



**Using Women's Voices and Experiences to Interrogate the Efficacy of the
International Criminal Justice System (ICJS): The Case of the Rwanda 1994
Genocide**

By:

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**A Thesis submitted in fulfillment of the requirements for the Degree of Doctor of Philosophy
in Law
Southern and Eastern African Regional Centre for Women's Law (SEARCWL)
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July 2017

DEDICATION

This thesis is dedicated to all victims and survivors of conflict related sexual violence experienced during the 1994 Rwanda genocide.

ACKNOWLEDGEMENTS

I would like to express my gratitude first and foremost to God since this research had a spiritual impact I can never express in words.

I also salute both the victims and survivor witnesses of conflict related sexual violence, which forms the crux of this study. I thank those survivors and survivor witnesses who seized the moment to teach me what the law is all about thus helping me to explore “their lived law” as I listened to their voices and the silences portraying their trajectories. Some have since passed on – I miss them sorely and thank them all heartily for sharing the deepest pains of the 1994 Rwanda genocide. Thank you all for your strength to share about the terrible and horrific pain and stories of great endurance.

I thank friends, colleagues and leaders of different institutions from Rwanda who encouraged, mentored and supported some of the survivors who are now an inspiration to many. Additionally, I thank those Rwandan colleagues who patiently took time to explain the context to clarify some of the data collected from survivors coming from different parts of Rwanda. Mr. Jonas Mutwaza, in the ICTR Library, thank you for identifying recent articles and books for my literature review.

My supervisor, Professor Julie Stewart provided the intellectual acumen for this thesis, which in essence became the driving force for this study. Her consistency, guidance, dedication and selfless supervisions (which brought her to the small town of Arusha, Tanzania where the International Criminal Tribunal for Rwanda was then located) are a testament of her character as a great teacher and mentor. Additionally, a big thank you to the Women’s Law Centre great team who supported this study in different ways, from all the Cecillie(s) in the library, the Elizabeth(s) in the academia to the Sesedzai(s) in the Technology Section, tirelessly assisting retrieving lost documents on my computer.)

My husband, Forias provided endless support and prayers. Florence remained at the heart of this study giving tremendous support. Tadiwanaishe (Tea) monitored progress, reminding me of the possibility of missing deadlines. Irvine Munoshamisaishe, accompanied me to my first field work trip in Kibuye when he was 7 months old, connecting with some of the children of some survivors, thus assisting me to establish a rapport that became instrumental in 2009, 2010, 2013 and 2014 when I was working on this research, collecting and validating the empirical data.

DECLARATION

I, Renifa Madenga, hereby declare that this thesis submitted for the Doctorate of Philosophy degree at the University of Zimbabwe is my original work and has not been previously submitted to any other institution of higher education. All primary and secondary sources cited or quoted are indicated by means of a comprehensive list of references.

ACRONYMS/ABBREVIATIONS

ABASA – Name of an association in Rwanda for trauma counseling for survivors of sexual violence in Rwanda. Word for “we share the same fate” in Kinyarwanda

AFLA -African Legal Aid

AU – African Union

AVEGA-name of a widow survivors’ association primarily comprising of women, majority of who are survivors of sexual violence perpetrated during the 1994 Rwanda genocide.

CRSV- Conflict Related Sexual Violence

BH – Boko Haram

CEDAW – Convention on the Elimination of all forms of Discrimination Against Women

CAT – Convention Against Torture

DPKO – Department of Peacekeeping Operations

DPP – Director of Public Prosecutions

EAC – Extra Ordinary African Chambers

HRL – Human Rights Law

HRW – Human Rights Watch

IBUKA- is the name of the umbrella body of all survivors’ associations in Rwanda, it deals with survivors of the genocide including those who suffered the conflict related sexual violence perpetrated during the genocide.

ICC – International Criminal Court

ICL – International Criminal Law

ICJS – International Criminal Justice System

ICTY-International Tribunal of the Former Yugoslavia.

ISIS – ISIS (Islamic State of Iraq and Syria), ISIL (Islamic State of Iraq and the Levant), and DAESH in Arabic (Al-Dawla al-Islamiya al-Iraq al-Sham) meaning “Islamic State of Iraq and the Levant.

ICTR – International Criminal Tribunal for Rwanda

IDPs – Internally Displaced Persons

IHL – International Humanitarian Law

NGO – Non-Governmental Organization

OHCHR – The UN Office of the High Commissioner of Human Rights

OTP – Office of the Prosecutor

MITC- Residual Mechanism of International Tribunals

RAF – Rwandan Armed Forces

RPF – Rwanda Patriotic Front

WIGJ-Women Initiative Gender Justice

WMT-Witness Management Team

WVSS=Witness Victim Support Section

SGBV – Sexual and Gender-Based Violence

SARC- Sexual Assault Review Committee

SCSL- Special Court of Sierra Leone

SPLA – Sudan People’s Liberation Army

UN – United Nations

UNDP – United Nations Development Programme

UNFPA – United Nations Fund for Population Activities

UNICEF – United Nations International Children’s Fund

UNILAC – l'Université Internationale Libérée d'Afrique Centrale (International University of Central Africa)

ABSTRACT

This study analyzes the interactions between the International Criminal Justice System (ICJS) and survivor witnesses of conflict related sexual violence (CRSV) committed during the 1994 Rwandan genocide. It focuses on survivor perspectives about the notion of justice. While the ICJS as partly represented by ICTR focused on punishment, deterrence, and upholding the human rights of perpetrators of genocidal rape, the study shows how during the process it neglected the needs of survivor witnesses. The findings from this study are key to contributing to assessing the legacy of the International Criminal Tribunal for Rwanda (ICTR) from the perspectives of survivors. Though the ICC has one of the most innovative regime on witness participation and reparations, the voices and silences of survivors in this study can influence the future prosecutions on rape and how to create within the process a platform which identifies the needs, the concerns and aspirations of victims to prepare them to participate as empowered survivor witnesses.

It informs on the language survivors said they understand: timely and context specific sensitivity, flexibility and respect. These three pillars can assist other judicial bodies globally to dispense a form of justice which taken cognizance of the totality of the needs, the concerns and aspirations of the key stakeholders of ICJS. The study aims to elucidate the position of survivors as partners in the ICJS, rather than objects of the process or mere witnesses.

Whilst this study acknowledges the achievements of ICJS in so far as setting up tribunals such as the ICTR and making them somehow functional as indicated by some of the internationally acclaimed success stories – the survivor witnesses see the ICTR's legacy through very different lenses.¹ The process seemed to have been characterized by lack of political will to prosecute rape. Where rape was prosecuted, there remained weaknesses in the process, starting from the approach in the investigations, the prosecutorial strategy or lack thereof and the discretion used to call survivor witnesses to testify before the tribunal. The worst part of the process for some survivor witnesses was the disillusionment that the ICJS had little for them and some did not think it was part of the healing process.

ICJS needs to take a gender perspective at all stages when dealing with conflict related sexual violence. This flaw has been a large obstacle to gender justice, demonstrated through the lack of political will at every level of the judicial process, and reflected by the low number of rape cases brought for trial and few convictions at both the trial and appeals level. It is also evident in the disturbing gaps in witness protection, marked by a notion of protection, which leaves survivors more vulnerable and disempowered. Moreover, the disconcerting absence of compensation/reparations for survivors leaves survivors of sexual violence vulnerable and disproportionately affected by the consequences of armed conflict.

The study reveals a fundamental flaw in the ICJS at different levels. A lack a context-specific approach, a lack of discernment of the gender nuances surrounding the 1994 genocide and lack of a critical analysis of the complexity of the ethnic/racial categories in Rwanda, ranging from the Hutu/Tutsi delineations are part of the multiple factors which obscured the reality of the brutality different categories of Rwandan women suffered during the genocide.

¹ ICTR made progress in tracking some of the genocidaires, investigating them and prosecuting them these include the ICTR jurisprudence specifically in the areas of defining rape has greatly contributed to the development of jurisprudence on accountability for mass rapes and made notable breakthroughs in prosecution of rape and sexual violence.

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CHAPTER 1: INTRODUCTION – NO PLACE TO HIDE? VOICES FROM THE FIELD AND GENDER POLITICS OF TERMINOLOGY

I. BACKGROUND: The 1994 Rwanda Genocide

The 1994 Rwanda genocide marked the biggest and most devastating state-sponsored conflict in the country's history, with an estimated body count of at least 800,000 people in 100 days (Sai 2012; Women Media Center 2014). The foundational and gendered ideologies of the genocide had been planted decades before. The ideology of ethnic division, and the concept of the Tutsi as an enemy, and the Tutsi woman as a dangerous agent against an imagined "Hutu State" or "Hutu nationalism" found its power amongst the population long before, during, and after the end of Belgian colonial rule.

Much has been written about the use of mandatory identity cards in colonial Rwanda (which enabled the state to establish discriminatory policies on ethnic lines that favored the Tutsi minority group in economic, education, and socio-political opportunities), and the following complexities, inaccuracies and misconceptions about ethnic differences (which enabled an inner core of bureaucratic state actors to influence ordinary people towards systematic genocidal acts against a minority group in 1994). In her work on identity politics and the Rwanda genocide, Helen M. Hintjens warns that while overly simplified versions have been popular amongst the media and some scholars, the story is much more nuanced and complicated. The genocide was organized by state actors "during a time of economic and political crisis... to make the genocide thinkable, myths of origin were reinvented and differential forms of citizenship enforced" (Hintjens 25). Identity as well as gender politics became "a means of legitimizing collective violence and scapegoating, and a knife in the back of the civilian population as a whole, victims and victimizers alike." (Hintjens 2001, 25).

During the wave of decolonization on the continent in the late 1950s, and before Belgian colonial rule ended in the country in 1962, such identity politics had already come to play through Hutu majority political parties and movements. The "Hutu peasant revolution" or "the social revolution," a series of Hutu uprisings between 1959 and 1961, forced at least 120,000 people, mostly Tutsis, to flee the country for refuge (UN News Center n.d.).

By the time the genocide took place in 1994, Rwanda had been through many years of political tension and periodical pogroms on both ethnic lines. Claims to “Hutu majority rule” and nationalism had been made since the revolution, and was the main message propelling the political movement led by Rwanda’s first president, Gregoire Kayibanda, towards the country’s independence from Belgian rule. The party’s name, *Parti du Mouvement de l’Emancipation du Peuple Hutu* (the Party for Hutu Emancipation), highlights that for members of the movement, independence in 1962 not only meant “freedom” from Belgian colonial rule, but also from the perceived Tutsi hegemony that came with it.

The uprising and later, Kayibanda’s regime, highlighted the shift taking place in the country ideologically. In her article, “When Identity Becomes a Knife, Reflecting on the Genocide in Rwanda,” Hintjens states:

“From the 1950s onwards, the ideology of Bantu origins of the Hutu has been powerfully articulated with notions of ‘the people’. Le peuple majoritaire became the usual way to refer to the Hutu at around the time of independence, and referred not only to a numerical majority, but also to the supposed common ancestry of everyone defined as Hutu. Having been considered among the ‘wretched of the earth’, the dominated underclass of Rwandan society, Hutu elites started to conceptualize ‘their’ people as racial-cum-ethnic group” (31).

After Kayibanda’s regime, the country’s highest political seat changed to Juvenal Habyarimana’s dictatorial presidency in 1973, through a military coup. Although the regime was new, the ideologies were similar. Throughout his presidency, the government continued the use of identity cards. The regime also borrowed its strategies from Kayibanda’s presidency – it maintained a one-party system and state-sponsored violence against Tutsis and Hutu moderates, with political campaigns frequently and virulently calling Tutsi rebels *inyezi*, meaning “cockroaches” in Kinyarwanda (Kirschke 1996, 5). Such language was later repeated during the genocide, and referred to by survivor-witnesses when they spoke to the court about their experiences. By the 1990s, Habyarimana’s regime had embarked on an aggressive campaign through political speeches, state-sponsored violence, and state-backed mass media to demonize Tutsis as a whole as enemies of the state, and Hutu moderates as their accomplices.

It is estimated that between 250,000 to 500,000 Rwandan women were raped during the 100 days of the Rwandan genocide in 1994 (Degni Report 1994). According to this report rape was the rule and its absence the exception. Some of these women came forward to testify, however

some of the survivor witnesses felt that by walking out without any form of compensation ICJS as partly represented by ICTR had not adequately acknowledged the pain and suffering they endured during the genocide. For some who conceived and have children resulting from the rapes felt that the court process does not explore the totality of their needs, many of which arise directly from the injurious consequence of the 1994 genocide.²

On 8 November 1994 the United National Security Council established UN-ICTR to prosecute those who bear primary responsibility in committing the genocide and other violations of human rights which characterized the heinous crimes.³ Many ICTR judgments have found it as a proven fact that the Hutu, Tutsi and Twa are distinct social groups who have inhabited Rwanda. Between April 1994 and July 1994 extremist Hutu committed a genocide estimated to have killed between 800 000 and a million people, mainly Tutsis and moderate Hutus. The 1994 Rwanda genocide and other atrocities which followed in Africa came as a wakeup call and the births of other initiatives to try and deal with impunity.⁴

² See Ms Odette, the AVEGA representative's comments during a panel discussion: International Workshop on Conflict Related Sexual and Gender Based Violence Crimes in The Light of ICTR's Experience: Kigali, Rwanda 26-28 November 2012. She also highlighted plight of those looking after children (now young adults) conceived as a result of the 1994 genocide rapes)

³ ICTR wound up business in December 2015, handing over any outstanding functions to the Residual Mechanism from Criminal Tribunals (the Mechanism/MICT) established under the UNSC Resolution 1966, on 22 December, 2010. The Mechanism, like the ICTR is based in Arusha, Tanzania. MICT is tasked with "continuing the jurisdiction, rights and obligations and essential functions" of ICTR and ICTY and maintaining the legacy of both institutions. It commenced functioning on 1 July 2012. It remains responsible for the protection of victims and witnesses in cases ongoing before the 2 Tribunals.

⁴ See the innovative of definitions of crimes including genocide, war crimes and crimes against humanity for example in the Malabo Protocol (2014). The Malabo Protocol extends the jurisdiction of the proposed African Court of Justice and Human Rights. The controversy regarding one of its immunity provision has been a subject of academic debates, however this will not be addressed in this study.

2. The Problems of Labelling

In the aftermath of the Rwanda genocide, the terms “survivor”, “victim” and “witness” can be as complex as the politics of ethnicity for women who were sexually violated by perpetrators of the genocide. While the 1994 genocide unearthed tortuous and unresolved historical, political and cultural tensions, the trials that followed at the ICTR (International Criminal Tribunal for Rwanda) also uncovered gaps in the ICJS (International Criminal Justice System), one of which pertained to female witnesses who were survivors of mass rape, that had been ignored or only superficially covered under the law since the Nuremburg trials.

My research and this thesis exposes some of those gaps in depth by examining the way in which the ICJS system,⁵ sees survivors of gender based sexual violence as “witnesses” and as “tools” for a theoretical “justice” to meet the objectives of the court. My research juxtaposes this perspective with the way some survivors of the genocide themselves perceive their role within the ICJS (and the ICTR in particular), their own notion and definition of what justice means, and the challenges the survivors involved face in reconciling the two paradoxical identities.

Throughout this thesis, I refer to the women who spoke to me about their experiences during the genocide, at the ICTR, and at gacaca courts as “survivor-witnesses,” to emphasize the tension between how they saw themselves, and the way the ICJS system perceived them. In the context of this research, the words survivor, victims, and over-comer are sometimes used interchangeably depending on how the interviewees referred to or regarded themselves. The term “victims” is defined in Rule 85 of the International Criminal Court Rules of Procedure and Evidence (Rule 85 of the ICC RPE). Moreover, there remain many other layers and identities

⁵The study uses ICJS or alternatively ICJ system to describe the international criminal justice system.

that will emerge in each chapter. Imposing specific terms on the women in Rwanda often fails to realize that one lived experience is not an entire identity. It may contribute to a fraction of perceptions. Any terms which stick labels on women assume that the woman is static in a moment, paralyzed by abuse, powerless, unable to undergo personal development or re-gain an empowered life.

While the courts depend on these women to be labeled “witnesses” – to be enclosed and subject to the legal framework that serves the prosecution and the court (which is supposed to propel all parties involved closer to a “just and fair trial,”) – the women interviewed during this study saw themselves as individuals not only with the right to tell their own stories to the court, but also to determine what the court needs to know about what they experienced firstly as victims of genocide, as witnesses but more importantly as persons who have been deprived of their livelihood to survive, as “survivors” and “overcomers.” By coming out and speaking out, the survivor witnesses shook off the myths that because of shame and stigma attached to violations of a sexual nature they are reluctant to speak about the rapes. Their voices challenge the status quo of the existing legal framework and buttress the fact that community attitudes blaming victims are often reflected in courts.

There should be no shame or stigma whatsoever attached to survivors of rape crimes-the stigma and dishonor belongs on the physical perpetrator(s) and others responsible for the crimes and to some extent on the legal, protective, and enforcement systems and global security which have ignored, silenced or otherwise failed to respond appropriately to gender based crimes (Askin 2001, 7-8).

My work explores survivor-victims voices from the field and the real issues informing their experiences. Though some of the voices cut across the different components of the ICJS: the substantive, structural and cultural components, this study focused on the pain of the survivors and the corresponding flaws in the ICJS as represented partly by ICTR. Though the voices of the women I spoke to are diverse in many material ways, they all echo one thing: the international criminal justice system does not understand the lived realities of the survivors, its terms and definitions of justice mean sometimes it negates the lived realities which shapes their everyday life.

Survivor witnesses' problems are still largely ignored by the ICJS. Beyond my research, it is important to continue to collect and analyze empirical data to explore options, including a comprehensive form of gender justice, which takes cognizance of the positions of women and gender relations generated in the intersection between ICJS and the needs which arises in the post conflict life the which contribute to whether or not they have received quality justice. What is however clear from the voices of survivors, witnesses and victims listened to during this study is that the solution does not lie within the present system, but rather out of it, through a holistic approach that can only be informed by bringing out the voices and experiences of survivors as they interact with multiple forms of "justice."

3. Understanding Lived Realities: Victims, Survivors or Overcomers

It was very clear during this research that the language in the conflict related sexual violence (CRSV) discourse is highly sensitive. In this regard, it is equally important to define and distinguish the different violations, which formed a pattern of gender specific violations during the 1994 Rwanda genocide, some of which were never prosecuted as such. The research focused on conflict related sexual violence with an emphasis on rape.

Conflict Related Sexual Violence (CRSV)⁶ refers to those patterns of sexual violence that include rape, sexual slavery, forced prostitution, forced pregnancy, enforced sterilization, or any other forms of sexual violence of comparable gravity against women, men, girls or boys. Such incidents or patterns occur in conflict or post conflict settings or other situations (for example political strife). They also have a direct or indirect nexus with the conflict or political strife itself, that is, a temporal, geographical and causal link. In addition to the international character of the suspected crimes (that can, depending on the circumstances, constitute war crimes,⁷ crimes against humanity,⁸ acts of torture⁹ or genocide¹⁰) the link with conflict may be evident in the profile and motivations of the perpetrator(s), the profile of the victim(s), the climate (immunity/weakened state capacity), cross border dimensions and/or the fact that it

⁶ICTY, ICTR and Rome statute, when collectively read, sexual violence includes rape, sexual slavery, forced prostitution, forced pregnancy, enforced sterilization and many other forms of sexual violence of comparable gravity,, which, depending of the facts, may include indecent assault, trafficking, inappropriate medical examinations and strip searches. See UN Action Against Sexual Violence in Conflict's analytical & Conceptual framing of Conflict-related Sexual Violence Manual p.1). Conflict related sexual violence is not treated as synonymous or interchangeable with:

- Gender –based violence (GBV), which also includes acts that are not sexual in nature, such as physical assault or denial of economic resources and are overly broad category.
- Violence Against women (VAW), which does reflect the need to also address conflict related violence against men, girls and boys in a comprehensive sense.
- Harmful traditional practices (not reported as conflict related sexual violence during the 1994 Rwanda genocide, unless in instances were specific elements justify characterizing these as conflict related sexual violence)
- Sexual Exploitation and abuse (SEA), which amounts to individual infractions of the rules of conduct and discipline, addressed mostly in the UN system
- “Survival sex” which will not fall within the rubric of “conflict-related sexual violence” as premised on international, unless the circumstances are coercive and vitiate consent

⁷ According to the Rome Statute, war crimes point to actions and conduct perpetrated during wartime that violates international law, norms and rules of war.

⁸ Specifically, sexual violence as a crime against humanity. Crimes against humanity, according to the Rome Statute are any of the following acts committed as part of a widespread or systematic attack directed against a civilian population with the perpetrator's knowledge that such a conduct was part of the attack, in relevant part: rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity

⁹ CRSV in form of the rapes amounted in some circumstances to genocide since it was proven to be committed against Tutsi women and girls with intent to destroy in whole or in part; the Tutsi ethnic group by causing serious bodily or mental harm to members of the group; or deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. It also included imposing measures intended to prevent birth within the group; the perpetrator(s) intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such. The perpetrators' conduct took place in the context of a manifest pattern of similar conduct directed against the Tutsi's destruction; the perpetrator caused serious bodily or mental harm to one or more persons. (ICTR, ICC, ICTY Statutes)

¹⁰ Genocide refers to the deliberate and systematic killing of members of a particular national, cultural, political or ethnic group

violates the terms of a ceasefire agreement.¹¹

Throughout the data analysis, the variation in terminology had a bearing on the conclusions informing the findings. During the different conferences on conflict related sexual violence,¹² different target audiences raised different conceptual issues regarding the use of certain terms in this study. The terms “victims”, “survivors”, “overcomers” and “veterans’ were not only highly contested by different categories of audiences, but also invited interesting dialogue between the different women interviewed who formed the subject of this study. The respondents were allocated different pseudonyms from those assigned in respective cases to ensure further anonymity and buttress the protective orders in place for the witnesses. In the field, the witnesses themselves raised the issue: one witness (GHG) from the Kibuye area in Rwanda summarized the situation as follows:

Even before we went to Arusha to testify, we were called different things. However, we should not be under-estimated, we know who we are at every stage of this painful process. Some investigators called us “victims”, some survivors, some among us were singled out as the overcomers and commended for being “star witnesses” by the investigators. Whether this was to force some of us to stop crying or to encourage us to move on we can never know. The extent of this violence confused everyone, including the lawyers. No one seems to know what to call us. Personally, within one day I can wake up feeling in control. When I meet the person who murdered my children and they say “Amakuru”¹³ I feel powerless and depressed, time freezes again and I stop surviving and start to relive the genocide, feeling a sense of great loss that seems difficult to overcome. When I was in court this triggered so many things. The pain of reality set in. There were things I expected which we never talked

¹¹ A more elaborate on the nuances of defining conflict-related sexual violence can be found in: UN Action against Violence in Conflict: Analytical & Conceptual Framing of Conflict related sexual Violence requested by the secretary General Policy Committee (December 2010) this definition was endorsed by UN Action Steering Committee (2011)

¹² During the period of this study, from 2009 to 2017, I attended many conferences which specifically focused on the many aspects of my research. I also had an opportunity to validate findings as the study progressed particularly when I took UN assigned deployments focusing on investigating CRSV and mainstreaming gender into interventions recommended to prevent and protect survivors of CRSV. (2014 South Sudan, 2015 Boko Haram Nigeria and 2016 Libya ISIS) and also get more insights on the main issues forming the crux of this study. These include the conference in The Hague, Entebbe, Arusha and Edinburgh, Warwick, attendance was at the different stages of this study. These conferences were attended by lawyers and non-lawyers working with survivors of conflict related sexual violence.

¹³ A greeting in Kinyarwanda and as explained by FNN, that it can also be used to inquire whether the household had a peaceful evening. FNN explained that this becomes ironic when the person asking is a neighbor and one of the known perpetrator of the genocide which resulted in the wiping out of one’s family. FNN asked how one is supposed to respond to such a greeting given the developments during the genocide.(Interview of 2012) FN

about. Leaving the court I felt angry, injured and very lonely yet I did not desire any company, I withdrew. So I don't know whether I am a victim, a survivor, an overcomer or just a woman who feels manipulated by different systems, different people and different circumstances. What do you call someone disillusioned by the whole justice system and now asking: by the way whose justice are we talking about?

When I meet someone who has the same experience, I feel supported and ready to move on. We laugh, we cry, we vent our anger we go back to the fields and work. We even go to the former *Interahamwe*¹⁴ to ask for help, so you can call me what you want, as long as you give me my cow.... which they slaughtered. I cannot ask for my children, they were butchered. However, looking at someone in Arusha wearing a suit and coming back empty handed makes me feel that your system of justice confirms that we are victims who will struggle to survive for a long time.

The grave consequences ranging from sexual health, physical, emotional and spiritual well-being of persons involved compelled some witnesses to elaborate on the terms. Witness GHG found a need to explain:

For me, there are many stages I need to explain. What one needs to understand is that there is a complex process connected to our loss and grief, to the pain and the suffering. Some went through the cycle, the dreadful vicious cycle, starting with being hunted like animals, witnessing the killings of those closest to you, then comes the unexplainable pain, the shocks, the denials and everything about being taken and torn apart, this leaves very deep emotions, the deepest scars you still see today. I am not only a survivor of rape. As you know, my husband was Tutsi and I am Hutu, since though my mother was Tutsi, my father was Hutu. That is why on 6 April 1994 they killed my husband, my children and my mother before taking me away to be raped. All the people in the community know my story and know I survived but what they will never know is that I also died. So help me with this, what do you call a Hutu infected with HIV but was not buried with the Tutsi in my situation. There are times when I hear people say Hutus killed and Tutsi were raped. I am a victim, a survivor and a current veteran fighting to clear the concept that only Tutsi were killed and raped. As Rwandans, some of us suffered for twice, for marrying Tutsi and for being women. Hutu men who married Tutsi had a choice to kill or live, Hutu women who married Tutsi were not given a choice. You can choose for yourself the best term to describe each of us, we have no common word to describe ourselves we suffered because of meaningful killings. We will continue to suffer because of a justice system which has nothing for us!

It starts with you giving us new names (pseudonyms) like we are nameless. Then for each case I got different name as though Muhimana has forgotten my name. Sometimes you

¹⁴In the context of Rwanda during the genocide, *Interahamwe*, was literally translated in many ICTR cases as, referring to people who “work” or attack together. It was a general term used to refer to Hutu extremists from the ruling party sensitized, trained, and mobilized to kill Tutsi and moderate Hutus during the 1994 Rwanda Genocide. It is widely documented in many ICTR cases that that during the genocide, rapes were mostly perpetrated by the militia, *Interahamwe*, local authorities, soldiers, civilians, gendarmes, prisoners, and priests/pastors.

get angry but sometimes you laugh at the confusion. Even before being called to Arusha it was a struggle to get medication. I am a woman who was attacked viciously, raped and left to die slowly. I did not stay in Bisesero to die. When the French rescued us I told myself I will live and shame the enemy, they will not find me in Bisesero. I acted like a survivor, someone who overcame death. Then comes the process to prepare for Arusha after 11 years. I am playing back my life, now I am in that office, being raped. Now I am with others back at the hill, seeing women being raped. Again I see rapes, I saw a woman dismembered, a Tutsi woman, I heard the baby cry. Then rapes, and more rapes, more bleeding and more bleeding. Here, now you bring me to Arusha. I feel the pain, I feel sick. I am a real victim and no longer surviving. Even after visiting the clinic a day before testifying, quickly preparing me to talk, I start seeing myself even as less than a victim, wishing I was killed there in Bisesero. As I testify, I feel I survived and will tell what I went through, but each time I want to tell my story there are many rules we need to follow and I cannot even tell Muhimana to look me in the face and explain why he did that to me. He is protected and I feel vulnerable and there is nowhere to hide, I overcome the fear I speak and when I finish I am not sure of my status, a victim, a survivor or an overcomer. Whatever is my status at that point, I feel sick and frustrated.¹⁵

A member of the Witness Management Team based in Kigali confirmed in earlier interviews that witnesses coming from Arusha exhibit many frustrations. He stated that whilst some witnesses have expressed a sense of achievement when they came face to

¹⁵ Some aspects of GHG sentiments were voiced by the majority of the survivors, particularly BBJ, BBN and AAJ who expressed the need for sensitivity and creation of a clear policy on medical care for all survivors and follow ups for those who depose testimonies at the Arusha ICTR Tribunal. Some complained they did not receive counselling before and after testifying. An ICTR official from the clinic explained that counselling is given on a need basis, it's not automatic.

face with perpetrators in Arusha the majority have found it both challenging and frustrating. He explained that there is limited personnel in relation to the potential witnesses hence it is impracticable to attend to post trial debriefings. Additionally, their main concern is medical and psychological support, which is very limited. He indicated that most of the follow ups are made difficult by sometimes the lack of communication between the Witness Management Team (Kigali) and the Witness Victim Support Section (WVSS) UN ICTR (Arusha)¹⁶

During a discussion with an ICTR WTM officer in Kigali in 2013, the researcher was assured that since the Mechanism is now expected to take over the support services to witnesses, it is expected that the provision of medical and psychosocial services will be a priority to survivors of CRSV, particularly the HIV/AIDS patients.¹⁷

Eugene Rutembese¹⁸, a clinical psychologist and psychotherapist at the National University of Rwanda explained the condition of survivors appearing in court proceedings:

“One challenge to a victim is to move a “victim” to a “witness.” Victims suffer from depression, mental trauma, shame and humiliation. Remember some have been infected with HIV, most are already suffering silently, one patient told me if she talks she will die. The pain is such that they need medical care and psychological assistance,” they have

¹⁶ Witness Team Management (WMT) Investigator 1 (Kigali) elaborated on the frustrations. He admitted there were challenges, Medical assistance is limited. Though Witness Management Team (WMT) handled many such witnesses, they have no fund and have to use limited petty cash with the Witness and Victims Support Section (WVSS) in Arusha receiving more funding. He however added that the lot of many survivors is better since there are many organizations helping survivors in some of the remote areas of Rwanda. (Buttressing previous interviews)

¹⁷ According to article 20 of the Statute of MICT, the Mechanism took over responsibility for witness support and protection of approximately 3000 witnesses who testified in completed cases at the ICTR. The MICT WVSS was operational before the closure of the ICTR in December 2015.

¹⁸ Comments during a panel discussion: International Workshop on Conflict Related Sexual and Gender Based Violence Crimes in The Light of ICTR’s Experience: Kigali, Rwanda 26-28 November 2012.

urgent immediate needs and unique needs.”

4. Witnesses and the Courts: Prioritizing the Perspective of the Survivor

The aftermath of the Rwanda 1994 genocide saw many key players trying to address the horrific crimes, these include ICTR, significant contributions by Rwandese national courts, local initiatives in the form of the Gacaca courts and some courts exercising universal jurisdiction for example Belgium, France, Finland and Canada. The African Union (AU), has also facilitated exercise of universal jurisdiction within a national jurisdiction in Africa.¹⁹

While the ICTR has specifically made some strides, theoretically and legally, towards identifying, prosecuting and convicting some perpetrators, it has not offered some legal redress for survivors of genocide in general and those who need specific gender sensitive reparations to minimize the impact of the sexual violence suffered as a result of the genocide.

Many of the survivors witnesses interviewed repeated that more than anything, their basic needs were barely met. The important aspect of medical and psychological support, before survivor-witnesses could be on the witness stand, was designated as the responsibility of Registrar of the ICTR. In this regard, Registry would be expected to facilitate access to external medical care and payment of related bills, at the same time providing in house medical care. The majority of survivor witnesses explained that it even with medical attention it was often “too little, too late”²⁰

¹⁹ More recently, the Extraordinary African Chambers (EAC), The AU established EAC, within the Courts of Senegal which prosecuted and convicted the Chadian leader, Hissene Habre. Noteworthy to critique and consider is the “Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences: an African Perspective” adopted in 202. For further reading on the Habre Case, read Angela Mudukuti, An Unprecedented Victory for Justice, IOL Opinion, 2 March, 2017 and Evelyn A. Ankumah (Executive Director of Africa Aid (ALFA) insight on : “The Extraordinary African Chambers For The Prosecution of Hissene Habre: “An African Solution to an African Problem”; all available at: Africalegalaid.com/resources.

²⁰ Witnesses **BBC**, **BBD**, **BBF**, **EOE** and **BBG** explained that they only received medical attention they were on their

After the 1994 genocide, many of the raped women and girls discovered they had been infected with HIV/AIDS. To some like survivor witness EOE, this went to confirm, what one of the rapist meant when he said to his three colleagues: “We know our status, we will leave her to die a slow painful death, and there is no need to waste bullets or stain our machetes with blood”

Many of the possible people who could be survivor witnesses exhibited serious medical conditions. One of the survivor witness pseudonym AUU died a couple of months after testing in court.²¹

The relevant provisions of ICTR which procedurally apply to those who were identified as “potential witnesses,” did not go on to spell out issues related to physical and psychological rehabilitation. Initially, under Rule 34 of the ICTR Statute, the Registry established a medical unit in Kigali with access to a consultant psychologist, a gynecologist and a nurse psychologist to service the Kigali facility. The facility was also meant to provide HIV/AIDS treatment.

One Witness (Witness MMM) stated:

Even before the Tribunal was there, you would think there is a facility to cater for our medical needs and then our immediate needs, but it looked like we are a bother, an inconvenience; people who are slow to move on with life. Yet we were waiting for medication. It took so long to come by, and I know so many people who died because they

way to testify in Arusha. Effective follow up medical attention was only made possible by one of the survivors who secured employment at a local hospital and ensured that the majority of the survivors in her area could access the limited provisions relating to medication they desperately need.

²¹ During a mission trip, the researcher visited a potential survivor witness in the remote area of Butare. It was a follow up on the statement she had deposed in 1996 and in preparation for a court trial scheduled in two weeks’ time. This area was very remote and it took the investigators so many hours to navigate and improvise how to make “bridges with tree branches” to enable the UN van to cross rivers before accessing her hut. When we finally arrived, we received a report from one of the orphans that she had left home that morning to go to the next catholic Parish (which according to her narration the place was very far from her home.” She indicated she had gone look for medication for herself and food for the orphans. Looking tired, sick and worn out she told us she found the priest had gone to visit another sick woman, waited for a long time and returned with no assistance. The team could not assist and since it was getting very dark we had to leave and report her needs in Kigali. The woman was too sick to participate in the court proceedings.

could not wait for that long. Personally, I only got treatment when I went to Arusha, before testifying. Nowadays, things have become better since we have people from NGO(s) who assist and there is an arrangement to travel to the next medical point to get medication. However, all this comes late.”

Another witness, (Witness YYY), spoke about her experience. She felt gathering evidence to present in court was prioritized over survivor witnesses’ physical well-being. She stated that after statements were taken in 1996, there was no further contact until she was about to testify in 2005:

With your justice for everything we wait a long time then we do not get what we expect. My first contact with ICTR was in the early part of 1996. A group of 5 people composed of 4 men and a female interpreter came to our place in their big, white UN motor vehicle. They had problems accessing our place and when they arrived late they had to take a statement and go before it was dark. I had difficulties even with sitting and I was still experiencing bleeding and other issues from the rape, things like migraine headaches. Instead of seeing each one holding a file and water I would have been more pleased to see medicine, even painkillers. On this occasion, no one asked me about the rapes and I just talked about the killings since rape did not appear to be a priority, and neither were my medical needs. It was only when I was going to arrange to testify in 2005 that I received medication in Kigali and at the Arusha Clinic. “

Moreover, some critiques of the international justice system as experienced through the ICTR have voiced concern that some survivor experiences illustrate Arusha justice is “little justice” delivered very slowly. Binafer Nowrojee pointed out early in the process that the missing link was the survivor’s perspective:

“Looking at international justice through the eyes of rape victims’ points to an urgent need to better ensure, as a priority that international criminal courts neither overlook sexual violence crimes nor allow judicial processes that marginalize, dehumanize or demean rape victims.”²²

One common thread ran through the stories of the respondents, particularly survivor witnesses. It was courage; a relentless quest for their own perspective of justice, the justice

²² Binafer Nowrojee has testified at the ICTR as an expert witness. A member of the Coalition for Women’s Human Rights in Conflict Situations, she has authored many publications on the 1994 genocide and its impact on women. She is the author of “Shattered Lives: Sexual Violence during Rwandan Genocide and its Aftermath (1996.)” She was called as an expert witness in the dubbed “Military 1 case.”

which resonated with their own “living” law.²³ When they walked out of the courts empty handed many of them had a single word to describe the feeling. They felt “disempowered.” The former Secretary General of the United Nations, Mr. Ban Ki-Moon, observed that justice is central to the effort to help women become equal partners in decision-making and development, and that without justice, women are disenfranchised, disempowered and denied their rightful place in society (*UN Women Progress of the World’s Women Report 2011, 2*).

According to all respondents, the missing link between ICTR justice and the expectations of survivor witnesses of 1994 CRSV is mainly the lack of reparations. In their responses they also elaborated on the practical barriers in accessing and pursuing justice as presented by ICJS. Some, survivor witnesses who were called in different cases to testify about killings because the indictment had not charged any form of CRSV, including rape felt that they were silenced. Their story, their narrative was not part of the indictment.

There are many cases at the ICTR where the Prosecutor used her or his discretion to drop rape charges, including during plea bargaining.²⁴ There are instances where rape charges were not preferred against the accused persons in the indictment. Sometimes it was because of lack of evidence however since such information was not given to some survivors why rape charges were dropped, they only realized that when investigators approach them to testify only about “the killings”.²⁵ In cases like the Akayesu, it was when some witnesses started testifying also about CRSV that the gender sensitive bench which included the Honorable Judge Pillar, stood the matter down to allow the Prosecutor to look into the totality of the evidence, reinvestigate

²³ “Living law” here refers to what survivors witnesses perceived as the law, a law which had an ability to meet their needs, their concerns and some of their aspiration of survivor witnesses.

²⁴ For example in the case of Nzabirinda, Bisengimana, Serushago and Rugambarara rape charges were dropped during plea negotiations.

²⁵ For example in the case of Nsambonimana, 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/ See Nsambonimana Trial Judgement, paras. 1828, 1829; and para. 1841

the case and include relevant charges.

The survivor witnesses indicated that they were expected to cater to the prosecution's agenda yet they had also seen the opportunity to talk about the gruesome sexual violations. Some indicated that they were called to talk about a specific killing or event during the genocide as witnesses against specific perpetrators but often the court was not interested in their accounts resulting sometimes feeling that the sexual violations they had endured was not part of the prosecution case.

The survivor witnesses came with great expectations, anticipating a situation where the ICJS would fulfill its goals but also meet them at their point of need. Although the survivor witnesses expected that their participation would promote effective deterrence of sexual violence, which is also an element of justice, they expected more than that; they had specific needs arising from the violations they had suffered. Contrary to the assumption that witnesses are reluctant to testify, some of the survivors interviewed stated that they were willing to participate fully if they were given adequate information and could be regarded as full partners. Many indicated that sometimes they became reluctant participants because of the realization that the ICJS seemed to have little for them at the end of the process.

This has been noted in some previous studies that the ICTR's record of rape prosecution has remained baffling.(Nowrojee 2005:4) Some have noted that in most cases, gender crimes were only prosecuted after widespread lobbying by women's rights organizations or feminist scholars; at many crucial points in the prosecution's process, there seemed to be no prosecutorial strategy on/or commitment to gender justice.(Nowrojee 2005:4). Others highlight the enduring obstacles which contributed to a slow progress to prosecute gender

specific crimes.²⁶ (Askin, 2003) The summary of the history of prosecutions of cases at the ICTR below need to be assessed in relation to all relevant factors including the prevalence of CRSV during the 1994 Rwanda genocide.²⁷

Whilst survivors interviewed stated that no punishment can adequately redress the injuries suffered by the survivor witnesses²⁸ and no reparation or compensation will ever bring them to their previous state, they also stated that the least the ICJS could have done was to acknowledge their experiences by charging rape where appropriate and prosecuting it with a political will which corresponded with the gravity of the offence.²⁹

Survivor witnesses are looking for a legal process that treats them with both care and respect. “They want information in order to understand the process so as to make fully informed decisions on whether to testify, how to testify and what to expect at the end of it all” (Nowrojee 2005:4). There are legal, personal, situational, contextual, political and socio-cultural factors relating to violations of survivor witnesses’ rights during their interaction with the ICJS, which discourage them from significant and meaningful participation in the process. For example, witness anonymity is not fully guaranteed; which is why some witnesses dread to participate in the process, fearing the possibility of subsequent retaliation back home.³⁰

²⁶ For a further discussion see Binaifer Nowrojee, UN Research Inst. For Social Development., “Your Justice Is Too slow”: Will the ICTR Fail Rwanda’s Rape Victims 1 (2005), Kelly D. Askin, Prosecuting Wartime Rape and Other Gender-related Crimes Under International Law: Extraordinary advances, enduring Obstacles 21 Berkeley J. Int’l L. 2003

²⁷ See Annexure “S” a summary of statistics of cases prosecuted by the ICTR. The summary was compiled by members of the OTP Sexual Violence Committee. I was a member of the Committee from its inception until 31 Decemehr 2014 when I left the ICTR.

²⁸ See the voices of DCD, BNN, EOE DCD, PQQ, DBB, KOK, ROR, DBB, and ROR. This was validated by many survivor voices I listened to during the South Sudan, Nigeria (Boko Haram) and Libya assignments. On the 3 July 2017, some of the survivors of the Chad and Gambian violation attending the ALFA side reiterated the same feelings.

²⁹ The study noted a need for legislation and other measures which can ensure that victim witnesses have a right to equal and effective access to justice, the right to adequate, effective and prompt reparation for harm suffered including meaningful restitution, compensation, rehabilitation and all guarantees from State of non-repetition of such impunity. For those who die their heirs should be entitled to the same rights and be given adequate, effective and prompt reparation.

³⁰ Particularly in the early days of ICTR, there were recorded situations of retaliation and killing of witnesses or

Survivor witnesses come expecting an enabling environment in the courtroom, a conducive environment ensuring safety and also protecting them as witnesses from reprisal, exposure or stigmatization. Some of the solutions offered by the ICJS, re-locations for example, further isolate the witnesses, and do not offer the sense of security needed by witnesses going through a healing process.

Moreover, whilst the survivor witnesses are faced with urgent material needs which include health care, food and shelter, the ICJS is pre occupied with different priorities. The ICJS focuses on punishment, deterrence, and rights of perpetrators of genocidal rape and in the process neglects the needs of survivor witnesses. For example, victims who contracted HIV/AIDS need access to the same AIDS medication the ICTR provides to perpetrators in custody in Arusha or other respective detention centers designated by ICTR. Yet, survivor victims have persistently told me that the ICJS has used them at its discretion and discarded them with few (if any) returns that deal with their immediate needs.³¹

There are many documentations from observers and organizations (including IBUKA, AVEGA and Redress) highlighting the plights of some survivors of the genocide, including those who have testified at the ICTR. One of the judges in the celebrated Akayesu case³², Navenethem Pillay (the only female judge in the trial), learned from a journalist that one of the witnesses in Akayesu's trial, Witness JJ, was living in a ramshackle hut on bare ground. A journalist criticized the ICTR for having 'used and discarded' Witness JJ. (Durham and Gurd 2005). From the follow up research conducted in 2009, 2012, and 2013, some of the survivor

potential witnesses before or after testifying at the ICTR. Respondents, survivor witnesses confirmed that this was a major problem. The retaliation still happened when the witnesses were under assigned protective measures and other court orders which purportedly were meant to protect them.

³¹Survivor Witnesses **BBJ, BGB, AXA, BBC, QYQ** and others said they have moved on with life but the fact that they came out of the process empty handed still leaves them with more questions than answers about "this justice of yours"

³² In the Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4T, on 2 September 1998 (Akayesu Case)

witnesses living in rural areas of Rwanda the findings confirmed that, like Witness JJ and other survivor victims who suffered deprivation of food, housing, and medicine for the treatment of HIV/AIDS and other diseases which were in all probability contracted because of the rapes committed as part of the genocide; were just starting to receive assistance from NGOS working in Rwanda.

Arguably, the success of high impact litigation is largely driven by incentives, that is, meeting the needs of all the players involved, particularly the survivors. It is hard to win a public interest litigation/case where witnesses are skeptical as that skepticism will affect their testimony and/or willingness to participate in the process. There is a need for an ICJS with a bottom-up, gender-sensitive approach. Such an approach will have the needs and concerns of the survivors as its starting point and focal point. This needs to be reflected in all aspects of ICJS, including recruiting appropriate staff, gender sensitive training, and other measures to engender a gender sensitive approach in the ICJS.

Whilst conscious of the limited mandate of International Criminal Justice Tribunals (the mandate was mainly to focus on investigating crimes and bringing those perpetrators who bear the highest responsibility for the genocide to justice),³³ the reality of the complexities presented by post-conflict situations cannot fit into a “straight jacket” approach³⁴ like the one offered by the ICJS through the ICTR. International tribunals are instruments of social engineering (statutorily created and presumed to be elastic in their nature). In order to succeed, these courts should marshal their elasticity and fit into the political, socio-cultural and economic environment in which the problems they seek to address are grounded.

³³ UNSC Resolution 955 of 8 November 1994 Preamble.

³⁴ The approach being referred to as a “straight jacket approach” in this study takes the law as it’s starting and focal point; anything that seems not to fit into the four corners of the ICJS is perceived as irrelevant or inappropriate.

The current approach is problematic in that it is rooted in a top-down approach; a flawed model that mirrors an attempt to make the Rwandan problem fit into the ICJS. Any survivor who seems not to fit in is inevitably discarded or ignored. According to the survivor witnesses, that is what seemed to be repulsive about the ICJS: the insensitivity and the mechanical approach, which ignored their needs as survivors, a lack of a thorough preparation would allow them to move from being victims to being survivors empowered to participate and contribute meaningfully by bringing a survivor perspective into the ICJS.

On the other hand, the progress in prosecuting rape and sexual violence at the ICTR has been scrutinized by both scholars and activists who describe the prosecution of rape and sexual violence at ICTR as typically fraught with inherent difficulties and gratuitous obstacles (Askin 2003:13). Some of the same scholars have also same scholars have also described the progress made so far as “nothing short of revolutionary.” (Askin 2003, 13).³⁵ Amidst criticism from many quarters of the ICTR’s lack of attention to sexual violence crimes,³⁶ the study reveals a need to specifically collect empirical data from the survivor witnesses of the 1994 conflict related sexual violence, particularly rape and evaluate, from such data, the extent the ICJS has gone in terms of providing gender justice.

³⁵ During the numerous interviews I have had with those representing the international community, be they actors in the ICJS, state agencies or academia and even activists, I have identified a theory I call the “Diaspora Theory.” The international community has invested so much in the ICJS that the last thing they want to hear is that it is not meeting initial great expectations. (The Tribunal’s Security Council Progress Reports and legacy reports characterize what one Rwandan student from UNILAK described in the interview of October 2010. ‘Self-praise.’ This can be contrasted with the upfront voices of survivors pointing out that things “come too late and so little” that failing to meet them at their respective point of need.)

³⁶ See NGO Coalition on Women’s Human Rights in Conflict situations, Rwandan and International NGO reports on ICTR, Amnesty International: International Criminal Tribunal for Rwanda: Trials and Tribulations (London: Amnesty International, 1998); Women’s Caucus for Gender Justice, “Summary of Panel discussions on victim and witness Issues, July 27, 1999, or visit <http://www.iccwomen.org/archive/resources/vwicc/intro.htm>. Note that this study does not focus on gacaca system. Also note that the gacaca system is a huge study and so many researchers are doing interesting work on it; this study will only make relevant cross-references in the relevant chapter.

The question whether the ICJS is a perfect platform for achieving justice for survivors of rape calls for a critical discussion of the law. International criminal law as textually provided is not satisfactory or sufficiently complete to address CRSV in general and rape which ensued in particular. The fact that international criminal law now makes rape and other sexual offences prosecutable just indicates that the principle of legality, which once existed under customary international law, is no longer an obstacle to prosecuting gender specific crimes. For ICTR, the fact remains that the often celebrated and applauded milestones in international criminal law are not fully reflected in the ICTR statute which had no concrete provisions for witness survivor participation and reparations. There have been attempts by organizations representing survivors and victims' to invoke Rule 74 of the ICTR Statute to submit an *amicus curiae* to give a survivor collective perspective to aggravatory factors during sentencing at appeal chamber level.³⁷ Supporting the application the Prosecutor indicated that "the victims' collective voice was lacking during trial process and sentencing. The Prosecutor indicated that it is indisputable that victims should play an important role in giving their perspectives in order to assist the appeals chamber to assess consequences and continuing impact of the 1994 genocide."³⁸

Thus, whilst the research itself explored transitional justice issues³⁹ the legal framework of this research is situated at the intersections of a number of laws including International Human Rights Law, International Humanitarian Law, International Criminal Law and those national laws which influence international customary law.⁴⁰ Because of this approach, my research also uses

³⁷ See Request of IBUKA and Survivor Fund (SURF) for leave to submit a brief as amicus curiae in connection with appeals case" Prosecutor v, Ndindiliyimana et al. Case No. ICTR-00-56A

³⁸ Prosecutor Response to: The Request of IBUKA and Survivor Fund (SURF) For Leave to Submit a Brief As Amicus Curiae in Connection with the Appeals Case" Prosecutor v, Ndindiliyimana et al. Case No. ICTR-00-56A filed on 18 January 2012.

³⁹ Transitional justice here means judicial/formal and non-judicial, or sometimes informal means to address previous wrongs perpetrated during conflict such as human rights abuses and war crimes

⁴⁰ This study benefitted from an engendered discussion on the law, referred to by Juan. E. Mendez's *International Human rights Law, International humanitarian Law, and International Criminal Law and Procedure: New Relationships, in International crimes, Peace, and Human Rights*. Additionally and equally important the definitions

the lens of legal pluralism to critique the position of law and women in Rwanda.

Rwanda, like other former African colonies is affected by a plurality of norms. Legal centralism and legal pluralism are analytical frameworks which provide different understandings of the position of women in the context of multicultural societies and plural systems of law. (Bentzon et al, 1998) The process of the reinforcement or change of gender boundaries through rights and obligations, freedoms and restrictions is seen as a continuous process of action, negotiation and argumentation. (Hellum 1995; Bentzon et al 1998) That explains why, in the case of Rwanda, despite the economic progress recorded women survivors of genocide are still disproportionately affected by the impact of genocide and encounter more social barriers when trying to pursue the justice mirage.

As a researcher, I constantly reminded myself of such problems posed by plural systems of laws, not only on researchers, but also on women and law reformers and enforcers. I took cognizance of the fact that a wider range of normative orders than the formal law come into play to shape women's legal and social position. There is a need to understand how the norms and expectations which inform the position of women and gender relationships are generated into the intersection between general law, customary law and peoples' customs and practices (Bentzon et al 1998, 31). It became inevitable that I constantly explore "women's experiences with the pluralities beyond the borders of legal centralism (Bentzon 1998, 31)."⁴¹

Rwanda has come up with a unified state legal system within which general law and other various systems of customary law (e.g. gacaca courts) are recognized and applied uniformly by

of the different laws provided by the UN- OHCHR South Sudan Report (2014) check for right abbreviation.

⁴¹ Legal centralism, which according to Bentzon et al, remains the dominant tradition among academic lawyers, starts from the stand point that the state law or state recognized and enforced law is the most important normative and all other norm creating and enforcing social fields, institutions and mechanism are either illegal, insignificant or irrelevant.

the courts.⁴² There was a need for me to constantly explore customs and practices among Rwandans so as to identify and deal with emerging gateways that needed to be considered in the context of the formal legal system. I was aware that as a women's law researcher I needed to be working on all fronts with a holistic vision of the interconnectedness of the systems of the law that operate within Rwanda.

5. Towards a Critical and Cautionary Approach: The Researcher's Role and Perspective

A. The Gender Justice Mirage: Looking for a Transformative Justice?

My role as the researcher came with many layers. In this regard, some of my assumptions are derived from some childhood observations relating to armed conflict and women in Zimbabwe. My work as a public prosecutor, a judicial officer, a human rights activist, and an international civil servant at different levels informed some of the assumptions. I have been significantly influenced by my involvement in the national justice system in Zimbabwe working as a public prosecutor and a magistrate again at different levels of the justice delivery system.⁴³ My work in the ICJS system as a human rights lawyer, my place in the ICTR as a member of the prosecution team, as well as my presence at conferences, in the field, and in safe houses as a woman, confidant, scholar and activist for women's empowerment. My interest in unpacking the perspectives that influence the lived realities of survivor-witnesses in Rwanda, the efficacy of the International Criminal Justice System (ICJS), and the legacy of the ICTR began when I was working as a Case Manager, an Assistant Trial Attorney, Trial Attorney and Legal Advisor within trial teams at the ICTR and at one stage as a Gender Focal Person.

⁴² Legal reforms in Rwanda articulated in many ICTR cases addressing Rule 11 *bis* judgment, for example the Munyakazi Case.

⁴³ As a junior and senior, provincial magistrate in charge of the Mashonaland West Province, and as Regional Magistrate presiding among other cases, rapes involving vulnerable persons in Victim Friendly Courts in Bulawayo and Harare Courts in Zimbabwe.

On joining the UN-ICTR in 2001, I had the opportunity to work with survivor witnesses before, during and after trial. I have interacted with different categories of survivor witnesses who came through ICJS at the ICTR in different capacities. As I was validating some of my findings in this study I also had an opportunity to interact further with survivors and different practitioners and activists working on conflict related sexual violence cases. For example in my assignments in South Sudan, North East Nigeria (Boko Harams) and respondents working on CRSV purportedly committed by Daesh in Libya.⁴⁴ In the years I worked in those roles, I was an insider to the system, and in many instances I had the opportunity to speak directly with survivor witnesses; particularly at the ICTR where I was taking some of them through the pre-trial, trial and post-trial stages of the ICJS.

Prior to personally preparing and taking witnesses through the process, I worked as a case manager, assisting my team with assistance including preparatory work and interviews at the Safe House.⁴⁵ In this regard, even before personally handling survivor witnesses at ICTR, I had the opportunity during the course of my work as case manager to observe the process, people and practices involved, to gain a deep understanding of what the system was supposed to do in theory and what it did in practice for its “beneficiaries,” and to have an in-depth and detailed appreciation of the horrific events characterizing the 1994 Rwanda genocide.

⁴⁴ Daesh, refers to the self-proclaimed “Islamic State,” mainly known globally by three names: *ISIS (Islamic State of Iraq and Syria)*, *ISIL (Islamic State of Iraq and the Levant)*, and *DAESH in Arabic (Al-Dawla al-Islamiya al-Iraq al-Sham)* meaning “Islamic State of Iraq and the Levant.” The group at some stage conquered large swaths of territory in parts of western Iraq and eastern Syria, as well as some parts of Libya which were subsequently freed. Its “mission” in the simplest terms is to establish a Caliphate worldwide, as a state-building project. In Libya, the group has not only committed human rights violations against populations in occupied territories, it has also captured women and girls for the purposes of human trafficking, sex slavery, rape and torture.

⁴⁵ The safe house. Is a confidential location where survivor witnesses are accommodated during the different stages of trial cases. Both Prosecution and Defense witnesses under court protective measures are accommodated at different safe houses. As a case manager, on the prosecution side, I sometimes accompanied team members visiting to proof witnesses. There were times I would also proactively visit the witnesses after trial to follow up and check on them. This provided a good opportunity to find out their experience in different cases and courts.

Working as a case manager⁴⁶ I had an opportunity to sit down during week days and weekends and think deeply about the files I was preparing for my team, I also identified gaps in the international legal system which initially I was unaware of. As I sifted through piles and piles of court documents, witnesses statements which needed timely disclosure and reading through hundreds of statements in pretrial preparatory work. What attracted my whole attention were mainly e documents including narrations of details of rape found cross cuttingly in numerous piles of witness statements.⁴⁷ The horrific and gruesome details. Whether the Accused I was handling at a particular time was charged with rape or not, the totality of testimonies described rape, so did any other documents relevant to preparing cases for trial. It was unsettling to realize that nothing had really changed from the challenges encountered within the Zimbabwean national justice system.

The process disillusioned me and compelled me to think deeply about ICJS priorities. The first question was why they are not charging rape and other acts of sexual violence even in cases where on the face of it there was overwhelming evidence of such violations? That was a wrong question. I quickly realized it's not about "them", it was about "us" and when I realized that the second stage was to admit that "us" as representatives of the ICJS were playing a role in silencing survivors. The mental voyage took me from "us" as investigators, the prosecuting team or working in the Registry or Judiciary, to realizing that "we" as the ICJS had real problems at different levels in effectively articulating and perceiving the meaning of gender justice.

⁴⁶ When I joined UN ICTR in 2001, as a case manager, the role, in its simplest form functioned like that of a "glorified legal clerk." My key result areas, however, changed under the leadership of one Senior Trial Attorney (STA) Charles Adeogun Phillips, a British/Nigerian trained international lawyer whose team dubbed "The Kibuye Team" (TKT) allowed case managers to work and think like lawyers or responsible non lawyer professionals. Given my Women's Law training I brought in my gender analysis transferable skills and started interrogating the gender insensitive aspects of the system. I also cross checked indictments to find out why sometimes gender specific charges had not been preferred over some of the indictments.

⁴⁷ During my first year at the tribunal I personally handled and prepared many files containing witness statements for disclosure. I read each of those statements and the details relating to how the atrocities were perpetrated particularly regarding gender specific cases shocked and transformed me.

Something had to be done urgently since for every problem there is always a solution. It is at this stage that I started forming some of the assumptions reflected in this research.

I also gained an insight into the many ways in which the ICJS had failed to adequately address the pain of survivor witnesses after the genocide. However, listening to the voices of the survivors rebutted some of my assumptions but however propelled an independent investigation process in terms of properly identifying the needs, the concerns and some of the aspirations of survivors of the 1994 Rwanda genocide. I brought my previous experience working with national courts to bear on the process regarding sensitivity to survivors of violence,

Working as a public prosecutor in Zimbabwe from 1989, I regarded myself as a young dynamic lawyer with a passion to support vulnerable witnesses and a sharp sense of justice. I carried this belief into the magistracy and into starting to preside over rape cases as a Regional Magistrate in Zimbabwean courts. Like any ordinary lawyer, it was business as usual; we started with the law, we focused on the law and we made our conclusions on points of law and fact and applied the law as we understood it. This mindset changed when I had an opportunity to do post graduate studies in Women's Law in 1999. During the field research I interviewed one of my own former witnesses in the Regional Magistrate Court who explained how focusing on the law and ignoring her immediate needs left her feeling the insensitive sharp edge of the law. This was my "Road to Damascus experience."⁴⁸ I saw light and decided "to kill the lawyer in me and to cultivate a deconstructed human rights lawyer whose perspectives would be grounded

⁴⁸ The "Road to Damascus experience" refers to the bible story of Paul's encounter with the light and conversion experience. I can say it was one of the most defining moments in my career. The moment I told myself instead of regret and hopelessness, we can resolve to take responsibility to be sensitive, to repent and kill the "lawyer in me that I at that moment thought had enabled me to normalize the insensitivity in the justice system, to respond in a gender sensitive manner to all vulnerable persons, girls or boys, women or men, young or old, rich or poor".

on the fears, the concerns and aspirations of those seeking justice particularly the vulnerable. As I gathered the courage to wear the gender lens, my slogan changed, it was a mind shift with an inner urge to “let those who survived the genocide survive the court process”

B. Whose Law Are We Implementing?

While the law is intended to be a neutral set of rules to govern society, law tends to reflect and reinforce the privilege and the interests of the powerful, whether on the basis of economic class, ethnicity, race, religion or gender. Justice systems also reflect these power imbalances.

(UN Women 2012:11) The rule of law is about the existence of law. A corner stone of good governance and democracy, requiring laws to be in place to hold everyone to account.

However when it comes to implementation including in challenging plural legal contexts and post conflict societies, the reality, the rule of law, rules out women and translates to little in practices. (UN Women 2012:11)

Therefore, after the “conversion,” I realized that though we were busy trying to implement “the law”⁴⁹, this was not translating into tangible benefits for women. I left the magistracy where I was a presiding regional magistrate and joined an organization called the Musasa Project – an opportunity to manage and direct a nonprofit women’s rights organization working with survivors of domestic violence – I kept on telling myself I had to move and impact the lives of survivors of rape. Some of my fears were confirmed; women were dying at the hands of spouses whilst they had peace orders (or restraint orders) in their handbags! The peace orders issued at the magistrate’s court were not protecting the women because there was no effective system to monitor their operation and implement them. Instead of addressing the cause of the problem, the peace orders had simply targeted the symptoms.

⁴⁹ The formal laws, including international law etc. as opposed to the other the “lived law,” what ordinary survivors regard as law.

I knew the system was not perfect; however, I expected it to do the best it could, or at least to appear as if it was! I went through the organization's documents. There was, among other documents, a femicide register that attracted my immediate attention. Inside were stories of how women came in, stories of the kind of violence they were facing was recorded, followed by systematic counseling. Depending on their immediate needs and situations or circumstances they were sent to our shelter from violence as a temporary measure. This gave us time to apply urgently for peace orders, we received them and the women were "free" to go and live a productive life. I studied their trajectory, the majority were stalked and killed by their intimate partners who were the perpetrators of the gender based violence that brought them to Musasa project in the first place. The "law" was not working.

Women could not negotiate safe sex and were infected with HIV AIDS, and the organization was doing its best to provide medication. They were battered and would go to court and the same cycle began once more. Interventions including sensitizing police courts and community seemed not to have an impact. I told myself national systems were a real problem. I would have rather been working in the international arena. As soon as an opportunity arose to be an international civil servant, I decided to move on.

C. Letting Go and Thinking Globally to Trigger Local Action that Benefits Survivors

This study represents to me a difficult, but inevitable "self-evaluation" process.⁵⁰ From an insider perspective, it is evident that there are failures in the practice of international criminal law which occur at all stages of the prosecution process: investigation, charging, pretrial plea

⁵⁰ Self-evaluation in the sense that I was, during the research part of the ICJS, working directly with witness survivors, and here I was, listening to the voices of survivors sharing their experiences at ICTR.

negotiations, trial preparation, the provision of protective measures and appeals.⁵¹

My “great expectations” for the ICJS had a significant influence on the methodological approach I employed for the study. Having worked with the national criminal justice system in the Zimbabwean courts and noted how rape and other gender specific crimes were not properly addressed, it was with both a sense of shock and indignation that I noted horrendous rapes committed during the 1994 Rwandan genocide were seemingly not being treated with the seriousness they deserved even at the international level. Being one of the prosecutors in post-conflict Rwanda strategically placed me to identify the deficiencies of the ICJS as reflected in my assumptions.

I felt that issues like prosecutorial priorities, which tend to trivialize gender crimes at ICTR, could be best interrogated by an “insider.” One who within the prosecution team, hears conversations in the corridors of power relating to “difficulty of proof in rape cases”, perceptions of women as “emotional, confused and difficult to handle during trials,” and preferences for what colleagues referred to as “win-win situation” cases.

I also hoped to foster a relationship of both trust and confidentiality with the survivors and other witnesses I interacted with. Using women’s lived realities to uncover hidden dimensions of organizational dialectics, politics and shortcomings inevitably pointed me to the women’s law approach and other extraordinary interventions.⁵²

⁵¹For a further discussion see: Patricia V. Sellers, *The Appeal of Sexual Violence: Akayesu/Gacumbitsi Cases*, Center for Human Rights, *Gender Based violence and Armed Conflict in Africa: Perspectives From the Continent* 51. (<http://www.chr.up.ac.za/centre-publications/gender/Gender-based%20violence%in20%20Africa.PDF>)

⁵² During my Diploma in Women’s Law study I took the same approach of interrogating what hinders service delivery in an institution I worked for, i.e. the Ministry of Justice in Zimbabwe) and tried to identify possible interventions to bring in gender sensitive approaches to handling victims of rape. In this regard I gained a bit of experience in critiquing not only the law and responses of some colleagues, but my own work as reflected in the write up referred to in this study as “the Mabvuku Road to Damascus experience.”

CHAPTER 2: THE RWANDA GENOCIDE, SURVIVOR-WITNESSES, AND GAPS IN THE ICJS

1. Summary: Statement of the Problem and Justification of Study

In the Rwanda genocide, and elsewhere, globally conflict related sexual violence which included rape was used as a weapon of war, devastating the lives of tens and thousands of women and girls.

However, as highlighted in the introductory chapter of this thesis, when it comes to witness-survivors of sexual violence, there is need for a serious consideration of a legal order that takes cognizance of the survivor's needs. A system that genuinely values the information the survivor-witnesses have to offer, and gives them space to participate meaningfully in the process. When Tutsis and moderate Hutus were subjected to a range of human rights violations and/or were brutally killed within a space of one hundred days during the genocide, the violence assumed gender specific forms when members of the *Hutu* militia (known as the *Interahamwe*), the Rwandan Armed Forces (RAF) and civilians targeted Rwandan women and girls in a genocidal campaign of mass sexual violence (Human Rights Watch 2004).

This study aims to prioritize and address the pain of survivor witnesses who were sexually violated during the 1994 Rwanda genocide. This particular chapter details the historical context and environment in which survivor-witnesses were violated, beginning with background on the history, politics and ideologies that led to the genocide, the gender-specific ways in which genocide perpetrators saw mass rape as an effective tool, as well as a brief analysis of the cultural, political, historical and social belief systems that informed their strategies. I establish that the gender-based mass rape served as a genocidal tool to silence survivor-witnesses.

This chapter then connects the genocide's background to the flaws and inadequacies that then

follow when survivor-witnesses try to tell their own narratives in an international tribunal (as represented by the ICTR). There, the voices and perspectives of the survivor witnesses have also been silenced as they become imbedded in the system, and simultaneously survivor witnesses have often been re-traumatized because of the gaps in the system. The chapter then introduces the assumptions and research questions that led to the methodology utilized to complete this study.

2. Background: The Rwanda Genocide and Sexual Violence as Tool of Genocide

A. Silencing the Minority: The Foundational and Gendered Ideologies of the Genocide and the Language of Identity Politics

Before and during the genocide, the state not only targeted the Tutsi minority group, it also used rhetoric to target Tutsi women, and/or those seen to be associated with them, or those who denied the simplistic and hateful rhetoric the state was pushing. Sexual violence was used with impunity as a tool to terrorize and demoralize men and women and their supporters and as a means of ethnic cleansing, as well as a means of disparaging political opponents.

After the genocide, tens of thousands of Tutsi and moderate Hutu (those who were seen as Tutsi sympathizers, mistaken as Tutsi women, or those critical of the regime) women had been raped, mutilated and/or left with forced pregnancies. Reports by Human Rights Watch and other organizations, scholars of the genocide, survivor-witness testimonies gathered by the ICTR, and my own research speaking with survivor-witnesses, indicate that rape was extremely widespread; thousands of women were gang-raped, raped alone, enslaved and held hostage as “wives,” frequently assaulted with objects such as sharpened sticks, glass bottles, gun barrels and machetes, and/or mutilated and left for dead, then some raped again by another set of

attackers (Human Rights Watch 1996, 2).

On the propaganda disseminated by the state to specifically target women and their sexuality during the genocide, Liezlie Green highlights that “the existence of such hate propaganda targeting Tutsi women supports the argument that the sexual violence was not a mere side effect of the conflict but rather an integral part of the genocidal campaign” (Sai 2012).

Those propagating the propaganda worked to use it as a tool to cement a paternalistic, single-party Hutu majority political system. Interestingly, one magazine in particular, *Kangura*, appropriated Rwandan sexual politics and encouraged Hutu extremists to “reposition” Hutu women who had been marching and campaigning for an inclusive democratic system in protest of the male-dominated status quo (Holmes 2014, 102). In the midst of the complicated politics of gender and ethnicity in Rwanda, the state, through mass media and political rallies, repeated a simplified narrative and was determined for it to stick – the “good Hutu” versus the “bad Tutsi” dichotomy, which then would protect a male-dominated, single party state and “Hutu power” interests.

It is crucial to note that mere years before the genocide, in the 1990s, there were several movements and protests in the country pushed by pro-democratic, economically self-sufficient Rwandan women, and those movements added to the political unrest and tension that the Rwandan patriarchal society and the single-party rule feared (Holmes 2014, 106). Even in instances when it might have seemed that the regime wanted to give women a voice by placing them in positions of power in the regime, such women were often those like Agathe Habyarimana (President Habyarimana’s wife, a key player in the small and tight group of Habyarimana’s advisers), or Pauline Nyiramasuhuko (the country’s first Minister of Women and Family Affairs, and an extremist “Hutu power” politician who would herself incite rape in the

genocide); women who were already personally heavily invested in the hate speech the government supported (Lemarchand 1995, 10).

One of the most blatant examples of the complications of gender, political and ethnic identity right before the genocide can be seen through the tactics that were used by the state to silence Agathe Uwilingiyimana. She was a moderate Hutu politician who frequently questioned and challenged the government's policies on identity cards and its "Hutu power" rhetoric. So in articles strategically placed in hate speech media magazines, Uwilingiyimana was portrayed the way Tutsi women were often portrayed in such publications. She was portrayed naked, perched upon books as a nod to her position as Minister of Education at the time (Lemarchand 1995, 10).

As previously mentioned earlier in this chapter, such ideas of the "enemy within," one simultaneously feared and marginalized, were rooted in a simplified history of colonial stereotypes, so that when it came to the rape of women and their public humiliation during the genocide, their suffering then "symbolized the public humiliation of the Tutsi community," and "the purging of the Hutu nation state" (Holmes 2014, 110).

The mass rape of women then became a public project. Perpetrators of gender-based sexual violence against Tutsi and moderate Hutu women included all ranks, from government officials and members of the *Interahamwe*, to clergymen and ordinary people, to other women (Holmes 2014, 212). The plague of mass rape could not be escaped; for survivor-witnesses, it was used to silence them, to render them voiceless, and it was everywhere where death could be found (Women's Media Center 2013).

3. The Main Objective: Strategies Towards Listening to the Voices of Survivor Witnesses

A. Magnifying the Voices of Survivor Witnesses

Using the voices, silences and experiences of both survivors and witnesses to mass rape in the Rwanda genocide, this study interrogates the interactions between the international justice system and its purported beneficiaries; to see whether it forms part of a healing process or actually acts as a burden and an obstacle towards real justice for all stakeholders. The aim is to derive lessons from this interaction, with the view of developing a new theory of a gender sensitive justice, which takes cognizance of the survivor's needs, fears and aspirations. In this regard, the theory will focus on regions ravaged by conflict on the continent, contrasted and at times juxtaposed to Western theories based on a sexual victimization against a background of relative social stability, economic security and social networks.

Historically, both on the continent and globally, CRSV, including gender-based sexual violence in conflict has been most often perceived as inevitable and unavoidable, just “one of the spoils of war.” We know that even though both sides raped civilians in the Second World War, the Nuremburg trials were mostly silent on wartime rape as a serious crime (UN News Center 2014). While international criminal tribunals like the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the former Yugoslavia and now the International Criminal Court have recognized mass gender-based sexual violence as a tool of war, and the Akayesu case was groundbreaking, there still remain gaps in the system where survivor witnesses have been silenced. Moreover, according to the U.N. Special Rapporteur on Violence against Women, rape remains “the least condemned war crime (Human Rights Watch 2003, 54) and post-genocide, “redress for sexual violence remains extremely limited and selective. The search for post-conflict gender justice continues” (Askin 2003, 531).

B. Assumptions

The dilemmas survivors face as they interact with the ICJS have been underpinned by the following assumptions:

- Survivors of rape are unable to participate fully and access the ICJS because it discriminates against them.
- ICJS treats all survivors as a homogeneous group, limiting the choices and legal entitlements available to different categories of survivors (e.g. male, female, the young, old, married or single, those with different disabilities, different ethnicity.)
- Such discrimination reinforces impunity and makes survivors feel that the harm they experience during genocide is ignored or trivialized
- Ultimately the survivors view the ICJS as serving the needs of perpetrators due to myriad reasons (including lack of cost/benefit framework)
- The imbalance can be addressed by motivating survivors to participate fully and also receive reparations and compensation for pain, suffering and loss

These assumptions were mainly informed by my own experiences and observations.⁵³ In addition to the memory work, most of the initial assumptions of this study were influenced by the literature review.

C. Research Questions

Based on the above assumptions, the following research questions then guided this study

⁵³ Derived mainly from observations made when working as a case manager at the ICTR(2001-2003), assistant trial attorney and trial attorney (2003-2005) legal advisor and appeals counsel (2005 to 31 December 2014) and also assigned duties as the gender focal person at the ICTR.

- Are survivors unable to participate fully and access ICJS because it discriminates against them?
 1. Do survivors participate in and access ICJS?
 1. If yes, to what extent do survivors participate in and access ICJS?
 2. If, no, why are they not participating?
 3. Is the ICJS discriminatory against survivors of sexual violence?
- Does the ICJS treat all survivors as a homogeneous group, thus limiting the choices and entitlements available to different categories of survivors?
 1. Does the ICJS treat all survivors as a homogeneous group?
 2. To what extent are the different categories of survivors capable of exercising their choices and entitlements?
- Does such discrimination reinforce impunity, thereby making survivors feel the harm they experienced during genocide is ignored or trivialized?
 1. Does such discrimination reinforce impunity?
 2. How does such discrimination impact on survivors' feelings vis-à-vis their experiences during genocide?
- Do survivors view the ICJS as serving the needs of perpetrators due to myriad reasons?
- Can the imbalance be addressed by motivating survivors to participate fully and also receive reparations and compensation for pain, suffering and loss?
 1. In what manner can this imbalance be addressed?
 2. Is the motivation of survivors to participate fully and also receive reparations and compensation for pain, suffering and loss, the best solution?

3. If yes or no, why?

Whilst some of the questions could have been answered by a careful study of legal sources underpinning both international and international humanitarian law, the major questions could only be answered adequately by listening to both the voices and silences of survivors. In this regard, empirical research was inevitable, therefore in-depth interviews with the survivors, witnesses and other interested parties; actors in different sections of the tribunals formed the crux of this study. Subsequently, I also reviewed some cases dealing with CRSV from ICTR, the ICTY and other courts.⁵⁴

D. Overview on Collecting Survivor Witness Accounts

During the course of this research, I interacted with 76 survivors of conflict related sexual violence. Among these were survivors witnesses who testified before the ICTR, (46), there were survivors who though called to court, never testified about the rapes since in some case the charges were either amended and rape charges dropped by the prosecution team (10). The study coincided with assignments in other conflict and post conflict areas enabling the study to validate the main assertions from the interviewees. 20 survivors of CRSV from South Sudan (7), (Kenya Refugee Camp (4), Nigeria (3), Libya (2), Uganda (2) and Chad (2) validated the voices of the women who were survivors of CRSV during the 1994 Rwanda genocide in a very material way. This was particularly on the issue of the quest for reparations.

Additionally, the study benefited from many informal discussions and interviews with officials from ICTR and other Tribunals, particularly during many Conferences attended to validate the findings. Participants included members of the Office of the Prosecutor, including (prosecution

⁵⁴ See “**Annexure B**” a list of some case law reviewed for this study.

attorneys, former case managers and investigators based in Kigali, Rwanda and Arusha, Tanzania. I discussed the lack of reparations and issues related to stress management with many players in the ICJS including in some of the group discussions I participated in. ICTR witness assistant officers gave valuable information regarding the amount of re-traumatization they observed as they saw witnesses go through the courts process. This was confirmed by some members of the ICTR Medical Section. I had opportunities to discuss with some NGO representatives from Rwanda helped me to put this study in the proper context.

The first, and the majority of these interviews were at the ICTR, with follow-up interviews in Rwanda coinciding with missions to Kigali, Kibuye, Gisenyi and Butare. Since it was not feasible to have repeated dialogues with all the survivor witnesses due to security and confidentiality concerns, only selected survivor witnesses were identified for repeat dialogues to seek further clarifications or clarify certain aspects of their interaction with the ICJS.

The main group discussions involved participants from one of the universities in Kigali. The participants were students from both ethnicities and mobilized by BBN who had moved from Kibuye to Kigali. In 2013, there was an additional group discussions I participated with s various practitioners who had come to launch The ICTR Best Practice Witness/Survivors Manual. The group discussion focused on one of the crux of the study, how to address the needs of survivors and prevent any further harm to survivors of CRSV.

Two similar discussions were held in Uganda's Serena (Entebbe) and Ninja Nile Uganda resort, though not focused addressed the research questions. Participants in Uganda included actors of different institutions dealing with securing accountability for CRSV.⁵⁵ I also reviewed open

⁵⁵ See Appendix 7, a summary of the Respondents, the different categories of public actors who had discussions to explain the needs and concerns voiced by the survivor's witnesses and also the different group discussions on

source materials, reports, court cases from ICTR and other international tribunals addressing accountability issues related to genocide, war crimes and other crimes of similar gravity.

During the study, I attended numerous conferences and engaged with practitioners, lawyers and non-lawyers during conference group discussions focused on aspects relevant to my research.

The interviews took the form of informal, debriefing sessions with those survivors who had interacted with ICJS and was done to assess the experience without talking about the substantive matters involved in their cases. The consensus among those talked to was that there should be more to justice than “waiting for such a long time and then come back with very little to show.”⁵⁶ With some of the survivors, in addition to the time discussion at ICTR; I had opportunities to interact with them in Rwanda on the occasions I was on mission, just to maintain a continuous dialogue to follow-up on the discussion and verify certain aspects of the previous discussion. Open-ended interviews provided access to knowledge about women’s values and life experiences after the genocide. Using face-to-face interviews and legal research, I identified some of the needs of survivor witness from the ICJS; I collected empirical data about the lived realities of survivors of rape to achieve a holistic picture, mainstreaming legal methods to complement social science methods as recommended by experts in the field of “ground approach” methodology. (Dahl 1987; WLSA 1990).

As a prosecuting attorney within the ICJS, I constantly noted that I was part of this international justice system – the very justice system I was critiquing. Additionally and most importantly, I realized the flaws, the inadequacy in addressing the needs and concerns of survivor witnesses.

aspects related to this study.

⁵⁶ In an interview in Kibuye I wanted **XXS** to clarify what she meant by little and how little was little. Without hesitation she said little was in fact nothing. She came out of the Tribunal empty handed.

Interrogating myself as part of the system meant deconstructing my identity from a “knower” to a scholar, willing to objectively observe the system’s processes and attitudes towards the survivor witnesses. In this regard, my interviews were in fact very informal discussion around the needs, the concern and aspirations of the survivor witnesses and listening to their pain and the nature of their experience as they interacted with the ICJS. The dialogue uncovered flaws in the way ICJS interact with survivor witnesses.

From the 15 years of experience working within the ICJS, at the ICTR, through assignments in South Sudan, interacting with survivors from North East Nigeria, Libya and discussing with survivors from Chad I observed how as actors in the ICJS we sometimes unconsciously, endorse and support some of the flaws. As I identified some of the flaws and worked towards bringing them up to be addressed I spoke to many colleagues. Some were “justifiably” proud to have: “a rare opportunity to be part of this noble cause (the ICJS) to serve humanity in conflicts. We are not there to do anything outside our mandate, we have a mandate when doing this difficult work in armed conflict. Our life is on the line. The benefits derived from being part of the system, as a professional and for personal gratification, are almost undeniable, especially opportunities to be visible— to be seen as people contributing to humanity and addressing impunity. We are doing our best and things cannot be faster, that is the best we can go.”⁵⁷

However, the survivor witnesses interviewed wanted to know if there is more to a justice which seems to move at a snail’s pace – one which send them back home “empty handed.” As they answered my field research questions, they also posed their own questions: What is there for us in “your justice”, why we were not allowed to participate fully, why does it seem like our voices do not matter? In this notion of justice, whose justice are we talking about, if so what is

⁵⁷ Discussion with an international civil servant working in armed conflict zone. (2014)

justice?”

E. The Researcher’s Perceived Multiple Roles

In this process, I reminded myself of the inevitable multiple roles, which influenced my assumptions. There I was. A Christian. An African woman, a legal researcher, a human rights lawyer with experience working with cases involving the rights of women in local and international courts. I was naturally drawn to focus on problems affecting women, especially when I could see that the ICJS does not provide practical remedies, and makes survivors resort to using the national legal system to meet needs of their lived realities. Yet, coming from a national jurisdiction where accessing justice would also be a challenge given multiple factors including geographic barriers, institutional, social, cultural, political and both internal and external mental barriers.

I also wanted to approach the study on a positive note. The post genocide Rwanda has led the way in many aspects, including encouraging female leadership in public spheres;⁵⁸ however, like many other countries still recovering from a conflict, Rwanda still adheres to many of the same legal rules, principles and ideologies that existed before the genocide, which can be argued to reflect a legitimatization of the subordination of women to men. Both the administration and structure of the existing laws do not make remedies more accessible to rape survivors of the genocide. The socio-economic realities of such a country and the patriarchal ideology pervading such a society prevent the translation of abstract rights into real, substantive rights (Maboreke 1990).

Drawing on Amy Tsanga’s work, there are significant and numerous interlocking issues for

⁵⁸ Many progressive reforms have been made to the post genocide Rwandan legal framework to compile with international standards. In other respects, Rwanda’s women legislators lead the way and the [presence of woman has been a pivotal factor in achieving progressive legal reform on land, marriage and inheritance. (OHCHR 2008b.)

women who subsequently access the justice system. I realized during the research that this equally applies to the survivor witnesses of the 1994 Rwanda genocide. There are issues they bring into the system by virtue of being products of impunity perpetrated by a genocidal government. They live with the legacy and complexities of previous systems of identity and perceptions of value. In this regard, it is important to understand the multiple oppressions that are often brought to bear upon Rwandan women's lives that further complicate legal frameworks in addition to gender (Tsanga 2011).

The majority of the survivor witnesses I interviewed were from the most remote rural areas of Rwanda. I was struck by the abject poverty. The majority was in a devastatingly poor state, physically, financially and psychologically. I witnessed the effects of a combination of so many factors, visible and invisible, ranging from patriarchy in the culture, attitudes portrayed by the community towards survivors of sexual violence, and the altitude and boundaries to justice set by the justice system through its various actors, starting from the investigators to the presiding judge in Arusha, Tanzania's ICTR.

This context informed how I approached the study. The process was grounded in sensitivity; being sensitive to the experiences of survivor witnesses; not only respecting their memories, but also observing and ameliorating their experience as they travelled between Rwanda and Arusha seeking justice and in pursuit of spaces in which their voices could truly be heard. The process demanded a sharp sense of observation and consideration of all minute details of the ICJS process detailed in later chapters throughout this study.

CHAPTER 3: METHODOLOGY

1. Summary: Documenting Survivor Witness Voices

The overall methodology of this thesis focused on the survivor witnesses – asking them to share their experience when they interacted with ICJS and the ICTR, and carefully documenting any of their needs and concerns. This involved first building trust, and then listening to what a particular survivor witness said about her experience interacting with different actors in the ICJS.

This study inevitably cites a web of fears, needs, relationships and anxieties that affect survivors of rape interacting with the international criminal justice system. The process of listening to survivor voices as the key to the methodology of the study gave me the liberty to highlight significant encounters by the survivor witnesses interviewed, to describe their impressions of the ICJS and its actors. In between, I also interviewed others who interacted with the system in different capacities.

My research method enabled me to uncover some of the social and cultural complexities that the ICJS often fail to articulate or consider when it comes to handling cases of mass sexual violence. The process of witnesses and victims providing testimony to the court as evidence is often mired with obstacles and difficulties behind the scenes; factors that many legal practitioners fail to consider. In the context of the Rwanda genocide and survivor witnesses, I have noted many incidents in which cultural and social expectations and gender norms affected how a witness could or could not testify, as well as how she was perceived by others in her community and perceived her own role in the justice system.

Moreover, I found that my experience reading documents relating to the 1994 genocide as a case manager (before I became a trial attorney at the ICTR) enabled me to then place the interviews I dealt with in context. While empathizing with survivor victims, it became important to realize what happened to them could happen to anyone anywhere in the world, but it also needed to be discussed in context. My research shows that there are wider issues from the criminal justice system as a whole that also needed to be addressed when we speak of and think about genocide survivors – and those issues are best discovered when the survivor voices are heard.

2. Understanding the Dilemmas Facing Survivor-Witnesses

A. Overview of Issues and Concerns

When I spoke to survivor-witnesses, I often felt and heard them explain how they navigated numerous roles and expectations within their own homes, villages and towns, public spaces and legal systems. On the ground, there was a sense that “...survivors are seen as a parasitic presence today, a disturbance that prevents others from fully embracing the present by obliterating the traumatic legacy of the genocide” as captured in the book *Life Laid Bare*, by Alexandre Dauge (2010, 8). He cites Rwililiza, a survivor, who laments:

“I see today that there is uneasiness in talking about the survivors, even among Rwandans, even among Tutsis. I think that everyone would like the survivors to relinquish the genocide, in a way. ...As if people wanted them to leave the task of dealing with it to others who have never been in direct danger of being sliced by machete. ...We survivors, we are growing more like strangers in our own land- which we have never left...”

In the midst of this environment, for over two decades following the 1994 Rwanda Genocide, Rwandan women who were victims of sexual violence have constantly been silenced both at home and at the tribunal in many material respects which will be fully discussed in this study.

Most importantly they have remained without any compensation or redress or reparation.⁵⁹ But at the same time, many of them have been hoping to make a lasting contribution to the ICJS and local justice mechanisms by participating in court proceedings.

Many of them freely gave me interviews but also expressed fear that their real concerns were not addressed by ICJS. Furthermore, the ICTR concluded its mandate on 31 December 2015 without addressing their concerns. In particular, the lack of a cultural and gender-sensitive approach, as well as reparations to address survivor-witness daily needs on the ground, has left them disillusioned by the international justice system and further devastated by their circumstances.

Working with survivor witnesses and hearing their concerns as part of my research process for this dissertation enabled me to also investigate relevant strategies to address them. The ICTR statute has limited provisions for practical reparations. The limited mechanisms improvised outside the ICTR Statute to try to provide medical assistance have their own limitations,⁶⁰ which have also disappointed many survivors of genocide particularly those who experienced CRSV. As they walk away from the ICJS to Rwanda, victims are expected to pursue redress with domestic courts, which now incorporate the *gacaca* system⁶¹, an adaptation of a supposedly participatory, community level truth-telling mechanism. Given the massive number of rapes during the genocide and the extraordinary number of adjudications in Rwanda, one of the

⁵⁹ In the context of this study, the word reparations is used broadly to include action to repair the damage caused by genocidal rape both materially and symbolical (e.g. apologies and both individual and community service)

⁶⁰ The ICTR Statute was set up without any mechanism of compensation. Articles 105 and 106 of the ICTR Rules of Procedure and Evidence assign the issue of compensation to national courts. This contrasts with the ICC Rome statute provisions that specifically allow compensation.

⁶¹ It is important to make it clear that the *gacaca* system as important as it is not the focal point of this study. It is a huge study on its own and a lot of researcher is working in this area already. It is just being incorporated by reference to show the double jeopardy some of the survivors face in Rwanda. From the discussions with Respondents, this local initiative has formed part of their post conflict life and has left a mixed legacy in their lives. To ignore it will be ignoring a very important aspect of the survivors' narrative.

questions I asked as I researched is this: is it feasible for a victim to find in the gacaca system what is lacking in the ICJS?

Even before the gacaca system was implemented, some victims already had their reservations about receiving any kind of justice. A Human Rights Watch report stated: “When gacaca begins, it will seriously disturb survivors. They don’t have hope, or security. Now that people have started to talk about gacaca, the security situation has changed” (Human Rights Watch 2004, 1).

B. From Law to Life: Approaching Survivor-Witness Perspectives

In her pioneering work “Women’s Law. An Introduction to Feminist Jurisprudence,” Professor Tove Stang Dahl outlines the perceived objective of women’s law. Women’s law has been seen as a legal discipline aimed at describing, analyzing and improving the position of women in law and society (Dahl 1987; Maboreke 1990). In adopting this approach, I reminded myself that there is considerable disagreement between different schools of feminist jurisprudence regarding the role of law in women’s development, and this realization informed the strategies I used to understand the interviews I conducted. Carol Smart and Ann Stewart argue for non-engagement with the law in view of the power it wields over women, which is considered too substantial to change it from within (Weis, Bentzon et. Al 1998; Stewart 1993; Smart 1989).

In this regard, and since the study is predicated on the intersection of “laws” (ranging from the “living law” as understood by some of the ordinary survivors of genocide, to international law, criminal law, and Rwandan customary law) it became also important to “problematize” the law. Scholars like Zahle have noted that:

“We cannot construct an abstract definition of what law is. The definition is given in relation to the specific applications of the concept of law. The definition may be different from one order to the next, from the public to the private, from the national to the international order, etc. The definitions do, to a certain extent, cover a common set of norms and institutions. This coincidence brings with it a certain inner cohesion. As mentioned, there is good reason to believe that this coincidence is less than earlier assumed. But it is there, and you cannot speak of complete dissolution. The concept of law has become polycentric” (Zahle 1995, 198).

Given the nature of the interaction I had with 76 respondents who testified about CRSV, I decided to focus on the 46 whose experience related to testifying about the events of regarding the killings they witnessed and the rape they endured. I opted to pursue a grounded and relational theory in law approach. A grounded theory approach involves building up legal and social science knowledge, which encompasses the practices and perceptions of women and men in Southern and Eastern Africa (Bentzon et. al 1998). Throughout this research, the strategy was to engage empirical knowledge about gender relations and local practices and procedures in a constant dialogue with theoretical generalization and concept building. Such an approach helped me maintain the continuous dialogue and interaction between the initial theory and the empirical data collected. This allowed adjustments depending on the extent of mismatches between the initial theoretical assumptions and empirical data collected.

Between various field assignments, I had the opportunity to observe court hearings – to review legal correspondence and practice notes within the office regarding how witnesses should be treated at various stages. This included during investigations, pre-trial, trial and the after-trial stage. I found that what is on paper is often not disseminated to members of the prosecution team, nor is there a system to monitor that it is. As I continued to observe how different actors interacted with witnesses, it was clear there is a dichotomy between what is being done in practice and what is contained in the practice notes.

During the study, survivors' lived realities formed and remained the focal point on the recommended interventions. Specifically, I looked to witness accounts to draw my research path. For example, JOJ, was a Hutu woman mistaken for a Tutsi girl and raped during the genocide and then married a Tutsi man after the genocide. Like other witnesses I spoke to who were facing pressure from their families and spouses to keep silent, her husband was angry when he realized she told the court about the rape she experienced during the genocide. During the study, and during numerous interviews with survivor witness, mostly Tutsi women, it was discussed how before interacting with the ICJS, such marital complications and issues were underplayed. From the findings of the study, it is clear that:

“the existence of biological, social and cultural differences between women and men are not regarded as the main problem in women's lives, but rather law and societies systematic under valuation of female activities, values and characteristic are seen as the main source of women's subordination” (Dahl 1987, 13).

This study uses the women's law approach to provide a holistic approach to research. This is a woman centered legal discipline which takes women's actual lived experiences and life situations based in sexuality, maternity issues, care and domestic work as a starting point for the analysis of the position of women in law and society (Bentzon et. al 1998, 91).

It therefore follows that within the ICJS, if the subordination of women is to be addressed, then a legal order which recognizes women's needs, fears and aspiration can remove barriers and impediments which women face in trying to access ICJS. There is a need for a serious consideration of a legal order that takes cognizance of women's needs and values in terms of information, participation, self-determination and evaluation for their role in the ICJS.

3. On the Ground: Activist Research

A. Research Design, Interview Respondents and Research Sites

I identified and collected data, which addresses the needs of survivor witnesses. Interviews with survivor witnesses revealed that the ICJS does not address the needs of survivor witnesses because it tends to portray them as a homogenous group. In many material respects, they also had specific needs, as well as anxieties informed by their individual differences. So my first premise was to take note that the survivors were not a homogenous group – that even in their similarities, there was a need to take a more nuanced look, one more focused than the way the ICJS seeks, describes and identifies survivor-witnesses. Though I have noted before that the focus tends to be on Tutsi women, moderate Hutu women were also often targeted for rape during the genocide. The young and the old, the Tutsi and moderate Hutus, those now living with disabilities, those who were infected with HIV, and those who were recovering from the genocide told of different and similar experiences. In order to obtain a holistic understanding of the dynamics involved in this complex set-up, I used grounded methods of women's law. Many were trying to recover from the genocide and trying to find ways to move on with their lives. In order to obtain a holistic understanding of the dynamics involved in this complex set-up, I used grounded methods of women's law.

The research sites selected coincided with previous missions except for Kigali Rural and Cyangugu. Survivor witnesses interacted with at the Arusha Tribunal came from many places in Rwanda considering how wide spread or systematic CRSV was during the genocide. In essence, the whole of Rwanda was a crime scene. The focus was on:

1. Kigali
2. Kibuye
3. Butare
4. Gisenyi
5. Kibuye
6. Gitarama

In the Muhimana trial, I was particularly drawn to analyzing the research on what happened at Bisesero. Bisesero has been described as “Hill of Resistance” during many trial sessions in the Kibuye cases.⁶² In the Muhimana trial, witness after witness deposed how the Tutsi faced one of their darkest chapters during the genocide when they put up the last fight for their lives by mobilizing and throwing stones at the Hutu attackers at Bisesero, where more than 40,000 Tutsis were massacred. Given the fact that many were injured in previous attacks and the majority had been starved for a long period, the *Interahamwe* received reinforcement from other quarters and many Tutsis died a painful death.

One witness (DBD 2011) explained:

“Bisesero represents different things to different people. If you go around asking around this place you will find many call it --, ‘Agasikahanganyen’ibitero’ (The hill that resisted attacks). It was the place of hope, in our desperation we managed to encourage ourselves at the verge of starvation to climb high, higher, to the highest place. We fought until we all were at our very end. We could not go any higher up, there was finally and apparently to hold on to yet, no sign of anything to hold on to yet at such a dark moment nothing become something since the options are non-existent. Neither could we go down without being killed instantly since we were now hunted like animals. The only choice left was to imagine and hold on to whatever you thought was still there. I saw women being raped atrociously. For me, I thought at least I still was left with 2 things to hold on to. My 3 year old son was hiding with me in the same bush, he remained as still as a stone in the midst of visible movement of death.

Additionally I held on to the invisible, my faith, a faith I never realized was that important until during the war I had nothing else. On the next bush was a lady I know, a close relative, very pregnant. When they got where she was, started disemboweling her, when her baby cried and stopped crying signifying the ultimate fate of that baby, it became obvious that it was a choice between death and death. So to me Bisesero was physically the highest point we had reached to save ourselves yet what happened signified the lowest, darkest and deepest despair my soul travelled during the

⁶² Kibuye cases/files include Kayishema, Ntakirutimana, Rutaganda and others where the suspects are still at large and whose files were transferred to Rwanda

genocide. I wish what happened there was just a bad dream”

A different witness (AXX) shared how she saw the aftermath of Bisesero:

“Before the genocide I did not travel outside Bisesero, would just visit my family and attended weddings or funerals for those close to me. When the UN car came to take me to Kibuye, it was an experience. When I boarded the beech craft it was an experience and a half. Yes, I have complained about what happened during trial however leaving Bisesero, leaving Kibuye, leaving Rwanda gave me another perspective. For two weeks I did not gather firewood or cook, I sat and reflected, deeply, it was painful but helpful. The dream to go to Arusha was free but the journey back was not. I went to Arusha full of expectations, you recall how I cried afterwards at the Safe House, and I realized this justice has very little for me. In fact it had nothing for me.”

Another site included in this case study was at Mugonero Hospital; many of the participants from the Kibuye cases referred to the rapes at Mugonero hospital. Many of the women in the pilot study were raped at Mugonero hospital on 6 and 7 April 1994. This was the same place that had previously been viewed as pinnacle for health and life by the community, where the sick would go and recuperate or die in dignity. As one participant responded, BGB said, Mugonero, even many years after the war, remained to survivors of what it became in April 1994, a nightmare, death trap and its rooms the raping chambers:

“I can still hear my voice crying, echoes of despair, pain, loss and suffering,” said one survivor. Those details which you do not give us the space to explain in Arusha, details which your justice does not want to hear yet defines our story and reality. These are not just stories. For me it is part of my life I am trying to bring back in order to feel I have at least done my part to try to recover the part of me which was buried during the genocide.”



Image 1: Mugonero Hospital

Source:<http://www.adventistreview.org/assets/public/news/2016-03/Adventist-Rwanda-March29-1.jpg>

Another witness (POQ, 2011) stated:

“That is the Mugonero hospital where we had to flee to. We did not go there because we were sick. I was going there at a moment of despair. We were all afraid of the killers, those who could run, those who could not because of age had to be carried to their deaths. When the killing started and I managed to escape, I could hardly walk; you will understand the gang rape was my first sexual encounter. Instead of mourning for the loss of my virginity which in my culture is important and significant, I was mourning those very dear who were killed and angry that I was left to die a slow death, to die once, twice, more and more times continuously, to keep on dying. Even when I stood in court in Arusha I was dying and all those pillars in the corridors were like burying me with grief and pain I cannot explain.”

I began listening to those silences when I met witness CCB in Kibuye in 2009. She looked at me intensely without uttering a word. Amidst the piercing silence I noted that she looked weary and pale. Sensing that this was a critical moment, I took the liberty to hug her. She responded with a warm smile. I then referred to her as “mother-in-law,” for she knew my son, the one I brought into the field when we were preparing for Muhimana trial in 2005. That is when I

knew I met her adorable daughter, the one she was nursing during the interview, when she told me she had moved on with life and remarried. She looked at me again, this time directly in the eye and said:

“You were lost; you did not come to see us soon, even when you heard about the death of AUU? Now for this reason your son will not marry my daughter. But seriously, it is impossible for your son to become my son in law. Your son now goes to a good school, my daughter sometimes miss school to help me fetch water, and you know the disability I suffered during the genocide. You work at the UN, me I cannot be gainfully employed in this condition. We heard when we were in Arusha that UN pays their people well, we hear, people from different countries. So, your son will get very good education and will get married to someone who is rich. Our children are condemned to poverty. They will suffer not because they did anything wrong. Just because now that I live with disability I cannot support them as I should. Even going all the way to fetch water is a problem. Instead of sending those people to Mali you should bring them here to dig a well so that we have clean water. In Arusha you do not ask us what we need and as a result we remain poor because there is nothing for us. We came back with nothing from Arusha, is that justice?”

Soon after CCB gave me a warm hug with her one hand.⁶³ Our meeting briefly referred to the brief discussion in Arusha. She also looked at me for a long time giving me an opportunity to attempt to read her silence. She smiled After breaking the silence, BBJ sat down with me, gave me that disarming smile which seems to come naturally to many survivors despite what they have gone through which we cannot even start to imagine. The horror, the pain and the aftermath. The translator sat next to her. She talked about other challenges, the poverty and the problems. She was coming to us from a position of pain and loss which Arusha failed to address.

She talked about the possibilities, if Arusha had just give her compensation for pain and suffering she would have a starting point. She knew women whose cows were slaughtered by *Interahamwes* during the genocide who came back empty handed from the court in Arusha.

BBD had a sharp memory about Arusha, the family she left behind, friends, the community to

⁶³ After this meeting the interpreter told me there is a place where those seriously injured reside, a remote area for the neglected and abandoned. Even ICTR investigators would not bother going there for they did not want the inconvenience of finding translators who would assist with sign language or carrying around survivors who had multiple disabilities sustained during the genocide.

the investigators, attorneys and other public actors who inspired her to stand strong and those who took her through the legal process in court, at the safe house, and accompanied her to Arusha.

BBD is a Hutu mistaken for a Tutsi girl and raped during the genocide. She married a survivor and a Tutsi man who was angry when he realized she told the court about her rape experience. She opened my eyes to the complexities I would face for the years ahead, as I tried to patch together what being a female survivor witness in Rwanda really means. She told me she was surprised when someone told her the Hutu killed the Tutsi since the Tutsi il treated the Hutu. She worked for a Tutsi family who treated me “well like their family member and when we fled to Mugonero we fled together.”

Generally, the interactions in Arusha covered a broader geographical area, the whole of Rwanda, with survivor witnesses coming from Kigali rural and urban; Gitarama, Butare, Gikongoro, Cyangugu, Kibuye, Gisenyi and Ruhengere. Using the Muhimana Kibuye case as a pilot study formed an important consideration on the demarcation of the scope of the study. It enabled me at an early stage to realize some of the problems likely to be encountered and to adjust the demarcation of the study accordingly. In choosing my sites, I took into consideration the number of survivor witnesses who had passed through the ICJS, who I could access there or later during mission visits.

To communicate effectively with the women, I used 3 translators who were familiar with court cases and confidentiality issues since they were witnesses support assistants. They spoke Kinyarwanda, French and English. For general discussions with some actors in Rwanda I received a lot of support and assistance from 3 university law students from UNILAC whom I met on two occasions when I conducted outreach trainings. We collaborated very well, and

also this relationship allowed them to reprimand me, rebuke me, correct me about my assumptions and make very meaningful contributions.

In addition to survivor witnesses, I had many opportunities to talk and discuss the concerns with some representatives of women's organizations, NGO workers, ordinary Rwandans, and students from UNILAK University at different forums between 2009 and 2014. During the course of work I observed many court proceedings and observed the pain many survivor witnesses went through. In terms of the theoretical assumptions, I chose to research on both the urban and rural areas, since I assumed, for example, that the economic factors facing survivors in Butare rural would be different from those being faced by some survivors in Butare urban. There were also practical reasons for choosing Kibuye, Butare and Gisenyi. Since I was involved in cases from those regions when I worked with ICTR, it was easy to follow up some of the respondents and follow up on them during the course of my duties. Having a clearly demarcated frame within which the research was to be conducted did not mean excluding empirical data from places like Cyangugu. I however maintained the flexibility sought by the iterative process without risking lack of cohesion.

Regarding my interactions with survivor witnesses they were limitations regarding the length of time to engage in in-depth interviews since at any given time I had to get assistance from Kinyarwanda translator. These were colleagues working at the ICTR and time was of the essence due to a tight schedule and multi tasks.

B. Practical Role as a Researcher, Activist and Fellow African Woman

For an African woman legal researcher, I found that there is even more of a need to focus on problems affecting women, especially when the ICJS and explore how the law can be utilized as

a tool to alleviate the pain of survivors, to provide some appropriate remedies including empowering them to access national system in Rwanda to pursue reparations. Rwanda, like many other countries coming from a conflict, had after the 1994 genocide legal rules and principles that still reflect a legitimization of the subordination of women to men.⁶⁴ Both the administration and structure of the existing laws did not make remedies more accessible to rape survivors of the genocide. In many societies, the socio-economic realities of such a country and the patriarchal ideology pervading such a society prevent the translation of abstract rights into real, substantive rights (Maboreke 1990).

To achieve a holistic picture, mainstreaming legal methods need to be complimented with methods from social sciences (Dahl 1987; WLSA 1990). The study used the technique of uncovering the nature of women's problems in combination with open-ended interviews providing access to knowledge about women's values and life experiences. (Hellum 1990; Himonga 1990; Molokomme 1990)

As mentioned in the previous chapter, and outlined in previous sections, one of my assumptions was that ICJS discriminates against women survivor witnesses; that women are routinely discriminated against by the adjudication system at all levels, even in those systems with the so-called "gender neutral law" as well founded and well documented from my literature review.

As indicated earlier, one of the ways in which I acquired access to the empirical research I needed was by going to the places where women in Rwanda could gather and speak about their experiences outside the courts. I am a Christian, so I had opportunities to attend church services on three Sundays in 2009, 2012 and November 2011. In the informal discussions, I

⁶⁴ UN-ICTR Rule 11 *bis* judgments on progress made regarding legal reform in Rwanda.

heard about issues of reconciliation and forgiveness. We started talking of general issues, then there was concern about cases of domestic violence and forgiveness, where some participants explained that even after forgiving perpetrators of genocide (genocidaires), they found it impossible to be forgiven by their violent partners. Eleven of my interviewees were among the church attendees.

It was important to try and describe, understand and analyze the pain, listen to the voices, study the experiences and listen to the silences, which spoke louder than the voices about the flaws in the system that lawyers often do not recognize or ignore. The flaws seem to be magnified by ICJS. This meant, in essence, broadening the discussion to critically re-examine how legal rights are mediated and investigated in the first place. If there is going to be a reform, there first has to be a common understanding of the needs of survivors so as to reconstitute law as a tool of change, or emancipator change.

Re-conceptualization of needs also meant looking at how the law is taught or ought to be taught in order to use it as a tool to meet stakeholders at their points of need.⁶⁵ As the former Vice Chancellor of the University of Zimbabwe Professor Kamba states, to be effective, academic scholarship has to “...*forge a new orientation, an orientation that must take cognizance of local cultural demands, local aspirations and local susceptibilities.*” (Bentzon *et al.* 1998, 25; quoting Kamba 1990, 27)

In Kibuye, Gisenyi and Kigali Urban, my follow-ups included another place outside the court system when I attended a funeral service. . There, people explained that during the genocide,

⁶⁵ For an interesting account of a struggle over the form and content of the law curriculum see J. Kanyiwanyi: Twenty five years of teaching Law in Dar Es Salaam in Zimbabwe Law Review (Kanyiwanyi 1989-90). Reg Austin’s article “Access to Legal Education and the Legal Education and the Legal Profession in Zimbabwe, in Zimbabwe Law Review also cited Bentzon (1998:24)

there was no respect for rituals; bodies were dumped in mass graves and in latrine pits. However, traditionally and culturally, Rwandans explained to me that funerals are to be well organized and provide a great opportunity to empathizewhilst reflecting on deep issues affecting a given community. At such gatherings, informal discussions about how survivors viewed themselves after the genocide took place randomly depending on who was in attendance and who was standing next to me, a colleague who took me to this event kept on translating and explaining the different dialogues which were in Kinyarwanda.

On this occasion-, I easily connected to women. The same applied when we went shopping in Gisenyi and Kigali's Nyamirambo area. In 2009, the interpreter and myself spent half a day of that Saturday in a "shopping mall" in Nyamirambo where she had booked us for hair hair do (braiding). The two hairdressers had been identified by the interpreter as survivors by the interpreter explained their experience and concerns during the Arusha process. They referred us to three other survivors selling their wares at the markets. We also spent the rest of the Saturday at the Kigali market, with UNILAC (l'UniversitéInternationaleLibred'AfriqueCentrale) some students who then left. At this stage an ICTRcolleague who accompanied us easily identified survivors from their associations' visible injuries and disabilities, as we bought wares and negotiated prices we ended up discussing. Conversations often began with something unrelated to the subject matter of my research, and with further engagement, more women from next stalls joined in. As the group expanded, the issues that came up for discussion also expanded. On average, between five and seven women started talking and bringing in other subjects. Of concern were issues like the economic difficulties facing women especially with children. My colleague explained in 2009 the difficulty of talking of children since some of the children running around and apparently between 12 and 13 could assumedly have been conceived during the period of the genocide.

At a Burundi workshop colleague, and myself had an opportunity to have a meeting with one of the women from Rwanda, her comments about her experience further summarized the essence of the discussions I had with some Rwandan women at the market in Kigali?

“In Rwanda I work with many women who have testified at the Tribunal. We have failed to understand what you term justice. We are disillusioned and we have no faith in a justice which does not recognize the needs of those who suffered most, you should be constantly reminded that these survivor witnesses went through a lot of pain. When you conduct cases in Arusha do you realize you are dealing with women who have been turned into outcasts by the Interahamwe? By the time they come to Arusha they expect at least that the system will assist in picking along the shreds of their social fabric in order to go on with life. I have been to Arusha you come back feeling an unexplainable vacuum, the emptiness is very painful”

During one Sunday in 2011 at a church service in Kigali, my colleague introduced me to 5 survivor witnesses she had identified. When I introduced myself and explained that I was interested to hear their experience in Arusha, they were very eager to comment on that they did not get any apology at the “Arusha Tribunal.” Later each had something to say about their experience with ICJS as represented by ICTR. In terms of striking a rapport and collecting more data, I used many of the skills I had used living in Zimbabwe and Tanzania to integrate myself into local communities and to help the survivor witnesses feel more comfortable to disclose their feelings.. In Tanzania, whenever I had addressed a local audience, I made a deliberate effort to wear their traditional clothes. This opened avenues to talk about more and discuss more. In Rwanda, I realized that once the dressing “showed respect,” according to local customs, one could gain an audience more eagerly to help. One of them giggled and say “You came to church, we will tell you what we felt in Arusha)

Throughout these interviews, the interviewees often wanted to know of solutions to their social problems and other concerns ranging from restitution, maintenance, domestic violence, and a variety of problems. They began to ask questions about the ICJS that they would not have asked anyone else, because no one from that system had cared to ask them what they thought about

it.

Though this study did not engage many men in Rwanda, there were active general discussions with university male students who gave very progressive views on gender issues (UNILAK 2009). Two of the students made it possible to attend two more funerals in Gisenyi and Kibuye.

The two male students educated me about the rituals in the rural area, and how to dress with respect particularly as we visited genocide memorials. From there, I went to attend a funeral in the Kigali Urban, where the requirements were different – which was one of the challenges of this study. Just as each case I had looked at was different, many places in Rwanda also differed in custom. I looked like a woman from Kibuye and all my colleagues, who were “properly dressed,” kept a distance from me leaving me to strategically engage in a discussion with few women who looked like they had also “travelled from very far.” One of these women indicated that she was a survivor from Cyangugu being assisted by ABASA (an association in Rwanda that provides trauma counseling for genocide survivors). At each place and each stage, I was welcomed easily at times and had to explain myself at other times; I found the process enlightening, complicated and very telling of the gaps that have been missing in conceptualizing how the law works in the lives of survivors of genocide.

For some of the witnesses, the journey to Arusha temporarily freed them from some oppressive gender roles that have been used as justifications for giving women a limited space or no place at all to internalize and come to terms with the past, the present and the future. Asking and talking to the survivors as they arrived in Arusha was like giving a voice to their experience, starting with the present, going into the past and then waving our way to a hope and a different end. The approach was to deal with basic concerns that are relevant to the realities of women, raped during the genocide, now preparing to come and testify after more

than ten years. But I found that the process was painful and complicated for the women and for myself, as we reopened memories and wounds, and interrogated what “justice” meant and whom it was for.

C. Study Limitations

Although the actual collecting of empirical data started well before this study in 2005, it enabled me to make relevant follow up in 2009, coinciding with this study commencement. The collection of relevant empirical data remained a slow process given the fact that in many of the cases, had already been completed and locating some of the respondents was not always easy. Additionally, since I did not speak Kinyarwanda, I relied heavily on the colleagues who assisted me and they always had tight schedules. Any interactions had to be at very safe places, in the presence of those ICTR colleagues who fully understood the essence of the confidentiality surrounding protected witnesses. It was also done in a way that fully addressed the security concerns and confidentiality issues.

This research targeted key informants at all levels of ICJS. Though was especially advantageous that I was employed at the UNICTR and could access prosecution witnesses at the ICTR and in the field in Rwanda during proofing sessions. The time to do so was very limited so the interactions deliberately did not go into substantive issues. Any discussions had to be when survivor witnesses complete their testimonies before leaving the witness room or the safe houses in Arusha. There are times when I had an opportunity to debrief with witnesses at the safe house. Their time on both occasions were very limited because of the security arrangements and work related commitments which sometimes coincided with the times the witnesses were available. It was not possible to approach and interview defense witnesses given the logistics needed to obtain access to since I was on the prosecution team. And

authority to conduct this research had been granted on the basis that the safety and confidentiality of prosecution witnesses would not be compromised. It is for this reason that the survivor witnesses court pseudonyms were changed in this study to make sure the survivor witnesses would not be easily identified. In this regard, this study could not find out the needs, expectations and experience of the defense witnesses, some of which might also have been survivors of some gender specific crimes during the genocide.

I received permission to conduct research at the tribunal through the Chief of the Division of Administration and Support Service (DASS) other organized arrangements were made in terms of arranging meetings with those in authority in an administratively separate section.

Additionally, my study did not focus on the substantive part of the court process since it was a simple evaluation on the needs and concerns when the witnesses interacted with ICJS. With each participant, the process and approach was flexible. Survivor witnesses shared their experience and expectations and their impressions of the ICJS and its actors. I also interviewed women and men who interacted with the system in different capacities. To gain more insights into their experiences from and with the ICJS, I made follow-up interviews.

D. Confidentiality

In view of this type of emotionally and sociologically difficult encounter and others, there had to be confidentiality in the way in which I did my research. It is clear from this mental voyage that when it came to identifying the aspects of issues I wanted to research, I was inspired by, on one hand, the desire to address the pain which survivor witnesses continue to go through in and out of court, while on the other hand, I felt disillusioned by the flaws within the justice system and begin to question whether it is the best platform to prepare ushering survivors as

witnesses.

Since the research was undertaken in the context of my work, in line with UN policy on information sensitivity, classification and handling, information provided by survivor witnesses and other confidential material collected has been handled confidentially. As a result, any details which can reveal the identity of survivor witnesses including names, dates and places have been omitted in their narratives in order to ensure parties involved and their families remain safe and secure.

Of the 76, around 36 of the survivor witnesses interviewed, identified through either fellow attorneys in other cases or other survivor witnesses who directly or indirectly knew someone who testified regarding charges of sexual violence at the ICTR. The survivor witnesses all experienced extensive trauma and terror, hence it was important to continuously build trust through strict confidentiality and ensuring that adequate protection measures were in place. Particularly when children were involved, it was essential to create a secure environment in which victims and witnesses could recount their experiences.

The survivors were interviewed first individually and in follow up discussions in very small group discussions at very safe places consisting of those survivors who already knew each and are were supporting each other through collective debriefings. This strategy was adopted to avoid any further harm or re-traumatization. Being inspired by the desire to address the pain which survivor witnesses continued to go through in and out of court, I was cautious not to cause any further harm. I also took cognizance of the fact that the pain experienced in the judicial process cannot be looked at in a vacuum. It was intricately linked to the private domain and the issue of power and control embedded in the lives of women during conflict and during what is regarded as “peace time.” I was also disillusioned by the flaws within the justice

system, which started from the investigative period, to the post-trial phase and beyond. The question, which was then explored in this study was, given the pain which survivor witnesses go through, is it possible for it to change lens and look at gender justice from the lens of survivor witnesses?

E. Looking at Justice through a Different Lens

As indicated previously, a large part of my research involved letting the survivor witnesses speak not only about the genocide and what they saw then, but also about Arusha and how they themselves conceptualized “justice.” Many times, the witnesses said that they felt short changed and disappointed by the process, or hurt that they actually weren’t as involved as they were led to believe before travelling to Arusha. One witness (KOL 2010 Gyshita), pointed out the discrepancy between the “justice” she was receiving and the way that the ICTR treated the accused, and felt that there was something wrong with the way things worked. She said:

“I guess it is natural to feel this way since we could not talk to other witnesses before testifying and afterwards all those I spoke to felt this vacuum. In the court in Arusha it appears no one really understands the needs of those who are testifying. You get this awkward feeling that nobody wants to know about the basic things in your everyday life. Things like whether you then built your home after it was burnt down, what assistance you are receiving or whether anyone will assist the orphans you are looking after to go to school. With the government back home you know they are trying but they do not have the resources. In Arusha people look like they have money and Muhimana looked better than during the genocide, he looks happy, it’s like you come here just to get some additional pain to remind you of what you want to forget. I had a couple of questions I wanted to ask Muhimana however I could not, he was well protected and represented by so many people.”

This was buttressed by YOY, who showed how difficult it is for women to participate meaningfully in the ICJS. In 2005, I became acquainted with a witness, YOY, in Kibuye when I was interviewing witnesses for the Muhimana trial. She was coming to testify about the “killings” only, and was being handled by a colleague. She stated in 2009:

“Since I felt that those who were raped were also killed slowly, I decided to talk about those who I knew had been raped brutally. The attorney told me that since initially I was not listed to testify on the rape charges, the attorney would inform the court; however, this would not add much value to the charges since such an additional testimony will only be for the purpose of adding context. In essence, I was free to tell the court about the rape and I did. You will understand that I kept on feeling that what is important to me is not important to the justice system in Arusha. Lawyers there will argue of things you think have nothing to do with your life and you spent two weeks there. Two weeks doing what?”

I talked to YOY in 2009, we did not focus on the procedure or process that was not my concern too. She talked about on the people, pain and “principles of life”. As a matter of principle, she said “justice has to be justice, if it’s not then call it another thing.”

In 2009, I had an opportunity to follow up on YOY to explain the purpose of the series of the interviews I was conducting. It was clear that this was a case where a grounded theory approach was inevitable so as to collect empirical data, which informed on possible interventions. I found this approach relevant to many of my interviews, regardless of whether they were survivors, witnesses, or actors within the ICJS.

In depth interviews also explored “the ways in which the experience of oppression, marginalization and violence is not only the experience of powerlessness and despair but also a site of critique, alternative realities and agency through resistance to victimization and violation (Hooks 1990).”

During the study and numerous interviews with survivor witnesses (mostly Tutsi), it was discussed how before interacting with the ICJS, such issues were under played. From the findings of the study, it is clear that “the existence of biological, social and cultural differences between women and men are not regarded as the main problem in women’s lives, but rather law and societies’ systematic under valuation of female activities, values and characteristic are seen as the main source of women’s subordination” (Dahl 1987, 13). In this study, I hope to

bring in many of the sides of the story that have been ignored or lost to the ICTR in particular and ICJS in general when it comes to issues of gender vis-à-vis the lived realities of survivor witnesses of sexual violence in Rwanda.

The grounded approach to gathering empirical data proved very effective as it established a rapport among the researcher and the respondents who ended up discussing their concerns in a way that left them eager to take control of their situations and realize that they are still in control of their lives and can explore other options to pursue remedies not provided at the Arusha Tribunal. Additionally, the process enabled the researcher to understand the respondents' "lived law" and for the researcher to also explain how "the law" can be used as a tool to address some of their concerns and also bring in an element of justice in the form of deterrence.

CHAPTER 4: LEGAL FRAMEWORK – RAPE, THE LAW, AND PEACE AND SECURITY

1. Summary: Sexual Violence as a Crime in International Law

In the last two decades, there have been developments in recognizing and prosecuting gender crimes previously ignored and trivialized by many international legal bodies (Askin 2004). The unparalleled progress in the prosecution of sexual offenses has been linked to, and often initiated by feminist scholars working within and outside the courts and tribunals (Quenivet 2005, 171).

Historically, sexual violence, like most assaults committed in battle, was often not strictly regarded as a criminal act. In fact, depending on the context, rape was authorized and normalized, not condemned. International Humanitarian Law did not previously pay adequate attention to sex crimes and required a progressive interpretation in order to take such crimes into account appropriately.⁶⁶ In fact, in the 1929 Geneva Convention, sexual violence was treated as a matter of moral defamation rather than a violent crime which it is. Additionally, the charters of the Nuremburg and Tokyo Tribunals established to prosecute war crimes in the aftermath of the Second World War did not include rape.

Although the 1949 Geneva conventions stated: “women shall be especially protected against any attack on their honor,” rape was not listed as a grave breach of the conventions. However, the statutes of both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) do expressly address sex crimes. This to an extent gave gender violence under international criminal law more visibility. This chapter takes the aspect of realizing justice to the next level. There is a need to further push legal reforms to

⁶⁶ For example, the Geneva Conventions of 1949 do not specifically mention the gender dimension when listing the grave breaches which entail an obligation of criminal prosecution. Common Article 3 (1) of the Geneva conventions of 1949 refers to it only in general terms, under principle of non-discrimination.

enable the law to work as a tool for transformational, emancipatory change, rather than as a barrier for women in realizing justice. The law has to be more accommodative to the needs of survivors if gender justice is to become a reality to many survivors of conflict related sexual violence.

Feminists have presented a much needed challenge to the restrictive approach adopted in the both the conceptualization and definition of rape. (Quinevet 2005:3) Catherine MacKinnon's words describe the frustrations regarding the restrictive interpretations of rape that have plagued the legal frameworks under which survivors of sexual violence are expected to seek justice. She says: "Under law, rape is a sex crime that is not regarded as a crime when it looks like sex" (MacKinnon 1989, 172). Rape has been conceptualized narrowly, while courts have also ignored other forms of sexual violence (Searles and Berger 1995, 107).

This chapter also seeks to analyze why a gendered approach, within a legal framework, to sexual violence is crucial. While both men and women can be shot at, burned, hung, tortured or enslaved, "*additional* things happen to females which far less frequently happen to males," so that "apart from the brutalities committed against both genders, females — women and children alike — are sexually assaulted with alarming regularity" (Askin 1997, 12). In the majority of these cases, the violation to women's bodies echoes the gender inequalities that already existed in the society before conflict, and the accompanying violations which often take place with unimaginable, barbaric brutality.

Even before the internationally recognized definitions, including the one declared in the Akayesu case, feminists and reformists have been advocating for changing the definition of rape "to symbolize a rejection of a patriarchal view so as to embody in law the notion that rape is a crime of violence" (Spohn and Honrney 1995, 2).

Legal frameworks in international tribunals have overlooked gender-sensitive approaches to crimes of sexual violence. This chapter traces the history and roots of the legal frameworks that have been used as a transition between genocide and “peace,” and how they have dealt with the grave and mass crime of sexual violence. The interviews I conducted for this thesis repeatedly include survivor witness accounts of sexual violence and rape described as a way perpetrators made sure that their victims “receive[d] something more than death.”⁶⁷ At the same time, international tribunals have often treated crimes of sexual violence as trivialities of war, something less than death, and too often, something less than a crime.

As noted throughout this chapter, the explicit references to sexual violence that do exist in the treaties and other codes, from the Treaty of Amity to the Geneva Conventions continuously limited “sexual crimes to the prohibition of rape, with no express definition of what constitutes rape” (Park 2007, 13). Furthermore, although conventions, some of which may or may not have been ratified, may condemn genocide and violence against women, many still miss the intricacies of addressing gender-based crimes, and may not have the same power on the ground in transitional justice contexts that they seem to have on paper.

While the conventions and treaties paved the way for the ICTY and ICTR to reach a more revolutionary definition of what could be considered rape and sexual violence, and what could be prosecuted after the fact, the vague and general language in many of the conventions, as well as the lack of a nuanced, gendered approach in the current legal frameworks was and continues to be a significant obstacle in the way of advancing the status of sexual violence in international law, and making a real difference for survivors on the ground (Park 2007, 14).

⁶⁷ Interviews with JBJ, GBG, XAX took place in Kibuye in 2009

2. Development of Jurisprudence and Definition of Sexual Violence and Rape: From ICTY to ICTR⁶⁸

A. The Akayesu Case as a Change in the ICJS's Legal Framework

Before the standards set by the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the ICTR, which recognized that sexual violence was used as a weapon of war to target women systematically during both genocides, prosecuting sexual violence was not a priority for post-war tribunals. After the Second World War, the Nuremburg trials and Tokyo courts did not see rape as a crime to be prosecuted as harshly as killings or other crimes committed during the war (UN News Center 2014). Although, as noted earlier in this chapter, while international law norms prohibited sexual and gender based violence, it was specific cases tried at the ICTR and the ICTY, particularly the Akayesu case, that changed the conversation on how to conceptualize the crime of mass sexual violence in a tribunal's legal framework.

In 1998, four years after the genocide in Rwanda Trial Chamber considered sexual violence, which includes rape, to be any act of a sexual nature committed on a person under coercive circumstances. Sexual violence was not limited to the physical invasion of the human body, and included acts that did not involve penetration and/or even physical contact.⁶⁹ For example, an incident in which a student was undressed and forced to do gymnastics in the public courtyard of the *bureau communal*, in front of a crowd, constituted sexual violence.⁷⁰

The accused in *Akayesu* was charged with a violation of Article 3(g) of the ICTR Statute, as rape as a crime against humanity. The acts underlying this charge included the multiple rapes of numerous women and girls in and around the compound of the *Bureau Communal* of which the

⁶⁸ The analysis on the ICTR legal framework acknowledges the contributions from a paper written initially by Linda Bianca, a former member of the ICTR Sexual Violence Committee (Unpublished) which was subsequently used by other members by consent for workshop presentations)

⁶⁹ According to the *Akayesu* Trial Judgement, para. 688.

⁷⁰ Ibid.

accused was in charge. Much of the sexual violence occurred in front of large numbers of people and was all directed against Tutsi females. These acts specifically included:

"... the forced undressing of the wife of one Tharcisse outside the bureau communal, after making her sit in the mud, as witnessed by Witness KK; the forced undressing and public marching of Chantal naked at the bureau communal; and the forced undressing of Alexia, wife of Ntereye, and her two nieces Louise and Nishimwe, and the forcing of the women to perform exercises naked in public near the bureau communal."⁷¹

Moreover, the tribunal noted that:

"...while rape has been historically defined in national jurisdictions as non-consensual sexual intercourse, variations on the form of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual. An act such as that described by Witness KK in her testimony - the Interahamwes thrusting a piece of wood into the sexual organs of a woman as she lay dying - constitutes rape in the tribunal's view." (Para. 685.)

Akayesu was found guilty as charged. The trial chamber found that rape and sexual violence "[c]onstitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such."⁷² The accused was also charged with complicity in genocide. The chamber found that the presence, attitude and utterances of the accused "constitute tacit encouragement to the rapes that were being committed."⁷³ However, the accused was found not guilty of complicity in genocide because he was found guilty of genocide itself. The Trial Chamber also observed that coercive circumstances may be inherent in certain circumstances, such as armed conflict, so that in this regard, the prosecutor did not need to prove that the victims of sexual violence did not consent.

⁷¹ Supra. para 697.

⁷² From the *Prosecutor v. Akayesu, Judgement*, Case No. ICTR-96-4-T, T. Ch. I, 2 Sep. 1998, para. 731]

⁷³ Supra. paras 697-712

B. Reverting to the Norm: Other Cases at the ICTR and ICJS

After the *Akayesu* case, some ICTR cases, for example *Semanza*, *Kajelijeli*, *Kamuhanda* and *Gacumbitsi*, reverted to a more conservative and traditional understanding of rape, invoking the mechanical approach as expressly rejected by *Akayesu*. These cases exhibited a narrower consent-based definition endorsed by the ICTY Appeals Chamber in *Kunarac*.⁷⁴ This latter jurisprudence inserted the issue of non-consent as an element in the definition of the crime of rape.⁷⁵

Confronted with these different approaches to the requisite elements of the crime of rape, the ICTR Office of the prosecutor seized the opportunity in the *Gacumbitsi* case to clarify the law relating to rape as an act of genocide, crime against humanity or a war crime.⁷⁶ The prosecutor argued that the lack of consent from the victim and the perpetrator's knowledge thereof should not be considered elements of the offence to be proven by the prosecution.⁷⁷

⁷⁴ See *The Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-T, Judgement, para. 460; *The Prosecutor v. Dragoljub Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1-A, Appeal Judgement, paras. 129 and 130 ("*Kunarac* Appeal Judgement"). Several cases of the ICTR then followed the approach introduced at the ICTY: *Semanza* Trial Judgement, paras. 344 to 346; *Kajelijeli* Trial Judgement, para. 914; *Kamuhanda* Trial Judgement, para. 708; and, *Gacumbitsi* Trial Judgement, paras. 321 to 333, while others continued to follow *Akayesu*: *Alfred Musema v. The Prosecutor*, Case No. ICTR-96-13, Judgement and Sentence, 27 January 2000, para. 226; and *Muhimana* Trial Judgement, para. 551. In the ICTY, the first case to consider the *Akayesu* definition was *The Prosecutor v. Zejnil Delalic et al.*, Case No. IT-96-21-T, Judgement, 16 November 1998, which endorsed the *Akayesu* formulation of the definition. See: paras. 478 and 479.

⁷⁵ See *Kunarac* Appeal Judgement, paras. 129 and 130. The Appeals Chamber endorsed the Trial Chamber's definition as follows: 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.

⁷⁶ See *Gacumbitsi* Appeal Judgement, para. 147.

⁷⁷ *Supra.*, para. 147.

The crime of rape only came within the tribunal's jurisdiction when it occurred in the context of genocide, armed conflict or a widespread or systematic attack against a civilian population – circumstances in which genuine consent is impossible.⁷⁸ The prosecution submitted that rape should be viewed in the same way as other violations of international criminal law, such as torture and enslavement, for which the prosecution is not required to establish absence of consent.⁷⁹

The appeals chamber for the *Gacumbitsi* case adopted the *Kunarac* definition of rape, establishing non-consent and knowledge as elements of rape. As a result, the prosecution, again, had to bear the burden of proving non-consent and knowledge beyond reasonable doubt.⁸⁰ However, the appeals chamber held that the prosecution may prove non-consent by proving the existence of coercive circumstances under which meaningful consent is not possible.⁸¹ It was not necessary for the prosecution to either introduce evidence of the words and conduct of the victim or his/her relationship with the perpetrator, or introduce evidence to show that there was force.⁸² Instead, the trial chamber was free to consider all relevant evidence, and infer non-consent, from background circumstances such as an ongoing genocide campaign or the detention of the victim.⁸³

Similarly, if the prosecution wanted to show that an accused person had knowledge that the victim had not consented to their actions, the prosecution could establish beyond reasonable doubt that the accused was aware, or had reason to be aware, of the coercive circumstances

⁷⁸*Supra.*, para. 148.

⁷⁹*Supra.*, para. 149.

⁸⁰*Supra.*, para. 153.

⁸¹*Supra.*, para. 155.

⁸²*Supra.*, para. 155.

⁸³*Supra.*, para. 155.

that undermined the possibility of genuine consent.⁸⁴

Following this approach to prosecuting rape, it is now not a requirement to question any victim of sexual assault or rape on whether or not he/she consented to the sexual activity and such an approach is reflected in the provisions of the Rome Statute. Such questions would serve to re-traumatize the victim and would likely be quite offensive to a victim who underwent such brutal treatment in these coercive circumstances.

The length of time it took to establish that according to this standard, the prosecution need only establish the existence of coercive circumstances, which vitiates the possibility of meaningful consent is troubling. Some national progressive legal systems got the concept before some international systems. Instead of discussing the personal circumstances of the victim, such as to ask whether or not the victim did consent, the line of questioning, it's now established in international criminal courts that the focus is on eliciting the existence of coercive circumstances to create the presumption that there was a lack of consent. The appeals chamber's acknowledging that genocide, crimes against humanity and war crimes in general and conditions of detention constitute coercive circumstances pushed the gender agenda further

3. Direct and Indirect Liability: Criminal Responsibility as Defined by the ICTR and ICTY

The trial chamber in *Akayesu* held that criminal intent is the moral element required for any crime and that "[w]here the objective is to ascertain the individual criminal responsibility of a person accused of crimes falling within the jurisdiction of the Chamber, such as genocide,

⁸⁴Supra., para. 157.

crimes against humanity and violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II thereof, it is certainly proper to ensure that there has been malicious intent, or, at least, ensure that negligence was so serious as to be tantamount to acquiescence or even malicious intent".⁸⁵

The judgment of the trial chamber in *Tadic* characterized the accused's participation in terms of Article 7(1) of the Statute as a form of aiding and abetting. He was found guilty of violation of the laws and customs of war recognized by Article 3 and Article 3(1)(a) (cruel treatment) of the Geneva Conventions for acts which included forcing two prisoners to perform oral sexual acts on a third prisoner, and forcing one of these two prisoners to commit genital mutilation of the third prisoner. This judgment affirmed that non-physical perpetrators who are present can be liable for sexual violence under humanitarian law.

In *Akayesu*, the trial chamber attached direct liability to a civilian officer, who was not the physical perpetrator, for sexual assaults committed by a political militia, pursuant to Article 6(1) of the ICTR Statute. The trial chamber considered that in fairness to the accused, however, it could not consider the criminal responsibility of the accused under Article 6(3), as there was no allegation in the indictment that the Interahamwe, who are referred to as "armed local militia", were subordinates of Akayesu.

The trial chamber outlined situations where the accused was held individually responsible for acts of sexual violence, constituting rape and other inhumane acts, which were charged as crimes against humanity. Firstly, crimes of sexual violence were committed under his verbal encouragement: "his *words of encouragement* in other acts of sexual violence, which, by *virtue*

⁸⁵ See *Prosecutor v. Akayesu, Judgement*, Case No. ICTR-96-4-T, T. Ch. I, 2 Sep. 1998, para. 477. See annexure M.

of his authority, sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place . . ." Moreover, the tribunal found that under Article 6(1) of its Statute:

"... the accused, having had reason to know that sexual violence was occurring, aided and abetted the following acts of sexual violence, by allowing them to take place on or near the premises of the bureau communal and by facilitating the commission of such sexual violence through his encouragement of other acts of sexual violence, which, by virtue of his authority, sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place . . ."

In addition to holding the accused responsible for verbally encouraging sexual violence and also enabling such acts by doing nothing or tacitly complying, both the ICTR and the ICTY established that in cases of sexual violence during genocide, a single victim's testimony was enough to bring a case. At the ICTY, Rule 96(i) provided that no corroboration of the victim's testimony was required. In the *Tadić* case, the trial chamber restated that corroboration of a sexual assault in a victim's testimony was not required; similarly, the *Akayesu* case confirmed that "the chamber can rule on the basis of a single testimony provided such testimony is, in its opinion, relevant and credible".⁸⁶

Moreover, Rule 96(ii)(a), excludes evidence of consent if the victim has been "subjected to or threatened with or . . . [has] reason to fear violence, duress, detention or psychological oppression" or if the refusal of a victim to submit would have imperiled a third party and subjected them to sexual assaults. Under Rule 96(iii), the accused retains the ability to rebut the presumption by going *on camera* to satisfy the trial chamber that relevant and credible evidence of consent exists. This rule requires that relevant and credible evidence *satisfies* the trial chamber whenever an accused moves to show that consent defeats the alleged sexual assault. To date, there have been no rulings by the trial chamber on this element of the Rule

⁸⁶ See *Prosecutor v. Akayesu, Judgement* [Case No. ICTR-96-4-T, T. Ch. I, 2 Sep. 1998 at para. 135]

Lastly, Rule 96(iv) covers the admission of prior sexual conduct into the proceedings before the *ad hoc* tribunals. As can be noted from above, criminalization of sexual violence in wartime is a recent but extremely significant development of both international humanitarian law and international criminal law (Bergasmo, Skre and Wood 2012, Foreword). Since significant advances have been made in the recognition and prosecution of sexual violence crimes committed during conflict, there is a need to match this with steps to ensure the law addresses the needs of its stakeholders.

A. ICTR's Legacy on International Humanitarian Law and the case for Rwanda

It is widely documented that women and girls are particularly targeted by the use of sexual violence, including as a tactic of war to humiliate, dominate, instill fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group.⁸⁷ Women and girls in Rwanda suffered disproportionately from sexual violence and rape confirming what has been widely noted that certain crimes like forced pregnancy can be committed only against them (Chinkin 1993; MacKinnon 1994; Schomburg 2007).

In Rwanda, sexually subjugating and mutilating *Tutsi* women was used as a double edged sword to both punish the women and attack the ethnic group, thus becoming a means of dehumanizing and subjugating "ALL *Tutsi*."⁸⁸ The *Akayesu* trial judgment, poignantly noted

⁸⁷ UN Doc. S/RES/1820 (2008), 19 June 2008, p. 1. Men and boys have also become victims of sexual violence in armed conflicts, as pointed out by courts and many others authors (see, as an example Wolfgang Schomburg and Ines Peterson : Genuine Consent to Sexual Violence Under International Criminal Law : American Journal of International Law p. 121 citing Prosecutor v. Tadic, No. IT-94-1-T, para 198 (May 7 , 1997) ; R. Charli Carpenter, Recognizing Gender-Based Violence Against Civilian Men and Boys in Conflict Situations, 37 SECURITY DIALOGUE, 83 (2006).

⁸⁸ Additionally, see also expert report by Binaifer Nowrojee *Sexual Violence Crimes During the Rwandan Genocide*, Expert Report of Binaifer Nowrojee, Human Rights Watch, June 2004, paras. 36 – 47 ("Binaifer Expert Report"). See also Alex Obote-Odora, *Rape and Sexual Violence in International Law: ICTR Contribution*, NEW ENG. J. INT'L &

that:

“[S]exualized representation of ethnic identity graphically illustrates that Tutsi women were subjected to sexual violence because they were Tutsi. Sexual violence was a step in the process of destruction of the Tutsi group - destruction of the spirit, of the will to live, and of life itself.”⁸⁹

In the case of Rwanda, the hate propaganda prior to and during the genocide demonized Tutsi women’s sexuality and made the sexual attacks that were subsequently carried out against the Tutsi women a foreseeable consequence. The trial chamber in what is dubbed the “Media Case” observed that:

“Tutsi women, in particular were targeted for persecution. The portrayal of the Tutsi woman as a *femme fatale*, and the message that Tutsi women were seductive agents of the enemy was conveyed repeatedly by RTLM and Kangura. The Ten Commandments, broadcast on RTLM and published in Kangura, vilified and endangered Tutsi women, as evidenced by Witness AHI’s testimony that a Tutsi woman was killed by CDR members who spared her husband’s life and told him “do not worry, we are going to find another wife, a Hutu for you”. By defining the Tutsi woman as an enemy in this way, RTLM and Kangura articulated a framework that made the sexual attack of Tutsi women a foreseeable consequence of the role attributed to them.”⁹⁰

In the context of conflict, gender based and sexual violence takes many forms, which all needs to be comprehensively analyzed to reflect the extent of gender specific crimes. For example in Rwanda, it was varied and included individual rape; gang-rape; rape with sticks, guns, or other objects; sexual enslavement; forced marriage; forced labor; forced nudity and sexual mutilation (Human Rights Watch 2004, 7).

The statutes of the ICC, ICTR and the ICTY and other legal bodies now can progressively be interpreted to punish rape as genocide.⁹¹ Though a plain reading may show that all three

COMP. L. 131, Vol. 12:1, pp.131-132).

⁸⁹ Akayesu Trial Judgement, para. 732.

⁹⁰ See the Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze, Case No. ICTR-99-52-T, Judgement and Sentence, 3 December 2003, para.1079 (“Media Trial Judgement”).

⁹¹ See Article 6, ICC Statute; Article 2, ICTR Statute; and Article 4, ICTY Statute. This definition is essentially a copy of Article II of the Convention on the Prevention and Punishment of the Crime of Genocide (1948). The Statutes of

statutes do not expressly criminalize acts of gender-based violence as constituting acts of genocide, the court and tribunals have nonetheless been able to recognize them through judicial interpretation and several forms of CRSV can constitute acts of genocide.

In the *Akayesu* case, the court found that rape and sexual violence can constitute genocide, in much the same way as any other act. Worth noting is that such rapes and other sexual violence must be committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such.⁹² According to the trial chamber in the *Akayesu* case, rape and other sexual violence can cause the infliction of serious bodily and mental harm to the victims, thus constituting genocide.⁹³

Though rape is not included as a prohibited act in the Genocide Convention of 1948 nor is gender included as a protected group, the trial chamber found that the rapes and other acts of sexual violence were committed against *Tutsi* women, resulting in their physical and psychological destruction, their families and communities. The chamber further noted that sexual violence was an integral part of the process of destruction, specifically targeting *Tutsi* women and specifically contributing to their destruction and to the destruction of the *Tutsi* group as a whole.⁹⁴

In the *Rukundo* case at the ICTR, the trial chamber, for the first time, found that the sexual assault perpetrated by a clergy member on a young girl constituted genocide on the sole basis that she suffered *mental harm* from the attack, even when there were no findings that she also

the ICTR and ICTY also set out that in addition to the acts of Genocide being punishable, that conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; and complicity in genocide; are also punishable.

⁹²*Akayesu* Trial Judgement, para. 731.

⁹³*Akayesu* Trial Judgement, para. 731.

⁹⁴*Akayesu* Trial Judgement, para. 731.

suffered any physical harm from the attack. In doing so, the chamber held, “rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even [...] one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm.”⁹⁵

In considering what constituted mental harm, the trial chamber in *Rukundo* stated that it did not have the benefit of any direct evidence on the victim’s mental state following the sexual assault, apart from her testimony that she could not tell anyone about the incident. The chamber, however, saw that it was necessary to:

“...look beyond the sexual act in question and finds it particularly important to consider the highly charged, oppressive and other circumstances surrounding the sexual assault on Witness CCH. The Chamber noted that the members of her ethnic group were victims of mass killings; she and her family, fearing death in this way, sought refuge in a religious institution; on seeing a familiar and trusted person of authority and of the church, i.e. the accused, she requested protection for herself. Rukundo; however, refused her the protection she had requested, he specifically threatened her – that her family was to be killed for its association with the “Inyenzi.”

The court noted Rukundo had a firearm. Still hoping to be protected, Witness CCH sought to ingratiate herself to Rukundo by assisting him to carry his effects into a nearby room; Rukundo locked her in the room with him, put his firearm down nearby and proceeded to physically manhandle her in a sexual way. At the time of the incident, Witness CCH was sexually inexperienced.⁹⁶ In this case the chamber drew inferences from the evidence to find some evidence of the nature of her mental state. There was a dissenting opinion by Judge Park in regards to this finding in which he stated that the level of harm suffered by the victim did not rise to the level of seriousness required to constitute an act of genocide.⁹⁷ This conviction for rape was overturned on appeal however the reasoning on the trial chamber decision presents

⁹⁵See the *Prosecutor v. Rukundo*, Case No. ICTR-01-70-T, Trial Judgement, para. 386 (“*Rukundo Trial Judgement*”).

⁹⁶See *Rukundo Trial Judgement*, para. 388.

⁹⁷See Dissenting Opinion of Judge Park, *Rukundo Trial Judgement*, p. 183.

interesting rationales in the gender justice dialogues.

The ICTR's position can be compared with the ICC's, which expressly recognizes, in its Elements of Crimes document, that acts of torture, rape, sexual violence or inhuman or degrading treatment constitute the genocidal act of "causing serious bodily or mental harm to members of the group" (International Criminal Court 2011). It is important to understand the elements of the crime of genocide. The ICTR position is two pronged; first, it establishes the elements of rape, and thereafter, establishes that the rape fulfills the elements of genocide.

B. Solutions: Moving Towards Feminist Theoretical Frameworks and the Law

To address the needs of female victims of sexual violence on the ground, there has been a tireless effort to engender the ICJS, particularly by writers promoting feminist view of international law and international humanitarian law. Scholarly discourse on how the "male orientated" international humanitarian law affected the investigation, prosecution and judgment of crimes of sexual violence has affected the jurisprudence of the tribunals in its depth and reasoning.

In recent years, international law has come under scrutiny by feminist scholars who have challenged its claim to objectivity and neutrality. (Buss 1997, 360). In 1991, in their seminal article on feminist approaches to international law, Chinkin, Charlesworth and Wright opened the gates for reinterpretation of the rules of international law (Quenivet 2005). Feminist methods have exposed and questioned the limits of international law's claim to objectivity and insist on the importance of gender relations as a category of analysis (Charlesworth 1999).

In terms of critiquing the law, it has been argued that feminist scholarship developed along two lines: the examination and critique of international human rights and the critical examination of international legal doctrines and structures. (Buss 1999; Quenivet 2005) Some scholars have identified that the humanitarian women's lobby was arguably influenced by armed conflict, especially in Bosnia-Herzegovina, as well as by the late Kim Hak-Sung, Korean human rights activist and former comfort woman, who brought the first lawsuit in Japan demanding compensation from the Japanese government in 1991 (Shin 2004, 1).

International feminist jurisprudence has argued that if women are to be allowed a voice in the creation of human rights, women should be made subjects of international law (Hellum 1999). This research advocates for survivor witnesses to be regarded as subjects and not objects of ICJS.

3. Rape as a Peace and Security Issue

A. Redefining Interplays and Intersections between Human Rights Law, International Humanitarian Law and International Criminal Law

In addition to engendering the ICJS, it is also important to see the mass rape in general, and rapes which occurred in the 1994 Rwanda genocide, in particular, as a threat to peace and security. As reiterated in this chapter, rape during conflict is not a private problem. It is a public problem that affects the whole community, not just the perpetrator and the victim. As early as 1995, right after the genocide, the UN Beijing Platform sounded the alarm that parties to conflict often rape women with impunity, sometimes using systematic rape as a tactic of war and terrorism.⁹⁸ As noted by the former Special Representative of the Secretary-General on Sexual Violence in Conflict, "... the notion of sexual violence as a tactic of war has travelled from Beijing

⁹⁸ This refers to comments by the Special Representative of the Secretary General on Sexual Violence in Conflict, Margot Wallstrom, during the Commission on the status of women meeting on 10 th March 2010.

to the world's paramount peace and security body... the UN Security Council.”

Since this research is situated within the international legal framework, namely international human rights law (IHRL), international humanitarian law (IHL) and international criminal law (ICL), it is important to interrogate the different intersections. This section will explore those intersections and what they mean on the ground as well as in an international justice system.

We know that under international law norms, in 1994, the government in Rwanda was obligated at all times to respect, protect and fulfill the human rights of all persons within its territory and subject to its jurisdiction. Theoretically, in the context of an armed conflict, relevant provisions of international humanitarian law govern the conduct of all parties. During the genocide, there were many violations of the Common Article 3 of the Geneva Conventions, which sets forth minimum standards for the proper treatment of persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat. Additional Protocol II provided a more detailed protection of victims of non-international armed conflicts, and the rules of customary international law applicable in non-international armed conflicts.⁹⁹

International conventions state that armed groups that exercise *de-facto* control over territory must respect human rights standards. At the time of the genocide, the government's conduct affected the human rights of persons under their control, and exposed some of the challenges the IJS faces in terms of implementation of human rights norms in order to maintain peace and security.

⁹⁹ See the OHCHR 2015 South Sudan Report.

B. International Humanitarian Law

In theory, International Humanitarian Law (IHL) regulates the conduct of parties in armed conflict by protecting those who do not or no longer directly participate in hostilities. It regulates the means and methods of warfare with the aim of restricting the use of armed force “to the amount necessary to achieve the aim of the conflict, which – independently of the causes fought for – can only be to weaken the military potential of the enemy” (Sassòli, Bouvier and Quintin 2011, 1).

Under Customary International Humanitarian Law, the perpetrators of the Rwanda genocide were bound to comply with over-arching IHL principles of distinction, proportionality, precaution, as well as the prohibition on unnecessary suffering.

C. International Human Rights Law

My research took cognizance of the fact that a national government bears an obligation to protect and promote human rights of its citizens. Apart from its obligations under customary international human rights law, Rwanda assumed human rights treaty obligations. Rwanda had acceded to several international human rights treaties: Convention Against Torture (CAT), Convention Against Torture – Optional Protocol, Convention on the Elimination of Discrimination Against Women (CEDAW) and has further accepted the ‘individual complaint procedure’ under CEDAW-Optional Protocol and inquiry procedure under Article 20 of CAT. In addition, Rwanda remained bound by customary international law and by the rights enshrined in the international human rights treaties ratified by its predecessor state by virtue of the rule of ‘automatic

succession' to treaties.¹⁰⁰ Despite the change of regime preceding the genocide, Rwanda was still bound to the norms and treaties it had agreed to.

The position that, concerning international human rights treaties, a successor state is subject to automatic succession is based on the purposes and principles of the UN; the objectives and purposes of human rights and humanitarian treaties;¹⁰¹ the special character of human rights treaties; and treating human rights as part of doctrine of acquired rights.¹⁰² This can be supported by documented state practice globally, as most of the successor states have indeed confirmed their wish to be bound by the multilateral treaties ratified by their predecessor state from the date of their independence.

The human rights treaty bodies have adopted a series of general statements in support of the position of automatic succession.¹⁰³ The UN Human Rights Committee has supported the position of automatic succession in its General Comment 26, stating: "... once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the state party, including dismemberment in more than one state or state succession..." (Human Rights Committee 1997).

¹⁰⁰ In the case of Rwanda it has often been debated whether the post genocide Government is bound by treaties entered into by the 1994 genocidal government of Juvenal Habyarimana. The 1978 Vienna Convention on Succession of States (VCSS) in Respect of Treaties provides for the continuity of obligations in respect of *all* treaties that were binding on the predecessor state.

¹⁰¹ Treaties of humanitarian character enjoy a special place in international law because: i) they are considered as treaties under which obligations are owed primarily and directly to individuals, not other states, ii) often provide for direct access of individuals to international redress mechanisms, iii) compliance with humanitarian treaties is immune to the principle of reciprocity, iv) create public orders between groups of states rather than web of bilateral obligations, viii) special rules of reservation apply to humanitarian treaties. (UN-OHCHR South Sudan 2015 Report)

¹⁰² See Publications of the Permanent Court of International Justice, Collection of Advisory Opinions, series B, No. 6, *Settlers of German Origin in Territory ceded by Germany to Poland*, Page 36: "Private rights acquired under existing law do not cease on a change of sovereignty."

¹⁰³ Most importantly, in 1994 the 5th meeting of chairpersons of human rights treaty bodies declared that "...successor States were automatically bound by obligations under international human rights instruments from the respective date of independence and that observance of the obligations should not depend on a declaration of confirmation made by the Government of the successor State.": UN Doc. E/CN.4/1995/80 at 4.

D. International Criminal Law

With respect to non-international armed conflict, war crimes may, for example, include certain violations of the rules governing the conduct of hostilities and abuses against protected persons. In accordance with international jurisprudence, war crimes in non-international armed conflict may include serious violations of Common Article 3, of relevant provisions of Additional Protocol II, and of customary international law.¹⁰⁴

Inhumane acts intentionally causing great suffering or serious injury to body or to mental or physical health, if committed as part of a widespread or systematic attack against a civilian population, like those committed against Tutsis and moderate Hutus during the genocide, constitute crimes against humanity.¹⁰⁵ Crimes against humanity are generally defined as the commission of certain inhumane acts such as murder, torture, or sexual violence committed as part of a widespread or systematic attack.¹⁰⁶

Inhumane acts intentionally causing great suffering, or serious injury to body or to mental or physical health (such as rape), if committed as part of a widespread or systematic attack against a civilian population, may constitute crimes against humanity.

A crime against humanity is committed when a civilian population is the object of an attack that is 'widespread or systematic'. The two conditions are disjunctive, meaning that it is not required for the attack to satisfy both. The population against whom the attack is directed is considered civilian if it is predominantly civilian in nature. The presence of individuals within the civilian

¹⁰⁴ UN-OHCHR 2015 Report on South Sudan. ICTY jurisprudence, which ruled that violations of customary humanitarian law constitutes war crimes, even though the dispositions do not contain any explicit reference to criminal liability. "Principles and rules of humanitarian law reflect "elementary considerations of humanity" widely recognized as the mandatory minimum for conduct in armed conflicts of any kind" and they entail individual criminal responsibility, regardless of whether they are committed in internal or international armed conflicts" ICTY, Tadic, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Para.129.

¹⁰⁵ See notably Rome Statute, Art. 7.

¹⁰⁶ Rome Statute.

population who do not come within the definition of civilians does not deprive the population of its civilian character.¹⁰⁷

The term ‘widespread’ generally refers to the large-scale nature of the attack and the number of victims.¹⁰⁸ However, an attack may also be considered widespread by the “cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.”¹⁰⁹

The concept of a ‘systematic’ attack refers to the organized nature of the acts of violence and the improbability of their random occurrence.¹¹⁰ This would in principle be reflected in the non-accidental repetition of similar criminal conduct following a regular pattern.¹¹¹ As stated in previous chapters, mass rape in Rwanda was both systematic and widespread.

E. Modes of Individual Criminal Liability

Members of organized armed groups as well as state actors may commit crimes against humanity.¹¹² Under the Rome Statute of the International Criminal Court (ICC Statute), individual criminal responsibility may be attached, not only to those who (in) directly perpetrate international crimes, but also in certain situations where military and civilian superiors are responsible for international crimes. Individual responsibility can be established based on different modes of liability in most conflicts.

¹⁰⁷ See Judgment, *Naletilić and Martinović* (IT-98-34), Trial Chamber, 31 March 2003, par. 235; Judgment, *Akayesu* (ICTR-96-4), Trial Chamber, 2 September 1998, para. 582; Judgment, *Jelisić* (IT-95-10-T), Trial Chamber, 14 December 1999, para. 54.

¹⁰⁸ See Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, ICC-02/05-01/09, 4 March 2009, para. 81, Katanga, 30 September 2008, paras. 394-397.

¹⁰⁹ Judgment, *Blaškić* (IT-95-14), Trial Chamber, 3 March 2000, para. 206; Judgment, *Kordić and Čerkez* (IT-95-14/2-T), Trial Chamber, 26 February 2001, para. 179 ; Judgment, *Kordić and Čerkez* (IT-95-14/2-A), Appeals Chamber, 17 December 2004, para. 94.

¹¹⁰ See Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, ICC-02/05-01/09, 4 March 2009, para. 81, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the confirmation of charges, Pre-Trial Chamber I, ICC-01/04-01-/07, 30 September 2008, paras. 394-397

¹¹¹ See Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I, ICC-02/05-01/09, 4 March 2009, para. 81, Katanga, Decision on the confirmation of charges, paras. 394-398.

¹¹² See situation in the Republic of Kenya, ICC-01/09, 31 March 2010, paras. 90-93.

The first mode of liability is individual criminal responsibility, which may apply, for instance, to persons who directly perpetrated international crimes, as well as to persons who indirectly perpetrated international crimes, through ordering, inducing, soliciting, assisting, or otherwise supporting the commission of those crimes.¹¹³

The second relevant mode of liability is command or superior responsibility, under which a military or civilian superior may be held responsible regarding international crimes of persons under his or her command or control, because he or she failed to take measures to prevent, repress, investigate, or punish the crimes.¹¹⁴ In some circumstances, individual commanders or superiors may be legally responsible for acts perpetrated by members of affiliated militias or private individuals.

For individual criminal liability to apply under international criminal law; the requisite superior-subordinate relationship does not require a formal military rank; it may exist de jure in a military system or de facto within the command structure of state or non-state armed forces.¹¹⁵

For many of the survivor-witnesses I spoke to, the notion of “criminal liability” barely completed the picture of the kind of justice they deserved. While they faced the accused at the tribunal when they testified, or even when the accused was convicted and sentenced, this kind of “justice,” considered complete by the ICJS, still did not address the needs of survivor-

¹¹³ See Article 25, elaborating on a framework for analyzing individual criminal responsibility.

¹¹⁴ For the definition of command responsibility, see Articles 86 & 87 of AP I, as well as Art. 28 of the Rome Statute. The ICTY and ICTR have held that command responsibility is an applicable principle of customary international law in NIAC. See ICTY, *Hadžihasanović and Ors.* Decision on interlocutory appeal challenging jurisdiction in relation to command responsibility, 16 July 2003, Paras. 20 and 31. and ICTR, *Kayishema and Ruzindana*, Judgment, 21 May 1999, Para. 209 (at para 213, this case held that civilian commander may be held liable under theory of commander liability). See also in ICTY, *Mucic and al.*, Judgment, 16 November 1998, Para. 354.

¹¹⁵ See ICTR, *Kayishema and Ruzindana*, Judgment, 21 May 1999, Paras. 218 and 222; ICTY, *Mucic and al.*, Judgment, 16 November 1998, Para. 354.

witnesses when they went back home. Moreover, the tribunal's job and its role in the ICJS was to try the "big fish," the commanders, government officials in prefectures – mostly those who were in authority. It could not make everyone who was a perpetrator stand trial. When survivor-witnesses went back home, some of their neighbors, acquaintances, co-workers, relatives and even husbands and loved ones were also former *genocidaires*. And while there are systems and mechanisms like the *gacaca*, analyzed in the next chapter, to handle such cases, that "justice" was still not enough.

F. United Nations Resolutions

The crimes that took place during the genocide in Rwanda and the mass sexual violence systematically perpetrated against Tutsi women as a group fall under issues of international security. While the United Nations, through international humanitarian and criminal law, has attempted to define crimes against humanity and acceptable and unacceptable conduct for states and armed parties during a conflict, it has also attempted to bring international parties together to combat systematic sexual violence and define it under the context of peacekeeping after a conflict.

Many UN Security Council Resolutions have given visibility to the issue of women, peace and security on the international agenda. Some scholars have observed this process as a culmination of years of lobbying by feminists and women's groups and an emerging broad understanding of women's insecurity and the gendered effects of armed conflict (Meger 2012).

In the last 15 years, the United Nations Security Council has passed several resolutions to analyze and document the "impact of conflict on women" (UN Women 2012, 87) and establish

that “sexual violence is a matter of international peace and security. The resolutions are intended to establish some form of accountability for international bodies and member states to recognize how crucial women’s roles are in peace building after conflicts, and also to deliver a means of pursuing justice for women who have suffered from gender-based war crimes. According to UN Women’s 2012 report on the progress of these resolutions, the resolutions “provided building blocks” towards implementing member state obligations to prosecute sexual violence perpetrators and to provide equity across judicial bodies for survivors of sexual violence.

CHAPTER 5: GACACA COURTS: CAN THIS BE THE OPTION?

1. Summary: Are Gacaca Courts A Bottom-Up Approach to Justice?

Many survivors interviewed gave comparative accounts of their experiences in the ICTR and gacaca. This chapter analyses the efficacy of the gacaca system and its role, in comparison to and in the context of proceedings at the International Criminal Tribunal for Rwanda. Moving beyond the legal assessments of both systems, this chapter uncovers the limitations embedded in both the gacaca system and the ICTR in providing spaces in which female victims of sexual violence and rape can be heard. While the gacaca system has been praised by some scholars for its local and seemingly “grounded” approach, and while there have been assumptions that this approach is conducive to safer spaces in which citizens, including women, can receive justice, the survivors interviewed show that the gacaca system is actually not the “bottom-up” approach that it has been portrayed to be. Its role has been much more complex.

Witness GOG explained:

“For us women who have been raped during the genocide, the road we have travelled has been very difficult. Things are imposed on us. We are told to go to Arusha. From there we are compelled to participate in the gacaca. Each time you feel more vulnerable and that you are not taking full control of your life. You are not deriving any benefits from the processes. Although I personally felt more at home with gacaca system since at least I know the “inyangamungayo” (the presiding judges) and would feel they might understand our sufferings as compared with lawyers, some even men, wearing white wigs in Arusha. I must say, at the end of it all, it was equally frustrating. In both systems we came out bitter and not healed. Maybe both systems were never meant to address the crisis like what we had after genocide in 1994.”

While most gender scholars have focused on the role of society and culture and how it limits women’s access to justice, the survivor witness voices explored the impact of gacaca as an alternative form of justice for female survivors. The gacaca courts, though according to many, a potential source of reconciliation, according to some of the witnesses from Kigali were not always used to achieve its mandate and in most cases was manipulated for political advantages.

2. From the ICTR to Gacaca Courts

A. Overview: Role of Gacaca Courts from the Tribunal

For the twelve years between 2001 and 2012, gacaca courts existed alongside the International Criminal Tribunal for Rwanda. While in Arusha, the ICTR was established to try those considered to bear the most responsibility in planning and executing the genocide, the “big fish” of the command chain, the gacaca system in Rwanda was tasked with trying the thousands of other cases ineligible to be tried in the tribunal and in the national courts.



Image 2: Rwanda Gacaca Courts.

Source: Human Rights Watch, 2011.



Image 3: Gacaca in Session

Source: Human Rights Watch, 2011.

It is important to point out that some survivors appreciated the gaps filled in by the gacaca system. As witness CDC explained:

“When you are at the receiving end, every perpetrator is a “big fish” A whale and a shark destroying you and all what you have. When I heard Arusha is only prosecuting “big fish” I told myself they are missing the point, during the genocide people wielded such power that we were terrorized by neighbours and their small children. I was happy to see some of the people charged before gacaca courts. The ordinary people who caused a lot of terror to us during the genocide, At least they were named and shamed. Without Gacaca they could have got away with all that without answering to their irresponsible behavior. I had reservations with other things which happened in gacaca hearings but at least they bring everyone to come and own up some of their criminality.”

In an effort to bring national reconciliation at a local, grassroots level, the Rwandan government adopted a law (Organic Law 26) in January of 2001, effectively setting up the gacaca system’s jurisdiction. The gacaca system was also seen as a way to deal with the problems that the tribunal and national courts had failed to address.

Contrary to the gacaca system, the tribunal was given jurisdiction by the UN Security Council over prosecuting the crimes committed during the genocide as through several resolutions and in a framework defined by the Geneva Conventions.(Minow 1998, 31). The first few years of the tribunal were affected by challenges that had plagued previous tribunals responding to mass atrocities. Martha Minow identifies and assesses three critiques of the two World War II tribunals as well as the tribunals in Bosnia and Rwanda (Minow1998, 31). One of those was politicization: “rather than standing as independent institutions removed from political pressures and calculations, the tribunals’ very constructions and deployment allegedly enacted politics, undermining the ideals of impartiality and universal norms... for their very resources and continued cooperation, the tribunals remain fundamentally dependent upon the political views and wills of the members of the UN General Assembly” (Minow 1998, 32).

Indeed, the ICTR was not immune to this critique. There have been arguments that the tribunal, like the Nuremburg trials, delivered a “victor’s justice.” For example, reports that the second Chief Prosecutor, Louise Arbour, was criticized and stopped from sending investigators to question the participation of RPF members in war crimes. Some writers argue that the third Chief Prosecutor, Carla Del Ponte, reportedly lost her post due to pressure from the RPF-run government (Gilles 2013) serve as evidence to support Minnow’s critique of the tribunal.

Additionally, in relation to the tribunal’s relationship with the international community and the Rwanda government, Minow also points out that in the case of Rwanda, the massacres of a tenth of the Rwandan population during the genocide created a strong need for an international legal response, with African nations calling for the Security Council to create a tribunal similar to one that had been organized for the former Yugoslavia (especially because of the international community’s late and unacceptable response to the genocide). The genocide

and lack of stability in Rwanda was not only a domestic catastrophe but also a threat to international security – the scope of the genocide and the state of the country right after the genocide left few alternatives to creating an international tribunal. (Minow 1998, 33-35).

Another critique of the international tribunal has been its selectivity: “only a portion of those who can be charged with violations became the target of prosecutions for action” (Minow 1998, 33). It is important to continuously note that international tribunals are not designed to try each and every perpetrator of genocide or sexual violence – the ICTR was established to try the “most notable” figures of crimes against humanity, the “leaders” responsible for the genocide, particularly those who violated international humanitarian law between 1 January and 31 December of 1994, including Rwandan citizens who committed such violations in neighboring states outside of Rwanda

National courts and local gacaca courts on the ground in Rwanda were responsible for all the others accused of genocide and war rape that weren’t included at the tribunal. It is the complex relationship between these courts and the international tribunal that has largely determined the impact (or disconnect) that the international court has on the lives of those on the ground; the relationship between international law and gacaca law has simultaneously promoted and undermined the recognition of sexual violence crimes in the Rwanda genocide

Researchers have analyzed both the role of the tribunal and that of Gacaca in addressing the rampant gender specific crimes committed during the genocide. The ICTR raised some standards of accountability for crimes of sexual violence against women, primarily by recognizing rape as a tool of war and crime against humanity in the Akayesu case. Its legacy has influenced norms on the ground, allowing for different perceptions of “justice.” According to Thompson, both the gacaca courts and the tribunal have been filled with contradictions and

paradoxes when it comes to dealing with issues of sexual violence. The author goes on to argue that while gacaca courts are mostly initiated by the state in a nation where people are highly suspicious of the government's role in the transitional justice model (Thompson 2011), the 2001 Gacaca Law enacted by the government stated that survivors of sexual violence can request closed chambers to report their testimony or to also write out their ordeal in anonymous letters to be shared in the proceedings. While such provisions were made, many survivors still feared for their lives if and when they testified. Another writer, Wells states that while some aspects of the traditional gacaca court have been amended to accommodate the needs of rape victims –for example, previously, women in Rwanda could not participate in a gacaca court and were expected to be “reserved and discrete” (Wells 8), and now they could speak openly in gacaca courts though accruing to this author prevailing notions that women were somehow at fault for being raped still kept women from being vocal in these procedures.

The gacaca system was modeled from and named after a traditional court system that has existed since post-colonial Rwanda, through which judges could be elected on a local level throughout the country, and suspects could seek reconciliation. The word ‘gacaca’ means ‘grass’ and depicts the manner in which adjudication over conflicts in the community was approached in pre-colonial Rwanda. According to Penal Reform International, the Gacaca system was used for conflict resolution among members of the same lineage. The gacaca's role was to restore societal norms when they were violated, such as land disputes, damage to property, marital problems and struggles over inheritance. The disputed parties were brought together in an informal session, supervised by Inyangamugayo (people of integrity) (Penal Reform International 2010). During the colonial period, a western judicial system was introduced but gacaca remained an essential part of the traditional practice.

During the post-genocide era, the Rwandan government had 120,000 people suspected of genocidal crimes. In 1996, the conventional court started trying genocide cases but only managed to try 1,292 genocide suspects by 1998 (Human Rights Watch 2010). The process was slow; trials would take more than a century at that speed, leaving people behind bars awaiting trial for years.

Although it is normally argued that the trial cases could have been processed more quickly if the new government had brought in foreign lawyers and judges, many respondents do not think that bringing foreigners as experts can adequately resolve post conflict problems. Not surprisingly, the new government rejected this. The high number of cases and the high number of suspects also created problems for the Rwandan penitentiary system. After the genocide, Rwandan prisons were overcrowded with genocide suspects. According to Human Rights Watch, around 120,000 people were suspected of organizing or taking part in 1994 genocide – this led to overcrowding in prisons that had been built to hold 12,000 prisoners but were accommodating ten times than number, resulting in inhumane conditions that claimed thousands of lives (Human Rights Watch 2011). The new Rwandan government rejected the option of a general amnesty for the accused. Instead, the government wanted to reinforce respect for the rule of law and the principle of “due process” by prosecuting the suspects of genocide and massacres in hopes of eradicating the culture of impunity (2010: Penal Reform International). Due to the high number of people accused and the number of people who died during the genocide, the Rwandan government concluded that the conventional justice system could not, by itself, provide justice to the people. In 1998, the Government started looking for other alternatives to dispense justice to people, resulting in the development of proposals for ‘gacaca jurisdiction’. In June 2002, the Rwandan government introduced an unorthodox transitional justice system (the gacaca) in hopes of “blending local conflict resolution traditions

with a modern punitive legal system to deliver justice for the country's genocide" (Human Rights Watch 2011).

While gacaca courts have always existed, this was the first time that such courts were used to adjudicate over blood crimes. Initially, these reformulated gacaca courts were responsible for category 2, 3, and 4 crimes. Category 2 crimes consisted of cases for people suspected of murder or accomplices to murder; category 3 crimes consisted of cases for people who committed serious attacks without the intent to kill; category 4 crimes included cases for people responsible for property damage (Human Rights Watch 2004). For the Rwandan government, the gacaca court system was considered to hold many advantages over the conventional court systems.

Firstly, it accelerated the trial process, shortening the time for those awaiting trials: the victims and the suspects. Secondly, it reduced costs, making it possible to maintain the overburdened prisons. Thirdly, the government believed that community participation would be the most effective method to establish the truth of what had happened during the genocide. Fourth, the introduction of innovative sentencing to criminal justice, such as penalties like community service, would help the reintegration of criminals into society. Lastly, the Rwandan government believed that gacaca courts would help the healing and national reconciliation process, which was considered an important tool for peace, stability, development of the country and empowerment of its people (Penal Reform International 2010). The gacaca court' has been described, by Rwandan President Paul Kagame, as an 'African solution to African problems' (Human Rights Watch 2010).

With the adaptation of gacaca as a transitional justice mechanism, some have welcomed gacaca's swift work and the idea of involving local communities, while others have been very skeptical. Many were concerned, in particular, about the enormous bureaucratic and logistical challenges of managing such a system on a national scale; local and international human rights organizations feared that defendants' rights would be eliminated, especially with lawyers barred from any official involvement in the process (Penal Reforms International 2010). Survivors were concerned that not all perpetrators would be arrested or convicted for their crimes. According to a report on gacaca by the African Research Institute, the United Nations Office of the High Commissioner for Human Rights (OHCHR), indicated that such community-based justice systems are "ill equipped to handle complex genocide cases" (Clark 2012).

As mentioned before, and in theory, the gacaca system was designed to do what the international tribunal could not – amplify the voices of both victims, survivors and suspects of the genocide who were not public figures; the neighbours, classmates, co-workers, acquaintances – those considered ordinary civilians living in prefectures all over Rwanda. By the time gacaca courts officially closed in May 2012, over 12,000 of those courts had presided over more than a million cases.

In most cases, scholars and government officials studying and implementing transitional justice systems agree that prosecuting all criminal offenses after genocide is impossible to achieve due to the wide scope of crimes committed. It is difficult to define what justice means to every victim, who is and isn't even a victim, and to provide what each victim considers "justice." Countries emerging from conflict have many different goals, including rebuilding the country, keeping a record of the past violence and crimes committed, creating a national narrative or collective "memory" of such tragic national events, providing justice to the victims and

survivors, prosecuting the perpetrators, reintegrating perpetrators to society without the use of violence, and reconstructing a system to insure that atrocities and violation of human rights do not occur (Mon 2009). Depending on the context of cultural, social, economic and political factors in each case following a national atrocity, the transitioning countries take different approaches to prosecuting the perpetrators. They focus on the main players of the past crimes, and often, they introduce different mechanisms like 'truth telling' for the lower-level actors, who committed crime (Mon, 2009). Sometimes, as in the case for post-apartheid South Africa, the government calls for a truth commission – the Truth and Reconciliation Commission (TRC) in South Africa was introduced as a healing process as well as a tool for investigating the "truth" about what had happened before 1994, with many scholars praising the effectiveness of the TRC (Brouneus 2008). Sometimes, as in the case of Rwanda, post-conflict societies can create hybrid systems while adhering to internationally sanctioned tribunals, aimed at addressing a record for what happened through local "truth telling" settings as well as international law – simultaneously dealing with high-level and lower-level actors responsible for genocidal acts. In the aftermath of the horrific tragedy in Rwanda, particularly the first four years following the genocide, four types of justice systems were established to prosecute the genocidaires – the ICTR, foreign courts exercising universal jurisdiction, domestic criminal courts, and a domestic military tribunal (Sosnov 2008). As mentioned previously, the gacaca courts were then later created as a transitional justice instrument that focuses on accountability, with overtones referring to reconciliation (Ingelaer 2008, Kavuro 2011).

B. Analysis, Limitations and Criticisms of Gacaca Courts as a Vehicle for Justice

While the gacaca system has been called "unorthodox" and "one of the boldest and most original 'legal-social' experiments ever attempted in the field of transitional justice," it has also been criticized for being a biased trial process (Amick 2011), usually in favour of certain

“victims” or based on a predetermined narrative. Like the literature on the ICTR, opinions on the success and legacy of gacaca vary between scholars. There have been many empirical studies by scholars and international organizations accessing gacaca from different disciplinary perspectives. One empirical study, by Ruwebana and Brouwer (2014), assesses the legacy of the gacaca courts, their achievements and their failures in achieving their proclaimed objectives. The study includes interviews of 28 survivors compiled in January 2012. The survivors were active participants of gacaca courts, and the questions they answered focused on the notions of justice and reconciliation, as well as the procedures and outcomes of the gacaca proceedings they witnessed. They spoke on the importance of participation in gacaca, the workings of gacaca on an individual and societal level, the influence of time, security and other factors. The study was based on qualitative rather than quantitative research so that survivors could express their understanding of gacaca in detail and in their own words. The study shows that even though people still had grievances and were not fully satisfied with gacaca courts, they still believed that gacaca courts could be somewhat effective after the genocide. According to the author’s interpretation of their findings, many survivors “believed” that was a Rwandan justice for Rwandan genocide (Ruwebana and Brouwer, 2014).

One of the respondents in this study, a former lawyer at the ICTR buttressed Ruwebana and Brouwer findings by giving a personal testimony and her experience when she attended Gacaca proceeding related to the killings of some of her family members during the genocide. Although the proceeding were of allegations of killings she stated that the issues were dealt with in a very sensitive manner and all parties concerned agreed “justice was seen to be done since parties were encouraged to engage issues under discussion and they did so in a familiar environment. A normal criminal court cannot articulate the cultural context Rwanda operate in.”

This conclusion has also been supported by Havemen (2013), who argues that the classical penal system would have been much less effective than gacaca courts in terms of victim participation, speed, access to justice, and participants' physical and psychological proximity.

Another empirical study by Brehm, Uggen and Gasanabo (2014) looks at some of the outcomes of the gacaca courts, as a traditional justice system that was modified to address crimes of genocide. They conclude that gacaca courts "represented a powerful response to mass crime and an important element in the struggle to address society-wide tragedy and move forward," and that the blend of punitive and restorative aims and traditional and contemporary elements hold important insights for justice pursued around the world (Brehm, Uggen and Gasanabo 2014).

In his study, Lewis (2010) interviewed 32 students (28 male and 4 female), to observe the effectiveness of gacaca achieving forgiveness, reconciliation, justice, and the unveiling of truth about genocide. He also asked specific questions about the trustworthiness of judges, survivors, and prisoners; the fairness of the trials; and the safety of those who give testimony. From his findings, he highlighted that most of the students, Hutu or Tutsi, agreed with the vision of working to promote truth telling, justice, and reconciliation, but the problem lay in actualizing the state-sponsored vision, especially in cases of alleged corruption (Lewis 2010). Nevertheless, Lewis emphasizes that gacaca courts made great strides, despite their weaknesses, and that there is a need to all Rwandans to actively participate in finding solutions within this system.

Susan Thompson has also studied gacaca courts, but focused on the power dynamics behind Rwandan gacaca courts, offering a more nuanced and more controversial perspective. One of her most salient contributions to the analysis of the gacaca system is her observation that:

“While international donors and diplomats recognize that implementing an effective transitional justice strategy is a formidable challenge given the intimacy, scale and sheer brutality of the 1994 genocide, they fail to appreciate adequately the power relations that structure individual participation in traditional justice mechanisms like gacaca – which they praise as a model for other post-conflict societies to emulate in re-establishing the rule of law through trust, truth telling and access to justice for all” (2012, 373).

Just as Thompson criticizes how the gacaca courts work “in practice,” as opposed to “in theory,” this study noted that even locally, women’s voices can be as marginalized and silenced in Rwanda as they are in Arusha. The literature on gacaca largely focuses on legal analyses from the outside looking in. Testimonies from ordinary citizens – Rwandans whose daily realities and civic participation rotate around the system are rarely included, and without their perspective and their lived experiences, the flaws of the gacaca system continue to be hidden from view in the same manner the flaws in the ICTR system can be concealed in the ICJS bureaucracy.

While Thompson’s criticism on the gacaca system offers an overview of all crimes (not gender specific) tried by the gacaca courts, her perspective is very valuable in analyzing the voices of rape victims collected throughout my research. Not only have scholars failed to adequately gauge the nuances in the power and political structures embedded in the gacaca system, they have also largely ignored the repercussions of those power structures when it comes to gender-specific crimes and the needs of women on the ground. The gacaca system’s status in the literature as a “bottom –up” institution, there to compliment the “top-down” structure of the ICTR is largely flawed, and this structure especially affects female victims of sexual violence.

Karen Brouneus’ (2013) empirical study of 16 widowed women ranging from 27 to 67 years shows that the gacaca system was not adequate for them, and emphasizes that instead of receiving comfort and justice, these women were left isolated and vulnerable. She takes a feminist perspective and applies it to the women she interviewed, most of whom suffered sexual abuse during the genocide.

C. Gacaca Courts and Sexual Violence Crimes

While, according to the U.N. Special Rapporteur on Violence against Women, rape remains “the least condemned war crime,” (2003, 54) there has been an increased focus on the relationship between war and rape, and the transitional justice systems that handle sexual violence crimes after war. As Kelly Dawn Askin, one of the most prominent experts on war-rape has observed:

“The quest for post-conflict gender justice has improved markedly in recent years ...yet, despite unprecedented progress and unparalleled participation of women in decision-making positions internationally, redress for sexual violence remains extremely limited and selective. The search for post-conflict gender justice continues” (Askin 2012, 531).

Acts of genocide, particularly rape in developing countries, did not gain full recognition within the realm of the international humanitarian law until 1998 (Olwine 2011). The biggest achievement gained by women activists was in the Akayesu case, which recognized rape as an actual form of genocide, classifying rape as a class one offense with great penalties. In the national judicial courts in Rwanda, rape was considered a category 1, crime, which meant that those who committed acts of rape were considered on par with genocide organizers – they were, in a sense, notorious killers and persons who committed acts of ‘sexual torture’.

For the first time in its history, Rwanda adopted a law recognizing marital rape as a crime (Law on Prevention and Punishment of Gender Based Violence), and, encouraged by the recognition of sexual violence as a grave crime at the tribunal, women’s rights groups in Rwanda saw the fruits of their labour. According to interviews conducted by Sarah W. Wells in Rwanda in 2003 through New York University Center for Human Rights and Global Justice, many Rwandan activists support this classification of sexual violence crimes, arguing that within the context of the genocide, rape was a form of torture, often resulted in sexual slavery, and continues to be a crime “far more painful than being murdered” (Wells 6) for its victims. Women rights activists and female politicians in parliament continued to advocate that continued sexual torture “sits

above murder, unintentional homicides, and other serious assaults in the hierarchy of crimes under Rwandan law.”

The inclusion of sexual crimes in the first category was largely received as a signal that sex crimes were considered a high priority; as a triumph for women’s rights in the country (Amick 2014). However, in 2008, the Rwandan Government decided to hand over class one cases to the gacaca system. The Organic Law 16/2004 extended the competence of gacaca courts to try only some category one offenders, like rapists, while reserving trial for genocide planners and other category 1 offenders in national courts (Penal Reform International 2013). Almost 90% of the cases referred to gacaca courts were rape cases, betraying the trust of women, as it took a lot of assurance by the government, for women to come forward to report their cases (Human Rights Watch 2011).

The gacaca system was not equipped to handle category 1 cases; it lacked adequate judges, the legal framework to define and establish a rape case, and the impartiality to achieve justice in legitimate way. The judicial system (both national and local) was already weak before the genocide in 1994, but after genocide, the judicial system was completely dismantled through the killing of judges and administrative staff (National Serve of Gacaca Court 2012). The genocide eliminated all but 244 out of a previous 750 judges, with many survivors fleeing into exile. In 1997, Rwandan courts were functioning with only fifty lawyers and a notable absence of infrastructure and administration especially Courts of Appeal (Tiemessen 2004). The destruction of juridical system led to the lack of qualified and experienced judges, and a significant number of judges had not even obtained primary schooling. At province and district levels, the judges were more educated but still not fit to prosecute genocide criminals (Human Rights Watch 2011).. While judges had some special training to sensitize them on the issues

pertaining to sexual violence cases, the training mainly focused on handling the procedural aspects of the case. Many of the judges were not qualified enough to handle sexual violence cases, even though training was provided – the proximity of the cases to their community lives affected their partiality and compromised the confidentiality of rape victims sharing their stories in the courts.

The problem not only existed in the adequacy of judges, but also in the failure, by the government, to provide legal framework to prosecute the individuals accused of participation in Genocide. Rwanda had ratified various international conventions on Genocide but there was no domestic law punishing the genocidaires (National Service of Gacaca Courts 2012). The government failure, to appropriately define ‘rape and ‘sexual torture’ in the penal code, led to inconsistent verdicts in rape cases (Blundellm 2014). The inconsistent application of the term ‘rape’ and ‘sexual torture’ created confusion among the prosecutors and judges (Human Rights Watch 2011). This was particularly detrimental; it made judges, without any legal education, define ‘rape’ and ‘sexual torture, based on their own personal perspectives which, most of the time, lacked any legal experience or knowledge.

Re-thinking interventions and gender-sensitive justice systems should give renewed impetus to survivor witnesses to participate fully in any justice system. If women are unable to safely and fully participate in the justice system provided, it impedes the delivery of quality justice.

3. The Marginalization of Women’s Voices in the Gacaca System

A. Stigmatization of Rape Survivors in the Gacaca System

After the genocide, women were in more difficult and vulnerable positions compared to their male counterparts. For many women, the ‘dark carnival’ had not ended; they suffered through

physical, psychological and emotional trauma related to sexual violence, gender violence, and facing lack of economic resources, health care and other essential needs affiliated to their vulnerability. Even though they recognized the importance of justice and accountability, they were daunted by the need of acceptance from society. According to Human Rights Watch, only 6608 cases of rape or sexual torture were transferred from the national courts to the gacaca jurisdiction to be completed in the gacaca justice system (Amick 2011). A lack of governmental support and international aid exacerbated women's vulnerability; the lack of security and prioritization of survivors of sexual violence created fear and re-victimized women.

Moreover, the effects of patriarchal systems in Rwandan society have facilitated the marginalization of female survivor voices. Even though the majority of survivors are women, and the Rwandan government has been praised for its high percentage of women in parliament, societal norms prevail, including victim blaming. Scholars like Wells (2005) have illustrated that there is a widespread belief that women constitute a significant number of survivors due to the nature of the crimes they suffered like rape, leaving women to face humiliation, unwanted pregnancy, or sexually transmitted diseases, while men were most likely murdered. Hence the higher number of widows: they outnumber widowers five-to-one (Wells 2005).

In developing and developed countries, social stigma surrounding the taboo of rape leads women to blame themselves for the brutality they endured (Olwine 2011). The Rwandan judiciary treated rape as a family affair when and if it was reported, and the traditional channels to cope and "restore harmony" between the victim and the perpetrator sometimes included marriage without the consent of the victim, which compromises the victim's right, dignity and freedom of choice (Donnah 2003). Gacaca proceedings often contradicted its

purpose; the participation of every member of the community.

Participation could have an adverse effect on women – they could face consequences for speaking out – for being victims. The lack of privacy for women discouraged many from participating in gacaca courts. In some cases, women had to testify in front of their abusers, confront them in front of the community, and face not receiving justice after being ostracized by the community (Human Rights Watch 2004). The fear of stigmatization and ostracisation in gacaca courts silenced women in a way that conventional court did not, while at the tribunal and in national courts, women would have had to divulge intimate details of their ordeals in front of men who did not know them, sometimes testifying in front of up to 19 judges about the crimes they endured (Human Rights Watch 2004). In all court systems, women could not be heard under their own terms.

While gacaca judges were somewhat informed about the procedure for rape cases, they failed to follow through. Government support and international community involvement in this area would have been very essential to empower women, setting a new direction for the role of women in Rwanda. Providing basic need for women about the procedure, advising them on their rights, and encouraging them to participate in gacaca court systems under their own terms would have vastly improved the effectiveness of the system. Some women considered themselves as ‘fortunate’ because they “escaped” contracting sexually transmitted diseases like HIV/AIDS, so they were reluctant to testify as the revelations may have lead their husbands to reject them. The women who did testify were seen as the ones with “nothing to lose;” widows, women dying from HIV/AIDS, and women whose communities already knew that they are rape victims (Human Rights Watch 2004). Those women still had something to lose – seeing their expectations for “justice” vastly different from what they had imagined.

Being ostracized and stigmatized are not the only issues women feared when considering testifying in gacaca courts. Even though gacaca law prohibited tampering with or intimidating gacaca witnesses and judges (Human Rights Watch 2004) security remained a concern. Despite claims that officials were providing protection, many women were skeptical about testifying, as they feared retaliation by the family members or by the perpetrators (Human Rights Watch 2011) when information about their accusations was revealed. The issue of witness protection has been one of much government concern; the level of threats afflicted on witnesses has been unimaginable. The type of threats vary geographically, especially between urban, rural and between different regions (Clark and Palmer 2006).

Some of the interviewees reiterated some reports that those who testified sometimes faced threats, including from people supposed to support them. There are four main categories of actors who participated in threatening people; family members, local politicians, the military and economic elites, and neighbours. These actors used different forms of intimidation against witnesses such as physical injuries, killing livestock, and murder (Clark and Palmer 2006). The lack of protection makes witnesses and survivors more anxious, making them skeptical about testifying especially women who faced sexual violence. A report by Human Rights Watch (2004) emphasized that there have been cases where sexual violence survivors were hesitant to testify due to lack of security, especially due to the Code of Criminal Procedure, not requiring court judgments to redact the names and identifying information of rape complainants. The lack of confidentiality and protection discouraged women raped during the genocide to pursue their case through trial (Human Rights Watch 2004).

Beyond harassment and threats, some survivor witnesses interviewed stated that some survivors as well as other gacaca participants have lost their lives across the country in a brutal

manner. The messages of those killings have been clear: creating intimidation fear in survivors' minds so that they are unwilling to participate as witnesses. In one case, as a message to witnesses and survivors, the president of a gacaca court in Gisanza cell was murdered, with her body "hacked into pieces" and her "eyes plucked out" (Mon 2006). These kinds of intimidation techniques greatly affect survivors, especially female survivors, re-victimizing them. Penal Reform International has emphasized that gacaca testimony by rape victims may lead to life imprisonment or death penalty for the accused, so victims were harassed and threatened by the community members (Human Rights Watch 2004). These killings and threats have had a big impact on witnesses' testimony and in the credibility of gacaca courts to establish historical record of genocide and to end impunity. Entire communities have refused to participate, afraid to risk their lives after receiving no assurance from the government officials and police.

Moreover, some gacaca court judges have been accused of participating in some of these egregious crimes, making witnesses more skeptical and fearful about testifying. Few gacaca judges have been convicted of being bribed by the defendants in order to reduce the sentences or to place the defendant in different category other than category 1 (Human Rights Watch 2011). These killings and corruption magnify the failure of gacaca courts to establishment harmony and peace through truth and reconciliation. In 2008, the Rwandan government published a report that 156 survivors and witnesses were killed between January 1995 and August 2008 due to their participation in genocide trials (Clark and Palmer 2006).

The government has taken different measures to ensure safety of witnesses, such as a Victim and Witness Protection Unit (VWPU), which ensures the safety of witnesses. They respond in four ways: firstly, witnesses or survivors can file a formal complaint with local authorities; secondly, if the threat escalates, then the VWPU informs local police to patrol the

neighbourhood; thirdly, the unit sets up a meeting in communities emphasizing that threats are not tolerated; fourthly, if the threat persists, a permanent police authority is placed with witness and the witness is placed in a safe house in a different community (Clark and Palmer 2006). Even though there seems to be protection for witnesses on the surface tightknit communities complicate the security process, where witnesses have to live among the families and friends of the perpetrators.

B. Gacaca and Collective Memory

Contrary to the views expressed in much of the literature, and gacaca system is actually largely top-down and government sanctioned -- its processes are monitored and overseen by the National Service of Gacaca Jurisdictions (NSGJ). According to reports by Penal Reform International, the NSGJ primarily manages prisoner dossiers between national and local courts, connecting them to its local offices in each province. The NSGJ also has the right to advise gacaca courts, including how and which judges are elected, and “the ability to intervene at the local level when judges ‘are not in control of the proceedings’” (Penal Reform International), and local staff works with senior officials in government to “sensitize the population.” According to the same reports, which are based on interviews with NSGJ staff members, “sensitization” entails campaigns that “target rural populations to encourage people to participate out of self-interest and in the interest of national unity and reconciliation.”

In line with some of Thompson’s arguments, Tiemessen (2004) characterizes the Rwandan government as often acting like a “Tutsi ethnicocracy,” and that its heavy-handed approach to reconciliation has politicized the gacaca process, so that when the ethnic identities fuel the process, reconciliation is unattainable. Researchers like Rettig (2008), and organizations like

Human Rights Watch (2010) and have highlighted the weakness in impartiality of gacaca as a justice system which compromises the objectivity of the establishment of gacaca court system. Lauren Haberstock (2014) has highlighted the strengths and failures of gacaca system. In his paper, he concluded that the:

“Gacaca court system seeks to promote both justice and reconciliation, but it is by no means a perfect system as it lends itself to the possibility of corruption, further suffering endured by the victims and partisan justice. Nor does the gacaca system uphold the message of truth and reconciliation that it claims to pursue” (Haberstock 2014).

As witness BNN from Butare stated:

“I had the opportunity to participate both in the Arusha court and at gacaca. The systems are different and they are also similar. Reflecting on my experience at the local Gacaca trial in Butare and my experience in Arusha I feel both have challenges and opportunities, if the two process can work together it might come up with a system which tries to meet us at our point of need. For example during the gacaca, the people at the hearings know what happened and understand the pain. Even the perpetrators do not pretend they do not know what and how they committed the genocide. In Arusha, they act as though they are strangers to the events of the war. They sit there elegantly dressed in suits and other things and you would think they are coming from a different planet. All of a sudden they pretend they cannot talk and other people have to explain events and they look at you like they are hearing this for the first time, really? In your system people pretend. It's like people are acting. To us survivors it's like a nightmare. In Arusha things seem so remote it's too far. The Gacaca becomes too near. People claim to know too much and this can make you very sad and depressed. Even after the gacaca people seem like they are still talking about the trial, this makes us survivors miserable, the cloud of hopelessness and depression comes back. In both systems you come out empty, like the last drop of your blood has been poured out without your control. You start again to float in the same hopelessness and it becomes a vicious cycle. In both courts you don't not get a feeling you can freely express your loss and expectations. You feel you have to respect authorities, those people with power.”

Some analysts observed that criticism of the government during the gacaca process was highly discouraged– and victimhood was reserved only for certain people. For example, even though both Tutsi and Hutu women suffered sexual violence during the genocide, certain testimonies were given more weight. Those who refused to participate faced danger – for example, even Tutsi survivors could be excluded from civil society organization benefits that included free health and school fees if they refused to take part in gacaca proceedings. They could also be

shunned in their communities, intimidated, imprisoned without charge, and viewed by authorities as being hostile to the national goal of reconciliation and a post-genocide collective identity and memory (Thompson 2012, 379).

C. Choice between a Hard Place and a Rock: What Are the Options for Rape Survivors

Few studies have tackled the complex question of what to do about victims and survivors of sexual violence after genocide. While the ‘dance’ between the precedents set by the ICTR and the inclusion of women in local justice systems in post-conflict Rwanda has somewhat improved the agency of women in Rwanda, Rwandan women still face discrimination (Rwanda is ranked 76th out of 148 countries in the 2012 index of the UN’s Gender Inequality index), even when, according to the same index, an impressive 51.9 percentage of seats in the Rwandan parliament are held by women.¹¹⁶ Certain quotas on female seats in parliament do not necessarily guarantee an inevitable gender perspective in the judicial process – a ground up approach is critical to including the voices of female survivors in judicial processes, from the ICTR to gacaca courts. Judge Pillay, formerly the president of the ICTR, has highlighted the importance of how the law is applied and implemented in relation to gender-sensitive crimes:

“Who interprets the law is at least as important as who makes the law, if not more so. I cannot stress how critical I consider it to be that women are represented and a gender perspective integrated at all levels of the investigation, prosecution, defense, witness protection and judiciary.”¹¹⁷

¹¹⁷ The Honorable Navanethem Pillay, former President of the International Criminal Tribunal for Rwanda, former Judge of the International Criminal Court and former UN Commissioner of Human Rights. Cited in Bendoit.B and Hall Martinez, K., in “Ending Impunity for Gender Crimes under the International Criminal Court.”, *Brown Journal of World Affairs*, vol.6 pp.65-85.

CHAPTER 6: CAN THERE BE JUSTICE WITHOUT REPARATIONS? IDENTIFYING GAPS IN GENDER JUSTICE

1. Summary: In Search of Post-Conflict and Post-Genocide Reparations¹¹⁸

One of the key obstacles to gender justice identified by survivor witnesses and other survivors of conflict related sexual violence in this study is the disconcerting absence of reparations. The interviewed survivor witnesses of sexual violence indicated that they had great expectations of receiving compensation for their pain, suffering, and great loss. This chapter focuses particularly on survivor witnesses who contracted HIV as a result of the rapes perpetrated during the genocide. Voices of survivor witnesses on reparations, their experience, and their lived reality reveal an important point of reference to the missing link between reality and rhetoric within transitional justice interventions.

Most importantly, the voices of the survivor witnesses refer to context specific notions of both individual and collective reparations, which might take the gender agenda further for other tribunals already implementing the reparation regime; for example, the ICC and many other national courts. Victims and survivor witnesses called to testify at the ICC can now participate and receive compensation. This chapter encourages informed discussions in order to explore the notion of reparations, which can assist public actors to look at timely reparations through the lens of survivors.

Public actors have echoed some of their concerns in the international justice system. In 2014 I had an opportunity to discuss some of the findings of this study with practitioners working in different sections of ICJS at the ICTR. During my discussions with the prosecutor, Mr. Jallow, in

¹¹⁸ Please note this chapter also appears as part of a paper written by the researcher publication: “Can There Be Justice Without Reparations? Identifying Gaps in Gender Justice,” in the book *The International Criminal Court and Africa: One Decade on*, edited by Evelyn A. Ankumah and Benjamin B. Ferencz (Cambridge, United Kingdom: Intersentia, 2016. Print)

January 2014, he confirmed that one of the concerns, which he feels was not addressed because one of limitations in the provisions of the ICTR was reparations, and he said:

“If the tribunal was to start again, that is one of the most important requests I would make to the Security Council... provisions to allow the prosecutor to apply for reparations for the victims. Both individual and collective reparations would in the case of ICTR have addressed both urgent, immediate needs and longtime needs of our survivors.”

The former Judge President of ICTR, Judge VagnJoensen¹¹⁹ also indicated in the 2014 interview with the researcher that though the provisions of the ICTR Statute limited the aspect of reparations could be considered through other appropriate efforts. He added that feasible and appropriate options and mechanisms which can take the matter further and address the lack of reparations. Judge VagnJoensen explained that judges strike the balance between interests of all parties in court, so that they gain the confidence of the witness at the same time according an Accused his or her rights. In the case of remedies not applied for or not provided by the Statute judges act according to the rules of Procedure”

Many scholars from different perspectives have discussed the concept of reparations in international criminal justice. My research focuses on how survivors of sexual violence fit into the framework of post-conflict and post-genocide reparations, and draws mainly on the voices of some of the survivors and studies that show the survivor witnesses’ quest not only for reparations but for gender sensitive reparations.

2. The International Criminal Justice System and the Theory of Reparations

A. Reparations and International Human Rights Norms

Over the last two decades, scholars and adjudicators in the international community have expressed an increased interest regarding the issue of reparations in post-conflict areas.

¹¹⁹ Current judge at the Mechanism Criminal Tribunals, ICTR closed at the end of 2015 with some of its functions being taken over by the Mechanism

Additionally, there has been an explosion of both scholarly writings and academic offerings following the genocides in Rwanda, the former Yugoslavia, and other places. (Bauxbaum 2005). Over the last half century, the plight of the Second World War (WWII) victims has generated and propelled new discussions on reparations – specifically the issue of German reparations for atrocities committed during that war (Bauxbaum 2005). Following WWII, other mass atrocities, including the genocides in the former Yugoslavia and in Rwanda have prompted a closer look at how the literature and the international justice system conceptualize reparations and victim rights.

Article 75 of the Rome Statute enabled the International Criminal Court (ICC) to order an individual perpetrator to make direct reparations to victims of crimes.¹²⁰ The ICC reparation system was innovative in international law and marked a departure from the traditional inter-state approaches to the right granted to individuals to claim reparations for crimes under international law (Bottiglieri 2004, 210).

In theory, the right to reparations for survivors of human rights violations has been well established in international humanitarian law. The United Nations General Assembly has reaffirmed the rights of victims to reparations and it is now accepted that individuals have this right under international law. In 2005, the UN General Assembly introduced 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.” These principles are based on existing international obligations under

¹²⁰ The Rome Statute, adopted by 120 states on the 17th of July in 1998 (International Criminal Court, 2006), not only established that the International Criminal Court would not be a replacement for national jurisdictions (but rather a means of intervention where a state lacks mechanisms to investigate and prosecute perpetrators of genocide and other crimes against humanity), but in Article 75 of the Statute highlighted the issue of reparation for victims of genocide and crimes against humanity (Octavio Amezcua Noriega, "Reparation Principles under International Law and Their Possible Application by the International Criminal Court: Some Reflections", *Transitional Justice Network Paper No-1* (2011)).

international humanitarian law, calling for those involved in handling post-conflict and post genocide deliberations to provide adequate reparation “*proportional to the gravity of the violations and the harm suffered.*” Principle 14 recognizes both the responsibility of the State and a “*person, legal person or other entity which is found liable for reparation*” to provide reparations to the victim.¹²¹ Principle 15 expressly incorporates the possibility that reparations may not only be made by states, but also by persons found liable for reparation to a victim.

Previously established human rights treaties which set up state obligations not only focused on investigating and prosecuting suspects, but also addressed the protection of citizens, remedies, and reparations to redress violations. States are obliged to provide victims with both procedural and substantive reparations, as well as the obligation to afford victims with adequate relief. Compensation and an effective route to obtain such relief are both parts of the general obligation to provide reparations.

Lack of reparations in a system addressing conflict related sexual violence may be interpreted as reinstating or reinforcing the structural subordination and discrimination for women and men affected by the violence. It has been argued that reparations may have the potential to trigger important changes even if reparations alone cannot transform the root causes of conflict related sexual violence or the conditions that make such violence possible.¹²²

¹²¹ For further discussion see Eva Dwertmann’s, “The Reparation System of the International Criminal Court: its Implementation, Possibilities and Limitations”, Leiden-Boston (2010).

¹²² See the United Nations, “Guidance Note of the Secretary –General: Reparations for Conflict-Related Sexual Violence (June 2014) p. 8; making further references to the Nairobi Declaration on Women’s and Girls’ Right to Remedy and Reparation, Principle 3H; and comments by the International Criminal Court in *Prosecutor v. Thomas Lubanga Dyilo*: Decision establishing the principles and procedures to be applied to reparations, ICC-01/04-01/06-2904, Trial Chamber 1, 7 August 2012, para. 222.

B. What Does Justice Mean to some of the interviewed ICTR Survivor Witnesses?

Different survivor witnesses had differing views of what justice means and should be. However, the common theme was a quest for an empowering justice, one which dignifies their experience with compensation. When it comes to justice, women have a range of perceptions, closely linked to the injustices they see and experience around them. According to the women I interviewed, lack of provisions for reparations is in itself an injustice. One respondent who survived the 1994 genocide in Rwanda, JJM described her experience when she left the ICTR after testifying in court by stating:

“When it comes to my experience at the ICTR court I find it difficult to understand that kind of justice. I was happy I had an opportunity to go and tell the truth about what happened to me in 1994. However, one thing left me very sad and disillusioned by the Arusha justice. After all the killings and rapes I saw, after what happened to me in Gisenyi, to walk out from court with nothing, no apology, no compensation, but just nothing, was heartbreaking to say the least. I told myself, this cannot be justice, I have not seen justice with nothing to show that your pain was acknowledged, there is no compensation, and there is no justice for us. The feeling is bad. You feel used wrongly. Your wounds are re-opened and you leave bleeding again and empty handed. To me there is no justice without reparations.”

Scholars like Juergen Shurr have stated that reparations are a form of justice, so that *“justice without reparation is not justice.”* Shurr also criticized the failure of the Rwandan government and the ICTR to compensate the survivors and victims of genocide, even after the Rwandan government drafted the bill on compensation in 2001.

Even though international human rights and humanitarian law have established the right to reparations for survivors, the role of the ICTR in providing compensation is limited. Whilst the ICTR has been criticized for a lack of attention to sexual violence crimes,¹²³ the survivor witnesses have acknowledged the contributions of different NGOs. In the wake of the 1994

¹²³ See NGO Coalition on Women’s Human Rights in Conflict situations, Rwandan and International NGO reports on ICTR, Amnesty International, “International Criminal Tribunal for Rwanda: Trials and Tribulations” (London: Amnesty International, 1998); Women’s Caucus for Gender Justice, “Summary of Panel Discussions on Victim and Witness Issues (July 27, 1999), <http://www.iccwomen.org/archive/resources/vwicc/intro.htm>.

genocide, many NGOs took up the cause of women and girls' rights and some provided legal assistance, medical and counseling services to the best of their abilities. Given the limited provisions for reparations within the ICTR Statute, there have been different views from writers about the tribunal's role in those efforts. Shurr argues that even though it is impossible to fully compensate for crimes such as genocide, compensation is important for survivors as it serves as an acknowledgement of the crimes that were committed, and restores some sense of dignity for the survivors. Staub, Pearlman, Gubin, and Hagengimana argue that even before tackling the issue of reparations, "peace" after a conflict is difficult to establish; people's attitudes towards each other need to change first; for each group, forgiveness doesn't come quickly or all at once, and it is only when the desire for revenge no longer exists, and when people move away from primarily identifying themselves as victims, that wounds begin to heal and a real move towards reparations can be made (Staub et. al 2005, 297-334).

One witness (GHT) from Butare feels the system has not been sensitive to survivors, particularly those who contracted AIDS as a result of the rapes perpetrated on them during the genocide:

"Many of us contracted AIDS when we were raped in 1994. Some of the Interahamwes who raped us already suffered from the disease. Very few of us went to Arusha and among the few who went to testify, not even one was compensated. We waited for justice for a long time and when I asked about it I was told there was no provision to compensate us. I thought it is like building a hospital and telling patients there are no painkillers. When the time came to have our day in court we hoped to have it, to start to talk about our real needs, ranging from medical needs for all the opportunistic diseases which come with AIDS, some money for food, clothes and toiletries. When it was explained that we cannot get even money for food when we came home I thought why did I waste my time instead of focusing on my field?"

While there is a growing emphasis on the importance of victims' rights in international human rights law and international humanitarian law towards restorative justice,¹²⁴ in practice,

¹²⁴Restorative justice has been described as a concept that aims to involve the offender, the victim, and the community on a more or less equal basis in their search for repair, reconciliation, and justice. The concept includes measures of mediation, community service, restitution, and other forms of diversion aimed at providing redress to

reparations have been hard to find in the international justice system, and theories and declarations supporting the need for reparations have sent mixed messages. In reports related to compensation to victims submitted to the Security Council, both judges of the ICTR and ICTY concluded that the statutes of the Tribunals do not give them the mandate to decide on such issues.¹²⁵

Meanwhile, the eighth ICTY Annual Report confirmed the gradual formation of a right of victims to compensation under international law and recommended the International Commission for Compensation.¹²⁶ There were various attempts by the ICTR, through the Office of the Registrar to provide help witnesses. For an example, ICTR tried to projects in Kibuye'sTaba Township, the geographical location of Akayesu to help some of the .survivors. Due to budgetary constraints this did not materialize.¹²⁷ One of the ICTR legal advisors who was interviewed on the basis of anonymity explained that:

“Witnesses should be grateful that we are bending over backwards to assist them. We are not obliged by any of the provisions of the ICTR. It is therefore not a legal obligation. In fact as early as 2000, the office has been we going out of its way to accommodate some of the needs of both prosecution and defense witnesses. When both prosecutors and defense counsels prepare witnesses they need to manage their expectations. People need to be thankful for that assistance and not expect too much. They must know that we work within the four corners of our mandate”

The ICTR has provided some “assistance” to some of the victims of sexual violence who

the victim and reconciliation between victim and offender. See Dwertmann citing The Hague, 2003, pp 275; S. Garkawe: “Victims and the International Criminal Court: Three major issues”, *International Criminal Law Review* 3 (2003), p. 345.

¹²⁵¹²⁶ Recommendations made by the Tribunals included recommendations to the Security Council to consider a possible mechanism to deal with reparation to victims. See ICTY: Victims' Compensation and Participation- Report prepared by the ICTY Rules Committee. Appendix to a Letter dated 12 October 2000 from the President of the ICTY addressed to the UN Secretary-General, annex to UN Doc. S/2001/1063 of 3 November 2000; ICTR: Letter of the President of the ICTR to the UN Secretary-General. Annex to a Letter from the UN Secretary-General to the Security Council, UN Doc. S/2000/1198 of 14 December 2000.

¹²⁶ See Eighth ICTY Annual Report UN Doc. A/56/352 of 17 September 2001, para 49.

¹²⁷ Letter of the President of the ICTR to the UN Secretary-General. Annex to a letter from the UN Secretary-General to the Security Council; UN Doc. S/2000/1198 of 14 December 2000.

appeared as witnesses before the ICTR in the form of general medical services by a medical unit set up in Rwanda. Some authors have pointed though this might give an impression that , the ICTR has accepted a duty on the basis of Rule 34 of its Rules;¹²⁸ however, these efforts are not enough under the standards set by international law on reparations for victims.(De Brouwer, 217) Given the challenges woman still face in accessing justice in Rwanda, unrealistic to expect them to easily access justice in national courts. Witness ROR from Mugonerostated:

“Some of us have heard it all. We were told how after giving testimony in Arusha we could use the judgment to go to court here in Rwanda to get something. Many of us don’t think justice is going to Arusha and coming back with nothing, then having to wait again. I waited since 1994 to give evidence in 2005 and now I am still waiting, how long should I wait and what am I still waiting for? Death? What I call justice is not waiting this long for nothing; we are tired of people talking about it and then pointing fingers blaming each other with no one taking responsibility to address the issue. What will transform my life is getting the material assistance I need to stop bleeding and start to rebuild my life.”

Many of the survivors interviewed did not necessarily equate justice with prosecutions. In fact, in many instances, they reflected that recognition of what they had endured and finding means to build their lives often took precedence over going to court. Given that prosecution alone will be inadequate to ensure justice, the justice system has to identify complementary interventions and build collaborations, which manifest in gender sensitive forms of justice.

C. UN Resolutions and Theoretical Solutions

There have been many commendable attempts by the UN Security Council, to include a gendered perspective and address victims of sexual violence through new resolutions and

¹²⁸A.M. de Brouwer: “Reparation to Victims of Sexual Violence-Possibilities at the International Criminal court and at the Trust Fund for victims and Their Families”, *Leiden Journal of International Law* 20 (2007), pp. 207, 217.

amendments to previous resolutions. However, in practice, the theoretical framework has not always translated effectively to significant change on the ground. On October 31 2000, the UN Security Council adopted Resolution 1325 in order to emphasize the importance of women's participation in conflict prevention, peacekeeping and peace-building policy. Resolution 1325 called attention to the specific needs of girls and women in post conflict areas. The resolution's goals included encouraging a gendered perspective towards humanitarian issues, such as protecting women and girls from sexual abuse, rape and other gender-specific crimes perpetrated during conflict, and pointed to coordination between agencies in order to actually implement the resolution's objectives. The Interagency Taskforce on Women, Peace and Security now includes UNDP, UNFPA, UNICEF, DPKO and many others.

In 2008, The UN Security Council passed Resolution 1820, as a way to reinforce Resolution 1325. It acknowledged that sexual violence had been used "as a tactic of war, to humiliate, dominate, instill fear in, disperse and/or forcibly relocate civilian members of steps to prevent and respond to acts of sexual violence as a central part of maintaining international peace and security." The resolution specifically defined systematic sexual violence as a way to target women and girls, and committed the Security Council to take steps to punish perpetrators, including engaging military and other resources to end impunity.

The next year, resolution 1888, followed supposedly to pave the way for experts, advisors, monitoring mechanisms, and a Special Representative of the Secretary General on Sexual Violence in Conflict. It was passed by the UN Security Council in September 2009 after a unanimous vote for member states to implement even more strategies aimed at stopping sexual violence in conflict zones

UN Resolution 1889 was also passed in 2009 and also acted as a reinforcement of Resolution 1325; it included developing indicators and collecting data in order to track the previous resolution's impact, and reporting on the participation of women not only during, but after the conflict. Specifically, the needs of women were also to be considered in all sectors of peace building, such as disarmament agreements, education initiatives, economic empowerment and health care.

In 2010, resolution 1960 included a mandate that names of people "credibly suspected of committing or being responsible for patterns of rape and other forms of sexual violence in situations of armed conflict on the Security Council agenda" needed to be included in annual reports and tracked. The resolution was a response to the slow progress that other efforts had made, and engaged both State actors and non-governmental entities to ensure that accountability and clear guidelines were a priority. While some of the resolutions' key contributions were urging States to make judicial reforms towards ending sexual violence, moves towards sensitization on the local level to combat stigmas towards victims of sexual violence, and seriously considering sexual violence issues and including them in human rights agreements and ceasefires, the impact of these resolutions on the ground still left many gaps to be filled.

3. Steps towards Reparations

A. Identifying the Many Forms of Reparations

The Nairobi Declaration on Women and Girls' Right to a Remedy and Reparation presents a compelling case for gender-sensitive reparations which take into account pre-existing gender relations and power imbalances in order to come up with a fair assessment of the harm

inflicted on different categories of survivors.

Reparations may take a number of forms, such as restitution, compensation, or rehabilitation, as well as guarantees of non-repetition of the offense (Schurr 2011). Restitution can include restoration of liberty, return of property, and return to one's place of residence, but it is hard to access and assess as it is close to impossible to restore a victim's original situation before the violation.

"In my case things are very difficult. Though I was called to Arusha to tell my story and was given protective orders, the *Interahamwe* who raped me and participated in the killing of my family lives in a village next to me and each time we meet and he says "Amakuru"¹²⁹ I ask myself where is the protection? In Arusha we didn't talk about him, we talked about his Commander. Can I have my children back? I cannot. So what does that help? All this justice sometimes makes my head spin. I just feel dizzy. One would think if you cannot have your children back you can have some little money to go and buy painkillers. If this justice cannot give me money, what about an apology? Now I understand why one survivor and his wife decided just to move into Muhimana's house when the genocide stopped. They had lost everything and no way to stay. They just told themselves nobody cares, they went and started living there. Simple common sense that is exactly what justice should do. Do not complicate it. You cannot give us back what we lost, but this justice at least can come up with a comprehensive way of realizing those who lost everything needs something. "

Witness JKP from Kibuye explained.

Restitution for a victim depends on the content of the primary obligation that has been breached. As the first of the forms of reparation, it is of particular importance to determine whether the obligation breach is continuous; for example, an unlawful detention or disappearance will require the state to put an end to the situation as cessation or restitution (Redress 2003). What then would be appropriate for a survivor witness who lost her freedom to move around her village because the protective order she has is against the Commander and not the neighbor, an *Interahamwe*, who has never been charged with rape?

Witness VOV from Bisesero explained:

¹²⁹ Greeting in Kinyarwanda, meaning "how are you?"

“I have been ill since 1994 when I was raped. I still grieve over all the things I lost. All my 5 children. No one can do anything to bring my loved ones back. What about things which can have a solution? So I will never be compensated for my cow? Since I sometimes bleed I would sell milk and buy sanitary pads. I thought in Arusha the discussions would dwell on those important things. How I would be compensated so that I replace my cow. I did not hear the word “cow” at all and I could not ask for it since when they are there the accused persons talk through a lawyer and pretend they cannot talk. It is very strange how justice is looks like in Arusha. Additionally, though there is a protective order, it is not against the Interahamwe who raped me, it is against his commander who will never come to Rwanda. Freedom is restoration. I want to walk freely in the village; some of the Interahamwe should be relocated. I want to rebuild my life and not be perpetually intimidated.”

Compensation can include any “economically assessable” damage resulting from the crimes. Compensation can be particularly important in cases where restitution is no longer possible due to the nature of crime (Ferstman, Goetz and Stephens 2009). The function of compensation, as its title indicates, is purely compensatory. It is not concerned with the punishment of the responsible state; in this regard, the Inter-American Court of Human Rights held that compensation under international law did not recognize the concept of punitive or exemplary damages (Redress 2003, 23).

However, in some cases, compensation is difficult to accomplish, as countries coming out of genocide have different priorities. In the case of Rwanda, the Executive Secretary of the National Unity and Reconciliation Commission has addressed the need for compensation, even though resources for compensation are very limited and access to it can be challenging (Ferstman et al. 2009, 24). Moreover, in the Rwandan context, an empirical study conducted by Brehm, Uggen and Gasanabo (2014) indicates that gacaca embedded restorative justice, as perpetrators were asked to pay fines for offenses against property.

Alongside the gacaca system, the *abunzi* system of mediation also serves as a vehicle towards compensation, resolution and restitution for victims of the genocide. The word *abunzi* literally translates to “those who reconcile” and involves a group of local mediators on the ground in the country, and was recognized in 2006 by the government through an “Organic Law” as a

legitimate and decentralized way to buttress the gacaca and other state mechanisms in order to handle conflict on a local level. This law also prohibited *abunzi* mediators from giving out punitive sentences during mediation processes, thereby setting it apart from other state mechanisms of justice and reconciliation, and also highlighting it as an alternative form of conflict resolution. By 2011, more than 30,000 *abunzi* mediators were involved in the system. Like the gacaca system, *abunzi* gatherings/courts are state mandated, rooted in traditional and local structures of conflict resolution “opening spaces for ordinary citizens to participate in public processes.” (Mutisi 2011)

Despite claims by supporters of local systems like the gacaca courts and *abunzi* mediation system that they provide justice on a local level, there have been different opinions among the people of Rwanda. One opinion emphasizes that the government is more focused in establishing “beautiful Kigali” than the welfare of genocide survivors (Ferstman et al. 2009, 24). Research published in June 2012 by the Legal Aid Forum in Rwanda (based on interviews with over 2,700 compensation claimants) confirms that awards by gacaca courts are the “hardest to enforce,” with 92 percent of all genocide-related judgments yet to be actually implemented (Redress 2012). Paul Jean Mugiraneza also argues that compensation for genocide survivors is very important, and criticizes the failure of the Rwandan government in fulfilling these demands. He also emphasizes that while the Rwandan government has established a legal framework supposedly aimed at providing compensation for genocide survivors, the commitment has been much more visibly enforced on a criminal justice level, but not on a more compensatory level that the survivors can see (Mugiraneza 2014). .

One of the survivors who lives in Kigali Urban celebrated the reconstruction of Kigali and remarked that: “some of the perpetrators will get lost if they come back home; for example,

Kigali should make them ashamed, no one can destroy Rwanda, there is hope in Rwanda and from the ashes of the genocide we are raising the standard. She indicated that anyone blaming the post genocide government fails to appreciate its role in ending the genocide and starting from scratch given the fact that government coffers were looted by the killers.”

Along with compensation, rehabilitation is also an important component of reparation, and the previously mentioned UN Basic Principles provides that “*rehabilitation should include medical and psychological care, as well as legal and social services.*” (OHCHR 2005, 30). In *Barrios Altos v. Peru* (a case heard by the Inter-American Court of Human Rights in 1991 concerning the deaths of fifteen people and at least four injuries caused by a death squad composed of Peruvian Armed Force members in the Barrios Altos neighborhood of Lima, Peru), the court approved the agreement signed by the state and the victims, wherein the state recognized its obligation to provide “*diagnostic procedures, medicines, specialized aid, hospitalization, surgeries, laboring, traumatic rehabilitation and mental health*” to victims of the Barrios Altos massacre. In other cases, the court provided assurance for the future medical treatment of victims, where there was a direct link between the condition and the violation (Redress 2003, 23).

Rehabilitation is a form of restoration of a victim’s physical and psychological health. Vandeginste (2003) states that “rehabilitation in a full reparation programme will normally require an initiative on the part of the State and its active involvement in the provision of medical and psychological care and of legal and social services.” (Ruebana and Brouwer(2013) have also highlighted that gacaca was able to restore rehabilitation in the sense that during the gacaca proceedings, survivors and victims were allowed to relive their frustration and were able to restore good relations among the community. Another form of reparation, reconciliation is a

long-term process and does not happen overnight. Reconciliation at the societal level requires government to play an active role, but at the individual level it depends on different circumstances, like the magnitude of brutality suffered by the victims and survivors, their current living conditions, and the availability of additional support (Ruebana and Brouwer 2013).

It is not enough to have efforts towards reparations without guarantees that the offense will not be repeated to the satisfaction of the victims. A central component of reparations is the public acknowledgment of the violation suffered by the victims and survivors. There are difficulties in conceptualizing this form of reparation as a remedy awarded against an individual rather than a state. One way to think about the concept is to analyze how scholars have highlighted the importance of the victims' right to know the truth and to hold the perpetrators accountable (Redress 2003, 23). Vandeginste (2003) claims that "satisfaction" applies to those types of redresses that do not aim to set right specific individual losses or harm.

The main forms of "satisfaction" are: the verification of the facts and the disclosure of the truth; an apology; sanctions against individual perpetrators, and commemorations of and tributes to the victims. From their empirical study, Ruebana and Brouwer (2013, 35) illustrate that gacaca was still unable to fulfill the demands of survivors and victims in regards to reparation partially because of these forms of satisfaction. They also highlighted that reparation was essential for victims and survivors not only because of a need to be acknowledged, but also because many continue to live in poverty as a result of the genocide. Rwanda holds an annual public memorial service in April for victims of genocide. Nevertheless, the empirical study by Jacqueline Lewis (2010) indicated that during the memorial service, some Hutu students were uncomfortable – they believed that Hutus who were murdered because they refused to

participate in genocide are not commemorated. In these kinds of cases, the government should create a neutral atmosphere so that there is no increase in tension.

B. Reparations and Reconciliation

Reparations can be implemented at different stages of the reconciliation process. Vandeginste (2003) has argued that the concept and terminology of “reparations” is evolving and adopting a dynamic role. She argues that reparation measures can be implemented through reparation rights and reparation policies, individual and collective measures, financial and non- financial measures, and commemorative and reform measures.

Vandeginste (2003) also argues that we might continue to find a strong legal basis for reparations in domestic law or in international human rights law. It is helpful to use different types of reporting mechanisms for civil society groups to design a reparation proposal or lobby for structural reparation measures. It is also important to stress the interaction between the enforcement of reparation rights and the adoption of reparation policies. In recent years, changes in the regulation regarding reparation have been implemented, but enforcing these procedures has not yet developed far enough. Organizations like the Victims’ Rights Working Group have questioned the effectiveness of the ICC in establishing effective procedures. They criticize the insufficient progress that has been made in clarifying the reparation process and establishing the principles on reparation required by Article 75 (1) of the Rome Statute (Victims’ Rights Working Group 2011).

The notion that the ICC should participate in awarding reparations was controversial due to concerns that the intermingling of civil matters with criminal proceedings would distract the court from its primary mission of fairly prosecuting individuals responsible for mass atrocities

(War Crimes Research Office 2010). As the ICC has decided to approach reparation on a case-by-case basis, the Victims' Rights Group believes that this will result in inconsistent and weak reparation orders due to the different panels of judges.

Lack of sufficient information for victims has created frustration and confusion (Victims' Rights Working Group 2011, 47). Currently, there has been a shift in focus towards the gender perspective of questions of reparations. The observations emphasized key reparations principles including a gender-inclusive approach; non-discrimination; the importance of effective consultation with victims/survivors including women and girls; a broad concept of harm; and the transformative function of reparations (ICC Women 2012). The importance of a gender inclusive approach to reparation has also been emphasized by Zoglin (2007, 454-55) when she highlights the importance of a gendered approach. She argues that women tend to lack courage to come forward, especially in relation to rape cases, raising the need to find a way to encourage them to participate during proceedings and reparations.

For individual and collective measures, Vandeginste (2003, 34) argues that, even though individual reparation is important, individual reparation measures are often insufficient and close to impossible. During the transitional justice schemes, collective reparation is more effective by providing access to communal facilities and initiatives like health care centers, funded education programs, employment opportunities, etc. This argument has also been supported by Šoštarić (2012) as he argues that reparations should be divided between individual and collective measures. Individual reparation recognizes the importance of specific harm to the individual and an individual's worth as a citizen. Collective reparation aims to respond to collective harms and harms to collective cohesion.

Nevertheless, the combination of individual and collective approaches might have an impact on financial constraints, political and financial priority setting, and logical feasibility (Vandeginste 2003, 34). The problem also lies in identifying the correct enforcement of collective reparation or individual reparations. Even though individual reparation is beneficial in some cases, especially where atrocities have focused on a particular community or ethnicity, sex, or religion, collective measures seem more valuable. For example, in the recent ICC case of *The Prosecutor vs. Germain Katanga*, where Katanga was convicted by a majority of the Trial Chamber II as an accessory to the war crimes of directing an attack against a civilian population, pillaging, and destruction of property, as well as murder as a war crime and a crime against humanity, the chamber unanimously acquitted Katanga as an accessory to rape and sexual slavery as war crimes and crimes against humanity, as well as of the war crime of using child soldiers. (ICC Women 2014). In terms of reparations, the ICC decided to implement individual reparations, which was unsettling to the Women's Initiative. The Women's Initiative argued that individual reparations may limit the potentially positive effect of reparations and introduce an unintended hierarchy of victims within situations under investigation by the ICC (War Crimes Research Office 2010, 48). In relation to funds, there have been voluntary contributions and donations – not from the convicted person(s) – so utilizing these resources collectively would be more efficient and meaningful (ICC Women 2010).

Vandeginste (2003, 34) indicates that during the implementation of reparation policies, non-financial packages can be implemented to meet victim needs and expectations, like providing people with death certificates for their disappeared loved ones, the facilitation of exhumations and reburials, and the expunging of criminal records. She also illustrates that there are two different types of commemorative reparation claims: firstly, a backward-looking claim showing the barbarity and humiliation associated with the past oppression; and secondly, a forward-

looking claim seeking to alter the social and economic condition of disadvantaged groups. As indicated above, the forward looking approach has somewhat been addressed in Rwanda through the annual commemoration of the genocide in April where victims and survivors of the genocide are publicly honored, as well as the establishment of hundreds of memorial sites throughout Rwanda which to some extent provides survivors with a place to mourn and remember their loved ones who perished during the 1994 genocide.

The survivors have presented a compelling case for reparations. This has been buttressed by many scholars. For example, Vandeginste (2003, 34) has demonstrated the importance of reparations and why they are needed. The reparation component in transitional politics and law can be observed from different perspectives such as individual rights, reconciliation, acknowledging and repairing the suffering of victims, and political transition. The new government after a genocide or conflict should immediately take action for the past atrocities and guarantee individual rights and provide reparations to the victims.

C. The Lack of Reparations Negates a Gender-Sensitive Approach in Post-Conflict Interventions

Acknowledging and attempting to alleviate the suffering of victims is an important aspect of reparation. It is important for a victim to be recognized as a human being with equal rights and dignity. According to Vandeginste (2003, 34) political transition acts as a bridge between the past and the future through “backward looking objectivity compensation for victims to forward looking objectivity of political reforms.” Relevant to the Rwandan context, the Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation provides a useful blueprint for devising comprehensive strategies to address sexual violence and related forms of gender based violence perpetrated against women and girls (Redress 2012, 30). These kinds of reforms are important as they address the political and structural inequalities that negatively

shape women's and girls' lives (Redress 2012, 30).

It is encouraging that in the wake of the 1994 genocide, many NGOs took up the cause of women and girls rights and some provided legal assistance, medical and counseling services to survivors. To practically address the problems they faced after the genocide, the ICTR's role was much more elusive, and the government's role on the issue of reparations remains complicated. After the genocide, an estimated 70 to 80 percent of the surviving women in Rwanda were infected with HIV (AVEGA-AGAHOZO 1999; de Brouwer 2005, 390) and were in dire need of medical and rehabilitation services to deal with the trauma. Many factors strongly indicate that the majority of HIV/AIDS transmission took place through rapes perpetrated during the genocide.

In the midst of these challenges, witnesses and survivors of rape have struggled with finding ways to gain access to medical and psychological help, and to physically access promised medical care. One witness (Witness ROR Butare) explained some of the survival tactics developed among survivors:

“When I came back from Arusha, I decided to talk to others who were in my same situation. We agreed we are not going to sit and die, we were told we could go to Kigali and receive medication. That was better than before but we had to start to help ourselves ... We had to encourage each other to live and not give up living. Each time one of us needed medication we looked after her children. We were each other's keeper, caring for each other and trying to assist to meet the needs. What forced us to keep on living are our children. Most of the institutions supposed to assist can sometimes be rather illusive, however we encourage ourselves that we have to forge ahead and live to give our children a future and hope.”

According to ROR, although ICTR has helped to bring international recognition to the existence of rapes and other sexual violence in Rwanda in 1994,¹³⁰ the ICTR does not have a

¹³⁰There is a lot of literature documenting many of such challenges thus supporting the voices of many survivors. Refer, among other publications, to: B. Nowrojee, “‘Your Justice Is Too Slow’: How the ICTR Failed Rwanda’s Rape Victims”, in *Women and Armed Conflict* (UNRSD: Zubaan Books, June 2005); K.D. Askin, “The Treatment of Gender Crimes in the ICTR: Progress or Regression? The Akayesu Legacy at Risk”.

comprehensive, easily accessible and effective rehabilitation, restitution, and compensation regime. Some survivors interviewed expressed concern that ICTR is closing down without guaranteeing any reparations for victims of the genocide and rape, and barely offers assistance to witnesses called to testify. One survivor witness (Witness KOK 2011) remembered her trip to Arusha with disappointment:

“I respected the dead by going to Arusha to narrate how they were killed, what I saw with my own eyes. I was not asked to talk about my own sickness whose symptoms were disturbing me on the trip to Arusha. That was my first trip on air and someone told me your thing (UN Beech craft) did not have a toilet...When nobody talked about repairing my bladder, I knew we are forgotten, our issues are not the priority. You can only indicate your needs where you are part of a process.

In those courts, people are doing their own thing which you do not quite understand. You can see that those who ask you questions have no serious problems themselves. There is really no space to talk about “munda” (stomach aches), ruptured bottoms. “Bagenzibangenababuze” (I have lost my friends), who did not have a chance even to testify in Arusha due to continuous women’s problems. Here, even if you injure a person slightly, we all expect you to say sorry, pay something to stop the blood from flowing, yet in Arusha, you come back with nothing, no apology, not even “matibiryo” (food).

The only souvenir you bring is a heavy heart and the image of genocidaire who are well looked after, you have to carefully look to realize it’s them; they look well looked after. We are the forgotten lot. What does your justice have for us who testify about how we were killed, and how we were denied the chance to die?”

Even though Article 23 (3) of the ICTR Statute says the tribunal is entitled, in addition to imprisonment, to order return of any property and proceeds acquired unlawfully, compensation is rare, and the road towards practical implementation for such compensation is

unclear. Rule 105, as read with Rule 88 of the Rules and Procedure of Evidence, sets out three requirements for restitution. Restitution could be ordered where an accused is convicted and where the unlawful taking of property has been established and the property can be associated with the crime. A request for restitution has to be made by the Prosecutor, or the Chamber orders it *proprio motu*.¹³¹ This would then be followed by a cumbersome process involving a special hearing to determine the matter of restitution still pursuant to rule 105.

At the ICTR, in both the Bagosora and Musema cases, the issue of restitution for victims was raised by the governments of Rwanda, Belgium (from Bagosora), and an NGO— African Concern, pursuant to Rule 74 procedure related to *Amicus Curiae*.¹³² Compensation to victims could not be awarded by the tribunals because Rule 106 of the ICTR RPE specifically states that matters related to compensation fall within the jurisdiction of ‘national courts’ or other ‘competent bodies.’¹³³ It has been suggested by some scholars that the rationale behind Rule 106 (common to both the ICTR and ICTY) for not providing a direct compensation mechanism within the tribunals is probably the fear that tribunals would be inundated with a potentially high number of claims while at the same time expected to deal with prosecution of serious crimes.

At one stage there was some judicial activism at the ICTR calling for the provision of compensation to victims. In 2000, the then prosecutor of ICTY and ICTR, Carla Del Ponte, emphasized the deficits in the tribunals' legal system in relation to participation and payment of

¹³¹ See Rule 88 (B) of the ICTR Rules of Procedure and Evidence) as read with Rule 105 of the ICTR RPE.

¹³² See to The *Prosecutor v. Alfred Musema*, Decision on an application by African Concern for Leave to appear as Amicus Curiae, Case No. ICTR-96-13-T, 17 March 1999 (related to issues of restitution only); The *Prosecutor v. Theoneste Bagosora*, Decision on the Amicus Curiae application by the Government of the Kingdom of Belgium, case No. ICTR-96-13-T, 6 June 1998 (restitution and compensation); *Prosecutor v. Theoneste Bagosora, Gratien Kabiligi, Alloys Ntabakuze and Anatole Nsengiyumva*, Decision on amicus Curiae Request by the Rwanda Government, Case ICTR-98-41T, 13 October 2004 (restitution only).

¹³³ Rule 106 deals with “Compensation to Victims”.

compensation, underlining that the system fell short of delivering justice to the people of Rwanda and the former Yugoslavia (De Brouwer 2000). In 2002, Judge Navanethem Pillay, then President of the ICTR, called for compensation to victims, urging member states to compensate victims to facilitate recovery of Rwanda from the consequences of the genocide.

The UN General Assembly passed a resolution on 10 December 2004 calling for assistance to survivors of the 1994 genocide in Rwanda. The resolution invited “agencies, funds, and programmers” of the United Nations system to ensure assistance is provided in specific areas identified as priorities by the government of Rwanda, for instance: education for orphans, medical care, treatment for victims of sexual violence, including HIV positive victims, trauma and psychological counseling for genocide survivors and skills training and micro programs aimed at promoting self-sufficiency and alleviating poverty. However, the plight of victims has barely changed.

Like many international criminal justice systems, the ICTR faces challenges on how to implement victim rights, particularly their right to reparations, because of a pervasive victim rights paradigm and its problematic history in the ICJS. As mentioned previously, the ICJS’ history with the theory and practice of reparations has been problematic; reparations have been mentioned, at times implied, with no real action or power behind such statutes and declarations. In the Nuremberg and Tokyo Charters, reparations were not expressly mentioned.

Until the adoption of the ICC Statute, reparations for victims were not a formal part of international criminal justice. Before the ICC, some authors labeled the need or concern of victims in form of reparation as the “missing link” of the international justice system (Ferencz 2000, 3). Major developments and the codification of international legal standards for the rights of individuals, including the right to reparations, only gathered momentum in the second

half of the 20th Century (Bassiouni, 2006, 203).

Many of the survivors stated that victims are too often assumed to be passive, and rarely asked what kinds of restitution, reparations, or compensation they need in order to move on with their lives after traumatic experiences. There is no dialogue, and the victim is expected to understand and accept the modes of “justice” that a particular tribunal prescribes.

Human rights treaties seemingly provide a remedy, both substantive and procedural, for individuals suffering injury from unlawful conduct by state authorities.¹³⁴ However, the limitations in the ICTR Statute denied the survivors the right to be granted compensation by this court. In her critique of the ICTR, del Ponte pointed out that:

“Voices of survivors and relatives of those killed are not sufficiently heard. Victims have almost no rights to participate in the trial process, despite the widespread acceptance nowadays that victims should be able to do so. And... it is regrettable that the Tribunal’s Statute makes no provision for victim participation during trial, and makes only minimum provision for compensation and restitution to people whose lives have been destroyed.”¹³⁵

The issue of lack of reparations emerged in the findings amongst all respondents. In addition to referring to the social stigma and isolation, which accompanies survivor witnesses to and from the tribunal, many participants coming from rural settings in Rwanda stressed the extreme economic hardships they still encounter many years after the genocide. In this regard, they underscored the issues of reparations to compensate for pain and suffering. Almost all the

¹³⁴ Both the European Convention on Human Rights and the American Convention on Human Rights allow, respectively, the European Court of Human Rights and the Inter-American Court of Human Rights to afford just satisfaction to victims. According to the Inter-American Court ‘this provision constitutes a rule of customary law that enshrines one of the fundamental principles of contemporary international law on state responsibility’. More than the European Court, the Inter-American Court has made broad use of its competence to award both monetary and non-monetary remedies. Human rights treaties also provide for specific provisions on compensation, for example to victims of unlawful arrest or detention. The Convention against Torture provides for an obligation to repair violations of the prohibition against torture.

¹³⁵ See ICTY Press Address to the Security Council by Carla del Ponte, Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda, to the UN Security Council, JL/P.I.S./542-e, The Hague, 24 November 2000.

respondents I interviewed indicated that reparations in the form of medical services, housing allowances, and education allowances would meet their needs or those of their children or adopted orphans. One witness (GOG-Cyangugu) expressed her sentiments:

“Many women survivors here do not want to talk about their status. The majority of female survivors I know here were sexually assaulted, some are infected with STDs including HIV, some miscarried, we meet at the market, and we talk even as we participate in “Umuganda” (gatherings in Rwanda where people do community work). In the field, we have a common chorus. We complain of headaches and stomach aches. We know we are depressed and anxious. We know we are desperate since we are forgotten. I don’t have an appetite; it is like living in a foreign body.

I expected that part of the justice system is to ensure we get something to cater for our physical and mental needs. I got nothing, not even an apology, not even one “amafaranga” (Rwandan francs) to build a decent hut, not even something to replace my cow slaughtered and eaten by those who killed my family. Your justice! Maybe it’s because I have lost everything; sometimes I think I have lost my mind, I cannot understand how your justice works.”

As mentioned previously, survivor witnesses have developed, from the varied experiences, both personal and collective strategies to help them cope, without further assistance from institutions and organizations. This is especially true for women who were forced by circumstances to live with their rapists, or the period of time when women were in a form of sexual slavery after having “escaped” with the *Interahamwe* to refugee camps in DRC and Tanzania.

Almost all interviewed survivor witnesses feel there should be reparation hearings where the witnesses are called to give evidence before the imposition of sentences. According to the respondents, this can give them an opportunity to submit to the nature of reparation appropriate for them and their community. Most of the respondents explained that since the rapists were persons of authority or influence who raped or allowed their subordinates to rape, there is no reason why the accused persons cannot pay reparations.

D. Reparations for Survivors of Sexual Violence in Rwanda

The mechanisms improvised outside the ICTR Statute to provide medical assistance had their own limitations and recorded drawbacks. Rwanda, like other former colonial territories, is affected by a plurality of norms. Legal centralism and legal pluralism are analytical frameworks, which give way to different understandings of the position of women. The key to survivor witnesses feeling “heard” is offering reparations. Another witness (Witness XHX) took time to explain:

“Understand me here; I am not talking only of not getting any recognition for the pain and the suffering. Your justice does not give people space to grieve. As you recall I lost all my five children, the youngest, as you recall was 3 days old when she was killed, my husband was killed atrociously and before my own eyes and subsequent to these events I was raped! I did not expect that my testimony would bring back my mother, husband or adorable children. However as someone who lost all that mattered, I expected that this would form the subject matter of the testimony and I would be told, ‘we cannot do anything about your dead but since you are still living we have something for the living’. Your justice seems to have nothing for the dead and nothing for the living. When in court, I had all the opportunity to look at those who caused all this pain. They look well looked after. We also came to conclusions when we left Arusha. The system makes you feel like again you have lost something precious. It’s difficult to explain this thing which you feel stolen, dignity. (“Agaciro”) You feel like crying yet the system denies you the right to grieve, everyone needs to move on, it’s to send you back to a place of reflection and isolation. In Arusha no one talks about how you can get back some of those things you lost Nobody even talks about it, it is just not part of the justice we waited for so long.

“Agaciro” according to the Kinyarwanda interpreter who was assisting me means “dignity,” and from the context used by the witness, I was advised to equate the term to another concept – what many authors have explored within the context of the African philosophy of “Ubuntu” (Tamale 2011, 7). Ubuntu (humaneness) refers to understanding diversity and the belief in a universal bond and sharing. In the most fundamental sense it translates as personhood and “morality”.¹³⁶

¹³⁶Metaphorically, it describes the significance of group solidarity, compassion, respect, human dignity, conformity to basic norms, and collective unity, and in its fundamental sense, it denotes humanity and morality. Its spirit emphasizes a respect for human dignity, marking a shift from confrontation to conciliation. (Tamale (n 74), refers to Justice Yvonne Mokgoro of the South African Constitutional Court elaborating the concept of “Ubuntu” by

Another witness (Witness VOV Kibuye/Gyshita) mentioned:

“I was 15 years old when the war started and was raped. I do not want to talk about the pain I suffered but the scars are deeper than the physical violations, they permeate your very inner dignity (“Agaciro”). Losing my virginity was like losing my identity for me particularly, I am not speaking on behalf of many other girls who suffered in the same manner during the genocide. I married a survivor and he has not come to terms with the loss and this has caused discord in our marriage. I felt the courts will remember all the loss we suffered and give us something to help wipe tears. Arusha is not like that, you can be shocked, me I laughed with shock, some of these things are unbelievable when you compare what you look like and what the person who wronged you looks like. If your law does not recognize the nature of the harm we suffered then to me it is not of any help. The judges thanked me for my testimony and that was all. I am still grieving.”

The majority of the survivor witnesses of sexual violence I interviewed define justice through reparations, rehabilitation, and reconciliation or other notions related to their lived experience and reality. One psychologist working in Rwanda noted a need for a process that allows rape victims to grieve for the lost aspects of their lives, by stating that:

“rape is a loss; in most instances the loss is more painful than death since, it is best treated with a period of mourning and grief...social ceremonies for rape should be developed: rituals that, like funerals and wakes, would allow the mourners to recover the spirit that the rapist, like death, steals” (Mukamana and Collins 2006, 8).¹³⁷

Voices of survivor witnesses on reparations, their experiences, and lived reality reveal an important point of reference to the missing link between reality and rhetoric within international criminal justice systems as partly represented by the ICTR. In this regard, survivor witnesses refer to context specific individual and collective reparations, which are relevant to their needs. Survivor witnesses called to testify at the ICTR are afraid that the high hopes they had placed on the ICJS as represented by the ICTR were not be fulfilled, given the fact that over

quoting from Sachs 2009: 106-107). The same term was used during group discussions I had with UNILAC University students when we discussed issues to do with human dignity. I noted from the discussions that Rwanda as a nation has made significant progress in creating the space to discuss gender based violence, access to reproductive care, and issues of compensation.

¹³⁷ This point was buttressed by the discussions with Donatilla Mukamana and Dr. Mudimutsa, at the ICTR Ngurdoto, Tanzania during a workshop related to handling trauma.

twenty one years after the Rwanda genocide and on the eve of the closure of the ICTR, survivor witnesses have not received compensation for pain, suffering, and irreparable loss. Justice, in their view, has remained a mirage, and the majority feel it is rather late in the day to continue pursuing it. Given the gravity of the crimes perpetrated on them during the genocide and the demands on their lives, many of them have a question, can there be justice without reparations? Will they one day be awarded something for their great loss and pain? Is it too late to do something about it? One of the survivors looked at me in deep reflection, shook her head and said softly *"It is better late than never."*

There is a need to engage in dialogue to encourage international justice institutions like the ICC to continue to explore notions of gender sensitive reparations and reduce existing gender gaps. Meaningful participation in identifying context specific reparations should start with different categories of survivors taking ownership of the process; being granted space to define not only their notions of reparations, but also what is urgent and immediate, so that whilst waiting for long term reparations survivors can actually survive.

CHAPTER 7: RESPONDING AND LOOKING AT MULTI-LAYERED BARRIERS TO ACCESSING JUSTICE: Engendering the process

1. What is the Future of ICJS?

A. Addressing Persistent Institutional Barriers

While this study acknowledges the achievements of ICJS, it also emphasizes some of the traditional weaknesses of the ICJS that were brought from Nuremburg, the Tokyo tribunal and the ICTY and other similar tribunals marked by few nominal rape trials. Such international bodies lacked the political will to prosecute rapes, an attitude which one survivor who was not called to testify in Arusha referred to as pervasive. Even where rape was prosecuted, there are inordinate delays in bringing the survivors to testify, there are also some weaknesses in the prosecutorial strategy, or a lack of it.

Survivor witnesses come with great expectations, anticipating that the ICJS can also meet them at their point of need. Although the survivor witnesses expected that their participation would promote effective deterrence of sexual violence, they also expected more than that; they had and have specific needs arising from the violations they have suffered. Contrary to the assumption that witnesses are reluctant to testify, the survivors interviewed stated that they are willing to participate fully if they are given adequate information and can derive certain benefits for the system. Many indicated that sometimes they become reluctant participants because of the disillusionment that the ICJS seems to have little for them at the end of the process.

Despite the widespread use of rape as a weapon of war in the 1994 Rwandan genocide, only a few cases of rape have been brought before the ICTR. Whilst survivors interviewed stated that no punishment can adequately redress the injuries suffered by the survivor witnesses,

and no reparation or compensation will ever bring them to their previous state, they also stated that the least the ICJS can do is acknowledge their experiences by charging rape where appropriate and prosecuting it with a political will which corresponds to the gravity of the offence.¹³⁸

The ICTR's flawed performance on gender justice is not rooted in just one aspect of its processes. Other repeated criticisms include the fact that the Office of the Prosecutor (OTP) lacked gender sensitive investigative skills and prosecution strategy. The challenges are more about the ICJS. Survivor witnesses are looking for a legal process that treats them with both care and respect: "They want information in order to understand the process so as to make fully informed decisions on whether to testify, how to testify and what to expect at the end of it all" (Nowrojee2005, 4).

There are legal, personal, situational, contextual, political and socio-cultural factors relating to violations of survivor witnesses' rights during their interaction with the ICJS, which discourage them from significant and meaningful participation in the process. Some respondents felt that, witness anonymity is not fully guaranteed; hence some witnesses dread to participate in the process, fearing the possibility of subsequent retaliation back home.¹³⁹ Some respondents found it ironic that they would be protected from commanders who ordered the rapes yet, they live with neighbours who perpetrated the rape. Survivor witnesses come expecting an enabling environment in the courtroom; a conducive

¹³⁸ There is a need for legislation and other measures which can ensure that victim witnesses have a right to equal and effective access to justice, the right to adequate, effective and prompt reparation for harm suffered including meaningful restitution, compensation, rehabilitation and all guarantees from State of non-repletion of such impunity. For those who die their heirs should be entitled to the same rights and be given adequate, with effective and prompt reparation.

¹³⁹ There have been recorded situations of retaliation and killing of witnesses or potential witnesses before or after testifying at the ICTR.

environment ensuring safety and also protecting them as witnesses from reprisal, exposure or stigmatization. Some of the solutions offered by the ICJS, for example, re-locations, further isolate the witnesses and do not offer the sense of security needed by witnesses going through a healing process.

Whilst the survivor witnesses are faced with urgent material needs, which include health care, food and shelter, the ICJS is pre-occupied with different priorities. The ICJS focuses on punishment, deterrence, and rights of perpetrators of genocidal rape and in the process neglects the needs of survivor witnesses. For example, victims who contracted HIV/AIDS need access to the same AIDS medication the ICTR provides to perpetrators in custody in Arusha or other respective detention centers designated by ICTR. Yet,

Moreover, while acknowledging fundamental weaknesses in the ICJS in this research, it has been very hard to accurately identify the main obstacles to gender justice at the ICTR. Addressing such obstacles to effectively address gender imbalances embedded in the ICJS requires not only an understanding of the African context but also the inherent prejudices which have characterized the ICJS from Nuremburg to the International Criminal court (ICC). It requires a practical understanding of the justice delivery system from a gender perspective and a full appreciation of the interface of survivors with the ICJS.

The punitive aspect discussed and underscored by many scholars is not the central issue. An interrogation of collected data during this research sheds more light on how a tribunal like ICTR is wired to perform. There are fundamental textual and practical gaps in international criminal law, as it relates to gender justice. ICJS is more concerned about retribution and deterrence than restorative justice. Even where laws are put in place, there are

implementation gaps in the ICJS. They are treated as poor cousins of the perpetrators.

Whilst the ICJS pushes tirelessly on “punishing the perpetrators” as if it is the sole yardstick for quality justice, the survivors of rape seem to be less interested in a tribunal that ignores compensation for its complainants. Whilst scholars have focused on witness preparation, associated concepts of refreshment of their memory, exculpatory evidence and other legal niceties, the survivors have steadfastly and simply demanded that their wellbeing be part of the ICJS.

The voices and silences of survivor witnesses demonstrate that bread and butter issues will oil the wheels of the healing process and at the same time encourage survivor witnesses to participate in the process. Full participation is equated to full benefits -- which is not suggesting bribery or paying for testimony, but acknowledging and knowing that empathy and compensation are available for the victims. As a right, these benefits are not antithetical to the courts receiving honest testimony.

Though research and advocacy can be practically and conceptually viewed as separate processes, the participatory methods (meaning listening to the whole story, the full scope of what the survivor witnesses want to share, instead of dismissing witnesses to cut to trial without any compassion for the victim) used in this research may help to empower survivors of rape to participate fully in issues which concern them, as they go through the ICJS.

As a case manager and trial attorney at ICTR, I had an opportunity to see the facilities reserved for both accused persons and witnesses. On many occasions, I visited the safe houses and had time to see the facilities. At court, I also observed the difference between

the holding room for accused persons and the tiny rooms reserved for witnesses waiting to give evidence. Although all witnesses used the same rooms, there was nothing additional to accommodate the specific needs of those survivors who needed to use the bathroom more frequently. One would have thought they would be provided with en-suite room. One female lawyer visiting the Tribunal looked into the witness room and later gave this description:

“That room looked to me like a cupboard with a curtain, no window, no natural light, with just enough space for a chair and one would have to face a blank wall, it was also stuck on the edge of a quite busy corridor. Even as a seasoned lawyer I would have been claustrophobic, puzzled about what was going on, when I might be called. But I would know I could go toe to toe with the defense, know what the legal process was driving towards. I cannot imagine how the survivor witnesses must have felt in such an alien space.”¹⁴⁰

Witness LLL, a Tutsi woman who was called specifically to testify about an aspect in one of the cases is a professional in her own right. She gave details on how she felt when she would be brought to court on four consecutive days and spent a lot of time stuck in the room because the lawyers were deliberating on “points of law and fact “ before it could be decided whether or not she testifies.. According to LLL who works with an NGO in Rwanda it was unbelievable that she spent four days waiting to testify and was subsequently told that the prosecution decided that her evidence was no longer necessary since the gap had been filled up by previous testimonies.¹⁴¹

An ICTR court official who commented on the different room accommodation for witnesses and those accused of committing genocide. :

“You will understand that ICTR is dealing with high profiled accused persons. The “big fish”. Some of them are former ministers. They also need to debrief and instruct their defense lawyers so their holding rooms have to be spacious. At any given time they have the lead lawyer, the assistant, the investigator and another person, there is no way they can squeeze in a tiny room. It’s not a small feat to be accused of those

¹⁴⁰ Participant Professor of Law, at the ICTR October 2010.

¹⁴¹ Witness LLL, interview Hotel Ego, Bujumbura, Burundi, February 2013

horrible grave crimes. Even in the detention facilities, they are provided with a balanced diet, space for exercise and other facilities to comply with international standards. Tribunals operate with a limited budget. Accused are there for a long time, witnesses are just passing through so you cannot compare their facilities.”

The ICJS must be commended for raising standards for detainees.¹⁴² This is commendable and a lesson to many national jurisdiction. Accused perpetrators of offenses are deemed innocent until proved guilty and must be accorded their rights before, during and after trial regardless of the outcome of the case. However, is it expecting too much that the same standard needs to be raised for one of the key stakeholders, the witnesses? When interacting with the ICJS, survivor witnesses face institutional hurdles that demoralize them. There is an urgent need to better ensure, as a matter of priority, that the international criminal justice system sensitively addresses the needs, fears and aspirations of the witnesses whoever they are and avoid the case of the ICTR further marginalizing, dehumanizing and demeaning rape survivor witnesses.

B. ICTR, ICJS AND its Impact on Conflict Related Sexual Violence in Current and Future Conflicts

Whilst the ICTR and other tribunals have made progress in the area of ICJS by bringing to “justice” perpetrators of rape, and by recognizing that genocide can be committed through acts of sexual violence, this study has shown that many survivors of the genocidal rape, war crimes, crimes against humanity and other inhumane acts of a sexual nature still needlessly suffer the consequences of the violations. The challenges of international justice systems as represented by ICTR may continue to affect other tribunals if they are not addressed in a

¹⁴² To enable transfer of cases Rwanda had to construct detention facilities, which comply with international standards, there are aspirations that there will be corresponding facilities to cater for those survivors when they are testifying.

timely manner.

The case of ICTR demonstrates that ICJS, working in isolation will never be an adequate platform for achieving justice for survivors of CRSV. The fact that international criminal law now makes rape and other sexual offences prosecutable just indicates that the principle of legality which once existed under customary international law is no longer an obstacle to prosecuting gender specific crimes. However, from the ICTR experience and as mentioned in the above the fact remains that the often celebrated and applauded milestones in international criminal law are reflected in gender jurisprudence, but not in the lives of survivors of atrocities, particularly, survivors.

International tribunals are instruments of social engineering (statutorily created in their form, and hence presumed to be elastic in their nature). In order to succeed, these courts should marshal their elasticity and fit into the political, socio-cultural and economic environment in which the problems they seek to address are grounded. ICJS through its actors expects survivors to come in and fit into the rules and regulations. This current approach is problematic in that it is rooted in a top-down approach; a flawed model that mirrors an attempt to make the Rwandan problem fit into the ICJS. Any survivor who seems not to fit in is inevitably discarded.

Using the gender lens to view the efficacy of the ICTR and is looking at the past, the present and the future. The Rwanda genocide has been condemned in very strong terms however it is time to move from rhetoric and create a mindset which deals with impunity in a more effective way which will usher us into a new way of perceiving survivors in ICJS. This will help survivors in the context of ongoing political and ethnically motivated conflict related

sexual violence being perpetrated in South Sudan, and the widespread terrorist acts against women and girls in Northern Nigeria, Cameroon, Libya and other neighboring countries.

While the Rwanda case and those in other countries take place in different contexts and cultural and socio-political environments, they share three things in common:

- 1) Conflict related Sexual Violence is being used as a tool of war and violence;
- 2) Though there have been attempts by the United Nations, the African Union, and other ICTJ systems to intervene and prescribe remedies based on the system's perceptions of justice as well as lessons learned from previous cases the impact is yet to be felt;
- 3) The continuous marginalization of survivors of sexual violence is well demonstrated by lack of quick responses to intervene and prevent CRSV, this leads to inordinate delays in bringing accountability for gender specific crimes and protecting survivors of CRSV. Without appropriate, timely intervention survivors suffer untold pain and without timely remedies and reparations, it is a vicious cycle of misery.

Survivors of conflict related sexual violations have their lived law grounded on their lived realities. They come back or are left behind in communities which exposes them to face stigmatization, ostracisation, the same cultural barriers, which silences their voice in peace and in conflicts. There is a dire need to have context specific interventions which take cognizance of both the immediate and long term interventions. The question often posed is: In a post conflict situation where a new government takes over, who has an obligation to give priority to immediate needs, for example the provision of food, reproductive health facilities to provide well-coordinated survivor centered programs to facilitate reintegration, rehabilitation, and psychological recovery of survivors of CRSV.

The ripple effects extending from the victim to their families and communities is exacerbated by the slow access to justice mechanisms. The survivors are often detained for screening for long periods thus resulting in re-traumatization. Given security concerns, the survivors have no access to safe houses or protective measures.

The ultimate success of ICJS should be measured by how the system treats all its stakeholders, particularly survivors of atrocities. This should be reflected in the allocation of resources, cooperation and assistance given to survivors before, during and after trials. Survivors are key stakeholders as tribunals enforce the principle of accountability and the rule of law. However, when it comes to rights, benefits and assistance the law seems to continue ruling out survivors.

Perpetrators must never be allowed to evade justice simply because the survivors failed to survive in order to give evidence. Neglecting survivors' survival and life based needs permits individuals accused of the gravest of crimes to evade justice, thus reinforcing the culture of impunity that fuels conflict and atrocities. Survivors are entitled to an ICJS that empowers them to participate fully and provide restorative justice creating a culture of accountability.

C.Implementing Lessons Learned

There are many "Best Practice Manuals" which prescribe how ICJS can handle witnesses of CRSV. To its credit ICTR has two Manuals, one on investigating and one on handling survivors.¹⁴³ A lot of work has gone into them and as part of the Sexual Violence Committee at the ICTR from its inception to 31 December 2014, there are many lessons to learn from ICTR's achievements, its mistakes and

¹⁴³ ICTR's 2008 "Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in situations of Armed Conflict"; ICTR's "Best Practices Manual for the Handling Victims of Sexual Violence Testifying in International Criminal Tribunals." 2014.

many of its missed opportunities. The question which remains is how do we bridge the gap between rhetoric and reality? Survivors are looking for interventions which show that we are “walking the talk”

It is imperative that we all begin to see and hear the victims and survivors of sexual violence, from the very beginning of a conflict, during the conflict, during all the judicial proceedings. In the case of Rwanda, it became obvious that in early 1994, there was no peace to keep, and the violations that followed reflected that no one had anticipated lasting and appropriately gendered solutions. In his book *Shake Hands with the Devil: The Failure of Humanity in Rwanda*, former UNAMIR Force Commander, Lieutenant General Romeo Dallaire, wrote:

“I don’t know when I began to clearly see the evidence of another crime besides murder among the bodies in the ditches and the mass graves... The crime was rape, on a scale that deeply affected me... For a long time I completely wiped the death masks of raped and sexually mutilated girls and women from my mind as if what had been done to them was the last thing that would send me over the edge. But if you looked, you could see the evidence, even in the whitened skeletons. The legs bent and apart. A broken bottle, a rough branch, even a knife between them. Where the bodies were fresh, we saw what must have been semen pooled on and near the dead women and girls. There was always a lot of blood... They died in a position of total vulnerability, flat on their backs, with their legs bent and knees wide apart. It was the expressions on their dead faces that assaulted me the most, a frieze of shock, pain and humiliation.” (Dallaire 2003, 420)

Former ICTR Prosecutor Jallow stated that “...prosecution of sexual violence is an important aspect of tribunals’ legacies.”¹⁴⁴ Additionally, the then Prosecutor indicated that “though there have been several convictions on sexual violence, these convictions ...do not properly reflect the actual picture of such crimes.”

¹⁴⁴ Justice Hassan Bubacar Jallow, former Prosecutor of ICTR & MICT, opening speech: International Workshop on Conflict Related Sexual and Gender Based Violence Crimes in The Light of ICTR’s Experience: Kigali, Rwanda 26-28 November 2012

Mr Martin Ndogo, the then Prosecutor General of Rwanda noted

“... the challenges the ICTR faced at its genesis and saluted the Tribunal” for “struggling and succeeding”¹⁴⁵

The voices of survivors are also shaping the legacy of tribunals. In the case of ICTR, according to the respondents in this study, there cannot be justice without a couple of things, on top of the list is the issue of reparations, gender sensitive reparations which are not only limited to monetary aspects. Survivors needs can be assessed early in the process and ICJS has to forge stronger collaborations with different partners to complement local initiatives.

Collaboration at investigation level.

ICJS have to realize that sensitivity is a key factor in effectively empower the survivor witnesses to move from victims to witnesses who can find the system to be part of the healing process. The Chief Former Investigator, Alfred Kwende gave an insight into the initial stages regarding investigators working with survivors at ICTR:

“Frankly speaking, few if any of these staff had any training in sexual assaults investigations. The tendency was for them to interview witnesses, victims or survivors just like they would interview any other witness. And yet, these victims are not just any type of persons. They needed to be approached with a lot of sensitivity and show of empathy.”

Training should also be used in a broad sense to encompass getting information regarding

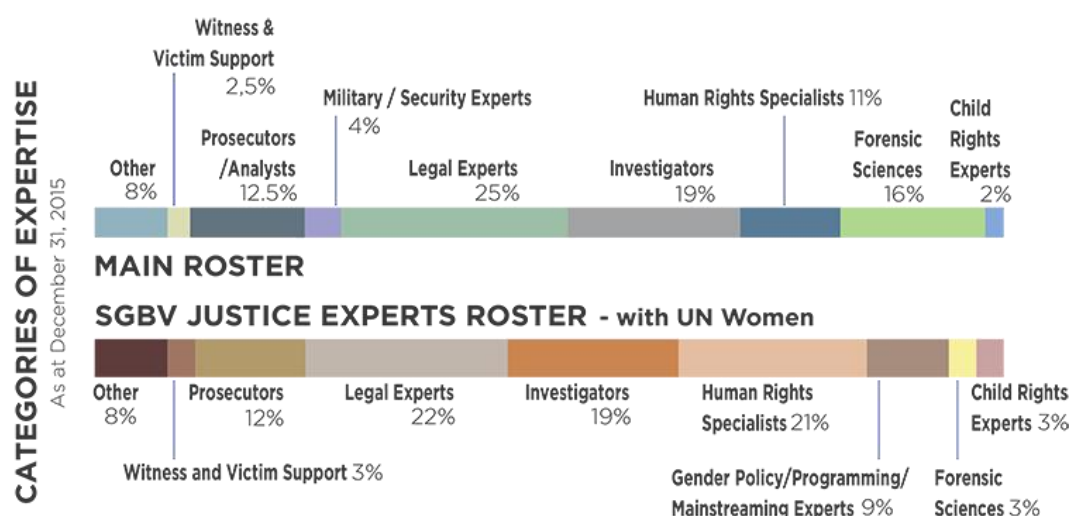
¹⁴⁵ Mr. Martin Ngoga, Prosecutor General, Rwanda, Panelist commenting on the key note by Alfred Kwende, : International Workshop on Conflict Related Sexual and Gender Based Violence Crimes in The Light of ICTR’s Experience: Kigali, Rwanda 26-28 November 2012

the culture, the language and taboos relevant to different groups of people. For all the learnt lessons to be implemented there is a need for all persons working within ICJS to realize that there need to be a careful needs assessment of survivors before even beginning investigation. ICJS might not have the budget or capacity to address and redress CRSV situations, however collaboration can bring any expertise which is needed to push the gender agenda further and in a timely manner.

There are many initiatives at different levels which can help the process move faster than the often complained “snow snail pace” ICJS works. A multi-sectorial approach, closer to the one deployed by Justice Rapid Response¹⁴⁶ (an organization which I, and UN Women have worked with in South Sudan). JRR’s approach to combating SGBV in conflict and post-conflict zones includes finding linguistically and geographically diverse experts specializing in gender-based violence and collaborating with government, civil society and other stakeholders on the ground to ensure that policies made by the international community in theory are implementable in practice. The organization’s SGBV expert roster includes investigators, prosecutors, human rights specialists, gender policy/mainstreaming experts, and child rights experts in order to focus on and build trust between the justice system, witnesses and victims (see expert chart below):

¹⁴⁶Justice Rapid Response (JRR) was created by states from North and south to ensure that the capacity and the mechanisms are in place to conduct credible investigations whenever needed. Its objective is to give the international community an effective and efficient tool to end impunity. JRR has established a diverse, global, expert roster who are trained in gender justice and can be readily be deployed to investigate core international crimes-genocide, war crimes, crimes against humanity and serious human rights violations. JRR works in partnership with others including States, regional Intergovernmental Organizations, UN women, ICC, International Criminal Investigations (IICI), ICTR & ICTY, OHCHR, and other UN Departments including the special Representative of the Secretary General for Sexual Violence in Conflict and Civil Society and human rights organization.)

Figure 1: JRR Experts Chart



Source: *Justice Rapid Response*: http://www.justicerapidresponse.org/wp-content/uploads/2015/03/Annual_Report_pdf

JRR experts have noted that there is a gap in the system between the law’s “objectives,” and the survivors’ access to the law. I would recommend, additionally, the wide use of local experts, who are familiar with the cultures and traditions, some of which have silenced the voices of survivors of CRSV. At one stage ICTR appointed a Sexual Assault Team, which among other things collaborated with NGOs:

“The Sexual Assault Team had close association with NGOs- AVEGA (Widows’ Association) and IBUKA (Survivor’s Association”)these organizations were able to identify most of [the] victims of rape and sexual violence”¹⁴⁷

ICJS is at a stage when it cannot afford to do business as usual, there has to be a mind shift and a political will to implement gender policies at all levels. As GloriaAtiba-Davies, the ICC –OTP Head of Gender and Children Units aptly explained:

“It is very important to have a unit that specifically focusses on sexual violence and will establish correct guidelines right from the initial stages...At the ICC...the Unit has an

¹⁴⁷ Alfred Kwende. 27 /11/2012 Kigali

input of information regarding sexual violence...it is not just an establishment of the Unit...it has to have the authority to do certain things. I am the Head of the Unit and have direct access to the Prosecutor and other units at every phase and am able to talk to people in the front line”¹⁴⁸

The Respondents in this study indicated that though it is good to know how much people working in the ICJS know, what is important is how much they care about the survivor needs and concerns as they go through the process. Many ICJS public actors have explained how much the work they do in their specific mandate, however the complexity of CRSV need effective collaboration to bring all the ingredients for an organic “masala” tight gender justice. Such a kind of justice can only be possible if survivor voices shape the process and the system starts with survivors as their focal point and bring in partners who can identify the immediate, and long term needs of survivors and find options to address these to alleviate their pain as they go through the ICJS.

Survivors pointed out what they regard as appropriate reparations using a very broad definition and within a very context specific regime. Some wanted their cows back, some a public apology, some proper compensation for pain and suffering. Some survivors wanted to know how the Prosecutor decides who is a witness, a victim or who should be indicted. Moreover, it seemed like the system was, to an extent, punishing the victims and rewarding the perpetrators: a clear deterrent message seems to be missing when perpetrators are perceived to have more rights than victims and witnesses are seen as a burden – there is still a sensitivity element missing in the way the system deals with survivors of sexual violence.

¹⁴⁸ Gloria Atiba-Davies Panelist, commenting on the key note by Alfred Kwende, : International Workshop on Conflict Related Sexual and Gender Based Violence Crimes in The Light of ICTR’s Experience: Kigali, Rwanda 26-28 November 2012

The wellbeing and safety of survivors creates an atmosphere of empowerment. This, followed by sufficient information, places the individual survivors in a situation where they can review and assess appropriate reparations. Survivors mention individual compensation particularly to those “injured” during the genocide and from the group discussions those on the receiving end were injured— physically, emotionally or financially, and sometimes in all these ways. What is appropriate depends on what the individual suffered or lost and also the impact on the community. Most of the inherent challenges and shortcomings plaguing the ICTR and other ICJS tribunal could, in the long run, be overcome if the starting point and focus become the needs, concerns and interests of survivors.

Ms. Odette Kayirere, AVEGA, stated as a matter of fact that “... the tribunal should not close its activities without addressing the issue of reparations.”¹⁴⁹ Now, decades after the genocide in Rwanda, the ICTR statute, which has no concrete provisions for witness survivor participation and reparations, has a mixed legacy. Major gaps and failure to really address the pain, humiliation and suffering that survivor witnesses faced, and to honor those victims who never made it to the stand, remain.

My latest assignments working with survivors of CRSV in Nigeria and South Sudan and Libya reconfirms the study findings that there is a dichotomy between what is on paper in terms of the law and policies and what translates on the ground. Cases still leave survivor-witness needs neglected on the ground. The problem has been lack of implementation, followed by discrepancies between what the law says and survivor-needs in terms of justice, lack of

¹⁴⁹ Ms Odette, the AVEGA representative, Panelist. International Workshop on Conflict Related Sexual and Gender Based Violence Crimes in The Light of ICTR’s Experience: Kigali, Rwanda 26-28 November 2012. She explained that AVEGA provides assistance to the victims who are HIV positive by giving them ARVs, education and legal assistance (According to AVEGA, now about 200 paralegals have been trained to assist survivors.) She also highlighted plight of those looking after children (now young adults) conceived as a result of the 1994 genocide rapes)

confidence in the ICJS for survivors in Rwanda (and now Libya, Nigeria, South Sudan and elsewhere on the continent), and the lack of a gender-specific lens towards justice. The problem has been bridging the gaps between abstract theories and reality, the law and women living in their realities.

For ICJS to have impact, it should not act like just another option. There is a need to review mandates and redefine notions. There is also a need to review the way in which the system trains experts and collects “evidence” in order to provide justice to victims.

From both the voices and the silences, it is clear that there is a need for a comprehensive form of social justice. This notion would not only restore their dignity, it would also empower them to influence the rules of the game, including the relevant and context specific punishment, which would fill in the gaps regarding gender justice.

Although certain progress has been made in that International law that makes it clear that governments are responsible for ensuring women’s access to justice and eliminating discrimination in all justice systems and tribunals like ICTR have contributed to ground breaking jurisprudence, there remains significant implementing gaps. For many survivor witnesses of the 1994 Rwanda genocide who experienced CRSV, who lost livelihoods, life and property, coming out from the Arusha Tribunal without reparations left many still seeking for a form of justice which overcomes the inequalities they face in everyday life, which addresses the injurious consequences of the CRSV they experienced during the 1994 genocide. A justice which presents them with choices to tell their full story, to participate in an informed way and to enable them to feel empowered to forge ahead with a new chapter in life.

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APPENDICES

ANNEXURE “S” CITED on footnote 27; page 25

SYNOPSIS OF CHARGES AND CONVICTIONS FOR RAPE AND OTHER SEXUAL VIOLENCE CRIMES FOR ICTR CASES.¹⁵⁰

- **93** ACCUSED IN TOTAL.
- **75** ACCUSED HAVE COMPLETED TRIALS (67 AFTER A FULL TRIAL, 8 AFTER A GUILTY PLEA).
- **2** INDICTMENTS WERE WITHDRAWN PRIOR TO TRIAL¹⁵¹, **2** ACCUSED DIED PRIOR TO TRIAL,¹⁵² **1** ACCUSED DIED DURING TRIAL.¹⁵³
- **10** ACCUSED HAVE BEEN ACQUITTED OUTRIGHT¹⁵⁴
- **52** ACCUSED HAVE BEEN CHARGED WITH RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES¹⁵⁵
- **9** OF THESE **52** ACCUSED HAVE NOT YET BEEN TRIED¹⁵⁶ CORRECT
- **42** COMPLETED CASES INCLUDED A CHARGE OF RAPE AND/OR SEXUAL VIOLENCE CRIMES
- OF THOSE **42**, **11** ACCUSED HAVE HAD A SUCCESSFUL CONVICTION FOR RAPE AND/OR SEXUAL VIOLENCE¹⁵⁷, AND **6** ACCUSED HAVE BEEN CONVICTED OF RAPE BY THE TRIAL CHAMBER THE APPEAL JUDGEMENTS COMPLETED IN 2015.¹⁵⁸ **1** ACCUSED WAS CONVICTED ON A COUNT OF OTHER INHUMANE ACTS AS A CRIME AGAINST HUMANITY FOR ACTS OF SEXUAL VIOLENCE¹⁵⁹

¹⁵⁰ This chart was modified from a chart developed by the OTP Sexual Violence Committee periodically. Some names of some fugitives have been redacted so as not to reveal any confidential information which can reveal information for those alleged perpetrators still at large on wanted list.

¹⁵¹ Bernard Ntuyahaga, Leonidas Rusatira.

¹⁵² Samuel Musabyimana, Juvenal Uwilingiyimana.

¹⁵³ Joseph Nzirorera.

¹⁵⁴ Bagilishema, Ntagerura, Bagambiki, Mpambara, Rwamakuba, Kabiligi, Nsengimana, Zigiranyirazo, Casimir Bizimungu, Bicomumpaka. Of these, Bagilishema and Kabiligi were charged with rape, and Casimir Bizimungu and Bicomumpaka were acquitted of rape at 98 bis stage.

¹⁵⁵ This number includes cases that have been transferred to France. It also includes the case of Munyagishari which has been transferred to Rwanda.

¹⁵⁶ 6 are fugitives at large whose files have been transferred either to Rwanda or to the MICT, 2 cases have been transferred to France, 1 Accused- has been transferred to Rwanda.

¹⁵⁷ Akayesu, Semanza, Muhimana, Gacumbitsi, Bagosora, Hategekimana and those completed in 2015 MICT.

¹⁵⁸ Ntahobali, Nyiramasuhuko, Bizimungu Augustin, Karemera, Ngirumpatse, Ngirabatware - Ngirabatware's appeal will be heard before the MICT.

¹⁵⁹ Niyitegeka was convicted of a crime against humanity, other inhumane acts, for acts of sexual violence but acquitted on the count of rape as a crime against humanity (See, *The Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-T, Judgement and Sentence, 16 May 2003, paras. 458 and 467).

- **22** ACCUSED HAVE BEEN ACQUITTED OF RAPE AND SEXUAL VIOLENCE,¹⁶⁰THE RAPE CHARGES WERE DROPPED IN THE GUILTY PLEAS NEGOTIATIONS OF **4** ACCUSED¹⁶¹ AND IN THE AMENDED INDICTMENTS OF **2** ACCUSED¹⁶².**1** ACCUSED -NIZEYIMANA- HAS BEEN ACQUITTED OF RAPE BY THE TRIAL CHAMBER BUT THE APPEAL ON RAPE ACQUITTALS IS PENDING.

¹⁶⁰Bagilishema, Musema, Niyitegeka, Kajelijeli, Mpambara, Bikindi, Barayagwiza, Kamuhanda, Muvunyi, Rukundo, Renzaho, Kabiligi, Ntabakuze, Nsengiyumva, Ndindabahizi, Nzumonemeye, Sagahutu, Gatete, Casimir Bizimungu, Mugenzi, Bicamumpaka, Mugiraneza. (Niyitegeka was acquitted of rape as a crime against humanity but guilty of crimes against humanity, other inhumane acts, specifically of acts of sexual violence. Musema, Rukundo and Renzaho were convicted at trial of rape, but this conviction was overturned on appeal. Casimir Bizimungu, Mugenzi, Bicamumpaka and Mugiraneza were acquitted of rape charges at 98 bis stage).

¹⁶¹Nzabirinda, Bisengimana, Serushago and Rugambarara.

¹⁶²Nzabonimana and Rwamakuba, when the Accused were severed from joint Indictments and charged separately.

OVERVIEW OF CHARGES AND CONVICTIONS REGARDING RAPE AND OTHER SEXUAL VIOLENCE CRIMES

NO.	CASE	POSITION	DATE OF TRIAL JUDGEMENT	STATUS OF APPEAL JUDGEMENT/ DATE APPEAL COMPLETED	CHARGE OF RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES	CONVICTION FOR RAPE AND/OR OTHER SEXUAL VIOLENCE CRIMES
1	Akayesu	<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 Judgement, paras. 696, 697 Confirmed on appeal, Appeal Judgement, para. 214
2	Serushago	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	Director of Gisovu Tea Factory in Kibuye	27 January 2000	16 November 2001	Count 7: Rape as a crime against humanity under Articles 6(1) and 6(3)	Trial Judgement, para. 967 On appeal this conviction was overturned and acquittal entered on this count (see Appeal Judgement, para.194)

4	Bagilishema	<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	Former Bourgmestre of Bicumbi Commune, MRND representative to the National Assembly	15 May 2003	20 May 2005	Counts 7 and 9 include Rape as a serious violation Common Article 3 Count 8 and 10: Rape as a crime against humanity	Guilty of Count 10: ‘Rape’ as a crime against humanity, Trial Judgement, para. 479 Confirmed on appeal, Appeal Judgement, paras. 289, 290
6	Niyitegeka	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 mental well being Count 10: Rape as a violation of common Article 3, outrages upon personal dignity	Guilty of Count 8: crimes against humanity other inhumane acts- ‘sexual violence’, Trial Judgement, para. 467. Niyitegeka’s appeal dismissed in its entirety.
7	Kajelijeli	Bourgmestre of Mukingo Commune from June to July	1 December 2003	23 May 2005	Count 7: Rape as a crime against humanity Count 11: Humiliating and degrading	None

		1994 One of the leaders of <i>Interahamwe</i> in Ruhengeri			treatment, rape, enforced prostitution and any form of indecent assault as a violation of Common Article 3	
8	Barayagwiza	President of CDR Founder and Director of RTLM radio station	3 December 2003	28 November 2007	Count 8: Outrages upon personal dignity as a serious violation of common Article 3	None Acquitted at 98 bis stage
9	Kamuhanda	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	<i>Bourgmestre</i> of Rusumo Commune in Kibungo <i>Prefecture</i>	17 June 2004	7 July 2006	Count 5: Rape as a crime against humanity	Trial Judgement, paras. 321 -333 Conviction confirmed on appeal, Appeal Judgement, paras. 99-108
11	Ndindabahizi	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 crime against humanity) but Rape count dropped in the amended indictment of 1 September 2003 (Trial Judgement, paras. 9, 13).	None

12	Muhimana	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 Judgement, paras. 552-563 Conviction confirmed on appeal (except for the rapes of Goretti Mukashyaka and Languida Kamukina, Appeal Judgement, Disposition)
13	Bisengimana	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	<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	Colonel in Rwandan Army and Commander of ESO camp in Butare	12 September 2006 (Muvunyi 1)	29 August 2008 (Muvunyi 1)	Count 4: Rape as a crime against humanity	None (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	Minister of Primary and Secondary Education in Interim Government	20 September 2006	Not Appealed	(Joint amended indictment of ...November 2001) 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	None Rape charges dropped in the separate amended indictment of 23 February 2005 (Acquitted on all counts)
17	Nzabirinda	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	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	Substitut du Procureur in Cyangugu and	12 November 2008	18 March 2010	Count 4: "genital mutilation" as part of other inhumane acts as a crime against humanity.	None No evidence led on genital mutilation, Trial Judgement,

		Interahamwe leader				paras. 221, 361
20	Bikindi	Musician	2 December 2008	18 March 2010	Counts 2 and 3: Rape and sexual violence as part of genocide	None
21	Bagosora	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 and other crimes of a sexual nature as part of extermination as a crime against humanity Count 7: Rape as a crime against humanity Count 8: Rape and other crimes of a sexual nature as part of persecution as a crime against humanity Count 9: Rape and other crimes of a sexual nature as part of other inhumane acts as a crime against	Count 2: Trial Judgement, para. 2158, under Article 6(3) Count 4: Trial Chamber, para. 2186 Count 6: Trial Judgement, para. 2194 Count 7: Trial Judgement, para. 2203, under Article 6(3) Count 8: Trial Judgement, para. 2213 Count 9: Trial Judgement, para. 2224, under Article 6 (3) Count 10: Trial Judgement, para. 2245 Count 12: Trial Judgement, para. 2254, under Article 6(3) Convictions for counts 2, 6, 7, 8, 10, 12 confirmed on appeal,

					humanity Count 10: Killing and causing violence to health and to the physical and mental well-being as a serious violation of common Article 3 Count 12: Outrages upon personal dignity as a serious violation of common Article 3	Appeal Judgement, para. 721
22	Kabiligi	Brigadier General (G3, Chief of Operations at HQ)	18 December 2008	Not appealed	Count 6: Rape as a crime against humanity Count 8: Other inhumane acts as a crime against humanity in connection with the sexual assault of the prime minister Count 10: Outrages upon personal dignity as a serious violation of common Article 3	None Acquitted on all counts, Trial Judgement, para. 2204
23	Nsengiyumva	Colonel, Chief of Operations in Gisenyi	18 December 2008	14 December 2011	Count 7: Rape as a crime against humanity Count 9: Other inhumane acts as a crime against humanity in connection with the sexual assault of the prime minister Count 11: Outrages upon personal dignity as a serious violation of	None

					common Article 3	
24	Ntabakuze	Major, Commander of Para-Commando Battalion	18 December 2008	8 May 2012	Counts 2 and 3: Rape as part of genocide Count 6: Rape as a crime against humanity Count 8: Other inhumane acts as a crime against humanity in connection with the sexual assault of the prime minister Count 10: Outrages upon personal dignity as a serious violation of common Article 3	None
25	Rukundo	Military Chaplain	27 February 2009	20 October 2010	Count 1: Sexual assault as part of genocide	Trial Judgement, paras 574-576 Conviction quashed on appeal, Appeal Judgement, paras. 237, 238
26	Renzaho	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 Judgement, para. 779, under Article 6(3) Count 4: Trial Judgement, para. 794, under Article 6(3) Count 6: Trial Judgement, para.

						811, under Article 6(3) Convictions reversed on appeal for pleading issues, Appeal Judgement, para. 129
27	Hategekimana	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	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	Completed	Count 6: Rape as a crime against humanity Count 8: Rape and other humiliating and degrading treatment as a violation of common Article 3	Convicted under Article 6(3), Trial Judgement, paras. 2127 and 2161 Appeal completed
30	Nzuwonemeye	Commander of RECCE Battalion	17 May 2011	Completed	Count 6:	None

					Rape as a crime against humanity Count 8: violation of common Article 3	
31		Second in Command of RECCE Battalion.	17 May 2011	Completed	Count 6: Rape as a crime against humanity and Count 8: violation of common Article 3	None
32	Ntahobali	Led a group of MRND militia men	24 June 2011		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	Count 7: Under Article 6(1), Trial Judgement, para. 6094 Count 11: Under Article 6(3), Trial Judgement, para. 6185 Appeal completed
33	Nyiramasuhu ko	Minister and member of MRND	24 June 2011		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 Judgement, para. 6093 Count 11: Under Article 6(3), Trial Judgement, para. 6183 Appeal completed in 2015

34	Bicamumpaka	Minister of Foreign Affairs	30 September 2011	completed	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)
35	Mugiraneza	Minister of Civil Service	30 September 2011	completed	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	completed	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)
37	Mugenzi	Minister of Trade and Commerce	30 September 2011		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	Minister of Interior Affairs as of 25 May 1994 First Vice President of MRND	2 February 2012	Completed	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 Judgement, paras. 1670 under Article 6(1), 1671 under Article 6(3) Count 5: Trial Judgement, para. 1684 under both Articles 6(1) and 6(3) Appeal completed
39	Ngirumpatse	President of MRND	2 February 2012	Completed	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 1: Trial Judgement, paras. 1670 under Article 6(1)), 1671 under Article 6(3) Count 5: Trial Judgement, para. 1684 under both Articles 6(1) and 6(3) Appeal completed
40	Nzirorera	National Secretary of MRND	Accused deceased during trial		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	None
41	Nzaboniman a Callixte	Minister of Youth and Associative Movements in the Interim Government	31 May 2012	completed	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 Judgement, paras. 1828,	None

					1829; and para. 1841	Rape count dropped
42	Nizeyimana	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	completed	Counts 1 and 2: Acts of sexual violence as part of genocide Counts 4: Rape as a crime against humanity Count 6: Rape as a serious violation of common Article 3	Acquitted on rape counts but appeal on rape acquittals pending
43	Ngirabatware Augustin	Minister of Planning in the Interim Government	20 December 2012	completed	Count 6: Rape as a crime against humanity (through JCE 3)	Trial Judgement paras. 1390-1393. Appeal completed
44	Alleged Genocidaire ZZZ	Still on wanted list	At Large		Counts 1 and 2: Rape as part of genocide Count 5: Rape as a Crime against Humanity Count 6: Torture as a crime against humanity Count 7: Other inhumane acts as a crime against humanity Count 8: Persecution as a crime	If arrested, this Accused will be tried before MICT

					against humanity Count 10: Torture as a violation of common Article 3 Count 11: Rape as a violation of common Article 3 Count 12: Cruel treatment as a violation of common Article 3 Count 13: Outrages upon personal dignity as a violation of common Article 3	
45	Munyagishari	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	SUSPECT 1	On wanted list	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	Case transferred to Rwanda

					2012)	
47	SUSPECT 2	On wanted list	At Large		Counts 1 and 2: Rape as part of genocide Count 5: Rape as a crime against humanity (Rape charges added in the second amended Indictment filled on 30 March 2012)	Case transferred to Rwanda
48	SUSPECT 3	On wanted list	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
49	SUSPECT 4	On wanted list	At Large		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) Count 7: Other inhumane acts as a	If arrested, Accused will be tried before MICT

					crime against humanity-including acts committed on the body of the Prime Minister , or alternatively Rape as a natural and foreseeable consequence of a joint criminal enterprise to commit genocide (JCE 3)	
50	SUSPECT 5	Wanted list	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

Annexure B. Cases: Judgments and Decisions Reviewed and Citations

(See page 54 footnote 54) (11072017 VERSION)

ICTR		
Akayesu	Akayesu Trial judgment	Prosecutor vs Akayesu, ICTR-96-4-T, Judgement, 2 Sept 1998
	Akayesu Appeal judgment	Prosecutor vs Akayesu, ICTR-96-4-A, Judgment, 1 June 2001
Bagilishema		Prosecutor vs Bagilishema, ICTR-95-1A
Bagosora	Bagosora trial judgment	Prosecutor vs Bagosora, Kabiligi, Ntabakuze, Nsengiyumva, ICTR-98-41-T, Judgement and Sentence, 18 Dec 2008
Bikindi	Bikindi trial judgment	Prosecutor vs Bikindi, ICTR-01-72-T, Judgement, 2 Dec 2008
Bisengimana	Bisengimana trial judgment	Prosecutor vs Bisengimana, ICTR-00-60-T, Judgement and Sentence, 13 Apr 2006
Bizamana		Prosecutor vs Bizamana, ICTR-98-44
Bizimungu (Casimir)		Prosecutor vs Bizimungu (Casimir), Mugenzi, Bicomumpaka and Mugiraneza, IT-99-50
Bucyibaruta		Prosecutor vs Bucyibaruta, ICTR-05-85
Gacumbitsi	Gacumbitsi trial judgment	Prosecutor vs Gacumbitsi, ICTR-2001-64-T, Judgment, 17 June 2004
	Gacumbitsi appeal judgment	Prosecutor vs Gacumbitsi, ICTR-2001-64-A, Judgement, 7 July 2006
Gatete		Prosecutor vs Gatete, ICTR-2000-62

Hategekimana		Prosecutor vs Nizeyimana and Hategekimana, ICTR-00-55-I, Decision on the Prosecutor's Application for Severance and Leave to Amend the Indictment against Idelphonse Hategekimana, 25 Sept 2007
Kajelijeli	Kajelijeli trial judgment	Prosecutor vs Kajelijeli, ICTR-98-44A-T, Judgment and Sentence, 1 Dec 2003
Kalimanzira		Prosecutor vs Kalimanzira, ICTR-05-88
Kamuhanda	Kamuhanda trial judgment	Prosecutor vs Kamuhanda, ICTR-99-54A-T, Judgement and Sentence, 22 Jan 2003
Karemera		Prosecutor vs Karemera, Ngirumpatse and Nzirorera, ICTR-98-44-T, Decision on Motions for Judgement of Acquittal - Rule 98bis of the Rules of Procedure and Evidence, 19 Mar 2008
		Prosecutor vs Karemera, Ngirumpatse and Nzirorera, ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006
Kayishema	Kayishema trial judgment	Prosecutor vs Kayishema and Ruzindana, ICTR-95-1-T, Judgement, 21 May 1999
Muhimana	Muhimana trial judgment	Prosecutor vs Muhimana, ICTR-95-1B-T, Judgement and Sentence, 28 Apr 2005
	Muhimana appeal judgment	Prosecutor vs Muhimana, ICTR-95-1B-A, Judgement, 21 May 2007
		Prosecutor vs Munyagishari, ICTR-97-26 & ICTR-05-89
Musema	Musema trial judgment	Prosecutor vs Musema, ICTR-96-13-T, Judgement and Sentence, 27 Jan 2000

	Musema appeal judgment	Musema v Prosecutor, ICTR-96-13-A, Judgement, 16 Nov 2001
Muvunyi		Prosecutor vs Muvunyi, ICTR-2000-55
Nahimana	Nahimana trial judgment	Prosecutor vs Nahimana, Barayagwiza and Ngeze, ICTR-99-52-T, Judgement and Sentence, 3 Dec 2003
	Nahimana appeal judgment	Prosecutor vs Nahimana, Barayagwiza and Ngeze, ICTR-99-52-A, Judgement, 28 Nov 2007
Ndindabahizi	Ndindabahizi trial judgment	Prosecutor vs Ndindabahizi, ICTR-2001-71-T, Judgement and Sentence, 15 July 2004
	Ndindabahizi appeal judgment	Prosecutor vs Ndindabahizi, ICTR-2001-71-A, Judgement, 16 Jan 2007
Ndindilyimana		Prosecutor vs Ndindilyimana, Augustin Bizimungu, Nzuwonemeye and Sagahutu, ICTR-00-56
Ngirabatware		Prosecutor vs Ngirabatware, ICTR-99-54, Decision on Prosecution Motion for Leave to Amend the Indictment, 29 Jan 2009
Niyitegeka	Niyitegeka trial judgment	Prosecutor vs Niyitegeka, ICTR-96-14-T, Judgement and Sentence, 16 May 2003
Nizeyimana		Prosecutor vs Nizeyimana and Hategekimana, ICTR-00-55-I, Decision on the Prosecutor's Application for Severance and Leave to Amend the Indictment against Idelphonse Hategekimana, 25 Sept 2007
Nsengimana		Prosecutor vs Nsengimana, ICTR-01-69
Ntagerura		Prosecutor vs Ntagerura, ICTR-96-10A

Ntakirutimana	Ntakirutimana trial judgment	Prosecutor vs Elizaphan and Gerard Ntakirutimana, ICTR-96-10 and ICTR-96-17-T, Judgement and Sentence, 21 Feb 2003
Nyiramasuhuko		Prosecutor vs Nyiramasuhuko, Kanyabashi, Ndayambaje, Nsabimana, Ntahobali, Nteziryayo, ICTR-98-42-T, Decision on Defence Motions for Acquittal under Rule 98bis, 16 Dec 2004
Nzabirinda	Nzabirinda sentencing judgment	Prosecutor vs Nzabirinda, ICTR-2001-77-T, Sentencing Judgement, 23 Feb 2007
Nzabonimana		Prosecutor vs Nzabonimana, ICTR-98-44
Renzaho	Renzaho sentencing judgment	Prosecutor vs Renzaho, ICTR-97-31-T Sentencing Judgment
Rugambarara	Rugambarara sentencing judgment	Prosecutor vs Rugambarara, ICTR-00-59-T, Sentencing Judgement, 16 Nov 2007
Rukondo	Rukondo trial judgment	Prosecutor vs Rukondo, ICTR-2001-70-T, Judgement, 27 Feb 2009
Rusatira		Prosecutor vs Rusatira, ICTR-02-80
Rutaganda	Rutaganda trial judgment	Prosecutor vs Rutaganda, ICTR-96-3-T, Judgement and Sentence, 6 Dec 1999
	Rutaganda appeal judgment	Prosecutor vs Rutaganda, ICTR-96-3-A, Judgement, 26 May 2003
Rutaganira		Prosecutor vs Rutaganira, ICTR-95-1C-T, Judgement and Sentence, 14 Mar 2005
Rwamakuba		Prosecutor vs ICTR-98-44C
Semanza	Semanza trial judgment	Prosecutor vs Semanza, ICTR-97-20-T, Judgement and Sentence, 15 May 2003

	Semanza appeal judgment	Prosecutor vs Semanza, ICTR-97-20-A, Judgement, 20 May 2005
Seromba	Seromba appeal judgment	Prosecutor vs Seromba, ICTR-2001-66-A, Judgement, 12 Mar 2008
Serushago	Serushago sentencing judgment	Prosecutor vs Serushago, ICTR-98-39-S, Sentence, 5 Feb 1999
Setako		Prosecutor vs Setako, ICTR-04-81
ICTY		
Blagojevic	Blagojevic appeal judgment	Prosecutor vs Blagojevic and Jokic, IT-02-60-A, Judgement, 9 May 2007
Blaskic	Blaskic trial judgment	Prosecutor vs Blaskic, IT-95-14-T, Judgement, 3 Mar 2000
	Blaskic appeal judgment	Prosecutor vs Blaskic, IT-95-14-T, Judgement, 29 July 2004
Brdanin	Brdanin trial judgment	Prosecutor vs Brdanin, IT-99-36-T, Judgement, 1 Sept 2004
	Brdanin appeal judgment	Prosecutor vs Brdanin, IT-99-36-A, Judgement, 3 Apr 2007
Bralo	Bralo sentencing judgment	Prosecutor vs Bralo, IT-95-17-S, Sentencing Judgement, 7 Dec 2005
Cesic	Cesic sentencing judgment	Prosecutor vs Cesic, IT-95-10/1-S, Sentencing Judgement, 11 Mar 2004
Celebici	Celebici trial judgment	Prosecutor vs Mucic and 3 others, IT-96-21-T, Judgement, 16 Nov 1998

	Celebici appeal judgment	Prosecutor vs Mucic and 3 others, IT-96-21-A, Judgement, 20 Feb 2001
Dordevic		Prosecutor vs Dordevic (IT-05-87/1)
Furundzija	Furundzija trial judgment	Prosecutor vs Furundzija, IT-95-17/1-T, Judgement, 10 Dec 1998
Galic	Galic appeal judgment	Prosecutor vs Galic, IT-98-29-A, Judgement, 30 Nov 2006
Hadzihasanovic	Hadzihasanovic appeal judgment	Hadzihasanovic and Kubura, IT-01-47-A, Judgement, 22 Apr 2008
Halilovic	Halilovic trial judgment	Prosecutor vs Halilovic, IT-01-48-T, Judgement, 16 Nov 2005
Haradinaj		Prosecutor vs Haradinaj and 2 others, IT-04-84-T, Judgement, 3 Apr 2008
Halilovic	Halilovic appeal judgment	Prosecutor vs Halilovic, IT-01-48-A, Judgement, 16 Oct 2007
Hadzic		Prosecutor vs Hadzic (IT-04-75)
Karadzic		Prosecutor vs Karadzic (IT-95-5/18)
Kordic	Kordic trial judgment	Prosecutor vs Kordic and Cerkez, IT-95-14/2-T, Judgement, 21 Feb 2001
	Kordic appeal judgment	Prosecutor vs Kordic and Cerkez, IT-95-14/2-A, Judgement, 17 Dec 2004
Kovacevic		Kovacevic (IT-97-24)
Krajisnik	Krajisnik trial judgment	Prosecutor vs Krajisnik, IT-00-39-T, Judgement, 27 Sept 2006
Krnojelac	Krnojelac trial judgment	Prosecutor vs Krnojelac, IT-97-25-T, Judgement, 15 Mar 2002

Krstic	Krstic trial judgment	Prosecutor vs Krstic, IT-98-33-T, Judgement, 2 Aug 2001
Kunarac	Kunarac trial judgment	Prosecutor vs Kunarac and 2 others, IT-96-23 & IT-96-23/1-T
	Kunarac appeal judgment	Prosecutor vs Kunarac and 2 others, IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002
Kupreskic	Kupreskic trial judgment	Prosecutor vs Kupreskic and 5 others, IT-95-16-T, Judgement, 14 Jan 2000
Kvocka	Kvocka trial judgment	Prosecutor vs Kvocka and 3 others, IT-98-30/1-T, Judgement, 2 Nov 2001
	Kvocka appeal judgment	Prosecutor vs Kvocka and 3 others, IT-98-30/1-A, Judgement, 28 Feb 2005
Limaj	Limaj trial judgment	Prosecutor vs Galic and 2 others, IT-03-66-T, Judgement, 30 Nov 2005
Martic	Martic appeal judgment	Prosecutor vs Martić, IT-95-11-A, Judgement, 8 Oct 2008
Milutinovic	Milutinovic trial judgment	Prosecutor vs Milutinovic and 5 others, IT-05-87-T, Judgement Volumes 1 to 4, 26 Feb 2009
Mladic		Prosecutor vs Mladic, IT-95-5/18
Mrksic		Prosecutor vs Mrksic and 2 others, IT-95-13/1-T, Judgement, 27 Sept 2007
Mucic		See Celebici case
Dragan Nikolic	Dragan Nikolic sentencing judgment	Prosecutor vs Dragan Nikolic, IT-94-2-S, Sentencing Judgement, 18 Dec 2003
Plavsic	Plavsic sentencing	Prosecutor vs Plavsic, IT-00-39&40/1-S,

	judgment	Sentencing Judgement, 27 Feb 2003
Prlic		Prosecutor vs Prlic and 5 others, IT-04-74
Rajic	Rajic sentencing judgment	Prosecutor vs Rajic, IT-95-12-S, Sentencing Judgement, 8 May 2006
Seselj		Prosecutor vs Seselj, IT-03-67
Sikirica	Sikirica sentencing judgment	Prosecutor vs Sikirica and 2 others, IT-95-8-S, Sentencing Judgement, 13 Nov 2001
Blagoje Simic	Blagoje Simic trial judgment	Prosecutor vs Simic and 2 others, IT-95-9-T, Judgement, 17 Oct 2003
Milan Simic	Milan Simic sentencing judgment	Prosecutor vs Milan Simic, IT-95-9/2-S, Sentencing Judgement, 17 Oct 2002
Stakic	Stakic trial judgment	Prosecutor vs Stakic, IT-97-24-T, Judgement, 31 July 2003
Stanisic		Prosecutor vs Stanisic and Simatovic, IT-03-96
Strugar	Strugar appeal judgment	Prosecutor vs Strugar, IT-01-42-A, Judgement, 17 July 2008
Tadic	Tadic trial judgment	Prosecutor vs Tadic, IT-94-1-T, Opinion and Judgment, 7 May 1997
	Tadic trial sentencing judgment	Prosecutor vs Tadic, IT-94-1-T, Sentencing Judgment, 14 July 1997
	Tadic appeal judgment	Prosecutor vs Tadic, IT-94-1-A, Judgement, 15 July 1999
Talic		Talic, IT-99-36
Todorovic	Todorovic sentencing judgment	Prosecutor vs Todorovic, IT-95/1-S, Sentencing Judgement, 31 July 2001

Vasiljevic	Vasiljevic trial judgment	Prosecutor vs Vasiljevic, IT-98-32-T, Judgment, 29 Nov 2002
Zelenovic	Zelenovic sentencing judgment	Prosecutor vs Zelenovic, IT-96-23/2-S, Sentencing Judgement, 4 Apr 2007
SCSL		
AFRC	AFRC trial judgment	Prosecutor vs Brima and 2 others, SCSL-04-16-T, Judgement, 20 June 2007
	AFRC appeal judgment	Prosecutor vs Brima and 2 others, SCSL-04-16-A, Judgment, 22 Feb 2008
CDF	CDF trial judgment	Prosecutor vs Fofana and Kondewa, SCSL-04-14-T, Judgment, 2 Aug 2007
	CDF appeal judgment	Prosecutor vs Fofana and Kondewa, SCSL-04-14-A, Judgment, 28 May 2008
Koroma		Prosecutor vs Koroma, SCSL-2003-03
RUF	RUF trial judgment	Prosecutor vs Sesay and 2 others, SCSL-04-15-T, Judgement, 2 Mar 2009
Sankoh		Prosecutor vs Sankoh, SCSL-03-02
Taylor		Prosecutor vs Taylor, SCSL-03-01

The Extraordinary African Chamber		
	Hissene Habre	Prosecutor vs Hissene Habre, Extra Ordinary African Chambers (EAC-04-16-T, Judgement, 30 May 2016)

Appendix7 Table of Interviewees/Participants/ (Including for informal discussions)/Group Discussions¹⁶³ footnote 55 page 56.

NO	DATE	NAME/PSEUDONYM	GENDER/AGE	TITLE/ORGANIZATION
1	21/10/2013-14	Judge President Van Joensen	Male /Adult	Former UN-ICTR Judge President
2	21/01/2013	Prosecutor Justice Hassan Jallow	Male/Adult	ICTR Former Chief Prosecutor
3	8/12//2011	Justice Elizabeth Ibanda	Female/Adult	Judge of the Residual Court of Special Court/Sierra Leone (SCSL) Former ICTR Legal Advisor (Chambers), former High Court Judge, Uganda International Crimes
4	7/12/2012	Joana Kagezi	Female/Adult	Former Principal State Attorney, DPP Uganda.
5	1/11//2009-	Alex Obote- Odora	Male/Adult	Former Chief of Appeals Section ICTR
6	11/01/2010	TTA 1	Male /Adult	Former ICTR, Trial Attorney

¹⁶³ Some Interviews were on numerous occasions with follow ups from previous interviews, some through phone. Witness survivors, survivor names and those who specifically requested anonymity to protect confidentiality of witnesses they handled had names redacted and identified by pseudonyms.

7	11/01/2010	LLA 1	Female /Adult	Former ICTR Legal Advisor
8	5/9/2009	Justice Unity Dow ¹⁶⁴	Female /Adult	ALFA Dakar, Former Judge Botswana High Court
9	6-11/01/2010	Grace Kisinza	Female/Adult	Assistant researcher/law student
10	12/01/2010	Investigator 1	Female/Adult	Former ICTR investigator based in Kigali
11	12/01/2010	Investigator 2	Male/Adult	Former ICTR Investigator/Kigali
12	13/10/2010	Witness Assistant Officer 1	Female/Adult	UN-ICTR WPA/WVSS
13	14/10/2010	Witness Assistant 2	Male/Adult	ICTR/Kigali, former Witness Assistant Officer
14	14/10/2010-2011	Witness Assistant 3	Male/Adult	ICTR/Investigator
15	14/01/2010	Judge Bossa ¹⁶⁵	Female/Adult	Former UN ICTR
16	14/01/2010-2013	André Moberly (Austria)	Female/Adult	Former ICTR Trial Attorney
17	14/01/2010-2013	TAT	Male/Adult	Former ICTR Trial Attorney/

18	8/04/2011-2013	Investigator 4	Female/Adult	UN-ICTR (Former ICTR Investigator in Akayesu)
19	01/01/2010-2012	Dr. Nadine	Female/Adult	UNICTR
20	6/12/2011 , and	Joana Kagezi	Female/Adult	Former Principal State Attorney, DPP Uganda.
21	7/12/2011	Majok Margaret	Female/Adult	JLOS (Uganda)(transitional justice)

¹⁶⁴ This was not an interview, it was an informal discussion on how national jurisdictions in Africa can implement some of the Akayesu gains to strengthen and move the gender agenda further.

¹⁶⁵ The informal discussion with Judge Bossa was to seek clarification on a media post which indicated the judges in the Butare case might have laughed in the middle of a trial giving the impression they laughed at a survivor witness. Both her explanation and the transcript show the judge did not laugh at the survivor. This was buttressed by the then TA, Gregory Transcend during a panel discussion at ICTR in 2014.

22	17/10/2013-2014	Gloria Atiba	Female/Adult	ICC/OTP Gender Advisor
23	7/12/2011	Jane Adong	Female/Adult	Women Initiative for Gender Justice, Former ICTR, Senior Trial Attorney.
24	7/12/2011	UGU	Female/Adult	CRV Survivor (Uganda)
26	8/12/2011	Ms. Miata Samba	Female/Adult	Special Court of Sierra Leone (Prosecution Division)
27	01 -31/2010-13-Kigali	WMT Nurse 1	Female/Adult	UNICTR
28	19/01/2010-13	ICTR/Kigali official	Female/Adult	Kigali/Rwanda (Follow-ups of 7/8/2008 interview)
29	19/01/2010-13	Former Sexual assault Investigator 4	Female/Adult	Kigali
30	20/01/2010-13	Former Sexual Assault/	Male/Adult	Kigali
31	20-30 /05/2010	UNICTR Nurse 1	Female/Adult	ICTR-Arusha
32	20/01/2010-2013	Kinyarwanda Translator TTT 1	MALE/Adult	ICTR
33	20/11/2010	Dennis Mabura	Male/Adult	ICTR former Assistant Trial Attorney
34	30/12/2-2011	SDX	Female/Adult	ICTR
35	7/4/2005	AAU ¹⁶⁶	Female/Adult	ICTR
36	21/01/2010	VOV	Female/Adult	ICTR
37	25/01/2010-2013	KOL	Female/Adult	ICTR
38	25/01/2012-2013	GHG	Female/Adult	ICTR
39	25/01/2009-2013	AAI	female/Adult	ICTR
40	25/01/2009-2013	BBJ	Female/Adult	ICTR

¹⁶⁶ This survivor died few months after giving her testimony and the debriefing at the safe house by the researcher was referred to in this study since the judgment specifically mentioned how brutal the rape was perpetrated on her, as the perpetrator kept on hitting her head again the floor while raping her and how her family including her children perished in this attack whilst she was being raped.

41	25/01/2009- Dec 2013	AAL	Female/Adult	ICTR
42	11-30 /12/2009	GHT	Female/Adult	ICTR
43	11-30 /12/2009	MMM	Female/Adult	ICTR
44	11-30 /12/2009	YYY	Female/Adult	ICTR
45	11-30 /12/2009	DBD	Female/Adult	ICTR
46	26/01/2009	AXX	Female/Adult	ICTR
47	26/01/2009	BGB	Female/Adult	ICTR
48	27/01/2010- 2013 (all Gisenyi	POQ	Female/Adult	ICTR/GISENYI (building up on initial contacts with the survivors during mission trip 7-12/09/2007)
49	28/01/2009- 2013	CCB	Female/Adult	ICTR
50	28/01/2009- 2013	BBD	Female/Adult	ICTR
51	29/01/2009- 2013	KOL	Female/Adult	ICTR
52	29/01/2009- 2013	JJJ	Female/Adult	ICTR
53	29/01/2009- 2013	YOL	Female/Adult	ICTR
54	29/01/2009- 2013	GOG	Female/Adult	ICTR
55	30/01/2009	JJM	Female/Adult	ICTR
56	30/01/2009- 2013	CDC	Female/Adult	ICTR
57	31/01/2009- 2013	BNN	Female/Adult	ICTR
58	31/01/2009- 2013	EOE	Female/Adult	ICTR
59	01/02/2009- 2013	ROR	Female/Adult	ICTR
60	01/02/2009- 2013	MMM	Female/Adult	ICTR
61	01/02/2010- 2013	ROR	Female/Adult	ICTR

62	01/02/2010-2013	DBD	Female/Adult	ICTR
63	01/02/2010	BBB	female/Adult	ICTR
64	02.02.2010-2013	AXX	Female/Adult	ICTR/KIBUYE
65	02/02/2010-2013	POQ	Male/Adult	ICTR/KIBUYE
66	03/02/2010-2013	GBG	Female/Adult	ICTR
67	04/02/2010-2013	XHX	Female/Adult	ICTR
68	05/02/2010-2013	BBG	Female/Adult	ICTR
69	05/02/2010-2013	CCH	Female/Adult	
70	05/02/2010-2013	GOG	Female/Adult	ICTR
71	05/02/2010-2013	CDC	Female/Adult	ICTR
72	5/10/2011-2013	KOL	Female/Adult	ICTR
73	05/02/2010-2013	GHT	Female/Adult	ICTR
74	05/02/2010-2013	ROR	Female/Adult	ICTR
75	05/02/2010-2013	PQQ	Female/Adult	ICTR
76	05/02/2010-2013	KOK	Female/Adult	ICTR
77	5/02/2010-2013	GOG	Female/Adult	ICTR
78	05/02/2010-2013	VOV	Female/Adult	ICTR
79	05/02/2010-2013	BBD	Female/Adult	ICTR

7.1. List of Participants in conference group informal discussions on needs of survivor witnesses (no individual or in-depth interviews)

NO	DATE¹⁶⁷	NAME	GENDER/AGE	ORGANISATION/TITLE/v
1	3/12/2010-2011	Hon, Justice Pillay	Female/Adult	Former Judge, UNICTR (Colloquium of Prosecutors' Challenges of International)
2	05/11/09-10	Charles Adeogun-Phillips	Male/Adult	Former STA (ICTR-Kibuye cases)
3	05/11/09-2013 (Kigali)	Alfred Kwende	Male/Adult	Former Commander UNICTR OTP Investigations; Kigali workshop
4	7/12/2009-2013	Paul Ngarau	Male/Adult	STA for OTP Government Files
5	30/31/08/2010	Mr. Van Alphonso	Male/Adult	Former STA
6	05/11/12	Amanda Reichman	Female/Adult	Former OTP legal advisor
7	8 December 2011	TRF	Female/Adult	Prosecutor in the national court. (Survivor of SGBV Uganda.)
8	05/11/09	TTT	Female/Adult	(Survivor-at Kigali workshop)
9	12/09/2012-2013	Justice Muthoga	Male/Adult	Former Judge ICTR, Kigali, Rwanda Workshop
10	7 December 2011 (Entebbe)	Binaifer Nowrojee	Female/Adult	Executive Director, Open Society Initiative for East Africa (informal discussions)
11	7/12/2011	Moses Chrispus Okello	Male/Adult	Senior Research Advisor, Refugee Law Project (informal discussion)

Informal discussions with different members of the Sexual Violence Committee on different aspects of witness treatment at various times.

1	12/11/09-2012	Linda Bianca	Female/Adult	OTP Sexual Violence Committee Member (SVC) (SAC)
2	12/11/09-11/10/2014	Jane Mukangira	Female/Adult	SVC (Former Assistant Appeals Counsel)
3	13/11/09-2012	Evelyn Kamau	Female/Adult	SVC (Former Appeals Counsel)
3	1/30//11/09-10	Gerda Visser	Female/Adult	SVC (Former Legal Researcher)
4	/09/2009-30/12/2011-13	Alfonso Van	Male/Adult	SVC (Former Senior Appeals
5	13/11/09-2013	Marie Ka	Female/Adult	Former Assistant Appeals Counsel
6	2009-2014	Francois Nsanzuwera	Male/Adult	Former Appeals Counsel
7	1/10/2009-2013	InnekeOnsea	Female/Adult	Former Senior Appeal Counsel
8	1/10/2009-2013	Christiana Formenky	Female/Adult	Former Assistant Appeals Counsel

7.4.GroupDiscussion(FGD)Group (UNILAC)

NO	Date	Group	Place	Number ofParticipa
1.	12/11/09-2010	UNILAC	UNILAC/KIGALI	17
2.	14/11/2009-2013	Kibuye (Rwanda)	Kibuye Safe Place	5 Survivors
3.	7/12/12 and 8/12/2012	Entebbe (Uganda) Lake Victoria Serena.	SERENA/UGANDA	9
4.	5/12/09	JINJA NILEResort Centre	Jinja Nile Uganda	21 (11 Female Prosecutors and 10 Male (Prosecutors)
5.	12/2013	KIGALI 2013	(Safe Place organized by a former ICTR witness support)	7 (All Women)
6.	8/4/2011	Hague Netherlands		14 (Mixed Group ICJS Practitioners and 4 NGO Representative)
7	1/10/2009-2013	Kigali Pentecostal Church	Kigali/Rwanda	12 Women
8.	25/01/2010-2012	Tanzania HIV Support Group, Mount Meru	Mount Meru hospital premises/Arusha/Tanzania.	13

Verification (South Sudan- Interviews Juba (7) Juba)(4) refugee camp -Kenya) Safe House period of interviews at ICTR and in Rwanda 4 April 2005 to 15 November 2014) Verification with participants from (2011 Uganda (2) Nigeria (3) and Libya (2) (2014-2016), last validation meeting (survivors from Chad (2) 2017 ALFA side event at the AU) (10 potential ICTR witnesses met in Rwanda had not testified since indictments of the accused were amended to drop out rape allegations/ indictments amended to drop rape allegations as part of plea negotiations.)