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From the Courthouse to the Backyard: The Gendered Impact of Transitional Justice Mechanisms in Post-Genocide Rwanda

Nam Luu

Connecticut College, nluu@conncoll.edu

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FROM THE COURTHOUSE TO THE BACKYARD

**THE GENDERED IMPACT OF TRANSITIONAL JUSTICE MECHANISMS
IN POST-GENOCIDE RWANDA**

**AN HONORS THESIS
PRESENTED BY
NAM LUU**

To

**THE DEPARTMENT OF GOVERNMENT AND INTERNATIONAL RELATIONS
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR
HONORS IN THE MAJOR FIELD**

**CONNECTICUT COLLEGE
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ABSTRACT

In one hundred days between April 6 and July 15, 1994, the Rwandan genocide took away the lives of approximately 800,000 Tutsis and politically moderate Hutus. The United Nations estimated that between 250,000 and 500,000 individuals were raped or sexually assaulted during the genocide, and rape was used as a tool of war with a clear genocidal intent to destroy the enemy. Both men and women subjected to rape, gang rape, sexual torture, sexual slavery, sexual mutilation, and various other types of abuse and humiliation. As the genocide ended with the victory of the Tutsi-dominated Rwandan Patriotic Front (RPF), Rwanda was confronted with a multitude of challenges, including holding perpetrators accountable, helping survivors reconcile with the past, and moving the country towards reconstruction. As an attempt to reckon with this painful past and the emerging challenges at present, Rwanda and the international community turned to transitional justice and hoped to deliver justice and reconciliation. Internationally, the United Nations Security Council established International Criminal Tribunal for Rwanda to investigate and prosecute high-level perpetrators, and various countries held trials based on the principle of universal jurisdiction to try perpetrators who fled Rwanda after the genocide. Domestically, Rwanda sought justice and reconciliation in the national courts, the local *gacaca* courts, and various reparation programs.

At the most preliminary level, this thesis provides a systematic comparative analysis of the strengths and weaknesses of international and domestic transitional justice mechanisms in bringing comprehensive justice – both retributive and restorative – to victims of rape and sexual violence during the genocide. This thesis argues that no mechanisms were perfect; each mechanism had different strengths and weaknesses. Internationally, the ICTR and universal jurisdiction trials in other states were particularly successful in creating jurisprudential norms of

prosecuting rape and sexual violence as serious crimes under international law. Domestically, the national courts and *gacaca* functioned as concurrent justice mechanisms, and were together able to uncover some truth about the genocide and prosecuted approximately 9,000 individuals for rape or sexual torture. Additionally, assistance programs, especially in terms of housing and healthcare, were delivered to some sexual violence survivors. Despite these achievements, both international and domestic transitional justice faced several shortcomings in bringing comprehensive justice for victims of rape and sexual violence. Compared to the estimated 250,000 to 500,000 rape cases during the genocide, retributive justice delivery in all levels was inadequate. Additionally, all mechanisms were not very successful at investigating and prosecuting sexual violence against male and Hutu victims. No mechanism was successful at uncovering truth about and prosecuting crimes committed by the RPF, and this appearance of “victor’s justice” was detrimental to national reconciliation between the two ethnic groups in Rwanda. Moreover, the operation of reparation programs within Rwanda also marginalized a large number of survivors of rape and sexual violence.

Because of these shortcomings, this thesis argues that to many Rwandan victims of sexual crimes, truth, justice, and reconciliation were impossible. The thesis points out that different survivors had different conceptions of justice and reconciliation, and that social stigmas surrounding sexual crimes were a constant independent variable that inhibited the justice process. The thesis ends with a summary of research findings and provides recommendations for future research and future transitional justice projects.

TO THE MEMORIES OF ZAIDA CATALÁN AND MICHAEL J. SHARP,
WHO WERE KILLED IN MARCH 2017 WHILE INVESTIGATING HUMAN RIGHTS VIOLATIONS IN THE
DEMOCRATIC REPUBLIC OF CONGO.

MAY THEIR COURAGE AND THE PURSUIT OF TRUTH AND JUSTICE LEAD US TO A BETTER WORLD
WHERE HUMAN RIGHTS ARE UNIVERSALLY PROTECTED.

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ABBREVIATIONS

AVEGA	<i>Association des Veuves du Genocide</i> – The Association of the Widows of Genocide
FARG	<i>Fonds d'Assistance aux Rescapés du Génocide</i> – The Assistance Fund for Genocide Survivors
FIND	<i>Fond d'indemnisation</i> – The Compensation/Indemnification Fund
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
MICT	Mechanism for International Criminal Tribunals
MRND	<i>Mouvement Républicain National Pour la Démocratie et le Développement</i> – National Republican Movement for Democracy and Development
NGO	Non-Governmental Organization
NURC	National Unity and Reconciliation Commission
OTP	Office of the Prosecutor
RPF	Rwandan Patriotic Front
SNJG	The National Service of the Gacaca Courts
UN	United Nations
UNSC	United Nations Security Council
UNGA	United Nations General Assembly

1. THE AFTERMATH

INTRODUCTION

At some point, a FAR soldier picked me out of the group and took me to a nearby bush. This soldier raped me. After he was done with me, he took me to a house and told the owners of the house to keep me safe so that he could rape me every time he came. He told them if anything happened to me he would kill them. Over five days, I was raped five times a day.¹

At 8:30 pm on April 6, 1994, a plane carrying Rwandan President Juvénal Habyarimana and Burundian President Cyprien Ntaryamira was shot down during its descent approach into Kigali International Airport, killing everyone on board. What immediately followed was the start of one of the fastest and most horrific genocidal conflicts the world has witnessed since the Holocaust. President Habyarimana's death provided Hutu extremists with complete control of the government, the military, and security services, effectively setting in motion the genocide of Tutsis and politically moderate Hutus. In 100 days between April 6 and July 15, 1994, the genocide resulted in the deaths of approximately 800,000 people at the rate of 333 1/3 deaths per hour and 5½ deaths per minute.² Hutu extremists employed various genocidal strategies, including using state-sponsored and privately owned media outlets, to propel violence against Tutsi "cockroaches."³ The principals of the genocide were able to mobilize a large population to participate in widespread killing to an unprecedented degree. To many, death, however, did not come quickly. The level of brutality exceeded imagination; victims were tortured both physically and psychologically before death, and subjected to the most painful and humiliating treatments

¹ Testimony by Marie Louise Niyobuhungiro in Anne-Marie De Brouwer and Sandra Ka Hon Chu, *The Men Who Killed Me: Rwanda Survivors of Sexual Violence* (Vancouver: Douglas & McIntyre, 2009), 32

² Michael N. Barnett, *Eyewitness to a Genocide: The United Nations and Rwanda* (Ithaca: Cornell University Press, 2002), 1

³ Gerald Gahima, *Transitional Justice in Rwanda: Accountability for Atrocity* (Abingdon, Oxon: Routledge, 2013), 44

possible. Some were buried alive; some were mutilated and left to bleed to death, while others were forced to kill their children, spouses, or friends before being killed themselves.⁴

Twenty-two years have passed, and the Rwandan genocide is still regarded as one of the most horrific mass atrocities in recent history. However, many forget that one of its most brutal aspects was the widespread use of rape and sexual assaults as genocidal tools. In the years leading up to the genocide, Tutsi women were especially targeted by genocidal propaganda. In December 1990, the Hutu paper *Kangura*, meaning "Wake up," published its "Ten Commandments of the Hutu" with special references to Tutsi women:

1. Every Hutu should know that a Tutsi woman, wherever she is, works for the interests of her Tutsi ethnic group. As a result, we shall consider a traitor any Hutu who:
 - Marries a Tutsi woman;
 - Befriends a Tutsi woman;
 - Employs a Tutsi woman as a secretary or concubine.
2. Every Hutu should know that our Hutu daughters are more suitable and conscientious in their role as woman, wife, and mother of the family. Are they not beautiful, good secretaries and more honest?
3. Hutu women, be vigilant and try to bring your husbands, brothers and sons back to reason.⁵

Through these Commandments, *Kangura* created the conditions that made sexual attacks of Tutsi women a foreseeable part of the genocide.⁶ Tutsi women were also accused of using their sexuality to enslave Hutu men for the promotion of Tutsi hegemony.⁷ Moreover, the depiction of Tutsi women through the propaganda contributed to the attitudes toward them – “that they were objects to be dominated, humiliated, dehumanized, and destroyed.”⁸ United Nations officials

⁴ Ibid 45

⁵ Samantha Power, *A Problem from Hell: America and the Age of Genocide* (New York: Basic, 2002), 338-339

⁶ Usta Kaiteesi, *Genocidal Gender and Sexual Violence: The Legacy of the ICTR, Rwanda's Ordinary Courts and Gacaca Courts* (Cambridge, Antwerp, and Portland, OR: Intersentia, 2014), 71

⁷ Ibid 7

⁸ Alex Obote-Odora, "Rape and Sexual Violence in International Law: ICTR Contribution," *New England Journal of International and Comparative Law* I. 12 (2005): 140

estimated that between 250,000 and 500,000 people were raped during the 100 days of conflict.⁹ Rape was often committed in public spaces such as schools and roadblocks, in view of husbands, children, and relatives. With neither children nor the elderly spared, Rwandan women were subjected to rape, gang rape, sexual torture, sexual slavery, sexual mutilation, the cutting open of wombs and removing of fetuses, and other types of abuses and humiliation.¹⁰ As social and political weapons, rape and sexual assaults functioned to fulfill genocidal visions by leading to physical death, community breakdown, and the dilution of the next generation.¹¹ It is crucial to note that Tutsi men and boys, as well as Hutu women who were married to Tutsi men and/or deemed sympathizers of the Tutsi, also suffered from sexual violence, albeit to a much lesser extent.¹² It is this combination of frequency, pervasiveness, and brutality with a clear genocidal vision that made rape an actual tool of genocide itself.

The long-term impact of gender-based violence, however, did not stop when the genocide ended, as Rwandan women were left in extremely dire socioeconomic conditions. Many rape survivors were infected with HIV and other sexually transmitted diseases, and either died or are dying of HIV/AIDS.¹³ Since many traditional male breadwinners of the family were either killed or imprisoned, women became heads of the households and bore the burden of not only supporting themselves and their children, but also of providing food for their imprisoned relatives.¹⁴ An estimated 5,000 babies were born as a result of rape during the genocide, and innocently served as a painful reminder of the traumatic events their mothers experienced.¹⁵ In

⁹ De Brouwer and Ka Hon Chu 16

¹⁰ Gahima 45, Kaitezi 76

¹¹ James E. Waller, "Rape as a Tool of "Othering" in Genocide," in *Rape: Weapon of War and Genocide*, eds. Carol Rittner and John K. Roth (Paragon House, 2012), 85

¹² Kaitezi 5

¹³ Gahima 45

¹⁴ Human Rights Watch, *Struggling to Survive: Barriers to Justice for Rape Victims in Rwanda* (New York, 2004), 10

¹⁵ Gahima 45

addition, many women faced humiliation, loss of respect and dignity, and extreme stigmatization by community members once it was known that they were raped. The list of traumatic effects of rape and gender-based violence goes on, and the ultimate question remains: Could there ever be justice for Rwandan victims of rape and sexual violence, and what would such justice look like?

This question of justice arose within the multitude of challenges facing post-genocide Rwanda. The military victory of the Rwandan Patriotic Front (RPF) brought the end of the genocide, leaving the country with a damaged social fabric, economy, and capacity to deliver essential public services. Torn apart by the death of almost one million Tutsis and moderate Hutus, with thousands remaining as refugees and internally displaced people, Rwanda was confronted with the difficult dilemma of how to deliver justice for survivors and hold perpetrators accountable while simultaneously moving the country towards reconstruction and reconciliation. These issues of immediate urgency emerged at a crucial moment in history when the international community was also concerned with ending the culture of impunity for gross human rights violations – not just in Rwanda, but also across the globe.¹⁶ For instance, in Europe, atrocities committed in the former Yugoslavia resulted in the establishment of the *ad hoc* International Criminal Tribunal for the Former Yugoslavia (ICTY) in August 1993, a few months prior to the start of the Rwandan genocide. The creation of an international tribunal mandated by the United Nations was the culmination of the international community's efforts to date to bring accountability for gross human rights violations in international politics, especially in the aftermath of war. The irony, however, lay in the fact that the same community, exemplified by the United Nations and its Security Council, did almost nothing to either prevent or stop the genocide in Rwanda despite having early and sufficient evidence that such a genocide

¹⁶ Ibid xxxvii.

took place.¹⁷ To confront the various demands for justice and reconciliation, Rwanda and the international community turned to an emerging field of praxis and study: transitional justice.¹⁸

Transitional justice is not a specific type of justice, but rather “an approach to achieving justice” for countries in the wake of conflict and/or state repression.¹⁹ It refers to a set of judicial and non-judicial mechanisms utilized by states to reckon with the legacy of gross human rights violations. These mechanisms include, but are not limited to, criminal prosecution, truth commissions, reparations programs, and institutional reforms.²⁰ Through these various methods, states aim to accomplish various goals, including: holding perpetrators accountable for gross human rights violations, providing opportunities for healing for victims, uncovering truth and testimony to create an official historical record and a “collective memory,” eliminating impunity to cultivate a culture of respect for human rights, promoting reconciliation across social divisions, and recommending ways to deter future repetitions of gross human rights violations.²¹

Within the universe of transitional justice for Rwanda, various mechanisms were implemented. Within the confine of this thesis, the following mechanisms are selected as the main objects of investigation. In terms of criminal prosecution, four mechanisms were implemented. In the international sphere, the United Nations mandated and created the *ad hoc* International Criminal Tribunal for Rwanda (ICTR) to investigate and prosecute masterminds of the genocide responsible for gross human rights violations. In addition, many countries to which genocide planners had fled, including Belgium, France, the Netherlands, Spain, and the United States, implemented trials to prosecute genocide crimes based on the principle of universal

¹⁷ For more information, see Michael Barnett, *Eyewitness to A Genocide*

¹⁸ Gahima xxxvii

¹⁹ International Center for Transitional Justice. Web. <https://www.ictj.org/about/transitional-justice>

²⁰ Ibid

²¹ Hugo van der Merwe, Victoria Baxter, and Audrey R. Chapman, *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (Washington, DC: United States Institute of Peace, 2009), 3

jurisdiction.²² Within Rwanda, the state made various attempts to prosecute every participant of the genocide in its domestic courts. These attempts proved to be unworkable, as the justice system was so overwhelmed by the genocide caseload that some serious crimes, such as rape, were not being investigated and prosecuted.²³ Rwanda then turned to a traditional form of justice by modifying and reinstalling the *gacaca* courts, a form of communal and local justice whose name means “justice on the grass” in Kinyarwanda. *Gacaca* in its traditional form was as a system of communal justice in which prisoners were brought before lay judges, who were often elected from the village populations and trained briefly in a system of dispensing justice.²⁴ While the traditional form of *gacaca* was purely restorative, the modification and reinstallation of the *gacaca* system after the genocide contained both retributive and restorative elements. In addition, the thesis also investigates the effectiveness of domestic reparation programs in delivering economic justice and facilitating reconciliation for victims of rape and sexual assault.

This thesis argues that both local and international transitional justice mechanisms for post-genocide Rwanda were imperfect; each possessed different strengths and weaknesses in bringing both retributive and restorative justice to victims of rape and sexual violence. Some measure of justice was delivered; some truth was uncovered; and some reparation was paid to victims. Internationally, the ICTR and trials based on the principle of universal jurisdiction were able to prosecute a handful of high-level perpetrators. The ICTR was particularly successful in creating jurisprudential norms on prosecuting rape and sexual violence under international law. Domestically, the national courts and *gacaca* operated as concurrent justice mechanisms, and were also able to prosecute approximately 9,000 perpetrators of sexual violence. The Rwandan

²² Gahima 192

²³ Ibid 66

²⁴ Eric Stover and Harvey M. Weinstein, *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge, UK: Cambridge UP, 2004), 12

government also paid more attention to reparations and developing new laws that attempted to improve women's sociopolitical and economic status. Both domestic and international mechanisms were able to contribute to some aspects of reconciliation for victims of rape and sexual violence.

Despite these achievements, all mechanisms faced several shortcomings. Compared to the estimated figure of between 250,000 and 500,000 cases of rape and sexual violence during the genocide, retributive justice delivery was inadequate. In addition, all mechanisms were insufficient in bringing justice to male and Hutu victims of rape and sexual violence, and no mechanisms were able to uncover truth and prosecute crimes committed by the RPF. Ethnic tensions between the Hutu and the Tutsi dominated Rwanda and underpinned the genocide, and this appearance of "victor's justice" constituted a major impediment to national reconciliation. International mechanisms focused predominantly on retributive justice, and paid inadequate attention to reparations and reconciliation. While reconciliation was one of the ICTR's objectives listed in its mandate, the Tribunal's foreign location in Arusha and its lack of public outreach effort significantly undermined its contribution to reconciliation. Within Rwanda, the national courts system was devastated after the genocide and overburdened by the large number of detained genocide suspects. It was not until *gacaca* was implemented as a concurrent justice mechanism that national mechanisms were able to bring more perpetrators to justice. *Gacaca* was a local justice mechanism situated within each community, and this proximity proved to be a double-edge sword: it was able to facilitate justice for some victims, but simultaneously maximized the fears of social stigmas and reprisals for many others. Additionally, while *gacaca* was implemented to facilitate the pursuit of both truth and justice, it decidedly focused on justice at the expense of truth, despite the fact that not much justice was actually served. Finally, the

operation of reparation programs also marginalized a large number of survivors of rape and sexual violence. The thesis concludes that social stigmas surrounding victims of rape and sexual violence were an independent variable that inhibited the justice process. Survivors of sexual crimes had different conceptions of justice and reconciliation, and to many, a full measure of justice was unfortunately impossible.

RESEARCH DESIGN

Justice is most effective when it works in tandem with other processes of national reconstruction and reflects the crucial needs of those most affected by violence.²⁵ To victims of rape and sexual violence in Rwanda, these “crucial needs” included the pursuit of justice, the uncovering of truth about what happened during the past, and reparations, especially in terms of housing and access to healthcare. Justice for Rwandan victims of rape and gender-based violence, in order to be comprehensive and effective, must therefore be both retributive and restorative. Retributive justice requires criminal prosecution and “punishment of the guilty.”²⁶ In a society that values the close-knit spirit of families and communities like Rwanda, however, victims of rape are usually stigmatized and ostracized by their own community, preventing them from coming forward about their traumatic experiences in court. In addition, the public nature of judicial processes often constitutes an inhospitable environment for victims of gender-based violence. It is how different transitional justice mechanisms attempted to resolve this tension between the public nature of criminal prosecution and the personal nature of rape and sexual assault that this thesis seeks to analyze.

Since Rwandan women were left in extremely dire socioeconomic conditions after the genocide, justice solely in terms of criminal prosecution does not suffice. Restorative justice is

²⁵ Ibid 11

²⁶ Jennifer J. Llewellyn, “Restorative Justice in Transitions and Beyond,” in *Telling the Truths: Truth Telling and Peace Building in Post-Conflict Societies*, ed. Tristan Anne Borer (University of Notre Dame Press, 2006), 90

therefore a crucial element of investigation in this thesis. Restorative justice seeks to recognize and address the harms to all of the relationships involved during the conflict, including, but not limited to, the relationship between “the victim and wrongdoer, between the victim and wrongdoer and their respective and various communities, and between the different communities involved.”²⁷ Restorative justice is thus often described as justice for victims or sometimes as restoration of the moral order, which may be achieved through other means than prosecution and punishment.²⁸ While different scholars disagree on a single definition of restorative justice, the consensus remains that its focus should be less on crime and more on compensating for the harm done to the victim and the society, especially through reparation programs.²⁹

In the context of restorative justice, feminist transitional justice scholars³⁰ have pointed out that while it is well known that war is gendered, less recognized is that peace is gendered as well.³¹ The preoccupation of transitional justice with violations of public political and civil rights has the tendency to marginalize the various harms experienced by women, especially violations of economic, social and cultural rights, because they are usually deemed private and non-political.³² This preoccupation thus usually results in the exclusion of women and omission of gendered harms from transitional justice procedures.³³ As a result, this thesis looks at the peacetime status of Rwandan victims of rape and gendered-based violence holistically. Through the lens of restorative transitional justice, the delivery of second-generation human rights usually

²⁷ Ibid 91

²⁸ Ibid 87

²⁹ Hugo van de Merwe, “Delivering Justice during Transition: Research Challenges,” in *Assessing the Impact of Transitional Justice: Challenges for Empirical Research*, eds. van der Merwe *et al.* (Washington, DC: United States Institute of Peace, 2009), 119

³⁰ For more information, see Fionnuala Ni Aolain, Dina Haynes Francesca, and Naomi Cahn R. *On the Frontlines: Gender, War, and the Post-Conflict Process* (Oxford: Oxford UP, 2011)

³¹ Tristan Anne Borer, “Gendered War and Gendered Peace: Truth Commissions and Postconflict Gender Violence: Lessons from South Africa,” *Violence Against Women* 15.10 (2009): 1170

³² Catherine O’Rourke. *Gender Politics in Transitional Justice* (Abingdon, Oxon: Routledge, 2013), 6; Borer, “Gendered War and Gendered Peace,” 1172

³³ O’Rourke 7

translates into reparations programs and the process of reconciliation and re-integration of victims into their communities.

The concept of “reconciliation” deserves particular attention. While reconciliation is often described as a desirable and crucial step towards a sustainable peace, there is no widely agreed-upon definition for reconciliation. Eric Stover and Harvey Weinstein argue that reconciliation can be defined as the development of a mutual conciliatory accommodation between different persons or groups engaging in war and political violence.³⁴ Tristan Borer offers an approach to defining reconciliation by dividing it into two overarching subcategories: individual reconciliation (IR) and national unity reconciliation (NUR).³⁵ While IR is usually associated with healing, apology, and forgiveness, NUR is usually described in terms of tolerance, peaceful coexistence, the rule of law, human rights culture, and democracy. Borer argues that while the IR and NUR models of reconciliation are qualitatively different and serve different functions, both are necessary for sustainable peace.³⁶ In addition, Pablo de Greiff offers a comprehensive conception of reconciliation:

Reconciliation, minimally, is the condition under which citizens can trust one another as citizens again (or anew). That means that they are sufficiently committed to the norms and values that motivate their ruling institutions, sufficiently confident that those who operate those institutions do so also on the basis of those norms and values, and sufficiently secure about their fellow citizens’ commitment to abide by and uphold these basic norms and values.³⁷

Reconciliation is therefore a complex and nuanced process that must be developed incrementally. Situating the concept of reconciliation in the context of Rwanda, the National Unity and Reconciliation Commission of Rwanda defines reconciliation by dividing it into six

³⁴ Stover and Weinstein 13

³⁵ Tristan Anne Borer, “Truth Telling as a Peace-Building Activity: A Theoretical Overview,” in *Telling the Truths: Truth Telling and Peace Building in Post-Conflict Societies*, ed. Tristan Anne Borer (Notre Dame, IN: University of Notre Dame Press, 2006), 32

³⁶ Ibid 32-34

³⁷ Pablo de Greiff, “Theorizing Transitional Justice,” in *Transitional Justice*, eds. Melissa S. Williams, Rosemary Nagy, and Jon Elster (New York: New York University Press, 2012), 51

different yet overlapping variables: 1) understanding the past, present and envisioning the future of Rwanda, 2) citizenship and identity, 3) political culture, 4) security, 5) justice, and 6) social cohesion.³⁸ Because of the Commission's legitimacy and cultural understanding of Rwandan society, and the report's extensive research and survey methodology, this thesis seeks to use this nuanced definition of reconciliation through a gender sensitive lens.

First, reconciliation requires acknowledging of the past and educating future generations of the genocide, which must include recognition of the widespread use of rape and sexual assaults during the genocide. Second, the sense of citizenship and national identity must be shared by victims of rape and sexual assaults, which can be partly constructed by the gradual changes in local communities' perceptions of the victims. Third, the citizens' confidence in governmental institutions and the political culture can only be developed through the government's specific attention to victims of rape and sexual assault, which can be demonstrated through reparation programs. Fourth, security and justice can be developed from both retributive and restorative justice for victims, which this thesis seeks to analyze. Finally, social cohesion must mean the reintegration of victims of rape and sexual assaults in their communities. This reintegration can only be developed incrementally through the construction of an equal gender relation between men and women, and the elimination of the social stigma and ostracism facing victims of rape and sexual assaults. These different elements of reconciliation, especially social cohesion, will take a long time to be implemented and are difficult to quantify. Since all transitional justice mechanisms for Rwanda have just recently ended, this thesis attempts to evaluate these mechanisms' *immediate* impacts on victims of rape and sexual assault. The long-term process of reconciliation must be facilitated by future policies, and this thesis seeks to provide some recommendations for these future projects.

³⁸ National Unity and Reconciliation Commission, *Rwanda Reconciliation Barometer* (Kigali, 2015), 6

The notion of “justice” investigated in this thesis is therefore both retributive and restorative. In assessing the strengths and weakness of different transitional justice mechanisms, the thesis seeks to analyze various elements of comprehensive justice. These elements include: 1) accountability for perpetrators of rape and gender-based violence, 2) economic justice for victim through reparations program, 3) reconciliation for and reintegration of survivors of rape and gender-based violence into their communities, and 4) post-transitional justice national and international legal developments concerning survivors of rape and sexual violence.

Research Questions

Drawing on scholarship on gender-based violence and transitional justice as a theoretical framework, the thesis employs national (domestic courts, the *gacaca* system, and reparation programs) and international (the ICTR and trials based on the principle of universal jurisdiction) engagement in Rwanda’s transitional justice in a comparative case study. This thesis contributes to the growing field of transitional justice by focusing on the following research questions:

- 1) Given the personal nature of rape and gender-based violence, and the social stigma surrounding victims of such crimes, what were the strengths and weaknesses of local and international transitional justice mechanisms in delivering the aforementioned elements of restorative and retributive justice for victims of rape and gender-based violence?
- 2) Did the objectives of local and international transitional justice mechanisms, in some cases, work against each other? If so, how did these discrepancies affect the outcomes of transitional justice for victims of rape and gender-based violence?
- 3) To what extent did different transitional justice mechanisms pay attention to violations of both first-generation (civil and political) rights and second-generation (economic, social,

and cultural) rights? How did this attention, or lack thereof, affect these mechanisms' ability to deliver comprehensive justice for women?

The scope of this thesis is summarized in this diagram:

	International	Domestic/Local
Retributive Justice (accountability and setting legal precedents)	A - The ICTR - Trials based on the principle of universal jurisdiction	B - National criminal court system - The <i>Gacaca</i> system
Restorative Justice (reparations and reconciliation)	C	D - The <i>Gacaca</i> system - Domestic reparation programs

Hypotheses

The following are the thesis's principal hypotheses:

In terms of retributive justice

A: The physical distance of the ICTR in Arusha, Tanzania, the language barrier between the victims and the Tribunal, and the public nature of an international tribunal would create an inhospitable environment for victims to come forwards. Third-party trials based on the principle of universal jurisdiction would face the same challenges.

The ICTR and trials based on the principle of universal jurisdiction, however, had the potential to push for more development in international law concerning victims of rape and gender-based violence, and women's rights in general. The findings of the ICTR had the potential to influence the construction of the Rome Statue and future cases at the International Criminal Court.

B: Given the damaged state capacity after the genocide and the widespread participation of civilians as *génocidaires*, the domestic criminal system was unlikely to have brought justice to victims of rape and sexual violence in Rwandan.

The local *gacaca* system, in contrast, had the potential to be more effective at investigating and trying cases of rape and gender-based violence. Because of *gacaca*'s public nature and the stigmatization of their respective communities, victims would face the same challenges of testifying about their experiences in international courts. However, *gacaca* was a traditional system situated within the local community and had significant cultural legitimacy. This communal environment and legitimacy could potentially create a *less hostile* environment for victims to come forward.

In terms of restorative justice

C: The ICTR would show several weaknesses in delivering economic justice and facilitating reconciliation for victims of rape and gender-based violence. Given its preoccupation with prosecuting the masterminds of the genocide, the ICTR would show a tendency towards prosecuting violations of first-generation and bodily-integrity human rights, while neglecting the importance of economic, social, and cultural rights.

D: While the modification of the *gacaca* courts included retributive elements, its communal environment and restorative elements still remained. The *gacaca* system was likely to be effective in facilitating reconciliation for victims of rape and sexual assaults. In addition, local nongovernmental organizations would have a better chance of working with the *gacaca* system than with the ICTR in pushing for more economic justice and reparation programs to facilitate reconciliation.

Case Selection and Contribution to the Literature

Transitional justice is emerging as one of the most exciting and complex interdisciplinary fields of social science. Many political scientists and legal scholars, such as Ruti Teitel, Neil Kritz, A. James McAdams, and William Schabas, have published extensively on the topic.³⁹ There is also a substantial amount of scholarship in the field on transitional justice on Rwanda, with scholars Timothy Longman, Mark Drumbl, and Phil Clark emerging as some of the most prolific.⁴⁰ Similarly, given the widespread use of rape and sexual assault in Rwanda and the former Yugoslavia, many feminist scholars such as Cynthia Enloe, James Waller, and Janie Leatherman have written extensively on this horrendous tool of war and its prominence in armed conflicts.⁴¹ The integration of transitional justice and feminist scholarship on gendered dimensions of war is, however, less developed. There is not as much literature on the effectiveness of transitional justice mechanisms in addressing the legacy of sexual violence and improving the conditions of victims of rape after conflicts. Even less literature has been written on transitional justice and gender-based violence in Rwanda itself. The thesis addresses this gap in the literature by providing a comprehensive and comparative study of transitional justice in post-genocide Rwanda through a gender-sensitive lens.

Rwanda's engagement in transitional justice provides an interesting case study because its combination of both a national legal response and an international judicial intervention is without many precedents. In assessing the successes of transitional justice in providing accountability for gender-based crimes, this thesis engages in a comparative analysis of the international and local sets of mechanisms along the various dimensions of justice mentioned

³⁹ See Ruti Teitel, *Transitional Justice*; Neil Kritz, *Transitional Justice*; A. James McAdams, *Transitional Justice and the Rule of Law in New Democracies*; William Schabas, *Genocide in International Law: The Crime of Crimes*

⁴⁰ See Timothy Longman, *Christianity and Genocide in Rwanda*; Mark A. Drumbl, "Law and Atrocity: Settling Accounts in Rwanda"; Phil Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers*

⁴¹ See Cynthia Enloe, *Maneuvers: The International Politics of Militarizing Women's Lives* and *The Curious Feminist*; James Waller, "Rape as a Tool of 'Othering' in Genocide"; Janie Leatherman, *Sexual Violence and Armed Conflict*

above. While criminal prosecution aimed at holding perpetrators accountable and ending the culture of impunity, there existed fundamental differences in their targets for prosecution. Internationally, the ICTR and trials based on the principle of universal jurisdiction focused on investigating and prosecuting the crimes committed by the masterminds and planners of genocide, many of whom used promises of rape and sexual assault against Tutsi women as a strategy for recruitment.⁴² Domestically, Rwanda's national criminal system and *gacaca* courts focused their efforts on trying *génocidaires* at lower levels who engaged in direct killing and raping of Rwandan women. The outcomes of these different trials have left and will leave distinctive marks on the development of national and international laws with regards to victims of rape and sexual assault. The strengths and weaknesses of the local and the international mechanisms are one of the main motivations behind this thesis.

Sources

Primary and secondary literature serves as the main resources for this research. Primary research includes reports produced by the four main judicial procedures (the ICTR, trials based on the principle of universal jurisdiction, Rwanda's domestic court, and the *gacaca* court), legislative documents pertaining to the rights of victims of rape and sexual assaults, and international treaty reports by the Rwandan government. Academic and legal scholarship (such as journal articles and books), reports produced by local, regional, and international NGOs (such as the International Center for Transitional Justice, Human Rights Watch, and Amnesty International), and reports produced by the United Nations in its investigation of human rights violations in Rwanda serve as secondary sources. It is crucial to note that in investigating the situation of Rwandan women during and after the genocide, victims' testimonies provide crucial and invaluable insights. Since my financial resources, lack of training in interviewing victims of

⁴² Gahima 44

rape and sexual assault, and the possibilities of secondary traumatization for victims prevent me from conducting this type of interview myself, I actively look for these testimonies provided in secondary sources.

HISTORICAL CONTEXT

The general question that emerged after the genocide, and still remains of crucial importance in intellectual and scholarly debates today, is what social, economic, and political factors inspired the genocide? At the most preliminary level, this section aims to provide a brief history of Rwanda leading up to the genocide, and how the ever-changing notions of ethnicity have affected Rwandan society.

The Rwandan genocide has been historically categorized as an ethnic conflict, since its clear genocidal vision was to annihilate the Tutsi population in the country. The argument that “tribalism” and ancient tribal hatred drove the Rwandan genocide is, however, misleading. First, using “tribe” as a category in describing Rwanda’s ethnic category is technically false.⁴³ By the mid-18th century, Rwanda was a centralized state, inhabited by the agriculturalist Hutu majority, the cattle-herding Tutsi minority, and the Twa, who accounted for only 1% of the population.⁴⁴ The integration of these different groups was extensive. Prior to European colonization, Hutus and Tutsis spoke the same language (Kinyarwanda), belonged to the same clans, honored the same gods, and had the same cultural practices. Many lived in the same regions and mostly in the same neighborhoods, and interethnic marriage was common. These communities were ruled by an absolute monarchy, as the all-powerful king maintained power through a hierarchy of competing chiefs, the majority of whom were Tutsi.⁴⁵ This monopolization of power within the Tutsi, however, did not result in systematic or continuous violence among communities, thus

⁴³ Scott Strauss, *The Order of Genocide: Race, Power, and War in Rwanda* (Ithaca: Cornell UP, 2006), 19.

⁴⁴ Gahima 33

⁴⁵ Ibid

dispensing with the notion of “ancient tribal hatred.” Benjamin Valentino argues that during this pre-colonial period, Tutsi and Hutu seemed to have considered themselves more akin to castes or classes than to ethnic groups,⁴⁶ while Scott Strauss adds that people could even “become” Tutsi by acquiring enough cattle.⁴⁷

The concept of race and ethnicity, however, changed drastically when German and Belgian colonial powers arrived in 1894 and 1919 respectively. While European rule did not invent the terms “Hutu” and “Tutsi,” this colonial intervention nevertheless racialized these ethnic categories, rendering them exclusive and immutable.⁴⁸ Impressed by a complex judicial system, European explorers and missionaries believed they had found in the Rwandan Tutsi a superior race of “natural born leaders,” while simultaneously considering the Hutu an inferior race.⁴⁹ Involving “modern scientific” methods such as the measurement of nose and skull sizes, colonial anthropologists described Hutus as short, stocky, dark-skinned, and wide-nosed, while presenting Tutsis as tall, elegant, light-skinned, and thin-nosed.⁵⁰ Most importantly, in the 1930s, Belgian colonial officers instituted a rigid system of ethnic classification and introduced identity cards that labeled Rwandans according to their ethnicity, which was a crucial facilitator in the identification and widespread killing of Tutsis during the genocide. This systematic race thinking thus became the basis for power allocation in the colonial system, reinforcing Tutsi dominance. European colonial rules rendered “race” the central determinant of power, and turned “race” into a symbol of oppression that largely discriminated against the Hutu.⁵¹ Rwandans seemed to have

⁴⁶ Benjamin A Valentino, *Final Solutions: Mass Killing and Genocide in the Twentieth Century* (Ithaca, NY: Cornell University Press, 2004), 178

⁴⁷ Strauss 20

⁴⁸ Valentino 178

⁴⁹ Strauss 21

⁵⁰ Peter Uvin, "Prejudice, Crisis, and Genocide in Rwanda," *African Studies Review* (1997): 95

⁵¹ Strauss 21

adopted these conceptions of race as well, further cementing the bi-polar differentiation between Hutus and Tutsis, and fueling hatred and division within the society.⁵²

Major changes in the Belgian colonial administration occurred after World War II. Under pressure from the newly established United Nations and the continental movement for independence in Africa, Belgium started the process of decolonization and relinquished its formal political power by introducing reforms to increase Hutu political representation.⁵³ Some Catholic missionaries took this opportunity to address the oppression of Hutu masses and created a new Hutu political class. Through a series of legislation, the colonial government and the Church used their influence to implement a transfer of power from the Tutsi aristocracy to Hutu elites.⁵⁴ The emergence of a new Hutu political class constituted the core of the 1959 “Hutu Revolution,” which installed a new Hutu president and Hutu-dominated government and purged Tutsis from positions of authority.⁵⁵ The 1960 – 1961 legislative elections led to a large-scale victory of *Parmehutu*, a radical Hutu and anti-Tutsi party. Widespread violence against the Tutsi occurred, killing hundreds of Tutsis and forcing many to flee the country. Between 1961 and 1963, many Tutsi refugees in Burundi and Uganda attempted to return to the country by launching small guerrilla attacks. While this attempt was stopped easily, the anti-Tutsi mentality led to organized massacres of innocent Tutsi civilians, leading to the deaths of up to 30,000 Tutsis and resulting in more than 100,000 Tutsis forcibly fleeing the country.⁵⁶ The 1959 Hutu Revolution thus marked the crucial transformation of ethnic identities in Rwanda. Racialized

⁵² Gahima 33

⁵³ Uvin 96

⁵⁴ Gahima 34

⁵⁵ Strauss 21

⁵⁶ Gérard Prunier, *The Rwanda Crisis: History of a Genocide* (New York: Columbia UP, 1995), 56

ethnicities both overshadowed the organization of the country and became Rwanda's central political idiom.⁵⁷

The newly established Hutu government in 1960s Rwanda was, however, neither democratic nor averse to repression. The post-independence Rwandan government was confronted with a dual mandate: 1) defining and solidifying the state as an institution with authority, and 2) strengthening the control of state power held by the new Hutu elites.⁵⁸ The state controlled all aspects of lives, from education, health care, rural development, to the promotion of cultural and social values. Through this absolute and comprehensive control of state power, the elites were able to fulfill the second part of their mandate through violent means in both the first Republic (1962-1973) under Grégoire Kayibanda and the second Republic (1973-1994) under General Juvénal Habyarimana. The Kayibanda regime implemented widespread persecution of most former Tutsi power-holders and all Tutsi politicians, and a few opposition Hutu politicians. The second Republic was an equally autocratic military dictatorship that killed many powerful figures from the first Republic and violently cracked down on opposition and dissidents.⁵⁹

Despite their autocratic nature, both regimes were very successful in legitimizing themselves in front of both domestic and international forces by employing an ethnic, “social revolution” argument and a “development” argument. The “social revolution” ideology argued that Rwanda belonged to the Hutus, its original inhabitants who were subjugated for centuries by both the Tutsi and European colonizers. Referencing discrimination against Hutus under the colonial period, this argument constructed the government as the legitimate representative of the

⁵⁷ Strauss 22

⁵⁸ Uvin 97

⁵⁹ Ibid 98

majority Hutu and as Hutus' sole defense against Tutsis' attempt to enslave the country again.⁶⁰ This argument was intricately linked to the second one, which argued that the state's sole objective was to facilitate economic development for the underdeveloped Hutu masses. Such ideology thus legitimized the state's interference in all aspects of social life, and diverted attention from crucial political and social problems within the country.⁶¹ These two arguments together reiterated a dehumanizing notion of Tutsi evilness and helped foster an ethnic-based intra-Hutu and anti-Tutsi societal division. It is crucial to note that even during this period, political rhetoric sustained by these two ideologies already contained genocidal languages. Prejudice, discrimination, and racism against the Tutsi became institutionalized; violence and human rights abuses against the Tutsi were glorified as acts of heroism protected by almost complete impunity.⁶²

By the end of the 1980s, the Habyarimana government faced pressure from several fronts. Obligated to undergo structural adjustment programs, Rwanda faced a decline in food production per capita, a collapse in international coffee prices, and a major fall in farm cash incomes.⁶³ Habyarimana's domestic political crackdown backfired, which resulted in an increase in internal opposition to the single-party system. In addition, with the fall of communism in Europe, Western donors no longer accepted single-party dictatorships, and Rwanda was no exception. Under pressure from France, President Habyarimana formally ended the exclusive rule of his party, allowing for a vigorous Hutu opposition to rise and to challenge his presidency. The largest opposition party was the *Mouvement Démocratique Republicain* (MDR).⁶⁴

⁶⁰ Ibid 98

⁶¹ Ibid 99

⁶² Gahima 44

⁶³ Uvin 107-108

⁶⁴ Strauss 24, Valentino 180, Gahima 34-35

In October 1990, Tutsi refugees under the banner of the Rwandan Patriotic Front (RPF) attacked Rwanda from southern Uganda, setting in motion a civil war between the Hutu-dominated government and the Tutsi-dominated rebellion. The Rwandan army, with the assistance of foreign troops, managed to turn back on RPF invasion. The civil war did not end, however, as the RPF shifted to low-level guerrilla warfare and cross-borders raids from Uganda into Rwanda.⁶⁵ By early 1992, it became clear that the Rwanda government lacked the capacity to defeat the RPF. In April 1992, President Habyarimana formed a coalition government with the political opposition and started peace negotiations with RPF rebels. The agendas during these peace talks included negotiations of a ceasefire, repatriation of Tutsi refugees, and a comprehensive political agreement for power sharing with the RPF.⁶⁶ Peace negotiations culminated in the signing of the Arusha Accords in August 1993, and the United Nations deployed a peacekeeping force, led by General Romeo Dallaire of Canada, to Rwanda. By nearly all accounts, the Arusha Accords were a triumph for the RPF.⁶⁷ The Accords created a viable threat to the monopolization of political and economic powers held by Hutu elites. Hutu extremists also saw the civil war in early 1990s as a Tutsi-caused threat to Hutu political and economic predominance in general. They also believed that the Tutsi posed a threat to the physical safety of all Hutus in Rwanda.⁶⁸ In addition, Prunier argues that when the political landscape looked as if the Tutsi were gaining extensive power through the Arusha Accords, “such a desperate threat called for desperate remedies.”⁶⁹

In the 1990-1993 period, the Hutu elites triggered a series of informal and irregular measures that laid the groundwork for the genocide in 1994. First, the hardliners linked the

⁶⁵ Valentino 179

⁶⁶ Strauss 24, 25

⁶⁷ Valentino 181

⁶⁸ Ibid 183

⁶⁹ Prunier 226

Tutsi-dominated RPF to the Tutsi population living in Rwanda, calling them rebel “accomplices” and subsequently arrested as many as 13,000 civilians, mostly Tutsi.⁷⁰ Second, the Rwandan army expanded dramatically and launched a civilian defense program to train civilian authorities in firearms use. This training mandate therefore incorporated civilians into the war, setting the stage for civilian participation in the genocide. Third, extremist politician and military officials started funding and organizing Hutu militia groups, including the *Interahamwe* (“those who stand or fight together”) and *Impuzamugambi* (“those with a single purpose”). These groups terrorized domestic political opponents, the RPF guerrillas, and Tutsi civilian “accomplices.”⁷¹ The training program for the *Interahamwe* also included instructions to create “death lists” of Tutsis, which would allow militiamen to exterminate Tutsi civilians.⁷²

Fourth, Habyarimana’s party, the *Mouvement Républicain National Pour la Démocratie et le Développement* (MRND) and its supporters funded and distributed racist propaganda against the Tutsi. Among the most notorious platforms was the radio station *Radio Télévision Libre des Mille Collines* (RTLHC), which broadcasted messages perpetuating fear-mongering about the ruthlessness of the RPF, ethnic nationalism, and ethnic stereotyping. In addition, the aforementioned “Hutu Ten Commandments” published by the extremist *Kangura* also instructed Hutus to break ties with Tutsis and to protect the gains of the Hutu Revolution.⁷³ The final development was the creation of a political alliance known as “Hutu Power.” The assassination of the elected Hutu President Ndadaye in Burundi by Tutsi military officers reverberated in the Rwandan political sphere. Hardliners took this opportunity to claim that Tutsis would never

⁷⁰ Strauss 25

⁷¹ Valentino 181

⁷² Strauss 27, 28

⁷³ Ibid 28

share power and only sought domination of Hutus.⁷⁴ The solidification of Hutu power indicated radicalization among nationalist and ethnic lines, as Hutu elite openly embraced exclusivist nationalism that framed Tutsis as a common enemy. In addition, various developments – the militia training and the “death lists,” among others – also suggested that by early 1994, Hutu extremists had already undergone extreme radicalization and showed genocidal tendency towards Tutsis.⁷⁵ During this period, the government was allegedly responsible for at least 16 major episodes of massacres against the Tutsi population.⁷⁶

Several factors affected the final decisions to launch a systematic genocide. First, the extremists’ efforts to deal with the Tutsi threat had failed, as the Arusha Accords provided the RPF with extensive political power. Second, the Hutu extremists showed a tendency to view the Hutu-Tutsi conflict in quasi-racial terms, assuming that all Tutsis were enemies and that cooperation between the two ethnicities was therefore impossible.⁷⁷ These hardliners argued that virtually all Tutsis were supporters of the RPF. Finally, the desire of Hutu extremists to not repeat the “mistake of 1959” appeared to have been one of the most crucial factors in facilitating the decision for genocide.⁷⁸ Prunier argues that the extremists thought of the genocide as a matter of survival, for the “mistake of 1959” had allowed for children of many refugees to come back and threaten Hutu hegemony.⁷⁹ This cold logic was shown most clearly in Colonel Bagosara’s speech at a party two days before the genocide began, in which he claimed that, “the only plausible solution for Rwanda would be the elimination of the Tutsi.” President Habyarimana himself also lost a significant amount of support and trust due to his failure to protect Hutu

⁷⁴ Ibid 29, 30

⁷⁵ Ibid 28

⁷⁶ Gahima 37

⁷⁷ Valentino 185

⁷⁸ Ibid 186

⁷⁹ Prunier 226-227

power from the RPF invasion. Many scholars speculated that the Hutu extremists were responsible for shooting down the airplane carrying Habyarimana on April 6, 1994.⁸⁰ What immediately followed was one of the most horrific chapters of human history. It was within this historical context that gross human rights violations and gender-based violence occurred. This thesis seeks to analyze how international, national, and local transitional justice mechanisms attempted to address this gendered legacy.

CHAPTER OVERVIEWS

The thesis is divided into five chapters. This first chapter introduces the thesis and its research design, and provides a brief historical background to the social and political tension leading up to the genocide. The second chapter is a review of literature in the field. It first provides a theoretical framework for understanding rape and sexual assaults as a tool of genocide and a weapon in armed conflicts. It then offers an overview of the major concepts, definitions, and debates within the field of transitional justice. The chapter ends with the issues surrounding gender justice within the context of transitional justice, and situates the thesis within the literature.

The third and fourth chapters are detailed cases study of international and local transitional justice mechanisms in post-genocide Rwanda. The third chapter focuses on the establishment of the ICTR and the creation of trials based on the principle of universal jurisdiction in other states. It evaluates the strengths and weaknesses, as well as successes and failures, of international mechanisms in bringing comprehensive justice for victims of rape and sexual violence. The chapter focuses specifically on the ICTR, and analyzes how its shortcomings and achievements could serve as precedents for future tribunals, especially the ICC, in prosecuting sexual crimes under international law.

⁸⁰ Valentino 184

The fourth chapter begins with a quick overview of Rwanda's attempt to prosecute participants of the genocide in its national criminal court system, which proved to be insufficient and ineffective. It then focuses primarily on the modification and reinstallation of the *gacaca* courts, and evaluates its success in delivering gender-sensitive justice. The chapter shows that the modern *gacaca* was a significant departure from its traditional version that was popular to Rwandan society, which resulted in various tensions and incompatible goals within the modern *gacaca* system. The extent to which *gacaca* was successful in bringing comprehensive justice to victims of sexual violence depended on how the victims defined justice and reconciliation. In addition, the chapter also evaluates whether reparation programs within Rwanda were able to provide assistance to survivors of sexual violence.

The last chapter is a comparative analysis of domestic and international transitional justice mechanisms with regards to their effectiveness in providing accountability for the legacy of rape and sexual violence during the genocide. It summarizes the thesis's research findings and provides recommendations for future research and transitional justice projects.

2. GENDERED WAR, GENDERED PEACE

GENDER, ARMED CONFLICTS, AND TRANSITIONAL JUSTICE

The past, as William Faulkner contends, is not even past. History lives on in Rwanda. As President Paul Kagame said, “Every Rwandan is either a genocide survivor or a perpetrator, or the friend or relative of a survivor or perpetrator.”⁸¹ The question of, and to some extent, the tension between, justice and reconciliation emerged almost immediately as the country attempted to reckon with its painful past. Within the multitude of challenges confronting post-genocide Rwanda, the question of how to bring justice and reconciliation to victims of rape and sexual assault was one of the hardest to answer. This was a crucial national matter, because how the country reckoned with its past could and would set precedents for new political and social norms that dictated the emerging post-genocide regime. For survivors of gender-based violence, these norms would also impact their reconciliation and reintegration into their communities.

As Juan E. Méndez, a prominent authority on legal transitional justice, argues, the hardest question is, “how to pursue the objectives of justice and reconciliation without falling into tokenism and a false morality that only thinly disguises the perpetuation of impunity.”⁸² In order to fully understand how Rwandan victims of rape and sexual assaults were impacted by these “objectives of justice and reconciliation,” it is necessary to understand the overarching issues facing women in both armed conflicts and transitional justice. This chapter is a review of the

⁸¹ Paul Kagame, Preface to *After Genocide: Transitional Justice, Post-Conflict Reconstruction, and Reconciliation in Rwanda and Beyond*, by Philip Clark and Zachary Kaufman (New York: Columbia University Press, 2009), xxi

⁸² Juan E. Méndez, “In Defense of Transitional Justice,” in *Transitional Justice and the Rule of Law in New Democracies*, ed. A. James McAdams (Notre Dame, IN: University of Notre Dame Press, 1997), 1

literature and provides a brief overview of the gendered impacts of both armed conflicts and transitional justice on women and situating the thesis in the literature.

GENDER AND ARMED CONFLICTS

Militarized Hyper-Masculinity and Sexual Violence

Hyper-masculinity dominates war and military training, which is a process of socializing soldiers into an extreme kind of masculinity that capitalizes on young men's sexual insecurities and identities.⁸³ This gender dimension of war and militarism is guided by the gender ideology that men are the protector, women are the protected, and war is men's chosen province in which they can prove their masculinity.⁸⁴ This protector/protected dichotomy imposes profound political consequences on women, as they are often associated with being victims, weak, and passive.⁸⁵ More importantly, such dichotomy also renders women extremely vulnerable to sexual violence committed by enemy's men.⁸⁶ This resort to sexual violence is a direct way of getting at the enemy by highlighting their failure to protect their women, thus emasculating and humiliating the enemy. The use of sexual violence and all forms of gender-based violence against women therefore becomes a symbolic tool of assaulting men's pride and national honor.⁸⁷

Sexual violence takes various forms in armed conflicts, and the use of sexual violence as a tool of war has become an epidemic commonality. Janie Leatherman categorizes and conceptualizes sexual violence in armed conflicts as a runaway norm that crosses four different thresholds of violence: type of violence, target, agency, and loss of neutrality and safe space.⁸⁸

Leatherman defines runaway norms as "a special class of norms that produce social harms and

⁸³ Jan Jindy Pettman, "Men, Masculinities and War," *Worlding Women: A Feminist International Politics* (New York: Routledge Press, 1996), 93

⁸⁴ Richard Rayner, "The Warrior Besieged," *New York Times Magazine*, June 22, 1997.

⁸⁵ Pettman, "Men, Masculinities and War," 99

⁸⁶ Ibid 100

⁸⁷ Ibid

⁸⁸ Janie L. Leatherman, "Dimensions of Sexual Violence in Conflict," *Sexual Violence and Armed Conflict* (Malden, MA: Polity Press, 2011), 32

public bads,” and argues that these norms legitimize and incentivize different conflict processes that result in gross violations of human dignity.⁸⁹ In genocides especially, Leatherman argues that rape and other forms of gender-based violence, such as genital mutilation and other means of degradation directed against sexual organs or the female body, point to the gendered nature of genocide, or “gendercide.”⁹⁰ Within the multitude of sexual violence in armed conflicts, rape is the most commonly used form of violence against women.⁹¹

Despite this commonality, scholars often situate rape and sexual violence in armed conflicts differently. Primordial approaches to gender and sexuality suggests that since men are aggressors against women, they employ rape and sexual violence to pursue and maintain dominance over women.⁹² Instrumentalist feminists, on the other hand, contend that rape and sexual violence is used as a means to achieve a specific end, such as the use of rape as a genocidal tool in Rwanda. Furthermore, a social constructivist approach highlights that understanding rape and sexual assault in armed conflicts requires a careful analysis of the overarching socio-cultural framework in which gender, sexuality, and ethnic power intersect.⁹³ For example, Catherine MacKinnon argues that in the case of the former Yugoslavia, sexual violence and rape must be understood as part of a larger strategy of violence against women and their ethno-religious community.⁹⁴

Rape and Sexual Violence as A Tool of Genocide

The instrumentalist approach to understanding rape and sexual violence points to a crucial aspect of violence in Rwanda: the use of rape as a genocidal tool. Scholars, however, are divided

⁸⁹ Leatherman, “Dimensions of Sexual Violence in Conflict,” 34

⁹⁰ Ibid 46

⁹¹ Ibid 42

⁹² Kaiteesi 44

⁹³ Ibid 45, also see Joane Nagel, *Race, Ethnicity, and Sexuality: Intimate Intersections, Forbidden Frontiers* (New York: Oxford University Press, 2003)

⁹⁴ Catherine MacKinnon, quoted in Leatherman, “Dimensions of Sexual Violence in Conflict,” 43

on whether rape should be recognized as a tool of genocide.⁹⁵ On one hand, scholars such as Catherine MacKinnon contend that rape, as in the case of Bosnian Muslim women raped by Serbs during the Yugoslav wars, was genocidal because it tended to destroy the victim and her Bosnian community.⁹⁶ Scholars in this line of thought emphasize intersectionality; they believe that the intersection of gender and ethnicity is a factor that can aggravate the victims' situation.⁹⁷ On the other hand, Rhonda Copelon and her supporters argue that rape occurs against women not because of the social or ethnic group to which they belong, but because they are women.⁹⁸ This rather essentialist approach to understanding rape in armed conflicts promotes the notion of womanhood as a homogenous victim group.⁹⁹ This thesis aligns with MacKinnon's line of argument and believes that in the case of Rwanda, the use of rape and sexual assault was genocidal. While the majority of victims of sexual violence are women, men and boys too can be sexually attacked. While men have been portrayed primarily as perpetrators, women can also assume this role to commit and facilitate sexual violence.¹⁰⁰

James Waller argues that during genocidal conflicts, rape often serves a macro-level purpose and is central to regime policy and directive.¹⁰¹ Waller writes that as a "political and social *tool* or *weapon*, rape can fulfill visions of genocide and ethnic cleansing by leading to physical death, community breakdown (including disruption of traditional gender roles), and the "dilution" of the next generation (including the intentional transmission of sexual diseases)."¹⁰² Leatherman

⁹⁵ Kaiteesi 46

⁹⁶ Catherine A. MacKinnon, *Are Women Human? And Other International Dialogues* (Cambridge, MA: The Belknap Press of Harvard University Press, 2006), 188-189

⁹⁷ Kaiteesi 46, also see: Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity politics, and Violence against Women of Color," *Stanford Law Review* 43 (1991): 1241

⁹⁸ Ibid 46, 46

⁹⁹ Ibid 47

¹⁰⁰ Mayesha Alam, "Defining Key Terms and Concepts," *Women and Transitional Justice: Progress and Persistent Challenges in Retributive and Restorative Processes* (Palgrave Macmillan, 2014), 22

¹⁰¹ Waller 85

¹⁰² Ibid

adds that rape is also a tool of branding, for rape creates “a lasting physical and psychological scar,” “invokes and re-invokes the horror of the original violation,” and “preserves and communicates the power of the perpetrators over family members and others in the community.”¹⁰³

In other words, the use of rape in genocidal conflicts is not result of “a few bad apples,” but rather represents a systemic method of violence employed with clear political motivation. As Catherine MacKinnon argues:

This is not rape out of control. It is rape under control. It is also rape unto death, rape as massacre, rape to kill and to make the victims wish they were dead. It is rape as an instrument of forced exile, rape to make you leave your home and never want to go back. It is rape to be seen and heard and watched and told to others: rape as spectacle. It is rape to drive a wedge through a community, to shatter a society, to destroy a people. It is rape as genocide.¹⁰⁴

The gender ideology that men are the protector and women are the protected is central to understanding rape as a tool of genocide. According to patriarchal principles, women are the male enemy’s property and should be used as an instrument to defeat the enemy. Raping a woman in armed conflict is thus a political act against her husband, father, and brother, and thus becomes a way to blame the enemy’s men, ethnicity, and country for failing to protect their women.¹⁰⁵ As Susan Brownmiller argues, “a simple rule of thumb in war is that the winning side is the side that does the raping.”¹⁰⁶ However, women also become the victims of the losing side, for raping women of the winning side is an act of retaliation and revenge. In a “never-ending cycle of revenge,”¹⁰⁷ women find themselves raped because of the “manifestation of the heroic fighting

¹⁰³ Leatherman, “Dimensions of Sexual Violence in Conflict, 48

¹⁰⁴ Catherine A. MacKinnon, “Rape, Genocide, and Women’s Human Rights,” in *Mass Rape: The War against Women in Bosnia-Herzegovina*, ed. Alexandra Stiglmeier (Lincoln: University of Nebraska Press, 1994), 190

¹⁰⁵ Vesna Nikolic-Ristanovic, “War and Violence Against Women,” in *The Gendered New World Order*, eds. Jennifer Turpin and Lois Ann Lorentzen (New York: Routledge, 1996), 198-201

¹⁰⁶ Susan Brownmiller, *Against Our Will* (New York: Simon and Schuster, 1975), 35

¹⁰⁷ Meredith Turshen and Clotilde Twagiramariya, “‘Favours’ to Give and ‘Consenting’ Victims: The Sexual Politics of Survival in Rwanda,” *What Women Do in Wartime: Gender and Conflict in Africa* (London: Zed Books, 1998), 103

men engaged in good fight.”¹⁰⁸ Rape, however, is not a tool only reserved for emasculating and humiliating the enemy. Women also face the prospect of being raped both by soldiers from their own countries and by peacekeepers – men who are supposed to be their protectors.¹⁰⁹

The Rwandan genocide exemplified the use of rape as a tool of war and genocide. Chiseche Salome Mibenge writes that two gendered and interwoven themes underpinned the construction of sexual violence as a weapon of war in Rwanda:

First, extremists used sexual violence to reclaim the lost ground of patriarchy and reassert a male dominance over Rwandan women. Second, sexual violence was supposed to perpetuate Hutu dominance and destroy all threats to racial purity and unity.¹¹⁰

Tutsi women were raped both because of their ethnicity and their gender, and their bodies became the figurative and literal sites of combats.¹¹¹ Following the notion of a “never-ending cycle of revenge,” Tutsi soldiers of the RPF also raped Hutu women in revenge for Tutsi women raped by Hutu men. Moreover, Tutsi girls and women were also obliged to “offer themselves” to RPF soldiers to avoid being regarded as sympathizers of the Hutu government.¹¹² In both sides of the conflict, women were raped to pay for what men from other side had done. Rape was also used as a tool of torture, as perpetrators employed amputation and mutilation of victims’ breast, vaginas, and buttocks, or features deemed to be Tutsi such as small noses or long fingers.¹¹³ Rape was also used as a weapon of genocide to kill and spread HIV/AIDS by perpetrators who often knew they carried the disease. This strategy proved to be horrendously successful, as 15 years after the genocide, an

¹⁰⁸ Nikolic-Ristanovic 198

¹⁰⁹ Borer, “Gendered War and Gendered Peace,” 1171

¹¹⁰ Chiseche Salome Mibenge, “All the Women Were Raped: Gender and Violence in Rwanda,” *Sex and International Tribunals: The Erasure of Gender from the War Narrative* (University of Pennsylvania Press, 2013), 74

¹¹¹ Turshen and Twagiramariya, 103

¹¹² Mibenge 75

¹¹³ Leatherman, 46

estimated 70% of rape survivors were HIV-positive.¹¹⁴ Furthermore, the traditional roles of women as mothers and child-bearers were also politicized and used for ethnic cleansing. Both Tutsis and Hutus used women as “reproductive vessels,” and raped them to make them bear the children of the rapists’ ethnic identity.¹¹⁵ Rwandan women were raped because it was widely recognized that victims of rape were never acceptable to the patriarchal community and to herself, and rape could destroy a woman’s chance of marriage. Survivors of rape almost always live with physical and emotional trauma while simultaneously being treated by their family and community as “damaged goods, living symbols of the nation’s humiliation and bearers of ‘enemy children.’”¹¹⁶

The warrior culture and its socialization of soldiers into a militarized hyper-masculinity have long lasting impacts even when armed conflicts have officially ended. In the United States, combat trauma and the stress of redeployment set the stage for homicide and domestic violence, and researchers have argued that those diagnosed with PTSD are “significantly more likely to perpetuate violence towards their partners.”¹¹⁷ In Bosnia, domestic violence also increased after the conflict. In a militarized, hyper-masculinized environment, men turned the abstract hatred of other nationalities into the concrete hatred of close relatives like wives and children.¹¹⁸ Jacquie True also argues that despite the official disarmament, domestic violence will escalate in post-conflict societies due to the “heightened militarization of the society and the celebration of armed masculinity.”¹¹⁹ Soldiers can also prey upon women for sexual advantage with impunity when the normal fabric of law enforcement and justice are disabled by wars. This impunity results from the

¹¹⁴ Ibid 42

¹¹⁵ Turshen and Twagiramariya, 104

¹¹⁶ Leatherman 47, 49

¹¹⁷ Lizette Alvarez and Deborah Sontag, “When Strains on Military Families Turn Deadly,” *The New York Times*, February 15, 2008; Lizette Alvarez and Dan Frosch, “A Focus on Violence by Returning G.I.’s,” *The New York Times*, January 2, 2009

¹¹⁸ Nikolic-Ristanovic 207

¹¹⁹ Jacqui True, “Rebuilding without or Without Women?” *The Political Economy of Violence Against Women* (New York, NY: Oxford University Press, 2012), 137

reality that immediate post-war violence against women is never prioritized during the process of national reconstruction, and is almost always considered an issue to be put off until later.¹²⁰ As a result, while the signing of a formal peace agreement can end armed conflicts; rape, sexual assault, forced pregnancy, prostitution, and trafficking continue to haunt women's lives.¹²¹ It is therefore widely acknowledged that domestic and sexual violence tends to increase in almost all post-conflict societies across the world.

TRANSITIONAL JUSTICE

The term “transitional justice” itself is relatively new. Initially dominated by legal scholars, the field of transitional justice at its early stage was predominantly occupied with the questions of accountability in democratic transitions.¹²² As Ruti Teitel defines, the conception of justice in political transitions is characterized by “legal responses to confront the wrongdoings of repressive predecessor regimes.”¹²³ The field, however, emerged out of its legal focus and became more interdisciplinary, as scholars of anthropology, psychology, political science, and sociology contribute significantly to the literature. The focus beyond legal justice then included non-legal concepts, including truth telling, reparations, healing, and forgiveness. Consequently, mechanisms of transitional justice became more diverse and included truth commission, reparation programs, institutional reforms, and memory projects, among many others. While there is no single and unanimously accepted definition of transitional justice, many of its elements remain universal. The International Center for Transitional Justice, the most well-known and respected research institution in the field, defines transitional justice as:

¹²⁰ Cynthia Enloe, *The Curious Feminist* (University of California Press, 2000), 224

¹²¹ True 132

¹²² For early literature on the field, see Neil Krtiz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*; Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*; A. James McAdams, *Transitional Justice and the Rule of Law in New Democracies*; and Lawrence Weschler, *A Miracle, A Universe: Settling Accounts with Torturers*

¹²³ Ruti G. Teitel, "Transitional justice genealogy," *Harvard Human Rights Journal* 16 (2003): 69

Transitional justice is not a ‘special’ kind of justice, but an approach to achieving justice in times of transition from conflict and/or state repression. By trying to achieve accountability and redressing victims, transitional justice provides recognition of the rights of victims, promotes civic trust and strengthens the democratic rule of law.¹²⁴

In addition, one of the most holistic definitions of transitional justice came from the former United Nations Secretary General Kofi Annan’s 2004 report, in which he defines transitional justice as:

The notion of “transitional justice” discussed in the present report comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.¹²⁵

This complex understanding points to two crucial and universal aspects of transitional justice. First, it is widely accepted and understood that states cannot bury their past wrongdoings and human rights violations. The pursuit of retrospective justice is a crucial task of democratization, for it sets the fundamental characters of a new social and political order based on the rule of law and respect for human dignity.¹²⁶ Second, through transitional justice, the road to democracy and the rule of law must be constructed by a holistic and “full range” of mechanisms. This holistic approach, which must include both retributive and restorative justice, sometimes clashes with the tendency of governments to believe that different measures can be traded off against one another.¹²⁷

The Evolution of Transitional Justice

¹²⁴ International Center for Transitional Justice. Web. <https://www.ictj.org/about/transitional-justice>

¹²⁵ United Nations Security Council, *The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General*, S/2004/616, August 23, 2004.

¹²⁶ Méndez, “In Defense of Transitional Justice,” 1

¹²⁷ De Greiff, “Theorizing Transitional Justice,” 32

The origin of transitional justice can be traced back to the post-World War II period.¹²⁸ This period was the heyday of international justice; the world witnessed a critical turning point from prior domestic responses to international responses.¹²⁹ In an effort to deal with the atrocities committed by Nazi Germany and Japan, the international community created two international tribunals: the 1945 International Military Tribunal at Nuremberg (Nuremberg Trials) and the 1946 International Military Tribunal for the Far East (Tokyo Trials). These trials hold historic significance by expanding the application of international law to individuals instead of to only states, and by stressing and prioritizing international law over domestic law.¹³⁰ The creation and jurisdiction of the Nuremberg and Tokyo Trials showcased that the principles of individual and group human rights were of international concern, and that international judicial intervention in bringing accountability for human rights violations could overrule the concept of national sovereignty.¹³¹ Since the concept of national sovereignty had been the guiding principle of international relations since the 1648 Treaty of Westphalia, this weakening of judicial sovereignty was a stepping-stone to the creation of the ICTR and the judicial intervention of the international community decades later.

The post-World War II period also marked the creation of the United Nations (UN), its human rights charter, and the International Court of Justice (ICJ). The creation of both the UN and the ICJ represented a landmark attempt to fight against impunity for gross human rights violations. Almost immediately afterwards, delegates passed the 1948 Universal Declaration of Human Rights and 1948 Convention on the Prevention and Punishment of the Crime of Genocide, creating the

¹²⁸ Teitel, "Transitional Justice Genealogy," 70

¹²⁹ Ibid 73

¹³⁰ Hinton 2,3

¹³¹ Gahima 2

core structure of the international human rights regime.¹³² The next few decades saw the adoption of various treaties concerning civil and political rights, economic, social, and cultural rights, torture, and discrimination. In addition, the world also witnessed the growth of regional human rights courts in Africa, Europe, and Latin America, and the creation of influential human rights organizations, such as Amnesty International and Human Rights Watch.¹³³ This international commitment to individual human rights also informed domestic and comparative law, as exemplified by the emergence of a wave of related constitutionalism.¹³⁴ As the Cold War dictated the bipolarization of the international order, this growing human rights regime came to a halt in the 1950s. Despite its short-lived length, this immediate post-War period, in which state and individual wrongdoings were criminalized and a universal rights scheme was established, forms the basis of modern human rights law.¹³⁵

Modern transitional justice took shape in the 1980s, as a body of literature concerning transitional justice emerged when a number of African (Uganda, Zimbabwe) and Latin American (Argentina, Bolivia, El Salvador, and Uruguay) countries transitioned from dictatorships and authoritarian governments towards democracy.¹³⁶ In addition, the end of the Cold War and the collapse of the Soviet Union also marked the beginning of democratization in Eastern Europe and South Africa.¹³⁷ Following this global movement towards democratization, a new phase of transitional justice commenced and moved beyond retributive justice and criminal prosecution. The rule of law was adhered to through trials by nation-states to legitimize the successor regime

¹³² Hinton 3

¹³³ Ibid

¹³⁴ Teitel, "Transitional Justice Genealogy," 74

¹³⁵ Ibid 71

¹³⁶ Hinton 3

¹³⁷ For a more thorough analysis of these transitions to democracy, see Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Tulsa: University of Oklahoma Press, 1991).

and advance nation building.¹³⁸ However, instead of solely focusing on holding the predecessor regime accountable, transitional justice also turned towards questioning how to heal a society after a painful past and to include various rule of law values, such as peace and reconciliation between former enemies. This shift away from legal justice reflected a change in the understanding of transitional justice, which was linked with more complex conditions of nation building.¹³⁹ With a clear need for both justice and reconciliation, scholars and practitioners questioned what type of mechanism was most appropriate. The debate soon revolved around the question of trials versus non-trial approaches, with those arguing for prosecution pitted against those in favor of amnesty.¹⁴⁰

In the context of transition, this debate took place when families of victims of former regimes and other survivors started increasing their demands for information about atrocities and human rights violations committed in the past.¹⁴¹ Uncovering the truth about human rights violations was considered of crucial importance to democratization, and truth telling was the central focus of transitional justice studies. As Luc Huyse argues, “dealing with the past is an inescapable task for new democratic regimes.”¹⁴² Many then turned to truth commissions, the most commonly used and prominent non-trial transitional justice mechanism. Transitional justice through truth commissions became a vehicle for victims to reconcile and recover from past harms, and a form of dialogue between victims and their perpetrators.¹⁴³ Reconciliation thus became both a national and a personal matter: while society as a whole struggled to confront its past, individuals simultaneously attempted to rebuild and restore their social and political identity. While questionable and often debated, it is often suggested that truth commissions, by uncovering the

¹³⁸ Teitel, “Transitional Justice Genealogy,” 76

¹³⁹ Ibid 77

¹⁴⁰ Borer, “Truth Telling as a Peace-Building Activity,” 19. Also see Robert I. Rotberg and Dennis Thompson, *Truth v. Justice: The Morality of Truth Commissions* (Princeton: Princeton University Press, 2000)

¹⁴¹ Ibid 17

¹⁴² Luc Huyse, “Dealing with the Past and Imaging the Future,” in *Peace-building: A Field Guide*, ed. Luc Reyhler and Thania Paffenholz (Boulder, CO: Lynne Rienner Publishers, 2002), 336

¹⁴³ Teitel, “Transitional Justice Genealogy,” 80

truth and giving victims a chance to speak, offer victims an opportunity for healing or “cathartic” experiences.¹⁴⁴ In addition, Pablo De Greiff argues that truth-telling mechanisms can facilitate the establishment or the entrenchment of the rule of law by promoting civic trust.¹⁴⁵ Truth commissions have continued to be adapted, and the most well-known and extensively studied institution is the 1995-2002 Truth and Reconciliation Commission in South Africa.

This forward-looking focus on national and individual reconciliation underlined modern transitional justice. In tandem with the backward-looking mechanism of criminal prosecution, transitional justice during this time also included apologies, reparations, memoirs and other ways of settling account in regards to past wrongdoings and human rights violations.¹⁴⁶ In addition, this phase of transitional justice also witnessed a change in relevant political actors from those with legal and political authority to those with moral authority in the society, such as churches, NGOs, and human rights groups.¹⁴⁷ Furthermore, this phase of transitional justice reflected a struggle between local and global decisions, increasing the complexity and interconnectedness of transitional justice, globalization, and sovereignty. The crucial question was whether and to what extent the response to human rights violations should remain under the control of the state where the harm occurred.¹⁴⁸

This tension was extremely visible in both the Former Yugoslavia and Rwanda. The violent acts in the Bosnian and Rwandan genocides were witnessed by the entire world. Eager to redeem itself, the United Nations established the ICTY and ICTR in 1993 and 1994 respectively. In the context of increasing globalization, the intersection of the principles of jurisdiction and sovereignty

¹⁴⁴ Priscilla B. Hayner, *Unspeakable Truth: Transitional Justice and the Challenge of Truth Commissions* (New York, NY: Routledge, 2011), 4

¹⁴⁵ Pablo De Greiff, “Truth Telling and the Rule of Law,” in *Telling the Truths: Truth Telling and Peace Building in Post-Conflict Societies*, ed. Tristan Anne Borer (Notre Dame, IN: University of Notre Dame Press, 2006), 182

¹⁴⁶ Teitel, “Transitional Justice Genealogy,” 85

¹⁴⁷ Ibid 83

¹⁴⁸ Ibid 88

has and will raise profound questions.¹⁴⁹ However, it is now widely accepted that there exists a duty, whether on national or international level, to implement both restorative and retributive measures to uncover truths and prosecute crimes of genocide, crime against humanity, war crimes, and torture.¹⁵⁰ This duty is a crucial tenet of transitional justice, which has become significantly interdisciplinary by the end of the twentieth century.

Transitional Justice Mechanisms and Objectives

As aforementioned, as the field of transitional justice emerged and expanded out of its legal-focused inception, a variety of mechanisms have been employed. While the insistence on confronting the past in countries in transition has become almost universal, the range of options remains vast and depends on the social, cultural, and political context of each country.¹⁵¹

One of the most common institutions of transitional justice is *criminal prosecution*. Varying from domestic and local trials to international tribunals, criminal prosecution is a retributive mechanism aimed at investigating the crimes committed during conflicts, holding perpetrators accountable, and punishing them for their abuse.¹⁵² As Martha Minow argues, trials “transfer the individuals’ desires for revenge to the state or official bodies,” and respond to the demand for accountability, acknowledgment of past harm, and punishment.¹⁵³ Many countries, such as Peru, Venezuela, and Egypt have used their respective domestic criminal systems to prosecute perpetrators, while in many other instances, such as Rwanda and the former Yugoslavia, the international community intervened judicially by opening *ad hoc* tribunals such as the ICTY

¹⁴⁹ Teitel, “Transitional Justice Genealogy,” 88

¹⁵⁰ See Diane F. Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,” *The Yale Law Journal* 100, no. 8 (1991): 2537-615.

¹⁵¹ Van Der Merwe *et. al*, *Assessing the Impact of Transitional Justice*, 2

¹⁵² Jacqueline H. R. DeMeritt, “Transitional Justice: Prospects for Postwar Peace and Human Rights,” in *What Do We Know about Civil Wars?* ed. Thomas David Mason and Sara McLaughlin Mitchell (Lanham, MD: Rowman & Littlefield, 2016), 181. Also see Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective*

¹⁵³ Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998), 26

and ICTR, or through the International Criminal Court.¹⁵⁴ In countries where post-conflict societies either lack the political will or capacity to prosecute perpetrators, hybrid courts, which include both international and domestic actors and use international legal standards, have been implemented for the pursuit of justice, such as in Sierra Leone, Timor-Leste, and Cambodia. Criminal and retributive justice is usually the first and most prominent demand, yet also one of the most difficult. Countries emerging out of a sustained period of conflict usually have a devastated judicial system, in which judges may be politically compromised, corrupt, timid, and/or lack expertise and resources.¹⁵⁵ In addition, victims often play a limited role in this retributive justice process, and reconciliation is usually not the goal of criminal trials.¹⁵⁶

Within the repertoire of non-judicial approaches to transitional justice, *truth commissions* are the most common. Truth commissions are temporary, non-judicial bodies that are authorized by the state to investigate a pattern of events in a sustained period of time, to engage directly with the affected population, and to gather information about their experiences.¹⁵⁷ While the South African Truth and Reconciliation Commission is the most well known and extensively studied, 44 other truth commissions have been set up in various countries, such as Argentina, Sri Lanka, Chile, Peru, and El Salvador, among many others.¹⁵⁸ Truth commissions are established to gather truth and construct an official historical record of human rights abuses to help victims find closure and signal an official commitment to prevent the reoccurrence of atrocities.¹⁵⁹ Psychological research points to the notion that truth telling itself is important, as survivors can be helped by sharing their story

¹⁵⁴ DeMeritt 181

¹⁵⁵ Hayner, *Unspeakable Truths*, 9

¹⁵⁶ Minow 26

¹⁵⁷ Hayner, *Unspeakable Truth*, 11, 12

¹⁵⁸ For a full list of countries that have had truth commissions, see: <https://www.usip.org/publications/truth-commission-digital-collection>

¹⁵⁹ For a more detailed study of the use of truth commissions, see Hayner, *Unspeakable Truths* and Borer, *Telling the Truths*

to sympathetic listeners and by situating their stories within the larger social context.¹⁶⁰ In addition, just as individuals need “closure,” a traumatized society can also benefit from a public airing leading to closure, setting the stage for former enemies to live together and creating a framework for non-recurrence of violence and human rights violations.¹⁶¹ Other non-retributive transitional justice mechanisms include *reparations* and *memory projects*. Reparations can be both material (through financial payments and social services) and/or symbolic (through public acknowledgment or apology). Reparations can also occur in tandem with institutional reforms to prevent recurrence of abusive practices and to revise the laws that facilitated such practices in the first place.¹⁶² Memory projects, such as monuments, annual prayer ceremonies, or mass graves, create official records, preserve memories of people and events, and serve as public acknowledgment of past wrongdoings to restore the dignity of victims.¹⁶³

Furthermore, many transitional justice mechanisms include both retributive and non-retributive elements. Some countries employ *lustration*, which identifies and removes politicians from former regime from public office.¹⁶⁴ This method has been criticized for lacking due-process guarantees and for relying on false intelligence from the prior regime, and has been rare outside of Eastern Europe.¹⁶⁵ Similar to lustration, some states also employ *vetting* or *purging* to remove those with a record of human rights abuse from security forces and other public positions.¹⁶⁶ In

¹⁶⁰ Naomi Roht-Arriaza, “The new landscape of transitional justice,” in *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, eds. Naomi Roht-Arriaza and Javier Mariezcurrena (Cambridge, UK: Cambridge University Press, 2006), 4

¹⁶¹ Ibid 4

¹⁶² Hayner, *Unspeakable Truths*, 10

¹⁶³ DeMeritt 182

¹⁶⁴ Hayner, *Unspeakable Truths*, 9

¹⁶⁵ Ibid

¹⁶⁶ Ibid

addition, many countries also grant *amnesties* to perpetrators in exchange for truth and mark a turning point from the conflict-ridden past to a new and more peaceful present.¹⁶⁷

The universe of transitional justice is therefore very diverse, and its mechanisms are not mutually exclusive. The establishment of different transitional justice mechanisms points to a wide range of goals. Hugo van der Merwe, Victoria Baxter, and Audrey R. Chapman provide a brief summary of what has been often accepted as the overall objectives of transitional justice:

- restoring dignity to victims and promoting psychological healing; ending violence and human rights abuses and preventing them in the future;
- creating a “collective memory” or a common history for a new future not determined by the past;
- forging the basis for a democratic political order that respects and protects human rights
- identifying the architects of the past violence and excluding, shaming, and diminishing perpetrators for their offences;
- legitimating and promoting the stability of the new regime;
- promoting reconciliation across social divisions;
- educating the population about the past; and
- recommending ways to deter future violations and atrocities.¹⁶⁸

Drawing upon these objectives of transitional justice, Pablo de Greiff concludes that all measures of transitional justice share two *mediate* goals (providing recognition to victims and fostering civic trust) and two *final* goals (contributing to reconciliation and to democratization).¹⁶⁹ In times of political transition, transitional justice aims to grant victims “moral standing as individual human beings” and “to provide victims a sense of recognition not only as victims but as (equal) right-bearers and, ultimately, citizens.”¹⁷⁰ Trust, on the other hand, involves an expectation of shared commitments to norms and values. This type of civil trust is a “disposition that can develop among citizens who are strangers to one another and who are members of the same community only in the sense in which they are fellow members of the same political

¹⁶⁷ DeMeritt 182

¹⁶⁸ Van de Merwe *et. al*, *Assessing the Impact of Transitional Justice*, 3

¹⁶⁹ De Greiff, “Theorizing Transitional Justice”, 40

¹⁷⁰ Ibid 42

community.”¹⁷¹ To victims and survivors of violence, civil trust can be attained by an institutionalized effort to confront the past as a good-faith effort to come clean, to understand and acknowledge long-term patterns of socialization, and to initiate a new political project around shared norms and values.¹⁷²

In connecting short- and long-term goals of transitional justice, De Greiff argues that recognition and civic trust are both preconditions and consequences of justice and reconciliation. Reconciliation, as defined earlier, refers to a state of social relations characterized by civic and norm-based trust.¹⁷³ It is crucial to note that this civic trust refers to both trust among individuals and trust between individuals and political institutions. Making institutions trustworthy, especially to survivors of violence, requires an institutional transformation for which transitional justice mechanisms can set the stage but not produce.¹⁷⁴ In a similar light, while the end goal of transitional justice is democracy, transitional justice mechanisms by themselves cannot *produce* democracy. Transitional justice can, however, contribute to democratization through its commitment to and the (re)establishment of the rule of law. De Greiff argues that different mechanisms, such as criminal prosecution and truth commissions, all represent to a promise of the rule of law.¹⁷⁵ The rule of law can be promoted as a range of traditional liberal civil rights that victims of violence are *recognized* to have as citizens, and as social norms and principles that form the basis of *civic trust* as enshrined in laws.¹⁷⁶ These rights and norms must translate into the rights to political participation.¹⁷⁷

¹⁷¹ Ibid 45

¹⁷² Ibid 46

¹⁷³ Ibid 52

¹⁷⁴ Ibid

¹⁷⁵ Ibid 53

¹⁷⁶ Ibid 56

¹⁷⁷ Ibid 58

These short- and long-term goals of transitional justice are particularly important in the case of Rwanda, where Tutsis and Hutus lived in integrated communities and interethnic marriages were common before the genocide. On the individual level, victims of rape and sexual assaults had to confront the possibility of reintegrating into their communities where their perpetrators lived. Transitional justice mechanisms, in order to facilitate reconciliation, must acknowledge and legitimize the victims' experiences, develop extensive trust between the victims and the perpetrators, and restore broken community ties. In addition, in most communities where victims of rape and sexual assaults were usually stigmatized and ostracized by their families and relatives, building trust between the victims and their respective community was crucial for victims to live peacefully and start of the process of healing. On the national level, civic trust must be restored between Hutus and Tutsis in order for norms of equality and reciprocity to emerge and be incorporated in the rule of law. Given the history of oppression of the Tutsi by the Hutu-dominated autocratic governments, these norms of equality must translate into equal rights of political participation and equal political representation in the government. In addition, an official historical narrative that recognizes the experiences of the Tutsi during the genocide, especially those experienced by victims of rape and sexual assault, must be developed through transitional justice mechanisms to facilitate the process of healing for victims.

Retributive and Restorative Justice

One of the most prominent debates in the field on the appropriate mechanisms to achieve the various goals of transitional justice is that between retributive and restorative justice. Both retributive and restorative theories of justice acknowledge that a balance has been disrupted by past wrongdoings. Their shared goal is therefore the restoration of such balance through reciprocity. Consequently, both theories believe that there must be a proportional relationship between the act

and the response: the victims deserve something for their sufferings and the perpetrators owe something for their offense.¹⁷⁸ Despite this commonality, retributive and restorative justices are different in their understandings of justice, their objectives, and their corresponding measures to achieve those goals.

Retributive justice, in its simplest form, is understood as, “punishment of the perpetrator by the state, through a process of judging guilt and imposing penalties commensurate with the nature of the crime.”¹⁷⁹ Martha Minow writes that retribution motivates punishment out of fairness and reflects the beliefs that wrongdoers deserve blame and punishment proportionate to the harm they inflicted.¹⁸⁰ Moreover, this retributive dimension of justice advocates for punishment not necessarily with hope of deterrence or other future effects, but as a way of denouncing previous wrongs and wrongdoers. In the bigger societal context, states use retributive justice to correct the wrongdoers’ message that victims were less worthy or valuable, and reassert the victim’s value by publicly punishing the wrongdoers.¹⁸¹ In the context of national reconstruction, retributive justice is necessary for states since they need to adhere to international legal standards,¹⁸² and states can do so by reaffirming the norms that grant equal rights to all.¹⁸³ Regarding the relationship between retributive justice and transitional justice, David Crocker argues that transitional justice “refers exclusively to penal justice and even to retributive interpretations of trials and punishment.”¹⁸⁴ Seen in this light, justice in transitional contexts must be retributive and thus requires prosecution and punishment of wrongdoers.

¹⁷⁸ Howard Zehr, *The Little Book of Restorative Justice* (Intercourse, PA: Good Books, 2014), 60

¹⁷⁹ Hugo van der Merwe, “Delivering Justice during Transition: Research Challenges,” in *Assessing the Impact of Transitional Justice*, eds. van der Merwe et. al (Washington, DC: United States Institute of Peace, 2009), 119

¹⁸⁰ Minow 12

¹⁸¹ Ibid

¹⁸² Orentlicher, “Settling Account,” 2562-2568

¹⁸³ De Greiff, “Theorizing Transitional Justice,” 43

¹⁸⁴ David A. Crocker, “Truth Commission, Transitional Justice, and Civil Society,” in *Truth v. Justice: The Morality of Truth Commissions*, eds. Robert I. Rotberg and Dennis Thompson (Princeton, NJ: Princeton University Press, 2000), 99

While scholars generally agree on the conception of retributive justice, transitional justice scholars, however, often approach restorative justice differently. Gerry Johnstone defines restorative justice as revolving around the idea that crime is “a violation of a person by another person (rather than a violation of legal rules)” and that “efforts should be made to improve the relationship between the offender and victim and to reintegrate the offender into the law-abiding community.”¹⁸⁵ Hugo van der Merwe argues that different definitions of restorative justice all agree that the focus should be less on the crime but more on restoring or compensating for the harm done to the victims and the society at large.¹⁸⁶ Furthermore, Fionnuala Ni Aolain, Dina Haynes and Naomi Cahn define restorative justice as, “characterized by apologies and other forms of direct victim confrontation with perpetrators, allowing victims and perpetrators to share a (safe) space, allowing the perpetrators to acknowledge the “wrong” committed and the victims to articulate the hurt or damage done to them as a result.”¹⁸⁷

Despite their differences, these various definitions of restorative justice all share one major common trait: the focus on and the contextualization of the relationship between the victim and the perpetrator in the bigger context of their community and of transitional justice. Drawing upon this common trait, Jennifer Llewellyn offers one of the most holistic and comprehensive conceptions of restorative justice. She proposes that it is “relationship centered” and “fundamentally concerned with restoring relationships harmed by wrongdoing to ones in which all parties enjoy and accord one another equal dignity, respect, and concern.”¹⁸⁸ Underpinning this theory of restorative justice, Llewellyn argues, is the conviction that all human beings are constituted in and through relationships, and the nature of these relationships, especially those of violence and oppression, are

¹⁸⁵ Gerry Johnstone, *Restorative Justice: Ideas, Values, Debates* (Abingdon, Oxon: Routledge), ix

¹⁸⁶ Van de Merwe, “Delivering Justice during Transition,” 119

¹⁸⁷ Fionnuala Ni Aoláin, Dina Francesca Haynes, and Naomi R. Cahn, *On the Frontlines: Gender, War, and the Post-Conflict Process* (Oxford: Oxford University Press, 2011), 169

¹⁸⁸ Llewellyn, “Restorative Justice,” 91,94

crucial to the beings of those involved.¹⁸⁹ Restorative justice thus aims to restore and reconstruct relationships to their ideal version, and views crimes primarily as harms to relationship and those involved.¹⁹⁰ She argues that while criminal justice is preoccupied with the idea that the state is the principal party harmed by crime, restorative justice views harms and wrongdoings through the lens of the victims, and assesses their impacts on the victims' web of relationships.¹⁹¹ Because of its focus on human and social relationship, restorative justice relies heavily on social context and thus must be tailored to the specific needs of each society, and society therefore plays a crucial role in the creation and solution of social conflicts.¹⁹²

There are fundamental differences in the roles of retributive and restorative justice in the bigger context of transitional justice, and these differences depend on the conception of transitional justice itself. On the one hand, transitional justice, as "justice to the extent possible," refers to the extent to which justice can be achieved in a transitional context. This conception of transitional justice is underwritten by the belief that "full" or "normal" justice is inherently retributive, and that "full" justice may not be achieved in times of transition.¹⁹³ Restorative justice seen in this account is partial justice and is used in the absence of prosecution; restoration of the moral order is therefore only one of the various goals served by justice.¹⁹⁴ On the other hand, many contend that political transitions have different demands and requirements for justice, and restorative justice in this transitional context is *the* proper form of justice.¹⁹⁵ In this account, transitional justice is and must be restorative, and such process must focus on restoring the dignity of victims and the moral

¹⁸⁹ Ibid 92

¹⁹⁰ Ibid 93

¹⁹¹ Ibid

¹⁹² Ibid 95, 96

¹⁹³ Ibid 85

¹⁹⁴ Ibid 87

¹⁹⁵ Ibid 88, also see Elizabeth Kiss, "Moral Ambition Within and Beyond Political Constraints," in *Truth v. Justice: The Morality of Truth Commissions*, ed. Robert I. Rotberg and Dennis Thompson (Princeton, NJ: Princeton University Press, 2000)

order. Martha Minow, for example, argues that truth commissions, as one of the essential institutions of restorative justice, are not an alternative to criminal prosecutions but a mechanism better suited to achieve the various goals of transitional justice.¹⁹⁶

Both of these approaches to transitional justice, despite their differences, share a common assumption that justice in normal times is retributive justice, and once political transition is over, this normal demand of justice will emerge again.¹⁹⁷ This assumption limits the influence of restorative justice to transitional time, while its objectives, such as the restoration of social relationships and the moral order, are often time-consuming. Retributive justice, in contrast, is done when prosecution and punishment end. Llewellyn contends that different from retributive justice, restorative justice is a process rather than a state of justice; it is a means to an end rather than the end goal itself.¹⁹⁸ A society's decision to employ different institutions of restorative and retributive justice will leave different impacts on victims of past harm. The focus of analysis and political debates surrounding transitional justice has been, however, preoccupied with prosecutorial rather than reparative objectives, and therefore with the question of how to punish perpetrators rather than with how to help heal victims.¹⁹⁹ Ruth Rubio-Marín argues that this tendency of transitional justice to be preoccupied with perpetrators often results in a double marginalization: the neglect of victims in transitional and post-conflict context, and within that, the marginalization of women.²⁰⁰ This chapter now turns to an analysis of the role of women, or lack thereof, in transitional justice and how different institutions of both retributive and restorative justice attempt to resolve the legacy of rape and gender-based violence.

¹⁹⁶ Minow 88

¹⁹⁷ Llewellyn, "Restorative Justice," 90

¹⁹⁸ Ibid 96, 97

¹⁹⁹ Pablo De Greiff, "Repairing the Past: Compensation for Victims of Human Rights Violations," in *The Handbook of Reparations*, ed. Pablo De Greiff (Oxford: Oxford University Press, 2006), 1,2

²⁰⁰ Ruth Rubio-Marín, "The Gender of Reparations: Setting the Agenda," in *What Happened to the Women?: Gender and Reparations for Human Rights Violations*, ed. Ruth Rubio-Marín (New York: Social Science Research Council, 2006), 22

GENDER AND TRANSITIONAL JUSTICE

“Adding Women” in International Law

Since the very inception of the field, women have largely been neglected in the process of transitional justice. Rape and sexual violence used as tools of war, however, is not a recent phenomenon. Systemic use violence against women in conflict has been documented at least since the rape of Chinese girls and women in Nanjing in the 1930s, the exploitation of Korean and Chinese comfort women by Japanese soldiers in the 1940s and 1950s, abuses against Vietnamese women by American soldiers in the Vietnam War, and the many other accounts of rape and sexual assaults in conflicts in, but not limited to, Afghanistan, Bangladesh, Darfur, Iraq, Sierra Leone, Sudan, and the Democratic Republic of Congo.²⁰¹ The earliest institutions of transitional justice, the post-World War II tribunals, did not pay adequate attention to the needs and experiences of women, and rape and sexual violence were largely considered spoils of war rather than systemic tools of conflict.²⁰² The very early stage of international human rights and humanitarian laws did not prioritize a gender-sensitive framework and thus excluded the various experiences and needs of women from the dominant practice of law at the time.²⁰³

As the concept of human rights started getting recognized and mainstreamed in the realm of international politics, incremental changes in international human rights and humanitarian law also occurred, including recognizing women as political actors in traditionally male-dominated domains. The 1948 Universal Declaration of Human Rights (UDHR), the 1951 Genocide Convention, the 1966 International Covenant on Civil and Political Rights (ICCPR), the 1984 Convention Against Torture and Other Forms of Cruel, Inhumane, and Degrading Treatment or

²⁰¹ Tazreena Sajjad, “Rape on Trial: Promises of International Jurisprudence, Perils of Retributive Justice, and the Realities of Impunity,” in *Rape: Weapon of War and Genocide*, eds. Carol Rittner and John K. Roth (St. Paul, MN: Paragon House, 2012), 65

²⁰² Alam 36

²⁰³ Ibid

Punishment (CAT), and the 2000 United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons altogether denounce all forms of torture, slavery, and degrading treatment as violations of bodily-integrity rights.²⁰⁴ Most of these legal standards, especially the 1948 UDHR and the 1951 Genocide Convention, however, lack a gendered perspective and reveal “a misguided and misinformed attempt to be gender neutral, as was the common tendency in international human rights.”²⁰⁵ It was not until the creation and adoption of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the 1993 United Nations Declaration on the Elimination of Violence against Women, and the 1994 Inter-American Convention on Violence that international laws started paying attention to the specific experiences of women during conflict, especially in terms of sexual violence. Within the framework of international humanitarian law, Article 27 of the Fourth Geneva Conventions specifically references rape and other forms of sexual mistreatment, and states that, “women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution or any form of indecent assault.” Rape is thus recognized as a crime of honor and as a human rights violation. In addition, rape and sexual assault are considered “inhumane treatment” under Article 147 and therefore constitute “grave breaches” of the Geneva Conventions.²⁰⁶

Gender-based violence against women in armed conflicts gained specific attention in the 1990s. During this time, literature on transitional justice was dominated by the work of human rights lawyers who argued that international human rights standards should be applicable to and enforced during these political transitions.²⁰⁷ The 1990s also witnessed the rise of feminist scholars who critiqued international human rights law and demanded the protection and promotion of

²⁰⁴ Sajjad, “Rape on Trial,” 66

²⁰⁵ Alam 37

²⁰⁶ *Prosecutor v. Tadic*, No. IT-94-I-T (7 May 1997)

²⁰⁷ O’Rourke 17

women's rights with specific attention to violence against women.²⁰⁸ As the concept of human rights in international politics once again gained worldwide attention in the 1990s after the end of the Cold War, interpretations of international laws also acknowledged that women experienced the same physical harms as men in the context of political violence.²⁰⁹ However, feminist interventions into international law specifically pointed to the different types of harms women experience in the context of political violence, referencing rape and sexual assault as a general category of political violence and using the widespread sexual violence in the Balkan and Rwandan conflicts as examples.²¹⁰ Following these conflicts, additional application and interpretation of the Geneva Conventions was further highlighted in the findings of both the ICTY and the ICTR, and later in the creation of the ICC through the adoption of the 1998 Rome Statute. The Rome Statute was a landmark creation of a legal and normative foundation for transitional justice, especially in regards to prosecuting sexual violence. The ICC categorizes "rape, sexual slavery, enforced prostitution, forced pregnancy, forced sterilization, or any other form of sexual violence of comparable gravity" as crimes against humanity,²¹¹ and defines rape as:

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.²¹²

This definition of rape prioritizes evidence of coercion over evidence of non-consent, recognizes that the question of consent does not apply to everyone subjected to sexual violence, including

²⁰⁸ Ibid 18

²⁰⁹ Ibid 21

²¹⁰ Ibid

²¹¹ Rome Statute, Articles 7 and 8

²¹² Res. ICC-ASP/1/3, adopted at the 3rd plenary meeting, on 9 September 2002, 119

children, the elderly, and the disabled, and focuses on the intention of perpetrators through the show of coercion or threats of coercion.²¹³ In addition, reforms were also introduced in the investigation of war crimes to improve the recognition of gender-based human rights violations and enhance prosecutors' access to expertise in the prosecution of gender-based crimes.²¹⁴ In addition, the adoption of UN Security Council Resolution 1325 on Women, Peace and Security in 2000 delivered a formal international political and legal recognition that both political violence and its resolution are gendered, for gender is a determining factor in how individuals experience political violence.²¹⁵

Gendered Shortcomings of Transitional Justice

Despite these various developments in international law that focus on the recognition of women as political actors and their experiences during armed conflicts, women have largely been marginalized from both retributive and restorative transitional justice process. Christine Bell and Catherine O'Rourke argue that one major feminist critique points to the "from" (male-defined political violence) and "to" (liberal democratic frameworks) framework of transitional justice discourse.²¹⁶ First, the gendered nature of the public/private dichotomy reveals that since women spend most of their lives in the private realm, a wide range of harms experienced by women, especially gendered-based violence, is usually deemed private and thus does not fall into the purview of state's intervention.²¹⁷ In addition, the predominantly Western liberal democratic frameworks of transitional justice and human rights heavily prioritize civil and political rights over economic, social, and cultural rights, and hence perpetuate the prioritization of public over private.

²¹³ Alam 48

²¹⁴ Christine Bell and Catherine O'Rourke, "Does Feminism Need a Theory of Transitional Justice? An Introductory Essay," *International Journal of Transitional Justice* 1, no. 1 (2007): 27

²¹⁵ O'Rourke 4

²¹⁶ Bell and O'Rourke 23

²¹⁷ O'Rourke 20

In this account, transitional justice processes orchestrated by the state are more concerned with an individual's relationship with the government as dictated by civil and political rights.²¹⁸ This major focus on public, first-generation human rights therefore allows states to neglect both the ongoing sexual violence happening in the private sphere during post-conflict national reconstruction.

In addition, this overwhelming prioritization of first-generation human rights translates into major neglect of second-generation human rights, which is crucial for women especially in the post-war economies. Post-conflict political economy is often gendered; since men are often either killed or imprisoned after conflict, women usually assume the role of heads of households and are responsible for family survival. These changing gender dynamics are usually neglected during the process of national reconstruction, for states often quickly prioritize state survival and defense and thus often either postpone or abandon gender transformation policies.²¹⁹ The presence of international actors, primarily UN Peacekeeping forces, also intensifies this gendered nature of post-conflict economies. First, since the purpose of peacekeeping missions is primarily to reestablish law and order, little attention is paid to securing social and economic livelihoods for women (and men) after conflict. A lack of focus on delivering economic, social, and cultural rights usually forces women and girls into dire socioeconomic conditions and into risky income-generation activities, such as sex work, to feed their family and gain protection from men with more resources.²²⁰ In addition, an international militarized presence often leads to the expansions of sex industries employing women as sex workers or sex slaves, or to widespread, systemic rape conducted by peacekeepers, as in the cases of the Democratic Republic of Congo and the Central African Republic.²²¹ In addition, since transitional justice mechanisms are often products of peace

²¹⁸ Ibid

²¹⁹ Borer, "Gendered War and Gendered Peace," 1171

²²⁰ True 137, 138

²²¹ Ibid 140

negotiations, and because negotiations processes themselves are gendered with negotiators being mostly men, the conceptualization of how accountability, justice, and human rights should be approached is overwhelmingly gendered.²²² This tendency of applying gender-neutral approaches to post-conflict reconstructions process therefore directly influences both restorative and retributive transitional justice procedures.

a) Gendered Retributive Justice

There exist major shortcomings in investigating and prosecuting rape and sexual violence in retributive justice mechanisms (i.e. criminal prosecution). First, in order for rape and sexual violence to be tried as a *jus cogens* crime,²²³ those actions must be found to have occurred in a systematic, organized pattern.²²⁴ In addition, given the personal nature of rape and sexual assaults, survivors of these crimes are often reluctant or afraid to testify in courts. In many cases, the burden of proving rape and sexual violence falls on the victims, intensifying their reluctance to share these experiences. Furthermore, the general shortage of women's representation in transitional justice mechanisms, in this case the courtrooms, also creates a lack of female perspective and a reliance on the application of a gender-neutral defense standard.²²⁵ This nature of traditional defense lawyering often creates an inhospitable and under-supportive environment for victims of these crimes, and even when the environment is supportive, not all women believe there are benefits of disclosing traumatic experiences of rape.²²⁶ In addition, the public and adversarial environment of the courtroom also increases the risk of secondary traumatization for the victims, as trials may become predominantly concerned with female accountability rather than male responsibility. Furthermore,

²²² Borer, "Gendered War and Gendered Peace," 1173

²²³ "*Jus cogens*, or *peremptory norms*, describe rules or customary law considered so fundamental and significant to the structure and functioning of the international community that they bind states even if the state has not given formal consent." Defined in Gerhard von Glahn and James Larry Taulbee, *Law Among Nations: An Introduction to Public International Law* (Pearson, 2011), 59

²²⁴ Sajjad, "Rape on Trial," 71

²²⁵ Aolain *et al.* 164

²²⁶ Ibid 159

testimonies of rape and sexual assault, under the potential of repetitive cross-examination, may turn these traumatic experiences into voyeuristic and pornographic devices, resulting in further traumatic re-victimization.²²⁷

In many trials, especially international tribunals, the Western tendency to focus on civil and political rights also overshadows the possibility of investigating and prosecuting violations of economic, social, and cultural rights. Even when sexual and reproductive violence is addressed, which is already undermined by the various factors mentioned above, accountability processes often fail to assess the various aspects of harm experienced by women. Violations of socioeconomic rights like deliberate starvation, blockade, and destruction of food and water are often neglected in wartime prosecutions that are heavily preoccupied with prosecuting violations of bodily-integrity rights.²²⁸ In addition, serious long-term impacts of rape and gender based violence, such as STDs, vaginal and reproductive tract problems, and sterility, if acknowledged, are usually considered secondary harms.²²⁹ This disproportionate attention to physical harms and violations of bodily-integrity rights not only has a direct effect on victims' lives, but also poses a threat to the long-term economic, social, and cultural sustainability of peace, which is the primary goal of post-conflict reconstruction.²³⁰ Despite various progressive developments in international law, they have often fallen short in terms of enforcement. These shortcomings help explain why the international conviction rates for gender-based violence are low, and the conviction rates in national courts are almost non-existent.²³¹

b) Gendered Restorative Justice

²²⁷ Ibid 166

²²⁸ Ibid 155

²²⁹ Ibid 153

²³⁰ Ibid

²³¹ Sajjad, "Rape on Trial," 70,71

It is generally accepted that criminal accountability for rape and sexual assaults, which is already incomplete in most cases, cannot by itself facilitate reconciliation for victims. Restorative justice mechanisms, such as truth commissions, in contrast, can be utilized to compensate for retributive justice's shortcomings. While truth commissions do not fall under the scope of this research, many other scholars have written extensively on the gendered aspects of truth commissions.²³² Within the repertoire of restorative justice mechanisms, this thesis looks specifically at reparation programs and the process of reconciliation. There is a growing consensus in international law that the state is obligated to provide compensations for victims of gross human rights violations committed by the governments.²³³ Such obligation, if not fulfilled, carries over to the successor government. In terms of international standards, the UN Human Rights Commission and its Sub-Commission on the Promotion and Protection of Human Rights had discussed since 1989 and finally approved in 2005 "The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law."²³⁴ While these principles refer to restitution, compensation, rehabilitation, and guarantees of non-repetition as forms of reparations, they do not define what constitutes either "gross violations of international human rights law" or "serious violations of international humanitarian law."²³⁵

For women, especially victims of rape and sexual assaults, the existence and effectiveness of reparation programs can contribute significantly to the process of reintegration and reconciliation. For example, the tendency to cast women as secondary victims, which is as living

²³² See Debra L. Deleat, "Gender Justice: A Gendered Assessment of Truth-Telling Mechanisms"; Tristan Anne Borer, "Gendered War and Gendered Peace: Truth Commissions and Postconflict Gender Violence: Lessons from South Africa"; Priscilla Hayner, "The Truth About Women and Men"

²³³ Neil J. Kritz, "The Dilemmas of Transitional Justice," *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Washington, D.C.: United States Institute of Peace Press, 1995), xxvii

²³⁴ UNGA Resolution 60/147, UN Doc. A/RES/60/147

²³⁵ Rubio-Marín 24

survivors of those killed by political violence, makes women the prime beneficiaries of reparations.²³⁶ In addition, since retributive justice's overwhelming tendency to neglect second-generation human rights, reparation programs can help improve women's dire socioeconomic conditions. Rubio-Marín notes the general trend of women's preference of basic social services, such as medical and psychological rehabilitation, education for children, and housing-related assistance, to meet their family's needs as the ideal form of reparation over restitution of lost property or monetary compensation.²³⁷ In addition, for victims of rape and sexual violence and those living with HIV/AIDS, medical and psychological services as reparations might play a crucial role in their psychological rehabilitation process.²³⁸ While the material needs of victims are overwhelming and criminal accountability by itself appears to be shallow justice, reparation programs, especially in the forms of material recompense and social services, can be significantly valuable to victims of rape and sexual assaults, at least in the short term.²³⁹

Neil Kritz argues that compensation and reparation can also contribute to the long-term process of national reconciliation by serving at least three functions: (1) it aids the victims to manage the material aspect of their loss; (2) it constitutes an official acknowledgment of their pain by the nation. Both of these facilitate the societal reintegration of people who have long been made to suffer in silence; and (3) it may deter the state from future abuses, by imposing a financial cost to such misdeeds.²⁴⁰ In addition, while retributive justice focuses on holding perpetrators accountable, Reparations, in contrast, may be "the most tangible manifestation of the efforts of the state" to remedy the harms the victims have suffered.²⁴¹ Similarly, Rubio-Marín argues that

²³⁶ O'Rourke 154

²³⁷ Rubio-Marín 29

²³⁸ Ibid 33

²³⁹ Aolain *et. al* 160.

²⁴⁰ Kritz, "The Dilemmas of Transitional Justice," xxvii

²⁴¹ De Greiff, "Repairing the Past," 2

reparations can become measures to promote both interpersonal trust and trust in the institutions of the new state and in its legitimacy, thus contributing to the creation of a more sustainable democratic state.²⁴² Colleen Duggan and Adila M. Abusharaf also argue that reparation programs can contribute to the long-term process of women's reconciliation by: 1) putting the women-citizen/State relationship on a more just and equitable footing, 2) creating a more supportive environment for victims to claim reparations, 3) establishing a societal conviction that victims of sexual violence must not be silenced and guaranteeing accountability for the crimes perpetrated against them, and 4) taking advantage of the transitional context to redefine the social norms that have fostered sexual violence, and forging an essential connection between the enforcement of the right to reparation and the establishment of public policies to prevent sexual violence in the future.²⁴³

Despite these various long-term and short-term advantages of reparation programs, government in political transitions often encounter various challenges that prevent victims of sexual violence from receiving the full benefits of reparations. In the case of Sierra Leone, the transitional government faced competing demands to finance retributive justice mechanisms (tribunals) and restorative justice mechanism (national reparation programs), and the resources allocated for remedying gender crimes were often curtailed.²⁴⁴ In addition, the various social and cultural taboos surrounding rape and sexual assaults that prevent victims from testifying in courts also discourage women from registering for reparations.²⁴⁵ The case of Sudan also highlights the fact that allocating resources for sexual violence reparations also means a state-sponsored

²⁴² Rubio-Marin 25

²⁴³ Colleen Duggan and Adila M. Abusharaf, "Reparation of Sexual Violence in Democratic Transitions: The Search for Gender Justice," in *The Handbook of Reparations*, ed. Pablo De Greiff (Oxford: Oxford University Press, 2006), 630-635

²⁴⁴ Ibid 641

²⁴⁵ Ibid 633, 634

acknowledgment of these crimes, and, while necessary for reconciliation, is often tantamount to admitting to the dishonoring of an entire society.²⁴⁶ Balancing the demands for both national and individual reconciliation, while creating a hospitable environment for victims to receive the benefits of reparations, proves to be a major challenge for many societies. In addition, while it is recognized that victims of these crimes should receive full restitution, intangible assets that were lost as a result of these crimes – such as purity, social standing, and marriageability – can never be returned.²⁴⁷ Compensating materially for these assets is complicated and depends heavily on the social and cultural context of each society.

The social and cultural context of each society, furthermore, also impacts the individual and national process of reconciliation extensively. Donna Pankhurst writes that while there is considerable international and national debate about how reconciliation may be achieved, there is “virtually no discussion about ‘gender reconciliation,’” and that women are often expected to identify themselves with the gender-neutral concepts of reconciliation and peace-building interventions.²⁴⁸ As mentioned in Chapter 1, this thesis examines reconciliation by dividing it into six different subcomponents: 1) understanding the past, present and envisioning the future of Rwanda, 2) citizenship and identity, 3) political culture, 4) security, 5) justice, and 6) social cohesion. Several challenges to criminal prosecutions and reparations programs in bringing justice for victims of rape and sexual assaults have been demonstrated throughout this chapter. These challenges in turn create significant obstacles to victims’ pursuit of justice and reconciliation process. The citizenship and political culture components of reconciliation can be developed with peace negotiations and designing transitional justice mechanisms. These processes, as

²⁴⁶ Ibid 634

²⁴⁷ Ibid 639

²⁴⁸ Donna Pankhurst, “Introduction: Gendered War and Peace,” *Gendered Peace: Women’s Struggles for Post-War Justice and Reconciliation* (New York: Routledge, 2008), 10

aforementioned, also often fail to include women in the decision-making process. Other factors of reconciliation, including acknowledging the past, security, and social cohesion, rely on the recognition of women as equal members of society, and the destruction of pre-existing conditions that allow rape and sexual assault to happen in the first place. The challenge, in other words, is to deconstruct unequal gender relations.²⁴⁹ Gender relations and ideologies stem from the deeply held traditions in which patriarchal societies regard women as property, and that their values reside only in women's productive and reproductive labor.²⁵⁰

Deconstructing these traditions, and eliminating the culture of stigma and ostracism that discriminates victims of rape and sexual assault, while necessary for reconciliation, are overwhelming tasks that transitional justice mechanisms often lack the capacity and time to implement. In addition, improving gender relations between men and women can partly come from improving women's political representation in a democracy, which transitional justice can help build but cannot produce. Reconciliation for victims within their communities must occur at the grassroots level, where victims face the daunting tasks of living with the perpetrators who have raped them. This process of reconciliation requires a fundamental change in which sexual violence is perceived.²⁵¹ Yet this fundamental change requires a political will to accept women's values as equal members that post-conflict communities often do not possess. Reconciliation for victims of rape and sexual assault thus requires a fundamental reconstruction of societal relations, in which women themselves are unfortunately often underrepresented. Reconciliation is therefore the most daunting task facing transitional justice mechanisms, which this thesis seeks to analyze.

²⁴⁹ Sheila Meintjes, Anu Pillay, and Meredith Turshen, "There is No Aftermath for Women," *The Aftermath: Women in Post-Conflict Transformation* (London: Zed Books, 2001), 14

²⁵⁰ Ibid 12

²⁵¹ Tina Sideris, "Problems of Identity, Solidarity, and Reconciliation," in *The Aftermath: Women in Post-Conflict Transformation*, eds. Sheila Meintjes, Anu Pillay, and Meredith Turshen (London: Zed Books, 2001), 60

In conclusion, both retributive and restorative justice for victims of rape and sexual assaults face the various contextual challenges that societies need to address through transitional justice mechanisms, while simultaneously encountering distinctive challenges because of the inherently personal nature of these crimes. This chapter is, at the most basic level, a review of the literature in the field, analyzing the gendered aspect of both armed conflicts and transitional justice. Rwanda, with both its local and international transitional justice mechanisms, attempted to resolve this complicated and multifaceted legacy of rape and sexual assaults. The next two chapters provide a comparative analysis of the strengths and weakness of these local and international mechanisms in reckoning with this painful legacy. While scholars have written extensively on the strengths and weaknesses of each transitional justice mechanism in post-genocide Rwanda, few have looked at these mechanisms from a comparative perspective. Even fewer scholars have analyzed this comparison from a gender-sensitive perspective with a focus on survivors of sexual violence. This thesis thus fills the gap in the literature by providing an analysis of the strengths and weaknesses of domestic and international attempts to bring both retributive and restorative justice to victims of rape and sexual assaults through a comprehensive and in-depth case study.

3. LOCAL CRIMES, INTERNATIONAL JUSTICE

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA & TRIALS BASED ON THE PRINCIPLE OF UNIVERSAL JURISDICTION

With *Akayesu*, Pillay made history again. “Rape had always been regarded as one of the spoils of war,” she said in a statement after the verdict. “Now it is a war crime, no longer a trophy.”²⁵²

On May 31, 1994, the then-Secretary-General of the United Nations, Boutros Boutros-Ghali, presented a report on the situation in Rwanda to the Secretary Council, in which he states:

The magnitude of the human calamity that has engulfed Rwanda might be unimaginable but for its having transpired. On the basis of evidence that has emerged, there can be little doubt that it constitutes genocide, since there have been large-scale killings of communities and families belonging to a particular ethnic group.²⁵³

The Rwandan genocide therefore happened against the backdrop of willful ignorance of the international community, which was aware of genocide yet refused to intervene. During the genocide, the United Nations Commission on Human Rights, however, did appoint Ivoirian law professor René Degni-Segui as the Special Rapporteur on the situation in Rwanda. The Special Rapporteur’s reports showed clear evidence of genocide and crimes against humanity, and recommended either the establishment of an international *ad hoc* tribunal or the enlargement of the jurisdiction of the ICTY to bring those responsible for the massacres of the genocide to justice.²⁵⁴ These recommendations were made in the context that the ICTY, an *ad hoc* tribunal, was created a year earlier. Given the severe crimes investigated by the ICTY, the reports on

²⁵² A statement from Judge Navi Pillay of South Africa, the first woman Judge at the ICTR, quoted in Dina Temple-Raston, *Justice on the Grass: Three Rwandan Journalists, Their Trial for War Crimes, and a Nation’s Quest for Redemption* (Simon and Schuster, 2005), 97

²⁵³ UNSC, *Report of the Secretary-General on the situation in Rwanda*, UN Doc. S/1994/640 (1994)

²⁵⁴ UNGA and UNSA, *Situation of human rights in Rwanda*, UN Doc. A/49/508 - S/1994/1157 (1994)

serious violations of international humanitarian law and the commission of crimes against humanity in Rwanda, and the lack of international efforts to stop the genocide, an international judicial institution, similar to the ICTY, was deemed to be of crucial importance. On December 18, 1994, the Security Council passed Resolution 955, establishing the International Criminal Tribunal for Rwanda (ICTR).

Between the end of the genocide in July 1994 and the establishment of the ICTR, millions of Rwandans fled the country to Europe, North America, and various African countries. Many of those fleeing were responsible for organizing and participating in the genocide. Rwanda, however, did not have extradition treaties with many states to obtain custody of suspects living in foreign countries. Many governments also refused to return these suspects, concerned about a judiciary in shambles in Rwanda and its questionable capacity to provide fair trials to suspects who might be returned to the country. Given the widespread acceptance of the fact that a genocide happened in Rwanda, and an international pressure to prosecute those responsible for the crimes committed during the conflict, twelve countries to which these perpetrators had fled organized trials based on the principle of universal jurisdiction.

This chapter analyzes and evaluates the extent to which the ICTR and trials based on the principle of universal jurisdiction were successful in bringing comprehensive justice to victims of rape and sexual violence during the genocide. The chapter first provides a brief background of the ICTR, including its mandate and objectives, and summarizes its record in prosecuting rape and sexual violence. It then provides a brief introduction to the legal framework for the creation of universal jurisdiction trials in other states, and summarizes their records. The chapter continues with an analysis of the strengths and weaknesses of these two mechanisms in bringing both retributive and restorative justice to victims of rape and sexual assaults.

Both mechanisms were able to bring some high-level perpetrators of rape and sexual violence to justice, and thus partially fulfilled their retributive justice mandate. Through both the testimonies of victims and the convictions of perpetrators, a partial historical record about rape and sexual violence during the genocide also emerged. This historical record contributed to a collective memory about what happened during the genocide, and confirmed that rapes and sexual violence were not only opportunistic attacks but also systemic elements of the genocide. Moreover, the ICTR was particularly successful at establishing an international jurisprudence for prosecuting rape and sexual violence under international law. Despite these successes, the ICTR also faced several institutional challenges as an international justice mechanism trying local crimes, and thus failed to bring comprehensive justice to many other victims. The Tribunal was inconsistent in defining rape and sexual violence, and different prosecutors demonstrated different levels of willingness to prosecute these crimes. Various cases moved through trials without sexual violence charges despite substantial evidence, creating a sense of frustration for many victims who had the courage to testify. In addition, the environment at the Tribunal was sometimes hostile to survivors of sexual crimes. Finally, the ICTR's record also reflects an incomplete picture of sexual crimes during the genocide, and the Tribunal paid insufficient attention to restorative justice.

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (ICTR)

On September 28, 1994, upon Special Rapporteur Degni-Segui's recommendation, Rwanda formally sent a request to the President of the UNSC to establish an *ad hoc* tribunal. On December 8, 1994, the UNSC passed Resolution 955 establishing the ICTR in Arusha, Tanzania with a sub-office in Kigali, Rwanda:

for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of

Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994²⁵⁵

This location was set to avoid the appearance of “victor’s justice” by the new Tutsi-dominated Rwandan government.²⁵⁶ However, locating the ICTR in Tanzania, despite good intentions, caused a significant physical and psychological distance between the Tribunal and Rwandan society.

Despite its formal request less than three months earlier, the Rwandan delegation to the UN cast the sole vote against the creation of the ICTR, with an abstention by China. Several reasons explain this opposition. Gerald Gahima, who served as the principal liaison between the Rwandan government and the ICTR, argues that the newly established government showcased a clear desire to assert its national ownership over the international aspect of accountability mechanisms, to emphasize its sovereignty in dealing with the international community during the reconstruction process, and to protect its military from exposure to prosecution by the proposed court.²⁵⁷ Second, the Rwandan delegation also cited various reasons for opposing the establishment, including, but not limited to: 1) the prohibition of capital punishment, which could lead to principal genocide planners receiving prison terms from the ICTR while their subordinates could face death penalty if found guilty in Rwanda’s national courts, 2) the limitation on temporal jurisdiction to the 1994 calendar year, which excludes the period of Hutu planning for the genocide that can be arguably traced back until 1990, 3) poor staffing, as the ICTR and ICTY would share an appeal chamber and a prosecutor, 4) the nominated judges’ potential conflict of interests in excluding their co-nationals who might be complicit in the

²⁵⁵ UNSC, Resolution 955 on establishment of an International Tribunal and adoption of the Statute of the Tribunal, UN Doc. S/RES/955 (1994)

²⁵⁶ Howard Ball, *Prosecuting war crimes and genocide: The twentieth-century experience* (University Press of Kansas, 1999), 171

²⁵⁷ Gahima 87

genocide, 5) the possibility of sentences being served outside Rwanda, and 6) the refusal to locate the seat of the Tribunal in Rwanda itself.²⁵⁸

Despite this opposition by the Rwandan government, the ICTR was nevertheless established with three main organs: 1) the Office of the Prosecutor (OTP), which investigated allegations, issued indictments, and prosecuted cases in court; 2) the Registry, which performed administrative tasks, and 3) the Chambers. There were three Trial Chambers, and one Appeals Chamber that was shared with the ICTY at The Hague. The Chambers had sixteen permanent members, of whom seven served at the Appeals Chamber and nine as *ad litem* judges. Judges were nominated by their home state and elected by the UN General Assembly, and no two judges could come from the same country.²⁵⁹ During the first nine years of its operation, the ICTR shared a common Prosecutor with the ICTY, until the Security Council determined that both Tribunals would be more effective and efficient if each had a separate Prosecutor and appointed one for the ICTR in 2003. Four individuals served in this role: Richard Goldstone of South Africa, Louise Arbour of Canada, Carla Del Ponte of Switzerland, and Hassan B. Jallow of Gambia.

The ICTR was established with a *ratione materiae*, or material jurisdiction, over the crimes of genocide, crimes against humanity, and violations of Article 3 common to the 1949 Geneva Conventions and of Additional Protocol II.²⁶⁰ According to the statute of the ICTR, rape constitutes a crime against humanity under Article 3; rape, enforced prostitution, and any forms of indecent assaults are also violations of Article 3 common to the 1949 Geneva Conventions

²⁵⁸ Ball 171-172, William A. Schabas, "Post-Genocide Justice in Rwanda: A Spectrum of Options," in *After Genocide: Transitional Justice, Post-Conflict Reconstruction, and Reconciliation in Rwanda and Beyond*, eds. Phil Clark and Zachary D. Kaufman (Columbia University Press, 2009), 210

²⁵⁹ Kaiteesi 53

²⁶⁰ UNSC Resolution 955. Article 3 common to the Geneva Conventions refers to rule of conduct in "conflicts not of an international character." In the case of Rwanda, a civil war that dated back until 1990 was the context in which the Rwandan genocide happened. For more details on Common Article 3, see <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/WebART/365-570006?OpenDocument>

and of Additional Protocol II. In relation to the genocide, the ICTR statute uses verbatim the Genocide Convention's definition.²⁶¹ With this jurisdiction, the ICTR became the world's first genocide court with several objectives.

Gerald Gahima summarizes seven main goals and expectations for the ICTR: 1) holding perpetrators accountable, 2) fighting impunity and promoting respects for human rights in Rwanda and other countries, 3) deterring future human rights violations, 4) facilitating the return of Rwandan refugees, 5) restoring and maintaining peace, 6) promoting reconciliation in Rwanda, and 7) supporting the rebuilding Rwanda's justice system.²⁶² The original language of UNSC Resolution 955 stresses two main objectives: holding perpetrators accountable and promoting reconciliation. The UNSC was determined that the crimes in Rwanda "constitute a threat to international peace and security," and that the Tribunal would take "effective measures to bring to justice the persons who are responsible for them."²⁶³ the Security Council also believed that by delivering retributive justice to the perpetrators of genocide, the Tribunal would "contribute to the process of national reconciliation and to the restoration and maintenance of peace."²⁶⁴ This mandate is different from that of the ICTY, for facilitating reconciliation was discussed in Security Council debates but was never included in the actual resolution that established the ICTY.²⁶⁵

²⁶¹ Kaitesi 54, 55. The 1948 Genocide Convention defines genocide as "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."

²⁶² Gahima 90-93

²⁶³ UNSC Resolution 955

²⁶⁴ Ibid

²⁶⁵ Alison Des Forges and Timothy Longman, "Legal responses to genocide in Rwanda," in *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, eds. Eric Stover and Harvey M. Weinstein (Cambridge University Press, 2004), 52

On December 31, 2015, the ICTR formally closed its operations. In its 20-year existence, the ICTR indicted 93 individuals, of which 62 were sentenced, 14 were acquitted, 10 were referred to national jurisdictions for trials, three were fugitives and referred to the Mechanisms of International Criminal Tribunals (MCIT), and two died before judgment was handed down. In addition, two indictments were withdrawn before trial.²⁶⁶ The MCIT assumed responsibility for all of the ICTR's tracking operations at the beginning of July 2012.²⁶⁷ With regards to sexual crimes, 52 out of the total 93 indicted were charged with rape or other crimes of sexual violence. Of these 52 cases, 43 cases proceeded to trials, seven were referred to Rwanda or France for trial, and two high-level fugitive cases have been transferred to the MCIT. 14 of the accused were convicted of these crimes;²⁶⁸ 27 were acquitted; and sexual violence charges in seven cases were dropped as part of plea negotiations or through amendment of the indictments.²⁶⁹ The OTP was successful in prosecuting and holding perpetrators accountable for rape and sexual violence as constituent acts of genocide (*Akayesu*, *Ngirumpatse*, *Karemera*), as crimes against humanity (*Akayesu*, *Nyiramasuhuko*, *Gacumbitsi*, *Bagosora*...), and as a war crime (*Bizimungu* and *Nyiramasuhuko*).

TRIALS BASED ON THE PRINCIPLE OF UNIVERSAL JURISDICTION

Universal jurisdiction is defined as “a legal principle allowing or requiring a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the

²⁶⁶ ICTR Website, <http://unictr.unmict.org/en/tribunal>

²⁶⁷ UNSC, Resolution 1966, UN Doc. S/RES/1966 (2010)

²⁶⁸ The 14 individuals that were convicted of rape and sexual violence are: Jean-Paul Akayesu, Laurent Semanza, Eliézer Niyitegeka, Sylvestre Gacumbitsi, Mikaeli Muhimana, Ferdinand Nahimana, Jean Bosco Barayagwiza, Théoneste Bagosora, Augustin Bizimungu, Idelphonse Hategekimana, Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, Edouard Karemera, and Matthieu Ngirumpatse.

²⁶⁹ ICTR OTP, *Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda* (2014), 5-6. A comprehensive chart with full statistics on the ICTR's record of prosecuting crimes of sexual violence can be found at Annex B of the Manual. (Hereinafter as “the Manual” or “Best Practices Manual.”)

nationality of the perpetrator or the victim.”²⁷⁰ Based on this principle, states can hold trials for international crimes committed by anybody, anywhere in the world. Traditionally, two main ideas justified this principle. First, there are crimes that are so grave – such as genocide, war crimes, crimes against humanity, and torture – that they pose significant threats to the international community. Second, due to the severity of these crimes, there must be no safe havens available for those who committed them.²⁷¹ Given the human rights violations committed during the genocide and the international community’s commitment to hold perpetrators accountable, the Rwandan genocide was a legally and morally justified backdrop against which states could exercise universal jurisdiction.

Twelve countries have been involved in holding perpetrators of the genocide accountable based on this principle, including: Switzerland, Belgium, the Netherlands, France, Finland, Denmark, Germany, Spain, Norway, United Kingdom, Canada, and the United States. The extent to which these countries exercised universal jurisdiction was, however, different and dependent on the political will of the country. Belgium, for example, has been one of the leading states in exercising universal jurisdiction for crimes committed during the Rwandan genocide. Several factors can explain this commitment, including the murder of Belgian peacekeepers during the genocide, the large number of Rwandan refugees seeking asylum in Belgium, its colonial history in Rwanda, and its decision to withdraw peacekeepers as the genocide escalated.²⁷² Belgium’s commitment to universal jurisdiction led to successful investigation and prosecution of a significant number of cases, including the landmark Butare Four case.²⁷³ In contrast, while

²⁷⁰ Xavier Philippe, "The principles of universal jurisdiction and complementarity: how do the two principles intermesh?" *International Review of the Red Cross* 88, no. 862 (2006), 377

²⁷¹ Ibid 378

²⁷² Gahima 195-196

²⁷³ The “Butare Four” consisted of four Rwandans convicted in Belgium for crimes committed during the Rwandan genocide. This case was the first time a Belgian court had convicted individuals for crimes committed abroad

France had by far the largest number of ongoing investigations related to the Rwandan genocide (25 genocide suspects), as of 2013, it has failed to complete any of the investigations and has yet to bring a Rwandan genocide case to trials.²⁷⁴ Gahima argues that this failure in investigating and prosecuting Rwandan genocide cases can be attributed mostly to the French government's lack of political will.²⁷⁵

While the scope of this thesis and my current available resources prevent me from analyzing in-depth the records of universal jurisdiction trials, it is clear from the current literature that trials based on the principle of universal jurisdiction have not been very successful in prosecuting crimes of rape and sexual assaults. Perpetrators of rape have been convicted of war crimes (Ephrem Nkezabera in Belgium and Desiré Munyaneza in Canada) and crimes against humanity (Desiré Munyaneza) in only a few cases, while in practice most of these crimes were ignored. Given the lack of research on universal jurisdiction trials for cases related to the Rwandan genocide, this chapter focuses on the achievements and shortcomings of the ICTR. In the realm of international judicial mechanisms, the contribution of third-party trials was in the aspect of creating an international jurisprudence.

ANALYSIS: MAJOR STRENGTHS AND SUCCESSES

The Landmark Case of *Prosecutor v. Akayesu*

Jean-Paul Akayesu, the former *bourgmestre*²⁷⁶ of the Taba Commune, was responsible for acts of genocide and violations of humanitarian law that occurred in the area under his control during the 100 days of the genocide. His initial indictment on February 16, 1996 included charges of genocide, crimes against humanity, and violations of Article 3 common to the Geneva

against international law. For more information about this case, see Luc Reydam's, "Belgium's First Application of Universal Jurisdiction: The Butare Four Case," *Journal of International Criminal Justice* 1 (2003): 428-436.

²⁷⁴ Gahima 202

²⁷⁵ Ibid

²⁷⁶ Similar to the role of a mayor

Conventions. None of these charges, however, included acts of rape or sexual violence.²⁷⁷ Eight days into the trial, Witness J testified and began talking about the rape of her daughter during the genocide without being asked by either the Judges or the Prosecutor. This narration led to more questions about other rapes she had witnessed, many of which were asked by the sole female Judge at the time – Judge Navi Pillay of South Africa. These events were confirmed many weeks later when Witness H took the stand and also testified about the sexual violence she had witnessed at the communal bureau under Akayesu’s control.²⁷⁸ These testimonies, those from five other witnesses, and various human rights reports about rape and sexual violence during the Rwandan genocide helped the prosecution link the evidence to the actions of the accused, which eventually led to an amendment that charged Akayesu with rape and sexual violence as genocide.

Akayesu pleaded not guilty on the basis that he did not commission any acts of rape and sexual assault, and that many testimonies were fabricated against him.²⁷⁹ The Trial Chamber held that a number of Akayesu’s statements, such as “Don’t ever ask again what a Tutsi woman tastes like” and “You should first of all make sure that you sleep with this girl,” constituted sufficient evidence that while he did not personally rape anyone, Akayesu was responsible for overseeing and encouraging rape against Tutsi women.²⁸⁰ Furthermore, in contextualizing rape and sexual violence in the bigger picture of the genocide, the Tribunal concluded that:

Tutsi women were subjected to sexual violence because they were Tutsi. Sexual violence was a step in the process of destruction of the Tutsi group – destruction of the spirit, of the will to live, and of life itself.²⁸¹

²⁷⁷ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, September 2, 1998, para 6 (Hereinafter as Akayesu Trial Judgment)

²⁷⁸ Kaitesi 127

²⁷⁹ *Akayesu* Trial Judgment, para. 32

²⁸⁰ *Ibid*, para. 732

²⁸¹ *Ibid*

In this conclusion, the Trial Chamber established that Akayesu was responsible for not only facilitating rape and sexual violence, but also encouraging those crimes with the intent to destroy Tutsi women and the Tutsi as a population.²⁸² The Trial Chamber also established that rape and sexual violence in the Taba commune, while by themselves did not constitute crimes against humanity, were committed as parts of the widespread and systemic attack against the Tutsi population with a discriminatory intent to destroy them, and thus were qualified as crimes against humanity.²⁸³ It is also crucial to note that rape is not included as a prohibited act in the 1948 Genocide Convention, and that gender is also not included as a protected group.²⁸⁴ Given that there was no judicial record and legal framework of prosecuting rape and sexual assaults as genocide that the ICTR could follow, the fact that the Tribunal was able to reach the conclusion that these crimes were just as genocidal as other brutal methods of killings is remarkable. In addition, through this judgment, the Tribunal exemplified a heightened awareness of sexual crimes by recognizing that some forms of sexual violence were easier to deny than other visibly obvious crimes of violence.²⁸⁵ More importantly, the ruling also concluded that a superior who knew or had reasons to know that their subordinates would or had committed rape and sexual violence with a genocidal intent was individually liable under international criminal law.²⁸⁶ This recognition therefore created a framework for investigating and prosecuting perpetrators of sexual violence in the future. The *Akayesu* trial, in establishing that rape and sexual violence

²⁸² Ibid, para. 731

²⁸³ Ibid, para. 598

²⁸⁴ Linda Bianchi, "The Prosecution of Rape and Sexual Violence: Lessons from Prosecutions at the ICTR," in *Sexual Violence as An International Crime: Interdisciplinary Approaches*, eds. Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens, and Larissa van den Herik (Intersentia, 2013), 141 (Hereinafter as "The Prosecution")

²⁸⁵ Kelly Dawn Askin, "The International Criminal Tribunal for Rwanda and Its Treatment of Crimes Against Women," in *International Humanitarian Law: Origins, Challenges and Practices*, eds. John Pritchard and John Carey (Brill Academic Publishers, 2006), 59

²⁸⁶ Kaitesi 144

were serious crimes that can be prosecuted under international law, successfully created a shift in paradigm of how these crimes should be perceived in the international community.²⁸⁷

More importantly, in establishing rape and sexual violence as elements of genocide and as crimes against humanity in the *Akayesu* Judgment, the Trial Chamber offered definitions of these crimes as follows:

The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.²⁸⁸

The Trial Chamber established that rape was a form of aggression, of which central elements “cannot be captured in a mechanical description of objects and body parts.”²⁸⁹ In addition, citing the similarity between rape and torture, the Trial Chamber argued that rape was used for “intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person.”²⁹⁰ In this account, rape was defined by the perpetrators’ purpose in context and by the specific sexual nature of the crime. Through this definition, the Trial Chamber moved the definition of rape from one of non-consent (non-consent must be established beyond reasonable doubt in order to hold the accused responsible) to one of coercion. Sexual violence, which includes rape, was defined in a similar light, which focused on the coercive nature of the attack. The Chamber used this definition to include acts such as forced nakedness and forced gymnastics while being naked as sexual violence in prosecuting *Akayesu*.²⁹¹

Through these definitions, the Chamber argued that while it was clear that rape itself was an unwelcome act, its coercive nature took the burden of proving non-consent from the

²⁸⁷ Ibid

²⁸⁸ *Akayesu* Trial Judgment, para. 598

²⁸⁹ Ibid para. 597

²⁹⁰ Ibid

²⁹¹ Ibid 688

prosecution.²⁹² In other words, using this definition allows judges to infer non-consent from the coercive background of the attack (such as genocide in the case of Rwanda) without requiring evidence of the perpetrator's force, threat of force, or the victim's resistance. This judgment also emphasized that coercion was often inherent in armed conflicts or when the military and militias were present.²⁹³ As a result, the Chamber successfully incorporated into its definition of rape the context of violent inequality common to the crimes it was statutorily authorized to prosecute, and, arguably for the first time, defined rape "in law as what it is in life."²⁹⁴ This progressive definition of rape set a legal framework to prosecute perpetrators of sexual violence during the ICTR's operation. For instance, in the *Gacumbitsi* Appeal Judgment, the Appeal Chamber confirmed that "the Prosecution can prove non-consent beyond reasonable doubt by proving the existence of coercive circumstances under which meaningful consent is not possible" and that "the Trial Chamber is free to infer non-consent from the background circumstances, such as an on-going genocide campaign or the detention of the victim."²⁹⁵

By contextualizing rape and sexual assaults into the bigger genocidal campaign where genuine consent was not possible, the ICTR pioneered a prosecution strategy by inferring non-consent from coercive contexts to hold perpetrators accountable. This decision caused a significant blow to some national courts' unjustified emphasis on evidence of the perpetrator's physical force or the victim's resistance to prove non-consent and the perpetrator's knowledge thereof.²⁹⁶ This progressive understanding of rape was subsequently used in ICTY and ICTR

²⁹² Catharine A. MacKinnon, "Defining Rape Internationally: A Comment on *Akayesu*," *Columbia Journal of Transnational Law* 44 (2005), 943 (Hereinafter as "Defining Rape Internationally")

²⁹³ Obote-Odora 147

²⁹⁴ MacKinnon, "Defining Rape Internationally," 944-955

²⁹⁵ *Gacumbitsi v. Prosecutor*, Case No. 2001-64-A, Judgment, July 7, 2006, para. 155 (Hereinafter as *Gacumbitsi* Appeal Judgment)

²⁹⁶ George William Mugwanya, "Justice Hassan Bubacar Jallow and Gender Justice in International Criminal Prosecutions," in *Promoting Accountability Under International Law for Gross Human Rights Violations in Africa*:

judgments, such as the 1998 ICTY *Celebici* judgment and ICTR judgments in *Musema* (2000), *Niyitegeka* (2003), and *Muhimana* (2005).²⁹⁷ More importantly, this focus on coercion instead of non-consent is also utilized by the ICC Statute's current definition of rape as a crime against humanity:

The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.²⁹⁸

This definition was also incorporated into legislation in the states of Illinois and California, which both define gender violence for civil purposes in part to include “a physical intrusion or physical invasion of a sexual nature under coercive conditions.”²⁹⁹

The Case of *Prosecutor v. Nyiramasuhuko et al.*

In 2002, the New York Times published an article by Peter Landesman titled “A Woman’s Work,” in which he details the role of Pauline Nyiramasuhuko – the former Minister of Family and Women’s Affairs – in perpetrating sexual violence in Butare during the Rwandan genocide.³⁰⁰ During Landesman’s interviews with those who confessed to taking part in the slaughter in Butare, Nyiramasuhuko came up as the coordinator of rape. She commanded the *Interahamwe* that, “Before you kill the women, you need to rape them,” and in other cases, asked, “Why don’t you rape them before you kill them?”³⁰¹ Landesman argues that Nyiramasuhuko led the soldiers to see rape as a reward for participating in the genocide. In

Essays in Honour of Prosecutor Hassan Bubacar Jallow, eds. Charles Chernor Jalloh and Alhagi Marong (Brill Academic Publishers, 2015), 389

²⁹⁷ Anne-Marie de Brouwer and Usta Kaitesi, “Sexual Violence,” in *The Elgar Companion to the International Criminal Tribunal for Rwanda*, eds. Anne-Marie de Brouwer and Alette Smeulers (Cheltenham, UK and Northampton, MA: Edward Elgar Publishing, 2016), 184

²⁹⁸ ICC Element of Crimes, Article 7 (1) (g)-1 Crime against humanity of rape, available at <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf>

²⁹⁹ MacKinnon, “Defining Rape Internationally,” 956

³⁰⁰ Peter Landesman, “A Woman’s Work,” *The New York Times*, September 15, 2002

³⁰¹ Ibid

Butare, rape was frequently accompanied by other forms of physical torture, staged as public performances to multiply terror and degradation, and oftentimes served as a prelude to murder.³⁰² Rape in Butare, as it was in many areas throughout Rwanda, was part of the genocidal campaign that was aimed at destroying the Tutsi.

At the ICTR, Nyiramasuhuko was the only woman to be tried and convicted of genocide, war crimes, and crimes against humanity. Along with five other accused, including her son Arsène Shalom Ntahobali, she was tried in the famous Butare Trial – known for being the Tribunal’s longest trial having lasted for ten years. The case was successful in confirming that women were capable of perpetrating sexual violence and genocide, and added to the historical record of the Rwandan genocide that Nyiramasuhuko was among the many women who participated as *génocidaires*. In fact, she was the first and only woman to be convicted of rape as a crime against humanity, and was sentenced to 47 years in prison. While the Prosecutor did not charge Nyiramasuhuko for rape as a tool of genocide, the Trial Chamber did acknowledge in its trial judgment that intent behind the rape perpetrated by Nyiramasuhuko was in fact genocidal.

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Other Techniques to Prosecute Rape and Sexual Violence

Beside the prosecution strategy to use coercive background to infer non-consent, the ICTR also succeeded in using additional techniques to prosecute rape and sexual violence during the Rwandan genocide. As demonstrated earlier, one of the biggest institutional challenges that the ICTR faced in fulfilling its mandate was to link the accused to rape and sexual violence and to attach criminal culpability. The ICTR was, however, successful in prosecuting perpetrators of rape and sexual violence in some cases by using the concept of joint criminal enterprise (JCE).

³⁰² Ibid

³⁰³ *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Trial Judgment and Sentence, June 24, 2011, para. 5828

Given that in various cases, perpetrators who fell under the jurisdiction of the ICTR did not personally commit rapes, using JCE enabled the prosecution of rape and other forms of sexual violence that were committed by other individuals.³⁰⁴ Having originally emerged from the jurisprudence of the ICTY, a JCE requires “a plurality of co-perpetrators who act pursuant to a common purpose involving the commission of a crime.”³⁰⁵ The first category of the JCE is the basic form represented by cases where all co-perpetrators possess the same criminal intent and act pursuant to a common purpose. The second category is a “systemic” form of JCE characterized by the existence of an organized system of ill-treatment. The third category, the “extended” form of JCE, covers cases involving a common purpose to commit a crime where one of the perpetrators commits an act that is outside of the common purpose but is nevertheless a natural and foreseeable consequence of that common purpose.³⁰⁶

The Prosecutor was successful in using the third category of JCE in holding Édouard Karemera and Matthieu Ngirumpatse accountable for genocide and crimes against humanity for rape and sexual violence, on the basis that these crimes were a natural and foreseeable consequence of the JCE whose purpose was to destroy the population.³⁰⁷ The Trial Chamber found that because both of the accused had participated in the MRND political party and because of Karemera’s role as Minister of the Interior of the Interim Government from May 1994, both individuals were aware that the widespread rapes and sexual assaults against Tutsi women constituted at least a possible consequence of the JCE, and that they were willing to take the risk of more rapes and sexual violence by continuing to participate in the JCE despite the widespread

³⁰⁴ Beth Van Schaack, "Obstacles on the Road to Gender Justice: The International Criminal Tribunal for Rwanda as Object Lesson," *American University Journal of Gender, Social Policy, and Law* (2009): 355

³⁰⁵ Bianchi, “The Prosecution,” 135

³⁰⁶ Ibid 135-136

³⁰⁷ Ibid 145

occurrence of sexual crimes.³⁰⁸ As Linda Bianchi argues, the *Prosecutor v. Karemera et al.* case stands as a strong precedent on prosecuting leaders who were physically distant from the actual rapes and sexual assaults, but nevertheless had influence over these crimes, knew about their occurrences, and were liable for allowing sexual violence to continue.³⁰⁹

Additionally, one of the biggest challenges in prosecuting rape and sexual violence in any legal systems is how to best approach and solicit evidence from victims/survivors. As an international tribunal located in a different country with judges and lawyers coming from around the world, accompanied by the stigma around victims of rape and sexual violence in Rwandan society, the ICTR inevitably faced this challenge. In some cases, the ICTR managed to solicit enough evidence and testimonies from other sources beside direct victims of rape and sexual assaults to investigate and prosecute these crimes. Given the leadership roles of the accused in many cases that involved rape and sexual violence, rape was often charged under a form of superior liability.³¹⁰ This approach allowed the OTP to bring relevant and eyewitness testimonies about rape at particular crime scenes without necessarily having to call the victims themselves. This method was used in the *Bagosora et al.* case, where the majority of the evidence was solicited from witnesses, especially General Roméo Dallaire and Major Brent Beardsley, who were not victims themselves.³¹¹ This method proved to be successful, as Bagosora was convicted on the basis of evidence of sexual assaults carried out by his subordinates.³¹²

³⁰⁸ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44T, Trial Judgment, February 2, 2002, para. 1483 (Hereinafter as *Karemera* Trial Judgment)

³⁰⁹ Bianchi, “The Prosecution,” 135

³¹⁰ Linda Bianchi, “Challenging Impunity for Crimes of Sexual Violence: The Efforts of Prosecutor Jallow to Set the Record Straight,” in *Promoting Accountability Under International Law for Gross Human Rights Violations in Africa: Essays in Honour of Prosecutor Hassan Bubacar Jallow*, eds. Charles Chernor Jalloh and Alhagi Marong (Brill Academic Publishers, 2015), 365 (Hereinafter as “Challenging Impunity”)

³¹¹ Ibid 366

³¹² *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Trial Judgment, December 18, 2008, paras. 1908, 1920-1924 (Hereinafter as *Bagosora* Trial Judgment)

In addition, the OTP was also successful in using a variety of sources to support its cases, including written statements and facts found in previous, relevant cases.³¹³ In *Karamera et al.*, the Prosecutor, concerning the widespread occurrences of rape and sexual violence throughout Rwanda, requested the Trial Chamber to take judicial notice thereof as adjudicated facts. When the Trial Chamber denied vital aspects of this motion, the Prosecutor appealed. In upholding the appeal, the Appeal Chamber found that the fact that a genocide happened in 1994 was reasonably indisputable common knowledge, and that rape was part of the violence in this conflict.³¹⁴ However, the Appeal Chamber reasonably deferred the matter to the Trial Chamber to determine if it would take judicial notice of the occurrence of rape *in a named location*, such as the widespread sexual violence in the Taba commune under Akayesu's control, as an adjudicated fact. A careful use of this discretion by Trial Chamber would ensure respect for the rights of both the accused and of the victims, in that a Chamber may admit the occurrence of rape in a specific location as adjudicated facts without having to question the victims of rape and sexual assaults.³¹⁵

Lessons Learned from Rwanda: Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions

As noted earlier, the ICTR, together with the ICTY, were the first international judicial institutions to prosecute rape and sexual violence as international crimes. The ICTR, by its mere establishment, was there positioned to make important legal precedents for its successor, the ICC, and other future national and regional courts. Due to the low conviction rate for sexual crimes, especially in light of a rather successful conviction rate for other crimes within the Tribunal's jurisdiction, the OTP created a Committee for the Review of the Investigation and

³¹³ Bianchi, "Challenging Impunity," 365

³¹⁴ Mugwanya 403

³¹⁵ Ibid 404

Prosecution of Sexual Violence in June 2007.³¹⁶ The Committee went through several stages of reviewing the Tribunal's jurisprudence, looking into cases where allegations of sexual violence had been included in the indictments, and analyzing the factors that contributed to either convictions or acquittals of those crimes.³¹⁷ This review process resulted in the creation and adoption of the *Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda*. Going through several reviews and editions, the final version of the Manual was produced and distributed in January 2014. The Manual summarized the lessons learned by the OTP in the investigation and prosecution of rape and sexual violence, and provided an annex that included detailed statistics from the ICTR's rape and sexual violence cases.³¹⁸ In addition, the Manual also highlighted major findings of the ICTR – including that rape was used and subsequently prosecuted both as an element of genocide and a crime against humanity – and provided recommendations on how to best investigate and prosecute these crimes in an international setting.

The production and distribution of this Manual was significant to the prosecution of sexual crimes in Rwanda for two main reasons. First, through its details about the ICTR's major findings, the Manual contributed to the process of acknowledging the past and reaffirmed the recognition that rape and sexual violence were as much a part of the genocide as other brutal methods of killing. The fact that the OTP produced an official document that focused solely on rape and sexual violence contributed to the overall historical record about what happened during the genocide. Second, the distribution of this Manual also strengthened the ICTR's jurisprudence on rape and sexual violence by offering lessons and creating a framework upon which future

³¹⁶ Bianchi, "The Prosecution," 129

³¹⁷ Ibid 129-130

³¹⁸ See *Best Practices Manual*, Annex B

trials can better prosecute sexual violence. For instance, the earlier version of the Manual was used in a 2009 conference held in Arusha for prosecutors from national jurisdictions who were involved with prosecuting international crimes in their home states.³¹⁹ In 2014, the ICTR's successor, the ICC, released its Draft Policy Paper on Sexual and Gender-Based Crimes. This Paper refers specifically to the work of the ICTR and the Best Practices Manual, and incorporates several of the Manual's major recommendations, such as the need to pay attention to specific challenges confronting the prosecution of rape and sexual violence and necessary measures to prevent the possible secondary or re-traumatization of the victims.³²⁰ Furthermore, the Best Practices Manual was also cited frequently as the major influence for the "International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, Basic Standards of Best Practice," a part of the United Kingdom's Prevention of Sexual Violence Initiative, by providing a legal precedential guide on the development of this Protocol.³²¹

ANALYSIS: MAJOR WEAKNESSES AND FAILURES

Lack of A Comprehensive Prosecution Strategy

A closer look at the landmark *Akayesu* case shows an often-overlooked fact: its initial indictment did not include any rape or sexual violence charges. Although numerous early reports highlighted the prominence of rape and sexual violence during the conflict,³²² these crimes were never considered a central element of the prosecution strategy, which partly explained the Tribunal's poor conviction rate.³²³ Usta Kaitesi argues that the initial failure to indict Akayesu for his sexual crimes could be best explained by the failure to link evidence of rape and sexual

³¹⁹ Bianchi, "Challenging Impunity," 367

³²⁰ Ibid 368

³²¹ Ibid

³²² In fact, one of the earliest and most often-cited reports came out in 1996, when HRW published Nowrojee Binaifer's report titled *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath*.

³²³ Mugwanya 378

violence evidenced in human rights reports to the crimes of the accused.³²⁴ In other words, while rape and sexual violence were widespread, genocidal, and well-known, they were not deemed worthy of prosecution at the beginning of the Tribunal. It was not until the courageous victims decided to speak about their experiences of rape, in tandem with the repeated push by the sole female judge at the time – Judge Navi Pillay of South Africa – that more narratives on rape and sexual violence were solicited and that Akayesu was convicted of sexual crimes.

While this landmark case of the ICTR had the potential to dictate the course of the Tribunal in prosecuting rape and sexual violence, the initial lack of a prosecution strategy to investigate these crimes still nevertheless impacted the operation of the ICTR. Binaifer Nowrojee argues that because of this systemic lack of attention to sexual crimes that by 2004, ten years after the ICTR was opened, only two defendants were specially convicted for their role in sexual violence crimes, the third conviction was reversed on appeal, and none of the rape acquittals were appealed by the Prosecutor.³²⁵ In addition, Nowrojee notes that in the first ten years of the Tribunal, cases were moved forward without rape charges even when the Prosecutor possessed strong evidence. Moreover, in a significant number of cases, rape charges were added belatedly as amendments and as an afterthought, rather than an integral part of a prosecution strategy that acknowledged rape as a form of genocidal violence.³²⁶

As Nowrojee argues, the lack of a political will to prosecute rape and sexual violence was demonstrated in the ways in which Tribunal approached these crimes.³²⁷ Since the ICTR was established as the first “genocide tribunal” in the world, its focus was holding perpetrators accountable for crimes such as genocide, murder, and extermination. This focus led to a

³²⁴ Kaiteesi 138

³²⁵ Binaifer Nowrojee, *Your Justice is Too Slow”: Will the ICTR Fail Rwanda’s Rape Victims?*, UNRISD Occasional Paper No. 10, 2005, 4 (Hereinafter as *Your Justice is Too Slow*)

³²⁶ Ibid 8

³²⁷ Ibid

prosecution approach in which the OTP sought to establish whether these already targeted and indicted persons had also been involved in rape and sexual violence. The OTP then hoped to find an actual woman who had been raped by that target, which was equivalent to “looking for a needle in a haystack.”³²⁸ As Chiseche Salome Mibenge argues, while human rights reports on Rwanda have shown that it is hard to find a woman in Rwanda who was not raped, international judicial procedure at the ICTR reframed the challenge as “show me a woman who was raped.”³²⁹ Despite the fact that *Akayesu* established rape as a tool of genocide, the prosecution strategy utilized by the OTP nevertheless seemed to portray sexual violence as occurrences that happened on a random basis rather than a part of the greater atrocity that took place in Rwanda.³³⁰

Furthermore, this lack of attention to sexual violence prosecution resulted in poor investigations of these crimes throughout the operation of the Tribunal. As sexual crimes were not a central focus, many investigators had no prior experiences in the investigation of sexual violence.³³¹ Investigators also did not receive any training on interviewing methods for rape victims, and many even believed that rape and sexual violence were not crimes that deserved specific attention.³³² While it has been established that victims of rape and sexual violence often felt more comfortable sharing their experiences with other women, in 2003, only five of the 100 investigators were women.³³³ Given the lack of financial resources for a long-running Tribunal, investigators often chose to collect statements in areas where they received a higher stipend, thus paying less attention in areas such as Kigali where there was a high level of sexual violence. Sexual violence investigations, as a result, were often poor in quality and not trial-ready, forcing

³²⁸ Bianchi, “The Prosecution,” 131

³²⁹ Mibenge 61

³³⁰ Bianchi, “The Prosecution,” 131

³³¹ Ibid 132

³³² Nowrojee, *Your Justice is Too Slow*, 12

³³³ Ibid 13

attorneys, in many cases, to travel from Arusha to Rwanda to conduct their own investigations.³³⁴

Binaifer Nowrojee also argues that the OTP's willingness to prosecute rape and sexual violence was not consistent over the years.³³⁵ The OTP gained some momentum in prosecuting rape under some Prosecutors, and lost such momentum under others. In his two-year tenure as the first Prosecutor, Richard Goldstone of South Africa never translated his pronounced commitments to punishing sexual crimes into action.³³⁶ The OTP gained more momentum during the tenure of Canadian Prosecutor Louise Arbour from 1996 to 1999. By the last year of her mandate, all new indictments contained sexual violence charges, and the OTP was poised for a rapid acceleration in performance and efficiency with regards to prosecuting sexual violence.³³⁷ This momentum was, however, lost completely when Carla Del Ponte of Switzerland took charge of the OTP. There was a steady decline in the number of new indictments that contained sexual crime charges and a lack of commitment to using evidence for prosecution in cases where rape charges were included. Del Ponte moved several cases, such as *Cyangugu*, through trial without rape charges even when OTP possessed strong evidence.³³⁸ Mibenge argues that under the pressure to speed up trials, Del Ponte regarded sexual violence charges as unnecessary and the least relevant of the crimes being investigated, and in many cases, sacrificed them in the interests of expediency.³³⁹ As a result of this lack of attention, the proportion of new indictments including sexual violence charges dropped from 100% in 1999-2000 to 35% in 2001-2002, and

³³⁴ Ibid 12

³³⁵ Ibid 12

³³⁶ Ibid 9

³³⁷ Ibid 10

³³⁸ Ibid 10

³³⁹ Mibenge 67

by her last year as Prosecutor, none of the new indictments contained rape charges.³⁴⁰ Prosecutor Hassan Jallow of Gambia replaced Del Ponte in 2003, and served at the Tribunal until its conclusion. In many aspects, he was the Prosecutor most committed to prosecuting rape and sexual assaults. Major achievements of the ICTR, such as using the JCE and creating the Best Practices Manual, were gained during his tenure.³⁴¹ Despite these commitments shown by Prosecutors Arbour and Jallow, the overall inconsistency in the willingness to prosecute rape and sexual violence led investigators to:

gather too little or the wrong kind of evidence, which does not prove all elements of the crimes; fail to keep track of the evidence over time; use inappropriate methodology; miss investigatory opportunities; and potentially create a disconnect between the charges in the indictment and what the prosecution can actually prove at trial, which results in the need to amend indictments to drop charges, or leads to acquittals.³⁴²

In other words, the overall inconsistent willingness to try rape cases that underpinned the operation of the OTP and the significant failures during the tenure of Prosecutor Del Ponte ultimately undermined the record of prosecuting rape and sexual violence at the ICTR.

Inconsistency in Defining and Prosecuting Rape as Genocide

Despite its trailblazing legacy in offering a progressive definition of rape and in prosecuting rape as an element of genocide, *Akayesu* still stands out as an anomaly in the ICTR's record of prosecuting rape and sexual violence. While *Akayesu*'s definition of rape has been used internationally in both the ICTY and the ICC, the extent to which it was utilized at the ICTR was rather discouraging. The only other instances that explicitly accepted the *Akayesu* formulation

³⁴⁰ Gaëlle Breton-Le Goff, "Analysis of Trends in Sexual Violence Prosecutions in Indictments by the ICTR from November 1995-November 2002," *Coalition for Women's Human Rights in Conflict Situations* (Montreal 2002), 7

³⁴¹ For more information on the contribution of Prosecutor Jallow, see Bianchi, "Challenging Impunity," and Mugwanya

³⁴² Valerie Oosterveld, "Gender-sensitive Justice and the International Criminal Tribunal for Rwanda: Lessons Learned for the International Criminal Court," *New England Journal of International and Comparative Law* 12 (2005): 127-128

were the *Musema*, *Niyitegeka*, and *Muhimana* cases.³⁴³ In contrast, some later cases at the ICTR, such as in *Semanza*, *Kajelijeli*, and *Kamuhanda*, seemingly reverted to a more traditional understanding of rape that was rejected by *Akayesu*, and accepted a narrower consent-based definition endorsed by the ICTY Appeals Chamber in *Kunarac*.³⁴⁴ In addition, the *Semanza* ruling in 2003 also considered *Akayesu* definition too “broad,” and the *Kunarac* definition “narrower.”³⁴⁵ While Trial Chamber I in *Akayesu* succeeded in contextualizing rape in the bigger context of coercion that was genocide, other Trial Chambers unfortunately reversed to a more mechanical definition. MacKinnon argues that this failure was partly a result of the Tribunal’s unwillingness to hold the superiors responsible for rapes, and showed the common tendency to think of rape as individual, decontextualized, once-at-a-time attacks.³⁴⁶ Similarly, Alex Obote-Odora adds that close analyses of the ICTR and ICTY jurisprudence show that Trial Chambers in these Tribunals often seemed reluctant to abandon consent as an element of rape as it existed in the legislation of most national jurisdictions.³⁴⁷ This inconsistency in defining rape can arguably be attributed to the fact every Judge at the ICTR came from a different country and thus had different legal training and interpretation of international law. Indeed, while *Akayesu* is one of the ICTR’s most applauded achievements, a closer look at the record of the Tribunal nevertheless shows that this achievement was an anomaly in a Tribunal that often forgot to place

³⁴³ Bianchi, “Challenging Impunity,” 370

³⁴⁴ Bianchi, “The Prosecution,” 143. *Kunarac* Appeal Judgment, paras 127. The Appeals Chamber endorsed the Trial Chamber’s definition as: “the *actus reus* of the crime of rape in international law is constituted by: 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) the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.”

³⁴⁵ *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Trial Judgment, May 15, 2003, para. 344

³⁴⁶ MacKinnon, “Defining Rape Internationally,” 953

³⁴⁷ Obote-Odora 155

rape in the context of genocide, which resulted in many missed opportunities to prosecute rape and sexual violence as elements of genocide.

An Inhospitable Environment for Victims of Rape and Sexual Assaults

The literature review in Chapter 2 demonstrates that victims of rape and sexual assaults often find it difficult to testify about their experiences in private, if not more so in a public, international tribunal. The record of the ICTR, however, shows this was not always the case. Throughout the Tribunal, various victims came forward and testified about their experiences, even when they were not asked to, as exemplified by the courageous witnesses in the *Akayesu* case. Unfortunately, in most of the cases, the Tribunal did not respond well to this astonishing courage of the victims, and faced similar criticism of international judicial mechanisms trying intimate crimes such as rape and sexual violence.

Legal commentators have criticized the manner in which judges presided over sexual violence cases, especially for permitting the re-traumatization and humiliation of victims during “inept” and “insensitive” cross-examination by defense counsel.³⁴⁸ One incident that was heavily criticized by human rights groups happened during the Butare Trial in 2001. While Witness TA, a victim of multiple of rapes, was being cross-examined insensitively by the defense counsel, all three judges suddenly burst out laughing.³⁴⁹ Not only did the judges show a reluctance to limit and restrain excessive cross-examination, they also showed a disrespectful insensitivity to the emotionally wrenching position of the victim. In addition, Binafer Nowrojee also notes that rape victims were often harassed on the stand by the defense counsel for hours, days, and even weeks.³⁵⁰ This harassment was often worsened in joint trials with numerous defendants, when victims got asked the same questions over and over again by different defense attorneys.

³⁴⁸ Mibenge 67

³⁴⁹ Nowrojee, *Your Justice is Too Slow*, 23

³⁵⁰ Ibid

Moreover, these questions were sometimes highly offensive. Witness TA was asked questions such as, “Did you touch the accused’s penis?” and “How was it introduced into your vagina?” In the same Butare Trial, a prosecution lawyer noted that a rape victim whom she led on the stand was asked 1194 questions by the defense counsel.³⁵¹

In addition, even in cases where the victims and eyewitnesses felt comfortable testifying about their experiences or what they witnessed, these victims oftentimes felt a cultural constraint and lack of sufficient words to explain what happened.³⁵² Because of Rwandan culture, victims often refrained from saying directly what happened to them and opted for euphemisms, such as “he married me/her,” “he took her/me by force,” and “he took advantage of me/her.”³⁵³ Moreover, post-trial interviews with victims also showed that they often could not find sufficient words to describe and explain the extreme trauma of rape.³⁵⁴ This tension between an international Tribunal and the experiences of victims in a local setting, in which foreign judges often did not understand how the local culture could impact victims’ ability to testify, was one of the main institutional challenges that confronted the ICTR, and in many ways, affected the Tribunal’s record of prosecuting rape and sexual violence.

In addition, one of the most horrifying aspects of testifying at the ICTR for victims was that their names could be leaked back into Rwanda. Pre-trial witnesses were informed by the OTP that their identities would be kept confidential, and they often testified behind the curtain using pseudonyms. However, the Tribunal rules required that the defense know the names of the witnesses testifying against the accused, which means that oftentimes these names got leaked

³⁵¹ Ibid

³⁵² Kaitesi 174

³⁵³ Mugwanya 385-386

³⁵⁴ Kaitesi 174

back to Rwanda.³⁵⁵ There are significant social stigmas surrounding victims of rape and sexual assaults, and the fact that they were raped could destroy their chance to marry, upon which their survival often depended. In the case of Witness TA at the Butare Trial, her experiences at the Tribunal attracted significant attention and resulted in her fiancé leaving her, and she has not been able to marry.³⁵⁶ This danger placed a significant burden on the victims and witnesses who testified at the ICTR. Not only were they subjected to insensitive and offensive questioning during the trials, their ability to reconcile and reintegrate to society could also be severely impeded by the ICTR's lack of protection for witnesses. While the ICTR did provide protection for the witnesses during trials, it argued that the burden of post-trial protection fell onto the government of Rwanda.³⁵⁷ This argument reflects the need for more coordinated efforts between the ICTR and the Rwandan government.

An Incomplete Picture of Rape and Sexual Violence

The ICTR served not only as a judicial process to bring perpetrators of the genocide to justice, but also as a truth-telling mechanism that documented a historical record about what happened during the genocide. This uncovering of truth happened not only by the convictions of the perpetrators, but also through the victims' and witnesses' articulation of their experiences and observations, which are now presented in the trials' transcripts. The picture of rape and sexual assault during the genocide is, unfortunately, incomplete in many aspects.

First, the rather poor conviction rate of the Tribunal, while partly contributing to the historical record, did not portray the full picture of who was responsible for the genocide, especially given the high acquittal rate. In addition, throughout the Tribunal's operation, only Tutsi women appeared to be victims of rape and sexual violence, and other categories, such as

³⁵⁵ Nowrojee, *Your Justice is Too Slow*, 22

³⁵⁶ Kaitezi 173

³⁵⁷ Nowrojee, *Your Justice is Too Slow*, 25

Hutu and male victims, were neglected. Chiseche Salome Mibenge argues that the ICTR's dominant narrative of gender and violence is monolithic and overtly exclusive, for it solely consisted of sexual violence against Tutsi women.³⁵⁸ For instance, the rape and sexual assault of moderate Hutu Prime Minister Agathe Uwingiliyimana was completely erased from the legal findings of the Tribunal. In the *Bagosora* judgment, the sexual aspect of her death – a bottle was shoved into her vagina – did not receive any legal consideration,³⁵⁹ whereas in *Akayesu*, thrusting a piece of wood into the vagina of a Tutsi woman was considered rape. Mibenge charges that this erasure of sexual violence against the Prime Minister was made possible because her Hutu identity did not fit into the dominant rape narrative of the ICTR, which explicitly indicated a dichotomy of only Tutsi women as rape victims and Hutu men as perpetrators.³⁶⁰

This dichotomy also impacted the ICTR's consideration of sexual violence against a prominent Tutsi man – Assiel Kabanda. He was killed and castrated, and his head and genitals were subsequently hung up and displayed near his fruit shop.³⁶¹ In the *Niyitegeka* judgment, the ICTR mentioned the killing, decapitation, and castration of Kabanda as crimes against humanity,³⁶² yet ignored the fact that castration was not merely an amputation but an attack against a male sexual and reproductive organ, which was often considered a symbolic amputation of one's masculinity.³⁶³ In other words, while there was sufficient evidence about sexual violence against a male victim, the Tribunal's record never referred to this attack as having a sexual nature, thus failing to create a more comprehensive record of truth about sexual violence against men and boys during the genocide. Usta Kaitezi also notes that the Tribunal's

³⁵⁸ Mibenge 62

³⁵⁹ *Bagosora* Trial Judgment, para. 705

³⁶⁰ Ibid

³⁶¹ Mibenge 80

³⁶² *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-T, Judgment and Sentence, May 16, 2003, para. 465

³⁶³ Mibenge 81

record only mentioned two situations of sexual violence against men in three cases, as two cases shared the same victim.³⁶⁴ Moreover, this neglect fits into a trend in the field of transitional justice, in which researchers have largely ignored the issue of sexual violence as a form of gender-based violence against men in armed conflict.³⁶⁵

Finally, the ICTR was located in Arusha, Tanzania to avoid the appearance of “victor’s justice.” The UNSC reiterated on many occasions, especially during the first ten years of the ICTR’s mandate, the need to investigate and prosecute human rights violations that were committed by the RPF.³⁶⁶ The Tribunal, however, failed to uncover truth about and prosecute these crimes, which undermined the very decision to locate it in a foreign country.

Insufficient Attention to Restorative Justice

As noted in Chapter 1, this thesis divides restorative justice into reparations and reconciliation. The ICTR and trials based on the principle of universal jurisdiction as international judicial processes, however, were mechanisms of retributive justice. Both mechanisms had no mandate to provide reparations for victims. The ICTR did, in 2000-2001, launch a service program to distribute monetary, legal, and medical support to women through five Rwandan women’s organization; yet the program was only largely symbolic and not implemented widely.³⁶⁷ This lack of attention to reparations for victims of the genocide in general was a result of an institutional challenge facing the ICTR. Established as a “genocide tribunal,” its tasks were to prosecute genocide, crimes against humanity, and other violations of international humanitarian law. This mandate therefore systemically shaped the focus of the

³⁶⁴ Kaiteesi 175

³⁶⁵ Ibid

³⁶⁶ Gahima 232-233

³⁶⁷ Heidi Rombouts, “Women and Reparations in Rwanda: A Long Path to Travel,” in *What Happened to the Women? Gender and Reparations for Human Rights Violations*, ed. Ruth Rubio-Marin (New York: Social Science Research Council, 2006), 201

ICTR on prosecuting violations of first-generation and bodily integrity rights, while neglecting violations of economic, social, and cultural crimes. With regards to gender-based violence, only rape and other physical invasions of the women's body were paid attention to and prosecuted as "sexual violence." Crimes such as the intentional spread of HIV/AIDs and other STDs were never considered under the Tribunal's mandate. This systemic lack of attention to the long-term impacts of sexual crimes and other forms of gender-based violence on victims led to an unfortunate situation: while those in the ICTR's custody received adequate healthcare, their victims, especially those in needs of HIV/AIDs treatment, completely lacked basic access to healthcare.³⁶⁸

The other aspect of restorative justice – reconciliation – was, however, included in the mandate of the ICTR. UNSC Resolution 955 states that the ICTR would contribute to "the process of national reconciliation and to the restoration and maintenance of peace." This chapter now analyzes the extent to which the ICTR facilitated the reconciliation of victims of rape and sexual assaults through six main elements laid out in the introduction: 1) understanding the past, present and envisioning the future of Rwanda, 2) citizenship and identity, 3) political culture, 4) security, 5) justice, and 6) social cohesion. The ICTR, by its role as a judicial mechanism and as a truth-uncovering mechanism, had the potential to push for more understanding of the past and to bring perpetrators to justice. In her interviews with victims of rape and sexual violence, Binafer Nowrojee noted that victims were primarily interested in two aspects of the Tribunal: jurisprudence and justice.³⁶⁹ In other words, they wanted public acknowledgment of the crimes committed against them, and wanted information about the fate of their perpetrators in the legal

³⁶⁸ Gahima 114

³⁶⁹ Nowrojee, *Your Justice is Too Slow*, 4

process.³⁷⁰ The Tribunal was somewhat successful at facilitating reconciliation for victims and survivors who testified and saw their perpetrators being brought to justice, yet failed many others when it moved cases through trials without rape charges despite substantial evidence. Inadequate retributive justice delivery and an incomplete picture of rape and sexual violence thus prevented the ICTR from fulfilling its objectives. In addition, the extent to which a judicial mechanism can facilitate reconciliation for victims depends on whether the victims know about its record. Located in Arusha, Tanzania, the ICTR was already an institution physically and psychologically distant from the majority of the victims of sexual assaults. Its frequent maltreatment of victims and witnesses also created major impediments to reconciliation, such as re-traumatization, for those who testified in front of the tribunal in pursuit of justice and closure.

Moreover, the majority of the Rwandan population was generally under-informed of the progress that the ICTR made over the years. This lack of knowledge about the ICTR can be attributed to the Tribunal's lack of outreach efforts.³⁷¹ Those who testified at the Tribunal received little or no information about the trial process and its results. This lack of information and follow-up gave many victims a sense of having been used; as one witness said, "our tribunal gives us nothing, not even a thank you."³⁷² The one exception was after the *Akayesu* case, when the OTP staffers returned to Taba and held a public town hall meeting to explain the judgment. While it is reasonable to argue that the Tribunal did not have the responsibility to follow up with survivors who testified, public outreach effort similar to the town hall meeting after *Akayesu* was crucial to facilitate reconciliation, which was included in UNSC Resolution 955 as one of the ICTR's objectives. As a retributive justice institution, the ICTR had the ability to facilitate reconciliation for survivors by publicly acknowledging the wrongness of the crimes committed

³⁷⁰ Ibid

³⁷¹ Ibid 21

³⁷² Ibid

against Rwandans, which could only happen if the victims actually knew about the punishment of their perpetrators. As Dina Temple-Raston argues:

The ruling would have meant more if the thousands of women in Rwanda who had been victims of rape during the genocide had known it even occurred. This, too, was one of the problems with the ICTR. It meted out justice and Rwandans were never informed.³⁷³

The fact that the ICTR was located in Tanzania required a more proactive effort in public outreach if the Tribunal wanted to contribute to survivors' reconciliation, from which the ICTR unfortunately fell short.

Moreover, the work of the Tribunal spanned over 20 years. Many cases, such as the Butare Trial, lasted for a long time and were difficult for victims to follow. In addition, after heavy criticism for its slow progress, the ICTR assigned more cases to each trial chamber, and on any given day, it was extremely difficult to know what was happening at which time.³⁷⁴ Information about the ICTR and its procedures were only available in English and French, with little or no information available in Kinyarwanda. This selective and rather discriminatory access to information, which aimed at a small, literate middle class while the rest of the population did not know what was happening, created major impediments to reconciliation for those who wished to know about the judgment of the perpetrators who had raped and ruined their lives. In addition, the physical disconnect between the ICTR and the Rwandan population almost completely prevented the ICTR from fulfilling other aspects of reconciliation, such as citizenship and identity, political culture, and security. In many instances, such as with Witness TA from the Butare Trial, testifying at the Tribunal even worsened the victims' prospect of security and reintegrating into their communities as full citizens. As Gahima argues, the various shortcomings that the ICTR confronted made it unlikely that the ICTR would contribute to or have any long-

³⁷³ Temple-Raston 97

³⁷⁴ Nowrojee, *Your Justice is Too Slow*, 21

term impact on “fighting impunity, deterring human rights abuses, promoting reconciliation, and advancing sustainable peace.”³⁷⁵ In addition, Nicola Palmer’s empirical research in Rwanda showed that reconciliation did not consistently or broadly emerge as an impact of the Tribunal, while developing an international jurisprudence was identified as the dominant contribution.³⁷⁶

CONCLUSION

As this chapter has demonstrated, the major strengths and successes of international transitional mechanisms lay predominantly in the sphere of retributive justice – criminal prosecution and setting legal precedents. Francois-Xavier Nsanzuwera argues that, “the Tribunal has contributed positively to the overall situation in Rwandan by arresting, detaining, and convicting many of the key figures responsible for genocide, and so prevented these perpetrators pursuing their genocidal goals.”³⁷⁷ These mechanisms also created a strong international jurisprudence for the prosecution of sexual crimes in international law. These legal precedents were necessary, as both mechanisms were two of the first international institutions to prosecute rape and sexual violence as either genocide, crimes against humanity, or war crimes. Prior to the establishment of the ICTR, rape and sexual violence were not treated as serious violations of international humanitarian law, given the international record of non-prosecution of these crimes.³⁷⁸ The international jurisprudence created by the ICTR and those of the ICTY and ICC all support the assertion that prosecuting sexual violence, at the very least rape and sexual slavery, has risen to the level of *jus cogens*.³⁷⁹ Setting legal precedents, while necessary, was not

³⁷⁵ Gahima 124

³⁷⁶ Nicola Palmer, *Courts in Conflict: Interpreting the Layers of Justice in Post-Genocide Rwanda* (New York: Oxford University Press, 2015), 68-69

³⁷⁷ Francois-Xavier Nsanzuwera, “Contribution of the ICTR for Rwandans,” in *The Elgar Companion to the International Criminal Tribunal for Rwanda*, eds. Anne-Marie de Brouwer and Alette Smeulers (Cheltenham, UK and Northampton, MA: Edward Elgar Publishing, 2016), 492

³⁷⁸ Obote-Odora 156

³⁷⁹ Kelly D. Askin, “Prosecuting wartime rape and other gender-related crimes under international law: extraordinary advances, enduring obstacles,” *Berkeley Journal of International Law* 21 (2003), 349

sufficient; only future victims of rape and sexual assaults in other international and national conflicts can receive the benefits that this international jurisprudence gave to international law. In other words, these international mechanisms were not successful at bringing comprehensive justice to the victims they intended to serve, but have the potential and power to bring justice to future victims of rape and sexual assault.

In addition, some aspects of restorative justice were achieved. Through the testimonies of the victims and witnesses, a partial record of truth about sexual violence during the genocide emerged from the ICTR and contributed to a collective memory in Rwanda. In other words, as both a judicial and truth-telling mechanism, “the Tribunal wrote the genocide story.”³⁸⁰ The findings of the ICTR have confirmed that these crimes of a sexual nature must not be seen as opportunistic attacks, but rather as essential parts of the intent to destroy the enemy in armed conflicts. Women were also active participants in the genocide, and were also responsible for perpetrating rape and sexual violence. Crimes of a sexual nature therefore must be considered amongst the most serious international crimes worthy of prosecution under international law, and these two international mechanisms have contributed significantly to this acknowledgment. Both mechanisms, however, failed to uncover more information about sexual violence against men and boys, the Hutus, and crimes committed by the RPF, rendering this record of truth and justice incomplete.

As one of the first international tribunal since the Tokyo and Nuremberg Trials and the ICTY, the ICTR faced an unprecedented task of prosecuting perpetrators of genocide, especially those who committed sexual violence. Given the lack of judicial framework of prosecuting sexual crimes as genocide that it could follow, the fact the ICTR was able to gain these achievements is indeed remarkable. However, the ICTR’s overall record reflects several

³⁸⁰ Nsanzuwera 502

institutional challenges for prosecuting crimes and rape and sexual violence. Different Prosecutors demonstrated different levels of willingness to prosecute rape cases, even when the OTP possessed strong evidence. While the ICTR did incrementally utilize more tools to prosecute rape, such as using the JCE theory, it was unfortunate that sexual crimes were rarely included as a central element of investigation, which resulted in many missed opportunities to hold perpetrators accountable. Many victims felt that the environment at the Tribunal was too hostile and foreign for them to testify about intimate experiences of sexual violence. In addition, while the ICTR possessed the ability to contribute to the process of reconciliation for survivors of sexual crimes, particularly by developing a partial record of truth and justice, it failed almost completely to follow up with victims who testified and oftentimes gave them the feeling of having been used. While it is difficult to ask an international, retributive justice mechanism to pay specific attention to restorative justice, being aware of the need for information-sharing and restorative measures can further contribute to the success of future tribunals.

In conclusion, both the ICTR and universal jurisdiction trials in other states showed both strengths and weaknesses in bringing both retributive and restorative justice to victims of rape and sexual violence. Their major contribution – leaving legal precedents to prosecute crimes of a sexual nature under international law – should not be underestimated. The extent to which that this contribution impacted the peacetime status of rape victims in general and of women in particular is rather contested. Changing and improving the status of women in Rwandan society, and eliminating the social stigma surrounding the victims of rape and sexual assault, requires systemic and internal efforts that international mechanisms did not possess. The next chapter analyzes the extent to which domestic mechanisms of transitional justice were successful in carrying these internal efforts.

4. INTERNATIONAL CRIMES, LOCAL JUSTICE

NATIONAL COURTS, *GACACA* COURTS, AND REPARATIONS PROGRAMS

“Why do you foreigners [*abazungu*] ask such stupid questions?!? How can you ask me about reconciling with my neighbors when I see their children wearing my [dead] children’s clothing, when they are in their house eating at my table, when they cook in my pots? Reconciliation!?! It’s not possible.”³⁸¹

As the genocide ended, Rwanda was left with a seemingly insurmountable task of rebuilding its social, economic, and political fabric and restoring the rule of law. The wounds of the genocide were too painfully visible to be ignored, and bringing justice to victims of the genocide became a central part of rebuilding the country. As the international community attempted to prosecute international crimes of genocide and other crimes against humanity at the ICTR and trials based on the principle of universal jurisdiction in other states, Rwanda itself also tried to reckon with its painful past. The Rwandan government first used its domestic courts to try crimes of genocide, yet its post-genocide collapsed justice system soon proved to be utterly ineffective. Confronted by both a devastated, overburdened judicial system and an overwhelming desire for justice from the population, the Rwandan government resorted to the *gacaca* court – a local and communal justice system deeply rooted within Rwandan culture and popular in Rwandan society. In many ways, post-genocide *gacaca* incrementally evolved both as a complement to and as an alternative of the national courts. In addition, the Rwandan government acknowledged that justice solely in terms of criminal prosecution was not enough for a population overwhelmed by the daily struggles of survival; reparations therefore became of crucial importance. Genocide victims could claim reparations as civil parties in both the national

³⁸¹ Jennie E. Burnet, *Genocide Lives in Us: Women, Memory, and Silence in Rwanda* (Madison, WI: University of Wisconsin Press, 2012), 216-217 (hereinafter as Burnet, *Genocide Lives in Us*)

courts and *gacaca*. Furthermore, the government introduced legislation to establish two reparation programs: the FARG assistance fund (*Fonds National d'Assistance aux victimes les plus nécessiteuses du génocide et des massacres*) and the FIND indemnification/compensation fund (*Fond d'indemnisation*).

While challenges confronting post-genocide Rwanda were overwhelming, the Rwandan government's attempts to solve these problems were extensive and aspirational. Rwanda's domestic responses to the crimes of genocide stood out for the unprecedented lengths to which the state has gone to hold perpetrators accountable and to bring justice to victims.³⁸² Within the scope of this thesis, a question arises: How successful were these transitional justice mechanisms in bringing comprehensive justice to Rwandan victims of rape and sexual assaults? A UN report estimated that there were between 250,000 and 500,000 people who were raped and sexually assaulted during the Rwandan genocide.³⁸³ While the ICTR and universal jurisdiction trials were primarily concerned with prosecuting the mastermind of the genocide, domestic mechanisms were more concerned with trying other categories of perpetrators. To victims of sexual violence, domestic mechanisms brought the possibilities of bringing those who directly raped and sexually assaulted them to justice. The victims' proximity to the justice mechanisms and their potential to claim reparations showcased a promise of justice and reconciliation.

This chapter analyzes the extent to which domestic mechanisms – national courts, *gacaca* courts, and reparation programs – were able to fulfill their promises. It first provides a brief background to these mechanisms and summarizes their records. The chapter continues with an analysis of the strengths and weaknesses of these mechanisms in bringing comprehensive justice – both retributive and restorative justice – to victims of rape and sexual violence. The chapter

³⁸² Gahima xxxviii

³⁸³ De Brouwer and Ka Hon Chu 16

argues that given the Rwandan government's commitment to justice, domestic mechanisms were somewhat successful at prosecuting at most 9,000 perpetrators of rape and sexual violence, and were able to provide reparations in the form of assistance programs to a portion of victims, especially widows of the genocide. Despite this commitment, domestic mechanisms faced several institutional challenges that came from the genocide and from the social norms deeply embedded within Rwandan society. As a result, while domestic mechanisms were able to bring justice to some victims, they also unfortunately failed many others. Within these mechanisms, *gacaca* deserves particular attention for its cultural values and its pioneering approach to transitional justice. However, modern *gacaca* was heavily modified to fit the Rwandan government's pursuit of justice, and arguably became a justice mechanism unsuitable for crimes of rape and sexual violence.

NATIONAL COURTS

Between 1994 and 1996, the Rwandan government discussed with national experts the possibility of criminal justice and accountability for genocide-related crimes within the domestic legal framework. This two-year discussion culminated in the adoption of Organic Law No. 08/96 on the Organization of Prosecution of Offences Constituting the Crime of Genocide and Crimes Against Humanity.³⁸⁴ With this 1996 law, Rwanda became the first country to pass domestic criminal legislation on genocide.³⁸⁵ This law established the first legal and judicial framework to prosecute genocide-related crimes within Rwanda, and created four categories of offenders subjected to prosecution. Category one consisted of organizers or leaders of genocide, well-known killers, and perpetrators of sexual torture. Category two included murders and accomplices to murder or serious attacks. Category three included persons who committed

³⁸⁴ Hereinafter as 1996 Genocide Law

³⁸⁵ Lars Waldorf, "Mass justice for mass atrocity: Rethinking local justice as transitional justice," *Temple Law Review* 79 (2006): 43

serious attacks without the intent to cause death, and category four included those responsible for property damage.³⁸⁶ This chapter is primarily concerned with category one offenders who raped and committed acts of sexual torture.

As the 1996 Genocide Law entered into force in December 1996, several institutional challenges facing national courts soon came to the fore as the courts attempted to try more than 120,000 persons accused of genocide-related crimes. At the end of the genocide, Rwanda counted only 20 judicial staffers for criminal prosecutions and only 19 lawyers, and by 1997, the 448 judges serving in national courts by 1997 were poorly trained.³⁸⁷ Given this limited human resource and the lack of financial resource, the courts were only able to try 1,292 genocide suspects by 1998 and, at that rate, genocide trials would have continued for more than a century.³⁸⁸ The justice system was so overwhelmed by the caseload that even serious crimes such as sexual torture – category one crimes subjected to the most severe punishments – were not investigated and prosecuted.³⁸⁹ This slow pace of justice, overcrowding and inhumane prison conditions, and insufficient due process for the accused in trial practices, all led to heavy criticism of the government.³⁹⁰ With regards to rape and sexual violence, Human Rights Watch states that “between 1998 and 2004, an extraordinary small number of cases of genocidal sexual violence were prosecuted at the domestic level.”³⁹¹ Between December 1996 and December 2003, the national courts tried 9,728 persons accused of genocide-related crimes, of which only 32 cases included charges of rape or sexual torture.³⁹² Rwandan women’s organization AVEGA

³⁸⁶ Human Rights Watch, *Struggling to Survive* (New York, NY: 2004), 14

³⁸⁷ Ibid 13

³⁸⁸ Human Rights Watch, *Justice Compromised: The Legacy of Rwanda’s Community-Based Gacaca Courts* (New York, NY: 2011), 2

³⁸⁹ Gahima 142

³⁹⁰ Sarah L. Wells, "Gender, sexual violence and prospects for justice at the *Gacaca* Courts in Rwanda," *Southern California Review of Law and Women's Studies* 14 (2004): 173

³⁹¹ Human Rights Watch, *Struggling to Survive*, 18

³⁹² Ibid

(*Association des Veuves du Genocide* – The Association of the Widows of Genocide) estimated that less than 100 rape cases were heard in the national courts, while Usta Kaitesi in an interview estimated that there were much fewer than 1,000.³⁹³

GACACA COURTS

Responding to the nearly complete destruction of the judicial infrastructure and the high level of civilian participation in crimes of the highest degrees, the Rwandan government resorted to the traditional justice process called *gacaca*, which some scholars deemed as the “last hope for justice and reconciliation” in Rwanda.³⁹⁴

2001 Gacaca Law

Traditional *gacaca* mainly dealt with civil matters such as land disputes and general family relations, and was a private affair rooted within restorative justice elements, especially the restoration of relationship between parties.³⁹⁵ *Gacaca* can be traced back until at least the 17th century, and operated throughout the Belgian colonial period. Traditional *gacaca* operated under the Habyarimana regime, and families continued to resolve intrafamilial conflict through *gacaca* when necessary.³⁹⁶ Modern *gacaca* – the modified version that was implemented following the Rwandan genocide – was, however, drastically altered to fit the need for post-genocide justice, and its proceedings turned into a public affair with the entire community participating. *Gacaca* trials were judged by *inyangamugayo*, local elder leaders who were elected by citizens for their integrity and standing within the community. While traditional *gacaca* operated in an *ad hoc* manner, its modern version was based on a complex written law, with systematic administrative

³⁹³ Emily Amick, "Trying International Crimes on Local Lawns: The Adjudication of Genocide Sexual Violence Crimes in Rwanda's *Gacaca* Courts," *Columbia Journal of Gender and Law* 20 (2011): 43

³⁹⁴ Ibid 24

³⁹⁵ Jennie E Burnet, "(In)Justice: Truth, Reconciliation, and Revenge in Rwanda's *Gacaca*," in *Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence*, ed. Alexander Laban Hinton (Rutgers University Press, 2010), 98. (Hereinafter as Burnet, "(In)Justice")

³⁹⁶ Ibid 99

divisions and the power to impose prison sentences (but not the death penalty) on the accused.³⁹⁷ More importantly, while women were often not permitted to speak in traditional *gacaca*,³⁹⁸ modern *gacaca* addressed this shortcoming. Women were elected as *inyangamugayo*, participated both as victims and as perpetrators, and actively contributed as eligible members of the general assembly.³⁹⁹

On March 15, 2001, the Rwandan government adopted Organic Law No. 40/2000 on Setting up ‘*Gacaca* Jurisdiction’ and the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed between October 1, 1990 and December 31, 1994,⁴⁰⁰ and established the *gacaca* courts as a concurrent justice mechanism to operate alongside the national courts. *Gacaca* was established with five main objectives: 1) to reveal the truth about the genocide, 2) to speed up the cases of genocide and other crimes against humanity, 3) to eradicate the culture of impunity, 4) to strengthen unity and reconciliation among Rwandans, and 5) to prove the Rwandans’ capacity to solve their own problems.⁴⁰¹ Each *gacaca* court was comprised of a General Assembly (100 community members), a Bench (19 *Inyangamugayo* judges, who were all elected by the community), and a Coordination Committee (one President, two Vice-Presidents, and two secretaries who altogether managed the operation of *gacaca*).⁴⁰² The 2001 *Gacaca* Law established approximately 11,000 *gacaca* courts at different administrative levels – the cell, sector, district, and province levels – for the pilot phase.⁴⁰³

³⁹⁷ Ibid 28

³⁹⁸ Waldorf 48

³⁹⁹ Kaitezi 209

⁴⁰⁰ Hereinafter as 2001 *Gacaca* Law

⁴⁰¹ National Services of the *Gacaca* Courts (SNJG), *Gacaca Courts in Rwanda* (Kigali, 2012), Part I, Chapter II, Section 2

⁴⁰² Ibid

⁴⁰³ Human Rights Watch, *Struggling to Survive*, 15

The 2001 *Gacaca* Law used the same four categories of crimes established by the 1996 Genocide Law, but expanded category one to include the crime of rape. Under this law, all genocide-related cases had to first go before *gacaca*. *Gacaca* took place once a week in public if the quorum (at least five members of the bench and 100 members of the general assembly) was present. *Gacaca* operated in three stages: information gathering, categorization of crimes, and trials. During the last step of the information-gathering phase at the cell level of *gacaca*, witnesses testified publicly or in writing before the assembly. Information was also collected in confessions and guilty pleas of the perpetrator. During phase two, *gacaca* judges reviewed the files and categorized the accused in accordance with the hierarchy of crimes created by the 1996 Genocide Law. The *gacaca* court then tried and delivered verdicts on crimes of the latter three categories, while category one crimes including rape were transferred to the national courts system for prosecution.⁴⁰⁴ Since traditional *gacaca* was a form of communal justice, modern *gacaca* also required every citizen to take part in the procedure, for every Rwandan was witness to the crimes of genocide.⁴⁰⁵

Regarding rape and sexual violence, one important trend emerged. While the initial legal procedures within the national courts remained private and rather limited to the related parties, every case must go through the public proceedings of *gacaca* under the 2001 *Gacaca* Law. The pilot phase report revealed that the public nature of the information gathering and guilty pleas exposed victims of sexual torture to further victimization and social stigmas surrounding these crimes. Between the launch of the pilot phase and June 2002, 581 *gacaca* courts in ten provinces registered approximately 134 cases of rape and sexual torture, as compared to the approximately

⁴⁰⁴ Wells 175-176; National Service of *Gacaca* Courts, Part I, Chapter II, Section 2

⁴⁰⁵ Usta Kaitesi and Roelof Haveman, "Prosecution of Genocidal Rape and Sexual Torture before the *Gacaca* Tribunals in Rwanda," in *Victimological Approaches to International Crimes: Africa*, edited by Rianne Letschert, Roelof Haveman, Anne-Marie de Brouwer, and Antony Pemberton (Cambridge: Intersentia, 2011), 394

3,308 cases of non-sexual violence crimes.⁴⁰⁶ In response, the government adopted a new law in 2004 to address the weaknesses identified, such as the public nature of the information-gathering process during the pilot phase.

2004 Gacaca Law

Organic Law No. 16/2004 on the Organization, Jurisdiction, and Functioning of the *Gacaca* Courts⁴⁰⁷ was adopted on June 19, 2004 and laid out several changes in accordance with the lessons learnt in the pilot phase. To speed up the nationwide implementation of *gacaca*, *gacaca* at the provincial and district levels were abolished, and cases in these levels were transferred to various sector *gacaca* courts. Categories two and three were combined in a new category two, and the former category four became the new category three. The number of judges in each *gacaca* court was reduced from 19 to 9 with 5 alternates, and additional training programs for *gacaca* judges were developed and implemented.⁴⁰⁸ Nationwide implementation of *gacaca* began with the launch of the information-gathering phase in 2005.

Specific procedural changes were implemented to protect victims of rape and sexual violence from the public nature of the information-gathering stage, and the 2004 *Gacaca* Law prohibited publicly gathering information on sexual violence. Victims of sexual crimes were supposed to give evidence in closed settings to a single judge of their choosing or, if they did not trust any of the judges, could give the evidence directly to the public prosecutor at the national courts. Perpetrators could make confessions about rape but must not do so in public, and third parties, such as witnesses, were prohibited from publicly reporting sexual violence crimes.⁴⁰⁹

2008 Amendment

⁴⁰⁶ Human Rights Watch, *Struggling to Survive*, 22

⁴⁰⁷ Hereinafter as the 2004 *Gacaca* Law

⁴⁰⁸ Gahima 166, 167

⁴⁰⁹ Amick 45, 46

The last significant changes in the operation of *gacaca*, especially with regards to rape and sexual violence, occurred after the adoption of the 2008 amendment to the 2004 *Gacaca* Law on May 19, 2008. In order to speed up first category trials at the national courts, the 2008 amendment extended the jurisdiction of *gacaca* to cover some first category crimes, including trying perpetrators of rape and sexual torture and their accomplice. Under this law, cases arising from the information gathering phase and those already at the prosecution office of the national courts were transferred to the competent *gacaca* courts. Prior to this amendment, everyone could either testify or confess about what they saw or experienced during the genocide. Under this amendment, for new claims, only victims had the right to lodge new rape cases, and in case the victim was dead or incapable, other concerned parties could lodge it; all of these claims had to be submitted secretly.⁴¹⁰ After 2008, between 6,608 and 8000 cases that included rape and sexual violence charges were estimated to have been transferred from the national courts to *gacaca*.⁴¹¹ Trials began in January 2009 and ended in July 2010. The exact number of delivered verdicts that included rape and sexual torture crimes is not currently available.

In addition, the law also required that rape trials must be in closed sessions (*in camera*) where the general public was excluded. There were usually six people allowed in the trial room: the victim, the accused, the judge, a security officer, a *gacaca* representative, and a trauma counselor chosen by the victim.⁴¹² As a safeguard for human rights, all judgments were announced publicly. In addition, the National Service of *Gacaca* Jurisdiction (SNJG), which monitored the implementation and progress of *gacaca* and the post graduate training institute for the justice sector in Rwanda, organized a 10-week, expert training program for various individuals, who would in turn train the *Inyangamugayo* on approaching cases of rape and sexual

⁴¹⁰ Kaitesi and Haveman 396

⁴¹¹ Amick 3; Human Rights Watch, *Justice Compromised*, 112; Kaitesi 82

⁴¹² Amick 52

torture. This interdisciplinary training covered both legal and psychological aspects of the law and judicial process.⁴¹³

REPARATION PROGRAMS

Several reparation programs were proposed in the aftermath of the genocide with a focus on two different types of reparations: compensation that made up for the loss suffered by the victim, and assistance that aimed at helping the neediest among the population. In reality, however, only one program was eventually established and maintained financially, while others were never adopted or did not have the financial capacity to be effective. Regarding reparations for victims of rape and sexual violence in particular, the prospects were even grimmer.

Reparations Within Genocide Trial

Under the 1996 Genocide Law, the specialized chambers were given the competence to adjudicate the victims' reparation claims within criminal trials. Perpetrators of first category crimes, including rape and sexual torture, incurred civil liability for all damages suffered by the victims during the genocide throughout the country.⁴¹⁴ Reparation claims were to be paid by the perpetrators and their families. By the end of the 1990s, the government, overwhelmed by the heavy caseload and the slow progress of justice at the national courts, had given up on the idea of individualized compensation awarded by the national courts, and looked at solutions involving administrative compensation distributed by a fund that was to be established in the wake of the introduction of the *gacaca* system.⁴¹⁵

The Assistance Fund (*Fonds d'Assistance aux Rescapés du Génocide* – FARG)

⁴¹³ Kaitesi and Haveman 398. For more details on the training process, see this chapter.

⁴¹⁴ Paul Christoph Bornkamm, *Rwanda's Gacaca Courts: Between Retribution and Reparation* (Oxford: Oxford University Press, 2012), 132

⁴¹⁵ Ibid 133

In 1998, the government decided to create an independent fund named FARG, which would distribute assistance in the form of education, healthcare, housing, and income-generating programs.⁴¹⁶ The two most important criteria to qualify as a FARG beneficiary were being “in need” (orphan, widow, and the handicapped) and being a “*réscap*.” A *réscap* was defined as “a person who escaped the genocide or the massacres committed between October 1, 1990 and December 31, 1994. The FARG did not provide legal definitions of genocide and massacre but only referred to the element of intent: the intent of the genocide was to target and exterminate individuals and to destroy their properties because of their ethnic background or their political opposition to the genocide.”⁴¹⁷ This definition shied away from the notion of victimhood. Rombouts argues that while “harm” and “loss” is central to the notion of victimhood, central to the notion of *réscap* is “having escaped persecution,” which was often interpreted in an *ad hoc* manner by local authorities.⁴¹⁸ Because of this interpretation, some survivors of rape and sexual violence were categorized as *réscapes* while others were not. Since the fund was perpetually underfunded, only a fraction of those entitled to receive assistance was able to receive it.⁴¹⁹

The Compensation Fund (*Fond d'indemnisation* - FIND)

While the creation of a compensation fund was announced in the 1996 Genocide Law, two different drafts for a FIND law did not take place until 2001 and 2002 respectively. The funds would come partly from the Rwandan state, partly from those convicted of genocide, and from the international community and individuals on a voluntary basis. The profits from community service programs would also be transferred to the fund for distribution. The process

⁴¹⁶ Ibid 134

⁴¹⁷ Heidi Rombouts, “Gender and Reparations in Rwanda: A Long Path to Travel,” in *What Happened to the Women? Gender and Reparations for Human Rights Violations*, ed. Ruth Rubio-Márin (New York: Social Science Research Council, 2006), 214

⁴¹⁸ Ibid 200

⁴¹⁹ Bornkamm 134

of implementation of this fund came to a standstill in the wake of the 2003 elections, and has not been taken up again since. While the 2003 Constitution contains a provision on the “welfare of victims of genocide,” it also states that such provision is only manageable within the limits of the state’s capacity. The two FIND drafts have never been adopted, and most observers no longer believe in the implementation of this fund.⁴²⁰

ANALYSIS: MAJOR STRENGTHS AND SUCCESSES

As noted in Chapter 2, human rights reports and transitional justice scholars have largely employed a pessimistic and negative viewpoint while analyzing the prospects for comprehensive justice for victims of rape and sexual violence in political contexts of transition. In Rwanda, the number of rape and sexual violence cases heard in both the national courts and the *gacaca* courts in total amounts to fewer than 9,000, a significantly small figure compared to the estimated 250,000 – 500,000 cases of rape and sexual violence during the genocide. Yet to argue that domestic mechanisms did not bring any justice to victims of rape and sexual violence is to unfairly undermine the work they have done, and to underestimate the unparalleled challenges they faced as the country attempted to reckon with the legacy of the genocide.

Justice and Jurisprudence

The inclusion of rape and sexual torture within category one of genocide-related crimes deserves particular consideration. This inclusion, after various debates within Parliament, moved rape cases from category three (serious assaults against persons without clear genocidal intent) to category one, whose perpetrators were subjected to life imprisonment or death penalty. This decision unequivocally acknowledged that rape and sexual torture not only constituted an essential part of the genocide, but also amounted to the category of most serious crimes deserving the heaviest forms of punishment, which altogether had “considerable impact on the

⁴²⁰ Bornkamm 135-136, Rombouts 199-200 & 214

perception of rape as a spoil of war.”⁴²¹ Symbolically, this decision showed an appreciation the severity of the experience suffered by hundreds of thousands Rwandan during the genocide. Practically, some of these victims were able to see their perpetrators being brought to justice by either serving their prison terms or being executed.

To some extent, both national courts and *gacaca* were able to facilitate the creation of a *partial* historical record of truth about what happened during the genocide. For *gacaca*, its major potential in uncovering truth lay in the information-gathering and investigation stage. While formal legal procedures such as the criminal courts often restrained the victims’ testimonies, the informal nature of *gacaca* allowed for more truth to be discovered. Truth emerged not only from the confessions of perpetrator and testimonies of victims and witnesses, but also from the judgments that were made public by the judicial authority. While rape and sexual violence trials were in camera, all judgments had to be made public. These judgments had both potential retributive and restorative impacts: they not only put the perpetrators within the confines of the justice system and removed them from their communities for punishment, but also affirmed the wrongness of the violence committed against the victims. These impacts were arguably more powerful within the context of *gacaca*, since *gacaca* could be seen as a blend of retributive and restorative justice with “confessions and accusations, guilty pleas and trials, forgiveness and punishment, community service and incarceration.”⁴²² While cases in national courts often happened far away from the communities in which the victims and perpetrators lived, *gacaca* situated such justice process within the community itself. The fact that *gacaca* sessions could only start when 100 members of the general assembly were present means that open judgments of rape and sexual violence cases were arguably intended to provide the community with a better

⁴²¹ Chitra Nagarajan, "An Appraisal of Rwanda's Response to Survivors Who Experienced Sexual Violence in 1994," *Wagadu: A Journal of Transnational Women's and Gender Studies* 10 (2012): 117

⁴²² Waldorf 52-53

understanding of what happened during the genocide, and could help facilitate the emergence of truth about what happened during the genocide within such community itself. The National Service of *Gacaca* Courts published a final report in 2012 titled *Gacaca Courts in Rwanda*, which included a section about what *gacaca* uncovered about rape and sexual torture.⁴²³

Modern *gacaca* was not only a legal institution, but also a social institution as well. This combination of both legal and social functions dominates some scholars' compliments of *gacaca*'s impact. Matthew Braley argues that the *gacaca* was capable of "empowering a disenfranchised citizenry and offering an institutional space in which alienated individuals and groups can recognize a degree of interdependence."⁴²⁴ By allowing victims to testify about their experience and publicly denouncing those acts of violence, *gacaca* offered victims of rape and sexual violence a platform to talk and to be listened to, and validated them by acknowledging their sufferings. Emily Amick argues that the real value of *gacaca* came in its provision of a kind of truth commission, a community-wide discussion about what took place during the genocide, and a beginning of the conceptualization of how individuals would engage with their neighbors in the new Rwanda and would altogether form a common society.⁴²⁵ In theory, truth telling in *gacaca* served as "a manner to develop a common language of morality," and *gacaca* provided a space for a renegotiation of the mores of everyday society and affirmation of social moral norms.⁴²⁶ Many women who testified in *gacaca* felt that it "enabled them to relieve their hearts, to have their experiences and their suffering during the genocide recognized, and to urge others

⁴²³ SNJG, Part III, Chapter III, Section 2

⁴²⁴ Matthew Bersagel Braley, "Rooting, Reforming, Restoring: A Framework for Justice in Rwanda," *J. Lutheran Ethics* 4 (2004): 40

⁴²⁵ Amick 80, 90

⁴²⁶ Ibid 91, 92

to act to prevent these crimes from ever happening again.”⁴²⁷ Bert Ingelaere argues that it was this discursive nature of *gacaca* – in which people were not forced but chose to talk about their experiences – that functioned as a catalyst of the transitional justice process.⁴²⁸

Gacaca, as a unique approach to transitional justice by serving both as a judicial and social institution, deserves particular attention for the length it went to seek truth, justice, and reconciliation. The extent to which *gacaca* was successful in doing so, especially in bringing justice to victims of rape and sexual violence, requires more field research that I do not have the capacity to implement. Writing about the extent to which truth telling can contribute to sustainable peace and reconciliation, Tristan Borer points to the phenomenon of equating “aspiration with empiricism,” in which claims about truth-telling mechanisms are presented as facts while insufficient empirical work has been done to substantiate them in reality.⁴²⁹ As this chapter later demonstrates, there existed significant institutional challenges that impeded the justice process at *gacaca* and prevented many victims of rape and sexual violence from participating. Truth and justice that emerged from *gacaca* were at least symbolic and at most partial; it is arguable that the compliments and observations made by the authors mentioned above may somewhat be too aspirational while there are reasons to believe that *gacaca* was not that successful.

Saying that *gacaca* was not successful at all, as this section does not in any way attempt to, is an extreme oversimplification that undermines the courage of the victims that came forward. A partial historical record about what happened during the genocide and justice served

⁴²⁷ Anne-Marie De Brouwer, "The Importance of Understanding Sexual Violence in Conflict for Investigation and Prosecution Purposes," *Cornell International Law Journal* 48 (2015): 659 (Hereinafter as “The Importance of Understanding Sexual Violence”)

⁴²⁸ Bert Ingelaere, "'Does the truth pass across the fire without burning?' Locating the short circuit in Rwanda's *Gacaca* courts," *The Journal of Modern African Studies* 47 (4) (2009): 516

⁴²⁹ Borer, “Truth Telling as a Peace-Building Activity,” 27

by those who were convicted at *gacaca* are undoubtedly better than no truth and justice at all, especially in a country where insufficient legal personnel could barely make the national courts system work. While acknowledging the gaps in the current literature on the lack of empirical evidence supporting aspirational claims about the success of *gacaca*, this thesis does want to give credit where credit is due. Through both the national courts and *gacaca*, the collective memory in the form of a partial record of truth and the justice served by those convicted of rape and sexual torture could arguably contribute to both national and individual reconciliation. This thesis examines reconciliation by dividing it into six different components: 1) understanding the past, present and envisioning the future of Rwanda, 2) citizenship and identity, 3) political culture, 4) security, 5) justice, and 6) social cohesion. The recognition of rape and sexual violence as some of the most serious forms of genocide not only contributed to the emerging understanding of the past, but also to the justice and security components by isolating and punishing the perpetrators in those 9,000 cases that included rape charges. Moreover, Anne-Marie de Brouwer – a prolific scholar who has conducted field research and written extensively on sexual violence and transitional justice in Rwanda – argues that the public was gradually beginning to comprehend the significance of hearing stories of rape and sexual violence in *gacaca* in order to effectively respond to rape and sexual violence in the future.⁴³⁰ While this contribution was rather limited given the number of cases actually heard and tried within the national courts and *gacaca*, it is nevertheless important to acknowledge such contribution, especially to the victims who were able to see their perpetrators brought to justice.

Procedural Changes to Protect Victims of Rape and Sexual Violence

Up until 2008, national courts and *gacaca* operated as concurrent justice mechanisms to prosecute genocide-related crimes. Both institutions thus were never static but ever changing,

⁴³⁰ De Brouwer, “The Importance of Understanding Sexual Violence,” 659

and *gacaca* itself went through at least five different amendments.⁴³¹ Through these amendments, the *gacaca* courts were able to incorporate more procedural changes to protect and encourage victims of rape and sexual violence to participate. After the pilot phase in the early 2000s, the Rwandan government soon realized that the information-gathering stage exposed some victims to heavy social stigmatization once their families and communities found out that they were raped. The 2004 *Gacaca* Law thus prohibited the publishing of information regarding to rape, and the lodging of these cases had to be done in private and reported directly to one *Inyangamugayo*. The 2008 *Gacaca* Law, which transferred cases of rape and sexual torture to the *gacaca* courts, established in camera trials so victims and perpetrators could testify/confess about their cases in protected settings. As aforementioned, the victims were also able to choose the judge to hear their case, and choose a counselor to assist them within the process. One woman interviewed by Human Rights Watch preferred her case to be heard before *gacaca*, because the procedures were less formal and she could speak more freely with emotional support.⁴³² The law also included provisions on punishments for individuals who breached this secrecy and exposed the victims to trauma and social stigma. The 2008 *Gacaca* Law also laid out a framework for extensive gender-sensitive trainings for judges to deal with rape and sexual violence cases.

In addition, the 2008 *Gacaca* Law also allowed the victims in criminal cases to determine whether the case should be tried or not.⁴³³ Ordinary criminal justice often does not reflect the needs of the victims and may do justice at the expense of victims. Usta Kaitesi and Roelof Haveman argue that this provision was rooted in a restorative justice purpose, for it allowed all stakeholders to participate not only in the court but also in the decision to either enter the case in

⁴³¹ Kaitesi 219

⁴³² Human Rights Watch, *Justice Compromised*, 113

⁴³³ Kaitesi and Haveman 397

the criminal process or not.⁴³⁴ This provision was also intended to protect the victims, since some accusations were lodged maliciously to expose and further attack the victims.⁴³⁵ As this chapter further demonstrates, these provisions were able to help some victims feel more welcomed to testify at *gacaca* while simultaneously not being able to help many others. Some victims were either too overwhelmed by the fear of social stigmas surrounding sexual violence; others did not want to come forward at all and had already learned to live with their lives. These procedural changes, however, demonstrated that the Rwandan government was well aware of these challenges confronting victims and survivors of sexual violence, and that it had no control over some of these challenges – such as culturally embedded social stigma. The government was nevertheless willing to modify the *gacaca* process throughout the years, especially based on the lessons learned in the pilot phase, as demonstrated by the fact that major changes in *gacaca* law, such as those in 2004 and 2008, contained specific provisions on helping victims of rape and sexual violence come forward. It is because of this good intention and willingness to address challenges facing victims – despite the acknowledgment that it was only able to fix some but not fundamentally counter all of these challenges – that the Rwandan government should be applauded.

Assistance and Reparation for (Some) Women

Traditionally, women were often regarded as dependents of their male relatives, and their position in society was limited in public settings and built around their roles as daughters, mothers, and wives. Gender relations have changed since the genocide, since the Rwandan government seized the post-conflict period as an opportunity to improve gender equality.⁴³⁶ As early as 1999, the government changed the discriminatory inheritance rule, under which women

⁴³⁴ Ibid

⁴³⁵ Ibid 398

⁴³⁶ Rombouts 204

could not inherit from their husbands or fathers, and women have since become rightful owners of land.⁴³⁷ This development was particularly important, since many women became widows during and after the genocide; being able to own and work on their lands was an essential component of life sustenance. Understanding that the economy was destroyed after the genocide, which inevitably affected women disproportionately, the government also created the Ministry of Gender and Women in Development to oversee development programs with a focus on women. In addition, the 2003 Constitution explicitly underscored gender equality and stipulated that all decision making bodies should be composed of at least 30% women.⁴³⁸

Structural, top-down changes were thus made to facilitate the incorporation of women into post-genocide Rwanda, many of whom were victims of rape and sexual violence. More importantly, these women were often widows, and thus fell under the definition of “the neediest *réscares*” that qualified them as beneficiaries of the FARG fund. In other words, reparations and assistance coming from FARG was not organized around victimhood of sexual violence, but rather around widowhood. The fact that the FARG fund was somewhat gender-sensitive proved to be beneficial to various victims of rape and sexual violence who were widows. Heidi Rombouts argues that widowhood was a much safer banner for women because organizing themselves around a victimhood of sexual crimes would involve a much too explicit and public assertion of their experiences that might result in further re-traumatization or social stigmas. The fact that FARG targeted “the neediest” among Rwandans also indirectly made women the primary beneficiaries of its assistance, since they were generally poorer than men, and female-headed households were usually in more dire situations than male-head ones.⁴³⁹

⁴³⁷ Ibid 205

⁴³⁸ Ibid 205

⁴³⁹ Ibid 214

FARG's census in 1998 showed that out of 282,000 *réscares*, 80,000 women and 53,000 men were without shelter, and one of FARG's first initiative was to provide houses to *réscares* of the genocide.⁴⁴⁰ Since new houses were often grouped together, some women were able to establish contacts with other victims instead of being forced to live with their old neighbors whom they did not trust.⁴⁴¹ In addition, FARG also established a health program that provided medical health cards with which *réscares* could go to several hospitals for free medical care, including genocide-related diseases, such as wound infections and medical consequences of mutilation.⁴⁴² These assistance services were of particularly importance for women in general and victims of rape and sexual violence in particular, who were in overwhelming needs to overcome physical harms and to generate income in order to start their life. In addition, the FARG fund was also particularly successful in working with women's groups, such as IBUKA and AVEGA, to help distribute their services packages to widows who lived far away from the capital. While the FARG fund did not pay specific attention to trauma and HIV/AIDs, which victims of rape and sexual violence generally experienced, AVEGA incrementally became more involved with providing services that dealt with these problems while simultaneously focusing on helping widows with their daily survival, including distributing clothes and housing and looking for funds to support income-generating projects.⁴⁴³ AVEGA has arguably remained the only lifeline for genocide survivors by providing guidance and moral support as well as concrete assistance.⁴⁴⁴

As noted in Chapter 2, transitional justice scholars have generally pointed out the significant need to provide reparations for victims of gross violations of human rights, especially

⁴⁴⁰ Ibid 222

⁴⁴¹ Ibid 223

⁴⁴² Ibid 224

⁴⁴³ Ibid 211, 212, 222

⁴⁴⁴ Nagarajan 122

for victims of rape and sexual violence. It was generally impossible for some victims to think about justice and reconciliation when they still struggled to survive and fulfill basic needs every day. The various developments in national law that focused specifically on women and the distribution of service packages by FARG could in theory facilitate reconciliation by gradually constructing a political culture that is gender-sensitive and reflects the specific needs of victims of rape and sexual violence. In addition, the constitutional provision that requires the representation of women in executive and legislative branch did in fact contribute to the citizenship and identity component of reconciliation. As of 2014, Rwanda managed to reach 64% women in its Parliament, a figure that is practically unheard of anywhere else.⁴⁴⁵ Women's representation in the government reflects a significant power in a society dominated by patriarchal norms that often relegate women to the private sphere and fail to give women the full benefits of citizenships. The fact that Rwandan women are overwhelmingly represented in government shows the potential that the needs of rape victims would be assisted in the future.

ANALYSIS: MAJOR WEAKNESSES AND FAILURES

Throughout the years, the national courts, *gacaca* courts, and various reparation programs have received heavy criticism for their failure to bring justice to victims of rape and sexual assaults. The total number of rape and sexual assaults cases heard in the national courts and *gacaca* was fewer than 9,000. The number of perpetrators actually convicted of these crimes is not available, but is presumably equally small, if not smaller. This figure is disproportionately small compared to the estimated number of rape and sexual violence incidents during the genocide (between 250,000 and 500,000). Many victims indeed never saw their perpetrators brought to justice. Similarly, while some victims of rape and sexual violence received reparations from FARG, many did not. The question remains: what factors impacted the

⁴⁴⁵ Jane Dudman, "Lessons from Rwanda's female-run institutions," *The Guardian*, July 1, 2014

adjudication of rape and sexual violence cases and the distribution of reparations? This section sheds light on some institutional and systemic challenges confronting domestic justice mechanisms, over many of which these mechanisms had no control.

Social Norms Inhibiting the Justice Process

As demonstrated in Chapter 2, one major theme dominates in transitional justice literature on how different mechanisms reckon with the legacy of rape and sexual violence: victims are generally afraid to come forward to either testify about their experiences or to receive benefits as victims of rape and sexual violence. Societal and cultural norms dictate women's behaviors and discussion of sexuality across the world, if not more so in Rwanda. Female victims of rape often talked about feeling of shame, depression, and stigmatization, and the fear of isolation and rejection by their family and communities as the main reasons why they did not testify in the national courts and *gacaca*.⁴⁴⁶ Many found that it was impossible to testify because "the words to describe some sexual acts do not even exist in Kinyarwanda,"⁴⁴⁷ while others hesitated to talk about rape for fear that such revelation would lead their husbands to reject them or make them unmarriageable.⁴⁴⁸ In a patriarchal country where women depended heavily on marriage for survival and sustenance, this fear was so overwhelming and extensive that in many cases it overshadowed the victims' desire for justice and reconciliation. While both men and women were victims of rape and sexual violence, social stigma affected women disproportionately. A 2002 survey conducted by the National Unity and Reconciliation Commission of Rwanda found that sixty percent of sexual violence survivors thought that women would testify significantly less than men because of the nature of these crimes, and that the risks of testifying for female survivors were so much greater than those of men that many

⁴⁴⁶ Human Rights Watch, *Struggling to Survive*, 24

⁴⁴⁷ Amick 63

⁴⁴⁸ Ibid 27

families would prevent young girls from testifying about their experiences of wartime sexual violence.⁴⁴⁹

Karen Brounéus's field research in Rwanda also shows that *gacaca* impacted men and women differently. From this research, women demonstrated significantly higher levels of war-related trauma, depression, and PTSD than men.⁴⁵⁰ Men had more positive attitudes towards integrating prisoners than women, and women found it more difficult than men to interact with someone who was accused in *gacaca*.⁴⁵¹ Women were significantly more negative than men in their perspectives of *gacaca*: they did not believe that *gacaca* made living together easier and believed to a higher extent than men that *gacaca* intensified suffering.⁴⁵² While this study did not focus specifically on victims of rape and sexual violence, the fact that many participants experienced sexual violence during the genocide demonstrates that these results are applicable to the analysis of this thesis.

In addition, Human Rights Watch and other NGOs in Rwanda such as AVEGA and IBUKA argued that the categorization of rape and sexual torture as category one crimes, whose perpetrators were subject to either death penalty or life imprisonment, also impeded the justice process despite its good intention.⁴⁵³ First, the severity of punishment for category one offenders discouraged many from making confession, pleading guilty, and asking for forgiveness, which undermined the discovery of truth about what happened during the genocide.⁴⁵⁴ Second, such categorization placed a significant burden on the victims. A report by the Penal Reform International stated that since perpetrators of sexual violence could receive harsh punishment,

⁴⁴⁹ Ibid 64

⁴⁵⁰ Karen Brounéus, "The women and peace hypothesis in peacebuilding settings: Attitudes of women in the wake of the Rwandan genocide," *Signs: Journal of Women in Culture and Society* 40, no. 1 (2014): 143

⁴⁵¹ Ibid 141

⁴⁵² Ibid 144

⁴⁵³ Human Rights Watch, *Justice Compromised*, 113

⁴⁵⁴ Kaitei 235

sexual violence victims faced enormous pressure from their communities not to testify for fear of reprisals.⁴⁵⁵

The national courts were primarily concerned with justice and holding perpetrators accountable, and truth was often deemed as a by-product rather than a goal of this mechanism. *Gacaca* was, however, institutionally more concerned with establishing a record of truth about what happened during the genocide.⁴⁵⁶ As a community-based justice system, *gacaca* was created to succeed only if community members were willing to come up and testify. An incapacity to speak of their most intimate experiences of sexual violence, accompanied fears of social stigmas and reprisals, constituted an institutional challenge to both the victims who needed to tell their stories and to the entire justice process that needed to take into account these narratives. Because of this challenge, Emily Amick argues that *gacaca* was an unsuitable to hear and prosecute the crimes of rape and sexual violence.⁴⁵⁷

***Gacaca*: Not a Suitable Mechanism to Prosecute Rape and Sexual Violence?**

While the national courts were considered a more private justice system for rape victims to testify about their experience since community members were not allowed, this privacy was essentially undermined when the *gacaca* courts were launched to gather information and categorize perpetrators for prosecution purpose in 2001. The public nature of *gacaca* in its pilot phase exposed women to significant social stigma if they chose to testify in front of more than 100 members of their communities. In various cases during the information-gathering stage, perpetrators intentionally testified to harm the victims, as guilty pleas or public confessions could serve as a means to strike “one last blow against the surviving victims especially before an

⁴⁵⁵ Amick 65

⁴⁵⁶ Bornkamm 140

⁴⁵⁷ Amick 2

audience which does not expect any better from these perpetrators.”⁴⁵⁸ Moreover, many perpetrators also confessed in public as part of the plea bargain process during this phase, and these public confessions exposed women who did not want to reveal their past to re-traumatization. In addition, the public nature of these hearings means that family and friends of the accused were often present during the process, and women had a well-founded fear of reprisals. There have been many allegations and cases of witness disappearances, beatings, and killings after they testified at *gacaca*.⁴⁵⁹

The concurrent justice framework, in which both the national courts and *gacaca* courts operated together to gather information and to prosecute perpetrators, was often criticized for imposing heavy burdens on victims of rape and sexual violence. Until 2008, this dual jurisdiction framework forced victims who wanted to testify to bring their cases before *gacaca* and then the national courts. Testifying at *gacaca* was only relevant for gathering information and categorizing perpetrators, and the victims had to testify again at the national courts.⁴⁶⁰ Victims were responsible for convincing the *gacaca* judges and the general assembly that sexual offenders had actually assaulted them to categorize these perpetrators as category one offenders, so that the case against the accused could include rape charges and move to the national courts for trials. In most cases, victims often did not possess the medico-legal evidence of their experiences, and physical evidence suggestive of forced sexual relations was often not collected immediately following the assault.⁴⁶¹ Since the social and medical fabric of the country was destroyed after the genocide, Rwanda also did not have the capacity to medically examine the victims and preserve evidence. This lack of evidence was a significant challenge for victims in

⁴⁵⁸ Kaitesi 124

⁴⁵⁹ Amick 78

⁴⁶⁰ Kaitesi 212

⁴⁶¹ Human Rights Watch, *Struggling to Survive*, 31

proving their cases.⁴⁶² Moreover, most *gacaca* judges were community members who did not have a legal background and often had the tendency to not believe the victims or blame the offences on the victims themselves.⁴⁶³ These various challenges often resulted in the failure to record the charges of sexual violence, and many perpetrators were granted provisional release.⁴⁶⁴ This failure was two-fold: the victims were not able to see their perpetrators being held accountable despite the excruciating justice process, and they were forced to face these perpetrators again within their communities once they were released, which both impeded the reconciliation and reintegration process for these victims.

While the 2004 and 2008 *Gacaca* Laws included several provisions for protecting victims of sexual violence and maintaining confidentiality, these changes oftentimes were not able to overcome the communal nature of *gacaca*. First, many women did not know of the options laid out in these laws, and thus viewed the justice process as a public one that would expose them to stigma and ridicule, discouraging them from coming forward.⁴⁶⁵ Despite the closed-door nature of the new proceedings, Human Rights Watch reported that everyone in the community would still know that the case involved rape because on the day of the *gacaca* sessions, whether public or private, community members would see a woman and a man enter a room and therefore guess the nature of the case.⁴⁶⁶ Furthermore, the communal and informal nature of *gacaca* also posed various risks of miscarriage of justice. Many women reported that they did not believe their cases would be heard fairly and impartially given the judges' ties with the community. Some women said that at times rapists or their family members had served as *gacaca* judges in various rape

⁴⁶² Kaiteesi 213

⁴⁶³ Human Rights Watch, *Struggling to Survive*, 33; Amick 80

⁴⁶⁴ Human Rights Watch, *Struggling to Survive*, 34

⁴⁶⁵ Nagarajan 118

⁴⁶⁶ Human Rights Watch, *Justice Compromised*, 114

cases.⁴⁶⁷ Chitra Nagarajan also reports that while judges in the national courts were believed to be better able to understand the delicacy of rape cases, give equitable judgments, and keep confidentiality, *gacaca* judges were often viewed as less likely to maintain information private because of their close ties to the community.⁴⁶⁸

Because of these various institutional challenges, many of which resulted from the cultural norms surrounding women and discussion on sexuality, *gacaca* was often criticized for being an inadequate platform to prosecute rape and sexual violence. The International Rescue Committee conducted surveys in 2002, 2005, and 2006, which showed that Rwandans' belief in the appropriateness of *gacaca* to deal with sexual violence cases had actually diminished over time.⁴⁶⁹ The percentage of people agreeing that revelations of rape at *gacaca* would hinder the reconciliation process also increased over time: 26% in 2002, 22% in 2005, and 34% in 2006.⁴⁷⁰ Because of this belief, women's groups such as IBUKA and AVEGA often criticized the 2008 amendment that transferred rape cases to *gacaca*.⁴⁷¹ This amendment also came as a shock to many rape victims, some of whom had been reluctant to come forward in the first place and did so only after receiving assurance that their cases would be heard in the national courts and not their local communities.⁴⁷² Moreover, this adjudication phase started in January 2009 and ended in July 2010, presenting a brief time frame for *gacaca* to address the 6,608 cases of rape and sexual torture that were transferred from the national courts.⁴⁷³ The brief timeframe for prosecution, an uninspiring number of cases heard and tried within *gacaca*, and various

⁴⁶⁷ Ibid

⁴⁶⁸ Nagarajan 120

⁴⁶⁹ Amick 64 65

⁴⁷⁰ Ingelaere 512

⁴⁷¹ Human Rights Watch, *Justice Compromised*, 113

⁴⁷² Ibid

⁴⁷³ Amick 35

institutional challenges inhibiting the justice process altogether undermined *gacaca*'s legitimacy as it aimed to bring justice to victims of rape and sexual violence.

Lack of Reparations for Many Victims of Rape and Sexual Violence

The fact that reparations in Rwanda came predominantly from FARG, and that such assistance was focused on the neediest *résapes* of the society, over time showcased a marginalization of various groups of victims. First, since the perpetrators were usually poor, victims often found it very difficult to recover compensation from the national courts. Second, the two FIND drafts were never adopted due to the lack of political will, thus further exacerbating the prospects of victims receiving reparations for the harms done to them.⁴⁷⁴ Third, the distribution of assistance programs within FARG itself also exposed significant tension. Since one of FARG's main target groups was widows of the genocide, this focus did not include young girls, married and unmarried women, or widows whose husbands died before or after the genocide.⁴⁷⁵ Widowhood because of the genocide was thus often interpreted in a strict, mechanical way that excluded many female victims who needed help. In addition, for men and boys who were raped, the prospects of receiving reparations were even grimmer because of cultural norms on masculinity and the fact that they were not the targeted beneficiaries of FARG.⁴⁷⁶ Moreover, since the Rwandan genocide has been predominantly referred to as one against the Tutsi both nationally and internationally, Hutu men and women who were raped or sexually assaulted were not categorized legally as beneficiaries of FARG.⁴⁷⁷

Even to those who should have been or were considered beneficiaries, the implementation of the FARG fund also created major barriers to receiving assistance. First, the

⁴⁷⁴ Nagarajan 122

⁴⁷⁵ Rombouts 213

⁴⁷⁶ Ibid 209

⁴⁷⁷ Ibid 215-216

status of *réscares* was not awarded by an independent body, but instead must be recognized by neighbors, victims' organizations or local authorities.⁴⁷⁸ This fact often meant that women who had a higher social status, a better social network, or lived in Kigali where the funds were located, had a higher chance of receiving assistance, thus marginalizing those with lower socioeconomic status that desperately needed help. Second, while FARG's education program could have been beneficial to women who needed professional skills to strengthen their economic status, this program had often neglected women and rather focused on covering school fees for the younger population attending secondary schools and universities.⁴⁷⁹ Third, since FARG was gender-sensitive but not oriented towards victims of rape and sexual violence, treatments for traumas and harms specific to sexual crimes such as HIV/AIDs and unwanted pregnancy were often neglected in FARG's health program.⁴⁸⁰ In addition, women often reported that they feared maltreatment while using FARG's health assistance, since nurses and doctors often questioned why they deserved free care while others needed to pay. Taking care of harms and psychological traumas caused by rape required a basic trust between the doctor and the patient, which was often undermined by social tensions within a post-genocide Rwanda.⁴⁸¹

CONCLUSION

As this chapter demonstrates, domestic transitional justice mechanisms – the national courts, *gacaca*, and reparation programs – had both strengths and weaknesses in bringing comprehensive justice to victims of rape and sexual violence. On the one hand, retributive justice mechanisms were able to prosecute at most 9,000 rape and sexual violence cases. This prosecution not only held various perpetrators accountable and contributed to the prospects of an

⁴⁷⁸ Ibid

⁴⁷⁹ Ibid 223-224

⁴⁸⁰ Ibid 224-225

⁴⁸¹ Ibid 230

emerging culture of justice embedded in the rule of law, but also facilitated the development of a partial historical record of truth about what happened during the genocide, especially in terms of rape and sexual violence. Both national courts and *gacaca* were not static institutions but ever-changing ones, as the Rwandan government did attempt to introduce amendments that could make these institutions a more welcoming environment for victims of rape and sexual violence. This political will itself and the fact the rape and sexual torture were considered the highest level of genocide-related crimes deserve attention and compliments. Reparation programs from FARG were also able to help a segment of victims who desperately needed assistance with daily survival. To those who were lucky to see their perpetrators brought to justice and to receive reparations, domestic mechanisms had the potential to facilitate their process of reconciliation and reintegration.

On the other hand, however, many more victims were not that lucky. Compared to the estimation of between 250,000 and 500,000 cases of rape during the genocide, the estimated 9,000 cases heard in domestic mechanisms, in many of which perpetrators were also acquitted and released, were underwhelming. Moreover, thousands of victims of rape and sexual violence never received reparations since they were not technically categorized as beneficiaries of FARG's programs. Overall, Hutu victims of the genocide and male victims of sexual violence were often neglected in both retributive and restorative justice processes.⁴⁸² In a country torn by colonially imposed ethnic tensions, this appearance of "victors' justice," in which crimes committed by the RPF were never investigated and prosecuted, significantly undermined the overall legacy and legitimacy of transitional justice. The imbalance of justice for some and injustice for many others not only hampers the process of national reconciliation in a country completely wrecked by the genocide, but also personal reconciliation as well. In all fairness, no

⁴⁸² Amick 85

judicial system or transitional justice system in the world has been designed to cope with the requirements of prosecuting crimes committed during a genocide with such a significantly high rate of civilian participation and an even higher rate of victimization.⁴⁸³ Bringing comprehensive justice to victims of gross human rights violations is hard in any transitional justice context, but even more so in a post-genocide Rwanda and to victims of rape and sexual violence. Cultural norms that discourage victims from talking about sexual violence because of social ostracism and reprisals constituted significant challenges for victims to testify about their experience.

As this chapter unfolds, I grapple with an emerging question: To whom, exactly, was justice served? This question became excruciatingly hard to answer in the context of *gacaca*, for it was both a restorative and retributive mechanism that possessed both a public, communal nature in general and a private setting for victims of rape and sexual violence in particular. First, *gacaca* was a restorative justice and social institution because it allowed the victims in general to *choose* to come forward and tell their stories in front of their neighbors and communities. While the law required all citizens to participate in *gacaca*, the decision to actually tell their story was ultimately the choice of survivors. This designated choice gave the victim a sort of agency that is often lacking in criminal justice mechanisms. In traditional retributive justice settings, victims often testify because they are called in by the justice system whenever necessary but not generally out of their own choosing. The basic assumption underlying this choice was that the victims should be able to comfortably testify, and that such testimonies were welcomed and necessary for a historical record of truth. However, victims often saw this choice differently. While many women wanted to “shout it from the rooftops,” others did not want to participate

⁴⁸³ William A. Schabas, "Justice, democracy, and impunity in post-genocide Rwanda: Searching for solutions to impossible problems," *Criminal Law Forum* 7 (3) (1998): 533

because of the fear, shame, and stigma associated with victims of rape and sexual violence.⁴⁸⁴ The conception of justice thus varied significantly amongst the victims, whereas such conception was rather monolithic when the government reestablished *gacaca*. The fact that information obtained within in camera trials could be leaked to the public also worsened this tremendous fear for these victims. In addition, post-genocide Rwanda was a society in which living together was not a personal choice but a simply necessity and reality of life.⁴⁸⁵ The fact that *gacaca* was implemented nationwide only in 2005 – more than ten years after the genocide – meant that this cohabitation had become the norm, and the initial mutual fear amongst neighbors had diminished progressively with the passing of time.⁴⁸⁶ In this context, *gacaca* could be arguably seen as “too little too late,” as many victims had already learned to go on with their lives. Reconciliation and reintegration often come together, and in this case, forced reintegration out of sheer necessity may have in fact contributed to a sense of forced reconciliation as well, especially to the victims who decidedly did not want to remember their experiences.

Another institutional tension within *gacaca* lay in the nature of the modern system that was implemented following the genocide. While traditional *gacaca* was a purely restorative justice mechanism that operated privately with the concerned parties in order to ease social tension, modern *gacaca* was an institutionalized, state-mandated, and public affair with new retributive functions. This modification of *gacaca* came from the fact that the Rwandan government was more concerned with speeding up the criminal justice process within the national courts rather than using *gacaca* in its original and popular form. Modern *gacaca* can thus be seen as an “invented tradition” with a new prosecutorial logic that functioned according

⁴⁸⁴ Amick 71

⁴⁸⁵ Ingelaere 513, 514

⁴⁸⁶ Ibid

to typical Western trial proceedings.⁴⁸⁷ This modification undermined the restorative justice nature of traditional *gacaca*. Victims were under social burdens to not testify because of potential reprisals by the perpetrators' family, and perpetrators were less likely to confess because of the potential punishment as analyzed above. As a result, while the discovery of truth was one of *gacaca*'s main objectives, such discovery was heavily weakened by the prosecutorial functions of modern *gacaca*.⁴⁸⁸ In addition, since *gacaca* was mandated and supervised by the government, the Tutsi-dominated RPF, the truth emerging from *gacaca* was thus state-mandated and notoriously ignored crimes committed by the RPF itself during the civil war. This partial record of truth thus bore the appearance of the "victors' truth," which seriously undermined the process of reconciliation for Hutu victims of the genocide. Many Rwandans argued that the absence of any trials for war crimes committed by RPF soldiers challenged *gacaca*'s contribution to establishing the truth about the conflict.⁴⁸⁹ Modern *gacaca* therefore had to grapple with the classic transitional justice tension between truth and justice, which it had decidedly sided with the latter at the expense of the former in various cases, even though not much justice was actually served.

With regards to cases of rape and sexual violence, another tension lay in the fact that while it was a public process, victims of rape and sexual violence had the ability to testify in private. This ability came from the 2004 and 2008 *Gacaca* Laws that aimed to protect victims from re-traumatization. To some, these protection measures did make *gacaca* a more accommodating environment for them to come forward. However, these measures also simultaneously took away the ability for some women who wanted to tell their community about

⁴⁸⁷ Ibid 517

⁴⁸⁸ Ibid

⁴⁸⁹ Nicola Palmer, *Courts in Conflict: Interpreting the Layers of Justice in Post-genocide Rwanda* (Oxford University Press, 2015), 174

their experience in the form of a public testimony. If *gacaca*'s main strength was its existence as a type of truth commission, the insistence on in camera trials took the discussion of sexual violence during the genocide out of the public narrative and such discussion was not interwoven into the community narrative and the emerging common morality.⁴⁹⁰ In a similar light, Human Rights Watch argues that since *gacaca* derived its legitimacy from popular participation, hearing sexual violence cases behind closed door undercut the very rationale of using this local court and thus was not compatible with the nature of *gacaca*.⁴⁹¹ To decide whether the insistence on in camera trials was good or bad is almost impossible. Some victims preferred the closed, protected setting, while others wanted the entire community to know about what was done to them. The fact that victims have different conceptions of justice and reconciliation therefore makes it extremely difficult to determine whether a community-based justice system like *gacaca* was successful.

In conclusion, similar to any transitional justice mechanisms, the national courts, *gacaca*, and domestic reparation programs possessed both strengths and weaknesses in bringing comprehensive justice for victims of rape and sexual violence. These mechanisms faced various institutional challenges, over many of which they had no control, such as cultural and social norms that are deeply patriarchal. Within these mechanisms, *gacaca* deserved particular attention for its pioneering method of using a local justice mechanism during transitional justice processes. *Gacaca* was, without a doubt, not a perfect mechanism, as it was forced to grapple with significant tensions that resulted from the modification in 2001. Reports from Rwanda nevertheless send positive signals about its contribution to reconciliation. The NURC's 2015 survey on reconciliation states that on average, 92.5% of Rwandans who participated in the study

⁴⁹⁰ Amick 92

⁴⁹¹ Human Rights Watch, *Justice Compromised*, 112

felt affirmed that they were somewhat able to reconcile with the past.⁴⁹² In addition, the final *gacaca* report concludes that 87.3% of the participants in a study carried by the Centre for Conflict Management of the National University of Rwanda believed that *gacaca* did contribute to the objective of national unity and reconciliation.⁴⁹³ Given the various shortcomings analyzed above, it is rather hard to assume that victims of rape and sexual violence were actually that successful at achieving reconciliation facilitated by domestic mechanisms.

⁴⁹² National Unity and Reconciliation Commission, *Rwanda Reconciliation Barometer* (Kigali, 2015), xiv

⁴⁹³ SNJG, Part III, Chapter III, Section 4

5. LOOKING BACK, MOVING FORWARD

LESSONS LEARNED FROM RWANDA

In the aftermath of the Rwandan genocide, nothing seemed possible. Domestically, Rwanda was confronted with the seemingly insurmountable tasks of rebuilding every aspect of its social, political, and economic fabric, while simultaneously bringing perpetrators of the genocide to justice and moving the country towards reconciliation. By 1999, Rwandan prisons were filled with approximately 120,000 genocide suspects, and thousands of criminal proceedings were seemingly beyond the political and economic capacities of this post-conflict society. Internationally, the international community, despite possessing sufficient and early evidence that a genocide took place, bore the responsibility of failing to intervene to stop it. The United Nations Security Council – the most powerful international organization to date – was tasked with reasserting its legitimacy as an international authority that aims to protect world peace and global security. Within the multitude of challenges confronting post-genocide Rwanda, this thesis is primarily concerned with the attempts to reckon with the legacy of widespread, genocidal rape and sexual violence during the genocide. This thesis starts out with a simple question: Could there ever be justice for Rwandan victims of rape and sexual violence, and what would such justice look like?

As this thesis demonstrates, there were no easy answers to such a question. The length to which both Rwanda and the international community have gone to seek truth, justice, and reconciliation was inspiring and aspirational. Both international and domestic transitional justice mechanisms attempted to bring comprehensive justice to survivors of rape and sexual violence in

various ways. The extent to which these mechanisms were successful is, however, difficult to quantify. The thesis shies away from the notion of “success,” since defining and operating success is almost an impossible task. The thesis therefore focuses on analyzing the strengths and weaknesses of domestic and international mechanisms in bringing comprehensive justice to victims of rape and sexual violence, rather than focusing on determining which mechanism was more successful. This chapter concludes the thesis, summarizes major research findings, and offers some recommendations for future research and transitional justice projects.

RESEARCH FINDINGS

The first question this thesis asks is, “given the personal nature of rape and gender-based violence, and the social stigma surrounding victims of such crimes, what were the strengths and weaknesses of local and international transitional justice mechanisms in delivering different elements of restorative and retributive justice for victims of rape and gender-based violence?” As shown in Chapter 3 and 4, no transitional justice mechanisms were perfect; each possessed different strengths and weaknesses. All mechanisms were able to bring some measure of justice to some victims while simultaneously failing to bring justice to many others. While a blanket statement of how one mechanism was more successful than the other would surely be more satisfying, reality was rather much more nuanced.

Achievements and Shortcomings of Retributive Justice

The fact that the ICTR was established within a short timeframe of discussions at the UNSC immediately after the genocide was already in and of itself an important milestone in the realm of international law. The ICTR convicted 14 high-level individuals for sexual violence crimes as elements of genocide, crimes against humanity, and war crimes. Despite the lack of data on universal jurisdiction trials in other states, it was evident that a few individuals were also

convicted of sexual violence. The Belgian court convicted Ephrem Nkezabera of rape as a war crime, and the Canadian court convicted Desiré Munyaneza of rape as both a war crime and a crime against humanity. The Nkezabera case stood out as the first instance in Belgian judicial history when rape was convicted as a war crime.⁴⁹⁴

Within Rwanda, both the national courts and the *gacaca* courts were able to hear at most 9,000 cases of rape and sexual violence. While the data on how many perpetrators were actually convicted of sexual crimes is not currently available, this number is presumably equally small, if not smaller. As the UN estimated that between 250,000 and 500,000 individuals were rape and sexually assaulted during the Rwandan genocide, the fact that transitional justice mechanisms were not able to bring more perpetrators to justice is indeed frustrating. However, in a post-genocide context where the justice system was devastated, the fact that these mechanisms were at least able to bring some perpetrators justice is undoubtedly better than no justice at all. Moreover, undergoing the complex practice of investigating the darkest period of Rwanda's history is already an accomplishment unto itself.

Additionally, the prosecution of rape and sexual violence in all retributive mechanisms also served as an unequivocal acknowledgment of the responsibility to try these crimes. While sexual crimes in armed conflicts have been historically regarded as opportunistic attacks, spoilers of war, and results of “a few bad apples,”⁴⁹⁵ widespread rape and sexual violence during the genocide proved that these crimes were not only systematic but also perpetrated with an intention to destroy the enemy. These crimes therefore had to be considered and prosecuted as elements of genocide, crimes against humanity, and war crimes, and transitional justice mechanisms for Rwanda somewhat succeeded in doing so. Within Rwanda, rape and sexual violence were

⁴⁹⁴ Gahima 198

⁴⁹⁵ Alam 36

category one crimes at the national courts and *gacaca* – the most serious category of crimes whose perpetrators were subjected to life imprisonment and execution.⁴⁹⁶ Additionally, international mechanisms were particularly successful in developing new international jurisprudential norms. The ICTR affirmed that crimes of a sexual nature were international crimes that had to be prosecuted under international law, and offered progressive definitions of rape and sexual violence. The Tribunal was also able to attach criminality to the masterminds of the genocide, many of whom did not personally rape but oversaw the perpetration of sexual crimes, by using the Joint Criminal Enterprise theory. The ICTR also offered lessons on prosecuting sexual violence by publishing the *Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda*.

In the repertoire of transitional justice mechanisms for Rwanda, the ICTR stood out for its contribution to international law. While the ICTR was an *ad hoc* tribunal, its successor, the ICC, is a permanent court; lessons from the ICTR could provide guidance for future cases at the ICC. As a result, additional cases of rape and sexual violence have been prosecuted at the ICC, and this permanent tribunal has been investigating and prosecuting sexual crimes committed in Uganda, Darfur, the Democratic Republic of Congo, and the Central African Republic.⁴⁹⁷ More importantly, the international jurisprudential norms created by the ICTR and those by the ICTY and ICC all affirm that prosecuting sexual violence, at least rape and sexual torture, has risen to the level of *jus cogens*.⁴⁹⁸ In other words, the prosecution of rape and sexual violence as international crimes is now a judicial norm so fundamental to the peace and security of the

⁴⁹⁶ The Rwandan government abolished the death penalty in 2007, which was prior to the transfer of category one crimes from the national courts to *gacaca*.

⁴⁹⁷ De Brouwer and Ka Hon Chu 164

⁴⁹⁸ Askin, “Prosecuting wartime rape and other gender-related crimes under international law,” 349

international community that it binds states even if they have not given formal consent.⁴⁹⁹ This development confirms the hypothesis that international mechanisms, especially the ICTR, had the potential to push for more positive changes in international law concerning victims of rape and gender-based violence. In other words, creating international jurisprudence on prosecuting sexual crimes under international law is the international mechanisms' biggest contribution.

Despite these contributions to retributive justice, domestic and international mechanisms also faced several shortcomings. One of this thesis's hypotheses is that the physical distance of the ICTR in Arusha, Tanzania, the language barrier between the victims and the court, and the public nature of an international tribunal would create an inhospitable environment for victims to come forward. As Chapter 3 demonstrates, this hypothesis is only partially true. The language barrier was undoubtedly a challenge for many victims. However, many victims nevertheless still came forward to talk about their experience of sexual violence, even when they were not asked to, such as in *Akayesu*. The public nature was therefore not the problem for many. It was the way some judges presided over sexual violence cases and did not pay due attention to the emotional position that many survivors were in when they were testifying, and the insensitive, overwhelming questioning and cross-examination of the defense counsel that made the environment inhospitable.

In addition, as shown in Chapter 3, various other factors not listed in the hypothesis did impact the ICTR's shortcomings. The Tribunal did not have a clear and comprehensive prosecution strategy regarding sexual crimes, although early human rights reports that came out after the genocide all showcased that sexual violence was widespread and genocidal during the conflict. As a result, sexual crimes were rarely included as a central element of investigation and prosecution. Moreover, prosecuting sexual crimes depended heavily on the Prosecutor's

⁴⁹⁹ Von Glahn and Taulbee 59

willingness to do so, which was inconsistent amongst the four individuals who had served in this role at the ICTR. Many cases were moved through trials without rape charges although the Office of the Prosecutor (OTP) possessed strong evidence, often because these charges were considered irrelevant while the OTP needed to speed up the justice process. In addition, while Trial Chamber I offered progressive definitions of rape and sexual violence that allowed judges to infer non-consent from the coercive background of the attack, such as genocide in the case of Rwanda, without requiring evidence of the perpetrator's force, threat of force, or the victim's resistance, other Chambers were not quite successful in consistently using these definitions.

Similarly, domestic retributive justice mechanisms – the national court and *gacaca* – also faced several shortcomings. Chapter 4 confirms the hypothesis that the devastated judicial system in post-genocide Rwanda rendered the national courts ineffective and insufficient in prosecuting rape and sexual violence. It was not until *gacaca* was implemented as a concurrent justice mechanism, which first classified perpetrators into different categories and moved category one cases, including rape and sexual torture to the national courts, that this domestic mechanism was able to hear and prosecute more cases. Chapter 4, however, confirms that the hypothesis that the communal nature and cultural legitimacy of *gacaca* created a less hostile environment for victims to come forward was only partially correct. For some victims who wanted to tell their stories to their communities and see their perpetrators being brought justice, *gacaca* offered them the opportunity to fulfill this desire. However, to many other survivors, the social stigma surrounding victims of sexual violence, fear of reprisals by community members and the perpetrators' families, lack of trust in judges who had close ties with the community, and fear of not being able to marry and/or being isolated by their communities prevented them from testifying at *gacaca*. The proximity of *gacaca* thus proved to be a double-edged sword: it

facilitated the process of justice and reconciliation for some while maximizing the fears for others.

Achievements and Shortcomings of Restorative Justice

This thesis divides restorative justice into two components: economic justice through reparations, and reconciliation. Reconciliation is further divided into six subcomponents: 1) understanding the past, present, and envisioning the future of Rwanda, 2) citizenship and identity, 3) political culture, 4) security, 5) justice, and 6) social cohesion.

On the one hand, as international retributive justice mechanisms, the ICTR and universal jurisdiction trials did not pay due attention to reparations. While there was a short service program at the ICTR to distribute monetary and medical support to Rwandan victims through five Rwandan organizations in 2000-2001, this program concluded shortly and was largely symbolic. Similarly, the Belgian court was able to provide some reparations to a few victims, which was also a symbolic effort rather than a comprehensive one. The Rome Statute of the ICC did address these shortcomings by allowing victims to request reparation.⁵⁰⁰ For instance, Article 79 of the Rome Statute provides that a "Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims."⁵⁰¹

On the other hand, national mechanisms were more successful in providing reparations for victims. While there were several proposals for different reparation programs, the assistance FARG (*Fonds d'Assistance aux Rescapés du Génocide* – Assistance Fund for Genocide Survivor) fund was the only one that was actually implemented and is still currently operating. FARG, however, focused on providing reparations for the neediest *rescapés* after the genocide,

⁵⁰⁰ De Brouwer and Ka Hon Chu 164

⁵⁰¹ Oosterveld 131

and was thus oriented towards helping Rwandan widows rather than victims of rape and sexual violence specifically. While there was undoubtedly some overlap between the two categories, many rape survivors were not categorized as beneficiaries of FARG. Local authorities often interpreted the definition of “*rescapés*” in an *ad hoc* manner, which included victims of sexual violence as *rescapés* in some cases while neglecting other victims in other situations. While there was a systemic effort to provide service packages to widows, especially in terms of housing, FARG has faced several challenges, such as the perpetual lack of funding, which has deprived a large number of sexual violence survivors of reparations.

With regards to non-economic reconciliation, the ICTR, universal jurisdiction trials, the national courts, and *gacaca*, as retributive justice mechanisms, all contributed partially to the security and justice components by removing a handful of perpetrators from their communities, putting them within the confines of the justice system, and convicting them for crimes of rape and sexual violence. In addition, retributive justice mechanisms also served as truth-uncovering platforms. Through the convictions of perpetrators and individual articulations of survivors about what they witnessed and experienced, these mechanisms were able to contribute to the creation of a partial historical record of truth about what happened during the genocide, and thus helped facilitate an understanding of the past. This historical record is part of a collective memory about the genocide, and is now presented in trials’ transcripts, in the ICTR’s *Best Practices Manual*, and in the National Service of Gacaca Courts’ *Gacaca Courts in Rwanda*.

Truth from these retributive mechanisms was, however, extremely partial and incomplete. As Bert Ingelaere argues, truth emerging from criminal tribunal was at best “forensic truth,” which entailed answers to basic questions of who, where, when, how, and against whom,

and the context, causes, and pattern of violations.⁵⁰² Other aspects of truth – narrative, social, and restorative – were hardly achieved. Another way of thinking about different types of truth is the distinction between “knowledge” and “acknowledgment.” While knowledge is akin to forensic truth and contributes to an understanding of the past, acknowledgment – such as narrative, social, and restorative truth – contributes more directly to the personal healing of victims.⁵⁰³ In addition, all mechanisms were insufficient in uncovering truth about crimes against Hutu and male victims. This lack of truth and justice thus constituted a major impediment to reconciliation for these victims. Moreover, the fact that no mechanisms were successful at prosecuting and uncovering truth about crimes committed by the RPF is detrimental to national reconciliation. The Rwandan genocide was one against Tutsis and politically moderate Hutus, which was partly the result of long-lasting ethnic tensions between the two ethnic groups that could be traced back until the colonial period. The fact that all justice mechanisms created jurisprudence that appeared to be “victors’ justice,” in which crimes by the RPF remained hidden and unprosecuted, can undermine the efforts of reconciliation between the two ethnic groups. While Rwanda banned ethnicity as a criterion of social classification in 2004, the extent to which such law could overcome the shortcomings of this partial truth and justice requires more empirical research.

Beside these contributions, how national and international mechanisms contributed to other aspects of reconciliation varied extensively. As international mechanisms located outside of Rwanda, both the ICTR and universal jurisdiction trials had almost no power and impact over components of reconciliation such as citizenship & identity and political culture. This impotence is demonstrated in the statement by one of the staffers at the ICTR who was interviewed by Nicola Palmer:

⁵⁰² Ingelaere 516

⁵⁰³ Borer, “Truth Telling as a Peace-Building Activity,” 22

This is not just for Rwanda... nor is it our way to fix the Rwandan judiciary. The ICTR does not exist to please the Rwandan community. If the issue had been about strengthening the Rwandan judiciary then the trials should have happened in Rwanda, there could have been assistance through foreign staff and there would be an application of Rwandan law.⁵⁰⁴

While creating legal precedents remains as international mechanisms' most significant contribution, the extent to which such contribution has translated into concrete impacts on Rwandan society and judiciary was rather limited. In addition, as demonstrated in Chapter 3, while reconciliation was one of the ICTR's objectives listed in its mandate, the ICTR showed insufficient attention to this component of restorative justice. In order for retributive justice to contribute to reconciliation, victims must know about the judgments against their perpetrators and the affirmation of the wrongness of the acts committed against them. The ICTR throughout its operation, however, was systematically inadequate in its effort to follow up with Rwandan society, leaving many victims who testified with the feeling of having been used. This lack of attention could be attributed to the fact the ICTR was one of the first international tribunals of its kind and had little in the way of a precedential framework to follow.

In contrast, domestic mechanisms, especially *gacaca*, had more potential to contribute to these components. For instance, while women were often not permitted to speak in traditional *gacaca*, modern *gacaca* included women in every aspect of its process: as judges, as members of the general assembly, and as victims and perpetrators. In addition, as shown in Chapter 4, the Rwandan government also implemented several laws that aimed to advance the status of women within Rwandan society, which could positively contribute to both the citizenship and identity and the political culture components. The fact that the Rwandan parliament currently has the highest level of women's representation in the world shows potential for improvement of women's social status in the future. This acknowledgment does not deny that the aforementioned

⁵⁰⁴ Palmer 78

social stigmas surrounding victims of rape and sexual violence still exist, but rather affirms an optimistic belief that Rwandan women's social status can be improved over time. Based on these observations, it is therefore arguable that international mechanisms paid more attention to violations of first-generation rights, especially bodily-integrity rights, while national mechanisms were more balanced in their approach to both first-generation rights (women's representation in government) and second-generation rights (economic assistance through reparations).

Finally, the social cohesion component of reconciliation has not been analyzed extensively thus far. The National Unity and Reconciliation Commission of Rwanda defined social cohesion as a combination of trust, tolerance, solidarity, conviviality, and friendship among Rwandan citizens.⁵⁰⁵ Bert Ingelaere's research shows that many Rwandans did manage to cohabitate alongside one another.⁵⁰⁶ This cohabitation was common in rural areas, since neighbors depended on each other in their daily activities and their fight for survival; tensions and conflicts were thus often kept in the dark. Since the Rwandan genocide had a high rate of civilian participation, it was often the norm that survivors and perpetrators came from the same community. Cohabitation, in many ways, was not a direct result of transitional justice, but rather borne out of sheer necessity and the reality of life.⁵⁰⁷ How cohabitation could amount to social cohesion is, however, open to interpretation and further research. "Social cohesion" – the most difficult aspect of reconciliation to both achieve and quantify – requires extensive empirical research that this thesis does not have the resource to implement. This thesis is the product of one year of research, most of which was qualitative and heavily focused on current secondary literature. Because of this limitation, this thesis hopes to stay away from the phenomenon of

⁵⁰⁵ National Unity and Reconciliation Commission of Rwanda, *Rwanda Reconciliation Barometer*, xiv

⁵⁰⁶ Ingelaere 514

⁵⁰⁷ Ibid

“aspiration without empiricism,” in which scholars present aspirational claims about the impact of transitional justice without having empirical evidence to substantiate them.⁵⁰⁸

As Chapters 3 and 4 both demonstrate, patriarchal norms embedded within Rwandan society constituted an independent factor that inhibited the justice and reconciliation process at both international and national mechanisms. These norms include, but are not limited to, social ostracism and rejection of victims of rape and sexual violence, the tendency to not believe or constantly question rape victims, the fear of being unable to marry once it was revealed that they were raped, and the fact that life sustenance depended heavily on marriage. Despite several measures of protection developed at the ICTR and *gacaca*, many victims still refused to come forward because of these well-founded fears. As an international mechanism located in a different country, the ICTR certainly had no control over, or the power to change, these norms. In addition, while *gacaca* was a local mechanism popular with the Rwandan population, it was only implemented nationwide in 2005 and ended in 2012. This relatively short time period gave *gacaca* insufficient power to fundamentally alter patriarchal norms deeply embedded within society. Patriarchal norms surrounding women can only be changed incrementally and organically through education, government policy, and local initiatives. It is rather unrealistic to think that transitional justice mechanisms – which were *ad hoc* and short-term in their nature – actually had the power to change these norms.

Internally Incompatible Goals

One of the principal research questions of this thesis is whether the objectives of local and international transitional justice mechanisms conflicted with each other, and if so, how such discrepancies could affect the outcomes of transitional justice for victims of rape and sexual

⁵⁰⁸ Borer, “Truth Telling as a Peace-Building Activity,” 26

violence? As this thesis has shown, it was hardly the case that these different mechanisms had conflicting goals, but rather that there were incompatible goals within each mechanism itself.

The ICTR was primarily concerned with punishing high-level perpetrators, contributing to reconciliation, and restoring and maintaining peace. Locating the ICTR in Arusha, Tanzania was primarily based on a good intention of avoiding “victor’s justice,” since the UNSC was determined to prosecute crimes committed by the RPF as well. The physical distance of the ICTR, however, unfortunately took away from the ICTR the power to directly influence deterrence justice, the rule of law, and reconciliation within Rwanda itself. The fact that ICTR failed to investigate and prosecute crimes committed by the RPF counteracted the very decision to locate the Tribunal in a foreign country. In addition, while the ICTR was able to foster legal precedents in prosecuting rape and sexual violence as serious violations of international law, the Tribunal hardly implemented any public outreach efforts. The fact that most Rwandans did not know about the ICTR’s judgments significantly undermined the impact that the Tribunal could have on the victims’ process of reconciliation. Furthermore, Nicola Palmer’s field research shows that most legal personnel and staffers within the ICTR identified the development of an international case law as the Tribunal’s central contribution.⁵⁰⁹ This belief was understandable, because the ICTR was a judicial institution through which the UNSC attempted to re-establish the authority of the international community for its failure to protect civilians during the genocide.⁵¹⁰ This authority first started with the condemnation of gross human rights violations at the ICTR. While it is difficult to argue that the ICTR was more attuned to recreating the international rule of law rather than helping Rwandan victims reconcile, the fact that the Tribunal

⁵⁰⁹ Palmer 158

⁵¹⁰ Ibid

paid insufficient attention to restorative justice, especially by its lack of reparations for and communications with those who testified, was indeed frustrating to many victims.

In Rwanda, the national courts and *gacaca* were primarily concerned with holding perpetrators accountable. It is crucial to acknowledge that no judicial system has the power to render justice for a mass atrocity on the scale of the Rwandan genocide, especially given the high rate of civilian participation. The RPF-dominated government was nevertheless committed to the pursuit of mass justice. While discussing potential transitional justice mechanisms in the immediate aftermath of the genocide, the Rwandan government never seriously considered a truth commission, since both policy makers and genocide survivors considered a truth commission to be “a grossly inadequate response to the horror of the genocide.”⁵¹¹ The national courts were the Rwandan government’s first choice, and the pursuit of justice and accountability, sometimes at the expense of truth, became the dominant objective of transitional justice within Rwanda itself. Lars Waldorf argues that RPF’s insistence on mass and often arbitrary arrests and extensive criminal prosecutions only worsened the terrible situation immediately after the genocide; such insistence “saddled a devastated justice sector with the impossible task of trying some 120,000 Hutu suspects and it fostered a culture of denunciation, both of which have undermined efforts to establish the rule of law.”⁵¹² As Chapter 4 shows, this national courts system was unfortunately extremely inadequate. Rwanda never had an independent and impartial system of administration of justice prior to the genocide and this already imperfect justice system was further destroyed as a direct result of the genocide, making it impossible to fulfill the pursuit of mass justice.

⁵¹¹ Gahima 65

⁵¹² Waldorf 85

Since the national courts soon proved to be insufficient, the pursuit of justice subsequently became the main goal of *gacaca*. The modification of *gacaca* from its private, communal, restorative, and *ad hoc* form into a public, state-mandated, and mandatory affair, however, created various tensions within *gacaca*. While traditional *gacaca* drew its legitimacy and popularity from its private and restorative nature, in which concerned parties could resolve familial and intra-familial conflicts among themselves, this nature was completely lost when modern *gacaca* was introduced and implemented as a quasi-judicial mechanism. It is arguable that offences such as genocide and crimes against humanity, especially rape and sexual violence, were too serious to be tried in *gacaca* since, “historically, it was not competent to handle serious crimes.”⁵¹³ In addition, while the national courts only considered truth a byproduct of justice, among *gacaca*’s various objectives were both holding perpetrators accountable and uncovering truth about what happened during the genocide. Pursuing both truth and justice about sexual violence was, however, impossible in *gacaca*. The classification of rape and sexual torture as category one crimes at both the national court and *gacaca* was intentionally aimed at giving perpetrators of the most serious crimes maximum punishment, which included the death penalty until 2007. Such classification, while necessary for retributive justice, undermined the pursuit of truth. Perpetrators had less incentive to confess their sexual crimes because of fear of life imprisonment or execution, and victims were also less willing to come forward and testify for a well-founded fear of reprisals from the perpetrators’ families. While truth and justice are often inseparable goals in the field of transitional justice, national courts and *gacaca* decidedly focused on the pursuit of justice at the expense of truth, despite the fact that not much justice was delivered either.

⁵¹³ Waldorf 85

LARGER TRANSITIONAL JUSTICE LESSONS

In this thesis, I investigate transitional justice in post-genocide Rwanda because prior to 1994, the combination of both domestic and international mechanisms was without many precedents. As countries emerging from social conflicts attempt to reckon with legacies of gross violations of human rights, both achievements and shortcomings of transitional justice in Rwanda can provide helpful lessons for future transitional justice projects. As this thesis demonstrates, social stigmas surrounding victims of rape and sexual violence constitute an independent variable that impedes the justice process, and these stigmas are almost universal across the world. Lessons from Rwanda teach us that first, in order for transitional justice to be effective for victims of sexual violence, these stigmas must be taken into account at the very formation stage. Second, a clear prosecution strategy that includes sexual violence as a central element of investigation is of crucial importance. Third, different protection measures must be implemented to help maintain victims' privacy and security if they decide to come forward and testify. Finally, different transitional justice mechanisms must be attuned to the needs of these victims, including both justice and reparations, as they attempt to reconcile with the past. To elaborate on the lessons learned from Rwanda, this section provides some preliminary suggestions for future transitional justice projects.

War is Gendered; So is Peace⁵¹⁴

There is an increasing recognition within academia and the field of law that gender is an independent variable that impacts how men and women experience war and peace differently. This thesis is yet another affirmation of this acknowledgment. The premise of this thesis lies in the belief that since victims of rape and sexual violence had unique and gendered experiences during the genocide, the way in which transitional justice impacted these victims was

⁵¹⁴ Borer, "Gendered War and Gendered Peace," 1170

undoubtedly gendered as well. As this thesis has shown, the fact that many transitional justice mechanisms in post-genocide Rwanda did not look at peace-building and transitional justice through a gendered lens resulted in many missed opportunities to bring justice to survivors of sexual violence. Without a gendered lens, the conception of truth, justice, and reconciliation will be inevitably incomplete. Future transitional justice projects must therefore take sexual violence into account at the formation stage of justice mechanisms. Opportunities should be created and supported for women to take up more leadership roles so that they can have more influence on the construction of these mechanisms. With regards to retributive justice, having women as judges and investigators is very important; victims of rape and sexual violence, especially women, are more likely to feel comfortable talking about their experience to women than to men. It is hard to imagine the successful outcomes of *Akayesu* had it not been for the constant push for more truth about sexual violence by the only female judge at that time – Judge Navi Pillay.

Victims' Conceptions of Justice and Reconciliation Vary

The core objectives of all transitional justice projects are holding perpetrators accountable and helping victims reconcile with the past. Victims, especially survivors of rape and sexual violence, often have different conceptions of justice and reconciliation. In the case of *gacaca*, while many victims wanted to tell their communities of their experiences and hear an acknowledgment of the wrongness of the acts committed against them, many already learned to live with the past and did not want to relive those memories at all. In contrast, Nicola Palmer's coding of interview materials in Rwanda showed a popular understanding that Rwandans wanted a full record of truth about the genocide and the civil war, even more than justice and accountability.⁵¹⁵ Moreover, while many wanted to see truth and justice, many preferred reparations programs that could help alleviate the daily struggles of life sustenance. This lack of

⁵¹⁵ Palmer 166

uniformity in the perception and desired outcome of transitional justice unfortunately suggests that to many victims of rape and sexual violence, a full notion of justice is simply not possible. It is crucial for future transitional justice projects to be more attuned to what victims envision as justice and reconciliation so that such projects can be best oriented towards the needs of the victims.

While it was unfortunate that the FARG program has not been able to provide sufficient reparations to all victims of the genocide, particularly survivors of sexual violence, it is even more disheartening to know that the government diverted resources away from these survivors towards criminal prosecution. Instead of focusing on funding reparation programs, the government and international donors spent millions of dollars incarcerating and occasionally trying genocide suspects.⁵¹⁶ While criminal prosecution was important, reparations and economic justice were equally, if not more, important as well. The fact the Rwandan was too focused on mass justice while neglecting the needs of millions of victims who had to build their lives from the ground up was yet another missed opportunity to orient justice towards the needs of the survivors.

Social Context Matters

As this thesis has demonstrated, social stigmas surrounding rape and sexual violence were an independent factor that impeded the justice and reconciliation process for victims of these crimes. This factor also once again confirms that transitional justice must be multifaceted; bringing justice for victims of sexual violence must be equated with improving their socioeconomic status within society as well. Moreover, social stigmas are deeply embedded not only within Rwandan society, but also across the world. While the Rwandan government noticed how social stigmas impacted the justice process at the national courts and *gacaca*, and

⁵¹⁶ Waldorf 85

subsequently implemented several procedural changes throughout the years to ensure a more hospitable environment for victims to come forward, the ICTR did not pay adequate attention to these norms. The Tribunal thus faced a common shortcoming of international justice mechanisms attempting to solve the legacy of local crimes: they often do not have adequate understanding of the local context. Understanding the context of the conflict and the country is thus important and must be considered central to any transitional justice projects. Just as different conflicts have different characteristics, transitional justice projects must reflect this diversity as well. There is no one-size-fits-all solution to transitional justice, and each mechanism must be carefully tailored to fit the particular context to address the needs of the population.

Realistic Expectation for Transitional Justice

As countries attempt to reckon with the legacy of social conflicts and gross violations of human rights through transitional justice, they often have high expectation for the outcomes of these processes. In Rwanda, however, it is hard to imagine that any justice mechanisms could have had the potential to reconcile a country that was almost completely devastated by the fastest and most effective genocide the world has witnessed since the Holocaust. As the historical context section of Chapter 1 shows, prior to the genocide, Rwanda already had a history of ethnic tension, human rights violations, and a culture of impunity. Indeed, while the Rwandan government aspired to establish the rule of law and a culture of human rights through its transitional justice processes, it is unimaginable that such goals were attainable in the aftermath of genocide. Future transitional justice projects therefore should have realistic goals and expectations. These goals, more importantly, should be tailored to the need of the population in the wake of conflict. It is inevitable that any justice mechanism would have both strengths and

weaknesses; to realize these traits and to target these strengths to the specific context are tasks that must be done at the formation stage of transitional justice. In addition, it should be understood that to many victims, a full conception of justice is somewhat unattainable.

Moreover, building a culture of human rights, the rule of law, and democracy are long-term goals that transitional justice mechanisms are often unable to obtain within their relatively short operations. Moreover, societies coming out of violence are often not in a good position to undertake all transitional justice and peace-building activities. *Gacaca*, for instance, was only implemented nationwide in 2005, more than ten years after the genocide, because of planning and experimentation during the pilot phase. Commitments to successful outcomes of transitional justice must entail constant self-reflection and incremental changes to best suit the need of the population. As the literature review in Chapter 2 also points out, actual and long-term reconciliation for victims of rape and sexual violence often require a fundamental change in the gender relation between men and women, and an improvement of women's socioeconomic and political status in general. It is quite impossible, if not naïve, to believe that any transitional justice process actually has the capacity to fulfill these tasks. If the international community and the country in context genuinely want to help victims of rape and sexual violence, they must pay attention to developing laws and carrying out social programs that can first address the needs of the victims. In Rwanda, legislation like the 1999 law allowing women to become rightful owners of land and the 2003 constitutional provision requiring a high level of women's representation in every decision-making body is a good beginning.

International Support and NGO Advocacy Matter

If it takes a village to raise a child, it also takes the entire international community to make any comprehensive transitional justice project successful. In many aspects, this was the

case in Rwanda. First, the ICTR and universal jurisdiction trials were particularly important, as this thesis has demonstrated. Second, one of the main tasks confronting post-genocide Rwanda was to rebuild its economy while simultaneously funding trials and reparation programs. While the international community unfortunately diverted resources away from reparations programs, it was nevertheless able to fund the national courts and *gacaca*. Additionally, as countries emerging from conflicts engage in transitional justice in both domestic and international levels, there must be extensive communications among different mechanisms, and between these mechanisms and the population they intend to serve.

As this thesis also demonstrates, NGO advocacy is also particularly important to the success of transitional justice. International NGOs and human rights groups, such as Amnesty International, Human Rights Watch, and AVEGA, constantly advocated for more rape and sexual violence indictments at the ICTR, which resulted in the prosecution of some high-level perpetrators. Within Rwanda, national and local NGOs and human rights groups such as AVEGA and IBUKA also helped distribute reparation packages, while simultaneously providing additional services, such as trauma counseling and HIV/AIDs treatments, to survivors of rape and sexual violence when reparation programs fell short. NGOs therefore played a crucial role in every aspect of transitional justice in Rwanda, and it is imperative that future transitional justice projects consult extensively with local and international NGOs for advising, capacity building, training, and logistical assistance.

FURTHER RESEARCH

While the current literature offers a large amount of information on the successes of each transitional justice mechanism in Rwanda, few studies focus on a comparative analysis of these mechanisms. Even fewer scholars have looked at this comparison through a gendered lens. This

thesis contributes to the growing field of transitional justice by offering a systematic comparative analysis of the strengths and weaknesses of both domestic and national transitional justice mechanisms in bringing comprehensive justice for victims of rape and sexual violence during the Rwandan genocide. As the result of one year of research, this thesis undoubtedly lacks the capacity to make claims based on quantitative data. The author has actively tried to look for empirical studies to substantiate the claims made in this thesis. Given this limitation, this section aims to provide some implications for future research.

As Chapter 4 shows, while many scholars applauded *gacaca* as a pioneering local approach to transitional justice that left positive impacts on reconciliation, these aspirational claims were often not substantiated with extensive empirical evidence. Future research projects must therefore pay attention to both quantitative and qualitative research to make a nuanced evaluation of transitional justice. Without accurate statistics and empirical data, all that is left is theoretical framework, which is often not reflective of the experiences in everyday life. Since all transitional justice mechanisms in Rwanda recently ended, the ICTR in 2015 and *gacaca* in 2012, this is a crucial time to quantitatively and qualitatively evaluate the impact of transitional justice in post-genocide Rwanda.

Moreover, future research should also focus on victims of rape and sexual violence specifically. While there was some empirical research about how transitional justice process impacted Rwandan survivors, almost none of these projects paid specific attention to victims of rape and sexual violence. This thesis does recognize that approaching survivors of these crimes, inviting them to open up about the past, and asking them to participate in research projects require scholars to have a substantial amount of gender-sensitive training and a high level of cultural understanding. These tasks, while overwhelming, are not impossible; they are also

necessary. If transitional justice outcomes in Rwanda offer one lesson, it would be that victims of rape and sexual violence are sometimes more courageous and willing to talk about their experiences for the pursuit of justice more than the current literature depicts. Understanding how transitional justice impacts victims of rape and sexual violence means that future project can learn from both the achievements and shortcomings of these mechanisms as well.

CONCLUSION

In the aftermath of the Rwandan genocide, nothing seemed possible. Yet, as this thesis demonstrates, domestic and international transitional justice mechanisms were somewhat successful at making the impossible possible. Some justice was served, some truth was uncovered, and some reparations were delivered to victims. It goes without saying that partial truth and justice is better than no truth and justice at all. Moreover, a critical analysis of these mechanisms' weaknesses and failures is not, in any way, an attempt to undermine their legitimacy. Understanding the shortcomings of the past is a crucial to achieving successes in the future.

Truth, justice, and reconciliation have emerged as the principal objectives of societies emerging from violent conflict. At the heart of this thesis is the belief that in order for these complex theoretical concepts to be translated into reality, they must be seen through a gendered lens. Rape and sexual violence in armed conflicts have never been only opportunistic; they are almost always deliberate, systemic crimes committed with specific intent to destroy the enemy as well. It is imperative, as more countries engage in transitional justice, that governments and the international community broaden the concept of success of transitional justice mechanisms to include the victims of rape and sexual violence. More importantly, it is crucial to note that with the emergence from the dark chapter in Rwanda came the promise of "Never Again" – a promise

that the international community would never sit idly by and let atrocities such as the Rwandan genocide ever happen again. This, unfortunately, has not been the case. The Syrian civil war and its subsequent refugee crisis, ethnic cleansing and persecution of the Rohingya Muslims in Burma, and devastating civil wars in the Democratic Republic of Congo and the Central African Republic are the just tip of the iceberg of the ongoing mass violations of human rights that are happening every day. Transitional justice mechanisms are designed to exemplify what they aspire to create – relationships of social equality in which all parties enjoy and accord another equal dignity, respect, and concern.⁵¹⁷ A commitment to human rights and equality must start with a serious commitment to never let atrocities happen in the first place.

⁵¹⁷ Llewellyn 102

APPENDIX

OVERVIEW OF CHARGES AND CONVICTIONS REGARDING RAPE AND OTHER SEXUAL VIOLENCE CRIMES AT THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

No.	CASE	POSITION	DATE OF TRIAL JUDGMENT	DATE OF APPEAL JUDGMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
1	Akayesu, Jean-Paul	<i>Bourgmestre</i> of Taba Commune	2 September 1998	1 June 2001	Count 13: Rape as a crime against humanity Count 14: Other inhumane acts as a crime against humanity	Trial Judgment, paras. 696, 697 Confirmed on appeal, Appeal Judgment, para. 214
2	Serushago, Omar	One of the leaders of <i>Interahamwe</i> in Gisenyi Prefecture	5 February 1999 Pleaded guilty	6 April 2000 (Sentence Appeal)	Count 5: Rape as a crime against humanity in the amended Indictment of 14 October 1998	None Rape Charge dropped in guilty plea negotiations
3	Musema, Alfred	Director of Gisovu Tea Factory in Kibuye	27 January 2000	16 November 2001	Count 7: Rape as a crime against humanity under Articles	Trial Judgment, para. 967

No.	CASE	POSITION	DATE OF TRIAL JUDGMENT	DATE OF APPEAL JUDGMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
					6(1) and 6(3)	On appeal this conviction was overturned and acquittal entered on this count (see Appeal Judgment, para.194)
4	Bagilishema, Ignace	<i>Bourgmestre</i> of Mabanza Commune	7 June 2001	3 July 2002	Count 7: “outrages on personal dignity of women” resulting in serious violations of Article 3 common to the Geneva Conventions of 1949 and Additional Protocol II (“Common Article 3”)	None (Acquitted on all counts)
5	Semanza, Laurent	Former Bourgmestre of	15 May 2003	20 May 2005	Counts 7 and 9	Guilty of Count

No.	CASE	POSITION	DATE OF TRIAL JUDGMENT	DATE OF APPEAL JUDGMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
		Bicumbi Commune, MRND representative to the National Assembly			include Rape as a serious violation Common Article 3 Count 8 and 10: Rape as a crime against humanity	10: 'Rape' as a crime against humanity, Trial Judgment, para. 479 Confirmed on appeal, Appeal Judgment, paras. 289, 290
6	Niyitegeka, Eliézer	Minister of Information of Interim Government	16 May 2003	9 July 2004	Count 7: Rape as a crime against humanity Count 8: Inhumane acts, including rape as a crime against humanity Count 9: Rape as a violation of Common Article 3, violence to life health and physical or	Guilty of Count 8: crimes against humanity other inhumane acts- 'sexual violence', Trial Judgment, para. 467. Niyitegeka's appeal dismissed in its entirety.

No.	CASE	POSITION	DATE OF TRIAL JUDGMENT	DATE OF APPEAL JUDGMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
					<p>mental well being</p> <p>Count 10: Rape as a violation of common Article 3, outrages upon personal dignity</p>	
7	Kajelijeli, Juvénal	<p>Bourgmestre of Mukingo Commune from June to July 1994</p> <p>One of the leaders of <i>Interahamwe</i> in Ruhengeri</p>	1 December 2003	23 May 2005	<p>Count 7: Rape as a crime against humanity</p> <p>Count 11: Humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault as a violation of Common Article 3</p>	None
8	Barayagwiza, Jean-Bosco	<p>President of CDR</p> <p>Founder and Director of RTLM radio station</p>	3 December 2003	28 November 2007	Count 8: Outrages upon personal dignity as a serious violation of	<p>None</p> <p>Acquitted at 98 bis stage</p>

No.	CASE	POSITION	DATE OF TRIAL JUDGMENT	DATE OF APPEAL JUDGMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
					common Article 3	
9	Kamuhanda, Jean de Dieu	Minister of Higher Education in Interim Government	22 January 2004	19 September 2005	Count 6: Rape as a crime against humanity Count 8: Rape, outrage upon personal dignity as a serious violation of common Article 3	None
10	Gacumbitsi, Sylvestre	<i>Bourgmestre</i> of Rusumo Commune in Kibungo Prefecture	17 June 2004	7 July 2006	Count 5: Rape as a crime against humanity	Trial Judgment, paras. 321-333 Conviction confirmed on appeal, Appeal Judgment, paras. 99-108
11	Ndindabahizi, Emmanuel	Minister of Finance in Interim Government	15 July 2004	16 January 2007	Count 5 of the Amended Indictment of 5 October 2001(Rape as a	None

No.	CASE	POSITION	DATE OF TRIAL JUDGMENT	DATE OF APPEAL JUDGMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
					crime against humanity) but Rape count dropped in the amended indictment of 1 September 2003 (Trial Judgment, paras. 9, 13).	
12	Muhimana, Mikaeli	Conseiller of Gishyita <i>Secteur</i> , Gishyita Commune, Kibuye Prefecture	28 April 2005	21 May 2007	Count 3: Rape as a crime against humanity	Trial Judgment, paras. 552-563 Conviction confirmed on appeal (except for the rapes of Goretti Mukashyaka and Languida Kamukina, Appeal Judgment, Disposition)

No.	CASE	POSITION	DATE OF TRIAL JUDGMENT	DATE OF APPEAL JUDGMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
13	Bisengimana, Paul	Bourgmestre of Gikoro <i>Commune</i> , Kigali-Rural <i>Prefecture</i>	13 April 2006 Pleaded guilty	Not Appealed	Count 8: Rape as a crime against humanity Count 9: Serious sexual abuse as a crime against humanity Count 11: Rape as a serious violation of Common Article 3 Count 12: Causing serious violence to life as a serious violation of common Article 3	None Rape counts dropped in guilty plea negotiations
14	Mpambara, Jean	<i>Bourgmestre</i> of Rukara <i>Commune</i> in Eastern Rwanda	11 September 2006	Not Appealed	Counts 1 and 2: Rape as part of genocide	None (Acquitted on all counts)
15	Muvunyi, Tharcisse	Colonel in Rwandan Army and Commander of ESO camp in	12 September 2006 (Muvunyi 1)	29 August 2008 (Muvunyi 1)	Count 4: Rape as a crime against	None

No.	CASE	POSITION	DATE OF TRIAL JUDGMENT	DATE OF APPEAL JUDGMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
		Butare			humanity	(All convictions and the sentence were set aside and a retrial of one allegation of direct and public incitement to commit genocide was ordered)
16	Rwamakuba, André	Minister of Primary and Secondary Education in Interim Government	20 September 2006	Not Appealed	<p>(Joint amended indictment of ...November 2001)</p> <p>Count 3: Rape as a natural and foreseeable consequence of a joint criminal enterprise to commit genocide (JCE 3)</p> <p>Count 5: Rape as a crime against humanity</p>	<p>None</p> <p>Rape charges dropped in the separate amended indictment of 23 February 2005</p> <p>(Acquitted on all counts)</p>

No.	CASE	POSITION	DATE OF TRIAL JUDGMENT	DATE OF APPEAL JUDGMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
17	Nzabirinda, Joseph	Employee of Ngoma Commune as <i>Encadreur</i> of Youth	23 February 2007 Pleaded guilty	Not appealed	Counts 1 and 2: Rape as part of genocide Count 4: Rape as a crime against humanity	None Rape charges dropped in guilty plea negotiations
18	Rugambarara, Juvénal	Bourgmestre of Bicumbi Commune, Kigali-Rural Prefecture	16 November 2007 Pleaded guilty	Not appealed	Count 7: Rape as a crime against humanity Count 9: Rape, violence to life health and physical or mental well being, outrage upon personal dignity, as a serious violation of common Article 3	None Rape charges dropped in guilty plea negotiations
19	Nchamihigo, Siméon	Substitut du Procureur in Cyangugu and Interahamwe leader	12 November 2008	18 March 2010	Count 4: “genital mutilation” as part of other inhumane acts	None No evidence led on genital

No.	CASE	POSITION	DATE OF TRIAL JUDGMENT	DATE OF APPEAL JUDGMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
					as a crime against humanity.	mutilation, Trial Judgment, paras. 221, 361
20	Bikindi, Simon	Musician	2 December 2008	18 March 2010	Counts 2 and 3: Rape and sexual violence as part of genocide	None
21	Bagosora, Théoneste	Directeur de Cabinet in the Ministry of Defence	18 December 2008	14 December 2011	Count 1: Rape and other crimes of a sexual nature as part of conspiracy to commit genocide Counts 2 and 3: Rape and other crimes of a sexual nature as part of genocide Count 4: Rape and other crimes of a sexual nature as part of murder as a crime against humanity Count 6: Rape	Count 2: Trial Judgment, para. 2158, under Article 6(3) Count 4: Trial Chamber, para. 2186 Count 6: Trial Judgment, para. 2194 Count 7: Trial Judgment, para. 2203, under Article 6(3) Count 8: Trial

No.	CASE	POSITION	DATE OF TRIAL JUDGMENT	DATE OF APPEAL JUDGMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
					<p>and other crimes of a sexual nature as part of extermination as a crime against humanity</p> <p>Count 7: Rape as a crime against humanity</p> <p>Count 8: Rape and other crimes of a sexual nature as part of persecution as a crime against humanity</p> <p>Count 9: Rape and other crimes of a sexual nature as part of other inhumane acts as a crime against humanity</p>	<p>Judgment, para. 2213</p> <p>Count 9: Trial Judgment, para. 2224, under Article 6 (3)</p> <p>Count 10: Trial Judgment, para. 2245</p> <p>Count 12: Trial Judgment, para. 2254, under Article 6(3)</p> <p>Convictions for counts 2, 6, 7, 8, 10, 12 confirmed on appeal, Appeal Judgment, para. 721</p>

No.	CASE	POSITION	DATE OF TRIAL JUDGMENT	DATE OF APPEAL JUDGMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
					<p>Count 10: Killing and causing violence to health and to the physical and mental well-being as a serious violation of common Article 3</p> <p>Count 12: Outrages upon personal dignity as a serious violation of common Article 3</p>	
22	Kabiligi, Gratien	Brigadier General (G3, Chief of Operations at HQ)	18 December 2008	Not appealed	<p>Count 6: Rape as a crime against humanity</p> <p>Count 8: Other inhumane acts as a crime against humanity in connection with</p>	<p>None</p> <p>Acquitted on all counts, Trial Judgment, para. 2204</p>

No.	CASE	POSITION	DATE OF TRIAL JUDGMENT	DATE OF APPEAL JUDGMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
					<p>the sexual assault of the prime minister</p> <p>Count 10: Outrages upon personal dignity as a serious violation of common Article 3</p>	
23	Nsengiyumva, Anatole	Colonel, Chief of Operations in Gisenyi	18 December 2008	14 December 2011	<p>Count 7: Rape as a crime against humanity</p> <p>Count 9: Other inhumane acts as a crime against humanity in connection with the sexual assault of the prime minister</p> <p>Count 11: Outrages upon personal dignity</p>	None

No.	CASE	POSITION	DATE OF TRIAL JUDGMENT	DATE OF APPEAL JUDGMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
					as a serious violation of common Article 3	
24	Ntabakuze, Aloys	Major, Commander of Para-Commando Battalion	18 December 2008	8 May 2012	<p>Counts 2 and 3: Rape as part of genocide</p> <p>Count 6: Rape as a crime against humanity</p> <p>Count 8: Other inhumane acts as a crime against humanity in connection with the sexual assault of the prime minister</p> <p>Count 10: Outrages upon personal dignity as a serious violation of common Article</p>	None

No.	CASE	POSITION	DATE OF TRIAL JUDGMENT	DATE OF APPEAL JUDGMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
					3	
25	Rukundo, Emmanuel	Military Chaplain	27 February 2009	20 October 2010	Count 1: Sexual assault as part of genocide	Trial Judgment, paras 574-576 Conviction quashed on appeal, Appeal Judgment, paras. 237, 238
26	Renzaho, Tharcisse	Prefet of Kigali-Ville	14 July 2009	1 April 2011	Count 1: Acts of sexual violence as part of genocide Count 4: Rape as a crime against humanity Count 6: Rape as a serious violation of common Article 3	Count 1: Trial Judgment, para. 779, under Article 6(3) Count 4: Trial Judgment, para. 794, under Article 6(3) Count 6: Trial Judgment, para. 811, under Article 6(3) Convictions reversed on appeal for

No.	CASE	POSITION	DATE OF TRIAL JUDGMENT	DATE OF APPEAL JUDGMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
						pleading issues, Appeal Judgment, para. 129
27	Hategekimana, Ildephonse	Commander of Ngoma Camp in Butare	6 December 2010	8 May 2012	Counts 1 and 2: Rape as part of genocide Count 4: Rape as a crime against humanity.	Count 4: Trial Judgment para. 729, under Article 6(3) Confirmed on appeal, Appeal Judgment paras. 203, 204
28	Gatete, Jean Baptiste	President of MRND in Murambi Commune and leader of Interahamwe	31 March 2011	9 October 2012	Count 6: Rape as crime against humanity	None
29	Bizimungu, Augustin	Chief of Staff of Army	17 May 2011	30 June 2014	Count 6: Rape as a crime against humanity Count 8: Rape and other humiliating and degrading treatment as a violation of common Article	Convicted under Article 6(3), Trial Judgment, paras. 2127 and 2161 Conviction affirmed.

No.	CASE	POSITION	DATE OF TRIAL JUDGMENT	DATE OF APPEAL JUDGMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
					3	
30	Nzuwonemeye, François-Xavier	Commander of RECCE Battalion	17 May 2011	11 February 2014	Count 6: Rape as a crime against humanity Count 8: violation of common Article 3	None
31	Sagahutu, Innocent	Second in Command of RECCE Battalion.	17 May 2011	11 February 2014	Count 6: Rape as a crime against humanity and Count 8: violation of common Article 3	None
32	Ntahobali, Arsène Shalom	Led a group of MRND militia men	24 June 2011	14 December 2015	Count 7: Rape as a crime against humanity Count 11: Outrages upon personal dignity, rape and indecent assault	Count 7: Under Article 6(1), Trial Judgment, para. 6094 Count 11: Under Article 6(3), Trial

No.	CASE	POSITION	DATE OF TRIAL JUDGMENT	DATE OF APPEAL JUDGMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
					as serious violations of common Article 3	Judgment, para. 6185
33	Nyiramasuhuko, Pauline	Minister of Family and Women's Development and member of MRND	24 June 2011	14 December 2015	Count 7: Rape as a crime against humanity Count 11: Outrages upon personal dignity, rape and indecent assault as serious violations of common Article 3	Under Article 6(3), Trial Judgment, para. 6093 Count 11: Under Article 6(3), Trial Judgment, para. 6183 Conviction affirmed.
34	Bicamumpaka, Jérôme	Minister of Foreign Affairs	30 September 2011	Not appealed	Count 8: Rape as a crime against humanity Count 10: Outrages upon personal dignity, rape and indecent assault as serious violations of	None Acquitted at 98 bis stage (Acquitted on all counts)

No.	CASE	POSITION	DATE OF TRIAL JUDGMENT	DATE OF APPEAL JUDGMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
					common Article 3	
35	Mugiraneza, Prosper	Minister of Civil Service	30 September 2011	4 February 2013	Count 8: Rape as a crime against humanity Count 10: Outrages upon personal dignity, rape and indecent assault as serious violations of common Article 3	None Acquitted at 98 bis stage
36	Bizimungu, Casimir	Minister of Health	30 September 2011	Not appealed	Count 8: Rape as a crime against humanity Count 10: Outrages upon personal dignity, rape and indecent assault as serious violations of common Article 3	None Acquitted at 98 bis stage (Acquitted on all counts)

No.	CASE	POSITION	DATE OF TRIAL JUDGMENT	DATE OF APPEAL JUDGMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
37	Mugenzi, Justin	Minister of Trade and Commerce	30 September 2011	4 February 2013	Count 8: Rape as a crime against humanity Count 10: Outrages upon personal dignity, rape and indecent assault as serious violations of common Article 3	None Acquitted at 98 bis stage
38	Karemera, Édouard	Minister of Interior Affairs as of 25 May 1994 First Vice President of MRND	2 February 2012	29 September 2014	Count 3: Rape as a natural and foreseeable consequence of a joint criminal enterprise to commit genocide (JCE 3) Count 5: Rape as a crime against humanity	Count 3: Trial Judgment, paras. 1670 under Article 6(1), 1671 under Article 6(3) Count 5: Trial Judgment, para. 1684 under both Articles 6(1) and 6(3)

No.	CASE	POSITION	DATE OF TRIAL JUDGMENT	DATE OF APPEAL JUDGMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
39	Ngirumpatse, Matthieu	President of MRND	2 February 2012	29 September 2014	<p>Count 3: Rape as a natural and foreseeable consequence of a joint criminal enterprise to commit genocide (JCE 3)</p> <p>Count 5: Rape as a crime against humanity</p>	<p>Count 1: Trial Judgment, paras. 1670 under Article 6(1)), 1671 under Article 6(3)</p> <p>Count 5: Trial Judgment, para. 1684 under both Articles 6(1) and 6(3)</p>
40	Nzirorera, Joseph	National Secretary of MRND	Accused deceased during trial		<p>Count 3: Rape as a natural and foreseeable consequence of a joint criminal enterprise to commit genocide (JCE 3)</p> <p>Count 5: Rape as a crime against humanity</p>	None

NO.	CASE	POSITION	DATE OF TRIAL JUDGMENT	DATE OF APPEAL JUDGMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
41	Nzabonimana, Callixte	Minister of Youth and Associative Movements in the Interim Government	31 May 2012	29 September 2014	Count 7 of the initial Indictment of 21 November 2001: Rape as a crime against humanity, but charge dropped in the amended indictments of 12 November 2008 and 24 July 2009, Trial Judgment, paras. 1828, 1829; and para. 1841	None Rape count dropped
42	Nizeyimana, Ildéphonse	Captain in the Forces Armées Rwandaises ("FAR"); S2/S3, in charge of intelligence and military operations at the Ecole des Sous-Officiers (ESO) in Butare Prefecture	19 June 2012	29 September 2014	Counts 1 and 2: Acts of sexual violence as part of genocide Counts 4: Rape as a crime against humanity Count 6: Rape as	Acquitted on rape counts.

No.	CASE	POSITION	DATE OF TRIAL JUDGMENT	DATE OF APPEAL JUDGMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
					a serious violation of common Article 3	
43	Ngirabatware, Augustin	Minister of Planning in the Interim Government	20 December 2012	18 December 2014	Count 6: Rape as a crime against humanity (through JCE 3)	Trial Judgment paras. 1390-1393. Rape count was reversed.
44	Bizimana, Augustin	Minister of Defence	At Large		<p>Counts 1 and 2: Rape as part of genocide</p> <p>Count 5: Rape as a Crime against Humanity</p> <p>Count 6: Torture as a crime against humanity</p> <p>Count 7: Other inhumane acts as a crime against humanity</p>	If arrested, Accused will be tried before MICT

No.	CASE	POSITION	DATE OF TRIAL JUDGMENT	DATE OF APPEAL JUDGMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
					<p>Count 8: Persecution as a crime against humanity</p> <p>Count 10: Torture as a violation of common Article 3</p> <p>Count 11: Rape as a violation of common Article 3</p> <p>Count 12: Cruel treatment as a violation of common Article 3</p> <p>Count 13: Outrages upon personal dignity as a violation of common Article 3</p>	

No.	CASE	POSITION	DATE OF TRIAL JUDGMENT	DATE OF APPEAL JUDGMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
45	Munyagishari, Bernard	Secretary General of the MRND for the Gisenyi City, President for the Interahamwe of Gisenyi			Counts 2 and 3: Rape as part of genocide Count 5: Rape as a crime against humanity	Case transferred to Rwanda
46	Ndimbati, Aloys	Bourgestre of Gisovu commune	At Large		Counts 1 and 2: Rape as part of genocide Count 6: Rape as a crime against humanity) Count 7: Rape as part of persecution as a crime against humanity (Rape charges added in the second amended Indictment filled on 8 May 2012)	Case transferred to Rwanda
47	Ntaganzwa, Ladislav	Bourgestre of Nyakizu Commune	At Large		Counts 1 and 2: Rape as part of	Case transferred to Rwanda

No.	CASE	POSITION	DATE OF TRIAL JUDGMENT	DATE OF APPEAL JUDGMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
					<p>genocide</p> <p>Count 5: Rape as a crime against humanity</p> <p>(Rape charges added in the second amended Indictment filled on 30 March 2012)</p>	
48	Ryandikayo,	Businessman in Mubuga secteur	At Large		<p>Counts 1 and 2: Rape as part of genocide</p> <p>Count 6: Rape as a crime against humanity</p> <p>Count 7: Rape as part of persecution as a crime against humanity</p> <p>(Rape charges added in the</p>	Case transferred to Rwanda

No.	CASE	POSITION	DATE OF TRIAL JUDGMENT	DATE OF APPEAL JUDGMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
					second amended Indictment filled on 8 May 2012)	
49	Mpiranya, Protais	Commander of the Presidential Guard Battalion of the Rwandan Armed Forces (FAR) and Commander of the Presidential Guard "Camp Kimihurura"	At Large		<p>Count 5: Rape as a crime against humanity, or alternatively Rape as a natural and foreseeable consequence of a joint criminal enterprise to commit genocide (JCE 3)</p> <p>Count 7: Other inhumane acts as a crime against humanity-including acts committed on the body of the Prime Minister , or alternatively Rape as a</p>	If arrested, Accused will be tried before MICT

No.	CASE	POSITION	DATE OF TRIAL JUDGMENT	DATE OF APPEAL JUDGMENT	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
					natural and foreseeable consequence of a joint criminal enterprise to commit genocide (JCE 3)	
50	Munyarugarama, Pheneas	Lieutenant Colonel in the FAR, Commander of Gako Camp	At Large		Counts 1 and 2: Rape as part of genocide Count 7: Rape as a crime against humanity	Case transferred to Rwanda
51	Munyeshyaka, Wenceslas	Priest, Vicar of St. Famille Parish, Kigali City	Case transferred to France (Accused residing in France)		Count 2: Rape as a crime against humanity	Case transferred to France
52	Bucyibaruta, Laurent	Prefet, Gikongoro Prefecture	Case transferred to France (Accused residing in France)		Count 6: Rape as a crime against humanity	Case transferred to France

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