

CHAPTER ONE

GENERAL INTRODUCTION

Sexual violence, especially against women, has been endemic in war and conflict situations all over the world from time immemorial. The idea of women as property and spoils of war has endured for centuries and does not indicate signs of abating.¹ A number of examples can be given to validate this proposition. Among the ancient Greeks, for example, the victor in war gained “the right to rape.”² Russian troops during World War II are estimated to have raped between 100 000 to 980 000 women and girls, while in the Chinese town of Nanking the Japanese Army forced more than 200 000 women and girls into brothels to be used as “comfort women” in order to boost the morale of the Japanese troops.³

During Sierra Leone’s bloody civil war between 1991 and 2002 thousands of women were victims of systematic sexual violence. According to the United Nations Special Rapporteur on the elimination of violence against women, Radhika Coomaraswamy, an estimated 72 per cent of Sierra Leone women and girls experienced human rights abuses and over 50 per cent were victims of sexual violence during the civil war.⁴

During the Rwandan genocide of 1994 that horrifically appalled the conscience of the world, an estimated 500, 000 women and girls were raped.⁵ The Rapporteur for Rwanda intimated to the world community of this despicable situation thus:

Rape was the rule and its absence the exception... under-age children and elderly women were not spared. Women about to give birth or who had just given birth were also the victims of rape in hospitals... Women who were “untouchable” according to the custom (e.g. nuns) were also involved and even corpses, in the case of women who were raped just after being killed.⁶

These examples are not isolated cases but are reflective of the magnitude of sexual violence in war and conflict situations. Cases of sexual violence of similar magnitude have been

¹ Litetia van der Poll, “The Emerging Jurisprudence on Sexual Violence perpetrated Against Women During Armed Conflict”, in African Year Book on International Humanitarian Law (November 2007),1.

² Claire de Than and Edwin Shortts, International Criminal Law and Human Rights (London: Sweet and Maxwell, 2003), 347.

³ See Malcolm N Shaw, International Law, fourth edition (Cambridge: Cambridge university press, 2000), 471. See also Litetia van der Poll, 2.

⁴ Centre for Conflict Resolution, Peace Versus Justice? Truth and Reconciliation Commissions and War Crimes Tribunals in Africa (Cape Town: CCR, 2007),23.

⁵ *Ibid*, 27.

⁶ Special Rapporteur of the Commission on Human Rights, Report on the Situation of Human Rights in Rwanda. UN Doc E/CN. 4/1996/68 (29 January 1996)

documented from other countries experiencing conflict war such as Uganda,⁷ Burundi,⁸ Liberia,⁹ Democratic Republic of Congo,¹⁰ and The Sudan in Darfur region.¹¹

This thesis studies the development of sexual violence jurisprudence in International Humanitarian Law and some of the abiding challenges in effective prosecution of perpetrators. It takes Rwanda as a case study.

Statement of the Problem

The problem and challenge confronting International Humanitarian Law is to end impunity by successfully prosecuting and convicting perpetrator of proscribed gross violations of human rights such as sexual violence in times of war and conflict. Even where mechanisms have been devised for the successful prosecution of perpetrators of international crimes, little or no success is achieved.

The International Criminal Tribunal for Rwanda though credited for recognizing the gravity of sexual violence and convicting perpetrators of sexual violence, has been proceeding at an outrageously sluggish pace. President Paul Kagame of Rwanda has argued that the Rwandan Tribunal was created to do "as little as possible."¹² Moreover only a small number of indictments have captured acts of sexual violence and, let alone secured convictions. Therefore the proceedings of the tribunal do not offer a true account of the horrendous acts of sexual violence committed during the conflict.

It is therefore this challenge of successfully prosecuting and convicting international criminals, particularly perpetrators of sexual violence that is the central focus of this research.

Purpose of the Study

⁷ See Amnesty International, Uganda: Doubly Traumatized: Lack of Access to Justice for Female Victims of Sexual and Gender-based violence in Northern Uganda (November 2007).

⁸ See Amnesty International, Burundi: No Protection from Rape in war and Peace (October 2007)

⁹ Amnesty International, Liberia: A flawed Post-war Process Discriminates against Women and Girls (March 2008).

¹⁰ See International Federation for Human Rights, Democratic Republic of Congo (DRC): Breaking The Cycle of Impunity (March 2008). See also World Organization Against Torture (OMTC), Violence Against Women in the Democratic Republic of Congo: Alternative Report Prepared for the Committee On the Elimination of Discrimination Against Women (August 2006).

¹¹ See Lisa French Blaker, Heart of Darfur: Hope and Humanity in the World's Worst War Zone (London: Hodder and Stoughton Ltd, 2007). See also Human Rights watch, Five Years On: No Justice for Sexual Violence in Darfur (April 2008). And see also Amnesty International, Sudan: Displaced in Darfur: A Generation of Anger (January 2008)

¹² Ibid, 29.

The purpose of the research or study is to trace the prominence given to sexual violence in the development of International Humanitarian Law, and through the experience of the ICTR, expose in detail the challenges that confront international humanitarian law before perpetrators of gross sexual violence in war and conflict situations can be successfully prosecuted and convicted. The working hypothesis is that the challenges facing international humanitarian law before securing a conviction are not insurmountable that when these challenges are brought to light, there will be enough international determination to overcome these hurdles.

Significance of the Study

In order to break the cycle of impunity, perpetrators of internationally recognized crimes must successfully be brought to justice. International humanitarian law ought to be the tool for ending the cycle of impunity. This research is significant because it will illumine the hurdles or challenges that international criminal law has to overcome in order to effectively carry out its mandate of ending and punishing impunity. It will also point to the direction towards which international humanitarian law would have to evolve.

Methodology

The research methodology included sampling, data collection, data analysis and report writing. Although the research makes use of existing statistics, it is qualitative and not quantitative.

Sampling: the conflicts and wars that have been sampled for the purpose of establishing the challenges of bringing to justice perpetrators of sexual violence are those primarily in Africa, though occasionally reference has been made to situations outside Africa. Though the research has made reference to sexual violence in Democratic Republic of Congo, Northern Uganda, Burundi, Sierra Leone, Liberia and Sudan's Darfur region, the main focus will be the International Criminal Tribunal for Rwanda that was created in the aftermath of the Rwandan genocide of 1994. The research does establish the extent of sexual violence in Rwanda and establish to what extent perpetrators of sexual violence in this country answer for their crimes.

Data collection: In collecting data on the prevalence of sexual violence, focus has been on the detailed reports issued from time to time by international organizations present in war and conflict zones such as reports by Human Rights Watch, various UN agencies, Amnesty International and the International Federation for Human Rights. Published works of experts in international humanitarian law were actively sought and appropriately applied. The research also collected and considered decisions of the international courts or tribunals, such as the Sierra Leone Special Court, International Criminal Tribunal for Yugoslavia and the International Criminal Court at the Hague, though primacy was given to the ICTR which is the focus of the research.

Research questions

The research was guided by the following research questions:

1. How prevalent is sexual violence in war and conflict situations?
2. How did international humanitarian law deal with cases of sexual violence prior to the setting up of the ICTR?
3. What jurisprudence is emerging from the ICTR on sexual violence?
4. What challenges still subsist in prosecuting crimes of sexual violence by international tribunals?
5. What lessons can be drawn from the ICTR?

Scope of chapters

Chapter one gives the general introduction to the whole dissertation. The second chapter examines in detail the jurisprudence on sexual violence in international humanitarian law the Rwanda Tribunal inherited. For purposes of thorough exposition, the chapter broadly clusters the time periods as follows: The time before the First World War, the period during the First World War, the period during and after the Second World War.

In chapter three of the dissertation, background information of sexual violence in Rwanda during the genocide is examined. This chapter discusses in detail the guiding definition of what ought to be considered sexual violence; the magnitude of sexual violence; the forms and nature of sexual violence; and the purpose for which sexual violence was used. The chapter also considers some of the consequences of sexual violence to the victims.

Chapter four explores the International Criminal Tribunal for Rwanda (ICTR)'s contribution to the evolving sexual violence jurisprudence in International humanitarian law. Just about a year after the International Criminal Tribunal for the former Yugoslavia (ICTY) was set up in May 1993 to try persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia,¹³ the ICTR was set up in November 1994 by the United Nations acting under a request from the Rwandan government.¹⁴ These two contemporaneous ad hoc tribunals have affirmed and developed the viability of international humanitarian law mechanisms after a hiatus of more than 50 years since the Nuremberg and Tokyo Tribunals as they have managed to hold violators of International humanitarian law accountable. The tribunals have revitalized international humanitarian law jurisprudence that had been in abeyance since the Nuremberg and Tokyo Tribunals.¹⁵ And more relevant to our thesis, the tribunals have developed a valuable source of sexual violence jurisprudence, as shall be seen below.

¹³ See Security Council Resolution 827 of May 1993. See also William A. Schabas, An Introduction to the International Criminal Court, Second Edition (Cambridge: Cambridge University Press, 2004), p.11

¹⁴ Security Council Resolution 955 of November 1994.

¹⁵ Richard Dicker and Elise Keppler, "Beyond The Hague: The Challenge of International Justice," Human Rights Watch, 2004.

The fifth chapter offers an examination of the failures of the ICTR to comprehensively deal with the seriousness of sexual violence. It chronicles outright failures, inconsistencies and glaring squandered opportunities that have characterized the ICTR in its existence of more than a decade.

CHAPTER TWO

2.0 THE ESSENCE OF HUMANITARIAN LAW AND THE HISTORY OF SEXUAL VIOLENCE IN THE DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW

2.1.0 INTRODUCTION

International Humanitarian Law is a branch of Public International Law that is concerned with limiting the suffering caused by war by protecting civilians and military personnel no longer taking an active role in war and assisting them as far as possible.¹⁶

Its objective is simply to regulate hostilities and attenuate their hardships.¹⁷ International Humanitarian Law addresses the reality of conflict without considering the reasons for or legality of resorting to force.¹⁸ It is known as Jus in bello (law in war) as its provisions apply equally to warring parties irrespective of reasons for the conflict, as opposed to jus ad bellum (law on the use of force or law on the prevention of war).¹⁹

Traditionally International Humanitarian law has been divided into two branches. The first branch is being generally referred to as the Law of Geneva which has been designed to safeguard military personnel who are no longer taking part in fighting as well as people or civilians who are not actively involved in hostilities.²⁰ The second is known as the Law of The Hague, which establishes the rights and obligations of belligerents in the conduct of military operations, and limits the means and extent of harming the enemy.²¹

In as far as this distinction is still relevant, this thesis is more grounded in Geneva Law as it will be centred around discussing the protection of civilians, and in this case, the victims of crimes of sexual violence during the 1994 Rwanda Genocide.

It must be noted, however, that there is authority that the distinction between The Hague and Geneva Law is redundant, that upon the adoption of Additional Protocol I, the entire distinction between Hague and Geneva Law became conspicuously outdated. In its Advisory Opinion of 1996 on the Legality of the Threat or Use of Nuclear Weapons, the International Court of Justice had this to say about The Hague and Geneva Law:

¹⁶ ICRC, International Humanitarian Law. Answers to your questions, 2002.

¹⁷ Ibid.

¹⁸ Supra, note 1. See also Yoram Denstein, The Conduct of Hostilities Under the Law of International Armed Conflict (Cambridge: Cambridge University Press, 2004), p.4.

¹⁹ Ibid

²⁰ Ibid. See also Supra note 2.

²¹ Ibid

...the two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one complex system, known today as international humanitarian law. The provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law.²²

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2.2.0 BEFORE THE FIRST WORLD WAR

While it is true that sexual violence has characterized several conflicts throughout human history, it is not true that there were no attempts until recently to outlaw such misconduct in international law. The idea of regulating hostilities under international law is not entirely new. Throughout the Middle Ages in Europe there were some attempts at codifying norms respecting the conduct of hostilities.²³ Most of these norms remained customary (unwritten), though at times states made bilateral and multilateral treaties dealing with specific humanitarian problems arising out of war.²⁴ Among them, bilateral or multilateral treaties that related to the protection of women and specifically to the protection from sexual violence before the First World War mention may be made of the following:

2.2.1 The trial of Peter von Hagenbach (1474)

Many scholars consider the trial of Landgrave Peter Von Hagenbach in 1474 as the forerunner of contemporary international criminal tribunals.²⁵ In 1469 Duke Charles of

²² Advisory Opinion On the Legality of the Threat or Use of Nuclear Weapons [1996] ICJ Rep. 226, 256.

²³ Yougindra Khushalani, Dignity and Honour of Women as Basic and Fundamental Human Rights (The Hague: Martinus Nijhoff Publishers, 1982) p.3.

²⁴ *Ibid*, p.3

²⁵ See for example: George Schwarzenberger, International law as applied by international courts and tribunals: the law of armed conflict, volume II (London: Stevens and Sons Ltd, 1968) p.443- 465; Edoardo Greppi, "The evolution of Individual Criminal Responsibility Under International Law," in International Review of the Red Cross, No.835, September 1999, p.531- 553; Robert K. Woetzel, The Nuremberg Trials (London: Stevens and sons Ltd, 1962) p17- 19; Lyals S. Sunga, Individual Responsibility in International Law for Serious Human Rights Violations (The Hague: Martinus Nijhoff Publishers, 1992) p.18- 22 and William Schabas, An Introduction to the International Criminal Court, Second edition (Cambridge: Cambridge University Press 2004) p. 1. Schabas states: "the first genuinely international trial for the perpetration of atrocities was probably that of Peter von Hagenbach, who was tried in 1474 for atrocities committed during the occupation of Breisach."

Burgundy forced the Archduke of Austria to pledge to hand his possessions on the Upper Rhine owing to financial difficulties. One of these possessions was the fortified town of Breisach where Charles installed Peter von Hagenbach as governor or "Landvogt."²⁶ Duke Charles actually had no intention of ever returning these places to the Archduke of Austria and therefore he set out on an ambitious policy of incorporating such places into his Burgundy empire.²⁷ In carrying out his masters' instructions to subjugate Breisach, Peter von Hagenbach instituted a regime of terror characterised by murder, rape, illegal taxation and wanton destruction of private property.²⁸

A large coalition constituting Austria, France, Bern and the other towns and knights of the Upper Rhine put an end to these atrocities and captured Hagenbach.²⁹ The Archduke of Austria, under whose authority von Hagenbach was captured, ordered his trial. Instead of remitting the case to an ordinary court, an ad hoc tribunal was set up consisting of 28 judges representing the "allied states" and towns.³⁰ Hagenbach was charged with murder, perjury and other malefactor. More significantly he was also charged with sexual violence, namely, rape.³¹ For all these offences Hagenbach was found guilty. In consequence he was stripped of his rank of knighthood and was executed.³²

However the trial of Hagenbach can hardly be considered to have occurred in international law because the states and towns that composed the entities that oversaw the trial of Hagenbach were still technically part of the one Holy Roman Empire.³³ This is in spite of the fact that the Holy Roman Empire had already degenerated to the point where relations among different entities had already taken a properly international nature, and Switzerland had already claimed independence (though not formally).³⁴ It was the Treaty of the Peace of Westphalia 1648 which formally broke up the Holy Roman Empire and led to the emergence of sovereign states in Europe as they are known today.³⁵ However, the fact that the entities that came together to try Hagenbach mirror to a great extent sovereign states as emerged after the Peace of Westphalia sufficiently foreshadows contemporary international criminal tribunals. It could therefore be safely stated that sexual violence was considered from the twilight of international humanitarian law as among the grave violations of human rights meriting prosecution by the international community.

²⁶ Robert K. Woetzel, The Nuremberg Trials in International Law (London: Stevens and Sons Ltd, 1962) p. 19.

²⁷ Georg Schwarzenberger, International law as applied by international courts and international tribunals: the law of armed conflict, volume II (London: Steven and sons Ltd, 1968) p. 462.

²⁸ Ibid, p. 462.

²⁹ Edoardo Greppi, "The Evolution of Individual Criminal Responsibility under International Law," in International Review of the Red Cross No. 835, September 1999,

³⁰ Ibid

³¹ Ibid, see also Georg Schawrzenberger supra, note 6.

³² Ibid, see also Lyals S. Sunga, Individual Responsibility in International Law for serious Human rights Violations (The Hague: Martinus Nijhoff Publishers, 1992) p. 18.

³³ Supra, note 8

³⁴ Ibid

³⁵ Kriangsak Kittichaisaree, International Criminal Law (Oxford: Oxford University Press, 2005) p. 4.

2.2.2 Treaty of Amity 1785

When the United States of America gained its independence from Great Britain, it entered into several agreements with countries such as France, The Netherlands, and Prussia.³⁶ Almost invariably each of these treaties would contain provisions on war.³⁷ In 1785 it (the USA) entered into a treaty with Prussia known as the Treaty of Amity and Commerce between the United States and Prussia (1785) which contained provisions going further than other contemporary treaties which manifested greater humanitarian sensitivity. The relevant provision stated:

if war should arise between the two contracting parties... all women and children... shall not be molested in their persons.³⁸

This provision does not expressly mention sexual violence but surely 'molesting' in this context is wide enough to cover sexual violence during the time of war.

2.2.3 General Winfield Scott's General Order No. 20 19 February 1847

General Winfield Scott (1786- 1866) was an American General in three wars and commander of the army from 1841 to 1861.³⁹ During the Mexican war of 1846 to 1848, Scott achieved the most spectacular success of any US commander when he captured Mexico through the Port of Vera Cruz without loss of life for any of his troops.⁴⁰ At the beginning of the campaign, Scott had issued General Order No. 20, responding to atrocities committed by some of the volunteer troops; and in it he required his troops to respect the rights and property of Mexicans, local government and the Roman Catholic Church.⁴¹

General Order No.20 is of great historical importance because it made individuals criminally liable for violations of human rights during war. It specifically established punishment for the following offences: assassination, murder, malicious stabbing, and maiming, rape;

³⁶ Yougindra Khushalani, Dignity and Honour of women as basic and fundamental human rights (The Hague: Martinus Nijhoff Publishers, 1982) p. 3

³⁷ Ibid. P.3

³⁸ Article XXIII Treaty of Amity and Commerce Between the United States and Prussia 1785

³⁹ John H Eicher and David J Eicher, Civil War High Commands(Stafford: Stafford University Press, 2001)

⁴⁰ Ibid

⁴¹ "Winfield Scott", Available at www.vtn.nl.

malicious assault and battering; robbery and theft.⁴² Rape is specifically mentioned under Article 2 of the General Orders as one of the offences which would be severely punished.

2.2.4 The Lieber Code 1863

The Lieber Code or the General Order No. 100 Instructions for the Government of Armies of the United States in the Field, drafted by Law Professor Francis Lieber and signed by President Abraham Lincoln in 1863, represents the first documented modern codification of international humanitarian law.⁴³ That this was pioneering work is evident from Lieber's own acknowledgment that there was no precedent he could rely on. He wrote this to a colleague:

I had no guide, no ground work, no text book...usage, history, reason and conscientiousness, and a sincere love of truth, justice, and civilisation have been my guide; but of course the whole must be still very important.⁴⁴

The Lieber Code contains three (3) provisions which show great sensitivity to crimes of sexual violence. The first is under Article XXXVII which states:

The United States acknowledge and protect, in hostile territories occupied by them, religion and morality...the persons of the inhabitants especially women, and the sacredness of domestic relations. Offences to the contrary shall be rigorously punished.

Another Article provides:

All wanton violence committed against persons in the occupied country... all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offence. A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior.⁴⁵

Further, the third Article states:

⁴² Article 2, General Order No. 20 February 19, 1847.

⁴³ Howard S. Levie, "History of the law of war on land," International Review of the Red Cross No. 838, 30 June 2000, p. 339- 350.

⁴⁴ As cited in Yougindra Khushalani, Dignity and Honour of Women as Basic and Fundamental Human Rights (The Hague: Martinus Nijhoff Publishers, 1982)

⁴⁵ Article XLIV, Lieber Code 1863.

Crimes punishable by all penal codes, such as arson, murder, maiming, assault, highway robbery, theft, burglary, fraud, and rape, if committed by an American soldier in a hostile country against its inhabitants, are not only punishable at home but in all cases in which death is not inflicted, the severe punishment shall be preferred.⁴⁶

These three provisions make it clear that from the dawn of the codification of international humanitarian law, sexual violence, especially against women, and more especially sexual violence in the form of rape, was considered to be a grave violation of Humanitarian law. However, it must not be forgotten that the Lieber Code was not an international treaty but a national United States standard set for the regulation of their troops.⁴⁷ That said, it must be acknowledged that with the writing of the Lieber Code, a foundation was laid for sturdy and firm development of international humanitarian law. As Khushalani correctly observed, the Lieber Code “stands out as a monument and signpost, and moreover, an inspiration to constant reflection on morality and law in war.”⁴⁸ It is the Lieber Code that furnished much of the material for the Hague Conventions of 1899 and 1907.⁴⁹

2.2.5 Declaration of Brussels

An international conference was convened in Brussels in 1874 to examine international rules to cover the entire area of law and usages of war.⁵⁰ It was the first attempt at international level to codify international humanitarian law. The Declaration of Brussels, which summed up the resolutions of the conference, contained a vital provision which recognized that sexual violence was a wrong that did not need to be entertained by the international community. The Declaration stated: “the honour and rights of the family...shall be respected.”⁵¹ Even though the Brussels Declaration was never formally adopted as a treaty, still it is significant in that it shows the consciousness of states at the time of the need for the protection of “family honour.”⁵²

2.2.6 The Hague Conventions 1899 and 1907

⁴⁶ Article XLVII, Lieber Code 1863.

⁴⁷ Supra, note 22

⁴⁸ Yougindra Khushalani, Dignity and Honour of Women as Basic and Fundamental Human Rights (The Hague: Martinus Nijhoff Publishers, 1982)p. 7.

⁴⁹ Ibid, p.7

⁵⁰ ibid

⁵¹ Article XXXVIII, Brussels Declaration August 27, 1874.

⁵² Generally in many old international humanitarian law instruments “family honour” relates to sexual violence. It shall later be discussed why describing sexual violence as family honour is being strongly criticized.

The attempt at the Brussels conference in 1874 to define the laws and customs of war took final shape some twenty-seven years later in the form of the Hague Conventions.⁵³ These conventions represented the first significant codification of the laws of war in an international covenant.⁵⁴

Article 46 Of the Regulations Respecting the Laws and Custom of War on Land (Hague Convention IV) 1907, provides:

Family honour and rights, the lives of persons and private property, as well as religious convictions and practice, must be respected.

Explicit terms referring to sexual violence are not used here but the words “family honour” or simply “honour” are to be understood as referring to protection from sexual violence.⁵⁵ It should however be noted that the Hague Convention V, as the other Hague Conventions, did not provide for individual criminal liability for breach of its provisions, but it did impose obligations upon states.⁵⁶ So no sanctions were prescribed in the treaty for violation of any of its violations.

2.3.0 WORLD WAR I

After the First World War (World War I) had ended in 1918 the victorious Allies attempted to create a special tribunal to prosecute those who bore responsibility for the violation of international humanitarian law.⁵⁷ The Allied powers set up the Commission on the Responsibility of the Authors of War and on the Enforcement of Penalties.⁵⁸ The Commission in 1919 recommended that:

All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including chiefs of state, who have been guilty of offences against the laws and customs of war or laws of humanity, are liable to criminal prosecutions.⁵⁹

⁵³ Supra, note 27, p. 9

⁵⁴ William A. Schabas, *An Introduction to the International Criminal Court*, second edition (Cambridge: Cambridge University Press, 2004) p. 2.

⁵⁵ Supra, note 32

⁵⁶ Ibid, p. 2

⁵⁷ Claire de Than and Edwin Shortt, *International Criminal Law and Human Rights* (London: Sweet and Maxwell, 2003) p. 2271.

⁵⁸ Kriangsak Kittichaisaree, *International Criminal Law* (Oxford: Oxford University Press, 2005) p. 14.

⁵⁹ As cited in Lyals S. Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations* (the Hague: Martinus Nijhoff Publishers, 1992) p. 22.

More significantly, the Commission prepared a list of 2 war crimes. Of these offences listed, rape was listed as a crime under number 5 while “abduction of girls and women for purposes of enforced prostitution” was listed as a crime under number 6.⁶⁰

However the Commission’s recommendation to expose high state officials to criminal responsibility met with cold opposition from the United States of America representatives. The United States argued that the exposure of state officials to this kind of responsibility was without precedent both under municipal and international law and would be contrary to the doctrine of state sovereignty.⁶¹ In response to the opposition and in the spirit of compromise, no mention of individual responsibility was included in the subsequent Treaty of Versailles which formally marked the end of the World War I.⁶² As a result the Versailles Treaty simply provided:

The Germany government recognizes the right of the Allied and Associated powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or the territory of her allies.⁶³

Further Germany was requested to handover Germany suspects to the Allied Powers for their prosecution.⁶⁴ More specifically the Versailles Treaty indicted “William II of Hohenzollern, formerly Germany Emperor, for a supreme offence against international morality and the sanctity of treaties.”⁶⁵ The Allied powers were to address a request to the Netherlands Government where the Emperor had gone into hiding to surrender the emperor so that he could stand trial.⁶⁶ The efforts to prosecute the emperor collapsed when the Netherlands refused to extradite the emperor arguing that the offences he was charged with were political in nature and not punishable under Dutch law.⁶⁷

With regard to the trial of other suspects, justice was evaded when Germany duped the Allied powers. In December 1919, Germany cleverly pre-empted the Allied plans for the trial of German suspects by authorising the supreme court of the Reich to try those individuals

⁶⁰ Yougindra Khushalani, *Dignity and Honour of Women as Basic and Fundamental Human Rights* (The Hague: Martinus Nijhoff Publishers, 1982) p. 12

⁶¹ *Supra*, note 38, p. 22.

⁶² *Supra*, note 37, p. 15.

⁶³ Article 228 Versailles Treaty June 28, 1919.

⁶⁴ *Ibid*, Article 228.

⁶⁵ *Ibid*, Article 227

⁶⁶ *Ibid*, Article 227.

⁶⁷ Kriangsak Kittichaisaree, *International Criminal Law* (Oxford: Oxford University Press, 2005) p. 15.

for war crimes.⁶⁸ The German government promised to bring all German suspects to justice. Under pressure from the German public, the Allied powers agreed to permit German prosecutors to prosecute and punish the war criminals themselves.⁶⁹ The Allied powers presented a list of 901 persons they wanted prosecuted. However, of the 901 cases brought to trial, 888 were acquitted or summarily dismissed, and only 13 ended in conviction.⁷⁰ Further, those who were convicted were not to serve their sentences as they escaped or were simply allowed to leave.⁷¹ The whole enterprise aimed at bringing World War I criminals collapsed ultimately because German authorities, including judges, perceived the project as illegitimate.⁷²

Even though the attempt after World War I to punish offenders collapsed, as discussed in this section, it is noteworthy that crimes of sexual violence were considered among the grave offences for which persons responsible were to be held accountable, as the 1919 Commission above acknowledged.

2.4.0 WORLD WAR II

This section of the chapter examines the place of sexual violence in international humanitarian law as it emerged in the immediate aftermath of the Second World War.

2.4.1 The Nuremberg International Military Tribunal

At the Moscow Conference in 1943, the Allies' determination to punish the major war criminals of the European Axis found firm expression.⁷³ In the "Declaration on German Atrocities," adopted on 30th October 1943, the governments of the United States of America, United Kingdom, and the Soviet Union, collectively stated that:

German officers and men and members of the Nazi party, who have been responsible for, or have taken a consenting part in atrocities, massacres and executions (in countries overrun by German forces) will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the first government which will be created therein,

⁶⁸ Lyals S. Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations* (The Hague: Martinus Nijhoff Publishers, 1992) p. 22

⁶⁹ *Ibid.*, p. 22.

⁷⁰ *Ibid.*, p. 23.

⁷¹ *Ibid.*, p. 50.

⁷² Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and Rule of Law* (Oxford: Oxford University Press, 2003) p. 84.

⁷³ The Charter and Judgment of the Nuremberg Tribunal- History and Analysis: Memorandum Submitted by the Secretary General, 1949 UN Doc. A/CN.4/5.

Stating further that this declaration was,

without prejudice to the case of major criminals, whose offences have no particular geographical location and who will be punished by joint decision of the governments of the Allies.⁷⁴

True to the above declaration, on June 26 1945, the governments of France, The Soviet Union, United Kingdom and United States of America met in London to decide on a common strategy towards addressing the trial of the major war criminals.⁷⁵ After several days of negotiations and refining strategies The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis was signed and adopted by the Allied powers on August 8, 1945. Annexed to this Agreement was the Charter of the International Military Tribunal. The jurisdiction of the Tribunal was unequivocally stated thus:

The tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who acting in the interests of the European Axis countries, whether as individuals or as members of organisations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the tribunal for which there shall be individual responsibility:

- (a) Crimes against peace: namely, planning, preparation, initiating or waging a war of aggression, or war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.
- (b) War crimes: namely, violations of laws and customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.
- (c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or

⁷⁴ Ibid

⁷⁵ Formulation of the Nuremberg Principles- Report by J. Spiropoulos, Special Rapporteur. Available in Yearbook of the International Law Commission, 1950, volume II.

persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated.⁷⁶

From the foregoing it can be noted that the Tribunal was not expressly and explicitly vested with any powers to prosecute and punish crimes of sexual violence as Article 6 cited above, which the crimes over which the Tribunal will have competence to handle, is manifestly silent about crimes of sexual violence. This is as well confirmed by the Judgment rendered by the Tribunal which, though several times made reference to the Hague Convention VI(1907) which had express reference to protection from sexual violence, was inexplicably silent about sexual violence.⁷⁷ None of the individuals that appeared for trial was indicted nor convicted of any sexual violence offence by the Nuremberg Tribunal.⁷⁸

2.4.2 Control Council Law No. 10

On December 20, 1945, the four Allied Powers (the Allied Control Council for Germany) promulgated Control Council Law No. 10.⁷⁹ The aim of this law was to provide a basis for trying Nazi suspects who could not be dealt with at the Nuremberg Tribunal. This law, as regards crimes of sexual violence was progressive as it expressly recognised certain forms of sexual violence as grave violations of international humanitarian law meriting prosecution. To this effect Control Council was given the jurisdiction over:

atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of domestic laws of the country where perpetrated.⁸⁰

Despite the Control Council recognising that sexual violence (rape) was a prosecutable offence, it is however lamentable that no single charge of rape was brought to trial pursuant

⁷⁶ Article 6, Charter of the International Military Tribunal annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, August 8, 1945.

⁷⁷ Judgement of the International Military Tribunal for the Trial of Germany major war criminals

⁷⁸ Ibid

⁷⁹ Kriangsak Kittichaisaree, *International Criminal Law* (Oxford: Oxford University Press, 2005) p. 19. See also Marie-Claude Roberge, "Jurisdiction of the ad hoc tribunals for the former Yugoslavia and Rwanda over crimes against humanity and genocide," in *International Review of the Red Cross*, No. 321, p.651- 664. 31 December 1997.

⁸⁰ Article II(1) (c) Control Council Law No. 10, 1945

to Control Council Law No. 10.⁸¹ It should equally be noted that Control Council Law No. 10 is inward looking, that is, it was not an international humanitarian law convention but was primarily a national instrument with limited scope.

2.4.3 The Tokyo Tribunal

General Douglas MacArthur, Supreme Commander of the Allied Powers in the Far East, ordered the creation of the International Military Tribunal for the Far East (Tokyo Tribunal).⁸² The Tribunal was established "for the trial of those persons charged individually, or as members of organisations, or in both capacities, with offences which include crimes against peace."⁸³ Annexed⁸⁴ to the Special Proclamation for the Establishment of an International Military Tribunal for the Far East, is the Charter of the International Military Tribunal for the Far East. The Charter gave the Tribunal jurisdiction over the following crimes:

- a. Crimes against peace: namely, the planning, preparation, initiation or waging of a war declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
- b. conventional war crimes: namely, violations of the laws or customs of war;
- c. crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated. Leaders, organisers, instigators and any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.⁸⁵

⁸¹ Report of the Special Rapporteur on Violence Against women, its causes and consequences, Ms Radhika Coomaraswamy, Submitted in Accordance with Commission Resolution 1997/44, UN Doc. E/CN.4/1998/54. January 26, 1998, paragraph 19.

⁸² Article 1, Special Proclamation for the Establishment of an International Military Tribunal for the Far East.

⁸³ Ibid, Article 1.

⁸⁴ Annex 5 of the Special Proclamation for the Establishment of an International Military Tribunal for the Far East.

⁸⁵ Article 5, Charter of the International Military Tribunal for the Far East.

Even though sexual violence was not recognized by name as a crime for which the tribunal had jurisdiction, the Tokyo Tribunal showed greater sensitivity towards sexual violence. The tribunal recognized that rape, just like torture, murder and other atrocities, was a crime.⁸⁶ In several paragraphs the Tribunal's Judgment acknowledge that sexual violence was widely perpetrated against women. In reference to the atrocities committed in the City of Nanking by Japanese soldiers, the tribunal acknowledged that:

There were many cases of rape. Death was a frequent penalty for the slightest resistance on the part of civilian or the members of her family who sought to protect her. Even girls of tender years and old women were raped in large numbers throughout the city, and many cases of abnormal and sadistic behaviour in connection with these rapings occurred. Many women were killed after the act and their bodies mutilated. Approximately 20,000 cases of rape occurred within the city during the first month of the occupation.⁸⁷

The tribunal further acknowledged that women were recruited on a massive scale and forced into virtual sexual slavery as ladies of comfort to satisfy the lust of Japanese soldiers.⁸⁸ In one vivid account, the tribunal took time to narrate a blood curdling account of a young girl, which story epitomises the fate of several women who were at the mercy of Japanese soldiers. This was the testimony of one Japanese soldier:

we captured a family of four. We played with the daughter as we would with a harlot. But as the parents insisted that the daughter be returned to them we killed them. We played with the daughter as before until the Unit's departure and then killed her.⁸⁹

The Tribunal's boldness in acknowledging that crimes of sexual violence were committed is also reflected in its verdict. In its verdict against Hirota Koki, the tribunal held him accountable for atrocities perpetrated at Nanking where sexual violence was so widespread.⁹⁰ Hirota was foreign minister and later prime minister. As foreign minister he received reports of atrocities committed on a large scale in the town of Nanking but took no reasonable measures to bring them to an end. For this the tribunal convicted him, saying:

The tribunal is of the opinion that Hirota was derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action upon him to

⁸⁶ See Judgment of the International Military Tribunal for the Far East, Chapter VIII: Conventional War Crimes (Atrocities).

⁸⁷ Ibid, Chapter VIII: Conventional War Crimes (Atrocities)

⁸⁸ Ibid

⁸⁹ Ibid

⁹⁰ Judgment of the International Military Tribunal for the Far East, Chapter X: Verdict: Hirota Koki.

bring about the same result. He was content to rely on assurances which he knew were not being implemented with hundreds of murders, violations of women, and other atrocities being committed daily. His inaction amounted to criminal negligence.⁹¹

Another high ranking Japanese official in whose verdict crimes of sexual violence appeared is Matsui Iwane. Matsui Iwane was a senior officer in the Japanese army who had attained the rank of General.⁹² The Tribunal held that when Matsui made his triumphant entry into Nanking, for several days, and to his knowledge, "thousands of women were raped."⁹³ Matsui was personally present in the city of Nanking and might have observed these atrocities personally and therefore must have been aware of the misbehaviour of his army. For his part in these atrocities, the tribunal pronounced its verdict thus:

The tribunal is satisfied that Matsui knew what was happening. He did nothing to abate these horrors. He had the power as he had the duty to control his troops and to protect the unfortunate citizens of Nanking. He must be held criminally responsible for his failure to discharge this duty.⁹⁴

2.5.0 GENOCIDE

The term "genocide" was coined by Raphael Lemkin, a renowned jurist and used for the first time in 1944 in his book entitled the "Axis Rule in Occupied Europe."⁹⁵ Lemkin was very instrumental in focusing the conscience of the international community to take cognisance of the seriousness of genocide, and was also the vehement proponent of formulating and ultimately persuading the United Nations to adopt the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).⁹⁶ The word genocide was created by combining the Greek word "genos" (meaning race or tribe) with the Latin word "cide" (meaning killing).⁹⁷

The Genocide Convention, adopted on 9 December 1948, on the eve of the adoption of the Universal Declaration of Human Rights, was the first humanitarian convention created under the United Nations. The adoption of the Genocide Convention was inspired by the collective abhorrence of the atrocities committed during the second world war and was

⁹¹ Ibid, chapter X: Verdict: Hirota Koki.

⁹² Ibid, chapter X: Verdict: Matsui Iwane.

⁹³ Ibid

⁹⁴ Ibid

⁹⁵ Claire de Than and Edwin Shorts, International Criminal Law and Human Rights (London: Sweet and Maxwell, 2003) p. 65; see also Kriangsak Kittichaisaree, International Criminal Law (Oxford: Oxford University Press, 2005) p. 67.

⁹⁶ Ibid, p. 65.

⁹⁷ Ibid, p. 65.

preceded by the General Assembly Resolution 180(II) of 21 December 1947, in which the United Nations recognized that “Genocide is an international crime which entails the national and international responsibility of individual persons and states.”⁹⁸

The Genocide Convention defined genocide as follows:

in the present convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.⁹⁹

The Convention further provided that genocide shall not be considered as a political crime under international law for purposes of extradition.¹⁰⁰

There are several important aspects of the intent of the crime of genocide that must be satisfied in order to prove that the crime has been consummated. First of all, there must be an intention to destroy a “group”¹⁰¹ and not just an individual or a few individuals who are only coincidentally members of the group affected. As the International Law Commission rightly stated,

The prohibited act must be committed against an individual because of his membership in a group and as an incremental step in the overall objective of destroying the group. It is the membership of the individual in a particular group rather than the identity of the individual that is the decisive criterion in determining the immediate victims of the crime of genocide. The group itself is the ultimate target or intended victim of this type of massive criminal conduct.¹⁰²

⁹⁸ General Assembly Resolution 180(II) of 21 December 1947. See also Marie- Claude Roberge, “Jurisdiction of the ad hoc tribunals for the former Yugoslavia and Rwanda over crimes against humanity and genocide,” in *International Review of the Red Cross*, No. 321, p. 651- 664, 31 December 1997.

⁹⁹ Article 2, Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948.

¹⁰⁰ *Ibid*, Article 7.

¹⁰¹ *Ibid*, Article 2.

¹⁰² Draft Code of Crimes Against Peace and Security of Mankind with Commentaries, 1996, Adopted by the International Law Commission at its forty-eighth session in 1996, and submitted to the General Assembly as part of the Commission’s report covering the work of the session.

The second aspect of the genocidal intent is the destruction of the group “as such”, that is as a separate and distinct entity and not merely individuals who happen to be members of the group.¹⁰³ Thirdly, the intention must be to destroy the group “in whole or in part.”¹⁰⁴ This means it is “not necessary to intend to achieve the complete annihilation of a group from every corner of the globe.”¹⁰⁵ It is sufficient to intend to destroy a substantial part of a particular group. Fourthly, and finally, there must be an intention to destroy the category of the groups envisioned by the Convention, that is, national, ethnic, racial or religious groups.

As can be seen from the foregoing, sexual violence finds no explicit expression in the Genocide Convention. Women, who are usually the main victims of sexual violence, are not even mentioned as part of the categories of groups capable of being intended for the perpetration of the crime of genocide. However, it should be stated that, as shall be demonstrated below, that some acts specified under Article 2 of the Genocide Convention such as “causing serious bodily or mental harm to members of the group,” “deliberately inflicting on the group conditions calculated to bring about its physical destruction,” and “imposing measures intended to prevent births within the group,” have been interpreted to encompass sexual violence by subsequent Tribunals.

2.6.0 GENEVA CONVENTIONS

As learnt above, until the middle of the 19th century, all treaties concerning the conduct of hostilities during war were situational and binding only for the signing parties.¹⁰⁶ Such agreements were purely military designed, and were solely based on a sense of mutual obligations in order to be enforced.¹⁰⁷ Usually the treaties were in force only during specific armed conflict.¹⁰⁸ Therefore, until the middle of the 19th century, standing written rules of universal application intended for the protection of victims of sexual violence and the regulation of hostilities did not exist.

During the war of Italian Unification, on 24 June 1859, Franco-Sardinian forces clashed with Austrian troops near a small town of Solferino in northern Italy.¹⁰⁹ On that day a merchant and citizen of Geneva (Switzerland) by the name of Henry Dunant was travelling in the area to meet Napoleon III on personal matters. On the evening of the battle Dunant arrived in the village of Castiglione, where more than 9000 wounded people had taken refuge. e,

¹⁰³ Article 2, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948.

¹⁰⁴ Ibid,

¹⁰⁵ Supra, note 81.

¹⁰⁶ See for example, the Treaty of Amity and Commerce Between the United and Prussia (1785)

¹⁰⁷ “Geneva Convention,” available at <http://www.redcross.v/en/conventions>. Last accessed 18 February 2009.

¹⁰⁸ Ibid

¹⁰⁹ ICRC, “From the Battle of Solferino to the Eve of the First World War,” available at <http://www.icrc.org/web/eng/siteeng0.inst/htm/57JNVP>. Last accessed 18 February 2009.

with local women, strove for several days to attend to the injured and help provide them with supplies.¹¹⁰

When Dunant returned to Switzerland he publicized his dissatisfaction with the way wars were being fought. In 1862 he published a book entitled "A Memory of Solferino" in which he described the battle he witnessed at Solferino.¹¹¹ In the book he asks two significant questions:

Would it not be possible, in time of peace and quiet, to form relief societies for the purpose of having care given to the wounded in war time by zealous, devoted and thoroughly qualified volunteers?¹¹²

The quest for answering this question led, eventually, to the foundation of the International Committee of the Red Cross. In the second instance Dunant asked the military leaders of various countries if they could formulate:

...some international principle, sanctioned by a convention and inviolate in character, which, once agreed upon and ratified, might constitute the basis for societies for the relief of the wounded in different European countries?¹¹³

This second question led to the birth of the Geneva Conventions, which shall be considered in detail in this section, and marked the birth of the modern formalized and ubiquitous international humanitarian law.

On 25 August 1863, the International Committee of the Red Cross decided to convene an international conference in Geneva, to study the ways of overcoming the inadequacy of army medical services. The conference led to the adoption of the Ten Resolutions which in turn provide for the establishment of societies for the relief to wounded soldiers.¹¹⁴ In 1864, the International Committee of the Red Cross, through the Swiss government, convened another conference, which met from 8 to 28 August 1864. The conference was attended by representatives from 16 states. On 22 August 1864, the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field was formally adopted.¹¹⁵ With the adoption of this convention, modern international humanitarian law was born.

¹¹⁰ Ibid

¹¹¹ Supra, note 86.

¹¹² Supra, note 88.

¹¹³ Ibid

¹¹⁴ Ibid

¹¹⁵ Ibid

The Geneva Convention for the Amelioration of the Condition of the Wounded in the Armies in the Field was replaced in 1906,¹¹⁶ and then again in 1929,¹¹⁷ at which instance a second Convention on prisoners of war was added.¹¹⁸ In 1949 these Conventions were superseded by a set of four¹¹⁹ Geneva Conventions.¹²⁰ It is these 1949 Conventions that will be given a detailed evaluation for their responsiveness to cases of sexual violence during armed conflict.

The four Geneva Conventions do have provisions that relate to protection from sexual violence during war. These Conventions, it must be noted, only apply to "... cases of war or any other armed conflict which may arise between two or more High Contracting parties."¹²¹ This means that the protection against sexual violence offered in these treaties does not extend to cases of internal war or armed conflict. Efforts by the International Committee of the Red Cross to try to persuade states to make these conventions apply to cases of internal armed conflict as well were rejected by states, perceiving it to be an attempt to interfere in the domestic affairs of states and to protect all forms of insurrections, rebellion, anarchy and the disintegration of states.¹²² However, as a compromise, and out of a desire to protect victims of internal armed conflict, the four Geneva Conventions do contain a common Article 3 which applies to cases of internal armed conflict.

In providing protection for victims of internal conflict, the Geneva Convention states:

in the case of armed conflict not of an international character occurring in the territory of one High Contracting party, each party to the conflict shall be bound to apply, as a minimum, the following provisions:

- (1) Persons taking no active part in hostilities, including members of forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall

¹¹⁶ By the Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armies in the Field, 1906.

¹¹⁷ By the Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armies in the Field, 1929.

¹¹⁸ Geneva Convention Relative to the Treatment of Prisoners of War, 1929.

¹¹⁹ The four Geneva Conventions are: Convention (I) for the Amelioration of the Condition of the wounded and sick in armed forces in the field; Convention (II) for the Amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea; Convention (III) Relative to the treatment of prisoners of war; and Convention (IV) Relative to the Protection of civilian persons in time of war. All these were adopted on 12 August 1949.

¹²⁰ Yoram Dinstein, The Conduct of Hostilities Under the Law of International Armed Conflict (Cambridge: Cambridge University Press, 2007) p.10/11.

¹²¹ See for example, Article 2, Convention (I) for the Amelioration of the condition of the wounded of the wounded and sick in armed forces in the field, Geneva, 12 August 1949.

¹²² "War rape," from Wikipedia, the free internet Encyclopedia, www.wikipedia.com, last visited May 12, 2010.

in all circumstances be treated humanely, without any distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) Taking 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 recognised as indispensable by civilized peoples.¹²³

The words "outrages upon personal dignity" and "humiliating and degrading treatment" under Article 3(1) (c) were meant to protect victims of sexual violence. The use of such words in characterising sexual violence has been severely criticised, as shall be indicated below, but it must be understood that the conventions developed in a patriarchal age.

Apart from the provisions in common Article 3, Convention (I) and Convention (IV) have a few more provisions that relate to protection from sexual violence during international armed conflict. Convention (I) requires that all "women shall be treated with all consideration due to their sex."¹²⁴ It is Convention (IV) which has a more extensive provision as relates to sexual violence:

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against insults and public curiosity.

Women shall be especially protected against any attack on their honour, in particular, against rape, enforced prostitution, or any form of indecent assault.¹²⁵

¹²³ Common Article 3 to the four Geneva Conventions of 1949.

¹²⁴ Article 12, Convention (I) for the Amelioration of the condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949.

¹²⁵ Article 27, Convention (IV) Relative to the Protection of Civilians Persons in Time of War, Geneva, 12 August 1949.

Convention (IV) is the first international humanitarian law treaty to make specific reference to sexual violence and it is in fact the first to specify particular forms of sexual violence such as “rape, enforced prostitution, or any form of indecent assault.”¹²⁶

Despite Convention (IV)’s extensive reach, it does not protect women/civilians from activities of the state of which they are a national.¹²⁷This defect is cured by Protocol I¹²⁸ and Protocol II¹²⁹ of 1977. Protocol I prohibits:

outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault.¹³⁰

Protocol II supplements common Article 3 to the 1949 Geneva Conventions and applies primarily to instances of internal armed conflict.¹³¹Protocol II unequivocally prohibits:

outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault.¹³²

There are two major weaknesses that need to be mentioned about the Geneva Conventions as they relate to sexual violence. The first has to do with the mischaracterisation of sexual violence. In the Geneva Conventions sexual violence is often characterised as an attack against the victim’s “honour.” This fails to recognise the brutal nature of rape and uses instead a “value” term to define the interest to be protected rather than the victim’s interest.¹³³ This gives the impression that “honour” is something inherent to women by men and society at large, and that a woman who suffers sexual violence is thereby dishonoured¹³⁴. Instead of the perpetrator being dishonoured it is now the victim who gets dishonoured. Radhika Coomaraswamy succinctly stated the defect about the Geneva Conventions and the engendered consequence. She argues that the Geneva Conventions:

¹²⁶ Ibid

¹²⁷ Women, Peace and Security, Study Submitted by the Secretary General Pursuant to Security Council Resolution 1325(2000), UN 2002, paragraph 120.

¹²⁸ Protocol Additional to the Geneva Convention of 12 August 1949 and Relative to the Protection of Victims of international Armed Conflict(Protocol I), 8 June 1977.

¹²⁹ Protocol Additional to the Geneva conventions of 12 August 1949 and Relating the Protection of Victims of non- international armed Conflicts (Protocol II), 8 June 1977.

¹³⁰ Article 75, Protocol Additional to Geneva Convention of 12 August 1949 and Relative to the Protection of Victims of international Armed conflict (Protocol I), 8 June 1977.

¹³¹ Article 1(1) (2) Protocol II, 8 June 1977.

¹³² Ibid, Article 4(2) (e)

¹³³ Charlotte Lindsey, “Women and War- an overview,”in the International Review of the Red Cross, no. 839, 561- 579, 30 September 2000.

¹³⁴ UN Division for the Advancement of Women, Sexual Violence and Armed conflict: United Nations Response (April 1998).

...treat violence against women as a crime of honour rather than of violence. By using the honour paradigm, linked as it is to concepts of chastity, purity and virginity, stereotypical concepts of femininity have been formally enshrined in humanitarian law. Thus, criminal sexual assault, in both national and international law, is linked to the morality of the victim. When rape is perceived as a crime against honour or morality, shame commonly ensues for the victim, who is often viewed by the community as "dirty" or "spoiled."¹³⁵

The second defect to be noted about the Geneva Conventions and their additional Protocols is that the gravity of sexual violence as demonstrated in the next chapter is hardly acknowledged. Under the Geneva Conventions, states parties have a duty to seek out and try or extradite those responsible for "grave breaches"¹³⁶ What constitute grave breaches are listed as:

wilful killing, torture or inhumane treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile power, or wilfully depriving a protected person of the right of fair and regular trial... taking of hostages and extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly.¹³⁷

Thus, even though the Geneva conventions provide for the protection against sexual violence, it is at the same time trivialised as it is not listed among the grave breaches for which states have an obligation to punish.

2.7.0 CONCLUSION

There have been several diverse views by scholars over the prominence given to crimes of sexual violence during the development of international humanitarian law. Some of the positions, in view of the foregoing exposition, need to be corrected. In general terms there

¹³⁵ Report of the Special Rapporteur on violence against women, its causes and consequences, Ms Radhika Coomaraswamy, submitted in accordance with Commission Resolution 1997/44. UN Doc E/CN.4/1998/54, January 1998.

¹³⁶ Article 146, Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.

¹³⁷ Ibid, Article 147.

have been scholars arguing that crimes of sexual violence have “long been ignored,”¹³⁸ that despite the widespread and appalling reality of sexual violence in war there has been throughout history “deafening silence,”¹³⁹ adding further that “historical records are largely silent about the occurrence of sexual violence during Second World War.”¹⁴⁰ In view of the analysis undertaken in this chapter these statements seem to be overstretched. All the kairos in the development of international humanitarian law considered before the First World War indicate that sexual violence was considered among the offences that merited condemnation and prosecution.

Sexual violence offences featured prominently in the aftermath of the First World War attempts to prosecute war criminals. No one was ultimately prosecuted for these offences, but that was the case for all other non sexual offence . Therefore the non prosecution of sexual violence here could not have been based on any specific prejudice towards sexual offences.

In the wake of the Second World War, perpetrators of sexual violence could have answered for their misdeeds through three mechanisms: the International Military Tribunal at Nuremberg, the Control Council and the Tokyo Tribunal. It was the Nuremberg tribunal that lamentably failed to reflect sexual violence in the Tribunal Charter, indictments and judgment. This oversight is inexcusable. The Control Council Law No. 10 recognized the gravity of sexual violence, included it among the offences to be prosecuted, but unfortunately no one was indicted for such an offence.

The Tokyo Tribunal scored better on this note. Though sexual violence was not explicitly stated as a crime for which the Tokyo Tribunal had jurisdiction over in the Tribunal Charter, the tribunal reflected the magnitude of sexual violence in its judgment. Several paragraphs, as cited above, from the Tokyo Tribunal’s judgment indicate that the Tribunal was sensitive to crimes of sexual violence and reflected this in the convictions of Hirota and Matsui.

The Genocide Convention did not expressly recognise sexual violence as being capable of being a component of the crime of genocide. However, its provisions are wide enough to encompass sexual violence, as shall be demonstrated in the fourth chapter.

The Geneva Conventions of 1949 and their Additional Protocols do address crimes of sexual violence. However, prior to the creation of ad hoc tribunals for Rwanda And the former Yugoslavia, it was not clear whether rape and other crimes of sexual violence were punishable under international law. The ambiguity arose as a result of the non-recognition

¹³⁸ Kelly D. Askin, “A decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003,” in Human Rights Brief, Volume II, issue 3 (2004), p. 16.

¹³⁹ Judith G. Gadarm, “Women, human rights and international humanitarian law,” in International Review of the Red Cross no.324, 30 July 1998, p. 421- 432.

¹⁴⁰ UN Division for the advancement of women, Sexual Violence and Armed Conflict: United Nations Responses (April 1998)

of crimes of sexual violence as grave breaches of the Geneva Convention rules. But as shall be seen in the fourth chapter, the ad hoc Tribunals for Rwanda and the former Yugoslavia have clarified the law and the ambiguity seems to have vanished.

That said, it could safely be concluded that, generally, the crimes of sexual violence have always been part of the development of international humanitarian law. The only major defect, which is obviously born of generational prejudices, is that usually crimes of sexual violence were mischaracterised or at least couched in patriarchal stereotypes which saw a woman's sexuality as embodying the honour and dignity of the community she belongs to. Under such circumstances sexual violence is not appreciated as a crime of violence against an individual but more as a source of shame and embarrassment for the community to which the victim belongs. Therefore what is at the core of this protection against sexual violence would largely be society values and not so much the bodily integrity and inviolability of the victim.

In the next chapter, having considered the place of sexual violence in the historical development of international humanitarian law, we consider the magnitude of the occurrence of crimes of sexual violence during the Rwanda Genocide of 1994.

CHAPTER THREE

3.0 THE MAGNITUDE OF SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE OF 1994

3.1 INTRODUCTION

On the 6th of April 1994, the plane carrying President Juvenal Habyarimana of Rwanda and President Cyprien Ntaryamira of Burundi crashed at Kigali Airport in Rwanda, killing all on board. Consequent upon the death of the two presidents, widespread killings, having both political and ethnic dimensions, began in Kigali and shortly swept the whole country.¹⁴¹ Soon stories and pictures of despicable acts of heinous mass slaughters of Tutsi and moderate Hutus by the Hutu extremists dominated the international media. An estimated 500,000 to 1,000,000 Rwandan men, women and children were slaughtered between the period of April to September 1994, when the then rebel movement known as Rwanda Patriotic Front led by General Paul Kagame claimed victory.¹⁴² Stories of mass rapes and sexual violence were not immediately reported and it was only later when it dawned that sexual violence was applied as an apparatus in the accomplishment of the extermination of the Tutsi ethnic group. The genocidal rapes and sexual violence were first reported in the international media by the Christian Science Monitor on March 27, 1995, long after the genocide.¹⁴³ According to Mr. Rene Degni-Segui, Special Rapporteur of the Commission on Human Rights, because of the massive sexual violence that assailed them, women can be regarded as the main victims of the Rwandan genocide.¹⁴⁴

In this chapter two of the dissertation, background information of sexual violence in Rwanda during the genocide will be presented. This chapter discusses in detail the guiding definition of what ought to be considered sexual violence; the magnitude of sexual violence; the forms and nature of sexual violence; and the purpose for which sexual violence was used. Before drawing conclusions, the chapter also considers some of the consequences of sexual violence to the victims.

¹⁴¹ The Prosecutor v. Jean-Paul Akayesu Case No. ICTR-96-4-T Judgment of 2 September 1996, paragraph 1.

¹⁴² Human Rights Watch, Shattered Lives: Sexual Violence During the Rwandan Genocide and its Aftermath. September 1996

¹⁴³ Keith Harmon Snow, "Mass Rape and Genocide in Rwanda, 1994" in Peacework Magazine, March 1997.

¹⁴⁴ Report on the Situation of Human Rights in Rwanda Submitted by Mr. Rene Degni-Segui, Special Rapporteur of the Commission on Human Rights, May 25, 1994, E/CN.4/1996/68, paragraph 2.

3.2 DEFINITION OF SEXUAL VIOLENCE

In this dissertation the words “sexual abuse” and “sexual violence” shall be used interchangeably. There have been several definitions of sexual violence which have been coined. In his recent article, eminent law scholar Professor Muna Ndulo cites with approval, the definition of sexual abuse which considers sexual abuse as “actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions.”¹⁴⁵ Professor Ndulo’s article examines sexual abuse of women and girls by UN Peace Keepers and addresses the unequal balance of influence between peace keepers and women in war zones. That definition is therefore apt under those circumstances as it is trying to criminalize consensual sex which would not be punishable if it were committed by an ordinary person. This definition, however, would not be appropriate in the context of International humanitarian Law. The short-coming in this definition, in relation to International Humanitarian Law, is that sexual violence which is not of a physical nature or where the perpetrator does not physically touch the victim seems to be excluded, as only “physical intrusion” seems to be recognised as amounting to sexual violence. Therefore acts of sexual violence such as forcing women to undress in public and perform gymnastics while naked does not amount to “physical intrusion” and under that definition may not therefore be considered sexual violence. As the International Criminal Tribunal for Rwanda correctly observed, “sexual violence is not to be limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.”¹⁴⁶

The World Health Organisation defines sexual violence as:

Any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person’s sexuality using coercion by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work.¹⁴⁷

This definition or description of what constitutes sexual violence is wide enough to encompass any form of sexual violence, be it physical or otherwise.

A more succinct and brief definition of sexual violence was given by the trial chamber of the International Criminal Tribunal for Rwanda as, “sexual violence, which includes rape, is considered to be any act of a sexual nature which is committed on a person under

¹⁴⁵ Muna Ndulo, “The United Nations Response to Sexual Abuse and Exploitation of Women and Girls by Peacekeepers During Peacekeeping Missions,” Berkeley Journal of International Law, Vol.27.1, 2008.

¹⁴⁶ The Prosecutor v. Jean-Paul Akayesu Case No. ICTR-96-4-T Judgment of 2 September 1996, paragraph 688.

¹⁴⁷ World Health Organisation, World Report on Violence and Health, Geneva 2002, page 149.

circumstances which are coercive.”¹⁴⁸ This chapter adopts the definition of sexual violence as given by the World Health Organisation and the International Criminal Tribunal for Rwanda. In concrete terms sexual violence in this chapter shall include rape, mutilation of sexual organs, sexual teasing, forced “marriages,” thrusting sticks and other sharp objects into the victims’ genitals, forced nudity and public humiliation.

3.3. MAGNITUDE OF SEXUAL VIOLENCE

In describing the sexual violence that accompanied the Japanese Army occupation of Nanking in China during the World War II, an American missionary was lost for words and simply stated,

never have I heard or read of such brutality. Rape! Rape! Rape! We estimated at least 1000 cases a night, and many by day. In case of resistance...there is a bayonet stab or bullet. We could write up hundreds of cases a day.¹⁴⁹

The same kind of alarm could easily be repeated on the extent of sexual violence in Rwanda.

Prevalence of sexual violence during the Rwandan genocide can be gleaned from the extent to which Tutsi women were raped. Mr. Rene Degni-Segui, Special Rapporteur of the Commission on Human Rights, after visiting Rwanda, found that “rape was systematic and used as a weapon by the perpetrators of the massacres.”¹⁵⁰ Working on the estimated number of rape-occasioned-pregnancies recorded by health facilities of between 2000 and 5000, the Rapporteur, calculated on the basis of medical statistical probability that one hundred cases of rape gave rise to one pregnancy. On the basis of that, he concluded that the lowest number of women raped could be 250 000 while the highest figure would be 500,000.¹⁵¹

The magnitude of sexual violence can also be seen from the nature and targeting of victims of violence, as the Rapporteur revealed,

The nature of persons targeted also testifies to the systematic nature of rapes. No account was taken of a person’s age or condition.... pregnant women were not

¹⁴⁸ The Prosecutor v. Jean-Paul Akayesu Case No. ICTR-94-T Judgment of 2 September 1996, paragraph 688.

¹⁴⁹ From the diary of An American Missionary in Nanjing, China, 1937, as cited in Kevin Gerrard Neill, “Duty, Honour, Rape: Sexual Violence Against Women During War” in Journal of International Women’s Studies, November 7, 2000.

¹⁵⁰ Report on the Status of Human Rights in Rwanda Submitted by Mr. Rene Degni-Segui, Special Rapporteur of the Commission on Human Rights, E/CN.4/1996/68, paragraph 16.

¹⁵¹ Ibid, paragraph 16.

spared either. Women about to give birth or who had just given birth were also the victims of rape in hospitals.... women who were “untouchable” according to custom (e.g., nuns) were also involved and even corpses, in case of women who were raped just after being killed.¹⁵²

It therefore means that every Tutsi woman was the target of sexual violence. A 2000 report prepared by the Organisation of African Unity’s International Panel of Eminent Personalities concluded that “we can be certain that almost all females who survived the genocide were direct victims of rape or other sexual violence, or were profoundly affected by it.”¹⁵³ Of a sample of Rwandan women surveyed in 1999, 39 per cent reported being raped during the 1994 genocide, and 77 per cent said they knew someone who had been raped.¹⁵⁴

Another factor which indicates that sexual violence was widely practised as an aspect of genocide was the policy to rape before killing the female victims. For example, the former bourgmestre (mayor) of Bacumbisi commune, Laurent Semanza was heard asking the Interahamwe, a Hutu militia group, “are you sure you’re not killing Tutsi women and girls before sleeping with them... you should do that and even if they have some illness, you should do it with sticks,”¹⁵⁵ while the International Criminal Tribunal admitted that Mikaeli Muhimana, counsellor of Gishita Secteur indicated to the interahamwe that “it would not be proper to kill the girls without first raping them” and that “Muhimana ordered the Interahamwe to rape the other girls and kill them by opening up their bellies.”¹⁵⁶ Alfred Musema, a prominent Hutu businessman, during one meeting said of Tutsi women, “those who wanted to have fun could rape their women and their children without fearing any consequence.”¹⁵⁷

It may be impossible to get the exact number of the victims of sexual violence during the Rwandan genocide. However, all the evidence available indicates that sexual violence was

¹⁵² Ibid, paragraph 17.

¹⁵³ As cited in Annie-Marie de Brouwer, “Sexual Violence Against Women During the Genocide in Rwanda and its Aftermath,” a paper presented at the Solace Ministries Conference, 30 April- 4 May 2007, at Einegen, Switzerland.

¹⁵⁴ UNFPA, “Sexual Violence Against Women and Girls in War and its Aftermath: Realities, Responses, and Required Resources,” a briefing paper prepared for the symposium on sexual violence in conflict and beyond, 21- 23 June 2006, Brussels, Belgium.

¹⁵⁵ The Prosecutor v. Laurent Semanza Case NO. ICTR- 97-20-T Judgment and Sentence of 15 May 2003, paragraph 253.

¹⁵⁶ The Prosecutor v. Mikaeli Muhimana Case NO. ICTR-95-1B-T Judgment and Sentence of 28 April 2005, paragraph 169.

¹⁵⁷ The Prosecutor v. Alfred Musema Case NO. ICTR- 96-13- A Judgment and Sentence of 27 January 2000, paragraph 800.

perpetrated on a massive scale and therefore it can safely be stated that sexual violence was an integral part of the plan to destroy the Tutsi group.¹⁵⁸

3.4 FORMS OF SEXUAL VIOLENCE

Sexual violence was perpetrated employing, apart from the above, diverse ways. One survey of Rwandan women reported that 89 per cent of women that were raped; 37 per cent were forced to undress or stripped of clothing; 33 per cent were gang raped; 33 per cent were abducted; 14 per cent were molested and 4 per cent penetrated by foreign objects into genital opening or anus.¹⁵⁹ This part of the thesis gives flesh to some of the common ways through which sexual violence was accomplished in Rwanda during the genocide.

3.4.1 Enforced nudity and public humiliation

As an aspect of sexual violence, several women were stripped of their clothing and exposed to public mockery. For example, in the case of Niyitegeka,¹⁶⁰ the trial chamber heard and accepted testimony that the accused, after ascertaining that the particular woman was Tutsi, ordered the Interahamwe to undress the said woman and expose her to public view.¹⁶¹ Similarly, in Muhimana¹⁶² case the trial chamber heard and admitted evidence that Muhimana stripped naked a lady named Mukasime, took her legs, spread them apart and

¹⁵⁸ Ibid, paragraph 933. Perhaps the extent of sexual violence during the Rwandan genocide is well epitomized by the testimony of witness JJ in the Akayesu case: "witness JJ testified that often the Interahamwe came to beat the refugees during the day, and that the policemen came to beat them at night. She also testified that the Interahamwe took young girls and women from their sites of refuge near the bureau communal into a forest nearby and raped them. Witness JJ testified that this happened to her- that she was stripped of her clothing and raped in front of other people. At the request of the prosecutor and with great embarrassment, she explicitly specified that the rapist, a young man armed with an axe and a long knife, penetrated her vagina with his penis. She stated that on this occasion she was raped twice. Subsequently, she told the chamber, on a day when it was raining, she was taken by force from near the bureau communal into the cultural centre within the compound of the bureau communal, in a group of approximately fifteen girls and women. In the cultural centre, according to witness JJ, they were raped. She was raped twice by one man. Then another man came to where she was lying and he also raped her. A third man raped her, she said, at which point she described herself as feeling near dead. Witness JJ testified that she was at a later time dragged back to the cultural centre in a group of approximately ten girls and women and they were raped. She was raped again, two times. Witness JJ testified that she could not count the total number of times she was raped. She said "each time you encountered attackers they would rape you,"- in the forest, in the sorghum fields. Witness JJ related to the chamber the experience of finding her sister before she died, having been raped and cut with a machete.

¹⁵⁹ Simon Wilson, "The effects of sexual violence against women in war: a case study of Rwanda." 2004. Available on <http://codmanacademy.org/branches/jus04-05/index.php?module=page&PAGE>. (last accessed 23/ 10/ 2008).

¹⁶⁰ Prosecutor v. Eliezer Niyitegeka Case NO. ICTR- 96-14-T

¹⁶¹ Ibid, Judgment and sentence of 16 May 2003, paragraph 416.

¹⁶² The Prosecutor v. Mikaeli Muhimana Case NO. ICTR- 95-1B-T Judgment and Sentence of 28 April 2005.

said, "Everyone passing should see what the vagina of Tutsi woman looks like."¹⁶³ In another instance, Muhimana, it was accepted by the trial chamber, after having girls raped by Interahamwe, ordered the girls to march stark naked in public, with their legs apart. He then called for young people to come and see "what Tutsi girls look like."¹⁶⁴

In humiliating Tutsi women and girls, sometimes their genital organs were ripped off and displayed for public viewing. A blood curdling instance of such brutality was narrated by one woman victim to Human Rights Watch:

"...when he finished, he took me inside and put me on bed. He held one leg of mine open and another one held the other leg. He called everyone who was outside and said, "You come and see how Tutsikazi are on the inside." Then he said, "You Tutsikazi, you think you are the only beautiful women in the world." Then he cut out the inside of my vagina. He took a small stick and put what he had cut on the top. He stuck the stick in the ground outside the door and was shouting, "everyone who comes past here will see how Tutsikazi look..."¹⁶⁵

Sometimes women were stripped naked and asked to walk some distance naked or do some exercises naked. Ms. Radhika Coomaraswamy, the Special Rapporteur on violence against women, its causes and consequences, recorded the story of a woman who was compelled to walk naked for 30 Kilometres, who still feels humiliated whenever she meets people who saw her.¹⁶⁶ Equally in Akayesu¹⁶⁷ the accused had the wife of a man named Tharcisse sit down in the mud and undressed.¹⁶⁸ The same accused instructed the Interahamwe to undress a lady known as Chantal and forced her to march around and do gymnastics in public view, while the accused was laughing and happy to be watching and afterwards ordered the Interahamwe to rape the same girl.¹⁶⁹ Again, with Akyesu's complicity, before a woman named Alexia was raped and killed, she and her n were forced by Interahamwe

¹⁶³ Ibid, paragraph 265.

¹⁶⁴ Ibid, paragraph 17.

¹⁶⁵ Human Rights Watch, *Shattered Lives: Sexual Violence During the Rwandan Genocide and its Aftermath*, September 1996. See also Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, E/CN.4/1998/54, at paragraph 33 reports a similar incident: "when the genocide began, a journalist named Rugenzin came to Donatillis' house with a group of men to rape her. Two of the men kept her legs apart while the journalist, using rusty scissors, cut her genitalia. Her clitoris was cut and her labia mutilated. Her aggressor then displayed the cut genitalia in public for everyone to see...."

¹⁶⁶ Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, E/CN.4/1998/54. January 26, 1998, paragraph 78.

¹⁶⁷ The Prosecutor v. Jean-Paul Akayesu Case No. ICTR-96-4-T Judgment of 2 September 1996.

¹⁶⁸ Ibid, paragraph 311.

¹⁶⁹ Ibid, paragraphs 453 and 688.

to undress and ordered to run around and do exercises in order to display thighs of Tutsi women.”¹⁷⁰

3.4.2 Wilful HIV transmission

The United Nations Secretary General has acknowledged that sexual violence as a strategic and tactical weapon of war contributes to the spread of sexually transmitted infections, including HIV/ AIDS.¹⁷¹ In Sierra Leone, for example, it has been estimated that 70 per cent to 90 per cent of rape survivors had contracted sexually transmitted infections.¹⁷² In Rwanda many women were raped by men who knew or at least ought to have known that they were HIV positive and deliberately tried to sadistically transmit the virus to Tutsi women and their families.¹⁷³ Before the genocide war, 45 per cent to 65 per cent of Rwandan soldiers and officers were infected with HIV/AIDS and several times women were taken to be raped by soldiers or other persons who were known or thought to be HIV positive so that the virus could be transmitted to the Tutsi women.¹⁷⁴ Radhika Coomaraswamy, Special Rapporteur on violence against women, its causes and consequences after a fact finding mission to Rwanda, reported one such incident of a person who knew he was HIV positive and deliberately raped a Tutsi woman in order to pass on the virus to the woman:

“When the genocide began, Jeanne took her Bible and went to pray at the church with her friend. At the entrance to the church, Jeanne met one of her neighbours with two other men. Her neighbour, whose wife, she knew had AIDS, told her, “I have AIDS and I want to give it to you.” He then raped her, right in front of the church, even though she was pregnant. The other two men also raped her afterwards.”¹⁷⁵

Not only was rape used to torture and humiliate but it was employed as a conduit of transmitting the HIV virus into the bodies of Tutsi women with the view that even if the

¹⁷⁰ Ibid, paragraph 732.

¹⁷¹ Women, Peace and Security, Study submitted by the Secretary General pursuant to Security Council Resolution 1325 (2000), UN 2002, paragraph 76.

¹⁷² Ibid, paragraph 76.

¹⁷³ Annie-Marie de Brouwer, “Sexual violence against women during the genocide in Rwanda and its aftermath,” a paper presented at the Solace Ministries Conference, 30 April- 4 May 2007 at Einingen, Switzerland.

¹⁷⁴ Simon Wilson, “The effects of Sexual violence against women in war: a case study of Rwanda,” 2004. Available at <http://codmanacademy.org/branches/jus04-05/index.php?module=pagemaster&PAGE> (last accessed 23/ 10/ 2008).

¹⁷⁵ Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, E/CN.4/1998/54, January 26, 1996, paragraph 36.

affected women survived the genocide, they would still be exterminated as a result of their condition degenerating into AIDS and slowly die.¹⁷⁶

3.4.3 Mutilation of genital organs

Mutilation of female genital organs of Tutsi women was rampant during the Rwandan genocide. Sexual mutilation of, in particular, breasts vaginas or buttocks or of features considered to be Tutsi such as small noses, long fingers or long legs was frequently employed against Tutsi women so as to prevent them from having Tutsi children.¹⁷⁷ Women were targeted and brutalised in this manner because, Rwanda being a patrilineal society, the child belongs to the father's ethnic group, and therefore women were perceived as potential carriers of the enemy.¹⁷⁸ The reasoning behind this behaviour is well epitomised by evidence heard and admitted by the trial chamber in Akayesu.¹⁷⁹ The accused, Akayesu, made a public statement that if a Hutu woman was impregnated by a Tutsi man, the Hutu woman had to be found in order "for the pregnancy to be aborted."¹⁸⁰ The accused justified this position by citing a Rwandese proverb saying, "iy nzoka yiziritse ku gisabo, nta kundi bigenda barakimena" (if a snake wraps itself round a calabash, there is nothing that can be done, except to break the calabash).¹⁸¹

Several times the mutilation was carried out with utmost brutality. In Musema¹⁸² evidence was heard that Musema, the accused, cut off the breast of a woman and gave it to her child to eat, if the child was hungry.¹⁸³ Radhika Coomaraswamy documents another bestial incident of a woman whose clitoris and labia were mutilated using scissors and displayed for public amusement.¹⁸⁴

¹⁷⁶ One survivor of the genocide, Imaculee Ilibagiza, in her book, Left to tell: Discovering God Amidst the Rwanda Holocaust (New York: Hayhouse, 2006), page 123, narrates incidents where "HIV-positive soldiers were being ordered to rape teenage girls to infect them with their disease."

¹⁷⁷ Annie-Marie de Brouwer, "Sexual violence against women during the genocide in Rwanda and its aftermath," a paper presented at the solace Ministries conference, 30 April- 4 May 2007, Eningen, Switzerland.

¹⁷⁸ Prosecutor v. Jean-Paul Akayesu Case No. ICTR-96-4-T Judgment of 2 September 1996, paragraph 121.

¹⁷⁹ *ibid*

¹⁸⁰ *ibid*, paragraph 121.

¹⁸¹ *ibid*, paragraph 121.

¹⁸² The Prosecutor v. Alfred Musema Case No. ICTR-96-13-A judgment and sentence of 27 January 2000.

¹⁸³ *ibid*, paragraph 809.

¹⁸⁴ Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, Addendum, Report of the mission to Rwanda on the issues of violence against women in situations of armed conflict, E/CN.4/1998/54.Add. 1, 4 February 1998, paragraph 31.

A gruesome and vivid account of mutilation of Tutsi women was recorded by the trial chamber in Muhimana¹⁸⁵ thus:

In the course of the search, the Interahamwe caught Pascale Mukaremera, who was pregnant. When they brought her to the accused, he said, "I'm going to cut this woman, to disembowel this woman, to see the position of the foetus in its mother's womb." According to the witness, "Mika took a machete and he cut up this woman into pieces, beginning from her breasts, right up to her genitals, and then he removed the baby from the mother's womb and put it beside its mother. The baby cried for some moments and then died."¹⁸⁶

3.4.4 The Insertion of sharp objects into genitals

Instead of having their genitals mutilated or slashed, sometimes Tutsi women had sharp objects pushed into their genital orifices. Eliezer Niyitegeka, minister of information during the genocide, was heard instructing Interahamwe to make sure they raped Tutsi women before they killed them and that if they feared that those women had illnesses, at least they could do it by inserting sharp sticks into their vaginas.¹⁸⁷ This was put into effect, for example, when a group of Interahamwe, acting under Niyitegeka's orders undressed the body of a Tutsi woman and inserted a sharpened piece of wood into her genitalia, and left the piece protruding from the vagina, in plain view of the public.¹⁸⁸ It was usually a common practice that after being raped, a woman would be inserted with sharp objects in her genitalia and left to die.¹⁸⁹

3.4.5 Forced "Marriages" and gang rapes

In the killing sprees during the Rwandan genocide, some Hutu men had hidden Tutsi women while scouring for Tutsi men to kill. It was said that Tutsi women were beautiful and so some Tutsi women were kept by Hutu men as virtual sex slaves to be repeatedly raped.¹⁹⁰ This

¹⁸⁵ The prosecutor v. Mikaeli Muhimana Case No. ICTR-95-1B-T Judgment and Sentence of 28 April 2005.

¹⁸⁶ Ibid, paragraph 393.

¹⁸⁷ The prosecutor v. Eliezer Niyitegeka Case No. ICTR 96-14-T Judgment and sentence of 16 May 2003, paragraph 253.

¹⁸⁸ Ibid, paragraph 416.

¹⁸⁹ See for example, ibid, paragraph 396, after raping a lady known as Mukakankuyu the Interahamwe then thrust pieces of wood into her vagina until she died; and in paragraph 414, after two girls, Beatrice and Immaculee, were raped, sticks were thrust into their genitalia as they died.

¹⁹⁰ Immaculee Ilibagiza, Left to tell: Discovering God Amidst the Rwanda Holocaust (New York: Hayhouse, 2006), page 68.

was yet another way that Tutsi women were brutalized. Amnesty International records one such incident where a Tutsi woman was kept in virtual sexual slavery:

During the genocide, the militia at the barriers said they would protect me, but instead they kept me and raped me in their homes. One militia member would keep me for two or three days, and then another would choose me... I had to stay with these men because I would have been killed otherwise.¹⁹¹

The International Criminal Tribunal for Rwanda heard similar evidence of how Tutsi women were kept by some Hutu men only to be gang-raped or repeatedly raped. Examples abound. In Kayishema,¹⁹² for example, a witness F's wife was gang raped by Hutus;¹⁹³ Muhimana, apart from frequently instigating the rape of Tutsi women, specifically in one instance gave permission to one Mugonero, to take away a Tutsi woman (code named BG) and Mugonero did so, keeping the woman under guard and frequently raping her.¹⁹⁴

3.4.6 Sexual teasing

Sexual violence was a step in the process of the destruction of the Tutsi group and often the sexual violence was accompanied by verbal expressions that were meant to humiliate and break the spirit and the will to live.¹⁹⁵ Several times expressions such as, "let us now see what the vagina of a Tutsi woman tastes like,"¹⁹⁶ "we are going to rape you and taste Tutsi women,"¹⁹⁷ "everyone passing should see what the vagina of a Tutsi woman looks like,"¹⁹⁸ "we are going to rape you to death"¹⁹⁹ were made in the course of brutalising women. Human Rights Watch records an incident where one woman was being teased while being raped,

¹⁹¹ Amnesty International, Rwanda: *Marked for Death, Rape Survivors Living with HIV/AIDS in Rwanda*

¹⁹² The prosecutor v. Clement Kayishema and Obed Rizindana Case No. ICTR-95-1-T Judgment of 21 May 1999.

¹⁹³ Ibid, paragraph 299.

¹⁹⁴ The prosecutor v. Mikaeli Muhimana Case No. ICTR-95-1B-T Judgment and Sentence of 28 April 2005.

¹⁹⁵ The prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T Judgment of 2 September 1996, paragraph 732.

¹⁹⁶ Ibid, paragraph 732.

¹⁹⁷ The prosecutor v. Jean de Dieu Kamuhanda Case No. ICTR-95-54A-T, paragraph 367.

¹⁹⁸ The prosecutor v. Mikaeli Muhimana Case No. ICTR-95-1B-T Judgment and Sentence of 28 April 2005, paragraph 265.

¹⁹⁹ Fergal Keane, "massacres at Nyarubuye Church." BBC news. Available at <http://news.bbc.co.uk/go/pr/fr/-12>. (Last accessed 20/06/2008).

While they were raping me, they were saying that they wanted to kill all Tutsi so that in future all that would be left would be drawings to show that there were once a people called Tutsi.²⁰⁰

3.5 FACTORS UNDERLYING SEXUAL VIOLENCE

It is now axiomatic that “sexual violence happens during war for the same reasons it happens during peacetime” as “it is a phenomenon rooted in inequality, discrimination, poverty and aggression, misogyny and the entrenched socialisation of sexual myths.”²⁰¹ In the context of the Rwandan genocide, sexual violence was fuelled particularly by gender and ethnic stereotypes.²⁰² Tutsi women were often targeted on the basis of the propaganda which depicted them as arrogant but beautiful and seductive women using their beauty to spy for the Tutsi group.²⁰³ Extreme Hutu ideology conceived Tutsi women as a means of achieving Tutsi domination of the Hutus by their group. The perpetrators of sexual violence thus viewed sexual violence as an effective way to shame and conquer the Tutsi people by humiliating, degrading and destroying the pride of the Tutsi people.²⁰⁴

A good example of extreme Hutu propaganda employed against Tutsi women was exhibited on 10 December 1990 when a journalist named Hassan Ngeze published the “Ten Commandments of the Hutu” in a widely circulated magazine known as Kagura. The first three of those commandments strongly despised Tutsi women and read as follows:

1. Every Muhutu should know that a Mututsi woman, wherever she is, works for the interest of the Tutsi ethnic group. As a result, we should consider as a traitor any Muhutu who:

- marries a Tutsi woman,
- befriends a Tutsi woman
- employs a Tutsi woman as a secretary or concubine.

²⁰⁰ Human Rights Watch, Shattered Lives: Sexual Violence During the Rwandan Genocide and its Aftermath, September 1996.

²⁰¹ Muna Ndulo, “The United Nations’ response to the Sexual Abuse and Exploitation of Women and Girls by Peacekeepers during peacekeeping missions,” *Berkeley Journal of International Law*, Vol 27.1, 2008.

²⁰² Human Rights Watch.

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*, see also Human Rights Watch, Struggling to Survive: Barriers to Justice for Rape Survivors in Rwanda.

2. Every Muhutu should know that our Hutu daughters are more suitable and conscientious in their role as women, wife, and mother of the family. Are they not beautiful, good secretaries and more honest?

3. Bahutu women, be vigilant and try to bring your husbands, brothers and sons back to reason.²⁰⁵

In Rwanda, therefore, Tutsi women were sexually assaulted because of their gender, that they, as women, carry the honour of the Tutsi ethnic group and are deployed to seduce the Hutu men in order to subdue and dominate the Hutu, and because of their ethnicity were seen as carriers of the next generation of the enemy. This explains why attacks on women were usually accompanied by mutilation of the genitalia.²⁰⁶

3.6 CONSEQUENCES OF SEXUAL VIOLENCE

As a result of sexual violence, the victims suffered devastating consequences. Among the most common consequences were the following:

3.6.1 HIV/AIDS and other Sexually transmitted Infections

In the year 2000 the United Nations Secretary General remarked that "armed conflicts... increasingly serve as vectors for the HIV/AIDS pandemic."²⁰⁷ In Liberia, for example, where an estimated 60 to 70 per cent of civilians suffered some form of sexual violence during the conflict, clinics in Monrovia reported in 2003 that all female patients tested positive to at least one sexually transmitted infection. In this case most of the victims were either raped by the government militia or by armed opposition groups.²⁰⁸

Sexual violence in Rwanda served as a factor in fuelling the infection of women victims of sexual violence with HIV and other sexually transmitted infections. Although not all cases of HIV and STIs among rape victims can certainly be attributed to sexual violence they suffered, the deliberate targeting of Tutsi women for wilful infection of HIV and the mass rape during the 1994 genocide contributed significantly to the spread of the HIV virus.²⁰⁹ In the year 2000, AVEGA, a Rwandan association for genocide widows, carried out a study of 1125

²⁰⁵ Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, Addendum, Report of the mission to Rwanda on the issues of violence against women in situations of armed conflict, E/CN.4/1998/54/Add.1, 4 February 1998.

²⁰⁶ Amnesty International, "Lives Blown Apart: Crimes Against Women in Times of Conflict"

²⁰⁷ As cited in UNFPA, "Sexual violence against women and girls in war and its aftermath: Realities, responses, and resources required," a briefing paper prepared for the symposium on sexual violence in conflict and beyond, 21-23 June 2006, Brussels, Belgium.

²⁰⁸ Amnesty International, Lives Blown Apart: Crimes Against women in times of conflict.

²⁰⁹ Amnesty International, Marked for death: rape survivors living with HIV/AIDS in Rwanda

women who survived the genocide and found that 66.7 per cent had HIV.²¹⁰ Consequences of living with HIV are grave and include poor state of health, ostracism and ultimately death. It is estimated that 50,000 Rwandese per year died of AIDS.²¹¹

3.6.2 Unwanted pregnancies, unwanted children and unsafe abortions

Unwanted pregnancies and unwanted children have been a trust on women as a result of sexual violence (rape). Figures of how many conceptions occurred as a result of rape vary. Some estimate that at least between 2000 and 5000 pregnancies occurred as a result of rape.²¹² In one survey of 304 survivors of rape conducted by the Rwandan Ministry of Family and Promotion of Women, in collaboration with UNICEF, it was established that 35 per cent became pregnant after being raped.²¹³ Another survey conducted in 1995 by the Ministry of Family and Promotion of Women found that of 716 rape cases, 472 women had become pregnant.²¹⁴

Sometimes women who became pregnant as a result of rape procured self-induced abortions, which were often fatal, resulting in either impairing their health or death.²¹⁵ The women who managed to carry the pregnancy to completion and delivered their babies suffered further humiliation and ostracism from their society as their children were not accepted and usually called by derogatory and pejorative names. Such children are frequently referred to as, "children of hate," "enfants non-desires" (unwanted children), "enfants mauvais souvenir," (children of bad memories), "little Interahamwe," "gifts of the enemy," or "little monster."²¹⁶

3.6.3 Prostitution

For several women the impact of sexual violence was to dull them to the dangers of sexual trade and prostitution. Many such women voluntarily became prostitutes considering

²¹⁰ *ibid*

²¹¹ *ibid*

²¹² Report on the situation of Human rights in Rwanda submitted by Mr. Rene Degni-Segui, Special Rapporteur of the Commission on Human Rights, E/CN.4/1996/68, 29 January 1996. See also Simon Wilson, "the effects of sexual violence against women in war: a case study of Rwanda, 2004." Available at <http://codmanacademy.org/branches/jus04-05/index.php?module=pagemaster&PAGE>. Last accessed 23/10/2008.

²¹³ Human Rights Watch, *Shattered Lives: Sexual violence during the Rwanda genocide and its aftermath*, September 1996.

²¹⁴ *ibid*

²¹⁵ *ibid*

²¹⁶ *ibid*, see also Report on the Situation of Human Rights in Rwanda Submitted by Mr. Rene Degni-Segui, Special Rapporteur of the Commission on Human Rights, E/CN.4/1996/68, 29 January 1996.

themselves lucky that they are now being paid for 'services' they would have given free of charge under brutal circumstances during the war.²¹⁷

3.6.4 Physical injuries and scars

As indicated above several women survivors of sexual violence were sexually mutilated by having had a breast chopped off, acid thrown on their genitals, or their reproductive system permanently damaged as a result of large or sharp objects thrust into their vaginas or due to the sheer number of times they were raped.²¹⁸ It is estimated that 7 to 8 out of 10 women survivors have physical health problems as a result of sexual violence they suffered.²¹⁹

3.6.5 Ostracism

Even outside the context of war, the implications of being a rape or sexual violence victim for women in many societies are extreme, and usually include ostracism and loss of marriageable status.²²⁰ For example, in Sierra Leone, after the war, there has been an assumption among some people that women and girls were somehow responsible for what happened to them. They are often viewed as "shameful" or "dirty" because of the sexual violence, making marriage an unlikely future option for many women who suffered sexual violence.²²¹

The experience of Sierra Leone was replicated in the aftermath of the Rwandan genocide. In Rwanda communities who knew that a particular woman had been raped assumed that such a woman had a sexually transmitted infection, particularly HIV/AIDS.²²² In other cases, their own communities would tell such women that if they had survived, then they must have collaborated with perpetrators of the genocide.²²³ Under such circumstances married women were disowned by their husbands. Unmarried women were unable or had difficulty

²¹⁷ UNFPA, "Sexual violence against women and girls in war and its aftermath: Realities, responses and required resources," a briefing paper prepared for the symposium on sexual violence in conflict and beyond, 21-23 June 2006, Brussels, Belgium.

²¹⁸ Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, Addendum, Report on the issues of violence against women in situations of armed conflict, E/CN.4/1998/54/Add. 1, 4 February 1998, paragraph 79.

²¹⁹ Ibid, paragraph 78.

²²⁰ Cleare de Than and Edwin Shorts, International Criminal Law and Human Rights (London: Sweet and Maxwell, 2003), page 347.

²²¹ Amnesty International, Sierra Leone: Getting Reparation Rights for Survivors of Sexual Violence, AI Index: AFR 5/005/2007, 01 November 2007.

²²² Amnesty International, Rwanda: Marked for Death: Rape Survivors Living with HIV/AIDS in Rwanda

²²³ Ibid

in finding a marriage partner once it was known that they had suffered sexual violence.²²⁴ Consequently women victims of sexual violence who are not able to marry or have been abandoned by their husbands are deprived of the 'protection' and economic support that men are traditionally expected to provide.²²⁵ Many women and girls who suffered sexual violence, unable to live in their communities that consider them to be dirty or a shame, flee their homes; abandon their communities for somewhere far away where they can live quietly and anonymously.²²⁶

3.6.6 Psychological problems

Sexual violence has been associated with a number of mental health problems. In one population based study, the prevalence of symptoms or signs suggestive of psychiatric disorder was 33 per cent in women with a history of sexual abuse as adults, 15 per cent in women with a history of physical violence (but non-sexual) by an intimate partner and 6 per cent in non-abused women.²²⁷ Victims of sexual violence often suffer from post-traumatic stress disorder, in which symptoms such as anxiety, memory loss, obsessive thoughts, emotional numbness, suicidal tendencies, sexual apathy, and loss of sleep are evident.²²⁸

3.7 CONCLUSION

The United Nations has recently acknowledged that "women and girls are particularly targeted by the use of sexual violence, including as a tactic of war to humiliate, dominate, instil fear...disperse and/or forcibly relocate civilian members of a community or ethnic group."²²⁹ Cynthia Enloe explains why women are usually targeted as a tactic of war in a patriarchal society:

If military strategists...imagine that women provide the backbone of the enemy's culture, if they define women chiefly as breeders, if they define women as men's property and as the symbol of men's honour, if they imagine that residential communities rely on women's work – if any or all of these beliefs about society's proper gender division of labour are held by war-wagging policy makers- they will be

²²⁴ Amnesty International, Lives Blown Apart: Crimes against Women in Times of Conflict: Stop Violence Against Women.

²²⁵ *ibid*

²²⁶ Report on the situation of human rights in Rwanda submitted by Mr. Rene Degni-Segui, Special Rapporteur of the Commission on Human Rights, E/CN.4/1996/68, 29 January 1996, paragraph 26

²²⁷ World Health Organisation, World Report on Violence and Health. Geneva 2002

²²⁸ Randy Thornhill and Craig T. Palmer, "Why men rape," in New York Academy of sciences, 2000

²²⁹ Security Council Resolution 1820 (2008), Adopted by the Security Council on 19 June 2008.

tempted to devise an overall military operation that includes male soldiers' sexual assault of women.²³⁰

When sexual violence is applied in such a manner on a people, its impact is two-fold: "it dishonours women and by implication serves as a symbolic castration of their men."²³¹

In Rwanda, during the genocide of 1994, sexual violence was employed to accomplish the genocidal intent, that is, to exterminate the Tutsi group. Tutsi women were targeted because they symbolised both the pride of the Tutsi ethnic group and because they, as women, were seen as potential carriers of the enemy. In order to exterminate, humiliate, debase and totally shatter the enemy, sexual violence was applied.

The consequences of sexual violence, as seen above, are grave and far reaching. There is therefore need for the international community to provide redress for victims of such bestial activities and ensure that punishment of perpetrators takes effect in order to end impunity for sexual violence. The next chapter will therefore consider in more detail the manner in which international humanitarian law has evolved in the aftermath of the Rwanda Genocide particularly as developed and expounded by the International Criminal Tribunal for Rwanda to respond to crimes of sexual violence.

²³⁰ Cynthia Enloes (2000) as quoted in Elizabeth Jean Wood "Sexual violence during war: Explaining variation," a paper presented at the Order, Conflict and Violence Conference at Yale University, April 30- May 1, 2004.

²³¹ Gerder Lemer, The Creation of Patriarchy (Oxford: Oxford University Press, 1986), page 80.

CHAPTER FOUR

4.0 THE ICTR'S CONTRIBUTION TO THE EVOLVING SEXUAL VIOLENCE JURISPRUDENCE IN INTERNATIONAL HUMANITARIAN LAW

4.1 INTRODUCTION

This chapter explores the International Criminal Tribunal for Rwanda (ICTR)'s contribution to the evolving sexual violence jurisprudence in international humanitarian law. Just about a year after the International Criminal Tribunal for the former Yugoslavia (ICTY) was set up in May 1993 to try persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia,²³² the ICTR was set up in November 1994 by the United Nations acting under a request from the Rwandan government.²³³ These two contemporaneous ad hoc tribunals have affirmed and developed the viability of international humanitarian law mechanisms after a hiatus of more than 50 years since the Nuremberg and Tokyo Tribunals as they have managed to hold violators of international humanitarian law accountable. The tribunals have revitalized international humanitarian law jurisprudence that had been in abeyance since the Nuremberg and Tokyo Tribunals.²³⁴ And more relevant to our thesis, the tribunals have developed a valuable source of sexual violence jurisprudence, as shall be seen below.

Save for minor nuances, the two tribunals have similar areas of jurisdiction and their rules of procedure and evidence are the same. And more interesting the ad hoc tribunals have one and the same Appeals Chamber and at one time there was just one prosecutor for both tribunals. Even though the ICTR jurisprudence will be the main focus of this chapter, the jurisprudence of the ICTY will be referred to several times as the two tribunals in practice, as shall be seen below, kept referring to each other's precedents and in some sense consolidating each other. Therefore, even though the two tribunals are distinct entities, their jurisprudence cannot be completely analysed in isolation from each other.

This chapter is divided into four parts. The first part gives a brief overview of the ICTR, the second part discusses two elements of the Rules of Procedure and Evidence of the ICTR that relate to sexual violence, the third part will discuss the substantive international humanitarian law crimes that relate to sexual violence over which the ICTR has jurisdiction and the fourth part shall be the conclusion to the chapter.

²³² See Security Council Resolution 827 of May 1993. See also William A. Schabas, An Introduction to the International Criminal Court, Second Edition (Cambridge: Cambridge University Press, 2004), p.11

²³³ Security Council Resolution 955 of November 1994.

²³⁴ Richard Dicker and Elise Keppler, "Beyond The Hague: The Challenge of International Justice," Human Rights Watch, 2004.

4.2 OVERVIEW OF THE TRIBUNAL

As stated above the, ICTR was created by the Security Council of the United Nations acting under Chapter Seven of the United Nations Charter. The ICTR is governed by its statute²³⁵ and its Rules of Procedure and Evidence.²³⁶ The ICTR has competence to:

Prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda or Rwandan citizens responsible for such violations committed in territory of neighbouring states between 1 January 1994 and 31 December 1994.²³⁷

More specifically the tribunal is vested with power to adjudicate over the crimes of Genocide,²³⁸ Crimes against humanity,²³⁹ and violations of common Article 3 and of Protocol II.²⁴⁰

4.3. RULES OF PROCEDURE AND EVIDENCE AS THEY RELATE TO CRIMES OF SEXUAL VIOLENCE

The ICTR, unlike the Tokyo and Nuremberg Tribunals, has incorporated in its Rules of Procedure and Evidence provisions that are sensitive to the needs of sexual violence victims. Two of the rules more relevant are those that relate to witness protection and to the non-requirement of corroboration of testimony in order to convict for sexual violence offences. It is these two rules that shall be discussed here.

4.3.1 Witness Protection

The Statute of the ICTR provides:

The International Tribunal for Rwanda shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of an in camera proceedings and the protection of the victim's identity.²⁴¹

Pursuant to Article 21 of the ICTR Statute, Rule 34 notes:

- (A) There shall be set up under the authority of the Registrar a victims and witnesses support unit consisting of qualified staff to:
- (i) Recommend the adoption of protection measures for victims and witnesses in accordance with Article 21 of the statute;

²³⁵ Statute of the International Criminal Tribunal for Rwanda. Adopted 8 November 1994.

²³⁶ Rules of Procedure and Evidence Adopted 5 July 1995.

²³⁷ Article 1, Statute of the International Criminal Tribunal for Rwanda.

²³⁸ Ibid, Article 2.

²³⁹ Ibid, Article 3.

²⁴⁰ Ibid, Article 4.

²⁴¹ Article 21, Statute of the ICTR

- (ii) Ensure that they receive relevant support, including physical and psychological rehabilitation, especially counselling in cases of rape and sexual assault; and
- (iii) Develop short term and long term plans for the protection of witnesses who have testified before the tribunal and who fear a threat to their life, property or family.

(B) A gender sensitive approach to victims and witnesses protective and support measures should be adopted and due consideration given, in the appointment of staff within this unit, to the employment of qualified women.²⁴²

As shown above in the preceding chapter, victims of sexual violence, apart from the physical scars they may have to live with, also in the aftermath of the conflict face the problem of social ostracism. If it is known that one has been a victim of sexual violence that significantly, for example, reduces the chances of that person finding a marriage partner.

Therefore these provisions on witnesses and victims protection were incorporated in order not just to shield victims and witnesses from reprisals but also to shield them from public exposure and also to provide many of them with facilities for counselling and relief of trauma. The Victims and Witnesses Support Unit of the ICTR has paid special attention to providing physical and psychological support to victims and witnesses, and, above all, it has been monitoring the security of the witnesses and victims who intend to testify or may have testified before the Tribunal.²⁴³ A total of 280 witnesses in 2007 were offered special protection, and one prosecution witness was relocated.²⁴⁴

The most common form of witness protection offered to witnesses has been non-disclosure of the identity of the victim or witness to the public which practice was used in the Akayesu case.²⁴⁵ To further enhance the protection of witnesses the ICTR has also allowed the use of closed-circuit television so that the victim does not need to see the accused.²⁴⁶

²⁴² Rule 34, Rules of Procedure and Evidence for the International Criminal Tribunal for Rwanda, 2008. Rule 34 of the Rules of Procedure and Evidence Adopted in 1995 initially read: "(A) There shall be set up under authority of the registrar a Victims and Witnesses Unit consisting of qualified staff to: (i) recommend protective measures for victims and witnesses in accordance with Article 21 of the Statute; (ii) provide counselling and support for them, in particular in cases of rape and sexual assault, and (iii) develop short and long term plans for the protection of witnesses who have testified before the Tribunal and who fear a threat to their life, property or family. (B) Due consideration shall be given, in the appointment of staff, to the employment of qualified women."

²⁴³ Paragraph 71, Twelfth Annual Report of the ICTR, 21 August 2007.

²⁴⁴ Ibid

²⁴⁵ Report of the Special Rapporteur on Violence Against Women, its Causes and its Consequences, Ms Radhika Coomaraswamy, UN Doc. E/CN.4/1998/54. 26 January 1998.

²⁴⁶ Ibid

Apart from witnesses and victims protection offered by the Victims and Witnesses Support Unit pursuant to Rule 34, the parties, under exceptional circumstances, are mandated to apply to a trial chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal. Rule 69 provides:

(A) In exceptional circumstances, either of the parties may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until the chamber decides otherwise;

(B) In the determination of protective measures for victims and witnesses, the trial chamber may consult the Victims and Witnesses Support Unit;

(C) Subject to Rule 75, the identity of the victim or witness shall be disclosed within such time as determined by Trial Chamber to allow adequate time for preparation of the Prosecution and Defence.²⁴⁷

Though this protection afforded to victims and witnesses is of a general nature, it assumes special significance for victims of sexual violence as being a victim of sexual violence carries substantial societal stigma and almost invariably leads to discrimination and ostracism, as demonstrated in chapter two.

4.3.2 Corroboration in Sexual Violence Cases

Many common law jurisdictions have or had in their rule of evidence a requirement that testimonies of sexual assaults were required to be corroborated before a verdict of guilty could be entered, while the civil law jurisdictions have had the general evidence rule of *unus testis, nullus testis* (one witness is no witness) whereby the testimony of one witness is inadmissible unless it is corroborated.²⁴⁸ In a remarkable development, the ICTR (and its ICTY contemporary) has departed from the requirement for corroboration in all cases of sexual assault, and went further to undo the practice in many jurisdictions of cross examining a witness about his or her sexual history or conduct.

Rule 96 provides:

In cases of sexual assault:

²⁴⁷ Rule 69, Rules of Procedure and Evidence for the International Criminal Tribunal for Rwanda 2008. When adopted in 1995 Rule 69 read: "(A) In exceptional circumstances, the Prosecutor may apply to a trial chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the tribunal (B) In the determination of protective measures for victims and witnesses, the trial chamber may consult the Victims and Witnesses Unit; (C) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence."

²⁴⁸ See *The Prosecutor v. Jean Paul Akayesu* Case NO. ICTR-96-4-T Judgment Decision of 2 September 1998, paragraph 132; see also *Prosecutor v. Dusko Tadic aka DULE* Case NO. IT-94-1-T Judgment of 07 May 1997, paragraph 535.

- (i) Notwithstanding Rule 90(c), no corroboration of the victim's testimony shall be required;
- (ii) Consent shall not be allowed as a defence if the victim:
 - (a) Has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression; or
 - (b) Reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;
- (iii) Before evidence of the victim's consent is admitted, the accused shall satisfy the trial chamber in camera that the evidence is relevant and credible;
- (iv) Prior sexual conduct of the victim shall not be admitted in evidence or as a defence.²⁴⁹

As regards corroboration, the ICTR has vehemently defended the rule against many attempts to undo it.²⁵⁰ For example, in *Kayishema*²⁵¹ the Appeal Chamber was faced with an argument by the accused's defence that the testimony of a witness alleging injury without furnishing a medical report in corroboration should be excluded from evidence.²⁵² The Appeal Chamber rejected the argument and held that the testimony of a witness on a material fact may be accepted as evidence without the need for corroboration.²⁵³

The significance and purpose of this rule was succinctly stated by the trial chamber in *Akayesu*,²⁵⁴ citing with approval the decision of *Tadic*:²⁵⁵

²⁴⁹ Rule 96, Rules of Procedure and Evidence for the ICTR, 2008.

²⁵⁰ In *The Prosecutor v. Jean Paul Akayesu* Case NO. ICTR-96-4-T Judgment Decision of 2 September 1998, paragraph 135, the trial chamber stated: "in view of the above the chamber can rule on the basis of a single testimony provided such testimony is, in its opinion, relevant and credible." In *The Prosecutor v. Clement Kayishema and Obed Ruzindana* Case NO. ICTR-95-1-T Judgment of 21 May 1999, paragraph 80, the tribunal stated that "corroboration of evidence is not a legal requirement to accept a testimony." In *The Prosecutor v. Alfred Musema* Case NO. ICTR-96-13-A Judgment and Sentence of January 2000, paragraph 43, the tribunal held that: "the chamber may rule on the basis of a single testimony if in its opinion, that testimony is relevant and credible." In *The Prosecutor v. Juvenal Kajelijeli* case NO. ICTR-98-44A-T Judgment and Sentence of 1 December 2003, paragraph 41, the tribunal ruled that "corroboration of evidence is not a customary rule of international law and as such should not be ordinarily required by the international tribunal." And finally in *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda* Judgment and sentence of 6 December 1999, paragraph 18, the trial chamber held that "pursuant to Rule 96(i) of the Rules, no corroboration of the victim's testimony is required in the case of rape and sexual violence."

²⁵¹ *The Prosecutor v. Clement Kayishema and Obed Ruzindana* ICTR-95-1-A Appeal Judgment of 1 June 2001.

²⁵² *Ibid*, paragraph 154.

²⁵³ *Ibid*, paragraph 154.

²⁵⁴ *The Prosecutor v. Jean Paul Akayesu* Case NO. ICTR-96-4-T Judgment decision of 2 September 1998.

²⁵⁵ *The Prosecutor v. Dusko Tadic* aka "DULE" Case NO. IT-94-1-T Judgment of 7 May 1997.

The provisions of this Rule, which apply only to cases of testimony by victims of sexual assault, stipulate that no corroboration shall be required. In the Tadic judgment rendered by the ICTY, the trial chamber ruled that this sub-rule accords to the testimony of victims of sexual assault the same presumption of reliability as the testimony of victims of other crimes, something which had long been denied to victims of sexual assault in common law.²⁵⁶

Sometimes the defence in many cases involving sexual violence ingeniously tried to reinstate the corroboration rule by arguing that testimonies of many victims and witnesses were replete with inaccuracies and contradictions between pre-trial statements and oral evidence adduced during trial. For example, in Akayesu²⁵⁷ the defence vehemently tried to impugn the testimony of witness J arguing that her case was only of interest to psychiatrists and of no interest to justice.²⁵⁸ It was the testimony of J that she had lived in a tree for one week after her family were killed and her sister raped while several months pregnant. Noting some inconsistencies, the defence had argued that the testimony (being uncorroborated) was simply not credible but rather the product of fantasy.²⁵⁹

In dismissing the defence argument, the trial chamber explained that the majority of witnesses who appeared before the chamber were eye-witnesses whose testimonies were based on events they had seen or heard in relation to the acts alleged in the indictment.²⁶⁰ The chamber observed that during the trial, for a number of witnesses, there appeared to be contradictions or inaccuracies between, on the one hand, the content of their testimonies under solemn declaration to the chamber, and on the other hand, their earlier statements to the prosecution or the defence. The chamber was of the view that this alone is not a ground for believing that the witnesses gave false testimony. It argued that some testimony is based mainly on memory and sight, two human characteristics which often deceive the individual, this criticism is to be expected, and therefore testimony is rarely exact as to the events experienced. It was the intimate view of the chamber that to deduce from any resultant contradictions and inaccuracies that there was false testimony, would be akin to criminalizing frailties in human perception.²⁶¹

In Musema²⁶² the trial chamber succinctly stated why it would not impeach the uncorroborated and inconsistent testimony of victims of sexual violence:

²⁵⁶ The Prosecutor v. Jean Paul Akayesu Case NO. ICTR-96-4-T Judgment decision of 2 September 1998, paragraph 134.

²⁵⁷ Ibid

²⁵⁸ Ibid, paragraph 42.

²⁵⁹ Ibid, paragraph 42.

²⁶⁰ Ibid, paragraph 140.

²⁶¹ Ibid, paragraph 140.

²⁶² The Prosecutor v. Alfred Musema Case NO. ICTR-96-13-A Judgment and Sentence of 27 January 2000.

Many of the witnesses who testified before the chamber in this case have seen or have experienced terrible atrocities. They, their family or their friends have, in many cases, been the victims of such atrocities. The trauma that may have arisen, and may continue to arise, from such experiences is a matter of grave concern to the chamber. The chamber notes that recounting and revisiting such painful experiences is likely to be a source of great pain to the witness, and may also affect her or his ability fully and adequately to recount the relevant events in a judicial context. The chamber has, accordingly, considered the testimony of these witnesses in this light.²⁶³

4.4 SUBSTANTIVE JURISPRUDENCE ON SEXUAL VIOLENCE

The ICTR was vested with competence to try the offences of Genocide,²⁶⁴ Crimes against Humanity²⁶⁵ and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.²⁶⁶ In analysing the ICTR's contribution to substantive jurisprudence in relation to sexual violence, the analysis will be based on these offences over which the Tribunal has jurisdiction.

4.4.1 Sexual Violence as Genocide

What constitutes genocide is defined in the ICTR Statute as:

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- a. Killing members of the group;
- b. Causing serious bodily or mental harm to members of the group;
- c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d. Imposing measures intended to prevent births within the group;
- e. Forcibly transferring children of the group to another group.²⁶⁷

In the Akayesu²⁶⁸ case the ICTR made history when it held that acts of sexual violence could and in fact did constitute Genocide.²⁶⁹ The accused, Jean Paul Akayesu, was bourgmestre of Taba region in Rwanda at the time of the genocide. During the genocide, while seeking refuge at the bureau communal, female displaced Tutsi civilians were regularly taken by

²⁶³ Ibid, paragraph 100.

²⁶⁴ Article 2, Statute of the ICTR

²⁶⁵ Ibid, Article 3.

²⁶⁶ Ibid, Article 4.

²⁶⁷ Article 2(2), Statute of the ICTR

²⁶⁸ The Prosecutor v. Jean Paul Akayesu Case NO. ICTR-96-4-T Judgment Decision of 2 September 1998.

²⁶⁹ Ibid, paragraphs 732 and 733.

armed militia and communal police and subjected to various forms of sexual violence including rape.²⁷⁰ Akayesu knew about these acts and at times was present when they were being committed.²⁷¹ Taking into account the general context of genocidal violence against the Tutsi population in which these acts of sexual violence occurred, the trial chamber held that rape and other inhumane acts of sexual violence were committed as part of the systematic violence aimed at exterminating the Tutsi population, and that sexual violence in fact did contribute towards physical and psychological destruction of the Tutsi.²⁷² This jurisprudence has been upheld in subsequent such cases as Gacumbitsi²⁷³ and more recently in Rukundo.²⁷⁴

In analysing what constitutes genocide in relation to sexual violence, we shall do so by considering first the mens rea of Genocide and second the actus reus of genocide.

Mens Rea of Genocide

Before analysing what the ICTR considered to be what constitutes mens rea in the case of genocide, it is worthy calling to mind that the Genocide Convention which was adopted in 1948, remained dormant in international law for almost fifty years until the ICTR Judgment in the case of Akayesu.²⁷⁵ Akayesu was the first case since the adoption of the Genocide Convention that an international tribunal made a judicial finding of the element of the crime of genocide.²⁷⁶

The crime of genocide is distinct from other crimes inasmuch as it requires a special intent or *dolus specialis* as mens rea. This special intent in genocide is “the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”²⁷⁷ The determination of mens rea in a case of genocide requires, first, that it must be established that a person who killed or caused serious bodily or mental harm to another person, did so on the basis of the victim’s membership in a protected group; and secondly, it must be established that the perpetrator’s intent was to destroy that group as such in whole or in part.²⁷⁸

²⁷⁰ Ibid, paragraph 452.

²⁷¹ Ibid, paragraph 452.

²⁷² Ibid, paragraphs 695 and 731.

²⁷³ The Prosecutor v. Sylvester Gacumbitsi Case NO. ICTR-2001-64-T Judgment and Sentence of 17 June 2004, paragraphs 292 and 293.

²⁷⁴ The Prosecutor v. Emmanuel Rukundo Case NO. ICTR-2001-70-T Judgment of February 2009, paragraph 576.

²⁷⁵ Justice Hassan Bubacar Jallow, “The International Criminal Tribunal for Rwanda: Contribution to Human Rights Jurisprudence.” (undated).

²⁷⁶ Ibid

²⁷⁷ The Prosecutor v. Jean Paul Akayesu Case NO. ICTR-06-4-T Judgment of 2 September 1998, paragraph 498. See also Prosecutor v. Clement Kayishema and Obed Ruzindana Case NO. ICTR-95-1-T Judgment of 21 May 1999, paragraph 91.

²⁷⁸ The Prosecutor v. Laurent Semanza Case NO. ICTR-97-20-T Judgment and Sentence of 15 May 2003, paragraph 312.

It is also the view of the ICTR that even though a specific plan to destroy would not constitute an element of genocide, it would nevertheless seem that it is improbable to carry out genocide without such a plan, or organisation.²⁷⁹ Citing the authors Morris and Scharf, the ICTR noted that:

It is virtually impossible for the crime of genocide to be committed without some direct or indirect involvement on the part of the state given the magnitude of this crime.²⁸⁰

The ICTR acknowledged that it might be difficult to find explicit manifestations of intent by the perpetrator. However, the perpetrator's actions as well as the surrounding circumstances under which the perpetrator acted could provide sufficient evidence of intent as the ICTR trial chamber in Akayesu observed:

Intent is a mental factor which is difficult, even impossible to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against the same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of membership of a particular group, while excluding the members of other groups can enable the chamber to infer the genocidal intent of a particular act.²⁸¹

Actus Reus of genocide

The actus reus of the crime of genocide constitutes the perpetration, by commission or omission, of the acts enumerated in sub-paragraph (2) of article 2 of the ICTR statute, namely (a) killing members of the group, (b) causing serious bodily and mental harm to members of the group, (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, (d) imposing measures intended to prevent births within the group, (e) forcibly transferring children of the group to another group.

²⁷⁹ The Prosecutor v. Clement Kayishema and Obed Ruzindana Case NO. ICTR-95-1 Judgment of 21 May 1999, paragraph 94.

²⁸⁰ Ibid, paragraph 94.

²⁸¹ The prosecutor v. Jean Paul Akayesu Case NO. ICTR-96-4-T Judgment Decision of 2 September 1998, paragraph 498.

With the exception of Article 2(2)(a) of the ICTR statute (killing members of the group) and Article 2(2)(e) Of the ICTR statute (forcibly transferring children of the group to another group), the other enumerated constitutive elements of the crime of genocide were stated to be capable of commission by sexual violence by the ICTR. The remaining three enumerated elements will now be considered in relation to sexual violence.

(i) Causing serious bodily or mental harm to members of the group

The ICTR has made it clear that “serious bodily or mental harm” does not necessarily mean that the harm is permanent or irremediable.²⁸² However, the ICTR trial chambers have been unanimous in holding that sexual violence, rape or sexual mutilations constitutes “serious bodily and mental harm” and therefore an element of committing the crime of genocide.²⁸³ In the case of Sylvester Gacumbitsi²⁸⁴, for example, the accused publicly instigated the rape of witness TAQ and seven other women of the Tutsi ethnic group. The trial chamber found that these rapes caused serious physical harm to the victims and consequently to members of the Tutsi ethnic group.²⁸⁵ Accordingly, the trial chamber found Gacumbitsi guilty of genocide based on those rapes.²⁸⁶

In the Akayesu case, the ICTR trial chamber held that rape and other forms of sexual violence were systematically perpetrated against the Tutsi women, on the basis of their membership of the Tutsi tribe.²⁸⁷ This conclusion is reinforced by the testimony of eye witnesses present during the Rwandan Genocide of 1994. Romeo Dallaire, former United Nations peace keeping force commander in Rwanda during the time of the genocide, testified to having observed what seemed to indicate massive perpetration of sexual violence against Tutsi women. He stated:

...we could notice on many sites, sometimes very fresh- that is, I am speaking of 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 material were crushed or implanted into their vaginas; their breasts were cut off and their faces, were in many cases, still the eyes were open and there was like a face that seemed

²⁸² Ibid, paragraph 502; see also the Prosecutor v. Clément Kayishema and Obed Ruzindana Case NO. ICTR-95-1-T Judgment of 21 May 1999, paragraph 108; the Prosecutor v. Alfred Musema Case NO. ICTR-96-13-A Judgment and Sentence of 27 January 2000, paragraph 156; The Prosecutor v. Georges Anderson Nderubumwe Rutaganda Judgment and Sentence of 6 December 1999, paragraph 51.

²⁸³ See for example Prosecutor v. Kayishema and Obed Ruzindana Case NO. ICTR-95-1-T Judgment of 21 May 1999, paragraph 108; The Prosecutor v. Alfred Musema Case NO. ICTR-96-13-A Judgment and Sentence of 27 January 2000, paragraph 156; The Prosecutor v. Georges Anderson Nderubumwe Rutaganda Judgment and Sentence of 6 December 1999, paragraph 51.

²⁸⁴ The Prosecutor v. Sylvester Gacumbitsi Case NO. ICTR-2001-64-T Judgment and Sentence of 17 June 2004.

²⁸⁵ Ibid, paragraph 292.

²⁸⁶ Ibid, paragraph 293.

²⁸⁷ The Prosecutor v. Jean Paul Akayesu Case NO. ICTR-96-4-T Judgment of 2 September 1998, paragraph 732.

horrified or something...there were, I would say generally at the sites you could find younger girls and young women who had been raped.²⁸⁸

A Month later Dallaire's assistant, Major Brent Beardsley testified before the ICTR:

...when they killed women it appeared that the blows that had killed them were aimed at sexual organs, either breasts or vaginas; they had been deliberately swiped or slashed in those areas...there was a great deal of what we came to believe was rape, where the women's bodies or clothes would be ripped off their bodies, they would be lying back in a back position, their legs spread, especially in the case of very young girls. I'm talking girls as young as six, seven years of age, their vaginas would be split and swollen from obviously multiple gang rape, and they would have been killed in that position.²⁸⁹

Having heard such and many more testimonies from witnesses and actual victims of sexual violence, it was imperative for the ICTR to conclude that: "sexual violence was a step in the process of destruction of the Tutsi group- destruction of the spirit, of the will to live, and of life itself."²⁹⁰

The trial chamber found that in most cases, the rapes of Tutsi women were accompanied with intent to kill those women as many rapes were perpetrated near mass graves where women were taken to be killed. Consequently the tribunal took the view that it was clear that the acts of sexual violence amounted to serious bodily and mental harm committed against the Tutsi people.²⁹¹

- (ii) Deliberately Inflicting on the Group Conditions of Life Calculated to bring about its physical Destruction in whole or in Part

Under Article 2(2)(c) of the ICTR statute "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" is an element of the crime of genocide. The trial chamber in Akayesu held that the expression deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, should be construed as the methods of destruction by which the perpetrator does not immediately kill members of the group, but which, ultimately, seek their physical destruction.²⁹² Traditionally this was thought to include starving a group of people, reducing required medical services below a minimum and withholding reasonable

²⁸⁸ As cited in Binaifer Nowrojee, "Your Justice is Too Slow: Will the ICTR Fail Rwanda's Rape Victims?" Occasional Paper NO. 10, United Nations Institute for Social Development, November 2005.

²⁸⁹ Ibid

²⁹⁰ The Prosecutor v. Jean Paul Akayesu Case NO. ICTR-96-4-T Judgment Decision of 2 September 1998, paragraph 732.

²⁹¹ Ibid, paragraph 733.

²⁹² The Prosecutor v. Jean Paul Akayesu Case NO. ICTR-96-4-T Judgment Decision of 2 September 1998, paragraph 505.

living conditions for a reasonable period, provided these would lead to the destruction of the group in whole or in part.²⁹³ In an interesting development, the ICTR included rape and other forms of sexual violence as some of the conditions that this strand of genocide would envisage.²⁹⁴ No doubt this holding is given credence by instances highlighted in the previous chapter such as where a woman would be gang raped and left to die or sharp objects inserted into the genitalia of a woman and left to die or where a woman is deliberately raped by people who were aware that they had HIV with the hope that the victim may catch the infection and die slowly.

(iii) Imposing Measures Intended to Prevent Births Within the Group.

Under Article 2(2)(d) of the ICTR statute imposing measures intended to prevent births within the group is an element of the actus reus of genocide. In *Akayesu* the trial chamber was of the view that Tutsi women in many instances suffered sexual violence because Rwanda is a patrilineal society so women were viewed in a way as potential carriers of the enemy. In order, therefore, to prevent the women from bringing forth Tutsi offspring, Tutsi women suffered sexual violence.²⁹⁵ On this account even Hutu women impregnated by a Tutsi were considered to be carriers of the enemy and therefore had to suffer sexual violence.²⁹⁶ The accused *Akayesu*, in support of such action, had publicly stated that if a Hutu woman were impregnated by a Tutsi man, such woman had to be found in order for the pregnancy to be aborted.²⁹⁷ In justification of this proposition *Akayesu* cited a common Rwandese proverb which states that “*iyi inzoka yiritsye kugisabo intakundi bigenda barakimena*” (to mean if a snake wraps itself round a calabash, there is nothing that can be done, except to break the calabash).²⁹⁸

In such a context the ICTR in *Akayesu* held that measures intended to prevent birth within the group should be construed as sexual mutilation, the practice of forced sterilisation, forced birth control, separation of sexes and prohibition of marriages.²⁹⁹ Further the tribunal opined that in a patriarchal society such as Rwanda, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within the group would be a case where, during rape, a woman of the affected group is deliberately impregnated by a man of another group, with the intent to have her give

²⁹³ *The Prosecutor v. Clement Kayishema and Obed Ruzindana* ICTR-95-1-T Judgment and Sentence of 21 May 1999, paragraph 116.

²⁹⁴ *Ibid*, paragraph 116.

²⁹⁵ *The Prosecutor v. Jean Paul Akayesu* Case NO. ICTR-96-4-T Judgment decision of 2 September 1998, paragraph 111.

²⁹⁶ *Ibid*, paragraph 121.

²⁹⁷ *Ibid*, paragraph 121.

²⁹⁸ *Ibid*, paragraph 121.

²⁹⁹ *Ibid*, paragraph 507. See also *The Prosecutor v. Alfred Musema* Case NO. ICTR-96-13-A Judgment and sentence of 27 January 2000, paragraph 158; *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda* Judgment and sentence of 6 December 1999, paragraph 53.

birth to a child who will consequently not belong to its mother's group.³⁰⁰ Such a situation is well exemplified by certain facts of the Kunarac³⁰¹ case. In one instance the accused Kunarac raped a Muslim woman and told her that from now on she would give birth to Serb children.³⁰² The trial chamber narrated what Kunarac had done to the Muslim woman:

He then told her to undress and forced her to touch his penis with her hand, telling her she would enjoy being "fucked by a Serb." He complied and he raped her vaginally. She put her hands across her eyes out of shame and fear, but he told her to look at him....while she was being raped, the other two soldiers watched from the car, laughing. Dragoljub Kunarac told them to wait for their turn. When he had finished, the next soldier raped her orally and vaginally. After he had his way with the witness, Kunarac told her that she would carry "a Serb baby, but never know who the father was."³⁰³

Furthermore, the trial chamber in Akayesu noted that measures intended to prevent births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.³⁰⁴

(iv) Can Sexual Violence Lead to the Wiping out of a Protected group? The case of Emmanuel Rukundo.

As the ICTR continued to flesh out the bare bones of international humanitarian law which had been in abeyance since the Nuremberg and Tokyo Trials in the aftermath of the Second World War, sometimes it was confronted by extremely novel cases. Such was the situation in the case of Emmanuel Rukundo³⁰⁵ in which the ICTR had to consider whether a sexual assault which does not amount to rape could in fact amount to genocide.

In Akayesu it was stated, without further elaboration, that:

contrary to public belief, the crime of genocide does not imply the actual extermination of a group in its entirety, but is understood as such once any one of the acts mentioned in Article 2(2)(a) is committed with specific intent to destroy in whole or in part a national, ethnical, racial or religious group.³⁰⁶

³⁰⁰ The Prosecutor v. Jean Paul Akayesu Case NO. ICTR-96-4-T Judgment Decision of 2 September 1998, paragraph 507.

³⁰¹ The Prosecutor v. Dragoljub Kunarac Radomir Kovac and Goran Vukovic Case NO. IT-96-23-T and IT-96-23/1-T Judgment of 22 February 2001.

³⁰² Ibid, paragraph 322.

³⁰³ Ibid, paragraph 342.

³⁰⁴ The Prosecutor v. Jean Paul Akayesu case NO. ICRT-96-4-T Judgment Decision of 2 September 1998, paragraph 508.

³⁰⁵ The prosecutor v. Emmanuel Rukundo Case NO. ICTR-2001-70-T Judgment of 27 February 2009.

³⁰⁶ The prosecutor v. Jean Paul Akayesu Case NO. ICTR-96-4-T Judgment decision of 2 September 1998.

This is generally understood as meaning that once one, with appropriate means ready, embarks on committing genocide, one does not necessarily have to succeed in order for it to be genocide.

It was in Rukundo that this jurisprudence had to be developed further. To put the tribunal's decision in context a few facts of the Rukundo case will have to be narrated here. Emmanuel Rukundo was ordained a Catholic priest on 28 July 1991 and was later in 1993 appointed chaplain for the Rwanda Armed Forces (RAF).³⁰⁷ He was charged with, inter alia, the offence of genocide, on the basis that on or about 15 May 1994 at the St. Leon Minor Seminary, Emmanuel Rukundo, armed and escorted by an armed soldier, took a young Tutsi refugee woman (Code named witness CCH) into his room, locked the door, and sexually assaulted her thereby causing her serious mental harm.³⁰⁸

The testimony of victim CCH was not corroborated but was admitted as credible by the trial chamber. It was the evidence of CCH, as admitted by the trial chamber, that when they were in the room (the victim and Rukundo) Rukundo forced her to lie on the bed, opened the zipper of his trousers and lay on top of her. CCH did not consent to lying on the bed. At one point CCH said that Rukundo put his pistol on the table next to the bed. He tried to force CCH to remove her rose-coloured skirt. Although she resisted, he pulled it down. He caressed her hair without speaking, kissed her, but never actually touched her vagina. Witness CCH asked Rukundo what she should do if she became pregnant and did not die, and he responded that he was only asking her to allow them to make love. She told Rukundo that she could not have sexual intercourse with him, and he told her that if she would, he would never forget her.³⁰⁹

Rukundo tried to spread her legs, but when she continued to resist, Rukundo gave up trying to have sexual intercourse. He lay on top of her, continued to rub himself against her body, squeezed her tightly in his arms until she felt him shake or shiver and then lose his erection. After this Rukundo let go of her, took a bottle of beer, sipped it, gave it to witness CCH who sipped it and then left the room. Rukundo said bye to CCH and told her that he might be back again another time.³¹⁰

CCH knew that Rukundo was a Catholic priest at the time of the incident. She felt that ultimately Rukundo took advantage of her position of weakness by trying to have sexual intercourse with her and trying to dishonour her. She said she never consented to the sexual actions, or that she never reacted in a way that might give him the impression of consent.³¹¹

³⁰⁷ The Prosecutor v. Emmanuel Rukundo Case NO. ICTR-2001-7-T Judgment of 27 February 2009.

³⁰⁸ Ibid, paragraph 14.

³⁰⁹ Ibid, paragraph 366.

³¹⁰ Ibid, paragraph 366.

³¹¹ Ibid, paragraph 366.

Having heard the narrated facts, the trial chamber found that Rukundo sexually assaulted CCH.³¹²

Before holding that Rukundo's sexual violence against CCH constituted an element of the crime of genocide, the trial chamber gave a detailed analysis of what led to its decision. The chamber started, citing Akayesu, by recalling that rape and sexual violence do constitute genocide in the same way as any act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group targeted as such.³¹³ It adopted the definition of sexual violence coined in Akayesu which is that sexual violence is:

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.³¹⁴

In order for the act of sexual violence to constitute genocide under the circumstances of the case the chamber held that it must, pursuant to Article 2(2)(b) of the ICTR statute, have caused serious bodily or mental harm to members of the group.³¹⁵

The trial chamber adopted a three tiered analysis: first, the chamber had to consider and determine whether the act against CCH was of a sexual nature; second, the tribunal had to determine whether there were coercive circumstances; and third, it had to determine whether the act, if sexual, caused CCH serious mental harm.³¹⁶

The tribunal was in no doubt that the acts in question were sexual in nature. In reaching this position the tribunal was aided by the fact that Rukundo forced sexual contact with her by opening the zipper of his trousers, trying to remove CCH's skirt, forcibly lying on top of her and caressing and rubbing himself against her until he ejaculated and lost his erection.³¹⁷

The next question the tribunal had to determine was whether the circumstances were coercive. The tribunal cited Akayesu which had held 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, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau commune.³¹⁸

³¹² Ibid, paragraph 378.

³¹³ Ibid, paragraph 379.

³¹⁴ Ibid, paragraph 379.

³¹⁵ Ibid, paragraph 379.

³¹⁶ Ibid, paragraph 380.

³¹⁷ Ibid, paragraph 381.

³¹⁸ Ibid, paragraph 382.

The trial chamber took into account the fact that many people were regularly abducted from St. Leon Minor Seminary (where CCH was picked by Rukundo) and killed; the fact that CCH was fleeing for her life and had implored Rukundo to hide her; that Rukundo instead compounded her fear by indicating that she and her family must be killed because they were Inyenzi (cockroaches) ; that at all material times Rukundo was armed; that Rukundo locked the room, forced himself upon her while she struggled to free herself from his control. The chamber considered that these events, taken together, clearly constitute coercive circumstances,³¹⁹ which effectively vitiated witness CCH's ability to consent to the sexual assault in question.³²⁰

Finally the trial chamber had to decide whether CCH as a result of the sexual assault suffered serious mental harm. The chamber listed the following eight circumstances that enabled it reach its conclusion:

1. Members of her ethnic group were victims of mass killings;
2. She and her family, fearing death in this way, sought refuge in a religious institution;
3. Upon seeing a familiar and trusted person of authority and of the church, i.e., the accused, she requested protection for herself;
4. The accused refused her the protection she had requested- he specifically threatened her family- that her family was to be killed for its association with the "inyenzi";
5. Rukundo had a firearm
6. Still hoping to be protected, witness CCH sought to ingratiate herself to Rukundo by assisting him to carry his effects into a nearby room;
7. The accused locked her in the room with him, put his firearm down nearby and proceeded to physically manhandle her in a sexual way; and
8. At the time of the incident, witness CCH was sexually inexperienced.³²¹

In the light of the totality of these circumstances the tribunal by a majority, Judge Park dissenting, found that the only reasonable conclusion from the above circumstances is that CCH suffered serious mental harm as a consequence of Rukundo's actions.³²²

Having concluded its thorough analysis the chamber held that Rukundo had the necessary intent for the commission of the offence of genocide. This was because of the general

³¹⁹ Ibid, paragraph 384.

³²⁰ Ibid, paragraph 385.

³²¹ Ibid, paragraph 385.

³²² Ibid, paragraph 389.

context of mass killings and Rukundo's actual worlds spoken to CCH prior to his assault of CCH, that her entire family had to be killed for they were assisting "inyenzi". The chamber therefore held that Rukundo had at the material time possessed the intent to destroy, in whole or in part, the Tutsi ethnic group.³²³ Accordingly, the trial chamber found that Rukundo was guilty of the crime of genocide constituted solely by the act of sexual assault on CCH.³²⁴

It must be noted, however, that there was a strong dissent by Judge Park in the Rukundo case on this finding.³²⁵ Judge Park was of the view that genocide was a crime of the most serious gravity which affects the very foundations of society and shocks the conscience of humanity. Therefore, Judge Park opined, to support a conviction for genocide, the bodily or mental harm inflicted must be of such a serious nature as to threaten its destruction in whole or in part.³²⁶ But, with due respect, the position of Judge Park seems to be at variance with the jurisprudence of both the ICTY and ICTR, as cited above, which indicates that serious harm need not be permanent or irremediable. As seen above, for example in Akayesu, instances of sexual violence such as forcing a young lady to perform gymnastics while naked were considered to have been constitutive of genocide even though it may be difficult to quantify the seriousness of the harm inflicted.

From the foregoing analysis it is now clear that genocide is not equal to the actual extermination of a whole or substantial part of the group but is committed when one, with the appropriate mens rea does an act that furthers any of the enumerated instances of the actus reus of the crime of genocide.

4.5 SEXUAL VIOLENCE AS CRIMES AGAINST HUMANITY

Crimes against humanity were recognized in the Charter of the Nuremberg Tribunal and judgment of the Nuremberg Tribunal as well as in Law No. 10 of the Control Council for Germany. Article 6(c) of the Charter of Nuremberg Tribunal defines crimes against humanity as:

...murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the chamber, whether or not in violation of the domestic law of the country where perpetrated.

Article II of Law No. 10 of the Control Council Law defined crimes against humanity as:

³²³ Ibid, paragraph 574.

³²⁴ Ibid, paragraph 576.

³²⁵ Dissenting Opinion of Judge Park in The Prosecutor v. Emmanuel Rukundo Case NO. ICTR-2001-70-T-183.

³²⁶ Ibid, paragraph 3.

Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape or other inhumane acts committed against any civilian population or persecution on political, racial or religious grounds, whether or not in violation of the domestic laws of the country where perpetrated.

For the ICTR what constitutes crimes against humanity for which it has jurisdiction is stated as follows:

The International Tribunal for Rwanda shall have 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 ground ;
- (i) Other inhumane acts.³²⁷

Unlike the Nuremberg Charter, the ICTR statute specifically names rape as a crime against humanity.

In order for a conviction to be sustained under Article 3 of the ICTR statute the trial chamber of the ICTR in Akayesu stated that there are four essential elements that must be present, namely:

- (i) The act must be inhumane in nature and character, causing great suffering, or serious injury to body or to mental or physical health;
- (ii) The act must be committed as part of a widespread or systematic attack;

³²⁷ Article 3, Statute of the ICTR.

- (iii) The act must be committed against members of the civilian population;
- (iv) The act must be committed on one or more discriminatory grounds, namely, national, political, ethnic, racial or religious grounds.³²⁸

According to the trial chamber the concept of widespread means massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims; while the concept of systematic may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources.³²⁹ There is no requirement that this policy must be adopted formally as the policy of a state.³³⁰

The Chamber considered that an act must be directed against the civilian population if it is to constitute a crime against humanity. Civilians are people who are not taking an active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed hors de combat by sickness, wounds, detention or any other cause.³³¹

Among the enumerated ways of committing the offence of crimes against humanity, Article 3(c) (enslavement), Article 3(f) (torture) and Article 3(g) (rape) have been held by the Rwandan Tribunal as capable of being committed through acts of sexual violence. It is these three elements that shall be analysed here.

(i) Enslavement

The ICTR Statute does not define what it considers to be enslavement. So far no defendant under the ICTR has been charged for crimes against humanity under the element of enslavement. However, the ICTY, whose Statute, like that of the ICTR, does not define enslavement, was confronted with the charge of enslavement in *Kunarac*,³³² arising from the fact that the accused had held certain girls in a room for several days while they continuously raped the girls and used them to do chores such as cleaning up. The Trial chamber, in trying to find a suitable definition of what would aptly constitute enslavement in international humanitarian law turned to the 1926 Slavery Convention which defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."³³³

³²⁸ The Prosecutor v. Jean Paul Akayesu Case NO. ICTR-96-4-T Judgment Decision of 2 September 1998, paragraph 578.

³²⁹ *Ibid*, paragraph 580.

³³⁰ *Ibid*, paragraph 580.

³³¹ *Ibid*, paragraph 582.

³³² The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic Case NO. IT-96-23T and IT-9623/1-T Judgment of 22 February 2001.

³³³ *Ibid*, paragraph 519.

The trial chamber adopted that definition and broadened it by indicating that under that definition, indications of enslavement include:

Elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. It is often rendered impossible or irrelevant, for example, the fear or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessary, involving physical hardship; sex; prostitution; and human trafficking.³³⁴

From the foregoing discussion it is clear that various acts of sexual violence can and do actually constitute enslavement as was the case in Kunarac.

(ii) Torture

Article 3(f) of the ICTR statute criminalizes torture as a crime against humanity. But there is no definition of what constitutes torture for which the tribunal was to have jurisdiction. Naturally the ICTR turned to international human rights law to aid its construction of what would constitute torture. In *Akayesu* the trial chamber adopted the definition of torture as given by the Convention Against Torture:

For purposes of this Convention the term torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected to have committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other persons in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.³³⁵

From international human rights law, jurisprudence linking sexual violence and torture had already started emerging before the ICTR was constituted. For example, the Special Rapporteur on torture in a 1986 report identified rape and sexual assaults as common forms

³³⁴ *Ibid*, paragraph 542.

³³⁵ Article 1 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

of torture.³³⁶ In another instance, the Inter-America Commission of Human Rights' Report on Haiti stated that the infliction of rapes on the female civilian population, was torture.³³⁷ Yet again in In the Matter of Krone, the United States Immigration's Appeal Board found that a Haitian woman who was gang raped in retaliation for her political beliefs had been persecuted and tortured.³³⁸

With such precedents from international human rights law, the ICTR had firm grounds on which to develop sexual violence jurisprudence in relation to torture as a crime against humanity under international humanitarian law.

Having adopted the definition of torture as found in the Convention Against Torture, the trial chamber in Akayesu listed the following as the essential elements of the crime of torture:

- (i) The perpetrator must intentionally inflict severe physical or mental pain or suffering upon the victim for one or more of the following purposes:
 - (a) To obtain information or a confession from the victim or a third person;
 - (b) To punish the victim or a third person for an act committed or suspected to having been committed by either of them;
 - (c) For the purpose of intimidating or coercing the victim or a third person;
 - (d) For any reason based on discrimination of any kind.
- (ii) The perpetrator was himself an official, or acted at the instigation of, or with the consent or acquiescence of, an official or person acting in an official capacity.³³⁹

Having made such an analysis, the trial chamber in Akayesu concluded that rape was torture which is a crime against humanity. It argued that like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person.³⁴⁰ It further added:

Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.³⁴¹

³³⁶ As cited in Human Rights Watch, Shattered Lives: Sexual Violence During the Rwandan Genocide and its Aftermath, September 1996.

³³⁷ Ibid

³³⁸ Ibid

³³⁹ The Prosecutor v. Jean Paul Akayesu Case NO. ICTR-96-4-T Judgment Decision of 2 September 1998, paragraph 594.

³⁴⁰ Ibid, paragraph 597.

³⁴¹ Ibid, paragraph 597.

Thus, for the ICTR, provided the key ingredients of torture enumerated above are met then rape can constitute a form of torture and consequently a crime against humanity. The ICTY, just as the ICTR, in Furundzija also held that rape is resorted to as a means of punishing, intimidating, coercing or humiliating the victim, or obtaining information, or a confession, from the victim or a third person.³⁴²

The ICTR was not confronted with a situation where the perpetrator inflicting severe pain or suffering through sexual violence was not acting in official capacity or at the instigation of some official. Such a situation confronted the ICTY in Kunarac. In Kunarac, in order to respond adequately to such a situation, the trial chamber drew a distinction between torture as a term under international human rights law and torture as a crime under international humanitarian law.³⁴³ The trial chamber drew two sharp distinctions between the two branches of law. Firstly, the chamber argued that the role and position of the state as an actor is completely different. International human rights law is born out of the abuses of the state over its citizens and out of the desire to protect the citizens from state violence. The state is the ultimate guarantor of the human rights protected and has the duty over the observance of such rights. In the event that the state defaults it could be called to account and to take appropriate measures to put an end to the violations.³⁴⁴ On the other hand, international humanitarian law places restraints on the conduct of warfare in order to diminish the effects of war on victims of hostilities. In International humanitarian law it is individuals who are accountable and individual criminal responsibility for violations of International humanitarian law does not depend on the participation of the state in the commission of the offence.³⁴⁵

Secondly, the trial chamber held that the part of international criminal law applied by the tribunal is a penal law regime which sets one party, the prosecutor, against another, the defendant; while for human rights law the respondent is the state.³⁴⁶

Having thus argued, the Kunarac trial chamber held that there are three elements of the definition of torture in the Convention Against Torture which are uncontentious and would be considered as part of customary international law. These are:

- (i) Torture consists of the infliction by act or omission, of severe pain or suffering, whether physical or mental;
- (ii) This act or omission must be intentional;
- (iii) The act must be aimed at reaching a certain goal.³⁴⁷

³⁴² The Prosecutor v. Anto Furundzija Case IT-95-17/I-T Judgment of 10 December 1998, paragraph 163.

³⁴³ The prosecutor v. Dragoljub Kunarac, Radomir Kovac and Goran Vukovic Case NO. IT-96-23/1-T Judgment of 22 February 2001.

³⁴⁴ Ibid, paragraph 470.

³⁴⁵ Ibid, paragraph 470.

³⁴⁶ Ibid, paragraph 470.

Having considered that the tribunal's statute criminalizes torture as a crime against humanity it was clear to the tribunal that the role of the state in the commission of the offence is peripheral and therefore not a pre-requisite.³⁴⁸ On that basis the tribunal held that in the field of international humanitarian law the elements of the offence of torture are, therefore, as follows:

- i. The infliction, by act or omission, of severe pain or suffering, whether physical or mental;
- ii. The act or omission must be intentional;
- iii. The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.³⁴⁹

Having reasoned this way, it was easy for the tribunal to hold that acts of sexual violence, conducted for non-official purposes and by persons not designated by the state, such as occurred in Kunarac, constituted torture. The Kunarac judgment therefore removed the official element in the definition of torture and therefore torture under international humanitarian law is now understood as being capable of being committed by private individuals. This position of the ICTY was sustained on appeal, the Appeals Chamber holding that the trial chamber was right in taking the position that the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside the framework of the Torture Convention.³⁵⁰

It is therefore international humanitarian law that acts of sexual violence, such as rape, even when conducted for private ends, provided they meet the larger framework of crimes against humanity, are recognized crimes.

(iii) Rape

Rape is criminalized as a crime against humanity under Article 3(g) of the ICTR statute. The ICTR, in Akayesu, was confronted with the first case in which an international tribunal had to consider the offence of rape as a crime against humanity. There was no definition of rape in international law on which it would rely.³⁵¹ It acknowledged, however, that rape has been defined in certain national jurisdictions as non-consensual intercourse, and may involve the

³⁴⁷ Ibid, paragraph 483.

³⁴⁸ Ibid, paragraph 485.

³⁴⁹ Ibid, paragraph 497.

³⁵⁰ The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic Case NO. IT 96-23 and IT-96-23/1-A Appeal Judgment of 12 June 2002, paragraph 148.

³⁵¹ The Prosecutor v. Jean Paul Akayesu Case NO. ICTR-96-4-T Judgment Decision of 2 September 1998, paragraph 596.

insertion of objects and/ or the use of bodily orifices not considered to be intrinsically sexual.³⁵²

Having failed to find a universally accepted definition of rape in international law, the trial chamber in Akayesu took the liberty to define rape as follows: “the tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.”³⁵³

It is noteworthy that this definition of rape is gender neutral, very conceptual and acknowledges that rape is an invasion on a person as opposed to dishonouring a person. The chamber explained the necessity of adopting such a conceptual definition arguing that it considers rape as a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of body objects and parts.³⁵⁴ The trial chamber of the ICTR in Musema concurred with the conceptual approach adopted in Akayesu for the definition of rape, and added that:

The essence of rape is not the particular details of the body parts and objects involved, but rather the aggression that is expressed in a sexual manner under conditions of coercion.³⁵⁵

While the ICTR had made such a remarkable achievement in adopting a conceptual definition of rape, the ICTY on the other hand, had seemed uncomfortable with such an approach and reverted to seeking a mechanical definition of the crime of rape involving body parts and objects.³⁵⁶

Furundzija was the first ICTY case to depart from the definition of rape as set forth in Akayesu. The trial chamber acknowledged that there is no definition of rape that can be found in international law.³⁵⁷ In order to reach at an accurate definition of rape based on the maxim “*nullum crimen sine lege stricta*” it opined that it was necessary to look to principles of criminal law common to the major legal systems.³⁵⁸ After a detailed examination of national laws and legal systems of the world on rape, the trial chamber found that although the laws of many countries specify that rape can only be committed against a woman, others provide that rape can be committed against a victim of either sex.³⁵⁹ It further stated that in most legal systems of the world (both common law and civil law) rape is considered as the forcible sexual penetration of the human body by the penis or the forcible insertion

³⁵² Ibid, paragraph 596.

³⁵³ Ibid, paragraph 688.

³⁵⁴ Ibid, paragraph 597.

³⁵⁵ The Prosecutor v. Alfred Musema Case NO. ICTR-96-13-A Judgment and Sentence of 27 January 2000, paragraph 226.

³⁵⁶ The Prosecutor v. Anto Furundzija Case No. IT-95-17/I-T Judgment of 10 December 1998, paragraphs 175 and 177.

³⁵⁷ Ibid, paragraph 175.

³⁵⁸ Ibid, paragraph 177.

³⁵⁹ Ibid, paragraph 180.

of any other object into either the vagina or the anus.³⁶⁰ But the trial chamber was at pains to accommodate forced oral sex in this framework.³⁶¹ However the trial chamber reasoned that, even if it found no uniformity in national legal the treatment of forced oral sex, it considered forced oral sex to be humiliating and degrading attack upon human dignity.³⁶² Having reached this stage the trial chamber in Furundzija defined rape as:

- (j) The sexual penetration, however slight:
 - (a) Of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
 - (b) Of the mouth of the victim by the penis of the perpetrator;
- (ii) by coercion or force or threat of force against the victim or a third person.³⁶³

In Kunarac, the ICTY was faced with a charge of rape whose circumstances were peculiar. In this case the victim and witness, DB, was threatened by the co-accused that if she did not initiate sexual intercourse with the other co-accused (Kunarac) she would be killed. Out of fear, when Kunarac arrived, the girl undressed and initiated sexual intercourse with Kunarac. Kunarac was not aware of such a prior arrangement by his co-accused.³⁶⁴

The Kunarac trial chamber accepted the mechanical definition of rape as reflected in Furundzija but sought to recast the definition in line with the circumstances of the case at hand. So it sought to “clarify” the understanding of the element of rape in paragraph (ii) of the Furundzija definition, which it considered to be too narrowly stated.³⁶⁵ It considered that holding that sexual violence would only constitute rape when accompanied by coercion or force or threat of force against the victim or third person does not take into account other factors, such as those in the Kunarac case, which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim.³⁶⁶

The Kunarac trial chamber, after a review of national jurisdictions on the offence of rape, formed the opinion that the basic principle which is truly common to these legal systems is that serious violations of sexual autonomy are to be penalized.³⁶⁷ Therefore sexual autonomy is violated whenever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant.³⁶⁸

³⁶⁰ Ibid, paragraph 181.

³⁶¹ Ibid, paragraph 182.

³⁶² Ibid, paragraph 183.

³⁶³ Ibid, paragraph 185.

³⁶⁴ Ibid, paragraphs 644 and 645.

³⁶⁵ Ibid, paragraph 438.

³⁶⁶ Ibid, paragraph 438.

³⁶⁷ Ibid, paragraph 457.

³⁶⁸ Ibid, paragraph 457.

In light of such considerations, the trial chamber defined rape under international law as the sexual penetration, however slight:

- (a) Of the vagina or anus of the victim by the penis of the perpetrator; or
- (b) The mouth of the victim by the penis of the perpetrator where such sexual penetration occurs without the consent of the victim.³⁶⁹

According to the trial chamber consent for this purpose must be given voluntarily, as a result of the victim's free will, which must be assessed in the context of the surrounding circumstances.³⁷⁰

The two definitions of rape as developed by the ICTR in *Akayesu* and as developed by the ICTY in *Furundzija* and *Kunarac* seemed irreconcilable for a long time. So subsequent trials had to choose between the two definitions, and the practice became to abandon the *Akayesu* definition. The ICTR trial chambers in *Kamuhanda*,³⁷¹ *Semanza*,³⁷² and *Kajelijeli* departed from the *Akayesu* definition.³⁷³

It was however, the ICTR which reconciled these definitions of rape under international humanitarian law which had seemed at first irreconcilable. In *Muhimana* the trial chamber of the ICTR considered that *Furundzija* and *Kunarac*, which are often construed as departing from *Akayesu*, are actually substantially aligned to the *Akayesu* definition of rape and actually provide additional details on the constituent elements of acts considered to be rape.³⁷⁴ The chamber took the view that the *Akayesu* definition and the *Kunarac* elements are not incompatible or substantially different in their application. Whereas *Akayesu* referred broadly to a "physical invasion of a sexual nature," *Kunarac* went on to articulate the parameters of what would constitute a physical invasion of a sexual nature amounting to rape.³⁷⁵ On the basis of this analysis the chamber endorsed the conceptual definition of rape established in *Akayesu*, which, in the view of the chamber, encompasses the elements set out in *Kunarac*.³⁷⁶

4.6 SEXUAL VIOLENCE AS VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II

³⁶⁹ *Ibid*, paragraph 460.

³⁷⁰ *Ibid*, paragraph 460.

³⁷¹ *The Prosecutor v. Jean de Dieu Kamuhanda* Case No. ICTR-95-54A-T Judgment of 22 January 2004, paragraph 709.

³⁷² *The Prosecutor v. Laurent Semanza* Case NO. ICTR-97-20-1 Judgment and Sentence of 15 May 2003, paragraph 345.

³⁷³ *The Prosecutor v. Juvenal Kajelijeli* Case No. ICTR-98-44A-T Judgment and Sentence of 1 December 2003, paragraph 915.

³⁷⁴ *The Prosecutor v. Mikaeli Muhimana* Case NO. ICTR-95-1B-T Judgment and Sentence of 28 April 2005, paragraph 549.

³⁷⁵ *Ibid*, paragraph 550.

³⁷⁶ *Ibid*, paragraph 551.

Pursuant to article 4 of the ICTR statute the tribunal has jurisdiction to try cases of violations of Article 3 common to the Geneva Conventions of 1949 and of Additional Protocol II of 1977. It provides:

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the protection of war victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

- (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 form of corporal punishment;
- (b) Collective punishments;
- (c) Taking hostages;
- (d) Acts of terrorism;
- (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- (f) Pillage;
- (g) 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;
- (h) Threats to commit any of the foregoing acts.³⁷⁷

Article 4(e) more specifically relates to the commission of crimes of sexual violence.

In the Akayesu case the trial chamber analysis of this provision turned much on the applicability of the provision.³⁷⁸ It was uncontested that common article 3 and Additional Protocol II extends a minimum threshold of humanitarian protection to all persons affected by a non-international conflict, a protection which was further developed and enhanced by the 1977 Additional Protocol II.³⁷⁹ What was contentious was which category of people would be held accountable for violations of these provisions. The trial chamber was of the view that these provisions are primarily addressed to persons who by virtue of their authority, are responsible for the outbreak of, or are otherwise engaged in the conduct of

³⁷⁷ Article 4 Statute of the ICTR.

³⁷⁸ The Prosecutor v. Jean Paul Akayesu Case No. ICTR-96-4-T Judgment Decision of 2 September 1998, paragraph 601.

³⁷⁹ Ibid, paragraph 601.

hostilities.³⁸⁰ Therefore the category of persons to be held in this world be limited to commanders and other members of the armed forces.³⁸¹

The chamber found that it was not established that the accused Akayesu was a member of the armed forces, that he was not legitimately mandated and expected, as a public officer to support the war efforts.³⁸² For these reasons, the trial chamber was unable to hold Akayesu liable under article 4 of the ICTR statute for his misdeeds.³⁸³

This decision of the trial chamber was the subject of appeal by the prosecution. The prosecution argued that there is no requirement for the public agent element in order to trigger the application of Article 4 of the ICTR statute.³⁸⁴ The Appeals Chamber favoured the approach of the prosecution and reversed the decision of the trial chamber. It argued that the primary object of this provision is to highlight the unconditional character of the duty imposed on each party to afford minimum protection to persons covered under that provision.³⁸⁵ It was the view of the Appeals chamber that the minimum protection provided under common Article 3 implies necessarily effective punishment on persons who violate it. It stated that international humanitarian law would be lessened and called into question if it were to be admitted that certain persons be exonerated from individual criminal responsibility for violations of common Article 3 and Additional Protocol II under the pretext that they did not belong to a specific category.³⁸⁶ The Appeals Chamber thus found the trial chamber to have erred in requiring that a special relationship be a separate condition for triggering criminal responsibility for a violation of Article 4 of the ICTR statute.³⁸⁷

4.7 CONCLUSION

When the ICTR, with its contemporary ICTY at The Hague, was established in 1994 there was not much in terms of sexual violence jurisprudence in international humanitarian law jurisprudence. The Nuremberg and Tokyo Tribunals that were set up in the aftermath of World War II left an impoverished sexual violence jurisprudence legacy such that in almost all cases where sexual violence was charged in the ICTR there were practically no precedents to inform the decisions of the tribunal. As a result the ICTR had the onerous duty to carve out appropriate jurisprudence that responded specifically to the problems it was created to address but also one which advances international humanitarian law.

The mark that will be left by the ICTR will be indelible in international humanitarian law. As seen above, it is the ICTR in Akayesu, which was the first international court to ever hold

³⁸⁰ Ibid, paragraph 630.

³⁸¹ Ibid, paragraph 630.

³⁸² Ibid, paragraph 643.

³⁸³ Ibid, paragraph 643.

³⁸⁴ The Prosecutor v. Jean Paul Akayesu Case No. ICTR-96-4-T Appeal Judgment of 1 June 2001, paragraph 427.

³⁸⁵ Ibid, paragraph 437.

³⁸⁶ Ibid, paragraph 443.

³⁸⁷ Ibid, paragraph 444.

that sexual violence constitutes both genocide and crimes against humanity. It is the ICTR which has coined the most appropriate definitions of sexual violence and rape which are hard to impeach. It has also put sexual violence on the same level as torture.

The ICTR has also developed rules of procedure and evidence that are responsive to the needs of victims of sexual violence. It departed from the practice in many jurisdictions which require sexual violence testimonies to be corroborated by providing expressly that such shall not be a requirement. This puts victims of sexual violence on the same level of reliability as victims of other crimes.

Ultimately the ICTR has shown that international law is capable of placing crimes of sexual violence on the same level as other crimes and no longer as an abstract notion of a taint (or dishonour) on an entire family.

The ICTR has tremendously demonstrated that international criminal law actually works, that it is not a mere wishful statement of lofty and detached idealisms but can be a reality and can offer redress to victims and the affected societies.

CHAPTER FIVE

5.0 CHALLENGES AND SHORT COMINGS OF THE ICTR IN HANDLING SEXUAL VIOLENCE

5.1 INTRODUCTION

This chapter offers an examination of the challenges and shortcomings of the ICTR to comprehensively reflect the seriousness of sexual violence. It chronicles outright failures, inconsistencies and glaring squandered opportunities that have characterized the ICTR in its existence of more than a decade.

The previous chapter explored at large the ICTR's massive contribution to the emerging sexual violence jurisprudence in International Humanitarian Law. In that respect its accomplishments are without doubt monumental. However, the ICTR has not been thoroughly consistent in responding to sexual violence and that has created agony in the hearts of many victims. The despair of several victims of sexual violence over the ICTR's lackadaisical handling of many situations of sexual violence is succinctly expressed in the words of one victim thus:

For those of us on the road to death, the justice will be too slow. We will be dead and no one will know our story. Our families have been killed and our remaining children are too young to know. What happened to us will be buried with us. The people for whom the Tribunal was set up are facing extinction- we are dying. We will be dead before we see any justice.³⁸⁸

In considering the challenges and shortcomings of the ICTR in handling sexual violence, this chapter will tackle them under the following sub-categories: the inept investigation and prosecution of sexual violence, the ICTR judges' lackadaisical approach to sexual violence, the faulty witness protection for victims of sexual violence, the lack of adequate remedies to redress the harm suffered by the victims of sexual violence, the failure to address sexual violence committed by the French and Rwandan Patriotic Front forces, the lack of foresight in crafting a residual mechanism that will ensure the welfare of victims of the sexual violence after the tribunal closes. It must be emphasized that the weaknesses identified do not necessarily relate to individuals but are more institutional shortcomings.

³⁸⁸ As cited in Binaifer Nowrojee, "Your Justice is too slow: will the ICTR fail Rwanda's Rape Victims?" Occasional Paper NO. 10 of the United Nations Research Institute for Social Development (November 2005).

5.2.0 INEPT INVESTIGATION AND PROSECUTION OF SEXUAL VIOLENCE

5.2.1 Sexual violence as an afterthought: no initial indictment for sexual violence

When asked for what they want from the ICTR, many Rwandan women victims of sexual violence clearly indicate that they are looking for public acknowledgment of the crimes that occurred against them. They want the record to show that they were victims of horrendous sexual violence at the hands of those who instigated and carried out the genocide.³⁸⁹ To satisfy that legitimate desire the ICTR, from investigation, prosecution and ultimately to verdict ought to have treated cases of sexual violence with seriousness proportional to the gravity of the offence and the widespread nature of the violence. But a look at the ICTR's record in that area indicates a daunting record of squandered opportunities as the Tribunal on the whole does not seem to have paid enough attention to the crimes of sexual violence.

From the beginning the ICTR never had a strategy to thoroughly investigate and prosecute sexual violence. In the first two years of its existence no indictment issued in that period contained charges of sexual violence.³⁹⁰ Considering, as exposed in chapter three, that sexual violence was so rampant and routinely carried out in public, it is an astounding record that the ICTR did not see fit to comprehensively investigate sexual violence from the beginning. Radhika Coomaraswamy, then United Nations Special Rapporteur on violence against women found this record appalling, stating:

Having heard the testimonies of so many women victims of sexual violence, the Special Rapporteur was absolutely appalled that the first indictment on the grounds of sexual violence at the International Criminal Tribunal for Rwanda (ICTR) was issued only in August 1997, and then only after heavy international pressure from women's groups.³⁹¹

Such a situation, according to the Special Rapporteur, could lead to the conclusion that the ICTR treats victims of sexual violence as "second class citizens."³⁹²

And to compound the problem, as intimated by Radhika Coomaraswamy above, the momentum to amend indictments to include charges of sexual violence was not the initiative of the ICTR prosecutor's office but the work of victims coupled with public pressure from international women's organisations. This is more evident in the case of

³⁸⁹ Ibid

³⁹⁰ Addendum Report of the Mission to Rwanda on the Issues of Violence Against Women in Situations of Armed Conflict, Report of the special Rapporteur on Violence Against Women, Its causes and Consequences, Ms. Radhika Coomaraswamy, UN. Doc. E/CN.4/1998/4 4/Add February 2009.

³⁹¹ Ibid

³⁹² Ibid

Akayesu, the first case whose indictment was amended to incorporate sexual violence charges.

In the Akayesu case, for example, allegations of sexual violence first came to the attention of the trial chamber not through the meticulous work of the investigation and prosecution team but through the unprompted spontaneous testimony of a victim of sexual violence, a witness J, a Tutsi woman who stated that her six year old daughter had been raped by three Interahamwe when they came to kill her father.³⁹³ She told her story simply.³⁹⁴ Her slow delivery gave her words even greater impact as she waited patiently for the interpreters to repeat them in French and English, the official language of the court. She said she was seven months pregnant in the summer of 1994, when she and her neighbours fled their village.³⁹⁵ Before the slaughter began, she had managed to hide in a tree, where she stayed for several days. She came down at night to look for food. But instead found the dead bodies of her mother, her children, her sisters and brothers- their corpses thrown into a pit latrine. Then her father was killed right under the tree in which she was hiding. That night she came down again to bury him because dogs were going to eat his body.³⁹⁶

She lost track of how long she stayed in the tree, but she finally judged it to be safe to leave. It was then that she found her six year old daughter still alive. Together they started to escape from the area, but before they moved far they were caught. Her little daughter was gang raped by three men.³⁹⁷ On examination by the Trial chamber, witness J also testified that she had heard that young girls were raped in her area.³⁹⁸ Subsequently, witness H, a Tutsi woman testified that she herself was raped in a rhum field and that, just outside the compound of the bureau commune in Taba, she personally saw other Tutsi women being raped and knew of at least three such cases of rape by Interahamwe.³⁹⁹

Fortunately, the sole female judge at the ICTR then, Judge Navanethem Pillay, was one of the three judges sitting on the case. Judge Pillay questioned the witnesses about these crimes, suspecting that these were not isolated instances of sexual violence.⁴⁰⁰ She then invited the prosecution to consider the further investigation of sexual violence crimes and to consider amending the indictment to incorporate charge of sexual violence if found to have been committed.⁴⁰¹ Judge Pillay right away registered her disappointment with the prosecution:

³⁹³ The Prosecutor v. Jean Paul Akayesu Case No. ICTR-96-4-T Judgment of 2 September 1998, paragraph 417.

³⁹⁴ Jan Goodwin, "Rwanda: Justice Denied," in On the Issue: The Progressive Woman's Magazine, 1997.

³⁹⁵ Ibid. See also Kelly D. Askin, "A decade of the Development of Gender Crimes in International Courts and Tribunals: 1993- 2003," in Human Rights Brief, volume 11, issue 3, 2004.

³⁹⁶ Ibid

³⁹⁷ Ibid

³⁹⁸ The Prosecutor v. Jean Paul Akayesu Case no. ICTR-96-4-T Judgment of 2 September 1998, paragraph 416.

³⁹⁹ Ibid, paragraph 416.

⁴⁰⁰ Kelly D. Askin, "A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993- 2003," in Human Rights Brief, volume 11, issue 3, 2004.

⁴⁰¹ Ibid

We have to try a case before us where this person [Akayesu] has not been specifically charged with rape.... we're hearing the evidence, but the defence has not cross-examined the witnesses who gave testimony of sexual violence, because it is not in the indictment. I'm extremely dismayed that we are hearing evidence of rape and sexual violence against women and children, yet it is not in the indictment because the witnesses were never asked about it.⁴⁰²

It was at this juncture that several international human rights organisations working in the area of women's rights, made an intervention, under the umbrella of the Coalition for Women's Human Rights in Conflict Situations, appearing before the ICTR as Amicus Curiae.⁴⁰³ According to the Coalition, its intervention was precipitated by concern that the prosecution has not charged rape and sexual violence, despite testimony in the record, and other documentation indicating the availability of other probative evidence, that sexual violence was part of a campaign of violence constituting genocide, crimes against humanity and war crimes.⁴⁰⁴

The Coalition forcefully argued that failure to amend the indictment in the Akayesu case (and other cases), when there has been a plethora of clear evidence both at trial and from other sources, produces unfairness and constitutes a miscarriage of justice since:

1. The grave violations of human rights suffered by the women who were raped in the Taba commune under the authority of Akayesu are ignored;
2. Jean Paul Akayesu is given effective impunity for the rapes which were committed in his commune;
3. The community and in particular the women of the community, are denied vindication and the satisfaction that there has been a fair trial of the issue and that justice has been done;
4. The failure by the prosecutor to pursue investigating and convicting Akayesu on charges of rape in the face of testimony of rape at trial leaves the impression that the Tribunal does not consider rape and sexual violence to be as important an offence as other offences and is thereby discriminatory to women; and

⁴⁰² Jan Goodwin, "Rwanda: Justice Denied," in *On the Issue: The Progressive Woman's Magazine*. 1977.

⁴⁰³ Coalition for Women's Human Rights in Conflict Situations, Amicus Curiae Respecting Amendment of the Indictment and Supplementation of the Evidence to Ensure the Prosecution of Rape and Other Sexual Violence within the competence of the Tribunal: Re: The Prosecutor v. Jean Paul Akayesu.

⁴⁰⁴ Ibid

5. Finally, since justice must be considered to have two aspects: a corrective and a normative aspect. The absence of charges of rape in the prosecution of Akayesu, therefore, not only fails to normatively establish that rape is egregious and unacceptable conduct.⁴⁰⁵

Bowling to pressure the prosecutor finally, on June 16, 1997, submitted a request to bring an expedited oral motion before the tribunal seeking to amend the indictment.⁴⁰⁶ On 17th June, 1997 the trial chamber allowed the amendment of the indictment to include crimes of sexual violence.⁴⁰⁷

Following the amendment in the Akayesu case, several more cases, especially those that were part of the first indictments issued by the ICTR, were amended to include acts of sexual violence up to 1999.⁴⁰⁸ Actually beginning from 1998 sexual violence is incorporated into the initial indictment and no longer by amendment for all prosecutions instituted after 1998.⁴⁰⁹ However, this momentum was short lived. As shall be illustrated later below, from 2001 onward there is a marked decrease in charging sexual violence⁴¹⁰ such that on the whole the record of the ICTR indicates that in 70 per cent of the cases adjudicated sexual violence is not charged.⁴¹¹

5.2.2 Poor Investigation Techniques

It was readily accepted by the ICTR prosecution in Akayesu that facts that led to the prosecution being surprised by the spontaneous testimonies of sexual violence which were not in the indictment were due to the "insensitivity in the investigation of sexual violence."⁴¹² The truth is that the investigations were not just insensitive but not appropriate to elicit any information at all from victims of sexual violence. One of the major shortfalls in the work of the investigation of sexual violence cases is the fact that investigators never went out to investigate or search for cases of sexual violence but rather victims or potential witnesses must take the initiative to approach the investigators.⁴¹³

⁴⁰⁵ Ibid, paragraph 12.

⁴⁰⁶ The Prosecutor v. Jean Paul Akayesu Case No. ICTR-96-4-T- Judgment of 2 September 1998, paragraph 23.

⁴⁰⁷ Ibid, paragraph 417.

⁴⁰⁸ See the Analysis of Trends in sexual Violence Prosecutions in Indictments by the International Criminal Tribunal for Rwanda (ICTR) from November 1996 to November 2002, A Study by the McGill Doctoral Affiliates Working Group on International Justice, Rwanda Section (November 2002).

⁴⁰⁹ Ibid

⁴¹⁰ Ibid

⁴¹¹ See the Letter to the ICTR Prosecutor Hassan Jallow, of February 8, 2005, by the Coalition for Women's Human Rights in Conflict situations signed by Ariane Brunet. See also Eva Gazurek and Anne Saris, "Protection of Women as Witnesses at the ICTR," a report prepared for the Coalition for Women's Human Rights in Conflict Situations (2002).

⁴¹² The Prosecutor v. Jean Paul Akayesu Case No. ICTR-96-4-T Judgment of 2 September 1998, paragraph 417.

⁴¹³ See the Addendum report of the Mission to Rwanda on the Issue of Violence Against Women in situations of Armed Conflict, Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Ms. Radhika Coomaraswamy, UN Doc. E/CN.4/WG.4/Add.1, 4 February 1998.

Usually only if during the general investigations of offences, aspects of sexual violence emerged, would the investigators pursue the leads.⁴¹⁴ Obviously such an approach led to limited cases being recorded by investigators.

Even in cases where investigators went into the communities the investigation teams would usually be composed of men, many of them without any previous expertise in soliciting testimonies of sexual violence,⁴¹⁵ would show up at a site and would ask in the group, "Has anybody been raped?"⁴¹⁶ As discussed in chapter two of this thesis, sexual violence victims face stigma and ostracism once their identity is known in Rwanda. Considering that all the cases of sexual violence brought before the ICTR had women and girls as victims, it is axiomatic that many women would have difficulties to reveal explicit details of sexual violence to male investigators, as one of the then ICTR judges, Judge Pillay, observed:

Speaking from my 30 years as an attorney and human rights activist, I know that rape survivors find it extremely hard to talk to men, especially men who don't speak their language, about this kind of violence.⁴¹⁷

On their part the prosecution investigators explain that the problem is that the Rwandese culture and traditional upbringing prevents women from speaking openly about some private matters.⁴¹⁸ The Deputy Prosecutor of the ICTR once told Human Rights Watch that "African women don't talk about rape... we haven't received real complaints. It's rare in investigations that women refer to rape."⁴¹⁹

⁴¹⁴ Ibid

⁴¹⁵ Human Rights Watch, Shattered Lives: Sexual Violence During the Rwanda Genocide and its Aftermath (September 1996).

⁴¹⁶ Jan Goodwin, "Rwanda: Justice Denied," in On the Issues: The Progressive Woman's Magazine (1997).

⁴¹⁷ Ibid

⁴¹⁸ See Addendum Report of the Mission to Rwanda on the Issue of Violence Against Women in Situations of Armed Conflict, Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Ms. Radhika Coomaraswamy, UN Doc. E/CN. 4/1998/5 4/Add.1 4 February 1998.

⁴¹⁹ Human Rights Watch, Shattered Lives: Sexual Violence During the Rwanda Genocide and Its Aftermath (September 1996). The Prosecution team's belief that victims of sexual violence were not prepared to talk about their ordeal is immortalized in the words of Dr. Alex Obote-Odora, Special Assistant to the ICTR Prosecutor in his letter responding to women activists who wanted to know why sexual violence charges were dropped in the Muvunyi case: "The rape charges against Tharcisse Muvunyi were dropped because some of the prosecution cannot be traced while other prosecution witnesses have refused or declined to testify. It serves no purpose to proceed with charges that the prosecution will not be able to prove beyond reasonable doubt, not because the crimes were not committed, but because the prosecution witnesses refuse or decline to testify, or cannot be traced either because they have died or have changed residence without leaving forwarding addresses." [Prosecutor's Letter of Response on Dropping Rape charges of Friday, 11 February 2005]. It is strange that the prosecution seems uninterested in finding out why the prospective witnesses who had willingly offered testimony would be unwilling to testify. In the aftermath of a war that left the country destroyed it seems really strange that the prosecution would expect people to be leaving forwarding addresses. The situation was still volatile and as shall be seen below many witnesses and prospective witnesses were killed. In any case the explanation given by the prosecution seems to be a variance with what many women felt. A leader of one women's association stated: "before the war women were raped but they lived in silence. During the war rape was so widespread it became a problem shared by many women. Because

While there could be some truth in the view that in many African countries and other places in the world women are socialised into tolerating sexual violence, there is evidence that where interviews are conducted in conditions of safety and privacy, and if (Rwandan) women believe that telling their testimony will help bring about justice, they will talk. Where interviews are conducted by persons they trust, conducted in privacy and if possible by a woman, it has been shown that victims will explicitly tell their stories of sexual violence.⁴²⁰

The inadequacy of the ICTR's office of the Tribunal Prosecutor's (OTP) investigation is well summarised in the observation made by Radhika Coomaraswamy, after visiting Rwanda and the seat of the ICTR in Arusha:

It was explained that their 'culture' and traditional upbringing prevented women from speaking openly about such private matters. The Special Rapporteur, however, seemed to have no problem eliciting information and testimonies from victims and witnesses. Whilst culture may prevent women from speaking out, the Special Rapporteur had the impression that, encouraged and supported by women's organisations, women victims of violence seem to believe that speaking is cathartic and may in fact lead to justice.⁴²¹

As if this were not enough prosecution investigators, choosing areas to investigate, were actuated not more about bringing justice for victims but about making more money for themselves. Areas far away from Kigali, for example, carried a higher stipend for investigators.⁴²² The pattern of investigation has shown that investigators opted to collect statements in areas with a higher stipend, and so other areas such as Kigali, have been neglected despite their high levels of sexual violence.⁴²³

In some of the fortunate circumstances where the investigators managed to collect statements of sexual violence, the statements gathered would usually be of poor quality.⁴²⁴ Statements would usually be no more than a paragraph or two in length and offering close to no information that could enable the linking of accused persons to the commission of offences.⁴²⁵ The manner in which witness statements were collected from victims and witnesses of sexual violence exhibited tremendous ineptitude on the tribunal's prosecution

of this it became easier for them to talk about sexual assault." [Connie Walsh, "Witness Protection, Gender and the ICTR," a Report Prepared for the Coalition for Women's Human Rights in Conflict Situations, July 1997.

⁴²⁰ *Ibid*

⁴²¹ Addendum Report of the Mission to Rwanda on the Issue of violence against women in situations of armed conflict, Report of the Special Rapporteur on Violence Against women, its causes and consequences, Ms. Radhika Coomaraswamy, UN Doc. E/CN.4/1998/5 4Add.1 4 February 1998.

⁴²² Binaifer Nowrojee, "Your Justice is too slow: Will the ICTR fail Rwanda's Rape Victims?" Occasional Paper No. 10 of the United Nations Research Institute for Social Development, November 2005.

⁴²³ *Ibid*

⁴²⁴ *Ibid*

⁴²⁵ *Ibid*

investigators. Very often statements were presented in narrative form, such that it was impossible for the lawyer conducting trial to distinguish between personal observations of investigators, the words of the person giving testimony and what was mere hearsay.⁴²⁶

The ICTR has no system of vetting its investigators (nor other staff it engages) to ensure that only credible people worked for it. This had damaging consequences. During the years 2001 and 2002 revelations emerged that within the team of ICTR investigators were perpetrators of genocide and sexual violence.⁴²⁷ This led to the loss of credibility of the ICTR in the eyes of the Rwandese public and especially in the eyes of sexual violence victims who no longer felt that their privacy and protection would be guaranteed.⁴²⁸ The presence of the perpetrators of violence among investigation teams not only damaged the credibility of the ICTR but also raised the issue of possible manipulation and concealment of evidence, the possibility of subordinating witnesses, the pressuring of witnesses and victims to withdraw their testimony and ultimately the piercing of the veil of victim and witness protection anonymity rules which leaves victims in a more precarious situation of feeling deceived, intimidated and threatened.⁴²⁹

That these revelations did not go unnoticed by victims of sexual violence is evidenced by the actions taken by leading Rwandese NGOs AVEGA and IBUKA that announced that until the ICTR got rid of the genocide and sexual violence suspects on its payroll then they would no longer cooperate with the ICTR and would further cease assisting with the sending of sexual violence witnesses to the ICTR's seat in Arusha.⁴³⁰ This decision was subsequently supported by the Rwandan Government, and due to the lack of witnesses travelling to Arusha from Rwanda, the ICTR was forced to adjourn hearings several times.⁴³¹

The seriousness of the ICTR in investigating sexual violence could be contrasted with that of the Special Court for Sierra Leone. The comparison makes it clear that the lack of comprehensive investigation and prosecution of sexual violence at the ICTR is due to lack of political will feeding on the widespread perception among many ICTR investigators that sexual violence is a "lesser" or incidental crime not worthy investigating.⁴³² In contrast with the ICTR, the Special Court for Sierra Leone devised a prosecution strategy from the beginning which incorporated the thorough investigation and prosecution of crimes of

⁴²⁶ Ibid

⁴²⁷ Analysis of Trends in Sexual Violence Prosecution Indictments by the International Criminal Tribunal for Rwanda (ICTR) from November 1995 to November 2002, A Study of the McGill Doctoral Affiliates Working Group on International Justice, Rwanda Section (November 2002). See also "UN Tribunal Investigating 12 on its Payroll," in *Global Policy Forum* (June 29, 2006), and James Munyaneza, "Rwanda: Government Could Cut Links with ICTR," in *New Times* (September 12, 2006).

⁴²⁸ Ibid

⁴²⁹ Ibid

⁴³⁰ Ibid

⁴³¹ Ibid

⁴³² Human Rights Watch, *Shattered Lives: Sexual Violence During the Rwanda Genocide and its Aftermath* (September 1996).

sexual violence from the outset.⁴³³ With only 10 investigators in the investigation team for the Special Court for Sierra Leone, two competent and experienced female investigators (that is 20 per cent of the investigation team, as opposed to the ICTR, which has never dedicated more than 2 per cent of its investigation team of about 100 persons) were assigned to investigate the issue of sexual violence.⁴³⁴ The fruits were quick to appear. After only a year in existence most of the indictments included sexual violence charges, several days before even the courts began to hear the cases.⁴³⁵

5.2.3 Dropping Sexual Violence Charges in exchange for plea of guilty and failure to lead evidence of sexual violence

Reinforcing the belief that the ICTR treats crimes of sexual violence as of less importance was the practice by the ICTR prosecutors to drop sexual violence charges as part of plea bargaining.⁴³⁶ For example, the prosecution agreed to withdraw the charge of rape against the accused Omar Serushago in exchange for his cooperation with the tribunal and as part of his guilty plea bargain in October 1998.⁴³⁷ This pattern of behaviour was repeated in the case of Joseph Nzabirinda where sexual violence charges were dropped when he pleaded guilty to other charges.⁴³⁸ The fact that sexual violence charges are dropped in this manner gives the impression that sexual violence crimes are not treated with the same degree of seriousness and importance by the ICTR.

At other times, bowing to pressure to maintain sexual violence charges, the prosecution have proceeded with charges of sexual violence but neglected to lead sexual violence evidence at trial. This is more evident in the case of Laurent Semanza, where the judges were astounded that despite having indicted the accused with sexual violence charges, the prosecution did not at all lead any evidence about rapes and other forms of sexual violence alleged to have been committed by the accused.⁴³⁹

5.2.4 Blatant Lack of Interest in prosecuting Sexual violence Crimes

⁴³³ Binaifer Nowrojee, "Your Justice is too slow: will the ICTR fail Rwanda's Rape victims?" Occasional Paper No. 10 of the United Nations Research Institute for Social Development, November 2005.

⁴³⁴ Ibid

⁴³⁵ Ibid. See also Binaifer Nowrojee, "Making the Invisible War Crime visible: Post conflict Justice for Sierra Leone's Rape Victims," in the *Harvard Human Rights Journal*, volume 18.

⁴³⁶ See Analysis of Trends in Sexual violence prosecution Indictments by the International Tribunal for Rwanda (ICTR) from November 1995 to November 2005, A Study of the McGill Doctoral Affiliates Working Group on International justice, Rwanda section (November 2005).

⁴³⁷ Ibid

⁴³⁸ See *The Prosecutor v. Joseph Nzabirinda* Case No. ICTR-2001-77-T Sentencing Judgment of February 2007, paragraph 41.

⁴³⁹ See *the Prosecutor v. Laurent Semanza* Case No. ICTR-97-20-T Judgment of 15 May 2003, paragraph 250.

In handling matters of sexual violence the prosecution several times displayed blatant lack of commitment and interest in prosecuting sexual violence crimes. This is evident by the Prosecution team knowingly keeping covered evidence of sexual violence, failing to amend indictments when in possession of credible evidence and/or simply not filing an appeal when there was a good chance of succeeding to reverse an acquittal on a charge of sexual violence. The following cases are brief illustrations of the above assertions:

a. The Prosecutor v. Samuel Imanishimwe, Emmanuel Bagambiki, Andre Ntagerura
Case No. ICTR-99-46-T

In this case the Prosecutor failed to prosecute the accused for sexual violence when the victims and witnesses had given appropriate evidence incriminating the accused.⁴⁴⁰ Around 1999, while in the field the prosecution investigators came across evidence of sexual violence incriminating the three accused in this case, especially Imanishimwe, who had not only raped women personally but had also killed a woman by inserting a pistol into her vagina and shooting her to death.⁴⁴¹ Much later during trial, Witness LBI, a Tutsi woman, and LAM, who testified on other matters, also testified about widespread sexual violence where women were repeatedly raped and taken for sexual slavery.⁴⁴² That the prosecution was aware of such evidence is confirmed by the words of one of the prosecution lawyers who remarked that, "we had collected strong evidence. The women of Cyangugu were begging us to tell their story."⁴⁴³

Cyangugu is the place where the accused in this case were alleged to have committed the atrocities with which they stood charged. The victims of sexual violence in Cyangugu, through the Association of Widows of the Genocide of April 1994 (AVEGA Cyangugu), organised themselves to help them come forward and testify. The Association had even issued a public statement beseeching the ICTR not to ignore the sexual violence that had occurred in their area.⁴⁴⁴

⁴⁴⁰ See Analysis of Trends in Sexual violence Indictments by the tribunal for Rwanda (ICTR) from November 1995 to November 2002, A study of the McGill Doctoral Affiliates Working Group on International Justice, Rwanda section (November 2005).

⁴⁴¹ Binaifer Nowrojee, "Your Justice is too Slow: will the ICTR fail Rwanda's Rape Victims?" Occasional Paper No. 10 of the United Nations Research Institute for Social Development (November 2005).

⁴⁴² Coalition for Women's Human Rights in conflict situations, Amicus curiae brief Respecting the Need to Include Sexual violence charges in the indictment: the Prosecutor v. Samuel Imanishimwe, Emmanuel Bagambiki, Andre Ntagerura case No. ICTR-99-46-T (March 1, 2001).

⁴⁴³ Binaifer Nowrojee, "Your justice is too slow: will the ICTR fail Rwanda's Rape victims?" Occasional Paper No. 10 of the United Nations Research Institute for Social Development (November 2005).

⁴⁴⁴ Ibid, see also Analysis of Trends in Sexual Violence Prosecution in Indictments by The International Criminal Tribunal for Rwanda (ICTR) from November 1995 to November 2002, A Study by the McGill Doctoral Affiliates Working Group on International Justice, Rwanda Section (November 2002).

Armed with this information, the prosecution drafted a motion to add sexual violence charges and ready to be submitted to the court.⁴⁴⁵ However, due to frivolous and personal quarrels within the office of the prosecutor the prepared amendment sat unfiled for several months before being finally belatedly submitted.⁴⁴⁶ The late submission of the proposed amendment did not find favour with the judges and consequently the ICTR chief Prosecutor, Carla del Ponte, was summoned to a meeting with the judges. After the meeting, without any explanation, Carla del Ponte ordered her team to withdraw the rape amendment which had yet to be ruled on by the judges.⁴⁴⁷

The failure of the Prosecutor to charge sexual violence in this case did not go unnoticed among several Rwandan victims, especially the sexual violence victims, as depicted by the words of one rape victim of Cyanguu:

We helped the ICTR [prosecutor's staff] to find rape victims in this area. They even interviewed a rape victim who was HIV positive dying in her hospital bed. We are angry and disappointed that the ICTR, after making us talk about all the humiliating things that were done to us, they did not bring rape charges. What has the ICTR really done since it started? It has cared better for the Interahamwe [civilian militia force that carried out much of the killing]. If the Tribunal does not change its approach to give value to women, then its not worth it for us to work with them.⁴⁴⁸

As can be noted from the above statement, failure by the prosecution to indict the suspects Emmanuel Bagambiki, Andre Ntagerura and Samuel Imanishimwe on charges of sexual violence when there is clear evidence sends the signal that the ICTR does not consider it significant enough to prosecute sexual violence and sends a message that the ICTR does not consider sexual violence to be grave enough to warrant its undivided attention.⁴⁴⁹

b. The Prosecutor v. Juvenal Kajelijeli Case No. ICTR-98-44A-T

In relation to sexual violence, the charge against Kajelijeli in part read:

The accused ordered and witnessed the raping and other sexual assaults of Tutsi females. At all times material to the indictment, the

⁴⁴⁵ Binaifer Nowrojee, "Your Justice is too slow: will the ICTR Fail Rwanda's Rape Victims?" Occasional Paper No. 10 of the United Nations Research Institute for Social Development (November 2005).

⁴⁴⁶ Ibid

⁴⁴⁷ Ibid

⁴⁴⁸ Ibid

⁴⁴⁹ Coalition for Women's Human Rights in Conflict Situations, Amicus Curiae Brief Respecting the Need to Include Sexual Violence Charges in the Indictment: The Prosecutor v. Samuel Imanishimwe, Emmanuel Bagambiki, Andre Ntagerura Case No. ICTR-96-46-T (March 1, 2001).

accused, as a person in authority over the attackers failed to take any measures to stop these acts on the Tutsi females.⁴⁵⁰

In support of this charge the prosecution relied predominantly on the testimony of witness GDO who testified that the Interahamwe began searching the forest for Tutsi and found her daughter, whom they threw to the ground, undressed and raped her. The witness was unable to count the number of Interahamwe raping her daughter. Then, while searching the forest, the Interahamwe saw the witness and the baby she was carrying on her back. The Interahamwe put the baby on the ground and stripped and beat the witness until she lost consciousness. When she regained consciousness she saw her raped daughter dead, with her mouth open and her legs apart.⁴⁵¹

The trial chamber accepted the testimony of GDO as credible.⁴⁵² However, the majority, Judge Ramaroson dissenting, having believed the witness, turned around and doubted whether, inter alia, at GDO's point of vantage had clear visibility to identify the accused.⁴⁵³ Consequently, the majority found that as a result of that doubt, they could not convict the accused on the charge of sexual violence.⁴⁵⁴

Judge Ramaroson, in dissent, had issued a cogent opinion to the effect that if the court accepted the credibility of the testimony of a witness and there was no other evidence on record contradicting that testimony, then the court had no basis for disregarding and discarding that evidence.⁴⁵⁵ Fortified with a well argued dissenting opinion of Judge Ramaroson, this was a perfect case for appeal.

On 16 December 2003, the prosecution filed an Urgent Motion for an Extension of Time to File Notice of Appeal in which it submitted that it required an English translation of the dissenting opinion of the judgment delivered by Judge Ramaroson in French, and requested an extension of 30 days from the date of the receipt of the English translation of the

⁴⁵⁰ The Prosecutor v. Juvenal Kajelijeli Case no. ICTR-98-44A-T Judgement and Sentence of 1 December 2003, paragraph 629. Shocking enough, when the NGO Coalition of Women's Human Rights in Conflict Situations intervened through an Amicus Curiae Brief to ask the trial chamber to exercise its power by asking the prosecutor to consider making an amendment to the indictment to include sexual violence crimes, it was the prosecutor, not the defence, that asked the trial chamber to entertain the thought [The Prosecutor v. Andre Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe Case No. ICTR-99-46-T Decision on The Coalition for Women's human Rights in Conflict Situation's motion for Reconsideration of the Decision on Application to file Amicus Curiae Brief].

⁴⁵¹ Ibid, paragraph 638.

⁴⁵² Ibid, paragraph 680.

⁴⁵³ Ibid, paragraph 680.

⁴⁵⁴ Ibid, paragraph 683.

⁴⁵⁵ See Professor Catherine MacKinnon, "The Recognition of Rape as an act of genocide- Prosecutor v. Akayesu," in *New England Journal of International and Comparative Law*, volume 14, Number 2 (27 October 2008). See also Binaifer Nowrojee, "Your Justice is too slow: will the ICTR fail Rwanda's Rape victims?" Occasional Paper No. 10 of the United Nations Research Institute for Social Development (November 2005).

dissenting opinion, by which to file the notice of appeal.⁴⁵⁶ On 17 December 2003, a pre-appeal Judge, ruled that the prosecutions' reason for seeking an extension of time to file the notice of appeal cannot be considered to constitute good cause within the meaning of Rule 116 of the Rules of Procedure and Evidence, given that the prosecutor is expected to work equally in English and French, and therefore dismissed the application and ordered the prosecution to file the notice of appeal not later than 31 December 2003.⁴⁵⁷

Having been so decided, the prosecution had no choice to file their notice of appeal by 31 December 2003. However, a disturbing precedent for victims of sexual violence was set by the negligent behaviour of prosecution team. Christmas break came and the prosecution staff took their leave.⁴⁵⁸ The deadline passed and no appeal notice was filed. The prosecutor's office inexplicably missed the deadline, thereby waiving its right to appeal.⁴⁵⁹

Having come back from the Christmas break, the prosecutor, belatedly, on January 5, 2004 filed a "Prosecution Urgent Motion for Acceptance of Prosecution Notice of Appeal Out of Time" as well as the "Prosecution Notice of Appeal."⁴⁶⁰ The prosecution, inter alia, argued that:

1. The prosecution did not become aware of the decision of 17 December 2003 until 5 January 2004;
2. The prosecutor's notice of appeal should be accepted by the Appeals chamber in order to ensure a fair trial and expeditious appeal hearing;
3. If the notice of Appeal is not accepted, the prosecution will be precluded from pursuing several avenues of appeal they believe to be meritorious and significant to this case and to the jurisprudence of the ICTR generally and that such a result would be drastically disproportional to the failure of the prosecution to file the notice of appeal in time; and
4. Given the very short delay between the day the notice of appeal was ordered to be filed, namely 31 December 2003, and the filing of the motion on 5 January 2004, no prejudice has been caused.⁴⁶¹

The Appeal Chamber, however, noted that there was no evidence that the prosecution did not receive the decision of 17 December 2003 promptly, and that the prosecution could, for example, have produced log books to show when the 17 December 2003 Decision was in fact received in its office.⁴⁶² The Appeals Chamber also noted that the prosecution was

⁴⁵⁶ The Prosecutor (appellant) v. Juvenal Kajelijeli (Respondent) Case no. ICTR-98-44A-A. Decision on Prosecution's Urgent Motion for An Extension of Time to File Notice of Appeal, Decision of 17 December 2003.

⁴⁵⁷ Ibid

⁴⁵⁸ Binaifer Nowrojee, "Your justice is too Slow: Will the ICTR fail Rwanda's Rape Victims?" Occasional Paper No. 10 of the United Nations Research Institute for Social Development (November 2005).

⁴⁵⁹ Ibid

⁴⁶⁰ The Prosecutor v. Juvenal Kajelijeli Case No. ICTR-98-44A-A. Decision on Prosecution Urgent Motion for Acceptance of Prosecution Notice of Appeal Out of Time. Decision of 23 January 2004.

⁴⁶¹ Ibid

⁴⁶² Ibid

aware that its “Prosecution Urgent Motion for an Extension of Time to File Notice of Appeal,” filed on 16 December 2003, was pending before the pre-appeal judge and it should have made reasonable efforts to monitor the status of that request before the expiration of the thirty-day period for filing a notice of appeal.⁴⁶³ For the foregoing reasons, the Appeals chamber dismissed the motion.⁴⁶⁴

The manner in which the prosecution handled the appeal of the sexual violence aspect in this case, not only manifests a negative working culture of the ICTR prosecution team but strongly suggests that the prosecution team does not place the well being of the victims of sexual violence foremost.

c. The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze Case No. ICTR-99-52-T (The Media case).

Another case in which the prosecution showed an astounding lack of commitment to prosecute sexual violence crimes is the case involving three media executives, namely Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze, in which the prosecution paid no attention to the vicious gender propaganda that explicitly encouraged sexual violence and lethal attacks on Tutsi women.⁴⁶⁵ The prosecutor never brought a single charge of sexual violence in this case.

The three media heads were responsible for media propaganda that appealed to the conscience of the Hutu to build hatred and contempt for the Tutsi.⁴⁶⁶ In one article reviewed by the trial chamber authored by Hassan Ngeze’s newspaper entitled the “Tutsi Woman” it was stated that Tutsi women were sold or married to Hutu or highly placed Hutu officials, where they could serve as spies in influential Hutu circles and arrange government appointments, issue special import licences, and pass secrets to the enemy.⁴⁶⁷ The trial chamber found many other pieces that portrayed the Tutsi as a ruthless enemy, determined to conquer the Hutu and called on the Hutu to take all necessary measures to stop the enemy.⁴⁶⁸

Ironically, even though the media executives were never charged with crimes of sexual violence, the trial chamber, obiter, found that the three, through their propaganda articulated a framework that made the “sexual attack on Tutsi women a foreseeable

⁴⁶³ Ibid.

⁴⁶⁴ Ibid.

⁴⁶⁵ Binaifer Nowrojee, “Your Justice is too slow: will the ICTR fail Rwanda’s Rape Victims?” Occasional Paper no. 10 of the United Nations Research Institute for Social Development (November 2005).

⁴⁶⁶ The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze Case No. ICTR- 99-52-T Summary Judgement of December 2003, paragraphs 16 and 64.

⁴⁶⁷ Ibid, paragraph 13.

⁴⁶⁸ Ibid, paragraph 16.

consequence of the role attributable to them.”⁴⁶⁹ The trial chamber held that this was not directly caused but, citing the Nuremberg Judgment on Julius Streicher, the NAZI propagandist, took the view that the propaganda injected into the minds of many Hutu a poison that caused those consequences.⁴⁷⁰

In this case, where the accused did not personally and directly commit the offences they were convicted of but were convicted on the basis of their propaganda inciting the Hutu into a frenzy that facilitated the genocide, the failure by the prosecution to indict the accused of sexual violence, but retain, for example, charges of incitement to murder, while relying on evidence that would as well sustain charges of sexual violence, as acknowledged by the trial chamber, indicates a tacit lack of interest on the part of the prosecution to bring justice to the victims of sexual violence.

d. The Prosecutor v. Theoneste Bagosora et al. Case No. ICTR-98-T

Bagosora was another squandered opportunity where the prosecution failed to bring charges of sexual violence. Even though several instances of sexual violence could have been attributable to General Bagosora, there was one which was well known to the prosecution, that is, the sexual violence against the moderate Hutu Prime minister Agathe Uwilingiyimana. On the evening of 6 April 1994, shortly after the attack on the president’s plane, Bagosora chaired a meeting of the Military Crisis Committee, which was composed of senior army and gendarmerie offices at Camp Kigali.⁴⁷¹ General Romeo Dallaire then force commander of UNAMIR also participated. During the meeting, Dallaire proposed that the military contact Prime Minister Agathe Uwilingiyimana. She suggested that she should address the nation following the shooting down of the president’s plane. Bagosora refused.⁴⁷² Later that night, Bagosora and Dallaire met with Jacques Roger Booh-Booh, the Special Representative of the United Nations Secretary General at his home. Bagosora again refused to consult with the Prime Minister.⁴⁷³

During the night General Dallaire ordered that an UNAMIR escort be provided to the Prime Minister so that she could address the nation on Radio Rwanda in the morning. Around 05:00 hours on 7 April, 10 Belgian peacekeepers were dispatched to her residence.⁴⁷⁴ In the preceding hours, elements of the Reconnaissance Battalion and Presidential Guard had

⁴⁶⁹ Ibid, paragraph 118.

⁴⁷⁰ Ibid, paragraph 89.

⁴⁷¹ The Prosecutor v. Theoneste Bagosora et al. Case no. ICTR-9841-T Oral Summary Judgment of 18 December 2008, paragraph 2.

⁴⁷² Ibid, paragraph 2.

⁴⁷³ Ibid, paragraph 2.

⁴⁷⁴ Ibid, paragraph 3.

surrounded the Prime Minister's compound and at times fired on gendarmes and Ghanaian peacekeepers guarding the Prime Minister.⁴⁷⁵

After the Belgian peacekeepers arrived, the compound came under attack. The Prime Minister fled her home and hid at a neighbouring compound. She was later captured, killed and sexually abused, a bottle having been thrust into her vagina.⁴⁷⁶

Though Bagosora did not personally commit the murder of the Prime minister, it was attributable to him, under the doctrine of command responsibility, explaining that the trial chamber could not simply accept that elite units of the Rwanda Army would spontaneously engage in sustained gun and grenade fire with Rwandan gendarmes and United Nations peacekeepers, and murder and assault the Prime Minister.⁴⁷⁷ Though Bagosora was held guilty for the killing of the prime minister, he was not held guilty of the sexual violence against the Prime Minister, even though the evidence relied upon was equally weighted. The prosecution was aware of the sexual violence suffered by Agathe Uwilingiyimana as it referred to the incident of the sexual violence of the Prime Minister in the indictment of Pauline Nyiramasuhuko.⁴⁷⁸

5.3.0 JUDGES INSENSITIVE TO SEXUAL VIOLENCE

As seen in chapter four, ICTR judges have immensely contributed to the development of sexual violence jurisprudence in International Humanitarian law. That said, there were however, instances on the part of judges that detracted from their overall achievements, which manifested an inclination towards trivializing sexual violence or at least crassness towards victims of sexual violence. Such instances include the arbitrary denial of amending indictments to include sexual violence charges, failing to protect witnesses and general insensitivity towards victims and witnesses.

5.3.1 Judicial insensitivity towards victims and witnesses

Many witnesses and victims of sexual violence who came to testify before the ICTR were from rural areas. They had never been to big cities, had never left their own country and had never been to any big court room.⁴⁷⁹ Yet for the first time many of them were being picked out of their villages, carried in big United Nations vehicles, flown to Arusha in planes

⁴⁷⁵ Ibid, paragraph 3.

⁴⁷⁶ Ibid, paragraph 3.

⁴⁷⁷ Ibid, paragraph 24.

⁴⁷⁸ See the Prosecutor v. Pauline Nyiramasuhuko and Shalom Ntahobali, case. No. ICTR-97-21-I Amended Indictment as Per decision of Trial chamber II of August 10 1999.

⁴⁷⁹ Jan Goodwin, "Rwanda": Justice Denied," in On the Issues: The Progressive Woman's Magazine (1997).

and encountering judges in a big courtroom who spoke strange languages.⁴⁸⁰ This in itself was frightening enough and would have urged maximum sensitivity on the part of the judges, as former ICTR president, Judge Pillay, once said, the tribunal was dealing with frightened and traumatised people.⁴⁸¹

In one particularly humiliating instance during the Butare trial, the three judges sitting on the case guffawed during the testimony of a rape victim. On October 31, 2001, while witness TA, a victim of multiple rapes, was being cross examined by defence lawyer Duncan Mwanyumba.⁴⁸² One of the questions, which led to the laughter, was put by the defence lawyer which made reference to the fact that the witness had not taken a bath and the attendant commentary that she could not have been raped because she smelled.⁴⁸³ The three judges, William Sekule of Tanzania, Winstone Maqiso of Lesotho and Arlette Ramarason of Madagascar, never apologized to the witness for their unprofessional conduct and gross insensitivity.⁴⁸⁴

Witness TA was shattered by the experience of judges laughing at her while she testified. In an interview she later gave to Human Rights Watch Lawyer Binaifer Nowrojee in 2003, she reflected how profoundly the insensitivity of the judges hurt her:

My parents, my brother and my sister were killed. I am alone. My relatives were killed in a horrible fashion. But I survived- to answer the strange questions that were asked by the ICTR. If I say you were raped, that is something understandable. How many times do you need to say it? When the judges laughed, they laughed like they could not stop laughing. I was angry and nervous... today I would not accept to testify, to be traumatized for a second time. No one apologized to me.⁴⁸⁵

5.3.2. Failure to Control Embarrassing and Harassing Cross Examination

Under Rule 90(F) of the Rules of Procedure and Evidence, the trial chamber is vested with responsibility to exercise control over the mode of cross examination. This rule was put to test in the Akayesu case. During the trial, the presiding judge, Laity Khama, guided the parties thus:

⁴⁸⁰ Ibid

⁴⁸¹ As quoted in Jan Goodwin, "Rwanda: Justice denied," in On the Issues: the Progressive woman's magazine (1997).

⁴⁸² See Binaifer Nowrojee, "Your justice is too slow: will the ICTR fail Rwanda's rape victims?" Occasional Paper no. 10 of the United Nations Research Institute for Social Development (November 2005).

⁴⁸³ Ibid

⁴⁸⁴ Ibid

⁴⁸⁵ Ibid

...as regards the accused, the cross examination of the witness must be done within the limits of the prosecutor's examination. In other words, the accused is free to ask for clarification on any point which the answer was not clear. He may also ask other questions of the witness, given that these questions are only questions and that he does not provide commentary. I would also like to remind both the defense and the prosecution that questions put to a witness must be directly linked to the facts as they are described in the indictment and that they must not give general commentary....⁴⁸⁶

It was on the basis of this that Judge Khama interfered with cross-examination of witness JJ in the Akayesu trial. During cross examination of witness JJ the defence asked the witness how many times she was raped. Having answered that she could not recollect the number of times she was raped, the defence counsel proceeded to ask details of how she was raped, the use of condoms by perpetrators and then reverted to ask her how many times she was raped. It was then that Judge Khama intervened to protect the witness from further superfluous questions:

"...is that important.... she was raped so frequently that she can no longer remember how it was, 4, 5, 6, 7 times...."⁴⁸⁷

These comments of Judge Laity Khama were the subject of an appeal by Akayesu's defense, arguing that they prejudiced Akayesu as they indicated bias on the part of the judge.⁴⁸⁸ The Appeal chamber, however, dismissed the arguments, holding that Rules of Procedure and Evidence, sanctioned by Rule 90(F), generally required the trial chamber to exercise control over cross-examination.⁴⁸⁹

This precedent set by in the Akayesu case in controlling cross examination, was however not to be thoroughly followed in other cases. In the Butare case, for example defense lawyer insensitively questioned the witness at length about the rape and specifically made reference to the fact that she had not bathed and therefore she smelt and could not have been raped.⁴⁹⁰ The defense lawyer further asked offensive questions such as, "did you touch the accused's penis?", "how was it introduced in to your vagina?" and "were you injured in the processes of being raped by nine men?"⁴⁹¹ Yet the judges never stepped in to guide or control the cross examination even though it was clear that what was being asked

⁴⁸⁶ The Prosecutor v. Jean Paul Akayesu CaseNo. ICTR-96-4-T Appeal Judgment of 1 June 2001, paragraph 314.

⁴⁸⁷ Ibid, paragraph 201.

⁴⁸⁸ Ibid, paragraph 201.

⁴⁸⁹ Ibid, paragraphs 206 and 317.

⁴⁹⁰ Binaifer Nowrojee, "Your Justice is too slow: will the ICTR fail Rwanda's Rape Victims?" Occasional Paper No. 10 of the United Nations Research Institute for Social Development (November 2005).

⁴⁹¹ Ibid

was superfluous and only tended to humiliate the witness than to make probable or disprobable her testimony.⁴⁹²

5.3.3. Judges Arbitrarily Refusing to Amend Indictments to Incorporate Sexual Violence.

The ICTR's Rules of Procedure and Evidence do not have any time limit within which to request for an amendment of the indictment by the prosecution. Rule 50, which governs amendment of indictments states:

The prosecutor may amend an indictment, without prior leave, at any time before its confirmation, but thereafter, until the initial appearance of the accused before a trial chamber pursuant to Rule 62, only with leave of the judge who confirmed it, in optional circumstances, by leave of a judge assigned by the president. At or after each initial appearance, an amendment of an indictment may only be by leave granted by a trial chamber pursuant to Rule 73....

The efficacy of this rule was put to test in the Akayesu case. Following the spontaneous testimony of witnesses J and H about the rapes that occurred in the Taba region, and the consequent intervention by Coalition of Women's Human Rights in Conflict Situations through an amicus curiae brief, the prosecutor requested for an amendment to include sexual violence charges, which was granted and trial stayed for four months to allow the defence more time to respond adequately to the new charges.⁴⁹³

The belated allowance of an amendment to the indictment was the subject of an appeal by Akayesu's defense, contending that such late amendment caused him substantial prejudice; that the consequences of such prejudice are irreparable and that the late amendment of the indictment resulted in a violation of his right to full answer and defense.⁴⁹⁴ In dismissing the appeal, the Appeals chamber held that, inter alia, the trial chamber acted consistently with Rule 50 of the Rules of Procedure and Evidence, and had granted Akayesu four months in which to prepare his defence thereby removing any prejudice that may have been occasioned.⁴⁹⁵

This precedent set in Akayesu was not to be consistently followed, as exemplified by the Cyangugu case.⁴⁹⁶ During trial two witnesses testified spontaneously about acts of sexual

⁴⁹² Ibid

⁴⁹³ The Prosecutor v. Jean Paul Akayesu Case No. ICTR-96-4-T Judgment of 2 September 1998, paragraphs 23, 416 and 417.

⁴⁹⁴ The Prosecutor v. Jean Paul Akayesu Case No. ICTR-96-4-T Appeal Judgment of 1 June 2001, paragraphs 103, 104 and 106.

⁴⁹⁵ Ibid, paragraph 122.

⁴⁹⁶ The Prosecutor v. Samuel Imanishimwe, Emmanuel Bagambi and Ntagerura Case No. ICTR-99-46-T

violence they had personal knowledge of.⁴⁹⁷ Witness LBI, a Tutsi woman narrated how she was raped when she returned from her hiding place within the parish where she went to seek help and food.⁴⁹⁸ Witnesses LAM told the court that she witnessed groups of women and girls being taken to be raped.⁴⁹⁹ When this new evidence emerged the Coalition for Women's Human Rights in Conflict Situations, as amicus curiae, sought the intervention of the trial chamber to halt the proceedings and invite the prosecution to consider amending the indictment to include sexual violence charges, pursuant to Article 25 of the ICTR Statute.⁵⁰⁰ Amici noted, inter alia, that in that case the prosecutor had not closed their case and the defendants had not started to present their defense.⁵⁰¹ And therefore, under such circumstances the defendants would not suffer irreparable prejudice, as was determined in the Akayesu case.⁵⁰² In addition, it was within the powers of the trial chamber to order various remedial measures such as to postpone the trial by some days to enable the defense be allowed to have witnesses LAM and LBI recalled and be cross examined.⁵⁰³

The trial chamber dismissed the motion.⁵⁰⁴ When the prosecution strove ingeniously to use the same evidence of sexual violence as an element of existing genocide charges, the presiding judge, Judge Lloyd Williams ruled that the prosecution cannot introduce evidence in court of a crime that is not charged.⁵⁰⁵

The arbitrariness of the judges' denial of the motion to amend the indictment is reflected in the fact that under similar circumstances, the trial chamber in Akayesu had ruled to allow an amendment to be made, as shown above. Considering that any potential prejudice could have been reparable, the decision by judges not to allow an amendment implies that judges did not take into account the significant harm occasioned on the rights of the victims of sexual violence. This decision equally denies victims of sexual violence access to justice through no fault of their own and effectively perpetuates impunity for crimes of sexual violence.

This case was not an isolated instance; in another case, that of Ruzindana,⁵⁰⁶ witnesses again spoke spontaneously about sexual violence.⁵⁰⁷ The judges could not stay the

⁴⁹⁷ Coalition for Women's Human Rights in Conflict Situations, Amicus Curiae Brief Respecting the need to include Sexual violence charges in the indictment: the prosecutor v. Samuel Imanishimwe, Emmanuel Bagambiki, Andre Ntagerura Case No. ICTR-99-46-T (March 1, 2001).

⁴⁹⁸ Ibid

⁴⁹⁹ Ibid

⁵⁰⁰ Ibid

⁵⁰¹ Ibid

⁵⁰² Ibid

⁵⁰³ Ibid

⁵⁰⁴ The Prosecutor v. Andre Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe Case No. ICTR-99-46-T Decision on the Coalition for Women's Human Rights in Conflict Situations' Motion for Reconsideration of the Decision on Application to file Amicus Curiae Brief.

⁵⁰⁵ See Binaifer Nowrojee, "Your justice is too slow: will the ICTR fail Rwanda's Rape victims?" Occasional Paper No. 10 of the United Nations Research Institute for Social Development (November 2005).

⁵⁰⁶ The prosecutor v. Clement Kayishema and Obed Ruzindana Case No. ICTR-95-1-T Judgment of 21 May 1999.

proceedings to allow women who were still testifying in another case to be brought before it to fortify the prosecution case.⁵⁰⁸

5.4.0. INEFFECTIVE WITNESS PROTECTION

Article 21 of the ICTR Statute requires that the Tribunal's Rules of Procedure and Evidence shall provide protection for victims and witnesses. Pursuant to this Article, Rules 34, 69 and 75 of the Rules of Procedure and Evidence provide for various forms of protection, which may include non disclosure of the identity of the victims or witnesses, expunging names and identifying information from the Tribunal's Public records, giving testimony through image or voice altering devices or closed circuit television.⁵⁰⁹

In practice, however, the ICTR delayed in putting in effect the witness protection measures as provided for under Rule 75. This had consequences for victims and witnesses. During Akayesu's trial, for example, while witness JJ was testifying the defendant directed some threatening and contemptuous gestures at her whilst the proceedings were in progress, as the witness was in full view of the defense.⁵¹⁰

Even when protection measures guaranteeing anonymity were put in place, the scheme was porous and often victims and witnesses found themselves in more precarious situations after testifying. This was due to the combination of the following flaws in the process:

a. Disclosure of Witness Identity to the Defense.

In many jurisdictions it is considered to be a requirement of the dictates of natural justice that the defendant should know and face the accuser. Similarly, the Rules of the Tribunal require that the prosecution is under a duty to make available to the defence information that effectively pierces the veil of anonymity such as:

- a. Making available to the defence copies of statements of all witnesses whom the prosecutor intends to call to testify at trial;
- b. Making available to the defense documents, photographs and tangible objects in his custody or control which are material to the preparation of the defence, or are

⁵⁰⁷ Analysis of Trends in Sexual Violence Prosecution's Indictments by the International Criminal Tribunal for Rwanda (ICTR) from November 1995 to November 2002, A Study by the McGill Doctoral Affiliates Working Group on International Justice, Rwanda Section (November 2002).

⁵⁰⁸ Ibid

⁵⁰⁹ See more specifically Rule 75 of the Rules of Procedure and Evidence of the ICTR, 2008.

⁵¹⁰ See Addendum Report of the Mission to Rwanda on the Issue of Violence Against Women in situations of armed conflict, Report of the Special Rapporteur on Violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, UN Doc. E/CN.4/1998/54/Add.1, 4 February 1998.

- intended for use by the prosecution as evidence at trial or were obtained from or belonged to the accused; and
- c. Notify the defence of the names of the witnesses that the accused intends to call in proof of the guilty of the accused.⁵¹¹

Although it is a violation of the rules for the defendant or their counsel to disclose the name of a witness, the reality is that these names get leaked.⁵¹²

To compound the situation witnesses and victims are not told truthfully that their identity will be revealed to the defendant and that raises possibilities of their anonymity not being fully guaranteed.⁵¹³ When asked by Human Rights Watch researchers in 2003 as to why the witnesses are not informed about this, the head of witness management at the ICTR remarked: "If we tell them this, they won't testify for us."⁵¹⁴ The ICTR thus opts for expediency by not fully disclosing to witnesses and victims that there are inevitable holes in the scheme of their protection and that is a blatant betrayal of trust and confidence the victims and witnesses have reposed in the ICTR. The issue is not about privileging the victims and witnesses at the expense of the defendant but it is about finding a balance that takes care of the interests of both parties.

b. Public Records and Several encounters with ICTR Staff

When the Special Rapporteur on Violence against women, Ms. Radhika Coomaraswamy visited the ICTR, it was discovered that in several cases when witnesses travelled from Rwanda to Arusha, they had been asked to fill out departure cards with their names and addresses, which are then available as public records to anyone at the ICTR.⁵¹⁵ Contributing also to the porousness of the witness protection scheme is that the ICTR did not envision a coordinated response system of handling witnesses whereby a witness did not need to be handled by several staff. At the ICTR a witness on average encountered around 30 ICTR employees in the course of being a witness, a record which makes it virtually impossible to neither guarantee that their anonymity will be respected nor make it easy to investigate

⁵¹¹ See Rules 66 and 67 of the Rules of Procedure and Evidence of the ICTR. See also Article 20 of the ICTR Statute which guarantees the accused certain minimum rights.

⁵¹² See Binaifer Nowrojee, "We Can do better investigating and prosecuting international crimes of sexual violence," a paper presented at the colloquium of prosecutors of international tribunals in Arusha, Tanzania, 25-27 November 2004. See also Binaifer Nowrojee, "Your justice is too slow: will the ICTR fail Rwanda's Rape Victims?" Occasional Paper no. 10 of the United Nations Research Institute for Social Development (November 2005).

⁵¹³ Ibid

⁵¹⁴ Ibid

⁵¹⁵ Addendum Report of the Mission to Rwanda on the Issue of Violence Against women in situations of armed conflict, Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, UN Doc. E/CN.4/1998/54/Add.1 4 February 1998.

who may be responsible if the identity of a witness were leaked.⁵¹⁶ What is required is to have a small number of staff that will be directly handling the witnesses while the other members of the tribunal could rely on this core staff or any information they need. There is no need, for example, for members of staff working on logistics such as accommodation to directly deal with witnesses and have their actual names.

c. Recklessly Exposing Witnesses

Another factor which renders anonymity of witnesses impossible is that when the ICTR investigators and staff go into Rwanda to meet the witnesses and victims, or to arrange their evacuation to Arusha, they do so in very conspicuous ways which draws the attention of everyone in the community to the witness or victim.⁵¹⁷ Usually ICTR staff would visit in big vehicles clearly marked "UN" and that enables everyone in the village to make an easy guess, when their neighbour goes away for some days, to assume that they are collaborating with the ICTR.⁵¹⁸

The failure of maintaining the anonymity of the witnesses has devastating consequences. Most witnesses called to testify at the ICTR live in Rwanda and return there after testifying.⁵¹⁹ As they return home from testifying in Arusha many witnesses find their testimonies are already known in the communities, and have to face reprisals from hostile members of the community.⁵²⁰ Several witnesses and prospective witnesses have been killed and many more socially ostracized. Both the United Nations Commission for Human Rights Field Operation in Rwanda (HRFOR) and African Rights have extensively documented the killing of witnesses and victims and other people perceived to be collaborating with the ICTR, and victims of sexual violence have been the majority.⁵²¹ In January and February 1997, HRFOR reported that 62 prospective ICTR prosecutable witnesses were killed and that between January and December 1996 227 prospective witnesses were killed.⁵²² And more specifically one Hutu woman who testified against Akayesu on sexual violence was killed just when she came back from testifying and her husband and four children and three other

⁵¹⁶ See the Best Practices Manual for Investigation and Prosecution of Sexual violence Crimes in Situations of Armed Conflict: Lessons from the International Criminal Tribunal for Rwanda, 2008.

⁵¹⁷ Connie Walsh, "Witness Protection, Gender and the ICTR," a Report Prepared for the Coalition for Women's Human Rights in Conflict Situations, July 1997.

⁵¹⁸ Ibid

⁵¹⁹ Alison des Forges, Leave None to Tell the Story: Genocide in Rwanda (Human Rights Watch, March 1999).

⁵²⁰ Connie Walsh, "Witness Protection, Gender and the ICTR," a Report Prepared for the Coalition for Women's Human Rights in Conflict Situations, July 1997.

⁵²¹ Ibid

⁵²² Ibid

children who were in the house at the time were also killed.⁵²³ In September 1996, the ICTR estimated that 10 people who had agreed to testify for the prosecution had been killed.⁵²⁴

For the victims of sexual violence, the piercing of the veil of anonymity, if it does not result into death, will certainly result into social exclusion and stigma. As seen above in the third chapter, victims of sexual violence are stigmatised by society. Once it is known that one is a victim of sexual violence, that occasions stigma, shame, and ostracism and ultimately affects the victim's marriageability and reintegration in society.⁵²⁵ In an extremely patriarchal society like Rwanda, for many victims of sexual violence the ability to rebuild their lives in a post conflict situation depends much on their marriageability.⁵²⁶

The fate of many sexual violence victims who chose to testify is epitomized in the words of one woman who testified before the ICTR about sexual violence and returned home to face a hostile world:

When I returned from [testifying in] Arusha, everyone knew I had testified. Everyone in my neighbourhood had nicknamed me "Mrs. Arusha." Shortly after returning from Arusha I was chased from the house I had been renting in Kigali. The landlord asked me to leave because he knew I had testified in Arusha. At night people would come and throw stones at my house; I was scared... I told the ICTR staff in Kigali about the problem I had upon return from Arusha. I also told them I was chased from the house I had been renting. They gave me \$100(30,000 Rwanda Francs) and told me they would find me a job. I used the money to rent another place in a different part of Kigali where a soldier had told me it was safe. I was able to pay for three months' rent with the money they had given me. The job they had found was a painting job. It would involve a lot of climbing. Then the transportation cost to get to the place where I was supposed to work would have eaten up most of my pay. Because of these reasons I never took the job. I have no source of income... after three months had elapsed; I was unable to continue paying rent for the house I had moved into. I had to leave. Now am staying in an unfinished house in another part of Kigali... I told the ICTR staff the continued security concerns that I have but nothing was done...since I have come back from testifying in Arusha, life has been particularly hard. I was chased from the house I had been renting. Because I had to move, I was unable to continue to run the shop I had. I used to be able to make a

⁵²³ *ibid*

⁵²⁴ *ibid*

⁵²⁵ See the Expert testimony of Binaifer Nowrojee in the Prosecution v. Asmir Bizimungu, Justine Mugenzi, Jerome-Clement Bicamumpaka and Prosper Muginarezwa Case No. ICTR-99-50-T, Wednesday 18 May 2005

⁵²⁶ *ibid*

living but this is no longer possible. I cannot survive. I feel the ICTR is just bringing us problems for nothing.⁵²⁷

5.5.0 VICTOR'S JUSTICE

While it is true that the 1994 Rwanda genocide was orchestrated by Hutu extremists against minority Tutsi, it is not true that all violations of humanitarian law were perpetrated only by Hutu extremists. There is some documentation that French troops stationed in Rwanda played more than an insignificant role in training and arming the genocidaires.⁵²⁸ More specifically, the French troops are reported to have also carried out mass rapes of Tutsi women.⁵²⁹ A commission of inquiry into the role played by the French in the Rwandan genocide, appointed by President Paul Kagame in 2006, confirmed widespread sexual violence perpetrated by French troops.⁵³⁰ One of the commissioners, Jean Paul Kimoyo said of the French troops: "they were asking for Tutsi- not women- Tutsi."⁵³¹

No French soldier has ever been indicted by the ICTR. That means victims of sexual violence perpetrated by the French troops will never be able to access justice. It is hard to understand why no single French soldier was indicted because the statute of the ICTR does not prevent that from happening.

Apart from French troops, the then rebel movement, Rwanda Patriotic Front (RPF), led by Major General Paul Kagame, as they advanced to conquer the Rwanda mainland from Uganda frontiers, committed atrocities that included sexual violence.⁵³² The United Nations Secretary General in 1995 reported that what distinguished the Hutu from RPF is that while Hutu acted in a concerted, planned and systematic way to eliminate all Tutsi, RPF violence seemed subtle, sporadic but without any indication of being systematically ordained with a genocidal intention.⁵³³ Sexual violence by the RPF took the forms of: RPF compelling Tutsi women to have sexual intercourse with them in order to show gratitude for saving them

⁵²⁷ Connie Walsh, "Witness Protection, Gender and the ICTR," a Report Prepared for the Coalition for Women's Human Rights in Conflict Situations, July 1997.

⁵²⁸ Alison des Forges, Leave None to tell The Story: Genocide in Rwanda (Human Rights Watch, March 1999). In one instance, for example, on 21 January 1994, a few months before the genocide occurred in April, a French DC-8 landed secretly at night with a load of arms including ninety boxes of sixty mm mortars meant for genocidaires.

⁵²⁹ Stephen Bloomfield, "French troops raped girls during Rwanda genocide," in The Independent, Friday, 31 August 2007.

⁵³⁰ *Ibid*

⁵³¹ *Ibid*

⁵³² Frontline magazine, Interview with Alison des Forges, 1 October 2003.

⁵³³ Report of the Secretary General Pursuant to paragraph 5 of the Security Council Resolution 955(1994) of 13 February 1995.

from genocide, and sexual violence against Hutu women in retaliation for Tutsi women who were raped and Tutsi who were killed.⁵³⁴

Discussion of atrocities committed by the RPF soldiers is taboo in Rwanda because it is taken as an attack on the current government.⁵³⁵ Victims of sexual violence perpetrated by these forces will never access justice. Efforts by the ICTR chief prosecutor Carla del Ponte to investigate and prosecute RPF ended disastrously as the Rwandan government, in protest, ceased cooperation with the ICTR.⁵³⁶ Benard Muna, former Deputy Prosecutor of the ICTR, readily admits that one of the challenges which remain unresolved by the ICTR is to bring to justice those on the RPF side who also committed atrocities during the 1994 conflict.⁵³⁷

5.6.0 RESIDUAL MECHANISMS AND SEXUAL VIOLENCE

The ICTR is an ad hoc tribunal and therefore does not have an indefinite lifespan. In 2003 the United Nations Security Council determined that the ICTR had to complete all investigations by end of 2004, complete all trial activities at first instance by end of 2008, and all of its work by 2010.⁵³⁸

When the ICTR finally ceases to be, many questions remain to be determined, such as, for our purpose, the issue of protecting witnesses and victims of sexual violence. Currently the ICTR has a unit which recommends the adoption of protection and security measures for victims and witnesses to judges; providing rehabilitation and psychological service and devising short and long term plans for the protection of witnesses who have testified and who fear for their lives.⁵³⁹ Problems with witness protection will not evaporate with the disappearance of the ICTR. The statute of the ICTR has no provision on how witness protection measures will be managed. For victims and witnesses who appeared before the ICTR the following questions beg for an answer:

1. Who will be responsible to redress violations of protection measures ordered by the ICTR during its existence?
2. Who will review applications for modification of protective measures?

⁵³⁴ Amnesty International, Rwanda: Marked for Death: The HIV/AIDS in Rwanda (2008). See also Amnesty International, Rwanda: the Enduring Legacy of Genocide and War (2008); Human Rights watch, Shattered Lives: Sexual Violence During the Rwanda Genocide and its Aftermath (September 1996).

⁵³⁵ Ibid

⁵³⁶ Benard A. Muna, former Deputy Prosecutor ICTR, "The early challenges of conducting investigations and prosecutions before International Criminal tribunals," a paper presented at the forum between offices of UN Ad hoc Criminal Tribunals and national prosecuting authorities, 26-28 November 2008, Arusha, Tanzania.

⁵³⁷ Ibid

⁵³⁸ See Security Council Resolution 1503(2003).

⁵³⁹ See Rule 34 of the Rules of Procedure and Evidence of the ICTR, 2008.

3. Who will keep track of protected witnesses to inform them of the impending early release of convicted persons against whom they sought protection measures ordered on their behalf?
4. Who will be monitoring and assessing threats to ensure that protective measures remain effective and are respected?⁵⁴⁰

The ICTR has set up a Legacy Committee to propose how such problems that will be handled concomitant with the closing of the tribunal. The Legacy Committee has submitted a draft report to the United Nations Secretary General.⁵⁴¹ Unfortunately that draft report had not yet been made public at the time of writing, so it was difficult to determine whether the Residual Mechanisms proposed would be viable in addressing the concerns of the victims of sexual violence.⁵⁴²

The process of developing residual mechanisms lacking transparency and wider participation it does not seem will inspire the crafting of a mechanism that will be bought into by several Rwandese and especially victims of sexual violence. It is our suggestion that in future Security Council Resolutions establishing mandates of ad hoc criminal tribunals should incorporate provisions as to residual mechanism especially as they relate to the continuing needs of witnesses and victims of sexual violence.

5.7.0 PROXIMITY AND CREDIBILITY OF THE ICTR TO RWANDAN VICTIMS

Former Deputy Prosecutor of the ICTR, Benard Muna, apart from compensation of victims and prosecuting RPF, singled out the apparent remoteness of the ICTR from the Rwandese on the ground.⁵⁴³ He states that one of the challenges still abiding for which there is no easy solution is the lack of credibility of the ICTR among Rwandan people.⁵⁴⁴ The Tribunal was always viewed as an organisation of the United Nations with no direct connection with their society.⁵⁴⁵ This, probably, is due to the fact that the tribunal is seated out of the country and

⁵⁴⁰ See Gabriel Oosthuizen and Robert Schaeffer, "Complete Justice: Residual Mechanisms of the ICTY, ICTR and SCSL," in *Hague Justice Journal* Volume 3, Number 1, 2008. See also Dr. Jean-Pele Fomente, "Beyond 2010: Few Legacy and Succession Issues Related to the End of the ICTR mandate," a paper presented at the ICTR-CCM conference on challenging impunity, Kigali, 7-8 November, 2006.

⁵⁴¹ See letter dated 14 May 2009 from the President of the ICTR addressed to the Security Council Reporting on the Completion Strategy of the ICTR.

⁵⁴² *Ibid.* See also Judge Dennis Byron, ICTR President's Address to the United Nations Security Council: Six-Monthly Report on the Completion Strategy of the ICTR, 4 June 2009.

⁵⁴³ Benard A. Muna, "The early challenges of conducting investigation and prosecution before International criminal tribunals," a paper presented at the forum between UN ad hoc tribunals and national prosecuting authorities, 26-28 November 2008, Arusha, Tanzania.

⁵⁴⁴ *Ibid.*

⁵⁴⁵ *Ibid.*

also due to the limited role given to the Rwandese to lay.⁵⁴⁶ Most Rwandan women interviewed by Human Rights Watch had not heard of the ICTR.⁵⁴⁷ The ICTR remained inaccessible to many victims of sexual violence and perceived as uninviting.⁵⁴⁸ Some who had heard about its existence did so through radio and not through contact with ICTR staff.⁵⁴⁹ Even when an ordinary Rwandan wished to contact the IC R by phone, the cost of a telephone call to Arusha is beyond the reach of many women who were victims of sexual violence.⁵⁵⁰ Binaifer Nowrojee records the futility of attempting to visit the ICTR by Rwandese victims:

Security guards often speak only English and can be very disrespectful to visitors coming to the Tribunal. To gain entrance, a visitor must wait at the gate until a staff member from the ICTR comes to escort them into the building. There is one telephone at the gate that can be used to alert the staff of one's presence at the gate. Often times, individuals are not in their offices or a visitor does not know the proper extension of the ICTR staff member they are scheduled to meet with. One Rwandese woman seeking to visit a member of staff was told that she must wait in the mud.⁵⁵¹

The ICTR, though an International Criminal Tribunal applying International Humanitarian Law, is primarily about the people of Rwanda. It was created on the premise that the prosecution of the persons responsible for the violations of International Humanitarian Law shall contribute to national reconciliation, restoration of peace and effectively redress the harm suffered.⁵⁵² If the ICTR has to achieve those objectives, it needs to be more visible to the Rwandan victims in order to enable people to see justice being conspicuously done. A tribunal, such as the ICTR, distant and impersonal, doesn't seem to be well equipped to demonstrate that. A lesson could be learnt from the Prosecutor for the Special Court for Sierra Leone, David Crane, who, within the first four months of assuming his role, visited every district of Sierra Leone holding community meetings explaining to the people how the court works and updating them on the progress being made.⁵⁵³ David Crane continues to visit the communities regularly to report to the members of the community how the court

⁵⁴⁶ Ibid

⁵⁴⁷ See Binaifer Nowrojee, "We Can do better investigating and prosecuting international crimes of sexual violence," a paper presented at the colloquium of prosecutors of international tribunals in Arusha, Tanzania, 25- 27 November 2004.

⁵⁴⁸ Ibid

⁵⁴⁹ Ibid

⁵⁵⁰ Binaifer Nowrojee, "Your justice is too slow: will the ICTR fail Rwanda's Rape victims?" Occasional Paper no. 10 of the United Nations Research Institute for Social Development (November 2005).

⁵⁵¹ Ibid

⁵⁵² Security Council Resolution 955 of November 1994.

⁵⁵³ David M. Crane, "Dancing with the Devil: Prosecuting War Africa's War Lords: Current Lessons Learned and Challenges," a paper presented at the third colloquium of prosecutors, Arusha, Tanzania, 2008.

and his office are working.⁵⁵⁴ It is suggested that where security allows such tribunals should be as accessible as possible to the people it is intended to serve and efforts should be made to ensure that as long as security allows such tribunals should be seated in the state they are created to serve.

5.8.0 CONCLUSION

As shown in the fourth chapter of this thesis the ICTR was faced with novel circumstances and as a result has pioneered progressive sexual violence jurisprudence in International Humanitarian Law which will be valuable for future tribunals as well as the ICC. That record is impeccable. However, as shown in this chapter, in relation to sexual violence, there are grey areas that have not been adequately addressed, neglected or simply trivialized, such as the poor investigation, inept prosecution, uninterested and callous judges, ineffective protection measures, not addressing sexual violence by RPF and French troops and the matter of the Tribunal lacking credibility in the eyes of the victims. If these concerns are not promptly addressed, when the ICTR closes its doors, its jurisprudence will not have told the whole story of sexual violence during the 1994 genocide. The story of the ICTR will not have correctly revealed that mass rapes, sexual slavery and habitual mutilations against thousands of Rwandan women occurred.

Having raised the main challenges bedevilling the ICTR in relation to sexual violence crimes, the next chapter, which will form the general conclusion of the thesis, will explore significant lessons that can be learnt and propose interventions that will ensure that future tribunals are not caught up in similar predicaments.

⁵⁵⁴ Ibid

CHAPTER SIX

6.0 GENERAL CONCLUSION

This dissertation has been a study of the developments in sexual violence jurisprudence, especially as advanced by the ICTR, but it is also an exposition of enduring obstacles that need to be overcome. In the second chapter it has been shown that sexual violence has been part of the development of International humanitarian law, even though at times such as during the Nuremberg Trial it was not given any recognition at all. Almost all the major moments in the development of International Humanitarian Law, from the trial of Peter von Hagenback in 1474 to the composition and passing of the 1949 Geneva Conventions, had some provisions relating to protection from sexual violence, though often couched in condescending language.

The third chapter contextualizes the thesis by giving details of sexual violence suffered during the Rwanda genocide. Rape, mutilation of sexual organs and other forms of sexual violence were systematically perpetrated on a wide scale, and as acknowledged in the Akayesu judgment, employed as a weapon by perpetrators of the genocide to exterminate the Tutsi. As a consequence many ills befell the victims such as social ostracism, physical injuries, permanent scars, psychological problems, unwanted pregnancies, unsafe abortions and death.

Having exposed the magnitude of sexual violence, the fourth chapter discusses the role of the ICTR in advancing sexual violence jurisprudence in International Humanitarian Law. Many International Humanitarian Law Instruments remained dormant for years and could not specifically fit the circumstances that were before the ICTR. The judges, in order to accommodate the novel circumstances that emerged had to resort to expansive interpretations of the ICTR statute and other instruments. Finally, the fifth chapter gives a critical look at some of the enduring obstacles, as manifested through the ICTR, to the successful holding accountable perpetrators of sexual violence in conflict.

From the study two major lessons emerge: 1) The International Humanitarian Law statutes have been superseded by developments in case law and need to be revised so as to suit changing times, and 2) the mistakes and obstacles faced by the ICTR in prosecuting and adjudicating over sexual violence cases should be carefully studied to avoid their recurrence in future. These two lessons are explored below with a few illustrations and suggestions of what ought to be done.

- a. The need to review International Humanitarian Law statutes

By way of illustration, the following matters highlight the need to review the International Humanitarian Law statutes.

i. Geneva Conventions

The 1949 Geneva Conventions and their 1977 Additional Protocols form the bedrock of contemporary International Humanitarian Law. As was noted above the Geneva Conventions of 1949, although being the most important International humanitarian Law treaties governing armed conflict, do not expressly include sexual violence on the list of grave breaches.⁵⁵⁵ Not including sexual violence on the list of grave breaches meant that states did not have a duty to seek out, prosecute or extradite perpetrators of sexual violence in conflicts.⁵⁵⁶ However, our chapter four studying developments in sexual violence jurisprudence indicate that this limitation has been overturned by events. Article 4 of the ICTR statute, for example, is revolutionary as it does two major things. First, it prohibits acts of sexual violence on the same level as those listed as grave breaches under the Geneva Conventions. Second, it applies those norms to internal conflict, which previously were thought to be only applicable in international conflicts.⁵⁵⁷ In chapter two it was also shown how the Geneva Conventions (and other treaties) mischaracterized sexual violence by using terms such as protection of honour, humiliating treatment, degrading, and outrages upon personal dignity. The jurisprudence reviewed above indicate that such offences were considered to be serious crimes threatening the integrity of individuals and the whole community and it is now time to cease referring to them in pejorative and prejudicial terms masking society's stereotypes against women.

ii. Genocide Convention

Although men also suffer sexual violence, statistics indicate that women overwhelmingly are its most frequent targets.⁵⁵⁸ This has been true for the Rwanda conflict. The fact that it is women who are preponderantly the main victims of sexual violence reveals that in conflict, sexual violence reflects gender based motivation, apart from other discriminatory factors such as ethnicity.⁵⁵⁹ This fact is not yet recognised in the Genocide Convention as gender is not listed among protected categories, as was seen above in chapters two and four.

The Akayesu judgment makes it clear that sexual violence could be held in that case was a constituent act of genocide. Tutsi women, as shown above, suffered sexual violence

⁵⁵⁵ See Amnesty International, Stop Violence Against Women: How to Use International Criminal Law to Campaign for Gender Sensitive Law Reform(London, 2008); see also Claire de Than and Edwin Short, International Criminal Law and Human Rights(London: Sweet and Maxwell, 2003), page 349.

⁵⁵⁶ Ibid

⁵⁵⁷ See Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy. Addendum report of the Mission to Rwanda on Issues of violence against women in situations of conflict. UN Doc. E/CN.4/1998/54/Add.1 February 4, 1998.

⁵⁵⁸ Dorothy Q. Thomas and Ralph E. Regan, "Rape in war: Challenging the tradition of impunity," SAIS Review, Volume 1 (John Hopkins University Press, 1994).

⁵⁵⁹ Ibid

because of their ethnicity, but also because of their female gender. It is proposed that the Genocide Convention be reviewed and amended to include gender as a protected category. Moreover, there is authority that gives considerable support to the view that gender ought to be included into the category of protected groups. In *Akayesu*, for example, when considering whether any additional groups would be able to meet the criterion of protected groups under the Genocide Convention, the trial chamber was of the view that the intention of the convention was “patently to ensure the protection of any stable and permanent groups.”⁵⁶⁰ For the trial chamber this would include all groups constituted in a permanent fashion and membership of which is determined at birth and therefore this excludes mobile groups which an individual may join voluntarily such as political or economic associations. In addition, in *Musema*, the trial chamber expressly stated that:

In assessing whether a particular group may be considered protected from the crime of genocide, it [trial chamber] will proceed on a case by case basis, taking into account both the relevant evidence proffered and the specific political, social and cultural context in which the acts allegedly took place.⁵⁶¹

The spirit of these statements from the ICTR indicates that women could form a category of their own as protected persons from genocide. There is an inherent danger and practical problems in expanding genocide to include gender. For example, would a serial killer targeting female prostitutes be considered to be committing genocide? In order to take care of such possible practical problems and ensure certainty it is suggested that where gender is factored into the definition of genocide, it should be tied to the same constitutive elements of the crime with just a further proviso that targeting women in order to accomplish the stated constitutive elements of genocide would be committing the crime of genocide.

iii. Torture Convention

Sexual violence is profoundly dehumanising, inflicts immense mental and physical suffering. It is, as UN Secretary General put it, “a well established method of torture.”⁵⁶² As seen above in chapter four when discussing sexual violence as torture, the tribunal found no existing definition of torture under International Humanitarian Law. Resort to Human Rights Law was not particularly helpful because of the requirement of public connection on the part of the perpetrator. In order to avoid such uncertainty it is appropriate and timely to take measures to clearly define what under International Humanitarian Law constitutes torture. Here it is not suggested that the Torture Convention should be amended. The definition of torture under the Torture Convention, since it is a multilateral International treaty binding

⁵⁶⁰ The Prosecutor v. Jean-Paul Akayesu Case No. ICTR-96-4-T Judgment of 2 September 1996, paragraph 516.

⁵⁶¹ The Prosecutor v. Alfred Musema Case No. ICTR-96-13-A Judgment and Sentence of 27 January 2000, paragraph 163.

⁵⁶² Report of the Secretary General Pursuant to Security Council Resolution 1820 of July 15, 2009. UN Doc. S/2009/1362, paragraph 4.

the state parties, is apt. What is suggested is that existing International Humanitarian Law treaties imposing individual criminal responsibility for the commission of the crime of torture should be revised in order to expressly state that in International Humanitarian Law is considered torture in light of the developments in the jurisprudence reviewed above.

iv. Rape

Akayesu was the first case of rape as a crime against humanity that confronted an international criminal tribunal. The tribunal found no existing standard definition of rape in International Humanitarian Law. In Akayesu the trial chamber coined a conceptual definition of rape, which was later departed away from by subsequent decisions that preferred a mechanical approach. But later, in Muhimana, a conceptual definition was preferred. But the fact that various decisions within the life of one tribunal do not agree on one definition speaks volumes of the need to have a standard definition of rape in order to enhance certainty. This would require amending all International Humanitarian Law instruments that refer to rape to make clear what under International humanitarian Law is understood as rape.

b. Overcoming enduring challenges : some suggestions

As seen in the fifth chapter of this thesis, the ICTR was assailed with many challenges some which if not adequately redressed, will give a permanent impression that the ICTR had a phenomenal contempt for victims of sexual violence as they (victims) seem to have been in several instances sacrificed at the altar of judicial expediency.

i. Investigations

As shown above, investigations of sexual violence were inept, as clearly manifest in the Akayesu case where the first record of sexual violence to be laid before the tribunal came to light not through the meticulous work of investigators and prosecutors but through the untold courage of some victims and witnesses. A lot of lessons could be drawn here for future tribunals.

In order for future tribunals to avoid being found in the seeming position of gross incompetence in investigating sexual violence it is recommended that the office of the tribunal prosecutor do put an investigation and prosecution policy from the beginning that incorporates sexual violence and sets aside a dedicated and competent number of investigators who shall be dedicated to the investigation of sexual violence. The policy should clearly provide for collaboration between trial lawyers and investigators so that there is no disconnect between them. This will enhance the quality of statements and general evidence collected by the investigators as investigators shall know from trial lawyers what is expected of them.

The experience from Rwanda shows that in that context female victims were at peace revealing details of the sexual violence suffered to female investigators.⁵⁶³ In light of such an experience, it is recommended that in investigations teams dedicated to sexual violence, women should be given the lead.

Investigators also, as shown above, showed in many instances remarkable lack of judgment as they would visit their clients in clearly marked out UN vehicles. This, in a volatile situation like Rwanda was in the aftermath of the genocide, exposed the victims to further vulnerability. This could have led many to remain mute instead of risking further victimisation. It is proposed that future tribunals should consider covert investigations whereby vehicles used are not marked and the means of contacting victims and witnesses do not attract unnecessary attention to them (victims).

Since officers that get employed in tribunals of this nature come from diverse legal families and their experiences vary, it is suggested that in order to standardise the approach in investigation, all investigators must undergo a standard training from the outset on how to investigate sexual violence and how to handle victims and witnesses. Further, it is possible to prepare model questionnaires and model witness statements for investigators in order to ensure that appropriate information is obtained from the victims and witnesses of sexual violence.⁵⁶⁴ To guarantee that perpetrators of atrocities are not in the rank of the employees of the tribunal there must be mandatory vetting of all tribunal employees.

ii. Witness Protection

Many witnesses who testified or collaborated with the ICTR found themselves in a precarious situation. They were killed while others had to face hostile neighbours when they returned. In order to avoid such occurrences it is necessary to devise, as already stated, covert methods of investigation that do not expose the witnesses to the wrath and curiosity of their communities. Marked vehicles, for example, should not be used. Further, when visiting communities, investigators should not just visit their clients but need to diffuse attention by visiting and talking to as many people as possible.⁵⁶⁵

In the context of post trial protection, witnesses should be given clear contact details of the tribunal officers who they would report dangers to their security in the shortest possible time. In this age of bludgeoning technology the possibility of providing a cell phone that has an emergency dialling facility should be explored. The involvement of local police in witness protection should be outlined as the tribunal may not have enough capacity to police an entire volatile country.

⁵⁶³ Human Rights Watch, Shattered Lives: Sexual violence During the Rwanda Genocide and its Aftermath (September, 1996).

⁵⁶⁴ Best Practices Manual for the Investigation and Prosecution of Sexual violence in armed conflict: Lessons from the International Criminal Tribunal for Rwanda (2008).

⁵⁶⁵ Ibid.

Specifically for the ICTR, while it is still being determined how the tribunal will close, it is proposed that in order not to leave victims without an judicial body to resort to when in need of further protection or in need of modifying their protection orders, it is suggested that there is need to extend the lifespan of the ICTR for a few years, while progressively downsizing and giving it a limited mandate (such as ordering and varying witness protection orders).

It is absolutely necessary that witnesses are clearly and expressly informed that even if there are measures intended to protect them, the rules of court require that their names be known at some point by the defence and therefore there is always a possibility however remote that their identity may be leaked. This will ensure that witnesses fully understand the consequences of their action and make an informed decision about testifying. This will enhance the credibility of the tribunal, instead of tricking witnesses into testifying and later on they find, as was seen above, that their story and their whole private life is the gossip of everyone in their communities when they return home.

iii. Training and proximity

There were instances when judges and prosecutors seem to have hidden their prejudices behind judicial and legal expediencies when handling cases of sexual violence. Though judges and prosecutors employed by the ICTR come with extensive experience, they are not specifically required by the ICTR statute that they should have had experience in handling cases of sexual violence. In view of the diversity of the experiences of the judges and prosecutors it is proposed that at the start of their engagement with the tribunal they ought to undergo a standard course in the handling of victims of sexual violence. Such a course should be tailored to ensuring that sexual violence victims are treated with sensitivity, due respect and care when they appear before the tribunal.

In order for judges and all tribunal employees to contextualize their work, it is proposed that as much as it is practicable, and as much as the security situation allows, a tribunal should be seated in the country it is serving. That would allow the tribunal to have a direct experience of the context in which they operate and would also allow the people to relate with the international justice system which is set up on their behalf. Further, that would increase the possibility of as many people as possible being aware of the work of the tribunal and its relevance in their lives. A distant and seemingly impersonal tribunal to which ordinary people do not have access seems ill equipped to demonstrate its ability to promote reconciliation in the community and bring about healing and peace.

Rwanda is neither the final conflict in Africa nor in the whole world. There are other conflicts that occasioned massive abuse of human rights and disregard of international humanitarian law in countries such as Sudan, Eastern Congo, Kenya, Northern Uganda, Ivory Coast, Somali, Zimbabwe, and Burundi which have not been fully redressed. Therefore it may not be impossible to see the creation of an international criminal tribunal within this

age, especially a hybrid tribunal such as the Special Court for Sierra Leone, for countries which may wish to localise international justice, despite the creation of the permanent International Criminal Court. This thesis which has studied advances and obstacles in the development and effective prosecution of perpetrators of sexual violence may be of valuable use. The ICTR has scored monumental progress in advancing sexual violence jurisprudence in International Humanitarian Law. At the same time it was assailed with many challenges. Such challenges are not raised in order to detract from the positive record of the tribunal but in order to ensure that lessons are learnt and the possibilities are increased towards greater achievements, as John Stuart Mill, stated: "The people who think it a shame when anything goes wrong- who rush to the conclusion that the evil could and ought to have been prevented, are those who, in the long run, do most to make the world better."⁵⁶⁶

⁵⁶⁶ John Stuart Mill, Representative Government, 1861, chapter 3.

APPENDIX

STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

Article 1: Competence of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.

Article 2: Genocide

1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this Article or of committing any of the other

acts enumerated in paragraph 3 of this Article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

3. The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

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.

Article 4: Violations of Article 3 Common to the Geneva Conventions

and of Additional Protocol II

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva

Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

(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 form of corporal punishment;

(b) Collective punishments;

(c) Taking of hostages;

(d) Acts of terrorism;

(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) Pillage;

(g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;

(h) Threats to commit any of the foregoing acts.

Article 5: Personal Jurisdiction

The International Tribunal for Rwanda shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 6: Individual Criminal Responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the

planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute,

shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or

she knew or had reason to know that the subordinate was about to commit such acts or had done

so and the superior failed to take the necessary and reasonable measures to prevent such acts or

to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.

Article 7: Territorial and Temporal Jurisdiction

The territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda including its land surface and airspace as well as to the territory of neighbouring States in respect of serious violations of international humanitarian law committed

by Rwandan citizens. The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994.

Article 8: Concurrent Jurisdiction

1. The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the

territory of the neighbouring States, between 1 January 1994 and 31 December 1994.

2. The International Tribunal for Rwanda shall have the primacy over the national courts of all

States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the

Rules of Procedure and Evidence of the International Tribunal for Rwanda.

Article 9: *Non Bis in Idem*

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda.

2. A person who has been tried before a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal for Rwanda only if:

(a) The act for which he or she was tried was characterised as an ordinary crime; or

(b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present

Statute, the International Tribunal for Rwanda shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 10: Organisation of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall consist of the following organs:

(a) The Chambers, comprising three Trial Chambers and one Appeals Chamber;

(b) The Prosecutor;

(c) A Registry.

Article 11: Composition of the Chambers

1. The Chambers shall be composed of sixteen permanent independent judges, no two of whom may be nationals of the same State, and a maximum at any one time of nine *ad litem* independent judges appointed in accordance with article 12 *ter*, paragraph 2, of the present Statute, no two of whom may be nationals of the same State.

2. Three permanent judges and a maximum at any one time of six *ad litem* judges shall be members of each Trial Chamber. Each Trial Chamber to which *ad litem* judges are assigned may

be divided into sections of three judges each, composed of both permanent and *ad litem* judges.

A section of a Trial Chamber shall have the same power and responsibilities as a Trial Chamber

under the present Statute and shall render judgment in accordance with the same rules.

3. Seven of the permanent judges shall be members of the Appeals Chamber. The Appeals Chamber shall, for each appeal, be composed of five of its members.

4. A person who for the purposes of membership of the members of the International Tribunal for Rwanda could be regarded as a national of more than one State shall be deemed to

be a national of the State in which that person ordinarily exercises civil and political rights.

Article 12: Qualification and Election of Judges

The permanent and *ad litem* judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment

to the highest judicial offices. In the overall composition of the Chambers and sections of the Trial Chambers, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

Article 12 bis: Election of Permanent Judges

1. Eleven of the permanent judges of the International Tribunal for Rwanda shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(a) The Secretary-General shall invite nominations for permanent judges of the International Tribunal for Rwanda from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;

(b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in article 12 of the present Statute, no two of whom shall be of the same nationality and neither of whom shall be of the same nationality as any judge who is a member of the Appeals Chamber and who was elected or appointed a permanent judge of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter referred to as 'the International Tribunal for the Former Yugoslavia') in accordance with article 13 bis of the Statute of that Tribunal;

(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twenty-two and not more than thirty-three candidates, taking due account of the adequate representation on the International Tribunal for Rwanda of the principal legal systems of the world;

(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect eleven permanent judges of the International Tribunal for Rwanda.

The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.

2. In the event of a vacancy in the Chambers amongst the permanent judges elected or appointed in accordance with this article, after consultation with the Presidents of the Security

Council and of the General Assembly, the Secretary-General shall appoint a person meeting the

qualifications of article 12 of the present Statute, for the remainder of the term of office concerned.

3. The permanent judges elected in accordance with this article shall be elected for a term of four years. The terms and conditions of service shall be those of the permanent judges of the International Tribunal for the Former Yugoslavia. They shall be eligible for re-election.

Article 12 *ter*: Election and Appointment of *Ad litem* Judges

1. The *ad litem* judges of the International Tribunal for Rwanda shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(a) The Secretary-General shall invite nominations for *ad litem* judges of the International Tribunal for Rwanda from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;

(b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to four candidates meeting the qualifications set out in article 12 of the present Statute, taking into account the importance of a fair representation of female and male candidates;

(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than thirty-six candidates, taking due account of the adequate representation of the principal legal systems of the world and bearing in mind the importance of equitable geographical distribution;

(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect the eighteen *ad litem* judges of the International Tribunal for Rwanda. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters shall be declared elected;

(e) The *ad litem* judges shall be elected for a term of four years. They shall not be eligible for re-election.

2. During their term, *ad litem* judges will be appointed by the Secretary-General, upon request of the President of the International Tribunal for Rwanda, to serve in the Trial Chambers

for one or more trials, for a cumulative period of up to, but not including, three years. When requesting the appointment of any particular *ad litem* judge, the President of the International Tribunal for Rwanda shall bear in mind the criteria set out in article 12 of the present Statute regarding the composition of the Chambers and sections of the Trial Chambers, the considerations set out in paragraphs 1 (b) and (c) above and the number of votes the *ad litem*

judge received in the General Assembly.

Article 12 *quater*: Status of *Ad litem* Judges

1. During the period in which they are appointed to serve in the International Tribunal for Rwanda, *ad litem* judges shall:

(a) Benefit from the same terms and conditions of service *mutatis mutandis* as the

- permanent judges of the International Tribunal for Rwanda;
- (b) Enjoy, subject to paragraph 2 below, the same powers as the permanent judges of the International Tribunal for Rwanda;
- (c) Enjoy the privileges and immunities, exemptions and facilities of a judge of the International Tribunal for Rwanda;
- (d) Enjoy the power to adjudicate in pre-trial proceedings in cases other than those that they have been appointed to try.

2. During the period in which they are appointed to serve in the International Tribunal for Rwanda, *ad litem* judges shall not:

- (a) Be eligible for election as, or to vote in the election of, the President of the International Tribunal for Rwanda or the Presiding Judge of a Trial Chamber pursuant to article 13 of the present Statute;
- (b) Have power:
 - (i) To adopt rules of procedure and evidence pursuant to article 14 of the present Statute. They shall, however, be consulted before the adoption of those rules;
 - (ii) To review an indictment pursuant to article 18 of the present Statute;
 - (iii) To consult with the President of the International Tribunal for Rwanda in relation to the assignment of judges pursuant to article 13 of the present Statute or in relation to a pardon or commutation of sentence pursuant to article 27 of the present Statute.

Article 13: Officers and Members of the Chambers

1. The permanent judges of the International Tribunal for Rwanda shall elect a President from amongst their number.
2. The President of the International Tribunal for Rwanda shall be a member of one of its Trial Chambers.
3. After consultation with the permanent judges of the International Tribunal for Rwanda, the President shall assign two of the permanent judges elected or appointed in accordance with article 12 *bis* of the present Statute to be members of the Appeals Chamber of the International Tribunal for the Former Yugoslavia and eight to the Trial Chambers of the International Tribunal for Rwanda.
4. The members of the Appeals Chamber of the International Tribunal for the Former Yugoslavia shall also serve as the members of the Appeals Chamber of the International Tribunal for Rwanda.
5. After consultation with the permanent judges of the International Tribunal for Rwanda, the President shall assign such *ad litem* judges as may from time to time be appointed to serve in the International Tribunal for Rwanda to the Trial Chambers.
6. A judge shall serve only in the Chamber to which he or she was assigned.
7. The permanent judges of each Trial Chamber shall elect a Presiding Judge from amongst their number, who shall oversee the work of that Trial Chamber as a whole.

Article 14: Rules of Procedure and Evidence

The Judges of the International Tribunal for Rwanda shall adopt, for the purpose of

proceedings before the International Tribunal for Rwanda, the Rules of Procedure and Evidence

for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the International Tribunal for the former Yugoslavia with such changes as they deem necessary.

Article 15: The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of

Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

2. The Prosecutor shall act independently as a separate organ of the International Tribunal for Rwanda. He or she shall not seek or receive instructions from any government or from any other source.

3. The Office of the Prosecutor shall be composed of a Prosecutor and such other qualified staff as may be required.

4. The Prosecutor shall be appointed by the Security Council on nomination by the Secretary-General. He or she shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases.

The Prosecutor shall serve for a four-year term and be eligible for reappointment. The terms and

conditions of service of the Prosecutor shall be those of an Under-Secretary-General of the United Nations.

5. The staff of the Office of the Prosecutor shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

Article 16: The Registry

1. The Registry shall be responsible for the administration and servicing of the International Tribunal for Rwanda.

2. The Registry shall consist of a Registrar and such other staff as may be required.

3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the International Tribunal for Rwanda. He or she shall serve for a four-year term and be eligible for re-appointment. The terms and conditions of service of the Registrar shall be

those of an Assistant Secretary-General of the United Nations.

4. The Staff of the Registry shall be appointed by the Secretary-General on the recommendation of the Registrar.

Article 17: Investigation and Preparation of Indictment

1. The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.

2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may,

as appropriate, seek the assistance of the State authorities concerned.

3. If questioned, the suspect shall be entitled to be assisted by Counsel of his or her own choice, including the right to have legal assistance assigned to the suspect without payment by

him or her in any such case if he or she does not have sufficient means to pay for it, as well as necessary translation into and from a language he or she speaks and understands.

4. Upon a determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

Article 18: Review of the Indictment

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he or she shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.

2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other

orders as may be required for the conduct of the trial.

Article 19: Commencement and Conduct of Trial Proceedings

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal for Rwanda be taken into custody, immediately informed of the charges against him or her and transferred to the International Tribunal for Rwanda.

3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter

a plea. The Trial Chamber shall then set the date for trial.

4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its Rules of Procedure and Evidence.

Article 20: Rights of the Accused

1. All persons shall be equal before the International Tribunal for Rwanda.

2. In the determination of charges against him or her, the accused shall be entitled to a fair and

public hearing, subject to Article 21 of the Statute.

3. The accused shall be presumed innocent until proven guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

(b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;

- (c) To be tried without undue delay;
- (d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interest of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
- (e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
- (f) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the International Tribunal for Rwanda;
- (g) Not to be compelled to testify against himself or herself or to confess guilt.

Article 21: Protection of Victims and Witnesses

The International Tribunal for Rwanda shall provide in its Rules of Procedure and Evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

Article 22: Judgement

1. The Trial Chambers shall pronounce judgements and sentences and penalties on persons convicted of serious violations of international humanitarian law.
2. The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 23: Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda.
2. In imposing the sentences, the Trial Chambers shall take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Article 24: Appellate Proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:
 - (a) An error on a question of law invalidating the decision; or
 - (b) An error of fact which has occasioned a miscarriage of justice.
2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

Article 25: Review Proceedings

Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor

in reaching the decision, the convicted person or the prosecutor may submit to the International Tribunal for Rwanda an application for review of the judgement.

Article 26: Enforcement of Sentences

Imprisonment shall be served in Rwanda or any of the States on a list of States which have indicated to the Security Council their willingness to accept convicted persons, as designated by the International Tribunal for Rwanda. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal for Rwanda.

Article 27: Pardon or Commutation of Sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal for Rwanda accordingly. There shall only be pardon or commutation of sentence if the President of the International Tribunal for Rwanda, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.

Article 28: Cooperation and Judicial Assistance

1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to:

- (a) The identification and location of persons;
- (b) The taking of testimony and the production of evidence;
- (c) The service of documents;
- (d) The arrest or detention of persons;
- (e) The surrender or the transfer of the accused to the International Tribunal for Rwanda.

Statut du Tribunal pénal international pour le Rwanda 07 64

Article 24 : Appel

1. La Chambre d'appel connaît des recours introduits soit par les personnes condamnées par les Chambres de première instance, soit par le Procureur, pour les motifs suivants :

- a) Erreur sur un point de droit qui invalide la décision; ou
- b) Erreur de fait qui a entraîné un déni de justice.

2. La Chambre d'appel peut confirmer, annuler ou réviser les décisions des Chambres de première instance.

Article 25 : Révision

S'il est découvert un fait nouveau qui n'était pas connu au moment du procès en première instance ou en appel et qui aurait pu être un élément décisif de la décision, le condamné ou le Procureur peut saisir le Tribunal international pour le Rwanda d'une demande en révision de la sentence.

Article 29: The Status, Privileges and Immunities of the International Tribunal for Rwanda

1. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the International Tribunal for Rwanda, the judges, the Prosecutor and his or her staff, and the Registrar and his or her staff.
2. The judges, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.
3. The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under Articles V and VII of the Convention referred to in paragraph 1 of this article.
4. Other persons, including the accused, required at the seat or meeting place of the International Tribunal for Rwanda shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal for Rwanda.

Article 30: Expenses of the International Tribunal for Rwanda

The expenses of the International Tribunal for Rwanda shall be expenses of the Organisation in accordance with Article 17 of the Charter of the United Nations.

Article 31: Working Languages

The working languages of the International Tribunal for Rwanda shall be English and French.

Article 32: Annual Report

The President of the International Tribunal for Rwanda shall submit an annual report of the International Tribunal for Rwanda to the Security Council and to the General Assembly.

BIBLIOGRAPHY

Books

Broomhall, Bruce. International Justice and the International Criminal Court: Between Sovereignty and Rule of Law. Oxford: Oxford University Press, 2003.

De Than, Claire, and Edwin Shorts. International Criminal Law and Human Rights. London: Sweet and Maxwell, 2003.

Des Forges, Alison. Leave None to Tell the Story: Genocide in Rwanda. Human Rights Watch, 1999.

Denstein, Yoram. The Conduct of Hostilities Under the Law of International Armed Conflict. Cambridge: Cambridge University Press, 2004.

Eicher, H. John, and David J. Eicher. Civil War High Commands. Stafford: Stafford University Press, 2001.

ICRC. International Humanitarian Law. Answers to Your Questions. 2002.

Ilibagiza, Immaculee. Left to Tell: Discovering God Amidst the Rwanda Holocaust. New York: Hayhouse, 2006.

Kittichaisaree, Kriagsak. International Criminal Law. Oxford: Oxford University Press, 2005.

Khushalani, Yougindra. Dignity and Honour of Women as Basic and Fundamental Human Rights. The Hague: Martinus Nijhoff Publishers, 1982.

Mill, John Stuart. Representative Government. 1861.

Schabbas, William. An Introduction to the International Criminal Court, Second edition. Cambridge: Cambridge University Press, 2004.

Schwarzenberger, George. International Law as Applied by International Courts and Tribunals: the Law of Armed Conflict, Volume II. London: Stevens and Sons Ltd, 1968.

Shaw, N. Malcom. International Law, Fourth edition. Cambridge: Cambridge University Press, 2000.

Sunga, S. Lyals. Individual Responsibility in International Law for Serious Human Rights Violations. The Hague: Martinus Nijhoff Publishers, 1992.

Woetzel, K. Robert. The Nuremberg Trials. London: Stevens and Sons, 1962.

Reports

Amnesty International. Liberia: A Flawed Post-war Process Discriminates Against Women and Girls. March 2008.

_____ Lives Blown Apart: Crimes Against Women in Times of Conflict. 2008.

_____ Rwanda: Marked for Death. Rape Survivors Living with HIV/AIDS in Rwanda. 2008.

_____ Rwanda: The Enduring Legacy of Genocide and War. 2008.

_____ Sierra Leone: Getting Reparation Rights for Survivors of Sexual Violence. 2007.

_____ Stop Violence Against Women: How to Use International Criminal Law to Campaign for Gender Sensitive Law. 2008.

_____ Sudan: Displaced in Darfur: A Generation of Anger. January 2008.

Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Situations of Armed Conflict: Lessons from the International Criminal Tribunal for Rwanda. 2008.

Centre for Conflict Resolution. Peace Versus Justice? Truth and Reconciliation Commissions and War Crimes Tribunals in Africa. Cape Town: CCR, 2007.

Coomaraswamy, Radhika. Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences Submitted in Accordance with Commission Resolution 1997/44. UN Doc. E/CN.4/1998/54. January 26, 1998.

_____. Report of the Special Rapporteur on Violence against women, its causes and consequences submitted in accordance with Commission Resolution 1997/44.

_____. Report of the Special Rapporteur on the Mission to Rwanda on the Issues of Violence Against Women in Situations of Armed Conflict. UN Doc. E/CN.4/1998/54.Add.1. February 4, 1998.

Degni-Segui, Rene. Report on the Situation of Human Rights in Rwanda Submitted by Special Rapporteur of the Commission on Human Rights. May 25, 1994.

_____. Report on the Status of Human Rights in Rwanda Submitted by the Special Rapporteur of the Commission on Human Rights. UN Doc. E/CN.4/1996/68. January 29, 1996.

Human Rights Watch. Shattered Lives: Sexual Violence During the Rwanda Genocide and its Aftermath. September 1996.

_____. Struggling to Survive: Barriers to Justice for Rape Survivors in Rwanda. 2003

International Federation for Human Rights. Democratic Republic of Congo(DRC): Breaking the Cycle of Impunity. March 2008.

ICRC. From the Battle of Solferino to the eve of the First World War. Available at <http://www.icrc.org/web/eng/siteengO>.

Report of the Secretary General Pursuant to Security Council Resolution 1820 of July 15, 2009. UN Doc. S/2009/1362

UNFPA. Sexual Violence Against Women During the Genocide in Rwanda and its Aftermath: Realities, Responses and required Resources. June 2006.

Women, Peace and Security. Study Submitted by the Secretary General Pursuant to the Security Council Resolution 1325/2000. 2002.

World Health Organisation. World Report on Violence and Health. Geneva: 2002.

World Organisation against Torture(OMTC). Violence Against Women in the Democratic Republic of Congo: Alternative Report Prepared for the Committee on the Elimination of Discrimination Against Women. August 2006.

UN Division for the Advancement of Women. Sexual Violence and Armed Conflict: United Nations Responses. April 1998.

Journal Articles and Academic Papers

Askin, D. Kelly. "A Decade of Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003." Human Rights Brief, Volume II, Issue 3. 2004.

Bloomfield, Stephen. "French Troops Raped Girls During Rwanda Genocide." The Independent. Friday 31, August 2007.

Brunet , Ariene. Letter to the ICTR Prosecutor Hassan Jallow. February 8, 2005.

Crane, M. David. "Dancing with the Devil: Prosecuting West Africa's War Lords: Current Lessons Learnt and Challenges." a paper presented at the Third Colloquium of Prosecutors.2008.

Coalition for Women's Human Rights in Conflict Situations. Amicus Curiae Respecting Amendment of the indictment and supplementation of the evidence to ensure the prosecution of rape and other sexual violence within the competence of the tribunal: Re: The Prosecutor v. Akayesu (1997).

_____ Amicus Curiae Brief Respecting the need to include sexual violence charges in the indictment: the prosecutor v. Samuel Immanuel Bagambiki, Andre Ntagerura Case No. ICTR-99-46-T (March, 2001).

De Brouwer, Annie- Marie. "Sexual Violence Against Women During the Genocide in Rwanda and its Aftermath." A paper presented at the Solace Ministries Conference, 30 April- 4 May, 2007, Eingen, Switzerland.

Dicker, Richard and Elise Keppler. "Beyond The Hague: the challenge of international justice." Human Rights Watch, 2004.

Frontline Magazine, Interview with Alison des Forges. 1 October, 2003.

Fomente, Jean-Pele. "Beyond 2010: Few legacy and succession issues related to the end of the ICTR mandate." A paper presented at the ICTR-CCM conference on challenging impunity, 7- 8 November, 2006, Kigali, Rwanda.

Gadarm, G. Judith. "Women, human rights and international humanitarian law." International Review of the Red Cross. No. 324. July 30, 1998.

Gazarek, Eva, and Anne Saris. Protection of women as witnesses at the ICTR: A report Prepared for the Coalition for Women's Human rights in Conflict Situations. 2002.

Goodwin, Jan. "Rwanda: Justice denied." On the Issues: the Progressive Women's Magazine, 1997.

Greppi, Edoardo. "The evolution of individual criminal responsibility under international law." International Review of the Red Cross. No. 835. September 1999.

Ingadottir, Theordis, Carla Ferstman, and Edda Kristjansdottir. "Victims of atrocities-access to reparations," a paper presented at a conference entitled "search for justice: comprehensive action in the face of atrocities," presented on 4- 6 June, 2003, at York University, Canada.

Keane, Fergal. "Massacres at Nyarubuye Church." BBC News. Available at <http://www.news.bbc.co.uk/go/pr/fr/-12>

Levie, S. Howard. "History of the law of war on the land." International Review of the Red Cross. No. 838. 30 January 2000.

Lindsey, Charlotte. "Women and war- an overview." International Review of the Red Cross. Nov. 837. September, 2000.

McGill Doctoral Affiliates. Analysis of trends in sex violence prosecutions and indictments by the International criminal Tribunal for Rwanda (ICTR) from November 1996 to November 2002. 2002.

McKinnon, Cathrine. "The recognition of Rape as an act of genocide: Prosecutor v. Akayesu." N.E. Journal of International and Comparative Law, volume 14, Number 2. 27 October, 2008.

Muna, A. Benard. "The early challenges of conducting investigations and prosecutions before International criminal tribunals." a paper presented at the forum between offices of the UN ad hoc tribunals and national prosecuting authorities, 26-28 November 2008, Arusha, Tanzania.

Munyaneza, James. "Rwanda: Government could cut links with ICTR." New Times. September 12, 2006.

Neill, Kevin Gerrard. "Duty, honour, rape: sexual violence against women during war." Journal of International Women's Studies. November 7, 2000.

Nowrojee, Binaifer. "Making the invisible war crime visible: post conflict justice for Sierra Leone's rape victims." Harvard Human Rights Journal, volume 18.

_____ "Your justice is too slow: will the ICTR fail Rwanda's Rape victims?" Occasional Paper No. 10 of the United Nations Institute for Social Research and Development, November 2005.

Oosthuizen, Gabriel, and Robert Schaeffer. "Complete Justice: Residual Mechanisms of the ICTY, ICTR and SCSL." Hague Justice Journal, volume 3, number 1(2008).

Roberge, Marie- Claude. "Jurisdiction of the ad hoc tribunals for the former Yugoslavia and Rwanda over crimes against humanity and genocide." International Review of the Red Cross. No. 321. 31 December, 1997.

Snow, Keith Horman. "Mass rape and genocide in Rwanda." Peace Magazine. March 1997.

Spiropoulos, J. "Formulation of the Nuremberg Principles." Year Book of the International Law Commission, volume II, 1950.

Thomas, Q. Dorothy, and Ralph E. Regan. "Rape in war: challenging the tradition of impunity." SAIS Review, volume 1(1994).

Twahirwa, Aimable. "Genocide survivors tire of unrealistic promises." Global Policy Forum. April 20, 2006.

van der Poll, Litetia. "The emerging jurisprudence on sexual violence perpetrated against women during armed conflict." Africa Year Book on International humanitarian law. November 2007.

Walsh, Connie. Witness protection, gender and the ICTR. A report prepared for the Coalition for women's Rights in Conflict Situations. July 1997.

Wilson, Simon. The effect of sexual violence against w men in war: a case study of Rwanda(2004). Available at <http://www.codmanacademy.org/branches/jus04-05/index.php?>