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**“Your Justice is Too Slow”:
Will the ICTR Fail
Rwanda’s Rape Victims?**

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Summary

This paper offers an examination of international justice from the perspective of rape survivors from the Rwandan genocide, and exposes the squandered opportunities that have characterized sexual violence prosecutions over the past decade at the International Criminal Tribunal for Rwanda (ICTR).

Throughout the Rwandan genocide, widespread sexual violence, directed predominantly against Tutsi women, occurred in every prefecture. Thousands of women were raped on the streets, at checkpoints, in cultivated plots, in or near government buildings, hospitals, churches, and other places where they sought sanctuary. Women were held individually and in groups as sexual slaves for the purpose of rape. They were raped to death using sharp sticks or other objects. Their dead bodies were often left naked, bloody and spread-eagled in public view. The hate propaganda before and during the genocide fuelled the sexual violence by demonizing Tutsi women's sexuality.

Given the evidence and the crimes that the ICTR is tasked with prosecuting, virtually every defendant coming before this international court should be charged and convicted, where appropriate, for his role in perpetrating these acts, or for command responsibility in not preventing the acts of subordinates.

Yet on the tenth anniversary of the Rwandan genocide, the ICTR had handed down 21 sentences: 18 convictions and 3 acquittals. An overwhelming 90 per cent of those judgements contained no rape convictions. More disturbingly, there were double the number of acquittals for rape than there were rape convictions. No rape charges were even brought by the Prosecutor's Office in 70 per cent of those adjudicated cases. If the trend continues, full and fair justice for women victims of the Rwandan genocide appears increasingly unlikely before the ICTR.

This paper is based on interviews with Rwandan rape survivors, including some who have testified as witnesses before the ICTR. The first part is an examination of the dismal record of the ICTR Prosecutor's Office in investigating and prosecuting sexual violence crimes. The past decade reveals a lack of political will at the senior management level to integrate sexual violence crimes into a consistently followed prosecution strategy. Prosecutions have been hampered by inadequate investigations, the use of inappropriate investigating methodology, and a lack of training for staff. Some cases have moved forward without rape charges, sometimes even when the prosecutor is in possession of strong evidence. In a significant proportion of the cases, rape charges have been added belatedly as amendments, rather than being made an integral part of the prosecution strategy. Trial team leaders continue to have differing, and even contradictory, interpretations of legal responsibility for the violence against women and opinions on what legal approaches to adopt in the courtroom.

The second part of the paper is based on the voices of the rape witnesses, including some who have testified before the ICTR. It reveals the deep disappointment and frustration of rape victims with the international justice process. Rwandan women articulate what they see as the failure of this court, which not only denies them justice, but exacerbates the suffering they continue to experience. This paper highlights some of the shortcomings in the process, which is structured without regard to providing optimal care and protection to rape victims, including a lack of information and follow-up, and the lack of full disclosure by the Prosecutor's Office on the possible risks. In the courtroom, often as a result of joint trials

with multiple defendants, rape victims find the environment hostile as they are subjected to repeated and lengthy cross-examinations, coupled with a reluctance on the part of some judges to limit excessive cross-examination. Because of a lack of adequate preparation, some rape victims have felt humiliated and embarrassed on the stand because they were not warned that they would have to speak explicitly about sexual parts or acts. Following trial, rape victims often find that despite the promised anonymity, they return home to find their identity revealed as rape victims, and are subject to threats and reprisals.

After a decade of existence, it is discouraging to see how little justice the ICTR has delivered to the victims of sexual violence. In this era of international justice, concerted efforts must be made to learn from the experiences of the Rwandan rape victims to ensure that the United Nations does not continue to short-change rape victims. 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 a judicial process that marginalizes, dehumanizes or demeans rape victims.

Introduction

Almost 10 years after the Rwandan genocide, the courtroom at the International Criminal Tribunal for Rwanda (ICTR) listened intently as Roméo Dallaire, former UN peacekeeping force commander, testified against the top military men accused of the 1994 genocide. “The corpses that you observed, either at roadblocks or at the scenes of killings,” the prosecutor asked Dallaire, “I want to draw your attention to the female corpses. Was there anything in particular with respect to those corpses that you made any observations about?” From the witness stand, Dallaire responded:

... we could notice on many sites, sometimes very fresh—that is, I am speaking of my observers and myself—that young girls, young women, would be laid out with their dresses over their heads, the legs spread and bent. You could see what seemed to be semen drying or dried. And it all indicated to me that these women were raped. And then a variety of material were crushed or implanted into their vaginas; their breasts were cut off, and the faces were, in many cases, still the eyes were open and there was like a face that seemed horrified or something. They all laid on their backs. So there were some men that were mutilated also, their genitals and the like. A number of them were—women had their breasts cut off or their stomach open. But there was, I would say generally at the sites you could find younger girls and young women who had been raped.

(ICTR 2004a)

The next month Dallaire’s assistant, Major Brent Beardsley, followed as a witness in the same case. The same question was put to him. “With respect to the female corpses, in particular,” the prosecuting lawyer asked, “did you make any observations about any particular characteristics that those corpses may have had?” Beardsley replied:

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

Rape was one of the hardest things to deal with in Rwanda on our part. It deeply affected every one of us. We had a habit at night of coming back to the headquarters and, after the activities had slowed down for the night, before we went to bed, sitting around talking about what happened that day, drink coffee, have a chat, and amongst all of us the hardest thing that we had to deal with was not so much the bodies of people, the murder of people-I know that can sound bad, but that wasn’t as bad to us as the rape and especially the systematic rape and gang rape of children. Massacres kill the body. Rape kills the soul. And there was a lot of rape.

It seemed that everywhere we went, from the period of 19th of April until the time we left, there was rape everywhere near these killing sites.

(ICTR 2004b)

Shortly after the genocide, the United Nations set up the ICTR to hold accountable those with greatest responsibility for the atrocities that took place during the Rwandan genocide. The ICTR is tasked with prosecuting serious violations of international humanitarian law committed during 1994 in Rwanda or by Rwandan citizens in neighbouring states.

Rape is a prosecutable crime under international law. When committed on a mass scale, it is explicitly identified as one of the crimes against humanity. Rape and other forms of sexual violence against civilians are war crimes, a violation of Article 3 common to the Geneva Conventions and of the Additional Protocols (for both international and internal conflicts). Sexual violence can be a crime under the Genocide Convention if committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group through killing or serious bodily harm. Rape can also be a form of torture.

Throughout the Rwandan genocide, widespread sexual violence, directed predominantly against Tutsi women, occurred in every prefecture (Nowrojee 1996). Every part of the Rwandan environment was a location for rape, often multiple gang-rape. Women were held individually and in groups as sexual slaves for the purposes of rape. Women were not just raped behind closed doors, they were raped on the streets, at checkpoints, in cultivated plots, in or near government offices, hospitals, churches and other public buildings. They were raped to death using sharp sticks or other objects. Their dead bodies were often left naked and spread-eagled, with nearby pools of blood and semen, in public view. The hate propaganda before and during the genocide fuelled the sexual violence by demonizing Tutsi women's sexuality and, as the Media trial judgement noted in convicting three media executives for publicly inciting to genocide, "made the sexual attack of Tutsi women a foreseeable consequence" (ICTR2003, ¶118, p.27). Sexually subjugating and mutilating Tutsi women was a way to attack the ethnic group and to punish the women. The sexual violence directed at the women during the Rwandan genocide was part of the attack against the Tutsi, which is why the ICTR in its first judgement (Akayesu) ruled that rape was an act of genocide.

It is hard to imagine that anyone present in Rwanda during the genocide would not have been aware that tens of thousands of women were being attacked with such ferocity. Political, administrative and military leaders at the national and local levels as well as heads of militia directed, encouraged or permitted the killings and sexual violence to further their political goals: the destruction of the Tutsi as a group.

Given the evidence and the elements of the crimes that the ICTR is tasked with prosecuting, virtually all the defendants coming before this international court should be charged and convicted, where appropriate, for their role in perpetrating such acts against women, or for command responsibility in not preventing the acts of their subordinates.

Examining the judgements of the ICTR

Ten years after the genocide, what is the record of the ICTR? As of May 2004, the ICTR had handed down 21 judgements: 18 convictions and 3 acquittals.¹ This represents judgements on

¹ As of April 2004, the ICTR had indicted 82 persons and made 66 arrests. Sixteen indicted suspects remain at large and six others are no longer in custody: one died prior to trial, two have had indictments against them withdrawn, and three have been acquitted. Of the 60 in custody, 18 are convicted (12 have appeals pending), 21 are on trial and another 21 remain in detention awaiting trial. The Appeals Chamber has so far confirmed seven convictions and one acquittal. It remains to be seen whether the ICTR will bring any new indictments for crimes committed by members of Rwandan Patriotic Front (RPF) forces, credited with ending the genocide

one-third of the individuals in custody. Only two cases have resulted in rape convictions. More disturbingly, there were four acquittals for rape (double the number of convictions).

No rape charges were even brought by the Prosecutor's Office in 90 per cent of those adjudicated cases. In the 30 per cent that included rape charges, only 10 per cent were found guilty for their role in the widespread sexual violence. Double that number, 20 per cent, were acquitted because the court found that the prosecutor did not properly present the evidence beyond a reasonable doubt.² In real numbers, that means only two defendants have specifically been held responsible for their role in sexual violence crimes (a third conviction was reversed on appeal), despite the tens of thousands of rapes committed during the genocide.³ None of the rape acquittals has been appealed by the prosecutor. How can this be?

Much has been written by legal scholars celebrating the international tribunals as an important step forward in ending impunity for sexual violence against women. The widespread evidence of sexual violence as a weapon of conflict in the former Yugoslavia and the genocide in Rwanda has led to groundbreaking judgements through the two tribunals set up by the United Nations to convict those responsible for crimes against humanity, genocide and war crimes.⁴ The ICTR is feted by lawyers for its first landmark judgement in the case of Akayesu that expanded international law on rape—a point of pride that ICTR officials always cite as a manifestation of their commitment to prosecute sexual violence.⁵ Yet, as groundbreaking as the Akayesu judgement is, it increasingly stands as an exception, an anomaly. Even as international accountability for sexual violence in conflict becomes a reality, there are some disturbing aspects about the justice that the United Nations is choosing to deliver to rape victims.

What do Rwandan women have to say?

What do Rwandan women have to say about this? In this era of international justice, it has been remarkable how little of the debate has included the voices of the victims for whom these tribunals have ostensibly been formed. What do the rape victims think of these institutions? What do they want from international courts? What have they gained from

before taking power; and whether the ICTR will opt to transfer some of its caseload to either Rwanda or some other national jurisdiction in order to meet the 2008 completion deadline (ICTR 2004c).

²Musema, Alfred (ICTR-96-13): life sentence for rape (2000), overturned on appeal and acquitted of rape (2001). Niyitegeka, Eliezer (ICTR-96-14): acquitted of rape (2003), rape acquittal not appealed by prosecution. Kajelijeli, Juvenal (ICTR-98-44A): acquitted of rape (2003), rape acquittal not appealed by prosecution; and Kamuhanda, Jean de Dieu (ICTR-99-54): acquitted of rape (2004), rape acquittal not appealed by prosecution.

³Akayesu, Jean Paul (ICTR-96-4): 15 years for rape (1998), upheld on appeal (2001). Musema, Alfred (ICTR-96-13): life sentence for rape (2000), overturned on appeal and acquitted of rape (2001). Semanza, Laurent (ICTR-97-20): seven and 10 years for two counts of rape, appeal pending.

⁴In 1998, the ICTR handed down a landmark judgement in the case of Akayesu. It was the first conviction for genocide by an international court, the first time an international court punished sexual violence in an internal conflict, and the first time that rape was found to be an act of genocide to destroy a group. In 2002, the International Criminal Tribunal for the former Yugoslavia (ICTY) issued a significant ruling in the Foca case, convicting three men for rape, torture and enslavement as crimes against humanity. It was the first indictment by an international tribunal solely for crimes of sexual violence against women and the first conviction by the ICTY for rape and enslavement as crimes against humanity.

⁵The counts against Jean Paul Akayesu, the bourgmestre of Taba commune in Rwanda, originally contained no sexual violence charges despite the mass rapes in the area. Human rights and women's organizations that had documented the rapes repeatedly urged the prosecutor to amend, and during the trial sexual violence testimony emerged. Only after the judges invited the prosecution to consider investigating gender crimes in order to add rape charges and the submission of an *amicus curiae* brief urging the same by the Coalition on Women's Human Rights in Armed Conflict did the prosecution finally amend the charge.

them? There is not a rape survivor to whom I spoke who had not heard of the ICTR and who did not have thoughts about the institution. They are watching.

This article attempts to give voice to the Rwandan rape victims regarding their views of the international justice they have encountered at the hands of the ICTR. I have been talking to Rwandan rape victims since 1996, and last year I spent time in Rwanda interviewing them specifically about their perceptions of the ICTR. Interviews were conducted with numerous rape survivors, including six rape victims who had testified before the ICTR, and three rape victims who are scheduled to appear, as well as ICTR representatives.

Even as Rwandan rape survivors continue to recognize the value and potential of an international court set up to deliver justice to them, the overwhelming sentiments expressed by them are a burning anger, deep frustration, dashed hopes, indignation and even resignation. Justice moves slowly for all at the ICTR, but even more slowly for rape victims.

Virtually without exception, they articulate what they see as not only the failure of this court to deny them justice, but its tendency to exacerbate the suffering they continue to experience. Their concerns can be divided roughly into two related, but different, aspects: jurisprudence and justice.

When asked what they want from the international tribunal, Rwandan women above all mention the law: they say that they are looking for public acknowledgment of the crimes committed against them. They want the record to show that they were subjected to horrific sexual violence at the hands of those who instigated and carried out the genocide.

They also talk about the process of justice. They want tribunal staff to ensure a legal process that treats rape survivors with the utmost respect and care at all stages of the process. They want information and agency in order to understand the process and to make fully informed decisions on whether to testify and what to expect. They want to be notified of developments before and after they testify. They want an enabling environment in the courtroom when they come forward as witnesses, where they will not be humiliated unnecessarily when describing their rapes, harangued for days on the stand in cross-examination, or (as in one egregious case) subjected to laughter from the judges while describing what happened to them. Following testimony, they want safety and protection from reprisal, exposure or stigma. Since many of these rape victims have now contracted HIV/AIDS, they want access to the same AIDS medications that the tribunal currently provides to the defendants in custody.

The Importance of Prosecuting Sexual Violence

Rwandan women express deep concern that the ICTR is not fully and properly prosecuting the crimes that occurred against them: that the court is not acknowledging their pain, not telling their story, not enshrining their experience of the genocide. Astonishingly, punishment and vengeance were astonishingly the least articulated reasons for why Rwandan women wanted and valued ICTR prosecutions of rape. Women in Rwanda, when asked what they want from the tribunal, speak mostly about wanting their experiences acknowledged and the violence against them condemned by the ICTR. They want the ICTR to say loudly and in no uncertain terms that what was done to women was a crime of genocide, and that as rape survivors they did not willingly collaborate with those who committed genocide, who kept them alive to rape.

This sentiment was summed up most articulately by one young woman who lives on the outskirts of Kigali in a housing co-operative set up to house and help rape victims with HIV/AIDS. Although she talked about the brutal violence inflicted on her during the 1994 genocide, the subsequent discovery that she had contracted HIV, and the arrangements that had already been made to care for her three young children following her death, it was not these things that brought tears to her eyes. Rather, when asked about her thoughts on justice and the ICTR, she began to cry. And as she wiped away the tears with her threadbare T-shirt, she said:

For those of us on the road to death, this justice will be too slow. We will be dead and no one will know our story. Our families have been killed and our remaining children are too young to know. What happened to us will be buried with us. The people for whom this tribunal was set up for are facing extinction—we are dying. We will be dead before we see any justice.⁶

Of all the things that international justice can give to the victim, this is perhaps the most straightforward. If it condemns, prosecutes and convicts offenders of sexual violence crimes, the crime committed against the rape victim is acknowledged and the silence is broken. No punishment can ever adequately redress the injuries of, or restore to their previous state, the victims of genocide. Yet despite this, there remains something important to the victims about the act of acknowledgement.

Public acknowledgement

Public acknowledgement and condemnation of the egregious abuses suffered are important first steps in providing recognition and redress to victims of violence. Speaking the public truth and condemning the atrocities that have occurred against a person becomes a step towards restoring the humanity of the victim and her value in society. For a person who has been stripped of everything including her essential humanity, this is one important way to be given back a place of value in society. For rape victims, the breaking of the silence that surrounds the sexual violence directed at them is all the more important because of the stigma and shame attached to rape.

As simple as it sounds, victims and witnesses of atrocities value societal condemnation of such acts against them, and take steps to hold to account those responsible. In his work with survivors of the Nazi concentration camps, Robert Lifton labelled this process the survivor's "struggle for meaning". Lifton observed that concentration camp survivors would "seek something beyond economic or social restitution—something closer to acknowledgement for crimes committed against them and punishment of those responsible—in order to reestablish at least the semblance of a moral universe" (Lifton 1980:123). Conversely, when society is silent on, or denies the experiences of a victim of violence, the damage can be significant. As Martha Minow notes, "For the victimized deserve the acknowledgement of their humanity and the reaffirmation of the utter wrongness of its violation" (Minow 1998:146).

People who have been brutalized in any context need to reach some form of reconciliation with the violence that they have experienced in order to move forward with their lives. For survivors of mass atrocities this is even more true. These are people who have not only been targets of violence themselves, but simultaneously cope with the loss of their loved ones, as well as the disintegration of their communities and the larger society as they have known it.

⁶ Interview with rape victim, Kigali, 2003.

In a post-conflict situation, institutions in society that publicly condemn the brutality can be one means through which the process of rebuilding can start for victims.

A public record documenting the historic truth

The documenting of historical truth is another important function of justice, because history is not simply what happened in the past, but rather the scribe's interpretation of events. In this case, the ICTR serves not only as an arbiter of justice, but also as a documenter of the narrative of the Rwandan genocide. Implicit in the mandate to prosecute persons responsible for serious violations of international humanitarian law in Rwanda is the need to establish an accurate public record of the events of 1994. The court's interpretation of those events, through its judgements, will colour how generations to come will view what happened in Rwanda and who bears responsibility.

If the current trend continues, when the doors of the ICTR close, the judgements from this court will not tell the full story of what happened during the Rwandan genocide. They will not correctly reflect responsibility for the shocking rapes, sexual slavery and sexual mutilations that tens of thousands of Rwandan women suffered.

The jurisprudence as it now stands —with a growing string of acquittals for rape— will, in fact, do the opposite. The record of this tribunal in history will not only minimize responsibility for the crimes against women, but will actually deny that these crimes occurred. A reader of the ICTR jurisprudence will be left mistakenly believing that the mass rapes had little or nothing to do with the genocidal policies of their leaders. This is indeed a serious miscarriage of justice.

Sexual Violence as an Afterthought

There is a reason why 90 per cent of the ICTR judgements do not contain rape convictions and why the number of rape acquittals is double the number of convictions. Over the past decade, sexual violence crimes at the ICTR have never been fully and consistently incorporated into the investigative and prosecution strategy of the Prosecutor's Office over the past decade. For the past nine years, no comprehensive prosecution strategy or precise work plan to properly document and bring the evidence of sex crimes into the courtroom has been consistently pursued.

This is not to say that the Prosecutor's Office has neglected this issue entirely. It has not. Approximately half the cases that the court will hear contain allegations of sexual violence.⁷ There have been some commendable efforts made at various periods, but the problem is that they have not been consistently pursued. The squandered opportunities, the periods of neglect and the repeated mistakes have caused major setbacks to effective investigations and prosecutions of sexual violence crimes.

Ten years after the genocide, full and fair justice for Rwandan women remains unattainable. This is largely because there has been a lack of political will in the Prosecutor's Office to comprehensively investigate or reflect the widespread sexual violence in the indictments, particularly during the tenure of prosecutor Carla Del Ponte. The sporadic attention to gender crimes over the years has sent an implicit message to the investigations and prosecution staff

⁷ Unless of course the rape charges are withdrawn by the current prosecutor, as was done recently in the case of Emmanuel Ndindabahizi in 2003.

that this issue is not important. The lack of sustained attention by the leadership has in turn resulted in a weak institutional capacity within the Prosecutor's Office to investigate effectively and to develop the evidence to prosecute these crimes.

Some cases have moved forward without rape charges, sometimes even when the prosecutor is in possession of strong evidence. Other cases with rape charges have come to trial without adequate investigations to ensure that the necessary evidence had been collected. In a significant proportion of the cases, rape charges have been added belatedly as amendments, as an afterthought, rather than as an integral part of a prosecution strategy that acknowledges that rape was used as a form of genocidal violence. Trial team leaders continue to have differing, and even contradictory, interpretations of legal responsibility for the violence against women and opinions on what legal approaches to adopt in the courtroom.

Despite the rhetoric and the repeated pronouncements expressing a commitment to prosecuting rape, the Prosecutor's Office has never articulated and pursued a consistent prosecution strategy, including how this crime fitted into the genocidal policies of the leaders, nor has it consistently employed effective investigative techniques to fully document the crimes against women. The four prosecutors who have held this office since 1994 have adopted a variety of approaches to this issue. As a result, there has never been one identified work plan pursued consistently by all investigators and trial lawyers in putting together their cases on this issue over the nine years of the court's existence.

Sexual violence against women and girls in situations of armed conflict or systematic persecution constitutes a clear breach of international law. Perpetrators of sexual violence can be convicted for rape as a war crime, a crime against humanity, or as an act of genocide or torture, if their actions meet the elements of each. Leaders in positions of command responsibility who knew or had reason to know of such abuses, and who took no steps to stop subordinates who committed sex crimes, can also be held accountable.

It is therefore part of the mandate of the ICTR, and the job of the prosecutor, to investigate effectively and prosecute this crime with the same seriousness as other international crimes. Accountability for the sexual violence should be integrated into virtually all the cases, given its widespread and systematic use during the Rwandan genocide.

Looking at the prosecutors' record: Lack of political will

In the early days of the tribunal, the first prosecutor, Richard Goldstone, grappled with founding the office and making the first arrests and prosecutions in a post-genocide context of political insecurity, confusion and lack of resources. In the wake of the widespread publicity about prosecuting mass rapes at the International Criminal Tribunal for the former Yugoslavia (ICTY), the South African prosecutor avowed publicly that the sexual violence in Rwanda would be punished. However, these pronouncements were never actually translated into action during his two-year tenure from November 1994 to September 1996. Goldstone never articulated a comprehensive prosecution strategy at the outset to ensure the consistent inclusion of sexual violence charges in the indictments. During his time, the capacity of the investigations team to collect rape evidence remained limited and undeveloped, largely because of a lack of political will among those leading the investigations.⁸ A shortage in

⁸In a March 1996 interview with Goldstone's deputy prosecutor, he said they had not collected rape testimonies because "African women don't want to talk about rape.... We haven't received any real complaints. It's rare in investigations that women refer to rape" (Nowrojee 1996:95).

investigators, budget difficulties and the lack of training for investigators all contributed to spotty investigations. Additionally, inappropriate interviewing methodology and the absence of an organized effort precluded the office from effectively obtaining many rape testimonies. At the prosecutorial level, there was no strategy articulated for the comprehensive inclusion of rape charges in all the cases, and Goldstone neglected to include rape in most of the early ICTR indictments.⁹ Responding to public criticisms, a sexual assaults investigations team was created in July 1996, shortly before his departure.

It was during the three-year tenure of Canadian prosecutor Louise Arbour that more tangible efforts were made to investigate and prosecute gender-based crimes. Under Arbour, the Prosecutor's Office put forth a vision to hold the national leadership accountable. Inspired by Nuremberg, Arbour organized joint trials for the planners and architects of the genocide, who relied on the state apparatus. There were administrative problems during this time, particularly as a result of the logistical challenges that such large-scale trials posed, but there was also a commitment to make the highest goals of the tribunal prevail. This vision extended to the prosecutions of crimes against women. From the time she took office in October 1996, Arbour's initiatives demonstrated greater political will to emphasize responsibility for crimes of sexual violence at the highest levels of authority and to make this issue a policy priority within her office. Sexual violence amendments were added to a number of cases, and rape charges were increasingly included in the new indictments. By the last year of her mandate, all new indictments contained sexual violence charges.

Although Arbour did invigorate the sexual assault investigations team, it should be noted that even then, this team never received the requisite backing required to accomplish its enormous mandate given the breadth of gender crimes committed during the genocide. Furthermore, rape charges were routinely added to indictments, using virtually identical language; on occasion this was done without ample evidence, in anticipation of further investigations. These ultimately never happened, and the legacy is that some trial teams today are struggling to look for more evidence as they begin trial.

These gains were steadily, and perhaps irreversibly, eroded during the four-year tenure of prosecutor Carla Del Ponte, who took office in September 1999. During this time there was no demonstrable commitment to the prosecution of gender crimes, and the most lasting damage to gender justice was done. By the time Del Ponte arrived from Switzerland, staffing and funding were more than double their previous levels. Having indicted and arrested most of the major national figures, and now appropriately staffed and provisioned, the Prosecutor's Office was poised for a rapid acceleration in performance and efficiency.

Yet regrettably, Del Ponte's administration was characterized by a period of extraordinary malaise, low staff morale and crippling inter-office conflicts. Much of the prosecutor's strategy concentrated on more arrests and indictments. The prosecutor's plan to add some 100 new arrests was steadily scaled back as it became clear that the criteria for selection of suspects were poorly conceived and targets of investigation were not prioritized by relative importance or likelihood of arrest, leading to misallocation of human and material resources.

Sexual violence investigations and prosecutions suffered greatly during Del Ponte's time. The momentum generated during Arbour's time dissipated after the first year. There was a steady

⁹ For an excellent quantitative analysis that cites the figures on the trends in sexual violence prosecutions at the ICTR, see Breton-Le Goff (2002:7).

decline in the number of new indictments that contained sexual violence charges, as well as a lack of commitment to adequately develop the evidence in cases where rape charges had previously been included. The sexual assault investigations team was disbanded, and investigations of sexual violence faltered. The proportion of new indictments including sexual violence charges dropped from 100 per cent in 1999–2000 to 35 per cent in 2001–02 (Breton-Le Goff 2002:7). By Del Ponte's final year, none of the new indictments contained rape charges. Rape evidence collected under Arbour's time remained marginalized and was not integrated into the work of the trial teams.

Under Del Ponte, cases moved through trial without rape charges, even when the Prosecutor's Office possessed strong evidence. One example is the Cyangu case (discussed in detail later in this paper), where, despite trial testimony about rape, ample possession of evidence and repeated public promises, the prosecutor never added the rape charges. Another is the trial of three media executives, known as the Media trial, which gave scant attention to the vicious gender propaganda that explicitly encouraged sexual and lethal attacks on Tutsi women. In a bid to comply with pressure to speed up the trials, prosecuting teams were encouraged to cut unnecessary charges. Sexual violence charges were seen to be in that category.

As Del Ponte's contract came up for renewal, she sought to counter public charges that she had neglected this issue. In May 2003 she reinstated the sexual assault investigations team, although its mandate and its coordination with trial teams were never defined. The appointment of a new deputy and chief of prosecutions, both with greater commitment to addressing the shortcomings, began the important process of sending a message through the office that that this issue was once again on the table. Del Ponte's contract as ICTR prosecutor was not renewed.

The fourth and to date final prosecutor, Hassan Jallow from Gambia, took office in late 2003. With pressure from the UN Security Council for the court to finish its work by 2008, this is the final stretch. This is the last chance for the successful prosecution of gender-based crimes at the ICTR, and although some of the lost opportunities may never be recouped, there is still hope that the current leadership will continue to make this issue a priority through the remaining lifespan of the tribunal. One third of the caseload has been completed. Few new indictments are expected.

In the next four years, Jallow is expected to shepherd through what is referred to as the "completion strategy": the trials of the remaining two thirds of the individuals in custody, including some 16 of the top military and government command. In April 2004, half of those cases were in trial, and most of these 20 or so cases contain sexual violence charges. The remainder await trial, and although fewer of these cases contain sexual violence charges, there is a possibility of conducting new investigations to add rape charges, since the trials have not begun.

In Jallow's first year in office, the new prosecutor and the top leadership in the Prosecutor's Office expressed a commitment to renew attention to the issue of sexual violence. There have been a number of preliminary steps to begin to address some of the shortcomings in the investigation that contributed to the unsatisfactory judgements. However, much more work remains to be done in order to make an impact in the courtroom. Although meetings were held in 2004 by the prosecutor to map out a working plan of action for the cases and to set out

the completion strategy, those conversations omitted any serious discussion of the sexual violence prosecutions.

Equally disturbing was the fact that in December 2003, the Prosecutor's Office lost a crucial opportunity by negligently missing the deadline to appeal rape charges in the Kajelijeli case. This was one case where there was a strong possibility of reversing the rape acquittal because of a dissenting opinion by one of the judges.

Sexual violence prosecutions will need to be made a concerted priority by the leadership in the Prosecutor's Office for the remaining years of the ICTR's existence to ensure that investigative efforts are effectively reinvigorated and that all the trial teams move forward with a single, clearly articulated prosecution strategy. If this is not done, it is likely that the growing string of acquittals will continue, and that the jurisprudence of the ICTR will not accurately assign responsibility for the crimes that occurred against women.

Lest it be said that such crimes are too difficult to investigate or prosecute, a look at the UN Special Court for Sierra Leone best illustrates what can be achieved to address this issue by a prosecutor with political will. The court was set up in 2002 by the United Nations to hold accountable those most responsible for the atrocities committed during the Sierra Leonean civil war. Despite significantly fewer resources and staff at his disposal, prosecutor David Crane made a concerted decision that justice would be delivered to Sierra Leonean victims of sexual violence. Under his watch, a prosecution strategy that incorporated sexual violence crimes was devised at the outset *and followed through consistently*. With only 10 investigators in the team, two competent and experienced female investigators were immediately dedicated to sexual assault investigations (20 per cent of the investigations team, as opposed to the ICTR, which has never dedicated more than 1–2 per cent of its investigative team of approximately 100 persons to this issue). After only one year in existence, most of the indictments included sexual violence charges, before the court had even begun to hear the cases. The Prosecutor's Office is planning not only to bring rape charges, but to fully prosecute the sexual violence and to set out arguments that seek to broaden and expand the existing international law by also charging individuals with sexual slavery and "forced marriage".

The dependence on the choice of prosecutor as the determining factor for whether sexual violence charges will be brought is problematic. It signals the need for international justice institutions to be mandated explicitly to ensure that attention is given to the effective investigation and prosecution of sexual violence crimes.

Poor-quality investigations

Proper investigations are the foundation to the success of every case. One of the major stumbling blocks in prosecuting rape at the ICTR is the lack of consistent attention to this issue by the prosecutor's investigations division. There has been a lack of consistent and sustained investigative work: the diligent and painstaking collection of information relevant to prove the cases, coupled with a thorough analysis and processing of witness statements.

Sexual violence investigations at the ICTR have generally been poor in quality and are often not trial-ready when handed to prosecutors. The lack of a comprehensive prosecution strategy for sexual violence has meant that the information collected has been of varying utility to prosecuting attorneys. Investigators have opted to collect statements in areas with a higher

stipend, and so other areas, such as the capital Kigali, have been neglected despite their high levels of sexual violence. This impacts on the ability of the team's prosecuting officials responsible for the Kigali area. Often investigators have opted for quantity, not quality, and witness statements are no more than a paragraph or two long, offering close to no information that could assist a prosecuting attorney. Another problem with witness statements is that most are presented in narrative form, so the attorney cannot distinguish between observations and hearsay. In some cases, attorneys have to travel from Arusha, Tanzania, where the court is based, to Rwanda to conduct their own investigations, sometimes during trial. This defeats the purpose of having an investigations division. Responsibility for this problem lies with the chief of investigations, who has three commanders of investigation under whom the teams are organized.

The lack of coordination and interaction between investigation teams in Kigali and trial teams in Arusha has undermined prosecutions. For example, trial lawyers have to build their case based on a strategy that was designed without input from investigating lawyers. Investigators do not work under direct instructions or the direction of the prosecuting lawyers. There is limited contact and coordination between the prosecuting attorneys and the investigators.

One of the challenges investigators face in collecting sexual violence evidence is a lack of skills in how to obtain such evidence. Investigators receive no training on interviewing methodology for rape victims, and the majority of the investigators are male. Often investigators come from backgrounds where they have not had any experience with this issue, or they believe this is not a crime that deserves serious attention. Many investigators, though fully equipped with the necessary skills to investigate cases, lack training and direction on how to elicit information about sexual violence from witnesses. In 2003, there were approximately 100 investigators, of whom approximately five were women. When the sexual violence team has been in existence, it has never consisted of more than 10 individuals. At no time has the ICTR ever dedicated more than approximately 1 per cent of its workforce to the sexual assaults team, a sharp contrast with 20 per cent at the UN Special Court for Sierra Leone.

Generally, when investigators start working at the ICTR, they receive little or no systematic training focused on their substantive responsibilities. In particular, there is no standard training to develop skills in sexual violence investigations, and all knowledge is based on individual experience and initiative developed on the job.

Prosecuting with inadequate evidence

The years of varying levels of neglect with regard to collecting sexual violence evidence have meant that there are gaps in presenting the evidence at trial. At the prosecution level, there are concerns among trial lawyers that they do not have strong evidence to proceed with rape charges in some cases. This is not the situation for all cases, but it is true particularly for the important cases, such as those of top military and government officials, where the command responsibility link is more difficult to prove. This leaves the trial lawyers in the difficult position of either deciding to drop rape charges as the case begins to move forward, or prosecuting the case with weaker evidence, risking an acquittal. Unless more work is done by the Prosecutor's Office, what we are likely to see are rape convictions at the level of the local authorities, but not at the top levels of government and military. There are some committed investigators and lawyers in the Prosecutor's Office who are trying to address this issue, but

their efforts reflect an individual initiative rather than a comprehensive institutional commitment.

Given this sad state of affairs, it is not surprising that prosecution lawyers are not even thinking about a prosecution strategy that tries to broaden the international jurisprudence on sexual violence. Innovative legal strategies to expand the jurisprudence by prosecuting rape as sexual slavery or torture, for example, have not occurred. Again, this contrasts with the situation at the UN Special Court for Sierra Leone. Here, the prosecutor is committed to expanding the international law on sexual slavery and is attempting to break new ground, for example, in charging individuals with forced marriage.

Ignoring the evidence: The injustice of the Cyangugu case

Prosecution lawyers sitting in the courtroom in February 2004 were outraged when the ICTR judges handed down two acquittals and a sentence of only 27 years against three officials. The former Minister of Transport Andre Ntagerura, prefect Emmanuel Bagambiki and military commander Samuel Imanishimwe were on trial for massacres and other crimes committed in their area of Cyangugu. In acquitting Ntagerura and Bagambiki, the judges noted that the prosecutor had failed to establish guilt beyond a reasonable doubt. A strong statement from the Rwandan government followed shortly afterwards, and genocide survivors in Cyangugu demonstrated against the verdict. “The acquittals are a miscarriage of international justice,” Edda Mukabangwiza, Rwanda’s Minister for Justice, said, calling the judgement “unsatisfactory and shocking” (One World n.d.).

Behind the public denunciation of the Cyangugu acquittals lies another miscarriage of international justice—equally unsatisfactory and shocking—which should evoke as much outrage. Long before the judgement was delivered, the prosecutor and the judges took steps that blocked the rape victims of Cyangugu from ever seeing justice from the ICTR.

Weak investigations that result in inadequate evidence to prosecute sexual violence crimes are problematic. However, even more damning are situations where the prosecutor has strong evidence and still does not prosecute the rape charges. The Cyangugu case is one example where rape charges should have been brought, but never were, even though the prosecutor had evidence. This example highlights not only the lack of transparency and accountability in the prosecutorial decision-making process at the ICTR, but also the lack of commitment to justice for rape victims.

At the outset, no sexual violence charges were included in the Cyangugu case. However in 1999, around the time that the sexual assaults team was making a strong push to collect evidence of sexual violence, the Prosecutor’s Office came across a number of statements by rape victims. The statements of these women contained strong evidence, particularly against military commander Imanishimwe, who had not only raped women himself, but also killed a woman by inserting a pistol into her vagina and shooting her to death. Much later during the trial, witnesses who testified on other matters also talked about the widespread sexual violence during the massacres in Cyangugu prefecture and confirmed that women were taken as sexual slaves and repeatedly raped by soldiers.¹⁰

¹⁰ Witness LBI’s testimony was heard on 26 October 2000 and witness LAM was heard on 2 November 2000.

One trial attorney said, “We had collected strong evidence. The women of Cyangugu were begging us to tell their story.” The rape victims in Cyangugu, through the Association of Widows of the Genocide of April 1994 (AVEGA-Cyangugu), organized themselves to help the ICTR staff to collect the testimonies and pledged to come forward and testify. AVEGA-Cyangugu issued a public statement beseeching the ICTR not to ignore the rape that had occurred in the prefecture:

In the prefecture of Cyangugu, as in other parts of the country, women and girls were subjected to rape during the genocide of April 1994.... The women victims of rape and sexual violence were wounded with respect to their dignity, self-love, and sense of decency. They swallowed these atrocities in the presence of their children, their husbands in short, the public eye. These women also contracted many sexually transmitted diseases, even AIDS. The rapes were committed by many men successively, sometimes known, and often unknown to the victim. The number of rapes remains unknown in all of the prefectures, because sometimes after the rapes the women were killed. The testimony of a rape survivor imprisoned in a military camp commanded by Imanishimwe: she found a naked cadaver of a girl she knew well. One hundred and thirty-two cases of rape have been reported, and the list is getting longer All of these women are waiting for justice to be served in order for them to feel at least some sense of moral release The members of AVEGA forcefully condemn the acts of rape and sexual torture that were perpetrated against the women and girls of Cyangugu, and ask the ICTR to establish criminal and civil liability for the leaders of the genocide in Cyangugu: Bagambiki, Imanishimwe and Ntagerura. It would be unfortunate for the ICTR not to condemn the leaders of the genocide in Cyangugu on charges of rape.

(AVEGA n.d.)

By September 1999, a motion to add sexual violence charges was drafted and ready to be submitted to the court, but because of personnel problems within the Prosecutor’s Office, the prepared amendment sat unfiled for some months before being submitted. The prosecutor asked the court to add charges of rape as a crime against humanity against both Bagambiki and Imanishimwe. The late arrival of the request to amend was reportedly not received kindly by the judges, who viewed it as yet another of many delays by the prosecutor.¹¹ Shortly afterwards, Del Ponte was called in for a meeting by the judges.

In December 1999, following her meeting with the judges, the prosecutor, without explanation, ordered her team to withdraw the rape amendment, which had yet to be ruled on by the judges. At that meeting, Del Ponte reportedly said when announcing that the rape charges would be dropped, “I can do this because I am a woman. If I were a man, there would be a fuss.” As a result, was it by capitulating to pressure from chambers in the interest of accommodating scheduling that Del Ponte denied the rape victims of Cyangugu justice? On 14 February 2000, the prosecutor withdrew her request to add rape charges.

In the Cyangugu case, the evidence to prosecute rape was available. The prosecution would have only needed to formally amend the indictment to put the accused on notice. Unfortunately, rather than pressing to retain the amended indictment in the interests of justice, the prosecutor opted to withdraw the application. Defenders of the decision contend that the amendment to add sexual violence charges would have delayed the trial, a violation

¹¹ The case was heard in Trial Chamber III with judges Lloyd Williams (presiding), Yakov Ostrovsky and Pavel Dolenc.

of the accused's right to a fair trial. However, given the availability of the evidence in the prosecutor's possession, it is unlikely that amending the indictment at that point would have caused serious delays to the trial or compromised the rights of the accused, since the trial had not even begun.

The trial began on September 2000. In October and November 2000, two witnesses, LAM and LBI, gave testimony of the sexual violence that had occurred. On 13 February 2001, when a third witness, LBH, came to the stand, the prosecuting team asked questions about the evidence of rape and sexual assault during the direct testimony. The defence objected. The judges barred the rape testimony on the grounds that it had not specifically been pleaded in the indictment. The prosecuting attorney unsuccessfully argued that the crime of rape was an inherent element of the existing genocide charges against the accused, and therefore did not need to be brought as a separate rape charge. However, presiding Judge Lloyd Williams ruled, "the prosecutor cannot introduce evidence in court of a crime that is not charged ... That will be inherently unfair and prejudicial." He added that the charge could not be brought half-way through the proceedings as an integral part of genocide-related crimes. "The accused have a right to be informed of concise facts of charges as stipulated in the statutes," Judge Williams said. All references to rape allegations were ordered struck from the official records (Chhatbar 2001).

The arbitrariness of the judge's denial was highlighted by the fact that in February 1998 the judges in the case of Akayesu, presented with similar circumstances, had ruled to allow the testimony, citing "justice" as their reason. In Akayesu, the trial chamber allowed the indictment to be amended, following testimony of sexual violence during the course of the trial, after the presiding judges concluded that it was "in the interests of justice to present evidence of sexual violence" (ICTR 1998).

On 1 March 2001, in an attempt to provide an opening to the court and the prosecutor to reconsider the decision to omit rape charges in the Cyangugu case, the non-governmental Coalition for Women's Human Rights in Armed Conflict Situations filed an *amicus curiae* motion before the court. They asked the judges to exercise their supervisory authority under rule 25 of the ICTR statute to call upon the prosecutor to review the evidence presented in the case and amend the indictment to include sexual violence charges in light of the testimonies of witnesses LAM and LBI. In concluding, the Coalition noted that the court was sending:

a message to the Rwandan women ... that these atrocities are not sufficiently grave to warrant the attention of the Tribunal The failure to add charges of sexual violence in the indictment, where there has been clear evidence at trial constitutes a denial of justice.

(Meillier 2001)

The court denied the application. The judges noted that the issue was not before the court.¹²

¹² In its submission, the Coalition argued that the chamber had misapplied the relevant standard inherent in rule 74, thereby limiting the scope of the rule in future cases by appearing to prohibit *amicus* intervention in relation to issues that were not already under consideration by the trial chamber. This would thereby prevent an intervenor from bringing new or unconsidered issues to the attention of the trial chamber, thus having a deleterious effect on the ability of under-represented groups to participate in the development of international law. See ICTR 2001. For the *amicus curiae* see www.pili.org/library/brief_bank/Documents/Cyangugu%20amicus%20brief.doc

Even worse was the response of the prosecutor. Instead of supporting the *amicus curiae* application in order to use it as an opening to ask the court for leave to file amended rape charges (which had been done in the Akayesu case, resulting in that groundbreaking judgement), the prosecutor filed a response on 7 September, calling on the court to deny the *amicus curiae*. Del Ponte's position was all the more puzzling given that only months before, in a media interview in *Arusha* on 12 April, she had announced that a second indictment would be filed against those on trial, focusing strictly on the sexual violence committed in the prefecture of Cyangugu (Cruvellier 2001). Additionally, in the prosecutor's response of 8 May to the filing of the *amicus curiae* application, promises were again made publicly to the women of Cyangugu: "The Prosecutor advises that as soon as possible, she intends to file new indictments against accused Emmanuel Bagambiki and Samuel Imanishimwe containing rape charges." The prosecutor never acted on her promises. The Cyangugu case closed without rape charges ever being brought.

The prosecutor's actions have not gone unnoticed among the women of Cyangugu. One rape victim in Cyangugu said:

We helped the ICTR [prosecutor's staff] to find the rape victims in this area. They even interviewed a rape victim who was HIV positive dying in her hospital bed. We are angry and disappointed that the ICTR, after making us talk about all the humiliating things that were done to us, they did not bring rape charges. What has the ICTR really done since it started? It has cared better for the *Interahamwe* [the civilian militia force that carried out much of the killing]. If the tribunal does not change its approach to give value to women, then it's not worth it for us to work with them. Women have so many other things to worry about. Why should we waste our time with the tribunal? Many women have AIDS and are starting to die. Today we buried a woman. Last week, another. Last month, another. Women here have so many problems, and no one to go to.¹³

In Cyangugu's Duhozanye Association, a women's association for rape survivors, only 22 of the founding members are still alive. Eight have died of AIDS. Each year, this women's group decides how to divide its meagre resources between hospitalization costs for its members and the purchase of coffins (Nduwimana 2004). These women will now all go to their graves without having received the satisfaction of justice from the ICTR.

Let history show that Del Ponte and the judges opted to prioritize scheduling over justice. The brutal rapes and sexual slavery committed against these women will never be put in the public record, let alone punished by the ICTR. The silence the women perceive by the ICTR around the sexual violence that devastated them sends a message that this is a lesser crime, not worthy of attention by the international community. Given the stigma attached to rape in Rwandan society, the international community's silence further amplifies the societal constraints that women are already under to muffle their voices about what happened to them. The continued silence and impunity surrounding these rapes has been facilitated by the ICTR.

No appeal of rape acquittals: a missed opportunity in Kajelijeli

Juvénal Kajelijeli, the mayor of Mukingo commune during the genocide, founded and led the civilian militia *Interahamwe* in his area. He was charged by the ICTR with 11 counts,

¹³ Interview with rape victim, Cyangugu, 4 February 2002.

including rape. On 1 December 2003 Kajelijeli was convicted for genocide, but acquitted of rape.

This was a perfect case to appeal. The rape acquittal hinged on the credibility of a witness who had testified about the sexual violence. Two of the judges had not accepted the witness as credible, but one of the judges had written a strong dissenting opinion regarding the rape acquittal. The fact that there was a dissenting opinion on the rape count boded very well, and offered a strong basis upon which to appeal the acquittal.

The Prosecutor's Office decided to appeal. It filed a notice asking for an extension of time to file an appeal (required within 30 days of the judgement) on the grounds that the dissenting opinion had been delivered in French and had not been translated into English. (In keeping with the rules of the ICTR, which allow any submission to be made in either English or French, the judges can choose to deliver their judgements in either language. In this case, the judgement of the two assenting judges was delivered in English, and the dissenting judgement of the third judge was delivered in French.) The appeals court denied the request on 17 December on the grounds that the office was expected to function equally in English and French, the two languages of the ICTR. The prosecutor was required to file by 31 December 2003.

The Christmas break came and went. Staff went on holiday. The deadline passed. Nothing was filed. The Prosecutor's Office inexplicably missed the deadline, thus waiving its right to appeal. Finally realizing it had failed to file on time, it appealed the denied motion on 5 January 2004.¹⁴

Clearly annoyed with the prosecutor's apparent negligence, the Appeals Chamber denied outright the request. Chastising (and rightly so) the Prosecutor's Office for not making "reasonable efforts to monitor the status of that request before the expiration of the thirty-day period for filing a notice of appeal", the denial was given on 23 January 2004.

The negligence of the Prosecutor's Office in not ensuring that the deadline to appeal was observed in the Kajelijeli case is yet another example in a series of squandered and lost opportunities to provide justice to rape victims. It is unforgivable and negligent, particularly after the need for vigilance on this issue has been brought repeatedly to the attention of the Prosecutor's Office.

The Appeal Chamber's pique is understandable. It clearly wanted to send a strong message to the prosecutor that these sorts of careless transgressions would not be tolerated. It is clear that the Appeals Chamber's decision was made solely as a punitive gesture to the prosecutor, rather than based on any real delay that the late filing would have caused to the appeal. At the same time as the prosecutor's application for an extension was denied, the court granted Kajelijeli's lawyers an extension of 45 days. It was not as though the Prosecutor's Office was

¹⁴ Rule 116 allows the Appeals Chamber to grant a motion to extend a time limit for "good cause". In its application, the prosecution argued that it did not become aware of the 17 December 2003 decision until 5 January 2004 and that the application should be accepted to ensure a fair and expeditious appeal hearing, since the prosecutor would otherwise be precluded from pursuing several meritorious and significant avenues to the case and to the jurisprudence of the ICTR generally; and that such a result would be drastically disproportionate to the failure of the prosecution to file the notice of appeal in time. Given the short delay between the day the notice of appeal was ordered to be filed, namely 31 December 2003, and the filing of the motion on 5 January 2004, the prosecutor argued that no prejudice had been caused. Available at <http://www.icttr.org/default.htm>.

holding up the appeal. The judgement of the two assenting judges that had been delivered in English still needed to be translated into French, and the court ruled that the appeals would not begin until 45 days after the Registry provided the French translation to the defendant on 11 February, to provide him with reasonable time to read the judgement. The Appeals Court later agreed to a further delay of a week, granting the Registrar's Office an extension to produce the translation of the dissenting judgement by 16 February.

The appeals judges ruled that it was "in the interests of justice" to grant the extension of time to Kajelijeli. But in punishing the prosecutor, they ultimately have succeeded only in denying the possibility of justice to Kajelijeli's rape victims. Can they truly say that their decisions have been made "in the interests of justice"?

Justice: A Process, Not Just a Judgement

Justice cannot only be measured by judgements. It must be reached through a process that is fair and that upholds the rights and the dignity of those who come before it. This is particularly of concern for international justice mechanisms that seek to provide redress to conflict-affected victims who have been degraded, demeaned and dehumanized. The utmost care must be taken to ensure that international justice mechanisms adopt humane processes that do not in any way further contribute to their suffering. One of the goals of international justice should be to restore dignity and humanity to victims who have been stripped of these. The experience of testifying at the ICTR should not be a dehumanizing and disempowering experience. If we do injustice to rape victims in the process of providing international justice, then we are doing wrong. Attention to the issue of process is critical to the ICTR's ability to obtain strong witnesses, to undertake effective investigations and prosecution of crimes of sexual violence, and to ensure a more effective witness protection programme.

Unfortunately, little about the institutional culture of the ICTR places the well-being of the genocide victims/witnesses foremost. The witnesses are treated as cogs in the larger machine rather than placed central to the process. Rwandan women, particularly those who have testified at the ICTR, speak about a number of aspects of the trial process at the ICTR that they believe are structured without regard to the needs of the rape victims.

Information and follow-up

Little or no information about the trials at the ICTR reaches the majority of Rwanda's population at large. In large part, the location of the ICTR in Arusha, Tanzania, makes it impossible for the vast majority of the Rwandan population to observe a trial or to see the ICTR at work. The distance, both physical and virtual, that divides the ICTR from the ordinary Rwandan has diminished its impact within the society.

When the ICTR cases first opened, it was easy to follow a trial. The chambers heard one case at a time, and one could follow chronologically the progression of a case as it was argued over the months. At a certain point, responding to criticisms that the trial process was moving too slowly, the ICTR responded by assigning a number of trials to each trial chamber in order to increase the total number of trials in progress. Many of these trials have opened, only to be followed by long adjournments. The same trial chamber is hearing a different case on different days. What this has meant is that on any given day, it is extremely difficult to know which chamber is hearing which case at which time. Cases are cut up; they start and stop. If you are a Rwandan seeking to follow a trial from your home area, for example, it is very difficult to know when it will be heard and at what stage it will be.

The ICTR has made some efforts in response to the need for outreach and information in Rwanda. A large building with the ICTR logo painted on its side sits in the heart of Kigali, with videotapes and printed information in English and French. This type of initiative is aimed at the small, literate middle class that would have an interest in the ICTR's progress. However, little or no outreach is conducted by the ICTR in the Kinyarwanda language in the outlying areas. For those Rwandans who have testified, this silence is frustrating.

The situation is not much different for those who provide information or testimony to the tribunal. Rwandan women's groups and rape victims who have sought to co-operate with the ICTR complain that their contact with the ICTR is minimal and lacks follow-up. One witness said, "When they need us, they treat us like eggs, and when they finish with us, they throw us in the garbage." In particular, they complain that they have little or no regular information or updates about what happens in the cases they help the Prosecutor's Office with, and that contact with the Prosecutor's Office in Kigali is difficult.

The women who testify are treated like blinkered horses. They are brought to Arusha when it is time to testify. While in Arusha, because of safety concerns, they are unable to watch the trial and are kept in safe houses for the duration of their stay. While this is important, it does mean that their understanding of where and how they fit into the trial is limited. Although they are shown the empty courtroom by the witness protection staff before they testify, their first encounter with the trial process is when they appear on the witness stand. As soon as their testimony is completed, they are sequestered once again, and returned promptly to Rwanda. The trial lawyers, who are consumed by the task of assembling and managing their cases, provide little or no information about the trial process to them. And after returning to Rwanda, these women hear little or nothing about what has happened in the trial.

The one exception was after the first trial of Jean Paul Akayesu, where the Prosecutor's Office returned to Taba and held a public town hall meeting to explain the judgement. This clearly contributed to a sense of accomplishment and empowerment expressed by one of the Akayesu rape witnesses who felt that she had made a contribution:

I am still ready to testify again to tell the world what happened. It is important for the world to know. Thousands were raped and don't dare say it. We gave courage to others who haven't spoken. We dared to speak, to say what happened.¹⁵

However, the ICTR has not always followed up to explain the outcome of a judgement to the victims. The lack of information and silence further contribute to the sense of alienation from the ICTR and its irrelevance to the ordinary Rwandan. Further, among those rape victims who testify, it fosters a feeling of having been used. One Akayesu witness who had testified said: "Our tribunal gives us nothing—not even a thank you."¹⁶

Once again, the comparison with the UN Special Court for Sierra Leone is stark. In Sierra Leone, when the court talks about outreach, it does not mean a big building or documents. In Sierra Leone, outreach is the prosecutor and a Krio interpreter travelling to remote outlying areas where they address the population in the local language and explain in simple, comprehensible language what the court is doing. Prosecutor David Crane has visited and addressed people in every province in the country. At all of these meetings, he talks about

¹⁵ Interview, rape victim, Taba, 2003.

¹⁶ Interview, rape victim, Taba, 2003.

how his mandate is to provide justice to his client, the Sierra Leonean people. While the ICTR prosecutors have periodically travelled through Rwanda, the fact that they are not based in the country limits their ability to do this. It is rare for the ICTR prosecutor to travel within Rwanda to explain, through a Kinyarwanda interpreter, the work that is being done. ICTR prosecutors do not speak about being accountable to their client, the Rwandan people. As a matter of policy, the Prosecutor's Office does not always return to an area to explain to the local population what judgement has been rendered in a case and the implications of it. The tribunal does not pursue low-cost outreach efforts which target the average Rwandan, a Kinyarwanda-speaking, small-scale cultivator, with no literacy skills. This policy could readily be changed. For example, the ICTR could employ a Rwandan in each prefecture where a case is being heard, who could hold periodic town meetings in key areas to update the residents about developments in the case.

Additionally, building a relationship of trust with local survivor and women's organizations in Rwanda is another important way to reach a wider Rwandan constituency. The ICTR continues to have a relationship fraught with tension and distrust with Rwandan survivor and women's organizations, which periodically accuse the ICTR of disregard and disrespect for the genocide survivors. This tension is in part manipulated and encouraged by the Rwandan government, which seeks to withhold genocide witnesses whenever the ICTR considers bringing charges against its Rwandan Patriotic Front (RPF) officials for crimes they committed as they swept through the country ending the genocide. However, the government taps into a genuine discontent among the survivor community about their relationship with the tribunal.

Agency

Agency is the process through which people are empowered in order to make fully informed decisions about things that affect them. When deciding whether to testify before the ICTR, survivors have to weigh the risks and benefits in order to make their decision. Many of the survivors, however, are not being fully informed by the Prosecutor's Office in order to make this decision. Most of the witnesses who have testified had initial contact with the witness management team (which was abolished in 2003) of the Prosecutor's Office. These pre-trial witnesses are informed by the Prosecutor's Office that their identity will be kept confidential when they testify. That is true: when they come to Arusha, they testify behind a curtain, they are given a pseudonym, and their names are never publicly disclosed.

What they are often not told is that the rules of the court require that the defence know the names of the witnesses who are testifying against the accused. This means that often, by the time witnesses return after testifying in Arusha, their names are known in their home areas as people who have testified at the ICTR. Although it is a violation of the rules for the defendant or defence counsel to disclose the names of witnesses, the reality is that these names get leaked back to Rwanda.

This can have a devastating impact on the witness. First, it is a betrayal of the trust that the witness has placed in the ICTR as an institution. Second, it puts the witness at risk of reprisal for having testified; all the rape victims interviewed who had testified talked about varying levels of threats directed at them upon returning from Arusha. Rape victims are often widows living alone and are even more vulnerable to violence. Third, because of the stigma attached to being a rape victim, a number of the women who have agreed to testify have not notified their families or their intimate partners that they were raped during the genocide. One rape

victim, who testified based upon the promise that her identity would be confidential, was exposed as a rape victim upon returning after testifying. When her fiancé discovered she was a rape victim, he abandoned her. For many of these rape victims, their ability to rebuild their lives in a post-genocide Rwanda is dependent on their marriageability.

There is no easy answer to this problem. The due process rights of the defence require that the defendant know who is accusing him or her. It is close to impossible to prove the leak came from the defence in order to prevent or punish this breach. However, there should be full disclosure to witnesses and an explicit warning provided by the Prosecutor's Office that their identity could be leaked. Rape victims should be given the agency to make their decision to testify based on the full information. When this issue was raised with the head of the witness management team in 2003, his response was, "If we tell them this, they won't testify for us." The Prosecutor's Office cannot opt for expediency in securing witnesses by misleading them. If the cost of full disclosure is that the Prosecutor's Office loses some witnesses, then so be it. It is more important that rape survivors understand fully the risks that they take and choose to come forward fully informed. They should not later find themselves unwittingly vulnerable and exposed, as has been the case.

An enabling court environment: The laughing judges

It requires significant courage for a rape victim to come forward and to publicly speak about the sexual assault against her. The world over, rape victims have difficulty in speaking out because of the stigma attached to being a rape victim and the taboo of speaking publicly about sex. Often, women who allege rape are subjected to disbelief, public scrutiny of their sexual past, or shamed for admitting they have been raped.

It is important that judges create an enabling courtroom environment where rape victims are treated with sensitivity, respect and care when they come forward to testify. At the ICTR, rape victims have been harangued and harassed on the stand by defence counsel without intervention by the prosecution lawyers or the judges. Because many of the trials are joint trials with numerous defendants, rape victims are often subjected to hours, days and weeks on the stand, being cross-examined by each defence counsel, sometimes going over the same questions again and again. A prosecution lawyer noted that a rape victim whom she led on the stand was asked 1,194 questions by the defence counsel in the Butare case (a case with six defendants). While the defence clearly has a right to cross-examine witnesses, care should be taken by judges to ensure that questioning of rape victims is not excessively or gratuitously repetitive. If rape charges are not being brought against all the defendants in a joint trial, the cross-examination of the sexual assault should be limited to those charged with rape.

Judges at the ICTR have shown a reluctance to limit or restrain excessive cross-examination of rape victims. This has meant that some rape victims who have testified leave the stand feeling violated for a second time, expressing outrage at the fact that they had to endure days of repeated, detailed questioning about the intimate details of the rapes they endured.

In one particularly egregious case in the Butare trial, the judges guffawed during the testimony of a rape victim. On 31 October 2001, the judges suddenly burst out laughing while witness TA, a victim of multiple rapes during the genocide, was being cross-examined by defence lawyer Duncan Mwanyumba. As lawyer Mwanyumba ineptly and insensitively questioned the witness at length about the rape, the judges burst out laughing twice at the

lawyer while witness TA described in detail the lead-up to the rape. Witness TA had undergone a day and a half of questioning by the prosecutor, before being put through a week of cross-examination by the counsel of the six defendants. One of the more offensive questions put by defence lawyer Mwanyumba included reference to the fact that the witness had not taken a bath, and the implication that she could not have been raped because she smelled. Other questions asked were, “Did you touch the accused’s penis?”, “How was it introduced into your vagina?” and “Were you injured in the process of being raped by nine men?” To which witness TA responded, “If you were raped by nine people, you would not be intact.” The three judges—William Sekule (Tanzania), Winston Maqutu (Lesotho) and Arlette Ramaroson (Madagascar)—never apologized to the rape victim on the stand, nor were they reprimanded in any way for their behaviour.

In 2003, witness TA agreed to speak with me about her experience. She said that originally she had agreed to testify when she was asked because she thought that if she refused the strangers (the ICTR investigators), they would “think I had lied and nothing would happen to those in jail”. Witness TA lost her whole family during the genocide. She said:

My parents, my brother and my sister were killed. I’m all alone. My relatives were killed in a horrible fashion. But I survived—to answer the strange questions that were asked by the ICTR. If you say you were raped, that is something understandable. How many times do you need to say it? When the judges laughed, they laughed like they could not stop laughing. I was angry and nervous.

When I returned, everyone knew I had testified. My fiancé refused to marry me once he knew I had been raped. He said, you went to Arusha and told everyone that you were raped. Today I would not accept to testify, to be traumatized for a second time. No one apologized to me. Only Gregory Townsend [the ICTR prosecuting lawyer] congratulated me after the testimony for my courage. When you return you get threatened. My house was attacked. My fiancé has left me. In any case, I’m already dead.¹⁷

In a society such as Rwanda, where women are valued highly for their roles as wives and mothers, witness TA’s reintegration into society was very much predicated on her marriageability. The exposure of TA’s status as a rape victim following the publicity that surrounded the incident resulted in her fiancé breaking off their relationship. A split second of careless laughter by the ICTR judges destroyed this woman’s best chance to rebuild her life.

Post-trial protection

While the ICTR provides good protection for its witnesses in Arusha during trial, there is little sustained follow-up to ensure the protection of witnesses post-trial. Witnesses continue to complain of harassment in the form of verbal or other threats they receive after testifying in Arusha. However, the ICTR continues to assert that it does follow up, but places responsibility for post-trial protection with the Rwandan government. The Rwandan government in turn blames the ICTR for not providing adequate post-trial protection. Clearly, there needs to be some co-ordinated effort by the government and the ICTR to ensure protection to witnesses post-trial. At the moment, there is no adequate tracking system to accurately know how many witnesses have faced harassment, what sort of threats they are receiving, and in which parts of the country this is occurring.

¹⁷ Interview, rape victim, Butare, 2003.

Can't We Do Better?

After nine years of existence, the ICTR has only a few more years before its anticipated closure in 2008 (2010 for the Appeals Chamber). It is discouraging to see how little justice this international court has delivered to rape victims so far, and difficult to hear the angry and disappointed voices of the Rwandan women.

Of course, it is never too late to attempt to rectify the situation. Efforts must continue to be made by the ICTR leadership to address its treatment of gender crimes cases. At this late stage, however, it remains to be seen whether the institution will ever manage to overcome completely the seriously eroded trust and confidence, and be regarded as an institution that can deliver redress to rape victims.

The world over, rape victims commonly encounter difficulties in the process of securing justice through the courts. Women are often deterred from coming forward to report sexual violence because of the stigma. In many countries, national laws mischaracterize rape as a crime against honour or custom, rather than a crime of physical harm to the victim, thus minimizing its seriousness. Negligent investigative work by police investigators and procedural hurdles frequently impede the ability of a rape victim to prosecute. Even when sexual violence crimes are reported, investigators and prosecutors often do not treat them seriously, and excuse the actions of rapists or blame the victim. More often than not, a woman's honour is put on trial rather than the alleged rapist's actions. Women who allege rape are commonly subjected to disbelief, public scrutiny of their sexual past, or shamed with the stigma of being "dishonoured" or "tainted" for admitting they have been raped. Legal redress and a judicial process that respects the dignity of the rape victim are hard to come by in most countries.

There has been an implicit assumption on the part of many in the legal community that the United Nations—tasked with securing universal respect for human rights and fundamental freedoms of individuals throughout the world—would ensure, as a priority, that the justice mechanisms it created would neither overlook sexual violence crimes nor allow a judicial process that marginalized, dehumanized or demeaned rape victims. Yet somehow—despite the statements about the need for justice for rape victims that are periodically made by tribunal officials—the United Nations has managed to transpose some of the same crushing limitations and biases that rape victims encounter in their national jurisdictions to the international legal system it administers.

The international legal community must ask itself: are these international judgements really for the survivors of war and genocide, or are they for some more lofty, albeit important, cause of "international justice"? And most importantly, are we expanding and strengthening international law on sexual violence at the expense of the rape survivors of genocide and war who come forward to testify?

In this era of international justice, concerted efforts must be made to learn from the experiences of the Rwandan rape victims and witnesses in order to ensure that we do not continue to short-change rape victims at the permanent International Criminal Court or other ad hoc tribunals that may be set up by the United Nations. International justice must be measured not only by the judgements rendered, but also by the manner in which these rulings are arrived at. Let us reconsider our notion of international justice from the perspective of where the witnesses are sitting.

The ICTR has weathered the growing pains of an emerging international institution and offers lessons to other international justice initiatives which have sought to better provide justice to rape victims. The UN Special Court for Sierra Leone has, from the outset, incorporated gender investigations as a priority into its work, and has charged sexual violence more comprehensively. The permanent International Criminal Court, established by the United Nations in 2003, has pledged a commitment to gender-inclusive justice at the highest level. We would do well to ensure that the mistakes of the ICTR in administering gender justice are never repeated. The voices of the Rwandan women are a reminder to us of why we set up these institutions, and provide direction about how we should administer international justice. Let us listen to them.

As we continue to build on the gains from the ad hoc tribunals, let us not continue to treat rape victims with the callous disregard that has often characterized the ICTR experience. Let us not deny rape victims international justice. And when we do bring rape cases, let us make sure that the investigative and judicial process is conducted effectively and in a manner conducive to the victim's dignity, comfort and safety. Let us not build international justice at the expense of the victims, who can least afford to make more sacrifices.

A large proportion of the genocide survivors are women, and if justice can best serve the living, surely the international community has a responsibility—more than that, a duty and an obligation—to effectively and vigorously prosecute those responsible for the mass rapes that occur routinely in conflicts around the world.

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