why the owners were hunted and killed. The properties were both symbols, for example cows, and sources of livelihood, like housing for those persons destined for destruction and hence targets for destruction too.

All these crimes include accomplices, i.e. persons who have, "by any means, provided assistance to commit offences with persons" who committed the said acts themselves.[167] Superiors are criminally responsible for the acts of their subordinates "if he or she knew or could have known that his or her subordinate was getting ready to commit this act or had done it, and that the superior has not taken necessary and reasonable measures to punish the authors or prevent that the mentioned act be not committed when he or she had means."[168]

Applicable sentences under *gacaca* laws include life sentences, other prison sentences, suspended sentences,[169] community service[170] and the payment of damages for property offences related to the genocide.. Initially also the death penalty was possible. In 1998, a total of 22 people were executed in public execution ceremonies. Since then more than 500 1st category offenders have been sentenced to death, but no one has been executed. The death penalty was finally abolished in Rwanda in 2007.

Regarding rape and sexual torture – first-category offences – the applicable penalties are life imprisonment or a prison sentence of up to 30 years. An important determining factor is whether the suspect/offender has confessed, pleaded guilty, repented and apologised. In that case the punishment is substantially diminished, in order to encourage confessions. Offenders who are guilty of rape and sexual

167 *Supra* note Article 53.
168 *Ibid.*
169 Organic Law No. 10/2007 of 01/03/2007 introduced the suspended sentence; the reason behind this is that the number of persons sentenced to imprisonment was expected to be too high to hold all of them in the available prisons.
170 *Supra* note 244, Article 13.

torture and who have confessed and repented face a prison sentence of between 20 and 30 years.[171] Community service is not possible.

Apart from imprisonment and community service, offenders who were 18 years and older when they committed the crimes "are liable to"[172] the withdrawal of civil rights, perpetually or for the duration of the sentence, that is to say the right to be elected, to become leaders, to serve in the armed forces, to serve in the National Police and other security organs, and to be a teacher, a member of medical staff, a magistrate, a public prosecutor and a member of the judicial council.[173] The rights to be withdrawn and the duration thereof depend on the category and whether the offender has confessed.

171 Within the group of confessors a distinction has been made according to the moment when the confession is made: before the name was included on the list of perpetrators drawn up by the cell gacaca: 20 to 24 years, and after that moment, when the suspect already appears on that list: 25 to 30 years. This distinction already existed for 2nd category cases, but was introduced with regard to 1st category offenders by Organic Law No. 10/2007 of 01/03/2007.

172 We understand that "are liable to" (in the French text: "*encourent*") means: rights may be withdrawn but not necessarily.

173 *Supra* note 244, Article 15 and Article 76.

3 THE RWANDAN EXPERIENCE: A COMPLEX REALITY

3.1 GENDERED GENOCIDAL DISCOURSE: A PRECURSOR TO GENOCIDE

In the years leading up to the genocide, especially Tutsi women were targeted by genocidal propaganda. Christopher Jones in his work "*A gendered genocide: Tutsi women and Hutu extremists in the 1994 Rwandan Genocide*" explores in great detail the targeting of Tutsi women and the reasons for doing so by Hutu extremist propaganda before and during the genocide.

The role of pre-genocide anti-Tutsi propaganda was correctly explained by the ICTR, writing about the publication of the Hutu Ten Commandments in the journal Kangura, in 1990, with the conclusion that: "By defining Tutsi women as an enemy … , Kangura articulated a framework that made the sexual attack of Tutsi women a foreseeable consequence of the role articulated to them."[1] Pre-genocide discourses about the sexuality of Tutsi women defined them in a manner that created an imagery of Tutsi women as an enemy weapon. Hutu extremists were preoccupied by their belief that Tutsi women threatened the Hutu since, as argued, Tutsi women used their sexuality to lure Hutu men. Yuval Davis rightly observes that "those who are preoccupied with the purity of the race would also be preoccupied with the sexual relationships between the members of different collectivities."[2]

The genocide intended to make Rwanda a homogenous Hutu country yet the homogeneity of the Hutu would not survive the intermarriages and other relationships between Hutu men and Tutsi women. The specific targeting of Tutsi women was certainly aimed at enhancing the Hutu purity ideology, but most clearly at reversing certain practices in society. Intermarriage was specifically targeted by the Hutu extremists' propaganda in the 1990s in order to alter an earlier provision by Gitera, the author of the first Hutu Ten Commandments from the 1950s in which, according to commandment seven, Hutu men were allowed to marry Tutsi women but prohibited them from having Tutsi concubines.[3]

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1 *Supra* note 106 para 188.

2 Yuval-Davis, N. and Anthias, F. (1993), *Race, Nation, Gender, Colour and Class and the ant-Racist Struggle* (New York: Routledge) at 18.

3 *Supra* note 123 at 245-247.

At the same time Gitera warned his fellow Hutu against the intrigues, lies, dishonesty and dangerousness of the Tutsi. In commandment six Gitera prohibited adultery and fornication with Tutsi women qualifying promiscuity with them as a curse. In commandment nine Gitera reminded Hutu men that it was wrong to admire and pursue Tutsi women and girls. In his comparison of Tutsi and Hutu women Gitera noted that Tutsi women and girls did not have better physical features than those of the Hutu, instead they exhibited more forms of bad behaviour when compared to Hutu women.[4]

Decades after Gitera's first version of the Hutu Ten Commandments, a new and modified version of the commandments was published by Hassan Ngeze in the Kangura extremist newspaper on 6 December 1990.[5] Gitera and Hassan Ngeze's anti-Tutsi propaganda reveals the importance that Hutu extremists attributed to sexual relations between Tutsi women and Hutu men. Obviously an analysis of the commandments and other related genocide propaganda reveals that rape and other forms of sexual violence were an unavoidable outcome.

The December 1990 issue of Kangura entitled "Appeal to the Conscience of Hutu", directly attacked Tutsi women in its part four subtitled "Tutsi women". Tutsi women were depicted as spies in Hutu influential circles claiming that through sexual and marital relations Tutsi women passed on secrets to the enemy. The first commandment warned the Hutu to abstain from relations with Tutsi women otherwise they would be considered as traitors if they married, took Tutsi women as mistresses and employed them as secretaries or *protégées*.[6] The prohibition against marrying Tutsi women was repeated but in a more specific manner *vis-à-vis* the Rwandan Armed Forces; Commandment No. 7 called for the forces to be entirely Hutu and explicitly that: "*No soldier must marry a Tutsi woman*".[7]

After alienating Tutsi women, the second and third commandments appealed to all Hutu men to appreciate and relate with Hutu women. It states: *"Every Hutu male must know that our Hutu daughters are more dignified and conscientious in their role of woman, wife and mother. Are they not pretty, good secretaries and more honest!"*[8] The third commandment appealed to Hutu women to liberate Hutu men from the snare of Tutsi women calling upon "Hutu woman, be vigilant and bring your husbands, brothers and sons back to their senses."[9] According to the Office of the Prosecutor of the ICTR the Hutu Ten Commandments were "not only an outright call to show contempt and hatred for the Tutsi minority but also to slander and persecute Tutsi women."[10]

4 *Ibid*.
5 Ngeze Hassan's Hutu Ten Commandments as published by Kangura No. 6 of December 1990, available at: https://repositories.lib.utexas.edu/bitstream/handle/2152/9315/unictr_kangura_006a.pdf, last accessed on 4 May 2013.
6 Taylor, C. (1999), *Sacrifice as Terror: The Rwandan Genocide of 1994* (New York: Berg) at 49.
7 *Supra* note 106 paras 138-139.
8 *Supra* note 254 at 44.
9 *Ibid* at 45.
10 *Supra* note 256 para 383.

A common element within the genocide propaganda is the comparison between Tutsi women and Hutu women. The comparison of Tutsi women with Hutu women is responsible for the antagonism Hutu women held against their Tutsi sisters. Tutsi women were reflected by the colonial narrative in terms of beauty, for example the Catholic priest Van de Burgt observed that: "(w)e can see Caucasian skulls and beautiful Greek profiles side by side with Semitic and even Jewish features, elegant golden-red beauties in the heart of Ruanda and Urundi."[11] Narratives praising the beauty of Tutsi women downplayed Hutu women as less attractive, which may explain why some Hutu women mercilessly abused or caused the sexual abuse of Tutsi women during the genocide.

In another Kangura Issue, No. 40 of February 1993, Tutsi women were depicted as one of the two effective Tutsi weapons against Hutu unity. The issue stated in part "when the Tutsis were overthrown by the people's revolution in 1959, they have never slept again on their laurels. They have been doing their utmost to restore the monarchy by using their women *ibizungerezi* and money which seems to have replaced cows."[12] *Ibizungerezi* is the plural of a Kinyarwanda metaphor for Ikizungerezi which was used to refer to Tutsi women as a source of destabilisation for Hutu men. *Ikizungerezi* is coined from the verb *kuzengereza* meaning dizziness.

By calling Tutsi women *ibizubgerezi* the genocide propagandists implied that the so-called seductive character of Tutsi women was responsible for making Hutu men insensible. Josiah Semujanga stated that a woman referred to as *ikizungerezi* is desirable since she is beautiful.[13] This explains why the Hutu extremist radio RTLM producer Kantano appealed to Hutu women to become *ibizungerezi* towards the French soldiers. Kantano asked Hutu women to seduce French soldiers to become allies of the Interim government as the Tutsi women did.[14]

From the reading of the genocidal propaganda the Tutsi were victims of genocidal sexual and gender violence because of three major roles they were seen to play in the Rwandan context. First, is their role as producers, which had two dimensions; they ensured the birth and biological continuation of the Tutsi. The destruction of the Tutsi would not effectively suffice without the destruction of Tutsi women as individuals and equally important as reproducers of the Tutsi. This explains acts of genocidal violence such as genital mutilation, the cutting off of breasts, the opening of wombs of pregnant women, deliberate infection with incurable diseases and the use of acids and other destructive objects like broken bottles.

11 Prunier, G. (1995), *The RwandaCrisis History of Genocide* (Kampala: Fountain Publishers) at 7. See also, Mworoha, E. (1977), *Peuples et Rois de l'Afrique des Lacs* (Dakar: Les Nouvelles Editions Africaines) at 25.

12 *Supra* note 256 para 382.

13 Semujanga, J. (1998), *Recits fondateur du drame rwandais Discours Socials, Ideologies et stereotypes* (Montreal: L'Harmattan) at 194.

14 Rangira, B.G. (2008), Militarism, Ethnicity and Sexual Violence in the Rwandan Genocide, 9-30 in: Mama, A., and Okaziwa-Rey, M., *Feminist Africa 10 Militarism, Conflict and Women's activism* (Capetown: African Gender Institute) at 20.

The second dimension of Tutsi women as reproducers was the fact that they threatened Hutu purity. Children born out of Hutu-Tutsi intermarriages, although taking the ethnicity of their fathers due to the patriarchal lineage, were never considered purely Hutu. That is why the exclusivity of the Hutu is mentioned. To take the propaganda further, it was claimed that Tutsi women married to Hutu men never fell pregnant with their husbands; instead it was claimed they had their Tutsi brothers impregnate them as a means of avoiding producing Hutu children. This campaign is to be blamed for the crossing of lines in which Hutu men killed their children because they had been persuaded about the so-called treachery of their Tutsi wives but also of the threat that their Tutsi wives and mixed children posed to the ultimate goal of the unity and purity of the Hutus.[15]

A second important role of Tutsi women that exposed them to genocidal violence was the fact that they were Tutsi. Through sexual violence Tutsi women and some men were destroyed as a means to achieve the immediate and long-term genocide against the Tutsi. Tutsi women and men were attacked mainly because of their ethnicity in a manner that prioritised the use of gendered or sexualised forms of destruction for women predominantly, but also for some men.

When reviewing all of the Hutu Ten Commandments in Kangura No. 06, it becomes obvious that the entire Tutsi population was targeted. Directing special commandments at Tutsi women was intended to pursue that goal. Social relations, especially through intermarriage, had put Tutsi women and their Hutu husbands into positions of compromise, their intimate relations would otherwise have prohibited Hutu men from looking at their wives as enemies, evil, dishonest and ethnically ambitious.[16] It was therefore important to include in the hate propaganda articles that would destroy and politicize otherwise natural family relations.

The third constructed role of Tutsi women that exposed them to genocidal violence is explicitly reflected in Hutu extremist propaganda that is that Tutsi women were "agents of the enemy." For whatever reason, the Hutu Ten Commandments begin with an immediate attack on the hidden ethnic motives of Tutsi women. While the order may not suggest the hierarchy of the Commandments, it nevertheless suggests that relations between Tutsi women and Hutu men were a strong pre-occupation for the Hutu extremists. The concern of extremists as argued earlier depended largely on the central and obstacle role those inter-ethnic marriages posed in the destruction of the enemy and in the identification of a homogeneous Hutu population.[17] The ICTR in Ngeze Hassan's case was of the view that the extremists' propaganda suggested that:

> *Tutsi women intentionally use their sexuality to lure Hutu men into liaisons in order to promote the ethnic dominance of the Tutsi over the Hutu. The*

15 *Supra* note 256 para 140.
16 *Supra* note 255 at 45.
17 *Ibid* at 44-45.

> *reference to Tutsi women trapping Hutu men through marriage echoes the warnings set forth in The Ten Commandments about the danger of Tutsi women.*[18]

During the 1990s the negative and promiscuous image of Tutsi women continued to be painted by Kangura. Issue No. 36 for example, published the opinion of a reader who had suggested that Hutu men married to Tutsi women should divorce them if they did not wish to face an adverse fate.[19]

From the perspective of extremist genocidal propaganda the political use of Tutsi women's sexuality was spread beyond Hutu men to also ensnare foreign forces in Rwanda at the time. General Romeo Dallaire, the Canadian general and the head of the United Nations Peacekeeping force in Rwanda, and the Belgian paratroopers were depicted in different sexual acts with Tutsi women in journalistic cartoons in various Kangura issues. The caption on a cartoon depicting General Dallaire in sexual embraces with Tutsi women read "le Général Dallaire et son armée sont tombés dans le piège des femmes' fatales"[20] and this is particularly relevant.

Kangura No. 56 of February 1994 claimed that Tutsi women were responsible for winning whites for the Rwanda Patriotic Army (RPF). In a related manner another cartoon had a caption that referred to Tutsi women as sexual forces; it reads: "la force du sexe et les paras belges."

In the Rwandan case rape and sexual violence were not an incident of conflict but one of its means. Gender and sexual violence against the Tutsi in Rwanda was, as suggested by Catherine MacKinnon:

> *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.*[21]

Targeting the gender and sexuality of Tutsi women clearly formed part and parcel of genocidal ideology and the extremists' propaganda. This targeting was deliberate and intentional to avoid the mistakes of 1959 in which Tutsi women were spared. The discourse lacked direct language implicating the sexuality of Tutsi men. Logically, the sexuality of Tutsi men had not been constructed as a tool to foster Tutsi dominance. Nevertheless, gender and sexual violence against Tutsi men was employed for its dehumanizing impact as will be further shown in this chapter.

18 *Supra* note 256 para 178.
19 *Ibid* para 151.
20 *Supra* note 106 paras 138-139.
21 *Supra* note 58 at 190-191.

3.2 THE SCOPE AND NATURE OF GENDER AND SEXUAL VIOLENCE

The genocide in Rwanda in the early 1990s shocked the conscience of humanity when more than one million predominantly Tutsi were killed in cold blood often after other forms of violent abuse and leaving many more abandoned and injured. Gender and sexual violence were deliberately used as a tool of genocide, to intimidate, humiliate and ultimately destroy. Indeed genocidal violence consciously assumed some gender-specific forms. Rape, gang rape, being raped with objects, sexual mutilation, forced sexual intercourse with dead animals for men, sexual captivity, forced public nudity, intentional transmission of HIV/AIDS,[22] the mutilation of breasts, the cutting open of wombs and removing the foetus, and forced intercourse between victims.

Genocidal gender and sexual violence happened throughout the country. Victims were raped within their own communities, on the roadside, at roadblocks, in government buildings including at the *Prefectures*, *communes* and *secteur* offices. Stadiums, hospitals, schools, churches, the market and many other public places became rape and sexual violence sites where victims were violated in full public view. Gender and sexual violence also happened in abandoned houses, in the bush and at the homes of the perpetrators.

Binaifer Nowrojee in her expert testimony at the ICTR explained that:

> *Every part of Rwanda was a location for rape, often multiple gang rapes. Women were not just raped behind closed doors; they were raped on the streets, at check points, in cultivated plots in or near government offices, hospitals, churches and other public buildings. Their dead bodies were left in public view, naked and spread eagle with nearby pools of blood and semen. [This sight was] so routine that the occurrences cannot only have been coincidental. There was in this repetitive conduct the message of subjugation, humiliation and degradation of the Tutsi.*[23]

Victims of genocidal gender and sexual violence were Tutsi women, children and men of all ages, very young girls, pregnant women, the elderly, the physically handicapped, young and old men, and some victims were sexually violated *post mortem*. Some Hutu women were also raped because of their family or political affiliation with the Tutsi. Hutu women politicians, those married to Tutsi or those who were hiding Tutsi were subjected to rape and sexual violence. The perpetrators of genocidal gender and sexual violence include cabinet ministers, members of militia groups – the *Interahamwe* and *Impuzamugambi*, civilians, neighbours,

22 In fact a survey conducted by AVEGA-*Agahozo* in 1999 reveals that 80.9 % of the surviving women are HIV positive and 13% have a broken vertebra.

23 Nowrojee, B. (2005), Expert Witness Testimony in Prosecutor v Bizimungu *et al.* (Government Trial), 16 May 2005.

relatives, friends, locals, the military, religious leaders, journalists, young boys, mothers, fathers, sons, daughters, men, women and schoolteachers.

The scope and extent of genocidal gender and sexual violence was immense. The United Nations Special Rapporteur Degni Ségui, whose report has been widely referenced, concluded that during the genocide "rape was the rule and its absence the exception."[24] Human Rights Watch concluded in "Shattered lives" that:

> *Although the exact number of women raped will never be known, testimonies from survivors confirm that rape was extremely widespread and that thousands of women were individually raped, gang-raped, raped with objects such as sharpened sticks or gun barrels, held in sexual slavery (either collectively or through forced "marriage") or sexually mutilated. These crimes were frequently part of a pattern in which Tutsi women were raped after they had witnessed the torture and killings of their relatives and the destruction and looting of their homes. According to witnesses, many women were killed immediately after being raped.*[25]

Similarly, the report by eminent persons appointed by the Organisation of African Unity (OAU) concluded that gender and sexual violence were genocidal, remarking that "there is no question that rape was used as a systematic tool of the Hutu masterminds to wipe out the Tutsi population."[26] Aware of the difficulty in obtaining accurate data on the occurrence of rape and sexual violence, the report by the eminent persons nevertheless makes an overreaching numeric conclusion that:

> *According to testimonies given by survivors, we could conclude that practically every female over the age of 12 who survived the genocide was raped. Considering the difficulty of assessing the actual number of rape cases, confirming or denying that conclusion is not possible. However, we can be certain that almost all females who survived the genocide were direct victims of rape or other sexual violence, or were profoundly affected by it.*[27]

The testimonies of Romeo Dallaire and Brent Beardsley, who were eyewitnesses to the genocide, explain a great deal concerning the nature and extent of genocidal gender and sexual violence. Beardsley explains:

> *When they killed women, it appeared that the blows that killed them were aimed at sexual organs, either breasts or vagina. They had been deliberately swiped or slashed in those areas. And secondly, there was a great deal of what*

24 Degni-Ségui, R. (1996), *Report on the situation of human rights in Rwanda*, United Nations, Economic and Social Council, E/CN.4/1996/68, 29 January 1996, at 7.

25 Human Rights Watch (1996), *Shattered Lives; Sexual Violence during the Rwandan Genocide and its Aftermath*, (NewYork: Human Rights Watch), at 24.

26 *Supra* note 6 para 16.20.

27 *Ibid*.

> *we came to believe was rape, where the women's bodies or clothes would be ripped off their bodies. They would be lying back in a back position, their legs spread, especially in the case of very young girls. I'm talking about girls as young as six, seven years of age. Their vaginas would be split and swollen from obviously multiple gang rape, and then, they would have been killed in that position. So they were lying in the position that they had been raped.*

Romeo Dallaire's explanation of their encounter with genocidal rape and sexual violence is illustrative of their nature, scope and impact:

> *Rape was one of the hardest things to deal with in Rwanda on our part. It deeply affected every one of us. … , the hardest thing that we had to deal with was not so much the bodies of people, the murder of people. I know that can sound bad, but that wasn't as bad to us as the rape and especially the systematic rape and gang rape of children. Massacres kill the body and rape kills the soul. And there was a lot of rape. It seemed that everywhere we went, from the period of 19th of April until the time we left, there was rape everywhere near these killing sites.*[28]

All narratives about the scope of gender and sexual violence recognise the difficulty in quantifying that scourge, at the same time all authors try to make estimations of the number of victims. The effort to quantify is in fact proof that there is indeed a need to quantify. We have argued that "in the case of genocide it becomes in particular important to know the number, as it is one of the factors to conclude whether the sexual violence and sexual torture was used as a tool to commit genocide, indeed as a tool to destroy in whole or in part a group on the basis of ethnicity."[29] Similarly, quantifications help in painting a true picture of the genocide accounting for the experiences of all victims.

Bijleveld and others[30] explain various other reasons why quantification is indeed necessary, of which I would like to point out one regarding the impact of sexual violence:

> *Though the large-scale murders that occurred during the genocide uncontestedly destroyed Rwandan society, rape contributed to the destruction in its own way. Rape served to break the resistance, to humiliate victims, as the spoils of war, as revenge, and ultimately to destroy also those who survived rape itself and break up their societies by bestowing them with these victims and their mostly unwanted offspring, and often also with HIV infections.*

28 *The Prosecutor v. Théoneste Bagosora et al.*, Transcripts, Case No. ICTR-98-41-T, 3 February 2004, paras 51-52.
29 *Supra* note 241 at 386.
30 *Ibid*.

> *As such, reliable estimates of rape prevalence are necessary to evaluate comprehensively the quantitative impact of the genocide*".[31]

Bijleveld *et al.* are the first to make a more elaborate estimation of the occurrence of gender and sexual violence during the Rwandan genocide. Their estimation is based on a few existing numbers of the genocide, for example those who were killed, survivors, the birth rate etc., and an attempt to quantify statements such as the above quoted from Degni-Ségui. They

> *Arrive at a total number of 354,440 women who were raped during the genocide in Rwanda in 1994 (…) or somewhat less than half the number of people killed. Based on an estimated population of approximately 7,7 million (…), of whom just less than 4 million were female, more than 350,000 women were raped. This translates to approximately 8,972 rapes per 100,000 women.*
>
> *Thus, our calculations show that in the 100 days of the genocide, the risk for a Rwandan female to be raped at least once was about 1 in 11, or about 9 %. Obviously, the risk for Tutsi women was much higher, being more than 80 %.*[32]

As mentioned earlier all these numbers do not in fact represent an accurate figure for the victims of gender and sexual violence during the genocide; there are indeed many unaccounted experiences. Important, however, is that all authors confirm that gender and sexual violence crimes were committed on an enormous scale during the Tutsi genocide.

Genocidal intent is the most essential element for any criminal act to amount to genocide. The genocidal nature of gender and sexual violence is undoubtedly recognised by many authors. Bijleveld *et al.* note that rape contributed to the destruction of Rwandan society in its own way.[33] Mullins concludes that in Rwanda there was clear involvement by state agencies and state actors, *"more than lenient commanders and over-stimulated men*", in the rape and sexual violence used as one of many tools to eliminate the Tutsi population.

Mullins explains that rape and sexual violence "*was not merely an ad hoc tactic used spontaneously by men during the broader homicidal violence. It was specifically modeled and encouraged by leaders on the ground during the genocide*".[34]

Of all attempts to quantify gender and sexual violence, none has documented the experience of Tutsi men as victims of genocidal gender and sexual violence. All the presented data exclusively reflect the experience of women victims and to a

31 Bijleveld, C., Morssinkhof., A. and Smeulers, A. (2009), "Counting the Countless: Rape Victimization During the Rwandan Genocide," *International Criminal Justice Review* 2009, 19, 208-224, 2, at 211.

32 *Ibid* at 219.

33 *Ibid* at 211.

34 Mullins, C.W. (2009), "He would kill me with his penis: Genocidal rape in Rwanda as a State Crime," *Critical Criminology*, 15-33, at 30.

minimal extent those of children. It seems that perpetual silence remains with regard to the experiences of Tutsi men who endured genocidal gender and sexual violence.

The absence of the stories of male victims can be explained by various reasons. Firstly, social and cultural beliefs continue to reflect rape and sexual violence as crimes against women committed by men. From that perspective male victims will be much more traumatized if they openly narrate their sexual ordeal, for doing so will attest that they have lost their manliness. The consequence is that most male victims, like some female victims, opt to envelop their experience in secrecy.

Secondly, some of the most prominent studies in this area start on a somewhat biased note in favour of women victims. Take, for example, the study by Christopher Mullins, entitled "*He would kill me with his penis: Genocidal rape in Rwanda as a state crime*" that analyses the nature and dynamics of sexual violence as it occurred in Rwanda during the genocide in 1994. Mullins' title suggests that men were the genocidal killers by the use of their penis and by this fails to account for the women who sexually killed many Tutsi men.

But Mullins is not alone in this perspective. The questioning of witnesses Romeo Dallaire and Brent Beardsley by the ICTR prosecutor in Bagosora *et al.* is relevant. In both instances the prosecutor asked "*I want to draw your attention to the female corpses. Was there anything in particular with these corpses that you made any observation about*?" Such questioning is probably why the jurisprudence of the ICTR failed to account for the victimisation of Tutsi men. In his response Dallaire observed that there were corpses of men whose genitals had been mutilated despite the fact that the prosecution was enquiring about women only. Another hindrance to access to justice for male victims is the lack of activists on their behalf. It is well documented that feminists and women's rights activists have worked tirelessly to engender post-genocide justice. Their strategy has been to include women's experiences. As a result the experience of men is ignored.

3.3 THE COMPLEX REALITY AS SEEN FROM THE TRAINING

In the section that follows, I will recount narratives of the experiences of victims gathered during the training. I have chosen to recount some of the complex experiences of victims because of three reasons. First, it communicates a sense of the outrageous and complex genocidal acts that were rampant during the genocide against the Tutsi in Rwanda. Secondly, it fulfils the desire of surviving victims who wish to make their ordeal known, hoping that it will help in developing informed strategies to prevent future victimisation.

Thirdly, I include the testimonies because victims' experiences inform this study, recounting, however briefly, that the nature of events cannot be analysed

dispassionately. I will try to remain academic and objective, but this would mask the real experiences of the victims. The purpose of this next section is to illustrate that genocidal gender and sexual violence demands a human and personal approach, is emotionally draining and could not be studied with absolute detachment. After all, such detachment would only rob us of recognizing the reality and the challenge that such reality possesses in practice and in theory.

This section discusses the training conducted by myself that became the basis to see genocidal rape and sexual violence in a way that I could not see it before. It introduces the training, shares the genocidal experience of victims of gender and sexual violence during the genocide and the dilemmas that such experiences pose to related theory and legal practice.

3.3.1 INTRODUCTION, CONTEXT AND METHOD OF THE TRAINING[35]

The genocide in Rwanda has attracted many publications, academic and journalistic alike. Gender and sexual violence was a distinct aspect of the genocide against the Tutsi that left humanity shocked by the nature and scope of the violence, the cruelty and the immensity thereof. Scholars have placed specific focus on gender and sexual violence committed during the genocide. Tutsi women and men endured massive rape and sexual torture. Rape and sexual torture have been officially acknowledged among the most serious acts of genocide by being included in the list of category one crimes together with planners, instigators and organizers of the genocide. Rape and sexual torture were first tried by the ordinary courts and later shifted to the *gacaca* courts.

On 19 May 2008 Organic Law No. 13/2008 modifying and complementing Organic Law No. 16/2004 of 19/6/2004 establishing the organisation, competence and functioning of *gacaca* courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between 1 October 1990 and 31 December 1994 was promulgated. Organic Law No. 13/2008 was ground-breaking in that it gave *gacaca* courts competence to try some first category offences including mostly cases of rape and sexual torture.

Earlier on the *gacaca* courts had only dealt with cases of rape and sexual torture during the information gathering phase as will be discussed in detail under chapter 6 of this study. At the time only ordinary courts had competence over all category one offences. *Gacaca* laws were amended on several occasions to accommodate emerging realities in the execution their mandate.[36] Since their creation the *gacaca* courts only had the mandate to try cases of the second and third category. In an

35 *Supra* note 241 at 398-402.

36 *Supra* note 235.

attempt to increase the threshold of *gacaca* cases and expedite genocide-related justice, some category one offences were reduced to the second category in 2007.[37]

Rape and sexual torture were among the final cases that the *gacaca* courts tried in their final year of operation. From June 2008 until June 2009 at least 7,000 cases of rape and sexual torture were tried by 17,000 *gacaca* judges (Inyangamugayo) in 1,900 *gacaca* courts. Although all acts of genocide are equally heinous and extremely difficult to distinguish, it can be said without exaggeration that rape and sexual torture may be considered among the worst. It is not generally easy to try genocide cases, but it may readily be assumed that rape and sexual torture cases are amongst the most difficult for all involved in the trial but mostly for the victim who must narrate and relive the most intimate details of acts of violence committed against him/her.

The National Service of *Gacaca* Jurisdictions (hereinafter SNJG)[38] in partnership with the Institute of Legal Practice and Development (hereinafter ILPD)[39] decided in early 2008 that the *Inyangamugayo* should receive at least some training about how to deal with rape and sexual torture cases.

Because of the language and the very specific experiences required, it was decided that the experts/trainers should be Rwandans. Two trainers were identified: a lawyer for the legal issues (the author of this study) and a clinical psychologist for the psychological part of the training (Jeanne Marie Ntete). Since it would have been impossible for two expert trainers to train all 17,000 *Inyangamugayo* within a reasonable time, it was decided to train a group of about 250 trainers, forming teams of a lawyer and a trauma counsellor, who together would train all

37 *The Organic Law modifying and complementing Organic Law No. 16/2004 of 19/6/2004 establishing the organisation, competence and functioning of Gacaca Courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between 1 October1990 and 31 December 1994 as modified and complemented to date.* Article 11 of the 2007 Organic Law diminished the first category by taking three components of category one into the second category. So category 2 now covered the person whose criminal acts or criminal participation among the killers or authors of serious attacks against others, causing death, together with his or her accomplices; the person who injured or committed other acts of serious attacks, with the intention to kill, but who did not attain his or her objective, together with his or her accomplices; and the person who committed or participated in criminal acts against persons, without any intention of killing them, together with his or her accomplices; the well-known murderer who distinguished himself or herself in the area where he or she lived or wherever he or she passed, because of the zeal which characterized him or her in the killings or excessive wickedness with which they were carried out, together with his or her accomplices; the person who committed acts of torture against others, even though they did not result in death, together with his or her accomplices; the person who committed dehumanizing acts on a dead body, together with his or her accomplices.

38 In Rwanda usually the French abbreviation for this service is used: SNJG or Service National de Jurisdictions *Gacaca*. It was established by Law No. 08/2004 of 28/04/2004 on the establishment, organisation, and duties and functioning of the National Service in charge of the follow-up, supervision and coordination of the activities of *Gacaca* Jurisdictions.

39 The ILPD is the postgraduate training institute for the whole justice sector in Rwanda, established by *Law No. 22/2006 of 28/04/2006, O.G special number of 07/06/2006*. The ILPD organizes an initial training programme for judges, prosecutors and advocates, as well as continuing legal education for the whole justice sector.

Inyangamugayo during a three-month period. Only the re-elected *Inyangamugayo* chosen by and amongst other *Inyangamugayo* were elected on the basis of their outstanding integrity, moral values and credibility.

Methodologically, the three-day training session was interactive and in small groups of participants in order to ensure the full participation of the trainees. This method was preferred because it was considered more effective in equipping the trainees for their role of training the *Inyangamugayo*. Each of the three days covered a specific activity; day one was for introductions and the legal aspects; day two for the psychological aspects of the trial; while day three was for practice in which participants role-played the trial in a mock trial putting into practice the legal and psychological skills acquired during the training.

A training manual had earlier been developed by the legal and psychology expert trainers and was adopted through a meeting between the consultant trainers and the Jurists at the SNJG. Some of the complex cases that will be discussed were introduced by the jurists during this meeting. As far as I am concerned the manual's harmonizing meeting turned out to be an introduction to a complex reality. Yet more disturbing realities were unveiled on a daily basis for the 36 days of training. It is not to assertive to say that *gacaca* courts generally handled challenging matters those of gender and sexual violence happening at the very end when the courts had practically garned much experience.

The *gacaca* courts are Rwanda's innovative, participative and restorative justice system designed to adjudicate an unprecedented genocide. *Gacaca* acted more than simply a justice system, it became a forum in which the Rwandan population met and expressed their painful experiences with a chance to be hard by the same community within which the pain was experienced and a chance for some to repent and express remorse. *Gacaca* courts were as well an opportunity for lay citizens to see and be part of doing justice in Rwanda. G*acaca* courts reflect Rwanda's creative approach to an unprecedented legal and judicial challenge to post genocide Rwanda. They were born from the desire to end the culture of impunity coupled with the incapacity to achieve this end through the existing ordinary or classical justice system in Rwanda.

Right from their inception *gacaca* courts attracted attention albeit mostly negative. The negativity towards *gacaca* courts by international human rights organisations especially Human Rights Watch and Amnesty International in the opinion of Phil Clark emanates from a narrow perception of justice that reflects legal rigidity and a limited understanding of the aims of *gacaca* courts.[40] The minister of justice in his response to Human Rights Watch Report in 2011 characterised such reports as not constructive because they "characterise *gacaca* as a formal legal institution,

40 Clark, P. (2012), *How Rwanda judged its genocide* (London: African Research Institute) at 5.

applying a strict procedural framework to the community-based courts and western legal concepts to an emerging justice sector".[41]

A particular example and one that is relevant most relevant for this study is the reports of Human Rights concerning the trials of rape and sexual violence by the *gacaca* courts. In 2008 as discussed earlier in this chapter *gacaca* courts were mandated to try some first category cases the majority of which involving cases of rape and sexual torture in a bid to further expediate genocide related cases.

For the same reason of expediating trials in 2007 an amendment to the *gacaca* law was made transefering most of the remaining first category cases into the second category to permit *gacaca* courts to handle them this largely diminished the first category cases to about 10,000 cases. About 8,000 of the 10,000 cases involved acts of rape and sexual torture leaving the former 10% of first category becoming 90% because most of the cases in this category had been moved lower in 2007.

In eference to the minister of justice and the executive secretary of the SNJG Human Right Watch was expressed that it was concerned with what it termed as the "dramatic accumulation of rape cases" in 2008. Factually as explained above there was no dramatic accumulation of cases at all instead the 2007 law and the fact that most of the second category cases were being concluded cases of rape and sexual torture ended up being the majority of the remaining case load.

Yet on the basis of the wrong conclusion that there was an accumulation of cases that was dramatic the human rights organisation further shocks professional consciousness by suggesting possible reasons for the non factually based so called accumulation. Practically and proefessionally one expects that an international human rights organised so very pronounced as Human Rights Watch conducts sufficient research and draws its conclusions on the basis of well researched and informed information. This was however not the case in the organisations explanations for the reasons of the so called accumulation of rape case. In this case two negative explanations are advanced both of which assume "bad faith" on the government of Rwanda. On one hand HRW tries to implicate the prosecution for the delay in cases of rape. It speculates that:

> *The prosecutor's office has deliberately delayed prosecution of rape cases until virtually all other cases have been judged. This is highly unlikely (…). (…) if it were to be true, [this 'highly unlikely' explanation] would seem to indicate a conscious discrimination against rape victims, a discrimination that would be all the more tragic given that some were exposed to HIV/AIDS as a consequence of the crime and may have a shorter life expectancy than victims of other crimes.*[42]

41 The Rwandan Minister of Justice/Attorney General, Tharcisse Karugarama, in response to criticism on the *gacaca* ventured by Human Rights Watch in *Justice Compromised, The Legacy of Rwanda's Community-Based Gacaca Courts*, 2011, pp. 137-143, at 143.

42 Human Rights Watch, (2008), *Rwanda; Law and Reality. Progress in Judicial Reform in Rwanda*, at 49.

On the basis of this statement one would have expected that Human Rights Watch was ready to welcome an alternative for the prosecutions failure through the *gacaca* courts despite the fact that HRW clearly expresses that this assumed reason is unlikely. This implies that the report is far from an analysis of factual evidence that most readers of Human Rights Watch reports assume happens in all cases. The above statement is but a reflection of simply speculations employed to justify a confrontational accusation.

Further after Human Rights Watch's above speculation it tries to justify from its perspective rather than from the factual realities their assumed accumulation of rape cases. Unbelievably it is assumed that the cases are used as a means to solicite convictions for otherwise persons who would have been innocent of lesser offenses:

> *The accusations are motivated by some purpose other than simple law enforcement, such as to enhance the possibility of other convictions. In a number of cases there are grounds for believing that rape charges (which do not fit the facts) may be being used to undertake prosecution where other charges cannot be successfully brought or are unlike to secure conviction.*[43]

One wonders why in the opinion of HRW it is likely have a successful false conviction for such serious offenses. There is no clear and methological explanation for this kind of conclusion. It is right and necessary to ask on the basis of what such entirely negative speculations inform the conclusions of an organisation that is fully aware of the traditional and historical confidence the international community accrues to its reports.

What is as well interesting is why Human Rights Watch claims that the 8,000 rape and sexual violence cases is an escalation of numbers, yet in its earlier reports it expressed much higher numbers in which at least 25,000 Tutsi women were victims of rape and sexual violence.[44] It wouls have been more logical for HRW to ask about justice for more than 19,000 cases of rape than falsefully qualifying it as an accumulation.

Similarly, the critique contradicts earlier requests by HRW demanding the expedition of justice for victims of rape and sexual torture. Clearly in the 2004 report "*Struggling to survive: Barriers to Justice for Rape Victims in Rwanda*" HRW was concerned that with the pace of justice at the Rwandan judiciary it was unlikely that the victims of rape and sexual torture, most of whom were sick from diseases contracted through sexual abuse including HIV/AIDS, would survive to see justice being done.

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43 *Ibid.*

44 For a discussion on the number of rape and sexual violence victims during the genocide in Rwanda see generally Human Rights Watch, *Leave none to tell the story: Genocide in Rwanda* (New York: Human Rights Watch, 1999). See also Human Rights Watch, *Struggling to survive: Barriers to Justice for Rape Victims in Rwanda*, (New York: Human Rights Watch, 2004), Vol. 16, No. 10(A) at 7.

Unfortunaltely, the approach, method and conclusions of Human Rights Watch on Rwanda is mostly confrontational and no constructive criticism. I wish to reiterate the following conclusion that I find relevant on Human Rights Watch's reporting on Rwanda.

> *In its reports about human rights in Rwanda, Human Rights Watch makes factual mistakes; interprets public statements by authorities entirely out of context; presents incidents as structural problems; cites examples of many years ago to illustrate the situation in recent years, as if nothing has changed since; assumes almost per definition that governmental decisions are taken with bad intentions; (...) generalises on the basis of only few individual opinions; embraces individual opinions as the direct basis for its own judgement disregarding the personal background of individual opinions, without any reflection on the necessity of measures taken, on alternatives for choices made, on the complexity of political decisions in a post-conflict society, a balance between individual and societal interests, or whatever other considerations; everything in a by times disrespectful tone.*[45]

3.3.2 SHARING GENOCIDAL EXPERIENCES OF VICTIMS

Narratives recounted in this section are disturbing for what they are and in terms of seeking to understand or interpret them. The impact of the stories was for the trainers and trainees frustrating, emotional and left most of us speechless. Let me begin with Nana's story, one that was heard by all trainees because at the first training I had to share this story in an effort to break the ice in our training method.

Nana was fourteen years old when the genocide began; on 7 April 1994 her life was shattered by the killing of her two brothers and their mother in cold blood. She and the rest of the family ran to different places for refuge; in search of refuge, she moved during the night and hid during the day for three days. Her escape journey led her to Nyamirambo where she hoped she would survive at the house of an elder sister married to a Hutu man.

Nana was instead handed over to the *Interahamwe*[46] by her brother-in-law as a ransom for the protection of his wife and children who were in the eyes of the *Interahamwe* not Hutu enough because of their mother's blood. The *Interahamwe* took Nana to an abandoned house. She was immediately stripped naked and violently raped until she lost consciousness while being raped by the seventh of her rapists. As if the rape was not enough, Nana recalls being forced by her abusers to also drink semen from the condoms they had used while raping her.

45 Haveman, R. (2013), Watching the Human Rights Watchers, 231-258, in: Matthee, M., Toebes, B., Brus, M. (eds.), *Armed Conflict and International Law: In Search of the Human Face. Liber Amicorum in Memory of Avril McDonald* (Hague: Asser Press) at 256.

46 The *Interahamwe*, initially a youth movement formed in the early 1990s and linked to the then ruling party MRND, developed into a militia which became the driving force behind the genocide.

Every time I shared Nana's story the participants responded one after the other, narrating very painful and outrageous acts. I should observe that each case was difficult in its own way. The worst case was just as bad as any other and it became extremely difficult because most trainees spoke of the cases of their relatives, mothers, sisters, children, neighbours and friends.

The first trainee to share his experiences was an interesting middle-aged man. We had met earlier on the bus to the training town of Nyanza. During the two-hour journey while Jean was sitting next to me he was impressively interactive and apparently cheerful. After Nana's story I asked him if he had anything to share; his cheerfulness immediately faded away and he appeared uncomfortable, his eyes turned red and he seemed somewhat furious. He started with intervals of sighing and hesitation; he then stated that the experience he was about to share concerned the death of his sister, and although he did not witness it, he had been able to hear it in detail from survivors who had witnessed it.

Wondering if it was important to speak, he resolved to narrate his sister's ordeal. His sister Jeanette had died a shameful and painful death, her abusers being a group of youths from their neighbourhood who had undressed her, mocked her nudity and arrogantly exposed her sexual parts. Later the perpetrators beat her breasts until she became unconscious. When she regained consciousness she pleaded with them for some water to drink. Instead one of them took his nailed cab (stick), inserted it in her vagina and as she bled the *Interahamwe* took a container and collected the blood from her vaginal bleeding and forced her to drink it. Taking a deep sigh Jean ended his story wondering if there could be any justice for such "beasts".

My colleague Ntete shared a case from her previous research where an only surviving girl of a family of nine children had shared her experience. She was 18 years old during the genocide while hiding with her 10-year old brother; the *Interahamwe* found them and forced the young boy to have intercourse with her sister. When the boy failed they mockingly asked her to do it on his behalf, otherwise they would penetrate her with a club (an *ubuhiri*). According to the narrator, she sobbed with tears and in resignation she said "*we tried* … ." In grief the victim expressed:

> *This scenario doesn't leave my mind and it didn't prevent these killers from cutting the sexual organ of my brother before killing him in front of me! I condemn myself every day for not having provoked them to kill me as well. Men are vicious! They raped me in turns. When I became conscious I saw that I was bleeding. My nipples had been cut.*[47]

The second trainee, a trauma counsellor, shared the story of her client who had been raped and then had broken bottles inserted into her sexual organs. This victim, according to the counsellor, lived in hell: "*njye mbana n'ukuzimu*", restating

47 Ntete, J.M. (2008), Sharing narratives from her Research, at ILPD Nyanza during the training of trainers. Translation of narratives by the author.

the words of her client. For this victim hell had rejected her chance to die and instead she had to live with it. All of her children and her husband had been killed after watching her torture and her torturers had informed her that no better death was going to come her way. She unfortunately only knew one of her abusers who had fled the country and nothing was now known of his whereabouts.

Other cases include women and men who had been held in sexual captivity for weeks and months and forced by female and male *Interahamwe* to submit to their sexual demands. Many of the *Interahamwe* would boast of the killings they had been involved in and threatened to kill their victims too. One woman who had been held in sexual slavery survived only to realise that she had been infected with HIV/AIDS and had given birth to an infected child conceived during her captivity.

Recounted below is the anonymous testimony of a male victim of rape during the genocide.[48] In the testimony he will be referred to as RJ. RJ was raped by four women who found him where he was hiding by a woman who used to bring him food and who also became one of his rapists. After checking the house the rapists asked RJ:

> *"If we wanted you to do some things for us, would you do them?" I did not know what they wanted me to do.*
>
> *I told them I would do it if I could. But I did not know what they were planning. They had a small thin bag with some drugs in it. It was like cocaine with a kind of powder and they put it on my nose. It smelt good. But when I would inhale it, whenever I would inhale, I would gain more strength. They even had syringes so they would shoot me with some ... they kept injecting me. So after having all that, because in every muscle of my body I felt this strength, I had this energy and thirst so I started drinking water from the jerry can that was around there. I was like an animal. The strength I had then I do not think I will ever have it again in my life.*
>
> *They got a knife and stripped off my shirt and everything, they left me naked. There was a mattress for a double bed. They told the other woman who used to bring us food, they told her to go and do what she has always been doing. They locked the door and stayed behind. They had some other cans of food with them with a lot of salt in it. They gave me that, that's what they also ate, that was the first time that I saw them. I can tell you I ate so many things that I did not even know that day.*
>
> *That is when they started sexually assaulting me. It was my first time to even do that. They really did all sorts of things for three days. So the two would stay,*

48 The story was gathered and transcribed by my friend Sara E. Brown, Kigali, 2011. I personally tried to meet the victim but he preferred to remain anonymous but accepted that Sara could share his testimony with me. His testimony was therefore not gathered during the training as most of the others discussed herein.

and two would go, and they kept on shifting, they would mix all sorts of drugs in my tea, in my water, all sorts of things. I was really hurting, I had so much pain but at the same time, this urge to do what they wanted me to do. They even made me use my tongue and all these things. It was so shameful. Very, very shameful.

Violence really hurts. There are times when people just say the word but they do not really give it any content. To be raped is something unusual. It is just that at times someone fails to really bring it out in the best expression that they could. There are times when I remember all that and I feel that I do not have any desire to do anything. I used to sit with women, young girls, ladies, and felt that I wanted to throw up. Sometimes when they would raise that topic, sexual topics, I would go outside and throw up. Sometimes they would say maybe I am drunk. Yet it was the topic that they would be talking about that really affected me. Violence really hurts. It's very bad. I was really hurt. It's hard for me to really bring out the real pain I had then. When some people look at you they think everything is ok but behind all that there is this pain. I was really, really hurt. At times I think I don't think I will ever be hurt beyond that.

After those three days, I don't know what happened to me. I completely lost all my strength, I don't know, maybe it was because the drugs that were in my body had ... so what happened is after the three days they left and then K who was sick started trying to crawl next to me and pour water on me because he thought I was dead. He told me that it was after 2 days that my senses came back. But when I woke up, I felt that I smelled so bad. When I looked at myself, my private organ was really bruised. I do not know how I can explain it. I was not circumcised but the skin had really gone down as if I had been.

A particularly painful case concerns a seven-year old boy who was made to have sexual intercourse with his mother as a means of infecting him with HIV/AIDS. Several *Interahamwe* had been raping his mother until they stopped, believing that the last to rape her was HIV/AIDS positive. As they forced the boy, they were heard to boast that he was going to die alongside his mother and that they were incapable of helping each other since both had been infected. The victims were informed that a slow and painful death was what they deserved.

The case of a 50-year old married man stripped naked and forced to have sexual intercourse with dead animals in front of his wife, children and neighbours was disheartening. In his presence, and that of their children, his wife was also sexually abused by two of his abusers. At the same time, he was verbally abused and mocked to prove his manhood before his family. All their five children died, but he and his wife survived. Even though they live in the same house it seems that living as a family had died too. The stigma and shame of witnessing each other's abuse haunts them to this day.

Many victims had their genitals mutilated, sharp objects inserted into their genitals. One such tortuous case concerned the mutilation of the sexual organs of a man, and the forcing of his wife to use the mutilated sexual organs to have sexual intercourse with. Such cases included both male and female *Interahamwe*. Some men were mutilated, castrated, and hanged by their sexual organs. Bestiality is unacceptable and even unimaginable in Rwandan society. In order to humiliate Tutsi men some were forced by the *Interahamwe* to have sex with dead animals like dogs and cats specifically killed for that purpose. Usually the abuse occurred while the family members of the victims were forced to watch.

These cases, as will be discussed under the dilemmas below, are proof of the challenge in dispensing justice in cases of genocidal gender and sexual violence. Throughout the training each new group brought new insights to the problem and complex challenges involved in resolving it.

3.3.3 THE DILEMMAS: REFLECTIONS AND IMPRESSIONS

Through the training I was able to gather reflections and impressions on the subject-matter of this study. It became obvious that rape, sexual violence and sexual torture are indeed complex in the manner they were perpetrated and how they could be addressed. The cases are polemic in reality, theory and legal response. There is almost no judicial system that was informed of such troubling details when they were first created. It became pertinent to ask in certain cases how criminal justice or any other form of justice can possibly respond. Below I will give examples of the most polemic of the cases shared above and the questions which arose in dealing with them.

3.3.3.1 The Complex Reality and Challenges on the Legal Platform

The cases of victims who could not identify their abusers are clearly troublesome. In some cases and some parts of the country genocide was largely committed by the then government soldiers and in some cases by French soldiers[49] especially as far as the victims in the "zone turquoise" were concerned.[50] Victims in these cases need to see justice being done yet they do not know the names and identity of the perpetrators. Clearly criminal justice cannot respond to the needs of these specific victims; wondering about the most viable means by which to do some form of

49 The « *Commission Nationale Indépendante chargée de Ressembler les preuves montrant l'implication du l'État Français dans le génocide perpétré sur Rwanda en 1994* » ; Organic Law No. 05/2005 of 14 April 2005, generally referred to as the Mucyo Commission after its President, Jean de Dieu *Mucyo*. Its report was published on 17 November 2007.

50 *Opération Turquoise* is the code name, generally used, to indicate the intervention of France during the genocide, "securing" the southwestern part of the country – *zone Turquoise* – from the approaching RPF/RPA in favour of the old regime; in this part of the country the genocide continued when the rest of the country had already been overrun by the RPF. The Security Council allowed France to intervene in Rwanda under Chapter VII: SC Resolution 929 of 22 June 1994. For some of those cases see the Report of the *Mucyo* Commission, at 90, 102, 262 and 268.

justice is proof that the mainstream criminal justice approach leaves a considerable number of victims unaddressed.

Other examples include the case in Kibuye in which the perpetrator had pleaded guilty to rape. In contrast, the mentioned victim in this specific case vehemently rejected the plea as malicious and deceitful. A natural consequence is to ask certain questions in this case, including on what legal basis would a judicial decision be based? In the absence of other evidence why was there a guilty plea and its subsequent rejection?

At first glance one assumes that the suspect has probably lost his mind, especially in legal systems where guilty pleas are discouraged to avoid self-incrimination. Nevertheless, it becomes relevant to try and understand the context of his plea – maybe the suspect is telling the truth because he wishes to come to terms with what he has done, with the community and maybe with God as a spiritually persuaded Christian, especially due to the strong Church influence that made guilty pleas common in most Rwandan prisons.

But what if the denying victim is indeed correct that she was never raped, and the suspect is instead trying to destroy her socially reconstructed life as he is aware of the social stigma and orchestration attached to victims of rape and sexual torture? What if it is true that he did indeed rape her but because she has decided to go on with her life and avoid the consequences of being a victim of such an unacceptable offence she decides to keep her painful past a secret in order to avoid any related stigma and possible rejection from her family and society? A challenging question in this case is how the court is expected to decide on this matter, would it find the suspect innocent? Is there a possibility for the suspect to be convicted when the only witnesses are the suspect and the victim and they contradict each other?

In another case, a woman who was held in sexual captivity during the genocide officially married her captor. Her surviving relatives, neighbours and friends have accused her present husband and former captor of having raped and abducted her during the genocide. The wife objects to the prosecution of her husband, claiming that even though she had indeed been raped by her present-day husband during the genocide she claims to love her husband, instead blaming her husband's accusers of being malicious and jealous.

The complexity in this case includes a decision on what would be the correct recourse in this matter, prosecution or not? Maybe the victim has indeed reconciled and created a new life with her previous captor, but what if she is living in perpetual captivity and her captor had married her because he simply wanted to use her as a shield against facing accountability? What if they have indeed reconciled, would that guarantee no prosecution for her husband? Does this not subjugate justice to the will of the victim and the accused? Is it not possible that the victim is obstructing justice and therefore committing a crime under Rwandan law? What

about the pursuit for eradicating impunity? Is there a possibility in this and related cases to have a consensus on the most appropriate legal approach?

There is certainly more challenges on the legal platform concerning dealing with the reality. They importantly include how the post-genocide judicial mechanisms have addressed gender and sexual violence, whether they have qualified such acts for what they are, which is genocidal. The case of Mikaeli Muhimana is most illustrative of the genocidal character of rape and sexual violence during the genocide. After raping one of his victims, a Hutu woman, Muhimana apologized to her for having mistaken her for a Tutsi and immediately released her. Mikaeli put it into context that he was not simply raping but was specifically targeting Tutsi women because they were Tutsi. This reflection invites a discussion on the intersection between gender and other identifications like ethnicity. It reveals that for Mikaeli the attack was not against women as women but against Tutsi women, in their capacity as Tutsi.

Genocidal gender and sexual violence challenge existing legal and ordinary language. There is so far no term to capture all the details and character of acts referred to as rape, sexual violence and sexual torture. Rwandan law, just like international law, can only capture a handful of the details. Rwandan ordinary criminal laws at the time of the genocide only criminalized rape and indecent assault, without a legal definition of either in the law. In practice the three legal approaches have struggled with definitional issues and the interpretation of rules that are vague and lack definitions. The legacy they have created invites discussions to see how they have managed to address the complex reality.

3.3.3.2 Theoretical Challenges

The cases narrated make me also wonder how far existing theory can explain the complex realities of genocidal gender and sexual violence in Rwanda. Feminist theories are so far the most developed in terms of explaining and seeking redress for rape and other forms of sexual violence. The reality of the training reveals more forms of abuse that go beyond the ordinary discourse, particularly regarding male victims and female offenders.

The main discourse dominated by feminists and women's rights activists does not reflect sexually mutilated men, men forced to have intercourse with dead animals, men and young boys beaten to erection, Tutsi men forced to have intercourse with other Tutsi victims, forcing male victims to place their genital organs in sand-filled holes and other horrifying experiences reveal that some particular experiences of genocidal sexual violence are absent from the common discourse.

The dominant narrative on rape and sexual violence also lacks any theory on the agency of women perpetrators for crimes of rape and sexual violence. The fact that men were victims and women perpetrators brings new dimensions to the academic

discussion especially where the object of the study is to give a full account of the situation being studied.

Indeed the empirical reality presented above reveals interesting challenges to theoretical descriptions of the problem. Apparently in the face of reality it is unfair to judge lived experiences through a theoretical framework that especially developed from a context far and different from the Rwandan reality. It should be noted that mostly reality cannot be theoretically explained without being undermined. The relationship between reality and theory often assumes that theory explains reality and not the contrary. In the case of Rwanda theory is very limited, foreign and an after-fact explanation. It seems that, instead of explaining this problem from a theoretical angle, theory needs to adopt and validate its explanations on sexual and gender violence in the specific case of Rwanda in order to avoid unnecessary generalization or at times irrelevancy.

On the basis of the complex reality, the experience of Rwanda contributes to clarify theorizing on genocidal gender and sexual violence. Indeed the reality challenges classical theories that consider rape and sexual violence as crimes of male power and dominance. Such theories do not explain the presence of other powers that influence female perpetrators and the victimisation of men. Thus in cases of genocide, it becomes important to understand ethnic power in fostering the commission of gender and sexual violence.

4 FEMINIST THEORY

The problem of wartime and genocidal gender and sexual violence has attracted concerted theoretical attention. Feminist legal literature as mentioned in chapter two is by far the most elaborate on this topic. Feminists have engaged in describing and naming events affecting women including gender and sexual violence and seeking legal action especially at the international arena for gender and sexual violence. However, feminists are still far from reaching a consensus on this and other subjects that they study, there are controversial debates relating to how gender and sexual violence should be qualified.[1]

Following the efforts in chapter three to explain the complex realities of gender and sexual violence during the genocide in Rwanda, this chapter establishes the theoretical guideline of the study. In this study feminist theory is considered to be the knowledge base underpinning the phenomenon of gender and sexual violence.

Feminist legal theory particularly informs this study because of its role in describing the phenomenon of gender and sexual violence and due to its influence on the international legal platform in the prosecution of wartime and genocidal gender and sexual violence. Feminists have brought to international and public attention a phenomenon of rape and sexual violence that had earlier received negligible attention.[2]

Ethnic cleansing in the Former Yugoslavia and the genocide in Rwanda aroused the theoretical and activist instincts of feminists to no longer tolerate the common practice of ignoring wartime rape and the failure to prosecute and punish those atrocious criminal acts.[3] Feminist legal scholars and activists engaged in the process of bringing to light those events through naming, explaining, considering and demanding action.[4] Gender and sexual violence were discussed as international crimes, crimes against humanity and genocide, albeit in very contradictory positions.

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1 Buss, D. (2009), "Rethinking 'rape as a weapon of war'", *Feminist Legal Studies,* 17, 145-163. See also Charlesworth, H. (1999), "Feminist Methods in International Law." *The American Journal of International Law* 93:379-394. Bos, P.R. (2006), Feminists interpreting the politics of wartime rape: Berlin, 1945; Yugoslavia, 1992-1993. *Signs: Journal of Women in Culture and Society,* 31(4), 995-1025.

2 Lyon, M.A., "Hearing the Cry without Answering the Call: Rape, Genocide and the Rwandan Tribunal", *Syracuse Journal of International Law and Commerce*, 28: 99-124, at 104-105.

3 Franke, M.K. (2006), "Gendered Subjects of Transitional Justice", 15 *Colum. J. Gender & L.* 813, 817-819.

4 MacKinnon, C.A., Genocide's Sexuality, in: Williams, M. and Macedo, S., (eds.), *Political Exclusion and Domination* (New York: New York University Press, 2004) at 315. See also, Ettienne, M., "Addressing Gender-Based Violence in an International Context" (1995) 18 *Harv. Women's L. J.* 139 at 140.

I subscribe to the theory that describes gender and sexual violence in Rwanda as acts of genocide.[5] Nevertheless, because feminist analysis focuses on male violence against women[6] the present theory tells only a part of story of the Rwandan reality. It explains only the experiences of Tutsi women when they were the victims of Hutu men. The theory does not consider the experiences of Tutsi men as victims of genocidal gender and sexual violence.

This chapter aims to discuss the feminist theoretical arguments generally and particularly those that will be employed in describing, explaining and further clarifying the phenomenon. A general overview of feminist literature is made in order to establish the backgrounds to and the philosophical approach of feminists on gender and sexual violence. While it will be illustrated that feminism is diverse and often contradictory, it is also important to note that its founding principle is studying women and their situations and only men in as far as they affect women. I will also discuss how feminist theories generally address gender and sexual violence.

In pursuit of contextualising Rwanda, African feminism is discussed due to its proximity to Rwanda and in consideration of certain continental shared values especially the preference of the community over the individual and the appraisal and pride with which motherhood is embraced, both of which are strong points of departure between Western and African feminism. From the perspective of African feminists I present their arguments and approach to gender and sexual violence. The chapter then embarks on a particular focus on gender and sexual violence in war and genocide with the case of Rwanda in mind and it concludes with an analytical section.

4.1 GENERAL OVERVIEW OF FEMINIST THEORIES

As the heading suggests, this section gives a general overview of feminist theories relating to the topic herein studied. I take the caution that feminist theories are broad and have nuances from each and within themselves. This section therefore gives a broader overview and does not assume to fully discuss all the differences within the schools. I should mention also that the different feminist waves introduced maintain a sense of progression and do not have a homogeneous position on the matters they discuss. Thus, this section explores how leading feminist theorists have examined and contributed to the examination of gender and sexual violence. Generally, Feminist concentrates on gender and claim to insert the "woman question" in different disciplines.[7]

5 Verdirame, G. (2000), "The Genocide Definition in the Jurisprudence of the ad hoc Tribunals." *The International and Comparative Law Quarterly* 49: 578-598. See also Sharlach, L. (1999), "Gender and genocide in Rwanda: women as agents and objects of genocide." *Journal of Genocide Research* 1: 387-399.

6 Wishik, (1985), "To question everything: The inquiries of feminist jurisprudence", 1 *Barkerley Women's L. J.* 64, 72-77.

7 Fineman, M.A., Feminist legal theory, *Journal of Gender Social Policy and Law*, Vol. 13(1) 13-25, at 13.

Feminists' theorists[8] analyse questions pertaining to the oppression of women, gender and power relations on the basis of which they unleash subordination and expose male domination. On the basis of their analyses, feminists seek to pursue equal rights and opportunities for women, to combat male domination in all its forms and to disentangle the sex/gender social system. Principally feminist theories investigate, understand, explain, advocate and propose to rectify gender inequality and its perpetuation in society.[9] Herein below I will introduce the major feminist schools of thought.

4.1.1 LIBERAL FEMINISTS

The first wave of feminists, also known as liberal feminists, they are concerned with egalitarian issues. They have been concerned since their introduction with issues of equal rights for women, legal reforms, access to education and employment and the right to vote.[10] The central contribution of liberal feminists is centred on exposing how discrimination against women is enhanced by treating women and men differently. The central theory of liberal feminists expresses that gender equality is achievable trough ignoring biological differences between men and women.[11] Liberal feminists insist that gender neutrality must be incorporate in language and law

Subsequently, they asked why law treated women and men differently, yet they are not different. This discourse claims that the common humanity between men and women supersedes any differentiation based on their procreative roles. In that case they demanded that women and men should not be treated differently before the law.[12] Women should therefore enjoy the same rights and equal opportunities in education and at the workplace.

Motherhood was negatively perceived as women's primary role and arguably the value of the woman was constructed along the lines of childcare and household management.[13] Gender inequality viewed as fostered by women's limited reproductive choices, lower salaries for women's jobs, the divide between women's jobs and those of men and the restricted entry into political and higher managerial positions.[14]

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8 *Supra* note 156 at 13.

9 Hoglund, A.T. (2003), "Justice for Women in War? Feminist Ethics and Human Rights for Women" *The Journal of the Britain and Ireland School of Feminist Theology* 11: 346-361.

10 Rossi, A.S. (ed.), *The feminist papers: From Adams to de Beauvoir* (New York & London: Columbia University Press) at 472- 572.

11 See generally Nussbaum, M.C. (2005), *Sex and Social Justice* (Oxford: Oxford University Press).

12 Smart, C. (1989), *Feminism and the Power of Law* (London: Routledge).

13 Shanley, M.L. (1989), *Feminism, Marriage and the Law in Victorian England* (Princeton: Princeton University Press).

14 Bianchi, S.M. (2000), "Maternal Employment and Time with Children: Dramatic Changes or Surprising Continuity" *Demography* 37(4): 401-414.

Liberal feminism embraces the political system advocating that the State through laws should liberate women from injustices and inequality. Thus, liberal feminists demand that women should have the liberty to: choose to work beyond the home; to have an abortion;[15] to share housework and childcare responsibilities with their husbands and have their achievements and capabilities recognised.

In their effort to challenge and redress gender inequality, first wave appealed for gender-neutral language so as to combat the construction of male values as the valuable norm as opposed to the feminine characteristics regarded as weak and needing emotional support and protection. The socialization process persistently constructs gender differences portraying men as assertive and professional and women as emotional, motherly and weak. As a means to bring women on an equal footing positive action was advocated and initiated by this school.

Liberal feminist have been criticised that on the basis of the fact that in their fight for the social status of women, liberal feminists have tried to resemble men and undermined womanhood and women's roles like pregnancy, childbirth, nurturing and care, blaming them as the source of women's subordination. Arguably, liberal feminists are blamed for promoting men as the standard for which they indirectly apply. The definition of equality that favours the 'sameness' of women and men and which rejects gender differences was criticised for endorsing a measurement of women according to male standards and on male terms.

Their appeal to gender neutrality ignores the distinct roles and needs that biological factors impose on women and men differently. As Simon de Beauvoir suggests, the absolute human type is masculine and the woman is the oblique of the male vertical. After all, the woman is trapped in her ovaries and uterus that particularly trap her in her subjectivity.[16]

4.1.2 RADICAL FEMINISTS

Radical feminists spearheaded by Catherine MacKinnon are best known for their dominance theory that considers men and women in society from a standpoint that reflects men as dominant and women as subordinate.[17] Radical feminists assertively claim that law must address the problem of power inequality between men and women.[18]

The radical feminist school evolved around the same time as other movements and revolutions like racial and class. In the process the women's movements started once again to fill marginalized and watered down by the wider contexts

15 Thomson, J.J. (1972), "A Defence of Abortion" *Phyilosophy and Public Affairs* 1: 47-66.
16 De Beauvoir, S. (1973), *The Second Sex* (New York: Vintage Books) at 13.
17 MacKinnon, C.A. (1989), *Towards a Feminist Theory of the State,* (Cambridge: Harvard University Press).
18 Littleton, C.A. (1987), "Feminist Jurisprudence: The Difference Method Makes" *Stanford Law Review* 41 at 751-84.

rendering them nearly invisible once again. This school came up with movement slogans promoting womanhood, sisterhood and other slogans like the "personal is political" and theories asserting the oneness of women.[19] The potential of women being able to collectively empower each other was emphasised. They claim that while gender, race and social class oppression are related, sexual oppression is more important than race or class.

Radical feminists introduced an analysis of the "personal is political" in which gender was not seen as a natural characteristic of a section of power in society. This analysis takes four interrelated standpoints. Firstly, that women are dominated as a group by men as a group and therefore also as individuals. Secondly, that women's subordination is not personal by nature or by biology, but that women are subordinated by and in society. Thirdly, that the gender division, including the sex division of labour that keeps women in high-heeled, low-status jobs, pervades and determines also women's personal feelings in relationships. And lastly, because a woman's problems are not hers individually but those of women as a whole, they cannot be addressed except as a whole.[20]

The above viewpoint is the result of the consciousness-raising method in which women's consciousness or lived knowledge becomes the process in which their problems are identified. This second-wave feminist method is relevant for this study because it is based on such a method that the experience of victims of genocidal gender and sexual violence presented from their viewpoint is believed to be an important knowledge level in understanding the complexity of gender and sexual violence as part and parcel of the genocide against the Tutsi.

Further, this school employs the Marxist theory of class dominance in the construction of the feminist theory of the State.[21] Patriarchy was seen as inherent in bourgeois society. They argued that the liberation of women is only possible under socialism and that the overthrow of capitalism is possible through the liberation of women.

The concepts of patriarchy and capitalism are seen as intertwined while gender and class are studied from an integrated perspective.

The works of Catherine MacKinnon, especially "Towards a feminist theory of the state",[22] are particularly informative on the theories employed by this school. On social inequality between women and men, MacKinnon explains that social power shapes the way we know and vice versa. In this way gender is considered as a form of power and explaining that power should also be understood from its gendered forms.

19 *Supra* note 319 at 95, 240.
20 *Ibid*.
21 *Supra* note 156 at 3-37.
22 *Supra* note 319.

The legal system is also criticised for being a mechanism of patriarchy through which male dominance is emphasised. Gender inequalities are seen as a result of legal and societal structures. They claim that the deep-seated male orientation infects all practices. The State is arguably male as it exists and participates in enforcing the epistemology of male dominance through law which purports to use sexual politics. The law is but a representation of male dominance and it sees women and treats them just like men do. Law is therefore criticised for pretending to be impartial, objective and rational.

Unlike liberal feminists who claimed that by amending laws women's inequality can be resolved, the radical point of view asserts that existing law receives its legitimacy at the expense of women and cannot be used to correct that from which it is legitimised.[23] On the contrary, they argue that only feminist law can liberate women. This implies that the law as it exists must be improved to eliminate women's inequality and cannot improve the lives of women who did not participate in establishing its dominating rule. The theory of sexuality is another central analysis. It was in fact introduced by the socialist feminist Catherine MacKinnon who argued that sexuality is central in enhancing the subordination of women. MacKinnon and her proponents explain that sexuality is central to gender and that biology has a social meaning in a system of sexual inequality. The present school rejects de Beauvoir's argument that "one is not born but rather becones awoman."[24]

In the same line of thinking it has been argued that distinctions between gender and sex have been made too rigidly that is by the first wave of feminists; she rather posits that gender and sex are in fact interacting factors. Further, she questions whether there is anyone who can seriously claim that women's physical, genetic, and especially hormonal factors do not affect their behaviour.[25] For that matter no woman can escape her biology, but it is up to feminists to analyse how female biology is interpreted.[26]

Their perspective of womanliness makes them emphasize the need for women themselves to make their voice heard, arguing that they alone have the potential to expose their reality since women are the ones who know and have faced inequality. Women must face and expose the pervasiveness of male power, MacKinnon argues.

> *Grasping women's reality from the inside, developing its specificities, facing the intractability and pervasiveness of male power, relentlessly criticizing women's condition as it identifies all women, it has created strategies for change, beginning with consciousness raising.*[27]

23 *Ibid* at 237-246.
24 *Supra* note 317 at 301.
25 Slattery, M., *Key Ideas in sociology* (UK: Neldon Thomes Ltd 2003) at 116.
26 *Ibid*.
27 *Supra* note 319 at 242.

The above statement illustrates the method that radical feminists engage in, in their inquiry into inequality which they present as a situation common to all women.[28] They claim that in order to effectively address and understand inequality, this must be done from a woman's point of view.

Radical feminists purport that women suffer from a whole range of inequality including rape, domestic violence, sexual harassment, sexual abuse, unequal pay, pornography, exclusion from property ownership, discrimination at the workplace, a denial of reproductive rights, exclusion from public life and many more. On that note MacKinnon is of the view that "sex inequality is the true name for women's social condition."[29] For her, inequality is not an issue of sameness or differences as suggested by liberal feminists but a matter of dominance.

A central critique of radical feminists is their generalised approach with regard to sisterhood and the oneness of women. They are considered to be composed of middle-class, white women who echo only the needs and situation of that class yet assuming a voice for every other woman. They, just like patriarchy, are too assuming and make themselves the standard for other women to subscribe to.

The theory of sexuality as purely subordinating women is also rejected by the third wave of feminists, especially those who are preoccupied with the theories of sexual pleasure and the liberating force of sexuality as advanced by some African feminists and gay feminists.

4.1.3 CULTURAL FEMINISTS

Often regarded as the third wave of feminists,[30] this school is dominated by post-colonialist and post-socialist world order ideas.[31] Cultural feminism embraces the difference between men and women taking a positive strand that women's uniqueness should be celebrated.[32] It seeks to challenge sexism through appreciating gender and differences. Opposed to liberal feminists demanding gender neutrality,

cultural feminists posit that feminine traits be liberated from patriarchy.[33] It embraces mainstreams ideas of multiplicity, ambiguity, and diversity in theory. Gender is regarded as a discursive practice that is hegemonic, and a social matrix that is perfomative.[34] Butler argues that seemingly natural appearance of gender

28 *Ibid*.
29 *Ibid* at 242.
30 Flax, J. (1997), Postmodernism and Gender Relations in Feminist Theory, in: Kemp, S. and Squires, J. (eds.), *Feminism* (Oxford & New York: Oxford University Press) at 170-178.
31 See generally Frug, M.J. (1992), *Postmodern Legal Feminism* (New York: Routledge).
32 Orr, C.M. (1997), "Charting the Currents of Third Wave" *Hypathia* 12(3): 20-45.
33 Siegel, D.L (1997), Reading Between the Waves: Feminist Histiography in a Post Feminist Moment, in: Heywood, L. and Drake, J. (1997), *Third Wave Agenda: Being Feminist, Doing Feminism* (Minneapolis: University of Minneapolis Press) at 55-82.
34 Salih, S., "On Judith Butler and Performitivity" available at http://queerdigital.pbworks.com/f/SalihButlPerfo.pdf, accessed on 12 May 2010.

must be understood as constructed from performing a set of repeated acts overtime hence gender is not being but rather doing.[35]

Third-wave or postmodern feminists argue that language is an important tool in the construction and locating of human experiences. Butler[36] and Frug assert that sex and gender have been constructed by language. It is contended that direct coercion is not the only way in which power is exercised, noting that power is also expressed through the way language shapes and draws limits to our reality. From another perspective, Frug suggests that language should be seen as a tool through which feminists should combat stereotypes concerning women.

Frug's criticism of legal language is particularly interesting; in different ways she analyses how legal discourse constructs women. On the basis of legal rules and legal discourse a specific meaning is given to the female body. Frug notes that some rules permit and at times mandate the terrorizing of the female body. She argues that the female body is viewed as a body that is "in terror" through a combination of laws that fail to adequately protect women from physical violence, on the one hand, and, on the other, rules that encourage her to seek refuge in case of insecurity.[37]

Focusing on motherhood, according to Frug, is another means through which legal rules and discourse construct the female body.[38] Duties and rights attached to motherhood are specifically viewed as materialising the woman. Legal rules and discourse also permits and/or mandates the sexualisation of the female body. Laws relating to prostitution, marriage, homosexuality, pornography, rape and sexual harassment define the female body as desirable, 'rapeable', and/or one that is designed for sex with a man.

Frug notes that the above laws and legal discourse constitute a system that engenders the female body. It is argued that through linguistic strategies, images of the female body are drawn. She concludes that

> *by deploying those images, legal discourse rationalizes, explains, and renders authoritative the female body rule network. The impact of the rule network on women's reality in turn reacts back on the discourse, reinforcing the "truth" of these images.*[39]

Frug's discussion on the impact of legal language and discourse will be interestingly explored further in this work while analysing the realities of the genocidal sexual

35 Butler, J. (1990), Perfomative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory" in: Case, S.E., *Performing Feminism: Feminists Critical Theory and Theatre* (Baltimore: Johns Hopkins University Press) at 19-25.

36 *Ibid* at 270.

37 Frug, M.J. (1992), A Postmodern Legal Manifesto (an unfinished draft), *Harv. L. Rev.* Vol. 105, 1045-1075 at 1049.

38 *Ibid* at 1051.

39 *Ibid* at 1050.

and gender violence on the basis of how legal language or discussion has shaped the experiences of the victims of gender and sexual violence and how social discourse has influenced or reinforced the female victim and male perpetrator dichotomies.

Postmodern feminists reject liberal and modern feminists' theories of women as a homogeneous group; on the contrary they embrace differences between different groups of women, through claiming that the situation and reaction of various women will differ depending on their race, ethnicity, sex, sexuality and class. By embracing diversity, postmodern feminists reject the claims of earlier feminist schools that there is an all-women perspective and problem. Therefore in contrast to liberal and radical feminists, postmodernists reject women as a universal subject and the claim that there is a unified voice for women and the assumption that there is a common solution to the woman problem. For the postmodernist, asking a woman questions is not alike except if a specific woman asks questions within her/their own context.

Butler's theory on gender and sex reflects earlier schools that view gender differences from a social constructionist approach. Further developing de Beauvoir's theory that men and women are not born but made, Butler explains gender as something that one acquires through the practice of socially and culturally constructed codes of gender-based identity. Butler asserts that gender identity is a perfomative construct that develops as the subject repeatedly performs different acts in order to meet the heterosexual matrix. Butler explains that in the absence of the different acts subscribing to heterosexual standards there would be no gender.[40]

Butlerian theory rejects patriarchy and attempts at heteronormative social regulation that make distinctions between gender and sex seem natural and unchangeable. After negating the existence of gender, Butler expresses the view that the difference between gender and sex is simply dubious and non-existent. She claims that when gender is separated from sex the former should be understood as "a free floating artifice".[41] It is expressed that gender can be done or undone, hence gender is problematic in that it is a social creation or behaviour and roles that changes in time and space. Similarly, sex is equally a cultural construction since the distinction between sex and gender is considered to be no distinction at all. Butler calls for a radical rethinking of gender identity.[42] Postmodern feminists advance constructionist theory vis-à-vis the notions of gender and sexuality. Theories of sexuality and gender suggest that gender identity can be deconstructed on the basis of its perfomative character.

Kimberley Crenshaw has developed an interesting and elaborate theory that does not focus on how identities are created, instead Crenshaw's intersectionality theory elaborates on the impact of multiple identities. She argues in the case of women of

40 Butler, J. (1988), Perfomative acts and gender constitution: An essay in phenomenology and feminists theory, *Theatre Journal*, Vol. 40. No 4: 519- 531 at 521.
41 Butler, J. (1990), *Gender trouble: feminism and the subversion of identity* (New York: Routledge), at 10.
42 *Ibid* at 11.

colour that their lives are shaped by their identity-based characteristics of gender and colour and that the experiences of women of colour happen at the intersection between their gender and colour. Kimberley correctly claims that what women experience are not incidental to gender or colour but are specific vulnerabilities created by an overlapping of the said multiple identities.[43]

The intersectionality theory notes that the experience of women of colour is not incidental to race or gender but is the result of the intersection between their gender and race.[44] Crenshaw's theory recognises that religion, ethnicity, and sexual orientation are also important aspects in conceptualising intersectionality. Crenshaw[45] expresses the view that it is important to use an intersectional analysis of women's experience to avoid the traditional analysis that focuses on gender or race which results in marginalising women of colour within both the category of gender and race. Crenshaw emphasises that an analysis that ignores one of the identity-based characteristics of women victims fails to fully appreciate the experiences of women.

4.2 A FEMINIST'S GENERAL VIEW ON GENDER AND SEXUAL VIOLENCE

As the status of women is central to feminist studies, the place and use of gender and sexual violence occupies an important space in their theorising. All three waves started from a domestic and non-international setting hence most of their initial views on rape and sexual violence emanate from their domestic systems.

The classic feminist theory views rape and sexual violence, whether in wartime or peacetime, as being motivated by the patriarch desire to exert power and dominance over women. Male power and domination is the central reason for gender and sexual violence in the eyes of classical feminists. What is permitted or is not permitted, such as rape or other sexual violence crimes, is nothing more than the underlining of male dominance through the law and society that empowers patriarchy.[46]

With the same reasoning Brownmiller expresses that rape is a conscious process of dominance and intimidation in which all men seek to keep all women in a constant state of fear. She views rape as a crime of violence perpetrated by men in order to exert power and control over the female victim. Similarly, Millet proposed that patriarchy is the reason why men rape; in this context Millet suggests that women

43 *Supra* note 167 at 114.

44 Crenshaw, K. (1991), "Mapping the Margins: Intersectionality, Identity politics and Violence against Women of Colour" 43, *Stan. L. Rev.* 1241, at 1241.

45 *Ibid*.

46 See generally Jasinski, J.L. (2001), Theoretical explanations for violence against women, in: Renzetti, C.M., Edleson, J.L. and Bergen R.K. (eds.), *Sourcebook on Violence Against Women* at 12 (London: Sage Publications).

are perceived as second-class citizens who men believe are their possessions.[47] Through rape Millet and Brownmiller suggest that man promote greater power to his body while denying the woman of her body and taking away her power.

On wartime rape, Brownmiller asserts that wars produce rape because wars are a means through which masculine dominance is enhanced.[48] The so-called "pressure-cooker" theory of wartime rape explains that wartime sexual violence is a result of the combination of biological libido on the part of combatants and the stresses and chaos they experience both during and after war. Brownmiller advances that rape is not entirely a crime of sexual passion, but is mainly one that is motivated by men's desire to exert dominance over women. She argues that wartime rape is a means used by combatants to express their contempt for women.[49]

MacKinnon's theory on sexuality is intriguingly informative concerning the feminist understanding of gender and sexual violence. In her insightful theory on sexuality, she illustrates that the vices of sexual crimes are "allowed *de facto* as they are prohibited *de jure*."[50] The formal prohibition of rape and other sexual crimes, in her opinion, has not improved their prevention, instead it has made it difficult to believe that they are common practice. The sexuality theory engages in describing the sexual nature of power controls. MacKinnon asserts that aggression against women is seen by men as sexual pleasure and an entitlement of masculinity. Similarly she claims that female subordination is sexualised, as dominance is for the male. In this logic, sexual abuse is employed as a form of terror used to create and maintain the status quo.

On rape particularly MacKinnon holds the view that rape is a problem of sexism, one of inequality between men and women.[51] MacKinnon advances an interesting discussion on the phenomenon of reported cases of rape and those that are not reported suggesting that it is important to ask why the reported cases are indeed reported and importantly to also ask why those unreported cases are not in fact reported. MacKinnon explains that cases that are reported are the ones that subscribe to forms that will most likely be believed, in her case rape by strangers and rape by a black man are the while male archetype of rape.

A feminist theory of sexuality according to MacKinnon is constructed on the basis of data relating to male sexualised violence against women. Accordingly, sexuality is placed within the theory of gender inequality that establishes a social hierarchy placing men over women.[52] Sexuality is subsequently regarded as a social construction of male power because it is defined by men and forced on women.[53]

47 Millet, K. (1969), *Sexual Politics, and Theory of sexual Politics* (London: Virago Press).
48 *Supra* note 13 (Brownmiller) at 32.
49 *Ibid*.
50 *Supra* note 156 at 5.
51 *Ibid* at 5-8.
52 *Supra* note 319 at 127.
53 *Ibid*.

Feminist literature challenges the legal framework due to its weakness in addressing rape, pornography, and intimate rape and sexual violence crimes committed against women and children often by men who are well known to them. It is argued that rape is viewed as an indicator of the State's failure to recognise the rights of women to be free from coerced sex relations. Subsequently, feminist scholars demanded the amendment of laws related to rape, sexual assault, pornography and abortion.

The feminist literature has criticised rules of evidence applicable to rape and sexual offences, like taking the previous sexual conduct of the victim of rape into consideration, requirements of resistance on the part of the victim of rape, the exclusion of marital rape from punishable conduct, the determination of non-consent,[54] an element that persisted even within the practice of the ICTR as will be discussed further under chapter 5 of this study.

As a result feminist critiques of rape laws succeeded in provoking major legal reforms in the United States of America. Rape was seen as sexual-neutral in some states.[55] Consent was seen as the fundamental difference between legal and illegal sexual intercourse. Rape was outlawed as a crime of violence with sexual assault and battery. Evidential rules were amended, no longer requiring corroborating evidence in some states, excluding the resistance from the standards of proof and allowing expert testimony on Rape Trauma Syndrome.[56]

4.3 OVERVIEW OF AFRICAN FEMINISM

African feminists are just as diverse as much as the continent itself. Southern Africa mostly focuses on gender and racial relations, the Maghreb states are influenced by Islamic law and Sub-Saharan Africa ranges between religious, cultural and ethnic-based factors. Overall Africans have experienced or been affected by colonialism in many ways. It naturally follows therefore that the African feminists' struggle is uniquely influenced and affected by the continent's diverse pre-colonial context, slavery, colonization, and liberation struggles. They come from a context of colonial domination and neo-colonial exploitation.[57] The colonial legacy on the African continent is one of repression and exploitation and of racial and ethnic ideologies as Rwandan history discussed under chapter two illustrates.

54 Morrison, T. (1995), *"Feminist Legal Scholarship on Rape: A Maturing look at One Form of Violence against Women"* 2 *Wm. & Mary J. Women & L. 35*, available at http://scholarship.law.wn.ed/wmjowl/vol2/iss1/3 at 38, last accessed on 14 may 2012.

55 *Ibid* at 39.

56 *Ibid*.

57 Oloka-Onyango, J. and Tamale, S. (1995), "'The personal is political', or why women's rights are indeed human rights: An African perspective on international feminism" *Human Rights Quarterly,* 17:4 691-731 at 693.

African feminists have generally been shaped by and founded upon the continent's struggles for independence.[58] Moreover, African feminism was shaped by resistance to colonial rule in which both African men and women participated. Colonial practices by and large were violent, "capturing, defining and transforming or orientalising realities in the third world"[59] as suggested by Onyango and Tamale.

Colonialism has been criticised for failing to embrace domestic social organisations including gender. On the contrary, in their power-based notions of class, gender and sexual coercion of indigenous women were introduced.[60] According to Mikkel, contemporary gender inequalities in Africa are primarily the result of colonial processes. She argues that African women in pre-colonial Africa were integrated in society systems and arrangements.[61] While recognising that colonialism exacerbated power inequalities, McFadden contradicts Mikell's argument by arguing that power hierarchies existed in Africa societies before colonialism.[62]

African feminists stemmed from the African virtue and ideology of communal value instead of the individualistic point of departure for Western feminists. The community as a whole is placed above the individual in all African societies. Communal perceptions allowed African women to be part of the liberation struggles against colonialism. Prior to colonialism, in many parts of Africa there were culturally imbedded forms of society participation that resulted in African women maintaining a strong collective identity. Men were not seen as bad all the time in fact some African feminists reject feminism because of the radical view that men are the enemy. An illustrative example is Buchi who explains: "I have never called myself a feminist ... . I don't subscribe to a feminist idea that all men are brutal and repressive and we must reject them."[63] African feminist's expressed sentiments of resentment to mainstream western feminists arguing that feminists in the west had evolved with hostilities to male due to the central opposition to patriarchy and an individualistic approach contradictory to most African community based values.[64] Minimal hostility to patriarchy was within Africa's historical context understandable because men and women had jointly fought for the decolonisation

58 See generally Mama, A. (1998), Sheroes and Villians: Conceptualising Colonial and Contemporary Violence against Women in Africa. In Jacqui, M.A. and Chandra, T.M. (eds.), *Feminist Genealogies, Colonial Legacies, Democratic Futures* (London: Routledge). See also Steady, F.C. (1989), African Feminism: A worldwide perspective, in: Terborg-Penn, R. (ed.), *Women in Africa and the African Diaspora*, (Boston: Harvard University Press).

59 *Supra* note 360 at 694.

60 See generally Chi-Chi Undie and Kabwe Benaye, The State of Knowledge on sexuality in sub-Saharan Africa A synthesis of Literature, *QUEST: An African Journal of Philosophy / Revue Africaine de Philosophie,* XX: 119-154.

61 Mikell, G. (1995), "African feminism: Towards a new politics of representation", *Feminist Studies* Vol. 21, No. 2 405-424 at 406.

62 MacFadden, P. (2003), "Sexual Pleasure as Feminist Choice" *Feminist Africa 2* available at www.feministafrica.org/index.php/sexual-pleasure-as-feminist-choice, last accessed on 15 May 2012.

63 *Supra* note 364 at 406.

64 *Ibid*.

of their countries.[65] Colonial liberation wars in Africa introduced other spheres of dominance that apparently united African men and women or in some specific cases ethnic tensions allowed the joint domination of men and women who shared a group.

Cultural factors are commonly seen as being responsible for the dominant status of African women from the perspective of Western feminists. The generalised negative view of African culture is a point of departure for disagreements between Western and African feminists. Sylvia Tamale appraises the liberating force of African culture for women. She considers Africa's common cultural ideologies to be the ethos of communitarianism, solidarity and *ubuntu*.[66] On this note Tamale views gender as a social construct, constructed within a cultural context. Tamale recommends that African feminists should work within the specificities of their realities because there is a close connection between gender, culture and sexuality.

As discussed above, African feminists like Tamale insist that considering cultural realities in feminist scholarship is pertinent. Traditional practices and beliefs remain a stronghold in gender relations between men and women in most African contexts. In this analysis I would like to discuss the contextual perspective to gender and sexual violence committed by the *Mai Mai* militia group in the eastern part of the Democratic Republic of Congo (DRC).

The *Mai Mai* is one of the many militia groups operating in the eastern part of the DRC that employs military strategies largely influenced by traditional witchcraft beliefs and practices. The *Mai Mai* believe that "if they douse themselves with a herb-infused potion prior to battle, no bullet will penetrate them. By magic, whatever they encounter in battle will pass them like water."[67] This belief holds only for *Mai Mai* male fighters and goes hand in hand that with specific prohibitions of abstinence from rape. It is believe that if male combatants engage in rape before engaging in battle the myth of bullet non penetration fails thus to rape strips them of the protection from bullets as is their belief.

In order to regain protection a *Mai Mai* combatant who raped must undergo a laborious cultural cleansing ritual.

For that matter, *Mai Mai* women who are not generally fighters in their own right support the movement by committing other war based violations like rape and often do not take part in frontline battle field fighting. Thus, there is no need

65 Roy-Campbell, Z.M. (1996), "Pan African Women Organising for the Future: The Formation of the Pan African Women's Organisation and Beyond" *African Journal of Political Science New Series* Vol. 1 No. 1, June 1996, 45-57 at 46.

66 Tamale, S. (2006), "'African Feminism' Taking a 'Culture Turn'", presented at the Launch of the African Feminist Forum, Acra, Ghana, available at www.africanfeministforum.org/v3/files/African_Feminism_Taking_Cultural_Turn.pdf.

67 Shannon, L. (2010), *A thousand sisters: My Tourney into the Worst Place on Earth to be a Woman* (Berkeley: Seal Press) at 158.

of cleansing rituals where *Mai Mai* women rape because first of all there are no similar cultural standards for women. Understanding *Mai Mai* cultural practices and beliefs relating to wartime rape permits us to partly explain why women perpetrators of rape and sexual violence have increased in Eastern DRC because *Mai Mai* women engage in rape as a weapon of war on behalf of their men who would otherwise compromise military success through engaging in rape.[68]

Apart from the initial resistance by some African feminist on western perspective, African feminists are as well challenged by patriarchal norms within Africa's traditional and colonial heritage. like their Western sisters, central themes within African feminist studies range from violence against women, their legal and political rights, patriarchy, sexuality and reproductive rights, employment, discrimination and education. To a greater extent, though, the dominant Western feminist approach is by and large rejected by African feminists on the basis that it does not reflect differences in race, ethnicity, colour and the historical perspectives of colonialism and the impact that those differences present for women and feminists on the African continent.

African feminists also attempt to dismantle patriarchy in all its forms in order to enhance women's equality.[69] As a central point, they seek to question the legitimacy of institutions that continue to compromise the rights of women. Accordingly, patriarchy is identified as systems of male authority that foster and legalise the oppression of women through political, social, economic, legal and other instructions.

African feminist scholars challenge gender hierarchies and seek to redress inequality in its substance and form. Inequality and its driving force patriarchy are seen as factors that change over time and take different forms based on other factors like race, ethnicity, religion and global imperialism. They argue that confronting patriarchy alone would be insufficient if not challenged together with other systems of oppression and exploitation that mutually support each other.[70] The notion of gender was theorised as a force that undermined women through marriage, notions of belonging strengthened by legal notions of property ownership. Control over women's sexuality was aggravated by gender discourses during the colonial and post-colonial eras.

In the same way third-wave feminists reject the womanhood and sisterhood debates, most African feminist scholars also reject it. They strongly denounce claims that African feminism emanates from Western feminists and claim their

68 Lawry, L. explains that the *Mai Mai* are a group that mostly use women to rape in the DRC because of traditional rituals attached to traditional beliefs relating to the male military code of conduct.

69 Mikell, G. (1997), *African Feminism: The Politics of Survival in Sub-Saharan Africa* (Philadelphia: University of Pennsylvania Press) at 335.

70 The African Women's Development Fund, *Charter of Feminists principles for African Feminists*, Ghana, 2006, at www.africanfeministforum.org/v3/files/Charter_of_Feminist_Principles_for_African_Feminists.pdf, last accessed on 13 July 2009, at 5.

right to theorize, write, strategize and speak for themselves as African women.[71] This sentiment does not however reject a feminist move towards international feminism that seeks to join different and common experiences of women and not just the voice of liberal Western feminist thoughts.

From the above perspective Tamale[72] recognizes the commitment of other scholars and activists beyond the continent in their fight against the suffering of women, especially where international crimes are concerned, as reaffirming the often African claimed value of "Ubuntu". Ubuntu is an African concept of humanness that concerns understanding diversity and believe in universal sharing and bond for human kind.[73]

On this note, Oloka Onyango and Sylivia Tamale embrace universalism claiming that universality exists in women's concerns despite the differences that exist in women as a group.[74] They suggest that, without forgetting the particularities imposed by location, women should maintain the category and avoid the trap of the difference debates as observed by Hillary Charlesworthy.[75]

The legal systems introduced by colonialists altered gender relations in Africa. Western values of the State and its patriarchal character and property laws placed the individual at the centre as opposed to communal property ownership which existed in pre-colonial Africa. Unfortunately, religious-based marriage enshrining either Christian or Islamic values further subordinated African women by predominantly making the man the head and allowing exclusive property rights.

Feminists of one group or another – including African feminists – have devoted ample attention to theorising sexuality. Hereunder I discuss how sexuality is discussed within African feminism. I should mention, however, that it is impossible in space and time to present all discussions on the topic. Nevertheless, it is believed that a grasp of the literature elaborates further on the theoretical context of the present study.

Amina Mama suggests that African sexuality was derived from colonial thoughts and legacies.[76] Similarly other scholars have noted that African sexuality as it

71 *Ibid* at 7.
72 *Supra* note 369.
73 For a discussion on *Ubuntu* see: Mogobe, R. (1999), *African Philosophy through ubuntu* (Harare: Mond Books).
74 *Supra* note 360 at 697.
75 Charlesworth, H. and Chinkin, C. (2000), Boundaries *of International law: A Feminist Analysis*, (Manchester: Manchester University Press) at 46-47.
76 Mama, A. (1996), *Women's Studies and Studies of Women in Africa during the 1990s* (Dakar: CODESRIA).

appears today is influenced by colonial and Western norms on the subject.[77] This perspective sees sexuality in Africa as secretive, uncivilised and/or hypersexual.[78]

Patricia McFadden's[79] work on "*sexual pleasure as a feminist choice*" is particularly interesting, albeit controversial. McFadden raises crucial issues including the interplay between sexual pleasure and power, and the critical need to distinguish sexuality from reproduction. She claims that sexual choice is fundamental and relevant for women and recognises and reasserts the need for feminist agency as the starting point to combat sexual violations.[80]

From a rights-based perspective McFadden claims that sexual pleasure and choice are fundamental to the right of women to a safe and wholesome lifestyle. She asserts that once women reclaim their sexual energy and power then they can retrieve personal and political power to fight oppressive social systems and circumstances.

McFadden, however, makes a far-reaching generalisation concerning patriarchal societies by suggesting that in all patriarchal societies there is the suppression of women by denying them the right to a name, the right to enjoy themselves and subjecting them to control. She criticises such societies for what she calls teaching females consistently and often violently that:

> *Their bodies' are dirty, nasty, smelly, disgusting, corrupting, imperfect, ugly and volatile harbingers of disease and immorality. The redemption of the pathologised female body is seen to come through males of various statuses: fathers, who protect and defend the family honour through them; priests, who experience holiness and godliness through them; brothers, who learn through women and girls how to become authoritative and vigilant; husbands, who realise their masculinity through sexual occupancy and breeding; and strangers, who wreak misogynistic vengeance upon them for an entire range of grievances, imagined and otherwise. A denied right, misinformation, a frown, a disapproving scowl, a raised voice, an angry reprimand, a verbal insult, a shaken fist, a shove, a slap, a punch, rape, a slit throat – these are part of the routine processes of socialisation and gendered identity construction through which girls and women are persistently reminded that they are the chattels of men in our societies.*[81]

The above, according to this African radical feminist, is the fundamental power for patriarchy and its impunity. What this writer calls the routine process of socialisation and the construction of gender identity is full of violence, both verbal

77 Arnfred, S. (2004), African Sexuality/ Sexuality in Africa, in: Arnfred, S. (ed.), *Re-thinking Sexualities in Africa* (Uppsala: Nordic Africa Institute) at 64.

78 Cornwall, A., Joly, S. and Hawkins, K. (eds.), (2013), *Women, Sexuality and the Political Power of Pleasure: Sex Gender and empowerment* (London & New York: Zed Books) at 5.

79 *Supra* note 365.

80 *Ibid* at 2.

81 *Supra* note 365 at 8.

and physical, by men from all walks of life. The sexual gender socialisation process is in the eyes of McFadden nothing more than brutality.

Pereira, a critique of McFadden, notes that the latter's mode of argument is problematic because of the assumptions on which her claims are based and the way in which McFadden "*erases complexities and contradictions in African women's realities*".[82] Pereira criticises McFadden because her argument on the primacy of sexual pleasure is based on a generalised assumption that African women are intrinsically repressed sexually. In this criticism Pereira observes that while there is some truth in the assumption, the overreaching aspect is too general to be true.

Pereira notes that McFadden fails to address whether that sexual repression occurs across the continent, ethnic groups, religions, class and age groups and whether, if it does happen at all, it occurs in a similar way. In Pereira's opinion, it is important to rather seek to explain how sexualities were constructed in the spectrum of historical periods – before colonialism, during colonialism and post-colonialism. Further, Pereira observes that McFadden's standpoint fails to suggest that African women's sexualities vary across space, time and regions.

Across the African continent, sexuality and sexual initiation rituals were and in some places remain as central aspects of maturity or the transition to adulthood. Both African boys and girls go through different rituals ranging from male circumcision to female genital mutilation, to the elongation of the clitoris in other traditions including the Rwandan. Some cultures enjoy heterosexual intercourse with 'dry' women while others find it satisfying once the woman is sexually 'wet'. How these practices are discussed depends largely on the discussants' view, for example most sexual pleasure discourse has criticised FGM as a violation of women's sexual rights through reducing the eroticism of women.[83]

In conclusion, it can be said that, as mentioned earlier, African feminists are indeed numerous and diverging, notably though the history, culture and political experiences that have shaped feminism in Africa. They discuss gender, sexuality, religion, social, political and economic conditions which shape the lives of African women. They study the influence of religion, especially Christianity and Islam, and how those religions have embraced and transformed sexuality in Africa.

Some African feminists have for example criticised religious groups for only embracing heterosexuality and the heterosexual marital setting while vehemently condemning non-heterosexual relations like homosexuality.[84] Imperialistic and colonialist ideologies and perceptions of indigenous people attracts voluminous

82 Charmaine, P. (2003), "Where angels fear to tread" Some thoughts on Patricia MacFadden's "Sexual Pleasure as Feminist Choice*", Feminist Africa,* 2 at 1.

83 Mustafa Abusharaf, R., "Rethinking Feminist Discourses on Female Genital Mutilation The Case of The Sudan" *Canadian Women Studies/Les Caheirs de la femme* Vol. 15 Numbers 2 and 3, at 52-54.

84 Imam, A.M. (1997), The Muslim Religious Rights (Fundamentalists) and sexuality, Muslim Living Under Muslim Laws, *Dossier*, 17, 7-25, at 8.

African feministic criticism for their failure to understand the local population and introducing their hierarchical ideas of gender inequality, patriarchy and gender and sexual violence.

Many more African feminists have diligently discussed militarism, conflict and gender and sexual violence on the continent. Because of the specific interest that the latter possess for this study the next section discusses gender and sexual feminism as features within African feminism.

4.4 AFRICAN FEMINISM AND GENDER AND SEXUAL VIOLENCE

Within the African feminist academia efforts to theorise and activism against gender and sexual violence whether occurring during conflict or in so-called times of peace are a central feature in African feminist literature.

Some African feminist theorists have suggested that the colonial process is fundamentally central to understanding gender and sexual violence. Scholars in this line of thought blame the colonisation process for gender and sexual violence as colonisation is a violent process in itself. They argue that during the colonisation process the sexual coercion of African women was practised along with other degrading practices that degraded both African men and mostly African women.

Colonial racial politics and policies have been discussed as gendered and violent. The colonial practice of categorising the colonial population into complex categories of hierarchies of gender as men, women, or race as in the example of the Rwandan Tutsi, Hutu and Twa was considered to be violent because it created aliens and otherness. This school suggests that violence is epistemological and discursive and views the relationship between being gendered and violence to be an intimate one.

Amina Mama is one of these scholars who have looked at gender and sexual violence from the historical and social setting of the continent. She suggests that widespread violence against women is probably the most direct and unequivocal manifestation of women's oppressed status in Africa.[85] She reiterates that even though such violence has at times caused public outrage, it has nonetheless remained the responsibility of women's organisations to take committed action.[86]

According to Mama, understanding gender-based violence in Africa requires an understanding of the phenomenon during colonialism. She observes that:

85 Mama, A. (1997), Heroes and villains: conceptualizing colonial and contemporary violence against women in Africa", in: Alexander, M.J. and Mohanty, C.T., *Feminist genealogies, colonial legacies, democratic futures*, (New York: Routledge) at 46.

86 *Ibid*.

> *(B)eing conquered by colonising powers; having been culturally and materially subjected to the nineteenth century European racial hierarchy and its gender politics and being indoctrinated into all-male European administrative systems … has persistently affected all aspects of social, cultural, political and economic life in postcolonial African States.*[87]

She tries to illustrate how the lives of African women were deemed to follow the experience of their European counterparts especially because of the violent male dominated character of the so-called civilisation process used to "civilise" the African continent.[88]

Further, Mama argues that rape and sexual violence during colonization were used as a weapon against communities that resisted the colonizers. She states that the "Reality was that rape and sexual violence were used against mothers, sisters, wives, and daughters of men who were suspected of resisting the colonizers in order to humiliate the men."[89] She notes that sexual violence was an integral part of colonization and functioned as a metaphor for the conquest of African lands and the humiliation of the peoples of Africa.

Interestingly Mama unearths racial sentiments within the colonial policies on sexuality between African women and the colonialists. She states that contradictions existed based on, on the one hand, the required racial purity of the colonizers and, on the other, the sexuality needs of imperial masculinity filled with simultaneous desire and contempt. Specific colonial rules were established to control inter-racial relations through, for example, Lord Lugard's condemnation of sexual relations between a white man and an African woman as bestiality on the part of the man. While intermarriages were outspokenly prohibited, Mama illustrates that Lugard's colonial policy successfully comodified African women by outlawing marriage with whites but encouraging prostitution.[90]

The prohibition of marital relations between African women and the imperialists is relevant for this study because it relates to the Hutu Ten Commandments and other media propaganda that discouraged marriage or other official relationships with Tutsi women, on the one hand, and, on the other, encouraged and promoted the sexual abuse and torture of the said victims.

Mama therefore highlights that the use of sexual violence in the colonial conquest and the whole colonization process transformed African gender relations in a very complex, diverse and contradictory manner. She argues that widespread rape and abuse is caused by the power to coerce, intimidate and harass that is wielded by officials and men in uniform in dictatorial society.

87 Mama, A. (1997), *Beyond the mask, race, gender and Identity* (New York: Routledge) at 47.
88 *Supra* note 375 at 4.
89 *Supra* note 388 at 51.
90 *Ibid* at 50.

On wartime rape, including that of a genocidal nature, Mama importantly notes that rape during war is an ethno-sexual phenomenon. She argues that differences in nationality, race or ethnicity separate the combatants and identify the targets of aggression in military operations. Persuasively Mama asserts that whether violence in war emanates from combat or sexual attack, and whether it is guns or bodies that are used as weapons, those who are physically or sexually assaulted are almost always different in some ethnic way. Mama further observes that men at war do not as a rule rape their "own" women unless, of course, those women are suspected of disloyalty, especially sexual disloyalty or "collaboration."

Another discourse among African feminists focuses on the link between gender and sexual violence, and militarism and conflicts. This school focuses on rape as a weapon of war and one that fosters the interests of war. This school is most relevant for this study as it engages in the reasons for and the uses of rape during war and conflict. There are contradictions as to whether large-scale war and conflict-based forms of violence should be studied in isolation and/or whether they should be analysed theoretically within the ordinary vulnerabilities of women in ordinary and peaceful situations.

In their analysis of war and conflict different feminists discuss the importance of militarism.[91] Militarism is discussed as a point of departure and argues that war and conflict are deeply gendered, ethnicised and classed.[92] They embrace feminist theorisations that argue that gender-based violence is the expression of gender inequality that precedes the wars and conflict in which gender-based violence occurs. It is concluded that gender-based violence precedes war and does not end with it.[93]

After this overview of feminism generally and African feminists and how they generally view gender and sexual violence, I now wish to embark on an analysis of the literature on gender and sexual violence as crimes against humanity and as genocide. The central argument of this study, as stated earlier, is that Tutsi women and men in Rwanda experienced genocidal gender and sexual violence. I therefore investigate if such a reality is reflected in the conceptualisation of gender and sexual violence. Jane Bannett[94] in fact claims that "there is a tension between the theoretical conceptualisation of sexual violence in conflict situations, and the reality of sexual violence".[95] The Section that follows hereunder explores the feminist literature on gender and sexual violence and whether it constitutes genocide or crimes against humanity.

91 See generally Mama, A. and Okaziwa-Rey, M. (eds.), (2008), *Feminist Africa 10 Militarism, Conflict and Women's activism* (Capetown: African Gender Institute).
92 *Ibid* at 3.
93 *Ibid* at 3, 9.
94 Bannett, J., "Circles and Circles": Notes on African Feminist Debates around Gender and Violence in c2, in: Mama, A. (2010), Rethinking Gender and Violence, *African Feminist*, 14 at 21.
95 *Ibid* at 8.

Feminist theorising needs to advance because the classical feminist theory is insufficient in explaining some forms of sexual violence used during the genocide in Rwanda and particularly fails to account for the victimisation of men and the criminal participation of women in perpetrating gender and sexual violence. The perspective that the primary perpetrators of gender and sexual violence are men and that the primary victims are women dominates the feminist discourse on gender and sexual violence which means that any theorising is limited to the realities of some conflicts including Rwanda.

4.5 GENDER AND SEXUAL VIOLENCE IN WAR AND GENOCIDE: A FEMINIST DEBATE

This section focuses on divergent positions on the subject of gender and sexual violence during wars and conflicts within feminist legal scholarship. It analyses existing controversies on rape and other gender and sexual violence as genocide or a crime against humanity and the impact that such an academic and judicial qualification has had on referring to and redressing the realities of Rwanda.

The section seeks to analyse how feminist scholars have termed gender and sexual violence in the context of Rwanda. As noted earlier, the naming of events develops a discourse through which specific reality is understood and dealt with. It should be noted that despite existing controversial arguments on wartime and mass rape, feminists have played a significant role in making visible war and conflict-based gender and sexual violence.

While gender and sexual violence happen in all wars and armed conflicts, their extent, form and purpose differ tremendously.[96] The ICTR has argued that in some cases in Rwanda the use of rape and sexual violence comprised genocide. During the conflict in Bosnia-Herzegovina the systematic and widespread use of rape has been qualified as a crime against humanity by the ICTY. Kelly Askin has noted that rape and sexual violence are rampant in wars and atrocities.[97] She explains that the use of rape and sexual violence in wars is both strategic and opportunistic.[98]

Wartime rape and sexual violence is generally inflicted on women by both sides of the conflict and against women belonging to all sides. In this context women are targeted as part of male violence which is common in wars. Women victims in wartime rape are often unaware of which side their aggressors belong to.

96 See generally Littlewood, R. (1997), "Military Rape" *Anthropology Today* 13(2): 7-16. See also, Siefert, R. (1996), "The Second Frontline: The Logic of Sexual Violence in Wars" *Women's Studies International Forum* 19: 35-43.

97 Askin, K. (2012), Treatment of sexual violence in armed conflicts: A historical perspective and way forward, In De Brouwer, A.M. *et al*., *Sexual violence as an international crime: Interdisciplinary Approaches*, (Antwerp: Intersentia), at 19.

98 *Ibid*.

Historically rape has been qualified as an inevitable by-product of war, tolerated and encouraged as a worthwhile reward for male combatants.[99]

Classical feminist theory posits that wartime as well as peacetime rape should be explained from the aspect of patriarchy which seeks to exert male domination, power and control over women.[100] This classical feminist argument contends that women are the primary victims of rape and other forms of sexual violence and males are the primary perpetrators.[101]

Ruth Seifert expresses that rape is part of the rules of war, a symbolic expression of male humiliation and defeat. In the same way Seifert suggests that war rape is made possible by the culturally rooted contempt for women.[102] Similarly, Claudia Card views wartime rape as a cross-cultural language of male domination.[103] One of the leading feminist legal scholars on this subject, Rhonda Capelon, is of the view that "rape embodies male domination and female subordination".[104]

Arguing further, Capelon[105] notes that rape communicates defeat to male belligerents whose women have been raped since it signifies that the men are no longer capable of protecting women as expected.[106] Catherine MacKinnon also elaborates that wartime rape serves an inter-male communicative medium. In this logic she suggests that gender and sexual violence transforms women's bodies into a medium of men's expression. Arguably rape is a means through which the rapist communicates to the men of the raped women that they are incapable of protecting their women from a masculinity perspective.[107]

In the wake of the conflict in the Former Yugoslavia and Rwanda feminist legal scholars engaged in an effort to acknowledge, refer to and make significant the incidents of rape and sexual violence and they promoted the the inclusion of gender and sexual violence crimes within the ambit of international criminal law. Two mainly opposing positions divided feminist debates on wartime or massive rape and sexual violence.

One group led by the feminist legal scholar Catherine MacKinnon pursued the qualification of rape in the realities of Bosnian Muslim women and eventually of Tutsi women in Rwanda as genocidal rape. This group defines rape in the cases of Rwanda and the former Yugoslavia as an instrument of genocide. MacKinnon

99 Capelon, R. (2000), "Gender Crimes as War Crimes: Integrating Crimes against Women into International Criminal Law", *McGill Law Journal* at 220.
100 Gotschall, J. (2004), "Explaining Wartime Rape" *The Journal of Sex Research* 41(2).
101 Green, J.L. (2004), Uncovering Collective Rape: A Comparative Study of Political Sexual Violence" *International Journal of Sociology*, 34(1): 97-116.
102 *Supra* note 14 at 54-57.
103 *Supra* note 59 at 7.
104 *Supra* note 161 at 263.
105 *Ibid*.
106 *Supra* note 14 at 58-65.
107 *Supra* note 164 at 223.

observes that genocidal rape, like all rape, is particular as well as beinggeneric, emphasizing that its particularity is important. She asserts that, "this is ethnic rape as an official policy of war in a genocidal campaign … "[108] Allen Beverly defines genocidal rape as a military policy of rape for the purpose of genocide.[109]

On the other hand, Rhonda Capelon and her proponents reject rape as genocide suggesting that wartime rape is nothing new but an ordinary wrongdoing despite its occurrence on a large scale. In their view genocidal rape undermines the horribleness of rape.[110] Copelon[111] and Engle's[112] rejection of mass rape has nothing to do with the true naming of what rape does in a genocidal sense but on their pre-occupation with their perceived function of how genocidal rape would impact on the visibility of other women victims of rape and sexual violence during war. Capelon holds that rape occurs to women irrespective of the group they belong to, but because they are women.[113] She suggests that emphasising the genocidal nature of rape and sexual violence can potentially make rape invisible.[114] Similarly, Engle explains that qualifying rape and sexual violence as genocide downplays the extent to which all women raped during the conflicts were victims.[115]

Capelon's camp intends to make visible every case of rape occurring in war without any distinction as to the specific contexts of the conflict or war and the intrinsic purpose of rape in that specific case. Capelon and her group redefine genocidal rape noting that women are a group deserving protection in its own right hence the argument that rape on all sides of the conflict must be punishable and can be considered as genocidal against women as a group.

Capelon vehemently rejects linking rape to genocide, suggesting that rape is a crime against women as a gender and if it must be regarded as genocide, then it is genocide against women and not an ethnic one.

In Capelon's thinking the focus must be on the victims' gender and not other forms of the victim's identity. Hence she sees associating rape and genocide as dangerous because in her opinion Bosnian Muslim women were attacked because of their sex and not because of their ethnicity and/or religion.[116] Neglecting the ethnic and religious realities of Rwanda, Capelon and her proponents suggest that rape is genocidal because the target is women, due to their sexual and reproductive roles.[117]

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108 *Supra* note 58 at 183, 190.
109 Beverly, A., *Rape Warfare: The Hidden Genocide in Bosnia-Herzegovina and Croatia* (Minnesota: University of Minnesota Press, 1996) at 62.
110 *Supra* note 161 at 779.
111 *Supra* note 161 at 207.
112 *Supra* note 161 at 786.
113 *Supra* note 161 at 207.
114 *Ibid* at 207.
115 *Supra* note 161 at 786.
116 *Supra* note 161 at 246.
117 *Supra* note at 207.

Similarly, wartime rape is a crime against humanity based on the gender of the victims since in her opinion it is used as a means of encouraging soldiers and a reward for them. In her opinion there is therefore no difference between genocidal rape and other forms of rape in war because the impact is the same on the women victims.

In the same sense, Buss Doris[118] rejects the appellation of wartime rape as genocidal claiming that such an appellation would lead to ignoring or eliminating less severe and exceptional forms of sexual violence against women.[119] In her thoughts on Rwanda Doris notes that if rape during the genocide in Rwanda is labelled as genocidal, then it will reduce all rapes and sexual assaults to the equation of Hutu male perpetrators against Tutsi female victims.[120]

The terming and qualification of wartime rape from Capelon's line of thought emphasizes the liberal feminist women's voice theory, in which it is the woman and her experience that matters, after all "rape embodies male domination and female subordination" Capelon suggests.[121] Susan Brownmiller, a proponent of Capelon's position, notes that women in the Balkans were victims of war irrespective of their ethnic or religious identification.[122]

MacKinnon is of the view that wartime rape and genocidal rape are different on the basis that genocidal gender and sexual violence requires the existence of the intent to destroy an ethnic group to which the women are part.[123] While MacKinnon recognises that women experience rape and sexual violence in their daily lives, she strongly suggests that it is important to emphasise, where applicable, the ethnic component of genocidal rape and how it is used as a policy to destroy an ethnic group through women.

Crenshaw's intersection theory is particularly relevant in discussing genocidal gender and sexual violence. Instead of emphasising the focus on gender as a group as Capelon does, she suggests that it is important to use an intersectional analysis of women's experience that considers their gender and other forms of identity. Crenshaw holds that an analysis that ignores one of the identity-based characteristics of women victims fails to fully appreciate the experiences of the woman. Crenshaw states that the experience of women of colour is not incidental to race or gender but is a result of the intersection between their gender and race.[124] Similarly, she recognises religion, ethnicity, and sexual orientation as important aspects which play a role during women's experience of violence.

118 Doris, B. (2009), "Rethinking Rape as a Weapon of War" *Feminist Legal Studies,* Vol. 17 at 145-163.
119 *Supra* note 303 at 156.
120 *Ibid* at 155.
121 *Supra* note 161 at 198.
122 *Supra* note 13 at 180.
123 *Supra* note 164 at 188-189.
124 *Supra* note 339 at 1241.

The intersectional theory distinguishes between wartime rape and genocidal rape, arguing that the latter seeks to exterminate a group. Thus rape and sexual violence should be seen as a weapon of genocide once there is the special intent to destroy a specific group required in the proof of genocide. MacKinnon points out that wartime rape and genocidal rape differ because in genocidal rape the perpetrators have the intent to destroy an ethnic group.[125] It is thus argued that the intersection between gender and ethnicity aggravate the manner in which, for example, Tutsi women experience the genocide. It is in fact the intersection of ethnicity and gender that qualifies the use of gender and sexual violence in Rwanda as genocidal.

Genocide is defined by MacKinnon as a "war against peoples" that is not intended to rule but to destroy them. The intended victory in genocidal rape is the destruction of the people of whom the assaulted are members. In genocidal gender and sexual violence "the perpetrators and victims know who they are in terms of group identity."[126] Even though genocide has happened within the contexts of war, MacKinnon observes that genocide goes beyond war and is more associated with discrimination than war. Genocide, as she remarks, is more of a continuing discrimination than war. She asserts that genocide is a violent practice of discrimination. In concluding that there is a link between genocidal gender and sexual violence and war, she notes that even if genocide is carried out partly through wars, genocide and genocidal sexual and gender violence remain distinct from wars.

MacKinnon argues that in pursuit of a genocidal goal, systematic rape is a prominent weapon, planned and ordered from the top and permitted on a wide scale. It is rape as torture which is a combination of both sex and ethnic discrimination and it is rape as ethnic expansion through forced pregnancy and childbearing. Rape is used to destroy, dominate and shatter a community and is therefore indeed genocide.[127]

She further highlights that the aggressors and the aggressed are identifiable in cases of genocidal gender and sexual violence. Thus she condemns equating the aggressor in such circumstance with the aggressed noting that in the minds of the aggressor there is a will to exterminate the victim. Elaborating on the situation in the Former Yugoslavia MacKinnon explains that there was genocide there in which ethnicity was a tool for political hegemony and a war as an instrument of the genocide, yet rape is an instrument of both.

Rosalinda Dixon[128] suggests that rape and sexual violence is an effective weapon of genocide in patriarchal societies because it renders female victims socially infertile by making them unmarriageable or even untouchable.[129] Hence violence

125 *Supra* note 164 at 188-189.
126 *Ibid* at 222.
127 *Ibid* at 170.
128 Rosalinda D. (2002), "Rape as a Crime in International Humanitarian Law: Where to from here?" 13:3 *European Journal of International Law*, at 703.
129 *Ibid*.

against women is an expression of the imbalance of power and it maintains such an imbalance.[130]

Yuval-Davis[131] explains the role of sexual violence in ethnically-based conflicts on the basis of the role that women play in defining the groups in question. She explains that a person's ethnic identity is often based on his or her birth in the group. In cases like Rwanda the reproductive role played by women in the procreation and continued purity of defined groups determines the manner in which they are targeted.

The desire, for example in Rwanda, to create a monogamous Hutu community created a mechanism for the gendered attack against Tutsi women viewed as agents of the reproduction of the Tutsi and equally important obstacles to Hutu purity in cases of inter-ethnic relations between Hutu men and Tutsi women which were common. In this thinking Yuval-Davis explains that "those who are pre-occupied with the purity of the race would also be preoccupied with the sexual relations between the members of different collectivities."[132]

Apart from the above diverging positions on the naming of gender and sexual violence crimes as genocide between MacKinnon and her proponents and those of Capelon, I wish to express that acts of gender and sexual violence are deemed to be genocidal in this study because they legally fit the ambits of the crime of genocide as per the ICTR Statute and the Genocide Convention which was applicable in the situation of Rwanda. If the use of gender and sexual violence during the genocide in Rwanda had fallen short of the existence of an intention by the Interahamwe and other Hutu militia to destroy the Tutsi then the central argument of this study would not hold water.

The testimonies of the survivors of the genocide against the Tutsi outspokenly indicate that gender and sexual violence were perpetrated with the intention to destroy, in part or as a whole, the Tutsi as a group. The Akayesu case in fact acknowledged that Tutsi women were deliberately selected for death through rape because of their ethnic identity.[133] Similarly, the Akayesu trial chamber held that rape and sexual violence in Rwanda were genocidal because the attacks were against all Tutsi women and were committed solely against them.[134] Secondly, it was determined that it was genocide because "in most cases, the rapes of Tutsi women were accompanied by the intent to kill those women."[135] This point will be discussed in more detail in chapter five in which the judicial legacy of the ICTR is analysed.

130 *Ibid*.
131 *Supra* note 254.
132 *Supra* note 254 at 18.
133 *The Prosecutor v. Jean Paul Akayesu* (1998), Case No. ICTR 96-4-T, Trial Camber I, Judgment (2 September 1998), para 730.
134 *Ibid* para 732.
135 *Ibid* para 733.

4.6 CONCLUDING REMARKS

Discussions made in Chapter 4 demonstrate the achievement and challenges existing in feminist theories on gender and sexual violence. Both the achievements and similarities have together contributed in the way we have known and judged genocidal gender and sexual violence in Rwanda. Feminists legal literature discussed underpin competing argument on how gender and sexual violence committed during the genocide should be qualified and prosecuted.

The two major arguments differ on the basis of emphasis on genocidal gender and sexual violence as opposed to its rejection. Rhonda Copelon and proponents of her point of argument reject genocidal gender and sexual violence in the name of wishing to have all women victims of gender and sexual brought into the spotlight. By this argument they ignore the need to legally describe why specific women were specifically targeted.

Thus, the theoretical argument presented by MacKinnon and others on genocidal gender and sexual violence is most relevant for this study because it advances and incorporates sexualized aspects of the genocide against Tutsi. Genocidal gender and sexual violence targeted Tutsi women, children and men and is not genocidal rape because it attacks women as suggested by Copelon but genocidal because it was part of the genocidal plan against Tutsi male and female.

What we can and have known about genocidal gender and sexual violence in Rwanda is largely influenced by the above discussed feminist literature. This is why there is clearly lack of sufficient knowledge about men as victims of genocidal gender and sexual violence and about women as perpetrators. Such a lack calls for further theorising Rwanda and informs us of the dominance of feminist biases.

Thus whereas the contribution of feminists in exposing genocidal gender and sexual violence must be celebrated, the need for feminists to learn and adopt theory that explains more realistically the complex realities of Rwanda is much desired.

5 THE LEGACY OF THE ICTR

If genocide is an actual possibility of the future, then no people on earth ... can feel reasonably sure of its continued existence without the help and protection of international law.[1]

5.1 INTRODUCTION

For nearly twenty years the ICTR has been charged with trying the most serious perpetrators of the genocide against the Tutsi in Rwanda. High-ranking perpetrators of atrocious international crimes of genocide, crimes against humanity and other violations of international human rights have been judged at the Arusha-based Rwandan International Tribunal. Attempting to do justice for the unspeakable suffering and heinous cruelty is a true challenge for the Tribunal given the nature, animosity and suffering of victims.

Over the years victims of genocide have frequented the ICTR as mostly prosecution witnesses in the process of this International Criminal Justice approach to Rwanda. It is with a close look at the legacy created by the Tribunal that we are able to judge if from the perspective of the Rwandan victims of genocidal gender and sexual violence justice has in fact been done. The Tribunal was, as suggested by Chouliaris, a channel through which justice is delivered to those directly affected.[2]

Perpetrator profiles range from government leaders including the Prime Minister of the genocide government and the majority of his ministers, while Prefectoral, Commune and Sector local government leaders were not speared. Senior military and the *Interahamwe* militia leaders frequented the dockets of the ICTR. The Tribunal similarly adjudicated cases involving several religious leaders, businessmen, leading media producers and a medical practitioner. The accused were mostly male Rwandans except for George Ruggie, an Italian journalist working for the RTLM genocidal radio station, and Pauline Nyiramasuhuko, the only woman indicted and convicted by the Tribunal.[3]

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1 Arendt, Eichmann in Jerusalem, cited by Destexhe, A. (1995), *Rwanda and Genocide in the Twentieth Century* (London: Pluto Press) at 65.

2 Chouliaras, A. (2011), The victimological concern as the driving force in the quest for justice for state-sponsored international crimes, 35-64, in: Letschert, R. *et al.* (eds.), V*ictimological Approaches to International Crimes: Africa* (Antwerp: Intersentia).

3 *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Trial Camber II, Judgment and Sentence (24 June 2011), see also *The Prosecutor v. Jean Paul Akayesu* (1998), Case No. ICTR 96-4-T, Trial Camber I, Judgment (2 September 1998).

As a pioneer in the interpretation of the Genocide Convention, it is self-evident that the tribunal leaves an obvious legacy in the fight against humanity and a better and enriched international criminal law framework. The ICTR law and judicial legacy has elaborated on various important issues of international criminal law including the definition and condemnation of gender and sexual crimes.[4] Convictions have been upheld relating to rape and other forms of sexual violence where the accused were charged and convicted under individual and command responsibility and most recently within the auspices of the Joint Criminal Responsibility theory.[5]

Persuaded by the retributive and deterrent roles of criminal justice, the ICTR posits that through punishments handed down in cases where convictions have been upheld perpetrators have been held accountable for their criminal actions and a clear message has been delivered to possible international criminals that the international community no longer tolerates such crimes. On this note Carroll explains:

> *… therefore, clear that the penalties imposed on accused found guilty by the tribunal must be directed on the one hand on to the retribution of the accused, who must see their crime punished, and on the other hand as deterrence, namely dissuading for good those who will be tempted in the future to perpetrate such atrocities, by showing them that the international community was no longer ready to tolerate serious violations of international humanitarian and human rights.*[6]

Looking back, overall the tribunal has managed at the trial level to deliver 55 verdicts involving 75 accused. 46 cases have been completed including 12 acquittals most of which were contested by Rwandan genocide survivors. Nine of the completed cases resulted from guilty pleas and 17 cases are pending at the appeal level and are expected to be completed in 2014.[7]

The prosecutorial record relating to rape and sexual violence as genocide is generally disheartening, less than a handful of cases have included indictments for genocide on the basis of such acts and even fewer have been convicted. In terms of setting a historical record, the ICTR chambers have advanced their OTP and expanded their discussions on gender and sexual violence offences as genocide

4 For a summary of the ICTR achievements see Mose, E. (2005), "Appraising the role of the ICTR" *Journal of International Criminal Justice* 3, 920-943.

5 For a discussion on Joint Criminal Enterprise, see *The Prosecutor v. Edouard Karemera et al.,* Case No. ICTR-98-44-T, Trial Chamber III, Judgment and sentence (12 February 2012), at 261-268.

6 Carroll, C. (2000), "Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994" *Boston University Law Journal* 18: 163-200.

7 Case status available on at http://unictr.org/Cases/tabid/204/Default.aspx, last accessed 3 March 2013.

even in cases where the prosecution failed to charge the persons concerned with this offence.[8]

This study seeks to look at how the ICTR's legacy has dealt with gender and sexual violence that qualify as acts of genocide. It follows that in exercising its judicial duty the ICTR has greatly contributed to the end of impunity for the genocide in Rwanda. Central to its pivotal contribution is its decisions relating to rape and other forms of sexual violence as acts of genocide, crimes against humanity and serious violations of humanitarian law.

This follows from the understanding that criminal justice is effectively done once the realities of the victims and the criminal mind and actions of the perpetrator are correctly labelled. Simester and Sullivan suggest that the offence label should be clear enough in order to communicate to the offender the kind of criminal act he/she has committed.[9] The judicial record of the tribunal fundamentally records the experiences of the victims of the genocide in Rwanda and establishes a discourse about how the genocide reality is explained and condemned. The study is undertaken by centrally discussing three pivotal judgments.

The Akayesu case has been chosen because of its importance in setting the ground for judicial discourse on gender and sexual violence as a genocidal element of serious bodily harm within the Rwandan experience.[10] The second case studied is the Mikaeli Muhimana trial judgment. Muhimana's case[11] is relevant to this study because of its detailed factual narration on rape and sexual violence. Even though the prosecutor had not charged the defendant with genocide, the detailed facts and their recognition by the trial chamber confirms that the complex realities of gender and sexual violence are genocidal as illustrated by the utterances and behaviour of the perpetrator.

The last case presented herein is the Pauline Nyiramasuhuko trial judgment.[12] I have chosen to analyse Nyiramasuhuko's case because of its uniqueness as the only tribunal case involving a woman perpetrator charged with rape and sexual violence. In many respects the analysis of Nyiramasuhuko's case contributes to the academic discussion on the failure to charge acts of gender and sexual violence as genocide even though the case is clearly appropriate. It also invokes rethinking on the perpetrators and victims of conflict-based gender and sexual violence.

8 See generally *The Prosecutor v. Kayishema and Ruzindana,* Case No. ICTR-96-4-T, Trial Chamber II, (21 May 1999); *The Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Trial Chamber III, (15 May 2003), see also *Supra* note 106.

9 Simester, A. and Sullivan, G. (2007), *Criminal law theory and doctrine* (Portland: Hart Publishers).

10 *The Prosecutor v. Jean Paul Akayesu* (1998), Case No. ICTR 96-4-T, Trial Camber I, Judgment (2 September 1998), para 731.

11 *Supra* note 12.

12 *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Trial Camber II, Judgment and Sentence (24 June 2011).

A final analytical section is presented at the end of this chapter in which I will argue on the basis of examples drawn from its general record that the Rwandan tribunal failed to appropriately charge and punish genocidal gender and sexual violence within its proper Rwandan context.

I should mention that while I am generally optimistic about the ICTR's legacy and contribution to international criminal law in many aspects, I am sceptical in cases relating to gender and sexual violence. My scepticism is the result of a number of reasons including the fact that in some important cases the prosecution failed to charge and enter convictions for gender and sexual violence as genocide despite the presence of significant evidence within its records.

The tribunal's judicial discourse also does not include any convictions relating to male victims of genocidal gender and sexual violence, a record that dangerously omits from the international public record on genocide this unique case of the specific complexities of the genocide against the Tutsi. My scepticism is also the result of the Tribunal's unbalanced concentration on gender and sexual crimes as crimes against humanity hence proof of the widespread and systematic nature of rape with less effort dbeing devoted to its genocidal use. Such judicial record wrongly suggests that gender and sexual violence were not in most cases genocidal but incidental to the genocide or opportunistic as the Rukundo case concluded.[13]

5.2 PROSECUTOR V. JEAN PAUL AKAYESU

5.2.1 BACKGROUND

On 2 September 1998, the ICTR rendered the very first international judgment on genocide. Akayesu was convicted of genocide and crimes including rape and sexual violence as acts constitutive of the genocide and crimes against humanity. In this landmark decision Akayesu was convicted of genocide including rape as an act and instrument of genocide. Rape and sexual violence were also recognised for the first time to constitute crimes against humanity.[14]

Jean Paul *Akayesu*[15] had been *Bourgmestre* of the *commune* Taba since 1993.[16] This position gave Akayesu exclusive control over the communal police and the

13 *The Prosecutor v. Emmanuel Rukundo*, Case No. ICTR-2001-70-T, Trial Chamber II, Judgment and Sentence, (27 February 2009).

14 *Supra* note 10.

15 *Ibid*, Akayesu entered politics in 1991, becoming a founding member of the Mouvement Democratique Republicain (MDR). He served as chairman of the local wing of the MDR in Taba commune. In April 1993, Akayesu, with the support of several key figures and influential groups in the commune, was elected Bourgmestre of Taha. He held that position until June 1994, when he fled to Zambia.

16 *Ibid*, paras 3-4: "Rwanda's administrative structure was at the time of the genocide divided into 11 prefectures. Each prefecture was governed by a *Prefect*. The prefectures were further subdivided into Communes which were placed under the authority of *Bourgmestres*. The *Bourgmestre* of each commune was appointed by the President of the Republic, upon the recommendation of

responsibility and capacity to maintain peace and public order within the commune.[17] During his tenure as *Bourgemestre* of Taba commune acts of genocide and violations of humanitarian law occurred in the area under his control between April and July 1994.

Akayesu's initial indictment was on 13 February 1996 and this was confirmed on 16 February.[18] He was accused of genocide, complicity to commit genocide, direct and public incitement to commit genocide, four counts of crimes against humanity, and four counts of violations of Article 3 common to the Geneva Conventions. None of the 12 charges at the beginning included acts of gender and sexual violence.

Eight days into the Akayesu trial, the prosecution Witness J took the witness stand on 27 January 1997. On that fateful day, the historical contribution of Akayesu to genocidal gender and sexual violence was set in motion as the prosecution Witness J spontaneously started talking about rape as she was answering prosecution questions not related to rape in any way. Witness J seized the opportunity to mention that she was with her six-year old daughter who had been raped during the events witnessed. Witness J's off-track narration on rape led to more questions about her daughter's rape and other rapes she had witnessed.

Witness J, a survivor and an eyewitness of the genocide, was a resident of Taba commune during the genocide. Witness J's personal initiative to testify about the rape of her daughter and of other girls around Akayesu communal bureau in the commune Taba broke the silence and brought acts of gender and sexual violence in the Taba commune to the official record. Despite their knowledge about rape in and around the commune Taba, the ICTR investigation and prosecutors had not adduced any evidence to that effect. Weeks later Witness H also testified that Akayesu was present at the communal bureau where and acts of gender and sexual violence were taking place.

The testimonies of Witnesses J and H together with other human rights-based evidence on rape and sexual violence in Rwanda were used by women's human rights activists to lobby for the prosecution of gender and sexual violence crimes as genocide. In 1996 a feminist activist-based human rights non-governmental organisation – the Coalition for Women's Human Rights in Conflict Situations – was formed and mandated itself to monitor and ensure that the tribunal incorporated the rights and protection of Rwandan women. One of its important contributions

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the Minister of the Interior. In Rwanda, the bourgmestre was the most powerful figure in the commune. His *de facto* authority in the area was significantly greater than that which is conferred upon him *de jure*."

17 *Ibid* para 6.

18 *Ibid* at 123. The indictment against Jean-Paul Akayesu was submitted on 13 February 1996 by the then prosecutor Richard Goldstone and was confirmed on 16 February 1996. Originally, it did not contain specific charges of sexual crimes. However, the prosecutors amended the indictment during the trial, in June 1997, and resubmitted it, under the signature of the prosecutor Louise Arbour, with the addition of three counts (13 to 15) and three Paragraphs (10A, 12A, and 12B).

was *amicus curiae* brief submitted to the court regarding the need to include in Akayesu's charges acts of rape and other acts of gender and sexual violence.[19]

5.2.2 THE AMENDED INDICTMENT

In a hearing held on 17 June 1994, prosecution counsel submitted an oral motion to amend Akayesu's indictment. In justifying the amendment prosecution witnesses expressed that the testimonies of Witnesses J and H had helped the prosecution to link the evidence on rape and sexual violence to the actions of the accused. Explaining the motion to amend the indictment, the prosecution stated:

> *In this case it is clear throughout the testimony that there had been hints that there were acts of sexual violence occurring in the Taba Commune. It came up not only in the testimony of Witness J or Witness H but I have to say it also came up in prior investigations, but the … information we received before, in our opinion, was not enough to link the accused to the acts of sexual violence. We continued to look into it. … After receiving [additional witness statements], we as the Office of the Prosecutor feel that we are duty bound to come here today and make this request …*[20]

According to the amended indictment Akayesu was charged with fifteen counts. He was charged with genocide, crimes against humanity (extermination, murder, rape, other inhumane acts), incitement to commit genocide, and violations of common Article 3 to the Geneva Conventions and of Article 4(2)(e) of Additional Protocol II (murder, cruel treatment, outrages upon personal dignity in particular rape, degrading and humiliating treatment and indecent assault). On the basis of the new Paragraphs 12A and 12B Akayesu was charged with rape and sexual violence as genocide.

Once the trial reconvened on 23 October 1997, gender and sexual violence sufficed including charges of rape and sexual violence within the existing genocide charges, plus three new counts of rape as a crime against humanity and a violation of Article 3 Common to the Geneva Conventions and of Article 4(2)(e) of Additional Protocol II.[21] Akayesu was not accused of personally committing acts of rape and sexual violence but evidence demonstrated that he was the superior leader in Taba commune.

19 *Akayesu Case*, Transcript p. 6, (17 June 1997) Count 13: rape, as a Crime Against Humanity, punishable under Article 3(g) of the Statute, Count 14: inhumane acts, a Crime Against Humanity, punishable under Article 3(i) of the Statute, and Count 15: outrages on personal dignity, notably rape, degrading and humiliating treatment and indecent assault, a Violation of Article 3 Common to the Geneva Conventions and of Article 4(2)(e) of Additional Protocol II, as incorporated in Article 4(e) of the Statute at 6.

20 *Ibid*.

21 *Ibid*.

Trial Chamber I heard evidence submitted against Akayesu illustrating that the accused stood by and encouraged the commission of rape, forced nudity, sexual mutilation and other forms of sexual violence committed against Tutsi women.[22] He was present during the commission of those crimes and facilitated the commission of acts of sexual violence.[23] The Trial Chamber also heard allegations that Akayesu ordered Tutsi girls to march or perform gymnastics while naked before a Hutu crowd that laughed and mocked them.

The amended indictment introduced a working definition of rape defining it as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."[24] This definition was discussed and employed by Trial Chamber I as the definition of rape as a crime against humanity. The tribunal argued that such a definition captures the full range of acts committed. The above definition was sought because it encompassed acts including the insertion of objects, and the use of bodily orifices not considered to be intrinsically sexual.[25]

The amended indictment alleged the following facts in support of charges of rape and sexual violence

> *12A. Between 7 April and the end of June, 1994, hundreds of civilians (hereinafter "displaced civilians") sought refuge at the bureau communal. The majority of these displaced civilians were Tutsi. While seeking refuge at the communal bureau, female displaced civilians were regularly taken by armed local militia and/or communal police and subjected to sexual violence, and/or beaten on or near the bureau communal premises. Displaced civilians were also murdered frequently on or near the bureau communal premises. Many women were forced to endure multiple acts of sexual violence which were at times committed by more than one assailant. These acts of sexual violence were generally accompanied by explicit threats of death or bodily harm. The female displaced civilians lived in constant fear and their physical and psychological health deteriorated as a result of the sexual violence and beatings and killings.*

And;

> *12B. Jean Paul AKAYESU knew that the acts of sexual violence, beatings and murders were being committed and was at times present during their commission. Jean Paul AKAYESU facilitated the commission of the sexual violence, beatings and murders by allowing the sexual violence and beatings and murders to occur on or near the bureau communal premises. By virtue of his presence during the commission of the sexual violence, beatings and murders*

22 *Supra* note 10 para 10A.
23 *Ibid* para 12B.
24 *Ibid* para 688.
25 *Ibid* para 686.

and by failing to prevent the sexual violence, beatings and murders, Jean Paul AKAYESU encouraged these activities.[26]

These paragraphs are the basis on which rape and sexual violence were charged as acts of genocide in the amended indictment. Despite the ruling of the Chamber, Paragraphs 12A and 12B are quite ambiguous lacking any precise description of the crime, the victims, the dates and the place of the offences.

5.2.3 THE AKAYESU TRIAL AND JUDGMENT

The Akayesu case lasted for sixty trial hearing days starting on 9 January 1997 and closing for deliberations on 26 March 1998.[27] Trial Chamber I was composed of the presiding Judge Laity Kama and Judges Navanethem Pillay and Lennart Aspegren and they pronounced the Akayesu judgment on 2 September 1998. Akayesu was convicted on nine of the 15 charges including rape and sexual violence as acts of genocide and of rape and other sexual acts as a crime against humanity on the basis of Article 6(1) of the ICTR Statute for ordering, instigating as well as aiding and abetting rape and sexual violence pursuant to command and superior responsibility.[28]

During the trial evidence linking Jean Paul Akayesu to the mass killing and rape and sexual violence committed in and around the communal bureau premises and throughout Taba commune was heard by the Tribunal for nearly three months. While the initial evidence on gender and sexual crimes was introduced by Witness J and H spontaneously, throughout the trial more evidence on rape and sexual violence was adduced as a result of the above-discussed amended indictment.

Throughout the trial process Akayesu pleaded not guilty. In his defence, Akayesu argued that he did not commit murder or encourage or participate in the alleged killings, beatings and acts of sexual violence. While conceding that genocide did occur in Rwanda and in Taba commune, Akayesu contended that he was powerless and could not prevent the Interahamwe. Akayesu however contested and denied the commission of any acts of rape and sexual violence at the communal bureau in his presence and while he was not there.[29] He qualified the amended indictment that included rape as being the result of women's human rights movements and testimonies maliciously fabricated against him which were vehemently rejected by the prosecution.

In its closing remarks, the prosecution submitted that the alleged acts of rape and sexual violence constituted "serious bodily and mental harm" and "conditions of

26 *Ibid* para 12B.
27 *Ibid* para 28.
28 *Ibid* paras 697-698, 734.
29 *Ibid* para 32.

life calculated" to destroy the group as per the definition of the crime of genocide.[30] The Tribunal noted in its ruling on genocide that rape and sexual violence was one of the worst forms of inflicting bodily and mental harm on the victim.[31]

Thus, the Chamber established on the basis of the evidence that the acts of violence committed in Rwanda as well as in Taba commune during the alleged period had been committed with the intention to destroy the Tutsi population.[32] Trial Chamber I highlighted that each of the victims was a member of the protected groups.

Trial Chamber I took judicial notice of the facts generally presented in Paragraph 5-11 of the indictment. The judicial notice was taken on the basis of the expert testimonies of Dr. Ronie Zachariah, Ms. Lindsey Hilson, Mr. Simon Cox, and Dr. Alison Desforges; the tribunal also relied on the testimony of General Romeo Dallaire, United Nations force commander during the genocide in Rwanda, and the UN report's general findings on Rwanda. Those facts generally related to the presence of an internal armed conflict in Rwanda, the presence of evidence of genocide against the Tutsi and of crimes against humanity and of violations of Article 3 common to the Geneva Conventions and Additional Protocol II.[33]

Cautiously, the ICTR, before determining the responsibility of Akayesu, considered the protection against genocide applied to the Tutsi by analyzing if the Tutsi could be qualified as a national, ethnic, racial or religious group protected by the genocide law.[34] An ethnic group was defined as a group with a common language or culture. Trial Chamber I observed that the Tutsi do not have a language and culture distinct from that of other Rwandans. On that basis the Tribunal resorted to referring to the intention of the drafters of the Genocide Convention. The Tribunal held that in its opinion the intention of the drafters of the Genocide Convention was to guarantee protection to any stable and permanent group whose membership is determined by birth in a continuous and often irremediable way.[35] The tribunal therefore ruled that the Tutsi qualified as a "stable and permanent group".[36]

30 *Ibid* paras 14-19.
31 *Ibid* para 731.
32 *Ibid* paras 168-169.
33 Judicial Notice was taken of: UN Reports *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution* 935 (1994), U.N. Doc. S/1994/1405 (1994); *Report of the Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions, Bacre Waly Ndiaye, on his mission to Rwanda from 8-17 April 1993*, U.N. Doc. E/CN.4/1994/7/Add.1 (1993); *Special Report of the Secretary-General on UNAMIR, containing a summary of the developing crisis in Rwanda and proposing three options for the role of the United Nations in Rwanda,* S/1994/470, 20 April 1994; *Report of the United Nations High Commissioner for Human Rights, Mr. José Ayala Lasso, on his mission to Rwanda 11-12 May 1994,* U.N. Doc. E/CN.4/S-3/3 (1994). See also, generally, the collection of United Nations documents in *The United Nations and Rwanda, 1993-1996,* The United Nations Blue Books Series, Volume X, Department of Public Information, United Nations, New York. See para 165 The Akayesu Trial Judgment.
34 *Supra* note 10 para 499.
35 *Ibid* para 516.
36 *Ibid* para 702.

The Tutsi were qualified as such since "at the time of the alleged events, the Tutsi did indeed constitute a stable and permanent group and were identified as such by all."[37] The finding of the tribunal on this matter was based on a finding that prior and during the genocide there was official classification in which individuals had national identity cards on the basis of ethnicity of which Tutsi was enlisted.

The Chamber established that genocide had been committed against the Tutsi group in Rwanda in 1994 arguing further that the very high number of atrocities committed against the Tutsi and their widespread nature were not limited to Taba commune but were a nationwide occurrence. To this effect the tribunal established:

> *(T)he fact that the victims were systematically and deliberately selected because they belonged to the Tutsi group, with persons belonging to other groups being excluded, the Chamber is also able to infer, beyond reasonable doubt, the genocidal intent of the accused in the commission of the above-mentioned crimes.*[38]

5.2.3.1 Findings on Rape and Sexual Violence

During the Akayesu trial, the court found that Tutsi girls and women were sexually violated, beaten and murdered in and around commune (District) Taba. Many Tustis had taken refuge at the communal bureau hoping that they would be protected from violence. Instead many were killed, raped and endured many more forms of violence at the communal bureau, around it and throughout Taba.

Seven witnesses testified about rape and sexual violence of whom four had endured sexual violence themselves and three had witnessed the rape and sexual violence of other women and girls. Women were raped in the nearby forest, in fields, on the roads, in or outside houses and at the cultural centre in Taba. Rape and sexual violence happened in different forms including gang rape, being raped in front of a group of people, for example one witness testified that she was raped while another fifteen women were watching and much more sexual violence happened in full view of larger crowds. The perpetrators were militias, young boys and men and some were neighbours known to the accused and the victims.

The Chamber established that Akayesu knew and had reason to know that sexual violence was happening in and around the communal bureau and the entire commune. There was evidence that Akayesu encouraged, ordered, instigated and aided and abetted rape and other forms of sexual violence. Akayesu was heard telling militias never to ask him again how Tutsi women taste like. In another instance he ordered the undressing of a Tutsi woman who was forced to march naked as Akayesu watched and laughed, then ordered the Interahamwe to take her

37 *Ibid*.
38 *Ibid* 730.

away reminding them that "you should first of all make sure that you sleep with this girl."[39]

With regard to acts of rape and sexual violence, the tribunal expressed that the prosecution had successfully adduced sufficient evidence attesting to the fact that Tutsi women had been subjected to sexual violence, killing and beatings near the communal offices and around Taba commune in 1994. On the basis of Witness OO's testimony quoting Akayesu as saying that "you should first of all make sure that you sleep with this girl"[40] the tribunal established that such a statement is proof that he ordered and instigated sexual violence.

5.2.3.2 Discussion and Ruling on Genocidal Gender and Sexual Violence

As to whether rape and sexual violence constituted acts of genocide, the Trial Chamber established that as long as rape and sexual violence have been committed with the intent to destroy in whole or in part and subscribes to one of the five enumerated acts of genocide it indeed qualifies as genocide. Finding Akayesu guilty of rape and sexual violence as acts causing serious bodily harm, the Akayesu Trial Chamber underscored that rape and sexual violence

> *constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm. In light of all the evidence before it, the Chamber is satisfied that the acts of rape and sexual violence described above, were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public, in the Bureau Communal premises or in other public places, and often by more than one assailant. These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities.*[41]

In reaching its conclusion from the evidence before it, Trial Chamber I elaborated that rape and sexual violence had only been committed against Tutsi women because they were Tutsi with the intention of subjecting them to what the tribunal qualified as the worst public humiliation. Through multiple public rape and mutilation the tribunal noted that rape and sexual violence was an integral part of the destruction of the Tutsi women, their families and contributed to the destruction of the Tutsi group as a whole.[42]

39 *Ibid.*
40 *Ibid* paras 425-426.
41 *Supra* note 10 para 731.
42 *Ibid.*

Some have passionately asked how rape and sexual violence can be qualified as a tool to destroy a group. The OTP suggested in the Kayishema and Ruzindana case that the destruction of the group must be interpreted in a broad sense to include acts that not only cause death but also those that appear to lack the immediate death impact. Taking the Akayesu ruling on gender and sexual violence as genocide, Trial Chamber II in Kayishema and Ruzindana adopted the understanding of the destruction of the group to include acts of rape and sexual violence.

The genocidal targeting in this case was intelligently illustrated by the tribunal through the specific targeting of Tutsi women, the utterances of the perpetrator and on the basis of the fact that rape and sexual abuse were often followed by killing the victim. The sparing of a Tutsi woman married to a Hutu man because her ethnic identity was not clearly known; Akayesu's encouraging statements and such utterances like "don't ever ask again what a Tutsi woman tastes like" were regarded by Trial Chamber I as proof of the intent to destroy Tutsi women and the Tutsi as a population.

Note that the Tribunal elsewhere discussed the challenge of proving the genocidal intent to destroy, in part or in whole, a protected group. The Akayesu case clarified the intent of genocide noting that because it is a mental factor that is difficult to determine and prove especially where there is a guilty plea from the accused, such intent may be inferred from different factors.[43]

The tribunal established a deductive standard in order to demonstrate the intent to destroy in genocide. It asserted that "it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others."[44] The Tribunal suggested that some factors are useful in deducing genocidal intent. The Chamber suggested that factors to be considered include the scale of the atrocities committed; their general nature; the deliberate and organized targeting of people because of their affiliation to a particular group; and the exclusion of members of other groups from these policies.[45]

While Akayesu was not charged with personally raping women, the charges and judgment elaborate his role in overseeing and encouraging rape and sexual violence. The Tribunal concluded that rape and other acts of sexual violence constitute the infliction of serious bodily or mental harm on members of a protected group under the definition of genocide. Akayesu's responsibility was based on facts proving that he encouraged rape against Tutsi women, stood by, facilitated rape, forced nudity, sexual mutilation and other forms of sexual violence and that he forced young Tutsi women to perform gymnastics in public while naked. The Tribunal concluded to

43 Magnarella, P.J. (1997), "Some Milestones and Achievements at the International Criminal Tribunal for Rwanda: the 1998 Kambanda and Akayesu Cases" 11 *Fla. J. Int'l L.* 517 at 532.

44 *Supra* note para 321.

45 *Ibid* 321.

this effect that: "Tutsi women were subjected to sexual violence because they were Tutsi. Sexual violence was a step in the process of destruction of the Tutsi group – destruction of the spirit, of the will to live, and of life itself."[46]

5.2.3.3 Ruling on Rape and Sexual Violence as Crimes against Humanity

Even though the focus of this study is on gender and sexual violence as acts of genocide, it is pertinent to consider the Tribunal's ruling on rape and sexual violence as a crime against humanity. Article 3 of the ICTR statute outlaws crimes against humanity. The crime against humanity ruling is also important because of the ruling and the definitions of rape and sexual violence under this category of crimes. Akayesu was specifically charged with and convicted of rape as a crime against humanity.[47] Rape and sexual violence constitute crimes against humanity as long as they are: "(a) part of a widespread or systematic attack; (b) on a civilian population; (c) on curtained catalogued discriminatory grounds, namely: national, ethnic, political, racial, or religious grounds."[48]

On rape and sexual violence as crimes against humanity, Trial Chamber I established that widespread and systematic attacks against a civilian population had occurred in Taba commune and that rape and other acts of sexual violence had been committed as part of the widespread and systematic attack.[49] In the finding of the Chamber, rape was widespread and systematic even though for it to qualify as a crime against humanity rape does not in itself have to be widespread and systematic; the requirement is that rape or sexual violence be part of the general widespread and systematic attack against a civilian population. Akayesu's conviction was based on his role in encouraging, aiding and abetting and the facilitation of rape and sexual violence as a crime against humanity especially that committed near the communal bureau.[50]

Trial Chamber I defined rape and sexual violence as crimes against humanity. Rape as a crime against humanity was defined as: "*physical invasion of a sexual nature, committed on a person under circumstances which are coercive*."[51] The tribunal rejected a definition of rape limited to a mechanical description of objects and body parts. The tribunal adopted a conceptual perspective in describing rape where it argued that, *"(L)ike torture, rape is used for such purposes as intimidation, degradation,*

46 *Supra* note 10 para 732.

47 Askin, K. (1999), "Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status", *American Journal of International Law* 93(1): 97-123. See also Askin, K. (2005), "Gender Crimes Jurisprudence in the ICTR: Positive Developments", *Journal of International Criminal Justice* 3(4): 1007-1018. Kelly D. A. (2003). "Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles", 21 *BERKELEY J. INT'L L.* 288.

48 *Supra* note 10 para 598.

49 *Ibid* 695.

50 *Supra* note 10 para 696.

51 *Supra* note 10 para 598.

humiliation, discrimination, punishment, control or destruction of a person."[52] The tribunal noted that the traditional domestic definition of rape in domestic jurisdiction on the basis of non-consensual sexual intercourse was too narrow a definition.[53]

Similarly the crime against humanity of sexual violence including rape was defined as "any act of a sexual nature which is committed on a person under circumstances which are coercive."[54] Such conduct in the reasoning of Trial Chamber I may include acts that do not include penetration or even physical contact, such as forced nudity. These definitions are milestone achievements in international law since they remove the traditional definitions focusing on body parts and consent which are not applicable in massive and war or conflict-based gender and sexual violence.

5.2.4 ANALYSIS OF THE AKAYESU CASE

The Akayesu decision represents progress in international criminal law in that it is the first to classify gender and sexual crimes as acts of genocide. Through Akayesu the ICTR contributed to the development of international law outlawing genocide. Through Akayesu the international community was graced with a definition of genocide recognizing gender and sexual violence as such. The legal theory on genocidal gender and sexual violence advanced by MacKinnon and her proponents was translated into positive law by Akayesu.

As much as the conviction of Akayesu is important for gender and sexual violence to qualify as genocide, the role of victims in this deserves more focus. The prosecution in this case, like in many others, had failed to link some of the sexual violence evidence it had with the prosecuted crimes and the accused. Note that the most applauded tribunal ruling on rape and sexual violence as genocide would not have been possible had the witnesses not come forward, a factor that influenced the amendment of the indictment. While it was the prosecution that indeed sought leave to amend the indictment, the contribution to this effect by Witnesses J and H is outstanding. Through the testimonies of Witnesses J and H the prosecution was motivated to amend the indictment.

The testimony of Witness H was central in this case because it illuminated that Akayesu was liable due to his failure to prevent rape from occurring near or at the communal bureau. Victim H expressed to the Trial Chamber that the communal police and Akayesu had the power to prevent rapes from being carried out by the Interahamwe at or near the bureau of the commune. The importance and

52 *Supra* note 10 para 597.

53 For a detailed analysis of consent and force as definitional element of rape see especially, MacKinnon, C.A., "Defining rape internationally: A comment on Akayesu" 44 *Colum. J. Internat'l L* 940, 2005-2006, at 940.

54 *Supra* note 10 para 688.

contribution of Witness H was reiterated by the prosecution in their introductory remark in the amended indictment. The prosecution expressed that "*the testimony of Witness H motivated them to renew their investigation of sexual violence in connection with events which took place in Taba at the bureau communal.*"[55]

Let me now draw attention to the reasons advanced by the Akayesu prosecutors for not including rape and sexual violence in Akayesu's initial indictment, which are debatable. In their explanation prosecuting counsel used the classical argument that victims would not testify due to shame and stigma attached to their experience. Additionally and more acceptable they admitted that: " ... I'm ready to admit maybe sometimes we were not as sensitive as we should have been on the issue."[56]

In addressing the fear of shame for the victim as a reason for not having sexual violence prosecuted, I will instead question whether the problem is not caused by what General Dallaire calls "sealing away from rape".[57] I argue that while shame and stigma are indeed present in some cases, in the Akayesu case the victims came out spontaneously and cannot be seen to harbour shame resulting in not talking.

There is evidence that victims were already talking about rape and sexual violence. Victims J and H as well as the witnesses testifying on rape during earlier investigations as noted by the prosecution exemplify the will to testify for Rwandan victims despite a magnitude of challenges. It is rather unfortunate that often the courageous efforts taken by victims testifying about their complex experiences of rape and sexual violence are easily undermined by the generalised perception that the shame accompanying rape and sexual violence prevents women from testifying about their experiences of gender and sexual violence.

Volumes of testimonies of victims of rape and sexual violence existed as early as 1996 when "Shattered lives" and other human rights-based reports narrated shocking experiences of victims of rape and sexual violence during the genocide. More testimonial monographs have been and are being written. Clearly victims are willing to talk and put on record their experiences despite the difficulties of facing reality through the narrative.

From a cultural and contextual perspective, it is important to mention that some victims remain silent for several reasons. I would argue that victims in Rwanda have been more willing to testify than has often been depicted despite the stigma attached. Clearly victims J and H were willing to testify about rape and sexual violence and had not done so because they had never been asked.

55 *Supra* note 10 para 417.
56 *Ibid*.
57 Dallaire, R. (2004), *Shake hands with the devil. The failure of Humanity in Rwanda* (London: Arrow books).

The Akayesu case reveals that the failure to initially indict Akayesu for rape and sexual violence can be best explained by the prosecution's failure to link acts of rape and sexual violence to the accusation of Akayesu and by its insensitivity as admitted by the Akayesu prosecutor. It is interesting that Witness J – the instigator for introducing rape and sexual violence – had never been questioned on rape and sexual violence by the investigators and the prosecution on whose behalf she was testifying. What this reveals is the unfortunate reality of criminal trials in which victims are not often allowed to tell their story but to only give the prosecution line of evidence. It also illustrates how through the prosecutorial narrative such important aspects of the genocide would have gone unnoticed had it not been for the brevity of the witnesses and victims of gender and sexual violence.

The prosecution's initial failure, as admitted by the prosecuting attorney, illustrates the OTP's lack of sensitivity to rape and sexual violence. A lack of sensitivity in crimes of rape and sexual violence during wars is not an innovation of the OTP of the ICTR. Kelly Askin has described the failure to expressly prosecute sexual violence at the Nuremberg and Tokyo Tribunals despite the presence of such evidence.

It is pertinent to ask why prosecutors at the ICTR and the Nuremberg and Tokyo tribunals hesitated in prosecuting rape and sexual violence as part of the actions amounting to crimes falling within their jurisdictions. Like the ICTR, the prosecution in the war crimes trials illustrated the failure or fear to confront rape. The reason for this is still to be clearly understood; Askin wonders if it was the result of discomfort, prudishness, confusion, or other reasons.

Take into consideration the narrative of the Nuremberg war crimes prosecutors on rape and sexual violence. The prosecutor is quoted as having told the tribunal after reporting rape that "I will not mention any more of the atrocities mentioned in this document."[58] Further, after submitting that "54 women or young girls of 13 to 50 years of age were raped by maddened soldiers" the prosecutor argued that "The Tribunal will forgive me if I avoid citing atrocious details which follow."[59]

It is challenging to interpret the reasons as to why the prosecution at the military tribunals and the ICTR prosecutors resisted prosecuting rape and sexual violence. An interpretation of the prosecution's discourse in the war crimes tribunal reveals mixed sentiments. The fear of the details of the atrocities including rape and sexual violence as if murder was less atrocious or acceptable in terms of narration. And while qualifying the details as atrocious, the prosecutor excuses himself for not narrating them.

58 Askin, K. (2013), Treatment of Sexual Violence in Armed Conflict: A Historical Perspective and the Way Forward, 19-49, at 33, in De Brouwer, A-M. *et al.*, *Sexual violence as an international crime: Interdisciplinary approaches* (Antwerp: Intersentia).

59 *Ibid*.

The fear of facing rape and sexual violence is well explained by General Romeo Dallaire in his book "Shake hands with the devil." Dallaire explains:

> *I know that for a long time I sealed away from my mind all the signs of this crime, instructing myself not to recognise what was there in front of me. The crime was rape, on a scale that affected me ... For a long time I wiped away death masks of raped and sexually mutilated girls and women from my mind as if what had been done to them was the last thing that would send me over the edges.*[60]

The Akayesu case and the narrative at the war crimes tribunal suggest a different approach. I argue that the prosecutors in both cases already had evidence emanating from the testimonies of the victims and witnesses. The problem is therefore not that victims will not talk as often suggested because in these two situations victims had already talked. The problem should therefore be analysed beyond the shame and stigma associated with the victim and instead it should be viewed from the approaches of the perpetrators.

The Akayesu prosecution explains that they were insensitive and could not link the evidence they had with the perpetrator. But why would they not link rape in the same way they did with killings? this raises a question of why they failed to engage prosecution Witnesses J and H on the topic, yet they had managed to question them on other matters. Clearly Witnesses J and H were willing witnesses before the Trial Chamber and although it could not have been more intimidating, they were able to offer their decisive testimony. It is interesting why prosecuting attorneys failed to find a link between rape as genocide and Akayesu, something that the prosecution witnesses were able to link without any difficulty. In establishing the link between her rape and Akayesu, Witness H explained that Akayesu had the power to prevent rape in and around the communal bureau.

The war crimes narrative indirectly explains away rape and other forms of sexual violence when the perpetrators are described as maddened. Within the auspices of criminal justice maddened perpetrators would be seen as irresponsible due to a lack of the mental faculty to commit a crime. The question is why a perpetrator of rape and sexual violence is seen to be less maddened than a notorious killer?

Qualifying rape and sexual violence as an opportunistic crime committed by uncontrollable soldiers is one of the major reasons why wartime rape has often been explained away. This unfortunately suggests that those rapes were not part of the war but an incidental occurrence aside from the context. It can be concluded that this is why rape and sexual violence did not suffice in the first Akayesu indictment and generally in the first indictments of the Tribunal. While I appreciate the reasons advanced by existing scholarship on the topic, I wish to take the discussion further and to include what I suggestively call the "mind seal away

60 *Supra* note 495 at 430.

approach of Dallaire." This notion is derived from General Dallaire's narrative on witnessing and recognizing rape and sexual violence.

Dallaire confesses that he had sealed away his mind and instructed himself not to recognize rape and this reflects how he positions himself in the face of Rwanda's complex reality of rape and sexual violence. He explains the impact of facing rape and sexual violence on a scale that Rwanda presented. Would it be fair in this context to simplistically suggest that Dallaire's reaction illustrates the male contempt for women or expresses patriarchal dominance over women? Such a conclusion does not explain why Dallaire believed that the death masks were the last thing to send him over the edge.

On a different but similar note a former RPF soldier narrates that when he witnessed the rape of two Tutsi women by an Interahamwe in a banana plantation where he was hiding as he was making reconnaissance for an intended military attack he was so psychologically and sexually affected that for two years after what he had witnessed he lost his sexual virility.

The testimonies by Dallaire and the RPF soldier, both of whom were male eyewitnesses to the genocide, suggest that we must look further at the fear and impact associated with facing genocidal rape including reactions by the investigators and prosecutors. The deep pain and fear that rape and sexual narrative gathered during the training is partly the reason why I want to further find out if self-sealing is not a reasonable reason for the investigators' and perpetrators' initial and subsequent failure, which has been explained away as insensitivity, even though there are some who are indeed insensitive or there are victims who indeed fear shame in other instances.

It can also be argued that the "mind seal off" approach to rape, even though it is explained in other terms, is partly to blame for the failure to initially indict Akayesu and others before the ICTR. It also partly explains the avoiding narrative of the war crimes prosecutor presented in this situation. This approach as explained by Askin has an impact that results in the lack of public documentation and official condemnation of rape and sexual violence.

The absence of any public record or condemnation of rape and sexual violence communicates or is rather interpreted as expressing that gender and sexual violence are not as serious as killing or other violent acts of genocide, crimes against humanity or war crimes. It also unfortunately puts a stronger burden on victims to take the extra mile, like Witnesses J and H in order for their experiences to be heard in the general discourse.

Akayesu made a significant contribution to the debate between feminist scholars on how rape and sexual violence should be qualified and described. Before the Akayesu case, debates existed between feminist legal scholars on whether rape should be qualified as genocidal or not. The debate had been informed entirely by

the events in the Former Yugoslavia and had been part of the lobby engaged before and at the time of the demands to have gender and sexual crimes included within the ICTY's jurisdiction. One group spearheaded by Catherine MacKinnon argued for the recognition of genocidal rape[61] while another group led by by Rhonda Capelon sought to emphasize women as victims of rape and sexual violence because they are women[62] as I have illustrated in Chapter 4 of this study.

Capelon's group vehemently opposed defining gender and sexual violence as genocidal because she feared that it would render invisible the cases where women are raped because of domination, terror or as war booty. In her opinion the "*The elision of genocide and rape in the focus on 'genocidal rape' as a means of emphasizing the heinousness of the rape of Muslim women in Bosnia is dangerous,*"[63] Capelon's concerns are not based on a belief that the rape of Bosnian Muslim women was not genocidal but on her desire to maintain and sustain the male domination theories of rape seen as an attack against all women indiscriminately. Obsessed with making the voice of all women heard, Capelon chooses to generalise the situation of women by rejecting other determinant factors which play a role in the specificity of how some women experience rape and sexual violence during conflicts.

Capelon distinguishes genocide and rape by emphasising that genocide intends to debilitate or destroy a people on the basis of their identity as a group while rape is an effort to degrade and destroy women based on their identity as women. Capelon's definition of genocide and rape makes a dangerous assumption concerning women and the identity of a people. Her perspective gives rise to the question of whether women are not part of a people. And are women homogenous due to gender? Talking about women as a group was rejected by modern feminist theories that emphasise that women have multiple identities and such identities have a role in worsening their experience of violence as well as the basis upon which their victimisation is constructed. The anti-Tutsi targeting of Tutsi women and the praising of Hutu women challenges Capelon's assumption on women as women.

In rebuttal, MacKinnon rejects Capelon's emphasis on women. She notes Capelon's focus on rape which is separate from gender in cases of gender and sexual violence in grasping those criminal actions in their religious or ethnic particularities or as attacks against one's specific sex. One is an attack against a people and a culture and the other is an attack against women. The danger in this positioning or discourse is the exclusive consideration of rape as either an attack against a people or against women, but never both. Capelon is criticized because her narrative suggests that an attack against women cannot define an attack against a people.

The Akayesu case was able to bridge this discussion when it decided that the gender and sexualized attack on Tutsi women was sexualized ethnicity and an attack on

61 *Supra* note 491.
62 *Supra* note 13.
63 *Ibid*.

Tutsi women as such, their families and the entire Tutsi community. Genocidal rape was qualified as an attack to humiliate and destroy not only Tutsi women but also their Tutsi community. The evidence in Akayesu clearly illustrates that an attack against women depends on their positioning on the basis of gender and sex within the context of a group and the conflict.

For that matter, Tutsi women were attacked specifically because they were Tutsi, while some Hutu women were attacked because they were pregnant with Tutsi babies when they were spouses of Tutsi men because the Rwandan community is patriarchal and so the child takes the father's ethnic identity. In Akayesu in one instance a Tutsi woman married to a Hutu man survived rape because her Tutsi identity was unknown to the rapists. While other Tutsi women were hiding, being raped and killed she was freely going to church as she describes in her testimony. The differential treatment of women due to their link to the Tutsi negates the assumed womanhood theory by Capelon.

It should be mentioned that the Akayesu contribution generally represents a case in which Tutsi women were the only victims of Hutu men, a conclusion that reflects their victimization as both Tutsi and women thus reflecting the intersectionality of their gender and ethnicity. It does not therefore contribute to women as perpetrators of genocidal sexual violence or to the victimization of Tutsi men through genocidal gender and sexual violence.

The Akayesu decision clarified the intersectional theory by positioning ethnic rape and the gendered aspects of genocide. The ethnic and gendered aspects of rape and sexual violence were both taken into consideration when the Court held that Tutsi women were raped because of the fact that they were both Tutsi and female. Hutu women in this case were raped because of their relationship with Tutsi men.

The attack against Hutu women was put in the genocide context by the words of Akayesu while encouraging the attack. According to prosecution witnesses Akayesu encouraged the attack against Hutu women married to Tutsi men by demanding that where a Hutu woman had been impregnated by a Tutsi man she had to be forced to abort the Tutsi foetus. Elsewhere witnesses testified that Akayesu used the 'snake and calabash' saying in order to promote violence against Hutu women married to Tutsi men.[64]

64 *Supra* note 10 para 121 "*According to prosecution Witnesses KK, PP and OO, the accused expressed this opinion on other occasions in the form of a Rwandese proverb according to which if a snake wraps itself round a calabash, there is nothing that can be done, except to break the calabash ('Iyo inzoka yiziritse ku gisabo, nta kundi bigenda barakimena'). In the context of the period in question, this proverb meant that if a Hutu woman married to a Tutsi man was impregnated by him, the foetus had to be destroyed so that the Tutsi child which it would become should not survive. It should be noted in this regard that in Rwandese culture, breaking the 'gisabo', which is a big calabash used as a churn was considered taboo. Yet, if a snake wraps itself round a gisabo, obviously, one has no choice but to ignore this taboo in order to kill the snake.*"

The Tribunal illustrated the understanding that the objective in Rwanda was to achieve genocide against the Tutsi. In the pursuit of this genocide gender and sexual violence was employed mostly against Tutsi women and girls. To illustrate the sexualized targeting of Tutsi women, the tribunal recognized the role of sexualized ant--Tutsi propaganda that portrayed Tutsi women as sexual objects serving the interest of their Tutsi ethnic group. Genocidal propaganda had exposed Tutsi women as seductive spies and enemies of the Hutu. They were also viewed as inaccessible and superior to Hutu women. Propaganda suggested that Tutsi women were too arrogant to marry Hutu men. Paragraph 732 of the Akayesu trial judgment reproduced hereunder summarizes the tribunal's position on the interplay between gender and ethnicity in genodical gender and sexual violence:

> *The rape of Tutsi women was systematic and was perpetrated against all Tutsi women and solely against them. A Tutsi woman, married to a Hutu, testified before the Chamber that she was not raped because her ethnic background was unknown. As part of the propaganda campaign geared to mobilizing the Hutu against the Tutsi, the Tutsi women were presented as sexual objects ... , The Interahamwe who raped Alexia said, as he threw her on the ground and got on top of her, "let us now see what the vagina of a Tutsi woman tastes like" ... Akayesu himself, speaking to the Interahamwe who were committing the rapes, said to them: "don't ever ask again what a Tutsi woman tastes like". This sexualized representation of ethnic identity graphically illustrates that Tutsi women were subjected to sexual violence because they were Tutsi. Sexual violence was a step in the process of destruction of the Tutsi group – destruction of the spirit, of the will to live, and of life itself.*[65]

The Tribunal's finding affirms an important aspect of genocidal gender and sexual violence also expressed by MacKinnon about the need to consider the particular and generic aspects in genocidal gender and sexual violence. We understand that in situations of genocide as illustrated above some particular women are targeted because they are part of a specific group targeted for genocide. It is therefore required that in such a case the particularities of the targeting of, for example, Tutsi women must be considered. It is the role that both gender and ethnicity play in advancing genocidal rape that demands an intersectional approach to genocidal gender and sexual violence. Genocidal gender is in the conclusion of the ICTR and that of MacKinnon different from rape not having a genocidal intent.

The ICTR sustained MacKinnon's point of view that genocidal rape is not only an attack on a woman's identity as suggested by Capelon but also an attack on a woman's identity as a member of a particular targeted group. It emphasized that both gender and ethnic identity are equally important distinguishing features in cases of genocidal rape. Another scholar, Kalajdzic, arguing in favour of the theory of rape as genocide elaborates that it is dangerous to overemphasize gender to the exclusion of other possible motivating factors because it renders obscure other

65 *Supra* note 10 para 732.

factors of a woman's identity upon which the aggressors decide which women to rape or not.

The testimony of a Tutsi woman cited above who was not raped because her ethnic identity was not known to the rapists confirms MacKinnon's and Kalajdzic's point of view. Similarly the rape of Hutu women married to Tutsi men reflects the central position of ethnicity during the genocide. It was the primacy of ethnicity rather than gender that was determinative in the identification of victims of gender and sexual violence.

The Akayesu judgment was historic in terms of persons with command and superior responsibility who would tolerate, encourage or remain indifferent when rape and sexual violence were occurring. The ruling concluded that a superior who knows or had reason to know that his or her subordinates were about to commit or had committed acts or rape and sexual violence with the required genocidal intent is individually liable under international criminal law. Other senior government officials were convicted of rape and sexual violence as crimes against humanity for planning, instigating, ordering or aiding and abetting rape and sexual violence.

The Akayesu ruling importantly elaborates that rape and sexual violence indeed lead to genocide since they destroy a people, the victims, their families and their communities. In the Chamber's opinion the rape and sexual violence was intended to cause serious bodily harm specifically targeted at Tutsi women as members of the Tutsi group whose destruction was intended. The ruling that rape and sexual violence constitutes serious bodily harm as an element of genocide is a great achievement. While there is indeed a need to have rape and sexual violence enumerated as genocide, the absence of any specificity does not justify a failure to prosecute those acts as genocide.

The ICTR ruled that gender and sexual violence are genocidal because they cause serious bodily harm to the victim. Acts causing serious bodily and mental harm qualify as genocide when they are committed with the required genocidal intent. To elaborate on this, the Akayesu case distinguished the attack on victim U, a Tutsi who on occasions was threatened with death while being interrogated, with that of victim V, a Hutu man who was beaten in the presence of the accused. The attack against victim U was qualified as causing harm as required under genocide while the attack on V was not qualified as such. The tribunal held that such acts committed against victim V cannot be qualified as genocide against Tutsi because V was Hutu woman.[66] The Chambers here made an important distinction between genocide and crimes against humanity by emphasising the need to distinguish the victims on the basis of the intent to destroy carried by the perpetrators of genocide.

In the same way, the Akayesu justices concluded that even though the acts committed against victim Y, a Hutu woman, constituted serious bodily and mental

66 *Supra* note 10 paras 711-712.

harm against the victim, the chamber concluded that the acts could not constitute acts of genocide because the victim was a Hutu woman.[67] This does not however suggest impunity because in either instance the accused was convicted of crimes against humanity and violations of Article 3 common to the Geneva Conventions and Additional Protocol II. The rape of and sexual violence against Hutu women committed during the genocide against the Tutsi were not ignored because genocidal gender and sexual violence is recognized; instead a clear and correct qualification was made by the Akayesu case, putting into context the realities of the case at hand.

It is therefore a fair conclusion that since rape and sexual violence inflict serious bodily harm and once they are committed in order to destroy, in part or in whole, a religious group this is no less genocidal than killing, the Akayesu decision concluded. In this regard gender and sexual violence were acknowledged not just as capable of causing serious bodily harm but much more as the most serious form of acts that cause serious bodily harm. The recognized bodily harm is on the basis of the presence of the genocidal intent required.

Genocidal gender and sexual violence is distinguished from other forms of rape and sexual violence that are not genocidal because the testimonies reveal that they had the specific intention to destroy. Tutsi victims were clearly not raped incidentally or as an alternative to destruction but as a part of the wider genocide plan. The Tribunal concluded that through gender and sexual violence the perpetrator pursued the destruction of the Tutsi. It was a means and a tool of the genocide.

In conclusion, I wish to highlight that the Akayesu case dispensed justice in a fair manner for the victims of genocidal gender and sexual violence because it was able to recognize the experiences of the women victims for what they were: genocidal. It made a sifgnificant contribution in the efforts to understand, explain and name the complex reality of the experiences of genocidal gender and sexual violence.[68]

The Akayesu decision correctly affirmed MacKinnon's argument that rape and sexual violence when genocidal must be distinguished from other forms of sexual violence. The Tribunal in a concise and elaborate way recognized that there is an intersection between gender and ethnicity that worsens the experiences of victims of genocidal gender and sexual violence. The Tribunal was able to identify the fact that Tutsi women are both Tutsi and women and victims of genocide against the Tutsi through sexual and gender forms of violence. It also recognized that 'such abuse extends to the woman victim, family and the entire Tutsi population'.

67 *Supra* note 10 para 721.

68 See generally Obote-Odora, A. (2005), "Rape and Sexual Violence in International Law: ICTR Contribution", *NEW ENG.J. INT'L & COMP. L.* 131, Vol. 12:1, at 137. Kruger, J. (2011), "A Comparative Analysis of Genocidal Rape in Rwanda and the Former Yugoslavia: Implications for the Future" *Master's Theses and Doctoral Dissertations.* Paper 327, available at: http://commons.emich.edu/theses, last accessed on 18 January 2012.

The Akayesu case is interesting because it does not emphasize the stereotype that men are the only perpetrators of rape and sexual violence. Even though all perpetrators in this case were men, the Tribunal's silence is important for not enhancing the male/female dichotomies of victim/perpetrator.

It is the opinion of this study that the Akayesu case established a judicial discourse on rape and sexual violence. It reveals that dealing with genocidal violence is indeed complex. It has tried to develop knowledge on gender and sexual violence in genocide and has noted some challenging realities. It refers, for example, to rape and sexual violence as crimes against humanity. Thus, there is still no legal or judicial definition of rape and sexual violence within the context of genocide.

The Akayesu judicial discourse made great strides in recognizing genocidal gender and sexual violence against Tutsi women as victims. By emphasizing that those crimes were committed solely against Tutsi women, the ICTR set a tone that represented genocidal gender and sexual violence in Rwanda as a genocidal attack on Tutsi women only. The Akayesu case and the entire ICTR docket maintain this discourse of gender and sexual violence.

While this is a great achievement in confronting the nature of the violence that the Tutsi women suffered, this narrative fails to indicate such experiences that were suffered by Tutsi men. Akayesu leaves us wondering if there were no such cases of rape and sexual mutilation against Tutsi men or if such experiences were there and were simply not considered genocidal? After analyzing the two ICTR cases I will engage in an analysis of genocidal gender and sexual violence against Tutsi men and what the legacy of the Tribunal is in this regard.

5.3 THE PROSECUTOR V. MUHIMANA

5.3.1 BACKGROUND

Mikaeli Muhimana was a local official conseiller of *secteur* gishyita in Gishyita *commune,* Kibuye *Préfecture*.[69] In November 1995 Mikaeli Muhimana was indicted for conspiracy to commit genocide; genocide; murder as a crime against humanity; extermination as a crime against humanity; other inhuman acts as a crime against humanity; serious violations of Article 3 common to the Geneva Conventions and serious violations of the Additional Protocol thereto.[70] In October 1996 a warrant of arrest was issued against him and he was subsequently arrested in Dar es Salaam, Tanzania, and transferred to the ICTR detention facility in Arusha.

The indictment was amended on 21 January 2004 thereby charging Muhimana with four counts of genocide, or in the alternative, complicity in genocide, murder as a crime against humanity and rape as a crime against humanity, all of which

69 *Supra* note para 4.
70 *Ibid* at annex 2 at 2.

were committed between April and June 1994 in Bisesero area, in many locations in Gishyita commune, Kibuye prefecture. It was alleged that Muhimana had armed, mobilised and led perpetrators to attack about 5,000 Tutsi seeking refuge at Mubuga Church and 6,000 Tutsi refugees at the Mugonero complex in Gishyita commune.[71] Muhimana was also accused of individually and gang raping Tutsi women and children or those he believed were Tutsi women and children and killing many Tutsi.

The Muhimana amended indictment failed to charge the accused with rape and/or any other form of sexual violence as genocide. The numerous charges of rape and other forms of sexual violence were all charged under crimes against humanity. Akayesu was a greater success in terms of rape and sexual violence as genocide, yet Muhimana's indictment included much more detail regarding the use of rape and sexual violence. Instead of linking the genocidal intent illustrated by Muhimana in his charges of rape and sexual violence the prosecution chose the crimes against humanity charge thus proving that the rapes were widespread and systematic which are the principal elements of crimes against humanity.

After entering a not guilty plea, the trial of Mikaeli Muhimana began on 29 March 2004 and the 34 trial days were closed on 20 January 2005. Five months later, on 28 April 2005, Trial Chamber III Judges Khalida Rachid Khan, Lee Gacuiga Mathoga and Emile Francis Short convicted Mikaeli Muhimana. Muhimana was convicted of genocide (count 1) and two counts of crimes against humanity (counts 3 and 4) and sentenced to three life sentences that would run concurrently. Mika Muhimana appealed against the decision of Trial Chamber III and on 21 May 2007 the Appeals Chamber confirmed Trial Chamber III's conviction and sentence against Muhimana.

5.3.2 THE MUHIMANA INDICTMENT

Mikaeli Muhimana was initially indicted in 1995 and jointly charged with Ignace Bagilishema, Clement Kayishema, Charles Sikubwabo, Aloys Ndimbati, Vincent Rutaganira and Obed Ruzindana. In 1996 the joint indictment was amended confirming the seven counts of conspiracy to commit genocide; genocide; murder as a crime against humanity; extermination as a crime against humanity; other inhuman acts as a crime against humanity; serious violations of Article 3 common to the Geneva Conventions and serious violations of the Additional Protocol thereto.[72] None of the seven counts directly referred to any form of sexual violence.

Sexual violence was introduced in Mikaeli's indictment nine years after the initial indictment. In 2004 a revised indictment charging him with four counts was instigated, whereby counts I and II charged him with genocide pursuant to Article 2(3)(a) or, alternatively, complicity in genocide according to Article 2(3)(e) of the

71 *Ibid* para 5.
72 *Ibid* annex 2 at 2.

Statute of the International Criminal Tribunal for Rwanda, count III charging him with murder as a crime against humanity as per Article 3(a) of the Statute of the Tribunal and count IV charging him with rape as a crime against humanity pursuant to Article 3(g) of the Statute of the Tribunal.[73]

5.3.3 FACTUAL AND LEGAL FINDINGS

The allegations against Mikaeli Muhimana included charges of genocide and complicity in genocide, for which no charge of rape and sexual violence was included, and charges of crimes against humanity, under which all acts of rape and sexual violence were included.

Because this study is most interested in rape and sexual violence as genocide, I will consider the allegations and findings on rape and sexual violence with an interest in elaborating the prosecution's failure to charge such acts as genocide. I will therefore start with the Tribunal's factual and legal findings on rape and sexual violence as crimes against humanity because I wish to end with the Tribunal's findings on genocide from which my analysis is drawn.

Count 3 of the indictment charged Mikaeli Muhimana with rape as a crime against humanity pursuant to Article 3(g) of the ICTR Statute. Rape was charged as part of a widespread and systematic attack against Tutsi women civilians and others perceived to be Tutsi in Gishyita Sector, Mugonero Church, the Hospital and Nursing School and in the Bisesero area.[74]

In proving crimes against humanity the prosecution must submit that the attack was committed as a part of widespread and systematic attack, and against a civilian population on a discriminatory basis that is national, political, ethnic, racial or religious grounds. Taking the Gacumbitsi, Semanza and Kajelijeli arguments into account, the Muhimana Trial Chamber also explained that the victim need not belong to the specified groups as long as the intention of the perpetrator is to enhance the attack against a civilian population on one of the mentioned discriminatory grounds.[75]

Muhimana was convicted of rape as a crime against humanity because he had committed rape during the months of April and May 1994 and aided and abetted in the commission of rape by others. In so doing Trial Chamber III recalled its earlier finding in this case that the accused had participated in attacks against the Tutsi in April to June 1994 in which he intended to destroy the Tutsi as an ethnic group.[76] The Chamber also noted that the accused chose his rape victims because he believed that they were Tutsi. In its final ruling the Tribunal emphasized

73 *Ibid*.
74 *Ibid* para 6.
75 *Ibid* paras 877-878.
76 *Ibid* para 559.

the required elements for crimes against humanity to support the conviction of Muhimana.[77]

In Count I of the amended indictment the prosecution charged Muhimana with causing, by acting individually or together with others, the death of many Tutsis. He was accused of having participated in several attacks against the Tutsi from April to June 1994. Muhimana was accused of attacks at Mubuga Curch; Mugonero complex and throughout Gishyita commune that resulted in the death of many Tutsi victims. He was also accused of mobilizing the assailants and distributing arms to them, especially guns and grenades. He was accused of looting humanitarian food intended for refuges; shooting at Tutsi at Uwingabo and pursuing and attacking Tutsi at Rushishi, Ngedombi, Gitwa and Muyira Hills.[78]

Muhimana was found not guilty on several allegations of rape for different reasons that included the prosecution's failure to support the facts as pleaded, insufficient evidence and in one allegation the Tribunal's finding that the disemboweling of the pregnant woman Pascasie Mukaremera could not constitute rape even though it interfered with sexual organs. Instead Muhimana was convicted of this act as a crime against humanity (killing).[79] The Chamber noted that the disemboweling could not be qualified as a physical invasion of a sexual nature. Similarly the fact that the disemboweling was done in order for the accused to see what the foetus looked like did not constitute an act of genocide.

The Tribunal's finding in Mukamurera's disemboweling will be analysed below because of its contribution to the argument presented in this study. First, it will be employed to explain that forms of gender and sexual violence experienced during the genocide against the Tutsi are too complex to be understood within the terminologies of rape, however much the Tribunal has tried to elaborate further on rape and sexual violence. Secondly, it will be employed to illustrate the prosecution's failure to correctly qualify the truth or the experiences of the victims.

Mikaeli Muhimana was sentenced to life imprisonment for the charges of rape and murder as crimes against humanity and for genocide. The Trial Chamber dismissed the charge of complicity in genocide because it had entered a conviction for genocide.

Let me now embark on Trial Chamber III's findings on genocide. Like the Akayesu Trial Chamber, in Muhiman the Chamber had to address the issue of the Tutsi as a protected group. The Chamber noted that the minority ethnic group was called the Tutsi and they were officially identified as such by the government and that the majority of the population was comprised of an ethnic group known as the Hutu, also officially identified as such by the government. Subsequently, the Chamber

77 *Ibid* paras 560-562.
78 *Ibid* para 487.
79 *Ibid* para 577.

found that in 1994 all persons in Rwanda were identified as either Hutu, Tutsi or Twa.[80] The Chamber concluded that the Tutsi were a group protected by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.[81]

The defence's line of argument was that the prosecution had failed to indicate the precise form of participation in genocide because the prosecution did not mention in the amended indictment the specific material elements of genocide charged and the accused's criminal responsibility under Article 6(1).

The Chamber found that this imprecision by the prosecution was not considered fatal because the factual allegations within the indictment thoroughly described the accused's role in the alleged crimes. The Tribunal hence considered all forms of criminal participation provided by Article 6(1) that it deemed relevant to the factual findings in its legal findings on Muhimana's criminal responsibility for genocide.[82]

Trial Chamber III considered the evidence presented by the parties as to allegations relating to the participation of Mikaeli Muhimana in the attacks against the Tutsi as alleged in count I to be reliable and credible.

In its findings on genocide, Trial Chamber III employed the same reasoning that the Tribunal had adopted in Akayesu, Gacumbitsi, Semanza, Kayishema and Ruzindana, and Ntagerura *et al*. It considered the perpetrator's special intent to destroy a group in part or in whole noting, like other Trial Chambers, that genocidal intent can be inferred from the deeds and utterances of the accused. It held that special intent can also be derived:

> *from the general context of the perpetration, in consideration of factors such as: the systematic manner of killing; the methodical way of planning; the general nature of the atrocities, including their scale and geographical location, weapons employed in an attack, and the extent of bodily injuries; the targeting of property belonging to members of the group; the use of derogatory language towards members of the group; and other culpable acts systematically directed against the same group, whether committed by the perpetrator or others.*[83]

Taking into consideration the killing of members of the group and the causing of serious bodily harm – the alleged genocide elements – Trial Chamber III noted that the accused must have committed the alleged acts with an intent to destroy. The standard employed in Akayesu in defining serious bodily harm was adopted by the Muhimana Judges. Thus causing serious bodily harm was defined as any physical injury to the victim such as torture or sexual violence and that such violence must not necessarily be irremediable.

80 *Ibid* paras 10-11.
81 *Ibid* para 511.
82 *Ibid* para 491.
83 *Ibid* para 496.

The accused was found guilty of killing members of the Tutsi ethnic group and causing serious bodily and mental harm to members of the Tutsi group. Muhimana was convicted of genocide on the basis of his participation in the attacks, and the tribunal concluded that "his words and deeds demonstrated his intention to destroy in whole or in part the Tutsi group."

In discussing the accused's genocidal intent the Chamber established that the attack at Mubuga Church was particularly directed against the Tutsi because before the attack commenced some of the Hutu refugees were ordered to leave the premises. The accused willingly and intentionally targeted Tutsi and those he deemed were Tutsi while shooting and raping. The accused's apology to Witness BJ who he had raped believing that she was a Tutsi attested to the fact that he was raping for the purpose of genocide. Similarly, Muhimana referred to the Tutsi ethnicity while identifying victims of rape during some of his attacks. The Tribunal also noted that the large number of Tutsi killed or seriously injured and the number of attackers involved in the attack against the Tutsi were a basis upon which "*the Chamber came to the irresistible conclusion that the massacres, in which the Accused participated, were intended to destroy the Tutsi group in whole or in part*".[84]

5.3.4 MUHIMANA CASE ANALYSIS AND COMMENT

On the 28th of April 2005, when Trial Chamber III delivered the oral summary of its judgment against Mikaeli Muhimana, the Chamber closed with a note of appreciation for different actors including the witnesses. With regard to the witnesses, it stated that: "The chamber would also like to thank the witnesses who have travelled to Arusha to tell their story and to assist in understanding the truth and rendering justice."[85]

As noted in the Chamber's appreciation, the witnesses, especially the victim witnesses, told their stories through their testimony and contributed in making known and understanding the truth. This created an official record of their experiences and facilitated in having justice dispensed. The Muhimana case is one of the cases in which many factual details in relation to gender and sexual violence were revealed by the witnesses, some of whom were victims of such abuse themselves. Victims and witnesses recalled intimate details of what they had suffered or witnessed at the hands of the accused in this case.

In this analysis I wish to examine whether the Muhimana case was right in qualifying the victim's story and whether the judgment was able to render justice for the victims of genocidal gender and sexual violence suffered at the hands of the accused. The Muhimana case unfortunately illustrates one of the major disappointments of the ICTR prosecution as far as the victim witnesses were concerned, some of whom had courageously come forward to testify about their

84 *Ibid* para 516.
85 *Ibid* para 76.

ordeals. The Prosecution Office failed to link acts of rape and sexual violence to charges of genocide despite such telling evidence before it.

The factual findings clearly illustrate the genocidal nature of acts of gender and sexual violence in this case. Muhimana's genocidal intent in the commission of rape and sexual violence was illustrated by his words and actions. The accused was specific and deliberate in the selection of victims for rape and sexual violence. By allowing Hutu women married to Tutsi men who had fled alongside their family to leave the premises before attacking the Tutsis, Muhimana illustrated that his target was only Tutsis.

Similarly, in the sexual assault of Witness BJ, a young Hutu girl who Muhimana mistakenly raped because he had perceived her to be a Tutsi, the accused apologised and set this victim free because of her Hutu identity. This should have been a *prima facie* case proving Muhimana's genocidal use of rape. Instead of noting the intention to commit genocidal rape against the Tutsi the prosecution asserted that the actions of Muhimana were widespread and systematic in attacking Tutsi women and those he perceived as such. In telling her story, Witness BJ clarified that Muhimana was not raping women for the sake of notoriously doing so; by his apology Muhimana sent a message that the rape of BJ was incidental or accidental and would not have been intended had her identity been known.

The role of ethnicity in determining which women to rape or not has been elaborated in the analysis of Akayesu. This is illustrated by the way the assailants were concerned with the ethnicity of their victims. In Akayesu a Tutsi woman whose Tutsi identity was unknown to the assailants survived rape and sexual violence.[86] Similarly but from a different angle, in Muhimana Witness BJ was raped because her Hutu identity was not known to the assailant. The two cases reveal the central role of ethnicity as opposed to gender in genocidal gender and sexual violence. Being a Hutu meant that a woman was safe from gender and sexual violence while being Tutsi or being perceived as such meant that a woman was in grave danger of being raped and subjected to sexual violence.

Akayesu's apology to and the release of Witness BJ after knowing that she was Hutu was recognised in passing by Trial Chamber III as an illustration of genocidal intent. The Muhimana prosecution failed to make use of such intentional discriminatory behaviour by the accused to charge him with rape and sexual violence as genocide which it undoubtedly was. It would have been factually and judicially relevant to contend that Muhimana had demonstrated genocidal intent through his selection of victims as well as his apology to BJ. Interestingly, elsewhere in its findings on the accused's genocidal intent not related to rape and sexual violence the Chamber concluded that the act of allowing Hutu refugees to leave the premises before the attack commenced also illustrated the intent to commit genocide.[87]

86 *Supra* note 10 para 732.
87 *Supra* note 12 para 515.

Unlike the Akayesu case that concluded that rape and sexual violence when committed with the intent to destroy, in part or in whole, a protected group qualifies as genocide in the same way as murder, the Muhimana case failed to contend under its genocide charges that rape resulting in death or followed by death either amounted to the killing of members of a group or causing serious bodily harm. Trial Chamber III employed Akayesu's definition of causing serious bodily harm that uses torture and sexual violence as examples thereof. Nevertheless, because the prosecution had not pleaded any of the sexual violence and rape cases as such, the legacy of Muhimana suggests that there were no acts of rape and sexual violence committed with a genocidal intent as far as the accused was concerned.

Even though not based on charges of rape and sexual violence, Trial Chamber III established that Muhimana's intention to destroy the Tutsi was illustrated by the specific targeting and references to the Tutsi during the attacks. The Chamber conceded that:

> *The Accused targeted Tutsi civilians during these attacks by shooting and raping Tutsi victims. He also raped a young Hutu girl, Witness BJ, whom he believed to be Tutsi, but later apologised to her when he was informed that she was Hutu. During the course of some of the attacks and rapes, the Accused specifically referred to the Tutsi ethnic identity of his victims.*[88]

Yet in none of the mentioned rape instances was a conviction entered for genocidal gender and sexual violence. By this the Muhimana case departs from the Akayesu findings. In Akayesu when similar acts were endured by the Tutsi and Hutu, the Tribunal distinguished in its findings that the attack against a Tutsi amounted to an act of genocide because of the presence of the intention to destroy, in whole in part, the Tutsi as a group. On the contrary, concerning the attack against a Hutu on whom serious bodily harm had been inflicted the Tribunal elaborated that this harm constituted a crime against humanity because the required intent for genocide was not present.

The Muhimana prosecution unfortunately qualified the tens of rapes and sexual violence against Tutsi women as mainly an attack on civilian women on the basis of discriminatory grounds, hence a crime against humanity instead of what it was: genocide through rape and sexual violence. The prosecution of murder as an act of genocide was pleaded with ease despite the fact that all witnesses were dead while with regard to gender and sexual violence the Muhimana prosecutors were not able to adduce genocide.

Indirectly Muhimana used the argument raised by Capelon in which it considered attacks against women as crimes against humanity and not genocide. It lacks a reason to explain why in the perception of the Muhimana prosecution such atrocious crimes committed against Tutsi women, as they were called by the

88 *Ibid* para 517.

Chamber, were only seen as acts intended to degrade and humiliate them and not to degrade, humiliate and destroy them, their families and the entire Tutsi population as concluded by the Akayesu judgment.

In the reasoning of Trial Chamber III on the conviction for genocide and rightly so, the Chamber argued that in order to be guilty of genocide the accused must possess the specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group. Unlike the case of crimes against humanity in which numerous victims through widespread and system attacks is required, in the opinion of Trial Chamber III there is no numeric threshold of victims required in proving genocide and there is no need to prove that the perpetrator intended to completely annihilate the targeted group.[89]

Significantly the Muhimana case reveals that the prosecution failed to charge the accused with rape and sexual violence as genocide, yet a great deal of evidence on rape and sexual violence illustrates the role of Muhimana in committing and aiding and abetting such genocidal forms of violence. The prosecution in Muhimana not only failed to correctly qualify the allegations of rape and sexual violence as genocide, it also omitted much of the evidence about rape and sexual violence when it amended its indictment. During its closing arguments the prosecution disappointingly requested the Chamber to consider unpleaded rapes: "The Prosecution requested that the evidence of unpleaded rapes be the subject of findings and also averred that unpleaded material facts could be used to establish genocidal intent …"[90] Out of the seven pieces of evidence not pleaded only two do not concern rape.[91]

Yet even the evidence against Muhimana proved that he had raped, on several occasions, different Tutsi women including Witnesses BG and AX. He forced Tutsi women to parade naked, to display their genitals in public and in some cases the accused called on some people to come and see "what Tutsi girls look like".[92] As explained earlier, genocidal intent can be derived from, among other things, the utterances of the perpetrators of genocide. On the basis of statements uttered by the accused, Jean Paul Akayesu was convicted of rape and sexual violence as acts of genocide.[93] In fact the Trial Chamber in Akayesu qualified such behaviour as the sexualised representation of ethnic identity.

Akayesu's conviction was made possible because the prosecution had charged him with such. Unfortunately, the ICTR OTP was not able to appreciate the evidence before it during the amendment of the indictment in a manner that would have allowed them to charge Muhimana for what he intended to achieve by committing rape and sexual violence – the destruction of the Tutsi.

89 *Ibid* para 498.
90 *Ibid* para 458.
91 *Ibid* paras 462-463, 481.
92 *Ibid* para 19.
93 *Supra* note 10 para 732.

Lastly, I shall consider the Muhimana legacy in relation to the disembowelment of a pregnant Tutsi woman, Pascasie Mukamurera, who was cut by a panga from the breasts to the genitals. When Muhimana ordered the disemboweling of Mukamurera he explained that he wanted to see what a foetus looked like in the stomach. If the prosecution's failure to charge this act as genocide was not bad enough, Trial Chamber IIIalso rejected the qualification of such acts as rape. Chamber expressed that:

> *The Chamber has carefully considered the Prosecution's submission to consider this act as rape, and concludes that such conduct cannot be classified as rape. Although the act interferes with the sexual organs, in the Chamber's opinion, it does not constitute a physical invasion of a sexual nature.*[94]

By this conclusion the Chamber refused to recognise the fact demonstrated by Beardsley when he explained the manner in which women were killed, noting that the attack was specifically sexual in nature.[95] By qualifying the death of Mukamurera as murder, the sexualised nature of her death was neglected. The Tribunal swept away her sexualised suffering as merely interfering with her sexual organs. The approach of Trial Chamber III's approach on this departs from the findings on related evidence in the other jurisprudence of the ICTR.

In Akayesu, for example, the thrusting of a piece of wood into a woman's sexual organs was qualified as rape. In the opinion of Trial Chamber I, sexual violence was defined broadly, not limiting it to a physical invasion of the human body as suggested by the Muhimana Trial Chamber. Rather, sexual violence includes acts which do not involve penetration or any physical contact like forced nudity.[96] Rape was also defined to include "the insertion of objects or use of body orifices not to be considered intrinsically sexual."[97] Similarly, in Gacumbitsi the Trial Chamber qualified the driving of a stick into a woman's genitals right through to her head as rape arguing that the sexual penetration with genitals or foreign objects constitutes rape.[98] The rejection of the disembowelling of Mukamurera as rape is a setback in understanding the truth of genocidal gender and sexual violence from the perspective taken by the Tribunal in Muhimana.

It would have been both logical and correct to qualify the death of Mukamurera as genocidal sexual violence. The factual findings of Trial Chamber III qualifying the death of Mukamurera as murder renders sexualised violence invisible; genocidal sexualised violence as testified by Romeo Dallaire was a reality during the genocide in Rwanda. Dallaire explains that the attack against Tutsi women was often sexual.

94 *Supra* note 12 para 557.

95 *The Prosecutor v. Theoneste Bagosora,* Case No. ICTR-98-41-T, Trial Chamber I, Judgment and Sentence (18 December 2008). See also Binaifer Nowrojee, Your Justice is too slow: Will the ICTR fail Rwanda's Rape Victims?

96 *Supra* note 10 para 688.

97 *Ibid.*

98 *Prosecutor v. Gacumbitsi,* Case No. ICTR-2001-64-T, Judgment (17 June 2004), para 321.

Dallaire explained such deaths as death masks of rape. The death mask of the rape of Mukamurera is made invisible because it was sidelined as murder. This approach results in not telling the entire story of her death, it masks the fact that her death was sexual, targeting her genitals and reproductive capacity.

More widely, Mukamurera's case and the contradiction it raises with Akayesu and Gacumbitsi elaborates the complexity of prosecuting genocidal gender and sexual violence. Considering the atrociousness of genocidal gender and sexual violence the possibility of an all-encompassing definition is unlikely. Confronted by this and further details on rape and sexual violence as they occurred in Rwanda, one realises, as I mentioned in Chapter 3, that ordinary and legal language can hardly grasp the reality. I think that reality must take charge in order to better name and address the truth.

Yet I argue that what is required is not as complex as it appears; the challenge the prosecution faced in the Muhimana case was far from whether Mukamurera had suffered serious bodily harm or whether what happened to her was because the accused had the intention to annihilate the Tutsi as a group. In the realities we have in this case the proof of genocide is easier than the extra mile of defining rape and trying to fit the experiences of Mukamurera and the like as such instead of what those crimes were – genocide through gender and sexual violence against Tutsi women because they were both Tutsi and women.

5.3.5 MUHIMANA CONCLUDING REMARKS

The Muhimana decision illustrates that the prosecution narrative and judicial discourse has regrettably illustrated that Muhimana, one of the zealous 'genocidaires' of Rwanda, never perpetrated genocidal rape and sexual violence. The record suggests that the victims of Muhimana's rape and sexual violence did not experience those with a genocidal intent despite the fact that most of the victims succumbed to death through their sexualised attack or were killed shortly thereafter.

The Muhimana approach diverted the focus from rape as part of Rwanda's genocidal context. It rejected any link between Muhimana's genocidal intent and acts of genocide and sexual violence, hence qualifying rape and sexual violence in Gishyita commune, Kibuye prefecture, as if it was incidental to the genocide against the Tutsi. The strategic use of genocidal rape, as clearly illustrated by Muhimana's words and actions, failed to persuade the prosecution to charge Muhimana with genocide. By focusing on the crimes against humanity charge, Muhimana failed to effectively demonstrate the genocidal functionality of rape and sexual violence against the Tutsi in Rwanda.

Muhimana affirms the argument that any effective redress must be informed by a contextually-based understanding of the problem. Trial Chamber III's findings would have been able to sufficiently deal with genocidal gender and sexual violence

that Muhimana perpetrated or aided and abetted had the prosecution been able to place the acts of rape and sexual violence within the wider context of genocide.

Muhimana, like Akayesu, reveals that dealing with genocidal gender and sexual violence is complex, the real experiences of victims are so complex to grasp and need a more committed understanding of the context in order to better qualify them. The overlap between genocide and crimes against humanity has led to acts of a genocidal nature being easily swept into the crimes against humanity category the impact of which is that the record of rape and sexual violence as genocide in Rwanda is still lacking. Note that a conviction for crimes against humanity in a case where genocide should have been contended is in reality a miscarriage of justice for the victim, society and the perpetrator. It diverts the narrative from the genocide that it was in the Muhimana and Rwandan situation.

The genocidal character of rape and sexual violence in Kibuye was discussed in earlier ICTR cases on genocide. The case against Eliazer Niyitegeka discussed under the section that deals with the legacy of the ICTR on male sexual violence infra and the Kayishema and Ruzindana judgment will be briefly discussed here.

On 21 May 199 Trial Chamber II rendered its decision in the case against Clement Kayishema and Obed Ruzindana.[99] Kayishema was the prefect of Kibuye Prefecture during the genocide while Obed Ruzindana was a trader in Kibuye.[100] Kayishema and Ruzindana were among those considered most responsible for genocide in Kibuye Prefecture as well as Mikaeli Muhimana[101] and Eliazer Niyitegeka.[102]

Trial Chamber II gave significant opinions on rape and sexual violence as genocide despite the absence of allegations of gender and sexual violence in the indictment. While discussing the determination of serious bodily harm, the Kayishema and Ruzindana Judgment endorsed the Akayesu holding that "acts of sexual violence, rape, mutilations and interrogations combined with beatings, and/or threats of death, were all acts that amount to serious bodily harm and these crimes formed part of the genocide in Rwanda."[103] The Kayishema and Ruzindana Judgment also expressed that where rape, among other things, leads to the destruction of a group in whole or in part, it qualifies to be considered among acts that deliberately inflict on the group conditions of life calculated to bring the physical destruction of a group.[104]

A careful reading of Kayishema, Niyitegeka and Muhimana demonstrates that despite the absence of any charges of genocidal rape and gender and sexual

99 *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Trial Chamber II, Judgment, (21 May 1999).
100 *Ibid* paras 6-12.
101 *Ibid* para 386.
102 *Ibid* para 400.
103 *Ibid* para 108. The Judgment referred to the Akayesu Judgment, paras 706-707 and 711-712.
104 *Ibid* para 116.

violence, the Chamber significantly recognised its presence in the *Prefecture* of Kibuye. It goes without saying, though, that the absence of legal consequences for the masterminds of genocidal gender and sexual violence in Kibuye is a denial of justice for the victims of these atrocious acts.

5.4 THE PROSECUTOR V. NYIRAMASUHUKO *ET AL.*

5.4.1 BACKGROUND

1. On 24 June 2011 Trial Chamber II, presided over by Judge William Sekule, Judges Arlette Ramaroson and Solomy Balungi Bossa, handed down the verdict in the longest, most voluminous trial in which the only woman to be tried by the ICTR was convicted of genocide, war crimes and crimes against humanity including rape.
2. Nyiramasuhuko was accused of aiding and abetting and encouraging the Interahamwe to rape Tutsi women before killing them.[105] She was convicted of rape as a crime against humanity on the basis of sufficient evidence proving that Nyiramasuhuko had encouraged and ordered the Interahamwe to kill and rape Tutsi women. The evidence proved that Nyiramasuhuko had a superior/subordinate relationship with the Interahamwe and this was shown by the fact that she ordered them to rape Tutsi women and they did so.

In May 1997 an initial indictment was issued and confirmed against Pauline Nyiramasuhuko and her son Shalom Ntahobari. In July 1997 Pauline was arrested in Kenya and transferred to the ICTR detention facility in Arusha. At her initial appearance in September 1997 she pleaded not guilty to all the five counts against her.[106]

Nyiramasuhuko *et al.,* also known as the Butare Trial, is famous for having been the longest trial lasting for a period of ten years. The Butare Trial began on 12 June 2001, and the judgment was rendered on 24 June 2011. Upon the reading of the judgment Trial Chamber II observed that the case was lengthy and complex.[107] Moreover, the case included six accused with a total of twelve defence lawyers who examined and cross-examined all witnesses irrespective of whether the testimony referred directly to a specific accused or not. It is also famous for the fact that it was the only ICTR case in which a woman was accused of genocide and rape as a crime against humanity.

105 *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Trial Camber II, Judgment and Sentence, (24 June 2011), para 637.
106 *Ibid* paras 13-14.
107 *Ibid* para 5.

5.4.2 THE AMENDED INDICTMENT AND THE ALLEGED FACTS

The Prosecutor v. Pauline Nyiramasuhuko *et al.* was a voluminous case in which six people were accused: Pauline Nyiramasuhuko, Rwanda's former Minister of Family and Women's development under the interim genocidal government; her son Arsene Shalom Ntahobali, a university student in 1994; Slyvain Nsabimana, the prefect of the Prefecture of Butare between April and June 1994; Alphonse Nteziryayo, a military officer; and Joseph Kanyabashi and Elie Ndayambaje, the bourgemasters of the communes Ngoma and Muganza, respectively.[108]

All six were each charged with criminal responsibility for conspiracy to commit genocide; genocide; complicity in genocide; several counts of crimes against humanity and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. Apart from Ntahobali, Pauline and the four others were also charged with direct and public incitement to commit genocide.[109]

The indictment was amended in August 1999 charging Nyiramasuhuko with 11 counts of "genocide, (Counts 1 to 4), crimes against humanity (Counts 5 to 9), and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (Counts 10 and 11)."[110] The amended indictment charged rape as a crime against humanity against Pauline Nyiramasuhuko.[111] The amended indictment charged, in addition, Nyiramasuhuko and her son Ntahobali with rape as a crime against humanity and outrages upon personal dignity as a war crime on the basis of direct and superior responsibility.

Nyiramasuhuko was found guilty of seven of the eleven charges against her. She was guilty of count one of the indictment concerning conspiracy to commit genocide, count two concerning genocide, count six concerning extermination as a crime against humanity, count seven concerning rape as a crime against humanity on the basis of superior responsibility over the raping *Interahamwe*, count eight concerning persecution as a crime against humanity and counts ten and eleven concerning violence to life and outrages upon personal dignity as war crimes. She was subsequently sentenced to life imprisonment.

In the interest of space and precision, I will not consider the Nyiramasuhuko case as a whole and only those aspects relating to rape and sexual violence will be discussed. I will, however, present a general overview of the facts alleged against Pauline Nyiramasuhuko and a summary of the tribunal's findings before engaging in an analysis.

108 *Ibid* para 8.
109 *Ibid* para 1.
110 T. 12 August 1999 pp. 24-28 (Pre-Joinder Transcript: see Case No. ICTR-97-21).
111 *Nyiramasuhuko and Ntahobari*, Decision on the Prosecutor's Request for Leave to Amend the Indictment (TC), (10 August 1999).

5.4.3 FACTUAL AND LEGAL FINDINGS

The prosecution alleged that Pauline Nyiramasuhuko and others conspired to commit genocide against the Tutsi in Butare. Nyiramasuhuko was charged with conspiring with the members of the interim government to kill the Tutsi.[112] On the basis of her participation in cabinet meetings that discussed the massacre of the Tutsi, the Trial Chamber concluded that Nyiramasuhuko had entered into an agreement with members of the interim government to kill the Tutsi in the Prefecture of Butare with the intent to destroy, in whole or in part, the Tutsi ethnic group. The Tribunal concluded that Nyiramasuhuko had conspired with the interim government to commit genocide against the Tutsi of Butare.[113]

Nyiramasuhuko was accused not only of inciting the slaughter of the Tutsi but also with aiding and abetting the population to slaughter the Tutsi in the entire Butare Prefecture.[114] The indictment alleged that during the events alleged in the indictment acts of rape, sexual assault and other crimes of a sexual nature were perpetrated widely and notoriously in Rwanda. Pauline Nyiramasuhuko was alleged to have aided and abetted the commission of violence against the Tutsi and was accused of, together with her co-accused, participating in the planning, preparation or execution of a common scheme, plan or strategy to commit atrocities including the murder and rape of Tutsi.[115] The alleged crimes were committed by the accused herself, the persons she assisted, or her subordinates and with her knowledge or consent.[116]

Count 7 of the indictment specifically charged Pauline Nyiramasuhuko and her son Shalom Ntahobali with having individual responsibility in the commission of rape as part of a widespread and systematic attack against the Tutsi as a crime against humanity under Article 3(g) of the ICTR Statute. Count 11 charged Nyiramasuhuko and Shalom Ntahobali with outrages upon personal dignity, in particular humiliating and degrading treatment, rape and indecent assault as serious violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II.[117]

Nyiramasuhuko was found guilty of conspiracy to commit genocide; genocide; extermination; murder; persecution; other inhumane acts and rape as crimes against humanity. She was also found guilty of violence to life, health and the physical or mental well-being of persons and outrages upon personal dignity as serious violations of Article 3 common to the Geneva Conventions and of Protocol II thereto.

112 *Supra* note 105.
113 *Ibid* para 583.
114 *Ibid* para 6.47.
115 *Ibid* para 6.53.
116 *Ibid* para 6.56.
117 *The Prosecutor v. Pauline Nyiramsuhuko, Shalom Ntahobali,* Case No. ICTR-97-21-I, Count 11.

Her conviction for rape was on the basis of evidence adducing that she had encouraged, aided and abetted the Interehamwe militia to commit rape and the murder of Tutsi women.[118] The Tribunal concluded that Nyiramasuhuko had ordered the Interahamwe to rape Tutsi women at the Butare Prefecture Offices; she therefore bore responsibility as a superior for their rapes.[119]

The Tribunal noted that while the prosecution in its pre-trial brief and opening statement had made reference to rape as genocide and submitted an Appendix to the Pre-Trial Brief to the effect that "witness summaries that are pled in support of genocide and that allege various rapes and killings,"[120] the Chamber explained that it was not clear whether the prosecution had intended to pursue the charges of rape as genocide against the accused. The Chamber did not convict Nyiramasuhuko of rape as an act of genocide as it would have been prejudicial to the accused to be held responsible for acts not directly charged and that lacked sufficient notice.

The Trial Chamber expressed disappointment with the prosecution's failure to plead rape as genocide against Pauline Nyiramasuhuko as, in the opinion of the Chamber, the evidence attested to the fact that rape was used as a form of genocide. On this matter, the Chamber held that it was a defect of the prosecution that it did not plead rape as genocide and had failed to rectify this defect because it was not able to provide information relating to this defect in good time, consistently and clearly.[121] The prosecution did not allege that rape was committed during the abductions and killings of the Tutsi at Hotel Ihuliro that was pled in support of genocide.[122]

5.4.4 THE COURT'S OPINION ON RAPE AS GENOCIDE

Note that while Nyiramasuhuko was not convicted of rape and sexual violence as genocide because the prosecution had failed to indict and plead as such, the Chamber did reach significant conclusions in its legal findings on rape as genocide. The Chamber adopted the necessary caution throughout these findings and its conclusions on the matter of rape as genocidal were only made in order "to convey the entire set of facts in a coherent fashion" and were not used in assessing the charges of genocide which were not pled.[123] Reading the Tribunal's legal findings on genocide and rape, it is evident that had the prosecution not erred in its charges or had it managed to rectify the defect in ample time, then Nyiramasuhuko would have been held accountable for the genocidal gender and sexual violence which she had instigated.

118 *Ibid* para 6087.
119 *Ibid* para 6093.
120 *Ibid* para 5833.
121 *Ibid* paras 5831-5832.
122 *Ibid* para 5828.
123 *Ibid* paras 5837-5838.

In its legal discussion on genocide, the Trial Chamber noted that the rape and sexual violence fitted within the element of genocide in causing serious bodily and mental harm. In interpreting serious bodily and mental harm, the Chamber noted that rape is one of the quintessential examples of serious bodily and mental harm.[124] Such a conclusion had also been reached earlier in the Appeals Chamber's Seromba Judgment.[125] To amount to a conviction for serious bodily and mental harm as genocide the Tribunal expressed that such harm must be so serious that it threatens to destroy a protected group in whole or in part.

With reference to the rape of prosecution Witness TA and other Tutsi women, Trial Chamber III concluded that:

> *Considering the brutality and repetitive nature of these attacks, the vulnerable nature of the population seeking refuge at the BPO and the fact that they were Tutsis, there can be no question that the bodily and mental harm inflicted by Ntahobali and the Interahamwe on the Tutsi women at the BPO was of such a serious nature as to threaten the destruction in whole or in part of the Tutsi ethnic group.*[126]

To that effect the Chamber noted that "*the bodily harm or the mental harm inflicted on the Tutsi refugees at the BPO was of such a serious nature as to threaten the destruction in whole or in part of the Tutsi ethnic group.*"[127] In the Tribunal's reasoning, Nyiramasuhuko, even though she had not been held accountable for the crime due to the prosecution's failure to indict, had indeed aided and abetted the Interahamwe who committed the genocidal rapes at the BPO because she assisted, encouraged and gave moral support to the perpetrators.[128] Thus, Trial Chamber III expressed the view that the rapes at the Butare Prefecture Offices were tantamount to genocide. It concluded that "*the Chamber considers the bodily harm or the mental harm inflicted on the Tutsi refugees at the BPO was of such a serious nature as to threaten the destruction in whole or in part of the Tutsi ethnic group*."[129]

In its legal findings the Chamber also discussed whether Pauline Nyiramasuhuko possessed the necessary *mens rea* to commit genocide. In its evaluation of the accused's criminal mind for genocide, the Tribunal considered, based on the same standard, her tacit approval of the inflammatory speeches by President Sindikubwabo and Prime Minister Kabanda and the distribution of condoms, as well as the encouragement provided to the Interahamwe to rape Tutsi women. Effectively the Tribunal established that:

124 *Ibid* para 5868.
125 Seromba Appeals Judgment para 46.
126 *Supra* note 105 para 5868.
127 *Ibid* para 5869.
128 *Ibid* para 5869.
129 *Ibid* para 5869.

> *These actions can only be understood as intending to eliminate this group of persons. By attacking this group of wounded and sick Tutsi refugees, and in light of the evidence as a whole, the only reasonable conclusion is that Ntahobali, Nyiramasuhuko and the other Interahamwe assailants possessed the intent to destroy, in whole or in substantial part, the Tutsi group.*[130]

In the next section I will analyse the Pauline Nyiramasuhuko legacy, the prosecution's failure to plead rape and sexual violence as genocide despite the evidence, as well as the impact of the evidence. I will also use the Nyiramasuhko case in order to discuss one of the core statements that I make in this study, i.e.,that in Rwanda gender and sexual violence were also perpetrated by women.

5.4.5 ANALYSIS OF THE NYIRAMASUHUKO CASE

In the analysis of this case I highlight the issue of the prosecution's non-rectified defect in not charging genocidal gender and sexual violence as genocide; the subject of female perpetrators which calls for a rethinking of the traditional notions of women as victims and peacemakers; and the gender discourse of women as mothers, innocent nurturers and being incapable of committing such crimes that Nyiramasuhuko employed in her defence.

The analysis ends with a section reflecting the complexity of testifying on gender and sexual violence where I take the experience of prosecution Witness TA in this case as a point of departure. Although the experience of TA might be a more severe case of what the courtroom environment entailed for the victims, most participating victims did not experience the empowerment of attesting to their genocidal experiences at the ICTR. The courtroom environment was mostly tense for the victim witnesses and the testimony led to most victims being re-victimised by their families and communities as Witness TA expressed in an interview which she gave me.

5.4.5.1 Defective Indictment for Genocidal Gender Rape and Sexual Violence

In Chapter 4 of this study I have discussed that legal language and discourse which shapes and provides limits to reality. Through Frug's theory on legal language and discourse it has been demonstrated that legal discourse explains, rationalizes and qualifies reality and the truth. It is from this perspective that I discuss the prosecution's failure to charge Pauline Nyiramasuhuko with rape and sexual violence as genocide.

I argue that by failing to charge and convict Nyiramasuhuko of gender and sexual violence as genocide, the Tribunal established a judicial precedent of sidelining the condemnation of some important acts tantamount to genocide. The complex

130 *Ibid* para 5871.

experiences of the victims are not fully accounted for, hence an incomplete judicial picture is gained of the genocide, specifically regarding genocidal gender and sexual violence and the agency of women as perpetrators of genocidal gender and sexual violence. The prosecution file in this case did not fully discuss how Nyiramasuhuko, a woman and the Minister of family and women's development, had planned, instigated and conspired in the commission of genocide in Butare and Rwanda generally.

The role of witnesses, especially those who doubled as victims, was indeed to tell their story in order to contribute to the understanding of the truth and to have justice done as recognized by Trial Chamber III at the delivery of the oral summary in the Muhimana case discussed supra. For the same reason the victim prosecution witnesses in Nyiramasuhuko hoped that their genocidal experience would be recorded and judged accordingly. Unfortunately the narrative of the prosecutors in Nyiramasuhuko significantly failed the victims of genocidal rape and sexual violence by failing to charge the accused with such crimes. Except for mere neglect and the undermining of rape and sexual violence, there is no good explanation as to why Nyiramasuhuko, a ringleader in the genocide in Butare, was not seen in the eyes of her prosecutors to have instigated, ordered and encouraged rape in pursuit of her ultimate genocidal motive.

The Chamber shared the disappointing sentiments about the prosecution's approach to gender and sexual violence in the Nyiramasuhuko indictment. Trial Chamber II noted that the indictment was defective in failing to charge Nyiramasuhuko with rape as an act of genocide.[131] The Chamber stated that the prosecution did not include any acts of rape in its charges on genocide and where rape was in fact mentioned the prosecution pled crimes against humanity instead of genocide. In the Chamber's analysis throughout the indictment the prosecution did not plead any rapes in support of genocide.

Even when being given the opportunity to amend the indictment for the second time, the prosecution did not try to rectify the defect of not charging rape and sexual violence as genocide. For reasons which are best known to it, the prosecution was satisfied with its new indictment despite such a fundamental missed opportunity. In the new indictment rape was once again pled against Nyiramasuhuko as a crime against humanity. Regrettably the prosecution expressed in the new amendment that "the new charges contained in the proposed amended indictment, accurately reflect the totality of the accused['s] ... alleged criminal conduct and allows the Prosecutor to present the full scope of available, relevant evidence … "[132] Nothing was more disappointing in the prosecution's approach to sexual violence than its failure to appreciate that rape and sexual violence were a genocidal tool.

131 *Ibid* para 5911.
132 *Ibid* para 5862.

It is surprisingly difficult to understand why the prosecution, given two opportunities to amend the indictment, maintained its incapacity to link rape and genocide. A failure to use evidence of rape to support genocide charges was common in nearly all cases involving rape and sexual violence. The Akayesu prosecution, as discussed earlier, admitted that until the testimony of Witness H the prosecution could not link the evidence on rape in Taba with the responsibility of the accused. Similarly the prosecution in Muhimana, albeit after the fact, acknowledged that it would have been able to plead rape as an act of genocide had it considered the non-pleaded fact that was available; however, the prosecution was at least able to request Trial Chamber III to use the unpleaded fact of rape in its legal findings as proof of genocidal intent.

It is much more difficult to understand why the prosecution, which was able to adduce genocidal intent in testimonies about the murdered victims, failed in nearly every case to capture the link between rape and genocide. In the cases of Akayesu and Muhimana the victims, who were only fifteen years of age at the time of the genocide and their sexual assault, testified without any sense of confusion that their rape was part and a form of genocide because they were Tutsi or were mistakenly recognised as Tutsi. What defies understanding is why the learned prosecutors did not simply grasp the reality in this sense? Moreover, the judges in Akayesu, Muhimana and Nyiramasuhuko understood and vividly elaborated the genocidal character of rape and sexual violence.

Since the prosecution's failure to include rape and sexual violence in charges of genocide was common practice in all the three cases analysed except for the fact that Akayesu was able to rectify this through the amended indictment, in the final section of this chapter I will discuss the reasons for this unfortunate practice.

In Nyiramasuhuko the Trial Chamber's decision to mention rape under its legal findings on genocide was insightful. With the disappointing decision by the prosecution, the Trial Chamber decided to discuss its legal findings on rape as genocide. The Trial Chamber stated that the discussion of rape under its legal findings on genocide was for the sake of "conveying the entire set of facts coherently."[133] By this statement the Tribunal indirectly undermined the prosecution's adamant claim that the amended charges "accurately reflect the totality of the accused['s] ... alleged criminal conduct and allows the Prosecutor to present the full scope of available, relevant evidence …"[134]

Having illustrated the disappointment on the part of the prosecution in Nyiramasuhuko, I wish to look at the Tribunal's findings on genocide generally as well as on rape and sexual violence in support of genocide. I must mention that the Tribunal's realization vis-à-vis rape as genocide is only mentioned for the sake of the record and must not be understood as a judicial precedent. With this the

133 *Ibid* para 5865.
134 *Ibid* para 5862.

Tribunal tried to correct the historical record on genocidal rape in Butare Prefecture despite the absence of a true judicial record of Nyiramasuhuko's criminal actions concerning genocidal rape and sexual violence.

The legal findings on genocide by Trial Chamber II rightfully illustrated that Pauline Nyiramasuhuko had committed genocide by causing serious body and mental harm when she encouraged, aided and abetted the Interahamwe to rape Tutsi women. The Tribunal concluded that Nyiramasuhuko's encouragement of rape was intended to destroy, in part or in whole, the Tutsi as an ethnic group. Through the Nyiramasuhuko Judgment, the Chamber enriched the Tribunal's record on rape and sexual violence.

The Chamber established that in Butare Prefecture, just like elsewhere in Rwanda, acts tantamount to genocidal gender and sexual violence had been committed by the leaders and the Interahamwe. In its conclusion that Nyiramasuhuko conspired with the interim government to commit genocide against the Tutsi, the judges in Nyiramasuhuko affirmed that there was a plan to commit genocide including the use of rape and sexual violence to that end.

5.4.5.2 Female Perpetrators

Most of the cases relating to male sexual violence presented in Chapter 3 of this study point to women perpetrators of gender and sexual violence. Throughout the training and over the ten years of participation in the *gacaca* courts, I have understood that women in Rwanda actively participated in the genocide as perpetrators, planners, instigators, and zealous '*genocidaires*'.

The fact remains, however, that Nyiramasuhuko was the only woman convicted at the ICTR, hence the international media publicity. But Pauline Nyiramasuhuko was far from being the only female 'genocidaire'; she is in fact not an anomaly within the contextual realities of Rwanda. Women from all walks of life in Rwanda participated in the genocide; from the political and religious leadership or otherwise to ordinary women living an ordinary village life.

Statistics from the Rwanda Correctional Services in charge of the execution of criminal sentences reveal that indeed thousands of women participated in the genocide. While male perpetrators greatly outnumber their female counterparts the number of women is also relatively high. Out of a total of 4,060 current female inmates, 2,230 are genocide indictees serving jail sentences ranging from a few years to life imprisonment and most of these women are first category offenders including those convicted of rape and sexual torture. A total of 426 female genocide indictees are serving the alternative sentence of community service for participating in category two acts of genocide. These figures do not reflect the

numbers of women falling into the third category that committed genocidal acts relating to property.[135]

Herein I provide an example of women who have been prosecuted by the Rwandan Courts. Agnes Ntamabyariro, Rwanda's former Minister of Justice during the interim government at the same time as Pauline Nyiramasuhuko, was convicted of genocide and crimes against humanity by the Intermediate Court in Nyarugenge; her case is the subject of an appeal.[136] Euphraise Kamatamu[137] and Rose Karushara, each a *conseilluer* in different sectors in Kigali, were also convicted. Kamatamu was accused of collecting and distributing guns as well as being one of the masterminds of the killing within Muhima sector.

Karushara had actively participated in the identification of victims and participated in the killing and ordering the killing of more than 5,000 Tutsi who were thrown into the River Nyabarongo near Kigali.[138] Major Anne Marie Nyirahakizimana, a military officer in Rwanda's defeated army and a medical practitioner, was convicted by the Military court as a category one offender charged with genocide and crimes against humanity.[139]

In foreign jurisdictions Rwandan women have been convicted while others are undergoing investigations and trials in cases relating to their role in the genocide in Rwanda. Examples include the conviction of Basebya for genocide by a Dutch Court;[140] and the two Catholic nuns in Belgium.[141] In France and the United States of America an investigation into Agathe Habyarimana, the wife of the deceased Rwandan President Juvenal Habyarimana, is underway[142] and the trial of Beatrice Munyenyezi, the wife of Shalom Ntahobali and the daughter-in-law of Pauline Nyiramasuhuko is ongoing. Like her husband and mother-in-law, Munyenyezi

135 Rwanda Correctional Services, Statistics provided by the RCS Information and Data Service.

136 *Prosecutor v. Agnes Ntamabyariro,* Case No. RP/Gen.0081/04/TP/KIG (19 January 2009).

137 *Prosecutor v. Kamatamu Euphrasie et al.,* Case No. R.P. 014/CSK/97 RMP.5833/S12/NRV R.P.032/CS/KIG ET RMP6509/S12/NRV (17 July 1998).

138 Jones, A., "Gender and Genocide in Rwanda", *Journal of Genocide Research* (2002), 4(1), 65-94 p. 83.

139 *Military Prosecutor v. Major Anne Marie Nyirahakizimana and Pastor Athanase Nyirinshuti* No. R.P. 0001/C.M.C.S./KGL 799, (3 June 1999).

140 *Basebya Yvonne* was tried in the Netherlands by the District Court of The Hague on charges of genocide (committing and incitement). On 1 March 2013 she was convicted of incitement to commit genocide and sentenced to six years and eight months imprisonment. Accessed at: www.asser.nl/default.aspx?

141 Neyt, M.F., Two Convicted Rwandan Nuns, in *Genocide in Rwanda: Complicity of the Churches?* Rittner C., *et al. (*eds.), (St.Paul, Minnesota: Paragon House, 2004) 251-258 p. 251. For more examples of women perpetrators see African Rights, *Rwanda not so innocent: women as killers*, (London: African Rights, 1995). See generally Hogg, N., "Women's participation in the Rwandan genocide: Mothers or monsters", *International Review of the Red Cross* Volume 92, No. 877, 2010.

142 Since 2007 *Agathe Habyarimana* has been the subject of a sase relating to genocide (complicity), crimes against humanity and issues of refugee status. See the Asser Institute Centre for International European Law at: www.asser.nl/default.aspx?

allegedly encouraged and aided and abetted acts of rape and sexual violence in Butare.[143]

Nyiramasuhuko's role in rape and sexual violence and that of many other Hutu women challenges the theoretical argument by Brownmiller and Capelon that sees rape as a means employed by men intended to dominate women and to keep them in perpetual fear. Nyiramasuhuko is a woman who has been convicted of aiding, abetting and encouraging her subordinates to mercilessly rape Tutsi women. As a Minister of women's development she had moral and professional reasons to protect.

If rape is an expression of male domination and female subordination and a conscious process that all men engage in to dominate and intimidate all women as Capelon and Brownmiller suggest, Nyiramasuhuko defies this argument. It is worthwhile contextualizing the kind of domination that Nyiramasuhuko's actions advance. The all-men perpetrators and all-women victims also do not hold true as she is a woman and a perpetrator.

While domination and destruction is indeed at the centre of genocidal gender and sexual violence, the classical male domination/female subordination discourse is insufficient. The Rwandan reality of women perpetrators illustrates that other power dimensions must be analysed as well. Hutu, ethnic and political power are most relevant in Rwanda and Nyiramasuhuko led and participated in the genocide in order to promote her ethnic and political ideologies. The consideration of other sites of power than gender is necessary for one to avoid a classic qualification of rape.

Nyiramasuhuko was a woman superior in many ways; she was superior to the other 'genocidaires' in Butare because she was a minister in charge of the supervision of Butare Prefecture. Most importantly she was superior to Tutsi women and men because of the domination and political power of the Hutu at the time. Nyiramasuhuko ordered the killing and rape of the Tutsi. During her genocidal leadership some Tutsi men were raped by Hutu women even though these incidents were not investigated or contended in the Butare case in Arusha. This was revealed by PKP, himself a survivor of genocidal rape. PKP was raped by three old women in the neighbourhood of Nyiramasuko; the women continuously kept him in sexual slavery raping him interchangeably. As they raped him they uttered abusive words including the fact that the arrogant Tutsi men had been disempowered.[144]

143 Willis Shalita, "Rwanda Issues and other Random Thoughts", Beatrice Munyenyezi: Convicted, at last and justice prevails at http://willisshalita.wordpress.com/2013/02/21/Beatrice-munyenyezi-convicted-at-last-and-justice-prevails. The U.S. District Court in Concord convicted Beatrice Munyenyezi of lying about her role in the genocide in order to obtain U.S. citizenship.

144 PKP preferred to remain synonymous, although he shared his experiences through his friend NM, a female survivor of genocidal rape and sexual violence in Butare who also participated as a witness in the Butare case at the ICTR.

As discussed earlier, the instrumentalist use of ethnicity as a ladder to politics and resources constructed Rwanda's ethnicities. Ethnicity was the most central factor in Rwanda's recent history and genocide was committed in its name. It is therefore not surprising that women like Nyiramasuhuka were obsessed by the nationalist ethnic-based ideologies in her role as a perpetrator of rape and sexual violence, except when scholars differentiate it from the ethnic-based angle which Capelon and Brownmiller did not attempt.

The second suggestion that rape is an attack by all men against all women theorized by Brownmiller once tested against the realities of Rwanda, specifically the case of Pauline Nyiramasuhuko, does not hold true. Hutu women, including Pauline Nyiramasuhuko, directed and encouraged the Interahamwe to rape women in the most gruesome way. Hutu women gave their sons, husbands, Interahamwe and social outcasts Tutsi women to sexually assault. The factor of sisterhood and womanhood as a homogenous group is certainly not sustainable in the case at hand. The argument advanced by Brownmiller and others does not explain why Nyiramasuhuko, a fearless woman, encouraged and directed rape and sexual violence.

On the basis of political and ethnic interests Hutu women denounced the sisterhood claim. Instead of protecting all Rwandan women in her mandate as a Minister of family and women's development Pauline Nyiramasuhuko, in broad daylight and on many occasions, commanded the Interahamwe under her to rape and kill Tutsi women. On this issue Lisa Sharlach's conclusion holds a great deal of truth. She points out that "in 1994 in Rwanda, a woman's loyalty to her ethnic group almost always overrode any sense of sisterhood to women of the other major ethnic group."[145] In order to better understand the realities of Rwanda feminists must engage in explaining and understanding ethnic conflicts and politics and interpret their gender dimensions effectively.

5.4.5.3 Gender Discourse in Nyiramasuhuko's Defence

Another interesting aspect to be discussed in relation to female perpetrators is the defence of the woman, mother and nurturer narrative. This narrative was employed by nearly all women perpetrators accused of genocide in their defence. It suggests that women as mothers and nurturers cannot commit violent crimes. The argument finds its inspiration from the essentialist feminist school that claims that men are inherently more warlike than women.[146] This school of thought believes that "the wars we have suffered are the result of male-dominated political and military systems." Further, essentialist feminists argue that "the world would be more peaceful if it were women making policy or reweaving the web of life."[147]

145 *Supra* note 158 at 388.
146 *Supra* note 158 at 389.
147 *Ibid*.

Carolyn Nordstrom has explained that in all cultures across the world there is the concept of women as nurturers and a perception that women do not commit violent crimes like rape and sexual violence. In the same line of argument Archer observes that a perpetual perception that "violence and aggression are male problems rather than human problems" exists. Rwandan cultural perceptions consider a virtuous woman as one who is not aggressive and is motherly, kind-hearted, clean and shy. Women are hence seen in this perspective as non-violent, sympathetic, welcoming, innocent, submissive and carers.

Nyiramasuhuko's defence unsurprisingly resorted to this gender discourse of women and motherhood as proof of her innocence. Before she was officially charged, in a BBC interview Nyiramasuhuko exclaimed that "I cannot even kill a chicken. If there is a person who says that a woman – a mother – killed, then I'll confront that person".[148] During her defence, Nyiramasuhuko claimed that she could not have been responsible for crimes against women as charged because such charges are contrary to her character and the fact that she had worked for many years to promote Rwandan women.[149] Her defence illustrates how the gender discourse affects the true appreciation of women's enterprise. In the Butare case it was clearly illustrated that none of the six accused held more authority and power than Nyiramasuhuko. She was in control of death and sexual violence as the '*genocidaire*' minister.

Indeed the agency of women perpetrators challenges traditional and cultural perceptions of women as much as the dominant feminist theory that claims that women by nature or nurture are not violent. Jones' conclusion on this matter is relevant. He notes that the "Rwandan test" refutes the equation of women and peace that has dominated the discourse over gender and conflict.[150]

Interestingly, Pauline Nyiramasuhuko also invokes the classical gender power relationship discourse when she claimed that in a male-dominated government she was powerless and could not stop the genocide.[151] Despite the heinous genocidal acts many women have pleaded powerlessness in their defence. Women play the double-sided coin of using power to commit violent crimes and denying its presence when faced with accountability. Patricia Pearson warns against such cowardly reasoning claiming that "We cannot insist on the strength and competence of women in all the traditional masculine arenas yet continue to exonerate ourselves from the consequences of power by arguing that, where the course of it runs more

148 Landesman, P., "A woman's Work" *The New York Times*, 15 September 2002, p. 5. See also: Bergsmo, M. (ed.), "Thematic Prosecution of International Sex Crimes and Stigmatisation of Victims and Survivors", *FICHL Publication Series,* No. 13 (2012) at 122.

149 *The Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Trial Camber II, Judgment and Sentence (24 June 2011).

150 Jones, A., "Gender and Genocide in Rwanda", *Journal of Genocide Research* (2002), 4(1), 65-94 at 88.

151 Hirondelle News Agency, Arusha, accessed on 2 February 2011, available at: www.hirondellenews.com/content/view/2904/26/.

darkly, we are actually powerless. This has become an awkward paradox in feminist argument."[152]

5.4.5.4 Complexity of Testifying: Witness TA's Experience

The challenge of testifying about rape and sexual violence remains the most threatening in terms of testimonies related to mass atrocities. There are different reasons for this, including the sensitive nature of violence; social and cultural taboos relating to sex in different communities; and demanding legal systems that require too many details from the victim about a very intimate and painful experience. Another specific challenge is the fact that most witnesses in cases of gender and sexual crimes are themselves victims speaking about their own experiences which in most cases remain physically, emotionally and psychologically fresh.

The struggle to explain their experiences in appropriate words in a less traumatic way has been nearly impossible. A judicial process employs two major lines to construct the events or narratives: the prosecutorial construction and the defence's response which is in fact a deconstruction of the prosecutorial narrative. In this context, testifying victims are bound to tell their story in a manner that favours the prosecutor's narrative as opposed to her/his story as such. In any event, narrating the realities of incidents of genocidal gender and sexual violence is a challenge to capture in words, whether they be legal or ordinary. Nearly all victims express incapacity to fully narrate their experiences. One of the male victims of rape interviewed in this study stated that:

> *I don't know if there is a name to call my experience and what was happening to us during the genocide. How do you explain something that destroyed your entire life? After the assault you remain sick for so long, you are not talking about the past but the present yet the Court is more interested in the past while the present is as painful or even more.*[153]

Norwejee in her criticism of the ICTR's approach to acts of rape and sexual violence mentions a number of factors in the complexities involved for witnesses. The experiences at the ICTR for victims, she explains, have not only denied justice for women victims but also exacerbated their suffering. In order to take this complexity somewhat further I use the experience of Witness TA[154] at the ICTR during the Butare case trial.

152 Pearson, P. (1997), *When She Was Bad: Violent Women and the Myth of Innocence* (Viking: New York) at 32.

153 Testimony by TPT, a male victim of gang rape and sexual violence committed by Hutu women in Kigali.

154 See Wood, S.K. (2004), "A Woman Scorned for the 'Least Condemned' War Crime: Precedent and Problems with Prosecuting Rape as a Serious War Crime in the International Criminal Tribunal for Rwanda," 13 *COLUM. J. GENDER & L.* 274, 276.

Witness TA narrowly survived the genocide while nearly all her family members were killed during the genocide in Butare. Witness TA's genocidal experience was full of beatings, abuses and rape including gang rape endured by herself and witnessing other Tutsi women being raped on different occasions.[155] She is one of the survivors of genocidal rape who have graced post-genocide justice internationally and locally with her painful testimony. Apart from her testimony in Arusha in the Butare case, she has testified against other genocidal rapists in Canada, the United States of America and before Rwanda's domestic courts concerning the events that happened at the genocide sites she was at in Butare.

While she was testifying in Arusha against Pauline Nyiramasuhuko and her son Shalom Arsene Ntahobali, prosecution Witness TA was subjected to a rigorous and lengthy cross-examination process. In an interview with her she recalls giving her testimony over one and half days and being subjected to hurtful questioning for nearly a week. TA explained that the defence intended to bombard her with questions until she decided that she no longer had time to stay in Arusha. She felt frustrated, embarrassed and humiliated.

Witness TA's testimony provided substantial details regarding rape that took place in and around the Butare Prefecture Offices. She explained how she was raped several times by Ntahobali and gang raped by other Interahamwe.[156] She also witnessed the rape of other Tutsi women as she was being raped herself and on other occasions.[157] As discussed earlier, the prosecution failed to qualify the rape experiences of Witness TA as charges of genocide hence denying Witness TA of the opportunity of seeing justice being done for genocidal rape. Looking back on her genocidal experience Witness TA explains: "*Rape was a more painful weapon used by the Hutu to subject us to a tortuus nature of death. The men who were taken were killed once but we were killed several times through rape. Rape never leaves a scar, it is a continuous wound which is deeply hidden.*"[158]

As if the pain of genocidal rape and its consequences was not enough TA explains that the justice process is a painful reminder yet it does not guarantee that the perpetrators will be judged as they should. The manner of questioning and the questions that were posed to Witness TA during her cross-examination was in her view strange, insensitive and expressed indifference. She still wonders why the lawyers could not understand what she meant when she said she was raped as if rape is not understandable. Worst of all was the indifference of the judges; I remember them laughing as though I was funny, I felt so angry and frustrated with them. With a sense of remorse Witness TA stressed that:

> *What hurts me now is that these cases are not judged like they should. The questions they asked show that they don't understand rape and the context*

155 *Supra* note 105 paras 2174, 2180-2185.
156 *Ibid* para 2631.
157 *Ibid* para 2632.
158 Interview with Witness TA conducted in June 2013.

> *of our suffering. In court my rapists wanted to drive me crazy through their lawyers. For us rape happened with guns and other genocide weapons around you and the words of the rapists were so undermining. With such a context the court expects you to have had time to look at the private parts of the rapist to know the size of his penis or if he had pubic hair. I was only sustained by my commitment to expose the genocidaire.*[159]

By this, Witness TA was referring to some of the questions posed to her in the course of her cross-examination. Defence counsel representing Shalom Ntahobali was particularly offensive in his questioning. For example, he asked Witness TA to describe how the Accused had introduced his penis into her vagina. Whether she had touched his penis and whether she was injured in the process of being raped by nine men. Most provocative and abusive in the opinion of TA was when he told her that she could not have been raped since she must have smelt from not bathing.

Norwejee has rightfully expressed that the victims who wanted justice ensured a smooth and dignifying legal process. She notes that "justice is a process, not just a judgment". A judgment is indeed important if it correctly establishes the truth, recognising the experiences of the victims and holding accountable those who are responsible. Equally important for the victims is how they are treated in the process of justice. A justice system through which the victim's experiences are undermined and her/his dignity is ignored fundamentally fails to serve victims who otherwise wish the judicial process to be a healing one.

The testimony of Witness TA reveals challenging details about genocidal rape, and so does her courtroom experience whens dealing with genocidal gender and sexual violence. The process of testifying in Arusha was a great challenge for the victims. They were asked to relive memories of genocide and for most it was the first time to travel beyond Rwanda to a foreign land and language; it was another encounter with the perpetrator and mostly an insensitive questioning process.

Witness TA's life has been overly traumatized by her experiences in Arusha. During cross-examination on the witness stand, one defence counsel persistently asked Witness TA insensitive and strange questions. Witness TA was asked intimate and somewhat harassing questions by defence counsel as if the rape was something ordinary. The common law cross-examination system, which is unfamiliar to most Rwandans, was in itself intimidating. For an entire week the only survivor of genocide in her family and a victim of individual and gang rape endured painful questions and comments from defence counsel.

Talking to Witness TA more than ten years after her testifying experience in Arusha her despair is even greater. The publicity that her experience attracted in Arusha resulted in her then fiancé leaving her. She has not yet been able to marry. For her the genocide destroyed her family and her testimony in Arusha has taken

159 *Ibid.*

away her hopes for a future family because a strong social stigma remains attached to victims of rape in many aspects especially vis-à-vis the marriageability of the victim.

Witness TA was also shocked when the judgment in the Butare case was rendered in 2011 because there was no conviction for genocidal rape for Ntahobali and his mother Nyiramasuhuko. Witness TA wonders why the Tribunal and the prosecuting lawyers could not understand that genocide for them was committed through rape and sexual violence which is far worse than an immediate physical death, as it entails death from the pain of the assault, life thereafter and even the justice process itself.

Taking a different look altogether, it is a pertinent question to ask whether it is not almost impossible to have a common law-based cross-examination process without compromising the victim witness or if the compromise is much more acceptable in a retributive criminal justice system that prioritises the rights to a fair trial for especially the defence. The best practices manual adopted by the ICTR in 2007 and the approach of the ICC to the treatment of victims and their participation are positive developments in striking a criminal justice process balance. Indeed more sensitive measures were adopted by the ICTR after Witness TA's experience.

More realistically though, the narration of atrocious rape and sexual violence is indeed more difficult; during the training experience I realised that two factors further complicate the narrative. On the one hand, cultural constraints affect the manner in which rape and sexual violence are reported or spoken about. The use of euphemisms to refer to acts of gender and sexual violence is common practice. Culturally women do not discuss sex and sexuality publically. It is imaginable what the impact is of asking a Rwandan woman in a room full of strangers and assailants to describe the sexual organ of her assailant without any due regard being paid to the specific circumstances of rape in genocide.

The second factor is, as expressed by many victims, the lack of sufficient words to explain what happened. The male victim interviewed explains that it is difficult to explain the extreme animosity of genocidal rape and sexual violence. As a result many people fail to understand it, they do not believe it or make painful comments when you speak out. In his opinion what is important is to give value to that incomprehensible experience and not to regard it as mere news but to combat it.

5.4.6 FINAL AND CONCLUDING REMARKS

Before drawing the final conclusions of this chapter one needs to discuss the legacy of the Tribunal in dealing with genocidal gender and sexual violence perpetrated against Tutsi men and boys and to make general remarks on the failure to charge rape and sexual violence as genocide in most ICTR cases.

5.4.6.1 Legacy on Gender and Sexual Violence against Tutsi Men and Boys

> *"Punishment is necessary to defend the honour of the injured party who would otherwise be degraded if no punishment were accorded to his aggressors."*[160]

Having seen that the perpetration of genocide was not the exclusive faculty of men in Rwanda, it is relevant to illustrate that genocidal gender and sexual violence was suffered by Tutsi females and males and the perpetrators were both male and female as well. Gender and sexual violence was used to violate the person and the social being of his or her community. Tutsi men were sexually violated as a means to destroy them as individuals and a sign of the destruction of their community. In Chapter 4, I explained the social construction of a man and his manhood as both socially and sexually intertwined. Sexual violence hence serves a dual means of communication. The case of the castration of Kabanda discussed in Muhimana is clearly illustrative of that.

One of the central issues of the complex realities of the genocide in Rwanda which I have raised is the fact that Tutsi men were subjected to acts of gender and sexual violence. Yet this is the least prosecuted aspect of genocidal gender and sexual violence. In fact the ICTR record only mentions two situations in three cases whereby in two of the cases mention is made of the same victim. Many factors affect the exposure of gender and sexual violence including the insensitivity of the personnel of criminal justice systems and the trauma and stigmatisation attached to those crimes.

A Tutsi male victim of genocidal sexual violence explains:

> *Rape was a big tool of the genocide which employed extreme animosity against both Tutsi males and females. Yet many people don't believe it or if they hear the testimonies they make embarrassing comments. They must give value to our experience, not treat it as simple news but combat it.*[161]

The justice process and result is central in giving value and recognising the victims of these violent crimes. As Grotius expressed in the quotation at the beginning of this section, punishment is necessary to give the victims the honour they deserve and to curb any further degradation for the victim. Unfortunately the general judicial discourse is fundamentally lacking on genocidal gender and sexual violence against Tutsi men.

Of the three cases that I have analysed in this chapter, male sexual violence is only mentioned in the Mikaeli Muhimana case.

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160 Grotius, H. quoted by Destexhe, A., *Rwanda and Genocide in the Twentieth Century* (London: Pluto Press, 1995) p. 64.

161 Interview with a male victm of rape conducted in June 2013. He was sexually abused by several Hutu women who put him under the influence of drugs. He was unfortunately unable to see justice being done because one of his rapists died while the other three were unknown to him.

In the Muhimana case prosecution Witness BB[162] testified that the accused had participated in the genital mutilation of a prominent Tutsi Trader, Assiel Kabanda, who was decapitated and castrated. Prosecution Witness BB testified that "We also saw Assiel Kabanda's body; he was naked. His head had been cut off. He had also been castrated, so they had cut off his penis."[163] Other witnesses also testified to Kabanda's genital mutilation and he had been hung on a pole.[164]

The testimony regarding the sexual assault of Kabanda was not taken any further by Trial Chamber III and neither did that testimony persuade the prosecution to amend the indictment and to include genocidal gender and sexual violence among the charges as had been the case in Akayesu. The testimony referring to Kabanda by Witness BB was not considered because it was submitted in support of allegations in Paragraph 5(d)(vii) of the indictment that the Tribunal subsequently dropped because the allegations therein were considered to be too vague.[165]

Prosecution Witnesses AF, BE, and AT testified that they had seen Kabanda's naked and decapitated body with his private parts having being severed.[166] Despite the constant mentioning of Kabanda's castration and the displaying of his genitals, Trial Chamber III only considered Kabanda's decapitation. The sexual element of his assault was successfully ignored. The castration of Kabanda had been subject to an earlier Trial before Trial Chamber I in the Eliazer Niyitegeka Case.[167]
Eliazer Niyitegeka, a resident of Kibuye Prefecture, was a Minister of Information in the Interim Government in 1994.[168] Niyitegeka was accused of genocide according to the elements of killing and causing serious bodily and mental harm. He was also directly charged with the decapitation and castration of Kabanda, a Tutsi prominent trader in Kibuye, as a crime against humanity – other inhumane acts.[169] The Tribunal established that Niyitegeka was responsible not because he had personally castrated Kabanda but because he was with the group that perpetrated these crimes and rejoiced when Kabanda was killed, decapitated and castrated.[170] Considering, among other things, the decapitation and castration of Kabanda, the Trial Chamber was of the opinion that the accused had perpetrated those attacks with the requisite intent to destroy, in part or in whole, the Tusti ethnic group.

In its findings relating to "other inhumane acts" (a crime against humanity), Niyitegeka was convicted on the basis of his participation in the attack that resulted in the decapitation and castration of Kabanda. On the basis of his jubilation over

162 *Supra* note 12 para 417.
163 *Ibid* para 418.
164 *Ibid* paras 441-444.
165 *Ibid* paras 420-422.
166 *Ibid* para 441.
167 *Prosecutor v. Eliazer Niyitegeka*, Case No. ICTR 96-14-T, Judgment, Trial Chamber I (16 May 2003).
168 *Ibid* para 5.
169 *Ibid* para 303.
170 *Ibid* para 312.

the events and the crimes against Kabanda the Tribunal concluded that the accused had aided and abetted the commission of a crime against humanity.[171]

The castration of Kabanda and the sexual violence committed on the dead body of a Tutsi woman was qualified by the Chamber as "acts of seriousness comparable to other acts enumerated in the article, and would cause mental suffering to civilians, in particular, Tutsi civilians, and constitute a serious attack on the human dignity of the Tutsi community as a whole."[172] The castration of Kabanda was particularly considered as an aggravating circumstance in considering the sentencing of Niyitegeka.

The Niyitegeka Trial Chamber briefly considered the castration of Kabanda in its discussion on genocide: "the Chamber has noted the Accused's jubilation at the killing of Assiel Kabanda and his subsequent decapitation and castration, Kabanda was a prominent Tutsi whose capture was met with rejoicing by the accused and others."[173]

The Chamber concluded that on the basis of the evidence to this effect, because of the "accused's leadership role and personal participation in attacks at Bisesero, where the Interahamwe were chanting "let's exterminate them" being a reference to Tutsi,"[174] and his association with officials and prominent figures in these attacks, illustrate that the accused perpetrated these attacks with the necessary intent to destroy the Tutsi and was therefore guilty of genocide.[175] Trial Camber I concluded that Niyitegeka was individually criminally responsible for killing and serious bodily harm in accordance with Article 2(2)(a) and (b) of the ICTR Statute.[176]

The different treatment of the evidence relating to the castration of Kabanda by Trial Chamber I in Niyitegeka and Trial Chamber III in Muhimana is puzzling. While one Chamber considered the matter as gender and sexual violence and discussed it, the other simply mentioned it. What this implies is the absence of a specific policy and theory within the strategic functioning of the OTP and the Chambers.

The analysis by Sivakuruman in "Lost in translation: UN responses to sexual violence against boys in situations of armed conflict" is a relevant explanation of the Tribunal's approach to and record on male gender and sexual violence. The writer notes that in some cases, including Muhimana, the Tribunal acknowledged sexual violence against males but ignored such practice when applying legal

171 *Ibid* para 462.
172 *Ibid* para 46.
173 *Ibid* para 417.
174 *Ibid* para 419.
175 *Ibid* para 419.
176 *Ibid* para 420.

consequences attached to the acknowledged facts.[177] The Niyitegeka case is appreciated by Sivakurumun for its more inclusive approach. In fact Niyiteka is the only ICTR case that has been able to convict for sexual crimes against a Tutsi man. The Niyitegeka case reveals that the willingness of judges to discuss the matter attracts much more attention than the seriousness of the offence or the availability of evidence. After all it is concerning the same victim and circumstances that Trial Chamber I and Trial Chamber II diverged in their treatment.

The castration of Kabanda, which was not an isolated instance during the genocide, served the communicative and symbolic purpose of sexual violence. The previous chapter, I elaborated on the relationship between manhood and the sexual virility of a man and the link between manhood and sexuality within the Rwandan social cultural context. Making a public spectacle of one of the prominent Tutsi men was a symbolic communication of not only the killing of a Tutsi man, which indeed it was, but also of the security, defence and future of the Tutsi. Muhimana explained, as he ordered the hanging of Kabanda's sexual organs, that any Tutsi who would be found would suffer the same fate. This was sexual mutilation for the destruction of the Tutsi and symbolic of the ethnic group's power and sense of protection.

In a different but related case, during the testimonies by prosecution witnesses Romeo Dallaire and Beardsley Brent evidence of sexual violence against men was spontaneously mentioned. Both Beardsley and Dallaire mentioned gender and sexual crimes evident on male corpses as well. Dallaire noted that there was mutilation of men's genitals.[178] Beardsley similarly recounted that "men's scrotum area was cut by machetes."[179]

Apart from these observations and the cases that I mention in Chapter 3, there is evidence of the use of rape and sexual violence against Tutsi boys and men during the genocide in Rwanda. Shaharyar Khan in his book "The shallow graves of Rwanda" explains that the Interahamwe "would cut off the private parts of Tutsi children and throw them at the faces of their terrified parents."[180] Gerald Prunier also refers to sexualized violence against Tutsi men stating that "mutilations were common, with breasts and penis often being chopped off."[181]

The experience of Jean de Dieu, his father and sister Marie-Ange narrated by Caravielhe and produced in Linda Mervin's book further illustrates the faces of genocidal gender and sexual violence. All three members of the family experienced gender and sexual violence. Jean-de-Dieu, just eleven years old, was beaten and forced to suck the penises of men and boys. He had witnessed his abusers kill his

177 Sivakuruman, S. (2010), "Lost in translation: UN responses to sexual violence against boys in situations of armed conflict" *International Review of the Red Cross*, Vol. 92, No. 877 at 16.
178 *Supra* note 606 para 1908.
179 *Ibid* para 976.
180 Khan, S.M. (2000), *The Shallow Graves of Rwanda*, (New York: I.B. Tauris Publishers) at 16.
181 *Supra* note 263 at 256.

parents. His father's genitals had been cut off by the same men and inserted in the mouth of his nine year old sister as he watched.[182]

Indeed Tutsi men and boys were sexually mutilated, raped by women, forced to have sexual intercourse with other victims including their close relatives like daughters, sisters and mothers or with other victims deemed to have HIV/AIDS. Men were beaten on their genitals and held in sexual slavery. Sexual violence against males is a problem that is still hidden even much more than sexual violence against women. Boys and men who were raped remain silent because they fear the stigma, the loss of their masculinity, shame and a lack of a sensitive justice environment. Investigators, prosecutors and judges are still bound by the stereotypes that see women as the victims and men as the perpetrators of gender and sexual violence.

Sandesh Sivakumaran, who has produced one of the few available studies on sexual violence against boys and men, explains that sexual violence against males is still grossly under-reported because individuals on the ground may be aware that men and boys are also subjected to sexual violence and may lack training to detect signs of abuse.[183] Clearly the absence of advocacy on behalf of male victims is an issue that encourages silence in these cases. There is still no record on male victims of genocidal gender and sexual violence in Rwanda.

All estimates and attempts are based on figures relating to female victims and some reports including the prominent "Shattered lives" and the one issued by the OAU eminent persons which refers to women as the exclusive victims. Violence against women attracts advocacy. In fact feminism is a discipline that is committed to making the voice of women known. While focusing on female victims of rape and sexual violence is relevant and crucial, devoting undivided efforts to that cause neglects sexual violence against males, after all the problem has acquired a classic narrative in which women are the victims.

The record of the ICTR in relation to gender and sexual violence against males is almost non-existent. There is no judgment directly linking gender and sexual violence against Tutsi men and boys. On the matter of genocidal gender and sexual violence the International Criminal Tribunal for Rwanda did not endeavour to investigate, record and judge these equally atrocious genocidal acts. As demonstrated by Sivakumaran the problem of sexual violence against males is still a hidden one. Moreover, when reported its prosecution is even much more unlikely. Sivakumaran has significantly elaborated that gender and sexual violence against men legally qualify to be prosecuted as war crimes, crimes against humanity and

182 Melvern, L.M. (2000), *A people betrayed: the role of the West in Rwanda's Genocide* (London: Zed books), at 186.

183 See generally Sivakumaran, S., Prosecuting Sexual Violence against Men and Boys, in De Brouwer, A-M., *Supranational Criminal Prosecution of Sexual Violence* (Antwerp: Intersentia, 2005) 85. Sivakumaran, S., "Sexual Violence Against Men in Armed Conflict", 18 *EUR. J. INT'L L.* 253 (2007); Sivakumaran, S., "Male/Male Rape and the 'Taint' of Homosexuality", 27 *HUM. RTS. QTY.* 1274 (2005).

genocide where applicable.[184] Genocidal gender and sexual violence against Tutsi men and boys should have been prosecuted as genocide for killing or causing serious bodily and mental harm.

5.4.6.2 Remarks on the Defect in not Charging Genocidal Gender and Sexual Violence

Throughout this chapter a lingering question remains: why has the prosecution in most of these cases failed to plead rape and sexual violence as acts and instruments of genocide or has done so as a second thought yet there has been ample evidence within its files? There is no easy answer to this question. The ICTR Best Practices Manual identifies and tries to address the central factors accountable for the weak record relating to gender and sexual violence.

Linda Bianchi discusses extensively the findings of the Committee for the Review of the Investigation and Prosecution of Sexual Violence established in 2007 by the Office of the Prosecutor (on the basis of which the best practices manual was compiled).[185] The committee's conclusions and Bianchi's discussions reveal troubling conclusions for the prosecution's failure in investigating and pleading rape and sexual violence in Arusha.

The committee's conclusions reflect that the ICTR investigations have overlooked gender and sexual crimes in favour of prosecuting other acts of violence; there was generally a lack of knowledge among the investigating and prosecution teams on how to successfully investigate and prosecute these crimes within the context of Rwanda since it was the first time that this had to be done and there was no such precedent internationally; lastly and importantly, there was a perception that victims of rape are unwilling to talk to the investigators and there was a weak and inconsistent political will to include gender and sexual violence crimes within the crimes charged.

I will discuss only some of the findings that are most appropriate in describing the prosecution's behaviour in both Nyiramasuhuko and Muhimana. The committee found that there was a general lack of understanding among prosecutors and investigators on how sexual violence could be successfully investigated and prosecuted. Another and closely related reason was the varying political will at the prosecution management level to include acts of rape and sexual violence within the genocide, crimes against humanity and the violation of humanitarian law charges.

184 Sivakumaran, S., Prosecuting Sexual Violence against Men and Boys, in De Brouwer, A-M., *Supranational Criminal Prosecution of Sexual Violence* (Antwerp: Intersentia, 2005) at 85.

185 Bianchi, L., The Prosecution of Rape and Sexual Violence: Lessons from Prosecutions at the ICTR, in De Brouwer, A-M., *Supranational Criminal Prosecution of Sexual Violence* (Antwerp: Intersentia, 2005) at 130-146.

The Nyiramasuhuko case illustrates clearly that the prosecution's defects and inconsistency in its intention to charge rape and sexual violence as genocide and its subsequent failure to plead this was the result of both a lack of understanding and a failure to appreciate the facts and the need to charge as such. It is most obvious that the absence of a clear prosecution strategy integrating gender and sexual violence within the context of genocide in Rwanda is responsible.

The method and approach used in the prosecution of genocidal rape and sexual violence analysed mainly from the cases studied reveals a fundamental lack of understanding or the lack of any willingness to fully acknowledge the intensity of rape and sexual violence as part of the genocide. When in the Akayesu case the prosecutors recognized their insensitivity to the topic they were able to rectify this by adopting a more contextualized approach to the genocide and gender and sexual violence that had occurred in Rwanda. There is no explanation as to why during the investigations and the prosecution the focus was on massive killings, persecution and not rape or sexual violence or why, in particular, where murder had been commited through rape and sexual violence, the murder case was prioritized as in the situation of Mukamurera in the Muhimana case.

5.4.6.3 Final Concluding Remarks for Chapter 5

The three central cases analysed in this chapter have proved monumental in the inclusion of rape and sexual violence under international criminal law. The Akayesu decision is a milestone in many respects. It stands out for its conclusion that rape and sexual violence constituted an act of genocide in the same way as killing. It affirmed that commanders and superiors are individually responsible as well as their subordinates for genocidal gender and sexual violence.

Unfortunately the monumental achievement of Akayesu was not sustained by Muhimana and Nyiramasuhuko. The amended indictments failed to include rape and sexual violence within the genocide charges. These defects were not healed by the prosecution's failure to obtain a conviction for genocidal gender and sexual violence. Butare and Kibuye, where Nyiramasuhuko and Muhimana were active leaders and participants in the genocide, recorded large and extreme forms of genocidal rape and sexual violence.

The Tribunal's finding that indeed Nyiramasuhuko and Muhimana were among those bearing the greatest responsibility for genocide within their respective areas is important. However, the absence of charges and a conviction is a great disappointment because it takes away any responsibility for genocidal gender and sexual violence from them. There has clearly been no legal consequence attached to genocide for Muhimana and Nyiramasuhuko relating to these genocidal actions.

Despite the absence of genocidal gender and sexual violence within the Nyiramasuhuko and Muhimana indictment, hence the absence of a conviction, Trial Chambers II and III made important findings on genocidal gender and sexual

violence. Both Chambers expressed within their legal findings on genocide the view that rape and sexual violence amount to causing serious bodily and mental harm as genocide despite the prosecution's failure to charge as such. They were persuaded on the basis of the evidence available on record including the non-pleaded ones that the accused possessed the required intent for genocide which is to destroy, in whole or in part, the Tutsi ethnic group when they were committing or encouraging the commitment of rape.

Looking at the legacy of the Akayesu, Nyiramasuhuko and Muhimana cases the failures of the prosecution vis-à-vis genocidal rape are indeed obvious. None of the initial charges against the accused in these cases has been established. The last two amendments were not able to rectify the vice that rape and sexual violence were not perceived as genocidal but as crimes against humanity and violations of Article 3 common to the Geneva Conventions and Additional Protocol II thereto as though they were not part of the major happening – genocide. It is as if the investigators and prosecutors had the traditional perception that rape is incidental to the conflict.

Unlike the prosecution's regrettable approach, the Chambers have made greater milestones in terms of the record. The Tribunal in the above cases discussed genocidal gender and sexual violence more persuasively. While in Muhimana and Nyiramasuhuko they were unable to hold them criminally responsible for genocidal gender and sexual violence due to irremediable defects in charging as such within the indictment, they were able to put the record straight. The entire record of the ICTR as suggested by Bianchi reveals a broader picture of what happened in Rwanda.

The ICTR made significant legal and factual findings on genocidal gender and sexual violence within the cases discussed above and in many more cases including those where there was no charge at all relating to rape and sexual violence and those that resulted in acquittals.[186]

Nyiramasuhuko's participation in genocide and particularly in gender and sexual violence has significantly challenged one of the crucial feminist theories on rape as a crime committed by men who pursue the imbedded patriarchal desire of keeping all women in constant domination and fear. The participation of women in the killing and raping of the Tutsi in Rwanda demands a re-theorising. The Rwandan genocidal realities provide new areas for theorising including the agency of women as perpetrators.

186 For a deeper analysis of the ICTR's record see generally Bianchi, L., "The Prosecution of Rape and Sexual Violence: Lessons from the ICTR", in De Brouwer, A-M. (2013), See also Buss, B. (2010), "Learning Our Lessons? The Rwanda Tribunal record on Prosecuting Rape", in MacGlynn, C. and Munro, V., *Rethinking Rape Law: International and Comparative Perspectives*, (eds.), (London: Routledge Cavandish).

The experiences of Tutsi men and boys of genocidal gender and sexual violence need further analysis, documentation and theorising. This study adds to the few already existing ones on the subject and elaborates that it has been complex to report, investigate, accuse and judge gender and sexual violence committed against Tutsi men in Rwanda. Even where evidence has been available, the Tribunal's approach has been, as described by Sivakumaran, either to mention but not characterize acts of rape and sexual violence against men; mentioning and characterizing but without any consequences being attached thereto as discussed in the Muhimana case earlier; or in only one case characterizing sexual violence against males as crimes against humanity and subsequently holding the accused liable.

The case against Pauline Nyiramasuhuko is a disappointment concerning some central arguments sustained by feminist scholars relating to rape and sexual violence. Susan Brownmiller asserts that women are raped by men to keep them in a continuous state of fear. Rhonda Capelon argues that genocidal rape happens on either side of the conflict where women are the targeted group and not their ethnic group. Catherine MacKinnon holds that sexual violence symbolizes and actualizes women's subordinate social status to men.

Central to these feminists' arguments is the power dimension revealed by gender and sexual crimes. The missing link, however, is that none of those explanations is capable of explaining sexual and gender crimes perpetrated by women against women and men. Indeed the power dimension remains, but not of men over women. We now know that rape is not always gender specific and is employed in equal propensity by men and women alike. Nyiramasuhuko's conviction reinforces the argument that the genocide in Rwanda was ethnically based in which both Hutu men and women fought vigorously to exterminate all Tutsi elements, men, children, women and anyone else whose actions would otherwise foster the continuation of the Tutsi. Therefore men and women were all complicit in committing genocide against the Tutsi in Rwanda.
This chapter has therefore attempted to assess whether the ICTR has condemned gender and sexual violence as genocidal acts. The chapter reveals that although the Akayesu judgment successful interpreted the elements of genocide to include acts of gender and sexual violence, the record of the ICTR especially the office of the prosecution demonstrated major shortcomings. As a result a less complete judicial portrait the genocide has emerged, one that fails to illustrate the extent of genocidal gender and sexual violence in Rwanda.

The Akayesu case must be applauded for inserting into the framework of international criminal law the concepts rape and sexual violence and making a direct application of their interpretation as constitutive elements of the crime of genocide. Akayesu was a result of many efforts not least of them the brevity of prosecution witnesses to bring to light the dark and initially ignored aspects of genocidal gender and sexual violence. Unfortunately the rhythm set by Akayesu has not persisted since the condemnation of Akayesu stands alone in judging rape

and sexual violence as genocide.[187] Other important legal findings have been made by the Tribunal to this regard but from the setting record perspective other than a judicial decision leading to accountability for the accused. The cases of Mikaeli Muhimana and Pauline Nyiramasuhuko demonstrates such a failure resulting not from the absence of evidence which was plenty in both cases but from the prosecutions failure to plead gender and sexual violence as genocide.

This leaves a legacy that is incomplete and controversial for genocide in Rwanda generally and particularly for the victims of genocidal gender and sexual violence in Butare and Kibuye as experessed by Witness TA on her reflections about the Nyiramasuhuko decision.

187 See also Van Schaack, B., Engendering Genocide: The Akayesu Case before the International Criminal Tribunal for Rwanda, *Social Science Research Electronic Paper Collection*: http://ssrn.com/abstract=1154259, accessed on 12 may 2012 at 26.

6 THE LEGACY OF THE ORDINARY COURTS IN RWANDA

For victims, doing justice means to uncover the truth of what took place, establish the identities of those responsible and subject them to the appropriate sanctions.[1]

6.1 INTRODUCTION

With the military victory of the RPF over the former Rwanda government military forces and militia groups engineering the genocide, the RPF managed to end the genocide that had already claimed over a million innocent lives by July 1994.[2] The post-genocide Rwandan government was faced with insurmountable challenges socially, politically, economically and legally. Practically every problem was in need of apparently impossible urgent reconstruction. The number of orphans injured physically and emotionally was very high; and families had been destroyed leaving widows and widowers with insurmountable physical, psychological and sexual wounds.

More than two million Rwandans had fled to neighbouring countries, forced to flee by the defeated forces that still held civilians to serve as shields;[3] and a large number of inmates flooded prisons and detention facilities.[4] The need for criminal justice was demanded by the detained suspects, the victims and the government that posited that justice must precede reconciliation and lasting peace.[5] International pressure had also begun arguing Rwanda to bring to an end the illegal detention of many suspects who had remained in detention for over two years.

The journey towards a criminal justice method that would ensure accountability and take into consideration the specific complexities involved lasted for two years and culminated in the ground-breaking Organic Law No. 08/96 of 30 August

1 Ardiles, H.S (1996), The absence of Justice in: Harper, C., *Impunity an Ethical Perspective* (Geneva: World Council of Churches Publications) at 107.

2 *Supra* note 263. See also *Supra* note 98.

3 UNHC (2000) *The State of the World's Refugees 2000: Fifty Years of Humanitarian Action*, Chapter 10: "The Rwandan Genocide and its Aftermath", at 250.

4 *Supra* note 98 at 225.

5 Van Lierop, R.F. (1997), "Rwanda Evaluation: Report and Recommendations", *The International Lawyer* (ABA), Vol. 31(3) 887-910 at 898. See Schabas, A.W. (2009), Post-Genocide Justice in Rwanda: A spectrum of Options in Clark, P. and Kaufman, D.Z. (eds.), *After Genocide Transitional Justice, Post- Conflict Reconstruction and Reconciliation in Rwanda and Beyond* (New York: Columbia University Press) 207-227, at 207.

1996.[6] This organic law was promulgated after national and expert consultations.[7] It was as a legislative compromise to deal with the challenges of ending the culture of impunity, and identifying the perpetrators and punishing them. This law established the first legal and judicial framework to deal with the genocide and related offences.

The draft legislation was submitted to Parliament on 24 April 1996 after its adoption by the Government and the Prime Minister submitted a request for its discussion as a matter of urgency on 17 May 1996. Consequently the Council of the presidents of parliamentary commissions, that studies laws requiring urgent consideration, submitted its report on the draft to the plenary session on 12 June 1996. The plenary discussed the pertinence of the organic law and subsequently that law was adopted on 25 July taking the same 100-day period as the climax of the genocide that left slightly over a million victims.

The justice process was a means employed to contain the temptation for vengeance and was considered a crucial step towards national reconciliation and unity. It was necessary in order to distinguish between the guilty and innocent among the many suspects flooding prisons and other detention facilities. The preamble to Organic Law No. 08/96 expressed that the "exceptional situation in the country requires the adoption of specially adapted measures to satisfy the need for justice of the people of Rwanda."[8] Rwanda's ordinary judicial system could not sustain the challenge of justice without adaptation to the realities of genocide.

In her justification of the draft organic law in Parliament the then Minister of Justice suggested that ending impunity is required in order to create a stable society. She was however concerned that an effective judicial solution must bear in mind the huge number of cases, the economic incapacity and the limited human resources which made it impossible to employ the normal criminal justice process.[9]

The 1996 legislation introduced innovative approaches unknown to Rwanda's ordinary criminal justice system inspired by the civil law system practised in Belgium, Rwanda's colonial master. The system introduced placing suspects into 4 categories of criminal participation in which they would be punished according to the seriousness of their criminal acts; suspects were given an opportunity to plead guilty and ask for forgiveness, in turn benefiting from reduced penalties.[10]

In mid-1996 the Government submitted to Parliament a draft organic law on the organization and prosecution of the crime of genocide and crimes against humanity.

6 *Supra* note 218.
7 Digneffe, F. and Fierens, J. (eds.) (2003), *Justice et Gacaca: L'Experience Rwandaise et le Genocide* (Namur: Presses Universitaire de Namur) at 53-63.
8 *Supra* note 218, see the last paragraph of the preamble.
9 Repubulika y'u Rwanda, Inteko Ishinga Amategeko, Inyandiko-Mvugo z'Inteko Vol. XXI, Igihembwe gisanzwe n'ikidasanzwe cyo kuwa 14/06/1996-25/07/1996 Inyandiko No. 2006-218, 206.
10 *Supra* note 218, Article 2 on Categorisation and Articles 4-9 on Confession and Guilty Pleas.

The organic law was also applicable to violations of the Geneva Conventions and their additional protocols because the conventions and protocols are referred to as part of the International Conventions defining punishable offences. Organic Law No. 08/96 of 30 August 1996 was promulgated as the first legal framework on the basis of which the Rwandan courts could adjudicate matters relating to genocide and other international crimes.

The first genocide procedural organic law was intellectually informed by discussions and recommendations of the 1995 Kigali International Conference, moreover the purpose of the conference was dialogue for national and international response on genocide, impunity and accountability. A few months after the conference, the Government of Rwanda submitted a draft organic law to Parliament on the organisation of prosecutions for offences constituting the crime of genocide or crimes against humanity committed on the territory of Rwanda since 1 October 1990.[11] On 17 May 1996 the Prime Minister, by means of a letter, requested the National Assembly to table the draft law as a matter of urgency.[12]

Discussions on the draft organic law started on 14 June 1996 and the organic law was promulgated on 30 August 1996 after intensive discussions for over two months.[13] The crime of genocide and crimes against humanity were prosecuted on the basis of the current law until 2001 when a new law instituting *gacaca* courts was promulgated. The Gacaca Law was also the basis upon which first category offenders were prosecuted before ordinary criminal law courts in Rwanda.

In her presentation of the draft project the Minister of Justice expressed that genocide and crimes against humanity existed in Rwanda because Rwanda was party to International Conventions that regulated prosecutable crimes. While there was no ambiguity concerning the crime of genocide and violations of common Article 3 to the Geneva Conventions and Additional Protocol II thereto, the definition of crimes against humanity was far from clear. Crimes against humanity were mostly applicable on the basis of international customary law which itself lacks a consistent definition of crimes against humanity.[14]

She highlighted the challenge of a lack of laws relating to the legal process and punishments for these crimes yet an obligation to that effect existed and had come along with the signing of the genocide convention in 1975. In order to bridge the legal lacuna of the absence of punishment the government's proposal was to apply penalties prescribed by the penal code. In this way it was possible to ensure the

11 Repubulika y'u Rwanda, Inteko Inshinga Amategeko, Inyandiko-Mvugo Z'Inteko Vol. XXI, Igihembwe Gisanzwe n'Igihembwe Kidasanzwe cyo kuva ku wa 14/06/1996 Kugeza Kuwa 25/07/1996 Inyandiko No. 206/AN/96 yo kuwa 14/06/1996.

12 *Ibid* at 3.

13 *Ibid*.

14 Chesterman, S., "An Altogether Different Order: Defining the Elements of Crimes against Humanity", 10 *Duke J.Comp. & Int'l. L.* (1999-2000) 307-343, at 308-310.

principle of legality and avoid violating the principle of the non-retroactivity of criminal law.

The reasoning of the Government that was adopted by Parliament was a combination of applying the Convention's definition of the crime of genocide and other relevant international crimes. Instead of insisting on the five constitutive elements of the crime of genocide, Parliament innovatively made no mention thereof and instead established that crimes under ordinary Rwandan common law were constitutive elements of the crime of genocide whose punishment is derived from the stipulations that punish the specific crime therein.

According to the organic law an offence qualified as a crime of genocide or a crime against humanity once it fulfilled the requirement of being one of the punishable crimes under Rwandan criminal law. This was an attempt to provide a safeguard against the risk of drafting a law that would otherwise seem retroactive hence jeopardising the rule of law and the principle of legality for a government that was still looking for full acceptance both nationally and internationally.

Organic Law No. 08/96 made no attempt to define genocide or crimes against humanity. Instead, Article 1(a) referred to genocide or crimes against humanity as defined by the three major conventions ratified by Rwanda years before the genocide. The Conventions mentioned therein were the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; the Geneva Convention relative to the Protection of Civilian Persons in time of War of 12 August 1949 and its Additional Protocols; and, finally, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

Making no attempt to define the international crimes in question was not a problem as such because the Constitution places International Conventions that have been fully ratified and adopted domestically in a higher position than any other laws apart from the Constitution itself.[15] Defining genocide was not therefore necessary because the Genocide Convention's definition was directly applicable. The absence of a definition of crimes against humanity was however a set-back because this was not clear as the Conventions mentioned in the organic law do not contain a set definition of these crimes either. While crimes against humanity had indeed acquired the status of a norm of customary international law, there was certainly nothing clear-cut as to the applicable definition of crimes against humanity.

Another interesting innovation was the proposal that other acts like the destruction of property that would not ordinarily qualify as an act of genocide were prosecutable

15 *Constitution of the Republic of Rwanda* (O.G No. Special of 4 June 2003) as subsequently amended to date. Article 190 of The Constitution of the Republic of Rwanda, stipulates that "*Upon their publication in the official gazette international treaties and agreements which have been conclusively adopted in accordance with the provisions of the law shall be more binding than organic laws and ordinary laws except in case of non compliance by one of the parties*."

under the genocide law because of the direct link that these crimes had with the events of the genocide plan and campaign.[16] The Genocide Convention does not refer to objects and symbols of an ethnic group but to the physical destruction of the group. By linking property-based crimes, especially the destruction of cows because they are a symbolic tool of the Tutsi, the context within which genocide in Rwanda should be understood was somehow extended.

This chapter discusses the legislative qualification of gender and sexual crimes; the practice of specialised chambers in dealing with sexual violence within the mandate of Organic Law No. 08/96 and subsequent genocide-related laws; the practice of guilty pleas in cases of gender and sexual violence will also be analysed and a conclusion on the legacy of Rwanda's ordinary courts on genocidal gender and sexual violence will be drawn at the end.

Note that I study the legacy of the ordinary courts in Rwanda with a caution that ordinary courts in Rwanda continue to try cases of genocidal gender and sexual violence, unlike the ICTR that is in its completion phase and the *gacaca* courts that have already closed. It is also important to note that due to several judicial reforms in Rwanda, genocidal gender and sexual violence have been tried by different courts. Specialised chambers were abrogated in 2004, replaced by the *gacaca* courts for second and third category offenders and transferring the mandate to try first category genocide offences including rape and sexual torture to the provincial courts that replaced the courts of first instance.

In 2006 the provincial courts were replaced by the intermediate courts which were mandated, just as their predecessors, to adjudicate first category offenders. Because of the persistently large caseload for first category offenders,[17] the Gacaca Organic Law was amended in 2008 to give *gacaca* the competence to try most of the category 1 offences, the majority of which were cases of genocidal rape and sexual torture. Only a few cases involved planners, or organisers and their accomplices and the accused who held leadership positions at the national and prefecture levels in public, political, security, religious, and militia groups.[18] With the closure of the *gacaca* courts the primary courts were mandated to adjudicate cases of genocidal rape and sexual torture.[19] For the sake of precision the legacy

16 *Supra* note 638 at 8.

17 Ministry of Justice, Report of the International Conference on the Impact of Judicial Reforms for the Justice Sector in Rwanda, Kigali June 2008. This report notes that Category 1 Cases to be tried by Gacaca Courts include 413 planners of genocide, 600 organisers; 1797 accused of supervising the genocide; 1029 who held positions of authority and 6606 that committed rape and sexual torture, at 29.

18 Article 9, Organic Law No. 13/2008 of 19/05/2008, modifying and complementing Organic Law No.16/2004 of 19/06/2004 establishing the organisation, competence and functioning of gacaca courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity committed between 1 October 1990 and 31 December 1994 as modified and completed to date.

19 No. 02/2013 of 16/06/2013 Organic Law is modifying and completing Organic Law No. 51/2008 of 09/09/2008 determining the organisation, functioning and jurisdiction of courts as modified and completed to date, Year 52 Special No. *bis* of 16 June 2013.

of the ordinary courts sudied herein encompasses the practice of the specialised chambers and their successors in the ordinary judiciary except the primary courts because their mandate was very new at the time of finalising the present study.

6.2 GENDER AND SEXUAL VIOLENCE IN THE LEGISLATIVE NARRATIVE

Discussions on gender and sexual violence sufficed in Parliament as they discussed the principle of the categorization of criminals on the basis of the gravity and the level of their participation in the genocide. Parliamentarians at first opposed the idea of any categorization arguing that there was no need to distinguish all the perpetrators because they had all committed genocide. Secondly, Members of Parliament suggested that the power to determine the seriousness of the crime should have been reserved for the judges.[20]

6.2.1 RAPE IN THE GOVERNMENT'S DRAFT ORGANIC LAW

The plight of genocidal rape and sexual violence victims was fully known to Rwanda's post-genocide leadership. The Rwanda Patriotic Army (RPA) was aware of and had witnessed mass rape as they fought to overthrow the Interim Government and bring genocide to an end. In an interview with *le Figaro* in 2002 President Kagame stated that they "knew that the government (interim) used to take AIDS patients out of hospitals to form battalions of rapists".[21]

Rape figured within the discussion and report of the International Conference held in Kigali organized by the Government of Rwanda in November 1995. The Kigali International Conference engaged in a national and international dialogue on responding to genocide and the need to end impunity and to bring those responsible to account. Rape surfaced in relation to discussions on the challenges of doing justice and attending to the needs of genocide survivors, raped women were particularly mentioned among other categories of surviving victims.[22] Raped women were also considered in the discussions on the social consequences of genocide.[23]

The conference recommendations suggested that rape, murder and other serious crimes be prosecuted and seriously punished while less serious genocide-related crimes would be resolved through non-detention mechanisms of accountability. According to the recommendations of the Kigali Conference, raped women, those taken hostage and mutilated survivors were among the survivors for whom

20 *Supra* note 634 at 53.
21 *Le Figaro*, "AIDS used as a weapon during Rwandan Genocide" Kagame, 26 November 2002. Landesman, P. (2002), "A woman's Work", *The New York Times*, Issue of 15 September 2002, (Magazine) at 116.
22 *Supra* note 216 at 6.
23 *Ibid* at 8.

rehabilitation as a means of reconstituting moral, physical, social, economic and psychological values was to be prioritised.[24]

The Kigali International Conference was an excellent avenue for national reflections on the possible approaches to justice and the challenges therein. Apart from mentioning rape at several instances other crucial issues were discussed in detail. The bulkiness of cases was discussed against the need to do justice and to respect the fundamental rights of the individuals concerned and particularly the character of the applicable law was diligently considered in order to ensure the rule of law and to avoid violating fundamental criminal law principles like the non-retroactivity of criminal laws.

6.2.2 PARLIAMENTARY DISCOURSE: RAPE VS. SEXUAL TORTURE

As mentioned in this chapter, the government proposal included rape as the only gender and sexual crime which was qualified as a third category offence and being only superior to property crimes. This attracted passionate discussions from different Members of Parliament, both male and female. In her presentation of the draft law the Minister had mentioned that some women had objected to the third category classification of rape and did not explain further why the government had maintained its position.

When the House seized the opportunity to comment on the draft law most parliamentarians rejected the naming of sexual and gender violence committed during the genocide as rape as well as its qualification among third category offences. The Hon. Muhongayire Jacquiline vehemently objected to using the word rape to refer to the experiences of women victims of genocide.[25] She explained that rape was too narrow a term, stating that in earlier wars and conflicts in Rwanda and elsewhere women had indeed been raped and taken into captivity but in her opinion what had happened in Rwanda during the genocide was way beyond this.

Muhongayire stated that while some victims of gender and sexual violence did not die immediately, they continue to live with and have death within. By this she was objecting to the third category qualification which concerned people who had committed serious crimes against people that did not result in death for the victim. Muhongayire further wondered if it was fair to qualify as rape the insertion of cotton soaked with acid into the vagina of a five-year old girl. She also expressed that rape was insufficient to explain how men experienced gender and sexual violence.[26]

The Hon. Mbanda Yohani illustrated that it would be inappropriate to qualify what in his opinion are atrocities that happened to women and girls as rape. What

24 *Ibid* at 26.
25 *Supra* note 638 at 8.
26 *Ibid* at 18-19.

happened to women and girls is not rape but atrocities. Comparing rape with what had transpired during the genocide Mbanda suggested that in rape per se the rapist at least has to some extent a sense of desire and liking for the victim. In his opinion the atrocities committed against Tutsi women and girls could not be qualified as rape. Doing so was in his opinion disappointing and painful.[27]

The Hon. Kayumba Imakulata stated that it was not fair to consider rape during the genocide as the rape that happens in ordinary situations and other countries. In her opinion genocidal rape is different from most wartime rapes that are committed by undisciplined soldiers. Wartime rape, she suggested, was often unplanned and incidental, largely motivated by the rapists' sexual libido but not drawing a plan to rape some woman or girls because they belong to a specific group.[28]

Kayumba explained that what happened in Rwanda was rape as a weapon of genocide. She argued that it was not rape against any woman or girl but the rape of the Tutsi. It was not rape because many victims were killed through the rape. Kayumba appealed to parliamentarians to remember the women who had been sexually assaulted with sticks. This rape, she said, was planned and executed. She submitted a request to move rape from category three to at least the second category in which killers had been included.

In response to the concerns with regard to rape the representative of the government made a distinction between rapists – those who committed rape that resulted in death and those who raped with the intention to kill would be considered in the same way as killers, but he expressed that in his opinion rape should be distinguished from the intention to kill. The Minister suggested that rape resulting in death should be qualified as murder while ordinary rape as per the penal code.[29]

In response, the Hon. Uwanyirigira Anastasie objected, expressing that ordinary rape does not exist and rape must be seen as a crime against humanity.[30] Kayumba also suggested that ordinary rape must remain within the ordinary situation but considered rape within the context of genocide where it was employed as a tool to kill.[31]

Parliament vehemently rejected the government's proposal relating to qualifying gender and sexual violence as rape. In the opinion of several parliamentarians rape could not capture the seriousness of gender and sexual crimes as part of genocide and could insufficiently grasp the intensity and animosity of the crimes. Therefore

27 *Ibid* at 24.

28 *Ibid* 40.

29 Repubulika y'u Rwanda, Inteko Inshinga Amategeko, Inyandiko-Z'Inteko Vol. XXI, Igihembwe Gisanzwe n'Igihembwe Kidasanzwe cyo kuva ku wa 14/06/1996 Kugeza Kuwa 25/07/1996 Inyandiko No. 208/AN/96 yo kuwa 18/06/1996 at 22.

30 *Ibid* at 24.

31 *Supra* note 638 at 25..

the Government and Parliament considered the discussions relating to the nature of gender and sexual violence and opted to qualify such crimes as sexual torture.

Similarly the offence was moved from the third category to the first category together with planners, instigators, leaders and notorious killers.[32] The draft organic law had mentioned rape under the third category of offences. The first category of offenders covered the highest levels in which perpetrators were put depending on the seriousness of their criminal participation in the genocide or crimes against humanity.

Third category offences concerned persons who participated in the genocide by committing "other serious assaults against persons".[33] Rape constituted an act of genocide or crimes against humanity on the basis of the fact that it had been committed as a part of the campaign to destroy the Tutsi. Some parliamentarians thought that categorizing rape as a third category offence was an unfortunate choice because it neglected the seriousness of the experience of women. She asked parliamentarians to imagine a victim raped by twenty or fifty men some of whom had used sticks and that this is qualified as third category?[34] Indeed the government's proposal to place rape under category 3 which would implicitly lead to a conclusion that rape was not seen to be such a serious offence of genocide. The government was simply intent on seeing the direct application of the penal code and it defaulted in appreciating the contextual realities of gender and sexual violence committed during the genocide.

Organic Law No. 08/96 adopted the use of sexual torture. This included rape and was distinguished from death as some parliamentarians had suggested; the purpose was to accommodate the context in which sexual torture had occurred in the genocide. For this category physical and immediate death was different from death due to sexual torture. Parliament and the government agreed that many victims had been sexually assaulted.

There was the challenge of the absence of definitions of genocide and crimes against humanity under Rwandan law and that of rape within the penal code. The crime of rape was indeed punishable by Article 360 of the Penal Code. What rape constituted was however far from clear. The penal code only ascribed penalties for rape without attempting to define it. Rape carried a punishment of five to ten years imprisonment, where aggravating circumstances existed the penalty could be increased from 10 to 20 years in case the victim was a child under the age of 16 years and the death penalty could be imposed in cases where rape resulted in the death of the victim.[35]

32 Repubulika y'u Rwanda, Inteko Inshinga Amategeko, Inyandiko-Mvugo Z'Inteko Vol. XXI, Igihembwe Gisanzwe n'Igihembwe Kidasanzwe cyo kuva ku wa 14/06/1996 Kugeza Kuwa 25/07/1996 Inyandiko No. 216/AN/96 yo kuwa 23/07/1996 at 22.

33 *Ibid*.

34 *Supra* note 638 at 31.

35 *Code Penal du 18/08/1977, Decree-Loi No. 21/77* Article 360.

A thorough reading of the penal code reveals that what was criminalized was rape in its traditional criminal law definition, where the absence of consent to sexual intercourse is what is criminalized. The penal code mentioned that rape also included sexual intercourse with someone who due to sickness and/or intoxication had impaired mental faculties or had been otherwise manipulated.[36] Rape in Rwanda implicitly meant sexual intercourse committed in the absence of consent on the part of the victim.

It is this perspective of the sexual nature of rape that the Transitional National Assembly refused to apply because in their argument it did not reflect the reality. By referring to gender and sexual crimes Parliament argued that this language of the law could not qualify the intensity of the examples discussed: the castration of Tutsi men and the sexual mutilation of Tutsi boys, men and women and girls. One parliamentarian lamented that what had happened was far from rape expressing that even though rape is also abusive it is preferred because there is an assumption that the perpetrator sexually admired the victim which was not the case during the genocide.[37]

Subsequently Parliament rejected the Government's proposal for rape and of its qualification as a third category offence. Thus rape was replaced with sexual torture and qualified under the first category. With sexual torture as a first category offence Rwanda expressed that genocidal gender and sexual violence was seriously condemned.

Article 2(d) of Organic Law No. 08/1996 included acts of sexual torture among the first category offenders including the planners, organizers and instigators of genocide and crimes against humanity; persons who had abused their leadership positions and participated in or incited others to commit genocide; and those who distinguished themselves as notorious murderers identified by virtue of their zeal or excessive malice employed in the commission of genocide. The inclusion of sexual torture as a first category offence was the result of the parliamentary arguments to incorporate wider forms of gender and sexual violence.

6.3 PROSECUTING RAPE AND SEXUAL TORTURE 1996-2008

6.3.1 INTRODUCTORY REMARKS

All genocide and crimes against humanity cases were tried by specialized chambers for five years. The pace was deemed to be too slow and a new justice mechanism was introduced taking most of the caseload to the newly introduced *gacaca* courts. Category one offences remained within the specialized chambers until these chambers were subsequently replaced by the provincial courts and the intermediate courts. The mandate to prosecute rape and sexual torture remained

36 *Ibid*.
37 *Supra* note 638.

within the criminal competences of the ordinary courts from the promulgation of Organic Law No. 08/96 until mid-2008 when the Gacaca Law was amended giving the community-based courts the necessary competence to adjudicate first category offences for which up to 90%[38] of cases included rape and sexual torture.

When the prosecutions began the practice was not to qualify so-called "simple" rape as sexual torture as such, instead rape was charged as a third category offence resorting back to what Parliament and the Government had rejected as a misrepresentation of what rape constituted in genocide. The consequence was that some genocidal gender and sexual crimes were dealt with more seriously than others. The gravity of the rape was diminished whenever it lacked an obvious act of torture. Parliament's desire to treat all forms of gender and sexual torture alike was lost in the application of the law by the courts.

The prosecutions of genocidal gender and sexual violence that took place between 1996 and 2001 established a hierarchy between rape and sexual torture. The prosecution and the judiciary were not aware of the spirit of the legislator in choosing the sexual torture appellation. The confusion might have been caused by the criminal law principle in which a strict interpretation of the law is required and no analogy is permitted. This would have been avoided by either mentioning both rape and sexual torture, an option that was taken up in the 2001 amendment, or by adopting the Akayesu style where they defined sexual torture mentioning that rape was inclusive. The legislator's earlier preference for sexual torture was more practical because it encompassed not only rape but also the other diverse forms of gender and sexual violence like the sexual mutilation of Tutsi women and men and other sexual crimes with torture manifestations.

Unfortunately the spirit of the legislator was misunderstood by the prosecuting attorneys who instead resorted back to the category three qualification of rape. Many of the rapes that had been committed without an obvious physical torture element were sidelined from the wider perspective of sexual torture. The situation was however rescued by Parliament in 2001 where the provision on categorization was amended mentioning both rape and sexual torture within the first category of offences.

When the Government introduced the legislation establishing the *gacaca* courts the article relating to categorization had been amended. Categories had been reduced to 3, thereby merging the first and second categories. Without explanation the Government had omitted sexual torture and replaced it with rape under the first category. On realizing this, Kamanda explained the need to reintroduce sexual torture expressing that when they adopted the use of sexual torture in 1996 the idea was to capture the animosity with which acts of gender and sexual violence had been committed.

38 *Supra* note 644.

Supporting him, the Hon. Nkusi Yuvenali expressed that sexual torture had been chosen because it would include cases of the castration of Tutsi men. The use of rape in his opinion would result in the exclusion of most male victim cases that could not be included within the meanings of rape.[39] The Member of Parliament Gatete Polycarpe suggested that rape does not reflect the reality of what happened and, as a solution, he suggested that if rape is maintained in the law then sexual torture would be added in quotes. In his opinion rape is a common occurrence that is different from what happened during the genocide.

The debate was resolved through adopting both rape and sexual torture because the latter was something that reflected the castration of men. The Minister however expressed that in genocide there is nothing like simple rape because all that happened was sexual torture.[40]

In contrast, the Hon. Somayire Antoinne wondered if the rape of a woman who had found refuge in her assailant's home would be qualified as rape as such.[41] In 1996 another Member of Parliament had earlier questioned if it was correct to assume that rape was part of a plan to commit genocide. In the opinion of Rwasamirera this matter should have been left to the judges to determine the seriousness of the offence.[42]

6.3.2 THE LEGACY OF THE ORDINARY COURTS

The specialised chambers commenced their mandate with extreme and nearly impossible challenges: a huge number of illegally detained suspects and a very small number of defence lawyers, in fact the Kigali Bar Association, the first of its kind in Rwandan legal history, was created months after the establishment of the specialised chambers in 1997.[43] On his reflections on Rwanda's post-genocide justice system Schabas considers them to be "impossible problems".[44]

Both men and women have been prosecuted for committing acts of rape and sexual torture during the genocide in Rwanda. The specialised chambers had judged a few thousand cases prompting a search for an alternative. The chambers were able to hear some cases of rape and sexual violence. The most outstanding of

39 Repubulika y'u Rwanda, Inteko Inshinga Amategeko, Inyandiko-Mvugo Z'Inteko Numero: 729/A.N/2000 yo ku wa 10/10/2000 at 24.

40 *Ibid* at 26.

41 *Ibid* at 26.

42 Repubulika y'u Rwanda, Inteko Inshinga Amategeko, Inyandiko-Mvugo Z'Inteko Vol. XXI, Igihembwe Gisanzwe n'Igihembwe Kidasanzwe cyo kuva ku wa 14/06/1996 Kugeza Kuwa 25/07/1996 Inyandiko No. 207/A.N./1996 of 17 June 1996 at 5.

43 Law No. 03/97 of 19 march 1997 establishing the Kigali Bar Association, O.G. No. 8 of 15 April 1997.

44 Schabas, W.A. (1996), " Justice, Democracy, and Impunity in Post-Gnocide Rwanda: Searching for Solutions to Impossible Problems, " *Criminal Law Forum*, Vol. 7 No. 3 at 526. For a more details see also Schabas, W.A. (2008), Post-Genocide Justice in Rwanda: A Spectrum of Options, in: Clark, P. and Kaufman, D.Z. (eds.), *After Genocide Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond* (London: Hurst & Company).

the cases adjudicated by the specialised chambers included that of the 22 persons who were executed on 28 April 1998 for genocide. The Government stated that the executions were an illustration of its commitment to punishing genocide. The same message was sent for those who had committed sexual torture because some of the executed perpetrators had been convicted of sexual torture.

On 4 January 1997 the specialised chamber of the court of first instance in Kibungo entered a guilty verdict against Deo Bizimana, a hospital administrator during the genocide, and Ejide Gatanazi, a local administrator before and during the genocide. Bizimana and Gatanazi had been accused of pillaging, killing and sexual torture. After the exhaustion of the available legal processes both were executed in Kibungo in April 1998.[45] Among the 11 counts against Bizimana was that he had castrated a Tutsi man in full view of the victim's wife and thereafter he had raped her with the mutilated sexual organs of her deceased husband.

Despite the commitment to take gender and sexual violence seriously at the beginning of the genocide trials through the conviction of both Gatanazi and Bizimana and their subsequent execution fewer convictions for rape and sexual torture were reached. More acquittals took place after the judges had considered the evidence. Some of the justifications for the acquittals seemed to be less concerned with the appreciation of the gravity and the challenge of speaking about rape and sexual torture.

Mukakayijuka Hadidja is one of the women who were accused of rape before the specialised chamber of the court of first instance in Kigali.[46] She was accused of torturing Tutsi women and handing them over to be raped. Under count 8 the prosecution accused Mukakayijuka of rape under category 3.[47] Yet in the accusation the prosecution mentioned sexual torture.

The chamber did not find Mukakayijuka Hadidja guilty of some of the allegations including that relating to the torture and rape of the daughters of Mukawera. In its reasons justifying the not guilty decision, the specialised chamber explained that the victims denied any rape or sexual torture. Therefore the accusation of rape and sexual torture made by Mukawera, the mother of the victims, was rejected.

This case, like the case of the guilty plea and its denial before the *gacaca* courts discussed in Chapter 3, illustrates the complexity of dealing with gender and sexual violence. The following two scenarios are possible; first, that the girls who were victimised did not want to be seen as such and hence the denied the allegations

45 The New York Times (04 January 1997) "Rwanda to Execute two Hutu; First Verdict on '94 Killings" availbale at: www.nytimes.com/1997/01/04/world/rwanda-to-execute-2-hutu-first-verdict-on-94-killings.html, accessed on 22 July 2013.

46 *The Prosecution v. Mukakayijuka Hadidja*, Case No. R.M.P. 7049/S12/MB R.P. 034/CS/KIG of 15/01/99. *Igitabo Cy'Imanza Zaciwe N'Inkiko z'U Rwanda Zerekeranye N'Icyaha Cy'tsembabwoko N'Itsembatsemba,* Vol. III, ASF-Belgium, at 209-220.

47 *Ibid* at 211.

made by their mother that were probably true. Or, by the time of the trial they had reconstructed their lives and buried their painful past and by denying the events they provided a safeguard against retraumatisation and stigma. The second scenario could be that the accuser was not sure, as expressed in the opinion of the specialised chamber, and was wrongfully accusing Mukakayijuka. While we may never know the truth in this case, it is evident that accusing, testifying and judging rape is indeed challenging.

This case also reveals that the prosecution and judges at times failed to qualify rape and sexual torture correctly as a category 1 offence. The reasons for this vary but can be seen to include the assumption that gender and sexual crimes were not indeed sufficiently serious crimes to amount to the highest category or placing a high degree of proof for rape and sexual torture so that a double standard for killing and gender and sexual violence was created.

Nyirandayisaba Jeanette was jointly accused with Uwamahoro Alphonsine of killing two Tutsi women as an act of genocide because the victims were killed due to their Tutsi ethnicity.[48] They were accused of forming a criminal gang, owning weapons illegally and taking the clothes that the two Tutsi women were wearing before taking them to where they were killed.[49] The prosecution accused them of looting the clothes of the victims but failed to qualify it as sexual torture despite the fact that they were led to their place of slaughter unclothed and in the presence of many onlookers. Uwamahoro was found not guilty of all the charges while Nyirandayisaba was convicted of other charges apart from the looting of the clothes. Given the summarised nature of the written judgment it is not clear what the evidence and the reasons put forward by the judges were on the matter.

The specialised chamber of the military court dealt with several cases of genocide including gender and sexual crimes. I will discuss only two in the interest of space and clarity. The specialised chamber of the military court sitting in Kigali rendered a not guilty verdict against Sergeant Barayagwiza Ildephonse.[50] He was accused of committing genocide in Cyahafi, Nyarugenge between April and July 1994. The charges accused him of training the Interahamwe militias; being a member of a criminal enterprise; killing different Tutsi victims; and committing rape and sexual torture against Agnes, a Tutsi woman. Sergeant Baraayagwiza had taken the victim to his house claiming that he was going to protect her, while he subsequently subjected her to sexual slavery.

48 *The Prosecution v. Nyirandayisaba Jeannette and Uwamahoro Alphonsine*, R.M.P. 39478/S4/MB/KMA R.P. 029/K1/98 of 08/09/1999, Specialised Chamber, Ruhengeri Court of First Instance, in a compilation of genocide related case: Imanza Zaciwe N'Inkiko Zerekeranye N'Icyaha Cy'Itsembabwoko N'Itsembatsemba, Umutumba w IV, Urukiko Rw'Ikirenga, Ishami Rishinzwe Inkiko, 315-333, at 316.

49 *Ibid* at 317.

50 *Ministere Public contre: Sergent GD Barayagwiza Ildephonse; R.M.P: 1663/AM/KGL?NZF/97 R.P: 0012/CG-CS/98, Le Conseil De Guerre 26/11/1998 reproduced in.Recueil de Jurisprudence Contentieux du Genocide, Tome III, Cour Supreme Department des Cours et Tribunaux, 2005, 313-381, at 313.*

The chamber was not convinced by the testimony of the victim and therefore found the accused not guilty. The specialised chamber based its decision on the fact that the victim had been inconsistent about staying at the house all day. The reasoning of the court went somewhat astray, however, by challenging why the victim had not lodged accusations against the accused with local leaders yet she had seen him several times after the alleged abuse.[51]

This reasoning of the court is unrealistic because it ignores the difficulty in speaking about rape and sexual torture especially the fear on the part of victims that once they testify or make allegations they will not be believed. The silence of wartime rape victims is not a unique experience of Rwanda and Wells[52] has recognised that female victims of war and conflict-based gender and sexual violence may be deterred from making accusations against their rapists despite seeing them or knowing where the offenders live in the aftermath of the war.[53]

The chamber also re-emphasised the victim's non-belief by the decision rendered in this case. Secondly, alleging that the lack of an accusation to local leaders could amount to proof of the absence of the crime is in itself disturbing. Genocide is a crime without statutory limitations and indeed there was no judicial system mandated to deal with the matter. It does not make clear legal sense why a delay in making an accusation to a non-legal authority is proof of no accountability in the perception of the court.

In another case against Corporal Ndazigaruye Emmanuel, before the specialised chamber of the military tribunal sitting in Nyabisundu, rape and sexual torture were alleged. Corporal Ndaziguye was charged with genocide on several counts of killing members of the Tutsi ethnic group, as well as the rape of a Tutsi woman he had rescued from killers and taken to his house where she was raped several times. He was also accused of being a member of a criminal enterprise as a leader of the Interahamwe.

On the basis of witness testimonies including that by the victim of the rape[54] perpetrated by Ndazigaruye and in consideration of his defence argument, the court was convinced that the accused had raped his victim several times and was therefore guilty. The chamber concluded that he was guilty of genocide because he had committed all the acts he was accused of with the intention of destroying the Tutsi.[55]

51 *Ibid* at 122.

52 Wells, S.A. (2005), "Gender Sexual Violence and Prospects for Justice at the Gacaca Courts" 14 *S.CAL.REV.L. & WOMEN'S STUD* at 168-183.

53 *Ibid* at 183.

54 *Ubushinjacyaha Bwa Gisirikare burega: Cpl Ndazigaruye Emmanuel,* Urukiko Rwa Gisirikare rwa Repubulika y'U Rwanda Urugereko Rwihariye ruri I Nyabisindu Ruhaburanisha Imanza Z'Itsembabwoko N'Itsembatsemba N'Ibindi Byaha Byibasiye Inyokomuntu Rwakijije None Kuwa 16 Kanama 1999, Urubanza No. RMP 1444/AM/KGL/NZF/97 RP 0005/CG-CS/9 at 4-8.

55 *Ibid* at 29.

In all the cases that were adjudicated before the specialised chambers, the victims also sued for damages as civil parties. This was because the 1996 Organic Law allowed persons aggrieved by the crime of genocide or crimes against humanity to apply to instigate a civil action. Individual damages were awarded even though no damages were ever legally recovered. For example, in the case against Sergeant Barayagwiza discussed in this section moral and material damages amounting to nearly 150 million Rwandan Francs were awarded.[56]

Allowing for civil actions and the award of damages was in principle something that should have been maintained because it is a legal principle that anyone liable for damages must be held liable and instructed to place the victim in her prior position as if the crime had not occurred.[57] Realistically, though, it is far from possible to compensate someone who has lost nearly everything in the genocide. More realistic was also that most of the perpetrators owned nothing and were liable to pay damages that they never had and, given the conditions, never would be able to pay. The payment of damages remains one of the outstanding challenges. While punishments have been served and continue to be served, for many victims a given level of material compensation remains vital to the process.

An overview of the jurisprudence of specialised chambers suggests challenges in the approach to gender and sexual torture. Generally there were many acquittals where accusations of rape and sexual torture were concerned, as well as inconsistencies in qualification where some cases qualified acts of rape as third category offences, while others qualified them in the first category and in some cases even though sexual torture was explicitly mentioned they would nonetheless be qualified in the third category which attracted light prison sentences as opposed to the first category that at the time carried the death penalty.

As part of the legacy of the ordinary courts on gender and sexual violence, I wish to discuss the case adjudicated in absentia before the court of higher instance of Rusizi in 2007. In this case the public prosecution accused Emmanuel Bagambiki of genocide on the basis of exclusively acts of rape and sexual torture.[58] This case is particularly interesting due to its focus on acts of rape and sexual torture and mostly because in his earlier case at the ICTR the accused had been tried and acquitted of genocide on the basis of other criminal actions but not rape and sexual torture.

Emmanuel Bagambiki is a former prefet of the prefecture of Cyangugu; he was appointed prefet on 4 July 1992 and remained in that position until 17 July 1994.[59]

56 *Supra* note 50 at 381.

57 *Supra* note 218 Articles 27-32.

58 *Ubushinjacyaha burega Emmanuel Bagambiki, Urukiko Rwisumbuye rwa Rusizi, ruri ku Cyicaro Cyarwo, Ruhaburanisha Imanza Z'Inshinjabyaha mu Rwego rwa Mbere, Urubanza No. RPGR 76/Gen/MJB/RE RP/Gen/0008/06/TGI/RSZ Ikiza ry'Urubanza mu Ruhame ryo ku wa 10/10/2007.; See also The Prosecutor v. Samuel Imanishimwe, Emmanuel Bagambiki Andre Ntagerura*, Case No. ICTR-99-46-T, Trial Chamber III, Judgment and Sentence (22 February 2004) para 12.

59 *Ibid* para 12.

On 25 February 2004 Emmanuel Bagambiki was acquitted by Trial Chamber III of all the charges against him because in the view of the trial judges the prosecution had failed to submit evidence proving beyond reasonable doubt his participation in the alleged offences.

The ICTR case against Bagambiki had silenced the pursuit of justice for victims of genocidal gender and sexual violence in Cyangugu. Despite spontaneous testimony that the accused had committed acts of rape and sexual violence the prosecution made no attempt to amend the indictment and to charge those offences. Disappointed by the prosecution's attitude, the Coalition for Women's Human Rights in Conflict Situations[60] took an *Amicus Curie* stand before the Tribunal demanding that the prosecution should reconsider the indictment to include charges of gender and sexual violence. In defence of its prosecutorial discretion the prosecution rejected demands for the amendment of the indictment.

In 2007 the public prosecution at the higher instance level in Cyangugu instigated charges against Emmanuel Bagambiki who had already been acquitted in Arusha. He was accused in absentia of personally committing crimes of rape and sexual torture and aiding and abetting rape against Tutsi women as acts of genocide. The indictment specifically mentioned the rape of women and girls often followed by torture and sexual slavery crimes committed against many Tutsi women.[61] The accusation explained that Bagambiki chose his rape victims on the basis of their Tutsi identity. He allegedly commanded the sexual torture of a Tutsi girl called Seraphina as a mark of appreciation for Burgemestre Fulgence, accusing her of having visited RPF soldiers in Kigali. He was accused of the rape committed by communal policemen and soldiers at Kamambe Airport.[62]

Witness Nteziryayo Theogene testified about Bagambiki's personal and command roles in the commission of genocidal gender and sexual violence in Cyangugu.[63] He testified about the accused's rape of a victim in his office for a whole day, where she was locked inside and left at night. The next day he asked an HIV positive man to rape her.[64] Another witness explained Bagambiki's complicity in the crime of rape and sexual torture.

Witness Tabaro explained that the accused had chaired a meeting in which it was agreed that Tutsi girls from the high school at Kabashisha would be rounded up and taken to war-wounded government soldiers as a means to boost the soldiers' morale. Witnesses recalled some rapists stating that Bagambiki had commanded them to rape and sexually torture Tutsi women.[65] One victim was raped by three

60 See: htpp://www.womensrightscoalition.org/site/main_en.php, Coalition for Women's Human Rights in Conflict Situations, accessed on 10 July 2013.
61 *Supra* note 685 at 1.
62 *Ibid* at 2-3.
63 *Ibid* at 4.
64 *Ibid* at 5.
65 *Ibid*.

men and the third inserted a metal bar in her sexual organs leaving her to bleed helplessly.

Bagambiki was subsequently convicted of the rape of Tutsi girls and women as well as complicity in the acts of genocidal rape and sexual torture. He was subsequently punished with a life sentence. As said earlier, Bagambiki Emmanuel was tried in absentia and remains at large.

This case is particularly interesting because it allowed access to victims who would otherwise have been fully silenced had the Tribunal been their only option. The defect in the ICTR prosecution's choice not to prosecute any acts of rape and sexual violence was rectified from the perspective of the victims by the Rwandan court's decision. It is also interesting because it is so far the only case in which genocide has been pleaded entirely on the basis of acts of gender and sexual violence. The prosecution and the trial court emphasized the fact that the accused had targeted victims on the basis of their Tutsi ethnicity and such acts of rape and sexual violence were committed as part of the genocide that had consumed Rwanda at the time when the alleged acts were committed.

The court of higher instance established its competence on the matter on the basis of the legal requirement that acts of rape and sexual torture are category one offences. The court found that the law mandated the ordinary courts to adjudicate all first category offences. The court proceeded by trying the case in closed session on the basis of the law prohibiting public guilty pleas and trials in order to safeguard the victims.[66] As a safeguard for the rights of the accused, however, the verdict must be pronounced in public.[67]

6.4 GUILTY PLEAS AND THEIR IMPACT ON RAPE AND SEXUAL TORTURE

The practice of guilt pleas was a great innovation introduced in Rwanda's criminal justice by the laws relating to the prosecution of genocide and crimes against humanity. The rules relating to the guilty plea procedure can be said to have had a negative impact on victims of genocidal gender and sexual violence. While the right to choose to plead guilty was available to all,[68] the procedure did not provide a benefit in terms of a reduction in penalties for persons placed in the first category for which acts of rape and sexual torture belonged.[69] This means that if the accused pleaded guilty to rape and sexual torture before the ordinary courts, he would still be punished with the death penalty, before its abolition, or a life sentence, the maximum penalties in Rwanda at the time.

66 *Supra* note 235, Article 38.
67 *Supra* note 642, Article 19.
68 *Supra* note 218, Article 2.
69 *Ibid* Article 74.

In the 2001 and 2004 Gacaca Laws, the mandate of the ordinary courts to try acts of rape and sexual torture was laid down. The 2001 Gacaca Organic Law did not make major improvements. There was, however, the possibility to benefit from reduced penalties for those pleading guilty, expressing remorse and asking for forgiveness. The penalty could be reduced to between 25 and 30 years imprisonment in cases of an accepted plea process as opposed to the death penalty (when it was still applied under Rwandan law) or a life sentence.

It can hence be argued that the placing of rape and sexual torture within the first category was a positive development communicating less tolerance for acts of gender and sexual violence. From a less positive angle, the category qualifications resulted in a more rigid system for the victims of gender and sexual violence. This was resolved by the 2004 Gacaca Law.

6.5 CONCLUSION

When the first genocide prosecution law was promulgated in Rwanda a strong commitment was established in 1996 when sexual torture was criminalized as one of the most serious offences of the genocide carrying the death penalty at the time. This legal commitment was more than apparent when the very first persons convicted of genocide at the national level – Gatanazi and Bizimana – were executed for genocide including convictions of sexual torture.

The Gatanazi and Bizimana legacy was not sustained in practice because a general view on the cases is that there were inconsistencies in the prosecution of rape and sexual torture especially before the amendment of the first category in 2001 to add rape to sexual torture within the first category. The legacy has been that for some victims of rape and sexual torture their perpetrators benefited from the less serious offence because they were prosecuted before the 2001 law amending the categories to add rape to sexual torture within the first category offences. This also resulted in a sense of injustice for the perpetrators of rape, some of whom have been punished more severely because they have been prosecuted as category 1 offenders yet those tried earlier were considered as category 3 offenders serving mostly a life sentence for the former and some years of imprisonment, often drastically reduced in the case of a guilty plea, for the latter.

Another issue was the fact that within the first trials damages and compensation had been awarded to victims of genocide including those of rape and sexual torture on the basis of Rwanda's civil liability law. However, none of these judgments was ever executed, a fact that frustrated victims who had participated within the justice system.

The third element was the dual jurisdiction process for victims of rape and sexual torture when the *gacaca* courts were first introduced. Victims reported their cases at the *gacaca* to an Inyangamugayo who the witness or victim trusted and

thereafter would be transferred to the prosecution office for trial before ordinary jurisdictions. With this the victims had to go through a tedious process in the name of protection against public humiliation and stigma. While I appreciate this protective measure, its impact has been to partly omit gender and sexual violence from the general public discourse on genocide.

7 THE LEGACY OF THE *GACACA* COURTS

7.1 *GACACA* JUSTICE AND GENDER AND SEXUAL VIOLENCE CRIMES 2001-2007

7.1.1 INTRODUCTION

Accounting for the experiences of victims of gender and sexual violence in times of peace, war and genocide has never been an easy process in any justice system. The cultural, social and judicial environment enhances this complexity. Victims of gender crimes often struggle for justice more than other surviving victims. The system of the *gacaca* courts adopted by Rwanda as a compliment to and an alternative in confronting the dilemmas of post-genocide justice was both ambitious and original in its approach. When faced with the mandate to deal with first category offences, especially rape and sexual torture, the *gacaca* system re-established its methods in order to enhance a protective and accessible environment that would safeguard against further trauma and stigma.

For rape and sexual torture the *gacaca* courts introduced closed sessions (trials in camera) hence altering the popular character of the *gacaca* courts; the power and decision to accuse was taken away from the public and given to the victims or their relatives in case the victim was incapable of lodging the case personally – this was intended to encourage the constructive role of the *gacaca* process thus a safeguard against accusations or pleas intended to enhance trauma or lead to the social orchestration of the victim.

The presence of trauma counsellors and security personnel in the courtroom was a measure intended to ensure the mental and physical safety of those involved in these particular cases. After all, these cases often involved a personal encounter between the victim and the aggressor unlike most of the other cases that did not concern first degree victims but rather second degree because of the death of a relative or the destruction of their property.

Note that post-genocide justice for gender and sexual crimes is not meant for the surviving victims only, but also for the victims whose lives were lost due to this violence. There are some victims of the genocide whose death was through gender and sexual violence as mentioned by Romeo Dallaire and his executive assistant Brent Beardsley in their testimony before the ICTR in the Bagosora case.[1]

1 *Supra* note 280 at 51-52.

The *gacaca* courts introduced a judicial platform in which the experiences of the surviving and dead victims of genocidal gender would be adjudicated within an environment that was more dignifying to the victims.

Carolyn Nordstrom captures the purpose of genocidal or politically motivated gendered violence when she argues that "it is an attack directed equally against personal identity (meaning the victim) and cultural integrity and intends to break down the fabric of society."[2]

As the 'genocidaires' engendered the genocide, any rightful redress requires the process to be equally engendered. Engendering the process of justice does not necessarily require a streamlined approach but rather a gender-sensitive one. One has to be aware of the gravity that gender crimes took but also of establishing safeguards to allow victims to have access to justice in a less traumatic manner. This means that the *gacaca* courts will partly be judged on to how they were able to address, record and do justice for the victims of gender violence who are numerous among the surviving victims. It means that survivors having to face the *gacaca* process would possibly participate more readily if the system is sensitive to the nature and context of their suffering, thus facilitating not only the establishment of a more complete record of the genocide but also fostering justice.

In this chapter I will embark on the legacy of the *gacaca* courts in addressing genocidal sexual violence. Any discussion on the *gacaca* courts requires an understanding that it is an unprecedented progressive system. Consequently, the discussion herein reveals that addressing gender crimes in the *gacaca* courts moved from the insensitive information gathering and guilty plea phases to a more protective system and finally to the more engendered system introduced later.

Apart from the inclusion of rape within the first category in the 2001 Gacaca Organic Law, Parliament did not engage in discussing the impact of the *gacaca* system on victims of rape and sexual torture. This was because from the very beginning the *gacaca* courts were not deemed to be competent to try any first category cases.

This resulted in a fundamental lack of any discussion on how the information-gathering process would affect the victims of gender and sexual violence. The *gacaca* court of the cell ran the information-gathering phase and the categorization in which details about the events of the genocide transpired in the cell in question, naming the perpetrators and the victims in public. As a result, in some places the 'genocidaires' intentionally targeted victims by declaring in public that they had raped some women whose stories were not yet known to their families, hence causing isolation and dismay for some victims who might have chosen to bury their sexual violence experiences in the past. In response the 2004 Gacaca Organic

2 Nordostrom, C. (1989), "Women and war: Observations from the field" *Minerva: Quarterly Report on women and the military* Vol IX, No. 1991, at 1-15, 10.

Law prohibited any public declarations of rape and sexual torture in the form of accusations, information or a guilty plea. Both these public declarations and their absence have had a negative impact, the former being targeted at and harming the victim and her/his family and the latter amounting to the exclusion of accounts of genocidal gender and sexual violence from the public record

7.2 THE FUNCTIONING OF THE *GACACA* COURTS: THEIR IMPACT ON VICTIMS OF GENDER VIOLENCE

Understanding the impact of the *gacaca* courts on victims of genocidal gender violence requires an understanding of how these courts functioned. At this stage emphasis will be placed on the *gacaca* court of the cell which until the promulgation of the 2008 *gacaca* law amendments accessed information relating to gender crimes through its duties of information gathering and categorisation. The study will elaborate on how the information-gathering phase impacted on the rights of female survivors of gender violence. It will be noted that at the beginning the law accorded no specific protection measures for the victims given the public nature of these courts, a fact that would result in further trauma and shame for the victims.

Article 3 of Organic Law No. 16/2004 of 19/6/2004 establishing the organisation, competence and functioning of the *gacaca* courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between 1 October 1990 and 31 December 1994, established the *gacaca* court of the cell. In each cell, there is the *gacaca* court of the sector and the *gacaca* court of appeal in each sector of the Republic of Rwanda. These courts replaced the already mentioned *gacaca* courts established in 2001. The *gacaca* court of the cell like its sister court is made up of a general assembly, a seat for the *gacaca* court and a coordination committee.

The three different organs of the *gacaca* court of the cell have different but fulfilling roles. Its general assembly is composed of all the cell's residents aged 18 years and above; a cell can only have a *gacaca* cell court if it has at least two hundred eligible persons. In cells where this number cannot be attained, the cell is merged with another cell of the same sector, to make one *gacaca* court of the cell. The general assembly of the *gacaca* cell court can only convene if one hundred members are present. The seat of the *gacaca* court of the cell which is its second organ is composed of nine *Inyangamugayo* and five deputies, the latter participating if the number of seven who can preside over one sitting is not attainable. The last organ is the coordination committee appointed from among the members of the seat of a *gacaca* court. It is composed of the President, a first Vice-President, a second Vice-President and two secretaries. Members of the *gacaca* coordination committee are elected for a one-year term that can be renewed. Since the *gacaca* courts do not have court clerks like ordinary courts, their secretaries are responsible for making the reports and they assume the responsibilities of court clerks.

7.2.1 INFORMATION GATHERING

As the process unfolded, amendments were made to the law. For example, the frank nature of the confessions caused problems, especially with regard to rape. In response, people are no longer allowed to openly speak about their involvement in sexual violence.[3] Apparently, at the time of the promulgation of the first *gacaca* laws the legislator underestimated the impact of what these *gacaca* activities would do to the victims. Some researchers who have focused on the exclusion of gender crimes from the *gacaca* courts fail to recognize that the *gacaca* process is more than just a trial. In the initial information-gathering phase a great deal was spoken about sexual torture. This explains why after this phase gender violence cases were numerous. I therefore argue that the *gacaca* courts dealt with gender violence crimes committed in the genocide especially in their truth-finding phase although not resulting in any punishment, instead these cases were simply referred to the ordinary courts.

Articles 33 and 34 common to the 2001 and 2004 Laws are particularly important as far as matters relating to victims of gender violence are concerned. Article 33 elaborates the responsibilities of the general assembly of the *gacaca* cell; they include electing Seat members and their deputies; attending to the activities of the *gacaca* court of the cell; intervening whenever requested to do so; and assisting the Seat of the *gacaca* court in the establishment of a list of persons among others who committed genocide and other crimes against humanity and their victims.

Further, Article 34 gave the Seat of the *gacaca* court of the cell together with the participation of the general assembly the duty to compile lists of persons who were residing in the cell before the genocide; people who were killed in their cell of residence; those killed outside their cell of residence; people who were killed in the cell while they were not residing therein; those victimized and those who had their property damaged. They also received confessions, guilty pleas, repentance and apologies from the persons who participated in the genocide; they received evidence and testimonies and other information relating to the planning and execution of the genocide; they categorized the accused; and forwarded the files on the defendants classified in the first category to the Public Prosecutor. As a matter of clarification, point 1°(f) of Article 34 defines the victim as:

> *anybody killed, hunted to be killed but survived, suffered acts of torture against his or her sexual parts, suffered rape, injured or victim of any other form of harassment, plundered, and whose house and property were destroyed because of his or her ethnic background or opinion against the genocide ideology.*[4]

3 The Prosecutor General, Ngoga Martin, addressing the colloquium of prosecutors, available at: http://unictr.org/ENGLISH/colloquium04/reports/final_report.pdf.

4 *Supra* note 235 at Article 34.

Although gender crimes remained in category one to be adjudicated in the ordinary courts, the *gacaca* courts were bound to deal with these offences since they seemingly assumed the investigative or evidence-gathering role even for cases that had to be tried by the ordinary courts. Women have had a very crucial and active role in the *gacaca* courts, they have been appointed as *Inyangamugayo*, participated as both victims and as perpetrators and actively participated as eligible members of the general assembly.[5] The impact of the *gacaca* for all these women varies depending on how they come to these courts, are invited and participate. Relevant for this discussion is the victims of sexual violence including both male and female. The *gacaca* courts are empowered by the law to receive any information relating to victims of sexual torture. This information could be given by the surviving victims or anyone else with relevant knowledge. *Gacaca* laws established an obligation to participate in *gacaca* jurisdictions and penalties for those unwilling to talk when required to. Article 29 on the punishments relates to a refusal to testify:

> *Any person who omits or refuses to testify on what he or she has seen or on what he or she knows, as well as the one who makes a slanderous denunciation, shall be prosecuted by the gacaca court which makes the statement of it. He or she incurs a prison sentence from three (3) months to six (6) months. In case of a repeat offence, the defendant may incur a prison sentence from six months (6) to one (1) year.*[6]

According to this law, refusing to testify is considered to be when someone apparently knew something concerning a matter denounced by others in his or her presence and that person decides not to express his or her own opinion. Although assuming that victims of rape and sexual torture are the most likely not to speak out is too general a conclusion, the intimate nature of their violation within a culturally constrained community as far as sexuality is concerned would justify their silence. The possibility of their silence was explored in the 2002 report of the National Unity and Reconciliation Commission expressing that sixty percent of survivors of gender crimes were less likely to testify due to the intimate nature of the crimes they endured. It further argued that female victims were more likely not to testify about their violation than other genocide survivors in fear of rejection in the community as not being marriageable, and being dishonoured by their acquaintances.

Rape and sexual torture are regarded as the worst forms of genocide. Their impact is felt and feared by all in the community. Many can come up with explanations for the genocide in general but not easily for the forms of sexual torture. Not even the perpetrators have the luxury of brushing away the nature of animosity these crimes took in the genocide. Rwanda's cultural and traditional values consider a

5 I personally participated in the gacaca general assembly, was appointed as an Inyangamugayo and thereafter attended many trial as a requirement for all citizens.

6 *Supra* note 235 at Article 29.

girl according to her marriageable value; women are often respected as honoured mothers.

Many victims live with HIV/AIDS and this is seen as a constant reminder of their ordeal. Culture has trained Rwandan women and children not to speak in public, let alone speaking about topics which are considered to be obscene. A fear of speaking about rape and sexual violence for the victims is not uncommon, neither is it a fear experienced by only female victims of gender violence crimes. Often victims are stifled into not speaking because systems of justice are insensitive or very limiting. Beth Goldblatt and Sheila Meintjes writing on gender and the South African Truth and Reconciliation Commission[7] and Michelle Staggs Kelsall and Shanee Stepakoff on the special court on Sierra Leone[8] detail how restorative justice systems deny or silence victims of sexual and gender violence.

The public nature of the offences to be tried coupled with the historically participative and public nature of the traditional *gacaca* system shaped the system and functioning of the *gacaca* courts in a unique and unprecedented manner, and its impact on more female victims of rape and sexual torture was unforeseen. Beth Goldblatt and Sheilla Meintjes in their work on gender and the truth and reconciliation commission of South Africa argue that such modes of justice that call for public disclosure, truth telling and dialogue have particular consequences for women. They suggest that transitional justice systems need to consider the circumstances in which women, in this case girls, were also prepared to testify and understand the hardship of overcoming the stigma attached to speaking publicly about sexual violations. Like in the *gacaca* courts, the TRC realised that generally women were not willing to speak about personal sexual violence experiences.

In the *gacaca* procedure, nothing was specifically mentioned on the manner in which female victims of the genocide would access justice without undergoing the public humility, trauma and shame attached to gendered and sexual crimes. On the contrary, refusing female victims to have access to the *gacaca* justice process would minimise their experiences. Like most restorative justice systems, the *gacaca* courts intended to establish the truth and a historical record of the genocide. A good account of the genocide required that also the experiences of female victims of the genocide, especially in relation to rape and sexual torture, were indispensable, as their absence would minimise the success of justice and fail in making an effective record of history.

Ustinia Dolgopol[9] observes that: "If the experiences of women are to have an impact on our understanding of our world and our history, it is important that events

7 Goldblatt, B. and Meintjens, S. (1996), "Dealing with the Aftermath- Sexual Violence and the Truth and Reconciliation Commission", *Agenda* 36.

8 Kelsall, M.S. and Stepakoff, S. (2007), "When we Wanted to Talk about Rape: Silencing Sexual Violence at the Special Court in Sierra Leone" The International Journal of Transitional Justice, Vol. 1353-374 available at: http://ijtj.oxfordjournals.org, accessed on 19 March 2013.

9 Dolgopol, U. (1995), "Women's Voices, Women's Pain" *Human Rights Quarterly,* Vol. 17(1), 127-154.

particular to women be chronicled."[10] Sarah Wells[11] warned that if female survivors are marginalized in *gacaca* and their experiences not heard, the understanding and punishment of crimes committed against female victims during the genocide would be greatly reduced.[12] On the other hand, if *gacaca* proceedings were to threaten women into silence, it was going to be unlikely that a complete historical record of the genocide would be established to reveal the truth. Yet the success of the *gacaca* courts and a holistic redress of the genocide requires that also the wrongs perpetrated against in particular female victims of rape and sexual torture be punished and recorded.

The genocidal gender violence that girls and women suffered will hardly ever be captured in its full capacity, its manner and methods are unfathomable, while men, women and children sexually tortured, mutilated, gang raped and committed many more sexual and gender atrocities than can be imagined. While some women suffered mainly because of their gender, others suffered because of their political opinion, Tutsi girls and women suffered in a genocidal manner. For them the end – which was to destroy – justified the means. Victims failing to speak about their ordeal could be understood because of the unimaginable experiences they went through. Often they cannot come up with the words to illustrate their horror, yet they are required to do so. The *gacaca* system was created to succeed based mainly on spoken testimony; an incapacity to speak of the unspeakable threatened most survivors, coupled with the fear that people would not understand them or would reject hearing such language.

Critical about the obligation to speak is the failure of the legislator to create a favourable environment for the victims. The required public was too large but also too close to the victim since it was often in their neighbourhood full of persons with whom the victim and perpetrator were acquainted with. Abiding by the obligation to speak in fear of judicial reprisals could minimize the sensitive nature of these cases. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power requires that victims of crime must be treated with compassion and respect for their dignity.[13] The Government of Rwanda soon realized that this approach was not effectively doing justice to the victims of gender crimes. Information gathering and the search for evidence remained central in the *gacaca* process although the manner in which it was sought for such crimes changed.

Although the information-gathering phase gave female victims the opportunity to testify about crimes they had endured, victims resisted out of fear of exposure and other related consequences emanating from the tradition and socially constructed beliefs on sexuality and sexual violence. Concerns about the possible silence of

10 *Supra* note 130.

11 Wells, S.A. (2005), Gender Sexual Violence and Prospects for Justice at the Gacaca Courts" 14 *S.CAL.REV.L. & WOMEN'S STUD* 168-183.

12 *Ibid*.

13 United Nations; Declaration of Basic Principles of justice for Victims of Crime and Abuse of Power, General Assembly Resolution 40/34 of 29 November 1985.

the victims of sexual violence raised by the National Unity and Reconciliation Commission were soon felt. Victims of gender[14] and sexual crimes started to avoid *gacaca* proceedings out of a fear of reliving the memory, shame, stigma and orchestration from their families. After all, the *gacaca* courts were not empowered to try their cases because of a lack of jurisdiction.

Victims who felt prompted to testify before the *gacaca* courts still went an extra step because their trials could only take place before the national courts. It meant that choosing to speak before the *gacaca* court was only relevant to facilitate the correct categorization of the offence and to transfer the case to the national prosecution service which would then embark on a further investigation and go through all the tedious processes that the *gacaca* courts were meant to minimize. It should be remembered that when the *gacaca* courts were created, their mission was to minimize the tediousness of the ordinary system in order to diminish the bulky case load; meanwhile, the victims of gender violence remained outside this mainstream.

Noteworthy is that some victims courageously chose to inform the public about their genocidal violation through the *gacaca* courts.[15] Like other lessons learnt from the pilot phases, the burden of speaking about rape and sexual violence for the victims and survivors whose deceased relatives had been victims of gender violence was immense. It can be argued that the testimony of those courageous victims exposed the weaknesses in the pre-trial phases concerning the victim thus calling for the establishment of more victim-friendly proceedings.

With regard to gender violence victims, the public nature of the *gacaca* courts obstructed some of them from participating.[16] Even though they were hungry for justice like other victims, the burden and impact of reporting their experiences was even greater. Such victims needed confidentiality to be able to tell the truth about what happened. The initial *gacaca* set-up increased their rejection and insecurity. Victims not only feared for their lives but also for their reputation and honour in a society orchestrating their isolation and rejection. Reprisals, shame, and isolation for those who came forward at the initial stage greatly affected other potential witnesses resulting in their silence.

14 Some of the victims I interviewed expressed their concern about the fear of speaking in public about their genocidal experience concerning matters which were so intimate in the presence of the majority of the families of their abusers and the perpetrators themselves. They feared their reaction, and for their safety.

15 *Supra* note 659 at 167, 183.

16 Revealed by a victim I interviewed who stated that the presence of the whole village would not allow her to testify about her ordeal because she would be mocked for having been raped. She explained that because she does not want her neighbours to know about the fact that she had been raped she travels from her village to Kigali to get her HIV medicine which she could have easily received from the health centre nearby but does not because her neighbours would easily know since their children work at the health centre.

Victims of sexual violence before the *gacaca* courts were burdened with the onus of convincing the general assembly in order for their abusers to be properly categorised. They often had to answer questions which were too personal and retraumatising without being prepared for the consequences. The information mainly provided by the victims was in the absence of a confession which was the main basis of the categorization. The victims had the burden of convincing the *gacaca* court that the suspect had raped and/or tortured them before he was appropriately classified in the rightful category or even at a later stage having to reveal their ordeal in order to seek a reclassification in cases where the perpetrators had already been classified in a lower category that would otherwise allow them to serve less severe sentences compared to the seriousness that sexual torture and rape entails.

7.2.2 CONFESSIONS AND A GUILTY PLEA

Apart from the discussed information-gathering phase, the *gacaca* courts, like the ordinary courts, allow the accused to make guilty pleas and confess.[17] This process was encouraged from the outset in order to settle the legal process and to facilitate reintegration through reduced sentences and reconciliation through seeing forgiveness and an expression of remorse as required by the law. In previous discussions I have[18] illustrated that victims did not access justice because of the absence of any benefit for those accused of category one offences from reduced penalties in case of a valid confession, despite that there are however some cases of confessions relating to acts of rape and sexual torture. Other perpetrators who would otherwise not have benefited from pleas of guilty because of being in category one were afforded this opportunity if their names had not yet been published on the category list prepared by the public prosecution authority. It is these confessions that are relevant in furthering this discussion. Guilty plea and confession procedures concern everything that surrounds the offence, including the location where it was committed, the date, and the names of the victims as well as the witnesses, and damaged assets, if there are any. The accused is obliged to disclose the names of accomplices where this is applicable and any other useful information.

Any person charged with the crime of genocide and crimes against humanity, committed between 1 October 1990 and 31 December 1994, or according to the law those charged with other crimes provided for in the Penal Code of Rwanda that were committed according to available evidence with the intention of committing genocide or crimes against humanity have the right to the procedures of confessions, guilty pleas, repentance and apologies.[19] This means that even those accused of gender crimes may choose to make use of these procedures. According

17 Combs, N. (2002), Copping a Plea to Genocide: The Plea Bargaining of International Crimes, *University of Pennsylvania Law Review* Vol. 151(1) (Combs discusses generally the practice of plea bargaining for international crimes).

18 See supra this study Chapter 6.4 where I discuss the impact of putting rape and sexual torture in the first category of offences.

19 *Supra* note 235 at Article 54.

to the principle of equality before the law, it would have been a violation of the rights of the accused if they were denied this right enjoyed by other perpetrators. However, most threatening for the victim was not the revelation of the truth but the manner in which this truth would be transmitted and the impact on the livelihood of the victim.

At the outset the 2001 Organic Law on the Gacaca established the nature of the guilty plea, confession and apology. The accused was required to publicly make an apology to the surviving victim and Rwandan society in general. For confessions, guilty pleas, repentance and apologies to be accepted the defendant is required to give a detailed description of the offence he/she is confessing to, including mentioning how he or she carried it out, where and when. The offender must mention any witnesses to the facts, the persons victimized and when the victims had died the offender must show where he or she threw their dead bodies and explain the injuries they caused to those dead bodies. He/she must reveal the co-authors, accomplices and any other information useful to facilitate a criminal action and, lastly, he or she must apologise. Although allowed to plead guilty and confess, they were initially not allowed to benefit from any commutation of the sentence, nevertheless, those under this category confessing before their names appeared on the first category list drawn up by the public prosecution office could benefit from the commutation of penalties.[20]

Just like in the other information-gathering procedures, this confession can be very threatening to victims. Two cases come to mind[21] when once attending an information-gathering process. An accusedcame forward to plead guilty, confess and apologise and he then began to speak of a particular girl they had raped and then not only mentioned her name but also the name of her husband who she had married three years after the genocide. The manner of his confession did not sound like a remorseful apology, but as another way in which to further haunt this lady who was trying to put her past behind her and to move forward. Another case in Kibuye[22] concerned an offender who was pleading guilty of having raped a woman who was a girl during the genocide only to have the victim come forward to denounce these claims. From the two cases, it can be argued that from a hate-driven genocide in which the perpetrators never gave up but were rather defeated, guilty pleas could act as an occasion to strike one last blow against the surviving victims especially before an audience which does not expect any better from these perpetrators. On the other hand, victims may choose to denounce such claims to defend their families, friends and community against rejection and orchestration.

20 *Ibid* at Article 55.

21 The confession was made in the Huye Stadium in June 2003 when prisoners from Karubanda hospital offered to come and make their public confession as part of the information-gathering process.

22 This case was presented by Mr. Kalinda the SNJG Jurist for Kibuye during the presentation for the harmonization of the training manual in June 2006.

False testimony and half-truths have not been uncommon in the procedure of confessions, guilty pleas, repentance and apologies. Nonetheless, this process has been one of the most creative aspects of the *gacaca* courts because they not only reveal the truth but have become a cornerstone in seeking it. Uvin considers that confessions are one of the most innovative and important aspects of the *gacaca* trials, and he believes that it can lead to substantially more truth than conventional justice systems.[23] Nevertheless, cases of lying, omissions, and other forms of truth manipulation have been observed. Penal Reform International, an international organization involved in the criminal justice process in Rwanda has observed on this matter that "as for the testimonies of those released, the omissions, half-truths, even lies and false witness were very common."[24] In response to such malfunctioning, the law established a safeguard against false testimony or half-truths that have not been uncommon for those pleading guilty, where an accused manipulating the procedures will instead be prosecuted for the unconfessed acts at any time when it is discovered and be reclassified in the category in which the committed offences place him or her; consequently, he/she will be punished by the maximum penalty provided for this category. What the law fails to address is the impact that such strategic guilty pleas can have on the victim.

Following the lessons learnt especially from the above-discussed pilot phase, information gathering and guilty plea confessions, a new law on the *gacaca* courts was adopted in 2004. The new law reduced the levels of the courts and the number of *Inyangamugayo* to make the system more manageable. The categories were revisited and categories two and three, that initially overlapped, were merged. For the purposes of this research on the existing category one offence of sexual torture, it is important to note that rape was added to condemn rape and sexual torture.

On the matter of the procedure that affected female victims because of its public nature and mandatory manner, the law was changed to protect victims from such exposure. Article 38 states that:

> *As regards offences relating to rape or acts of torture against sexual parts, the victim chooses among the Seat members for the gacaca court of the cell, one or more to whom she submits her complaint or does it in writing. In case of mistrust in the seat members, she submits it to the organs of investigations or the public prosecution.*
>
> *In case of death or incapacity of the victim, the complaint shall be secretly lodged by any interested party in the manner provided for by paragraph one of this article. The person of integrity entrusted with such a complaint, forwards it secretly to the Public Prosecution for further investigations. It is prohibited to publicly confess such an offence. Nobody is permitted to publicly*

23 Uvin, P., The Gacaca Tribunals in Rwanda, in: *Reconciliation after violent conflict* (Stromsburg: Idea, 2003) at 117.

24 Penal Reform International, "Research Report on Gacaca Courts: Gacaca Reconciliation-Kibuye case study". (Kigali and Paris: PRI, 2004) at 13.

sue another party. All formalities of the proceedings of the offence shall be conducted in camera.

Article 50 of Organic Law No. 16/2004 gives the *gacaca* service (SNJG) powers to make "rules and regulations relating to the smooth running of *gacaca* courts, as well as the conduct of persons of integrity, without prejudice to the *gacaca* courts' ways of trying."[25] Accordingly, many regulations have been established to simplify and detail the application of the rules established in the laws. Of interest to this research is Regulation/Instruction No. 05/2005 of 15/03/2005 of the Executive Secretary of the National Service of Gacaca Courts concerning receiving testimony and information about what happened in the genocide.

Article 38 of Gacaca Organic Law[26] and Article 9 of Regulation[27] established new approaches for dealing with sexual torture and rape during the information-gathering or guilty plea procedures. This law waived the obligatory nature of having to testify before the *gacaca* general assembly on matters relating to such crimes often regarded as attacking the intimacy of a person. Instead of coming to stand before a multitude of neighbours, friends and family in a society that orchestrates victims of sexual crimes a new option of selecting amongst the nine *Inyangamugayo* one or more of her/his choice in whom she confides and to whom the testimony is given. As an alternative for those who can read and write, they had the option of writing down their testimony or claim and then submitting it to the *Inyangamugayo*. Victims or others claiming on behalf of the dead or incapacitated persons through reporting to the *gacaca* courts contributed in the establishment of a record of especially the nature that the sexual violence took during the Tutsi genocide.

The law outspokenly prohibited the public lodging of any claims or even guilty pleas concerning cases involving gender violence. The victim was empowered to decide on who to report to and if no *Inyangamugayo* of her preference was identified among all the nine bench members, the victim could send her/his complaint directly to the judicial police authorities or the public prosecution service. Rape and sexual torture are category one offences which according to the Organic Law of 2001 and 2004 remained within the jurisdiction of the ordinary courts, consequently the trusted *Inyangamugayo* only acted as a secretary and a liaison officer between the victim and the public prosecution service in the submission of the claim. The public prosecution service could then proceed with the normal proceedings of criminal investigations in order to decide whether to prosecute or or it could keep the complaint on file if found that the evidence was insufficient which was often likely because of the unwillingness of some victims to return to the justice system that seemed to have failed them.

25 *Supra* note 235 at Article 50.
26 *Ibid* Article 38.
27 Regulations No. 05/2005 concerning the means of gathering testimonies in *gacaca* courts.

The secrecy can itself be regarded as a bar to exposing the truth and restricting the capacity to prosecute. For example, the information-gathering sheets that the national service in charge of *gacaca* jurisdiction had designed for a uniform recording required that no names of the victims would be indicated in the cases involving gender violence offences. This in itself was a bar in future trials whereby it allowed the accused to have a legitimate defence because no record existed of the victims who acted as principal witnesses. The prosecution would probably have been limited in their actions with such a lack of information. Further, the public trial, however negative, allowed a collective gathering of information as opposed to lodging a claim, the only option allowed for the victims. Note, though, that the absence of names does not mean that especially in cases of guilty pleas the victim is not mentioned by the perpetrator although it is not recorded.

Although the above changes were greeted with relief from especially victims who feared going public about their violations, we cannot assume that all victims share this belief. Some are fully aware of the public nature of the crimes they suffered and could afford to feel more relieved if they had the occasion to publicly expose their offenders, although this might be minimal given the social stigma attached to rape and sexual violence. Further, one may wonder if this form of protection is victim-oriented or community-oriented. Members of a community, especially those without the energy to confront the animosity of rape and sexual torture, may decide on protective means that do not reflect the needs of the victim but rather their own and their community's needs. When this is community-based, some have criticized the *gacaca* as a system that does not focus on the victims as individuals but as a property of the community. The argument raised here should be understood as not demeaning the need for protection for the women concerned and even for community values but proposes that effective protection takes into account the victim's point view if it can be expressed.

Women's experiences were subjected to an extra process of speaking to an *Inyangamugayo* who would forward her claim to the ordinary criminal justice system. The failures of ordinary criminal justice in cases of genocide have already been discussed. It was criticized for being unable to deliver justice, because it was far removed from the poor among the population, it required very classical methods and was too slow. Schabas warns about this failure when he argues that "no judicial system in the world has/had been designed to cope with the requirements of prosecuting genocide."[28] Further, he notes that "criminal justice systems exist to deal with crime at an individual level and that they are not suited for crime committed by thousands and directed against hundreds of thousands."[29]

Dealing with genocide is hard; dealing with genocidal gender-based violence is even harder. Any system is 'damned if it does and damned if it doesn't'. Public

28 Schabas, W., "Justice Democrasy and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems" 7 *Crim. L.F.* (1998) at 533.

29 *Ibid* at 534.

testimonies and the release of information in these cases can be harmful to the victim while, on the other hand, avoiding the same process may hamper the creation of a clear record of the genocide and the manner in which it was executed including genocidal gender violence. In any situation, victims need to be asked how they want justice to be done. Often victims are assumed and combined as if they are one with just one way of dealing with their situation. Some want to see justice done in a manner which is very protective in order to reinstate their broken social fabrics, while others need to publicly shift the burden from themselves to their abusers. Coupled with the incapacity of knowing the best way of addressing genocide and consequently genocidal gender violence, Rwanda was deemed to have a flexible system open to new horizons if situations and facts so demanded. This is why it will be argued in the next section that as the *gacaca* courts evolved they continued to improve until the 2008 amendments to the Gacaca Organic Law which now contains more victim-based ideas of justice.

Although some had tried to approve of the fact that not trying sexual violence in the *gacaca* courts was protective, it was soon realized that Rwanda was falling into the same trap as previous systems like the Nuremberg courts that missed the opportunity of recording rape and other forms of sexual violence. Whether protective or not, the choice to try and condemn gender violence must be expressed by the political will to do so. Even though this does not elude to the seriousness and challenges attached to these cases, the willingness to do so will facilitate the search for the most likely solutions.

As said by President Kagame, in an unprecedented system mistakes are very likely but where they do manifest themselves new searches for improvement begin. Restricting testifying about gender violence in the public system of the *gacaca* courts came as a result of the complaints and traumas resulting from the trial phase. It nonetheless also led to some unfortunate results because the method adopted limited the choice for women. But it can also be argued that it minimised the experiences and suffering of women and girls since they were not to be recorded in similar ways to establish a clear record.

Critically speaking, this approach denied women a system that allows for a choice to speak or not. It reaffirmed to the women in question that they should not speak in public about such heinous crimes that were committed against them, yet the abuses also mainly took place in public. As Minnow suggests,[30] many women were to be frustrated into silence or speaking outside the system of justice. Women have since spoken to different human rights reporters thus challenging the common rhetoric that women do not speak about their experiences. What is right is that victims deserve a gender-sensitive system through which they can express their pain and receive justice. I cannot afford to suggest one effective system but rather

30 Minnow, M., *Between Vegeance and Forgiveness: Facing History After Genocide and Mass Violence* (Boston: Beacon Press, 1998) at 25.

commend the flexibility of ameliorating or even creating new systems for the sake of delivering justice for these victims.

Note also that the above restriction challenged the reason for the being and purpose of the *gacaca* courts for the survivors and victims of sexual violence during the genocide. The *gacaca* courts have, as one of their objectives, to establish a historical record of the Tutsi genocide. A failure to try sexual violence and to gather information on the said acts would lead to leaving out the enormous suffering and cruelty that female Tutsi suffered in the period of the genocide. Ustinia Dolgopol warns against such a failure where she argues that "if the experiences of women are to have an impact on our understanding of our world and our history, it is important that events particular to women be chronicled."[31]

7.3 *GACACA* TRIALS

Previous discussions revealed that the *gacaca* courts were created in 2001 with the purposes already discussed in this work. Even though many other laws have undergone a number of amendments to cope with and address emerging issues in the country, the *gacaca* law has probably been the most amended. In their eight years of functioning the *gacaca* courts underwent at least five amendments. From a legal point of view modifying the law to such an extent can be criticized for rendering it unreliable and at times inconsistent.

Nevertheless, any critical discussion of these modifications and amendments must take into consideration the fact that the Government in creating the *gacaca* never assumed their perfection and gave the Ministry of Justice the task of monitoring their functioning and proposing improvements to the system. In all their endeavours to ensure justice for genocide and related offences, the laws remained consistent on substantive issues but often changed in terms of procedures to allow a more effective manner of delivering justice. While the outside world may have been shocked by all those amendments, anyone who participated[32] in the *gacaca* system was aware that they often had to be re-regulated to render them functional. On the eve of launching the *gacaca* courts President Kagame stated in an interview concerning the flexibility for improvement:

> *There is no system that we could put in place that is without flaws. We had to look at which system would, overall, provide us with a solution, then to keep working on the elements within the system that may be undesirable. That is*

31 *Supra* note 657 at 133.

32 The SNJG Jurists reminded that they often went back to the "garage" to search for solutions and this approach and the pilot phase approach often called for an amendment to take *gacaca* mechanism to another level or to adopt different approach.

> *why it has taken us a long time to start the trials. We had to brainstorm about this new innovation, and try to anticipate the outcomes and difficulties.*[33]

Further, he acknowledged that even after they began new challenges could emerge but ensured that they could then be addressed as they occurred:

> *As I said, it is an innovation, but broadly, we think it will work. We had to devise a solution to this problem. But in solving this problem, other problems may arise. We shall deal with them and devise solutions as we go along. But we are already putting in place measures to deal with the problems.*[34]

Even though criticising this approach could be apt in many respects, the flexibility therein and the numerous cases, including gender violence, should be hailed for finally allowing female victims to have access to what is believed to be the most effective form of justice in addressing the Tutsi genocide in Rwanda. Initially the *gacaca* system was not at all conscious of the manner in which it would provide justice to the victims of gender crimes. It has already been illustrated in the previous section that its first phases merely involved exposing victims to laws obliging them to testify or allowing perpetrators to plead guilty and confess without any protective measures.

A modification of the law in 2004 and the establishment of certain regulations allowed gender violence victims to be protected from the public nature of the courts but also removed their cases from the general process thus risking the absence of any record of these cases in the record established by the *gacaca* courts. Eventually, female victims through amendment 13/2008 have had a more mainstreaming approach and one that does not only protect them but also allows them to have justice through a trial before the same courts. Therefore, even at a later stage when some of the initially surviving victims have died due to AIDS and other violence-related diseases, at least the victims have been allowed to have restorative justice just like other victims and in a manner that allows them to take an active part in the decision as to whether or not to participate.

In the next discussion I will analyse the discussions leading to the decision to include gender violence within the competence of the *gacaca* jurisdictions, the process of the draft amendment and the parliamentary debates on that amendment. After the promulgation of the Law the *Inyangamugayo* were faced with new elements which were not similar to their previous competences. As was often done whenever an amendment or a change to the law occurred the *Inyangamugayo* and the general public would be made aware of the necessary changes. The *Inyangamugayo* could specifically receive training in the new procedures and elements in the law, often conducted by lawyers from the national service in charge of *gacaca* jurisdictions.

33 See an interview with President Paul Kagame on the eve of launching the *gacaca* courts at: www.gov.rw/government/president/interviews/2001/gacaca.html, last accessed 10 April 2009.

34 *Ibid*.

After amendment 13/2008 the Inyanagamugayo received such general training, but for the first time they also received specialized training from mainly two experts at different locations.

7.3.1 WHY THE *GACACA* COURTS BECAME COMPETENT TO TRY RAPE AND SEXUAL TORTURE

The *gacaca* courts in most areas had been finalized or were in the processes of being finalized towards the end of 2007. The year 2007 was actually the time of the intended closure of the *gacaca* courts that had the competence to hear category 2 and 3 cases. With all the challenges they had gone through often requiring amendments to the law governing them so that they could address the new challenges, their closure meant a challenge, especially with regard to the caseload in category one that remained large. The Government, through the Ministry of Justice, requested Parliament to amend the law in order to extend the competence of the *gacaca* courts so as to be able to address most of the category one offences.

The Minister of Justice highlighted that over 7,000 category one cases were still at the ordinary courts after having forwarded most 1st category cases to the 2nd category, hence to the *gacaca* courts. He argued that if these cases remained within the competence of the ordinary courts, the justice process would be further delayed. Further, the government held that if the *gacaca* courts were to be closed without dealing with this caseload, they would have failed in their mandate to expedite justice relating to genocide. In his appeal to Parliament the Minister emphasized the need to do justice with a reasonable delay in order to afford justice to both the victims and the perpetrators.

In answering the question of why the *gacaca* courts were accorded competence to try the most serious genocide cases towards the end of their mandate, an interesting discussion arises as to whether this choice was based on the need to extend justice to the victims of gender crimes with a specific womens' rights focus or whether it was a way of embarking on the general road of addressing genocide and crimes against humanity in Rwanda. Feminists have historically argued along two diverging lines. One group argue that women's human rights should be addressed specifically while others indicate that they should be mainstreamed and not ignored but addressed as part of the entire crime in question.

This research argues that for the gender crimes committed during the war and genocide in Rwanda the context of the crimes is so relevant and acts against the female Tutsi deserve to be addressed not generally as genocide, but rather as a more intense form thereof. As stated earlier any justice for genocide would only be justice if it also addresses gender crimes. Schabas argues that "Rwanda's approach to transitional justice is one of the most principled manifestations of the commitment

of international human rights law and policy."[35] As discussed, the Government of Rwanda strongly believed that the *gacaca* system was the most effective response. For female victims of genocidal sexual violence the justice commitment must also reflect their commitments in order to be assured of justice that facilitates their healing discovery of the truth and reconciliation. Gender violence victims, like other victims, need their story to be heard and understood, but they also long for the establishment of the accountability of their abusers.

The commitment to address gender crimes as part of the most serious offences during the genocide has been discussed in detail revealing that the initial government proposal never regarded them as such but later realized the graveness of the offences by promulgating a law placing the initial category three offence in category one. This decision, more than anything else, is responsible for allowing the *gacaca* courts to have the necessary competence to adjudicate this matter. If the objectives of the *gacaca* courts were to be measured based on their importance, the need to solve the real problem of numerous suspects would be the most important.

In their functioning the *gacaca* courts always wished to reduce the large number of suspects initially in detention but also to render accountable those who had committed the said crimes and lived within the community. This overriding desire to close the genocide justice chapter also always influenced the directions that the *gacaca* courts took. For example, amendments were made to reduce the number of *Inyangamugayo* to make them more expeditious and manageable, a recategorization was made in order to reduce the large number of category one cases in which leaders at the cell and sector levels were removed from category one especially those who had been placed there based on their leadership role, and the *gacaca* benches were increased in order to achieve the targeted end date.

Nevertheless, cases still increased as more information came from the *gacaca* courts and as more people participated. The ordinary courts had not improved in doing justice in the remaining first category cases when combined with their day to day duties of dispensing justice in general. Their incapacity to deal with the genocide, as revealed in the 1990s, still remained very real as the cases they still had to try after the *gacaca* courts were given the competence to hear category one cases amounted to at least 7,000 as elaborated by the Minister of Justice while presenting the draft bill to Parliament. Logically speaking, specialized chambers had to be able afford justice for the caseload as the ordinary courts certainly could not attain this given the wide range of their activities in their ordinary functioning. The Minister argued before Parliament that leaving all the category one offences, over 90% of which were gender violence-related cases, would further the desired need to finish the justice process and to look forward to national development. The *gacaca* courts were created as a means to end impunity and to dispense justice in a reasonable

35 Schabas, A.W. (2008), Post-Genocide Justice in Rwanda: A spectrum of Options, in *After Genocide; Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond*, Clark, P. and Kaufman, D.Z. (eds.), (London: Hurst and Company) at 207.

time in order "to break away from the problems of the past, from the Genocide, and start the process of rebuilding the country," as elaborated by the President of the Republic of Rwanda.

Being still committed to dispensing justice in all genocide-related cases, the Government was still concerned about the large number of category one cases illustrated above. Unlike in other cases where acts initially found in category one were moved into category two, gender crimes remained in this category with the planners and instigators of the genocide. Thus the government retained the communicative value of sexual violence as an extremely serious offence equivalent to planning and instigating the genocide and opted instead to empower the *gacaca* courts with the competence to try some category one offences including gender offences.

It should also be mentioned that keeping gender violence in category one may have served the negative consequence of delaying justice for the victims and perpetrators but the intention was to allow a more effective trial that apparently the *gacaca* courts were initially not believed to to be able to offer. According to the Government's position, the *gacaca* courts could not try category one offences in which a conviction could lead to the death penalty. Thus, since the death penalty no longer existed under Rwandan law and since the *Inyangamugayo* were familiar with other sentencing rules which were applicable, the Minister argued that there was no serious reason why these courts could not try category one offences.

In trying to persuade Parliament to accept the draft amendment, the Minister reiterated the desire to do justice for the victims with a reasonable delay, but without unnecessary further delays. He reasoned that justice should be done for the victims while they are still alive and that it is equally true that justice also required this to be done while the perpetrators are still alive in order to be rendered accountable. Although not echoed in the words of the Minister it can be interpreted he implied that a number of victims and perpetrators of gender violence have died due to abuse-related infections including HIV/AIDS.[36] In this case justice needed to be seen by both the victims and perpetrators with no more delays. The Minister clearly elaborated that the intention of amendment 13/2008 was to expedite justice and to dispense justice to all those charged with genocide and genocide-related offences.

Thus, in answering the question posed at the start, it must be noted that even though the justice system was not specifically intended for female victims only, it should be commended for its holistic approach in putting an end to trying to attribute accountability for genocide without distinction. At least the Government expressed the view that gender violence is equally important and proved that a justice system that rejects this has failed in its endeavours. If justice for the victims of gender violence had not been considered as equally important, amendment

36 Repubulika y'u Rwanda, Inyandiko-Mvugo No. 23/CD./PV/MG./08, Inteko rusange yo ku wa 03 mata 2008 at 6.

13/2008 would not even have been proposed because out of the just over 7,000 first-category cases at least 6,000 included gender violence. Hence, however late the amendment came, the Government of Rwanda reaffirmed its most recent commitment to women's human rights as human rights and the desire to remain accountable for them.

7.3.2 INTRODUCTION TO AMENDMENT 13/2008

With the introduction of the *gacaca* courts in Rwanda the Government and Parliament expressed that since the offences had been committed publicly an equally public redress was appropriate as expressed by the preamble to the 2004 *gacaca* law partly stating that "considering that such crimes were publicly committed in the eyes of the population, which thus must recount the facts, disclose the truth and participate in prosecuting and trying the alleged perpetrators."[37]

In the course of the operation of the *gacaca* courts, it was realized that the culture of Rwandans and the nature of the gender crimes committed in the genocide, coupled with the shame and stigma attached to the offences, would not allow female victims and generally all victims of gender crimes to come forward. Minnow,[38] in responding to societal violence, observes that different cultures and circumstances dictate the most appropriate response. This argument can be extended to state that based on the nature of the offence, gender stereotypes and the cultural context of a society, justice approaches can differ. The *gacaca* system for gender crimes confirms this argument, although with similar objectives the most appropriate response to gender violence proved the need to rethink existing structures and procedures.

Sullivan argues[39] that restorative justice, of which the *gacaca* system is a part, should provide a more humane, participatory, and inclusive need, and an effective response to state-defined crimes. He further argues that a new way of doing justice does not only need to address the nature of the crime and how to respond to its effects but also how to reorganise the social life of the affected community more justly. Justice is often an abstract concept which only makes sense when those that it serves feel it and apply it. In its pursuit of reorganizing a broken society restorative justice should address both individual and collective needs in order to minimize the prevalence of harm related to the crime addressed.

Thus, the harm that female victims suffered during the genocide deserved *gacaca* redress if the courts were to be truly a restorative justice system for Rwanda. Its purpose of doing justice to all to enhance reconciliation would be measured on the basis of what it could afford for all those affected by the genocide without exclusion, so it was then required to equally address the experiences of women.

37 *Supra* note 235 at Preamble.
38 *Supra* note 678.
39 See generally; Sullivan, D. and Tiffit, L. (eds.) (2006), *Handbook of restorative Justice: A global Perspective* (NewYork: Routledge).

It can be argued that 'equally' in this case does not mean 'similarly'. The argument raised here is that when dealing with the death of family members, torture that is not sexualized or gendered and the destruction of property are also unbearable for the victims and the community and can be addressed publicly with minimum consequences as was the case in the *gacaca* courts for category two and three offences, then dealing with situations that do not welcome similar structures does not call off justice but requires a more detailed and specific approach that will not deny justice. Opting for no justice is not an option but an injustice as Minnow argues, "victims will never forget what they have been through and denying them retribution will only build hatred and resentment."[40]

The Government's request to Parliament to discuss the relevance of the amendment was accepted and Parliament embarked on discussing the amendments therein. Consequently, amendment 13/2008 was promulgated in May 2008. This amendment came to address specifically category one offences as justice was otherwise proving to be too slow as far as these offences were concerned. The amendment concerned the following three major issues. Parliament was asked to legislate on the fate of category one cases still at the *gacaca* courts because they had not yet been forwarded to the ordinary courts; these were mainly new cases which emerged during the information-gathering phase. Parliament was also supposed to legislate on cases that had remained in the ordinary courts since their instigation at the time of the specialised chambers. Victims and perpetrators had started to plead for justice – offenders mostly remained in detention without trial and victims eagerly wanted to see those accountable for their violation being brought to justice. The amendment would also regulate on matters related to cases being transferred to Rwanda through extradition procedures and /or ICTR transfers; issues relating to applications for review as an avenue for redress especially for cases decided in ordinary cases; new cases emerging after the closure of the *gacaca* courts; and the procedures to be regulated for those cases to be tried by the *gacaca* courts through the desired extension. The following discussion will look at matters relating to gender violence in the parliamentary debates on amendment 13/2008.

7.3.3 PARLIAMENTARY DISCUSSIONS ON AMENDMENT 13/2008

With regard to the subject of this research Parliament was asked to have cases of gender violence tried in camera, to specifically designate *Inyangamugayo* with a mostly irreproachable character to try these cases and, finally, to establish specific forms of punishment in case of a breach of confidentiality for those trying these in camera trials. The Minister argued that whether or not these cases remained within the competence of the ordinary courts did not seem important for the victims' gender crimes as these victims desperately wanted justice instead. These victims wanted to be assured that measures would be taken to facilitate a smooth and less traumatising experience.

40 *Supra* note 678.

The Chamber of Deputies in its legislative capacity discusses bills often initiated by the Government, although Members of Parliament may also initiate bills. The bill received is then distributed among the Members of Parliament and discussed in a plenary session on matters relating to the appropriateness of the draft bill or amendment. This process verifies the adequacy of the bill and the drafting authority – in this case the government – presents the purpose of the desired law and explains the issues to be regulated.

The discussions by the Minister of Justice in previous pages reflect the draft bill as the government wished and his arguments for Parliament to accept its appropriateness. At this phase Members of Parliament can do the following: express their support for the draft bill; demonstrate its inadequacy; ask questions; or propose alternative issues to be included. If the appropriateness of the bill is accepted then the draft bill, together with a copy of the report of the session accepting its appropriateness, are submitted to one of the parliamentary committees for a more in-depth analysis and examination. Although the committee members are responsible for the analysis of and any amendments to the initial bill, any other Member of Parliament may propose amendments or include new articles in the bill. The bill is then presented to the plenary session for voting which is done on an article by article basis and later the entire legislation is voted upon.

Since the government proposal has already received sufficient analysis under this section, it is important to now analyse the reactions from Members of Parliament. As discussed elsewhere in this work, the role of Parliament cannot be ignored since it was the first to shape the seriousness of sexual torture and later rape as category one offences. Thus the discussion that follows explores the arguments and proposals raised by Members of Parliament, first at the plenary session on the appropriateness of the law, then during the committee's discussions and the voting phase.

This section is going to look at the discussions raised by the plenary session in relation to amendment 13/2008 and the government's response. Note that this draft bill was considered to be appropriate by Members of Parliament and was later voted into law. Only discussions which are relevant to the subject of this research will be subject to analysis.

Most Members of Parliament noted that gender violence committed during the genocide was a weapon of genocide and acts amounting to crimes against humanity. They also expressed the opinion that rape predominantly targeted women although some men were also targeted. They argued that rape and sexual torture kills the most intimate part or privacy of a person, it destroys the victim's identity turning them into a thing even though not physically dead. Thus, they mostly agreed that rape and sexual torture were serious acts of genocide deserving punishment. Hence, they expressed their approval of and supported the government's proposal in this regard. Some were nonetheless sceptical about the best way to do justice

for the victims, wondering whether it would achieve justice and even questioning whether the proposed form was the best.

Members of Parliament taking the floor after the government's appeal for a vote of appropriateness took two different directions. Most parliamentarians expressed total support and argued that gender crimes should be tried by the *gacaca* courts, although only by benches specifically designed to deal with these specific cases. For example, Munyandekwe Emmanuael supported the need for *Inyangamugayo* charged with trying only gender violence cases but stressed the need to have them trained in the specific aspects of these offences. He argued that the *gacaca* courts were a forum to speak about gender violence in the genocide and that discussing the matter was indispensable.[41] It should be remembered that when the *gacaca* courts were established the government believed that through speaking about their experiences the victims of the genocide would receive a kind of healing which would be important for their continued existence.

Most profound and interesting to study were the remarks made by Kalisa Evariste,[42] supported by other members speaking after him. Some feminists argue that issues particular to women are best understood by women and often raised by female victims or their female counterparts. Although this might be true in most circumstances, judging men as being totally indifferent concerning such matters would be too general and would not reflect reality. Both male and female Members of Parliament seemingly agreed on the seriousness of the offences committed predominantly against female victims. While I will discuss the comments of this Member of Parliament from both the positive and negative angle, I understand that from the context his remarks were equally made from a protective angle and even out of a sense of frustration as to what one can just afford to do.

He began his intervention with a biblical saying: "Do not unto others what you would not have them do unto you (Analects 15:23);"[43] he further lamented that those "raped during the genocide and whose violation was an act of genocide are our sisters, our wives, our mothers, and to others our children".[44] Further, he appealed to his colleagues by questioning if they would wish to see their children, wives, and mothers face such public trials? Further, he stated that seeing a mother or an old lady face the *gacaca* court is instead mocking them. He questioned the importance of justice for the victims condemned to die due to the rapes and sexual torture they suffered wondering, further, if this *gacaca* justice was appropriate for these victims. He lamented that the *gacaca* courts were incapable of healing the incurable diseases that victims suffer and which had originated from their abuse. Thus he strongly argued for keeping gender violence offences within the

41 Repubulika y'u Rwanda, Inyandiko-Mvugo No. 23/CD/PV/MG./08, Inteko rusange yo kuwa 03 Mata 2008 at 6.

42 Republic y'u Rwanda, Inyandiko Mvugo No. 11/CD/PV/MG/2008, Inteko rusange yo kuwa 21 Gasyantare 2008 at 19.

43 *Ibid.*

44 *Ibid* at 20.

jurisdiction of the ordinary courts because then the public prosecution service would directly confront the accused and this would not allow any other contact between the victim and the alleged perpetrator.

The above observations are important for this work because of two major reasons, first they were initiated by the Chairperson of the Parliamentary Committee on Unity, Human Rights and the Fight against Genocide, a commission that was yet to examine the draft amending bill in depth and because of their impact as they expressed how serious the offence is in a manner that seems protective of the victim but in the end insensitive to their need to see justice being done. For the purpose of putting this discussion into context, it is important to mention the importance of this parliamentary committee for female victims of genocidal gender violence.

The Chamber of Deputies of the Rwandan Parliament has twelve working committees that deal with a great amount of the Chamber of Deputies' business to be adopted in Plenary Sessions. These committees have a more detailed understanding of the laws and initially draft laws within their mandate. All of the twelve committees deal in a very specialized manner with specific national issues. In this regard, the Committee on Unity, Human Rights and the fight against Genocide is the most specialized in matters dealing with justice in the aftermath of the genocide.

Other than just analyzing draft bills such as the ones in question in depth, the committee, or at least its members, have the powers to introduce and initiate legislation dealing with unity and reconciliation, any form of justice including those employed in the search for solutions for the effects of genocide.

With regards to *gacaca* for victims of genocidal gender and sexual violence, some members of parliament preferred ordinary courts arguing that the public nature of *gacaca* courts would jeopardise victims. While others were confident that *gacaca* had matured to manage such serious cases. These Members of Parliament expressed the view that the draft amending bill was appropriate even for the remaining cases of which the ordinary courts were considered incapable of handling without undue delay, yet on the other hand they seem to argue that 90% of those cases that include gender violence can remain in the ordinary courts.

Members of the Chamber of Deputies with the above view further contradict themselves when they seem to doubt the purpose of the *gacaca* justice system for the victims of genocidal gender violence. It is probably an unconscious expression of discrimination in the right to have access to justice. Initially Parliament had strongly expressed the need for justice in the reconstruction process of Rwanda. When the 1996 law was promulgated such a commitment was expressed and re-emphasized in all subsequent amendments. As already discussed, none of these amendments considered the specific nature of the victims of gender offences given the culture and social context of Rwandan society.

The Government and Parliament have often agreed on the desire to see justice done in cases of genocide but mostly to have it with reasonable delays, and for the above proponents their concern is indeed a form of protection but the most appropriate question is for who and against whom? For the victims of gender and sexual violence, choosing a system that had been seriously labelled unsuccessful would have been a set-back to full justice in terms of genocide. Victims of rape and sexual torture and the survivors thereof equally needed expeditious justice for reconciliation and the revelation of the truth about their suffering. If the *gacaca* system is indeed the most appropriate structure, the option of not making it accessible to victims of gender violence would have manifested the lack of any willingness to ensure justice for the remaining victims of genocidal gender violence, some of whom are dying.

The option suggested above was another expression of denying female victims of gender violence access to justice. Victims are often denied such access by those legislating who do not at times recognize their victimization or who recognize it but fail to establish gendered systems that would facilitate these victims to come forward. In other circumstances the community or other actors choose to silence the victims especially because of the socially constructed beliefs on gender violence offences. Often we hear actors recognize the seriousness of gender violence crime, especially that affiliated with genocide and wars, but without establishing serious mechanisms of accountability.

If the Government had not persisted together with other Members of Parliament who argued that the *gacaca* courts must also do justice for the victims of gender violence but in a manner so specific and sensitive of the victims' pain and courage, then the Parliamentary Committee would probably have been influenced by its chairperson and would not have made *gacaca* justice accessible to the victims of gender violence although it has the responsibility to follow up and to search for a solution to the effects of genocide and to combat discrimination in speeches, writings, actions and in any other forms.

The Parliamentary Committee had failed on an earlier occasion to evaluate whether Rwandan laws were doing equal justice to all victims of genocide during the years of its existence prior to the discussion of amendment 13/2008. Nonetheless, the Chairman of the committee and other members agreed on the government proposal to have gender violence tried before the modified *gacaca* jurisdictions.[45]

On the matter of who would judge gender violence cases before the *gacaca* courts, the Members of Parliament questioned the Government's proposal to elect from the *Inyangamugayo* those deemed to have the greater integrity. The argument raised was that such language risked qualifying the *Inyangamugayo* in different classes which would have a negative impact on the value of the cases that had been tried by the other *Inyangamugayo* who would be considered to have less

45 *Ibid* see also at www.inteko.gov.rw.

integrity if compared to the ones to later try gender violence cases. In this regard the Government stated that all acting *Inyangamugayo* have what it takes to act as judges since those who failed in this quality were dismissed and replaced but also stated that these elections amongst the *Inyangamugayo* themselves concerned the peer evaluation of persons who have distinguished themselves amongst their colleagues by their level of secrecy and their capacity to evaluate such serious matters and had proved their integrity in their functioning in *gacaca* jurisdictions.

Interesting in this debate is that some Members of Parliament went as far as to suggest a *gacaca* trial composed of only a single judge who is also not known to the offender. Interesting is that on this matter even the Minister of Justice responded thereto positively arguing that if Parliament deems it feasible it would be an appropriate option. Understandably, Parliament had successfully legislated in 2004 that a victim could report his or her case to one person. The Minister nonetheless expressed the view that a single judge system had not yet been introduced in Rwanda and had often been received with discomfort. This observation by Parliament did not necessarily match the need for victims to see justice being done so it is interesting to hear Members of Parliament in a country where victims actually exist discussing, as if these victims could not be reached, the manner in which justice could be done for them with less trauma attached.

Other than the single *Inyangamugayo* suggestion, it was also suggested that victims should be given the right to decide on who will try them or not, but this suggestion was criticised as demeaning the course of justice that the *gacaca* system was set to pursue. It should be remembered that the desire to have a gender-sensitive system was not going to overshadow the purpose of the *gacaca* courts, i.e. dispensing justice and not vengeance, facilitating reconciliation and revealing the truth.[46]

The single judge proposal seemingly failed to put into context the fact that the *gacaca* courts reach their decisions based on especially oral evidence and the presence of more than one member on the bench help the judges to become familiar with the events of the genocide and to decide based on the understandings that they can share.

Parliamentarians emphasised the need to punish any breach of confidentiality by the *Inyangamugayo* trying gender violence cases. The Government proposed custodial sanctions ranging from three months to six months, a penalty similar to that for refusing to testify and intimidation against the *Inyangamugayo* and one the Government argued was seen as the standard punishment which is applicable in other countries for crimes of breach of confidentiality.[47]

Parliamentarians considered that this breach was extremely grave and argued that the penalties suggested are not in line with the gravity of the offence referred

46 *Supra* note 689 at 4.
47 *Ibid* at 5.

to. It was argued that the nature of the offence is too sensitive to be punished by three to six months imprisonment in the case of a breach of an obligation to remain confidential. The sentences were seen as being incapable of reflecting the importance that the obligation of confidentiality entails. Later, the members of the commission who examined the draft bill and the report of the plenary session discussions determined that adequate penalties ranged from one year to three years,[48] a proposal that was subsequently accepted and voted into law.

On the issue of persons permitted to be present during the trials of gender violence in camera, Members of Parliament requested that the draft should consider whether the victim may choose someone to participate in their trials. It was explained that some victims do not have the courage to speak because of what their violation represents. In this regard it was argued that victims need to be prepared in order to assess their willingness to confront the pain of speaking out. They also wanted to see victims being given some form of assistance during the trial, ranging from psychological, legal or any other assistance that would prevent any further pain since the victims have already suffered enough pain. Although some victims had received some counselling from trauma counsellors from especially genocide survivors' groups, they were not focused on the decision of appearing before the court to face and accuse their aggressors. Thus, Parliament supported the Government's proposal that the victim should be accompanied although this finally did not seem to be specific to the victim, as the discussion on the training will reveal.

In analysing the parliamentary discussions, it becomes evident that sexual violence is hard to deal with at all levels. Aware of the need for justice in circumstances of the genocide, Parliament was being invited by some of its members not to rethink about creating the most appropriate mechanism to allow access to justice for these victims but to keep them in a system they had expressed was insufficient seven years earlier by voting on the first *gacaca* law.

What most of these discussions reflect is that speaking about rape and sexual violence and addressing it not only affects those who suffered from the offence but also those who hear of it. Victims are often stunned into silence by the fear and stigma attached to the crimes which later causes decision makers not to legislate, prosecute or interpret existing legal norms to also reflect women's suffering. Accepting to hear of the offence is accepting to face an unfathomable fact. As already discussed and as will be detailed later, the weight we put on sexual violence can also be threatening to the victims because they would not like to be viewed as having suffered and even survived the unbearable, unbelievable and impossible phenomenon. In other words it reaffirms to them that they have been rendered abnormal by their suffering and pain.

48 *Ibid* at 6.

7.3.4 ORGANIC LAW NO. 13/2008 AND REGULATION NO. 16/2008

On 19 May 2008 the Organic Law that mandates the *gacaca* courts to adjudicate matters of rape and sexual torture was promulgated. Organic Law No. 13/2008 is an achievement to be celebrated because it not only introduced new dimensions in trying genocidal sexual violence uncommon to most other systems established to deal with mass violence crimes but is also an expression that a legal system that chooses to be victim-oriented is a great commitment towards accessing justice for the victims of gender violence but also for the suspects especially those in detention whose course of justice remains uncertain due to the slowness of the ordinary courts. This amendment also reflects that transitional justice can be designed in a manner that is sensitive to the experiences of victims of gender violence.

In the interest of effectively trying rape and sexual torture, the Executive Secretary of the National Service in Charge of Gacaca Jurisdictions established Regulation No. 16/2008 of 5 June 2008 relating to cases of those accused of acts of genocide and crimes against humanity in the first category.[49]

Article 6 of Organic Law No. 13/2008 permitted a victim who wished to lodge an accusation to make it before the competent *gacaca* court of the sector, to a Judicial Police Officer or to the Public Prosecution Service. The last two would in turn submit the claim to the competent *gacaca* court.[50] The complaint must always be lodged secretly. The same applies for those lodging a complaint on behalf of a deceased victim or one who has been incapacitated either because of sickness or any other reason.[51] The law incorporated the concern relating to a public confession of the crimes of rape and sexual torture. It also prohibited anyone from initiating proceedings related to this crime in public. Hence, all judicial proceedings were held in camera. Apart from the perpetrator, the victim and the *Inyangamugayo* some other officials were permitted to attend the trials in camera on the basis of the contribution of their profession in the smooth running of the trial. These included *gacaca* court supervisors and coordinators, trauma counsellors and security officers.[52]

Regulation No. 16/2008 provided additional information on the rules to be respected in trying cases involving rape and sexual torture before the *gacaca* courts. Article 4 restated the importance of in camera trials but reiterated the fact that the announcement of the judgment must be made in public. Furthermore, it explained that in cases where allegations of rape or sexual torture and other genocide-related

49 (Instructions of the Executive Secretary of SNJG) Urwego Rw'Igihugu Rushinzwe Inkiko Gacaca; Amabwiriza No. 16/2008 yop ku wa 05/06/2008 Y'Umunyamabanga Nshingwabikorwa W'Urwego Rw'Igihugi Rushinzwe Inkiko Gacaca Arebana N'Ibindi Byaha Byibasiye Inyokmuntu byo mu Rwego rwa Mbere, Imanza za Jenoside Zizava mu Nkiko Zisanzwe n'iza Gisirikare no Gusuburishamo Imanza mu Nkiko Gacaca.

50 *Supra* note 645 at Article 6 the second paragraph.

51 *Ibid*.

52 *Ibid* at Article 6.

criminal acts are made, the *gacaca* courts competent to try cases of rape and sexual torture will jointly also try the other accusations.[53]

The regulations also established penalties for those participating in the in camera trials who breach the obligation of secrecy concerning the details revealed during the trial. The penalties ranged from one to three years imprisonment. Cases involving this specific offence would also be conducted in secrecy.[54] With regard to witnesses, the regulation established that witnesses would only be allowed to remain in court for a period not exceeding that required for them to testify.[55]

The Organic Law and Regulation established an environment that allowed access to justice but also ensured the protection of victims from further trauma. They however excluded the public from being able to feel the animosity and extent of genocidal rape and sexual violence in Rwanda. This has also made the details of these cases less accessible for public consumption. More information will be documented once the documentation centre has become fully functional and more widely accessible.

7.3.5 THE *GACACA* COURTS' ADJUDICATION OF RAPE AND SEXUAL TRIALS

From June 2008 until their closure, the *gacaca* courts dealt with the backlog of cases including mostly rape and sexual violence. The extent to which some victims of gender and sexual violence chose whether or not to access the *gacaca* courts depended on many factors. One of the victims who accused her perpetrators was Witness TA who also participated in the Butare case against Nyiramasuhuko and her son. Witness TA had been raped on different occasions including one instance when nine men had raped her.[56] Some of her rapists were in Rwanda and she managed to accuse them before the *gacaca* courts. One man was convicted and punished with a life sentence by the *gacaca* court in her home area, while another two escaped to neighbouring countries.

In another case in Rubavu a man was convicted of forcing a Tutsi man to place the victim's penis in a hole full of sand which seriouslyy damaged the victim's private parts. The *gacaca* sector court sentenced the perpetrator to life imprisonment as well.

In its hearing that took place between 6 and 8 October 2009, the *gacaca* court of Gatizo sector convicted Benoit Uwishuli and Paulin Havugimana of rape and they were sentenced to life imprisonment in accordance with Articles 17, 51 and 72 of Organic Law No. 13/2008. Uwishuli and Havugimana were accused of raping

53 *Supra* note 697 at Articles 4-5.
54 *Ibid* Article 7.
55 *Ibid* at Article 8.
56 Interview with Witness TA, conducted on 10 June 2013.

Alphonsine and her sisters who were thereafter forced to exhibit their naked bodies as they were led to Nyabarongo River where they were subsequently drowned.[57]

Some victims did not personally know their abusers, others feared the stigma and orchestration that would result, while others had converted to some forms of religious practices believing that since they had forgiven their abusers and were at peace with themselves, it was not necessary to make any accusations. Some of the victims mentioned in Chapters 3 and 5 were not able to have their cases heard by the *gacaca* courts because they did not know their abusers or did not know their whereabouts.

The male victim who was raped by women wishes he had known his abusers so that he could have accused them in order to make them accountable for the pain they had caused him. Some women also expressed that their abusers were soldiers who were unknown to them including French troops in one of the cases discussed. The number of victims who were able to access the *gacaca* justice system is much smaller compared to the figures or estimates of the number of victims raped during the genocide.

An analysis of the *gacaca* court jurisprudence on rape and sexual torture reveals that it was not easy to find proof in some cases while in others, because of the public nature of the abuses, evidence was more accessible. Another important observation is that there was hardly any mention of sexual torture as most accusations were often qualified as rape. Apparently every sexual act including enforced nudity or the insertion of objects was considered as rape.

The trials had an impact on the victims who testified. TA expresses that she has been able to expose, shame and hold her abusers accountable. She states that the conviction of her abusers and their sentencing ensures her safety while she remains worried about the danger she might face from her abusers who are still at large both within and outside Rwanda. She and another victim who testified recalls the chilling effect of facing their abusers once again and the trauma that it caused. Nevertheless, this relieved them of the shame and burden they had carried from their rape and sexual torture experience. The unburdening effect of participating in the *gacaca* courts was also revealed to De Brouwer and Ka Hon Chu by victims who had participated in the *gacaca* process.[58]

The *gacaca* courts were closed on 18 June 2012 while all trials had ended over 18 months earlier, except for a few cases being subject to a review. To date, there are victims who were not able to access the *gacaca* courts and wish that they could

57 Case accessed from the *gacaca* files at the Gacaca documentation centre, Muhima, Kigali on 15 August 2010.

58 De Brouwer, A-M. and Ka Hon Chu, S., "Gacaca Courts in Rwanda: 18 Years after the Genocide, is there Justice and Reconciliation for Survivors of Sexual Violence?" Available on The Men Who Killed Me website at: htt://www.menwhokilledme.com/news/reconnecting-wit-the-survivors-featured-in-%e2%80%9cthe-men-who-killed-me%e2%80%9d, last accessed on April 2012.

resort to a similar framework because they reject the ordinary judicial system to where all genocide-related cases are referred to as being too legalistic and far removed from them.[59]

7.3.6 CONCLUSION

Scholars agree that while the *gacaca* courts were greeted with scepticism in the beginning, they were eventually able to achieve their central objectives of exposing the genocide, speeding up the genocide caseload, ending the culture of impunity by holding the perpetrators accountable and fostering reconciliation.[60]

The decision to give the *gacaca* courts the competence to try acts of rape and sexual violence was prompted, on the one hand, by a political necessity in which the Government was faced with a heavy caseload, the majority of which included rape and sexual violence. This called for the Government to revise its earlier policy and to include within the competence of the *gacaca* courts some category one offences including rape and sexual torture. On the other hand, it was suggested that some women victims had demanded that the *gacaca* courts be given the mandate to allow them to have access to justice in good time as other victims of genocidal violence were able to do.

The *gacaca* courts were able to seriously punish acts of rape and sexual torture suffered by some Tutsi women, men and children. Even though the number of cases involving rape and sexual torture tried by the *gacaca* courts has not yet been revealed, it is certainly in the thousands, a number that none of the other post-genocide judicial approaches were able to deal with.

The *gacaca* courts were not without their flaws: some perpetrators were acquitted after subjecting the victim to the trauma or reliving their genocidal experiences of rape and sexual torture. Another criticism was that the severity of the punishment for offenders in the first category discouraged many of the perpetrators from confessing, pleading guilty and asking for forgiveness.[61]

It can therefore be concluded that the belated *gacaca* trials for rape and sexual torture illustrated another initiative to try and develop a judicial response that not only safeguards the basic principles of justice but also one that was pragmatically feasible for its efforts to balance the extraordinary complex realities of rape and

59 This was revealed by three victims with whom I discussed the issue of post-Gacaca justice in December 2012 in Kigali City.

60 Mukwiza, N.F. and Muleefu, A., Revisiting the Legal, Socio-Political Foundations and (Western) Criticisms of Gacaca Courts in Bennett, T. and others (eds.), *African Perspectives on Tradition and Justice* (Intersentia, 2012) 149-173. See also Haveman, R. and Muleefu, A. (2011), Gacaca and Fair Trial, in: Rothe, D. *et al* (eds.), *Crimes of the State (*Rutgers: University Press, 2011).

61 Supra note 706 at 7.

sexual violence and the classical standards of justice as correctly remarked by Daly.[62]

62 Daly, E. (2002), "Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda" *International Law and Politics* 34, 355-396, at 367.

8 SUMMARY AND RECOMMENDATIONS

8.1 SUMMARY

This study has set out to investigate the legacy of post-genocide judicial institutions mandated to adjudicate cases of genocide and related offences vis-à-vis genocidal gender and sexual violence. The study takes the complex genocidal experience of victims of gender and sexual violence as the background of the study. The central questions were: How do feminist theories explain genocidal sexual violence and what is the contribution of feminist theories to the solution of the problem? And how has post-genocide justice acknowledged the experiences of victims' genocidal sexual violence? Genocidal gender and sexual violence in this study refers to all violence of a gendered or sexual nature committed as a means to enhance the genocide against the Tutsi.

Chapters 1 and 2 introduced the study and established its contextual and theoretical frameworks. In Chapter 3 I have tried to further explain the complex reality of genocidal gender and sexual violence by sharing some of the experiences of the victims, and the complexities attached to the limits in explaining, understanding and addressing them. Chapter 4 examined how feminist theories explained gender and sexual violence and genocidal sexual violence in particular. This chapter concludes by observing the limits of feminist theories due to a lack of theorising on genocidal gender and sexual violence perpetrated against Tutsi men and the criminal agency of Hutu women. In Chapters 5 to 7 I have studied the legacy of the ICTR and the ordinary and *gacaca* courts in addressing genocidal gender and sexual violence. The courts are each studied separately to highlight their contribution in acknowledging the experiences of genocide-based gender and sexual violence.

The study shared the experiences of victims of gender and sexual violence and concluded that the pervasive use of gender and sexual violence in Rwanda was part and parcel of the genocide against the Tutsi. The cause was the use of genocide to annihilate the Tutsi in the most possible dehumanizing manner. This, however, has not always been depicted as such on the theoretical and judicial platform. Through the eyes of the complex reality and on the basis of Rwanda's history and contextual realities this study reveals that rape and sexual violence in Rwanda formed part of the entire genocidal plan and policy.

I have examined the debates on how gender and sexual violence during conflict and genocide are qualified within feminist literature and how they are explained. There is no consensus because some argue that they are an unavoidable consequence of

wars, others suggest that they are used in order to further patriarchy hierarchies while others qualify such violence as the sexualised representation of ethnicity. While all these arguments may be correct depending on the case at hand, in this research I have argued that the Rwandan situation was genocidal and gender and sexual violence worked in furtherance of this genocide.

This research concluded with an understanding that speaking of and naming gender and sexual violence is not a simple task. The Nuremberg prosecutors have been criticized for failing to prosecute World War II sexual violence by shying away claiming that "(...) *the subject as too distasteful.*"[1] As if other crimes in its prosecutorial power were no less atrocious, the Nuremberg prosecutor managed to convince the Tribunal to permit him to "*avoid citing the atrocious details.*"[2]

The fear of confronting acts of gender and sexual violence committed during the genocide has been discussed citing some Members of the Rwandan Legislative Assembly who strongly objected to the fact that the *gacaca* courts could be vested with the authority to try rape and sexual torture without suggesting a workable alternative. A full analysis of this shying away and objection discussed in this study demonstrates the fear of hearing about or speaking of gender and sexual violence.

In line with the above, I have concluded that while justice is a legal issue some decisions related to justice including naming and outlawing a particular behaviour is provoked by other factors including culturally embedded values and perceptions. This is demonstrated by the challenge of what genocidal gender and sexual violence entails. They include rape, sexual torture, sexual mutilation, sexual slavery, forced nudity, enforced prostitution and many more crimes that still lack sufficient legal language to qualify them.

In this study I have asked the question why even when practitioners, researchers and legislators understand the context of the approach to gender and sexual crimes there is still a reluctance or an approach that avoids going into the details of these atrocious events. I have argued that from speaking with the victims the fear of hearing the worst overshadows us. Speaking about sex has never been normalized in most communities, very dear loved ones do not stand before strangers and speak about sex and neither has most legal training demystified it. Thus when confronted with the duty to prosecute or legislate such acts the fear of hearing the unheard or speaking the unspeakable emerges.

Sometimes what we qualify as the choice not to prosecute or legislate is indeed based on the socially constructed beliefs that it should not be condemned or even spoken of. The Members of Parliament who requested that it be kept in the ordinary courts can also be analyzed from the protective angle, not necessarily

1 Balthazar, S., "Gender Crimes and the International Criminal Tribunals", 10 *Gonz. J. Int'l L.* (2006), available at www.gonzagajil.org, accessed on 12 July 2008.

2 *Ibid*.

protecting the victim but rather themselves. The fear of hearing of or about the nature of torture and humiliation that those we love suffered makes it unbearable. We cannot avoid expressing the taboos of not speaking about sexual violence.

Romeo Dallaire, standing as a witness before the ICTR, expressed that rape was the hardest thing to deal with; in his testimony he did not refer to seeing it happen but to the manner in which the victims were found, especially female victims after they had been killed. His testimony has been interpreted by many, and rightly so, as having been expressive of the numerousness of the offences but we often fail to understand that probably due to the same reason Romeo Dallaire was only able to write about sexual violence on no more than one page of his over three hundred-page volume on the genocide in Rwanda that he witnessed.

In the training that I conducted for the trainers who were still to train the Inyangamugayo, the failure to speak about rape and other forms of sexual violence was expressed. Whenever we sought to speak about actions from which victims of gender violence suffered the reactions from both male and female trainees invited us to continue since we all knew what happened, and the main reason was because it was difficult to speak about but equally because it was difficult to hear.

Even as a trainer I wished that I did not have to do this, but the greatest challenge for justice, especially criminal justice and more so transitional justice, is that detailed accounts are required of issues that we are neither prepared to speak about nor to hear. Consequently, those with the power to decide or even help tend to silence victims by not creating mechanisms through which they may receive justice or by silencing them even when they want to have access to such mechanisms because we have socially labelled their experiences as unspeakable or unbearable.

The three central cases analysed in Chapter 5 are monumental in the inclusion of rape and sexual violence under international criminal law. The Akayesu decision is a milestone in many respects. It stands out for its conclusion that rape and sexual violence constituted an act of genocide in the same way as killing. It affirmed that commanders and superiors are individually responsible as well as their subordinates for genocidal gender and sexual violence.

Unfortunately the monumental achievement of Akayesu was not sustained by Muhimana and Nyiramasuhuko. The amended indictments in both cases failed to include rape and sexual violence within the genocide charges. These defects were not rectified by the prosecution, resulting in the lack of conviction for genocidal gender and sexual violence. Butare and Kibuye, where Nyiramasuhuko and Muhimana were active leaders and participants in the genocide, were the locations of large and extreme forms of genocidal rape and sexual violence.

The Tribunal's finding that Nyiramasuhuko and Muhimana were indeed among those bearing the greatest responsibility for genocide within their respective areas is important. However, the absence of charges and a conviction in this respect is a

great disappointment because it removes the responsibility for genocidal gender and sexual violence from them. There has clearly been no legal consequence attached to genocide for Muhimana and Nyiramasuhuko relating to these genocidal actions.

Despite the absence of genocidal gender and sexual violence within the Nyiramasuhuko and Muhimana indictment, hence the absence of a conviction, Trial Chambers II and III made important findings on genocidal gender and sexual violence. Both Chambers expressed within their legal findings on genocide that rape and sexual violence constitute causing serious bodily and mental harm as genocide despite the prosecution's failure to include them in the charges. They were persuaded on the basis of the evidence available on record including the non-pleaded evidence that the accused possessed the required intent for genocide which was to destroy, in whole or in part, the Tutsi ethnic group when they were committing or encouraging the commitment of rape.

Looking at the legacy of the Akayesu, Nyiramasuhuko and Muhimana cases the failures of the prosecution vis-à-vis genocidal rape are indeed obvious: none of the initial charges against the accused in these cases was established. The last two amendments were not able to rectify the vice that rape and sexual violence were not perceived as genocidal but as crimes against humanity and violations of Article 3 common to the Geneva Conventions and Additional Protocol II thereto as though they were not part of the major picture - genocide. It is as if the investigators and prosecutors bore the traditional perception that rape is incidental to the conflict.

Unlike the prosecution's regrettable approach the Chambers delivered greater milestones in terms of the record. The Tribunal in the above cases discussed genocidal gender and sexual violence more persuasively. While in Muhimana and Nyiramasuhuko they were unable to hold them criminally responsible for genocidal gender and sexual violence due to an irremediable defect in charging as such within the indictment, they were able to put the record straight. The entire record of the ICTR, as suggested by Bianchi, reveals a broader picture of what happened in Rwanda.

The ICTR made significant legal and factual findings on genocidal gender and sexual violence within the cases discussed above and in many more cases including those where there was no charge at all for rape and sexual violence and those that resulted in acquittals.[3]

Nyiramasuhuko's participation in the genocide and particularly in gender and sexual violence has significantly challenged one of the crucial feminist theories on

3 For a more in-depth analysis of the ICTR's record see generally, Bianchi, L. (2013), The Prosecution of Rape and Sexual Violence: Lessons from the ICTR, 123-149, in: De Brouwer, A-M. *et al* (eds.), *Sexual Violence as an International Crime: Interdisciplinary Approaches*, (Cambridge, Antwerp, Portland: Intersentia). See also Buss, D. (2010), "Learning Our Lessons? The Rwanda Tribunal record on Prosecuting Rape," in *Rethinking Rape Law: International and Comparative Perspectives*, MacGlynn, C. and Munro, V. (eds.), (London: Routledge Cavandish).

rape as a crime committed by men who pursue the imbedded patriarchal desire of keeping all women in constant domination and fear. The participation of women in the killing and raping of the Tutsi in Rwanda demands a retheorising. The Rwandan genocidal realities provide new areas for theorising including the agency of women as perpetrators.

Tutsi men's and boys' experiences of genocidal gender and sexual violence need further analysis, documentation and theorising. This study adds to the few already existing studies on the subject and elaborates that it has been complex to report, investigate, accuse and judge gender and sexual violence committed against Tutsi men in Rwanda. Even where evidence has been available, the Tribunal's approach has been, as in Sivakumaran, either to mention but not characterize acts of rape and sexual violence against men; mentioning and characterizing but without any consequence as discussed in the Muhimana case earlier or, but only in one case, characterizing sexual violence against men as crimes against humanity and subsequently holding the accused liable.

The case against Pauline Nyiramasuhuko is a disappointment with regard to some central arguments sustained by feminist scholars relating to rape and sexual violence. Susan Brownmiller asserts that women are raped by men to keep them in a continuous state of fear. Rhonda Capelon argues that genocidal rape occurs on either side of the conflict where women are the targeted group and not their ethnic group. Catherine MacKinnon holds that sexual violence symbolizes and actualizes women's social status which is subordinate to men.

Central to these feminists' arguments is the power dimension revealed by gender and sexual crimes. The missing link, however, is that none of those explanations is capable of explaining sexual and gender crimes perpetrated by women against women and men. Indeed the power dimension remains but not of men over women. We now know that rape is not always gender-specific and is employed in equal propensity by men and women alike. Nyiramasuhuko's conviction reinforces the argument that the genocide in Rwanda was ethnically based in which both Hutu men and women fought vigorously to exterminate all Tutsi elements, men, children, women and anyone else whose actions would otherwise foster the continuation of the Tutsi. Therefore men and women were all complicit in committing genocide against the Tutsi in Rwanda.

The testimonies of the victims of gender and sexual violence discussed herein and elsewhere illustrate that there are theoretical conceptual and practical challenges. It has been explored that the categories of rape, sexual torture, enforced pregnancy, and prostitution do not capture intimate details such as the use of forced sexual intercourse between victims, the use of sand on male sexual organs and the pouring of acid onto female genitals. Thus the complexity of the reality is sometimes left unnoticed when legislators, practitioners and scholars still study the phenomenon of genocidal gender and sexual violence within the limits of the available language.

The interaction between victims and those who work alongside victims during this study led to questioning why prosecutors are reluctant to prosecute gender and sexual violence or why they often qualify such violence as less serious offences. A common suggestion has been that victims fear testifying due to the social stigma and orchestration related to these crimes. According to the findings in this study, it is indeed true that gender and sexual violence carry a great sense of trauma and orchestration, but this is however insufficient in explaining the lack of a willingness to prosecute.

In the ICTR cases analysed victims and witnesses had offered to testify about rape and sexual violence although the prosecution had not taken the initiative to investigate and prosecute those crimes. Thus, there is need to find a more persuasive reason to explain why neglecting gender and sexual violence is permitted to prevail. It is the prosecutors and other actors in the justice system that bear the onus of explaining the factors that lead to this unfortunate event. Sara Sharrat[4] partly provides the answer. In her interviews with prosecutors, judges and investigators, many of those interviewed confessed to having rape myths, having misogynistic views about women and were uncomfortable when dealing with cases involving rape and sexual violence.

Of even greater controversy, however, is why there are much more limited investigations, research and documentation on gender and sexual violence against men. There is greater silence on genocidal and sexual violence against men in the Rwandan context. This study suggests that this is partly influenced by the dominant feminist narrative that promotes the voice of women. With this feminist bias it is revealed that some have failed to embrace realities like those of Rwanda. For the same reason some feminist scholars are hesitant to embrace women's role in committing gender and sexual crimes.

This is partly explained by the historical perception of men as predominantly the abusers and women as victims. While this is still true, new power dimensions suggest that we should reconceptualise to accommodate the new facts enhanced by genocidal gender and sexual violence.

8.2 RECOMMENDATIONS

While much has already been researched on gender and sexual violence committed during the genocide there is a need to further study all forms of gender and sexual violence in order to further explore the complex reality.

4 Sharrat, S., Voices of Court Members: A Phenomenochological Journey – The Prosecution of Rape and Sexual Violence at the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the Bosnian War Crimes Court (BIH) 355-368, in: De Brouwer, A-M., *et al* (eds.), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Cambridge, Antwerp, Portland: Intersentia).

It is in order to investigate the extent of gender and sexual violence committed against men and to analyse the factors that prompted it and the reasons why it is less discussed and prosecuted that we will be able to further illustrate the complexity of gender and sexual violence.

While I have interpreted the factors that caused Hutu women to commit rape and sexual torture, it is important to study further the factors that enhanced the agency of Hutu women in this direction. How were they persuaded to ignore women's traditional roles emphasised within Rwandan cultural settings and to become killers, rapists and torturers?

Nearly every victim interviewed and other people continuously asked whether there was any specific designation of the forms of and the animosity used in committing gender and sexual violence. Thus an analysis of the method and means of sexual violence and the factors that influence such a choice is still to be made.

SAMENVATTING

In deze studie is onderzocht hoe feministische theorieën het probleem van gendergerelateerd en seksueel geweld als genocide verklaren en in hoeverre deze theorieën bijdragen aan de oplossing ervan. Daarbij is de erfenis voor Rwanda van de rechtspleging na de genocide bestudeerd en is onderzocht hoe de verschillende mechanismen de ervaringen van de slachtoffers van gendergerelateerd en seksueel geweld erkennen als genocide. De studie analyseert de theorie en de juridische praktijk tegen de achtergrond van de complexe realiteit van de ervaringen van de slachtoffers van gendergerelateerd en seksueel geweld als genocide. Deze benadering komt voort uit de opvatting dat een reactie door middel van rechtspraak het meest effectief is indien men inzicht heeft in de context en reikwijdte van het op te lossen probleem.

De studie levert een bijdrage aan de recentelijk ontwikkelde inzichten dat gendergerelateerd en seksueel geweld niet alleen werd gebruikt tegen vrouwen, maar ook tegen mannen, kinderen en ouderen. Evenals het inzicht dat deze misdrijven met een gendergerelateerd en seksueel karakter, ofschoon hoofdzakelijk gepleegd door Hutu mannen, ook werden begaan door vrouwen en kinderen.

De studie begint met enige inleidende hoofdstukken die de achtergrond schetsen. De onderzoeksvraag en de relevante contextuele en theoretische kaders voor de studie worden besproken. Historische en contextuele factoren worden onderzocht om grip te krijgen op de processen die hebben geleid tot de genocide in Rwanda. Alvorens het onderwerp van gendergerelateerd en seksueel geweld als manifestatie van genocide aan te snijden is het van belang het begrip etniciteit in Rwanda te analyseren in de context van de geschiedenis en theoretische verklaringen. Daarom is in deze studie gekozen voor een analytische benadering, die aandacht besteedt aan het snijpunt tussen gender en etniciteit in Rwanda.

Er zijn drie theorieën over etniciteit die de betekenis hiervan in Rwanda trachten te begrijpen en verklaren. De naturalistische theorie stelt dat Hutu en Tutsi van nature groepen zijn die worden bepaald door bloedverwantschap. De instrumentalistische theorie daarentegen suggereert dat etnische identiteit een sociale en politieke constructie is door elites die gericht zijn op economisch en materieel voordeel. Etniciteit wordt beschreven als een informeel politiek forum dat sociale en culturele waarden manipuleert in het economisch en materieel belang van enkele leiders. De constructionistische theorie ziet etniciteit als een construct van het kolonialisme. Deze theorie stelt dat de etnische kloof tussen Tutsi en Hutu het gevolg is van de politiek en praktijken uit de koloniale tijd. De instrumentalistische en constructionistische theorieën zijn het meest geschikt om de situatie in Rwanda

te verklaren. De naturalistische verklaring voor de vorming van etnische groepen is niet van toepassing op Rwanda, omdat deze geen rekening houdt met enkele in deze studie beschreven traditionele praktijken, zoals *kwihutura* en *gucupira*, die een migratie van leden van de ene groep naar de andere groep mogelijk maakten op basis van het verwerven van een andere sociale status door verkrijging of verlies van vee of door gemengde huwelijken.

Voor Rwanda geldt in het bijzonder dat de genocide plaatsvond onder de noemer van etniciteit, ongeacht of Hutu en Tutsi waren gevormd als natuurlijke, sociale klassen of als een uitvinding van de kolonisator. Het is duidelijk dat er rond 1994 beslist sprake was van etnische groepen, op basis waarvan de genocide werd gepland en uitgevoerd. Burgers zagen zowel zichzelf als de ander vanuit een etnisch perspectief. Sinds de jaren dertig waren alle personen geregistreerd als lid van een specifieke etnische groep en de mogelijkheid om uit een groep te stappen was niet langer aanwezig vanwege het ontstane institutionele karakter van etniciteit.

In hoofdstuk 3 is getracht om de complexiteit van gendergerelateerd en seksueel geweld als genocide uiteen te zetten. Bovendien worden de omvang, de intensiteit en het wrede karakter van gendergerelateerd en seksueel geweld uiteengezet. Uit individuele getuigenverklaringen blijkt dat de omvang en ernst van verkrachting en andere vormen van seksueel geweld amper voor te stellen zijn. Ook is het moeilijk een aantal in het verleden minder aan de orde gestelde aspecten van gendergerelateerd en seksueel geweld te begrijpen en verklaren, zoals het gebruik ervan tegen Tutsi mannen en het feit dat Hutu vrouwen zowel als individu als in de functie van leider of superieur gendergerelateerd en seksueel geweld begingen.

De beschrijving van de schokkende ervaringen van slachtoffers is nodig, omdat deze cruciaal is voor de uiteenzetting van de realiteit van de genocide in Rwanda. Via de training van *Inyangamugayo*, die door mij in het hoofdstuk wordt genoemd als eyeopener voor de complexe realiteit van het gendergerelateerd en seksueel geweld als genocide, heb ik in dit onderzoek de Rwandese genocidale realiteit laten zien. Hierbij werd bevestigd dat gendergerelateerd en seksueel geweld zonder twijfel een essentieel onderdeel vormden van de genocide jegens de Tutsi. Dit aan genocide verbonden gendergerelateerd en geseksualiseerd geweld dient te worden onderscheiden van andere vormen van gendergerelateerd geweld.

De conclusie van dit hoofdstuk is dat het alomtegenwoordige en strategische gebruik van gendergerelateerd en seksueel geweld tijdens de genocide in Rwanda was bedoeld om de Tutsi uit te roeien op de meest mensonterende wijze denkbaar. In de volgende hoofdstukken wordt op basis van deze realiteit geanalyseerd of de theorie en de juridische praktijk in staat zijn geweest om de werkelijke aard van deze handelingen, namelijk dat deze onderdeel vormden van de genocide, in volle omvang te bevatten en te behandelen. Helaas zijn zowel in de theorie als in de praktijk enkele belangrijke aspecten van gendergerelateerd en seksueel geweld als genocide over het hoofd gezien.

In hoofdstuk 4 wordt een overzicht gegeven van de opvattingen van verschillende feministische rechtswetenschappers. Vastgesteld wordt, dat deze opvattingen invloed hebben gehad op de ontwikkeling van het internationale strafrecht en op de conceptualisering en veroordeling van gendergerelateerd en seksueel geweld. Onderzocht wordt hoe gendergerelateerd en seksueel geweld tijdens een conflict en genocide vanuit de feministische theorieën wordt gekwalificeerd en verklaard. Consensus is hier ver te zoeken, omdat de feministische wetenschap breed is en veelal de confrontatie zoekt. Er is sprake van twee belangrijke theoretische stromingen. De eerste geeft er de voorkeur aan om gendergerelateerd en seksueel geweld niet specifiek als genocidale handelingen te kwalificeren. De tweede benadrukt juist het genocidale karakter van gendergerelateerd en seksueel geweld.

MacKinnon heeft de realiteit van de Rwandese slachtoffers het dichtst benaderd door het inzicht in het dominante karakter van genocidale verkrachting te verruimen: genocidale verkrachting is een middel tot dominantie dat tot doel heeft om het individuele vrouwelijke slachtoffer en haar groep te vernietigen. Deze opvatting van genocidale verkrachting heeft een positieve invloed gehad op het Akayesu vonnis. De wetenschappers die het genocidale karakter van gendergerelateerd en seksueel geweld benadrukten bleven echter vasthouden aan het patroon van het vrouwelijke slachtoffer en de mannelijke dader en kwamen zo niet toe aan een uitbreiding met vrouwen als daders en mannen als slachtoffers.

Het door MacKinnon gemaakte essentiële onderscheid tussen een genocidale verkrachting en een gewone verkrachting (of een andere in oorlogstijd gepleegde verkrachting) kenmerkt gendergerelateerd en seksueel geweld inderdaad als instrumenten van genocide. Haar benadering vormt een essentiële voorwaarde voor het begrijpen van de aard en de omvang van het lijden van de verschillende slachtoffers van gendergerelateerd en seksueel geweld in oorlogen en conflicten. Daarmee kan de 'rule of law' gehandhaafd worden door individuen te vervolgen voor de handelingen die zij begingen en niet voor een minder ernstig alternatief feit.

In Rwanda vormde de genocide jegens de Tutsi het alomvattende kader. In deze studie wordt betoogd dat het opnemen van gendergerelateerd en seksueel geweld in het discours over genocide ertoe dient om de definitie van het misdrijf van genocide te formuleren binnen de Rwandese realiteit, waar gendergerelateerd en seksueel geweld inderdaad hoofdzakelijk werd ondergaan door Tutsi vrouwen, maar eveneens door Tutsi mannen, op een wijze die valt onder de wettelijke definitie van genocide. Ik heb gesteld dat het vereiste opzet hier niet is gericht op verkrachting, verminking of het plegen van andere vormen van seksueel geweld, maar veeleer specifiek is gericht op de vernietiging van een groep; indien dit oogmerk aanwezig is hanteren de daders verschillende methodes om het uiteindelijke doel van vernietiging te bereiken, waaronder verkrachting en andere handelingen van gendergerelateerd en seksueel geweld.

De suggestie van de Afrikaanse feministe Amina Mama dat de slachtoffers van een verkrachting tijdens een genocide lijden vanwege hun etniciteit geeft het gendergerelateerd en seksueel geweld als genocide in het geval van Rwanda weer. Het verkrachten van Tutsi vrouwen, en tot op zekere hoogte van mannen en kinderen, vormde geen randverschijnsel tijdens de genocide: welbeschouwd waren zowel de intentie als de context genocidaal. Indien het gehele conflict genocidaal van aard is, is het, zoals Mama suggereert, logisch te redeneren dat in de strijd vooruitgang wordt geboekt door schending van de lichamen van de slachtoffers, of dat nu met een wapen gebeurt of op een seksueel gewelddadige wijze: het genocidale of etnische karakter van het geweld overheerst.

De klassieke uitleg van verkrachting, als zijnde een misdrijf gepleegd vanuit een universeel patriarchaat waarbij het doel is de mannelijke dominantie te vergroten en alle vrouwen continu daaraan te onderwerpen, is niet toereikend om het gendergerelateerd en seksueel geweld als genocide in Rwanda te verklaren. Het verhaal van het vrouwelijke slachtoffer zoals voorgestaan door Capelon verklaart slechts ten dele waarom sommige mannen vrouwen verkrachten, maar verklaart niet waarom enkel Tutsi vrouwen en niet alle Rwandese vrouwen het doelwit waren: dat zou immers het geval moeten zijn als verkrachting en seksueel geweld inderdaad exclusief tegen vrouwen waren gericht. Het verhaal dat de leidende 'génocidaires' ter instructie gebruikten bij het bevelen en aanmoedigen van verkrachting van de Tutsi maakt duidelijk dat het hier niet ging om patriarchale macht maar om Hutu macht. Denk bijvoorbeeld aan de woorden van Laurent Semanza, die verkrachters ertoe aanzette om stokken te gebruiken bij slachtoffers met seksueel overdraagbare ziektes.

Deze studie reikt verder dan het ter discussie stellen van het patriarchale aspect in de feministische theorieën over macht en dominantie. Het onderzoek omvat tevens andere bronnen van macht, in het bijzonder Hutu macht. In deze studie wordt geconcludeerd dat bij toepassing van machtstheorieën met betrekking tot verkrachting en seksueel geweld de genocidale realiteit van Rwanda aantoont dat gendergerelateerd en seksueel geweld inderdaad misdrijven zijn die voortkomen uit vormen van dominantie die verder gaan dan patriarchaat en mannelijke dominantie. De genocide in Rwanda illustreert dat er nieuwe, op etniciteit gebaseerde machtsdimensies zijn die erop gericht waren om Rwanda te veranderen in een homogeen Hutu territorium.

In de hoofdstukken 5 tot en met 7 wordt de door het internationale Rwanda Tribunaal (ICTR) en de gewone nationale rechtbanken en g*acaca* rechtbanken nagelaten erfenis bij de behandeling van gendergerelateerd en seksueel geweld als genocide besproken. Zowel op het internationale als op het nationale niveau zijn belangrijke en prijzenswaardige resultaten geboekt met betrekking tot de berechting van gendergerelateerd en seksueel geweld als genocide. Als gevolg van de juridische aanpak in postgenocide Rwanda is de discussie over gendergerelateerd en seksueel geweld als genocide aangezwengeld.

Het ICTR en Rwanda's nationale juridische procedures hebben het bewijsmateriaal met betrekking tot gendergerelateerd en ander seksueel geweld zichtbaar gemaakt en meer helderheid verschaft over de aard en omvang van dit geweld en in het bijzonder in het genocidale gebruik ervan. Hoewel de gerechtelijke vervolgingen en de uitspraken van de verschillende rechters in dit opzicht niet consistent waren, hebben de behandelde feiten en de vastgelegde informatie een gedetailleerd inzicht gegeven in de complexe belevingen van de slachtoffers en overlevenden van gendergerelateerd en seksueel geweld als genocide.

De erkenning door het ICTR van verkrachting en seksueel geweld als genocide vormt de allerbelangrijkste bijdrage van de Akayesu zaak. Deze zaak droeg aldus bij aan de ontwikkeling van het materiële internationale strafrecht. Het internationaal discours kreeg de beschikking over een definitie van genocide die gendergerelateerd en seksueel geweld erkent als een daad van genocide. Na Akayesu waren er echter grote discrepanties in de jurisprudentie van het Tribunaal over gendergerelateerd en seksueel geweld als genocide. De door de rechters in de zaak Akayesu geïnstigeerde vernieuwing werd niet op een verantwoorde wijze doorgetrokken. Het openbaar ministerie heeft de vervolging van gendergerelateerd en seksueel geweld als vorm van genocide verder genegeerd. Slechts in een handvol zaken wordt verkrachting als daad van genocide benoemd, zij het in de meeste gevallen meer als een onderwerp van discussie voor de rechters dan om strafrechtelijke toerekenbaarheid vast te stellen.

Het ICTR heeft belangrijke kansen laten liggen toen het naliet om Pauline Nyiramasuhuko en Mikaeli Muhimana te vervolgen en te veroordelen voor verkrachting en seksueel geweld als genocide. De in deze twee zaken overgelegde bewijsmiddelen zouden hebben moeten volstaan voor de levering van het bewijs in een zaak van gendergerelateerd en seksueel geweld, maar het openbaar ministerie heeft nagelaten dit ten laste te leggen. De rechters lieten het eveneens afweten, door geen actie te ondernemen om deze nalatigheid te herstellen.

Helaas werd Muhimana niet ter verantwoording geroepen en gestraft voor de verkrachting van diverse Tutsi vrouwen als zijnde een handeling van genocide, terwijl juist zijn verontschuldiging aan het enige vrouwelijke Hutu slachtoffer, dat hij haar per vergissing verkrachtte, zijn genocidale opzet illustreert. Het is significant dat Muhimana specifiek Tutsi vrouwen verkrachtte in het kader van de uitvoering van de genocide op de Tutsi. De verontschuldiging aan het Hutu slachtoffer bracht aan dit specifieke slachtoffer de boodschap over dat haar verkrachting, ook al was deze begrijpelijkerwijze pijnlijk en traumatisch, een bijkomstigheid was en het gevolg van het feit dat hij haar had aangezien voor een Tutsi. Dit excuus maakte tegelijkertijd duidelijk aan zijn Tutsi slachtoffers dat de verkrachting en het seksueel geweld jegens hen opzettelijk was en bedoeld om ook de vrouwen, hun gezinnen en de gehele etnische Tutsi groep te vernederen en vernietigen.

Opgemerkt dient te worden dat, ondanks het feit dat gendergerelateerd en seksueel geweld als genocide ontbrak in de tenlasteleggingen van Nyiramasuhuko

en Muhimana en er derhalve ook geen veroordeling te dien aanzien volgde, de kamers II en III van het tribunaal belangrijke bevindingen deden met betrekking tot gendergerelateerd en seksueel geweld als genocide. Beide kamers gaven in hun overwegingen over genocide te kennen dat vormen van verkrachting en seksueel geweld, die ernstige lichamelijke en mentale schade veroorzaken, wel degelijk genocide opleveren, ondanks het feit dat het openbaar ministerie had nagelaten dit als zodanig ten laste te leggen. De rechters waren er op basis van de beschikbare bewijsstukken, met inbegrip van het niet opgevoerde bewijs, van overtuigd dat verdachten het voor genocide vereiste opzet hadden, namelijk om de etnische Tutsi groep geheel of gedeeltelijk te vernietigen, toen zij de verkrachtingen pleegden of aanmoedigden.

Nyiramasuhuko's deelname aan de genocide en in het bijzonder aan het gendergerelateerd en seksueel geweld heeft belangrijke vraagtekens gezet bij een van de belangrijke feministische theorieën, namelijk degene die verkrachting ziet als een misdaad gepleegd door mannen die toegeven aan een diepgeworteld patriarchaal verlangen om alle vrouwen continu te domineren en vrees in te boezemen. De deelname van vrouwen aan het vermoorden en verkrachten van de Tutsi in Rwanda vraagt om nieuwe theorievorming. De realiteit van de genocide in Rwanda draagt nieuwe aspecten aan voor de formulering van een theorie die ook het handelen van vrouwen als daders omvat.

De ervaringen van Tutsi mannen en jongens als slachtoffers van gendergerelateerd en seksueel geweld als genocide dienen verder te worden geanalyseerd, gedocumenteerd en in een theorie te worden gevat. Deze studie levert een bijdrage aan de weinige al bestaande studies over het onderwerp en geeft uitvoerig de complexiteit weer van het aandragen, onderzoeken, aanklagen en beoordelen van gendergerelateerd en seksueel geweld dat tegen Tutsi mannen in Rwanda werd gepleegd. Zelfs in de zaken waarin bewijs beschikbaar was heeft het ICTR, zoals Sivakumaran suggereert, de volgende benaderingen gehanteerd: het vermelden maar niet kwalificeren van verkrachtingen en seksueel geweld tegen mannen, het vermelden en kwalificeren echter zonder hieraan consequenties te verbinden zoals eerder besproken in de Muhimana zaak. In slechts één zaak is seksueel geweld tegen mannen als een misdaad tegen de menselijkheid gekwalificeerd met het gevolg dat de dader hiervoor werd veroordeeld.

De zaak tegen Pauline Nyiramasuhuko vormt een teleurstelling voor enkele door feministische wetenschappers met betrekking tot verkrachting en seksueel geweld gehanteerde centrale stellingen. Susan Brownmiller stelt dat vrouwen door mannen worden verkracht om hen in een voortdurende staat van angst te houden. Rhonda Capelon beweert dat genocidale verkrachting plaatsvindt aan beide zijden van het conflict, waarbij vrouwen en niet hun etnische groep de doelgroep vormen. Catherine MacKinnon is van mening dat seksueel geweld de ondergeschikte sociale positie van vrouwen ten opzichte van mannen symboliseert en realiseert.
In deze feministische redeneringen staat de machtsdimensie die wordt blootgelegd door gendergerelateerde en seksuele misdrijven centraal. Het in al deze verklaringen

ontbrekende aspect is echter dat ze geen verklaring kunnen geven voor seksuele en gendergerelateerde misdrijven die door vrouwen worden gepleegd tegen vrouwen en mannen. De machtsdimensie is inderdaad aanwezig, maar niet die van mannen over vrouwen. We weten nu dat verkrachting niet altijd genderspecifiek is en door zowel mannen als vrouwen met dezelfde overgave wordt gepleegd. Nyiramasuhuko's veroordeling versterkt het argument dat de genocide in Rwanda berustte op een etnische basis waarin zowel Hutu mannen als vrouwen krachtig streden om alle Tutsi elementen te vernietigen: mannen, kinderen, vrouwen en voorts iedereen wiens handelingen het voortbestaan van de Tutsi anderszins zou bestendigen. Om die reden waren mannen en vrouwen allen medeplichtig aan het plegen van genocide jegens de Tutsi in Rwanda.

De in dit boek besproken getuigenissen van de slachtoffers van gendergerelateerd en seksueel geweld en van anderen illustreren de theoretische, conceptuele en praktische problemen. Het is duidelijk geworden dat de kwalificaties verkrachting, seksuele marteling, gedwongen zwangerschap en prostitutie, de intieme details, zoals het afdwingen van seksueel verkeer tussen slachtoffers, het gebruik van zand op mannelijke geslachtsorganen en het gieten van zuur in vrouwelijke geslachtsorganen, niet kunnen bestrijken. De complexiteit van de realiteit blijft zo soms buiten het gezichtsveld van wetgevers, rechtswetenschappers en praktijkjuristen die gehouden zijn het fenomeen van gendergerelateerd en seksueel geweld als genocide binnen de grenzen van de beschikbare taal te bestuderen.

In Rwanda zelf laat de erfenis van de gewone rechtbanken eens te meer zien hoe complex de omgang is met gendergerelateerd en seksueel geweld als genocide. Een van de meest in het oog springende problemen vormt het ontbreken van definities van seksuele marteling en verkrachting en de juridische kwalificatie ervan. De studie heeft de invloed onderzocht van de kwalificatie van seksuele marteling als een strafbaar feit van de eerste categorie, in de veronderstelling dat verkrachting in de praktijk zou worden beschouwd als een handeling vallend onder seksuele marteling, hetgeen niet altijd het geval bleek.

Dit leidde aanvankelijk tot discrepanties, aangezien sommige rechtbanken verkrachting wel als zodanig beschouwden, terwijl andere deze berechtten als een minder ernstig strafbaar feit. Deze discrepanties beïnvloedden de kwaliteit van de rechtspraak, aangezien de plegers van hetzelfde strafbare feit verschillend werden gestraft om de enkele reden dat het openbaar ministerie verkrachting en seksuele marteling verschillend kwalificeerde op grond van hun eigen beoordeling. Na een wetswijziging werd verkrachting specifiek vermeld als een strafbaar feit van de eerste categorie tezamen met seksuele marteling.

Vermeld dient te worden dat de gewone rechtbanken, in tegenstelling tot het ICTR en de *gacaca* rechtbanken, van meet af aan de rechten van de slachtoffers hebben erkend en dat zij miljoenen Rwandese francs aan schadevergoeding hebben toegekend aan slachtoffers die tijdens de processen een vordering daartoe hadden ingediend. Deze positieve ontwikkeling was echter niet vol te houden, aangezien

ze leidde tot nog meer frustratie voor de slachtoffers toen dezen er niet in slaagden de schadevergoeding ook daadwerkelijk te verkrijgen. De meeste veroordeelden waren onvermogend en niet in staat te betalen.

De gewone rechtbanken hielden ook minder rekening met het delicate karakter van de zaken, waardoor veel potentiële getuigen werden afgeschrikt. Dit leidde tot meer vrijspraken bij zaken die gendergerelateerd en seksueel geweld betroffen dan bij andere genocidale handelingen. De slachtoffers van gendergerelateerd en seksueel geweld werden onderworpen aan een langer en omslachtig systeem, waarbij zij hun zaken eerst dienden voor te leggen aan *Inyangamugayo* die de zaak vervolgens overdroegen aan de gewone rechtbanken. Gerechtigheid voor de slachtoffers van gendergerelateerd en seksueel geweld als genocide werd vertraagd omdat deze zaken onder de bevoegdheid bleven vallen van de gewone rechtbanken, die echter na de introductie van de *gacaca* rechtbanken hun aandacht minder richtten op zaken die genocide betroffen.

De inadequaatheid, traagheid en logheid van de gewone rechtbanken had juist geleid tot de introductie van de *gacaca* rechtbanken. De eerste *gacaca* rechtbanken kenden echter geen specifieke strategie voor de behandeling van zaken die gendergerelateerd en seksueel geweld als genocide betroffen. De in hoofdstuk 7 besproken verbeteringen van de g*acaca* procedures gaven blijk van betrokkenheid om de overlevenden en slachtoffers van gendergerelateerd en seksueel geweld als genocide de mogelijkheid te geven bewijs te leveren op een wijze die rekening houdt met het delicate karakter van de zaken en met hun trauma's, en met mogelijke hertraumatisering indien de noodzaak van herstel van het slachtoffer wordt ontkend in het belang van de rechtspleging.

In hoofdstuk 7 heb ik uitvoerig besproken hoe de *gacaca* rechtbanken gendergerelateerd en seksueel geweld behandelden en heb ik laten zien dat de berechting van zaken die gendergerelateerd en seksueel geweld als genocide betreffen geen eenvoudige opgave vormt. De in deze studie geïnterviewde slachtoffers leken wat optimistischer te zijn over de g*acaca* rechtbanken en wekten de indruk minder geïntimideerd en mondiger te zijn door de *gacaca* processen. De *gacaca* rechtbanken werden geconfronteerd met enkele zeer complexe vragen, zoals het volgende dilemma: hoe om te gaan met een zaak waarin de dader schuld bekent maar het slachtoffer alle bewijzen van haar verkrachting ontkent. Ook slachtoffers die niet bekend waren met de identiteit van hun verkrachters leken enige vorm van gerechtigheid te zoeken bij de *gacaca* rechtbanken, die dit soort zaken eigenlijk niet konden berechten. Door de vertraging die optrad bij de overdracht van verkrachtingszaken aan de *gacaca* rechtbanken werd aan enkele slachtoffers van gendergerelateerd en seksueel geweld gerechtigheid onthouden; zij bezweken aan de HIV/AIDS die zij hadden opgelopen bij de genocidale verkrachting.

De slachtoffers van gendergerelateerd en seksueel geweld hebben het *gacaca* proces op uiteenlopende wijzen ervaren. Sommigen van hen konden de last van het slachtofferschap van zich afschudden door hun mishandelaars aan te klagen

en de dader de zwaarste straf te laten ondergaan. *Gacaca* vormde een uitdaging en toonde aan dat de dader niet langer meer de baas was en hen geen kwaad meer kon doen.

Het ten volle vatten van de complexiteit van de ervaringen van de slachtoffers van gendergerelateerd en seksueel geweld als genocide vormde voor alle drie gerechtelijke instanties (het ICTR, de gewone rechtbanken en de *gacaca* rechtbanken) een ware uitdaging. Het ICTR was opgericht vóór de publicatie van alle rapporten over de aard en omvang van gendergerelateerd en seksueel geweld tijdens de genocide in Rwanda. Dit is waarschijnlijk een van de redenen waarom het tribunaal aanvankelijk minder strategisch opereerde bij de tenlastelegging van gendergerelateerd en seksueel geweld als genocide. Voor de nationale rechtbanken was de Rwandese wetgeving betreffende gendergerelateerd en seksueel geweld als genocide niet consistent in de benoeming van het strafbare feit: in de ene wet was er enkel sprake van seksuele marteling en in een latere, nieuwe wet waren zowel verkrachting als seksuele marteling strafbaar gesteld. Wat de g*acaca* rechtbanken betreft is het opmerkelijk dat de processtukken uit de begintijd geen specifieke aandacht besteedden aan de gevallen van verkrachting en seksuele marteling, waardoor het nog langer duurde voordat de slachtoffers gerechtigheid ervoeren.

Grote aantallen slachtoffers konden geen toegang krijgen tot de beschikbare vormen van strafrechtspleging omdat zij hun mishandelaars niet kennen, omdat hun verkrachters het land zijn ontvlucht, of omdat niet bekend is waar deze zich bevinden. Deze slachtoffers leven in de vrees dat de daders weer zullen opduiken en een bedreiging zullen blijven, zoals getuige TA uitlegt wanneer zij vertelt dat twee van haar groepsverkrachters zijn gevlucht naar buurlanden van Rwanda.

Ondanks de uitdagingen en de zwaktes ervan, bleek de *gacaca* benadering efficiënter te zijn dan het ICTR en de gewone rechtbanken, vanwege de centrale rol die de slachtoffers hadden bij het bepalen of ze wel of geen aanklacht wilden indienen, vanwege het feit dat deze rechtbanken minder duur waren omdat zij zich in de buurt van de woonplaats van het slachtoffer bevonden, en ten slotte omdat zij overwegend werden geleid door mensen voor wie de ervaringen van de slachtoffers niet verschilden van de zaken waar zij zelf getuige van waren geweest of die ze zelf hadden overleefd. Tegelijkertijd maakten de beschermende maatregelen om de slachtoffers te vrijwaren van publieke vernedering en de verplichting om de details van het proces geheim te houden het de deelnemende slachtoffers mogelijk om tijdens het proces te herstellen. Ze kregen de kans te spreken over hun ervaringen en zich te ontdoen van de gewoonlijk door het slachtoffer ondervonden trauma's in een meer prettige en vriendelijke omgeving.

De studie toont ten slotte aan dat het aantal behandelde zaken met betrekking tot gendergerelateerd en seksueel geweld bij genocide veel kleiner is dan de grote aantallen die vaak worden genoemd in rapporten over mensenrechten. Hiervoor zijn diverse oorzaken aan te wijzen, zoals het feit dat sommige slachtoffers hun mishandelaars niet eenvoudig konden identificeren, en het verlangen van slachtoffers

om het verleden te vergeten en door te leven zonder de angst voor hernieuwd slachtofferschap als gevolg van het juridische proces en de isolatie en stigmatisatie van slachtoffers door de gemeenschap. De onwil bij een deel van het personeel van het gerechtelijk systeem om handelingen van gendergerelateerd en seksueel geweld serieus en bij voorrang te onderzoeken is mede verantwoordelijk voor het geringe aantal zaken en veroordelingen met betrekking tot gendergerelateerd en seksueel geweld bij genocide.

BIBLIOGRAPHY

BOOKS AND JOURNAL ARTICLES

Adelman (2005)
Adelman, H. (2005), "Theories of genocide: The case of Rwanda" at: www.humiliationstudies.org/documents/AdelmanTheoriesGenocide.pdf, accessed on 23 June 2012.

Adelman and Suhrke (1999)
Adelman, H. and Suhrke, A. (eds.), (1999). *The Path of a Genocide: The Rwanda Crisis from Uganda to Zaire* (New Brunswick, N.J.: Transaction Books, 1999).

Ardiles (1996)
Ardiles, H.S., "The absence of Justice", in Harper, C., *Impunity an Ethical Perspective* (Geneva: World Council of Churches Publications, 1996).

Askin (1999)
Askin, K. (1999), "Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status", *American Journal of International Law* 93(1), 97-123.

Askin (2005)
Askin, K. (2005), "Gender Crimes Jurisprudence in the ICTR: Positive Developments", *Journal of International Criminal Justice* 3(4), 1007-1018.

Askin (2013)
Askin, K. (2013), Treatment of sexual violence in Armed Conflict: A historical Perspective and the Way Forward, 19-49, at 33, De Brouwer, A-M. *et al.*, *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Antwerp: Intersentia).

Balthazar (2006)
Balthazar, S., "Gender Crimes and the International Criminal Tribunals", 10 *Gonz. J. Int'l L.* (2006).

Bassiouni (1994)
Bassiouni, M.C., "Crimes against Humanity: the need for a specialised convention" (1994) 31, *Colum. J. Transnat'l L.* 457-458.

Bassiouni and Wise (1995)
Bassiouni, M.C., and Wise, E.M., *Aut dedere Aut Judicare: The duty to extradite or prosecute in international Law* (The Hague: Maritnus NijHoff, 1995).

Bijleveld *et al* (2009)
Bijleveld, C., Morssinkhof, A. and Smeulers, A. (2009), "Counting the Countless: Rape Victimization During the Rwandan Genocide" *International Criminal Justice Review* 19(2), 208–244.

Brannigan and Jones (2009)
Brannigan, A. and Jones, A.N. (2009), "Genocide and the Legal Process in Rwanda From Genocide Amnesty to the New Rule of Law" *International Criminal Justice Review*, Vol. 19, No. 2, 2009, 192-207.

Brownmiller (1975)
Brownmiller, S., *Against Our Will: Men, Women and Rape* (New York: Simon & Schuster, 1975).

Bubkley-Zistel and Stanley (2012)
Bubkley-Zistel, S. and Stanley, R. (eds.), *Gender in Transitional Justice* (London: Palgrave MacMillan, 2012).

Buss (2005)
Buss, D. and Manji, A. (eds.), *International Law and Modern Feminists Approaches* (Oxford: Hart Publishing, 2005).

Buss (2010)
Buss, D., Learning Our Lessons? The Rwanda Tribunal record on Prosecuting Rape, in: MacGlynn, C. and Munro, V. (eds.), *Rethinking Rape Law: International and Comparative Perspectives* (London: Routledge Cavandish).

Chabal and Daloz (1999)
Chabal, P. and Daloz, J.P., *Africa Works: Disorder as Political Instrument* (Indiana: Indiana University Press, 1999).

Chesterman (1999-2000)
Chesterman, S., "An altogether different order: Defining the elements of crimes against humanity", (1999-2000), *Duke Journal of Comparative and International Law,* Vol. 10, 307-344.

Cohen, (1974)
Cohen, A., The Lesson of Ethnicity, in: Cohen, A. (ed.), *Urban Ethnicity* (London: Tavistock, 1974).

Combs (2002)
Combs, N. (2002), Copping a Plea to Genocide: The Plea Bargaining of International Crimes, *University of Pennsylvania Law Review* Vol. 151(1).

Daly (2001-2)
Daly, E. (2001-2), "Between punitive and reconstructive justice: The Gacaca Courts in Rwanda", *New York University Journal of International Law and Politics* 34, 355.

Dallaire (2004)
Dallaire, R. (2004), *Shake hands with the devil. The failure of Humanity in Rwanda* (London: Arrow books).

De Brouwer (2005)
De Brouwer, A-M., *Supranational criminal prosecution of sexual violence: The ICC and the practice of the ICTY and the ICTR* (Antwerp: Intersentia, 2005).

De Brouwer (2009)
De Brouwer, A-M. and Ka Hon Chu, S., *The men who killed me: Rwanda Survivors of Sexual Violence* (Vancouver, Toronto, Berkeley: Douglas & McIntyre, 2009).

Degni-Ségui (1996)
Degni-Ségui, R., *Report on the situation of human rights in Rwanda*, United Nations, Economic and Social Council, E/CN.4/1996/68, 29 January 1996.

Digneffe and Fierens (2003)
Digneffe F. and Fierens J. (eds.), (2003), *Justice et Gacaca: L'Experience Rwandaise et le Genocide* (Namur: Presses Universitaire de Namur).

D'Heltfelt (1964)
D'Heltfelt, T.M. and Coupez, A., *Le Rouyate sacree de l'ancien Rwanda* (Tervuren: Musee Royal de l'Afrique Centrale, 1964).

D'Heltfelt (1971)
D'Heltfelt, T.M., *Les Clans du Rwanda ancien* (Tervuren: Musee Royal de l'Afrique Centrale, 1971).

Destexhe (1995)
Destexhe, A., *Rwanda and genocide in the twentieth century* (London and East Haven, CT: Pluto Press, 1995).

Dolgopol (1995)
Dolgopol, U. (1995), "Women's Voices, Women's Pain" *Human Rights Quarterly,* Vol. 17(1), 127-154.

Donat and D'Emilio (1998)
Donat, P.L.N. and D'Emilio, J., A feminist redefinition of rape and sexual assault: Historical foundations and change at 35-49, in: Odem, M.E. and Clay-Warner, J. (eds.), *Confronting Rape and Sexual Assault (*Lanham, MD: Rowman and Littlefield, 1998).

Drumbl (2000)
Drumbl, M.A. (2000), "Sclerosis: Retributive Justice and the Rwandan Genocide" *Punishment and Society*, 2(3) pp. 287-307.

Drumbl (2000)
Drumbl, M.A. (2000), "Punishment, post genocide: from guilt to shame to *civis* in Rwanda" *New York Law Review* (heinonline) Vol. 75: 1221-1326, at www.nyu.edu/pages/lawreview/75/5/drumbl.pdf, last accessed June 2012.

Eller and Coughlan (1993)
Eller, J. and Coughlan, R. (1993), "The poverty of premordialism: The demystification of Ethnic Attachment" *Ethnic and Racial Studies*, Vol. 16(2), 183-202.

Fineman (2005)
Fineman, M.A., "Feminist Legal Theory" *Journal of Gender, Social Policy and the Law* Vol. 13(1).

Fineman (2011)
Fineman, M.A., *Transcending the Boundaries of Law Generations of Feminism and Legal Theory* (Abingdon, Oxon: Routledge, 2011).

Foucault (1980)
Foucault, M. (1980), *Herculine Barbin* (New York; Colophon, 1980).

Foucault (1988)
Foucault, M., *The History of Sexuality: The Care of the Self* (Vintage: Vintage Books, 1988).

Geertz (1963)
Geertz, C. (ed.), *The Integrative Revolution, in Old and New States* (New York: Free Press, 1963).

Geertz (1967*)*
Geertz, C., "Politics past, Politics Preset: Some Notes on the Contribution of Anthropology to the Study of a New State" (1967*) European Journal of Sociology*, 8(1), 1-14.

Ginsburgs *et al* (2001)
Ginsburgs, G., *et al (*eds.), *International and National Law in Russia and Eastern Europe: Essays in honour of George Ginsburgs*, (The Hague; Boston: M.Nijhoff Publishers, 2001).

Goldstone (1996)
Goldstone, R.J., 50 years after Nuremberg: A new international Criminal Tribunal for Human Rights criminals in: Jongman, A.J. (ed.), *Contemporary Genocides: Causes, Cases, Consequences* (Leiden: PIOOM, 1996).

Hatzfeld (2005)
Hatzfeld, J., *Machete season: The killers in Rwanda speak* (L. Coverdale, Trans.) (New York: Farrar, Straus and Giroux, 2005).

Haveman and Kavran (2003)
Haveman, R. and Kavran, O. (eds.), S*upranational criminal law: a system suis generis* (Antwerp: Intersentia, 2003).

Haveman and Muleefu (2010)
Haveman, R. and Muleefu, A., Gacaca and fair trial, in: Rothe, D. *et al* (eds.), *State Crimes* (Rutgers University Press, 2010) at 219-244.

Haveman, De Brouwer and Pemberton (2011)
Haveman, R., De Brouwer, A-M. and Pemberton, A., *Victimological Approaches to International Crimes: Africa* (Antwerp: Intersentia, 2011).

Haveman (2013)
Haveman, R., Watching the Human Rights Watchers, 231-258, in: Matthee, M., Toebes, B. and Brus, M. (eds.), *Armed Conflict and International Law: In Search of the Human Face. Liber Amicorum in Memory of Avril McDonald* (Hague: Asser Press, 2013).

Horovitz (2002)
Horovitz, D.L., *Ethnic Groups in Conflict* (London: University of California Press Ltd, 2002).

Jenkins (1997)
Jenkins, R., *Re-thinking ethnicity: Arguments and explorations* (London: Sage Publications, 1997).

Jones (2010)
Jones, N., *The Courts of Genocide politics and the rule of law in Rwanda and Arusha* (Oxfordshire: Routledge, 2010).

Juan Diez-Mendrano (2007)
Juan Diez-Mendrano, Ethnic Conflict and Democratic Governance 21-32, in: Koenig, M. and De Guchteneire, P., *Democracy and Human Rights in Multicultural Societies* (Burlington: Ashgate Publishing Company, 2007).

Kagame (1975)
Kagame, A., *Un Abrégé de l'ethnohistoire du Rwanda,* Vol. 1 (Butare: Editions Universitaires du Rwanda, 1972).

Kaitesi and Haveman (2011)
Kaitesi, U. and Haveman, R., Prosecution of Genocidal Rape and Sexual Torture before the Gacaca Tribunals in Rwanda, in: Letschert, R., Haveman, R., De Brouwer, A.-M., Pemberton, A., *Victimological Approaches to International Crimes: Africa*, (Antwerp: Intersentia, 2011), pp. 387-412.

Lanotte (2007)
Lanotte, O., *La France au Rwanda (1990-1994). Entre Abstention impossible et engagement ambivalent* (Brussels: P.I.E. Peter Lang SA., 2007).

Lawry, *et al* (2010)
Lawry, L., *et al*, "Association of Sexual Violence and Human Rights Violations with Physical and Mental Health in Territories of Eastern Democratic Republic of the Congo", (2010) American Medical Association, reprinted in *JAMA*, Vol. 304, No. 5. 553 downloaded from www.jama.com, on 4 August 2010.

Longman (2003)
Longman, T., The Domestic Impact of the International Criminal Tribunal for Rwanda, in: Ratner, S.R. and Bischoff, J.L. (eds.), *International War Crimes Trials: Making a difference* (Austin: University of Texas Press, 2003).

Lorentzen and Turpin (1998)
Lorentzen, L.A and Turpin, J. (eds.), *The Women and War Reader* (New York: New York University Publisher, 1998).

Lukashuk (2001)
Lukashuk, I.I., Contemporary International Criminal Law: concept and general features in Ginsburgs, G. *et al* (eds.), *International and National Law in Russia and Eastern Europe: Essays in Honour of George Ginsburgs* (The Hague; Boston: M.Nijhoff Publishers, 2001).

MacKinnon (1987)
MacKinnon, C.A., *Feminism unmodified discourses on life and Law* (Cambridge, Massachusetts: Havard University Press, 1987).

MacKinnon (1991)
MacKinnon, C.A., "Reflections on Sex Equality under Law" 100 *Yale Law Journal* 1302.

MacKinnon (1994)
MacKinnon, C.A. (1994), Rape, Genocide, and Women's Human Rights, in: Stiglmayer (ed.), *Mass Rape: The War against Women in Bosnia-Herzegovina.* (Lincoln: University of Nebraska Press, 1994) 183-196, pp. 190-191.

Major (1999)
Major, M.V.M., "War Crimes in the 21st Century" (1999*) Hofstra L. & Pol'y Symp.* 47.

Mamdani (2001)
Mamdani, M., *When Victims Become Killers; Colonialism, Nativism and the Genocide in Rwanda* (Kampala: Fountain Publishers, 2001).

Melvern (2000)
Melvern, L.R., *A People Betrayed: The Role of the West in Rwanda's Genocide* (London: Zed Books, 2000).

Minow (1998)
Minow, M., *Between Vegeance and Forgiveness: Facing History After Genocide and Mass Violence* (Boston: Beacon Press, 1998).

Morris (1997)
Morris, M.H. (1997), "The Trials of Concurrent Jurisdiction: The Case of Rwanda." *Duke Journal of Comparative and International Law* 7.

Mugesera (2004)
Mugesera, A., *Imibereho y'Abatutsi kuri Repubulika ya mbere n'iya kabiri (1959-1990)* (Kigali: Les Editions Rwandaises, 2004).

Mugwanya (2007)
Mugwanya, G., *The Crime of Genocide at International Law: Appraising the Contribution of the UN Tribunal for Rwanda* (London: Cameron May Ltd, 2007).

Mullins (2009)
Mullins, C. (2009), We Are Going to Rape You and Taste Tutsi Women, *British Journal of Criminology* 49, 719-735.

Mullins (2009)
Mullins, C.W., "He would kill me with his penis": Genocidal rape in Rwanda as a State Crime, *Critical Criminology* (2009), 15-33.

Muzungu (2003)
Muzungu, B., *Histoire du Rwanda pré-colonial* (Paris: L'Harmattan, 2003).

Muzungu (2009)
Muzungu, B., (2009) "Le problème des races au Rwanda," *Cahiers Lumière et Société* 42.

Newbury (1988)
Newbury, D., *The Cohesion of Opression: Citizenship and Ethnicity in Rwanda, 1860-1960* (New York: Columbia University Press, 1988).

Ndahinda and Muleefu (2012)
Ndahinda, F. and Muleefu, A., Revisiting the legal and socio-political foundations and (Western) criticisms of gacaca courts, in: Bennet, T., *et al* (eds.), *African Perspectives on Tradition and Justice*, (Antwerp: Intersentia, 2012) at 149-173.

Ngoga (2008)
Ngoga, M., The institutionalization of Impunity: a judicial perspective on the Rwandan Genocide, in: Clark, P. and Kaufman, Z.D. (eds.), *After Genocide Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond (*London: Hurst & Company, 2008).

Ni Aolain (2000)
Ni Aolain, F., "Sex-based Violence and the Holocaust – A Re-evaluation of Harms and Rights in International Law" (2000) *The Yale Journal of International Law*, Vol. 12: YY.

Nordostrom (1989)
Nordostrom, C., "Women and war: Observations from the field" *Minerva: Quarterly Report on women and the military* Vol. IX, No. 1991, at 1-15.

Pages (1933)
Pages, A., *Un royaume hamite au centre de l'Afrique* (Bruxelles: Hayes, 1933).

Peterson and Runyan (2009)
Peterson, V.S and Runyan, A.S., *Global Gender Issues in the New Millennium (Dilemmas in the World Politics)* (Boulder: Westview Press, 2009).

Prunier (1995)
Prunier, G., *Rwanda of Genocide* (Kampala: Fountain Publishers, 1995).

Rangira (2008)
Rangira, B.G, Militarism, Ethnicity and Sexual Violence in the Rwandan Genocide, in: Mama, A. and Okazawa-Rey, M., *Militarism, Conflict and Women's Activism* (Cape town: African Gender Institute, 2008).

Rothschild (1981)
Rothschild, J., *Ethnopolitics: A Conceptual Framework* (New York: Columbia University Press, 1981).

Rutayisire (1996)
Rutayisire, P., "Le Tutsi étranger dans le pays de ses aïeux" *Les Cahiers: Evangile et Société: Les Idéologies*, No. 4 (December 1996), 42-55.

Sanders (1969)
Sanders, R., "The Hamitic Hypothesis: its origin and functions in time perspective" *Journal of African History* (1969), 521-32.

Sarkin (2004)
Sarkin, J., *Carrots and Sticks: The TRC and the South African Amnesty Process*, (Antwerp: Intersentia, 2004).

Schabas (1996)
Schabas, W.A., "Justice, Democracy, and Impunity in Post-Gnocide Rwanda: Searching for Solutions to Impossible Problems", *Criminal Law Forum,* Vol. 7, No. 3 (1996).

Schabas (2000)
Schabas, W.A., *Genocide in International law: The crime of crimes* (London: Cambridge University Press, 2000).

Schabas (2004)
Schabas, W.A., *An introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2004).

Schabas (2009)
Schabas, W.A., Post-Genocide Justice in Rwanda: A spectrum of Options, in: Clark, P. and Kaufman, D.Z. (eds.), *After Genocide Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond* (New York: Columbia University Press, 2009) 207-227.

Scanlon (2008)
Scanlon, H., Militarisation, Gender and Transitional Justice in Africa, in: Mama, A. and Okazawa-Rey, M., *Militarism, Conflict and Women's Activism* (Cape town: African Gender Institute, 2008).

Seligman (1966)
Seligman, C.G., *Races of Africa*. 4th ed., (London, New York: Oxford, 1966).

Sellers (2002)
Sellers, V.P. (2002), "Sexual Violence and Peremptory Norms: The Legal Value of Rape" *Case Western Reserve Journal of International Law* at 34:287.

Semujanga (1998)
Semujanga, J., *Récits fondateur du drame rwandais Discours Socials, Ideologies et stereotypes* (Montreal: L'Harmattan, 1998).

Stiglmayer (1994)
Stiglmayer, A., *Against Women in Bosnia-Herzegovina* (ed.), (Lincoln: University of Nebraska Press, 1994).

Uvin (2003)
Uvin, P., *The Gacaca Tribunals in Rwanda, in Reconciliation after violent conflict* (Stromsburg: Idea, 2003).

Van Leirop (1997)
Van Lierop, R.F. (1997), "Rwanda Evaluation: Report and Recommendations" *International Lawyer* (ABA), Vol. 31(3), 887-910.

Verwimp (2000)
Verwimp, P., "Development Ideology, the peasantry and genocide: Rwanda represented in Habyarimana's speeches" *Journal of Genocide Research* (2000).

Wells (2005)
Wells, S.A., "Gender Sexual Violence and Prospects for Justice at the Gacaca Courts" 14 *S.CAL.REV.L. & WOMEN'S STUD* 168-183 (2005).

Wollf (2006)
Wollf, S., *Ethnic Conflict: A global perspective* (Oxford: Oxford Publications, 2006).

Wood (2004)
Wood, S.K. (2004), "A Woman Scorned for the 'Least Condemned' War Crime: Precedent and Problems with Prosecuting Rape as a Serious War Crime in the International Criminal Tribunal for Rwanda," 13 *COLUM. J. GENDER & L.* 274, 276.

RWANDA LAWS

Loi du 20 mai 1963 portant Amnistie général des infractions politiques commises entre le 1er octobre 1959 et le 1er Juillet 1962. (J.O, 1963, p. 299).

Organic Law No. 01/2012/OL of 2 May 2012 *instituting the Penal Code*, OG No. Special of 14 June.

Organic Law No. 05/2005 of 14 April 2005 establishing the *"Commission Nationale Indépendante chargée de Ressembler les preuves montrant l'implication du l'État Français dans le génocide perpétré sur Rwanda en 1994"*.

Law No. 22/2006 of 28 April 2006, O.G special number of 7 June 2006 *creating the Institute for Legal Practice and Development.*

Organic Law No. 08/1996 of 30 August 1996 *on the organisation of prosecutions for offences constituting the crime of genocide or crimes against humanity committed since 1 October 1990*, O.G No. 17 of 1 September 1996.

Organic Law No. 40/2000 of 26 January 2001 *setting up 'Gacaca Jurisdictions' and organizing prosecutions for offences constituting the crime of genocide or crimes against humanity committed between 1 October 1990 and 31 December 1994.*

Organic Law No. 33/2001 of 22 June 2001 *modifying and completing Organic Law No. 40/2000 of 26 January 2001.*

Organic Law No. 16/2004 of 19 June 2004 *establishing the organization, competence and functioning of gacaca courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between 1 October 1990 and 31 December 1994*, O.G. Special No. of 19 June 2004.

Law on the Prevention and Punishment of Gender Based Violence, No. 59/2008 of 10 September 2008, O.G. No. 14 of 6 April 2009.

Organic Law No. 13/2008 of 19 May 2008 *modifying and complementing Organic Law No. 16/2004 of 19 June 2004 establishing the organisation, competence and functioning of gacaca courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity committed between 1 October 1990 and 31 December 1994 as modified and completed to date.*

Organic Law No. 02/2013 of 16 June 2013 *modifying and completing Organic Law No. 51/2008 of 9 September 2008 determining the organisation, functioning and jurisdiction of courts as modified and completed to date,* Year 52 No. Special *bis* of 16 June 2013.

Organic Law No. 13/2008 of 19 May 2008 *modifying and complementing Organic Law No. 16/2004 of 19 June 2004 establishing the organisation, competence and functioning of gacaca courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity committed between 1 October 1990 and 31 December 1994 as modified and completed to date.*

Décret-loi No. 8/75 de 12 Février 1975 Journal Officière 230.

Civil Code Book 1 of 18/08/1988, O.G., 1999.

Penal Code, of 18/08/1977, O.G., 1978. N.

Urwego Rw'Igihugu Rushinzwe Inkiko Gacaca; *Amabwiriza No. 16/2008 yop ku wa 05/06/2008 Y'Umunyamabanga Nshingwabikorwa W'Urwego Rw'Igihugi Rushinzwe Inkiko Gacaca Arebana N'Ibindi Byaha Byibasiye Inyokmuntu byo mu Rwego rwa Mbere, Imanza za Jenoside Zizava mu Nkiko Zisanzwe n'iza Gisirikare no Gusuburishamo Imanza mu Nkiko Gacaca.*

CONVENTIONS, STATUTES AND OTHER DOCUMENTS

Convention on the Prevention and Punishment of the Crime of Genocide, UN General Assembly Res. 260 A (III) (9 December 1948), 78 UNTS 277.

The Statute of the International Criminal Tribunal for Rwanda, Annexed to Security Council Resolution 955 (1994), adopted on 8 November 1994, SC Res. 955 UN SCOR, 1994, UN Doc. S/RES/955.

The International Criminal Court, Rome Statute of the International Criminal Court, available at: www.icc-cpi.int.RomeStatutEng1.pdf**,** last accessed on January 2013.

Report of the Secretary General on the Situation in Rwanda, UNSC, UN Doc. S/1994/640 (1994) para 36.

Final Report of the Commission of experts established by Security Council Resolution 935 (1994), UNSC, UN Doc. S/1994/1405 (1994).

Penal Reform International, Research Report on Gacaca Courts: Gacaca Reconciliation-Kibuye case study (Kigali and Paris: PRI, 2004).

Security Council, Resolution 1431 (2002) adopted by the Security Council at its 4601st meeting of 14 August 2002, S/RES/1432 (2002).

Security Council, Resolution 1503, Annex 1 (2003), (S/RES/1503), adopted by the Security Council in its 4817th meeting, on 14 August 2003.

UN Security Council Resolution 1820 (2008), Adopted by the Security Council at its 5916th meeting, on 19 June 2008, S/RES/1820 (2008).

Nkubito Bakuramutsa, Rwanda delegate to the United Nations, comments during the voting of the creation of the ICTR, UN Doc.

Government of Rwanda, Minister of Justice Letter of 6 August 1994 addressed to the Secretary-General.

Letter from the Permanent representative of Rwanda to the Security Counicl, 28 September 1994 UNSC, UN Doc. S/1994/1115 (1994).

Africa Staff Human Rights Watch *et al*, *Shattered Lives; Sexual Violence during the Rwandan Genocide and its Aftermath* (New York: Human Rights Watch, 1996).

Human Rights Watch, *Leave non to tell the story: Genocide in Rwanda* (New York: Human Rights Watch, 1999).

Human Rights Watch, *Struggling to Survive: Barriers to Justice for Rape Victims in Rwanda* (New York: Human Rights Watch, September 2004) Vol. 16, No. 10(A).

Amnesty International, *Sudan, Darfur: Rape as a weapon of War: Sexual violence and its consequences* (London, 2004) at: www.amnesty.org/en/library/asset/, accessed on 4 June 2012.

United Nations; Declaration of Basic Principles of justice for Victims of Crime and Abuse of Power, General Assembly Resolution 40/34 of 29 November 1985.

OTHER SOURCES

Le Figaro, "AIDS used as a weapon during Rwandan Genocide" Kagame, 26 November 2002.

The New York Times, "A woman's Work", Landesman, P., 15 September 2002, (Magazine).

Viullemin, D., Article in Le Monde, 4 February 1964.

Address to the Nation by H.E. Paul Kagame President of the Republic of Rwanda on the eve of the election of Gacaca Judges on 3 October 2001, available at: www.rwanda1.com/government/07 11 01 add.htm

The New York Times (04 January 1997) "Rwanda to Execute two Hutu; First Verdict on '94 Killings" availbale at: www.nytimes.com/1997/01/04/world/rwanda-to-execute-2-hutu-first-verdict-on-94-killings.html, accessed on 22 July 2013.

Republic of Rwanda, Office of the President, Recommendation of the Conference held in Kigali from 1 to 5 November 1995 on Genocide Impunity and Accountability: Dialogue for a National and International Response, December 1995, p. 20.

Kararsira, P., "Gacaca: Justice for all or injustice for some" available at: www.inkiko-gacaca.gov.rw/En/EnGacaca.htm, accessed on 29 June 2009.

Repubulika y'u Rwanda, Inteko Inshinga Amategek, Inyandiko-Mvugo Z'Inteko Vol. XXI, Igihembwe Gisanzwe n'Igihembwe Kidasanzwe cyo kuva ku wa 14/06/1996 Kugeza Kuwa 25/07/1996 Inyandiko No. 206/AN/96 yo kuwa 14/06/1996.

Repubulika y'u Rwanda, Inteko Inshinga Amategek, Inyandiko-Mvugo Z'Inteko Vol. XXI, Igihembwe Gisanzwe n'Igihembwe Kidasanzwe cyo kuva ku wa 14/06/1996 Kugeza Kuwa 25/07/1996 Inyandiko No. 208/AN/96 yo kuwa 18/06/1996.

Repubulika y'u Rwanda, Inteko Inshinga Amategek, Inyandiko-Mvugo Z'Inteko Vol. XXI, Igihembwe Gisanzwe n'Igihembwe Kidasanzwe cyo kuva ku wa 14/06/1996 Kugeza Kuwa 25/07/1996 Inyandiko No. 216/AN/96 yo kuwa 23/07/1996.

Repubulika y'u Rwanda, Inyandiko-Mvugo No. 23/CD/PV/MG./08, Inteko rusange yo kuwa 03 Mata 2008.

Republika y'u Rwanda, Inyandiko Mvugo No. 11/CD/PV/MG/2008, Inteko rusange yo kuwa 21 Gasyantare 2008.

TABLE OF CASES

The Prosecutor v. Jean Paul Akayesu, Case No. ICTR 96-4-T, Trial Camber I, Judgment (2 September 1998).

The *Prosecutor v. Mikaeli Muhimana,* Case No. ICTR 96-IB-T, Trial Chamber III Judgment (28 April 2005).

The Prosecutor v. Georges Anderson Nderubumwe Rutaganda, Case No. ICTR-96-3-T, Judgment and Sentence (6 December 1999).

The Prosecutor v. Ignance Bagilishema, Case No. ICTR-95-1-A-T, Trial Chamber I, Judgment (7 June 2001).

The Prosecutor v. Jean Kambanda, Case No. ICTR 97-23-S (4 September 1998).

The Prosecutor v. Théoneste Bagosora et al., Transcripts, Case No. ICTR-98-41-T (3 February 2004).

The Prosecutor v. Laurent Semanza, (2003) Case No. ICTR-97-20-T.

The Prosecutor v. Nyiramasuhuko et al, Case No. ICTR-98-42-T, Trial Camber II, Judgment and Sentence (24 June 2011).

The Prosecutor v. Georges Anderson Nderubumwe Rutaganda, Case No. ICTR-96-3-T, Judgement and Sentence (6 December 1999).

The Prosecutor v. Ignance Bagilishema, Case No. ICTR-95-1-A-T, Trial Chamber I, Judgment (7 June 2001).

The Prosecutor v. Jean Kambanda, Case No. ICTR 97-23-S (4 September 1998).

The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Ngeze Hassan, Case No. ICTR-99-52-T.

The Prosecutor v. Samuel Imanishimwe, Emmanuel Bagambiki Andre Ntagerura, Case No. ICTR-99-46-T (herein after the Cyangugu Case) Trial Chamber III, Judgment and Sentence (22 February 2004).

The Prosecutor v. Dragol Jub et al, Case No. IT-96-23 and IT-96-23/1-T, ICTY Judgment (22 February 2001).

The Prosecutor v. Tihomir Blaskic, Case No. IT-95-14-T, ICTY Judgment (3 March 2000).

The Prosecutor v. Radovan Karadzic and Ratko Mladic, Case No. IT-95-5-R61, IT-95-18-R61. Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence.

Ubushinjacyaha burega Mukakayijuka Hadidja, Case No. R.M.P. 7049/S12/MB R.P. 034/CS/KIG of 15/01/99. *Igitabo Cy'Imanza Zaciwe N'Inkiko z'U Rwanda Zerekeranye N'Icyaha Cy'tsembabwoko N'Itsembatsemba,* Vol. III, ASF-Belgium.

Ubushinjacyaha burega Emmanuel Bagambiki, Urukiko Rwisumbuye rwa Rusizi, ruri ku Cyicaro Cyarwo, Ruhaburanisha Imanza Z'Inshinjabyaha mu Rwego rwa Mbere, Urubanza No. RPGR 76/Gen/MJB/RE RP/Gen/0008/06/TGI/RSZ Ikiza ry'Urubanza mu Ruhame ryo ku wa 10/10/2007.

Ubushinjacyaha burega Nyirandayisaba Jeannette & Uwamahoro Alphonsine, R.M.P. 39478/S4/MB/KMA R.P. 029/K1/98 of 08/09/1999, Specialised Chamber, Ruhengeri Court of First Instance, in a compilation of genocide related case: Imanza Zaciwe N'Inkiko Zerekeranye N'Icyaha Cy'Itsembabwoko N'Itsembatsemba, Umutumba w IV, Urukiko Rw'Ikirenga, Ishami Rishinzwe Inkiko.

Ministere Public contre: Sergent GD Barayagwiza Ildephonse; R.M.P: 1663/AM/KGL?NZF/97 R.P: 0012/CG-CS/98, Le Conseil De Guerre 26/11/1998 reproduced in.Recueil de Jurisprudence Contentieux du Genocide, Tome III, Cour Supreme Department des Cours et Tribunaux, 2005.

Ubushinjacyaha Bwa Gisirikare burega: Cpl Ndazigaruye Emmanuel, Urukiko Rwa Gisirikare rwa Repubulika y'U Rwanda Urugereko Rwihariye ruri I Nyabisindu Ruhaburanisha Imanza Z'Itsembabwoko N'Itsembatsemba N'Ibindi Byaha Byibasiye Inyokomuntu Rwakijije None Kuwa 16 Kanama 1999, Urubanza No. RMP 1444/AM/KGL/NZF/97 RP 0005/CG-CS/99.

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