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# Engendering Genocide: The Akayesu Case Before the International Criminal Tribunal for Rwanda

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## Chapter 6

# Engendering Genocide: The *Akayesu* Case Before the International Criminal Tribunal for Rwanda

Beth Van Schaack\*

### *Introduction*

Gender crimes and crimes of sexual violence are no longer as invisible as they once were thanks largely to the work of feminist scholars, practitioners, and activists, and to the landmark case against John Paul Akayesu before the International Criminal Tribunal for Rwanda (“ICTR” or Tribunal). The case against Akayesu is credited with establishing many “firsts” in international criminal law. For one, it resulted in the first adversarial conviction for genocide under international law since that crime’s inception fifty years prior. It also established a number of important jurisprudential precedents concerning the law of incitement, complicity, cumulative charging, individual criminal responsibility in non-international armed conflicts, and the constitutive elements of the crime of genocide. Most importantly for the purposes of this volume, the case was the first to recognize the concept of genocidal rape—the subject of vigorous discussion and advocacy among the feminist legal and activist community at the time.

Akayesu was *bourgmestre* (mayor) of Taba Commune and one of its most powerful people in April 1994 when genocide engulfed the small mountainous country of Rwanda. The primary allegations against Akayesu were not that he personally engaged in acts of violence. Rather, he was charged with ordering, inciting, or instigating international crimes. As one witness described it, “Akayesu did not kill with his own hands, but with his orders.”<sup>1</sup>

During the course of the proceedings against Akayesu, advocates for gender justice in Rwanda and elsewhere intervened to urge that Akayesu be held responsible for the rapes perpetrated in Taba Commune and that these acts be recognized as predicate

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<sup>1</sup> Press Release, Fondation Hirondelle, Akayesu Found Guilty of Genocide (Sept. 2, 1998), *available at* <http://www.hirondelle.org/hirondelle.nsf/caefd9edd48f5826c12564cf004f793d/f12757ecc6d866d1c12566730041e5ae?OpenDocument>.

acts for the genocide charge. This outcome would not have been reached had the original indictment against Akayesu not been amended in crucial ways, enabling the Tribunal to rule on the genocidal rape allegations. This story will highlight the role that advocates played in encouraging the Tribunal to consider genocidal rape in Rwanda and the limitations such advocates have faced in piercing the prosecutorial and adjudicative process.

For its rulings on rape and genocide, *Akayesu* has been heralded as “the most important decision rendered thus far in the history of women’s jurisprudence.”<sup>2</sup> Given subsequent developments before the Rwanda tribunal, however, *Akayesu*’s gender justice legacy—at least vis-à-vis victims in Rwanda—is more modest. The full story of the impact of the case must await the work of the International Criminal Court. At this point, however, there is no doubt that the case ratcheted up the expectations and aspirations of advocates for international gender justice.

### *History of the Rwandan Conflict*

A brief history of Rwanda is necessary to understand the 1994 genocide.<sup>3</sup> Anthropologists and historians recount that the people of Rwanda (and Burundi) descended from three distinct populations: one known as the Hutu, who resembled the Bantu people of the region; a second, the Tutsi, who resembled the Cushitic or Nilotic people of the Horn of Africa; and a third, the Twa, related to local pigmy populations. Over time, these groups intermixed and developed a common language and culture. The groups were differentiated by occupation, economic means, and political status and were more fluid than fixed.

During the colonial era, from approximately 1890 to 1962, Belgian colonial administrators solidified these distinctions by “assigning” individuals an “ethnicity” on a state-issued identity card. The Hutu represented about eighty-four percent of the population, the Tutsi constituted about fifteen percent, and the Twa about one percent. At first, the colonizers favored individuals identified as Tutsi—for reasons grounded in racism, some have argued, as such individuals had more Caucasian features. As a nascent independence ethos began to develop among the Tutsi elite in the 1940s, the Belgian colonizers shifted their allegiance to the Hutu populace in an effort to prolong their rule over the region. This coincided with the Catholic Church’s promotion of a political awareness among the Hutu populace. Hutu intellectuals soon published revolutionary manifestos outlining the political, social, and economic oppression suffered by the Hutu populace at the hands of the minority Tutsi group. In 1956, the U.N. Trusteeship Council pressured Belgium to organize elections on the basis of universal

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<sup>2</sup> Kelly Askin, *Women’s Issues in International Criminal Law: Recent Developments and the Potential Contribution of the ICC*, in INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT 47, 52 (Dinah Shelton ed., 2000).

<sup>3</sup> This historical account is drawn from the factual findings in *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, at paras. 54, 78-129 (Sept. 2, 1998) [hereinafter “*Akayesu*”]. See generally ELIZABETH NEUFFER, THE KEY TO MY NEIGHBOR’S HOUSE: SEEKING JUSTICE IN BOSNIA AND RWANDA (2001); PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA (1998).

suffrage. These elections elevated Hutu individuals for the first time into local and national positions of political power. Rwanda achieved its independence in 1962 under the leadership of the Belgium-installed Grégoire Kayibanda, a Hutu leader who imposed ethnically-based quotas for access to schools, some industries, and the civil service that significantly limited Tutsi participation in these sectors.

More systematic violence began to break out between the two groups in the wake of these policies and the inequities they generated.<sup>4</sup> Many Tutsi individuals fled to neighboring countries, especially Uganda, Burundi, and Congo. Some of these exiles organized themselves into militia to carry out cross-border raids at night, embracing what later became the epithet *Inyenzi*, meaning “cockroach.” These raids provoked violent reprisals against Tutsis within Rwanda. Tutsi exiles in Uganda further organized themselves into the Rwandese Patriotic Front (“RPF”), with the Rwandan Patriotic Army (“RPA”) as its military wing. Their goals were the return of exiles to Rwanda and eventually the overthrow of the Hutu-dominated regime, later led by President Kayibanda’s successor, General Juvénal Habyarimana, who took power in a coup on July 5, 1973. Habyarimana at first installed a one-party state with automatic national membership in his *Mouvement Républicain National Pour La Démocratie et le Développement* (the National Revolutionary Movement for Democracy and Development, or MRND). Habyarimana eventually capitulated to internal and external pressure to allow multipartyism. This opened the way for the rise of Hutu-power political groups, such as the *Coalition pour la Défense de la République* (“CDR”).

The RPF launched a devastating attack in October 1990, further destabilizing Habyarimana’s regime. Hutu-power political parties began to form and train paramilitary units, such as the MRND’s *Interahamwe* (“those who stand together”) and the CDR’s *Impuzamugambi* (“those who share a single goal”). Together, the groups stepped up anti-Tutsi violence and propaganda, particularly through the Hutu-dominated *Radio Télévision Libre des Mille Collines* (“RTLM”) and a pictorial magazine, *Kangura* (“Wake Up”). After several failed ceasefires, the RPF and the Government of Rwanda agreed to the Arusha Peace Accords on August 4, 1993, providing for the establishment of a transitional government to include the RPF, the partial demobilization and integration of the two opposing armies, the creation of a demilitarized zone, and the deployment of a two-year U.N. peace-keeping force composed of 2,500 soldiers (the United Nations Assistance Mission for Rwanda (“UNAMIR”)) to help implement the Accords.

As President Habyarimana and Burundian President Cyprien Ntaryamira were returning on April 6, 1994 from a meeting in Tanzania on the implementation of the Arusha Peace Accords, their plane was shot down over Kigali Airport. The identity and the precise motive of the assassins remain unknown. Many speculate that Hutu nationalists, angered that President Habyarimana had capitulated during the peace process, were responsible.

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<sup>4</sup> This account belies the tendency of some to describe the killing in Rwanda as an expression of so-called “age-old tribal animosities.” This facile explanation masks the role that political elites played in manipulating differences to consolidate political power.

Radios immediately proclaimed the end of the last ceasefire and government agents set up roadblocks around the country. Massacres of Tutsi and moderate Hutu individuals began in Kigali and soon spread to other parts of the country. Fueled by genocidal propaganda broadcast over the radio and facilitated by the ubiquitous identity cards, many Hutu citizens turned against their Tutsi friends, neighbors, and compatriots. Even children were not spared. By the end of April, corpses clogged rivers and streams and lay in heaps around the country. Because ammunition was eventually in short supply, many deaths were accomplished with machetes and other rudimentary farm implements. Eventually, 500,000-800,000 individuals were left dead, almost seventy-five percent of the Tutsi population.<sup>5</sup>

In the face of this bloodshed, the international community remained largely silent. In January 1994—several months before the genocide began—Major-General Roméo Dallaire, the Canadian force commander of UNAMIR, had learned from a high-level informant that the extermination of the Tutsi populace was being planned. Dallaire made several requests to expand his mandate, but in fact, the opposite ensued. On April 7, 1994, the Rwandan Army executed ten Belgian peacekeepers (so called “blue helmets”), apparently in order to provoke Belgium’s withdrawal. Belgium complied and recalled the rest of its troops on April 19. On April 21, the U.N. Security Council reduced UNAMIR’s force size to a few hundred individuals. The international community employed a series of semantic contortions to avoid using the term “genocide,” afraid that the Genocide Convention would require states parties to intervene. Six weeks after the genocide began, the U.S. State Department finally permitted the use of the term.

In 1993, the Security Council had established an ad hoc international tribunal to prosecute individuals accused of committing international crimes in the ongoing war in the former Yugoslavia—the International Criminal Tribunal for the Former Yugoslavia (“ICTY”). Responding to calls that Africans deserved international justice too, especially in the face of atrocities committed on an exponential scale, the Security Council established the International Criminal Tribunal for Rwanda (ICTR)<sup>6</sup> with jurisdiction over genocide, crimes against humanity, and certain war crimes. Before the Tribunal, rape—like crimes such as murder, torture, or arbitrary detention—was not prosecutable as a freestanding crime; rather, it could only be charged as a crime against humanity or a war crime. Nor was rape an enumerated predicate of genocide, although the actus reus of the latter crime was broadly defined.

As originally designed, the two ad hoc tribunals shared a Chief Prosecutor and an Appeals Chamber. The first Chief Prosecutor was Justice Richard Goldstone, a jurist

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<sup>5</sup> HUMAN RIGHTS WATCH, *LEAVE NONE TO TELL THE TALE: GENOCIDE IN RWANDA*, available at <http://www.hrw.org/reports/1999/rwanda/Geno1-3-04.htm> (citing various estimates of the number of deaths).

<sup>6</sup> Through this Resolution, the Security Council expressed the finding that widespread violations of international law within the territory of Rwanda constituted a threat to international peace and security justifying intervention under Chapter VII of the U.N. Charter. It also concluded that establishing an international criminal tribunal to prosecute individuals responsible for international crimes in Rwanda would “contribute to the process of national reconciliation and the restoration and maintenance of peace.”

with a long history fighting human rights abuses in Africa. Below the Chief Prosecutor, separate prosecutorial offices and deputy prosecutors staffed the two institutions. At the moment, the two tribunals are subject to Security Council-ratified Completion Strategies that envision all trial proceedings completed by the end of 2008 and all appellate proceedings completed in 2010. In the context of establishing these Completion Strategies, the Security Council appointed a Chief Prosecutor dedicated to the ICTR.

### *Jean Paul Akayesu*

Akayesu had been appointed *bourgmestre* in April 1993 of Taba Commune, located a mere 11 miles from the capital of Kigali, amid rolling hills of banana and coffee fields. As *bourgmestre*, Akayesu was responsible for maintaining public order and exercised exclusive control over the local commune police and some authority over any *gendarmes* (members of the national police force) dispatched to the area.<sup>7</sup> Although he originally resisted the unfolding genocide in his region, Akayesu apparently later realized his political fortunes required him to join the fray, and he changed course.<sup>8</sup> The evidence established at trial that Akayesu presided over a meeting in which he urged the local population to eliminate accomplices of the rebel RPF, which—according to the indictment—“was understood by those present to mean Tutsis,” and named three prominent Tutsi individuals to be killed. Akayesu also traveled throughout his region ordering particular “accomplices of the RPF” to be abused or killed, and he permitted numerous acts of violence to occur in his presence. The Prosecutor alleged that, all told, at least 2,000 murders took place in Taba Commune and that Akayesu did nothing to prevent them or punish the perpetrators.<sup>9</sup>

Akayesu had not originally been on the ICTR’s radar until his name appeared on a list of individuals the government of Rwanda was seeking. When Akayesu surfaced in 1995, Goldstone hastily indicted him for his role in inciting and enabling violence against Tutsi individuals in his commune. In particular, Goldstone charged Akayesu with direct responsibility for genocide, complicity in genocide, incitement to genocide, crimes against humanity (extermination and murder), and war crimes (murder).

The Tribunal determined that Akayesu was indigent—despite the fact that he had been one of the most prominent figures in his community—and so counsel was appointed for him at the Tribunal’s expense. The prosecution team included Yacob Haile-Mariam (Ethiopia), Pierre-Richard Prosper (United States), Mohamed Chande Othman (Tanzania), and others. During the course of the trial, jurist Louise Arbour (Canada) succeeded Justice Goldstone as the Chief Prosecutor for both the ICTR and the ICTY.

### *The Trial*

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<sup>7</sup> As the Trial Chamber noted, Akayesu “was in charge of the total life of the commune in terms of the economy, infrastructure, markets, medical care and the overall social life. . . . The *bourgmestre* was . . . commonly treated with great respect and deference by the population.” *Akayesu*, Case No. ICTR-96-4-T, at para. 54.

<sup>8</sup> *Id.* at paras. 187-193.

<sup>9</sup> *Id.* at para. 12.

Akayesu's trial commenced on January 9, 1997 before Trial Chamber I of the ICTR composed of Judge Laïty Kama (Senegal), presiding alongside Judge Lennart Aspegren (Sweden) and Judge Navanethem Pillay (South Africa). At the time, Judge Pillay was the only female judge on the Tribunal. After a number of witnesses testified to violence against the Tutsi population in Taba Commune, Witness J<sup>10</sup> was called to the stand on January 27, 1997. A resident of Taba Commune, J was six months pregnant when the genocide erupted. Most members of her family were killed by a group of militia who came to their home. J and her six year old daughter managed to escape this fate by hiding in a tree and scavenging for food. In response to questioning from a prosecutor, J mentioned, in an almost offhand way, that her six-year-old daughter had been raped.<sup>11</sup> J confirmed that she had never been questioned about this by any investigators of the Tribunal. The President of the Tribunal and then Judge Aspergen

<sup>10</sup> Pursuant to Article 21 of the ICTR Statute and Rule 75 of the Rules of Procedure and Evidence ("RPE"), the Prosecutor in the *Akayesu* case requested, as a protective measure, that witness identities not be disclosed to the public. *Akayesu*, Case No. ICTR-96-4-T, Motion on Behalf of Prosecutors for Orders for Protective Measures for Witnesses to Crimes Alleged in Counts 1 Through 12 of the Indictment (Aug. 16, 1996). In connection with the motion, the Prosecutor submitted a Declaration of Ian Martin, the Chief of Mission for the United Nations High Commissioner for Human Rights Field Operation in Rwanda (HRFOR), which detailed attacks on survivors of and witnesses to the 1994 genocide. Virtually all eyewitnesses called on behalf of either party received protective measures.

<sup>11</sup> J testified as follows on direct examination and in response to questions from the bench:

BY MR. HAILE-MARIAM: . . .

A. After that I went to Kabgaye.

Q. Did anybody go with you?

A. I was with my daughter, who had been raped.

Q. When was she raped?

A. They raped her when they had come to kill my father.

Q. How many men did rape your daughter?

A. Three men.

Q. Was this question ever put to you by the investigators of the Tribunal?

A. No, they did not ask me this question. . . .

Q. I would like to ask you one question, which I skipped when I was asking concerning the rape of your daughter. How old was your daughter?

A. She was six years old.

Q. I don't have any more questions, Mr. President. Thank you.

MR. PRESIDENT: Your daughter was raped by three men you say? Do you know these three men or some of the three men?

THE WITNESS: Yes, I know them.

*Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Transcript, at pp. 00101-00102 (Jan. 27, 1997).

Later, a different judge returned to the topic:

JUSTICE ASPEGREN: To your knowledge were there any other incidents of rape in Taba?

THE WITNESS: I heard it said that there were young girls who were at the *bureau communal* [the office of the commune] who were raped. I heard that, but I did not see it.

JUSTICE ASPEGREN: Thank you very much, Madame.

*Id.* at p. 00137.

returned to this line of questioning, and J testified further that she had heard that other girls had been raped in Akayesu's *bureau communal*, but she had not seen it herself.

In March 1997, Witness H—the last of the Prosecution's witnesses—was called to the stand. H testified that her house had been attacked as well and her family had fled into nearby bushes. Eventually she was discovered, raped, and abandoned. Her father found her and brought her to the *bureau communal* where he had heard people were taking refuge. By her account, most of the people there were women and children; members of the communal police and Interahamwe were also present with weapons, but did nothing to stop the violence. H testified that Akayesu was present while these abuses were occurring.

On cross examination, the defense did not take up the issue of the rapes, but Judges Pillay and then Aspergan did, asking H to elaborate upon where Akayesu was and what he was doing while women were being raped at or near the *bureau communal*. Accounts of this trial credit Judge Pillay with bringing the issue of sexual violence in Taba Commune to the attention of the prosecution.<sup>12</sup> The transcript reveals, however, that all members of the bench pursued this line of questioning in the face of virtual silence from the parties.<sup>13</sup> The transcript also suggests that the key testimony emerged somewhat randomly. If J had not offered the fact that her six-year-old daughter had been raped, the existence of sexual violence in Taba Commune may never have made it into the formal record. In addition, it is noteworthy how few details were solicited from the witnesses, almost as if no one wanted to touch the material or failed to immediately recognize its significance. That said, prosecutors working on the case had apparently been aware of the existence of sexual violence in Taba, through the testimony of witness H and others, but had been unable to link it to the accused sufficiently as required by principles of individual criminal responsibility.<sup>14</sup>

<sup>12</sup> See, e.g., Rhonda Copelon, *Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law*, 46 MCGILL L.J. 217, 225 (2000).

<sup>13</sup> This is not the only case in which the judges intervened to raise the issue of gender violence. In the Decision confirming the *Prosecutor v. Nikolić* Indictment, the ICTY Trial Chamber exhorted the Prosecutor to include gender crimes in the Indictment:

It appears that women and girls were subjected to rape and other forms of sexual assault during their detention . . . Dragan Nikolić and other persons connected with the camp are related to have been directly involved in some of those rapes and sexual assaults. These allegations do not seem to relate solely to isolated incidents. The Trial Chamber feels that the prosecutor may be well advised to review these statements carefully with a view to ascertaining whether to charge Dragan Nikolić with rapes and other forms of sexual assault, either as a crime against humanity or as grave breach or war crimes.

*Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, at para. 33 (Oct. 20, 1995). The Prosecutor did amend the indictment several years later to include rape charges. *Prosecutor v. Nikolić*, Case No. IT-01-46-I, First Amended Indictment, at paras. 44-59 (Feb. 12, 1999), available at <http://www.un.org/icty/indictment/english/nik-1ai990212e.htm>.

<sup>14</sup> Email from Patricia Viseur-Sellers to author (February 2, 2008) (on file with author). Viseur-Sellers indicated that various amended indictments were drafted during April and May, but that these remained confidential at the time. Other accounts suggest that the Prosecutor's office in The Hague was supportive

At the close of H's testimony, trial was adjourned until May 12, 1997. Trial observers brought the testimony of J and H to the attention of women's groups active in Rwanda and elsewhere. At this time, the issue of gender justice had been on the agenda of many human rights organizations. Accounts of rape in Rwanda had appeared in the press and elsewhere. Human Rights Watch, for example, issued a comprehensive report in 1996 on sexual violence during the Rwandan genocide that drew in part on interviews with women in Taba Commune.<sup>15</sup> The report called upon the ICTR to fully and fairly investigate and prosecute acts of sexual violence as war crimes, crimes against humanity, and genocide, where appropriate; integrate a gender perspective into investigations by, among other things, hiring more women investigators; treat sex crimes against women with the same gravity as other crimes; amend existing indictments to ensure that sexual violence charges were brought, where appropriate; and strengthen and expand the Witness Protection Unit to protect witnesses and prepare them for testifying. Mobilizing around these concerns, feminist activists formed a non-governmental organization ("NGO"), the Coalition for Women's Human Rights in Conflict Situations ("Coalition"), in 1996 specifically to monitor the ICTR and ensure that it protected the rights and interests of women appearing before the Tribunal.<sup>16</sup>

In light of J and H's testimony, the Coalition<sup>17</sup> submitted an amicus curiae brief<sup>18</sup> ("Coalition Brief") on behalf of over forty other NGOs and law clinics to the ICTR on May 27, 1997.<sup>19</sup> The Coalition Brief called upon the Trial Chamber to exercise its

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of pursuing these investigations, but that the office in Kigali, Rwanda was pursuing rape investigations less earnestly, due to lack of expertise, interest, or resolve. At the time, genocide was largely considered to be the equivalent of mass and discriminatory killings, and so prosecutors may have overlooked the potential for acts of sexual violence to serve as predicate acts for genocide. This does not explain, however, why these acts were not charged as crimes against humanity. Email from Rhonda Copelon to author (June 18, 2008) (on file with author).

<sup>15</sup> HUMAN RIGHTS WATCH, *SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH* (1996) [hereinafter "HUMAN RIGHTS WATCH, SHATTERED LIVES"], available at <http://www.hrw.org/reports/1996/Rwanda.htm>.

<sup>16</sup> The Coalition continues to promote the prosecution of perpetrators of gender violence in transitional justice systems based in Africa in order to create precedents that recognize violence against women in conflict situations and to obtain justice for women survivors of sexual violence. See [http://www.womensrightscoalition.org/site/main\\_en.php](http://www.womensrightscoalition.org/site/main_en.php).

<sup>17</sup> The brief was not the Coalition's first communication with the Tribunal over the dearth of indictments addressing gender violence in Rwanda. On August 7, 1996, the Coalition wrote to then Chief Prosecutor Richard Goldstone urging him to include gender crimes in his Rwandan indictments and to undertake a number of reforms to ensure that such crimes were fully and effectively investigated. Letter from Coalition for Women's Human Rights in Conflict Situations to Chief Prosecutor Richard Goldstone (Aug. 7, 1996) (on file with the author).

<sup>18</sup> Amicus Brief Respecting Amendment of the Indictment and Supplementation of the Evidence to Ensure the Prosecution of Rape and Other Sexual Violence within the Competence of the Tribunal, Coalition for Women's Human Rights in Conflict Situations, available at [http://www.womensrightscoalition.org/site/adv-ocacyDossiers/rwanda/Akayesu/amicusbrief\\_en.php](http://www.womensrightscoalition.org/site/adv-ocacyDossiers/rwanda/Akayesu/amicusbrief_en.php) [hereinafter "Coalition Brief"].

<sup>19</sup> The Brief is not part of the official online record of the case, for reasons that are not entirely clear. The speculation is that there were procedural errors in its filing, perhaps because the Coalition did not seek leave of the Tribunal to appear as amicus in advance of its submission (the brief itself includes a prefatory motion under Rule 74). In any case, it is not clear if leave was strictly necessary; an ICTY document entitled "Information Concerning the Submission of Amicus Curiae Briefs" (IT/122), dated March 27,

inherent supervisory authority to invite the Prosecutor to amend the indictment against Akayesu to charge rape and other serious acts of sexual violence. It also urged the Trial Chamber to expand the investigation to inquire into the prevalence of sexual violence in Rwanda, and to examine why none of the indictments issued up until that point had included charges of rape or sexual assault, despite the existence of probative evidence in the record,<sup>20</sup> and in the public domain, supporting such charges. The Coalition Brief argued further that the Tribunal, in the civil law tradition, had the authority to issue orders as necessary for the purposes of investigation, the conduct of the trial, and the production of additional evidence or the summons of witnesses. Without an amendment to the indictment, the Coalition Brief argued, Akayesu would be granted immunity for rapes committed within his commune, the women of Taba would be denied justice, and the Tribunal would send a message that sexual violence is not as serious as other forms of assault. The Coalition Brief argued that the indictment should be amended to charge rape and sexual mutilation as crimes against humanity (torture, rape, and persecution on political, racial or religious grounds) and war crimes (violence to life, health and physical or mental well-being; outrages upon human dignity, in particular humiliating and degrading treatment, rape, and any form of indecent assault; and threats to commit same). The Coalition Brief also suggested that the Prosecutor consider charging rape as genocide, arguing that rape and sexual violence were an integral and pervasive part of the Hutu genocidal campaign designed “to destroy a woman from a physical, mental or social perspective and [to destroy] her capacity to participate in the reproduction and production of the community.”<sup>21</sup>

On June 17, 1997, the Prosecution sought a hearing before the Trial Chamber. During this hearing, Prosper and his co-counsel, Sara Darehshori (United States), made

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1997, indicated that “amicus briefs may be submitted unsolicited or in response to a general invitation from a Trial Chamber.” A subsequent letter from the President of the ICTR to the Coalition acknowledged receipt of the Brief and indicated that it was placed in the official case file and served on all parties. *See* Letter from Laïty Kama to Coalition for Women’s Human Rights in Conflict Situations (June 4, 1998) (on file with the author). The Coalition also received letters from the Registrar and the Office of the Prosecutor acknowledging receipt. Indeed, on July 7, 1997, after the indictment had been amended, the Coalition received a letter inviting its members to seek leave to present arguments concerning the Brief. The Coalition declined, as the indictment had already been amended. Email from Rhonda Copelon to author (June 18, 2008) (on file with author). The Judgment refers to the Coalition Brief in this passage:

The Chamber notes that the Defence in its closing statement questioned whether the Indictment was amended in response to public pressure concerning the prosecution of sexual violence. The Chamber understands that the amendment of the Indictment resulted from the spontaneous testimony of sexual violence by Witness J and Witness H during the course of this trial and the subsequent investigation of the Prosecution, rather than from public pressure. Nevertheless, the Chamber takes note of the interest shown in this issue by non-governmental organizations, which it considers as indicative of public concern over the historical exclusion of rape and other forms of sexual violence from the investigation and prosecution of war crimes. The investigation and presentation of evidence relating to sexual violence is in the interest of justice.

*Akayesu*, Case No. ICTR-96-4-T, at para. 417.

<sup>20</sup> At the time the brief was filed, amici were unable to obtain a full transcript of the trial because it was not yet publicly available. They were, thus, relying upon unofficial public reports of the trial.

<sup>21</sup> Coalition Brief, *supra* note 18, at para. 19.

an oral motion to amend the indictment in light of the testimony about sexual violence that had emerged during the trial. Prosper argued that he had been aware of the acts of rape and sexual violence in Taba Commune, but had been unable to connect these crimes to the defendant until hearing the testimony of J and H. He explained:

I think it's safe to say that the issue of sexual violence is of great importance to the Office of the Prosecutor and we take this issue very, very seriously. We feel that sexual violence being used as a weapon or as a tool is deplorable and cannot be accepted. In this case it is clear throughout the testimony that there had been hints that there were acts of sexual violence occurring in the Taba Commune. It came up not only in the testimony of Witness J or Witness H but I have to say it also came up in prior investigations, but the ... information we received before, in our opinion, was not enough to link the accused to the acts of sexual violence. We continued to look into it. ... After receiving [additional witness statements], we as the Office of the Prosecutor feel that we are duty bound to come here today and make this request....<sup>22</sup>

Addressing the absence of allegations concerning sexual violence in the first indictment, Prosper explained: “Maybe because the shame that sometimes accompanies these acts prevented the women from testifying or declaring what occurred to them or also I’m ready to admit, maybe sometimes we were not as sensitive as we should have been on the issue.”<sup>23</sup> He denied that the Prosecution was motivated by the Coalition Brief. “I would like to say to this Chamber right now and make it perfectly clear that the amicus curiae is not motivating us today. It is not motivating us today and, in fact, it can only be considered as a factor. And I say this as a factor because what it does is it reminds us of the importance of the issue of sexual violence.”<sup>24</sup> The prosecution proposed to amend the indictment to charge the crime against humanity of rape, the crime against humanity of inhumane acts, and the war crime of outrages upon personal dignity, including rape and indecent assault, under Common Article 3 and Additional Protocol II.<sup>25</sup> Prosper did not propose to amend the genocide counts to specifically include reference to sexual violence as predicate acts of genocide. Not surprisingly, Akayesu’s counsel opposed the proposed amendments, arguing that the timing was improvident and that the defense had been given no time to consider the supporting materials, having been provided copies of witness statements—most of which were dated June 12, 1997—over the preceding weekend and an English translation of the proposed Amended Indictment that morning.

After deliberating for ten minutes, the Chamber granted leave to amend and postponed the trial until October 22, 1997. The following three paragraphs concerned with sexual violence in Taba were then added to the amended indictment:

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<sup>22</sup> *Akayesu*, Case No. ICTR-96-4-T, Transcript, at p. 6 (June 17, 1997).

<sup>23</sup> *Id.* at 7.

<sup>24</sup> *Id.* at 8.

<sup>25</sup> *Id.* at 18.

10A. In this indictment, acts of sexual violence include forcible sexual penetration of the vagina, anus or oral cavity by a penis and/or of the vagina or anus by some other object, and sexual abuse, such as forced nudity. . . .

12A. Between April 7 and the end of June, 1994, hundreds of civilians (hereinafter “displaced civilians”) sought refuge at the *bureau communal*. The majority of these displaced civilians were Tutsi. While seeking refuge at the *bureau communal*, female displaced civilians were regularly taken by armed local militia and/or communal police and subjected to sexual violence, and/or beaten on or near the *bureau communal* premises. Displaced civilians were also murdered frequently on or near the *bureau communal* premises. Many women were forced to endure multiple acts of sexual violence which were at times committed by more than one assailant. These acts of sexual violence were generally accompanied by explicit threats of death or bodily harm. The female displaced civilians lived in constant fear and their physical and psychological health deteriorated as a result of the sexual violence and beatings and killings.

12B. Jean Paul Akayesu knew that the acts of sexual violence, beatings and murders were being committed and was at times present during their commission. Jean Paul Akayesu facilitated the commission of the sexual violence, beatings and murders by allowing the sexual violence and beatings and murders to occur on or near the *bureau communal* premises. By virtue of his presence during the commission of the sexual violence, beatings and murders and by failing to prevent the sexual violence, beatings and murders, Jean Paul Akayesu encouraged these activities.<sup>26</sup>

The Prosecution also added three additional counts, charging Akayesu with the crimes against humanity of rape and “other inhumane acts” as well as the war crime of committing “outrages upon personal dignity, in particular rape, degrading and humiliating treatment and indecent assault.”<sup>27</sup> The genocide counts were textually unchanged. Due to the placement of the new factual allegations immediately after paragraph 12 as set forth above, however, the alleged acts of sexual violence were incorporated by reference into the original genocide counts of the indictment. So, in essence, the Prosecution also charged sexual violence as a predicate act of genocide, although it had not expressly sought, or received, leave to do so.<sup>28</sup>

### *Testimony of Sexual Violence*

The trial recommenced on October 23, 1997 pursuant to the amended indictment. Akayesu again pled not guilty. The Prosecution presented six new witnesses, five of whom (JJ, OO, KK, NN, and PP) testified to being raped repeatedly and/or to seeing other women and girls being raped, humiliated, or sexually abused. All testified that

<sup>26</sup> *Akayesu*, Case No. ICTR-96-4-T, Amended Indictment (June 1997).

<sup>27</sup> *Id.*

<sup>28</sup> According to Patricia Viseur-Sellers, it was not necessary to amend the genocide counts specifically, because the definition of genocide, and particularly the actus reus of causing serious bodily or mental harm, covered the new evidence of sexual violence. Adding the new allegations was sufficient to charge genocidal rape. Viseur-Sellers Email, *supra* note 14.

Akayesu was either present or nearby when the abuses occurred and that he was often supervising, encouraging, or ordering the direct perpetrators. The harrowing testimony of Witness JJ about the prevalence of rape in the *bureau communal*, as summarized by the Trial Chamber, is emblematic of what transpired in Taba Commune on that day.

421. . . . Witness JJ testified that this happened to her—that she was stripped of her clothing and raped in front of other people. At the request of the Prosecutor and with great embarrassment, she explicitly specified that the rapist, a young man armed with an axe and a long knife, penetrated her vagina with his penis. She stated that on this occasion she was raped twice. Subsequently, she told the Chamber, on a day when it was raining, she was taken by force from near the *bureau communal* into the cultural center within the compound of the *bureau communal*, in a group of approximately fifteen girls and women. In the cultural center, according to Witness JJ, they were raped. She was raped twice by one man. Then another man came to where she was lying and he also raped her. A third man then raped her, she said, at which point she described herself as feeling near dead. Witness JJ testified that she was at a later time dragged back to the cultural center in a group of approximately ten girls and women and they were raped. She was raped again, two times. Witness JJ testified that she could not count the total number of times she was raped. She said, “each time you encountered attackers they would rape you,”—in the forest, in the sorghum fields. Witness JJ related to the Chamber the experience of finding her sister before she died, having been raped and cut with a machete.

422. Witness JJ testified that when they arrived at the *bureau communal* the women were hoping the authorities would defend them but she was surprised to the contrary. . . . On the way to the cultural center the first time she was raped there, Witness JJ said that she and the others were taken past the Accused and that he was looking at them. The second time she was taken to the cultural center to be raped, Witness JJ recalled seeing the Accused standing at the entrance of the cultural center and hearing him say loudly to the Interahamwe, “Never ask me again what a Tutsi woman tastes like,” and “Tomorrow they will be killed.” According to Witness JJ, most of the girls and women were subsequently killed, either brought to the river and killed there, after having returned to their houses, or killed at the *bureau communal*. Witness JJ testified that she never saw the Accused rape anyone, but she, like Witness H, believed that he had the means to prevent the rapes from taking place and never even tried to do so.<sup>29</sup>

A number of defense witnesses—many of whom were in detention in Rwanda—testified that they did not see any rapes in the *bureau communal*.<sup>30</sup> Several also testified that Akayesu attempted to help Tutsi individuals, by issuing *laissez-passeurs* and holding off the *Interahamwe*. Defense witness Matata, called as an expert, expressed the opinion that “rapists were more interested in satisfying their physical needs, that there were spontaneous acts of desire even in the context of killing [and] that Tutsi women, in general, are quite beautiful and that raping them is not necessarily intended to destroy an

<sup>29</sup> *Akayesu*, Case No. ICTR-96-4-T, at paras. 421-22.

<sup>30</sup> *Id.* at paras. 439-45.

ethnic group, but rather to have a beautiful woman.”<sup>31</sup> Akayesu also secured the testimony of Major-General Roméo Dallaire, former force commander of UNAMIR, in an effort to prove that if Dallaire could not stop the abuses, Akayesu could not have been expected to do so.

This was Akayesu’s defense when he finally took the stand on March 12, 1998. Akayesu tried to refashion the facts to show he was a figurehead under the control of the *Interahamwe* and that he did all he could to reduce the violence in his commune. On direct examination, Akayesu conceded that genocide occurred in Rwanda and that acts of violence, including killings, occurred in Taba Commune. He denied, however, that any acts of rape or other sexual violence took place in his *bureau communal*, while he was present or otherwise.<sup>32</sup> Prosper, the lead prosecutor, did not pursue the issue on cross examination, focusing instead on the meeting in Gishyeshye sector in which the incitement to genocide allegedly occurred.<sup>33</sup> Judge Pillay raised the issue of sexual violence, after Prosper announced he had no more questions, by asking Akayesu for his reaction to the testimony on rape that he had heard. Akayesu again denied that he had witnessed acts of rape in his Commune.<sup>34</sup> He also questioned why evidence of rape had not been in the initial witness statements procured by the Prosecution. He suggested that the indictment had been amended because of pressure from the women’s movement and that the testimony was fabricated: “There have been some amicus curiae. There have been activities. Akayesu must be accused of rape. People, women are agitated in Rwanda. They are awakened. They are worked up to agree that they have been raped. So there is a change in my indictment.”<sup>35</sup>

In closing arguments, the Prosecution focused more actively on the acts of sexual violence in the record, arguing that they constituted “serious bodily and mental harm” and “conditions of life calculated” to destroy the group within the meaning of the genocide definition.<sup>36</sup> In their closing, defense counsel attacked the testimony of various witnesses on the ground that they lacked credibility and accuracy, arguing, for example, that it was incredible that J—being six months pregnant—would have been able to climb a tree. The defense also argued that the rape allegations were a reaction to “public

<sup>31</sup> *Id.* at para. 442.

<sup>32</sup> *Akayesu*, Case No. ICTR-96-4-T, Transcript (Direct Examination) (Mar. 12, 1998). In its Judgment, the Trial Chamber noted “the Accused’s emphatic denial of facts which are not entirely within his knowledge.” *Akayesu*, Case No. ICTR-96-4-T, at para. 32. One observer has noted that defendants almost always deny responsibility for acts of sexual violence, even when they acknowledge their involvement in other crimes. GAËLLE BRETON-LE GOFF *on behalf of* THE COALITION FOR WOMEN’S HUMAN RIGHTS IN CONFLICT SITUATIONS, ANALYSIS OF TRENDS IN SEXUAL VIOLENCE PROSECUTIONS IN INDICTMENTS BY THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (ICTR) FROM NOVEMBER 1995 TO NOVEMBER 2002 (Nov. 28, 2002), *available* at [http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/rapeVictimssDeniedJustice/analysisofrends\\_en.php](http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/rapeVictimssDeniedJustice/analysisofrends_en.php).

<sup>33</sup> *Akayesu*, Case No. ICTR-96-4-T, Transcript (Cross Examination), at pp.189-92 (Mar. 13, 1998).

<sup>34</sup> In particular, Akayesu testified: “nobody ever reported to me that it had taken place, that we had rape in my commune, and certainly nothing, to the best of my knowledge, was done in the *bureau communal* and I never saw with my eyes anybody being raped in the *bureau communal*.” *Id.* at p. 190.

<sup>35</sup> *Id.* at p.192 *See also Akayesu*, Case No. ICTR-96-4-T, at para. 448.

<sup>36</sup> *Akayesu*, Case No. ICTR-96-4-T, Transcript (Closing Arguments), at pp. 14-19 (Mar. 23, 1998).

pressure” without basis in reality and that a syndicate of informers had procured the testimony against his client in an effort to misappropriate his property, notwithstanding that Akayesu had been found indigent.<sup>37</sup> All told, the trial proceedings consumed about sixty days—over fourteen months. The Chamber retired for their deliberations.

### *Genocidal Rape in Theory*

Women experience armed conflict and repression in ways that are different from men. In particular, “[w]omen are violated in ways that men are not, or rarely are.”<sup>38</sup> Rape and other forms of sexual violence against women have long been employed as weapons of war and as tools to subjugate entire communities.<sup>39</sup> The 1863 Lieber Code, one of the first efforts to codify the laws of war, designated rape as a war crime,<sup>40</sup> rejecting the customary view that the rape of women associated with the enemy was an expected spoil, inevitable byproduct, or legitimate tactic of war. Despite this promising beginning, many modern international humanitarian law treaties euphemistically prohibit sexual violence as a violation of dignity or honor rather than as crime of assault against the physical integrity of the victim. Even when positive law recognizes rape as an international crime, prosecutions may be sparse when the commission of rape is invisible, considered inevitable, or trivialized. For example, the World War II Nuremberg indictment and Judgment did not mention rape, although evidence of rape was entered into the record. The contemporaneous Tokyo Tribunal did hold Japanese officials liable for failing to control their troops, including during the literal and metaphorical “Rape of Nanking”; however, the proceedings were entirely silent as to the sexual slavery suffered by the so-called “comfort women,” and victims continue to seek justice today. Modern definitions of international crimes now routinely include rape and other forms of sexual violence as enumerated acts. The crime of genocide, which anchored the indictment against Akayesu, has not been amended since its inception. The definition of genocide

<sup>37</sup> *Akayesu*, Case No. ICTR-96-4-T, Transcript, at pp. 54-55 (Mar. 26, 1998). *See also Akayesu*, Case No. ICTR-96-4-T, at paras. 44-47 (ruling that such allegations should be put to particular witnesses on cross examination rather than raised with respect to all witnesses).

<sup>38</sup> Catherine A. MacKinnon, *Crimes of War, Crimes of Peace*, in *ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 1993* 83, 85 (Stephen Shute and Susan Hurley eds., 1993).

<sup>39</sup> As Susan Brownmiller has written about rape in wartime:

Rape of a doubly dehumanized object—as woman, as enemy—carries its own terrible logic. In one act of aggression, the collective spirit of women and of the nation is broken, leaving a reminder long after the troops depart. And if she survives the assault, what does the victim of wartime rape become to her people? Evidence of the enemy’s bestiality. Symbol of her nation’s defeat. A pariah. Damaged property. A pawn in the subtle wars of international propaganda.

Susan Brownmiller, *Making Female Bodies the Battlefield*, *NEWSWEEK*, Jan. 4, 1993, at 37. *See also* SUSAN BROWN MILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 31–113 (1975) (discussing rape and war).

<sup>40</sup> *See* Instructions for the Government of Armies of the United States in the Field (Apr. 24, 1863) (“Crimes punishable by all penal codes, such as arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery, and rape, if committed by an American soldier in a hostile country against its inhabitants, are not only punishable as at home, but in all cases in which death is not inflicted, the severer punishment shall be preferred.”). President Abraham Lincoln promulgated the Lieber Code to govern Union forces during the United States Civil War.

does not mention sexual violence per se, but it does encompass various acts involving the commission of serious bodily and mental harm.

The term genocide “is a modern word for an old crime.”<sup>41</sup> When the Allies unveiled the Nazi concentration camps, revealing the horrific full scope of the Nazi “Final Solution,” the world community was faced with the challenge of how to understand and explain the enormity of the Holocaust. As an initial response, and in reply to Winston Churchill’s portrayal of the entirety of Nazi violence as a “crime without a name,”<sup>42</sup> the Polish scholar and jurist Raphaël Lemkin coined the term “genocide” from the Greek word *genos* (race, tribe) and the Latin word *caedere* (to kill). For Lemkin, who had fled Poland upon the German invasion, the critical elements of genocide were not the individual acts, though they may be crimes in themselves, but the broader aim to destroy entire human collectivities.<sup>43</sup> On Lemkin’s urging, the General Assembly eventually promulgated a multilateral treaty defining the crime of genocide (Article II) as follows.

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

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction 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.<sup>44</sup>

This definition has been incorporated verbatim into the statutes of the ad hoc criminal tribunals and the permanent International Criminal Court (ICC). While there have been some prosecutions for genocide before the ICTY, all the defendants before the ICTR have been prosecuted with participation of one sort or another in this “crime of crimes.”<sup>45</sup> Akayesu was the first.

The idea that acts of rape and other forms of sexual violence could be charged as acts of genocide—in addition to as crimes against humanity and war crimes—was first debated in connection with the violence in the former Yugoslavia. As that war broke out, reports by journalists and women’s groups surfaced that Bosnian Muslim, and to a lesser extent Croat, women were being detained in a network of rape camps or were being

<sup>41</sup> Louis René Beres, *Justice and Realpolitik: International Law and the Prevention of Genocide*, 33 AM. J. JURIS. 123, 124 (1988).

<sup>42</sup> WINSTON S. CHURCHILL III, THE CHURCHILL WAR PAPERS: THE EVER-WIDENING WAR 1099-1106 (Martin Gilbert ed. 2000), available at <http://ibiblio.org/pha/policy/1941/410824a.html>.

<sup>43</sup> See RAPHAËL LEMKIN, AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS 79 (1944).

<sup>44</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter “Genocide Convention”].

<sup>45</sup> *Akayesu*, Case No. ICTR-96-4-T, Sentencing Hearing (Oct. 2, 1998).

forcibly impregnated by Serbian aggressors intent on propagating more Serb children.<sup>46</sup> Evidence emerged that Bosnian Serb soldiers had been instructed to employ rape to demoralize the Muslim forces and maximize the shame and humiliation experienced by the Muslim community.<sup>47</sup> There was also evidence that Serbian soldiers were attempting to alter the demographic profile of the country by forcing women to carry babies born of rape to term. The first legal cases to plead rape as genocide were a pair of Alien Tort Statute cases brought in New York against Radovan Karadžić, the self-proclaimed President of Republika Srpska (the Serbian enclave in Bosnia-Herzegovina), in which both sets of plaintiffs won default judgments against the defendant.<sup>48</sup>

The allegations of widespread sexual violence in the former Yugoslavia mobilized the feminist community globally, but especially in the United States, to advocate for the creation of a vigorous system of international justice to prosecute such crimes.<sup>49</sup> Scholars and activists conceptualized the crime of genocidal rape as a way to physically and psychologically harm individual victims while at the same time undermining and denigrating the group or community to which the women belonged.<sup>50</sup> A new concept was needed, feminist academics and advocates argued, to counter the tendency within international criminal law to either characterize acts of rape as isolated war crimes or to overlook them as incidental to issues of real international concern: the perpetration of aggressive war, ethnic cleansing, or genocide.<sup>51</sup>

As multiple sources have now revealed, rape in Rwanda was committed on a massive scale. Although accurate statistics are impossible to gather,<sup>52</sup> estimates range

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<sup>46</sup> Most importantly, a Special Rapporteur appointed by the U.N. Commission on Human Rights highlighted the deliberate and extensive use of rape in the former Yugoslavia as an attack on an individual victim and also as a method of ethnic cleansing “intended to humiliate, shame, degrade and terrify the entire ethnic group.” Tadeusz Mazowiecki, *Report on the Situation of Human Rights in the Territory of the former Yugoslavia*, Annex at 57, U.N. Doc. A/48/92-S/25341 (Feb. 10, 1993). See also Final Report of the Commission of Experts Established Pursuant to S.C. Res. 780 (1992), U.N. Doc. S/1994/674 (May 27, 1994) (also detailing systemic practice of rape).

<sup>47</sup> See Richard P. Barrett & Laura E. Little, *Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals*, 88 MINN. L. REV. 30, 69-72 (2003).

<sup>48</sup> See *Kadić v. Karadžić*, 70 F.3d 232, 236-37 (2d Cir. 1995) (reinstating claims alleging “various atrocities, including brutal acts of rape, forced prostitution, forced impregnation, torture, and summary execution, carried out by Bosnian-Serb military forces as part of a genocidal campaign conducted in the course of the Bosnian war.”). Karadžić has been indicted by the ICTY and was only recently brought into custody to stand trial.

<sup>49</sup> ARYEH NEIER, *WAR CRIMES: BRUTALITY, GENOCIDE, TERROR, AND THE STRUGGLE FOR JUSTICE* 178 (1998) (noting that gender crimes abroad became a domestic political issue for United States women). See also *Symposium: Rape as a Weapon of War in the Former Yugoslavia*, 5 HASTINGS WOMEN’S L.J. 1, 1-315 (1994).

<sup>50</sup> CHRISTOPHER C. TAYLOR, *SACRIFICE AS TERROR: THE RWANDAN GENOCIDE OF 1994* 151-79 (1999).

<sup>51</sup> MacKinnon, *supra* note 38, at 88 (noting that violations are seen “either as genocide or as rape, or as femicide but not genocide, but not as rape as a form of genocide specifically directed at women. [An act of rape] is seen either as part of a campaign of Serbia against non-Serbia or an onslaught by combatants against civilians, but not an attack by men against women. Or, in the feminist whitewash, it becomes just another instance of aggression by all men against all women all the time, rather than what it is, which is rape by certain men against certain women.”).

<sup>52</sup> Alex Obote-Odora, *Rape and Sexual Violence in International Law: ICTR Contributions*, 12 NEW ENG. J. INT’L. & COMP. L. 135, 141 (2005) (“Sex-based crimes are not easily identifiable, like gunshot wounds or

from 250,000 to 500,000 rapes during the period of the genocide.<sup>53</sup> Rape in Rwanda was also accompanied by sexual mutilation and torture. Women and girls were often literally raped to death by perpetrators wielding machetes, sharpened sticks, broken bottles, and other implements. Major Brent Beardsley, the assistant to Major-General Dallaire, was once asked before the ICTR to describe the female corpses he saw. He responded:

[W]hen they killed women it appeared that the blows that had killed them were aimed at sexual organs, either breasts or vagina; they had been deliberately swiped or slashed in those areas. ... [G]irls as young as six, seven years of age, their vaginas would be split and swollen from obviously multiple gang rape, and they would have been killed in that position.<sup>54</sup>

Other women were held as “wives” in a form of sexual slavery. Many women were rendered infertile or HIV-positive by this sexual violence. In the former Yugoslavia, forced impregnation was a hallmark of sexual violence and a key proof point for rape as genocide.<sup>55</sup> In the Rwandan context, the emphasis on the reproductive consequences of rape was less salient; most women were killed or left for dead after they were raped. Many of the women who survived their rapes did end up pregnant. The lack of available abortion in the largely Catholic country of Rwanda resulted in the births of innumerable *enfants de mauvais souvenir*—“children of bad memories.”<sup>56</sup>

The evidence presented before the ICTR revealed that Hutu Power adherents targeted women victims on the basis of both their gender and their ethnicity. This intersection is highlighted by the explicitly gendered hate propaganda employed by Hutu Power adherents in the months leading up to the genocide.<sup>57</sup> This propaganda vilified Tutsi women as emblematic of Tutsi hegemony and invited the abuse of Tutsi women as a way to destroy the Tutsi community. The *Ten Commandments of the Hutu*, an extremist ideological tract published in *Kangura*, contained four commandments denigrating Tutsi women, one of which warned that “A Tutsi woman ... works for the interests of her Tutsi ethnic group. As a result, we shall consider a traitor any Hutu who

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amputated limbs. This is because these crimes inflict physical and psychological wounds, which women can conceal to avoid further emotional anguish, ostracization, and retaliation from perpetrators who may live nearby. [Estimates based on pregnancies] do not account for the women whose injuries prevented them from conceiving a child, or the number of women who experienced multiple rapes and gang rapes.”)

<sup>53</sup> See Special Rapporteur of the Commission on Human Rights Under Para. 20 of S.C. Res. S-3/1, *Report on the Situation of Human Rights in Rwanda*, para. 16, E/CN.4/1996/68 (Jan. 29, 1996), available at <http://www1.umn.edu/humanrts/commission/country52/68-rwa.htm> (“rape was the rule and its absence the exception”).

<sup>54</sup> Binaifer Nowrojee, “Your Justice is Too Slow”: *Will the ICTR Fail Rwanda’s Rape Victims?*, 1 (United Nations Research Institute for Social Development Occasional Paper 10, Nov. 15, 2005), available at: [http://www.unrisd.org/80256B3C005BCCF9/\(httpPublications\)/56FE32D5C0F6DCE9C125710F0045D89F?OpenDocument](http://www.unrisd.org/80256B3C005BCCF9/(httpPublications)/56FE32D5C0F6DCE9C125710F0045D89F?OpenDocument).

<sup>55</sup> See R. Charli Carpenter, *Surfacing Children: Limitations of Genocidal Rape Discourse*, 22 HUM. RTS. Q. 428, 437-39 (2000).

<sup>56</sup> Emily Wax, *Rwandans Are Struggling to Love Children of Hate*, WASH. POST, Mar. 28, 2004, at A01, available at <http://www.genocidewatch.org/RwandanAreStrugglingToLovChildreno%20Hate.htm>.

<sup>57</sup> See generally Llezlie L. Green, *Gender Hate Propaganda and Sexual Violence in the Rwandan Genocide: An Argument for Intersectionality in International Law*, 33 COLUM. HUM. RTS. L. REV. 733 (2002).

marries a Tutsi woman, befriends a Tutsi woman, or employs a Tutsi woman as a secretary or concubine.”<sup>58</sup> *Kangura* also warned that the Tutsi “will not hesitate to transform their sisters, wives and mothers into pistols” to conquer Rwanda.<sup>59</sup> In the iconography and rhetoric of Hutu propaganda, Tutsi women were demonized as sexual “infiltrators” intent on undermining Hutu Power. In a case against the editor-in-chief of *Kangura*, the Trial Chamber noted that this saturation propaganda created a “framework” that “made the sexual attack of Tutsi women a foreseeable consequence.”<sup>60</sup> This propaganda confirms that acts of rape and other sexual violence were not a mere “side effect” of the armed conflict between the Rwandan Army and the RPF but were instead “an integral part of a genocidal campaign.”<sup>61</sup>

The sudden focus on genocidal rape raised concerns among members of the feminist legal community. Some objected to the notion that there is something more egregious about genocidal rape than “ordinary” rape or even rape committed in wartime. The concern was that acknowledging and penalizing rape only when it is a form of genocide risks “rendering rape invisible once again.”<sup>62</sup> Some emphasized that the fixation on the ethnic element of the crime would obscure the gendered nature of the genocidal rape, which represents an intersection between ethnic violence and sexualized violence.<sup>63</sup> Adherents of this view also sought to avoid “privileging” some victims of rape over others by conceptualizing them as victims of genocide—the crime at the pinnacle of international criminal law.<sup>64</sup>

In contrast, proponents of the recognition of genocidal rape argued that viewing sex/gender as the only vector upon which violence may be committed in an act of rape ignores the intersectionality of women’s identities.<sup>65</sup> It accordingly overlooks the fact that women may be seen, and may see themselves, more saliently as members of a besieged ethnic group than as bearers of a particular sex/gender, especially in the context

<sup>58</sup> SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* 338 (2002).

<sup>59</sup> HUMAN RIGHTS WATCH, *SHATTERED LIVES*, *supra* note 15.

<sup>60</sup> *Prosecutor v. Nahimana, Barayagwiza, and Ngeze*, Case No. ICTR-99-52-T, Judgment, at para. 118 (Dec. 3, 2003) (“The Chamber notes that Tutsi women, in particular, were targeted for persecution. The portrayal of the Tutsi woman as a *femme fatale*, and the message that Tutsi women were seductive agents of the enemy was conveyed repeatedly by RTLM and *Kangura*.”). Like *Akayesu*, *Nahimana* was heard by Trial Chamber I with Judge Pillay presiding, now joined by Judges Erik Møse (Norway) and Asoka de Zoysa Gunawardana (Sri Lanka).

<sup>61</sup> Green, *supra* note 57, at 734.

<sup>62</sup> Rhonda Copelon, *Gendered War Crimes: Reconceptualizing Rape in a Time of War*, in *WOMEN’S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES* 197, 204 (Julie S. Peters & Andrea Wolper eds., 1995) (“[W]e must surface gender in the midst of genocide at the same time that we avoid dualistic thinking. We must examine critically the claim that rape as a tool of ‘ethnic cleansing’ is unique, worse than, or incomparable to other forms of rape in war or in peace—even while we recognize that rape coupled with genocide inflicts multiple, intersectional harms. . . . To exaggerate the distinctiveness of genocidal rape obviates the atrocity of common rape.”).

<sup>63</sup> Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, 5 *HASTINGS WOMEN’S L.J.* 243, 246 (1994).

<sup>64</sup> *See also* Neier, *supra* note 49, at 186 (arguing that focusing on genocidal rape “distorted the reality of the harm done to women and men”).

<sup>65</sup> For more on intersectionality, *see generally* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241 (1991).

of inter-ethnic warfare. While rape happens “on all sides” in war as in peace, genocidal rape is more often unidirectional, committed by the aggressor group against the victim group. This asymmetry belies laying blame solely along gender lines and thus equalizing the responsibility of all sides to a conflict.<sup>66</sup> The exploitation of the intersectionality of women’s identity in a multiethnic society thus provides a key factor differentiating genocidal rape from “ordinary” rape in war or peace.<sup>67</sup> Furthermore, proponents of the concept argued that genocidal rape is almost inevitably the result of a policy or deliberate strategy of a perpetrator group<sup>68</sup> to effectuate the destruction—in whole or in part—of a protected group through attacks on women as a vulnerable and discrete segment of a community. A single act of rape may implicate multiple international criminal law prohibitions, but it is this surplus of intent inherent to the crime of genocide that also distinguishes genocidal rape from rape perpetrated as a war crime or a crime against humanity, or rape committed as an act of gender persecution.

The notion of genocidal rape was of thus of great concern to feminist academics and activists. It was not until *Akayesu* that the idea was first litigated and ultimately grounded in the jurisprudence of international criminal law. The opinion is chilling in its ability to demonstrate the lived experience of women during a genocide.

### ***The Judgment: Prosecutor v. Akayesu***

In its 169-page Judgment, the Tribunal found Akayesu liable for inciting, ordering, and causing harm to Tutsi individuals seeking refuge in the *bureau communal*. For this, he was convicted of murder, extermination, and torture as crimes against humanity. Akayesu was acquitted on the war crimes counts, including the new Count 15 concerning outrages upon dignity under Protocol II to the Geneva Conventions, based on the Trial Chamber’s ruling that the Prosecutor had failed to demonstrate that the events in Taba Commune were sufficiently connected to the armed conflict between the Rwandan government and the RPF being fought elsewhere in the country.<sup>69</sup>

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<sup>66</sup> The debate over whether women should advance gender solidarity over nationalism with respect to the rapes in the former Yugoslavia seriously split the feminist community in that region. See Jelena Batinić, *Feminism, Nationalism, and War: The ‘Yugoslav Case’ in Feminist Texts*, 3 J. INT’L WOMEN’S STUD. 2 (2001).

<sup>67</sup> See BEVERLY ALLEN, *RAPE WARFARE: THE HIDDEN GENOCIDE IN BOSNIA-HERZEGOVINA AND CROATIA* 39, 62, 75 (1996).

<sup>68</sup> MacKinnon, *supra* note 38, at 89 (writing of the use of rape in the former Yugoslavia, “[t]his is ethnic rape as an official policy of war. . . . It is rape under orders. . . . It is rape as an instrument of forced exile. . . . It is rape to be seen and heard by others, rape as spectacle. It is rape to shatter a people, drive a wedge through a community. It is the rape of misogyny liberated by xenophobia and unleashed by official command”).

<sup>69</sup> The Prosecution had presented evidence that Akayesu wore a military jacket, carried a weapon, and assisted the members of the military upon their arrival in Taba Commune; however, this was deemed insufficient to trigger the applicability of the war crimes prohibitions in the ICTR Statute. *Akayesu*, Case No. ICTR-96-4-T, at paras. 641-44. The Prosecution successfully appealed the legal standard employed by the Trial Chamber when it held that the defendant must be shown to be a commander, combatant, or other member of the armed forces; however, the Appeals Chamber left the verdict on the war crimes counts untouched. *Akayesu*, Case No. ICTR-96-4-A, Judgment, at paras. 425-46 (June 1, 2001).

When it turned to the allegations of Akayesu's involvement in acts of sexual violence in the record, the Chamber limited its inquiry to several incidents that occurred in the *bureau communal*: the rape of a number of girls and women (including Witness JJ and OO) and the forced undressing of several women, who were then forced to perform "gymnastics" in public. The victims of several of these events did not testify at trial, although the incidents were recounted by other eye witnesses. The Chamber disregarded the evidence in the record concerned with sexual assaults committed outside the *bureau communal* on the ground that the indictment alleged only Akayesu's responsibility for acts "on or near" the compound.

Through ordering, instigating or aiding and abetting these acts, Akayesu was found guilty of the crimes against humanity of rape and "other inhumane acts."<sup>70</sup> In so holding, the Chamber, for the first time in history, defined rape and sexual violence under international law:

The Tribunal considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Tribunal also notes the cultural sensitivities involved in public discussion of intimate matters and recalls the painful reluctance and inability of witnesses to disclose graphic anatomical details of sexual violence they endured. . . . The Tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. . . . The Tribunal notes in this context that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of *Interahamwe* among refugee Tutsi women at the *bureau communal*.<sup>71</sup>

In crafting these open-textured, holistic and explicitly ungendered definitions of rape and sexual violence,<sup>72</sup> the Chamber invoked the Convention Against Torture and Other Cruel,

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<sup>70</sup> *Akayesu*, Case No. ICTR-96-4-T, at paras. 696-7. Specifically, the Chamber held that Akayesu was responsible for these acts "by allowing them to take place on or near the premises of the *bureau communal* and by facilitating the commission of such sexual violence through his words of encouragement in other acts of sexual violence which, by virtue of his authority, sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place." *Id.* at para. 694.

<sup>71</sup> *Id.* at paras. 687-88.

<sup>72</sup> For a discussion of these definitions and alternative definitions employed in the international criminal law jurisprudence, see generally Catharine A. MacKinnon, *Defining Rape Internationally: A Comment on Akayesu*, 44 COLUM. J. TRANSNAT'L L. 940 (2006). Professor MacKinnon lauds the Trial Chamber for defining rape as a crime of coercion rather than with reference to non-consent, which she argues is inapposite in the context of war or a widespread and systematic attack against the civilian population. *Id.* at 942. Other Trial Chambers did not adopt this approach. See generally Adrienne Kalosieh, Note, *Consent to Genocide? The ICTY's Improper Use of the Consent Paradigm to Prosecute Genocidal Rape in Foča*, 24 WOMEN'S RTS. L. REP. 121 (2003).

Inhuman and Degrading Treatment or Punishment, which does not “catalogue specific acts in its definition of torture, focusing rather on the conceptual framework of state-sanctioned violence.”<sup>73</sup> The Chamber furthered the analogy when it noted that “[I]like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, and the control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when it 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.”<sup>74</sup>

On the genocide counts, the Tribunal—after devising a flexible, subjective view of ethnicity—had little trouble finding that Akayesu acted with genocidal intent,<sup>75</sup> and that genocide had occurred in Rwanda. The Trial Chamber also explicitly recognized the concept of genocidal rape when it ruled that the acts of rape and sexual violence in the record could serve as the predicate acts of genocide along with the other murders and assaults on members of the Tutsi group.

With regard, particularly, to the acts described in paragraphs 12(A) and 12(B) of the Indictment, that is, rape and sexual violence, the Chamber wishes to underscore the fact that in its opinion, they constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of [inflicting] harm on the victim as he or she suffers both bodily and mental harm. . . . These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.<sup>76</sup>

The Tribunal concluded that even those rapes that do not result in the death of the victim could constitute genocide where “[s]exual violence was a step in the process of destruction of the Tutsi group—destruction of the spirit, of the will to live, and of life itself.” At the same time, it recognized that the goal of many acts of sexual violence was to make Tutsi women suffer and to mutilate them even before killing them, the intent being to destroy the Tutsi group while inflicting acute suffering on its members in the process.<sup>77</sup> In this way, the Tribunal emphasized that both the mental and physical harm

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<sup>73</sup> *Akayesu*, Case No. ICTR-96-4-T, at para. 687.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at para. 729 (“regarding Akayesu’s acts and utterances during the period relating to the acts alleged in the Indictment, the Chamber is satisfied beyond reasonable doubt, on the basis of all evidence brought to its attention during the trial, that on several occasions the accused made speeches calling, more or less explicitly, for the commission of genocide.”).

<sup>76</sup> *Id.* at 731.

<sup>77</sup> Notably, unlike other depictions of genocidal rape, this account of murderous genocidal rape does not depend upon rapes happening in a “traditional” or patriarchal cultural milieu that values women’s chastity

associated with rape satisfied the actus reus of the crime of genocide.<sup>78</sup> Akayesu was thus convicted of genocide.<sup>79</sup>

Prior to his pre-sentencing hearing, Akayesu dismissed his trial lawyers and spoke in his own defense. He was sentenced to life imprisonment, with multiple sentences to be served concurrently for offences arising from the same acts.<sup>80</sup> After he staged an eight-day hunger strike that was joined by twenty-five other defendants, the Tribunal awarded Akayesu his choice of new counsel for his appeal—Canadians John Philpot and André Tremblay. One argument central to Akayesu’s appeal was that he had been prejudiced by the amendment of his indictment to include the rape charges. The Appeals Chamber—composed of Judges Claude Jorda (France), Lal Chand Vohrah (Malaysia), Mohamed Shahabuddeen (Guyana), Rafael Nieto-Navia (Colombia) and Fausto Pocar (Italy)—ruled that the scope of the amendments proposed did not amount to a “new indictment” that prejudiced Akayesu, and that he was given reasonable and adequate time to prepare his defense.<sup>81</sup> His appeal rejected, Akayesu with several other defendants was transported to Mali where he is serving his life sentence pursuant to an agreement between that country and the Tribunal.

### *The Akayesu Legacy*

The Judgment against Akayesu was a significant development for gender justice and suggested an enhanced role for advocates to play in influencing the work of the ad hoc tribunals. In the end, however, the case did not necessarily herald a sea change within the jurisprudence of the ICTR. The case concerning abuses in the prefecture of Cyangugu presents a telling counterpoint. No sexual violence charges were included in the original indictments against defendants André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe—government and military officials in Cyangugu.<sup>82</sup> The local Association of Widows of the Genocide of April 1994 (AVEGA) organized themselves to help investigators find witnesses who would testify to sexual violence in the prefecture.<sup>83</sup> In response, the Prosecution announced that it intended to amend the indictment against accused Bagambiki and Imanishimwe “as soon as possible” to include new rape charges, but took months to do so.

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or fidelity. Cf. Kalosieh, *supra* note 72, at 132 (emphasizing the religious and cultural characteristics of Bosnian Muslim society in describing genocidal impact of rape).

<sup>78</sup> In this way, the Tribunal’s reasoning also tracked cases before regional human rights institutions that have found acts of rape to constitute physical and mental torture. See Raquel Martí de Mejía v. Perú, Case 10.970, Inter-Am.C.H.R., Report No. 5/96, OEA/Ser.L/V/II.91, doc. 7, at 157 (1996); Aydín v. Turkey, 25 Eur. Ct. H.R. 251 (1997).

<sup>79</sup> He was also convicted of incitement to commit genocide. *Akayesu*, Case No. ICTR-96-4-T, at paras. 672-75. The complicity in genocide count was dismissed on the ground that charges of committing and being complicit in genocide were mutually exclusive. *Id.* at paras. 723-30, 734.

<sup>80</sup> *Akayesu*, Case No. ICTR-96-4-T, Sentencing Hearing (Oct. 2, 1998).

<sup>81</sup> *Akayesu*, Case No. ICTR-96-4-A, at paras. 102-23.

<sup>82</sup> Prosecutor v. Ntagerura, Case No. ICTR-96-10-I, Indictment (Jan. 29, 1998); Prosecutor v. Bagambiki, Case No. 97-36-I, Indictment (Oct. 13, 1997).

<sup>83</sup> HUMAN RIGHTS WATCH, SHATTERED LIVES, *supra* note 15, at 14.

After finally filing the motion, Chief Prosecutor Del Ponte was called before the Trial Chamber. She subsequently withdrew the motion to amend.<sup>84</sup> As happened in the *Akayesu* case, female witnesses began giving evidence about sexual violence they experienced in the prefecture during the trial. Once again, as in the *Akayesu* case, the Coalition moved to appear as amicus, urging the Tribunal to call upon the Prosecution to amend the indictment to include sexual violence charges. This time, however, the Prosecution opposed the Coalition's motion, arguing that the choice of what charges to bring was within prosecutorial discretion. The Chamber denied the Coalition's motion, siding with the Prosecution.<sup>85</sup> In addition, upon defense motion, the Trial Chamber excluded evidence of uncharged crimes, such as sexual violence, fearing prejudice to the accused. The Tribunal ultimately acquitted Ntagerura and Bagambiki for lack of evidence; it convicted Imanishimwe.<sup>86</sup> The verdict was upheld on appeal.<sup>87</sup> Rwanda later announced that it would try defendant Bagambiki, once the Cyangugu prefect, for sexual violence, even though the ICTR had ruled that he was not responsible for the prefecture massacres in which the alleged sexual violence occurred. Because no rape charges were pursued before the ICTR, there was no double jeopardy bar. Rwanda sought his extradition from Tanzania and eventually tried and convicted him of rape in absentia in October 2007. Bagambiki eventually received political asylum in Belgium; that country is considering an extradition request from Rwanda, although there is no extradition treaty in place between the two.<sup>88</sup>

Other cases before the ICTR have met similar fates. At one point, more than half of the ICTR indictments included charges of rape and other sexual violence (many involving counts added by amendment). Many cases, however, have ended in acquittal on the rape and sexual violence counts. For example, *Prosecutor v. Musema* resulted in a conviction for rape as genocide and as a crime against humanity before the same Trial Chamber that heard the *Akayesu* case.<sup>89</sup> Musema was accused of personally raping a Tutsi woman in May 1994. On appeal, however, new evidence emerged that

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<sup>84</sup> This incident is recounted in HUMAN RIGHTS WATCH, SHATTERED LIVES, *supra* note 15, at 15. Del Ponte reportedly stated, "I can do this because I am a woman. If I were a man, there would be a fuss." *Id.*

<sup>85</sup> *Prosecutor v. Ntagerura, Bagambiki & Imanishimwe*, Case No. ICTR-99-46-T, Decision on the Application to File an Amicus Curiae Brief According to Rule 74 of the Rules of Procedure and Evidence Filed on Behalf of the NGO Coalition for Women's Human Rights in Conflict Situations (May 24, 2001).

<sup>86</sup> *Prosecutor v. Ntagerura, Bagambiki & Imanishimwe*, Case No. ICTR-99-46-T, Judgment (Feb. 25, 2004).

<sup>87</sup> *Prosecutor v. Ntagerura, Bagambiki & Imanishimwe*, Case No. ICTR-99-46-A, Judgment (July 7, 2006).

<sup>88</sup> See Kevin Jon Heller, *What Happens to the Acquitted?*, 21 LEIDEN J. OF INT'L L. 663 (2008).

<sup>89</sup> *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgment and Sentence, at para. 933 (Jan. 27, 2000) ("acts of serious bodily and mental harm, including rape and other forms of sexual violence were often accompanied by humiliating utterances, which clearly indicated that the intention underlying each specific act was to destroy the Tutsi group as a whole. The Chamber notes, for example, that during the rape of Nyiramasugi, Musema declared: 'The pride of the Tutsis will end today.' In this context, the acts of rape and sexual violence were an integral part of the plan conceived to destroy the Tutsi group. Such acts targeted Tutsi women, in particular, and specifically contributed to their destruction and therefore that of the Tutsi group as such. Witness N testified before the Chamber that Nyiramasugi, who was left for dead by those who raped her, had indeed been killed in a way. Indeed, the Witness specified that 'what they did to her is worse than death.'").

controverted the testimony presented at trial. The Appeals Chamber ruled that a miscarriage of justice had occurred and quashed the rape conviction.<sup>90</sup>

In *Prosecutor v. Kajelijeli*, the defendant was acquitted of rape (charged as a crime against humanity), because two of the judges found the key witness lacked credibility due to inconsistencies in her testimony at trial and statements to investigators. The Trial Chamber acquitted the defendant of rapes that were proven to have occurred.<sup>91</sup> In a strong dissent, Judge Arlette Ramaroson (Madagascar) argued that the inconsistencies were not due to a lack of credibility but to an incompetent investigation.<sup>92</sup> Later, the Prosecution missed a deadline to appeal the acquittal, and was chastised for prosecutorial negligence by the judges.

Other acquittals for rape occurred in the cases against Niyitegeka,<sup>93</sup> Muvunyi,<sup>94</sup> and Kamuhanda<sup>95</sup>—primarily because the prosecutor failed to meet the required burden of proof. The Prosecution did not appeal these acquittals. In other cases, such as with respect to defendants Ndindabahizi,<sup>96</sup> Nzabirinda,<sup>97</sup> Serushago,<sup>98</sup> and Bisengimana,<sup>99</sup> the Prosecution withdrew sexual violence counts. Since the establishment of the Tribunal, only a handful of defendants had been found guilty of gender crimes, including Akayesu, Gacumbitsi,<sup>100</sup> Semanza,<sup>101</sup> and Muhimana<sup>102</sup> (all charged with rape as a crime against humanity). Only Akayesu has been convicted of genocidal rape. One is left with the impression that the *Akayesu* case is a mere anomaly.

How to explain the apparent *volte face* within the organs of the ICTR when confronted with crimes of gender violence? A number of potential explanations come to mind. It is tempting to look to the composition of the bench and the presence of female

<sup>90</sup> *Musema*, Case No. ICTR-96-13-A, Judgment, at paras. 172-194 (Nov. 6, 2001).

<sup>91</sup> *Prosecutor v. Kajelijeli*, Case No. 98-44A-T, Judgment, at paras. 908-925 (Dec. 1, 2003).

<sup>92</sup> *Kajelijeli*, Case No. 98-44A-T, Dissenting Opinion of Judge Arlette Ramaroson, at paras. 26-28, 36 (Dec. 1, 2003).

<sup>93</sup> *Prosecutor v. Niyitegeka*, Case No. 96-14-T, Judgment (May 16, 2003) (acquitting defendant of rape charges (pled as a crime against humanity) for insufficient evidence).

<sup>94</sup> *Prosecutor v. Muvunyi*, Case No. 00-55A-T, Judgment (Sept. 12, 2006) (finding prosecutor failed to prove defendant knew, or had reason to know, subordinates had committed rape).

<sup>95</sup> *Prosecutor v. Kamuhanda*, Case No. 95-54A-T, Judgment (Jan. 22, 2004).

<sup>96</sup> *Prosecutor v. Ndindabahizi*, Case No. 01-71-I, Judgment, at para. 13 (July 15, 2004) (recounting the granting of a motion to withdraw counts that had been added through amendment of the indictment).

<sup>97</sup> *Prosecutor v. Nzabirinda*, Case No. 01-77-T, Judgment, at paras. 3, 4, 44 (Feb. 23, 2007) (discussing withdrawal of counts “because the evidence was not there.”).

<sup>98</sup> *Prosecutor v. Serushago*, Case No. 98-39-S, Judgment, at para. 4 (Feb. 5, 1999) (noting that defendant pled guilty to four out of five counts, but pled not guilty to the rape count; prosecutor subsequently withdrew the rape charge).

<sup>99</sup> *Prosecutor v. Bisengimana*, Case No. 00-60-T, Judgment, at paras 7, 12 (Apr. 13, 2006) (noting that prosecution withdrew rape and other charges; defendant later pled guilty to remaining counts of murder and extermination).

<sup>100</sup> *Prosecutor v. Gacumbitsi*, Case No. 01-64-T, Judgment (June 17, 2004).

<sup>101</sup> *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgment (May 15, 2003).

<sup>102</sup> *Prosecutor v. Muhimana*, Case No. ICTR-95-1B-T, Judgment (Apr. 28, 2005). In *Muhimana*, the Appeals Chamber affirmed a genocide acquittal, reversed a finding of criminal responsibility for two specific rapes, and affirmed a finding of guilt for crimes against humanity with respect to other acts of rape.

judges. Judge Pillay has observed that, “Who interprets the law is at least as important as who makes the law, if not more so. . . . I cannot stress how critical I consider it to be that women are represented and a gender perspective integrated at all levels of the investigation, prosecution, defense, witness protection and judiciary.”<sup>103</sup> The *Akayesu* Transcript, however, reveals that all the judges participated in the process of surfacing indictable gender crimes, and the *Cyangugu* narrative reveals that placing a woman in charge of prosecutions will not necessarily ensure that gender justice is aggressively pursued. Alternatively, the Tribunal may simply have been exhausted with prosecutorial mishandling of cases generally. Finally, the relentless Completion Strategy mandated by the U.N. Security Council is no doubt weighing against the expansion of proceedings in any fashion.

Most critics of this apparent trend against gender justice take aim at the ICTR Office of the Prosecution, and in particular with then-Chief Prosecutor Del Ponte.<sup>104</sup> Advocates of gender justice have accused Del Ponte and the Office of the Prosecution in Kigali of neglecting the prosecution of crimes of sexual violence committed in Rwanda. After the Prosecution failed to amend the *Cyangugu* indictment, for example, the Coalition sought a meeting with Del Ponte. Their concerns are memorialized in a letter sent to the Chief Prosecutor after the meeting. The letter accuses Del Ponte of neglecting gender justice:

[W]e believe that your four-year record as ICTR prosecutor shows no concrete commitment to effectively developing evidence to bring such charges, despite the longstanding and overwhelming proof of sexual violence during the 1994 Rwandan genocide.<sup>105</sup>

The Coalition expressed similar concerns in a letter to then-Secretary General of the United Nations, Kofi Annan, who was at the time considering Del Ponte’s renewal.<sup>106</sup>

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<sup>103</sup> U.N. Division for the Advancement of Women and Centre for Refugee Studies, York University, Canada, *Gender-Based Persecution: Report of the Expert Group Meeting*, at 33, EGM/GBP/1997/ Report, (Nov. 9-12, 1997), available at <http://www.un.org/documents/ecosoc/cn6/1998/armedcon/egmgbp1997-rep.htm>.

<sup>104</sup> As he was leaving office as Chief Prosecutor, Justice Goldstone created a sexual violence investigations team and appointed Patricia Viseur-Sellers as a Legal Officer on Gender Issues for the Office of the Prosecutor to direct the indictment of individuals responsible for such crimes in Yugoslavia and Rwanda. Hon. Richard J. Goldstone, *Prosecuting Rape as a War Crime*, 34 CASE W. RES. J. INT’L L. 277, 280 (2002) (noting that soon after he “arrived as the Chief Prosecutor in The Hague on August 15, 1994, [he] was inundated with letters and petitions from women and men in the United States, Canada, and many of the western European nations. [These letters implored him] to give adequate attention to gender-related crimes.”). Prosecutor Arbour continued this work, earning praise from gender advocates for her comprehensive approach to gender justice. HUMAN RIGHTS WATCH, SHATTERED LIVES, *supra* note 15, at 10.

<sup>105</sup> Letter from the Coalition for Women’s Human Rights in Conflict Situations to Carla Del Ponte, Prosecutor, International Criminal Tribunal for Rwanda (Mar. 12, 2003), available at [http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/rapeVictimssDeniedJustice/lettertoprosecutor\\_en.php](http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/rapeVictimssDeniedJustice/lettertoprosecutor_en.php).

<sup>106</sup> Letter from the Coalition for Women’s Human Rights in Conflict Situations to Kofi Annan, Secretary General of the United Nations (July 24, 2003), available at

Several days later, Annan announced the appointment of Hassan Bubacar Jallow (Gambia) to replace Del Ponte<sup>107</sup> as Chief Prosecutor for the ICTR. Del Ponte stepped down from her ICTY post in December 2007 and was replaced by Belgian Serge Brammertz.

Several policies and practices of the Office of the Prosecutor are specifically singled out for criticism. The failure of early investigations to surface allegations about sexual violence is blamed on the fact that the majority of investigators were men, having been drawn from national police forces, with little experience or training in taking rape testimony from women victims and making it trial ready. Critics also point to the original lack of expertise in gender justice in the Office of the Prosecutor; the 2000 decision to disband the sexual assault investigative team formed in 1997;<sup>108</sup> the lack of coordination between the Office of the Prosecution and the Victims and Witnesses Unit (housed in the Registry); the failure to add sexual violence counts to new indictments despite available evidence; the pursuit of sexual violence claims with inadequate evidence; and the failure to fully and consistently incorporate investigations about sexual violence into the investigative or prosecutorial strategy.<sup>109</sup> After repeated frustrating experiences with the Tribunal,<sup>110</sup> several victims' groups in Rwanda eventually cut off all cooperation with the Tribunal. One report indicated that the overwhelming sentiments expressed by rape survivors in Rwanda about their experience with the ICTR were "burning anger, deep frustration, dashed hopes, indignation and even resignation."<sup>111</sup> Overall, it appears that the Office of the Prosecution proceeded without a coherent strategy for investigating sexual violence or a theory of how sexual violence fit into the way in which genocide was committed in Rwanda. Where rape allegations are not central to a prosecutorial strategy, they become dispensable.

The record before other international and quasi-international tribunals in prosecuting gender crimes is perhaps somewhat better, although none of these tribunals has yet adjudicated charges of genocidal rape.<sup>112</sup> Prior to the *Akayesu* case, Justice

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[http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/rapeVictimssDeniedJustice/lettrekofiannan\\_en.php](http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/rapeVictimssDeniedJustice/lettrekofiannan_en.php).

<sup>107</sup> From the Tribunals' beginning, observers expressed concern that the Rwandan prosecutions were not getting the Chief Prosecutor's full attention. *The Economist*, for example, reported that Del Ponte spent only thirty-five days in Africa. Simultaneous with the adoption of the Completion Strategy, the Security Council by Resolution 1503 (2003) split the Office of the Prosecutor into two positions over the objections of Del Ponte. S.C. Res. 1503, Annex I, U.N. Doc. S/RES/1503/Annex I (Aug. 28, 2003). Although the Security Council ostensibly bifurcated this position to facilitate the completion of investigations and trials, it has been argued that the real reason stemmed from dissatisfaction with Del Ponte's articulated intentions to prosecute high level members of the Tutsi-dominated RPF for massacres of Hutus during the war in Rwanda. Rwandan President Paul Kagame, the founder of the RPF and a strong ally of the West, allegedly obstructed these investigations and complained about Del Ponte to the Security Council and the U.N. Secretary General.

<sup>108</sup> Amid complaints that sexual violence was not receiving the attention it deserved, Del Ponte reinstated the sexual violence investigations unit in 2003.

<sup>109</sup> See, e.g., HUMAN RIGHTS WATCH, *SHATTERED LIVES*, *supra* note 15, at 10-13.

<sup>110</sup> Nowrojee, *supra* note 54, at 3 (interviewing victims about what they hoped the ICTR would achieve).

<sup>111</sup> *Id.* at 4.

<sup>112</sup> The current indictments against Karadžić and Mladić before the ICTY plead sexual violence as a predicate act of genocide. See, e.g., Prosecutor v. Karadžić, Case No. IT-95-5/18, Amended Indictment, at

Goldstone issued from the ICTY the first international indictment focused exclusively on sexual violence committed in the town of Foča. Defendants were convicted of rape and sexual slavery as crimes against humanity.<sup>113</sup> Likewise, *Prosecutor v. Furundžija* exclusively involved sexual violence claims. After an eleven day trial—the Tribunal’s shortest—the defendant was convicted of rape as a form of torture, a conviction upheld on appeal despite a challenge to the Judge’s impartiality.<sup>114</sup> The ICTY has generally taken a conservative approach to convicting defendants of the crime of genocide. It has ruled that the massacre at Srebrenica constituted genocide,<sup>115</sup> but so far has not found a policy on the part of the Serbian political leadership to commit genocide in Bosnia-Herzegovina writ large.<sup>116</sup> Where most charges for sexual violence are brought, they are charged as crimes against humanity or war crimes, not as genocide. Before the Special Court for Sierra Leone, the former Chief Prosecutor integrated charges of sexual violence into virtually all indictments, although genocide is not implicated in the violence there. In addition, he successfully charged individuals with forced marriage, which is not specifically enumerated in the Statute of the Special Court.<sup>117</sup>

The Coalition’s Amicus Brief recently made a cameo appearance before the ICTY. In June 2008, the Prosecution moved to amend the indictment against cousins Milan and Sredoje Lukić to include crimes of sexual violence—including rape, enslavement, and torture—arising out of their establishment of a rape camp in Višegrad.<sup>118</sup> In support of his motion, the Prosecutor argued the acts of sexual violence were an intrinsic part of the crimes committed in Višegrad. Moreover, the Prosecutor argued, it would be in the interests of justice to permit the amendments in order to allow the witnesses, most of whom had already been disclosed, to testify fully about the harm they suffered at the hands of the defendants and to establish the full truth of the defendants’ crimes. The Prosecutor cited *Akayesu* and the Coalition’s Brief for the authority to belatedly amend the indictment, as the deadline to amend the indictment had passed during Del Ponte’s tenure as Chief Prosecutor.<sup>119</sup> The ICTY, however, declined

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para. 17 (Apr. 28, 2000). The original indictments against both men had specifically mentioned the rape of women in the recitation of genocidal crimes. See *Prosecutor v. Karadžić & Mladic*, Case No. IT-95-5-I, Indictment, at para. 19 (May 24, 1995).

<sup>113</sup> *Prosecutor v. Kunarac*, Case No. IT-96-23&23/1-T, Judgment (Feb. 22, 2001).

<sup>114</sup> *Prosecutor v. Furundžija*, Case No. IT-95-17/1, Judgment, at paras. 199-200 (July 21, 2000) (“[E]ven if it were established that Judge [Florence] Mumba expressly shared the goals and objectives of the U.N. [Commission on the Status of Women] and the Platform for Action, in promoting and protecting the human rights of women, that inclination, being of a general nature, is distinguishable from an inclination to implement those goals and objectives as a Judge in a particular case. It follows that she could still sit on a case and impartially decide upon issues affecting women.”).

<sup>115</sup> *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment, at para. 599 (Apr. 19, 2004).

<sup>116</sup> See *Prosecutor v. Krajišnik*, Case No: IT-00-39-T, Judgment, at paras. 857-69, 1091-94 (Sept. 27, 2006) (acquitting Serbian political leader of genocide).

<sup>117</sup> *Prosecutor v. Alex Tamba Brima et al.*, Case No. SCSL-2004-16-A, Judgment, at paras. 175-203 (Feb. 22, 2008).

<sup>118</sup> *Prosecutor v. Lukić*, Case. No. IT-98-32/1-PT, Prosecutor’s Motion Seeking Leave to Amend Second Amended Complaint (June 16, 2008).

<sup>119</sup> *Id.* at paras. 49-51.

the motion on the ground that the granting the motion after the Prosecutor's unnecessary delay would unduly prejudice the accused.<sup>120</sup>

Although the outcomes of the cases are mixed, much of this jurisprudence served as a foundation for the gender violence provisions in the Rome Statute creating a permanent International Criminal Court ("ICC"). As a result of the comprehensive work of advocates for gender justice during the multilateral drafting of the ICC Statute, that treaty is not only characterized by gender inclusiveness in its substantive law, but also in its structures and procedures.<sup>121</sup> In particular, the ICC Statute contains an expansive list of gender crimes in the war crimes and crimes against humanity provisions.<sup>122</sup> Gender is listed as a ground—like ethnicity or race—on which an individual or collective may be persecuted.<sup>123</sup> With respect to the possibility of charging genocidal rape, the definition of genocide in Article 6 mirrors that of the Genocide Convention. However, the Elements of Crimes—drafted to assist the ICC in interpreting its substantive offenses—note that "serious bodily or mental harm" "may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment,"<sup>124</sup> thus laying the foundation for future prosecutions of genocidal rape before the ICC. In terms of personnel, the Statute requires the State parties to choose judges and other staff with experience with "violence against women or children"<sup>125</sup> and calls for "fair representation of female and male judges."<sup>126</sup> Of the eighteen ICC judges, seven are now women. This compares favorably to other international courts, whose composition is heavily dominated by men.<sup>127</sup> The ICC Statute also contains a non-discrimination provision stating that the ICC's application and interpretation of the law must be

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<sup>120</sup> *Prosecution v. Lukić*, Case No. IT-98-32/I-PT, Decision On Prosecution Motion Seeking Leave To Amend The Second Amended Indictment And On Prosecution Motion To Include U.N. Security Council Resolution 1820 (2008) As Additional Supporting Material To Proposed Third Amended Indictment As Well As On Milan Lukić's Request For Reconsideration Or Certification Of The Pretrial Judge's Order Of 19 June 2008, at paras. 62-3 (July 8, 2008).

<sup>121</sup> This reflects calls by NGOs and the United Nations for the integration of a gender perspective into all aspects of the human rights system and for a focus on accountability for violence against women. See World Conference on Human Rights, General Assembly, *Vienna Declaration and Program of Action*, U.N. Doc. A/Conf. 157/23 (July 12, 1993), available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En); World Conference on Human Rights, General Assembly, *Declaration on the Elimination of Violence Against Women*, 48<sup>th</sup> Sess., U.N. Doc. A/Res/48/104 (Feb. 23, 1994).

<sup>122</sup> Arts. 8(2)(b)(xxii) and (e)(vi) of the Rome Statute specifically enumerates the crimes of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and other forms of sexual violence as war crimes whether committed in international or non-international armed conflict. The same crimes are listed as crimes against humanity in Art. 7(1)(g). Enslavement as a crime against humanity is also defined with reference to the trafficking of women and children. Art. 7(2)(c). See Rome Statute of the International Criminal Court, July 1, 2002, 2187 U.N.T.S. 90 [hereinafter "Rome Statute"].

<sup>123</sup> Rome Statute, Art. 7(1)(h).

<sup>124</sup> International Criminal Court, Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000).

<sup>125</sup> Rome Statute, Arts. 36(8) (Judges), 42(9) (Office of the Prosecution), and 43(6) (Victims and Witnesses Unit).

<sup>126</sup> *Id.* at Art. 36(8).

<sup>127</sup> A study conducted of international courts (of which there are now over thirty) revealed that the vast majority of international judges are male. Cherie Booth, *Prospects and Issues for the International Criminal Court: Lessons From Yugoslavia and Rwanda*, in FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 157, 162 (Philippe Sands ed., 2003) (citing study).

consistent with internationally recognized human rights and be without adverse distinction founded on, inter alia, gender.<sup>128</sup>

Many of these provisions in the Rome Statute are the result of the work of another coalition of women's groups, then called the Women's Caucus for Gender Justice ("Caucus"), which was active during the drafting of the Rome Statute.<sup>129</sup> The Caucus formed in 1997 to infuse a gender perspective in the negotiations surrounding the establishment of the ICC. To achieve these provisions, the Caucus had to overcome significant resistance from certain states and delegations to the Rome Conference—including the Vatican, several anti-choice organizations, and a core of Islamic states—that were less sympathetic to the concerns of gender justice. The Caucus, reorganized in 2004 as the Women's Initiative for Gender Justice,<sup>130</sup> is now focused on monitoring the Court's implementation of the gender provisions of the Rome Statute and channeling the concerns of women in the regions in which the ICC is working. These achievements may prove to be the most enduring legacy of the *Akayesu* case as the ICC begins work.

### *Conclusion*

Every once in a while, a case comes along that, for the first time, firmly embeds legal theory into positive law. The case against *Akayesu* is one such jurisprudential pioneer. The case is also often cited as a promising example of successful feminist advocacy. Advocacy did produce important concrete results in the *Akayesu* case. It situated the concept of genocidal rape within the international criminal law framework, despite the Prosecutor's claim that he was not motivated by the Coalition's work. Placed in a larger context, the case better exemplifies the difficulty activists face in influencing the prosecutorial and adjudicative process, where prosecutorial discretion is paramount, and tribunals may only rule on the evidence that properly appears before them. It is tempting to credit much of the story about the progress of gender justice before the international tribunals to the presence of key women involved in the international criminal law process. The stories recounted above, however, reveal that male judges and prosecutors were at times equally as enlightened to issues of gender justice as their female counterparts and that the presence of women in leadership roles does not always translate into feminist policies.

Subsequent cases—at least before the ICTR—have not, by and large, built on the *Akayesu* precedent. If anything, the cause of gender justice seems to have been subject to backsliding. As the two ad hoc tribunals wind down under their Completion Strategies, the story of *Akayesu* is likely to become a mere introduction to further developments in gender justice achieved before the International Criminal Court. For now, *Akayesu* stands alone in recognizing rape as a form of genocide.

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<sup>128</sup> Rome Statute, Art. 21(3).

<sup>129</sup> For a discussion of the contributions of the Caucus and others, see Barbara Bedont & Katherine Hall Martinez, *Ending Impunity for Gender Crimes under the International Criminal Court*, 6 BROWN J. WORLD AFF. 65 (1999), available at [http://www.crlp.org/pub\\_art\\_icc.html](http://www.crlp.org/pub_art_icc.html).

<sup>130</sup> See <http://www.iccwomen.org/>.