Show me a woman!

Narratives of Gender and Violence in Human Rights Law and Processes of Transitional Justice

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Show me a woman!

Narratives of gender and violence in human rights law and processes of transitional justice

Toon mij een vrouw!

Narratieven over gender en geweld in het recht van de mensenrechten en in transitional justice processen.

(met een samenvatting in het Nederlands)

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Chiseche Salome Mibenge

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Dedication

For Joyce and Benjamin, Chisala, Mwenzi, Chimango,
Mayase, Bweupe and all our children – your stories
still leave me spellbound.
Thank you for your love - we did this together.

Preface

In a Lusaka Market

It was my first year as a student at the University of Zambia. I was seventeen. It was a Friday evening and I left campus for a weekend with my family. It was not yet dark, and the Lusaka Central Market was busy. The bus queues to Kabulonga were extremely long but I waited patiently for my turn to board a minibus – I actually enjoyed the commotion all around me.

Then, two young men approached me. I recognised one as Chitumba a friend of my cousin Natasha. They joined me in the queue and we chatted briefly before they invited me to join them in a taxi ride home, at their expense, as they lived beyond my parents' home anyway. I agreed readily and we walked together, one on either side of me, stepping over vegetables and vendors until we stepped into a parked taxi. As we did so, an old woman shouted after my young men: 'You've done well. Take her away from here. They were going to strip her naked!'

I remember my shock at realising that the commotion: whistling and shouting from the young men loitering around the market had been directed at my legs and thighs. My cotton, floral, summer dress, a gift from my mother, was apparently attracting mob justice. It is an infrequent occurrence, but an occurrence nonetheless, that an 'indecently attired' young woman in Lusaka is pursued by a gang of vigilante youths ostensibly trying to preserve the dignity of Mother Zambia and traditional African values. If she is captured, the woman is normally stripped naked, groped and roughed up as an appreciative crowd gathers to witness the assault. The woman might escape the mob if she is rescued by a shopkeeper and his workers, who will barricade her in their shop until the police arrive and disperse the party.

My two young rescuers were better acclimatised than I was to the body and gender politics on the streets of Lusaka and foresaw that I was on the verge of falling victim to a sexual assault. Chitumba admitted that the taxi invitation was a ruse to get me away from danger. I recounted this story to my parents that evening and choked on tears of rage as I did so. My father tried to rationalise: 'You should understand our culture mama, those people are grassroots people.' I shouted in response: 'They're not grassroots! They don't know anything about our culture! They're just thugs!'

As a young woman in her teens sexual violence was the bogeyman in the morality tales of my southern African society. These morality tales took the shape of gendered narratives that attached to body parts, sexualised body parts, and expressions of sexuality and sexual autonomy. The shape and tone of these social narratives was often censorious of women and girls irrespective of the sex of the narrator. Girls who showed their thighs, girls who stayed out after dark, girls who did not respect themselves: These girls attracted aggressive sexual attention from men, ostracisation and name-calling from women's peer groups and if they really pushed the boundaries, they would get the punishment of rape.[1] However, this was not to be the ultimate punishment. The ultimate punishment would be the fact that nobody would believe it was rape, or if they believed it was rape, the conclusion would be that it was well earned by the victim and perhaps even overdue. Social narratives of

1 Annemiek Richters refers to my description of teen social-sexual angst as the 'omnipresence of rape fear' which can work 'factually and symbolically to maintain or restore the gender biased, hierarchical order of society.' Richters (1998), p. 115. Similarly, Susan J. Brison, writes that sexual violence victimises not only those women who are directly attacked, but all women. 'The fear of rape has long functioned to keep women in their place.' Brison (1998) pp. 11-27. Latoya Peterson would describe my experience in the Lusaka market as part of the 'not rape' phenomenon. She explains the invisibility of the sexual harassment, intimidation and coercion that young women experience but never speak of because it was 'not actually rape.' This 'not rape epidemic' has a controlling and stifling effect on women's sexual autonomy and right to physical integrity. It also permits sexual aggressors who are 'not rapists' to escape detection or punishment. Peterson (2008), pp. 209-220.

gender and sexual violence attached adjectives to women rape victims, such as 'drunken', 'careless', 'provocative', or 'stupid'.[2] These narratives made words such as 'consent', 'force' and 'coercion' ambiguous on my university campus. If I believed in the narratives I would have had to accept that it was the shapeliness of my bare legs that threatened public morality and order as well as my own dignity and physical integrity in the Lusaka market. This would mean submitting to the narratives of power and their objective of privileging men by policing women's autonomy.

Seventeen years have passed since that early evening in the market and finally I can laugh when my father teases me about my ever rising hemlines and the antics of Lusaka's *mishanga* boys.[3] The sense of humiliation and rage passed some time ago, but what remains with me both intellectually and emotionally is a lasting desire to investigate gender narratives and their narrators. I am ever watchful trying to see why and how men and women are influenced and/or bound by the narratives. I have searched for and found powerful and often coercive gender narratives wherever my research has taken me over the past decade: In Dutch law faculties I have been struck by the traditionalist gender narratives on motherhood versus career progression – it is to my surprise perfectly acceptable to publicly grill expectant Dutch co-workers on personal choices concerning child care and their obligation to 'raise their own children'; in Bradford in the North of England I was intrigued by the gender narratives of 'acceptable' dress and behaviour for British-born Pakistani university female students. I was especially amused by a white British librarian who said of a rowdy group of British-Pakistani students 'such a pity, they're just as foul-mouthed as our girls now, sometimes worse. We don't dare to hush them'; and in Washington D.C. in the build-up to the US Presidential elections I overheard many gendered sentiments about the candidates as well as their spouses: 'Sarah Palin should focus on her five children and not politics'; 'Hillary Clinton lost because of the pantsuits, she should have worn more skirt suits'; 'Michelle is great because she stands behind her husband, she lets him be the man'; 'McCain is an old man, he will make America look weak.'

Having grown up in five different countries and three Continents (North America, Europe and Africa), I am inclined to view gender narratives as constructing gender relations in each and every socio-political regime, be it in 'democratic countries', 'secular states', 'war-torn countries', 'developing nations', 'liberal traditions' or 'conservative states'. While personally inhabiting a 'world citizen' identity, my regional focus is, for the purposes of this study, Sub-Saharan Africa. The lifeblood of this process of research has been my fieldwork conducted in the dynamic Republics of Rwanda and Sierra Leone.

My decision to focus on Rwanda and Sierra Leone, two African countries best known in the international community for decades of political violence and armed conflict, was not taken to highlight the most extreme or egregious manifestations of unequal gender hegemonies in wartime. Rather, the two countries' postwar reconstruction processes present a plethora of responses to gender inequality and discrimination in their societies. These responses have taken many shapes including human rights advocacy, affirmative action, reform of discriminatory legislation, security sector reform, demobilisation of fighters, civil society activism, education and community sensitisation, constitutional amendments, and criminalisation. Both countries are rich in gender narratives that compete with as well as complement these processes. This study concentrates on the responses to gross human rights violations by the justice sector. This sector produces compelling narratives detailing the experience of political violence. Legal narratives legitimate victims and condemn perpetrators. I identify the ways in which gender is included in these narratives. I also examine the interface between legal narratives and socio-political narratives disseminated at the local level.

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2 The attribution of culpability to rape victims is an international phenomenon. Speaking against the low conviction rate for rape cases in the United Kingdom, it has been said that 'Alcohol seems to have become the new short skirt. The majority of cases resulting in an acquittal now involve a complainant who had been drinking.' The Guardian Unlimited, *Why is Rape so Easy to get away with?* 1 February 2007.

3 *Mishanga* is the Nyanja word for matches. Many young men with little opportunities for education or formal employment sell cheap goods on the streets of the major cities, including cigarettes and matches, hence the generic term '*mishanga* sellers' or '*mishanga* boys'.

More broadly, this study is situated in the violent political states experienced in Africa from the eighteenth century. The transatlantic slave trade, the imperial wars of conquest, colonisation, liberation struggles, civil wars and transitions from totalitarianism to good governance and the rule of law are the political sites from where I listen for dominant narratives of gender and violence that shape or colour justice. I am inspired in this respect by the words of Poyi Soyinka-Airewele who reminds us that 'in the narrative of African societies the invocation of the past is most intense when it is embodied within the discourses and memories of violence struggles, of communities emerging from and through collective traumas, of oppression, violent resistance and the continuity of pain on the minds of those who have suffered.'[4]

The Kenyan-born artist Ingrid Mwangi-Hutter also reminds us that 'the reason to go a short way back in history is because it is still happening now.'[5] Mwangi-Hutter's reminder and the memory of a young woman in a Lusaka market in this preface should hint at the approach I take in this study: Looking backwards at old harms and injustices in order to understand contemporary forms of sexual violence and exploitation and looking at the evolution of international legal systems as their narratives legitimise or override society's more contentious constructions of gender. I do this all the time criticising the narratives for what they make visible, what they make invisible and how this discretionary power empowers and disempowers victims of gender-based discrimination and inequality 'back then' and in the present day.

Finally, I recall a vow made by Albie Sachs, a South African Constitutional Court justice and an iconic victim of apartheid. Sachs vowed that he would not make himself an exhibit, even when asked to speak subjectively of his victimisation by the apartheid state.[6] This vow is a guiding light in my own work and my use of private narratives alongside legal narratives: Even as I place my body and the bodies of other African women and men into this work, I vow not to make myself or others exhibits.

The exhibit in this work is Law. A robust system of international law can withstand some prodding from its pupils. This will not make a spectacle of the Law but rather enhance its transparency and accountability to its gendered subjects. The gender critique is my contribution to the legal scholarship and community that has fostered me throughout my study and research.

The doctoral research process is often referred to as a lonely road, however, I am happy to say that mine was an extroverted project. I enjoyed academic support, fellowship and community from a host of individuals and institutions and wish to convey my gratitude here. The research was supported by a generous grant from the Netherlands Organisation for Scientific Research (NWO). This made possible my residence over a five-year period with the School of Human Rights Research (the School), a part of Utrecht University's School of Law. It is impossible to thank all of the scholars who guided me throughout my stay in Utrecht, however, it would be remiss not to single out Tom Zwart, Bas de Gaay Fortman, Anne-Marie de Brouwer and Paulien Muller for their support and influence. In particular, I thank Tom Zwart as Dean of Graduate Studies and Director of the School for his moral and financial support of my transatlantic research ventures.

The Mozaiek grant also made possible the training that preceded field visits to Sierra Leone, with the University of Amsterdam and the Netherlands Research School of Women's Studies in 2004[7] and also with the International Human Rights Network with the cooperation of the Irish National Defence Forces in 2005. Another important institutional relationship came with my 3-month position as a visiting fellow with the Africa Centre for Peace and Conflict Studies[8] within the University of Bradford's Department of Peacekeeping in the United Kingdom. There I collaborated with faculty and PhD researchers working on issues of conflict in Sub-Saharan Africa and who are well versed in interdisciplinary and qualitative research. In particular, I thank

4 Soyinka-Airewele (2004), p. 7.
5 Mwangi Hutter (2003).
6 Sachs (1997), p. 20.
7 Formerly the NOV and now the Graduate Gender Programme (GGeP).
8 Now the John and Elnora Ferguson Center for African Studies.

Preface

Connie Scanlon, David Francis and Kenneth Omeje for hosting me and fostering my maturity into an interdisciplinary researcher.

A crucial academic year of writing up the study was conducted at American University (AU (2008-2009)). Early manuscripts were reviewed and roundly critiqued by AU Faculty at the Washington College of Law as well as at the AU School of International Service and AU's International Training and Education Program. I made a number of presentations or 'mock defences' of draft chapters throughout my stay in the US at Cornell University's Institute for African Development, Georgetown Law, SUNY Potsdam, SUNY Cortland, Emory University's Institute for Developing Nations and the International Centre for Research on Women. The dialogue these meetings engendered was invaluable in the final stages of writing as I worked to unite and finalise my arguments. I spent my Christmas holiday, Spring break and Sunday mornings in the Pence Law Library, and could not have asked for a more comfortable and inviting refuge for a scholar. I thank Adeen Postar and her colleagues at the Pence Law Library and the Bender Library for their support of my research efforts. I also thank Meetali Jain (WCL), Wenjing Liu (visiting scholar), Jan Kratochvil (visiting scholar), and Noya Rimalt (visiting Professor) whose friendship inside and outside of the library made the research that much lighter. I must also thank Brenda V. Smith (WCL), Susan Shepler (SIS), Teresa Phelps (WCL), Valerie Oosterveld (Western Ontario), Susanne Zwingel (SUNY Potsdam), and my academic sponsor, Diego-Rodriguez-Pinzón (WCL) for their professional mentorship, friendship and inspiration throughout my residence at AU.

My growth as an academic has been patiently nurtured by my promoters Cees Flinterman and Andre Klip, who took me on as a junior researcher almost a decade ago. Professors Klip and Flinterman have provided the strongest criticism as well as the strongest support of my ambitions and dreams for this manuscript. I look forward to continued collaboration with them in this new postdoctoral phase of my research. I must also thank the members of my reading committee: Prof. Abdullahi An-Na'im, Prof. Hector Olasolo, Prof. Teresa Phelps, Prof. Bas de Gaay Fortman for their final and critical review of this work. As a researcher who likes to 'look back' I must give thanks to my early Professors from the University of Zambia. Carlson Anyangwe urged me to 'research Africa! It's all happening here!' And Alfred Chanda (1959-2007) and Elizabeth Mumba (1948-2005) who encouraged me to pursue a scholarship and Masters programme in The Netherlands – I regret that these two great scholars and early role models passed away before my doctoral defence. I must also express my gratitude to my peers: Dr. Maria Nybondas (2009), Irene Hadiprayitno (2009), Mitja Kovac (2008), Eline Hofman (2007), and Giuseppe Dari Mattiacci (2003). We began our academic pursuits at the same time, and they all defended their dissertations a year, and even years ahead of me. But they never tired of urging on their slower sister until she too finished the race: Thank you for sharing your families, fine cooking, spare rooms, and homes with me – you are my 'Dutch family' and a great source of strength.

Psychologically, emotionally and physically, the research and writing of this study was a collective effort, although of course, I take sole responsibility for any errors or omissions in the final work. The greatest source of collectivism in the pursuit of scholarship came in the field. In Rwanda I was generously hosted by the ICTR sexual violence unit in Kigali, and the Centre for Conflict Management in Butare. I cannot begin to express my gratitude to the Rwanda Police, gynaecologists, survivor groups, survivors, prosecutors, I met and spoke with in Butare and Kigali. Similarly, in Sierra Leone I enjoyed a heart warming reception and cooperation from the Sierra Leone Police, military, survivors of civil war and civil society organisations. The narratives gathered from these interactions underlie this work and I foresee that they will continue to enlighten and enliven my approach to researching gender, violence and justice for many years to come.

Dupont Circle, Washington D.C, United States
02-09-2008

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List of Abbreviations

AFRC	Armed Forces Revolutionary Council
AFL	Armed Forces of Liberia
AIDS	Acquired Immune Deficiency Syndrome
APC	All People's Congress
ANC	African National Congress
AU	African Union
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CDF	Civil Defence Force or Civil Defence Forces
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
DDR	Demobilisation, Demilitarisation and Repatriation
Doc.	Document
DRC	Democratic Republic of Congo
ECOWAS	Economic Community of West African States
ECOMOG	Economic Community of West African States Monitoring Group
EoC	Elements of Crimes
FAR	Forces Armées Rwandaise (Rwandan Armed Forces)
HIV	Human Immunodeficiency Virus
HRW	Human Rights Watch
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IMTFE	International Military Tribunal for the Far East (Tokyo Tribunal)
IDP(s)	Internally Displaced Person(s)
INGO	International non-governmental organisation
NGO	Non-governmental organisation
No.	number
OAU	Organisation for African Unity
p.	page
para.	paragraph
Paras.	paragraphs
pp.	pages
PCCA	Prevention of Cruelty to Children Act
Res.	Resolution
RPA	Rwanda Patriotic Army
RPE	Rules of Procedure and Evidence
RPF	Rwanda Patriotic Front
RUF	Revolutionary United Front
SC	Security Council
SLA	Sierra Leone Army
SLPP	Sierra Leone People's Party
STDs	Sexually transmitted diseases
TRC	Truth and Reconciliation Commission
UN	United Nations
UNAMSIL	UN Mission in Sierra Leone
UNIFEM	UN Development Fund for Women
US	United States
v.	versus
Vol.	Volume
VWU	Victims and Witnesses Unit

CHAPTER 1

Introduction

1 CHIEF SESAY'S NARRATIVE

I was the guest of Paramount Chief Sesay[1] in Sierra Leone.[2] I asked the Chief how he had survived the war. He explained that as rebels advanced he was able to escape to Freetown, where he stayed during the years that the rebels occupied his Chiefdom. Upon his return to his Chiefdom, he held several meetings with his people. Apparently, the men of the village asked the Chief to thank the rebels for their benevolent rule during the occupation. According to the village representatives, apart from a few killings at the start of the occupation, life under the rebels had been peaceful and secure. I was rather taken aback by this anecdote from the Chief, having read widely of the atrocities committed by rebels against civilians.

The Chief introduced me to Bintu,[3] a mature woman who had recently been elected the first woman local councillor in the area's political history. She had been supported in her campaign with leadership training and funding by several local women's non-governmental organizations. In a private conversation with her I mentioned that 'some men' had told me that apart from killings in the early days, rebel occupation had been secure. As I anticipated, Bintu exploded in anger: 'Who told you that? It's a lie! We women were slaves! Wake up in the morning to farm for them, collect their water, we had to feed them! Those rebels! They raped us in front of our husbands and our husbands did nothing.'

Bintu's outburst presents the kernel of this research on gender and violence in legal narratives. Bintu asserts through her narrative that gender shaped the way she experienced insecurity within armed conflict. Gender continues to shape the way she experiences the new and shaky peace process. Bintu speaks of herself and other women as slaves. The Chief, informed by the people's representatives, on the other hand describes 'some killings'. Bintu describes not only rape but also rape as theatre as husbands were forced to watch the rape of their wives. However, men's narratives (at least not their public narratives) do not refer to these communal-familial rapes.

The introductory narrative raises a number of questions about gender and violence. There are the questions that are too simple and too obvious to build a thesis upon. For example, one might conclude that Bintu's narrative is asking rhetorically 'who suffers the most in war, men or women?' This contest can be observed between victims, victim organisations, humanitarian organisations, the media and human rights advocates depending on their specific political agendas. Some argue that men suffer the worst human rights abuses; after all, they are killed unlike women who are only raped.[4] This viewpoint is accompanied by the image of Srebrenica for example, thousands of men and boys being led to an execution ground as their women are only put on buses and exiled from their village.[5] Others torment the public with images of abandoned or orphaned children

1 A pseudonym.

2 This and subsequent introductory narratives in chapters 2, 3,4, 5 and 6 are taken from private and informal conversations and interactions I had while on field visits to Sierra Leone (2007) and Rwanda (2004). In this and other introductory narratives I intentionally obscure some prominent identifying factors such as the names of Chiefdoms or towns. Further, I apply pseudonyms where it seems appropriate to protect identities in the interest of privacy.

3 A pseudonym.

4 See Adam Jones for a detailed study on the 'gendercide' of battle-aged men and how genocide disproportionately targets men. This gender-specific targeting of men has 'attracted virtually no attention at the level of scholarship and public policy.' Jones (2004), p. 2.

5 The UN Report on the fall of Srebrenica is widely quoted in the gendered narratives depicting men as the iconic victims of Srebrenica. 'Several thousand more men are still missing, and there is every reason to believe that additional burial sites, many of which have been probed but not exhumed, will reveal the bodies of thousands more men and boys.' UN Report of the Secretary-General pursuant to the General Assembly Resolution 53/55: The Fall of Srebrenica, 1999.

conveying the message that children suffer the most; they are the most vulnerable to exploitation.[6] Others tell us that actually women suffer the most atrocious violence. They are raped because it is a fate worse than death; perpetrators of rape tell women they will die from sadness and there is no need to waste bullets on them. Women, especially widows, are left to head households and rebuild shattered families and lives.[7]

This is not the contest Bintu's narrative draws this research towards although it will become evident that this study engages with sexual violence in international law in its most traditional construction as a form of violence that disproportionately targets women. However, this should not be seen as a lack of awareness of the many gender-specific forms of sexual violence that men and boys experience distinct from women and girls' experience, both in and outside armed conflict. Such forms of sexual violence, and their general absence in the ambit of international law, are referred to in later chapters with regard to the lack of sexual autonomy and integrity of male slaves, homosexual and transgender persons in detention, and the construction of authentic masculinity as requiring an inviolate (unrapeable) body. Further, the decision to operate in the dominant international law framework of 'rape as male aggression against women victims' in this study should not be taken as an inference that men are not harmed by sexual violence against women. To put it into context, I would be loath to conclude that 'the husband' forced to watch the rape of Bintu 'the wife' is not as traumatised and sexually violated as Bintu or that it is not the intention of the rebels to traumatise and sexually violate him as much as his wife. The apparent absence of sexual violence in the narrative of the Chief is in itself a valuable gender narrative that demands a deeper analysis.[8]

Bintu and the Chief's separate yet related accounts hint at the gendered perspectives that influence postwar reconstruction processes, particularly legal and justice processes: How did people experience violence and human rights violations? Whose narrative is privileged? Who is representing or giving voice to victims' experiences and which stories are they telling?

Some questions can be reduced to a procedural and substantive framework: Are we shaping our human rights law and criminal justice responses on the Chief's narrative of war or on Bintu's narrative? Do we dare to acknowledge Bintu's narrative when we are selecting witnesses or defining the factual and legal elements of the crime of enslavement? Doing so would require a whole host of gender-specific measures including: training investigators to investigate sexual crimes; subjecting the laws of war to a rigorous gender and feminist analysis; recruiting psychologists in the victims and witnesses unit who understand the cultural ramifications for victims testifying about sexual violence; including protection and confidentiality measures for women and girls in our prosecution strategy; sensitising judges concerning their responsibility to victims of sexual violence; including sexual reproductive health care as part of the reparations package for victims.

1.1 Scope of Conflict, Gender and Justice

'Conflict' provides the prevailing backdrop and context to this study. It is a social, economic, political and cultural event that shapes hegemonic relationships between and within groups in nation states. Conflict manifests itself in processes, systems and structures of inequality and discrimination based on grounds such

6 See Laura Suski for a detailed analysis of the motivation and outcome of humanitarianism that privileges the suffering of children. Suski (2009).

7 See Stefan Kirchner's description of the conflict in Eastern Congo as hell in paradise, 'A hell for women, that is.' The claim inadvertently implies that Congolese men can still equate their daily lives to paradise despite the armed conflict and widespread rape of their womenfolk. Kirchner (2008), p. 2. Many academics and activists pressing for the privileging of women's experience tend to reduce women's gender experience of conflict to rape. This draws attention to widespread sexual violence but eclipses other dislocating and grave experiences such as internal displacement, loss of property, loss of status arising from widowhood or loss of children and food insecurity. See The Council of Europe report on Rape in Armed Conflicts, Doc. 8668, 15 March 2000, which replicates this reductionist tendency. Women are described in paragraph 3 of the report as 'the foremost victims of violations of international humanitarian law such as gang rape, forced prostitution, sexual slavery, forced insemination, torture and sexual abuse.'

8 The words of Allesandro Portelli on silences are pertinent to the silences on sexual violence in men's narratives: 'The most important information may lie in what informants hide and in the fact that they do hide it, rather than in what they tell. Portelli (1991), p. 53.

as gender, race and nationality. The most notorious political systems of violent conflict described in this study are apartheid, imperialism and colonialism and internal armed conflict.[9] Apart from internal and internationalised armed conflict these processes inherently and necessarily base inequality and discrimination on the racial superiority of one group and the cultural inferiority of the other. Thus the study of gender inequality and discrimination will in most cases intersect at least with racial, national or ethnic discrimination.

The distinction between internal and international armed conflicts in the law has become less pronounced and internal conflict is now governed to a large extent by the rules and principles which had traditionally only applied to international conflicts. I make no distinction between internal or internationalised conflicts as I believe every internal conflict is internationalised by nature by the fact of the international arms trade, overt and/or covert support from a third state or regional or international actors, and the often essential contribution to the war economy by Diaspora in the region or further abroad.

The fact that apartheid as seen in the United States, South Africa or The Federation of Rhodesia and Nyasaland was legitimated by parliamentarians does not conceal that racial segregation was upheld by violence, and the apparent absence of armed resistance under these systems merely attested to the victory of violence and the threat of violence by the ruling elite. Thus, in chapters two, three, four, five and six my studies of gross abuses of women's rights in Imperial Great Britain and France, Apartheid South Africa, and the independent nations of Rwanda and Sierra Leone presuppose a coercive zone of conflict or armed conflict.

Since the 1980s there has emerged a comprehensive and growing body of literature particularly in the fields of peace and conflict studies and international relations that sift the different layers and phases of conflict through a gender sieve and pick out the specific ways in which women experience conflict. These studies are central to the current position held by the international community that declares sexual violence a weapon of war and demands that a gender perspective and policy are mainstreamed into any peace process and postwar reconstruction.[10] The strength of this scholarship lies in its avoidance of compartmentalizing women's vulnerability to sexual violence and other forms of gender-based violence into a dichotomous peace and war framework. This scholarship has allowed for a greater understanding of the insecurity women experience irrespective of peace, war and the various gray zones that mark the continuum of economic, social and political insecurity.

Undertakings to establish accountability for war crimes and crimes against humanity have become a feature of negotiated peace. Mechanisms of accountability such as truth commissions and ad hoc criminal tribunals operate at the official close of armed conflict, but often in a state of insecurity for civilians. Bearing this in mind, this study collapses the temporal zones of peace, the aftermath of armed conflict, the postwar period, the post-conflict into a zone broadly referred to as conflict. Conflict may precede armed conflict or it may follow the signing of a peace treaty. It is often the site of continuing violence; however, it is violence tempered by a wide range of developments impacting security, such as a partial demilitarization and demobilization process or the exporting of armed conflict to a third territory.

Throughout the escalation or transition of conflict to armed conflict, the daily life of the civilian population is destabilised by rumours or threats of violence, pockets of violence, arbitrary curfews, shortages of basic amenities such as electricity and water, disruption to daily rituals such as attending school, community meetings or prayer groups and battle-rousing propaganda and images. Scholars have described the ways in

9 The crime of apartheid is a crime against humanity. It means inhumane acts against a civilian community committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime. The Rome Statute, Articles 1 (j) and 2 (h).

10 See Security Council Resolution 1325 passed unanimously on 31 October 2000. This was the first resolution ever passed by the Security Council that specifically addresses the impact of war on women, and the need to increase women's contributions to peace and conflict resolution processes. S/RES/1325 (2000). See also Security Council Resolution 1820 passed unanimously on 19 June 2008 which specifically states that rape is a weapon of war and can be a crime against humanity, and a constitutive element of genocide. Resolution S/RES/1820 (2008).

which such propaganda co-opts gender into its narrative.[11] Even as masculinity and the male body are aggressively militarised, femininity and women's bodies are transposed onto the identity of the nation: The vulnerable mother nation must be protected from violation and the enemy nation must be violated (raped even) and conquered.

The literature reveals that throughout the de-escalation and demilitarisation of armed conflict into conflict the situation of the civilian population can be as dramatic and precarious as during the period of armed conflict, and in some cases worse. The risk of renewed hostilities is high so that the application of the term 'peacetime' is no more than a fleeting fiction. The crime rate goes up, infrastructure (water, health, education, justice, security) has been destroyed, homes lie in ruins, problems of a humanitarian nature are rife, the economy is paralysed and the aid provided by the international community is often woefully insufficient.[12]

Research on women's living conditions in conflict zones is very revealing of the gendered outcomes of violence and their impact on survivors of armed conflict. Scholars have identified that violence in the conflict zone is often concealed in private women's spaces and acts such as child bearing. Thus, the collapse of primary health-care services is experienced by women in a war zone most cuttingly through high levels of maternal and infant mortality and morbidity.[13] Domestic and community violence against women is revealed to increase after armed conflict.[14] Women, particularly women widowed by the conflict, are exposed to violent altercations over land with strangers as well as relatives, in-laws, children and aggressive suitors. The adoption of often unfamiliar head of household roles for many women, without sustainable livelihood opportunities and the burden of providing for war-affected dependants may increase vulnerability to exploitative transactional relationships.

The profile constructed by humanitarian workers of internally displaced persons (IDPs) and refugees has gradually expanded to include women with individual as well as gender-specific needs. There is a marked shift in the field from an androcentric model which viewed refugees primarily as men and their dependants (children and women). Sustained gender assessments of refugee policy by researchers have led to a deeper understanding of the ways in which displacement enhances women's vulnerability to exploitation and abuse.[15] Women displaced by armed conflict are especially vulnerable to sexual abuse and exploitation in camps and as they attempt to return to and reclaim their homes.

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11 Straus (2007) and Thompson (2007) provide useful analyses on the role of the media as a propaganda tool in the build-up to the Rwandan genocide. See also Zarkov (2001) and (2007) for specific references to the ways in which the media also uses gender stereotypes of masculinity or maleness to fuel armed conflict.

12 Haroff-Tavel describes variables of the aftermath, for example when a natural disaster such as drought compounds the effects of protracted armed conflict, or months or even years after the end of the conflict when donor fatigue sets in and a humanitarian crisis is renewed. Haroff-Tavel (2003), p. 185. See also Cockburn (2001) for a gendered analysis of armed conflict and the insecurity that prevails in its aftermath.

13 Jacobson (1999), p. 180 quoted by Cockburn (1999), p. 11.

14 Benjamin Ndabila Mibenge describes how incidents of domestic violence increased dramatically when traumatised soldiers returned from the battlefield to their homes. 'Upon their return from the (fighting, as part of the British land forces in the First and Second World War) wars, demobilized soldiers exhibited a propensity for violence, especially when they discovered that their wives had betrayed them in their absence.' Mibenge (2004), p. 32. Fionnuala Ní Aoláin refers to the 'returning warrior' who has through conflict normalized the use of violence and views the home as another site in which to exercise power and control through physical force. She also writes of South Africa that 'the perceived escalation of domestic violence rates post-Apartheid have raised deep concerns about the relationship between pre-existing apartheid violence and its spill over to a transitional society.' Ní Aoláin (2008), p. 19.

15 See Kristin B. Sandvik describing how the unprecedented focus on the extent and gravity of gender-based violence in situations of unrest and displacement has led to the recognition of refugee women as a particularly vulnerable group. Sandvik (2009). See also Vann (2002) on programmatic responses to gender-based violence against displaced populations. Amy G. Lewis provides an insight into the levels of violence which women experience in refugee camps and communities and provides case studies of multi-sectoral approaches taken by the UNHCR, including psycho-social, health and security (including legal justice) responses in the African context. Lewis (2005-2006).

Introduction

'War is not over (for women) with the last bullet' has become the popular truism signifying the ongoing gender impact of conflict on women's security and vulnerability to violence and exploitation.[16] The term conflict as applied in this research is more appropriate than the term 'peace' when taking into account that despite demilitarization, women's security remains precarious yet marginalised from the core peace processes and reconstruction policies and projects, particularly pertaining to transitional justice.

The discussion of 'wartime rape' suggests that there is something called 'normal rape' that happens occasionally in peaceful societies. 'Normal rape' would be an apolitical offence that does not traumatize or offend in the same way that wartime rape does the sensibilities of civilized peoples and its victims.[17] Differentiating between rape in 'war' and 'peace' carries the danger of prioritizing sexual assaults so that rape that is used as a tactic of ethnic cleansing evokes moral outrage, yet forced sex in the privacy of family life is accepted.[18] This is an insupportable claim as it puts rape in the private sphere and allows lawmakers, the police and communities to explain it in terms of dysfunctional relations and attitudes between men and women. This definition separates violent sexual relations and the construction of masculinities and femininities from an analysis of power relations. Deprived of such an analysis the task of transforming social relations becomes more difficult.[19]

Thus the claim that wartime rape differs from sexual assault in peacetime in that it is committed in a political context which often engenders organised violence is inaccurate.[20] It does not take into account abuses such as the organised nature of trafficking in women and girls in 'peacetime', systemic discrimination by courts of law against victims of domestic violence or the sexual exploitation of female inmates by wardens for financial gain. Rape in peacetime is also committed in the political context of hegemonic power and it has serious repercussions for gender equality and non-discrimination in the enjoyment of fundamental human rights.

There has also been extensive research on the changing nature of warfare since the start of the nineteenth century, when World Wars and intra-state wars were perceived by the international community as the most pressing threats to security and peace. In contemporary armed conflict it is the lives of civilians that are marked by gross violations of human rights; they are terrorised and traumatised by systematic attacks against their communities, social, cultural and political structures.[21]

The testimony from victims and witnesses before tribunals such as the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Sierra Leone Special Court (the Special Court) reveal that armed conflict takes place in the homes, classrooms, front

16 See Cullberg Weston and Kvinna till Kvinna (2002) describing the practical ways in which women's centres help women survivors overcome obstacles in the healing and recovery process in Bosnia-Herzegovina. The focus is far reaching and addresses issues such as wartime traumatisation, economic losses, the effects of war on families, the return process for refugees and IDPs and its traumas and fractured relationships with neighbours and communities, for example dealing with wartime betrayals and collaboration.

17 The distinction between peace and wartime rape is often emphasized by the attachment of adjectives such as heinous, egregious, atrocious and brutal to rapes occurring in armed conflict. I try to avoid this tendency in this study.

18 Nordstrom (1991), cited by Sideris (2001), p. 146.

19 Sideris (2001), p. 61.

20 The Council of Europe's report on rape in armed conflict erroneously describes 'ordinary rape' as less serious than wartime rape.
7. Peacetime rape is itself a traumatic experience resulting in great psychological damage to the victim; the trauma can only be worse in wartime. Furthermore, wartime rape is never an isolated incident, but generally repeated, unchecked and frequently unpunished.
8. Wartime rape is worse than 'ordinary' rape and is accompanied by other war-related trauma: loss or death of husbands, children, parents or friends, loss of property, etc.
11. As already explained, wartime rape differs from sexual assault in peacetime in that it is committed in a political context which often engenders organised violence.
Council of Europe Rape in Armed Conflicts, Doc. 8668, paras. 7, 8 and 11, 15 March 2000.

21 See Judith Zur on the civil war in Guatemala and the very domestic ways in which it was waged against communities and its impact on widows. See also Nordstrom on the civil war in Mozambique and its impact on villagers. Zur (1998) and (1997) and Nordstrom (1997).

gardens, fields and churches of civilians as combatants occupy towns and villages and effectively hold hostage their occupants. These texts or transcripts complement the change in the research focus from battlefield casualties to civilian casualties on the home front. To call armed conflict 'armed' conflict is actually misleading as the civilian hostages targeted for enslavement, amputation, mutilation, rape, torture, abduction, summary execution, forced labour and other gross violations of human rights are unarmed.

Feminist scholars have led the way in displacing two powerful gendered narratives that undermined the development of relevant international law protection for women in armed conflict. The first narrative restricted women's victimhood to the loss of husbands and sons on distant battlefields. Scholars do not deny that the loss of male heads of households is a devastating loss for women; however, they have provided the cultural, economic and legal implications of such loss for individual women. The loss of social status is closely linked to the loss of civil status where, for example, women's property rights or citizenship rights depend on a male guardian. The second narrative or myth dispelled is that rape is the only gender-based violation that distinguishes women's experience of armed conflict from men's. Research does reveal that rape predominantly targets women. However, there is a tendency to ignore that a gendered analysis of armed conflict requires that we understand how cross-cutting issues such as housing rights, food insecurity, health care and the loss of one's livelihood shape gender-based violence but also exist independently as human rights concerns of women separate from rape or the threat of rape.[22] Further, rape is one of many forms of sexual violence that women as a gender group experience. Feminist legal scholarship increasingly calls on the legal recognition of acts such as forced nudity and separation from infants to be recognised as egregious forms of sexual violence.[23]

Feminist scholarship has also contributed to a move beyond the paradigm that creates women universally as victims and men as warrior-villains or warrior-heroes. Women's multiple roles in conflict expose the ways in which women conform to and break out of gender roles in order to prevent or sustain conflict. As 'mothers of the nation' women have been active in supporting or even pressuring sons and husbands to rally to war. Conversely, the mothers of the nation may form powerful anti-war or peace movements.[24] In societies where men leave the homestead for military training or battle, women may take on head of household responsibilities and other traditionally masculine roles such as managing field workers, selling produce and smuggling prized commodities. In militarized communities women may take up arms in order to bolster civilian defence forces and, of course, women can take up arms as belligerents in the conflict.

Legal scholarship on the subject of transitional justice is unavoidably located in societies engaged in violent social and political transition. Mechanisms of accountability such as truth and reconciliation commissions, ad hoc criminal tribunals and military trials emerging in recent decades in countries such as Iraq, South Africa, Cambodia, Sierra Leone and Rwanda were seen to herald in the transition to participatory politics and the rule of law. Prosecutors, commissioners and human rights experts investigated gross violations of human rights and issued binding and non-binding indictments against those deemed to be the architects of atrocities. Transitional justice with its ambition of ending impunity through the establishment of individual criminal responsibility via truth telling and/or prosecutions has become a central element of postwar reconstruction.[25]

The military trials in Tokyo and Nuremberg represent the first international effort to establish individual criminal accountability for war crimes and crimes against humanity. The Prosecution of German and Japanese leaders showed that the enforcement of human rights could be possible with political will and international

22 See Pankhurst (2007) and Enloe (2007).

23 Ní Aoláin (2000).

24 A good example is *Abuelas* (Grandmothers) *de Plaza de Mayo,* an Argentinian NGO seeking the restitution of children who disappeared and grandchildren who were kidnapped under a military dictatorship (1976-1983). Its quest to trace disappeared or kidnapped children has served to investigate and expose the gross human rights violations of the military regime and serves as a condemnation of military and other forms of authoritarian rule.

25 See McCormack and Simpson (1997) for a review of war crimes trials and the evolution of an international criminal law regime. They describe contemporary ad hoc tribunals for Rwanda and the former Yugoslavia but also provide an extensive review of domestic war crimes trials including those conducted by Germany, Austria, France, the Netherlands, Israel, Australia and Canada in the wake of the Second World War.

cooperation.[26] An international treaty prohibited slavery in 1926 and yet the narrative of the international criminal justice process ignored well-documented evidence of the systematic enslavement of Asian girls and women in World War II. The first legal narrative condemning the enslavement of up to 200,000 women by the Japanese Imperial Army during the Second World War was first heard in 1994 through a study and investigation commissioned by the International Commission of Jurists (ICJ).[27]

In the 1990s, criminal prosecutions of and convictions for rape as a form of gender-based violence could be seen for the first time before ad hoc international criminal tribunals, and an extensive body of legal research accompanied these processes. Much of the legal research accompanying these prosecutions focused the gender lens on a critique of substantive laws, usually in the shape of statutes laying down the subject-matter jurisdiction over crimes committed during armed conflict. For example, the inclusion of sexual violence as a crime against humanity in the Statutes of the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) and the interpretation of this provision by the Tribunals has been widely discussed and criticised. Apart from the Statute, the substantive critique has also focused on the rules of procedure and evidence of ad hoc criminal tribunals. In particular, rules specifically focusing on the admissibility of evidence of sexual violence have received attention – for example, the rule against the corroboration of testimony about sexual violence.[28] The fact that several tribunals were established in the 1990s has allowed for comprehensive comparative reviews of Statutes and rules of evidence and procedure by legal researchers. In this way researchers might ask whether the ICTR chambers' definition of 'consent' as a defence against sexual violence is more broad than that of the ICTY chambers.[29]

Other legal writers focusing on gender in the justice process have moved beyond the interpretation of the statute and rules of evidence and procedure and focused on the needs of victims and witnesses of gender-based violence, and have discussed the reception and treatment of victims and witnesses by the victim and witness unit, by prosecutors and defence counsel.[30] They have raised the issue of reparations for victims and witnesses, invoking this as a form of social justice, for example suggesting the provision of housing and medical treatment to victims and witnesses.[31]

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26 Patricia Viseur-Sellers clarifies that evidence of sexual abuse as well as male sexual abuse by the Gestapo, the Nazi SS forces and ordinary German soldiers against Russian and French civilians was tendered by the Russian and French Prosecutors, relying on witness testimony, police reports, medical certificates and affidavits. Abuses included sexualised forms of torture of men, forced recruitment of girls and women into brothels, gang rapes, and sterility experiments on Jewish women. The defence neither objected nor raised a defence to counter the evidence of sexual violence. Despite this well-documented narrative of sexual violence, the Nuremberg judgment dealt with evidence of war crimes and crimes against humanity in an unspecific manner. Sexual violence was subsumed under the terms atrocities and ill-treatment. Only killings, slave labour and the persecution of Jews were addressed with any specificity. In contrast to the Nuremberg indictments, the Tokyo indictment explicitly alleged acts of sexual violence. Testimonies of sexual violence committed by invading Japanese troops or during the occupation of Borneo, the Philippines, Burma, Java, French Indochina and China were submitted. The Tokyo judgment is unambiguous in that war crimes encompassed murder, rape and other cruelties. Viseur-Sellers dispels the belief held by many international lawyers that evidence of sexual violence was not admitted at Nuremberg or Tokyo or, if it was admitted, that it was immaterial to the judgment. Viseur-Sellers (2001), pp. 281-290.

27 Dolgopol and Paranjape (1994).

28 See Piragoff (2001) and (2001a) for an excellent analysis of the negotiation and drafting of the Rules by States. He provides a rare insight into the many challenges posed by States in creating specific provisions for sexual violence, particularly relating to issues such as 'consent', 'corroboration' and 'in-camera' testimony. See also André Klip and Goran Sluiter's Annotated Legal Cases of International Criminal Tribunals from 1999 onwards which provide a legal commentary on the decisions of the ad hoc criminal tribunals for Rwanda and the former Yugoslavia, the Sierra Leone Special Court, the Timor Leste Special Panels for Serious Crimes and more recently the International Criminal Court.

29 See Cole (2008) for a review of the Gacumbitsi (ICTR), Akayesu (ICTR), and Kunarac (ICTY) cases' contradictory definitions of the elements of rape. See also Askin (1999) and (2003) and Viseur-Sellers (2002) and Ní Aoláin (1997).

30 This body of literature has benefited from contributions from staff members or former staff members of the tribunals. See, for example, Vahidy et al. (2009), Stepakoff et al. (2007), Cole (2008), Akhavan (2005), and Viseur-Sellers (2001) and (2002). NGOs supporting women survivors of armed conflict have also produced evaluative studies of the victim and witness experience of transitional justice. See for example, Kvinna till Kvinna (2004).

31 Both De Brouwer (2005) and Nowrojee (2005) address the needs of victims and witnesses before the ad hoc criminal tribunals. Rombouts (2006) and De Brouwer (2005) provide insightful studies on gender and reparations for the survivors of genocide in Rwanda.

Chapter 1

Social scientist researchers have revealed how the media and propaganda machine include and exclude victims of gender-based violence from narratives of victimhood in postwar societies.[32] In the case of gender-based violence at the domestic level, scholars have exposed how the race, ethnicity and social status of a victim can limit or improve the prosecutor's odds of securing a conviction. However, at the level of international criminal law we are missing a parallel review that could reveal those factors that disadvantage victims of gender-based violence from accessing effective justice.

Factors such as stigma or ignorance of the workings of the legal system are regularly put forward as obstructing women from seeking justice at the international level. However, the focus is on projecting fear or reluctance on women as victims and witnesses and placing the responsibility for accessing justice exclusively on women. There is little energy directed toward investigating the tribunal and its possible reluctance to give an audience to women on discriminatory grounds. Few scholars have empirically investigated whether an international criminal tribunal is sexist, racist, or ageist, for example. Efforts by legal scholars to identify the reasons why women might shun the legal system fail to call on the same legal system to self-examine. There is an assumption, and this is in contrast to the domestic level, that international processes of justice are immune from projecting gender, race and other forms of bias on victims and witnesses. While there is an understanding that elderly, poor, illiterate women may lack the means to access justice, there is no examination of whether a Prosecutor might deem poor, illiterate and elderly women to be unreliable witnesses, or that commissioners might judge all poor and elderly women to be an unlikely target of rapes. Bias emanating from the international justice process has yet to be thoroughly interrogated by legal scholars.

'Narratives' formalise tales, myths, accounts and stories that emerge from society on any given subject. Gender narratives focus on social relations between men and women and produce affirming or censorious judgments on gender appropriate behaviour and conduct. In countries that have experienced gross violations of human rights, gender narratives emerge which map the manifestation of conflict and abuses; producing victims, perpetrators, collaborators, martyrs, traitors and heroes as expressions of good and bad gender models. For example, one gender narrative might affirm the integrity of men who killed their daughters rather than let them be kidnapped and raped by invading armies. Another narrative might condemn the morals of women who survived armed conflict whilst their husbands and children were killed. Narratives occur within all sectors of society. Narratives, because of their authoritative potential, can have an impact on accepted social roles and relations. Violence ultimately generates and transforms social hierarchies and perceptions within and between groups.[33] And in the aftermath of violence, communities shape collective narratives that can represent a cultural remembrance of the violence and its significance for the group identity, including gendered identities.[34]

This study is concerned primarily with gender narratives arising from the investigation and/or prosecution of rape and other forms of gender-based violence as an international crime. The legal narratives selected will provide an inquiry into the subjective location of the tribunal in question and how this shapes the inclusion as well as exclusion of gender-based violence from the process of justice. The justice processes referred to may be conducted at both the national and international level, and may take the shape of tribunals, commissions and inquiries. Narratives in this study are collected not only at the judgement and sentencing stage but also at the reporting, investigation, selection of victims and witnesses, examination and cross-examination stages. The interplay and intersection between legal and judicial narratives and other forms of narrative, particularly social, is an important point of departure in this study as the research examines the mirroring of social narratives on gender and gender-based violence in human rights law and criminal justice processes.

Throughout this research I use terms such as gender and gender equality that are widely and often casually adopted in everyday parlance as well as in scholarship and policy and practice in fields such as development

32 Zarkov (2007) and Ross (2002) and (2005).

33 The violent transformation of social hierarchies could be illustrated by the image of an armed child soldier arresting or facilitating the passage through a check point of frightened adult civilians in their vehicles.

34 See Peyi Soyinka-Airewele for an elaboration on the transformative impact of state violence on personal and political identity. Soyinka-Airewele (2004), p. 7.

studies, international relations, anthropology, peace and conflict studies and human rights. In this section I provide not 'definitions' so to speak, but rather the parameters in which I understand and apply the terms throughout this work. And indeed my definitions are often far from legal definitions borrowing as they do from concepts and popular usage of these terms by researchers and practitioners outside of the field of law. Chapters 2 and 3 will provide strictly legal definitions of the terms gender, inequality and discrimination as provided by international conventions and treaty bodies.

'Gender' refers broadly to the socially constructed roles as ascribed to women and men, as opposed to biological and physical characteristics under the banner of 'sex'. Gender relationships are social relations which include the ways in which the social categories of male and female interact in every sphere of social activity, such as those which determine access to resources, security, power and participation in political, cultural and religious activities.[35] Gender also denotes the social meanings of male and female and what societies decree to be appropriate behaviour, attitudes and attributes for men and women. Although the details vary from society to society and change over time, gender relations always include a strong element of inequality between women and men and are influenced strongly by ideology.[36]

Gender relations vary according to socio-economic, political and cultural contexts, and are affected by other factors, including age, race, class, sexual orientation and ethnicity. Gender groups are traditionally divided into two monolithic units: men and women. This tends to make invisible sub-groups and cultures within a dominant gender social construction and also conceals the hierarchies and hegemonic power within a single gender group. Thus within the supposedly monolithic group of men, there is an idealised man who fulfils the gender expectations dictated by society. Those men who conform to this model would enjoy greater civil, political and economic freedom than men who deviate from the idealised model. There is no universal model of the idealised male: In one society the idealised male could be Muslim, heterosexual, self-employed, married and faithful to his wife; and in another he may be Protestant, educated to college level, heterosexual with multiple sexual partners and married. And those women who complement and enable men's fulfilment of the role of idealised male are promised greater security in a patriarchal universe and privileged access to contested or scarce resources. Gender equality requires that the gender roles of women and men who do not fulfill and/or complement the idealised male gender role model are awarded the same merit as those of the idealised male and entitled equally to access rights and resources.

Inequalities in the enjoyment of human rights arise from gender-based discrimination which is an umbrella term for any harm that is the result of power imbalances that exploit distinctions between men and women and amongst men and women. Gender-based discrimination or the threat of gender-based discrimination can coerce 'deviant' men and women to conform to 'acceptable' gender roles. Thus, a woman may conceal that she is gay in order that she does not jeopardise her appointment as a partner in a law firm or an unmarried woman may wear a wedding ring in order to gain the respect of colleagues in an office. Gender-based discrimination may be sex based or gender based and often occurs as a combination of both. For example, a company may refuse to employ young women because of an expectation that they will get pregnant and prove a liability. This form of discrimination is based on women's sexual reproductive potential, i.e. their biological sex. It is also based on the common belief that women should take primary responsibility for child rearing, household chores and other domestic roles perceived to be gender appropriate but incompatible with the pursuit of a career outside of the home.[37]

'Gender-based violence' is a severe manifestation of gender-based discrimination, and takes many forms including sex selective abortions, gaybashing, honour killings and sexual harassment. There is often a continuum of harm and maginification of scale with regard to this form of discrimination. Thus, discriminatory

35 Pankhurst (2003), p. 166.

36 Ibid.

37 See reports on the pressures women face from peers, family members and colleagues to quit work in order to raise children. New York Times The Female Factor: The Good Mother, and Modern Politician, 17 January 2010 and New York Times, The Female Factor: In Germany, a Tradition Falls, and Women Rise, 19 January 2010.

hiring practices against 'girls', 'gays', 'pregnant women', etc. can foster a work environment where sexual harassment or even assault is condoned by managers. Violence may be physical, sexual, psychological, economic or cultural.[38] In many cases victims of gender-based violence experience a combination of these forms of violence and or threat of violence. Gender-based discrimination characterizes violent abuses such as the conscription of child soldiers, disappearances, detention and enslavement. And there is a recent unanimous acceptance by the international community that sexual violence in armed conflict is a weapon or strategy of war.[39] The egregious nature of gender-based violence, particularly sexual violence, is aggravated by the prima facie coercive nature of armed conflict.[40] A coercive circumstance arising from conflict could include stark conditions of internal displacement and occupation or permanent or temporary control by a military presence such as a rebel group or colonial administration.

1.2 Hypothesis

The chief hypothesis within this study is that the transitional justice process produces a dominant narrative about gender in relation to violence in armed conflict. This dominant narrative is essentialising in that it constructs women as a monolithic victim group and gender as a unitary ground of discrimination. In essentialising gender, the said dominant narrative fails to acknowledge variables occurring within the group gender, and ultimately variables in the nature and impact of gender-based violence.

The dominant narrative requires a 'perfect' or 'legitimate' victim who is allowed to access justice processes. However, the victim whose gendered experience of violence and conflict does not match up to the dominant narrative of victimhood is excluded from access to justice. The long-term result of this judicial selection process is a perpetuation of inequality and discriminatory attitudes that enable violence against women in armed conflict and conflict societies to remain unchallenged.

The legal narrative of the 'perfect victim' varies from society to society and remains dynamic. In the context of the United States' legal and justice narratives Alice Sebold describes herself as the perfect victim in the following way:

> 'I was a virgin. He was a stranger. It happened outside. It was night. I wore loose clothes, and could not be proven to have acted provocatively. There were no drugs or alcohol in my system. I had no former involvement with the police of any kind, not even a traffic ticket. He was black and I was white. There was an obvious physical struggle. I had been injured internally…I was young a student at a private university…he had a record and had done time.'[41]

This study is concerned with the impact of the 'perfect victim' narrative on the alternative narratives of women who are not 'perfect.' Inclusion in the justice process is constrained by this dominant narrative as victims must adjust their narratives to the perfect script. And exclusion is imposed on victims who defy the prescribed gender roles which women are expected to portray in conflict.

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38 Psychological violence may occur where the threat of violence is used by a woman's in-laws to coerce her to desist from leaving the marital home without their express permission or accompaniment by her husband or other male relative.

39 Security Council Resolution 1820, S/Res/1820 (2008), 19 June 2008.

40 The Trial Chamber in the Akayesu Case determined that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, including armed conflict. This case also provides broad definitions of rape and sexual violence. Jean-Paul Akayesu, Judgment, Case No. ICTR-96-4-T, 02-09-1998, paras. 598 and 688.

41 Sebold, in describing her experience of the legal system, contrasts herself with rape survivors effectively barred from the justice process by disinterested police investigators and doubtful prosecutors and social workers because of their (the survivor's) history of substance abuse, their belonging to a minority race, or having had a domestic relationship with the perpetrator. Sebold (2002), p. 168 quoted by Chamalla (2005), p. 14 in her review essay of Sebold's memoir. Susan J. Brison also notes that she was spared suspicion from the police and medical personnel because she was a married woman, she was attacked by a stranger in a safe public place, and bore the visible marks of strangulation and a severe beating to her face and body. Brison (1998), pp. 15-16.

1.3 Research question

Transitional justice processes in Africa are proliferating. Ethiopia's government embarked in 1992 on prosecutions of President Haile Mariam Mengistu's regime (1974-1981), convicting Mengistu of genocide and crimes against humanity in absentia.[42] Kenya's Human Rights Commission is leading a lawsuit on behalf of Mau Mau freedom fighters who were summarily detained without due process and tortured by the British colonial government in the build-up to Kenya's independence.[43] Liberia's truth commission has heard the testimony of victims of war crimes, including from victims in the Diaspora.[44]

Transitional justice processes in Sierra Leone and Rwanda have produced various legal, quasi-legal, traditional and informal responses to gross violations of human rights. In Rwanda a UN Tribunal was created to prosecute top-level perpetrators of crimes against humanity and in Sierra Leone a Special Court was established by the Government with the cooperation of the UN. Both these Tribunals work concurrently with local remedies enacted by Parliament to establish accountability for atrocities. In Sierra Leone, a Truth and Reconciliation Commission (TRC) was established to address gross violations of human rights. In Rwanda, the ordinary criminal courts and *gacaca* are prosecuting genocide. At the community level in both countries, other traditional, faith based, and animist approaches to retributive and restorative forms of justice are applied. In this study the transitional justice processes from Rwanda and Sierra Leone are referred to in an illustrative manner as opposed to a comparative manner as the nature and manifestation of violence and gender-based violence in the two countries was so different. As a result, the judicial inclusions and exclusions are based on different considerations and biases and provide a greater range of discussion for the purposes of this study.

The research questions arising from the hypothesis in the preceding section and posed in the context of narratives taken from justice processes in Sierra Leone and Rwanda are as follows: What is the dominant narrative of gender and violence emerging from the transitional justice processes?; Are there alternative narratives of gender and gender-based discrimination excluded from or only partially included in the dominant narrative?

Having responded to the fundamental research question and produced the dominant and alternative narratives of gender and violence for analysis, the following sub-questions will be raised: Which factors, such as legal, social, political and cultural have been influential in the construction of the dominant and alternative narratives of gender and gender-based violence in the human rights law framework and criminal justice process?; What is the impact of the dominant narrative on the enjoyment of the right to an effective remedy for victims of sexual violence and other forms of gender-based discrimination in conflict societies?

The research question is directed at narratives from international criminal courts as well as domestically situated tribunals investigating and/or prosecuting gender-based violence. Both the domestic and international tribunals in question are confronted with widespread and systematic mass rapes committed as part of a war strategy.

Whilst justice processes in Sierra Leone and Rwanda form the major case studies in the study, some historical cases of sexual violence in the context of the nineteenth and early twentieth century European imperial venture in Africa are interspersed throughout the study. These historiographies are juxtaposed with the contemporary Rwandan and Sierra Leonean case studies in order to highlight the pervasive and common themes in the construction of gender and gender-based violence in legal and socio-political narratives throughout the

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42 See Wondwossen L. Kidane, for a legal assessment of the prosecution of the Military Council that ruled Ethiopia from 1974 to 1991 (the 'Dergue' in Amharic), a period known as the Red Terror. The then Transitional Government of Ethiopia established the Special Prosecutor's Office in 1992 with a mandate to investigate acts of genocide and other crimes committed during the 17-year rule, to provide a historic record and to bring those most responsible to justice.

43 The lawsuit on behalf of the Mau Mau veterans was filed in June 2009. See www.khrc.or.ke/maumaupress.asp for the official press release and case analysis.

44 The Final Report of the Truth and Reconciliation Commission of Liberia was released in July 2009. See www.trcofliberia.org/reports/final for the summarised and full report.

centuries. The intention is not to apply the modern body of international human rights law or the supranational criminal law framework retroactively to nineteenth century violations against women, but rather to emphasise the evolutionary process that 'put gender' into the discourse of human rights law and subsequently transitional justice.

Contemporary yet historical twentieth century incidences of gender-based violence are also recalled in this study because they are representative and illustrative of inclusion and exclusion in judicial narratives that have emerged in the nearly 60 years since the Second World War in reports, commissions, civil claims, state apologies, reparations processes, courts martial, and international military tribunals. The dominant narratives these processes have spawned in the post-War span are more established and visible than those I refer to as emerging from the Rwanda and Sierra Leone tribunals in a decade-long period. I use the historical cases to respond to the research questions and also to add weight to my conclusions on narratives emerging from the modern African conflicts, conclusions which may otherwise be challenged as being premature.

1.4 Methodology

This is a legal study. The subject matter is law and its enforcement through mechanisms of accountability, namely, the International Criminal Tribunal for Rwanda, the Sierra Leone Special Court and the Sierra Leone Truth Commission. The decisions, at a procedural and substantive level, of these processes are examined in order to extract patterns pertaining to the criminalisation of gender based violence. However, the study and analysis of human rights law and transitional justice processes is strongly influenced by interdisciplinary scholarship, particularly, the work of anthropologists and political scientists who have revealed complex and intimate analyses of gender and other political hegemonies shaping conflict, and its cultural, social and political manifestations in Sierra Leone, Rwanda, Bangladesh, South Korea, Japan, Mozambique, and other sites. This method of transposing social, cultural and political narratives produced by scholars outside of the legal discipline onto justice narratives in order to reveal the parameters of legal remedies is not unique to this study, far from it: Chapters 4, 5 and 6 which focus on transitional justice in Sierra Leone and Rwanda, profit from the works of legal scholars and practitioners such as Fionnula Ni Aolain, Patricia Viseur-Sellers and Doris Buss whose analysis of transitional justice is replete with references to the works of historians, ethnographers, critical race theorists, and other social scientists.

The analysis of law and enforcement has also profited from my own field visits to Rwanda, Sierra Leone and Tanzania (the seat of the International Criminal tribunal). The legal methodology adopted in this study has been significantly influenced by field observations I made as I attempted to collect court records and police statistics in post-conflict societies. The primary objective of the field visit was always to obtain an understanding of the social and political regime and framework within which the human rights of women are constructed, violated, as well as protected and enforced in Sierra Leone and Rwanda, keeping in mind, at all times, the construction and deconstruction of the gender status quo in the periods preceding, during and post armed conflict. The fulfillment of this objective was necessary in order to remove my study of legal norms from the confines of a desk review of legal texts such as statutes, rules of evidence and procedure and judgments. Encountering (though not always understanding) the localized and specific context of gender-based discrimination provided the necessary challenge to the textual judicial narratives I had already extracted on gender, violence and access to justice in Rwanda and Sierra Leone. Practices prohibited by human rights norms such as female circumcision, forced marriage, early marriage and polygamy in regional and international declarations and conventions took on shades of ambiguity, symbolism and political might in conversations with the police, activists and hosts in the different social and familial spaces I was invited into.

My study of law and enforcement in Rwanda and Sierra Leone is not ethnographic; it lacks the intensity and sophistry of anthropological and sociological method. However, the study is informed by the knowledge I gained from observations and interviews with survivors of armed conflict in Rwanda and Sierra Leone. Institutional support in the field was instrumental in shaping the field methodology. I arrived in Butare in June 2004 after two weeks in Arusha with the UN-ICTR and a week in Kigali with the UN office of the prosecutor. In Rwanda I was attached to the Centre for Conflict Management, a part of the University of Butare. The University was an apolitical academic institution and my contacts viewed this positively as an insider

institution as compared to an attachment to an international organisation such as the ICTR, the Office of the Prosecutor in Kigali or an International NGO.

In the case of Sierra Leone I was unable to establish contact with the law school and made the decision to commence the field research without institutional support at the domestic level. The lack of a local partner and its credentials did not hamper my access to certain individuals or institutions although I was required more than in Rwanda to assert my social and family ties to local Sierra Leoneans in lieu of institutional credentials.[45] It did happen that I was once mistaken for an EU official and later as a journalist and I was careful to refute this impression. Some assumed that as an academic I was a guest of the Fourah Bay College, an assumption I did not challenge. In every encounter I produced my business card which clearly stated my position as a junior research assistant with Utrecht University. In every event I emphasised that I was a student who wanted the informant to help me learn from local people.[46]

The field research involved an aspect of institutional observation of organisations promoting and defending women's human rights. These were selected from amongst grass roots organisations, INGOs, legal practitioners, medical practitioners, prosecutors, the police and the military, and government agencies. The purpose of institutional observation was to understand the organisation, mission and methodology of government and other agencies and their institutional capacity to protect and/or enforce the rights of victims of gross violations of human rights, in particular victims of sexual violence. I prioritised but did not limit myself to sexual violence in the armed conflict.

Observation involved interviews with staff members and these interviews revealed the constraints and challenges encountered at the institutional and societal level in protecting women and girls from violence. I observed institutional etiquette and started interviews with Heads of Department and then, subsequently, with those working directly with communities and individual clients on gender issues. For example, at both the ICTR and Sierra Leone Special Court I commenced with interviews with the Registry heads and thereafter conducted lengthier interviews with the Registry's psychologist for the Victims and Witnesses Unit, or the gender adviser to the Registrar. At the provincial level in Sierra Leone I spent time with the Chief and Mayor before seeking and gaining access to interviews with recently elected women local councillors, vocational trainers, college students and others. These actors at the local level produced keen analyses of prevalent gender hegemonies and their impact on women's enjoyment of human rights in peace and war.

My observation methods varied as I tried to adopt a style that was appropriate to the environment. In this way I accompanied Kigali-based investigations staff of the ICTR sexual violence unit on a field mission but resolutely stayed away from a women's NGO on Friday afternoons when the distribution of medication to women living with HIV was conducted. In both cases no formal invitation or bar was given, but I relied on intuition to gauge when issues of privacy, ethics and confidentiality would be compromised by my presence.

My methodology at the institutional level also involved the collection of records. At the family support unit of the Sierra Leone Police in Freetown this meant reviewing, under supervision, police statistics on the reporting of child abuse cases and at Haguruka legal aid clinic for women in Butare, Rwanda this took the form of viewing a selection of client files arranged on thematic issues such as intestacy and property disputes and the dissolution of marriage. It is my training in the discipline of law that initially defined my approach to research. My training placed high capital on reference to documentation, in the shape of case law and treaties

45 When asked whether I had family in Sierra Leone, I presented myself as belonging to a Sierra Leonean family, whom I regarded as guardians, and who regarded me as their ward, when asked whether I was alone in Sierra Leone.

46 Anthropologist Dona Davis presented herself in the same way as a student working on a doctoral degree in anthropology who wanted to learn from, in her case, Newfoundlander women, what she could not learn from textbooks. Davis describes that 'since the villagers had no social category for professional anthropologists or, for that matter, professional women, they evaluated and responded to me much as they would any woman in the community. And if I didn't fit in completely with local female role and behaviour patterns, I was excused – after all, I was an outsider.' I read this nearly a year after my Sierra Leone field research and four years after my Rwanda field visit and had a sharp moment of recognition. Davis (1986), p. 246.

and conventions, police records, indictments, and decisions. Indeed in my initial draft research proposal submitted to the Netherlands Organization for Scientific Research I had limited the study to a gender analysis of indictments, decisions and judgments of tribunals prosecuting sexual violence. Institutional records such as annual reports, client files and statistics were to provide secondary sources.

However, field research in countries emerging not only from war, but also from decades of abject poverty and collapsing infrastructure shook my faith in written (I mostly encountered handwritten) documents. For example, records at a police station predating the 1994 genocide in the case of Rwanda were simply non-existent as the documented history of the police station I visited began in 1995 after the installation of an interim government. So, attempting to determine the levels of reporting of sexual violence cases before the genocide through documentation and statistics alone was impossible. At the local prosecutor's office I encountered the same problem as well as the fact that records were not written in *French* as I had anticipated, but in *Kinyarandwa*. Files for criminal cases dating before 1998 were available but unfiled, incomplete and thick with layers of dust.

Ultimately, documentation painted an incomplete picture of the incidence and prevalence of sexual violence. However, I was able to discern that the omissions themselves sometimes presented a vivid description of the institutional and societal obstacles women encountered when seeking justice for sexual violence. For example, according to records from the police station (at Butare) not a single woman was raped between 1999 and 2002.[47] All allegations of sexual abuse referred to girls and one boy (apparently abused by a female domestic servant). I commented: 'So. Women don't get raped in this town.' As I expected there was appreciative laughter from the policeman and woman assisting me in my search.

We (the police, my research assistant and I) understood that the absence of any reports of rape by women did not really point to the conclusion that only female children were sexually abused in Butare. Adult (women) victims of rape were viewed by the population and the police as consenting to sex by virtue of having known the accused rapist or having had prior intimate or sexual relations with him.[48] Other conversations with the police revealed their belief that the reporting of sexual violence by parents and guardians of girls and particularly boys was also hugely underrepresented. They explained that child abusers were normally friends or relatives and so families chose to resolve the issue privately with a settlement, usually financial.

In this way I learnt to read the available documents at face value but to give equal weight to the redactions, silences and omissions when reaching an informed analysis and conclusion. In many cases the police, prosecutors, gynaecologists and others provided candid and astute analyses of their records pointing to gender constructions at the social and institutional level that skewed the results of their statistics and data.

Interviews and narratives from the field research

In early grant proposals (2003-2004) my methodology for this research included interviews with what I termed 'victim groups'. I wrote:

> 'This qualitative segment of the research will require a selection of four victim groups: 1. Victims of sexual violence who sought a remedy; 2. Victims of a gross violation of human rights (not of a sexual nature) who sought a remedy; 3. Victims of sexual violence who reported the crime to a non-governmental organisation but did not subsequently seek a remedy; 4. Victims of a gross violation of human rights (not of a sexual nature) who reported the crime to a non-governmental organisation but did not subsequently seek a remedy.'

47 I was not allowed to photocopy the police records but under supervision I was allowed to copy relevant information by hand into my notebook. Records are available as field notes.

48 Other researchers have concluded that the absence of rape reports from adult women is a result of a combination of institutionalised discriminatory practices occurring at the reporting and investigative phase. Myriam Merlet writes that a survey of reported cases of rape and other forms of gender-based violence in Haiti revealed high levels of rapes of girls between the ages of 7 and 16. No reported cases of the rape of an adult woman by an individual were reported during the time of review or a single case of conjugal rape or violence. Merlet (2001), p. 166.

Introduction

Sexual violence was widespread and systematic in both the genocide in Rwanda and the civil war in Sierra Leone. Unlike in most contemporary conflicts, the documentation of sexual violence in these conflicts was investigated and documented in the immediate aftermath of war. In the case of Sierra Leone the mass rape of women and girls was documented by domestic human rights activists even as the war raged for a decade. In both cases, UN investigators, domestic NGOs and international organisations such as Physicians for Human Rights provided reliable and poignant witness testimony and some analysis of the nature and roots of sexual violence in the conflict.[49]

In my terms of reference (2006-2007) I described the object of a field visit as follows:

> '(i) To provide the researcher with an insight into society and culture in Sierra Leone and the construction of gender roles, and stereotypes therein. (ii) To comprehend attitudes regarding for example, the value of marriage in society, the status of married women versus unmarried women, attitudes towards sexual freedom for men and women, the importance of initiation ceremonies for the youth, the tolerance levels of communities for domestic abuse, etc. (iii) To assess understanding of Constitutional, national and international norms and procedures for the protection of women against gender based violence. And further to comprehend attitudes of survivors to the different systems of transitional justice established by the government and also at the community level. (iv) To find out how survivors understand and interpret gender based violence as it occurred in the context of the armed conflict and how this translates with respect to attitudes about rape survivors, bush wives, war brides, etc …'

As I approached my field research I made the decision to rely on existing rape testimonies provided by non-governmental organisations (NGOs) as well as ethnographers[50] in contradistinction with victim and witness testimony contained in tribunal and court transcripts. I realized that I could meet my objectives without pursuing the rape testimonies as designed in my early project plan.[51] I made this decision as it became clear to me that the objective of my fieldwork was not to attempt to verify that rape occurred – and indeed I subsequently found that rape as a widespread phenomenon of armed conflict in Rwanda and Sierra Leone was accepted within communities, by politicians and the courts of law. I was able to acknowledge that I was unable to guarantee the confidentiality or other physical and psychological protection measures that would keep my interviews ethical, confidential and safe. Regarding the psychological aspect of protection I considered my own

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49 See Physicians for Human Rights (2002), Human Rights Watch (1996), Human Rights Watch (1999), Human Rights Watch (1998), Human Rights Watch (1999), Human Rights Watch (2001), Human Rights Watch, 2001a. The value of these harrowing testimonies cannot be overstated. I compare it to the genre of North American slave narratives created to render in horrific detail the inhumanity of the slave system and to break the silence that maintained racial hegemonies. See Born in Slavery: Slave Narratives from the Federal Writers' Project, 1936–1938 containing over 2000 first-person accounts of slavery. The Federal Writers' Project was a United States federal government project to support writers during the Great Depression. It was part of the Works Progress Administration and a New Deal program. These narratives were collected in the 1930s and assembled and microfilmed in 1941 as the 17-volume 'Slave Narratives: A Folk History of Slavery in the United States from Interviews with Former Slaves.' The US Library of Congress maintains an online collection of the narratives that is available to the public. See also Keshgegian (2009) describing the use of witness testimony (NGOs) to shock humanity and rouse a humanitarian response to the Armenian genocide. See also Lacquer (2009) on the work of witness narrative (journalistic) for similar purposes in the case of the Bulgarian atrocities.

50 Doctoral and other graduate dissertations have proved to be an excellent source of ethnographic research and well considered and analysed interviews with survivors of armed conflict in Rwanda and Sierra Leone. See Baldwin (2006), Zrala (2008), Breau (2007), Fofana Ibrahim (2006), Fujii (2007), Burnet (2005), Ranck (1998), Olatunsie Johnson (2002), Rall (2005), Gless (2008), Pillsbury Pavlish (2004).

51 I also could relate to Mari Kimura's decision to interview Asian women survivors of Japanese military slavery for her own doctoral research. She writes that, 'firstly, when I decided to do research on the issue, there was already a lot of material on testimonies published…These [sic] means that these women had participated in a lot of interviews on their experiences during the Second World War, and they have started to feel tired of repeating their stories. This is because, although some aspects of their lives have changed the compensation and apology from the Japanese Government, which they seek for most, has not yet been achieved. Moreover, repeating their stories…they have to relive their painful experiences again. Therefore, I felt it was not appropriate for me to ask them to repeat their life stories again only for my research purpose … because the nature of the topic is very sensitive I did not want to speak through interpreters. Kimura (2003), p. 5.

emotional vulnerability as well as that of informants and the harm that was likely to arise from an inexpert examination of mass rapes and other forms of sexual violence.[52]

Fieldwork became an opportunity to investigate how gender shaped the ways in which survivors of war told and remembered war narratives. In short, instead of looking for sex I found gender. What was inevitable, however, was that I interviewed survivors of the genocide in Rwanda and survivors of the war in Sierra Leone. I interviewed men and women who witnessed atrocities (including rape) against family members and close associates and many experienced atrocities themselves (including rape). I chose to approach Sierra Leoneans and Rwandans I encountered as survivors of armed conflict rather than as rape victims or witnesses. To illustrate the way in which I implemented this method I can point to an interview I conducted with an NGO worker who had survived the armed conflict in Sierra Leone.

On a visit to the Association for Girls Development[53] in Freetown I met with Aminatta,[54] a programme officer who presented me with the Association's extensive documentation of women and girl's rape testimony. She was between the age of 30 and 35, a university graduate and did not conceal the fact that she was irritated at having to take time out to speak to me at the orders of the Director of the Association. We talked privately in her office and because she begrudged me the interview I asked her only routine questions about the institute and gathered annual reports, statistics and other formal documents. I also left the interview with an impressive oral testimony, which I did not solicit, but which came out spontaneously (after the interview) as we made small talk around the politics of the day. Above the paraphrased testimony (below) I place my questions in bold print.

You interviewed all of these girls and women who were raped. Weren't you traumatised yourself listening to such horror stories?

Aminatta told me that she had a photographic memory before she began her work with victims of war. She was especially adept at recording sequences of numbers. However, after a daily diet of recording harrowing rape testimonies from young girls and women after the invasion of Freetown by rebels in 1999 she noticed that she had completely lost this facility. She could not to this day recall her own telephone number. She described this as both her traumatisation and her brain's protective device to erase disturbing images of rape testimony from her mind. She claimed to actually have no recall of the testimonies beyond the recorded texts.

You come from the South. Wasn't that the headquarters for the civil defence forces (CDF)-*kamajor*s? They were popular there? Didn't they protect the people?

Aminatta answered: 'They all raped.' She went on to describe how she visited her family in the South during the war. She described an incident where the CDF identified her neighbour as an informant for the rebels. They swarmed the home of the neighbour but he could not be found. In his place, they apprehended and decapitated a male relative residing in the alleged informant's home. Aminatta, her family and neighbours were forced to watch the decapitation as a sign of their allegiance to the CDF. A few days after this public execution, rebels swarmed the village perhaps in retaliation for the killing, and Aminatta, her family, the community and the CDF fled into the bush where they lived for some days or weeks before daring to return to their homes. She described the horror and terror she experienced having to live in the bush in close quarters with and at the mercy of CDF – men she had witnessed summarily execute a neighbour. She explained that even in the bush they randomly identified informants and enemies and disciplined them with violence. She concluded her

52 I also found Choman Hardi's account of her own cautious attitude to discussing sexual violence, the subject of her interviews with Kurdish women, helpful. 'At times, if a woman used metaphoric language about abuse and circled around the subject, I too found it difficult to ask her a direct question about it. I felt that I owed it to them not to press them on issues that they found embarrassing or difficult.' It is not always clear whose embarrassment rouses the other's discomfort first. Hardi (2007).

53 A pseudonym.

54 A pseudonym.

narrative, which at first glance had little to do with violence against women: So. You see. All of them were bad. CDF. Government. Rebels. They all raped.'

In my analysis Aminatta's responses were about sexual violence, trauma, and insecurity. As I read the CDF indictment at the Special Court for Sierra Leone's documentation centre, which is empty of charges of sexual violence, I could begin to challenge the legal omission with Aminatta's unexpected narrative: 'CDF. Government. Rebels. They all raped.' Without this non-legal and non-documentary narrative I could not have begun to investigate the social and political forces that constructed the CDF in the judicial narrative as possessed of a moral code that prohibited them from abusing civilians, particularly women and girls. It was not necessary for my field research objectives to interrogate Aminatta about rapes she may or may not have witnessed or whether she herself had been raped by the CDF or rebels during the civil war.[55]

1.5 Location of self

The distinguished legal feminist Professor Ratna Kapur attempts to locate herself in her research and shares an important lesson with all researchers: As a post-colonial feminist intellectual in law living in the context of India she is presumed to be committed to Third World nationalist causes and faithful to native cultural traditions. However, she states that she is also a cosmopolitan and subaltern sexual subject and that this identity also raises the presumptions of all things Western.[56] Clearly, Kapur has a firm grasp of where she stands and where she is presumed to stand and understands that both or all of these positions impact responses to and analyses of her scholarship. Kapur does not disown or deny the location of self. Rather, she uses her complex location and the search for the space between the authentic subject and the native informant to provoke her engagement in the subject of post-colonialism, law and sexuality.[57]

Kapur's position(s) urged me as I analysed my field observations, (and those of other scholars) to accept the inevitable assumptions about my partiality and assimilation to 'native culture' and/versus 'western culture'. However, Kapur's work also urged me to take cognisance and responsibility for my position, origin, allegiances and influences. Thus, as I ventured into field research in Africa, I became conscious of the need to acknowledge my own subject location, something that was never before demanded in my career as a legal researcher.[58] Taking this step allowed me to better understand certain choices I made in the preparation and conduct of my research. For example, I was able to attribute my reticence to collect testimonies from rape survivors ostensibly to ethical issues related to my lack of training but also to a duty I felt as an African researcher speaking from a Western academic platform, not to further stigmatise Africa by criminalising and demonising all African men as oppressors and rapists of women; and objectifying all African women as rape victims complicit in their subjugation.[59]

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55 I also found affirmation of my method when reading Ann Fuji's description of her fieldwork methodology in Rwanda: 'The question is why I was not able to elicit such [detailed accounts of atrocities and horrors]. Perhaps I did not ask the right questions or establish the requisite level of rapport with informants. I chose not to ask direct questions about the most intimate details of the violence, particularly atrocities, for various reasons. Asking about the details of atrocities that people witnessed or committed felt too pornographic…Perhaps it was my own norms that kept me from broaching the subject, despite being keenly interested in expressive forms of violence'. Fujii (2007), p. 30.

56 Kapur (2001) p. 335.

57 Ibid.

58 I have already in preceding paragraphs unwittingly described myself as 'an African researcher on a Western academic platform' and as a 'world citizen.'

59 The international media furor over South Africa's Medical Research Council's survey that found that one in four men admit to raping a woman contributes to this type of representation. Many journalists extracted the sentiment from these statistics that widespread rape in South Africa is 'rooted in an African ideal of manhood' thereby suggesting that all African men and women embrace rape as integral to masculinity and gender relations. See The Guardian, *1 in 4 men in South Africa admit rape*, 18 June 2009, p. 22.

Chapter 1

Rwanda 2004

Locating myself in my field research on a day to day basis was most evident in my individual interview procedures. In Rwanda my interview procedure usually involved a formal interview with an individual, usually someone in authority, for example the head of a women's association or senior police. I could not conceal that I was privileged by my education and life abroad in Europe, and more than once I was referred to and even introduced to others as a *muzungu* or white woman, depending on the circumstance this could be a favourable or unfavourable image to project.[60] In these interviews the person I spoke with clearly expected me to extract a notebook and they paused after each sentence to make sure that I recorded their responses accurately. This was the formal interview and it normally lasted anything from 30-45 minutes. My questions were restricted to structural issues such as the number of staff employed and the nature of client services.

I would then make a second visit usually unannounced. I would drop in without my notebook and pencil and as always on foot. I would adopt the role of a visitor. I would sit informally, and chat with my former interviewee. These meetings could last from ninety minutes to 2 hours. I would be invited to talk about my parents, their home, the marriage ceremonies of my sisters, the initiation rituals of my tribe, Zambia's economy, President Kenneth Kaunda, violence in Zambian homes, and the anticipated bride price for an educated girl like myself. On this visit I was often offered a beverage, and a comfortable chair not separated from my host by a table. These were conversations rather than interviews and I learnt that after the formal interview it was right and proper for me to visit as a guest.

Here I did not assert my foreignness, my whiteness, and my academic credentials. I applied all the intricate social courtesies I learnt as a child growing up in multi-cultural but pan-African communities in Canada, Kenya, Ethiopia, Namibia and Zambia. I was deferential to men and women over a certain age and curtsied slightly when shaking hands with the elderly. In these meetings it was natural to wander outside with my interviewee-cum-host for a short walk, to buy peanuts or fruit at the side of the road and to sit down again to unhurriedly finish the courtesy call. In retrospect I realise I aimed to create a partial insider status that allowed for a momentary subjective involvement in the lives of the informants, and their perception of my having a particular meaning in their lives.[61]

It is not surprising, then, that it was in these follow-up meetings that people spoke about gender, women, power relations, domestic violence, incest, ethnicity – the things I wanted to know about but could not raise in the

60 I use the terms European/white and African/black not as racial markers but as class markers and as political sites denoting opposites such as knowing and not knowing, privilege and want. For example, I might be expected as a white person in Rwanda to be exceptionally educated. However, as a white person I might conversely be expected to lack wisdom and knowledge of local cultures that might be understood as an absence of respect, decorum or maturity. Knowing how to maintain respect and decorum would be implicit in an African woman of a certain age and I had to demonstrate my knowledge. Such frameworks for judging outsiders are fluid, for example in Rwanda, Stephen, a prosecutor, introduced me to a second prosecutor, Frank, by saying 'Chiseche is just like a White.' Stephen was by then an old friend who had referred to me in this way many times during our relationship. As I got to know Frank better he told me 'Stephen said you are white but you are really quite African.' In both cases I took no offence at the judgements passed and am inclined to conclude that both Stephen and Frank intended to compliment me. And in an example taken from Sierra Leone I was initially referred to as the 'stranger from Holland' (a description I resented quite a bit). Later, and perhaps as I proved my 'Africanness', this changed to 'she is from Ghana'. A Ghanaian businesswoman residing at my guesthouse explained that this was as a result of my short hairstyle which made me resemble Ghanaian schoolgirls who are required to keep their hair natural and cropped close to the scalp. Others also referred to me teasingly as 'Schoolgirl.' I believe this was linked again to my schoolgirl hairstyle or perhaps to my academic achievements. Early in her research, Dona Davis was described by local Newfoundland women as the 'little girl with the book' (dissertation), and she concluded that the 'locals saw me as a kind of glorified schoolgirl.' This was an impression she inadvertently dispelled as locals learnt of her extensive travels and field work in the Middle East, Latin America, Europe and Africa and as she integrated into women's social lives and activities. Davis (1986), pp. 246 and 250.

61 Grele (1994), p. 13.

formal meeting when I was tongue-tied and made shy by my position of power ('the Academic') which went against my socialisation as an African woman.[62]

Sierra Leone 2007

Three years later I was in Sierra Leone and pleased to discover that I had shed the awkwardness I experienced in myself in Rwanda. Thus, I did not have to rely on the second visit to break the ice and be accepted as a 'serious Western' researcher as well as a familiar but distant relative from Africa. I recall arriving at a women's drop-in centre for an appointment with the Director, a woman in her mid thirties. When I arrived I found she had not yet arrived, but four women (clients) were waiting for her and they encouraged me to wait with them in the bare and simple office. I made an effort to chat with the clients but they identified me as a researcher or journalist and said they would talk to me only when the Director arrived. Loud dance music was blasting from the kiosk nearby and I heard a local dance track I had come to recognise from crowded bus rides. I stood up and playfully challenged another woman to dance. We danced together as the others clapped and cheered us on. The Director walked in on this scene and shouted approvingly: 'So, you are a real social worker!' We then walked into her office and started our interview and conversation where I did not have the feeling of having to struggle with the 'white me' and the 'local me'.

I realised early on in Sierra Leone as in Rwanda that the people I spoke with were curious about my culture. Even as I conducted interviews I made it clear by my receptiveness that I welcomed a two-way dialogue about gender in Sierra Leone and gender in Zambia. If I challenged a point of view it would be with a comparison with Zambian culture. For example, my host in Makeni Province, a man in his mid thirties with a professional accounting qualification, explained that he had a child with an ex girlfriend. He explained that she maintained custody of the child because he was a generous person. His culture gave him a right to the custody of children upon the dissolution of marriage or in the case of children born outside of wedlock. This revelation aroused some indignation in me, but I answered with a description of my own tribe, which is matrilineal and which would entitle me to custody of a child in case of divorce. He greeted this comparative exchange with polite interest but not necessarily agreement.

On returning to the Netherlands after my first field research in Rwanda I faced a dilemma: I was unable to view the disclosure that came from the follow-up visits as authoritative, or important scientific material to be used in my thesis. Disclosure was usually made when I wore my cap of African guest and not the European cap of the distant scientist. Quoting directly from my informants felt tantamount to revealing family secrets to spice up my academic research. Yet I was well aware that the documentary evidence I collected told only half the story. Shortly after my return from Rwanda in September 2004 I submitted an article to Dubravka Zarkov for inclusion in a book on: Gender Conflict and Development.[63] She commended my legal analysis but regretted that the work lacked any insight into women's lived lives. She chided me gently for overreliance on the work of a certain anthropologist whose views perpetuated rather outdated and colonial views of Rwandan and in general African women as having no agency or identity except as wives and mothers of African men. She explained that she understood that I was not an anthropologist but that I had been to Rwanda and I was African, surely I could draw on my own field observations, personal experience and insight of gender in an African context. In short, my lived experiences could strengthen my theory and my theory could provide a deeper understanding of the experience.[64]

This gave me the permission I needed to draw on my conversations as insight that added depth to my gender analyses of violence against women and legal responses to it. I began to produce a social, cultural and political

62 I was 29 years old on my first field research to Rwanda, and unmarried and as a result I often felt like a girl and not even a woman when interviewing, for example, the local Director of the *Association des Veuves du Genocide* (Genocide Widows' Association) who was widowed and had several children and dependants. I was conscious that I should not trespass with questions which a respectful girl cannot ask her mother.

63 Dubravka Zarkov is Associate Professor of Gender, Development and Conflict Studies at the Institute of Social Studies in The Hague.

64 Rhode (1990), p. 621.

analysis of complex experiences of violence and sexual violence that disrupted the narratives on gender and violence produced by transitional justice processes and human rights law.[65] Without this timely intervention the narratives on gender and power shared by the girl in the Lusaka market, Bintu, the Paramount Chief, Aminatta and many others would have been absent from this study. The benefit of this intervention is most evident in the application in this study of the Sierra Leone field visit, coming as it did after a period of academic maturity and self-acceptance of my methodology.

In concluding my retrospective account of fieldwork methodology I can say that in both Rwanda and Sierra Leone I was humbled by the high level of cooperation and hospitality I received from colleagues from all sectors. Generally, my Zambian nationality was viewed favourably.[66] Many people complimented my parents on my level of education and achievements considering my youth. Women and men even commended me for postponing marriage but advised me in a friendly way not to wait until it was too late.[67] The subject of my research was well received in both countries. It was not anti-government, it was not perceived as being political and it centred on women, a group that was high on the political agenda in both countries.

1.6 Structure of the book

This study is divided into two parts: The first part - part I – is focused on gender in the international and regional law framework; and part II is focused on transitional Justice decisions, practice and policy and the ways in which they impact gender and access to justice. Part I includes this introductory first chapter and part II includes the concluding chapter 7.

Chapters 2 and 3 provide an international legal framework addressing women, gender and violence. These chapters introduce a three-tiered ladder of rights – each representing the progressive inclusion of gender as a protected category entitled to equal protection by the law. Chapter 2 titled 'Narratives of Gender and Violence in International and Regional Human Rights Law' provides a gender critique of the international human rights framework. The critique is strongly influenced by feminist legal theory, particularly, third world women's feminist theory.

At its start it points out the well-developed feminist critique that the body of international law is laden with an androcentric personality and outlook that preclude the insertion of women as a gender group, and subsequently, their gender-specific experience of human rights abuses. Traditionally, international law proscribed gender neutral provisions for the protection of human rights; however, when gender specificity colours a human rights violation, as with the case of sexual violence against domestic partners, international law has until recently been unresponsive.

The Convention on the Elimination of All Forms of Discrimination against Women (Women's Convention) and the Maputo Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) are given special attention within the historical review of gender as it has entered

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65 The following observation also summed up the difficulty I encountered in using my research observations, interviews and conversations as data for analysis: 'Fieldwork produces a kind of authority that is anchored to a large extent in subjective, sensuous experience. One experiences the indigenous environment and lifeways for oneself, sees with one's own eyes, even plays some roles, albeit contrived ones, in the daily life of the community. But the professional text to result from such an encounter is supposed to conform to the norms of a scientific discourse whose authority resides in the absolute effacement of the speaking and experiencing subject.' Pratt (1986), p. 32 quoted by Kleinman and Copp (1993), p. 13.

66 I found Rwandans and Sierra Leoneans extremely fond of Kenneth Kaunda, who served as Zambia's President for nearly thirty years (1964-1991). Many Sierra Leoneans responded enthusiastically with these four words when I disclosed my nationality: 'ZAMBIA SHALL BE FREE!' The title of Kenneth Kaunda's autobiography, obviously a mandatory part of the reading list on the national school curriculum. I admit I was forced to pretend that I had read the said book. Kaunda (1963).

67 I found abundant discussions by male and female anthropologists describing favourable as well as unfavourable reactions they experienced from locals whilst on field visits in response to their 'advanced' years (between 25 and 30 years of age) and unmarried status. See Whitehead (1986), pp. 213-240 and Angrosino (1986), pp. 64-84.

into the human rights discourse.[68] The norms provided therein and the feminist critique are held up against cases of sexual violence against women in the imperial/colonial period. In chapter 2 a study of human rights law is built on the historiography created through the experience of Sara Baartman, a Khoisan woman trafficked to Europe in the nineteenth century for sexually exploitative exhibitions. The Sara Baartman narrative illustrates complex or multiple forms of discrimination that women experience and that in many cases are not reflected in contemporary models of human rights standards.

Chapter 3 titled 'Narratives on Gender and Violence in Human Rights Law and International Humanitarian Law' provides an introductory discussion of the feminist critique of humanitarian law, in particular the limiting construction of women's vulnerability as intrinsically linked to biological functions such as child bearing and nursing.

The international human rights framework introduced in chapter 2 is further elaborated upon in chapter 3 in order to highlight the extension of human rights law to conflict zones. A gender critique of this human rights development and its emerging narrative on gender and gender-based violence is provided. Chapter 3 identifies the role of third generation instruments in identifying the continuum of gender based violence that women experience in armed conflict and the periods of 'peace' that precede and follow it.

The second part of the research builds on the three-tiered human rights framework established in chapters two and three. Part two introduces the enforcement of human rights law by retributive and restorative models of transitional justice. Statutes and decisions of transitional justice mechanisms are themselves regarded as human rights instruments enumerating rights and defining violations at the level of international law. This section of the research is a gender critique of the justice narratives as they impact women's access to justice.

Chapter 4 provides a brief background to the establishment of the International Criminal Tribunal for Rwanda (ICTR) by the international community in the wake of the 1994 genocide and presents the claims by legal scholars and observers that the Prosecutor and Chambers lacked gender competence and as a result, convictions for sexual violence were underrepresented. This chapter introduces the theory that the ICTR emphasised sexual violence as a (collective) ethnic attack and that this obscured the fact that vulnerability (as well as relative immunity) from gender based violence was influenced by ethnicity as well as elite status, low status, nationality, religion, race and other intersecting factors. I produce alternative narratives to the dominant 'ethnic rape' narrative produced by the ICTR case law and describe the rape of 'Big men', for example western peacekeepers, the rape of 'Small women' for example a young Hutu servant and illustrate that acts of gender based violence falling outside of the dominant narrative received no gender analysis within the justice process and were therefore, not categorised as gender based violence.

Chapter 5 titled 'Narratives of Gender and Violence: The Sierra Leone Truth Commission' explores the human rights law narrative of gender inequality and discrimination in Sierra Leone produced by the Final Report of the Truth Commission. This report produces a gendered narrative of human rights, peace and conflict. Bearing this in mind, attention is given to the Truth Commission's perceived location as a restorative and indigenous model of transitional justice and the impact this had on its construction of gender and violence in Sierra Leone. In particular, the rights discourse on forced marriage in armed conflict and early marriage as forms of gender-based discrimination provide an illustration of the problematic narrative produced by the Truth Commission. This chapter also introduces alternative narratives provided by ethnographic researchers embedded in Sierra Leonean society that inform and disrupt the legal narratives.

Chapter 6 titled 'Narratives of Gender and Violence: Sierra Leone's Special Court' is also situated in Sierra Leone. The Special Court Statute creates an extraordinary and broad gender mandate and specifically calls for the Office of the Prosecutor and Registry to adopt specific measures in order that women and girls' needs are

68 The Convention on the Elimination of All Forms of Discrimination against Women, see General Assembly Resolution 34/180 of 18 December 1979 and the Maputo Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa Protocol Adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, 11 July 2003.

realised by the justice process. This chapter criticises the decision-making process of the prosecutor, particularly with regard to charges of sexual violence in the indictment and biases in the selection of victims and witnesses. Chapter 6 also criticises the introduction of the Truth Commission and the Special Court's narratives on forced marriage and sexual slavery as crimes distinct from the customary international law crime of enslavement.

Chapter 7 provides a summation of the dominant arguments in this study and a final round up and review of the narratives interspersed throughout the study.

CHAPTER 2

Narratives on Gender and Violence in International and Regional Human Rights Law

2 INTRODUCTION AND AIMABLE'S NARRATIVE

I sat with Aimable,[1] a State Prosecutor at the Office of the Prosecutor of Butare-Ville in Rwanda. I asked him for his thoughts on why prosecutors failed to pursue allegations of sexual violence. He answered me with a story: He described a curious incident whereby a detainee confessed to having raped a number of women. Aimable immediately recognised that this was an incredible confession considering that the death penalty was still in place in Rwanda for those who confessed to sexual violence and other crimes listed as category one offences. Confessions for lower level crimes were frequent in 2004 but Aimable had not yet encountered a confession to a category one crime. The detainee made a full disclosure and he listed the names of the women, living and murdered, he had raped with his accomplices. Aimable duly commenced an investigation into these claims starting with statement taking from the survivors. However, Aimable was faced with the unexpected predicament that the alleged victims denied that they had been raped by the accused or his accomplices. The women completely refused to cooperate with the Office of the Prosecutor. Consequently, Aimable was forced to withhold the rape charges from the dossier although he did not doubt their veracity. I asked Aimable why the women reacted as they did and he responded with a nod in my direction: 'YOU should know why.'

Aimable's introductory narrative is encouraging at its outset. In 1994 Rwanda's legal system lay devastated by a long civil war, a swift genocide, decades of state-sponsored and structural violence entrenched by state interference in the independence of the judiciary. In spite of this legacy the transitional government known as the Broad Based Government of National Unity (1994-2003) was dedicated to renewing public faith in the judiciary and placed justice at the centre of the country's democratisation and peace process. A strong human rights discourse buttressed this call for justice and far-reaching judicial reform.

It was this governmental commitment that mandated Aimable, the intrepid prosecutor, to investigate sexual violence as an element of the genocidal massacres. However, despite his best efforts, the alleged victims of sexual violence rejected their fundamental human right to access the State's criminal justice process, for reasons they declined to disclose. I have shared this anecdote with many legal audiences and after initial puzzlement we place the blame on 'African taboos' and the stigma surrounding sexual violence in Rwanda, a conservative, African and Catholic nation. These answers are not wrong but they are far too obvious and too simple to build a chapter upon, and I pay them little attention in this chapter.[2] In this chapter Aimable's narrative and the silent narrative provided by the alleged rape survivors produce a gap which acts as a challenge or counterweight to the positioning of the human rights law framework as a mechanism that prohibits discrimination against women.

The primary objective of chapter 2 is to examine the construction of violence against women as a form of gender-based discrimination within the international and regional human rights law framework. This examination includes a contemporary as well as historical review of the inclusion and exclusion of gender from the narratives of emerging human rights norms. Chapter 2 posits that contemporary (twentieth century to the present day) inclusions of gender in the interpretation of human rights legislation have often failed to recognise

1 A pseudonym.

2 See Mibenge (2007) for a discussion on the absence of the so-called 'culture of silence' surrounding gender-based violence in Rwanda and how this stifles survivors' narrative while privileging the media and politicians in the broadcasting of a 'rape experience'. See also Buss (2007) for a discussion on the 'hypervisibility' of rape in postwar societies, and its negative impact on prosecution and conviction in cases alleging sexual violence.

the full extent and range of women's experience of gender-based discrimination and inequality. And further that women's experiences of human rights denial have been constructed as random or opportunistic events that are linked to women's sexual, psychological and physical frailty.

Human rights mechanisms are only beginning to construct violence and other forms of discrimination against women as emblematic of structural inequalities housed in patriarchal, androcentric and hetero-normative social, economic and political institutions. As the interpretation of human rights instruments transitions from the construction of violence against women to gender-based violence, many women choose to remain outside the parameters of formal legal redress. I argue in this chapter that 'Aimable's victims' will not transition to the role of victim-witness until the human rights law framework has fully internalised the nature, root causes and impact of gender-based violence. Running through this chapter is the question whether the victims' refusal to cooperate with the state should be regarded as an act of passivity or an act of agency that rebels against and disrupts the promise of human rights law enforcement. Chapter 2 also contextualises the legal narrative on violence against women by identifying the relationship between the human rights discourse and existing social and political narratives on discrimination and equality as they erected and dismantled political systems of oppression.

Two dominant themes in this chapter are the application of formal equality and the single axis as responses to gender discrimination and inequality. Formal equality implies that women have equal rights and are treated as equal to men. Throughout the twentieth century the formal equality approach to redressing women's human rights denial played an important role in combating inequality and discrimination against women. A popular example of its application could be seen in the post-World War II era when many European women were granted the right to vote, a right which was formerly only granted to European men.

However, a limitation of the remedy of formal equality is that although people may be granted the same rights, this does not ensure that these rights have an equalising impact, as everybody is not similarly situated. Thus, despite the legal award of formal equality it may well be that some women may still require the implicit or explicit permission of a guardian (such as a father, mother-in-law or husband) before registering to vote. Or women citizens (unlike men) who marry foreign nationals may immediately lose their citizenship and the attendant right to vote. It may also be that women's literacy levels are dramatically lower than those of men's making them less informed concerning the candidate's policies and reducing their inclination or ability to independently register as voters.

The application of a single axis analysis entails that lawmakers centre their response to inequality and discrimination around one feature, in this case an essentialised female image measured against an essentialised male image.[3] This approach results in legal responses that can only effect cosmetic or limited challenges to gender inequality, for example by creating formal equality between men and women. The limitations of the single axis and formal equality responses will become evident as this chapter focuses on the human rights law framework and its construction and deconstruction of women as a universal and unified group. Women's identities are multidimensional and this means that a combination of factors intersect with gender to shape and distinguish inequality and discrimination for individual as well as collective groups of women. Multiple identities in the gender group could refer to sex, religion, age, race, ethnicity, nationality, disability, caste and sexual orientation. These intersections can aggravate as well as mitigate gender-based discrimination depending on the social and political context in which a woman or women is/are located. Understanding the role of intersecting identities is crucial in order that the human rights law framework effectively meets the concerns of women at a universal, collective and individual level.

The following sections introduce the legal framework of this study. This is provided by both the international and African regional human rights instruments and mechanisms. In this section the use of an historical abuse

3 I borrow the term 'single axis analysis,' from Kimberly Crenshaw. She argues that the single axis analysis distorts the multidimensionality of Black women's experience. I apply the concept in greater detail later in this chapter. Crenshaw (1989), pp. 139-140.

will facilitate the critique of the contemporary human rights framework. The historiography of an African victim of trafficking in the nineteenth century serves to locate the study in Africa and to highlight the multi-dimensional features of discrimination and inequality that the human rights law framework must accommodate.

2.1 Three generations of human rights

In order to clearly illustrate the human rights law framework for the purposes of a gender analysis within this study I have created a three-tiered structure of rights. A cross-section of international and regional laws are divided into three 'generations' representing an evolutionary progression of the inclusion and exclusion of gender and gender-based violence into and from the human rights discourse. The examination of the tri-generational framework primarily reveals the gendered difference between 'rhetorical rights bearers' and those who were actually privileged in their enjoyment of human rights by the interpretation of the international or regional instrument.

The earliest human rights instruments for the purposes of this chapter are referred to as first generation rights, namely, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the African Charter on Human and Peoples' Rights (Banjul Charter).[4]

The second generation of human rights instruments considered in this chapter include the Convention for the Elimination of all forms of Discrimination against Women (CEDAW), and General Comments of the treaty bodies established adjacent to the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Racial Discrimination.[5] These are, respectively, the Human Rights Committee and the CERD Committee.[6]

The most advanced end of the evolutionary scale with respect to incorporating gender and gender-based discrimination into human rights laws is the third generation of human rights instruments. Third generation instruments are represented by various General Comments of the treaty body monitoring the implementation of the Convention for the Elimination of all forms of Discrimination against Women, the Maputo Protocol to the African Charter on the Rights of Women in Africa, the Declaration on the Elimination of All Forms of Violence Against Women and various thematic reports prepared by Special Rapporteurs and other UN human rights experts.

The tri-generational framework introduced in this chapter should not be confused with the well known human rights discussion on first and second generation human rights. Briefly, the latter classifies civil and political rights elaborated under the International Covenant on Civil and Political Rights, as first generation rights and economic, social and cultural rights under the International Covenant on Economic, Social and Cultural Rights as second generation. At its most divisive the discussion suggests that governments have positive duties to realise civil and political rights while the realisation of economic, social and cultural rights is a mere aspiration and does not impose positive duties on states. Under the tri-generational scheme in this chapter and throughout the study, it is taken as given that civil, political, economic, social and cultural rights are indivisible, inalienable, interdependent and interrelated.

The presentation and selection of the various human rights instruments should not be taken to be a chronological charter of human rights legislation. Rather, the chronology is guided by the inclusion of gender into the ambit of the instrument in question. The instruments referred to in this study should not be regarded as

4 Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the African Charter on Human and Peoples' Rights (Banjul Charter). CERD and the Banjul Charter.

5 Convention on the Elimination of all forms of Discrimination against Women.

6 Human Rights Committee and the CERD Committee.

exhaustive. Firstly, I have selected representative human rights laws that provide the clearest illustration of the inclusion as well as the exclusion of gender as a ground for discrimination and unequal treatment. Secondly, the use of a generational framework serves to emphasise the evolving nature of human rights instruments.

2.1.1 Sara Baartman

The Preamble to the Maputo Protocol to the African Charter on the Rights of Women in Africa points out that, 'despite the ratification of the African Charter on Human and Peoples' Rights and other international legal instruments by the majority of States parties, and their solemn commitment to eliminate all forms of discrimination and harmful practices, women in Africa continue to be victims of discrimination and harmful practices.'[7]

This Preambular statement reminds us that the subject of human rights law and gender equality in Africa cannot be discussed in this chapter without acknowledging the civil and political, economic, social and cultural realities that women in Sub-Saharan Africa are confronted with despite the evolution of an impressive human rights law framework at the international and regional level. Some of the most egregious of these challenges are presented in this chapter in the shape of an historical yet all too contemporary experience of gender discrimination.

The study of human rights law is centred around the historiography created through the work of social scientists studying the case of Sara Baartman[8], a Khoisan woman trafficked to the United Kingdom and subsequently to France in the nineteenth century for sexually exploitative exhibitions. Baartman's narrative receives a legal analysis and is used in itself as an analytical tool to expose areas of exclusion and inclusion in the evolving narrative of contemporary international and African regional human rights law. The references to historical abuse should not be seen as an attempt to verify whether contemporary human rights law can be applied retroactively, but rather as a desire to place the study squarely in Africa and in the body of an African woman.

Hallmark features of Third World women's writings on feminism include the focus on the idea of the simultaneity of oppressions as fundamental to the experience of social and political marginality and also the grounding of feminist politics in the histories of racism and imperialism.[9] The application of the Sara Baartman narrative in this chapter is in line with this method. Sara's narrative is crucial to illustrating complex or multiple forms of discrimination that women experience and that in many cases were not reflected in the traditional models of human rights standards. The imperial and colonial historiography of Sara Baartman is introduced and referenced throughout this chapter as a social and political narrative of gender and violence representing the paradigm of a universal as well as highly individualised experience of rights violation.[10] This

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7 Maputo Protocol, Preamble.

8 I adopt this spelling of Sara Baartman knowing that there is no correct spelling of her name. This serves as a reminder throughout this study that I am joining many writers before me in moulding and revising her history and identity in order to complement the objectives of my research. The inconsistency in spelling emphasises the arbitrary way in which Sara was claimed as an object by her owners. Researchers still grapple with the political implications of the use of the name Saartje, a Dutch name – particularly in light of Dutch abuses against the Khoisan in the eighteenth century, while others reject the anglicised spelling of Sarah adopted after a Christian baptism in the United Kingdom. If Sara Baartman had an indigenous Khoikhoi name, no trace of it remains. In the words of South Africa's former President Thabo Mbeki, 'Sarah Baartmann should never have been robbed of her name and relabelled Sarah Baartmann.' Address of the President of South Africa, Thabo Mbeki, at the Funeral of Sarah Baartman, Hankey, Eastern Cape, 9 August 2002 (hereinafter Mbeki (2002)).

9 Antony Anghie summarises that other salient features of Third World feminist writing are: the crucial role of a hegemonic state in circumscribing their/our daily lives and survival struggles; the significance of memory and writing in the creation of oppositional agency; the differences, conflicts, and contradictions which are internal to third world organisations and communities. In addition, they have insisted on the complex interrelationships between feminist, antiracist, and nationalist struggles. Anghie (2008), p. 46 citing Ferguson, 2003.

10 I use the following definition of historiography: 'the narrative presentation of history based on a critical examination, evaluation, and selection of material from primary and secondary sources and subject to scholarly criteria.' www.dictionary.reference.com

socio-political narrative operates in contradistinction but also in tandem with the evolution of gender into human rights discourse which is the subject of this chapter.

Born in 1789 in the Eastern Cape Sara was a Khoisan.[11] She was trafficked from the Eastern Cape to London in 1810 and sold more than once to showmen and displayed as an exhibit under the name: Hottentot Venus. She was subsequently sold in France to an animal trainer.[12] The text below can only begin to suggest the degradation of her dignity, physical integrity and humanity that marked her experience in Europe:

> He found her surrounded by many persons, some females! One pinched her, one gentleman poked her with his cane; one lady employed her parasol to ascertain that all was, as she called it, 'nattral'. This inhuman baiting the poor creature bore with sullen indifference, except upon some provocation, when she seemed inclined to resent brutality…On these occasions it took all the authority of the keeper to subdue her resentment.[13]

Sara died in 1816 and her skeleton and organs, including her genitals and brains, were displayed for the French public by museums up until 1976. Some 186 years after her death, what remained of her remains was returned to South Africa in 2002 for burial.[14]

Historian David Johnson presents an article on representations of the Cape 'Hottentots' during Imperial and colonial times up until the post-apartheid era in South Africa.[15] He frames his analysis of historical expeditionary journals in part with South African former President Thabo Mbeki's (1999-2008) speeches on the South African-French historical relationship of conflict as well as cooperation.[16] Johnson's methodology led me to Thabo Mbeki's eulogy at the burial of Sara in the Eastern Cape.[17] A liberal appropriation of sections of this public text allows me to place international human rights law within the tri-generational framework described above. I note here a regrettable consequence of my manipulation and appropriation of the text and that is the loss of the generous spirit of Thabo Mbeki's stirring eulogy in its unedited and complete form.

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11 Clifton Crais' and Pamela Scully's recent biography on Sara Baartman places her birth in or around 1770, substantially earlier than the widely stated birth date of 1789. Crais and Scully (2009). Regarding Baartman's tribe or race, David Johnson explains that: In the racist nomenclature of the eighteenth century, Sarah Baartmann was defined as 'Hottentot', a people regarded as 'a form of human beasts.' Whilst he adopts the term 'Hottentots' in the title of his article he explains that the term is derogatory and dates back to the writings from the seventeenth century when French travellers left accounts of their experiences including Jean Tavernier (in 1648), Guy Tachard (in 1685), Francois Leguat (in 1691). Johnson (2007), p. 546.

12 Sara Baartman has been the subject of extensive academic research by social scientists such as historians and anthropologists. She has also become a cultural icon and her life can be seen in theatre productions, art exhibits of every medium, and fictionalised biography. I have found it near impossible to extract a reliable history that is not coloured by the political positioning of the writer or performer, be it anti-colonial, postcolonial, feminist, third world feminist, racist, and so on and so forth. It is for this reason that my historical record of Sara is kept sparse. I focus on presenting the historiography created by the multiple sources of 'her life story.'

13 Qureshi (2004), p. 4.

14 Sara's dissected body was exhibited in the Musée d'Histoire Naturelle until 1827 and subsequently moved to the Musée de l'Homme in 1937. In response to criticism from the feminist movement, the museum removed Baartman from public exhibition in 1976 and her remains were put into one of the museum's storerooms. She remained in storage until March 1994 when her body cast was part of an exhibition of nineteenth century ethnographic sculpture at the Musée d'Orsay. Because of public criticism she had been removed by June of that year and reshelved at the Musée de l'Homme until her eventual repatriation to South Africa in 2002. Gordon-Chipembere (2006), p. 90.

15 Johnson (2007) at p. 525.

16 Johnson himself acknowledges that 'there is something quixotic in a university employee trying to score intellectual points off a president, but believe the gesture is worth making, as more sophisticated versions of Mbeki's arguments enjoy wide support in academic discourse.' Johnson (2007), p. 526. I borrow his defence for my own appropriation of Mbeki's speech and have also encountered this approach in the writing of Signe Arnfred. Arnfred uses Thabo Mbeki's eulogy at the funeral of Sara Baartman and extracts from other public speeches to illustrate and criticise Mbeki's oratory skill of exposing dichotomies (white/black; man/woman; rich/poor) to turn the 'dark continent discourses' upside down. Arnfred (2004).

17 Thabo Mbeki (2002).

Chapter 2

2.2 First generation of human rights law

Many narrators have narrated the life and times of Sara Baartman. At one extreme she is represented as an opportunistic and merry showgirl, a prostitute and a drunkard. At the other extreme she is represented as the ultimate incarnation of woman as a victim, whose agency and identity are entirely obfuscated by the litany of abuses she suffered. Mbeki's eulogy presents a multi-tiered historiography depicting her narrative, firstly, as a story of the African continent and its peoples; secondly, an ethnic attack against the indigenous Khoisan peoples; thirdly, as a violation against the dignity of African women and, finally, as a violation of Sara the young African Khoisan woman.

In this section describing the first generation of rights I apply extracts taken from Mbeki's speech that construct Sara's experience as emblemising the narrative of Africa under colonial rule. At the outset of his eulogy for Sara Baartman, Thabo Mbeki describes Sara's narrative as:

> ... An account of how it came about that we ended up being defined as a people without a past, except a past of barbarism, who had no capacity to think, who had no culture, no value system to speak of, and nothing to contribute to human civilisation - people with no names and no identity ...
> The story of the African people of our country in all their echelons. It is a story of the loss of our ancient freedom. It is a story of our dispossession of the land and the means that gave us an independent livelihood…It is a story of our reduction to the status of objects that could be owned, used and disposed of by others, who claimed for themselves a manifest destiny to run the empire of the globe.[18]

This introduction by Thabo Mbeki (read in isolation and not in the context of the full text of the eulogy for the purposes of this analysis) depicts the trafficking, exhibition, dissection and post-mortem exhibition of Sara's body as symbolic of a universal experience of colonised peoples of Africa: Objectified, commoditised and disposed of by a colonising entity.

Precursors to human rights law

The principles of equality and non-discrimination enshrined in the first generation of human rights legislation were inspired by national and international laws, for example the US Declaration of Independence (1776) and the League of Nations Covenant (1919). However, Thabo Mbeki's depiction of Sara's experience as a colonial assault on African sovereignty resonates with another aspect shared by early declarations and laws. A characteristic of the said precursors to early first generation human rights instruments was the application of law and a human rights narrative to consolidate power and legitimise abuse of power by a small but conquering elite. In this respect it has been said that the dominant voice of the US Declaration of Independence (US Declaration) that spoke for 'we the people' did not nearly speak for everyone, but for a political faction of colonists trying to constitute itself as a unit of many disparate voices: 'its power lasts only as long as the contradictory voices remain silenced.'[19]

Thus the elite appropriates the narrative of human rights abuse, experienced and expressed by the contradictory voices of indigenous peoples (described in the declaration as 'the merciless Indian savages'), and African slaves and their descendants. Ultimately, the elite even claims the voice of victimhood for itself. So, whilst the Declaration of Independence condemns the King of England for imposing taxes arbitrarily, abolishing colonists' most valued Laws, waging war, and destroying their lives, the colonists do not acknowledge their own destruction of the culture and identity, liberty and integrity of slaves and indigenous peoples.[20] The legal

18 Thabo Mbeki (2002).
19 Harris (1989-1990), pp. 582-583.
20 The US Declaration condemns the King of England as follows: 'The present King of England…he has combined with others to subject us to a jurisdiction foreign to our constitution…he has plundered our Seas, ravaged our coasts, burned our towns, and destroyed the lives of our people. He is at this time transporting large Armies of foreign Mercenaries to compleat the works of death, desolation, and tyranny, already begun with circumstances of Cruelty & Perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.' US Declaration (1776).

narrative emerging from the Declaration maintains a hegemonic and disempowering status quo between settlers, natives and slaves but also between settler men and women. The civil rights movement and feminist struggle in the US has focused on righting these early exclusions.[21]

Similarly, the Covenant of the League of Nations (LON Covenant) describes its chief desire to uphold peace and security for mankind in the wake of a terrible World War. Powerful nations lament their losses in the War while seeking to maintain their political hegemony over colonised and occupied territories. The Covenant creates laws that condone imperial expansion by 'advanced nations' and legitimates the colonisation of 'peoples not yet able to stand by themselves.'[22] Its legal narrative depicts imperialism as a civilising mission and colonised peoples as perpetual minors incapable of the fundamental right to self-determine.[23]

Likewise, within Thabo Mbeki's text, there is a political appropriation of an individual experience (Sara's) for the creation of a national or even continent-wide experience of victimisation of colonised peoples at the hands of an imperial force. Mbeki erases Sara Baartman, the woman, the individual, the Khoisan, from the narrative of historical injustice and reproduces her as Mama Saartjie, the Mother of the Nation. The chief outcome of such a nationalised construction is to highlight the genuinely atrocious human rights record of European colonisers and implicitly legitimate Black majority rule on an African continental level or at the macro level of national politics in South Africa.

If legislators responding to this analysis of the eulogy were to draft a law, it would resemble an instrument such as the LON Covenant or the US Declaration. It would focus on state sovereignty and self-determination, interstate grievances against aggression and claims for redress to the State and not to citizens. There would be no reference to the gender-specific harms experienced by women, or to groups in opposition to the dominant voice of the ruling elite, or to the rights of minorities or indigenous groups. In this way political hegemony would be maintained and couched in the language of victimhood and even human rights.

International Bill of Rights

The first generation of international human rights law was enacted shortly after and was greatly influenced by the Second World War. The Universal Declaration is the best known General Assembly Declaration and has influenced the development of subsequent human rights treaties, codes, declarations and proclamations since its adoption. In particular, the International Convention on Civil and Political Rights and the International Convention on Economic, Social and Cultural Rights greatly elaborated on the principles and protections laid down by the Universal Declaration of Human Rights. Together the three documents are referred to as the International Bill of Rights.[24]

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21 Suzanne Pharr writes that 'Since those who wrote the Constitution were white male property owners who did not believe in the complete humanity of either women or blacks, then these two groups have had to battle for inclusion.' Pharr (1997), p. 68.

22 LON Covenant, Article 22.

23 Anthony Anghie provides an excellent analysis of the ways in which imperialism and colonialism by Europeans of Asia, the Americas and Africa were legitimised by international law, which he refers to as European International Law because it consisted of a series of doctrines and principles that were developed in Europe, that emerged out of European history and experience, and that were extended in time to the non-European world which existed outside the realm of European international law. Anghie illustrates his analysis with the justification by the 'fathers of international law' of the violent conquest by the Spanish of indigenous Americans. Indians were referred to as the barbaric Indians and were seen to exist beyond the existing parameters of international law which demanded sovereignty for all nations. Spanish violence was understood to be, simultaneously, overwhelming, liberating, transforming and humanitarian. Anghie (2008), pp. 23-35.

24 Whilst the Universal Declaration is not binding, its influence on human rights legislation has been phenomenal. In a sixty-year period, more than 40 emerging States have explicitly incorporated the Universal Declaration into their Constitutions. Regional intergovernmental organisations in Europe, Africa and the Americas have incorporated the Universal Declaration into their charters or resolutions. And, finally, the UN and many of its specialised agencies have repeatedly invoked the Declaration in resolutions and declarations.

Chapter 2

In contrast to the LON Covenant, the Universal Declaration emphasizes the right to self-determination and also prohibits discrimination against colonized nations.[25] However, the greatest difference lies in the fact that the Universal Declaration focuses on the rights of individuals against the abuse of power by the state. It provides that all human beings are born free and equal in dignity and rights and everyone is entitled to all the rights and freedoms without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[26] The Universal Declaration restricts itself to this blanket ban on distinctions based on sex and the right to non-discrimination on the basis of sex was not elaborated upon or described substantively. At the time the understanding of sex was linked to women's biological differences from men rather than to their socially constructed sex and gender roles. The International Bill of Rights did not provide a definition of discrimination until the Human Rights Committee provided one in 1989.[27]

Subsequently, the ICCPR and the ICESCR maintained the general provision on equality and non-discrimination with regard to sex.[28] Although there is a greater elaboration of women's rights than in the UDHR the focus remained on women's biological differences from men, particularly with respect to their sexual reproductive potential. For example, the ICCPR prohibits the execution of the death sentence on pregnant women.[29] Women and their experience of human rights violations are not given any deeper analysis or response apart from applying a formal equality response to discrimination. Thus except for the reference to the pregnant woman felon (and the desire to protect her foetus) the larger question of gender and how it might impact the enjoyment of the right to a legal remedy or equality before the law is ignored. The International Bill of Rights does not consider women's traditional exclusion from access to legal remedies due to factors related to their gender. For example, in many societies despite formal equality in Constitutions and other national laws, women are not regarded as possessing legal standing and would require a male custodian to pursue an action on their behalf or to give them permission or even financial support before they could pursue an action in their own right. The role that gender plays in criminal actions where a woman is the accused is also inadequately provided for by the gender-neutral human rights law provisions. Do jurors respond more severely to 'criminal' women than 'criminal men'? Are women defendants more likely to be indigent than men? Responding to such questions brings the principle of equality and non-discrimination before the courts into doubt.

The International Bill of Rights' focus on formal equality had the effect of upholding institutions and structural bias that maintained the status quo that ensured that women were not similarly situated with men, and therefore more vulnerable to the denial of their basic human rights. The ICESCR provision that women enjoy just and favourable conditions of work and remuneration which is equal to that of men for equal work is a case in

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25 Universal Declaration, art. 2. Commentators point out that the UN did not begin to convincingly champion self-determination until the sudden influx of independent states as member states in the late 1960s, notwithstanding the fact that many Western coloniser states made attempts to undermine the decolonisation process. Balakrishnan Rajagopal points out that at the drafting stage the Universal Declaration was subject to intense manoeuvring by Britain to prevent its application to its colonies and further that anti-colonial nationalist revolts in Kenya and Malaya, for example, were successfully characterised by the British as 'emergencies' to be dealt with as law and order issues, thereby avoiding the application of either human rights or humanitarian law to these violent encounters. Rajagopal (2006), p. 65.

26 Universal Declaration of Human Rights arts. 1 and 2.

27 Human Rights Committee General Comment 18 (1989)
Art. 7 based on the definitions provided by CERD and the Women's Convention: 'While these conventions deal only with cases of discrimination on specific grounds, the Committee believes that the term 'discrimination' as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

28 ICCPR
Art. 2 (1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
Art. 3 The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

29 ICCPR, art. 6 (5).

point.[30] The protection fails to address pertinent gender issues such as working hours that do not take into account women employees' (gender) role as the primary carers of children, partners and dependant family members.

Apart from the workforce, another institution left unchallenged by the International Bill of Rights is the family, referred to as the 'natural and fundamental' group unit of society.[31] The rights of women in relation to family life when elaborated upon refer typically to marriage and childcare signifying those areas defining women's sexual and reproductive functions.[32] This focus by human rights law on protecting women's reproductive and sexual potential demonstrates the belief that the family with heterosexuality and marriage is biologically certified as 'natural', hence benign and non-violent. This normative assumption that women belong in relationships with men – within the family – denies that heterosexuality and family life constitute a context of risk for women, and implies that such risk is occasioned by aberrations from the norm, rather than being part of a continuum of various forms of violence (not necessarily physical battering) that affect all women's lives.[33] The Banjul Charter replicates this belief and confirms Thomas McClendon when he points out that whilst African men and the state had their long-standing conflicts, they agreed that the subordination of African women through control of their mobility from rural to urban areas and reproductive rights maintained patriarchy and other forms of male privilege.[34]

This idea of promoting strict equality between women and men whilst subjecting women to the control and even tyranny of the family and other community-based institutions is a typical feature of first generation human rights law instruments. Within these legal frameworks women belonged or were relegated to the (private) home 'for their own protection' due to their biological and/or sexual vulnerability and in order to nurture their natural child-bearing and maternal instincts. The first generation human rights instruments with their formal equality approach fell short of effectively identifying the gendered nature of human rights violation and responding to it in an effective and manner. This led to the depoliticisation of private acts of violence and other forms of discrimination and left structural inequalities intact.

The failure by the first generation rights instruments to distinguish inequalities within the universal 'woman group' is also problematic, and posed a challenge to latter-day first generation instruments, such as the Convention on the Elimination of All Forms of Racial Discrimination whose thematic focus on race precluded any inclusion of gender, an apparently separate and unrelated ground for discrimination.

Banjul and CERD

Further in his eulogy Thabo Mbeki moves away from the African experience of colonisation and closer to the exploitation of a collective indigenous group.

> This means that we must act to restore the dignity and identity of the Khoi and San people as a valued part of our diverse nation.[35]

The Khoikhoi group, a tribal group that was nearly made extinct by exposure to and conquest by Europeans is suddenly privileged as victims of imperialism. Emphases in Mbeki's speech made it clear that Sara's burial was a nation-building event but also a national event with all the trappings of a Khoikhoi burial ceremony. The

30 ICESCR, art. 7.
31 See art. 16 of the Universal Declaration of Human Rights, art. 10 of the ICESCR and art. 23 of the ICCPR for references to the family. art. 23.
32 ICCPR, art. 23.
33 Wilkerson (1998), p. 131.
34 See Thomas V. McClendon for a historical account of the collusion between African men and the colonizing settler government necessary to restrict women's urban migration in order to maximize women's production and reproduction for men and the state. McClendon (2002), pp. 164-179. See a similar analysis of urban migration from Western Tanzania and male strategy (colonial and indigenous) to control and mould female gender identity. Lovett (1996). Art. 18 (1) of the Banjul Charter describes the family unit as 'the natural unit and basis of society.'
35 Mbeki (2002).

ceremony was used ostensibly to publicly commemorate historical injustices which the Khoikhoi people had suffered at the hands of imperial marauders, colonisers and settlers.[36]

The Banjul Charter (Banjul) is categorised in this study as a latter-day first generation instrument, and indeed its foundation is firmly rooted in the principles of the International Bill of Rights. However, as Africa's first regional human rights instrument enacted forty years after the Universal Declaration its political backdrop is not the construction of a new world order after the Holocaust but rather the liberation of 'African Peoples' from colonial rule. With the rapid liberation of many countries throughout the 1960s and 1970s in Africa it is unsurprising that sovereignty, control of mineral wealth, development, and reclaiming values and cultures that had been besieged by the colonial experience were central to the identity and focus of the Banjul Charter. The Banjul Charter represents a claim by Africans that their experience of human rights denial, characterised chiefly by their historical subjugation and exploitation on racial grounds, was so unique and specific to the Continent as to require not only a universal human rights response but also a regional one.

Banjul's provisions on equality and non-discrimination mirror those of the International Bill of Rights as Member States are enjoined to prohibit all forms of discrimination, particularly those based on race, ethnic group, colour, sex, language, religion, political or any other opinions, national and social origin, fortune, birth or other status.[37] As with the International Bill of Rights, Banjul assumes a universal experience of rights enjoyment and denial for the African family. Thus whilst Africans are distinguished from the universal family, Banjul does not evince that human rights violations overlap and affect different groups more severely. Africans are presented as a monolithic family united against the colonising West. The protection of ethnic groups, for example, does not lead to any elaboration on how these groups can be more vulnerable to human rights denial and abuse. Banjul has no provision against State-authorised land grabbing from indigenous groups, for example, or forced relocations arising from development projects that deny these groups the exercise of their cultural livelihood. The focus remains on the protection of African resources from colonisers and never envisages the reality of human rights abuse by legitimate African governments. Further, the presumed universality of the African family makes belonging to the African group the single axis upon which rights protections are elaborated. Thus, racism apparently has no linkage to sexism, and no overlaps are envisaged between ethnic and religious persecution by the State, for example.

So, even as Mbeki's text zooms in on the 'Khoisan-ness' of the victim, and distinguishes Sara from the universal African or South African group, this distinction is not used to better analyse and understand her individual gendered experience. We cannot detect a Khoisan man, woman or child in the eulogy text but only a Khoisan experience of historical abuse and marginalisation, in colonial and contemporary times. The narrative of the eulogy implies that the Khoisan peoples suffered persecution as a universal or monolithic experience.

The Convention on the Elimination of All Forms of Racial Discrimination (CERD) is one of several thematic human rights instruments expanding on a specific area of discrimination referred to broadly by the International Bill of Rights. It is rooted in the fundamental equality principle of the International Bill of Rights but it focuses exclusively on the prohibition of racial discrimination. CERD prohibits discrimination on the

36 Clifton Crais and Pamela Scully suggest that this recognition of the Khoikhoi was part of a wider effort by the African National Congress to court the Khoikhoi-'Coloured' vote in elections. Crais and Scully (2009), p. 153. They also illustrate how many indigenous groups attempted to profit from claiming Sara as their own descendant. Different Khoisan Councils claimed their own authenticity and denounced that of others. The authors point out that this contest for Sara's body was presided over, fought by and determined by men in a patriarchal fashion. Ibid., pp. 157-158.

37 The prohibition against discrimination in much the same form can be found in earlier international human rights conventions and declarations I would classify as first generation instruments. The Convention on the Political Rights of Women (1952), the Convention on the Nationality of Married Women (1957), and the ILO Convention concerning Discrimination in Respect of Employment and Occupation.

grounds of race, colour, descent, national or ethnic origin.[38] Like the Banjul Charter, CERD is located in social and political conditions such as apartheid and segregation that led to wide-scale racial discrimination; however, no effort is taken to investigate the ways in which racial discrimination can be exacerbated by intersecting features such as caste, gender and religion. In this way CERD could fail to effectively protect, for example, Dalit Christians, Malaysians of Chinese origin or African American women from discrimination in the workforce or school system. There is a uniformity assumed in groups targeted for racial discrimination but no attempt to disaggregate these groups in order to see how multiple identities might exacerbate or mitigate discrimination. Thus whilst CERD could respond to the persecution of the Khoisan peoples, it could do little to redress gender-specific harms suffered by Khoisan women and men.

The Banjul Charter and CERD made substantial advances from their precedent in the first generation of human rights, the International Bill of Rights. They provide definitions of discrimination and whilst they do not refute the universality of human rights, they deny a uniformity in the ways in which freedoms are enjoyed and denied. In the case of Banjul, rights are placed in the context of African culture, history and politics. CERD focuses on specific groups who suffer discrimination on the grounds of race and the political regimes that make widespread racism possible. Banjul and CERD begin the task of disaggregating victims of discrimination; however, like the International Bill of Rights, they fail to expose gender-based discrimination as a pervasive human rights violation. One that shaped African women's experience of imperialism and colonialism, both political structures identified and challenged by Banjul and CERD. Thabo Mbeki's speech establishes collective victimhood for the Khoisan but erases Khoisan women in as far as their experience might differ from that of men.

2.2.1 Second generation of human rights law

Having dealt with the suffering of (black) South Africans and the suffering of the Khoikhoi peoples, Mbeki's speech developed into a third trajectory and that was the exploitation of Sara specific to her sex:

> The women of our country have borne the brunt of the oppressive and exploitative system of colonial and Apartheid domination. Even today, the women of our country carry the burden of poverty and continue to be exposed to unacceptable violence and abuse. It will never be possible for us to claim that we are making significant progress to create a new South Africa if we do not make significant progress towards gender equality and the emancipation of women.[39]

Thabo Mbeki notably acknowledges that the exploitation Sara suffered in the nineteenth century is still experienced by many women in a democratic South Africa. He refers in some detail to Sara as a symbol of the subjugation of African women in the Diaspora, African women on the African Continent and the women of South Africa.[40] In this regard it was not a coincidence that her Khoisan burial ceremony fell on South Africa's National Women's Day on 9 August, 2002.

> Today we celebrate our National Women's Day. We therefore convey our congratulations and best wishes to all the women of our country. We also mark this day fully conscious of the responsibility that falls on us to ensure that we move with greater speed towards the accomplishment of the goal of the creation of a non-sexist society.'[41]

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38 CERD art. 1 In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

39 Mbeki (2002).

40 Natasha Gordon-Chipembere writes that 'the legacy of a dominant and racist colonial narrative holds true for contemporary perceptions of Black women's sexuality throughout the African Diaspora, with associations of promiscuity, ugliness and evil.' Gordon-Chipembere (2006), p. 65.

41 Mbeki (2002). It has been pointed out that not all South African women embraced this gesture. Two women Chiefs protested because they felt that Sara Baartman deserved a day that belonged to her alone as opposed to being co-opted into the general nationwide Women's Day celebrations. The Chiefs invoked the Vermillion Accord on Human Remains that privileged local

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So in the eulogical extracts described in this and the preceding sections on first and generation instruments we see these grounds of discrimination against Sara: on the grounds of her African race, and her Khoikhoi tribal mark. And with the extracts above we see the first acknowledgment that her sex and her gender as a woman were factors in her experience of discrimination. Finally, structural inequalities maintained by systems such as apartheid and colonialism are put forward as perpetuating women's subordination. This is an important construction of gender inequality and discrimination that allows policy makers to respond to violence against women as a wide-scale phenomenon that raises the state obligation to prevent its commission and punish perpetrators. It is in line with the growing recognition within the international community reflected in second generation human rights instruments that gender-based violence and other forms of discrimination were not adequately protected by existing human rights mechanisms.

Intersectionality is the unexplored facet of Mbeki's eulogy and also of first generation human rights instruments. Nationality, race, gender and sex are individually identified as grounds for discrimination; however, their confluence is never seriously examined as aggravating human rights abuses. Second generation laws slowly began to make inroads into addressing the reality of multiple forms of discrimination.

CEDAW

The advent of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) represents the maturity from first to second generation instruments marked by the prominent location of women's rights in human rights law. CEDAW, as a first generation instrument, made several broad moves away from the International Bill of Rights' protection against gender inequality and discrimination. It provides a substantive definition of discrimination against women as follows:

> ... any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[42]

The indivisibility of human rights is affirmed and whilst the term 'sex' and not 'gender' is used in the definition, it is clear that CEDAW does not underestimate the socially constructed gender roles and expectations that constrain and challenge women in their enjoyment of human rights. CEDAW urges states to end prejudices and harmful stereotypes of women based on the idea of their inferiority in all spheres of life, specifically in the field of education.[43] In a revolutionary step revealing its recognition of the unevenness of the playing field for men and women in the enjoyment of their rights, CEDAW provided for temporary special measures such as affirmative action to facilitate women's attainment of gender equality with men.[44]

However, despite its status as the Women's Bill of Rights, CEDAW has not escaped criticism for maintaining elements of the formal equality approach to attaining gender equality and non-discrimination, particularly with respect to the right to employment and participation in political life and omissions relating to forms of gender-based violence such as domestic violence. Regarding the former, CEDAW calls for women's equal participation in the workforce or the political realm, areas which were traditionally dominated by male employers and employees without addressing hostile hegemonic responses such as sexual harassment. Sexual harassment was not constructed as a human rights abuse in CEDAW's narrative, despite being a primary barrier for many women to enter, excel and be retained in the workforce or political life.

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communities in the dispensation of remains. However, their protests were said to have been met with indifference. Crais and Scully (2009), p. 163.

42 CEDAW, art. 1.

43 Ibid., art. 5 and art. 10 (c).

44 Ibid., art. 4. See also HRC General Comment 18, art. 10 to the effect that the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the ICCPR.

It should come as no surprise, then, that women who fear harassment from male peers and superiors may opt out of the workforce. This 'voluntary' decision to opt out is not far removed from the 'voluntary' decision by Prosecutor Aimable's victims to opt out of the justice process presented in this chapter's opening narrative. Human rights instruments may grant equal rights to men and women but then leave women ill-equipped to navigate the hostile social terrain of their community that poses a constraint to their realizing their rights fully.[45]

A founding principle of the women of colour movement states that the struggle against patriarchy is linked to the struggle against all forms of subordination, and therefore all forms and patterns of oppression and subordination are interlocking and mutually reinforcing.[46] However, the Women's Convention as an early second generation law provides the dominant conceptions of discrimination on the ground of sex and gender which constructs subordination as a disadvantage occurring along a 'single category axis.'[47] This axis 'erases black women' in the conceptualisation, identification and remediation of race and sex discrimination by limiting inquiry to the experiences of otherwise privileged members of the group.[48] Crenshaw points out that this approach, when applied to feminist theory and anti-racist politics analysis, creates a paradigm of sex discrimination that tends to be based on the experiences of white middle-class women and the model of race discrimination tends to be based on the experience of black middle-class men.[49]

CEDAW provides extensive protection for women as a unitary and universal group. However, it is very limited in its efforts to acknowledge that within the universal women group there are differences that can increase vulnerability to human rights abuse. This recognition is restricted to references to married women, rural women, prostitutes and trafficked women. The selection is in its own way a caricature of the different roles which women may play in a society.[50] These groups inarguably require special attention; however, their inclusion cannot be justified when migrant women, domestic workers, displaced women, LBGTQ,[51] disabled women, women living with HIV/AIDS, refugee women, and other groups of women are not considered.

With regard to the reference to prostitutes and trafficked women, in particular, the failure to address the intersection of gender discrimination with other bases of discrimination, in particular race discrimination, weakens any protection measures. The international traffic in women is fuelled in many cases by embedded beliefs in the racial inferiority of women, whether it is trafficked Slavic women being received in the Netherlands, Filipino women in the United States, Korean women in Japan, Senegalese women in Spain or Albanian women in Italy. This form of gender and racial discrimination combines with other elements such as poverty or exploitative interstate postcolonial relationships that fuel the traffic in women throughout the world. In order for States Parties to respond effectively (and not only with the arrest of prostitutes and deportation of trafficked women) they must be guided by international norms that define the intersecting and complex issues fuelling organized crime leading to violations of the rights of women.

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45 Another analogy can be made with the restoration of Sara's human dignity by means of a national funeral that was followed by the desecration of her burial site by vandals and graffiti. The State initially did little to safeguard the site. Crais and Scully (2009), p. 167.

46 Mari J. Matsuda concedes that all forms of oppression are not the same, but lists several predictable patterns emerging, which include: All forms of oppression involve taking a trait, X, which often carries with it a cultural meaning, and using X to make some group the 'other' and to reduce their entitlements and power; All forms of oppression benefit someone and sometimes both sides of a relationship of domination will have some stake in its maintenance; All forms of oppression implicate a psychology of subordination that involves elements of sexual fear, the need to control, hatred of self and hatred of others. Matsuda (1990-1991), pp. 1188-1189.

47 Crenshaw (1989), pp. 139-140.

48 Ibid., p. 140.

49 Ibid., p. 151.

50 CEDAW, arts. 6, 14 and 16. And indeed prostitutes and trafficked women may define themselves beyond these parameters; as sex workers, economic migrants, refugees or wives. The complexities of women's multiple identities are far from encompassed by first and second generation instruments.

51 By LGBTQ I refer to lesbian, gay, bisexual, transsexual and queer/questioning.

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CEDAW might allow us to label the abuse against Sara as a problem of trafficking, or enforced prostitution, but this would lead to an insufficient justice and remedies response. Sara's experience of discrimination was rooted and channelled through imputed racial and gender stereotypes. Certainly other factors may have contributed to Sara's vulnerability to captivity and human rights abuse, including her youth, or marital status (unwed) and it is important that the early focus by second generation instruments on gender as a monolithic ground of discrimination is challenged and broadened in order that the full extent of gender-based discrimination can be identified and redressed.

Human Rights Committee and CERD Committee

The General Comments (Comments) passed by the Human Rights Committee and CERD Committee are interpretative sources of human rights substantive law and represent the most developed instruments in the second generation of human rights.

However, the foremost Comments made by the major treaty bodies neglected to put gender into the Conventions. Like the first generation instruments before them, the treaty bodies were criticised for failing to recognise that sex or gender can be a significant dimension in defining the substantive content of individual rights or that it can affect the choice of methods that must be adopted by States to ensure that all individuals within their jurisdiction enjoy those rights equally.[52] Andrew Byrnes aims this criticism at the HRC General Comment on the right to privacy which ignores the importance that this right has assumed in the struggle of women in many countries for control over their reproductive lives, for example with respect to abortion or the spacing of children.[53] Instead traditional (androcentric) concepts such as the inviolability of the home from State interference and restrictions on the use of sensitive personal information by governments and others are the major preoccupation of the Committee.[54] The narrative arising from the HRC General Comment on the issue of privacy privileges the concerns of men.

However, with the passage of time Committee members have come to place gender at the core of their Comments to States. Through these General Comments, first and second generation human rights instruments have been elaborated upon in order that multiple identities of women are identified and thoroughly explored. General Comments have become an important means of normative development in a regime that is frustratingly limited in this respect.[55] The Human Rights Committee, earlier criticised for failing to take gender into account, produced a General Comment addressing article 3 of the ICCPR on equality between men and women in a far-reaching and insightful manner.[56] Gender is squarely addressed as a ground for discrimination and its impact on vulnerability to discrimination as well as the shape of discrimination is discussed within the Comment. States are instructed by the Comment that combating inequality in both public and private spaces is the responsibility of the state and cannot be limited to formal equality but requires multiple responses including: the removal of obstacles to the equal enjoyment of such rights, the education of the population and of State officials in human rights, and the adjustment of domestic legislation, the adoption of protection measures and affirmative action for the advancement of women.[57]

The HRC General Comment goes on to prohibit states from justifying unequal treatment and opportunity on the grounds of tradition, history and culture or religious attitude. Dowry killings, clandestine abortions, prenatal sex selection and the abortion of female foetuses are condemned as a manifestation of discriminatory

52 Byrnes (1988), p. 216. See also Diane Otto's arguments that General Comments and Recommendations of all treaty bodies should more extensively mainstream gender into their authoritative interpretation of treaties. Otto (2002).
53 HRC General Comment 17 (1988).
54 Byrnes (1988), p. 217. Art. 17 of the ICCPR provides for the right of every person to be protected against arbitrary or unlawful interference with his privacy, family, home or correspondence as well as against unlawful attacks on his honour and reputation.
55 Otto (2002), p. 10.
56 HRC General Comment 28 (2000).
57 HRC General Comment 28, arts. 3 and 4.

attitudes that subordinate women.[58] The HRC General Comment describes how poverty and deprivation, armed conflict and states of emergency can compromise women's rights and increase their vulnerability to discrimination, often in the shape of violence, such as sexual violence and abduction.[59]

The record of the CERD Committee also reveals that despite an initially androcentric or formal equality approach to the right to equality and non-discrimination, the specific gendered experience of women can be incorporated into the scope of protection enshrined by international human rights law. Gender-related aspects of racial discrimination were ignored by the CERD Committee in its 19 General Comments passed before 1996. At one stage the CERD Committee Chairperson made the astounding declaration that he rejected 'directives' to integrate gender issues into the CERD's work as 'fundamentally misconceived' and considered that it was CEDAW's job to deal with women.[60] This statement was even more astounding considering that in 1995 the Chairpersons of the Treaty Committees had endorsed a shared commitment to 'fully integrate gender perspectives into their working methods, including identification of issues and preparation of questions for country reviews, general comments, general recommendations, and concluding observations.'[61]

It is notable, however, that in the past decade the CERD Committee has actually exceeded the HRC Committee in its efforts to incorporate gender into its treaty. Indeed the CERD Committee introduces a gender analysis of human rights into various Comments and not only a thematic Comment on gender. In General Comment 25 the CERD Committee notes that there are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way, or to a different degree than men. Such racial discrimination will often escape detection if there is no explicit recognition or acknowledgement of the different life experiences of women and men, in areas of both public and private life.[62] Further, certain forms of racial discrimination may be directed towards women specifically because of their gender, such as sexual violence committed against women members of particular racial or ethnic groups in detention or during armed conflict; the coerced sterilisation of indigenous women; the abuse of women workers in the informal sector or domestic workers employed abroad by their employers.[63]

The Comment elaborates that racial discrimination may have consequences that affect primarily or only women, such as pregnancy resulting from racial bias-motivated rape; in some societies the women victims of such rape may also be ostracized.[64] Women may also be further hindered by a lack of access to remedies and complaint mechanisms for racial discrimination because of gender-related impediments, such as gender bias in the legal system and discrimination against women in private spheres of life.[65] The General Comment clearly states that gender issues and factors can and are highly likely to intersect with racial discrimination and urges states to investigate this intersection in a consistent and systematic manner.[66]

This is a landmark interpretation and analysis of racial and gender discrimination as indigenous women, minority women, displaced women, imprisoned women, women before a prejudiced justice process, women political prisoners, women in armed conflict and other unspecified groups are envisaged by the Committee as falling within the mandate of the Convention on the Elimination of All Forms of Racial Discrimination.

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58 Ibid., arts. 5 and 10.
59 Ibid., art. 10.
60 Otto (2002), p. 27 citing Gallagher (1997), p. 304. The statement was made by the CERD Committee Chairperson when reporting to the Chairpersons of the Treaty Committees' annual meeting.
61 Report of the sixth meeting of persons chairing the human rights treaty bodies, UN Doc. A/50/505, 4 October 1995 at para. 34. The recommendations were proposed by an Expert Group on the integration of gender perspectives into UN human rights activities and programmes, which met in Geneva from 3-7 July 1995 to follow up recommendations from the 1993 World Conference on Human Rights. Otto (2002), p. 28.
62 CERD Committee General Comment 25 (2000), art. 1.
63 Ibid., art. 2.
64 Ibid.
65 Ibid.
66 Ibid., art. 3.

The CERD Committee succeeds with this General Comment in enhancing its efforts to integrate gender perspectives, incorporate gender analysis, and encourage the use of gender-inclusive language in its sessional working methods, including its review of reports submitted by States parties, concluding observations, early warning mechanisms and urgent action procedures, and general recommendations.[67] This is a remarkable commitment and since it was made the CERD Committee has passed two other General Comments that show a sophisticated analysis and mainstreaming of gender issues. General Comment 27 on discrimination against the Roma provides states with measures for the protection of Roma communities.[68] However, it also refers in several instances to Roma women who are often victims of 'double discrimination.'[69] In the area of education, for example, States are urged to take responsibility for the high drop-out rates of Roma children and to take into account gender issues that might force girls out of school far earlier than boys.[70] Women and female children are specifically addressed as requiring special attention in the campaign to end racial discrimination against Roma communities. The Comment calls on government programmes, projects and campaigns in the field of education to take into account the feminisation of poverty.[71] The Committee also urges that health programmes implemented by states to service Roma communities factor into their policy and administration cultural attitudes that subordinate women and girls and contribute to their lower levels of education.[72]

CERD General Comment 29 adopts a broader approach to discrimination than General Comment 27 on the Roma and focuses on descent-based discrimination, discrimination on the ground of caste and analogous systems of inherited status.[73] Discriminatory practices against affected communities might include: the restricted ability to alter inherited status; socially enforced restrictions on marriage outside the community; private and public segregation, including in education, access to public spaces, places of worship and public sources of food and water; subjection to debt bondage; and subjection to dehumanising discourses referring to pollution or untouchability.[74] Moving further and further away from a monolithic construction of women, General Comment 29 also identifies the particular vulnerability of women to multiple forms of discrimination in the areas of personal security, employment and education.[75] In line with General Comment 27 a provision on discrimination in education is made and states are urged to protect girl children from being doubly prejudiced by perceived gender roles and their caste/descent.[76] Both General Comment 27 and 29 with their careful attention to gender and racial discrimination have been successful in acknowledging what Sideris refers to as the socio-political conflicts that relations of power produce.[77]

These two General Comments (on the Roma and on descent) provide a much needed gender analysis of multiple discrimination against women members of targeted communities. Sexual exploitation and forced prostitution are specifically referred to as gendered experiences for women that should be accounted for and responded to in projects designed to support these groups.[78]

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67 Ibid., art. 4.
68 CERD General Comment 27 (2000), Preamble.
69 Ibid., art. 6.
70 Ibid., art. 17.
71 Ibid., art. 22.
72 Ibid., art. 34.
73 The Preamble to the General Comment provides that the Comment arose from a thematic discussion with members of the CERD Committee, some Governments, experts from the Sub-Commission for the Promotion and Protection of Human Rights, and non-governmental organisations which produced compelling evidence of the extent and persistence of descent-based discrimination in different regions of the world. CERD General Comment 29 (2002), Preamble.
74 Ibid., article 1.
75 Ibid., article 12.
76 Ibid., article 44.
77 Sideris (2000), p. 145.
78 Ibid., article 11.

The CERD Committee also provides a gender analysis in General Comment 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system.[79] It is certain that in future Comments gender will remain central to any analysis of racially discriminatory practices.

The CERD General Comments focus chiefly on discrimination that can be traced to State policy, for example, discriminatory entrance requirements for school children or discriminatory selection criteria for public housing. However, less attention is paid to investigating and naming inequality and discrimination as it manifests itself in private spaces, such as the home and formal and informal community institutions such as places of worship, private housing and social clubs. Thus issues such as high incidences of domestic violence within indigenous minority groups or early marriages sanctioned by religious communities are overlooked, as the focus of the General Comments is fixed on the position of vulnerable groups vis-à-vis oppressive State policy or dominant groups. Discrimination emanating from within the group is studiously avoided in the human rights narrative of second generation rights in an effort to avoid further stigmatising groups such as the Mormons in North America, the Roma in Europe and aboriginal peoples in the Pacific region. This omission inadvertently mirrors the omission of first generation rights to subject the family and other private institutions from any serious scrutiny of institutionalised violations against women and girls.

A final point on omissions would be that the second generation instruments continue to evade issues of sexual autonomy thus leaving the enjoyment of this highly gendered freedom in the custody of matriarchs and patriarchs in the family, the community and places of worship. LBGTQ communities are well aware that their status as subaltern sexual minorities combined with race, colour, descent, or national or ethnic features can greatly magnify hostility and even violent reprisals from their own ethnic but heterosexual community as well as the dominant heterosexual community. This omission places the reality of race and sexuality-based discrimination out of sight and reach of human rights protections.

2.2.2 Third generation of human rights law

Mbeki ultimately, albeit briefly, refers to Sara as a unique individual on 'a voyage of misery and death.' He describes Sara as a 'lonely African woman in Europe', and 'as a child and a young woman.'

This scrutiny of an individual woman takes us to the third generation of rights instruments represented by the Maputo Protocol, the CEDAW General Recommendations and the reports of the UN Special Rapporteurs. The third generation instruments are focused first and foremost on gender. Gender is not an afterthought but the core theme shaping discriminatory practices against women. Third generation rights instruments view women's rights away from the mirror reflection that is a man, or the uniform representation of a woman as Everywoman (single axis). Rather than providing a descriptive account of each article within the said instruments (as each article refers to gender), this section will focus on the most profound distinction between third generation instruments and earlier instruments, namely, the intrusion of third generation rights into the private sphere. This has brought once invisible forms of gender-based discrimination, such as harmful traditional practices, to the fore of human rights discourse. In particular, this section looks at the way in which third generation rights have brought violence against women into the gendered narrative of human rights law.

Maputo Protocol and CEDAW General Recommendations

The CEDAW Committee General Recommendations and the provisions of the Maputo Protocol provide some of the most innovative normative and interpretive protections against inequality and discrimination on the ground of gender. In 1992, the CEDAW Committee's General Recommendation 19 extended CEDAW's general prohibition on sex discrimination to include gender-based violence.[80] The General Recommendation

79 CERD, General Comment 31, article 40 refers to protective measures for women and mothers who are non-nationals and subject to deportation. Several articles of this Comment could be applied to the disproportionate representation of minorities (especially men) in prisons in countries such as the United States, the United Kingdom and Australia. See article 1 (d).

80 CEDAW General Recommendation 19 (1992).

states that CEDAW's definition of discrimination prima facie includes gender-based violence including acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.[81]

The CEDAW General Comment elucidates that violence against a woman constitutes a violation of her internationally recognized human rights, regardless of whether the perpetrator is a public official or a private person and provides an illustrative list of those fundamental rights and freedoms that can be impaired by gender-based violence: the right to life; the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment; the right to equal protection according to humanitarian norms in times of international or internal armed conflict; the right to liberty and security of the person; the right to equal protection under the law; the right to equality in the family; the right to the highest standard attainable of physical and mental health; and the right to just and favourable conditions of work.[82]

It is a defining feature of third generation human rights instruments such as CEDAW General Recommendations that 'private' violence is not only identified as a human rights violation but that States parties have a positive obligation to protect victims, punish abusers and eliminate the practice in communities.

As a regional women's rights convention the Maputo Protocol actually takes on all aspects of pre-existing human rights instruments.[83] Referring to the Banjul Charter, the Preamble to the Maputo Protocol expresses the unequivocal recognition of regional as well as international human rights instruments as important reference points for the application and interpretation of the African Charter.[84] At the level of international law, the Maputo Protocol is strongly and substantively influenced by the Women's Convention and interpretations of CEDAW General Comments.[85] The influence of the Women's Convention on this third generation instrument can be seen with the nearly ad verbatim definition of discrimination as any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life.[86]

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81 Ibid., art. 6.

82 CEDAW General Recommendation 19, art. 7.

83 The Maputo Protocol is a supplementary Protocol to the Banjul Charter. The Protocol was adopted by the African Union on 11 July 2003 in Maputo, the capital city of Mozambique. The Protocol entered into force on 25 November 2005, 30 days after the fifteenth ratification, in accordance with Article 29 of the Protocol. By May 2007, 20 States Parties to the Charter had ratified the Protocol: Benin, Burkina Faso, Cape Verde, the Comoro Islands, Djibouti, the Gambia, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Namibia, Nigeria, Rwanda, South Africa, Senegal, Seychelles, Togo and Zambia. The following countries have signed but not ratified: Algeria, Chad, Côte d'Ivoire, Congo, the Democratic Republic of Congo, Equatorial Guinea, Ethiopia, Gabon, Ghana, Guinea Bissau, Guinea, Kenya, Liberia, Madagascar, Mauritius, Niger, Sahrawi Arab Democratic Republic, Sierra Leone, Somalia, Swaziland, Tanzania, Uganda and Zimbabwe. 7 countries have not yet signed the Protocol: Sudan, São Tomé and Príncipe, Eritrea, Egypt, the Central African Republic, Botswana and Angola.

84 Banjul Charter
Art. 60 provides that: The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the parties to the present Charter are members.
Art. 61 provides that: The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognised by member states of the Organisation of African Unity, African practices consistent with international norms on human and Peoples' rights, customs generally accepted as law, general principles of law recognised by African states as well as legal precedents and doctrine.

85 The CEDAW Committee was established in 1982, and is composed of 23 experts on women's issues from around the world. Their General Recommendations have over the years elaborated on provisions listed in the Women's Convention and the nature and scope of discrimination against women.

86 Maputo Protocol, art. 1 (f).

The rather bold entry into the private sphere and the family allowed the Protocol to emerge as the first international convention to explicitly articulate a woman's right to a medical abortion when pregnancy endangers the life or health of the pregnant woman, or when it results from sexual assault, rape or incest.[87]

The Maputo Protocol defines violence against women as all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peacetime and during situations of armed conflicts or of war.[88] The Protocol defines violence against women specifically as a form of gender-based discrimination.[89] It provides a far-reaching construction of violence against women, including verbal attacks, sexual violence and harmful traditional practices, conducted in public as well as in private spaces.[90] Thus, it not only prohibits female circumcision as a harmful traditional practice, it also defines it as an act of violence against women. Violence is not compartmentalised into states of peace and war, or into private and public spaces. The definition clearly sees violence as a widespread phenomenon, a continuum of inequality marking women's lives and threatening their enjoyment of fundamental human rights.

Maputo's condemnation of harmful traditional practices was preceded by CEDAW's General Recommendation 14 on the subject.[91] The General Recommendation notes its reliance on the work of the Special Rapporteur on Traditional Practices Affecting the Health of Women and Children and on the study of the Special Working Group on Traditional Practices.[92] These precedents as well as Maputo's location as a regional human rights body allowed it to place the prohibition on harmful traditional practices into early drafts and to negotiate agreements from member States at the signing and ratification stages. Inclusion in the main body of the Maputo Protocol has given the issue greater prominence; however, it is CEDAW's General Recommendation that provides an extensive and layered interpretation of the cultural, traditional and economic pressures that allow female circumcision and other harmful traditional practices to flourish. The Recommendation identifies partners with whom States can cooperate in the eradication of harmful traditional practices, including traditional birth attendants, universities and other research centres, artists, religious leaders and local and national women's networks. This particular focus emphasizes that the home, the community and other previously 'private' spaces are not exempt from the standards of equality and justice and are critical stakeholders in righting inequality.[93]

Like the CERD Committee through its General Comments, the Maputo Protocol is cognisant of the multiple forms of discrimination that women as a gender group and as individuals experience. It moves away from formal equality and attempts to disaggregate the multilayered genre of women in order to better protect them against human rights violations. Maputo calls on States to take special measures in the protection of women in distress and these include: elderly poor women and women heads of families including women from marginalized population groups and women with disabilities.[94] States are called upon to provide these women with an environment which is suitable for their condition and their special physical, economic and social needs. It takes into account that formal equality will not suffice for women who are historically and systematically

87 Maputo Protocol, art. 14 (c).
88 Ibid., art. 1 (j).
89 Ibid., Preamble.
90 Ibid., arts. 3, 4 (2) (a), 5, 11, and 12.
91 CEDAW General Recommendation 14 (1990).
92 4 E/CN.4/Sub.2/1989/42 of 21 August 1989 and 5 E/CN.4/1986/42 respectively.
93 See also CEDAW's General Recommendation 21 (1994) which addresses equality in the family and marriage. It acknowledges the different shapes marriage can take (while continuing to censor early, forced and polygamous marriages) and points out that in the public and private sphere, socially-constructed gender roles for women are regarded as less valuable than men's. This is identified as a factor in inequality and injustice within the family. General Recommendation 21 arts. 11-13.
94 Ibid., arts. 23, 22 (a) et al.

subordinate to men and to other women and require special assistance to overcome physical, economic and social disadvantages before they can begin to compete on a level playing field.[95]

Sexual violence and other forms of violence are mainstreamed into the human rights protections of Maputo. Further, sexual violence is seen as targeting women beyond reproductive age. This emphasises that the 'honour' element of sexual violence has lost credence. For example, with respect to elderly women, the Protocol acknowledges the vulnerability of elderly women to violence, including sexual abuse.[96]

The section below provides a concluding analysis on gender and its inclusion in the first, second and third generation human rights framework.

2.3 Concluding narrative on human rights, gender and violence

The tri-generational model of human rights instruments illustrated the remarkable shift in the construction of gender as an analytical tool in exposing and responding to inequality and discrimination. Recognising that men and women belonged to socially constructed gender groups allowed for the interpretation of rights enjoyment, abuse and protection and to take into account the impact of gender. The most extraordinary outcome of this evolutionary process of analysis and interpretation can be seen in latter-day human rights instruments' construction of sexual violence and other forms of violence against women as a form of gender-based discrimination and inequality. This outcome is made even more extraordinary by the fact that sexual violence and other forms of violence against women often manifest themselves in private settings that traditionally were beyond the jurisdiction of state/legal protection or intervention.

This chapter closes with Sara Baartman and her experience of exploitation and abuse. That there were elements of sexual objectification and harm in Sara's captivity is apparent in the accounts of her public exhibition by a keeper. The definition of sexual violence provided in chapter 1 is easily applicable to her experience.

> …any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.[97]

The concluding question I pose in this chapter asks whether the definition provided in chapter 1 of gender-based violence immediately applies to Sara Baartman's case of sexual violence and exploitation.

> Gender-based violence is a severe manifestation of gender-based discrimination, and takes many forms…violence may be physical, sexual, psychological, economic or cultural.

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95 Ibid., arts. 24. CEDAW's General Recommendation 19 (1992) on gender-based violence is also mindful of the different ways in which socio-economic status can increase vulnerability to violence and other forms of gender-based discrimination. Speaking of rural women, it describes their increased vulnerability to gender-based violence because of traditional attitudes regarding the subordinate role of women that persist in many rural communities. Girls from rural communities are at special risk of violence and sexual exploitation when they leave the rural community to seek employment in towns.

96 Maputo Protocol, art. 22 (b).
CEDAW General Recommendation 24 (1999) which interprets art. 14 of the Women's Convention (on women and health), gives special attention to older women and how their age may compromise or otherwise affect their ability to access health care.
The Committee is concerned about the conditions of health care services for older women, not only because women often live longer than men and are more likely than men to suffer from disabling and degenerative chronic diseases, such as osteoporosis and dementia, but because they often have the responsibility for their ageing spouses. Therefore, States parties should take appropriate measures to ensure the access of older women to health services that address the handicaps and disabilities associated with ageing.
This type of interpretation is far more significant to women's lived lives than the provision in the Women's Convention which focused solely on the reproductive rights of women, a major concern for the male population. Art. 12 (1) and (2) refer specifically to pregnancy, confinement and the post-natal period, adequate nutrition during pregnancy and lactation, and family planning.

97 Jean-Paul Akayesu, Judgment, Case No. ICTR-96-4-T, 02-09-1998, para. 688.

Sadiah Qureshi cautions against an overemphasis by researchers on the racial and gender hegemonies that combined to make Sara's exploitation possible. Her own study of Sara Baartman highlights in part the often overlooked material and economic processes at play as Sara was transported, sold, exhibited and sold again in Europe. Sara's commoditization, and that of other 'exotic' peoples, is made analogous to the trade in other colonial flora, fauna and animals.[98] Qureshi argues that the fascination with Sara's sexual organs was no different from the fascination that made Londoners gather to view Count Boruwalski, a pituitary dwarf exhibited at a circus or freak show.[99] Qureshi reminds us that Baartman's exhibition and treatment by her show's patrons was not unique.[100] However, this claim unwittingly mirrors that of Sara's owner Cezar defending himself against charges of enslavement: 'And pray…has she not as good a right to exhibit herself as an Irish Giant or Dwarf….'[101] To respond to Cezar's flimsy defence in the most basic and base way I would respond: Would an Irish Giant exhibiting his giant phallus in a public square be as innocuous as an Irish Giant exhibiting his Giant feet in a public square? The distinction whether the exhibit is an Irish male or a Khoisan female is what 'peculiarity' they are displaying and the social, cultural, political and indeed biological imputation that 'peculiarity' is burdened with by the spectating public.

A gender analysis such as that provided by the CERD General Comments, the CEDAW General Recommendations and the Maputo Protocol, which acknowledge that gender can exacerbate women's vulnerability to human rights abuse, reveals that Sara Baartman's body was not the only draw for audiences but the mythology and imputed character of her sex and sexuality that determined the sexual exploitation and violation she suffered.[102] The definition of sexual violence noted in the first chapter is applicable to her case.

I discard the argument that the genre of 'exhibited people' endured a universal experience of human rights violation. Second and third generation human rights instruments such as the General Comments by CERD and the General Recommendations by CEDAW demand that discrimination be investigated as a complex and intersecting process: race, gender, sex, nationality, descent or other defining features often conflate to exacerbate human rights denial. It is the denial of gender and sexuality as grounds of discrimination from the human rights agenda that makes domestic and international law protections futile in the fight against contemporary forms of organised crime such as trafficking in girls and women.[103] Furthermore, comparing Sara Bartman to dwarves and giants only serves to reinforce racist stereotypes that equate African women with 'freaks'.

Rieke Andreassen also describes the display of exotics in European public houses, royal courts and zoos from the fifteenth to the early twentieth century. Such exhibitions in Danish zoos included: 'Inuits', 'Blackamoors', 'Nubians', 'Saamis', 'Chinese', Japanese and 'Abyssinians' beginning in the sixteenth century and culminating in 1909.[104] While showing the commonality of such displays of men and women, she does not implicitly or

98 Qureshi (2004), p. 233-236.

99 Ibid., p. 237.

100 Ibid., p. 238. Other writers have also cautioned against an overemphasis on Saartje's sex and race as instruments of her subjugation. Magubane argues that researchers erroneously valorise biological essentialism when they focus obsessively on Sara's blackness and her sexual organs. Magubane writes that 'a substantial portion of the British public actually saw her as representing much more [than sexual organs and blackness]. When many people looked at Baartman, they saw not only racial and sexual alterity but also a personification of current debates about the right to liberty versus the right to property. For many, Bartmann's captivity encapsulated the conflict between individual freedom and interests of capital.' Magubane (2001), pp. 817, 827 and 828.

101 Gordon-Chipembere, (2006) citing Hobson 2005, p. 41

102 Gordon-Chipembere strongly argues that medical scientists of the day fabricated the existence of a Khoisan 'veil' or 'apron' (elongated labia) in order to further alienate and fetishise Sara's body. Scientists were fixated on this 'freakish' piece of genitalia that was said to distinguish Sara from European women. Gordon-Chipembere criticises the work of Western feminists who accept the existence of the veil and further disfigured, silenced and discursively hobbled Sara's body. Gordon-Chipembere, (2006), p. 9. See Gilman for a detailed analysis of Europe's fixation with the moral degeneracy of women and how the Hottentot Venus and her body suggested moral degeneracy. Gilman (1985), pp. 84-90.

103 Shekar and Sharangpani (2008), pp. 102 and 108.

104 Andreassen (2003), pp. 21-38. I put the ethnic descriptions of exhibited persons in quotation marks to indicate that they were often inaccurate labels. Andersen explains, for example, that a large group of so-called Nubians consisted in reality of several

explicitly deny the gendered and sexualised nature of the shows. She points out that the 'exotic is sexual' and that 'exotic' women (not men) in Denmark were often half naked and performed deliberately staged provocative dances.[105] Clearly, exhibited men and women were required to behave or perform gender roles prescribed by the audience and the exhibitor's conception of what was natural for 'primitive'/'natural' men and women.[106]

Read in conjunction, Qureshi and Andreassen's research are extremely important in that they reveal the widespread exploitation, objectification and fetishisation of women exotics as exhibits in Imperial times. These findings point to the fact that Sara Baartman and women in general were targeted for this form of exploitation because of their gender and race, revealing the discriminatory nature of the practice.

The introductory narrative to this chapter was provided by a group of silent women. Their silence should not bely their agency and resistance to further objectification and exploitation. The concluding note to this chapter is Sara's silent narrative in response to those who attempted to right the injustice she suffered: Even considering the moral standards of the day, it is possible to encounter a counter-narrative against the popular exhibition of the 'Hottentot Venus' in Europe. The following observation by a scandalised Englishman reveals as much:

> This poor female is made to walk, to dance, to shew herself, not for her own advantage, but for the profit of her Master, who, when she appeared tired, held up a stick to her, like the wild beast keepers, to intimidate her into obedience … I am no advocate of these sights: on the contrary, I think it base in the extreme, that any human beings should be thus exposed. It is contrary to every principle of morality and good order, but this exhibition connects the same offence to public decency, with the most horrid of all situation, Slavery.[107]

Some writers have described Sara's voyage to Europe as a consensual voyage: Sara was lured by the promise of adventure and financial gain and her exhibition is described as 'her tour', 'her career', or 'her contract'. A reading of her history in the context of the hegemony of imperial and colonial nations over their subjects leads me to the conclusion that she was trafficked and subsequently sold as a slave or under slave-like conditions on at least three separate occasions. The power imbalance between Master and subject in the imperial and colonial political framework in itself creates a coercive environment where the threat and actual use of violence govern and define relations between subjugated peoples and their rulers.

Many who object to the abuse of Sara and adopt her as an icon of oppression and emancipation skirt around the historical fact of the appearance of her cause before the highest common law court in England, the Kings Bench. Anti-slavery activists pressured the Attorney General to submit a writ of habeus corpus, an application to the court requesting that the judges collect evidence concerning Sara Baartman. The investigation proceeded on the grounds of slavery and freedom yet the abolitionists' own material and political ambitions were

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different African ethnic groups that had arrived in Hamburg in 1876 and travelled during the next couple of years to major European cities including Berlin, Bremen, Paris, London and Copenhagen. Andreassen (2003), pp. 23-24.

105 Ibid., (2003), pp. 22, 31 and 32. Sara's exploitation also has parallels to a North American case: A male Congolese pygmy named Ota Benga was exhibited temporarily with orangutans and monkeys at the Monkey House in New York's Bronx Zoo in 1906. He died in March 1916 when he shot himself apparently succumbing to feelings of depression due to the fact that he was unable to return to the Congo. In the limited research studies I have found on this sad tale, it is evident that his captivity at the zoo was to emphasise racial inferiority and the naturalness of African peoples. There is no mention of any sexualisation of Ota Benga's exhibit. See The New York Times, 10 August 2006 and The Washington Post, 3 January 2009.

106 Andreassen describes this 'naturalness' as being central to many of the Danish exhibits of exotic peoples. Crowds wanted to view people uninfluenced by civilisation. The authentic was attractive and on several occasions the exotic people on display were inspected by anthropologists who guaranteed their authenticity and naturalness, Andreassen., pp. 26-27.

107 Gordon-Chipembere, (2006) citing Hobson (2005), p. 40. More recent criticisms that apparently galvanised the movement to return Sara Baartman to South Africa came from global feminists but also from Western critics of racialised science. The palaeontologist and comparative biologist Stephen Jay Gould criticised the use of Sara Baartman by the French scientist Cuvier and others for biological determinism in his book The Mismeasure of Man (1981). The work of Kirby, a Scottish musicologist, produced articles on the Hottentot Venus and represented her as a symbol not of sexual excess and racial inferiority but of the moniker of everything wrong with Western civilisation: enlightenment science, racism, abuse and exploitation of women, colonialism and exoticising the 'Other'. Crais and Scully (2009), p. 3.

underlying rivers of the cause.[108] The matter faltered when Sara Baartman testified in an interview by investigators that she was satisfied with her situation and would continue to exhibit herself in London.

Sara Baartman rejected the arm proffered to her by the courts of law. As a result, her narrative, like the narrative of Prosecutor Aimable's rape survivors, is a silent narrative. It is a narrative that suggests passive victimisation but also active agency. Victims may reject an engagement with the justice system to signify a vote of no confidence in its claim of impartiality or in the value of its remedies. The silent narrative of Aimable's victims disrupts the human rights discourse that presented criminal prosecutions as the exclusive and appropriate form of justice for victims. In 1807 civilised men abolished slavery in the British Colonies on the grounds that all men were born free and equal. The silence that Sara imposed on a justice process investigating her enslavement disrupts and even discredits the claims of equality and freedom enshrined by the law.

108 Clifton Crais and Pamela Scully provide an excellent description of the abolitionists' efforts to free Sara and how these were linked partially to their own political, material and personal gain. Crais and Scully, pp. 82-102. See also Gordon-Chipembere's analysis of this case. She notes that the real issue for the Court was not the immorality of exhibiting a live, African woman in a cage like an animal, thousands of miles away from home, but the indecent exposure of her body before a civilized, moral and upstanding public. Gordon-Chipembere, (2006), pp. 71-75.

CHAPTER 3

Narratives on Gender and Violence in Human Rights Law and International Humanitarian Law

3 INTRODUCTION AND ISATA'S NARRATIVE

After my workday in Freetown I often found my neighbour Mrs B[1] seated outside her home at a small kiosk selling call-time to mobile phone users in the neighbourhood. This was one of her many lucrative enterprises. I sat with her, and we gossiped about her neighbours as they walked by and greeted us.

I was very struck one evening by a statuesque beauty standing across the dusty street from us in a beautiful fitted African print dress. I said, 'Auntie B that girl looks like a gazelle. I wish I could photograph her.' At that moment the gazelle sauntered across the street and asked Mrs B if she could purchase a one-minute telephone call. Money and phone exchanged hands and after a minute the young lady gave the phone back to Mrs B who berated her roughly for speaking for 70 seconds and not one minute as agreed. Mrs B proceeded to interrogate the girl who answered her shyly. Mrs B translated concurrently from the Krio language to English for my benefit: 'She's Isata.[2] She thinks she's sixteen years old. She can't read or write. She's never even entered a classroom. It's terrible. She has an old man who helps her. He bought her cloth and now she was calling him to send her more money so the tailor can make her a new dress.' Mrs B arranged that Isata would pose while I took her photograph.

I bumped into Isata from time to time, we struggled to communicate but always smiled and held hands before parting. I felt saddened that so few opportunities existed for this young woman. On another evening I sat with Mrs B and asked her if she couldn't help Isata, maybe give her a job as a servant in her household. Mrs B exclaimed: 'A girl like that in my house! So she can seduce my husband?' We laughed a little at this image, and then Mrs B continued quietly. 'I know it's not her fault, it's all she knows. That's how they survived you know … Sex.'

As stated in my methodology in chapter 1 I did not methodically seek out 'rape survivors', 'prostitutes' or even 'former girl fighters' while on field visits to Rwanda (2004) and Sierra Leone (2007). Thus, I was initially drawn to Isata because of the spectacle of her youthful good looks and haute couture in a visibly impoverished and underserviced neighbourhood. I did not seek to make her a subject of my gender review of Sierra Leone's transitional justice process, or even of my introductory narrative.

That evening in Freetown, I proceeded on only one assumption and that was that Isata, like Mrs B and her neighbours, was a survivor, meaning that she had witnessed and lived through Sierra Leone's civil war. Because the subject of Isata's specific war experience never arose naturally in our subsequent chance encounters on the street or at Mrs B's kiosk, I never independently investigated or determined whether Isata was, for example, an IDP or war orphan. I accepted, however, from Mrs B's astounded response ('A girl like that in my house!') her conviction that Isata was a child prostitute. Further, Mrs B's conciliatory aside ('it's not her fault…that's how they survived') told me that Isata, and more broadly young women and girls, had experienced some form of sexual exploitation during the armed conflict.

Mrs B provides an ambiguous narrative about gender-based violence in conflict and armed conflict. I heard this ambiguity recounted by women, men, international humanitarian workers, Chiefs, child protection officers, prosecutors, international prosecutors, locals and expatriates. This socio-political narrative fluctuated between

1 A pseudonym.
2 A pseudonym.

a censorious and scornful tone to a sympathetic view of women and girls' gendered experience of violence and insecurity. It demonstrates a sophisticated understanding at the grassroots and local level of sexual violence as a weapon of war and strategy deployed by combatants. Conversely, it brands survivors of sexual violence as complicit in their victimisation.

These inconsistencies in the narrative of gender and violent conflict place the survivor of wartime rape in a precarious social position long after the end of active hostilities. The mixed emotions which Isata aroused in both Mrs B and I is a testament to this: suspicion, envy, maternal compassion, pity, derision, solidarity and aversion. In retrospect it is clear that Mrs B and I pressed Isata into silence as we jointly constructed her war story and determined the assistance we felt she required.[3] Similarly, international agencies, politicians, and community leaders usurp narratives of violence from women and produce a narrative that may not resonate with women, their reality and expectations for meaningful assistance. The production of this dominant narrative is a political process that is familiar to any researcher of narratives of gender-based violence in postwar societies in any given century or Continent.[4]

Chapter 3 presents a brief overview of the feminist critique of international humanitarian law (IHL) prohibitions against rape and other forms of sexual violence against women in wartime.[5] This overview includes the argument that IHL constructs an essentialised image of women based on a patriarchal reduction of women to a reproductive resource. This construction leads to a narrative of wartime rape as an honour crime and contributes to a weak protection framework for women under IHL.

The introductory overview of IHL protections for women leads to an exploration of the potential for international human rights law to respond to gender-based violence against women in conflict and armed conflict situations. Chapter 3 provides an overview of the rapid trespass of human rights law into the jurisdiction of IHL since World War II. This chapter presents a selection of human rights instruments that have constructed abuses against women in armed conflict simultaneously as gendered and discriminatory and falling within the jurisdiction of international humanitarian as well as international human rights law. Chapter 3 explains how and why human rights law progressively broadened its protection of women against violence to situations of armed conflict. This intervention by human rights law is presented favourably in this chapter; however, it too is criticised for its early focus on the vulnerability of women and its neglect of women as actors in and agents of conflict and armed conflict.

3.1 Third generation of rights

Chapter 2 examined gender-based violence through a three-tiered framework of international and regional human rights instruments. The third generation instruments such as the CEDAW General Recommendations and provisions of the Maputo Protocol were given credit for 'getting gender' by, inter alia, investigating multiple forms of discrimination, and moving beyond the formal equality model for redressing inequality. Most importantly, third generation instruments pursued human rights abusers into their private spaces and condemned acts of violence such as spousal abuse and sexual harassment as systemic and discriminatory.

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3 I am increasingly doubtful that Isata would have leapt at an offer of domestic work, which was what I had limited my 'rescue plan' for her to.

4 Appropriating women's experiences is a feature of many post-conflict societies. In the context of the Bangladesh War and the Indian Partition, Nayanika Mookherjee explains that a war-affected community might acknowledge the rape of 'their' women as a public secret. However, the articulation of this public secret by 'their women' calls for punitive measures against them. Therefore, Bengali-Muslim women who agreed to be interviewed and photographed by the media as rape survivors were confronted with social sanctions such as ostracisation and sarcastic remarks evoking the rapes by community members. Mookherjee (2006).

5 See Parker (2001) for an overview of humanitarian law, its historical development and present-day treaty-based and customary standards relating to the situation of women in contemporary wars as well as to the rights and duties of women combatants and POWs. See also Quénivet (2005) for an in-depth critique of the feminist criticism of international humanitarian law.

Chapter 3 builds on the said tri-generational framework of international and regional human rights instruments and is concerned chiefly with the emergence of human rights instruments that recognise that gender can shape women's experience of political violence and insecurity and that provide gender-specific responses to survivors of such violence during and in the aftermath of conflict. The CERD Committee and the Human Rights Committee with their pioneering references to the vulnerability of women in armed conflict will be discussed as well as the general recommendations of the CEDAW Committee.

Chapter 3 also introduces the World Conferences as a platform for states, civil society and NGOs to affirm their shared commitment to human rights and to broaden their understanding of rights and duties. The impact of war on women's human rights has become a central point of advocacy and activism at these conferences. Outcomes of the World Conferences as well as reports of the Special Rapporteurs and human rights working groups, and Resolutions of the Security Council, are also reviewed as human rights instruments providing a strong impetus for gender-specific interpretation and responses at the intersection between human rights law and humanitarian law. This chapter posits that the World Conferences and the work of experts such as Rapporteurs have emerged as alternatives to human rights conventions in defining rights protection and enforcement. Their mainstreaming of a gender analysis into norm setting and application rests at the most evolved end of the third generation rights.

Chapter 3 also shows that IHL and international human rights law constructions of gender and armed conflict often correspond with hegemonic narratives of women's gender roles at the national and local level. Thus the chapter includes not only the IHL and international human rights law framework for discussion but also the social and political framework in which gender hegemonies are shaped.

3.1.1 Gender hegemonies

Anne-Miek Richters describes a study of rape survivors in the United States who showed that their rape experience made them aware of the 'little rapes' that plague women on a daily basis. 'Little rapes' were defined as encounters with phenomena such as sexist jokes and pornography which were only experienced as negative after the experience of rape. The experience of sexual violence made the women realise that their real-life world and their language is full of symbols of objectification and degradation of women, out of which the potential for rape arises. This awareness led to the opportunity for rape survivors to realise they were not only the victims of an individual perpetrator but of male hegemony within society at large and the social and political constructions that enable and even sanction gender-based violence.[6]

Similarly, Susan Brison, a philosopher and survivor of sexual violence and attempted murder, describes her subsequent awareness of a pervasive culture of violence against women broadcast innocuously by the media in the United States. She explains that images such as the trials of the defendants in the Central Park jogger case, the controversy over the book American Psycho (and subsequently its film version), the Gulf War, the Kennedy rape case, the Tyson trial, and the axe murders of two women students at Dartmouth College by a male acquaintance triggered 'debilitating flashbacks' and a 'visceral' reaction.[7] And Brenda Smith describes how she has been able to place an abusive relationship between her parents within the context of a number of

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6 Richters (1998), p. 114.

7 Brison (1998), p. 21. The referenced events all garnered intense, sensationalised and prolonged media coverage in the United States. Some of the events, particularly the Kennedy case, Tyson case and Central Park case permeated popular culture outside of the US, thanks in part to reporting by the international media: Trisha Meilli was brutally attacked and raped while jogging in New York's Central Park in 1989. She was referred to as the 'Central Park Jogger' by the media. Four teens were convicted for the crime but their convictions were vacated when another man, Matias Reyes confessed to the crime in 1991. DNA evidence confirmed his confession; Bret Easton Ellis's book American Psycho (1991) is a psychological thriller about a young, attractive and wealthy investment banker who is also a psychopath. The book contains scenes of graphic and (arguably) gratuitous violence against women, including mutilation, cannibalism, torture and rape; William Kennedy Smith a physician and member of a prominent American political family was accused and charged with rape in 1991. Kennedy Smith was acquitted; Mike Tyson, a distinguished heavyweight boxing champion was accused and charged with rape in 1991. Tyson was convicted of rape and served three years of his six year prison sentence. Defence counsel for both Tyson and Kennedy Smith claimed that sex had been consensual.

other equally violent experiences in her life, such as racial segregation, poverty, and a fear for her safety from people outside of her home.[8]

Taken together, the accounts from Richters, Brison and Smith are important to this study of gender and violence in that they politicise violence. They call on the reader to place what could be considered random or private acts of violence into a framework of structural inequality and discrimination. The 'peacetime' in which 'little rapes' in our daily media, work situations, entertainment centres, and domestic households are allowed to flourish is actually a state of conflict for many women. Works of scholarship such as these press us to grasp the gravity and pervasiveness of violence or the threat of violence outside of the context of armed conflict, and its objective of maintaining inequality and discrimination in order to privilege elite groups in their enjoyment of human rights. This hegemonic structure perpetuates violence against women so that the insecurity that women experience in peacetime is commensurate with that in a conflict zone. Hegemonic power relations also stoke violence against women in armed conflict and, as the chapter reveals, this form of violence is also depoliticised by social as well as legal narratives.

3.2 Women, gender, violence and IHL

International humanitarian law (IHL) is the body of norms regulating the conduct of warfare between armed combatants. It also seeks to minimise the civilian population's vulnerability to the vagaries of war. Many governments can legitimately derogate from human rights during war. For this reason, humanitarian law and the protections it affords civilians in wartime is often referred to as the human rights regime in armed conflict. However, such an accolade should not distract from the fact that military expediency lies at the heart of IHL's objectives. The laws of war are first and foremost military instruments seeking to maintain military discipline necessary for the successful conduct of war.

There is an interesting note that accompanies the contribution made by American General Winfield Scott to IHL. In the United States-Mexico War, Scott issued general orders in 1847 regulating the conduct of war. This martial law protected Mexican property rights, the sanctity of religious structures, and, most notably, it identified rape as a military offence punishable by death.[9] According to military commentators and biographers, Scott's strong opposition to sexual violence against Mexican civilian women by American troops was motivated by a keen sense of military expediency and not by humanitarian principles. General Scott had learnt from the mistakes of French soldiers, under Napoleon's command, who had raped and pillaged wilfully when they invaded Spain in the early nineteenth century. Reacting to the French military's record of plunder and rape, Spanish residents revolted and sparked a cycle of violence and atrocities.[10]

In this period preceding the formation of an international humanitarian law framework, the status of women is not addressed directly. Wartime rape is limited to a crime of troop discipline and as an illegal but inevitable occurrence during armed conflict – and women are perceived as private objects rather than public subjects in law.[11] The outcomes of this exclusion of women from the public realm and the privileging of discipline over the welfare of civilians is best exemplified by the Japanese Imperial Army's system of enslavement of Japanese, Korean, Filipino and other women in the 1930s and throughout the Second World War. This system was seen by Japanese military commanders as vital to maintaining troop discipline, public health and public order in occupied areas. Maintaining troop discipline and morale completely outweighed the interests of the women and girls who suffered extreme physical and mental anguish as a result of the system of militarised enslavement.

8 Smith (2003).
9 Parker (2001), p. 291.
10 Fisher (2004), p. 12.
11 Mitchell (2005) pp. 236 and 237.

Hague Regulations and Geneva Conventions

All laws are influenced by their place in space and time, and the four Geneva Conventions (1947) are postwar instruments influenced by the immediate retrospective of atrocities committed by the Axis Powers, particularly the Holocaust.[12] Whilst little reference is made of it in the Nuremberg judgement, women did experience a gendered experience of anti-Semitism and of the Holocaust. Fionnula Ní Aoláin provides one of the few gendered legal analyses of the Holocaust. She describes, in particular, how the vulnerability of women living in ghettos was heightened by and linked to traditional attitudes towards them as well as their gender-defined conditions and their unique maternal responsibilities.[13] Many of the atrocities committed against women in the Holocaust centred on their maternal position; this included the deprivation of the reproductive rights of women through enforced sterilisation, abortions, and separation from their children.[14] Women with young children were usually selected for extermination upon their arrival. Their maternal status and their continued attachment to their children made them uniquely assailable and defenceless.[15]

This insightful gender analysis of the Holocaust explains in part the preoccupation of the Geneva Conventions with the protection of women as mothers. Few of the several specific references to women in the Geneva Conventions and the Additional Protocols (1977) transcend the mothered construction of women's vulnerability and victimisation in armed conflict.

This maternal narrative of women and their experience of war predated the Second World War and was also enshrined in the Hague Regulations of 1899 and 1907 which also provided an 'honour-based' construction of sexual violence. They provided that family honour and rights, the lives of persons, and private property, as well as religious convictions and practice must be respected.[16] This opaque language conceptualised sexual violence as a crime offending the virtue of women as opposed to a crime of aggression violating the dignity and physical integrity of women. Family honour connotes the chastity of women and the potency of men to penetrate as well as protect 'their' women from impure relations with rival men, and it is rooted in patriarchal considerations.[17] There is men and society's fear of miscegenation. At its most basic construction, this is based on the idea that women raped by 'the enemy' army/nation/race will produce children that will be alienated from the targetted group. Conversely, there is also the symbolic poisoning of women by the enemy rapist which makes them physically, psychologically or socially infertile.[18] It is this fear that men will be deprived of a sexual reproductive asset when women are kidnapped, raped or impregnated by enemy belligerents that solidifies the construction of rape as an honour crime that primarily befalls menfolk as well as their communities. In this construction, the violent and traumatising impact of rape on individual women is lost as, ultimately, concepts of virtue and family honour objectify 'pure' women and stigmatise 'impure' women according to the gender standards of the day.[19] Both objectification and stigmatisation are tools for the policing of women's sexual autonomy, economic productivity and sexual reproductive potential in conflict and armed conflict.

12 First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva I); Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva II); Third Geneva Convention Relative to the Treatment of Prisoners of War (Geneva III) and Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva IV).

13 Ní Aoláin (2000), pp. 53-55.

14 Ní Aoláin (2000), pp. 54, 57 and 58.

15 Ní Aoláin (2000), pp. 53 and 56.

16 Hague Convention Respecting the Laws and Customs of War on Land, (and Annex Regulations Concerning the Laws and Customs of War on Land) 18 October, 1907 (Hague Convention No. IV).

17 Nancy Lindisfarne presents a compelling analysis of the ways in which gender norms creating powerful men and weak chaste women contribute to a rape culture because penetrative sex, even forced, becomes integral to 'becoming a man' and fulfilling the requirements of proper masculinity. Lindisfarne (1994), pp. 82-96.

18 Rosalind Dixon describes the dishonour that befalls a rape survivor as leaving female victims socially infertile, by virtue of their 'unmarriageability' or untouchability. Dixon (2004), p. 704.

19 Turshen (2001), p. 65.

Similarly, the portrayal of all women exclusively as 'mothers', 'nursing mothers', or 'pregnant women' strips women of individuality and focuses legal protection on women's sexual reproductive potential.[20] This presumes and perpetuates the patriarchal claim of guardianship over the sexual and reproductive function and potential of women. This focus is again an androcentric view of women's central role in society.[21]

The legal implications of the honourisation of sexual violence are evident in the categorisation of crimes. Whilst the Geneva Convention (IV) provides specifically against rape, it was excluded from the category of crimes known as grave breaches. The legal significance of this is that in the case of violations categorised as 'grave breaches' of IHL – the *ergo omnes* principle obliges states to prosecute violators or extradite them for prosecution in another jurisdiction. The categorisation of rape outside of the grave breach category signified that sexual violence was subject only to domestic jurisdiction and the discretion of national prosecutors as opposed to a positive obligation.[22]

An attempt to remedy this miscategorisation was attempted in 1958 by the International Committee of the Red Cross (ICRC). The ICRC Commentary on the Geneva Convention (IV) recognised that the grave breach of 'inhuman treatment' should be interpreted in the context of Article 27 (prohibiting rape). However, this contribution was ignored by the Diplomatic Conference of 1977 upon the enactment of the Optional Protocols (I and II) to the Geneva Conventions.[23] These Protocols were introduced in order to increase the scope of IHL from international conflicts between states. Optional Protocol I to the Geneva Conventions most notably provided that wars of liberation should be regarded under the same legal regime as international armed conflicts.[24]

The only provision applicable to non-international armed conflicts before the adoption of Protocol II was Article 3 common to all four Geneva Conventions of 1949.[25] This Article proved to be inadequate in view of

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20 See for example, Geneva (IV)
Art. 89 Expectant and nursing mothers and children under fifteen years of age, shall be given additional food, in proportion to their physiological needs.
Art. 132. Each interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist…The Parties to the conflict shall, moreover, endeavor during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees, in particular children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time.

21 Noya Rimalt examines sexual harassment legislation in Israel, the United States and Europe and the manner in which Israeli courts, in particular, 'talk' about sexual harassment and conceptualise its harm. She concludes in part that the narrative of the courts is patriarchal and contrary to human rights discourse, because of its conceptualisation of sexual harassment as an honour crime rather than a prima facie human rights violation. Thus whilst woman complainants may gain access to justice, the narrative is not a true representation of the harm that sexual violence has caused. Rimalt (2008). See also Diggs Mange (2007) for a critique of US anti-discrimination law and its failure to redress discrimination on the grounds of gender.

22 The absence of many forms of gender based violence from the criminal codes of many domestic jurisdictions further compounds the low status accorded to violence against women.

23 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts (1977).

24 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.
Article 1 (4): The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

25 Common Article 3 to the Geneva Conventions of 12 Aguust 1949, and Relating to the Protection of Victims of International Armed Conflicts:
In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the

the fact that about 80% of the victims of armed conflicts since 1945 have been victims of non-international conflicts and that non-international conflicts are often fought with more cruelty than international conflicts.[26] The aim of Protocol II relating to the protection of victims of non-international armed conflict was to extend the protections of IHL to internal wars fought between:

> ... government's armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.[27]

Despite the unprecedented attention the Diplomatic Conference raised around the experience of civilians in contemporary armed conflicts, the humanitarian law narrative remained fixated on women as mothers and generally marginalised any wider interpretation and analysis of gender and its interface with armed conflict.

3.2.1 Communal and individual harm

The gendered critique by scholars of IHL and its narrow construction of women's experience of armed conflict as a community harm is warranted. Since the mid-1990s there have been impressive victories through the Trial Chambers of ad hoc criminal tribunals which have clearly adjudicated rape and other forms of sexual violence as acts of aggression against individual women. And the human rights discourse also increasingly eschews the narrative of vulnerable mothers in favour of civilian women navigating and challenging the insecurity of armed conflict. The gendered human rights critique at present requires scholars to privilege individual harm over collective harm, and at times it denies the collective harm altogether. This approach is said to provide women with the full recognition their war experience merits.

These positions, however, have left little room for an analysis of the intersection between what Tina Sideris refers to as the individual psychic injury and collective social traumatisation caused by political violence.[28] This section of the chapter cautions that erasing the intersection between communal and individual harm makes it difficult for scholars to analyse the root causes, the motive behind and impact of war crimes and crimes against humanity. The widespread repercussions of sexual violence, such as, for example, where women are raped in order to force an entire community to flee a region, cannot be entirely categorised as attacks against the individual. Particularly in the case of crimes against humanity, where a threshold of 'widespread or systematic' for attacks must be attained, the collective social trauma must necessarily be incorporated into the legal narrative. Introducing the collective impact of gender-based violence need not negate women's individual suffering and indeed it can enhance an understanding of the extent of harm and aggravating ramifications for women survivors.

The gender critique has focused its gaze on international humanitarian law and the way it constructs women chiefly as mothers and wives in relation to men. What is missing from this critique is women's own perception of their gender roles regarding, for example, the care and protection of children and the self-sacrifice of personal interests over those of their families and communities. The following three examples of women's experience of conflict in Asia and Europe illustrate timely disruptions by scholars of the dichotomous construction of violence against women as either individual or communal in nature. The studies of the repatriation of abducted Indian women from Pakistan; the repatriation of Korean women from enslavement by the Japanese military; and the detention of Jewish women in ghettos and in the Holocaust provide vastly

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above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
(2) The wounded and sick shall be collected and cared for.

26 ICRC on International Humanitarian Law at http://www.ictr.org/ihl.nsf/INTRO/475.

27 Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of Victims of Non-International Armed Conflict (Protocol II), 8 June 1977. Article 1.

28 Sideris (2001), p. 57.

different contexts of armed conflict but raise similar and important questions about constructions of gender and violence and the most effective responses to women's losses and the harm suffered.

Ritu Menon and Kamla Bhasin present an analysis of how women themselves do not necessarily separate their individual and communal identities from their experience of gender-based violence. They provide a description of the political capital gained by the Indian government in its response to abducted women through the Central Recovery Operation carried out between 1948 and 1956.[29] Menon and Bhasin described the 'rescue' as bitter and painful for many women: The women were abducted as Hindus, converted into and married as Muslims, repatriated and reverted back to Hinduism but were required to relinquish their children because they were born to Muslim fathers, and subsequently disowned as impure and ineligible for membership within their erstwhile family and community. Their identities were in a continual state of construction and reconstruction by others.[30]

Any attempt by scholars to investigate and analyse the individual harm that 'rescued' women experienced cannot be understood without an understanding of gender constructions governing the trajectory of women's lives within both Hindu and Muslim communities. Women's resistance to rescue was shaped by the intersection with individual and communal ideas about gender roles, particularly relating to motherhood and marriage. Thus Menon and Besin's research shows that many Hindu women expressed a desire to remain with their husband-captors in order to preserve relationships with their Muslim children and/or to preserve the status and protection provided by Muslim husbands within the sacred institution of marriage. These individual choices are shaped by an intimate knowledge, if not acceptance, of community-wide gendered constructions of motherhood, marriage, chastity and honour. And it may be that the individual may embrace and internalise these constructions in part or in whole. The failure by the State's remedy (a recovery operation) to take this intersection of individual and community harm into account resulted in the pain and bitterness that scholars, Menon and Bhasin, so poignantly revealed.

Testimonies taken by the International Commission of Jurists (ICJ) from victims of wartime enslavement are also very revealing in illustrating the interface between individual harm and community harm in women's narratives of gender-based violence.[31] The ICJ report, in contrast to the scholarship of Menon and Bhasin, focuses on a legal narrative and the need to insert both an individual and collective standard of harm when understanding women's war experiences. Because the ICJ testimonies were collected decades after the period of enslavement, they were able to prominently feature the hardship that women experienced after their liberation and repatriation. Much of this hardship was linked to their rejection by society as well as their internalisation of this rejection. It related to their own perceived devaluation from the gender ideal of a chaste girl or an honourable mother. The theme of interrupted motherhood is very strong in both narratives selected below.

> When I reached my house my husband received me very warmly while in the presence of the American soldiers. However, when the soldiers had left he immediately distanced himself from me. He told me to sleep in a separate room and made it very clear that he would not share a bedroom with me anymore. I swallowed this insult because of the fact that I could at least be near my children. However, he would not allow me to share my children's bedroom. I was thus isolated in my own house. Thereafter, I noticed that my husband also treated me just like a comfort woman. He would come to me whenever he felt the need for sex. He said he did not want to restore our original relationship because he termed me as a leftover of the Japanese soldiers. He could not reconcile himself to the fact that it was not my doing and that I was not at fault. My husband never fully understood or even tried to understand my plight.[32]

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29 The Prime Ministers of India and Pakistan met and passed a declaration and Treaty agreeing that women and girls abducted at Partition be rescued from their respective territories and restored to their families. Butalia (2000), pp. 109-111.

30 Menon and Bhasin (1996) pp. 3 and 16.

31 The international NGO International Commission of Jurists (ICJ) conducted a mission to the Philippines, the Republic of Korea, the Democratic People's Republic of Korea and to Japan in April 1993 to study the issue of military sexual slavery. Its report provided the first legal and empirical investigation into and an analysis and condemnation of the Japanese government for its failure to accept state responsibility for its actions. Dogopol and Paranjape (1994).

32 Dogopol and Paranjape (1994), p. 74.

A second testimony describes the interruption of motherhood through the loss of reproductive potential.

> Because of her experiences she had to have a hysterectomy and continues to rue the fact that she has never been able to have children. At the age of 28 she married a man twenty-three years her senior and lived with him and his five children for three years, but as she has not been able to have any children, his family refused to give her any property after his death. She lived for many years in a Buddhist temple, helping the monks by cooking and cleaning and doing general chores.[33]

The ICJ report places the sexual abuse the women experienced into a patriarchal framework where hegemonic power between men and women is unequal and tipped in favour of men. The Report duly decries this structural inequality yet also illustrates that the victims of sexual violence recount their experience of rejection long after the armed conflict in the patriarchal language of 'shame', 'virtue', 'honour' and 'impurity'. The loss of family life and marriage, sexual intimacy, child bearing and child rearing is lamented throughout the testimonies. The gendered critique tends to obscure that many women do in fact privilege the gender roles of mothering and child bearing as sites of affirmation and fulfilment. Without acknowledging this, the legal narrative of human rights law and transitional justice misses the fact that 'the acts of brutality committed against these women go beyond the immediate suffering of having to endure a continuous rape...the pain these women endured has continued throughout their lifetime.[34]

Fionnula Ní Aoláin's study of a gender and sex-based view of the Holocaust also responds to the post-War enterprise of justice which fell short of naming many harms that women experienced. Ní Aoláin focuses on inter alia the harm arising from the separation of children from mothers upon their arrival at concentration or labour camps to illustrate the failure of the Laws of War to engage with the totality of harm experienced by women.[35] This type of harm is easily categorised as relating to 'motherhood' and could be criticised for essentialising women's experience. Thus the apparent construction of separation as targeting the gendered role of mothering states that women carry children and remain primary carers of their offspring. Mothering is a gendered undertaking and was understood as such by the Nazis and in receipt by the victim.[36]

Ní Aoláin recognises the problematic nature of privileging motherhood over individual personhood; however, her analysis individualises the harm of forcible separation by arguing for its categorisation as another quantifiable harm occurring in the realm of the sexual self and not exclusively in the realm of the familial self.[37] Ní Aoláin points out that many women also articulate such separation from children as a physical act of aggression against their own person, concentrated on their own experienced sense of being female, aimed at undermining their sexual identity by taking away the expression of that reproductive self or product of sexuality – the child.[38] Ní Aoláin describes it as a failure of the Laws of War in the wake of the Holocaust that they did not and do not recognise enforced separation as sex-based harm targeting the woman's body, both in its symbolic and actual manifestations.[39]

Sexual violence in and outside of armed conflict has a unique stigma because of its general perception as a specifically sexual violation, which tends to subsume its violent nature and gravity as a gender-specific

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33 Dogopol and Paranjape (1994), p. 81.
34 Ibid., p. 57.
35 Ní Aoláin (2000), p. 20.
36 Ní Aoláin, p. 15.
37 Ní Aoláin (2000), p. 15.
38 Ní Aoláin, pp. 18-19.
39 Ní Aoláin, pp. 18-19. Arguably, article 2 (e) of the Genocide Convention (1948) identifies that forcibly transferring children of a national, ethnic, racial or religious group to another group with the intent to destroy a group is an act of genocide. This is of course a form of separation of children. However, in keeping with Ní Aoláin analysis, the gender dimensions of forcibly transferring children are ignored in this legal categorisation. The legal categorisation focuses on the transfer of children from the group. Thus women's unique gender role as primary carers of children is ignored, as is their unique experience of sexuality and reproductivity, that result in a unique experience with children and a unique experience of separation.

offence.[40] There are few modern societies that do not valorise an idealised image of purity as well as fertility in women. Acknowledging this is a necessary step toward investigating the power of rape to destroy the fabric of society through the gendered targeting of women and, more importantly, to find social, political and legal responses that can diminish this power. The call for the individualisation of gender-based violence within IHL and a focus thereon as an act of aggression rather than an honour crime or a crime against a community is a valid one. However, a focus on the individual need not exclude her relationship with her community and their (hers and the community's) dominant constructions of gender, be they contested or accepted in whole or in part. The arguments for a more complex and intersecting analysis of the nature of the harm caused by gender-based violence are pertinent in contemporary cases such as the repatriation of Liberian refugee women from Sierra Leone to Liberia, or the reunification programmes of Sierra Leone's girl soldiers with their families, or in the sentencing stage of the international criminal prosecution of those most responsible for sexual violence and other crimes against humanity before the International Criminal Court.

3.2.2 Continuum of insecurity and violence

The brief cases described in the previous section of the repatriation of Indian Hindu-Muslim women and of Korean women highlight the fact that women's experience of gender-based violence is not extinguished with the ending of armed hostilities. Hostile legal, social and political responses often pursue women so that a state of conflict persists, at least in their private lives. It is therefore a striking omission that whilst IHL protections have moved from international conflicts to encompass internal conflicts involving non-state actors, they have failed to expand their temporal jurisdiction which is restricted to active hostilities. Thus the scope of protection provided by IHL ends abruptly with the official ending of hostilities. The resultant IHL narrative suggests that gender-based violence is temporal and unique to armed conflict. This results in a lost opportunity for policy makers invested with dismantling and reconstructing political and social structures that contribute to the conditions for the perpetration of widespread sexual violence against women in war and its aftermath. Leaving intact these structures spawns new forms of sexual exploitation linked to historical shapes of sexual violence and exacerbated by wartime conditions.

Sexual exploitation proliferates in the immediate aftermath of armed conflict. Peacekeepers, humanitarian workers, invaders, occupying forces, retreating forces – these combatants and non-combatants are regularly implicated in the sexual exploitation of women and girls made vulnerable by months and even years of armed conflict. In the context of the aftermath of World War II, Susanne Zwingel describes how in the French, British and US American occupation zones, the situation of material deprivation generated considerable dimensions of 'occasional prostitution' in exchange for basic goods.[41] Richard W. McCormick presents evidence of more egregious abuses, including the mass rape of German women by the victorious Allies. He reviews the film *BeFreier und Befreite* and presents as evidence of mass rapes an interview with a doctor who treated women raped by the French on a massive scale in Freudenstadt, a town in the Black Forest, as a reprisal for atrocities committed against French civilians.[42]

Yuki Tanaka writes about widespread incidences of sexual violence by Allies in occupied Japan. He describes American soldiers breaking into the homes of civilians and raping women and girls resident there, fondling

40 Mitchell (2004-2005), p. 247.

41 Zwingel (2004), p. 8. And Madeline Morris produces several historical US military records indicating that the Criminal Investigation Branch of the Provost Marshal's office investigated an indeterminable number of rape reports committed by American troops during the breakout and liberation of France: 'The invading soldiers came fully armed…Many soldiers had the notion that French women generally were both attractive and free with their love…Generally speaking, the rape cases of the French Phase fell into one broad pattern characterised by violence, though of different degrees. The use of firearms was common in perpetrating the offence.' Office of the Judge Advocate General, Department of War, History of the Judge Advocate General's Office in the European Theatre, 18 July 1942-1 November 1945, at p. 241 (1945) quoted by Morris (1995-1996), p. 667.

42 McCormick (2001), p. 106. BeFreier und Befreite (1992) (Liberators take Liberties (US title)) was directed by Helke Sander. McCormick analyses Sander's examination of the mass rapes of German women by Soviet soldiers as they marched toward and conquered Berlin in 1945.

girls and women clerking in public offices and abducting girls and women for sexual violence.[43] Most disturbing, however, is Tanaka's revelation that the defeated Japanese government created a comfort woman system for the occupation forces. Japanese geishas and prostitutes were recruited as well as women and girls impoverished by the war and coerced by duplicitous police officers into volunteering for a 'special task'.[44] The 'volunteers' were typically gang raped repeatedly by GIs before being allocated to comfort stations referred to as recreation and amusement centres.[45] The grim conditions many of these Japanese women experienced under occupation in 'peacetime' at the hands of the victors bore a terrible likeness to the experience of sexual violence in wartime committed against Asian women in Japanese occupied territories.

These post-War situations of gender-based violence described were equal in their scale to violence committed against civilian populations in armed conflict. And yet civilian women and their families were only able to seek justice from occupying powers responsible for the violence. The futility of reporting sexual violence to the military police was evident and impunity characterised the abuse of women and girls by the liberators and victors. It was the US and Russian military's concerns over military discipline and the spread of venereal disease that ultimately led to commanders applying stronger controls over troops' sexual exploitation and abuse of Japanese and German women respectively. It is only in the last two decades that the international community has directed its attention to such forms of gender-based violence spilling over from armed conflict into the conflict states. Human rights law advocacy has played a role in bringing such forms of abuse to light, and this will be discussed below.

3.2.3 Human rights law and armed conflict

The human rights framework is increasingly called upon to respond to the harm suffered by women as a State fluctuates unpredictably between 'war' and 'peace' and 'war' again. The unpredictability of such political movements makes the invocation of international humanitarian law problematic as it is often difficult to discern with accuracy whether a State is at 'peace' or at 'war' and the application of IHL can be seen by some as premature whilst others petition strongly for it. A scientific and legal assessment of a war threshold might not match the assessment of a population affected by protracted conflict and its accompanying depravation and indignities. Human rights law instruments, on the other hand, are increasingly applicable to such states of ambiguity. Further, the sixty-plus years since the entry of the Universal Declaration and the four Geneva Conventions make it evident that the human rights law framework has developed in response to global trends at a rate that the more conservative humanitarian law cannot match. It is fair to say that third generation human rights instruments, in particular, have increasingly 'encroached' on the territory of IHL standards and in many respects have overtaken IHL in protecting women against violations in 'war', particularly with respect to the temporal spaces preceding and existing after 'war'.

World Conferences

World Conferences have acted as a platform for states, civil society and NGOs to affirm their shared commitment to human rights and to broaden their understanding of rights and duties. The impact of war on women's human rights has become a central point of advocacy and activism at these conferences.

The end of decade conference[46] held in Nairobi in 1985, the Forward Looking Strategies for the Advancement of Women,[47] (adopted to provide a blueprint for the advancement of women to the Year 2000), referred to the especially vulnerable situation of women affected by armed conflict, including threats of physical abuse.

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43 Tanaka (2002), pp. 121–122.
44 Ibid., pp. 136–139.
45 Ibid., p. 140.
46 The objectives of the UN Decade for Women, running from 1976–1986, included the promotion of equality between men and women.
47 The 1985 Nairobi Forward Looking Strategies for the Advancement of Women grew out of the World Conference to Review and Appraise the Achievements of the UN Decade for Women. See Report of the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace, (1986).

However, violence against women was not specifically linked to widespread and systematic violence in armed conflict nor was there a strong affirmation that violence against women was prima facie a human rights issue.[48] The reference to vulnerability implied that the IHL concerns over women's honour (seen in biological or sex-based states of virginity and fertility) remained the dominant area of concern.

To counteract the invisibility of abuses against women in the mainstream human rights discourse the Global campaign for Women's Human Rights was organised to influence the Second world conference on Human Rights in Vienna (1993).[49] The Centre for Women's Global Leadership collaborated with women's organisations around the world to promote the campaign goal which was to give visibility to forms of violence against women that UN experts in human rights and governments had failed to include as part of human rights, especially those occurring in the community, family, and private sphere, and to demand government accountability for eradicating them.[50] To do this, the global campaign organised a series of tribunals around the world, culminating in the Vienna Tribunal for Women's Human Rights, in which thirty-three women testified to first hand experience of violence including war crimes against women, political persecution and discrimination.[51]

The testimonies were heard by an audience of NGOs and country delegates and judged by a panel of judges. The judges concluded that a widespread failure to recognise violence against women and to protect their human rights was pervasive and required urgent attention. The reasons for this general failure, they stated, were linked to a lack of understanding of the systematic nature of the subordination of women, and the social, political and economic structures which perpetuate such subordination; a failure to recognise the subordination of women, particularly in the private sphere, as a violation of their human rights; and an appalling failure or neglect by the state to condemn and provide redress for discrimination and other violations against women.[52] The judges made several recommendations including: the appointment of a Special Rapporteur on Violence Against Women at the UN Human Rights Commission; General Assembly approval of a UN Declaration on the Elimination of Violence against Women; and the recognition of war crimes against women in an international criminal court.[53]

Many of the recommendations made by the Global Campaign were adopted in the Vienna Declaration, the conference's Final document and later by the UN.[54] The Declaration on the Elimination of Violence Against Women[55] (the Declaration) provided a far-reaching definition of gender-based violence, and its influence can be detected in subsequent human rights conventions and the work of treaty bodies.[56] Its non-binding nature allowed that harmful traditional practices, sexual harassment in the workforce, domestic violence and other harms widely regarded as private matters were specifically referred to as violence which discriminates against women. However, the Declaration did not make the link between sexual violence and war crimes. Rather it referred in its Preamble to women's vulnerability in armed conflict.

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48 UNDAW (1988), p. 7.
49 Dauer (2001), p. 68.
50 Ibid., p. 68.
51 Ibid., p. 66. Ratna Kapur challenges the positive contribution of these tribunals which often invite women who have experienced the most heinous human rights abuses. Kapur argues that these testimonies produce a sensationalised and essentialising (negative) culture and gender in the process of rousing a strong reaction from the international community. Kapur (2002), pp. 20-21.
52 Dauer (2001), p. 68 citing Bunch and Reilly (1994), p. 3.
53 Dauer (2001), p. 69.
54 Ibid., p. 69.
55 Declaration on the Elimination of Violence against Women (1993).
56 Declaration on the Elimination of Violence against Women (1993)
Article 2 Violence against women shall be understood to encompass, but not be limited to the following:
(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

> Concerned that some groups of women, such as women belonging to minority groups, indigenous women, refugee women, migrant women, women living in rural or remote communities, destitute women, women in institutions or in detention, female children, women with disabilities, elderly women and women in situations of armed conflict, are especially vulnerable to violence.

Further, the UN Human Rights Commission did approve the appointment of a Special Rapporteur on Violence against Women and she has produced various studies focusing on sexual violence in armed conflict. An International Criminal Court was established in 2000 and includes in its jurisdiction rape and other forms of sexual violence – including enforced prostitution, forced pregnancy and sexual slavery as crimes against humanity, and as war crimes when committed in the context of international or internal armed conflict.[57]

The 1993 Vienna Declaration and Programme of Action[58], adopted by the UN World Conference on Human Rights, also confirmed that 'violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of human rights and humanitarian law' and that they require a 'particularly effective response.'[59] Article 28 of the Vienna Declaration provides a strong censor against massive violations of human rights and singles out genocide, ethnic cleansing and the systematic rape of women in war situations. The Vienna Declaration refers to these crimes as 'abhorrent' and calls for the punishment of perpetrators. It lists discrimination against women amongst some of the most egregious forms of gross and systematic violations of human rights alongside crimes such as disappearances and arbitrary detentions, crimes which are associated with armed conflict and particularly internal armed conflicts.[60]

At the Fourth World Conference on Women (Beijing Conference) sexual violence against women during armed conflict occupied a prominent position.[61] The Beijing Declaration and Platform for Action (the Beijing Declaration and Platform) identified women and armed conflict as one of the 12 critical areas of concern to be addressed by Member States, the international community and civil society.[62] The Beijing Declaration and Platform defines violence against women as any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.[63] Violence against women in armed conflict is expressly referred to as follows:

> Other acts of violence against women include violation of the human rights of women in situations of armed conflict, in particular murder, systematic rape, sexual slavery and forced pregnancy.[64]

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57 Dauer (2001), p. 69.
58 Vienna Declaration and Programme of Action as adopted by the World Conference on Human Rights on 25 June 1993.
59 Vienna Declaration and Programme of Action, art. 30.
60 Vienna Declaration, arts. 28 and 30.
61 Preparations for the World Conference on Women: Action for Equality, Development and Peace, (1992), held in Beijing in November 1995. The purpose of this conference was to review and appraise the advancement of women since 1985 in terms of the Nairobi Forward Looking Strategies for the Advancement of Women and to mobilise men and women at both the policy-making and grassroots levels to achieve their objectives.
62 The 12 critical areas of concern are: The persistent and increasing burden of poverty on women; inequalities and inadequacies in and unequal access to education and training; inequalities and inadequacies in and unequal access to health care and related services; violence against women; the effects of armed or other kinds of conflict on women, including those living under foreign occupation; inequality in economic structures and policies, in all forms of productive activities and in access to resources; inequality between men and women in the sharing of power and decision-making at all levels; insufficient mechanisms at all levels to promote the advancement of women; lack of respect for and inadequate promotion and protection of the human rights of women; stereotyping of women and inequality in women's access to and participation in all communication systems, especially in the media; gender inequalities in the management of natural resources and in the safeguarding of the environment; persistent discrimination against and violation of the rights of the girl child. Beijing Declaration and Platform for Action, Fourth World Conference on Women (1995), para. 46.
63 Beijing Declaration and Platform, para. 114.
64 Ibid., para. 115.

Chapter 3

The Beijing Declaration and Platform places violence against women in armed conflict within a structural hegemonic framework that subordinates the gender role of women in society.[65] Rape is described as a tactic of war and terrorism. The impact of war on women is described in terms of displacement, loss of the home and property, the loss or involuntary disappearances of close relatives, poverty and family separation and disintegration.[66] Women are described not only as rape victims but also as victims of acts of murder, terrorism, torture, involuntary disappearance, slavery, sexual abuse and forced pregnancy in situations of armed conflict.

Importantly, violence against women in armed conflict, foreign occupation and other forms of alien domination is described not as a temporal event but as having lifelong social, economic and psychologically traumatic consequences.[67] The Beijing Declaration and Platform pays particular attention to the enhanced vulnerability to abuse and exploitation experienced by refugee and internally displaced women.[68] It shines some light on sexual violence against uprooted women and girls employed as a method of persecution in systematic campaigns of terror and intimidation that forces members of a particular ethnic, cultural or religious group to flee their homes.[69] The Declaration and Platform describes gender as a ground of persecution and transcends the temporal jurisdiction of IHL by pointing out that women persecuted on grounds of gender, for example through acts of sexual violence, continue to be vulnerable to violence and exploitation while fleeing, in countries of asylum and resettlement and during and after repatriation. Women often experience difficulty in some countries of asylum in being recognised as refugees when the claim is based on such persecution.[70] An unequivocal recognition such as this is pertinent when recalling the invisibility of enforced prostitution, rape and sexual bartering that so dominated the landscape of occupied and liberated Europe after the Second World War.

The Beijing Declaration and Platform is one of the first rights instruments to refer to the positive roles women play in mediating conflict and mitigating its harmful impact on themselves, their wards and community. It states that during times of armed conflict and the collapse of communities, the role of women is crucial. They often work to preserve social order in the midst of armed and other conflicts.[71] Women make an important but often unrecognized contribution as peace educators both in their families and in their societies.[72] Refugee, displaced and migrant women are also saluted by the Beijing Declaration and Platform for their endurance and resourcefulness and positive contribution to countries of resettlement or country of origin on their return. The Beijing Declaration calls on states to involve these women in shaping policy that affects them.[73] More broadly, the Declaration and Platform calls on states to mainstream a gender perspective into all programmes responding to armed conflict and to increase the participation of women in conflict resolution at decision-making levels.[74]

3.2.4 Treaty bodies and General Comments

Taking into account the violent power struggles that many African countries have undergone since the inception of the Universal Declaration, attention is being paid at the regional level to the protection of women affected by war, including women seeking asylum, refugees, returnees and internally displaced persons, against all forms of violence, including rape and other forms of sexual exploitation. The Maputo Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol) uses the term ‘women’ to include both

65 Ibid., para. 136.
66 Ibid., para. 136.
67 Ibid., para. 136.
68 The Declaration and Platform notes that women and children constitute some 80 percent of the world's millions of refugees and other displaced persons, including internally displaced persons. They are threatened by deprivation of property, goods and services and deprivation of their right to return to their homes of origin as well as by violence and insecurity. Ibid., para. 137.
69 Ibid., para. 137.
70 Ibid., para. 137.
71 Ibid., para. 141.
72 Ibid., para. 138.
73 Ibid., para. 138.
74 Ibid., para. 143.

women and girls; however, at times girls are given special mention by virtue of their status as minors, particularly with respect to their special vulnerability in armed conflict to sexual violence and recruitment for child soldiering.[75] The Maputo Protocol, in the manner of third generation instruments, asserts that the perpetrators of such violence (gender-based violence as a war crime, genocide and/or crimes against humanity) will be brought to justice.[76]

Early references to violence against women in armed conflict in international human rights documents became more specific in the 1990s with the media devoting attention to gender-based violence as a form of ethnic cleansing. In 2000 the Human Rights Committee noted the particular vulnerability of women in times of internal or international armed conflicts and called on States parties to inform the Committee of all measures taken to protect women from rape, abduction and other forms of gender-based violence.[77] Interestingly, CEDAW does not focus on making a 'war' and 'peace' distinction but leans towards describing hegemonic relationships, for example those arising in occupied territories, where women may be especially vulnerable to sexual abuse and exploitation: In highly specific gendered language CEDAW has stated that wars, armed conflicts and the occupation of territories often lead to increased prostitution, trafficking in women and sexual assaults against women, which require specific protective and punitive measures.[78] CEDAW not only acknowledges that widespread rapes could be utilised as a weapon of war, but also the issue of sexual bartering and prostitution in inherently coercive environments, for example where political administration is militarised or occupying forces live amongst civilians in residential areas. CEDAW also calls generally for accountability for the perpetrators of rape, traffickers and others preying on the vulnerability of women in war or other coercive environments.

CERD (2000) provides that certain forms of racial discrimination may be directed towards women specifically because of their gender, such as sexual violence committed against women members of particular racial or ethnic groups in detention or during armed conflict.[79] CERD is also rather specific in its General Comment when calling for accountability for abusers. It calls for the establishment of an international tribunal to prosecute crimes against humanity. CERD's comment was made following the Security Council resolution establishing the International Criminal Tribunal for the former Yugoslavia.[80] In its support for the Security Council Resolution, CERD specifically calls for the prosecution of genocide, crimes against humanity, including murder, extermination, enslavement, deportation, imprisonment, torture, and rape persecutions on political, racial and religious grounds and other inhumane acts directed against any civilian population.[81]

3.2.5 Special Rapporteurs

The UN Office of the High Commissioner for Human Rights defines 'special procedures' as those mechanisms established by the Commission on Human Rights to address either specific country situations or thematic issues. The special procedures are a way for the Commission to be constantly engaged in an issue of concern throughout the year. Although they may be constituted in any manner, special procedures are commonly either an individual, called a special rapporteur or representative or an independent expert, or a group of individuals, called a working group.[82]

These experts, whether individually or as a group, examine, monitor, advise, and publicly report on human rights situations in specific countries or territories, known as country mandates, or on major phenomena of human rights violations worldwide, known as thematic mandates. Various activities can be undertaken by

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75 Maputo Protocol (2003), art. 11 (3) and (4).
76 Ibid., art. 11 (3).
77 Human Rights Committee General Comment 28 (2000), art. 3 (8).
78 CEDAW Committee General Recommendation 19 (1992) art. 16.
79 CERD Committee General Comment 25 (2000), art. 2.
80 Security Council Resolution 872 (1993) establishing an international tribunal for the purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia.
81 CERD General Recommendation 18, 1994.
82 Office of the High Commissioner for Human Rights. http://www.unhchr.ch/html/menu2/2/mechanisms.htm

special procedures, including conducting studies, providing advice on technical cooperation, responding to individual complaints, and engaging in general promotional activities. Thematic subjects have included investigations into trafficking in persons, child prostitution and child pornography, the human rights of internally displaced persons, and violence against women.[83] Reports submitted by these experts have produced far-reaching interpretations of human rights instruments, many of which include a gender analysis taking into account the different ways girls, boys, men and women are experiencing human rights abuses on a day to day basis, including in armed conflict.

The work of the Special Rapporteurs and other human rights experts has added texture and depth to the international community's understanding of gender-based violence and its victims. Their elaboration on the shape and impact of gender-based violence is possible through country visits that allow a contextual analysis of harms. The Special Rapporteur on violence against women provides a far-reaching analysis of violence against women in armed conflict. This analysis provides an unprecedented analysis of sexual violence as a weapon of war. Her analysis is strengthened by evidence collected from country visits she conducted under her mandate, particularly to Rwanda and Sierra Leone.

Following a country visit to Rwanda after the 1994 genocide, the Rapporteur on violence against women (Rapporteur on violence) substantiated existing definitions of sexual violence with the testimonies of Rwandan women describing their personal experiences of genocide. Forced nudity appeared as a recurring theme in many of these testimonies. In one case, women were forced to strip naked as they dug graves and buried the corpses of their husbands.[84] In another case, a woman was forced to strip naked and walk for thirty kilometres – the woman spoke to the Rapporteur of the humiliation she felt in peacetime when she encountered people who had witnessed her nudity during the genocide.[85] The Rapporteur referred to these experiences as not only humiliation, but as sexual humiliation that resulted in psychological health problems. The country visit allowed the Rapporteur to write the continuum of harm into the narrative of gender-based violence, emphasising the individual harm women experience as well as the aggravating nature of women's perceived sense of rejection and censorious judgment by their communities. Further, because of her physical presence in Rwanda she was able to discern the violent and sexual nature of forced nudity and its cultural context from the victim's perspective. The Rapporteur's report also provides an insight into structural inequalities existing in Rwanda prior to the genocide such as women's lack of access to land rights and poorly developed reproductive health care for women.

The Special Rapporteur's mission to Sierra Leone in 2001 also produced a gendered analysis of violence against women in armed conflict.[86] As with the Rwanda report, the Rapporteur sought to describe violence against women in armed conflict as well as to underlie the fact that the aftermath of the armed conflict posed gendered obstacles to justice for human rights violations, social and psychological rehabilitation and political and economic empowerment for women. Rape and other forms of gender-based violence are described as constituent elements of crimes against humanity and war crimes. The Special Rapporteur describes women's experience in general strokes but then focuses on specific groups which she determined were especially vulnerable to violence, including women and girls abducted by armed forces, women and girls abducted by armed forces and forced into sexual relationships with combatants, and women in internally displaced persons' camps. The narrative provided by the Rapporteur's interviews with women survivors of war revealed

83 Special Rapporteurs, representatives, independent experts or working group members are appointed by the Chairperson of the Commission on Human Rights after consultation with the five regional groups, which consist of Member States of the Commission. The appointees are independent, are not paid and serve in a personal capacity for a maximum of 6 years. Currently there are over 30 special procedure mechanisms. The Commission on Human Rights requests the Office of the High Commissioner for Human Rights to provide these mechanisms with personnel and logistical assistance to aid them in the discharge of their mandates. From the Office of the High Commissioner for Human Rights. http://www.unhchr.ch/html/menu2/2/mechanisms.htm

84 Special Rapporteur Report on the Mission to Rwanda (1998), para. 78.

85 Ibid., para. 34.

86 Special Rapporteur Report on the Mission to Sierra Leone (2001).

widespread levels of sexual violence but also heinous incidents such as where an abducted teenaged girl was made to carry her father's decapitated head in her arms on a forced march.[87]

With respect to women's experience of conflict, women are increasingly seen not exclusively as victims of rape; but rather as exercising agency and adopting multiple roles that may include or exclude the victim role. For example, women and adolescent girls may also support fighting forces and prolong the conflict in numerous ways; they may infiltrate opposition groups for the purposes of passing information, hide or smuggle weapons under their clothing and via their children, support or care for fighters. Individual women combine various roles at once, such as a displaced person, a community activist, a small business owner, a soldier and a homeless person.[88] As with the Rwanda mission and report, the Rapporteur identified pre-existing inequalities and discrimination against Sierra Leonean women that made postwar redress difficult.

> Even before the conflict, women in Sierra Leone had been marginalised in all spheres of life. Some of the reasons for this were low or no literacy, poverty, lack of capacity to participate in decision-making and cultural constraints, all of which contributed to the low status of women in society. The conflict has exacerbated the problem by creating many female headed households which face, inter alia inappropriate shelter conditions, family separations and legal inequality, for example discrimination under the law in regard to property ownership and inheritance rights.[89]

The Security Council's Resolution 1820 can be seen as the culmination of decades of efforts to place gender-based violence within the narrative of gross human rights violations.[90] The Resolution's Preamble specifies the significance of early instruments such as the obligations under CEDAW and the commitments under the Beijing Declaration and Platform to condemn, protect against and punish sexual violence in armed conflict. Resolution 1820 displays the international community's comprehension that sexual violence is a weapon of war.

> women and girls are particularly targeted by the use of sexual violence, including as a tactic of war to humiliate, dominate, instil fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group;...rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide...'[91]

The gravity of sexual violence as a war crime is emphatically expressed through the Resolution's exclusion of crimes involving sexual violence from amnesty provisions in the context of conflict resolution processes.[92] The Resolution notes the continuum of (sexual) violence into the aftermath of conflict, and as a result indicts not only belligerents but 'peace building' actors such as local police officers and UN personnel as perpetrators of sexual abuse and the exploitation of women, particularly displaced women.

3.3 Concluding analysis

Third generation instruments have developed a narrative of violence against women in armed conflict that places gender as an independent ground for discrimination. Violence against women has come to be construed by these instruments as a gross human rights violation and a constituent element of crimes against humanity and war crimes. Instruments such as Rapporteurs' reports, final documents of the World Conferences and Security Council Resolutions show that perpetrators of wartime sexual violence seek to exacerbate conflict and gain political and military advantage.

The legal narrative states that sexual violence with other forms of gender-based violence is a strategy of war and that it is widespread and systematic. This is an important conclusion taking into account society's

87 Ibid., para. 8.
88 Secretary-General on Women, Peace and Security, para. 47, (2000).
89 Special Rapporteur Report on the Mission to Sierra Leone (2001), para. 34.
90 Security Council Resolution 1820 (2008).
91 Security Council Resolution 1820 (2008), Preamble and art. 4.
92 Security Council Resolution 1820 (2008), art. 4.

ambivalent response to victims of sexual violence. The opening narrative to this chapter described Isata, a defiant yet tragic figure in her community. She was stigmatised by her war experience which was perceived to have included sexual violence. Isata's community, like so many other communities emerging from armed conflict, could not entirely construct a narrative of sexual violence as gender-based violence, a human rights violation and war crime. The internalisation of the third generation human rights instruments narrative into enforcement mechanisms such as truth commissions and ad hoc tribunals could contribute to transforming the local censure of rape survivors and mitigate the ambiguity attaching to them.

The contribution of human rights instruments such as the final documents of the World Conference and the reports of human rights experts and working groups to mainstreaming gender into the application of human rights law in armed conflict cannot be overstated. They do not actually elaborate on international humanitarian law but extend human rights law into zones of conflict to the extent that a reworking of humanitarian laws is not called for. Thus, the Security Council resolution is influenced more by the references to gender, human rights and armed conflict within the Women's Convention and the Beijing Declaration and Platform than by provisions of the Hague Regulations or Geneva Conventions. International humanitarian law benefits from these elaborations at the enforcement stage, when Judges are able to broaden narrowly constructed definitions of violence against women. Judges are able to do so with the precedents of sophisticated gender analysis provided by the third generation rights. The work of Rapporteurs and other experts in Rwanda, Sierra Leone and other conflict states further supports judges in their interpretation of humanitarian law.

Third generation instruments, have overwritten humanitarian law's traditional temporal jurisdiction. International humanitarian law privileged international armed conflict, and active hostilities. Third generation human rights instruments have presented the international community with gender-based violence in the context of conflict. Conflict may be armed conflict and it may involve active hostilities; however, it may more often resemble peace, as in the case of foreign occupation and colonisation. Conflict may be the perilous state displaced persons occupy in a peaceful host country. The instruments necessarily blur the line between armed conflict and other shapes of political violence that foster coercive and exploitative climates that make gender-based violence systemic and inevitable. International humanitarian laws traditionally regulated the actions of armed combatants. However, by transcending the temporal boundaries of IHL, the human rights instruments have directed the gaze of the international community on the culpability of 'peacetime actors' and those intervening on humanitarian grounds such as regional forces, the police, the civilian police and humanitarian workers. The broad construction of conflict as a site of hegemonic inequality and insecurity allows a wide understanding of the nature of sexual violence and its full impact on society to be reflected in humanitarian and justice policy.

The third generation instruments are increasingly policy driven and their recommendations on the training of peacekeepers, the police and relief workers are gendered and well considered. Further, they call for the involvement of women at decision-making levels and the formulation of responses. This, more than their firm avoidance of references to 'mothers', 'nursing mothers' and 'pregnant women', reflects that the human rights instruments seek an empowering narrative for victims of gender-based violence, and attempts to create room for women to dictate gender-specific needs as well as to shape policy and responses to all aspects of their wartime experiences.

CHAPTER 4

Narratives on Gender and Violence: The International Criminal Tribunal for Rwanda

4 INTRODUCTION AND HERMIEN'S NARRATIVE

I spoke with Lynette,[1] a Rwandan girlfriend, some years ago. She survived the genocide because at its onset she was attending a boarding school in Kenya. Her parents were massacred by neighbours, some of whom were relatives (by marriage). She returned to Rwanda after the genocide and reunited with her remaining family. She studied Law and upon graduation was appointed as a State Prosecutor. She recounted a conversation she had had with her Aunt Hermien[2] nearly a decade after the genocide. Like Lynette, Aunt Hermien was a genocide survivor, the difference being that Hermien was in Rwanda during the genocide. Lynette expressed her concern about Anna,[3] her cousin and Hermien's teenage daughter. According to Lynette, Anna's behaviour was becoming increasingly erratic to the point where Lynette suspected that the young woman was mentally unhinged. Hermien listened to Lynette's concerns but eventually interrupted with a question: 'Well how do you expect Anna to behave after the rapes?' Lynette exclaimed in shock: 'What! My cousin was raped!' Her aunt challenged her calmly: 'Lynette. Show me a woman who wasn't raped.'

This conversation between Lynette and Hermien greatly informs this chapter's gender review and analysis of the investigation and prosecution of gender-based violence by the United Nation's International Criminal Tribunal for Rwanda (ICTR). In particular, Aunt Hermien's response signifies the seemingly binary positions from which narratives on gender and violence are positioned. One position at the local level readily accepts the narrative provided by Aunt Hermien: A casual acknowledgment that both Aunt Hermien and Cousin Anna were raped; all of us were raped; all Rwandan women were raped; every Hutu woman and every Tutsi woman was raped. In this widely inclusive narrative of gender and violence the woman who was not raped is the exception to the rule.

The powerful challenge from the local level to 'show me a woman who wasn't raped' is diagrammatically opposed to a second position at the international level and, more specifically, at the substantive and procedural level of international criminal law. The ICTR reframes the challenge in this way: 'Show me a woman who was raped.' This challenge asks Aunt Hermien and other survivors of wartime rape to try and place their experience within the parameters of the ICTR mandate. Thus allegations of rape must satisfy the requirements of articles (2), (3) and (4) of the ICTR Statute under the headings of genocide, crimes against humanity or violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. The Statute provides definitional boundaries and thresholds that victim narratives must meet in order that their allegations of gross human rights violations fall within the jurisdiction of the Tribunal or Court. This chapter argues that the narrow interpretation of these boundaries contributes to low conviction rates for sexual violence so that the resultant transitional justice narrative proclaims that 'the woman who was raped' is an anomaly or the exception to the rule.

This chapter argues that the dominant narrative of the ICTR in which violence against women is constructed is monolithic and overtly exclusive. This chapter reveals ways in which the justice narrative denies gender-based discrimination while it privileges ethnicity as the requisite condition of sexual victimisation. Under this construction sexual violence must amount to ethnic annihilation. Further, the privileging of ethnicity has led to an undue focus on women and their biological capacity to reproduce ethnicity. This has reduced the ICTR's gender narrative to a focus on women's sexual reproductive function. This dominant narrative is extracted

1 A pseudonym.
2 A pseudonym.
3 A pseudonym.

chiefly from outcomes of the work of the Office of the Prosecutor (OTP) and the decision-making process of the Trial Chambers and has proved to be a crucial determinant of which aspects of women's experience of armed conflict are actually investigated, charged and prosecuted. Ultimately, it has impacted which victims of sexual violence were permitted to access international criminal justice and what narrative of gender and gender-based violence emerged from their testimony.

Chapters 2 and 3 referred to the treaty body for the Convention on the Elimination of all Forms of Racial Discrimination (CERD). The CERD Committee took cognisance of the intersection of gender with race discrimination and the ways in which this impacted women's enjoyment of human rights.[4] The Committee also made the link between gender and its significance in the commission of crimes such as ethnic cleansing in conflict and armed conflict. This chapter heeds the CERD Committee's call for an acknowledgement of the different life experiences of women and men but it also moves beyond the double discrimination framework (i.e. ethnicity and gender) in order to reveal multiple forms of discrimination unexamined in the case law of the ICTR. The chapter argues that gender and other systemic forms of social discrimination made all women in Rwanda vulnerable to sexual and other forms of violence during the genocide, irrespective of their ethnicity. The case of Sara Baartman described in chapter 2 revealed that vulnerability to violence is never uniformly distributed amongst and between women. And indeed, identity marks such as ethnicity, class, race and biological sex in the context of the Rwanda genocide greatly enhanced or mitigated vulnerability. The chapter emphasises that it is essential for the fulfilment of the right to equal access to justice for all victims that all intersecting grounds of discrimination are identified and written into the judicial process invoked in the wake of gross violations of human rights.

This chapter produces narratives that are disruptive of the dominant narrative. These sources of disruption are actually extracted from within the case law of the ICTR but reveal the narrow interpretation by the Prosecutor in the prosecution of gender in gender-based violence. The disrupting narratives relate to gender-based violence yet their marginal position in the case law does not raise a gender analysis and interpretation. This chapter presents these instances of gender erasure and provides the necessary gender analysis of the inclusion and the exclusion. The Akayesu,[5] Muhimana,[6] Gacumbitsi,[7] Niyitegeka,[8] Ntuyahaga,[9] Bagasora,[10] and

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4 CERD General Comment 25 (2000) art. 1.

5 Jean-Paul Akayesu, Amended Indictment, Case No. ICTR-96-4-T, 06-06-1997. Akayesu was the Mayor of Taba Commune and was responsible for maintaining law and public order in his commune. At least 2000 Tutsis were killed in Taba between April 7 and the end of June, 1994, while he was still in power. The Prosecutor charged that the killings in Taba were openly committed and so widespread that, as Mayor, Akayesu must have known about them. Although he had the authority and responsibility to do so, Akayesu never attempted to prevent the killing of Tutsis in the commune in any way. He was found guilty of genocide; direct and public incitement to commit genocide; and the crimes against humanity of extermination, murder, torture, rape and other inhumane acts.

6 Mikaeli Muhimana et al., Amended Indictment, Case No. ICTR-95-1-I, 20-10-2000. Muhimana was the Counsellor of Gishyita Commune in the Kibuye Prefecture. He was charged with acting individually and in concert with others to mobilise civilians and gendarmes in the persecution of Tutsi civilians in the Kibuye prefecture and Bisesero area. He was convicted of genocide and rape and murder as crimes against humanity.

7 Sylvestre Gacumbitsi, Indictment, Case No. ICTR-2001-64-T, 01-06-2001. Gacumbitsi was the Mayor of Rusumo commune in the Kibungo Prefecture. He was charged with ordering, instigating, participating in and aiding and abetting in genocidal massacres and rapes. He failed to take reasonable measures to prevent soldiers, gendarmes, militias and civilian militias under his authority from the persecution of Tutsi civilians. Sexual violence was widespread and systematic in Rusumo commune. He was convicted of genocide, and extermination, rape and murder as crimes against humanity.

8 Elezier Niyitegeka, Indictment, Case No. ICTR-97-27-I, 11-07-1997. Niyitegeka was a journalist and Minister of Information of the Interim Government on 9 April. He was a member of the ruling party, the Mouvement Démocratique Républicain (MDR), and its Chairman in the Kibuye Prefecture (1991-1994). He was also a member of the national political bureau. He was charged with individually committing acts of genocide and crimes against humanity and using his authority to incite the persecution of Tutsis. He was convicted of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, and the crimes against humanity of extermination, murder and other inhumane acts.

9 Bernard Ntuyahaga, Indictment, Case No. ICTR-98-40-I, 26-09-1998. Ntuyahaga was a major in the Rwandan Army at the outset of the genocide. As an officer of the armed forces he was charged with responsibility for the genocide and widespread atrocities committed by the army against the Tutsi civilian population. He was also charged with failing to protect the Prime Minister Agathe Uwingiliyimana from assassination and for facilitating the killing of Belgian peacekeepers. The Prosecutor withdrew the indictment in order to allow the Belgian government to prosecute Ntuyahaga. The ICTR indictment was

Ndindiliyimana et al.[11] cases provide specific narratives that illustrate the consequences of a restrictive construction of gender-based violence.

4.1 Locating narratives

This chapter describes narratives as emanating from international, national and local sites. The 'international' refers to the International Criminal Tribunal for Rwanda's narratives on gender and violence through the outcomes of the work of the Office of the Prosecutor (OTP) and the Trial Chambers as they interpret and fulfil their mandates.[12] Substantively, the statute of the ICTR is rooted in international law norms including customary international law. Thus, even as the statute (and those of the ICTY and ICC) consists of a 'fusion and synthesis'[13] of the common law and civil law traditions it qualifies as a source of international law in conformity with Article 38 of the Statute of the International Court of Justice (ICJ). The case law of the ICTR also qualifies as a source of international law, either as international customary law or as a general principle of law pursuant to Article 38 (i) (d) under judicial decisions.[14]

The Security Council took the extraordinary step of establishing the ICTR under chapter VII of the United Nations Charter.[15] This executive action was justified by the Security Council as the genocide in Rwanda posed a threat to international peace. A chapter VII resolution created a binding obligation on all States to cooperate in the enforcement of justice in Rwanda, an obligation which was not dependant on States voluntarily ratifying a treaty as is the case with the International Criminal Court (ICC). This enhanced the impression that the international community unanimously accepted the legitimacy of international criminal justice. More significantly, the Security Council Resolution emphasised that the Government of Rwanda requested the establishment of an international tribunal for the prosecution of war criminals.[16] However, the Rwandan

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withdrawn and Ntuyahaga was released. He voluntarily surrendered to the Belgian government and was convicted of the murder of the Belgian peacekeepers in July 2007. He is now serving a twenty-year sentence in Belgium.

10 Théoneste Bagosora, Amended Indictment, Case No. ICTR-96-7-I, 31-07-1998. Bagosora held the office of *directeur de cabinet* in Rwanda's Ministry of Defence. In this capacity he managed the day-to day affairs of the Ministry in the absence of the Defence Minister. In the build-up to the genocide he presided over a military commission mandated to design a Final Solution that would exterminate Tutsi civilians in Rwanda. He was the highest authority in the Ministry of Defence during the genocide. He was convicted of genocide, the crimes against humanity of murder, the murder of peacekeepers, extermination, rape, persecution, other inhumane acts, and three counts of serious violations of article III of the Geneva Conventions and Additional Protocol II as follows; violence to life, violence to the lives of the peacekeepers and outrages upon personal dignity.

11 Augustin Ndindiliyimana, Amended Indictment, Case No. ICTR-2000-56-I, 25-10-2002. Ndindiliyimana was the Chief of Staff of the *Gendarmerie Nationale*. At the outset of the genocide he formed the senior ranks of the interim government that led and conducted the genocide. His trial is ongoing.

12 For the mandates of the Prosecutor, the President of the Trial Chamber and Trial Chambers see ICTR Statute, arts. 10, 11, 12, 13, 14, 15, 17, 18 and 19.

13 See Zdravko Mucić et al., Judgment, Case No. IT-96-21, 16-11-1998, para. 159 and De Brouwer (2005), p. 27.

14 De Brouwer (2005), pp. 27 and 29. See also the Statute of the International Court of Justice
Article 38
1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

15 Chapter VII (arts. 39-42) of the UN Charter addresses action to be taken by member States with respect to threats to the peace, breaches of the peace and acts of aggression. Article 40 provides that the Security Council shall determine the existence of any threat to the peace, and propose measures to be taken to maintain or restore international peace and security. Under chapter VII such measures may be provisional and not involving the use of armed force, for example sanctions or the severance of diplomatic relations (art. 41). Where measures under article 41 are inadequate chapter VII authorises the Security Council to take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockades, and other operations by air, sea, or land forces of Members of the United Nations (art. 42).

16 See Security Council Resolution 955 (1994).

government's submission to the Security Council Resolution was short-lived as its objections to various provisions of the Statute of the ICTR regarding temporal jurisdiction, the severity of penalties and the location of the seat of the Tribunal outside of Rwanda in Arusha, a town in Northern Tanzania, were ignored.[17] The drafting of the Resolution and the ICTR Statute grew to be so contentious that Rwanda, which had a seat on the Security Council at the time, cast the sole vote opposing the adoption of the Resolution.[18]

A narrative that is described as emanating from an international source need not be disconnected from the local people. However, the location of the Tribunal in Arusha created an insurmountable physical and psychological disconnection between the international community's pursuit and process of justice and the expectations of the Rwandan government and the local populace in Rwanda.[19] Whilst Security Council Resolution 955 claimed that the establishment of the ICTR would contribute to peace and reconciliation and end impunity in Rwanda, its extra-territorial status alienated it from the daily reality of Rwandans attempting to rebuild a nation and society destroyed by a near successful genocide and a civil war that for all intents and purposes continued even with the launch of the ICTR's first indictments.

Hermien's narrative represents a local narrative on gender and violence. This chapter's analysis of the legal narrative on gender and violence is informed by narratives such as Hermien's but also by local narratives provided by anthropologists such as Christopher Taylor, Lisa Malkki and Johan Pottier.[20] Their ethnographic research proved to be an important source of local narrative on ethnic, gender and other socially constructed hegemonies. Their scholarship provided an insight into the complexity of identity formation in Rwanda - an insight that is largely absent from legal texts on genocide in Rwanda.[21] These texts allowed for the disruptive analysis of the ICTR's narrow construction of gender-based violence in this chapter.

The references in this chapter to local narratives should not create the impression that the narratives are representative or widely accepted narratives amongst communities. We can note, for example, that Aunt Hermien's local narrative should not be read as representative of all Tutsi survivors, otherwise Lynette, also a Tutsi survivor, would not have been so shocked by it. It is of course possible that Lynette's understanding of the widespread nature of sexual violence shifted drastically upon hearing Aunt Hermien's disclosure and acknowledging that her female relatives were raped. This chapter states the existence of the local narrative to a legal audience that is apparently unaware of their existence. It then elucidates the importance of the local narratives to the legal and judicial process and pinpoints the gender deficit in these processes.

Local narratives should be distinguished from national narratives. National narratives emanate from elected representatives of the people although they may not always be representative of people's thoughts and reality. The arguments made by Rwanda's government against the establishment of the ICTR would be national narratives. They may indeed represent the sentiment of the wider population; however, they are made in furtherance of the Government's own national prosecutorial strategy and ambitions.

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17 See Mibenge (2002) for a detailed description of early conflicts between the Government of Rwanda and the UN Security Council relating to temporal jurisdiction, sentencing practices and the seat of the Tribunal in Arusha.

18 Ibid.

19 This fundamental flaw in location is also tied to the association of Arusha with the failed Arusha Accords (1993), that many felt precipitated President Habyarimana's assassination and the genocide. Alice Karekezi, an observer of the ICTR, stated in an interview that 'Arusha where the international tribunal has its seat…is in the memory of Rwandese a sign of failure …I spoke of the Arusha Agreement on August '93….it was a failure…a failure which [*sic*] name is Genocide'. Alice Karekezi interview with Harry Kreisler, Justice for Women in Rwanda, Conversations with History series, Institute of International Studies, Office of Media Services, University of Berkley. http://www.youtube.com/watch?v=Gd_PAqy9Pi8

20 Taylor (1999), Malkki (1992) and Pottier (2005).

21 These social scientists do not focus exclusively on women or gender or gender-based violence; however, their wider study of the creation of national identity have helped me deepen my own observations and conclusions on the ICTR narrative and the missing analysis of grounds of discrimination apart from gender and ethnicity.

4.1.1 Historicity

Even into the new millennium we are confronted by apologists and revisionists who attempt to rewrite or deny historical facts of the Second World War.[22] The fact of German aggression is evidenced and confirmed by the prosecution and conviction of those most responsible for crimes against peace, war crimes and crimes against humanity as part of the Nuremberg Trials.[23] Whilst well-founded allegations of victor's justice have not abated, this at the time novel process of justice establishing individual criminal accountability laid the foundation for the creation of various contemporary ad hoc criminal tribunals as well as the permanent International Criminal Court. The convictions have also provided a historical and even pedagogical record of war crimes, war criminals and their victims.[24]

However, Nuremberg's judicial-historical narrative of gender and gender-based violence is far from satisfactory. The widespread and systematic nature of sexual violence in the War and its aftermath is well documented by historians and other social scientists; however, it is not affirmed by a binding legal narrative. While evidence of mass rape was written into the trial record by French and Soviet Prosecutors, rape and other forms of sexual violence were not explicitly criminalised in the Nuremberg Trials as either war crimes or crimes against humanity.

The absence of specific prosecutions for sexual violence from the Nuremberg Trials was a great omission and a poor precedent for the ad hoc criminal tribunals. The Prosecutor and Trial Chambers of the Yugoslav and Rwanda Tribunals were unable to rely on judicial precedent from an international criminal process when trying to define and interpret rape and sexual violence as international crimes. The decisions of the ad hoc criminal tribunals have remedied this omission and broadly defined constructions of rape and other forms of sexual violence are now part of the emerging body of international criminal law.

Tribunals and national courts have begun to refer to the ICTR and ICTY statutes and decisions and, in particular, their definitions of sexual violence and rape are being co-opted into national and international justice processes. The case law of the Sierra Leone Special Court, the final report of the Sierra Leone Truth Commission, reports of the Special Rapporteurs, General Comments of the treaty bodies and Security Council resolutions specifically refer to the case law of the ad hoc tribunals. The doctrinal achievements of the ad hoc tribunals are contributing to a growing awareness of a gendered experience of war and other forms of political violence. The role of gender critiques such as this one is to affirm existing gender inclusions in the case law as well as to point out the exclusionary practices and constructions that render the narrative on gender and violence incomplete. The critique produces alternative texts and theories of gender and violence which should

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22 Some recent international headlines are illustrative: International Herald Tribune, *Vatican Turnaround: Holocaust Denier Must Recan*t, 4 February 2009; International Herald Tribune, *Austrian Court Frees British Author Jailed as Holocaust Denier*, 21 December 2006 and; International Herald Tribune, *Swiss Court Convicts Turkish Politician of Genocide Denial: Court Hands Down First Such Conviction*, 9 March 2007. This last article reports that the politician was convicted under a 1995 Swiss law prescribing a 3-year maximum penalty for those denying, belittling or justifying any genocide.

23 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and the Charter of the International Military Tribunal, London, 8 August 1945. I have intentionally left out the International Military Tribunal for the Far East (Tokyo Trials) as many legal commentators have argued that the impact of the Tokyo Trial has been minimal compared to that of Nuremberg as 'its voluminous transcripts were placed in public archives but not published unlike the Nuremberg Trial which alone became the representative judicial act ending the war.' Brook (2007), p. 150. Madoka Futamura also notes the absence of primary source material from the Tokyo Trial and discusses its position as a 'forgotten trial.' Futamura (2008), p. 9-10. This has perhaps contributed to the international community's greater tolerance for denialism from the Japanese government about war crimes whereas similar denialism is not tolerated from the German government or general public.

24 In contrast, the denial of early nineteenth century campaigns of genocide against the Armenian and Herero and Nama peoples are not widely criminalised in Europe because they were never made subject to comparable international criminal prosecution. The right to an apology and other forms of remedies is still contested by the German and Turkish governments and the descendants of the victims. The following headlines reveal that the debates over moral and legal responsibility persist. Der Spiegel, *Herero Massacre: General's Descendants Apologise for 'Germany's First Genocide'*, 10 August 2007; International Herald Tribune, *Bush Urges Congress to Reject Armenian Genocide Resolution*, 10 October 2007.

be read by scholars and practitioners not as ancillary to, but as equally essential legal and pedagogical sources for application in subsequent tribunals' prosecutions of gross violations of human rights.

4.2 The Genocide

Until 1960 Rwanda was ruled by a Tutsi king under the tutelage of the Belgian colonial administration.[25] The Tutsi group exercised a pastoralist livelihood and were a minority in Rwanda, comprising 15-20% of the population. The Hutu exercised an agricultural livelihood and constituted about 80-85% of the population. In addition there was a third group called the Twa, who were potters and foragers, constituting about 1% of the total population. The Tutsi held the overwhelming majority of posts in the indirect rule state apparatus under the Belgians.[26] In the 1950s educated Hutus sought a greater role in the Rwandan government and became increasingly politically active. Their movement, aided by the Rwandan Catholic Church and later supported by the Belgian colonial administration, culminated in the replacement of Tutsi administrators with Hutus. Thereafter the system of Tutsi dominance was overthrown and the Tutsi king abdicated.

The violence of this transition, which began in 1959 and continued until 1964, claimed the lives of tens of thousands of Tutsis. Thousands emigrated to neighbouring countries and further, creating a Diaspora. During the 1980s these refugees sought to return to Rwanda. When their overtures to the Habyarimana government met with political and legal obstruction, they decided to return to Rwanda by force. Their movement, the Rwanda Patriotic Front (RPF), also drew support from some Hutus disaffected with the Rwandan regime and more importantly, an alliance with Uganda's national army. The RPF invaded Rwanda from Uganda in October 1990. Peace accords ending this war were signed in Arusha, Tanzania in August 1993 and gave the RPF most of what it had fought for: the right to Rwandan citizenship, the right to take up permanent residence in Rwanda, and a role in a broad-based government. Implementing the peace accords, however, proved to be another matter as Habyarimana and his supporters proclaimed that the Arusha Accords was a toothless document. Hostilities between the two sides resumed on April 7, 1994 after President Habyarimana was killed when his aircraft was shot down by extremist elements within his own circle.[27]

The first victims of the massacres by the interim government that was formed following Habyarimana's assassination were Hutus known within political circles as opponents of the Habyarimana government and not necessarily as Tutsi sympathizers. Within 24 hours the Prime Minister Agathe Uwilingiyimana, Joseph Kavaruganda, the President of the Supreme Court, and several other prominent members of government, together with 10 Belgian members of UNAMIR, were shot or bludgeoned to death by civilian militias known as the *interahamwe*.[28] The massacres spread through the country as the Rwandan army's (Forces Armées Rwandaise (FAR)) war strategy against the Rwanda Patriotic Front degenerated into the massacre of every Tutsi man, woman and child in Rwanda. The highest levels of the interim government incited the general Hutu populace to join in the carnage with absolute impunity. Many did so armed with rudimentary weapons such as machetes and other farming tools.[29] The genocide ended when the Rwanda Patriotic Front invaded and occupied the countryside and Kigali and the Rwandan army fled into the neighbouring Democratic Republic

25 This brief and general history draws extensively from the timeline of the conflict advanced by the case law of the International Criminal Tribunal for Rwanda.

26 The nature of the ethnic or racial distinction and division in Rwanda is debated by scholars. My own position is that at different pre-colonial, colonial and post-colonial periods, ethnicity was a fluid political, social, cultural and even economic construct.

27 Taylor (1999).

28 From 1990 onwards the political assassinations of Hutu opposition leaders by rival parties was a feature of politics in Rwanda. See Taylor for accounts of assassinations and reprisal assassinations between Hutu factions from the North and South. Taylor (1999), pp. 158-159. However, the political assassinations following the assassination of President Habyarimana are widely described as representing a shift from political rivalry to genocidal massacres. The assassination of Juvenal Habyarimana, Agathe Uwilingiyimana and other senior Hutu politicians was necessary to create a power vacuum leading to the formation of a ruling party that could effect the genocidal campaign.

29 For the role of media discourse and propaganda inciting genocide see Cotton (2007), Slocum-Bradley (2008) and Rothbart and Bartlett (2008).

of Congo with up to one million civilians. Up to one million Tutsis, opposition and moderate Hutus were killed in a three-month period (April 1994 to June 1994).[30]

On 1 July 1994, the UN Security Council adopted resolution 935 in which it requested the Secretary-General to establish a commission of experts to determine whether serious breaches (including genocide) of humanitarian law had been committed in Rwanda.[31] The commission reported that genocide as well as systematic and widespread violations of international humanitarian law had been committed in Rwanda, resulting in a massive loss of life.[32]

4.2.1 The ICTR and the gender critique

More than a decade after the establishment of the ICTR there is an impressive and still growing body of scholarly work reviewing the interpretation of gender and sexual violence in the Statute, Rules, decisions and case law of the ICTR. The ICTR's early landmark convictions for sexual violence as a part of genocide and a crime against humanity were applauded but also subjected to critical review.[33] There have been many comparative and complementary studies of the ICTR's judicial interpretations and case law with other ad hoc tribunals and the ICC. However, as the ICTR nears its completion date, there is a resounding verdict from legal commentators that the early convictions were no more than an anomaly in the record of the ICTR prosecution of sexual violence.[34] The larger body of case law does not reflect the high levels of gender-based violence committed in Rwanda during the genocide.

The Tribunal has been criticised for a systemic lack of gender-based violence charges in its indictments and high numbers of acquittals for sexual violence charges in genocide cases. Binaifer Nowrojee noted as of March 2004 that an overwhelming 90 percent of judgments handed down by the ICTR contained no rape convictions. Further, she noted at the time that there were twice as many acquittals for rape as there were rape convictions.[35] As the ICTR approaches the finalisation of its completion strategy, its record remains poor. Doris Buss noted that as of July 2008, out of 22 completed trial decisions, a significant number, approximately 14, make mention of rape as a component of the genocide, even in cases where rape is not among the charges against the accused.[36] However, only 10 of the 22 trials actually pursued charges against the accused and of those 10 cases only 4 resulted in any convictions for rape or sexual violence against men. Further, within those four cases in which a conviction for sexual violence against women resulted, the vast majority of the rapes alleged and/or included in the indictment were dismissed.[37] Buss contrasts and criticises the hyper-visibility of sexual violence as an effective backdrop to genocide with the striking invisibility of sexual violence in indictments, sentences and verdicts.

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30 Participation in killings differed throughout Rwanda. In some places the authorities as well as civilians killed readily and vigorously, in other areas such as central and southern Rwanda, where the Tutsi were numerous and well integrated and where the ruling party had few supporters, many Hutu refused initial orders to kill and even joined Tutsi in fighting off assailants. Only under punitive actions, ranging from fines to threats of death, did the Hutu give up their opposition to genocide. Human Rights Watch (1999), p. 11.

31 Resolution 935 (1994).

32 UN Doc.S/1994/1125. See Magnarella (1997) for an overview of Security Council Resolutions, General Assembly Resolutions, the ICTR Statute and other legal and judicial responses to the genocide.

33 See Cole (2008), pp. 55-85 (31), Goldstone (2002), Askin (1999), De Brouwer (2005), Askin (2003).

34 Nowrojee (2007), p. 110.

35 Binaifer Nowrojee points out that no rape charges were even brought by the Prosecutors Office in 70 percent of the adjudicated cases. In the 30 percent that included rape charges, only 10 percent were found guilty for their role in the widespread sexual violence. Double that number, 20 percent, were acquitted because the court found that the prosecutor had not proved this beyond a reasonable doubt. ibid., p. 109. See also the NGO Coalition of Women's Human Rights in Conflict Situations for an analysis of trends in sexual violence prosecutions in indictments by the ICTR from 1995-2002. NGO Coalition of Women's Human Rights in Conflict Situations (2002).

36 Buss (2008), Rethinking Rape as a Weapon of War, (unpublished copy with author), p. 8 (some still being subject to an appeal). These were contested cases (excluding guilty pleas), involving 28 individual defendants.

37 Ibid., p. 8.

Chapter 4

The Office of the Prosecutor has been accused of lacking gender competency in fulfilling its mandate, particularly with respect to investigating gender-based violence. Investigators and prosecutors are said to have lacked the skill and political will to identify, cultivate trust and interview victims of sexual violence. In its defence, the OTP position has blamed Rwandan women for their cultural sensitivities which prevented them from disclosing sexual violence – a claim that has been disproved by numerous researchers and human rights investigators, who have with the requisite will and skill collated thousands of reliable and profound testimonies from survivors of sexual violence in Rwanda and throughout the Great Lakes Region since 1994 up until the present day.[38] A truer analysis is that sexual violence charges were regarded by the prosecutor as the least relevant of the grave crimes being investigated and in many cases were sacrificed in the interest of expediency.[39] In the final analysis, it can be said that gender-based violence has never emerged as central to the ICTR's prosecutorial strategy. No comprehensive prosecution strategy or a precise working plan to properly document and bring the evidence of sex crimes into the courtroom has been consistently pursued for the very considerable number of years that the ICTR has been at work.[40]

Judges have not been exempt from criticism by legal commentators regarding the manner in which they have presided over cases involving gender-based violence. They have been censored for permitting the retraumatisation and humiliation of victims of sexual violence during 'inept' and 'insensitive' cross-examination by Defence Counsel.[41] The post-trial interviews of women survivors of sexual violence who testified as victims and witnesses before the ICTR also reveal a disenchantment with the international criminal justice process. A recurring complaint is that despite protection and confidentiality measures before the Tribunal, witnesses were exposed to political and social repercussions upon returning to their communities.[42]

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38 Honoré Rakotomanana, the first deputy prosecutor of the ICTR (1995-1997), stated in an interview with Human Rights Watch that: 'the reason they have not collected rape testimonies is because African women don't want to talk about rape…We haven't received any real complaints. It's rare in investigations that women refer to rape.' Human Rights Watch (1996).

39 Fiona De Londras describes the reorientation of prosecutorial priorities following the arrival of Carla del Ponte as Prosecutor in 1999. Upon taking office, Del Ponte announced her intention to prosecute 153 suspects by 2005 (Sixth Annual Report of the ICTR, 2000-2001). This ambitious plan required the 'streamlining' or 'rationalisation' of the OTP, which included dismantling the investigation unit dedicated to examining and investigating crimes relating to sexual violence (Sixth Annual Report of the ICTR, 2000-2001). In other words, a clear prosecutorial decision was taken to deprioritise sexual violence, possibly because investigating and prosecuting such crimes is especially labour and resource-intensive, and instead to focus on 'other' crimes. The incongruence between the marginalisation of sexual violence by the OTP and its centrality to the Rwandan genocide is clear and holds clear implications for the position of sexual violence before the Tribunals: it is important as long as it does not get in the way of other, more easily prosecuted, crimes. De Londras (2009), p. 12. Strong protests were posted by feminist groups such as the NGO Coalition for Women's Human Rights against the Prosecutor's decision not to pursue sexual violence charges in the Cyangugu and Muvunyi cases despite the Prosecutor's possession of comprehensive evidence of sexual violence. NGO Coalition for Women's Human Rights (2002). See Muvunyi Tharcisse, Case No. ICTR-2000-55A-TT, 23/02/2005, Decision on the Prosecutor's Motion for Leave to File an Amended Indictment. See also André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe, Case No. ICTR-99-46-T, 24/05/2001, Decision on the Application to File an Amicus Curiae Brief According to Rule 74 of the Rules of Procedure and Evidence Filed on Behalf of the NGO Coalition for Women's Human Rights in Conflict Situations.

40 Binaifer Nowrojee speaks further of the prosecutor's 'squandered opportunities', 'periods of neglect' and 'repeated mistakes' in the investigation and prosecution of sexual violence. Nowrojee (2007), p. 113. Interviews conducted by Buss with Tribunal staff from the OTP and Registry reveal some concurrence with the major criticisms from observers: A shifting political commitment by the OTP, the poor investigation of sexual crimes and the poor drafting of rape charges in indictments, Doris Buss, Rethinking Rape as a Weapon of War, (unpublished copy with author), p. 8.

41 Nowrojee describes one notorious incident in the Nyiramasuhuko Case (Amended Indictment, Case No. ICTR-97-21-I, 01-03-2001) when Trial Chamber Judges burst out laughing while witness TA, a victim of multiple rapes during the genocide, was being cross-examined in inappropriate detail about the events leading up to her rape. Binaifer Nowrojee (2005), pp. 4 and 24.

42 See the Special Rapporteur on Violence against Women for a full report on victims' concerns about the Victim and Witness Unit's (VWU) ability to protect them from repercussions after testifying. She raises, from the victim's perspective, issues of relocation, and claims of violent reprisals, amongst other concerns. The report also includes a response from the VWU describing the logistical and financial challenges it faces in providing protection to victims and witnesses. Special Rapporteur Report of the Mission to Rwanda (1998), paras. 11 and 12.

Ending impunity for individual perpetrators of gross violations of human rights is assumed to have a deterrent effect whereby governments and others engaged in warfare will observe more closely the rules of war and duties towards civilians. However, any such impact of the convictions for sexual violence before the ICTR in Rwanda and in the Great Lakes Region is negligible as evidenced by the civil war that begun in 1990 and which has continued intermittently between Rwanda's government and *interahamwe* to this day. With the Rwanda Patriotic Front takeover of government the *interahamwe-genocidaires* established a military and political base in the Democratic Republic of Congo (DRC) that soon formed deadly alliances with various Congolese insurgent groups.[43] This war has continued to threaten regional security as other African countries overtly and covertly allied themselves militarily with the DRC or Rwanda.[44] A widespread and unprecedented campaign of sexual terror against Congolese and Rwandan women caught in the crossfire has been a constant reality of the conflict in the Great Lakes region and is well documented throughout the region and internationally.[45] Observers report that the DRC government forces, insurgents, Rwandan forces and *interahamwe* are all responsible for the widespread rape of women and girls in the DRC. This backdrop to the ICTR judgments undermines daily any significance of the prohibition and punishment of sexual violence as a crime against humanity, a war and a form of genocide in the Great Lakes region and elsewhere.

4.2.2 Genocide and ethnic persecution

The Genocide Convention (1948) describes five acts as amounting to genocide if committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; and forcibly transferring children of the group to another group.[46] In the immediate wake of the Second World War and the Holocaust the drafters of the Convention identified that the aforementioned groups would be especially vulnerable to destruction through genocide.[47]

With the Holocaust as its reference point, the international community experienced, analysed and constructed violence in Rwanda as a genocidal (ethnic or racial) conflict. Thus, in its understanding of the range of crimes against humanity and genocide, the perpetrators of civilian massacres were overwhelmingly Hutus and the civilian casualties of the massacres were overwhelmingly Tutsis. This construction of the conflict is encoded in the language of Security Council Resolution 955. The Resolution's reference to the ICTR's jurisdiction over 'genocide and other serious violations of international humanitarian law' privileged the investigation and

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43 This protracted civil war has been the subject of various studies and even international court action. See the International Court of Justice's Press Release 2002/15, *The Democratic Republic of the Congo (DRC) initiates proceedings for provisional measures against Rwanda citing massive human rights violations by Rwanda on Congolese Territory,* 28 May 2002. The application of the DRC was ultimately dismissed when the ICJ found that it had no jurisdiction to entertain the application. See Press Release 2006/4 of 3 February 2006, Armed Activities on the Territory of the Congo (New Application: 2002), (Democratic Republic of the Congo v. Rwanda), Jurisdiction of the Court and Admissibility of the Application.

44 The New York Times describes the regional conflict as follows: In the aftermath of the Rwandan genocide in 1994, Hutu militias that carried out the killing fled into Congo, then known as Zaire. They eventually formed a group known by its French abbreviation, the F.D.L.R (Forces Démocratiques de Libération du Rwanda). It preys on Congolese civilians and enriches itself with the country's gold, tin and coltan, a mineral used in making the tiny processors in electronic equipment. In 1996, Rwanda backed a rebel force led by Laurent Kabila that ultimately toppled Congo's long-time president, Mobutu Sese Seko. The initial aim had been to capture the Hutu fighters who had carried out the genocide, but the fighting devolved into a frenzy of plundering of Congo's minerals, spawning a conflict that drew in half a dozen nations and left as many as five million people dead. Most died of hunger and disease. Congolese officials have accused Rwanda of supporting Tutsi rebels led by a renegade general from the same ethnic group as much of Rwanda's establishment. Rwanda has accused Congo's government of colluding with an armed group led by some of the Hutu militia who carried out the 1994 genocide in Rwanda. New York Times, *Militias in Congo Tied to Government and Rwanda*, 12 December 2008.

45 For accounts of the nature of the sexual violence against women in the DRC and impediments to justice see Human Rights Watch (2005) and (2009), Amnesty International (2008) and De Vries (2007).

46 Genocide Convention (1948), art. 2.

47 Ibid., art. 2.

prosecution of ethnic persecution in the shape of genocide as the chief crime committed in Rwanda and the Great Lakes region.[48]

Throughout the case law of the ICTR the construction of factual events and legal findings by the prosecutor is compellingly framed in the language of ethnic persecution. The Gacumbitsi case is an excellent case in point. The Gacumbitsi indictment describes the Rwanda Patriotic Front as 'predominantly Tutsi', the target of violence is 'Rwanda's civilian Tutsi population' and 'the ordinary citizens of Rwanda, primarily Hutu peasantry', are the killers.[49] The Prosecutor substantiates the ethnic violence thesis through the selection and examination of victims and witnesses of genocide. Eyewitness accounts of the attack on the parish of Nyarubuye where up to 30,000 Tutsi and Hutu displaced persons sought refuge from violence described how the Hutu were ordered or invited to separate themselves from the Tutsi before genocidal massacres could begin in earnest.[50] A particularly poignant testimony from witness TAQ describes how a young woman and child came out of the church when Hutus were ordered to separate themselves. However, the child was pushed back towards the refugees because he was summarily judged by the attackers to be a Tutsi. He was killed when grenades were lobbed into the crowd of refugees.[51]

Through such testimony we see the 'gender neutral' narrative of genocide where Tutsi children, men and women are felled by machetes, grenades and gunfire. There is a formal equality to the construction of collective Tutsi victimhood within the legal narrative. The following section describes the extent to which rape as a gendered form of violence was constructed within the ICTR narrative of violence.

4.2.3 Rape as ethnic persecution

Women's experience of the Rwandan genocide was marked by the intersection of race and gender in ways that were analogous with women's experience of violence in European ghettos and the Holocaust.[52] Chapter 3 referred to Fionnula Ní Aoláin's gender study of women and the Holocaust. She described how women in ghettos and concentration camps experienced separation from infant children, forced abortions, forced nudity and other abuses as specifically attacking their gendered and sexual identities constructed both at a societal and an individual level.[53] Ní Aoláin showed that the specific harms suffered by women were not addressed within the legal formulation of the protection of women which retained the narrow pre-War construction of women in their 'familial' role.[54] The emphasis of these descriptors lay on women as sexual reproductive vessels regenerating the racial, national, ethnical and religious group.

Ní Aoláin criticised the Laws of War, in particular the Geneva Conventions of 1977 and the supplementary Additional Protocols of 1977 and the jurisprudence of the Nuremberg Trials. This chapter, guided by Ní Aoláin's critique and conclusions, focuses its criticism on the material jurisdiction of the Genocide Convention which is replicated in the Statute of the International Criminal Tribunal and the case law of the ICTR, in particular the Akayesu case.[55] The Akayesu case is the landmark ICTR case that defined sexual violence as an element of genocide. It is amongst international legal scholars a celebrated case because the Trial Chamber's decision produced a broad definition of rape and sexual violence at the level of international law.

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48 his emphasis is made morepromounced when one considers that the ICTY was created to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. There was no reference to 'genocide' in the enacting Statute despite there having been strong allegations of genocide and ethnic cleansing made against the Serb government by the media and United Nations human rights investigators before the establishment of the Tribunal.

49 Sylvestre Gacumbitsi, Indictment, Case No. ICTR-2001-64-I, 01-06-2001, para. 3.

50 Sylvestre Gacumbitsi Judgment, Case No. ICTR-2001-64-T, 17-06-2004, para. 108 (referring to para. 15 of the Indictment of 01-06-2001.)

51 Sylvestre Gacumbitsi Judgment, Case No. ICTR-2001-64-T, 17-06-2004, para. 113.

52 See Ní Aoláin (2000).

53 Ní Aoláin (2000).

54 Ní Aoláin (2000), p. 15.

55 Jean-Paul Akayesu, Judgment, Case No. ICTR 96-4-T, 02-09-1998.

However, this chapter argues that the focus on women in the Genocide Convention, the Statute of the ICTR and the case law on sexual violence as genocide (represented by the Akayesu case) privileges the biological function of sexual reproduction and, to a lesser degree, the attendant gender role of women as primary carers of children over other harms women experience and which the perpetrator intends.[56] Thus, the persecuted woman is constructed first and foremost as a mother and the nature of harm is an ethnic group harm as the Tutsi group would no longer be able to regenerate itself and subsequently succumb to extinction.

This legal construction is an important but far from individualised construction of the scope of gender-based discrimination within the act of genocide.[57] Ní Aoláin pointed out that the perpetrator and the Holocaust victim understood the ways that acts of violence against women attacked complex and intersecting strands of women's gender identity and sexual autonomy.[58] Likewise, testimonies from survivors of Rwanda's genocide clearly enunciate the communication between perpetrator and victim about the nature of gender-based violence, the intent of the perpetrator and the harm the victim, her immediate family and her community experienced. Testimonies provided by the Special Rapporteur on Violence against Women on her mission to Rwanda are illustrative of this communication as well as the gendered and sexed spaces from which women's multiple harms arose. The testimony below is provided by a victim known as JJ who also testified as a witness before the ICTR:

> 'A young man rushed at me. He led me to the corner of the room. He undressed and put his clothes on the ground. I asked him what he was doing; he said I had no right to ask him anything. In fact, he did humiliating things to me even though I was a mother.'[59]

Placing the legal analysis of witness JJ's testimony within a social and cultural context highlights the weakness in calling for the outright rejection of 'motherhood' in order to advance humanitarian law protections for women:[60] Tutsi women were raped on a widespread and systematic scale because as 'women mothers' they would bear future generations of Tutsis. This is the single-axis, androcentric and antiquated legal analysis of any testimony of sexual violence in the context of ethnic cleansing, genocide or holocaust. Ní Aoláin's exceptional analysis presses the legal scholar of gender and violence to understand the attack against 'women mothers' not only as a nationalistic construct of the Hutu Power ideologues but also from the micro-level of the individual victim and the individual perpetrator.

Reading the testimony of witness JJ it is not clear whether she was fourteen or fifty years of age. What is clear to the perpetrator is that his victim is a mother and he is a youth. In the major cultures of the world, her societal status as a 'woman mother' far exceeds that of women who are unwed and who are childless. And certainly, her status exceeds that of a young unwed man. The status of motherhood would, in a civilised society, protect her from sexual advances from men outside of her matrimonial home. Witness JJ's harm and the perpetrator's intentions are both strongly influenced by this shared awareness of society's positive and empowering construction of women as wives and mothers. Witness JJ suffers an individual harm and the perpetrator is

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56 Genocide Convention (1948)
Article 2 (2) (d) (Imposing measures intended to prevent births within the group) and
Article 2 (2) (e) (Forcibly transferring children of the group to another group).
I note that the attendant gender role of rearing children is also widely understood to be a biological function as women's so-called maternal instinct is often linked to hormonal and other physical attributes such as producing milk or higher levels of estrogen.

57 Ní Aoláin concluded (and it is applicable to the case at hand), with respect to the Laws of War, that it is a construction that 'lacks breadth, encompassing only a fraction of what women actually experienced as sexual harm and which was intended as such by their captors.' Ní Aoláin (2000), p. 14.

58 Ní Aoláin (2000), pp. 13 and 18.

59 Taken from the testimony of witness 'JJ' as heard by the Special Rapporteur on 24 October 1997 when observing the trial against Jean-Paul Akayesu at the International Criminal Tribunal for Rwanda, Arusha. '*Interahamwe*' refers to Hutu militia groups during the 1994 genocide. Special Rapporteur on Violence Report on Mission to Rwanda (1998), para. 10.

60 Ní Aoláin writes that 'defining harms that categorically or even partially place the women in a maternal context is not without theoretical or practical complications. Feminist theory continues to struggle with and to rally against the essentialising of the female person to her unique biological capacities.' Ní Aoláin (2000), p. 15.

aggressing an individual woman in the corner of a room filled with male (presumably) Hutu aggressors and female (presumably) Tutsi victims. However, both the perpetrator and witness JJ also appraise the attack and the humiliation it brings as an attack on her sexual inviolability bestowed by her role as a mother.[61] In as much as some feminist theorists might frown at any focus on women as mothers, there is a need for us to explore and deeply analyse the ways in which victims and perpetrators understand motherhood as a gender, sex and sexual construct. Doing so is a necessary step in identifying the limitations of law in its construction of gender-based violence and its impact on women.

The Statute mandates the ICTR to prosecute genocide in the shape of causing serious bodily or mental harm to members of the group. For purposes of interpreting the relevant article, article 2 (2) (b), the Trial Chamber found that serious bodily or mental harm included rape and other forms of sexual violence.[62] Sexual violence as serious bodily or mental harm was described as the physical and psychological destruction of Tutsi women, their families and their communities.[63] The Trial Chamber's elaboration of gender-based violence in the commission of genocide was sensitive to physical, spiritual, psychological harms. And the reference to mental trauma was an important feature of the Chamber's analysis of individual harm.[64] However, it stops short of describing the source of trauma separate from the physical act of rape.

Legal analysis has failed to address the issue of social death resulting from an irreversible interruption to the gendered trajectory of life. Erin K. Baines stated that the nationalisation of the Rwandan state was produced in social spaces, including in the private sphere and in the location of the female body, most highly valued by the ability to reproduce children. Motherhood is a critical social identity and an esteemed status for women.[65] It is this exalted state that is cordoned off by genocidal rape and its reproductive harms such as infertility and infection with STIs including HIV. It is of course not the case that every woman who was raped was rendered infertile or developed an STI. However, this is a strong assumption made by local, national and international actors.

Social and physical death are closely interwoven. Pouligny rightly points out that the field of transitional justice has developed in 'almost total disconnection from other fields of expertise – more particularly anthropology and mental health studies' and that this disconnect partly explains the frequent de-contextualisation of international action. Moreover, whereas everybody understands why mass crime is traumatic to the individuals involved, the collective consequences of such trauma remain largely unconsidered – she calls for a closer scrutiny of the relation between legal or paralegal (such as truth commissions) processes and social and psychological processes.[66]

The Trial Chamber in describing rape as a form of ethnic persecution was aware that it was navigating a delicate balance, struggling not to erase the individual even as it described communal violence. In its legal analysis the Trial Chamber provides that for any of the acts charged under Article 2 (2) of the Statute to be a constitutive element of genocide, the act must have been committed against one or several individuals, because such individual or individuals were members of a specific group, and specifically because they belonged to this group. Thus, the victim is chosen not because of her individual identity, but rather on account of her membership of a national, ethnic, racial or religious group. The victim of the act is therefore a member of a group, chosen as such, which, hence, means that the victim of the crime of genocide is the group itself and not

61 This analysis would apply also in cases where the victim of rape is visibly pregnant or carrying a nursing child. In the major cultures of the world, these factors raise greater public outrage in cases of rape and other forms of gender-based violence.
62 Jean-Paul Akayesu, Judgment, Case No. ICTR 96-4-T, 02-09-1998, paras. 688 and 731.
63 Jean-Paul Akayesu, Judgment, Case No., ICTR 96-4-T, 02-09-1998, para. 731.
64 The UN General Assembly in its Resolution on the human rights situation in Rwanda recognized the extremely high number of traumatized children and women victims of rape and sexual violence, and urged the international community to provide adequate assistance to them. A/Res/50/200.
65 Baines (2003), p. 482.
66 Pouligny (2007), p. 7.

only the individual.[67] In a footnote the Trial Chamber reveals it has been guided by the position that victims as individuals 'are important not *per se* but as members of the group to which they belong.'[68]

This unabashed emphasis on ethnicity and the attendant issue of sexual reproduction was deemed by the Trial Chamber as essential in prosecuting genocide against the Tutsi group. It was also evident with the prosecution of sexual violence as a crime against humanity. The Chamber determined that for sexual violence to be a crime against humanity it must be committed as part of a widespread or systematic attack on a civilian population and on certain catalogued discriminatory grounds, namely, national, ethnic, political, racial, or religious grounds.[69] Thus, in the Akayesu case various acts of sexual violence such as forcing Tutsi civilian women and girls to strip naked and parade before crowds were determined to be crimes against humanity under article 3 (i) of the Statute (other inhumane acts). And the rape of Tutsi civilian women and girls at the bureau commune, in a nearby field and forest by *interahamwe* was deemed by the Trial Chamber to amount to rape as a crime against humanity under section 3 (g) (rape) of the Statute.[70]

In describing sexual violence as an element of genocide, the Chamber highlighted individual indignity such as being forced to sit in the mud prior to being raped, or being raped in a position that guaranteed one could witness the concomitant rape of a female relative. The idea of rape as an individual harm and an act of aggression against women (as opposed to an honour crime against her tribe or race) was stressed although, ultimately, as with genocide, rape as a crime against humanity was constructed primarily as an ethnic attack. Ultimately, the rapes had to be part of a widespread and systematic attack against the civilian ethnic population of Tutsis in Rwanda, between April 7 and the end of June, 1994.[71] The full implications of this requirement will be elaborated upon in the following section which deals specifically with alternative narratives.

4.3 Alternative narratives to ethnic rape

Ethnicity was a defining reality of the conflict but not the exclusive one. The alternative narratives referred to in this section reveal that sexual violence was in part emblematic of a conflict surrounding long-standing structural social inequalities in Rwandan society prior to the genocide. For example, widely held perceptions of gender roles regarded women as lacking legal capacity; thus they could not be property owners, except by extension through male guardians such as a father, an adult son or a husband. This construction of gender had implications in increasing women's vulnerability to sexual exploitation and abuse by men seeking to accrue property.[72] Evidence of this claim cannot be found within the transcripts and decisions of the ICTR; however, it is plausible when one considers Meredeth Turshen's theory to the effect that there is economic value in women's reproductive and productive potential as well as their right to property.[73]

Another traditional gender role in Rwanda saw women as primary caregivers and homemakers; thus women holding public office would be regarded as violating social norms and even challenging male dominance in the public sphere. This, too, could also make a woman more vulnerable to sexual violence in armed conflict by men seeking to symbolically return women to their domestic sphere for reproduction, production (farming) and other domestic services. These narratives and reality are present in the case law of the ICTR as the following section on alternative narratives will reveal. However, their significance as indicators of gender, class

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67 Jean-Paul Akayesu, Judgment, Case No. ICTR-96-4-T, 02-09-1998, para. 521.

68 Jean-Paul Akayesu, Judgment, Case No. ICTR-96-4-T, 02-09-1998, para. 521, (at footnote 100).

69 ean-Paul Akayesu, Judgment, Case No. ICTR-96-4-T, 02-09-1998, para. 598.

70 CTR Statute
Article 3: Crimes against Humanity. The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: a) Murder; b) Extermination; c) Enslavement; d) Deportation; e) Imprisonment; f) Torture; g) Rape; h) Persecutions on political, racial and religious grounds; i) Other inhumane acts.

71 Akayesu, Judgement and Sentence, Case No. ICTR-96-4-T, 02-09-1998, ibid. 695

72 Rose (2005), pp. 911-936.

73 Turshen (2001), p. 65.

and other grounds of discrimination are obscured by the exclusive focus on ethnicity and/or the sexual reproductive potential of women.

The scale of sexual violence committed against women during the genocide should not be understood purely as acts of genocide against women as a reproductive resource. The construction of sexual violence in Rwanda as a weapon of war is rooted in two highly gendered and interwoven hypotheses. Firstly, extremists used sexual violence in order to reclaim the lost ground of patriarchy and reassert a male dominance over Rwandan women. Secondly, sexual violence was supposed to perpetuate Hutu dominance and destroy all threats to the racial purity and unity.

Historical and anthropological accounts taken from the postcolonial era suggest that in Rwanda male dominance was maintained by customary laws and traditions rooted in patriarchy and legitimised by discriminatory Parliamentary enactments or omissions. In the mid-80s, for example, women in Rwanda, and no doubt elsewhere in the region, were increasingly active in business and enterprise. However, institutionalised discrimination against women's advancement was manifested in a number of ways. For example, banks would permit husbands to withdraw money from their wives' accounts without permission but would require a husband's consent before a woman could open her own account.[74] Further, Rwanda's customary laws barred women from inheriting land from their parents or partners. This custom was manifestly discriminatory and would have had far-reaching consequences for women's economic empowerment and security and must have perpetuated their dependency on husbands or other male custodians for security. It was only in 2000 that a law on inheritance and marriage settlements was enacted to rectify this situation.

Despite institutionalised and social challenges to the advancement of women in the public and private sphere, women, and especially those living in urban areas, made steady gains to such an extent that it created resistance: 'To many Rwandans**,** gender relations in the 1980s and 1990s were falling into a state of decadence as more women attained positions of prominence in economic and public life, and as more of them exercised their personal preferences in their private lives.'[75] Christopher Taylor recounts an incident that occurred in Rwanda's cities in the 80s and highlights the perceived threat that women's socio-political and sexual freedom posed to Rwanda's gender regime. He writes that 'scores of young Rwandan women, virtually all residents of Kigali, Butare and other cities in Rwanda, had been arrested and placed on 're-education farms' outside of Kigali. All were accused of 'vagabondage' or prostitution and some were indeed prostitutes. Others, however, were guilty of nothing more than having European boyfriends or consorting with Europeans socially.'[76]

In his analysis of this incident Taylor concludes that 'an underlying fear that motivated the campaign was that a national reproductive resource was gradually being lured away by the blandishments of foreigners' money. In addition, [men] lamented the dissolution of patriarchal authority and the diminishing control that older women exercised over younger women.'[77]

It is worth returning to Taylor's account of the arrests of women as a starting block in order to begin to understand the complex construction of the Tutsi woman's sexuality and her character in the ideology of Hutu hegemony and in the ethnographic literature. The said event occurred in the 80s when the prospect of rape as

74 Jefremovas (2002), pp. 88-89.
75 Taylor (1992), p. 130.
76 Ibid.
77 Ibid. Gisele Geisler describes a strikingly similar attempt by the Zimbabwean government to clean up the streets and control women. The operation targeted mainly young, single, professional women, squatters and vagrants. Thousands of women over the whole country were detained under the Vagrancy Act. Those who could not produce marriage certificates were sent to a resettlement area in the Zambezi Valley, where they were deprived of courts and lawyers. Far from being prostitutes many of the affected women felt targeted 'because they were young, single and showed evidence of earning their own living.' Geisler (1995), p. 557. Andrew M. Ivaska describes a comparable campaign of the harassment of and assaults against 'decadent' women by the Youth League of Tanzania's ruling party in the 1960s and 1970s. Ivaska attributes these attempts at defending Tanzania's culture against crises in rural-urban migration, conflicting ideas between modernisation and an idealised pre-colonial state. The mistrust of urban women and their mobility was a key feature and financially independent women working in offices and university undergraduates were regular targets in the campaign. Ivaska (2002).

a tool of genocide was inconceivable in Rwanda. It is perhaps for this reason that there is no allusion in Taylor's account as to the ethnic composition of the women 'vagabonds' and 'prostitutes' rounded up. It is therefore striking that in a subsequent book published soon after the genocide, Taylor revisits this incident and adds the surprising conclusion that 'the most enduring consequence of the repression was to plant the idea in the minds of many Rwandans that single Tutsi women were likely to be prostitutes.[78] Taylor's implication in the subsequent account of the same incident is that Tutsi women were the chief targets of this police harassment and arbitrary arrests.

Taylor's shift from a gender-based analysis of the incident to an exclusively ethnic-based analysis is analogous with the international community's decision to reduce gender-based violence and all other forms of violence in Rwanda to ethnic persecution for the purposes of the criminal justice process.[79]

Other legal commentators have called for the ICTR to pay attention to dual forms of discrimination, i.e. ethnicity and gender. But it was Doris Buss who took the erstwhile missing step in legal scholarship of seeking multiple forms of discrimination that made women increasingly vulnerable to sexual violence in Rwanda. Gender, class, nationality, religion and age, are some of the factors Buss points out are overlooked by the single axis construction of ethnicity as the key factor behind sexual violence against Tutsi women. Her analysis benefited from the analysis of social scientists, particularly Johan Pottier.

Pottier's account provides a survivor testimony to remind academics not to construct the Rwanda tragedy as a straightforward ethnic phenomenon. Pottier argues that besides deflecting from the class factor, a focus on 'pure' ethnic conflict masks the deep, historically evolved rift within Rwanda's Hutu population.[80] Pottier illustrates that gender, race, ethnicity and class were variables that influenced vulnerability and security, but also variables and identity tags that were shifting and interchangeable on a day to day basis during the genocide.

A genocide survivor states that 'people came to tell me that I was Tutsi and not a Zairean (zairoise). We argued for a long time until some people [among the killer mob] recognised me and said: 'Leave her alone, she is zairoise, and Zaireans are the friends of Rwanda.'[81] However, whilst her Zairean identity allowed her to disguise her Tutsi identity it did not protect her from an attempted rape. Pottier's survivor describes how a man who once served as her boy or house servant made a sexual advance towards her which she was able to rebuff. In her analysis of Pottier's survivor's narrative, Buss makes the plausible analysis that the desire to upend perceived or actual oppressive social hierarchies (such as master and boy) may have motivated rapists as much or more so than ethnic hatred as the genocide erupted in Rwanda.[82] The survivor is described by Pottier as a Tutsi, a Muslim and a Congolese national and this multiple identity allows her to escape Rwanda and genocide whereas her travelling companion, a Tutsi and a Muslim of Rwandan nationality, is repeatedly raped at checkpoints and eventually killed with her baby.[83]

The local narrative provided by Pottier reminds us that Tutsi women occupied identities outside of their ethnicities. In some cases, these multiple identities exaggerated vulnerability and in other cases reduced vulnerability or even provided immunity from genocide.

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78 Taylor (1999), p. 162.

79 This genocide/ethnic construction also has the effect of granting immunity to perpetrators who raped for reasons that were not ostensibly 'ethnic persecution'. Peyi Soyinka-Airewele explains how girls and women were obliged to 'offer themselves' to the Rwanda Patriotic Front soldiers in order to avoid being regarded as sympathisers of the deposed Hutu government. Soyinka-Airewele (2004), p. 27.

80 Pottier (2005), p. 204.

81 Pottier (2005), p. 205 Interestingly Pottier's survivor describes her surprise when she succeeds in escaping Rwanda and is warmly received in Bukavu by Zairean soldiers. The soldiers refer to her as a Tutsi despite her protests that she is a Zairean sister. Pottier (2005), p. 210.

82 Buss (2008) unpublished draft, p. 19.

83 A second companion, described as a Hutu woman, is able to take two of the murdered woman's children and pass them off as her own, thus saving their lives. Buss (2008), pp. 18-19.

Chapter 4

It is notable that the genocide survivor is the subject of an extensive and highly individualised study by an anthropologist and not a prosecutor. Perhaps it is for this reason that a striking feature of the survivor's narrative is the amazing level of agency she demonstrated when one considers the unprecedented levels of violence and upheaval accompanying a fleeing population.[84] Pottier's account reveals, however, that the exercise of agency (in this case, the decision and ability to flee, to bribe killers, to alter identities, and to adopt and shelter persecuted children) was shaped by gender, class, race, nationality, and other dynamics at play in the individual circumstances of a perilous and exploitative situation.[85]

The following sections focus on multiple forms of discrimination, particularly the intersection of class and gender that appear within the ICTR case law, visible yet un-interrogated for their gender significance. Building on Buss's multi-intersectional analysis I present three narratives: Narratives that are gender-based but that emphasise class status as an intersecting identity marker. Building on but distinguishing my narratives from Buss (whose focus was on Tutsi women) my narratives derived from within the judgments of the ICTR reveal the rape of what I describe as a Hutu 'Big' Woman, a Tutsi 'Big' Man and a Hutu 'Small' Woman. I use these terms to describe class status measured by prominence in society and determined by a host of factors such as level of education, wealth and powerful family connections.

Alternative narrative 1: The rape of a Big woman

The indictment against Bagosora described the assassination of important Hutu opposition leaders, prominent Tutsi and Belgian peacekeepers in the earliest hours of the genocide.[86] This indictment charges that the Prime Minister Agathe Uwingiliyimana was 'tracked down, arrested, sexually assaulted and killed by members of the Presidential Guard, the Para-Commando Battalion and the Reconnaissance Battalion.'[87] The Minister of Information, Minister of Agriculture, Minister of Labour and Communications, the President of the Constitutional Court and other opposition politicians were described as having been 'arrested, confined and killed'. Clearly, these local 'big' men and woman were killed because of their politics but also their prominent status in society, perceived wealth and superiority over ordinary Rwandans. But only Prime Minister Agathe Uwilingiyimana was raped because of her gender which distinguished her from her male counterparts.

In the amended indictments against Niyitegeka and Ndindiliyimana et al. the Prime Minister's experience is reduced to assassination, and no reference to sexual assault is made.[88] The Bagosora Judgment retained the reference to the sexual assault of the Prime Minister after her death, and a witness explicitly testified to having seen the Prime Minister's naked and bullet-ridden body lying openly in her residential compound with a bottle shoved into her vagina.[89] This provided an explicit description of sexual violence against the Prime Minister; however, this aspect of the assassination did not receive a legal analysis. However, analogous assaults against the bodies of Tutsi women received considerable legal analysis in Akayesu and other cases.[90] In its judgment the Trial Chamber found that as the highest authority in the Ministry of Defence, Bagosora was responsible for the murder of the Prime Minister.

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84 During the genocide up to 2 million people were displaced and 1 million escaped the country as refugees. Magnarella (1997).

85 Jayashri Srikantiah provides an excellent analysis of the limits of agency in the context of trafficking. It provides a useful analogy with women's agency and its limits in the context of armed conflict. Srikanthiah (2007), p. 199.

86 Théoneste Bagosora et al., Amended Indictment, Case No. ICTR-96-7-I, 31-07-1998.

87 Théoneste Bagosora Indictment, para. 6.9. The Bagosora Judgment (summary) repeats that 'The Prime Minister fled her home and hid at a neighbouring compound. She was found, killed and then sexually assaulted.' Bagosora et al. Oral Summary, ICTR-98-41-T, para. 23., 18-12-2008

88 Elezier Niyitegeka, Amended Indictment, Case No. ICTR-2000-56-I and Augustin Ndindiliyimana et al., Amended Indictment, Case No. ICTR-2000-56-I, 25-10-2002, paras. 48, 103 and 104.

89 Bagosora Judgment, ICTR-98-41-T, 18-12-2008, para. 705.

90 In the Jean-Paul Akayesu Judgment, Case No. ICTR-96-4-T, 02-09-1998, para. 686 the Trial Chamber decided that thrusting a piece of wood into the vagina of a woman as she lay dying constituted rape. The Trial Chamber in the Elezier Niyitegeka Judgment, Case No. ICTR-96-14-T, 16-05-2003, paras. 463-667 was confronted with a similar violation of a dead (as opposed to dying) woman. It decided that vaginally penetrating a corpse with a stick could not be rape but still amounted to a crime against humanity under the category of 'other inhumane act.'

The murder of the Prime Minister provides the backdrop to many ICTR cases, but the aspect of gender-based violence that marked her assassination is erased from the Prosecutor's examination of witnesses and ultimately from consideration by the Trial Chamber at the conviction and sentencing stages of the Tribunal. This whitewash of rape was made possible because the Prime Minister's Hutu identity jarred with the dominant rape narrative of the ICTR which states explicitly that Tutsi women were raped and all Hutu peasants were killers, rapists or accomplices.

Further, Agathe's 'Big' status distinguished her from the majority of Rwandan women (and men) and could have contributed to the construction within the judicial narrative of her sexual body as (sexually) inviolable. Interestingly, in the build-up to the genocide, Hutu Power media propaganda portrayed Uwilingiyama as a sex toy passed around by UN peacekeepers and Rwandan opposition leaders.[91] In order to reduce her from a 'Big' woman to a 'Small' woman, her sexual integrity was impugned, and ultimately she was sexually violated physically by agents of her political enemies. It is a paradox that being a 'Big' woman made the act of rape (which diminished women) difficult to acknowledge for prosecutors whilst at the same time being 'Big' made rape an essential element for Uwilingiyimana's subordination and ultimately her moral and political assassination.

The public nature and highly sexualised violation of the Prime Minister's corpse fit neatly into the thesis that sexual violence represented an armed gender struggle for power between men and women.[92] So whilst conceding that Tutsi women were primary victims of rape, the parallel and concomitant rape of both Hutu and Tutsi women functioned as a form of gender hegemony. Thus the infamous propaganda tool - the Hutu Ten Commandments - beseeched Hutu wives and sisters to ensure that their Hutu husbands and brothers did not recruit Tutsi women as concubines and secretaries. According to the Hutu Power ideologists, Hutu and Tutsi women's opportunities and potential were restricted to serving men through roles such as mistresses and secretaries.

It is impossible to ascertain from ICTR narratives whether other moderate Hutu women (whether they were as 'Big' as Uwilingiyimana or not) were sexually violated as a prelude to murder, as the murder of Hutu moderate women is never investigated by the prosecutor or specifically charged.[93] Gender-based violence against Hutu moderate women is simply referred to in broad and gender-neutral strokes, as in 'some Hutu moderates were also targeted for killings.'

The conflation of violent conflict at the intersection between gender, ethnicity and class were exacerbated in the case of the Prime Minister by regional considerations that led to the conflict between Rwanda's northerners and southerners. The Ntuyahaga indictment describes this political scenario:

> From 1973-1994, the government of President Habyarimana used a system of ethnicity and required quotas which was supposed to provide educational and employment opportunities for all but which was used increasingly to discriminate against both Tutsi and Hutu from regions outside of the North West. In fact, by the late 1980s persons from Gisenyi and Ruhengeri occupied many of the most important positions in the military, political, economic and administrative sectors of Rwandan society. Among the privileged elite, an inner circle of relatives and close associates of President Habyarimana and his wife Agathe Kanzinga, known as the *Akazu*, enjoyed great power. The

91 The term 'Hutu Power' has come to define a political movement that was best surmised by the Hutu Ten Commandments, a manifesto for ethnic segregation and exclusion. The primary goal of Hutu Power was to preserve Hutu dominance and supremacy in all areas of life and reject any form of power sharing between the extremist political parties and Tutsi or Hutu opposition parties. It demanded absolute loyalty to the ruling party and at its most extreme manifestation called for the extermination of the Tutsi as well as Hutu opponents to the government of Juvenal Habyarimana.

92 Mibenge (2007). This claim should not be taken to suggest that rape and other forms of sexual violence were widespread in Rwanda prior to the conflict. Christopher Taylor observes that in more peaceful times, Rwanda was not characterised by a high incidence of rape. However, after the 1990 invasion of Rwanda by the RPF the nation became increasingly militarised and violent. Sexual violence became widespread, but this was not a 'normal' state of affairs. Taylor (1999), pp. 157-158.

93 Others have noted that all Tutsi women were targeted for rape and that educated, elite women were attacked, regardless of their ethnicity. Mzvondiwa Ntombizodwa (2007), p. 101, citing Newbury (1988).

> select group almost exclusively Hutu was supplemented by individuals who shared its extremist Hutu ideology, and who came from the native region of the President and his wife.[94]

Before 1990 the great political conflict in Rwanda was the conflict between the 'prosperous' North which benefited disproportionately from the President's patronage and the rest of the country which was thoroughly neglected and underdeveloped.[95] In this setting, Prime Minister Agathe was a Big woman, who overstepped and upset gender and class hierarchies and she was also a southerner. This factor contributed to her appointment as Prime Minister under the power-sharing agreement under the Arusha Accords and it would not be surprising that this factor contributed to her assassination and sexual violation. As a 'Big' woman, as a southerner, her status and gender must have been a particular affront to the Hutu Power ideologues.

The Prime Minister's assassination is adjudged by the Trial Chambers as a crime against humanity (murder) and part of a widespread and systematic attack against civilians on political and national grounds. Describing Hutus who were killed for their 'moderate' politics is meant to indicate their Tutsi sympathies and opposition to Hutu Power.[96] So, whilst the Prime Minister's assassination is ostensibly not based on ethnic persecution, it is tied to her perceived empathy to the Tutsi. There is an absolute exclusion by the ICTR of an analysis and discussion of the significance of her gender, status, or southern identity on the nature of violence and its possible wider impact on Rwandan women's security and vulnerability during the armed conflict and genocide in Rwanda.

Alternative narrative 2: The rape of a Big man

The issue of class and/or other social conditions shaping sexual violence can also be seen in the narrative provided by the Niyitegeka and Muhimana cases where the ICTR presents a rare reference to sexual violence against a male victim.[97]

According to witness testimony in the Niyitegeka and Muhimana cases the killers were 'tired of killing' but their zeal was reignited when Assiel Kabanda was found. 'The attackers rejoiced at his capture - they had been looking for Kabanda for several days because he was an influential trader and well-liked.' Kabanda was killed and then decapitated and castrated with a machete. His skull was pierced through the ears with a spike and carried away by two men, each holding one end of the spike with the skull in the middle. Kabanda's head and genitals were subsequently hung up and displayed near his shop.[98]

The Trial Chamber in Niyitegeka treated the testimony on the killing of Kabanda as a unique and especially shocking event. Kabanda's killing was even invoked at the sentencing stage as an aggravating factor.[99]

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94 Bernard Ntuyahaga, Case No. ICTR-98-40-I, 28-09-1998. See Peter Uvin for a detailed study of the *Akazu* northern power base.

95 The Théoneste Bagosora Indictment describes that the early years of Rwanda's First Republic was under the domination of the Hutu of central and southern Rwanda – led by Gregoire Kayibanda. However, in 1973 ethnic and political tension between the North and South resulted in a military coup by General Juvenal Habyarimana on 5 July 1973 shifting power from civilian to military hands and from the Hutu of central Rwanda to the Hutu of the northern prefectures of Gisenyi and Ruhengeri (Habyarimana's native region). Theoneste Bagosora, Amended Indictment, Case No. ICTR-96-7-I, paras. 1.2 and 1.3. See also Mamdani (2000) for a detailed account and analysis of the North-South political and economic divide in Rwanda. And Erin K. Baines argues that the *Akazu* spurred on anti-Tutsi discourse as a means of diverting attention from class and geographic tensions in Rwanda. Baines (2003), p. 485.

96 See the reference in Jean Kambanda, Judgment and Sentence, ICTR-97-23-S, 04-07-1998, para. 39 (iv) 'Jean Kambanda acknowledges his participation in a high level security meeting at Gitarama in April 1994 between the President, T. Sindikubwabo, himself and the Chief of Staff of the Rwandan Armed Forces (FAR) and others, which discussed FAR's support in the fight against the Rwanda Patriotic Front (RPF) and its "accomplices", understood to be the Tutsi and Moderate Hutu.'

97 Elezier Niyitegeka, Indictment, Case No. ICTR-97-27-I, 11-07-1997. Mikaeli Muhimana et al. Amended Indictment, Case No. ICTR-95-1-I, 20-10-2000.

98 Elezier Niyitegeka, Judgment and Sentence, Case No. ICTR-96-14-T, 16-05-2003, paras. 303, 312, 417, 462 and 271. See also Mikaeli Muhimana, Judgment and Sentence, ICTR-95-1B-T, paras. 441, 443, 462.

99 Elezier Niyitegeka, Judgment and Sentence, Case No. ICTR-96-14-T, 16-05-2003, para. 499.

However, it raises questions for the inquisitive gender/legal researcher. Was the castration of men widespread? Was the castration of Tutsi men widespread and systematic? Was the castration or sexual mutilation of murdered Tutsi men a symbolic prevention of births (genocide) or forced sterilisation (genocide)?[100] The testimony of General Romeo Dallaire suggests that the castration or other sexual violence against men is another incomplete gender narrative in the ICTR case law. In the Bagosora (Military 1) case Dallaire describes the state of decomposing corpses: 'There were some men that were mutilated also, their genitals and the like.'[101] However, his observation that men were sexually mutilated is lost in a longer testimony about the rape of women and girls. Dallaire immediately 'sees sex' in the shape of women's corpses lying with their dresses over their heads, but his testimony on castrated men does not raise a hint of sexual violence against men.

The description of Kabanda's castration in the Niyitegeka case and Dallaire's testimony account of castrated men as non-sexual attacks are in themselves the product of gender-prescribed ideas of a man's body, which cannot or should not be sexually victimized, unlike the weak, sexually vulnerable and open body of a woman.[102] This construction was internalized by the Office of the Prosecutor in its charging of crimes. Ultimately, the Trial Chamber mirrored this gender blind spot and in the Bagosora judgment, Dallaire's testimony is edited to the extent that only the gender-based violence against women is reflected and acknowledged by Chambers.[103]

The issue of sexual violence as a form of gender-based violence against men in armed conflict has been largely ignored by legal researchers providing a gender commentary on transitional justice processes in Africa. Sandesh Sivakumaran presents one of the most detailed legal studies on the subject and presents evidence indicating that sexual violence takes place against men in armed conflict in nearly every armed conflict in which sexual violence is committed. What remains unknown is the precise extent to which this crime occurs.[104] Sivakumaran's typology of sexual violence against men challenges the legal researcher to examine the castration of Kabanda and Dallaire's cursory reference to mutilated men through a gender lens. Could the

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100 Sexual mutilation is listed alongside genocidal measures such as forced sterilisation in the Rutaganda, Akayesu and Musema Judgements under Article 2 (2) (d) (of the Statute): genocide as a measure to prevent births. See also the Jean-Paul Akayesu Judgment and Sentence, Case No. ICTR-96-4-T, 02-09-1998, para. 507.

101 Théoneste Bagosora, Trial Chamber Decision, Decision on motions for judgement of acquittal, ICTR-98-41-T 02-02-2005 (at footnote 63) testimony of General Romeo Dallaire, Transcript of 20 January 2004, pp. 31-33.

102 In the context of the armed conflict in the former Yugoslavia and elsewhere, Dubravka Zarkov explains the low reporting of sexual violence against men as linked to the fact that masculinity is inseparable from power, and thus, unimaginable as victimized. Victimised man is not a man. Within the definition of masculinity in our societies, men are always and only rapists, and thus, unrapeable. Zarkov (1997).

103 Dallaire testified as follows regarding sexual violence:
'Some of the sites ... and you could see by the layout of the women and so on that rape and then mutilation had happened ... that is I am speaking about my observers and myself that young girls, young women, would be laid out with their dresses over their heads, the legs spread and bent. You could see what seemed to be semen drying or dried. And it all indicated to me that these women were raped. And then a variety of materials were crushed or implanted into their vaginas; their breasts were cut off ... a number of the women had their breasts cut off or their stomach open ... I would say generally at the sites you could find younger girls and young women who had been raped or, you know, deducting that they were raped ... I would say that not many sites that were reported did not have such scenes of rape.'
Théoneste Bagosora, Trial Chamber Decision, Decision on motions for judgement of acquittal, ICTR-98-41-T, 02-02-2005 (at footnote 63) testimony of General Romeo Dallaire, Transcript of 20 January 2004, pp. 31-33.

104 Siyakumaran notes that in some conflicts the sexual violence seems sporadic and ad hoc, in others it is clearly more systematic. He provides an illustrative list of conflicts where sexual violence against men has been chronicled in the more distant past as well as in contemporary conflicts. In Ancient Persia, and the Crusades, as well as by the Ancient Greek, Chinese, Amalekite, Egyptian and Norse armies. It has occurred in the conflicts in El Salvador, Chile, Guatemala, and Argentina. It has been perpetrated in the conflicts in Greece, Northern Ireland, Chechnya, Turkey, and the former Yugoslavia. It has been a feature of the conflicts in Sri Lanka, Iraq-Kuwait, Coalition-Iraq, and the Sino-Japanese war. It has been present in the conflicts in Liberia, Sierra Leone, Kenya, Sudan, the Central African Republic, Burundi, Uganda, Rwanda, the Democratic Republic of the Congo, Zimbabwe, and South Africa. Sivakumaran (2007), pp. 257-258.

castration of Kabanda be constructed as a form, albeit symbolic, of forced sterilisation, a crime that would also fall under Article 2 (2) (a) of the Genocide Convention?[105]

The killing, decapitation and castration of Kabanda were determined by the ICTR to be a crime against humanity (other inhumane acts). This was an interesting conclusion considering that in a comparable testimony Niyitegeka ordered *Interahamwe* to undress the body of a Tutsi woman, who had just been shot dead, and to fetch and sharpen a piece of wood, which was then forced into her vagina.[106] The Chamber actually decided that the castration of Kabanda and the penetration of the dead woman's body were acts of seriousness comparable to other acts enumerated in Article 3 (crimes against humanity) of the Statute, and would cause mental suffering to Tutsi civilians, and constitute a serious attack on the human dignity of the Tutsi community as a whole.[107] However, and tellingly, the attack against the woman's genitals and corpse is referred to as a sexual violation, while the attack against Kabanda is simply described as 'the killing, decapitation and castration'.[108] There is a glossing over of the fact that castration is not merely an amputation but the amputation of a male sexual and sexual reproductive organ. This omission or silence in the narrative is clearly gendered.[109]

In the same vein, the killing of Belgian peacekeepers by militias provides a backdrop to the genocide in many of the ICTR cases. The Ntuyahaga indictment provides that four of the Belgian soldiers were killed on the spot whilst the six remaining Belgian soldiers withstood several attacks for a number of hours before finally being killed. Journalists have reported that the Belgian soldiers were subjected to torture and mutilation including castration.[110] The absence of any such reference in the charges supports a conclusion that the ICTR narrative of gender and gender-based violence precluded the powerful Western male military body from sexual humiliation.[111]

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105 Ibid. p. 265. There has been some discussion on the symbolic meanings of castration in Rwanda. See Alison Des Forges' explanation that in pre-colonial times some Tutsi kings would decorate a ceremonial drum with the genitalia of defeated enemy rulers. Des Forges (2007), p. 45. Hutu propaganda used this historical image to circulate a false claim that Burundi's President was castrated, when in fact he was killed by a bayonet blow to his chest in 1993. Ranck produces a lurid cartoon depicting the first elected president of Burundi, Ndadaye, hanging on a cross while the leaders of the Rwanda Patriotic Front castrate him. The cartoon caption reads: Finish off this stupid Hutu, let us hang his genitals on a drum.' Ranck (1998), p. 45. It could also be argued that the castration of Kabanda was constructed or understood at the local level as toppling or emasculating Tutsi kings.

106 Elezier Niyitegeka, Judgment and sentence, Case No. ICTR-96-14-T, 16-05-2003, para. 463

107 Elizier Niyitegeka, Judgment and Sentence, Case No. ICTR-96-14-T, 16-05-2003, para. 465.

108 Franke writes that any body part could be considered a sexual or intimate body part depending upon the context in her article examining sexual acts being used as an instrument of gender and race-based terror in a case of policy brutality in the form of sodomy. Franke, (1997-1998) pp. 1158 and 1160.

109 Katherine M. Franke makes a similar observation of the ICTY proceedings in the Meakic case which acknowledge the sexual element of torture that women suffered while concealing the sexual element suffered by men in comparable contexts and conditions. The torture and humiliation of female prisoners was prosecuted as 'wilfully causing great suffering or serious injury to body or health' and rape, but the torture and humiliation of male prisoners even when it specifically targeted the genitals was prosecuted as wilfully causing great suffering or serious injury to body or health 'and other inhumane acts'. Further in the Tadic case the defendant was charged with committing a crime against humanity under Article 5 (g) (rape) against a woman prisoner. However, in another case, the defendants beat a male prisoner, after which they forced two other male prisoners to lick the beaten prisoner's buttocks and penis, and then to bite off one of his testicles. The Prosecutor charged Tadic with a grave breach under Article 2 (b) (torture or other inhumane treatment), a violation of the laws or customs of war under Article 3 (cruel treatment), and a crime against humanity under Article 5 (i) (other inhumane acts) of the Statute. Dusko Tadic was not charged with violating Article 5 (g) of the Statute (rape), even though the conduct included forced fellation and other sex and gender-based violence. Franke, (1997-1998), p. 1168 -1169 referring to Zejko Meakic et al., Indictment, ICTY, Case No. IT-94-I-T, 02-13-1995 and Dusko Tadic et al., Second Amended Indictment, Case No. IT-94-I-T, ICTY, 14-12-1995 and Dusko Tadic et al., Initial Indictment, Case No. IT-94-i-T, ICTY, 13-02-1995.

110 Peterson (2000), p. 292. Dubravka Zarkov discusses the specific meaning men give to castration. It is an act of physical as much as symbolic de-masculinisation, of stripping man of his masculine powers symbolised by his penis. It makes a man into a non-man. It is not in itself an act of a perverted homosexual desire; it is an act of perverted desire for power. Zarkov (1997), p. 144.

111 Kirsten Campbell complicates my analysis somewhat with her analysis of the legal proceedings before the ICTY. Campbell points out the unexpectedly high number of cases and counts involving sexual violence against male victims. First, prosecutions against these cases are in clear contrast to the general lack of visibility of male sexual assault in the Yugoslavian conflict; both in terms of media coverage and in comparison to the institutional and legal focus upon sexual violence

Ignoring the sexual and gender construction of the crime of castration is possible because of the precedent set by the Akayesu narrative which privileged ethnicity and essentialised sexual violence as a crime committed exclusively against Tutsi women. According to this, women could be raped only if they belonged to the Tutsi group. This precluded any serious investigation, analysis or understanding of the nature of sexual assaults against men or Hutu women.

Despite the obvious difference in their sex and perceived gender roles, the desexualised description of Kabanda's assassination is analogous with the assassination narrative of Agathe Uwilingiyimana described above. Both of these victims were 'Big', powerful, wealthy, respected, and influential. Neither fit the passive Tutsi victim role. The following questions arise: Why was Agathe raped if she was not a Tutsi woman? Why was she killed even before Tutsi women? The focus by the ICTR on ethnicity (Agathe was a Tutsi sympathiser and therefore a Tutsi) alone leaves the burden on scholars to discern different and intersecting motives behind Agathe's assassination and their wider implications on the nature and impact of the conflict in Rwanda.

The rape of women and the castration of men are at the same end of the domination paradigm.[112] Looking into the issue of male sexual violence will not take away from female sexual violence for ultimately it forms part of the same issue, namely the gender dimension of conflict.[113] There is a strong link between male sexual violence and sexual violence against women and it is doubtful that sexual violence as a tool of warfare would target only women. Certainly, levels of sexual violence, the nature of this form of violence, the societal meanings attaching to it and its scale would differ. Such differences would arise around gendered constructions of masculinities and womanhood, and not merely around biological differences between men and women. Male sexual violence should be considered under the same rubric and using similar analyses as sexual violence against women for, as will be seen, the dynamics, the constructions of masculinity and femininity and the stereotypes involved are similar.[114]

Alternative narrative 3: The rape of a 'Small' woman

The concluding narrative describes the intersection of gender-based violence with class, in this case where vulnerability to rape attached to a low class status combined with youth/childhood.

Muhimana was charged with genocide, complicity in genocide, murder as a crime against humanity and rape as a crime against humanity.[115] With respect to the rape charge he was charged with committing rape as part of a widespread or systematic attack against Tutsi women civilians and other women perceived to be Tutsi in Gishyita sector, Mugonero church, hospital and nursing school, and in the Bisereso area.[116] The particulars of this charge describe gang rapes and multiple rapes committed by Muhimana and his cohorts in public spaces designed to attract spectators and incite others to rape Tutsi women. In one instance Muhimana raped women in his home and thereafter paraded them naked before crowds of civilians and *interahamwe*. [117]

Witness BJ is a Hutu and at the outset of genocide she was a house servant and at fifteen years of age she was a minor. Witness BJ's rape testimony leads to another alternative and marginalised rape narrative – similar but distinguished from the narratives produced by the assassinations of Uwilingiyimana, the peacekeepers and

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against women. Second, the high proportion of counts of male sexual assault is surprising given the generally agreed predominance of sexual violence against female victims in the conflict. The high number of male sexual violence prosecutions by the ICTY does not reflect the presumed gender differential patterns and scales of sexual assaults. Whilst the highest range of women raped is 50,000, there are no claims that the number of men sexually assaulted is comparable to the widespread and systematic rape of women. She accounts for this by the fact that the high number of counts of male sexual assault may be explained by the disproportionate number of male witnesses appearing before the Tribunal. Eighty percent of Tribunal witnesses are male and 20 percent are female. Campbell (2007), pp. 422-424.

112 Card (2004), p. 136.

113 Sivakumaran (2007), p. 260.

114 Ibid. p. 260.

115 Mikaeli Muhimana, Revised Amended Indictment, Case No. ICTR-95-1B-I, 29-07-2000.

116 Mikaeli Muhimana, Revised Amended Indictment, Case No. ICTR-95-1B-I, 29-07-2000, para. 6.

117 Mikaeli Muhimana, Revised Amended Indictment, Case No. ICTR-95-1B-I, 29-07-2000, para. 6 (a) (i).

Kabanda. One that supports Hermien's suggestion that sexual violence against women and girls was widespread and indiscriminate.

On 16 April 1994 after she witnessed assailants killing refugees, witness BJ fled to a hospital, where she hid in a room with two other girls, Murekatete and Mukasine. Muhimana entered this room with two accomplices. The men were armed with a club, machete and a sharpened stick. They ordered the girls to strip and lie on their backs in order to show the men their Tutsi genitals. Witness BJ did as she was told believing that she would be killed otherwise. Muhimana raped her as Murekatete and Mukasine were raped beside her. Muhimana then prepared to insert a sharpened stick into her vagina when one of the *interahamwe* suddenly identified her as a Hutu. Muhimana apologised to witness BJ and said he had been unaware that she was a Hutu.[118] She was then allowed to escape. She quickly ran home because she was told by her rapist that if she remained too long on the road, the *interahamwe* could mistake her for a Tutsi and kill her. The witness never saw Murekatete and Mukasine again. The fact that witness BJ was a child was considered an aggravating factor in the sentencing of Muhimana.[119] However, her rape and Muhimana's 'apology' was treated as proof of the genocidal intent of Muhimana and his accomplices. Witness BJ's testimony served to reinforce the prosecutor's focus on ethnic rape as opposed to rape as a form of gender-based violence that saw Rwandan women preyed upon throughout the genocide.

Kabanda, the prominent Tutsi businessman, and Agathe Uwilingiyimana, the southern Hutu woman Prime Minister, occupied a completely different social plane from witness BJ.[120] While Uwilingiyimana and Kabanda's power and privileged ethnicity collided with gender to increase their vulnerability to persecution and to sexual violence, it was witness BJ's lack of social status that exposed her to sexual violence. She was a child and unprotected by a male guardian or family network. Unlike the *Zairoise*, the Tutsi survivor described by Pottier, she did not have the stature to bribe or intimidate attackers. Witness BJ was unable even to speak and identify herself as a Hutu in order to spare herself from rape as a mature or more assertive woman might have done. She noted in her testimony that she escorted and delivered her employer's children to the church where her employer had taken refuge, thereafter she had to seek her own sanctuary. Unlike her employer's children, witness BJ was an unaccompanied minor with no parent or guardian to shelter with. Indeed the warning she received from her rapist as she escaped the hospital that she might be mistaken for a Tutsi and killed on the road is rather disingenuous. Witness BJ was raped because she was powerless and insignificant and not because she was mistaken for a Tutsi woman.[121]

It is feasible that Muhimana (and no doubt other men who transformed themselves into serial rapists during the genocide) was reckless as to BJ's ethnicity and simply preyed sexually on young women made vulnerable by displacement. Certainly, all of the other women raped by Muhimana or raped at his instigation are identified by the prosecutor's witnesses as Tutsi; however, the fact that only Tutsi rapes were investigated and charged should not have to mean that other rapes did not take place on a widespread scale. I concur with Clara Chapdelaine Feliciati's argument that the widespread victimisation of the girl child is excluded from the narrative of sexual violence and genocide in Rwanda. She argues that the analysis of violence should be both 'gendered' and 'childered'. It is doubtful that witness BJ was the only young, unaccompanied, unprotected,

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118 Mikaela Muhimana, Judgment, Case No. ICTR-95-1B-T, 28-04-2005, para 284-286.

119 Mikaela Muhimana, Judgment, Case No. ICTR-95-1B-T, 28-04-2005, paras. 61, 606 and 607. The Chamber noted that art. 360 of the Rwanda Code Penal in effect in 1994 directed Rwandan Courts to consider the age of the victim (regarding minors) as an aggravating factor in sentencing for the crime of rape.

120 Identity can be a double-edged sword. Kabanda's Tutsi identity was both a source of his power and the source of his vulnerability in the context of the genocide. Agathe's Hutu identity was a source of her power as well as the source of her vulnerability in the context of the political struggle.

121 Gerard Prunier writes that as the French humanitarian intervention in Rwanda began, the Hutu extremist radio invited Hutu women to welcome them: 'You Hutu girls wash yourselves and put on a good dress to welcome our French allies. The Tutsi girls are all dead, so now you have your chance.' Prunier (1995), p. 292, quoted by Taylor (1999a). I find this a disingenuous call from the Radio and its allusion that witness BJ and other Hutu girls enjoyed uninterrupted lives secure from sexual violence and violence during the genocide. The radio invitation was also framed in the context of the colonial ideology of Hamitism which depicted Tutsi women as more beautiful and desirable than Hutu women. Taylor (1999), p. 156.

poor girl who was 'mistaken' for a Tutsi woman during the genocide.[122] Other 'small' or vulnerable Hutu women and girls experienced violence including sexual violence by opportunistic predators.[123] This claim is sustainable even without taking account of the documented widespread and systematic sexual exploitation and abuse of Hutu and Tutsi women that occurred in refugee camps in the DRC after 1994 before the repatriation of Rwandan citizens commenced.[124] Pottier describes how Laetitia, a Tutsi woman who could pass as a Hutu, travelled through Rwanda with a (forged) Hutu ID. However, her successful adoption of a Hutu identity did not stop the soldiers from raping her.[125] Hutu women fleeing violence were vulnerable to sexual violence and in many cases experienced it.

The Defence challenged witness BJ's credibility on the ground that she should have identified herself as a Hutu when Muhimana spoke of Tutsi women. Her explanation is very striking: She thought all Rwandans were the same as they had taken refuge in the same place.[126] This response by witness BJ is important when one considers her seeking refuge with Murekatete and Mukasine, young women who did not live to testify before an international criminal tribunal. At the moment Muhimana and his cohorts entered the room the three girls were all the same. Gender was the unifying group characteristic between witness BJ, Murekatete and Mukasine and it is what defined the sexual violence they experienced. It cannot be denied that, ultimately, ethnicity spared witness BJ from death.

4.3.2 Concluding analysis

Chapters 2 and 3 presented a tri-generational framework of human rights instruments and discussed the ways in which gender as a group and as an analytical tool entered into the construction of protection and harm. This process of maturity whereby gender entered the scope of human rights instruments redistributed rights and widened the categories of rights holders. Human rights laws are being drafted and interpreted in order that the experiences of women, including those women who have been traditionally excluded from the human rights narrative, are being understood as products of inequitable distributions of power in their private and public lives. Chapter 3 also focused on third generation rights instruments and their situating human rights violations in situations of conflict and armed conflict and how this impacted the understanding of gender and gender-based violence.

In chapter 4 we see the practical application by an international criminal tribunal of the gender analysis presented by Comments of treaty bodies, Mission Reports of thematic Rapporteurs and other instruments. The ICTR is a mechanism of accountability envisaged and in some cases specifically called for by third generation instruments, and it should not come as a surprise that its construction of gender is shaped by the parameters set by human rights instruments.

A feature of the gender analysis that emerged from the tri-generational framework is its strong focus on women. Second and third generation instruments such as the CERD General Comments and the HRC General Comments make credible analyses of the different ways rights abuses impact women vis-à-vis men; and increasingly, the different ways different women experience rights abuses - for example, migrant women have limited access to justice in contrast to female citizens. In the face of the historical exclusion of women from legal status and legal protection from egregious abuse it is difficult to challenge the application of the gender

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122 Feliciati (2006), p. 23.

123 Opportunistic rapes of Hutu and Tutsi women committed by perpetrators on a violent rampage as opposed to with any intent to commit genocide are described by Gasana et al. (1999) p. 165, Adedeji (1999), p. 72, Amnesty International (2004), p. 6; and OAU/IPEP (2000), p. 164. Opportunistic killings of Hutus by Hutu militias was also widespread as the young men who hung around the [road barriers], often drunk or under the influence of marijuana, plundered, raped and even killed Hutu bystander and passers-by. Sometimes they confiscated identity cards from victims so that they could claim that they were Tutsi. They paraded through the sectors with the firearms meant for use at the barriers, extorting what they wanted from unarmed neighbours. Des Forges (1999), p. 572.

124 See Baldwin (2006).

125 Pottier (2005), p. 207

126 Mikaeli Muhimana Judgment, Case No. ICTR-95-1B-T, 28-04-2005, para. 290.

analysis predominantly on women's experience of harm. As stated earlier, women's experiences were ignored by early human rights instruments to the extent that they varied from that of the 'elite' or 'authentic' male. However, the focus on women as the primary beneficiaries of the gender analysis has had consequences for men who by the gender standards of their communities are neither 'authentic' or 'real' men and whose experience of human rights denial is shaped by this perception. So, sexual violence against transgender men in US male prisons, racial profiling by the police of 'Muslim' male commuters in European capitals, the murders of 'gay' men in Brazil or violent assaults against 'African' male students in Russia's cities – these and other rights abuses which predominantly target society's 'deviant' or subaltern masculinities are highly gendered but are not yet articulated as such by the human rights law narrative of gender-based discrimination and inequality.

The alternative narratives drawn from the ICTR case law presented allusions to sexual violence against men that are only partially acknowledged by prosecution witnesses, the prosecutor and the trial chambers. This ambiguity surrounding sexual violence against men in armed conflict reflects the reality that the emphasis on women in the human rights law gender analysis has been privileged over an investigation into the ways men who are outside of the elite male experience gender-based violence and other forms of discrimination. This has specific consequences in peace and highly specific gendered consequences in armed conflict as the cases of Kabanda, the Belgian peacekeepers, and Agathe Uwilingiyimana (a woman as powerful as any man in her cultural and political context) revealed.

Men and women feminists have fought hard for the inclusion of women's gendered experiences of inequality, and it remains an ongoing battle. The alternative narratives in this chapter raise the conclusion that the human rights framework has yet to fully construct gender as a ground of discrimination that targets women as well as men. It would be strengthened by a broadening of the gender analysis to include a deeper analysis of gender-based discrimination - this could empower international ad hoc tribunals as well as the permanent International Criminal Court to do justice to gender. This is not to suggest that gender is not evident in the case law of the ICTR. However, the alternative narratives in this chapter illustrate that the inclusion of gender in the narrative of justice does not always signify a thorough or even accurate analysis of gender-based violence against women even.

The second conclusion drawn from the alternative narratives described in this chapter relates to the ICTR's singular focus on ethnicity to the exclusion of other factors contributing to genocide. The singular focus on ethnic persecution is rooted in the construction of the Holocaust as a model for crimes against humanity. As with the Holocaust, this construction led to a limited understanding of the nature of the genocidal conflict, and the complex motives fuelling armed conflict. Other conflicts were waged in Rwanda, including gender conflicts, agrarian conflicts, religious conflicts and Hutu North and Hutu South conflicts. However, the legal framework adopted with Security Council Resolution 955 effectively stole and then erased these conflicts from the perpetrator as well as the victims.[127] In its mission to create a pure ethnic-based conflict in line with the Resolution, the Office of the Prosecutor refused to engage in any serious investigation, analysis or prosecution of grave breaches of humanitarian law and crimes against humanity outside of the Hutu *genocidaires* versus Tutsi victim paradigm. This had the effect of placing all Hutus within the perpetrator role and all Tutsis in the role of victim.

The final outcome was disastrous for women as the single axis construction of discrimination produces an incomplete narrative that demands an either/or dichotomy. In this either/or dichotomy, where 'either you were raped or you are not a Tutsi' any serious analysis of gender discrimination was sacrificed to the extent that violence against women was reduced to ethnic rape. Thus the rape of women could only be acknowledged if the victim was a Tutsi and if the Hutu perpetrator intended to commit genocide. Those social makers such as education, lack of education, middle class or elite that greatly distinguish even a 'unified' group experience, were entirely subsumed by the primary focus on ethnicity and the misdirected construction of sexual violence as only a sexual reproductive (ethnic) issue. Understanding gender as a social construct as opposed to

127 Nils Christie describes lawyers as particularly good at stealing conflicts from victims. Christie (1977), p. 4.

biological functions such as menstruation, lactation and pregnancy is essential to a meaningful criminal justice response to sexual violence in Rwanda and elsewhere. Gender permits an investigation into Hermien's assertion that 'we women were all raped.' It would also permit an investigation into gender based violence that targets masculinity. It would also compel investigators, be they prosecutors or academic/legal commentators, to note and incorporate intersections apart from ethnicity that heighten vulnerability and shape sexual violence into an effective and far-reaching weapon of war.

CHAPTER 5

Narratives on Gender and Violence: The Sierra Leone Truth and Reconciliation Commission

5 INTRODUCTION AND BINTU'S NARRATIVE

I was sharing lunch with Chief Sesay,[1] my host in the Provinces in Sierra Leone. He reminisced about his return to the town after his exile during the civil war. He recounted a conversation with Bintu,[2] a woman who had lived under the rebel occupation of the town. This conversation made a lasting impact on the Chief as it was according to him (and I agreed (initially)) on the woman's part disrespectful, angry and rude:

> 'I [the Chief] tried to tease her. I asked her, "So, I hear you found a nice husband, didn't you have a rebel husband looking after you?" And this woman, this Bintu, she answered me: "So what? What's the difference Chief? Sleeping with you or sleeping with rebels? No difference. You're all just the same!"'

As the Chief expected I was visibly shocked by this anecdote. I asked him, 'What did you say Chief?' He responded, 'What could I say? The lady was so angry. I mean I was only trying to joke with her. I'm the Chief, I became embarrassed and I had to pretend I was not angry because there were people.'

In chapter 1 of this study, Bintu and Chief Sesay provided an introductory narrative that demonstrated the ways in which gender can shape the experience of war but also the ways in which men and women remember and relate atrocity. The claim that 'We women were slaves!' can be heard once again in the communication or miscommunication between two survivors in the opening narrative above. Once again Bintu and the Chief provided me with a thought-provoking narrative of gender in armed conflict and the conflict that is its aftermath. I did not observe their exchange, but the Chief shared it with me. The Chief's account disrupted my own construction of proper gender roles in Sierra Leone for a number of reasons: The first disruption was that a man, a Chief my father's age, would initiate a discussion with me about sex. Until that point, I had pointedly avoided speaking to the Chief about the 'sex' aspect of my work. I referred to my research in his Chiefdom as a study of human rights and women's participation in public life. This aversion to 'sex talk' was rooted in my own socialisation which made such a conversation with 'my father' seem indecent.[3] This particular conversation challenged my understanding of what is a respectful way for a mature man and a young woman (myself) to converse.[4]

The second disrupting feature of the Chief's narrative related to the first and that was that Bintu (a woman) would speak so disparagingly and frankly to a Big man, a Chief, who in my hierarchical estimation was a Head

1 A pseudonym.
2 A pseudonym.
3 In my own socio-cultural framework speaking about sex with a married man is a prelude to a sexual relationship and adultery.
4 In my early interaction with the Chief I regarded him as a Big man and comported myself as a Small woman (his daughter). I later realized that the Chief regarded and spoke to me as a Big woman because of features such as my apparent worldliness and advanced education. I adjusted my interaction with him accordingly. Richard Fanthorpe's observations on the role of the Chief sheds some clarity on my field observation: Chiefs remain leading political figures in rural areas. It remains their prerogative to authorise all initiation rites in their chiefdoms. Paramount and other high-ranking chiefs are expected to serve as patrons of these rites, attending them in person if possible and making contributions to their cost and the public celebrations that accompany them. Fanthorpe (2007), p. 10.

of State.[5] Finally, I was surprised that the Chief, unprompted, shared a story that revealed his public humiliation by a woman.[6]

The introductory narrative to this chapter and my initial responses to it support the sentiments expressed in the preface and chapter 1 that fieldwork is essential in order to challenge one's longstanding understanding of gender-appropriate roles in Africa. Fieldwork provided an especially informative reminder that gender and gender roles can shift drastically particularly in the aftermath of violent social and political conflict. Bintu's response 'what's the difference, you are all the same' is a pervasive statement throughout this chapter which critiques the human rights law narrative on gender and violence provided by the Sierra Leone Truth Commission ('Truth Commission' or 'TRC'). The primary source of this narrative for the purposes of this critique is the final report of the findings of the Sierra Leone Truth and Reconciliation Commission (the Report) and its analysis of gender hegemonies in Sierra Leone before the armed conflict.

The Report presents a much needed gender critique of Sierra Leone's laws and customary law. However, this chapter argues that the resultant narrative from this critique is an essentialising image of Sierra Leonean women and girls as perpetual victims not only of war but also of patriarchy in peacetime. At times the Report's narrative creates the imputation that the subordination and violation of the rights of Sierra Leonean women and girls is indistinguishable in war and in peace. This narrative of absolute and perpetual victimhood for women and girls in war and peace conceals the agency which women exercise in their multiple responses to unequal power relations and abuse. This results in the exclusion from the transitional justice process of those women who are unwilling or unable to conform wholly to the victim role prescribed by the Sierra Leone Truth Commission. Further, the narrative of absolute victimhood for women requires the absolute vilification of Sierra Leonean men as perpetrators and wanton abusers of women. This further restricts the gender narrative as men's experience of civil, social and economic disenfranchisement, often through violence, is also marginalised from the gender analysis.

Chapter 5 also argues against the Report's presentation of formal law as a chief political site of oppression, and its determination that law reform is the chief remedy for the emancipation of women. This chapter argues that jurists have yet to investigate the meaning of formal law in a non-Western paradigm. Law in Sierra Leone is far more contested and dynamic than the Report suggests and this chapter questions the relevance or legitimacy of the formal law as it is described by the Report.

The Report produces an extensive narrative on inequality and discrimination in gender relations and its expression in vital socio-cultural and political institutions such as the institutions of family and marriage, particularly early marriage.[7] As the Report presents its gender analysis of the nature and extent of war crimes and crimes against humanity during Sierra Leone's civil war, it also establishes a link between women's experience of persecution in war and the day to day experience of gender inequality and discrimination against women in peacetime. The analysis becomes problematic when the Report constructs early marriage in Sierra Leone and its surrounding customs in terms that are indistinguishable from the formation and conditions of forced marriage in wartime, which is also referred to in the Report as sexual enslavement.

Early marriage is the practice whereby families arrange the marriages of daughters who by the standard of regional human rights laws, such as the African Charter for the Rights and Welfare of the Child (African

5 Bintu was a 'Big' woman. This was demonstrated to me as I walked down the street with her and women applauded or cheered her on as we passed. She was one of the few elected women government representatives in the region. I also observed that she participated in and even dominated my conversations with the Mayor and the Chief.

6 It is this final point that probably made me burst out laughing. Fortunately, the Chief and his nephew, our chaperon, joined in my laughter although it was obviously at their (men's) expense.

7 My construction of the institutions of family and marriage positions them as institutions comparable to the Truth Commission or Special Court in their capacity to narrate, legitimate and censor gender roles and gender-based violence.

Charter for the Child), fall far below the age of majority.[8] The Report describes early marriage in all its forms as a harmful social and customary practice that prejudices the health and interests of children and discriminates against girls, the primary victims of these arrangements.[9] However, under the jurisdiction of the national and customary laws of Sierra Leone, families arrange marriages for 'young women' and not 'girls'. The brides are recent initiates into womanhood and therefore, by the standards of their society, are prepared for all of the privileges as well as duties that the institution of marriage implies.[10]

This chapter explores competing narratives on gender and violence, particularly relating to marriage in Sierra Leone, and demonstrates the dissonance between international and regional human rights law narratives with the narratives voiced by survivors of violence. This raises an essential discussion between legal practitioners and scholars in the area of transitional justice in Sub-Saharan African where culture and customary law are easily made the scapegoat to any discrimination women experience. This widespread understanding or misunderstanding of customary law leads to its exclusion as a positive frame of reference or resource in the process of remedying human rights abuses. This approach is potentially harmful in a society that is heavily reliant on culture and custom for political and social governance. Throughout decades of conflict and armed conflict, failed legislatures and judiciaries, Sierra Leonean women and men depended on culture and customary law to negotiate and navigate idealised and real hegemonic relationships.[11]

Ní Aoláin challenges the ready assumption that 'cultural elements' are the substantive barrier to post-conflict recovery for women. She presses scholars not to stop at making the evaluation of native culture but also to include a reflection on the ingrained patriarchies that international interface and oversight brings to transitional societies.[12] Ní Aoláin's challenge spurs the review in this chapter of the TRC's ingrained patriarchy and biases. As Bintu and the Chief disrupted my understanding of gender relations in Sierra Leone, my objective in this chapter is to disrupt the TRC narrative on gender hegemonies in Sierra Leone.

Sexual violence was widely perpetrated by all parties to the armed conflict, including government forces. The enslavement of girls was a particularly egregious and protracted form of sexual violence and took on different shapes and significance from one fighting force to another. It is widely attributed to the fighting coalition known as RUF/AFRC.[13] This group was formed in 1998 comprising of rebels of the Revolutionary United Front (RUF) and the Armed Forces Revolutionary Council (AFRC), a mutinous element of the Sierra Leone Army (SLA). Every reference to enslavement by the rebels throughout this chapter should be understood to refer to sexual violence perpetrated by the RUF/AFRC and the specific manner in which it was perpetrated by them.

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8 The African Charter on the Rights and Welfare of the Child, OAU doc. CAB/LEG/24.9/49 (1990), entered into force 29 November 1999. Article 1 provides that a child is any human being below the age of eighteen years. This corresponds with the Convention on the Rights of the Child art. 1. The TRC Report specifically indicates its adherence to the Convention on the Rights of the Child, the Women's Convention, the Universal Declaration of Human Rights, CCPR, CCESCR and other major human rights instruments. Truth and Reconciliation Report volume 1, chapter 1, paras. 54-55 (hereafter TRC Report 1:1:54-55).

9 TRC Report 3:3:116. One assumes that if two fifteen year olds were married, both the bride and the groom would be regarded by human rights advocates as victims of early marriage.

10 The question what is early marriage in the Sierra Leonean or West African experience defies a quick answer, which is all that could be attempted within the parameters of this study. Marriage, early or otherwise, in Sierra Leone differs between and within tribes, regions and faiths. Furthermore, marriage is not only an act or legal relationship entered into by two individuals with a brief ceremony and contract. Entering into marriage is a protracted process involving communities and requiring the fulfilment of rituals that ultimately fulfil the marriage contract.

11 I describe idealised hegemonic gender roles as those a community might claim as the pervasive and accepted model when the 'real' model is far more widely practised. For example, the reality in a community may be that the family income is derived primarily from women's informal work. However, men and women in the community may collude in presenting men as the primary breadwinners – an idealized hegemonic gender role.

12 Ní Aoláin (2008), p. 8.

13 TRC Report 3b:3:298.

The Report describes the enslavement of boys and girls during the armed conflict. In order to make a gender distinction on enslavement the Truth Commissioners refer to girls' experience of slavery as 'forced marriage', 'bush marriage' and 'sexual slavery'. The conjoining of 'bush' and 'forced' with marriage suggests a consensual conjugal arrangement and conceals the egregiousness of enslavement; however, a lengthy critique of these terms will be provided in detail in chapter 6. Throughout this chapter the terms as described and applied by the TRC will be used. The term 'early marriage' will be used in distinction from the wartime experiences of forced marriage, bush marriage and sexual slavery.

5.1 Historicity, history and the location of truth commissions

This chapter refers to the power of truth commissions to create an authentic historical account that exposes untruths through the production of a truth that binds national, regional and international polities. This power is constitutive as well as derived from the process of truth telling. Truth commissions are ad hoc bodies and yet their lack of longevity does not preclude them from becoming, from their very outset, historical monuments commemorating a nation's emergence from a dark era. This status grants the process and final outcomes of commissions a sacrosanct status in the larger political process of accounting for past abuses. In the case at hand, a truth commission has the power to create an immutable history of the nature and causes of gender-based violence and even recommendations for the prevention of gender inequality in Sierra Leone. This extraordinary authority requires a critique and close review of commissioner's findings and recommendations by legal and other scholars.

TRC recommendations to governments could include demands for apologies and petitions for commemorative monuments. However, these recommendations often remain unenforced because they are vested with moral and not legal authority and governments and identified perpetrators are not compelled to make any positive action to redress the rights of victims. This may contribute to the low level of attention that is paid to truth commissions by legal commentators in contrast to the aggressive challenges we make against decisions of criminal trials that use their legal authority to award extensive damages and convict and sentence public officials or other perpetrators of human rights abuses.[14]

The very nature of truth commissions as ad hoc, quasi-judicial and informal mechanisms of justice gives them a broad mandate. This is most evident with respect to the very far-reaching temporal jurisdiction of the Sierra Leone Truth Commission. Whilst the TRC is focused on the armed conflict, it looks additionally at the politics and history preceding that period as well as at the aftermath of violence in order to describe and define the violence in the designated time frame. So, according to the Commissioners, describing gender-based violence during armed conflict required an extensive study of gender equality and discrimination in Sierra Leone's history, as far back as the entry or re-entry of freed slaves in the eighteenth century. This historical narrative of gender inequality and discrimination has a bearing on understanding gender-based violence in armed conflict and avoids the neat categorisation of periods into peacetime and wartime. It illustrates the continuum of discrimination and its institutionalisation after the conflict and even maps the future with recommendations to the State on redressing human rights abuses committed during the civil war.

Many distortions arise surrounding the experience and telling of key events in conflict and its aftermath. Conflicting narratives abound in the aftermath of conflict and this is evident where gender-based violence is involved.[15] Post-war national and local narratives mistakenly refer to survivors of widespread and systematic

14 There is a great body of critical writing on the gendered processes and outcomes of truth commissions but it is largely produced by anthropologists, ethnographers, political scientists and other social scientists. See Ross (2005), Shaw (2005), Goldblatt and Meintjes (1996). Notable legal commentators include the International Centre for Transitional Justice (ICTJ) which has published various research studies on truth commissions. ICTJ researchers are exemplary in that they often integrate or mainstream gender into their case study evaluations of truth commissions. See also Jocelyn Getgen for a gendered legal analysis of a Truth Commission. Getgen (2009).

15 The nature and extent of gender-based violence is rarely fully revealed in transitional justice processes. Gender-based violence is often depoliticized so as to remove it from the political domain. See Getgen (2009) for a critique of the Peruvian Truth Commission's exclusion of enforced sterilization of low-income indigenous Quechua-speaking women from its

rape as comfort women, collaborators, bush brides, war brides, prostitutes and camp followers. These derogatory labels raise a narrative that conceals harm, they stigmatise women and denigrate the agency they exercised in order to emerge as survivors of armed conflict. The Report's narrative of gender and violence will be examined in order to see how it has contributed to or challenged false representations of women's war experience.

The status or subjective location of the TRC is somewhat ambiguous. The ambiguity arises as the TRC seeks to collect and channel grassroots narratives even as it looks to international law and the case law of supranational courts to frame an overarching narrative of gross human rights violations in Sierra Leone. The TRC is a mechanism of accountability or a process of transitional justice created with a high level of involvement and pressure from international and regional actors, including the Economic Community of West Africa (ECOWAS) and the United Nations.[16] It has been argued that the government of Sierra Leone did not support the establishment or the work of the TRC but merely succumbed to the determination of the international community to establish a truth commission. Rosalind Shaw points out that whilst the government of Sierra Leone was unsupportive of the TRC, many Sierra Leoneans were concerned that the national commissioners were too close to the then ruling Sierra Leone Peoples' Party (SLPP) government.[17] She provides the example that the TRC chairman supported Sierra Leone's President Kabbah when he refused to apologise for the war on behalf of the state. The TRC was established through a sophisticated and high-stakes peace treaty in Abidjan which is far removed geographically and psychologically from the reality and priorities of 'ordinary people' in Sierra Leone. However, it maintains a local seat and also inhabits a local grassroots space as it claims to 'come down' from a national or even international height in order that victims can physically access a forum which is receptive to their narratives of wartime. And indeed the TRC was often a mobile forum, as Commissioners travelled and held sessions throughout the country in an effort to literally bring justice to Sierra Leoneans.

The TRC by its purported proximity to the local milieu could claim to possess knowledge of local practices and customs unknown to a foreign tribunal. Presumably, the TRC could contextualize the civil war and better crystallize the needs of victims and perpetrators. These assumptions of belonging and knowledge placed the TRC in a position similar to that of the third generation of human rights instruments described in chapter 3. Human rights instruments such as the Maputo Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol) were able to criticise harmful traditional practices in Africa such as early marriage and polygamy without being tagged as Western mouthpieces. As we will see in this chapter the Report is indeed heavily censorious in its narrative of gender inequality and discrimination in Sierra Leone.

The chapter questions the 'insider status' of the TRC and the legitimacy of its critique of gender inequality in Sierra Leone. It questions the extent to which the Report's construction and narrative of gender roles, particularly in marriage, is influenced by its interchanging position at the local, national and international site. In the preceding chapter on the International Criminal Tribunal for Rwanda, disruptive narratives were extracted from the case law in order to challenge the dominant narrative of gender and violence in the judgments. Chapter 5 takes a more ethnographic approach to disrupting the dominant narrative produced by the TRC Report. An important tool in seeking answers will be provided in this chapter by local gender narratives lived and expressed in daily life. These narratives are at times in accordance, but more often in conflict with the narrative of the Report which privileges international human rights law, statutory and customary law over local narratives.

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purview. The narrative of more than 200,000 affected women was denied a political acknowledgment.

16 Shaw (2005), pp. 5-6.

17 The SLPP were defeated in a democratic election in the 2007 General Elections by the All Party's Congress (APC) led by H.E. President Bai Koroma. See BBC News, *Democracy Wins in Sierra Leone Polls*, 18 September 2007.

Chapter 5

5.1.2 Methodology

In the context of this study I refer to all Sierra Leoneans who had lived in Sierra Leone during any period between the outset and the close of the armed conflict as a survivor of the conflict. This approach in the field allowed me to avoid mentally attempting to categorize individuals as either victims or perpetrators. The term survivor is intended to connote the fact that the civilian populace was disproportionately targeted for and impacted by human rights violations and war crimes committed by all factions in the conflict. Despite this, they survived.[18]

The arguments in this chapter on transitional justice narratives at the national and local level draw from my experience of fieldwork in Sierra Leone in January 2008. In a society as diverse as Sierra Leone, it is impossible to find a consensus or a dominant narrative at the local level. Further, narratives I heard expressed orally and narratives expressed through gestures, behaviour and day to day interaction often differed drastically making it more difficult to analyse and deduce a single or dominant narrative. Therefore, I acknowledge the contribution of interdisciplinary and, particularly, anthropological sources for guidance in seeing and hearing narratives at the local level.

An inexhaustible source of local narratives of marriage as a gendered institution was the work of social scientists, most notably the anthropologists Chris Coulter and Mariane Ferme, both of whom conducted extensive ethnographic studies in Sierra Leone: Chris Coulter studied marriage amongst the Kuranko in the north of the country, particularly bush marriage and its impact on young women attempting to reintegrate into their communities and Mariane Ferme studied different features of Mende society, including marriage and gender practices.[19]

The work of these and other anthropologists studying societies reminded me that my visit to Sierra Leone as primarily a legal researcher allowed only a preliminary glimpse into the surface or the 'visible world' made up of discourses, apparent social ties and relations.[20] However, this 'visible world' is activated by an often ambiguous sequence of forces and meaning existing 'underneath it'.[21] The very brief nature of my visit (3 months) and the legal framework of my research meant that my ability to listen about and analyze early and forced marriage at the local level could only extend to detecting the presence of an 'underneath' even as I failed or struggled to understand or analyse it squarely. Carolyn Nordstrom provides a cautionary tale of the ways in which a well-intentioned but ill-prepared researcher might hear only the most superficial level of testimony from local people. She refers to an anthropologist who concluded in his book on Mozambique that peasants did not understand that they lived in a political entity called Mozambique - illiteracy, rural isolation and tribal identity meant that peasants could not, for example, name the President of Mozambique. However, in Nordstrom's own research she found that peasants were perfectly aware who the President of Mozambique was but might choose to feign ignorance when asked directly. They strategically employed different levels of knowledge.[22]

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18 The term survivor is also applicable to victims who inhabited ambiguous moral zones during the armed conflict, for example, a child abducted by the Sierra Leone army, who committed war crimes and who was demobilized and repatriated to his family after a peace accord. See Claudia Card for a compelling thesis on victims and other oppressed persons who occupy or are forced to concomitantly occupy oppressive roles themselves. Card (1999).

19 Ferme (2001) and Coulter (2006). I found it especially helpful that Ferme and Coulter studied communities in very different geographical regions and at different points in the armed conflict. This created some sharp differences in their representation of practices and traditions; this was a reminder that gender is experienced differently in different locations, times and spaces. See also Caroline Bledsoe (1980) and (1994) for ethnographic research on women, marriage and gender in Sierra Leone. See also Janneke van Gog (2008) for an excellent study of the experience of girls and women returning to their hometowns after abduction and forced marriage by armed groups.

20 Ferme (2001), pp. 2-3.

21 Ferme (2001), pp. 2-3.

22 Carolyn Nordstrom explains that: 'People have learned that, politically and militarily, knowledge is a dangerous thing. How did one come by such knowledge? Who was one fraternizing with to gain such knowledge? And worse, how are people using or misusing, this knowledge? These questions can result in death. When I first asked people who did not know me what was going on in the war, who the President was, or just about any other question, I often got the reply, I really don't know. As

My study of ethnographic research was the viewfinder within which a compelling analysis of the 'underneath of things' was found. This allowed me to illuminate the weaknesses and the strengths of the human rights narratives produced by transitional justice processes to transform local narratives of gender and gender-based violence in order that women and girl survivors of forced marriage can access effective remedies.

This approach was buttressed by a simple rule I applied when attempting an analysis of human rights norms vis-à-vis local practices as described by ethnographers. The rule required that when an anthropologist embedded in the local observes that not all gendered institutions such as marriage in a Sierra Leonean host community are degrading and enslaving, and further that women exercise agency and power over and even against their husbands, then the value and transformative impact of the human rights narrative must be reassessed against these local narratives. In the same way, when a human rights law narrative condemns a local practice as harmful to individuals and their society, then the value and necessity of the local tradition must be reassessed against the human rights instrument. This approach is necessary in order to identify the significance, if any, of gaps between the two narratives.

In my own field experience, discussions with survivors of the civil war were often made more illuminating by my inadvertent observation of practice or applied narrative. I can best illustrate this assertion with some examples drawn from my experiences of Sierra Leonean hospitality. I had the pleasure of spending some nights as a guest in several different households during my stay in Sierra Leone. I did not interview my hosts; however, I was able to consciously and subconsciously see gender narratives at work. These narratives operated in contradistinction to the TRC narrative of gender hegemonies:

In one household my hosts were a middle-aged widow and her very elderly mother. My sleep was disturbed by a man who banged and shouted through the windows and doors until he was allowed into the house in the early hours of the morning. In the morning I asked the 34 year old son of my host about the commotion and he explained simply: 'That's my mother's friend.' As I prepared to leave the house the mother's friend in his role as the man of the house accosted me in his boxer shorts and interrogated me about my identity and research objectives in Sierra Leone. I identified myself and my activities and thanked him for the hospitality of his home. Privately, I was shocked that a widow, particularly a mature one, would acknowledge a boyfriend publicly. In the gender norms of my own society a widow expressing that she has a boyfriend and is impliedly sexually active would be a disgrace. This relationship also did not seem to tally with my initial understanding, supported by the TRC narrative, that marriage was venerated as the only legitimate relationship between men and women in Sierra Leone.

In another household, I was accommodated by a career woman in her early thirties, her widowed sister and their seven young children and dependants. I was told that the husband was away in Freetown and I intuited that probing further about his whereabouts was plain rude or embarrassing to the sisters. I concluded correctly or incorrectly that my host was a second or third wife and that her husband was living in Freetown with his other family.

In a third household, I asked the son of the servant the whereabouts of his father and he informed me casually that his father lived with his 'other mother' in the village and that he and his mother lived comfortably in the servants' quarters of his mother's employers. Because the little boy slept in the main house, took part in the family prayer at dawn, took meals with the family and had his school fees paid for by my hosts, I had mistakenly assumed that he was a family member and not the servant's child. And he was indeed a family member, but not in the nuclear or Western shape I was accustomed to.

At yet another household, I was hosted by a successful businesswoman. Her teenaged children were studying in the US. She had lived abroad in neighbouring countries for nearly two decades with her husband, a

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I sat and talked with people, shared food, explained my work and the people whose friendships I valued, made return trips, listened to their stories and shared my own, people's 'answers' changed. They did know what Mozambique was, who represented the power brokers.' Nordstrom (1997), pp. 81-82.

successful businessman. She borrowed a generator from her neighbour so that we could stay up and watch the latest Nigerian dramas on her VCR and television. Her only dependent, the teenage daughter of her servant explained without any prompting on my part that, 'Auntie was too proud. She chased her husband and now he is with another wife.' It surprised me that Auntie had apparently chased her husband but also maintained the matrimonial home and property, a practice I had imagined customary law in Sierra Leone would not permit. Again I was surprised that the servant's child belonged to the house.[23]

These and other samples of field observation revealed the presence of boyfriends, lovers, merry widows, cuckolds, heartsick men, adulterous wives, independent women, estranged spouses, absent husbands and extended households. They made it difficult to embrace the essentialising image of the girl child and early marriage so prevalent in international human rights campaigns. I would not refer to these field observations as revealing representative experiences of women in Sierra Leone; rather they revealed the presence of an underneath that was useful to challenging the TRC construction of inequality and subordination in the framework of formal law and customary law. They will be revisited in the section on the discussion of alternative narratives provided by anthropologists.

Before turning to a detailed study of the TRC, the next section first provides the background to the Sierra Leone conflict.

5.2 Civil war and gross human rights violations

The Republic of Sierra Leone borders Liberia to the southeast, Guinea to the north, and the Atlantic Ocean to the west.[24] The country is about 71,700 sq. km in size and has a population of approximately five million spread across 149 chiefdoms.[25] Seventeen ethnic groups make up the Sierra Leonean people and the largest of the indigenous ethnic groups are the Mende of the southern and eastern regions and the Temne (each about 30%), followed by the Limba (under 10 %). Both the Temne and the Limba are dominant in the north.[26] English is the country's official language although the population primarily uses Krio, Mende and Temne. Most of the population is Muslim, though there is a significant Christian population and followers of indigenous religions.[27]

Sierra Leone gained independence from the British in 1961 and the country held a prestigious place on the African landscape as the land of freed slaves and a West African centre of academic excellence boasting the oldest University on the Continent.[28] Today, as it emerges from the devastation of a civil war, Sierra Leone is one of the poorest countries in the world, despite having rich mineral resources. A dominant theory attributes the root cause and continuation of the armed conflict to the battle for 'conflict diamonds'.[29] However, an impressive body of scholarship provides elaborate and intersecting theories on the roots of the conflict; these

23 I thank Dr Susan Shepler for pointing out to me that polygamous unions make it easier for Sierra Leonean women to maintain rights to the matrimonial home in the case of divorce.

24 This brief and general history draws extensively from the timeline of the conflict advanced by Keen (2005).

25 TRC Report 3b:3:1-2.

26 Other groups include the Kono in the east, the northern Koranko, the Mandingo, Loko, Susu, Fullah and Yalunka. Smaller groups include the Bullom, Sherbro, Vai, Gola and Krim, with the Kissi in the eastern hinterland. TRC Report 3b:3:2.

27 I observed tolerance between the religious faiths, and in the Sierra Leonean households I visited I found that different family members belonged to different faiths. As I joined them in the vigorous dawn family prayer session, I noticed that they easily combined their different faiths, languages and religious songs.

28 The settlement of Freetown – the 'province of freedom' – was established in 1787 as a British settlement and a settlement for former slaves. The Krios who constitute 2 to 3 percent of the population are descended from former slaves from the United States, Britain, and Jamaica who settled in Freetown between 1787 and 1850. Krios are also made up of recaptives, or slaves rescued from slave ships stopped by the British navy on the high seas after the enactment of the Anti-Slavery Act of 1807. Hirsch (2005), p. 23.

29 A Panel of Experts described 'conflict diamonds' as 'diamonds that originate in areas controlled by forces fighting the legitimate and internationally recognised government of the relevant country.' Report of the Security Council Panel of Experts for Sierra Leone on the link between the trade in diamonds and the trade in weapons (2000), para. 144. The Panel of Experts was appointed pursuant to Security Council Resolution 1306.

include disenfranchised youth, corrupt politicians, failed traditional institutions, an agrarian crisis, proxy wars fought by neighbouring Liberia, an apathetic counter-insurgency by the government, and economic mis-management and crises.[30]

The Revolutionary United Front (RUF) emerged in 1991, claiming to be a social and political movement committed to rescuing the country from the corruption of the ruling party's All People's Congress (1968-1992 and 2007-the present). The struggle between the RUF and three successive governments raged throughout the 1990s against the backdrop of three decades of State disintegration brought about by corruption and mismanagement.[31] During this period huge numbers of the civilian population were forcibly recruited by all sides in the conflict, although the RUF is consistently cited as having abducted the greatest number of children for soldiering.[32]

A defining feature of the armed conflict was its 'chameleonic' character, whereby many of the belligerents changed allegiance against a background of complex military and political dynamics.[33] This feature was most clearly demonstrated in May 1997 when the Sierra Leone Army (SLA) overthrew President Kabbah, formed the Armed Forces Revolutionary Council (AFRC), and infamously joined forces with the RUF. Some of the conflict's most egregious human rights violations were committed during the January 1997 RUF/AFRC invasion of Freetown. There were hundreds of reports of women and girls being rounded up and raped and more than 6,000 civilians killed.[34] In 1999, the international community brokered a cease-fire, which led to the signing of the Lomé Peace Accord, a power-sharing agreement between the Government and the RUF that granted amnesty to all combatants.[35] In spite of the Lomé Accord, political violence and pitched battles continued intermittently into 2002.

Nearly a decade after the Lomé Peace Accord, few would deny that the civilian population, including those abducted and associated with fighting forces, bore the brunt of war crimes and human rights violations. Atrocities during the war were characterized by the corruption and degradation of tradition and social mores. TRC testimonies were very revealing of victims' perceptions that they not only experienced the human rights violation as individuals, but also that violence desecrated fundamental values that defined community identities. One survivor described rebels forcing sons and mothers and sons-in-law and mothers-in-law to sing and dance together while holding the other's genitals. Her son-in-law, apparently filled with shame, was unable to obey these orders properly and he was slaughtered by the rebels before his mother's eyes and his decapitated head was given to her to hold.[36]

This particular testimony speaks volumes about the desire by rebels not only to physically conquer victims but also to undermine their entire social underpinnings and traditions relating to relationships between elders and the youth, between men and women, between family members, between relatives by marriage, between

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30 See Adedeje (2002), O'Brien (1996), Cook (2000); Hirsch, (2005) Richards (1996). These authors provide a detailed analysis of how the battle for resources intersected with underlying issues at the local, regional and international levels.

31 See Keen (2005) and Reno (2006).

32 TRC Report (2004), Human Rights Watch (1999) and (2001), Physicians for Human Rights (2002).

33 David Keen describes how at different stages in the conflict, states such as Guinea, Liberia, and Libya were implicated as having directly acted as belligerents in the conflict or as supporting actors. Regional and international forces have also played active roles in the conflict, such as the Economic Community of West Africa (ECOWAS) and the UN Mission in Sierra Leone (UNAMSIL). And at a crucial moment, the Sierra Leone government called on the South African mercenary corporation Executive Outcomes to challenge ex-SLA and rebel fighters. ECOWAS and Executive Outcomes also enjoyed close cooperation not only with government forces but also with the Civil Defence Force (CDF) whose leaders were charged by the prosecutor with war crimes and crimes against humanity. To varying degrees some members of these groups have also been implicated in organized crime and human rights violations such as trafficking in arms, diamonds, drugs and women and children. Keen (2005), pp. 1, 147, 155 and 158.

34 Ibid., p. 1.

35 The Peace Accord is described in greater detail in chapter 6.

36 TRC Report 3:3:205. The specific cultural sensitivities of this incident are made clearer by Marian Ferme's description of how relationships between sons-in-law and mothers-in-law were marked by avoidances and strictly proscribed contact and behaviour. Ferme (2001), p. 101.

mothers and sons, and mothers and children.[37] A whole range of rites and relationships were overturned by the violent incident described, including the responsibility of the living towards the dead, pertaining to the proper burial and mourning rites required of a civilised society.

In this testimony, the shame of the son-in-law, which ultimately cost him his life, reminds the reader that sexualised violence or violence tinged with sexual innuendos, threats and harm was also employed against men. And the TRC narrative is cognisant that the men who at the behest of rebels carried out or simulated sexual acts with their female relatives were also victims of sexual violence.

5.2.1 Gender mandate

Under the Lomé Peace Agreement, the Truth and Reconciliation Commission (TRC) was created as part of the framework for national reconciliation and the consolidation of peace. In February 2000 Sierra Leone's Parliament adopted the Truth and Reconciliation Act. It became operational after 5 July 2002, when the seven commissioners appointed by the President were formally sworn in.[38]

The findings of the TRC Commissioners can be read in volumes one to five of the TRC Report. In stating its objective to present a historical account of Sierra Leone's civil war, the Commissioners' record of the conflict promises to depart from 'popular history' and debunk certain myths and untruths about the conflict.[39] Nowhere is this desire to create an authentic history more evident than in the TRC Report's narrative of gender and gender-based violence in the armed conflict and more generally at the local level before and after the armed conflict.

The Truth Commissioners tried to respond to questions posed by Sierra Leonean survivors of the civil war such as 'what precipitated the wave of vengeance and mayhem that swept across the country? How was it that the people of Sierra Leone came to turn on each other with such ferocity? Why did so many abandon traditions of community and peaceful co-existence? Why were long-held and cherished customs and taboos so wantonly discarded?'[40] The Commissioners divided their work and findings into the different themes of: Historical Antecedents to the Conflict; Governance; Military and Political History of the Conflict; Nature of the Conflict; Mineral Resources in the Conflict; External Actors in the Conflict; Women and the Armed Conflict; Children and the Armed Conflict; Youths and the Armed Conflict; the TRC and the Special Court for Sierra Leone; and lastly, a National Vision for Sierra Leone.

The TRC sought to create a historical record of human rights and international humanitarian law abuses from the beginning of the conflict in 1991 to the signing of the Lomé Accord.[41] The TRC objectives specifically referred to violence against women and girls as gender-based and undertook to dedicate special attention to sexual violence within armed conflict.[42] This commitment to the gender mandate was shaped in part by the strong criticism which the South African Truth and Reconciliation Commission (1995) (South Africa TRC) had received regarding its unsatisfactory inclusion of women and their apartheid-era narratives from the

37 See also the testimony of witnesses about brothers forced to identify and then rape their sisters. TRC Report 3b:3:295 and 332.

38 TRC Report 1:1:4. Four members of the Commission were Sierra Leonean: the Commission Chairman, Bishop Joseph Humper; the Commission Deputy Chair, Laura Marcus-Jones, a former judge of the Sierra Leone High Court; Professor John Kamara, a college principal and veterinary surgeon; and Sylvanus Torto, a professor of public administration. The remaining three foreign commissioners were proposed by the UN High Commissioner for Human Rights: Satang Jow, a former Minister of Education in the Gambia; William Schabas, a Canadian and Director of the Irish Centre for Human Rights; and Yasmin Sooka, a South African lawyer and former Commissioner on the Truth and Reconciliation Commission in South Africa.

39 TRC Report 1:1:10.

40 TRC Report 1:1:1.

41 TRC Report 1:1:6 See also the Truth and Reconciliation Commission Act (2000) (TRC Act), art. 6 (1).

42 TRC Report 1:1:6. See also the TRC Act (2002), art. 6 (1) (b).

commission experience and final report.[43] In many respects, the Commissioners of South Africa's Truth and Reconciliation Commission perpetuated the social construction of women as merely wives and widows of men, whilst men were feted as freedom fighters or other political actors. As a result, many women did not testify before the Truth Commission because their experience of apartheid did not fit the limited definition of human rights violations constructed by Commissioners. It was not, for example, necessarily considered a political crime against a woman when she was summarily detained and tortured in order to punish or flush out her husband who was a political activist against apartheid.[44]

The South African TRC's construction of what amounted to a gross human rights violation minimised the severity of the gender-specific harms women suffered. The apartheid apparatus was particularly severe against women's freedom of movement, right to work and right to housing and led to great dependence by women on male guardians bordering on transactional and exploitative relationships. Women were in effect faced with grave insecurity and vulnerability as a result of oppressive apartheid laws and yet the definition of apartheid, crimes against humanity and political crimes, did not include these forms of structural discrimination and the resultant harm that impacted women, their children and dependants on a daily basis. Fortunately, the situation differed in the case of Sierra Leone, perhaps in part due to the influence of Yasmin Sooka, a former Commissioner of South Africa's TRC on the Sierra Leone Commission. She may have helped sensitise Sierra Leone's Commissioners and ensure that they did not replicate the South African gender omissions arising from the androcentric interpretation of a gender-neutral mandate.[45]

Another factor that may have contributed to the Sierra Leone TRC's early commitment to addressing gender-based violence was the widespread reporting, investigation and documentation of sexual violence by local, national and international organisations throughout the civil war and particularly during and after the RUF/AFRC invasion of Freetown.[46] The role of INGOs is also significant in understanding the gender policy adopted by post-conflict entities such as truth commissions. International non-governmental organisations such as Amnesty International and Human Rights Watch are active, sending investigative missions, producing numerous reports, and providing a large range of support for their domestic NGO counterparts, partners and beneficiary organisations. Ní Aoláin makes the important observation that prior interventions such as those made by INGOs are critical to framing the way in which accountability is sought, articulated, and constructed in the settlement phase of a conflict.[47] Ní Aoláin's observation raises the following inquiry in this analysis: who constructed the narrative on gender-based violence in Sierra Leone? The TRC as a local and grassroots instrument of justice or the TRC as an agent or an export of the international community?

Sierra Leonean legislation created the TRC as a fully independent body, but the Commission itself chose to be housed, for legal and administrative purposes, as a project of the UN Office of the High Commissioner for

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43 See Manjoo (2007), Goldblatt and Meintjes (1996), Ross (2005) for gender criticism of the conditions for the inclusion and exclusion of women's narrative in South Africa's truth-telling process.

44 See Fiona Ross who criticises the omission of the torture of women political activists from the South African Truth and Reconciliation process. She describes that the Trauma Centre for Victims of Violence conducted research on detainees in Zwelethemba in 1995. None of the five women in the focus group who had been detained were interviewed in the process. Ross attributes this omission to the fact that the centre recorded only those who were detained for periods exceeding 48 hours. The Centre made the mistaken assumption that those detained for shorter periods were not tortured or otherwise mistreated. Ross (2005), p. 230.

45 The South African Truth and Reconciliation Commission attempted to be gender-neutral with no specific reference to women, gender, or gender-based violence. Rashida Manjoo argues that this purported neutrality ultimately created a gender-biased process that silenced many women's (mostly black women's) stories of sexual violence as well as other indignities suffered under apartheid. Manjoo (2007), pp. 145 and 148. See also Ross (2002), Goldblatt and Meintjes (1996).

46 See Human Rights Watch (2001) and Amnesty International (2000). Physicians for Human Rights (2002) was one of the first to scientifically document the extent of sexual violence as a result of war. The Campaign for Good Governance, Council of Churches and Forum for African Women Educationalists are NGOs based in Sierra Leone that at different stages of the war attempted to provide services such as health care and counselling to survivors of sexual violence. They collated evidence of the widespread rape of women and girls. Physicians for Human Rights acknowledges their support in their own research process. Physicians for Human Rights (2002) p. 10.

47 Ní Aoláin (2008), pp. 38-39. Ní Aoláin emphasises that prior interventions by INGOs are often unwilling to consider their patriarchy or recognise it in an export form.

Human Rights (OHCHR) in Geneva.[48] The Commission entered into an important partnership with the United Nations Development Fund for Women (UNIFEM), which led to the launching of the Initiative for the Truth and Reconciliation Commission under UNIFEM'S Peace and Security Programme.[49] This initiative made available training for Commissioners, staff and UNIFEM's NGO partners. UNIFEM also assisted the NGO community in making submissions on issues affecting women.[50] UNIFEM became involved in mobilising women's groups in Sierra Leone to participate in the Commission's activities by making submissions to the Commission, assisting with the hearings, providing witnesses to the Commission and attending the hearings. UNIFEM also provided two international gender consultants to assist the Commission and women's organisations both in writing the report and formulating the recommendations.[51] This international assistance raises the question as to the extent of the influence of UNIFEM ideology in the gender research and analysis of the TRC Report.[52]

The TRC Report describes several procedural measures that facilitated the participation of women in the TRC process. In the *barray* phase Commissioners and staff held public meetings in local *barrays* (which are equivalent to town halls) and reportedly reached out to women, women's groups and agencies dealing with women, sensitising them to the aims and objectives of the Commission's work.[53] The Commission made it clear that it intended to mainstream gender in all its activities and that it would deliberately recruit women to be trained as statement-takers. At the outset, the Commission made an effort to recruit women into senior staff positions. In addition, it ensured that more than forty percent of the statement-takers were women.[54]

According to the Report the Commission arranged for the training of all statement-takers in issues of rape and sexual violence, as well as helping them to cope with trauma.[55] The Commission also provided guidelines on how to specifically work with women victims of sexual abuse. In summary, these guidelines directed statement-takers to ensure the following basic conditions: That statement-taking should always be on a one-to-one basis; that the presence of husbands and fathers should be discouraged during statement-taking, unless insisted upon by the statement-giver; and that when dealing with issues of rape and sexual violence, female statement-takers should take the statements.[56] The Commission provided trained counsellors who would brief and debrief the women and girls who appeared at these special hearings.[57]

The Commissioners also fashioned a special hearings procedure to be held in camera and presided over and attended only by female Commissioners and staff.[58] The Commission had expected that most women who were

48 International Centre for Transitional Justice (2004), p. 3.

49 UNIFEM is the women's fund at the UN and focuses its activities on supporting the implementation at the national level of existing international commitments to advance gender equality. Advancing gender justice, transforming harmful traditional practices and ending violence against women are some of its thematic areas. The Beijing Platform for Action and the Convention for the Elimination of all forms of Discrimination against women provide the framework for the work of UNIFEM. Security Council Resolutions 1325 (2000) on women, peace and security, and 1820 (2008) on sexual violence in conflict are crucial references for UNIFEM's work in support of women in conflict and post-conflict situations.

50 TRC Report 3b:3:31.

51 TRC Report 3b:3:31 and 32.

52 It was reported that funding for the Commission primarily came from international sources, including $500,000 to more than $1 million from the United States, the United Kingdom, and the European Union, as well as significant support from Denmark, Norway, and Sweden. In addition, Germany and the United States have each pledged $200,000 to $400,000 for a successor institution. The Sierra Leone government also provided some initial support, which covered the costs of the Commission's first office space. International Centre for Transitional Justice (2004), p. 3.

53 TRC Report 3b:3:19.

54 Ibid.

55 According to the Report the TRC Legal and Reconciliation Unit worked quite intensively with witnesses and a number of counseling agencies in Sierra Leone. The unit provided witnesses with referrals to counseling agencies where appropriate. The reconciliation unit also ensured that follow-up sessions were provided by trained counselors after the hearings. Counselors visited the witnesses later in their homes and completed questionnaires that dealt with the impact and consequences of appearing before the Commission. TRC Report 3b:3:28.

56 TRC Report 3b:3:20.

57 TRC Report 3b:3:22-26.

58 TRC Report 3b:3:23.

willing to testify would choose to do so in camera. The Commission found it surprising that many women shunned secrecy, particularly in rural areas, where it was said that women wanted the community to hear their stories and volunteered to testify in public.[59] This misplaced assumption on the part of the Commissioners highlights the way in which preconceived ideas held by the principals of transitional justice can impose silence on women. Fortunately, in the case at hand, women were able to express their needs and, apparently, many saw open testimony as empowering.

These provisions providing care, sensitisation, training, and protection measures surpassed existing efforts by truth commissions in Latin America and Africa to acknowledge the gendered nature of human rights violations and to respond with measures that would ease access to the process for victims of gender based-violence. It appears that these measures were effective as the Report states that during the December 2002 pilot phase, which saw statement-takers deployed to the various regions, women and girls came out in large numbers to participate in the statement-taking process.[60] Despite these encouraging accounts, the report acknowledged that the Commissioners feared that many women and girls stayed away from the process; in particular former girl combatants were underrepresented before the TRC for reasons that will become clearer in chapter 6.

5.2.2 Narrative on gender inequality

Much has been said about the ability and authority of truth commissions to bring hidden transcripts to the public forum.[61] Jan Blommaert describes the testifying as a transformative process occurring as stories of previously voiceless victims become discourses of power and authority.[62]

The Report clearly regards Sierra Leone's women, children and the youth as belonging to a traditionally and historically voiceless segment of society. The Report presents a chapter for the sole discussion of women and the armed conflict and another for the discussion of children and the armed conflict.[63] In its attempt to transform individual stories of human rights abuse into authoritative discourses, the Report presents Sierra Leone's civil and political, economic, social and cultural sectors that traditionally and historically kept women voiceless. Special emphasis is placed by the Report on discriminatory deprivation in the areas of education,[64] politics,[65] economic status[66] and sexuality.[67] This approach was important in that it revealed that violence

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59 There were also many women who opted to make written statements only to the Commission and who chose not to appear before any hearings. As far as girls under 18 years of age were concerned, the Commission employed a policy that all testimony would be given in camera and that mechanisms would be found to have this testimony heard without making identities public. TRC Report 3b:3:26 and TRC Report 4:4:19. Statement-takers were also trained by its statement-taking staff on how to take testimonies sensitively from children who had been sexually violated. TRC Report 4:4:18.

60 TRC Report 3b:3:21.

61 Blommaert et al., p. 37.

62 Ibid., p. 37.

63 I thank Prof. Noya Rimalt's students in the course on Women, Gender and War at Georgetown Law (20 April 2009) for questioning the conclusion in an early draft of my thesis that a chapter on women indicated gender mainstreaming into the narrative of the TRC Report. Mainstreaming gender and women's concerns into the report would have required that women's experience was also inserted into the different volumes of the Report.
Gender mainstreaming has been described as the strategy established by Member States of the UN to achieve gender equality. Gender mainstreaming is defined in the Economic and Social Council's agreed conclusions 1997/2 as: The process of assessing the implications for women and men of any planned action, including legislation, policies or programmes in all areas and at all levels. It is a strategy for making the concerns and experiences of women and men an integral dimension of design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality. Gender mainstreaming entails bringing the perceptions, experience, knowledge and interests of women and men to bear on policy-making, planning and decision-making. Women, Peace and Security Study submitted by the Secretary-General pursuant to Security Council Resolution 1325 (2000), para. 12, p. 4.

64 TRC Report 3b:3:35-42.

65 TRC Report 3b:3:43-60.

66 TRC Report 3b:3:67-70.

67 TRC Report 3b:3:81-83.

against women was not a random event occurring and suspended in and with armed conflict. The TRC's broad jurisdiction allowed it to predate gender inequality and discrimination to peacetime.

Within all of these areas of exclusion is the overriding issue of early marriage and the status and condition of women in marriage. The Report places marriage as the central element within each sector of exclusion (education, politics and sexuality) and also as a factor exacerbating the exclusion. Thus, early marriage is linked to early school drop-out levels for girls and early sexual activity within the marriage as leading to the increased possibility of complications arising out of early pregnancy and childbirth.[68] This is an acceptable and correct analysis; however, its limited focus creates a narrative that only partially or marginally describes marriage in Sierra Leone.[69]

Thus, even as the TRC Report decries the Sierra Leonean veneration of marriage and all beliefs and practices surrounding it, for example, virginity and circumcision, it reproduces this veneration. The TRC primarily describes women and men in the gender roles of husbands and wives and all human rights violations against women in peacetime as arising from this inevitably oppressive (for women) relationship.[70] The Report specifically targets 'early marriage' as a human rights violation. However, the TRC Report in constructing early marriage as a prime human rights violation against women in Sierra Leone suggests that early marriage precipitated and even legitimized the sexual enslavement of girls and women in armed conflict. By claiming that because of the non-consensual nature of early marriage in peacetime 'some of the armed groups did not consider it an aberration to rape young women or use them as sex slaves,'[71] wives and sexual slaves become nearly interchangeable terms and experiences for women and girls. The experience of slavery in armed conflict by giving slavery a meaning that extends beyond the limits set by the text, context, and purpose of the 1926 Slavery Convention is thus made somewhat banal.[72] And it stigmatises the gendered and socio-political institutions of the Family and Marriage by reducing Sierra Leonean men to husbands and 'enemies of mankind'[73] and Sierra Leonean women to their victim-wives. The TRC narrative of marriage in peacetime also makes it easier to leave unchallenged the claim made by rebels that early marriage and forced marriage are one and the same practice.

This dominant discourse linking marriage to gender inequality and discrimination is impressed on the reader by the TRC Report not only through reference to international human rights instruments but also via an extensive criticism of Sierra Leone's domestic laws that enshrine gender inequality and discrimination. The Sierra Leone Constitution's Bill of Rights (a typical first generation human rights instrument) is presented by the Commissioners as illustrative of the extent to which Sierra Leone's women are left vulnerable to human rights denials. The Constitution denies women their fundamental human rights by permitting carte blanche

68 TRC Report 3b:3:73 and 74.

69 The link between early marriage and other violations of the rights of the girl child are supported by others. '…she's (the child bride) likely to experience early and forced sexual intercourse without protection, exposing her to potential injury and infection. In childbearing, she is more likely than a woman who marries late to experience complications, give birth to an underweight or stillborn baby or die. She must drop out of school, stunting her intellectual growth and often isolating her from her peers. World Vision (2008), p. 3. Girls who marry young are more likely to live in poverty, more likely to die during childbirth, more likely to experience violence at home and less likely to continue attending school. International Centre for Research on Women, About Child Marriage at http://www.icrw.org/childmarriage/about.html

70 See Barbara Arneil's critique of second-wave feminists who used wives as a unit of analysis for a universal woman. Arneil (2001), pp. 43-44. Omolara Ogundipe-Leslie also criticises the reduction of African women's lives and identities to their conjugal and coital functions by Western analysts and feminists. Ogundipe-Leslie (1994), p. 251.

71 TRC Report 3b:3:85.

72 The High Court of Australia, The Queen v Tang (2008) HCA 39 28 August 2008 M5/2008, p. 16. The Court cautioned against inappropriate applications of the term slavery. It underscored that it was important to recognize that harsh and exploitative labour conditions do not themselves amount to slavery. The Court exemplified this with the example that prostitution is exploitative; however, it is not a form of slavery.

73 See Simpson (2007) for the term 'enemy of mankind' at p. 159. Cited by Judge Kirby, High Court of Australia, The Queen v. Tang (2008) HCA 39 28 August 2008 M5/2008 p. 49.

gender and sex-based discrimination with regard to adoption, marriage, burial, and devolution of property on death or other interests of personal law.[74]

The Report presents this constitutional provision and other statutory examples as evidence of discrimination and inequality on grounds of gender. The review of Sierra Leone's legal system vis-à-vis international standards was important. It was conducted, however, in isolation of voices of girls and women so that the historiography of women's lives before the war is derived entirely from a review of international and domestic legislation and the reporting of international human rights organisations. This approach created the impression that the laws are immutable and women's submission to the laws in the regulation of their private lives (particularly in the area of marriage) is absolute.

The overreliance by Commissioners on the legislative review leads the reader to the assumption that victims who came before the TRC placed their violations in the context of article 27 of the Constitution and discriminatory provisions of the Mohammedan Marriage Act, the Civil Marriage Act, the Christian Marriage Act, the Matrimonial Causes Act, and other laws classed as discriminatory by the Report.[75] Further, it assumes that legal redress is the primary avenue women and girls would take in order to seek redress against injustice at any given time. The TRC does not address the reality that this avenue for redress is highly unlikely considering that before, during and after colonization the Sierra Leonean people could not rely on legislation or the courts of law as effective sources for remedy or regulation. The institutions of the (formal) public realm, such as the judiciary, lost credibility and authority decades before the civil war as a result of endemic corruption and other abuses of power. And yet, these laws take centre stage in the TRC analysis of the root causes of gender inequality and discrimination.

In its gender narrative the Report fails to note this failure of the judiciary and legislature that preceded the outbreak of armed conflict and that has pressed Sierra Leoneans to seek other avenues for redress, resolution and remedy that are bound to abound in a pluralist legal system normally found in a traditional, multi-denominational and multi-cultural society. It has been noted quite rightly by Tim Kelsall and others that English common law courts in Anglophone Africa have never been popular, in part because the language, strict adversarial protocol and the winner-takes-all nature of the judgements are foreign to African traditions, which tend to be more inquisitive, mediatory and restorative. Conflicts are better represented in local moots, informal chiefdom courts, and customary courts, which, while retaining their own problems, tend nevertheless to be more popular and accessible.[76]

Rather than acknowledge the failure of formal law in Sierra Leone, the Report focuses on the failure of culture. Women in the Third World are portrayed as victims of their culture. This portrayal reinforces stereotyped and racist representations of that culture and privileges the culture of the West.[77] Ratna Kapur elaborates that the issue of culture is often displaced onto a First World and Third World divide with the result that colonial assumptions about cultural differences between the West and 'the Rest', and the women who inhabit these spaces, are replicated. Some cultural practices have come to occupy our imaginations in ways that are totalising of a culture and its treatment of women, and are nearly always overly simplistic or a misrepresentation of the practice.[78]

Indigenous responses to conflict are consigned to the category of 'culture' and therefore marginalised by the TRC. However, such responses, often referred to as alternative dispute resolution mechanisms, are particularly active in regulating the entry into, conduct of and dissolution of marriage. Some examples include inter-family

74 Section 27 provides that no law shall make any provision which is a discriminator either of itself or in its effect. And section 27 (4) makes exceptions for adoption, marriage, divorce, burial, the sharing and distribution of property on death or other interests of personal law.

75 The Mohammedan Act Section 9, Chapter 96 of the Laws of Sierra Leone (1960). The Civil Marriage Act, Chapter 97 of the Laws of Sierra Leone (1960). The Matrimonial Causes Act Section 3, Chapter 102 of the Laws of Sierra Leone, 1960.

76 Kelsall (2005), p. 17.

77 Kapur (2002), p. 5.

78 Kapur (2002), p. 8.

mediation, faith-based counselling, counselling and training by elders, cleansing rituals, intervention and judgment by men and women's secret societies, community interventions, witchcraft and fetish and public shaming. It is extraordinary that these remedies (and this list is far from exhaustive) were neglected in the TRC's construction of formal law in Sierra Leone. Michael Schatzberg's argument that most studies on Africa are 'out of focus' with local political realities has some resonance in this gender investigation into a Truth Commission as an effective transitional justice process in Sierra Leone. Schatzberg warns that unless we begin to take indigenous understandings of concepts and categories more seriously than we do at present, we shall continue to miss vital and living elements of politics in Africa.[79]

The Report mistakenly speaks of customary law as a formal and uniform code binding society and invariably oppressing all Sierra Leonean women and girls and presumably privileging all Sierra Leonean men. However, a more nuanced evaluation of this multi-layered and dynamic code was called for in order to fairly criticise the protection measures for the rights of women and girls.[80] The evaluation of customary law was not taken seriously and this was to the detriment of the gender analysis. Such an evaluation might have been made possible if there had been more reliance on victim testimony revealing their experiences of 'formal' law, as well as 'informal' mechanisms of redress for injustice before, during and after the civil war. Further, such an evaluation would have signified that the TRC Commission used its local positioning in order to determine the 'underneath of things' with its vital and living elements that make up the political reality of Sierra Leone society.[81]

In every society there are informal rules and norms that members of society consider sufficiently important that they are legitimately treated as alternatives to the formal (encoded) ones. Informal institutions tend to become salient especially in situations where formal ones are weak.[82] The informal institutions can help to reinforce, complement or undermine formal institutions.[83] In the case of Sierra Leone I would suggest that informal judicial and legislative institutions actually override much of the authority of their formal and failed counterparts. It is only in the interest of clarity that I will continue to refer to a uniform customary code and statutory law as formal law and the wide-ranging occurrence of customary practices and alternative mechanisms as informal.

Thus, adoption, marriage, burial, and the devolution of property upon death or other interests of personal law are resolved by customary law norms and practices which are actually negotiated by parties on a case by case and day to day basis, as will be illustrated in section D on alternative narratives. The 'underneath' of the formal mechanisms described by the TRC is the customary law and the 'underneath' of the customary law is far from visible in the TRC Report. This underneath of customary law relates to the 'living law' or the day to day application, manipulation, negotiation and reinterpretation of customary law by people. I recall the conversation where a young man claimed that under customary law (*de jure*) he (the man) was entitled to sole custody of his child. However, it became apparent to me that whilst he maintained the child financially, his former girlfriend, the mother of the child, enjoyed sole custody in Freetown (*de facto*).[84] There must have been negotiation concerning the apparently fixed customary practice that would have discriminated against a woman's right to custody, and the extent to which this norm is adapted by other parents in Sierra Leone would

79 Schatzberg (2002), pp. 37 and 70 quoted in Kelsall (2005), p. 7.

80 See Coulter's account of the initiation of over 100 girls in a town that had been destroyed by war. She notes how the initiation was the first since the war displaced villagers and that its new utility was to reconfigure disrupted family and kinship ties. The initiation ceremony also illustrated that war had altered gender relations, for example the visible presence of men in the celebratory stage of the ceremony was a postwar innovation. Coulter shows that initiation became more than a women's journey or event, in this case it was a central event in the reconciliation and rehabilitation of a war devastated community. Coulter (2005).

81 Ferme (2001) and Schatzberg (2002).

82 Hyden (2008), pp. 2-3.

83 Ibid., p. 3.

84 Indeed I began to suspect that if he failed to meet his financial obligations towards the child, the mother of the child could alienate the child from him and transfer paternity to another financial provider.

have to be studied quantitatively and qualitatively before one leapt to conclusions on the customary norm's authenticity and its authority over men and women in the resolution of custody disputes.

The TRC Report missed an opportunity to examine customary law as prima facie formal law but also distinguished from statute law. With the enforcement of customary law judges and counsel are replaced by families, chiefs, and relatives who have vested interests in the dissolution of or entry into marriage. These vested interests may allow the actors in a divorce proceeding, for example, to circumvent or flout customary laws. The TRC Report's representation of customary law is dismissive of a real investigation into custom as a remedy for inequality and discrimination, and this is a mistake because custom and customary law are actually the primary and in many cases the sole source of justice for men and women in Sierra Leone.[85]

The scale of this omission is evident in the TRC's failure to describe women's societies – an important source of political power for women in Sierra Leone.[86] Membership of such groups has provided women with both economic and political power, as well as basic support networks for their day to day activities.[87] Probably the best known of the West African women's associations is the Bundu, or Sande Society in Sierra Leone, to which it is said that roughly 95% of all Sierra Leonean women belong.[88] Backed by the supernatural, the Bundu Society guarantees women respect from all members of society[89] and plays a significant role in equalising women's relationships with men.

Bundu law enhances the status of all women by protecting them, for example, from degrading acts such as male voyeurism. Should a man fail to make a warning noise as he approaches the place where women bathe, he will be charged for his offence. Should he make sexual advances to an uninitiated girl, he risks illness and death unless he goes to the Bundu leader, confesses, pays a fine, and submits to a ritual cleansing. Husbands are wary of offending their wives in marital disputes. There is always a chance that the abused wife, or her mother, will use 'medicine' known to Bundu women to harm him, especially to render him impotent.[90] Membership of the Bundu Society, then, provides important benefits to women, not the least of which is a deterrent to mistreatment from their husbands and other men.[91]

The exclusion of any analysis of the Bundu reveals how women's sources of strength are subsumed by the human rights critique. The picture of African women's lives is distorted by the TRC justice process into a grotesque litany of subjugation by African men.[92] Ratna Kapur describes how the British colonial power used the position of women to legitimise colonial rule by pointing to extreme cultural practices as evidence of the

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85 While visiting the Chief I observed a flurry of movement throughout the day in a large square outside his residence. The court was in session. Sessions were presided over by the chief's representatives and they resolved all manner of conflicts. One case involved a member of a men's society who was fined for not informing the Chief before launching an initiation. My interview with the Chief was interrupted as his representative asked the Chief to suggest the fine that should be paid by the wrongdoer.

86 There is no single centralised women's society, and each society is shaped by many influences, including Islamic culture, political history, tribal composition, coastal or interior geography and border influences.

87 Cunningham (1996), p. 340 citing Wipper (1984). See also MacCormack (1979) for a study of the Sande Secret Society.

88 Cunningham (1996), p. 340 citing MacCormack Hoffer (1975), p. 173.

89 Ibid., p. 340, citing MacCormack Hoffer (1975), p. 155.

90 Cunningham (1996), p. 340 citing MacCormack Hoffer (1975), p. 162. Richard Fanthorpe makes the interesting point that rape, along with other serious crimes, violates Sande as well as Male Societies. Violations of these laws might be adjudicated by the society in the bush and those found guilty of the most serious violations might even be sacrificed to assuage this spirit. Fanthorpe (2007), p. 4 citing Bellman (1975), p. 125.

91 It is unclear what effect the civil war had on the activities and cohesion of women's secret societies. In contrast, it has been noted by researchers that leaders of the male societies were often targeted for humiliating beatings and attacks by rebels. Henry (2006), p. 386. Richard Fanthorpe writes that the end of the armed conflict has seen the secret societies re-established, and mass initiations of boys and girls hosted throughout the country. He also describes that the societies have increased in stature as a result of their ability to mobilise their youth in national and local government elections. Fanthorpe (2007), pp. 13-14.

92 See Kapur for an analogous study of the violence against woman discourse on the 'cultural' practice of dowry violence in Asia. She points out that there is a gratuitous connection invoked between culture and violence in the Third World, though it is not invoked in a similar way when discussing violence against women in various Western contexts. Kapur (2002), p. 10.

barbarity of Indian society and of its resulting need for colonial intervention.[93] This argument is relevant in the current context as the transitional justice process is legitimised by its presenting extreme cultural practices against women as evidence of the human rights crisis in Sierra Leone, the failure of customary and formal law and the need for international intervention. Arguably, acknowledging the existence of a functioning and thriving customary law system could undermine calls for international criminal justice.

The TRC narrative falls into the trap set by the first generation rights described in chapter 2 of this study. First generation rights created the private and public sphere, and the Report clearly corrals women into the private sphere by omitting to investigate women's lives in the public realm. Bledsoe makes the important observation that legal approaches tend to overemphasise the differences between men's and women's official sources of authority, reserving the public sphere for men and the private sphere for women and children. By treating women as legal minors they obscure the importance of women's political and economic ambitions – and wrongly conclude that women cannot and do not acquire power and status through alternative channels.[94] The Bundu Society is a major but not the sole alternative channel through which women can acquire power in both the private and public sphere.

5.2.3 Narrative on gender and violence in wartime

A population-based assessment by Physicians for Human Rights (widely quoted in the Report) reveals shocking reports of rape and all manner of sexual violence perpetrated against Sierra Leone's women and girls during the civil war.[95] This study provided an important insight into the plight and particular vulnerability of displaced persons in a protracted civil war. The TRC Report referred extensively to this report, particularly with respect to the rape of women refugees and IDPs. This section of the Report was valuable as the IDP experience was widespread during the conflict and needed to be addressed as part of the historical and gendered narrative of the armed conflict.[96] By 2002 more than 300,000 people had registered as IDPs and up to 1 million were unregistered as IDPs throughout the country.[97] The addition of the IDP experience allowed one of the traditionally overlooked experiences of armed conflict, the gendered experience of refugees and displaced persons, to be heard within a process of transitional justice.

The TRC Report describes women's gendered experience as more than instances of sexual victimization. According to the Report women and girls took part directly and indirectly in the conflict: They assumed varied roles, including becoming armed combatants, providing medical assistance, feeding armed groups and supplying opposing forces with intelligence information often at great risk to their lives.[98] However, in describing women as active agents of and in conflict, in the sense that they at times donned the identity of combatants in the conflict, the TRC is obviously guided by the popular humanitarian discourse that regards women as natural peacemakers and victims. The image of a soldier remains a male image and women are

93 Kapur (2002), p. 14.
94 Bledsoe (1980), p. 180.
95 Physicians for Human Rights (2002).
96 The most common violation in the Commission's database is forced displacement, which accounts for 23.5% of the violations against women and 19.3% of the violations against men. TRC Report 3:3:201.
97 Physicians for Human Rights (2002), p. 1. The PHR study on IDPs indicates that war-related sexual violence experiences perpetrated by armed combatants (primarily RUF) were widespread among IDPs in Sierra Leone. Approximately one out of every eight household members (13%) reported one or more incidents of war-related sexual violence. Nine percent (94/991) of respondents reported war-related sexual violence. 53% of respondents who reported 'face to face' contact specifically with RUF forces reported sexual violence, compared to less than 6% for any other combatant group. One third of the women who reported sexual violence reported being gang raped. Participants reporting sexual violence related the following: rape (89%), being forced to undress/stripped of clothing (37%), gang rape (33%), abduction (33%), molestation (14%), sexual slavery (15%), forced marriage (9%), and insertion of foreign objects into the genital opening or anus (4%). The majority of the incidents of sexual violence reported by participants (68%) occurred between 1997 and 1999. The Report also quoted UNICEF's report describing the sexual exploitation of children in IDP camps by humanitarian workers and fellow IDPs. TRC Report 3:4:319-320.
98 TRC Report 3b:3:388.

placed at the peaceful end of a moral continuum.[99] Therefore, women's participation was driven by 'socio-economic needs, the need to protect themselves and their families or to improve the quality of their lives.'[100] In other cases, 'Many women experienced personal losses, which hurt them a great deal and led them into enrolling in the Army to avenge their loved ones.'[101] The Report presents no investigation into the status of women who voluntarily conscripted for example, or women who excelled at military tasks.

Although attention was paid to the reality of women combatants, it had the effect of stripping women of agency in the same way that a narrative focusing exclusively on victimhood would have done.[102] Again the voiceless are granted an audience only for selected narratives and to emphasise the human rights law framework laid at the outset of the Truth Commission's process. Even as the Commission attempts to put violence against women into a political and authoritative framework, it depoliticises women, their experience and their agency.[103] The rigidity with which this framework is observed risks losing the important aspect of women strategically manipulating this framework.[104] Allowing for an enquiry into women's battle experience would have allowed room for fuller testimonies that show that victimhood and active political roles are not exclusive and, in fact, are intersected with some frequency in Sierra Leone.

Whilst a nuanced narrative of women's experience emerges at times, the Report produces overwhelmingly an experience of victimisation, particularly sexual victimisation.

5.2.4 Narrative on forced marriage

What is forced marriage? What is its relationship with early marriage in Sierra Leone? This section presents the TRC's narrative of the forced marriage of abducted women during Sierra Leone's civil war. It highlights and then responds to those elements of forced marriage that raised the assertion in the Report that early marriage and forced marriage are products of the same structural inequality and discrimination.

As a transitional justice mechanism with no legal authority, the TRC is less constrained by legal definitions. This can be seen in its definitions of sexual slavery and forced marriage which overlap significantly. According to the Report sexual slavery occurred when women and girls were captured and abducted. They became part of the entourage of the armed group to which their captors moved along with them in a type of roaming detention which could last from one or two days to several months and years.[105] The arrangement of forced marriage arose when abducted women were handed over to combatants and became their 'bush wives', for the purpose of satisfying not only their sexual needs but also to perform a host of different duties including domestic chores.[106] With this construction by the TRC, what distinguished sex slaves from bush brides was that bush brides performed domestic chores such as cooking and cleaning and had an exclusive sexual relationship with a male combatant. The definition is a difficult one to support and the Commissioners themselves point out that 'while some of the girls were assigned and attached to one partner, such attachment did not prevent other perpetrators from using them, particularly if the combatant they were attached to was not a senior commander. In some cases, husbands willingly offered their wives out to other fighters.[107] The following testimony illustrates this:

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99 Coulter (2005), p. 232

100 TRC Report 3b:3:389.

101 TRC Report 3b:3:389. Heather Baldwin cautions that portraying women as agentless victims helps to raise sympathy for their plight, but the harm is that they come to believe they are victims unable to have any control over their own lives. This belief may lead to serious consequences for their mental and physical health. In addition, researchers and aid workers respond with interventions and programmes focusing only on the victim status. Baldwin (2006), pp. 20-21.

102 Stripping women of agency when they take on roles that contravene the roles of their gender socialisation is similar to the stripping away of children's agency by the language of human rights. Susan Shepler describes how former child combatants strategically resist or assist in their depoliticisation by human rights workers. Shepler (2005).

103 Ibid., p. 205-206.

104 Ibid., p. 206.

105 TRC Report 3b:3:299 and 304.

106 TRC Report 3b:3:301.

107 TRC Report 3b:3:302.

Chapter 5

> I lost my virginity to this C.O. Koroma, who was 45 years old. I was kept in a locked room always ready for him to sex me. Sometimes when he is away, his junior boys will come and open the door, sometimes three, sometimes four men. They will force me, telling me I refuse them they will kill me. As a small girl I will allow them to satisfy themselves…'[108]

Despite the attempt at providing legal definitions distinguishing sexual slavery from forced marriage, the Truth Commissioners describe the experience of girls and women abducted by rebels interchangeably as sexual slavery or forced marriage throughout chapter 3 of the Report. The Commissioners note that enslavement becomes a gendered form of persecution when an individual is enslaved because of his or her particular function in society as in where women are used for cooking and cleaning, for sex and reproduction. Enslavement is described as the non-sexual form of sexual slavery and includes acts such as domestic labour and mining.[109] When referring to women and girls the term enslavement is discarded in favour of sexual enslavement.

The TRC narrative on forced marriage and sexual slavery is confusing. It is unintentionally intersecting and self-contradictory: All women and girls are referred to as sex slaves or bush brides. Sex slaves are girls who are raped by rebels and made to do domestic chores and bush brides are girls who are raped by a single rebel and made to do domestic chores exclusively for him. At the same time, bush brides are not slaves but sex slaves because every relationship of forced marriage involved forced sex or the inability to control sexual access or exercise sexual autonomy.[110] The ill-demarcated categories of forced marriage and sexual slavery, previously unheard of crimes in the field of transitional justice, obliterate an in-depth discussion of slavery and slavery-like practices that were perpetrated against abducted civilians during the conflict. The TRC narrative on sexual slavery and forced marriage reduces a gendered experience to a rape experience. This is the narrowest application of 'gender' and does the least to advance any understanding of women's and men's full experience of surviving war.

5.2.5 Collapsing forced marriage into marriage

In demonstrating the link between structural inequalities in Sierra Leone's society and gross human rights violations against women during the armed conflict, the distinction between the institution of early marriage and the relationship of forced marriage was collapsed by the narrative of the TRC. The Commissioners and others (INGOs and NGOs) operating at the local level have suggested that bush marriages in wartime mirrored arranged or early marriages in peacetime. This approach is useful to INGOs as a tool to strengthen the ongoing human rights campaign against early marriage in Sierra Leone and throughout Africa. It produces an advocacy narrative against early marriage and its attendant harms. An outcome that was not envisaged by the mandate of the TRC.

References to initiation and/or other rituals and the awarding of social status and power to bush wives in forced marriage have been used to support the claim that bush marriage and early marriage are similarly situated as human rights violations. These elements of bush marriage are discussed below and disputed as validating forced marriage by comparing it to early marriage.

Ethnographers have described traditional institutions, ceremonies and mechanisms governing relationships in the bush, including bush marriage. Chris Coulter's informants, many of whom had escaped bush marriage, spoke of the presence of a senior woman or Mammy Queen in the bush and the elevated position of powerful girls married to Commanders who acted as mediators in disputes between or affecting girls in camps.[111] Her

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108 TRC Report 3b:4:172.
109 TRC Report 3b:3:194.
110 TRC Report 3b:3:184.
111 In peacetime, Coulter explained that in the Kuranko community, women were politically and economically subordinate. However, the most prestigious position for a woman was that of Mammy Queen. The responsibilities of the Mammy Queen were often to mediate between parties and to settle disputes within households, between men and women and also between women. Indeed certain grievances would be brought to the Mammy Queen even before being passed on to the chief or traditional courts. Coulter (2006), p. 188.

interviews revealed that Mammy Queens in the bush conflict were actually called upon to 'do the marriage' - presumably this meant that they could conduct some form of marriage ceremony. This is the only account I encountered suggesting that marriage ceremonies or imitations of marriage ceremonies were conducted in the bush. Testimonies by victims of slavery in reports by UNICEF, Physicians for Human Rights, Amnesty International, Save the Children and others who have documented the practice indicate that girls were summarily selected by male combatants without ceremony.

However, despite the high esteem a Mamy Queen enjoyed in the bush, Coulter cautions that there was little a Mammy Queen could do to protect women from their own bush husbands. An informant revealed that despite the presence of a well-known broker, such as a Mammy Queen, disputes were not settled in a customary way.

> '….There was no one to report to if your husband abused you…There my husband was a big man, where will I report him? Nowhere! When he do me – I only hold God and sit.'[112]

Coulter concluded that the presence of Mammy Queens testified to the continuity between the organisation of ordinary and wartime life. She suggests that women's submission and lack of recourse to justice in the face of abuse from bush husbands 'was no different from life in peacetime.'[113] This is at best a tenuous parallel to make and one that understates the alternative dispute resolution mechanisms available through religious channels, indigenous courts, secret societies, and so on. At worst the parallel compares Sierra Leonean husbands and men to vicious drug-fuelled rebels who had the power of life and death over girls and women. Rape, summary beatings and the fear of execution were inherent to enslavement; however, it is far from accurate to suggest that rape, beatings and the fear of execution are inherent to marriage in Sierra Leone, even early marriage. It is highly questionable that women's subordinate position resulted in impunity for men who mistreated their wives and otherwise failed to fulfil their obligations towards their families. However, this will be questioned more deeply with alternative narratives provided in the section below.

Finally, the role of the Mammy Queen or even suggestions that a marriage ceremony was conducted are insufficient evidence of a legitimating of bush marriage considering the protracted process that leads to early marriage. In some cases, initial agreements between families and betrothals are made before or at the birth of a child. Irrespective of its obviously contravening international human rights law, the complex process of early marriage cannot be compared to the comparatively summary allocation of girls to commanders and other fighters. It is a harmful traditional practice that can be challenged but with better considered strategies.

There is a sentiment expressed in research studies to the effect that bush marriage elevated the status of abducted girls. The picture of the 'happy' bush wife stems from privileges and wealth said to have been enjoyed by bush wives compared to the villagers who were victims of rebels' wanton looting and attacks. Coulter recounts, for example, that favoured wives of senior commanders held authority in rebel social life. Apparently many had several people, young and old, both men and women, working for them, preparing food, laundering, and taking care of their children. Often, senior wives were in charge of the distribution of arms and ammunition before an attack.[114] Further, commanders' wives had the power to punish or reward and were often in a position to get everything they asked for including jewellery, music, clothing, either by looting it for themselves or having it done for them. Coulter describes that these girls were often envied and revered by girls in the lower rebel social hierarchy, and some of her informants admitted that they had feared violent reprisals from commanders' wives more than they feared the actual commanders.[115]

Discussing privilege and protection in the bush must be done with caution and with an understanding of the violence and potential for violence in the context of confinement and coercion in the bush in the midst of armed conflict. The following testimony indicates that sexual slaves even bearing the title of bush wife were

112 Ibid., pp. 188-189.
113 Ibid., p. 188.
114 Ibid., p. 194.
115 Ibid., p. 194.

potentially available to a wide range of men and further that factors such as the age of the 'wife' or the military rank of a bush husband also impacted the vulnerability of abducted girls to sexual violence.

> 'On our arrival we were assigned to the wives of commanders and later given to commanders or fighters to be their bush wives. As a bush wife, my duties were to provide for him anything he requested, including sex any time of the day. I was used as a sex slave for each commander when they came to our camp, especially because my bush husband was not a senior commander.'[116]

Access to privileges such as looted goods was highly dependant on factors such as the status of the commander or fighter 'husband.' And it should be noted that these privileges (of bush wives) had no comparison with privileges and status women were awarded once they were wed in peacetime. Much of this privilege in peacetime was associated with initiation, which includes but is not limited to circumcision, as well as induction into a secret society through the medium of the bush.

It is essential that before attempting to explain the phenomenon of bush marriage some insight into the term 'bush' is provided. It is a gendered site as well as an adjective that when attached to the institution of marriage provides much symbolic meaning and power. The word 'bush' can connote the wildness of nature, the taming of the untameable, familiarity with nature, the anti-social as well as the undomesticated.[117] It can be a derogatory adjective attaching, for example, to a rustic person.[118] During Sierra Leone's eleven-year war, the bush was a site where people were transformed from civilians into deadly and even invincible fighters, through harsh military training, but also through magic rituals and seemingly bizarre but carefully choreographed physical and psychological initiation processes. In this sense 'bush' was used as an opposite to life in the village: the village being domesticated and restrained and the bush being wild and unbridled.[119] Rebels returning from combat to their villages, whether as escapees during the war or as demobilized fighters after the peace, were described as 'returning from the bush' and abducted women referred to their wartime experience as when they were 'in the bush'.[120]

Outside of the war context the bush was also conquered by women and girls. The bush has been described as the site of a girl's greatest journey, that is to say, the journey from childhood to womanhood.[121] Initiation requires that girls are separated from their community and taken into the bush where they are trained in a wide range of subjects including the ways of womanhood, marriage and matrimonial sex.[122] In this context the bush, which can be seen as a male or animal figure, becomes the site of a highly gendered psychological and physical conquest for women as well as a transformation through excision in preparation for penetration through intercourse, gestation and, ultimately, childbearing.

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116 TRC Report 3b:3:171.

117 Coulter (2006), p. 182 citing Jackson (1977), p. 34.

118 'Bush' has taken on negative connotations with respect to original or indigenous peoples in central and southern Africa who have retained their traditional livelihoods and lifestyles and are regarded by urbanites as immune to modernisation and therefore backward. I encountered this attitude as a teenager living in Kenya and Namibia where being called 'bush' or a 'bush man' was a taunt about one's village manners (village being regarded by urbanites as uncivilised) and more recently saw this in Rwanda where the Twa forest gatherers were regarded as inferior and uneducatable 'bush people' who could not advance themselves. See Malkki (1995) for a detailed analysis of the depiction of the Twa as 'bush' by Hutu refugees in Tanzania.

119 Coulter (2006), p. 182.

120 bid., p. 181. However, as an interesting aside I refer to Coulter's account of an interview where a girl explained that the rebels did not live in the bush as one would think but that they occupied village homes, and turned villagers out to sleep in the bush: 'The villagers lived in the bush, we lived in their houses!' And Ferme points out that in times of conflict 'farms and work spaces hidden in the forest are the first temporary shelters for refugees from villages, and hence they are the potential beginnings of new permanent settlement'. Ferme, (2001), p. 14. Clearly it is not possible to exhaust the different meanings attached to the bush and those who can inhabit it.

121 Coulter (2006), p. 44.

122 Traditionally, initiation was a protracted period, up to two years in the bush with girls of the same age, and girls who underwent initiation through the secret women's societies were treated with deference and feted by their communities. Human Rights Watch (2003), p. 27.

So, the bush was wild, but could be mastered by hunters, by rebels, and by women who set aside their fear of the bush and entered it in order to domesticate the passions of young uninitiated girls, in preparation for the rigours of womanhood.[123] For many girls, marriage followed within a few weeks or months after returning from the bush as a woman, and indeed many suitors funded the costly initiation process on behalf of their in-laws and as a condition of marriage.[124] This great journey and the privileges it bestows, including the status of a woman and entry into the institution of marriage, is a far cry from the bush capture, abuse and lingering stigma bush wives endure.

It is noteworthy that even in the oppressive conditions that marked relations in the bush, a tone of moral righteousness sneaks into Coulter's informants' distinction between the status of bush wives and unattached women.[125] Those girls and women who did not become wives were forced to work far more strenuously than wives, and were continuously abused sexually by any number of men.[126] As one informant put it, those who were selected by commanders and brigadiers for marriage were 'free' from being used for gang rapes and became 'good women'. One informant referred to the unmarried women as 'riff-raff women' who are used all day and all night by everyman.[127] The disdain for riff-raff women is clear, and the multiple rapes are treated as promiscuity on the part of the girl.

However, security and status for the 'good women' could also be no more than an illusory state as a commander's protection could be withdrawn at a whim. As Coulter relates: 'Musu was one of six bush wives to a commander. She became pregnant but miscarried, and thinks this was because of frequent beatings from her husband. The reason for the beatings, she believed, was that her bush husband usually took drugs which made him wicked.'[128] Husbands provided a measure of security for some girls; however, these husbands were often heavy drug users, brutal, brutalised themselves and likely to be suffering from the traumas of rebel life and atrocities regularly committed against others. The husband's ownership over his wife included the power to kill her summarily for any hint of disobedience.

It should be noted that even as security is shown to be very subjective in the context of abduction in armed conflict, women's attempts at negotiating their own safety should not be understated. Doing so involved a variety of means, including using small arms, aligning themselves with a powerful male commander, perpetuating impressive acts of violence, and engaging in subtle acts of acquiescence as well as bold acts of resistance. These mechanisms, which carried varying degrees of success, highlight the girls' capacity for negotiation and agency as well as resourcefulness, resistance, and mutual forms of support.[129]

So some highly tenuous parallels could be drawn between life in the bush: marriages were entered into, polygyny was practised, Mammy Queens were apparently appointed and rebel camps, hierarchies and the gendered division of labour were organised. There was a perceived superiority of bush wives over unattached women and, clearly, abducted women and rebels themselves used the language of 'marriage' to describe their bush relationships. However, it would be careless for the legal scholar to accept these terms without investigating the motives men and women would have for describing violence and subordination in conjugal terms. A motive that is most apparent would relate to protection and this has been discussed at length in earlier paragraphs. Describing oneself as a wife could have also reflected attempts to legitimise these relationships in order to minimise stigma or possibly to maximise profits that could be gained as a 'wife' or indeed as a 'husband'. While few scholars have ventured into a gender analysis of men and wartime masculinities in the

123 Just as girls endured a prolonged initiation process in the bush so did boys under the auspices of the men's Poro Society.
124 Coulter (2006), p. 144.
125 Coulter (2006), p. 223
126 Ibid., p. 196.
127 Ibid., p. 223.
128 Ibid., p. 189.
129 Denov and Gervais (2007), p. 895. Denov and Gervais also point out that these survival strategies ultimately reflect poorly on women who survive captivity and enslavement as women slaves are seen as untrustworthy, promiscuous and seductive. They are considered to have chosen to align themselves with their captors and are responsible for their own victimization. Ibid., pp. 604-605.

construction of bush marriage, speculatively, considering the improved status of men upon marriage in peacetime, it would appear that acquiring a wife and being able to claim her as an exclusive possession was dependant on one's status or rank and power over other men.[130] Conversely for women, whilst bush marriage may have improved their status in the bush, it has proved to be a damaging label in peacetime. Research shows that women who escaped rebel control after shorter periods of enslavement were welcomed back by their communities more readily than women regarded as having entered into rebel marriages.

Brenda Smith points out that an offshoot of sexual violence is the complicated relationships that sometimes emerge between captive and captor. The roles of the oppressed and the oppressor can become confused – sometimes resulting in relationships that stretch traditional boundaries of captor and captive. These relationships were often motivated by need - the oppressor had access to items that would make slavery or imprisonment more bearable - better food, clothing, better work assignments, protection from other oppressors, and increased status within the framework.[131] A psychiatric analysis also raises the issue of chronic traumatic stress experienced during captivity. Abusers may alternate between kindness and viciousness; for psychological survival, the victim may form positive feelings for that part of the perpetrator that is kind and ignore the vicious side. This 'traumatic attachment' can result in seemingly illogical behaviour such as the victim becoming protective of the perpetrator or evasion of law enforcement assistance.[132] Claiming one's torturer as one's husband could be viewed as 'traumatic attachment' under the banner of 'seemingly illogical behaviour'.

So, the allusion that bush wives were lucky or better off than those who were not selected belittles the suffering girls and women suffered irrespective of marital status. It creates a 'false universalism' between wives and girls enslaved by rebels in Sierra Leone and creates a contest that is not worth entering into, namely, the 'who suffered the grossest human rights violation' contest.[133]

5.3 Alternative narratives of gender at the local level

This section presents disruptive ethnographic narratives in the context of peacetime gender hegemonies particularly within the institution of marriage. These narratives are a small sample of divergent experiences and voices, and are intended to hint at the underneath of dominant narratives of gender inequality and discrimination in the human rights discourse in Sierra Leone. They do not produce an exhaustive, conclusive or single narrative but rather have the role of forcing a re-evaluation of human rights discourse on the subordination of women under law and customary law in Sierra Leone.

A rights-based narrative extracted from the TRC Report presents this analysis of customary law: Customary laws discriminate against women in Sierra Leone and prescribe no minimum marriage age. Further, the consent of the husband is sought but that of the woman is in many cases not necessary.[134] A woman is considered the

130 Mazurana and McKay write that in Sierra Leone the higher the status of a male commander, the more abducted girls he was given as a wife. Mazurana and McKay (2004), p. 3.

131 Smith (2006), pp. 580-581.

132 Srikantiah (2007), pp. 200-201, citing psychiatrist Joe Hidalgo in a co-authored article, Sadruddin, Hidalgo and Walter (2005), p. 404. This form of attachment is also addressed as a form of psychobiological consequence of severe trauma. One of the most pernicious effects of torture is that in their attempt to maintain attachment bonds, victims turn to the nearest source of hope to regain a state of psychological and physiological calm. Under situations of emotional deprivation they may develop strong emotional ties to their tormentors. This traumatic bonding is thought to occur among hostages, abused children, and abused spouses. The need to stay attached contributes to the denial and dissociation of the traumatic experience, and in order to preserve an image of safety and to avoid losing the hope of the existence of a protector, victims may begin to organize their lives around maintaining a bond with and placating their captors. Saporta and van der Kolk (1992), pp. 154-155.

133 Arneil demonstrates that attempts by feminist scholars to universalize women are dismissive of issues such as race and class. She exemplifies this within the American context where the African American women's historical experience of slavery and the Amerindians' experience of colonization must be included before feminists can claim to include all groups of women in their analysis. Arneil (2001), p. 46.

134 Lawyer's Center for Legal Assistance, Sierra Leone (LAWCLA), p. 21.

property of her husband and can be inherited by other male family members upon the death of her husband.[135] Married and single women alike have no right to refuse sex from their husbands or other men.[136]

This account of customary law is accurate if as human rights lawyers we seek only to shock, shame and condemn. However, this account is far from adequate if we determine to work towards systematic engagement in a 'cultural negotiation' which would emphasise the positive cultural elements and demystify the oppressive elements in culture-based discourses.[137] I would add that the human rights lawyer must also seek to demystify the oppressive elements of rights-based discourses before attempting an analysis of culture.

Culture is not applied uniformly by its constituents – people may pick and choose the aspects that apply and appeal to their situations. Shock tactics obscure and mystify customary law and the different ways in which it is observed. My fieldwork experience revealed that despite the failure of the Constitution, legislation and customary laws to protect the rights of women and girls, many Sierra Leoneans, men and women, are indeed engaged in cultural negotiation that has transformed or is transforming hegemonic models of gender.[138] Furthermore, reaching outside of the human rights law discipline is essential, but only if the human rights lawyer is willing to confront or negotiate with narratives of gender at the local level that challenge the authoritative narrative emerging from transitional justice processes, in this case Sierra Leone's Truth Commission.

5.3.1 Alternative narratives: Confusing the public and the private

Earlier chapters discussed the human rights law discourse categorizing the division of the public and the private into gendered and binary spaces. Men ostensibly occupy the public (powerful) spaces of society such as political life and women retreat into and inhabit the private such as the kitchen. Deconstructing the public-private divide has been an important centrepiece in the Western feminist battle against gender inequality and discrimination. In areas such as criminal law, for example, it has contributed to the criminalisation of 'private abuses' such as spousal abuse, stalking and date rape.[139] However, as Ferme reveals, it is a model that can also be deconstructed at the grassroots level in Sierra Leone in order that men and women distribute and redistribute power in gender relations.

Ferme's life with the Mende people reveals ambiguities and transgressions in appropriate gender roles and practices.[140] She acknowledges the visible gendered division of public and private spaces as certain objects and spaces are perceived to be 'owned' by men while others are 'owned' by women. However, she also describes an 'underneath of things' where women arbitrarily seize public spaces from men. She provides the example of Kpuawala women's ceremonial occupation of the male public domain for several days 'visibly, in large numbers and while explicitly declaring them off limits to men'.[141] She also describes how seemingly male domains were also appropriated by women known as the *Mabolesia*, who can be initiated as high-ranking female officials within the men's Poro Society. The *Mabole* hunts unchallenged with men, fishes with women, but is perceived as a marginal member of both the fishing community of women and the hunting community of men.[142] It is impossible to clearly identify the gender of the *Mabolesia*, for they possess male and female attributes and principles of overlapping gender qualities and of gender indeterminacy itself.[143] It is, in fact, for the purposes of this study not necessary to understand the *Mabole*, rather she is an important figure demonstrat-

135 Ibid., p. 22.
136 TRC Report 3b:3:74.
137 Report of the Special Rapporteur on Violence against Women, its Causes and Consequences: Intersections between Culture and Violence against Women, para. 52.
138 Think of the 'shocking' account I described of the widow flaunting her lover, or the divorcee firmly ensconced in the matrimonial home in the field narratives in section 5.1.2.
139 Pateman (1983), pp. 281-303.
140 Ferme (2001).
141 Ibid., pp. 62-63.
142 Ibid., pp. 74-75.
143 Ibid., p. 78.

ing that disruptions of gender roles do occur in Sierra Leone, and often in a spectacular fashion. Ferme's analysis also reveals that African women's disruptions of the public and the private may not resemble disruptions by Western feminists through legal theorising and advocacy; however, they merit our serious attention and acknowledgment.

The limitation of the TRC Report is that it does not note the fluidity of gender hegemonies throughout Sierra Leone's rapidly changing political landscape and that individually and collectively there can be room for women and men to navigate gender identities and spaces. This limited representation of gender hegemonies makes it entirely possible to construct bush marriage as emblematic of inequality and discrimination in Sierra Leonean society, culture and laws.

5.3.2 Alternative narratives of power in marriage

This chapter defines power in marriage as the ability of married persons to exert influence over the other parties to the marriage (the husband, co-wives, in-laws, parents, clan) in order to negotiate the terms and conditions of the matrimonial contract. Parties to a marriage exercise power when they are able to enforce or partially enforce the duties they believe they are owed by the other parties to the marriage and exploit those privileges they believe they are owed by virtue of the union. Power in marriage is also linked to the ability to enter into and extract oneself from marriage.

Ferme's study of gender hegemonies is useful for the human rights law scholar because her description of marriage and forms of dependence in her host community reveals that marriage is a gendered institution that can bestow as well as wrest power from both men and women. She describes, for example, the different ways that men and women in marriage and through marriage could alternate between the role of slave or dependent and positions of patronage such as big man and big woman.[144] She describes slave and master relationships in the idiom of marital and kin relations, for example, a maternal uncle is the master of his 'slave' nephew.[145] The matrilateral uncle owns the nephew and in the past would have possessed a right to sell the nephew into slavery.[146] Thus, by arranging a strategic marriage, 'enslaved' men and women, and even families, could free themselves from relationships of dependence and even increase their own control over other individuals or families.[147]

Ferme's analysis is useful for this study because it does not only focus on women's dependency, as the TRC human rights discourse is wont to do, but also describes masculinities and male dependency at times weakened or reinforced by strategic marriages. Rather than attempt to repeat Ferme's analysis, this section only presents certain studies of marriage types represented in her work emphasising that gender hegemonies are not as clear-cut as the human rights discourse supposes.

In contrast with the TRC Report, Ferme identifies several types of marriage. One category includes variations of early marriage: for example, the betrothal of girls to a suitor and the courtship by a suitor of a newly matured woman preparing for initiation or recently initiated.[148] A second category identified by Ferme is the marriage of 'mature' women, for example, widowed women or women who separated from or deserted earlier unions

144 Ferme describes a young woman with a 'big woman' status. She was from outside Kpuawala, and married to a younger man whom she supported financially. Unlike him, she had attended school and could write and speak English. She was cosmopolitan in her grooming and attire and stated that she was not a 'bush person' like her neighbours. During her business trips (she was a dancer and a businesswoman and often travelled to perform) her mother-in-law lamented her absence because her daughter-in-law took care of her and fed her unlike her own son who had not supported her in years. Ferme (2001), p. 174.

145 Ibid., p. 82.

146 Ibid., p. 87

147 Ferme explains that the links between marriage and slavery help place in context the degrees of dependence that underpin the Mende notion that everybody is under someone's patronage. She used this patronage notion to consider marriage and other relations as incorporated within a family universe.

148 Ibid., pp. 89-91.

and wish to remarry, often a lover who may have contributed to the demise of the earlier marriage. These women, whether widowed or separated, may well have experienced early marriage and may indeed be child brides under the international law framework, but the significance of their narratives for the purposes of this study is that they illustrate that power is not necessarily extinguished when girls/young women enter into (and leave) marriage. What is emphasised is that in Sierra Leone, as in many Sub-Saharan African countries, marriage is often less a discrete event than an ambiguous process sometimes lasting over years: a process involving the transfer of wealth, the inception of sexual relations, the birth of children, establishing a joint residence and the exchange of symbolic tokens.[149]

The following examples illustrate that customary law and custom cannot be easily written off as perpetuating the inequality and disempowerment of women. They also highlight that marriage cannot be reduced to a single, undifferentiated category, wherein people were married or unmarried, and all marriages had the same significance.[150] And lastly, they emphasise that women as well as men are social actors with needs and goals of their own. Like men, women use marriage and divorce as tools for their own purposes and often disrupt male ambitions and strategies of advancement.[151] The following narratives describe the case of a litigious wife, and cases of deserted husbands and cuckolds:

Ferme describes a respected headman who showed up at his friend's home to be fed because his own wife had refused to cook for him since he had slapped her in an argument. Subsequently his wife sued him in the chief's court which found him guilty and demanded that he apologise and pay her a punitive fine.

In another case Ferme returned to Kpuawala after an absence and found that three wives had deserted a 'big man', the head of the two towns. One was pregnant at the time she instituted divorce proceedings. Ferme also observed that other women she knew to have left husbands did not even bother with official (customary law) divorce proceedings.

In another instance, Ferme describes how one husband appeared desolate and confessed that it was due to his suspicion that his wife was having an affair, 'he was so worried that she would leave him for her lover that he did not have the courage to confront her with his suspicions.'[152]

In another case of suspected adultery, Alimatu lived as Momoh's wife although no formal customary marriage ceremony had been conducted by their kin. She met Momoh after leaving a previous husband although no traditional or formal ceremony marked their union. Annually, Alimatu left Momoh to visit her relatives in a distant hometown, but one year her visit extended beyond two months. Momoh followed Alimatu to her hometown but she refused to return to their home. It transpired that she was cohabiting with another man, so Momoh, lacking the means to force her to return against her will, returned to Kpuawala alone.[153]

And, finally, Ferme describes Moinana, a man who had only one wife. When he suspected she was pregnant as a result of an extramarital affair he forced her to confess her lover's name in court (*ndawo*). She did so, but then declared that she no longer wanted to return to her husband. Instead she asked to stay with the younger lover whose baby she was expecting. Her lover was fined, but he also helped her raise the money to obtain a divorce and later he married her. Ferme notes that the outcome of this case depended in part on the willingness of the woman's relatives – particularly, her parents – to support her bid for a divorce as the union with the lover was more profitable as he shared a lineage with the family.[154]

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149 Bledsoe and Pison (1994). pp. 2 and 4.

150 Ibid. p. 4. See also Cunningham's study on gender, marriage and power in Mende society in Sierra Leone. She writes that 'in addition a woman may marry a man from the outside, live in his village, divorce him, marry another man, and move back to Kpetema to be with him.' Cunningham (1996), p. 336.

151 Bledsoe (1980), p. 179.

152 Ferme (2001) p. 103.

153 Ibid., p. 103. Cunningham also suggests that extended visits to one's natal village were a ruse for women to divorce and seek remarriage. Cunningham (1996), p. 346.

154 Ferme (2001), p. 104.

Narratives such as these gleaned from ethnographic research allow for a multiple layered and complex picture of women, men, gender and gender roles in marriage in Sierra Leone to emerge. The narratives permit that girls and women may exercise forms of agency in the selection of partners, terminating marriages through strategising, and alliance-building that allow for a negotiation of customary law modes of justice. The narratives also introduce the idea that marriage itself is a process and not a final destination. Many of the examples above suggest a winding trajectory of marriage, negotiated separations, remarriage that has implications on dependence, mobility and independence that are as yet unexplored and unacknowledged by the human rights discourse on marriage in Sierra Leone.[155]

The narratives are discordant with the human rights discourse of the TRC which presented an essentialised view of marriage as undissolvable and pervaded by violence, forced labour and forced sex. Most importantly, these alternative narratives permit a gap to develop and widen between the practice of marriage in Sierra Leone, in all its forms, and sexual enslavement by rebels of abducted women and girls in wartime.

5.3.3 Concluding analysis

The TRC Report presents a skewed and incomplete image of marriage and gender hegemonies in Sierra Leone. It may well be true that most girls in Sierra Leone marry as child brides; however, the TRC fails to acknowledge the different shapes and trajectories of marriage, and the shifting nature of power between men, women and the numerous stakeholders (kin, clan, in-laws, etc.) in any one marriage.

This reduction of women's lives to inescapable relationships of oppression is an underlying discourse that has been used to justify oppressive interventions such as the colonisation of India to liberate 'burning brides', or the occupation of Iraq to liberate the socially and politically veiled Muslim woman. My conclusion is not that the Truth and Reconciliation Commission is a colonial expedition or an illegal humanitarian intervention violating Sierra Leone's fundamental laws or ideas of natural justice. However, it is the case that the reduction of women's lives to an essentialised position of subjugation effectively serves to legitimise a post-conflict justice response that was for all intents and purposes imposed on a government and a people.

This imposition of a transitional justice response and model is revealed in the evident disconnection between the TRC Report and the lived reality of Sierra Leonean men and women. It manifests itself in an elitist tendency to devalue indigenous processes in order to legitimize elite institutions such as commissions and courts. The overriding effect of the TRC Report's presentation of gender and gender-based violence in armed conflict, and the periods preceding and following it, was that the voices of women were not as loud as the legal analysis and legal definitions of the war experience. According to the Report, what defined inequality and discrimination in peace and war was not the experience of women as told by women but rather the glaring shortcomings of the domestic legislation when held up against international human rights law instruments.

On the one hand, this process of creating a historical and political context for the narrative transforms the individual or private from one that is isolated or easily ignored and forgotten. In this case, women's experience of violence was clearly described as a weapon of war and part of the political economy of the armed conflict. At the same time, it can also be argued that the historical and political blanket also had the effect of erasing individual narratives and creating instead a narrative of patterns of collective violence established from individual testimonies.

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155 Anthropological research shows that what might pass as marriage under a Western construction of the union may not be a marriage in Sierra Leone or other cultures. A man and woman may cohabit and bear children but they may not be married until the man makes his final installment of gifts to the woman's parents. Or a man and woman may not undergo a marriage ceremony until the wife falls pregnant, thereby affirming that the union is fertile. See Kenneth Omeje's excellent critique of community activists, women's rights campaigners, missionaries and the state's failure to 'liberate' women known as cult women from sexual exploitation among the 'Bangu' peoples of Sub-Saharan Africa. He illustrates that confronting this harmful traditional practice from a doctrinalist paradigm, particularly human rights theory, has only reinforced the practice and further disempowered women victims of the practice. Omeje (2001).

The parallels between bush marriage and early marriage made by the TRC were superficial to say the least. The differences between life in the bush and life in peacetime were more profound than the parallels drawn: People were killed, age hierarchies were reversed, traditional relations of reciprocity were severed, kinship and language ties were obliterated, and consciousness was altered through the massive use of drugs.[156] Coulter describes bush life as a radically transformed organisation of social relationships, a violent exaggeration of regular life.[157] The fact that the violence of bush marriage became normalised in armed conflict does not mean that in the aftermath of armed conflict, in the narrative of transitional justice, bush marriage should be normalised and affirmed by Judges, Commissioners, Prosecutors and Defence Counsel. Forced marriage is not a type of marriage practised and condoned by Sierra Leonean people as culture. Adopting the term 'forced marriage' legitimises the criminal acts of rebels and pushes an international crime into the private sphere of conjugal and coital relationships.

The Commissioners put the idea forward that the abduction of girls as bush wives and sex slaves during the war could partly be attributed to the traditional beliefs that governed the issue prior to the war.[158] It is a harmful sentiment that ignores the evidence that the RUF sought to degrade culture and traditional institutions. This desire to degrade explains why Chiefs, prominent members of the Poro Society, and other cultural leaders were attacked in the most degrading ways.[159] And marriage as a venerated institution steeped in culture and tradition was not exempt from attack. Rebels, by abducting and enslaving girls, were breaking and not making the sacred vows of marriage.

Life in the bush was less of a 'radicalised form of peacetime social life' than a 'perverse universe', 'an inverted morality' or an 'upside-down world'.[160] Social life and mores in the bush were impossible to navigate and contrary to anything known in peacetime. In effect, the rebels turned law and morality on their heads: what was immoral became not only justifiable but even heroic. Slavery was the antithesis of the matrimonial union: The selection of virgins from amongst captive girls was not a prerequisite to initiation and marriage but rather a prelude to multiple rapes. The questionable privileges of bush marriage, such as control over other abducted children and access to drugs and looted goods, have no relation to what is perceived by many to be the primary privilege of early marriage for daughters: That parents are securing their safety by pledging them to a regular male guardian as marriage provides security for the future, as well as from exposure to male strangers or rape and other attacks and the dishonour of premarital sex and pregnancy outside of marriage.[161] The narrative legitimizes rebel acts and stigmatizes marriage in Sierra Leone. The institution of marriage in Sierra Leone requires an investigation and review in the aftermath of armed conflict and decades of autocratic rule over society.

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156 Coulter (2006), p. 174.

157 Coulter (2006), p. 193.

158 Human Rights Watch also suggested a link between bush marriages and marriages by capture which were common at the turn of the nineteenth to twentieth centuries in Sierra Leone. In tribal wars, the conquerors would kill the male inhabitants of the vanquished village and capture the women who subsequently became the wives of the conquerors. The 'marriage' was validated by the captor's public declaration of his intention to cohabit with his captive wife. Such a wife was regarded as a slave and her children could not inherit from their father. Smart (2002), p. 29. However, this is a link I consider too tenuous to maintain. I have not encountered other suggestions that combatants justified sexual slavery or forced marriage by claiming to be reviving a practice that fell into disuse centuries ago.

159 'Sometimes they (police, school principals, chiefs, Poro members) would be forcibly sodomised, branded with RUF slogans, or executed.' All were deliberate attempts to attack or overturn shared values, ideological norms and traditional institutions.' Henry (2006), p. 386.

160 Keen (2005), pp. 76 and 233.

161 World Vision p. 8 (2008) citing Chulho Hyun, (2007) UNICEF, p. 1. http://www.unicef.org/infobycountry/uganda_40064.html. It is a travesty that there are currently some 60 million girls in the developing world who are married before their 18th birthday, and in several countries more than half the girls are married before they reach this age. ICRW, About Child Marriage, http://www.icrw.org/childmarriage/about.html

CHAPTER 6

Narratives on Gender and Violence: The Sierra Leone Special Court

6 INTRODUCTION AND LARS SVEN'S NARRATIVE

In February 2007 I conducted an interview with Lars Sven,[1] a development worker in Sierra Leone. In the course of the interview he explained that he was not at all surprised by the cruelty women and girls suffered in war because Sierra Leonean women were no more than slaves in peacetime too. According to Lars, 'It's the same in war and peace, these little girls are sold into marriage by their parents; they are slaves in marriage. They are no more than slaves to their husbands.' In January 2009 I shared Lars' observation with Papa,[2] a Sierra Leonean colleague in the US. Papa responded that actually he was not at all surprised by Lars' comments because 'that's what white people think about us [Africans].' I countered, 'I don't know if that's fair. This man has lived and worked in Sierra Leone for many years. His wife is Sierra Leonean. He loves the country.' And Papa replied 'those are the worst kind. They tell lies about our culture and tradition and we applaud them. He doesn't know a thing about Sierra Leone or Sierra Leonean women or the way we marry. And neither does his wife.'

This introductory narrative emphasises the issue of location and the assumptions it can raise at an individual and institutional level. Those who possess or claim to possess insider status often compete over whose knowledge of the local is legitimate. These claims and assumptions are difficult to sustain when one's identity is part insider, part outsider. Indeed one's identity is rarely monochromatic. Thus, a local resident might also be an expatriate whilst a citizen may be separated from his motherland by an ocean and a passport issued by his host state. Is it possible that an expatriate in Sierra Leone may be better versed in the harsh realities of local culture than a Sierra Leonean in the Diaspora?

The earlier discussions on transitional justice processes, namely the International Criminal Tribunal for Rwanda and the Sierra Leone Truth Commission, are a relevant backdrop to this line of questioning because they revealed that models of justice do not fall neatly into categories such as domestic or international. Further, practitioners' and legal scholars' assumptions of a tribunal's impartiality, legitimacy and knowledge of local contexts are often misplaced. Could the case law of an international tribunal make a greater contribution to enforcing the rights of women than that of an indigenous tribunal? Does a so-called hybrid court co-opt local culture and sensitivities in its decisions more effectively than an international court? Does a local seat ensure civil society's support for the transitional justice system? Questioning positionality within an institutional justice structure informs this chapter's gender review of the narratives on crimes against humanity and war crimes produced at the local level by the Sierra Leone Special Court (the Special Court). Chapter 6 focuses on a process of criminal justice although the discussion will at times take a comparative turn where reference to the practice of the Sierra Leone Truth Commission will enhance the critique. This chapter will reveal the ways in which the Special Court's multiple locations, as a local and international tribunal, impact its construction and definition of gender-based violence, specifically the crime(s) of forced marriage and sexual slavery - both prosecuted for the first time as crimes against humanity.

The study of case law is marginal in this chapter. Rather than conducting a traditional case law review and producing a detailed review of the judgments in the completed trials before the Sierra Leone Special Court,

1 A pseudonym.
2 A pseudonym.

this chapter selects areas and processes which are neglected by legal scholars.[3] Thus the gender review focuses on the material jurisdiction of the Statute; the selection of reliable witnesses and victims by the Prosecutor; and the Prosecutor's inclusion of charges in the indictment. And in order to reveal individual agency behind the often opaque façade of international institutions, the focus is largely on the Prosecutor and the ways in which gender is a factor in the exercise of his extensive powers of discretion. Determining the Prosecutor's gender biases is not based on empirical research but rather on hypotheses based on gendered outcomes of the transitional justice process.[4] The approach in this chapter is influenced by Hillary Charlesworth's description of feminist method as exposing and questioning the limited basis of international law's claim to objectivity and impartiality while insisting on the importance of gender relations as a category of analysis. She warns, and I do likewise, that this approach will not produce neat 'legal' answers but will challenge the very categories of 'law' and 'non-law'.[5] As with chapters 4 and 5, chapter 6 intends to disrupt the legal categorisation of gender-based violence in armed conflict.

The Statute of the Special Court (the Statute) gave prominence to widespread and systematic acts of sexual violence as definitive crimes against humanity or war crimes committed during Sierra Leone's civil war. This leads the chapter to the gender critique of decisions made by the Prosecutor and Trial Chambers at the pre-trial and trial stage of the criminal proceedings. The decisions discussed in this chapter reveal instances of both the exclusion and inclusion of gender and violence in the justice narrative. Under the heading of exclusion is the decision of the Prosecutor to omit charges of sexual violence from the Civil Defence Force indictment. A second exclusion refers to the prosecutor's strategy for witness selection that greatly prejudiced children and in particular former girl soldiers from sharing their narrative of abduction and exploitation. The decisions discussed under inclusion relate to the inclusion of sexual violence charges in indictments and in particular the definition of sexual slavery and forced marriage provided by the Special Court. This will be contrasted with the definition provided by the TRC.

Chapter 5 argued that creating analogies between forced marriage and early marriage as forms of slavery made the egregious crime of slavery somewhat banal and unnecessarily stigmatised the institution of marriage in Sierra Leone. Chapter 6 continues with this argument by elaborating on the definition of slavery in international law and the narrative of gender and enslavement as told by international courts including the Special Court. This chapter argues that the crimes of forced marriage and sexual slavery prosecuted by the Special Court are false legal realities erroneously pursued by the Prosecutor. The chapter argues that enslavement was a sufficient term under which to prosecute and do justice to the experience of Sierra Leone's abducted girls and women and interrogates the influences that moved the Special Court to 'sex' slavery and the experience of abducted or conscripted women and girls. The chapter concludes with the premise that the impact of 'sexing'

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3 For the leading gendered case law review of the Sierra Leone Special Court judgments and decisions see Oosterveld (2008) and (2009). See also volume 9 of the Annotated Leading Cases of International Criminal Tribunals which provides the full text of the most important decisions, including concurring, separate and dissenting opinions of the Sierra Leone Special Court from 2003-2004. Klip and Sluiter (2007).

4 The brief nature of my stay in Sierra Leone required that I make choices regarding which institutions I invest my time and research energies. Thus compared to my three-week visit with the International Criminal Tribunal for Rwanda (ICTR) and interviews with Judges, Defence Counsel, the Office of the Prosecutor, the Registry and the Witness and Victims Unit in Kigali and Arusha, I spent only four days with the Special Court. My visit to the ICTR and the unlimited access I enjoyed to the staff was made possible by the fact that three Utrecht alumni were employed as Prosecutors at the time and prior to my arrival connected me to colleagues. The ICTR Registry also welcomed researchers and prepared a comprehensive interview schedule for me before my arrival. They secured my interview with the President of the Tribunal and a ten-day research visit with the Office of the Prosecutor in Kigali. I was granted an official UN ICTR visitor's card during my stay in Arusha and Kigali. In contrast I conducted interviews solely with the Victims and Witness Unit at the Sierra Leone Special Court. I was unsuccessful in securing an invitation as a guest researcher from the Registry before my arrival or in establishing confident relationships with Special Court staff. The lack of institutional accreditation made even a physical entrance into the Special Court burdensome (due to security checks), compared to my security clearance in Arusha, and this shaped my decision to focus on more accessible institutions, such as the Police, the Ministry of Gender, NGOs and INGOs. See Jayashri Srikantiah who also shows that despite an inability to access empirical evidence from institutions, hypotheses can be drawn by researchers in order to identify flaws in the institutional implementation of gendered processes. Srikantiah (2007), p. 158.

5 Charlesworth (1999).

slavery had a negative impact on girls as well as boys enslaved by rebel forces and defeats efforts to conduct a thorough gender analysis of enslavement.

Chapter 1 provided the study of an historic abuse of human rights through Sara Bartman's experience of exploitation in the United Kingdom and France. Bartman's historiography was a tool to emphasise the gender gaps in the contemporary international human rights law framework. In this chapter the long look back evokes transatlantic slavery and colonial slavery as sites that can be revisited in order to inform the present study of gender and the ways in which it shapes enslavement. This, in turn, informs the review in this study of contemporary constructions of enslavement by the International Criminal Tribunal for the Former Yugoslavia, the Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery, the Rome Statute for the International Criminal Court and, finally, the Sierra Leone Special Court. As in the preceding chapter the works of anthropologists who have lived and worked closely with communities struggling to reintegrate child soldiers is useful in this chapter for providing the legal research with the historical continuities and cultural underpinnings of the reasons and ways fighting forces in Sierra Leone justified the use of child soldiers for enslavement and other abusive and exploitative functions.[6]

6.1 A Hybrid Court

Chapter 5 briefly described the Sierra Leone civil war as a backdrop to the establishment of the TRC. This chapter provides a background to the peace process as well as the conflict in order to locate the positionality of the Sierra Leone Special Court.[7] The Sierra Leone peace process initially called for a full amnesty from criminal prosecution but later demanded the establishment of individual criminal responsibility for those most responsible for gross violations of human rights in Sierra Leone. These dual and opposing objectives of the justice process led to the establishment of the TRC as well as the Special Court, and influenced the allocation of victimhood as well as guilt for perpetrators in the decisions of the trial chamber and policy of the Prosecutor.

The Lomé Peace Accord (the Lomé Accord) granted the leader of the Revolutionary United Front ('RUF' or 'the rebels') Corporal Foday Sankoh an absolute and free pardon.[8] A blanket amnesty was also adopted in the earlier Abidjan Peace Accord of 30 November 1996 and the Conakry Agreement of 23 October 1997. Under this and the past agreements the Government of Sierra Leone was prohibited from taking any official or judicial action against any member of the RUF or other fighting forces in respect of anything done by them in pursuit of their military and political objectives. In addition, the Government was required to adopt legislative measures necessary to guarantee immunity to former combatants, exiles and other persons, outside the country for reasons related to the armed conflict and to protect the full exercise of their civil and political rights.[9]

Under the Lomé Accord Foday Sankoh was also appointed as head of a new Mineral Resources Commission and granted the status of Vice-President.[10] Despite the generous amnesty and award of political legitimacy, Sankoh's RUF and/with the AFRC repeatedly violated the accord. The RUF continued to fight the Armed Forces Revolutionary Council (AFRC) and Civil Defence Force (CDF) in the countryside, prevented the deployment of UN peacekeepers to the diamond-rich eastern provinces, and in one infamous incident held more than 500 peacekeepers hostage and confiscated their heavy weapons and vehicles. Reports of raping,

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6 Shepler (2005), pp. 2-3.

7 This brief and general history draws extensively from the timeline of the conflict and peace process advanced by Keen (2005) and Adedeje (2002).

8 A suspended death sentence hung over Sankoh's head at the signing of the Lomé Accord. This arose from his arrest (detention under house arrest) in 1997 by Nigeria which subsequently handed him over to Sierra Leone in July 1999. The UN, OAU and the Commonwealth were moral guarantors of the Lomé Accord. Representatives of Benin, Burkina Faso, Ghana, Guinea, Liberia, Libya, Mali, Nigeria, Britain and the United States were also present. Adedeje (2002), pp. 97-99. The special representative of the Secretary-General appended to his signature of the Lomé Agreement a statement that the UN did not consider that the amnesty provisions of the Agreement would apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.

9 Lomé Accord, arts. 9 (1) (2) and (3).

10 Keen (2005), p. 251.

looting, and the abduction of children in the countryside by rebels escalated.[11] Public resentment of Sankoh and his apparent impunity intensified and calls for a waiver of the amnesty provisions were heard in Sierra Leone and internationally. It was evident that repetitive awards of amnesty and impunity only fuelled the rebel's desire for war and did nothing to promote peace and reconciliation in Sierra Leone.[12] Following a public demonstration by civilians, Sankoh was arrested on 17 May 2000. By the close of 2000 it seemed possible that security could be restored to the nation as the UN Mission in Sierra Leone (UNAMSIL) swelled to more than 20,000 peacekeepers - the largest peacekeeping operation in the world at that time.[13]

The permanent representative of Sierra Leone to the UN initiated a request to the President of the Security Council for the establishment of a criminal tribunal to prosecute leaders of the RUF.[14] This led to the establishment of the Special Court for Sierra Leone jointly by the Government of Sierra Leone and the UN pursuant to Security Council Resolution 1315.[15] The Court is mandated to try not only the rebels as the Government intended, but all those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.[16]

The Statute of the Special Court unequivocally waives any amnesty for any person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime against humanity, or a violation of the laws of war.[17] Further, perpetrators under the age of 15 at the time they committed crimes against humanity or war crimes are excluded from the jurisdiction of the Special Court.[18]

A total of 14 individuals have been indicted by the Prosecutor, three of whom, Sam Bockarie, Foday Sankoh and Samuel Hinga Norman, have subsequently died.[19] The trials of three former leaders of the Armed Forces Revolutionary Council (AFRC) and of two members of the Civil Defence Force ('CDF' or 'Kamajors') have been completed, including appeals. The trial judgment in the trial of three RUF leaders was delivered in February 2009 but still awaits an appeal. The trial of Charles Taylor is the final case being determined. The trial judgments in the AFRC and RUF are the first to result in convictions for sexual violence and other forms of gender-based violence.

The Special Court is seen as representing a new wave of mechanisms of accountability incorporating both domestic and international features. For this reason the Special Court is widely described as a hybrid court. This classification is unwarranted as apart from its geographical location in Freetown, the Special Court's core prosecutorial features are international and absent of any significant influences from Sierra Leone's legal

11 Adedeje (2002), p. 101.

12 Other important factors for the failure of the Lomé accords include: the destabilizing influence of Liberia which continued to provide arms and purchase diamonds from the RUF; obstructionism by the RUF leadership; the exclusion of the AFRC/SLA from the agreement; the weakness of support from the international community in the demobilisation process; and the weak international peacekeeping effort. Keen (2005), p. 253.

13 Keen (2005), p. 206 citing Patel (2002), p. 37.

14 Kunowah-Tinu Kiellow (2008).

15 Unlike in the case of the International Criminal Tribunal for Rwanda, this application of a Security Council Resolution (1315) was not invoked under Chapter VII of the UN Charter (Action with respect to threats to the peace, breaches of the peace, and acts of aggression). See Security Council Resolution 1315 (2000) on the Situation in Sierra Leone.

16 Special Court Statute, art. 1.

17 Special Court Statute, art. 10.

18 Special Court Statute art. 7 (1) and (2). And special provisions were provided for the potential prosecution of juvenile offenders, or those children over 15 but under 18 years of age at the time of the crime. Art. 8 (2).

19 Foday Sankoh died of ill-health on 29 July 2003 in hospital in UN custody. Samuel Hinga Norman, a leader of the CDF, died on 22 February 2007 following surgery in a hospital in Dakar, Senegal whilst in UN Custody. Sam Bockarie, an RUF General, was reportedly shot dead in the Ivory Coast on 6 May 2005 when Liberian government forces attempted to arrest him. Johnny Paul Koroma, the former coup leader and Head of State of Sierra Leone (May 1997-February 1998), was indicted as the Chairman of the AFRC. He fled Sierra Leone before he could be tried. His whereabouts are still unknown.

system.[20] Despite its local presence, many argue that the Court remains remote from local people.[21] 'Local' in this sense refers not to a geographic location as both the Special Court and TRC were situated in Sierra Leone. Rather, it refers to the real or imagined proximity to the social and cultural context underlying the formal transitional justice process. Local also presumes a perceived independence from external pressures exerted by international donors or third party States.

The Special Court's Statute and Rules of Evidence and Procedure ('the Rules') reveal its international origins. The Rules of the Special Court replicate the Rules of Evidence and Procedure of the International Criminal Tribunal for Rwanda ('ICTR'). In contrast, Sierra Leonean national rules of evidence and procedure are overlooked and this further discredits the 'hybrid' tag.

The material jurisdiction provided by the Special Court Statute covers crimes against humanity and war crimes. The Statute attempts to enhance the so-called hybrid effect by giving the Special Court the jurisdiction to prosecute crimes falling under the Prevention of Cruelty to Children Act (PCCA), an archaic statute that manifestly discriminates against the rights of the girl child.[22] The PCCA is replete with defences that are backward in the face of contemporary developments in the rules of evidence and procedure at the level of international criminal law. For example, the Rules of the ad hoc criminal tribunals for Rwanda and the former Yugoslavia and the Sierra Leone Special Court provide that corroboration of the testimony of victims of sexual violence is not necessary. In contrast, the PCCA provides that the evidence of girl witnesses must be corroborated, particularly if the child was a common prostitute or of low morality.[23] The two positions are entirely irreconcilable.

This attempt at incorporating national law into the Statute in order to enhance the hybrid nature of the transitional justice model reveals the desire by the international community drafting the Statute to show their respect and recognition of Sierra Leone's legal system. However, this inclusion also reflects the failure by the drafters to investigate the legitimacy of local laws vis-à-vis the international duty to protect and promote the rights of women and girls in Sierra Leone. The Prosecutor for the Special Court wisely ignored the PCCA when framing the charges against accused persons in the indictments, and its inclusion remained a dead letter.

It is also said that the Special Court's hybrid personality is illustrated by the fact that a significant number of its staff are Sierra Leonean. The Deputy Registrar is Sierra Leonean and two of the four Appeals Chamber

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20 The Special Court Agreement Act was enacted by Sierra Leone's Parliament in 2002 and the Act gives legal effect to the powers and competences of the Special Court within the legal system of Sierra Leone.

21 nternational Crisis Group (2003), p.11. I was in Sierra Leone when Charles Taylor was extradited to Sierra Leone by the Nigerian government on 29 March 2007, and Samuel Hinga Norman was airlifted to Dakar, Senegal on 17 February 2007 for surgery. Norman died from medical complications on 22 February 2007. On both occasions I called one of my Sierra Leonean host families for a security briefing before leaving my lodgings to head into downtown Freetown. My informants in this case were a couple Mr and Mrs Koroma (pseudonyms) and both worked at a Ministry in downtown Freetown, and Mr Koroma was a proud card-carrying Kamajor. In both cases, my family were amused that I imagined news from the Special Court would impact their routines. They told me in no uncertain terms that I should continue with my regular business and report to work exactly as they intended to. Their message to me was that life went on for Sierra Leoneans and the work and dramas of the Special Court held no special significance for them. An Amnesty International press release also broached concern that the work of the Special Court made little impact on Sierra Leoneans. Amnesty International Press Release, *Sierra Leoneans unaware of Charles Taylor Trial*, 14 July 2009.

22 The Statute for the Sierra Leone Special Court provides as follows:
Article 5 (a) - Crimes under Sierra Leonean Law: The Special Court shall have the power to prosecute persons who have committed the following crimes under Sierra Leonean law: (a) Offences relating to the abuse of girls under the Prevention of Cruelty to Children Act, 1926 (Cap. 31): (i) Abusing a girl under 13 years of age, contrary to section 6; (ii) Abusing a girl between 13 and 14 years of age, contrary to section 7; (iii) Abduction of a girl for immoral purposes, contrary to section 12.

23 Chapter 31 of the Laws of Sierra Leone provides:
Article 15 of the PCCA provides that when a person is accused of defiling a minor it shall be a sufficient defence if the person so charged had reasonable cause to believe that the girl was of or above the specified age. And article 10 provides that defiling a minor is a misdemeanour – unless the child was a common prostitute or of known immoral character.

judges are Sierra Leonean.[24] At the same time a significant number of its senior staff were recruited from the ICTR and ICTY, including the Registrar, Deputy Registrar, Prosecutor and Chief of the Victims and Witnesses Unit. It can be assumed that these appointees brought the institutional culture of international criminal tribunals to the Special Court. A head count of local versus foreign staff is, however, a formulaic approach and does not signify that a tribunal is 'hybrid.'[25] Even if Sierra Leonean senior staff were to outnumber foreign senior and core staff, this factor would not of itself make the court a hybrid or even a local court.

The Special Court is an ad hoc international criminal tribunal in the nature of the ICTR and ICTY. Unlike the ICTY and ICTR the Special Court was not the result of a Security Council Resolution. However, this did not reduce its power to indict the former President of Liberia Charles Taylor, to exert pressure on Nigeria to extradite him to Sierra Leone and subsequently to effect the transfer of his trial to The Hague. The Special Court exhibited extensive political clout commensurate with its status as an international court. Its establishment through a treaty agreement does not conceal the Special Court's primacy over Sierra Leone's domestic laws and its power to override decisions of domestic courts.[26] If the drafters of the Statute, namely the international community (this includes the Sierra Leonean government), intended the national laws and procedure to play a meaningful role in the prosecution process of the hybrid Court, the Statute would have specifically stated so. The term hybrid is not a creation of the Statute but that of the international actors seeking to emphasise a 'home-grown' or 'grassroots' institution in order to legitimise transitional justice. Clarifying at this stage that its international identity trumps any genuinely hybrid elements, I lay the groundwork for the analysis of the ways in which the 'international' identity of the Special Court influences decision-making relating to gender and relationships with victims, witnesses and other stakeholders such as the Government.

6.2 Gender mandate

The Beijing Declaration and Platform described in chapter 3 as a progressive third generation rights instrument called on states to integrate a gender perspective in the resolution of armed conflicts and to aim for a gender balance when nominating or promoting candidates for judicial and other positions in all relevant international bodies, such as the United Nations International Tribunals for the former Yugoslavia and for Rwanda and the International Court of Justice, as well as in other bodies related to the peaceful settlement of disputes.[27] States are also called upon to ensure that these judicial bodies are able to address gender issues properly by providing appropriate training to prosecutors and judges and other officials in handling cases involving rape, forced pregnancy in situations of armed conflict, indecent assault and other forms of violence against women in armed conflicts, including terrorism, and to integrate a gender perspective into their work.[28]

The Sierra Leone Special Court is the ad hoc tribunal that best reflects the gender considerations of the Beijing Declaration and Platform. Indeed the Statute of the Sierra Leone Special Court has been lauded by observers of transitional justice for extending the list of crimes provided by the ICTR and ICTY Statutes with respect to the crime of rape.[29] The Special Court Statute lists rape as a crime against humanity, but also includes sexual

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24 Three of the Special Court Judges are Sierra Leonean, namely, Justice Rosolu John Bankole Thompson (Trial Chamber), Justice Jon Kamanda (Appeal Chamber) and Justice George Gelaga King (Presiding Judge of the Appeals Chamber). Other judges have originated from Senegal, Uganda, Cameroon, Nigeria, Samoa, Austria, Canada, and Northern Ireland.

25 Just as a high representation of women in Parliament should not lead to the presumption that women-friendly laws will follow. If the institutional culture of Parliament remains patriarchal, colonial and elitist its laws will continue to reflect this irrespective of the gender of Parliamentarians. I thank Karen Colvard of the HF Guggenheim Foundation for raising this point at the Emory University conference on *Gender Violence and Gender Justice* in May 2009 in her presentation *Western Feminism and Gender Issues in the Developing World.*

26 Art. 8 (1) of the Statute provides that the Special Court and domestic courts shall have concurrent jurisdiction and Art. 8 (2) provides that the Special Court shall have primacy over national courts and further that at any stage of the procedure, the Special Court may formally request a national court to defer its competence.

27 Beijing Declaration and Platform (1995), para. 144 (c).

28 Ibid., para. 144 (d).

29 Art. 6 (c) of the Charter of the International Military Tribunal (Nuremberg) does not refer to rape as a crime against humanity and only includes 'murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds…'

slavery, enforced prostitution, forced pregnancy and any other form of sexual violence as crimes against humanity.[30] Apart from crimes against humanity, the Special Court has the power to prosecute persons who committed or ordered the commission of serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. The war crimes listed are extensive and include outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.[31] The Statute provides a list of other serious violations of international humanitarian law and most notably includes conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.[32]

The Prosecutor was to be responsible for the investigation and prosecution of persons bearing the greatest responsibility for serious violations of international humanitarian law committed in Sierra Leone since 30 November 1996.[33] The Statute provided that given the nature of the crimes committed and the particular sensitivities of girls, young women and children victims of rape, sexual assault, abduction and slavery of all kinds, due consideration should be given in the appointment of prosecutors and investigators experienced in gender-related crimes and juvenile justice.[34] This provision demanded gender competence as a professional requirement not only of the specialist investigators focussing on gender-based violence but of the entire staff of the Office of the Prosecutor. This requirement revealed that the drafters of the Statute and architects of justice had taken cognisance of the widespread and systematic nature of sexual violence perpetrated throughout the civil war. Further, the specific reference to gender was a strong mandate for the Prosecutor to investigate not just rape but all manner of gender-based crimes committed against women and girls.[35]

The Statute also mandated the Special Court's Registry to establish a Witness and Victims Section (WVU) to provide protective measures and security arrangements, counselling and other assistance for witnesses and victims appearing before the Court.[36] The Statute specifically laid down the requirement that the unit personnel would have experience in trauma, including trauma related to crimes of sexual violence and violence against children.[37] The psycho-social unit consists of staff trained in counselling, plus two medically trained staff and one psychologist.[38] This was another demonstration that the architects of transitional criminal justice in Sierra Leone had justice for women and children at the forefront of their prosecutorial objectives. Witnesses and victims of the fighting forces or the government were not just an indistinguishable mass but to be seen as men, women and children who survived the brutalities of an armed conflict. At the same time the provisions of the

30 The Sierra Leone Special Court Statute provides:
Art. 2 The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population: (a) Murder, (b) extermination, (c) enslavement, (d) deportation, (e) imprisonment, (f) torture, (g) rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence; (h) persecution on political, racial, ethnic or religious grounds; and (i) other inhumane acts.
The Statute of the ICC extends the crime of rape in a similar fashion:
Art. 7 Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity are listed.

31 The Sierra Leone Special Court Statute provides:
Art. 3 (a) violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any other form of corporal punishment; (c) taking of hostages; and (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.

32 Ibid., art. 4 (c).

33 Ibid., art. 15 (1).

34 Ibid., art. 15 (3) and (4).

35 I compare the Special Court Prosecutor's 'gender mandate' to the ICTR Prosecutor's 'genocide mandate.' As I described in chapter 4, the 'genocide mandate' was contained in the Security Council Resolution stating the international community's conviction that genocide occurred in Rwanda. Based on this mandate it would have been unthinkable for the Prosecutor for Rwanda not to include a genocide charge in every indictment it issued. This 'genocide' mandate and its impact on the investigations of gender-based violence by the Prosecutor were elaborated upon in chapter 4.

36 Art. 16 (4) of the Special Court Statute divides the Witness and Victim Unit into two units: a protection, security and movement unit with nearly 30 staff members and a psycho-social support unit with around 10 staff. The former manages all logistical and security arrangements for witnesses, including the identification and maintenance of safe houses.

37 Ibid.

38 Horn et al. (2009), p. 137.

Statute described above show that women suffered harms that were specific to their gender, age and other intersecting factors.

The provisions of the Statute present a narrative that takes it as given that women's gender impacts their experience of armed conflict. Crimes against humanity and war crimes are presented as crimes against civilian populations that may take specific shapes and forms when committed against women. It is an important justice narrative and in many ways exemplary in a world where transitional justice processes are an inherent part of the postwar reconstruction process.

6.2.1 Exclusion of girl witnesses

The Statute clearly spelled out the gender mandate of the Prosecutor and this section enquires into whether the Prosecutor fulfilled his obligation towards victims of gender-based violence. A report by the University of Berkley's War Crimes Studies Center (the Berkley Report) indicated a prosecutorial strategy that discriminated against child witnesses, specifically girl witnesses.[39] A review of the CDF, RUF and AFRC cases showed that the number of child witnesses was kept to a minimum. Further, it revealed that as of 2006 all of the witnesses categorised as child witnesses who had testified at the court were boys.[40] This was a startling revelation considering that up to 25% of children in the fighting forces were girls.[41] As of December 2005, only one female former combatant had testified before the Special Court. Other female witnesses testified about crimes they were forced to commit after abduction into the fighting forces, but generally the prosecution did not categorise these witnesses as former combatants.[42]

The prosecution's principal criterion for determining when it would hear a child witness was whether or not the witness was a child combatant - the individual's actual age did not figure in the calculus.[43] As girl witnesses were not considered to be combatants, it seems the issue of gauging whether they were children (under 18 according to international standards) was not raised.[44] The disproportionate representation of boy fighters as witnesses leads to the conclusion that girls were not regarded by investigators as combatants.

This omission against girl combatants made by the Prosecutor mirrors the development of the laws of war with respect to child combatants. The four Geneva Conventions omitted any regulation of the participation of children in armed conflicts, and their protection as children qua children came later with the two Additional Protocols of 1977.[45] The Protocols impose an obligation on states not to recruit children under fifteen into the armed forces and to ensure that children under fifteen do not take part in active hostilities. A direct part in hostilities when narrowly defined means that 'the person in question performs warlike acts which by their nature or purpose are designed to strike enemy combatants or material; acts therefore such as firing at enemy soldiers, throwing a Molotov cocktail at an enemy tank, blowing up a bridge carrying enemy war *matériel*, and so on.'[46]

The Prosecutor clearly followed the narrow international humanitarian law (IHL) definition of 'active hostilities' and consequently excluded girl former combatants from participation as witnesses in the transitional justice process. The Prosecutor's position undermined the multiple roles Sierra Leonean girls fulfilled during the armed conflict, serving simultaneously as fighters, porters, cooks, food producers, messengers between camps, communication technicians, workers in diamond mines, assistants to the sick and wounded, wives,

39 A general conclusion drawn by the Report was that contrary to the requirements of the Statute for gender competency most prosecution investigators and attorneys responsible for determining the most resilient witnesses were not trained to incorporate gender into their work. Sanin and Stirnemann (2006).
40 Sanin and Stirnemann (2006), p. 15.
41 Ibid.
42 Ibid., p. 15.
43 Ibid., p. 11.
44 Ibid., p. 15.
45 Happold (2000), p. 31.
46 Happold (2000), p. 36 citing Kalshoven (1987), p. 91.

slaves, launderers, child-care providers, spies and labourers.[47] If, indeed, they were sent to the front lines less frequently, it is due to the fact that they were so crucial to the war effort. In many cases they were regarded as less expendable than boy combatants.[48] And yet it is this very reality that disqualified girl former combatants from combatant status by the prosecution through its discriminatory witness selection process that boxed girls and women into the gender roles of rape victims and rejected their participation in the non-traditional gender role of combatant.[49]

The Statute gives the Prosecutor the power to prosecute persons who conscripted children under the age of 15 years into armed groups or used them to participate actively in hostilities.[50] The Statute provides that the mere act of conscripting children into an armed group is in itself a serious violation of IHL. Thus, the perception that only boys were conscripted for participation in active hostilities violates the spirit and intent of the Statute. The Statute required that the prosecution would provide narratives from children (both boys and girls) conscripted by armed forces. Participation in active hostilities was not conditional to a prosecution for conscription of children into armed groups. Beyond the letter of the Statute, what was required was gender competence that allowed for an understanding of the context and nature of girl soldiering as a core contribution to active hostilities. This contextual analysis is found in the scholarship of social scientists but still eludes inclusion within legal scholarship and justice processes. It is an analysis that is crucial in shaping a gender competence that would allow women and girls a war experience beyond one of victimization.[51]

Several factors could be applied to mitigate the Prosecutor's exclusion of girl combatants from the witness-stand. Firstly, is the claim that girls fear stigmatisation more than boys for their association with fighting forces and are more likely to evade investigators and participation in a criminal justice process that would expose their association with fighters. Secondly, it could be argued that girls, more than boys, remained under the control of former commanders after the Demobilisation, Demilitarisation and Repatriation (DDR) process and feared reprisals if they cooperated with the Prosecutor.[52] A third argument refers to the likelihood that girls would be more likely than boys to be traumatised under examination and cross-examination considering the combined experience of combat, violence and sexual violence.

None of the arguments put forward are tenable in light of the strong gender mandate vested in the Prosecutor by the Statute combined with the special gender-sensitive measures required of the WVU.[53] A WVU manned by psychologists and social workers responsive to rape trauma syndrome symptoms, and the fears of survivors linked to confidentiality and security would guarantee a vigilant response to the needs of girl combatants. And, finally, the possible retraumatisation of victims of gross violations of human rights is a reality for any international court seeking justice for survivors of civil war. The response to this high probability of trauma

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47 Sanin and Stirnemann (2006), p. 15. See also Mazurana and Carlson (2004), p. 1.

48 Ibid., p. 15. Mazurana and Carlson provide an interesting perspective of a former girl fighter who argued that combining 'marriage' with fighting was a strategy for security. At the age of 15 she was an RUF frontline fighter, and felt it was better to be a fighter as well as a wife to a common soldier because you could better protect yourself with your own weapon, you had greater access to food and loot, and your chances of escape were greater, unlike captive 'wives' of commanders who were closely guarded with little chance of escape. This testimony shows how girls donned different roles strategically and that classifying this 15 year old rebel frontline fighter as a wife and ending the analysis at that point is to produce an incomplete and even demeaning narrative. Mazurana and Carlson (2004), p. 12.

49 Morris Kallon et al., Judgment Summary, Case No. SCSL-04-15-T, 25-02-2009. The Trial Chamber confirmed the Prosecutor's limited interpretation of active hostilities.
Para. 49. The Chamber has found that after their military training, the children were assigned specific functions within the RUF. Certain children were retained by Commanders for domestic labour or to go on food finding missions, and the Chamber has found that this use does not constitute active participation in hostilities.

50 Sierra Leone Statute, art. 4 (a).

51 See Susan Shepler on the cultural context of child recruitment into fighting forces in Sierra Leone. Shepler (2005). Other groundbreaking studies on the central role that girl soldiers play in Africa's armed conflicts include Mazurana and Carlson (2004), Save the Children (2005), Mazurana and McKay (2006) and Stavron (2005).

52 Sierra Leone ended its national DDR programme in December 2003. Since the programme began in 1998, 72,500 former combatants have been demobilized, including 4,751 women (6.5 percent) and 6,787 children (9.4 percent), of whom 506 are girls. Mazurana and Carlson (2004) p. 2 citing Bradley and Fusato (2003).

53 See article16 of the Sierra Leone Special Court Statute.

is not to limit witness testimony and participation but to ensure that Tribunal staff are capable of supporting witnesses before, during as well as after their testimony.[54]

The claim that the Prosecutor's disproportionate representation of boy witnesses is a form of gender discrimination against girl combatants is supported by the fact that whilst issues of stigma, trauma and security fears are valid concerns for girl fighters, they can and do apply to many boy fighters.[55] Obstacles such as the fear of reprisals from commanders and negative reactions from family members are common to witnesses irrespective of gender. Yet in the case of boy soldiers they have been overcome, not easily, but with careful pre-trial assessment by the Office of the Prosecutor, and counselling and protection services and follow-up care by the WVU. Extending this response to girls would allow the Special Court to fulfil its gender mandate and facilitate equal access to justice.

The case of Aisha,[56] the only girl combatant called as a witness, confirms that with political will the special and gendered needs of girl witnesses, such as child-care and protection from intimidation by an unsupportive spouse, can be realised and their participation in the process successfully facilitated.[57]

> Aisha was 17 at the time of demobilisation and she already had three children with her bush husband. At the time of testifying she was still married to her bush husband and was raising her children with him. The Report reveals that she successfully concealed the fact that she was cooperating with the Court from her husband, because she feared that as a former RUF combatant himself, he would not support the prosecution of the alleged RUF leaders. She worked closely with the Witnesses and Victims Services and the prosecution to devise explanations for her frequent travel to Freetown and prolonged absences from her family.[58]

Jayashri Srikantiah provides a review of US federal immigration agencies' construction of an 'iconic victim' in the anti-trafficking discourse. This iconic victim is constructed by prosecutors and agents investigating traffickers. Srikantiah points out the fact that the same prosecutor who decides whether a victim would be a good witness also decides whether the victim is a victim for the purposes of the relevant remedy (a special US humanitarian visa).[59] Her analysis illustrates the conflict inherent in placing the victim-identification function in prosecution hands as each prosecutor determines subjectively who is a 'deserving' victim.[60] In the US case, lawmakers successfully utilised an image of the traffic victim as meek, passive, sexualised objects in order to pass protecting legislation. They ignored victims of trafficking for forced labour and emphasised the sexual exploitation of women and girls in their advocacy campaign. Srikantiah argues that the prosecutor's identification of actual trafficking victims is impacted by this political rhetoric, with tragic consequences for victims of labour or sex trafficking who do not describe their stories consistently with it.[61]

Parallels between the sex trafficking narrative and the sex slavery narrative are apparent, and are useful to this study. Srikantiah traces the need for an 'iconic' victim to two sources. One is the need to distinguish between trafficking victims and unlawful economic migrants. The latter are categorically denied victim status as this might legitimate their 'wilful' illegal entry and residence in the United States. The former are thought to enter under the complete physical and psychological control of the trafficker. Second, the stereotypical victim story

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54 The Sierra Leone Special Court's WVU demonstrated a commitment and an ability to provide follow-up supervision and support to witnesses. See Vahidy et al. (2009) for an internal WVU review of the services it provided to victims and witnesses.

55 The point being that boys also suffer serious social or psychological repercussions after returning from the bush. This experience may not be linked to 'bearing children' or the loss of virginity as in the case with girls returning from the bush. However, this should not per se make their experience less harmful. It should be viewed instead through a gender lens, which would reveal the very specific ways boys experienced harm and how it impacted their reintegration after demobilisation.

56 The Berkley Report provided the witness with a pseudonym.

57 The Berkley Report does not elucidate on whether the Prosecutor regarded Aisha's relationship as 'marriage' or 'sexual slavery' and whether the witnesses and victims services supported her in seeking alternatives to this relationship.

58 Sanin and Stirnemann (2006), p. 16.

59 Srikantiah (2007), p. 160

60 Ibid.

61 Ibid.

of the passive and paralysed (with fear) sex worker is a highly effective prosecutorial strategy allowing prosecutors to describe the trafficker as maximally culpable.[62] The humanitarian aspect of prosecuting the sexual exploitation of girl soldiers was subsumed by the ambition of the Prosecutor to secure convictions of war criminals with the assistance of 'iconic victims' and 'credible witnesses', and this required 'paralysed' female victims who had taken no part in active hostilities.

Apart from denying women and girls' whole narratives of armed conflict, the prosecution's strategy regarding the selection of witnesses raises some damaging gender assumptions and outcomes. The first is that the testimony of boy combatants is more reliable than that of girls: The Special Court established guiding principles for working with child witnesses. With regard to witness selection the Rules provide that the prosecution should only approach the most resilient child witnesses and only those who are already resettled with their families or communities. In identifying potential child witnesses, only children in the care of their families or legal guardians should be considered.[63]

This policy showed a disregard for the gendered realities of abducted girls, who for the most part experienced greater challenges to demobilisation, rehabilitation, and family reunification than boys. Many girls experienced discrimination and exclusion from a DDR programme that was designed to address the needs of men and boys (who were perceived as combatants).[64] Thus, girls were more likely than boys to face rejection when they returned to their families with no money earned or vocational skills acquired from participation in DDR processes. Many girls returned home having had a child or children and with low prospects for marriage. Girls formerly associated with fighting forces were more likely to be branded 'bad apples' than boys and this social narrative is reinforced by the prosecutor's exclusion of their narrative from the justice process. The narrative of girl soldiers would have contributed greatly to sensitising Sierra Leoneans about the coercive and violent society girls inhabited during their captivity. Instead, the prosecution strategy perpetuated the stigmatisation of abducted girls by society.

An intersecting assumption arising from the discriminatory exclusion of girl combatants from participation as witnesses is that girls were less innocent than boys. Laura Suski's critique of the development practice discourse configuration of the innocent individual child provides a helpful analysis. Suski charges that there is a tendency to position children of the South as deprived versions of children of the North.[65] This distracts us from seeing the social and economic deprivations that prevent some children in the South from being considered priceless or worthy of protection. The imposition of a Northern version of child rearing, family life, and early education not only neglects alternate versions of childhood, but also fails to address the complexities that children face when economic pressures take them far from the 'ideal' and 'normal' model of childhood.[66]

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62 Ibid., p. 160-161.

63 Ibid., pp. 18 and 20.

64 Mazurana and Carlson (2004), p. 21. According to Demilitarisation, Demobilisation and Repatriation (DDR) officials, 'wives', including those who had been abducted, were to be explicitly excluded from formal entrance into DDR. The focus of DDR was on the main fighting forces, and 'minority' groups would not be taken into consideration. However, since women and girls frequently played multiple roles, a narrow classification of them as 'wives' resulted in programmatic errors. Mazurana and Carlson found that while 60 percent of women and girls indicated having served as a 'wife', only 8 percent claimed that it was their primary responsibility or role. Mazurana and Carlson, p. 21.

65 I adopt these terms in this specific instance in the context of the North as representing (in the most broad and simplistic way) the wealthy developed nations and the South as representing developing nations. In this paradigm the South is dependent on the North for development assistance, agency and policy. The North is positioned as economically superior, and leverages this to assert moral and cultural superiority.

66 Suski (2009), p. 206 citing Penn, H., (2002), pp. 118-32 and Penn (2005). The UN rule of law tools for post-conflict states national consultations of transitional justice refers to the fact that children are often excluded from justice processes by 'widespread traditional views of childhood across all regions of the world'. OHCHR (2009), p. 20. This is an important concession yet one that does not take into account the hegemonic relationship between states funding and leading justice processes and states which are regarded as beneficiaries of a justice intervention. Thus the 'widespread traditional views' which bear the most weight and influence are those emanating from the powerful nations administering justice.

Accepting Suski's (the model child) and Srikantia's (the deserving victim) analysis in the area of transitional justice, it is not unreasonable to speculate that the Special Court with its international positioning would struggle to place the experience of the Sierra Leonean child soldier within the dominant construction of childhood in the Western-cum-international world.[67] The child soldier is a victim but also an active and even zealous perpetrator of gross violations of human rights abuses and susceptible to substance abuse and other vices. Serious breaches of accepted or expected gender roles only make it more difficult for the Western gaze to assume the innocence of a child soldier. Thus the image of a child soldier pregnant with a child, carrying her child on her back, strategically and aggressively initiating a sexual relationship with commanders in exchange for security, or engaging in sex work after demobilisation is so alternate an image of childhood that it cannot be articulated by the transitional justice process.[68] Girl soldiers, more than boys, become 'deviants from modern childhood' and the narrative they would contribute from the witness-stand cannot possibly be one that 'pleads for the restoration of their childhoods.'[69] It would be impossible to undo or conceal that they are not virgins, that they are mothers, sex workers and wives and knowledgeable concerning adult experiences. The excluding outcome of the Prosecutor's strategy in witness selection signifies a failure to concede that whilst victims may be able to exercise some free will within exploitative relationships, this ability or agency should not negate the physical and psychological control of the exploiter.[70]

Suski makes the observation that development campaigns often voice the narrative of children of the South visually, through tears or vacant looks.[71] In conclusion I am inclined to concur with the sentiment that the narrative of girl soldiers 'does not fundamentally require a voice'. This has some resonance with the Prosecutor's application of the mass abduction and mass rape of girl soldiers as a backdrop to the justice process without actively seeking participation through the testimony of girl combatants in the courtroom.

6.2.2 Impunity for rape

The section on methodology in chapter 1 of this study described the testimony of a Sierra Leonean woman Aminatta concerning the decapitation of a neighbour by the Civil Defence Force (CDF). According to Aminatta 'they all raped.' She referred to the Sierra Leone Army including the Civil Defence Force (CDF), as well as rebels, international peacekeepers and West African security forces as culpable of violence against women.

Similarly, the TRC Report associated the crimes committed by the CDF, the Sierra Leone Army (SLA) and the RUF-AFRC rebels as grave violations of international humanitarian law and crimes against humanity. The Report rejected the argument from some quarters of Sierra Leonean society that crimes committed by the government and its agents (including the CDF) fighting an insurgency should be judged less harshly than acts of the rebels. The TRC narrative is particularly clear with regard to violence against women that 'they all raped.'[72]

Therefore it is striking that the indictment issued by the Prosecutor against the leaders of the CDF did not include a single charge of sexual violence. This omission was grounded on a number of factors discussed below and makes the CDF defendants an anomaly as the other nine defendants were charged with sexual violence against women. The following section presents a comparative overview of the TRC Report and its

67 See Balakrishnan Rajagopal for a discussion on the West as the source of the international human rights law framework. Rajagopal (2006).

68 See Mats Utas for a detailed analysis and case study of civilian girls and women in the context of the Liberian civil war who employed their sexuality as a survival tool to compete for and win senior military men and the relative security these relationships provided. Utas (2005).

69 I borrow the phrase 'deviants of childhood' from Suski. Suski (2009), p. 207.

70 Srikantiah (2007), p. 161.

71 Suski (2009).

72 TRC Report 3:3:6 and 200. The Report concludes that women and girls were deliberately targeted by all armed groups. It also condemns the sexual exploitation of women and girls by humanitarian workers who were known to have demanded sex in exchange for assistance.

narrative of sexual violence committed by the CDF and the Special Court's narrative on sexual violence arising not from the inclusion but from the exclusion of a gender narrative.

The Report made a careful distinction between the Civil Defence Force as a militarized agent and ally or even an arm of the Government of President Kabbah and the CDF as a unit that traced its roots to a traditional hunting society.[73] The CDF was a network of civil militiamen created in 1996 from several different units, including Kamajors, Gbethes, Donsos, Tamaboros and Kapras, organized according to ethnicity and their District of origin.[74] This distinction allowed the Truth and Reconciliation Commission to vigorously investigate allegations of sexual violence against women by certain elements of the CDF.[75]

The Report found that the traditional initiates of the hunters' secret societies tended to respect and uphold the rules and regulations that governed their society membership and breaking any of the rules was taboo.[76] Secret society rules apparently prohibited men from having sexual intercourse with women while performing their society duties, as they believed that sexual contact with women before a battle would diminish their supernatural powers of immunity in battle. The Commission detected scarcely any sexual violations attributed to the CDF in the years before 1996 and concluded that the predecessors of the CDF, most of whom were vigilantes and hunters, did not commit sexual violations or rape systematically.[77]

Whilst many CDF combatants laid claim to being traditional hunters with origins in their secret societies that predated the conflict, the Report clarified that the overwhelming bulk of the fighters, particularly Kamajors, were in fact disaffected youths who were crudely enlisted into combat through illusory ceremonies of initiation.[78] This situation arose as the armed conflict escalated and the CDF was compelled to increase the number of recruits in its fighting forces. According to the Report, the rapidity with which this expansion occurred meant that recruitment standards lapsed, numbers became unmanageably large and the purported code of ethics was overlooked. The effect of this was that newer 'initiates' into the CDF did not feel bound by age-old traditions and practices. Indeed, the new generation of CDF adopted a different ethos that was entirely geared towards war and the perceived benefits it could yield.[79]

The Report does not shy away from describing the CDF's sexual exploitation and abuse of women and girls. It explains that as CDF units were usually attached to a specific town or village for a specific period of time, they were not as mobile as the RUF/AFRC. Therefore, in contrast to the 'roaming detentions' of the rebels, the preferred *modus operandi* of the CDF in terms of sexual violations was to abduct women and girls and take them prisoner. Women would then be confined to a single secure location, usually in a village or town under the complete control of the CDF. They would often be held naked and were freely available to be raped or gang raped.[80]

The TRC's narrative on the CDF, gender and violence is corroborated by other local narratives provided by human rights observers and scholars who gathered survivor testimony describing sexual violence committed

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73 Mazurana and Carlson point out that the government supplied the CDF with weapons and financial and logistical support. Mazurana and Carlson (2004), p. 11.

74 TRC Report 3b:3:347.

75 This decision not to exempt some groups from accountability is in sharp contrast to the South Africa Truth Commission which failed to comprehensively facilitate truth-telling processes with respect to violence committed in extra-territorial liberation camps of the (now ruling) African National Congress (ANC).

76 TRC Report 3a:558-562 and 571 and TRC Report 3b:3:349.

77 Keen (2005), p. 91.

78 TRC Report 3a:3:558-564. Another myth which was left untouched by the Sierra Leone Truth Commission was that women did not play a military role in the CDF. Mazurana and Carlson's field-based data on the DDR process revealed the presence of fully initiated female members in the CDF beginning in the early 1990s. Women were included in all ceremonies, amulets, and scarification; they served as frontline fighters, commanders, initiators, spiritual leaders, medics, herbalists, spies and cooks. Mazurana and Carlson (2004), pp. 12-13.

79 TRC Report 3b:3:352.

80 TRC Report 3b:3:353 and 345.

by the CDF.[81] Many of these testimonies reveal the widely held belief amongst civilians and CDF members themselves that the CDF was an arm of the government or an extension of the Sierra Leone Army and therefore immune from punishment for civilian abuse.

> Twenty CDF came to the guardroom and told us, the women, that we could choose between [being raped] or killed. I was raped by a young CDF on the ground of the guardroom. I told him that I was a suckling mother but he did not care. My baby was in the room when he raped me. He made me stoop like an animal. He said, 'I am a government man so no one will ask me anything about this.[82]

In the latter period of the conflict, from 1997 onwards, the Commission noted a marked increase in the number of violations attributed to the CDF. The Report refers to the Commission's database of violations, which revealed that sexual violence was not a random act by CDF members, but rather a defining act by the group committed on a widespread and systematic scale. Rape was one of their weapons of war.[83] The conclusion is drawn by the Report that CDF perpetrators demonstrated twice as high a propensity to commit rape than their propensity to commit other violations overall. CDF forces acted with a savagery comparable to the RUF towards women and girls.[84]

The Prosecutor's indictment issued against CDF leaders Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa is at odds with the TRC's charge that the CDF used sexual violence as a weapon of war. The accused were jointly charged with crimes against humanity, violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II (war crimes) and other serious violations of international humanitarian law.

A vigorous legal conflict between the Prosecutor and the Appeal Chamber erupted four months before the beginning of the CDF trial when the Prosecutor attempted to amend the indictment in order to include four new counts of gender-based crimes, namely: rape as a crime against humanity under article 2 (g) of the Statute; sexual slavery and any other forms of sexual violence as crimes against humanity under article 2 (g) of the Statute; other inhumane acts as a crime against humanity under article 2 (i) of the Statute; and outrages upon personal dignity as a war crime under article 3 (e) of the Statute. The Prosecutor pleaded that the delay was caused by women's reluctance to come forward and testify as to sexual violence.[85]

The majority of the judges held that the Prosecutor was aware of gender-based crimes as early as June 2003 and that it was not timely to wait until February 2004 to request the amendment. The majority judges opined that the proposed charges related to sexual violence did not merit an exception to the general rules on timeliness.[86] The majority denied the application[87] and brought the gender competence of the Office of the Prosecutor into disrepute when they chastised the Prosecutor, 'who is at the helm of the investigation process,' for neglecting to 'exercise extraordinary vigilance, diligence and attention so as to immediately and without any undue delay, as stipulated by Article 17 (4) (c) of the Statute of the Court, bring before justice for trial, all those suspected of having committed gender offences and other categories of offences within this competence.'[88] The majority judges also considered the consequences for the accused's right to a fair trial

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81 See Macartan Humphreys and Jeremy M. Weinstein whose interviews with CDF combatants revealed many instances of sexual violence. 'One Kamajor farmer noted that whether or not you were raped depended on whether the woman was pregnant, nursing a child, or younger than 12 years old.' Humphreys and Weinstein (2004), p. 10.

82 HRW (2002), p. 47.

83 TRC Report 3b:3:355.

84 TRC Report 3b:3:351-355.

85 Samuel Hinga Norman et al., Prosecution Request to Amend the Indictment against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa, Case No. SCSL-04-14-PT, 09-02-2004.

86 Ibid.,para. 84.

87 Samuel Hinga Norman et al., Decision on Prosecution Request for Leave to Amend the Indictment, Case No. SCSL-04-14-PT, 20-05-2004, para. 10 (c).

88 Samuel Hinga Norman et al., Decision on Prosecution Application for Leave to file an interlocutory appeal against Decision on Motion for Concurrent Hearing of Evidence Common to Cases, Case No. SCSL-2004-15-PT and SCSL-2004-16-PT, para. 42, 1-06-2004.

should new charges to the Indictment be allowed. They expressed their concern that such an amendment would present a potential delay as defence counsel would have to respond to the charges.

The Prosecutor subsequently sought leave from the Trial Chamber to appeal its (the Trial Chamber's) decision. This application was soundly rejected by the Trial Chamber.[89] The Prosecutor subsequently appealed to the Appeals Chamber, but the Appeals Chamber ruled that it did not have jurisdiction to consider the appeal.[90] What followed the Trial Chamber decision of May 2004 was a trial that in many key moments relied on the testimony of women victims as witnesses but which muzzled any attempt by the Prosecutor or witnesses to refer to sexual violence.[91] Indeed, throughout the trial the majority judges made several rulings precluding the admission of evidence of gender-based violence. In these rulings, the majority judges prohibited the introduction of, or expunged from the record, a wide range of evidence: actual evidence of forced marriage and sexual violence, evidence that might concern forced marriage or sexual violence, and evidence that was potentially linked to forced marriage or sexual slavery.[92] Shannee Stepakoff and Michelle Staggs Kelsall confirm, through interviews with women who were called as witnesses but were not permitted to speak of sexual violence they experienced and/or witnessed, the psychological harm they suffered from this silencing.[93]

Women victims and witnesses in the CDF case were commoditised by the legal process and their stories appropriated and misrepresented in the official court transcripts.[94] Women who had been 'bush wives' were unable to testify about being abducted and forced into marriage. Instead, their testimony had to begin at the point in their story where they were 'married'. And the official record did not indicate that this arrangement was forced upon them and actually a crime against humanity under the Statute of the Special Court.[95]

Different reasons were put forward by the Prosecutor for the initial omission of sexual violence from the CDF indictment. Apart from the alleged reticence of witnesses to cooperate with the prosecution, the Prosecutor argued that despite the availability of evidence of sexual violence as early as June 2003 initial investigations had not uncovered sufficient evidence to support counts of sexual violence against the CDF beyond a reasonable burden of proof.[96] In seeking leave to appeal against the decision of the Trial Chamber the Prosecutor also argued that the collection of evidence of gender-based violence in the CDF case was not comparable to conditions in other Special Court cases. The CDF case raised special difficulties for investigation because many survivors of sexual violence were supporters of the CDF and continued to live in the same communities as their abusers. Further, the CDF were regarded in the aftermath of the conflict as heroes who rescued Sierra Leone from defeat by rebels.[97]

In an attempt to mitigate the Prosecutor's alleged negligence, Stepakoff and Kelsall recommend that special measures relating to sexual violence could have resolved the impasse between the Prosecutor and the Judges. For example, a provision in the Rules could have extended the period during which evidence of sexual violence could be admitted due to the specific challenges involved at the investigative stage. This argument might have been appropriate in the case of the novel international ad hoc tribunals for Rwanda and the former Yugoslavia

89 Samuel Hinga Norman et al., Majority Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decisions on the Prosecution's Request for Leave to Amend the Indictment Against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa, Case No. SCSL-04-14-T, paras. 4 and 6, 02-08-2004.

90 Samuel Hinga Norman et al., Case No. SCSL-04-14-T, 19-01-2005, Decision on Prosecution Appeal Against the Trial Chamber's Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal, para. 44.

91 Kelsall and Stepakoff present various accounts of the Chamber calling for the redaction of any hint of sexual violence in the testimony of victims and witnesses. Kelsall and Stepakoff (2007).

92 Oosterveld (2009).

93 See Staggs Kelsall and Stepakoff (2007), p. 373. For a legal commentary on the Appeals Chamber decision see Mibenge (2007).

94 Muddell (2007), p. 98.

95 Muddell (2007), ibid.

96 Kelsall and Stepakoff (2007), p. 360.

97 Samuel Hinga Norman et al., Majority Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution's Request for Leave to Amend the Indictment against Samuel Hinga Norman, Moinina Fofana and Alieu Kondewa, Case No. SCSL-04-14-T, 02-08-2004, para. 8.

where prosecutors had no precedent for investigating and prosecuting rape committed on a widespread and systematic scale.[98] Such an extension is unnecessary, however, when the Court's Statute provided extensive impetus for the Prosecutor to investigate thoroughly. What was needed was a prosecution strategy that put gender at the core of its investigation and prosecution strategy as called for by the Beijing Declaration and Platform for Action, Security Council Resolution 1820 and other human rights instruments.

Sierra Leone is a small country with a small population and, broadly, it could be said that all Sierra Leoneans were affected by the armed conflict as primary and/or secondary victims. And in many cases, the line between victim and perpetrator is blurred.[99] Atrocities were often perpetrated not by strangers but by neighbours, relatives, tribesmen and other intimates. This feature of the conflict was obvious to human rights observers, to truth commissioners and to the Prosecutor. Local and international human rights observers and truth commissioners were able to elicit reliable and timely testimony from victims and witnesses of sexual violence by the CDF, and view the Prosecutor could have done the same.

Whilst the Prosecutor has borne the greatest scrutiny for the omission of a narrative on gender-based violence from the narrative of the CDF trial, many voices have also criticised the Trial Chamber for its arguments rejecting the Prosecutor's application.[100] In its concern for an expedient trial, the Trial Chamber failed to seriously consider the issue of the consequences of its decision for victims of gender-based violence at the hands of the CDF.[101] The Prosecutor described the consequences of his omission and the Trial Chamber's denial of an amendment quite accurately as precluding the victims from having their crimes characterised as gender-based crimes; impairing the remedies to which they are entitled; and establishing impunity with respect to gender crimes, as the prospect of prosecution under domestic jurisdiction for sexual violence was highly improbable.[102] The Prosecutor also argued that he could not establish a complete and accurate historical record of the crimes committed during the armed conflict in Sierra Leone and could not acknowledge the right of the victims to have crimes committed against them characterised as gender-based crimes.[103]

Dissent did arise from within the Trial Chamber. Justice Boutet showed that he believed the Prosecutor's request was made in a timely manner and decried the Trial Chamber's failure to acknowledge the difficult nature of collecting evidence of gender-based violence.[104] In his dissenting opinion Justice Boutet wrote that the Trial Chamber's refusal to grant leave to appeal threatened to undermine the mandate of the Court outlined in Article 1(1) of the Statute, namely 'to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law.' He stressed that this mandate was founded on recognition by the

98 In contrast, the ICTR was very amenable to extending time limits with respect to the amendment of indictments. In the Barayagwiza case the Trial Chambers acknowledged that an extension of time could prejudice the rights of the accused and ordered that the accused receive damages for such harm. See Mibenge (2007) for a discussion on the amendment of the indictment to include new charges including charges of sexual violence.

99 Rosalind Shaw describes a teenager's testimony describing the brutal attack and murder of his mother by an RUF rebel. The rebel was known to the family and had in the past made unwelcome sexual advances towards the boy's mother. On the same day of the murder, the Civil Defence Force (CDF) took over their village. The boy and his siblings reported the murder to the CDF who summarily killed the man they identified. The testimony brings to light that in some cases civilians were involved in reprisal killings, either directly or through informing on others. Shaw (2007), pp. 194-195. Colin Knox and Rachel Monaghan in the context of political violence in South Africa and Ireland present the ambiguities and contestation in responding to the question: Who are the victims? Knox and Monaghan (2002), pp. 51-60.

100 See Mibenge (2007), Oosterveld (2009) and Shaw (2007).

101 Mibenge (2007).

102 Samuel Hinga Norman et al., Majority Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decisions on the Prosecution's Request for Leave to Amend the Indictment Against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa, SCSL-04-14-T, 02-08-2004, para. 6.

103 Samuel Hinga Norman et al., Majority Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave to Amend the Indictment against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa, Case No. SCSL-04-14-T, 02-08-2004, para. 4.

104 Samuel Hinga Norman et al., Dissenting Opinion of Judge Pierre Boutet on the Decision on Prosecution Request for Leave to Amend the Indictment Case No., SCSL-04-14-PT, 31-05-2004, paras. 23-33.

Secretary-General that sexual violence committed against girls and women was one of the most egregious practices committed during the armed conflict in Sierra Leone.[105]

A judgment was passed in the CDF case by the Trial Chamber on 2 August 2007 and included no reference to sexual violence. Nine months later an Appeals Chamber judgment attempted to remedy this omission without actually introducing evidence of crimes of gender-based violence against women into the Civil Defence Force judgments, effectively excluding evidence of sexual slavery and rape from the narrative.[106] Justice Winter also added her dissenting voice. She criticized the Trial Chamber majority for failing to correctly balance the rights of the accused with the Prosecution's duty to prove guilt beyond a reasonable doubt and the mandate of the Special Court to prosecute gender-based violence and the ability of victims to access justice.[107]

The question of positionality raised afresh by Lars and Papa in this chapter's introductory narrative is salient. It reminds us that well before the establishment of the Special Court, there was what Ní Aoláin refers to as a prior narrative of violence and causality. This narrative is significantly constructed by the watchful and deeply involved international community.[108] In this narrative the CDF was indistinguishable from the democratically elected government of President Kabbah (1996-1997 and 1998-2007), a rare emblem of democratisation and good governance in the troubled West African nation after a brutal civil war. The international community's heavy involvement in and commitment to the physical and political reconstruction of Sierra Leone depends on the presence of a Government perceived, both locally and internationally, to be of high integrity and responsible for the security of its citizens. 'Defaming' the government and its allies or agents with an overtly heinous charge sheet would have gone against such interests. The glaring absence of sexual violence as a form of gender-based violence from the CDF judgment has raised a strong perception in Sierra Leone that political considerations trumped the rights of women to justice and an effective remedy.

6.3 Narratives on gender and enslavement

This final section of chapter 6 looks at the legal definitions of gross violations of human rights. The question raised relates to the positionality of those who name crimes and the impact of such naming on both access to justice and the process of justice for men and women. The proper naming of crimes is a key objective of international criminal justice process. The naming of crimes has many implications for the development of law and the dispensation of justice but it also contributes to the war narrative as a legacy of the justice process. This narrative also constructs a typology of crime that marks any given conflict and it contributes to the formation of a collective historical memory of armed conflict. For example, the crime of aggression (charged by the Prosecutor) remains a prominent feature of the Second World War unlike the crime of enslavement which was never charged as a crime against humanity by the Chief Prosecutors at the International Military Trials.
The discussion in this section begins with another invocation of the past, in this case in the shape of transatlantic slavery and slavery in colonial times. The discussion of gender and its impact on slavery begins with a review of the leading literature on the subject in a historical and gendered framework. This literature reveals that, historically, the ownership of another human being through slavery has been connected to sexual and reproductive exploitation of peoples. This thesis will inform the analysis of the construction of gender and enslavement in contemporary processes of justice. Contemporary interpretations of gender and enslavement will be provided through a review of the ad hoc criminal tribunal for the former Yugoslavia and its case law

105 Samuel Hinga Norman et al., Dissenting Opinion of Judge Pierre Boutet on Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution's Request for Leave to Amend the Indictment against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa, SCSL-04-14-T, 05-08-2004, para. 18.

106 See Oosterveld (2009) for the most comprehensive account of the Appeal Chamber's review of the Trial Chamber decision. See Moinina Fofana and Allieu Kondewa, SCSL-04-14-A, 28-05-2008. It should be noted that in this Appeal the Prosecutor did not seek the remittal of the case to the Trial Chamber for the consideration of additional counts on gender crimes even if the Appeal Chamber upheld his request, see para. 415.

107 Moinina Fofana and Allieu Kondewa, SCSL-04-14-A, Judgment, Partially Dissenting Opinion of Judge Renate Winter, para. 73, 28-05-2008.

108 Ní Aoláin (2008), p. 39.

on enslavement. Other references will be also be made to the Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery (the Women's Tribunal) and the Statute of the International Criminal Court (the Rome Statute). These samples from contemporary legal constructions of enslavement reveal two different approaches to constructing women's gendered experience to enslavement and other crimes against humanity. The review and analysis of the evolution of gender into the customary international law crime of enslavement will inform this chapter's gender critique of the introduction of sexual enslavement and forced marriage as crimes against humanity by the Sierra Leone Special Court and the TRC.

6.3.1 Gender and enslavement

The Preamble to the 1926 Slavery Convention repeated the declaration made in the General Act of the Brussels conference of 1889-1890 to put an end to trafficking in African slaves, and to secure the complete suppression of slavery in all its forms. Slavery was defined as the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.[109] The prohibition of slavery was the first human rights issue to arouse international concern and yet slavery and slavery-like practices remain a grave and persistent problem today.[110] Slavery and slavery-like practices have underpinned the major global forms of political oppression including apartheid, colonisation and imperialism. Like all crimes against humanity, enslavement is shaped and influenced by gender.

This section of chapter 6 continues to press the argument made in earlier sections to the effect that a narrow interpretation of gender leads scholars and legal practitioners to insert the rape of women into a legal narrative with no further attempts at investigating the social and political nature and nuances of rape as well as other harms women experience. In the case of enslavement in the context of Sierra Leone's armed conflict, Truth Commissioners, the Prosecutor and legal practitioners and many human rights advocates have reduced women's experience of enslavement to a coital and conjugal experience. The appendage of sex (and more recently marriage) to slavery has become the defining distinction between men and women's experience of enslavement and is the limit of the gender analysis. According to this limited gender analysis male slaves are 'just' slaves whilst their female counterparts are 'just' sex slaves. This chapter argues that these tags are overly simplistic and fall far short of a gender analysis of an international crime.

Contrary to the increasingly popular representation by legal practitioners and scholars of 'sexual slavery' with its emphasis on multiple or mass rapes, Pamela Bridgewater provides an extensive review of the female slave experience in the United States.[111] She describes a wide range of gender-based forms of violence, ranging from denying new mothers the opportunity to recover from labour or nursing and otherwise caring for their children and no legal protection from rape.[112] She makes the important point that rape was not only a condition inherent to the female slave experience, but unfettered sexual access to women was central to the right of ownership which slave owners exercised over slaves.[113] Bridgewater describes that this sexual access to women extended to control and ownership of the reproductive potential and product of women. Thus, the slave owner owned children born from the rapes of his female slaves.[114]

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109 Slavery Convention (1926), art. 1.

110 Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Gulnara Shahinian, 28 July 2008, A/HRC/9/20.

111 Bridgewater (2005).

112 Ibid., pp. 115-117.

113 Ibid., pp. 117-118. See also Corcoran-Nantes describing sexual violence as inherent to slavery in Brazilian society where female slaves were also expected to engage in sexual labour. From an early age pubescent females were given to young males in the household and were subject to all manner of abuse. The master of the household would expect to have the female slave of his choosing wherever, however and whenever it pleased him. It was also customary to offer slave women to male house guests....marriage and family life were generally denied to the slave population. Corcoran-Nantes (1998), pp. 160-161.

114 Bridgewater describes legislation enacted in part of the United States regulating this reality. These laws focused on prohibiting children born from such rapes from inheriting property from their owner-father. Bridgewater (2005), p. 118.

With the closing of the international slave trade in 1808, female slavery still included physical labour but it increasingly centred on bearing, nourishing and rearing children needed for the continual replenishment of the slave labour force.[115] Slave breeding consisted of a concerted effort to increase the number of slave holdings by forcing female slaves to reproduce.[116] Breeding methods varied and could include the rape by slave owners of their slaves, or more systematic methods where 'good breeders' were paired or sold to the market.[117] In many ways the sexual vulnerability and reproductive potential of women shaped the female experience of slavery to the extent that it was an important rallying point in abolitionist campaigns and even characterised Congressional debates over the Thirteenth Amendment.[118]

Brenda Smith's work on women in prisons has been useful and enlightening in expanding the narrow approach to gendering enslavement.[119] Her approach to gender analysis requires that women as well as men's experiences are seen as gendered. Smith points out that sexual violence is a reality for both women and men in prison and she shows that sexual violence against male slaves and male prisoners takes different shapes than violence against women slaves or women prisoners. She writes that 'it would be tempting to say that sexual abuse in institutional settings primarily affects women, and therefore - like slavery - an identifiable group is targeted for discriminatory treatment. That, however, is not true. Both male and female prisoners frequently face sexual abuse by both staff and other inmates as a means of domination.'[120]

Transposing the analyses of Smith and Bridgewater onto the outcomes of the prosecution of enslavement by the Special Court exposes an entirely insufficient interpretation of the gendered nature of slavery that refers to abducted women and girls as sex slaves and abducted men and boys as slaves. This justice narrative transposed onto transnational slavery would cloud and not clarify the gendered realities of the slave experience. Jeffrey J. Pokorak adds a helpful social dimension to the definition of slavery when he writes that 'slavery is commonly understood as the control of all aspects of a slave's social interactions.'[121] Bearing this in mind, we can see that describing male slaves as 'mere' slaves also precludes the development of a narrative describing the ways male slaves experienced gender-specific forms of slavery, including but certainly not limited to sexual and reproductive exploitation. The breeding of male and female slaves, the rape of women, the separation of children from their parents, the destruction of the African and African-American family – these abuses against slaves are clearly gendered and resonate in the slave experience from different epochs and locales. The gendered analysis should be understood to reflect that enslaved men also suffered gender-specific harms. Sexual and reproductive ownership of male slaves was seen in various ways including the denial of their fundamental right to be fathers and husbands,[122] and reduced to a reproductive role analogous to bulls in the practice of animal husbandry with women not of their own choosing. Further, castration was regarded as a legitimate punishment and form of oppression of male slaves.[123] Such exercises of ownership over male slaves were gender-specific harms degrading the masculinity of male slaves and denying their humanity.

Another notable study on gender and enslavement is provided by historian Casper Erichsen. Erichsen describes the enslavement of the Nama peoples held summarily as prisoners of war on Shark Island in what was then German South West Africa (now Namibia). His gender-specific analysis of women's experience describes that women prisoners of war (POWs) were stripped of all sexual autonomy and human dignity as German soldiers voyeuristically photographed their naked forms and raped them. Erichsen's gender analysis of slavery-like practices and conditions on Shark Island also examines the reasons why women made up the largest population

115 Ibid., pp. 119-120, citing White (1990).
116 Ibid., p. 120.
117 Ibid., p. 121.
118 Ibid., p. 125. The Thirteenth Amendment to the US Constitution officially abolished slavery and involuntary servitude, except as punishment for a crime. It was adopted on 6 December 1865.
119 Smith (2006). Smith's analysis is particularly relevant as she describes the sexual exploitation of incarcerated women as a modern corollary to slavery.
120 Smith (2006), p. 279.
121 Pokorak (2006-2007).
122 Bridgewater (2005), p. 126.
123 Smith (2006), p. 579.

in POW camps, and that their exploitation as forced labour was massive. He is able with this gender analysis of sexual and other forms of exploitation to draw a link with the disproportionate number of deaths of women from hunger, malnutrition, exposure to the elements and other sub-human conditions maintained in the camps. This important narrative transcends the focus on sex in order to distinguish male enslavement from that of women. Had Erichsen simply described Nama women as sex slaves of the Germans, we would still be missing a full and nuanced narrative on ways in which gender shaped women's experience of armed conflict and enslavement in German South West Africa. Instead he describes slavery and the various denials of freedom, including rape and forced labour that accompanied it.[124]

The historic examples of transatlantic and colonial slavery illustrate that ownership of slaves inherently includes sexual and reproductive ownership. The sexual and reproductive exploitation of a slave is comparable to the exploitation of his/her labour as he/she harvests the slave owner's field or repairs his home. It is the right of ownership that allows a slave to toil under the most egregious conditions and to submit to sexual exploitation. This right of ownership, all it entails and its gender manifestations should be examined in order that women's and men's gendered experiences can be fully revealed, distinguished, condemned and remedied.

Armed conflict has also depended on slavery and slavery-like practices. The enslavement of Chinese men by Japanese corporations during the Second World War, the enslavement of up to 200,000 women by the Japanese Imperial Army prior to and during the Second World War, the enslavement of European peoples in labour camps by the Nazi government during World War II, the enslavement of Tutsi women during the 1994 genocide and the enslavement of women detainees in the Former Republic of Yugoslavia are but a few examples of enslavement in contemporary conflicts.

The crime of enslavement was recognised as a crime against humanity by the Nuremberg and Tokyo Charters though no elaboration of the element of this crime was provided. It was not until the 1990s that the International Criminal Tribunal for the Former Yugoslavia (ICTY) prosecuted enslavement. Two defendants, Kunarac and Kovac (the 'Kunarac case') were charged with rape and enslavement as crimes against humanity. And Kovac was charged singly with outrages upon personal dignity as violations of the laws of war. These charges arose from the mistreatment of women and children and allegations of forced labour in 1992 after the town of Foca was placed under the control of Serb forces. The Muslim and Croat inhabitants of the occupied town were rounded up and then assigned to detention facilities.[125] The gender-specific nature of the enslavement of women in the former Yugoslavia was evident:

> The women were kept in various detention centres where they had to live in intolerably unhygienic conditions, where they were mistreated in many ways including, for many of them, being raped repeatedly. Serb soldiers or policemen would come to these detention centres; select one or more women, take them out and rape them. Many women and girls, including 16 of the Prosecution witnesses, were raped in that way. Some of these women were taken out of these detention centres to privately owned apartments and houses where they had to cook, clean and serve the residents, who were Serb soldiers. They were also subject to sexual assault.[126]

According to the Trial Chamber Kovac enslaved two women and girls he kept in his apartment for a period of more than four months and two other girls for a week, after which he handed them over to other men.[127]

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124 Erichsen (2004). See Rachel Anderson for a descriptive account of harsh detention and labour conditions, including medical experimentation against the Herero people. Anderson (2005). See also O'Donnell's article on domestic work in German South West Africa in 1904-1915 and the white patriarchal control over the bodies of black women workers. She describes the exercise of the so-called paternal right of correction over workers through sexual violence against African women. Women were viewed primarily as reproductive or sexual agents and the punishments reflected this, for example, treading on pregnant women until they miscarried. O'Donnell (1999), p. 36.

125 Kunarac et al., Judgment, Case No. IT-96-23-T & IT-96-23-T & IT-96-23/1-T, 22-02-2001.

126 Ibid., paras. 573-574.

127 The factors confirming the enslavement included that (1) the women were not allowed to leave the apartment unaccompanied by Kovac. They were also psychologically detained because even if they had managed to escape from the apartment they would have had nowhere to go. They were also aware of the risks if they were recaptured; (2) Kovac sold three of the witnesses; (3) Twice he handed two of the witnesses over to a group of soldiers for almost a fortnight and they were

Kovac was found guilty of enslavement, rape and outrages upon personal dignity. The last count (outrages) related to Kovac's forcing the women to dance naked on a table while he sat on a sofa pointing weapons at them.[128]

The charges against Kunarac alleged that he kept two women in an abandoned house in Trnovace for six months. During this period they were repeatedly raped by Kunarac and DP6, another man, treated as their personal property and ordered to clean the apartment. The Trial Chamber accepted that even though the women were given keys to the front door they had no realistic opportunity of escape. They were subject to other abuse such as Kunarac inviting a soldier into the house so that he could rape 'his' captive in exchange for money. The two women were treated as the personal property of Kunarac and DP6. The Trial Chamber determined that Kunarac established these living conditions in concert with DP6 and that both men personally committed the act of enslavement.[129] The Trial Chamber found Kunarac guilty of rape and enslavement. The Appeals Chamber confirmed that contemporary forms of slavery (as opposed to the traditional concept of slavery defined in the 1926 Slavery Convention (referred to as chattel slavery)) form part of enslavement as a crime against humanity under customary international law.[130]

The decision in the Kunarac case has been criticised for not fully conveying the fact that enslavement was particularly of a sexual nature and, therefore, sexual slavery. Kelly Askin argues that the Tribunal missed an opportunity to recognise the sexual nature of the enslavement but instead treated the enslavement as merely one of a large number of factors that indicated that enslavement had occurred.[131] I argue that a gender analysis of crimes against humanity such as torture, slavery and imprisonment does not call for a 'sex tag'. Sexual slavery, sexual detention, sexual imprisonment and sexual torture will not shed light on men's and women's experiences of human rights abuses. Do the high incidences of sexual violence against male detainees make their experience sexual imprisonment? Does a torturer's targeting of male and female detainees' genitals warrant a description of sexual torture?[132] If an enslaved woman alleges that 5% of her experience was sexual violence and the other 95% was related to labour such as farming her captor's fields, is she 'just a slave' or a 'sex slave'? These questions are looking for 'sex' and not gender and the ways in which gender shapes the commission and experience of crimes against humanity. Looking for sex in crimes against humanity reduces women's narrative to a sexualised version of what happened to men and obstructs the gender analysis.

The approach taken by the Prosecutor and the Trial Chamber in the Kunarac Case avoided 'sexing' women's experience but still made a clear point that sex and the control of sexuality were core elements of enslavement. However, it was not necessary for the Statute, Prosecutor or Trial Chamber in this case to categorise the experience of women as sexual enslavement, as the 'sexual' range of crimes women slaves experienced, are consistent with 'the exercise of power' necessary to create an absolute slave-master relationship. The Kunarac decision provides a landmark recognition of the ways in which gender can significantly impact gross violations of human rights. Both men and women were enslaved in the context of the Yugoslav war; however, the Trial Chamber did not allow this to obscure the gender-specific manifestations of this international crime. The Trial Chamber did not describe slavery in a 'neutral way'. Rather it produced a gender analysis that revealed the

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continuously raped by them; (4) Mistreatment such as beating; (5) His claim of exclusivity over one of his victims whom he raped almost every night he spent in the apartment; (6) The poor conditions and lack of food; (7) They had to do household chores, including cooking and cleaning the apartment. Ibid., paras. 749-752, 754, 756, 761 and 780.

128 Ibid., paras. 766-774.

129 Ibid., para. 742.

130 Kunarac et al., Appeals Chamber Judgment, Case No. IT-96-23 & IT-96-23/1-A, 12-06-2002, para. 117.

131 Askin (2003), p. 2561.

132 In the 1980s literature began to emerge focusing on the psychological as well as sexological aspects of torture. Political exiles in Europe, from the Middle East, North Africa and Latin America began to provide an insight into the sexual traumatisation arising from torture focusing on the sex and gender of prisoners. This form of torture can consist of forcing the prisoners to take part in humiliating or deviant sexual relations (this characterised the torture of male Muslim prisoners in the Yugoslav war context). Torture can be carried out by inflicting physical pain to the genitals which brings the prisoner to associate pain or panic with sexuality. I believe that greater attention to this literature from the psychological or medical fields would enhance the competence of legal researchers and practitioners dealing with gender and gross violations of human rights, See Agger (1989), p. 309.

different shapes war crimes and crimes against humanity took when used by men against men and by men against women. In this case, women, unlike men prisoners, were detained in apartments or other suburban addresses and ordered to conduct servile acts such as cleaning and cooking and made sexually available to their captors.

The Kunarac case clearly constructs the elements and root causes of gender-based violence occurring in the act of enslavement. Enslavement was shaped by hegemonic gender relations between men and women. It should be noted that performing servile acts and being confined to a bedroom may not and almost certainly did not reflect the lived gender reality of Serbian or Muslim women in the former Yugoslavia prior to the armed conflict. However, the fact that these forms of abuse were reserved for female detainees is the first step to their becoming gendered acts of violence. The second is that the space where the violations were committed affirmed an archaic (real or imagined)[133] patriarchy that confined women to gendered spaces deemed private (the bedroom and the kitchen). The attacks were a part of the wider persecution of Muslims; however, they clearly attacked women as a gender group.

6.3.2 Sex and enslavement

This section provides an illustrative case of the outcome of a narrow judicial interpretation of gender in the definition of the crime against humanity of enslavement. In contrast to the approach taken by the ICTY and the work of academics such as Bridgewater, Smith and Erichsen the human rights discourse surrounding the enslavement of Asian peoples by the Japanese Imperial Army essentialised women's experience to multiple rapes (sexual enslavement) in contradistinction to men's experience of enslavement. The Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery (the Women's Tribunal) sat in Tokyo from 8 to 12 December 2000. It was a people's tribunal, organised by international human rights advocates and Asian grassroots movements and its judgement lacked any legal force.[134] However, its moral force lay in examining the evidence and in developing a lasting historical record of the crimes committed in the past.[135] The Women's Tribunal was intended to pave the way for the government of Japan to recognise its full responsibility and to provide redress to enslaved women.[136] In its findings, sexual slavery was held to have been a crime against humanity in 1945 in the context of the Second World War. According to the Tribunal:

> Sexual slavery is not a new crime but rather a particularly outrageous, invasive and devastating form of enslavement defined as the 'exercise of any or all the powers of ownership over a person. The conscription of the 'comfort women' as part of the 'material' of war represents the institutionalisation of sexual slavery on an unprecedented scale, rooted in profoundly misogynistic and racist attitudes all too common in the world today...'[137]

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133 There is very often a disconnection between real and imagined gender realities. For example, a community may agree that men are the breadwinners and have primary responsibility for financially maintaining the home. However, men and women may be expressing an idealised image of men's gender role while denying the reality that women in their community have historically and traditionally created and maintained the bulk of household wealth through their commercial transactions in the informal sector. I thank Brandon Hamber of INCOR University of Ulster for raising this point at the Emory University Conference *on Gender Violence and Gender Justice in* May 2009 in his presentation *Masculinity and Transition. Crisis or Confusion*? And Christopher Taylor in his analysis of gender hegemonies in the context of the Rwanda genocide also notes that Hutu extremists sought to reassert a male dominance that had probably never existed in Rwanda's actual history. Taylor (1999), p. 155.

134 See Piccigallo for one of the few existing detailed studies of the entire Allied Eastern war crimes operations. The study reveals that Dutch military courts tried 448 cases involving more Japanese accused (1,038) than any other nation save the United States. A civilian hotel proprietor in Batavia, Washio Awochi, was charged with the war crime of the enforced prostitution of 12 Dutch women and girls. He was found guilty and sentenced to ten years imprisonment. Piccigallo (1979), pp. 179-180.

135 De Brouwer (2005), p. 139.

136 Ibid.

137 The Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery in the matter of the Prosecutor and the Peoples of the Asia Pacific Region v. Emperor Hirohito et al. and the Government of Japan, Summary of findings, 12 December 2000, para. 24.

The narrative from the Women's Tribunal on gender-based violence asserts that multiple rapes and gang rapes were the sole and defining harm suffered by detained women and girls, and further that the primary reason for their abduction was to provide labour in the form of sex to the Japanese military. The major historical works on comfort women confirm this narrative.[138] There are few references to other gross violations of human rights such as beatings or torture; to domestic work such as providing laundry services for the military; to entertainment tasks such as singing at recreation centres; to forced labour such as digging or farming; or to carrying out covert military activities such as spying on local communities or acting as translators or interpreters. The narrative focuses exclusively on multiple rapes, gynaecological examinations, treatment for STIs, forced abortion, forced use of contraception, miscarriages, and infertility. This is the historiography of comfort women presented by the Women's Tribunal to the international community and to future generations. And it is affirmed in the major academic works on the comfort women.

Sel Wahng is a rare voice of disruption.[139] He criticises the superficial scholarly analysis of the Korean sex slaves that renders them solely as victims of wartime rapes. His work reveals not only mass and multiple rapes but the ways in which gender was assaulted and constructed by the act of enslavement. He speaks of the gendered and sexual erasure of Korean women, and its contribution to a Japanese nationalist agenda.[140] One form of erasure was through the masculinisation of Korean women's bodies by the Japanese military. Wahng uses testimonies to show that Korean women were referred to during rapes as 'bastards', 'men' and 'guys' and they were subject to medical interventions that made them barren so that the rape of Korean female bodies was constructed as a sexually non-reproductive act.[141] He shows that these women actually inhabited gendered territory beyond the culturally specific definitions of 'women' and the different gender constructions of Korean women, Asian women, Dutch women and Japanese women created a hierarchy of sex slaves and aggravated or mitigated levels of abuse.[142] These are important analyses and distinctions, contextualising the rape of Korean women in the context of a colonial history with Japan which developed a mythology of male and female Koreans' superhuman strength and suitability for forced labour.[143]

For the purposes of this study, the gender analysis of enslavement in the context of the Second World War provided by Whang inspires a greater attempt at investigating gender as it related to and shaped the enslavement of men and women in the context of the Sierra Leone conflict. Replicating the term 'sexual enslavement' as it is adopted by the Women's Tribunal is clearly inappropriate for the purposes of norm setting in the context of contemporary forms of international and internal armed conflict.[144]

It is a worrying development for the advancement of gender analyses of international crimes that the Rome Statute of the ICC has provided separate listings for enslavement and sexual slavery as distinct international crimes. The Rome Statute reaffirmed the well established definition of 'enslavement' as the 'exercise of any

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138 See Tanaka (2002). An exception and valuable contribution to broadening the range of abuses and indignities women suffered is presented by Karen Parker and Jennifer F. Chew. They detail other forms of torture and abuse women experienced, including beatings, mutilations, murder and being forced to watch the torture of fellow women slaves. They also describe the poor living conditions such as inadequate nourishment, forced moves and long distances to travel in wartime conditions. Many women died from lack of appropriate medical care for malaria, malnutrition and broken bones and internal bleeding resulting from beatings. Parker and Chew (1993-1994), p. 509.

139 Spade and Wahng (2004).

140 Ibid., p. 244.

141 Ibid, pp. 244 and 251 (at footnote 9).

142 Ibid. While the Women's Tribunal identifies sexual enslavement as misogynistic and racist, its analysis falls short of distinguishing between the different racial categories and hierarchies existing between and amongst Asian peoples.

143 Ibid., p. 250 (at footnote 8).

144 The Special Rapporteur's study of 'military sexual slavery' applied a different approach to the Women's Tribunal. She emphasised that she did not intend to invent new crimes committed against women in armed conflict. She used the term 'sexual' as an adjective to describe a form of slavery, not to denote a separate offence. The term 'sexual' was used to highlight the historic and contemporary reality that slavery amounts to the treatment of a person as a chattel, which often includes sexual access and forced sexual activity. In all respects sexual slavery is slavery and its prohibition is a *jus cogens* norm. Special Rapporteur on Violence against Women Mission to the Democratic People's Republic of Korea , Republic of Korea and Japan, E/CN.4/1996/53/Add.1, July 1995, paras. 11, 17and 30.

or all of the powers attaching to the right of ownership over a person…including the exercise of such power in the course of trafficking in persons. In particular, women and children.'[145] The International Criminal Court's Elements of Crimes (EoC) described enslavement as follows:

> 1. The perpetrator exercised any or all of the powers attaching to ownership over one or more persons such as by purchasing, selling, lending, or bartering such a person or persons or by imposing on them a similar deprivation of liberty. [11]
> [11] It is understood that such deprivation of liberty, may, in some circumstances, include exacting forced labour or otherwise reducing a person to servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.[146]

This definition is clearly admissible in the context of the decision on the enslavement of women in the Kunarac case. The Trial Chamber stated that under its definition of enslavement indications of enslavement often include, though not necessarily, sex and control of sexuality.[147] 'Any or all of the powers attaching to ownership' would include the acts of sexual abuse and exploitation and the reference in footnote 11 to 'forced labour and servile status' covers the gendered exploitation of women for domestic work. However, the drafters of the Rome Statute felt that 'all of the powers attaching to ownership' did not adequately encompass sexual violence perpetrated against women slaves. Thus, the Rome Statute introduced the crime of sexual slavery in article 8 (2) (e) (vi). In 2000 the Preparatory Commission to the ICC provided the specific elements or Elements of Crimes of sexual enslavement[148] that distinguish it from the definition of enslavement in the following manner:

> 'The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.'[149]

The construction by the Rome Statute of sexual violence as a crime separate from slavery was widely welcomed by international legal scholars as an overdue recognition of the sexual aspect inherent in slavery.[150] The move was regarded as a contemporary and more correct way to describe certain harms that might otherwise have been narrowly referred to as 'enforced prostitution'.[151] The Women's Caucus supported the separate listing arguing that women may be forced into maternity or temporary marriage complete with domestic duties, both of which might have sexual and non-sexual aspects. In this case a Prosecutor could charge both enslavement and sexual slavery.[152] Others opined that sexual slavery recognises the specific nature of the form of enslavement and ensures that it will be given the distinct attention it deserves. Moreover, victims of the crime of sexual slavery may need somewhat different forms of protective measures or redress than victims of other forms of slavery.[153]

These responses reinforced the application of the most limited insertion of gender into the crime of enslavement, namely, the inclusion of rape and other forms of sexual violence as the defining feature of the harm suffered by women. They permit the institutions mandated to bring justice to conflict societies to maintain and indeed reinforce a patriarchal construction of African women as rape victims or potential rape victims. Women in conflict societies are cast in a perpetual state of sexual vulnerability and passivity. This portrayal allows that institutional protection of women becomes another form of oppression – silencing, essentialising and undervaluing women's experiences. And in the longer process of postwar reconstruction and rehabilitation, programmatic efforts promoting gender equality will restrict their gaze and tailor their response to the monolithic rape survivor identity of their women clients.

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145 ICC Rome Statute, Article 7 (2) (c).
146 Footnote [11] to Article 7 (1) (c), EoC.
147 Kunarac Case, Judgment, para. 540 and 543.
148 Report of the Preparatory Commission for the International Criminal Court, Finalized Draft Text of the Elements of Crimes, Preparatory Commission for the International Criminal Court, addendum part II, UN Doc. PCNICC/2000/1/Add.2 (2000).
149 Elements of Crimes.
150 De Brouwer (2005), p. 137.
151 Oosterveld (2004), p. 608. See also De Brouwer (2005), p. 137.
152 Oosterveld (2004), p. 624 citing Women's Caucus Recommendations at p. 11.
153 Oosterveld (2004), p. 624 citing Agribay, p. 386.

6.3.3 Concluding analysis

The monumental legal development in the Rome Statute and case law of the Sierra Leone Special Court that saw enslavement fragment into a separate 'gendered' crime of sexual enslavement is a part of a wider movement by international justice mechanisms to limit the process of gender mainstreaming in their processes. The Special Court Statute's inclusion of the crime of sexual enslavement and the Prosecutor's decision to charge forced marriage under outrages upon personal dignity mirrors the approach taken by the Women's Tribunal. However, the construction of military sexual enslavement in the context of the 'comfort women' in World War II is far from analogous with the contemporary context of child soldiering in Sierra Leone's civil war.
A leading anthropological study of child soldiering is provided by Susan Shepler and it provides an obvious yet often ignored African truth. Shepler writes that the group that shoulders the heaviest burden of productive labour in African societies is not women, but rather the young. She points out, for example, that indeed both men and women look forward to an old age in which the young support them.[154] Child labour almost defines childhood in Sierra Leone and a child who does not work is a bad child.[155] And conversely a parent who does not make their child work is a useless parent who abdicates his or her responsibility to train the child in preparation for an independent adult life.

Shepler's work reveals many factors that begin to elucidate child soldiering in Sierra Leone. One way she does this is by disrupting the dominant narratives of 'gendered domestic chores'. This is an important feature as sexual slavery and forced marriage are characterised, according to the Sierra Leone Special Court and the Truth Commission, by domestic work which is presumably 'girl's work'. However, the labour boys and girls carry out may overlap in unexpected ways. A child (Shepler refers to boys in her study) might have to sweep the house and compound, get water for the household's morning baths, find wood in the forest and bring it home, then go to school, if not school, then work on the farm or in the garden.[156] If an investigation such as Shepler's reveals that the nature of work entrusted to children is not clearly defined by gender, this would challenge legal narratives placing evidence of 'domestic' work as an element of sexual enslavement or forced marriage in Sierra Leone. Sexual violence in armed conflict occurs in specific historical, social, political, and economic contexts.[157] Terms such as 'bush brides', camp followers, 'comfort women' are shaped not only by systematic rape but also by the unique combination of contexts in any given region of conflict. These contexts permit combatants to use rape as a socially constructed event. Turshen provides the powerful statement that because it is socially constructed, rape is neither inevitable nor unchangeable.[158] This statement should provide the impetus to investigate the social, historical, political and economic context in order to challenge the use of rape as a weapon of war. An analysis focusing on 'sex' alone will not sufficiently empower us to do this.

A focus on the sexual abuse of boys in State-run institutions also provides an important disruption. A 2009 report released by the Irish government made disclosures of shocking brutality against children in industrial and reformatory schools, churches, and Christian schools.[159] A striking feature of this report is the ready comparative gender analysis made possible by the fact that since the nineteenth century the bulk of State institutions in Ireland were gender segregated. So, patterns emerge as one reads the report of how girls and boys experienced abuse and neglect in similar but also different ways. One striking conclusion drawn by the report is that, in general, girls' schools were not as physically harsh as boys' schools and that there was no

154 Shepler (2005) citing Bledsoe (1980) p. 186.
155 Shepler (2005) p. 12.
156 I recall my own surprise at waking up at dawn to find Uncle Abduh 'man of the house' cooking fish on a brazier on the back porch in preparation for a family outing to the beach. I asked a dependant in the home if uncle Abduh always cooked and she replied 'he cooks the fish.' Uncle Abduh cooking the family meal while the women swept or in my case slept may not be representative of the distribution of labour in Sierra Leonean households. I use the story to show how my own impression of traditional male (i.e. fishing) and female tasks (i.e. cooking the fish) may not tally with the Sierra Leonean reality. Certainly according to Shepler's study, the gendered division of labour is far from clear with respect to children.
157 Turshen (2001), p. 56.
158 Ibid.
159 Irish Child Abuse Commission (2009).

persistent problem of sexual abuse in girls' schools. Abuse of girls was opportunistic and predatory by male employees or occurring in outside placements.[160] In contrast, sexual abuse in boys' schools was described as 'systemic', 'endemic', 'chronic' and occurring at 'disturbing levels'. Much of the abuse described was attributed to Catholic Brothers; however, the report describes sexual abuse by peers. In one situation, vulnerable boys had to submit to sex in exchange for protection from older boys.[161]

The disruption raised is not the contest that I distanced myself from in Chapter 1, which would ask 'did Irish boys or Irish girls suffer the most?' Challenging the legal necessity for a separate crime of sexual slavery will not be done with claims that 'boys were raped too and more frequently than girls.'[162] The objective with this rather cursory but important reference to sexual violence against boys and adolescents in State institutions is to raise the questions that a thorough gender analysis of incarceration, captivity, conscription, and enslavement would require. The current status reduces a gender analysis of enslavement to the rape of women, and excluding any analysis of the ways in which masculinity is attacked by slavery. This focus on women and sex also presents a risk of 'eroticising' intercourse between women and male owners, rather than exploring and challenging hegemonic gender relations that make such violence inherent in and even necessary to sustain military factions. If we approach enslavement not from a 'sex'/lust perspective but from the hegemonic power perspective, we would leave room for a study of boys' and mens' experiences of captivity. Further, we would gain a deeper understanding of the social and political underpinnings of sexual violence, as it disproportionately affects women, but also as it affects men and target communities.

Franke illustrates the possibilities of such an approach with an example of punishment in Ancient Rome. When a husband caught another man in bed with his wife, it was acceptable punishment for the husband and/or his male slaves to orally or anally rape the male offender.[163] She points out that while it is possible that the person administering the punishment in these circumstances derived erotic satisfaction from these practices, to fundamentally characterize them as erotic in nature is to radically pervert their meaning.[164] Some interpretations better reflect the ways in which the practices are understood by the participants, the significance they hold in the cultures in which they took place, and the unique ways in which sex can be a powerful tool to inflict myriad forms of harm.[165]

When poorly considered and analysed, the mere classification of practices as sexual holds the danger of eclipsing other relations of power and symbolic acts, punishments and practices that men and women experience collectively and also in specific ways shaped by gender.

160 Irish Child Abuse Commission (2009), p. 21.
161 Ibid.
162 This would not be disruptive, it would be counter-productive, as it could be used to normalise girls' experience and even sexual violence.
163 Franke (1997-1998), p. 1149, citing Richlin (1992), pp. 215 and 256.
164 Franke (1997-1998), p. 1149.
165 Franke (1997-1998), p. 1149.

CHAPTER 7

Conclusion

7 INTRODUCTION AND MARIA'S NARRATIVE

As an international visiting scholar at American University Washington College of Law's Centre for Human Rights and Humanitarian Law I was invited to contribute as a speaker at a conference on international criminal prosecutions of gender-based violence. It was a dynamic conference, bringing together NGO representatives, academics from various disciplines, victims' rights advocates, Judges, Prosecutors, victim support officers and Defence Counsel with first-hand experience of international criminal justice gained at the Sierra Leone Special Court, the Rwanda and Yugoslav Tribunals as well as the International Criminal Court.

In the final moments of the conference, Hannah,[1] a participant, voiced her displeasure at the fact that the conference organisers did not invite victims of rape to the conference. She felt this omission reflected a wider omission by international criminal courts of meaningful victim representation and robbed the conference of victims' voices. Hannah's contribution took my mind back to two conferences I attended in The Hague where former child soldiers were indeed invited to participate. However, in both cases I was angry at the manner in which they were invited to participate. I felt their participation was not on par with the participation of the academic speakers. Indeed, their participation was restricted to their being gawked at by us, the academics.

At the reception following the international conference I spoke with Maria,[2] a fellow participant, and expressed my reservations about inviting African rape survivors. She sympathised with my reservations but also added her own very striking response to the effect of: 'Why did Hannah assume that there were no rape victims in the conference room?'

My purpose with this study is to affirm that: as the legal construction and interpretation of human rights norms matured, gender emerged in the analysis of rights denial. And secondly, with the recent establishment of international criminal tribunals, gender considerations are evident in the case law and narrative of justice processes. In the preface of this study I noted that I have found inclusive as well as exclusive narratives on gender and violence not only in human rights instruments and criminal tribunals in the post conflict societies of Rwanda and Sierra Leone but also at the international conferences, expert seminars, lecture halls and research institutes I have visited as part of the doctoral process in the United States and Western Europe. Therefore, whilst Maria's narrative is not a field narrative I include it as this study's final introductory narrative because it speaks so obviously to the issue of positionality and its role in the inclusion and exclusion of women as a group and a gender construct in narratives produced by transitional justice processes as well as academic scholarship on human rights.

My initial reaction to Maria's astute inquiry was a deep sense of disappointment in myself because despite my own personal experiences of gender-based discrimination (see the preface for an example), I had casually accepted Hannah's intimation that there were no rape victims in our select midst. I understood, rightly or wrongly, that Hannah's contribution was part of a human rights narrative that refers only to Third World victims and makes (sexual) victimhood synonymous with women in marginal states. Maria's question forced me out of the complacency that arises in human rights law scholars when we embrace the comforting narrative that rape and other abuses of human rights are happening to 'those women'. 'Those women' are too often 'brown women' and they are made brown not only by their race and complexions, but also by their illiteracy, poverty and generally subordinate position in the global hierarchies of power. These features combine to allow

1 A pseudonym.
2 A pseudonym.

academics (us) to impose 'otherness' and muteness on brown women (them).[3] The war victims I encountered exhibited at 'international' conferences looked disturbingly but also reassuringly like victims; they did not look like 'us'. They were brown exotics in ill-fitting clothes, unsuited for the cool European climate, and escorted (like Sara Baartman (see chapter 2)) by a humanitarian spokesperson-minder-translator.

Throughout this study I analysed other persons' actions and words in order to create socio-legal narratives within this study, and will do so again here: Hannah, myself and possibly other academics and practitioners at the international conference(s) had little difficulty in assuming the absence of rape victims in the conference room for a number of reasons: We were all too educated to be victims, too wealthy, too white, too Westernised, too articulate, too well-travelled, too Big, too feminist, too well dressed, and altogether too powerful. And yet the statistics on the prevalence of sexual violence against women in the world make a fiction of the idea that in a room full of at least 200 women none harboured personal narratives of rape or other forms of gender-based discrimination from our experiences of peace, conflict, armed conflict, the Third World and the First World.

Maria forces us to acknowledge our assumptions and essentialising construction of women victims. Does her observation raise the conclusion that as activists, advocates, practitioners and scholars gathered at an international conference, we are sexist, gender biased and racist? Or that the very format and function of our 'international' conference is patriarchal and colonial in its outlook? This chapter's concluding analyses respond to these valid questions relating to issues of positionality at the individual as well as institutional levels of administering justice as a humanitarian venture.

7.1 Positionality and self

The issue of positionality emerged alongside the discussion of gender inclusion and exclusion in this study and this important development in the research process merits some attention in these closing sections. It is perhaps the strongest evidence of the interdisciplinary scholarship that influenced the conduct of the legal process and scholarship. If a conclusion must be drawn on methodology, it is that interdisciplinary approaches to research are crucial for the studies of transitional justice processes where the culture(s) and politics of law and society are so entwined. The engagement with other fields of study presented the opportunity to explore the loyalties and allegiances of beneficiary communities in Sierra Leone and Rwanda but also of the national and international architects and administrators of justice. And doing so, albeit briefly in Rwanda, Tanzania (Arusha) and Sierra Leone was essential for a strong analysis, cooption and at times rejection of the findings of social scientists such as anthropologists.

Therefore, my initial foray into positionality was strongly influenced by my surprised but positive reaction to the work of social scientists, particularly anthropologists who unabashedly wrote in the first person and admitted that their academic output and interaction with their subject(s) was influenced, for better or worse, by factors such as their own secular upbringing, sexual orientation, religious education, sex and gender. These scholars revealed that even when they did not acknowledge their subjectivity those communities they studied accurately identified the scholar's preconceived notions, prejudices and expectations of the subjects and the research. The subjects duly responded, positively or negatively, to the preconceptions and expectations of the scholar and the study. Thus, one's position or perceived position shapes narratives, observations and interactions, and ultimately academic output.

An even greater source of surprise came when I discovered rather late in the course of my doctoral process that feminist scholars from the law academy drew from their personal experiences, specific to minority and/or marginalised identities, to buttress their critique of discriminatory laws and policy. It was a high point in my

3 I thank Prof. Pamela Scully (Emory Women's Studies) and Prof. Sita Ranchod-Nilsson (Institute of Developing Nations at Emory University) for bringing together the men and women at the May 2009 Emory University conference on *Gender Violence and Gender Justice: Critical perspectives on Post-Conflict Societies*. We shared vivid and intimate discussions on 'brown women' and 'those women' and the ways our own theory and practice reproduce these harmful categories. The candid disclosure of many speakers at this conference strongly motivated the tone of this final chapter.

legal career to realise that I did not have to relinquish the discipline in order to freely articulate my reservations and arguments about the equality of the law. I was a foreigner for the ten years that the seeds of this research were sown, took root and flowered in the Netherlands, Sierra Leone, Rwanda, the United Kingdom and the United States. It is perhaps through this prolonged experience of otherness that the concept of free articulation in my research developed to mean that a 'part of my work become an attempt to make my own origin visible.'[4] It was this feminist legal scholarship, even more than the social scientists', that brought me to the revelation that admitting one's positionality would not cheapen, discredit or otherwise compromise scholarship. And, importantly, it would not require me to make an exhibit of myself or other women.

Investigating one's positionality is an ongoing process and fieldwork does not (did not) necessarily provide answers to the numerous questions I addressed to myself and of myself. The questions were largely unresolved and I never fit wholly into the dominant categories used to describe scholars such as Third World, western, African or elite; however, they served the purpose of increasing my self-awareness and challenging my seemingly innocent and impartial rendering of narratives elicited from the men and women I encountered, interacted with and observed in Rwanda and Sierra Leone. As I stated in chapter 1, it was clear that my insider status co-existed with an outsider status. The two states often intersected and overlapped, at times off-setting or increasing my position of power. Most importantly, the decision to acknowledge my own positionality allowed me to acknowledge the hegemonic nature of my research and role as the narrator appropriating Bintu, Isata, the Chief, Hannah, Lars, Maria and others' narratives in order to support my thesis, to illustrate my arguments and, yes, to authenticate my theory. While judging Bintu and others' motives, I was forced to judge my own motives and ultimately they are presented in this study for judgement by others.[5]

7.2 Positionality and human rights law

Identifying the insider and the outsider that I am provided a useful analogy for the gender review of the human rights law framework and transitional justice processes. Is human rights law a Western export, an Imperialist project, a universal body of norms or a vernacularised language of natural justice adapted to accommodate Asian, African, European and other cultural-geographical sensibilities? I will not claim in my conclusion that this line of inquiry is an original one. Many activists and scholars, particularly in the Global South, have questioned the construction of universality and/in international human rights law before me. Feminist theorists have played a central role in showing that the exclusion of gender from human rights discourse undermines claims of universality. By asking 'where are the women?' they have radically transformed the interpretation of international law quite notably through the major treaty bodies such as CAT, the Human Rights Committee, CERD and CEDAW. These have in turn challenged narrow and androcentric interpretations of human rights law that left women vulnerable to gender-specific harms that fell below the radar of a 'universal' (male elites') experience of harm. Critical race feminists have asked where are the women of colour in feminist legal critique? They have challenged the veracity of a 'universal' (white elite) body of women experiencing inequality in the same way. They have produced a counter-hegemonic race-class-gender ideology that presents a three-dimensional Black woman.

I do not claim with this study to have contributed to this well developed and elucidated body of scholarship. Rather my contribution lies in the localising of the legal argument into a trans-historic African space. I describe the international and African regional human rights framework and question the positionality of its authors, in order to ascertain law's legitimacy and relevance to its subjects, in this case survivors of violence and other forms of gender-based discrimination.

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4 Enwezor and Shonibare, p. 164.

5 In as much as I would like to deny that I use narratives from the field to authenticate my work, I must admit that I see my students and peers take my work 'more seriously' when they hear that I have conducted fieldwork and when they hear me recount observations and, particularly, narratives from the field. The more discerning students and peers will judge whether the 'authenticity' of my field narrative is restricted to adding gloss to the study or if it succeeds in deepening the legal analysis by disrupting assumptions of the legitimacy and impartiality of human rights law and justice responses.

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Starting with a young Zambian woman in a floral summer dress in a Lusaka market (preface) and a young Khoisan woman on a one-way ticket to Europe (chapter 1), I produced disruptive images of African women through narratives that are about gender and the human right to equality and non-discrimination. These and other narratives in this study operate as a genealogy of representation about African women and our bodies and the veneration, ownership and censorship of our thighs, backsides and wombs, that creates an overpowering sense of vulnerability as well as an overpowering desire by our international and local communities to protect and shield us. And now a riddle: Human rights laws, courts of law, customary courts, fathers and mothers, early marriage, vigilante street youths and Secret Societies. What do these institutions that I have featured in this study all have in common? The answer to this riddle is that their actions ostensibly have our (vulnerable African women's) protection as chief motivators. And indeed the quickly expanding legal norms and enforcement mechanisms against violence against women are a testament to the desire to protect women. However, the pain they inflict, the omissions they make, the control they keep, the freedoms they confiscate, and the oppression they legitimate are part and parcel of their protection mechanisms deemed necessary in a patriarchal society. Their language of protection is a historically conditioned response that needs to be investigated and resisted as significant parts of it preclude the crafting of legal and social responses that empower survivors of gender-based violence and other forms of discrimination to overturn patriarchy.[6] As it stands, the dominant narrative of gender and violence requires that the survivor must be disempowered not only by the rape or other rights violation, but also by the cloak of abject vulnerability imposed on a daily basis by the legal discourse, society and other protectors.

There is, however, a fundamental difference between the universal human rights law framework and the larger group of protectors that includes parents arranging early marriages, street youths and the police chasing down immodest girls, and aunties and grannies that circumcise and manipulate the shape and design of the vaginal walls and labia. The latter group of protectors understand patriarchy because they live and navigate it every day as individuals and members of a community. They are local. They survive and prosper because they understand power and its distribution in their own household, clan, homestead, commune, village, sector, district, town, city and metropolis. Thus the teenage boys who rescued me from rape in the market (see the preface) were able to intervene in a timely fashion because they saw and clearly understood the gendered manifestations of power in the market. I was not able to protect myself because I (the powerful law student) did not understand that I was powerless. I would not (could not) see myself through a patriarchal lens and hierarchy.

International human rights law reminds me of that first year law student. At its birth it was so deeply rooted in principles of universality and equality it was a system that could not readily insert patriarchy and other structural inequalities into its narrative of man and his fundamental freedoms. Patriarchy, heterocentrism, nationalism and other essentialising socio-political systems impose, often violently, one authentic model of masculinity and a complementary but subordinate model of femininity. Patriarchy and its attendant systems of oppression sabotaged early human rights efforts to establish formal equality between authentic men and deviant men and women who did not validate the authentic man. Likewise, valiant efforts to insert gender and not only biological-sexual differences into the language, interpretation and enforcement of human rights laws were diffused when these hegemonic social structures were not exposed, challenged and/or transformed. Thus the civil, political, economic, social and cultural rights enshrined in the International Bill of Rights (described as a first generation human rights instrument in chapter 2) did not and could not take into account that the right to education might be thwarted by sexual relations between girls and examiners, or that the right to a livelihood could be stumped by exorbitant child-care costs, or that the right to privacy would be the mask for violent assaults by intimate partners.

African regional human rights conventions (described in chapter 2 as both second and third generation rights) have demonstrated a greater capacity to formulate protections taking into account the lived reality of peoples: for example, the European peoples, Inter-American peoples or African peoples. The sensibilities, history and culture of a region colour the construction of rights in conventions such as the European Convention on Human

6 Otto (2002), p. 35.

Rights and Fundamental Freedoms and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women. However, the principle of universality remains a defining feature of even the regional conventions. This is a detriment to the real demand and purpose of such instruments at the local level which is to maintain the principle of universality whilst 'bringing human rights home'. In the Maputo Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol), this can be illustrated by the protections relating to the equality that men and women should enjoy when entering into and dissolving marriage. The Maputo Protocol provides the universal premise that no marriage shall take place without the free and full consent of both parties. The consent of the individual is a core element of the highly individualized Western-cum-universal construction of human rights. This absolute espousing of universalism makes no reference to the reality that individual consent is a fiction in many African settings unless it includes the consent of the family and the community.[7]

To elaborate further on this point, we can look to the African (Banjul) Charter for Human and People's Rights which is clear in its Preamble that the enjoyment of rights implies the performance of duties on the part of everyone. Many of these duties are owed to one's family, society and other communities.[8] So, the freedoms of each individual should be exercised with due regard to the rights of others, morality and common interest.[9] The Maputo Protocol's several provisions on marriage omit any reference to the consent of the family and indeed families in matrimonial unions, whether monogamous or polygamous. It is an exceptional omission when one considers that the 'consent' of families expressed in culturally specific ways is a prerequisite to marriage for many Africans (the author included).[10] Further, marrying without seeking counsel and the consent of parents and other family members is a risk in the event that the marriage dissolves, for example due to domestic violence, the arbitrary introduction of co-wives, or the contested paternity of children. The family support needed to mediate peace between husband and wife, provide a shelter for a battered wife, discretely arrange a surrogate in case of infertility, extract children from an abusive household, extend paternity to extramarital children, or facilitate a temporary separation could be withheld if the parties to the marriage did not seek and receive consent for the union. These are realities that are neither acknowledged nor contested by the Maputo Protocol, and this brings the validity of this unequivocal provision on individual consent as a fundamental freedom into doubt.

The value of regional human rights instruments should be that they are intimate with the practices and (rights) culture of peoples. However, in the competing desire to be truly universal they can miss opportunities to elucidate and affirm legitimate cultural expressions of rights, for example, the communal nature of the family, marriage and kinship.[11] Their responsibility to affirm rights bearing in mind the hegemonic relationships that may exist in systems such as patriarchy, patronage and kinship is not met and this obscures the ways family and community mitigate or aggravate in the enjoyment of women's human rights. Further, the potentially hazardous outcomes of entering into a marriage without the consent of parents and other stakeholders would disproportionately affect women. It is irresponsible for regional human rights instruments to advocate a principle such as 'consent' in marriage without first defining 'consent' in context and without acknowledging the cost of such an individualised exercise of rights on men and women, individually and as kin.

Introducing gender into the universal legal regime was impacted by the failure to identify systems of inequality that perpetuated a monolithic model of masculinity and femininity as a means to uphold the status quo.

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7 In some cases the consent of ancestors will also be divined or otherwise sought.

8 Article 27 (1).

9 Article 27 (2).

10 The family's consent, which need not be exclusive to the prospective bride or groom, could be discerned, for example, from the exchange of gifts, the sharing of a meal, the joint labour of prospective in-laws on a plot of farm land, or evidence that the betrothed is pregnant and that a marriage would be fertile.

11 This brings to mind Graça Machel, the former First Lady of Mozambique and former First Lady of South Africa, and the reservations she had about marrying the then President Nelson Mandela. Mrs Machel admitted in an interview, that her reluctance was related to her concern that the Machel and Mandela families would not consent to hers and Mandela's union. Her 'responsibilities to herself as a woman' had to be considered with the responsibilities towards her family. Graça Machel talks to Al-Jazeera Part I, 17 July 2008. http://www.youtube.com/watch?v=GsxNEejQ9cY

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Women, gays, lesbians, indigenous peoples, religious minorities, transgender persons, racial minorities and other groups continue to advocate for a human rights law regime that places their specific needs at its core and not its margins. The Convention on the Elimination of All Forms of Racial Discrimination (CERD) and its General Comments, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and its General Recommendations, and the Maputo Protocol exemplify the ways in which the State, the authentic man and his wife (in that order) are being strategically challenged as the primary beneficiaries of international human rights law.

The opening paragraphs of this study emphasised that adding a gender analysis is not a contest between the importance of men and women's experiences of human rights denial. Nor is gender a discussion of the rape of women by men. It is apparent that a conclusion must be drawn to settle the question: So what is this 'gender' that must be inserted into the human rights law framework?

In this study gender has come to be the lens through which the dominant narrative of the authentic man and the authentic woman (his wife) are dethroned as the universal models of mankind that human rights laws tailor their protection mechanisms to. A conclusion drawn in this study is that one's categorisation as the authentic man and/or his wife is a dubious privilege. In the context of armed conflict it is the authentic man and his powerful and inviolable body that makes castration or sexual torture such a potent attack. Conversely, it is this inviolable body that conceals castration from the investigation, prosecution and conviction process that is the transitional justice process. The narrative presents the wife of the authentic man as infinitely vulnerable – the better to complement the authentic man's power. It is her infinite vulnerability that makes sexual violence such an incontestable and dominant narrative in peace and war. In peace she must avoid public spaces such as the workplace and be indoors before dark in order to avoid the advances of predatory men. And in war the enemy must rape her. In this narrative, the anticipation of sexual violence is a pervasive fear shared by the woman and her community. The privileging of her vulnerability over other women's by the legal framework guarantees only that her victimhood is acknowledged, but not necessarily with an effective legal remedy. In fact, acknowledgment may result in more severe forms of self-cloistering and a restriction of her freedom of movement.

Despite the central role of gender hegemonies in perpetuating sexual violence and maintaining this dominant narrative, gender based violence as a broad range of acts targeting femininity and masculinity remains under-represented before justice processes. Sexual violence against women, as a limited construct, is recognised by us (investigators and prosecutors) as a serious phenomenon, but only because we have come to accept that it is to be expected. Sexual violence is part of the hegemonic relationship between the authentic man and his subordinates (women and weak men).[12] Sexual violence attaches easily and even naturally to the bodies of women to such an extent that it becomes a natural leap to construct it as the defining or only harm that women experience in conflict and armed conflict. Thus, sexual violence without the benefit of a serious gender analysis is not readily constructed by investigators and prosecutors as a widespread and systematic crime, a war crime or a form of persecution. This approach leaves a wide range of victims of gender based war crimes and crimes against humanity outside of the justice process. The discussion in chapters 5 and 6 on gender and enslavement highlighted that the legal narrative on 'sex slaves' did not do justice to the experience of enslaved men and women during the Sierra Leone civil war.

Ultimately, the exclusion-invisibility as well as the inclusion-visibility of gender and gender-based violence in legal narratives were equally important in this research, as both serve to consolidate dominance and subordination between and within the sexes that ultimately determine whether victims and their experience

12 'Gender' in gender-based violence shapes the nature of sexual violence against men as well. See Just Detention International's reporting on the particular vulnerability of incarcerated gay and transgender men. These groups are disproportionately targeted for rape and other forms of sexual violence than self-identified heterosexual men in the same conditions of detention. My own analysis concludes that men who are not authentic men, in this case, violating the laws of heteronormality, are singled out by apparently heterosexual men for sexual violence as a form of discipline, humiliation or punishment. Just Detention International Fact Sheet (2009) and 2009a.

of violence is granted or denied legitimacy, and whether perpetrators gain or lose their immunity from prosecution for violence against women.

Rachel Kalish provides an exemplary gender analysis of women's violence in relationships. The analysis follows women who have been arrested in domestic disturbances but shows how women's use of violence differs from that of men. Her gender analysis of women's violence in relationships challenges the justice process for failing to identify the contexts for and the reasoning behind women's violent behaviour. A gender analysis reveals that defensive or reactive violence are more likely to characterise women's violence than men's violence in intimate relationships. The importance of her research is that it does not deny women's violence even as it provides an insight into the ways women use violence, which can improve service provision for women who are arrested for intimate partner violence.[13]

Analysis such as that by Kalish is reflected in my construction of gender-based violence which reached another conclusion to the effect that violence, particularly sexual violence, does not have to disproportionately affect women and girls for it to be gender based. What made the sexual abuse of Irish boys in industrial and reform schools (discussed in chapter 6) a form of gender-based violence was not necessarily that it happened disproportionately to boys. What confirms the violence against boys as gender-based violence is the analysis of the ways in which their sex and gender shaped the nature, extent and impact of the abuse they suffered. For example, sexual violence against boys may have been so prevalent because boys' schools were located in especially remote areas as 'boys did not need family contact as much as girls', or boys were more likely to be under the care of the Christian Brothers who were more likely to be sexual predators than Nuns.[14] Boys may have been regarded as being more recidivist and corrupt than girls; therefore their reporting of abuse would be treated as less credible by the authorities, and hence the culture of silence facilitated the endemic abuse. These are gendered assumptions formed around dominant ideas of masculinity and are more compelling than a mere head count of Irish victims disaggregated into sex. Elaborated gender considerations can change policy relating to current cases of juvenile custody, whether in foster care or government institution.

Continuing in the same vein that argues that a poor understanding of gender denies both men and women a whole narrative describing their experience of conflict, I present three hypothetical scenarios: (i) In the 1970s a Southern Rhodesian freedom fighter in a liberation movement faces systematic sexual violence including forced domestic chores for and from her commander in a training camp; (ii) in the 1970s a Southern Rhodesian freedom fighter faces systematic sexual violence by military interrogators in a South African detention facility including the administration of electric shocks to his genitals; (iii) in 2007 a Zimbabwean member of the opposition is sodomised with a bottle by a militia wing of the ruling party.

An inquiry by truth commissioners or a prosecutor's investigation that omits a gender analysis would raise many distortions and conceal the wider significance of sexual violence in the conflict(s). Distortions may in the first scenario reduce the first rape to a romantic-seduction arising naturally and consensually when men and women are lonely in remote camps. The second rape might be described as the torture of political prisoners without any reference to sexualised forms of torture, sexual parts or even the disclosure of the sex of the victim. And the third rape might be described generically as evidence of terrorist tactics waged against a community in the context of a violent election. These conclusions illustrate that without applying gender as an analytical tool, sexual violence as a form of gender based analysis will not be effectively determined by justice processes. Thus, the mutilation and castration of men's genitals (chapter 4) or the widespread rape of Hutu girls and women (chapter 4) are excluded from a full analysis that would reveal violence as gender based.

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13 Kalish (2006) reviewing Miller (2005).

14 I acknowledge the ease with which I accept the dominant image of a sexual predator as male. I therefore add the recently released (and very disruptive) statistics from the US Bureau of Justice which reveal high levels of sexual abuse of youth in juvenile facilities: Approximately 95 percent of all youth (male and female) reporting staff sexual misconduct said they had been victimized by female facility staff. In 2008, 42 percent of staff in juvenile facilities under state jurisdiction were female. US Bureau of Justice Statistics (2010) at http://bjs.ojp.usdoj.gov/content/pub/press/svjfry09pr.cfm

Chapter 7

7.3 Positionality and transitional justice

Chapters 4, 5 and 6 on transitional justice in Rwanda and Sierra Leone have shown that transitional justice processes such as truth commissions and criminal tribunals sift through testimonies of gender and violence and separate the wheat from the chaff. The 'wheat' refers to inclusion, or what we (legal scholars and practitioners) see and hear in the dominant legal narrative encoded in factual and legal analyses. The 'chaff' refers to what we see and hear but exclude from the legal narrative because it is not significant to our varied objectives, will not contribute significantly to international law or is contentious enough to pose a threat to the peace, justice or security process.

The vulnerable woman and other women

In the case of abuse, the essentialised image of the victim of patriarchy is the vulnerable woman. She may be the young virgin, the Hindu beauty, the pious Muslim, the wife of the freedom fighter, the widow of the soldier, or the schoolgirl. Her body represents national pride, the promise of new life, cultural values and honour but it is not honoured by security forces or rebels. This composition of her body makes rape an anticipated act yet still an affront to society.[15] Increasingly, protecting women as the repository of national identities and symbols demands that sexual violence enters the narrative of transitional justice processes established after violent conflict. The first few shocking individual testimonies are recorded and prosecuted. They are appropriated by the legal practitioners and scholars who are quick to appreciate the invaluable contribution such decisions make to a slow to develop body of international humanitarian law and a young but quickly developing body of international criminal law. The Akayesu, Kunarac, Gacumbitsi, and Furundzija cases are just some of the cases from the ad hoc criminal tribunals that have spawned an industry of both critical and congratulatory academic writing and analysis. Legal analyses of these judgements are on the curriculum of any self-respecting graduate programme in international criminal law. And, gradually, we are seeing references to this case law invoked in international campaigns against issues as far-ranging as female genital cutting, early marriage, trafficking in women and pornography.

The testimonies that help to secure landmark convictions for sexual violence are also appropriated by postwar (victor) regimes that are well aware that up to a decade or more after the signing of a peace accord, the completion of transitional justice processes, restoring and maintaining security remains a Herculean effort. Reconstructing a war-torn nation requires more than the demobilisation of soldiers, the prosecution of war criminals, the rebuilding of schools and so on and so forth. It also requires a psychological process of reconstruction that depends on State constructed narratives justifying past conflict and future aggression, motivating reconciliation between divided societies, indoctrinating an emerging youth polity and legitimating the ruling party and its ideology. Victim narratives and particularly rape narratives are emotive and can be effective for further vilifying defeated, exiled or imprisoned military and political rivals. The social and political narrative of rape, even when it is not matched by the political will to prosecute offenders, can be used to symbolise a black past of infamy and barbarity that can never be returned to. The promise of the two words 'never again' can be used by the ruling party and its international backers to legitimate increasingly strong-arm tactics and a chipping away at democratic gains.

The hypervisibility of rape narratives in the public domain propagated by justice processes in Rwanda and Sierra Leone is not accidental. However, we have seen that it does not translate into high conviction rates for sexual violence. The representational narrative of women is shaped by international and national preoccupations that have limited resonance in women's lives. It is not only the State that can profit from the rape narrative's potentially legitimating power, but the international backers with their massive financial and manpower investment in the reconstruction process require a legitimate State to bolster and interact with. Maintaining this legitimacy represents the success of the international backer's peace-building and reconstruction processes. So, a complicit attitude to the downplaying of rape charges in the transitional justice process

15 Susan J. Brison notes quite aptly that sexual violence is a problem of catastrophic proportions – a fact obscured by its mundanity, by its relentless occurrence, by the fact that so many of us have been victims of it. Brison (1998), p. 24.

in favour of a ruling party or victor as seen in the post-World War II military trials and before contemporary tribunals in Rwanda and Sierra Leone serves an important function. The discussion around the withholding of sexual violence charges in the CDF case before the Sierra Leone Special Court emphasised the political balancing acts maintained when government agents are accused of sexual violence (chapter 6).

The study illustrated that governments and tribunals are at loggerheads over certain aspects of justice. This is a well-documented fact in media reports and scholarship and can relate to decisions on the seat of a tribunal or the perceived harshness or leniency of sentences. However, there are aspects of the justice process on which governments and tribunals concur. And this brings us to the observation that the international community plays a complex role in compounding gender inequality and unaccountability once entangled with a transitional society.[16] There is a 'transitional moment' which represents only one point on the continuum of a protracted legal and political engagement between the transitional state and the international community.[17] There may be complicity in the dropping of charges against key actors in the peace process, there may be a mutual decision to focus on crimes against humanity and to ignore war crimes, and there may be a common interest in prosecuting child soldiering but not mass rape. It should not come as a surprise that I concur with the idea that there is an ideology to judging.[18] Particularly in states emerging from protracted armed conflicts and pressed into transitional justice and other massive democratisation projects by the international community.

The processes, institutions and values that drive change in transitional societies are deeply gendered.[19] The Special Court, the Truth Commission and the ICTR were all received with some ambiguity and at times hostility by the sitting governments of Sierra Leone and Rwanda, and this makes their processes even more interesting to study. Identifying the stakeholders in the processes would reveal their motives in dispensing justice, and their understanding of justice and a gendered form of justice. By not assessing the structures and modalities of change that create and enforce exclusion for women in post-conflict and post-repression contexts, we fail to effect meaningful political and legal transformation for women in contexts where profound social and political change is negotiated.[20]

In conclusion, the justice narrative of rape is a form of appropriation of victims' voices. It is often comprised of a small and apparently representative sample of the most sensational and heinous acts (breasts hacked off, corpses raped) suited to the needs of international lawyers. Old crimes such as enslavement receive new labels, such as 'forced marriage' and 'sex slavery' and the remaining backlog of cases is dropped for want of sustained interest from the legal audience, although official explanations refer to reasons such as a lack of sufficient evidence and the recalcitrance of victims and witnesses. At this point the Prosecutor's perspective can be likened to Aunt Hermien (chapter 1) and Aminatta (chapter 1): S/he too has taken it for granted that 'they were all raped' and accepts the hypervisibility of rape. But by doing so, the Prosecutor, like Aimable (chapter 2), no longer needs to make the serious gender analysis of violence against men and women in armed conflict. S/he has secured rape landmark/test cases and can now focus on grave breaches of international law.

And then there is the 'chaff' or the excluded groups, and this refers to those women who cannot be raped or rather whose rape testimonies merit no narrative in the justice process. In 'peacetime' these could be migrant women, impoverished women, trafficked women, prostitutes and other groups of women marginalised from early human rights instruments. In the context of different armed conflicts, we have seen that the sworn testimony of elite women, women politicians, Hutu women, women combatants, girl soldiers, Big women, and wives of insurgents are not rigorously sought for inclusion in the justice narrative. They are excluded from the victim narrative – because they do not conform to the essentialised rape victim and therefore do not attract the protective response of authentic men and their mechanisms of justice.

16 Ní Aoláin, (2008), p. 38.
17 Ní Aoláin, (2008), p. 38.
18 Rajagopol (2006), p. 26.
19 Ní Aoláin, (2008), p. 2.
20 Ibid., p. 2.

Chapter 7

So, the mass rape of Asian women by Japanese men did not stir the indignation of the Allies and their international military tribunal, and the mass rape of German women by the Red Army elicited the same judicial indifference. The exploitation of Japanese women as comfort women by the Occupiers in Japan in 1945, the taking of women genocide survivors as wives by the Liberators in Rwanda in 1994, the enslavement of civilian women by the Civil Defence Forces in Sierra Leone, and the sexual exploitation of Nama and Herero women by German colonisers – these abuses of human rights are unsuitable for judicial narratives because the victims were or are still not regarded as vulnerable women in need of protection. Their wartime experience, in general, has only appeared as a cursory narrative in popular history annals, and garnered even less attention in legal and transitional justice narratives.

Who are we anyway?

The international status of transitional justice processes implies the strict adherence to international fair trial standards, the appointment of impartial and professional Judges and prosecutors, a firm commitment to the protection of human rights and the ancillary call to mainstream gender into the justice process. These assumptions have largely precluded any serious investigation by legal outsiders and insiders into the biases exhibited by transitional justice processes. It is therefore important that this study's focus on justice processes in Sierra Leone and Rwanda has shown that justice processes are neither impartial nor independent in the construction of narratives of gender and violence through processes such as victim and witness selection, drawing up charges in the indictment and prioritising the focus of their investigation.

The Sierra Leone TRC made a notable effort to place sexual violence within a framework of patriarchy (chapter 5). However, it failed to examine and declare its own position in the patriarchal hierarchy that is part and parcel of a developing and post-conflict nation being reconstructed socially and politically under the watchful eye and the firm hand of powerful regional (ECOWAS) and international stakeholders (UN Mission in Sierra Leone and INGOs). The result was that women's violations were being remedied and their truths narrated through the parameters of a hegemonic and even patriarchal justice process. Designing and shaping an essentialised victim of rape requires a hegemonic institutional framework that oppresses or stigmatises as much as it protects and enforces. As described in chapter 6 on the Sierra Leone Special Court, girl soldiers are described by the OTP as vulnerable to retraumatisation. However, their protection amounted to exclusion from the witness-stand. In the same instance girls who were abducted from their homes into a hellish bush existence had their experience erroneously compared to marriage by their captors as well as by an uninformed legal construction by both the transitional justice processes (chapter 6). And in chapter 5 the Truth Commissioners admitted that they corralled woman into closed hearings, ostensibly for their own protection, when in fact many wanted to speak publicly in order to educate the public about their experiences and possibly as a show of self-empowerment.

In contrast with international or internationalised justice processes, domestic criminal justice systems in 'peacetime' have been thoroughly criticised by scholars for their gender and racial biases against minorities reflected in prosecution strategies, sentencing practices, rates of conviction and the awarding of damages. This criticism has led to a great sense of self-awareness in many jurisdictions. In some cases it led to the overhaul of the death penalty, greater scrutiny in jury selection and a ready willingness to move court sittings to impartial districts in order to enhance the rights of the defendant. Similar criticism is largely absent from the scholarship on transitional justice. The transitional justice tribunals discussed in the previous chapters are not investigated, nor do they self-investigate, as to their (im)partiality. Their gender competence as tribunals and as organs such as the Registry, the OTP and Chambers is taken as given and yet the studies of the Sierra Leone Special Court, the Sierra Leone Truth Commission and the International Criminal Tribunal for Rwanda have shown that gender is not properly understood as an element of violence and a ground for inclusion in the prosecution process.

Coming back to the questions Maria raised with her narrative at the beginning of this concluding chapter: Does the overall lack of gender competence point to negligent recruitment practices, for example where gender competency is called for by the Statute? Does it indicate sexism or just ignorance of the relevance of gender as an analytical tool? A review by of individuals has come in the shape of individual praise for female Judges

such as Florence Mumba, Navinathem Pillay and Elizabeth Odio Benito for the roles they played in pressing for prosecutorial investigations into sexual violence or for checking inappropriate cross-examination of women rape victims/witnesses.[21] The Office of the Prosecutor has fared less well, and in particular, the Prosecutor Carla del Ponte (1999-2003) receives strong criticism for a policy that marginalised and even obstructed the prosecution of sexual violence at the International Criminal Tribunal for Rwanda.[22] But more is required before gender competence becomes an ambition, requisite and reality for transitional justice projects. The need for a sustained review and identification of the position in which tribunals stand with respect to gender, the interests they (the tribunals) represent, the constituents they serve and their political ambitions and objectives should be embraced internally and by external actors and observers. Such an evaluation would have to be conducted at both an institutional and individual level, and interdisciplinary academic partnerships are central to formulating sustained research. This study contributes to the small but growing body of scholarship that is laying the foundation for larger gender projects.

7.4 The narratives

The concluding section in this concluding chapter is appropriately a statement on narratives. Each chapter of this study opens with a story or narrative, and the first six introductory narratives are drawn from field experience. The main body of each chapter and even the footnotes are interspersed with observations from field narratives. What has been their contribution to this study and what was their relevance to analysing human rights law and transitional justice processes?

My own narratives in this study are about Bintu, the Chief, Isata, Mrs B., Auntie Hermien, Lynette, Lars Sven, and many others. Other personalities such as Momo and Alimatu, Moinana and his fickle wife, taken from ethnographic research appeared alongside my quick studies (chapter 5). In as much as Bintu and others represent a story told to me, and then narrated by me – they are also indirectly first-person narratives. The narratives reflect my surprising reactions to Bintu's aggression, the Chief's humility and Isata's beauty in an ugly neighbourhood.[23] The value of first-person narratives is that they can expose previously hidden biases in the discipline's subject-matter and methodology and our own biases as (legal) scholars.[24] Thus, the narratives are also about the law and justice projects invoked by the postwar reconstruction processes in Sierra Leone and Rwanda. These projects come with their gender biases, blind spots and priorities.

In the sections above, my own positionality and that of human rights law and justice processes are discussed. They could not have been revealed in this study without the aid of the narratives.

Producing gaps

In the early days of my field visits, helpful acquaintances offered to connect me to prostitutes, rape victims and other 'interesting women'. I declined these invitations as I resisted the impulse to fill the study with baleful testimonies about exploitation and abuse. The study does contain a number of testimonies, and they are all gendered and their contribution has been to stimulate the gender analysis of the laws and justice process in each chapter. This has meant in some cases that they focus on the rape of women by men. However, for the most part, the narratives' contribution is to nuance the experiences of men and women in armed conflict, thereby posing a challenge to assumptions and easy conclusions that could be drawn by legal scholars relying solely on case law as a source of narrative.

Bintu's outburst (chapter 1), 'Who told you that!', was a call to scholars to review the case law of tribunals for both sides of the story: The Chief and his men tell one war story and it entirely excludes women's experience

21 See de Londras (2009).
22 See Nowrojee (2007)
23 I say 'surprising' because in retrospect I cannot imagine why I expected Bintu to be mild or timid, the Chief to be arrogant or young women like Isata to have been made ugly and drab by war.
24 Brison (1999), pp. 207-208.

of war. There is a discordant gap between the Chief and Bintu's narrative of the war experience, though both stories are strongly gendered in their substance and in the telling. In this case it was this gap which provided an unexpected narrative on constructions of masculinity and femininity in armed conflict and its aftermath. In this narrative Bintu reveals that the men's omission in their narrative is a denial that they were emasculated when their wives were reduced to slaves. This conclusion could only be drawn when the silences and words from both the men and women were collected.

It has been said that a great virtue of narrative over theory is its ability to transcend false 'either/and' dichotomies and present a nuanced 'both/and' picture of social phenomena.[25] The narratives throughout this study performed this very function for the human rights law scholar. They should have reminded us to listen not to two sides but to each and every side within the dichotomously constructed genders of male and female. The narratives remind us that 'doing gender' is not only about hearing the men's and women's stories. Rather, it is acknowledging that men do not produce one story, nor do women produce a single (opposite to men's) story. Women produce multiple stories that represent their own constructions of gender and gender-based violence and reflect their own location in a conflict society. Lynette and Aunt Hermien (chapter 4) were both genocide survivors and yet, differences in their status in society, education levels, sense of physical security, physical and psychological proximity to the atrocities, and other factors resulted in their deeply diverging understanding of the reach and scale of gender-based violence in Rwanda. Lynette believed 'rape happened to those women' while Aunt Hermien believed it happened 'to every woman.' The features that unite Hermien and Lynette as 'women' are as numerous as those features that distinguish their self-interests, access to resources such as education and health care, and social and political capital in their communities.

The Statute of the Rwanda Tribunal or the judgment in the Akayesu case do not disrupt the genre of universal woman, apart from classifying some women as victims and others as perpetrators. The victims were targeted because they were wives and mothers of Tutsi men, and the perpetrator women are implicated in genocide because they are wives and mothers of the Hutu *interahamwe*. The gap between the monolithic identity and multiple identities of women produced by the judicial narrative and a narrative obtained from the field, such as Hermien's, invites a gender analysis and is in itself a rich source for gender analysis.

Essentialising the victim only marginally benefits the model victim over others who cannot conform to this role. Even the victim who is legitimised by the dominant victim narrative is aware that she/he must compromise and erase parts of his/her narrative in order to provide a match with the legal framework for victimhood already erected well before the testimony is made. Thus when appearing before the Tribunal, a Hutu victim of a beating must emphasise her Tutsi sympathies, a Hutu rape victim should be willowy in order that she resembles a Tutsi, a Sierra Leonean girl who voluntarily joined the civil defence forces with her siblings must present herself as having been forcibly recruited for marriage, and a sexually violated man must conceal his sexual abuse and refer only to his conscription and military service.

This self-censorship can guarantee access to justice but it also creates the apparent untruths in the narratives. It is seen in the case of Comfort Women discredited by revisionists who refer to these women as prostitutes because of serious inconsistencies in their narratives. Depending on the audience (for example, a feminist workshop, a formal court hearing or an interview with the media) the individual testimony surrounding the recruitment of comfort women has been seen to vary dramatically. In one narrative a woman will report that she was abducted by the Japanese, in a second narrative she was given by her parents to the Japanese military, and in a third narrative she applied for work with a dishonest local businessman and was then duped and trafficked. Kimura argues that these are not inconsistencies or fabrications, but that they reveal the survivors' awareness that they are straddling a virgin-whore dichotomy of women.[26] It is my conclusion in this study that the tribunals and the human rights narratives create the benchmarks for 'true victimhood' and women learn with each testimony they give that justice, acknowledgment and social and political absolution is forthcoming when the right form of victimhood is claimed.

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25 Chamalla (2005), p. 38.
26 Kimura (2003), pp. 11-13.

The narratives do not provide answers and they are not conclusive evidence of custom, practice or theory. They should lead scholars to investigate and disrupt the case law and its narrative of gender and violence and raise a line of inquiry that reveals the parameters within which the justice process constructs gender.

7.5 Conclusion

Bintu asks the Chief, 'What's the difference? You (rebel husbands and civilian husbands) are all the same' (chapter 5). The significance of this statement occurred to me more than a year after I left Sierra Leone, and my analysis began to develop around the argument in this study that traditional forms of marriage in Sierra Leone were not synonymous with abuses such as forced marriage and sex as implied by the Sierra Leone Truth Commission and human rights advocates against early marriage. Although Bintu's claim appeared to be that rebel marriage was as exploitative and cruel as marriage to the Chief or other men in peacetime, I concluded that Bintu was not equating herself to a bush bride or sex slave. At the close of this study my understanding is that Bintu and many women I spoke with regarded marriage as a failed institution. Women seemed to agree equivocally that husbands did not protect wives from rape by rebels and marriage failed to protect bush wives from constant violence in the bush and stigmatisation upon returning to their communities. Bintu's statement was an assertion of her post-conflict transformation into an elected councillor and political figure and not her submission to enslavement.

The collapse of social and political institutions, including the institution of marriage, often results in accelerated transformation. Postconflict societies as seen in countries such as Sierra Leone, Liberia, Rwanda, South Africa and Uganda reveal that as institutions are reconfigured, gender equality can take root in previously unimagined spaces and at unprecedented rates. The rapid transformation in specific sectors of gender hegemonies is linked to the realisation of the burden women bore under systems of oppression, be it apartheid or ethnic cleansing, but also to the acknowledgment of the agency women exercised in subverting an oppressor and protecting themselves and their communities from human rights violations.

These transformations are however, obscured by the case law of criminal trials which operate necessarily within a scope of temporal jurisdiction, focusing on gross violations of human rights during a specified period of time. The past and future are referenced only in order to evidence intent to commit a crime (where the government began arming civilians a year before the massacre, for example) or to evidence the impact of violations (for example, by showing that the ethnic composition of a town changed drastically after killings). An interdisciplinary and even ethnographic approach to analysing legal narratives is needed from legal scholars in order to reveal cultural transformations that occurred during and in the aftermath of armed conflict. Once they are revealed and supported, these cultural transformations can disrupt the human rights law and justice narrative which tends to project an overwhelmingly oppressive image of culture through the lens of atrocity and victimhood.

As stated throughout this study, transitional justice processes since the post War military trials are authoritative and lend themselves to a historical account and pedagogy. It should not be surprising then that unchallenged truths emerge from justice processes, such as: Muslim women's immense shame about sexual violence, Sierra Leoneans prizing virginity, or the immense wealth and privilege of the Tutsi peoples. These truths are essentialising. My field visits did not include a questionnaire to verify; the levels of shame Muslim women (as opposed to Protestant Christian women (who are apparently unperturbed by rape), for example) harboured about sexual violence; or to investigate the educational levels and household incomes of the 'privileged' Tutsi group. Rather, a review and analysis of narratives collected individually or through the work of ethnographers produced a set of disruptive narratives: widows flaunting their lovers; independent and successful businesswomen; Hutu victims of rape; divorced women occupying the matrimonial home; and young women expertly negotiating transactional relationships with husbands, ex-husbands and suitors. The sample of narratives in this study is far from representative or even consistent, but these and other narratives were contrary enough to the legal narratives to produce disruptions and stimulate a deeper gender analysis. Their diversity rather than their uniformity made them valuable samples for this study.

The narratives are not intended to define, justify or condemn culture or gender hegemonies in specific African settings. The ethnographic narratives produced in chapter 5 on the Sierra Leone Truth Commission reveal, for example, that despite having had its very foundations systematically attacked and desecrated for over a decade by armed factions, the institution of marriage like other traditional institutions and practices in Sierra Leone retains its power as a driver of change. Men, women and families are changing the terms of marriage every day. The Truth Commissioners and their partners, however, presented a narrative of marriage as merely a restraint on equality for women. This is a position and a narrative that jars with the narratives within this study and can contribute to misguided interventions by legislators, development workers and others seeking to protect the rights of women and girls in Sierra Leone. It has been said that international donors treat local institutions as constraints on the realisation of actor preferences when in fact they are the real drivers of change in Africa.[27] Transitional justice narratives can be said to have adopted the same attitude when they presume that legal and human rights culture in post-conflict Africa is irreconcilable with universal tenets of human rights.

According to Laurel R. Rose, legal anthropologists influence common theoretical interpretations of and practical interventions in post-conflict situations – even indirectly – through their ethnographic writings and verbal consultations with programme planners. She argues that when anthropologists choose to play a direct role in the development of post-conflict methodologies, they more significantly influence and control ideas and policies, including those that concern women.[28] This influence could translate to post-conflict justice.

Many experts have been invited to testify before international tribunals. They have been useful in reconstructing military strategy or constructing the colonial past of an African nation. However, they are poorly equipped to deconstruct colonial constructions of indigenous social and political structures. This is best evidenced by the exclusion by experts of powerful institutions such as the Women's Secret Society from the justice narrative in Sierra Leone and also by the distorted representation of the institution of marriage. Implanting a transitional justice process such as the Sierra Leone Special Court in a conflict society is a valid response to a failed domestic system of justice. However, it can obscure concurrent justice when the existing justice processes are not familiar to international observers. They are dismissed as informal-indigenous processes when in fact they were formalised well before colonialism and survived and even thrived when post-independence governments pushed for modernisation. Their relevance to communities is salient and it is not wise to ignore their existence in transitional justice processes.

It has slowly transpired that the target range of the permanent international criminal court has fastened on to the African continent. To date, indictees have originated solely from armed conflicts fought on African soil. Should this trend continue it becomes imperative that those (legal practitioners) pressing for international adjudication over gross human rights violations in Africa partner with experts outside of their institutional structures. Anthropologists, political scientists historians and others have a role to play in the formulation of a justice process as do local practitioners of law and custom in all its forms. These partners should not be restricted to the role of expert witnesses at the trial stage but as consultants, advisers and reviewers at key stages of the prosecution.

I join Ogundipe-Leslie and others who call for more narratives of African women's identities and lives, roles and status beyond the conjugal and coital milieus.[29] The conjugal and coital roles of African women have emerged as a preoccupation of transitional justice processes, to the extent that gender-based violence has been reduced to sexual violence against women and girls. This construction is far from fulfilling the demands of a gender analysis. It adds women to the ambit of war crimes and crimes against humanity but excludes gender and feminism from the analysis.

27 Hyden (2008), pp. 1 and 2.
28 Rose (2000).
29 Ogundipe-Leslie (1994), p. 251.

The repercussions of this are far reaching and are illustrated by the easy cooption of forced marriage as a crime against humanity by the Prosecutor. This term 'forced marriage' reveals the discursive power of rebels and local communities who accepted this term and reminds us that the local justice process has discursive power to effectively influence the law making and (transitional) justice process.[30]

Where does this leave women and girls abducted by the rebels and described by rebels, their communities and the legal system as bush brides? There is no single answer to the long-term social and political implications for women and girls who experience rape and other forms of gender-based violence in armed conflict. Judith Zur writes of Guatemalan widows who rejected the military's branding of them as 'wives of the guerillas', because of its symbolic devaluation and its implicit threat to their sense of self.[31] Conversely, Jelke Boesten describes how young Andean women and their families called upon military superiors to force soldiers to 'domesticate' rape by marrying girls and women they had raped.[32] There is amongst women, perpetrators and their communities the realisation that names create experiences. Jurists have yet to acknowledge that their legal narrative helped to create and calcify the experience of bush marriage in Sierra Leone and left women few choices but to remain in the relationship or deny their entire experience of abduction in order to escape the devaluing and stigmatising title of 'bush bride'. Both choices required shunning their exercise of the right to access to justice.

In conclusion, the representative judicial narrative asserts that the major power struggle is between the Tutsi and the Hutu, the rebels and the army, or the freedom fighter and the coloniser. This narrative conceals that the major power struggle is a gender struggle too and that the armed conflict is in itself gendered. So long as this concealment exists, violence against women is seen as merely a manifestation of these struggles. So, the deduction that some African women in South African detention centres delivered babies in prison without the aid of a midwife because apartheid was a racist system misses what a gender analysis would begin to capture: Such maltreatment of women prisoners could reveal the threat that 'political' women posed to Black as well as White masculinities in a militarised conflict state. A gender analysis would require that women's victimisation was discussed also in the context of men's socialisation under apartheid and in the post-apartheid era.[33] Masculinities belong in the gender analysis not to reveal analogous 'male rapes' but also to understand the communication of harm between perpetrators and victims around hegemonic power.

Transitional justice has become a standard feature of peace building and conflict resolution in Africa. Nearly twenty years after Ethiopia started prosecuting crimes against humanity committed by the Dergue regime and nearly fifteen years after South Africa established its Truth and Reconciliation Commission, I can safely conclude that transitional justice narratives are overtaking local and national human rights campaigners in setting human rights priorities. And activists for women's rights in African societies are calling on the precedents of these transitional justice mechanisms to emphasise the pressing need for intervention in their struggle. However, transitional justice has yet to expand the focus of protection of women in armed conflict to patriarchal concerns around sexual violence. This has interfered with the maturation of national narratives of gender-based discrimination, including but not restricted to sexual violence. Narratives on gender inequality at the national-level should be more reflective of issues such as globalisation, international markets, urban migration, and other factors intersecting with gender discrimination. Transitional justice, even as it has situated itself in Kigali and Freetown, has yet to acknowledge the local institutions and processes already engaged in righting inequality and discrimination through local, regional and transnational partnerships.

Transitional justice narratives are constructing an African culture and history. Truth Commissions are fairly overt in this objective, yet criminal justice processes are doing the same though with less fanfare. Together they are creating a historiography of African women. An iconic image of the brown woman rape victim is emerging

30 Peetz (2008), p. 17.
31 Zur (1994).
32 Boesten (2008).
33 May and Strikwerda (1994), p. 135.

from this legal narrative. It is a representation that will make women's role in their emancipation insignificant, and it bears a resemblance to the creation of the iconic victim image of Sara Baartman.

Transitional justice has internationalised women's rights issues in Rwanda and Sierra Leone. It has drawn the gaze of powerful international actors, such as the UN and the EU back onto the bodies of African women. The lens they (we) look through is a legal and juristic one, and it has produced names such as 'sex slave' that stigmatise irreparably.[34] The lens shows us a perpetual victim whose abuse is made possible through the 'rape culture' that characterise African women's lives in peace and war.[35]

The lens must be adjusted, and the view must move from quick studies of 'sex in war' to cross cutting analyses of 'gender, violence and conflict'. The former reinforces the passive image of the 'brown woman'. This image disempowers those who seek justice as a form of empowerment and delegitimises transitional justice processes in the eyes of those who choose to participate only as dissidents, outside of its chambers and beyond its jurisdiction.

34 See Salah M. Hassan for a critical essay of the 'scientific' lens that objectified African women's bodies. Hassan describes the work of artist, Hassan Musa, as deconstructing or adjusting this and other lenses through his representations of iconic figures such as Sara Baartman and the famed performer Josephine Baker. Hassan (2003), pp. 115-127.

35 The term 'rape culture' makes rape appear to be a harmful traditional practice accepted by African men and women as part of their socialisation.

Samenvatting

Toon mij een vrouw!
'Narratieven'[1] over gender en geweld in het recht van de mensenrechten en in transitional justice processen

Chiseche Mibenge

'Toon mij een vrouw die niet werd verkracht!'

Deze uitdagende woorden, uitgesproken door de overlevende van een genocide, verstoorden het 'narratief' over transitional justice als een wondermiddel ter herstel van grove schendingen van de mensenrechten, begaan tegen de vrouwelijke burgerbevolking. De uitdaging 'toon mij een vrouw' wordt geuit vanuit een locaal perspectief van vertrouwdheid tussen daders en slachtoffers, die woningen en de publieke ruimte delen. In deze studie symboliseert deze de tweeledige positie van slachtoffers, die gerechtigheid zoeken en die 'juridische mensen', die gerechtigheid verschaffen. De laatstgenoemden hebben slechts oor voor getuigenissen van de overlevenden, voor zover deze de juridische parameters complementeren, die worden gesteld door hun mandaten en hun vervolgingsstrategie. Uiteindelijk zijn zo weinig overlevenden van een gewapend conflict in staat om hun oorlogsverhaal te gieten in een vorm die voldoet aan de strenge vereisten van het internationale strafrecht, dat het de aanklagers zwaar valt om geloofwaardige slachtoffers en getuigen te vinden en zij dan vragen: 'Toon mij een vrouw die *werd* verkracht.'

Narratieven over geweld, en de wijze waarop dit wordt gevormd door locale en internationale interpretaties van mannelijkheid en vrouwelijkheid, zijn complex en kruisen elkaar. Politicologen, antropologen en andere sociale wetenschappers hebben bijgedragen tot de ontwikkeling van een aanzienlijk oeuvre ter staving van het voorgaande, zowel binnen de Afrikaanse context als daarbuiten. De auteur stelt, dat juridische wetenschappers echter ontkennen dat er sprake is van enige complexiteit bij de reconstructie van gender en geweld in transitional justice processen. De genderdimensies van het gewapende conflict zijn evident bij de genocide en burgeroorlog in Rwanda en bij de burgeroorlog in Sierra Leone. De ervaring van de vrouwelijke burgerbevolking in een gewapend conflict is zichtbaar in de jurisprudentie van het International Criminal Tribunal voor Rwanda en de Special Court van Sierra Leone, en in het definitieve rapport van de Truth Commission van Sierra Leone: misdrijven als seksuele slavernij en verkrachting als een vorm van genocide (*genocidal rape*) worden vervolgd en berecht. De auteur van dit werk ontkent dit ook niet. Veeleer vraagt zij de lezer om het proces van internationale rechtspleging kritisch te doorvorsen naar gender stereotypen en -vooroordelen bij de analyse van geweld tegen vrouwen, welke leiden tot een al te eenvoudige uitkomst, doordat de toevoeging van een aanklacht wegens verkrachting voldoende bewijs wordt geacht van de onderbrenging van gender bij de gangbare juridische constructie van op gender gebaseerd geweld.

Uit het voorwoord en het inleidende hoofdstuk – hoofdstuk 1 – komt de persoonlijke beweegreden van de auteur naar voren tot het verrichten van onderzoek op het gebied van gender, geweld en de toegang tot het recht in Sub-Sahara Afrika. In het voorwoord wordt gezinspeeld op de gehanteerde interdisciplinaire benadering en wordt een persoonlijk 'narratief' geplaatst naast het juridische 'narratief'. In hoofdstuk 1 wordt het onderwerp van de studie geïntroduceerd, dat in essentie gaat over 'narratieven' en de kracht daarvan om gender in naoorlogse maatschappijen te construeren en te reconstrueren via politieke processen, waarin de ver-

1 Noot van de vertaler: gekozen is voor de term narratieven als vertaling van 'narratives'. De auteur geeft de volgende definitie: narratieven stileren vertellingen, mythen, verslagen en verhalen die in een gemeenschap worden gecreëerd over enig onderwerp. Gender narratieven concentreren zich op de sociale verhoudingen tussen mannen en vrouwen en geven bevestigende of kritische oordelen over 'gender-appropriate' gedrag. In landen waar grove schendingen van de mensenrechten hebben plaatsgevonden ontstaan gender narratieven die de aard van het conflict en de misstanden in kaart brengen en aldus slachtoffers, daders, medeplichtigen, martelaren en helden presenteren.

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antwoordelijkheid voor misdrijven tegen de menselijkheid en voor oorlogsmisdrijven dient te worden vastgesteld. In hoofdstuk 1 wordt tevens het vraagstuk van de positionaliteit geïntroduceerd en wordt beschreven hoe dit de wijze, waarop rechtswetenschappers en rechtsbeoefenaren gender en geweld conceptualiseren en analyseren, beïnvloedt. De auteur beschrijft de diverse posities van waaruit zij voor deze studie onderzoek heeft verricht en analyses heeft uitgevoerd. Nu eens is zij een minderheid, een Afrikaanse wetenschapper op een traditionele continentaal-Europese rechtenfaculteit, dan weer is zij de westerse wetenschapper die op een politiebureau in Rwanda de verkrachtingsstatistieken beoordeelt, en in een andere setting is zij een van de vele gekleurde vrouwen, die op een rechtenfaculteit in de Verenigde Staten discussiëren over gender en geweld. De auteur stelt dat vragen van zelfperceptie belangrijk zijn vanwege hun echte of vermeende invloed op de gender analyse van de veldobservaties. In hoofdstuk 1 worden enkele ervaringen uit het veldwerk van de auteur in Sierra Leone en Rwanda beschreven, ter illustratie van de in het boek toegepaste interdisciplinaire methodologie en ter benadrukking van de prominente plaats die in de volgende hoofdstukken zal worden toegekend aan de locale en nationale niveaus als bronnen van 'narratieven' over gender en geweld.

Het internationale juridische kader met betrekking tot vrouwen, gender en geweld wordt beschreven in de hoofdstukken 2 en 3 van de studie. Hoofdstuk 2 bevat een gender kritiek op het internationale en regionale mensenrechtenkader. Deze kritiek is in hoge mate beïnvloed door de feministische rechtstheorie, de kritische rechtstheorie en geschriften van vrouwen uit de derde wereld over het feminisme. De auteur begint met de algemeen bekende feministische kritiek op de sterk androcentrische aard en zienswijze van het internationale recht, waardoor vrouwen als gendergroep worden buitengesloten en, in het verlengde daarvan, hun genderspecifieke ervaring van schendingen van de mensenrechten.

In de hoofdstukken 2 en 3 introduceert zij een 'ladder' van rechten met drie sporten: op elke sport of in elke 'generatie' wordt gender in toenemende mate erkend als een beschermde categorie, die een gelijke rechtsbescherming verdient. De auteur beschouwt de in de directe nasleep van de Tweede Wereldoorlog afgesloten verdragen, zoals de International Bill of Rights, als mensenrechten-instrumenten van de eerste generatie. Deze en andere instrumenten van de eerste generatie legden de nadruk op de gelijkheid tussen mannen en vrouwen, maar erkenden niet dat lang ingeburgerde onderdrukkingssystemen in zowel de privé als de publieke sfeer dienden te worden bestreden, alvorens vrouwen als gendergroep in het genot zouden komen van hun fundamentele rechten.

De rechten van de tweede generatie, zoals het Verdrag inzake de uitbanning van alle vormen van discriminatie tegen vrouwen (Vrouwenverdrag) en de Algemene Aanbevelingen van het Comité voor de Rechten van de Mens komen aan de orde in hoofdstuk 2; deze zouden verdergaan dan het poneren van de formele gelijkheid tussen mannen en vrouwen en sociale, economische en politieke structuren onderkennen, die een rem hebben gevormd op de deelname van vrouwen aan het openbare leven. De auteur heeft echter kritiek op deze en andere instrumenten, omdat ze uitingen van op gender gebaseerde discriminatie, zoals seksuele intimidatie en mishandeling door een echtgenoot, niet serieus beschouwen als schendingen van de mensenrechten, die de staat nopen tot het nemen van positieve maatregelen tegen mishandelaars en ter ondersteuning van slachtoffers. Ten aanzien van de rechten van de derde generatie, zoals het Maputo Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol) stelt de auteur dat deze grote inbreuken op de 'privé' sfeer zoals de woning hebben gemaakt, om schadelijke traditionele praktijken tegen vrouwen en geweld tegen vrouwen aan het licht te brengen en te veroordelen. De auteur beoordeelt de instrumenten van de derde generatie rechten ook positief, omdat deze erkennen, dat op gender gebaseerde discriminatie en andere vormen van discriminatie, zoals op basis van ras en klasse, elkaar kruisen en vrouwen dientengevolge in versterkte mate blootstaan aan rechtsontzegging. De rechten van de derde generatie onderscheiden zich eveneens van eerdere instrumenten door het verwerpen van de notie, dat vrouwen een universele gendergroep zijn en dat interventies ter bescherming van de mensenrechten uniform dienen te zijn. De auteur betoogt dat de instrumenten van de derde generatie bijvoorbeeld rekening houden met de volgende zaken: dat plattelandsvrouwen mogelijkerwijs sterker worden getroffen door economische onmondigheid (*disempowerment*) dan vrouwen in de stad, de wijzen waarop geradicaliseerde nationale en etnische identiteitsgevoelens er in tijden van conflict toe leiden dat seksueel geweld tegen vrouwen verheven wordt tot oorlogsstrategie, of de wijzen waarop vrouwelijke migranten mogelijkerwijs eerder blootstaan aan economische exploitatie dan vrouwelijke ingezetenen.

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De feministische kritiek op de in hoofdstuk 2 genoemde normen wordt geïllustreerd aan de hand van het seksuele misbruik en de seksuele exploitatie van vrouwen in het tijdperk van het imperialisme en het kolonialisme. Zo is het 'drie-generatie-kader' van het recht betreffende de mensenrechten geconstrueerd rond de geschiedschrijving die ontstond naar aanleiding van de lotgevallen van Sara Baartman, een Khoi-Khoi vrouw, die in de negentiende eeuw naar Europa werd gehaald om op een seksueel uitbuitende wijze te worden tentoongesteld. Het narratief over Sara Baartman illustreert de complexe of veelvoudige vormen van discriminatie die vrouwen ondervinden en die niet werden bestreken door de eerste en tweede generatie van mensenrechtennormen, maar door de instrumenten van de derde generatie beter werden geconceptualiseerd en beschermd.

Het in hoofdstuk 2 besproken kader voor de internationale mensenrechten wordt verder uitgewerkt in hoofdstuk 3, waarbij het accent ligt op de uitbreiding ervan naar conflictgebieden. Hoofdstuk 3 bevat een inleiding tot de feministische kritiek op het internationaal humanitair recht (IHR). De auteur onderzoekt in het bijzonder de traditionele opvatting van het IHR dat vrouwen in oorlogstijd uitsluitend vanwege hun biologische verschillen met mannen kwetsbaar zouden zijn. De auteur besteedt aandacht aan de spanning tussen rechtswetenschappers die pleiten voor een benadering waarbij het individuele slachtoffer centraal staat bij op gender gebaseerd geweld in oorlogstijd versus de collectieve schade, die gemeenschappen lijden indien vrouwen geweld wordt aangedaan vanwege hun groepsidentiteit en -lidmaatschap als moeders, echtgenotes en draagsters van kinderen. De auteur onderzoekt de wijzen waarop een afzonderlijke dader en een slachtoffer een daad van verkrachting of een andere vorm van op gender gebaseerd geweld zowel kunnen beschouwen als een individuele aanval, alsook als een aanval die is gericht op de samenhang en de identiteit van een gemeenschap. In hoofdstuk 3 wordt de rol van de derdegeneratie-instrumenten belicht bij de vaststelling van het continuüm van op gender gebaseerd geweld dat vrouwen ervaren tijdens een gewapend conflict en in de periodes van 'vrede' die eraan voorafgaan, respectievelijk erop volgen. De auteur beschouwt de erkenning door de internationale gemeenschap in Resolutie 1820 van de VN Veiligheidsraad, dat seksueel geweld een oorlogswapen is en dat vrouwen niet enkel slachtoffers van een oorlog, maar tevens instrumenten voor verandering en conflict transformatie zijn, als een belangrijke doorbraak.

In het tweede deel van de studie verschuift de aandacht van de gender kritiek van het kader van het recht van de mensenrechten naar transitional justice processen binnen supranationale structuren. Deze werden tot dusverre nog niet kritisch onderzocht met betrekking tot de volgende thema's: hun vooroordelen wat betreft ras en gender bij de selectie en het benoemen van slachtoffers, getuigen en daders, en hun samenwerking met de internationale en nationale heersende elites in dit proces. De in de hoofdstukken 4, 5 en 6 van de studie geuite kritiek beoogt de veronderstelling te weerleggen, dat de internationale rechtspleging onpartijdig en onafhankelijk zou zijn, en onderzoek te bevorderen naar de op gender gebaseerde wijzen waarop vrouwen zowel uit het juridische 'narratief' worden buitengesloten, alsook hierin worden betrokken.

In hoofdstuk 4 wordt de achtergrond geschetst van de oprichting door de internationale gemeenschap van het International Criminal Tribunal for Rwanda (ICTR) in de nasleep van de genocide van 1994 en wordt verwezen naar de stellingen van rechtswetenschappers en waarnemers, dat sprake was van een ontbreken van gender competentie bij de aanklager en de rechters en dat bijgevolg veroordelingen voor seksueel geweld ondervertegenwoordigd waren. De auteur poneert de theorie dat het ICTR seksueel geweld vooral beschouwde als een (collectieve) etnische aanval, en dat door deze opvatting het feit werd overschaduwd, dat het blootstaan aan (evenals de betrekkelijke immuniteit voor) op gender gebaseerd geweld zowel wordt beïnvloed door etniciteit alsook door een elitestatus, een lage status, nationaliteit, religie, ras en andere elkaar overlappende factoren. Zij presenteert andere narratieven dan het overheersende narratief over 'etnische verkrachting' dat uit de ICTR jurisprudentie naar voren komt en beschrijft de verkrachting door 'Big men', bijvoorbeeld westerse vredesmilitairen, de verkrachting van 'Small women', bijvoorbeeld een jonge Hutu bediende en illustreert, dat op gender gebaseerd geweld dat niet in het overheersende narratief paste, geen gender analyse kreeg en niet werd geclassificeerd als op gender gebaseerd geweld.

In hoofdstuk 5 worden wederom overheersende juridische narratieven en de deze verstorende, alternatieve narratieven gepresenteerd, maar verplaatst de studie zich naar een proces in het kader van de restoratieve rechtvaardigheid (*restorative justice*) in Sierra Leone. De auteur onderzoekt het door de Sierra Leone Truth

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Commission in diens Final Report gepresenteerde narratief over gender en geweld vanuit de optiek van het recht van de mensenrechten. Ze onderzoekt de vermeende positie van de Truth Commission als zijnde een restauratief, autochtoon en legitiem model van transitional justice en de invloed van deze opvatting op de uitleg door de commissie van op gender gebaseerd geweld in Sierra Leone, zowel voor als na het conflict. De auteur gebruikt in het bijzonder door etnografische onderzoekers gepresenteerde narratieven over gender hegemonieën ter weerlegging van de gender analyse en het narratief van het Report over gedwongen huwelijken in gewapende conflicten en vroege huwelijken in 'vredestijd'. De auteur put ook uit haar eigen observaties van beleefde (lived) en gehoorde (spoken) narratieven op lokaal niveau om controversiële en afgedwongen gender hegemonieën in Sierra Leone bloot te leggen en om aan te geven dat er hiaten zijn tussen juridische narratieven en lokale narratieven. Deze hiaten vormen de aanzet voor de kritische genderanalyse van transitional justice in dit hoofdstuk.

In hoofdstuk 6 blijft de casestudy in Sierra Leone, waar het proces in het kader van de retributieve gerechtigheid (*retributive justice*) wordt bestudeerd. De auteur beschrijft het speciale en ruime gendermandaat van de Sierra Leone Special Court, vervat in de Special Court Statute. In deze wet is specifiek vastgelegd dat het Bureau van de aanklager en de griffie speciale maatregelen dienen te nemen om ervoor te zorgen, dat het juridische proces inspeelt op de noden van vrouwen en meisjes. De auteur oefent kritiek uit op het besluitvormingsproces van de aanklager, vooral met betrekking tot aanklachten van seksueel geweld in de tenlastelegging en gender vooroordelen bij de selectie van slachtoffers en getuigen. De auteur heeft ook kritiek op het narratief van de Special Court, waarin seksuele slavernij wordt beschouwd als een van het misdrijf 'onderwerping aan slavernij' (*enslavement*) uit het internationale gewoonterecht te onderscheiden misdrijf. Dit hoofdstuk bevat een overzicht van wetenschappelijk onderzoek over trans-Atlantische slavernij en koloniale slavernij met het oogmerk duidelijk te illustreren dat seksuele exploitatie inherent is aan onderwerping aan slavernij en dat een genderanalyse noodzakelijk is om de volledige omvang van de manifestaties en de implicaties voor mannelijke en vrouwelijke slaven te doorgronden en te criminaliseren.

In het laatste hoofdstuk – hoofdstuk 7 – wordt een appel gedaan op rechtswetenschappers en -beoefenaren tot het onderzoeken en erkennen van hun persoonlijke en institutionele aannames van legitimiteit, onpartijdigheid en kennis bij de rechtsbedeling in de nasleep van ernstige misstanden als genocide, misdrijven tegen de menselijkheid en oorlogsmisdrijven. De auteur pleit voor een interdisciplinaire discussie over de humanitaire, echter tekortschietende, antwoorden op vrouwen, gender, geweld en gerechtigheid in 'postconflict' maatschappijen. Ze concludeert dat de overheersende juridische narratieven weliswaar leiden tot veroordelingen wegens verkrachting, maar dat deze tevens diepgewortelde schadelijke stereotypen bevatten over mannelijkheid en vrouwelijkheid, die in de weg staan aan een grondige genderanalyse ter correcte classificatie van de in de Afrikaanse burgeroorlogen begane misdrijven tegen mannen en vrouwen en die tevens aard en achterliggende oorzaken van op gender gebaseerd geweld in 'vrede' en oorlog verbergen.

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Curriculum vitae

Chiseche Mibenge (1975) studied Law at the University of Zambia. She was admitted to the Bar as an Advocate of the High Court of Zambia and began her career as a lawyer in private practice. In September 2000 she enrolled in the Masters program in International and European Protection of Human Rights at Utrecht University. Thereafter she joined the Netherlands Institute of Human Rights Research as a junior researcher focusing on the documentation and analysis of decisions of the international ad hoc criminal tribunals.

Chiseche was awarded the prestigious Mozaiek research grant by the Netherlands Organisation for Scientific Research in November 2005 in support of her PhD research with the School of Human Rights Research. She has been a visiting scholar at the University of Bradford's Department of Peacekeeping, American University's Washington College of Law and the National University of Rwanda's Centre for Conflict Management. She has published widely and has presented her research in leading academic institutes including: the Lehman Centre for Political Science (City University of New York), the Ludwig Boltzmann Institute of Human Rights (Vienna) and the National Institute for the Study of Criminal Science (Mexico City).

She is currently an independent consultant and most recently, she has been recruited as a consultant by the United Nations to coordinate and support justice projects for survivors of sexual violence in Sierra Leone (UNIFEM) and in the Democratic Republic of Congo (OHCHR). In this role she has focused on the provision of reparations and services to survivors.