

DEALING WITH RAPE AS A HUMAN RIGHTS VIOLATION UNDER GACACA JUSTICE SYSTEM

Submitted in partial fulfilment of the requirements for the LLM
Degree in Human Rights and Democratisation in Africa
Center for Human Rights, University of Pretoria

by

Kamashazi Donnah

Prepared under the Supervision of
Dr. Baker G. Wairama

Faculty of Law
Makerere University
October 2003

DECLARATION

I KAMASHAZI Donnah, declare that the work presented in this dissertation is original. It has never been presented at any University or Institution. Where other peoples' work has been used, references have been provided and in some cases quotations made. It is in this regard that I declare this work is my own presented in partial fulfilment for award of a Masters of Law Degree (Human Rights and Democratisation in Africa).

Signed:.....

Date:.....

Supervisor: DR. G. Baker Wairama.

Sign:.....

Date:.....

ACKNOWLEDGEMENTS

First of all, I take pride in thanking God almighty for having enabled me to do this course, which was challenging; but by his grace, I approached every bit of it with courage and wisdom.

Secondly, special thanks go Mary and the late Paul, my beloved parents, who took good care of me since my conception and did everything that was possible to bring me up and educate me. You are always appreciated.

My special gratitude also goes to my husband, Mr. Gasana Emmanuel who not only encouraged me in my career as a lawyer but also went to a great length of keeping the family alone and safe while I was away pursuing this masters degree. My love, your care and courage are appreciated.

Special thanks go to the LLM (2003), which became my second family; Special thanks go to Priscilla Ankuti, Abiola Ayinla and Leda Limann who were my source of joy and inspiration throughout the course.

Special thanks to my supervisor, Dr. Baker G. Wairama for his patience and guidance throughout this research. His comments, suggestions and encouragement are so much appreciated.

I am indebted to the staff of the Center for Human Rights. Professor Michello Hansungule, thank you for inspiration and wisdom throughout my stay in Pretoria. Martin and Norman, your support was a fundamental contribution. May God bless you.

I am greatly indebted to the Center for Human Rights Pretoria for both academic and financial support without which my dream would not have come true.

DEDICATION

This book is dedicated to my children, Edwin and Maureen, who in spite of their tender age seemed to appreciate the importance of my absence throughout the year. My babies, your existence is always my motivation for working hard!!...

LIST OF ABBREVIATIONS

ICTR:	International Criminal tribunal for Rwanda
ICTY:	International Criminal Tribunal for Former Yugoslavia
UN:	United Nations
UNIFEM:	United Nations Development Fund for Women
ICCPR:	International Covenant on Civil and Political Rights
G.A:	General Assembly
OG:	Organic Law
CEDAW:	Convention on Elimination of All Forms of Discrimination Against Women
S.C:	Security Council

TABLE OF CONTENTS	Pg
DECLARATION.....	i
DEDICATION.....	ii
ACKNOWLEDGEMENT.....	iii
LIST OF ABBREVIATIONS.....	iv
 CHAPTER 1 GENERAL INTRODUCTION	
1.1 Background of the study.....	1
1.2 Statement of the problem	2
1.3 The objective of the study	4
1.4 Justification of the study.....	4
1.5 Hypothesis.....	5
1.6 Methodology.....	6
1.7 Limitations.....	7
1.8 Literature review.....	7
1.9 Scope.....	9
 CHAPTER 2	
2.1 Definition of rape.....	9
2.2 Patterns of rape	13
2.3 Anger rape	14
2.4 Power rape.....	13
2.5 Sadistic rape	14
2.6 Myths about rape.....	15
 SECTION 2	

2.2.1	The legal nature of rape crime.....	17
2.2.2	The nature of rape under international human rights law.....	18

SECTION 3

2.3.1	Forms of sexual violence committed against Rwandan women during Genocide.....	22
2.3.2	Rape.....	22
2.3.3	Sexual slavery.....	23
2.3.4	Sexual mutilation.....	23
2.3.5	Consequences.....	24

CHAPTER 3 Gacaca justice system

3.1	Historical background.....	26
3.2	Rwandan Traditional approach to the crime of rape.....	29
3.3	The Law establishing Gacaca and Organisation.....	30
3.4	Qualification of Judges.....	38
3.5	Gender distribution of gacaca judges.....	39
3.6	A rape victim before Gacaca court.....	40

CHAPTER 4. Challenges facing ‘Gacaca’ Justice System

	43
4.1	General Challenges.....	43
4.2	Challenges specific to rape victims.....	45
4.3	Recommendations to general challenges.....	46
4.4	Recommendations specific to dealing with rape victims.....	47

CHAPTER 5

	General conclusions.....	49
--	--------------------------	----

Chapter 1

1.1 Background

Between 1990 and 1994, Rwanda experienced a genocide in which it is estimated that 1,000,000 people were killed in one hundred days¹, and nearly two million people fled to neighbouring Tanzania, Burundi and the former Zaire². Well documented is the fact that rape and other forms of sexual and gender-based violence were actively committed, encouraged, and even forced upon unwilling participants to humiliate and demoralize women, their families, and their communities. In January 1996, the Special Rapporteur for Rwanda reported, “In Rwanda rape was the rule and its absence was the exception.”³

Although the exact number of survivors of sexual and gender violence (SGV) committed between 1990 and 1994 is not known, it is estimated that 250,000 women were raped and 30,000 pregnancies occurred from rape⁴. It is clear however, that mass rape was used as a weapon of war. Some were raped as just one of many crimes committed against their person. Some were targeted explicitly for rape and the permanent mutilation of their sexual organs. A 1999 study that focused on physical torture, psychological torture, and sexual violence committed during the genocide (including individual and gang rape, forced incest, removal of genital organs, introduction of harmful objects into the vagina, and HIV infection following rape with one or more infected persons), indicated that 80.9 percent had symptoms of trauma, 67 percent of survivors are considered HIV positive, 13 percent had broken vertebrae, 12 percent lost leg

¹ <<http://search.csmonitor/durable/1998/03/intl.3html>> Accessed on October 21,2003

² <<http://www.refugees.org/world/countryrpt/africa/rwanda.html>> Accessed on October 21.2003.

³ E/CN.4/1996/68. Report of the Special Rapporteur on the Situation of Human Rights in Rwanda.

⁴ As above.

usage, and 7.9 percent had amputated legs.⁵ When human rights violations occur, the first place to look for redress is a court of law. In short, courts are the highest forums both at national and international level. In Rwanda, apart from the international crimes tribunal and the Rwandan national ordinary courts, Gacaca jurisdictions have been established under law to help speed up the justice system. Gacaca⁶ justice system is a traditional justice system, which involves everybody in the community.

These courts will try genocide suspects in category two through to four. The rape suspects who fall under category one will only appear before these courts during confession and guilty plea in accordance with the provisions of the law. During categorisation, Gacaca courts will also categorise suspects under category one who will not have been categorised before. At cell level, rape suspects will be expected to contribute to the process of information gathering in relation to the crime because they are only ones who know the truth if they are to access justice. This is complex. Under ordinary courts, few rape perpetrators have not been tried compared to the extent of mass rape that was committed during genocide because victims have not sought redress.

1. 2. Statement of the problem

Rwanda has embraced reconciliation process through, among others, Gacaca⁷ justice system, which is a community-based system that involves everybody at the community level to reveal the truth about the crime of genocide and other crimes against humanity, committed between October 1990 to December 1994. The organic law Number 40/2000 of 26/01/2001 setting up 'Gacaca' law sets

⁵ 'Avega-Agahozo', Study of Violence Against Women of Rwanda, pamphlet (1996) p.1

⁶ Sarkin, Promoting Justice, truth and reconciliation in transitional Societies: 'Evaluating the Rwanda's Approach in the New millennium of using Community based Gacaca Tribunals to Deal with the Past'. American International Law 2000(2) 112,115, Also See Dugard, 'Dealing with Crimes of the past regime. Is Amnesty still an option?' (1999) 12 JIL 1001,1002.

⁷ Gacaca justice system is the traditional a Rwandan justice system.

categories of the crimes committed during genocide. Rape falls under category one which ordinarily is not supposed to be prosecuted by 'Gacaca' courts. However, the confession procedure and guilty plea provided for under Article 54 is open to suspects in category one to appear before the 'Gacaca' courts to plead guilty. These might include rape suspects. This definitely involves rape survivors. Also under Article 56(2), persons who will have offered confession before their names previously appeared on the list of first category referred to in article 51 of the organic law, will benefit from penalty commutation. Under Article 59 the confession procedure and guilty plea is proposed before the 'Gacaca' jurisdiction' seat and the requirements for the confession to be admissible are set out in the same provision. Article 37 provides that the 'Gacaca' Jurisdictions like ordinary courts, try defendants on basis of testimonies against or in favour. Based on this they have been given mandate to summon before the court any person they consider that his/her contribution should be necessary Article 37(2). All provisions discussed above provide avenues where rape victims will have to deal with 'Gacaca' courts either as principle witnesses during evidence collection and categorisation or complainants during guilty plea and confession procedure.

All in all, both procedures will take place before the general assembly, which brings together all the people in the cell.⁸ When one looks at the prosecution process in Rwanda and ICTR so far, there have been few cases of rape prosecuted to date because rape victims won't come forward as principle witnesses. The point of focus of this research is to discuss three questions among others, which are the following:

- Why has a very small number of rape victims sought justice before courts in Rwanda and ICTR compared to the magnitude of rape committed during the genocide?
- Will Gacaca justice system address this problem or worsen it?

⁸ A cell is the smallest administrative Unit in Rwanda inhabited by around 200 people

- What should be done to help rape victims access justice and finally reconciliation?

1. 3 Objective of study/ Significance of the study

Much work has been done on 1994 Rwandan Genocide both under ICTR and Rwanda criminal law system. Gacaca justice system is a traditional justice system, which is also involved in prosecuting the crime of Genocide and crimes against humanity.

The objective of this work is:

- To attempt and show the inadequacies that exist under this law especially with regard to prosecution of rape.
- To examine some of the provisions of Gacaca law especially those that provide for guilty plea and confession procedure and the right to camera hearing in relation to rape crime, and where there are problems, suggest legal solutions.
- To address the psychological needs of the rape survivors which should be provided to help them access justice both at national and international level

1. 4 Justification of the study

Much work has been done on 1994 Rwandan Genocide both under ICTR and the Rwanda justice system. Among the crimes committed during genocide in Rwanda was the crime of rape. However, considering the rate of mass rape committed, there are few cases of rape prosecuted so far compared to other

crimes of the same gravity, and nothing has been said about the causes of the low rate reporting of this crime by the victims.

A Gacaca court, which is a traditional justice system, is also involved in prosecuting the crime of Genocide and other crimes against humanity. This is traditional justice system/ community system, which is also a tool of reconciliation through revealing information about the crimes committed during genocide. This applies to rape victims who will be required to recount their experiences before the community court. On the other hand, the perpetrator may recount the crime he committed for the sake of sentence commutation. Whichever way, the rape victims will either face Gacaca courts through this procedure or go without accessing justice.

Given the small number of individuals who have formally sought legal redress, one can safely assume that most survivors in Rwanda have not come forward, and live with trauma alone, and in silence.

This paper has highlighted the gaps in the Rwandan justice system in relation to rape victims. Further still, the researcher has laboured to establish the causes of the low rate of rape cases brought before courts in Rwanda. The impact of Gacaca justice system in relation to rape reporting has also been discussed.

International human rights instruments relating to rights of both the accused and the victim have been considered and where loopholes appear, an alternative legal approach, which may provide security and confidentiality for the victims to achieve justice, has been proposed.

1. 5 Hypothesis.

The Organic law on Gacaca provides that rape falls under category one which places such cases before ordinary courts. But according to the same law, there is

a lot of evidence that these victims will have to participate in Gacaca courts in order to access justice and have the perpetrators face the law. Through confession and guilty plea, the perpetrators confess to the crime even when rape survivors have decided not to talk about it. This happens before the community and family where the rape victims live.

The paper has critically analysed the procedures adopted by Gacaca law in relation to category one suspects and tested them against both national conventional courts and International crimes court of Rwanda (ICTR). The two specific concerns addressed are:

- Whether the procedures impact positively or negatively on the rights of the rape victims.
- Whether “Gacaca” justice system will help rape victims access justice and reconciliation.

1. 6 Methodology adopted

A number of research methods of data collection have been employed. The complementarities of these methods of data collection have played an important role in the working of this research paper. These include:

- Library oriented research method. This involved reading of the already existing literature such as books, articles, newspapers, reports and journals on related issues. It also involved consulting domestic legislations in Rwanda and international instruments.
- Advanced electronic research method was also used; this is basically Internet based.
- Personal knowledge of Rwandan culture especially in relation to rights of women.
- Interviews with survivors of rape victims in Rwanda were also used in this research especially those cited in reports.

1. 7 Limitations.

Lack of enough documented materials on rape in Rwanda limited this research. Time for research and interviews have been short hence limiting extensive research. This limitation confined the researcher to the already documented interviews.

Resources like transport during research limited the scope of research.

1. 8 Literature Review.

Many writers have written and researched on 1994 Rwandan genocide; but have not systematically addressed the subject of rape and the justice systems. Many writers are concerned with the occurrence of genocide that is how it happened, how it is an international crime, how the trials are being conducted especially in relation to the rights of the accused, how many women were raped and many issues of similar kind. But less has been written on how the justice systems have impacted on the rights of rape victims. In this research we have visited a lot of literature which include the following:

Organic law establishing “Gacaca” jurisdiction.⁹ This law generally narrates what Gacaca justice system is, how it will solve conflict in Rwanda and lead to reconciliation through finding out the truth on what happened, categorisation and guilty plea procedure.

International instruments such as CEDAW and other Conventions on human rights¹⁰ Convention Against Torture & other Cruel, Inhuman or Degrading

⁹ Organic Law No. 40/2000 setting up ‘Gacaca jurisdictions’ and organising Prosecutions for the offences constituting the crime of genocide and crimes Against humanity committed between October 1,1990 and December 31, 1994.

¹⁰ Convention on Elimination of all Forms of Discrimination Against Women of 1979.

Treatment or Punishment¹¹, International Covenant on Civil and Political Rights¹², Universal Declaration of human rights¹³ and statute of ICTR¹⁴, The Geneva conventions of 1949, convention on prevention and punishment of the crime of genocide of 1948 are yardsticks upon which rights of individuals are measured. They have been consulted extensively in this research. The right not to be tortured, the right to be treated with dignity, the right to protection of non-combatants in the situations of armed conflict are all embedded in these instruments which are directly linked to the area of interest.

Reports e.g. Africa Rights, Human rights watch, Association of the widows of 1994 genocide (Avega) Reports to mention but a few. Human rights watch and Africa rights reports go at length to discuss the prevalence of rape and needs of rape survivors in the aftermath of genocide, the history of genocide and the responses and the challenges of bringing perpetrator to justice. The AVEGA report deals specifically with the consequences of rape on the survivors in the aftermath of genocide and their needs. These reports have been very instrumental in this research.

Luckier Omar, Shattered Lives, sexual violence during Rwanda genocide¹⁵ explains in detail how rape was used as a weapon of war during 1994 Rwanda genocide. Luckier Omar also carried out extensive interviews with rape survivors and all this has been consulted in this research.¹⁶

¹¹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN, 1984)

¹² General Assembly Resolution 2200A (XXI) of 16, Drafted December 1966, Ratification, March 1976 (ICCPR)

¹³ Universal Declaration of Human Rights (UN, 1948)

¹⁴ Statute of International Tribunal for Rwanda (UN, 1994)
¹⁵ <<http://www.hrw.org>> Accessed on September 15, 2003.

¹⁶ As above.

There is a variety of literature that has been consulted but only to mention but a few.¹⁷ The rest is quoted in the rest of the research paper. However, the research attempts to go further than the analysis made by the researchers mentioned.

1. 9 Scope

The scope of study is limited to the impact of the *Gacaca* system on the human rights of rape victims in Rwanda. Lessons from other jurisdictions where the crime of rape was adjudicated have been borrowed for comparative analysis. The analysis has taken the trend of international, national and historical response to the crime of rape. This research is divided into five chapters of which chapter one deals with general introduction, while chapter two deals with different legal definitions of rape, patterns of rape, myth about rape, the legal nature of the crime of rape, rape under international human rights law, forms of sexual violence committed against Rwandan women during genocide and the consequences. Chapter three deals with the law establishing *Gacaca* and the impact of the *Gacaca* justice system on the rights of rape victims, chapter four deals with recommendations and finally chapter five deals with general conclusions.

¹⁷

<<http://pinoyrape.freeservers.com/essenceofrape.htm>> see also,
<<http://www.utah.edu/women/PEER/define.html>> Accessed on October 5, 2003.

Chapter 2

2.1 Definition of rape

There is no consensus on the definitions of many phenomena in criminal law and rape is one such example. Legal definitions of rape vary considerably in different Jurisdictions. On the other hand the police often have their own working definitions, which may differ from legal definitions. For example if a woman is raped by someone she knows, the police may often ignore the case because they are sceptical about most acquaintance and date rapes.¹⁸ The following are some of the definitions of rape, which are evident to the fact that definitions vary from jurisdiction to jurisdiction.

Under Rwanda penal code, the crime of rape is defined, as forced sexual intercourse against a person's will and it is a crime under Article 360.¹⁹

The definition of rape adopted by, Women's resource centre, at university of UTAH is that rape as sexual assault is a crime of control and violence in which sex is the weapon.²⁰

Under Massachusetts's law, rape is defined as penetration against the victim's will of a bodily orifice (vagina, anus, or mouth) by a penis or other part of the body, or by an object. Legally, penetration must occur in order for the crime to be considered rape.²¹

It is thus argued that rape is an act of violence and control using sex as a weapon. It is not motivated by sexual desire, but by the desire to overpower and dominate the victim.²²

¹⁸ <<http://pinoyrape.freeservers.com/essenceofrape.htm>>
Accessed on September 15, 2003

¹⁹ See Rwandan penal Code (1977) Article 360,

²⁰ Women resource Center university of UTAH,
<<http://www.utah.edu/women/PEER/define.html>>
Accessed on September 4, 2003

²¹ <<http://www.free-rape-phto.com/rape/hndouts/definitions.htm>>
Accessed on September 4, 2003

Rape is defined in the California Penal Code, Section 261 as forced sexual intercourse against a person's will.²³

The District of Columbia defines rape as vaginal penetration by a penis using force or threat of force, or when the woman is physically or mentally unable to give her consent.²⁴

International legal definition of rape in the context of genocide was delivered in September 1998. Trial Chamber I of the International Criminal Tribunal for Rwanda, sitting under United Nations jurisdiction in Arusha, Tanzania, handed down a landmark judgment²⁵ which defined the crime of rape, for which there is no commonly accepted definition in international law as already discussed above. The Chamber defined rape as a physical invasion of a sexual nature, committed on a person under circumstances, which are coercive.²⁶ In addition, the court provided that Sexual violence, including rape, is not limited to physical invasion of the human body and may include acts, which do not involve penetration or even physical contact, the court elaborated. It noted that coercive circumstance does not need to be evidenced by a show of physical force. That threats, intimidation, extortion and other forms of duress which prey on fear or desperation could be coercion.^{27"}

²² See n. 15 above

²³ Addressing violence in Oklahoma, Sexual assault <<http://www.health.state.ok.us/program/injury/violence/rape.html>>

²⁴ <<http://www.ageofconsent.com/comments/rapedefined.htm>>
Accessed on September 2, 2003

²⁵ <<http://www.un.org/ictt/english/judgement/akayesu.html>>
Accessed on September 3, 2003

²⁶ As above

²⁷ See note 25 above, See also Allen, B. rape warfare-The hidden Genocide in Bosnia-Herzegovina and Croatia, University of Minesota press: Minneapolis, 1996

This is the first definition not to restrict itself to specifying gender or bodily parts. Furthermore, the Tribunal set a precedent by ruling that "coercive circumstances" need not involve force, but that threats and intimidation also qualify.²⁸

The ICTR definition of rape is more appropriate and broad because it covers all the circumstances not covered by any other legal definitions discussed above. For example under jurisdictions that define rape as forced sexual intercourse like Rwanda, issues that arise are what exactly constitutes force? How does one measure it? What is the definition of intercourse? Does it include oral and anal intercourse, intercourse with a foreign object, or is it defined only as vaginal penetration by the penis? How much penetration is necessary to qualify as intercourse.²⁹?

How does one determine if an attempt at rape or some lesser sexual assault has occurred.³⁰?

How does one deal with the fact that the rapist and even the rape survivor quite often do not believe that a rape occurred, even when the incident matches the legal definition of rape.³¹?

2.2 Patterns of rape

As already discussed in the preceding subsection, rape is a physical invasion of sexual nature, committed on a person under coercive circumstances.³² It is a

²⁷ As above (n.25)

²⁸ See n. 20 above

²⁹ Definition of rape <<http://www.dianrussell.com/prndefinitions.htm>>
Accessed on September 4, 2003.

³⁰ As above

³¹ As above

³² Akayesu case (n.25 Above)

hidden crime and only 1/10 of it is reported.³³ This means that many people who are raped live under trauma and do not access justice. Given the different circumstances that the crime of rape is committed under, patterns of rape have been identified each with its own consequences on the victim and the society at large. Rapists have different motives for raping which creates distinct patterns of attacks.³⁴

The patterns of rape include the anger rape, the power rape and the sadistic rape.³⁵

2.3 Anger rape/aggression

The anger rape accounts for forty percent of the rapes that occur nationwide.³⁶

It is characterized by physical brutality with the rapist using far more force than is necessary to subdue the victim. The experience has been that the offender has conscious and deliberate anger and rage.³⁷ The offender expresses his rage both physically and verbally upon the victim during the attack. His aim is to hurt and debase his victim. He often shows his contempt through abusive and profane language.

The anger rapist considers rape the ultimate offense he can commit against the victim. Such a rapist strikes sporadically and infrequently, because the attack will

³³ <<http://pinoyrape.freesevers/whenandhowrapeiscommitted.htm>>
Accessed on september15, 2003

³⁴ <<http://pinoyserers.com/violenceandintimidation.htm>>
Accessed on September 14, 2003

³⁵ Zarkov, D" War rapes in Bosnia, On Masculinity, femininity and Power of the Rape Victim Identity", Belgrade: feminist Notebooks, 1997 p 54

³⁶ <<http://svay.tipod/myths.htm>> Accessed on September 22, 2003

³⁷ Human Rights Watch/Africa Shattered Lives: Sexual Violence During the Rwandan Genocide and its aftermath, New York: Human Rights Watch, 1996 p, 18.

discharge his anger and relieves his frustrations for a time. His need is to hurt and degrade the victim; his weapon being sex and his motive is revenge.³⁸ With regard to this kind of rape during Rwandan genocide, the rapists were moved by their own inadequacies and believed they were caused by “tustis” whom they sought to revenge upon through their women.³⁹

1.5 The Power Rape

The objective of the power rapist is to control his victim, not to harm her. Sexuality becomes a way to compensate for his underlying feelings of inadequacy and feeds his issues of mastery, control, strength, authority and capability.⁴⁰ The power rapist relies upon verbal threats, intimidation with a weapon, and only uses the amount of force necessary to subdue his victim.

Because this is only a fantasy, he does not feel reassured by either his performance or the victim’s response, he feels that he must find another victim, convinced that this time the victim will be “the right one”. Hence his offences may become repetitive and compulsive. He may commit series of rapes over a short period of time.⁴¹ A good example of this kind of rape in Rwanda is where the rapists took their rape victims into sexual slavery as their wives to satisfy their egos. These women were always intimidated with death threats in case they attempted to disobey.

1.6 The Sadistic Rape

³⁸ Roberta Clarke, Violence Against Women in the Caribbean, state and non-State responses, UNIFEM: New York, 1998 p 9,

³⁹ Human rights interview, Kigali April 4, 1996 with rape survivors: That Rapists quite often mentioned that if it was not during war, the “*Tutsikazis*’ would not sleep with them.

⁴⁰ <<http://geshem.bi.org/pattersa.html>> Accessed on September 22, 2003

⁴¹ As above

In the sadistic rape, the rapist transforms anger and power so that the aggression becomes sexual and eroticized for him or her. He finds intentional maltreatment of his victim sexually gratifying. He takes pleasure in his torment, distress and anguish.⁴²

Sadistic rape usually involves torture and restraint. Sometimes it can take on a ritualistic or other bizarre qualities.⁴³ The victim's injuries will focus primarily on the sexual areas of her body; there may be mutilation of these areas⁴⁴. The rapist may use some type of instruments or foreign objects to penetrate his victim. The sadistic rapists; assaults are deliberate, calculated and preplanned. The victims of a sadistic rapist may not survive the attack. For some offenders, the ultimate satisfaction is gained from murdering the victim.⁴⁵ This is a typical of what happened in Rwanda where sexual mutilation, acid burning of genital organs and other forms of torture were committed against the victims after raping them.

The different forms of rape are important towards understanding the offender and his intentions and advancing the fact that rape is not motivated by sexual desire nor is it fulfilling a need for sexual gratification. It is an act of violence motivated by anger, control frustration not sexual frustration. Rape is a way of sexually expressing aggression.⁴⁶ Sex is then used as a weapon of war. It is the means not the cause.

Mass rape on the other hand takes place during the time of war and it was committed mostly in the former Yugoslavia and Rwandan genocide. Mass rape is

⁴² As above

⁴³ As above

⁴⁴ As above.

⁴⁵ As above

⁴⁶ As above (n.40)

a systematic policy and a tool of war or genocide.⁴⁷ It is sexualized violence that seeks to humiliate, terrorize and destroy a woman based on her identity as a woman and her community.⁴⁸

2.4 Myth about rape and sexual assault.

The crime of rape has for long not been regarded as serious because of the myth that surround it worldwide. Some of such myths are:

- Rape is a sexual act, which is enjoyed by both the rapist and the victim and no big deal,
- The victim provokes rape, any woman could prevent the rape if she really wanted to,
- Rape is an impulsive, uncontrollable act of sexual gratification.
- Most rapes are spontaneous (i.e., a sexually frustrated man sees an attractive woman and can't control himself.⁴⁹

The consequence of such myths has led to low reporting of rape crimes because at the end of the day the victim shares responsibility in the crime. This does not take place only in rapes in times of peace but also those that take place during conflict either international or internal ones. In Rwanda for example the humiliation that the rape victims suffer is partly related to the myths that surround rape. Rape victims blame themselves for having been raped because society blames them for having been raped and having survived.⁵⁰

⁴⁷ Resolution 798, Adapted by the S.C at its 3150th Meeting, on December 18, 1992

⁴⁸ Copelon R. "Surfacing Gender-Re-conceptualising Crimes Against women in Times of War", Mass Rape: the war against Women in Bosnia-Herzegovina, ed. Stiglmyer A., University of Nebraska: Linocln, Nebraska (1994) p. 205

⁴⁹ <<http://svay.tripod.com/myths.htm>> Accessed on September 22, 2003

⁵⁰ Gerald Prunier, the Rwandan Crisis: History of a Genocide, (New York: Colombia University press 1995), p 231-232

However as shown under international human rights law, rape is a violent crime committed in a sexual manner. It is a sexual release of anger and control or power to inflict violence and humiliation upon the victim. Whether or not there is physical force, without consent, it is rape⁵¹. Rape is a socially learned behaviour; it correlates with history, sex roles, conditioning and sexual violence in the media as was the case of Rwanda where media was used to incite rape.⁵²

Section 2

2.2.1 The legal nature of the crime of rape

The crime of rape has been treated as a war crime and crimes against humanity in recent definitions⁵³. Rape –like murder, extermination, enslavement, deportation, imprisonment, torture, persecution on political or racial and religious grounds and other inhumane acts is a crime against humanity. Crimes against humanity arise when such serious crimes are committed on a massive scale against a civilian population.⁵⁴

The Statute of the tribunal for Rwanda defines crimes against humanity as those crimes, including rape, that are committed in part of wide spread or systematic

⁵¹ See n. 18 above.

⁵² Africa rights, Rwanda: Death Despair and Defiance, revised. Ed. (London: African Rights, 1995), p 74-75

⁵³ See Jean Paul Akayesu Case No. ICTR-96-4-T of 2 September 1998.

⁵⁴ Under the Nuremberg charter Article 6(c) states that crimes against humanity are “Atrocities and offences, including but not limited to murder, extermination, enslavement deportation, imprisonment, torture, rape or other inhuman acts committed against any civilian population or persecution on racial, political or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal whether or not in violation of the domestic law of the country where perpetrated.

attack against a civilian population on national, political, ethnic racial or religious grounds.⁵⁵

Rape and other acts of sexual violence can also be genocidal acts. The crime of genocide has been codified in the Convention on the prevention and punishment of the crime of genocide.

Article 2 provides that:

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

- (a) Killing members of the group;
- (b) Causing serious bodily harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.⁵⁶

It is against such a background that recently in both Former Yugoslavia and Rwanda, tribunals' rape has been treated as crimes against humanity and a war crime as exhibited by the definitions decided by the Court both in Celebic and Akayesu cases respectively.⁵⁷ This is because women have suffered rape at the hands of soldiers throughout the history of warfare and in Rwanda both at the hands of soldiers and the militias. During a war in Bosnia, women in detention camps were subjected to multiple rapes, beatings and torture. Some were

⁵⁵ As above

⁵⁶ Convention on Prevention and Punishment of the Crime of Genocide, December 9, 1948, 78 U.N.T.S.277

⁵⁷ See Note 53 above, See also Human Rights watch, "Sexual Violence as an International Crime," Kosovo background New York: Human Rights watch. (May 10, 1999)

enslaved to what amounted to rape camps⁵⁸. It is no wonder therefore, that for the first time in history both the international tribunal of Rwanda and the International tribunal for the former Yugoslavia are prosecuting rape as a war crime.⁵⁹

2.2.2 The nature of rape in international human rights law

Sexual violence against Women and girls in situation of armed conflict constitute a clear breach of international human rights law. Under international law, perpetrators of sexual violence can be held accountable for the crime of rape as a war crime, as crimes against humanity, or as an act of genocide if their definitions meet the elements of each.

International human rights law explicitly and implicitly condemns rape and other forms of sexual assault as war crimes. The Geneva Convention of August 12, 1949 and the Additional protocols prohibit rape in both International and internal conflicts. In internal conflict as occurred in Rwanda, common Article 3 of the Geneva Conventions prohibit "Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" as well as "outrages upon personal dignity, in particular degrading and humiliating treatment."⁶⁰ Protocol II Additional to the Geneva Conventions, which also governs certain

⁵⁸ <<http://www.Amnestyusa.org/group/balkans/sign.html>>
Accessed on September 16, 2003

⁵⁹ As above.

⁶⁰ The Geneva convention of August 12, 1949 relating to protection of victims of None International conflict, Article 3

internal conflicts and which applies to the conflict in Rwanda⁶¹ expressly forbids “violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation” and “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution, and any other form of indecent assault,” as well as “slavery and the slave trade in all their forms.”⁶²

Under the Statutes of both International Crimes for Rwanda and the Former Yugoslavia, rape was recognized as a form of torture under the convention against torture and other cruel inhuman or degrading treatment or punishment⁶³ and the tribunals prosecute rape as a form of torture.

Article 7 of the International covenant on civil and political rights (ICCPR) provides that:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.⁶⁴

⁶¹ The independent Commission of Experts on Rwanda concluded that both Common Article 3 and Additional Protocol II apply to the Rwandan Conflict. Theodor Meron, International Criminalization of Internal Atrocities,” American Journal of International Law (Washington, D.C), no.3 July, p, 561

⁶² Protocol II to the Geneva Conventions Additional to the Geneva Conventions of 12 August 1949, relating to protection of Victims of Non-International Armed Conflicts opened for signature in December 12, 1977 Article 4(a), (e) 1125 UNTS 3,16 ILM 1442 (1977) protocol II

⁶³ Convention against Torture and other Cruel, Inhumane or degrading Treatment or Punishment, December 10,1984.I.L.M. 1027 (1984), Article 1, defines Torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or the third party has committed or is suspected to have committed, or intimidating or coercing him or third party, or for any reason based on discrimination of any kind, when such pain and suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

⁶⁴ International Covenant on Civil and political Rights, General Assembly Resolution

Article 5 of Universal Declaration of human rights provides that:

No one shall be subject to torture, cruel inhuman treatment⁶⁵.

Rape amounts to inhuman degrading treatment and cruel treatment which is contrary to the above provisions

Convention on elimination of all discrimination against women recommendation No. 19 recommends that states should take every legal measure necessary to protect women from all forms of abuse including rape.⁶⁶

Françoise Krill, of international committee of the Red Cross wrote a study” The protection of women in international humanitarian law”. She finds that from 1929 onwards, women have enjoyed special protection under international humanitarian law.⁶⁷

According to the Economic and Social Council of April 1970 on “Protection of women and children in times of emergency, war, struggle for peace, national independence and liberation, women, whatever their nationality, race, religion, marital status, social condition age, have an absolute right to respect of their honor and modesty, in short their dignity as women⁶⁸”

It is in this regard the United Nations established a commission in 1972 to investigate and determine grave breaches of Geneva Convention and other violations of International Humanitarian law that had occurred on the territory of former Yugoslavia. Based on the findings of the commission, the International

2200A(XXI) of 16, Drafted 1966.

⁶⁵ Universal Declaration of Human Rights, G.A. res.217A (II), U.N Doc. A/810 71(1948)

⁶⁶ Convention on elimination of all Forms of Violence Against Women of 1979 Article 1

⁶⁷ David J Schefer, Ambassador at large for war crimes issues, Remarks, Fordham, University of New York, October 29, 1999
<<http://www.coverage.org/nz/mpa/petition.htm>>

⁶⁸ As above

tribunal for the prosecution of the persons responsible for serious violations of the international humanitarian law committed in the territory of former Yugoslavia since 1991 was set up.⁶⁹

Rape constitutes a crime under international humanitarian law and its is part of substantive applicable law of both the ICTY⁷⁰ and the ICTR⁷¹. Rape was also recognized as a torture in the Celebic case, the ICTY characterized the rape of Bosnian Serb women at the Celebic camp as acts of torture.⁷² The tribunal found Hazim Delic a Bosnian Muslim deputy camp commander, guilty of a grave violation of the Geneva conventions (Torture) and war crimes (torture) for the rape he committed.⁷³

Under International humanitarian law also the crime of rape has evolved at great length to include what is called the command responsibility. For example Zdravk MUCIC, The Bosnian Croat Camp Commander, was found to have command responsibility for the crimes committed at Celebici, including crimes of sexual assault.⁷⁴ Likewise in Akayesu Case, command responsibility was imputed on him though he himself had not committed the crime but had been committed massively in his commune under his command.⁷⁵ The ensuing discussion will

⁶⁹ Press Release of 1995 releasing information about indictment of 21 defendants from Omarska detention camp: ICTY Hague. (1995)

⁷⁰ Bunch, Ch. "Demanding Accountability", Center for Women's Global Leadership & UNIFEM: New York (1994) p 33

⁷¹ Human Rights watch, "Sexual Violence as International Crime," Kosovo Background New York: Human Rights Watch. (May 10, 1999)

⁷² As above.

⁷³ See n. 27 above

⁷⁴ The Global Challenge of Establishing Accountability for Crimes Against Humanity" Address by David J Scheffer, Ambassador- at- large for War crimes Issues, university of Pretoria, Center for Human Rights August 22, 2000 <<http://usembassy.state.gov/posts/sf/www/hvjb.html>> Accessed on October 21, 2003

⁷⁵ The Akayesu case in Arusha marked a turning point in International human rights law. In this case of Jean Paul Akayesu (Decision of 2 September 1998, Case No. ICTR-96-4-T), the sentence concluded that sexual violence constitutes genocide in so far as it is committed" with the intent to destroy in part or in whole, a particular group, targeted as

deal with the forms of sexual violence committed against Rwanda women during genocide. This will help in the determination of the justice system that would help such victims access justice.

Section 3

2.3.1 Forms of sexual violence committed against Rwandan women during

2.3.2 Rape

During the 1994 genocide, Rwandan women were subjected to sexual violence on a massive scale, perpetrated by the infamous militia, by other civilians and by soldiers of Rwanda Armed forces, including the presidential guard. Although the number of the rape victims is not known, it is confirmed that rape was used as a weapon of war⁷⁶ and wide spread, and that women were individually raped, gang-raped, raped with objects such as sharpened sticks or gun barrels, held in sexual slavery (either collectively or forced “marriage”) or sexually mutilated.⁷⁷ Rape was also used as a weapon to terrorize and degrade the Tutsi ethnic group to achieve a political end. The humiliation, pain and terror were not just meant for the victim but also to strip humanity from the larger group of which she was part.⁷⁸ The rape of women during the genocide was translated into an assault on the whole community through the emphasis placed in Rwandan culture on women’s sexuality: The shame of the rape humiliates the family and all those associated with the survivor which the biggest problem facing rape victims in Rwanda to date.⁷⁹

such ”ICTR further asserts, “sexual violence was a step in the process of the destruction of Tutsi-destruction of the spirit, of the will to live, and of life itself”.

⁷⁶ See note 1 above

⁷⁷ Human Right watch, *Slaughter Among Neighbours: The Political Origins of Communal Violence* (New Haven: Human Rights Watch/ Yale University Press, 1995) p. 13-32

⁷⁸ See n. 77 above p.33

⁷⁹ See Avega Report (n.4 above)

2.3.3 Sexual slavery

Sexual slavery is a situation where women were singled out for the militias' sexual service. These were locked in their homes or homes of captors for a short time or the time of the genocide. Such women in Rwanda were referred to as women of the ceiling. The arrangement could also be referred to as "forced marriages"⁸⁰ and women so held as "wives" but these women had not consented and lived in coercive conditions under which they were held. They were in fact captives, "looted" possessions of the militiamen, held in sexual slavery.⁸¹

2.3.4 Sexual mutilation

In Rwanda during genocide, often rape of women was followed or accompanied by mutilation of the sexual organs of features held to be characteristic of the Tutsi ethnic group. Sexual mutilation included the pouring of boiling water into the vagina; the opening of the womb to cut out the unborn child before killing the mother; cutting off the breast; slashing the pelvis area; and the mutilation of the vaginas.⁸²

2.3.5 Consequences of rape

Rwandan rape survivors like everywhere in the World suffer psychological, social and physical aspects of such appalling sexual violations⁸³. Some of the

⁸⁰ Human Rights watch interview, Shyanda Commune, Butare Province April, 1996

⁸¹ As above.

⁸² Coordination of Women's advocacy, "mission on gender-Based War Crimes Against Women and Girls During the Rwandan Genocide: Summary of surveys and Recommendations, p 7.

⁸³ <<http://www.academic.udayton.edu/race/obrights/georegions/Africa/rwanda01.htm>> Accessed on September 21, 2003, See also Khon, E.A., 'Rape as a weapon of War:

consequences are social isolation and ostracization, severe health complications and the children born out of rape.⁸⁴ The lack of judicial accountability for the perpetrators of genocide further intensifies the victims' physical and psychological trauma.⁸⁵

In addition, Rwanda is a society that has regarded women traditionally dependent on their male relatives first, then as wives and finally as mothers, rape had a devastating effect on them. For example, traditional Rwandan society values women for the number of children they can produce.⁸⁶ Thus, physical mutilation and violence produces a dual harm: a physical harm based on the injury itself, and an emotional and social harm for the woman who can no longer reproduce and thus fulfil her role as a mother.

Psychological problems have been what the victims have most commonly shared.⁸⁷ There are varied sources of the shame associated with sexual violence. For example, African tradition prohibits the sexual acts committed and considers them a taboo. The stigmatisation associated with these acts has compounded their detrimental effects on the victims. Indeed, victims of sexual violence have demonstrated a variety of responses ranging from over- sensitivity and shame to "a form of madness" in Rwanda.⁸⁸

Women's rights during the dissolution of Yugoslavia" Golden Gate University Law review, no. 24,1996

⁸⁴ See Avega Report (n.4 above) p.20

⁸⁵ See note 74 above, interview Human Rights watch with Judith kanakuze, Director General Duterimbere, Kigali, March 19,1996 as cited in Shatter Lives, Sexual Violence during the Rwandan genocide and its aftermath, p. 69

⁸⁶ As above p. 65

⁸⁷ General Assembly Document A/48/858, Report of the Secretary General "Rape and Abuse of Women in the Areas of Armed Conflict in the Former Yugoslavia," New York 9 January 29, 1994) paragraph 251

⁸⁸ See n. 37 above p.17

The sexual violence also has resulted in social exclusion. Girls fearing that they are no longer able to find husbands have fled their homes to live in seclusion and anonymity.⁸⁹ Thus, although these women's lives were theoretically spared, their traumatic experiences have robbed them of their community and identity.

Forced impregnation has had deep psychological effects on rape survivors⁹⁰. Suffered exclusively by women, forced pregnancy involves a violation of, among other things, reproductive freedom and sexual rights, and has lasting effects given that the women may then have to raise the offspring.⁹¹ Rape victims who became pregnant have suffered intense shame and ostracization in a society that is particularly influenced by culture.⁹²

Women also suffered the various physical effects associated with sexual violence. Indeed, "the physical injuries and their consequences range from mere abrasions to instant death, and include infection with sexually transmissible diseases," including HIV.⁹³"

⁸⁹ As above

⁹⁰ See Avega Report (n, 4 above) p. 20

⁹¹ Korak, M. Linking Arms: Women and war in Post-Yugoslav States, Uppsala: Life and Peace Institute (June, 1998) p. 59, See also Human Rights Watch, Shattered Lives: Sexual Violence during Rwandan genocide and its Aftermath, U.S.A. NY: Human Rights, 1996, p. 62

⁹² Human Rights Watch Report (Note 77 above) p.65

⁹³ Human Rights Watch interview, Emile Dr. Rwamasirabo, Director, Maternity Ward, Kigali Central Hospital, Kigali march 18, 1996

Chapter 3. 'Gacaca' justice system

3.1 Historical background of 'Gacaca' justice system and its relationship with Reconciliation initiative in Rwanda

The practice of *Gacaca*, a community-based dispute resolution forum was the approach used in pre-colonial Rwanda. The name *Gacaca* is derived from the word for 'lawn'⁹⁴, referring to the fact that members of the *Gacaca* sit on the grass when listening to and considering matters before them. There was no legal representation, which is the criticism it faces even today.⁹⁵

In the pre-colonial period, prior to bringing a civil dispute before the Umwami, or king, individuals had to bring the dispute before the community. Serious crimes, however, such as conflicts between hierarchical chiefs and homicide, were not brought to *Gacaca* first, but rather were taken directly to the Umwami. In *Gacaca* proceedings, respected community figures served as "judges" who involved the entire community in a dispute resolution process.⁹⁶

Generally, *Gacaca* considered disputes around inheritance, civil liability, and failure to repay loans, and conjugal matters. There is also some evidence that *Gacaca* was used in conflicts amounting to minor criminal offences such as theft. In these situations, sanction for the act still resembled a civil settlement, such as compensation for the damage incurred, rather than imprisonment. The sanction arising from a *Gacaca* proceeding was meant to serve two objectives. First, it allowed the accused to better appreciate the gravity of the damage that he or she

⁹⁴ The word "Gacaca" in kinyarwanda means a certain kind of 'grass' or 'lawn' where elders used to sit while adjudicating a conflict or while discussing important issues that affected society.

⁹⁵ Amnesty International Report, "Unfair Trials", Justice denied" (1997), see also article 36 of Organic Law On *Gacaca*. " No right to legal representation"

⁹⁶ <[http: www.bc.edu/schools/law/lawreviews/meta-Elements/journals/bciclr/26_2/09_FTN.htm#88](http://www.bc.edu/schools/law/lawreviews/meta-Elements/journals/bciclr/26_2/09_FTN.htm#88)> Accessed on October 2, 2003.

caused. Secondly, the sanction allowed the accused to reintegrate into the local community.⁹⁷

Gacaca justice was a participatory one. It afforded chance for the grass roots deciding their own justice in the context of their own circumstances. The result of such justice was always durable because people understood it and could relate to it. It was an indigenous model of justice in Rwanda. Through *Gacaca*, Rwandans demonstrated their capacity to forgive.⁹⁸

The judges of *Gacaca* courts were people of integrity respected within the community.⁹⁹ The principle of ' honest person was important not only in Rwanda but in Africa at large. In Rwanda, access to judiciary to serve as a judge or councillor used to be dependent on a host of personal characteristics. Unless the right was hereditary, elders would be consulted to determine suitability of a person to serve in a high office and character was one of the cardinal factors. The underlying theme behind was that community participated directly in "trying" the accused and in deciding justice in general.¹⁰⁰

On the contrary women in Rwanda could be rarely, if at all, be elected as judges but would be consulted before decisions were made.¹⁰¹ However even where they were consulted, their views would not be independent from the men's and

⁹⁷ Common knowledge from the oral history passed from Parents to children in Rwanda where the author of this paper originates.

⁹⁸ Professor Michelo Hansungule, A critical Evaluation of indigenous or tree-based Justice systems in Rwanda with relevant examples from Africa (Un published paper) p.129

⁹⁹ People of integrity in Kinyarwanda language are known as "*Inyangamugayo*"

¹⁰⁰ As above

¹⁰¹ Penal Reform International, Access to Justice in Sub-Saharan Africa, November 2000 p. 21

this affected greatly their position especially in justice, property ownership and leadership.¹⁰²

In a nutshell the silent features that characterised “*Gacaca*” justice system in Rwanda just like other African traditional systems were as follows:

- Any problem that arose was viewed as that of a community
- An emphasis on reconciliation and restoring social harmony;
- Traditional arbitrators are appointed within the community, on the basis on lineage or status;
- A high degree of participation;
- Customary law is merely one factor considered in reaching compromise
- The rules of evidence are flexible
- There is no legal representation;
- The process is voluntary and the decision was always based on agreement;
- An emphasis on restorative justice.¹⁰³

The guiding principle of *Gacaca* justice system in Rwanda was to restore peace, social harmony within the community by ensuring that disputants are reconciled along with their respective supporters.¹⁰⁴

At the heart of *Gacaca* courts, lied the notion of reconciliation or the restoration of harmony, the job of the judge was less to find the facts, state the rules of law and apply the facts than to see the wrong in such a way as to restore harmony within the disturbed community.

¹⁰² As above, (n.101) p 22

¹⁰³ As above n.101

¹⁰⁴ As above

Traditional Arbitrators were usually of higher status than the disputants. These were always referred to as '*inyangamugayo*¹⁰⁵' in Rwanda; meaning people of integrity. They held their positions by virtue of their age, inheritance, status or influence within the community in articulating shared norms and values.¹⁰⁶

The main purpose of traditional justice system in Rwanda was to restore social harmony and reconcile the parties as already discussed above. The penalties therefore formed compensation or restitution in order to restore the parties to the positions they were in before rather than punishment.¹⁰⁷ In some instances however, *Gacaca* resorted to restitution of for example twice the number of the stolen goods to the owner especially if the offender had been caught 'red-handed'. Capital offences were most of the times punished by banishment of the offender sometimes together with his family.¹⁰⁸

This justice system was not always fair especially with regard to women. For example a woman who got pregnant was banished without any investigations on who and how she had conceived¹⁰⁹. She was neither consulted nor represented at a family court and its decision was final and she was left to face her fate. The question of individual rights was unheard of especially in relation to women because they did not participate in decision-making process.

3.2 Rwandan Traditional approach to the crime of rape.

Rape in Rwanda just like many Africa traditional justice systems was treated as a family affair if at all it was reported. It was a hidden crime because if it happened

¹⁰⁵ The Term "*Inyangamugayo*" means people of integrity in *Kinyarwanda*.

¹⁰⁶ See Penal Reform International. p. 21 (n. 101 above)

¹⁰⁷ This was what was referred to as restorative penalties

¹⁰⁸ Banishment in Rwanda was known as "*koheera*" for a girl and "*Guca*" for a man. A girl Would be banished in all cases if she got pregnant out of wedlock and if she was suspected to be a witch.

¹⁰⁹ True stories from Rwanda where such girls/women were either banished thrown in long pits.

it disgraced the entire family. The victim of rape was a disgrace to her family. The concern of the family was how to cope and restore relationships between the two families of the victim than punish the perpetrator.

One of the coping mechanisms was to force the perpetrator to marry the victim and pay a cow or produce to the family of the victim both as compensation and bride price. The rights of the victims to dignity and freedom of choice were irrelevant in such cases. Just like in Victorian era in England, the woman who was able to tell her violation in the open was regarded as immoral. Modesty required that a woman could not speak about such in public, so if a woman complained of rape she might become lewd herself.¹¹⁰ The decisions of the family were binding to her.

This kind of set up contributed to the low rate of rape reporting in Rwanda. As already discussed, traditional justice system focused a lot on restoration of relationship between families rather than individual rights and responsibilities. Women were part of the society and men took decisions on their behalf.

The family meeting was referred to as a 'Gacaca', which was way of resolving conflict. Rape was so secretive and dishonor in Rwandan society to the extent that majority people up to date think it was none existent. It is because of the myth that surrounds rape in Rwandan culture that still influences rape victims to keep quiet even after 1994 genocide where it was used as a weapon of war.

3.3 The Law Establishing Gacaca and Organization.

After the 1994 genocide in Rwanda, the legal system at the time was not designed to respond to massive violations that had taken place. The country's classical courts did not have capacity to prosecute the enormous number of

¹¹⁰ <http://www.st.andrews.ac.uk/~www_se/personal/pvm/woman.html>
Accessed on October 20, 2003, see also,
<<http://members.lycons.co.uk/HastingsHistory/19/overview.htm>>
Accessed on October 19, 2003

suspects; almost all Rwandese had been affected by the genocide either as victims or as perpetrators. It was found imperative that every Rwandan participates to arrive at the truth of what happened in order to facilitate reconciliation process. As a consequence the authorities formed the popular tribunals, the *Gacaca*.¹¹¹

The *Gacaca* courts had been used traditionally in resolution of conflicts before colonialism as already discussed. A modern version has to deal with crimes against humanity and the crime of genocide. *Gacaca* will involve perpetrators, victims and the whole community in the legal process. The goal is not only to assist the ordinary courts but also to heal the wounds, to bring forth the truth, to create justice, and to contribute to the reconciliation process.¹¹²

In relation to the topic of our discussion, we will attempt to discuss the law establishing “*Gacaca* jurisdictions”¹¹³ with the main purpose of establishing whether the psychological, legal and social needs of rape survivors are covered compressively to facilitate them access justice as their human rights. The differences in treatment of rape victims during modern “*Gacaca*” and the old one.

As discussed above, rape was rarely dealt under traditional *Gacaca* system. The *Gacaca* judges were supposed to judge by consensus. Wise men of the village gathered to adjudicate the matter in *Gacaca* councils without prosecutor or defender. Women were not allowed to participate, but were to be consulted before decisions were made.

¹¹¹ The Government assigned a group of researchers with the task of assessing various ways to reconcile people. The work to develop *Gacaca* system started in 1995 with judicial and practical planning of the legal processes. The law was put before the interim national assembly on October 12, 2000.

¹¹² See preamble Organic law No. 26/01/2001 as amended Setting up *Gacaca* Organising prosecutions for offences constituting the crime of genocide or crimes against humanity committed between October 1, 1990 and December 31,1994.

¹¹³ As above.

Today, the law establishing *Gacaca* provides that judges shall be elected not based on any discrimination, which gives women a right to act as judges and have a right to participate in decisions of the court. This is a good input within the modern *Gacaca* and a departure from the past. But the question that remains is “How many women judges in comparison with men?”

Though *Gacaca* law provides that rape victims will have nothing to do with *Gacaca* courts, during categorization¹¹⁴ and guilty plea procedure¹¹⁵ they will be required to participate if they have to access justice. Given the nature and the seriousness of the crime of rape, such a situation should be taken more serious than is the case currently in Rwanda today in relation to rape victims.

In the ensuing discussion we will look at the structure of *Gacaca* jurisdiction, categorization and guilty plea procedure

- **Structure and jurisdiction to date of *Gacaca* jurisdiction.**

The *Gacaca* will operate at four levels: from cell¹¹⁶, sector, district and province. There are approximately 9000 cells in Rwanda. At the cell level all citizens over the age of 18 constitute a general assembly.¹¹⁷ If a cell has more than 200 members, it will be split into two, but no cell has less than 50 members.

¹¹⁴ Article 34(e) the seat of *Gacaca* jurisdiction shall among others make categorisation of Defendants as per organic law no.08/96 August 30, 1996. This means that even rape suspects who will not have listed on the public prosecutor’s list will be categorised at the cell level.

¹¹⁵ Article 54(1) of the law establishing *Gacaca* jurisdiction provides that: Any person who committed the offences aimed in Article on has a right to have recourse to confession procedure and guilty plea, Article 56(2) Provides that persons who will have offered confessions and guilty plea without their names being previously published on the list of the persons of first category referred to in Article 51 of the Organic law will be classified in the second category. Article 59 of organic law on *Gacaca* provides that the procedure of confession and guilty plea is proposed before the *Gacaca* jurisdiction” seat or before the Public Prosecution department in charge of investigation pursuant to article 47 of the Organic law

¹¹⁶ A cell is the smallest administrative unit of the country.

¹¹⁷ Carla J. Ferstaman: “Domestic Trials for Genocide and Crimes against Humanity:

The tasks of the assembly at the cell level are outlined under Article 34¹¹⁸

Among the main tasks mentioned above for the cell level “Gacaca” jurisdiction includes to make a list members of the society that were killed during genocide, but also a list of the killers, in the same way both the rapist and the raped will be listed¹¹⁹. Rape victims will be required to provide information to facilitate investigations where necessary as provided by the law. Categorization is done at the cell level, within the community where the rape victims live before the general

The example of Rwanda:” African Journal International law; December 1997, Vol.9 p.857

- ¹¹⁸ Establishing a list of all persons who were staying in the cell before the genocide and the massacres; Make a list of persons who have been in the cell, victims of the crime of genocide or crimes against humanity Alleged authors of the offences referred to in this organic law; Persons who lived in that cell but were killed in other places; Persons who were hunted and whose whereabouts are still unknown;
- Persons who still live in the cell;
- Persons who have changed residence;
- Damaged assets; Bring together the files forwarded by the prosecution;
- Taking cognizance of evidence and testimony offers;
- Making investigations on given testimonies;
- Making categorization of defendants as per Organic Law;
- Receiving the procedure of confession and guilty speech for the defense;
- Forwarding the lists of third category suspects to the to the sector;
- Forwarding to the ‘Gacaca Jurisdiction’ of the District and the province the files of defendants classified in first and second categories;
- Electing members of the coordinating committee.

- ¹¹⁹ See Article 34 (a) of the Organic law on genocide

assembly. The Court has a right to investigate affairs of both the victims and the suspects in search of truth at the general assembly.¹²⁰

It is in such instances that rape survivors may be called to contribute to the search of the truth by giving evidence against their perpetrators before the community. Brave victims who will be willing to go through all the procedure without any problem, but the less brave may find this experience traumatic and the law does not provide any sort of protection to such victims in an elaborate manner as of right.

On the other hand the tasks of the *Gacaca* jurisdiction at the Sector, district or province level are outlined under Articles 35 and 36 of the Organic Law, which include the following: electing the seat members of the jurisdiction, for the ‘*Gacaca* Jurisdiction of the sector and appoint among themselves, persons to delegate to immediately higher ‘*Gacaca* jurisdiction’, electing deputies of held back members of *Gacaca* jurisdiction’ seat; constituting, if necessary, additional seats within ‘*Gacaca*’ jurisdiction’; providing evidence against or in favor in the trials of genocide or crimes against humanity, examining and adopting the activity report established by the coordinating committee, making investigations if necessary on the given testimonies.

- **Categorization**

The people accused of genocide are divided into four categories:

- **Category 1: the planners, organisers and leaders of the genocide, those who acted in a position of authority, well known murderers and those guilty of rape and sexual torture and these carry mandatory death penalty.¹²¹**
- **Category 2: those guilty of voluntary homicide, of having participated or been complicit in voluntary homicide or acts against persons resulting in**

¹²⁰ Article 37(1) provides that the court may summon to appear before it any person they consider his contribution should be necessary.

¹²¹ Organic law NO. 40/2000 Setting up “Gacaca Jurisdictions” Article 51

death, of those having inflicted wounds with intent to kill or who committed other serious violent acts which did not result in death.¹²²

- **Category .3: those who committed violent acts without intent to kill.**
- **Category 4: those who committed crimes against property.**

The accused in the first category will be judged by the ordinary courts, i.e., Courts of First Instance / Magistrates' Courts. However as already discussed, suspects in first category may appear before *Gacaca* courts to plead guilty

For all other cases the government created around 11,000 *Gacaca* jurisdictions, each made up of 19 elected judges known for their integrity. Over 250,000 of these judges were elected between the 4th and 7th October 2001.

There are four levels of jurisdiction for the different categories of crime (2, 3 and 4) tried by the *Gacaca* courts. Only the second and third categories may appeal. The highest district and provincial levels of the administration then examine the judgements.

The *Gacaca*¹²³ jurisdictions at "cell" level investigate the facts, classify the accused and try the fourth category cases (no appeals).

The *Gacaca*¹²⁴ jurisdictions at sector level are in charge of third category crimes.

The *Gacaca*¹²⁵ jurisdictions at district level hear the second category cases and the third category appeals.

The 12 *Gacaca* jurisdictions at provincial level or of Kigali are in charge of appeals of second category cases.

Three structures coexist at each jurisdictional level:

¹²² As Above Article 51 (2) (a) &(b)

¹²³ The *Gacaca* Jurisdictions all over the territory of Rwanda at cell level is 9, 201

¹²⁴ Number of *Gacaca* jurisdiction at the Sector level is 1,545

¹²⁵ The number of *Gacaca* jurisdiction at the District level is 106

1. **The General Assembly (at cell level, the entire population over the age of 18; at all other levels a group of 50 or 60 elected "people of integrity."¹²⁶**
2. **The bench: 19 judges in each jurisdiction,**
3. **The coordination committee made up of 5 people**

The *Gacaca* courts do not have the right to pass the death penalty.

With the exception of defendants in the second category who refuse to confess and plead guilty, it has been decided that all the other prisoners in categories 2 and 3 may serve half their prison sentences doing Community Service.

The defendants in Category four will not be sentenced. If no agreement can be reached on the return of stolen or destroyed goods, the Chair of the cell's *Gacaca* jurisdiction will decide on the damages to be paid.

The new *Gacaca* system is based on a participatory justice system and on its reconciliatory virtues just like the original *Gacaca* system. According to the Justice Ministry, the population that was in the hills at the time of the genocide will be witness, judge and plaintiff.

- **The Confession and Guilty Plea procedure as a violation of victims rights**

Article 54 affords the opportunity for the accused persons to have recourse to guilty plea and confession procedure without going through the long process of trial. This has been commended by renowned writers like professor Michelo Hansungule as a very popular way of bargaining between the accused and the prosecution.¹²⁷

This may be good because it reduces the prolonged court procedures and facilitates arriving at the truth. But in such cases, the rights of the victims may be

¹²⁶ "People of integrity" are known as "Inyangamugayo" in Kinyarwanda.

¹²⁷ Michelo Hansungule 59. (n.98 above.)

downtrodden because they are no consultations made because it is assumed the prosecution represents their interests. This may not always be true because there is no legal contact between the former and the latter. In the case of rape victims in Rwanda, few have reported may be because of the fear of consequences, in the law, no mention is made of the right of the victims to privacy and not to be tortured during this process. It is against such a background that we discuss matters pertaining to guilty plea and confession procedure.

The importance is to establish where the requirements of this guilty plea and confession procedure especially affect the lives of rape victims. The requirements outlined in Article 54 are as follows as:

- In order to benefit from the clause, the defendant is required to give a detailed description of everything that surround the offence including the location where it was committed, the date, names of victims as well as witnesses, and damaged assets, if any. She/he must also disclose the names of accomplices where this is applicable and any other useful information. Lastly, he must disclose the apologies he offers for the crime he committed.

If the disclosures were accepted, the tribunal would invoke Article 55, which would entitle defendant to commutation of penalties falling under category 2,3 and 4. Article 56(2) also provides an opportunity to category one prison commutation if they have not yet appeared on the list before.

Though these provisions are well meaning given the burden that Rwanda has today of over congested prisons, they may have a negative effect on rape survivors. This may be potentially abusive to them because it affects their right to silence. This will happen where suspects will have to reveal the names of their rape victims as in the law.

The law has in effect provided means to relieve the defendants irrespective of the feeling of the victims. Practice in all jurisdictions shows that confessions are potential sources of violations of the right of the suspect or the accused not to be tortured¹²⁸. In this particular case, it is the rights of the survivors that will be affected since the suspects plead guilty for their own sake without regard to the feelings of the victims.

Some rape survivors prefer not to talk about the incident because of the complications that come with it that impact on them worse than the crime itself. For example other consequences that are associated with rape are increase in violence against the victims or re-victimization, as some cases have already indicated.¹²⁹

Gacaca tribunals are vested with all the powers of existing Rwandan courts and prosecutors' offices, including the power to summon any person to appear and testify, to issue warrants and conduct searches, to attach personal goods, and to impose sentences. In addition, *Gacaca* tribunals will impose sentences commensurate with the Genocide Law, including life imprisonment. Those who confess and plead guilty will be eligible for greater reductions in sentences than currently exist and may opt for substituting prison time for community service. This as already discussed may be beneficial to the suspect but not to the rape victims because the released suspects will come back to live in the community where these survivors live. This will increase fear of re-victimisation will increase if no other support systems are put in place to help them cope.

3.4 Qualification of the judges as a bar to justice for the rape victims

As far as qualification of judges is concerned, Article 10 provides that an honest person must fulfill the following:

¹²⁸ See n.98 above.

¹²⁹ Of recent rape victims have been victimised by their partners on discovering through *Gacaca* courts that they were raped during confession and guilty plea.

- To have a good behavior;
- To always say the truth;
- To be trustworthy; to be characterized by the spirit of sharing speech;
- Not to have been sentenced by a trial emanating from the tried case to a penalty of at least 6 months imprisonment;
- Not to have participated in perpetrating offences constituting the crime of genocide or crimes against humanity;
- To be free from the spirit of sectarianism.

A person fulfilling the above conditions maybe elected to any *Gacaca* jurisdiction without any discrimination based on sex. origin. Religion, opinion or social position. In *Gacaca* justice system, legal background is irrelevant. The judges not only lack professional training, but may not also be sensitive to the needs of survivors of rape.

This automatically may dispel survivors from participating. Conducive atmosphere for the survivors is partly provided by sensitive judges. Security is partly provided by the professional counselors who are not mentioned by *Gacaca* law. Rape survivors' needs are different from other victims and are determined by their circumstances. While other victims may need a judge who is characterized by a spirit of sharing speech for example, a rape victim may need a judge who will support her with confidentiality and security. Confidentiality is not a characteristic of *Gacaca* court because of its very public nature.

Rape by its very nature robs the victims of the confidence to appear before the public. In addition, these judges have not been trained on the psychosocial needs of such victims and they have not been informed of the fact that by the nature of the *Gacaca* law, rape victims, may actually be required to appear before the courts for the purposes mentioned above.

3.5 Gender distribution of ‘Gacaca’ judges as a bar to justice for rape victims.

At this writing, the ratio of men to women judges of *Gacaca* jurisdictions was not yet established. However, International Alert report states that 20-36% at every administrative level are women.¹³⁰ This is something but given the fact that the majority of Rwandan population is women, it is still low. Research has shown that rape victims respond better to women than men. It means if we have to get more rape victims report, the number of *Gacaca* women judges must increase. And the reasons why women are few in such public sphere should be addressed. For example Rwandan women are not accustomed to get involved in public discussions because of the influence of culture and they need to be emancipated from this attitude first.

The most important step is to sensitize them on their role especially in relation to rape victims under *Gacaca* justice system. They need to be taught about their human rights in relation to the crime of rape and how it affects victims and the kind of psychosocial assistance that is needed in relation to justice and reconciliation. There should be some incentive that will attract women to get the zeal to participate; like payment since most of them are single mothers and struggle to bring up their children. With such incentive, women will be encouraged to participate as judges while catering for the needs of their families at the same time.

3.6 A rape victim before ‘Gacaca’ court

As already discussed after 1994 Rwanda embraced a justice system known as *Gacaca*¹³¹, The organic law setting up ‘*Gacaca*’ jurisdiction categorises the crimes committed during genocide and rape falls under category one which ordinarily is not supposed to be prosecuted by ‘*Gacaca*’ courts. This means that

¹³⁰ International Alert, “Profemmes Twese Hamwe”, Promoting Women’s’ roles in the *Gacaca* justice system, May, 2002, p.5

¹³¹ See n. 6 above

ordinarily rape victims would have nothing to do with *Gacaca* courts. However, when analysis of the law is done, it is revealed that in some cases both rape victims and suspects may appear before *Gacaca* court not as defendant or the accused but as may be required by the law to participate in arriving at the truth. The confession procedure and guilty plea under Article 54 provides that:

Any person who has committed offences aimed at article one of this organic law has the right to have recourse to confession procedure and guilty plea

The requirements to be fulfilled for the confession to be received were alluded to at the beginning of this chapter.¹³²

There is no doubt that the need to get confessions from the defendants is the real objective behind this procedure. Authorities would wish so solve the problem of the large numbers of the of the genocide inmates by offering them a chance to go back into society provided they confess or plead guilty, there is no doubt that the states objective in *Gacaca* is to get suspects cooperate in its efforts to deal with the problem.

If the disclosures are admitted, the tribunal will invoke Article 55 relating to commutation of penalties falling under categories 2,3 and 4 and category one where the names of the suspects had not appeared on the list of 1st category before.

Clearly this provision benefits the suspects and may lead to discovering the truth and lead to reconciliation, but for the survivors of rape this may be detrimental because the whole community where she lives may not support her after the suspect has confessed that he raped her especially if she has not yet told anyone.

The consequences of this procedure to rape survivors have been/will be two fold; first, people will/have been caught unawares of the fact that rape suspects have

¹³² See Article 54 (n. 121)

been mentioned with detail before *Gacaca* court revealing the names of the victims to the dismay of their families and husbands for those who have re-married.¹³³ In such circumstances it will lead to re-traumatisation of victims who otherwise would not have liked to reveal their ordeal without any support from family, friends or society.

Also under Article 56(2), persons who will have offered confession before their names previously appeared on the list of first category referred to in article 51 of the organic law, will benefit from penalty commutation.

At this time it is not clear in Rwanda how many people who committed such crimes fall under this category, but it is clear they are not few and among them rape suspects. Rape survivors know them but don't feel secure enough to reveal them. These are people who might appear before *Gacaca* court to benefit from penalty commutation. This is another avenue where rape victims will come face to face with community justice system perhaps without their will. This will humiliate them even further.

Under Article 59 the confession procedure and guilty plea is proposed before the '*Gacaca*' jurisdiction' seat at the cell level. However much rape victims avoid being involved, the cell is where she lives and as a person above 18 years of age, she is obliged to participate under the *Gacaca* law.

Article 37 provides that the '*Gacaca*' Jurisdictions like ordinary courts, try defendants on basis of testimonies against or in favour. They have also been given mandate to summon before the court any person they consider that his/her contribution should be necessary Article 37(2).

All provisions discussed above provide avenues where rape victims will have to appear before '*Gacaca*' courts either as principle witnesses or complainants. Either way, all cases and files will be completed before the general assembly,

¹³³ International Rescue Committee report on the prevalence of rape during genocide (2002).

which brings together all the people at cell level¹³⁴. Where rape victims will be considered to have viable information that might lead to the truth, they will be summoned by the cell *Gacaca* jurisdiction as provided under Article 37(2) before the general assembly, which will be comprised of community members, to account for information she knows. In other circumstances, rape victims who have decided not to talk about their rape experience, the perpetrators may reveal it through confession and guilty plea procedure. This as already indicated will lead to re-traumatization and isolation of the victims by the community.

The above procedure is not completely different from what happens in ordinary courts. The difference is that *Gacaca* courts are held at family level, involving all the community members who might not be aware that they live with these rape survivors. This procedure will lead to traumatic situation for both survivors and their families and the relationships. This will happen where partners of rape survivors and family were not aware that their wives were raped during genocide.

Similarly, in classical court system the whole court process can be an extremely intimidating and humiliating experience for women. Some rape victims have described the cross-examination they have to endure as like being raped for a second time.¹³⁵ This shows that in both *Gacaca* courts and ordinary courts, something needs to be done to suit the needs of rape victims.

In court proceedings, the evidentiary rules are so high that rape victims will feel more traumatised. According to Rwandan law, the prosecution must prove beyond reasonable doubt that rape took place, which is hard in the crime of rape especially after ten years along the road.

Rape victims will always depend on state prosecutors as already discussed who are always incompetent compared to the situation where victims have their own lawyers. Often prosecutors do not even speak to the complainants until just

¹³⁵ <<http://www.worldsocialist.cwi.org/index2.html? /eng/2002/07/19women.html>>

hours before the trial because they are supposed to represent the state and remain impartial.¹³⁶

¹³⁶

As above

Chapter 4. Challenges facing *Gacaca* justice system

4.1 General challenges

The general challenges that face *Gacaca* system is the criticism that it does not fulfill the international obligations like the right of the accused to due process of law like right to fair trial and legal representation¹³⁷. According to *Gacaca* law, irrespective of the category the suspect may fall into legal representation will only be available at the suspect's expense. This reflects Rwanda's inability to manage the legal system within the required international standards and not a systematic denial of the rights to the accused. It is important to note however, that *Gacaca* is modeled on the traditional justice system where the legal representation was irrelevant; community was in charge of the whole process.

With regard to rape victims, the public nature of *Gacaca* courts may be a big challenge on the rate of reporting because victims need confidentiality to be able to tell the truth about what happened. This kind of set up has also increased the insecurity of survivors. For example at the beginning of *Gacaca*, courts justice was threatened by disappearances and deaths of witnesses during and after testimonies.¹³⁸ This greatly affected other potential witnesses who feared to testify for fear of their lives being in danger.

In addition perpetrators are to be tried within their communities.¹³⁹ The possibility is very high that if the community is generally composed of people who embraced genocide, the perpetrators may end up being acquitted thus undermining the process of reconciliation. This will especially take place in the cases of rape where survivors will decide to keep quiet for fear for their lives.

¹³⁷ Amnesty International Report, "unfair trials", Justice denied" (1997), see also article 36 of Organic Law On *Gacaca*. " No right to legal representation"

¹³⁸ As above, n.137

¹³⁹ See n. 121 Articles10 and 12.

As already discussed, *Gacaca* judges are people of integrity but are not qualified judges, majority of them may not know how to read or write. This to us is a major challenge with regard to recording of information and proper case compilation for future references. The few *Gacaca* courts that we visited, the clerks of the court seemed semi illiterate and the writing was so slow that to in our point of view some information was lost.

The above challenge can also be bundled together with the problem of resources that faces Rwanda justice system. Though *Gacaca* is a model of traditional justice system, the problem that it faces are immense with regard to the caseload of the suspects in prisons to go through *Gacaca*, how to keep records and how to collect data and process it. All this needs finances that are not available in Rwanda.

4.2 Challenges specific to the victims of rape in Rwanda both under Ordinary Courts and *Gacaca* its effect on reconciliation process.

The challenges that face rape victims are just like those that face rape victims all over the world. A lot of reports have shown that rape victims feel that the rape trial is more traumatizing than rape itself. This is because rape victims in court turnout to be accused while answering questions and giving account on how the incident took place to convince the judges beyond reasonable doubt that rape took place.

This is the same in Rwanda both before *Gacaca* courts and ordinary courts. If a rape victim has to convince the general assembly at the cell level to categorize her rapist during categorization, she will have to bear all the questions during investigations, which might not be easy for her.

In *Gacaca* courts like other courts, judgments will be delivered based on evidence. The rape victims will have the burden of convincing *Gacaca* court that the suspect raped her before they classify him in the appropriate category. Or vice versa to convince the court that a person was classified in a wrong category

granting less sentence compared to the crime he committed against her during the genocide. In all these cases the burden of proof lies heavily with the victim who won't have any legal representation.

Before the ordinary Court, rape victims have to prove beyond reasonable doubt that they were raped during the 1994 genocide. This is a challenge nine years a long the road, the victims have forgotten all the details that courts need, many of them have lost the zeal to testify and others are intimidated by trauma or have resigned to fate. Further still, rape victims that were infected with diseases have today died or are at the terminal end of their life that they feel justice is already denied to them by not accessing treatment and have resigned.

Another problem that faces the victims before the ordinary courts is the requirement to have witnesses. Today survivors of rape in Rwanda may not have any of their relatives surviving who may have been the only witnesses. The result of such a situation may lead to a conclusion, which may not favor the victim hence leading to more traumatisation of victims. Further still the medical examination that is usually done in cases of rape, today is irrelevant to rape victims of 1994 because of the length of time that has passed, and this may undermine the credibility of evidence.

4.3 Recommendations to the general challenges

With regard to general challenges that face justice system in Rwanda, it is important that some legal guarantees be recognized within *Gacaca* justice system especially for the victims who may need to have legal representation apart from Public prosecution Department. However, given the little financial capacity of Rwanda, this may not be possible. The international community should be able to make a contribution in this regard. Some commentators will argue that the international community is funding the International Crimes Tribunal for Rwanda which taken to be enough contribution.

On our part while this is appreciated, a lot still remains to be desired at the national level since the majority of the suspects are in national prisons. One would also safely say that the international community should be more involved in the reconciliation efforts undertaken since the crime committed in Rwanda against Rwandans is also a crime against humanity and international law.

In relation to the problem of documentation of the *Gacaca* cases and court rulings, it is our opinion that funding should be availed by the donors and international community to help in proper documentation and collection of information. The experts on documentation should also be trained or hired to help document this wonderful initiative that might in future act a model of conflict resolution mechanism world over.

With regard to the situation of rape victims before *Gacaca* courts, first of all in this book we tried to show how and where the rape victims will be required to appear before these courts, which many people have not paid attention to. In such cases, it is important to make *Gacaca* courts more sensitive to the needs of the rape victims. The *Gacaca* judges should be trained on the needs of such victims and the community at large.

The rights of the victims to keep silent when they want to should be respected especially during confession and guilty plea procedure. Rape victims should be given a right to camera hearing. And this camera hearing should be redefined to show how many people are involved in it and how it is possible in a public hearing like *Gacaca*.

A lot of sensitization should be done at community level to make people aware of the needs of the rape survivors and the need to support them. Experts on rape should train those who are involved in investigations. There should be a media campaign that will awaken the population on the needs of such people. In addition, there should be a coordination between different stakeholders in the

area of medical, social, security, community and justice to address the needs of rape survivors.¹⁴⁰

4.4 Recommendations to the specific challenges related to dealing with the crime of rape under Gacaca justice system

In order to effectively address the issue of rape in Gacaca justice, it is important to address it comprehensively and throughout the lifeline of the community. Focusing on the fact that rape was used as a weapon of war during genocide, it is important to support the victims to recognize that they have the capacity within themselves to address these issues. While it is critical not to undermine the process of justice that must take place, the priority with the rape survivors is to respond to their needs in a more inclusive and integrated manner. The needs of the survivor are the determining factor upon which the services are designed, justice inclusive.

Survivors who experienced rape need comprehensive support in order to fully recover – this includes medical services, emotional, psychological, physical and social support as already noted in the previous chapter.

However, in seeking to redress crimes of this nature, which are recognized as a crime against humanity, these basic needs are almost always overlooked and the survivor is treated more as a key witness for the community than a person in need. Before such needs are addressed which are overwhelming to the survivors, they may not find courage to participate in justice system and reconciliation will never be a reality to them. It is therefore important that rape survivors receive such services like counselling; while at the same time training them on the importance to reveal the truth of what took place in relation to the crime of rape.

¹⁴⁰ Medical is where a rape victim goes for treatment, the community is where she lives and where she needs support from family and friends, security, this includes the police where she goes to report, social, is where the rape victims find services like counselling and all these areas need to be sensitive to her situation

It is also important that information be collected on the number of rape survivors in Rwanda. Due to the highly unsystematic methods of information collection many rape survivors may not be found out and the results may be underestimated. It is therefore, important that information is collected on the number of 1994 genocide rape victims that exist within Rwandan community since the estimates are already too high compared to the number that has testified both before *Gacaca* courts and ordinary courts. This will help in planning for support services in a more appropriate manner.

Silence has been demonstrated to actually intensify survivor's suffering and continues their alienation and isolation. In all studies that have been carried out it was established that this silence is only broken by treating survivors in a more sensitive manner, giving them confidence that they will not be humiliated again. It is therefore important to train all the people that will be involved with the rape survivors both in *Gacaca* and ordinary courts especially those involved in collection of information and provision of services.

Training for police, forensic and medical examiners, prosecutors etc on the needs of rape survivors with regard to their security and confidentiality will increase the number of rape cases being reported. In ordinary courts, specialist teams of prosecutors should be hired or trained to deal with rape cases especially during investigations.

The expert witnesses should be called on in rape trials to dispel many of the myths related to it. A Victim-friendly courtroom should be established in Rwanda. This kind of courtroom was first opened in Namibia and it is structured to shield survivors of sexual crimes from having to come face to face with their alleged attackers when they have to testify against them in court.¹⁴¹

¹⁴¹ <<http://www.namibia.com.na/2003/august/national/03F606B347.html>>
Accessed on October 11, 2003.

Chapter 5: General Conclusions

Nine years down the road, few rape victims have testified. This shows that while the legal responses adopted by both the international community and the national jurisdictions have made some achievements, they remain inadequate to deal with the crime of rape.¹⁴² This paper has addressed the areas where the rape victims may appear before the *Gacaca* courts though it has been taken for granted that the suspects under category one fall out of *Gacaca* jurisdictions and therefore rape victims, it has highlighted the lope holes in the system that might be the cause of the low rate of rape reporting, it has also addressed the inadequacies that exist with regard to ordinary courts with regard to this crime and proposed solutions which might in our opinion help to solve these problems.

The paper also discussed at length the patterns of rape committed against unwilling victims in Rwanda and their consequences.

The importance of bringing out all this was to emphasize the different needs of rape victims at a given moment and their right to be treated with due respect. Importantly however, this paper is aimed at raising awareness that Rwandans should not celebrate success in reconciliation and justice when victims of rape have not accessed it.

The paper also went at length to discuss the nature of rape under international law, the nature of the crime of rape under international humanitarian law, rape under traditional justice system, myth about rape, and forms of sexual violence committed against Rwandan women during genocide. In the third chapter, we dealt with the background of *Gacaca* justice system and its relationship with reconciliation, the law establishing *Gacaca* and Organisation, qualification of judges and finally we discussed challenges and proposed solutions.

It is hoped that this paper will have its own contribution to justice system in Rwanda and especially with regard to rape victims and reconciliation process.

¹⁴² See note 1 above

WORD COUNT: 15.585

BIBLIOGRAPHY

BOOKS

- Africa Rights, Rwanda: Death Despair and defiance, revised edition (1995)
- Allen, B. rape Warfare- The hidden genocide in Bosnia-Herzegovina and Croatia, University of Minesota press: Minneapolis, 1996.
- Capelon R. “ Surfacing Gender- Re-Conceptualising Crimes Against Women in Times of War”, Mass Rape: The War Against Women in Bosnia –Herzegovina, ed (1994)
- Gerald Prunier, The Rwandan Crisis: History of a genocide, New York: Colombia University Press (1995)
- Roberta Clarke, Violence Against Women in The Caribbean, State and None State responses (1998)
- Khon, E.A, Rape as a weapon of War: “The Women’s rights during the dissolution of Yugoslavia” Golden Gate university Law Review (1996)
- Korak, M. Linking Arms: Women and War in Post Yugoslav States (1998)
- Sarkin, promoting justice, truth and reconciliation in transitional Societies: ‘Evaluating the Rwanda’s approach in the new millennium of using community base gacaca Tribunals to deal with the past’ American International Law (2000)
- Zarkov, D “ War rapes in Bosnia, On Masculinity, Femininity and Power of the Rape Victim Identity”, Belgrade Feminist Notebooks (1997)

INTERNATIONAL INSTRUMENTS

- UN Convention on Prevention and Punishment of the Crime of Genocide adopted by the UN general Assembly on December 1948
- UN Convention on Elimination of all Forms of Discrimination against Women (1979)
- UN Convention Against Torture and other cruel and, inhuman or Degrading Treatment or Punishment (1984)

Universal Declaration of Human rights (1948)

Statute of International tribunal for Rwanda (UN 1994)

International Covenant on Civil and political rights (1966)

Statute of International Tribunal for the Prosecution of Persons responsible for serious violations of International humanitarian Law Committed in the territory of the Former Yugoslavia since 1991 (UN December 1993)

Geneva convention relative to the Protection of civilian Persons in time of war (1949)

Charter of the International Military Tribunal (August 8, 1945)

REPORTS

Amnesty International report “ Unfair Trials”, Justice denied” (1997)

Avega- Agahozo, Study of Violence Against Rwandan women during the Genocide, (1996)

David J Scheffer, Ambassador-at-large for war crimes Issues, The Global Challenge of Establishing Accountability for crimes against Humanity (August 22, 2000).

Human Rights watch/Africa, Shattered Lives: Sexual Violence during Rwandan genocide and its aftermath, September 1996.

Human Rights Watch, The Slaughter Among Neighbours: The political origins of communal Violence (1995)

Human rights watch, “ Sexual Violence as an International crime,” Kosovo background (May 10,1999).

International Alert, “ *Profemmes Twese Hamwe*” Promoting Women’s Role in the *Gacaca* Justice System, (May, 2002).

Press Release of 1995 releasing information about indictment of 21 defendants from Omarska detention camp: ICTY Hague (1995).

Professor Michello Hansungule, A critical Analysis of indigenous or tree-based Justice Systems in Rwanda with relevant examples from Africa (Un Published report)

Report of the Special Rapporteur (E/CN/1996/68) on the situation of human rights in Rwanda (1996)

The Secretary General, General Assembly Document A/48/858, Rape and Abuse of Women in the areas of Armed Conflict in the Former Yugoslavia, January 29, 1994.

JOURNAL ARTICLES

Sarkin, Promoting Justice, truth and reconciliation in transitional Societies: "Evaluating the Rwanda's Approach in the new millennium of using Community based *Gacaca* tribunals to deal with the past" American international Law Journal 2000(2) 112, 115.

Dugard, J " Dealing with crimes of past regime: Is Amnesty Still an Option? (1999) 12 LJIL 1001

Carla J. Ferstaman: "Domestic Trials for Genocide and Crimes against Humanity: The example of Rwanda:" African Journal International law; December 1997, Vol.9 p.857

RWANDAN DOMESTIC LEGISLATIONS

Organic Law No.40/2000 of 26/01/2001 Setting up "Gacaca jurisdiction" and organising prosecutions for the offences constituting the crime of genocide or crimes against humanity committed between October 1, 1990 and December 31, 1994

Rwanda penal code (1977)

INTERNET RESEARCH

Background of research

<<http://search.csmonitor/durable/1998/03/intl.3html>>

See also [http:// www.refugees.org/world/countryrpt/africa/rwanda.html](http://www.refugees.org/world/countryrpt/africa/rwanda.html)>

<http://www.st.andrews.ac.uk/~www_se/personal/pvm/woman.html>

<<http://members.lycons.co.uk/HastingsHistory/19/overview.htm>>

<<http://usembassy.state.gov/posts/sf/www/hvjb.html>>

David Schefer, ambassador at large for war crimes issues, remarks, Fordham, University of New York, October 29, 1999

<<http://www.coverage.org.nz/mpa/petition.htm>>

Definitions of rape

Namita Bhadare, The definition of rape is a problem (New Delhi, October 17, 2003)

<http://www.hindustantimes.com/news/181_426093001300540000.htm>

<<http://pinoyrape.freesevers.com/whenandhowrapeiscommitted.htm>>

Women Resource Center, University of UTAH,

<<http://www.utah.edu/women/PEER/define.html>>

< <http://www.free-rape-photo.com/rape/hndouts/definitions.htm>>

<<http://www.ageofconsent.com/comments/rapedefined.htm>>

Addressing Sexual Violence Oklahoma, Sexual Assault,

<<http://www.healthstate.ok.us/program/injury/violence/rape.html>>

<<http://www.dianrussell.com/prndefinitions.htm>>

Akayesu case <<http://www.un.org/ict/english/judgement/akayesu.html>>

<<http://pinoyrape.freesevers.com/essenceofrape.htm>>

Myths about rape <<http://svay.tripod.com/myths.htm>>

Patterns of rape

<<http://pinoyrape.freesevers.com/whenandhowrapeiscommitted.htm>>

Power rape <<http://geshem.bi.org/pattersa.html>>

The legal nature of the crime of rape

<<http://www.Amnestyusa.org/group/balkans/sign.html>>

<<http://pinoysersers.com/violenceandintimidation.htm>>

Consequences of rape

<<http://www.academic.udayton.edu/race/obrights/georegions/Africa/rwanda01.htm>>

<<http://www.hrw.org>>

Gacaca as a dispute resolution mechanism

<http://www.bc.edu/schools/law/lawreviews/meta-elementa/journal/bciclr/26_2/09_FTN.htm#88>

General challenges < <http://www.worldsocialist.cwi.org/index2.html?/eng/2002/07/19women.html>>

Victim friendly courtrooms, case of Namibia
<<http://www.namibia.com.na/2003/august/national/03F606B347.html>>

Kenneth Roth and Alison DesForges, Justice or Therapy?
<<http://www.bostonreview.net/BR27.3/rothdesforges.html>>